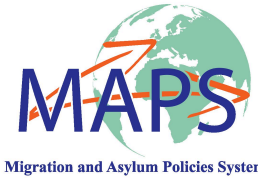

Migration and Asylum Policies Systems

UNIVERSITÀ DEGLI STUDI DI NAPOLI
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MIGRATION AND ASYLUM POLICIES SYSTEMS CHALLENGES AND PERSPECTIVES

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TWO COURTS BUT A SIMILAR OUTCOME – NO HUMANITARIAN VISAS

ANNA LIGUORI*

1. Introduction

Recently both the European Court of Justice and the European Court of Human Rights have been called upon to decide, respectively, in cases *X and X v. Belgium*[1] and *M.N. and others v. Belgium*[2], whether an obligation to issue humanitarian visas at embassies could be derived from the prohibition of torture and inhuman treatments under particular circumstances.

The topic of humanitarian visas, as legal and safe entry channels for people in need of international protection, is very complex and has been long debated in literature over the past years[3]. Also, the New York Declaration[4] and the Global Compact on Refugees[5] refer to humanitarian visas within the topic "Legal pathways".

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[1] CJEU, judgment of 7 March 2017, *X and X* [GC], case C-638/16 PPU.

[2] ECtHR, decision of 5 May 2020 [GC], *M.N. and others v. Belgium,* App. No. 3599/18.

[3] See, *ex multis*, G. Noll, "Seeking Asylum at Embassies: A Right to Entry under International Law?", *International Journal of Refugee Law,* 2005, p. 542 ff; V. Moreno-Lax, "Must EU Borders have Doors for Refugees? On the Compatibility of Schengen Visas and Carriers' Sanctions with EU Member States' Obligations to Provide International Protection to Refugees?", *European Journal of Migration and* Law, 2008, p. 315 ff.; T. Gammeltoft-Hansen, *Access to Asylum: International Refugee Law and the Globalization of Migration Control*, Cambridge University Press, Cambridge, 2011, in particular p. 135 ff.; U.I. Jensen, *Humanitarian visas: option or obligation?*, European Parliament, September 2014, <http://www.europarl.europa.eu/RegData/etudes/STUD/2014/509986/IPOL_STU(2014)509986_EN.pdf>(07/20); M-C. Foblets, L. Leboeuf (eds), *Humanitarian Admission to Europe The Law Between Promises and Constraints,* Hart Publishing, Oxford, 2020.

[4] New York Declaration for Refugees and Migrants, UN Doc. A/RES/71/1.

[5] Global Compact on Refugees, UN Doc. A/73/12.

As pointed out[6], "visa rules in general, and humanitarian visas in particular, lie at the core of a paradox: under international migration law, the human right to leave any country, including one's own, is not accompanied by the corollary right of entering any other country".

The practice is indeed based on different national frameworks, characterized by discretionary powers which often result in arbitrariness and lack of transparence. What is worse is that in most cases domestic procedures and judicial controls are completely absent or inefficient.

This is why it could be particularly useful – even in the presence of a domestic legislation providing for the possibility of humanitarian visa – to recur to supranational courts. And this is why great expectations had been placed first on the Court of Justice of the European Union (hereinafter CJEU), thanks also to an admirable Opinion of Advocate General Mengozzi[7]; and later on the European Court of Human Rights (hereinafter ECtHR), thanks also to the position adopted by Judge Pinto de Albuquerque in a previous case[8].

Indeed, claims before the two European Courts concerned in both cases a family coming from Syria with minor children: because of the situation in their country of origin, if the applicants had managed to reach the European Union, they would have certainly benefited from international protection under the EU qualification directive. In addition, the request for visas had been addressed to a country - Belgium - that in those same days was carrying out *opérations de sauvetage*[9] in favour of Syrian people of Christian religion from Aleppo, delivering visas to allow their entry to Belgium in order to apply for asylum. The operations, even if conducted in a secret and discretionary manner, might have encouraged people - in situations

[6] See J.Y. Carlier, L. Cools, E. Frasca, F. Gatta, S. Sarolea, "Humanitarian visa: does the suspended step of the stork become a hunting permit?", *Cahiers de l'EDEM*, June 2020, <https://uclouvain.be/fr/instituts-recherche/juri/cedie/actualites/european-court-of-human-rights-gc-decision-on-admissibility-of-5-may-2020-m-n-and-others-v-belgium-appl-no-3599-18.html>(07/20).

[7] Opinion of Advocate General Mengozzi delivered on 7 February 2017, case C-638/16 PPU *X and X*.

[8] *Hirsi Jamaa and others v. Italy*, judgment of 23 February 2012 [GC], Applic. No. 27765/09, Concurring Opinion of Judge Pinto de Alburquerque, p. 70.

[9] See *Focus: Visas humanitaires*, <https://www.myria.be/files/FOCUS_visa_humanitaire.pdf > (07/20).

similar to those that fell within the above-mentioned program - to file a request for a visa at Belgium embassies. Nevertheless, in spite of the existing practice and the fulfilment of eligibility conditions (not only for international protection in Belgium but also for the above mentioned governmental program, since all the applicants were Syrian and Christian), the Syrian families' requests had been rejected by the Administrative authorities in both cases.

Unfortunately, both the CJEU and the ECtHR dismissed the claims, despite the fact that there were possible alternative solutions, as demonstrated by Advocate General Mengozzi with respect to the European Union and suggested by Judge Pinto de Albuquerque with respect to the ECHR system.

2. The *X and X v. Belgium* Judgment of the European Court of Justice of 7 March 2017

The first of the two European Courts called upon to decide on the issue of humanitarian visas was the Court of Justice, which delivered its ruling on 7 March 2017[10].

[10] This part of the paper is based on a previous paragraph already published in A. Liguori, *Migration Law and the Externalization of Border Controls-European State Responsibility*, Routledge, London and New York, 2019, p. 80 ff. On the *X and X v. Belgium* judgment see also E. Brouwer, "The European Court of Justice on Humanitarian Visas: Legal integrity vs. political opportunism?", *CEPS Commentary*, 16 March 2017, <https://www.ceps.eu/system/files/Visa%20Code%20CJEU%20E%20Brouwer%20CEPS%20Commentary_0.pdf >(07/20); H. De Vylder, "X and X v. Belgium: a missed opportunity for the CJEU to rule on the state's obligations to issue humanitarian visa for those in need of protection", *Strasbourg Observer*, 14 April 2017, <https://strasbourgobservers.com/2017/04/14/x-and-x-v-belgium-a-missed-opportunity-for-the-cjeu-to-rule-on-the-states-obligations-to-issue-humanitarian-visa-for-those-in-need-of-protection/ >(07/20); G. Raimondo, "Visti umanitari: il caso X e X contro Belgio, C-638/16 PPU", *Sidiblog*, 1 May 2017, <http://www.sidiblog.org/2017/05/01/visti-umanitari-il-caso-x-e-x-contro-belgio-c%E2%80%9163816-ppu/>(07/20); A. Del Guercio, "La sentenza X. e X. della Corte di giustizia sul rilascio del visto umanitario: analisi critica di un'occasione persa", *European Papers*, Vol. 2, 2017, p. 271 ff., <http://www.europeanpapers.eu/en/europeanforum/la-sentenza-x-e-x-della-corte-di-giustizia-sul-rilascio-del-visto-umanitario>(07/20); C. Favilli, "Visti umanitari e protezione internazionale: così vicini così lontani", *Diritti umani e Diritto internazionale*, 2/2017, p. 553 ff., <http://www.sidi-isil.org/wp-

