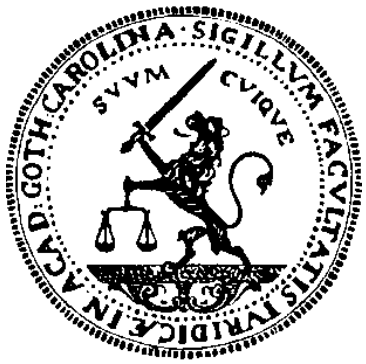

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The Future of Humanitarianism?

Humanitarian Visas in the European Union in light of CJEU Case C-638/16 *X and X*

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Contents

Summary

In December 2016, a Belgian court referred questions to the Court of Justice of the European Union (CJEU) concerning the issuance of humanitarian visas to a Christian Syrian family. The central question in the case is whether international treaties and Union law oblige EU Member States to allow their consulates and embassies to issue humanitarian visas. This thesis discusses the outcome of that judgement, and the Opinion of Advocate General Mengozzi, in an attempt to understand what the future for humanitarian visas in the EU might hold.

Humanitarian visas are constructed as to provide safe and legal access to a state's territory, allowing the final asylum claim determination procedure to take place on the territory of the potential host state. Currently in the EU, however, a prerequisite for seeking asylum is to be on a Member States' territory, which has resulted in an estimated 90% of all asylum seekers entering Europe in an irregular way.

As argued by the Advocate General in *X and X,* the Visa Code, which establishes the harmonised procedures and conditions for issuing Schengen visas for short stays or transits in the Schengen Area, could offer such humanitarian visas, through so called LTVs, or visas with limited territorial validity. According to the Visa Code, such visas may be offered in exceptional circumstances, when a Member State considers it necessary to derogate from the common entry conditions for reasons of national interest, on humanitarian grounds or because of its international obligations.

The essential difference between Advocate General Mengozzi's Opinion and the Court's judgement is whether or not the situation before the referring court can be considered an application for a visa with limited territorial validity in accordance with the Visa Code. For, if the situation falls within the scope of the Visa Code, this would oblige Member State authorities to act in accordance with the rights guaranteed under the Charter and ECHR. If the opposite conclusion is reached, however, not only does the situation before the referred court fall outside the scope of the Visa Code, but also outside the scope of EU law.

For while the Court considers it apparent that as the purpose of the application differs from that of a short-term visa, thus falling outside the scope of the EU law, the Advocate General reaches a very different conclusion. Contrary to the Court, Advocate General Mengozzi considers that the situation in the na-

tional court falls within the scope of the Visa Code, and that it must be covered by the humanitarian grounds in Article 25 of the Visa Code. Further, Mengozzi argues that EU law requires Member States to issue an LTV visa, if the alleged humanitarian grounds are well-founded.

After the judgement, some academics have accused the Court of 'taking the politically easy way out' and indulging the concerns of the Member States. Further, some have expressed confusion as to why the Court has shied away from extending the applicability of the Charter to those in need of its protection, especially at a time when EU asylum policy has raised questions concerning the Union's "self-professed dedication to human rights". It seems that the future for humanitarian visas in the European Union is at a crossroads.

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
ECB	European Central Bank
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
ICCPR	The International Covenant on Civil and Political Rights
IMF	International Monetary Fund
LTVs	Visas with limited territorial validity
PEPs	Protected Entry Procedures
TFEU	Treaty on the Functioning of the European Union, also referred to as the Treaty of Rome
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

1. Introduction

1.1 Background

> "It is, in my view, crucial that, at a time when borders are closing, and walls are being built, the Member States do not escape their responsibilities, as they follow from EU law or, if you will allow me the expression, *their* EU law and *our* EU law."[1]

The statement above was made by Advocate General Mengozzi in the Opinion of the high-profile case C-638/16*, X and X* concerning humanitarian visas in the European Union. This has resulted in the re-emergence of the discussion on humanitarian visas to, and in, the European Union (EU). However, as is illustrated below, while humanitarian visas as a concept received plenty of attention around the time of the judgement, the concept, and the discussion surrounding it, is in itself nothing new.

Back in 2002, humanitarian visas where examined in a study for the European Commission, only to resurface in the 2006 Green Paper on Asylum and going on to become the focus of the 2009 Stockholm Programme. Further, the 2013 Task Force Mediterranean Communication states that "opening up of legal channels to safely access the European Union should be explored".[2]

Since that statement, however, momentum seems to have been lost. Instead, the new focus, especially after the joint EU-Turkey Statement in 2016, is voluntary resettlement and safe third countries. As an indication of this new approach, any reference to humanitarian visas disappeared from the 2015 European Agenda on Migration, where discussions concerning legal channels where replaced with increased border controls and cooperation with third countries, in order to prevent hazardous journeys to the EU.[3]

However, with the CJEU's judgement, along with the acclaimed Opinion of Advocate General Mengozzi, humanitarian visas might be regaining momentum. Although the CJEU ruled against the use of the Visa Code in the way argued by the Advocate General, the case might just have reignited the discussion on humanitarian visas in the EU.

[1] Case C-638/16 PPU, AG Opinion, para 4.
[2] Task Force Mediterranean Communication, p. 13.
[3] Moreno-Lax (2017B).

1.2 Purpose

The purpose of this thesis is to attempt to describe and understand the concept of humanitarian visas in the European Union; both when it was first introduced as a viable option, but also why it has lost momentum, and what its future prospects are. This will be done by examining the judgement, and the Advocate General Opinion, in CJEU Case C-638/16 *X and X*, as this is the most significant case concerning humanitarian visas in recent years.

The aim is to use the above-mentioned case in order to explain said developments, and to try to highlight the dichotomic opinions that continue to surround the concept of humanitarian visas. Why were humanitarian visas seen as a possible solution for so long, only to later disappear from official documents? How does the CJEU case fit into this development, and what alternative solutions have been presented? In an attempt to analyse the future of the humanitarian visa concept in the European Union, abovementioned questions and aspects will be scrutinised.

1.3 Research Questions

In light of the above purpose, the research questions are as follows:

- How did Advocate General Mengozzi and the CJEU, respectively, argue in Case C-638/16 *X and X*?
- Why might they have reasoned as they did?
- Does the judgement have any significance for the future of humanitarian visas in EU law, and what might such a future entail?

1.4 Delimitations

This thesis will not focus on the issues of immigration and the Common European Asylum System at large, nor will the EU Visa System be discussed in any greater detail. Likewise, the suggested Recast Visa Code is only mentioned in passing. Similarly, although there is significant case law that is interlinked with, or touches upon, the issues discussed in CJEU Case C-638/16 *X and X*, these will not be covered, with a few exceptions.

Further, when national humanitarian visa systems are mentioned, this is done in passing, and the thesis does not claim to cover either all the existing humanitarian visa programmes within the EU Member States, or those few that are mentioned in their entirety. Furthermore, both the Recast Visa Code, and

the Dublin System, are only mentioned in passing, and only the aspects relevant to the present thesis. Finally, as regards the human rights standards that are cited, both on a regional and international level, only the aspects deemed relevant are mentioned, and the material is far from comprehensive.

1.5 Material

The main source of material for this thesis is the judgement, along with the Advocate General reasoning, in CJEU Case 638/16 *X and X*. To supplement this material, and to facilitate a deeper understanding, doctrine commenting on the case has also been used. Further, legal documents, and to a certain extent other case law, have been consulted in an attempt to illustrate the significance of the case. Due to a lack of recent material discussing humanitarian visas in the EU, a lot of the doctrine discussing this concept is a few years old, but I have still deemed it relevant.

Additionally, material from various EU institutions, such as the Commission and the European Parliament, have been examined, in order to highlight the concept of humanitarian visas in the EU at various points in time. Finally, the idea of safe third countries has been briefly reviewed, in part as it surfaced in *X and X*, but also due to its growing significance in the EU migration legal field.

1.6 Method

In the following thesis, in an attempt to answer my abovementioned research questions, the traditional legal dogmatic method will be used. The legal dogmatic method is based on the study of legislation, jurisprudence and doctrine, and its purpose is to recreate and describe the normative system of legal rules.[4] This is done by systemising and interpreting the relevant legal sources in order to discern the meaning of the relevant law.[5]

As this thesis focuses primarily on EU law and sources of EU law, the legal dogmatic method will be used in combination with an EU legal method. There is, however, not one EU legal method, but rather a plethora of different ones. Instead, EU legal method is an approach used to manage EU legal sources, keeping in mind that EU law exists simultaneously on two levels; both at the Union level and at the national level.[6] The EU's competence derives from

[4] Jareborg (2004) p. 8.
[5] Sandgren (2015) p. 43 ff.
[6] Hettne &,Otken Eriksson (2005) p. 81.

three central principles; the principles of conferral, subsidiarity and proportionality. These principles are regulated in Article 5 TFEU, which also states the limits and use of these competences.

The main source of the thesis is the Court's judgement, along with Advocate General Mengozzi's Opinion, in Case C-638/16 *X and X*. Thus, the main part of this thesis constitutes a commentary of both the Court's and the Advocate General's reasoning. At the time of writing, there has been extremely limited doctrinal commentary of *X and X*, making the process of interpreting the case, and its significance for the EU asylum legal field, complicated. In an attempt to rectify this, I have relied heavily on the case itself, along with older doctrine concerning humanitarian visas in the EU.

The sources of international law, according to Article 38 of the Statute of the International Court of Justice (ICJ Statute)[7] are conventions, customary law and general principles.[8] The primary tools of interpretation are set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). In so far as this thesis touches upon international law, the international legal dogmatic method will be used, in order to distinguish the content of international law from its sources.[9]

1.7 Research Status

Since the Court's ruling in *X and X* in early 2017, there has been very little extensive doctrinal commentary, with the exception of posts in a few EU or asylum law blogs. This is in line with what seems to be a general trend concerning humanitarian visas, that is, a lack of interest in recent years. One can only speculate on the reasons for this, be it the lack of political will or the sensitive issue that migration has become in the EU, but the end result remains the same; in the last decade there has been little doctrinal commentary.

Notably, Professor Gregor Noll's dissertation *Negotiating Asylum: the EU acquis, extraterritorial protection and the common market of deflection* from 2000 discusses both the concept of humanitarian visas in some dept, as well as examining third safe countries and readmission agreements. The dissertation has proven helpful in the writing of this thesis and filled a void when it was written. However, as it was published nearly two decades ago, there is a

[7] San Francisco 26 June 1945.
[8] Note that Article 38 of the ICJ Statue corresponds to customary international law.
[9] Vienna Convention on the law of treaties (with annex). Concluded in Vienna on 23 May 1969.

need for new material. Here, Helen O'Nions' *Asylum – a right denied: a critical analysis of European asylum policy* from 2014 has provided some guidance.

Despite this, there seems to be a clear need for more research into humanitarian visas in the EU, as especially the potential interconnectedness between humanitarian visas and the concept of safe third countries. For it seems when the one falls from grace; the other has taken its place. Likewise, further examination of individual Member States asylum legislation regarding humanitarian visa schemes would be welcomed, as it is currently difficult to get a clear overview.

1.8 Structure

The second chapter of this thesis begins by briefly introducing the relevant international human rights law concerning the issues of human rights and migration. Focusing on the regional perspective, the third chapter will discuss migration and asylum issues in the European Union; both the historical development and its current form. Here, the Dublin System and the Common European Asylum System (CEAS) will also be examined. The fourth chapter concerns the concept of safe third countries and readmissions agreements, including some critique that has been made against the two. The fifth chapter describes humanitarian visas and looks at the reception it has gotten within the European Union and individual Member States. The sixth chapter outlines Case C-638/16 *X and X*, presenting both the Advocate General's arguments, and those in the Court's judgement. Finally, chapter seven summarizes case *X and X*, while also presenting some doctrinal commentary. Concluding the thesis, some speculations about the future of humanitarian visas are presented.

