the SPANISH YEARBOOK of INTERNATIONAL LAW

Humanitarian Visas and Discretionary Choices in the EU: Policies on Visas and on International Protection

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Abstract: In its current form, the European area of Freedom, Security and Justice lacks safe entry channels for asylum seekers facing persecution or serious inhuman or degrading treatments in their countries of origin. Leaving aside the experiences of organizing a limited number of admissions based on resettlement, the EU and its member states have instead developed normative, operational and physical obstacles in order to prevent the entry and the admission of foreigners into their territories. This paper examines the extent to which in this context it would be possible to consider that member states have a legal duty to issue humanitarian visas to asylum seekers presenting themselves before their consulates or embassies in transit countries and applying to obtain a visa. This will be assessed taking into account how the Court of Justice has interpreted the margin of discretion of the states in other areas of international protection policy.

Keywords: Humanitarian Visas Margin of discretion Asylum seekers Entry into the EU.

(A) INTRODUCTION

Since the entry into force of the Treaty of Amsterdam and the initial steps of the Tampere Programme, the security component of the European area of Freedom, Security and Justice has been developed as regards migrants and controls at the external borders in order to prevent the entry of unexpected influxes of foreigners. Some provisions have been introduced in immigration policy in order to facilitate the entry or the residence of third country nationals, and mainly to satisfy European economic interests; and the policy on international protection contains norms that attempt to coordinate and harmonize the asylum policy of states as regards refugees and asylum seekers present in the area of freedom of movement. Leaving aside the recent and limited experiences concerning resettlement, the EU and its member states have not developed operational or normative tools for creating safe entry channels for asylum seekers and refugees forced to flee from their countries of origin, where they face persecution or serious threats of suffering from inhuman or degrading treatments. They have instead developed a number of obstacles of a legal (codes on borders controls; on visas, etc.), operational (Frontex), and physical (walls and fences at the most vulnerable borders) nature to prevent the spontaneous entry of foreigners, which act as impediments to asylum seekers and refugees attaining a safe place in Europe in order to apply for international

Article published on 31 December 2019

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 DOI: 10.17103/sybil.23.17

protection.[1] Over the last 20 years, the EU has built up an intangible fortress, with many hurdles to be overcome by foreigners wishing to migrate to Europe, in order to make it impenetrable for the asylum seekers who risk their lives every day trying to cross the Mediterranean.[2]

This paper is aimed at analyzing the extent to which in this context it would it be possible to consider that member states have a legal duty to issue humanitarian visas to asylum seekers presenting themselves at their consulates or embassies in transit countries and applying for a visa in circumstances where returning to their country of origin is impossible. The margin of discretion of states in this area will be assessed, taking into account how the Court of Justice has interpreted the margin of discretion of the states in other areas of the international protection policy, such as the clauses that allow member states to take charge of applicants for international protection on humanitarian or other grounds in the Dublin system (humanitarian and sovereignty clauses). We will endeavour to answer the following question: if a common norm on humanitarian visas is adopted at the EU level (as a revision of the *Schengen Visa Code* or as a separate norm), what will the margin of discretion of member states be in applying EU law?

(1) Some data

According to the information available at the *Missing Migrants Project*, hosted by the International Organization on Migrations, the Mediterranean is the region in the world where most immigrants die trying to reach a safe European country:[3] Around 20,000 deaths have been recorded since 2014. The majority of refugees and people in search of protection arrive in the EU illegally or through illegal channels. In a number of countries, including Spain, consulates and embassies receive a small proportion of people in need of protection that apply to the Spanish authorities for a safe transfer to Spanish territory in order to formally present an international protection application.[4] It does not matter if they ask for a humanitarian visa or to obtain asylum, because the operational procedure will usually be the same in case

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1 Elspeth Guild, 'The Border abroad-Visas and Border Controls', in Kees Groenendijk, Elspeth Guild, Paul Minderhoud (eds.), *In Search of Europe's Borders* (Kluwer, The Haghe, 2002) 87-104; and Elspeth Guild, *Interrogating Europe's Borders: Reflections from an Academic Career*, Farewell speech delivered on Friday 6 September 2019 (Radboud University, Nijmegen).

