EU Mobility and Migration Law Course

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HUMANITARIAN VISAS: A EU PATH TOWARDS A SOLUTION OF THE MIGRATION CRISIS?*

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ABSTRACT: *The present paper tries to account for the issue of visas in the frame of the EU legislation. Part 2 presents the legal framework concerning EU visas, then the paper addresses visas for humanitarian purposes. The main case law (part 3) will lead us through the most notable developments both in policy and in public debate. Finally, the Italian case (part 5) will be used to enhance the relationship between asylum and visa legislation, as well as to suggest new ways in which the visa instrument can be employed to facilitate the access to international protection. The obligation/discretion dilemma will constitute the final point of reflection.*

KEYWORDS: Visa Code – humanitarian visa – MSs discretion – asylum - humanitarian corridors

1. INTRODUCTION

According to a recent research developed by the European Parliament "up to 90% of the total population of subsequently recognised refugees and beneficiaries of subsidiary protection reach the territory of Member States and access the CEAS (Common European Asylum System) irregularly" and this happens because of the "very limited legal pathways the EU offers". It seems that there is no possibility to reach the European territory through a legal channel for the sole purpose of applying for international protection. Therefore, many people have no other choice but to engage in a long and dangerous journey often including the crossing of the Mediterranean Sea (Van Ballegooij, Navarra, 2018). Statistic provided by the UNHCR show how in 2019 a total of 117,820 migrants reached the European countries through the Mediterranean, via sea or land. At the present date (15

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December 2019), against the safe 117,820, another 1,234 are estimated dead or missing during the route. The main countries of origin are Afghanistan and the Syrian Arab Republic (UNHCR).

As a matter of fact, the only way for citizens from the aforementioned countries (and from other countries of origin) to reach the EU territory is through visa application, as nor do they belong to the Schengen area nor are they visa-exempt (European Commission). However, conditions to obtain a visa - listed in the Community Code on Visas - apply only to migrants who intend to stay for a short period of time, and do not take the special needs of the refugees into consideration. Moreover, the access to a visa on humanitarian grounds falls under the scope of national law, as stated by the CJEU (Court of Justice of the European Union) in *X and X v. Belgium*, which means that, according to the CJEU, there is no ground to access EU territory for the purpose of seeking international protection and settling for a long period under EU legislation. The only way to apply for international protection is directly on the territory of the European Union, upon arrival. The other possibility is to resort to the discretion of the Member States and to Protected Entry Procedures (PEPs), adopted on a national level, which take the form of resettlement programmes, community and private sponsorship schemes and humanitarian corridors (Van Ballegooij, Navarra, 2018).

In our work we will first have a look at the relevant EU legislation on the Common Visa Policy. Afterwards, we will analyse the main case law of the Court of Justice of the European Union in order to discover the most debated interpretative issues raised by the legal framework on the Common Visa Policy. Lastly, we will present the Italian case, which offers a possibility to understand the way one of the Member States is taking advantage of the framework offered by the EU legislation in order to promote humanitarian corridors and offer a safe and legal path to migrants searching for international protection. In continuity with the proposal of the European Parliament for a regulation on establishing a European humanitarian visa, our main argument is that a better management of the Visa issue on the EU level could provide a safe environment for migration and consequently help avoiding the tragic destiny of people who embark in unsafe journeys across the Mediterranean and the denial of their fundamental rights (Atanassov, 2019). However, our work is not meant to be exhaustive, on the contrary the aim is to investigate some open questions and to present the many aspects of the debate.

2. THE EU LEGAL FRAMEWORK

The original Schengen Agreement, signed on 14 June 1985 by Belgium, France, Germany, Luxembourg and the Netherlands, set up the necessary structure for the abolition of controls on persons and goods at the borders between the signatory states. It

was supplemented by the 1990 Schengen Convention, which regulated the details of the abolition of controls at the common borders between the Contracting States through the thesis of compensatory measures and the distinction between internal and external borders. A common visa policy is a necessary complement to the Schengen area, to secure its effectiveness. This is the Schengen Visa, which in principle covers short periods ranging from 90 days to 180 days.