2. Relevant International Law

International law protects the dignity and rights of all persons, regardless of nationality or other factors. However, international law does not exist in a vacuum, and is thus affected by the politics of border control.[10] The right to seek and enjoy asylum was first given universal recognition in the Universal Declaration of Human Rights (UDHR) in 1948.[11] Here, Article 14 of the UDHR states that "[e]veryone has the right to seek and enjoy in other countries asylum from persecution". However, it is important to note that neither Article 14, nor the UDHR, generally possess the qualities of binding international law.[12]

Further, each sovereign state, in line with the theory of territorial sovereignty, ultimately decides who is and is not allowed onto their territory.[13] It is important to note that although there is a right to leave a state, even one's own, there is no corresponding right to enter a state's territory.[14]

2.1 The Refugee Convention

In 1950, the United Nation's General Assembly established a permanent refugee agency, the United Nations High Commissioner for Refugees (hereinafter: UNHCR) through a resolution that also constitutes UNHCR's statute.[15] The main instrument of the UNHCR is the 1951 UN Convention relating to the status of Refugees and its 1967 Protocol (the Refugee Convention). [16]

The states that have acceded or ratified the 1951 Convention have agreed that the term 'refugee' should apply to any person considered a refugee under earlier international agreements, but also any person who qualifies as a refugee under the (UNHCR) statute.[17] Thus, Convention refugees are identifiable as they must possess four elemental characteristics; (1) they are outside their country of origin, (2) they are unable or unwilling to avail themselves to the protection of that country, or to return there, (3) such inability or unwillingness is attributable to a well-founded fear of being persecuted, and (4) the

[10] O'Nions (2014) p. 1.
[11] UN GA *Universal Declaration of Human Rights,* General Assembly Resolution 217 (III) of 10 December 1948.
[12] Noll (2000) p. 362.
[13] Linderfalk (2012) p. 17.
[14] See Article 13.2 UDHR, Article 12.2 and 12.4 ICCPR.
[15] *Statute of the Office of the United Nations High Commissioner for Refugees,* UNGA Resolution 428 (V), adopted on 14 December 1950.
[16] Iben Jensen (2014) p. 3.
[17] Goodwin-Gill & McAdam (2007) p. 18.

persecution feared is based on reasons of race, religion, nationality, membership of a particular social group, or political opinion.[18]

Article 33 of the Refugee Convention, which is binding not only to the State Parties to the instrument, but also to those who have ratified the 1967 New York Protocol,[19] reads as follows:

> "No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
>
> The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."[20]

From this it becomes clear that the prohibition of refoulement is not an absolute one, as illustrated in the second paragraph of the article. Further, it is unclear when a person is to be regarded as a 'danger to the security' or a 'danger to the community' for a potential host country.[21] It has also been claimed that the prohibition of refoulement constitutes a part of customary international law.[22]

2.2 The 1984 CAT Convention

The 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[23] limits the rights of states to remove aliens in its third article:

> "No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subject to torture."[24]

CAT generally outlaws torture as well as cruel, inhuman or degrading treatment or punishment. However, the scope of the removal position in Article 3 is limited to torture. Due to the fundamental character of the prohibition of

[18] Goodwin-Gill & McAdam (2007) p.18 f.
[19] See Art. 1 (1) of the New York Protocol.
[20] Article 33 of the Refugee Convention.
[21] Noll (2000) p. 363.
[22] Noll (2000) p. 363.
[23] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, 1465 UNTS 85.
[24] Article 3 CAT.

torture, CAT does not provide derogation in exceptional cases, and thus the prohibition of torture is absolute.[25]

2.3 Other Protection

The principle of *non-refoulement* can be found in other instruments than the Refugee Convention and CAT however. Article 7 of the International Covenant on Civil and Political Rights (hereinafter: ICCPR) states that "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment". The article has been interpreted as to include a prohibition of refoulement.[26] Further, the principle of *non-refoulement* constitutes international customary law.[27]

Important to note is that there is no right to extraterritorial protection in neither Article 14 UDHR, nor in Common Article 3 and 32 of the Geneva Convention relating to the Protection of Civilian Persons in Time of War[28] (Fourth Geneva Convention).[29] However, when the claimant is situated within a potential host state or at its borders, states are obliged to refrain from refoulement.[30]

On the regional level, well-established jurisprudence from the European Court of Human Rights (hereinafter: ECtHR) has found that despite the lack of an express *non-refoulement* provision in the European Convention on Human Rights (hereinafter: ECHR), such a prohibition was 'already inherent in the general terms of article 3'.[31]

[25] Noll (2000) p. 365.
[26] Human Rights Committee (HRC), *General Comment No. 31*, para. 12.
[27] The Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol (2001), preamble 4.
[28] Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), International Committee of the Red Cross (ICRC), 12 August 1949.
[29] Noll (2000) p. 595.
[30] See Article 33 GC, Article 3 CAT, Article 45 FC; Article 3 ECHR and Article ICCPR.
[31] *Soering v. United Kingdom,* para. 88; Gil-Bazo (2015).

3. The European Union and Asylum – A Brief Introduction

In order to put this thesis into context, it is essential to briefly discuss and outline the European Union's relationship with asylum and migration issues. How migration is currently regulated in the EU, and how this current system has come into being, are some of the issues that will be discussed in this chapter.

3.1 The Development of the Common European Asylum System (CEAS)

Policies of migration have been a Community concern as far back as 1974, although at first the primary focus was ensuring the free movement of European labour.[32] However, with the passing of the Single European Act in 1986, work began to develop and consolidate the internal European market, requiring the Member States to cooperate on policies concerning the entry, movement and residence of third country nationals.[33] At around the same time, the Schengen Agreement was established and enacted between the five signatory states.[34]

The following year, the *Ad Hoc Group for Migration* was created, tasked with reviewing how unauthorised migration could be prevented in the Schengen area, and thus a platform was formed, although still formally outside the scope of European law, linking common border policies with the goal of preventing irregular migration.[35] Additionally, in 1995, when the 1990 Schengen Convention came into force, a single external border was established in the Schengen area.[36] Finally, the Schengen acquis became a formal part of EU law after the Treaty of Amsterdam in 1997, and the Schengen area itself has since grown significantly.[37]

[32] O'Nions (2014) p. 73.
[33] OJ L169 29 June 1987.
[34] *The Schengen Acquis – Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on Gradual Abolition of Checks at Their Common Borders* OJ L239, 22 September 2000.
[35] O'Nions (2014) p. 73.
[36] European Council *The Schengen Acquis.* As Referred to in Article 1(2) of Council Decision 1999/435/EC of 20 May 1999 OJ L 176 10 July 1999.
[37] O'Nions (2014) p. 74.

Both Schengen and the Ad Hoc Group on Migration were intergovernmental undertakings, and apart from the Council, the EU institutions had limited roles. Further, while the Schengen acquis and the Ad Hoc Group had similar strategies and objectives, they differed in terms of their institutional 'location', with Schengen outside the EU legal system, and the Ad Hoc Group a Council body. Due to this, at the end of the 1980s, there were two parallel institutions through which the Member States could coordinate their asylum and migration policies for internal security purposes.[38] This had the effect of ultimately making interior officials the decisionmakers regarding EU's asylum and migration policies, and the 'securitarian' approach that had previously been used at the national level, was thus lifted up to European level.[39]

In 1998, the European Commission established a communication and consultation procedure vis-à-vis non-EC countries.[40] Real concern regarding irregular migration came with the fall of the Berlin Wall in 1989, and this period has been identified by scholars as the start of a new securitised analysis of migration.[41] This new approach was further enabled by the movement of migration and asylum to the Justice and Home Affairs pillar of Community law in the Maastricht Treaty[42] in 1992.[43] Chou argues that by "providing a legal basis for external migration regulation, the [Maastricht Treaty] legitimised the 'securitarian' approach".[44]

However, the Court of Justice of the EU (CJEU) also gained competence to rule on matters of asylum and migration, specifically on the interpretation of asylum provisions, following references from the Member States' courts through the Amsterdam Treaty.[45] However, the legal area is, as expressed by Noll, "engulfed in a straight-jacket of intergovernmental decision-making".[46] This due to the fact that many states continued to regard the area of migration control as a matter of state sovereignty.

The introduction of the Treaty of the Functioning of the EU (TFEU), has simplified the situation, and the opportunity for accountability increased.[47] For

[38] Chou (2009) p. 546.
[39] Chou (2009) p. 546.
[40] European Commission Decision of July 8 1985 *Setting up a Prior Communication and Consultation Procedure on Migration Policies in Relation to Non-Member Countries.*
[41] Byrne, Noll & Vedsted Hansen (2002) ch. 1.
[42] The Treaty on the Functioning of the European Union, commonly known as the Maastricht Treaty.
[43] O'Nions (2014) p. 74.
[44] Chou (2009) p. 547.
[45] Treaty of Amsterdam amending the Treaty of the European Union, the Treaties Establishing the European Communities and certain related acts, Article 73.
[46] Noll (2000) p. 594.
[47] *Consolidated Version of the Treaty of the Functioning of the EU* 30 March 2010 C 83/47 'TFEU'; O'Nions (2014) p. 75.

example, judicial oversight has been reinforced and the European Parliament has been given a key role as regards asylum law-making, as the ordinary legislative procedures was extended to include such asylum matters.[48] Further, Article 78 TFEU *"*requires the adoption of a uniform status for individuals having been granted international protection, uniform standards on procedures and reception conditions as well as a common system of temporary protection".[49] Notably, as Article 78 is *lex specialis* it has paved the way for further harmonisation, from minimum standards to common procedures.[50]

Another major change is the legally binding status of the EU Charter of Fundamental Rights[51], as the Charter includes both a right to asylum and the prohibition of refoulement, although only applicable to the EU institutions.[52] As a result of these changes, greater advancements in refugee protection have been anticipated, especially as the reduced legislative role of the Council, should mean that Member State interests should be balanced with the interests of the European Parliament.[53]

3.1.1 The Origins of the Common European Asylum System

The European Council's Tampere milestones from 1999 include a commitment to the Refugee Convention and international human rights' standards, by acknowledging the right to seek asylum.[54] The aspiration of a common asylum system thus seems founded on justice, fairness and solidarity. However, simultaneously to the abovementioned values, the need to control external borders in order to prevent illegal immigration is recognised.[55]

O'Nions states that although it is regrettable that asylum and illegal immigration are linked together, it is not surprising. She goes on to argue that the illegal immigration agenda has prevailed, with asylum interpreted narrowly as a matter of immigration control, and a security concern.[56] In accordance with this view, combating terrorism had become the key task of the common policy by 2004, with the introduction of The Hague programme.[57] Since, surveillance and inception strategies have been introduced *"with the primary aim*

[48] O'Nions (2014) p. 75.
[49] O'Nions (2014) p. 75.
[50] O'Nions (2014) p. 75.
[51] ECHR reference.
[52] Article 18 and Article 19 respectively, *EU Charter of Fundamental Rights* C 364/1 OJ 18 December 2000.
[53] O'Nions (2014) p. 75.
[54] European Parliament *Presidency Conclusions Tampere European Council* 15 and 16 October 1999, para 4.
[55] European Parliament *Presidency Conclusions Tampere European Council* 15 and 16 October 1999, para 3.
[56] O'Nions (2014) p. 76.
[57] O'Nions (2014) p. 77.

of controlling irregular migration".[58] Furthermore, an external dimension of EU migration policy has been developed, resulting in third countries being co-opted into migration management.[59]

3.2 The Dublin System

The Dublin System is based on Regulation 604/2003,[60] which provides both the criteria and mechanisms for determining the Member State responsible for the assessment of an asylum claim made by a third-country national, or stateless person, in one of the EU's Member States. These criteria do not take the wish of the concerned individual(s) into account, but rather focuses on factors such as through which Member State the applicant first entered the EU, or in which Member State the applicant was prior to the asylum application.[61] The Dublin System has been referred to as the 'cornerstone of the Common European Asylum System', and was created in order to prevent asylum seekers from both 'asylum shopping', i.e. to apply for international protection in the most favourable country, and/or applying for asylum in multiple Member States.[62]

Yet, according to data from the European Asylum Support Office (hereinafter: EASO), the Dublin System does not deliver the results anticipated by the Member States. Instead, many asylum seekers chose to disappear into illegality, rather than be transferred to a Member State in which they do not want to live. Despite this, Member States will not discuss an alternative to the status quo, and instead focus their efforts on saving the, according to some, failing Dublin System.[63]

3.3 The EU Charter of Fundamental Rights

The EU Charter of Fundamental Rights (hereinafter: The Charter) regulates all the personal, civic, political, economic and social rights enjoyed by people within the EU. The Charter is applicable by all institutions and bodies of the EU, and to national authorities when they are implementing EU law. For this

[58] O'Nions (2014) p. 77.
[59] Baldaccini, A 'The External Dimension of the EU's Asylum and Immigration policies: Old Concerns and New Approaches' in Baldaccini et al supra n27, 283; O'Nions (2014) p. 77.
[60]Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).
[61] Progin-Theuerkauf & Zoeteweij-Turhan (2017A).
[62] Progin-Theuerkauf & Zoeteweij-Turhan (2017A).
[63] Progin-Theuerkauf & Zoeteweij-Turhan (2017A).

particular thesis, Articles 4 and 18 of the Charter are the most relevant, and thus will be outlined below.

3.3.1 Article 4 – Prohibition of Torture and Inhuman or Degrading Treatment or Punishment

The scope of the prohibition of torture and inhuman or degrading treatment or punishment, as enshrined in Article 4 is defined in Article 51 of the Charter.[64] Article 4 addresses the institutions, bodies, offices, agencies of the EU, and the Member States, but only when they are implementing EU law.[65]

The prohibition of torture and inhuman or degrading treatment or punishment follows from the inviolability of human dignity and enshrines a fundamental value of democratic societies.[66] The prohibition has therefore received a special status under international law, constituting one of the few absolute and non-derogable human rights.[67]

Despite the negative formulation of the prohibition of torture and ill-treatment, this right also creates a corresponding positive obligation. Therefore, EU institutions and bodies must take positive measures to comply with the prohibition of torture and ill-treatment.[68]

Finally, it should be noted that Article 19 (2) of the Charter contains an explicit 'right of non-refoulement'. The Article states that "[n]o one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment'.

3.3.2 Article 18 – Right to Asylum

Article 18 of the Charter states that:

> "[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union".

[64] Article 4 corresponds to the right guaranteed under Article 3 of the ECHR, by virtue of Article 52(3) of the Charter, and thus has the same scope and meaning as the ECHR Article.
[65] Peers, Hervey, Kenner & Ward (2014) p. 63.
[66] *Soering v. The United Kingdom*, para 88.
[67] Peers, Hervey, Kenner & Ward (2014) p. 75.
[68] Peers, Hervey, Kenner & Ward (2014) p. 89.

