Part 1.
Humanitarian Admission Under International and EU Law. The Right to Asylum and its Paradoxes

Chapter 1:
Humanitarian Admission Under Universal Human Rights Law: Some Observations Regarding the International Covenants

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Contents

Introduction

The topic of humanitarian admission can be approached from multiple angles, but in many ways it is particularly intriguing from a human rights

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perspective.[2] Human rights law is generally contingent to state territory or more broadly state jurisdiction.[3] However, human distress does not stop at borders, and the question arises to what extent human rights law does or should impose duties on states beyond their territory, such as a duty to grant humanitarian visas to refugees either physically appearing in a state ´s embassy abroad or simply filing an application from outside.[4] As Benvenisti has aptly put it:

> 'But a serious look at the idea of human rights will reveal that if these rights precede state sovereignty, they must precede the sovereignty of

2 For a general overview of state practice on humanitarian visas see <www.ohchr.org/Documents/Issues/Migration/OHCHR_DLA_Piper_Study.pdf> accessed 29 July 2019.

3 F Coomans, 'The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural Rights' (2011) 11 *Human Rights Law Review* 1, 2.; generally on jurisdiction see M Den Heijer, *Europe and Extraterritorial Asylum (2012)* (Oxford Heart Publishing) 25 ff; see furthermore F Svensén, '*Humanitarian Visas and Extraterritorial Non-Refoulement Obligations at Embassies*' (2016) Faculty of Law Stockholm University, 38 <www.diva-portal.se/smash/get/diva2:1060800/FULLTEXT01.pdf> accessed 20 July 2019 who claims that jurisdiction has come to be the '[t]hreshold criterion', hence '*non-refoulement* obligations stemming from human rights law apply wherever a state is exercising jurisdiction abroad'.

4 See generally, G Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law? (2005), 17 *International Journal of Refugee Law*, 542–573; K Ogg, 'Protection Closer to Home? A legal case for claiming asylum and embassies and consulates' (2014) 33(4) *Refugee Survey Quarterly* 81.; Den Heijer (n 3); T Gammeltoft-Hansen, 'The Extraterritorialization of Asylum and the Advent of "Protection Light"' (2007) DIIS working paper <www.econstor.eu/dspace/bitstream/10419/84510/1/DIIS2007-02.pdf> accessed 02 August 2019; on the importance of this question see P Endres de Oliveira, 'Legaler Zugang zu internationalem Schutz – zur Gretchenfrage im Flüchtlingsrecht' (2016) 2 *Kritische Justiz*, 167; European Parliamentary Research Service, Humanitarian visas: European Added Value Assessment accompanying the European Parliament's legislative own initiative report (PE 621.823, 2012) <www.europarl.europa.eu/cmsdata/150782/eprs-study-humanitarian-visas.pdf> accessed 30 July 2019; S Morgades-Gil, 'Humanitarian Visas and EU Law: Do States Have Limits to Their Discretionary Power to Issue Humanitarian Visas?' (2017) European Papers <www.europeanpapers.eu/en/europeanforum/humanitarian-visas-and-eu-law-do-states-have-limits-to-their-discretionary-power> accessed 29 July 2019; T Spijkerboer and E Brouwer and Y Al Tamimi, 'Advice in Case C-638/16 PPU on prejudicial questions concerning humanitarian visa' (2017) <thomasspijkerboer.eu/wp-content/uploads/2017/01/Advies-VU-English1.pdf> accessed 29 July 2019; Den Heijer (n 3) 35.

all states, and therefore all states must consider the human rights of foreigners when they make decisions that affect them.'[5]

This raises the contested issue of extraterritorial jurisdiction.[6] At the same time, even where territorial jurisdiction is triggered, human rights protection is not limitless. Whilst human rights apply to a person under a state´s jurisdiction, they do not necessarily entail a state duty to host that person indefinitely in order to guarantee that they can permanently benefit from this high standard. As long as someone does not enjoy citizenship or another right of permanent residence, the only clear limit to sending people back to their country of origin is where this would be contrary to the principle of non-refoulement as established in international refugee law and fortified in international human rights law.[7]

This shows that the promise of universal human rights is in fact a rather contingent one. Not only does effective human rights protection depend on state territory or jurisdiction, but the state can also determine to some extent whom it allows onto the territory or whom it subjects to its jurisdiction.[8] This is, of course, a natural consequence of state sovereignty, borders and the limitations of human rights commitments that states have entered into. Encroachments on sovereignty are limited. In real life, this can lead to inhumane consequences that are at odds with the idea of protection against fundamental experiences of injustice.[9] Human rights, on the one hand, claim to be universal standards that are not negotiable, whilst, on the other hand, they can get stronger or weaker depending on the proximity of a person towards a state´s authority, which the state itself can influence. Human rights provide strong and often absolute guarantees, but their applicability may in fact be of a gradual nature. The positivist legal construct of human rights only pierces state sovereignty in a vertical (state-subject within jurisdiction), not in a diagonal way (state-subject within an-

5 E Benvenisti, 'Law as a Barrier, Law as a Bridge? On "Humanitarian Visas" and the Obligations of Distant States' (2017) *Global Trust - Sovereigns as Trustees of Humanity* <globaltrust.tau.ac.il/law-as-a-barrier-law-as-a-bridge-on-humanitarian-visas-and-the-obligations-of-distant-states/> accessed 31 July 2019.

6 See generally Den Heijer (n 3).

7 J Allain, The ius cogens Nature of non-refoulement' *International Journal of Refugee Law* (2001), 534ff.; G Goodwin-Gill, 'The Refugee in International Law' (2007), 232f.

8 Generally on jurisdiction and human rights Den Heijer (n 3) 28 ff.

9 For this understanding of human rights see for instance E Riedel ´Menschenrechte als Gruppenrechte auf der Grundlage kollektiver Unrechtserfahrungen' (1999) in H Reuter (ed): Ethik der Menschenrechte, 295 ff.

other state´s jurisdiction). Hence, to relate once more to Benvenisti´s article, human rights law is sometimes more of a 'barrier' than of a 'bridge'.[10]

Of course, one might argue that the refugees´ countries of origin have usually entered into human rights obligations themselves. Failure to respect them cannot completely be compensated by other governments that are often far away from and little responsible for the actual violations. State sovereignty can only be limited by human rights obligations within the field that sovereignty covers. This may pose limits to the controversial notions of humanitarian intervention or responsibility to protect.[11] However, it does not bar states from relaxing or expanding access to their domestic human rights standards and by interpreting these standards in a way that is less reliant on territory or jurisdiction.

The following analysis will deal with the question to what extent these pleas correspond to existing duties under universal human rights law and to what extent they deserve consideration *de lege ferenda*. The guiding hypothesis is that whilst human rights obligations as such posit strong and sometimes absolute claims that increasingly demand extraterritorial application, states can still control their scope to some extent by regulating the degree of physical and legal proximity (or distance) between them and the potential rights holders. If human rights are, as often claimed, like spotlights, states are the illuminators that decide to some extent upon their direction. This is particularly the case with regard to extraterritorial jurisdiction, which concerns human rights obligations relating to embassies such as in the *X and X v Belgium* case[12] which constitutes the occasion for this volume.

