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2/1/2018

# **Conflict and Compromise between Law and Politics in EU Migration and Asylum Policies**

Odysseus Annual Conference 2018

## **Background Paper**

*A collection of articles aimed at  
introducing the different workshops  
and plenary sessions*

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**Odysseus Academic Network**

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# ***CONFLICT AND COMPROMISE BETWEEN LAW AND POLITICS IN EU MIGRATION AND ASYLUM POLICIES***



*By Philippe DE BRUYCKER, ULB & Odysseus Coordinator*

*The blog post below critically exposes the main themes of our next annual conference that will take place on Thursday 1 February 2018 in Brussels. This event is organised in the framework of the OMNIA Project with the support of the Jean Monnet Networks under the Erasmus+ Programme of the EU.*

2017 has been marked by several rulings about crucial questions related to the European migration and asylum policies. The Court of Justice was called to rule on the most politically sensitive issues and delivered very controversial answers. The Odysseus Network decided therefore that its annual conference will focus on "Conflict and Compromise between Law and Politics in EU Migration and Asylum Policies". The six workshops organised in the framework of the conference will tackle key legal, policy and operational challenges in relation with Court rulings around three streams.

## **1. Externalisation**

The efforts of the EU to contain migration flows from Libya provide an excellent example of a policy designed to avoid as much as possible any legal responsibility before a court. Knowing that contacts with people trying to flee could entail jurisdiction of the European Court of Human Rights and that it is currently impossible to send them to Libya without violating article 3 of the ECHR due to the horrific conditions in that country, the EU and its Member States leave the so-called Libyan coast guards do the job and "save" those persons against their will on their way to the EU.

One may however wonder if international responsibility can be totally avoided in this case. The EU and its Member States are indeed providing different types of assistance to the Libyan coast guards like training, equipment and financial support. Moreover, they do so while knowing what happens to the persons “pulled back” to Libya. From then on, one may legitimately ask if the conditions required by the [draft articles on responsibility of States for internationally wrongful acts of 2001](#) are not fulfilled. The speakers of **workshop A** will try to answer this question.

The increasingly successful externalisation of the EU migration policies to stem the flows raises also the issue of the access of asylum seekers to the EU. The impossibility to travel without a visa forces most of them to have recourse to smugglers. One Syrian family tried to get a visa for Belgium with the intention to apply afterwards for asylum. After refusal of the visa application by the Belgian Immigration Office, the Belgian judge decided to ask the CJEU if the international obligations envisaged by [article 25 the EU Visa Code](#) comprise [article 4 and 18 of the EU Charter on Fundamental Rights](#) and, in case, if Member States are obliged to deliver a visa to avoid a breach of those provisions. The speakers of **workshop B** on “Visas for asylum: not under EU law or not at all?” will critically analyse this controversial case as Violeta Moreno Lax already did (see [here](#) and [here](#)).

One should not misunderstand the object of this ruling. The CJEU did not rule about the substance of the question which is if the refusal of a visa by consular authorities can be considered as equivalent to a prohibited *refoulement*. The court did not deal with that question because it considered that the Charter was not applicable to such issue which is outside the implementation of EU law, with the consequence that the CJEU is simply not competent to answer such question belonging to national law, possibly under the control of the ECtHR.

Many observers will conclude that the Court did not want to answer that question and decided to escape. Even if it is probably true that not having to answer this delicate legal question has been a relief for the Court, arguing that the judges actually had this intention is vain as it is speculative. Knowing that scholars could also be suspected of academic activism, the only valid question from a legal point of view is if the Court determined rightly or not the scope of application of the Charter.

The case law of the CJEU when it has to determine when Member States implement EU law is actually far from clear. Even specialists of the EU Charter can get lost in the Court's reasoning on this complex and delicate issue. If X & X is one of the cases where the answer of the Court about the scope of application of the Charter is debatable in relation to previous case law as shown by [ECRE in its comment](#) on the case, it is certainly not the only one.

But there is more. The key issue that has to be solved before the question of the scope of the Charter is actually about the real object of the application of X & X. Is it about a short or a long-term visa, and if so does it fall or not under the Visa Code, knowing that there are disagreements even about the scope of the visa code (see the [technical counter-arguments developed](#) against one blog post criticizing the way the CJEU has determined the scope of this instrument).

Personally, I add that the qualification in that case of the particular visas as 'humanitarian visas' is wrong, and that they are actually 'asylum visas' as [article 25 of the Visa Code](#) envisages "international obligations" and so possibly the Geneva Convention on refugees. This is not only a question of the correct label. It has a crucial impact as the Court considered that humanitarian long term visas fall outside the scope of EU law because they have not been harmonized under the common immigration policy. I would argue instead that asylum visas belong to a policy that has obviously been harmonised. One can however argue that asylum applications made through consular or diplomatic representations of Member States do not fall under the scope of EU law on the basis of [article 3, §2 of the asylum procedures directive of 2013](#).

All these detailed observations give an idea of the technicality and complexity of the discussion that will take place in this workshop in presence of a mix of experts of the EU Charter on Fundamental Rights, as well as of migration and asylum law, the knowledge of those two areas being actually necessary to try answering the questions raised in X & X.

## **2. Human rights**

**Workshop C** about the human right to leave a country is linked with the measures taken by the EU to stem migration flows examined under the

previous workshops. The right to leave is not absolute and can be limited under [article 2, §3 of Protocol 4 ECHR](#) for “reasons of national security, public safety, public order, the prevention of crime, the protection of health or morals, and the protection of the rights and freedoms of others”, but the question is if such reasons can provide a legal basis for the measures taken by Turkey or Libya and, in that case, to which extent they can be justified.

Such issue has, to my knowledge, not yet been examined by a judge. As underlined by Elspeth Guild [in her blog post preparatory to our workshop](#), the most relevant case is *Stamose* which the ECtHR ruled in 2012. The Court considered that the automatic imposition of such a measure (the confiscation of a passport for two years) without any regard to the individual circumstances of the person concerned (a Bulgarian national returned by the USA for illegal stay) may not be characterized as necessary in a democratic society.

Interestingly, the Court added that it might accept that a prohibition to leave one’s own-country imposed in relation to breach of the immigration laws of another State in certain compelling situations be regarded as justified. However, it did not have to rule about this issue as the salient point was that the applicant had been prevented to travel anywhere and not only to the USA where he had breached the law. The CJEU was even more restrictive towards a similar measure taken by the Romanian government in [Jipa](#), but the legal framework of this case is specific as it concerned a European citizen and such case law can therefore not be transposed to third-country nationals.

The right to leave is forgotten by the EU and its Member States when they praise Turkey and Libya for preventing asylum seekers and migrants to leave their territory on their way to Europe. The objective of our workshop is to bring it back on the agenda and to launch a legal debate about the limitations that can be imposed to that fundamental right.

**Workshop D** is about the prohibition of collective expulsion. Among the very few cases where a violation of [article 4 of protocol 4 ECHR prohibiting collective expulsions](#) has been recognised, is the *Khlaifia* case concerning a very small group (only three Tunisians) with two contradictory rulings:

- The [second section](#) of the Court considered firstly that there had been a collective expulsion in particular because the refusal-of-entry orders did not contain any reference to the personal situation of the applicants.

- o However, the [Grand Chamber](#) considered that the relatively simple and standardised nature of the refusal-of-entry orders could be explained by the fact that the applicants had neither alleged that they feared ill-treatment in the event of their return, nor that there were any other legal impediments to their expulsion. Therefore, the Grand Chamber held that simultaneous removal of the three applicants may be explained as the outcome of a series of individual refusal-of-entry orders instead of a collective expulsion.

One may wonder what must be the standard of review in order to avoid a collective expulsion, in other words, to which extent the authorities must individualise the examination of each potential returnee. The requirement of taking individual decisions adapted to the specificities of each case could be considered as a general principle of administrative law, even if it has not been explicitly expressed under human rights law.

But simply requiring individualization without providing any further indication, as the second section of the ECHR did in the case [Khlaifia \(point 156\)](#) is too easy. The judge should instead try to assist the administration by explaining precisely what has to be checked in order to avoid a collective expulsion. One element of answer can be found in the decision of the Grand Chamber which underlined as a “paramount safeguard” the fact that the applicants had been given the opportunity to apply for asylum but had not done so [\(point 247\)](#).

This leads to the idea that the authorities should at least check the risk of violation of [article 3 ECHR](#) before returning a person that has not applied for asylum. One will note with interest that this issue is precisely what is currently at stake in the case of the [Sudanese recently send back to Sudan by the Belgian authorities](#) and who might have been tortured upon arrival, a point that is for the moment the object of an enquiry to determine the legal and political responsibility of the Belgian authorities in that case.

This raises the question which arguments the authorities must examine *proprio motu*. The list of elements to be automatically checked by the administration would therefore disregard another potential element of individualisation, namely the protection of family life under [article 8 ECHR](#), which is not an absolute right. Bearing in mind all those elements, we expect critical discussions during this workshop.

### 3. Institutions

The last stream of workshops will deal with issues of a very different nature, revolving around institutional and operational matters. **Workshop E** focuses on the external competence and representation of the EU and its Member States in migration and asylum.

This is a politically controversial, but also legally complex area where the distribution of competences, and in particular their nature (exclusive or concurrent?) is not always easy to determine. As it is well known, the General Court considered in [NF](#) that the [EU-Turkey statement of 18 March 2016](#) cannot be regarded as a measure adopted by the European Council, but one that was adopted instead by the Heads of State or Government of the Member States of the EU and the Turkish Prime Minister. It therefore concluded that it has no jurisdiction on the matter.

What is striking is that the General Court never questioned the distribution of competences in relation to a statement such as the EU-Turkey statement of 16 March 2016. As explained by [Paula Garcia in her post](#) introducing the workshop, some of its most important elements (readmission and asylum) belong to the exclusive competence of the EU. It so appears that the General Court has allowed the Member States to intervene in such area, giving the priority to a kind of intergovernmental framework instead of the institutional framework of the EU.

One will note with interest that "*[f]or the sake of completeness, the Court considers that, even supposing that an international agreement could have been informally concluded during the meeting of 18 March 2016, that agreement would have been an agreement concluded by the Heads of State or Government of the Member States of the European Union and the Turkish Prime Minister*" ([point 72](#)). Such conclusion goes directly against the entire case-law of the Court of Justice launched by the historical ruling in [ERTA of 31 March 1971](#)!

We therefore await with great interest the [decision of the Court of Justice on appeal](#) of this case in order to find out whether the General Court did not get lost in a role of Sherlock Holmes reviewing the documents and press releases



related to the meeting of 16 March 2016 to determine their author, instead of taking into consideration all relevant elements from a legal point of view.

The last **Workshop F** will focus on Justice and Home Affairs Agencies, in particular the amended Frontex whose official denomination is now the European Border and Coast Guard (EBCG) and EASO that should become in the future the EU Asylum Agency (EUAA). Agencies are the vehicle of a progressive but profound transformation of the modes of implementation of EU law that has been fueled by the 2015 crisis. We examined in last year's conference the emergence of an administration integrating the European and national levels on the basis of research done by Lilian Tsourdi. This year will be devoted to the analysis of another trend related to the control of Member States through agencies even if the word control is carefully avoided not to frighten them.

This evolution has already been observed with the EBCG that I presented as a new model based on an old logic in the European Papers. The new elements are that this agency has been given the power to adopt a “technical and operational strategy for European integrated border management” (article 3) while the Member States have to adopt their own strategy that must be “in line” with the European strategy (article 3). Moreover, the agency should assess the availability of the technical equipment, systems, capabilities, resources, infrastructure, adequately skilled and trained staff of Member States necessary for border control through what is called a “vulnerability assessment” (article 13).

The same evolution with the transformation of the EASO into a EUAA can be observed on the basis of the partial agreement concluded on 27 June 2017 between Council and Parliament regarding the Commission proposal that could be adopted in the near future. The emerging trend observed with the EBCG seems to deepen with the EUAA:

- Even if the asylum agency will not provide general guidance to the Member States like Frontex through a European strategy, it will acquire the power to steer them on specific issues through guidance notes on countries of origin that “Member States should take into account” when assessing individual asylum applications and other soft law tools like operational standards and guidelines.

- The “monitoring mechanism” – (a concept whose scope might be broader than the vulnerability assessment?) - would lead the asylum agency to assess “the operational and technical application of the Common European Asylum System in order to prevent or identify possible shortcomings in the asylum and reception systems of Member States and preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems”. Even if comparing the EBCG and EASO regulations is an interesting exercise, one should not forget the global picture that gives us as mentioned above the image of the old logic behind this new model. Frontex 2.0 and EASO 2.0 would remain fundamentally intergovernmental agencies; an assessment which brings to question their independence towards Member States as well as their capacity to supervise policy implementation. If the legislator is aware of this issue, no solution has been envisaged apart from creating a supervisory board around the Director of Frontex (an idea of the Commission that was dropped) and providing the EUAA with sufficient resources and staff, including the agency’s own staff.

As the upcoming contradiction between the new functions and the intergovernmental nature of EU agencies seems difficult to resolve without reopening an inter-institutional war between the Commission and the Council on the control of agencies, this is a promising avenue for new research since the literature on Justice and Home Affairs Agencies has up to date mainly focused on the issue of accountability.

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## TOWARDS JUDICIAL PASSIVISM?

The discussions in all these workshops will feed in the debate during the **closing plenary session devoted to the position and role of judges in EU migration and asylum law and policy.**

Political correctness should not prevent us to mention that the authority of the CJEU is at stake with rulings like X & X and NF. Among the harsher comments made about X and X, one will note that the Court “sheds further doubts on its capacity to act as a true human rights courts” and finally preferred political opportunism to legal integrity; about NF, “dismissing the important questions raised by the deal, as the GC did, will undermine the protection of human rights and the rule of law and will cast doubt on the existence of an effective system of judicial protection in the EU legal order” and “the General Court has

*bent the authority of the European judicial system to the demands of real politik*". Not only NGOs but most academics seem to share the idea that the Court tried to escape ruling on the substance by considering that the EU Charter does not apply to the request for an "asylum visa" and that the European Council has not adopted the statement with Turkey. In other words, the Court is using an "avoidance technique".

Even the case *Slovakia and Hungary v Council* where the CJEU ruled on the substance by refusing to annul the relocation scheme of asylum seekers has been strongly criticised by Henri Labayle in a paper ironically entitled "solidarity is not a value" where he considers that "*the Court used the principle of solidarity to the expense of the solemn proclamation we could have hoped for. It could have opted for a direct approach, similar to that of its Advocate General, to deliver one of the praetorian phrases of which it alone has the secret, consisting in conspicuously recognizing all its legal strength to the principle (of solidarity) formulated in article 80 TFUE. Yet, it took a biased approach by searching a manifest error of assessment to arrive at the same conclusion*". This is what *Iris Goldner Lang* considers "judicial passivism" (in the narrow or large sense that can be given to this expression) in a blog that we will publish very soon to introduce the final plenary session of the Odysseus annual conference. This is also why we have entitled the debate that will gather judges and academics "**Towards judicial passivism in EU Migration and Asylum Law**"?

The reader will note the question mark that we added to this title. One has indeed to be careful with the accusation of judicial passivism (or restraint) that might not be more consistent than the idea of judicial activism traditionally opposed to the CJEU. In that sense, *Franklin Dehousse*, former judge at the General Court of justice, considers that "*in general, there is little basis for the accusation of activism. Judicial activism itself is an overrated concept and, in any case, the ECJ is generally quite careful not to engage in it. The criticism that the ECJ lacks technical competence seems to have more validity if one reads the academic literature*". In particular, Franklin Dehousse considers that the case-law of the CJEU suffers from "*limited explanations*" and "*weak methodology*", "*observers criticising less the ECJ's results than the method by which they are achieved*".

“Judging Europe’s judges” to borrow the title of a [famous book](#) remains a delicate task. Accusing the CJEU of judicial passivism in those cases is tempting as it goes along the idea of “integration (in this case it would be disintegration) through law” considering the Court of Justice as a political actor, an idea supported by political scientists. Starting from the point that the Court is not a political actor (at least not one like the others), [Andreas Grimmel](#) warns about the danger of transferring existing approaches and concepts from political science to the field of law and considers rightly that fair and appropriate critique of the judicial development of law must be addressed by means of law, not by projecting ultimately non-testable political interests on the Court and its judges.

This invites not only a critical but also a careful and in-depth analysis of arguments and counter-arguments about the case law and it is why we have convened the workshops on X & X and NF before the final debate. As explained above, those cases are actually about fundamental questions of (EU) law. [X & X](#) raises firstly the question how to determine the object of the visa application, and secondly how to delineate the scope of application of EU law not only on the basis of the contorted jurisprudence of the CJEU on this issue, but also of the detailed provisions of the [Visa Code](#) (see above). [NF](#) raises the question of the determination of the author of an act which implies more than researching who adopted it and necessitates taking into consideration elements such as its content. It looks as if the more basic the questions are, the more difficult it becomes to answer them clearly.

One will note that the debate is this time not only about the reasoning of the Court, as it is often the case, but as well also about the very answer provided by the Luxembourg judges. [Thomas Spijkerboer](#) considering that [“the options preferred by the Court are the outcome of a combination of legal analysis and political choice”](#) has perfectly described with strong words the fundamental debate behind X & X and NF: it is not only about keeping migrants and refugees “outside the territory of the European Union” as it the case with the externalisation of EU policies but about keeping them “outside the scope of EU law”. He concludes that by [“reserving European law for Europeans, the court also naturalizes policies that intervene in third countries without even seeking the legitimacy that comes with judicial supervision and human rights law”](#).