The case concerned a Syrian family who had come to Beirut (Lebanon) to apply at the Belgian Embassy for a territorially limited Schengen visa (LTV visa) on account of humanitarian considerations, in order to reach Belgium and request international protection there. Judgment was delivered on the issue of preliminary ruling from the Conseil du Contentieux des Étrangers (Belgium) concerning the interpretation of Article 25(1)(a) of 'the Visa Code' and of Articles 4 and 18 of the Charter of Fundamental Rights of the European Union, asking in substance whether, under the Visa Code Member, States have the duty to issue a territorially limited Schengen visa, where there are substantial grounds to believe that the refusal to issue that document will have the direct consequence of exposing persons to torture or inhuman or degrading treatment.

In its judgment the Court, although it acknowledged that the applicants in the main proceedings were facing a real risk of being subjected to inhuman and degrading treatment[11], does not pronounce on the merits, but states that the application falls outside the scope of the Visa Code. This because, in the Court's view, even if formally grounded on Article 25 of the Visa Code (concerning visas for intended stays of no more than three months), the application in reality was submitted "with a view to applying for asylum in Belgium immediately upon their arrival in that Member State and, thereafter, to being granted a residence permit with a period of validity not limited to 90 days"[12].

As a consequence, the Court inferred that the provisions of the Charter, in particular Articles 4 and 18 thereof, referred to in the questions of the Belgian court, do not apply[13], thus concluding that:

> an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national, on the basis of Article 25 of the code, to the representation of the Member State of destination that is

content/uploads/2017/04/Osservatorio-Favilli-per-SIDI.pdf>(07/20); G. Cellamare, "Sul rilascio di visti di breve durata (VTL) per ragioni umanitarie", *Studi sull'integrazione europea*, N. 3/2017, p. 527 ff.; F. Calzavara, "La sentenza della Corte di giustizia in tema di visti umanitari: quando la stretta interpretazione rischia di svilire la dignità umana", *Ordine internazionale e diritti umani,* 2017, p. 546 ff., <http://www.rivistaoidu.net/sites/default/files/5_Calzavara_0.pdf >(07/20).

[11] Para. 33.

[12] Para. 42.

[13] Para. 45.

within the territory of a third country, with a view to lodging, immediately upon his or her arrival in that Member State, an application for international protection and, thereafter, to staying in that Member State for more than 90 days in a 180-day period, does not fall within the scope of that code but, as European Union law currently stands, *solely within that of national law*[14].

One of principal shortfalls of the decision is that it puts the applicants outside the scope of EU law on the basis of the real intention of their application, which was to reach Belgium in order to apply for asylum. However, as convincingly argued by the Advocate General Mengozzi[15] in its Opinion of 7 February 2017:

The intention of the applicants in the main proceedings to apply for refugee status once they had entered Belgium cannot alter the nature or purpose of their applications ... [S]uch an intention could at the very most constitute a ground for refusal of the applications of the applicants in the main proceedings, pursuant to the rules of that code, but certainly not a ground for not applying that code[16].

The Opinion of the Advocate General, a long and rich exposition – if we compare it with the brief reasoning of the Court – deserves attention under a number of aspects, and seems worthwhile to review it, even if synthetically. It is true that the possibility of applying for humanitarian visa has not been codified yet at European level, despite

[14] Italics added.

[15] Opinion of Advocate General Mengozzi delivered on 7 February 2017, case C-638/16 PPU *X and X*.

[16] On this point see also V. Moreno-Lax, "Asylum Visas as an Obligation under EU Law: Case PPU C-638/16 X, X v État belge" (Part. I-II), *EU Immigration and Asylum Law and Policy*, 16 and 21 February 2017, <http://eumigrationlawblog.eu/asylum-visas-as-an-obligation-under-eu-law-case-ppu-c-63816-x-x-v-etat-belge/> (07/20): "This would be tantamount to accepting, for instance, that failed asylum seekers were *ab initio* excluded from the remit of the Qualification Directive and the Asylum Procedures Directive because ex post, upon determination of their claims, it has been concluded that they did not qualify for refugee status or subsidiary protection. The fact that an application for either a visa or for international protection under EU law is dismissed on the merits (or even at the admissibility stage) cannot be confounded with the determination of whether the rules of the relevant instruments (i.e. the CCV or the QD+APD) apply to and govern the examination of the claim".

proposals in this direction[17]. However, the Opinion of the Advocate General shows that another interpretation, one that might have allowed a solution more in conformity with human rights[18], was possible. Indeed, after having illustrated that the intention of the applicants was irrelevant, the Advocate General adds that:

> by issuing or refusing to issue a visa with limited territorial validity on the basis of Article 25 of the Visa Code, the authorities of the Member States adopt a decision concerning a document authorising the crossing of the external borders of the Member States, which is subject to a *harmonised set of rules* and act, therefore, *in the framework of and pursuant to EU law*[19].

He goes on to say that such a conclusion cannot be called in question by the circumstance that the Member State enjoyed discretion in applying Article 25(1)(a) of the Visa Code, because the Court of Justice has stated in a number of cases that acts adopted in the exercise of discretion fall within the scope of EU law[20]. He then concludes that by adopting a decision under Article 25 of the Visa Code, Member States implemented EU law and therefore were required to respect the rights guaranteed by the Charter. He then goes on to analyse the merits of whether the discretion of the Member State had been exercised in conformity with the Charter. To this end, first of all he recalls that in the judgment of 21 December 2011, *N. S. and Others*[21], concerning the determination of the Member State responsible for processing an application for asylum, the Court stated that a mere option for a Member State may turn into an actual obligation on that Member State in order to ensure compliance with Article 4 of the

[17] The recent recast of the Visa Code [Regulation (EU) 2019/1155 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code)] does not introduce rules concerning the issue of humanitarian visas. On the position of the European Parliament see *ultra* in the Conclusions.

[18] In literature the possibility to recognize a legal access route under article 25 of the Visa Code has been extensively discussed: see U. I. Jensen, cit; S. Peers, "Do Potential Asylum-Seekers Have the Right to a Schengen Visa?", *EU Law Analysis*, 20 January 2014, <http://eulawanalysis.blogspot.com/2014/01/do-potential-asylum-seekers-have-right.html >(07/20); Moreno-Lax, "Asylum Visas", cit.

[19] Para. 80. Italics is in the Opinion.

