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

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

2 Litigation for Humanitarian Admission to Europe

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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