Chapter 3:
Is Access to Asylum the Same as Access to Justice?

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Contents

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Introduction

For those forced to flee, seeking asylum is tantamount to seeking access to justice. Justice, however, requires access to a place where, unlike where the asylum seeker previously resided, human rights could be claimed and guaranteed, at least the most basic human rights. Seeking asylum is a second-rate solution, the better solution is to ensure that asylum seekers will again be able to live in what they consider their own home and fully claim these basic rights there. It follows that if access to such basic rights is impossible or denied, so, too, the access to the right to justice. The universality of human rights remains under question until and unless human rights can be claimed some place else. This 'somewhere' is a State or an inter-State. These rights do not exist independent of an institutional incarnation, and access to that institution in question, namely the State, is central to asylum seekers.

In asylum law, the right of access to 'justice' has increasingly become a highly debated issue, especially in case law. In guaranteeing the principle of *non-refoulement*,[2] the Geneva Convention also relies on several international and regional conventions relating to fundamental rights. The principle is so worded as to safeguard the notion that no one may be returned 'in any way whatsoever' to a country where there is a risk of injury to life or threat of torture.

But in order to avoid being turned or sent back, it is still necessary to have arrived at a place where such a right can and will be upheld and exercised. Availing oneself of this right presupposes an interlocutor, a debtor of this right. This interlocutor is the guardian of the gateway to this 'justice'. The central question then becomes: *Where* is this gateway?

Access to justice depends on the existence of this gateway. But does it really exist? There is no simple or unique answer to that, for the reality is plural. Sometimes the gate to be crossed only exists on maps where borders are very long or in a hostile environment such as when they run across a desert. Its physical non-existence certainly does not necessarily mean an absence of danger but that access may possibly be allowed. The gateway is sometimes a waterway – rivers or seas – separating States. Here, too, it must be navigated, often under perilous conditions. Sometimes, the gateway exists physically, like in the airports, train stations, or where fences are installed (around Ceuta and Melilla, at the eastern borders of European Union).

2 Geneva Convention, article 33.

Europe is surrounded by such gateways. Should they then at least be half-opened when they are already reached, when the asylum seeker is physically in front of the gate, seeking to step in? These metaphors reflect a reality. Everything then rests on accessing roads to this gateway, and knowing how to reach them.

The gates to Europe have been dangerous these past years. Since 1993, the UNITED network has been monitoring the 'deadly results of the building of "Fortress Europe" by making a list of the refugees and migrants, who have died in their attempt of entering the "Fortress" or as a result of Europe's immigration policies'.[3] The number of deaths last documented was 36,570. The list mentions names, and sometimes just the initials of the dead, along with their place of origin and the information source. This list was published in several major newspapers.

The only way to escape this high-level risk is by providing access to legal avenues. Despite being increasingly debated at the EU policy level, as underlined by Francesco Gatta,[4] this issue has only led to very limited implementation and transposition into practical measures and common European actions. This volume reports and analyses a number of initiatives towards opening and making available safe mobility channels (resettlement initiatives, humanitarian admission programmes and so-called humanitarian visas). But those programmes are not compulsory and can grant access to migrants *only if States decide to express their right to open their borders.*

This chapter revisits the premises of the first European case on this subject, namely ECJ's *X & X* ruling on the question of issuing humanitarian visas to asylum seekers at consular and diplomatic representations in third countries. This case has, however, spawned a wide range of reflections on the responsibility of States in regards to asylum, as well to future options. The fundamental issues this topic raises are much larger and complex than *X & X*, which is the focus of this chapter. This is mainly because the current orientations of the EU policy in this field have made it necessary to act more and more outside of its geographical borders. Besides the delicate question of the nature of the acts adopted within the framework of this ex-

3 European network against nationalism, racism, fascism and in support of migrants and refugees, www.unitedagainstracism.org/campaigns/refugee-campaign/fortress-europe/#99; http://unitedagainstrefugeedeaths.eu/.

4 F Gatta, 'Legal avenues to access international protection in the European Union: past actions and future perspectives' (2018) 3 *Journal européen des droits de l'homme - European Journal of Human Rights (JEDH)*. See also the contribution of Ziebritzki to this volume.

ternal action, it is essential to view the exercise of its extraterritorial jurisdiction through the prism of fundamental rights.

This raises complex technical questions, or rather questions to which the answers are neither clear nor unambiguous in light of the current legal framework and the point of view ultimately adopted. Beyond a *de lege lata* analysis regarding the current legal framework, the global consistency of the solution adopted must be questioned. The point of view of this paper will be a legal one, not because ethics and law would be in opposition but because it is our point of view. But before that, it is important to mention that the 'other' European Court will pronounce a judgment in the following months on the same subject.

On 24 April 2019, the Grand Chamber of the European Court of Human Rights (ECHR, Strasbourg) held its hearing on humanitarian visas in *MN and others v Belgium*[5]. The applicants are a Syrian family from Aleppo who applied for humanitarian visas for the entire family at the Belgian embassy in Beirut. The refusal to issue visas was suspended by the Council for Aliens Law Litigation (hereinafter: the Belgian Council) under the extreme urgency procedure.[6] Several domestic decisions followed the first one. The first judgment was based on the alleged risk of violation of Article 3 ECHR. Belgium's obligation to issue a visa because of this risk is the central issue on which the Court of Strasbourg will have to decide. The provisions at stake are Article 1 (which define the territorial scope of the Convention), Article 3, Article 6(1) (guaranteeing the right to a fair trial), and Article 13 (protecting the right to an effective remedy).

5 The case was heard but the decision is still pending (as on 11 September 2019).

6 In Belgian law, the extreme urgency procedure is available as a complement to an action for annulment of an administrative decision. The Council for Aliens Law Litigation is the administrative court that is competent to hear appeals lodged against decisions relating to asylum and residence. It reviews the legality of these measures mainly with respect to infringement of essential procedural requirements. Where it is not automatically suspensive, the action for annulment may be accompanied by a request for suspension and/or a request for provisional measures. Those last ones [specify] may be lodged in ordinary procedure or in extreme urgency. Then a decision could be taken at a very short delay (a few days or even hours, if necessary). Since neither the action for annulment, nor the request for suspension is suspensive, the urgent procedure is the only way to benefit for an effective remedy. Otherwise, the applicant could have been removed without a decision of the judge or be subjected to a refusal to access the territory during a long period of time. That is why, here, the applicant used the extreme urgency procedure to obtain a rapid decision in view of the dramatic situation in Aleppo.

The importance of this case in understanding States' obligations in the field of asylum has prompted several interventions from other States[7] but also from NGOs and professional organisations.[8] The former (other States) sided with Belgium while the latter supported the applicants. The stakes in this case justified its referral to the Grand Chamber. At the time of writing this article, it is only possible to make prognostications on the basis of the existing case law and the general principles governing the protection of human rights.

1. *The Setting of the Play: The Right of Asylum, a Right 'of the Foot in the Door'*

International law is grounded on a schizophrenic paradox. Asylum seekers only have the right to leave a country, including their own, but no right to enter a third country, even to ask for protection. This results from the silence of international law on legal avenues and the limited scope of territorial application of the principle of *non-refoulement*.[9]

To apply for asylum, it is necessary to have arrived in a third country and thus to have entered or, to say the least, fallen under the jurisdiction of another sovereign State, which means being on what is legally considered its territory: land, maritime, the border. Indeed, if international law recognises the right to leave any country, including one's own, it guarantees no legal entry to a third country, even in the field of asylum. The principle of *non-refoulement* has territorial limits, for Article 33 of the Geneva Convention guarantees the prohibition of expulsion or return ('*refoulement*') thus:

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7 Austria, Czech Republic, Croatia, Denmark, France, Germany, Latvia, Netherlands, Slovakia, and United Kingdom.

8 The Human Rights League (LDH), the International Federation of Human Rights Leagues (FIDH), the Centre for Advice on Individual Rights in Europe (the AIRE Centre), the European Council on Refugees and Exiles (ECRE), the International Commission of Jurists, the Dutch Council for Refugees, and the Bar Council of French-speaking and German-speaking Lawyers of Belgium (OBFG).

9 On this subject, see mainly N Frenzen, 'The Practice of Shared Responsibility in Relation to Extraterritorial Refugee Protection' (2016) *University of Southern California Gould School of Law, SHARES Research Paper 80*, www.sharesproject.nl, in: A Nollkaemper and I Plakokefalos (eds), *The Practice of Shared Responsibility in International Law* (Cambridge, Cambridge University Press, 2016); M den Heijer, 'Europe and Extraterritorial Asylum', https://openaccess.leidenuniv.nl/handle/1887/16699.

> No Contracting State shall expel or return ('*refouler*') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Even if the expression 'in any manner whatsoever' seems to offer an effective and large degree of protection, in practice, it is limited by its territorial scope of application. Asylum is the right of getting the foot in the door. Asylum seekers are protected by the principle of *non-refoulement* only if they enter the territory or reach the borders. But the applicability of protection in prior areas and zones, or in specific zones, such as the airports and the transit areas, is disputed in case law, and perspectives differ depending on the continent and the geographical area from where access to protection is sought.

Starting with the simplest cases, this chapter will revert to the geographically more complicated ones. Having once, legally or not, entered the territory of a host State, asylum seekers are protected by the principle of *non-refoulement*, which also benefits them at the border insofar as they have access to it. However, questions of interpretation are beginning to arise around the exact definition of the border.

First step: the transit zones of the airport in the host country. In *Amuur v France*,[10] the European Court of Human Rights ruled that those zones are not extraterritorial. Admittedly, even if this judgment did not concern Article 3 but Article 5, it had a direct impact on asylum seekers. France argued that the applicants were free to leave the transit zone to fly back to Syria since they had departed from that country. The Court rejected this alternative, underlining that

> this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in. Sending the applicants back to Syria only became possible, apart from the practical problems of the journey, following negotiations between the French and Syrian authorities. The assurances of the latter were dependent on the vagaries of diplomatic relations, in view of the fact that Syria was not bound by the Geneva Convention relating to the Status of Refugees (§ 48).

