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<p>Asylum seekers aspiring to find refuge in the territory of the European Union are faced with a myriad of barriers to entry that inhibit or even prevent legal entry into the Union. Among these barriers emerges EU visa policy effectively requiring nationals of all major refugee-producing countries to meet strict visa requirements to lawfully cross the external borders of the Union. As a result many attempt to reach the territory of the Member States irregularly and often in precarious fashion. The EU Visa Code (810/2009/EC) enables Member States to issue visas for humanitarian purposes despite the applicant not fulfilling the prescribed entry requirements under the Schengen <i>acquis</i>. The thesis expounds current visa practices in the Schengen framework and sheds light on the barriers to entry and the notion of the humanitarian visa. The employment of conscious and harmonised visa policy at Union level could facilitate the safe passage of asylum seekers into the European Union as one tool in the toolbox for lowering the migrant death toll.</p> <p>Euroopan unionin alueelle pyrkivät turvapaikanhakijat kohtaavat usein lukuisia luvallista maahantuloa vaikeuttavia esteitä. Eniten pakolaisia tuottavien maiden kansalaiset ovat lähes poikkeuksetta viisumivelvollisia saapuessaan unionin ulkorajoille. Ehdottomien viisumivaatimusten vuoksi yhä useampi kolmannen maan kansalainen turvautuu epäsäännöllisiin ja turvattomiin keinoihin päästäkseen unionin jäsenmaiden alueelle hakeakseen turvapaikkaa. Euroopan unionin viisumisäännöstö (810/2009/EY) mahdollistaa niin sanotun humanitaarisen viisumin eli alueellisesti rajoitetun viisumin myöntämisen, joka voidaan myöntää humanitaarisista syistä, vaikka viisuminhakija ei täyttäisi maahantulon edellytyksiä. Käsittelen tässä tutkimuksessa Schengen-jäsenmaiden tämänhetkisiä viisumikäytäntöjä sekä luvallista maahantuloa vaikeuttavia esteitä. Lisäksi tarkastelen humanitaarisen viisumin käyttötapoja sekä mahdollisuuksia helpottaa turvapaikanhakijoiden pääsyä unionin alueelle. Tarkoituksenmukaisen ja yhteensovitetun viisumipolitiikan avulla EU-tasolla voitaisiin vähentää unionin ulkorajoilla kuolevien turvapaikanhakijoiden määrää.</p>			
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EU Visa Policy: A Bastion of Exclusion or Patron of Refugees – The Case of the Humanitarian Visa

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Abstract

Asylum seekers aspiring to find refuge in the territory of the European Union are faced with a myriad of barriers to entry that inhibit or even prevent legal entry into the Union. Among these barriers emerges EU visa policy effectively requiring nationals of all major refugee-producing countries to meet strict visa requirements to lawfully cross the external borders of the Union. As a result many attempt to reach the territory of the Member States irregularly and often in precarious fashion. The EU Visa Code (810/2009/EC) enables Member States to issue visas for humanitarian purposes despite the applicant not fulfilling the prescribed entry requirements under the Schengen *acquis*. The thesis expounds current visa practices in the Schengen framework and sheds light on the barriers to entry and the notion of the humanitarian visa. The employment of conscious and harmonised visa policy at Union level could facilitate the safe passage of asylum seekers into the European Union as one tool in the toolbox for lowering the migrant death toll.

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1. Introduction

Armed conflicts and other emergencies around the world produce mass movements of people in need of protection. Safe haven in the form of asylum is often the grail sought after. These displaced persons often resort to irregular methods of crossing the border of the state in which they will eventually apply for asylum in want of adequate legal means to do so. We have witnessed this all too frequently in the headlines of newspapers and reports about migrants attempting to cross the Mediterranean in search for better lives only to find the expedition to be their last. Barriers to entry such as carrier sanctions, interceptions at sea and strict visa requirements all play their part in inhibiting asylum seekers from embarking on the endeavour of entering legally. Instead they frequently resort to undertaking perilous voyages. This all the while European Union Member States are bound by the collective responsibility of states to protect refugees. The figures offer a rather dire image of the present situation. The United Nations refugee agency (UNHCR) reported on World Refugee Day¹ 2014 that the number of forcibly displaced persons globally has surpassed 50 million.² This figure comprises refugees, asylum seekers and internally displaced persons alike.

The responsibility of states to protect refugees is multi-layered and fragmented. Various legal instruments are part and parcel of this entirety. Coming from many fronts, this responsibility is imposed on states pursuant to international human rights law, international refugee law and regional human rights instruments coupled with directly applicable European Union law commanding adherence to these sources of norms. The proliferation of instruments addressing the rights of the vulnerable refugees and the obligations of the participating states on the one hand and the often-perceived inactivity of states on humanitarian issues on the other speak to the sensitive nature of the topic. Entry into the territory of the Union whether for certain third country national tourists or asylum seekers is dependent upon having an entry permit, a visa. The requirement of having to be in possession of a visa for the purpose of entry into the Union is one of the many barriers to entry.

¹ A UNHCR organised event held every June 20 to raise awareness on refugee-related matters.

² 'World Refugee Day: Global forced displacement tops 50 million for first time in post-World War II era', *UNHCR News Stories*, June 20, 2014, available at <<http://www.unhcr.org/53a155bc6.html>> (accessed June 24 2014).

Visa policy in the EU has been harmonised to an impressive extent considering the highly politicised character of migration-related matters. Visa requirements are imposed on third countries for a variety of reasons of which the impediment of illegal immigration is the most commonly spoken. Currently, all major refugee-producing countries are required to be in possession of a visa to enter the area of the Member States. The legal framework on visa policy is a rigid one. The requirements to be met in order for the third country national to be issued a visa, especially from certain third countries, are sometimes difficult to meet even for a regular traveller. The chances of success in this regard for a forcedly displaced person are scant. However, the provision in the EU Visa Code (810/2009/EC) regarding the issuance of a visa with limited territorial validity for humanitarian grounds or because of international obligations may give hope yet. The employment of conscious and considered visa policy could pave the way for the implementation of a true responsibility to protect those fleeing persecution, a responsibility already envisaged under many human rights tools. The common Schengen visa, the issuance of which is practically dependent upon agreement by all Member States, entitles its holder to travel freely within all Schengen Member States. The visa with limited territorial validity, or humanitarian visa, for the most part, entitles its holder to travel only to the issuing Member State. The issue of the humanitarian visa is as topical as ever, as conflicts in the outskirts of Europe ensue, the number of displaced persons is at an all-time high since the end of World War II and migrant death tolls due to attempts at reaching the Union irregularly have reached a pinnacle.

This thesis examines the potential and current role of EU visa policy in facilitating the safe passage of asylum seekers and refugees into the territory of the Member States. More specifically, the emphasis is on Schengen Member States³ as they have committed to a common visa policy in the EU framework⁴. The study also considers some specific changes that current legislation ought to undergo in order to enable Member States to better live up to their international obligations vis-à-vis those in imminent peril. Both opportunities as well as challenges to the conclusions and propositions presented in the ensuing text are also contemplated. The research concentrates on the potential of the enabling legislation, preparatory documentation, political statements, various reports and

³ Current Schengen Member States are Austria, Belgium, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Slovakia, Slovenia, Spain, Sweden and Switzerland (July 2014).

⁴ Treaty on the Functioning of the European Union, Art. 77(2).

statistics whether they support the arguments put forward or challenge them. Ministry officials, European Commission representatives and consular staff, too, have been interviewed for this purpose.

The methodology I adopted for the analysis of the relevant law comprises both a black-letter analytical approach as well as a more sociological method. I began the research by reading and analysing relevant legal instruments as part of a system of inter-related rules regulating visa policy and asylum. Following the initial analysis, I composed questionnaires that were later sent to the Commission, foreign ministries of Schengen Member States and various embassies and consulates situated in or accredited to third countries that produce large numbers of asylum seekers. Additionally, the annual visa statistics compiled by the Commission presented material for the analysis of current state practices. The relationship between EU visa policy and refugee protection has not to this day been studied in depth. The link between migration and security has of course been researched, but the provisions of the fairly new Visa Code enabling the issuance of visas for humanitarian reasons or because of international obligations and its potential to facilitate the safe passage of bona fide asylum seekers remains to my knowledge by and large unexplored. Due to the relative novelty of the research question and enabling legislation, little case law on the matter exist.

The present thesis is organised in seven separate chapters. The various legal tools that bind Schengen Member States regarding refugee protection are outlined in chapter 2 *Legal Framework of the Responsibility to Protect Refugees*. The limited access to the territory of the Member States due to barriers to entry as well as strict visa requirements are dealt with in chapter 3 *Barriers to Entry*, where various individual restrictive properties of visa policy are also examined. Chapter 4 sketches the *Role of EU Visa Policy* as others and I have envisaged it and whether it currently protects or exposes refugees to harm. Chapter 5 considers the crux of this research, i.e. the potential of *Visas with Limited Territorial Validity* as well as the legal framework, including an analysis of the proposal text and the adopted text of the enabling article. Also statistics and the one piece of relevant case law are discussed in this chapter. The *Opportunities, Challenges and Recommendations* regarding humanitarian visas are reflected on in chapter 6. *Concluding Remarks* are presented in chapter 7.

2. Legal Framework of the Responsibility to Protect Refugees

This chapter outlines briefly the historical background of the institutions dealing with refugee matters and goes into more recent developments with regard to the collective responsibility of states to protect refugees.

2.1 The Principle of Non-Refoulement and Access to Asylum

The recognition by states of a collective responsibility to protect refugees can be traced back to the end of the First World War and finally culminating in the more detailed 1951 Convention Relating to the Status of Refugees and in its 1967 Protocol. The first known inceptions of the concept of ‘refugee’ in the international legal context took place already in the 19th century. It was not, however, until the end of the First World War that states actually took to instrumentalize the protection of those fleeing persecution as a proper legal notion.⁵ The 1933 Convention Relating to the International Status of Refugees crystallised the principle of ‘restricted expulsion’⁶, albeit that treaty was not at the time widely applicable due to measly membership. Various international commissions and offices concentrating on refugee matters were established and subsequently wound up or replaced between 1920 and 1950.⁷ After the Second World War the United Nations General Assembly established the United Nations High Commissioner for Refugees⁸, which is operational to this day. Similarly, in the aftermath of the war, came to existence the principal treaty on refugee protection – The 1951 Geneva Convention Relating to the Status of Refugees. During the same decade came the European Convention for the Protection of Human Rights and Fundamental Freedoms⁹, indirectly addressing the right to asylum. Further down the road the European Union began to bestow upon asylum seekers various rights.

⁵ A. Hurwitz, *The Collective Responsibility of States to Protect Refugees* (Oxford: Oxford University Press, 2009), pp. 10-11.

⁶ Restricted expulsion refers to the notion that Contracting Parties were not to remove from the territory or refuse entry into the territory by application of police measures, such as expulsions or non-admittance at the frontier, refugees who have been authorised to reside there. Only measures dictated by reasons of national security or public interest were justified.

⁷ E.g. The Office of the International Commissioner for Refugees; International Nansen Office for Refugees; High Commission for Refugees Coming from Germany; Intergovernmental Committee on Refugees.

⁸ Charter of the United Nations, Article 22.

⁹ Convention for the Protection of Human Rights and Fundamental Freedoms, to which all EU Member States are party as are the EU institutions.

2.1.1 The 1951 Refugee Convention and International Law

The starting point for the operation of the 1951 Refugee Convention is that refugees be outside the territory of their own country and that their own state is incapable of protecting them¹⁰. The treaty introduced the requirement that the fear of persecution be grounded on one of the five grounds of race, religion, nationality, political opinion and membership of a particular social group¹¹. Fulfilment of these conditions would in theory determine the applicant a refugee. The term 'refugee' thus denotes recognition by a state of the particular status attached to the person¹². Before a determination on the person's status is made, that person is termed 'asylum seeker'. The Institute of International Law defined the concept of 'asylum' as '...the protection which a State grants on its territory or in some other place under the control of certain of its organs, to a person who comes to seek it.'¹³ It should, however, be noted that international law merely recognises the right to seek and enjoy asylum from persecution¹⁴ whilst the granting of asylum is left for the discretion of individual states. The most recent attempt at regulating asylum at the international level was the 1977 UN Conference on Territorial Asylum, which proved to be a failure. Furthermore, the principle of 'non-refoulement' inevitably links the two concepts together by virtue of rendering it against international law to turn away an alien to a third country where there is a well-founded fear of persecution.¹⁵

Under the Refugee Convention no Contracting State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion¹⁶. Reservations on the provision are not allowed. The convention

¹⁰ P. Weis, 'Legal Aspects of the 1951 Geneva Convention', 30 *British Yearbook of International Law* (1953), 478-489 at 480.

¹¹ Refugee Convention, Art. 1A(2).

¹² The Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders defines 'asylum seeker' as 'any alien who has lodged an application for asylum within the meaning of this Convention and in respect of which a final decision has not yet been taken.'

¹³ Institute of International Law, Bath Session, *Annuaire* 1 (1950), Article 1.

¹⁴ Universal Declaration of Human Rights (1948) as adopted by the United Nations General Assembly, Article 14.

¹⁵ See e.g. G. Goodwin-Gill and J. McAdam, *The Refugee in International Law* (Oxford: Oxford University Press, 2007), p. 357.

¹⁶ Refugee Convention, Art. 33.

provides for an extremely limited exception¹⁷ to this the application of which is revealed by the *travaux préparatoires* as very narrow indeed.¹⁸

The Final Act of the 1951 Refugee Convention stated that Article 33 of the Refugee Convention on the principle of non-refoulement was an expression of a generally accepted principle. It certainly is now widely seen as a principle of customary international law also due to, but not limited to the fact that there are some 150 states bound by the convention obligation.¹⁹ The principle has since been recognised and affirmed in international declarations, conventions and in various United Nations General Assembly resolutions.

The 1951 Refugee Convention is not the only instrument granting protection to refugees. The obligation of non-refoulement has been developed in the realm of international human rights law, too. There it plays the role of a preventive approach to the protection of human rights.²⁰ There exist a wide array of treaties to this effect such as the 1966 International Covenant on Civil and Political Rights and the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment and of course the European Convention on Human Rights.

2.1.2 The European Convention on Human Rights

While the regional human rights convention does not itself expressly provide for a right to seek asylum, nor does it expressly incorporate the principle of non-refoulement, Article 3 prohibits torture and inhuman or degrading treatment and punishment. Indirectly, therefore, a state could be in violation of the article where a citizen of a third country would be denied access into a Member State and turned away thus putting that person in risk of said treatment or punishment. Denying a person access to or expelling from the Member State may also have the effect of raising issues under the right guaranteed under Article 2 of the convention, the right to life, or indeed other convention rights.²¹ Therefore

¹⁷ The exception covers refugees for whom there are reasonable grounds to regard as a danger to the security of the country in accordance with Art. 33(2) of the Refugee Convention.

¹⁸ UNHCR Advisory Opinion on the Extraterritorial Application of *Non-Refoulement* Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, January 26, 2007.

¹⁹ *Ibid* 5, p. 204. It should also be noted that the matter is currently being disputed.

²⁰ *Ibid* 5, p. 188.

²¹ E.g. on Art. 6 (right to a fair trial) see European Court of Human Rights, *Mamatkulov and Askarov v. Turkey*, Nos 46827/99, 46951/99, February 4, 2005; more generally on Art. 2 (right to life) and Art. 15(2)

convention rights may be pleaded to prevent non-admission, expulsion or extradition of an alien to a state where he or she may face treatment or punishment prohibited under the ECHR. This would suggest a *de facto* right to asylum.

Although jurisdiction is traditionally linked to the territory of a state, it may also come into question where states exercise ‘effective control’ extraterritorially. Effective control typically entails the use of public power by one state over individuals or another state outside its own territory so as to attach accountability or attributability to itself²². In a human rights context the function of jurisdiction differs from the function in a general public international law setting. It is not here the question of legal entitlement for a state to act or refrain from acting but rather the issue of whether or not to grant persons certain rights.²³ As exemplified by the following cases, this view of jurisdiction as deriving from practice rather than from strict legal entitlement is nonetheless in line with the view of public international law as held by the International Court of Justice²⁴:

‘Physical control of a territory, and not sovereignty or legitimacy of title, is the basis for state liability for acts affecting other states.’²⁵

The applicability of the ECHR is limited to situations within the jurisdiction of a Member State of the Council of Europe. However, the applicability of the rights enshrined in the convention may be triggered pursuant to a Member State exercising effective control over persons at high seas or other no-man’s land.²⁶ France attempted to argue that persons in the transit zone of Paris airport were not under the jurisdiction of France and therefore the convention rights did not apply. The European Court of Human Rights disagreed and held that the domestic laws of France did not guarantee the persons’ right to liberty under

(prohibition of derogation from certain convention rights) see European Court of Human Rights, *Soering v. United Kingdom*, No. 14038/88, July 7, 1989.

²² See e.g. European Court of Human Rights, *Ilaşcu and others v. Moldova and Russia*, No. 48787/99, July 8, 2004; European Court of Human Rights, *Banković and others v. Belgium, Czech Republic, Denmark, France, Germany, Greece, Hungary, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Spain, Turkey and the UK*, No. 52207/99, December 12, 2001.

²³ T. Gammeltoft-Hansen, *Access to Asylum – International Refugee Law and the Globalisation of Migration Control* (Cambridge: Cambridge University Press, 2013), p. 46.

²⁴ *Ibid*, p. 107.

²⁵ International Court of Justice, *Namibia (South West Africa) Case*, June 21, 1971, para. 53.

²⁶ See e.g. European Court of Human Rights, *Xhavara and Others v. Italy and Albania*, No. 39473/98, January 11, 2001 and *Hirsi Jamaa and Others v. Italy*, No. 27765/09, February 23, 2012.

Article 5 of the ECHR.²⁷ In *Hirsi Jamaa and Others v. Italy* Italian authorities had intercepted at sea a boat carrying some 200 migrants, including asylum seekers. The migrants were summarily returned to Libya pursuant to a bilateral agreement between the authorities of Italy and Libya. The European Court of Human Rights stated that despite the migrants failing to seek asylum while in captivity, Italy was not exempted from complying with the convention. In the court's opinion, there was a risk that the persons could be subjected to punishment or treatment prohibited under Article 3 of the convention. The court applied the concept of 'constructive notice', according to which the Italian authorities *should have known* how their Libyan counterparts apparently fulfilled their obligations vis-à-vis the protection of refugees and that many of the migrants onboard were subject to be further deported back to their respective countries of origin, namely Somalia and Eritrea. The Italian authorities were duly found to be in violation of Article 3 of the ECHR.