2 Jef Huysmans, 'The European Union and the Securitization of Migration', 38 *Journal of Common Market Studies* (2000-5) 751-777, at 753. *Vide* also Lorenzo Gabrielli, 'Securitization of migration and Human rights: Frictions at the Southern EU Borders and Beyond', 16-2, *Urban People*, 2014, pp. 311-322; and Nuria Arenas Hidalgo, 'Flujos masivos de población y Seguridad. La crisis de personas en el Mediterráneo', 36 *Araucaria. Revista Iberoamericana de Filosofía, Política y Humanidades* (2016) 339-372, at 352.

3 OIM: Missing Migrants. Tracking deaths along migratory routes.

4 Between 2012 and 2016, 1.334 individuals applied for asylum at consulates in Spain, according to the Ministerio del Interior, Oficina de Asilo y Refugio (OAR), *Asilo en cifras 2016*, table 7. The statistical report published by the Ministry of Interior in September 2019, with data for 2017 (371 applications in embassies) and 2018 (371 applications in embassies), reported that applications in embassies were for family extensions of the international protection of a family member: OAR, *Asilo en cifras 2018*, tables 5-6. Out of a total of 371 applications submitted in embassies in 2018, 169 were presented in Syria, and 39 in Somalia. Taking into account that according to the former Asylum Law in force until 2009, embassies and consulates were considered *suitable places* for presenting an application for international protection, and that the Asylum Law currently in force does not prohibit reception of these applications, it is possible to guess that even if most are based on family reunification, a number could be applications for international protection of refugees or people in need of protection. More information available here.

 DOI: 10.17103/sybil.23.17

of success, and consist of transferring these people to the territory of the state where they will be able to begin a procedure that is able to determine their status. This procedure is nowadays completely managed by internal agents which apply domestic non-harmonised rules, leaving considerable margin of discretion to the authorities of the states.

(2) Starting point

The main starting point of this paper is that EU Law and policies on Borders and Visas do not address expressly the situation of refugees. Some safeguard clauses are included in the main norms, but they do not mean that safe entry channels for asylum seekers and refugees are foreseen. The EU law on asylum and international protection has not yet seriously addressed the two main gaps in the international regime on asylum, which are access to protection and instruments of solidarity among the members of the International Community. The European countries are therefore bound by the principle of *non-refoulement*, which prevents them from sending back anyone who is risking persecution or serious threats to their life or human rights. The key issue is the scope of application of *non-refoulement* and determination of the situations in which asylum seekers and refugees are under the jurisdiction of a state bound by this principle. Article 3 of the Schengen borders code states that:

> 'This Regulation shall apply to any person crossing the internal or external borders of Member states, without prejudice to: (a) the rights of persons enjoying the right of free movement under Union law; (b) the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*'[5]

Article 14, paragraph 1, of the same regulation establishes that:

> 'A third-country national who does not fulfill all the entry conditions laid down in article 6(1) and does not belong to the categories of persons referred to in article 6(5) shall be refused entry to the territories of the Member states. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas'.[6]

These precautionary provisions do not encompass a right of entry for refugees or asylum seekers. Articles 3, paragraph 3.b), and 14, paragraph 1, of the Schengen Borders Code (SBC) only clarify that any possible right of asylum seekers or refugees to entry or admission into a EU country would prevail over the SBC provisions. To date, any International Law provision establishes a right to entry into a country for individuals who do not possess the nationality of that country, even if they are refugees and asylum seekers, and even if they arrive directly from their country of origin. Nevertheless, the *non-refoulement* principle has been interpreted to mean that it encompasses a preventive protection, involving refugees or people in need of protection benefiting from a right of entry if a refusal would directly and unavoidably lead them to

5 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) OJ 23.3.2016 L 77/1–52.

6 Ibid.

 DOI: 10.17103/sybil.23.17

treatments contrary to their human rights.[7] This logical interpretation has not been translated into formal express rules, and leaves room for states to interpret the threshold of the serious risk of violations of human rights in cases where no decision to grant entry is made.

(B) HUMANITARIAN VISAS... IN EU LAW?