Initially the right to asylum was grouped together with the prohibition of collective expulsion[69], and while this was later revised, it illustrates the interrelationship of the two articles.[70]

The right to asylum is understood as including a series of distinct rights that govern the relationship between the individual seeking, or in need of, international protection and the petitioned states. These distinct rights begin when the right of being allowed entry into the state's territory, and being admitted to a status determination procedure, and is concluded with the applicant attaining some kind of durable solution.[71] It is important to note that while the right to asylum is closely linked to the prohibition of refoulement, the institution of asylum is not limited to non-refoulement.[72]

States have generally refused to accept an international obligation to grant asylum, and while Article 18, and the Charter as a whole, is an attempt to codify existing Member States practices, its purpose was not to extend the scope of the right to asylum, or to create new rights.[73]

Article 18 does not include any express limitations, but the right to asylum may be subjected to restrictions in accordance with general derogation clause of Article 52 (1) of the Charter, which states that all such limitations must be based in law and meet the test of proportionality and necessity.[74]

3.4 The Common EU Visa Policy

The EU's Common Visa Policy is derived from the Schengen *acquis*, which in turn is founded on the 1990 Convention implementing the Schengen Agreement of 14 June 1985 (Schengen Convention).[75] Through the Schengen Convention, internal border checks where set aside, and a common policy on external border management created. Finally, work towards adopting a common visa policy had started in earnest.[76]

When the Schengen *acquis* was incorporated into the EU framework in 1999, the EU gained exclusive competence in issuing short-stay Schengen visas

[69] The prohibition of collective expulsion is regulated in Article 19 (1) of the Charter.
[70] Peers, Hervey, Kenner & Ward (2014) p. 521.
[71] Peers, Hervey, Kenner & Ward (2014) p. 522.
[72] Peers, Hervey, Kenner & Ward (2014) p. 522.
[73] Peers, Hervey, Kenner & Ward (2014) p. 530.
[74] Peers, Hervey, Kenner & Ward (2014) p. 537.
[75] Convention implementing the Schengen Agreement of 14 June 1985 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 19 June 1990, [2000] OJ L 239/19 (as amended).
[76] Chapter 3 of the Schengen Convention.

(type C), a visa which allows an individual to transit through the international airports of the Member State, or stay for no more than 90 days in any 180-day period in the EU.[77] Furthermore, Article 77 (2) (a) of the TFEU provides that the European Parliament and the Council should adopt measures concerning the common policy on visas and other short-stay residence permits.

The Common EU Visa Policy requires nationals of certain non-EU countries to be in possession of a Schengen visa when seeking to cross the external borders of the Member States, and when travelling to the Schengen area for short stays.[78] These countries are listed in the Visa List Regulation.[79] Annex I lists the nationalities that require a visa for short stays in the Schengen Area, while Annex II lists those who do not require visas.[80]

Thus, it is interesting to recognise what considerations have impacted the placement of a particular country on either the list in Annex I, or the list in Annex II. The preamble provides an indication, stating that "risks relating to security and illegal immigration should be given priority consideration".[81] However, according to Noll, the exact implications of the term 'risks relating to the illegal immigration', remains undefined. Noll argues that there is "little doubt that the number of protection seekers impacts on the assessment of 'risks related to illegal immigration'".[82]

In order for visa requirements to work as an effective tool, the harmonisation of visa regimes is essential. Such harmonisation includes both formal and material issues, such as procedural and technical co-operation and agreeing on conditions for the issuing of visas.[83] Especially in an area without internal borders and border controls, such as in most of the EU, divergences in visa requirements particularly undermines the efficiency of entry controls.[84]

3.4.3 Community Code on Visas (The Visa Code)

The Community Code on Visas, often referred to as the Visa Code, establishes the harmonised procedures and conditions for issuing Schengen visas for short stays or transits in the Schengen Area.[85] The Visa Code, which entered into force in 2010, thus represents a further development in the

[77] Article 2 of Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July establishing a Community Code on Visas (Visa Code), [2009] OJ L 243/1 (as amended).
[78] Iben Jensen (2014) p. 10.
[79] [2001] OJ L 81/1 (as amended). Recitals 2-3 and 12 of the Preamble.
[80] Article 1 (1) - (2) of the Visa List Regulation.
[81] Preamble, Visa Regulation, para. 3.
[82] Noll (2000) p. 166.
[83] Noll (2000) p. 162.
[84] Noll (2000) p. 162.
[85] Iben Jensen (2014) p. 10.

Schengen *acquis*, and the objective is to ensure harmonised application of the common visa policy.[86] Further, the Visa Code interacts with the Visa List Regulation, and the Visa Code applies to any third-country national listed in Annex I of the Visa List Regulation.[87] Visas constitute one of the major pre-entry measures, that is, measures affecting the possibility of protection seekers to reach the territory of potential host states.[88]

The Visa Code does not establish a separate procedure for the lodging and processing of Limited Territorial Validity Visas (hereinafter: LTVs) applications on humanitarian grounds or because of international obligations, meaning that possible protection needs, and human rights issues are reviewed in the 'ordinary' visa application process.[89] Further, a visa is for the purpose of the Visa Code defined in Article 2 as "an authorisation … [for] entry in the territory of the Member States".

3.4.4 Visas with Limited Territorial Validity

LTVs may be issued in exceptional cases, if the concerned Member State "considers it necessary" to derogate from the common entry conditions for reasons of national interest, on humanitarian grounds or because of its international obligations.[90] Typically, such a visa is only valid on the territory of the Member State that issued the visa, although it can in exceptional cases be extended to other Member States if they consent to this.[91]

Thus, if a Member State considers itself to have an international obligation vis-à-vis a refugee visa applicant, the Member State shall issue an LTV Visa. However, the wording of Article 25 of the Visa Code does not clarify when there might be an obligation to issue such visas.[92] Additionally, the Visa Code states that Member States should have a cautious approach, recommending the issuing of LTVs only as an exception. In an Annex to the Visa Code, it is instead stated that "[i]t should not be expected that the Schengen [Member States] [would] use and abuse the possibility to issue LTVs".[93]

[86] Recitals 3 and 18 of the Preamble, cf. Recital 38.
[87] Iben Jensen (2014) p. 10.
[88] Noll (2000) p. 161.
[89] Iben Jensen (2014) p. i.
[90] Art. 25(1) CCV.
[91] Art. 25(2) CCV. Art. 2(4) CCV defines LTVs as visas 'valid for the territory of one or more Member States but not all Member States'.
[92] Art. 15 CISA generally established that visas '*may* be issued'. See also Art. 16 CISA and para. 3.1, Part V, CCI.
[93] Annex 14 CCI; Moreno-Lax (2017A).

4 Safe Third Countries and Readmission Agreements

An increasingly discussed topic in the EU is that of safe third countries, and the role these countries should or should not play in EU's migration system. This chapter gives a brief introduction to the concept of safe third countries and readmission agreements.

4.1 The Concept of Safe Third Countries

According to Noll, the domestic rules for granting asylum currently vary greatly in Western Europe.[94] This has primarily two consequences. Firstly, a rational protection seeker would not seek protection in any potential host country, but rather choose a potential host country with comparatively high recognition rates. Second, it is further rational for a rejected asylum seeker to file an asylum application in another European country (a concept frequently referred to as 'asylum shopping').[95]

European States' reaction to the varying domestic rules and recognition rates was not at first further harmonisation, however, despite this being the primary reason for such secondary movements, or 'asylum shopping'. Instead, "states stipulate[d] the fictive equality of [the domestic] systems, and allocated protection seekers to them under mechanical rule".[96] This allocation of protection seekers is based on the concept of safe third countries. The concept is built on the idea that when a certain number of formal criteria indicate that a protection seeker could have sought protection in a third country through which he or she passed, then his or her claim should be rejected, and asked return to that country.[97]

The concept of safe third countries has two essential parts. Firstly, that the responsibility for the processing of a protection claim must be established by allocation criteria. Secondly, that physical readmission of the protection seeker to the responsible country must be secured.[98] Seeing as states are not under obligation to readmit non-nationals according to customary international law, this readmission obligation must be created through an international treaty.[99]

[94] Noll (2000) p. 182.
[95] Noll (2000) p. 182.
[96] Noll (2000) p. 183.
[97] Noll (2000) p. 183.
[98] Noll (2000) p. 184.
[99] Noll (2000) p. 184.

By establishing this mechanical transfer of protection seekers, the safe third country concept effectively denies protection seekers the freedom to choose between potential host countries and removes the states' obligation to process each claim in substance, as the responsibility to do so is transferred to another country.[100] In practice, a system of safe third countries requires a series of preconditions, for example the identity and travel route of the protection seeker must be established, and a third country must be willing to take over the protection seeker and his or her case.[101] Further, it is important that the identity of a protection seeker is established in order to prevent multiple applications.[102]

4.2 Readmission Agreements

Treaties establishing the mechanical transfer of protection seekers, are commonly known as readmission agreements.[103] The Report on the Implementation of Readmission Agreements includes a working definition of what is to be considered a readmission agreement:

> "A readmission agreement shall be understood in general as an international agreement stipulating the procedures for the return and readmission of individuals (with the exception of extradition). The objective of such an agreement […] is to:
>
> - combat illegal migration (and in this sense to maintain public order and political stability in the countries affected by the immigration influx)
> - share the burden of illegal migration by more countries
> - have a preventative influence on the thinking of potential immigrants
>
> and thus to meet one of the conditions for the gradual reduction or abolition of the control on the internal borders of the countries which follow the readmission principles".[104]

As concerns third country nationals, such agreements include a co-operation between transit countries and destination countries, since returning a third country national to a country other than the country of nationality or of habitual residence requires some form of agreement between at least two states.

[100] Noll (2000) p. 184.
[101] Noll (2000) p. 184.
[102] Noll (2000) p. 185.
[103] Noll (2000) p. 203.
[104] Working Group of the Budapest Group, Report on the Implementation of Readmission Agreements, Doc. No. BG11/96 C, p. 2.

Therefore, a readmission agreement is fundamental for a return to a safe third country.[105]

However, such readmission agreements and their increasing use has been criticised, notably by the UNHCR, due to the lack of provisions assuring the observance of the prohibition of refoulement. Accordingly, the UNHCR has expressly discouraged the use of "classic bilateral readmission agreements […] to return asylum-seekers, even where this is technically possible".[106]

4.2.1 Readmission Agreements in the EU

In 1994 the Council put together a specimen agreement, covering the readmission of national and third country nationals, and recommended its use in a non-binding instrument.[107] In 1995, this was followed by guiding principles for drawing up readmission protocols, and in 1996 the Council took further steps to disseminate readmission obligations.[108]

According to Noll, some of the EU acquis concerning allocation are worrying. For instance, states adhere to varying concepts of what constitutes a safe third country. This, Noll argues, has previously resulted in making it "virtually impossible for the first requesting state to predict where the requested state may return a given protection seeker […]", and thus protection seekers may be returned to a country that "would not have been considered safe by the state starting the return movement".[109]

Further, Noll highlights the risk that communication issues, or miscommunication, between the requesting and requested state may affect the legal certainty of the protection seeker's asylum process. For example, "if not made clear to the authorities of the requested state that a returned person made a protection claim which has not been decided in substance, the risk prevails that such a case will be treated simply as an illegal migrant which can be returned to the country of origin".[110]

Additionally, allocation to another Member State or a safe third country may negatively impact the legal standing of the protection seeker, according to

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[105] Noll (2000) p. 204.
[106] UNHCR Division of International Protection, Note for the Standing Committee of the Executive Committee, Composite Flows and the Relationship of Refugee Outflows, EC/48/SC/CRR.29, 25 May 1998, para. 19.
[107] See Recommendation of 30 November 1994 concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country, OJ (1996) C 274, pp. 20-4.
[108] Noll (2000) p. 205.
[109] Noll (2000) p. 209.
[110] Noll (2000) p. 209 f.

Noll. Asylum legislations vary considerably, even within the EU, and an allocation to a Member State with a more restrictive practice may decrease the chances of a person receiving protection. Furthermore, removal to a safe third country outside the EU may create an even greater protection loss, due to for example restrictive recognition practices.[111]

Finally, Noll argues that allocation mechanisms, such as readmission agreements, risk being manipulated by the protection seekers, and considers it "conceivable that some protection seekers prefer continued illegality in the destination country to being allocated to a safe third country". If this happens, then the allocation mechanisms have failed to 'solve the problem' but have rather shifted it somewhere else.[112]

[111] Noll (2000) p. 210.
[112] Noll (2000) p. 211.

5. Humanitarian Visas

> "Statistics from the International Organisation of Migration (IOM) show that, during the past 3 years, an average of 10 migrants a day have died in the Mediterranean. … When it published these statistics at the end of December 2016, the UNHCR called on the EU to organise legal migration routes for refugees. … Among the EU institutions, a courteous silence echoed those proposals."[113]

The United Nations has repeatedly called for more solidarity and responsibility-sharing measures, in addition to establishing legal migration alternatives in the form of humanitarian visas, PEPs and enhanced family reunification.[114] This chapter will discuss what a humanitarian visa is, what role it plays in the EU legal order, and what the future of humanitarian visas might look like.

5.1 What are Humanitarian Visas?

Humanitarian visas fall within the category of the so-called Protection Entry Procedures (PEPs), which allow a non-national to approach the potential host state outside its territory, at its diplomatic representation, with a claim of asylum or other international protection, and to be granted an entry permit in case of a positive response to that claim.[115] However, humanitarian visas are not the only such procedure, and there are other protection practices with the aim of meeting individual or collective protection needs outside the territory of a Member State, such as humanitarian admission, temporary admission, diplomatic asylum and resettlement.[116]

However, what makes humanitarian visas unique according to some experts is the central role given to the individual autonomy of the protection seeker, along with the fact that the eligibility assessment procedure can be conducted extraterritorially.[117] In this way, humanitarian visas are constructed as to provide safe and legal access to a state's territory, allowing the final determination procedure to take place there, a procedure which complements the CEAS, instead of substituting it.

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[113] Moreno-Lax (2017B).
[114] UN High Commissioner for Refugees (UNHCR), *UNHCR Central Mediterranean Sea Initiative (CMSI): EU solidarity for rescue-at-sea and protection of refugees and migrants*, 13 May 2014.
[115] Noll (2005) p. 3.
[116] Iben Jensen (2014) p. 1.
[117] Iben Jensen (2014) p. 2.