Although the ECHR does not directly guarantee the right to asylum, it can apply and be appealed to for the purpose of evading expulsion or extradition of an alien to a country where he or she may face treatment that contradicts with the rights guaranteed under the convention, most frequently the right not to be subjected to torture or to inhuman or degrading treatment or punishment. In essence this *de facto* right may have the effect of rendering the state in question unable to return the alien and may have to eventually after prolonged residence offer that person permanent residence.

2.1.3 European Union Law

The European Union also imposes obligations regarding the protection of asylum seekers onto Member States through primary and secondary sources of EU law. The Charter of Fundamental Rights of the EU became legally binding with the entry into force of the Treaty of Lisbon in 2009. The Charter lists in a single document the rights Member States of the Union are obliged to protect. It also quite unprecedentedly provides for the right to asylum²⁸ as well as for the prohibition of refoulement²⁹. The Treaty on the Functioning of

²⁷ European Court of Human Rights, *Amuur v. France*, No. 19776/92, June 25, 1996 at 52-54.

²⁸ Charter of Fundamental Rights of the EU, Art. 18.

²⁹ Charter of Fundamental Rights of the EU, Art. 19.

the European Union³⁰ makes direct reference to the 1951 Refugee Convention requiring that all measures adopted under the Common European Asylum System be respecting of the states' obligations under the convention. It could even be argued that the Court of Justice of the European Union (CJEU) has entrenched fragments if not all of the Refugee Convention into applicable EU law by virtue of *Salahadin Abdulla and Others*³¹, where the CJEU stated:

‘It is apparent from recitals 3, 16 and 17 in the preamble to the Directive³² that the Geneva Convention constitutes the cornerstone of the international legal regime for the protection of refugees and that the provisions of the Directive for determining who qualifies for refugee status and the content thereof were adopted to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria.’

In the framework of the Union the right of access to asylum is guaranteed by the Asylum Procedures Directive³³ as well as the Charter. Although the Charter commits to the right to asylum, EU law does not provide for the facilitation of entry for asylum seekers into the territory of the EU for the purpose of applying for asylum. Third country nationals, who are required under EU law to possess a visa to enter the territory of the Union, will be so required whether or not they are tourists, businessmen or asylum seekers.

The scope of application of the Asylum Procedures Directive is limited to the territory of the Member States, including airport transit zones and the borders³⁴. However, Article 6(2) and (5) of the directive require that Member States practically ensure that asylum seekers have effective access to the procedure. This does not change the fact that the directive only

³⁰ Treaty on the Functioning of the European Union, Art. 78(1): ‘The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties.’

³¹ Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, March 2, 2010, at 52.

³² The CJEU was referring to 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.

³³ Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status.

³⁴ Asylum Procedures Directive, Art. 3(1).

becomes applicable once a person reaches the territory, border or transit zone of a Member State. It could perhaps be argued that the asylum acquis is applicable where a Member State is engaged in extraterritorial refugee status determination. However, it would be quite inconceivable that the same rules were to apply where a Member State is not engaged in extraterritorial status determination but nonetheless exercises effective control over another person. Consequently it would appear that Member States are not under an obligation to apply the safeguards of the directive to third country nationals present in their own country or another third country, especially so if there is no element of status determination.

As the Treaty on the Functioning of the European Union entrenches into directly applicable primary EU law the provisions of the Refugee Convention as well as the principle of non-refoulement and right to apply for asylum, Member States are under an obligation to act accordingly in executing the common policy on asylum. The Commission in devising and executing the common policy alike is bound to adhere to the respective sources of law.

2.2 Right to Leave One's Country

The right to apply for asylum from persecution by default entails the existence of an empowering right to be able to leave one's own country, as asylum cannot be sought without leaving one's country of origin first. The right to leave, too, is widely recognised in international human law instruments such as the Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights and the 1989 Convention on the Rights of the Child.³⁵

The legal framework surrounding the collective responsibility of states to protect refugees and asylum seekers is a complex and yet developing web of inter-related rights, rules and obligations. Member States of the European Union are bound by various norms regarding the principle of non-refoulement and the right to asylum. However, due to territorial restrictions re the applicability of the asylum acquis and varying degrees of protection accorded by the various legal sources, the situation is far from clear. The right to leave

³⁵ Justified restrictions for this otherwise universal right may include, inter alia, the protection of national security or to prevent a criminal suspect from fleeing the country.

one's own country, too, is embodied in various international legal instruments, yet as no corresponding subjective right to be admitted by any other country exists, a paradoxical situation ensues. Containment measures such as interceptions at sea and other barriers to entry, which are discussed in the following chapter, may have the effect of hindering one's ability to exercise this right.

3. Barriers to Entry

Despite obligations deriving from various legal instruments at international, regional and national level, access to the territory of the Member States of the European Union is limited. Limited access of asylum seekers to the territory of the Member States is often attributed to a plethora of measures adopted at EU level. These comprise, inter alia, visa requirements and other pre-frontier controls, carrier sanctions and policies at the external borders of the Union. While asylum seekers worldwide are growing in numbers and the number of asylum claims in the EU were until recently at an all-time low, it is not all that far-fetched to suggest that border control and entry measures adopted in the EU have a role to play in this.

Carrier sanctions, or imposing strict liability on transportation service providers to ensure that they transport only passengers fulfilling the entry requirements, first appeared in the 1990 Schengen Convention. This strict liability encompasses fines as well as the duty to return passengers without proper documentation to the place of departure. These so-called carrier sanctions may very well have the effect of deterring both the transportation companies and the asylum seekers. First, the companies are pressured into exercising particular caution when assessing the documents of what the staff may or may not deem as potential asylum seekers and even impose more rigid requirements to qualify for a ticket entitling the holder to enter the vehicle. Second, asylum seekers are more likely to be refused ticket sales, as staff members of the transportation companies will exercise extra vigilance in fear of being penalised.³⁶

Another topical barrier to entry presents itself as interceptions at sea, or ‘pushbacks’. The phenomenon is self-explanatory. Suspicious vessels in the area of both Member States and of third countries as well as vessels in the high seas are monitored and occasionally intercepted and being ordered to return to the port of departure. The concerns are naturally that asylum seekers onboard are denied access to international protection or even that the returnees face persecution, which as it were, could have very well been the original reason

³⁶ See e.g. C. Rodier, *Analysis of the External Dimension of the EU's Asylum and Immigration Policies* (Brussels: European Parliament, 2006).

for leaving that particular third country. There is moreover a whole study to be written on the international legal aspects of denying citizens the right to leave their own country³⁷.

Overwhelmed by the awesome and rigorous procedure of gaining legal means of entering the territory of the EU, migrants and especially asylum seekers are forced to make use of irregular means of travel. Many find themselves in exploitative situations where smugglers and human-traffickers have no regard to the human rights, safety or wellbeing of their clients/victims. Attempts at crossing the Mediterranean Sea with an unseaworthy vessel in hope of a better life seldom finish with a flourish. The devastating tragedy in Lampedusa in October 2013 is but one instance of the all too well known affair that is called irregular migration in want of legal means to enter.

Visa requirements constitute a paramount barrier to entry, especially for those fleeing persecution. There remains a great deal to be said about the other barriers to entry for asylum seekers such as carrier sanctions, interceptions at sea and the use of immigration liaison officer networks operating in third countries, whose sole task is to combat illegal migration. However, this chapter focuses on visa regimes as barriers to entry and considers the various legal instruments in place.

3.1 Entry requirements – the Legal and Political Framework

It is of course no novelty that sovereign states impose requirements on entry. It is recognised in international law³⁸ that states have such a right. This right will also inevitably include the right to refuse entry and to expel third country nationals not fulfilling the prescribed conditions for entry. Emmerich de Vattel in *The Law of Nations* observed that as a matter of sovereignty and right of domain, conditions on the permission to enter the territory could be prescribed.³⁹ Requirements for entry are often related to the person planning to enter the area of the state. However, these personal characteristics pertaining to the eligibility to enter will on various occasions be examined through the narrative of the applicant's country of origin and conditions related thereto. It is no surprise

³⁷ See chapter 2 above.

³⁸ See e.g. European Court of Human Rights, *Soering v. United Kingdom*, No. 14038/88, July 7, 1989.

³⁹ E. de Vattel, *The Law of Nations* (Philadelphia: T. & J.W. Johnson & Co), Book 2, Chapter 8, § 100.

to find that currently all major refugee-producing third countries are among those countries whose citizens must be in possession of a visa to enter the territory of the Member States of the European Union. Similarly measures where the increase in asylum applications is a condition for triggering the measure are being adopted to more readily impose visa requirements for citizens of third countries whose nationals are currently not required to have a visa.

A visible trend in EU external border policy is the so-called securitization of the policy area. Securitization as considered by the Copenhagen School is taken as a starting point for this argument according to which, policy is securitized through successful speech acts. The topical threat is moved away from the political arena into somewhere apolitical so as to legitimate the employment of emergency measures without going through the normal democratic/legitimate process.⁴⁰ The formulation of security discourse with regard to EU external border policy is possibly most apparent in the 1990 Convention Applying the Schengen Agreement of 14 June 1985, ‘...which connects immigration and asylum with terrorism, transnational crime and border control.’⁴¹ It does not, however, necessarily follow that the policy field has been securitized insofar as the term is understood as remitting the issue away from the normal legislative procedure into something lighter, something that will address the issue less formally *because it has to be* by virtue of its nature. As far as the EU is concerned, the common policy on visas and other short-stay residence permits is achieved by the European Parliament and the Council acting in accordance with the ordinary legislative procedure⁴². The Commission has, however, issued a Communication to the Council and the European Parliament on an Open Method of Coordination (OMC) for the Community Immigration Policy⁴³. The OMC is a form of so-called new governance, whereby measures and tools may be adopted in order to achieve better policies in a less formal manner. The forms of new governance in the field of migration policy tend to be restricted to further information sharing and the encouragement of more inter-agency and intergovernmental cooperation. This is discussed in more detail below in the context of the safeguard clause and the Visa Regulation; where there may be

⁴⁰ H. Stritzel, ‘Towards a Theory of Securitization: Copenhagen and Beyond’, 13 *European Journal of International Relations* 3 (2007), 357-383 at 358.

⁴¹ J. Huysmans, ‘The European Union and the Securitization of Migration’, 38 *Journal of Common Market Studies* 5 (2000), 751-777 at 757.

⁴² Treaty on the Functioning of the European Union, Article 77(2)(a).

⁴³ COM(2001)387 final.

room to argue that some aspects of migration policy are taken out of the sphere of properly understood democratic decision-making.

The following considers the various requirements and mechanisms with regard to EU visa policy that constitute barriers to entry as features of the visa regime and therefore potentially discourage bona fide asylum seekers from undertaking to legally enter the country in which he or she intends to apply for asylum and instead resort to irregular means of crossing the border. Furthermore, official visa statistics compiled by the Commission will be presented to illustrate the arguments put forward. The identifiable barriers to entry as part and parcel of EU visa policy are dealt with in detail below and presented in relation to the relevant legal source.

3.2 Schengen Borders Code

The entry conditions for third country nationals in the Schengen framework, in other words non-EU or EEA Member State nationals, are listed out in the Schengen Borders Code⁴⁴. Currently, EU law only regulates short-term stays⁴⁵ whereas the issuance of residence permits is regulated at national level. For the purpose of short-term stays, the third country national must first of all be in possession of a valid travel document authorising him or her to cross the border. The recognition of travel documents issued by third country nationals is within the national competence of each Member State. However, the Commission has instituted a committee, the Travel Document Committee, under the comitology procedure in order to enhance cooperation and harmonisation within this field. The third country national must be in possession of a valid visa, if required so by the Visa Regulation⁴⁶. The third country national entering the Schengen Area must furthermore, elaborate the purpose and conditions of the intended stay. This will include proof of means of subsistence during both stay and return to the country of origin. The person must not be the target of an alert issued in the Schengen Information System (SIS) – otherwise entry may be refused. All entries in the SIS are called alerts. This rigid set of requirements is accompanied by the

⁴⁴ Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, Art. 5.

⁴⁵ Stays not exceeding three months per six-month period.

⁴⁶ Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

less definitive requirement that the third country national not to be considered a threat to public policy, international security, public health or the international relations of any of the Member States.

The first practical barrier to entry for asylum seekers is the requirement of having a valid travel document. This is discussed in further detail in the context of visas. However, pursuant to Article 5(4)(b) of the Schengen Borders Code, a visa may also be affixed on a separate sheet if e.g. the person is in possession of a travel document not recognised by the visa issuing authority. Providing proof of means of subsistence as well as producing a valid travel document will most likely prove burdensome for the refugee fleeing a warzone. The likely visa applicant from Syria in 2014 will most probably be unable to produce proof of being capable of providing for oneself during her stay in the territory of the Schengen Member State in question. Moreover, the purpose of the intended stay, in all likelihood being to apply for asylum, will almost undoubtedly lead to a negative visa decision. Having been the object of e.g. deportation from the Schengen Area in the past, the person is more than likely to find oneself the target of an alert in the SIS, again leading to a negative visa decision. A change in circumstances may have the effect of rendering the alert moot, however, the process for removing an alert in the SIS is an arduous one, especially so when the potential error is noticed by a Member State other than the one that issued the alert in the first place.⁴⁷ The original deportation and alert may have been executed pursuant to e.g. a car theft. Motive behind such a response is straightforward enough, however nothing to do with the current matter of applying for a visa in order to flee persecution. The purpose of the use of such deportation orders and subsequent alerts relate to the prior conduct of the person and quite possibly have nothing to do with the eligibility to qualify for refugee status.

It should, however, be noted that the aforementioned barriers, including the requirement to be in possession of a valid visa, may be waived due to humanitarian grounds, on grounds of national interest or because of international obligations pursuant to Article 5(4) SBC. This is further elaborated in connection to the prospects presented by the notion of the visa with limited territorial validity in chapter 5.

⁴⁷ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, especially Chapter 3 on Protection of Personal Data and Security of Data in the Schengen Information System.

3.3 The Visa Regulation

The Visa Regulation, along with its Annexes, lists out the countries whose nationals have to be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement. As the Visa Regulation also regulates the so-called safeguard clause, this section will underline the further tightening or securitization of migration-related matters in the field of visas as opposed to facilitating the legal entry of persons in need of international protection.

The 124 states⁴⁸ to which a visa requirement is attached are found in Annex I of the Regulation. In addition, other entities and territorial authorities that are not recognised as states by at least one Member State, including the Palestinian Authority, are among those subject to the visa requirement.

Visa required				
Afghanistan	Cuba	Kazakhstan	North Korea	Tajikistan
Algeria	D.R. Congo	Kenya	Oman	Tanzania
Angola	Djibouti	Kiribati	Pakistan	Thailand
Armenia	Dominica	Kuwait	Palau	Timor-Leste
Azerbaijan	Dominican Republic	Kyrgyzstan	Papua new Guinea	Togo
Bahrain	Ecuador	Kosovo	Peru	Tonga
Bangladesh	Egypt	Laos	Philippines	Trinidad and Tobago
Belarus	Equatorial Guinea	Lebanon	Qatar	Tunisia
Belize	Eritrea	Lesotho	Russia	Turkey
Benin	Ethiopia	Liberia	Rwanda	Turkmenistan
Bhutan	Fiji	Libya	Samoa	Tuvalu
Bolivia	Gabon	Madagascar	Sao Tome and Principe	Uganda
Botswana	Gambia	Malawi	Saudi Arabia	Ukraine
Burkina Faso	Georgia	Maldives	Senegal	United Arab Emirates
Burma/Myanmar	Ghana	Mali	Sierra Leone	Uzbekistan
Burundi	Grenada	Marshall Islands	Solomon Islands	Vanuatu
Cambodia	Guinea	Mauritania	Somalia	Vietnam
Cameroon	Guinea-Bissau	Micronesia	South Africa	Yemen
Cape verde	Guyana	Mongolia	South Sudan	Zambia
Central African Republic	Haiti	Morocco	Sri Lanka	Zimbabwe
Chad	India	Mozambique	St Lucia	
China	Indonesia	Namibia	St Vincent and the Grenadines	
Colombia	Iran	Nauru	Sudan	
Comoros	Iraq	Nepal	Suriname	
Congo	Jamaica	Niger	Swaziland	
Cote d'Ivoire	Jordan	Nigeria	Syria	

Figure 1 – countries whose nationals have to be in possession of a visa to enter the territory of the Member States.

⁴⁸ Situation in early 2014.

A significant minority of states along with a handful of other entities are exempt from the visa requirement (Annex II). None of the states on the African continent are on this list and only a handful of Asian states have made the cut. Following a superficial glance, it would appear that most states in the positive list (those exempt from the visa requirement) are either OECD states, implying a certain degree of financial stability or otherwise high-income economies, or in other respects politically close to the EU. It is clear that the discussion on transferring a country from one list to the other has both political and security-related reasons and may very well have far-reaching ramifications. This latter aspect highlights the importance of visa policy as a foreign policy tool to be employed by the EU to attain its goals.⁴⁹

No Visa required			
Albania	Costa Rica	Malaysia	Seychelles
Argentina	El Salvador	Moldova	Singapore
Australia	Former Yugoslav Republic of Macedonia	Montenegro	Taiwan
Bahamas	Guatemala	Nicaragua	United States of America
Barbados	Honduras	New Zealand	Venezuela
Bosnia and Herzegovina	Hong Kong SAR	Panama	
Brazil	Israel	Paraguay	
Brunei Darussalam	Japan	Republic of Korea (South Korea)	
Canada	Mexico	Saint Kitts and Nevis	
Chile	Macao SAR	Serbia	

Image 2 – List of third countries whose nationals are exempt from the visa requirement.

The Visa Working Party is the forum at EU level where delegates from Member States discuss the amendments to be made to the Visa Regulation and the Annexes. These discussions long focused, and finally resulted in the introduction of a safeguard clause, allowing the rapid, temporary suspension of the visa waiver for a third country on the positive list in case of an emergency situation, as a last resort:⁵⁰

⁴⁹ Recently the EU temporarily suspended the so-called visa dialogue with the Russian Federation as a reaction to the 2014 Crimean Crisis. The visa dialogue is aimed at negotiating the possibility of visa free travel between the EU and the Russian Federation.

⁵⁰ Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement, COM(2011) 290 final.

