

# Chapter 10: EU Initiatives on a European Humanitarian Visa

*Eugenia Relaño Pastor<sup>1</sup>*

## *Contents*

|                                                                                                          |     |
|----------------------------------------------------------------------------------------------------------|-----|
| 1. Introduction                                                                                          | 341 |
| 2. The concept of humanitarian visas within the EU Legal framework                                       | 345 |
| 2.1 What do we mean by humanitarian visa?                                                                | 345 |
| 2.2. Humanitarian visas and EU fundamental rights                                                        | 346 |
| 3. Current Regulatory Framework                                                                          | 349 |
| 4. For a comprehensive approach to humanitarian visas: EU Parliament vs. European Commission and Council | 353 |
| 4.1 From the Treaty of Amsterdam to the Stockholm Programme                                              | 353 |
| 4.2. From the Stockholm Programme to the migration crisis                                                | 356 |
| 4.3 The LIBE Committee's legislative own-initiative report                                               | 360 |
| 5. Some concluding observations                                                                          | 363 |

## *1. Introduction*

The last few years have witnessed loss of lives on an unprecedented scale in the Mediterranean and Aegean Seas.<sup>2</sup> The scale of the tragedy has exposed a number of inherent pitfalls in EU's migration and asylum policy and it

- 
- 1 Senior Research Fellow in the Department of Law & Anthropology of the Max Planck Institute for Social Anthropology. The author gratefully acknowledges the assistance of Mr Alvaro Garcia Navarro from the team of the Rapporteur Juan Fernando López Aguilar in providing information that has been used in this chapter. The European Parliament own-initiative report on Humanitarian Visas, authored by Rapporteur Juan Fernando López Aguilar (S&D, Spain), has been used in preparation of this text.
- 2 3,771 dying in 2015, 5,096 in 2016, 3,139 in 2017 and 2,217 in 2018, see:<<https://data2.unhcr.org/en/situations/mediterranean>> (accessed 20 March 2019).

has put pressure on the EU asylum system to design legal avenues of entry into the EU for those seeking international protection. In addition to EU resettlement procedures that are applicable to vulnerable refugees, this has not resulted in the introduction of any new procedures in EU law, either in the visa *acquis* or in the borders or asylum *acquis*, to facilitate admission of persons seeking protection in Member States' territory. It has been estimated that 90 % of the persons, subsequently being recognised as refugees or beneficiaries of subsidiary protection, had reached the territory of the Member States irregularly, quite often via life-threatening routes.<sup>3</sup>

The high cost of human lives in the so-called migration crisis of 2015 and the lack of harmonised EU legal framework triggered the European Parliament (EP) to issue an urgent call for the provision of humanitarian visas. In its 2016 *Resolution on the Situation in the Mediterranean and the Need for a Holistic EU Approach to Migration*,<sup>4</sup> the Parliament declared that persons seeking international protection would be allowed to apply for a European humanitarian visa directly at any consulate or embassy of a Member State and that, once granted, such a European humanitarian visa would allow its holder to enter the territory of the Member State which had issued the visa for the sole purpose of lodging an application for international protection in that country.

By a resolution of 11 December 2018,<sup>5</sup> the European Parliament requested that the European Commission (EC) tables, by 31 March 2019, a legislative proposal establishing a European Humanitarian Visa, giving refugees access to the European territory, in effect to the Member State issuing the visa, for the sole purpose of submitting an application for international protection.<sup>6</sup> The European Parliament considered that the legislative act should be adopted in the form of a regulation entitled 'Regulation of the European Parliament and of the Council establishing a Euro-

---

3 C Hein and M de Donato, *Exploring avenues for protected entry in Europe* (Milan, Italian Council for Refugees, 2012) at 17.

4 EP Res of 12 April 2016 on the situation in the Mediterranean and the need for a holistic EU approach to migration, 2015/2095(INI).

5 EP Res of 11 December 2018 with recommendations to the Commission on Humanitarian Visas, 2018/2271(INL).

6 The legislative initiative report was backed by 429 MEPs, 194 voted against and 41 abstained. See: EP News, *Humanitarian visas to avoid deaths and improve management of refugee flows* (Press Release, 11 December 2019) <<http://www.europarl.europa.eu/news/en/press-room/20181205IPR20933/humanitarian-visas-to-avoid-deaths-and-improve-management-of-refugee-flows>> (accessed 25 November 2019).

pean Humanitarian Visa'.<sup>7</sup> In March 2019, the Commission's response to the requests of the action taken, or intended to be taken, did not directly tackle a possible legislative proposal on European Humanitarian Visa. According to the EC, its recommendation to Member States about developing enhanced legal pathways for persons in need of international protection of September 2017 has led to the implementation of more than 24,700 resettlement places. Therefore, the focus should be on the regulation establishing a Union Resettlement Framework,<sup>8</sup> particularly as it has the potential of achieving the objective pursued by the Parliament's initiative for a European Humanitarian Visa to increase the overall number of persons in need of international protection admitted by the Member States. The Commission insisted on the unfeasibility of creating a subjective right to request admission and to be admitted or an obligation of the Member States to admit a person in need of international protection.<sup>9</sup>

---

7 The legal basis is Art 77(2)(a) of the Treaty on the Functioning of the European Union (TFEU): '1. The Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders (...)'.  
8 According to the UNHCR, resettlement is an international protection tool designed for refugees who cannot return to their countries, even if they have sought protection in another State, where their integration or their safety is at risk. These people can be transferred to another State that has voluntarily agreed to the resettlement programme and has a specified number of available spots. The EU has put considerable efforts into developing a common approach to resettlement with the UNHCR. The EU Resettlement Programme laid down the Union's priorities covering the period from 2009 to 2013, priorities that were revised in 2012. A new funding instrument adopted in 2014, the Asylum, Migration and Integration Fund (Regulation (EU) 516/2014), provides special incentives to resettlement programmes. Later, the Commission submitted a proposal for a Union Resettlement Framework on 13 July 2016. The proposal would complement the current ad hoc multilateral and national resettlement programmes by providing common EU rules on the admission of third-country nationals, procedures of the resettlement process, types of status to be accorded by the Member States, decision-making procedures for the implementation of the framework and the financial support for the Member States' resettlement efforts. On 27 September 2017 the Commission adopted a Recommendation to ensure that resettlement efforts can continue until the operationalisation of the Union Resettlement Framework. According to the Recommendation, Member States should offer at least 50,000 resettlement places to admit by 31 October 2019 to persons in need of international protection from third countries.