After a long evolution of the treaties that has finally lead to an extension of judicial control at EU level to migration and asylum law following the ordinary rules and the recognition of the Charter of Fundamental Rights as part of primary law, the rule of law and the place of human rights are still at stake in EU law. As suggested [by Anthony Arnull about how academic should respond to judicial activism](#) (as well as passivism), legal scholars have therefore the lonely and painstaking task and duty to scrutinise carefully the jurisprudence of the CJEU with the same degree of impartiality as we expect from judges, all the more so as migration and asylum are nowadays unfortunately among the most politicised issues at EU and national levels.

The Odysseus Network, that has already rewarded by its [annual prize](#) the work undertaken by Marie-Benedicte Dembour about what she considers as judicial passivism from the European Court of Human Rights in the area of migration and asylum, intends to open this debate about the CJEU by devoting its 2018 annual conference to ["Conflict and Compromise between law and politics in EU migration and asylum policies"](#).

## ***THE REPORT OF THE EUROPEAN PARLIAMENT ON THE REFORM OF THE DUBLIN SYSTEM: CERTAINLY BOLD, BUT PRAGMATIC?***



*By Francesco Maiani, Centre for Comparative, European and International Law, University of Lausanne & Constantin Hruschka, Max Planck Institute for Social Law and Social Policy, Munich*

A new chapter is being written in the troubled history of responsibility-allocation in asylum matters among the Member States. The Dublin system, (hastily) declared dead at the height of the crisis' of 2015, has been (belatedly) judged unfit for purpose by a whole range of actors including the Commission and Parliament. A fundamental reform has therefore been placed on the agenda as matter of urgency.

Except that the Commission [proposal](#) of May 2016 (examined [previously on this blog](#)), did *not* propose a fundamental reform of the system. To the contrary, it retained all the structural elements that doomed the system to failure: its disregard for the needs, aspirations and life circumstances of applicants; its 'asylum lottery' effects; its unfairness towards a select few

Member States – border and 'first application' States; its naïve trust in the willingness of Member States to cooperate in sharing responsibilities; its heavily bureaucratic approach to responsibility-allocation. If anything, the 'Dublin IV' proposal aggravated the defects of the system by accentuating its coercive character and its unbalanced distributive effects, while attaching to it an unworkable 'corrective allocation mechanism' (see [one study commissioned by the European Parliament](#) and [another one](#) ).

Reception has not been good among commentators. [Steve Peers](#), for instance, equated the proposal to a gruesome attempt to get a pig airborne, and coined the phrase '*Orbanisation of EU asylum law*' for the occasion. Council and

Parliament have not been enthusiastic either. While the Council is still mired in internal disagreement, the [European Parliament](#) has adopted as basis for inter-institutional negotiations a document that is highly critical of the Dublin IV Proposal: the ['Wikström report'](#)

The report is meant to constitute a 'bold but pragmatic proposal'. Its goal is a 'fundamental and structural reform' resulting in a system 'that will work in practice [...] in times of normal migratory flows as well as in times of crisis'. Bold it is, without a doubt: the boldest official proposal ever submitted for the reform of responsibility allocation. While it retains important elements of the Dublin IV Commission proposal, such as the aversion against the 'secondary movements' of asylum seekers, it replaces the 'sanctions-based' approach of the Commission with an 'incentives-based' approach, i.e. a range of reforms intended to incentivise 'both Member States and applicants [...] to follow the rules'.

An exhaustive analysis of the report, including a full human rights assessment, would exceed the limits of this blog-post. We will instead focus on the model of responsibility allocation envisaged in the report,

as it constitutes its most innovative side. Let us see whether it is indeed capable of 'working in practice' as claimed.

## 1. AN 'INCENTIVES-BASED MODEL OF RESPONSIBILITY ALLOCATION

### *THE REFORM OF THE DUBLIN CRITERIA*

An important element of strategy pursued with the report is the reform of the Dublin criteria. The whole hierarchy of criteria is re-centred on the 'genuine links' that applicants may have with particular Member States. Thus, the family criteria are significantly expanded. The same goes for the criteria based on former residence and, perhaps less appropriately, on possession of a visa. A new criterion, based on former studies in a Member State, is introduced. Most critically, the criterion of irregular entry is deleted. In order to facilitate allocation according to the reformed criteria, a new 'light procedure' based on their *prima facie* application is introduced. This should help, in particular, to break the evidentiary deadlock that has hitherto condemned the family criteria to irrelevance.

The logic of these amendments is to encourage persons to apply in the first State entered into: they (should) remove the prospect of being 'stuck' in the first port of entry, and enhance the prospect of being transferred to a desirable destination. Much in the same logic, applicants are entitled to request the application of the discretionary clauses, and 'sponsor organisations' may ask the admission of an applicant – with his or her consent – to the Member State where they are based. However, Member States are left free to reject or even to ignore such requests. Past experience suggests that they will predominantly do so.

A further, far-reaching amendment to the hierarchy of criteria is the reform of the rule that applies by default when none of the criteria described above is applicable. This is a critical element of the system: the criteria have so far been applied in a minuscule proportion of cases, and even the expanded 'genuine link' criteria may be expected to have low statistical impact. Therefore, the 'default rule' is the one potentially applying to the largest number of cases. As the law stands, the State where the first application had been lodged is responsible. In order to break the incentives that this may create for

applicants to travel on to their preferred destination, and in order to promote a fairer sharing of responsibilities among Member States, the 'Wikström report' would replace this rule with the automatic allocation of responsibility to the 'least burdened' State(s).

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### *THE PERMANENT ALLOCATION MECHANISM*

By becoming the default rule, 'corrective allocation' becomes a permanent feature of the system and not a 'crisis' mechanism as foreseen in the Commission proposal. In addition to its permanent character, the mechanism devised by the European Parliament differs from the one proposed by the Commission in two respects.

Procedurally, it is significantly streamlined. While the Commission proposal required the 'allocation State' to conduct a further Dublin procedure post-transfer, this feature is absent here: subject to a 'security verification', once a State is chosen as 'allocation State' it will have to accept the applicant and directly examine his or her application. In a bid to further boost the efficiency of the mechanism, the report proposes that the (future) EU Agency for Asylum (EUAA) be



entrusted with the execution of the transfer. It is not made clear, however, where the EUAA would find the resources to do so, on what authority it would manage the coercive aspects of the task, and which court would hear the unavoidable complaints against it.

Substantively, the allocation mechanism incorporates two new features intended to promote acceptance and cooperation on the applicants' side:

- First, an element of choice is inserted in the allocation process: the determining State is to 'shortlist' the four least-burdened States at the moment of the application, and the applicant is to be given a short deadline to choose among them. As a form of 'punishment', this choice would be denied to applicants who enter the Union irregularly without applying in the first State, and to those who are transferred on the basis of the 'light procedure' when it surfaces that the *prima facie* application of the criteria was wrong.
- Second, applicants are allowed to register as groups of maximum 30 persons. Family members and relatives are to be 'allocated' together in all circumstances. Other

applicants are to be allocated together 'to the extent possible'.

Some of these points are open to criticism, e.g. the idea of punishing applicants when the 'light procedure' misfires independently from any fault on their part. Some are symbolic gestures: past Dublin practice unequivocally shows that guarantees given 'to the extent possible' are destined to remain a dead letter.

Conceptually, however, the idea of giving applicants a choice as to their destination (and company) is nothing short of revolutionary, and breaks at last the 'no choice' taboo that has until now reigned uncontested in Dublin-dom. Still, restricting applicants' choice to four States – likely none of them 'preferred destinations' – seems a sure-fire way of depriving this bold reform of its intended effects. Indeed, if the objective is to promote acceptance while at the same time ensuring a fair distribution, why not give applicants the choice among *all* the Member States that are below quota at the moment of the application?

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#### NEW INCENTIVES FOR MEMBER STATES

The 'Wikström report' also aims to incentivise the other stakeholders – Member States – to play by the

rules. More specifically, it aims to make sure that border/application States carry out their 'gatekeeper' task properly. To this end, several steps are taken:

- The deletion of the irregular entry criterion, and of the default rule assigning responsibility based on the place of the first application, would of course remove powerful disincentives to identifying arriving migrants and registering the applications of those that seek protection;
- Similar to the (hotly contested) 'pre-procedure' of the Dublin IV proposal, the report foresees a 'filter' whereby that application States will have to screen out and take responsibility for applicants raising security concerns or 'manifestly unlikely' to qualify for protection. An effort is made, however, to 'carefully calibrate' the filter, so as to avoid excessive burdens for application States. Therefore, instead of placing on the application State all 'safe country cases' as the Commission proposal does, the new 'filter' would only apply when: (a) no family and dependency links determine responsibility, (b) no protection-relevant issues have been raised by the applicant, and (c) there are no

other indications that he or she may qualify for protection.

- The report places on the EU budget several costs that are currently borne by the application State, i.e. the costs of reception and transfers in the Dublin procedure, as well as the costs of reception for applicants 'manifestly unlikely' to qualify. These are costs incurred for providing 'public services' to the EU as a whole, so the logic of the reform is sound. Surprisingly, however, other 'public service' costs are left on the first application State (e.g. reception costs for screened out 'security cases', as well as processing costs for the Dublin procedure and for 'screened out' applications).
- Along with the 'carrot', the report also foresees a 'stick': Member States who fail to register incoming arrivals, and decline EU assistance to do so, are to be 'excluded' from the allocation mechanism. Since allocation is the 'default rule' in the system foreseen in the report, it is wholly unclear what would happen to the applicants to whom a 'genuine link' criterion does not apply. Indeed, little thought seems to have been given to the consequences. Conceivably, applicants would be left in a limbo and the 'defaulting' State could be

further encouraged to 'wave' them through.

Of course, over and above these (dis-)incentives, border and application States would only play the game if they trust the allocation mechanism, especially in times of crisis. Swift allocation of those that arrive and are registered would, in fact, be their only insurance against being quickly overburdened by 'first line' reception responsibilities. In this respect, the report suggests to introduce 'disincentives' – in the form of restricted access to, and use of, EU funds – also for Member States who would refuse to cooperate like the Visegrad States did under the 2015 relocation schemes. It is difficult to say whether such disincentives would be enough.

Should allocation fail to deliver for this or other reasons, however, the system would quickly founder in disorder as pressure to defect and 'wave through' would build on 'gatekeepers'. So can allocation work in practice?

## 2. A SYSTEM THAT WILL 'WORK IN PRACTICE'?

No matter how important the strengthened protection for family and other 'genuine' links, the revolutionary element of the report is automatic quota-based allocation

as soon as the 'genuine link' criteria have been found not to apply. This innovation would fundamentally change the system from one that is essentially based on 'responsibility' (for entry) to one that is essentially based on 'solidarity'. The gains in terms of distributive fairness between Member States would (theoretically) be considerable, while the expansion of 'genuine link' criteria would also make the system fairer for applicants. However, the system would probably prove unsustainably 'transfer-heavy'.

Under the current system, transfers are rare. Most frequently, lack of accepted evidence pointing to a responsibility criterion leaves responsibility with the State where the application has been lodged. Or else, time-limits for Dublin requests or transfers are transgressed and responsibility shifts to the State where the applicant is already present. Even so, Member States have been consistently unable to implement about two thirds of agreed transfers – just as they have been unable to implement most of the 'relocations' that had been agreed under the 2015 schemes.

Under the 'Wikström report', the number of transfers to be implemented would be far greater: allocation to another State would

become the 'default' rule, and the responsibility-shifting effect of time-limits would be deleted in most cases. Without a massive (and therefore highly unlikely) increase of transfer capacities, 'in limbo' situations would multiply, and could only be 'solved' by a large scale application of the sovereignty clause. This, in turn, would heavily impact the stated fair-sharing objective.

These considerations seem all the more valid since under the 'Wikström report', most transfers would likely still have to be implemented without the consent of applicants. Indeed, the expanded 'genuine link' criteria would still probably apply in a minority of cases, and the positive 'incentives' to cooperate with quota-based allocation seem inadequate (e.g. the choice between the four least-burdened States, or group allocation 'to the extent possible'). At the same time, the vast disparities that exist between the Member States – disparities in reception and protection standards, in economic opportunities, etc. – would make involuntary allocation unfair for applicants and evasion still attractive.

Similarly, it is far from certain that the system of incentives and

disincentives designed to secure the cooperation of Member States would be effective. On the one hand, considerable costs would still be left on the State of application, as well as all the risks related to the (non-)execution of allocation decisions. On the other hand, allocation States would still have obvious incentives not to cooperate, and as noted, it is doubtful that the threat to reduce access to EU funding would be sufficient to counterbalance them.

Short of being capable of attracting cooperation from the applicants and Member States in a majority of cases, the system would need to rely on coercion and heavy administrative procedures, that is on vastly increased financial and administrative capacities. This seems to be the least thought through aspects of the 'Wikström report' (and of the Commission proposal). Both seem to start from the premise that involuntary transfers on a large scale self-evidently will *work*, oblivious to the contrary evidence accumulated under both the Dublin system and the relocation schemes. Furthermore, neither the 'Wikström report' nor the Commission proposal justifies the massive increase in resources and time that would have to be devoted to the ancillary task of allocating and enforcing

responsibility. Those resources would be subtracted from the fundamental aim(s) of the CEAS, i.e. to provide decent reception and to examine protection claims.

Finally, neither document proposes a credible answer to the question of how a manifold increase in the efficiency of transfers is supposed to come about. The barely sketched-out transfer of responsibilities to the proposed EU Asylum Agency merely appears to shift the problem while leaving unaddressed the core difficulty: that 'moving' large numbers of persons against their will, while respecting fundamental rights, is a daunting task, and quite possibly one that is not feasible.

All of these factors contribute to a system that is unlikely to work in practice, and likely to produce a significant proportion of 'in limbo' situations and secondary movements.

## CONCLUSIONS

Overall, the 'Wikström report' sketches out a new model for the Dublin system. It is a step in the right direction, insofar as it attempts to take better into account the 'genuine links' that connect applicants and States, and even to give applicants an element of choice

as to their destination. It also constitutes an attempt to move from unfair distribution 'by default' to a system that theoretically would lead to a fairer distribution of tasks and finances between Member States. As such, it is a clear signal against both the 'emergency response' model of the Commission proposal and the 'no distribution' model of the States that promote 'flexible' or 'effective solidarity.'

Unfortunately, the report does not go far enough in its efforts to enlist the cooperation of applicants, while it leaves significant costs and risks on the few 'first arrival' and 'preferred destination' countries that are supposed to register protection seekers. A further, significant weakness lies in the sheer number of (predominantly involuntary) transfers that it would generate: probably unfeasible, and even if feasible destined to absorb an unjustifiable amount of financial and administrative resources.

That said, the 'Wikström report' is not the final word. Negotiations on the new asylum package seem still very much blocked by the paralysis of the Council that followed the Commission proposals from 2016. Indeed, the Commission roadmap of 7 December 2017 shows the extent

of disagreement more than it gives guidance on timelines. Therefore, it remains to be seen if, and to what extent, the report of the European Parliament will influence the future shape of responsibility-allocation.

It could perhaps be hoped that the strong resistances to an allocation model such as the one proposed in the report might lead to its abandonment, and to an accentuation of the elements that could make responsibility-allocation

truly fair and effective: (1) renouncing large-scale coercive transfers; (2) founding the allocation of responsibilities entirely on genuine links and quota-based allocations that applicants would *elect* to accept, and (3) sharing money and capacities on an entirely new scale. If the 'Wikström report' will make this transition possible, it will indeed have contributed to a 'fundamental and structural reform' resulting in a system 'that will work in practice'.

## ***A 'BLIND SPOT' IN THE MIGRATION DEBATE? INTERNATIONAL RESPONSIBILITY OF THE EU AND ITS MEMBER STATES FOR COOPERATING WITH THE LIBYAN COASTGUARD AND MILITIAS***



BY *Achilles Skordas*, PROFESSOR OF INTERNATIONAL LAW, *University of Copenhagen*

The discussion on the restrictive migration management policies of the European Union (EU) and its Member States (MS) has so far focused on the potential violation of the primary rules of international law that determine the conduct of subjects of international law. The question of applicability of the secondary rules of international responsibility that provide for the consequences of the commitment of a wrongful act has attracted less attention. The main question in the current context is whether the cooperation of the EU and its MS with the Libyan coastguard and militias with the view of stemming irregular migration flows to Europe generates international responsibility for the above actors. More specifically, it is asked whether

there is an autonomous basis in the law of international responsibility for holding the EU and its the MS responsible for the violations of human rights occurring in Libya, even if they do not exercise directly jurisdiction over migrants. Three aspects of this theme will be developed here: first, the nature and scope of the cooperation of the EU and its MS, in particular Italy, with the Libyan authorities, coastguard and militias in view of restricting the access of migrants to the EU; second, the extent of human rights violations of migrants in Libya; and third, the alleged complicity and responsibility of the EU and MS for the violations of these rights.

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## I. COOPERATION WITH THE LIBYAN AUTHORITIES, COASTGUARD AND MILITIAS

The cooperation with the Libyan coastguard is primarily based on the amended [Council Decision of 2015](#) establishing the Operation EUNAVFOR MED Operation Sophia. The core element of the original mission was to contribute 'to the disruption of the business model of human smuggling and trafficking networks in the Southern Central Mediterranean'. [A year later](#), the Council added new responsibilities to EUNAVFOR MED, including the capacity-building and training of the Libyan coastguard and navy. [The mandate was renewed in 2017](#) and is valid until the end of 2018.

Meanwhile, the EU and its Member States have been supporting post-conflict peace-building in Libya. On 2 February 2017, Italy and Libya signed a [Memorandum of Understanding \(MoU\)](#) with particular significance for the policies of migration management (see post relating to this MoU on this blog [here](#)). In the MoU, Libya agreed to take measures for stemming the migrant flows to Europe and Italy promised to support 'development programs in the regions affected by illegal immigration'. Moreover, Italy

agreed 'to provide technical and technological support to the Libyan institutions in charge of the fight against illegal immigration, and that are represented by the border guard and the coast guard of the Ministry of Defence and by the competent bodies and departments of the Ministry of Home Affairs' (Art. 1 MoU). Libya would host the migrants temporarily in camps until their return to their countries of origin and Italy would train personnel working in the hosting centers (Art. 2.3, and Preamble of the MoU). Furthermore, Italy would start 'development programs through adequate job creation initiatives within the Libyan regions affected by illegal immigration phenomena, human trafficking and fuel smuggling as "income replacement" '(Art. 2.6 MoU).