‘2. A Member State may notify the Commission if it is confronted, over a six-month period, in comparison with the same period in the previous year or with the last six months prior to the implementation of the exemption from the visa requirement for nationals of a third country listed in Annex II, with one or more of the following circumstances leading to an emergency situation which it is unable to remedy on its own, namely a substantial and sudden increase in the number of:

- (a) nationals of that third country found to be staying in the Member State's territory without a right thereto;
- (b) asylum applications from the nationals of that third country for which the recognition rate is low, where such an increase is leading to specific pressures on the Member State's asylum system;
- (c) rejected readmission applications submitted by the Member State to that third country for its own nationals.’⁵¹

Upon fulfilment of a former mentioned requirement and the notification thereof the Commission will launch a special examination procedure and may eventually adopt an implementing act temporarily suspending the exemption from the visa requirement.⁵² The French-Dutch Note to the Council in 2010 advocating for such a mechanism⁵³ also listed out grounds such as the abuse of asylum and failure of the third country in question to fulfil its obligations as regards readmission as grounds that would trigger the suspension mechanism.

This safeguard clause, as pointed out earlier, is where migration policy may be affected through less formal means and outside the democratic procedure, whereby normally, the third country would have to be transferred to the negative list according to the ordinary legislative procedure, possibly taking months. It will be interesting to see how readily Member States are willing to propose the triggering of the very recently adopted safeguard clause and how the Commission will react to those pleas. The liberalisation or emergence

⁵¹ Regulation of the European Parliament and of the Council (PE-CONS 65/13) amending Council Regulation (EC) 539/2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

⁵² *Ibid.*

⁵³ Note from the French and Netherlands delegations to the Council - Establishment of a mechanism to suspend visa liberalisation, 21 December 2010 (18212/10).

of such less top-down mechanisms may very well contribute to the perceived fortification of Europe and its borders to the exclusion of non-Europeans.

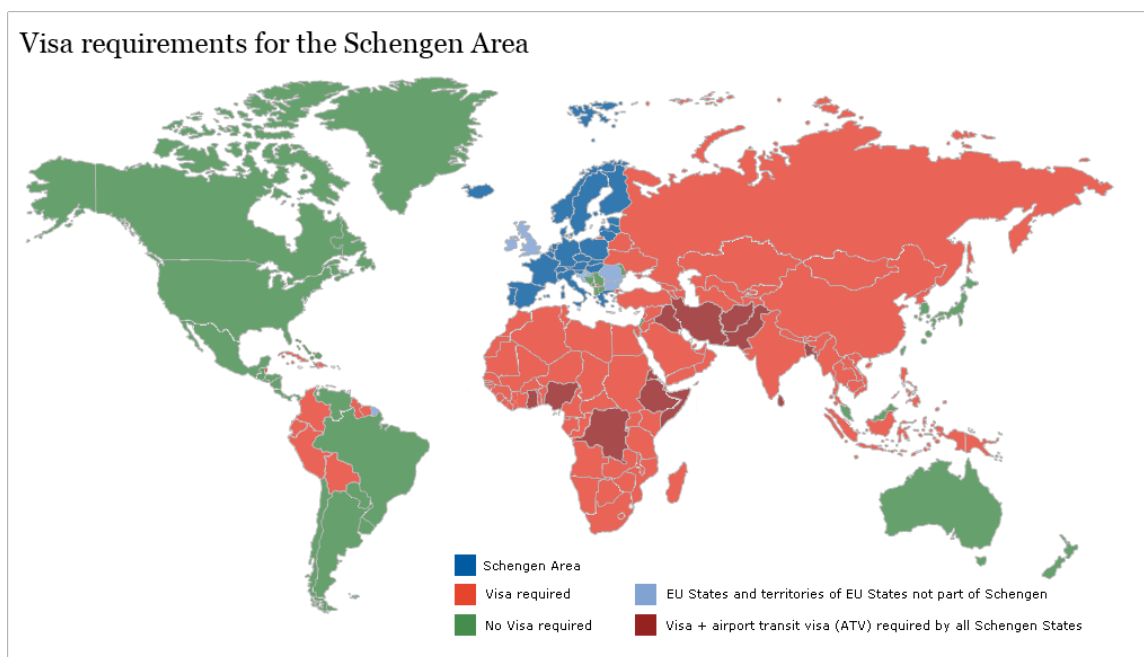


Image 3 – Visa requirements for the Schengen Area.⁵⁴

The adoption of the amending Regulation introducing the infamous safeguard clause speaks to the embraced future policy direction in contemporary visa policy of the EU. The mechanism was proposed as a response to the rise of unfounded asylum claims and unsuccessful attempts to readmit citizens from Western Balkan countries residing illegally in the EU.⁵⁵ However, considering the reference in Art. 1a(2)(b) on the increase of asylum claims, it is clear that the mechanism could potentially be triggered pursuant to a genuine rise of asylum applications brought about by a humanitarian crisis in the outskirts of the external borders of the EU in a country whose citizens could prior to the crisis benefit from visa exemption. This mechanism can have the effect of frustrating the expectations of third country nationals then exempt from the visa requirement who subsequently become subject to the requirement pursuant to a change in circumstances such as armed conflict, natural disaster, famine or any other phenomenon that may have the effect of commencing mass movements of people.

⁵⁴ Image taken from the European Commission Home Affairs website on Visa policy, available at <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm> (accessed September 4, 2013).

⁵⁵ European Commission, 'EU Visa Policy: ensuring legal certainty and preventing abuse', MEMO/11/328, Press Release, May 24, 2011.

3.4 The EU Visa Code

The EU Visa Code⁵⁶ regulates the issuance of visas, providing for certain requirements to be met for the issuance of a visa and lists the grounds on which a visa may be refused. A visa, for our purposes, means an authorisation – capable of being affixed to a travel document – issued by a Member State to enter the territory of the Member States. Visa applications are predominantly examined and decided on by Member State consulates situated or accredited to the region where the visa applicant resides.⁵⁷ In examining the visa application, the consulate shall ascertain whether the applicant fulfils the entry conditions set out in the Schengen Borders Code. Due regard is had to the assessment whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States and whether the applicant intends to leave the territory before the expiry of the visa applied for.⁵⁸ This encompasses a comprehensive verification of the authenticity of the travel document submitted as well as the supporting documents attached as evidence of intention to travel and other considerations related to the person of the applicant. Exhaustive lists of required supporting documents as well as common criteria for examining applications are often compiled in the guise of Local Schengen Cooperation⁵⁹ in the third country in question. This is intended to enhance the adoption of a uniform approach by all Member States in any given region.

The grounds for refusal of a visa are listed out in Article 32. From the various grounds, some more than others, pose problematic hindrances to travelling, and may have the effect of further thwarting efforts of asylum seekers to enter the territory. Failure to provide justification for the purpose and conditions of the intended stay will result in the refusal of a visa. The wording is sufficiently clear, but fails to make certain the threshold that constitutes ‘sufficient justification’. Failure to provide proof of sufficient means of subsistence equally leads to a refusal of the visa. For example, the Embassy of Finland in Windhoek, Namibia, evaluates the means of subsistence at EUR 30 per day in order to

⁵⁶ Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas.

⁵⁷ Visa Code, Art. 4(1). See also Art. 4 for exceptions.

⁵⁸ Visa Code, Art. 21(1).

⁵⁹ Visa Code, Art. 48.

cover the expenses of stay and return.⁶⁰ The competent Swedish authority, the Migration Board, has set this sum at EUR 50 (SEK 450)⁶¹. This feature underlines the socially and economically discriminative stance adopted by the EU in terms of welcomed visitors. The motivation of Member States in securing their social security systems from unwanted further burdens may nonetheless be understood, especially insofar that the estimated savings of intercepting an individual irregular migrant of EUR 50,000 according to an action programme by the Ministry of Interior of Finland are assumed correct⁶². The figure will obviously vary from one Member State to the next.

The statistics concerning grounds upon which visas are refused are not public. However, general data on the volume of refusals and issued visas are available. The statistics illustrate the differences between third countries and how nationals of certain third countries are more readily eligible for visas than those of others. In 2013, in St. Petersburg, out of a whopping 1,204,670 common Schengen visas applied for in the Consulate General of Finland, only 9,505 visas were refused (0.8%). Moreover, of all the common Schengen visas issued in this consulate, 1,000,578 were multiple entry visas (98%). Contrarily, out of a total of 715 visas applied for in Abuja, Nigeria, the Embassy of Finland refused 349 visas (48.8%).⁶³ These unambiguous findings come to show how for example Sub-Saharan African countries are seen as high-risk sources for illegal migration and other undesirable conduct. The table below exemplifies the aforementioned discriminatory nature of EU visa policy in terms of economic wellbeing and the affect thereof to the prospects of becoming a successful visa applicant. These third countries in question were chosen for this table due to their varying positions regarding economic stability, democratic values, ties with the EU and overall stability and how the aforementioned qualities illustrate the perceived risk of illegal migration.

⁶⁰ See e.g. The Embassy of Finland, Windhoek website, available at <<http://www.finland.org.na/public/default.aspx?contentid=142114&nodeid=41059&contentlan=2&culture=en-US>> (accessed March 7, 2014).

⁶¹ See The Swedish Migration Board website, available at <<http://www.migrationsverket.se>> (accessed March 18, 2014).

⁶² Action Programme on Illegal Migration (Laittoman maahantulon vastainen toimintaohjelma 2012-2015) <http://www.intermin.fi/download/38506_372012_Lama_toimenpideohjelma_web.pdf> (accessed March 16, 2014), p.6.

⁶³ These figures are based on the EU Directorate-General on Home Affairs statistics of 2013. Complete statistics on short-stay visas issued by the Schengen States (2013), available at <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm> (accessed March 7, 2014).

Location of Consulates	Schengen State	Visas applied	Visas denied %
Belarus	Poland	272,172	0.27%
Russia	Finland	1,501,223	0.55%
Ukraine	Estonia	17,576	3.00%
China	Lithuania	857	4.80%
Bolivia	Spain	7,137	15.70%
Nigeria	Finland	715	48.80%
Afghanistan	Germany	2,828	51.80%
Jordan	Norway	1,161	61.40%
Syria (2012)	Sweden	466	76.82%

Image 4 – Statistics of visas applied in certain third countries and the ratio of visas denied.

In third countries such as China and Belarus, the likelihood of being issued a visa is rather promising. Belarus has a close relationship with Poland and people living close to the border often work across the border, which explains the practically non-existent ratio of negative visa decisions. China is otherwise a relatively prosperous state and in fact the Chinese form an impressive fraction of the tourist body of third country nationals in Europe. The same cannot be said about war-torn Syria and Afghanistan, which are both major refugee-producing countries and the perceived risk of staying illegally after the expiration of the visa is extremely high.

The Commission is always eager in purporting to improve rights of citizens, including those of third countries. The Visa Code provides for an unprecedented Union-wide system of appeal in case of refusal, annulment and non-voluntary revocation of a visa.⁶⁴ Due regard is clearly had to the rights of the applicant as per his or her legal protection and legal safeguards. However, the appeals shall be conducted against the Member State that has taken the decision in accordance to the national law of that Member State. The obligation to establish an appeals mechanism has been imposed on the Member States. However the actual setting up of the appeals mechanism is left to the discretion of the individual Member States. This has led to gaping differences in the approaches adopted by Members.

For instance in Finland, the Administrative Procedure Act governs the appeal mechanism to be followed pursuant to a negative decision on a visa application⁶⁵. The procedure of appeal is a fairly light one, whereby the instance giving the original decision will decide on

⁶⁴ Visa Code, Arts 32(2) and 34(7).

⁶⁵ Finnish Administrative Procedure Act 6.6.2003/434, Chapter 7 a.

the rectification request. This does not, however, mean that the person taking the initial decision will decide on the appeal. In practice, the person taking the decision on the appeal would likely be a senior consular officer or even the ambassador in smaller embassies. The procedure is different for family members of EU/EEA citizens: the appeal will be conducted on a more thorough and heavy procedure in which the issue is decided in the Administrative Court. The rectification request must be done in one of the official languages of Finland and is free of charge. The likely third country visa applicant does not master Finnish or Swedish or the procedural requirements related to the submission of a rectification request and would therefore require the services of a trained lawyer. Contrasting this to the Italian stance adopted, differences are glaring. The procedure first of all bears a cost of 250 EUR and also without doubt requires the assistance of an Italian lawyer. Not only does the discretion provided for by Article 32 of the Visa Code create yawning differences in state practices – it may hardly be seen to meet the requirements of Article 41 of the Charter of Fundamental Rights, according to which ‘[e]very person has the right to have his or her affairs handled ... within a reasonable time.’ If a decision on the appeal takes a couple weeks or even months during peak times in tourism, the lapse of time has more than likely already frustrated the initial purpose of travel into the Schengen Area. The European Court of Human Rights may also have a bone to pick with some of the Member States concerning Article 13, on the right to an effective remedy, of the European Convention on Human Rights. This issue could perhaps arise in the context where an unsuccessful visa applicant claims there has been a case of prejudicial profiling and the appeal procedure is not sufficient. Consider for example the case where the persecuted third country national visa applicant in a Schengen Member State consulate appealing the negative visa decision the procedure of which will be governed by national law potentially demanding payment, providing for a time limit of 6 months to deal with the appeal and requiring that the appeal be submitted in the language of the Schengen Member State in question.

Whilst the Visa Code aims to endorse and promote fundamental rights and openness, practice seems to suggest the contrary. Fully-fledged coordination and harmonisation in the field of dealing with appeals is perhaps impossible. The current provision enabling the right to appeal, however, works akin to that of a directive, the implementation of which seems to deviate from one Member State to the next even more than in the case of regular directives. Neither is true accountability promoted to the fullest, seeing as e.g. in the case

of Finland, third country nationals have no avenue of redress once the first instance, the rectification procedure, is exhausted.

The Commission published its Proposal for a Regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code)⁶⁶ on 1 April 2014. Essentially, the amendment (or new regulation) takes into account and deals with the increased political emphasis given to the economic impact of visa policy in line with the Commission's Communication 'Implementation and development of the common visa policy to spur growth in the European Union'⁶⁷. Should the proposed text be adopted as is, common visa policy should become more 'user-friendly and efficient'. The proposal e.g. introduces a distinction between first-time travellers and regular travellers. The latter would benefit from certain procedural facilitations. It is debatable whether or not this could have an adverse effect on the procedural requirements that first-time travellers would have to meet, which within the scope of this paper is more relevant. These could comprise stricter requirements regarding acceptable supporting documents or an elevated subsistence or a more extensive travel medical insurance.

3.5 Airport Transit Visas

A separately regulated visa under the Visa Code, the airport transport visa (ATV), presents a further barrier to entry and access to international protection. An airport transit visa is a visa that is valid for transit through the international transit areas of one or more airports of the Member States⁶⁸. The common list of third countries whose citizens have to be in possession of an ATV when passing through the international transit areas of airports in the EU are listed in Annex IV of the Visa Code⁶⁹. They include major refugee-producing countries such as Afghanistan, Eritrea, Ethiopia, Iraq and Somalia. In addition, there exists a Member State-specific list of third countries whose nationals are required to be in

⁶⁶ COM(2014) 164 final.

⁶⁷ COM(2012) 649 final.

⁶⁸ Visa Code, Art. 2(5).

⁶⁹ Visa Code, Art. 3(1).

possession of an ATV when passing through the international transit areas situated on the territory of one or more Member States⁷⁰.

Airport transit zones have in some cases been treated not as an integral part of the territory of the State. Therefore, neither domestic provisions nor international obligations concerning international protection and humanitarian law apply. The imposition of the requirement to obtain an ATV thus effectively prevents asylum applications at airports from individuals in transit.⁷¹ While this may happen in practice, the European Court of Human Rights has in *Shamsa v. Poland*⁷² stated that the European Convention on Human Rights does indeed apply in airport transit zones and that the detention of two migrant brothers was unlawful pursuant to Article 5 of the convention. Even so, the convention does not provide for a subjective right to apply for asylum. The *de facto* right of asylum as discussed in chapter 2 above may however come into question.

3.6 Contemporary Issues: Other Barriers

In addition to the above there remain certain issues that are especially of a contemporary nature associated with political and practical themes. Geographic and political realities regarding the locations of embassies and consulates play a huge role in an asylum seeker's access to apply for a visa. Furthermore, advanced consultation procedures permitted by highly technical equipment and the proliferation of databases may, too, have a further exclusionary effect on third country nationals who are deemed unwanted by even no more than one Member State.

3.6.1 Consular Coverage and Spatial Difficulties

An understandable criticism voiced against Member States is that nationals of third countries in more remote locations are unfairly put in a disadvantaged position insofar as there may not be a consulate of the destination Member State within hundreds or even

⁷⁰ See the Commission Decision of 19.3.2010 on establishing the Handbook for the processing of visa applications and the modification of issued visas, Annex 7b.

⁷¹ See e.g. European Council on Refugees and Exiles, 'Defending Refugees' Access to Protection in Europe', December, 2007, p. 27.

⁷² European Court of Human Rights, *Shamsa v. Poland*, No. 45355/99, 45357/99, November 27, 2003.

thousands of miles. Furthermore travelling excessive distances from one country to the next only for applying for a visa may pose unreasonable burdens to bear along with personal security-related threats. Consider, for example, the Afghan wishing to visit her son in Finland. She would be required to travel a thousand miles from Kabul to New Delhi for lodging a visa application, while going through Pakistan, possibly be required to acquire a visa from the Pakistani authorities too, only to discover that her visa will (quite likely) be refused in the coming weeks. Similar distances may apply even when the visa-issuing consulate is located in the same country as the applicant. The situation is further impeded by the modern trend of downsizing and outright winding up of peripheral consulates, not least due to budgetary motives⁷³.

In order to tackle the issue of diminishing consular coverage – which includes the provision of visa services – especially in the more remote areas, the Visa Code provides for a possibility of arranging visa representation as between Schengen Member States. To illustrate, Finland represents Hungary in visa issues in Peru and Dar Es Salam. Reciprocally, Hungary represents Finland in visa matters in Chisinau and Chongqing. Article 8 of the Visa Code enables the governance and creation of a complex network of representation agreements. The Member States agree, in essence, to outsource the issuance and refusal of visas in a given third country. This includes the verification of entry conditions and risk assessment with an emphasis on the assessment of whether the applicant presents a risk of illegal immigration or a risk to the security of the Member States. In other words, plenty of discretion is handed out, discretion that will inevitably affect the eligibility of a third country national to be issued a visa, in part because the representing consulate will also apply its own national administrative laws in addition to the provisions of the Visa Code. This may lead to peculiarities of the representing state's administrative law affecting the rights of the applicant: on occasion to his or her detriment.