8 According to the UNHCR, resettlement is an international protection tool designed for refugees who cannot return to their countries, even if they have sought protection in another State, where their integration or their safety is at risk. These people can be transferred to another State that has voluntarily agreed to the resettlement programme and has a specified number of available spots. The EU has put considerable efforts into developing a common approach to resettlement with the UNHCR. The EU Resettlement Programme laid down the Union's priorities covering the period from 2009 to 2013, priorities that were revised in 2012. A new funding instrument adopted in 2014, the Asylum, Migration and Integration Fund (Regulation (EU) 516/2014), provides special incentives to resettlement programmes. Later, the Commission submitted a proposal for a Union Resettlement Framework on 13 July 2016. The proposal would complement the current ad hoc multilateral and national resettlement programmes by providing common EU rules on the admission of third-country nationals, procedures of the resettlement process, types of status to be accorded by the Member States, decision-making procedures for the implementation of the framework and the financial support for the Member States' resettlement efforts. On 27 September 2017 the Commission adopted a Recommendation to ensure that resettlement efforts can continue until the operationalisation of the Union Resettlement Framework. According to the Recommendation, Member States should offer at least 50,000 resettlement places to admit by 31 October 2019 to persons in need of international protection from third countries.

9 European Commission, Follow up to the European Parliament non-legislative resolution with recommendations to the Commission on Humanitarian Visas, 2018/2271 (INL) / A8-0423/2018 / P8\_TA-PROV(2018)0494.

Furthermore, the EC's statement of March 2019 postpones any further consideration on possible legal pathways to harmonise the Member States' discretionary procedures of humanitarian admissions, as well as to provide effective protection to those asylum seekers who do not fall under the general criteria enshrined in Article 6 Schengen Borders Code (SBC) nor its exceptions. Additionally, it states that in the future, and under the framework of the Union Resettlement Framework, the Commission will evaluate whether additional measures would be needed for admission to the territory of the Member States for persons in need of international protection.<sup>10</sup>

Consequently, resettlements will continue to be the only legal route to international protection in the EU, even if they do not provide primary access to a durable solution, instead helping only those declared refugees. What happened to the Commission's favourable attitude in 2002 towards EU measures on humanitarian visas?<sup>11</sup> Why did the Commission in 2013<sup>12</sup> take a holistic approach to maritime crossings and deaths at sea by exploring new legal channels for safe access to the European Union even as it opposed, later in 2016, the amendments to the Visa Code on humanitarian visas?<sup>13</sup> Which options were on the negotiation table for EU legislation on humanitarian visas? What was the role of the LIBE Committee (Committee on Civil Liberties, Justice and Home Affairs), the European Parliament and the EC in addressing the legal gap in EU law? This chapter aims to provide some clarifications on these questions and shed some light on the twists and turns the responses of the EU institutions have taken on the question of forging safe and legal pathways to access the EU territory for persons seeking international protection.

---

<sup>10</sup> Ibid.

<sup>11</sup> G Noll, J Fagerlund and S Liebaut, *Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure* (Danish Centre for Human Rights, Copenhagen, 2002).

<sup>12</sup> COM (2013) 869 final, Communication from the Commission to the European Parliament and the Council on the Work of the Task Force Mediterranean. Other actions include security measures such as increased border surveillance, and additional support to the Member States facing higher migratory pressure at 2.

<sup>13</sup> See the procedure 2014/0094(COD) on the recast of the Visa Code.

## 2. The concept of humanitarian visas within the EU Legal framework

### 2.1 What do we mean by humanitarian visa?

In 2002, the Danish Centre for Human Rights carried out a study on behalf of the European Commission on the feasibility of processing asylum claims outside the EU.<sup>14</sup> The study examined the practices and legal frameworks on the use of the so-called Protected Entry Procedure (PEP) in select EU Member States and in three non-European States.<sup>15</sup> The study found that there are legal obligations under European Convention on Human Rights (ECHR) that suggest that States

find themselves obliged to allow access to their territories in exceptional situations. Where such access is denied, claimants may rely on the right to a remedy. These are further reasons supporting the conception and operation of formalized Protected Entry Procedures, which offer a framework for handling such exceptional claims. Protected Entry Procedures would be coherent with the *acquis* as it stands today. Nothing in the present *acquis* curtails the freedom of individual Member States to provide for a Protected Entry Procedure at a unilateral level. Furthermore, there is a Community competence for developing a joint normative framework.<sup>16</sup>

Therefore, humanitarian visas fall in the category of a PEP, which allows

a non-national to approach the potential host state outside its territory with a claim for asylum or other form of international protection, and to be granted an entry permit in case of a positive response to that claim, be it preliminary or final.<sup>17</sup>

The aim could be that an asylum seeker directly approaches the diplomatic representation of the potential host state outside its territory in order to claim a humanitarian visa, and the eligibility assessment procedure may be conducted extraterritorially by the diplomatic representation of the potential host state. This would entail processing a humanitarian visa applica-

---

14 G. Noll et al. (n10).

15 The above-mentioned study relied on information provided in an earlier study on PEPs, see G. Noll and J Fagerlund, *Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests* (Copenhagen, The Danish Centre for Human Rights and UNHCR, 2002).

16 G. Noll et al. (n 10) at 4.

17 Ibid. at 3.

tion in-country to identify the degree of protection needed before the third country national reaches the border of the Member State. Hence once a humanitarian visa is issued and the third country national enters the territory of the Member State, he/she may lodge an application for asylum or for any other kind of residence permit.<sup>18</sup> The goals of the humanitarian visas are to (1) provide safe and legal access to territory; (2) secure the physical transfer and legal protection of the bona fide third country national seeking asylum; (3) constitute a legal alternative to irregular migration channels and uncontrolled arrivals; and finally to (4) prevent exploitation, ill treatment, and abuses of victims of human smuggling.

For a long time, UNHCR,<sup>19</sup> IOM,<sup>20</sup> and the FRA<sup>21</sup> have been calling for an urgent response to resolve the issue of protecting persons in need of protection who could not be accommodated through any other available mechanism to enter the EU territory (such as family reunification programmes, work permit or study permit), and have not yet arrived on the territory of a Member State, at the border, or in the transit zone of a Member State.<sup>22</sup> As a result of a lack of EU legal response, protection seekers need to embark upon irregular, dangerous and undignified journeys at a very high risk. Prior to the humanitarian crisis in 2015, the Members States most affected by arrivals by boats were Greece, Italy, Malta and Spain.<sup>23</sup>

## 2.2. Humanitarian visas and EU fundamental rights

The CJEU concluded in *X and X*<sup>24</sup> that visas for asylum-seeking purposes do not fall under the scope of EU law as it stands.<sup>25</sup> The Court arrived at this conclusion when considering the

---

18 U I Jensen, *Humanitarian Visas: Option or Obligation?* (Brussels, European Parliament, Study for the LIBE Committee, 2014) at 2.

19 A Betts, *Towards a 'soft law' framework for the protection of vulnerable migrants'* (Geneva, UNHCR Research Paper No. 162, 2008).

