THE PROHIBITION AGAINST REFOULEMENT AND THE OBLIGATION TO ISSUE A HUMANITARIAN VISA UNDER INTERNATIONAL AND EU LAW

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VU University Amsterdam

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FOREWORD

I would, in particular, like to thank my supervisor Evelien Brouwer for her wonderful guidance and support throughout this process. I would also like to thank my family and friends for their support.
**ABBREVIATIONS**

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<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tr>
<td>AG</td>
<td>Advocate General</td>
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<tr>
<td>CEAS</td>
<td>Common European Asylum System</td>
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<td>CJEU</td>
<td>European Court of Justice</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EU</td>
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<td>EU Charter</td>
<td>EU Charter of Fundamental Rights</td>
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<td>LTV-visas</td>
<td>Limited territorial validity visas</td>
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<td>SBC</td>
<td>Schengen Borders Code</td>
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<td>TCN</td>
<td>Third-country national</td>
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<td>TEU</td>
<td>Treaty on European Union</td>
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<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<td>Visa Code</td>
<td>Community Code on Visas</td>
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INTRODUCTION

SUBJECT
In recent years, the European Union (EU) has limited how refugees can legally access international protection by (actively) trying to keep them out of their jurisdiction altogether. In order to apply for asylum in the EU, an asylum-seeker needs to be within the territory of the EU, that is to say, within the territory of one of its Member States. The EU has restricted this access through deals with third countries. These deals effectively ensure that refugees remain in the territory of the third country or are, intercepted and, brought back to its territory through a forced take-back situation. This is problematic because the Refugee Convention, which serves as the benchmark for refugee protection rights, stipulates that in order to ignite its protection a refugee needs to access the territory of one of its State Parties.

The externalisation of migration control by the EU has not gone unnoticed or uncriticised. Refugees continue to rely on human smugglers to facilitate their access to the EU, resulting in violations of human rights and even loss of life. In 2018 alone, 2297 migrants have died or are still missing. This month alone a further 203 migrants are either missing or presumed dead. This practice is highly problematic. Not only because of human rights violations and loss of human lives. But, also, because 90% of the recognised refugees in the EU have entered the EU illegally.

Furthermore, the distribution of refugees around the world has led to countries, primarily bordering countries of refugee producing States, unable to cope with the massive and continuous influx of refugees. The UN Refugee Agency (UNHCR) has published its annual Global Trends study on 19 June 2018, in which it tracks forced displacement. The report highlights that in 2017, developing countries hosted 85% of all the refugees. These countries were, amongst others: Turkey, Pakistan, Uganda and Lebanon. Turkey has hosted 3.5 million refugees in 2017 alone. Lebanon hosted the largest number of refugees in relation to its national population with 1 in 6 people being refugees. The UNHCR also points out that these countries are facing difficulties in mobilizing sufficient resources to respond to the massive influx of refugees. The UNHCR also reports that in 2017 of the 68.5 million displaced individuals, 25.4 million were refugees, an increase of 2.9 million in comparison to

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7. IOM, Flow monitoring data <http://migration.iom.int/europe?type=missing>, accessed December 20, 2018
8. Ibid, accessed January 20, 2019
11. Ibid, p. 2
12. Ibid, p. 16-17
13. Including 5.4. million Palestinian refugees under the UNRWA’s mandate
2016. The UNHCR reports that this is the most substantial increase it has seen in a single year.\textsuperscript{14} The difference between internally displaced people and refugees is that refugees are outside of their country of origin. Whereas, internally displaced people are within the territory of that State.

These developments and practices urge the question: are there any other ways for refugees to seek international protection, in particular, to reach the EU safely and legally?

One possible pathway to access international protection is by issuing humanitarian visas to refugees. Humanitarian visas are entry visas that can be issued to a person to facilitate entry into the territory of the issuing State, for the purpose of applying for asylum.\textsuperscript{15} Humanitarian visas can also be allocated to regular migrants, that is to mean, non-refugees. For reasons such as: family reunification or for health purposes. \textsuperscript{16}

The legal debate on humanitarian visas (within the EU) as an alternative way to access asylum is not new.\textsuperscript{17} However, there is still uncertainty concerning whether the EU Member States must issue a humanitarian visa. Moreover, if so, under which circumstances does this obligation arise. Therefore, the central question of this thesis will be: whether EU Member States have an obligation to issue a humanitarian visa under international and EU law on the basis of the prohibition against refoulement.

The prohibition against refoulement, in essence, means that States are prohibited from sending someone back to a country where they will be subjected to grave harm and or torture. The act of removing someone is referred to as refoulement.\textsuperscript{18} The prohibition against refoulement and the non-refoulement principle refer to the same thing, and thus both terms will be used interchangeably throughout this study.

**PROBLEM DEFINITION**

**Research question:**

Do States have an obligation to issue a humanitarian visa under international law and EU law on the basis of the prohibition against refoulement?

**Sub-questions:**

1. What are humanitarian visas?
2. Is there a legal basis for the issuing of humanitarian visas in EU law?
3. What is the content and scope of the prohibition against refoulement under international and EU law?
4. Does the prohibition against refoulement apply to asylum applications at embassies or consulates of the EU Member States abroad?

\textsuperscript{16} ibid, p. 8
\textsuperscript{17} G. Noll, Seeking Asylum at Embassies: A Right to Entry under International Law?, International Journal of Refugee law, 2005/ 3., p. 542
JUSTIFICATION OF METHODS
This research was conducted using a doctrinal approach. The main sources that were examined are the following treaties: European Convention on Human Rights (ECHR), Refugee Convention, EU Charter of fundamental Rights (EU Charter), Schengen Borders Code (SBC) and the Visa Code. Furthermore, the historical research method was used to understand the underlining motives and reasons for the adaptation of legislation. In Chapter 1, this method was used to describe the time-line of the creation of an EU migration policy resulting in the adaptation of the Schengen Area, the SBC and the Visa Code.

THE STRUCTURE OF RESEARCH
Chapter 1 will focus on the legal framework of EU law in the area of immigration and asylum. In particular, the focus will be on the rules governing the Schengen Area, such as the SBC and the Visa Code. These rules govern the issuing of visas within the EU context.

Chapters 2 and 3 will focus on the meaning and scope of the prohibition against refoulement under both international as well as EU law. Chapter 2 will focus on Article 33 of the Refugee Convention19 and Article 3 of the ECHR.20 In particular, attention will be given to Article 3 and the case law of the European Court of Human Rights (ECtHR). Chapter 3 will analyse the principle of non-refoulement under EU law as codified in both primary EU law (EU Charter21) as well as secondary EU law (SBC and the Visa Code). In particular attention, is given to the X. and X. case in which the Court of Justice of the EU (CJEU) was asked to interpret Article 25 of the Visa Code in relation to Articles 4 and 19 of the EU Charter. Moreover, whether Article 25 contains an obligation to issue a humanitarian visa.

19 Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), art. 33
20 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art. 3
CHAPTER 1

EU MIGRATION POLICIES: DOES EU LAW PROVIDE A BASIS FOR THE ISSUING OF HUMANITARIAN VISAS?

1.1. Introduction
This chapter aims to establish whether EU law provides a basis for the issuing of humanitarian visas to refugees for the purpose of applying for asylum. This question will be answered through an account of the evolution of EU migration policies in general (towards all migrants) and in particular, in relation to refugees and asylum-seekers. This is important, not only to understand the current EU policy on migration, but also, to understand the effects these policies have on refugees and asylum-seekers. As has been mentioned in the Introduction, refugees and asylum-seekers are hindered from entering the EU in a legal and regular manner. That is to imply, that there is no EU legislation facilitating entry into the EU for refugees and asylum-seekers. As a result, refugees and asylum-seekers are often left to rely on illegal means to enter the EU. To fully comprehend the effects of the EU migration policies on protection seekers’ access to international protection, it is necessary to understand how these policies came to be and which legal provisions govern the movement of migrants today.

This chapter will, therefore, serve as a point of departure for this research. It will help to explain the objectives of the current EU migration policy and its effects on refugees and asylum-seekers. The upcoming chapters will go into the protection seekers’ right to protection and the obligation of non-refoulement. This chapter will discuss the evolution of the EU external border policies. From its early regime focused on checks at the external border, to covering pre-entry and extraterritorial controls carried out abroad. This chapter is divided into four sections: EU law on asylum and immigration (1.2.), Schengen Borders Code (1.3), Visa Code (1.4) and Humanitarian visas: a definition (1.5).

This chapter will conclude with a few closing remarks.

1.2. EU law on asylum and immigration
The origin of governing the entry of foreigners in Europe, and thereby the right of States to exclude them, can be traced back to ancient societies, such as the Greek and Roman societies. As such, the refusal of access to strangers by States to its territory is not a recent phenomenon. Today, the EU has harmonised its migration policies which consequently led the entry of migrants into the EU to be (heavily) regulated. The following section will briefly summarise how the EU has become a borderless Union for its own citizens and effectively a fortress for unwanted foreigners. A Union that is guarded by border control and restrictive pre-emptive requirements such as visas. It is in particular, essential to dive into the establishment of these policies, because refugees are often nationals of States which are not exempted from this visa requirement.

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23 And, also for certain TCNs that enjoy a right to free movement, i.e. long-term residents.
Schengen agreements: the first steps towards an EU framework

The history on the establishment of an EU regime for immigration and asylum is relatively short. Cooperation gradually started in the 1980s. However, these rules were first adopted outside the EU spectrum due to concern over the overreaching and supranational character of EU legislation. The EU Member States thus, at that time, opted to cooperate outside of that regime and adopted the Schengen agreements, which were signed in 1985 and 1990. The Schengen agreements aimed to abolish all the internal borders between States and, to create and strengthen their shared external border controls. This area is also known as the Schengen Area. The implementation of the Schengen agreements, and thus the abolishment of internal border controls, came into effect in 1995. The Schengen agreements at this time were not considered EU law, due to the concerns as mentioned above of EU Member States. However, these concerns gradually changed, and the Schengen agreements did become part of EU law. The following section will further elaborate on this development.

From Maastricht to Lisbon: the establishment of a formal EU framework on asylum and immigration

The Maastricht Treaty, signed in 1992 and entered into force in 1993, created the first formal and legal basis for legislation in the area of asylum and immigration under the TEU third pillar. However, in practice, no binding legislation in this area was adopted. Instead, non-binding recommendations and resolutions were adopted due to disagreements on the supranational character of EU legislation and the impact on national legislation.

The Amsterdam Treaty entered into effect in 1999 and created the Area of Freedom, Security and Justice (AFSJ). The AFSJ, therefore, brought the competences on asylum and immigration into the first pillar of the TEU. In order to create such an area, the Amsterdam Treaty consolidated the Schengen agreements into the legal framework of the TEU. The United Kingdom and Ireland were never parties to the Schengen agreements and, as such, are not bound to any EU legislation ‘building upon’ those core Schengen rules (also referred to as Schengen acquis). Such as the Schengen Borders Code (SBC) and the Visa Code which will be discussed further along in this chapter. Denmark is bound to the Schengen acquis in the form of international law as it is a signatory to the Schengen agreements. However, as Denmark objected to its asylum and immigration policies to be governed by the EU, it can only be bound by legislation building on the Schengen agreements if it decides to implement the provisions. Its obligation thus arises from international law.

25 D Chalmers, & G Davies, & G Monti, European Union Law, (Cambridge University Press 2016), p. 29
26 Ibid, p. 29
27 Ibid, p. 29
29 Ibid, Articles K - K9
32 D Chalmers, & G Davies, & G Monti, European Union Law, (Cambridge University Press 2016), p. 519
33 Ibid, p. 29
34 Ibid, p. 29
35 Case C-77/05 UK v. Council [2007]
36 D Chalmers, & G Davies, & G Monti, European Union Law, (Cambridge University Press 2016), p. 521
37 Ibid, p. 521
The Lisbon Treaty\(^8\) entered into force in 2009. The EU competences on asylum and immigration, now find their basis in Articles 77 to 79 of the Treaty on the Functioning of the EU (TFEU).\(^9\) It should be noted, that these EU competencies are part of the aforementioned AFSJ and are bound to its procedures and general principles.\(^10\) Furthermore, the CJEU through the adoption of the Lisbon Treaty has gained full jurisdiction in the area of asylum and immigration.\(^11\) Since the Schengen agreements and its consolidation into the EU legal framework, the EU has created other provisions that build upon the Schengen agreements and form part of its acquis.

The next sections will focus on these provisions, because they regulate the entry and movement of migrants into and within the EU.

