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

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

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

4 The Revolving Doors of the Rule of Law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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