Introduction: Humanitarian Admission to Europe. From Policy Developments to Legal Controversies and Litigation

Luc Leboeuf and Marie-Claire Foblets[1]

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Introduction

On 7 March 2017, the CJEU adopted its much-discussed ruling in the *X. and X.* case,[2] by which it decided that the EU Visa Code does not regulate

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2 Case C-638/16 PPU *X and X* [2017] EU:C:2017:173. The case has been widely commented by legal scholars, including by some of the contributors to this volume. See, among others: Y Al Tamimi, E Brouwer, and R Coene, 'Verplicht de Visum-

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the issuing of humanitarian visas to asylum seekers.[3] The *X. and X.* ruling was adopted at a time of heated controversies in Europe over migration, as the 2015 'refugee crisis' created major divisions among European societies and public opinion, which still continue to this day.[4] For that reason, the

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code tot afgifte van humanitaire visa aan Syriërs?' (2017) *Asiel en Migrantenrecht* 327-333; M Berger and G Maderbacher, 'Erteilung eines Visums zur Ermöglichung der Asylantragstellung im Inland unterliegt allein nationalem Recht' (2017) *Österreichische Juristenzeitung* 480-481; E Brouwer, 'Een gemiste kans voor een uniforme en mensenrechtelijke uitleg van de Visumcode wat betreft de afgifte van een humanitair visum' (2017) *Nederlands Tijdschrift voor Europees Recht* 69-78; J-Y Carlier and L Leboeuf, 'Droit européen des migrations' (2018) 26 *Journal de droit européen* 247 95-110, 97; R Colavitti, 'Ouvrir la jarre de Pandore ou trancher le nœud gordien ? La Cour face aux conditions d'application du Code des visas aux demandes déposées pour raison humanitaire' (2017) *Revue des affaires européennes* 139-147; J De Coninck and M Chamon, 'Geen recht op tijdelijke visums voor Syrische vluchtelingen' (2017) *Tijdschrift voor Europees en economisch recht* 382-387; B Delzangles and A Louvaris, 'Visas humanitaires et Charte des droits fondamentaux : la confrontation n'a pas eu lieu' (2017) 239 *Journal de droit européen* 170-176; P Endres de Oliveira, 'Antrag syrischer Flüchtlinge auf humanitäres Visum bei belgischer Botschaft im Libanon' (2017) *Neue Zeitschrift für Verwaltungsrecht* 611-615; F Gazin, 'Motifs humanitaires' (2017) 5 *Europe* 18-19; S-P Hwang, 'Humanitäre Visa für Flüchtlinge: Einfallstor für ein unbeschränktes Asylrecht?' (2018) *Europarecht* 269-288; W Kluth, 'Das humanitäre Visum als Instrument der sicheren Fluchtmigration' (2017) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 105-109; H Labayle, 'Visas dits « humanitaires » : la régulation a minima du droit d'asile par la Cour de justice de l'Union' (2017) 18 *La Semaine Juridique* 869-873; V Moreno-Lax, 'Asylum Visas as an Obligation under EU Law: Case PPU C-638/16, X, X v État belge' (2017) *EU Immigration and Asylum Law and Policy* <http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/> (accessed on 17 October 2019); K Müller, 'Kein legaler Zugangsweg in die EU durch humanitäre Visa: Einordnung des Verfahrens "X und X gegen Belgien" in die Europäische Migrations- und Flüchtlingspolitik' (2017) *Zeitschrift für Europarechtliche Studien* 161-184; S Sarolea, J-Y Carlier and L Leboeuf, 'Délivrer un visa humanitaire visant à obtenir une protection internationale au titre de l'asile ne relève pas du droit de l'Union : *X. et X.*, ou quand le silence est signe de faiblesse' (2017) *Cahiers de l'EDEM* <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/c-j-u-e-c-638-16-ppu-arret-du-7-mars-2017-x-et-x-ecli-eu-c-2017-173.html> (accessed on 17 October 2019); H-P Welte, '(Kein) Anspruch auf humanitäres Visum, Visakodex' (2017) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 220-221.

3 Regulation No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243.

4 On these divisions, see among others S Holmes and H Castaneda, 'Representing the "European Refugee Crisis" in Germany and Beyond: Deservingness and Difference, Life and Death' (2016) 43 *American Ethnologist* 12-24; D Thym, 'The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53 *CMLRev* 1545-1574.

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ruling offers an interesting case study of how the CJEU deals with the social tensions that accompanied the events of 2015. It illustrates the limitations of the current international, EU and domestic legal frameworks in dealing with societal controversies in the field of migration, when such controversies concern migrants who are outside European territory, and how attempts to bring about evolution in these frameworks through court litigation have been received by the judiciary to date.

Building upon that ruling, a workshop was held at the Max Planck Institute for Social Anthropology in May 2018, organised by its Department of Law & Anthropology and the Law Faculty of the Martin Luther University of Halle-Wittenberg. It gathered legal scholars, practitioners and anthropologists with the objective of engaging in a broader reflection on the extent to which these social controversies are channelled and managed through the positivist legal frameworks, starting from the specific case study of legal and safe access to European territory for those in search of protection. This book contains some of the proceedings of this workshop. It aims to offer a reflection on how and to what extent the existing legal frameworks guide the policy debates and controversies on humanitarian admission to Europe, as well as to engage in a broader critical reflection on the role which 'the law' can play in these policy debates.[5]

This introductory chapter sets the scene of the discussions that follow. It gives an overview of the current state of legal and policy debates on so-called 'legal avenues' and 'safe pathways' to Europe, and further questions whether and to what extent the law in its current form is adequately equipped to deal with these challenges. The first Section presents an overview of the main relevant policy developments of the past 10 years at EU level, culminating in the proposal by the EU Commission to establish a Union Resettlement Framework ('URF'). The second Section addresses how policy discussions and controversies on humanitarian admission to Europe have been accompanied by attempts to open up such access to European territory through litigation. The third Section discusses the approach developed by the CJEU in response to these attempts, departing from the *X. and X.* ruling. It identifies and discusses the reasons why the CJEU opposed the judicialisation of policy discussions on humanitarian admission to European territory through EU law. The fourth Section questions the role of the law in supporting policy claims towards humanitarian

5 This chapter constantly refers to the 'law' in its positivist sense, as a set of State-produced norms that have been formally adopted following the applicable legislative and administrative procedures.

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admission to Europe for selected refugees. It argues that, despite their strong limitations, the current legal frameworks may still be an adequate tool to indirectly foster policy developments in the field. The last Section presents the way that the chapters of the volume seek to contribute to a better understanding of the relevant legal frameworks and the challenges raised in their implementation, as well as to a critical reflection on current legal paradoxes and limitations.

1 Policy Developments Towards Humanitarian Admission to Europe

Controversies on humanitarian visas, as they ultimately emerged before the CJEU in the *X. and X.* ruling, fit within broader policy debates on humanitarian admission to European territory for refugees. These debates are long-standing and are often connected to discussions on 'burden-sharing' and 'responsibility sharing', i.e., on how to allocate the responsibility to protect refugees fairly among the international community.[6] They led to several kind of policy initiatives at international, EU and domestic levels, in which some States have been involved on a voluntary and discretionary basis. These initiatives have been developed around various policy models, which the first sub-Section classifies broadly in an attempt to clarify the terms of the discussion that will follow in the next chapter of the volume. The second sub-Section then focuses on the developments at EU level, and shows that the main results they yielded so far are in the field of resettlement.

1.1 From 'Legal Avenues' and 'Safe Pathways', to 'Humanitarian Visas' and other 'Protected Entry Procedures'

Humanitarian visas as addressed by the CJEU in the *X. and X.* ruling are but a specific means of granting humanitarian admission to European territory for refugees. A humanitarian visa is generally understood as an authorisation to access the territory of a State, and which is granted by derogation from the applicable rules because of specific humanitarian reasons. The humanitarian visa has been defined in the IOM Glossary as:

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6 M Gottwald, 'Burden Sharing and Refugee Protection' in E Fiddian-Qasmiyeh, G Loescher, K Long and N Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford, OUP, 2014).

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> A visa granting access to and temporary stay in the issuing State for a variable duration to a person on humanitarian grounds as specified in the applicable national or regional law, often aimed at complying with relevant human rights and refugee law.[7]

Legal and policy issues surrounding the issuing of humanitarian visas are the subject of controversy in the context of a broader debate on so-called 'legal avenues' and 'safe pathways' for refugees. 'Legal avenue' is a term that has been used in various policy documents at EU level to broadly qualify initiatives aimed at offering humanitarian admission to Europe for refugees, such as resettlement programmes, humanitarian visas, humanitarian corridors and other humanitarian admission schemes.[8] The term 'safe pathway' is used in a similarly broad understanding at UN level, for example, in the 2016 New York Declaration for Refugees and Migrants[9] and in the 2018 Global Compact on Refugees.[10] The terms 'avenues' and 'regular pathways' are sometimes used in an even broader sense, to refer to any kind of legal entry procedure, such as labour and education mobility schemes, whose initial aim is not to offer safe access to protection for asylum seekers, but which some asylum seekers may incidentally be eligible for.[11] In its Resolution 2015/2095, for example, the European Parliament called for a 'holistic' approach to migration that goes beyond a focus on satisfying some protection needs through specific protection tools, to include a broader reflection on migration in all its aspects, including other

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7 IOM, *Glossary on Migration* (Geneva, IOM, 2019) 95.