A humanitarian visa is usually considered a safe entry channel to safe countries. As a *visa*, it can be considered an instrument that facilitates entry into the country whose authorities have issued it; as it has been issued for *humanitarian* reasons, it is also a tool that acts as a waiver on compliance with the other requirements to entry in a EU country stipulated in the Schengen Borders Code (sufficient resources; object and purpose of the stay, etc.). Neither ordinary visas nor humanitarian visas certify a right of entry. Nevertheless, for refugees who have been able to flee from and leave their country of origin, humanitarian visas act as a permit of entry because of the application of the principle of *non-refoulement* and of the Geneva Convention on the Status of Refugees (which establishes a declaratory procedure). Humanitarian visas can also be used in cases of people that have not left their country of origin (and cannot be considered refugees) for medical or other reasons.

(1) Schengen Visa Code

Looking at the Schengen Visa Code (SVC), it is possible to consider that humanitarian visas are already provided for in EU Law. Article 25 of the Code contains provisions on visas with Limited Territorial Validity (LTV) issued by states, which are valid as a document for entering and staying in their territory while excluding the rest of the Schengen area. The wording of the relevant paragraphs of the article leaves the issue open to question of whether states have a duty to issue a visa of LTV in some cases on 'humanitarian grounds':

> '1. A visa with limited territorial validity shall be issued exceptionally, in the following cases:
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> (a) when the member state concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations,
>
> (i) to derogate from the principle that the entry conditions laid down in article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled(...)'.[8]

(2) Humanitarian Visas for refugees as beyond EU Law

The Court of Justice of the European Union (CJEU) has stated that despite the wording of article 25 of the SVC, the issue of humanitarian visas by states is not an act of application of EU Law if the applicants

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[7] On this preventive aspect of the principle of *non-refoulement*, see Fernando Mariño Menéndez, 'El concepto de refugiado en un contexto de Derecho internacional general', XXXV-2 *REDI* (1983), 337-369, at 364. See also Jean-Yves Carlier, 'Droit d'asile et des Réfugiés: De la protection aux droits', 332 *Rec. des C.* (2007) 321.

[8] Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) OJ 15.9.2009 L 243/1-58.

 DOI: 10.17103/sybil.23.17

are refugees (they have been able to leave their country of origin and apply for a humanitarian visa in an embassy in a country of transit); or people in need of protection if they are covered by the personal scope of application of the Common European Asylum System (CEAS). The two main arguments of the Court are: Firstly, that as the aim of the applicants is to present an application for international protection in the territory of the EU country, they are in fact applying for asylum and not to obtain a short-term Schengen Visa. Because they are applying for asylum, they are seeking to remain in the EU for a longer period of time. Second, the Court argues that the CEAS has a sphere of spatial application which only covers the territory of the member states, and has no extraterritorial application.[9]

This reasoning of the Court is consistent with (a) the underlying aim of the Area of Freedom, Security and Justice (AFS&J), i.e. to prevent third country nationals from entering and circulating in the Schengen area, except in cases where a right of entry is expressly provided; and (b) the strategies for contention of influxes and the *non-entry* principle, which is in tension with the right to leave, enshrined in the international legal standards. The Court of Justice has preferred to apply an interpretation that takes into account the final intention of applicants for a humanitarian visa, which is to obtain protection at the end of an asylum procedure. Nevertheless, this approach is hardly consistent with the wording of article 25 of the SVC, and clearly diminishes the *effet utile* of this article.

According to the Advocate General of the case, M. Paolo Mengozzi, the margin of discretion for member states was inherent in the interpretation of the term 'international obligations' in article 25 of the Code, and in which specific factual circumstances were able to trigger responsibility as regards these international 'obligations'.[10] It was possible to guess that these obligations would at least cover the *non-refoulement* principle.

The alternative taken by the Court was in contrast with previous judgements, which concluded that the application of articles of a regulation containing discretionary clauses had to be considered as an 'application of EU Law'.[11] To apply EU Law or otherwise has consequences when member states have to decide whether to issue a humanitarian visa. If states are not applying EU Law, they are not bound by the Charter of Fundamental Rights of the EU and their margin of discretion is not framed by EU standards on Human rights, values and principles. In that respect, it is important to assess how the CJEU has framed the areas of discretion of member states in Visa Policy and in the CEAS.

