Chapter 2:
Humanitarian Admission and the Charter of Fundamental Rights

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Contents

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Introduction

The examination of humanitarian admission from the perspective of EU law and policy brings to the fore a number of issues underpinning the EU's migration and asylum system. This chapter will examine three dimensions of this regime: the character of the EU visa regime and asylum framework and the challenges to which it gives rise for third-country nationals who wish to travel safely and legally, to seek asylum; the possibility for those individuals, often in dire need of protection, to rely on EU fundamental rights and international human rights; and the significance attached to the sovereignty-sensitive character of allowing access to Member State territory.[2]

This chapter will examine these issues in light of the European Court of Justice (ECJ) case of *X and X*[3] and the EU legal framework that underpins and shapes the discourse on the issuance of visas on a humanitarian basis by the authorities of EU Member States. It proceeds in the following four steps. Firstly, the facts of the *X and X* case are briefly set out, in light of the contours of the EU *acquis* on the application and issuance of visas. This brief outline will facilitate the second step, in which the understanding of the concept of the humanitarian visa as a Protected Entry Procedure is set out. Thereafter, the divergent reasoning of the Advocate General (AG) and Court in *X and X* will be examined, and the protections afforded to individuals seeking asylum under the EU legal framework and its interrelation with international law, assessed in this light.[4] Fourthly, the focus shifts to the scope and application of the fundamental rights dimension of EU legal protections, namely the Charter of Fundamental Rights (hereinafter CFR),[5] in the context of applications for humanitarian visas. Finally, legal and political (that is to say, with some general comments as to which insti-

2 See L Ypi, 'Borders of Class: Migration and Citizenship in the Capitalist State' (2018) 32 *Ethics and International Affairs* 141, 144, and highlighting the class dimensions of migration, which are often obscured in discourses on immigration.

3 Case C-638/16 PPU *X and X* EU:C:2017:173.

4 A key issue appears to be one of fragmentation in protections afforded to individuals in light of the objectives of different legal regimes; this characteristic will not be discussed further here however.

5 The CFR codifies fundamental rights protected in the EU in a single document. While proclaimed in 2000, the CFR was attributed the status of primary law in Art 6(1) Treaty on the EU (Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (European Union [EU]) [2007] OJ C306/1).

tution should be responsible for such decision-making) conclusions are drawn from the analysis undertaken in light of the reforms in EU law.

Between a Rock and a Hard Place: The Plight of the Syrian Family and the Externalisation of Border Control by the EU

This section sets out the limitations of the framework for making claims for asylum, the fundamental characteristics of the EU visa regime, and the problems these regimes pose in respect of the circumstances of the Syrian family in the case of *X and X*.

The EU Treaties set out that the Union policy on asylum and migration should be governed by the principles of solidarity and fair sharing of responsibility between the Member States in Art 80 TFEU; moreover, as regards the absence of internal border controls, Art 67(2) TFEU provides that the EU should 'frame a common policy on asylum, immigration and border control, based on solidarity between Member States which is fair towards third-country nationals'. The adherence to these principles as well as the notion that the Union should aim to facilitate managed migration as well as provide, where relevant, for safe, legal and controlled migration (both for people in need of protection and to deal with labour market needs)[6], and ensure respect for the right to claim asylum, have increasingly been called into question.[7] These issues have come to the fore in the last decade as increasing numbers of individuals fleeing conflict zones in Africa, Asia and the Middle East, have sought to reach EU Member State territory in order to make claims for asylum. In the absence of finding a safe and legal way to do so, they have turned to irregular means of migration including smuggling, resulting in devastating losses of life at sea. The following section will briefly set out the rules of the EU's Common European Asylum System (CEAS) and its visa regime in order to identify some of the problems faced by third country nationals seeking to make claims for asylum in a Member State of the EU.[8]

Before examining these issues further, it should be noted that the EU, and its Member States, have made considerable efforts in recent years to ex-

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6 European Parliament, 'Briefing - Legal Migration to the EU' PE 635.559 (Brussels, 2019).

7 See for example, E Guild, C Costello, M Garlick and V Moreno-Lax, 'Enhancing the CEAS and Alternatives to Dublin' Study for the LIBE-Committee of the European Parliament (Brussels, 2015).

8 It should be noted that this analysis is by no means exhaustive.

ternalise[9] its border controls. Indeed, the case of *X and X* illustrates the relationship between this externalisation and the application of EU law, and especially fundamental rights protections. This externalisation derives *inter alia* from national and EU policies that have an impact outside the borders of territorial Europe and the extension of the EU's 'external' borders far beyond its Member States' territories.[10] The overarching aim of these policies seems to be to ensure that third-country nationals do not leave those third countries through irregular means or, if they do, that they are returned. Notwithstanding that the EU is engaged in active externalisation in this field, the judgment in *X and X* unfortunately ensures that these law and policy actions are kept outside the scope of Union law, with the consequence that third-country nationals cannot access either the EU or the ECJ's jurisdiction.

The Common European Asylum System (CEAS)

The right to asylum was recognised in the 1951 Geneva Convention Relating to the Status of Refugees[11] and is now also established in Art 18 CFR. In the Treaty of Amsterdam,[12] the Member States transferred competences to the EU (then European Community) in the field of asylum, providing foundations basis for the development of rules on asylum from its international law basis to the EU *acquis*. Established initially in 1999, the CEAS has been under an almost constant process of reform. Increasingly, in light of the humanitarian crises surrounding asylum claims made in EU Member States, it has been subject to criticism from a number of perspectives. This chapter does not provide for detailed information on the functioning of the CEAS but rather aims to set out how it operates in line with the EU rules on visas in light of the *X and X* case.

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9 As well as to privatise and securitise its policy and law; see T Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2017) 31 *Journal of Refugee Studies* 216.

10 Including for example, requirements that airlines check visas and travel documentation (and consequent sanctions), requirements on third countries to take back individuals who have attempted to immigrate to Europe, patrols outside of the territorial seas of EU Member States and indeed in third country territorial waters.

11 Convention relating to the Status of Refugees (United Nations [UN]) 189 UNTS 137, UN Reg No I-2545, [1954] ATS 5, Cmnd 9171.

12 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Related Acts, OJ 1997 C 340.

The CEAS is made up of a number of pieces of EU legislation.[13] Given that the EU (Schengen area) is a space within which individuals who are on its territory can freely move across open borders, it has long been considered that there is a need for common EU rules to govern it and to ensure the existence of a strong external border. Each piece of legislation thus aims to provide for common rules, harmonising common minimum standards for the making and granting of asylum. The CEAS has the objectives to ensure that asylum seekers are treated fairly, that there is equality of outcome regardless of where the application is made, and that the responsibility for asylum applications is shared between Member States. The EU thus aims to be an area of protection for individuals seeking asylum. Whether these objectives are satisfied has long been called into question. Nevertheless, the CEAS is largely envisaged as providing a framework for the governance and cooperation of interstate relations, and not necessarily for individual protection. The component part most relevant to the issues explored in this chapter is the Dublin III Regulation, the most recent version of which came into force in 2013.[14] The Dublin III Regulation establishes the criteria by which Member States should be allocated the responsibility for the processing of claims for asylum, aims to ensure that problems potentially arising in national asylum systems from migration crises can be managed[15], and aims to ensure the protection of asylum seekers in this process.

The Member State on whose territory an asylum claim is made may not necessarily be responsible for the handling of that claim however. As such, in the first place it is necessary that every Member State is able to assess and

13 Including, amongst others: the revised Asylum Procedures Directive 2013/32/EU; the revised Reception Conditions Directive 2013/33/EU; the revised Qualifications Directive 2011/95/EU; the revised EURODAC Regulation (EU) No 603/2013 and the revised Dublin Regulation (EU) No 604/2013 (Dublin III or Dublin regime).

14 The Dublin III Regulation has been subject to ongoing discussions since its adoption (http://www.europarl.europa.eu/legislative-train/theme-towards-a-new-policy-on-migration/file-jd-revision-of-the-dublin-regulation/12-2016); see also the proposal of 4 May 2016 of the European Commission for a revised Regulation COM(2016) 270 final (https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/proposal-implementation-package/docs/20160504/dublin_reform_proposal_en.pdf).

15 To prevent, per recital 22 Dublin III, 'a deterioration in, or the collapse of, asylum systems'. The Dublin III Regulation includes an early warning, preparedness and crisis management system to ensure that problems in national systems can be identified and dealt with, and that Member States dealing with a high number of applications can be provided with assistance.

determine whether it is responsible for the examination of a claim.[16] The Dublin regime is based on the principle that only one State is responsible for examining an asylum claim, and that the responsible State is under an obligation to ensure effective access for individuals to its asylum procedure. As such, it intends to facilitate the operation of an efficient system for dealing with asylum claims, the speedy determination of which dictates that a single and clearly identifiable Member State is responsible for the quick resolution of those applications.[17] It provides that Member States can make transfer decisions by which individuals can be transferred to the Member State that is responsible for processing his or her claim for asylum.

Fundamentally for this chapter, Art 3(1) Dublin III sets out that applications for asylum must be made either at the border of, or on the territory of a Member State by the individual seeking asylum. Per Arts 3 of the Asylum Procedures Directive, governing applications for international protection, the directive applies only to requests made on the territory, at the border, in the territorial waters or in the transit zones of the Member States; it does not apply to requests made at their representations and Member States are not obliged to allow such applications.[18] Under the Dublin regime, third-country nationals, who wish to make a claim for asylum in an EU Member State, cannot do so on the territory of their state of origin, or another third State.[19] Chapter III of the Regulation sets out a hierachical set of criteria for determining which single Member State is responsible, from family members, to recent residence permit or visa possession, to the entry into the Member State of the EU. Asylum seekers should apply for asylum in the first country they enter, i.e. cross the EU's external

16 Member States are entitled and free to examine any asylum claim made on their territory, even if that Member State would not be the one to which the claim would be allocated under the Dublin III Regulation.