8 See, for example, the 2016 European Commission proposal to reform the Common European Asylum System (CEAS): COM (2016) 197 final, 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.

9 New York Declaration for Refugees and Migrants, UNGA Res 70/1 (19 September 2016).

10 Global Compact for Safe, Orderly and Regular Migration (adopted at Marrakech on 19 December 2018).

11 S Carrera, A Geddes, E Guild and M Stefan (eds), *Pathways Towards Legal Migration into the EU. Reappraising Concepts, Trajectories and Policies* (Brussels, Centre for European Policy Studies, 2017); E Collett, P Clewett and S Fratzke, *No Way Out for Refugees? Making Additional Migration Channels Work for Refugees* (Brussels, Migration Policy Institute, 2016); UNHCR, *Complementary Pathways for Admission of Refugees to Third Countries: Key Considerations* (Geneva, UNHCR, 2019); UNHCR and OECD, *Safe Pathways for Refugees. OECD-UNHCR Study on Third Country Solutions for Refugees: Family Reunification, Study Programmes and Labour Mobility* (Paris, OECD and Geneva, UNHCR, 2018); UNHCR, *Legal Avenues to Safety and Protection Through Other Forms of Admission* (Geneva, UNHCR, 2014).

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legal entry procedures such as labour migration schemes and family reunification, fighting the root causes of forced migration, and integration in the host country.[12]

In policy documents, a variety of policy initiatives, each with its own specific features, have since been described as 'legal avenues' or 'safe pathways'. The exact meaning of these terms varies considerably, however, depending on the context. The vocabulary that is being used is not always consistent and very much depends on the policy *jargon* developed within the institution concerned. It is, however, possible to identify some broad categories of 'legal avenues' and 'safe pathways' from current State practices. In the next paragraphs we venture to identify some of these, with a focus on admission schemes that have been developed with the humanitarian objective of offering humanitarian admission to asylum seekers.

First, resettlement programmes are a long-standing form of humanitarian admission that has been developed specifically for those who have been formally recognized as refugees. They are defined in the IOM Glossary as:

> The transfer of refugees from the country in which they have sought protection to another State that has agreed to admit them – as refugees – with permanent residence status.[13]

Resettlement programmes rest on a collaboration with local authorities and often involve the UNHCR as intermediary. The overall objective of resettlement programmes is to engage in some form of burden-sharing by transferring the duty to offer protection from countries facing a large number of refugees to other countries with higher hosting capacities. The selection of the refugees who will be resettled is made by the receiving country, among a pool of refugees who have been preselected by the UNHCR and other local partners. The preselection by the UNHCR results from a vulnerability assessment, with the objective of identifying specific protection needs that cannot be addressed in the host country, such as health-related issues and gender-related persecutions.[14] While common, resettlement programmes usually concern a limited number of refugees. In 2018, for example, 55,680 refugees were resettled worldwide through UNHCR sponsored

12 EP Res of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration.

13 IOM (n 7) 181.

14 UNHCR, *Resettlement Handbook* (Geneva, UNHCR, 2011).

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resettlement programmes, of a total of 81,337 refugees preselected by the UNHCR for resettlement.[15]

Second, 'evacuation programmes' are aimed at bringing civilians to safety following a humanitarian emergency caused by a disaster and/or armed conflict. These are large-scale responses and, contrary to resettlement programmes, their implementation does not presuppose an individual assessment nor impose any requirement that a person have specific vulnerabilities. As noted by the UNHCR, 'humanitarian evacuation does not focus, as does resettlement, on addressing individual protection needs, rather it focuses on the protection requirements of the group'.[16] Evacuation programmes usually take place close to the conflict (or disaster) zone. Humanitarian evacuation programmes were implemented during the Yugoslavian conflict, for example, as civilians were allowed to cross the border between Kosovo and Macedonia, where they were hosted in refugee camps managed by the UNHCR in cooperation with local authorities.[17] More recently, 'evacuation' programmes have been set up by the IOM and the UNHCR with EU support to the benefit of refugees detained in horrendous conditions in Libya, some of whom were removed to refugee camps in Niger. These programmes were set up on a much smaller scale, however, and developed together with 'assisted voluntary return' programmes encouraging voluntary returns from Libya to the home country.[18] They are also to be distinguished from earlier understandings of 'evacuation' programmes. The aim is not to organise the flight of a civilian population away from a war zone, but rather to offer an alternate solution to selected refugees with vulnerable profiles.

Third, some States provide for 'protected entry procedures' (PEPs), which are formalised procedures that allow foreigners to individually and directly petition the State to obtain humanitarian admission to their terri-

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15 UNHCR, *Resettlement Data*, <https://www.unhcr.org/resettlement-data.html> (accessed 10 August 2019).

16 UNHCR, *Updated UNHCR Guidelines for the Humanitarian Evacuation Programme of Kosovar Refugees in the Former Yugoslav Republic of Macedonia* (Geneva, UNHCR, 1999).

17 M Barutciski and A Suhrke, 'Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-sharing' (2001) 14 *Journal of Refugee Studies* 95–134.

18 C Loschi, L Raineri and F Strazzari, 'The Implementation of EU Crisis Response in Libya: Bridging Theory and Practice' (2018) *EUNPACK Working Paper* <http://www.eunpack.eu> (accessed 4 August 2019); J Brachet, 'Policing the Desert: The IOM in Libya Beyond War and Peace' (2016) 48 *Antipode* 2 272-292.

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tory.[19] In such procedures, 'the individual is directly engaging the potential host State in a procedure aiming at securing his or her physical transfer and legal protection [...] In this mechanism, [his/her] individual autonomy ... is accorded a central role'.[20] Protected entry procedures differ from other humanitarian admission schemes, such as resettlement, in that a more active role is bestowed upon the applicants, who engage directly with the receiving State authorities. They give rise to direct contact between the State and the foreigner seeking protection, without requiring the intervention of a local intermediary or of the UNHCR.

Humanitarian visas can be seen both as a PEP and as a tool that helps to implement other humanitarian admission schemes. Humanitarian visas are a PEP where they are issued in a particular situation, where the State was petitioned by an individual because of specific humanitarian considerations and following a procedure established under national law. Such visas are issued on a discretionary basis and under very specific circumstances as shown by the practices of the three EU Member States under investigation in this volume in the contributions of Serge Bodart, Pauline Endres de Oliveira and Katia Bianchini (Belgium, Germany and Italy).[21] Humanitarian visas may also be issued to implement a broader humanitarian admission scheme, for example, to grant administrative authorisation to cross the border to those selected for resettlement. This is the case notably for some of the resettlement programmes implemented in Belgium,[22] as well as for the 'humanitarian corridors' set up by Italy.[23]

These various policy models for humanitarian admission have been discussed at EU level, where developments intensified with the growing externalisation of EU border policies. Policy discussions culminated as the 2015

19 G Noll, J Fagerlund and S Liebaut, *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (Danish Centre for Human Rights, Copenhagen, 2002); G Noll, 'From "Protective Passports" to Protected Entry Procedures? The Legacy of Raoul Wallenberg in the Contemporary Asylum Debate' in J Grimheden and R Ring (eds), *Human Rights Law: From Dissemination to Application. Essays in Honour of Göran Melander* (Leiden, Martinus Nijhoff, 2006) 237-249.

20 G Noll, J Fagerlund and S Liebaut (n 19) 20.

21 See also the conclusions of a study commissioned by the European Parliament, which identified provisions on humanitarian visas within the legislation of 16 Member States: U I Jensen, *Humanitarian Visas: Option or Obligation?* (Brussels, European Parliament, Study for the LIBE Committee, 2014).

22 See the contribution of Serge Bodart to this volume.

23 See the contribution of Katia Bianchini to this volume.

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'European refugee crisis' increased policy interest in novel approaches to the management of migration movements. The policy developments at EU level are presented and discussed in the second sub-Section.

1.2 Policy Developments at EU Level. A Focus on Resettlement

In the EU, policy debates on humanitarian admission to Europe took a new turn in the 2000s as European countries started engaging more intensively in the 'externalisation' of their borders through so-called 'remote control' practices. The objective of such practices is to prevent irregular migration to Europe by 'policing at a distance' through legal and policy instruments allowing control of migrants before they reach European territory and preventing irregular migration to Europe.[24] The trend towards the externalisation of EU borders is leading to mounting criticisms from a human rights perspective, because one of its indirect effects is to prevent refugees from seeking safety in flight, whereas they often have no other practical alternative than to cross borders irregularly.[25] It has been criticised for being mainly driven by security considerations (increasing State control over migration movements) at the expense of humanitarian ones (guaranteeing access to safety for refugees). According to that critique, the strengthening of European border controls through externalisation has not been sufficiently counterbalanced by policy innovations that protect the fundamental rights of those subject to external border controls. In its 2013

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24 E Guild and D Bigo, 'The Transformation of European Border Controls' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff, Leiden, 2010) 257-278; R Zaiotti, 'Mapping Remote Control: The Externalisation of Migration Management in the 21st Century' in R Zaiotti (ed) *Externalizing Migration Management. Europe, North America and the spread of 'remote control' practices* (London, Routledge, 2016). The externalisation of EU border policies has the effect of generating numerous forms of international cooperation of a varying nature. For an overall presentation of these instruments, see: M Maes, D Vanheule, J Wouters and M-C Foblets, 'The International Dimensions of EU Asylum and Migration Policy: Framing the Issues' in M Maes, M-C Foblets and P De Bruycker, *External Dimensions of European Migration and Asylum Law and Policy / Dimensions Externes du Droit et de la Politique d'Immigration et d'Asile de l'UE* (Brussels, Bruylant, 2011) 11-60.