The case of humanitarian visas serves to illustrate this in a paradigmatic fashion as it raises the question under which circumstances states, under existing human rights law, are required to issue humanitarian visas, or at least should be required to do so, if the idea of human rights is to be taken seriously.[13] In order to make that very principled point, this chapter concentrates on the universal dimension of human rights, ie the International

10 E Benvenisti (n 5).

11 I Winkelmann, 'Responsibility to Protect' in Max Planck Encyclopedia of Public International Law (2010), para. 1-3.

12 CJEU *X and X v Belgium* 2017 C-638/16 PPU. For the opinion of Advocate General Mengozzi see <curia.europa.eu/juris/document/document.jsf?text=&docid=187561&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=664302> accessed 2 August 2019.

13 See Riedel (n 9) for attempts to underpin human rights from ethical perspectives.

Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESCR). These instruments, together with the Universal Declaration on Human Rights (UDHR), constitute the so-called Universal Bill of Rights and underpin the non-refoulement provision (Art 33) in the Geneva Convention. Whilst focusing on these instruments, the author recognizes that other global treaties (such as the Convention against Torture) and regional treaties (such as the European Convention on Human Rights (ECHR)), as well as fundamental rights in Constitutions, provide ample material for further study.[14]

The following analysis is divided into several sections that will display a major discrepancy, several observations and a tentative conclusion together with an outlook.

1 A Major Discrepancy Between Moral Claim and Legal Reality

As the introductory remarks have indicated, human rights suffer from a discrepancy between the moral claim and legal reality. This can be shown in particular where a state acts beyond its territory.[15] The *X and X* case before the Court of Justice of the European Union (CJEU) aptly illustrates that.[16] A Syrian family addressed the Belgian embassy in Lebanon in order to obtain a visa under Art 25 para 1, lit. a of the Visa Code 'with limited territorial validity',[17] which the Member State can grant 'on humanitarian grounds' where it 'considers' this 'necessary'.[18] The applicants aimed to use the visas as a basis to enter Belgium in order to then apply for protection as refugees.

Whilst Advocate General Mengozzi stated that in light of human rights obligations, Belgium was required to grant the visa in this case, the CJEU rejected the claim and reaffirmed that it was at the State´s discretion whether such a visa should be granted or not. The question concerned Art 3 of the ECHR, Art 4 of the European Charter of Fundamental Rights and

14 For further analysis see Ogg (n 4).

15 M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy* (OUP 2011) 3.

16 *X and X v Belgium* (n 12) 173.

17 Idem 19.

18 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ 2 243/1, Art 25(1)(a).

Art 33 of the Geneva Convention.[19] The Advocate General stated first of all that

> 'The fundamental rights recognized by the Charter, which any authority of the Member States must respect when acting within the framework of EU law, are guaranteed to the addressees of the acts adopted by such an authority *irrespective of any territorial criterion*'.[20]

He claimed that there is a 'parallelism between EU action, whether by its institutions or through its Member States, and application of the Charter'.[21] According to his view, the Charter of Fundamental Rights was therefore triggered as European Union (EU) law (ie the Visa Code) was applied.[22] By contrast, he refused to deal with the question whether the ECHR is applicable which serves to interpret the Charter which has similar guarantees.[23] The Court did not dispute the argument as such, but simply held that the claimants had only applied for the visa to claim asylum in Belgium, and that the latter situation was not covered by the Visa Code, which meant that the Charter was not applicable, either.[24]

To put the consequence of this judgment in a rather blunt, but not exaggerated way: If, for instance, a family wants to seek protection abroad from a civil war it seems that they need to physically reach a safe country or find another way into its jurisdiction. This can lead to enormous additional suffering and entail the exposure to severe risks to their lives, as the example of refugees in the Mediterranean shows. Moreover, many people may not even be able to make such choices, because they are too sick, too weak or too poor. If the family manages to reach their destination – legally or illegally – they may be subjected to the full or at least to some substantial human rights protection. By contrast, if they do not manage to cross the border, they may have risked everything but receive no protection. Is this really compatible with the notion of human rights? At the same time, how far can we stretch human rights without asking states to do the im-

19 *X and X v Belgium* (n 12) 28.
20 Idem. [89] (Opinion of AG Mengozzi).
21 Idem [91].
22 Idem [108]; see further on this Endres de Oliveira (n 4); see furthermore M Zoeteweij-Turhan and S Progin-Theuerkauf, 'AG Mengozzi's Opinion On Granting Visas to Syrians From Aleppo: Wishful thinking?' (2017) *European Law Blog*. 71 f, <europeanlawblog.eu/2017/02/14/ag-mengozzis-opinion-on-granting-visa-to-syrians-from-aleppo-wishful-thinking/> accessed 5 August 2019.
23 Zoeteweij-Turhan and Progin-Theuerkauf [71 f].
24 *X and X v Belgium* (n 12) 42-45.

possible or discarding the notion of state sovereignty which international law is built upon?

Essentially, human rights law as stipulated by the ICCPR and ICESCR means that a state is responsible for the protection of its own citizens and for residents on its territory. This does not only apply to countries such as Germany or France that are currently in peace and have a rather solid record of human rights protection. It also applies to countries where some of the worst civil wars and human rights violations are observed, even though comparable standards of human rights protection are in place (Syria, for instance, which ratified both Covenants already in 1969). Hence, the question is to what extent foreign states are legally responsible for what happens in a country where human rights are not safeguarded.

One way in which such responsibility could manifest itself would be through intervention onto the territory of the foreign state. Under certain very limited circumstances such intervention may be mandated by a decision of the UN Security Council under Chapter VII of the UN Charter. Lacking such authorization, concepts such as humanitarian intervention or more recently the responsibility to protect (R2P) might apply.[25] The former concept essentially relies on the emphasis on human rights in the Charter when formulating several conditions to allow interventions without a Security Council mandate in situations of grave human suffering.[26] The latter notion results from an essentially new understanding of sovereignty in the Charter – sovereignty not only as a right but also as a duty, the disregard of which may lead to intervention from outside.[27] Whilst such controversial notions are beyond the scope of this chapter, they do reveal the discrepancy between the idea of human rights as one of universal protection and its limits in light of sovereignty and the lack of will or ability of states to afford adequate protection domestically.

The discrepancy between 'is' and 'ought' becomes even more clearly visible where the issue is not intervention, but domestic responsiveness in the sense that a state is aware of and responds to human rights challenges of

25 See for instance C Gray, *International Law and the Use of Force* (OUP 2008) 51ff; R Thakur, 'Responsibility to Protect' (2016) 92 *International Affairs*, 415ff2; H Rahman Basaran, 'Responsibility to Protect: An Explanation' (2014) 36 *Houston Journal of International Law* 581, 583.