The next day after the signing of the MoU, on 3 February 2017, the European Council adopted the [Malta Declaration](#), emphasizing that 'in Libya, capacity building is key for the authorities to acquire control over the land and sea borders and to combat transit and smuggling activities.' The Council also decided to support 'where possible the development of local communities in Libya, especially in coastal areas and at Libyan land borders on the migratory routes, to improve their



socio-economic situation and enhance their resilience as host communities'. It also encouraged 'efforts and initiatives from individual Member States directly engaged with Libya' and welcomed the MoU.

The purposes of the MoU and the Malta Declaration were confirmed during the Paris meeting of the Heads of State and Government of France, Germany, Italy, Spain, the High Representative of the EU for Foreign Affairs and Security Policy, Niger, Chad, and the Chairman of the Presidential Council of Libya. In a [Joint Statement](#) on 'Addressing the Challenge of Migration' of 28 August 2017, they agreed to pursue the return of irregular migrants to the countries of origin, in particular to Niger and Chad. The Joint Statement expressed the will of the participants 'to improve human rights protection and living conditions for migrants in Libya ... on the basis of good standards treatment of migrants in the country, in particular for those who are rescued by the Libyan coast guards' (Art. 2.3-4). According to the Statement, 'the Italian project to cooperate with 14 communities along migration routes in Libya is much welcomed in this respect, as are projects financed by the EU

Emergency Trust Fund for Africa' (Art. 2.3-2).

There are three steps in the EU policy towards Libya. First, support to the Libyan coastguard in order to exercise effective control over its territorial sea and beyond. Italy has even decided to send a limited naval mission in the Libyan territorial sea to cooperate with the Libyan coast guard upon request of the Libyan authorities (see [here](#), [here](#) and [here](#)).

Second, progressive disengagement of the EU and the MS from involvement in Search and Rescue operations on the high seas. In that way, the Union and the MS would not exercise jurisdiction over migrants, under the terms of the [Hirsi Jamaa Judgment](#) of the European Court of Human Rights. A restrictive [code of conduct for NGOs](#) engaged in search and rescue operations, issued by the Italian authorities, is part of the policy of deterring migrants from undertaking the trip to Europe.

Third, financial support to the fourteen Libyan communities across the 'smuggling road' and the 'income replacement' are expected to destroy the smuggling business. The big question here is how these funds would be channeled to these

communities in the absence of an effective central authority. There is some justified skepticism on whether such projects could be realistically implemented without involving militias. However, there is considerable ambiguity and lack of clarity on this aspect of the problem (see [here](#) and [here](#)).

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## II. VIOLATIONS OF HUMAN RIGHTS OF MIGRANTS IN LIBYA

On the contrary, the state of migrants' human rights in Libya is sufficiently clear. According to the [EUBAM Libya Initial Mapping Report](#) of January 2017, about 4,000 migrants, most of them from West Africa, were detained in Libya. The conditions in the detention centers (DCs) were described by the Report as follows: "There are reports about these DCs which describe gross human rights violations and extreme abuse and mishandling of detainees, including sexual abuse, slavery, forced prostitution, torture and maltreatment. Detainees do not have access to proper medical facilities. The trafficking of migrants for organs has also been reported."

The EUBAM Report also describes the lack of authority and control over the militias and other security bodies. The Ministry of Defense,

which is also in charge of the coastguards and port security forces, 'has little or no control over the Armed Forces', in the formulation of the Report. The border guards in the South are also linked with the local militias, and the Ministry of Interior is infiltrated by 'militias and religiously motivated stakeholders'.

The violation of migrants' rights has been confirmed by other official sources. The [Report of the UN Secretary-General on the United Nations Support Mission in Libya \(UNSMIL\)](#) from 1 December 2016, described as follows the situation of migrants in Libya: "Migrants were detained arbitrarily in detention centres run by the Department for Combating Illegal Migration, and in other forms of informal detention under the control of armed groups and criminal smuggling and trafficking networks. Migrants detained in centres operated by the Department did not go through any legal process, and there was no oversight by judicial authorities. Conditions in the centres were inhuman, with people held in warehouses in appalling sanitary conditions, with poor ventilation and extremely limited access to light and water. In some detention centres, migrants suffered from severe malnutrition, and UNSMIL received

numerous and consistent reports of torture, including beatings and sexual violence, as well as forced labour by armed groups with access to the centres.”

On 11 April 2017, the [IOM revealed](#) the existence of ‘slave markets’ in Libya, and the [Report of the UN Secretary-General from 22. August 2017](#) repeated this information stating also that ‘migrants continued to be subjected by smugglers, traffickers, members of armed groups and security forces to extreme violence’. It was not until the [CNN showed concrete evidence of the slave trade](#) that the global public was alarmed. At the same time, the UN Human Rights Commissioner for Human Rights [Zeid Ra’ad Al Hussein stated](#) that the ‘suffering of migrants detained in Libya [was] an outrage to the conscience of humanity’ and that the ‘increasing interventions of the EU and its MS [had] done nothing so far to reduce the level of abuses suffered by migrants.’ The Human Rights Commissioner stressed that the situation of migrants had rapidly deteriorated.

In its recent [report on ‘Libya’s Dark Web of Collusion’](#) of 11 December 2017, Amnesty International took an extra step by stating that

‘European governments, and Italy in particular, are breaching their international legal obligations and becoming complicit in such violations, sharing with Libya the responsibility’.

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### III. INTERNATIONAL RESPONSIBILITY FOR THE EU AND THE MS?

The violation of human rights of migrants in Libya is a matter of fact. The main issue here is whether these violations generate the international responsibility of the Union and its MS, in particular Italy. The answer to this question requires the discussion of a variety of legal factors and potential legal bases and cannot be answered here. However, it is possible to discuss the core international law issue whether the migration management policies of the EU and its MS and their support to Libya amount to ‘assistance’ in the commitment of wrongful acts under the law of international responsibility of States and international organizations.

Article 16 of the [ILC Articles on ‘Responsibility of States for internationally wrongful acts’](#), as included in the UN General Assembly resolution 56/83, reads as follows: “A State which aids or assists another State in the

commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

(a) That State does so with knowledge of the circumstances of the internationally wrongful act; and  
(b) The act would be internationally wrongful if committed by that State. The same wording was adopted by Article 14 of the [ILC Articles on 'Responsibility of international organizations'](#) (UNGA res. 66/100)."

There are numerous legal issues concerning the interpretation of the above provisions. First, it is asked whether the assisting State or international organization incurs responsibility only for wrongful acts of another State or a *de facto* regime, or also for acts of militias and other similar armed groups. Second, the status of some of these groups perpetrating the atrocities as *de facto* or *de jure* organs of the Libyan State, or as criminal gangs or insurgents, should be clarified. Third, it should be discussed whether the legal basis of the alleged responsibility of the assisting State is to be sought only in the secondary rules of international responsibility, or whether primary rules of international law relating to complicity in the commission of war crimes or crimes against humanity

are also relevant. In fact, the distinction between primary and secondary rules is not always obvious. Notwithstanding these issues, the fundamental legal question that will be presented in some more detail here is the meaning of 'knowledge of the circumstances of the internationally wrongful act'.

The [Commentary of the ILC](#) on Art. 16 defines the 'knowledge of the circumstances' by two cumulative conditions. First, the assisting State must have knowledge of the facts linked to the commission of the wrongful act. According to the Commentary, when a State engages in cooperative relations of economic or financial nature with another State it does not usually assume that it assists the commission of acts that are inconsistent with international law.

Second, even knowledge of the facts is not sufficient for establishing the responsibility of the assisting State, because the ILC added a second element that can be understood as the 'purpose'. Responsibility can only be established if the assisting State acts 'in view to facilitating the commission of the wrongful act'. According to the Commentary, 'a State is not responsible for aid or assistance under article 16 unless

the relevant State organ intended, by the aid or assistance given, to facilitate the occurrence of the wrongful conduct and the internationally wrongful conduct is actually committed by the aided or assisted State'. Therefore, following this line of thought, it has to be proven that the Union and the MS had the intention to facilitate the commitment of torture and other similar crimes by Libya or by the Libyan militias and this has obviously not been the case.

It has also been argued that 'purpose' may exist even in the sense of 'awareness' that wrongful acts would happen in the 'ordinary course of events' under the standards of international criminal law (see [here](#)). In this context, though, the International Court of Justice followed a restrictive interpretation of intent in Article 16 of the ILC Articles on State Responsibility in the case on the Application of the Genocide Convention ([Bosnia and Herzegovina v. Serbia and Montenegro](#)) of 2007. The Court ruled that 'there [was] no doubt that the conduct of an organ or a person furnishing aid or assistance to a perpetrator of the crime of genocide [could] not be treated as complicity in genocide unless at the least that organ or person acted knowingly,

that is to say, in particular, was aware of the specific intent (*dolus specialis*) of the principal perpetrator (para 412 of the judgment). Therefore, the Union and the MS would engage their international responsibility for assisting Libya only if they were at least aware that it had specific intent to torture, and still offered assistance. The [Joint Statement on the Migrant Situation in Libya](#), issued by the African Union-European Union Summit of 29-30 November 2017 constitutes an outright condemnation of the human rights abuses that occurred in that country and is therefore an important indication that there is neither complicity nor intent by the Union, its MS and Libya to facilitate or commit such crimes.

At this point, a broader picture of the Union's actions and of the interpretation of Article 16 of the above ILC Articles might emerge. The main purpose of the cooperation of the EU and the MS with Libya is to manage the migration flows, which is a legitimate objective. The collapse of Libyan statehood has been one of the main factors that facilitated the exodus of migrants towards Europe and it is reasonable that the Union would try to re-establish the capacity of Libya to exercise effective control over its land and

maritime borders. This objective was also consistent with the policies of the United Nations for the restoration of peace in Libya after the 2011 war. In fact, an expansive interpretation of Article 16 of the ILC Articles establishing the international responsibility of third States for aiding or assisting the perpetrator would make international cooperation risky (see Georg Nolte/Helmut Philip Aust, Equivocal Helpers – Complicit States, Mixed Messages and International Law, ICLQ 58 (2009), 1-30). In particular, it would complicate post-conflict peace-building, because it would deter States from getting involved in the process of restoration of peace during the fractious, troubled and uncertain period of transition, where international support is necessary more than ever.

Nevertheless, this is not yet the end of the discussion. Article 41 of the ILC Articles on State Responsibility (Article 42 ILC Articles on the Responsibility of International Organizations) introduces a sharper measure in instances of assistance in the commitment of serious violations of peremptory norms of general international law (*jus cogens*). In such cases, 'no State (or international organization)

[should] ... render aid or assistance in maintaining' a situation created by the violation of the above norms (see Nolte/Aust, *ibid.*, at pp. 16-18). Whether this provision is relevant or applicable in the situation in Libya, cannot be answered here, because it would involve a detailed discussion on the facts.

Moreover, there are still more dimensions in the ambiguity surrounding the alleged responsibility of the Union and its MS. The secondary rules of State Responsibility under the ILC Articles may be displaced by special rules or legal regimes according to the rule *lex specialis derogate legi generali*, or applied simultaneously with such rules (Article 55 ILC Articles on State Responsibility, and Article 64 of the ILC Articles on the Responsibility of International Organizations). The discussion should therefore also involve the responsibility of the Union under European law, as well as the jurisdiction and responsibility of the contracting parties to the European Convention on Human Rights.

Europe is increasingly behaving as a realist power as a consequence of systemic crises and risks in its neighborhood. For this reason, it is necessary to conduct a discussion

involving both law and geopolitics. Furthermore, the conceptualisation, interpretation and application of international law, EU law and human rights law in the area of migration have consequences for many other international and transnational

activities and interests. In the area of international responsibility of States and international organisations, one should be particularly mindful of the broader consequences the interpretative exercise might have.

## ***TO PROTECT OR TO FORGET? THE HUMAN RIGHT TO LEAVE A COUNTRY***



By Elspeth Guild, Queen Mary University of London

The right to leave any country including one's own recognized under international and European human rights law is increasingly challenged by pullback practices as part of the fight against irregular migration and the externalisation of the EU migration policy. While the compatibility of such measures with the right to leave will be assessed during one workshop organised in the framework of the 2018 Odysseus Annual Conference, this background paper aims to give an overview of the main applicable international norms (1) and their interpretation by the UN Human Rights Committee (2) as well as the European Court of Human Rights (3).

### I. THE MAIN APPLICABLE INTERNATIONAL NORMS

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Article 13(2) of the Universal Declaration of Human Rights 1948 contains the first post WWII expression of the right to leave a country. It states: "everyone has the right to leave any country, including his own, and to return to his country". This call for a right to leave was transformed into a human rights obligation for states in the International Covenant on Civil and Political Rights 1966 (ICCPR). Article 12(2) states that "everyone shall be free to leave any country, including his own". The right is not absolute in so far as Article 12(3) permits restrictions provided by law which are necessary to protect national security, public order, public health or morals or the rights and freedoms of others and are consistent with the other rights recognised in the Covenant. The



ICCPR has been ratified by 116 states, and signed by another 6. Only 22 states have taken no action so far (most of these are small states, often islands. See <http://indicators.ohchr.org/>).

In the European regional setting, Article 2(2) of the [Protocol n°4 of the European Convention on Human Rights](#) states that “everyone shall be free to leave any country, including his own”. Article 2(3) permits restrictions only where they are “in accordance with the law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”. Of the 47 Member States of the Council of Europe only four have not ratified this Protocol (Greece, Switzerland, Turkey and the UK).

## II. THE INTERPRETATION GIVEN BY THE UN HUMAN RIGHTS COMMITTEE

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To clarify the interpretation given to the provision relating to the right to leave, the UN Human Rights Committee issued a [General Comment on Article 12 ICCPR on 1 November 1999](#). The opening salvo of this General Comment is that

“Liberty of movement is an indispensable condition for the free development of a person.” The Human Rights Committee determined that the right to leave a country may not be made dependent on any specific purpose or on the period of time the person chooses to stay outside the country. Travelling abroad as well as permanent departure are covered. The choice of where to go is that of the individual and the protection is not dependent on the person being lawfully present in the country from which he or she wishes to leave. According to the Committee, even an alien who is being expelled is entitled to choose his or her state of destination, subject to the agreement of that state. The right to leave also includes the right to a passport or other necessary travel documents which is normally a positive duty of the state of nationality. However, the Committee notes that state practices often adversely affect the right to leave. In order to assess the compatibility of such practices with the right enshrined in Article 12(2), the Committee called on all states parties to report on their legal and practical restrictions on the right to leave, including all information on measures that impose sanctions on international carriers which bring to their territory persons without

required documents, where those measures affect the right to leave another country.

The Optional Protocol to the ICCPR provides for a dispute resolution mechanism for individuals who consider that their rights as set out in the ICCPR have been violated. Ratification of the Optional Protocol is not mandatory but 116 states parties to the ICCPR have ratified it, 3 have signed it but not yet ratified it and only 78 have taken no action (of which only two in the Council of Europe – Switzerland and the UK). The Human Rights Committee is the body competent to receive complaints from individuals regarding the protection of their human rights contained in the ICCPR. There is an obligation for individuals to exhaust domestic remedies before making a complaint to the Committee.

So far, there have been only four Communications from the Human Rights Committee regarding complaints of breaches of Article 12(2) ICCPR. The first against Libya involved a Libyan student resident in Morocco who applied to the Libyan Consulate in Morocco for a passport in order to travel to France to continue her studies. The Libyan authorities refused to issue the

passport. As a result, she was unable to enrol in the University of Montpellier. The Committee found a violation of Article 12(2) as the student had been refused a passport without valid justification and subject to an unreasonable delay. She was also entitled to compensation. In the second case published on 31 August 2007, the claim was once again against Libya. The applicant was a Libyan national who had fled the country on account of his political beliefs for which he was persecuted there. He was granted asylum in Switzerland. His wife and children sought to join him there but were stopped at the Libyan-Tunisian border. Their passport was confiscated. The wife sought on numerous occasions to retrieve the passport unsuccessfully. Once again, the Committee found a violation of Article 12(2) and required the state to return the passport, so that the wife and children could join the applicant in Switzerland, and to pay compensation.

In the third case, Canada was the defendant state in a Communication published on 28 April 2009. The applicant claimed a breach of Article 12(2) because the Canadian authorities, following a refusal of his asylum application, refused to give him back his passport for the

purpose of leaving the country. The Committee found this part of his claim inadmissible as he had failed to substantiate it in light of the state party's explanation that his passport was seized pursuant to national law for the purpose of executing the applicant's lawful removal. The final communication regarding Article 12(2) was published on 21 August 2009 and the defendant country was Uzbekistan. The applicant claimed that her father had been convicted illegally for crossing the Uzbek-Turkmen border for a business trip in circumstances which were not a threat to any of the interests protected by Article 12(3). The Committee found a violation of Article 12(2) making reference to General Comment 27 as "it is not sufficient that the restrictions (on leaving a country) serve the permissible purposes; they must also be necessary to protect them". The state had provided no information about the necessity of the restriction on the applicant's father's travel, nor any justification of its proportionality.