While, long-stay visas are left to the Member States, community legislation has two main aspects :first, organization of the free movement within the European Union and, second, to address the security aspect (border control, police cooperation).

The Treaty of Amsterdam, by introducing a new Article 62(2)(b)(i) in the EC Treaty, has made it possible to make significant progress in Community visa policy. This provision has thus clearly established that Community competence covers both the determination of third countries whose nationals are subject to the visa requirement and those whose nationals are exempt from that requirement. In this sense, we have Regulation No 539/2001, adopted on 15.3.2001 on the basis of Article 62(2)(b)(i), logically establishes those two exhaustive lists of third countries (those whose nationals are subject to the visa requirement and those whose nationals are exempt from it). Indeed, the debate around these lists (one positive and one negative) is always controversial. Among the main objectives of visa regulation under the Regulation are: Combating illegal immigration, and fostering freedom, security and justice in the European Union.

According to Regulation No 539/2001, recital (5):" The determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment **of a variety of criteria relating inter alia to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity**. Provision should be made for a Community mechanism enabling this principle of reciprocity to be implemented if one of the third countries included in Annex II to this Regulation decides to make the nationals of one or more Member States subject to the visa obligation." It follows that the determination of the States in relation to which the visa requirement can be lifted are identified on the basis of a list of criteria, namely: illegal immigration, public order and security and the Union's external relations with third countries.

Do humanitarian visas fit into the same framework? Indeed, the same Regulation states that "stateless persons and refugees" are subject to other legislation, namely the European Agreement on the abolition of visas for refugees, signed in Strasbourg on 20 April 1959.

Additionally, article 15 of the Schengen Convention, amended by Regulation No 810/2009 provided that, in principle, short- stay visas may only be issued when a third-country national fulfils the entry conditions laid down in article 5(1). By way of derogation, Article 16 of the Schengen Convention (incorporated into the Visa Code), provided that, if a Contracting Party considers it necessary to derogate from the principle

laid down in Article 15 on humanitarian grounds, on grounds of national interest or because of international obligations, the visa issued must be of **limited territorial validity**.

Schengen visas may be issued as a:

· (a) uniform visa, meaning "[...] *a visa valid for the entire territory of the Member States* [...]";

· (b) visa with limited territorial validity (LTV visa) meaning "[...] *a visa valid for the territory of one or more Member States but not all Member States* [...]";

·(c) airport transit visa, meaning "[...] *a visa valid for transit through the international transit areas of one or more of the Member States* [...]".

Indeed, humanitarian visas fall within the scope of two major articles: Article 19 and Article 25. First of all, we can find in the Article 25(1) of the Visa Code: "1. *A visa with limited territorial validity shall be issued exceptionally, in the following cases: (a) when the Member State concerned considers it necessary* ***on humanitarian grounds, for reasons of national interest or because of international obligations***." Secondly, an application for a Schengen visa that does not meet the admissibility requirements set out in the Visa Code (application form signed and completed on time, valid travel document, photograph, visa fee paid and biometric data collected) may be considered admissible on humanitarian grounds or for reasons of national interest by the competent authorities pursuant to Article 19 (4) of the Visa Code, which reads: "*By way of derogation, an application that does not meet the requirements set out in paragraph 1 may be considered admissible on humanitarian grounds or for reasons of national interest*". the most important point is related to the definition of Humanitarian grounds. As observed by Noll in 2002, humanitarian grounds "[...] remain undefined in the Schengen Convention [as well as in the Schengen Borders Code and the Visa Code], but it is contextually clear that the granting of visas to alleviate threats to the applicant's human rights is covered by the term". We should specify that refugees are treated as a specific category, as a consequence, are entitled to a special treatment.[1] Article 6 of the Refugee Convention, for example, exempts refugees from the obligation to fulfill "*requirements which by their nature a refugee is incapable of fulfilling*".