(C) MARGIN OF DISCRETION OF STATES IN ASYLUM AND VISA POLICIES

If the interpretative option of the Court was that article 25 of the SVC was applicable as EU Law to refugees applying for a humanitarian visas, there would be two resulting possibilities: first, the provision on the SVC could have been interpreted as encompassing an obligation of Member states to issue a humanitarian visa in order to fulfil international obligations, such as *non-refoulement* in any cases of *prima*

9 Judgment of 7 March 2017 (CJEU, GC), *X. and X. versus Belgium*, C-638/16 PPU, ECLI:EU:C:2017:173.

10 Conclusions of AG Paolo Mengozzi of 7 February 2017, *X. and X. versus Belgium*, C-638/16 PPU, ECLI:EU:C:2017:93.

11 Judgment of 21 December 2011 (CJEU, GC), *N.S. and M.E.*, C-411/10 and C-493/10, ECLI:EU:C:2011:865, paragraph 68.

 DOI: 10.17103/sybil.23.17

facie refugees or people in need of protection. Second, it would have been possible to consider that a margin of discretion existed when assessing the specific situations that trigger the international obligations of states. The framework for assessing the margin of discretion of states is the Charter of Fundamental Rights of the EU when they are applying EU Law.[12] According to its provisions, if the grounds for asking for international protection (persecution or HR violations) is one of the rights enshrined in the ECHR (to be free from torture, inhuman or degrading treatment, etc.) the scope of the protection should be extraterritorial, according to the scope of the European Convention of Human Rights (ECHR), i.e. depending on the exercise of jurisdiction (territorial or extraterritorial -based on an *effective control*).

If the states have a margin of discretion when applying EU Law, the framework for this discretion is the European standards of protection of Human rights. In addition, the Court of Justice will exercise centralised control based on the Charter. If they do not apply EU Law, the framework of discretion is the same, but the Charter will not be a parameter of control, and nor would the Court of Justice have competences to exercise control over the accuracy of the decisions taken by states.

(1) Margin of discretion of states when they apply EU Law

(a) *Margin of discretion of states in the Visa policy*

The Court of Justice of the EU interpreted the grounds for denying a visa in a restrictive manner in the ***Kouskaki*** case. It considered that although states have a 'wide discretion' in examining the facts and interpreting these grounds, the only grounds for denying a visa were stipulated in the EU norm in a *numerus clausus* list. This was favorable for legal certainty, the protection of individuals and their legitimate expectations as regards EU Regulation.[13]

(b) *Margin of discretion of states in the CEAS*

In general, when there is a margin of discretion in the CEAS, the interpretation of the limits of this discretion by the CJEU has been favourable to the rights of asylum seekers, usually because these limits are provided by the standards of the protection of human rights. Three kinds of situations have been addressed by the CJEU: (i) cases presenting a risk of a violation of the right to be free from suffering torture or inhuman treatments; (ii) cases presenting a risk of violation of other rights of vulnerable people; and (iii) cases where no discretion was present in the decision process.

In the cases of *N.S and M.E.* (2011) and *C.K.* (2017) [i], the CJEU considered that the *sovereignty clause* had to be interpreted in line with the European standards for the protection of human rights, and that a Dublin transfer to EU countries should be avoided if a real risk of asylum seekers being submitted to

[12] Article 52 paragraph 3 of the Charter states that: 'In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human rights and Fundamental Freedoms, *the meaning and scope* of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection' (italics added for emphasis).

[13] Judgment of 19 December 2013 (CJEU, GC), ***Rahmanian Koushkaki*** C-84/12, ECLI:EU:C:2013:862, paragraphs 58-60

 DOI: 10.17103/sybil.23.17

inhuman or degrading treatments in the destination country, according to article 4 of the Charter of Fundamental Rights of the EU.[14] More recently, in the cases of *Jawo* and *Ibrahim* (2019) the CJEU has extended this exception to transfer based on a real risk of inhuman treatment to applicants who have in fact already been granted international protection in a member state.[15]

In the cases of *K.* (2012) and *M.A.* (2013) [ii], the CJEU addressed the margin of discretion of states in cases where other rights of vulnerable persons were at risk. First, in a case of dependency, the Court ruled that the *humanitarian clause* should be interpreted in line with the right to the family unit. According to the Court, the sentence 'Member states shall normally keep or bring together (...)' in article 17 of the *Dublin II* Regulation[16] meant that they had the obligation to keep or bring together dependent members of the family, and avoid transferring them in accordance with the other criteria of responsibility, except in cases where exceptional situations arose. Second, in *M.A.* the Court decided that the special vulnerability of children meant that they should not be transferred if they were physically present in a country where they had presented an application for asylum.[17]