5.2 Humanitarian Visas in the EU

> "Migrants who put their lives at risk by crossing the sea in unseaworthy boats to reach the shores of southern Europe highlight an alarming and unresolved chink in the European Union's protection of core rights of individuals."[118]

Currently, a prerequisite for seeking asylum in the EU is that potential asylum seekers must be on a Member States' territory, as EU law does not provide for "[…] ways to facilitate the arrival of asylum seekers […]", and as potential asylum seekers are primarily nationals of countries requiring a visa to enter the EU and "[…] often do not qualify for an ordinary visa, they may have to cross the border in an irregular manner."[119] To put this into perspective, in 2013 more than 100 nationalities required a visa to enter the EU, covering over 80 percent of the global non-EU population.[120]

Thus, no EU-wide legal routes are available for asylum purposes, making it impossible to trigger the protection mechanisms of the CEAS legally.[121] This has resulted in estimates suggesting that more than 90% of all asylum seekers entering Europe do so in an irregular way.[122] As a result, the EU has been criticised for the strong emphasis placed on security and migration control issues, and the relatively small attention that has been paid to the refugee and human rights responsibilities of the Member States.[123] In light of this, the UN has called for increased solidarity and responsibility-sharing measures, as well as creating legal migration alternatives through for example humanitarian visas and other PEPs.[124]

5.2.1 A Brief History: From the Tampere Conclusions to the post-Stockholm Guidelines

Since the adoption of the Tampere Conclusions[125] in 1999, the European Commission has encouraged Member States to set up a coordinated approach to humanitarian visas, as a part of the Commission's efforts to ensure an or-

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[118] EU Agency for Fundamental Rights (2013), *Fundamental rights at Europe's southern sea border*s, pp. 3 and 10.
[119] EU Agency for Fundamental Rights (2014), *Handbook on European law relating to asylum, borders and immigration*, para. 1.6.
[120] Frontex Annual Risk Analysis 2013, p. 14 ff.
[121] Guild & Moreno-Law (2013) pp. 5 and 20.
[122] Facchi (ed.) (2012) p. 17.
[123] Iben Jensen (2014) p. 4.
[124] UN High Commissioner for Refugees (UNHCR), *UNHCR Central Mediterranean Sea Initiative (CMSI): EU solidarity for rescue-at-sea and protection of refugees and migrants*, 13 May 2014.
[125] Presidency Conclusions at the Tampere European Council 15-16 October 1999, Conclusion 3.

derly arrival of persons to the EU. Despite support from the European Parliament, political will has been lacking in the Member States.[126] Additionally, the Tampere programme included a partnership with countries of origin, illustrating the growing importance of an 'external' dimension of EU migration and asylum policy.[127] The aim of this common approach was to achieve:

> "[…] an open and secure European Union, fully committed to the obligations of the Geneva Refugee Convention and other relevant human rights instruments, and able to respond to humanitarian needs on the basis of solidarity."[128]

The Commission was mandated by the European Council in the Tampere Conclusions to examine different ways to create legal access to EU territory for third-country nationals seeking protection.[129] In the Commission Communications of November 2000 and November 2001, the Commission emphasised the need for a "comprehensive and balanced approach to the common immigration policy, ensuring sufficient refugee protection within a system of efficient countermeasures against irregular migratory flows."[130] Thus, the Commission launched feasibility studies on these themes, in particular regarding the processing of asylum requests made outside the EU.[131]

One of these feasibility studies was carried out by the Danish Centre for Human Rights in 2002,[132] and it outlined and examined practice and the legal framework on the use of PEPs in a selection of European states and three non-European states, as well as the international and European legal framework of relevance to protection seekers and PEPs. The study concluded that:

> "[l]egal obligations under human rights instruments such as the ECHR suggest that states may find themselves obliged to allow access to their territories in exceptional situations. Where such access is denied, claimants may rely on the right to a remedy. There are further reasons supporting the conception and operation of formalised Protected Entry Procedures, which offer a framework for handling such exceptional claims. Protected Entry Procedures would be coherent with the *acquis* as it

[126] Iben Jensen (2014) p. 18.
[127] Boswell & Geddes (2011), p. 52.
[128] Presidency Conclusions at the Tampere European Council 15-16 October 1999, Conclusion 4.
[129] Supra, para. 15.
[130] European Commission (2000) Communication from the Commission to the Council and the European Parliament: Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, COM(2000) 755 final, 22 November, in particular paras. 1.2, 2.3.1 and 2.3.2, and European Commission (2001) Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration, COM(2001) 672 final, 15 November, in particular part II, para. 3.2. G.
[131] Iben Jensen (2014) p. 19.
[132] The Danish Centre for Human Rights, *Study on the feasibility of processing asylum claims outside the EU*, 2012.

> stands today. Nothing in the present *acquis* curtails the freedom of individual Member States to provide for a Protected Entry Procedure at a unilateral level. Furthermore, there is a Community competence for developing a joint normative framework."[133]

In light of the above, the study suggested five proposals that could be considered when developing future PEPs. The proposals included the flexible use of the visa regime, a gradual harmonisation through a Directive based on best practices, and the introduction of a Schengen Asylum Visa.[134] After the feasibility study, the Commission adopted a Communication in March 2003 in which the term 'protected entry scheme' was explicitly used for the first time.[135] Further, at the Thessaloniki European Council, the European Council noted the Commission Communication, and invited the Commission to *"[...] explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection [...]"*.[136]

Following this, the EU Italian Presidency seminar '*Towards more orderly and managed entry in the EU of persons in need of international protection'*, which was held in Rome on 13-14 October 2003, where the findings of the feasibility study was discussed. Here "[…] it became clear […] that with regard to the potential of Protected Entry Procedures, there is not the same level of common perspective and confidence among Member States as exists vis-à-vis resettlement" and the study was "[…] found too radical and did not get political support" among the Member States.[137] However, in contrast to this the European Parliament welcomed the notion of PEPs, which will be discussed further below.[138]

The Commission proceeded to not mentioning PEPs again until June 2008, when it reiterated the principle of a comprehensive and balanced migration policy, and stated that the CEAS should "ensure access for those in need of protection".[139] Further, in the Council of the European Union's European Pact on Immigration and Asylum of September 2008, the Council reaffirmed that

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[133] The Danish Centre for Human Rights, Study on the feasibility of processing asylum claims outside the EU, p. 4.
[134] Supra, pp. 5-6, proposal one, four and five, respectively.
[135] Iben Jensen (2014) p. 20.
[136] Presidency Conclusions of the Thessaloniki European Council 19-20 June, p. 33 f.
[137] European Commission (2004) Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin: "Improving access to durable solutions," COM(2004) 410 final, 4 June, para. 35.
[138] European Parliament (2004) *Resolution on the Communication from the Commission to the Council and the European Parliament entitled "towards more accessible, equitable and managed asylum systems",* para. 29.
[139] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum - an integrated approach to protection across the EU; Facchi (ed.) (2012) p. 35 f.

"[…] migration and asylum policies must comply with the norms of international law, particularly those that concern human rights, human dignity and refugees."

Instead, during the Hague Programme, which covered the period from 2005 to 2009, work was focused on a balanced approach to migration management, including measures to tackle illegal immigration, smuggling and trafficking. Further, an integrated approach to the management of external borders and visa policies was developed, along with the creating of a common asylum area.[140]

Finally, the Stockholm Programme covers the period between 2010 and 2014, and states that the EU needs to promote a dynamic and fair immigration policy. Included in this dynamic and fair approach are partnerships with third countries, and the extension of regional protection programmes to assist non-member states.[141] As can be seen from these action plans, the EU now plays a serious part in setting the migration and asylum agenda.[142]

5.2.2 Humanitarian Visas – The European Parliament's Take

In a briefing document from 2016 by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs, it was stated that the European Parliament has "consistently called for the establishment of safe and legal avenues to enable protection seekers to reach the European Union".[143] Furthermore, in its 12 April 2016 resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration, the Parliament argued that "persons seeking international protection should be able to apply for a European humanitarian visa directly at any consulate or embassy of the Member States" and that "it is necessary to amend the Union Visa Code by including more specific provisions on humanitarian visas".[144]

5.3 Humanitarian Visas in the Visa Code

In a 2014 paper requested by the European Parliament's Committee on Civil Liberties, Justice and Home Affairs, Ulla Iben Jensen concludes, after an analysis of the wording of the Visa Code and the application by analogy of the recent CJEU judgement in the *Koushkaki* case,[145] that Article 25 (1)

[140] Boswell & Geddes (2011) p. 52 f.
[141] Boswell & Geddes (2011) p. 52 f.
[142] Boswell & Geddes (2011) p. 53.
[143] Policy Department for Citizens' Rights and Constitutional Affairs, *Briefing: Towards an EU humanitarian visa scheme?,* Darren Neville and Amalia Rigon, June 2016.
[144] European Parliament resolution on the situation in the Mediterranean and the need for a holistic EU approach to migration, 12 April 2016.
[145] CJEU judgment in Case C-84/12 Koushkaki, 19 December 2013.

obliges Member States to issue LTV visas when this follows from the Member States' refugee and human rights obligations, which would entail a potential opening for humanitarian visas in the EU.[146] However, according to Iben Jensen, it still remains unclear whether there is a mandatory assessment of protection needs and human rights issues under Articles 19 (4) and 25 (1) of the Visa Code, and further whether there is a right of appeal if an LTV visa is refused.[147]

Another difficulty is that the concept of 'humanitarian grounds' remains undefined in binding EU instruments.[148] Noll et al. observed that humanitarian grounds "[…] remain undefined in the Schengen Convention [as well as in the Schengen Borders Code and the Visa Code], but it is contextually clear that the granting of visas to alleviate threats to the applicant's human rights are covered by the term."[149]

According to some, Articles 19 and 25 of the Visa Code provide the possibility of issuing humanitarian visas with limited territorial validity (LTV visas). This as Article 19 (4) allows for derogation from the admissibility requirements for visa applications, and Article 25 (1) allows derogation from fulfilment of Schengen visa requirements.[150]

Although there is no automatic link between the two articles, if a Member State recognises a humanitarian situation to be serious enough to warrant derogation from the admissibility requirements, it seems logical that the same humanitarian situation would be serious enough for the Member State to issue an LTV visa.[151] Iben Jensen further argued that the scope of the Member States' powers has been extended beyond their physical borders, yet this has not been met with an equivalent of their refugee and human rights obligations. This, according to Iben Jensen, has the potential of undermining the Member States' obligations, and "render the right to asylum an illusion".[152]

5.3.1 Article 19 (4): Derogations from Admissibility

[146] Iben Jensen (2014) p. 7.
[147] Iben Jensen (2014) p. 7.
[148] Iben Jensen (2014) p. 7.
[149] The Danish Centre for Human Rights, Study on the feasibility of processing asylum claims outside the EU, p. 235.
[150] Iben Jensen (2014) p. i.
[151] Iben Jensen (2014) p. 7.
[152] Iben Jensen (2014) p. 4 f.

Requirements

The first obstacle when applying for a Schengen visa, is having one's application declared admissible, something that might prove difficult for protection seekers, who are often unable to supply the correct documents or lack the required funds.[153] However, a Schengen visa application that fails to meet the admissibility requirements in Article 19, may be considered admissible on humanitarian grounds, or for reasons of national interest, pursuant to Article 19 (4) of the Visa Code.[154] Further, according to Article 16 (6) of the Visa Code, the visa fee may be waivered or reduced for humanitarian reasons.

5.3.2 Article 25 (1): Derogations from Schengen Visa Requirements

The Visa List Regulation, mentioned above, does not expressly allow exemptions from the visa requirements in Article 4 for protection seekers. Nonetheless, Recital 8 of the Preamble states that a Member State may exempt certain categories of persons from visa requirements or impose it on them in accordance with public international law or custom.[155] In contrast to this, Article 25 (1) of the Visa Code provides for the issuance of short-stay visas with limited territorial validity on humanitarian grounds, for reasons of national interest or because of international obligations. Further, this corresponds with the three exceptional reasons for which a Member State may allow entry into its territory pursuant to Article 5 (4) (c) of the Schengen Borders Code.[156]

5.4 The Koushkaki Case

The *Koushkaki* Case concerned an Iranian national whose Schengen visa application was refused by German authorities, as there was significant doubt whether he would return to Iran before the visa expired.[157] After the decision was appealed, the Berlin Administrative Court requested the CJEU to clarify the conditions for refusal of a Schengen visa. The CJEU ruled that a Schengen visa may only be refused on the grounds provided for in the Visa Code.[158] It is therefore not possible for a national authority to apply any other reasons for refusing such a visa, other than those stated in the Visa Code, as this would threaten the harmonised system of visa control in the EU. Further, such behaviour by some Member States, might result in 'visa-shopping', where third-country nationals apply for visas in the Member States that adhere to the listed

[153] Iben Jensen (2014) p. 11.
[154] Iben Jensen (2014) p. 11.
[155] The Danish Centre for Human Rights, Study on the feasibility of processing asylum claims outside the EU, p. 57 f.
[156] Iben Jensen (2014) p. 12 f.
[157] CJEU Case C-84/12 Koushkaki, para 19 f.
[158] CJEU Case C-84/12 Koushkaki, para 47.

grounds.[159] Furthermore, the CJEU clarifies that a visa may be refused, in accordance with the Visa Code, if there is reasonable doubt regarding the applicant's intention to leave the Member States' territory before the expiry of the visa. However, the authority does not have to be certain of the applicant's intention to remain. Relevant factors to consider are the general situation in the applicant's country of residence and the applicant's individual characteristics.[160]

5.4.1 Comments on the Koushkaki Case

As noted by Professor Steve Peers, in his article *Do potential asylum-seekers have the right to a Schengen visa?*, the judgement raises questions concerning the grounds of refusal for visa applications made by potential asylum-seekers. Noting this, Peers states that applicants for international protection "might well apply for a visa with the intention of leaving the country of origin in order to apply for asylum in the country which issues the visa".[161] Moreover, Peers warns that in order to dispel reasonable doubt as to their intentions to return, potential asylum-seekers would need to be dishonest. However, according to Peers, "Article 31 of the Geneva Convention implicitly makes it clear that the need to flee persecution justifies beaches of immigration law".[162]

Peers continues to argue that Member States are obliged to issue a visa with limited territorial validity, if the Member State considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations. Here, Peers states that "[a]rguably the binding nature of the relevant international obligations, along with the EU Charter of Fundamental Rights and the use of the word 'shall', override the discretion suggested by the words 'consider it necessary'".[163]

In another blogpost, Professor Steve Peers argues that the Court's judgement is "surely relevant by analogy to applications for most of the various forms of short-stay visas referred to in the visa code".[164] The key question in the judgement, that is, the 'right' to a Schengen visa, Peers considers the Court's ruling both welcome and convincing, and notes that the Court does not set out the

[159] European Database of Asylum Law, EDAL (2014).
[160] CJEU Case C-84/12 Koushkaki, para 56 f.
[161] Pears (2014).
[162] Pears (2014).
[163] Pears (2014).
[164] Pears (2014).