[20] See CJEU, *N. S. and Others*, 21 December 2011, C-411-10 and C-493-10, para. 68 and 69.

[21] Opinion of Advocate General Mengozzi., para. 94-98.

Charter[22]. He also stresses that this right corresponds to the right guaranteed by Article 3 of the ECHR, and affirms that

By analogy with the case-law of the European Court of Human Rights on Article 3 of the ECHR, Article 4 of the Charter imposes on the Member States, when implementing EU law, not only a negative obligation with respect to individuals, that is to say that it prohibits the Member States from using torture and inhuman or degrading treatment, but also a *positive obligation*, that is to say that it requires them to take measures designed to ensure that those individuals are not subjected to torture and inhuman or degrading treatment, in particular in the case of vulnerable individuals, including where such ill-treatment is administered by private individuals[23]... In examining whether a State has failed to fulfil its positive obligation to adopt reasonable steps to avoid exposing a person to a genuine risk of treatment prohibited by Article 4 of the Charter, it is necessary, in my view, to ascertain, by analogy with the case-law of the European Court of Human Rights relating to Article 3 of the ECHR, what the foreseeable consequences of that omission or that refusal to act with regard to the person concerned are[24].

Since the risks for the Syrian family were known or should have been known to the Belgian authorities, in light of the numerous reports attesting to the situation in Syria[25], the Advocate General concludes that Article 25(1)(a) of the Visa Code must be interpreted as meaning that the Member State shall issue a LTV visa on humanitarian grounds if there are substantial grounds to believe that the refusal to issue that document will have the direct consequence of exposing that national to treatment prohibited by Article 4 of the Charter[26].

[22] Ibidem, para. 137.

[23] Ibidem, para. 139. Italics is in the text. To this end the advocate General reminds that "in its judgments of 21 December 2011, *N. S. and Others* ... (para. 106 and 113), and of 5 April 2016, *Aranyosi and Căldăraru* (C-404/15 and C-659/15 PPU, ... para. 90 and 94), the Court already held that, like Article 3 of the ECHR, Article 4 of the Charter imposes a positive obligation on the Member States under certain circumstances".

[24] Ibidem, para. 140.

[25] Ibidem, para. 142-147.

[26] Ibidem, para. 163. The Opinion of the Advocate General is remarkable also with respect to the explicit statement that "the fundamental rights recognized by the Charter, which any authority of the Member States must respect when acting within

Finally, it is worthwhile to compare the statement of the Luxembourg Court, affirming that "to conclude otherwise ... would undermine the general structure of the system established by Regulation No 604/2013[27]" (the Dublin regulation), and the premise enounced by the Advocate General at the beginning of his opinion, i.e. that "It is ... 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"[28]. In the first case, the Court is concerned with the consequences that would result from a different interpretation of article 25 of the Visa Code, because this might entail legal access irrespective of the rules established under the Dublin system; on the other hand, the Advocate General explicitly affirms that

> It is, on the contrary, the refusal to recognize a legal access route to the right to international protection on the territory of the Member States – which unfortunately often forces nationals of third countries seeking such protection to join, risking their lives in doing so, the current flow of illegal immigrants to EU's borders – which seems to me to be particularly worrying,

the framework of EU law, are guaranteed to the addressees of the acts adopted by such an authority *irrespective of any territorial criterion*" (para. 89). This position is very important because it denotes a broader scope of application of the EU Charter in comparison to the ECHR. While the dominant case law of the Strasbourg Court sets "effective control" as a threshold for triggering jurisdiction under the ECHR (although, as we will analyse in the next paragraph, there are cases which point to a different approach), according to such interpretation, both EU institutions and the Member States, whenever they act within the scope of EU law, even outside the EU's borders, are bound by the Charter. In other words, as already convincingly upheld in literature, the European Union has the duty to respect the rights guaranteed by the Charter "whenever it exercises its competences, both internally and externally, either directly or through the intermediation of the Member States 'implementing EU law": see V. Moreno-Lax, C. Costello, Cathryn, "The Extraterritorial Application of the EU Charter of Fundamental Rights: From Territoriality to Facticity, the Effectiveness Model", in Steve Peers, Tamara Hervey, Jeff Kenner, Angela Ward (eds.), *The EU Charter of Fundamental Rights: A Commentary*, Hart Publishing, Oxford, 2014, p. 1682. See also J. Rijpma, "External Migration and Asylum Management: Accountability for Executive Action Outside EU-territory", *European Papers*, 2017, p. 79,
<http://www.europeanpapers.eu/en/system/files/pdf_version/EP_eJ_2017_2_7_Article_Jorrit_J_Rijpma.pdf > (07/20).

[27] Judgement of 7 March 2017, cit., para. 48.

[28] Opinion of Advocate General Mengozzi, cit., para. 4.

in the light, inter alia, of the humanitarian values and respect for human rights on which European construction is founded[29].

From this comparison it is clear that the Court probably made a self-restraint because of the concern – expressed by the fourteen intervening Member States – regarding an excessive augmentation of requests for visas at MS embassies in third countries[30]. The best answer to such fear, however, lies once again in Advocate Mengozzi's words:

Admittedly, the circle of persons concerned may prove to be wider than that which is currently the case in the practice of the Member States. That argument is however irrelevant in the light of the obligation to respect, in all circumstances, fundamental rights of an absolute nature, including the right enshrined in Article 4 of the Charter[31].

3. The *M.N. and others v. Belgium* decision of the European Court of Human Rights of 5 May 2020.

Recently, on 5 May 2020, the Grand Chamber of the European Court of Human Rights dismissed an almost identical claim in the *M.N. and others v. Belgium* case[32]. The decision, characterised by a

[29] Ibidem, para. 6.

[30] See A. Del Guercio, "La sentenza X. e X. della Corte di giustizia sul rilascio del visto umanitario: analisi critica di un'occasione persa", cit., p. 285.

[31] Ibidem, para. 171.

[32] On this decision see M. Baumgärtel, "Reaching the dead-end: M.N. and others and the question of humanitarian visas", *Strasbourg Observers*, 7 May 2020, https://strasbourgobservers.com/2020/05/07/reaching-the-dead-end-m-n-and-others-and-the-question-of-humanitarian-visas/; J.Y. Carlier, L. Cools, E. Frasca, F. Gatta, S. Sarolea, "Humanitarian visa: does the suspended step of the stork become a hunting permit?", cit; F. Camplone, "La decisione *M.N. e al. c. Belgio* alla luce della sentenza *X e X*: la conferma della prudenza delle Corti o un impulso allo sviluppo di canali di ingresso legali europei?", *Diritto, immigrazione e cittadinanza*, forthcoming; C. Danisi, "A "formalistic" approach to jurisdiction in the European Court of Human Rights' decision on humanitarian visas: Was another interpretation possible?", *Sidiblog*, 27 May 2020, <http://www.sidiblog.org/2020/05/27/a-formalistic-approach-to-jurisdiction-in-the-european-court-of-human-rights-decision-on-humanitarian-visas-was-another-interpretation-possible/>(07/20); T. Gammeltoft-Hansen, N. F. Tan, "Adjudicating old questions in refugee law: MN and Others v Belgium and the

"prudent and yet conservative approach towards the conditions to trigger extraterritorial jurisdiction"[33], is very deceiving, because "cette affaire représentait l'un des derniers remparts contre la politique de non-entrée menée par l'Union européenne à l'égard des personnes en besoin de protection international"[34].