From these communications of the Human Rights Committee, it is clear that the right to leave a country enshrined in Article 12(2) includes the right to leave a country of which one is not a citizen. It also requires states to provide travel documents

even if that is for the purpose of family reunification with a refugee, national of that state, enjoying asylum elsewhere. States are entitled to hold the passport of someone who wants to leave the state where this is for the purpose of expulsion. The proportionality requirement which is referred to in the most recent communication probably also applies to this reason for preventing a person from leaving the state. It is likely that if the state does not pursue the expulsion of the person in an expeditious manner the time will come when the retention of the passport will no longer be consistent with Article 12(2). Finally, if states seek to prevent a person from leaving the country then, should they do so, the legality of any criminal prosecution of the individual for unlawfully leaving the state will be dependent on the consistency of the restriction with Articles 12(2) and (3). If the state cannot justify the restriction on leaving the country in accordance with Article 12(3), then the criminal prosecution will also be inconsistent with that provision. Furthermore, any restriction on leaving a country must be proportionate to a legitimate aim (as contained in Article 12(3)).

### III. THE INTERPRETATION GIVEN BY THE EUROPEAN COURT OF HUMAN RIGHTS

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The right to leave a country contained in Article 2(2) of the [Protocol no. 4 to the European Convention on Human Rights](#) has been the subject of substantial challenge before the European Court of Human Rights. Since 1994, the jurisdiction of this Court has been mandatory for the 47 Council of Europe states parties to the Convention. So far, 18 cases have considered, on the merits, the right to leave a country. The [first case](#) was determined in 2002 and the [most recent](#) in 2016. The top country for cases brought against it for a violation of Article 2 of the Protocol n°4 is Russia (six cases) with violations found in five of them. Next comes Bulgaria, with five cases, and violations found in respect of all of them. Romania has had two cases but no violation found. All other countries (Azerbaijan, Croatia, Italy, Hungary and Ukraine) had one violation found against them by the Court. The majority of the cases involve questions about, on the one hand, the legal basis for preventing a person from leaving the country on the basis of national law and, on the second hand, the justification of the measures. The most notorious

judgment is that of [Stamose v. Bulgaria of 2012](#) where the state authorities' refusal to provide the applicant with a passport was at the request of a foreign government (the USA) from whence the person had been expelled. The Court found a violation of Article 2 Protocol 4 not least as the denial of passport facilities prevented the applicant from going anywhere, not just to the USA.

The European Court of Human Rights' jurisprudence on Article 2 of Protocol n°4 is primarily in respect of former Soviet bloc countries where restrictions on travel were the norm before 1989. However, the former Soviet style legislation placing restrictions on travel outside the country have been mainly dismantled in the decades since the fall of the Berlin Wall. Yet, many of the cases which have come before the Court have been decided after 2012. Even bearing in mind the fairly long gestation of cases before the Court, this is a matter of concern.

The right to leave a country whether one's own or any other country is a fundamental right both in international and European law. Careful examination of the circumstances of its breach and the search for remedies by individuals

who claim their right has been violated should be a matter of concern especially nowadays when the fight against irregular migration

prevents increasingly people to leave a country of transit or their own country.

## ***MONITORING AND STEERING THROUGH FRONTEX AND EASO 2.0: THE RISE OF A NEW MODEL OF AFSJ AGENCIES?***



*By Lilian Tsourdi, Departmental Lecturer in International Human Rights and Refugee Law, University of Oxford, Refugee Studies Centre*

Practical cooperation has passed from the margins to the center of the migration and asylum policies. The operationalisation of the hotspot approach to migration management points to the emergence of an increasingly integrated European administration. We are witnessing patterns of joint implementation, with experts deployed by EU AFSJ agencies involved in search and rescue operations, the registration and referral stages, as well as in the processing of asylum claims. However, less attention has been dedicated to a parallel development, that of the expansion of the mandate of EU JHA agencies, and specifically the revamped FRONTEX and EASO agencies, to include monitoring-like functions, as well as

functions which have the potential to steer policy implementation. This creates obvious tensions with the agencies' internal governance structures which are largely intergovernmental. In this contribution, I first outline some of the novel (envisaged) functions, while critically assessing the challenge of independence. I then open the question whether social accountability arrangements could act as a counterbalance. This fully sets the scene for the debate between academics, agency and civil society representatives, set to take place on the 1st February as part of a dedicated workshop in the framework of the 2018 Odysseus Academic Network Policy conference.

## **EASO and FRONTEX 2.0: the emergence of monitoring and steering functions**

One of the solutions to countering the asylum and migration 'crisis' was revamping two key JHA agencies, EASO and FRONTEX, responsible respectively for the coordination of practical cooperation in the areas of asylum, and external border management. This became a legal reality already in 2016 for FRONTEX with the adoption of the [European Border and Coast Guard \(EBCG\) Regulation](#). It is however still ongoing in the case of EASO where negotiations on a [European Union Agency for Asylum \(EUAA\) Regulation](#) are underway. The [European Parliament and the Council reached a partial agreement](#) on the file already in June 2017. Nevertheless, the conclusion of a final agreement is stalling since parts of the new agency mandate hinge on developments in other areas of the asylum policy also currently under negotiation, such as EU asylum procedures and [responsibility-allocation](#) (Dublin IV Regulation). While negotiations are ongoing, it is possible to discern common trends from the parts of the negotiations that have been finalised.

The European Border and Coast Guard, despite its denomination, does not aim to replace national border guard units centralising external border management, remaining [essentially a new model built on an old logic](#). However, a shift has taken place. As part of its new functions, the EBCG not only coordinates practical cooperation, but also develops and, to an extent, monitors European border management. Exemplary of the first trend, i.e. developing the policy, is the agency's role in adopting a 'technical and operational strategy for European integrated border management' based on which Member States should establish their own national strategies (art. 3 [EBCG Regulation](#)).

Regarding the second trend, i.e. monitoring, two aspects merit highlighting:

- liaison officers present in Member States are to monitor the management of the external borders (art. 8 [EBCG Regulation](#));
- a vulnerability assessment aimed at assessing the capacity and readiness of Member States to face upcoming challenges, at identifying (especially for those Member States facing specific and disproportionate challenges) possible immediate consequences for the external borders and for the operation of the

Schengen area as a whole, and at assessing Member State capacity to contribute to agency deployments (arts. 8 and 13 [EBCG Regulation](#)). The assessment could lead to the adoption of recommendations for alleviating the vulnerabilities and, in case of non-implementation with the latter, to a binding decision endorsed by the Management Board prescribing measures to be adopted by the Member State in question (art. 13 [EBCG Regulation](#)). A final, 'nuclear' option is to be activated when the functioning of the entire Schengen area is put in jeopardy. That is the adoption by the Council, on the basis of a proposal from the Commission, of a decision by means of an implementing act prescribing measures which the Member State has to implement/, including the roll out of agency-coordinated missions, and deployment of experts on its territory (art. 19 [EBCG Regulation](#)).

Similar trends are revealed in the case of the new EUAA. While the agency is not tasked with the adoption of an overall strategy, it has the potential to steer policy implementation through a novel process around country of origin information (COI). EASO currently coordinates networks of national administrators in this area and collects, disseminates and [produces COI](#). Its COI analysis is not binding,

Member States can treat it as one of the available sources. The partial agreement foresees an enhanced role for the EUAA through the development together with Member State experts, of a 'common analysis' on the situation in specific countries of origin and the production on this basis of guidance notes to assist Member States in the assessment of relevant applications (art. 10 [partial agreement EUAA](#)). The Executive Director would submit, after consultation with the Commission, the guidance notes accompanied by the common analysis to the Management Board for endorsement. Once endorsed, Member States should take this analysis into account in their decision-making 'without prejudice to their competence for deciding on individual applications'.

Another innovation is a monitoring role for the agency, which has been somewhat watered down during the negotiations. The partial agreement on an EUAA establishes a function to 'monitor the *operational and technical* application of the CEAS *with a view to assisting Member States to enhance the efficiency* of their asylum and reception systems' [emphasis added] (art. 2 [partial agreement EUAA](#)). Member States though the Council have managed to greatly



align the EUAA monitoring mechanism to the 'vulnerability assessment' process in the ECBG Regulation. The now stated aim of the monitoring is to 'prevent or identify possible shortcomings in the asylum and reception systems of Member States and to assess their capacity and preparedness to manage situations of disproportionate pressure so as to enhance the efficiency of those systems' (art. 13 [partial agreement EUAA](#)). It is envisaged that information would come mainly through the Member States themselves, but that the agency 'may also take into account information provided by relevant intergovernmental organisations or bodies, in particular UNHCR, and other relevant organisations'. Finally, the EUAA would have the capacity to conduct on-site visits and case sampling.

The findings of this monitoring exercise would be sent to the Member State for comments. Taking those comments into account, the Executive Director would then draw up draft recommendations, in consultation with the Commission, outlining both the measures to be implemented by the Member State, including with the assistance of the Agency as necessary, and providing a time-line for their implementation

(art. 14 [partial agreement EUAA](#)). The Member State would be given again an opportunity to comment, after which the Management Board would adopt the recommendations by a 2/3 majority of its voting members (art. 14 [partial agreement EUAA](#)). If these recommendations are not followed, and it is considered that the functioning of the Common European Asylum System is jeopardized, the next layer of monitoring actions involves the European Commission. The Commission would address its own recommendations to the Member State in question, and might decide to organize on-site visits to follow-up on their implementation (art. 14 [partial agreement EUAA](#)). A final, 'nuclear' option, aligned with what is foreseen in the ECBG Regulation, is an implementing act to be adopted by the Council prescribing a set of measures, including potential operational deployments, which the Member State would be required to accept (art. 22 [partial agreement EUAA](#)).

Both agencies are therefore to play pivotal roles not only in assisting, or jointly implementing the EU external border and asylum policies alongside Member States, but also in steering and monitoring policy implementation. This new set of tasks throws the challenge of

agency independence into sharp relief.

### **The challenge of independence**

In order to credibly and effectively operationalise these new functions, it would seem that agencies need to be independent from national interests and political influences. EU agencies, however, are 'betwixt and between', as eloquently noted by Deirdre Curtin, being both institutionally and functionally dependent on EU institutions and Member States. Agencies in the AFSJ do not constitute an exception. This is exemplified through the process by which they operationalise their mandate, which is inherently collaborative, and the design of their internal governance structures.

EASO's Management Board is, for example, composed of one member per Member State bound by the Regulation, two members from the European Commission, and UNHCR as a non-voting member (arts. 25-27 EASO Regulation). It has far-reaching functions in the areas of planning and operationalising the agency's mandate and is heavily involved on key agency products. By this I am referring to the need for the Board to specifically 'adopt' some of the agency's outputs that

are 'drawn up' by EASO (e.g. art. 29 EASO Regulation). These realities would be enhanced in new EUAA where the composition of the Management Board remains unaltered, while this organ would see its powers increased, including in the framework of the envisaged steering and monitoring functions as outlined in the previous section. A similar picture emerges when one examines the internal governance structures of the EBCG. The Management Board is composed by 'one representative of each Member State and two representatives of the Commission, all with a right to vote' (art. 63 EBCG Regulation). The Board again has an impressive array of functions (art. 62 EBCG Regulation), including holding pivotal roles in the steering and monitoring processes analysed in the previous section.

Parallel to containing extremely powerful Management Boards, both FRONTEX and EASO 2.0 are subject to multiple layers of accountability processes. According to Bovens, Goodin and Schillemans, accountability consists of three elements or stages: i) the actor should be obliged to inform the forum about his or her conduct, by providing various sorts of information about the performance of tasks, about outcomes, or about

procedures; ii) there needs to be a possibility for the forum to interrogate the actor and to question the adequacy of the explanation or the legitimacy of the conduct; and finally, iii) the forum may pass judgment on the conduct of the actor.

While their detailed analysis goes beyond the scope of this blog post, both agencies are subject to extra-judicial (such as political and financial), as well as judicial types of accountability. Accountability processes are a safeguard to the good functioning of EU agencies. However, in practice there is a delicate balance to be struck between agency accountability and independence. This is exemplified by the figure of the Executive Director who finds herself in the midst of the accountability and independence debate. This key figure should be independent in conducting her duties, and at same time she is the agency representative that is called to report to several accountability fora, including the Management Board, the Council, the European Parliament, and the European Commission. This reality further compounds the independence conundrum.

This is not to say that the Management Boards' composition and role, or the existence of accountability arrangements are inherently negative. Regarding the former element, [Ellen Vos](#) has argued that 'having all Member States represented at agency boards is in line with the conceptual understanding of the EU executive as an integrated administration and is an expression of the composite or shared character of the EU executive'. As for the enhanced role of the Management Board within FRONTEX and EASO 2.0 it could be explained based on the nature and scope of their activities. The tasks which these agencies are called to undertake are intrinsically linked with the implementation of the asylum and external border control policies and are therefore tasks in the remit of the Member States. When the European level, through an EU agency, starts to be more implicated in policy implementation, including through the deployment of experts on the ground, the Member States naturally want to have a strong say. However, it cannot simply be concluded that the national level is seeking to 'reappropriate powers through the back door', since the duty to implement legally rests with the Member States. In what concerns accountability structures, they

enhance transparency in the workings of the agencies and are linked with the principle of good administration enshrined in the [EU Charter of Fundamental Rights](#).

At the same time the independence challenge posed is real and should not be underestimated. The new steering and monitoring powers entrusted to EU agencies have the potential to further impact asylum seekers' and migrants' fundamental rights. [ECRE noted recently](#) that the EUAA's governance structure, in combination with the fact that the agency has no protection mandate *per se*, entails the risk that its country of origin guidance 'would be shaped by political considerations and administrative convenience rather than international protection considerations'. In a recent article, [Ariadna Ripoll Servent](#), raises another type of danger, notably that given the distribution of power in the field of asylum and border controls, the EBCG and the EUAA risk being captured by strong regulators and used as 'proxies' to control weaker ones. Indeed, understanding 'national interest' in these fields as singular does not do justice to either the divergence of interests between Member States, nor to their power differential. As explored [in the work of Natascha](#)

[Zaun](#) presented [here](#) on this blog strong regulators of North-Western Europe have used their powerful bargaining positions to shape EU asylum policies decisively, which has allowed them to impose their will on Member States in South-Eastern Europe. EU agencies can be conceptualised as vessels to operationalise, at least in part, the principle of solidarity and fair-sharing of responsibility. However, [as I analysed in a recent article in MJECL](#) the conception of solidarity remains emergency-driven, and this persists in the framework of the new agency Regulations. This reality combined with a deficit of independence could see these monitoring processes instrumentalised, rather than becoming impartial and objective monitoring exercises of the asylum and external border control policies of each Member State leading to the activation of genuine and robust solidarity measures.

## Perspectives

The tension brought about by the expansion of the mandates of AFSJ agencies is palpable. These agencies are clearly moving beyond operational cooperation and have the potential to steer and monitor policy implementation. This mandate expansion, has not been

coupled with a radical redesign of the internal governance structure of the agencies in what concerns the composition and role of their Member State-dominated Management Boards. This is compounded by a plethora of accountability arrangements. While these new functions have the potential to further harmonise practices, and to boost policy implementation and solidarity, they also entail dangers, as outlined in the previous section.

The way forward to counter these challenges is not clear. Altering the composition of Management Boards or restricting their functions, while it would have been impactful, does not seem to be a politically plausible solution. In view of this, one alternative avenue to be explored is further enhancing the role of external expertise within the AFSJ agencies, whether expertise is provided through international organisations, academics, expert practitioners, or expert civil society representatives. A characteristic example would be the proposal to establish a peer review system of the 'common analysis' on the situation in specific countries of origin by a panel of independent experts on COI. This would infuse the process of the adoption of guidance notes based on this

analysis with further impartiality than that afforded by the exclusive involvement of the agency Management Board in endorsing these products. Similar processes could be conceptualised in the framework of the national 'vulnerability assessments', or the monitoring of national asylum systems.

Another avenue which seems to be promising is strengthening social accountability processes. Madalina Busuioc has raised the danger of the proliferation of accountability obligations which can lead certain agencies facing an 'accountability overload'. However, it seems that accountability towards civil society has the potential, apart from better ensuring individuals' fundamental rights, to act as a counterbalance to the power wielded by Member States, and consequently to enhance agency independence. The EBCG has taken some decisive steps in this direction by boosting the role and powers of its Consultative Forum, parallel to instating the role of a Fundamental Rights Officer and initiating an individual complaints mechanism (arts. 61, 70-72 EBCG Regulation). The effectiveness of these mechanisms in practice, especially in what concerns the third element of accountability which is that 'the forum may pass judgment

on the conduct of the actor', needs to be further studied. This will allow to ascertain to what extent they constitute a useful blueprint for the EUAA, as well as how they should be further reformed to better ensure these goals.

Discussions during the Odysseus Network workshop on the 1st February 2018 will shed further light

to the operationalisation of, or ongoing negotiations around, these new functions, as well as critically debate potential solutions to the independence conundrum.

## ASYLUM VISAS AS AN OBLIGATION UNDER EU LAW: CASE PPU C-638/16 X, X V ÉTAT BELGE



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### Part I

On 7 February 2017, Advocate General Mengozzi handed down his Opinion in the case of [X, X v État belge](#), regarding the right to visas of limited territorial validity (LTV) on humanitarian grounds when there is a risk that an applicant will be exposed to torture or inhuman or degrading treatment. The Advocate General's opinion was handed down against the backdrop of difficult negotiations between the European Parliament and the Council on provisions for humanitarian visas in the [recast Community Code on Visas](#). This blog post, published in two parts, was prepared before Advocate General Mengozzi handed down his Opinion in X, X, but it takes into account this opinion. It was presented at the [2nd Annual Conference of the ODYSSEUS Network](#) on 10 February 2017.

This post draws on Chapters 4 (visas), 7 (EU Charter), 8 (*non-refoulement*), 9 (asylum), and 10 (remedies) of [Accessing Asylum in Europe](#) (OUP, forthcoming in 2017), and takes account of previous research [here](#), [here](#), [here](#), and [here](#) (see further [Academia](#)).