The third kind of situations that the Court of Justice has had to address is whether a risk of violation of Human rights entails an exception to the application of the criteria of the norm, in cases where the norm does not include a margin of discretion. In the *Jafari* case (2017), the Court decided that states did not have any margin of discretion in their responsibility to control their borders, even in large scale influxes, and that the standards of protection of human rights could not be used to frame or to modulate application of the rules.[18]

(c) *Proposals for reducing the margin of discretion of states in the CEAS*

Since its beginnings, the EU policy on asylum has aimed to prevent the secondary movement of asylum seekers and of refugees across the internal borders in the Schengen area, in order to keep security risks under control. As the existence of different levels of protection in the Member states is the source of secondary movements, the reduction of the margin of discretion of states is considered necessary to

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[14] Judgment of 21 December 2011 (CJEU, GS), *N.S. and M.E.*, C-411/10 and C-493/10, ECLI:EU:C:2011:865; judgment of 16 February 2017, *C. K., H. F., A. S. and Republika Slovenija*, C-578/16 PPU, ECLI:EU:C:2017:127.

[15] Judgment of 19 March 2019, (CJEU) *Abubacar Jawo*, C-163/17, ECLI:EU:C:2019:218; judgment of 19 March 2019 (CJEU), *Bashar Ibrahim and others*, C-297/17; C-318/17; C-319/17 and C-438/17, ECLI:EU:C:2019:219. About the application of the article 4 of the Charter, the existence of the risk because of the transfer, or later, during the procedure in the responsible member state, or after the outcome of the procedure due to the level of protection, is not relevant.

[16] Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member states by a third-country national, OJ 25.2.2003 L 50/1-10.

[17] Judgment of 6 November 2012 (CJEU), *K v Bundesasylamt*, C-245/11, ECLI:EU:C:2012:685; judgment of 6 June 2013 (CJUE), *M.A. and others*, C-648/11, ECLI:EU:C:2013367. On these issues, see Sílvia Morgades-Gil, "The discretion of States in the European Dublin *III* system for determining responsibility for examining applications for asylum: What remains of the sovereignty and humanitarian clauses after the interpretations of the European Court of Human Rights and the Court of Justice of the European Union?", 27-3 *International Journal of Refugee Law* (2015) 433-456.

[18] Judgment of 26 July 2017 (CJEU), *Khadija Jafari, Zaineb Jafari y Bundesamt für Fremdenwesen und Asyl*, C-646/16, ECLI:EU:C:2017:586.

 DOI: 10.17103/sybil.23.17

reduce differences between states and incentives for people in need of protection to move.[19] The Commission has proposed reducing the margin of discretion of states with this in mind, in a number of provisions in the Dublin Regulation: first, the sovereignty clause will no longer be based on *sovereignty* or discretionary will, but instead on extended-family grounds, and may only be used before the determination of the responsible member state;[20] second, the humanitarian clause is reduced in the sense that it does not expressly cover cultural considerations, and may only be used before the determination of the responsible member state;[21] and, third, Member states will be obliged to apply a *pre*-Dublin procedure, according to which they will have to consider an international application inadmissible if there is a first asylum country or a safe third country for the applicant, and examine asylum applications in an accelerated procedure if the applicant has the nationality of a safe country of origin, or is a threat to national security or public order.[22]

(2) Margin of discretion when states do not apply EU Law, but domestic norms

When states are not applying EU Law, the framework in which their margin of discretion is exercised is International Law. Article 33 of the Geneva Convention on the status of refugees (1951) prohibits *refoulement in any manner whatsoever* (*en modo alguno, de quelque manière que ce soit*). Any connecting factor (factual situation; extraterritorial exercise of authority; *effective control*...) between the refugee and the state should be sufficient to trigger the obligation to not return the individual who is attempting to enter to the territory or to enter a member of the Convention.[23] Where applicable, the *non-refoulement* principle entails a provisory protection before the non-admission or the removal in a *de facto* situation of presence under the authority of a state party in the Convention.

If the *non-refoulement* principle is interpreted in connection with the protection of the right to be free from torture or inhuman or degrading treatments enshrined in the European Convention of Human Rights (article 3), its scope of application will cover extraterritorial activities of agents of the states that involve an *effective control*.[24] In a pending case, the Grand Chamber of the European Court of Human Rights will have to decide if this doctrine on the extraterritorial application of the Convention is applicable to applications for humanitarian visas in consulates or embassies abroad.[25] Meanwhile, some internal courts have resolved similar cases in favor of the obligation of states to issue a humanitarian visa with LTV

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19 Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member states by a third-country national or a stateless person (recast), COM/2016/0270 final, p. 12.