3. The main case law of the Court of Justice of the European Union

Two important cases of the CJEU opened a debate regarding Article 25 (1) (a) of the Visa Code of 13 July 2009, which allows the Member States to issue visas on humanitarian grounds, the so called visas with "limited territorial validity": and *X and X v. Belgium*.

In the *Koushkaki* case of 19 December 2013, Mr Koushkaki, an Iranian national, applied for a "uniform" visa at the German embassy in Teheran (Iran).

The request was rejected on the ground that the circumstances raised doubts about the applicant's intention to return his country of origin before the expiry of the visa he applied for, even if he complied with all the requirements: he fulfilled the entry conditions set out in the Visa Code and in the Schengen Border Code. Therefore, the German authorities recognised a risk of illegal immigration and refused the application. Afterwards, the authorities asked the CJEU to release a preliminary ruling, mainly to understand to what extent the Member States have the possibility to derogate from the principle that admission should be denied if entry conditions are not fulfilled. When the entry conditions are satisfied and there are no grounds for refusing the application, is the Member State obliged to issue the visa or does the State authorities have some level of discretion in the examination of the application?
In its judgement, the CJEU stated that the Member States are obliged under EU law to issue an ordinary Schengen visa when the applicant satisfies the criteria to obtain one. Yet the national authorities enjoy discretion when they apply those criteria, particularly where they assess whether there is a reasonable doubt as regards the intention of the applicant to leave the territory of the Member States before the expiry of the visa.

The main question that arose from the *Koushkaki* judgment is whether the obligation to issue the "uniform" visa applies also to the issuing of LTV (Limited Territorial Validity) visas, too. Are the Member States obliged to issue "humanitarian visas" under certain conditions (defined by EU legislation) and which is the level of discretion they can count on in taking the decision whether to accept or to refuse an LTV visa application? The question was dealt in the *X and X v. Belgium case* of 7 March 2017.

In *X and X v. Belgium* a Syrian family submitted an application for visa with limited territorial validity ("humanitarian visa") on the basis of Article 25 (1) (a) of the EU Visa Code, at the Belgian Embassy in Beirut (Lebanon). The applicants had the intention to leave Aleppo in order to apply for asylum in Belgium, but the application was refused by the Belgian authorities.
Therefore, the applicants brought the case before the Council for Alien Law Litigation, which in turn decided to refer to the CJEU for preliminary ruling. Mainly, the Council wanted to inquire if the States are obliged to issue a "humanitarian visa" under EU law and if the refusal of such visa would be an infringement of article 4 and/or article 18 Charter of Fundamental Rights of the European Union (CFREU) or another international obligation by which Belgium is bound.
In its preliminary ruling of 7 March 2017, the CJEU said that the situation did not fall under the scope of the EU Visa Code, which covers only short-term visas.

Applications for a "humanitarian visa" with the aim of applying for international protection once arrived in the State and therefore to stay in the State for more than 90 days fall within the scope of national law instead. Therefore, the CJEU did not deem it necessary to answer the questions from the preliminary ruling and it did not take a position on the issue whether or not international and EU law can oblige EU Member States to issue a humanitarian visa in certain cases. In the following paragraph we quote the statement that can be found in the press release of the CJEU that resumes the judgement:

> *Member States are not required, under EU law, to grant a humanitarian visa to persons who wish to enter their territory with a view to applying for asylum, but they remain free to do so on the basis of their national law. EU law establishes only the procedures and conditions for issuing visas for transit through or intended to stay on the territory of the Member States not exceeding 90 days.*