There are, however, no sanctions prescribed for not expanding the consular coverage of a Member State through representation agreements. It may in fact even be seen as a burden for smaller states, seeing as reciprocity is the name of the game and smaller Member States have less impressive consular coverage. The representing state will undoubtedly request the represented state in question to represent them in another jurisdiction. Whilst it is

⁷³ E.g. the closing of the Embassy of Finland in Islamabad, Pakistan, which can hardly even be considered peripheral in terms of political importance.

undisputed that the representation agreements are well in place to tackle the problem of consular absence with regard to more remote third countries where Member States are generally not present, the problem persists.

Another topical problem in the field of consular coverage is the temporary or permanent closing of consulates once the severity of a crisis surpasses a given threshold. The majority of Member States' consulates in Damascus were soon closed after the Syrian Uprising began. Once this happened, there were simply no means of applying for a visa other than to attempt at reaching the nearest visa-issuing consulate abroad. In the case of the 2011 Syrian Uprising, for many Member States it would come to be their embassies in Ankara.

The Commission in its proposal for a new Visa Code addresses the issue of insufficient geographical coverage in visa processing. A general notion of 'Schengen Visa Centre' is introduced. Reference is made to the concept of mandatory representation 'according to which, if the Member State competent to process the visa application is neither present nor represented (under such an arrangement) in a given third country any other Member State present in that country would be obliged to process visa applications on their behalf.'⁷⁴ Representation arrangements, cooperation with external service providers and resource pooling are also mentioned as means to tackle the insufficient geographical consular coverage. It will be fascinating to see how the Member States respond to this notion of mandatory representation and whether or not it will survive to the adopted text.

3.6.2 Prior Consultation of Central Authorities

A Member State may require the central authorities of other Member States to consult its central authorities during the examination of visa applications lodged by nationals of specific third countries or specific categories of such nationals.⁷⁵ This applies not only to the Member State of final destination but others, too. The determination of competent central authorities is up to each individual Member State. It may nonetheless be safe to assume that in most cases the central authority would be the national intelligence service or other security service dealing with sensitive information involving risk analysis, personal

⁷⁴ COM(2014) 164 final, p. 4.

⁷⁵ Visa Code, Art. 22(1). Central authorities currently have seven days in which they must reply to a prior consultation. Commission Proposal COM(2014) 164 final would amend this to a five day period.

Third countries	Specific categories concerned, if applicable
Afghanistan	
Algeria	
Bangladesh	
Belarus	Applies only to holders of diplomatic and service passports.
D.R. Congo	
Egypt	Does not apply to holders of diplomatic and service passports.
Iran	
Iraq	
Jordan	
(North) Korea	
Lebanon	
Libya	
Mali	
Mauritania	
Morocco	
Niger	
Nigeria	
Pakistan	
Russian Federation	Applies only to holders of service passports.
Rwanda	
Saudi Arabia	Does not apply to holders of diplomatic passports.
Somalia	
South Sudan	
Sri Lanka	
Sudan	
Syria	
Tunisia	
Uzbekistan	Does not apply to holders of diplomatic passports or soldiers and police officers who travel for the purpose of exercising their duty
Vietnam	
Yemen	
Category of persons	
Palestinians	
Refugees	
Stateless	
Persons	

Image 4 – Table of the nationalities and specific categories of persons who are subject to prior consultation.

consultation constitutes a further hurdle to be overcome by the visa applicant who is subject to such additional procedures – another barrier to entry, especially when looking at the specific third countries on the list. The table lists out the third countries and specific groups of such third country nationals subject to prior consultation by one or more Member States. To illustrate, all citizens of Afghanistan are subject to the prior consultation by one or more Member States, while e.g. only holders of diplomatic and service passports from Belarus are subjects of prior consultation of authorities of one or

data and national security. The list of those third countries, whose nationals or specific categories of such third country nationals who are subject to prior consultation is public. Member States notify requests for prior consultation to the Commission, who under Article 53(2) publishes the information regarding the third country concerned in Annex 16 of the Visa Code Handbook. However, the Visa Code does not provide for the publication of the information on which Member State requires prior consultation for which third countries or specific categories of third country nationals. In its initial proposal on the Visa Code in 2006⁷⁶, the Commission had with a view to enhancing transparency proposed that all information on prior consultation be accessible to the public, but this provision was not retained in the final compromise text adopted.⁷⁷ Prior

⁷⁶ COM (2006) 403 final/2.

⁷⁷ Response from Head of Unit C2, European Commission DG HOME to e-mail inquiry, dated October 22, 2013.

more Member States. This underlines the external relations dimension of EU visa policy. It is moreover interesting to note that from the top 5 refugee-producing countries⁷⁸ all are represented on the list. Perhaps even more fascinating is the fact that all stateless persons and persons with official refugee status are subject to prior consultation when applying for a visa.

It would sincerely be an interesting exercise, should the consultation requirements be fully transparent on a Member State-to-Member State basis, to discern which States require prior consultation of stateless persons and persons with refugee status and for what reasons. One may but speculate; yet the lack of trust between Member States may very well be one fundamental reason for this. Also, it may be a contention of the Member States' authorities that a person with refugee status can be deemed unlikely to leave the Schengen Area within the period of validity of his visa and he is indeed free to move within the territory of the Member States in want of internal border checks.

3.6.3 Virtualization of Borders, the Self and Reality

The potential and opportunities presented by advanced information sharing systems and databases in the field of security and migration have not gone unnoticed by the Commission. In the Communication from the Commission to the European Parliament and the Council on fighting trafficking in human beings - an integrated approach and proposals for an action plan,⁷⁹ the Commission lays out certain means, which are necessary for the purpose of adopting an integrated approach for tackling the issue. The Communication states that the Council should as soon as possible implement biometric identifiers in visas and residence permits as this will assist in the identification of trafficked persons. Like the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings⁸⁰, also the EU Action Plan on combating terrorism⁸¹ calls for the proliferation of automatic data processing and other technologies for the identification

⁷⁸ Situation in end 2013: Afghanistan, Syria, Somalia, Sudan and the Democratic Republic of the Congo. Source: UNHCR Report, available at <<http://www.unhcr.org/53a155bc6.html>>. Situation may have changed as the Syrian Uprising as well as the conflicts in Central African Republic and Iraq persist.

⁷⁹ COM(2005) 514 final.

⁸⁰ 2005/C 311/01.

⁸¹ Note from the EU Counter-Terrorism Coordinator (CTC) to the Council/European Council – EU Action plan on combating terrorism, December 9, 2011, 17594/11.

of culprits as well as for information sharing purposes. Both underline the importance of the Visa Information System⁸² as well as the significance of the consultation procedure under Article 22 of the Visa Code within the Schengen consultation network. The use of biometrics for the purposes of visa applications, which are then stored on a common database accessible by all Member States and by Europol is also highlighted.

More and more cooperation and information sharing is done via automated data processing means: arrest warrants and alerts on refusals of entry are issued within SIS⁸³; and fingerprints along with bank statements of visa applicants are saved into huge servers to which all Member States have access to. It will be interesting to see the possible effects data protection instruments have on the full-scale proliferation of databases containing sensitive biometric data such as fingerprints and digital face images, not to mention retina scans, if they are introduced in the future. It is worthy of mention, however, that this very snowball effect in information gathering and transcending into the virtual domain is very much in sync with the Commission Communication to the Council and the European Parliament on an Open Method of Coordination for The Community Immigration Policy⁸⁴, reinforcing the fight against trafficking by initiating measures to keep track of illegal movements and by promoting pre-frontier cooperation.

Some argue that that the proliferation of databases has led to a virtualization of the borders and the self. The virtual self or ‘immaterial doppelganger’ is composed of every drop of information governments and private agencies have gathered on the person. From the nuggets of fragmented information border guards, consular officers and law enforcement officers conduct risk analyses and ultimately make value judgments on the person’s integrity and reliability e.g. for the purpose of assessing the eligibility to be issued a visa. Thus this apparent virtual self becomes dominant over the physical self and consequently the controlling source of particular information whether a question needs to be settled at the border or at some pre-frontier juncture.⁸⁵

⁸² VIS became operational in Autumn 2011.

⁸³ Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Art. 96.

⁸⁴ COM(2001)387 final.

⁸⁵ O. Marenin, *Challenges for Integrated Border Management in the European Union*, (Geneva: Geneva Centre for the Democratic Control of Armed Forces, 2010), pp. 48-54.

3.7 Barriers to Entry: Conclusions

This chapter set out the various barriers to entry that asylum seekers are faced with. Carrier sanctions, interceptions at sea along with immigration liaison officer networks and stringent visa requirements all play their part in fortifying Europe. The conditions to be issued a visa are difficult to satisfy and may prove rather impossible for an asylum seeker fleeing persecution. Requirements pertaining to travel documents, available funds, insurance coverage and possibly having to travel extensive distances to reach a consulate in the first place to even lodge an application often prove inconceivable. Still, meeting these requirements does not yet entitle the applicant to a visa. Depending on the nationality and other personal characteristics of the applicant, the application may fail upon one or more Member States objecting to the issuance of the visa pursuant to the consultation procedure. The appeals system does not exactly present itself in the best light either in terms of providing legal guarantees and legal protection due to the highly technical nature and potential costs.

The restrictive and exclusionary merits of EU visa policy come at many fronts and derive from many tools, both legal and political. Regulations and other legally binding measures are adopted at EU level and bind the Member States on the one hand. On the other, political statements and official communications touching upon entry, asylum and visas are conveyed and voiced at local, regional and international level. The role of EU visa policy and its potential is presented in the following chapter. Political statements related to the policy field and its potential to facilitate the entry of asylum seekers into the territory of the Union are also addressed.

4. The Role of EU Visa Policy: Protecting or Exposing Refugees?

More often than not, asylum seekers aspiring to reach Europe are subject to the visa requirement in order to enter the Schengen Area legally by virtue of the Visa Regulation and its Annexes as discussed above. There are no additional means of gaining legal access to the Area for a person who qualifies for refugee status or expresses a wish to apply for asylum. What follows is that the responsible asylum seeker will have to, like all other migrants from a third country whose citizens have to be in possession of a visa to cross the external borders of the EU, successfully apply for a visa from a Schengen Member State embassy or consulate. The remaining option is to resort to irregular means and attempting to cross the external borders as a clandestine migrant, in which case the risks borne may very well outweigh the benefits; premature death and serious risk thereof are not uncommon phenomena when considering voyage across the Mediterranean Sea, long hikes in the scorched deserts of Africa and hazardous land routes from Eurasia into Southern Europe.

This chapter considers the downside of the rigidity of current visa policies as covered by the media as well as the potential scope that EU visa policy could have in facilitating the safe passage of refugees and asylum seekers into the area of the Union. Measures adopted under EU visa policy and their usages may be both structural as well as reactive, both being preventive measures by nature. This is discussed below after an overview of the discourse and reactions in media and among top politicians regarding the lack of legal means to cross the external borders.

4.1 Discourse and Pretext

In February 2014, at least 15 migrants drowned in the early days of the month where hundreds took it upon themselves to reach Spanish Ceuta from Morocco. Over 360 people were reported dead in the aftermath of the tragic incident near the coast of Lampedusa in October 2013.⁸⁶ A group of 32 women and 48 children along with 12 men in their perilous journey across the Sahara from Niger to Algeria were found dead near the border of the

⁸⁶ See e.g. 'The Migrants' Files: surveying migrants' deaths at Europe's door', *EUObserver*, March 31, 2014, available at <<http://euobserver.com/investigations/123682>> (accessed May 13, 2014).

two countries, again in October 2013.⁸⁷ In late March 2011, only 11 out of a total of 72 passengers on a boat heading toward the Italian coasts made it to land after having being left to drift for 16 days after the alleged discovery by European authorities that the vessel was in distress. The out-of-oil boat drifted with the currents into Libyan territories and the passengers never made it to European soil. Libyan authorities detained the survivors.⁸⁸ These are but a glimpse of the gloomy reality of migration deaths connected to the quest to Europe. In fact, a report in 2013 by the UN Special Rapporteur on the human rights of migrants found that more than 16,000 people are known to have died trying to reach the borders of the EU between 1998 and 2012.⁸⁹ The finding should be construed as a rather conservative one, seeing as unreported deaths are not taken into account. Furthermore, e.g. Weber and Pickering argue that the process of border-related deaths is a political act through which deaths may be denied or obscured by governments⁹⁰.

On Wednesday, October 16 2013, in the wake of the most devastating Lampedusa tragedy, demonstrators marched against EU immigration policy and EU external border policy in the streets of Helsinki, Finland. The various organisations that partook in the demonstration proclaimed that the recent deaths in the Mediterranean are directly attributable to EU policies, above all to the lack of sufficient legal means for the distressed migrants for crossing the external borders of the Union.⁹¹ On the same day, Director General of the International Organization for Migration (IOM), William Lacy Swing, called on the international community ‘...to develop a more comprehensive approach to protect migrants and uphold human dignity’⁹². What is meant by *comprehensive approach* in this regard is that no action on its own is adequate to deal with this sensitive and significant issue. IOM suggests tangible efforts in this regard vis-à-vis migrants and relevant countries, that is, countries of origin, transit and destination.

⁸⁷ A. Hirsch, ‘Niger migrants died from thirst, after stranding in Sahara desert’, *The Guardian*, October 31, 2013, available at <<http://www.theguardian.com/world/2013/oct/31/niger-migrants-found-dead-sahara-desert>> (accessed May 13, 2014).

⁸⁸ J. Shenker, ‘Aircraft carrier left us to die, say migrants’, *The Guardian*, May 8, 2011, available at <<http://www.theguardian.com/world/2011/may/08/nato-ship-libyan-migrants?uni=Article:in%20body%20link>> (accessed May 13, 2014).

⁸⁹ ‘Report of the Special Rapporteur on the human rights of migrants, François Crépeau’, *United Nations*, April 24, 2013.

⁹⁰ L. Weber and S. Pickering, *Globalization and Borders – Death at the Global Frontier* (Hampshire: Palgrave Macmillan, 2011), pp. 67-69.

⁹¹ ‘EU:n rajapolitiikkaa vastaan marsittiin Helsingissä – video’, *Yle Uutiset*, October 16, 2013, available at <http://yle.fi/uutiset/eun_rajapolitiikkaa_vastaa_marssittiin_helsingissa_-_video/6885326> (accessed May 13, 2014).

⁹² ‘IOM Director General Calls for Urgent Action to Save the Lives of Migrants Arriving by Sea in Europe’, *International Organization for Migration*, October 16, 2013.

In a meeting of EU leaders following the events in Lampedusa, Martin Schulz, President of the European Parliament stated that ‘Europe can neither save nor welcome the whole world.’⁹³ He has, however, recently called for the enhancement of legal avenues for migration for those seeking better opportunities in Europe. European Commissioner for Home Affairs, Commissioner Cecilia Malmström, in a press conference told media representatives that that the EU needs to create ‘safer ... legal ways’ for refugees to enter the Union⁹⁴. In September 2013, the Alliance of Liberals and Democrats for Europe Group (ALDE) in a press release called for the facilitation of temporary access to the EU for those fleeing the conflict in Syria⁹⁵. Other politicians have voiced their expression for a need to share among Member States the so-called burden generated by mixed flows of migrants in accordance with solidarity within the Union.

Italian politician, Simona Bonafe, in mid-May 2014 appealed to the European Union that Italy could not continue to deal with the humanitarian emergency alone. The Democratic Party representative was referring to the capsizing of a boat carrying up to 400 migrants in the Mediterranean⁹⁶. In the aftermath of the event, the Italian government accused the EU of not succeeding in doing enough to control and manage the flow of migrants entering Europe via the Mediterranean.⁹⁷ Italian minister for the interior was quoted as saying ‘The Mediterranean is not an Italian border but a European border’⁹⁸. He also warned EU leaders that Italy would start letting those with the right to asylum cross the Italian border into other European countries. Other Italian politicians have voiced their criticisms and advocated for a change to the Dublin rules that currently require asylum seekers to apply

⁹³ K. Paramaguru, ‘Can Europe Stop the Mediterranean From Turning Into a Graveyard?’, *Time*, December 9, 2013, available at <<http://world.time.com/2013/12/09/can-europe-stop-the-mediterranean-from-turning-into-a-graveyard/>> (accessed May 13, 2014).

⁹⁴ A. Rettman, ‘Lampedusa: EU Commission Keen to Upgrade Border Agency’, *EUObserver*, October 8, 2013, available at <<http://euobserver.com/justice/121712>> (accessed May 13, 2014).

⁹⁵ ‘Europe urgently needs to convene a humanitarian Conference on Syrian refugee crisis’, *Alliance of Liberals and Democrats for Europe Group*, Press Release, September 12, 2013, available at <<http://www.alde.eu/press/press-and-release-news/press-release/article/europe-urgently-needs-to-convene-a-humanitarian-conference-on-syrian-refugee-crisis-42022/>> (accessed May 13, 2014).

⁹⁶ See e.g. N. Squires, ‘Dozens of Migrants die off Libya Coast on Boat Heading for Europe’, *The Telegraph*, May 12, 2014, available at <<http://www.telegraph.co.uk/news/worldnews/europe/italy/10825336/Dozens-of-migrants-die-off-Libya-coast-on-boat-heading-for-Europe.html>> (accessed May 15, 2014).

⁹⁷ ‘Migrants Drown as Libya Boat to Italy Sinks’, *BBC News*, May 12, 2014, available at <<http://www.bbc.com/news/world-europe-27379493>> (accessed May 15, 2014).

⁹⁸ *Ibid.*

for asylum and remain in the country in which they first arrived.⁹⁹ Concerns over being left alone to deal with the highly controversial and burdening issue in this regard are not without foundation.