10 ECtHR, *Amuur v France*, 25 June 1996, Appl. No 19776/92.

One step further, at a domestic court: Does the principle of *non-refoulement* protect asylum seekers at an airport in the country of origin? *Roma* stemmed from a 2001 bilateral agreement between the United Kingdom and the Czech Republic, which permits British immigration officers to 'pre-clear' all passengers at the Prague Airport before they board any aircraft bound for the United Kingdom. The UK Appellate Court judged that the principle of *non-refoulement* did not apply to those who had yet to 'leave their country of origin'.[11]

Between those two locations at airports, various other cases occur mostly at sea. Here, one must distinguish between the territorial sea, over which the State has jurisdiction as it is part of the national territory, and the high seas, over which no one nation has jurisdiction and is thus equally accessible to all nations. First, to even establish a precedent, is the famous case of *Sale* of September 1981. The United States and Haiti entered into an agreement to authorise US coastguards to intercept in high seas vessels that were engaged in the illegal transportation of Haitian migrants to US shores. Following the 1992 Executive Order by President H.W. Bush, coastguards started repatriating Haitians, depriving them of any opportunity to establish themselves as refugees. When the case found its way to the US Supreme Court, the Court denied relief to the plaintiffs on the grounds that the *non-refoulement* obligation only applied to those who were 'at the border or within a country, not the high seas'.[12]

This case was the only legal precedent when the European Court of Human Rights was confronted with the application in the *Hirsi* case.[13] While the legal basis was different— the ECHR in the *Hirsi* case and the Geneva Convention in the *Sale* case—the Strasbourg Court offered a contrary ruling. Somali and Eritrean migrants travelling from Libya who had been intercepted at sea by the Italian authorities were sent back to Libya. The Court found that the applicants were within the jurisdiction of Italy for the purposes of Article 1 of the Convention. The criterion of the 'jurisdiction' under this provision was grounded on the notion of effective control. It reiterated the principle of international law, enshrined in the Italian Na-

11 House of Lords, *R (European Roma Rights Centre) v Immigration Officer at Prague Airport* [2004] UKHL 55

12 United States Supreme Court, *Sale v Haitian ctrs. Council, Inc.* (1993) No 92–344, https://caselaw.findlaw.com/us-supreme-court/509/155.html. In disagreement with the Court, read Interam. Comm. H.R., Rapport n° 51/96, case n° 10.675, 13 of March 1997.

13 ECtHR (Grand Chamber—judgment), *Hirsi Jamaa and others v Italy*, 23 February 2012.

vigation Code, that a vessel sailing on the high seas was subject to the exclusive jurisdiction of the State of the flag it was flying. The events had taken place entirely on board the ships of the Italian armed forces with an Italian military crew. In the time between boarding the ships and being handed over to the Libyan authorities, the applicants had been under the continuous and exclusive de jure and de facto control of the Italian authorities.

States have tried to restrict the scope of their control, through fictional notions such as 'the operational border'. In *ND v Spain*,[14] still pending before the Grand Chamber at the time of writing, the first question to be answered by the Court concerned Spain's jurisdiction under the Convention. Could the summary *refoulement* of the applicants be considered an exercise of Spain's jurisdiction within the meaning of Article 1 of the Convention? The Spanish government used the concept of an 'operational border',[15] arguing that the applicants had not 'succeeded in going beyond the protection system at the Melilla border crossing'. According to the Court, the notion of 'operational border' was clarified upstream of the disputed facts, through the operating protocol of 26 February 2014 of the Guardia Civil (Civil Guard), Spain's border surveillance, which contains the following statements:

> With this system of fences, there is an objective need to determine when the illegal entry failed or when it took place. This requires a delimiting line that exists for the sole purpose of defining national territory with respect to the regime governing foreigners: The fence is a physical embodiment of the line of demarcation. Thus, when efforts of law enforcement agencies responsible for border surveillance to contain and repel attempts by migrants to illegally cross this line are successful, no actual illegal entry is said to have taken place. Entry is only considered to have taken place when a migrant has gone beyond the aforementioned internal enclosure, has thus entered the national territory and is therefore subject to the aliens regime.

Citing the *Hirsi* judgment, the applicants and third parties asserted, on the contrary, that

> the removal of aliens, which in their opinion has the effect of preventing migrants from reaching the borders of the State or even returning them to another State, constitutes an exercise of jurisdiction within the

14 ECtHR, *ND and NT v Spain,* 3 October 2017, No 8675/15 and 8697/15.
15 §§ 17 and 44.

> meaning of Article 1 of the Convention, which engages the responsibility of the State in question in the field of Article 4 of Protocol No. 4'.

Some third parties also pointed out that the applicants were already on Spanish territory at the barrier, in view of the territorial delimitations provided for by the international treaties between Morocco and Spain.

The Court opted for the criteria of control exercised by Spain over the applicants. This control made those operations enter into the scope of Spanish jurisdiction rather than a mechanical analysis based on territory. This way the Court avoided the factual dispute about localisation.[16] Rather than ruling on whether or not the applicants were on Spanish territory, the Court stated that 'from the moment the applicants descended from the border fences, they were under the continuous and exclusive control, at least de facto, of the Spanish authorities'.[17] Furthermore, it added that 'no speculation concerning the competences, functions and action of the Spanish police forces on the nature and purpose of their intervention could lead the Court to any other conclusion'. This last clarification defeats the concept of an 'operational border' put forward by the Spanish government. As underlined by Louis Imbert,

> in doing so, the Court further closes the gap between the 'border of controls' (perimeters of the places and contexts in which migration controls are carried out) and the 'border of rights' (perimeters of the places and contexts in which rights are likely to be protected). It therefore confirms once again that the 'border of rights' extends beyond the

16 '53. The Court also observes that the border line between the Kingdom of Morocco and the cities of Ceuta and Melilla has been delimited by the international treaties to which the Kingdoms of Spain and Morocco are parties and that it cannot be modified at the initiative of one of those States for the purposes of a concrete factual situation. It takes note of the statements made by CEAR in its observations on the border perimeter between Spain and Morocco (paragraphs 47 and 33 above) and those of the Commissioner for Human Rights echoing those of the Spanish Ombudsman, according to which Spanish jurisdiction would also be exercised on the land between the fences at the Melilla border crossing and not only beyond the protection system of the post in question (paragraphs 46 and 34 above). 54. In the light of the foregoing and the context of the present applications, the Court refers to the applicable international law and the agreements concluded between the Kingdoms of Morocco and Spain concerning the establishment of land borders between those two States. However, it considers that it is not necessary to establish whether or not the border fence between Morocco and Spain is located on the territory of the latter State.'.

17 § 54.

territorial border to include contemporary border surveillance practises, in particular those that seek to repel attempts to enter the territory of a State Party.[18]

2. *The Need for Legal Avenues*

Those combined rules—no right to legal avenues and limited scope of application of the principle of *non-refoulement*— make all asylum seekers into legal offenders. Do asylum seekers then have no other choice than to resort to irregular means to cross borders and reach safety? They are forced to attempt an irregular entry just to be able to garner the protection guaranteed by international law. When borders are not shared because they are separated by a sea, they must try to cross it.

The solution would be to provide legal avenues. Those that exist are not legally binding. The authorisation to enter legally is governed by the discretionary power of the concerned country. The large-scale loss of life and broader pressures on the EU asylum system have reinvigorated calls for more and better legal avenues of entry into the EU, the 'Protected Entry Procedures' (PEPs). To date, the primary PEP in place in the EU has been resettlement, whereby persons who have been identified as needing international protection are transferred directly to a Member State where they are admitted either on humanitarian grounds or with the refugee status. Figures show us, however, that the percentage of resettlement is very low. Since 2015, EU resettlement programmes have helped over 43,700 people find shelter in the EU. Under the new EU resettlement scheme (December 2017-October 2019), 27,800 persons should be resettled.[19]

Alongside resettlement, humanitarian visas are viewed as an alternative PEP. Humanitarian visas allow asylum seekers to legally access a third country and/or apply for asylum following expedited asylum procedures,

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18 L Imbert, 'Refoulements sommaires: la CEDH trace la "frontière des droits" à Melilla. Note sous CEDH, 3 octobre 2017, *N.D. et N.T. c. Espagne*, req. n° 8675/15 et 8697/15' (2018) *Revue des droits de l'homme*, https://journals.openedition.org/revdh/3740. See also T Maheshe, 'Expulsions collectives et crises migratoires, note sous Cour eur. D.H., *N.D. et N.T. c. Espagne*, 3 octobre 2017' (October 2017) *Cahiers de l'EDEM*.

19 https://ec.europa.eu/commission/sites/beta-political/files/factsheet_-_union_resettlement_framework.pdf. Read on this subject, K Bamberg, 'The EU Resettlement Framework: From a Humanitarian Pathway to a Migration Management Tool?', www.epc.eu/documents/uploads/pub_8632_euresettlement.pdf?doc_id=2012.

where the merit of their application is examined in situ. Under existing schemes, humanitarian visas are issued at the discretion of individual States and are requested directly by the third country national at the consulate of the State where asylum is sought. The pre-screening process can then be conducted extraterritorially before a humanitarian visa is issued, enabling the asylum seeker to reach the State where they can apply for asylum safely and legally. The decision on the substance of the asylum application is then made on that State's territory. Those humanitarian visas are processed and issued very slowly and a very limited percentage of the arrivals are granted it in reality. It is the legal basis for this answer that was ruled by the ECJ in *X and X*.