What is important is that even if the applications were submitted on the basis of an Article of the Visa Code, according to the CJEU they fall outside its scope and they have to refer to national law.
Advocate General Mengozzi had taken an opposite approach. In his opinion, he argued that the application felt within the scope of the EU Visa Code and that a State is required to ensure that the rights guaranteed by the CFREU are respected when it is adopting a decision in relation to applications for visas with limited territorial validity, because in those cases the State is formally implementing EU law. Moreover, article 4 CFREU implies the existence on positive obligation on the part of the Member States to issue a visa with limited territorial validity where there are substantial grounds to believe that the refusal to issue that document will have the direct consequence of exposing the person who seek international protection to torture or inhuman or degrading treatment which is prohibited by that article. According to Mengozzi, as a consequence, the applicants were obliged either to risk their lives by staying in the Syrian war zone, live in Lebanon as refugees or risk their lives by trying to reach illegally the EU. This choice undermines the enjoyment of the right to asylum as recognised by article 18 EU CFREU and the 1951 Convention Relating to the Status of Refugees and its 1967 protocol (refugee Convention). A situation like this could have been avoided had a humanitarian visa been an enforceable means to access international protection in Europe. He also takes into consideration the relevant fact that had the Syrian family applied for the international protection directly on Belgian territory, they would have been probably granted the refugee status. Since they were in Syria, they were not given this possibility, which proves the difficulty in moving beyond

a territorial conception of State obligations, but also a difficulty in creating legal paths for refugees.

Following the CJEU judgment in *X and X v. Belgium*, it seems that the exception provided in Article 25 (1) of the EU Visa Code cannot be used to exempt refugees from fulfilling the general entry conditions, mainly because they intend to stay for a period longer than 90 days, which means that the EU Visa Code fails to take into account the special needs of refugees. Moreover, it ensures that the issuance of humanitarian visas by Member States is entirely discretionary, without any obligation.

The case demonstrates the lack of legal pathways for people who need protection and the lack of commitment of the CJEU, which is apparently trying to avoid its involvement in a mainly political debate. As a matter of fact, the judgement opened an intense discussion, which resulted in another case. *M. N. and others v. Belgium,* similar to *X and X v. Belgian State*, currently pending before the ECtHR (European Court of Human Rights), that has to do mainly with the interpretation of the European Convention of Human Rights. The main concern of the critics is the possibility that the Court could conclude that there is a positive obligation for the Member States to issue a visa in certain cases, which would result in a mass influx of migrants into the EU territory and in a work overload for Consulates. On the other hand, pressures are increasing especially from the European Parliament that has been calling on the necessity to establish a European humanitarian visa to cover the void of the current legislation.

4. DATA

4.1 The Schengen Area

Figure 1. Map of Schengen Countries and EU Countries. Source: www.schengenvisainfo.com

4.2 Visa Requirements for the Schengen area

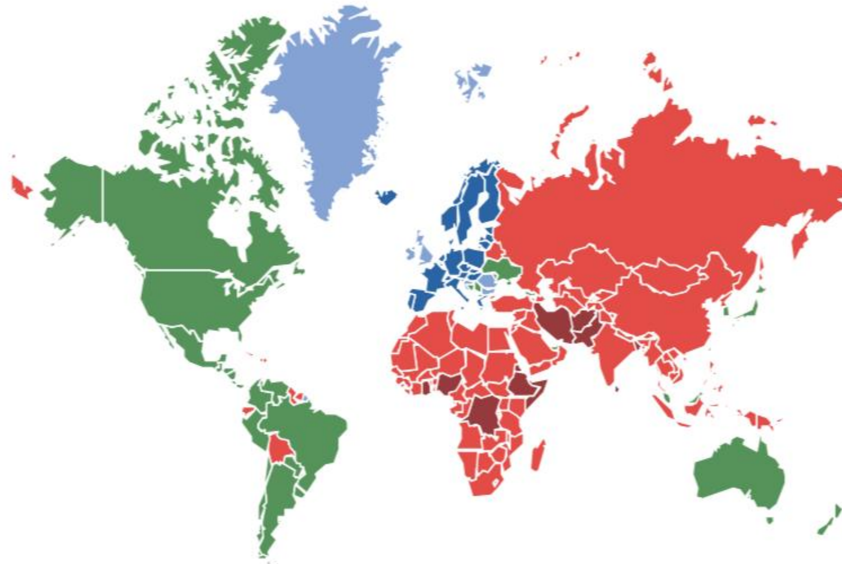

Figure 2. Visa Requirements for the Schengen area: in blue *Schengen area*; in red *Visa required*; in green *No visa required*; in dark red *Visa + airport transit visa (ATV) required by all Schengen States*; in light blue *EU states and territories of EU states not part of Schengen and other exceptions.* Source: European Commission