25 See, for example, a report by the Red Cross EU Office, *Shifting Borders - Externalising Migrant Vulnerabilities and Rights?* (Brussels, Red Cross EU Office, 2013). See also D S Fitzgerald, *Refuge beyond Reach. How Rich Democracies Repel Asylum Seekers* (Oxford, OUP, 2019).

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report on *The Management of the External Borders of the European Union and its Impact on the Human Rights of Migrants*, for example, the UN Special Rapporteur for the Human Rights of Migrants, François Crépeau, concluded his comprehensive study of EU border management practices by emphasising that:

> Despite the existence of a number of important policy and institutional achievements in practice, the European Union has largely focused its attention on stopping irregular migration through the strengthening of external border controls.[26]

These concerns have also been echoed at global level, where there is a broader policy trend towards incentivising developed countries to organise some humanitarian admission schemes for selected refugees. In the New York Declaration, the UN General Assembly expressed its will 'to expand the number and range of legal pathways available for refugees to be admitted to or resettled in third countries'.[27] The Global Compact on Refugees similarly calls for the establishment of 'complementary pathways' to resettlement, including 'humanitarian visas, humanitarian corridors and other humanitarian admission programmes'.[28]

In reaction to these concerns, a variety of policy initiatives have been developed by the EU institutions with the aim of adopting some measures intended to offer humanitarian admission to Europe to some preselected refugees. These initiatives have been intensifying in the past years, notably following the proposal for a regulation establishing a Union Resettlement Framework ('URF'). While they are often criticised for having yielded little concrete result so far, they are far from new.[29] Already on the occasion of the June 2003 Thessaloniki meeting, the European Council had invited the European Commission 'to explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international

26 Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Regional Study: Management of the External Borders of the European Union and its Impact on the Human Rights of Migrants*, A/HRC/23/46 (24 April 2913) at para 75.

27 UN GA Res 71/1 adopted on 19 September 2016, at para. 77.

28 Global Compact on Refugees A/73/12 (Part II) at para. 95. The Global Compact also refers to regular pathways other than humanitarian admission, including educational opportunities and labour mobility.

29 On this criticism, see: F Gatta, 'Legal Avenues to Access International Protection in the European Union: Past Actions and Future Perspectives' (2018) *Journal européen des droits de l'homme/European Journal of Human Rights* 163.

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protection'.[30] Taking into consideration that the EU Member States were already individually engaged in the resettlement of refugees without overall coordination at EU level,[31] the EU Commission suggested the organisation of an EU-wide resettlement scheme to be implemented in close cooperation with the UNHCR.[32] The objective was to enhance reception capacities in first countries of asylum by transferring the most vulnerable refugees to Europe, where their specific protection needs (such as health care or education) could be addressed in a way that would ultimately allow them to achieve self-reliance.

Further EU policy documents connect the involvement of the EU in the field of humanitarian admission to Europe with the broader policy objective of preventing disordered secondary movements of refugees to Europe. Resettlement has been privileged in an attempt to reconcile humanitarian considerations with security ones and it is consistently viewed by the EU not only as a humanitarian policy tool, but also as a border management tool. The objective of the involvement of the EU in resettlement programmes is to guarantee the dignity of the refugees stranded in third countries that lack the capacity to host them, in a way that offers them a 'durable solution', i.e., a 'means by which the situation of refugees can be satisfactorily and permanently resolved to enable them to lead normal lives'[33], in line with the goals pursued by the UNHCR. It is also to prevent disordered movements of refugees to Europe by enhancing the hosting capacities in countries of first asylum, relieving them from the duty to offer protection to the most vulnerable refugees who have specific protection needs requiring additional assistance.

At first, various initiatives in support of resettlement were financially steered by the EU in the context of 'Regional Protection Programmes' (RPPs). RPPs are policy programmes pursuing the overall objective to 'en-

30 D/03/3, Presidency Conclusions of the Thessaloniki European Council of 19 and 20 June 2003, Conclusion 26.

31 K Duken, R Sales and J Gregory, 'Refugee Resettlement in Europe' in A Bloch and C Levy (eds), *Refugees, Citizenship and Social Policy in Europe* (Basingstoke, Palgrave Macmillan, 1999) 105-131.

32 COM (2004) 410 final, Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin "improving access to durable solutions".

33 IOM Glossary (n 7) 57.

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hance the capacity of areas close to regions of origin to protect refugees'.[34] More concretely, RPPs are to be seen as a tool for financing projects in third countries that improve refugee protection. These projects are often led by the UNHCR in cooperation with local NGOs.[35] Projects with a resettlement component obtained EU funding under the RPP framework.[36] Over time, however, the EU started also supporting resettlement initiatives led by its Member States outside the RPP framework. As noted in a ECRE study, 'while EU support for resettlement started in the framework of the RPP, progressively it developed somewhat independently'.[37] For example, the involvement of EU Member States in UNHCR-sponsored resettlement programmes has also been financed through the European Refugee Fund (ERF), whose main objective was to support domestic initiatives in the field of refugee protection.[38]

These policy developments led the EU Commission to suggest, in 2009, the establishment of a 'Joint EU resettlement Programme' with a view to coordinating at EU level a more consistent involvement of the Member

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34 COM (2005) 388 final, Communication from the Commission to the Council and the European Parliament on regional protection programmes. RPPs were subsequently integrated into the EU Global Approach on Migration and Mobility (GAMM), of which they constitute one of the main components; see P Garcia Andrade, I Martin with the contribution of V Vita and S Mananashvili, *EU Cooperation With Third Countries in the field of Migration* (Brussels, European Parliament, Study for the LIBE Committee, 2018) 42; M Garlick, 'EU Regional Protection Programmes: development and prospects' in M Maes, M-C Foblets and P De Bruycker (n 24) 371-386.

35 L Tsourdi and P De Bruycker, *EU Asylum Policy: In Search of Solidarity and Access to Protection* (Florence, Migration Policy Centre, Policy Brief, 2015) 6.

36 For example, an independent evaluation of the RPPs, led at the request of the EU Commission, mentions a project in Tanzania that 'helped to develop a sophisticated method for the screening and profiling of persons with disabilities for the purpose of resettlement'. <http://ec.europa.eu/smart-regulation/evaluation/search/download.do;jsessionid=1Q2GTTWJ1m0pM7kSWQ90hlv 1CBzxjvJpV2-CLp0BgQxQv 8zyGqQ3j!1601440011?documentId=3725> (accessed on 17 October 2019). The evaluation is mentioned in ECRE, *Regional Protection Programmes: An Effective Policy Tool?* (Brussels, Discussion Paper, 2015).

37 Ibid. 7. The European Council on Refugees and Exiles (ECRE) is a civil society organisation gathering European NGOs advocating for refugee rights.

38 The third ERF (2008-2013) explicitly provided for the financing of resettlement programmes; see Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme Solidarity and Management of Migration Flows and repealing Council Decision 2004/904/EC OJ L 144, 6.6.2007, p. 1–21, recital 18.

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States in resettlement programmes, for example by setting annual priorities regarding the profile and the number of asylum seekers to be resettled.[39] The Joint EU Resettlement Programme was adopted in 2012. It is financed through the 'Asylum, Migration and Asylum Fund' (AMIF) that is the successor to the ERF, and that now provides for a lump sum per refugee resettled.[40] The administrative implementation of the Joint EU Resettlement Programme is supported by the 'European Asylum Support Office' (EASO), an EU agency founded in 2010 to encourage and strengthen administrative cooperation among EU Member States in the field of asylum.[41]

In 2013, the sinking of a boat off the coast of Lampedusa and the drowning of around 500 migrants attracted major attention and led to an intensification of policy discussions on 'legal avenues' to Europe beyond resettlement. An expert group set up by the EU Commission following a meeting of the Council, the 'Task Force Mediterranean' (TFM), identified various areas of action to prevent further loss of life at sea.[42] The organisa-

39 COM (2009) 447 final, Communication from the Commission to the European Parliament and the Council on the establishment of a joint EU resettlement programme.

40 Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, OJ L 150, 20.5.2014, p. 168–194, recital 40. The lump sum varies between EUR 6,000 and 10,000.

41 Article 7 of Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132, 29.5.2010, p. 11–28. On the role of EASO-supported forms of administrative cooperation in deepening the EU harmonisation process in the field of asylum, see L Tsourdi, 'Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office' (2016) 1 *European Papers* 3, 997-1031. The Commission proposed to reform the EASO into a European Agency for Asylum (COM, 2018, 633 final), see C Hruschka, 'Perspektiven der Europäischen Asylpolitik' in S Beichel-Benedetti and C Janda (eds.), *Hohenheimer Horizonte. Festschrift für Klaus Barwig* (Baden-Baden, Nomos-Verlag, 2016) 382-400 393.

42 EU Council of 7 and 8 October 2013, Press Release 14149/13. The move was also welcomed by the European Parliament, which insisted in being involved in the works of the TFM; see: EP Res of 23 October 2013 on migratory flows in the Mediterranean, with particular attention to the tragic events off Lampedusa (2013/2827(RSP)) OJ C 208, 10.6.2016, 148–152, point J.5.