### Introduction: Background Discussions on Humanitarian Visas

Discussions on humanitarian visas are not new. The measure was thoroughly examined in a [study for the European Commission](#) in 2002, resurfacing again in the context of the 2006 [Green Paper on Asylum](#), and becoming the object of specific attention in the 2009 [Stockholm Programme](#). A commitment to the development of a dedicated EU system of facilitated admission for

asylum-seeking purposes was reiterated in 2013 in the [Task Force Mediterranean](#) Communication, propounding a 'holistic approach' to deal with maritime crossings and death at sea, including the opening of 'legal channels to safely access the European Union *to be explored*'. Momentum was somewhat lost thereafter, with the Commission establishing that protected-entry procedures 'could complement resettlement, starting with a coordinated approach to humanitarian visas and common guidelines' in its 2014 Communication on [An Open and Secure Europe](#). But neither the guidelines nor the coordinated approach have ever materialized. The focus has, instead, been on (voluntary) [resettlement](#)—particularly after the [EU-Turkey Statement](#) was adopted in 2016. In fact, the reference to humanitarian visas disappeared from the 2015 [European Agenda on Migration](#), where legal channels for access to asylum were replaced with increased border control and cooperation with third countries to 'prevent hazardous journeys'. The timid approach of the Commission and its stagnation in a permanent exploratory phase of 'ways to promote a coordinated European approach' regarding 'humanitarian permits' thus persists in the run

up [Towards a Reform of the Common European Asylum System](#).

In parallel, the [negotiations on the recast Community Code on Visas](#), at the height of the so-called 'refugee crisis', have provided new impetus for further exchanges on this count, leading, however, to a polarization of political positions. While the [European Parliament](#) wants to clarify the regime applicable to humanitarian visas on the basis of *existing* provisions on Limited Territorial Validity visas (LTVs) in the [current version of the Code](#), the prevailing view at the [Council](#) opposes such a move—against the backdrop of [The Bratislava Roadmap](#) insisting on border protection to 'further bring down [the] number of irregular migrants', and without consideration of international protection needs. Yet, within the Council, there are also stark divisions, with some of the 'first entry' Member States being quite vocal on the urgency of finding a 'solution' to boat arrivals. Most notably, the current [Maltese Presidency](#) has advocated for the 'opening up [of] humanitarian corridors to allow people fleeing conflict to cross the Mediterranean'. The idea is for the EU to 'organize humanitarian safe passages...that



would get recognized asylum-seekers to Europe safely', avoiding drowning and loss of life at sea—5,083 died last year, surpassing the record figure of 3,777 reached in 2015, according to [IOM](#).

In the meantime, some Member States maintain measures for humanitarian admission as part of either *ad hoc* or more formalised resettlement or evacuation programmes, as a recent [European Migration Network survey](#) reveals. However, these are normally considered discretionary and managed largely *ex gratia*. The [Belgian programme of humanitarian visas for family members of beneficiaries of international protection residing in Belgium](#), that provides the background to this post, is no exception in this regard. So, the question of whether there is ever, if at all, an obligation to allow entry through the issuance of a (LTV) visa under EU law is particularly relevant.

### **Request for preliminary ruling in Case PPU C-638/16 X, X v État belge**

[Case PPU C-638 X, X v Belgium](#) revolves around the request for a Schengen visa by a family with two minor children of a

young age from Aleppo, submitting an application under Article 25 of the [Community Code on Visas](#) (CCV) on account of humanitarian considerations, to allow the family to travel to Belgium and request asylum there. They assert the derelict situation obtaining in Syria, generally, and in Aleppo, in particular, with bombings and indiscriminate violence adding to direct attacks on the civil population by terrorist groups, government forces, and other fighting factions, as proof of the 'extreme emergency' situation in which they are immersed—as documented by [Amnesty International](#) and denounced by the [UN](#) and [Ban Ki-Moon](#) himself, qualifying Aleppo 'as synonym for hell'. They also raise the [specific risk of persecution](#) they face as Christians on religious grounds, and adduce evidence of past ill-treatment suffered by X at the hands of militia captors, who only liberated him upon ransom. These circumstances have not been disputed by the Belgian government ([Conseil de contentieux des étrangers de Belgique Arrêt 179 108 du 8 décembre 2016](#)) and are supported by statistics in Belgium, reaching a figure of 97.6% positive [recognition rates for Syrians](#) of the total 2,792 requests filed in 2015.

The situation in neighbouring countries, including Lebanon—where the visa was requested—Jordan and Turkey, was also presented as substantiating the family's plight. Lebanon has terminated the registration process of refugees run since the beginning of the Syrian war, is not a Contracting Party to the 1951 Refugee Convention (CSR51), and is not providing adequate assistance to current asylum seekers, hosting, as it is, the equivalent of 25% of its own population in Syrian exiles. Its Minister of Labour has actually called for the expulsion of Syrians to avoid clashes with the local population, inciting harassment against the displaced, with the Foreign Minister concurring that 'the only sustainable solution to the crisis of the Syrian exodus to Lebanon is to return back the displaced persons to their homeland'. Jordan, in turn, housing over half a million Syrians and equally a non-party to the 1951 Convention, has closed its borders to further refugees, and has recently been accused of orchestrating an 'ejection campaign' back to Syria. Finally, regarding Turkey, with nearly 3 million registered refugees, reliable sources have reported that 'Turkish border guards are shooting and

beating Syrian asylum seekers trying to reach Turkey'. The Turkish-Syrian passage is also closed and there are plans for a new border wall to stop crossings. Erdogan's forces have allegedly contributed to the degradation of the situation in Syria by bombing Kurdish militia, disregarding risks for civilians. In addition, as Amnesty International deplores, incidents of *refoulement* and illegal mass returns to Syria are on the rise since the conclusion of the EU-Turkey deal. Thus, none of these countries of transit towards the EU (and Belgium, in the present case) can be considered 'safe third countries' pursuant to the Union's own definition in the Asylum Procedures Directive (APD), requiring the absence of *refoulement/ill-treatment* risks and, crucially, 'the possibility...to request refugee status and, if found to be a refugee, *to receive protection in accordance with the Geneva Convention*' (Article 38(1)(e) APD). Qualification of Turkey, Jordan or Lebanon as 'first countries of asylum' is unjustified as well, considering the situation of refugees there—far from amounting to 'sufficient protection...including benefiting from the principle of *non-refoulement*' in substantive and procedural terms (Article 35 APD).

Against this backdrop, the situation of the claimants, from both an individual and general perspective, taking account of subjective and objective factors together (Article 4 [Qualification Directive](#)), leaves no room to doubt that, if allowed to claim asylum, they would prima facie qualify as either refugees or beneficiaries of subsidiary protection—like 97.6% of [Syrian claimants](#) in Belgium in 2015 and [98% in EU-28](#) over the same period. This is also the view of the referring court, which however expresses doubts as to the extent of obligations under the Visa Code in these circumstances, regarding in particular two concrete points [referred to the CJEU for a preliminary ruling](#):

- i. *Do the ‘international obligations’, referred to in Article 25(1)(a) CCV cover all the rights guaranteed by the EU Charter of Fundamental Rights (CFR), including, in particular, those guaranteed by Articles 4 and 18, and do they also cover obligations in the light of the ECHR and Article 33 of the Geneva Convention?*
- ii. *A. In such case, must Article 25(1)(a) CCV be interpreted as meaning that, subject to its discretion with regard to the circumstances of the case, a*

*Member State to which an application for a LTV visa has been made is required to issue the visa applied for, where a risk of infringement of Article 4 and/or Article 18 CFR or another international obligation by which it is bound is detected?*

*B. Does the existence of links between the applicant and the Member State to which the visa application has been made (for example, family connections) affect the answer to that question?*

The key issues to elucidate are therefore the applicability of the CCV to the case, the remit of LTV provisions, and the extent of protection obligations to asylum and *non-refoulement* in the (extraterritorial) visa-issuing context.

### **The Applicability of the CCV in International Protection Situations: LTVs**

As Article 1 CCV makes clear, the Regulation establishes the procedures and conditions for issuing short-term visas under EU law and applies to ‘any third country national who must be in possession of a visa when crossing the external borders of the Member States’ according to the [Visa Regulation](#)

[539/2001](#)— which concerns all refugee-producing countries, including Syria. The motives underpinning the visa application are irrelevant at this juncture—they serve to assess the merits of the application (Article 21 CCV), but do not by themselves determine the applicability of the Visa Code per se (concurring: [Mengozi](#), para. 49 ff).

Contrary to the Belgian government's allegations in *X, X*, the applicants' intentions cannot alter the nature or subject of their claim, nor can they legally transform their application into one for a long-stay visa, thereby removing the applicants from the scope of application of the Visa Code. This would be tantamount to accepting, for instance, that failed asylum seekers were *ab initio* excluded from the remit of the [Qualification Directive](#) and the [Asylum Procedures Directive](#) because *ex post*, upon determination of their claims, it has been concluded that they did not qualify for refugee status or subsidiary protection. The fact that an application for either a visa or for international protection under EU law is dismissed on the merits (or even at the admissibility stage) cannot be confounded with the determination of whether the rules of the relevant instruments (i.e. the

CCV or the QD+APD) apply to and govern the examination of the claim. The applicants' circumstances (including motives and intentions) can therefore lead to the rejection of the application, but do not constitute a reason for the *a priori* non-application of the rules—that would be very dangerous, leading to a legal black-hole on imputed grounds, negating the rule of law. In fact, the linking factor to the QD+APD is simply that the person be an 'applicant', that is, 'a third-country national...who has made an application for international protection in respect of which a final decision has not yet been taken' (Article 2(i) QD). Similarly, regarding the CCV, its rules apply to any 'application' meaning 'an application for a visa' submitted by a 'third-country national', that is, 'any person who is not a citizen of the Union' whose entry is subject to obtaining a visa (Article 2(10) and 2(1) CCV).

On that basis, Schengen visas are conceived of as *authorisations* issued by a Member State with a view to transit through or stay in the territory of the Member States of a duration of no more than three months in any six-month period' (Article 2(2) CCV). But, crucially, there is no discretion to 'refuse...to issue such a visa to an

applicant unless one of the grounds for refusal...listed in [the CCV] provisions can be applied to that applicant' (*Koushkaki*, para. 63). So, although visas are not issued 'as of right' to those requesting them, neither can they be considered as completely dependent on Member State whims. Sovereign discretion is delimited and constrained by EU law.

Arguably, this applies to the LTV provisions in the Code. The only difference with 'normal' visas, as to its effects, is that LTVs grant access to the territory of the issuing Member State only—instead of to the entire Schengen zone (Article 2(4) CCV). Otherwise, it appears that LTVs '*shall* be issued' when the criteria of Article 25 CCV are met (Concurring: *Peers*). That provision foresees that 'on humanitarian grounds...or because of international obligations' it may be 'necessary' for Member States 'to derogate from the principle that the entry conditions laid down in Article [6(1)] of the *Schengen Borders Code* must be fulfilled'. In fact, the Schengen Borders Code (SBC) applies 'without prejudice to...the rights of refugees and persons requesting international protection' (Article 3(b) SBC). The exception to entry rules on account of 'humanitarian grounds...or because of international

obligations' is explicitly contemplated in the body of the Code (Article 6(5)(c) SBC)—to which visa rules explicitly refer (Article 21 CCV).

Yet, the Belgian government's interpretation highlights the discretionary elements of Article 25 CCV's formulation. The wording is indeed equivocal and could lead to opposing constructions. While the text stipulates that a LTV '*shall* be issued... for reasons of national interest or because of international obligations', it also indicates that this be '*exceptionally*' and only 'when...a Member State *considers* it necessary'. Thus, whether there is an obligation to issue a LTV under certain circumstances, and whether such circumstances must be appraised in light of fundamental rights is open to contention. That *there is* a margin of appreciation seems undisputable. What remains to be clarified is *the extent* to which this margin is subject to and structured by the 'humanitarian grounds' and 'international obligations' mentioned therein.

Leaving momentarily aside the issue of the extent of the margin of appreciation, it is advanced that the effect of Article 25 CCV is to carve out an exception to 'normal'

exclusion rules defined in Article 32 CCV, enumerating the circumstances in which a visa should 'normally' be denied. Rules on visa refusals under Article 32 CCV (i.e. the rule) should be interpreted as being 'neutralized' by Article 25 CCV (i.e. the exception). They apply '*without prejudice to Article 25(1) [CCV]*'. Article 25 CCV should thus be taken to create a parallel, exceptional regime to cater for Member State obligations arising, *inter alia*, in the context of 'the right to asylum and to international protection', as established in the Schengen Code. Indeed, Article 14(1) SBC encloses the twin provision of Article 32 CCV, requiring Member States to refuse entry to the Schengen zone to third-country nationals not fulfilling the normal conditions for admission, but indicating—as Article 32 CCV does in the framework of the visa-issuing procedure—that this be '*without prejudice to the application of special provisions concerning [refugees]*'. So, as much as refusals of entry are subject to respect for 'the Charter of Fundamental Rights [CFR]...relevant international law, including...the Geneva Convention, [and] *obligations related to access to international protection*, in particular the principle of *non-refoulement*' (Article 4 SBC), so too

are visa rejections, as per the terms of the CCV Preamble (Recital 29).

So, coming back to the point on discretion, whatever the margin of manoeuvre allowed to Member States under Article 25 CCV, it must be concluded that it remains subject to the fundamental rights *acquis*, as foreseen by Recital 29 CCV. In any case, subjection to primary law (including fundamental rights) within the EU legal order does not require specific assertion to this effect. Its primacy is constitutionally scheduled in the Treaties and in case law. Hence, whether the term 'international obligations' used in Article 25(1)(a) CCV implicitly encompasses CFR obligations, as per Question 1 of the referring court, is not crucial (similarly: [Mengozi](#), para. 73 ff). The very structure of *internal* EU sources mandates subordination of rules of secondary law to the dispositions of primary law. As the Court of Justice (ECJ/CJEU) has consistently held, where 'the wording of secondary law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the [EU] Treaty' ([Ordre des Barreaux](#), para. 28). This same tenet has been reiterated in the asylum context, with [NS & ME](#) making clear that

'Member States must...make sure they do not rely on an interpretation of an instrument of secondary legislation which would be in conflict with the fundamental rights protected by the EU legal order or with the other general principles of EU law' (*NS & ME*, para. 77). This is in line with the place reserved to fundamental rights within the hierarchy of sources, as founding values of the Union (Article 2 TEU) and as standards of validity/legality of EU acts (Article 6 TEU and 263 TFEU).

Consequently, the fact that the [Visa Manual](#) fails to contemplate the situation of asylum seekers as specific scenarios in which the issuance of a LTV may be justified is without consequence. Whether the list of examples provided therein is intended to be exhaustive is also irrelevant, as is the legal nature of the Manual (as either binding or non-binding). Being an act of the European Commission, its interpretation and application remains subject to the Treaties (and the Charter). And neither the Manual nor, ultimately, the Visa Code can limit the effect of primary law (*Siples*, para. 17).

The applicability of the CCV to X and X's plight, as third-country nationals from a country requiring visas for

entry into Schengen territory and the fact that the LTV provision and the margin of appreciation under Article 25 CCV must be interpreted in light of (and in line with) primary law, should, therefore, be beyond doubt. What remains to be determined is the extent of that margin, which in turn depends on the determination of the precise scope of application of EU fundamental rights, so as to provide a complete answer to the first question referred to the CJEU. This issue will be fully assessed in [Part II](#) of this post.

## Part II

Drawing on Part I of this post, the object of Part II is to determine the extent of the margin of appreciation available to Member States under Article 25 CCV. On the basis of the conclusion from Part I that the [Community Code on Visas](#) (CCV) applies to X and X (*Case PPU C-638 X, X v Belgium*), what remains to be established to answer thoroughly the [questions of the referring court](#) is the applicability of the [Charter of Fundamental Rights](#) (CFR) and the consequences ensuing in such situation.

## **LTVs (Limited Territorial Validity visas), Extraterritoriality, and the Charter of Fundamental Rights**

I have argued [elsewhere](#) that ‘jurisdiction’ has no bearing in the interpretation of the scope of application of the EU Charter (concurring: [Mengozi](#), para. 75 ff). Statist notions of ‘sovereign authority’ and ‘effective control’, as they operate in the framework of the [ECHR](#), are inapplicable within EU law. The only threshold criterion for the application of the Charter relates to the ‘EU-relevant’ nature of the situation at stake. If there is a connecting link making EU law relevant to the case, then the Charter provisions apply as well. This is the conclusion of [Fransson](#), establishing that ‘situations cannot exist which are covered in that way by European Union law without...fundamental rights being applicable. The applicability of EU law entails applicability of the fundamental rights guaranteed by the Charter’ (para. 21).

Thus, territoriality plays no role in this regard. What counts is whether the EU or the Member States are acting within the remit of EU law. Charter provisions are addressed to ‘the institutions, bodies, offices and agencies of the Union...and to the

Member States only *when they are implementing Union law*. As a result, they ‘shall’ respect Charter rights and principles, promoting the application thereof within the realm of their respective powers (Article 51(1) CFR).

Following the [Charter Explanations](#), the issuance or refusal of visas under the CCV amounts to a clear instance of ‘implementing EU law’, as it entails direct application of an EU Regulation to the case at hand. Indeed, as per the CJEU, a ‘Regulation is binding “in its entirety” for Member States. In consequence, it cannot be accepted that a Member State should apply in an incomplete or selective manner provisions of a [EU] Regulation so as to render abortive certain aspects of [EU] legislation which it has opposed or which it considers contrary to its national interests’ ([Commission v. Italy](#), para. 20). Consequently, where activities covered by the Visa Code take place (e.g. consideration of LTV requests under Article 25 CCV), *a fortiori* the guarantees therein become applicable as well (as per Recital 29 CCV. See [Part I](#) of this post).

