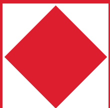
Schriften zum Migrationsrecht 30

Marie-Claire Foblets | Luc Leboeuf (eds.)

Humanitarian Admission to Europe

The Law between Promises and Constraints



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Volume 30

Marie-Claire Foblets | Luc Leboeuf (eds.)

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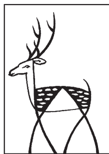

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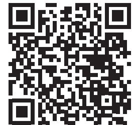

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Foreword

Winfried Kluth[1]

Scientific research on migration law is not possible without a close link to reality. For courts and judges the situation is not very different. This was made clear in the opinion of Advocate General *Mengozzi*, presented on 7 February 2018, in the case *X. and X.* involving a Syrian family that had already been subjected to torture and which applied for humanitarian visas at the Belgian embassy in Beirut.

Advocate General Mengozzi argued with respect to the responsibility of the EU and the Member States: "It is, in my view, crucial that, at a time when borders are closing and walls are being built, the Member States do not escape their responsibilities, as they follow from EU law or, if you will allow me the expression, *their* EU law and *our* EU law."

The impulse given by Advocate General Mengozzi's opinion was answered by organizing an international conference focusing on the legal framework of persecution and the genuine dangers that refugees face on their way to "safe harbours". The formidable scientific network of *Marie-Claire Foblets* and the excellent coordination by *Luc Leboeuf* made it possible to invite outstanding experts from several countries to discuss the legal aspects of humanitarian visas and other instruments that can be used to facilitate safe escape paths.

The conference organizers took the very compelling approach of focusing on the topic from different legal and institutional points of view, and this volume likewise follows that logic. The first part starts with an analysis of humanitarian admission in international and EU law, with *Dirk Hanschel*, *Stephanie Law* and *Sylvie Sarolea* presenting their sophisticated observations. The second part adds three national perspectives. The contributions of *Katia Bianchini (Italy)*, *Pauline Endres de Oliveira (Germany)* and *Serge Bodart (Belgium)* vividly illustrate how different nation-states deal with the same problem. The great difficulties inherent in claiming and actually being granted humanitarian admission in reality are demonstrated by *Sophie Nakueira (with reference to Uganda)* and *Tristan Wibault,* who represented the plaintiffs before the European Court of Justice in the case *X*

1 Professor in the Faculty of Law, Martin Luther University Halle-Wittenberg.

and X. Finally, some future prospects on humanitarian admission to Europe are presented by *Catharina Ziebritzki*, *Eugenia Relano Pastor* and *Jean-Yves Carlier*.

This collection of inspiring and dense articles is the result of two days of intensive discussions. The contributions touch on all relevant legal aspects that should be taken into account by the Member States and the EU when they are searching for a "value-based" response to the problems observed in the Mediterranean Sea region.

Recently, the first steps towards such a response were taken with the Malta Declaration of 23 September 2019, but the political agreement on burden sharing between Germany, France and some other countries is only a first step and is not legally binding. The scientific considerations in this book are sure to prove very useful as further political and legal solutions are sought.

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Introduction: Humanitarian Admission to Europe. From Policy Developments to Legal Controversies and Litigation

Luc Leboeuf and Marie-Claire Foblets[1]

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Introduction

On 7 March 2017, the CJEU adopted its much-discussed ruling in the *X. and X.* case,[2] by which it decided that the EU Visa Code does not regulate

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1 Luc Leboeuf is a Head of Research Group in the Department of Law & Anthropology of the Max Planck Institute for Social Anthropology. Marie-Claire Foblets is Director of the Department of Law & Anthropology of the Max Planck Institute for Social Anthropology and Professor in the Law Faculty of the Catholic University of Leuven (KUL).

2 Case C-638/16 PPU *X and X* [2017] EU:C:2017:173. The case has been widely commented by legal scholars, including by some of the contributors to this volume. See, among others: Y Al Tamimi, E Brouwer, and R Coene, 'Verplicht de Visum-

the issuing of humanitarian visas to asylum seekers.[3] The *X. and X.* ruling was adopted at a time of heated controversies in Europe over migration, as the 2015 'refugee crisis' created major divisions among European societies and public opinion, which still continue to this day.[4] For that reason, the

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code tot afgifte van humanitaire visa aan Syriërs?' (2017) *Asiel en Migrantenrecht* 327-333; M Berger and G Maderbacher, 'Erteilung eines Visums zur Ermöglichung der Asylantragstellung im Inland unterliegt allein nationalem Recht' (2017) *Österreichische Juristenzeitung* 480-481; E Brouwer, 'Een gemiste kans voor een uniforme en mensenrechtelijke uitleg van de Visumcode wat betreft de afgifte van een humanitair visum' (2017) *Nederlands Tijdschrift voor Europees Recht* 69-78; J-Y Carlier and L Leboeuf, 'Droit européen des migrations' (2018) 26 *Journal de droit européen* 247 95-110, 97; R Colavitti, 'Ouvrir la jarre de Pandore ou trancher le nœud gordien ? La Cour face aux conditions d'application du Code des visas aux demandes déposées pour raison humanitaire' (2017) *Revue des affaires européennes* 139-147; J De Coninck and M Chamon, 'Geen recht op tijdelijke visums voor Syrische vluchtelingen' (2017) *Tijdschrift voor Europees en economisch recht* 382-387; B Delzangles and A Louvaris, 'Visas humanitaires et Charte des droits fondamentaux : la confrontation n'a pas eu lieu' (2017) 239 *Journal de droit européen* 170-176; P Endres de Oliveira, 'Antrag syrischer Flüchtlinge auf humanitäres Visum bei belgischer Botschaft im Libanon' (2017) *Neue Zeitschrift für Verwaltungsrecht* 611-615; F Gazin, 'Motifs humanitaires' (2017) 5 *Europe* 18-19; S-P Hwang, 'Humanitäre Visa für Flüchtlinge: Einfallstor für ein unbeschränktes Asylrecht?' (2018) *Europarecht* 269-288; W Kluth, 'Das humanitäre Visum als Instrument der sicheren Fluchtmigration' (2017) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 105-109; H Labayle, 'Visas dits « humanitaires » : la régulation a minima du droit d'asile par la Cour de justice de l'Union' (2017) 18 *La Semaine Juridique* 869-873; V Moreno-Lax, 'Asylum Visas as an Obligation under EU Law: Case PPU C-638/16, X, X v État belge' (2017) *EU Immigration and Asylum Law and Policy* <http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/> (accessed on 17 October 2019); K Müller, 'Kein legaler Zugangsweg in die EU durch humanitäre Visa: Einordnung des Verfahrens "X und X gegen Belgien" in die Europäische Migrations- und Flüchtlingspolitik' (2017) *Zeitschrift für Europarechtliche Studien* 161-184; S Sarolea, J-Y Carlier and L Leboeuf, 'Délivrer un visa humanitaire visant à obtenir une protection internationale au titre de l'asile ne relève pas du droit de l'Union : *X. et X.*, ou quand le silence est signe de faiblesse' (2017) *Cahiers de l'EDEM* <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/c-j-u-e-c-638-16-ppu-arret-du-7-mars-2017-x-et-x-ecli-eu-c-2017-173.html> (accessed on 17 October 2019); H-P Welte, '(Kein) Anspruch auf humanitäres Visum, Visakodex' (2017) *Zeitschrift für Ausländerrecht und Ausländerpolitik* 220-221.