After a short analysis of the reasoning of the Court, with specific reference to the claim similar to the one brought before the Court of Justice of the European Union, concerning the risk of torture or inhuman treatment in case of refusal of a humanitarian visa[35], the

limits of extraterritorial refoulement", *EU Immigration and Asylum Law and Policy*, 26 May 2020, <http://eumigrationlawblog.eu/adjudicating-old-questions-in-refugee-law-mn-and-others-v-belgium-and-the-limits-of-extraterritorial-refoulement/>(07/20); E. Lenain, "Il était une fois, un visa obligatoire qui n'existait pas. Quand les Cours européennes dansent la polka autour des lacunes du droit", *La Revue des droits de l'homme*, 2020, n. 17, <https://journals.openedition.org/revdh/9913>(07/20), p. 1 ff; A. Reyhani, "Expelled from Humanity – Reflections on M.N and Other v. Belgium", *Verfassungsblog*, 6 May 2020, https://verfassungsblog.de/expelled-from-humanity/; V. Stoyanova, "M.N. and Others v Belgium: no ECHR protection from refoulement by issuing visas", *European Journal of International Law: Talk!*, 12 May 2020, <https://www.ejiltalk.org/m-n-and-others-v-belgium-no-echr-protection-from-refoulement-by-issuing-visas/. For comments on the *MN* case before the ECtHR decision see D.Schmalz, "Will the ECtHR Shake up the European Asylum System?", *Verfassungsblog*, 30 November 2018, <https://verfassungsblog.de/will-the-ecthr-shake-up-the-european-asylum-system/>(07/20); E. Delval, "La CEDH appelée à trancher la question des "visas asile" laissée en suspens par la CJUE: Lueur d'espoir ou nouvelle déception?", *EU Immigration and Asylum Law and Policy*, 12 February 2019, <https://eumigrationlawblog.eu/la-cedh-appelee-a-trancher-la-question-des-visas-asile-laissee-en-suspens-par-la-cjue-lueur-despoir-ou-nouvelle-deception/>(07/20); F.L. Gatta, "La 'saga' dei visti umanitari tra le Corti di Lussemburgo e Strasburgo, passando per il legislatore dell'Unione europea e le prassi degli Stati membri", *Dirittifondamentali.it*, 1/2019, <https://dirittifondamentali.it/2019/06/12/la-saga-dei-visti-umanitari-tra-le-corti-di-lussemburgo-e-strasburgo-passando-per-il-legislatore-dellunione-europea-e-le-prassi-degli-stati-membri/> (07/20), p. 35 ff.

[33] J.Y. Carlier, L. Cools, E. Frasca, F. Gatta, S. Sarolea, "Humanitarian visa: does the suspended step of the stork become a hunting permit?", cit.

[34] E. Lenain, "Il était une fois, un visa obligatoire qui n'existait pas. Quand les Cours européennes dansent la polka autour des lacunes du droit", cit., p. 6.

[35] The applicants also lodged a complaint under art. 6 ECHR, which will not be the object of our analysis. On this point see TJ.-Y. Carlier, L. Cools, E. Frasca, F. Gatta, S. Sarolea, "Humanitarian visa: does the suspended step of the stork become a hunting permit?"; F. Camplone, "La sentenza *M.N. e al. c. Belgio* alla luce della sentenza *X e X*", cit.

present paper intends also in this case to propose a possible different interpretation that the Strasbourg Court might have followed.

The facts upon which the Strasbourg decision and the Luxembourg judgment are based are very similar: a married couple with minor children from Syria had come to Beirut (Lebanon) to apply at the Belgian Embassy for a territorially limited Schengen visa (LTV visa) grounded on humanitarian considerations, in order to reach Belgium and there to request international protection.

The national proceedings in the *MN* case began in August 2016 and were particularly complex. At the end of "Kafkian proceedings"[36], the Belgium Alien Office categorically refused to grant a visa despite judiciary decisions to the contrary. In the view of the Aliens Office, the LTV visas were only for persons wishing to reach a Schengen State for a short period for reasons such as the illness or death of a relative, whereas granting a visa on humanitarian grounds to people who intended to apply for asylum would "create a precedent which would derogate dangerously from the exceptional nature of the procedure for short-stay visas"[37]. It is important to add, however, that the Aliens Office invited the applicants to apply for another type of visa, for more than 90 days, based on Belgian legislation, but that this application was rejected by the Belgian authorities too.

The applicants lodged a claim before the Strasbourg Court on 10 January 2018, alleging that the Belgian authorities' refusal to issue a humanitarian visa had exposed them to a situation incompatible with Article 3 ECHR (prohibition of torture and of inhuman or degrading treatment) with no possibility of an effective remedy, as required by Article 13 ECHR.

In addition, with respect to the internal proceedings, they complained that the impossibility of having the favourable judicial decision executed was in breach of article 6 ECHR (right to a fair trial)[38].

[36] E. Lenain, "Il était une fois, un visa obligatoire qui n'existait pas. Quand les Cours européennes dansent la polka autour des lacunes du droit", cit., p. 2.

[37] Para. 12.

[38] The Court stated that the case fell outside the scope of art. 6 ECHR, referring to its settled case-law (see judgment of 5 October 2000, *Maaouia v. France* [GC], no. 39652/98, § 40). For criticisms to such an approach in this case see J.-Y. Carlier, L. Cools, E. Frasca, F. Gatta, S. Sarolea, "Humanitarian visa: does the suspended step of the stork become a hunting permit?", and more in general A. Liguori, *Le garanzie*

This paper will deal exclusively with the first complaint, which corresponds in substance to the object of the preliminary ruling before the EU Court of Justice. As we have seen, the CJEU avoided issuing a ruling on the merits through a formalistic reasoning, although a different interpretation was possible - as shown by Advocate General Mengozzi in his meritorious opinion. Similarly, the ECHR Court also decided not to examine the case on the merits, declaring the complaint inadmissible by reason of jurisdiction. In this case too, however, another conclusion was possible, had the Court chosen to apply a different notion of jurisdiction, based on some of its own precedents.

In the present decision the Court first of all reiterates that Article 1 ECHR limits its scope to persons within the "jurisdiction" of the States Parties to the Convention, stating that "jurisdiction is a condition *sine qua non* in order for that State to be held responsible for acts or omissions attributable to it" (para. 97).

The problem however is the particularly restrictive interpretation of jurisdiction delivered in this case, compared to previous case-law.