26 See for instance A Cassese, 'Ex inuiria ius oritur: Are We Moving towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community?' (1999) *European Journal of International Law*, 23 ff.

27 V Guiraudon and G Lahav, 'The Reappraisal of the State Sovereignty Debate: The Case of Migration' (2000) 33 *Comparative Political Studies*, 163.

persons who seek shelter within the jurisdiction of another state. This is the case of humanitarian visa, which constitutes the core of this analysis. The fact appears to be that, as the *X and X* case shows, states often undertake a major effort to avoid a situation where they need to provide full protection. Paradoxically, just because the standard of legally guaranteed human rights protection is so high, states may cautiously limit its scope in a way that makes human rights part of the ratio for borders. They may aptly do so under existing international law, but when looking at the notion of human rights as such, it is doubtful whether they should.

2 Observations

Keeping this major discrepancy in mind, it is worthwhile examining in more detail where the limits of existing international human rights law are. This in turn will help illustrate the scope of the above-mentioned gap.

2.1 The Scope of Human Rights - Territory, Jurisdiction and Beyond?

The first observation concerns the question as to how far human rights are applicable in the domestic realm. Are the limits aptly defined by state territory and jurisdiction or do they reach beyond these confinements?

The notion of territory characterizes statehood in a classical way, as the well-known three-elements- theory by Georg Jellinek expresses, according to whom the state consists of territory, a people that inhabits it and governmental power that is exercised with regard to the former.[28] As to the scope of applicability of the law, jurisdiction is the crucial term as it is connected but not limited to territory. It aptly determines the scope of application for domestic norms, including those that a state has accepted under international law.[29] Jurisdiction undoubtedly exists within the confine-

28 G Jellinek, *Allgemeine Staatslehre* (Verlag v. O Häring 1914), 396 ff; B Schöbener and M Knauff, *Allgemeine Staatslehre* (C.H. Beck, 2019) § 3, 43 ff; M Herdegen, *Völkerrecht* (C.H. Beck 2019) § 8, 4; N Akipinarli, 'The Fragility of the "Failed State" Paradigm' (2010) 2 *Revue belge de droit international*, 6.

29 Generally on the topic of jurisdiction M Akehurst 'Jurisdiction in International Law' (1972-1973) 46 *British Yearbook of International Law*, 145 ff.

ments of territory of a state.[30] Case law and scholarly opinions reveal quite a rich debate as to how far exactly jurisdiction beyond the territory may go.[31] International law partially determines the discussion as treaties define the scope of their application in different ways, as will be shown in the subsequent section.[32]

Irrespective of these aspects, there seems to be a major agreement that jurisdiction cannot merely be established by a legal bond, in particular citizenship (for instance nationals abroad that seek help through their embassy after they lost their passport). Instead, it can also be generated through a factual relationship, e.g. some kind of effective control of a state beyond its borders, which may in turn lead to legal obligations.[33] With regard to the former type of jurisdiction (which may also be described as *de iure* as opposed to *de facto* jurisdiction) it is quite clear that the relation between a state and its citizens (personal jurisdiction) can create jurisdiction beyond territory, which is demonstrated by the instrument of diplomatic protection.[34] It appears more difficult to establish criteria for extraterritorial *de facto* jurisdiction. Authority and effective control seem to be the more accepted criteria in this regard.[35] If a state occupies a country, the state can incur human rights obligations even though it does not possess the territory.[36] The fulfillment of such criteria might stem from military occupation (legally or illegally) or interventions in a foreign country.[37] *De facto* control can also be exercised in relation to persons (and that will usually

30 J Crawford, *Brownlie's Principles of Public International Law* (OUP 2012) 456 f; J Klabbers *International Law* (CUP 2017), 100; B Oxman, 'Jurisdiction of States' in Max Planck Encyclopedia of Public International Law (2007), para 11.

31 Oxman, para 9 ff.

32 On this issue see also F Coomans, *Extraterritorial Application of Human Rights Treaties* (Intersentia 2004), 41ff, 201ff.; Den Heijer (n 3) 24; the scope of the ICCPR and the ICESCR will be discussed properly in the following section.

33 Den Heijer (n 3) 52 with reference to the jurisprudence; for an overview see furthermore Svensén (n 3) 42 ff.

34 Svensén (n 3) 40 ff.

35 Idem, 42 ff.; on effective control see for instance Wilde, EJIL Talk <www.ejiltalk.org/let-them-drown-rescuing-migrants-at-sea-and-the-non-refoulement-obligation-as-a-case-study-of-international-laws-relationship-to-crisis-part-ii/> accessed 5 August 2019; see also www.icj.org/wp-content/uploads/2018/09/Belgium-Nahhas-Intervention-Advocacy-Legal-Submission-2018-ENG.pdf accessed 5 August 2019.

36 See *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136, para. 107-112; on jurisdiction resulting from control over territory see for instance Den Heijer (n 3) 35 ff.

37 See Coomans (n 3) 6; furthermore with reference to case law Den Heijer (n 3) 55.

be the case where a part of the territory is controlled).[38] This control overlaps with the *de iure* control of citizens abroad.

These categories of jurisdiction will become relevant in the analysis of human rights obligations in embassies (see 2.3 below), preceded by an examination of the general framework of extraterritorial jurisdiction according to the Covenants.

2.2 Extraterritorial Jurisdiction According to the ICCPR and the ICESCR

When it comes to the details of extraterritorial jurisdiction, it is necessary to look generally at the respective human rights instruments, each of which stipulates its own rules. In that vein, the extension of jurisdiction played a major role in cases before the European Court on Human Rights (ECtHR), eg in *Bankovic and Others v Belgium and 16 Other Contracting States* [39] where the Court established and applied the concept of effective control for military missions beyond a state´s territory.[40] Furthermore, the notion of *espace juridique*, ie the juridical space of the Convention, helped illustrate the scope of the Convention and its (limited) applicability beyond the territory of its Member States.[41] As Caflisch points out with regard to Article 1 of the ECHR, "jurisdiction of the Strasbourg court is essentially territorial"[42], but can, apart from being derived from sovereignty, also "flow…from lesser degrees of dominance such as occupation" or certain other types of control. [43] In addition, jurisdiction can emanate from specif-

38 See generally Den Heijer (n 3) 41 ff.

39 ECtHR *Bankovic and Others v Belgium and 16 Other Contracting States* 2001 App no 52207/99.

40 On further case law see for instance D Schmalz, 'Will the ECtHR Shake up the European Asylum System?' (Verfassungsblog, 30 November 2018) <www.academia.edu/37884076/Will_the_ECtHR_shake_up_the_European_asylum_system_On_what_to_expect_from_the_case_Nahhas_and_Hadri_v._Belgium> accessed 31 July 2019; on the long list of ECtHR cases regarding extraterritorial jurisdiction see ECtHR, Factsheet – Extra-territorial jurisdiction of States Parties <www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf> accessed 31 July 2019.