3 Regulation No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243.

4 On these divisions, see among others S Holmes and H Castaneda, 'Representing the "European Refugee Crisis" in Germany and Beyond: Deservingness and Difference, Life and Death' (2016) 43 *American Ethnologist* 12-24; D Thym, 'The "Refugee Crisis" as a Challenge of Legal Design and Institutional Legitimacy' (2016) 53 *CMLRev* 1545-1574.

ruling offers an interesting case study of how the CJEU deals with the social tensions that accompanied the events of 2015. It illustrates the limitations of the current international, EU and domestic legal frameworks in dealing with societal controversies in the field of migration, when such controversies concern migrants who are outside European territory, and how attempts to bring about evolution in these frameworks through court litigation have been received by the judiciary to date.

Building upon that ruling, a workshop was held at the Max Planck Institute for Social Anthropology in May 2018, organised by its Department of Law & Anthropology and the Law Faculty of the Martin Luther University of Halle-Wittenberg. It gathered legal scholars, practitioners and anthropologists with the objective of engaging in a broader reflection on the extent to which these social controversies are channelled and managed through the positivist legal frameworks, starting from the specific case study of legal and safe access to European territory for those in search of protection. This book contains some of the proceedings of this workshop. It aims to offer a reflection on how and to what extent the existing legal frameworks guide the policy debates and controversies on humanitarian admission to Europe, as well as to engage in a broader critical reflection on the role which 'the law' can play in these policy debates.[5]

This introductory chapter sets the scene of the discussions that follow. It gives an overview of the current state of legal and policy debates on so-called 'legal avenues' and 'safe pathways' to Europe, and further questions whether and to what extent the law in its current form is adequately equipped to deal with these challenges. The first Section presents an overview of the main relevant policy developments of the past 10 years at EU level, culminating in the proposal by the EU Commission to establish a Union Resettlement Framework ('URF'). The second Section addresses how policy discussions and controversies on humanitarian admission to Europe have been accompanied by attempts to open up such access to European territory through litigation. The third Section discusses the approach developed by the CJEU in response to these attempts, departing from the *X. and X.* ruling. It identifies and discusses the reasons why the CJEU opposed the judicialisation of policy discussions on humanitarian admission to European territory through EU law. The fourth Section questions the role of the law in supporting policy claims towards humanitarian

5 This chapter constantly refers to the 'law' in its positivist sense, as a set of State-produced norms that have been formally adopted following the applicable legislative and administrative procedures.

admission to Europe for selected refugees. It argues that, despite their strong limitations, the current legal frameworks may still be an adequate tool to indirectly foster policy developments in the field. The last Section presents the way that the chapters of the volume seek to contribute to a better understanding of the relevant legal frameworks and the challenges raised in their implementation, as well as to a critical reflection on current legal paradoxes and limitations.

1 Policy Developments Towards Humanitarian Admission to Europe

Controversies on humanitarian visas, as they ultimately emerged before the CJEU in the *X. and X.* ruling, fit within broader policy debates on humanitarian admission to European territory for refugees. These debates are long-standing and are often connected to discussions on 'burden-sharing' and 'responsibility sharing', i.e., on how to allocate the responsibility to protect refugees fairly among the international community.[6] They led to several kind of policy initiatives at international, EU and domestic levels, in which some States have been involved on a voluntary and discretionary basis. These initiatives have been developed around various policy models, which the first sub-Section classifies broadly in an attempt to clarify the terms of the discussion that will follow in the next chapter of the volume. The second sub-Section then focuses on the developments at EU level, and shows that the main results they yielded so far are in the field of resettlement.

1.1 From 'Legal Avenues' and 'Safe Pathways', to 'Humanitarian Visas' and other 'Protected Entry Procedures'

Humanitarian visas as addressed by the CJEU in the *X. and X.* ruling are but a specific means of granting humanitarian admission to European territory for refugees. A humanitarian visa is generally understood as an authorisation to access the territory of a State, and which is granted by derogation from the applicable rules because of specific humanitarian reasons. The humanitarian visa has been defined in the IOM Glossary as:

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6 M Gottwald, 'Burden Sharing and Refugee Protection' in E Fiddian-Qasmiyeh, G Loescher, K Long and N Sigona (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford, OUP, 2014).

> A visa granting access to and temporary stay in the issuing State for a variable duration to a person on humanitarian grounds as specified in the applicable national or regional law, often aimed at complying with relevant human rights and refugee law.[7]

Legal and policy issues surrounding the issuing of humanitarian visas are the subject of controversy in the context of a broader debate on so-called 'legal avenues' and 'safe pathways' for refugees. 'Legal avenue' is a term that has been used in various policy documents at EU level to broadly qualify initiatives aimed at offering humanitarian admission to Europe for refugees, such as resettlement programmes, humanitarian visas, humanitarian corridors and other humanitarian admission schemes.[8] The term 'safe pathway' is used in a similarly broad understanding at UN level, for example, in the 2016 New York Declaration for Refugees and Migrants[9] and in the 2018 Global Compact on Refugees.[10] The terms 'avenues' and 'regular pathways' are sometimes used in an even broader sense, to refer to any kind of legal entry procedure, such as labour and education mobility schemes, whose initial aim is not to offer safe access to protection for asylum seekers, but which some asylum seekers may incidentally be eligible for.[11] In its Resolution 2015/2095, for example, the European Parliament called for a 'holistic' approach to migration that goes beyond a focus on satisfying some protection needs through specific protection tools, to include a broader reflection on migration in all its aspects, including other

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7 IOM, *Glossary on Migration* (Geneva, IOM, 2019) 95.