20 IOM, *Irregular migration and mixed flows: IOM's approach*, MC/INF/297, 19 October (2009).

21 EU Agency for Fundamental Rights (FRA), *Handbook on European law relating to asylum, borders and immigration* (Vienna, 2013).

22 Ibid. at para 1.6.

23 Ibid. at 3 and 10.

24 Case C-638/16 PPU *X and X* [2017] EU:C:2017:173.

25 Ibid. at para 45: 'Since the situation at issue in the main proceedings is not, therefore, governed by EU law, the provisions of the Charter, in particular, Articles 4

purpose of [such] application – so as to reach the external borders of the Member States to subsequently lodge a separate claim for international protection – as ‘the defining feature of the situation’, thereby implying that, because that purpose differs from the key (policy) objective of the Code – which is ‘that of [establishing the procedures and criteria for issuing a] short-term visa’ – the situation becomes extraneous to the EU legal order.<sup>26</sup>

However, as it will be discussed later, and as the LIBE Committee pointed out in 2016, there is no legal or rational basis to exclude asylum seekers from the generic group of third country nationals who would qualify for a Schengen visa. There is even less reason to exclude them from the category of ‘persons crossing or showing an intention to cross’ the external borders of the Member States of the Union to whom admission criteria would apply.<sup>27</sup> This group of ‘persons’ is included in the Article 77(2) TFEU and is subject to checks when ‘crossing external border’. In this situation, European fundamental rights become relevant since fundamental rights govern the internal dimension of EU policies and actions and the external relations with the wider world. Therefore, the Union should observe fundamental rights in everything that the EU or the Member States do ‘when they are implementing Union law’.<sup>28</sup> Additionally, any policy made within the Area of Freedom Security and Justice (AFSJ) that is related to policies on border checks, asylum and immigration needs to respect human rights as a matter of EU primary law. The Treaty on the Functioning of the European Union (TFEU) requires the Union to adopt measures regarding asylum in accordance with the 1951 Refugee Convention Relating to the Status of Refugees, particularly, the Union ‘shall develop a common policy on asylum ... ensuring compliance with the principle of *non-refoulement*... in accordance with the Geneva Convention...and other relevant treaties’.<sup>29</sup>

---

and 18 thereof, referred to in the questions of the referring court, do not apply to it (...).’

26 Ibid. at para 47.

27 Art 1 and 2(10) of the Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L 77 and Art 1(2) of the Regulation No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) [2009] OJ L 243.

28 Art 51(1) EU Charter of Fundamental Rights (CFR).

29 Art 78 of the TFEU makes provision for the creation of a Common European Asylum system, which respects the obligations placed upon the States under the

The right to asylum and the principle of *non-refoulement* form part of the fundamental rights *acquis* and of the general principles of EU law. Following the Lisbon Treaty, which entered into effect on January 1, 2009, the EU Charter of Fundamental Rights went from being a simple 'declaration' to becoming a legally binding instrument. Article 18 of this Charter includes the right of asylum for the first time within the European scope, and Article 19 of the Charter prohibits returning persons to a State where they are at serious risk of being subjected to death penalty, torture or other inhuman or degrading treatment or punishments. Therefore, Article 4, which states that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment' is linked to Article 19 (2). Indeed, as the Charter Explanations clarified 'the right in Article 4 (CFR) is the right guaranteed by Article 3 of the ECHR', while Article 19(2) CFR 'incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR'.<sup>30</sup> As the Strasbourg Court reiterated in *Hirsi*, 'protection against the treatment prohibited by Article 3 imposes on States the obligation not to remove any person who, in the receiving country, would run the real risk of being subjected to such treatment'.<sup>31</sup> But this is valid not just in cases of removal. If any action under EU law, such as entry rejection or a visa refusal, could expose refugees or asylum seekers from third countries to ill treatment, Article 3 ECHR and Articles 4 and 19(2) CFR may be infringed.<sup>32</sup> It is important to underscore that there is a 'real risk' of exposing the applicant to irreversible harm (through entry re-

---

Geneva Convention of 1951 and, for such purposes, the following shall be adopted (Art 78): a uniform asylum status for third country nationals valid throughout the entire Union; a uniform subsidiary protection status for third country nationals which, without being granted European asylum, are in need of European protection; a common system for the temporary protection of displaced persons in the case of mass influx; common procedures for granting or withdrawing the uniform asylum or subsidiary protection status; criteria and mechanisms for determining the Member State responsible for examining an application for asylum or subsidiary protection; standards related to the reception conditions of the applicants for asylum or subsidiary protection; the association and the cooperation with third countries for managing the flows of persons who are applying for asylum or subsidiary or temporary protection.

30 See the explanations relating to the Charter of Fundamental Rights [2007] OJ C 303.

31 *Hirsi Jamaa v Italy* (App No 27765/09) ECHR 23 February 2012 at para. 123.

32 See V Moreno-Lax, *The Added Value of EU Legislation on Humanitarian Visas. Legal Aspects* (European Added Value Assessment accompanying the European Parliament's legislative own-initiative own-report, Rapporteur Juan Fernando López Aguilar, PE 621.823, 2018) at 51.



fusal, via visa rejection, or other extraterritorial activity covered by EU law). As Moreno-Lax point outs by quoting AG Mengozzi: ‘If the action/omission of the Member State concerned (via entry rejection, visa refusal or anything else) leads to a “real risk” of exposing the applicant to ill treatment, the option contemplated in Article 25 CCV should be understood to turn into an obligation, so as to avoid the risk from materializing’.<sup>33</sup>

### 3. Current Regulatory Framework

European Parliament has already stated that there is sufficient competence under the European Treaties to adopt the humanitarian visas legislation. The legislator could rely on Articles 77, 78 and/or 79 TFEU to this effect. The choice of the most appropriate legal basis must take into account the nature of the content and the aim pursued. Article 77(2)(b) TFEU<sup>34</sup> is one of the legal bases underpinning both the Schengen Borders Code (SBC) and the Community Code of Visas (CCCV) the objectives of which are, respectively, to lay down the ‘rules governing border control of persons crossing [or showing “an intention to cross”] the external borders of the Member States of the Union’,<sup>35</sup> and to establish ‘the procedures and conditions for issuing visas...to any third-country national who must be in possession of (one) when crossing the external borders of the Member States pursuant to (the Visa List Regulation)’,<sup>36</sup> which includes the nationals of all refugee-producing countries. As Moreno-Lax points out, Article 77 TFEU could be employed to elaborate on the ‘special provisions concerning the right of asylum and to international protection’ foreseen in Article 14 SBC, thus allowing for the adoption of uniform arrangements for the regulation of exceptions to the rules on refusal of entry (and pre-entry) contemplated by the Code.<sup>37</sup>

---

33 Ibid. at 52. Case C-638/16 PPU *X and X* [2017] EU:C:2017:93 Opinion of AG Mengozzi at paras 121, 129 and 131.

34 Art 77(1) TFEU: ‘The Union shall develop a policy with a view to (...) 2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: (b) the checks to which persons crossing external borders are subject’.