1.3. The Schengen Borders Code

The SBC regulates the obligation of abolishing internal borders between Member States and the governing of the external borders of the Union.\(^4\) It should be noted, that the SBC also contains provisions allowing for the temporarily re-enforcement of internal border checks between Member States, as a measure of last resort.\(^43\) Furthermore, aside from this temporary reintroduction of border controls, the SBC also allows for police checks around the border in exceptional cases. Albeit as long as these checks do not constitute border checks or are regarded as an equivalent to border checks.\(^44\) The crossing of the external borders of the Union is regulated under Title II of the SBC. Article 6 of the SBC regulates the entry conditions for third-country nationals (TCNs). TCN refers to: ‘any person who is not a Union citizen within the meaning of Article 20 (1) TFEU.’\(^45\) It further refers to those who do not enjoy a right to free movement based on family relation.\(^46\) Or those who do not enjoy a right to free movement based on their nationality.\(^47\) These TCNs are required to meet the following entry conditions:\(^48\)

1. carry ‘a valid travel document’\(^49\), 2. if required, carry ‘a valid visa’\(^50\), 3. ‘justify the purpose and conditions of their stay’ and have ‘sufficient means of subsistence’ ‘for the duration of the intended stay and for return to their country of origin’,\(^51\) 4. should not be registered in the SIS (alert)\(^52\) and 5) not be considered ‘a threat to public policy and internal security’.\(^53\) It should be noted, that refugees often do not meet these entry conditions.

Article 6 paragraph 5, however, contains derogations from the entry conditions mentioned above. In particular, relevant for this research is the derogation ground contained in para. 5 sub c. This ground specifies that: ‘third-country nationals who do not fulfil one or more of the conditions laid down in para. 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations.’ International obligations can

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\(^{40}\) Also See D Chalmers, & G Davies, & G Monti, European Union Law, (Cambridge University Press 2016) p. 520.

\(^{41}\) Ibid, Chalmers, Davies., p. 524


\(^{44}\) Ibid, Articles 25 and further.

\(^{45}\) Case C-188/10 Melki v. France [2010]


\(^{47}\) Ibid, Article 2 para. 5 sub A. These TCNs are members of the family of a Union citizen exercising his or her right to free movement.


\(^{49}\) Ibid, Article 6 para 1 SBC

\(^{50}\) Ibid, Article 6 para. 1 sub A

\(^{51}\) Ibid, Article 6 para. 1 sub B

\(^{52}\) Ibid, Article 6 para. 1 sub C

\(^{53}\) Ibid, Article 6 para. 1 sub D

\(^{54}\) Ibid, Article 6 para 1 sub E. There are also other grounds, however, for the purpose of this research those grounds are not relevant and thus not mention. Grounds such as e.g. international relations.
refer to human rights obligations such as the prohibition of refoulement. Whether Article 6 para 5 sub c of the SBC, in fact, refers to the non-refoulement principle and which obligations can arise from it, will be further discussed in chapter 3.

1.4. The Visa Code

Another EU legislation building on the Schengen acquis, and which is relevant for this research, is the Visa Code. The Visa Code was adopted in June 2009 and came into force on 5 April 2010. The Visa Code replaced several rules governing the issuing of visas by EU Member States, in particular, replacing Articles 9 to 17 of the Schengen agreement. These articles primarily regulated cooperation and border control. The Visa Code builds upon the Schengen rules as it is a further development of realising a common visa policy.

Furthermore, the objective of the Visa Code is to ensure a harmonised application of the common visa policy. In short, the Visa Code mainly regulates procedures and conditions for issuing short stay visas in the Schengen Area. The Visa Code is applicable to any TCN listed in Annex I of the Visa List Regulation (see Figure 1) who must be in possession of a visa when crossing the external borders of a Member State. TCNs listed in Annex II are exempt from the visa requirement (also see Figure 1). The Visa Code also lists the countries whose citizens must hold an airport transit visa. The countries on the so-called white list, whose nationals are exempted from a visa requirement used to be generally regarded as wealthier countries. However, whether that is still true is questionable, nationals of wealthier countries such as Bahrain, Qatar and Saudi Arabia, in the Arabia peninsula, are also subjected to the visa requirement.

All nationals of African countries are required to obtain a visa for entry into the Schengen area. In contrast, nearly all Latin American countries are exempted from the visa requirement except for nationals of Bolivia, Ecuador, Guyana and Suriname and in the Caribbean: Haiti, Cuba and Jamaica. It should be noted, that more countries have been added to Annex II. Countries that were previously on Annex I are for example: Colombia and Peru. More importantly and in light of this research, when analysing the countries listed in Annex I, the countries producing the most refugees are all listed under Annex I which means that their nationals are required to obtain a visa in order to travel into the Schengen Area, such as: Syria, Afghanistan, Eritrea and Somalia. Furthermore, nationals from these countries are also required to carry an airport transit visa. This could be problematic, as the Visa Code regulates short term visits and refugees, in applying for asylum, intent to stay longer than the

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57 Ibid, Recitals 3, 18.
58 Ibid, Article 1 paragraph 1
59 Regulation (EU) No 2018/1006 of 14 November 2018 of the European Parliament and the Council listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2018] L303/39, Article 1 and Annex I
Also see for current stats. <https://www.schengenvisainfo.com/transit-schengen-visa/>, last accessed on January 18, 2019
61 Regulation (EU) No 2018/1006 of 14 November 2018 of the European Parliament and the Council listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2018] L303/39, Article 1 and Annex II
64 Some Schengen states have also listed Syria in this category. See <https://www.schengenvisainfo.com/transit-schengen-visa/> for a current list. Last accessed January 18, 2019
time permitted on the basis of the Visa Code. This could mean that their visa applications might be denied. However, the refusal grounds of a visa application will be dealt with further along.

Definition of the term ‘visa’
The Visa Code in Article 2 specifies, that a visa means: ‘an authorisation issued by a Member State’ which gives the recipient a short right to stay in the territory of a Member State. This stay cannot exceed ‘three months in any six-month period.’ A visa can also mean a transit airport visa intended to provide a TCN with the right to ‘transit through the international transit areas or airports’ of the Member State (para. 2 sub b). Furthermore, Article 2 stipulates that there are various types of visas. Such as a ‘uniform visa’, meaning a short-term visa which is valid throughout the Schengen Area. And ‘visas with limited territorial validity’ (LTV-visas), which are short-term Schengen visas that are only valid for the territory of one (or more) Member States. In 2017, of the 16 million visa application, 111,483 thousand LTV were issued.

Procedures for the issuing of visas
Title III of the Visa Code deals with the conditions and procedures for issuing visas. Article 4 para. 1 specifies that as a general rule visa application are to be ‘examined and decided on by consulates.’ As a derogation, visa applications can also be examined and decided on by border control personnel at the external borders of a Member State (para. 2). Which consulate a person should apply to, and as such is competent, is governed by Article 6. Article 6 specifies that as a general rule, applicants should apply for a visa in the country in which he or she legally resides (para. 1). An applicant can also apply to a consulate in which they are legally present if they can provide a justification for their application (para. 2).

Admission requirements
Article 21 of the Visa Code specifies that ‘for an application for a uniform visa’ to be successful, the applicant needs to ‘fulfil the entry conditions’ laid down in Article 6 of the SBC. However, Article 30 of the Visa Code stipulates that possession of a visa, whether uniform of LTV, does not confer onto the visa holder ‘an automatic right of entry’. This means that EU Member States can still deny entry to a TCN if the border control finds (for example) that the TCN, at
that time, cannot prove to have ‘sufficient means of subsistence’. However, refusal does not mean annulment. The visa will still be considered valid. Annulment is only possible if it is proven that the TCN committed fraud during the obtainment of the visa. It should also be mentioned that the Visa Code, much like the SBC mentioned above, also contains provisions allowing for derogation of the entry conditions. Article 25 is such a derogative provision and allows for the issuing of LTV-visas in exceptional cases. This article will be further discussed in section 1.5. under humanitarian visas.

Refusal grounds
The refusal grounds of the Visa Code are stipulated in Article 32. There are numerous refusal grounds listed in Article 32, listed below is one refusal ground that is, in particular, relevant for this research.

Para. 1: Without prejudice to Article 25 (1), a visa shall be refused:
Sub B: If there are reasonable doubts as to - or his intention to leave the territory of the Member States before the expiry of the visa applied for.

The question of whether the refusal grounds mentioned in Article 32 are exhaustive was dealt with by the CJEU in its Koushakani judgment. This case concerned an Iranian national, whose visa application was refused on the basis of doubt as to his intention to return to Iran (para. 20). The referring court asked the CJEU to clarify the refusal grounds of a visa under the Visa Code (Article 32).

It should be noted that the applicant in the case met the entry conditions of Article 6 para. 1 sub a, c and d (para. 22). There was, however, doubt as to whether he formed a ‘threat to public policy due to a possible risk of illegal immigration’ within the meaning of Article 6 para. 1 sub e. (para. 23). Article 21 of the Visa Code contains the verification of the entry conditions of the SBC and refers to Article 6 of that provision. The referring court, in particular, wanted to know whether the applicant has a right to a visa if the conditions of Article 21 were met and none of the refusal grounds mentioned in Article 32 are applicable (para. 24). The CJEU ruled that a visa application can only be refused on the grounds specifically mentioned in Article 32, Article 32 is therefore exhaustive and limited. Allowing for more refusal grounds would jeopardise the uniformity of the Visa Code. The CJEU, however, did add that EU Member States have a wide discretion when assessing the ‘individual position of a visa applicant’ and can consider, among other things, ‘the political, social and economic situation of the country of origin’ (para. 56). This means that an EU Member State can deny a visa to a prospective asylum-seeker, that does meet the entry conditions of the SBC, on the basis of country specific or personal information and link it to the establishment of a ‘reasonable doubt’ as to the ‘intent to leave’ the premises of its territory. As has been stated above, this is a refusal ground under Article 32. However, most refugees will not be able to meet the entry conditions of Article 6 SBC and thus will not be able to obtain a visa. Whether Article 25 can provide any solace, will be further discussed below. Prior to this, the term humanitarian visa will be discussed.

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66 Ibid, p. 102
68 Case C-84/12 Koushakani v. Germany [2013]
1.5. Humanitarian visas: a definition

Humanitarian visas are visas which can be granted to TCNs by a national embassy to facilitate entry to the territory of that State, for the purpose of applying for asylum or international protection. It could be argued, that granting humanitarian visas is similar to granting diplomatic asylum as both can facilitate entry to the territory of the recipient State. However, humanitarian visas differ from diplomatic asylum for the following two reasons:

1. The final decision on asylum or international protection is conducted in the territory of the recipient State and not by the embassy personnel. Therefore, a humanitarian visa serves as an entry permit. The lodging and subsequent approval or refusal of an asylum- or international protection claim is conducted upon entry into the territory of the State. In contrast, diplomatic asylum is granted by diplomatic missions and thus not upon entry into the State territory. It is granted extraterritorial.

2. The objective of humanitarian visas is to provide a safe and legal way to enter the territory of a State. The same can also be said concerning diplomatic asylum, if upon receiving diplomatic asylum one is able to travel to the destination State. However, as has been stated before, a humanitarian visa is primarily an entry permit whereas diplomatic asylum can be seen as an equivalent of a positive asylum or international protection claim. Its primary objective is not to solely facilitate entry but to grant a status (asylum).

Although similar, humanitarian visas are significantly different from diplomatic asylum. In particular, considering the vast EU legislation on the granting of asylum, it is important to note that humanitarian visas do not equate to the granting of protection. And as such cannot substitute the EU rules governing the granting of asylum and its procedures. The next section will focus on whether there are EU legislation that regulate humanitarian visas.

As has been mentioned before, Article 25 of the Visa Code allows for derogation of the entry conditions of the SBC in exceptional cases and regulates the issuing of LTV-visas to TCNs. The issuing of LTV-visas can occur on the basis of either humanitarian grounds, for national interest or because of international obligations.

Article 25 stipulates that:

‘a visa with limited territorial validity shall be issued exceptionally... 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 6 (1) (a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled’

The words ‘when the Member State concerned considers it necessary’ might indicate that Member States have a wide discretion when deciding to issue an LTV-visa. However, international obligations such as the prohibition against refoulement can restrict the discretion of States. The CJEU has ruled on the applicability of Article 25 concerning a visa application on the basis of international obligations in its X. and X judgment in 2017.

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70 V. Moreno Lax, Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law. (Oxford University Press 2017, p. 309
72 Case C-638/16 X. and X. v. Belgium [2017]
CJEU: the issuing of humanitarian visas to refugees falls outside of the scope of EU law

Facts of the case and the main procedure

This case concerned a Syrian couple and their three minor children (para. 19). The couple applied for an LTV visa at the Belgian embassy in Beirut (Lebanon) on 12 October 2016 on the basis of Article 25 para. 1 sub a of the Visa Code. After they submitted their application, they returned to Syria (para. 19). The applicants, to substantiate their visa applications, stated that their intent in applying was to facilitate a way to leave Aleppo and apply for asylum in Belgium (para. 20). One of the applicants stated that they were abducted by a terrorist group, tortured and only released upon payment of ransom (para. 20). They also referred to the security situation in Syria, and in Aleppo in particular, and as Orthodox Christians, stated they were especially at risk of persecution on the grounds of their religious beliefs (para. 20). The Belgium Immigration Office rejected their applications on the following grounds: 1) the intended stay in Belgium was longer than permitted under the Visa Code (longer than 90 days), 2) that Belgium on the basis of Art. 4 EU Charter was not obliged to facilitate entry to ‘victims of a catastrophic situation’ and 3) that an application for asylum cannot be submitted at a diplomatic post. The Belgium Immigration Office argued that issuing an LTV-visa in this case would amount to allowing asylum applications to be submitted to a diplomatic post and processed there. (para. 21).