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tion of 'legal avenues' to Europe is one of the actions it identified.[43] The conclusions of the Task Force urge the EU institutions and the Member States 'to increase their current commitment on resettlement'. The TFM also calls for them 'to explore further possibilities for protected entry in the EU (and) (…) to open legal channels which give an opportunity for migrants to reach Europe in a regular manner.'[44] These suggestions of the TFM were followed in part in the 2015 European Agenda on Migration. It announced the setting-up of an EU-wide resettlement scheme with the objective to enable 20,000 refugees to take up residence in Europe between 2015 and 2017.[45] However, no specific action at EU level followed the conclusions of the TFM regarding the development of legal channels other than resettlement. The European Agenda on Migration simply encouraged EU Member States 'to use to the full the other legal avenues available to persons in need of protection, including private/non-governmental sponsorships and humanitarian permits, and family reunification clauses'.[46]

The EU resettlement scheme was adopted by the European Council on June 2015, at which European Heads of State or Government pledged to resettle 22,504 refugees from the Middle East, the Horn of Africa and North Africa.[47] It was implemented beyond expectations as, in the end, up to 27,800 refugees were resettled.[48] The success of that first EU resettlement scheme led to another one, which is still ongoing and at the time of writing set a target of 50,000 refugees to be resettled by 2019.[49] In addition to these schemes, which are of a general nature as they may apply to refugees of any nationality from a great variety of countries, another EU resettlement scheme was set up specifically to benefit Syrian refugees staying

43 COM (2013) 869 final, Communication from the Commission to the European Parliament and the Council on the Work of the Task Force Mediterranean. Other actions include security measures such as increased border surveillance, and additional support to the Member States facing higher migratory pressure.

44 Ibid. point 2.2, 2.4 and 2.5.

45 COM (2015) 240 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration.

46 Ibid. 5.

47 EUCO 22/15, Conclusions of the European Council meeting of 25 and 26 June 2015; decision adopted following the Commission Recommendation (EU) 2015/914 of 8 June 2015 on a European resettlement scheme C/2015/3560 OJ L 148, 13.6.2015, 32–37.

48 COM (2018) 798 final, Managing migration in all its aspects: Progress under the European agenda on migration, 4.

49 C (2017) 6504, Commission Recommendation of 27.9.2017 on enhancing legal pathways for persons in need of international protection.

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in Turkey. It was part of the 'EU-Turkey Statement' and provides for the resettlement in the EU of one Syrian refugee staying in Turkey for every one being returned to Turkey from the Greek Islands (the '1:1 scheme').[50] This resettlement programme reflects a different policy approach. Resettlement in this case is used to the strict extent necessary to support and facilitate the adoption and implementation of a border control arrangement.

The success of these EU resettlement programmes led the EU Commission to propose the adoption of a regulation establishing a 'Union Resettlement Framework' (URF) as part of the ongoing reform of the Common European Asylum System (CEAS). The objective of the URF is to establish a comprehensive and permanent resettlement framework, that would consistently guide EU-supported resettlement initiatives to be launched in the future.[51] The underlying idea is to move from ad hoc EU initiatives on resettlement to a consistent overarching approach at EU level. The proposal for a URF includes eligibility criteria that broadly correspond to the criteria set up by the UNHCR and that are based on the identification of specific needs induced by additional factors of vulnerabilities. The proposal also establishes exclusion grounds founded on public order and national security considerations. It organises standardised procedures that leave to the Member States the task of identifying the refugees who will be resettled and may be expedited in case of a humanitarian emergency. An annual Union Resettlement Plan will be established by the Council, and the Commission may establish more targeted resettlement schemes in line with that plan. The implementation of the HURF will be supervised by a High-

50 C (2015) 9490, Commission Recommendation of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey.

51 COM (2016) 468 final, Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework. For a detailed analysis of the proposal, see A Radjenovic, *Resettlement of Refugees: EU Framework* (Brussels, Briefing of the European Parliamentary Research Service, 2019). The proposal has generated some criticisms among civil society organisations for linking resettlement to migration management considerations; see: K Bamberg, *The EU Resettlement Framework: From a Humanitarian Pathway to a Migration Management Tool?* (Brussels, EPC Discussion Paper, 2018); ECRE, *Untying the EU Resettlement Framework* (Brussels, Policy Note, 2016); S Carrera and R Cortinovis, *The EU's Role in Implementing the UN Global Compact on Refugees. Contained Mobility vs. International Protection* (Brussels, CEPS Paper on Liberty and Security in Europe, 2019) 14; M Tissier-Raffin, 'Réinstallation – Admission humanitaire : solutions d'avenir pour protéger les réfugiés ou cheval de Troie du droit international des réfugiés ?' (2017) 13 *La Revue des droits de l'homme* <https://journals.openedition.org/revdh/3405> (accessed on 10 August 2019). On that debate, see the contribution of Catharina Ziebritski to this volume.

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Level Resettlement Committee, which will be chaired by the Commission and composed of representatives of the Council, the European Parliament, the High Representative of the Union for Foreign Affairs and Security Policy, and representatives of the Member States. The European Union Agency for Asylum (which is expected to succeed to the EASO once the recast of the CEAS is adopted), the UNHCR and the IOM may be invited to attend the meetings of the committee.

The main principles of the URF proposal reflect an approach already developed in past EU resettlement initiatives. *First*, EU-sponsored resettlement programmes are intended to function on a voluntary basis. The URF provides a general framework in which Member States are invited to participate (and thus benefit from EU funding). But it does not in and of itself create a legal obligation to resettle refugees on account of EU Member States. *Second*, EU resettlement programmes are to be developed and implemented in cooperation with the UNHCR. The URF proposal explicitly recognises the 'key role' of the UNHCR in identifying resettlement priorities and executing resettlement programmes. *Third*, there is a strong tie between resettlement and the enhancement of hosting capacities in third countries that are facing the arrival of a large number of refugees. The URF proposal connects EU resettlement programmes to the proposal of a 'new Partnership Framework with third countries under the European Agenda on Migration' that strives to support countries of origin and of transit in dealing with large refugee flows.[52] It states that the objective of EU resettlement is also to support 'partnerships with key third countries of origin and transit through a coherent and tailored engagement where the Union and its Member States act in a coordinated manner'.[53] From a policy perspective, resettlement remains conceived at EU level as both a humanitarian tool and a tool for migration management: the intent is to prevent disordered movements of asylum seekers to Europe by supporting hosting capacities in transit countries and countries of origin. As argued by Catharina Ziebritski in her contribution to this volume, policy developments towards increasing involvement of the EU in resettlement are slowly but surely leading to legal developments and a 'EU resettlement law' that has the potential of enhancing refugee protection, in so far as it remains

52 COM (2016) 385 final, Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration.

53 COM (2016) 468 final (n 51) 5.

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aligned on the fundamental rationale and legal dynamics of the Common European Asylum System.

So far, the increasing involvement of the EU in resettlement programmes has not, however, ended the debates regarding the opening and securing of humanitarian admission to Europe for refugees, for a variety of reasons. *First*, the EU resettlement policy remains of an essentially intergovernmental nature. The involvement of the Member States is strictly voluntary. They set the target numbers through the Council, and they freely decide on their own contribution.[54] *Second*, the scope of existing EU resettlement programmes remains relatively limited. They concern people in the thousands – an extremely low figure compared to the flows of people forcibly displaced worldwide, which numbers in the tens of millions.[55] A large number of them is thus likely to search for alternative solutions in order to reach safety. *Third*, and perhaps more importantly, EU resettlement programmes do not allow individuals to directly petition European authorities to obtain humanitarian admission to Europe on grounds relating to protection. Some of those who were not eligible for resettlement have therefore engaged in alternative procedures in an attempt to reach Europe safely and legally. Litigation is one of these. The next Section sets out the main developments that have taken place within the realm of the judiciary, and more specifically before European courts.

2 Litigation for Humanitarian Admission to Europe

In law, the intensification of policy debates on humanitarian admission to European territory for refugees is reflected in a number of vivid doctrinal as well as judicial debates. Those advocating the opening of 'safe pathways' and 'legal avenues' often ground their claims in international law. The arguments rely mainly on fundamental rights, such as the principle of *non-refoulement* and the right to leave one's country. The legal issues raised are intricate, as they relate not only to the content of migrants' rights (is there a violation?), but also to the allocation of responsibility for internationally wrongful acts (which State is responsible for the violation?). These arguments are discussed extensively among legal scholars, who highlight the

54 Some Member States have consistently refused to contribute; see: COM (2015) 240 final (n 45) 4.

55 In 2018, the UNHCR estimated the global population of those forcefully displaced worldwide as being comprised of 70.8 million individuals; see: UNHCR, *Global Trends. Forced Displacement in 2018* (Geneva, UNHCR, 2019).

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tensions between the right to asylum and external border control practices that can have the effect of preventing access to asylum.[56]

These legal claims and doctrinal debates are, in their own way, shaping policy debates on humanitarian admission to Europe, and increasingly so in the wake of attempts to involve the judiciary through litigation. Such attempts could be qualified as 'cause lawyering' by reference to the relevant socio-legal literature.[57] 'Cause lawyering' is a concept that has been used to qualify attempts to obtain and foster social and policy changes through the courts. It refers to the way legal professionals mobilise the legal system to campaign for a cause they actively support.[58] Using the concept of "cause lawyering" to qualify the increasing attempts to channel policy debates on legal avenues to Europe through the legal system indicates that policy and legal debates on safe pathways to Europe are deeply intertwined: Legal arguments have from the outset been used in the policy debate, and understandably so, since the internationally recognised right of refugees to seek protection lies at its core. It is therefore not surprising that over the past few years various attempts have been made to advancing arguments before the courts in support of the better organisation and securing of humanitarian admission to Europe for refugees. The contribution of Tristan Wibault to this volume offers a testimony of the high degree of personal involvement of some lawyers, who invest a lot of time and effort in searching for all the available legal means to defend the interests of their clients and ease their sufferings.