Traditionally a State's jurisdiction, for purposes of its human rights obligations, was assumed to be limited primarily, if not exclusively, to its territory. As international human rights law has evolved, it is now accepted that a State's jurisdiction for human rights purposes can extend to persons outside its territorial limits, whenever the State exercises "effective control" over them, or over the territory in which they are located.

With respect to the European Court of Human Rights case-law[39],

procedurali avverso l'espulsione, Editoriale Scientifica, Napoli, 2008, p. 12 ff. and literature quoted therein.

[39] See, *ex multis*, G. Gaja, "Art. 1", in Sergio Bartole, Benedetto Conforti, Guido Raimondi (eds.), *Commentario alla Convenzione europea per la salvaguardia dei diritti dell'uomo*, CEDAM, Padova, 2001, p. 28; P. De Sena, *La nozione di giurisdizione statale nei trattati sui diritti dell'uomo*, Giappichelli editore, Torino, 2002; M. O'Boyle, "The European Convention on Human Rights and extraterritorial jurisdiction: a comment on 'life after Bankovic'", in Fons Coomans, Menno T. Kamminga, *Extraterritorial Application of human rights treaties*, Intersentia, Antwerpen, 2004; E. Lagrange, "L'application de la Convention de Rome à des actes accomplis par les Etats parties en dehors du territoire national", *Revue générale de droit international public*, 2008, p. 521 ff.; M. Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford, 2011; R. Sapienza, "Art. 1", in Sergio Bartole, Pasquale De Sena, Vladimiro Zagrebelsky (eds.), *Commentario breve alla Convenzione europea* (eds), Cedam, Padova, 2012, p. 13 ff.; S. Besson, "The Extraterritoriality of the European Convention on Human Rights: Why

it is worthwhile to recall an extremely relevant statement in *Issa v. Turkey*[40]*:* "Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory". A consistent implementation of this principle could have led to a functional approach to extraterritorial jurisdiction.

However, the ECtHR jurisprudence on jurisdiction is quite puzzling. In *Banković v. Belgium* [41] the Court held that the text of "Article 1 does not accommodate" an approach to a "cause-and-effect" notion of jurisdiction (vigorously denying a functional approach); at the same time in *Al-Skeini v. the United Kingdom*[42], after reiterating that "A State's jurisdictional competence under Article 1 is primarily territorial", affirmed nonetheless the existence of jurisdiction "whenever the State, through its agents, exercises control and authority over an individual" (personal model) and "when, as a consequence of lawful or unlawful military action, a Contracting State exercises effective control of an area outside that national territory" (spatial model). In the *Hirsi* case the Court recalls both judgments, and also the *Medvedyev* case, which considered that *de facto* control over a ship suffices to establish the State party's jurisdiction (even if the people on board were not transported on the French warship)[43].

A more 'functional test' has been applied so far in only a few

Human Rights Depend on Jurisdiction and What Jurisdiction Amounts to", *Leiden Journal of International Law*, 2012, p. 857 ff.; S. Vezzani "Considerazioni sulla giurisdizione extraterritoriale ai sensi dei trattati sui diritti umani", *Rivista di Diritto Internazionale,* 2018, p. 1086 ff.. See also, with specific reference to migration cases, V. Moreno-Lax, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model" in this volume.

[40] ECtHR, *Issa and others v. Turkey*, judgment of 16 November 2004, Applic. No. 31821/96, para. 71. See in similar terms the UN Human Rights Committee in the case *Lopes Burgos v. Uruguay*, Par. 12.3 (UN Doc. CCPR/C/13/D/52/1979, 29 July 1981).

[41] ECtHR, *Banković and others v. Belgium*, decision of 12 December 2001 [GC], Applic. No. 52207/99.

[42] ECtHR, *Al-Skeini and others v. the United Kingdom*, judgment of 7 July 2011 [GC], Applic. No.55721/07.

[43] For more details see A. Liguori, "Some observations on the legal responsibility of States and International Organizations in the Extraterritorial Processing of Asylum Claims", *The Italian Yearbook of International Law*, Volume 25, 2016, in particular p. 155-157 and literature quoted therein.

cases, i.e. *Xhavara v. Albania and Italy*[44]. In this decision the Court seems to have adopted a "cause-and-effect" approach since, with reference to a collision which took place on the high seas, it admitted implicitly the existence of Italian jurisdiction (and excluded that of Albania) apparently because an Italian warship *caused* the sinking of a vessel carrying Albanian migrants: "La Cour note d'emblée que le naufrage du Kater I Rades a été directement provoqué par le navire de guerre italien Sibilla. Par conséquent, toute doléance sur ce point doit être considérée comme étant dirigée exclusivement contre l'Italie". The same approach emerges in *PAD v. Turkey*[45], concerning the killing of Iranian citizens by a Turkish helicopter, where the Court affirmed that "it is not required to determine the exact location of the impugned events, given that the Government had already admitted that the fire discharged from the helicopters *had caused the killing* of the applicants' relatives" (italics added). Likewise, in the decision of 3 June 2008, *Andreou v. Turkey*[46], concerning Turkish authorities positioned behind the border killing a demonstrator inside the UN-controlled area, the Court stated that "even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was the direct and immediate cause of those injuries, was such that the applicant must be regarded as within the jurisdiction of Turkey".

More recently, in *Jaloud v. The Netherlands*[47], the Court declared that the applicant fell within the jurisdiction of the Netherlands because he passed through a checkpoint "manned by personnel under the command and direct supervision of a Netherlands Royal Army officer". However, this last case confirms that the Court is probably not yet ready for a notion of "cause and effect" jurisdiction; otherwise, as pointed out[48], "[a]ll the talk [in Jaloud] about occupation, exercise

[44] ECtHR, *Xhavara and others v. Albania and Italy*, decision of 11 January 2001, applic. No. 39473/98.

[45] ECtHR, *PAD and others v. Turkey*, decision of 28 June 2007, applic. No. 60167/00.

[46] ECtHR, *Andreou v. Turkey*, judgment of 27 October 2009, applic. No.45653/99.

[47] ECtHR, *Jaloud v. The Netherlands*, judgment of 20 November 2014, applic. No. 47708/08.

[48] See the response of A. Sari to J. Lehmann's post "The Use of Force against People Smugglers: Conflicts with Refugee Law and Human Rights Law", *European Journal of International Law: Talk!*, 22 June 2015, http://www.ejiltalk.org/the-use-of-

of public authority and manning checkpoints would have been quite unnecessary".

In the present case, however, none of the decisions opening a window to a functional approach were referred to. On the contrary, the Court emphasized the necessity of *exceptional circumstances* as grounds for extraterritorial jurisdiction, rejecting all the arguments of the applicants and of the intervening NGOs in favour of the existence of such circumstances in the *MN* case and adhering completely to the position of the respondent Government, supported by numerous Member States[49].