35 Art 2(10) SBC.

36 Art 1(1) and (2) CCV.

37 See V Moreno-Lax (n 31) at 55-56. Article 77(2) TFEU provides for measures concerning ‘the common policy on visas’ The regime constitutes an autonomous system, derogating from the general norms governing visas and border controls on persons, according to both the CJEU and the EU legislator and it eases frontier

The Schengen Borders Code establishes the rules for the control of persons ‘without qualification crossing the external frontiers of the Member States of the European Union’ and includes in Article 3 two special categories of persons: those enjoying the right of free movement under Union law and the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*.<sup>38</sup> According to Article 6(5)(c) SBC now, by way of derogation from the general rule, ‘third-country nationals who do not fulfil one or more of the (general entry) conditions... may be authorized by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations...’. In a handbook designed for border guards, referred to as the ‘Schengen Handbook’, those international obligations were compiled by the Commission, in an effort to spell out the common guidelines, best practices and recommendations on border control. It is relevant to highlight the explicit link between the Schengen Code and the Common European Asylum System (CEAS) legislation in the Schengen Handbook:

[A]ll applications for international protection...lodged at the border must be examined by Member States in order to assess, on the basis of the criteria laid down in Directive 2011/95/EU of 13 December 2011, whether the applicant qualifies either for refugee status...or for subsidiary protection status [...].<sup>39</sup>

Additionally, a second complementary choice could be the Article 78(2)(g) TFEU, which provides a specific grounding for asylum seekers and foresees that the Union legislator ‘shall adopt’ measures for a Common European Asylum System (CEAS), including those aimed at ‘managing inflows of people applying for (international) protection’. This wording could easily accommodate the situation of asylum seekers attempting to reach the external borders of the Member States to exercise their rights under EU law. Indeed, if we combine Article 78(2)(g) TFEU with Article 14(1) SBC,

---

formalities for ‘border residents’ with ‘legitimate reasons frequently to cross an external border’, according to the Preamble of Regulation (EC) No 1931/2006 of 20 December 2006 laying down rules on local border traffic at the external land borders of the Member States and amending the provisions of the Schengen Convention (2006) OJ L 405/1.

38 See also Art 4 SBC.

39 Commission Recommendation establishing a common ‘Practical Handbook for Border Guards (Schengen Handbook)’ to be used by Member States’ competent authorities when carrying out the border control of persons, C(2006), 5186 final, 9 November 2006. Reviewed C (2008) 2976; C(2009) 7376; C(2010) 5559; C(2011) 3918; C(2012) 9330; and C(2015) 3894.

which relates to decisions on the refusal of entry, a legal path for those in need of seeking asylum or international protection could emerge. When taking decisions on the refusal of entry into consideration, Article 14(1) requires that this 'shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection'.<sup>40</sup> The problem is that, although any Member State should ensure that a person who has made an application for international protection has an effective opportunity to lodge it as soon as possible, they may also subordinate the exercise of this right to specific formalities, requiring that applications 'be lodged in person and/or at a designated place' to be valid.<sup>41</sup> Some examples of national practices, particularly from Spain, show that it is left to the domestic law to acknowledge whether there is an obligation under EU Law to provide access to asylum seekers attempting to reach the external border and whether there is a safe place to lodge the application.

For example, the Spanish Asylum Law, Law 12/2009 of 30 October,<sup>42</sup> does not allow applications for asylum to be lodged at diplomatic mission offices but leaves the possibility of facilitating the transfer of the applicant to Spain in the hands of the ambassador if he or she deems that the applicant is in physical danger. The Spanish Ombudsman has stated that denying access to asylum procedures in diplomatic mission offices may impinge upon Spain's international commitments.<sup>43</sup> Consequently, on 19 July

---

40 See the reports by the Fundamental Rights Agency of the EU (FRA): *Fundamental rights at land borders: findings from selected European Union border crossing points* (Vienna, 2014); FRA, *Fundamental rights at airports: border checks at five international airports in the European Union* (Vienna, 2014); and FRA, *Fundamental rights at Europe's southern sea borders* (Vienna, 2013) <<http://fra.europa.eu/en/project/2011/treatment-third-country-nationals-eus-external-borders-surveying-border-checks-selected/publications>> (accessed 25 November 2019).

41 Art 6(2) and (3) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L180/60.

42 Law 12/2009 of 30 October 2009 governing the right to asylum and subsidiary protection, entered into effect on November 20, 2009. This Law was amended by Law 2/2014 of March 25th, which has added a paragraph to Article 40.1 for the purpose of fully incorporating Article 2(j) of Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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] OJ L 337.

43 See: Defensor del Pueblo, *Asylum in Spain. International Protection and Reception System Resources* (Madrid, June 2016) at 48.

2016, the Spanish Ombudsman issued a recommendation to the Ministry of the Interior to amend the Law 12/2009 of 30 October, in order to introduce the possibility of filing claims for international protection in the diplomatic missions abroad. If that were not possible, the Ombudsman urged the use of the category of humanitarian visa for allowing access to the potential asylum applicant to the country's territory in order to lodge the asylum application in Spain. As the recommendation is still pending, the Ombudsman has argued that it is imperative to regulate visas for humanitarian reasons, so as to allow applicants access to the Spanish territory and to the asylum application procedure in Spain.<sup>44</sup>

Additionally, since 2013, the Ombudsman Institution has warned about the situation of third country nationals in need of international protection but without access to the border control posts of the Autonomous Cities of Ceuta and Melilla.<sup>45</sup> The Ombudsman has always considered Spain's Government to be under the obligation of detecting existing obstacles that prevent persons in need of protection from being able to access the border control posts without putting their lives in jeopardy. Due the Ombudsman's intervention, the Ministry of the Interior, in 2014 and 2015, set up facilities at the border control posts in both Autonomous Communities where applications for international protection were subsequently lodged.<sup>46</sup> Furthermore, many complaints were received by the Spanish

---

44 The Spanish Ombudsman has received complaints revealing this need, which have given rise to the respective interventions. Measures were under way for the granting of visas to Afghani interpreters who had been employed by Spain's Ministry for Defense and who were in an at-risk situation in their country on their contract ending. In the end, the Spanish Embassy in Kabul (Afghanistan) finally granted the visas. In another case, the Spanish Embassy in Ankara (Turkey) did not support a visa being issued for humanitarian reasons for a Syrian minor who had suffered burns on a major portion of his body so that he could come to Spain to officially lodge his application for asylum, even if his immediate family members were in Spain. The suggestion that was taken was for a transfer to Spain of a person who urgently needed to undergo surgery. See: *Ibid.* and Defensor del Pueblo, Resoluciones 16007048 of 31 May 2016 <<https://www.defensor-delpueblo.es/resoluciones/impairir-instrucciones-urgentes-para-el-traslado-por-razones-humanitarias-a-espana-de-un-solicitante-de-asilo-enfermo-que-se-encuentra-en-grecia-y-pueda-recibir-el-tratamiento-medico-que-necesita/>> (accessed 4 December 2019).