8 See, for example, the 2016 European Commission proposal to reform the Common European Asylum System (CEAS): COM (2016) 197 final, Communication from the Commission to the European Parliament and the Council towards a reform of the common European asylum system and enhancing legal avenues to Europe.

9 New York Declaration for Refugees and Migrants, UNGA Res 70/1 (19 September 2016).

10 Global Compact for Safe, Orderly and Regular Migration (adopted at Marrakech on 19 December 2018).

11 S Carrera, A Geddes, E Guild and M Stefan (eds), *Pathways Towards Legal Migration into the EU. Reappraising Concepts, Trajectories and Policies* (Brussels, Centre for European Policy Studies, 2017); E Collett, P Clewett and S Fratzke, *No Way Out for Refugees? Making Additional Migration Channels Work for Refugees* (Brussels, Migration Policy Institute, 2016); UNHCR, *Complementary Pathways for Admission of Refugees to Third Countries: Key Considerations* (Geneva, UNHCR, 2019); UNHCR and OECD, *Safe Pathways for Refugees. OECD-UNHCR Study on Third Country Solutions for Refugees: Family Reunification, Study Programmes and Labour Mobility* (Paris, OECD and Geneva, UNHCR, 2018); UNHCR, *Legal Avenues to Safety and Protection Through Other Forms of Admission* (Geneva, UNHCR, 2014).

legal entry procedures such as labour migration schemes and family reunification, fighting the root causes of forced migration, and integration in the host country.[12]

In policy documents, a variety of policy initiatives, each with its own specific features, have since been described as 'legal avenues' or 'safe pathways'. The exact meaning of these terms varies considerably, however, depending on the context. The vocabulary that is being used is not always consistent and very much depends on the policy *jargon* developed within the institution concerned. It is, however, possible to identify some broad categories of 'legal avenues' and 'safe pathways' from current State practices. In the next paragraphs we venture to identify some of these, with a focus on admission schemes that have been developed with the humanitarian objective of offering humanitarian admission to asylum seekers.

First, resettlement programmes are a long-standing form of humanitarian admission that has been developed specifically for those who have been formally recognized as refugees. They are defined in the IOM Glossary as:

> The transfer of refugees from the country in which they have sought protection to another State that has agreed to admit them – as refugees – with permanent residence status.[13]

Resettlement programmes rest on a collaboration with local authorities and often involve the UNHCR as intermediary. The overall objective of resettlement programmes is to engage in some form of burden-sharing by transferring the duty to offer protection from countries facing a large number of refugees to other countries with higher hosting capacities. The selection of the refugees who will be resettled is made by the receiving country, among a pool of refugees who have been preselected by the UNHCR and other local partners. The preselection by the UNHCR results from a vulnerability assessment, with the objective of identifying specific protection needs that cannot be addressed in the host country, such as health-related issues and gender-related persecutions.[14] While common, resettlement programmes usually concern a limited number of refugees. In 2018, for example, 55,680 refugees were resettled worldwide through UNHCR sponsored

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12 EP Res of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration.

13 IOM (n 7) 181.

14 UNHCR, *Resettlement Handbook* (Geneva, UNHCR, 2011).

resettlement programmes, of a total of 81,337 refugees preselected by the UNHCR for resettlement.[15]

Second, 'evacuation programmes' are aimed at bringing civilians to safety following a humanitarian emergency caused by a disaster and/or armed conflict. These are large-scale responses and, contrary to resettlement programmes, their implementation does not presuppose an individual assessment nor impose any requirement that a person have specific vulnerabilities. As noted by the UNHCR, 'humanitarian evacuation does not focus, as does resettlement, on addressing individual protection needs, rather it focuses on the protection requirements of the group'.[16] Evacuation programmes usually take place close to the conflict (or disaster) zone. Humanitarian evacuation programmes were implemented during the Yugoslavian conflict, for example, as civilians were allowed to cross the border between Kosovo and Macedonia, where they were hosted in refugee camps managed by the UNHCR in cooperation with local authorities.[17] More recently, 'evacuation' programmes have been set up by the IOM and the UNHCR with EU support to the benefit of refugees detained in horrendous conditions in Libya, some of whom were removed to refugee camps in Niger. These programmes were set up on a much smaller scale, however, and developed together with 'assisted voluntary return' programmes encouraging voluntary returns from Libya to the home country.[18] They are also to be distinguished from earlier understandings of 'evacuation' programmes. The aim is not to organise the flight of a civilian population away from a war zone, but rather to offer an alternate solution to selected refugees with vulnerable profiles.

Third, some States provide for 'protected entry procedures' (PEPs), which are formalised procedures that allow foreigners to individually and directly petition the State to obtain humanitarian admission to their terri-

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15 UNHCR, *Resettlement Data*, <https://www.unhcr.org/resettlement-data.html> (accessed 10 August 2019).

16 UNHCR, *Updated UNHCR Guidelines for the Humanitarian Evacuation Programme of Kosovar Refugees in the Former Yugoslav Republic of Macedonia* (Geneva, UNHCR, 1999).

17 M Barutciski and A Suhrke, 'Lessons from the Kosovo Refugee Crisis: Innovations in Protection and Burden-sharing' (2001) 14 *Journal of Refugee Studies* 95–134.