The applicants in the main proceedings argued that Article 18 of the EU Charter contains a positive obligation for Member States to guarantee both the right to asylum as well as preventing a violation of the prohibition against refoulement. The applicants argue that the only way for both these rights to be guaranteed, and thus for a Member State to adhere to its positive obligation, is by granting them international protection (para. 23). In support to this, the applicants in particular refer to the view of the Belgium government that the applicants were in an exceptional situation from a humanitarian point of view. They therefore claimed that they met all the conditions of Article 25 and should be granted an LTV-visa. (para. 23).

The Belgium government, in contrary, argued that they were under no obligation to admit the applicants into their territory, neither on the basis of Article 3 of the ECHR or Article 33 of the Refugee Convention. The Belgium government however did mention that if any obligations could have arisen, it would be the obligation to refrain from deportation (para. 24).

The referring court in essence asked the CJEU to elaborate on the ‘international obligations’ referred to in Article 25 para. 1 sub A. In particular, the Belgium court wanted to know if these international obligations referred to all of the provisions of the EU Charter, to Articles 4 and 18, or also to the prohibition against refoulement as laid down in the ECHR and Art. 33 of the Refugee Convention (para. 28). The referring court also asked whether “a Member State to which an application for a visa with limited territorial validity has been made is required to issue the visa applied for, where a risk of infringement of Article 4 and/or Article 18 of the Charter or another international obligation by which it is bound is established?” (para. 28).

CJEU ruling

The CJEU based its ruling and reasoning on two arguments:

1. The intended stay of the applicants for which they applied for an LTV differs from those stays as regulated in the Visa Code (namely not short-term).

2. To allow third-country nationals to apply for a humanitarian LTV would undermine the harmonised EU legislation in the area of asylum.

The CJEU started by pointing out the rationale of the Visa Code, which is to regulate the issuing of visas ‘for intended stays of no more than three months’ (para. 40). The objective of the Visa Code, laid down in Article 1, is therefore to regulate short-term visits (90 days in any 180-day period) (para. 41). The CJEU then stated that the applicants intended to stay longer than the 90-day period required under the Visa Code because they intended to apply for asylum in Belgium (para. 42). The CJEU
stated that by intending to stay longer than the given period, their application falls outside of the scope of the Visa Code (para. 43). Furthermore, the CJEU pointed out that the issuing of long-term humanitarian visas has not been regulated by the EU legislature (para. 44). The CJEU concluded that since the issue at hand is not regulated by EU law, the EU Charter is also not applicable (para. 45). The EU Charter is only applicable if EU law has been implemented. The CJEU, therefore, concluded that the issuing of long-term humanitarian visas falls within the national scope of EU Member States (para. 51). The CJEU in its closing paragraphs argued that ‘allowing third-country nationals to lodge applications for visas on the basis of the Visa code in order obtain international protection in the Member State of their choice, would undermine the general structure of the system established by Regulation No. 604/2013.’ (para. 48). The CJEU is referring to the Common European Asylum System (CEAS). The CJEU argues that the CEAS explicitly exclude asylum ‘applications made to the representations of Member States’. Only applications made on the territory of a Member State, including its borders and transit zones, are applicable (para. 49). The CJEU argued that the issuing of a humanitarian visa to refugees and asylum-seekers at a diplomatic post of a Member State is synonymous to processing an asylum claim.

Chapter 3 will further discuss the X. and X. judgment in light of the principle of non-refoulement and will answer the question whether the CJEU in this case has fully taken into account the prohibition against refoulement. For now, it is sufficient to acknowledge that the CJEU concluded that the issuing of humanitarian visas to refugees is not regulated by EU law. However, the European Parliament has been lobbying for the adoption of EU legislation that can facilitate humanitarian visas for refugees and has launched an own-initiative report.73 In December 2019, the European Parliament calls on the European Commission, in this regard, to create an EU legislative proposal by 31 March 2019.74 The objective to enable legal and safe pathways of entry for refugees is understandable. As has been mentioned in the Introduction to this research, 90% of recognised refugees reach the EU through irregular means.75

1.6. Concluding remarks

To conclude and to summarise the main points of this chapter, the entry into the EU for short-term visitors is heavily regulated. The EU has harmonised migration policies to facilitate and control the short-term entry of TCNs into the EU. The SBC and the Visa Code contain, among other things, the entry conditions and visa requirements applicable to TCNs. Refugees often cannot meet these entry requirements due to an inability to receive a visa. This means that the EU effectively restricts refugees from entering the EU. However, both the SBC as well as the Visa Code contain provisions that allow for entry on the basis of international obligations. What these international obligations entail and, in particular, whether these international obligations can constitute the prohibition of refoulement will be the focus of the next two remaining chapters.

75 See note 71, p. 5
CHAPTER 2

WHAT IS THE SCOPE AND REACH OF THE NON-REFOULEMENT PRINCIPLE UNDER INTERNATIONAL LAW?

2.1. Introduction

The previous chapter discussed and addressed the EU migration policies that affect the movement of refugees and concluded that there are no legal ways for refugees to enter the EU. The remaining two chapters will focus on the rights that refugees can obtain from international human rights treaties and EU law. In particular, special attention will be given to the prohibition of refoulement. The principle of refoulement is laid down in various international and EU treaties. In the international context, the Refugee Convention and the ECHR are of particular importance for this research. The Refugee Convention because it serves as the cornerstone legislation in the area of international protection. Moreover, on the basis of Article 78 TFEU, any EU policy in the area of asylum that was, or will be developed in the future, ‘must be in accordance with’ the Refugee Convention. It can, therefore, be said that the Refugee Convention influences the content of EU law. The same can also be said of the ECHR and in particular in relation to the adaptation of the non-refoulement principle under EU law. Furthermore, the ECHR is of particular importance because of the case law of the ECtHR in relation to this research in its development of the scope of extraterritorial jurisdiction. This chapter will thus solely focus on these two treaties as there is still uncertainty in relation to both the content and scope of the non-refoulement principle under international law.

I will start by providing a background into the right of asylum, to understand the relationship between the right of asylum and the non-refoulement principle. The concepts of ‘refugees’, ‘non-refoulement’ and ‘asylum’ are closely linked and highlight the rights and entitlements of refugees in general as well as the obligations of States under international and EU law. Where the refugee status provides refugees with the right to remain in the territory of the State of asylum. The legal basis of non-refoulement obliges States not to return a person to a country where they risk being persecuted. It is precisely the juxtaposition of these rights and obligations that are relevant to this study. Both the right to asylum and the obligation of non-refoulement serve different purposes but for this study can, or might be able, to facilitate entry into the EU. Allowing for both a right to facilitate the claiming of asylum (upon entry) and creating an obligation for Member States not to return a refugee.

This chapter discusses the definition and scope of the prohibition of refoulement as codified in the Refugee Convention (art. 33) and the ECHR (art. 3) and the right to asylum. This chapter is divided into four sections: the right to asylum and the right to entry (2.2.) Article 33 of the Refugee Convention (2.3.), Article 3 of the ECHR (2.4), and the territorial application of the prohibition against refoulement under international law (2.5).

This chapter will conclude with a few closing remarks.

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76 Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ c326/47, Article 78 TFEU para. 1
77 Again, in reference to Article 78 para. 1 TFEU in particular the mentioning of ‘other relevant treaties.’
2.2. The right to asylum and the right to entry

A key stage in the discourse on humanitarian visas, and a starting point in analysing the rights that are at stake, is whether refugees have a ‘right to seek asylum’ and whether this right carries a ‘right to receive asylum’. Such a possible right could mean that refugees have an individual right to receive asylum, and maybe even gain entry to the territory of a State of refuge. This section, thus, aims to establish whether refugees have a right to asylum to challenge the State’s right to refuse entry under state sovereignty. I will begin by offering a brief overview of the right of asylum, after which I will address the right to obtain asylum and entry.

The right to asylum

The word “asylum” is the Latin equivalent of the Greek word “asylon” that translates to ‘freedom from seizure’. In a historical setting, the word asylum has been construed to mean ‘a place of refuge’. Despite its longstanding history and practice, the legal concept of “asylum” still does not contain a universally accepted clear or agreed upon meaning. Interestingly, asylum, when viewed as a right, has been (universally) defined and contains the following constituents of state behaviour.

(i) ‘To admit a person to its territory’;
(ii) ‘To allow the person to sojourn there’;
(iii) ‘To refrain from expelling the person’;
(iv) ‘To refrain from extraditing the person’; and
(v) ‘To refrain from prosecuting, punishing, or otherwise restricting the person’s liberty’.

Furthermore, it has been contended that the right of asylum contains several rights. Roman Boed categorizes the right of asylum to contain three separate rights, namely: 1) The right of the state to grant asylum, 2) The right of an individual to seek asylum and 3) the right of an individual to be granted asylum.

The right of the state to grant asylum

The right of a state to grant asylum is a well-established principle of international law. It follows from the principle of state sovereignty, that every State has sole control over its territory and, thus, also over all the people present in it. Whether they are nationals or non-nationals of that State. From this standpoint, the right of asylum is a right of the state and does not include (or cannot directly be translated into) an individual claim of asylum. This understanding of the right of asylum has been codified in several international as well as regional treaties. Most notably, in Article 14 of the Universal Declaration of Human Rights (UN Declaration) which states that:

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Article 14:
“Everyone has the right to seek and to enjoy in other countries asylum from persecution”
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79. Ibid, p. 2
80. Ibid, p. 3
81. Ibid
82. Ibid, p. 3
83. Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR), art 14
The right of an individual to seek asylum

The second ‘right’ included in the right of asylum is the right of an individual to seek asylum. The right to seek asylum, under this definition, is synonymous with the right to leave one’s own country. States are prohibited from persecuting or preventing their own citizens for leaving to claim asylum in another country. This right is based on the principle that “a State may not claim to ‘own’ its nationals or residents” and is codified in several international treaties. The right to leave one’s own country has been codified in Protocol No. 4 to the ECHR which is binding to all EU Member States. Furthermore, individuals which are hindered by a State (party) to make use of their right to leave can be bring a claim to the ECtHR as the protocol is enforceable.

Protocol No. 4 ECHR
“everyone shall be free to leave any country, including his own”

The right of an individual to obtain asylum: a right to entry?

The third, and final, ‘right’ included in the right of asylum is the right of an individual to be granted asylum. The majority of legal scholars argue that a right of an individual to obtain asylum and, thus, to have an enforceable right to asylum vis-à-vis the state’s right to deny access is generally not accepted. The prevailing legal opinion is that the right of an individual to ‘seek and enjoy’ asylum consists of an individual’s right to seek asylum and not a right to obtain asylum. In other words, the prevailing opinion is that the right of asylum, at least as a written law, solely consists of the first two rights: the right of the state to grant asylum and the right of an individual to seek asylum.

The right to asylum, therefore, does not create a legal right of entry into a State territory for the purpose of applying for international protection.

The following section will focus on addressing this issue by providing an analysis of the principle of non-refoulement under international law.

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85 R. Boed, The State of the Right of Asylum in International Law, Duke Journal of Comparative & International Law 1994, 1994/1
86 Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR): Article 13 (2) Universal Declaration
2.3. The prohibition against refoulement: Article 33 Refugee Convention

This section will focus on the prohibition against refoulement under the Refugee Convention as has been laid down in Article 33.

Article 33 of the Refugee Convention

Article 33 para. 1 of the Refugee Convention stipulates that:

“No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”

This paragraph has also been called the ‘cardinal principle’ of the Refugee Convention and the principle of non-refoulement serves as the foundation for the protection of refugees. The prohibition against refoulement also serves as an important protective right for refugees because it ensures that they remain out of the reach of a persecuting State as long as their fear of persecution remains well-founded. This is in particular important in the absence of an individual right to obtain asylum under international law. The principle of non-refoulement cannot in itself require States to grant asylum. It can, nevertheless, guarantee that a person is not returned to the state of persecution even if an asylum application is denied.

The prohibition against refoulement can create both negative as well as positive obligations. A negative obligation means that States are obliged to refrain from conducting certain actions i.e. to return someone. A positive obligation can arise, when States are obliged to facilitate access to its territory in order to guarantee that a violation of the prohibition does not occur. Hathaway argues that this positive obligation arises because ‘admission is normally the only means of avoiding the alternative, impermissible consequence of exposure to risk’.