45 See: Defensor del Pueblo, Informe Anual 2014 <<https://www.defensor-delpueblo.es/informe-anual/informe-anual-2014/>> (accessed 25 November 2019).

46 It was found that the persons who were arriving at the border control post experienced a high degree of anxiety as a result of the hardships they had experienced along the way to the border control post. On the one hand, a majority of these

Ombudsman and measures were set into motion with the Administration to verify if Spain's Law Enforcement Forces and Bodies directly at the borders in the cities of Ceuta and Melilla or possibly having intercepted aliens at sea had turned these persons over to the Moroccan police and thereby ignored the possibility that they may be persons in need of international protection.<sup>47</sup>

#### 4. For a comprehensive approach to humanitarian visas: EU Parliament vs. European Commission and Council

##### 4.1 From the Treaty of Amsterdam to the Stockholm Programme

The 1997 Protocol to the Treaty of Amsterdam incorporated the *Schengen acquis* into the EU framework in 1999. The common list of non-EU countries whose nationals were subject to a visa requirement was a further development of the *Schengen acquis* and was enshrined in Council Regulation (EC) No. 539/2001 of 15 March 2001, listing the third countries whose nationals must be in possession of visas before crossing the external borders and those whose nationals are exempt from that requirement (Visa List Regulation). All the procedures and conditions for issuing Schengen visas were established in the 2010 Visa Code for short stays in and transit through the territories of Member States. Simultaneously, in 1999, the European Council Meeting in Tampere determined the need to create a common asylum system in order to achieve a regime for determining which EU State would be responsible for examining an application for protection, a uniform asylum status, a common procedure for granting or withdrawing the same, and a common temporary protection system.

As mentioned earlier, in 2002, the European Commission asked the Danish Centre for Human Rights to carry out a study on the feasibility of processing asylum claims outside the EU against the backdrop of the common European asylum system and the goal of a common asylum procedure. The Commission agreed to carefully examine the suggestions con-

---

persons were in need of medical care, which the National Police Force officers were not able to identify and make the pertinent referral correctly, and, on the other, unaccompanied minors were usually not taken into account. For an exhaustive analysis, see the annual reports of the Spanish Ombudsman: <<https://www.defensordelpueblo.es/en/publications/summaries-of-annual-reports/>> (accessed 25 November 2019).

47 Defensor del Pueblo (n 42) at 54.

tained in the study, given the diverse and inconsistent practices in the Member States and argued that since there was a strong need for harmonisation in this area, serious thought should be given

to the question of access to the territories of Member States for persons in need of international protection and compatibility between stronger protection for these people and respect for the principle of *non-refoulement* on the one hand and measures to combat illegal immigration, trafficking in human beings and external border control measures on the other.<sup>48</sup>

In June 2003, the Commission identified the need of a policy for an orderly and managed arrival of persons in need of international protection in the EU, and it proposed exploring the viability of setting up an EU Regional Task Force to undertake certain functions, such as resettlement and Protected Entry Procedures (PEPs), and gradual harmonisation through a Directive based on best practices.<sup>49</sup> The Commission asked the European Parliament and the European Council to endorse specific elements identified in the Communication, such as managed arrival in the EU, and a legislative instrument on PEPs. At the Thessaloniki European Council held in 2003, the European Council took note of the Commission Communication and invited the Commission to ‘... explore all parameters in order to ensure more orderly and managed entry in the EU of persons in need of international protection ...’.<sup>50</sup>

Under the EU Italian Presidency, in 2003, at the seminar held in Rome entitled ‘Towards more orderly and managed entry in the EU of persons in need of international protection’, Member States’ representatives discussed the findings of the Danish study. During this seminar, it became clear that with regard to the potential of Protected Entry Procedures (PEPs), ‘there is not the same level of common perspective and confidence among Member

---

48 COM(2003) 152 final, Communication from the Commission to the Council and the European Parliament on the common asylum policy and the Agenda for protection (Second Commission report on the implementation of Communication COM(2000) 755 final of 22 November 2000) at 16.

49 COM(2003) 315 final, Communication from the Commission to the Council and the European Parliament: Towards more accessible, equitable and managed asylum systems at paras. 6.1.2.3, 14 and 16.

50 Presidency Conclusions of the Thessaloniki European Council 19-20 June 2003, Conclusion 26.

States as exists vis-à-vis resettlement'.<sup>51</sup> By contrast, the European Parliament welcomed the concept of PEPs. Due to the lack of common perspective and confidence among Member States with regard to PEPs, the Commission dropped the idea of suggesting a PEP mechanism for the EU, and instead proposed the introduction of EU Resettlement Schemes and EU Regional Protection Programmes.<sup>52</sup>

The Commission did not mention PEPs again until June 2008, when it again reiterated the need of a comprehensive and balanced migration policy to 'ensure access for those in need of protection and ... ensure coherence with other policies that have an impact on international protection, notably: border control, the fight against illegal immigration and return policies'.<sup>53</sup> Based on this consideration, the Commission announced that it would examine a flexible use of the visa regime based on protection considerations, and stated that common action in this area would be needed in order to assure protection and reduce smuggling.<sup>54</sup>

On 15 and 16 October 2008, the Council of the European Union agreed on the European Pact on Migration<sup>55</sup>, and the Council made the commitment not only to make border controls more effective but also to strengthen European borders without blocking access to protection systems to those entitled beneficiaries. One year later, prior to the adoption of the *Stockholm Programme*, the Commission issued another Communication in

---

51 COM(2004) 410 final, Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin: 'Improving access to durable solutions' at para 35.

52 Ibid. at paras 56, 57 and 59.

53 COM(2008) 360 final, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum - an integrated approach to protection across the EU at paras 2-4.

54 Ibid. at para 5.2.3.

55 Council of the European Union, 'European Pact on Immigration and Asylum', No 13440/08, ASIM 72, Brussels, 24.09.2008. The Pact is based on five main pillars, which I quote: '(1) to organize legal immigration to take account of the priorities, needs and reception capacities determined by each Member State, and to encourage integration; (2) to control illegal immigration by ensuring that illegal immigrants return to their countries of origin or to a country of transit; (3) to make border controls more effective; (4) to construct a Europe of asylum; and (5) to create a comprehensive partnership with the countries of origin and of transit in order to encourage synergy between migration and development'. See S Bertozzi, *European Pact on Migration and Asylum: a stepping stone towards common European migration policies* (Barcelona, CIDOB, Opinion Migraciones, 2008).