18 C Loschi, L Raineri and F Strazzari, 'The Implementation of EU Crisis Response in Libya: Bridging Theory and Practice' (2018) *EUNPACK Working Paper* <http://www.eunpack.eu> (accessed 4 August 2019); J Brachet, 'Policing the Desert: The IOM in Libya Beyond War and Peace' (2016) 48 *Antipode* 2 272-292.

tory.[19] In such procedures, 'the individual is directly engaging the potential host State in a procedure aiming at securing his or her physical transfer and legal protection [...] In this mechanism, [his/her] individual autonomy ... is accorded a central role'.[20] Protected entry procedures differ from other humanitarian admission schemes, such as resettlement, in that a more active role is bestowed upon the applicants, who engage directly with the receiving State authorities. They give rise to direct contact between the State and the foreigner seeking protection, without requiring the intervention of a local intermediary or of the UNHCR.

Humanitarian visas can be seen both as a PEP and as a tool that helps to implement other humanitarian admission schemes. Humanitarian visas are a PEP where they are issued in a particular situation, where the State was petitioned by an individual because of specific humanitarian considerations and following a procedure established under national law. Such visas are issued on a discretionary basis and under very specific circumstances as shown by the practices of the three EU Member States under investigation in this volume in the contributions of Serge Bodart, Pauline Endres de Oliveira and Katia Bianchini (Belgium, Germany and Italy).[21] Humanitarian visas may also be issued to implement a broader humanitarian admission scheme, for example, to grant administrative authorisation to cross the border to those selected for resettlement. This is the case notably for some of the resettlement programmes implemented in Belgium,[22] as well as for the 'humanitarian corridors' set up by Italy.[23]

These various policy models for humanitarian admission have been discussed at EU level, where developments intensified with the growing externalisation of EU border policies. Policy discussions culminated as the 2015

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19 G Noll, J Fagerlund and S Liebaut, *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (Danish Centre for Human Rights, Copenhagen, 2002); G Noll, 'From "Protective Passports" to Protected Entry Procedures? The Legacy of Raoul Wallenberg in the Contemporary Asylum Debate' in J Grimheden and R Ring (eds), *Human Rights Law: From Dissemination to Application. Essays in Honour of Göran Melander* (Leiden, Martinus Nijhoff, 2006) 237-249.

20 G Noll, J Fagerlund and S Liebaut (n 19) 20.

21 See also the conclusions of a study commissioned by the European Parliament, which identified provisions on humanitarian visas within the legislation of 16 Member States: U I Jensen, *Humanitarian Visas: Option or Obligation?* (Brussels, European Parliament, Study for the LIBE Committee, 2014).

22 See the contribution of Serge Bodart to this volume.

23 See the contribution of Katia Bianchini to this volume.

'European refugee crisis' increased policy interest in novel approaches to the management of migration movements. The policy developments at EU level are presented and discussed in the second sub-Section.

1.2 Policy Developments at EU Level. A Focus on Resettlement

In the EU, policy debates on humanitarian admission to Europe took a new turn in the 2000s as European countries started engaging more intensively in the 'externalisation' of their borders through so-called 'remote control' practices. The objective of such practices is to prevent irregular migration to Europe by 'policing at a distance' through legal and policy instruments allowing control of migrants before they reach European territory and preventing irregular migration to Europe.[24] The trend towards the externalisation of EU borders is leading to mounting criticisms from a human rights perspective, because one of its indirect effects is to prevent refugees from seeking safety in flight, whereas they often have no other practical alternative than to cross borders irregularly.[25] It has been criticised for being mainly driven by security considerations (increasing State control over migration movements) at the expense of humanitarian ones (guaranteeing access to safety for refugees). According to that critique, the strengthening of European border controls through externalisation has not been sufficiently counterbalanced by policy innovations that protect the fundamental rights of those subject to external border controls. In its 2013

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24 E Guild and D Bigo, 'The Transformation of European Border Controls' in B Ryan and V Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff, Leiden, 2010) 257-278; R Zaiotti, 'Mapping Remote Control: The Externalisation of Migration Management in the 21st Century' in R Zaiotti (ed) *Externalizing Migration Management. Europe, North America and the spread of 'remote control' practices* (London, Routledge, 2016). The externalisation of EU border policies has the effect of generating numerous forms of international cooperation of a varying nature. For an overall presentation of these instruments, see: M Maes, D Vanheule, J Wouters and M-C Foblets, 'The International Dimensions of EU Asylum and Migration Policy: Framing the Issues' in M Maes, M-C Foblets and P De Bruycker, *External Dimensions of European Migration and Asylum Law and Policy / Dimensions Externes du Droit et de la Politique d'Immigration et d'Asile de l'UE* (Brussels, Bruylant, 2011) 11-60.

25 See, for example, a report by the Red Cross EU Office, *Shifting Borders - Externalising Migrant Vulnerabilities and Rights?* (Brussels, Red Cross EU Office, 2013). See also D S Fitzgerald, *Refuge beyond Reach. How Rich Democracies Repel Asylum Seekers* (Oxford, OUP, 2019).

report on *The Management of the External Borders of the European Union and its Impact on the Human Rights of Migrants*, for example, the UN Special Rapporteur for the Human Rights of Migrants, François Crépeau, concluded his comprehensive study of EU border management practices by emphasising that:

> Despite the existence of a number of important policy and institutional achievements in practice, the European Union has largely focused its attention on stopping irregular migration through the strengthening of external border controls.[26]

These concerns have also been echoed at global level, where there is a broader policy trend towards incentivising developed countries to organise some humanitarian admission schemes for selected refugees. In the New York Declaration, the UN General Assembly expressed its will 'to expand the number and range of legal pathways available for refugees to be admitted to or resettled in third countries'.[27] The Global Compact on Refugees similarly calls for the establishment of 'complementary pathways' to resettlement, including 'humanitarian visas, humanitarian corridors and other humanitarian admission programmes'.[28]

In reaction to these concerns, a variety of policy initiatives have been developed by the EU institutions with the aim of adopting some measures intended to offer humanitarian admission to Europe to some preselected refugees. These initiatives have been intensifying in the past years, notably following the proposal for a regulation establishing a Union Resettlement Framework ('URF'). While they are often criticised for having yielded little concrete result so far, they are far from new.[29] Already on the occasion of the June 2003 Thessaloniki meeting, the European Council had invited the European Commission 'to explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international

26 Report of the Special Rapporteur on the human rights of migrants, François Crépeau, *Regional Study: Management of the External Borders of the European Union and its Impact on the Human Rights of Migrants*, A/HRC/23/46 (24 April 2913) at para 75.