On May 15 2014, Commissioner Malmström, in a statement to The Independent referring to the situation in the Mediterranean, asked the seemingly hypothetical question ‘Why do people embark on those boats?’ ‘Because there are no legal ways to get to Europe’, she continued.¹⁰⁰ However, a month later in an interview with The Wall Street Journal¹⁰¹ she mentioned ‘humanitarian visas’ as a potential way of facilitating protected entry of migrants. In fact, the notion of the humanitarian visa was brought up already in the Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean¹⁰². The document only superficially touches upon the humanitarian visa or any other reinforcement of legal ways to access Europe. The majority of the document is dedicated to enhancing border security and tackling illegal migration. In the context of visas, the document merely states that the Commission will explore further possibilities for protected entry in the EU and that these could include guidelines on a common approach to humanitarian permits/visas¹⁰³. In a panel organised by the Finnish Refugee Council, representatives of all parties in Parliament supported the idea of issuing humanitarian visas for the safe passage of asylum seekers to exercise their rights of applying for asylum¹⁰⁴. If all national parties endorse the idea, then why not issue these humanitarian visas? According to the Chairwoman of the Left Youth of Finland the reason for this is the negative attitudinal climate regarding refugee issues, which makes it difficult to address to topic on a political level¹⁰⁵. Commissioner Malmström again in July 2014 in a press conference on asylum issues referred to the notion of humanitarian visas

⁹⁹ ‘Italy Warns EU after Latest Migrant Tragedy’, *Euronews*, May 13, 2014, available at <<http://www.euronews.com/2014/05/13/italy-warns-eu-after-latest-migrant-tragedy/>> (accessed May 15, 2014).

¹⁰⁰ C. McDonald-Gibson, ‘Syria conflict: Hundreds more desperate refugees could die at sea as Europe does little to help’, *The Independent*, May 15, 2014, available at <<http://www.independent.co.uk/news/world/middle-east/syria-conflict-hundreds-more-desperate-refugees-could-die-at-sea-as-europe-does-little-to-help-9380519.html>> (accessed May 16, 2014).

¹⁰¹ M. Stevis, ‘The EU at Migration Crossroads: Speaking with Cecilia Malmström’, *The Wall Street Journal*, June 26, 2014, available at <<http://blogs.wsj.com/brussels/2014/06/26/the-eu-at-a-migration-crossroads-speaking-with-cecilia-malmstrom/>> (accessed June 26, 2014).

¹⁰² COM(2013) 869 final.

¹⁰³ *Ibid* p. 13.

¹⁰⁴ J. Hamara, ‘Humanitaarinen viisumi yhdisti poliitikot vaalipaneelissa’, *Suomen Pakolaisapu*, May, 8, 2014, available at <<http://www.pakolaisapu.fi/fi/tietoa/uutiset/item/778-humanitaarinen-viisumi-yhdisti-poliitikot-vaalipaneelissa.html>> (accessed July 1, 2014).

¹⁰⁵ *Ibid*.

but also mentioned that Member States were not too keen on the idea¹⁰⁶. It would in my opinion be reasonable to suspect that she was referring to the Member States other than those directly affected by the mass influx of mixed flows of migrants. It would in that case be correct to assume that true solidarity and willingness to share the burden in the Union is lacking.

Burden sharing is often brought up in political discourse at the EU level with regard to irregular migration and asylum seekers. Due to geographic realities, it is no coincidence that Member States in the south, namely Italy, Greece, Spain and Malta, are in most cases the first destinations in the EU for irregular migrants. Should there be a concerted and harmonised approach to issuing visas for the purpose of entry the burden could be shared by all Member States according to capacity. In such circumstances, the persons initially screened as qualifying for international or subsidiary protection would be granted legal means of entry into the EU and so the clandestine voyage to the already burdened Member States bordering the contemporarily affected zone would be avoided. The matter is of course highly controversial and is yet to be resolved. There have, however, arisen proposals on how to arrange access for asylum seekers into the EU without resorting to irregular methods. For instance the suggestion put forward by the Red Cross presented below would also have the effect of relieving undue burden and pressure from the national migration authorities of Member States in the south as asylum seekers could apply to any Member State.

In its Position paper¹⁰⁷, the Red Cross gives the EU a set of recommendations with the help of which the EU could better respect its international obligations under the various sources of law and to ensure safe and effective legal avenues for migrants to enter the EU and gain access to international protection. Recommendation 6 of the document is for current purposes most relevant:

‘6. Allow for exemptions from EU visa regulations and promote the issuing of Humanitarian and Protection Visa.

¹⁰⁶ European Asylum Support Office, 2013 Annual Report on the Situation on Asylum in the EU, press conference, July 7, 2014, available at <<http://ec.europa.eu/avservices/video/player.cfm?ref=I090916>> (accessed July 7, 2014).

¹⁰⁷ ‘Legal Avenues to Access International Protection in the EU’, *Red Cross*, February 27, 2013, available at <http://redcross.eu/en/upload/documents/pdf/2012/Migration/Position%20Paper_Legal%20Avenues_RCEU_27.02.2013.pdf> (accessed May 13, 2013).

Visa obligations should be suspended for nationals and residents of countries in a significant humanitarian crisis and where there are no opportunities for issuing visas within the country of origin, as in the case of Syria at the moment. The issuing of humanitarian visas should be promoted in line with the Schengen Borders Code and the Visa Code. The EU should consider exempting from EU visa regulations refugees who are formally recognised by UNHCR and whose protection needs cannot be fully covered in their country of residence or are in situation of protracted displacement. Their legal entry for the purpose of lodging an asylum application in a Member State should be facilitated. Third countries which lack an appropriate asylum system should be encouraged to enable UNHCR to perform the refugee status determination in their territories.’¹⁰⁸

Reference is also made to the provision of the Visa Code regarding visas with limited territorial validity in the footnotes of the recommendation. This type of visa is discussed in detail in the next chapter.

However, the course of action is not always concerted nor commended. In an informal meeting of the Justice and Home Affairs Council, United Nations High Commissioner for Refugees, António Guterres said, ‘The EU has in the past urged Turkey to keep its borders open to Syrians wishing to seek asylum, while at the same time focusing resources on controlling irregular entry at its own external frontiers.’¹⁰⁹ Along these lines is the EU Action on Migratory Pressure – A Strategic Response¹¹⁰, where focus lies in preventing illegal migration e.g. through increased operational cooperation with third countries. The document makes direct reference as a strategic priority area to the better tackling of abuse of legal migration channels and in particular unfounded asylum applications upon visa liberalisation and over-stayers. As a specific tool to cater for the occasion, the paper turns to the Visa Regulation and the then not yet existing safeguard clause¹¹¹. With regard to the

¹⁰⁸ *Ibid*, p. 4.

¹⁰⁹ ‘Informal Meeting of the Justice and Home Affairs Council; Remarks by António Guterres, United Nations High Commissioner for Refugees’, 18 July, 2013.

¹¹⁰ ‘EU Action on Migratory Pressures – A Strategic Response’, Council of the European Union, 8714/1/12, April 23, 2012.

¹¹¹ *Ibid*, p. 17.

management of external borders, Frontex¹¹² has in the past 8 years concluded working arrangements with a variety of countries on the African continent. These working arrangements entered into between Frontex and third country authorities with border security functions are not, as it were, legally binding international treaties, but rather they convey a political and even technical commitment to advance mutual cooperation – cooperation that is rarely welcomed without criticism in civic society.¹¹³ These are but the tip of the iceberg when considering the measures that securitize the policy area further. Indeed, little if any of the policy documents since the Treaty of Amsterdam actually make reference to the facilitation of access for asylum seekers to the territory of the Union.

On a general reading it would appear that when it comes to EU immigration and external border policies, combating illegal migration enjoys a more significant standing at the expense of enhancing protection of vulnerable refugees. Under normal conditions political discourse as manifested in both documentation and statements uttered in press conferences still invokes the vocabulary of national interest, sovereignty and, of course, security. Public discourse on the subject tends to side with the humane angle in the wake of fatal tragedy, calling on decision-makers at national, regional and international level to take initiative and solve the problem, often referring to the increasing of legal means of entry. Perhaps, what should be realised, citing IOM Director General Swing, is that migration ‘...is a process to be managed and not a problem to be solved.’¹¹⁴

4.2 From Conflict to Movement – From Structural to Reactive Prevention

According to UNHCR, by the end of 2012, 45.2 million persons were coercively displaced. Of these, over 15 million were refugees of which over 80% are hosted by developing countries. Germany is the only Schengen Member State making it to the top 5 list of refugee-hosting countries. The high number of displaced persons is attributable to

¹¹² Officially called the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union.

¹¹³ See e.g. Frontex website on the characterisation of working arrangements and its external relations with third country authorities: <<http://frontex.europa.eu/partners/third-countries>>. For a critical analysis of the legitimacy and human rights dimension of working arrangements, see M. Fink, ‘Frontex Working Arrangements: Legitimacy and Human Rights Concerns Regarding “Technical Relationships”’, 28 *Utrecht Journal of International and European Law* 75 (2012), 20-35.

¹¹⁴ *Ibid* 92.

persecution, conflict, severe violence and human rights violations.¹¹⁵ In fact, 55% of all refugees today hail from five countries affected and torn by war¹¹⁶. Furthermore, economic distress, social conflict, political turmoil, man-made and natural disasters, labour market demands, climate change and public and private works projects similarly contribute to the growing number of displaced persons, irregular migrants and asylum-seekers.¹¹⁷ Indeed the Joint Africa European Union Strategy Action Plan¹¹⁸ section on migration, mobility and employment highlights the need to better manage legal migration between the two continents as well as the importance of addressing the root causes of migration and refugee flows. The Action Plan, however, only refers to facilitating mobility for commercial, professional and study reasons in connection to visa issues¹¹⁹. Visa policy is not explicitly dealt with as a means of controlling refugee flows. It is nonetheless clear that root causes, such as the ones classified above, have the full attention of EU and government officials when it comes to migration policy. In the following, I argue that visa policy could be employed to affect the course and development of those root causes in addition to being a sound means of identifying early warning signs.

As it is established that extraordinary circumstances such as emergencies and armed conflicts are main causes of irregular migration, there is worth in investigating the root causes of such undesirable events. The sociological and economic impacts of various root causes are not the focus of this thesis nor can they be studied in depth due to other limitations. Nonetheless, the hostility or other emergence stemming from the social and economic structures of societies¹²⁰ are relevant when considering the potential and power of the structural preventive limb of visa policy.

¹¹⁵ UNHCR, *Global Trends 2012: Displacement – The New 21st Century Challenge* (Geneva: United Nations High Commissioner for Refugees, 2013).

¹¹⁶ *Ibid.* By the end of 2013, the five countries were Afghanistan, Syria, Somalia, Sudan and the Democratic Republic of the Congo.

¹¹⁷ *Ibid* 115.

¹¹⁸ Joint Africa European Union Strategy Action Plan 2011-2013, available at <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/dpap/dv/jeas_action_plan/_jeas_action_plan_en.pdf> (accessed June 17, 2014).

¹¹⁹ *Ibid*, p. 62.

¹²⁰ It should also be noted that some critics have questioned the causal link between inequality and conflict. See e.g. A. Bellamy, 'Realizing the Responsibility to Protect', 10 *International Studies Perspectives* 2 (2009), 111-128.

When it comes to early warnings and first indicators of progressing conflicts, the forced movement of people is undoubtedly at the top.¹²¹ This suggests a rather unambiguous correspondence between conflict and movement. Furthermore, displaced persons, asylum seekers and refugees are best equipped to communicate to the international community the realities of the emergency and to help recognise when a conflict may or may not develop into genocide or other crimes against humanity. This is especially so seeing as the definition of a refugee focuses on various grounds of persecution.¹²² However, a study of the trends in the situation of asylum seekers in a time where the West is resorting to more and more advanced and innovative means of refusing entry for the purpose of seeking asylum, those fleeing from potential persecution and victimisation are less likely to cross borders in general. This has led on the one hand to a decrease in refugee numbers globally and an increase in the number of internally displaced persons.¹²³ Obtaining a visa is practically the only way for a third country national on the negative visa list to enter the Schengen Area legally. That is of course unless she has a valid residence permit. Being eligible for a visa, as discussed above, may prove extremely challenging for members of certain social strata, especially during times of emergency and armed conflict – the very reason they now aspire to seek safe haven. It would be beneficial for the international community, should the first wave of asylum seekers fleeing a given conflict reach safety in a timely manner and give an honest account of the events back home in a truthful and open manner. These accounts of events, or early warnings, are less likely to come to daylight when the persons fleeing persecution are considered illegal migrants in their new host state, if they ever survive the clandestine journey. The visa has the enabling faculties of removing its holder from harm's way into safety. From this notion I draw the association to the preventive characteristics of visa policy.

Visa policy as a tool can be employed as a structural preventive mechanism. What this means, is that the issuance of visas may be coordinated and implemented in such a way as to constitute general prevention or a form of control policy action, which may or may not have the effect of influencing behaviour. The rhetoric behind the argument for structural

¹²¹ OECD, 'Conflict and Fragility: Preventing Violence, War and State Collapse: The Future of Conflict Early Warning and Response' (2009), available at <<http://oberon.sourceoecd.org/vl=4380558/cl=42/nw=1/rpsv/ij/oecdthemes/99980010/v2009n6/s1/p11>> (accessed June 18, 2014).

¹²² S. Harris Rimmer, *Refugees, Internally Displaced Persons and the 'Responsibility to Protect'*, (Geneva: United Nations High Commissioner for Refugees, 2010).

¹²³ 'Lost in Limbo', *The Economist*, August 27, 2009, available at <<http://www.economist.com/node/14302845>> (accessed June 18, 2014) as cited in Harris Rimmer, *ibid.*

prevention is that by thwarting the emergence of a set of structural factors that enable and facilitate outbreaks of conflicts and crises, the cause, too, is excised. Smart use of migratory measures, including the introduction of visa policy in this field, could have the effect of rendering certain crises moot. Similarly, structural prevention of conflicts¹²⁴ inside the Schengen Area could be realised with visa policy by impeding the establishment of dissociated echelons of migrants into ghettos in only those Member States that neighbour the source countries¹²⁵. Instead, migrants could be allocated between Member States according to their respective capacities in hosting them rather than confining migrants into densely populated districts in a few towns that are wholly separate from the rest of the populace. In fact, a considerable role of visa policy in this could be the potential to allocate bona fide asylum seekers and refugees among Member States. This notion of burden sharing is often highlighted in media discourse¹²⁶ perhaps for a legitimate reason, too.

Secondly visa policy can be executed as a reactive preventive instrument. Safe to say, however, this mode of prevention does not obstruct the emergence of the root causes of crises but instead has the ability to prevent the potential bona fide applicants from falling victim to persecution, genocide or other atrocity. Thus it operates as an external reaction to the outbreak of emergencies simultaneously facilitating Member States to live up to their international obligations toward those in despair. Issuing humanitarian visas for persons likely to be persecuted for reasons of e.g. ethnicity or faith before the actual commencement of genocide or other atrocity is by definition preventive. This course of action is not in fact unprecedented. Kaunas-based Japanese diplomat, Chiune Sugihara, issued visas eventually facilitating the safe passage of more than 6,000 Jews to Japan in 1940¹²⁷. The prevalent problem of taking this approach to visa policy as a tool in protecting bona fide asylum seekers and refugees is that it would necessarily insist on a preliminary ruling by the consular officer on the merits of the case i.e. the honesty, sincerity and eligibility of the applicant for refugee status or other protection. However, without prejudice to the aforementioned, the consular officer will nonetheless have to assess the merits of each individual visa applicant on whether or not he or she fulfils the

¹²⁴ Mostly applying to social strife, economic and structural inequality etc.

¹²⁵ Referring to Greece, Italy, Malta and Spain in addition to the already top refugee-hosting Germany.

¹²⁶ See above.

¹²⁷ See e.g. Y. Sugihara, *Visas for Life*, (San Francisco: Edu-Comm, 1995).

criteria laid out in the Visa Code. This applies equally when evaluating the grounds for issuing a so-called humanitarian visa, or a visa with limited territorial validity.

4.3 Role of EU Visa Policy: Conclusions

EU visa policy is exclusive. Others may even maintain that it constitutes a form of structural violence that on its face renders certain groups of people wholly incapable of entering the territory legally¹²⁸. Visa policy can also be held to a certain extent accountable for the increasing border-related deaths. The policy area is highly politicised and often controversial in that it rather divides than unites people back at home. It is without a doubt clear, however, that the power of visa policy is two-sided. It has the power to exclude, but also the power to admit. Visas are not intrinsically broken or bad, yet perhaps misapplied in the case of asylum seekers and those fleeing persecution. Visas have the potential to remove people from conflict areas without forcing those people to resort to rickety boats and abusive traffickers. It would moreover appear from political discourse at the top level as well as the outcries from third country nationals, Union citizens and civic society in general that there truly is a need for a visa that could save human lives. The so-called humanitarian visa, or visa with limited territorial validity, which can be issued even when the entry requirements are not met, is discussed in depth in the next chapter.

¹²⁸ *Ibid* 90, p. 95.

5. Visa with Limited Territorial Validity

There exist a myriad of barriers to entry vis-à-vis the visa requirement. Principally, requirements representing major barriers set by the Visa Code concern travel medical insurance, visa fees, travel documents, prior consultations, insufficient guarantees to justice in terms of appeal, supporting documents, any prior ‘Schengen history’ the applicant may have and lack of access to a competent consulate. This chapter presents and analyses the notion of the humanitarian visa as regulated by the Visa Code. The chapter begins with a brief overview of the visa with limited territorial validity and its history and entry into force. Certain findings based on answers to my questionnaires are presented in this chapter. Statistics and analysis of those figures are also considered.

Common Schengen visas are intended to entitle the holder to short-term stay. The persecuted person seeking refuge by applying for a visa from a Schengen consulate will find no solace in the fact that further to long list of preconditions, visas are structurally inappropriate to the occasion. The legal instrument is not constructed for the purpose of entering the Schengen Area in order to apply for asylum or secondary protection. In fact, this is one frequently used reason for refusing a visa, which will be communicated to the applicant in a standard form¹²⁹. It is even conceivable that all of the reasons stated in the standard form can be referred to in the case of a suspicion of the applicant being an asylum seeker.¹³⁰ Then again, Article 12 of the Dublin III Regulation¹³¹ makes direct reference to

¹²⁹ Visa Code, Annex VI.

¹³⁰ 1. a false/counterfeit/forged travel document was presented;
2. justification for the purpose and conditions of the intended stay was not provided;
3. you have not provided proof of sufficient means of subsistence, for the duration of the intended stay or for the return to the country of origin or residence, or for the transit to a third country into which you are certain to be admitted, or you are not in a position to acquire such means lawfully;
4. you have already stayed for three months during the current six-month period on the territory of the Member States on the basis of a uniform visa or a visa with limited territorial validity;
5. an alert has been issued in the Schengen Information System (SIS) for the purpose of refusing entry by (indication of Member State);
6. one or more Member State(s) consider you to be a threat to public policy, internal security, public health as defined in Article 2(19) of Regulation (EC) No 562/2006 (Schengen Borders Code) or the international relations of one or more of the Member States);
7. proof of holding an adequate and valid travel medical insurance was not provided;
8. the information submitted regarding the justification for the purpose and conditions of the intended stay was not reliable;
9. your intention to leave the territory of the Member States before the expiry of the visa could not be ascertained.