3. *X & X: Does EU LAW require EU States to Open Legal Avenues for Asylum Seekers?*

The applicants were a Syrian family with three children. They were Orthodox Christians from Aleppo. One claimed to have been beaten and tortured by a terrorist group and released for ransom. They sought to claim asylum in Belgium where they had connections. As they wanted to reach Belgium lawfully and safely, without risking life and limb, huddled in dinghies, to the profit of traffickers, they asked Belgium to issue visas and avoid the well-known dangers. Before returning to Syria the following day, they filed the application at the Belgian embassy in Beirut on the basis of Article 25(1)(a) of the Visa Code, which governs applications for visas with limited territorial validity and on humanitarian grounds.

The Belgian authorities' response was that they were not required to grant visas, neither by EU nor by human rights law. The *Office des étrangers* of the Belgian administration held that the family clearly had the intention to stay on in Belgium after the expiry of the visa, since they had specified that they would apply for asylum once in Belgium. The visa application, according to the *Office*, would therefore fall under Belgian national law. It further held that neither Article 3 ECHR nor Article 33 of the Geneva Convention provided for an obligation to admit foreigners on the territory of the States party to the Convention, even if these foreigners lived in 'catastrophic circumstances', but that these articles merely provided for a prohibition of *refoulement*.

According to the principle of *non-refoulement*, States party to the Convention may not remove a person to another State if the person concerned faces a real risk of being persecuted or subjected to torture or to inhuman or degrading treatment in the country to which they are returned. The *Of-*

fice argued that this principle only applied to persons that are already within the Belgian (territorial) jurisdiction. It also argued that Belgian law does not allow its diplomatic posts to accept applications for international protection from third country nationals, and that granting a visa to the applicants in order for them to apply for international protection once on Belgian soil would circumvent the limitation of the competences of the Belgian diplomatic posts.

The urgent domestic administrative procedure (Council for Asylum and Immigration Proceedings) brought to bear against this decision has been suspended to refer the questions to the Court for a preliminary ruling.[20]

There are two principal issues in this case. The first concerns whether the Visa Code *allowed* Belgium to grant Family X the visa they had sought (the Visa issue). The second issue concerned the question of whether fundamental rights under the EU Charter, which include the right to remain free from torture and other degrading treatment in Article 4, positively *required* Belgium to grant it (the Charter issue).

In his opinion, Advocate General Mengozzi stated that the Visa Code not only allowed Belgium to grant a visa to Family X, but that the EU Charter of Fundamental Rights required it in situations where there was a real risk that individuals in question would be exposed to treatment contrary to Article 4, which included the prospect of crossing the Mediterranean sea by boat in perilous conditions.

Article 25 of the Visa Code leaves a certain margin of discretion to the Member States in their assessment of the arguments the applicants brought forward in their appeal to Article 25. However, since the Member States apply EU law for assessing an appeal to Article 25 of the Visa Code, their discretion is limited by EU law.

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20 '(1) Do the "international obligations" referred to in Article 25(1)(a) of the Visa Code cover all the rights guaranteed by the Charter, including, in particular, those guaranteed by Articles 4 and 18, and do they also cover obligations which bind the Member States, in the light of the ECHR and Article 33 of the Geneva Convention? (2) (a) Depending on the answer given to the first question, must Article 25(1)(a) of the Visa Code be interpreted as meaning that, subject to its discretion with regard to the circumstances of the case, a Member State to which an application for a visa with limited territorial validity has been made is required to issue the visa applied for, where a risk of infringement of Article 4 and/or Article 18 of the Charter or another international obligation by which it is bound is established? (b) Does the existence of links between the applicant and the Member State to which the visa application was made (for example, family connections, host families, guarantors and sponsors) affect the answer to that question?'.

This led the Advocate General to conclude that the Member States are under a positive obligation to take reasonable measures to prevent the risk of torture or inhuman or degrading treatment of which they know or should have known. Therefore, Member States' authorities must inform themselves with regard to the situation in the country of origin of an applicant before deciding to apply one of the reasons for refusal of a visa as listed under Article 32(1).[21]

The Court, however, held that the Visa Code did not govern the situation at hand. In effect, because Family X had intended to stay in Belgium for longer than 90 days, the request was not really for a *short-term visa* within the definition of the Visa Code, but for a *long-term humanitarian visa* which fell outside the scope of EU law. It is apparent from the order for reference and from the material in the file before the Court that the applicants in the main proceedings that had submitted applications for visas on humanitarian grounds based on Article 25 of the Visa Code at the Belgian embassy in Lebanon, did so with a view to applying for asylum in Belgium immediately upon their arrival there and thereafter to being granted a residence permit with a period of validity exceeding 90 days.

As such, it was contended that the Charter point was not relevant, and Belgium was *required to refuse* the visa application under the Visa Code. Even if this question was not included in the preliminary ruling, the Court considers that even a long-term visa would not fall under the scope of EU law as a way to prevent a future action and to 'definitively' close the door on the issue. The Court rules in paragraph 49 that

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21 A link could be made with the *NS* case (ECJ, Joined Cases C-411-10 and C-493-10, *NS v United Kingdom and ME v Ireland*): '68. Those factors reinforce the interpretation according to which the discretionary power conferred on the Member States by Article 3(2) of Regulation No 343/2003 forms part of the mechanisms for determining the Member State responsible for an asylum application provided for under that regulation and, therefore, merely an element of the Common European Asylum System. Thus, a Member State which exercises that discretionary power must be considered as implementing European Union law within the meaning of Article 51(1) of the Charter.' '106. Article 4 of the Charter of Fundamental Rights of the European Union must be interpreted as meaning that the Member States, including the national courts, may not transfer an asylum seeker to the "Member State responsible" within the meaning of Regulation No 343/2003 where they cannot be unaware that systemic deficiencies in the asylum procedure and in the reception conditions of asylum seekers in that Member State amount to substantial grounds for believing that the asylum seeker would face a real risk of being subjected to inhuman or degrading treatment within the meaning of that provision.'.

> It is also important to note that to conclude otherwise 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. Indeed, whereas the Visa Code is not intended to harmonise the laws of Member States on international protection, it should be noted that the measures adopted by the European Union on the basis of Article 78 TFEU that govern the procedures for applications for international protection do not impose such an obligation and, on the contrary, exclude from their scope applications made to the representations of Member States. Accordingly, it is apparent from Article 3(1) and (2) of Directive 2013/32 that that directive applies to applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the Member States, but not to requests for diplomatic or territorial asylum submitted to the representations of Member States. Similarly, it follows from Articles 1 and 3 of Regulation No 604/2013 that that regulation only imposes an obligation on Member States to examine any application for international protection made on the territory of a Member State, including at the border or in transit zones, and that the procedures laid down in that regulation apply exclusively to such applications for international protection.

The Court does not rely solely on the texts but seems to link the impossibility of seeking asylum via a visa to an overall logic of European law. The Court goes beyond the very application of the Visa Code, which only regulates short stays, to indicate that no asylum application may be lodged outside the European territory, failing which it runs counter to the fundamental logic of the common European asylum system and, in particular, the Dublin Regulation. The Court could have limited its response to the applicability of the Visa Code.

4. A Right Understanding of the Visa Code?

The interpretation of the Visa Code in this case must be considered with respect to four points: the text, the criteria of intention, the forgotten possibility for a prolongation and the future.

4.1 The text

According to Article 25 of the EU Visa Code, a visa with limited territorial validity 'shall be issued exceptionally … when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations'. Since it was clear that Family X sought to remain on the Belgian territory in excess of 90 days, the Court held that the 'visa' could not be issued on the basis of the Visa Code. Four other arguments strengthened the ruling of the Court.

One of the conditions of Article 32 of the Visa Code provides that a visa must be denied 'if there are reasonable doubts as to … [the] intention to leave the territory of the Member States before the expiry of the visa applied for'. The Visa Code was enacted on the basis of Article 62(2)(b)(ii) of EU Treaty, which confers upon the Council the power to adopt 'rules on visas for *intended stays of no more than three months*'.[22] It would therefore go beyond the legal basis of the Visa Code to allow Member States to grant visas in excess of that three-month period.

To allow humanitarian visas to be granted to enable asylum claims would undermine Dublin Regulation. It would oblige States to open the doors of their embassies. The recast Asylum Procedures Directive governs 'applications … made in *the territory* … in the territorial waters or transit zones of Member States' but specifically excludes 'requests for … asylum submitted to *representations* of Member States'. In a similar vein, Regulation No 604/2013, in Articles 1 and 3, only makes mention of it applying to 'applications … made in the territory … in the territorial waters or transit zones of Member States'. In that case, the 'visa' application at hand made at the Belgian representation in Beirut fell outside the scope of EU law.

A *long-term stay* corresponds to Article 79(2)(a) TFEU which, under the umbrella of a 'common immigration policy', allows the EU Parliament and Council to set 'the conditions of entry and residence, and standards on the issue by Member States of long-term visas and residence permits'. Yet, at the material time, no such standards had been laid down. The net effect was that EU law did not cover the request of Family X, and as such, Belgium was required, as a matter of EU law, to deny it.

As the Court pointed out, there was a fine distinction. This requirement under EU law certainly did not mean that the Belgian State had to refuse the visa application. It simply meant that it could not be granted *as a mat-*

22 Emphasis added.

ter of EU law. The Belgian authorities would have been free, *as a matter of national law*, to grant the visa application if they so chose to. It seems, however, that this analysis is not convincing or, at least, was not the only option, for reasons of internal and external consistency of EU asylum law.

4.2 The Inconstancy of the Criteria of Intention

Firstly, the inconstancy of the criteria of intention must be pointed out. As underlined by the Advocate General, nothing in the Visa Code justifies the conclusion that the applicants' *intention* to apply for asylum once on Belgian territory could change either the nature or the subject of their application, or transform the application into an application for a stay longer than three months for at least four reasons.