'right to a visa', but rather focuses on the exhaustive nature of the list of the grounds for refusal of a visa.[165] Commenting this, he states that:

> " … this is a distinction without a difference: national authorities must nonetheless issue the visa if the conditions are satisfied. As Mary Poppins might say, the different wording is simply a 'spoonful of sugar' to help the national authorities accept the Court's ruling."[166]

However, as the CJEU stresses, national authorities retain significant discretion in the application of the criteria in the Visa Code. Despite this, Peers considers that "the *Koushkaki* judgement has opened a significant crack in the wall of 'Fortress Europe' for would-be asylum-seekers".[167]

5.5 The Future of Humanitarian Visas in the EU

> "…until the [EU] has created effective legal pathways to Europe, as it has obliged itself to do, people in need of international protection will continue to use other ways to save themselves and their loved ones – whether the Member States like it or not."[168]

5.5.1 Humanitarian Visas in the EU Member States

In 2017, according to the European Parliament's Policy Department for Citizens Rights and Constitutional Affairs, there were 16 EU Member States that had, or previously had, some form of scheme concerning humanitarian visas. However, the same research revealed that in times of crisis the number of visas with limited territorial validity issued for humanitarian reasons decreased significantly.[169]

5.5.2 Some National Examples

One such EU Member State with a scheme concerning humanitarian visas is France. French authorities issue asylum visas to individuals who are in need of international protection, after they have lodged requests with French consulates in their country of residence. This request is then pre-assessed in an interview at the consulate, based on the criteria in the 1951 Refugee Convention and taking into account both the applicant's vulnerability as well as their risk of being subjected to refoulement. Further, the individual's personal connections with France, as well as their integration prospects are assessed. If

[165] Pears (2014).
[166] Pears (2014).
[167] Pears (2014).
[168] Progin-Theuerkauf & Zoeteweij-Turhan (2017B).
[169] Progin-Theuerkauf & Zoeteweij-Turhan (2017A).

granted an asylum visa, this allows the individual to stay in France for a period of six months, in order to lodge a formal asylum request with the competent authorities.[170]

Likewise, Germany has implemented humanitarian admission programmes sporadically since 1956, and regularly since the 1990s. One of the best known contemporary examples is HAP Syria (Humanitarian Admission Programme Syria), which has allowed approximately 20 000 Syrians to enter Germany directly from Syria's neighbouring countries, or from Egypt and Libya, from 2013 to 2015. Such visas are usually of a temporary nature, assuming residence will not be permanent, and their purpose is to offer protection during a period in which the country of origin is undergoing a crisis, war, or other dangerous condition. Thus, a residence permit is issued for two years, with the option of renewal.[171] In addition to similar programmes, German law provides for an individual foreigner to be granted a residence permit for the purpose of being admitted from abroad in accordance with international law or urgent humanitarian grounds.[172]

In a similar vein, the Irish Government developed a Syrian Humanitarian Admission Programme (abbreviated SHAP) in 2014, in order to allow naturalised Irish citizens of Syrian birth or nationality already lawfully residing in Ireland, to make applications for vulnerable close family members to join them in Ireland on a temporary basis of up to two years. Persons admitted under this programme are entitled to work, and have the opportunity of establishing a business or investing.[173]

[170] European Area of Freedom, Security & Justice (2015).
[171] Resettlement and Humanitarian Admission Programmes in Germany: Focus-Study by the German National Contact Point for the European Migration Network, p. 5 f.
[172] European Area of Freedom, Security & Justice (2015).
[173] European Area of Freedom, Security & Justice (2015).

6. CJEU Case C-638/16 *X and X*

In December 2016, a Belgian court referred questions to the Court of Justice of the European Union (CJEU) concerning the issuance of humanitarian visas to a Christian Syrian family. The central question in the case is whether international treaties and Union law oblige EU Member States to allow their consulates and embassies to issue humanitarian visas.

This chapter will attempt to outline the case in its entirety, both the reasoning of the referring court, the Advocate General and the CJEU.

6.1 The national process and background

On 12 October 2016, a Syrian couple, and their three minor children, submitted applications for visas with limited territorial validity, on the basis of Article 25 (1) (a) of the EU Visa Code, at the Belgian embassy in Beirut, before returning to Syria the following day.[174] The family, living in Aleppo, stated that the purpose of the applications was to attain visas on the basis of the EU Visa Code[175], with limited territorial validity, in order to leave their besieged hometown, and apply for asylum in Belgium.[176]

Further, one of the applicants stated that he had been abducted by an armed terrorist group in Syria, who he claimed had beaten and tortured him, and only released him following a paid ransom. As Orthodox Christians, the applicants emphasise their risk of religious persecution, as well as the generally deteriorating security situation in both Syria at large, and Aleppo specifically.[177]

On 18 October 2016, the Office des Étrangers (Immigration Office, Belgium) rejected the applications, stating that the application must be considered contrary to the EU Visa Code. This as the family, by seeking to obtain a visa with limited territorial validity, in order to apply for asylum in Belgium, clearly wished to stay longer than 90 days in Belgium. It was this aim, i.e. to stay in Belgium for longer than 90 days, which the Office considered contrary to the EU Visa Code. Additionally, the Office states that authorising entry visas, in

[174] CJEU Case C-638/16, PPU, X and X, para 19.
[175] Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (OJ 2009 L 243, p. 1), as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1).
[176] Court of Justice of the European Union, Press Release No 24/17, Luxembourg, 7 March 2017.
[177] CJEU Case C-638/16, PPU, X and X, para 20.

order to allow the Syrian family to apply for asylum Belgium, would amount to allowing them to make an asylum application at a diplomatic post.[178]

The Syrian family proceeded to challenge the Office's decision before the Conseil du contentieux des étrangers, and submitted that the Charter and ECHR, impose a positive obligation on Member States to guarantee the right to asylum.[179] Further, they claimed that it is only through international protection that it can be guaranteed that they will not be subjected to torture and inhuman or degrading treatment or punishment. The Belgian State, on the other hand, is of the opinion that it is under no obligation to admit a third-country national into its territory, and that its only obligation in that regard is to refrain from deportation.[180]

6.2 The Opinion of the referring court

The CCE referred the case to the Court of Justice for a preliminary ruling, concerning the interpretation of Article 25(1)(a) of the EU Visa Code, and of Articles 4 and 18 of the Charter.[181] The referring Court argues that it is apparent from Article 1 of the ECHR that applicants may rely on Article 3 of the ECHR only if they are within a Member States 'jurisdiction'. The referring court thus wonder whether the implementation of the visa policy can be considered as the exercise of jurisdiction in this case.

Further, the referring court also asks whether a right of entry follows from either the obligation to take preventative action, or from the principle of *non-refoulement*, from Article 3 of the ECHR and Article 33 of the Geneva Convention.[182] Additionally, the referring court points out that unlike Article 3 of the ECHR, Article 4 of the Charter, does not depend on the exercise of jurisdiction, but instead on the applicability of EU law, and that it does not follow from either the Treaties or from the Charter that that implementation is territorially limited.[183] Finally, the Belgian court notes that a Member State must issue a visa when it considers it to be necessary due to international obligations, according to Article 25 in the Visa Code, but considers the extent of the Member States' discretion unclear.[184]

Based on the abovementioned, the referring court decided to stay the proceedings and refer two questions to the Court of Justice for a preliminary ruling.

[178] CJEU Case C-638/16, PPU, X and X, para 21.
[179] Art. 3 of the ECHR and Art. 4 of the Charter.
[180] CJEU Case C-638/16, PPU, X and X, para 24.
[181] CJEU Case C-638/16, PPU, X and X, para 23.
[182] CJEU Case C-638/16, PPU, X and X, para 25.
[183] CJEU Case C-638/16, PPU, X and X, para 26.
[184] CJEU Case C-638/16, PPU, X and X, para 27.

The first question concerns the 'international obligations' referred to in Article 25 (1) (a) of the Visa Code, and whether this includes all of the rights guaranteed in the Charter, particularly those guaranteed by Articles 4 and 18. In line with this, the referring court asks whether these 'international obligations' include obligations that bind the Member States, in the light of the ECHR and Article 33 of the Geneva Convention.[185]

The second referred question is dependent on the answer to the first question, and here the referring court asks the Court of Justice to consider if Article 25 (1) (a) of the Visa Code should be interpreted as meaning that, subject to discretion regarding the circumstances of the case, a Member State is required to issue a visa with limited territorial validity, if there is a risk of infringement of Article 4 and/or Article 18 of the Charter or another international obligation which binds that Members State. Further, the referring court asks whether the existence of links between the applicant and the Member State (through for example family connections, host families, guarantors and sponsors), affect the answer to the first part of the second question.[186]

6.3 The Court of Justice: Jurisdiction

One of the key questions in the case is whether or not the Court of Justice has jurisdiction to answer the referred questions from the Belgian Court. In the section below, the issue of jurisdiction is illustrated, from the perspective of the parties, the Commission, the Advocate General, and the CJEU in turn.

6.3.1 The Parties' View

The Belgian Government submits that the Court of Justice lacks jurisdiction, as the applicant's situation falls outside the scope of EU law.[187] This, the government argues, is due to the fact that the Visa Code only governs stays no longer than three months in any six-month period ('short-stay visas'), and as the applicants do not fulfil the conditions required for a short-stay visa according to the Visa Code, their situation is not governed by EU law.[188] This view was subscribed to by most Member State governments participating in the hearings.[189]

Secondly, the Belgian Government states that neither the provisions relating to asylum, nor the provisions of the Charter, make it possible to link the applicant's situation with EU law. This as, according to Article 3 (1) and (2) of

[185] CJEU Case C-638/16, PPU, X and X, para 28.
[186] CJEU Case C-638/16, PPU, X and X, para 28.
[187] CJEU Case C-638/16, PPU, X and X, para 43.
[188] CJEU Case C-638/16, PPU, X and X, para 44.
[189] CJEU Case C-638/16, PPU, X and X, para 47.

Directive 2013/32, the Common European Asylum System applies only to asylum applications made in the territory, or at the borders, of Member States, thus excluding requests submitted at Member States' representations.[190] As EU law is not implemented concerning situations such as the one in the main proceedings, the Belgian Government is of the opinion that the Charter cannot be applicable. Finally, the Belgian Government argues that, as there is no EU legislative act covering the conditions for entry and stay for a three-month period for third country nationals on humanitarian grounds, the Member States have maintained their jurisdiction in the matter.[191]

6.3.2 The Commission's View

The Commission puts forward similar arguments to those of the Belgian Government, except for the government's argument regarding the Court of Justice not having jurisdiction. According to the Commission's interpretation, "a visa application for the purpose of reaching the territory of a Member State in order to seek international protection there cannot be understood as an application for a short-stay visa" but should be dealt with as an application for a long-stay visa under national law.[192]

6.3.3 Advocate General Mengozzi's View

The Advocate General begins by stating that all of the abovementioned objections should be rejected.[193] The Advocate General states that it is obvious from the main proceedings, that the applicants sought, under the Visa Code, the issuing of a short-stay visa with limited territorial validity. Likewise, it is apparent that the competent authorities classified, examined and processed the applications as applications for visas under the Visa Code, and the applications were deemed admissible under the Visa Code.[194]

Further, the Advocate General states that the intention of the applicants to apply for refugee status once they had entered Belgian territory, "*cannot alter the nature or purpose of their applications" (*Advocate General Mengozzi's italics*).* In particular, the Advocate General argues that the "intention cannot convert the visa applications into applications for long-stay visas or place those applications outside the scope of the Visa Code and of EU law", despite the submissions of several Member States at the hearing before the Court.[195] In line with this, depending on the interpretation of Article 25 of the Visa

[190] CJEU Case C-638/16, PPU, X and X, para 45.
[191] CJEU Case C-638/16, PPU, X and X, para 45.
[192] CJEU Case C-638/16, PPU, X and X, para 46.
[193] CJEU Case C-638/16, PPU, X and X, para 48.
[194] CJEU Case C-638/16, PPU, X and X, para 49.
[195] CJEU Case C-638/16, PPU, X and X, para 50.