17 The Dublin regime sets out the criteria (in hierarchical order) for establishing and allocating responsibility to Member States. The general rule is that asylum seekers should apply for asylum in the first country they enter unless they have family elsewhere or another country has issued a residence permit or a visa. Currently, the criterion most applied is that of illegal entry or stay in a Member State – that is, of the country of first entry into EU territory.

18 Directive 2013/32 on common procedures for granting and withdrawing international protection. The scope Directive 2013/33/EU laying down standards for the reception of applicants for international protection, per Art 3, is similar.

19 Indeed, in line with Art 1(2) 1951 Refugee Convention, the term applies, amongst other criteria, to those persons who are outside of the country of their nationality.

border, unless they have family elsewhere or another Member State can be designated in light of the criteria set out at Chapter III. The rule in Art 3(2) is that, where no Member State can be identified as responsible on the basis of these criteria, the first Member State in which an application is made shall be responsible. Applicants can be transferred to the Member State that has been indicated to be primarily responsible.[20] The Dublin III Regulation may result in different Member States being faced with processing different numbers of asylum applications. In light of this, Relocation Decisions have been introduced to relocate asylum seekers; for example, in 2015, 160,000 asylum seekers were moved from Italy and Greece to other EU Member States.[21] According to Eurostat, in 2017 and 2018, the States with the highest number of first-time applicants were Germany, France, Greece, Spain, and Italy.[22]

Schengen and the EU Legal Framework on Visas

The Schengen area, established on the basis of the Schengen Agreement 1985,[23] covers the territory of 22 Member States, 4 associated States and over 4 million square km of European "territory". The Schengen area is one without internal borders,[24] meaning that those who can enter it (whether citizens or residents of EU Member States, or visitors to the EU)

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20 Unless, per Art 3(2)(2), 'there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment within the meaning of Article 4 of the Charter of Fundamental Rights'.

21 Council Decision (EU) 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece and Council Decision (EU) 2016/1754 of 29 September 2016 amending Decision (EU) 2015/1601 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.

22 See Eurostat, 'Main Countries of Destination'; available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=File:Number_of_(non-EU)_asylum_seekers_in_the_EU_and_EFTA_Member_States,_2017_and_2018_(thousands_of_first_time_applicants)_YB19.png.

23 Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at their Common Borders [2000] OJ L239/13.

24 Under Schengen, the Member States can introduce temporary border controls in the event of a threat to public policy or internal security. It must be exceptional and proportionate, limited in term and be limited to the very minimum required. The Commission can issue an opinion as to the choices of the Member States to

can travel freely therein. This freedom nevertheless depends on the type of visa issued and the restrictions attached to it; visas with a limited territorial validity, including for example, a humanitarian visa issued on the basis of Art 25 Visa Code, allows only for travel to the Member State that issued the visa. As a result, it has been deemed necessary that the external Schengen border is strong and that checks are made on travellers who enter and exit it.[25] These checks and controls are organised and coordinated by the EU's Frontex agency (the European Border and Coast Guard Agency) and the Member States.[26] According to the amended Regulation by which it was established,[27] the Agency should operate in line with 'respect for fundamental rights and international protection'.[28] For the most part, these controls take place at the border of the territory of the EU. However, increasingly they are being externalised. This control might be exercised by the Member States' authorities, or by Frontex together with the authorities of a third State. This externalisation can be identified in Frontex's operation on the territory of a third State, facilitated by Status Agreements; the

introduce such controls. The bases on which such controls can be introduced are set out in Arts 26 – 29 of the SBC). This was done, for example, by certain Member States in light of the humanitarian crisis related to immigration from a number of countries.

25 Art 8 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) sets out that checks should be undertaken on cross-border movement at the external Schengen borders.

26 FRONTEX aims to secure cooperation between Member States. It primarily coordinates operations to help Member States in managing flows of migration. These include operations coordinated by the Frontex Agency at sea are governed by Regulation 656/2014, which establishes rules on interception, rescue and disembarkation. EUROSUR (European Border Surveillance System) is a mechanism that helps Schengen countries to establish an operational and technical framework, to work against cross-border crime, to prevent unauthorized border crossings and to reduce the deaths of migrants at sea.

27 Regulation (EU) 2016/1624 of the European Parliament and of the Council of 14 September 2016 on the European Border and Coast Guard and amending Regulation (EU) 2016/399 of the European Parliament and of the Council and repealing Regulation (EC) No 863/2007 of the European Parliament and of the Council, Council Regulation (EC) No 2007/2004 and Council Decision 2005/267/EC, OJ L 251, 16.9.2016, p. 1.

28 Art 34 Regulation (EU) 2916/1624 refers to the 1951 Geneva Convention, as well as the CFR and 'relevant international law'; see further, O de Schutter, 'The Implementation of the Charter of Fundamental Rights in the EU Legal Framework' Study for the DG for Internal Policies, Committee on Constitutional Affairs, PE 571.397, 42-46.

first instance of such an exercise derives from the joint operation of Frontex and Albanian border guards on the Greek-Albanian border from May 2019.[29]

The Schengen Border Code[30] and a common visa policy, by which the EU structures its migration regime through its relations with third States, governs the crossing of Schengen's external border, transits through Schengen States and short-term stays in Schengen States. This framework provides for common rules to be applied in governing external border checks, entry requirements and duration of stays in the Schengen area and beyond;[31] it establishes which nationals need a visa and those who do not. The EU Visa Code[32] encompasses a list of those countries whose citizens require a visa to enter Schengen, and those for whom a visa can be waived, on the basis of visa waiver agreements between the EU and non-EU States.[33] Nevertheless, it also aims to ensure that persons with a legitimate interest in entering the EU will be able to access and enter EU territory. The EU Visa Code and the Schengen Border Code[34] establish harmonised conditions and procedures for the issuance of short-stay visas (of less than 90 days in a 180-day period).[35] Visas for long periods and the issuance of residence permits are governed by national rules and remain matters to be determined by the Member States.[36]

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29 Status Agreement between the European Union and the Republic of Albania on actions carried out by the European Border and Coast Guard Agency in the Republic of Albania 10290/18. See the press release of the European Commission, 'European Border and Coast Guard: Launch of First Ever Joint Operation Outside the EU'; available at: http://europa.eu/rapid/press-release_IP-19-2591_en.htm?utm_source=NEWS&utm_medium=email&utm_content=1st+section+2nd+story+eu&utm_campaign=HQ_EN_therefugeebrief_external_20190522.

30 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

31 The United Kingdom and Ireland have an opt out from EU visa rules and rather apply their own visa policies.

32 EU Visa Code Regulation (EC) 810/2009.

33 Negotiations are generally bilateral; and the EU aims at visa reciprocity with non-EU countries per Regulation 1289/2013.

34 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code).

35 A short stay for non-EU citizens is defined as a stay of 90 days within a 180-day period; this has been applicable since October 2013.

36 The EU has a legal competence to adopt legislation to regulate the issuance of long-term visas or permits (Art 79(2)(a) TFEU) but has not yet adopted legislation on this basis.

A Schengen Visa is a short-stay visa that allows for travel in and across the 26 Schengen States.[37] It can either be issued for transit through or an intended stay in a Schengen State or transit through a transit area of an airport. Applications for short-term visas have to be made in the embassy or the consulate of the country that the applicant intends to visit.[38] If applicants intend to visit more than one country, the application should be made in the embassy or consulate of their main destination, though visas are generally valid for the entire Schengen area. One exception is the limited territorial visa, of which the visa issued on a humanitarian basis (amongst others bases per Art 25(1) EU Visa Code), to which the chapter turns below, is one example. Without delving further into its operation, it is simply worth noting that the applications of the rules of the CEAS may function so as to generate streams of irregular travel into the EU. That is to say, the EU rules do not facilitate the regulated arrival of asylum seekers to EU territory and only apply once the individuals reach the territory of the EU Member States; rather, individuals seeking asylum usually enter into the territory of an EU Member State without the documentation required, i.e. in most cases without a visa, or using unauthorised points to cross from one State to another. The resulting difficulty is reflected in mixed flows of asylum seekers and irregular migrants.[39]

Protected Entry Procedures and Humanitarian Visas

The EU visa regime is a mobility scheme for short-stay visits.[40] It is not asylum seeker-specific. That is to say, EU law does not provide for a separate

37 The Visa Code as well as other pieces of legislation provides for certain conditions that must be satisfied for a visa to be issued.

38 The usual requirements for a visa are set out in the Schengen Borders Code and Art 19(4) of the EU Visa Code.

39 European Parliament, 'EU Legal Framework on Asylum and Irregular Migration 'On Arrival' – State of Play' PE 551.333 (Brussels 2015), 5.

40 It is worth noting that humanitarian visas exist in both EU and States, outside of the EU, including for example Brazil. L Lyra Jubilut, C Sombra Muiños de Andrade and A de Lima Madureira, 'Humanitarian Visas: Building on Brazil's Experience' (2016) 53 Forced Migration Review (https://www.fmreview.org/community-protection/jubilut-andrade-madureira#_edn1). The existence of humanitarian visas in certain EU Member States has been set out in UI Jensen, 'Humanitarian Visas: Option or Obligation?' (2014) Study for the LIBE Committee of the European Parliament, 41. He notes that such visas are issued on a discretionary basis by the national authorities.

procedure to allow refugees who seek to make a claim for asylum in one of its Member States, to travel to its territory legally and safely. Individuals who wish to travel to the EU in order to make a claim for asylum in an EU Member State have to apply for a visa under the grounds set out in the EU Visa Code for the type of visa potentially relevant to individuals of their status. The judgment in *X and X* brings to the fore the question of whether individuals seeking asylum will be able to apply for a visa to travel to the EU. The combination of the EU policy and law on visas, together with the Schengen system, and carrier sanctions requiring individuals travelling to the EU from third States show documentation to their transport operate, give rise to the problem of the 'foot in the door' to the EU.[41] Certain mechanisms are, or have been until the judgment in *X and X*, envisaged in EU law and policy to facilitate safe and legal access to the territory of the EU Member States. Known as Protected Entry Procedures, these aim '[…] from the platform of diplomatic representations, [to allow] a non-national to approach the potential host state outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final'.[42]

Protected Entry Procedures, including visas issued on humanitarian grounds, have a number of aims, one of which is the promotion of safe and legal avenues to access the territory of EU Member States.[43] One example of a Protected Entry Procedure is a visa issued on the basis of Art 25(1) EU Visa Code which provides that Member States can derogate from the usual requirements to be fulfilled for the issuance of such documents. Art 25(1) provides that a short-stay Schengen limited territorial validity (LTV) visa can be 'issued exceptionally…(a) when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations'.