27 UN GA Res 71/1 adopted on 19 September 2016, at para. 77.

28 Global Compact on Refugees A/73/12 (Part II) at para. 95. The Global Compact also refers to regular pathways other than humanitarian admission, including educational opportunities and labour mobility.

29 On this criticism, see: F Gatta, 'Legal Avenues to Access International Protection in the European Union: Past Actions and Future Perspectives' (2018) *Journal européen des droits de l'homme/European Journal of Human Rights* 163.

protection'.[30] Taking into consideration that the EU Member States were already individually engaged in the resettlement of refugees without overall coordination at EU level,[31] the EU Commission suggested the organisation of an EU-wide resettlement scheme to be implemented in close cooperation with the UNHCR.[32] The objective was to enhance reception capacities in first countries of asylum by transferring the most vulnerable refugees to Europe, where their specific protection needs (such as health care or education) could be addressed in a way that would ultimately allow them to achieve self-reliance.

Further EU policy documents connect the involvement of the EU in the field of humanitarian admission to Europe with the broader policy objective of preventing disordered secondary movements of refugees to Europe. Resettlement has been privileged in an attempt to reconcile humanitarian considerations with security ones and it is consistently viewed by the EU not only as a humanitarian policy tool, but also as a border management tool. The objective of the involvement of the EU in resettlement programmes is to guarantee the dignity of the refugees stranded in third countries that lack the capacity to host them, in a way that offers them a 'durable solution', i.e., a 'means by which the situation of refugees can be satisfactorily and permanently resolved to enable them to lead normal lives'[33], in line with the goals pursued by the UNHCR. It is also to prevent disordered movements of refugees to Europe by enhancing the hosting capacities in countries of first asylum, relieving them from the duty to offer protection to the most vulnerable refugees who have specific protection needs requiring additional assistance.

At first, various initiatives in support of resettlement were financially steered by the EU in the context of 'Regional Protection Programmes' (RPPs). RPPs are policy programmes pursuing the overall objective to 'en-

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30 D/03/3, Presidency Conclusions of the Thessaloniki European Council of 19 and 20 June 2003, Conclusion 26.

31 K Duken, R Sales and J Gregory, 'Refugee Resettlement in Europe' in A Bloch and C Levy (eds), *Refugees, Citizenship and Social Policy in Europe* (Basingstoke, Palgrave Macmillan, 1999) 105-131.

32 COM (2004) 410 final, Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin "improving access to durable solutions".

33 IOM Glossary (n 7) 57.

hance the capacity of areas close to regions of origin to protect refugees'.[34] More concretely, RPPs are to be seen as a tool for financing projects in third countries that improve refugee protection. These projects are often led by the UNHCR in cooperation with local NGOs.[35] Projects with a resettlement component obtained EU funding under the RPP framework.[36] Over time, however, the EU started also supporting resettlement initiatives led by its Member States outside the RPP framework. As noted in a ECRE study, 'while EU support for resettlement started in the framework of the RPP, progressively it developed somewhat independently'.[37] For example, the involvement of EU Member States in UNHCR-sponsored resettlement programmes has also been financed through the European Refugee Fund (ERF), whose main objective was to support domestic initiatives in the field of refugee protection.[38]

These policy developments led the EU Commission to suggest, in 2009, the establishment of a 'Joint EU resettlement Programme' with a view to coordinating at EU level a more consistent involvement of the Member

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34 COM (2005) 388 final, Communication from the Commission to the Council and the European Parliament on regional protection programmes. RPPs were subsequently integrated into the EU Global Approach on Migration and Mobility (GAMM), of which they constitute one of the main components; see P Garcia Andrade, I Martin with the contribution of V Vita and S Mananashvili, *EU Cooperation With Third Countries in the field of Migration* (Brussels, European Parliament, Study for the LIBE Committee, 2018) 42; M Garlick, 'EU Regional Protection Programmes: development and prospects' in M Maes, M-C Foblets and P De Bruycker (n 24) 371-386.

35 L Tsourdi and P De Bruycker, *EU Asylum Policy: In Search of Solidarity and Access to Protection* (Florence, Migration Policy Centre, Policy Brief, 2015) 6.

36 For example, an independent evaluation of the RPPs, led at the request of the EU Commission, mentions a project in Tanzania that 'helped to develop a sophisticated method for the screening and profiling of persons with disabilities for the purpose of resettlement'. <http://ec.europa.eu/smart-regulation/evaluation/search/download.do;jsessionid=1Q2GTTWJ1m0pM7kSWQ90hlv 1CBzxjvJpV2-CLp0BgQxQv 8zyGqQ3j!1601440011?documentId=3725> (accessed on 17 October 2019). The evaluation is mentioned in ECRE, *Regional Protection Programmes: An Effective Policy Tool?* (Brussels, Discussion Paper, 2015).

37 Ibid. 7. The European Council on Refugees and Exiles (ECRE) is a civil society organisation gathering European NGOs advocating for refugee rights.

38 The third ERF (2008-2013) explicitly provided for the financing of resettlement programmes; see Decision No 573/2007/EC of the European Parliament and of the Council of 23 May 2007 establishing the European Refugee Fund for the period 2008 to 2013 as part of the General programme Solidarity and Management of Migration Flows and repealing Council Decision 2004/904/EC OJ L 144, 6.6.2007, p. 1–21, recital 18.

States in resettlement programmes, for example by setting annual priorities regarding the profile and the number of asylum seekers to be resettled.[39] The Joint EU Resettlement Programme was adopted in 2012. It is financed through the 'Asylum, Migration and Asylum Fund' (AMIF) that is the successor to the ERF, and that now provides for a lump sum per refugee resettled.[40] The administrative implementation of the Joint EU Resettlement Programme is supported by the 'European Asylum Support Office' (EASO), an EU agency founded in 2010 to encourage and strengthen administrative cooperation among EU Member States in the field of asylum.[41]

In 2013, the sinking of a boat off the coast of Lampedusa and the drowning of around 500 migrants attracted major attention and led to an intensification of policy discussions on 'legal avenues' to Europe beyond resettlement. An expert group set up by the EU Commission following a meeting of the Council, the 'Task Force Mediterranean' (TFM), identified various areas of action to prevent further loss of life at sea.[42] The organisa-

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39 COM (2009) 447 final, Communication from the Commission to the European Parliament and the Council on the establishment of a joint EU resettlement programme.