Code, and in particular its relationship with Article 32, the applicants' intentions could at most constitute a ground for refusal, but can never constitute a ground for not applying the Visa Code.[196]

Further, the Advocate General notes that the applicants did not need to apply for long-stay visas, as, if they had been allowed to enter Belgian territory, their right to remain in Belgian territory beyond the 90 days would have stemmed from their status of asylum seekers, in accordance with Article 9 (1) of Directive 2013/32.[197]

6.3.4 The CJEU's View

The Belgian Government, as outlined above, disputed the Court of Justice's jurisdiction to answer the referred questions, on the grounds that Article 25(1) of the Visa Code, does not apply to the applications at issue in the main proceedings.[198] However, the Court deemed that it in fact had jurisdiction over the present case, as it is "plain from the order of reference that the applications at issue were submitted on humanitarian grounds on the basis of Article 25 of the Visa Code".[199] Concerning the question of whether the Visa Code itself is applicable to such applications as those in the main proceedings, the Court stated that the answer "is inextricably linked to the answers to be given to the present request for preliminary ruling", and in those circumstances, the Court has jurisdiction over the request for preliminary ruling.[200]

6.4 Opinion of Advocate General Mengozzi

Advocate General Mengozzi starts by stating that the case provides the Court with an opportunity to clarify the legal requirements for Member States when adopting a decision regarding an application for a visa with limited territorial validity, and thus, their responsibility to respect the rights guaranteed by the Charter.[201] Advocate General Mengozzi argues that in the referred case, the Court must come to the conclusion that the respect for those rights, particularly Article 4 of the Charter, implies a positive obligation for the Member States. This positive obligation requires them to issue visas with limited territorial validity, if there are substantial grounds to believe that refusal will expose the applicant to torture or inhuman or degrading treatment.[202]

[196] CJEU Case C-638/16, PPU, X and X, para 51.
[197] CJEU Case C-638/16, PPU, X and X, para 53.
[198] CJEU Case C-638/16, PPU, X and X, para 35.
[199] CJEU Case C-638/16, PPU, X and X, para 36.
[200] CJEU Case C-638/16, PPU, X and X, para 36 f.
[201] Case C-638/16 PPU, AG Opinion, para 3.
[202] Case C-638/16 PPU, AG Opinion, para 3.

Further, as opposed to that argued by various governments at the Court's hearing, Advocate General Mengozzi is convinced that there is no need to wait for a hypothetical modification of the Visa Code, "in order to recognise a legal access route to the right to international protection".[203] Instead, he is of the opinion that such a legal route already exists, specifically through Article 25 (1) (a) of the Visa Code[204], as has also been acknowledged by the rapporteur of the Committee on Civil Liberties, Justice and Home Affairs.[205]

6.4.1 The first question referred for a preliminary ruling

The first of the referring court's two questions, consists of two parts. The first one concerns the meaning of 'international obligations' in Article 25 (1) (a) of the Visa Code, and whether it covers the rights guaranteed by the Charter, while the second part asks whether the expression covers obligations in the ECHR and Article 33 of the Geneva Convention.[206]

Advocate General Mengozzi starts by confidently stating that "there is not much doubt in my mind as to the reply to be given to the first part of the question"[207], and points out that the EU has its own legal order, separate from that of international law. According to Article 6 (1) TEU, the Charter is part of EU primary law, and is, as such, a source of EU law. Thus, the Member States must comply with the Charter by reason of their accession to the EU, and therefore the requirements in the Charter are not among the 'international obligations' mentioned in Article 25 (1) (a) of the Visa Code, regardless of the meaning given to that expression.[208] This, however, the Advocate General stresses, does not mean that decisions taken by Member States on the basis of Article 25 "are not required to be taken in compliance with the requirements of the Charter".[209]

The scope of the Charter, in terms of Member State action, is defined in Article 51 (1), and according to this, the fundamental rights of the Charter must be respected and guaranteed where national legislation, and the actions of the Member State, fall within the scope of EU law.[210] Therefore, it is necessary to ascertain whether a Member State, in situations such as the one in the main

[203] Case C-638/16 PPU, AG Opinion, para 8.
[204] Case C-638/16 PPU, AG Opinion, para 9.
[205] In the explanatory statement of the amendments proposed by the Parliament relating to 'humanitarian visas', the rapporteur states (p. 100) that he chose 'a prudent and legally sound approach based on *strengthening and developing existing provisions in the* [current] *text*' of the Visa Code (italics added).
[206] Case C-638/16 PPU, AG Opinion, para 71.
[207] Case C-638/16 PPU, AG Opinion, para 72.
[208] Case C-638/16 PPU, AG Opinion, para 73.
[209] Case C-638/16 PPU, AG Opinion, para 74.
[210] Case C-638/16 PPU, AG Opinion, para 75.

proceedings, implements EU law for the purposes of Article 51 (1) of the Charter.[211]

In order to ascertain this, Advocate General Mengozzi points out that the conditions and rules for issuing visas of limited territoriality are laid down in an EU regulation. Further, the purpose of that EU regulation is "to contribute to the development … of a common visa policy aimed at 'facilitating legitimate travel and tackling illegal immigration through further harmonisation of national legislation and handling practices at local consular missions'".[212]

The Advocate General argues that, by issuing, or refusing to issue, a visa with limited territorial validity, the Member States' authorities adopt a decision concerning the crossing of the Member States' external borders, "which is subject to a *harmonised set of rules* and act, therefore, *in the framework of and pursuant to EU law"* (AGs italics).[213] The fact that such a decision is regulated by EU law is not affected by the discretion awarded Member States concerning the application of Article 25 (1) (a) of the Visa Code.[214] Thus, according to Advocate General Mengozzi, when adopting a decision under Article 25 the Member States' authorities are implementing EU law in accordance with the requirements in Article 51 (1) of the Charter, which requires the authorities to respect the rights guaranteed by the Charter.[215]

This conclusion is in part based on the wording of the Visa Code itself, with recital 29 stating that the code is subject to the fundamental rights and the principles of the Charter. Further, the Commission, in the foreword to its *Handbook for the processing of visa applications and the modification of issued visas,* states that fundamental rights must be respected, emphasising that those rights must be guaranteed to any person applying for a visa.[216]

As argued by Advocate General Mengozzi in the abovementioned section concerning the Court's jurisdiction, the Visa Code was the basis for the application, and decision, by the Belgian authorities.[217] Thus, the decision in the main proceedings is an implementation of the Visa Code, and thus, EU law, as regards Article 51 (1) of the Charter. So, while implementing and adopting those decisions, the Belgian authorities were required to respect and uphold

[211] Case C-638/16 PPU, AG Opinion, para 76.
[212] Case C-638/16 PPU, AG Opinion, para 77.
[213] Case C-638/16 PPU, AG Opinion, para 80.
[214] Case C-638/16 PPU, AG Opinion, para 81.
[215] Case C-638/16 PPU, AG Opinion, para 84.
[216] Case C-638/16 PPU, AG Opinion, para 85.
[217] Case C-638/16 PPU, AG Opinion, para 87.

the rights guaranteed by the Charter.[218] Furthermore, Advocate General Mengozzi notes that the fundamental rights recognised in the Charter are guaranteed to the addressees of adopted acts, irrespective of any territorial criterion.[219]

Finally, the Advocate General states that if the Charter, and its guaranteed rights, are deemed to be inapplicable when an institution or a Member State implementing EU law acts extraterritorially, then such a decision would have consequences beyond the realm of visa policy.[220] But, if focusing on the visa policy area in particular, such a decision would have significant consequences, with Advocate General Mengozzi arguing that if Charter application was made conditional on both territorial connection with the EU, as well as a connection with EU law, then the vast majority, if not the whole, of the Visa Code would become exempt from the requirement of respecting the rights guaranteed by the Charter.[221]

The second part of the first referred question, concerns the expression 'international obligations' in Article 25 (1) (a) of the Visa Code, and whether this expression covers the obligations that bind Member States in light of the ECHR and Article 33 of the Geneva Convention.[222] Here, the Advocate General is of the opinion that the Court adopting a position on this question, would prove not useful in the main proceedings, as, regardless of the meaning and scope of this particular expression, it is indisputable that both the ECHR and the Geneva Convention are important for both the interpretation and action concerning EU law in this area.[223]

Addressing the concerns expressed by the referring court regarding the applicability of the ECHR and the Geneva Convention, as the situation in the main proceedings does not satisfy the territorial criterion preconditioning their applicability, Advocate General Mengozzi states that there is no need for the Court to adjudicate this.[224] This as the Belgian authorities were required to comply with the provisions of the Charter, more specifically, Articles 4 and 18 thereof, when adopting the decisions contested in the main proceedings.[225] Hence, as Articles 4 and 18 of the Charter guarantee protection which is, at the very least, equivalent to that provided by Article 3 of the

[218] Case C-638/16 PPU, AG Opinion, para 88.
[219] Case C-638/16 PPU, AG Opinion, para 89.
[220] Case C-638/16 PPU, AG Opinion, para 92.
[221] Case C-638/16 PPU, AG Opinion, para 93.
[222] Case C-638/16 PPU, AG Opinion, para 102.
[223] Case C-638/16 PPU, AG Opinion, para 103.
[224] Case C-638/16 PPU, AG Opinion, para 104 f.
[225] Case C-638/16 PPU, AG Opinion, para 106.

ECHR and Article 33 of the Geneva Convention, any further dwelling on the potential applicability of those conventions is unnecessary.[226]

6.4.1.1 Summary: The Advocate General's answer to the first referred question

To summarise, the Advocate General's answer to the first referred question is that the expression 'international obligations' in Article 25 (1) (a) of the Visa Code does not include the Charter. However, the Member States must comply with the Charter when examining, on the basis of Article 25, a visa application in support of which humanitarian grounds are invoked, and when adopting a decision in relation to such an application.[227]

6.4.2 The second question referred for a preliminary ruling

In its second question, the referring court asks whether, in a situation where there is a genuine risk of infringement of Article 4 and/or Article 18 of the Charter, a Member State is required to issue a humanitarian visa, in accordance with Article 25 (1) (a) of the Visa Code. This, despite the degree of discretion allowed each Member State when assessing the circumstances of individual cases. Furthermore, the referring court asks whether potential links between the applicant and the Member State is significant, for example family connections, host families, guarantors and sponsors.[228]

According to Advocate General Mengozzi, the answer to the first part of the question must be affirmative, irrespective of the existence of potential links between the applicant and the Member State concerned.[229] The Advocate General claims that, just as conceded by the Belgian government, the wording of Article 32 (1) of the Visa Code makes it clear that this provision applies 'without prejudice' to Article 25 (1) of the Visa Code. Thus, the grounds for refusing a visa, as stated in Article 32 (1), do not preclude a Member State from applying Article 25 (1) of the Visa Code.[230] Thus, Article 25 (1) enables Member States, to preclude the grounds for refusal listed in Article 32 on humanitarian grounds.[231]

Furthermore, the Advocate General is of the opinion that not only does EU law empower Member States to issue such humanitarian visas,[232] but it also

[226] Case C-638/16 PPU, AG Opinion, para 107.
[227] Case C-638/16 PPU, AG Opinion, para 108.
[228] Case C-638/16 PPU, AG Opinion, para 109.
[229] Case C-638/16 PPU, AG Opinion, para 110.
[230] Case C-638/16 PPU, AG Opinion, para 114.
[231] Case C-638/16 PPU, AG Opinion, para 119.
[232] Case C-638/16 PPU, AG Opinion, para 121.

requires Member States to examine the humanitarian grounds invoked by a third-country national.[233] If, after such an examination, the Member State considers the humanitarian grounds to be well-founded, the Visa Code requires that Member State to issue a visa with limited territorial validity.[234]

However, the Member States maintain a discretion concerning which humanitarian grounds that make it necessary to preclude the application of the grounds for refusal in Article 32 (1) of the Visa Code, in the light of the wording of Article 25 (1) (a) of the Visa Code.[235] Yet, this maintained discretion, is circumscribed by EU law.[236] Furthermore, the expression itself, that is 'humanitarian grounds', is a EU law concept, as Article 25 contains no references to the national law of the Member States.[237]

Advocate General Mengozzi argues that the situation of the applicants in the main proceedings must, 'without a shadow of a doubt', fall within the scope of the humanitarian grounds in Article 25 of the Visa Code, and continued to state that if this was not the case, then the "expression would be rendered meaningless".[238]

Further, the Advocate General points out that when a Member State decides to refuse to issue a visa with limited territorial validity, on the grounds that the humanitarian grounds stated by the applicant do not preclude the grounds for refusal listed in Article 32 (1) of the Visa Code, then the Member State is implementing EU law, and thus, must respect the rights guaranteed by the Charter.[239] The limit of Member States' discretion, then, is when the relevant authorities reach the conclusion that by refusing to grant the application of Article 25 (1) (a) of the Visa Code, despite the humanitarian grounds stated, the Member State does not thereby infringe the rights in the Charter. If the opposite conclusion is reached, it must preclude the grounds for refusal in Article 32 (1) and issue a visa with limited territorial validity.[240]

By analogy of the case-law of the European Court of Human Rights on Article 3 of the ECHR, Article 4 of the Charter imposes not only a negative obligation, that is, prohibiting Member States from using torture and inhuman or degrading treatment, but also a positive obligation. This positive obligation requires Member States to take action in order to ensure that individuals are

[233] Case C-638/16 PPU, AG Opinion, para 126.
[234] Case C-638/16 PPU, AG Opinion, para 127.
[235] Case C-638/16 PPU, AG Opinion, para 128.
[236] Case C-638/16 PPU, AG Opinion, para 129.
[237] Case C-638/16 PPU, AG Opinion, para 130.
[238] Case C-638/16 PPU, AG Opinion, para 130.
[239] Case C-638/16 PPU, AG Opinion, para 131.
[240] Case C-638/16 PPU, AG Opinion, para 132.

not subjected to torture and inhuman or degrading treatment, particularly in case of vulnerable individuals. Moreover, this obligation to take action extends even to when such ill-treatment is administered by private individuals.[241] The Court, in its judgment *N.S. and Others*[242] and *Aranyosi and Căldăraru*[243], held that, just as Article 3 of the ECHR, Article 4 of the Charter, under certain circumstances, imposes a positive obligation on the Member States.[244]