The first attempts at involving the judiciary in the debate were submitted to the ECtHR, in cases concerning contentious (and therefore vividly debated) external border control practices.[59] In the leading case *Hirsi Jamaa v Italy*, the ECtHR held Italy responsible for the violations of migrants' rights on the occasion of an external border control operation. Italy was

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56 See among others: E Guild and V Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered' (2018) *European Yearbook on Human Rights* 373-394; N Markard, 'The Right to Leave By Sea: Legal Limits on EU Migration Control By Third Countries' (2016) 27 *IJRL* 591-616; V Moreno Lax, *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford, OUP, 2017).

57 A Sarat and S Scheingold (eds), *Cause Lawyering and the State in a Global Era* (Oxford, OUP, 2001).

58 L Israël, 'Cause Lawyering' in O Fillieule, L Mathieu and Cécile Péchu (eds), *Dictionnaire des mouvements sociaux* (Paris, Presses de Sciences Po, 2019) 94-100.

59 Various attempts were also made before domestic courts; see: J Hathaway and T Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Colombia Journal of Transnational Law* 2 235-84.

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condemned for the so-called 'push-back' to Libya of asylum seekers who had been intercepted by Italian coastguards in the Mediterranean Sea before reaching European territory.[60] To reach its conclusion, the ECtHR ruled that migrants brought on board the vessels of European coastguards fall under the 'jurisdiction' of European States as, under the Law of the Sea, the jurisdiction of a State extends to vessels carrying their flags in international waters. The mere circumstance that migrants are intercepted on the high seas, outside of European territorial waters, does not dispense States from their responsibilities under the ECHR.

By reaching that conclusion, the ECtHR opened the door to some kind of international responsibility towards refugees in extraterritorial situations. The ruling in *Hirsi Jamaa v Italy* had the concrete effect of partially lifting one of the main legal obstacles to litigation for humanitarian admission to Europe, which is the limitation of the scope of the ECHR to the 'jurisdiction' of the State parties.[61] Through an important body of case law initially developed in the context of military interventions outside of European territory, the ECtHR interpreted the requirement of 'jurisdiction' as going beyond the national territory to include every situation that falls under the 'effective control' of the State.[62] The requirement of 'effective control' is a complex one that has been widely discussed among legal scholars.[63] It depends on numerous factors and requires an in-depth assessment of all relevant circumstances. With the *Hirsi Jamaa* ruling, the ECtHR clarified that these principles are also applicable to cases concerning migrants. What is important here is that this jurisprudential move allows

60 The ECtHR ruled that sending migrants back immediately, without prior examination of their individual situation and without offering them any opportunity to apply for asylum, violates various provisions of the ECHR, including the prohibition against collective expulsion; *Hirsi Jamaa v Italy* (App No 27765/09) ECHR 23 February 2012. For a detailed comment on this case, see: M Den Heijer, 'Reflections on Refoulement and Collective Expulsion in the *Hirsi* Case' (2013) 25 *IJRL* 265-290; M Giuffré, 'Watered-down Rights on the High Seas: *Hirsi Jamaa and others v Italy*' (2012) 61 *ICLQ* 728-750; V Moreno-Lax, '*Hirsi Jamaa and others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12 *HRLR* 3 574-598.

61 European Convention on Human Rights (adopted 4 November 1950; entered into force 3 September 1953) (ECHR) art 1.

62 *Al Skeini v the United Kingdom* (App No 55721/07) ECHR 7 July 2011.

63 For the main terms of the debate, see M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford, OUP, 2011); B Miltner, 'Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons' (2012) 33 *Michigan Journal of International Law* 4 693-745.

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for some judicial review of external border control practices and hence litigation by individuals.

That 'opening' on the part of the ECtHR is in itself insufficient, however, to pave the way to litigation for refugees seeking humanitarian admission to Europe. The ruling in *Hirsi Jamaa* safeguards the overall coherence of the case law of the ECtHR regarding the scope of the ECHR, but it does not mean that from now on every migrant who is subjected to external border control measures would be entitled to invoke the ECHR. Despite the interpretation of State jurisdiction as including extraterritorial situations that are subject to the 'effective control' of the State, the competence of the ECtHR in dealing with external border controls remains limited. It is debatable, to say the least, whether it also covers forms of so-called 'contactless controls'[64] which are performed through the intermediary of third countries. As Dirk Hanschel shows in his chapter, the position of the ECtHR corresponds to a broader trend in the field of international human rights law, where criteria for allocating responsibility for international wrongful acts remain primarily territorial in nature. In her contribution to this volume, Sylvie Sarolea further highlights what she labels 'the paradox of the foot in the door': only those refugees who somehow managed to reach the jurisdiction of a State, even if irregularly and at the risk of their lives, are in the position to make a protection claim on that State.

That is not to say that future changes in international law and in the interpretation of the ECHR must be ruled out.[65] On the contrary, the ECtHR has always emphasised that the ECHR is a 'living instrument', whose

64 V Moreno-Lax and M Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in S Juss (ed), *Research Handbook on International Refugee Law* (Cheltenham, Edward Elgar, 2019) 82-108. For example, Italy entered into an administrative cooperation agreement with Libyan authorities (a so-called 'Memorandum of Understanding') so that migrants are being intercepted by the Libyan coast guard; see D Nakache and J Losier, 'The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind?' (2017) *E-International Relations* <https://www.e-ir.info/2017/07/25/the-european-union-immigration-agreement-with-libya-out-of-sight-out-of-mind/> (accessed 23 July 2019). Attempts are being made at involving the legal responsibility of Italy for the actions of Libyan coast guard through litigation before the ECtHR; see A Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' (2018) 20 *EJML* 4 396-426.

65 For example, in the *M.N. v Belgium* case (App 3599/18) that is currently pending before the Grand Chamber of the ECtHR, a Syrian family applied to the ECtHR following the rejection of their application for a humanitarian visa by Belgian authorities. One of the arguments invoked in the course of the proceedings to justi-

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interpretation may evolve to account for social change.[66] It cannot be excluded that the interpretation of the ECHR by the ECtHR regarding external border controls might evolve in the future to guarantee that the increasingly sophisticated forms of border control do not lead to serious human rights violations. Some legal scholars have called for such an evolution. To them, there should not be a fragmented reading of international law. Other rights should also be considered in the interpretation, such as the right to leave one's country and the duty to rescue as established by the Law of the Sea.[67]

The current state of ECHR law, and its focus on responsibility for acts that are primarily territorial in nature, explains the search for other ways of judicialising the debate on humanitarian admission to Europe. EU law appeared as one such way. As demonstrated by Stephanie Law in her contribution to this volume, the scope of the EU Charter of Fundamental Rights ('EUCFR') has not been limited to the territory of EU Member States. It covers any act implementing EU law in line with the *Akerberg Fransson* doctrine, without explicit restriction to acts committed on European territory.[68] Drawing on this reasoning, the mere fact that migrants are subject to the application of EU law implies that they can call upon the EUCFR. The EU Visa Code explicitly provides for the issuing of humanitarian visas

fy the competence of the ECtHR is the one of 'optional jurisdiction', so to speak: because it made the sovereign choice to establish a provision to apply for humanitarian visas, Belgium is bound to implement that provision in a way that respects the ECHR (pleading by Frédéric Krenc, who represented the Bar Council of French- and German-Speaking lawyers in Belgium that intervened before the ECtHR in favour of the applicants; see the video transmission of the hearing available on <https://www.echr.coe.int/Pages/home.aspx?p=hearings&w=359918_24042019&language=lang&c=&py=2019>, accessed 23 July 2019). On that case, see D Schmalz, 'Will the ECtHR Shake up the European Asylum System?' (2018) *Verfassungsblog* <https://verfassungsblog.de/will-the-ecthr-shake-up-the-european-asylum-system/> (accessed 23 July 2019).

66 G Letsas, 'The ECHR as a Living Instrument: Its Meaning and Legitimacy' in A Føllesdal, B Peters and G Ulfstein (eds), *Constituting Europe. The European Court of Human Rights in a National, European and Global Context* (Cambridge, CUP, 2013) 106-141.

67 V Moreno-Lax, 'Seeking Asylum in the Mediterranean: Against a Fragmentary Reading of EU Member States' Obligations Accruing at Sea' (2011) 23 *IJRL* 2 174-220; N Markard, 'The Right to Leave by Sea: Legal Limits on EU Migration Control by Third Countries' (2016) 27 *EJIL* 3 591-616; E Guild and V Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered' in W Benedek, P Czech, L Heschl, K Lukas and M Nowak, *European Yearbook on Human Rights 2018* (Antwerp, Intersentia, 2019) 373-394.

68 Case C-617/10 *Akerberg Fransson* [2013] EU:C:2013:105.

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by EU Member States in exceptional cases, namely when they 'consider it necessary on humanitarian grounds'.[69] Litigation thus ultimately found its way to the CJEU, as we will examine in the next Section.