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41 Moreover, data seems to indicate that the numbers of individuals arriving in the EU from third States by air transport and being denied entry has declined considerably in recent years. See T Spijkerboer, 'Bifurcation of People, Bifurcation of Law: Externalization of Migration Policy before the EU Court of Justice' (2017) 31 *Journal of Refugee Studies* 216, 13. As Spijkerboer notes, it is unclear that there has been a similar decrease in those trying to reach the EU territory irregularly.

42 G Noll *et al*, 'Study on the Feasibility of Processing Asylum Claims Outside the EU' (2002) The Danish Centre for Human Rights: Study for the European Commission, 3.

43 Fundamental Rights Agency, 'Legal Entry Channels to the EU for Persons in Need of International Protection: A Toolbox' (2015) Fundamental Rights Agency - Focus.

Art 25(1) EU Visa Code provides a basis upon which an LTV visa can be issued exceptionally where the concerned Member State considers it necessary – for the above-mentioned reasons – to do so, derogating from 'the principle that the entry conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled',[44] as well as the admissibility requirements for short-term access to the territory in Art 19 EU Visa Code[45]. These admissibility requirements are standards that asylum seekers may not be able to satisfy because they lack the required documents or the resources to obtain them. While Art 25(1) may provide a basis for the relaxation of those standards in certain, limited circumstances,[46] it cannot be said that its purpose is to provide a basis for the issuance of humanitarian visas to asylum seekers.[47] Indeed, as examined below, the Court in *X and X* found that this was not the case. It is worth noting that where a visa is issued on humanitarian grounds, an initial assessment of these grounds is conducted in the embassy or consulate of the Member State; this does not constitute or relate to the application for asylum. Indeed, a separate and distinct assessment is made for asylum; in line with Art 3(1) Dublin III, the asylum procedure can only be conducted in the country in which refuge is sought after the asylum seeker reaches that territory. What is unclear is the determination of the exact criteria of Art 25(1) EU Visa Code, that is, the basis on which an LTV visa might be issued, both as regards humanitarian considerations and the relevant international obligations. It was these questions that came before the ECJ in *X and X*; moreover, following *X and X,* one must now ask in which circumstances such a visa might be issues on humanitarian grounds.

While the EU Visa Code provides the basis in EU law for the issuance of a humanitarian visa, EU law and policy only covers a certain dimension of the access to EU Member State territory for third-state individuals. That is to say, there is a certain set of considerations that should be taken into account as regards the competence for establishing the requirements and conditions for short and long-term access to Member State territory, and moreover, it must be recalled that in all circumstances, the decisions are

44 Art 25(1)(a)(i) EU Visa Code.

45 Art 19(4) EU Visa Code.

46 The humanitarian visa procedures are different from resettlement or other forms of humanitarian admissions to the territory of EU Member States.

47 Although, as found in the report of UI Jensen, 'Humanitarian Visas: Option or Obligation?' (2014) Study for the LIBE Committee of the European Parliament, 43, a number of Member States do engage Art 25(1) Visa Code as a basis for issuing humanitarian visas to individuals in order to afford international protection.

made by the authorities of the Member State. The discourse surrounding obligations to issue short-term visas, including that of the *X and X* case, can be said to be a reflection of the need to balance sovereignty of nation states and the protection under EU and international law of the fundamental rights of refugees.

The Problem of the 'Foot in the Door' to the EU

Before examining further the circumstances of the Syrian family, and the challenges they, and other, in a similar position, face, the problem of the 'foot in the door' to the EU should be unpicked. The problems faced by individuals seeking asylum are manifold and are often exacerbated by EU law and policy. The application of the CEAS rules, which dictate that applications for asylum must be made at the border of or on the territory of an EU Member State, alongside the EU visa policy, may impede the access of individuals to procedures by which they can claim asylum in an EU Member State. By requiring that applications for asylum must be made at the border of or on the territory of an EU Member State, these rules generate risks of irregular migration where a visa is not available to individuals. The operation of these policies may clash with and undermine the fundamental rights of migrants,[48] including the right to claim asylum, protection against non-refoulement as well as access to effective judicial protection, and ultimately result in a loss of human life.

Given that Europe has long been a place in which people have sought refuge, individuals have – as a result of the absence of safe and legal avenues to reach Europe – taken to crossing the Balkans or the Mediterranean illegally. Not only does it mean that individuals have to take considerable risk to reach and enter the territory of EU Member States, it means that even those who have a good basis for an asylum application might not be able to reach the EU to make that claim if they cannot afford to pay a smuggler to get them to Europe or are in an unfit physical state to make such an arduous journey. This system also dictates that the Member States located in the Mediterranean or in the Balkans are the first states that these individuals encounter, with the result that they are obliged to be responsible for more asylum applications than any other Member State. It therefore should be noted that this problem of the 'foot in the door' not only contributes to irregular migration but it also gives rise to a dispropor-

48 Set out at Arts 4, 18, 19 as well as 47 CFR.

tionate number of applications being made in neighbouring third states to those in conflict as well as in those at which refugees might arrive by sea, including notably Greece and Italy.[49] The CEAS, and especially the Dublin regime, which are intended largely to govern the relations between States as regards the management of and exchange of information on applications for entry to the territory of EU Member States[50] and for asylum respectively, have been criticised largely as regards the burden that results on these particular States.

As a result, individuals who wish to claim asylum in an EU Member State are faced with two options. The first, unthinkable, but a forced reality for many: they try to reach the border or territory of a Member State themselves. The second, apparently more palatable but often still dangerous and difficult: they try to make use of mechanisms, established in EU law to facilitate safe and legal access to the territory of an EU Member State.

The Situation of the Syrian Family

Referred to the European Court of Justice for a preliminary ruling by the *Conseil du Contentieux des Étrangers* (the Belgian Council for Asylum and Migration, hereinafter Belgian Council) in December 2016, the case of *X and X*[51] concerned the obligations on the part of EU Member States to facilitate safe and legal access for third-State individuals to their territory in order to allow them to exercise a right to apply for asylum. In particular, and for the purposes of this chapter, it concerned the existence on the part of the Member States of an obligation to issue a visa on humanitarian

49 The external dimension of EU asylum law: V Moreno-Lax, Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law (Oxford, Oxford University Press, 2017), T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalisation of Migration Control* (Cambridge, Cambridge University Press, 2011); G Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (The Hague, Kluwer Law International, 2000).

50 The Visa Information System allows Schengen States to exchange information on visas, especially in relation to short-term visas. The Schengen Information System also aims to ensure that data on suspected criminals, as well as individuals who may not have the right to enter or stay in the EU, on missing persons and on lost or stolen property can be exchanged. The EU has developed IT systems to facilitate this. Another important dimension concerns the need to ensure the security of travel documents and avoid the possibility that they might be counterfeited.

51 Case C-638/16 PPU *X and X* EU:C:2017:173.

grounds to individuals (per Art 25(1) EU Visa Code), where the non-issuance of such a visa might otherwise result in the violation of their fundamental rights.

The case concerned an Orthodox Christian family from Aleppo, Syria, who had travelled at great risk to their safety to the Belgian embassy in Beirut, Lebanon, where they applied for a humanitarian visa that would allow them to reach the Belgian territory safely and legally. In support of their application, they provided evidence that in Aleppo they had been subject to abduction, beatings and torture, and remained at further risk of persecution on the basis of their religious beliefs. It was subsequently also impossible for them to apply for asylum or otherwise financially support a stay in Lebanon. When making the application for the visa at the Belgian embassy in Beirut, the family indicated that they intended to apply for asylum as soon as they reached Belgium in line with the CEAS. Their application for the visa, a short-term visa with a limited territorial scope on humanitarian grounds,[52] was rejected by the Belgian Immigration Office on the basis that the family did not meet its short-term criteria; rather, they intended to apply for asylum once they reached Belgium and thus stay there for the long term.[53]

Still in Aleppo and with the assistance of a Brussels-based human rights law firm,[54] the family challenged the decision of the Immigration Office before the Belgian Council for Asylum and Migration, which decided to make a preliminary reference to the ECJ, asking two questions.[55] Firstly, it asked whether the 'international obligations' referred to in Art 25(1) EU Visa Code, included the provisions of the CFR, the ECHR protections and the provisions of the Geneva Convention, creating *de facto* a right of entry for asylum seekers to the territory of a Member State. Secondly, it asked whether Art 25 EU Visa Code should be interpreted as obliging Member States to issue humanitarian visas where there is a risk of the infringement

52 Art 25(1) EU Visa Code envisages the possibility of issuing a short-stay Schengen limited territorial validity visa on humanitarian grounds, grounds of national interest, or because of international obligations.

53 The maximum number of days for which an applicant would be allowed to stay in a Member State on a humanitarian visa.

54 For a testimony from the lawyer in charge of the case, see the contribution of Wibault to this volume.

55 For an explanation, by the First President of the Belgian Council, of the domestic context surrounding that procedure, see the contribution of Bodart to this volume.

of the prohibition of torture, of the right to asylum, of non-refoulement and of any other international obligations.