Legally speaking, the criteria of intention is in itself a weak one. Largely interpreted, it could lead to a refusal of most of the tourist visas and it opens the doors for subjective analysis, even of hidden intents. To make this analysis at the stage of the admissibility, or of the considering the scope of application of a text, seems to be clearly testing the grounds.

Considering other decisions, the role played by these criteria in this case is at odds with the ruling of the tribunal in the EU-Turkey agreement case. There, the right criterion is formal and not linked to the intentions.[23] In paragraph 71, the Tribunal says that, 'independent of whether it constitutes a political statement (as maintained by the European Council, the Council and the Commission) or, on the contrary, a measure capable of producing binding legal effects (as the applicant submits), the EU-Turkey

23 As a reminder, the Court of First Instance, considered itself incompetent by virtue of the fact that the EU-Turkey agreement had paradoxically not been concluded by the European Council, but by the heads of state or government of its Member States. The press release, which made good reference to the 'EU' and the 'members of the European Council', is described by the Tribunal as having 'regrettably ambiguous terms'. The European Summit held in Brussels on 17 and 18 March 2016 was, in fact, a set of 'two separate events', a session of the European Council on the one hand, and an international summit with Turkey on the other. For 'reasons of cost, safety and efficiency' these meetings were held in the same building. The Court also considered that 'in practice' Member States had given the President of the Council 'a task of representation and coordination of the negotiations' while the President of the Commission was present during the negotiations in order to ensure 'the continuity of the political dialogue' with Turkey. Consequently, the EU-Turkey agreement had not been concluded by the Council and the Court of First Instance could not examine the substance of the application.

statement, as published via Press Release No 144/16, cannot be regarded as a measure adopted by the European Council, or, moreover, by any other institution, body, office or agency of the European Union, or as revealing the existence of such a measure that corresponds to the contested measure'.[24] Moreover, in the domestic procedures, it has not been contested that the applications in question were for short-term visas. The decision in first instance was confirmed in appeal by the ECJ.[25]

Short-term visas may be used to legally enter the territory and then, after that, to apply for a long-term stay permit: family reunification, work permit of residence. Legally speaking, it is neither impossible nor rare. Numerous legal bases exist, namely, in Belgian law, which allow so-called transfers of status. The Visa Code itself opens the door for this line of argument. A visa with limited territorial validity shall be issued exceptionally in the following cases: (a) when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations.

Even if it falls under the discretionary power of Member States, it does not preclude the possibility of respecting EU law. The ruling of ECJ in the Dublin *NS* case was very clear on EU law's control over the exercise of discretionary power. An examination of Article 3(2) of Regulation No 343/2003 shows that it grants Member States discretionary power, which forms an integral part of the Common European Asylum System provided for by the TFEU and developed by the European Union legislature. Paragraph 66 underlines that, as stated by the Commission, such discretionary power must be exercised in accordance with the other provisions of that Regulation.

In *MSS*, the European Court did not admit a contradiction between discretionary power and legal obligations to be respected. Article 3 § 2 of Dublin Regulation only allows the Member States the possibility of under-

24 EU Trib., Case T-192/16, EU:T:2017:128.

25 ECJ, Order in Joined Cases C-208/17 P and C-210/17 P [2018] *NF, NG and NM*, EU:C:2018:705. In three appeals against this order, the ECJ declared the appeals against these orders inadmissible in a laconic manner. In general, the Court criticises the applicants for a lack of consistency in their arguments. The latter merely summarise 'eight pleas in law without their arguments emerging clearly and precisely from the elements mentioned in a vague and confusing manner', and 'are limited to general statements' of disregard for Union law 'without indicating with the required precision either the elements criticised in the contested orders or the legal arguments which specifically support the application for annulment.' On this decision, read PA Van Malleghem, 'La Cour de justice refuse de revisiter la légalité de l'accord UE-Turquie' (2018) *Cahiers de l'EDEM*.

taking to examine an asylum application even if it is not obliged to do so under the criteria prescribed by the text. Hence, combined with Article 3 of the European Convention of Human Rights that prohibits torture and inhuman and degrading treatments and obligates States to take action to guarantee rights and not just to refrain from violating them, *Article 3 § 2 represents an obligation*,[26] for, in effect, a rule recognising a discretionary power of the States may be transformed into a guarantee of protection of human rights if this rule is interpreted through the prism of those latter rights that act as governing principles.

4.3 The Forgotten Possibility for a Prolongation

It is not only possible to convert a short-term stay permit into a long-term one but also to extend it beyond the period of validity for an authorised short-term stay.

Article 33 of the Visa Code stipulates that the period of validity and/or the duration of stay of an issued visa shall be extended where the competent authority of a Member State considers that a visa holder has provided proof of *force majeure* or humanitarian reasons preventing them from leaving the territory of the Member States before the expiry of the period of validity or the duration of stay authorised by the visa. Such an extension shall be granted free of charge.

26 '339. The Court notes that Article 3 § 2 of the Dublin Regulation provides that, by derogation from the general rule set forth in Article 3 § 1, each member State may examine an application for asylum lodged with it by a third-country national, even if such examination is not its responsibility under the criteria laid down in the Regulation. This is the so-called "sovereignty" clause. In such a case, the State concerned becomes the member State responsible for the purposes of the Regulation and takes on the obligations associated with that responsibility. 340. The Court concludes that, under the Dublin Regulation, the Belgian authorities could have refrained from transferring the applicant if they had considered that the receiving country, namely Greece, was not fulfilling its obligations under the Convention. Consequently, the Court considers that the impugned measure taken by the Belgian authorities did not strictly fall within Belgium's international legal obligations. Accordingly, the presumption of equivalent protection does not apply in this case.'.

5. Scope of Application of EU Asylum Law

The Court closes the door for further applications in the same legal framework, underlining that even a long-term visa application would not have fallen under the scope of application of EU asylum law.

The Court relies on the scope of application of the Dublin Regulation as well as the Procedures Directive. The Dublin Regulation mentions it as applying to 'applications … made in the territory … in the territorial waters or transit zones of Member States', whereas the Procedures Directive governs 'applications … made in *the territory* … in the territorial waters or transit zones of Member States' but specifically excludes 'requests for … asylum submitted to *representations* of Member States'.[27] Even if this assumption is true, it hides an important part of EU asylum policy – that it does not limit itself to the territories of Member States.

Firstly, all the provisions on safe third countries are based on an assessment of events that occur outside of this territory. Secondly, the EU-Turkey agreement is a first step in the so-called new European asylum external policy. The EU could say until now that it is not EU law (the EU Tribunal ruled in this sense) but should this argument remain valid and is it in line of the reality in the future? Shall it be possible to argue that all those new agreements (like the Compacts) are not EU law?

Title V Article 78 TFEU, dedicated to the area of freedom, security and justice, contains a chapter 2 entitled 'Policies on Border-checks, Asylum and Immigration', according to which the EU shall adopt measures concerning partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection. It seems difficult to argue that EU asylum law is territorially limited to the geographical territory of EU countries, for the last developments illustrate a different reality.

In other cases, the ECJ did not hesitate to bring under the scope of EU law legal issues not directly linked to EU secondary law instruments, like nationality cases[28] or family reunification of family members of sedentary EU citizens.[29] Assuming a comprehensive approach of EU policies and legal framework only produces an erratic case law that is unable to generate guiding principles that are sufficiently consistent. To submit only one part of a policy and the legal instruments adopted to EU law and the Charter

27 § 49 of the procedures Directive.
28 ECJ, Case C-135/08 *Rottmann* [2010] EU:C:2010:104.
29 Again, just recently in ECJ, *K.A.*, EU:C:2018:308.

on the basis of formal distinctions is a bad solution, legally speaking, even if we understand that those distinctions are politically motivated.

6. *Consequences on the Application of the EU Charter*

Family X was not only claiming: 'Belgium, you *can* grant me a visa.' Their underlying argument was: 'Belgium you *must* grant me a visa because of your EU and international human rights obligations.' The obligations in question included the right to remain free from torture and inhumane or degrading treatment under Article 4 of the Charter and the right to claim asylum in accordance with the 1951 Refugee Convention under Article 18 of the Charter.

Was the Charter taken into consideration? The Charter applies only within the scope of EU law, even where Member States have a large margin of appreciation. For instance, concerning the Visa Code in *El Hasani*, the Court ruled in paragraph 36 that

Although it is true that in examining a visa application the national authorities have a broad discretion as regards the conditions for applying the grounds of refusal laid down by the Visa Code and the evaluation of the relevant facts, the fact remains that such discretion has no influence on the fact that the authorities directly apply a provision of EU law.

The Court continued, underlining that it is clear that the Charter is applicable where a Member State adopts a decision to refuse to issue a visa under Article 32(1) of the Visa Code.[30]

The above analysis seems relatively anodyne, for the more novel question is about extraterritoriality, as Family X was at risk of torture and degrading treatment *in Syria*. The Advocate General thought this was irrelevant. The Charter applies within the scope of EU law, regardless of any condition of territoriality. He noted that this conclusion was the necessary corollary to the *Åklagaren* principle that 'situations cannot exist which are covered in that way by EU law without those fundamental rights being applicable'.[31] This means that application of EU law also results in the application of fundamental rights, as both go hand in hand. The criterion is not based on geography but linked to the scope of EU law, which exceeds the territorial bounds of the EU.

30 ECJ, Case C-403/16 *El Hassani* [2017] EU:C:2017:960, §§ 36–37.
31 ECJ, Grand Chamber Case C-617/10 *Åklagaren v Fransson* [2013] EU:C:2013:105.

The Charter applies by virtue of EU law without any superadded condition of territoriality. In other words, it is the EU law that 'activates' the Charter, and not the connection to EU soil. To hold otherwise would also have the effect of removing the common visa policy from the purview of fundamental rights protection. The Advocate General went on to state that, unlike the ECHR, which requires an individual to be under the control or authority of the State, the EU Charter applies even when there is no such control or authority. In his view, therefore, it applies extraterritorially, but under *more lax* conditions than the ECHR.