Thus, Advocate General Mengozzi stated that, "in adopting the contested decisions, the Belgian State knew or ought to have known that the foreseeable consequences of that decision" left the applicants with an awful dilemma; either staying in Aleppo, and continuing to expose themselves to danger, suffering and inhuman treatment, or submit themselves to equivalent treatment, by trying to reach the Member States' territory without a visa.[245] This as the decisions by the Belgian State would "directly encourage the applicants in the main proceedings, unless they stayed in Syria, to have to expose themselves, in desperation, to physical pain, risking their lives in doing so, in order to exercise the right to international protection to which they lay claim".[246] The Advocate General believes that there is no doubt that such treatment as mentioned above, is prohibited by Article 4 of the Charter[247], and that a Member State should, in accordance with its positive obligation, take measures, within its powers, as to avoid third-country nationals seeking international protection having to take such risks.[248]

Rejecting the argument that the applicants in the main proceedings could have found refuge in Lebanon,[249] the Advocate General states that the registration of new Syrian refugees was suspended by the Lebanese Government at the time of the contested decision, meaning that unregistered refugees risked being arrested and detained for illegally residing in Lebanon.[250] In fact, some human rights observers have stated that in 2016, the situation for Syrian refugees in the host countries surrounding Syria were so precarious that many Syrian refugees chose to return to Syria, risking their lives. The situation for Christians proved to be especially difficult, with representatives of intergov-

[241] Case C-638/16 PPU, AG Opinion, para 139.
[242] C-411/10 and C-493/10, paras 94, 106 and 113.
[243] C-404/15 and C-659/15, paras 90 and 94.
[244] Case C-638/16 PPU, AG Opinion, para 139.
[245] Case C-638/16 PPU, AG Opinion, para 150.
[246] Case C-638/16 PPU, AG Opinion, para 152.
[247] Case C-638/16 PPU, AG Opinion, para 151.
[248] Case C-638/16 PPU, AG Opinion, para 152.
[249] Case C-638/16 PPU, AG Opinion, para 153.
[250] Case C-638/16 PPU, AG Opinion, para 154.

ernmental organisations and NGOs expressing fears of ostracism, intimidation and serious violence of the religious minority in Syria's neighbouring countries, even in refugee camps.[251]

The Advocate General is thus, based on the abovementioned, convinced that at the time of the adopted contested decisions, the Belgian State should have reached the conclusion that, by refusing to issue visas with limited territorial validity on humanitarian grounds, and by instead applying the grounds for refusal in Article 32 (1) of the Visa Code, there were substantial grounds to believe that this would expose the applicants to a genuine risk of suffering treatment prohibited by Article 4 of the Charter.[252] Additionally, Advocate General Mengozzi argues that "[i]t cannot be denied, in the light of the information … in the main proceedings, that the applicants … would have obtained the international protection … if they had succeeded in overcoming the obstacles of an illegal journey".[253]

Moreover, due to the absolute nature of the right in Article 4 of the Charter, Advocate General Mengozzi considers that the absence of family links, or links of any other nature, to the Member State, is a factor which should not affect the answer to the second referred question.[254] Regarding Article 18 of the Charter, the Advocate General does not rule out that the decision in the main proceedings also infringes the applicants' right to asylum, but does not, however, find it necessary to adjudicate this part of the referred question.[255]

6.4.2.1 Summary: The Advocate General's answer to the second referred question

As summarised by the Advocate General himself, Mengozzi proposes that:

> "the Court answer the second question submitted by the referring court as follows: Article 25 (1) (a) of the Visa Code must be interpreted as meaning that, in the light of the circumstances of the main proceedings, the Member State applied to by a third-country national in order to issue that national a visa with limited territorial validity on humanitarian grounds is required to issue such a visa if there are substantial grounds to believe that the refusal to issue that document will have the direct consequence of exposing that national to treatment prohibited by Article 4 of the Charter, by depriving that national of a legal route to exercise his right to seek international protection in that Member State."[256]

[251] Case C-638/16 PPU, AG Opinion, para 154.
[252] Case C-638/16 PPU, AG Opinion, para 156.
[253] Case C-638/16 PPU, AG Opinion, para 159.
[254] Case C-638/16 PPU, AG Opinion, para 161.
[255] Case C-638/16 PPU, AG Opinion, para 162.
[256] Case C-638/16 PPU, AG Opinion, para 163.

6.4.3 Concluding remarks concerning the Advocate General's reasoning

While acknowledging that the EU is going through a difficult period, the Advocate General argues that the "refusal to recognise a legal access route to the right to international protection on the territory of Member States – which unfortunately often forces nationals of third countries seeking such protection to join, risking their lives in doing so, the current flow of illegal immigrants to EU's borders – which seems to be to be particularly worrying, in the light, inter alia, of the humanitarian values and respect on which European construction is founded".[257] Therefore, Advocate General Mengozzi considers that both the EU's credibility, and that of its Member States, is at stake.[258]

Advocate General Mengozzi also stresses the fact that in all of the case-law from the European Court of Human Rights concerning Article 3 of the ECHR, the judgements are always made *ex post*, often after the treatment in question had proven fatal to the victim.[259] In the present case, however, the Advocate General sees another way forward, stating that "all hope for the applicants in the main proceedings has not, thus far, been lost", and that there is a humanitarian path, within the present EU law framework, requiring Member State to prevent infringements of the absolute rights of persons seeking international protection.[260]

6.5 Court of Justice

After the Fifth Chamber of the Court decided, on 15 December 2016, to allow the case to be tried under the urgent ruling preliminary ruling procedure provided for in Article 107 of the Rules of Procedure of the Court, it also requested that the Court assign the case to the Grand Chamber.[261] Below is a summary of the answers by the Grand Chamber to the referred questions.

6.5.1 Consideration of the questions referred

First, the Court of Justice points out that the fact that the question of a referring court only includes certain provisions of EU law, does not inhibit the Court of Justice from providing the national court "with all the guidance on points of interpretation that may be of assistance in adjudicating … whether or not that court has referred to those points in its questions".[262] Instead, it is

[257] Case C-638/16 PPU, AG Opinion, para 6.
[258] Case C-638/16 PPU, AG Opinion, para 165.
[259] Case C-638/16 PPU, AG Opinion, para 166.
[260] Case C-638/16 PPU, AG Opinion, para 167.
[261] Case C-638/16, PPU, X and X, paras 29-34.
[262] CJEU Case C-638/16, PPU, X and X, para 39.

up to the Court of Justice to extract, based on the information provided by the referring court, the points of EU law which require interpretation.[263]

The Visa Code was adopted on the basis of Article 62 of the EC Treaty, under which the Council of the European Union may adopt measures concerning visas for stays no longer than three months, including the procedures and conditions for issuing these visas by the Member States.[264] The purpose of the Visa Code is set out in its first article, which states that the objective is to establish procedures and conditions for issuing visas for transit through, or intended stays on, the territory of the Member States not exceeding 90 days in any 180-day period.[265]

Article 2 of the Visa Code defines the meaning of 'visa', in the context of the Code, as "an authorisation issued by a Member State with a view, respectively, to transit through or an intended stay on the territory of the Member States for a duration of no more than 90 days in any 180-day period and to transit through the international transit areas of airports of the Member States".[266]

The Court continues by stating that it considers it apparent, based on the order of reference and material before the Court, that the applicants submitted applications for visas on humanitarian grounds, based on Article 25 of the Visa Code. The purpose of these applications, made at the Belgian embassy in Lebanon, was to apply for asylum in Belgium directly after their arrival, with the aim of "being granted a residence permit with a period of validity not limited to 90 days".[267]

On the basis of Article 1, the Court of Justice thus considers such applications to fall outside the scope of the Visa Code.[268] Furthermore, the Court points out that no measure has, to date, been adopted on the basis of Article 79 (2) (a) TFEU,[269] regarding the conditions concerning issuing of long-term visas or residence permits to third-country nationals on humanitarian grounds, and thus the applications in the referred case "fall solely within the scope of national law".[270]

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[263] CJEU Case C-638/16, PPU, X and X, para 39.
[264] CJEU Case C-638/16, PPU, X and X, para 40.
[265] CJEU Case C-638/16, PPU, X and X, para 41.
[266] CJEU Case C-638/16, PPU, X and X, para 41.
[267] CJEU Case C-638/16, PPU, X and X, para 42.
[268] CJEU Case C-638/16, PPU, X and X, para 43.
[269] *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, 2008/C 115/01.
[270] CJEU Case C-638/16, PPU, X and X, para 44.

Accordingly, as the referred situation is not governed by EU law, the Court states that the provisions of the Charter, in particular Articles 4 and 18, are not applicable.[271] In the opinion of the Court of Justice, the crucial circumstance is that the purpose of the application in the referred case, differs from that of a short-term visa.[272] The Court further states that this conclusion is not affected by the reasonable doubt regulated in Article 32 (1) (b) of the Visa Code, concerning the "applicant's intention to leave the territory of the Member States before the expiry of the visa applied for", as this is a ground for refusal of a visa, not a reason to not apply the code.[273]

The Court of Justice stresses that deciding otherwise, "would be tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the Member State of their choice, which would undermine the general structure of the system established by Regulation No 604/2013", more commonly known as the Dublin system.[274]

Furthermore, the Court comments that deciding otherwise, would also have the effect of requiring Member States to allow third-country nationals to submit applications for international protection to the Member States' representations within the territory of third countries, on the basis of the Visa Code.[275] Measures adopted by the EU on the basis of Article 78 TFEU, concerning the procedures for applications for international protection, does not impose such an obligation, but instead explicitly excludes applications made to Member States' representations from its scope.[276]

Further, the Court of Justice argues, that it is apparent from Article 3 (1) and (2) of Directive 2013/32 that the Directive applies to applications for international protection made in the territory of the Member States, but not "to requests for diplomatic or territorial asylum submitted to the representations of Member States".[277] Additionally, Articles 1 and 3 of Regulation No. 604/2013 state that Member States are obliged to examine applications for international protection made on a Member States' territory, and that the procedures in the Regulation apply exclusively to such applications for international protection.[278]

[271] CJEU Case C-638/16, PPU, X and X, para 45.
[272] CJEU Case C-638/16, PPU, X and X, para 47.
[273] CJEU Case C-638/16, PPU, X and X, para 46.
[274] CJEU Case C-638/16, PPU, X and X, para 48.
[275] CJEU Case C-638/16, PPU, X and X, para 49.
[276] CJEU Case C-638/16, PPU, X and X, para 49.
[277] CJEU Case C-638/16, PPU, X and X, para 49.
[278] CJEU Case C-638/16, PPU, X and X, para 49.

In conclusion, the Court of Justice states that:

> "the answer to the questions referred is that Article 1 of the Visa Code must be interpreted as meaning that an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national, on the basis of Article 25 of the code, to the representation of the Member State of destination that is within the territory of a third country, with a view to lodging, immediately upon his or her arrival in that Member State, an application for international protection and, thereafter, to staying in that Member State for more than 90 days in a 180-day period, does not fall within the scope of that code but, as European Union law currently stands, solely within that of national law".[279]

[279] CJEU Case C-638/16, PPU, X and X, para 51.

7. Discussion

The abovementioned case, and in particular the difference in reasoning between the Advocate General and the Court, has resulted in both criticism and commentary. Why did the Advocate General and the Court, respectively, reason as they did? This chapter includes both commentary from other migration lawyers, but also my own highlights of said differences in reasoning.

7.1 Differences and similarities between the Court's and the Advocate General's reasoning

Before continuing to analyse the judgement and opinion in *X and X,* as well as attempting to understand its potential implications on the EU asylum system, as well as the future of humanitarian visas in the EU, I will below briefly summarise the key arguments from both the Advocate General and the Court.

7.1.1 What did the Court of Justice argue?

In its judgement, the CJEU states that it is apparent that the applicants submitted applications for visas on humanitarian grounds on the basis of Article 25 (1) (a) of the Visa Code, and that they planned to apply for asylum in Belgium upon arrival. Thus, the Court considers the applicants' aim was to be granted residence permits not limited to 90 days. Therefore, on the basis of Article 1 of the Visa Code, their application fall outside the scope of the Visa Code according to the Court.[280]

Furthermore, the Court argues that as there have been no measures taken on the basis of Article 78 (2) (a) TFEU concerning the issuing of long-term visas or residence permits to third-country nationals on humanitarian grounds, the situation in the referred case falls solely within the scope of national law. Following this, as the referred situation is not governed by EU law, the Charter provisions, in particular Article 4 and 18, are not applicable. The crucial circumstance, according to the CJEU, is that the purpose of the application in the referred case differs from that of a short-term visa. This conclusion is further not affected by the grounds for preclusion in Article 32 (1) (b), as this is a ground for refusing a visa, not a reason not to apply the Visa Code in its entirety.

Importantly, the CJEU mentions that deciding differently would be "tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the

[280] See chapter 6.5.1.

Member State of their choice", which would, according to the Court, undermine the current Dublin System.

Furthermore, a different conclusion than the one reached by the Court would force Member States to allow third-country nationals to submit applications for international protection at the Member States' representations in third countries, on the basis of the Visa Code. Here, the Court notes, measures adopted on the basis of Article 78 TFEU explicitly excludes such applications.[281]

7.1.2 What did the Advocate General argue?

The Court's stance is not shared by Advocate General Mengozzi, who reached an opposite conclusion, arguing that by issuing or refusing to issue an LTV visa, Member States adopt a decision concerning the crossing of the Member States' external border, "which is subject to a harmonised set of rules and act, therefore, in the framework of and pursuant to EU law". In line with this, the situation in the referred case is, according to Advocate General Mengozzi, covered by the Visa Code, and thereby a situation where the Member State in question must respect Charter rights.[282]

While some Member States at the Court hearing argued that it is necessary to wait for a modification of the Visa Code before humanitarian visas are a plausible option, this line of argument is rejected by Advocate General Mengozzi. Instead, the Advocate General believes that such a legal route already exists through Article 25 (1) (a) of the Visa Code, in interplay with Article 32, and thus there is no need to wait for such a hypothetical modification.