Personal scope of application: Article 1 Refugee Convention

To be able to rely on the protection of Article 33 of the Refugee Convention, an individual must personally fall within the scope of the Convention. In other words, he or she must be regarded as a ‘refugee’ as has been defined in Article 1A of the Refugee Convention. Article 1A para. 2 of the Refugee Convention defines a refugee as: any person “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.” This includes asylum-seekers who fall under the definition of ‘refugee’ awaiting the final decision on their refugee determination procedure. It should be noted, at this point that a refugee status is declaratory, and not part of a determination process to establish one as a refugee. If a person falls within the definition

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90 Ibid, p. 1334
91 Ibid p. 1335 (Unless they can be sent to a safe third country, the requirements for a safe third country and when this applies falls outside of the scope of this research and as such will not be further discussed).
92 Ibid, p. 1335
94 Ibid, p. 302
of Article 1A para 2, they are a refugee. Regardless to whether a State grants them asylum or not. Furthermore, and in particular important for the purpose of this research, refugees requesting protection at an embassy in their own country cannot rely on the protection of the Refugee Convention as they are not outside of their own country. Strictly speaking they are internally displaced people.\textsuperscript{96} The requirement to be outside of one’s own country is also referred to as the \textit{alienage requirement} by Hathaway and Foster.\textsuperscript{97} A consulate although falling within the jurisdiction of the representative state, is not officially part of the territory of the State whose interests are being represented.\textsuperscript{98} However, it is clear that the alienage requirement is met if a consulate is located outside of one’s own country, for example, in neighbouring countries.\textsuperscript{99}

If a person falls within the ‘refugee’ definition, he or she automatically falls within the scope of Article 33 and can enjoy the protection of the prohibition of refoulement, if applicable. This, however, means that the protection of Article 33 is limited, as certain groups of people are excluded from its protection (Article 33 para. 2) and from the protection of the Refugee Convention in its entirety (Article 1F). However, such persons can rely on other international provisions (such as Article 3 ECHR).

The following section will go into a deeper analysis of the wording of Article 33 para. 1, in order to fully understand the scope of the non-refoulement principle and the obligations that follow from it.

3. ‘No contracting state’

Every State that has acceded to the Refugee Convention, ratified and signed it are bound to the Refugee Convention. Regardless as to whether they have signed and ratified the later adopted Protocol (1967). The opposite is also true, States that have only signed and ratified the Protocol are also bound to Article 33.\textsuperscript{100}

4. ‘Shall expel or return (“refouler”)’

The term ‘expulsion’ does not have a uniform and universally defined meaning. However, it can be generally defined to constitute a State conduct which orders a person to leave the territory of the State and bars re-entry (often for a specific time-period). Expulsion thus solely refers to removing a refugee from the territory of the State.\textsuperscript{101}

The term ‘return’, in a dictionary reading, refers to: ‘to bring, send or put (a person or thing) back to a former place.’\textsuperscript{102} Here, return indicates any measures that returns a refugee to the frontiers of territories where their life or freedom is endangered.

The term ‘refouler’ refers to a Belgian and French administrative law that means ‘measures bringing a person back to the frontier of a neighbouring State.’\textsuperscript{103} This also includes acts of non-admission.

\textsuperscript{96} J. Hathaway & M. Foster, \textit{The law of Refugee Status}, (Cambridge University Press 2014), p. 23 HF
\textsuperscript{97} Ibid
\textsuperscript{98} Ibid
\textsuperscript{99} Ibid
\textsuperscript{101} Ibid, p. 1363
\textsuperscript{102} Definition ‘return’< https://www.merriam-webster.com/dictionary/return> accessed 10 September 2018
5. A ‘refugee’

This requirement has already been discussed under the personal scope of application of the Refugee Convention.

6. ‘In any manner whatsoever’

The words ‘in any manner whatsoever’ indicate that the intent of the drafters of the Refugee Convention was to ‘prohibit any act of removal or rejection that would place the person concerned at risk.’ Prohibited State conduct can be both intentional as well as non-intentional acts and can either consist of a particular action or inaction. For example: a State is prohibited from withholding or reducing basic necessities such as food and water in an effort to force refugees to voluntarily leave ‘the frontiers of territories where they will be at risk.’

7. ‘To the frontiers of territories’

‘Frontiers of territories’ refer to: the territory of the country of origin or country of last habitual residence and also includes the frontiers of that state. The act of removing a refugee in literature is often referred to as either direct or indirect refoulement. Direct refoulement can occur if a refugee is sent to a State where they fear persecution. This also means that a refugee cannot be sent to another State where the authorities of the country of persecution are present. This refers to a situation of occupation and where the military or security services of the country of persecution are present.

Another form of refoulement which is also prohibited under Article 33 para. 1 is what is referred to as indirect refoulement. This arises when a State sends a refugee to another country which then subsequently sends them to the country of persecution.

8. ‘Where his life or freedom would be threatened’

The prevailing view is that ‘threats to life and freedom’ is to be interpreted as broadly as possible to also include all forms of a ‘well-founded fear of being persecuted’ in line with Article 1A para. 2. Otherwise, not all refugees would be protected and that would undermine the object and purpose of the Refugee Convention. This would leave room for States to return refugees that would otherwise fall within the scope of Article 1A para. 2.

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105 Ibid, p. 1367
106 Ibid, p. 1367
107 Ibid, p. 1380
108 UNHCR SCIP. UNHCR EC/SCP/2 (1977)
Material scope of application: the nexus requirement

9. ‘On account of his race, religion, nationality, membership of a particular social group or political opinion’

A refugee needs to establish that there is a nexus or connection between who they claim to be (‘on account of’) and the risk they face of ‘being persecuted’ in the country of persecution.¹¹¹ There has to be ‘a causal relationship’ between ‘the risk of ‘being persecuted’ and the protected ground.’¹¹²

Having discussed the definition and scope of the prohibition of refoulement under the Refugee Convention, the following section will focus on the ECHR.

2.4. The prohibition of refoulement: Article 3 of the European Convention on Human Rights

This section will focus on the non-refoulement principle as laid down in the ECHR. It will follow the same approach as the previous section, however, this section will also additionally discuss relevant case law.

Article 3 ECHR¹¹³ stipulates that:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”

The prohibition of torture or inhuman or degrading treatment or punishment under Article 3 of the ECHR is often considered to be ‘the most absolute and sacred of fundamental human rights.’¹¹⁴ The ECtHR has noted that ‘the prohibition of torture occupies a prominent place in all international instruments on the protection of human rights.’¹¹⁵ It should be noted that, the prohibition of torture or inhuman or degrading treatment also means a prohibition against refoulement.

Similar to the Refugee Convention, the non-refoulement principle under the ECHR contains both a negative obligation not to return someone to a place where they face a real risk of ill-treatment as well as a positive obligation to facilitate access to the territory.

Before anyone can rely on the protection of the ECHR, they must fall within the scope of the ECHR. Article 1 of the ECHR specifies that: ‘the High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of this Convention.’ Article 1 serves as the scope of application of the ECHR and defines the obligations of its State Parties.¹¹⁶ The requirement of jurisdiction, referred to, is to create or invoke State responsibility and liability under the ECHR.¹¹⁷ Once this requirement is fulfilled, it is determined that the ECHR is applicable. The following section will focus on the content and scope of Article 3 of the ECHR.

¹¹² Ibid, p. 363
¹¹³ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), Article 3 ECHR
¹¹⁵ Ould Dah v. France (App no. 13113/03) ECHR 17 March 2009
¹¹⁶ İslı Karakas & Hassan Bakırçi, Extraterritorial Application of the European Convention on Human Rights in A. van Aaken & I. Motoc (eds), The European Convention on Human Rights and General International law (Oxford University Press 2018), p. 113
¹¹⁷ Catan v. Moldova and Russia (App no. 43370/04 ) ECtHR 19 October 201, para. 103
1. Personal scope of application = ‘everyone’

The term ‘no one’ refers to the personal scope of application of Article 3 ECHR. In other words, it defines who can rely on the protection of the prohibition of torture. Unlike Article 33 of the Refugee Convention, the personal scope of Article 3 is broader. Anyone regardless of his or her physical location, whether outside or inside of their country of origin, is protected by the prohibition of torture under Article 3. As long as the refuted actions fall within the jurisdiction of the contracting State of the ECHR. This means that, as long as the ECHR applies, it is possible for internally displaced people to benefit from the protection of Article 3 ECHR. As we have seen above, they fall outside of the scope of the Refugee Convention and cannot rely on the protection against refoulement on the basis of Article 33. Furthermore, people falling within the definition of Article 1F can also rely on Article 3 ECHR. However, this distinction in the personal scope of application is because anyone, and not solely refugees, can rely on the protection of Article 3 ECHR. Furthermore, Article 3 ECHR also applies to stateless people and irregular migrants, as limitations on the basis of nationality or legal status is prohibited. This also means that the conduct of the person relying on the protection against refoulement is irrelevant. If this was to be the case, the absolute character of Article 3 would be void.

2. Material scope of application

There is also a difference in the material scope of application between Article 3 of the ECHR and Article 33 of the Refugee Convention. The material scope of the Refugee Convention is limited by the requirement of a nexus between the risk and the Convention ground before a refugee can rely on the protection of Article 33. In contrast, the grounds on which Article 3 ECHR can be invoked are not restricted in that manner.

Furthermore, in contrast to Article 33 of the Refugee Convention, Article 3 cannot be limited, even in ‘the event of a public emergency threatening the life of the nation.’ Because the prohibition of torture “enshrines one of the fundamental values of democratic societies.”

Article 3 ECHR, similar to Article 33 of the Refugee Convention, protects individuals from both direct and indirect refoulement.

When applying Article 3 to the conditions of refugees and asylum-seekers in relation to the EU, a few comments can be made:

- The behaviour of the refugee is irrelevant as Article 3 ECHR is an absolute right. As has been discussed before, no derogation is possible. In the context of the EU this means that the conduct of a person evading border control is irrelevant. The person in question can still rely on the protection of Article 3 ECHR. While States may

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118 V. Moreno Lax, Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law. (Oxford University Press 2017), p. 268
119 Ibid, p. 268
120 D. v. United Kingdom (App no. 30240/96) ECHR 2 May 1997, para. 48
121 Chalal v. United Kingdom (App no. 22414/93) ECHR 15 November 1996, para. 160 Also see V. Moreno Lax, Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law. (Oxford University Press 2017), p. 268
122 V. Moreno Lax, Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law. (Oxford University Press 2017, p. 268
123 Ibid, p. 269
124 Ireland v. United Kingdom (App no. 5310/71) ECHR 18 January 1978, para. 163
125 Soering v. United Kingdom (App no. 14038/88) ECHR 7 July 1989, para. 88
126 V. Moreno Lax, Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law. (Oxford University Press 2017, p. 271
have an interest in controlling the entry, residence, and removal of TCNs, this cannot be balanced against the absolute right of the individual to be protected from torture. ‘No quid pro quo reasoning may be applied.’

The vulnerability of refugees should be taken into account.  

3. Threshold application of Article 3: ‘severity’

The threshold for the application of Article 3 ECHR requires ‘a minimum level of severity that involves actual bodily injury or intense physical or mental suffering’. Assessment of such harm depends on the circumstances of a case and takes into consideration ‘the duration of the treatment, its physical and mental effects and, in some cases, the sex, age, and state of health of the victim.’ The threshold for ‘inhuman or degrading treatment’ is that the ‘the suffering or humiliation involved must go beyond that which is inevitably connected with a given form of legitimate treatment or punishment’.

4. Difference between torture and inhuman or degrading treatment

Torture is not defined in the ECHR. The case law of the ECHR indicates that torture is defined as ‘an aggravated form of ill-treatment’, ‘causing very serious and cruel suffering’. Inhuman and degrading treatment are therefore a lesser cruel form of suffering.

Having discussed both the material and personal scope of the non-refoulement principle, the remainder of this chapter will focus on the territorial scope of the prohibition against refoulement. This is important, as the purpose of this research is to establish whether there is an obligation for EU Member States to issue humanitarian visas to refugees. These visas, as has been mentioned in chapter 1, are to be issued at embassies or consulates of EU Member States abroad and as such it is vital to research the territorial and extraterritorial application of both Articles 33 of the Refugee Convention and Article 3 ECHR.

2.5. The territorial application of the prohibition against refoulement

2.5.1. Refugee Convention: extraterritorial applicability?

The majority of the provisions of the Refugee Convention require refugees to have some sort of a jurisdictional attachment to the receiving State, before they can rely on its protection. However, certain core rights, such as the prohibition against refoulement, are applicable without any constraints or formal prerequisites for protection.