4.3 Migration flows in the Mediterranean Area

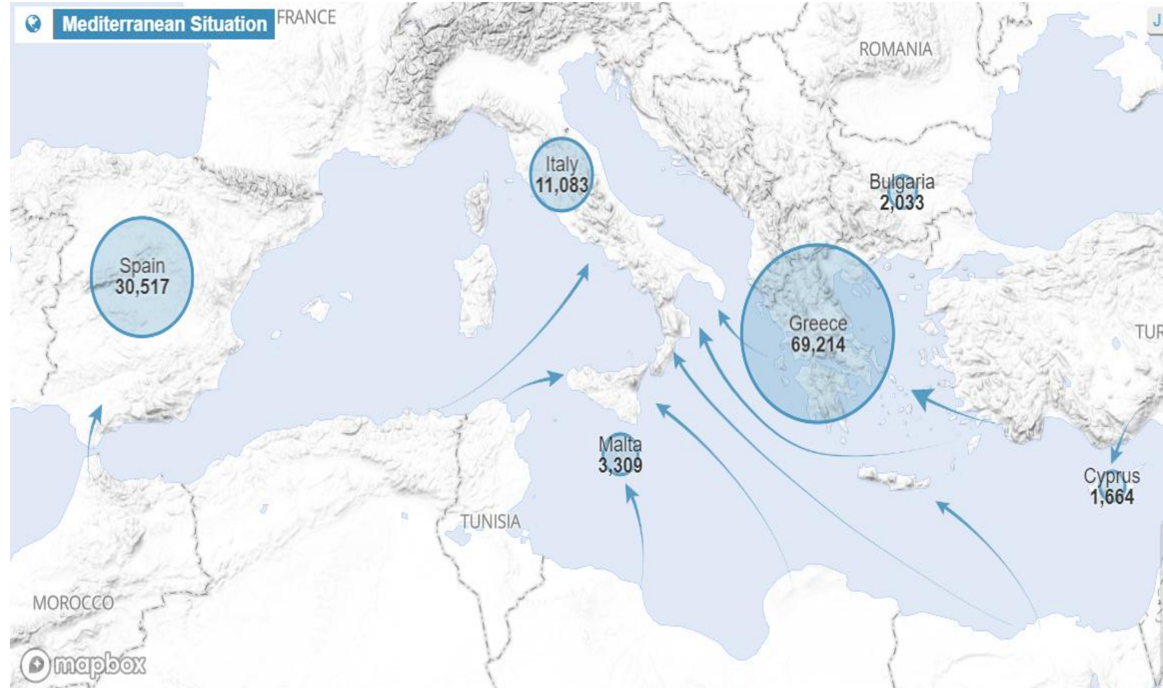

Figure 3. Sea and land arrivals in the Mediterranean region since January 2019. Last updated 9 December 2019. Source: UNHCR

Total arrivals	117,820
Sea arrivals in 2019 (Includes refugees and migrants arriving by sea to Italy, Greece, Spain, Cyprus and Malta)	95,870
Land arrivals in 2019 (Includes refugees and migrants arriving by land to Greece and Spain)	21,950
Dead and Missing in 2019	1,234

Table 1. Sea and land arrivals in the Mediterranean region since January 2019. Source: UNHCR