20 Ibid., p.53 (Article 19.1 in the proposal).

21 Ibid., p.54 (Article 19.2 in the proposal).

22 Ibid., p.43 (Article 33 in the proposal).

23 James Crawford, Patricia Hyndman, 'Three Heresies in the Application of the Refugee Convention', 1-2 *IJRL*, (1989) 176-177.

24 Although this has been developed over the years, the *Hirsi Jamaa* judgement is a leading case on this doctrine: Judgment of 23 February 2012, *Hirsi Jamaa versus Italy*, ECHR (2012), nº 27765/09, ECLI:CE:ECHR:2012:0223JUD002776509.

25 *M. N. and others v. Belgium*, pending judgment ECHR-GC, nº 3599/18.

 DOI: 10.17103/sybil.23.17

in cases where *non-refoulement* is at stake.[26] This situation highlights the inconsistency of the EU's policies: 'The EU cannot wish to achieve common border control and a common asylum policy on the one hand, while giving to Member states such a wide margin of appreciation that they are dispensed from the duty to give reasons to their decisions to reject a humanitarian visa application, on the other hand'.[27]

(D) PROPOSALS FOR A NEW APPROACH TO VISA POLICY: SCHENGEN VISAS AND HUMANITARIAN VISAS

The EU has finally adopted a double approach as regards visa policy: first, the reform of the Schengen Visa Code; and second, the possibility of creating a European Humanitarian Visa. The reform of the Schengen Visa Code was envisaged by the European Commission in 2014 [COM(2014)164 final] taking into account the evaluation of the implementation of the Code that entered into force in April 2010 'with the aim of enhancing travel to the EU through visa policy facilitations (thereby to contributing to tourism, trade, growth and employment in the EU) and to harmonising implementation of the common rules'.[28] The negotiations did not progress due to the differences in the positions of the European Parliament and the Council, and finally, also taking into account the new migratory and security challenges, the Commission decided to withdraw its proposal and to replace it with a new proposal that finally led to the approval of Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019, amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code).[29]

The European Parliament tried to include some provisions in this revision process of the Code to facilitate safe legal entry channels to the EU Member states for asylum seekers and individuals in need of protection. However, both the Commission and the Council rejected the amendments of the European Parliament to that end because they considered that they went beyond the scope of 'short stay visas' in the regulation. The European Parliament has therefore decided to take a second approach with a Resolution

[26] Decision of 21 February 2019, Tribunale ordinario di Roma. In this case, the judge ordered the Italian Ministry of Foreign Affairs and International Cooperation to issue a visa on humanitarian grounds according to article 25 of Regulation (EC) No. 810/2009 (Visa Code). This was not a case of *non-refoulement*, but a case where the 'humanitarian grounds' were based on the special vulnerability of an injured child injured whose mother was legally resident in Italy.

[27] Jean-Yves Carlier '[The X. and X. case: Humanitarian visas and the genuine enjoyment of the substance of the rights, towards a middle way?]', *EU Immigration and Asylum Law and Policy*, 27 February 2017.

[28] COM(2018) 252 final, Section 1.

[29] OJ 12.7.2019, L 188/25-54. The reform includes harmonised rules on multiple entry visas; the extension of the maximum period for submitting an application prior to travel to six months; the possibility of issuing single entry visas directly at the EU external borders under certain conditions; new visa fees; the possibility of lodging an application at the consulate of the Member State (MS) of the intended visit; the consulate of the MS of first entry; or any MS consulate present in the country; and a new link between visa policy and a readmission and return policy that puts pressure on third countries that do not cooperate in the readmission of third country nationals illegally staying in the EU. This will lead to discrimination on nationality for individuals that is hardly compatible with International law. On this subject, see: Elspeth GUILD, '[Amending the Visa Code: Collective Punishment of Visa Nationals?]', *EU Immigration and Asylum Law and Policy*, 10 May 2019. On the discriminatory effect of the policy on visas, in general, see Maarten den Heijer, 'Visas and Non-discrimination', 20 *EJML* (2018) 470-489.