40 Regulation (EU) No 516/2014 of the European Parliament and of the Council of 16 April 2014 establishing the Asylum, Migration and Integration Fund, amending Council Decision 2008/381/EC and repealing Decisions No 573/2007/EC and No 575/2007/EC of the European Parliament and of the Council and Council Decision 2007/435/EC, OJ L 150, 20.5.2014, p. 168–194, recital 40. The lump sum varies between EUR 6,000 and 10,000.

41 Article 7 of Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132, 29.5.2010, p. 11–28. On the role of EASO-supported forms of administrative cooperation in deepening the EU harmonisation process in the field of asylum, see L Tsourdi, 'Bottom-up Salvation? From Practical Cooperation Towards Joint Implementation Through the European Asylum Support Office' (2016) 1 *European Papers* 3, 997-1031. The Commission proposed to reform the EASO into a European Agency for Asylum (COM, 2018, 633 final), see C Hruschka, 'Perspektiven der Europäischen Asylpolitik' in S Beichel-Benedetti and C Janda (eds.), *Hohenheimer Horizonte. Festschrift für Klaus Barwig* (Baden-Baden, Nomos-Verlag, 2016) 382-400 393.

42 EU Council of 7 and 8 October 2013, Press Release 14149/13. The move was also welcomed by the European Parliament, which insisted in being involved in the works of the TFM; see: EP Res of 23 October 2013 on migratory flows in the Mediterranean, with particular attention to the tragic events off Lampedusa (2013/2827(RSP)) OJ C 208, 10.6.2016, 148–152, point J.5.

tion of 'legal avenues' to Europe is one of the actions it identified.[43] The conclusions of the Task Force urge the EU institutions and the Member States 'to increase their current commitment on resettlement'. The TFM also calls for them 'to explore further possibilities for protected entry in the EU (and) (…) to open legal channels which give an opportunity for migrants to reach Europe in a regular manner.'[44] These suggestions of the TFM were followed in part in the 2015 European Agenda on Migration. It announced the setting-up of an EU-wide resettlement scheme with the objective to enable 20,000 refugees to take up residence in Europe between 2015 and 2017.[45] However, no specific action at EU level followed the conclusions of the TFM regarding the development of legal channels other than resettlement. The European Agenda on Migration simply encouraged EU Member States 'to use to the full the other legal avenues available to persons in need of protection, including private/non-governmental sponsorships and humanitarian permits, and family reunification clauses'.[46]

The EU resettlement scheme was adopted by the European Council on June 2015, at which European Heads of State or Government pledged to resettle 22,504 refugees from the Middle East, the Horn of Africa and North Africa.[47] It was implemented beyond expectations as, in the end, up to 27,800 refugees were resettled.[48] The success of that first EU resettlement scheme led to another one, which is still ongoing and at the time of writing set a target of 50,000 refugees to be resettled by 2019.[49] In addition to these schemes, which are of a general nature as they may apply to refugees of any nationality from a great variety of countries, another EU resettlement scheme was set up specifically to benefit Syrian refugees staying

43 COM (2013) 869 final, Communication from the Commission to the European Parliament and the Council on the Work of the Task Force Mediterranean. Other actions include security measures such as increased border surveillance, and additional support to the Member States facing higher migratory pressure.

44 Ibid. point 2.2, 2.4 and 2.5.

45 COM (2015) 240 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration.

46 Ibid. 5.

47 EUCO 22/15, Conclusions of the European Council meeting of 25 and 26 June 2015; decision adopted following the Commission Recommendation (EU) 2015/914 of 8 June 2015 on a European resettlement scheme C/2015/3560 OJ L 148, 13.6.2015, 32–37.

48 COM (2018) 798 final, Managing migration in all its aspects: Progress under the European agenda on migration, 4.

49 C (2017) 6504, Commission Recommendation of 27.9.2017 on enhancing legal pathways for persons in need of international protection.

in Turkey. It was part of the 'EU-Turkey Statement' and provides for the resettlement in the EU of one Syrian refugee staying in Turkey for every one being returned to Turkey from the Greek Islands (the '1:1 scheme').[50] This resettlement programme reflects a different policy approach. Resettlement in this case is used to the strict extent necessary to support and facilitate the adoption and implementation of a border control arrangement.

The success of these EU resettlement programmes led the EU Commission to propose the adoption of a regulation establishing a 'Union Resettlement Framework' (URF) as part of the ongoing reform of the Common European Asylum System (CEAS). The objective of the URF is to establish a comprehensive and permanent resettlement framework, that would consistently guide EU-supported resettlement initiatives to be launched in the future.[51] The underlying idea is to move from ad hoc EU initiatives on resettlement to a consistent overarching approach at EU level. The proposal for a URF includes eligibility criteria that broadly correspond to the criteria set up by the UNHCR and that are based on the identification of specific needs induced by additional factors of vulnerabilities. The proposal also establishes exclusion grounds founded on public order and national security considerations. It organises standardised procedures that leave to the Member States the task of identifying the refugees who will be resettled and may be expedited in case of a humanitarian emergency. An annual Union Resettlement Plan will be established by the Council, and the Commission may establish more targeted resettlement schemes in line with that plan. The implementation of the HURF will be supervised by a High-

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50 C (2015) 9490, Commission Recommendation of 15.12.2015 for a voluntary humanitarian admission scheme with Turkey.

51 COM (2016) 468 final, Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework. For a detailed analysis of the proposal, see A Radjenovic, *Resettlement of Refugees: EU Framework* (Brussels, Briefing of the European Parliamentary Research Service, 2019). The proposal has generated some criticisms among civil society organisations for linking resettlement to migration management considerations; see: K Bamberg, *The EU Resettlement Framework: From a Humanitarian Pathway to a Migration Management Tool?* (Brussels, EPC Discussion Paper, 2018); ECRE, *Untying the EU Resettlement Framework* (Brussels, Policy Note, 2016); S Carrera and R Cortinovis, *The EU's Role in Implementing the UN Global Compact on Refugees. Contained Mobility vs. International Protection* (Brussels, CEPS Paper on Liberty and Security in Europe, 2019) 14; M Tissier-Raffin, 'Réinstallation – Admission humanitaire : solutions d'avenir pour protéger les réfugiés ou cheval de Troie du droit international des réfugiés ?' (2017) 13 *La Revue des droits de l'homme* <https://journals.openedition.org/revdh/3405> (accessed on 10 August 2019). On that debate, see the contribution of Catharina Ziebritski to this volume.