The two questions referred to the ECJ by the Belgian Council concerned this access as well as the nature of the protections that shape it. Essentially, the family had argued that Arts 4 (prohibition of torture and inhuman or degrading treatment or punishment) and 18 (right to asylum) CFR encompass a positive obligation on Member States to issue short-term visas for humanitarian reasons under Art 25(1) EU Visa Code, so as to avoid that asylum seekers have to undertake considerable sufferance to even have access to procedures affording them international protection, and to avoid the potential violations of Art 3 ECHR and Art 19(2) CFR (prohibition of torture and principle of non-refoulement) that might arise were they to remain in a conflict zone. This argumentation gave rise to the questions referred by the Belgian Council, and in particular, that of whether Member States are obliged to facilitate access for individuals to the territory of the EU territory, in order for them to exercise their right to make a claim for asylum. With the Belgian Council considering that the applicants could rely on Art 3 ECHR only if they were within Belgian territory, the question arose as to whether the exercise of the visa policy could be understood as an exercise of jurisdiction. The facts of the *X and X* case illustrate the problem of the need for individuals to have a 'foot in the door' to the territory of an EU Member State. Access to asylum procedures, and to the legal protection that they offer, is limited to those who have managed to reach EU territory or its borders; as has been well documented, in order to reach this position, many thousands of individuals will travel irregularly, and embark on a perilous journey, subjecting themselves to trafficking and so on, in order to reach this position.

The ECJ's Interpretation of EU Law

This chapter focuses on the responses of the Advocate General and Court to these questions, examines the confrontation between the interpretation of EU law offered by both and evaluates the limits of the Court's judgment. In light of these limits, this section focuses on the second question referred, namely on the scope of the application of the EU legal framework, particularly as regards the existence of an obligation on Member States under EU law and EU fundamental rights law, to issue humanitarian visas. For the moment, it should be noted that the first question referred was left unanswered by both the AG and the Court. This question is one which has subsequently come before the European Court of Human

Rights (ECtHR) in the case of *MN and Others v Belgium*,[56] which has similar facts to the *X and X* case, and is to be heard in April 2019 before the Grand Chamber.[57] Indeed, the case is also an interesting one from an academic perspective as it offers two distinct interpretations of EU law from the AG and the Court, with each drawing opposite conclusions on the scope of EU law and the resultant obligations on the Member States. The second question concerns two key issues: the first relates to whether the determination of whether to issue such visas fell within the scope of EU law so as to trigger the CFR (for the Court, whether the EU's had a legislative competence to regulate access to EU territory via short-and long term visas) and the second to the scope of the discretion held by the Member States to decide whether or not to grant access to migrants to their territory. These two issues arise in light of the absence of a relevant uniform procedure and criteria at the EU and national levels in the determination of the circumstances in which humanitarian visas might be issued.

In his non-binding opinion, the soon-to-retire AG Mengozzi adopted a fundamental rights-based approach to his reasoning. The AG held that the issuance of humanitarian visas fell within the scope of the implementation of EU law, as it was envisaged by the EU Visa Code; moreover, he reasoned that the applicants would stay for no longer than 90 days in Belgium on the basis of that particular visa, as they would subsequently apply for asylum and be resident in Belgium on the basis of that asylum claim. For AG Mengozzi, the issuance of a visa under Art 25(1) EU Visa Code amounted to a decision to issue a document to allow for the crossing of the EU's external border, 'subject to a harmonised set out rules and…therefore in the framework of and pursuant to EU law'.[58] The discretion afforded to the Member States in deciding whether to issue a visa on such a basis did not change this finding.[59] As the EU Visa Code was relevant, the matter fell

56 *MN and Others v Belgium*, App. No. 3599/18.

57 Interestingly, in the case of MN, there was a conflict between the Belgian *Office des Étrangers* and the *Conseil du Contentieux des Étrangers*; when the applicants filed for an interim injunction in Belgium, asserting that the process of application for a humanitarian visa had not engaged their fundamental rights concerns, it was the Belgian Council that issued the injunction and requested that the *Office des Étrangers* consider further the possible application of Art 3 ECHR. The Belgian Cour d'Appel then overturned this decision. For an overview of the case, see D Schmalz, 'Will the ECtHR Shake up the European Asylum System?' *VerfBlog*, 2018/11/30, https://verfassungsblog.de/will-the-ecthr-shake-up-the-european-asylum-system/.

58 Case C-638/16 PPU *X and X* EU:C:2017:93, para 80.

59 ibid, paras 81-83.

within the scope of the implementation of Union law, thus triggering the application of the CFR per Art 51(1).[60] As a result, he found that where there is a substantial basis to believe that the refusal of a humanitarian visa would result in the infringement of the rights set out therein, the discretion of the Member States could be limited. The AG referred in particular to the potential risk of torture, and of inhuman or degrading treatment (either in the third State or via irregular travel to a country in which asylum might be sought), or the deprivation of the individual to a legal path to be able to exercise his or her right to apply for asylum. Were substantial grounds to exist for such a belief, the Member States would be obliged to issue a visa on a humanitarian basis to that applicant. The AG drew his conclusions to a close with a powerful and oft-quoted statement setting out the humanitarian crises of irregular migration, urging the Grand Chamber of the ECJ to adopt a fundamental rights reasoning, in order to oblige Member States to issue humanitarian visas to facilitate safe and legal access to the EU's territory.[61]

The judgment of the Court – sitting as the Grand Chamber – differed considerably from the Opinion of the AG. It considered that the Syrian family's application was not for a short-term visa, which would fall within the scope of EU competence, but rather for a long-term right to stay on Belgian territory. Visas issued on the basis of Art 25(1) EU Visa Code were considered by the ECJ only to concern visas issued to allow access to the territory of a particular Member States for a limited period of time, 'not exceeding 90 days in a 180 day-period'.[62] As such, it held that the application made by the Syrian family was not covered by the provisions of the EU Visa Code and was not a matter of harmonised EU law;[63] instead, the issuance of such a visa was deemed to be a matter of national law and a determination for the Member States. Fundamentally, as the Court considered that the matter was not one in which EU law was being implemented, it found no trigger for the application of the CFR in line with Art 51(1) CFR. With this reasoning, the Court shaped its judgment in two ways. On the one hand, it found that it had no competence to reply on the merits as there was no issue of EU law at stake. Moreover, the Court avoided a fundamental rights analysis of the case, by finding that the matter was not one by which the Member State was 'implementing Union law' in line with

60 ibid, paras 84 and 88.
61 ibid, para 175.
62 ibid, paras 43-45.
63 ibid, paras 43-45.

Art 51(1) CFR, and therefore found no trigger for the application of the CFR and the rights protection established therein. On the other hand, the Court found that the issuance or refusal to issue visas that might afford entry to a Member States for a period of more than 90 days, even though these visas might be offered on a humanitarian basis, was a matter of national, and not EU law.[64] As such, there could be no EU law obligation on the part of Member States to issue such visas even if the facts of the situation dictated that the individuals making the application might be at risk of the violation of their rights under the CFR. Instead, Member State authorities are free to decide, in line with national law and policy, whether to grant such a visa.

The judgment of the Grand Chamber has been criticised for various reasons[65]. By avoiding a fundamental rights interpretation, the Court instead framed the issue as one of the EU's limited legislative competences as regards long-term access to Member State territory. The Court adopted a strictly formal reasoning, starting from the notion that EU law has not envisaged the possibility for a humanitarian visa to be issued in order to enable an application for asylum to be made. That is to say, the Court highlighted that while the EU Visa Code is based on Art 77(2)(a)(b) TFEU[66] which provides a legislative ground for the issuance of travel documents allowing for a short-term stay, no EU legislation has been adopted on the basis of Art 79(2)(a) TFEU (which provides a legislative competence for harmonised EU rules on travel documents) allowing for a long-term stay on EU Member State territory. As such, the Court seemingly anticipated that were it to have extended Art 25(1) EU Visa Code so as to also encompass

64 ibid, para 51.

65 A number of blogposts and commentaries have been published in reaction to the judgment of the Court. See for example: E Brouwer, 'The European Court of Justice on Humanitarian Visas: Legal Integrity vs Political Opportunism?' CEPS Commentary, 16 March 2017; available at: https://www.ceps.eu/wp-content/uploads/2017/03/Visa%20Code%20CJEU%20E%20Brouwer%20CEPS%20Commentary_0.pdf; J-Y Carlier and L Leboeuf, 'The X and X Case: Humanitarian Visas and the Genuine Enjoyment of the Substance of the Rights, Towards a Middle Way?' EU Immigration and Asylum Law and Policy, 27 February 2017; available at: https://eumigrationlawblog.eu/the-x-and-x-case-humanitarian-visas-and-the-genuine-enjoyment-of-the-substance-of-rights-towards-a-middle-way/; V Moreno-Lax, 'Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X and X – Parts I and II' EU Immigration and Asylum Law and Policy, 16 and 21 February 2017; available at: http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/.