3 A Cautious and Reserved Judicial Intervention

So far, litigation before the CJEU in an attempt to securing humanitarian admission to Europe for refugees has stumbled over the limits of the competence of the Court. In the *X. and X*. ruling, the CJEU ruled that these controversies fall outside the scope of EU law. The jurisprudential approach adopted by the Court is presented in sub-Section 1. In response to the question why the CJEU opted for a cautious and reserved stance, we argue in sub-Section 2 that the refusal of the Court to engage in debates on humanitarian admission to Europe reflects the shortcomings of the current EU legal framework. This in turn is to be seen in connection to a broader constitutional deficit, which the Court may not have the legitimacy to address in the current political social context characterised by strong divisions on migration that have amplified as a result of the 2015 'European refugee crisis'. We argue that not only these divisions, but also the constitutional deficit EU law is suffering from more generally speaking, help explain why attempts at involving the CJEU in the policy debate on humanitarian admission to Europe through litigation have failed so far.

3.1 The CJEU Invoking the Limits to its Competence of Judicial Review

In the *X. and X.* case, a Belgian court called on the CJEU to interpret the provision of the EU Visa Code on humanitarian visas. The Court of Justice was asked whether EU law may impose, under some exceptional circumstances, an obligation to issue such a visa. The position taken by the CJEU has been extensively discussed in the legal literature.[70] In a nutshell, the Court declined to address the merits of the case. It noted that the EU Visa Code covers short stays of less than three months only (the so-called 'tourist stay') and argued that it is not applicable to humanitarian visas requested by asylum seekers, who intend to apply for asylum and, thus, to

69 EU Visa Code (n 3), art 25.
70 See n 2.

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stay longer than three months.[71] The Court supported that interpretation by citing the Dublin Regulation and the territorial scope of the CEAS. The Dublin Regulation allocates the responsibility to examine asylum applications to the various EU Member States on the basis of a variety of criteria, including the State of first entry to European territory.[72] The Dublin Regulation does not apply to humanitarian visa applications; such applications are to be submitted to the consular representation of the migrant's choice. Moreover, allowing asylum seekers to apply for humanitarian visas on the basis of the EU Visa Code would run counter the territorial nature of the CEAS. The scope of the CEAS is indeed limited to EU territory.[73] As underlined by the Court:

> to conclude otherwise [that is, to conclude that the EU Visa Code applies to applications for a humanitarian visa introduced by asylum seekers] […] would mean that Member States are required, on the basis of the Visa Code, de facto to allow third-country nationals to submit applications for international protection to the representations of Member States that are within the territory of a third country.[74]

The position of the CJEU met with criticism among legal scholars,[75] some of whom expressed reservations about a strict distinction between the common visa policy and the CEAS. It is true that these policies have a different legal basis in the Treaty but, in practice, it is common for aliens to apply for a long-term residence status, including asylum, only after having en-

71 In his Opinion, Advocate General Mengozzi considered, on the contrary, that 'the intention of the applicants in the main proceedings to apply for refugee status once they had entered Belgium *cannot alter the nature or purpose of their applications*'. He also considered that, as a consequence, there is an obligation to issue a humanitarian visa if refusal would mean that the applicant would suffer from serious human rights violations (Case C-638/16 PPU *X and X* [2017] EU:C:2017:93 Opinion of AG Mengozzi).

72 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 [2013] OJ L180/31.

73 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60, art 3; Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96, art 3.

74 *X. and X.* (n 2) at 48.

75 See the comments cited in n 2.

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tered European territory on the basis of a tourist visa. There is a 'grey area'[76] between the common visa policy and the CEAS, which is well illustrated by the practices of some Member States, such as Belgium and Italy, where humanitarian visas are issued to refugees who are granted the benefit of resettlement programmes (Belgium) and in the case of the 'humanitarian corridors' (Italy).[77] In the *X. and X*. case, neither the Belgian court nor the administration initially contested the application of the EU Visa Code. That argument only came up later on, during the proceedings before the CJEU.[78]

In essence, these doctrinal criticisms are directed at the way the Court is fulfilling its constitutional role of guaranteeing the overall consistency of EU law and respect for primary law, including the EUCFR. What is regretted is the refusal of the Court to engage with ongoing legal and policy debates on humanitarian visas, and its decision to limit (or refuse to expand) the scope of EU law to addressing the issue of humanitarian admission to Europe. These criticisms are very similar to the ones targeting the approach adopted by the CJEU in the three cases *NF, NG and NM v European Council*, which concerns annulment proceedings brought against the 'EU-Turkey Statement' on the ground that, in violation of EU law, it prevents access to effective protection.[79] In an order adopted in that case a few months before the *X. and X.* ruling, the General Court of the CJEU declared that it did not have jurisdiction to rule on that legal challenge. It considered that the 'EU-Turkey Statement' was not adopted by the European Council, but by all the EU Member States acting in their individual capacity, and that it can therefore not been considered as a legal act of EU law falling under its competence of judicial review.

The *X. and X.* ruling thus seems to fit within a broader jurisprudential trend, showing that the CJEU prefers not to intervene in policy debates on humanitarian admission to Europe on account of the norms limiting its

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76 R Colavitti (n 2).

77 See the contributions of S Bodart and K Bianchini to this volume.

78 S Sarolea, J-Y Carlier and L Leboeuf (n 2).

79 Cases T-192/6 *N.F. v European Council* [2017] EU:T:2017:128; T-193/16 *N.G. v European Council* [2017] EU:T:2017:129 and T-257/16 *N.M. v European Council* [2017] EU:T:2017:130. Appeals introduced against these rulings before the Court of Justice were ruled to be inadmissible for formal reasons relating (Cases C-208 to C-210/17 P *NF, NG and NM v European Council* [2018] ECLI:EU:2018:705), see: M H Zoeteweij and O Turhan, 'Above the Law – Beneath Contempt: the End of the EU-Turkey Deal?' (2017) 27 *Swiss Review of International and European Law* 2 151.

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competence of judicial review.[80] Such a jurisprudential approach stands in stark contrast with the one adopted in other areas of EU law, where the CJEU has at times been accused of 'judicial activism' for expanding the scope of EU law in a way that overtly supports the harmonisation process.[81] This raises the question why the Court adopts such a 'cautious'[82] and reserved approach when it comes to issues regarding humanitarian admission to European territory. In our view, this approach cannot be disconnected from the broader European social context, marked as it is by extremely sensitive divisions and contrasting views on migration, and from some fundamental shortcomings in the current EU legal framework which the Court of Justice may not have the legitimacy to address. These factors are further identified and discussed in the next sub-Section.

3.2. Some Limits to the Intervention of Courts in Policy Debates on Humanitarian admission to Europe

It is the essence of the role of courts, and in particular of the higher courts entrusted with the constitutional function of safeguarding the overall coherence and integrity of the legal framework, such as the CJEU, to adapt

80 T Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy Before the EU Court of Justice' (2018) 31 *JRS* 2 216-239.

81 I Goldner Lang, 'Towards "Judicial Passivism" in EU Migration and Asylum Law? Preliminary Thoughts for the Final Plenary Session of the 2018 Odysseus Conference' (2018) *EU Immigration and Asylum Law and Policy* <https://eumigrationlawblog.eu/towards-judicial-passivism-in-eu-migration-and-asylum-law-preliminary-thoughts-for-the-final-plenary-session-of-the-2018-odysseus-conference/> (accessed 20 July 2019). In *Zambrano*, for example, the CJEU expanded the scope of EU law to guarantee the effective protection of the rights of EU citizens. It referred to the 'substance of the rights' of EU citizens as protected by the Treaties, holding that these rights may be invoked in purely internal situations that have no connections with the EU legal order, for example because EU citizens have not exercised their freedom of movement. Calls for the Court to apply a similar reasoning to determine the extent of the scope of EU law in situations arising outside of EU territory, allowing for its application in the case of a violation of 'the substance of the rights' established in the EU Charter, such as the right to asylum, have not been followed so far (J-Y Carlier and L Leboeuf, 'The *X. and X.* case: Humanitarian visas and the genuine enjoyment of the substance of the rights, towards a middle way?' (2017) *EU Immigration and Asylum Law and Policy* <https://eumigrationlawblog.eu/the-x-and-x-case-humanitarian-visas-and-the-genuine-enjoyment-of-the-substance-of-rights-towards-a-middle-way/>, accessed 20 July 2019).

82 J-Y Carlier and L Leboeuf (n 2) 96.

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the law to evolving social realities. The law is not fixed, but in constant evolution depending on court interpretations. However, the fact that the CJEU did not start engaging with policy debates on safe and legal access to Europe for refugees also points to the limits of the role which the judiciary can play in steering the development of the law. These limits pertain to both legal and social conditions, which are deeply intertwined.

The jurisprudential stance of the CJEU regarding litigation in the field of humanitarian admission to the CEAS reveals a broader 'constitutional deficit' when it comes to regulating the external dimensions of EU asylum and migration policy.[83] The reason why the Court is reluctant to review legal acts concerning migrants who are outside European territory, and to address the controversies on humanitarian admission to EU territory, arise from broader legal uncertainties pertaining to the content of the norms which guide its judicial review.[84] EU institutional rules and the EU fundamental rights framework turn out to be inadequate, in their current form, to govern in an efficient, coherent and transparent way issues surrounding access to European territory. Rules on the division of competence between the EU and the Member States are intricate[85] and the extent of fundamental rights obligations towards migrants who are (still) outside EU territory is unclear, to say the least.