Even the use of an option/derogation/exception provided for by the CCV—such as that contemplated in the wording of



Article 25(1)(a), employing the terms ‘when...*consider[ing] it necessary*’—is covered by this notion (concurring: [Mengozi](#), para. 80 ff). Borrowing from the CJEU, a ‘discretionary power’ conferred on the Member States by an instrument of EU law forms part of the system regulated thereby and, as such, ‘a Member State which exercises that discretionary power must be considered as implementing EU law within the meaning of Article 51(1) of the Charter’ ([NS & ME](#), para. 68). Thus, the applicability of the CCV and the Charter provisions to the case of *X*, *X* cannot be disclaimed.

### **LTVs and EU *Non-Refoulement***

The principle of *non-refoulement* forms part of the fundamental rights *acquis* as an absolute protection; the substance of Article 3 ECHR has been ‘absorbed’ within the EU legal order in several guises. *Non-refoulement* forms part of the general principles of EU law ([Elgafaji](#), para. 28), it has been codified in primary law in Articles 4 and 19 CFR, and it has equally entered the text of EU acts of secondary law regarding external borders (Articles 3(b) and 4 SBC). The principle thus penetrates the Union system all-pervasively—in line with its standing as a canon of

customary international law ([Bethlehem/Lauterpacht](#)), if not a *jus cogens* norm ([Allain](#)).

Focusing on its concrete manifestation as a rule of primary law, drawing on the [Charter Explanations](#), Article 4 CFR must be read as including the substance of the protection enshrined in Article 3 ECHR (and, it is posited, also that of Article 33 CSR51). This ‘cumulative standards’ approach ([Accessing Asylum in Europe](#), ch. 7) understands Charter provisions to ‘reaffirm’ individual rights ‘as they result, in particular, from the constitutional traditions and *international obligations common to the Member States*’, including those flowing from the ECHR and the CSR51—this is the interpretative technique generally followed in EU asylum case law (e.g. [Abdulla](#), paras 51-53). Following [AG Trstenjak in her Opinion on N.S.](#), ‘[e]ven though an infringement of the Geneva Convention or the ECHR...must be distinguished strictly, *de jure*, from any associated infringement of EU law, there is, as a rule, a *de facto* parallel in such a case between the infringement of the Geneva Convention or the ECHR and the infringement of EU law’ (para. 153)—accordingly, Member States’ ‘legitimate concern to foil the

increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions' (*mutatis mutandis*, [Amuur](#), para. 43; confirmed: [M.S.S.](#), para. 216).

Therefore, *ratione materiae*, any measure 'the effect of which is to prevent migrants from reaching the borders of the State [concerned]' may amount to *refoulement* if it exposes the applicant to ill-treatment ([Hirsi](#), para. 180; confirmed: [Sharifi](#), paras 112 and 115). There is no need to prove direct causation, as the matter is one of *prospective* harm; foreseeability of a 'real risk' suffices in this regard. So, a visa refusal the consequence of which is to prevent access to safety may well impinge upon Article 3 ECHR and Article 4 CFR. The fact that the applicant may have (in the abstract) a possibility to address her request to a different State is immaterial, particularly because 'this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in' ([Amuur](#), para. 48; confirmed: [M.S.S.](#), para. 216)—as is the case of X and X.

Yet, any restrictions *ratione loci* or *ratione personae* attached to Article 3 ECHR or Article 33 CSR51 are not transposable to Article 4 CFR in disregard of its specific design (see, resisting similarly limitative transplants from IHL, focusing instead on the text/context/purpose of EU law: [Diakité](#) and [commentary](#)). The protection against *refoulement* envisaged in the Charter covers everyone without exception (unlike Article 33 CSR51), and its territorial reach depends only on Article 51 CFR. As noted by [Mengozi](#) (paras 97-101), the ECHR (and arguably also the CSR51) work as minimum floors of protection below which the CFR cannot fall, but they should not be taken to prevent the more extensive protection that EU law can and does provide in several respects (Article 52(3) CFR; cf. [Elgafaji](#) vs. Article 3 ECHR case law prior to [Sufi & Elmi](#)). The incorporation of foreign, unwritten limitations into the text of the Charter would violate the principles of legality and narrow interpretation of exceptions under EU law (Article 52(1) CFR) and go equally against the autonomous construction of EU notions as per the independent requirements of the system, constraining their application on the basis of restrictions imposed elsewhere and

for purposes alien to the CFR— whose ultimate goal is explicitly to ‘*strengthen* the protection of fundamental rights’ (Recital 4).

Yet, as evidenced during [discussions](#) at the 2nd Annual Conference of the Odysseus Network, there are some who insist that the phrase: ‘the meaning and scope of [CFR] rights [which correspond to ECHR rights] shall be the same as those laid down by the [ECHR]’ in Article 52(3) CFR mandates incorporation within the remit of application of Article 4 CFR of the territorial restrictions applicable to Article 3 ECHR due to Article 1 ECHR. This, however, would negate the specific nature and objectives of the Charter within the (separate) EU legal order and break the coherence governing the entire fragmenting the territorial scope of Charter provisions depending on exogenous conditions originating in a different legal regime, so that CFR rights drawing on ECHR rights would depend on Article 1 ECHR to define their scope of territorial application, while the remit *ratione loci* of other CFR provisions would be determined by Article 51 CFR alone. This would negate the explicit terms of Article 51 CFR, which, as its title clearly indicates, is the *lex specialis*, within the Charter system, governing its

(entire) ‘field of application’. Constraining the territorial application of Article 4 CFR to Article 1 ECHR through a selective interpretation of Article 52(3) CFR (which explicitly foresees that ‘this provision *shall not* prevent EU law providing more extensive protection’), sidelining the literal tenor of Article 51 CFR, constitutes a *contra legem* interpretation that is unsustainable under EU law. Paraphrasing the Strasbourg Court, to accept this and ‘to afford [Article 4 CFR in line with Article 1 ECHR dispositions] a strictly territorial scope, would result in a discrepancy between the scope of application of the [Charter] as such [as governed by Article 51 CFR] and that of [Article 4 CFR], which would go against the principle [of coherence]’, demanding that the Charter ‘be interpreted as a whole’ ([Hirsi](#), para. 178).

A similar move was attempted in the context of the [Bank Saderat Iran](#) case, where the General Court refused the import of limitations ensuing from Article 34 ECHR in the interpretation of CFR provisions (in an extraterritorial case), chiefly on the ground that ‘Article 34 ECHR is a procedural provision which is not applicable to procedures before the Courts of the European Union’ (para. 36). The same should occur

regarding the import of Article 1 ECHR constraints on Article 3 ECHR (and equivalent interpretations of Article 33 CSR51) when appraising visa-issuing proceedings under the CFR.

Otherwise, if the CJEU decided to break the coherence of Charter provisions and accept a reduction of the scope of application of Article 4 CFR through the back door, it would still be confronted with the fact that visa issuance is one of the undisputed legal bases granting extraterritorial *de jure* jurisdiction to Member States that the Strasbourg Court has consistently acknowledged as triggering the action of Article 1 ECHR. Indeed, 'recognised instances of the extra-territorial exercise of jurisdiction by a State include cases involving the activities of its diplomatic or consular agents abroad... In these specific situations, customary international law and treaty provisions have recognised the extra-territorial exercise of jurisdiction by the relevant State' (*Bankovic*, para. 73; confirmed: *Al-Skeini*, para. 134). And, according to Article 5(d) Vienna Convention on Consular Relations, visa issuance cannot but be considered part and parcel of those 'activities', being explicitly listed as consular functions exercised on behalf of the issuing

State, as a manifestation of its sovereign right to control entry by foreigners into territorial domain. Thus, even if the territorial scope of Article 4 CFR was to be subjected to Article 1 ECHR, the applicability of EU *non-refoulement* to the case of *X*, *X* would be inescapable (in this line: *Spijkerboer/Brouwer/Al Tamimi*).

Regarding the possible margin of appreciation left to Member States to assess the circumstances in which the refusal of a LTV may lead to *refoulement*, in light of the circumstances (general and personal) of the applicants in *X*, *X*, this is non-existent in the present case—considering the dire situation in Aleppo, Syria, and neighbouring States. Generally, as AG Mengozzi underlines (paras 121, 129, 131), the exercise of discretionary clauses in EU instruments is subject to Member State obligations under the Charter. Thus, before refusing a visa under Article 32 CCV, account must be taken of the consequences, in light, especially, of the (absolute) prohibition of *refoulement* under Article 4 CFR. If the refusal may lead to a 'real risk' of exposing the applicant to irreversible harm, the *option* to issue a LTV contemplated in Article 25 CCV turns into an *obligation* to deliver

one to avoid the risk from materialising (concurring: [Mengozi](#), para. 132 ff). If there are no other practicable alternatives to ensure (in law and in practice) the *effet utile* of *non-refoulement*, the issuance of a LTV becomes compulsory. Any other construction would render 'practically impossible or excessively difficult the exercise of rights conferred by [Union] law' ([Unibet](#), para. 43), contrary to the aspiration of the Charter to 'guarantee real and effective...protection' (*mutatis mutandis*, [Von Colson](#), para. 23).

In such cases, a negative obligation not to *refouler* enjoins Member States to engage in positive action. As adjudged in [Căldăraru](#) (paras 90 and 94), 'it follows from the case-law of the ECtHR that Article 3 ECHR imposes, on the authorities of the [Member] State[s]...a positive obligation' to ensure compliance with the prohibition of ill-treatment, which applies in relation to Article 4 CFR as well (as the provision shares the same 'meaning and scope' *ratione materiae* pursuant to Article 52(3) CFR).

In these circumstances, like in similar scenarios governed by the principle of mutual trust, the requirement to comply with

fundamental rights requires Member States to set their reciprocal confidence aside so as to honour absolute obligations under the CFR ([NS & ME](#), paras 79-86 and 94-98). Mutual trust cannot 'undo' CFR duties, nor can it modify their nature and extent. So, an interpretation that would make observance of international obligations into 'exceptions' to the system of inter-State confidence (to be narrowly construed) would amount to putting the cart before the horses, ignoring the hierarchy of sources within Union law ([Kadi I](#), paras 169-170). It is the margin of appreciation of Member States that is subordinate to compliance with CFR duties, not the scope of CFR provisions which are subject to sovereign discretion. EU countries do have an 'undeniable sovereign right to control aliens' entry into and residence in their territory', but that right 'must be exercised in accordance with [CFR obligations]' (*mutatis mutandis*, [Amuur](#), para. 41).

Accordingly, the reply to Question 2 must be in the affirmative, so that Article 25(1)(a) CCV be interpreted as meaning that a Member State to which an application for a LTV visa has been made is *required* to issue the visa applied for, where a real risk of infringement of Article 4 CFR

is detected ([Mengozi](#), paras 3 and 163).

To that end (and in accordance with the rights to good administration and effective judicial protection in Articles 41 and 47 CFR), national authorities must take account of both the general and particular circumstances of the applicant concerned (Article 4 QD), relying on published sources and taking proactive steps to ascertain the reality of the risks faced by the him/her, 'carrying out a thorough and individualised examination of the situation of the person concerned' ([Tarakhel](#), para. 104; Article 4 SBC), 'before any individual measure which would affect him or her adversely is taken' ([MM](#), para. 83). Knowledge of the circumstances will otherwise be imputed on the Member State ([M.S.S.](#), para. 358; [Hirsi](#), para. 121; [NS & ME](#), para. 88; [Mengozi](#), para. 140 ff) and failure to adopt preventative means to spare the applicant from foreseeable harm will amount to a violation of the CFR.

The absence of links between the applicant and the Member State to which the visa application is made has no effect in this constellation (concurring: [Mengozi](#), para. 161). As much as '[t]he source of the risk does nothing to alter the level of protection guaranteed by [*non-*

*refoulement*]', neither does the concurrence of additional connecting factors to the requested Member State ([Tarakhel](#), para. 104). Requiring additional criteria would actually amount to indirectly introducing a (prohibited) limitation to *non-refoulement* (cf. Article 52(1) CFR), upsetting its absolute nature.

### **LTVs and the EU Right to Asylum**

Space constraints impede the thorough examination of the additional effect on LTVs of the right to asylum enshrined in Article 18 CFR. I invite readers to peruse ch. 9 of [Accessing Asylum in Europe](#) for a detailed account. Suffice it to note here that the principle of effectiveness pleads against a reductionist construction of Article 18 CFR that would render the protection it affords redundant or subsumed within Article 4 or 19 CFR. Its content shall be appraised as being distinct from a (reiterative) protection against *refoulement*. That it entails a right to recognition for one of the international protection statuses recognised within EU law should be beyond doubt (Article 78 TFEU). Both Articles 13 and 18 QD use the imperative 'shall' to establish the obligation on Member States to accord asylum to those qualifying

under the [Qualification Directive](#) (QD) provisions—an issue that the CJEU has also clarified, noting that ‘[u]nder Article 13 of the Directive, the Member State is *required* to grant refugee status to the applicant if he qualifies...’ ([Abdulla](#), para. 62), applying the same logic to Article 18 QD, according to which ‘Member States *are to grant* that status to a third-country national eligible for subsidiary protection’ ([M’Bodj](#), para. 29). In this framework, the QD provisions should be considered to constitute concrete specifications of the right to asylum in the CFR (*mutatis mutandis*, [Mangold](#))—which, however, do not exhaust its independent substance.

The personal scope of the EU right to asylum, despite the absence of a subject in the wording of the Charter provision, should be considered to cover third-country nationals generally (in line with the [Asylum Protocol](#) and as confirmed by the CEAS instruments adopted so far). And territorially speaking, the remit *ratione loci* of Article 18 CFR should not vary from that of the (entire) Charter. Here again, the principle of coherence points in this direction, as does the fact that Article 51 CFR is a horizontal provision governing the ‘field of

application’ of the Charter as a whole.

If this is true, the exercise of the right to asylum must be made possible, both in law and in practice—regardless of territorial considerations. There must be a *legal* means to ensure safe and regular access to asylum for refugee visa applicants, as in *X, X*, to be capable of effectively enjoying their entitlement to international protection under EU law. Depriving the claimants of a legal channel to exercise what is their legitimate right under the Charter cannot be considered a good faith interpretation / application of the CFR provisions (similarly: [Mengozi](#), para. 163).

## Conclusions and Implications

Several conclusions derive from the foregoing analysis that can be briefly recounted:

1. First of all, there is a pressing need to de-politicize refugee / asylum seeker rights and interpret / apply them as any other of the subjective entitlements deriving from the EU *acquis*;
2. In this line, EU law interpreters / implementers ought to stop importing legal categories /

limitations from exogenous systems and treat the CFR as first rank primary law, faithfully adhering to its provisions, in light of their object and purpose (as made explicit in its [Preamble](#) and the [Charter Explanations](#));

3. Relatedly, since the EU is not a State, the import of statist notions of sovereignty and territory as litmus tests determining the applicability of Charter protections is unwarranted;

4. The scope of application of EU rights is the same as that of EU law generally, as determined by the Court ([Fransson](#));

5. And the applicability of EU law (simply) depends on the concurrence of a connecting factor / relevant link that renders the particular situation 'EU-relevant';

6. Therefore, measures of EU border and pre-border control remain subject to compliance with EU fundamental rights, including in the context of visa-issuing procedures under the CCV;

7. So, where the CCV applies, the CFR follows, and, with it, so does EU protection against *refoulement* under Article 4

CFR (as well as the right to asylum in Article 18 CFR);

8. As a result, when contemplating the denial of a visa under Article 32 CCV, where this could lead to a 'real risk' of a *prospective* violation of Charter rights (especially those of an absolute nature), the faculty foreseen in Article 25 CCV *must* be used to deliver a LTV to ensure protection in conformity with CFR standards;

9. Indeed, where there are no other legal and practicable alternatives, as in the case of X and X ([Mengozi](#), para. 157), positive action must be adopted by the Member States to 'guarantee not rights that are theoretical or illusory but rights that are practical and effective' ([Artico](#), para. 33);

10. The 'floodgates' point raised by the Belgian government is irrelevant in this context—regardless of its hypothetical potential side-effect as an incentive to step up international assistance to Lebanon and ensure effective protection within the region of origin (cf. [Spijkerboer/Brouwer/Al Tamimi](#), para. 5.2). There are several reasons buttressing this conclusion—some of which have already been identified by [Mengozi](#) himself (para. 169 ff):



10.1 The point is empirically unsubstantiated, as demonstrated by the numbers concerned in past experiences with evacuation and [resettlement schemes](#). Plus, in the remote case of a mass influx deriving from an application of Article 25 CCV in line with the CFR, the [Temporary Protection Directive](#) provides the tools to cope with the issue. The clogging of Member State embassies is anyway improvable. The number of visas issued daily in EU-28 is in the thousands, with the system having never collapsed on that account—according to the [European Commission](#), in 2015 alone, Member States managed to issue a total ‘14.3 million visas for short stays’ without incidents. But if a rationalization of the LTV system was desired nonetheless, the CCV provides tailor-made options to this effect, leaving ample freedom for Member States to manage applications electronically, for instance, or with the collaboration of honorary consuls or via Common Application Centres (Article 40 ff

CCV), which would allow coordination with Dublin rules.

10.2 Yet, the floodgates argument is misplaced on a more fundamental level. It reifies beneficiaries of Charter entitlements reducing them to a ‘mass’ or a collective figure, diminishing the agency and dignity of rights-bearers. Above all, the fear of numbers does not constitute a *legal* argument, let alone one capable of warranting the limitation of *absolute* rights. In truth, compliance with the CFR is not optional or open to negotiation (Article 6 TEU and Article 51 CFR), and given the ‘absolute character’ of the rights concerned, even a mass influx or other commensurate difficulties ‘cannot absolve a State of its obligations under [the relevant] provision[s]’ ([Hirsi](#), paras 122-23). Potential ‘problems with managing migratory flows cannot justify recourse to practices which are not compatible with the State’s obligations...’ ([Hirsi](#), paras 179). Thus, the CJEU, when deciding on *X*, *X* should strictly adhere to EU law (Article 19 TEU), avoiding political or ideologically motivated temptations.