June 2009,<sup>56</sup> emphasising the need to balance security measures with human rights and international protection considerations. For the first time the Commission explicitly referred to humanitarian visas, specifically to the need to establish procedures for PEPs and to issue humanitarian visas:

In this context new forms of responsibility for protection might be considered. Procedures for protected entry and the issuing of humanitarian visas should be facilitated, including calling on the aid of diplomatic representations or any other structure set up within the framework of a global mobility management strategy.<sup>57</sup>

However, when the European Council adopted the *Stockholm Programme* in December 2009, the Council ignored the convenience of working on humanitarian visas and invited the Commission

to explore, in that context and where appropriate, new approaches concerning access to asylum procedures targeting main countries of transit, such as protection programmes for particular groups or certain procedures for examination of applications for asylum, in which Member States could participate on a voluntary basis.<sup>58</sup>

#### 4.2. *From the Stockholm Programme to the migration crisis*

The Action Plan for *Stockholm Programme* provided a roadmap for the implementation of political priorities set out for the Area of justice, freedom and security between 2010 and 2014. The Commission committed itself to take actions to further develop the integrated approach to managing EU's external borders. These include legislative proposals to modify Frontex, the Schengen Borders Code. The Commission also proposed setting up an Entry Exit System (EES) and continuing with visa liberalisation by negotiating Visa Facilitation Agreements with non-EU countries, as well as establishing a common area of protection for asylum seekers through responsibility-sharing among EU countries. The action plan also provides for a strengthened external dimension through cooperation with the United Na-

---

56 COM(2009) 262 final, Communication from the Commission to the European Parliament and the Council: An area of freedom, security and justice serving the citizen.

57 Ibid at para. 5.2.3.

58 *The Stockholm Programme. An Open and Secure Europe serving and protecting citizens* [2011] OJ C 115at para. 6.2.3.



tions High Commissioner for Refugees and through the development of the EU Resettlement Programme as well as new regional protection programmes.<sup>59</sup> In order to develop and implement the *Stockholm Programme*, in a Resolution of April 2014, the European Parliament called on

the Member States to make use of the current provisions of the Visa Code and the Schengen Borders Code allowing the issuing of humanitarian visas, and to facilitate the provision of temporary shelter for human rights defenders at risk in third countries.<sup>60</sup>

At the time of the 2014 EP Resolution, the tragic events close to the Italian island of Lampedusa, in which more than 366 people died, put back the issue of migration control in the Mediterranean sea at the top of the EU political agenda and triggered the Commission to establish the Task Force Mediterranean. The EC insisted that Parliament should be involved in it<sup>61</sup> and Parliament insisted that since ‘... EU legislation provides some tools, such as the Visa Code and the Schengen Borders Code, which make it possible to grant humanitarian visas’, it was incumbent upon ‘the Member States to take measures to enable asylum seekers to access the Union asylum system in a safe and fair manner.’<sup>62</sup> The Task Force Mediterranean set up 38 lines of action and, among other things, asked the Commission to explore guidelines for a common approach to humanitarian permits/visas.

According to the Commission, the recommendations emerging from the work of the Task Force Mediterranean had a very strong operational value, which was extremely relevant for addressing the crisis situation in the Mediterranean, for which reason its content was supposed to be implemented as a matter of priority and urgency.<sup>63</sup> In June 2014, the European Council discussed the guidelines, but did not explicitly endorse the Commission’s notion of reinforced legal coordinated approach to humanitarian

---

59 European Commission, Action plan on the Stockholm Programme <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=LEGISSUM:jl0036>> (accessed 25 November 2019).

60 See: EP Res of 2 April 2014 on the mid-term review of the Stockholm Programme, 2013/2024(INI) at para. 83.

61 European Commission News, *Task Force for the Mediterranean: Actions on migration and asylum* (Brussels, Press Release, 27 May 2014) <[https://ec.europa.eu/home-affairs/what-is-new/news/news/2014/20140527\\_01\\_en](https://ec.europa.eu/home-affairs/what-is-new/news/news/2014/20140527_01_en)> (accessed 25 November 2019).

62 EP Res of 23 October 2013 on migratory flows in the Mediterranean, with particular attention to the tragic events off Lampedusa, 2013/2827(RSP) at para. 5(G).

63 European Commission, Implementation of the Communication on the Work of the Task Force Mediterranean, SWD(2014) 173 final (22 May 2014).

visas.<sup>64</sup> One month earlier, the Commission had proposed recasting the Visa Code, with an almost exclusive focus on financial and security issues.<sup>65</sup> The Commission did not use this opportunity to introduce substantial amendments to Articles 19 (4) and 25 (1) on humanitarian visas. The Council discussed the Commission's proposal between April 2014 and April 2016<sup>66</sup> and during that period, the European Commission established a comprehensive European Agenda on Migration to address immediate challenges and the EU's responses in the areas of irregular migration, borders, asylum and legal migration.<sup>67</sup> In February 2016, in its communication to the European Parliament and to the Council, the European Commission detailed the implementation of the priority measures within the framework of the European Agenda on Migration. The Commission found that, despite the existence of a feasible system for managing migration, it was failing in its implementation on the ground.<sup>68</sup> The Commission has regularly reported progress made under the European Agenda on Migration and has set out other key actions to be taken.<sup>69</sup>

On the other hand, the LIBE Committee<sup>70</sup> continued to work on the legal gap as part of the review of the Visa Code (2014/0094(COD)), by insert-

---

64 Conclusions of the European Council of 26-27 June 2014.

65 COM(2014) 164 final, European Commission Proposal for a Regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast).

66 Art 290 TFEU puts the European Parliament and Council on an equal footing with regard to legislative scrutiny of the Commission's quasi-legislative acts. See: M Kaeding, 'Out of balance? Practical Experience in the European Union with Quasi-Legislative Acts' in O. Costa (ed.) *The European Parliament in Times of EU Crisis. Dynamics and Transformations* (London, Palgrave Macmillan, 2019) 161-175 at 163.

67 COM(2015) 245 final, Communication from the commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. A European Agenda on Migration (13 May 2015).

68 COM(2019) 481 final, Communication of the European Parliament Commission to the European Council and to the Council. Management of the refugee crisis, status of the process of carrying out the priority actions in keeping with the European Agenda on Migration (16 October 2019).

69 The latest Communication from the Commission to the European Parliament, the European Council and the Council was on 6 March 2019. See: COM (2019) 126 final, Progress report on the Implementation of the European Agenda on Migration.