Moreover, little guidance is available from the ECtHR, which is itself facing the limits of the 'jurisdiction' requirement as outlined above. It may further be questionable whether the (relatively) strong human rights guar-

83 On the 'constitutional deficit' of the external dimensions of EU asylum and migration law, see S Carrera, J Santos Vara and T Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis. Legality, Rule of Law and Fundamental Rights Reconsidered* (Cheltenham, Edward Elgar, 2019); L Leboeuf, 'La Cour de justice face aux dimensions externes de la politique commune de l'asile et de l'immigration: un défaut de constitutionnalisation?' (2019) 55 *Revue trimestrielle de droit européen* 1 55-66.

84 By 'EU constitutional framework', we refer to the fundamental rules as established by the EU Treaties to govern EU actions. These fundamental rules pursue two main objectives. *First*, they organise the institutional framework by establishing norms and principles on the division of competence between EU institutions and the Member States, and among EU institutions. *Second*, they set out the general objectives governing EU action, including the values to be respected while fulfilling these objectives. These values include respect for the fundamental rights established in the EUCFR.

85 P Garcia Andrade, 'EU External Competences in the Field of Migration: How to Act Externally When Thinking Internally' (2018) 55 *CMLRev* 1, 157–200; E Neframi, *Division of Competences Between the European Union and its Member States Concerning Immigration* (Brussels, Study for the European Parliament, 2011).

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antees established for the benefit of those who are found on the territory of a State, can be extended as such to external situations with a view to embracing access to Europe as well. The evolution of international human rights law has led to a body of guarantees that include protection against removal and some residence and minimal rights, such as adequate reception conditions for asylum seekers and access to the social assistance system for refugees.[86] One may wonder whether the extension of these guarantees to every migrant risking a violation of Article 3 ECHR or other forms of persecution, would be a realistic move, given the potentially unlimited number of persons concerned. As noted by the ECtHR in the inadmissibility decision it adopted in the *Abdul Wahab Khan v the UK* case concerning the refusal of a visa application grounded on a risk of ill-treatment in the home country, another interpretation 'would, in effect, create an unlimited obligation on Contracting States to allow entry to an individual who might be at real risk of ill-treatment contrary to Article 3, regardless of where in the world that individual might find himself'.[87] It is thus most likely that any move towards the establishment of some kind of humanitarian admission to Europe for refugees will also require the establishment of additional criteria, such as a focus on some particular vulnerabilities similar to the one developed in UNHCR-sponsored resettlement programmes, or, as indirectly suggested in the question addressed by the Belgian court to the CJEU in the *X. and X.* case, the requirement of a special connection with EU territory, for example, because family members are already living in Europe. These are major legal innovations, which go far beyond the mere extension of existing rules to situations that they were not initially designed to cover.

For these reasons, engaging in the debate on humanitarian admission to Europe would have required the development of innovative legal interpretations without a stable and clear constitutional foundation. It would have required engaging in the interpretation not only of the scope of the law, but also of its substance, in a new and groundbreaking way. The overall social context within which the CJEU is currently operating may not support such evolution. There does not seem to be an overall consensus for increasing judicial intervention in debates on 'legal avenues' and 'safe pathways' to Europe for refugees. The high legitimacy cost that may result

86 On that evolution, see among others: M Gil-Bazo, 'Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship' (2015) 34 *RSQ* 1, 11-42.

87 *Abdul Wahab Khan v the UK* (App No 11987/11) ECHR (dec.) 28 January 2014, para 27.

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from intervening in that debate was apparent in the *X. and X.* case, which can also be regarded as an attempt, by domestic judges, to safeguard their own legitimacy in the face of heavy internal criticism.[88] The request for a preliminary reference was addressed to the CJEU in a context of significant internal tensions concerning humanitarian visas. A previous ruling by the Belgian courts ordering the issuance of a humanitarian visa provoked outcry and an intense public debate in which some argued on the basis of fundamental rights considerations whilst others accused judges of exceeding their constitutional prerogatives and engaging in a 'government of judges'.[89] The proceedings before the CJEU in *X. and X.* thus fit into a broader judicial strategy to make up a legitimacy deficit at national level.[90]

Lastly, other social and policy factors, at EU level, may help explain why the CJEU declined to delve into the controversy and avoided dealing with the (major) shortcomings of the current EU constitutional framework. In other recent cases in the field of asylum and migration, the CJEU was confronted with social and policy controversies that resulted from concurring pressures aimed at questioning the fundamental principles of the EU *acquis* in the field of asylum and migration. For example, attempts have been made to circumvent the prohibition of systematic internal border controls, as clearly established by the Schengen Border Code. In the *Touring Tours und Travel and Sociedad de Transportes* case, in particular, the CJEU opposed the externalisation of internal border controls by Germany, which required private companies to systematically check passengers embarking on the territory of other Member States before transporting them to German territory.[91] The court's ruling referred to the useful effect of the

88 L Leboeuf, 'Visa humanitaire et recours en suspension d'extrême urgence. Le Conseil du contentieux des étrangers interroge la Cour constitutionnelle et la Cour de justice de l'Union européenne' (2016) *Cahiers de l'EDEM* <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/c-c-e-assemblee-generale-8-decembre-2016-n-179-108.html> (accessed on 17 July 2019).

89 On that controversy, see De Standaard, 'Heeft de rechter de scheiding der machten geschonden?' (9 December 2016) <https://www.standaard.be/cnt/dmf20161209_02617185> (accessed on 17 July 2019).

90 Running parallel to the case before the CJEU, the Belgian court addressed a preliminary reference to the Belgian Constitutional Court, asking it to specify the extent of the power of judicial review on the part of lower courts. The Constitutional Court declined to address the issue. See: Belgian Constitutional Court, Judgement of 18 October 2018 in the case 141/2018. See also the contribution of S Bodart to this volume.

91 Joined Cases C-412/17 and C-474/17 *Bundesrepublik Deutschland v Touring Tours and Travel GmbH and Sociedad de Transportes s.a.* [2018] EU:C:2018:1005.

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prohibition against systematic internal border controls, which it re-affirmed in the same social context of heavy divisions at play.[92]

There thus seems to be some 'legitimacy trade-off' at play, so to speak. The CJEU fulfils its role of enforcing the EU constitutional framework where its content is (relatively) clear, but it avoids engaging actively in further developing that framework where its content is controversial and would require that the judiciary develop particularly innovative interpretations to help it be attuned to the situation at hand. Such effort would necessitate a wide social consensus, which is clearly not present in the area of migration today. Jurisprudential innovation risks being met with strong opposition and may ultimately affect the legitimacy of the CJEU, as experienced by Belgian domestic courts. Our understanding of the Court´s position is that it is anxious to prevent aggravating existing divisions within European societies, and therefore exercises its power of judicial review in an extremely cautious way when it concerns laws or actions in fields that are highly controversial from a political point of view and still unclear in terms of EU constitutional framework. While, on the one hand, it does not hesitate to enforce norms that are of sufficient quality and offer certainty, on the other it refrains from developing major jurisprudential innovations that might enhance the quality of the existing legal framework but would also be met with severe opposition.

Does this stance mean that any attempt at bringing the debate about humanitarian admission to Europe and, more broadly, about external border control practices before the judiciary is doomed to fail? As we will show in the next Section, that is not necessarily the case: in our societies governed by the rule of law, the law aspires to govern every action of the executive. Further litigation attempts are therefore highly likely.

4 The Revolving Doors of the Rule of Law

In societies governed by the rule of law, legal arguments usually keep reappearing in policy debates and the law will somehow keep reappearing through the back door. Actors will seek to develop further innovative interpretations of the legal framework in an attempt to support their policy arguments. This is well illustrated by the pending litigation before the EC-

92 J J Rijpma, 'A Rose by Any Other Name: het Hof van Justitie stelt grenzen aan controles binnen het Schengengebied' (2019) *Nederlands Tijdschrift voor Europees Recht* 5-6 129-136, 136.

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tHR in the *MN v Belgium* case, where it has been argued that any State which made the policy choice of adopting provisions on humanitarian visas should implement them in line with the requirements set out in the ECHR, including the requirements of due process.[93] It is also worth noting that, from a strictly legal perspective, the ruling of the CJEU in *X. and X.* does not definitely close the door to future litigation attempts. On the contrary, the legal reasoning of the Court in *X. and X.* bears the seeds for further litigation. For example, the criteria of the intent of the applicants used by the CJEU to establish a strict distinction between the CEAS and the common visa policy may lead to further issues and litigation in the future. In *X. and X*. and as mentioned above, the CJEU relied on the declared intent of the applicants to apply for asylum once on Belgian territory in order to rule out the application of the EU Visa Code. But what if applicants were to conceal such intent in the future? Is there a duty on the part of the Member States to engage in a thorough study of short stay visa applications on humanitarian grounds to determine whether the 'true intent' of the parties is to apply for asylum? And to justify their decision accordingly and in line with the EUCFR, including with the principle of good administration?

The European Parliament, too, might not be entirely willing to leave free rein to the executives of EU Member States. As shown by Eugenia Relano Pastor in her contribution to this volume, the ongoing recast of the EU Visa Code was seized by some members of the European Parliament (MEPs) as an opportunity to move forward the introduction of a specific provision on humanitarian visas that would clearly regulate access to EU territory for refugees. This attempt failed to yield concrete results. But it shows that the debate remains alive within the European Parliament, and reminds us that future legislative interventions cannot be entirely excluded.