Level Resettlement Committee, which will be chaired by the Commission and composed of representatives of the Council, the European Parliament, the High Representative of the Union for Foreign Affairs and Security Policy, and representatives of the Member States. The European Union Agency for Asylum (which is expected to succeed to the EASO once the recast of the CEAS is adopted), the UNHCR and the IOM may be invited to attend the meetings of the committee.

The main principles of the URF proposal reflect an approach already developed in past EU resettlement initiatives. *First*, EU-sponsored resettlement programmes are intended to function on a voluntary basis. The URF provides a general framework in which Member States are invited to participate (and thus benefit from EU funding). But it does not in and of itself create a legal obligation to resettle refugees on account of EU Member States. *Second*, EU resettlement programmes are to be developed and implemented in cooperation with the UNHCR. The URF proposal explicitly recognises the 'key role' of the UNHCR in identifying resettlement priorities and executing resettlement programmes. *Third*, there is a strong tie between resettlement and the enhancement of hosting capacities in third countries that are facing the arrival of a large number of refugees. The URF proposal connects EU resettlement programmes to the proposal of a 'new Partnership Framework with third countries under the European Agenda on Migration' that strives to support countries of origin and of transit in dealing with large refugee flows.[52] It states that the objective of EU resettlement is also to support 'partnerships with key third countries of origin and transit through a coherent and tailored engagement where the Union and its Member States act in a coordinated manner'.[53] From a policy perspective, resettlement remains conceived at EU level as both a humanitarian tool and a tool for migration management: the intent is to prevent disordered movements of asylum seekers to Europe by supporting hosting capacities in transit countries and countries of origin. As argued by Catharina Ziebritski in her contribution to this volume, policy developments towards increasing involvement of the EU in resettlement are slowly but surely leading to legal developments and a 'EU resettlement law' that has the potential of enhancing refugee protection, in so far as it remains

52 COM (2016) 385 final, Communication from the Commission to the European Parliament, the European Council, the Council and the European Investment Bank on establishing a new Partnership Framework with third countries under the European Agenda on Migration.

53 COM (2016) 468 final (n 51) 5.

aligned on the fundamental rationale and legal dynamics of the Common European Asylum System.

So far, the increasing involvement of the EU in resettlement programmes has not, however, ended the debates regarding the opening and securing of humanitarian admission to Europe for refugees, for a variety of reasons. *First*, the EU resettlement policy remains of an essentially intergovernmental nature. The involvement of the Member States is strictly voluntary. They set the target numbers through the Council, and they freely decide on their own contribution.[54] *Second*, the scope of existing EU resettlement programmes remains relatively limited. They concern people in the thousands – an extremely low figure compared to the flows of people forcibly displaced worldwide, which numbers in the tens of millions.[55] A large number of them is thus likely to search for alternative solutions in order to reach safety. *Third*, and perhaps more importantly, EU resettlement programmes do not allow individuals to directly petition European authorities to obtain humanitarian admission to Europe on grounds relating to protection. Some of those who were not eligible for resettlement have therefore engaged in alternative procedures in an attempt to reach Europe safely and legally. Litigation is one of these. The next Section sets out the main developments that have taken place within the realm of the judiciary, and more specifically before European courts.

2 *Litigation for Humanitarian Admission to Europe*

In law, the intensification of policy debates on humanitarian admission to European territory for refugees is reflected in a number of vivid doctrinal as well as judicial debates. Those advocating the opening of 'safe pathways' and 'legal avenues' often ground their claims in international law. The arguments rely mainly on fundamental rights, such as the principle of *non-refoulement* and the right to leave one's country. The legal issues raised are intricate, as they relate not only to the content of migrants' rights (is there a violation?), but also to the allocation of responsibility for internationally wrongful acts (which State is responsible for the violation?). These arguments are discussed extensively among legal scholars, who highlight the

54 Some Member States have consistently refused to contribute; see: COM (2015) 240 final (n 45) 4.

55 In 2018, the UNHCR estimated the global population of those forcefully displaced worldwide as being comprised of 70.8 million individuals; see: UNHCR, *Global Trends. Forced Displacement in 2018* (Geneva, UNHCR, 2019).

tensions between the right to asylum and external border control practices that can have the effect of preventing access to asylum.[56]

These legal claims and doctrinal debates are, in their own way, shaping policy debates on humanitarian admission to Europe, and increasingly so in the wake of attempts to involve the judiciary through litigation. Such attempts could be qualified as 'cause lawyering' by reference to the relevant socio-legal literature.[57] 'Cause lawyering' is a concept that has been used to qualify attempts to obtain and foster social and policy changes through the courts. It refers to the way legal professionals mobilise the legal system to campaign for a cause they actively support.[58] Using the concept of "cause lawyering" to qualify the increasing attempts to channel policy debates on legal avenues to Europe through the legal system indicates that policy and legal debates on safe pathways to Europe are deeply intertwined: Legal arguments have from the outset been used in the policy debate, and understandably so, since the internationally recognised right of refugees to seek protection lies at its core. It is therefore not surprising that over the past few years various attempts have been made to advancing arguments before the courts in support of the better organisation and securing of humanitarian admission to Europe for refugees. The contribution of Tristan Wibault to this volume offers a testimony of the high degree of personal involvement of some lawyers, who invest a lot of time and effort in searching for all the available legal means to defend the interests of their clients and ease their sufferings.

The first attempts at involving the judiciary in the debate were submitted to the ECtHR, in cases concerning contentious (and therefore vividly debated) external border control practices.[59] In the leading case *Hirsi Jamaa v Italy*, the ECtHR held Italy responsible for the violations of migrants' rights on the occasion of an external border control operation. Italy was

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56 See among others: E Guild and V Stoyanova, 'The Human Right to Leave Any Country: A Right to Be Delivered' (2018) *European Yearbook on Human Rights* 373-394; N Markard, 'The Right to Leave By Sea: Legal Limits on EU Migration Control By Third Countries' (2016) 27 *IJRL* 591-616; V Moreno Lax, *Accessing Asylum in Europe. Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford, OUP, 2017).