 DOI: 10.17103/sybil.23.17

adopted in 11 December 2018 on a Proposal to the Commission for the adoption of a separate legal act for a 'Regulation establishing a European Humanitarian Visa'.[30]

According to this European Parliament resolution, Member states could issue European Humanitarian Visas (EHV) in embassies or consulates for the sole purpose of making an application for International Protection in the territory of the Member states issuing the visa ('the decision should remain the sole competence of MS').[31] According to the European Parliament, the EHV will neither entail a European obligation for states, nor a subjective right for refugees or asylum seekers. Like other kinds of visas, the EHV would enable individuals to enter the territory of the member state issuing the Visa for the sole purpose of making an application for International Protection in that member state. The EHV would be intended to complement existing national entry procedures as resettlement or spontaneous applications under International refugee law. The personal scope of the measure would include third country nationals:

(a) who must be in possession of a visa when crossing the external borders (with the exclusion of family members if they have otherwise a right to family reunification in a *timely* manner);
(b) whose claims of exposure to risk of persecution are manifestly well founded (the assessment is a *prima facie* basis, without a full status determination procedures: 'the assessment is an assessment of the visa application and not an external processing of an asylum application'[32]);
(c) who are not already involved in a resettlement process; and
(d) who pass a security screening in the relevant national and EU databases.

(E) FINAL THOUGHTS

Refugees and other people in need of protection do not have an expressly recognised right to enter the EU. Under International Law, this right can be considered as implicit and deriving from the combination of the *right to leave* (enshrined in the Universal Declaration on Human rights or in the Covenant on Civil and Political Rights); *non-refoulement;* and the extraterritorial application of the Human rights in case of *effective control* (at least in the European legal framework). Notwithstanding that right, member states would still have some discretion in assessing whether factual circumstances activate their international obligations.

With the Resolution approved in December 2018, the European Parliament has shown its commitment to refugees' rights and has addressed human security concerns. The issuing of European Humanitarian Visas would reduce the states' margin of discretion after the judgment of the CJEU in the

[30] European Parliament Resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)). P8_TA-PROV(2018)0494.

[31] Ibid., paragraph 3.

[32] Report with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)), Rapporteur Juan Fernando López Aguilar, A8-0000/2018, 4 December 2018, p. 13/16.

 DOI: 10.17103/sybil.23.17

M&V case.[33] Nevertheless: (a) the EHV may possibly favour an 'efficient management of migration flows' (article 79 TFEU) at the expense of devaluating the rights of asylum seekers to a fair procedure with sufficient guarantees (the EHV will be issued after a preliminary assessment of the claim of International Protection); (b) the EHV will foster the externalisation of the border control; (c) the EHV will risk leading to an implicit 'criminalisation' of spontaneous arrivals as in other non-European countries; and (d) as a special kind of visa with limited territorial validity regulated outside the Schengen Visa Code, the EHV will undermine the consistency of the EU visa policy.

There are grounds for considering whether a separate legal act to expressly and formally introduce European Humanitarian Visas is a realistic option. From the outset, it appears that if a new regulation establishing the EHV is finally adopted, the coherence of the EU Visa policy will be undermined with a short visa regulated outside the so-called Schengen Visa *Code*.[34] Finally, the establishment of the EHV without a relocation mechanism risks driving the system towards failure, because for people in need of protection, it will always be easier to accede to the embassies or consulates of some states rather than others due to reasons on the ground.[35]

[33] It shows quite a timid approach to the major problem of access to international protection in the EU. To assess the three different possible approaches in the EU Law framework, see Violeta Moreno-Lax 'Annex I. The Added Value of EU Legislation on Humanitarian Visas- Legal Aspects' in the Study of the European Parliamentary Research Service *Humanitarian Visas. European Added Value Assessment accompanying the European Parliament's legislative own-initiative report* (Rapporteur: Juan Fernando López Aguilar), 2018, PE 621.823, 23-124.

[34] It would be intended to facilitate admission into a Member state to formalise an asylum application; only this latter application will provide grounds for the legal stay in the EU for more than three months.

[35] The Report makes a confession on this issue, when the rapporteur decides not to propose a relocation mechanism 'to avoid the system becoming overly complicated'. Report with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)), A8-0000/2018, 4 December 2018, p. 13/16.

 DOI: 10.17103/sybil.23.17