Will the ECtHR Shake up the European Asylum System?

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In early 2017, a possible bouleversement of the European Asylum system appeared on the horizon. The European Court of Justice (ECJ) had to decide the case *X and X*, concerning a Syrian family who had applied for visas at the Belgian embassy in Lebanon, in order to enter Belgium and seek asylum. Was Belgium obliged to issue such "humanitarian visa"? Advocate General Paolo Mengozzi in his opinion suggested that it was: The Charter of Fundamental Rights of the European Union (EU Charter) prohibits inhuman and degrading treatment and binds a member state whenever applying European Union law. Where refusing a visa in application of the EU Visa Code would expose a person to a serious risk of inhuman or degrading treatment, Mengozzi argued, the visa must therefore be granted. The opinion was sound in that it relied on the EU Charter's scope of application (article 51), which is not territorially defined; it nevertheless had a revolutionary touch, since it departed from the conception that states have obligations towards asylum-seekers only as far as those are on their territory or at the border.

The ECJ in March 2017 did not follow Mengozzi's opinion. Focusing on the intended duration of stay, it held that the issuance of visas had not been a matter of EU law but of national law, and that it therefore was not governed by the EU Charter. Despite this matter-of-fact ruling by the ECJ, the case *X and X* highlighted a deep-seated dilemma of fundamental rights protection. For persons whose life and safety depend above all on the possibility to escape a country, rights provisions that bind states only towards those already on the territory are largely meaningless. But the case also illustrated how difficult it is to move beyond that territorial conception of state obligations.

All the more remarkable is that a case with largely parallel facts is now pending before the Grand Chamber of the European Court of Human Rights (ECtHR). *M.N. and others v. Belgium* equally concerns a Syrian family, who in 2016 applied for visas to travel to Belgium and seek asylum. The legal framework for the decision is obviously different: while the ECJ had been called to decide about the interpretation of the Visa Code in combination with the EU Charter, the ECtHR will have to rule on a possible violation of the European Convention of Human Rights (ECHR). But the broader task faced by the court is the same: to give meaning to fundamental rights in the context of forced migration. In that sense, the decision in *M.N. and others* will be a next chapter in an ongoing conversation.

The facts of the case

The Syrian couple, together with their two children, had applied for visas in the Belgian embassy in Beirut on 22 August 2016. (This was around two months prior to the claimants in case X and X.) As stated in the documents of the Belgian courts, the family was living at an uncle's house in Aleppo after their own home had been destroyed, finding themselves in constant fear for their lives and in dire conditions, without electricity and without access to drinking water. At that time, refugees were no longer registered in Lebanon, and even registered refugees lived under very precarious conditions. Especially with their two young children, neither staying in Lebanon seemed conceivable, nor traveling onwards by land, since borders to Turkey were closed. When applying for visas, the Syrian family had already established a connection with a Belgian family who was willing to host them and bear all costs.

The Belgian *Office des Étrangers* (OE) denied their request for a visa, pointing out that the intended duration of stay exceeded 90 days – the applicants had openly stated that they planned to apply for asylum in Belgium. Against the visa denial, they filed for an interim injunction before Belgian courts, arguing that

the assessment did not sufficiently take into consideration their fundamental rights positions. The Belgian *Conseil du Contentieux des Étrangers* (CCE) granted the injunction, urging the OE to consider in its decision article 3 of the ECHR – the prohibition of inhuman and degrading treatment, and suggesting that the applicants might have a valid claim in light of that provision. The OE objected, and a legal back and forth between the OE and the CCE followed. Eventually, the case was referred to the *Cour d'Appel*, which overturned the initial decision of the CCE. Against that background, M.N. and others submitted an application to the ECtHR.

The questions that the ECtHR has to decide are clear-cut. Did Belgium have jurisdiction over the Syrian family when denying their visa requests? And if so, did the denial violate the prohibition of inhuman and degrading treatment? In addition, given the proceeding before the Belgian courts and the refusal of the OE to follow the order of the CCE, the applicants raise claims under article 6 para. 1 ECHR, the right to a fair trial, and article 13 ECHR, the right to an effective remedy. There is no doubt about the significance of the case: several governments and non-governmental organizations have intervened with submissions and the initial chamber relinquished jurisdiction to the Grand Chamber.

The interpretation of "jurisdiction"

The key question of the case will be if Belgium's visa decision meant jurisdiction over the family. And it really is an open question. The interpretation of jurisdiction can build on prior jurisprudence of the ECtHR and other courts, but it ultimately depends on a broader conception of how to delimitate the obligations of states.

According to article 1 ECHR, the contracting parties are obliged to secure the convention rights to everyone within their jurisdiction. Jurisdiction generally exists on the territory of a state, but it can also exist extra-territorially, if a state exercises effective control over persons. The criterion of effective control has been interpreted by the court mostly as a physical control. In cases such as *Al-Skeini* and *Jaloud*, the court detailed the conditions of extra-territorial jurisdiction in military operations. In the case *Hirsi Jamaa*, the court held that migrants intercepted in the Mediterranean and brought on board of a ship by Italian coast guards where within the jurisdiction of Italy. Clearly, the situation of the applicants in this case was a different one. There was no immediate physical control of the embassy staff over them, they entered and left the embassy at discretion. Thought-provoking is the comparison to the case *M. v. Denmark*, in which a man trying to leave East Germany had entered the Danish Embassy in East Berlin and, after refusing to leave, was eventually handed over by the ambassador to the German police. The European Commission of Human Rights, deciding at the time about the admissibility of cases, held that M. had been within Denmark's jurisdiction. The case was dissimilar from the situation of *M.N. and others*, since at stake was the physical presence in the embassy. Nevertheless, the two cases compare since the embassy agents held the key to protect those seeking refuge. Can the refusal to hand over this key constitute jurisdiction?