However, does this also mean that the prohibition of refoulement can be applied in extraterritorial cases? Whether Article 33 is applicable extraterritorially depends on the ‘text, context, object and purpose’ of the Refugee Convention. As has been mentioned above, Article 33 can only be relied on by refugees that fall within the scope of the Refugee Convention and, as such, are not excluded from it. The most important aspect of the personal scope of application, is the alienage requirement, mentioned above in section 2.1. This means that the Refugee Convention does not apply in cases where refugees request protection in an embassy or diplomatic mission of an EU Member State that is inside

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127 Ibid
128 Ibid
130 Ibid, p. 171 and 172
131 Ibid, p. 174
133 Ibid, p. 160
their own country. However, refugees requesting protection in embassies outside of their own country, do fall within the Refugee definition as they are outside of their own country. Furthermore, as has been mentioned in section 2.3, the Refugee convention is applicable to the conduct of embassy personal as so far as it falls within their jurisdiction to act.135

2.5.2. ECHR: extraterritorial applicable?

As has been mentioned above, Article 1 ECHR serves as the cornerstone for the applicability of the ECHR. Article 1 also serves as the starting point in determining whether or not a conduct can be attributed to the State. In other words, whether or not an action (or inaction) falls within the jurisdiction of the State. The State’s jurisdiction is ‘primarily territorial’136 and extraterritorial jurisdiction can only arise in exceptional cases. For this research, it is important to understand in which cases extraterritorial jurisdiction arises and how the ECtHR interprets this notion. The following section will discuss the ECtHR case law in this area.

The ECtHR jurisprudence on the extraterritorial application of the ECHR has evolved over the years. The earliest case concerning the extraterritorial application of the ECHR was the X. v. Federal Republic Germany137 case in 1965. This case concerned a German national seeking protection from its own embassy in Morocco. The European Commission of Human Rights (‘the Commission’) did acknowledge that a State’s responsibility, under certain circumstances, can be engaged through conduct of diplomatic or consular staff as they ‘exercise authority of persons’. This is understandable, as diplomatic and consular agents by virtue of their role represent the State and as such the State is liable for their actions. In later cases, the ECtHR reiterated that the conduct of diplomatic or consular personnel is attributable to the State.138

The Commission in its Cyprus v. Turkey judgment139 in 1975 ruled that the conduct of the Turkish army in Northern Cyprus was attributable to Turkey because its army exercised ‘authority and responsibility over persons.’140 The Commission argued that, the exercising of authority by the army over the people in that region is what engaged the State’s jurisdiction. And not the strict definition of territoriality. Turkey did not annex the region or established a civil or military government, however, as the Commission ruled jurisdiction can also arise extraterritorial. This way of reasoning to determine when a State’s jurisdiction is engaged and emphasising the exercising of authority over a person to be the decisive element prevailed in the ECtHR judgments. Until, the Soering judgment in 1989, which added another dimension to jurisdiction.141

Soering: prospective breaches of refoulement and extraterritorial jurisdiction

The ECtHR gave its judgment in the Soering case in 1989. This case is interesting for this research as the ECtHR for the first time dealt with the question, whether Article 3 can be invoked in situations where a State party’s actions lead to adverse consequences outside of the State party’s jurisdiction as a result of inhuman treatment by the receiving State (para. 85). In other words, does Article 3 protect people from prospective breaches of the non-refoulement principle?

The ECtHR in its judgment emphasised that the ECHR cannot impose obligations on non-State parties (para. 86). However, the ECtHR does argue that State Parties cannot absolve themselves from their responsibilities under Article 3 ECHR (para. 86). The ECtHR, in particular, argues that ‘the object and purpose of the Convention as an instrument

136 Assanidze v. Georgia (App no. 71503/01)ECtHR 8 April 2004, para. 139
137 X. v. Germany (App no. 1611/62) ECtHR 25 September 1965
138 X. v. the United Kingdom (App no. 7547/76) ECtHR 15 December 1977
139 Cyprus v. Turkey (App. No 6780/74 and 6780/75) ECtHR 10 July 1976
140 Ibid, p. 21
for the protection of individual human beings require that its provisions be interpreted and applied so as to make its safeguards practical and effective’ (para. 87). The ECtHR goes further and states that State Parties that knowingly sent a person to a country where he or she faces torture are acting in contrary to the ‘spirit and intendment’ of article 3 (para. 88). The ECtHR essentially says that when States can foresee torture or inhuman treatment, they should act accordingly. This also means that State Parties cannot send a person to a country where he or she faces ‘a real risk of exposure to inhuman or degrading treatment or punishment prescribed by Article 3.’ (para. 88).

The importance of this judgment for this research is that the ECtHR for the first time extended its interpretation on extraterritorial jurisdiction to also include prospective breaches due to adversely consequences of a State party’s action. Not only can a State’s jurisdiction be engaged by effective control over a territory or person but also when inhuman treatment occurs (or could occur) in the territory of the receiving State as an adverse consequence of a State party’s action to extradite in refoulement cases. This judgment highlights the absolute character of the prohibition of refoulement and the extent of the obligation of State parties to ensure its protection.

Bankovic: applicability of ECHR limited to legal space and extraterritorial jurisdiction only in exceptional circumstances

The ECtHR gave its judgment in its Bankovic case in 2001. This case was considered to be ground-breaking. It reshaped the notion of extraterritorial jurisdiction and the applicability of the ECHR, in relation to the conduct of the State Parties in foreign territories. This case concerned Yugoslavian citizens (para. 7). During a NATO intervention, the applicants and their family members were either injured or killed by airstrikes (para. 10). The applicants complained that the NATO members, which also are State Parties to the ECHR, violated their rights under the ECHR. This case, first and foremost, concerns the question of admissibility and whether or not the conduct of a collective (NATO) is attributable to the State Parties.

The ECtHR concluded that the ECHR was regionally restricted in relation to its extraterritorial application (para. 80). The ECtHR in essence argued that the ECHR ‘was not designed to apply throughout the world even in respect to the conduct of Contracting parties (para. 80).’ The ECtHR thus ruled that the case was inadmissible.

Al-Skeini: restoring the applicability of the ECHR in extraterritorial circumstances: ECHR not regionally restricted

The ECtHR gave its judgment in the much-anticipated Al-Skeini case in 2011. This case concerned Iraqi nationals that filed applications on behalf of their family members that were either shot and killed by British troops, or died in custody, during the Iraq occupation (paras. 34 until 63). The applicants argued that the fatally injuring of their relatives fell within the jurisdiction of the United Kingdom and in particular within the jurisdiction of Article 1 ECHR (para. 95). The question here is thus similar to the one asked in Bankovic mainly: can a State Party be held reliable?

The ECtHR overruled its Bankovic judgment by recognising that the ECHR is not regionally restricted in its extraterritorial application of jurisdiction. Jurisdiction is tied to the conduct of States, and not to the geographical space of the ECHR (as a European convention) (para. 142). The ECtHR ruled on the question of jurisdiction that there was a link between the deceased and the U.K. as the U.K. ‘exercised authority and control over the individuals killed’ (para. 149).

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143 Bankovic and others v. Belgium (App no 52207/99) ECtHR 12 December 2001
144 Al-Skeini v. United Kingdom (App no. 55721/07) ECtHR 7 July 2011
Hirsi Jamaa: application ECHR and State responsibility can also arise in the High Seas

This case concerned 24 applicants who were all either Somali or Eritrean nationals (para. 9). They left Libya by boat in an attempt to reach the EU (through Italy) but were intercepted by the Italian Police and Coast Guard (paras. 9 and 10). The applicants were subsequently returned to Libya (para. 11). The applicants complained that their rights under the ECHR were violated, in particular the prohibition against refoulement and also the prohibition against collective expulsion. Article 4 of the Fourth Protocol prohibits States from expelling a group of foreigners as a collective. Collective expulsion means: “any measure of the competent authority compelling aliens as a group to leave the country. Except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group.”

The ECtHR in this first answer the question of admissibility. That is the question whether Italy can be held reliable for the actions of the Italian Police and Coast Guard (paras 70 to 82). The ECtHR starts off by reiterating its established case-law when jurisdiction can arise, namely that jurisdiction is primarily territorial and extraterritorial jurisdiction can arise in exceptional cases (paras 71 and 72). The ECtHR then states that jurisdiction in exceptional cases can arise through ‘the full and exclusive control over a prison or a ship’ (para. 73) and ‘exercising control and authority over an individual’ (para. 74). When applying this to the case, the ECtHR ruled that conduct and actions fall within the jurisdiction of Italy (para. 82). Even though these acts took place in the high seas, they occurred ‘on ships flying the Italian flag’ (para. 76). Furthermore, the ECtHR acknowledged that in accordance with international law that these types of acts are ‘cases of extraterritorial exercise’ of a State’s jurisdiction (para. 76). The ECtHR concluded that where such acts occur, ‘where there is control over another’ that control is synonymous with a de jure control over individuals (para. 77). The ECtHR then mentions that State Parties cannot ‘circumvent its jurisdiction under the Convention’ by stating that its officials exercised ‘minimal control’ over the individuals concerned or because the events took place in the high seas (para. 79). The ECtHR concluded that the individuals concerned were under the continuous and exclusive de jure and de facto control of the Italian authorities’ (para. 81). The ECtHR thus ruled that the case falls within the jurisdiction of Italy and is therefore admissible.

Concerning the claim on Article 3 ECHR and the Fourth Protocol, the ECtHR concludes that both Article 3 ECHR (para. 138) as well as Article 4 of the Fourth Protocol were violated (para. 186). Concerning Article 3 it is interesting to point out that the ECtHR found that this case concerned both direct (para. 136) as well as indirect refoulement (para. 158). Direct refoulement occurred when Italy forcibly returned the applicants to Libya, which left them at risk to be repatriated to their countries of origin (Somalia and Eritrea respectively).

N.D. & N.T.: State responsibility because of de facto control

A similar case concerning a push-back was the N.D. & N.T. v. Spain case. This case concerned an Ivorian and Malian national that tried to enter Spain through an overland border (Melilla) in Morocco (para. 1). Spain argued that the applicants were never in their control because the acts took place outside of its territory (para. 44). The ECtHR acknowledged that the border crossing between Spain (Melilla) and Morocco (Ceuta) was changed and argued that a State Party cannot change its border to create a ‘favourable situation’ for itself (para. 53). Furthermore, the ECtHR concluded that Spain exercised de facto control over the individuals concerned. The ECtHR ruled that the individuals

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145 Hirsi Jamaa and others v. Italy (App no 27765/09) ECHR 23 February 2012
146 Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto Article 4 Protocol 4 (Protocol 4), article 4
147 Hirsi Jamaa and others v. Italy (App no 27765/09) ECHR 23 February 2012 para. 166
concerned were ‘under the continuous and exclusive control’ of Spain ‘from the moment they descended from the border fences.’ (para. 54). The ECtHR therefore ruled that the conduct by the Spanish officials was attributable to Spain and thus falls within its jurisdiction (para. 55). The ECtHR then ruled that, as the case was admissible, that pushing the migrants back into Morocco without any consideration for their individual circumstances resulted in a prohibition of Article 4 of the Fourth Protocol.

The following section will focus on the ECtHR case law in particular of interest refugees. Again, these cases will be discussed in chronological order.

**Article 3: ECtHR case law specific to the situation of refugees and asylum-seekers**

The ‘generalised violence’ criteria:

**NA v. UK:**\(^{149}\) this case is of importance for this study because the ECtHR explicitly recognized that ‘in more extreme cases of general violence’ sending anyone back to that region would expose them to ill-treatment in contrary to Article 3 ECHR (para. 115).

**Sufi and Elmi v. UK:**\(^{150}\) this was the first case in which the ECtHR had found that the ‘generalised violence’ criteria was met. The ECtHR concluded that the situation in Mogadishu was considered to be so violent that sending anyone there would expose them to a real risk of ill-treatment, solely on the basis of their presence in there (para. 239).

The case law in this area is of particular importance to this research because if such a situation of generalised violence arises, then a refugee does not need to substantiate their claim against protection against refoulement. Their sole presence in the region is enough to meet the ‘real risk’ requirement needed to rely on Article 3 ECHR.

**2.6. Closing remarks**

Both the Refugee Convention as well as the ECHR protect refugees from refoulement. However, in analysing both provisions a few comments can be made:

I. The Refugee Convention is the primary source of international refugee law, however, the protection and the reach of the prohibition of refoulement is limited under this framework. The Refugee Convention, and thus, Article 33 can only be invoked if a refugee is outside of his or her own country (alienage requirement). The ECHR, in contrast, is not limited in its territorial application and the prohibition against refoulement can also be applied in one’s own country. For the purpose of this research, that concludes to say that refugees that avail themselves to the diplomatic powers of an EU Member States, inside their own country can only rely on the protection against refoulement as codified under the ECHR.