41 See for instance R Wilde (2005) The 'Legal Space' or 'Espace Juridique' of the European Convention on Human Rights: Is it Relevant to Extraterritorial State Action?, European Human Rights Law Review, 115-124.

42 L. Caflisch, 'Attribution, Responsibility and Jurisdiction in International Human Rights Law' *Colombian Yearbook of International Law* (2017) 181.

43 Idem, 184.

ic rules of international law, e.g. relating to "flag States of vessels at sea, aircraft in airspace or space vessels in outer space; the jurisdiction arising from the activities of diplomatic and consular officers and other agents abroad; and the jurisdiction resulting from the consent of the territorial sovereign".[44] Hence, whilst certain activities in embassies may incur jurisdiction, this does not entail that jurisdiction is triggered simply by the fact that a refugee enters an embassy. As tempting as it is to engage further with the rich case law in this regard (and the cases of M and others versus Belgium and Nahhas and Hadri v Belgium[45] will shed light on this), this chapter will focus on the international Covenants which, by their number of ratifications, provide a much broader framework of protection. The ICCPR and ICESCR as the two human rights instruments that aspire to universal application provide quite distinct standards in this regard.

2.2.1 The Standard of the ICCPR

The ICCPR states in Art 2 that

> 'Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant.'

This has invited a major discussion as to whether this 'and' is of a cumulative nature.[46] Both criteria will usually be fulfilled in parallel since territory normally entails jurisdiction. The issue becomes more difficult in cases that are beyond the territory but might still incur jurisdiction. Contrary to the narrow, cumulative understanding by some countries (in particular the United States), the Human Rights Committee (HRC) and most scholars

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44 Caflisch (n 42) 184; for an alternative interpretation of Art. 1 ECHR see S Besson who demands 'i)effective,(ii)overall,and(iii)normative power and control', 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to' *Leiden Journal of International Law* (2012), 884.

45 ECtHR *Nahhas and Hadri v Belgium* 2018 App no 3599/18. <www.icj.org/wp-content/uploads/2018/09/Belgium-Nahhas-Intervention-Advocacy-Legal-Submission-2018-ENG.pdf> accessed 5 August 2019.

46 See also Caflisch (n 42) 181; R Wilde, (2013) 'The extraterritorial application of international human rights law on civil and political rights' in S Sheeran and N Rodley (eds), *Routledge Handbook of International Human Rights Law* (Abingdon Rothledge 2013) (635 - 661); see also M Milanovic (n 15) 222 ff.

adhere to a wider interpretation which lets the criterion of jurisdiction suffice as a trigger for the application of the ICCPR.[47]

The HRC established this in principle as early as in the well-known case of *Lopéz/Burgos v Uruguay*[48]. The Committee held that Uruguay had violated the right to be free from torture and it asserted extraterritorial jurisdiction. It emphasized that the fact that Article 2 (1) of the Covenant places an obligation upon a State party to respect and to ensure rights 'to all individuals within its territory and subject to its jurisdiction' does not mean 'that the State party concerned cannot be held accountable for violations of rights under the Covenant which its agents commit upon the territory of another State, whether with the acquiescence of the Government of that State or in opposition to it'.[49]

In an individual opinion, Christian Tomuschat adds a nuanced note to this dictum which he considers too broad. He finds "that it was the intention of the drafters … to restrict the territorial scope of the Covenant in the view of such situations where enforcing the Covenant would be likely to encounter exceptional obstacles". However, he adds that it was "[n]ever […] envisaged […]to grant States parties unfettered discretionary power to carry out wilful and deliberate attacks against the freedom and personal integrity of their citizens living abroad.' [50]

In its General Comment No 31 the Committee later expressed the view: 'States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction.' To avoid any misunderstandings it adds:

> 'This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party.'[51]

The International Court of Justice (ICJ) has confirmed this view by stating in its advisory opinion on the legal consequences of the wall built by Israel

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47 D Moeckli (ed), International Human Rights Law (OUP 2014), 133; C Tomuschat, 'International Covenant on Civil and Political Rights (1966)' in Max Planck Encyclopedia of Public International Law 2010, para 22-26; see also Wilde (n 46) 635 ff.

48 *Delia Saldias de Lopez v Uruguay* (1984) UN Doc CCPR/C/OP/1 88.

49 Idem. [12.3].

50 Idem. [Appendix].

51 CCPR/C/21/Rev. 1/Add. 1326 May 2004, General Comment No. 31, [10].

in the occupied Palestine territories that both the ICCPR and the ICESCR are applicable.[52] With regard to the ICCPR it takes note of the divergent interpretations, but, relying inter alia on the practice of the Committee and the *travaux préparatoires* in the end concludes that it is 'applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory'.[53] As Ogg points out, this decision 'provides strong authority for the position that the ICCPR applies extraterritorially'.[54] In the case of *Democratic Republic of the Congo v Uganda* the Committee essentially confirmed this view.[55]

It appears that the approach of the HRC is to assert extraterritorial obligations where state action 'exposes an individual to violations of Covenant rights in another jurisdiction'.[56] Most of the jurisprudence on extraterritorial human rights obligations is focused on state action. There is little evidence when it comes to omissions in spite of a duty to act, even though such positive duties of protection are not necessarily weaker than the corresponding duties to refrain from intervention, depending on the particular case.[57] With regard to humanitarian visas, potential positive duties are in fact crucial. Technically, the denial of a visa can be characterized as an action. However, when viewed in relation to the situation of the refugee, it appears more appropriate to qualify it as an omission to help in light of a potential duty to deal with visa applications in the same way that a country would when the applicant has reached the national soil.[58] Without the opportunity to dwell further on this point, it does not appear too difficult to

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52 ICJ Rep 136 (n 36) para.107-112.

53 Idem. [111].

54 See K Ogg (n 4) 90.

55 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda), Judgment, I.C.J. Reports 2005, 168, [216]-[220]; the Court refers to the Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (2004) I.C.J. Reports 136, [106]; see also F Svensén (n 3) 35.

56 F Svensén (n 3) 58, with references to pertinent HRC views.

57 On this issue Den Heijer (n 3) 52 ff., for instance on 52: 'Problematic however, is that the nature of duties to protect and to fulfill (or: positive obligations 'not to omit') may make it difficult to identify what specific conduct of the state would engender a "jurisdictional link" between the state and the individual'. The author asserts that 'international courts are at the least receptive for claims relating to positive obligations in an extraterritorial setting'. Instead of effective control what appears to matter is a specific relationship between the state and the individual due to circumstances and the ability to 'positively influence a person's human rights situation.'.

58 G Goodwin-Gill (n 7) 54f.

imagine such a duty, e.g. resulting from the protection of life or prohibition of torture in the ICCPR.[59] The requirement for that is, of course, that a situation falls within the state jurisdiction. With regard to embassies, this is not easy to establish (as section 2.3 will show).