What is undisputable is that it is disputable. The same acts of state agents can often be framed as action or as omission. Whether a state exercised physical control over a person will be obvious in some cases, but in other cases will depend on what one chooses as frames of time and space. And the interpretation of extraterritorial jurisdiction along the lines of physical control is as such not cast in stone. From the prior jurisprudence, it seems likely that the court would deny the jurisdiction of Belgium. What speaks in favor of another outcome are the profound problems that the territorial conception of state obligations creates in the context of migration.

Universal rights, particular obligations

The questions that the interpretation of jurisdiction raises should be considered against the background of the tension that pervades universal rights treaties and their adjudication. On the one hand, basic rights and freedoms such as the right to life and the prohibition of torture apply without qualifications as to the nationality, legal status, or other characteristics of the

person. They are universal in the sense that we recognize every person should enjoy these basic rights and freedoms. On the other hand, the corresponding obligations of states are, and have to be, specific. Not every state has to actively secure the rights of individuals everywhere. The criterion of jurisdiction serves to delimitate the responsibility of states. This delimitation is in general not a problem for the safeguarding of rights, since there is always one state responsible. It can become a problem, however, in the context of migration.

The dilemma of a territorial delimitation of state obligations

Migration governance is marked by the tension between a state's legitimate interest to control access to the territory, and the commitment to refugee protection and migrants' fundamental rights. The territorial conception of obligations here translates into a rift regarding the rights of migrants: Those who reach the territory or otherwise are under the jurisdiction of the respective state have substantive procedural and material rights, including the right to an individual assessment of their asylum claim. Those who do not reach the territory have no rights at all. This rift would not be so dramatic if it would not also mean that states can prevent the access of asylum-seekers without engendering legal liability. The court's interpretation of jurisdiction in that sense outlines how states may hinder migrants to reach their territory without violating the convention. The case *Hirsi Jamaa* affirmed that extra-territorial jurisdiction existed where migrants were taken on board of a ship – but it thereby also sketched how maritime interception might take place without jurisdiction over the persons intercepted.

The territorial delimitation of state obligations – and I include in the notion the interpretation of extra-territorial jurisdiction along the lines of physical control – thus creates, firstly, a problematic incentive for states to deter the access of migrants. The effect of this incentive on the overall goal of refugee protection is enormous: it is visible in the proliferation of border fences and it contributes to a dysfunctional system, in which states compete in hindering migration and dispelling asylum-seekers. Secondly, the territorial delimitation of state obligations gives rise to a free zone for state actions which can have substantive, possibly fatal, effects on migrants' lives, without legal responsibility. Thirdly, the arrangement of obligations along lines of territory and physical control disadvantages less physically able migrants. Under the current regime, a person's access to protection often depends on her ability to put up with harsh conditions and obstacles in reaching a state. In theory, the particularity of obligations might not be in conflict with the universality of rights; in practice, it often is.

What to expect from a responsible judgment?

Is there a legal response to the dilemma of a territorial delimitation of state obligations? Would a different interpretation of jurisdiction solve the problem? The foremost thing to hope for, is that the court will not pass lightly over these issues. Judge Paulo Pinto de Albuquerque in his concurring opinion to the case *Hirsi Jamaa* described the core issue of the case as the question "how Europe should recognize that refugees have the 'right to have rights'". This holds true also for the case *M.N. and others*, and no matter how the court will rule, one can expect that it acknowledges the substantial theoretical, historical and political weight of the questions involved.

Albuquerque in this concurring opinion also argued in favor of a state obligation to grant a visa if a person is in danger of being tortured and asks for asylum in an embassy of a State bound by the EHCR. If no other escape is possible, the Convention might impose in such circumstances a positive duty on states under Article 3, Albuquerque suggested. The pressure from the side of state governments against such interpretation will, beyond doubt, be massive. They fear the "specter" of an "uncontrolled flood of applications", as Mengozzi framed it so pertinently in his opinion to the *X and X* case. To address that fear, Mengozzi emphasized the particular vulnerability of the Syrian family. Not everybody applying for visas in order to flee a country would be in a comparable situation, he main-

tained, the obligation would remain reserved for extreme cases.

This indicates that a less territorially focused conception of the reach of human rights obligations would likely come with the delimitation of state obligations along other lines, such as the notion of vulnerability. On the one hand, a wider interpretation of jurisdiction could thus counteract some of the structural dysfunctionalities we see in the context of migration and fundamental rights, which can be an important achievement. On the other hand, the tension between universal rights and particular obligations will remain, and we should carefully look out how other criteria of delimitation endanger the access to rights.

The opinion of Advocate General Mengozzi in the case *X and X* and the concurring opinion of Judge Pinto de Albuquerque in the *Hirsi* case were remarkable interventions that, beside their legal merits, illustrated also the political role of fundamental rights adjudication. Too accustomed have we often become to the limits of state obligations to note how they can make the promise of universal rights fade into hypocrisy. It is crucial that in light of concrete cases the drawing of boundaries is reconsidered – to ask what the law requires, and to render visible the responsibility we have to mitigate shortcomings of the law. The case *M.N. and others v. Belgium* should be an instance that challenges our taken-for-granted assumptions about the reach of obligations. At least in that sense, it will hopefully shake up the European asylum system.

The text has been changed on 25 April 2019 to omit the names of applicants, corresponding to the proceeding before the ECtHR.

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