II. The personal scope of application is also broader under the ECHR. The Refugee Convention only protects refugees against refoulement therefore a person needs to fall within the definition of Article 1A of the Refugee Convention. The ECHR on the other hands, is not limited. Anyone can rely on Article 3 and invoke its protection against refoulement.

III. The material scope of Article 3 of the ECHR is also broader. Article 3 offers refugees absolute protection, whereas Article 33 of the Refugee Convention is limited by the derogative and exclusion clauses in Articles 33 para. 2 and 1F. This means that certain refugees cannot rely on the protection against refoulement under the Refugee Convention.

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\(^{149}\) NA v. United Kingdom (App no. 25904/07) ECtHR 17 July 2008

\(^{150}\) Sufi and Elmi v. United Kingdom (App no. 8319/07) ECtHR 28 November 2011
This concludes to say that Article 3 offers an absolute protection against refoulement applicable in various circumstances, also within the territory of the country of origin.

The next chapter will focus on the prohibition of refoulement under EU law, addressing both the EU Charter as well as applicable secondary EU law, in particular, the SBC and the Visa Code.
CHAPTER 3

WHAT IS THE SCOPE AND REACH OF THE NON-REFOULEMENT PRINCIPLE UNDER EU LAW?

3.1. Introduction

The previous chapter focussed on the definition and scope of the prohibition of refoulement under international law. This chapter deals with the definition and scope of the prohibition of refoulement under EU law and will address both primary EU law (EU Charter) as well as secondary EU law (SBC and Visa Code). The prohibition against refoulement is codified under the EU Charter and is further also mentioned in various EU legislation such as the SBC.

This chapter bears a similar approach and lay-out as the previous chapter and is divided into 5 sections: 1) the establishment of the EU Charter (3.2), the right to asylum under EU law (3.3.), the prohibition against refoulement under primary EU law (3.4), the prohibition against refoulement under secondary EU law (3.5) and the territorial application of the prohibition against refoulement (3.6).

3.2. The EU Charter of Fundamental Rights

Before going into the provisions of the EU Charter it is essential to discuss the meaning of the EU Charter within the EU legal framework. The EU Charter codifies and gives expression to ‘the founding values of the EU’. The EU Charter in essence codifies and brings into effect the fundamental rights and freedoms mentioned in Article 2 TEU. The EU Charter was first drafted in 1999 at the request of the European Council. The European Council initiated this request to express and stress all the accomplishments the EU has made in the area of human and fundamental rights. The following year, in October 2000, a draft version of the EU Charter was drawn up and the EU Charter was proclaimed by the EU institutions (the European Commission, the European Parliament and the Council) in December 2000 at the Nice summit. The representatives of the Member States also politically acknowledged and endorsed the EU Charter at this meeting. Nevertheless, this proclamation and approval did not create a legally binding document. The EU Charter became legally binding when the Lisbon Treaty came into force in December 2009. It should be noted, that the EU Charter has the same legal status as the EU Treaties on the basis of Article 6 TEU and thus forms a primary source of EU law.

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153 Not to be mistaken for the Council which is a co-legislative institution of the EU and consists of representatives of each Member State, at a ministerial level. The European Council consists of the head of governments of each Member State. For a further elaboration see Craig and de Burca p. 41 and p. 47
155 The EU Treaties refer to: 1) the treaty of the European union (TEU) and 2) the treaty on the functioning of the European Union (TFEU).
156 Article 6 TEU para. 1 specifies that: ‘The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European of 7 December 2000, as adapted at Strasbourg on 12 December 2007, which shall have the same legal value as the Treaties’
Scope of application:

Article 51 deals with the scope of application of the EU Charter and specifies, in para. 1, that the EU Charter is applicable to EU institutions, EU bodies and to EU Member States ‘only when they are implementing EU law.’ This means that the EU Charter is only applicable if Member States are implementing and enforcing EU law. Article 51 para 2 further specifically states that the ‘Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties.’ The application of the EU Charter is thus limited to measures or situations falling within the scope of EU law and does not extend the EU powers beyond those defined in the EU treaties.  

Furthermore, Article 52 para. 3 is, in particular, important because it specifies that the provisions of the EU Charter are to be the same as those laid down in the European Convention of Human Rights (ECHR). Whether the EU Charter is applicable in the situation concerning the issuing of humanitarian visas at foreign embassies of the EU Member States will be further discussed in section 3.6, that deals with the extraterritorial jurisdiction of the EU Charter.

The following sections will deal with the right of asylum and the prohibition against refoulement codified under the EU Charter.

3.3. The right of asylum

The right of asylum is codified in Article 18 of the EU Charter and stipulates that:

“The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.”

There is no prevailing opinion on the precise meaning and content of Article 18 in legal doctrine. Gil-Bazo argue that Article 18 contains a ‘full-fledged’ right to asylum. Labayle, in contrast, argues that the content of Article 18 is identical and interchangeable to the content of the right of asylum under the Refugee Convention (e.g. Article 33 of the Refugee Convention). As is evident from its wording, the right to asylum under EU law takes into account the provisions of the Refugee Convention. The content of the prohibition against refoulement in Article 33 of the Refugee Convention is thereby incorporated into Article 18 of the EU Charter, so that compliance with Article 18 requires compliance with Article 33.

The correlation between Articles 18 of the EU Charter and Article 33 of the Refugee Convention was also underlined by the CJEU in its N.S. judgment. The CJEU underlined that the CEAS is based on the full and inclusive application of the Geneva Convention and the guarantee that nobody will be sent back to a place where they again risk being

161 Case C-411/10 N.S. and M.E. [(2011]
persecuted.’ The Court herein explicitly referred to Article 18 of the EU Charter and Article 78 of the TFEU as the foundation of this obligation.\textsuperscript{162}

3.4. Non-refoulement under primary EU law: Articles 4 and 19 of the EU Charter

The prohibition against refoulement under the EU Charter is in particular important because of its hierarchal position within EU sources. The EU Charter is considered to be a primary source.\textsuperscript{163} The following section will further analyse the provisions of the EU Charter that deal with the prohibition of torture (Article 4) and the prohibition of removal, expulsion and extradition (Article 19).

**Article 4: prohibition of torture**

Article 4 of the EU Charter stipulates that:

> “No one shall be subjected to torture or to inhuman or degrading treatment or punishment”

When assessing the definition of the prohibition of torture under the EU Charter, it is clear that it correlates with Article 3 of the ECHR and it is in fact identical in wording.\textsuperscript{164} The forms of ill-treatment under Article 4 are categorised from the severest (torture) to the lesser severe forms (punishment). However, all and any forms of ill-treatment is prohibited, including the lesser forms (degrading treatment or punishment). What all these forms have in common is ‘the infliction of severe pain or suffering.’ Furthermore, the prohibition of torture is an absolute right which means that no derogation is possible. This means that it cannot be set aside on the basis of any other right or be disregarded on the basis of the behaviour of the individuals involved (victims).\textsuperscript{165} Similar to the prohibition against refoulement as codified in the ECHR and the Refugee Convention, the prohibition against torture under Article 4 contains both a negative as well as a positive obligation to ensure its protection. Meaning that EU Member States in some cases are required to act in order to ensure the prohibition against torture is respected.\textsuperscript{166} In practice, the prohibition of torture is often a preventive measure, in many ways to ensure that its irreversible effects do not materialise.\textsuperscript{167} This positive obligation to respect the prohibition primarily is directed to EU institutions, bodies and EU Member States when implementing EU law. However, EU Member States also have an obligation to ensure that the prohibition of torture is respected within their jurisdiction. As has been mentioned in Chapter 2, the case law of the ECHR is of relevance for the interpretation of the prohibition against refoulement under EU law. The ECHR stated in its \textit{A v U.K.} case\textsuperscript{168} that the prohibition of torture ‘requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals.’

\textsuperscript{162} Case C-411/10 N.S. and M.E. [(2011), para. 75.  
\textsuperscript{163} V. Moreno-Lax, Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law. (Oxford University Press 2017), p. 282  
\textsuperscript{164} Ibid, p. 283  
\textsuperscript{165} Ibid p. 92  
\textsuperscript{166} Ibid p. 89  
\textsuperscript{168} A v. The United Kingdom (App no. 25599/94) ECtHR 23 September 1998, para. 22
**Article 19: prohibition of removal, expulsion and extradition**

Article 19 para. 1 of the EU Charter specifies that: ‘collective expulsions are prohibited’ and has the exact same meaning and scope as Article 4 of the Fourth Protocol to the ECHR. Article 4 of the Fourth Protocol prohibits States from expelling a group of foreigners as a collective. Two cases of the ECtHR are of importance here and have been discussed in Chapter 2 and shall thus not be discussed in depth. The first case is the *Hirsii Jamaa* case in which the ECtHR ruled that the pushing back of migrants and asylum-seekers on the high seas violated Article 4 of the Fourth Protocol as well as Article 3 of the ECHR. The second case is the *N.D & N.T. v. Spain* case, in which the ECtHR ruled that the pushing back of migrants overland to Morocco without any consideration for their individual circumstances, resulted in a prohibition of Article 4 of the Fourth Protocol.

Article 19 para. 2 of the EU Charter stipulates that:

“No one may be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”

Similar to Article 4, Article 19 para. 2 also correlates with Article 3 of the ECHR in particular as it also does not permit derogation. Now that the definition of Articles 4 and 19 have been explained, it is important to discuss the protection standards offered by these provisions.

Articles 4 and 19 of the EU Charter in essence have incorporated the content, scope and substance of both Article 3 of the ECHR as well as Article 33 of the Refugee Convention. Therefore, EU Member States are required to comply with the prohibition against refoulement as laid down in these two aforementioned Articles in order to satisfy the conditions of the EU Charter. AG Trstenjak in the CJEU *N.S.* judgment rightfully concluded that ‘even though an infringement of the Geneva Convention or the ECHR in connection with the transfer of an asylum-seeker.. must be distinguished strictly, de jure, from any associated infringement of EU law, there is, as a rule, a de facto parallel in such a case between the infringement of the Geneva Convention or the ECHR and the infringement of EU law’ (para. 153).

The CJEU also concluded in its *H.T.* judgment that ‘Member States must respect the principle of non-refoulement in accordance with their international obligations’ (para. 42) referring explicitly to Article 33 of the Refugee Convention. This case concerned a refugee whose residence permit was revoked on the basis of a conviction and subsequently was issued with an expulsion decision (para. 36). The CJEU was asked to clarify, whether the Qualification Directive allows for the revocation of a refugee’s residence permit and expulsion (paras. 38 and 39). The CJEU starts of by

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169 Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto Article 4 Protocol 4 (Protocol 4), article 4
170 *Hirsii Jamaa and others v. Italy* (App no 27765/09) ECHR 23 February 2012
171 Ibid, p. 286
173 Ibid, p. 286
174 Opinion of AG Trstenjak, see note 160
175 Case C-373/13 H.T. v. Land Baden-Württemberg [2015]
stating that Article 21 of the Qualification Directive\textsuperscript{176} requires Member States to respect the principle of non-refoulement (para. 42). The CJEU then states that Article 21 does allow for refugees to be sent back. However, only in cases not prohibited by international obligations and ‘where there are reasonable grounds for considering that the refugee is a danger to the security of the Member State’ (para. 42). This means that a refugee can only be sent back if the situation does not fall within the scope of refoulement. The CJEU then goes on to state that a convicted refugee who upon return would be subjected to refoulement cannot be sent back (para. 44). Subsequently, the residence permit of that refugee can also not be revoked (para. 44). This case is important because it highlights the importance of the protection against refoulement within the EU. EU Member State are thus obliged to respect the principle of non-refoulement on the basis of their international obligations when enforcing law. The CJEU further states that the ‘principle of non-refoulement is guaranteed as a fundamental right by Articles 18 and 19 (2) of the Charter of Fundamental Rights of the European Union.’ (para. 65).

3.5. The protection against refoulement under secondary EU law: the SBC and the Visa Code

The following section will focus on addressing the prohibition against refoulement under the SBC (Article 6 para. 5) and the Visa Code (Article 25 para. 1). The overall scope, rationale and placement of the SBC and the Visa Code within the wider EU legal framework on border control has been discussed in chapter 1 and will thus not be discussed in depth. However, a reference to its importance and definitions will be provided.

3.5.1. Schengen Borders Code

The SBC\textsuperscript{177} regulates the movement of persons across the internal and external borders. The SBC in its recitals obliges Member States to ‘respect fundamental rights and observe the principles recognised in particular by the EU Charter.’ (recital 36). Furthermore, Member States are obliged to apply the SBC in accordance with their obligations ‘as regards international protection and non-refoulement’ (recital 36).