These prospects for the future evolution of the legal frameworks on humanitarian admission to Europe should not, however, ignore the strong opposition to the involvement of the judiciary into the debate. The language of the judges is the one of subjective rights, for there is often no litigation without individual rights to be litigated. It can reasonably be feared that, if refugees are entitled to some kind of subjective right to access European territory, the EU Member States' administrations will be overwhelmed by applications. By contrast, other forms of humanitarian admission, such as resettlement programmes that rest on a collaboration be-

93 App No 3599/18 and pleading by Frédéric Krenc (n 65).

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tween the receiving and the hosting State, offer a higher degree of flexibility. For that reason, it is likely that European Governments will keep systematically opposing the emergence of concrete legal commitments and will do everything possible to prevent their responsibility from being engaged under the law because of some claims for international protection made outside their territory. Further attempts at litigating towards humanitarian admission in individual cases are likely, but they might also be doomed to fail in any predictable future.

Such litigation attempts contribute, however, to creating the overall conditions that incentivise States to participate in resettlement programmes and, more broadly, to open up a broader debate on the evolution of EU border policies, and the way these should be encapsulated by the rule of law. Commenting on the inflation of legal arguments and court cases concerning remote border control practices, Hathaway and Gammeltoft-Hansen noted that:

> law will thus be in a position to serve a critical role in provoking a frank conversation about how to replace the duplicitous politics of non-entrée with a system predicated on the meaningful sharing of the burdens and responsibilities of refugee protection around the world.[94]

Interestingly enough, the ruling in the *X. and X.* case has not prevented the emergence of such 'frank conversation'. It sends a clear message that one should not expect the CJEU to delve into policy debates on humanitarian admission to European territory. But, by declining to reply on the merits, the CJEU did also avoid that, by so doing, it would exclude any future application of the EUCFR to extraterritorial border control measures. Only a few months after the ruling in *X. and X.*, the position adopted in *El Hassani* seems to confirm that the EUCFR must be respected while implementing EU law outside European territory.[95] In *El Hassani*, the Court held that the EUCFR is applicable to decisions implementing the EU Visa Code and that concern migrants who are outside European territory.[96] Future developments in the case law of the CJEU to impose the respect of some human

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94 J Hathaway and T Gammeltoft-Hansen (n 59).

95 Case C-403/16 *El Hassani* [2017] EU:C:2017:960. See also the Case C-680/17 *Vethanayagam* [2019] EU:C:2019:627.

96 The case concerned the refusal of a visa application submitted by the family members of a Polish citizen they wished to visit in Poland. What the ruling makes clear is that there is a right to an effective remedy against the refusal of such visa applications.

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rights obligations when applying external border control mechanisms established by EU law cannot be ruled out.

Such debate is still likely to generate strong legal and policy controversies for the years to come, as it requires calling into question the legal understanding of the State as a territorial entity that extends over a fixed and well-defined physical space.[97] The development of the external dimensions of EU asylum and migration policies has profoundly modified the realities of border control, through the latter's externalisation and the multiplication of remote control practices. As a result, the border is no longer exclusively a fixed control point located at the edge of the territory of a State. It has become a complex and evolving social and policy process, which rests on intricate legal and policy mechanisms involving multiple actors.[98] There is no 'border' anymore, but rather numerous 'bordering processes'[99] leading to a 'shifting border' which 'relies on law's admission gates rather than a specific frontier location'.[100] Subjecting 'shifting' border practices to the rule of law requires major legal innovations, since the human rights framework was developed from a traditional Westphalian perspective, focusing on migrants who reside within a State's territory.

There is no consensus on how that fundamental challenge to the way the legal system has been conceived needs to be addressed. Legal uncertainties and controversies are thus likely to persist, alongside divisions and policy disagreements on how to address migratory movements. Irrespective of the opposition and failures that have been met so far, the legal debates show that ultimately, recourse to the law still functions as an appropriate tool to manage social divisions on migration and foster social change. Litigation on humanitarian admission to Europe fosters a much-needed conversation which this volume aims to further support by means of a thorough analysis of the current international, EU and domestic legal frameworks of the selected countries, as well as of their mobilisation by

97 The existence of 'a defined territory' is among the constitutive elements of the State as an actor of international law, see the Montevideo Convention on the Rights and Duties of States (adopted on 26 December 1933; entered into force 26 December 1934) art 1(b).

98 D Duez and D Simonneau, 'Repenser la notion de frontière aujourd'hui. Du droit à la sociologie' (2018) 98 *Droit et Société* 1 37-52.

99 V Kolossov and J Scott, 'Selected conceptual issues in border studies' (2013) *Belgeo* 1; D Newman, 'The Lines that Continue to Separate Us: Borders in Our "Borderless" World' (2006) 30 *Progress in Human* Geography 2, 143-161.

100 A Shachar, 'Bordering Migration/Migrating Borders' (2019) 37 *Berkeley Journal of International Law* 1 93-147, 96.

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the actors and the concrete difficulties that have arisen in its implementation. The content of the volume is briefly presented in the next Section.

5 The Law Between Promises and Constraints

The contributions to the collective volume address four main questions: *First,* which international and European legal obligations are binding both on the EU and on the Member States, and what constraints do they place – potentially and actually – on the international dimensions of EU migration and asylum policy? *Second*, does the law in the selected Member States (Belgium, Germany and Italy) provide for humanitarian admission procedures and, if so, what are the practices? *Third,* how do lawyers make use of existing provisions to obtain humanitarian admission, and how do refugees experience the functioning of current resettlement programs? *Fourth*, what are the prospects for future evolutions of the EU legal framework?

In the first part, several papers reflect on the limits of the current international and EU legal frameworks in regulating the situation of migrants who are outside European territory. Fundamental questions of human rights law and EU law are addressed, such as the extent of the jurisdiction of states and the scope of the EU Charter of Fundamental Rights. The paradoxes of the right to asylum are highlighted and questioned. Dirk Hanschel discusses the controversies surrounding the extent of the jurisdiction of the State under international human rights law. Drawing on the case law of the ECtHR and focusing on instruments such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, the author raises intricate questions of territory and jurisdiction that require nuanced answers. Stephanie Law discusses controversies surrounding the scope of EU law and of the EUCFR. She examines the relevant case law of the CJEU concerning the scope and implementation of EU law and analyses whether the application of the EUCFR is contingent on a territorial connection. The author advances the argument that territoriality is of no relevance to the application of the EUCFR. Sylvie Sarolea discusses the deficiencies in the current international and EU legal frameworks when it comes to dealing with the protection of migrants who are outside EU territory. She addresses the topic from a critical perspective and connects it with the broader issue of how to access justice.

In the second part, the national legal framework and practices regarding humanitarian admission are addressed in three selected Member States

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(Germany, Belgium and Italy). A concrete understanding of the everyday practices of these States regarding humanitarian admission and of the corresponding legal issues is provided. Katia Bianchini explores Italian legislation and practices regarding humanitarian admission, while devoting particular attention to the implementation of 'humanitarian corridors'. After explaining what the humanitarian corridors are, their legal basis, essential elements, and the potential for their replicability, she discusses their strengths and shortcomings. Pauline Endres de Oliveira analyses the conditions and procedures of the various humanitarian admissions programmes at the federal and regional (Länder) levels in Germany. She highlights the differences in procedure and in residence statuses. Serge Bodart analyses the Belgian legal framework on humanitarian admission and the limits on the judicial review performed by Belgian courts. He discusses the *X. and X.* ruling from the viewpoint of the domestic administrative tribunal over which he is now presiding and which requested a preliminary ruling from the CJEU.

In the third part, the concrete difficulties that have arisen in the implementation of existing provisions for humanitarian admission are highlighted. Tristan Wibault, the lawyer acting for the Syrian family in the *X. and X.* case, shares his experience of mobilising the law to obtain a humanitarian visa. He reflects critically on his own work by showing how, in practice and contrary to what the notion of 'strategic litigation' may suggest, lawyers tend to accompany as closely as possible the developments of a case, but are rarely in a position to develop, beforehand, a proactive and comprehensive strategy aimed at obtaining modifications of the legal framework. Sophie Nakueira, on the basis of the qualitative empirical data she collected during her extensive fieldwork in a refugee camp in Uganda, provides an account of the concrete difficulties vulnerable refugees face when trying to access resettlement programmes. She highlights and discusses the shortcomings and difficulties inherent in the implementation of the vulnerability criteria developed by the UNHCR to select refugees for resettlement, in a context where most of them are confronted with dire living conditions.

In the fourth part, concrete prospects for evolutions of the EU legal framework are being discussed. Catharina Ziebritski shows the emergence of an 'EU resettlement law' which, she argues, bears the promise of enhancing refugee protection if it remains aligned with the constitutional rationale of the CEAS. Eugenia Relano Pastor analyses the initiatives taken by the European Parliament to introduce a provision on humanitarian visas within the EU Visa Code, and the subsequent developments which ultimately led to the withdrawal of that proposal. She shows how the legal

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tensions which have emerged before the CJEU and the ECtHR also had an impact on the debates within the European Parliament and among the EU institutions.

Jean-Yves Carlier concludes the volume by calling for renewed forms of global migration governance that would move beyond the strict dichotomy between open and closed borders. He makes the proposal of launching a broader reflection on how visas may be abolished in the long run, and to start admitting some kind of limited judicial review in those instances where the 'substance of the rights' of migrants is being threatened, for example, when the very essence of their fundamental rights is at stake.

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