¹³¹ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an

being in possession of a visa for determining the competent Member State responsible for examining an application of international protection. However, the Visa Code introduces albeit not a novel type of visa but nonetheless a fresh and partially standardized type of visa, which we call upon to enable the legal entry of the person who seeks asylum.

A visa with limited territorial validity is a visa, which is valid for the territory of one or more Member States but not all Member States.¹³² This type of visa can be issued even when the applicant does not fulfil the entry requirements stipulated in the Schengen Borders Code¹³³. The individual effects and implications that these conditions for entry pose to the asylum seeker are dealt with in more detail above in chapter 3.

5.1 Background and Theoretical Framework

Prior to the EU Visa Code, provisions concerning visas with limited territorial validity (VLTV) were split between various articles in multiple legal instruments. The issuance of VLTVs was previously regulated by Articles 11(2), 14(1) and 16 of the Schengen Convention and Part V, 3 and Annex 14 of the Common Consular Instructions¹³⁴. Misuse, uncertainty and varying practices as between Member States in the issuance of VLTVs were widespread¹³⁵. The scattered provisions were for the first time gathered into one distinct article and integrated into the Visa Code.¹³⁶ However, the Commission in the course of replying to queries by a number of Member States stated that the VLTV is not fully intended to constitute a uniform visa.¹³⁷ The initial text of the draft proposal and the final adopted article of the Visa Code vary slightly. It is however important to note that substance-wise the two texts coincide for the most part. This is an important point to make when considering the *travaux préparatoires* and statements given pursuant to the adoption

application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

¹³² Visa Code, Art. 2(4).

¹³³ Schengen Borders Code, Art. 5(1)(a), Art. 5(1)(b), Art. 5(1)(c), Art. 5(1)(d), Art. 5(1)(e).

¹³⁴ Common Consular Instructions on Visas for the Diplomatic Missions and Consular Posts (2002/C 313/01).

¹³⁵ Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, 11752/06, July 24, 2006.

¹³⁶ COM(2006) 403 final/2.

¹³⁷ Valtioneuvoston kirjelmä Eduskunnalle ehdotuksesta Euroopan parlamentin ja neuvoston asetukseksi yhteisön viisumisäännöstöksi (*viisumisäännöstö*) (U 52/2008 vp).

of the Visa Code and when assessing the relevancy of those statements to the final adopted text.¹³⁸

The substance of the provision remains by and large the same; mostly only editorial changes have ended up in the adopted text. The main substantial change is in the specification of the competent actor. In the proposal reference is made to diplomatic missions and consular posts while the adopted text refers to the Member State concerned. This change most likely reflects the differences in practices between Member States and how they have organised their visa-issuing operations. In some cases it may be the central authority located inside the Member State who actually takes the decision on the visa application while in others it would be the diplomatic mission or consular post located within the third country that takes an independent decision possibly having consulted with the central authority back home.¹³⁹ The Commission in its most recent proposal amending the existing Visa Code does not intend to amend Article 25 on VLTVs.

The initial proposal by the Commission contained a provision waiving the visa fee in cases where the holder of a VLTV would need to travel to a Member State not included in the territorial validity of the VLTV and a second visa application would have to be lodged.¹⁴⁰ This provision would have proved particularly refugee-friendly when one Member State issues a visa only valid for travel into that state, but there were no direct flights from the country of origin and the transfer would take place in another Schengen Member State. However, the provision did not survive unchanged in the final version. The adopted text

¹³⁸ Point (b) in Art. 25(1) was originally adopted as ‘(b) when for reasons deemed justified by the consulate, a new visa is issued for a stay during the same *six-month* period to an applicant who, over this *six-month* period, has already used a uniform visa or a visa with limited territorial validity allowing for a stay of *three months*’ (emphasis added). The reference to time periods was amended from months to days in Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council.

¹³⁹ Even though Art. 4(1) Visa Code provides that applications shall be examined and decided on by consulates; paragraph 4 enables the involvement of other authorities. In Sweden, for example, decisions on visa applications are taken by the central authority in Sweden, Migrationsverket (The Migration Board).

¹⁴⁰ COM(2006) 403 final/2, Art. 16(7): ‘When the holder of an LTV issued in accordance with Article 21(1)(c) needs to travel – within the period of validity of that visa – to a Member State not included in the territorial validity of the LTV, no handling fee shall be charged for the processing of the second visa application.’

includes a similar but not as compelling provision for waiving the visa fee for humanitarian reasons¹⁴¹.

An interesting feature in paragraph 1 is that the wording used is ‘shall be issued’ instead of ‘may be issued’. The adopted phrasing employed suggests non-discretion. The word ‘shall’ is used widely in EU legislation and implies a mandatory nature to undertake to do a prescribed act or to refrain from doing so. Also the fact that during the Visa Working Party meetings between 2007 and 2008 there were vibrant discussions on the wording of the VLTV Article suggests that this particular issue was to some extent sensitive. It was indicated that the Benelux states could be treated as a single entity for the purpose of this individual Article.¹⁴² Proposals were also made for the employment of ‘may be issued’ in the text of the article. The communication from the Finnish Government to the Parliament¹⁴³ on the draft proposal for a Community Code on Visas (Visa Code) further seems to place emphasis on the wording. It states that Article 21(1) of the draft proposal (now Article 25(1)) sets out the individual cases where a visa with limited territorial validity *has to be issued*¹⁴⁴. There is, however, what I call a ‘two-fold test’, which vitiates the obligatory nature of the provision.

5.2 Two-Fold Test and Discretion

A visa with limited territorial validity shall be issued for our purposes when the Member State concerned considers it necessary for reasons of national interest, humanitarian grounds or because of international obligations to derogate from the entry conditions laid out in the Schengen Borders Code or to issue a visa despite an objection by a Member State consulted to the issuing of a uniform Schengen visa. The two-fold test constructed into Article 25(1) requires in the first place that there is a reason of national interest, humanitarian grounds or international obligations that the visa should be issued exceptionally. Secondly, the VLTV shall only be issued *if* the Member State concerned

¹⁴¹ Visa Code, Art. 16(6): ‘In individual cases, the amount of the visa fee to be charged *may be waived* or reduced when to do so serves to promote cultural or sporting interests as well as interests in the field of foreign policy, development policy and other areas of vital public interest or for humanitarian reasons’ [emphasis added].

¹⁴² Letter from the Ministry for Foreign Affairs of Finland, Unit for Passports and Visas, dated July 26, 2013.

¹⁴³ COM(2006) 403 final/2.

¹⁴⁴ *Ibid* 137, ‘Artiklan 1 kohdassa luetellaan yksityiskohtaisesti tapaukset, joissa *on myönnettävä* kelpoisuusalueeltaan rajoitettu viisumi’ [emphasis added].

considers it necessary. The handed down margin of appreciation as regards what it is that constitutes *necessity* is unclear and the regulation does not offer any guidance on the correct application or reading of the provision. Nor does the draft proposal. Discretion as regards the issuance of a visa when the entry conditions are met was considered in the *Koushkaki* case¹⁴⁵. The German Federal Republic had sent a request for a preliminary ruling to the Court of Justice of the European Union asking whether the competent authorities of a Member State can refuse to issue a uniform visa to an applicant who satisfies the entry conditions referred to in current Article 21(1) of the Visa Code. The Advocate-General argued that there was in fact no *right* to a common Schengen visa. The court disagreed and stated:

‘It follows ... that the competent authorities set out in Article 4(1) to (4) of the Visa Code cannot refuse to issue a uniform visa unless one of the grounds for refusal listed in Articles 32(1) and 35(6) of that code can be applied to the applicant.’¹⁴⁶

The judgment of the Court of Justice of the European Union (CJEU) in *Koushkaki* can be argued to be applicable by analogy to other types of visa, too. This would give the impression that the issuance of VLTVs does not in fact enjoy an unfettered discretion. However, the Commission, as pointed out above, had indeed stated that the VLTV is not intended to fully constitute a uniform visa¹⁴⁷. The aim and formulation of the two articles are also different. The potential applicability of *Koushkaki* by way of analogy to the discretion of the issuance of VLTVs is therefore uncertain. The CJEU referred to the list of grounds for denying a visa as exhaustive. This was the reasoning behind finding that once the conditions for a visa are met; the visa is to be issued. However, the CJEU also made note that the authorities responsible for assessing the relevant facts in order to determine whether the grounds for refusal are present have a wide discretion when doing so¹⁴⁸.

To maintain that asylum seekers have a right to be issued VLTVs pursuant to *Koushkaki* is flawed. This is especially so as the grounds for refusal of a visa do indeed apply to the potential asylum seeker. One ground for refusal above all is that ‘the applicant does not

¹⁴⁵ Case C-84/12, *Rahmanian Koushkaki v. Bundesrepublik Deutschland*, December 19, 2013.

¹⁴⁶ *Ibid* at 65.

¹⁴⁷ *Ibid* 137.

¹⁴⁸ *Ibid* 145 at 60.

intend to leave the territory within the validity period of the visa'¹⁴⁹. Steve Peers argues that Member States applying the Visa Code could in fact have an obligation to issue potential asylum seekers a VLTV, provided that the Member State in question complied with its international obligations as also entrenched by EU law. The asylum seeker would of course need to be dishonest, as he or she does not indeed intend to leave the territory within the validity period of the visa. However, this would not pose a major problem seeing as Article 31 of the Refugee Convention justifies breaches of national immigration laws for the purpose of fleeing persecution. According to Peers, because of the international obligations vis-à-vis the protection of persons fleeing persecution coupled with the EU Charter of Fundamental Rights, the word 'shall' in Article 25 of the Visa Code overrides the discretion granted by the same article in the words 'when the Member State concerned *considers it necessary*' [emphasis added].¹⁵⁰ This, I argue, is something that would have to be settled by the CJEU.

Koushkaki gives us some idea about the extent of discretion handed down by the Visa Code in terms of issuing a visa. In its response¹⁵¹ to my questionnaire, the German Federal Foreign Office stated that it does not possess the necessary information to assess the extent of discretion they regard as properly vesting with the competent authorities for processing visa applications. The Embassy of Finland in Tehran in its response¹⁵² to the questionnaire noted that in cases of possible VLTV issuance, the central authority – the Ministry for Foreign Affairs of Finland, Unit or Passports and Visas – is consulted for the determination of the discretion. In fact, in each individual case where a Finnish consular officer is considering issuing a VLTV, the central authority is consulted. The Embassy of Finland in New Delhi in its response¹⁵³ considered the extent of discretion bestowed upon consular officers by the Visa Code regarding the issuance of a VLTV as a rather broad one. This presumption is in line with *Koushkaki*.

The VLTV appears to enjoy a special standing and does not compare to a uniform common Schengen visa when it comes to the conditions for issuing one. On the other hand, Peers

¹⁴⁹ Visa Code, Annex XI, point 9.

¹⁵⁰ See e.g. S. Peers, 'Do Potential Asylum Seekers have the Right to a Schengen Visa?', *EU Law Analysis*, January 20, 2014, available at <<http://eulawanalysis.blogspot.fi/2014/01/do-potential-asylum-seekers-have-right.html>> (accessed June 24, 2014).

¹⁵¹ Letter from the German Federal Foreign Office, Optimising the visa procedure, Management consultation for visa sections, Schengen representation agreements and cooperation unit, dated April 11, 2014.

¹⁵² Letter from the Embassy of Finland in Tehran, Iran, dated March 24, 2014.

¹⁵³ Letter from the Embassy of Finland in New Delhi, India, dated April 1, 2014.

maintains that in a case involving the need for international protection and where that need is brought to the attention of the visa officer, the visa officer must take this into account by virtue of the EU Charter of Fundamental Rights.¹⁵⁴ There is currently no separate outlet or channel for applying for a VLTV; the same standard visa application is used as for a common Schengen visa. However, the International Foundation for the Protection of Human Rights Defenders in their general information form¹⁵⁵ regarding visas for human rights defenders makes special note of the possibility of applying for a VLTV and even advocates trying to apply for one. It would be interesting to see an applicant challenge the Member State on the basis of Article 25 in order to clarify the question concerning Member State discretion in its determinations about *necessity* and the nexus between necessity and international obligations of the state concerned.

5.3 Reasons for Issuing a Visa with Limited Territorial Validity

The grounds for issuing a VLTV are listed in Article 25 of the Visa Code. The reasons for our purpose comprise the following: the applicant does not satisfy the entry conditions laid down in Article 5(1)(a), (c), (d) and (e) of the Schengen Borders Code; one or more Member States have objected in accordance with Article 22 of the Visa Code; and due to reasons of urgency, prior consultation required under Article 22 has not been carried out. Another reason for issuing a VLTV is that the third country national applicant holds a travel document that is not recognised by one or more, but not all Member States. This situation arises often in case of non-regular passports such as special passports or service passports issued by certain third country authorities or entities. The Ministry for Foreign Affairs of Finland and certain Finnish Embassies were kind enough to respond to the questionnaires I sent out regarding the issuance of VLTVs in the respective third countries. The German Federal Foreign Office was content in stating that as they do not disaggregate between the grounds for issuing a VLTV, it was impossible to ascertain the specific humanitarian reason for issuing the visa or the specific international obligation in question that justified the issuing of the VLTV.

¹⁵⁴ S. Peers, 'External Processing of Applications for International Protection in the EU', *EU Law Analysis*, April 24, 2014, available at <<http://www.ein.org.uk/blog/external-processing-applications-international-protection-eu>> (accessed June 24, 2014).

¹⁵⁵ 'Schengen Visa Application Process: General Information & Tips for Human Rights Defenders at Risk', *The International Foundation for the Protection of Human Rights Defenders*, September, 2011, available at <http://www.frontlinedefenders.org/files/fl_schengen_visa_guidelines_0.pdf> (accessed June, 10, 2014).

Since the introduction of the Visa Code, Member States have been required by directly applicable EU law to compile annual statistics on visas in accordance with the table set out in Annex XII of the Visa Code¹⁵⁶. Further to this, consulates and embassies of Member States in a third country are required to exchange within local Schengen cooperation monthly statistics on uniform visas, visas with limited territorial validity, and airport transit visas issued, as well as the number of visas refused¹⁵⁷.

5.3.1 Reasons for Issuing a VLTV: Finland

Finland has exceptionally issued VLTVs mostly for humanitarian reasons when the travel document to which the visa is to be affixed is not recognised by one or more Member States. It could be Finland or any number of other Member States that do not recognise the travel document in question. VLTVs have in the past also been issued when a third country national residing in Finland has lost his/her residence permit abroad or when a third country national is arriving to Finland for marriage purposes. The Unit for Passports and Visas also indicated that in addition to the aforementioned reasons Finland has also after careful special consideration issued individual VLTVs for humanitarian reasons. Under the refugee quota, persons whom the UNHCR has designated as refugees have also been exceptionally issued VLTVs.¹⁵⁸

The Finnish Embassy in New Delhi issued 31 VLTVs in 2013. The main reason for issuing VLTVs there was not in fact related to the recognition of travel documents, as I had originally anticipated. The Finnish Embassy in New Delhi issued VLTVs e.g. for Afghan citizens whose visa applications had been submitted too late in order for the consultation procedure to be carried out. However, these persons have generally been either persons travelling on business or others known to the staff for their integrity and reliability, not potential asylum seekers. In such cases, the ground for issuing a VLTV is rather 'because of national interest' rather than a humanitarian one. At the time of the letter, no visas had

¹⁵⁶ Visa Code, Art. 46.

¹⁵⁷ Visa Code, Art. 48(3)(a).

¹⁵⁸ Letter from the Ministry for Foreign Affairs of Finland, Unit for Passports and Visas, dated July 26, 2013.

been issued for humanitarian reasons or because of international obligations.¹⁵⁹ The Finnish Embassy in Tehran echoed with most what the Finnish Embassy in New Delhi submitted. They, too, had issued humanitarian visas for reasons pertaining to the consultation procedure and also when a close relative of the visa applicant had been in an accident in Finland.¹⁶⁰

The issue of humanitarian visas made it to the headlines when the Finnish Broadcasting Company (YLE) published the findings of the Finnish Refugee Council (FRC) and the panel on humanitarian visas organised by the latter. The FRC advocates for the issuance of VLTVs to ensure the safe passage of persons fleeing persecution and to enable them to exercise their right to apply for asylum. The motion was put forward as a response particularly to the situation in Syria and the growing death toll in the Mediterranean. However, state authorities have taken a quota approach to refugees. Under this system, Finland accepts persons designated as refugees or other foreigners in need of international protection or resettlement by UNHCR. According to the Head of the Unit for Passports and Visas, Päivi Blinnikka, the matter of the so-called humanitarian visa is not as simple as the FRC leads on. If a person is issued a VLTV, that person is merely entitled to entry into Finland and to apply for asylum there. This does not guarantee that he/she will in fact be granted asylum, secondary protection or a residence permit, she continued.¹⁶¹ It could also be argued that the fear of changing policy and to start issuing VLTVs for such purposes arises from the notion that should the person fail to qualify for asylum, secondary protection or a residence permit, returning that person could prove to be next to impossible owing to practical reasons. These are often related to travel documents, not to mention that forced deportations are expensive as well as time-consuming operations.

¹⁵⁹ *Ibid* 152.

¹⁶⁰ *Ibid* 153.

¹⁶¹ E. Hiltunen, 'Järjestö: Humanitaarisesta viisumista apua pakolaisille', *Yle uutiset*, June 20, 2014, available at <http://yle.fi/uutiset/jarjesto_humanitaarisesta_viiisumista_apua_pakolaisille/7260421> (accessed July 1, 2014).

5.4 Statistics

The Commission publishes a compilation of all visa-related information gathered by all visa-issuing consulates and embassies annually on its website¹⁶². The importance of gathering statistical data is acknowledged in Recital 19 of the regulation, recognising that such data enables the monitoring of migratory movements and can serve as an efficient management tool.