7. *The scope of territorial jurisdiction of the European Convention of Human Rights*

Another argument invoked by the Belgian State was that the Charter, if applicable, had to be interpreted in the same sense as the ECHR. Under Article 52(3):

> In so far as this Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Does that 'scope' refer to the territorial scope of the ECHR? If so, the Charter rights are likely to apply, as the ECHR does, even abroad. Does that 'scope' also refer to the jurisdictional limit in Article 1 ECHR which seems to be absent from the Charter?

Those issues call for a clear way in the complex ECHR case law not on extraterritoriality, generally speaking, but on extraterritoriality in asylum and immigration cases. Among the various issues raised by the territorial application of ECHR in those fields, the one that is important here is the applicability to executive or adjudicative measures, which were specifically directed at persons residing abroad.[32]

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32 Much in line with the passport cases brought before the Human Rights Committee, see namely Communication 125/1982 (Uruguay): '6.1. The Human Rights Committee does not accept the State party's contention that it is not competent do deal with the communication because the author does not fulfil the requirements of article I of the Optional Protocol. The question of the issue of a passport by Uruguay to a Uruguayan national, wherever he may be, is clearly a matter within the jurisdiction of the Uruguayan authorities and he is "subject to the jurisdiction" of Uruguay for that purpose.'.

In *Haydarie*,[33] which concerned the Dutch government's refusal to issue a provisional residence visa to a person living in Pakistan, the Court expressly discarded the argument that the Convention could not apply because the applicant was outside the jurisdiction of the State refusing to issue the visa. The Court considered that, as regards family life at issue in the present case – the existence of which is not in dispute – no distinction could be drawn between the two applicants living in the Netherlands and the three others currently residing in Pakistan. Under these circumstances, it did not find it necessary to answer the government's argument that the three applicants in Pakistan could not be regarded as finding themselves within the jurisdiction of the Netherlands within the meaning of Article 1 of the Convention.

The Court ruled in the same way as in family reunification cases where the applicant was still in their country of origin.[34] In all those family reunification cases, some family members were residents of a Member State. Does this conclusion that the protection is in force when the rights of people living in EU are at stake also apply when that is not the case? One has then to turn to the criteria of effective control, as in *Hirsi*, notwithstanding the fact that in *Hirsi* the applicants were on an Italian boat.

In the Chamber judgment in *Öcalan*,[35] the Court noted that the material difference with *Banković*[36] was that Mr. Öcalan was arrested and then had been physically forced to return to Turkey by Turkish officials; as a re-

33 ECtHR, *Haydarie and others v Netherlands* (2005) No 8876/04.

34 For instance, ECtHR, *Senigo Longue v France*, No 19113/09; *Tanda-Muzinga v France*, No 2260/10; *Ly v France*, No 23851/10; *Mugenzi v France*, No 52701/09.

35 ECtHR, *Ocalan*, No 46221/99.
In this case, the Turkish courts had issued seven arrest warrants for the applicant on the grounds that he had founded an armed band with a view to ending the territorial integrity of the Turkish State and for having instigated acts of terrorism. In February 1999, under controversial circumstances, he was taken on a plane to Nairobi airport in Kenya and interrogated by Turkish officials. He was transferred back to the Turkey. The European Court of Human Rights ruled that the facts fell within the jurisdiction of the Convention. The applicant had been arrested by members of the Turkish law enforcement officers inside an aircraft registered in Turkey, in the international area of Nairobi airport. As soon as he was handed over by Kenyan officials to their Turkish counterparts, the complainant was effectively placed under the authority of Turkey and therefore under the jurisdiction of that State, even though, in this case, Turkey had exercised its authority outside its territory. He had been physically forced by Turkish officials to return to Turkey and had been subject to their authority and guidance. control as soon as he is arrested and returned to Turkey.

36 ECtHR, *Banković*, No 52207/99.

sult, he was 'subject to their authority and control'. In its Grand Chamber judgment, the Court confirmed this proposition and found it 'common ground' that that arrest, followed by a physically enforced return, had brought Mr. Öcalan under the jurisdiction of Turkey[37]. In *Al-Saadoon and Mufdhi v the United Kingdom*,[38] the Court refers to the 'the total and exclusive *de facto*, and subsequently also *de jure*, control exercised over the premises where the individuals were detained'.[39]

In 2014, an interesting inadmissibility decision was made in *Abdul Whabak Khan*.[40] After having resided in the UK for years, he received an order to leave the territory, and finally left the UK for Pakistan. The Court's ruling was as follows:

The application was filed by six persons residing in Belgrade, Serbia. It was directed against 17 NATO Member States that were also parties to the European Convention of human rights. The applicants denounced NATO's bombing of the Serbian Radio and Television Headquarters in Belgrade. This act, committed as part of its air strike campaign during the conflict in Kosovo, had damaged the building and killed several people. As Serbia was not a Member State of the Council of Europe (until 2003), the case raised the question of the territorial application of the Convention.

The Court declared the application inadmissible. It conceded that international law does not exclude extraterritorial exercise of its jurisdiction by a State. However, this jurisdiction is generally defined and limited by the rights of territorial sovereignty of the other States concerned. Other criteria of jurisdiction are exceptional and require special justification, depending on the particular circumstances of each case. She added that the Convention is a multilateral treaty operating in an essentially regional context, and more particularly in the legal space of the Contracting States, of which it was clear that the Federal Republic of Yugoslavia was not part of. Therefore, not being convinced of the existence of any jurisdictional link between victims and Defendant States, the Court declared the application inadmissible.

37 ECtHR, GC, *Oçalan v. Turkey,* N° 6221/99, § 91: 'It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was effectively under Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey.'.

38 ECtHR, *Al-Saadoon and Mufdhi v the United Kingdom*, No 61498/08.

39 The main criteria are summarized by the key case *Al Skeini* ruled by the Grand Chamber on the 7 of July 2011.

40 ECtHR, dec., *Abdul Whabak Khan v. United Kingdom*, No. 11987/11.

> A State's jurisdictional competence under Article 1 is primarily territorial'. However, the Court recognised two principal exceptions to this principle, namely circumstances of 'State agent authority and control' and 'effective control over an area (see *Al-Skeini…*). In the present case, where the applicant had returned voluntarily to Pakistan, neither of the two principal exceptions to territorial jurisdiction applied. The Court noted that the applicant did not complain about the acts of British diplomatic and consular agents in Pakistan and remained free to go about his life in the country without any control by agents of the United Kingdom. His position was deemed to be different than those of the applicants in *Al-Saddoon and Mufdhi* (who were in British detention in Iraq and thus, until their handover to the Iraqi authorities, were under British authority and control) and the individuals in *Al-Skeini and others* (who had been killed in the course of security operations conduct by British soldiers in South East Iraq).[41]

The Court continued to distinguish between

> on the one hand, someone who was in the jurisdiction of a Contracting State but voluntarily left that jurisdiction and, on the other, someone who was never in the jurisdiction of that State. Nor is there any support in the Court's case law for the applicant's argument that the State's obligations under Article 3 require it to take this Article into account when making adverse decisions against individuals, even when those individuals are not within its jurisdiction.[42]

For those reasons, the Court ruled that

> there is support in the Court's case law for the proposition that the Contracting State's obligations under Article 8 may, in certain circumstances, require family members to be reunified with their relatives living in that Contracting State. However, that positive obligation rests, in large part, on the fact that one of the family members/applicants is already in the Contracting State and is being prevented from enjoying his or her family life with their relative because that relative has been denied entry to the Contracting State (see, for instance, *Abdulaziz, Cabales and Balkandali*, cited above). The transposition of that limited Article 8 obligation to Article 3 would, in effect, create an unlimited obligation on Contracting States to allow entry to an individual who

41 § 25.
42 § 26.

> might be at real risk of ill-treatment contrary to Article 3, regardless of where in the world that individual might find himself. The same is true for similar risks of detention and trial contrary to Articles 5 and 6 of the Convention.[43]

Considering *Al-Saadoon* and applying the criteria of the effective control, how is it possible to consider – even implicitly – that the Belgian State does not effectively exercise authority over its diplomatic offices? A difference could be deduced from the fact that, in the first case, the UK had explicitly decided to exercise its sovereign power in Iraq while the visa applicant was at the consulate at the time of making the application. Such a distinction would leave large parts of public actions on the side, out of the scope of judicial control. It is one thing to say that there is no general obligation to issue a visa, but it is yet another to exclude a decision on a procedure just to maintain its legality.

This decision takes us back to the current Belgian case law. After the ECJ ruling, some new decisions were made by the administrative court on the visa applications submitted by Syrian nationals. Most of the positive ones – that cancelled the administration's decision to reject the visa application – had been processed mostly on the basis of Article 8 ECHR rather than Article 3.[44] As in *Abdul Whabak Khan*, the positive side of Article 8 seems to offer a wider protection than Article 3 despite the absolute character of the protection offered by this provision.

8. Access to Justice and the Criteria of the Availability of an Alternative

The debate is not closed. In the short term, it is unfortunate that the last proposal to recast the Visa Code does not include the issue of humanitarian visas. On 11 December 2018, the European Parliament adopted in plenary a legislative initiative report on the introduction of a European humanitarian visa for the purpose of seeking international protection in the European Union.[45] One of the objectives of this measure is to reduce the number of deaths on migration routes. This report proposes the establishment of a humanitarian visa issued in Member States' embassies and consulates in third countries, which would provide persons wishing to apply for international protection the possibility of entering the European territory

43 § 27.
44 www.rvv-cce.be/sites/default/files/arr/A199384.AN.pdf.
45 www.europarl.europa.eu/doceo/document/A-8-2018-0328_EN.html?redirect.

through a legal and secure route. This humanitarian visa would give access to the EU territory, but only to the Member State issuing the visa and for the sole purpose of applying for international protection. The last proposal to recast the Visa Code did not follow the parliamentary request.