2.2.2 *The Standard of the ICESCR*

In the ICESCR the wording is markedly different from the ICCPR, potentially providing a much broader scope for extraterritorial application. Art 2 states:

> 'Each State Party to the present Covenant undertakes *to take steps*, individually and through international assistance and co-operation, especially economic and technical, *to the maximum of its available resources*, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.'[60]

The precise scope of this obligation is not clearly determined.[61] However, the absence of a focus on jurisdiction and the stipulation of a positive duty to provide international assistance could indicate that states have to go far beyond domestic measures in realizing their economic, social and cultural rights. The ICJ takes a more cautious view by stating:

> 'The International Covenant on Economic, Social and Cultural Rights contains no provision on its scope of application. This may be explicable by the fact that this Covenant guarantees rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.'[62]

The Committee on Economic, Social and Cultural Rights appears to take a broader perspective by stating in General Comment No 14 that states have

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59 Article 6 ICCPR (Right to Life), Article 7 ICCPR (Prohibition of Torture).

60 Italics added.

61 See for instance Coomans (n 3) 7; see also E Riedel 'International Covenant on Economic, Social and Cultural Rights (1966)' in Max Planck Encyclopedia of Public International Law (2011), para. 7.

62 See ICJ Rep 136 (n 36) para 112.

> 'to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law'.[63]

With regard to Israel, the Committee has held that 'the Covenant applies to all areas where Israel maintains geographical, functional or personal jurisdiction'.[64]

A consortium of various actors led by NGOs pushed the agenda and passed the Maastricht Principles on Extraterritorial Obligations in 2011.[65] These principles seem to have been inspired more directly by questions of corporate responsibility than by issues of migration. Nonetheless they entail very relevant statements regarding the overall responsibility of states towards the realization of human rights. The Principles claim to reflect existing international human rights law[66], whilst they go quite far in some respects and have sparked off some discussion.[67] They deal with actions and omissions which may help to tackle the deficiencies described above. The document addresses extraterritorial obligations (ETOs) as 'a missing link in the universal human rights protection system'. It expresses a general obligation of states to 'respect, protect and fulfil human rights…both within their territories and extraterritorially' (I.3).[68]

The Principles distinguish between obligations 'relating to the acts and omissions of a State, within or beyond its territory, that have effects on the enjoyment of human rights outside of that State's territory' (II.8).[69] When looking at the catalogue carefully it becomes clear that jurisdiction is key to the scope of application as well. For this purpose, Principle 9 lists certain situations under the heading 'Scope of Jurisdiction'

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63 CESCR,/E/C.12/2000/4, 11 August 2000, General Comment No. 14, para 39; see furthermore Den Heijer (n 3) 52.

64 CESCR, E/C.12/1/Add.27, 4 December 1998, Concluding observations of the Committee on Economic, Social and Cultural Rights, para 6; see furthermore Den Heijer (n 3) 56.

65 <www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1 %5BdownloadUid%5D=23> accessed 5 August 2019.

66 Ibid.

67 See for instance W Vandenhole, 'Beyond Territoriality: The Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights', *Netherlands Quarterly on Human Rights* (2011), 233.

68 See Introduction Maastricht Principles, 3 <www.etoconsortium.org/nc/en/main-navigation/library/maastricht-principles/?tx_drblob_pi1 %5BdownloadUid %5D=23> accessed 30 July 2019.

69 Ibid.

> 'a) situations over which it exercises authority or effective control […]; b) situations over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights […]; c) situations in which the State […] is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially, in accordance with international law.'[70]

Hence, a much wider notion of jurisdiction is employed which might trigger obligations vis-à-vis asylum seekers in many different situations beyond the territory. As much as refugees might benefit from such an expansion of jurisdiction it remains to be seen whether such a reading of the ICESCR will be fully accepted by states or the Committee. It may, however, be used as a blueprint for future consensus raising interesting questions as to how far such duties might actually go when considering that in a given situation several states might be under a duty to protect at the same time. One might assert that the ICESCR is less important for the determination of non-refoulement obligations than the ICCPR, as it rather contains promotional obligations that are hard to determine in an absolute fashion. This argument may be countered by referring to the fact that all human rights are necessarily formulated in abstract fashion, "requiring concretization through court decisions and administrative and legislative measures".[71] When it comes to the question of resources, it is important to keep in mind that "[a]ll human rights involve costs, both procedurally and substantively, and the cost argument boils down to a question of degree, not of substance".[72] Since the 1990ies, the Committee on Economic, Social and Cultural Rights has come to demand progress from states in a rather robust fashion.[73] As part of this approach, the Committee on Economic, Social and Cultural Rights determined that all states need to safeguard the 'survival kit' by way of minimum core obligations.[74] In civil wars, for instance, states will often not meet this standard, which underlines the im-

70 Idem Principle 9.

71 E Riedel, 'Reflections on the UN Human Rights Committee' in *Archiv des Völkerrechts* (2016), 134.

72 Ibid.

73 Idem., 139: "States have to show how they have actually made progress in their social rights protection between two reporting cycles, and States parties have accepted that".

74 CESCR General Comment No. 3 (1990) The Nature of States Parties Obligations, para. 10; see also Riedel (n 71) 138 who asserts that "there are certain elements of rights that take immediate effect and must be safeguarded by States without delay or restrictions".

portance of economic, social and cultural rights in the field of humanitarian visas.

2.3 *The Exercise of Jurisdiction and Resulting Human Rights Obligations in Embassies*

The preceding analysis sets out the general scope for extraterritorial jurisdiction under the two Covenants which now allows discussing resulting human rights obligations in the operation of embassies. The generic question arising from the *X and X* case is to what extent the establishment and operation of a diplomatic mission abroad may incur human rights obligations not only towards the state´s own citizens but also towards foreigners who are somehow in contact with the embassy or consulate, for instance by appearing inside the building and filing an application for visas.

The operation of embassies and consulates is primarily governed by the theory of functional necessity.[75] Art 3 of the Vienna Convention on Diplomatic Relations describes the functions of the diplomatic mission which involve inter alia 'Representing the sending State in the receiving State' and 'Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law'. This entails that for the purpose of setting up an embassy the sending state does not receive a piece of territory in the host state, but merely exercises authority (and its agents enjoy immunity) to the extent that this is necessary for the smooth operation of the mission in light of the powers granted by the Vienna Conventions on Diplomatic and on Consular Relations. These powers do not entail jurisdiction related to territory (as the territory still belongs to the host state), but the embassy will allow a state to exercise personal jurisdiction regarding its own nationals. In that sense, the establishment and entertainment of diplomatic and consular relations including the operation of embassies on foreign ground is in fact one of the most prominent manifestations of extraterritorial jurisdiction.[76]

Beyond that the question (and this is the decisive one here) is whether there is also jurisdiction regarding foreigners that visit the embassy and want to enter the country that operates it. One might argue that de facto jurisdiction depends on 'physical presence' of applicants on the premise of the embassy or 'actions taken by the diplomatic agents' depending on the

75 C Barker, *The Protection of Diplomatic Personnel* (Routledge 2006) 48 ff.
76 See for instance Oxman (n 30) para 11, 18.