The obligation to respect the prohibition against refoulement and the rights of refugees are explicitly mentioned in several provisions of the SBC, in particular in:

<table>
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<th>Article 3 para. b</th>
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<tr>
<td>“This Regulation shall apply to any person crossing the internal and external borders of Member States, without prejudice to: ... the rights of refugees and persons requesting international protection, in particular as regards non-refoulement.”</td>
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<th>Article 4</th>
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<tr>
<td>“When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the ‘EU Charter’, relevant international law, including the ‘Refugee Convention’, obligations related to access to international protection, in particular the principle of non-refoulement, and fundamental rights.”</td>
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Both Articles 3 and 4 of the SBC and its contained wording ‘without prejudice to’ and ‘shall act in full compliance’ can arguably be understood to provide refugees and asylum-seekers with a right to protection against refoulement.

\textsuperscript{176} Directive (EU) No 2011/95 of 13 December 2011 of the European Parliament and the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted [2011] L337/9, Article 21

Case refers to the old Qualification Directive, however Article 21 has not been changed.

applicable in court proceedings. The CJEU, in its case law, concluded that ‘regulations generally have immediate effect in the national legal systems without it being necessary for the national authorities to adopt measures of application’. And that ‘Member States are under a duty not to obstruct the direct effect inherent in regulations’. Regulations are therefore directly applicable in court proceedings and as such can be relied on in court by individuals. This also means that authorities and in particular border control authorities are obliged to respect the non-refoulement obligation as their competences are based on the SBC.

Furthermore, Article 3 para. 2 stipulates that the principle of non-refoulement is applicable to ‘any person’, meaning that the personal scope of application is broad and not limited to refugees and includes any TCN.

At first glance, it can be argued that the SBC contains provisions that require States to uphold the prohibition against refoulement. However, a more detailed overview of its provisions provides a different picture.

According to the SBC, refugees fall under the overarching definition of TCNs and as such are not giving a distinct status under the code. However, does this also mean that refugees and asylum-seekers are expected to comply with the entry conditions of the SBC? As has been discussed in Chapter 1, Article 6 para. 1, specifies that TCNs need to be in possession of a valid travel document (and only if required also a visa) and have ‘the willingness to return to their country of origin’. This is a requirement as the SBC regulates short-term entry and movement of TCNs within the EU. Furthermore, the CJEU in its ANAFE judgment supports this notion and specifies that Article 6 ‘governs the conditions of entry of TCNs ‘including asylum-seekers’ and that the SBC is in principle applicable to all cross-border movement by persons.

The CJEU further states that ‘strict compliance’ with these entry conditions are paramount for the functioning of ‘an area of freedom, security and justice without internal frontiers’ (AFSJ). The Court explains this as follows: ‘each Member State whose territory is part of the Schengen area must have confidence that the controls carried out by every other State in the Schengen area are effective and stringent.’ The Court, in its Air Baltic judgment, has also emphasised the importance of upholding the entry conditions of the SBC as a means to protect the external borders of the Union and to facilitate the freedom of movement within the Union.

As has been mentioned in Chapter 1, refugees and asylum-seekers often cannot meet the entry conditions of Article 6 of the SBC, as they do not have valid travel documents or visas and more importantly, cannot return to their country of origin due to a fear of persecution. Article 6 para. 5 provides a derogation to the entry conditions laid down in para. 1 for a limited group of TCN. Article 6 para. 6 sub c is in particular of importance and stipulates that:

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178 This refers to the direct effect of Regulations, see CJEU Cases C-278/02 Herbert Handlbauer, para. 24 until 35. and CJEU Case C-253/00 Muñoz y Cia para. 30
179 Case C-403/98 Azienda Agricola [2001] para. 26
180 Case C-50/76 Amsterdam Bulb BV [1977] para. 5
181 V. Moreno-Lax, Accessing asylum in Europe: extraterritorial border controls and refugee rights under EU law. (Oxford University Press 2017, p. 74
182 Ibid, p. 74. In this regard, it should also be noted that refugees by definition cannot return to their country of origin or avail themselves to the protection of that state.
183 Case C-606/10 ANAFE [2012]
184 Ibid, para. 27
185 Ibid, para. 35
186 Ibid, paras 25, 26 and 27.
187 Case C-575/12 Air Baltic [2012], paras 65,66 and 67.
“third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 may be authorised by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations.”

The wording of Article 6 para. 5 and in particular the words ‘may be authorised’ indicate that Member States have a great deal of discretion whether to allow entry. It can therefore not be argued that TCNs can rely on the protection of Article 6 para. 5 solely on the basis of international obligations.

3.5.2. The Visa Code

The Visa Code, which has been discussed in Chapter 1, regulates the procedures and conditions for the issuing of short-term or transit visas to TCNs within the EU. The issuing of humanitarian visas and in particular, Article 25 of the Visa Code have also been discussed in Chapter 1. The purpose of this section is to discuss the principle of non-refoulement in relation to the Visa Code.

In contrast to the SBC, the recitals of the Visa Code do not specifically mention the non-refoulement principle but refers to the obligation to ‘respect fundamental rights’ and to ‘observe the principles recognised in’… the ECHR and the EU Charter. Which indicates that the prohibition of refoulement, a principle under both the ECHR and the EU Charter, is applicable under the Visa Code. In that regard it should be mentioned that the Visa Code contains ‘provisions building on the Schengen acquis’ and the SBC specifically mentions that Member States when implementing its provisions ‘shall act in full compliance with’ the prohibition of refoulement.

Article 25 which regulates the issuing of LTV-visas, and which has been discussed in Chapter 1, mentions international obligations as a way to derogate from the entry conditions of the SBC. Article 25 can require Member States to issue an LTV-visa to TCN in exceptional cases on the basis of either: humanitarian grounds, for national interest or because of international obligations. As has also been discussed in Chapter 1, the CJEU has ruled on the applicability of Article 25 in relation to the issuing of a humanitarian visa on the basis of the prohibition against refoulement . As has been concluded, the CJEU has ruled that the issuing of humanitarian visas to refugees falls outside of the scope of EU law and is not regulated by the Visa Code. The CJEU concluded this on the basis that refugees by virtue of applying for asylum intent to stay longer than is permitted on the basis of the Visa Code. The CJEU also stated that the issuing of humanitarian visas would undermine ‘general structure of the CEAS system’ (para. 48). The CJEU, in particular argued that the CEAS does not allow for asylum applications to be submitted at diplomatic or consular missions of EU Member States (para. 49). What the CJEU does here is equate the issuing of a humanitarian visa to the granting and processing of an asylum claim. The CJEU ruling is in particular interesting as the CJEU itself acknowledged that the applicants at the time ‘were facing a real risk of being subjected to inhuman and degrading treatment.’ (para. 33). The CJEU thus acknowledged that there was a refoulement circumstance.

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189 Ibid, Recital 29
190 Ibid, Recital 38
192 Case C-638/16 X. and X. v. Belgium [2017]
193 Ibid, para. 43
The following section will further discuss this judgment and help answer the question whether the CJEU took full account of the principle of non-refoulement when deciding this case.

Both the AG Mengozzi\(^{194}\) and legal scholars have argued that the situation of the applicants in the X. and X case falls within the scope of EU law and thus the issuing of humanitarian visas can be regulated by Article 25 of the Visa Code.

The CJEU thus did not follow the reasoning of the AG.

The AG Mengozzi stated that ‘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.’ (point 50). What the AG is referring to is that their intent to apply for asylum does not in itself turn their LTV-visa application into an application for a long-term visa. Furthermore, the possibility of remaining in Belgium depends on a successful asylum claim, which is regulated by rules on international protection and not immigration law. The AG therefore argues that the applicants did not even need to apply for long-term visas. Because “if they had been allowed to enter Belgian territory, and on the assumption that, having lodged applications for asylum, those applications had not been processed before the expiry of their short-stay visas, their right to remain on that territory beyond 90 days would have stemmed from their status of asylum seekers. Subsequently, that right would have resulted from their status as beneficiaries of international protection.’ (point 53).

The AG further argued that the situation does fall within the scope of EU law (point 61). The AG points out that neither the objective of the Visa Code (Article 1) nor the definition of visa (Article 2) refer to the ‘grounds on which the visa is applied for.’ These reasons only come into play at a later stage, that is when deciding upon the request but do not hinder a request from being made and as such EU law is being implemented.

Furthermore, and of particular interest, the AG concludes that although Article 25 provides EU Member States with a wide discretion to issue a humanitarian visa under certain cases that discretion can be limited (point 137). In particular in situations where a person is exposed ‘to a genuine risk or infringement of the rights enshrined in the Charter, particularly the rights of an absolute nature’ such as Article 4. The AG also refers to Article 3 ECHR in that regard (point 138). The AG then points out that the case-law of the ECtHR is important when assessing whether an EU Member State has fulfilled its positive obligation (point 140). In other words, does the action of the State create a risk of refoulement? In that regard, it is important to point out the Hirschii Jamaa judgment of the ECtHR discussed above where the ECtHR found that the prohibition of direct refoulement was violated because of the expulsion of the applicants to Libya and the prohibition against indirect refoulement because of the threat of expulsion to Somalia.\(^{195}\) Similarly, it can be argued that denying a visa application can result in the applicants being forced to return to a place where they fear torture.

Brouwer\(^{196}\) disagrees with the CJEU ruling on the following grounds:

1) Brouwer argues that the CJEU applies a too narrow interpretation of the Visa Code by concluding that the application falls outside of the scope of EU law because the applicant’s intent to stay is longer than permitted

\(^{194}\) Case C-638/16 PPU X. and X. v. Belgium [2017] Opinion Advocate General Mengozzi

\(^{195}\) Brouwer E., AG Mengozzi’s conclusion in X and X v. Belgium on the positive obligation to issue humanitarian visa. A legitimate plea to ensure safe journeys for refugees, CEPS Policy Insights 2017, 2017/9 , p. 6

under the Visa Code. The CJEU, hereby, ignores that the legal basis for the issuing humanitarian visas is contained within Article 25 and is based on "international obligations." 197 Brouwer further states that the CJEU by acknowledging the situation of the applicants to be one were they faced "a real risk of being subjected to inhuman and degrading treatment" ‘explicitly recognizes that the case.. in hand does concern the protection against the absolute right of non-refoulement.' Which makes the CJEU narrow interpretation of Article 25 and the Visa Code disappointing. The CJEU missed the opportunity to address the extraterritorial application of the EU Charter.

2) Brouwer further disagrees with the CJEU for denying the applicability of the Visa Code to facilitating entry for refugees solely on the basis that it would undermine the CEAS to be ‘an unconvincing teleological interpretation,’ 198 The Brouwer points out that the CJEU by favouring the CEAS ‘neglects the explicit goals of this system which are ‘to prevent double or multiple asylum applications, and to ensure the rapid determination of the responsible member states to guarantee effective access to international protection.' 199

Both the AG opinion and the Article of Brouwer highlight the shortcomings of the CJEU ruling. The CJEU, indeed has missed an opportunity to discuss the scope and reach of Article 25 of the Visa Code. Furthermore, as has been pointed out, the judgment is disappointing as the CJEU itself has acknowledged the refoulement component in this case.

As has been discussed in Chapter 1, humanitarian visas in their objective differ from asylum applications or visas that would facilitate an asylum claim. Humanitarian visas are aimed at facilitating entry not to grant asylum. I therefore agree with the AG and Brouwer, and thus disagree with the CJEU ruling in this regard. An asylum claim can only be lodge once a person has entered the EU and that claim decides whether refugees can remain in the territory of an EU Member State.

The CJEU firm stance in this matter can also not be easily ignored. This ruling will continue to provide EU Member States with a way to circumvent their responsibilities under international obligations.

This brings me to the question, whether the EU Charter can provide protection. This will be discussed in the next section.

3.6. Territorial application of the EU Charter and the principle of non-refoulement

According to Article 51 of the EU Charter, the EU Charter is applicable ‘whenever the institutions, bodies, offices, and agencies of the Union exercise their powers’ and when Member States ‘are implementing EU law.’ The EU Charter is therefore applicable whenever acts of Member States fall within the scope of EU law. 200 The EU Charter is also applicable extra-territorial, the CJEU in its Boukhalfa judgment 201 concluded that ‘the geographical application of the Treaty as defined in Article 52 and Article 355 TFEU, does not, preclude EU rules from having effects outside the territory of the Union.’ (para. 14 and 15). The threshold being the applicability of EU law, acts falling within the scope of EU law. If acts or implementation of EU law fall within the scope of EU law, the EU Charter and its guarantees are applicable. As has been discussed above, the CJEU has firmly argued that the issuing of humanitarian visa for refugees falls outside of the scope of EU law. As it is not regulated by EU legislation. The CJEU in applying a narrow interpretation of the Visa Code failed to discuss the scope and reach of Article 25 and based its reasoning on political grounds. However, considering the CJEU firm stance herein, I cannot conclude that EU law as it currently stands allows for a basis to issue humanitarian visas for refugees.