The following months and years will, of course, force the EU to choose an option for its asylum and immigration policy. *Firstly*, even if a regulation on humanitarian visas is not politically accepted, legal avenues must not be ignored. *Secondly*, even if the option seems to be more oriented to partnerships, resettlements, and subsequently to a collective approach, it is not conceivable to wrest a large part out of the control of the ECJ and the EU Charter in a field where human rights issues are so common yet tricky. *Thirdly*, how to also understand the message sent to the Member States that they are alone in resolving these important, fundamental issues?

A common guidance would have been valuable, because a *common* European asylum system is not a reality until the standards relating to its access are harmonised at the European level. By not meeting the first challenge, the European Union accepts that a significant proportion of immigration to the EU, that of the most vulnerable, is irregular. It then builds itself the spiral of the exit from a rule of law logic. By choosing to regulate immigration through instruments whose legal nature is ambiguous and unjustifiable through the usual channels of democratic control, the EU is creating a marginal policy, outsourced with respect to the institutions. Here, too, it escapes the logic of the rule of law.[46] Finally, by leaving States alone to face a fundamental challenge, EU courts are missing out on the role they can play in organising solidarity, both within and outside Europe.

The victims of the legal vacuum that this creates are firstly those without rights who flee and upon arrival have the greatest need for their rights to be restored. This decision is reminiscent of a recent decision of the European Court of Human Rights in *Naït-Liman* on the question of effective protection of human rights where the crucial issue of applicability was at stake.[47] It concerns the right of a refugee to file a civil claim at a Swiss court for damages relating to torture allegedly suffered in a third State, Tu-

46 JY Carlier and F Crépeau, 'Le droit européen des migrations: exemple d'un mouvement sans droit' (2017) *A.F.D.I.*; E Frasca, *Towards a privatisation of international protection? Private Sponsorship programmes in Europe and the Rule of Law*, Call for Papers from the ESIL Interest Group on Migration and Refugee Law: Migration and the Rule of Law.

47 On this case, see especially S Nkenkeu-Keck, 'L'arrêt *Naît-Liman c. Suisse* ou l'occasion manquée par la Cour européenne des droits de l'homme de renforcer l'effectivité du droit des victimes d'obtenir réparation de violation graves des droits

nisia. Specifically, the Grand Chamber examined whether – as a forum of necessity or as a matter of universal civil jurisdiction – the Swiss courts were required by Article 6(1) ECHR to examine the applicant's civil claim for compensation against Tunisia.

Like the Chamber, the Grand Chamber found that this was not the case, and considered that Member States were under no international law obligation to provide universal civil jurisdiction for torture. The Grand Chamber was clearly aware that its judgment could undermine access to redress mechanisms for torture victims: it doubly affirmed the 'broad international consensus recognising the existence of a right for victims of acts of torture to obtain appropriate and effective compensation',[48] commended States that had opened their legal systems to victims of torture abroad, and confirmed the principle of universal criminal jurisdiction.[49] In other words, while it considered that States are not under an obligation to provide for universal civil jurisdiction in torture cases, they are free to do so (like Belgium in *X & X*).

The forum of necessity is a private international law issue distinct from that pertaining to refugees. But both – victims of torture in a civil claim for compensation and those seeking to file an application for international protection – are faced with a search for a jurisdiction to bring them justice. Victims of torture are unable to introduce a case especially in the country of origin where the facts occurred, and those seeking international protection are obliged to escape their country of origin or residence to protect their basic human rights and have no other alternative than to file an application abroad. Such parallels must not just be assumed, but the dissenting opinion in *Naït-Liman* and the Advocate General's opinion in *X & X* underline similar issues about the effectiveness of human rights protection.

This lack of an alternative was emphasised by Advocate General Mengozzi in *X & X*.

> 175. Before concluding, allow me to draw your attention to how much the whole world, in particular here in Europe, was outraged and pro-

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de l'homme' (2018) 116 *R.T.D.H.* 986; J Kapelanska-Pregowska, 'Extraterritorial jurisdiction of national courts and human rights enforcement: Quo valid Justitia' (2015) *International Community Law review* 425; C Ryngaert, 'From universal civil jurisdiction to forum of necessity: reflections on the judgment of the European Court of Human Rights in Nait-Liman' (2017) 100(3) *Rivista di diritto internazionale* 783; F Krenc, 'Chronique de la jurisprudence de la Cour européenne des droits de l'homme (1er janvier–30 juin 2018)' (2018) 6752 *Journal des tribunaux*.

48 §§ 97 and 218.

49 § 178.

> foundly moved to see, two years ago, the lifeless body of the young boy Alan, washed up on a beach, after his family had attempted, by means of smugglers and an overcrowded makeshift vessel full of Syrian refugees, to reach, via Turkey, the Greek island of Kos. Of the four family members, only his father survived the capsizing. It is commendable and salutary to be outraged. In the present case, the Court nevertheless has the opportunity to go further, as I invite it to, by enshrining the legal access route to international protection which stems from Article 25(1)(a) of the Visa Code. Make no mistake: it is not because emotion dictates this, but because EU law demands it.

This opinion could be read in parallel with two dissenting opinions in *Naït-Liman*. Judge Serguides concluded that 'the dismissal of the applicant's action without an examination of the merits by the Swiss courts impaired the very essence of the applicant's right of access to court' and that his consequent 'inability to seek redress' was 'equivalent to a denial of justice' (see paragraph 18 of that opinion). In other words, the fact that the applicant was precluded from bringing his claim before the Swiss courts amounted, in the circumstances of the present case, not only to a denial of procedural access to justice but also to a denial of effective subjective access to justice, and, in the final analysis, even to a denial of any substantive access to justice at all. Judge Dedov called positivism 'a dark side of international law'.

> We cannot find any morality and justice in international law which, on the one hand, allows tyrants and dictators to enjoy one of the best banking and medical care systems in the world and, on the other hand, refuses access to the courts for their victims. The majority chose to make a legal judgment, not a moral open-ended judgment, although the latter approach would be the most appropriate in the present case.

The development of human rights has led to the emergence of rights with a broad personal and territorial scope. Neither nationality nor administrative status determines the level of human rights guarantees. Although not universal, territorial jurisdiction exceeds the national territory or the territory of the organisation concerned. However, the protection of human rights continues to require institutional access to justice, whether through the possibility of applying to an authority with public authority or to a judge sanctioning non-compliance with the law. However, this access is not guaranteed. No one disputes that the applicants, both in *X & X* and *Naït Liman*, have no alternative to the application they made. The visa re-

quested is intended to ensure access to a place where rights will be protected. The purpose of the proceedings in Switzerland is to obtain compensation for human rights violations. In both cases, the rights concerned belong to the hard core of absolute rights. International human rights jurisprudence has devoted considerable attention to due process and the effectiveness of remedies. Access to the judge before the procedure remains a less developed aspect, in particular through the criterion of the existence of an alternative to the procedural route used.

On this criteria of the availability of an alternative, an interesting parallel could be drawn with family reunification case law in Strasbourg. According the European Court of Human Rights, there is no right to family reunification. In the Grand chamber decision in *Jeunesse*, the judges recall in paragraph 107 that 'where immigration is concerned, Article 8 cannot be considered to impose on a State a general obligation to respect a married couple's choice of country for their matrimonial residence or to authorize family reunification on its territory.'[50]

But, in some cases, a balance between particular circumstances of the persons involved and the general interest could lead to consider that existence of a State's obligations to admit to its territory relatives of persons residing there and to determine the extent of this obligation. According to the Court, 'Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion'. 'Insurmountable obstacles' are taken into consideration to examine if alternatives exist. When it is not the case, a positive obligation to grant a visa or a permit of stay could exist.

The Court tempered the requirement for such obstacles by noting that while there appeared to be 'no insurmountable obstacles for them to settle in Suriname.' It also reasoned that 'However, it is likely that the applicant and her family would experience a degree of hardship if they were forced to do so. When assessing the compliance of State authorities with their obligations under Article 8, it is necessary to take due account of the situation of all members of the family, as this provision guarantees protection to the whole family'.[51] Other decisions of the Court provide examples of such

50 ECtHR, GC, *Jeunesse v. Netherlands*, req. 12738/10, 03/10/2014.
51 Pt 117.

obstacles. They can be deduced from the applicant's refugee status, even if he or she has meanwhile become a citizen of the country of residence. In *Tuquabo-Tekle and others v. the Netherlands*, the Court rejected the State's argument that the mother had left her child in her country of origin 'of her own free will'. The Court recalls that she had left a civil war situation in Eritrea to seek asylum after her husband's death.[52] In the same spirit, in *Mubilanzila v. Belgium*, about a young girl in a detention centre, the Court underlined that 'family life was interrupted only because of the woman's flight from her country of origin out of serious fear of persecution within the meaning of the Geneva Convention of 28 July 1951 relating to the Status of Refugees'.[53] In all those rulings, the fact that there is no real or realistic possibility of a family life elsewhere than in the host country is relevant in the analysis of the case and in the balance carried out.

Moving away from the notion of a 'material' obstacle, the case law also uses the best interests of the child as a criterion for considering that there may be a right to family reunification. 'When children are involved, their best interests must be taken into account.... On this particular point, the Court recalls that there is a broad consensus, particularly in international law, that the best interests of children should be a primary consideration in all decisions affecting them.... This interest alone is certainly not decisive, but it must certainly be given significant weight. In order to ensure that the best interests of children who are directly concerned are effectively protected and given sufficient weight, national decision-making bodies must in principle examine and assess the factors relating to the convenience, feasibility and proportionality of a possible removal of their father or mother who is a third-country national'.[54] This more flexible approach, which combines taking into account the presence of children integrated into the social network of the country of residence and the difficulty of family life in a third country, rather than its impossibility, was already present in some cases. The aim was to find the 'most appropriate' way to allow family life. In the case *Şen v. the Netherlands*, the applicants, legally residing in the Netherlands, wished to be joined by their daughter who had remained in

52 ECtHR, *Tuquabo-Tekle and others v. Netherlands*, 1st December 2005, req. N° 60665/00, pt 47.
See also, in the case of recognized refugees, ECtHR, Mugenzi v. France, 10 July 2014, req. N° 52701/09 and Tanda-Muzinga v. France, 10 July 2014, req. N° 2260/10.