As a caveat apropos the accuracy and reliability of the statistics, it should be noted that Member States are not under the current Visa Code obliged to record information on which specific ground the VLTV was issued. Consequently, the amount of VLTVs issued includes those issued for humanitarian reasons, because of national interests and because of international obligations. Not a single Member State currently disaggregates between the grounds for issuing a VLTV when compiling annual visa statistics, as far as the Commission is aware. However, the Commission head of unit dealing with visa policy, Jan De Ceuster, stated that the situation might change as the provisions of the Visa Code are being reviewed, including the ones on statistics¹⁶³. Indeed the Commission proposal for a new Visa Code emphasises the point that the lack of sufficiently detailed statistical data hinders the assessment of the implementation of certain provisions. Annex VII of the regulation, listing the information for which statistics is to be gathered, is thus subject to be amended. It is proposed that the annex should provide for the collection of all relevant data in a *sufficiently disaggregated* form to allow for proper assessment. De Ceuster in his response from July 2013 stated that the Commission would assess whether it is necessary to request an additional disaggregation of the VLTV data according to the reason why the visa was issued. It remains to be seen whether disaggregated data on the grounds for which Member States have issued VLTVs will be included in the final text.

¹⁶² See the Visa statistics for 2013, European Commission Home Affairs website on Visa policy, available at <http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm> (accessed September 5, 2013).

¹⁶³ Response from European Commission, Head of Unit C2, DG HOME to e-mail inquiry, dated July 26, 2013.

5.4.1 Data Table

I assembled the subsequent table of statistics on the basis of the statistical information compiled by the Commission with regard to visas issued by the Member States in 2013. There are currently almost 2,000 Schengen embassies and consulates issuing visas globally. Therefore, for the purpose of this study, 44 Schengen consulates and embassies were chosen for an analysis of Member States' VLTV-issuing practices. The following data is by no means supposed to illustrate a comprehensive account of how different Member States utilise VLTVs in their visa policy at a national level. Nonetheless, trends can be detected. The following statistics are intended to illustrate the current practices of various Member States in their issuance of VLTVs in relation to uniform visas. The consulates and embassies situated on or accredited to the territory of states confronted with recent conflicts and other emergencies are relevant for our purposes in determining the potential of the VLTV for facilitating the safe passage of vulnerable people. Therefore third countries such as Afghanistan, Bangladesh, Central African Republic, the Democratic Republic of Congo, Egypt, Iraq, Morocco, Syria and Sudan are included. Visa statistics of more stable third countries, such as the Russian Federation, Ukraine and Venezuela, are also presented in order to help comprehend the norm when it comes about VLTVs and visa statistics.

The information chosen for this specific table (out of 19 different columns of data and sorting bases) comprise the third country in question; location of consulate; Member State that issued the visa; total amount of Schengen visas applied for; the rate for Schengen visas not issued; amount of VLTVs issued; and rate for issued VLTVs of all Schengen visas applied for.

Third Country	Consulate/ Embassy	Schengen Member State	C Visas applied for	Rate for C visas not issued (%)	LTV Visas issued	Rate for issued VLTVs of all C Visas applied for
Afghanistan	Kabul	Germany	2,828	51.80%	54	1.91%
Afghanistan	Kabul	Netherlands	183	2.70%	37	20.22%
Afghanistan	Kabul	Poland	742	15.60%	214	28.84%
Afghanistan	Kabul	Denmark	124	13.70%	34	27.42%
Algeria	Algiers	Portugal	1,578	9.60%	115	7.29%
Algeria	Algiers	France	179,833	23.20%	128	0.01%
Algeria	Algiers	Switzerland	3,670	10.70%	224	6.10%
Algeria	Algiers	Hungary	602	49.70%	0	0%
Bangladesh	Dhaka	Italy	3,066	14.90%	344	11.22%
Bangladesh	Dhaka	Sweden	3,711	21.20%	217	5.85%
Cameroon	Yaounde	Italy	4,280	36.80%	179	4.18%
Cameroon	Yaounde	France	10,398	22.30%	7	0.07%
Central African Republic	Bangui	France	2,527	38.30%	16	0.63%
Congo	Brazzaville	Italy	1,221	34.60%	121	9.91%
Congo	Brazzaville	France	5,006	22.40%	10	0.02%
D.R. Congo	Kinshasa	Italy	7,170	41.40%	3,018	42.09%
D.R. Congo	Kinshasa	Switzerland	1,455	23.90%	1,036	71.21%
Egypt	Cairo	Germany	24,492	9.90%	410	1.67%
Egypt	Cairo	France	45,162	11.90%	5	<0.01%
Egypt	Cairo	Finland	897	16.40%	6	0.07%
Eritrea	Asmara	Italy	1,549	34.50%	42	2.71%
Ethiopia	Addis Ababa	Switzerland	1,061	17.20%	92	8.67%
Iraq	Bagdad	Germany	4,776	7.50%	4,390	91.92%
Iraq	Bagdad	Spain	2,284	2.00%	160	7.01%
North Korea	Pyongyang	Germany	258	7.40%	2	0.08%
Kosovo	Pristina	Germany	26,463	17.40%	21,629	81.73%
Libya	Tripoli	Germany	3,437	14.00%	2,706	78.73%
Mali	Bamako	Spain	800	29.60%	171	21.38%
Morocco	Tangier	Spain	43,554	7.00%	618	1.42%
Morocco	Rabat	Finland	503	21.90%	1	0.20%
Morocco	Rabat	Belgium	775	0.00%	44	5.68%
Myanmar	Yangon	France	1,658	3.20%	0	0%
Nigeria	Abuja	Switzerland	2,850	11.10%	184	6.46%
Russian Federation	Moscow	Spain	1,051,643	1.00%	3,991	0.40%
Russian Federation	St. Petersburg	Finland	1,204,670	0.80%	35	<0.01%
Rwanda	Kigali	Germany	225	20.90%	17	7.56%
Sri Lanka	Colombo	Germany	5,687	21.00%	82	1.44%
Sudan	Khartoum	Italy	1,756	2.80%	1,230	70.05%
Sudan	Khartoum	Spain	2,103	39.80%	168	8.00%
Syria	Damascus	Poland	380	42.60%	27	7.11%
Syria	Damascus	Czech Republic	15	13.30%	0	0%
Tunisia	Tunis	Italy	11,055	14.10%	77	0.70%
Ukraine	Kiev	Italy	63,609	1.40%	5,406	8.50%
Venezuela	Caracas	Poland	74	0.00%	52	70.27%

Image 5 – Statistics on visas with limited territorial validity.

5.4.2 Analysis of the Practices of Member States

It is interesting to observe the differences in Member State practices when it comes to the issuance of VLTVs in a given third country. It should be noted that some figures are misleading, e.g. the high rate of VLTVs issued in Kosovo by Germany and in fact by all Member States, is due to the fact that not all Member States recognise the statehood of Kosovo¹⁶⁴ nor the travel documents issued by the entity. Therefore visa applicants with Kosovar passports cannot be issued uniform Schengen visas. Again, the practically non-existent rate of VLTVs issued in St. Petersburg by Finland can be explained by the relative homogeneity of visa applicants and extremely high rate of common Schengen visas and multiple entry visas issued there.

In Damascus, Poland issued the most VLTVs of all Member States, comprising 7.11% of all Polish visas issued in Syria. This is not particularly high considering the dominant situation in Syria. Most visa-issuing consulates in Syria have however been closed and so Poland certainly stands out. Other Member States catch the eye as issuing great amounts of VLTVs in relation to the number of visa applications in conflict areas such as Italy (42.09%) and Switzerland (71.21%) in Kinshasa, Germany (91.92%) in Bagdad and (78.73%) in Tripoli, Italy (70.05%) in Khartoum and Poland (70.27%) in Caracas. It would in fact appear that in third countries, where the rate of common Schengen visas not issued is relatively high, the rate for issued VLTVs of all common Schengen visas applied for is low, too. This, I suggest, can perhaps be explained by the fact that high rates of refusals suggest a perceived risk of illegal immigration or other foul play, and this also deters the consular officers from issuing humanitarian visas in an overtly fashion. However, the contention is somewhat flawed. It is probably the ensuing conflict or other raging poor conditions that correlates to the high refusal rate and indeed the need for humanitarian visas in such circumstances. Therefore, should Member States issue VLTVs for the purpose of facilitating entry of those fleeing persecution into the Union, the respective ratio for VLTVs issued of all visas applied for should be higher in countries suffering from conflict or other emergency and where the refusal rate is relatively high. Two exceptions can be observed in the table above. Notwithstanding high refusal rates in Kinshasa, both Italy and Switzerland have issued an impressive amount of VLTVs. The Democratic

¹⁶⁴ E.g. Spain has not recognised Kosovo, possibly for reasons concerning domestic policy on Basque country and Catalonia.

Republic of Congo is, as it were, one of the top refugee-producing countries today. However, as the grounds for issuing the VLTVs are not disaggregated in the statistics, it is impossible to say whether or not the two correlate or whether e.g. Italy and Switzerland both recognise a special type of passport issued by D.R.C., which other Member States do not recognise. This, too, could explain the high rate for issued VLTVs of all common visas applied for there.

Some Member States stand out as not issuing at all or indeed very little VLTVs. France appears to be extremely passive in its issuance of VLTVs in general, including in third countries struggling with conflicts and emergencies. In Algiers, Bangui, Brazzaville, Cairo, Yangon and Yaounde, France issued an average rate of 0.12% VLTVs for all common visas applied for. The smaller Member States such as Czech Republic, Finland and Hungary, too, appear to be rather conservative in their VLTV-issuing practices.

Looking at present conflict zones and the visa-issuing practices there, it seems fair to suggest that certain Member States make use of the VLTV there whilst others are unenthusiastic about the idea. To reiterate, due to the lack of specific statistics on the grounds upon which the VLTV in question was issued, it is impossible to ascertain whether the visa was issued for the sake of facilitating safe passage over perilous waters, because one or more Member States does not recognise the travel document wielded by the applicant, one or more Member States have objected to the issuing of a uniform visa in the consultation procedure or any number of other reasons. Pursuant to the possible amendments to the existing Visa Code regarding the gathering of statistics, it should prove an interesting exercise to analyse the grounds more thoroughly. This would also provide a better starting point to interview consular officers on the specifics of each case, e.g. due to which exact international obligation the VLTV was issued and for what humanitarian reason.

5.5 Humanitarian Visas: Conclusion

Since the entry into force of the Visa Code in 2009 Member States have had the opportunity to issue visas for applicants who do not satisfy the entry conditions. Despite the Commission maintaining that the VLTV is not a fully uniform type of visa, EU politicians at the top level have called upon the undeveloped notion of humanitarian visa as a means to approach a common issue facing Europe. This is a political matter notwithstanding arguments in favour of the notion that VLTVs had to be issued for those fleeing persecution, following the *Koushkaki* ruling. Different Member States have adopted wholly different approaches to their policy vis-à-vis the issuance of VLTVs. It would be safe to assert that notwithstanding the harmonisation of visa policy at EU level, there exist simultaneously over twenty national visa policies on top of the overarching visa policy of the EU. In want of more accurate statistics on the grounds for which the VLTVs were issued, it is left to speculation and unofficial accounts on how each Member State conduct their VLTV-issuing.

The challenges and opportunities for issuing VLTVs as humanitarian visas are considered in the next chapter. Alternative methods for guaranteeing the safe passage of asylum seekers out of harm's way and for enabling them to exercise their right to apply for asylum are also outlined as measures, recommendations if you like, to be considered.

6. Challenges, Opportunities and Recommendations

The budding concept of the humanitarian visa brings with it opportunities and benefits to be secured but also challenges facing Member States and the integrity of the Schengen Area as a whole. This chapter considers the various challenges and opportunities vested in the notion of the humanitarian visa. Also, further responses and suggestions for amendments to existing legislation are contemplated in this chapter.

6.1 VLTV: The Humane Humanitarian Visa

As Member States especially in Southern Europe are feeling constantly increasing pressure in the capacities of their national authorities dealing with immigration and refugee matters such as search and rescue operations, asylum application processing, tackling trafficking in human beings and people smuggling and even logistical constraints when it comes to housing those who make it ashore, arguments in favour of the humanitarian visa come as a godsend. This is especially so when they are voiced at the top EU level. The programme of the six-month Italian presidency of the EU Council pays particular attention to the prevention of ‘asylum shopping’ and indeed emphasises that the Presidency will continue to promote genuine solidarity at European level regarding the particular pressure on the national asylum systems of some Member States¹⁶⁵. A harmonised approach to humanitarian visa-issuing within the EU would prove beneficial for those Member States that are currently unreasonably burdened by the mass influx of mixed flows of migrants by virtue of their geographic location. A concerted policy vis-à-vis VLTVs in the framework of facilitating asylum seekers’ safe passage into the area of the Member States for the purpose of applying for asylum could help allocate those fleeing persecution among all Member States according to their respective capacities to host them. This could be achieved through the operation of the representation networks and detailed mandates for that representation in addition to close cooperation between Member States. Currently,

¹⁶⁵ See the Programme of the Italian Presidency of the Council of the European Union, 1 July to 31 December 2014.

Germany, France, Sweden, the United Kingdom and Italy registered 70 % of all asylum applicants¹⁶⁶. The burden is borne by some more than others, as visible below.

	Applicants		Citizenships of main groups of asylum applicants								
	#	Per million inh.	First group	#	%	Second group	#	%	Third group	#	%
EU28	434 160	860	Syria	50 470	12	Russia	41 270	10	Afghanistan	26 290	6
Belgium	21 030	1 885	Russia	2 150	10	Afghanistan	1 675	8	Guinea	1 610	8
Bulgaria	7 145	980	Syria	4 510	63	Stateless	565	8	Algeria	435	6
Czech Republic	695	65	Ukraine	145	21	Syria	70	10	Russia	50	7
Denmark	7 170	1 280	Syria	1 685	23	Russia	965	13	Somalia	920	13
Germany	126 705	1 575	Serbia	18 000	14	Russia	15 475	12	Syria	12 855	10
Estonia	95	70	Vietnam	25	27	Syria	15	18	Russia	15	15
Ireland	920	200	Nigeria	130	14	Pakistan	95	10	Zimbabwe	70	8
Greece	8 225	745	Pakistan	1 360	17	Afghanistan	1 225	15	Bangladesh	730	9
Spain	4 485	95	Mali	1 470	33	Syria	725	16	Algeria	350	8
France	64 760	985	Kosovo*	5 505	8	Dem. Rep. of the Congo	5 325	8	Albania	5 045	8
Croatia	1 075	250	Syria	195	18	Afghanistan	185	17	Somalia	135	13
Italy	27 930	470	Nigeria	3 580	13	Pakistan	3 310	12	Somalia	2 885	10
Cyprus	1 255	1 450	Syria	570	45	Egypt	145	12	Bangladesh	105	8
Latvia	195	95	Georgia	145	76	Syria	15	8	Russia	5	3
Lithuania	400	135	Georgia	120	30	Afghanistan	85	22	Russia	75	19
Luxembourg	1 070	1 990	Kosovo*	160	15	Bosnia and Herzegovina	145	14	Montenegro	115	11
Hungary	18 895	1 905	Kosovo*	6 210	33	Pakistan	3 080	16	Afghanistan	2 330	12
Malta	2 245	5 330	Somalia	1 015	45	Eritrea	475	21	Syria	250	11
Netherlands	17 160	1 025	Somalia	3 270	19	Syria	2 705	16	Iraq	1 420	8
Austria	17 500	2 070	Russia	2 850	16	Afghanistan	2 590	15	Syria	2 005	11
Poland	15 150	395	Russia	12 760	84	Georgia	1 235	8	Syria	255	2
Portugal	500	50	Syria	145	29	Guinea	80	16	Nigeria	35	7
Romania	1 495	75	Syria	1 010	68	Iraq	45	3	Pakistan	40	3
Slovenia	270	130	Syria	60	23	Kosovo*	35	13	Algeria	20	8
Slovakia	440	80	Afghanistan	110	25	Somalia	55	13	Georgia	35	8
Finland	3 210	590	Iraq	820	25	Russia	245	8	Somalia	215	7
Sweden	54 270	5 680	Syria	16 540	30	Stateless	6 885	13	Eritrea	4 880	9
United Kingdom	29 875	465	Pakistan	4 645	16	Iran	3 055	10	Sri Lanka	2 280	8
Iceland	125	390	Albania	40	31	Russia	10	7	Syria	5	6
Liechtenstein	55	1 495	Russia	10	17	Kosovo*	5	11	Somalia	5	7
Norway	11 930	2 360	Eritrea	3 250	27	Somalia	1 695	14	Syria	865	7
Switzerland	21 305	2 650	Eritrea	2 560	12	Syria	1 900	9	Nigeria	1 765	8

Image 6 – Statistics on the respective EU Member States and the top nationalities applying for asylum as well as relevant numbers.¹⁶⁷

¹⁶⁶ ‘Large Increase to almost 435,000 Asylum Applicants Registered in the EU28 in 2013’, *Eurostat News Release*, March 24, 2013, available at <http://epp.eurostat.ec.europa.eu/cache/ITY_PUBLIC/3-24032014-AP/EN/3-24032014-AP-EN.PDF> (accessed July 3, 2014).

¹⁶⁷ *Ibid.*

Schengen and other EU Member States would benefit from this type of arrangement as would also third countries that are hubs for organised crime syndicates engaging in trafficking in human beings and people smuggling. These third countries quite often tend to be both transit and source countries, such as Libya and Turkey. A Libyan minister recently threatened to assist irregular migrants to cross the Mediterranean should the EU fail to help his country manage the constant flow of migrants arriving into Libya from Sub-Saharan Africa, migrants that eventually attempt at crossing the Mediterranean in unseaworthy vessels. The interim interior minister failed, however, to specify what *help* exactly entailed for him.¹⁶⁸ It should nevertheless be emphatically made clear that the VLTV or any kind of visa policy for that matter is not meant to nor should be employed as a result of attempts at strong-arming the EU.

The most crucial point to make in favour of issuing humanitarian visas is that it would save human lives, possibly in the hundreds annually. However, the effect that this policy would have on those that did not qualify for VLTVs would likely still be the same. They would still undertake to cross the Mediterranean in rickety boats, risking their lives in hope for a better future. The capacity of the Member States is limited notwithstanding current evaluations concerning the ageing populace of Europe and the nearing labour deficit. A sustainable solution for both the source countries and Member States alike requires structural undertakings, cross-administrative and far-reaching commitment to develop and guarantee security and safety locally. In other words, it requires solutions that eradicate the original root causes for mass movements of people whether it be economic instability, religious sectarianism, drought or any other circumstance giving rise to emergency. Without prejudice to the aforementioned, this does not frustrate the purpose and potential of the humanitarian visa as a temporary facilitator.

Another obvious argument supporting the issuance of humanitarian visas is that Member States could truly live up to their obligations regarding the protection of refugees. Member States could therefore better facilitate access to international protection besides being able to allocate asylum seekers across the board.