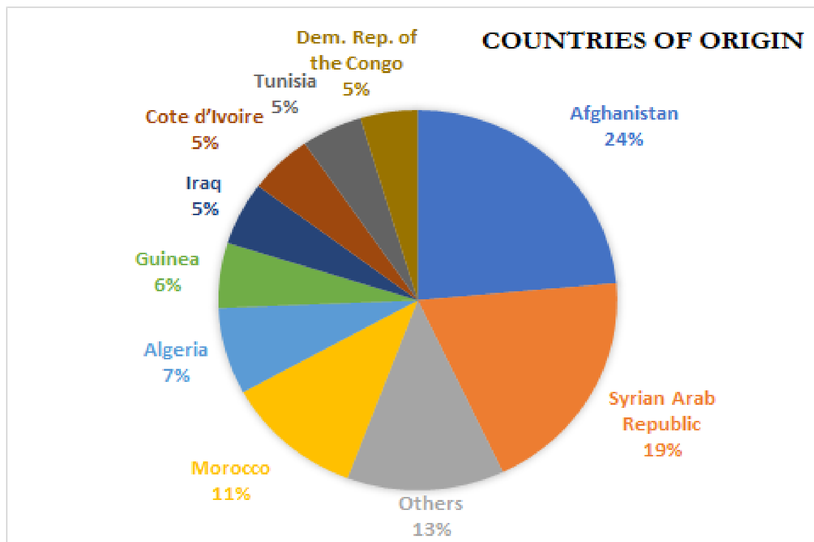

Figure 4. Most common nationalities of Mediterranean Sea and land arrivals from January 2019. Source: UNHCR

Previous years	Arrivals *	Dead and missing
2018	141,472	2,277
2017	185,139	3,139
2016	373,652	5,096
2015	1,032,408	3,771
2014	225,455	3,538

* Arrivals include sea arrivals to Italy, Cyprus and Malta and both sea and land arrivals to Greece and Spain

Table 2. Arrivals and Dead and missing migrants in the Previous years. Source: UNHCR

4.4 Migration flows in Italy

Figure 5. Sea arrivals in Italy in 2019. Source: UNHCR

Sea arrivals in 2019	11,083
Sea arrivals in 2018	23,370
Sea arrivals in 2017	119,369
Sea arrivals in 2016	181,436
Sea arrivals in 2015	153,842
Sea arrivals in 2014	170,100