The applicants, after recalling that the Court's case-law clearly indicated that the responsibility of the States could be engaged when acts by their authorities produced effects outside the national territory, stressed that in the present case "the Belgian State bodies were exercising a State function of border control"[50], adding that "this was necessarily a manifestation of its jurisdiction, which entered into play regardless of where it was exercised, regardless of which authorities, territorial or consular, implemented them, and regardless of whether or not the authorities involved exercised de facto or physical control over the individuals concerned"[51]. In addition, the applicants referred to the case-law on expulsion, established since the ruling in the *Soering* case, which had found that a State Party to the Convention could be held responsible for the extraterritorial consequences of decisions taken by it in the event of a risk of torture or ill-treatment, or of failures, attributable to it, to take measures with a view to avoiding or preventing exposure to such risks[52].

It is also worth mentioning the written submissions in support of the applicants, from third Parties interveners (from now on TPI), of the AIRE Centre, the Dutch Council for Refugees, ECRE and the International Commission of Jurists. In their observations, the TPI emphasized that in *Bankovic* the Court had clearly recognised that other instances of extraterritorial exercise of jurisdiction by a State

force-against-people-smugglers-conflicts-with-refugee-law-and-human-rights-law/>(07/20);

[49] In this case eleven States intervened in support of the Belgian government: the Czech Republic, Croatia, Denmark, France, Germany, Hungary, Latvia, the Netherlands, Norway, Slovakia and the United Kingdom.

[50] *MN* decision, para. 83.

[51] Ibidem.

[52] *MN* decision, para. 84.

could exist in cases concerning acts or omissions by diplomatic or consular agents when exercising a governmental function. In their view, since issuing visas corresponds to a prerogative of government power in the field of immigration control, it falls within the jurisdiction of the sending State and has to be exercised, in the case of States Parties to the Convention, in accordance with the rights and freedoms recognised by it, as emerges from the extensive case-law of the former Commission (*X. v Federal Republic Germany*, App no 1611/62, Commission decision of 25 September 1965); *X v. the United Kingdom*, App. no. 7547/76, Commission decision of 15 December 1977; *M. v Denmark*.; App. no. 17392/90, Commission decision of 14 October 1992), consistent with recent case-law of the United Nations Human Rights Committee[53] and of the Inter-American Court of Human Rights[54].

In addition, the interveners – basing their arguments on the *Soering* case and more extensively on the theory of positive obligations as applied in previous ECHR case-law - submitted that "State responsibility may be engaged when refusing treatment of a visa application, in circumstances where the State is or ought to be aware that applicant if returned faces a real risk of serious Convention human rights violations, in the absence of available alternatives that would prevent such outcome"[55].

A similar approach, in favour of a positive obligation of member States to issue humanitarian visas derived from article 3 ECHR if no other escape is possible, had already been envisaged by a former judge of the European Court of Human Rights, Pinto de Albuquerque. Indeed, in his separate opinion in the landmark Hirsi case, after stressing that "States cannot turn a blind eye to an evident need for protection", he used as example precisely the hypothesis of a person in an embassy of a State party to the ECHR in danger of being tortured

[53] See C. Danisi, "A "formalistic" approach to jurisdiction in the European Court of Human Rights' decision on humanitarian visas: Was another interpretation possible?", cit.

[54] See A. De Leo, J.Ruiz Ramos, "Comparing the Inter-American Court opinion on diplomatic asylum applications with M.N. and Others v. Belgium before the ECtHR", *EU Immigration and Asylum Law and Policy*, 13 May 2020, <http://eumigrationlawblog.eu/comparing-the-inter-american-court-opinion-on-diplomatic-asylum-applications-with-m-n-and-others-v-belgium-before-the-ecthr/>(07/20);

[55] TPI written submissions, para. 19.

in his or her country, concluding that "a visa to enter the territory of that State has to be granted, in order to allow the launching of a proper asylum procedure in the receiving State. This will not be a merely humanitarian response, deriving from the good will and discretion of the State. A positive duty to protect will then arise under Article 3"[56].

In the *MN* case, however, the Strasbourg Court completely ignored this approach, conversely entirely aligning itself with the Member State's line on jurisdiction.

In fact the Court, despite acknowledging that the Belgian authorities exercised a public power in ruling on the applicants' visa applications, states that "[T]he mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is … not such as to establish the jurisdiction of the State concerned over those persons outside its territory"[57], stressing that it is necessary to assess *exceptional circumstances* in order to come to the conclusion that Belgium was exercising extraterritorial jurisdiction in respect of the applicants.

After pointing out that "this is primarily a question of fact, which requires it to explore the nature of the link between the applicants and the respondent State and to ascertain whether the latter effectively exercised authority or control over them"[58], the Court comes to the conclusion that none of the former Commission case-law precedents cited above (involving the actions and omissions of diplomatic agents) are comparable, because the connecting links which characterised these previous cases are not present in this case: the applicants are not nationals seeking to benefit from the protection of their embassy and at no time did the diplomatic agents exercise *de facto* control over the Syrian family, since the applicants "freely chose to present themselves at the Belgian Embassy in Beirut, and to submit their visa applications there"[59] and "had then been free to leave the premises of the Belgian Embassy without any hindrance"[60].

[56] *Hirsi Jamaa and others v. Italy*, judgment of 23 February 2012 [GC], applic. No. 27765/09, Concurring Opinion of Judge Pinto de Alburquerque, p. 70.

[57] Para. 112, referring to Banković, at para. 75.

[58] Para. 113.

[59] *MN* decision, para. 118.

[60] In *M.N.* the Court took a much more restrictive approach than the one adopted in its precedents: as pointed out by Stoyanova ("M.N. and Others v Belgium: no ECHR protection from refoulement by issuing visas", cit.), in the present case the

The Court further rejects the additional argument that the applicants placed themselves within Belgian jurisdiction by suing courts at domestic level with a view to securing their entry to Belgium, affirming that the mere fact that an applicant brings proceedings in a State Party with which he has no connecting tie cannot suffice to establish that State's jurisdiction over him[61] and because "to find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction"[62].

This last statement unveils the real *ratio* at the basis of the decision, masked under a formalistic approach which has selectively picked only some of ECHR previous case-law, and surprisingly neglected other relevant ones (the deafening silence on a landmark decision such as the *Hirsi* case is indeed meaningful[63]).

Court introduced "a distinction between 'State's nationals or their property', on the one hand, and 'certain persons' over whom a State exercises *physical* power and control, on the other", which was not present either in Al-Skeini (see para. 134), nor in the highly criticized Bankovic decision, clearly going against "other, more optimistic assessments of the public powers doctrine to situations of migration control" (see T. Gammeltoft-Hansen, N. F. Tan, "Adjudicating old questions in refugee law: MN and Others v Belgium and the limits of extraterritorial refoulement", cit., referring in particular to T. Gammeltoft-Hansen, J.C. Hathaway, "Non-Refoulement in a World of Cooperative Deterrence"*, Columbia Journal of Transnational Law,*, 2015, pp. 266 ff.).