197 Ibid, p. 2
198 Ibid, p. 4
199 Ibid, p. 4
200 Case 5/88 Wachauf [1989]
201 Case C-214/94 Boukhalfa [1996]
CONCLUSION

In recent years, the EU through arrangements with third countries has hindered how refugees can reach its territory for the purpose of applying for asylum. This externalisation of migration control has been heavily criticised. Moreover, the massive influx of refugees into these regions and the limited resources of these countries has prompted refugees to attempt to reach the shores of the EU in dangerous and often life-threatening ways by relying on human smugglers. Unfortunately, many migrants have lost their lives in an attempt to reach the EU. What is even more astonishing is that 90% of recognised refugees in the EU have entered the EU illegally.

As has been concluded in Chapter 1, access to the EU has been heavily regulated. The SBC and the Visa Code form the core legislation concerning the regulation and control of short-term entry of TCNs. The EU has not harmonised the admission and access of TCNs for the purpose of long-term stay. Article 6 of the SBC regulates the entry requirements. A TCN is required (among other things) to carry a valid travel document and, if required, a visa. The Visa Code further regulates which TCNs are required to carry an entry visa (nationals of countries that are listed in Annex I). It should be noted, that the majority of refugee-producing countries are listed in Annex I. This means that refugees are required to obtain a visa to facilitate their entry into the EU. As has been discussed, refugees often do not meet the entry conditions prescribed under the SBC. However, in the rare occasion that they do, their visa application can still be denied on the basis of an investigation by the issuing EU Member State if there is a ‘reasonable doubt’ as to the ‘intent of leaving’ the territory of the Member State within the period given. Which, in the case of a refugee could be regularly established either on the basis of country information or personal information. This means that there are currently no legal ways in which refugees can gain entry into the EU for the sole purpose of applying for asylum.

The focus of this research has, thus, been to establish whether the prohibition of refoulement can require EU Member States to issue an entry visa to refugees at their embassies, for the sole purpose of applying for asylum in its territory. These entry visas are also referred to as humanitarian visas.

As has been discussed in Chapter 2, the right to asylum is closely connected with the prohibition of refoulement and the definition of ‘refugee.’ The recognition as a refugee provides refugees with a right to remain in the territory of the State of asylum. Furthermore, the prohibition against refoulement provides refugees with the legal protection that they will not be returned to their country of origin, as long as a real risk of being subjected to ill-treatment and torture exists. These rights are thus correlated and complement each other. However, as has been concluded in Chapter 2, the right of asylum does not grant refugees with a right to obtain asylum. This means that refugees do not have a right of automatic admittance to the territory of a State to apply for asylum. However, it would be too quick to conclude that EU Member States are free to deny access and close their borders to prospective asylum-seekers. EU Member States are bound by human rights treaties that can influence their jurisdiction and limit their discretion.

As has been confirmed in Chapter 2, the prohibition against refoulement under international law is codified in the Refugee Convention and the ECHR. EU Member States are bound to both provisions. Whether the Refugee Convention and the ECHR can provide refugees with a right to facilitate their admission into the territory of an EU Member State, based on the prohibition of refoulement will be discussed below.
The prohibition against refoulement contains a negative as well as a positive obligation. A negative obligation refers to the fact that States are obliged to refrain from acting in contrary to the prohibition, that means to say: States are not permitted to return anyone to a country where their life or freedom is threatened. Subsequently, the prohibition of refoulement can also create a situation where States are forced to act by creating a positive obligation. Such a situation can arise when it is determined that a real risk of refoulement can occur if a refugee is refused admittance to the territory of a State. That State, on the basis of the prohibition, can be required to facilitate access to its territory.

Can Article 33 of the Refugee Convention create an obligation to issue a humanitarian visa?

Article 33 of the Refugee Convention governs the prohibition of refoulement under the Refugee Convention. However, in order for a refugee to rely on the protection against refoulement, they need to: 1) fall within the personal and material scope of Article 33 and 2) the situation needs to fall within the territorial scope of Article 33. The personal scope is met, if a refugee falls within the definition of Article 1A para. 2 of the Refugee Convention and if the exclusion clauses of Article 33 para. 2 and Article 1F are not applicable. The material scope is met, when a refugee can prove that there is a causal connection between the fear of being persecuted and one of the protection grounds mentioned in Article 33. This is also referred to as the nexus requirement. The territorial scope of Article 33 is limited as the Refugee Convention only pertains to refugees outside of their country of origin. This is also referred to as the alienage requirement. Article 33 is extraterritorially applicable as it contains a ‘core right’ that is the prohibition against refoulement, which is applicable without any formal requirements.

Furthermore, Article 33 can be invoked at embassies and consulates of EU Member States outside of the refugees’ country of origin. For the purpose of this research, that means that internally displaced people cannot rely on the protection against refoulement anchored in the Refugee Convention. However, refugees availing themselves to embassies and consulates outside of their country of origin can rely on its protection.

To conclude, Article 33 of the Refugee Convention protects refugees against refoulement and can create a positive obligation for EU Member States to issue a humanitarian visa to refugees. However, its protection is limited. Article 33 only protects refugees that fall within the definition of Article 1A para. 2 of the Refugee Convention and are not excluded on the basis of either Articles 1F or Article 33 para. 2 of the Refugee Convention. An important requirement for this research is the alienage requirements. Refugees that avail themselves to embassies within their country of origin cannot rely on the protection of Article 33. Article 33, and the Refugee Convention, only provide protection for refugees that avail themselves to foreign embassies outside of their country of origin.

Can Article 3 of the ECHR create an obligation to issue a humanitarian visa?

Article 3 regulates the prohibition against refoulement under the ECHR. The protection of Article 3, in contrast to Article 33, is absolute. Thus, no derogation is possible. Similar to Article 33 of the Refugee Convention, a person relying on the protection against refoulement under the ECHR needs to fall within the scope of Article 3. However, unlike the Refugee Convention, this is not restricted to persons within the definition of Article 1 Refugee Convention. Article 3 ECHR stipulates that anyone can rely on the protection against refoulement. Therefore, the personal scope of the ECHR is broader than that of the Refugee Convention. Furthermore, the material scope of Article 3 is also broader than that of Article 33 of the Refugee Convention. Article 3 does not require a nexus, and the grounds on which Article 3 can be invoked are not limited in this regard.

The ECHR in its case law recognises that certain situations can lead to a violation of the prohibition of refoulement. In its NA v. UK judgment, the ECHR for the first time recognised that ‘in more extreme cases of general violence’ returning anyone to that region would expose them to ill-treatment or torture. The ECHR in its Sufi and Elmi v. UK judgment found that the criteria of ‘generalised violence’ were met. The situation in that region was considered to be so critical that the applicants were in danger of exposing themselves to ill-treatment and torture simply by their presence there. This means, that if a refugee can
establish that they come from a region that constitutes ‘generalised violence’, then the State is required to uphold its obligations under the prohibition of refoulement including, the positive obligation of issuing a humanitarian visa to facilitate access to its territory.

The territorial scope of Article 3 is also broader than Article 33. Article 3 can be invoked both territorially (including the refugees’ own country of origin) as well as extraterritorially. The ECtHR is not regionally limited in its extraterritorial application of jurisdiction. Jurisdiction is tied to the conduct of States and not to the geographical space of the ECtHR, as a European Convention (Al Skeini). For the purpose of this research, the extraterritorial application of Article 3 is of particular interest. The ECtHR in many of its case law iterated that State jurisdiction is primarily territorial and extraterritorial jurisdiction can only arise in exceptional cases. The exceptional cases in which a State’s jurisdiction is engaged can be grouped under 1) the actions of State and 2) the inaction of State.

I. Actions of State:
A clear-cut action of the State that engages its jurisdiction are the conducts of its diplomatic personnel. Diplomatic and consular agents by virtue of their position represent the State in foreign countries and as such the State is liable for their actions (de jure control). As the European Commission of Human Rights in its Cyprus v. Turkey judgment concluded that the ‘exercising of authority and responsibility over persons’ is the decisive element over the strict definition of territoriality and can trigger State jurisdiction and responsibility.

The abovementioned situation is a clear indication of a State act, however, there are also situations where it is less clear-cut that the State’s jurisdiction is engaged.

In its Al-Skeini judgment the ECtHR concluded that a State Party can be held liable for actions of its agents even if those acts take place outside of its jurisdiction because of its agents exercised ‘control and authority over an individual’

The ECtHR in its Hirsii Jamaa judgment further acknowledged that State jurisdiction can even arise in the high seas. The ECtHR ruled that Italy was liable because the acts occurred ‘on ships flying the Italian flag’. And because the persons involved ‘were under the continuous and exclusive de jure and de facto control of the Italian authorities’

II. Inactions of State:
In its Soering judgment, the ECtHR concluded that the jurisdiction of the State could also be engaged when it can foresee that its inactions can lead to ill-treatment or torture by the receiving State. Foreseeability at the time of decision is the decisive element. In relation to this research, the Soering doctrine means that: when a refusal of a humanitarian visa by an EU Member State at one of its diplomatic premises can lead to ill-treatment or torture in the country of origin, then the State jurisdiction of that Member State is engaged and can require the Member State to issue a humanitarian visa, if the risk of ill-treatment or torture is foreseeable.

To conclude, it is in my opinion, that the prohibition of refoulement under Article 3 ECHR gives refugees a substantial right and creates a positive obligation for States to facilitate entry to their territory in the aforementioned cases. Article 3 is not limited in its personal, material or territorial scope. The case law of the ECtHR is clear on the extraterritorial application of Article 3 and the responsibility of States to honour its provisions.

Having established, that the protection against refoulement under international law can create an obligation for EU Member States to issue a humanitarian visa to refugees to apply for asylum. Next, the protection against refoulement under EU law will be discussed.
Can EU law create an obligation to issue a humanitarian visa?

The prohibition against refoulement under EU law is codified under both primary as well as secondary law. The EU Charter is a primary source of EU law, and the prohibition of refoulement is codified under Articles 4 and 19. Both the SBC and the Visa Code, which are secondary EU applies. It is therefore vital to establish whether the issuing of humanitarian visas in order to enable individuals to apply for asylum within the EU, is governed by EU law.

As has been stated in Chapter 1, the SBC and the Visa Code regulate the short-term entry into the EU. However, both provisions contain derogative measures for entry conditions on the basis of international obligations. Article 25 of the Visa Code is of particular importance as it manages the issuing of humanitarian visas, in cases where a TCN cannot meet the entry requirements of the SBC (Article 6), on the basis of international obligations. As has been discussed in Chapter 3, international obligations referred to herein also contains the prohibition of refoulement.

The CJEU in its X. and X judgment, however, concluded that the issuing of humanitarian visas on the basis of Article 25 of the Visa Code, for the sole purpose of applying for asylum does not fall within the scope of EU law. The CJEU based its conclusion on the objective and rationale of the Visa Code, which is to regulate short-term stay visas. The CJEU found that the applicants intended to stay longer than the 90 days permitted under the Visa Code. Furthermore, the CJEU stated that the issuing of humanitarian visas to refugees at a diplomatic post of an EU Member State is equivalent to processing an asylum claim. According to the CJEU, allowing the issuing of humanitarian visas under the Visa Code, for the purpose of applying for asylum would undermine the structure of the EU asylum system. The CJEU missed an opportunity here to explain both the scope and reach of Article 25. As has been mentioned, considering the CJEU firm stance in its ruling, EU Member States have a ground to reject humanitarian visa application on the basis of Article 25 to refugees.

It is, therefore, in my opinion that the EU Charter cannot be invoked for the purpose of acquiring a humanitarian visa to facilitate admission into the territory of an EU Member State to apply for asylum. As has been stated, the EU currently does not regulate the issuing of humanitarian visas for long-term stay.

To answer my research question:

EU Member States are obliged under international law to issue a humanitarian visas at their foreign embassies to refugees, for the purpose of applying for asylum on the basis of the prohibition against refoulement. In particular, Article 3 ECHR offers refugees a substantial right of protection, in particular situations, as it is both absolute and extraterritorially applicable. Article 33 also offers refugees protection, albeit, limited by both the alienage and nexus requirements. Under EU law, EU Member States are not obliged to issue a humanitarian visa as the case law of the CJEU has established, the EU currently does not regulate the issuing of humanitarian visas and as such the protection of the EU Charter cannot be invoked in these cases.

To conclude, the relevance of these findings is that it confirms that refugees have a right under international law to facilitate their entry into the EU (in particular under Article 3 ECHR). The significance of this research is strengthened by the political change that is occurring within the EU. The European Parliament requested the European Commission to draw up a proposal for an EU legislation that can facilitate the issuing of humanitarian visas to refugees for the purpose of applying for asylum. The adaptation of this legislation will grant refugees with a substantial right under EU law to facilitate their entry into the EU. The deadline for the European Commission has been set for March 2019. Whether or not, such a humanitarian scheme will be envisioned remains to be seen.
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