53 ECtHR, *Mubilanzila v. Belgium*, req. 12 October 2006, N° 3178/03, pt 75.

54 ECtHR, GC, *Jeunesse v. Netherlands*, pt 109. In the same sense, Nunez v. Norway, 28 June 2011, req. N° 55597/09, pt 84; Mugenzi v. France, 2014, pt 45.

Turkey for three years. The Court 'takes into account the age of the children concerned, their situation in their country of origin and their degree of dependence on parents'.[55] It concludes that there is a major obstacle to the return of Family Şen to Turkey. However, it seems that this judgment is more flexible than the usual case law of the time, since the Court balances the interests involved without requiring proof of an impossibility of reunification abroad. The arrival of the child in the Netherlands 'was the most appropriate way to develop a family life with her, especially since, given her young age, there was a particular requirement to promote her integration into the family unit of her parents, who were able and willing to take care of her'.[56]

This openness to a logic based on the existence, or not, of an alternative to migration is all the more paradoxical since it occurs here in reference to rights that are not absolute, in particular, not absolute rights such as the prohibition of torture and inhuman and degrading treatment. If the explanation is linked to the presence of family members on the territory of a Council of Europe country, then this criterion should be clarified since the Court does not use such a criterion in other cases where Article 3 is imple-

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55 ECtHR, *Şen v. Netherlands*, 21 December 2001, req. N° 31465/96, pt 37. Contra, *Dec. I.A.A. and Others v. United Kingdom* (2016). With regard to the United Kingdom authorities' refusal to allow five children to enter the United Kingdom to be reunited with their mothers, the Court declares inadmissible the complaint based on the violation of Article 8. The mother had joined her second husband in the United Kingdom in 2004, leaving the children behind with her sister in Somalia. The children then moved to Ethiopia. As for the best interests of the child, the Court points out that 'The domestic courts accepted that it would be in the applicants' best interests to be allowed to join their mother in the United Kingdom. However, while the Court has held that the best interests of the child is a "paramount" consideration, it cannot be a "trump card" which requires the admission of all children who would be better off living in a Contracting State [...]. The present applicants' current situation is certainly "unenviable", as the domestic courts found. However, they are no longer young children (they are currently twenty-one, twenty, nineteen, fourteen and thirteen years old) and the Court has previously rejected cases involving failed applications for family reunification and complaints under Article 8 where the children concerned have in the meantime reached an age where they were presumably not as much in need of care as young children and are increasingly able to defend for themselves [...]. All of the applicants have grown up in the cultural or linguistic environment of their country of origin, and for the last nine years they have lived together as a family unit in Ethiopia with the older children caring for their younger siblings. None of the applicants has ever been to the United Kingdom, and they have not lived together with their mother for more than eleven years' (pt 46).

56 ECtHR, *Şen v. Netherlands*, pt 40.

mented in the context of extraterritorial jurisdiction, such as the use of force in Iraq.

While it is certain that claiming respect for fundamental rights in a situation with foreign elements, such as exile or migration, is, in fact, more difficult, these material obstacles must not be exacerbated by legal barriers. In his article on the philosopher Hannah Arendt entitled 'The dynamics of the egalitarian principle in the face of anti-Semitism and other racisms', François Rigaux expressed this fundamental requirement of formal equality.

> Undoubtedly, the egalitarian principle already suffers from deep cultural and economic inequalities, which trace an excessive separation between peoples and between individuals. But it is not the role of the law to reinforce these inequalities by covering them with a formal justification and trying to make them perpetual. On the contrary, the right has a dynamic function, its truth is in the future, not in the past, and the insufficient resources it offers must contribute to dismantling a network of injustices which, although traditional, are no less anachronistic.[57]

Belonging to a State dear to her cannot, as Hannah Arendt puts it, condition the 'right to have rights'. According to her, it is the difference between the rights belonging to a person and the right to claim those rights as belonging to them, which only citizenship guarantees. It shows how important it is, given the loss of authority of the *laws of nature* and religion, to belong to the nation as the basic place that also represents the source of rights that can be claimed. The stateless find themselves without rights within the organised and civilised humanity of nations. Hannah Arendt uses the image of the vicious circle as the process leading to extermination camps, with exclusion gradually taking root and gaining ground.

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57 Free translation of: 'Sans doute le principe égalitaire souffre-t-il déjà des profondes inégalités, culturelles, économiques, qui tracent entre les peuples et entre les individus une séparation excessive. Mais ce n'est pas le rôle du droit de renforcer ces inégalités en les couvrant d'une justification formelle et en s'efforçant de les rendre perpétuelles. Au contraire, le droit a une fonction dynamique, sa vérité est dans le futur, non dans le passé, et les ressources insuffisantes qu'il offre doivent contribuer à démanteler un réseau d'injustices qui, pour être traditionnelles, n'en sont pas moins anachroniques', F Rigaux, 'La dynamique du principe égalitaire face à l'antisémitisme et autres racismes', *in* MC Caloz-Tschopp (ed), *Hannah Arendt, les sans-États et le 'droit d'avoir des droits'*, vol 1, Geneva Group 'Violence et droit d'asile en Europe' (Université ouvrière de Genève, L'Harmattan, 1998) 93.

> The civil wars that opened and marked the twenty years of an uncertain peace were not only more cruel and bloody than the previous ones; they led to the immigration of groups that, less happy than their predecessors of the religious wars, were not welcomed anywhere and could not be assimilated anywhere. Once they left their homeland, they found themselves without a homeland; once they abandoned their state, they became stateless; once they were deprived of the rights that their humanity conferred on them, they found themselves without rights, the dregs of the earth.

Hannah Arendt stressed the link between national sovereignty and human rights. Once people are no longer protected by a sovereign national State, they no longer have any guarantee of respect for human rights. Hannah Arendt criticises the human rights ideology for failing to recognise that political affiliation (citizenship, possession of a passport) as being fundamental, rather than the defence of abstract rights that remain fictional in the court of law.

Writing at a time when she was personally confronted with the condition of exile and statelessness, Hannah Arendt was also describing a time before the adoption of international texts protecting fundamental rights on a non-discriminatory basis and the establishment of safeguard mechanisms that could be used by any person regardless of nationality or domicile. These texts exist today but, even if the progress made has been enormous, it is not yet sufficient to cover all the gaps where access to justice remains tenuous. The challenge of the human rights and immigration case law is to prohibit a denial of the 'right to have rights'. Any analysis must be concerned with generating alternatives rather than ascribing the inevitability of a negative legal ruling to the dictates of the legal texts.

Hunting for legal loopholes is a reality in international law. It is at the heart of the 'extradite or punish' clauses, the rules declaring the most serious crimes imprescriptible and the creation of international tribunals to try some of them. The limits to these mechanisms are numerous – from the failure of many States to accede to them to the practical obstacles imposed by cumbersome procedures. These questions relate to the search for justice in a transnational situation.

The *Naït-Liman* decision illustrates the limits of the extension of so-called universal criminal jurisdiction to civil litigation concerning compensation. In criminal law, universal jurisdiction is exercised by a State that prosecutes the perpetrators of certain crimes, regardless of where the crime was committed, and regardless of the nationality of the perpetrators or victims. This is a derogation from the principle of territoriality, which is the

basis for the exercise of jurisdiction in criminal matters. According to this norm, a person is prosecuted and tried by the authorities of the State on whose territory the offence was committed in accordance with the law in force in that State. This jurisdiction is combined with other traditional criteria of extraterritorial, but nevertheless classic, jurisdiction in criminal law: active personality, a criterion linked to the nationality of the perpetrator, and passive personality, which allows the State of which the victim is a national the jurisdiction over the matter. Universal jurisdiction refers to systems where the connecting link with the country of the forum is reduced or sometimes abolished.[58]

On the one hand, the problem of immunity was not dealt with in this case as the central issue was territorial jurisdiction. On the other hand, even if the Court considers that the right of victims of torture to obtain compensation, recognised under Swiss law, is a civil right protected by Article 6, it points out that the right of access to a court is not absolute. This right may be subject to limits in relation to which the State has discretion. The State's objective of ensuring the proper administration of justice and the effectiveness of domestic judicial decisions is considered legitimate and the Court understands the need to avoid diplomatic difficulties. As for proportionality, the Court points out that States that recognise universal jurisdiction in civil matters operating autonomously for acts of torture are currently the exception, so that an international custom cannot be identified. As for treaty law, while Article 14 of the Convention against Torture generally enshrines the right of victims of torture to obtain reparation, it is silent on how to effectively implement this right or the geographical scope of the States parties' obligation to do so.

As in international criminal law, in asylum law, the key issue is also the geographic scope of the obligations of the States, but more so even access to a territory where justice could be accessed. Hence, the crucial issue of access to justice as a preamble to a fair procedure is not a new challenge. It was discussed in a plenary hearing of the European Court of Human Rights almost half a century ago in *Golder*.[59] The origin of the legal dispute

58 D Vandermeersch, 'La compétence universelle en droit belge', in *Poursuites pénales et extraterritorialité = Strafprocesrech en extraterritorialiteit*, Dossier de la Rev. dr. pén., n°8, 2002, p. 41.
On international jurisdiction, see namely EU Parl., Policy Department for External Relations, F Jeßberger, J Krebs and C Ryngaert, Universal jurisdiction and international crimes: Constraints and best practices, EP/EXPO/B/COMMITTEE/FWC/2013-08/Lot8/21 EN September 2018 -PE 603.878.