66 Formerly Art 62(2)(a) and (b) Treaty establishing the EC.

long-term residence, that this would have amounted to an instance of judicial activism that would have been unwelcome by the Member States and the EU institutions. Indeed, the issue is one which has been subject to political discussions in the European Commission, Council and Parliament, with each institution adopting a different approach, and one which was opposed by 13 Member States (and the European Commission) who made submissions to the ECJ in the *X and X* hearing.[67] Moreover, the Court reasoned that had it allowed the Syrian family long-term access via the EU Visa Code, it would have *de facto* obliged Member States to allow for applications for asylum to be made outside Member State territory; this, for the Court, would have created a conflict between the Dublin regime and the Visa Code, where the latter was not intended to harmonise the rules governing applications for international protection.[68]

This would potentially be done in two ways; on the one hand, this decision would allow individuals seeking asylum to decide on the particular Member State in which he or she wants to make a claim for asylum. Per the Dublin regime, this 'choice' might be said to be indirect, to the extent that the Member State at which the individual first arrives is normally responsible for dealing with that application, absent other considerations. The Court then highlighted that the Procedure Directive 2013/32 and the Dublin Regulation exclude explicitly the possibility that individuals can make claims for asylum at the embassies or consulates of Member States in third States. That is to say, the Court anticipated that such a decision would have engendered a harmonised rule arising from the EU Visa Code (which was not intended to harmonise such laws) to require Member States to allow third-State individuals to make claims for asylum in the representation of those Member States in third countries.[69] The Court used the Dublin regime and related legislative provisions to exclude the factual situation in *X and X* from the scope of EU law, notwithstanding that the preliminary reference did not concern the interpretation of this legislation.[70] The Court used the purpose of the visa application, and the time period that results from it, to take the application of the Syrian family outside of the scope of the EU Visa Code[71]. In so doing, it further isolated humanitarian visas from the EU's visa policy notwithstanding that the very

67 On these discussions, see the contribution of Relano Pastor to this volume.
68 Case C-638/16 PPU *X and X* EU:C:2017:173, para 48.
69 ibid, paras 47-49.
70 ibid, para 49.
71 Moreover, it did not delve into the notion that the EU Visa Code itself establishes rules as to when visas might be exceptionally issued or extended in certain cir-

need for such visas often might stem from the application of the rules in the Visa Code and Dublin regime, as discussed above. The case is undoubtedly a reflection of the political difficulties faced by the Court in not undermining existing legislative regimes and ensuring the protection of third-State individuals. Nevertheless, a failure to deal with the 'foot in the door' problem and the related risks of irregular migration can be identified on the part of the ECJ.

The Application of the EU Fundamental Rights Framework to Humanitarian Visas

The *X and X* judgment reflects the conflict that arises between one the one hand, the protection of the rights of third-State individuals and on the other, the EU Member State's preservation of its sovereignty, particularly where the Member State has a discretion to exercise. The doctrine of State sovereignty emerged at the end of the 19th and beginning of the 20th centuries, and has been used to justify the notion that States have a largely unlimited discretion to decide on who can enter their territory.[72] The responsibility of States for human rights protection is typically limited to the jurisdiction of that State. This means that human rights apply only territorially and not beyond the borders of that State; as a result, individuals of third States would not fall within the scope of the human rights responsibilities of EU Member States. As outlined above, the AG and the Court adopted different approaches in responding to these concerns, with the latter adopting a largely formalistic approach that allowed it to reject entirely the reasoning of the former.[73] While the notion of jurisdiction is primarily territorial, it may also extend beyond State borders. As regards the questions referred by the Belgian Council, the issue unanswered by the ECJ is whether the provisions of the ECHR or the CFR might apply outside of the territory of the Member States, and whether the State's implementation of visa policy might amount to an exercise of jurisdiction. Here, several cases of the ECtHR are relevant to determination of the extraterritorial obligations of States.[74]

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cumstances beyond the usual limitation of 90 days in a 180-day period per Art 25(1)(b) and 33.

72 See *Chae Chan Ping v United States* 130 US 581 (1889).

73 Case C-638/16 PPU *X and X* EU:C:2017:93, para 175.

74 Jurisdiction may also exist extraterritorially where a State exercises effective control over persons there. Relevant cases include *Hirsi Jamaa and Others v Italy* App.

The EU Treaties provide that certain values and protections, including those of human rights, should be placed at the heart of the EU's operation. Via Art 21(1) and 21(3) TEU[75] and Art 3(5) TEU,[76] the EU and its Member States have committed to promote its Art 2 TEU[77] values across all fields of international relations. Nevertheless, the application of these values and fundamental rights in practice to areas which have external consequences, including the EU's migration and asylum as well as visa regime, is unclear. The Treaties make no reference to how the EU should facilitate or attain these objectives.

Does the EU Visa Code attribute to EU Member States the possibility to give a humanitarian visa to those seeking asylum? Were the Member States obliged – under the CFR – to grant such visas where rights set out under the CFR might otherwise be undermined? For AG Mengozzi, both of these questions should be answered in the affirmative. The Court on the other hand interpreted the EU Visa Code narrowly (that is as excluding travel documents that might allow individuals to stay in a Member State in the long term), which led it to avoid answering both questions. By virtue of

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No. 27765/09, *Al-Skeini and Others v UK* App. No. 55721/07 and *Al Jedda v UK* App. No. 27021/08. In *Al Skeini* and *Al Jedda* the ECtHR set out the possibility that a State need not exercise control over a territory in order to be deemed to have exercised jurisdiction for Convention purposes; instead, the exercise of the authority of an agent of the State or of functional jurisdiction may be sufficient to establish jurisdiction. See also, S Besson, 'The Extraterritoriality of the European Convention on Human Rights: Why Human Rights Depend on Jurisdiction and What Jurisdiction Amounts To' (2012) 25 *Leiden J Int'l L* 857.

75 Art 21(1) TEU: 'The Union's action on the international scene shall be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.'.

76 Art 3(5) TEU: 'In its relations with the wider world, the Union shall uphold and promote its values and interests and contribute to the protection of its citizens. It shall contribute to peace, security, the sustainable development of the Earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and the protection of human rights, in particular the rights of the child, as well as to the strict observance and the development of international law, including respect for the principles of the United Nations Charter.'.

77 Art 2 TEU: 'The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.'.

this interpretation, the Court found that EU Visa Code did not attribute the possibility to the Member States to issue a humanitarian visa on the particular facts of the case; instead, this was a matter for national law. Relatedly as to the second question, the ECJ had the possibility in *X and X* to clarify the application of the CFR to its visa regime. It did not do so, rather avoiding the question by finding that the issuance of humanitarian visas did not fall within the scope of Union law. Indeed, by adopting a narrow interpretation of the EU Visa Code, the Court managed to also avoid the second question of the Belgian Council, concerning the extraterritorial application of the CFR and of relevant international obligations. Moreover, the ECJ then avoided the question as to whether the implementation of the visa policy might otherwise amount to an exercise of a State's jurisdiction, so as to engage the need to avoid violations of the ECHR, and relevant international obligations. The key question for both the AG and the Court was whether the matter was one that fell within the scope of EU law. The AG found that it did, by virtue of which he identified no need to examine the first question of the Belgian Council, while the Court reasoned on the basis of a limited EU legislative competence, finding that the matter was not one falling within the scope of Union law. These findings then determined whether the CFR could be triggered to allow for an EU fundamental rights reasoning.

As regards the existence of a territorial requirement, the CFR is silent. The relevant provision on the CFR's application – Art 51(1) CFR – refers to the notion that the 'provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law'. [78] The provision has been included in the CFR in

78 The ECJ has held that the application of EU fundamental rights protection is mainly concerned with ensuring that the level of that protection does not vary across the EU Member States to such an extent that the 'primacy, unity and effectiveness of EU law' is undermined. This is in line with Art 53 CFR, confirmed by the ECJ in *Melloni*. The ECJ provided "It is true that Article 53 of the Charter confirms that, where an EU legal act calls for national implementing measures, national authorities and courts remain free to apply national standards of protection of fundamental rights, provided that the level of protection provided for by the Charter, as interpreted by the Court, and the primacy, unity and effectiveness of EU law are not thereby compromised", Case C-399/11 *Melloni* EU:C:2013:107, para 60. This was further confirmed in Case C-617/10 *Åkerberg Fransson* EU:C:2013:280, para 29. This objective has arguably allowed the ECJ to construct a broad framework as regards the interpretation of what falls within the notion of implementing EU law.

line with Art 6(2) TEU which requires respect for fundamental rights on the part of the Union institutions, and the case law of the ECJ, which requires respect on the part of the Member States when they are acting in the scope of[79] or implementing Union law.[80]

The body of case law on this notion of 'implementing EU law' is expanding, much due to the difficulties in understanding this concept, and the nature of enforcement in the EU legal order.[81]The difficulties in establishing when a national measure amounts to a measure implementing EU law are well known; it is the gatekeeper of the provision of Art 51(1) and delineates the application of the CFR. The CFR in itself does not in itself form the basis for the jurisdiction of the ECJ nor does it extend the field of application of Union law; CFR rights are not self-standing (in comparison to the ECHR) but must be triggered by another provision of EU law.[82]

In *Åkerberg Fransson*, the ECJ held that the notion of implementing EU law should be understood as to coincide with measures that are 'governed by European Union law' and 'fall within the scope of European Union law'.[83] This could be satisfied where a legal concern or dispute is 'connected in part' to an EU law obligation so as to trigger the application of the CFR, where a 'direct link' exists between the CFR and national law.[84] As Ward has stated, '*Åkerberg Fransson* confirms that the Court will undertake

79 Case C-5/88 *Wachauf* EU:C:1989:321, paras 17-19 and Case C-260/89 *ERT* EU:C:1991:254, para 42.

80 Case C-292/97 *Karlsson and Others* EU:C:2000:202, para 37. Further on Art 51 CFR, see A Ward, 'Article 51 - Scope' in S Peers *et al* (eds), *The EU Charter of Fundamental Rights: A Commentary* (London, Hart, 2014), 1413-1454.

81 The implementation, application and enforcement of EU law is for the most part decentralised; that is to say, the Member States are attributed the key role in these tasks. It is necessary therefore that the Member States ensure that the implementation of EU law is made in compliance with the CFR. The basis of the EU fundamental rights regime is Art 6 TEU which sets out the duty of the EU to respect fundamental rights. This duty extends to the national level and measures taken by the Member States given this decentralised system of enforcement, creating an obligation on the Member States (complementary to their international and constitutional obligations).

82 As the President of the CJEU, Judge Lenaerts, has written, 'Metaphorically speaking, the Charter is the "shadow" of EU law. Just as an object defines the contours of its shadow, the scope of EU law determines that of the Charter'; K Lenaerts and JA Gutiérrez–Fons, 'The Place of the Charter in the EU Constitutional Edifice' in S Peers and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Oxford, Hart, 2014), 1567.