¹⁶⁸ 'Libya Threatens EU over African Immigrants', *Al Jazeera*, May 11, 2014, available at <<http://www.aljazeera.com/news/middleeast/2014/05/libya-threatens-eu-over-african-immigrants-201451151638149598.html>> (accessed June 4, 2014).

There also exist various practical challenges when it comes to the status and actions of the potential asylum seeker who has been issued a VLTV. Upon entry into the issuing Member State, it would be safe to assume that the person would apply for asylum there. In fact, pursuant to Article 12 of the Dublin III Regulation the issuing Member State would have responsibility to process the asylum application of the person they issued the visa to. In the ideal situation this is exactly what would happen. However, as Päivi Blinnikka pointed out, the humanitarian visa is not as simple as that. Being in possession of a VLTV merely entitles the holder to cross the border of the issuing Member State. If the VLTV is issued for a period of validity of e.g. sixty days, the visa holder essentially has to submit his/her asylum application within that period or apply for a residence permit. Failing this, once the validity of the visa has expired, the person would practically become an illegal immigrant leaving that person into a kind of limbo status. Should the person leave the territory of the issuing Member State and enter into another one, the illegal person is then in violation of the immigration laws of that second country. Even if the person is apprehended, duly returned to the country that issued the visa in the first place, that first Member State may find itself practically impotent in the situation. The person has not applied for asylum, or even if he/she has and did not qualify for asylum, subsidiary protection or a residence permit, yet he/she cannot perhaps be expelled or returned to the country of origin due to the lack of a valid travel document recognised by the third country in question or any number of other practical reasons obstructing expulsion. Moreover, it would seem an unreasonable burden to bear for the Member State who in all sincerity offered to handle the case of an apparently bona fide asylum seeker. In such a case, the Member State in question may be obliged to issue the person a temporary residence permit or even eventually a permanent one after a number of years during which expulsion, return or deportation was not possible for one reason or another. The Member State must assume this risk and it may come at a high cost not only to the Member State and the integrity of the Schengen Area but also to bona fide asylum seekers and the whole institution of the humanitarian visa. This also raises questions about the lack of trust between Member States with regard to entry permits and the non-existence of internal border checks.

The European Migration Network (EMN) in 2010 published an ad hoc query on the 1959 Council of Europe Agreement on the Abolition of Visas for Refugees¹⁶⁹. The treaty

¹⁶⁹ European Migration Network, 'Ad Hoc Query on 1959 Council of Europe Agreement (Treaty No. 031) on the Abolition of Visas for Refugees', April 1, 2010.

provides that refugees residing lawfully in the area of a Contracting Party¹⁷⁰ are exempt from the visa requirement to enter or leave the area of another Contracting Party. Many EMN Member States took part in the survey responding that they had indeed encountered difficulties as a result of participation in the treaty. The typical concerns related to the fact that a person otherwise subject to the visa requirement was already residing in the area of another Contracting Party lawfully yet still lodged an application for asylum or other permission to remain in a second Contracting Party. Similarly administrative and technical procedures for returns were seen as rigid. The issues outlined by the participating states apply comparably to the situation where individual Member States would issue VLTVs for purposes of asylum seeking. It could moreover lead to an unwanted phenomenon of visa shopping in third countries and successful applicants would settle in another Member State than the issuing one. However, this risk exists even in the case of regular Schengen visas. Indeed, Belgium brought this point out in their response noting that they had not experienced problems with the treaty seeing as they are a member of the Schengen Area and refugees and beneficiaries of subsidiary protection residing lawfully in the Area having a valid travel document are entitled for visa free stay for a maximum of 90 days in Belgium.

As mentioned above, the consular officer considering the issuance of a VLTV will inevitably have to make an initial judgment on the merits of the case i.e. the eligibility of the visa applicant for refugee status or secondary protection. This on the other hand confers extra duties to the official who would also require further training for this purpose. Consequently, this additional duty also generates more room for the consular officer to err in his decision. Perhaps this potential room for error is what brings a further humane element or at least human factor into the humanitarian visa.

6.2 Other Possibilities to Facilitate Safe Passage

There remain some further possibilities to facilitate the safe passage of asylum seekers into the territory of the Union, which can conveniently be linked to this thesis. Below I present

¹⁷⁰ The European Migration Network Member States that are also Contracting Parties to the treaty are Belgium, Czech Republic, Denmark, Finland, Germany, Hungary, Ireland, Italy, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Sweden.

two ideas that could be achieved through the revision of two regulations discussed above – namely the Visa Regulation and the Schengen Borders Code. The following outlines the additional two possibilities for ensuring asylum seekers a safe entry into the Union.

6.2.1 Exemptions from the Visa Requirement: Article 4

The current Visa Regulation provides for a certain national discretion for distinct classes of persons for whom Member States may waive the requirement to be in possession of a visa to enter the area. A Member State may provide for exceptions from the visa requirement as regards holders of diplomatic passports, official-duty passports and other official passports as well as civilian air and sea crew. Similarly a Member State may waive the visa requirement for flight crew and attendants on emergency and rescue flights and other helpers in the event of disaster or accident. The article also makes reference to certain other groups of persons.

Different Member States have for a variety of differing reasons exempted certain groups of third country nationals from the visa requirement. These derogations from the visa requirements on a country-to-country basis are recorded in Annex 5 of the Visa Code Handbook. The groups of persons capable of being exempted from the visa requirement include politically significant persons such as holders of diplomatic passports and certain persons producing evidence signifying determined employment status. Asylum seekers, refugees and any mention to humanitarian purposes are omitted.

Should the regulation grant wider exemption rights to individual Member States on the rights of e.g. asylum seekers to enter the territory of the issuing Member State without a visa, this could effectively have a similar effect to that of the humanitarian visa. The European Parliament and the Council acting in accordance with the ordinary legislative procedure frequently amend the Visa Regulation within the common policy on visas and other short-stay residence permits. It is not certain, however, whether or not Member States would actually endorse this proposal to include certain vulnerable groups of persons within those who can be exempted from the visa requirement. Considering their apparent reluctance with regard to the humanitarian visa, it would seem unlikely that the proposal would attract much support initially. Taking also into account the current trend of

underlining security aspects and rather than *humanitarizing* legislation the fact that legislation is aimed at tightening border controls¹⁷¹ this would suggest that attitudes are not exactly receptive to this idea.

Nonetheless, similar effects as outlined above in relation to the VLTV would emerge in the context of visa exemptions. It goes without saying that the text of the article could not simply refer to ‘asylum seekers’ or ‘potential refugees’. This wording would undisputedly facilitate illegal migration at the expense of those truly in need of protection. Rather, the wording could refer to a double definition or permit system where the persons ‘earmarked’ as bona fide asylum seekers by the respective Member State or e.g. the UNHCR would be exempted from the visa requirement. This would obviously entail a similar initial decision on the merits of the individual case regarding the eligibility as in the case of the humanitarian visa. Furthermore, the embassy or other authority representing the exempting Member State present in the third country in question would have to issue some kind of proof of belonging to that group of persons referred to in Article 4 of the Visa Regulation that the person would need to produce to the border guard to entitle entry. This would in a sense merely replace the VLTV as a document that needed to be applied for and on which a decision was to be taken.

6.2.2 Shared Border Crossing Points and Jurisdiction

National laws as well as EU law and international law bind the border guard authorities of Member States. It is more often than not the case that an asylum seeker arrives irregularly to the border of a Member State to apply for asylum. This is precisely owing to the lack of legal means to gain access to the territory of the Member States. The regulation¹⁷² amending, among others, the Schengen Borders Code, inserts into the latter a novel sort of border crossing point, the ‘shared border crossing point’. It means any border crossing point situated either on the territory of a Member State or on the territory of a third

¹⁷¹ See e.g. the safeguard clause as discussed above in chapter 3.

¹⁷² Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 amending Regulation (EC) No 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), the Convention implementing the Schengen Agreement, Council Regulations (EC) No 1683/95 and (EC) No 539/2001 and Regulations (EC) No 767/2008 and (EC) No 810/2009 of the European Parliament and of the Council, Art. 1(1)(e).

country, at which Member State border guards and third country border guard carry out exit and entry checks one after another in accordance with their national law and pursuant to a bilateral agreement. Now with the possibility for EU Member States to establish according to the respective national laws and a bilateral agreement with the relevant third country a shared border crossing point, third country nationals, it is plausible, could potentially submit their asylum applications in the territory of a third country other than that of origin or failing that at least submit their visa applications.

In simplicity, the shared border crossing point entails enabling the conveyance of the Member State border into the territory of a third country. An article¹⁷³ requiring full compliance with relevant Union law, including the Charter of Fundamental Rights and relevant international law, including the Geneva Convention and other obligations related to access to international protection was also added to the Schengen Borders Code. Even without this latter amendment the concept of states' responsibilities and jurisdiction vis-à-vis access to asylum as embodied in international human rights law beyond the territorial borders of the state have been developed by various academics.¹⁷⁴ Furthermore, pursuant to Article 18 of the Charter of Fundamental Rights, the right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention. The Charter is also emphatic in prohibiting the removal, expulsion or extradition of a person to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

In addition to possibly being capable of applying for asylum outside the territory of the Member State, the third country nationals in question could apply for a VLTV at the shared border crossing point pursuant to Article 35 of the Visa Code, bearing in mind that the shared border crossing point constitutes an external border. External borders as understood by the Schengen *acquis* mean the Member States' land borders, including river

¹⁷³ *Ibid*, Art. 1(3): 'The following Article is inserted:

“*Article 3a*

Fundamental Rights

When applying this Regulation, Member States shall act in full compliance with relevant Union law, including the Charter of Fundamental Rights of the European Union ("the Charter of Fundamental Rights"); relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 ("the Geneva Convention"); obligations related to access to international protection, in particular the principle of *non-refoulement*; and fundamental rights. In accordance with the general principles of Union law, decisions under this Regulation shall be taken on an individual basis.”

¹⁷⁴ On the concept of effective control see e.g. K. Touzenis, ‘Access to Asylum: International Refugee Law and the Globalisation of Migration Control’, 24 *International Journal of Refugee Law* 2 (2012), 501-504.

and lake borders, sea borders and their airports, river ports, sea ports and lake ports, provided that they are not internal borders¹⁷⁵. A shared border crossing point situated physically on the territory of a third country can barely be fathomed as an internal border of the territory of the Member States. As is the case with regular visa applications, a visa applicant applying for a visa at the external borders can be issued a VLTV valid only for the territory of the issuing Member State. Same considerations regarding the discretion of issuing a VLTV as discussed above in chapter 5 apply to visas applied for at the external borders. The benefit of issuing VLTVs in such shared border crossing points would be that in the event of conflict that leads to the closing of an embassy or consulate, visa applications could nonetheless be processed in such an office should it remain operational during the conflict. This issue also opens up the debate whether or not asylum applications could be lodged at these shared border crossing points and how the principle of non-refoulement, access to asylum and effective control would apply there.

6.3 Recommendations

As already discussed in chapter 2 and outlined above, Member States of the EU are bound by numerous norms regarding the protection of refugees and the right to asylum. The rights enshrined in the Charter apply to Member States when they are implementing EU law. It does not apply in cases where EU law is not involved¹⁷⁶. The Treaty on the Functioning of the European Union defines the powers of the Union. By virtue of Article 78 of the TFEU the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the 1951 Refugee Convention and other relevant treaties. Furthermore, the European Parliament and the Council acting in accordance with the ordinary legislative procedure can adopt measures for a common asylum system comprising a common system of temporary protection for displaced persons in the event of a massive inflow¹⁷⁷; criteria and mechanisms for determining which Member State is

¹⁷⁵ Schengen Borders Code, Art. 2(2).

¹⁷⁶ However, the European Convention on Human Rights would apply.

¹⁷⁷ Treaty on the Functioning of the European Union, Art. 78(2)(c).

responsible for considering an application for asylum or subsidiary protection¹⁷⁸; and partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection¹⁷⁹. These competences read together with the essential articles of the Charter, the 1951 Refugee Convention and sources of EU law readily empower the Commission to take further action in making for better policies on border checks, asylum and immigration with a view to protect those fleeing persecution. Below are some recommendations for Member States and the Commission in promoting the general interest of the Union and overseeing the application of Union law.

1. Issuance of Visas with Limited Territorial Validity

Member States and the Commission should:

1. Study in depth the possibilities and challenges regarding the issuance of humanitarian visas at EU level and national institutions;
2. Start to gather disaggregated data on the grounds for issuing VLTVs;
3. Create a harmonised approach to VLTV-issuing practices when it comes to the discretion regarding the issuance of a humanitarian visas due to the current lack of harmony with respect to Member State practices in VLTV-issuing;
4. Create a common system for determining who is eligible for a VLTV;
5. On a trial basis, start implementation of a harmonised approach to VLTV-issuing practices and coordinate within Local Schengen Cooperation and through extensive representation networks in respective third countries.

¹⁷⁸ Treaty on the Functioning of the European Union, Art. 78(2)(e).

¹⁷⁹ Treaty on the Functioning of the European Union, Art. 78(2)(g).

2. Visa Exemptions

Member States and the Commission should:

1. Consider and discuss in the Visa Working Party and in the European Parliament the possibilities and methods for exempting from the visa requirement bona fide third country nationals in need of protection (e.g. those identified by the UNHCR).

3. Shared Border Crossing Points

Member States should:

1. Assume jurisdiction and responsibility of border guards to receive asylum applications and visa applications in the territory of third countries in accordance with the Schengen Borders Code.

7. Concluding Remarks

The study was set out to explore EU visa policy as a barrier to entry and how the concept of the humanitarian visa relates to the saving of lives of those in need of protection. The thesis outlined the legal norms regulating the responsibility of states to protect refugees and reviewed the current visa regime in place. The potential scope and role of visa policy as a preventive tool was considered. So, too, was the way in which media and politicians have reacted to the lack of legal means for asylum seekers to enter the Union. Legal instruments such as international treaties, Union legislation and policy documents along with statistics were analysed in order to establish the legal framework of the humanitarian visa as well as state practices with regard to the issuance thereof. The remainder of this study dealt with the recommendations regarding humanitarian visas as well as other means of facilitating the safe passage of asylum seekers into the Union together with the opportunities and challenges.

The protection of those fleeing persecution is not a question of charity and benevolence. It is on the one hand a question of rights and on the other a question of responsibilities. Everyone has the right to seek and enjoy in other countries asylum from persecution. In spite of this unambiguous right guaranteed under the Universal Declaration of Human Rights the right has failed to be entrenched in national laws that would entitle asylum seekers to cross the borders for the purpose of applying for safe haven. The right is ambitious and magnanimous in all its promise, yet it is illusory so long as it is not effectively bestowed upon those in need of protection, or in other words, so as long as those fleeing persecution cannot properly make use of this right apparently conferred upon them.

In spite of the right to seek and enjoy asylum, various barriers to entry inhibit access to asylum. In the aftermath of the Treaty of Amsterdam, the treaty bringing migration policy into the competence of the Union, a proliferation of border controls and restrictions on migration in Europe has taken place. These legal measures and actions adopted by the Commission and Member States contribute to the material barriers that desperate families face. Visa policy as currently exercised by the Member States and the Commission is exclusive by nature and indeed constitutes a barrier to entry along with carrier sanctions,

interceptions at sea and the employment of immigration liaison officer networks. Strict visa requirements for all major refugee-producing countries make it practically impossible for asylum seekers to enter the territory of the Union legally. In want of adequate legal means to gain access to asylum, those fleeing persecution often resort to irregular and clandestine means of crossing the border. This entails dangerous voyages across the seas in unseaworthy vessels, which as we unfortunately know, many a time lead to disastrous outcomes. While visa policy is stringent, the Visa Code nonetheless provides for a special type of visa that can be issued even if those strict requirements are not met. This so-called visa with limited territorial validity, or humanitarian visa, is most commonly valid only for the issuing Member State as opposed to a common Schengen visa, which is generally valid for all Member States.

The issuance of the humanitarian visa is not yet harmonised at EU level and this has led to deviation between the practices of Member States. The extent of discretion handed down to Member States by the Visa Code in relation to issuing humanitarian visas is also unclear. It is nonetheless certain from the facts presented above that some Member States already make use of the visa with limited territorial validity and its potential as a humanitarian visa. Some leading politicians have even spoken out calling on the notion of the humanitarian visa to lower the toll of migrant deaths at the external borders of the Union. In the meanwhile, Member States are by and large wary of giving the proposal the green light.

The current trend of visa policy instituted by policy-makers at the top level of the Union and individual Member States seems to lean toward enhancing security at the expense of human rights of asylum seekers. In the realm of security and migration, or national interest and human rights, there exist opposing views and contradictory premises, both formulated using the same language of security, human rights law and sovereignty. The only difference traces to the question of whose security and whose human rights. To advocate for an approach in migration and refugee policy making full use of the toolbox, including humanitarian visas, shared border crossing points and visa waivers for vulnerable persons, is perhaps premature without then accordingly adopting a sincerely comprehensive approach where far-reaching ramifications for national policies on asylum, naturalisation, integration, societal matters, welfare, employment issues and education, to mention but a few, are also considered and fitted together. For this purpose, the Commission and

Member States alike should take note and act. The concept of the humanitarian visa is certainly an idea worth exploring more and considering as part and parcel of the governmental response to the crisis at hand. Secondly, due to the non-disaggregation of currently issued visas with limited territorial validity, research on the frequency of VLTVs issued for humanitarian reasons and the appropriateness and feasibility of the VLTV to play the role of a harmonised humanitarian visa is potentially misleading. The Commission would do well in requiring that Member States provide disaggregated information on the grounds for which VLTVs have been issued in order to facilitate better and more accurate research. Nonetheless, current legislation provides for the issuance of the so-called humanitarian visa the use of which, as it would appear, is up to the discretion of each Member State.

There is worth in realising the importance of history as well as the shortcomings typified by modern means of dealing with migratory matters at EU level, and how understanding them can release us from our intuition that how things are, is what is necessary. Current practices have proved time and again insufficient for the purpose of protecting human lives and managing the external borders of the Union. The endeavour for creating a brighter and safer future for asylum seekers may very well begin with the deconceptualisation of current truisms and definitions on security, asylum and societal capacities spurred up by populist politics from the right, left and centre. Some maintain that the time of great stories is over. How grand would it be should a life or two be saved at the hand of a consular officer processing a mundane affair such as a visa application? The precept of the humanitarian visa, both controversial and powerful, may yet come to embody a harbinger of hope for those in need of protection. Whether or not that message is heard, understood and realised will be the true test of this doctrine.

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