59 ECtHR, Golder v United Kingdom, 21 February 1975, Appl. No o. 4451/70.

was the refusal of permission to consult a solicitor with a view to bringing a civil action for libel against a prison officer. The consequence was an exclusion of all matters of access to the courts. The applicant pleaded in Strasbourg that this decision violated Article 6 of the European Convention of Human Rights. The Court ruled:

> It would be inconceivable, in the opinion of the Court, that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.[60]

The British Government had submitted that expressions such as 'fair and public hearing', 'within a reasonable time', 'judgment', 'trial', and the like, clearly presupposed proceedings pending before a court. 'It does not, however, necessarily follow that a right to the very institution of such proceedings is thereby excluded'.[61] Even practically a criminal dispute or a civil procedure could begin prior to the referral procedure of the Trial Court. Returning to the fundamental principles, the Court underlined that the right to submit a claim to a court and the prohibition of denial of justice are some of the universally 'recognised' fundamental principles of law. The decision also highlighted the risk of a narrow interpretation of Article 6.

> Were Article 6 para 1 to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent on the Government. Such assumptions, indissociable from a danger of arbitrary power, would have serious consequences which are repugnant to the aforementioned principles and which the Court cannot overlook.[62]

The message is clear, and entirely dedicated to a useful effect of the protection regime. The Court used a well-known phrasing: 'The Convention is

60 ECtHR, Golder, pt 35.
61 ECtHR, Golder, pt 32.
62 ECtHR, Golder, pt 34.

intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective'.[63]

In the torts case of *Naït Liman*, the case law should accept going a step further than in *Golder,* even ruling in the same spirit. In this leading case, the Court of Strasbourg had to extend the material scope of a right but not to discuss its territorial scope. The right of access to justice in *Naït Liman* or in asylum is located upstream of access to the judicial institution itself, since it concerns the issue of whether the applicant is able to access a State which acknowledges an obligation towards him or her. In *Golder*, the Court emphasised that it was not enough for the proceedings before the judge to be fair. In asylum matters, it was not enough that a refugee right exists or that the principle of non-refoulement is guaranteed, it is necessary to have access to the debtor of these rights. A State that guarantees them must have obligations towards the asylum seeker. However, to do so, it is necessary, as the case law considers it, to have entered a geographical area where the State is bound by this obligation. This precondition is particularly paradoxical for the asylum seeker who is, by definition, in an extraterritorial situation that characterises flight. When called upon to rule, will the Strasbourg Court, as in *Golder*, opt for a teleological interpretation, giving useful effect to a right guaranteed by the Convention – here Article 6, here Article 3? The question is not as simple. The elasticity of the substantive scope of rights seems more natural than that of their territorial scope, even though in the end, in the light of the criterion of useful effect, the issues are similar.

9. Bridging the Gaps in Access to Justice: the Global Compact for Refugees

To avoid these gaps, one of the solutions lies in better cooperation. However, binding solutions must be adopted where there is a strong reluctance to do so.

A new instrument in asylum governance is the Global Compact for Refugees.[64] The Compact is in line with the process initiated in New York. The New York Declaration for Refugee and Migrants,[65] adopted by the

63 ECtHR, Golder, pt 18; see also *Airey c. Ireland*, 9 October 1979, Appl. N° 289/73, pt 24.

64 www.unhcr.org/gcr/GCR_English.pdf.

65 New York Declaration for Refugee and Migrants and Global Compact for Refugees, UN GAOR, Seventy-one Session, Agenda Items 13 and 117, UN Doc A/RES/71/1 (3 October 2016) ('New York Declaration').

United Nations at the General Assembly in September 2015, expressed the need to broaden the number and range of legal channels available for refugees admitted or resettled in third countries.[66] The need for more global solidarity was presented as a key issue for the future. The aim was to 'provide resettlement places and other legal pathways for admission on a scale that would enable the annual resettlement needs identified by the Office of the United Nations High Commissioner for Refugees to be met'.[67]

The Global Compact for Refugees consolidates those commitments. It was drafted by the UN High Commissioner for Refugees (UNHCR) in consultation with governments and other actors and adopted by the UN General Assembly in December 2018.

> The objectives of the global compact as a whole are to: (i) ease pressures on host countries; (ii) enhance refugee self-reliance; (iii) expand access to third country solutions; and (iv) support conditions in countries of origin for return in safety and dignity. The global compact will seek to achieve these four interlinked and interdependent objectives through the mobilization of political will, a broadened base of support, and arrangements that facilitate more equitable, sustained and predictable contributions among States and other relevant stakeholders.[68]

Just this sentence indicates that no binding mechanisms have emerged. This Compact evokes a wide range of reactions. They depend on the point of departure. The highly integrated system that the Compact offers does not represent an adequate response for meeting the diverse challenges at hand faced by migrants and host countries. At the same time, effective solutions are expected within the framework of the obligation of result as opposed to the obligation of means or conduct, which requires reasonable action towards the achievement of the desired result. It is important to distinguish between different categories of host countries so that the mechanisms put in place and the tools allocated directly respond to the positions

66 Point 77.

67 Point 78. 'Humanitarian admission programs, temporary evacuation programs such as evacuation for medical reasons, flexible arrangements to assist family reunification, private sponsorship for individual refugees and opportunities for labor mobility for refugees, including through private sector partnerships, and for education, such as scholarships and student visas figure among the opportunities to expand refugee admission.' (Point 79.).

68 Point 7.

they take with respect to migration and how that benefits refugees and asylum seekers.

The Compact offers African countries tools to build long-term solutions with refugees that are already on their territory. Fatima Khan and Cecile Sackeyfio[69] note that 'the Refugee Compact is also criticised for not changing the spatial allocation of refugees'. But

> while that may be the case, for the many women and children languishing in camps, the Compact can make a difference to 'the sheer waste of human potential' that is currently the *status quo*. As it stands, only a minority of refugees within African States can seek refuge elsewhere. Many are located within the African continent, often fleeing to neighbouring countries. Because of this, it remains important to nuance the responsibility-sharing dialogue. International cooperation to meet refugees *where they are* will do much not only to help host countries prosper, but to equalise opportunities for refugees within African nations'.

They advocate that

> in conclusion, it remains crucial to focus on the ways in which the Refugee Compact can benefit refugees, host communities, and host countries in Africa: that is, by addressing issues affecting resource-strained host countries and countries of origin that face large numbers of fleeing and repatriating people, but lack the mechanisms to cope. The Refugee Compact's human rights and humanitarian perspective has shifted the framework within which the refugee question is situated, to one which produces robust and tangible solutions: for refugee self-reliance and integration into urban spaces; for decreased usage of and need for refugee camps; for assessments of the reasons people seek refuge; and for shared and equitable international responsibility.

For Western countries facing the significant issue of access to their territory, the solutions proposed are weak. In 'The Global Cop-Out on Refugees', James Hathaway clarifies that

> the first and most critical priority—ironically not even addressed in the Global Compact—is access to protection. While we ought to promote assisted entry wherever that is feasible, the non-negotiable base-

69 F Khan and C Sackeyfio, 'What Promise Does the Global Compact on Refugees Hold for African Refugees?' (2019) *International Journal of Refugee Law*, eez002, https://doi.org/10.1093/ijrl/eez002.

> line commitment must be that refugees be allowed to access the international protection system in whatever country they can reach. No more barriers to entry, no more politics of *non-entrée*.'

The Compact does not meet this crucial challenge of the Global North (and other silent regions) to take their part, organise lawful access and real solidarity. It 'doesn't dependably get refugees to a place of protection; doesn't ensure dignified and empowering protection for the duration of risk; doesn't require meaningful burden and responsibility sharing; and doesn't guarantee solutions either for refugees or for their host communities'. He concludes,

> I think we need to call out this 'Compact' for what it really is—a 'cop-out'. We should be clear that we do not need a Compact 'on' refugees, in which refugees are simply the object, not the subject, of the agreement. It is high time for a reform that puts refugees—all refugees, wherever located—first, and which recognises that keeping a multilateral commitment to refugee rights alive requires not caution, but rather courage.

Cooperation mechanisms are essential but not sufficient. They allow exchanges of points of view and thus the adoption, or at least the hearing, of a different viewpoint. They are the best guarantee of measures and rules that target a problem as a whole, without legal gaps, and give impetus for further cooperation. But as a place for discussion, they can be sterile and dictated by political agendas. Without a binding instrument, especially considering that States are reluctant to assume obligations, blind spots remain. Asylum seekers seeking legal access to places of protection and justice are located firstly within the domain of the State, and especially asylum seekers who are victims of torture need the State for legal access to justice and protection. Even more than any other, borders must be places of law and not of lawlessness. Multiple risks, both actual and of denial of justice, converge there. This reality covers both the geographical borders of States and the borders of legal systems. If we fail to fill each gap, the weakest among us would be excluded from any protection.

In 'No Country, No Cry', Olivera Jokic[70] offers a timely reflection on gendered violence in migration contexts, which resonates paradoxically after decades of affirming and seeking some form of universal human rights

70 O Jokic, No country, no cry: Literature of women's displacement and the reading of pity, *Journal of Postcolonial Writing*, Volume 54, 2018 - Issue 6: Special issue: Refugee Literature, Pages 781-794.

protection. Especially for migrants and exiles, these rights stop at the border gates. Too often the judicial response is haunted by the fear of a resulting influx of claims for protection and compensation proceedings. However understandable that may be, the reflection should rather focus on how guaranteed rights risk being compromised if *places of effective protection* do not exist. It is one thing to ask about the risk of spill over from denunciations of violations, it is yet another to consider the actual risk to the substance of the rights if there is no hospitable port in which to moor.