83 Case C-617/10 *Åkerberg Fransson* EU:C:2013:280, paras 17-21.

84 ibid, paras 24-26.

a subject matter analysis. If some part of the subject matter of the dispute concerns substantive laws of EU law, then the Charter will be applicable, subject to the discretion…in the hands of Member States to determine the fundamental rights dispute by reference to national fundamental rights law in mixed subject matter cases…'.[85] The Court in *Fransson* has been considered to have attributed a rather wide scope to the CFR's application,[86] considering that the subject matter of the matter need only b partially related or connected to Union law.[87] Nevertheless, the decision has also faced criticism, including from the Bundesverfassungsgericht[88].

The ECJ then held in *IBV*, that when Member States' decisions are made within a framework established by EU law, this would be sufficient for Art 51(1) CFR.[89] Subsequently, the scope was more narrowly conceived in *Siragusa*, in which the ECJ provided a set of criteria for the interpretation of Art 51(1) CFR, to determine whether national legislation or national measures encompass the implementation of EU law.[90] The ECJ established a test for when it can be said that there is an implementation of EU law via the application of national rules in those circumstances in which the pertinent national law does not give effect to EU law as such but nevertheless applies in a field related to that occupied by EU law. The Court established that: 'In order to determine whether national legislation involves the implementation of EU law for the purposes of Article 51 of the Charter, some of the points to be determined are whether that legislation is intended to implement a provision of EU law; the nature of that legislation and whether it pursues objectives other than those covered by EU law, even if it is capable of indirectly affecting EU law; and also whether there are specific rules of EU law on the matter or capable of affecting it'.[91] For the

85 A Ward, 'Article 51 - Scope' in S Peers *et al* (eds), *The EU Charter of Fundamental Rights: A Commentary* (London, Hart, 2014), 1413-1454, 1452.

86 There is general agreement on this in the commentary on the case, and related case law of the ECJ. See M Ovádek, 'The CJEU on Humanitarian Visa: Discovering 'Un-Chartered' Waters of EU Law' VerfBlog, 13 March 2017; available at: https://verfassungsblog.de/the-cjeu-on-humanitarian-visa-discovering-un-chartered-waters-of-eu-law/.

87 Case C-617/10 *Åkerberg Fransson* EU:C:2013:280, paras 17-31.

88 BVerfG, Judgment of the First Senate of 24 April 2013 - 1 BvR 1215/07, para 91; http://www.bverfg.de/e/rs20130424_1bvr121507en.html.

89 Case C-195/12 *IBV* EU:C:2013:598, para 49.

90 Case C-206/13 *Siragusa* EU:C:2014:126, confirmed by Case C-198/13 *Hernández* EU:C:2014:2055, para 37, in which the court highlights that the determination of what falls within the scope of EU law is a question of fact.

91 ibid, para 25.

Court, the CFR would be inapplicable where EU law in that relevant area 'did not impose any obligation on Member States with regard to the situation at issue in the main proceedings'.[92] The danger with this approach is that the purpose of EU fundamental rights law, and the provisions of the CFR in particular, are attributed with a predominant objective; that is, only to ensure the primacy, effectiveness and coherence of Union law and not for protection of individuals who are potentially affected when a Member State acts in the field of, or related to, EU law.

The existence of a margin of discretion for the Member States when implementing EU law generates a significant amount of uncertainty. The key question is whether the existence of this discretion in the implementation precludes a national matter from being deemed to fall within the scope of EU law. Previously this has not been the case. For example, in *NS and Others*, the ECJ has held that the notion of 'implementing EU law' not only encompasses situations where the Member States are implementing EU legislation via national law, ie adopting national law, but also extends to situations where the Member States is exercising a discretion that is found in EU law.[93] In *NS*, the ECJ held that Art 3(2) of Regulation 343/2003 attributed to the UK a discretion to accept (through the Secretary of State) the responsibility for examining an asylum application; the exercise of this discretionary power by the Member State 'forms part of the mechanism for determining the Member State responsible for an asylum application' and must be understood to amount to the implementing of Union law for Art 51(1) CFR purposes.[94] While the cases are of course different, one must simply ask whether they are so distinct so that it can be said that a similar discretion does not exist with regard to *X and X*, where as in *NS*, there was no obligation on the Member State to come to any particular finding. *NS* has been interpreted as meaning that 'the Court found that when deciding whether to exercise discretion, ie whether to process the asylum claim, the UK was still 'implementing' EU law'.[95] The scope of the discretion is unclear – that is whether it applies to the assessment of the humanitarian considerations, or potential violations of international obligations, or to the issuing of the LTV visa itself – but regardless, these two assessments are

92 ibid, para 26.
93 Joined Cases C-411/10 and C-493/10 *NS and Others* EU:C:2011:865, para 68.
94 ibid, para 68.
95 E Spaventa, 'The Interpretation of Article 51 of the EU Charter of Fundamental Rights: The Dilemma of Stricter or Broader Application of the Charter to National Measures', Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs (Brussels, 2016), 19.

interrelated.[96] It has been suggested that the discretion afforded to Member States under Art 25(1)(a) EU Visa Code 'forms part of the mechanisms' for determining when a visa available under that provision should be issued, so as to fall within the common European visa policy and thus within the scope of EU law.[97] Reference can also be made to the case of *El Hassani*.[98] The ECJ held that as the EU legislature left it to the Member States to decide on the nature and conditions of remedies available following a refusal of a visa in line with their national procedural autonomy, this is limited by the principle of effectiveness and equivalence.[99] Moreover, the ECJ considered that when a Member State adopts a decision refusing to issue a visa under Art 32(1) EU Visa Code, it is a matter falling within the scope of EU law. As such Art 47 CFR applies, so as to require that a decision of an administrative body following that refusal must be subject to a further judicial control; essentially, the CFR requires that the Member States ensure access to a court at one stage of the proceedings.[100] Moreover, the discretion cannot be unlimited; it is at least limited by the case law of the ECtHR.[101]

Before examining the jurisprudence of the Strasbourg Court, it is worth highlighting that the reference in Art 51 CFR is therefore not to its geographical but rather its functional scope. This has led commentators to suggest that it is attributed a wide application, with no territorial condition. For example, Moreno-Lax and Costello have argued that the CFR is triggered simply by virtue of the notion that EU law is being implement-

96 This was seemingly confirmed by the ECJ in Case C-84/12 *Koushkaki* EU:C:2013:862, paras 58-60 which found that the Member States have a wide discretion in the assessment of relevant facts, but could not refuse to issue a visa unless one of the grounds for refusal in the EU Visa Code existed.

97 S Morgades-Gil, 'Humanitarian Visas and EU Law: Do States Have Limits to Their Discretionary Power to Issue Humanitarian Visas?' (2018) (2) *European Papers* 1005, 1013-1014.

98 A case concerning the availability and nature of a judicial appeal under the EU Visa Code and in line with Art 47 CFR, following the refusal of an application of a Schengen visa made at Poland's Consul in Rabat.

99 Case C-403/16 *El Hassani* EU:C:2017:960, paras 25-28.

100 ibid, paras 35-41, particularly in light of the notion that the administrative authority may not satisfy the requirements of independence and impartiality.

101 For AG Mengozzi, 'humanitarian grounds' also consisted a 'concept of EU law', and should also be limited by the ECJ's case law; Case C-638/16 PPU *X and X* EU:C:2017:93, para 130.

ed.[102] The ECJ seemed to find the same in *Fransson*; it held that the 'applicability of European Union law entails applicability of the fundamental rights guaranteed by the Charter', while reiterating that the CFR itself does not provide a basis for the ECJ to exercise its jurisdiction.[103] Nevertheless, this would suggest that the application of the CFR is unhindered by territorial conditions. Moreover, as AG Bobek found in *El Hassani*, following *Fransson*, the CFR – and particularly Art 47 – applies where 'two cumulative conditions' are satisfied; the matter falls within EU law, and there is a concrete right or freedom guaranteed by Union law to trigger the right to an effective remedy before a tribunal; there is no mention of a requirement of territoriality (the application for the visa was made in Rabat).[104] The ECJ in *X and X* nevertheless seemed to depart from the above-mentioned case law, only partially referencing *Fransson* as regards the application of the CFR.[105] AG Mengozzi referred to the notion that the rights established in the CFR 'are guaranteed to the addressees of the acts adopted by such an authority irrespective of any territorial criterion'.[106] The Court made no such finding, instead reasoning that Art 25(1) EU Visa Code falls outside the scope of implementing EU law, such that Member States cannot be required by virtue of the rights established in the CFR to allow, by extension, applications for international protection to be made in their representations outside of their territory. It is worth noting that in the recent *Front Polisario* cases, the General Court[107] and the ECJ[108] have confirmed that the application of the CFR does not rest on a territorial connection; in

102 V Moreno-Lax and C Costello, 'The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model' in S Peers *et al* (eds), *The EU Charter of Fundamental Rights: A Commentary* (London, Hart, 2014), 1657-1684.

103 Case C-617/10 *Åkerberg Fransson* EU:C:2013:280, paras 21-22.

104 Case C-403/16 *El Hassani* EU:C:2017:659, para 74 and 78. Moreover, while AG Bobek considered there to be no 'right to a visa' under EU law, there being no right of entry to EU territory, there is a right to have an application 'fairly and properly processed', paras 102-106.