[61] To this end the Court refers to its own decision of 28 January 2014 in the case *Abdul Wahab Khan v. the United Kingdom*, App. no. 11987/11, para. 28.

[62] The Court adds that such an extension of the Convention's scope of application would also have the effect of negating the well-established principle of public international law according to which the States Parties, subject to their treaty obligations, including the Convention, have the right to control the entry, residence and expulsion of aliens. At this point of the judgments the Strasbourg Court recalls the ruling of the CJEU in *X. and X v. Belgium*, examined above, i.e. that the issuing of long-stay visas falls solely within the scope of the Member States' national law (para. 124).

[63] As pointed out (E. Lenain, "Il était une fois, un visa obligatoire qui n'existait pas. Quand les Cours européennes dansent la polka autour des lacunes du droit", cit., p. 8), mentioning this judgment would have confirmed that the scope of the principle of non-refoulement is not restricted to removal from the territory of the defendant

With respect to jurisdiction, the Strasbourg Court has undeniably adopted a self-restraint position, because, as suggested by scholars, other approaches to jurisdiction are indeed possible[64].

In this paper we will focus in particular on one of these alternative approaches, concerning the notion of jurisdiction in relation to positive obligations, widely developed by the third interveners in their written submissions before the Court.

In fact, in their submissions the TPI pointed out that State responsibility under Article 3 is engaged when state authorities "fail to take preventive measures to protect the individual from inhuman and degrading treatment. This includes, amongst others, all the steps that the State can reasonably be expected to take to protect individuals, in the case of a particular threat to an individual or a group, from harm to their physical integrity of which it knew or ought to have known"[65]. To this end they explicitly quote the case *Mahmut Kaya v. Turkey*[66] ("State responsibility may therefore be engaged where the framework of law fails to provide adequate protection […] or where the authorities fail to take reasonable steps to avoid a risk of ill-treatment about which they knew or ought to have known") and *E v. United Kingdom*[67] ("a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State"), coming to the conclusion that – under the specific circumstances of the case –, the refusal to grant a humanitarian visa would be a violation of positive obligations inherent in article 3 ECHR. Indeed, if "[c]onduct of non-admittance of an individual in need of international protection without an effective opportunity given to apply for protection may thus constitute constructive refoulement[68] under

state or non-admission at the borders but is extended to anyone within the jurisdiction of the States Parties, no matter where he is.

[64] See literature quoted at note n.39 and most recently Moreno- Lax in this volume.

[65] Para 11.

[66] *Mahmut Kaya v. Turkey*, App. No. 22535/93 (ECtHR, 28 March 2000), para 115.

[67] *E. and Others v. United Kingdom,* Appl no 33218/96 (ECtHR, 26 November 2012), para 99.

[68] On the notion of "constructive refoulement" see P. Mathew, in S. Juss (ed.), *Research Handbook on International Refugee Law*, Edward Elgar Publishing, Cheltenham-Northampton, 2019, p. 207 ff.

international law"[69], this is particularly true in the present case because the applicants represent the paradigmatic family entitled to international protection and because denying visas in this specific circumstance surely exposed them to inhuman treatment as Lebanon was not able to offer appropriate reception conditions to them and the family's only alternative was to return to Syria (or face a dangerous journey through the Mediterranean Sea).

If the Court had decided to consider the approach based on the theory of positive obligations, it might have referred to some interesting precedent case-law which could have paved the way for establishing jurisdiction in the present case.

Indeed, as pointed out, "while it is counter-intuitive to assume that the requirement to find jurisdiction may be easier with respect to positive obligations than the traditional, 'negative dimension' of human rights, some paradoxical elements of the jurisprudence of the ECtHR may indeed point in this direction"[70] .

In fact, according to the circumstances of the case, the theory of positive obligations could be a useful tool for holding outsourcing States responsible, because in some cases the Strasbourg Court has been ready to accept a lower threshold for jurisdiction, disentangled from "effective control", in claims related to positive obligations[71]. Among the judgments in which the ECtHR adopted such a notion of jurisdiction with respect to positive obligations, the most relevant are *Ilaşcu and Others v. Moldova and Russia*[72], *Manoilescu and Dubrescu v. Romania and Russia*[73] and *Treska v. Albania and Italy*[74], where the Court affirmed in general terms that: "*Even in the absence of effective control of a territory outside its borders*[75], the State still has a positive obligation under Article 1 of the Convention to take the diplomatic, economic, judicial or other measures that it is in its power to take and

[69] Para. 18 of the TPI.

[70] H. P. Aust, *Complicity and the Law of State Responsibility*, Cambridge University Press, Cambridge, 2011, p. 404.

[71] Ibidem; see also M. den Heijer, *Europe and Extraterritorial Asylum,* Hart Publishing, Oxford, 2012, p. 48 and A. Liguori, *Migration Law and the Externalization of Border Controls-European State Responsibility*, cit., p. 38 ff.

[72] *Ilaşcu and Others v. Moldova and Russia* [GC], judgment of 8 July 2004, applic. No. 48787/99.

[73] Decision of 3 March 2005, applic. No. 60861/00

[74] Decision of 29 June 2006, applic. No. 26937/04.

[75] See *Treska v. Albania and Italy,* cit. Italics added.

are in accordance with international law to secure to the applicants the rights guaranteed by the Convention" . As pointed out, the formula used in these cases supports the conclusion that "the duty to take preventive or other positive action in respect of human rights interferences taking place in a foreign territory derives primarily from the influence a State wields over a particular situation, therewith the 'power', or capability, it has to prevent the occurrence of human rights violations" [76], and that "the ECtHR is at the least receptive for claims relating to positive obligations in an extraterritorial setting"[77]. In other words, in these decisions the Court explicitly disregarded "the test of effective control as a precondition for the establishment of jurisdiction"[78].

4. Conclusions

In conclusion, the two Courts have come to the same outcome by different reasoning: no possibility for the Syrian family to reach Belgium, notwithstanding the well-known fact that the family was in danger of incurring inhuman treatment in the event of refusal of a humanitarian visa at the embassy.

[76] See M. den Heijer, *Europe and Extraterritorial Asylum*, cit., p. 81, adding that "The establishment of the scope of this duty requires an inquiry, on the one hand, of the substantive international obligations of the state and the duties of due diligence inherent in them; and, on the other hand, an examination of the legal and factual capabilities of the state to change the course of events". See also *Ilascu and Other*s, para. 392-393.

[77] See M. den Heijer, R. Lawson, "Extraterritorial Human Rights and the Concept of 'Jurisdiction'", in Martin Scheinin, Malcolm Langford, Willem van Genugten, Wouter Vandenhole (eds.), *Global justice, State Duties: The Extraterritorial Scope of Economic, Social and Cultural Rights in International Law*, Cambridge University Press, Cambridge, 2013, p. 188.