'level of engagement and contact'.[77] Some cases may serve to illustrate this.[78] The case of *R (B & Others) v SSFCA* concerned two young Afghans who sought asylum in the British Consulate in Australia.[79] The British court stated:

> 'In summary, international law recognizes that embassy and consular authorities are entitled, in the territory of the receiving State, to exercise the authority of the sending State to a limited extent, particularly over the nationals of the sending State. The premises on which this limited authority is exercised are inviolable. It is not easy to see that the exercise of this limited authority gives much scope for the securing, or the infringing, of Convention rights.'[80]

However, since the asylum seekers were taken care of in the embassy the Court was

> 'content to assume (without reaching a positive conclusion on the point) that while in the Consulate the applicants were sufficiently within the authority of the consular staff to be subject to the jurisdiction of the United Kingdom for the purpose of Article 1.'[81]

In the case *Mohammad Munaf v Romania* a dual Iraqi-US-American citizen the HRC had to determine

> 'whether, by allowing the author to leave the premises of the Romanian Embassy in Baghdad, it exercised jurisdiction over him in a way that exposed him to a real risk of becoming a victim of violations of his rights under articles 6, 7, 9, 10, paragraph 1 and 14 of the Covenant, which it could reasonably have anticipated.'[82]

The HRC starts by 'recall[ing] its jurisprudence that a State party may be responsible for extra-territorial violations of the Covenant, if it is a link in the causal chain that would make possible violations in another jurisdiction'. The Committee concludes that 'the risk of an extra-territorial violation must be a necessary and foreseeable consequence and must be judged

77 Svensén (n 3) 51.
78 See also Svensén (n 3) 49 ff.
79 See *The Queen on the Application of 'B' & ORS v Secretary of State for the Foreign & Commonwealth Office* [2004] EWCA Civ 1344; Ogg (n 4) 99.
80 Ogg (n 4) 63.
81 Ibid 66.
82 *Mohammad Munaf v Romania*, CCPR/C/96/D/1539/2006, para 14.2.

on the knowledge the State party had at the time: in this case at the time of the author's departure from the Embassy'.[83]

Looking at recent cases and developments Ogg concludes that 'an obligation to grant protection will exist if:

> 'there is a real risk that a person … will be subject to torture or cruel, inhuman, or degrading treatment; – the embassy or consulate exercises jurisdiction over the asylum-seeker; and – the asylum-seeker would, as a direct consequence of being expelled from the embassy or consulate premises or being handed over to the agents of the receiving State, be exposed to torture or cruel, inhuman or degrading treatment.'[84]

There are similar cases by the ECtHR, such *W M v Denmark* where the Commission stated that

> 'authorised agents of a State, including diplomatic or consular agents, bring other persons or property within the jurisdiction of that State to the extent that they exercise authority over such persons or property. In so far as they affect such persons or property by their acts or omissions, the responsibility of the State is engaged'.[85]

These cases show that there is an increasing tendency to expand the scope of state jurisdiction regarding embassies, which can trigger human rights obligations. They all entail a concrete physical element; hence it is hard to conceive how simply filing an application from outside might be sufficient. Furthermore, the underlying rationale of all decisions seems to be that the state in one way or another bears a specific responsibility for the person. The question is whether jurisdiction is triggered by the mere fact that a refugee enters a foreign embassy or whether it requires further aggravating circumstances. It appears that de facto jurisdiction requires some special form of protection promised or provided which can then not be removed any more. It may result from permission to enter the premises of an embassy and a corresponding engagement to provide a certain level of protection.[86] The case law is not very clear in this regard. *De iure* jurisdiction might be established by the simple fact that embassies enjoy a certain status under the international law of diplomacy which confers certain rights onto the sending state. However, that jurisdiction mainly relates to the

83 Ibid.
84 Ogg (n 4) 112.
85 See *W.M. v Denmark* App No 17392/90 (Commission Decision 14 October 1992).
86 Ibid.

state´s citizens. To what extent the state provides assistance to foreigners is essentially dealt with by domestic law. The *X and X v Belgium*[87] raises this question of jurisdiction. At the same time it is different in such a way that Art 51 of the Charter of Fundamental Rights specifically states that this instrument is only applicable to the Member States 'when they are implementing Union law'. This is less a question of jurisdiction of a state than of the CJEU which depends on the applicability of EU law. Or to put it in another way: It is a question of EU jurisdiction which then incurs Member States obligations through Art 51 of the Charter. The reasoning of the CJEU according to which an application for a short term visa in order to enter the country and file an asylum application is beyond the scope of EU law and therefore of the Charter of Fundamental Rights and its jurisdiction is less than convincing, as it threatens to compartmentalize jurisdiction by distinguishing between aims that fall within and outside of it.[88]

In spite of the difficulty to find a common denominator within the case law, it appears that with regard to visa applications or jurisdiction it might suffice that such an application is processed by the embassy or consulate.[89] Engagement with an asylum seeker in an embassy or the existence of national visa codes that grant a certain right to apply, on the premises of the embassy, for entry and protection in the state, can trigger extraterritorial jurisdiction. Jurisdiction is hence essentially established through domestic legal rules (or in the *X and X* case: EU rules, in particular the Visa Code). This is aptly shown by the fact that states usually restrict applications of asylum-seekers to those that have reached their territory, which may help to control immigration but probably indirectly contributes to the devastating flight of millions of people. Hence, restrictive rules on admissible claims in embassies may exclude a human rights obligation to process an application for asylum. There seems to be no established rule of international law stating that jurisdiction is simply triggered by the filing of an application in an embassy. However, once *de iure* or *de facto* jurisdiction can be ascertained, human rights may dictate that the state processes an application for asylum and allows a foreigner to enter the country in order to file such an application. Furthermore, the principle of non-refoulement will have to be safeguarded.

87 *X and X v Belgium* (n 12).