105 Case C-638/16 PPU *X and X* EU:C:2017:173, para 45.

106 Case C-638/16 PPU *X and X* EU:C:2017:93, para 89.

107 T-512/12 *Front Polisario v Council* EU:T:2015:953, para 143.

108 The ECJ did not deal with the issue in its judgment: Case C-104/16 P *Council v Front Polisario* EU:C:2016:973. However, the Opinion of AG Wathelet illustrates the discussions surrounding the question of the need for a territorial connection for the triggering of the CFR; he held that 'since in this case neither the European Union nor its Member States exercise control over Western Sahara and Western Sahara is not among the territories to which EU law is applicable, there can be no question of applying the Charter of Fundamental Rights there' (Case

both internal and external policies, the EU institutions and Member States will be bound by acting within the scope of the implementation of EU law.[109] This approach establishes that the CFR applies, regardless of territorial connection, to the implementation of EU law by the institutions or the Member States; where the matter falls within the scope of the implementation of EU law, the CFR is applicable to establish that the EU owes human rights obligations towards individuals regardless of where they are located. This understanding is deemed to find further support from Art 52(3) CFR, which establishes that the protections afforded in the CFR can be extended beyond those set out in the ECHR. Art 52(3) CFR sets out the need for 'at least equivalent protection' between it and the ECHR, in line with Art 53 ECHR, while providing that Union law can provide 'more extensive protection'.[110]

To take the analysis of the ECHR slightly further, it is worth noting that a State's jurisdiction under Art 1 ECHR is normally territorial, ie exercised through the State's territory; the State is obliged to ensure that Convention rights of everyone on their territorial jurisdiction are protected[111] The ECtHR has found that States are required to protect the rights of individuals extraterritorially only in exceptional circumstances. These exceptions are to be assessed on the particular facts of the case, and where power or control has actually been exercised over the person of the applicant or on the basis of control actually exercised over the relevant foreign territory.[112] From the paragraphs above, it is submitted that the CFR is not limited by the same territorial conditions as the ECHR but can instead apply extraterritorially.[113] Were a territorial condition to exist, one might consider the following situations. The Syrian applicants have never been on the territory of an

C-104/16 P *Council v Front Polisario* EU:C:2016:677, para 177), suggesting that the CFR applies only where EU law is applicable extraterritorially on a limited basis, eg Art 355 TFEU).

109 O de Schutter, 'The Implementation of the Charter of Fundamental Rights in the EU Legal Framework' Study for the DG for Internal Policies, Committee on Constitutional Affairs, PE 571.397, 55-57.

110 See also AG Mengozzi, who rejected the argument of the Belgian State that the need for equivalence between the CFR and ECHR would mean that the territorial or jurisdictional limit in Art 1 ECHR should also apply to the CFR; Case C-638/16 PPU *X and X* EU:C:2017:93, paras 97-101.

111 *Assanidze v Georgia* App. No. 71503/01, para 139.

112 *Al-Skeini and Others v UK* App. No. 55721/07, paras 105 and 132-133, respectively.

113 Case C-638/16 PPU *X and X* EU:C:2017:93, para 94, identifying no need for control or authority as under the ECHR.

EU Member State.[114] The applicants had however been to the Belgian embassy; one might question – however unlikely – that a territorial connection could be drawn on the basis of this visit in line with the ECtHR case law. It remains unclear, even if such a territorial condition applied to the CFR, it would be worth exploring the notion that for Convention purposes, exceptional circumstances might arise from activities of a State's diplomatic or consular agents on the basis of international law where there is an exercise of authority and control over the relevant persons or their property.[115] It would be necessary to examine further whether the decision to issue or deny a visa would satisfy these exceptional circumstances. This becomes even more blurry when one considers that the decision of the EU Member State, here Belgium, to issue or deny a visa might not have been made (giving rise to the notion of exercise or control) at the embassy situated on the third State but instead in Belgium.

This gives rise to a final dimension of this analysis. As Bartels sets out, States and international organisations might violate and be responsible for the human rights of individuals through extraterritorial conduct, and through conduct exercised domestically but which has extraterritorial effect [116] The Belgian Council considered that the applicants could rely on Art 3 ECHR only if they were within Belgian territory; the question that the Council seemed to ask but which was not answered by the Court was whether the implementation of EU visa policy by a Member State could amount to an exercise of Belgium's jurisdiction so to as to engage either the CFR[117] or relevant international obligations, including the ECHR and the principle of non-refoulement. Had the CFR been deemed to apply or had the ECJ assessed the applicability of the ECHR, the application of, and need to respect, these fundamental rights would have given rise to an obligation on the part of the Member States to issue the visa, and to allow en-

114 Compare, concerning the ECHR, that in *Soering v UK* App. No. 14038/88, para 91, the individual concerned was already on UK territory and a decision was made to extradite him, which could have given rise to a violation of Convention rights; see S Miller, 'Revisiting Extraterritorial Jurisdiction: A Territorial Justification for Extraterritorial Jurisdiction under the European Convention' (2009) 20 *EJIL* 1223.

115 *Banković and Others v. Belgium and Others* App. No. 52207/99, para 73 and *M v Denmark* App. No. 17392/90.

116 L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2015) 25 *EJIL* 1071, 1071.

117 Including the right to remain free from torture and degrading or inhuman treatment per Art 4 CFR, the right to claim asylum per Art 18 CFR and the principle of non-refoulement per Art 19 CFR.

try to the territory in order to avoid their potential violation.[118] The ECHR dimension was instead left to the ECtHR.[119] The question that arises is whether there might be another basis on which the possible violation of these rights, which arises through the extraterritorial effects of States' domestic conduct, may generate an obligation on the part of the Member States to take preventative measures to avoid that very violation. Here, we might adopt Ryngaert's discussion of the human rights obligations that might be owed by the EU to third States with which they have concluded trade agreements. Firstly one might ask whether the EU or its Member State, via its decision not to grant a visa actually facilitate human rights violations (as might be the consequences under the trade agreement).[120] In exploring this consideration, Ryngaert suggests that a failure on the part of the EU, its institutions or Member States, to undertake due diligence or pay respect to the existence of a duty of care in making a decision that affects individuals and potential undermines their human rights, might generate consequences on those institutions. In the situation for example of *X and X*, the failure on the part of the EU Member State to exercise such due diligence might not amount to facilitating torture but could facilitate, for example, the denial of the right to asylum. This would amount to a territorial exercise on the part of the Member State, regardless that the consequences, ie the violation of the fundamental rights, are felt elsewhere. For Ryngaert, the decision having been taken on EU territory: '…institutional failures by the EU…to carry out a proper due diligence inquiry can be deemed to occur on EU territory, thus triggering the applicability of territorial human rights obligations'.[121] As Bartels notes, the situation in respect of human rights is less clear than as regards States' trade policies.[122] It is difficult to assert concretely that the above-mentioned Treaty provisions on the EU's promotion of fundamental rights in its external relations (Art 21 and Art 3(5) TEU)[123] or the general principles of Union law or the CFR (Arts 6(1) and 6(3) TEU) apply to (internal) policy which has extraterritori-

118 Including the prohibition of inhuman or degrading treatment in Art 3 ECHR, the right to a fair trial and effective remedy per Arts 6(1) and 13 ECHR, as well as the principle of non-refoulement in Art 33 of the Geneva Convention.

119 *MN and Others v Belgium*, App. No. 3599/18.

120 C Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial Obligations' (2018) 20 *International Community Law Review* 375, 386.

121 ibid, 387.

122 L Bartels, 'The EU's Human Rights Obligations in Relation to Policies with Extraterritorial Effects' (2015) 25 *EJIL* 1071, 1072.

123 See also European Commission and High Representative of the European Union for Foreign Affairs and Security Policy Communication on Human Rights and

al effect? The situation is even more unclear in the context of asylum and migration. What this would require is not necessarily an obligation to issue humanitarian visas but a requirement that procedural obligations on the part of the Union are fully engaged; that 'the EU adopt suitable human rights-sensitive processes, in particular carry out human rights impact assessments [eg] when negotiating international trade agreements' to ensure the 'procedural quality of Brussels-based institutional decision-making processes that may create human rights risks'.[124]

This argument might not be deemed to be fully applicable to the *X and X* case, in light of the fact that the processing of LTV visas is not something that is undertaken by the EU but by the Member States' authorities, which as the Court has held does not fall within the scope of EU law. Nevertheless, there is some indication that the Member States should engage in ensuring that such sensitive approaches are taken in the context of visa applications. While the Court did not touch on the process, AG Bobek in *El Hassani* considered that there exists a right to have one's visa application fairly and properly processed, he also identified a right to an effective judicial remedy if that application is refused, a matter which is deemed not only to a right to be 'treated fairly and correctly stemming from the right to human dignity, but also the particular interest of the EU and its Member States to uphold and control the exercise of public power and (European) legality. That need might be even stronger in geographically distant places.'[125] This finding ultimately depended however on the identification of a matter falling within the scope of Union law, and the triggering of the CFR.[126] Moreover, the Court's reasoning in *X and X* highlights that it en-

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Democracy at the Heart of EU External Action – Towards a More Effective Approach, COM(2011)886 final, 12 Dec. 2011, 7, in which it was provided that 'EU external action has to comply with' the CFR and ECHR.

124 C Ryngaert, 'EU Trade Agreements and Human Rights: From Extraterritorial Obligations' (2018) 20 *International Community Law Review* 375,, 388.

125 Case C-403/16 *El Hassani* EU:C:2017:659, paras 103-106 and para 111.

126 The Commission's (non-binding) Handbook also provides, 'The processing of visa applications should be conducted in a professional and respectful manner and fully comply with the prohibition of inhuman and degrading treatments and the prohibition of discrimination enshrined, respectively, in Articles 3 and 14 of the European Convention on Human Rights and in Articles 4 and 21 of the Charter of Fundamental Rights of the European Union.' European Commission, 'ANNEX to the Commission Implementing Decision amending Commission Decision No C(2010) 1620 final of 19 March 2010 establishing the Handbook for the processing of visa applications and the modification of issued visas' C(2019) 3464 final, 2.

gaged in no assessment of the extraterritorial application of the CFR or indeed the extraterritorial consequences of decisions made on the territory of an EU Member State. For AG Mengozzi, such an analysis was unnecessary as the CFR was deemed to apply given that the decision of the Belgian authorities to issue or deny a visa on the basis of Art 25(1) EU Visa Code amounted to the implementation of EU law, regardless of any territorial connection.[127] For the AG, the identification of a territorial condition for the triggering of the CFR would have removed the entire common visa policy from the scope of the CFR and the consequent fundamental rights connection.[128] This does not seem to be what the Court would have intended and yet, it is a potential consequence of its judgment.