Table 3. Sea arrivals in Italy in 2019 and in the previous years. Source: UNHCR

4.5 Humanitarian visas

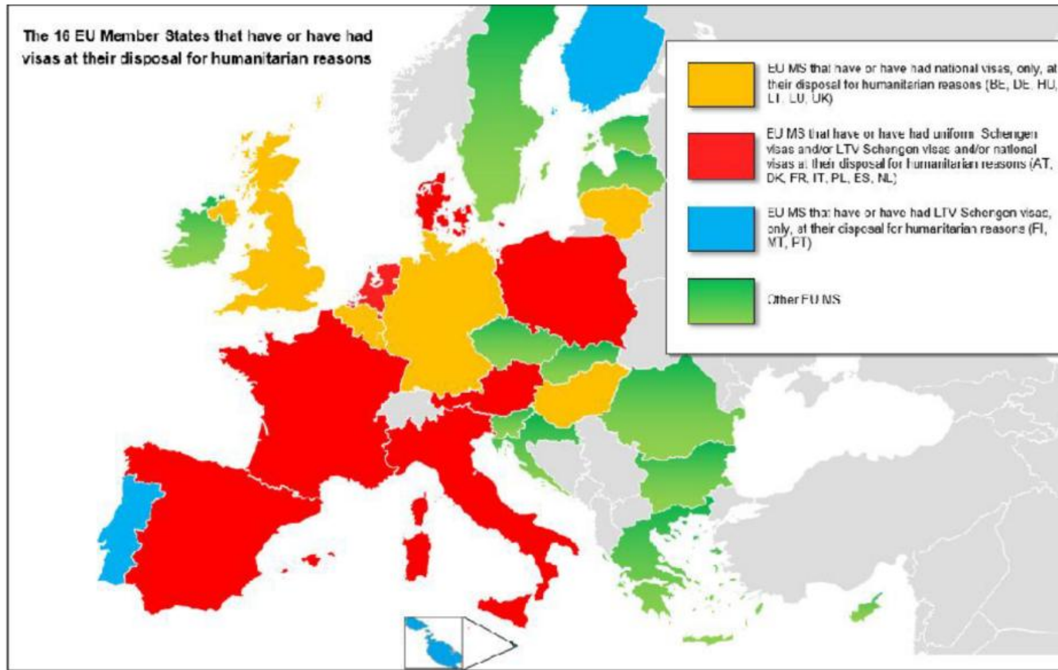

Figure 6. The 16 EU Member States that have or have had visas at their disposal for humanitarian reasons in 2014. Source: U. I. Jensen

Total LTVs issued in 2014	127,673
Total LTVs issued in 2015	109,505
Total LTVs issued in 2016	98,173
Total LTVs issued in 2017	111,483
Total LTVs issued in 2018	113,687

Table 4. Total LTVs issued in the Schengen States. Source: European Commission

5. Case study: Italy

The current debate around Article 25 of the Visa Code stems from a political conjuncture were the risks of illegal immigration and trafficking in human beings reinforce strong connections between the issues of visa, border control, asylum and the regulation of long-term legal migration. By concentrating on the interdependence between **visa** and **asylum**, we notice that, in the first place, visa obligations serve to prevent entry to the territory for asylum seekers; secondly,

issuing a visa is a ground to assign responsibility among the Member States to process asylum requests.

This last point draws our attention to the case of Italy, which, after the peak of the "migration crisis" (2015), has extremely suffered from the failure to establish a Common European Asylum System, both in terms of processing requests and granting the right of asylum. For what concerns European Institutions, Italy's situation, together with Greece's and Spain's ones, was deemed suitable for the activation of Art. 78 (3) TFEU, which, for "*Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries*", entails the possibility for the Council to "*adopt provisional measures for the benefit of the Member State(s) concerned. […]". The European Agenda on Migration (COM (2015) 240 final) provided an economic and logistic support to those countries most in need; at the same time, a European Resettlement Scheme was created in 2015 and amended in 2016 to favour Italy and Greece; however, the latter had to confront with the opposition of some Member States (the so-called Visegrad Group). As for the national management of migration inflows, the failed redistribution of asylum quotas has resulted in an externalisation of responsibility to countries of origin (Decree-Law n.13 of 17th February 2017, Memorandum of Understanding Italy-Libya, the 2016 Migration Compact) and in a more restrictive approach on procedures of granting asylum and on provisions on offences. (Decree-Law n. 188 of 4th October 2018).

The Italian case is illustrative of how a Common European Asylum System lagging behind has impacted national legislation on migration and participated in preventing the Member State from correctly combating illegal immigration and trafficking in human beings, as entailing what the OHCHR called a "violation of the principle of *non-refoulement*".

Given this non-reassuring picture, it is worth considering how a liberalization of visa policy, and most notably resorting to the instrument of humanitarian visa, could constitute for the Italian case a viable avenue for legal entry of persons in objective and severe personal conditions, as well as an alternative instrument to obtain an equitable redistribution of asylum applications between Member States.

Among the 16 Member States that allow the adoption of formal instruments for humanitarian protection (national, uniform Schengen visa, LTV Schengen visas), Italy is one of the few that allows access in exceptional cases and in an informal fashion; it is in fact important to notice that Italian law does not provide for visas to be issued for asylum purposes.

Italy today provides **LTV Schengen visas** for humanitarian reasons, including protection-related reasons: Italian embassies issued LTV visas for tourism/courtesy reasons to 150 Eritrean refugees from Libya in 2007 and 2010,

and to 160 Palestinians living in Al Tanf camp (Syrian-Iraqi border) in 2009; these visas were part of informal resettlement operations, and refugees were able to access a regular asylum application upon arrival.