88 For a critical account of the judgment see for instance Zoeteweij-Turhan and Progin-Theuerkauf (n 22) 72.

89 See Svensén (n 3) 53.

More recent developments indicate that there is a tendency to expand the scope of extraterritorial jurisdiction. Probably the best example of that is the ECHR decision in the *Hirsi case*[90] where the Court accepted both *de facto* and *de iure* jurisdiction of Italy. While it emphasized that extraterritorial jurisdiction remains the exception (para 72) it established that the ship was under exclusive Italian jurisdiction (and therefore control) and that the refugees were de facto treated by Italian military staff.[91] Several views by human rights committees and court decisions seem to point in the direction that embassies might increasingly be viewed in a similar light[92], even though one difference is that they are established on another state´s territory. With regard to the latter, probably the strongest pledge can be found by Judge Pinto de Albuquerque who, in his concurring opinion in the *Hirsi case*, emphasizes that whilst there is no duty of providing diplomatic asylum, international human rights law may demand that, under certain circumstances of extreme danger, asylum seekers be granted visa to enter the territory.[93]

> 'For instance, if a person in danger of being tortured in his or her country asks for asylum in an embassy of a State bound by the European Convention on Human Rights, a visa to enter the territory of that State has to be granted, in order to allow the launching of a proper asylum procedure in the receiving State.'[94]

It should be interesting to observe the further dynamic development of case law. In that vein, a major focus is currently placed on the case of *Nahhas and Hadri v Belgium*[95] which is pending before the ECtHR and picks up many of the issues that were pertinent in the *X and X v Belgium* case.[96] Several NGOs have referred to the Court´s case law and argued that "[w]hilst there is no right for a non-national to enter or remain in a State, immigration applications made by individuals outside a Contracting State's territory have been found to trigger the jurisdiction of the relevant Contracting State".[97] However, the authorities inferred are not compelling and so far do not appear to warrant the conclusion that full jurisdiction is

90 ECtHR *Hirsi Jamaa and Others v Italy* 2016 App no 27765/09.
91 Idem, 81.
92 Svensén (n 3) 49.
93 *Hirsi Jamaa and Others v Italy* (n 90) 70.
94 Idem.
95 *Nahhas and Hadri v Belgium* (n 45).
96 *X and X v Belgium* (n 12); see also D Schmalz (n 40).
97 *Nahhas and Hadri v Belgium* (n 45) p. 1.

engaged by merely operating an embassy that allows for the filing of visa applications or by the rejection of such applications. It may be, however, that the ECtHR will use the opportunity of this case to expand the scope of the Convention, in particular with regard to the prohibition of inhuman or degrading treatment (Art 3 ECHR) where positive obligations appear particularly strong. This would have major legal and political consequences.

Even where jurisdiction is established, the level of human rights protection is, however, limited. State duties are essentially circumscribed by the principle of non-refoulement expressed in Art 33 of the 1951 Geneva Convention. This entails that

'[n]o 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'.[98]

Art 14 para 1 of the UDHR states that 'Everyone has the right to seek and enjoy in other countries asylum from persecution'. Whilst that norm never became binding and anyway does not stipulate a state obligation to grant asylum[99], human rights treaties provide duties of protection that have added further substance to the non-refoulement principle.

This principle, which is hence supported and enhanced by international human rights law,[100] is clearly applicable in the case of territorial jurisdiction, ie where an applicant has entered another state´s territory. The notion of sending someone back appears to suggest a relation to territory. However, the case law mentioned above seems to indicate that non-refoulement may also concern cases of extraterritorial jurisdiction.[101] The ECtHR concedes that refoulement (or in this case expulsion) is, like jurisdiction, 'principally territorial'; however it adds that,

> '[w]here as in the instant case, the Court has found that a Contracting State has, exceptionally, exercised its jurisdiction outside its national territory, it does not see any obstacle to accepting that the exercise of

98 See P Weis, The Refugee Convention 1951: The Traveaux Preparatoires Analysed With A Commentary <www.unhcr.org/4ca34be29.pdf> accessed 31 July 2019.

99 T Gammeltoft-Hansen 'The Right to Seek – Revisited. On the UN Human Rights Declaration Article 14 and Access to Asylum Procedures in the EU' *European Journal of Migration Law* (2008), 446; Ogg (n 4) 84.

100 See Svensén (n 3) 19.

101 See furthermore Svensén, who speaks about the 'expansion of the extraterritorial scope of the principle of *non-refoulement*' (n 3) 62.

> extraterritorial jurisdiction by that State took the form of collective expulsion'.[102]

One factor that may influence the assessment of a case is whether asylum is sought in an embassy that is situated in the country where the persecution occurs or elsewhere.[103] In the former case the problem is whether this scenario lies within the rationale of the Geneva Convention. In the latter case, where the applicant has already managed to leave the country where he or she was under threat of persecution[104], it may be less likely that the lack of help in the embassy will directly lead to severe suffering, since the responsibility of the embassy´s host state will normally have been engaged anyway. Whether that responsibility is in each case effectively discharged is, of course, another question.

The bottom line is that, with some and probably increasing limitations, states can still largely control to what extent operation of their embassies entails subjecting them to the observation of human rights guarantees *vis-à-vis* their foreign visitors. As the X and X case shows, extraterritorial obligations are often triggered where states have accidentally not limited their jurisdiction sufficiently, which is quite unsatisfactory when considering the human distress and suffering that embassies are witnessing. Obviously, the state of origin has human rights obligations as well, and if it lives up to them such disruptive effects do not occur. Failure to do so cannot place all the burden on other states. Extraterritorial human rights obligations may easily overburden states. One should not infer them light-heartedly from existing guarantees which states have largely limited to their own territory. Nevertheless, the resulting double-standard is frustrating. Hence, a stepwise widening of the effective control doctrine by either interpreting it widely or by replacing it with notions such as influence (as stipulated under the Maastricht Principles) might be appropriate. That means that where a state has an influence on the human rights situation on a foreign territory, and be it only by operating an embassy that can provide some relief, it may under certain circumstances be under an obligation to act accordingly.

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102 *Hirsi Jamaa and Others v Italy* (n 90) 70. See on this matter further the detailed analysis by Ogg (n 4) 106 ff.

103 For this see for example Svensén (n 3) 62 ff.

104 *X and X v Belgium* (n 12) para 20.

2.4 *Inside Jurisdiction and/or Territory, but Outside Full Human Rights Protection*

To the extent that human rights provide an extraterritorial right to file an application for protection in embassies or to enter the territory for that purpose and to not be subjected to treatment that is contrary to the non-refoulement principle, the level of protection appears to be quite the same as under territorial jurisdiction. This seemingly happy conclusion is, of course, subject to a number of major constraints: First, embassies are the rare exception of how states can be addressed outside their territory. Second, their rules will often exclude the filing of asylum applications so that no *de iure* jurisdiction is established. Cases where applications for short term visa are admissible (which might serve to enter the country in order to then apply for asylum) are (as the *X and X v Belgium* case shows) on the borderline and will probably still generate much dispute – they are certainly no reliable basis. In a way one might even be inclined to argue that states use the law as a shield against having to apply human rights standards.