70 European Parliament's committees deal with EU legislative proposals by adopting reports, which then are referred to plenary for voting by all Members, and appoint negotiation teams to conduct talks with Council. They adopt non-legis-

ing a number of amendments regarding the creation of a European Humanitarian Visa. The aim of the amendments has been to strengthen the existing provisions by giving a different interpretation of the rather narrow interpretation of humanitarian grounds and international obligations currently in use and by closing some gaps in the Code in order to allow for a more coherent, protection-oriented approach.<sup>71</sup> The text adopted by the LIBE Committee on 15 March 2016 on the creation of a European Humanitarian Visa was as follows:

(26.a) The possibility to apply for a European humanitarian visa directly at any consulate or embassy of the Member States should be established. The provisions to that end should, however, only become applicable two years after the entry into force of this Regulation, in order to provide the Commission with sufficient time to define the necessary specific conditions and procedures for issuing such visas. When preparing the specific conditions and procedures for issuing such visas, the Commission should conduct an impact assessment. In the event that the Commission proposes a separate legal instrument setting up a European humanitarian visa, it should present a proposal to modify this Regulation before its provisions on a European humanitarian visa become applicable.

Article 22(5a) Persons seeking international protection may apply for a European humanitarian visa directly at any consulate or embassy of the Member States. Once granted following an assessment, such a humanitarian visa shall allow its holder to enter the territory of the Member State issuing the visa for the sole purpose of lodging in that Member State an application for international protection, as defined in Article 2(a) of Directive 2011/95/EU. The relevant provisions of Title III of this Regulation shall apply with the exception of Articles 11, 13a, 15 and 27.

The Commission shall be empowered to adopt delegated acts in accordance with Article 48 concerning the specific conditions and procedures for issuing such visas, supplementing or amending Articles 9, 10, 13, and 20 of this Regulation insofar as it is necessary in order to take into consideration the particular circumstances of persons seeking in-

---

lative reports. LIBE is the European Parliament Committee on Civil Liberties, Justice and Home Affairs.

- 71 Committee on Civil Liberties, Justice and Home Affairs (LIBE), Working Document on humanitarian visas (Rapporteur: Juan Fernando López Aguilar, 2018).

ternational protection and of consulates and embassies of Member States.

Article 18(11a) In the assessment of an application for a European humanitarian visa in accordance with Article 22(5a), only the provisions of paragraphs 4, 9, 10 and 11 of this Article shall apply.

Article 55(3a) Article 22(5a) shall apply from [2 years after the day of entry into force].<sup>72</sup>

Between June and September 2016, while considering LIBE Committee's amendments relating to humanitarian visas, the Council requested further clarification from the European Parliament, arguing, in line with the Commission, that the aim of the Visa Code was not to deal with migration, and the issue had to be examined within the EU Resettlement Framework. The Council discussed the issue further in November 2016 and October 2017. The argument against the amendments for the creation of a European Humanitarian Visa included that (1) the Visa Code was not the appropriate place for such rules as it dealt with short-stay visas; (2) there were other legal pathways, in particular, resettlement; and (3) the amendments risked overburdening consulates.

On 7 March 2017, the Court of Justice of the European Union (CJEU) adopted its judgment in Case C-638/16 PPU *X and X v État belge*, according to which Member States are not required, under EU law, to grant a humanitarian visa to persons wishing 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. After months of deadlock, with the Council refusing to continue negotiations if these amendments were not withdrawn, in September 2017, Parliament's negotiating team withdrew the amendments in relation to the creation of a European Humanitarian Visa. Instead the LIBE Committee decided to draw up this legislative own-initiative report.<sup>73</sup>

### 4.3 *The LIBE Committee's legislative own-initiative report*

On 6.12.2017, the Conference of Presidents authorised the request of the LIBE Committee for a legislative own-initiative report on humanitarian visas. According to the rapporteur in charge, Juan Fernando López-Aguilar, EU law as it 'currently stands' could be changed to allow the visas

---

72 Ibid. at 2-3.

73 Ibid. at 3.

to be issued to such persons. The rapporteur's report was supported by a European Added Value Assessment prepared by the European Parliamentary Research Service.<sup>74</sup>

The rapporteur argued that Parliament should call for a separate instrument in the legislative own-initiative report to be proposed by the Commission due to the fact that the Commission and the Council had repeatedly argued that the Visa Code was not the right instrument.<sup>75</sup> The rapporteur held that Article 78(2)(g) TFEU, which provides for 'partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection', would permit a sufficient legal basis if combined with Article 77(2)(a) on the common policy on visas and other short-stay residence.<sup>76</sup> Following that, the rapporteur added that it should be possible to apply for such a visa at the consulate or embassy of any Member State, with the Member State granting such a visa subsequently being responsible for the asylum procedure. And it would be up to the applicant to demonstrate that he or she was in need of international protection. The requirements should take into account that such a person was fleeing persecution, ie, could be outside his/her country of residence, lack certain documents, etc. The admissibility and substantive assessment would focus on the question of whether an application is *prima facie* not manifestly unfounded.<sup>77</sup>

On 4 December 2018, the rapporteur presented a Motion for a European Parliament Resolution with recommendations to the Commission on Humanitarian Visas. The recitals of the new legislative instrument highlighted the need to resolve the paradoxical situation that EU law lacked a provision on how a refugee should actually arrive, owing to which all arrivals take place in an irregular manner. The new legislative instrument will avoid the risk of fragmentation and it will lead the EU to a consistent common policy. The recommendations state that the new instrument should cover third country nationals who are subject to visa requirement

---

74 See European Parliamentary Research Service, *European Added Value Assessment accompanying the European Parliament's legislative own-initiative report*, Rapporteur Juan Fernando López Aguilar, Study by Violeta Moreno-Lax, The Added Value of EU Legislation on Humanitarian Visas- Legal Aspects, EPRS, PE 621.823, July 2018.

75 Committee on Civil Liberties, Justice and Home Affairs (LIBE), Working Document on humanitarian visas, (Rapporteur: Juan Fernando López Aguilar, 5.4.2018DT/1150200EN.docx, PE619.272v 02-00) at 5.

76 Ibid.

77 Ibid.

and who are in need of protection against a real risk of being exposed to persecution or serious harm but not covered by any other instrument such as resettlement. The Motion also includes the option of resettlement, but it cannot be the only legal safe pathway, since it addresses only the limited group of already recognised refugees.