Nonetheless, in more recent times, *private sponsoring* has proven itself more relevant for Italy, as it comprises the pilot experiment of *humanitarian corridors.*

Programs of private sponsoring resort to the intervention of private entities (NGOs, religious institutions and Churches, single individuals etc.) to select, transfer and receive groups of pre-selected vulnerable people. Interventions range from the domain of regular mobility schemes (study and work purposes) to refugee-related schemes.

In Italy the initiative started in 2015 on the part of three ecumenical organisations (Tavola Valdese, Federazione delle Chiese Evangeliche Italiane (FCEI) and Comunità di Sant'Egidio), who decided to sign a Memorandum of Understanding (*Opening of Humanitarian Corridors*) with the Ministry of Foreign Affairs and the Ministry of the Interior. The agreement was based on a humanitarian admission program supported by private sponsorship (*Mediterranean Hope*).

The procedure consists in promoters compiling a list of potential beneficiaries – according to criteria stated in the Directive 2013/33 of 26 June 2013, in Article 3 of the Memorandum of Understanding, in 1951 Geneva Convention and its 1967 Protocol – with the aid of local *contact points.* The list is then sent to the Ministry of Interior and consular authorities, who process the applications and verify prerequisites. Once the eligibility is confirmed, Italian Consulates proceed by issuing LTV Schengen visas on humanitarian grounds; after the visa is obtained, refugees transferred to Italy can apply for international protection, with the same associations supervising on their reception and integration in the country.

Humanitarian corridors were born with the intention of bringing 1.000 refugees from Syria (through Lebanon), Morocco and Ethiopia in Italy within 2 years; in light of the success obtained, the Protocol has been renewed for the period 2018-19, and is expected to involve 1.000 more beneficiaries.

The Italian initiative has been a pilot experiment conceived to soon include all Schengen countries; in fact, it seems having taken root in Belgium and France as well, where the first groups of refugees have arrived in late 2017.

These types of non-conventional avenues had been put in danger by a recent turn on the screw in national legislation on migration. Previously mentioned Decree-Law n.13 (2017) and Decree-Law n. 188 (2018) have aimed at limiting the entry of TCNs in need of international protection, and have abolished other related forms of protection, such as the humanitarian residence permit.

Latest developments see the resumption of timid discussions among Italy, Germany, Malta and France on relocation schemes for asylum applicants; as for

humanitarian visas, the scope of Article 25 remains to be clarified at a European level.

Following the sentences discussed in par. 4, talks have continued within the European Parliament regarding amendments to the Visa Code, for it to provide more clearly for humanitarian visas. A first standstill was posed by 2016 Council's opposition to including provisions related to humanitarian visas, namely the creation of a common EU frame. The Parliament put forward a new proposal in 2018, this time in the form of proposal to Regulation by 31st March 2019, that has then been dismissed by the Commission as "not politically feasible" (Carrera, Cortinovis, 2019). The debate has been put on hold ever since.

As previously stated, the management of migration flows and asylum applications remains an issue by which Italy is strongly touched, and solutions provided from the "visa pathway" are still insufficient. In fact, the Schengen Border Code and the Visa Code are meant for schemes of mobility and stay for legal and temporary migration, and granting a short-term humanitarian visa qualifies as a derogation to the general regime. Member States that apply this kind of protection are balancing between the thin line of "derogation to the norm" and "interpretative stretch".

On the other end of the debate lays the issue of sovereignty. The reiteration of this theme in matters of migration emerges both in public discourse and in policy, although the latter being often softer compared to the former: are then Member State entitled to the use of an "absolute" sovereignty? The current trend seems to suggest the idea of an inherently limited sovereignty, in which States must subject to international obligations, in this case a self-obligation to respect, protect and fulfil the rights of refugees according to 1951 Refugee Convention.

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