Finally, even where asylum or some other status of (subsidiary) protection is granted, this does not give individuals any guarantee to be protected in the same way that citizens or other inhabitants with a permanent right of residence are. Even if a person enters a country physically or otherwise manages to be subjected to its jurisdiction this does not mean that they are admitted to a 'paradise of human rights protection', because the level of protection is largely dependent on their right to reside in that country. The strongest guarantee of that right of residence is usually citizenship, followed by a multitude of other categories of status that can provide similar or slightly less protection.[105]

As long as refugees do not obtain such a status, their enjoyment of rights may be of a temporary nature only, ending upon lawful termination of their residence, subject to the non-refoulement requirement. The limitations that human rights place on sovereignty do not curtail the sovereign right of nations to decide about whom they should apply to that follows from conferral of rights of residence. As long as individuals do not enjoy an entrenched position as citizens, states can essentially decide to strip them of their human rights protection (again within the limits of the non-refoulement principle) by terminating their residence. This shows the discrepancy between claims for universality and actual limits of access which

105 See for instance G Goodwin-Gill (n 7) 51ff.

make human rights, in some way, a privilege. The inherent limitations of fundamental rights protection certainly help to protect state sovereignty which includes its right to protect the borders and decide who will enter the territory. Even in a globalized world where borders have in many regards been increasingly put in perspective, this right continues to provide an important function. Nevertheless, this sharp dividing line is very unsatisfactory when looking at the idea of human rights *per se*, even though it seems very unrealistic to solve all problems of human suffering through an expansion of human rights law.

The legal reasoning behind restricting the scope of human rights application is to assume an inherent limitation of state responsibility for actions by other states, even where one´s own action or omission is likely to expose the person to situations that by themselves constitute human rights violations. Obviously, it might be an immense overburdening to place a demand on each state to guarantee perfect enjoyment of human rights worldwide to the maximum extent of what domestic resources can afford. It might endanger social cohesion and lead to the opposite, namely an increasing opposition to human rights claims. One should also keep in mind that human rights "are not the cure to all ills", and that there are other means of legal protection such as international humanitarian and criminal law.[106]

That being said, the current doctrines that limit the applicability of human rights rather strictly to domestic situation do not fully live up to the notion of universal protection which the Bill of Rights and its underlying ideas are supposed to afford.

Conclusion and Outlook

There is, *de lege lata*, still no general human rights duty to provide for humanitarian admission through visas, as states, according to their sovereignty, may essentially still limit the extraterritorial scope of their human rights. In addition, even after arrival in a foreign country, there is no guarantee that a person enjoys the same human rights protection as nationals or accepted permanent residents. The human rights idea may ultimately suffer a damage or even make a mockery of itself if it does not offer procedures/mechanisms that allow a broader and more reliable access to enter the human rights regime. Exposure to high physical risks is no appropriate

106 Besson (n 44) 884.

limitation of the number of applications that may validly reach a country. This shows that a coordinated international effort is necessary *de lege ferenda* to expand the human rights regime. In light of persisting controversies, e.g. on the Global Compact, such a consensus appears rather unlikely at the moment. If we overstretch the human rights claim we may dilute the existing level of protection and frustrate the effort of states. Still, if no further steps are taken by the states to allow people to enter the human rights regime, the result may be that people will have to risk their life to enter a country. For people who are somehow unable to do so this would just be 'bad luck'. It appears very doubtful that such a rather cynical approach might be a solution. From the perspective of universal human rights law the claim for humanitarian visas in the *X and X v Belgium* case is a paradigmatic example of the rupture that is created by double standards. In that sense human rights might almost be criticized as becoming, to some extent, another way of richer nations to protect their welfare, with attempts to strengthen true universalism of the human rights claim being refuted where they appear. The divergence between the opinion of the Advocate General and the Court in the X and X and the long list of observations by Member States[107] might serve to illustrate this at least to some extent.

Since states have been cautious to limit their international human rights obligations *de lege lata*, the regime on the protection of migrants urgently requires reform. Whilst international practice as shown in decisions by human rights courts and committees has increasingly alleviated some of the pressure by a rather wide or even expansive reading of pertinent provisions, their wording and underlying state consensus poses certain limits to that endeavor. As much as one might wish to expand this scope further, one cannot replace the lack of state consensus by an increasingly expansive construction of treaty provisions. There may well be, as Den Heijer puts it, an 'emerging consensus among international courts and supervisory bodies that human rights constitute a paramount code of conduct for all state activity'[108]. However, the case law to some extent evokes the impression that it does not build upon a coherent doctrine but rather attempts to rem-

107 See *X and X v Belgium* (n 12), observations were issued by the Governments of Austria, the Czech Republic, Belgium, Denmark, Estonia, Finland, France, Germany, Hungary, Malta, the Netherlands, Poland, Slovakia and Slovenia and the European Commission.

108 Den Heijer (n 3) 62.

edy very specific situations of injustice.[109] Where the situation is somehow grave enough courts and committees appear to lean towards triggering the non-refoulement obligation. This is, indeed, a very human behavior that deserves respect, and it certainly appeals to the human rights idea as such. But it may also express a certain helplessness resulting from the fact that the law is so far away from effectively protecting human rights in situations of terrible distress. This puts judicial and quasi-judicial bodies in a situation where on the one hand they may want to provide relief, but on the other hand must not stretch the existing provisions too much in order to maintain credibility und to respect the limits of the (existing) law.

Therefore, one needs to think further in the direction of changes *de lege ferenda*, ie to generate a new and stronger consensus in the first place. The Global Compact and the New York Declaration are very important stipulations of that request. The Compact emphasizes human rights in many of its sections, e.g. in para 15 (f):

> 'The Global Compact is based on international human rights law and upholds the principles of non-regression and non-discrimination. By implementing the Global Compact, we ensure effective respect for and protection and fulfilment of the human rights of all migrants, regardless of their migration status, across all stage of the migration cycle.' [110]

This is preceded by various sections in the New York Declaration.[111] One may hope that, in spite of all the criticism that have accompanied them, these documents may pave the way for future regulation which comes to

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109 As Den Heijer (n 3) 60 points out: 'Discussions on the extraterritorial application of human rights have been burdened with a substantial amount of conceptual confusion, in particular in respect of the relationship between the meaning and functions of the notions of territory, jurisdiction and sovereignty within the body of human rights law.'.

110 Global Compact for Safe, Orderly and Regular Migration, UN A/Res/73/195.

111 New York Declaration for Refugees and Migrants, UN A/Res/71/1, e.g. para 26, which reads: 'We will continue to protect the human rights and fundamental freedoms of all persons, in transit and after arrival…' or para 41: 'We are committed to protecting the safety, dignity and human rights and fundamental freedoms of all migrants, regardless of their migratory status, at all times'. Similarly in para 42: 'We commit to safeguarding the rights of, protecting the interests of, and assisting our migrant communities abroad, including through consular protection, assistance and cooperation in accordance with relevant international law.' But this also includes 'that each State has the sovereign right to determine whom to admit to its territory, subject to that State´s international obligations'. (para 42); 'consider facilitating opportunities for safe, orderly and regular migration…' (para 57); 'We reaffirm that international refugee law, international hu-

grips with the specific vulnerability of migrants resulting from their being on the move and often falling between regulatory frameworks.

man rights law and international humanitarian law provide the legal framework to strengthen the protection of refugees.' (para 66).