## ***COLLECTIVE EXPULSION OR NOT? INDIVIDUALISATION OF DECISION MAKING IN MIGRATION AND ASYLUM LAW***



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Various international human rights instruments prohibit the collective expulsions of aliens, including [art. 4 of Protocol n° 4](#) to the ECHR. The text of this provision is, however, quite vague. It merely states that ‘Collective expulsion of aliens is prohibited’. The ECtHR has consistently ruled in several cases like [Conka](#) that the prohibition of collective expulsions is infringed by ‘any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group’. Collective expulsions take place when two constitutive elements are cumulatively met: the aliens are (1) expelled together with other aliens in a similar situation, (2) without

due examination of their own individual situations.

According to well-established case law ([Andric](#), [Sultani](#) and [Ghulami](#)), ‘the fact that a number of aliens are subject to similar decisions does not in itself lead to the conclusion that there is a collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis. The Court performs a holistic assessment of all relevant facts, including procedural guarantees, the motivation behind expulsion orders, and the circumstances surrounding their adoption and implementation. The approach is pragmatic, not formal. To date, the Court has determined that a violation of [article 4 of Protocol n°4](#) has occurred only in

specific and exceptional circumstances, where the existence of a policy aimed at systematically expelling a particular group of aliens was shown. Those included expulsions of Slovakian nationals of Roma origin by Belgium (Conka) and of Georgian nationals by Russia (Georgia v. Russia, Berdzenishvili and others v. Russia, Shioshvili and others v. Russia). Thus far, the Court has not required the aliens who have been subjected to collective expulsion to answer specific constitutive criteria. This is in contrast to the African Charter on Human and Peoples' Rights, which prohibits 'mass expulsion', defined as 'that which is aimed at national, racial, ethnic or religious groups'.

At first relatively discrete, the prohibition of collective expulsions has gained importance in the jurisprudence of the ECtHR following the evolution of European border policies. In various rulings, the Court relied on art. 4 of Protocol n° 4 to condemn 'push-back' policies, which consisted in the systematic expulsion of asylum seekers as soon as they reached the European territory or even before they could reach it, thereby preventing access to the asylum procedure. In Hirsi Jamaa v. Italy, the Court condemned the interception on the high Mediterranean Sea of vessels

of migrants who were sent back to Libya. Similarly, in Sharifi and others v. Italy and Greece and in N.D. and N.T. v. Spain, the Court condemned the immediate and automatic removal of aliens as soon as they entered Italian ports from Greece (Sharifi) or crossed the Spanish-Moroccan border in Melilla (N.D. and N.T.).

In each of these rulings, the lack of proper examination of the individual situation of the applicants weighed heavily in the reasoning of the Court, which insisted that they were not identified nor given access to the asylum procedure. The ruling in Hirsi Jamaa v. Italy opened a new line of jurisprudence in which procedural guarantees are at the heart of the reasoning of the Court. Doctrinal comments have highlighted that procedural guarantees enshrined by Hirsi Jamaa are such that they lead to the obligation of states to grant access to the asylum procedure to asylum seekers falling under their jurisdiction, including those rescued on the high seas.

This raises the question of the extent of procedural guarantees that can be deduced from the prohibition of collective expulsions. In Khlaifia v. Italy, the grand chamber of the Court made it clear

that an equilibrium must be found between the imperative and effective protection of fundamental rights, which requires procedural guarantees, and efficient border control. It expressed awareness of and understanding for practical difficulties that sudden mass influxes of migrants may cause. In that particular case, the grand chamber of the Court found that the expulsion of Tunisian nationals who were fleeing the Arab spring and had been intercepted by Italian coastguards and subsequently brought to Lampedusa, where they were detained before being expelled, was not a collective expulsion. It thereby reversed the ruling adopted by one of its chambers, which concluded that Art. 4 Prot. No. 4 had been violated.

Now that the EU is reshaping its migration and asylum policy following the crisis of 2015, such developments in the jurisprudence of the ECtHR call for broader reflection on the individualisation of administrative decisions adopted in the field of migration and asylum. Under EU law, the EU Charter of Fundamental Rights prohibits collective expulsions ([article 19, §1](#)). It also establishes other procedural guarantees, such as the right to good administration ([article 41](#)). Even though the right to good

administration as established by the Charter only applies to 'institutions, bodies, offices and agencies of the Union', the CJEU has already found in [Mukarubega](#) and in [Boudjlida](#) that one of its components, the right to be heard, reflects a general principle of EU law and must therefore be respected by Member States within the scope of EU law. This raises the question of whether such reasoning can be extended to other procedural obligations established by the right to good administration, such as the duty to give reasons.

In its jurisprudence on family reunification ([Chakroun, Khachab, K. & A.](#)), the CJEU has consistently emphasized the duty of national administrations to consider all relevant circumstances. In various rulings, it has held that Member States may not automatically reject applications for the sole reason that some requirements are not met, such as a fixed minimum of financial resources for the sponsor or standardized integration tests. Due regard must always be given to the particular situation of the concerned alien.

The workshop convened at the next Odysseus Annual Conference, to be held in Brussels on the 1st of

February 2018, therefore intends to discuss the relationship between the prohibition of collective expulsions as established by the ECHR and general procedural guarantees under EU law. Participants will analyse the jurisprudence of the ECtHR on [article 4 of Protocol n°4](#), with an emphasis on recent case law and controversies. They will then turn to a broader reflection on corresponding guarantees under EU

law as they stem from the EU Charter of Fundamental Rights, general principles of EU law and the jurisprudence of the CJEU. The panel will ultimately address the question of whether such procedural guarantees, combined with the prohibition of collective expulsions, can express a general requirement of individual decision making in migration and asylum law.

## **EXTERNAL COMPETENCE AND REPRESENTATION OF THE EU AND ITS MEMBER STATES IN THE AREA OF MIGRATION AND ASYLUM**



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The decision in cases [T-192/16](#), [T-193/16](#) and [T-257/16](#), *NF, NG and NM v European Council*) where the General Court considered that it is not competent to rule about the action for annulment brought by several asylum seekers against the [EU-Turkey Statement of 18 March 2016](#) is well known. People often get shocked by the Court's decision considering that it did not dare ruling on this burning issue when it affirmed that the European Council did not adopt the statement with Turkey. But there is much more than the question of the authorship behind that case raising the overall issue of the distribution of competences between the EU and its Member States (1) with the risk for the CJEU to contradict one of its fundamental decisions about the external powers of the EU in the [ERTA](#) case. This issue is also

linked to the external representation of the EU, whose implications can also be examined in the current negotiations of the Global compacts on migration and on refugees under the auspices of the United Nations (2).

Both questions are significant due to the sensitivity of the combination of migration and foreign affairs for national sovereignty, and complex due to the still ambiguous provisions governing EU external action in EU primary law, particularly those codifying the CJEU doctrine on implied external powers (see [art. 3.2](#) and [216.1 TFEU](#)).

In order to understand what is at stake in EU law, one has to keep in mind that the different objectives pursued by the external dimension of the EU migration policy,

according to [the Global Approach to Migration and Mobility](#) and [the new Partnership Framework](#), correspond to a complex intertwining of powers between the Union and its Member States.

Firstly, the EU enjoys exclusive external competences on short-term visas and borders on the basis of the [ERTA case-law](#) as the adoption of common internal rules in these fields prevents Member States from concluding international agreements which may affect their uniform application.

Secondly, Union competences are concurrent with those of Member States on readmission. The exercise by the Union of this explicit external competence will exclude Member States' external action from the moment the Union concludes an agreement with a given third country or even since the adoption by the Council of a negotiation mandate for that purpose. Union competences can also be qualified as concurrent regarding legal migration and migrants' integration, fields in which the conclusion of Union agreements is subject to legal and political constraints.

Thirdly, decisions on the volumes of admission of economic migrants from third countries still pertain to

the exclusive remit of Member States.

Fourthly, maximising the synergies between migration and development calls for the use of development cooperation, a policy in which EU and Member States' powers are parallel, without the former's action having pre-emption effects over the latter's.

Consequently, cooperation with third countries necessitates a very close cooperation between the EU and its Member States to address those diverse aspects.

A similar degree of cooperation is needed when it comes to the procedural aspect of organising the representation of the Union's and Member States vis-à-vis their partners. According to Art. 17 [TEU](#), the Commission is in charge of ensuring the external representation of the Union, with the exception of the Common Foreign and Security Policy (CFSP) whose representation falls into the common competence of the President of the European Council and the High Representative – Vice President (art. 15 §6, penultimate paragraph, [TEU](#)). Deciding who is in charge of representing the EU internationally in the field of migration therefore does not

depend on the category of i. authorities at the level of which the dialogue is being held. On the contrary, it merely follows from the policy addressed as I explained previously [on this blog](#). It therefore appears that the Commission should represent the Union in negotiations leading to an international agreement in the field of migration. This equally holds true for deliberations within an international organisation or any other forum.

The external representation of EU Member States in areas for which they are still competent is not regulated in the Treaties. It therefore needs to be clarified if it is about their exclusive competence or about a concurrent competence that the Union has not yet exercised. Whilst each Member State is entitled to present its own position in those cases, alternatives for a concerted representation should be looked for in view of ensuring the unity of the international representation of the EU as the ECJ requests ([see, inter alia, Case C-246/07, Commission v Sweden \(PFOS\), para. 73](#)).

## **THE CONTROVERSIAL AUTHORSHIP OF THE EU-TURKEY STATEMENT AND THE GENERAL COURT'S ORDERS**

On 28 February 2017, the General Court issued in cases [T-192/16](#), [T-193/16](#) and [T-257/16](#), *NF, NG and NM v European Council*) three identical orders in reply to the annulment actions brought by several asylum seekers against the [EU-Turkey Statement of 18 March 2016](#) when the EU convinced the Turkish authorities to stop the high influx of migrants crossing the Aegean sea to get to Europe. The most important commitments agreed include the readmission by Turkey of all new irregular migrants arriving in Greece; resettling, for every Syrian national returned to Turkey, another Syrian from Turkey to the Member States (1 to 1 scheme); accelerating the visa liberalisation roadmap and speeding up the disbursement of the money allocated under the Refugees Facility for Turkey (see the comments [by Henry Labayle](#), [by Henry Labayle and Philippe De Bruycker](#) and [by Daniel Thym](#) on this blog).

The applicants took the view that the EU-Turkey Statement was an act attributable to the European Council establishing an international



agreement between the EU and Turkey. Accordingly, they claimed that this act should be annulled by the Court as being non compliant with the Charter of Fundamental Rights of the EU as well as EU secondary law on asylum and would furthermore run counter the procedural requirements for the conclusion of international agreements on behalf of the EU as specified in [art. 218 TFEU](#).

The General Court dismissed the actions on the ground of its lack of jurisdiction. In the Court's view, whilst the content of the Statement "could, admittedly, imply that the representatives of the Member States of the European Union had acted [...] in their capacity as member of the European Council," the explanations given by the latter and the documents sent to Member States and Turkey in preparation for the meeting of 18 March 2016 indicate otherwise. The Court therefore concluded that "notwithstanding the regrettably ambiguous terms of the EU-Turkey Statement [...] it was in their capacity as Heads of State or Government" that the Member States' representatives met the Turkish Prime Minister in the Justus Lipsius building. As a consequence, its members switched hats with the result that the European Council did

not adopt the statement. The Court explained further that "even supposing that an international agreement could have been informally concluded during the meeting", it would have been concluded by the Member States with Turkey, and thus constitute an act falling outside its jurisdiction.

This ruling of the General Court raises several questions closely connected to the subjects referred to above. Firstly, it is necessary to inquire whether the content of the Statement and the circumstances of its adoption – the criteria at which the Court pointed at – really support the lack of EU involvement. Secondly, one may wonder if Member States are really able to decide, when they meet in the premises of the European Council, whether they are acting as Heads of States and Governments of the 28 or *qua* European Council. If that decision can be taken freely by Member States, could the collective action of Member States in fields within the scope of Union external competences be considered to be lawful? In this regard, two different issues are at stake.

On the one hand, the EU has already exercised its external concurrent competence on readmission with regard to Turkey, introducing

common rules in the EU legal order through the [Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation](#), done in Ankara on 16 December 2013 and in force since 1 October 2014, excepted regarding third-country nationals for whom readmission obligations are applicable only since 1 October 2017). Are the commitments assumed allegedly by Member States lawful due to the pre-emption effects of this Agreement with Turkey? And what about the commitments on asylum procedures and the visa liberalisation process which are areas “already covered to a large extent by Union rules” in the sense of the ERTA case law (see, e.g, [Opinion 1/03](#))?

On the other hand, in areas of EU concurrent competence in which the Union has not yet exercised its competence (which could be the case for resettlement), one may wonder whether the “collective action” by Member States can be legally exercised. Wouldn't it be at odds with art. 4.3 [TEU](#)? Can Member States choose to act outside the procedural framework foreseen in EU primary law in fields of Union competences?

If the General Court had taken the view that the European Council acted as counterpart of the Turkish authorities, the issue of the existence of a reviewable act within the meaning of [article 263 TFEU](#) would have had to be addressed. If one accepts that the EU-Turkey Statement is not a treaty (on this issue, [see the post of Olivier Corten and Marianne Dony on this blog](#)), could we argue that this non-legally binding agreement has nonetheless legal effects on third parties within the meaning of article 263 TFEU? Furthermore, in case the Court accepts the European Council's authorship, the question whether the signature of the Statement by this institution is in conformity with the procedural requirements of EU primary law should also be examined. Predominantly, these are determined by [article 218 TFEU](#), outlining the procedure for concluding international agreements and articles [16](#) and [17](#) TEU specifying the respective powers of the Commission and the Council as recently clarified by the Court in the [Swiss MoU case](#). Finally, the annulment actions would additionally have to pass the admissibility threshold, the complex question of whether or not the Statement, as an act of general

application, is of individual and direct concern to the applicants in accordance with article 263 §4 TFEU.

These are the questions to which the Court of Justice may have to reflect upon when replying to the appeal introduced by the applicants ([case C-208/17 P](#)) apart of the question of the authorship of the EU-Turkey statement.

## ii. THE REPRESENTATION OF THE EU IN THE NEGOTIATIONS OF THE UN GLOBAL COMPACTS

Current discussions within the United Nations regarding the adoption of the Global Compacts on refugees and on safe, orderly and regular migration, in which both the Union and its Member States are taking part, raise issues of a similar nature regarding the external representation of the EU and its Member States

In the [New York Declaration for Refugees and Migrants](#), adopted at the summit hosted by the UN General Assembly in September 2016, States decided to launch a process of intergovernmental negotiations leading towards the adoption of two instruments in 2018. On the one hand, the [Global Compact on Refugees](#) would outline

a comprehensive response framework and a programme of action to be applied to large-scale refugee movements, in view of its adoption by the General Assembly as a resolution. On the other hand, the [Global Compact for safe, orderly and regular migration](#) would set out principles, commitments and understandings on all dimensions of migration, and present a framework for enhanced international cooperation. The compacts will be presented for adoption at an intergovernmental conference on international migration to be hosted by the General Assembly in 2018. The elaboration of the Migration Compact, which started in April 2017, is being carried out through a process of intergovernmental negotiations, whose [modalities have been determined by the General Assembly](#) and following the [work plan developed by the UN Secretary General](#) in consultation with the OIM . At the same time, the Refugees Compact is [to be drafted by the UNHCR](#) in cooperation and consultation with UN Member States and other relevant stakeholders.

Looking at the annexes of the New York Declaration, where the main elements of the future Global Compacts are outlined, it is quite obvious that these instruments will cover areas corresponding to both

EU and Member States' competences: reception conditions, refugee admission procedures, resettlement and other legal pathways for admission, refugee status, border management, prevention and fight against human trafficking and migrant smuggling, return and readmission, migrants' admission, migrants' status, and development and humanitarian assistance, among others. In these fields, neither the Union nor the Member States can adopt measures on their own, even if the resulting instruments will not be legally-binding.

Current discussions and negotiations related to both Compacts therefore invite us to look at how the European participation is being orchestrated therein and who is precisely taking part in those talks on behalf of the Union and of its Member States, on the basis of the respective delineation of competences involved. Is the European Commission representing the Union in accordance with art. [17.1 TEU](#)? And does that representation cover all fields corresponding to Union competences or only to its exclusive and already exercised concurrent

competences? Which role is attributed to the HR – VP and the EEAS bearing responsibility for the coordination of different aspects of the Union's external action in conformity with article [18.4 TEU](#)? How is the international representation of EU Member States being organised? By virtue of the Treaties, have they assigned that role to the rotating Presidency of the Council, to the Commission, or have they decided to be individually present in the negotiations? In this regard, it should also be interesting to examine how the respective positions of the Union and of its Member States have been coordinated before and during the negotiations leading to the Global Compacts, as required by the imperative to ensure the unity of the international representation of the EU and the consistency of its external action.

All these and other questions will be critically addressed in the forthcoming workshop on the "External Competence and Representation of the EU and its Member States in the Area of Migration and Asylum" organised in the framework of the 2018 Odysseus Annual Conference.

## **TOWARDS 'JUDICIAL PASSIVISM' IN EU MIGRATION AND ASYLUM LAW? PRELIMINARY THOUGHTS FOR THE FINAL PLENARY SESSION OF THE 2018 ODYSSEUS CONFERENCE**



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Unlike “judicial activism”, the term “judicial passivism” has not been used in relation to EU law. In order to understand its meaning, it is necessary to briefly address and define the term “judicial activism”.