The recommendations in the Motion to the EP also cover the conditions and procedures for issuing humanitarian visas, which will be similar to short-stay visas. Accordingly, the visa application should be assessed on a *prima facie* basis to ensure that applicants have a valid claim of exposure to a real risk of persecution or serious harm. Such an assessment is necessary for the procedure to be credible. The rapporteur is fully aware that important practical preparations need to be undertaken before the new instrument could be implemented. One of the most important steps is to develop an efficient link between visa and asylum procedures in a way that the administrative workflow could function. Finally, some adjustments will be also needed in visa *acquis* and in the asylum *acquis*. Regarding the visa *acquis*, Schengen Borders Code will have to be amended to recognise the humanitarian visa of those arriving at the external border and, in relation to the asylum procedures, any assessment which would have already taken place as part of the visa application should also be taken into account in the asylum procedure, to avoid any unnecessary duplication of efforts.

Unfortunately, to date, the Commission has not submitted any legislative proposal establishing a European Humanitarian Visa and it has focused its attention on Union Resettlement Framework. The Commission changed its position held in 2009,<sup>78</sup> when it specifically referred to the need to establish procedures for PEPs and the issuing of humanitarian visas and affirmed that

it is not politically feasible to create a subjective right to request admission and to be admitted or an obligation on the Member States to admit a person in need of international protection. Indeed, the Common European Asylum System applies to applications for international protection made in the territory of the Member States and does not cover

---

78 COM(2009) 262 final, Communication from the Commission to the European Parliament and the Council: An area of freedom, security and justice serving the citizen.

request for diplomatic or territorial asylum submitted to representations of the Member State.<sup>79</sup>

### 5. Some concluding observations

Before December 2018, humanitarian visas were largely discussed in the EU context without any concrete results, although there was always a recognition of the urgency to harmonise an EU-wide intervention to avoid a fragmentation that undermines the existing visa and asylum *acquis*. The current framework as regards the visa *acquis*, on the one side, and the asylum *acquis* on the other, is detrimental to EU values and to EU commitments to fundamental rights. The Charter of Fundamental Rights, in particular the *prohibition of refoulement*, may render the issuance of visas for the purposes of seeking asylum compulsory in certain circumstances. And this obligation must be taken into account alongside legitimate concerns of the respective Member State, considering the significance of such factors as numbers, resource implications, and the workability of the ensuing EU scheme in devising the necessary action.

Since 2016, trilogue or tripartite talks on humanitarian visas between the Parliament, the Council, and the Commission changed the favourable position that the Commission had held towards humanitarian visas in 2009. At the time of writing, in 2019, Europe as a whole seems to be reeling under a more complex reality than the Europe back in 2009. The European Union as such, and particularly some of its Member States, are struggling with an unexpected and uncontrolled response to the arrival of thousands of refugees. Additionally, the fragmentation and the lack of cohesion between different EU policies and programmes, plus the number of initiatives to reform the CEAS proposed by the Commission, and the fact that the EU Member States tend to think about the asylum issue in domestic terms, led to the Commission to be reticent about an EU humanitarian visa scheme that most likely will not be supported for many Member States.

Finally, the Commission has decided to focus on the *EU Resettlement Framework* as part of its efforts to provide viable safe and legal alternatives for those who risk their lives at the hands of criminal smuggling networks

---

79 European Commission, Follow up to the European Parliament non-legislative resolution with recommendations to the Commission on Humanitarian Visas, 2018/2271 (INL) / A8-0423/2018 / P8\_TA-PROV(2018)0494 (1 April 2019).

across the Mediterranean.<sup>80</sup> However, as UNHCR has constantly reiterated, resettlement consists of the selection and transfer of *already-recognised refugees* from a country of first asylum to a third State that agrees to admit them as refugees and grant them permanent residence.<sup>81</sup> Therefore, the main reason for resettlement is the need for ‘better’ protection of particularly vulnerable refugees who have reached a country of asylum where their situation is precarious or unsafe due to health, security or other reasons. When the Commission presented its proposal for a Regulation setting up a Union Resettlement Framework in 2016, it was probably aware that the *Joint Resettlement Programme* established in 2009 did not work efficiently and the EU Member States’ contribution was slow and scarce. Only 10 Member States had established annual schemes with very limited capacity, and, unfortunately, no common planning or coordination mechanism existed at EU level.<sup>82</sup> Nevertheless, the European Commission insisted on launching in 2017 a new resettlement pledging exercise and called on EU Member States to resettle at least 50,000 persons in need of international protection by October 2019. If EU Member States, as expected, have not reacted to a resettlement scheme since 2009,<sup>83</sup> why does the Commission insist on this approach? Declarations, such as ‘the Union Resettlement aims to create a more structured, harmonized, and permanent framework for resettlement’, have proven to merely be political wishful thinking, with the effect that people smugglers and traffickers have remained undeterred. They have also not prevented persons seeking international protection from risking their lives, or dying, in their attempt to reach the EU territory.

The Commission planned for a comprehensive and balanced migration policy in 2008 and, jointly with the Council, pleaded for a holistic approach to maritime crossings and deaths at sea by exploring new legal channels to safely access the European Union in 2013.<sup>84</sup> Although, in late 2016, both opposed the amendments to the Visa Code, we hope that in the

---

80 The Commission proposal introduces a framework entailing a unified procedure for resettlements to the EU. However, the number of people to be resettled through the framework would be decided upon by individual Member States.

81 UNHCR, *Resettlement Handbook* (Geneva, UNHCR, 2011) at 3.

82 Commission Staff Working Document accompanying the Communication of the Commission on the establishment of a Joint EU Resettlement Programme (Impact Assessment), SEC(2009) 1127 (2 September 2009).

83 Out of 50,000 resettlements to be implemented by the end of October, only 24,700 have been implemented so far.

84 COM (2013) 869 Final, Commission Communication on the work of the Task Force Mediterranean at 2.



next evaluation of the application of the Regulation of the Union Resettlement Framework, the Commission will follow the EP's recommendations and is strongly committed to seeking additional measures towards developing a legal framework for European Humanitarian Visa. The Commission and the Council should enhance effective legal pathways for persons in need of international protection to ensure that Europe stands for responsibility, solidarity and partnership in migration and asylum matters. As the former European Commission President Jean-Claude Juncker said as a candidate to preside over the EC:

Our common European values and our historic responsibility are my starting point when I think about the future of Europe's migration policy (...) the future of a prosperous continent that will always be open for those in need, but that will also deal with the challenge of migration together, and not to leave some to cope alone.<sup>85</sup>

It is about time we had a forward-looking comprehensive holistic approach, like the one designed in the context of the Task Force Mediterranean, if the European Union is really committed to achieving the Union's values.

---

85 European Commission, *A Europe that protects our borders and delivers on a comprehensive migration policy* (May 2019) <[https://ec.europa.eu/commission/files/europe-protects-our-borders-and-delivers-comprehensive-migration-policy\\_en](https://ec.europa.eu/commission/files/europe-protects-our-borders-and-delivers-comprehensive-migration-policy_en)> (accessed 25 November 2011).