Further, the Advocate General argues that if the Charter was to be deemed inapplicable in situations such as the one in the referred case, then this would have consequences beyond the area of visa policy. If the Charter's applicability is made conditional on both territorial and legal connection, then Advocate General Mengozzi believes that according to the same logic the vast majority, if not the whole, of the Visa Code would also become exempt.

Regarding the question of whether or not EU law requires Member States to issue LTV visa, if the alleged humanitarian grounds are deemed well-founded, Advocate General Mengozzi maintains that while Member States retain discretion as regards which humanitarian grounds that preclude Article 32, this maintained discretion is circumscribed by EU law. Member States' discretion is therefore limited to situations when the appropriate authorities

[281] See section 6.5.1.
[282] See section 6.4.1.

conclude that by refusing to apply Article 25 (1) (a), despite alleged humanitarian grounds, this does not infringe the rights in the Charter. If the opposite conclusion is reached, that is, that Charter rights are infringed, then such a conclusion must preclude the grounds for refusal in Article 32 (1) (b) of the Visa Code.[283]

7.1.3 Comparing the Court's and the Advocate General's Conclusions

As is clear from their arguments above, both the Advocate General and the Court agree that the CJEU has jurisdiction to answer the referred questions. This despite arguments to the contrary presented both by the Belgian Government and the majority of the other Member State Governments participating in the hearings. This question of jurisdiction, however, seems to be the extent of the agreement between the Advocate General and the Court.

The essential difference between Advocate General Mengozzi's Opinion and the Court's judgement is whether or not the situation before the referring court can be considered an application for a visa with limited territorial validity in accordance with the Visa Code. For, if the situation falls within the scope of the Visa Code, this would oblige Member State authorities to act in accordance with the rights guaranteed under the Charter and ECHR. If the opposite conclusion is reached, however, not only does the situation before the referred court fall outside the scope of the Visa Code, but also outside the scope of EU law.

Here, the conclusions in the Advocate General Opinion and the judgement seem miles apart. For while the Court considers it apparent that as the purpose of the application differs from that of a short-term visa, thus falling outside the scope of the EU law, the Advocate General reaches a very different conclusion. Contrary to the Court, Advocate General Mengozzi considers that the situation in the national court falls within the scope of the Visa Code, and that it must be covered by the humanitarian grounds in Article 25 of the Visa Code. Further, Mengozzi argues that EU law requires Member States to issue an LTV visa, if the alleged humanitarian grounds are well-founded. Especially striking in the Court's judgement is its reasoning considering the applicability of the Charter, where it states that "in particular Articles 4 and 18, are not applicable". Explicitly mentioning the inapplicability of Articles 4 and 18 seems superfluous, especially considering that the Court had already deemed the Charter as a whole inapplicable in the case.

[283] See section 6.4.2.

7.2 Is the Court taking the politically easy way out?

Some academics have accused the Court of 'taking the politically easy way out' and indulging the concerns of the Member States. The explanation for this, according to some, is that ruling in favour of the applicability of the Visa Code, and thereby the applicability of the Charter, would leave the Court with the seemingly impossible task of interpreting the Charter in a way that would have a detrimental effect on the functioning of the Dublin System. Further, some have expressed confusion as to why the Court has shied away from extending the applicability of the Charter to those in need of its protection, especially at a time when EU asylum policy has raised questions concerning the Union's "self-professed dedication to human rights".[284]

The Court has further been criticised for answering the referred questions in only 14 paragraphs – even fewer if the introductory paragraphs are deducted. As one critic put it:

> "[c]onsidering the implications of the judgement, and the polemic surrounding this specific case and the EU asylum system as a whole, it would have been beneficial to have a deeper insight in the arguments and reasoning of the Court." [285]

Furthermore, it is asked why the Court did not take Article 25 of the Visa Code into consideration when discussing the scope of the Visa Code. This, as many consider the *exceptional circumstances* mentioned in Article 25, extend the meaning of 'visa' beyond the definition provided in Article 2 (2) (a) of the Visa Code, that is '[authorisation] for an intended stay of a duration of no more than three months in any six-month period".[286] Here, some argue that the concept of 'visa' should not be interpreted restrictively, especially as pertains to Article 25 of the Visa Code.[287]

Others have argued that it was:

> "[p]ossible for the Court to strike a balance: if it formulated its ruling in such a way as to highlight the exceptionality of the circumstances that would force Member States to apply Article 25(1) to issue [visas with limited territorial validity], despite the fact that there might be reasons to refuse according to Article 32, the EU would honour its obligations under international and European refugee and human rights law, without endangering the function of the CEAS. Such a ruling would boost the image of the EU as an advocate of human rights, an image

[284] Progin-Theuerkauf & Zoeteweij-Turhan (2017A).
[285] Progin-Theuerkauf & Zoeteweij-Turhan (2017A).
[286] Progin-Theuerkauf & Zoeteweij-Turhan (2017A).
[287] Progin-Theuerkauf & Zoeteweij-Turhan (2017A).

> that has been seriously battered by many of the recent EU actions in this policy field."[288]

7.3 Is the Court avoiding the question?

X and X is not the first time that the Court has faced criticism regarding how it has dealt with the applicability of the Charter. This was also the case concerning the reforms to national labour law agreed with the so-called troika (IMF/European Commission/ECB) as conditions for loans or other financial support for Member States in need of bailouts. One such example is the case of Portugal, where an Economic Adjustment Programme was negotiated in May 2011, and a Memorandum of Understanding (hereinafter: MoU) and Loan Agreement were signed shortly thereafter. This MoU reformed large tracts of Portuguese labour law. As a result of this, there were cuts to public sector wages, and trade unions argued that these radical reforms to national labour law contravened the Charter. [289]

As a result of this, the CJEU was referred a series of questions in the case of *Sindicatos dos Bancários du Norte.*[290]Before the Court had a chance to adjudicate, however, the Portuguese Constitutional Court found the public sector pay cuts contrary to the equality provision in Article 13 of the Portuguese Constitution.[291] The CJEU later declined to hear the reference, but not due to the fact that the case had already been adjudicated by a national court, but because the Court considered it a matter of national law, and not EU law.[292]

As suggested by Catherine Barnard:

> "This suggest a developing twin-track approach: on the one hand the Charter will be applied with vigour to non-crisis situations; on the other, the Charter will not be applied to rules arising out of the EU's response to the financial and economic crisis. Ultimately, such an approach, with crisis related measures in the slow lane, is not legally, politically or practically sustainable."[293]

This dichotomy between EU law, to which the Charter is deemed applicable by the Court, and non-EU law, to which is does not apply, is also interesting in the present case. Arguments concerning the scope of EU law, through Article 51 of the Charter, seems to be used by the Court in an attempt to avoid

[288] Progin-Theuerkauf & Zoeteweij-Turhan (2017B).
[289] Barnard (2013) section C1.
[290] Case C-128/12.
[291] Barnard (2013) section C1.
[292] Barnard (2013) section C1.
[293] Barnard (2013) section A.

the most sensitive of issues.[294] For one cannot help but notice some similarities; a politically sensitive issue, which the Court chooses not to adjudicate, with limited argumentation as to why. Whatever the reason, I agree with Catherine Barnard when she states that "[t]his failure is damaging to the long term legitimacy of the Union and undermines the Court's oft-expressed commitment to human rights."[295]

7.4 Potential loopholes?

Significantly, the Court focuses on the protection seekers' stated motive in the referred case. But in a hypothetical scenario, where the protection seekers in the referred case had not stated their intent to apply for asylum upon their arrival in Belgium, Belgian authorities might justifiably suspect that they did not intend to leave Belgian territory after their visa expires. However, in such a hypothetical scenario, the Belgian authorities could only refuse the visa application under Article 32 of the Visa Code, thus forcing them to take both Article 25 of the Visa Code, and the Charter, into account.[296]

Here, the Court's judgement in *Koushkaki* is especially interesting, as the Court in this judgement stated that a Schengen visa may be refused, in accordance with the Visa Code, if there is reasonable doubt about the intention of the protection seeker to leave the territory after the visa expires.[297] However, the Court also highlights that a Schengen visa may only be refused on grounds stated in the Visa Code, as acting otherwise might threaten the harmonisation of the visa rules in the Union. Harmonisation, both as a possible solution, or as a reason for the Court to adjudicate in a specific way, is not mentioned in the Court's judgement in *X and X.*

Specifically, in the *Koushkaki* case, the Court speaks of a scenario where, if the visa rules regarding Schengen visas are not harmonised, protection seekers may indulge in so-called 'visa shopping', that is, choosing to apply for visas in those EU countries with the most favourable visa rules. Seemingly this argument was not taken into consideration by the Court in *X and X*, and the risk of a non-harmonisation of humanitarian visa regulations resulting in 'humanitarian visa shopping' was not mentioned, although this could prove a possible future scenario.

[294] For a more indept discussion of Article 51 of the Charter, see section 6.4.1.
[295] Barnard (2013) section D.
[296] Progin-Theuerkauf & Zoeteweij-Turhan (2017A).
[297] For a more detailed account of the case, see section 5.4.

7.5 Possible Alternatives?

As suggested above, one way forward for the Court would have been to agree with the Advocate General in part, but to highlight the exceptionality of the circumstances of the applicants in the national proceedings. In this way, it might be possible for the Court to avoid the blow to the Dublin system which it is obviously concerned about, but still respect EU's human rights obligations. Further, this might re-establish the EU as a regional and global advocate of human rights. By doing this, the Court would also offer some well-needed clarity, a need articulated by both the Advocate General and experts in the field, concerning the ins and outs of Article 25 of the Visa Code and its relationship with Article 32. Arguably, the Court's judgement offers little in terms of clarification, but instead seems to only create more questions.

As Advocate General Mengozzi points out, the Court had the opportunity to clarify Article 25 of the Visa Code, and its relationship with Article 32. This, arguably, the Court failed to do, and the very short judgement offers little insight into the reasoning behind the Court's conclusions. Although, perhaps it is interesting in itself that the Court seems to have been unable to agree on anything more extensive than the brief judgement.

7.6 Concluding Discussion

As can be seen in recent years, the popularity of humanitarian visas seems to have declined in the EU, and with the Court's ruling in *X and X,* the door seems to have been firmly shut. However, despite this trend, individual Member States have embraced the idea, establishing what are ultimately humanitarian visas in various forms.

In this thesis, both the Advocate General's reasoning and the Court's judgement have been examined in some detail, but while the Advocate General's Opinion is both interesting and perhaps a cause for reflection, it is ultimately just that; an opinion. Unless the Court decides to change its interpretation, its judgement stands. So, what does that mean for the future of humanitarian visas?

It seems that the future for humanitarian visas in the European Union is at a crossroads. The concept might continue, in limited or extensive forms, in national legislation, and therefore be subject to the whims and political will of national governments, or it might yet again enter the EU arena through revised legislation that explicitly includes humanitarian visas. However, despite the European Parliament's positive stance to PEPs in general, and humanitarian visas in particular, most Member States remain sceptical, and in the spirit of

protecting the Dublin system and the CEAS in its current form, a change in stance on humanitarian visas in the near future appears unlikely.

A further reflection, and perhaps in part a reason behind the Court's judgement, is that of the effectiveness of EU law. As stated by the Court in its ruling, deciding otherwise "would be tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the Member State of their choice", which the Court points out would also undermine the current Dublin System.[298] Deciding in line with the reasoning of the Advocate General would mean that the Member States' embassies and representations in third countries would have to be able to receive and process such applications for humanitarian visas, through LTV visa applications regulated in the Visa Code. Currently, no such capacity exists in the vast majority of the EU Member States, which would make such a system, at least in the beginning, very slow and complicated, and would entail significantly increased costs for the Member States.

As stated by O'Nions it is not surprising, although perhaps regrettable, that asylum and illegal migration are linked together in this way. She argues that the illegal immigration agenda has prevailed, resulting in a narrow interpretation of asylum as a matter of immigration control and a security concern. With 90% of asylum seekers entering Europe in an irregular way, this has resulted in the EU receiving criticism for its strong emphasis on security and migration control, and the lesser attention given to refugee and human rights, along with Member State responsibilities in these areas. This criticism is unlikely to subside following the Court's judgement in *X and X.*[299]

Another increasingly important building block of the EU asylum system, mentioned briefly in both *X and X* as well as this thesis, is that of safe third countries and readmission agreements. In his Opinion, General Advocate Mengozzi outright mentions the issue, stating that Lebanon cannot be considered a safe third country for the applicants to return to. The issue was not addressed by the Court in *X and X* but has been getting increasing traction and attention from Member States, at around the same time when humanitarian visas began to fall out of favour.

However, as mentioned above, third safe countries, and the readmission agreements that facilitate the practice, have been criticised. For example, due to how they may affect the legal certainty of the protection seeker and how varying asylum legislation, both within and even more so outside the EU, may

[298] See section 6.5.1.
[299] For a more detailed account of O'Nions' research, see section 3.1.1.

result in protection loss for the concerned individual. Finally, such allocation mechanisms run the risk of being manipulated by protection seekers, who might prefer illegality to readmission.[300]

It seems that ultimately, the question of the future of humanitarian visas, and safe third countries, boils down to the political will and opinion of the Member States. With the current political climate in the EU, a revision of the Court's stance in *X and X*, whether through renewed case law or legislation, seems unlikely, and the trend towards increased harmonisation within EU asylum legislation momentarily on hold.

However, there might be increased harmonisation of the EU asylum system on the horizon, with the Commission aiming to introduce a comprehensive deal on migration in June 2018, stating that "the reformed Common European Asylum System is essential to ensure that the EU is well prepared to deal with any future migratory crises".[301] Thus, only time will tell if the harmonisation gap left by the Court in *X and X* might be filled.

[300] See section 4.1
[301] Communication from the Commission to the European Parliament, the European Council at the Council, *Progress report on the Implementation of the European Agenda om Migration,* p. 19 f.

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