[78] See C. Rozakis, "The Territorial Scope of Human Rights Obligations: The Case of the European Convention on Human Rights", in *The Status of International Treaties on Human Rights*, Strasbourg, 2005, pp. 70-72; see also V. Tzevelekos, P. Proukaki, "Migrants at Sea: A Duty of Plural States to Protect (Extraterritorially)?", *Nordic Journal of Int. Law*, 2017, p. 427 ff. *Contra* K.M. Larsen, *The Human Rights Treaty Obligations of Peacekeepers*, Cambridge University Press, Cambridge, 2012, pp. 220-224; see also S. Besson, "Due Diligence and Extraterritorial Human Rights Obligations", *ESIL-Reflection*, 28 April 2020, <https://esil-sedi.eu/esil-reflection-due-diligence-and-extraterritorial-human-rights-obligations-mind-the-gap/>(07/20).

The impression is that both courts made the fear of the intervening States their own, despite the special vulnerability of the applicants: in both proceedings as the case concerned a family from Syria with minor children[79], each option at the applicants' disposal in case of refusal – widespread violence in the event of a return to Syria, harsh living conditions in Lebanon or high risks of inhuman treatment and even death in the case of an irregular crossing to Europe through the Mediterranean sea – exposed them to a treatment in breach of art. 3 ECHR (and of art. 4 of the ECFR). Had the two European Courts reached a different conclusion in the cases under review, member States would have abided by their obligation to issue a humanitarian visa in the future only in extreme circumstances[80], since not everyone applying for visas from embassies would be in a similar situation.

Unfortunately, both Courts recurred to a formalistic approach which led the Strasbourg Court to deny its jurisdiction, on the one hand (although the endorsement for a different position from a former judge – Pinto de Albuquerke, and interesting precedents supporting a different approach to jurisdiction when positive obligations are at stake, both in its case law and in other regional and universal human rights bodies[81]); and the Luxembourg Court, on the other, to adopt a self-restraint decision, stating that the granting of humanitarian visas

[79] As pointed out (C. Danisi, A "formalistic" approach to jurisdiction in the European Court of Human Rights' decision on humanitarian visas: Was another interpretation possible?", cit.), the principle of the best interests of the child is totally absent in the *MN* decision despite the involvement of children.

[80] See D. Schmalz, "Will the ECtHR Shake up the European Asylum System?", cit., referring to Mengozzi's opinion.

[81] On recent developments with respect to the interpretation of "jurisdiction" (mostly concerning positive human rights duties) in other regional and universal human rights bodies see also D. Desierto, "The ICESCR as a Legal Constraint on State Regulation of Business, Trade and Investment: Notes from CESCR General Comment No. 24 (August 2017)", *European Journal of International Law: Talk!*, 13 September 2017 <https://www.ejiltalk.org/the-icescr-as-a-legal-constraint-on-state-regulation-of-business-trade-and-investment-notes-from-cescr-general-comment-no-24-august-2017/>(07/20); A. Berkes, "A New Extraterritorial Jurisdictional Link Recognised by the IACtHR", *European Journal of International Law: Talk!,* 28 March 2018 <https://www.ejiltalk.org/a-new-extraterritorial-jurisdictional-link-recognised-by-the-iacthr/>(07/20); D. Møgster, "Towards Universality: Activities Impacting the Enjoyment of the Right to Life and the Extraterritorial Application of the ICCPR", *European Journal of International Law: Talk!,* 27 November 2018 <https://www.ejiltalk.org/towards-universality-activities-impacting-the-enjoyment-of-the-right-to-life-and-the-extraterritorial-application-of-the-iccpr/>(07/20).

does not fall within the scope of EU law but solely of national law (notwithstanding the fact that Advocate General Mengozzi had convincingly suggested a different possible interpretation).

The outcome reveals the incoherence of European policies: although the rhetoric discourse, especially in official EU documents, is in favour of "safe passages" for those in need of international protection, the possibility of a practical legal path – such as the one at stake in the present decisions (applying for humanitarian visas at embassies) is in the end left to the discretion of the single member States. Unfortunately, the attempt of the European Parliament to reform the Visa Code "for the benefit of greater legislative coherence by combining the subject of humanitarian visas (access) with that of asylum procedures (*after* access)"[82] met the strong opposition of the Council and the reluctance of the Commission; as a result the recent recast of the Visa Code does not introduce rules concerning the issue of humanitarian visas[83] and the later Parliament's legislative impulse[84] has been left without a concrete follow-up[85].

In this context the self-restraint of both European Courts, passing the buck to the States, and refusing to intervene at least in such paradigmatic cases as the ones at stake in the abovementioned proceedings, in order to avoid the violation of a fundamental (and absolute) rights, such as the prohibition of torture and inhuman

[82] See J.Y. Carlier, L. Cools, E. Frasca, F. Gatta, S. Sarolea, "Humanitarian visa: does the suspended step of the stork become a hunting permit?", cit.

[83] Regulation (EU) 2019/1155 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code). See N. Vavoula, "Of Carrots and Sticks: A Punitive Shift in the Reform of the Visa Code", *EU Immigration and Asylum Law and Policy*, 5 September 2018, available at <http://eumigrationlawblog.eu/of-carrots-and-sticksa-punitive-shift-in-the-reform-of-the-visa-code >(07/20).

[84] See *European Parliament Resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas* (2018/2271(INL), <https://www.europarl.europa.eu/doceo/document/A-8-2018-0423_EN.html>(07/20).

85 The Commission has declared that its Proposal on resettlement meets the Parliament's recommendations for the creation of protected entry channels, adding that "it is politically not feasible to create a subjective right to request admission and to be admitted": see *Follow up to the European Parliament non-legislative resolution with recommendations to the Commission on Humanitarian Visas,* (SP(2019)149), Bruxelles, 1.4.2019, <https://oeil.secure.europarl.europa.eu/oeil/popups/ficheprocedure.do?lang=en&reference=2018/2271(INL)>(07/20).

treatment – creates a dangerous vacuum of protection not only for people seeking humanitarian visas at embassies, but also for all those situations that are the foreseeable consequences of the increasingly frequent strategies of externalization of border controls at European level (implemented both by the European Union and by single European States)[86].

[86] See A. Liguori, *Migration Law and the Externalization of Border Controls-European State Responsibility*, cit. and literature quoted therein. So far, the outcome of another important case concerning the consequences of externalization, the pending case *S.S. and Others v. Italy* (see V. Moreno-Lax, "The Architecture of Functional Jurisdiction: Unpacking Contactless Control—On Public Powers, S.S. and Others v. Italy, and the "Operational Model" in this volume), is indeed at risk, also in light of the latest developments in the Strasbourg case-law. As pointed out, the recent trio (*Ilias and Ahmed v. Hungary* , *N.D. and N.T. v. Spain* and *M.N. and others v. Belgium*) "point to a new and more cautious direction of the Court in regard to migration-related rights under the ECHR" (T. Gammeltoft-Hansen, N. F. Tan, "Adjudicating old questions in refugee law: MN and Others v Belgium and the limits of extraterritorial refoulement", cit.).