57 A Sarat and S Scheingold (eds), *Cause Lawyering and the State in a Global Era* (Oxford, OUP, 2001).

58 L Israël, 'Cause Lawyering' in O Fillieule, L Mathieu and Cécile Péchu (eds), *Dictionnaire des mouvements sociaux* (Paris, Presses de Sciences Po, 2019) 94-100.

59 Various attempts were also made before domestic courts; see: J Hathaway and T Gammeltoft-Hansen, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 *Colombia Journal of Transnational Law* 2 235-84.

condemned for the so-called 'push-back' to Libya of asylum seekers who had been intercepted by Italian coastguards in the Mediterranean Sea before reaching European territory.[60] To reach its conclusion, the ECtHR ruled that migrants brought on board the vessels of European coastguards fall under the 'jurisdiction' of European States as, under the Law of the Sea, the jurisdiction of a State extends to vessels carrying their flags in international waters. The mere circumstance that migrants are intercepted on the high seas, outside of European territorial waters, does not dispense States from their responsibilities under the ECHR.

By reaching that conclusion, the ECtHR opened the door to some kind of international responsibility towards refugees in extraterritorial situations. The ruling in *Hirsi Jamaa v Italy* had the concrete effect of partially lifting one of the main legal obstacles to litigation for humanitarian admission to Europe, which is the limitation of the scope of the ECHR to the 'jurisdiction' of the State parties.[61] Through an important body of case law initially developed in the context of military interventions outside of European territory, the ECtHR interpreted the requirement of 'jurisdiction' as going beyond the national territory to include every situation that falls under the 'effective control' of the State.[62] The requirement of 'effective control' is a complex one that has been widely discussed among legal scholars.[63] It depends on numerous factors and requires an in-depth assessment of all relevant circumstances. With the *Hirsi Jamaa* ruling, the ECtHR clarified that these principles are also applicable to cases concerning migrants. What is important here is that this jurisprudential move allows

60 The ECtHR ruled that sending migrants back immediately, without prior examination of their individual situation and without offering them any opportunity to apply for asylum, violates various provisions of the ECHR, including the prohibition against collective expulsion; *Hirsi Jamaa v Italy* (App No 27765/09) ECHR 23 February 2012. For a detailed comment on this case, see: M Den Heijer, 'Reflections on Refoulement and Collective Expulsion in the *Hirsi* Case' (2013) 25 *IJRL* 265-290; M Giuffré, 'Watered-down Rights on the High Seas: *Hirsi Jamaa and others v Italy*' (2012) 61 *ICLQ* 728-750; V Moreno-Lax, '*Hirsi Jamaa and others v Italy* or the Strasbourg Court versus Extraterritorial Migration Control?' (2012) 12 *HRLR* 3 574-598.

61 European Convention on Human Rights (adopted 4 November 1950; entered into force 3 September 1953) (ECHR) art 1.

62 *Al Skeini v the United Kingdom* (App No 55721/07) ECHR 7 July 2011.

63 For the main terms of the debate, see M Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles and Policy* (Oxford, OUP, 2011); B Miltner, 'Revisiting Extraterritoriality after Al-Skeini: The ECHR and Its Lessons' (2012) 33 *Michigan Journal of International Law* 4 693-745.

for some judicial review of external border control practices and hence litigation by individuals.

That 'opening' on the part of the ECtHR is in itself insufficient, however, to pave the way to litigation for refugees seeking humanitarian admission to Europe. The ruling in *Hirsi Jamaa* safeguards the overall coherence of the case law of the ECtHR regarding the scope of the ECHR, but it does not mean that from now on every migrant who is subjected to external border control measures would be entitled to invoke the ECHR. Despite the interpretation of State jurisdiction as including extraterritorial situations that are subject to the 'effective control' of the State, the competence of the ECtHR in dealing with external border controls remains limited. It is debatable, to say the least, whether it also covers forms of so-called 'contactless controls'[64] which are performed through the intermediary of third countries. As Dirk Hanschel shows in his chapter, the position of the ECtHR corresponds to a broader trend in the field of international human rights law, where criteria for allocating responsibility for international wrongful acts remain primarily territorial in nature. In her contribution to this volume, Sylvie Sarolea further highlights what she labels 'the paradox of the foot in the door': only those refugees who somehow managed to reach the jurisdiction of a State, even if irregularly and at the risk of their lives, are in the position to make a protection claim on that State.

That is not to say that future changes in international law and in the interpretation of the ECHR must be ruled out.[65] On the contrary, the ECtHR has always emphasised that the ECHR is a 'living instrument', whose

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64 V Moreno-Lax and M Giuffré, 'The Rise of Consensual Containment: From "Contactless Control" to "Contactless Responsibility" for Forced Migration Flows' in S Juss (ed), *Research Handbook on International Refugee Law* (Cheltenham, Edward Elgar, 2019) 82-108. For example, Italy entered into an administrative cooperation agreement with Libyan authorities (a so-called 'Memorandum of Understanding') so that migrants are being intercepted by the Libyan coast guard; see D Nakache and J Losier, 'The European Union Immigration Agreement with Libya: Out of Sight, Out of Mind?' (2017) *E-International Relations* <https://www.e-ir.info/2017/07/25/the-european-union-immigration-agreement-with-libya-out-of-sight-out-of-mind/> (accessed 23 July 2019). Attempts are being made at involving the legal responsibility of Italy for the actions of Libyan coast guard through litigation before the ECtHR; see A Pijnenburg, 'From Italian Pushbacks to Libyan Pullbacks: Is Hirsi 2.0 in the Making in Strasbourg?' (2018) 20 *EJML* 4 396-426.

65 For example, in the *M.N. v Belgium* case (App 3599/18) that is currently pending before the Grand Chamber of the ECtHR, a Syrian family applied to the ECtHR following the rejection of their application for a humanitarian visa by Belgian authorities. One of the arguments invoked in the course of the proceedings to justi-