The Political Questions: Policy and Legislative Discussions at the EU Level

The Court's approach might be (somewhat) justified on the basis that the questions referred to it were undoubtedly highly-sensitive from a political perspective; this can be seen from the media coverage emerging before the judgment was rendered. Yet, the Court's judgment seems to be one which is both political itself and which aims to avoid the political dimension of the case. That is to say, the Court avoids adopting a fundamental rights approach to the EU and Member States' obligations. Instead, it highlights the need to avoid undermining the 'general structure' of the Dublin regime and a conflict with the Visa Code. At the same time, it bases its judgment on the absence of a legislative basis in the Visa Code for the issuance of a long-term, territorially-limited visa on humanitarian grounds. To this end, the Court seems to suggest that it is not for the Court itself to make this step in order to identify a basis in the existing legislation for the issuance of such visas. As discussed above, it avoids any exercise of judicial activism in a legal and policy field fraught with political difficulties albeit many unjustified.[129]

It should be noted that both the Dublin regime and the Visa Code, which does provide a legislative basis for the issuance of humanitarian

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127 Case C-638/16 PPU *X and X* EU:C:2017:93, para 89.

128 ibid, para 93; see also, M Rhimes, 'The Extraterritorial Application of the EU Charter in Syria: To the Union and Beyond?' UK Human Rights Blog (10 March 2017); www.ukhumanrightsblog.com/2017/03/10/the-extraterritorial-application-of-the-eu-charter-in-syria-to-the-union-and-beyond-michael-rhimes/.

129 See again L Ypi, 'Borders of Class: Migration and Citizenship in the Capitalist State' (2018) 32 *Ethics and International Affairs* 141.

visas (with limited territorial validity and on a short-term basis), have been under almost constant review.[130] Avoiding the questions referred by the Belgian Council, the Court instead focused on the EU's (lack of) legislative competence, noting that 'as European law currently stands' the issuance of visas on a humanitarian basis is for the Member States in line with national sovereignty.[131] The Court reasoned on the basis that the Syrian applicants applied for a visa with the purpose of applying for asylum in Belgium. By adopting this approach, the Court looked not at the purpose of

130 In light of the absence of a specific procedure for humanitarian visas in EU law, with the exception of Art 25(1) of the EU Visa Code, there have been discussions since at least 2002 surrounding the introduction of a clear legal basis for the issuance of visas on humanitarian grounds. The main developments have taken place in recent years, reflecting it seems the unfolding of the crisis in North Africa and the Middle East. In 2014, the European Commission released its proposal for a recast of the Visa Code. This proposal did not include a framework for the issuance of humanitarian visas, notwithstanding that repeated calls had been made by the UNHCR, the ECR and the ECRE, for humanitarian visas to be included in any revision of the Visa Code. The European Parliament then launched its own call for a holistic approach to be adopted in relation to migration. This would aim to allow persons seeking international protection to apply for a European humanitarian visa directly at any Member State consulate or embassy in a third country. Once those persons were on the territory of a Member State, they would then be able to apply for international protection, i.e. for asylum. The European Commission announced in its 2018 Work Programme that it would withdraw its 2014 Proposal and advance a new one in March 2018. Similarly to the previous proposal, no provision was made in this proposal for humanitarian visas. The equivalent to Art 25(1) in the current Visa Code has been removed. Against this background, the European Parliament drafted and released its own Working Document on humanitarian visas in April 2018, in which it calls for a separate EU instrument for such visas. In December 2018, the Parliament voted on a resolution calling on the Commission to table a proposal for a Regulation on a European Humanitarian Visa (alongside clear criteria, procedural rules, administrative mechanisms and so on) as a means of accessing asylum procedures in Europe; a right to be heard without risking one's life, to combat human smuggling, and to manage arrivals, reception and processing of asylum claims better. Revisions to the Visa Code were adopted in July 2019 (Regulation EU 2019/1155 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code)). The Regulation introduces certain mechanisms to simplify the process for short-term visa applications, including an extension of the time period in which applications can be made; it also introduces mechanisms, including means of incentivising and 'punishing' (increased fees, lengthier processes) which aim to link visa policy and the EU's external policy, and to encourage third States to cooperate with the EU on readmissions. The reference to humanitarian grounds remains in Art 25(1).

131 Case C-638/16 PPU *X and X* EU:C:2017:173, para 45.

the applicants in applying for the particular visa, i.e. their situation which engaged humanitarian concerns, which it recognised had been 'formally submitted' on the basis of Art 25(1) EU Visa Code, but used this apparent objective of seeking asylum to turn their application into one for a long-term residence application. The application was thus deemed not to adhere to the objectives of the Visa Code itself. The approach can be said to conflict with that adopted by a number of EU Member States, which have issued humanitarian visas via Art 25(1) Visa Code for the purposes of affording individuals international protection.[132] At the same time, the Court's reasoning provides a basis for Member States to avoid the scope for the international obligations – a question that the Court entirely ignored, leaving it for the ECtHR – and fundamental rights obligations that arise from the application of both EU law, ie the Visa Code, and national law. Notwithstanding that the national measure or matter is deemed to fall outside the scope of EU law, so that the CFR is not triggered, relevant international law, Convention rights and national constitutional protections still apply.[133] It is exactly this issue on which the Belgian Council asked for clarification as regards the notion of 'international obligations' in Art 25(1) EU Visa Code. Where usually the Member States have a discretion under Art 25(1) Visa Code as to whether to issue visas with limited territorial scope, the Belgian Council is asking whether this discretion turns into a positive obligation where an absolute right of non-refoulement might otherwise be violated.[134]

The Court's determination can ultimately be deemed to be an 'unconvincing teleological one',[135] whereby it denies the application of the Visa

132 UI Jensen, 'Humanitarian Visas: Option or Obligation?' (2014) Study for the LIBE Committee of the European Parliament, 43.

133 K Lenaerts, 'The ECHR and the CJEU: Creating Synergies in the Field of Fundamental Rights Protection', Solemn hearing for the opening of the Judicial Year, 26 January 2018, 3, citing Case C-256/11 *Dereci and Others* EU:C:2011:734, paras 72-73 and Case C-23/12 *Zakaria* EU:C:2013:24, para. 41.

134 Moreover, the Court did not provide for a detailed analysis of fundamental rights and international obligations as forming part of the values underpinning the Union, per Art 2 and 3 TEU. Nor did it examine the provision in Art 78(1) TFEU which sets out that 'The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement…[in line with] the Geneva Convention of 28 July 1951.'.

135 E Brouwer, 'The European Court of Justice on Humanitarian Visas: Legal Integrity vs Political Opportunism' CEPS Commentary, 16 March 2017, 4.

Code, and in so doing rejects the possibility to provide clarification as to its objective, in favour of upholding the integrity of the Dublin regime. According to Brouwers, this priority is attributed to the Dublin Regulation, notwithstanding its deficits, and against providing international protection to the rights of third-State individuals.[136] Indeed, as Meloni sets out, the Court's judgment in *X and X* illustrates that security and foreign policy concerns underpin EU visa policy, and that while there may be a turn towards rights-based protections of individuals, visa policy nevertheless remains 'a policy which straddles the sovereignty sensitive areas of internal security and foreign policy'.[137] Moreover, it calls into question whether fundamental rights protections are really 'practical and effective' as opposed to 'theoretical and illusory', at least for individuals of third States.[138]

Conclusion

The question arises as to whether the ECJ's judgment and deferral in this case is satisfactory, especially given the problematics of irregular migration. The Court did not deal with the issue of whether there was any territorial requirement to the CFR but simply found that there was no implementation of Union law on the facts of the case. By finding neither that the facts of the case gave rise to the implementation of EU law, so as to trigger the application of the CFR, and having not considered whether the CFR or international obligations have any other scope, the Court reinforced that the European system of asylum and migration operates as one where, in these circumstances, the Union and its Member States avoid responsibilities and avoid encounters between third-country individuals and Union or national authorities[139]. What was ultimately at stake in the Court's judgment in *X and X* was not the Visa Code but ensuring the coherence of the Dublin regime. To this end, the Court largely avoided an examination of EU

136 ibid, 4.

137 Through the inclusion of rights to appeal the refusal of an application for a visa, to the grounds set out as to when a visa might be refused to the shift away from discretionary rules; see A Meloni, 'EU Visa Policy: What Kind of Solidarity?' (2017) 21 *Maastricht Journal of European and Comparative Law* 1, 7.

138 *Hirsi Jamaa and Others v Italy* App. No. 27765/09, para 175.

139 See I Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law* (Cambridge, Cambridge University Press, 2016) and D Schmalz, 'Review of I Mann, *Humanity at Sea: Maritime Migration and the Foundations of International Law*' (2017) 28 *EJIL* 649, 653, where the notion of encounter constitutes the basis of rights.

Treaty law and the CFR in favour of a mere analysis of whether the relevant secondary law, namely the Visa Code, was the correct basis on which an individual could apply for a visa to safely and legally access EU Member State territory, thus separating EU visa policy and the humanitarian visa entirely. The *X and X* case illustrates that the focus in visa policy cannot yet be said to be that of individual rights. As above, the question unanswered by the ECJ as to whether Member States might be obliged by virtue of Art 3 ECHR to issue visas on humanitarian grounds where a refusal of a visa might lead to a violation of the rights set out therein, remains an open issue, heard by the ECtHR in April 2019. The Court's deferral of this question illustrates the fragmentation that exists as regards the protection of individuals in the field of asylum and migration. Moreover, this question left unanswered by the Court will undoubtedly come not only before the ECJ in the near future but will also be a matter of legislative and policy-orientated concern. It has been expressed succinctly by Judge Paulo Pinto de Albuquerque in his concurring opinion in *Hirsi Jamaa*; namely, 'how Europe should recognise that refugees have the "right to have rights"'.[140]

140 *Hirsi Jamaa and Others v Italy* App. No. 27765/09 citing Hannah Arendt; H Arendt, 'We Refugees', in *The Menorah Journal*, 1943, republished in M Robinson (ed), *Altogether Elsewhere: Writers on Exile* (Boston, Faber and Faber, 1994).