In EU law, judicial activism is most often understood as cases when the judiciary oversteps its judicial powers. The problem with this definition is that the delimitation of the CJEU’s powers often lies in the eye of the beholder. In other words, a case which one person might define as an example of the Court transgressing its powers (activism) might be seen by somebody else as an example of the Court staying within its boundaries, and the other way round. The perception of the existence or non-existence of

judicial activism would partly depend on the ideology, beliefs and the background of the person you ask. It is also difficult, if not impossible, to tear the case away from its political and social setting. If we start from the premise that a judge is *homo politicus* and that he/she does not decide a case in a vacuum, every case is bound to carry a policy, social and political message.

Defining and determining cases of judicial passivism is equally problematic. Despite the fact that one might semantically consider judicial passivism as the opposite of judicial activism, this text will argue that judicial passivism is just a subgroup of judicial activism. In this regard, a self-standing definition of

judicial passivism would apply to cases where the CJEU is consciously (actively) not using its powers where it should, and thereby sending a message to EU institutions, its Member States and other political actors in the EU. This phenomenon can happen in one of the two following ways. First, “judicial passivism in its narrow sense” would refer to cases in which the Court chooses not to decide on the issue by declaring that it lacks jurisdiction. In other words, by identifying a certain situation as falling outside the scope of EU law, the CJEU is not addressing the substance of a given case and is actively choosing not to act. Second, “judicial passivism in the extensive sense” would also encompass situations where the Court is using its judicial (e.g. interpretative) role, but it does so in a manner which deviates from the teleological interpretation to which the Court has accustomed us over the past decades of its adjudication. Significantly, judicial passivism in both its narrow and its extensive sense can be understood as the flipside of judicial activism – as the Court’s conscious decision not to decide or to decide in a strict, formalistic way.

The phenomenon of judicial passivism will be discussed by

looking at recent judgments of the CJEU in the area of migration and asylum: the [judgments on the EU-Turkey Statement](#), the [judgment on humanitarian visas in X & X](#), and the judgments on the Western Balkans route in [A.S. and Jafari](#). These judgments encourage us to reassess the role of the Court for the future course of EU integration and evolution of EU law, in general, and for EU migration and asylum law, in particular. They open up the question of the Court’s role and responsibility in the context of the past years of the refugee influx into Europe and in terms of the consequent legal and policy developments.

### **Judicial Passivism in the Narrow Sense**

There are strong arguments to view the judgments of the General Court on the legality the EU-Turkey Statement as examples of judicial passivism in its narrow sense. When asked to review the legality of the EU-Turkey Statement – in three cases initiated by two Pakistani nationals and an Afghan national who feared being returned from Greece to Turkey if their asylum applications were rejected by the Greek authorities – the General Court declared that it lacked jurisdiction to hear and determine

the cases and, accordingly, dismissed them. In its judgments, the General Court accepted the arguments put forward by the EU institutions, which claimed that they were not the authors of the Statement, but that it was a measure concluded by the EU Member States. The Court, therefore, ascertained that the EU-Turkey Statement was not adopted by the European Council, but by the Heads of State or Government of the EU Member States, as actors of international law, and the Turkish Prime Minister. Therefore, the Court concluded that the EU-Turkey Statement could not be considered to be an act of an EU institution pursuant to [Art. 263 TFEU](#). Having said this, the Court declared that it lacked jurisdiction to review the Statement's legality and decided not to rule on the issue whether it was a political statement (as suggested by the European Council, the Council and the Commission) or an agreement producing binding legal effects.

This text will not enter a discussion of the EU-Turkey Statement (for a discussion related to this, see my chapter on Human Rights and Legitimacy in the Implementation of EU Asylum and Migration Law [here](#) – or of the arguments put forward by the General Court to

support its finding that the EU-Turkey Statement is not an EU act. This would require much more space, and a considerable amount of ink has already been spilled on this (see e.g. [here](#)). This text starts from the premise that there is room for a different reading of the EU-Turkey Statement (from the one given by the General Court), supporting the view that the EU-Turkey Statement should be considered as an EU act. One of the strong arguments in favour of such a reading is the [ERTA doctrine](#) which establishes the rule that once the EU implements a common policy in a certain field, the EU Member States no longer have the right “to undertake obligations with third countries which affect those rules or alter their scope” (e.g. see the discussion [here](#)). By failing to fulfil its judicial function of reviewing the legality of the EU-Turkey Statement, according to Art. 263 TFEU, the General Court has actively chosen not to decide on the substance of the cases. In this sense, the judgments on the EU-Turkey Statement can be viewed as an example of judicial passivism, which could have far-reaching effects both for EU migration and asylum law and for the future development of EU law in general. The Court's conscious decision not to decide enables the EU-Turkey Statement to endure and for similar

agreements to be concluded with third countries outside the scope of EU law and exempt from the judicial review of the CJEU. In this sense, the Court's behaviour could be explained as its desire to accommodate itself to political reality and the Member States' intentions, without having to rule on their compliance with EU law. However, it is doubtful that avoiding to scrutinise the EU-Turkey Statement can or should be reconciled with the judicial function. Giving a *carte blanche* to the EU institutions and Member States not only sends the wrong message that it is alright to have your cake and eat it, but also ties the Court's hands to rule on similar agreements in the future. It is hard to conceive that the Court of Justice – in the appeal procedure it will have to deal with in this case – will endorse the stance taken by the General Court and reduce its institutional powers by excluding a whole category of cases from its jurisdiction and influence.

There are views that the Grand Chamber's judgment on humanitarian visas in *X & X* represents another example of the Court's passivism in the narrow sense, i.e. that the Court should have decided that the case was governed by EU law, but it remained passive. The case concerned a

Syrian couple and their three minor children, living in Aleppo, who submitted applications for visas with limited territorial validity on the basis of Article 25(1)(a) of the Visa Code, at the Belgian Embassy in Beirut. They stated that the purpose of humanitarian visas would be to enable them to reach Belgium and apply for asylum there. They stressed the precarious security situation in Syria and pointed out that, as Orthodox Christians, they were at risk of persecution on account of their religious beliefs. They also emphasized that they could not register as refugees in Lebanon and were therefore forced to return to Syria.

In this case the Court was asked to rule whether the term "international obligations" contained in Article 25(1)(a) of the Visa Code covers the rights guaranteed by the Charter – in particular its Article 4 (prohibiting torture and inhuman and degrading treatment) and Article 18 (on the right to asylum) – and whether it also covers obligations binding Member States in the light of ECHR and the Geneva Convention. In case of a positive answer, in its second question, the referring court wanted to know whether a Member State to which an application for a humanitarian visa with limited territorial validity has been made is



required to issue the visa, where a risk of infringement of Article 4 and/or 18 of the Charter is established.

The crux of the case – for the purpose of the discussion on judicial passivism – is that the Court did not answer the questions. It noted that the Visa Code establishes procedures and conditions for issuing visas not exceeding 90 days in any 180-day period. The Court then ascertained that the Syrian family applied for humanitarian visas with a view to applying for asylum in Belgium and to being granted a residence permit with a period of validity not limited to 90 days. It therefore concluded that such applications fall outside the scope of the Visa Code and solely within the scope of national law. Consequently, the Court determined that the situation was not governed by EU law and that the provisions of the Charter did not apply.

However – in the context of the discussion on judicial passivism – the judgment in *X & X* significantly differs from the judgments on the EU-Turkey Statement. As pointed out previously, in the judgments on the EU-Turkey Statement, the Court took a formalistic approach when arguing that the situation fell outside the scope of EU law. This

judgment was not based on the nature and the effects of the Statement, but on the (EU institutions') view that the signatories of the Statement were not EU institutions, but its Member States. Having stated that the EU-Turkey Statement was not an EU act, the Court ascertained that it lacked jurisdiction to rule on the question.

On the other hand, in *X & X*, the Court cannot be accused of refraining from the discussion of the object and purpose of *X & X*'s applications, the Visa Code and EU asylum law in general. The Court examined the (in)applicability of the Visa Code on the applications for humanitarian visas made by the Syrian family, and it did this in a non-formalistic, teleological manner. The Grand Chamber made an effort to argue that classifying the applications in question as applications for humanitarian visas, pursuant to Article 25(1)(a) of the Visa Code, would be contrary to EU law on several levels. First, such a classification would be opposed to the objective of the Visa Code, as stated both in the Code itself (see para. 41 of [the case](#)) and in the TFEU (see para. 40 of [the case](#)). Second, deciding that the applications of the Syrian family are covered by Article 25 of the Visa

Code would be contrary to Article 79(2)(a) TFEU. Finally, it would be contrary to the general structure of EU asylum law, in particular Articles 1 and 3 the Dublin Regulation and Article 3(1) and (2) of the Asylum Procedures Directive (see [the ruling](#)'s para. 49). In other words, in the Court's view, the purpose of the applications was contrary to the purpose of the Visa Code (see para. 47 of [the case](#)). Consequently, the CJEU concluded the Visa Code did not apply to the situations and nor did any other EU law instrument. There are divergent views as to the correctness of the Court's logic (for a different approach see [AG Mengozzi's Opinion](#)). However, no matter which stance one takes, it is evident that, by its judgment in *X & X*, the Court sends a message to the EU legislators that an opposite conclusion would require legislative amendments of current EU asylum law.

### **Judicial Passivism in the Extensive Sense**

The aim of the preceding discussion of the judgments on the legality of the EU-Turkey Statement and of the judgment in *X & X* was to explain judicial passivism in its narrow sense. On the other hand, an examination of the cases *A.S. and Jafari* in the

following paragraphs serves as the starting point for the conceptualisation of judicial passivism in its extensive sense (for a detailed account of *A.S. and Jafari, Mengesteab* and the Western Balkans route, see [here](#)). As stated previously, an extensive understanding of judicial passivism would also encompass cases where the Court accepts to decide the case, but it does so in a formalist way, without taking into consideration the overall purpose and scheme of the relevant norms, the factual circumstances of the case and the intentions of the Member States, as the masters of the Treaties.

The judgments of the Grand Chamber of the Court of Justice in *A.S. and Jafari* are the Court's reaction to the non-application of the Dublin state-of-first entry rule across the Western Balkans route. Between September 2015 and March 2016, more than 700,000 people passed along this route, which involved a voyage from the Middle East, across Turkey and Greece to FYROM, Serbia, Hungary, Croatia (upon the Hungarian closure of its border with Serbia), Slovenia and Austria, mostly ending up in Germany. Significantly, the Western Balkans route was both authorised and facilitated by the authorities of

both the EU Member States and third countries on the route, which organised transportation along the track.

The cases *A.S. and Jafari* concerned a Syrian and two Afghan nationals respectively, who were taking the Western Balkans route in 2015/2016 and ended up in Slovenia and Austria respectively, where they applied for asylum. Slovenia and Austria refused to examine their asylum applications, taking the position that Croatia was responsible for the examination, as the state of first entry into the EU, not counting Greece which had been exempt from Dublin transfers due to systemic deficiencies in its asylum system. In its judgments, the Court of Justice ruled that the entries of A.S. and the Jafari sisters must be regarded as “irregular crossings” within the meaning of Art. 13(1) of the Dublin Regulation “irrespective of whether the crossing was tolerated or authorised in breach of the applicable rules or whether it was authorised on humanitarian grounds by way of derogation from the entry conditions generally imposed on third-country nationals” (para. 92 in *Jafari*). According to the Court, the fact that such a crossing took place in the context of the arrival of an unusually large number of third-country nationals could not

affect the irregular character of the crossing (para. 93 in *Jafari*). The only instance where the responsibility of the state of irregular crossing could be precluded would be the case where Dublin transfers to that state could lead to a risk of inhuman and degrading treatment of the transferee, within the meaning of Article 4 of the Charter (para. 101 in *Jafari*). Even though the Court did not explicitly incriminate Croatia – by characterising the crossing of the Croatian border as irregular – it indirectly stated that Croatia was responsible for examining the asylum applications of A.S. and the Jafari sisters (paras. 74-76 in *Jafari*) and thereby implied that Croatia was responsible for examining the applications for international protection of the vast majority of the 700,000 persons crossing its borders during the 2015/2016 migration wave (apart from those who would fall under the preceding criteria for determining the responsible Member State, stipulated by Articles 8-12 of the *Dublin Regulation*).

Why can the judgments in *A.S. and Jafari* serve as an example of judicial passivism in its extensive sense? The Grand Chamber of the Court made a visible effort to discuss the substance of

the cases and elaborated its judgments with many, often technical, details. Despite this, these judgments can be viewed as an example of a formalistic interpretation, which disregards, first, the overall purpose and scheme of the Dublin Regulation and EU asylum law, second, the factual circumstances on the Western Balkans route, and, third, the intentions of at least those EU Member States which took part in the organisation of the route. In this sense, the Court's (unusual?) reluctance to show flexibility in its interpretation and to depart from the strict reading of the Dublin Regulation deviates from Recital 5 of the Regulation (as pointed out in [AG Sharpston's Opinion](#)), which calls for the application of "objective, fair criteria both for the Member State and for the person concerned" when determining the Member State responsible for the examination of the asylum application. Second, the Court denies the inapplicability of the state-of-first-entry rule on the factual circumstances of a mass influx of persons across the Western Balkans route. Finally, when defining the term "irregular crossing" in relation to Article 13(1) of the Dublin Regulation, the Court disregards the fact that the route was both authorised and facilitated

by the states on the route, including the EU Member States linked to the dispute, which challenges the applicability to the situation of the term "irregular crossing".

All these arguments question the correctness and rectitude of the Court's formalistic approach. In addition, even if we start from the premise that the Court's literal interpretation of the Dublin Regulation is the correct one, its automatic presumption that the criterion of "irregular crossing" contained in Article 13(1) of the Dublin Regulation (i.e. the state-of-first-entry rule) is applicable to the case is rebuttable. As explained previously, A.S. and the Jafari sisters first entered the EU via Greece, so Greece was the state of first entry. However, Dublin transfers to Greece could not take place as of 2011, due to systemic deficiencies in its asylum system. However, as pointed out in [AG Sharpston's Opinion](#), there is nothing in Article 13(1) to suggest that "responsibility under that provision transfers to the second Member State of entry". Similarly, [AG Villalón in Abdullahi](#) suggested that if the criterion of "irregular crossing" becomes exhausted, the following criteria contained in the Dublin Regulation have to be applied, and

if none of the Member States can be designated based on these criteria, the responsible Member State would be the first one in which the asylum application was lodged, based on Article 3(2) of the Dublin Regulation.

However, it is no coincidence that on the same day as its judgments in *A.S. and Jafari* – 26 July 2017 – the Grand Chamber of the Court of Justice issued another important judgment in *Mengesteab*. Here, the Court limited the temporal effects of its judgments in *A.S. and Jafari* by declaring that a Dublin transfer cannot take place upon the expiry of the three-month period after the application for international protection has been lodged. According to the Court, that period starts to run before a formal asylum application has been lodged if a written document confirming the request for international protection has been received by the competent authority or if only the main information contained in such a document has reached the authority. In practical terms, this means that the three-month period has expired for all the migrants who crossed the Western Balkans route in 2015/2016 and that, consequently, Dublin transfers to Croatia are not possible for the vast majority of migrants who passed

through Croatia on their way to Western European states, where they eventually applied for asylum.

The combination of the Court's formalistic approach to the Dublin Regulation in *A.S. and Jafari* and its flexible interpretation of the three-month time limit in *Mengesteab* has a twofold effect. First, it sends the message to all EU Member States that they have to comply with the strict reading of the Dublin Regulation, regardless of the factual circumstances, and a message to the Member States as legislators that the application of the Dublin Regulation, as it now stands, leads to absurd and dangerous results in cases of mass influx. At the same time, it precludes any immediate, dangerous consequences of the rulings, by excluding their application for the majority of migrants who transited the Western Balkans route in 2015/2016, thereby indirectly recognising the humanitarian and political sensitivity of the cases. The Court's ruling in *Slovakia and Hungary v Council*, decided on 6 September 2017, adds to the equation the principle of solidarity by confirming joint Member State responsibility for the mandatory relocation of the agreed quotas of asylum seekers from Greece and Italy. In this way, all four judgments can be viewed

together as the Court's attempt to strike the right balance between competing interests and responsibilities in the EU.

However, there is no doubt that the judgments in *A.S. and Jafari* will have a strong effect on the development of EU asylum law and on the future behaviour of EU Member States in the case of a new refugee influx: it is inconceivable that the EU Member States would again authorise and facilitate a new Western Balkans route in the case of a future refugee influx. It is also doubtful whether striking the right balance by delivering a "package of judgments" makes up for the shortcomings of individual judgments contained in that package.

### **Concluding Remarks**

The preceding text has aimed at defining and determining cases of "judicial passivism" in the area of EU migration and asylum law. The text puts forward the proposition that judicial passivism is a subgroup, or the flipside, of judicial activism. It is applicable to cases where the Court consciously decides not to use its judicial power where it should. The Court does this either by claiming that the case falls outside the scope of EU law and that it therefore lacks

jurisdiction to decide on the substance of the case ("judicial passivism in the narrow sense"), or by deciding in a strict, formalistic way, without taking into consideration the overall purpose and scheme of the relevant norms, the factual circumstances of the case, and the intentions of the Member States ("judicial passivism in the extensive sense"). The CJEU's judgments on the EU-Turkey Statement and on the Western Balkans route have served to illustrate judicial passivism in its narrow and extensive sense respectively. The discussion has shown that, whichever type of judicial passivism was at issue, such passivism is the result of a conscious (active) judicial decision and, therefore, sends a conscious message to EU institutions, Member States and other political actors. Most importantly, the effects of judicial passivism could be far-reaching, both in terms of the further development of EU migration and asylum law and in terms of the future behaviour of the EU institutions and its Member States.

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