

Humanitarian Visas: Option or obligation?

Ulla Iben Jensen

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Abstract

Third-country nationals seeking protection have no EU-wide legal channels at present for entering EU territory and triggering protection mechanisms under the Common European Asylum System. As a result, many embark on hazardous journeys, with concomitant risks and loss of human life. The absence of 'protection-sensitive' mechanisms for accessing EU territory, along with EU external and extraterritorial border and migration management and control, undermine Member States' refugee and human rights obligations. Humanitarian visas may offer a remedy in this regard by enabling third-country nationals to apply in situ for entry to EU territory on humanitarian grounds or because of international obligations. This study asks whether the existing Visa Code actually obliges Member States to issue humanitarian visas. It also examines past implementation of humanitarian visa schemes by Member States and considers whether more could be done to encourage them to make use of existing provisions in EU law. Finally, with a Commission proposal for Visa Code reform on the table, it asks whether there is now an opportunity to lay down clear rules for humanitarian visa schemes.

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List of Abbreviations

CAT	United Nations Convention Against Torture
CCI	Common Consular Instructions
CEAS	Common European Asylum System
CIR	Italian Council for Refugees (<i>Consiglio Italiano per i Rifugiati</i>)
CJEU	Court of Justice of the European Union
EASO	European Asylum Support Office
ECHR	European Convention on Human Rights
ECRE	European Council on Refugees and Exiles
EMN	European Migration Network
FRA	European Union Agency for Fundamental Rights
IOM	International Organisation for Migration
LTV	Limited Territorial Validity
MVV	Regular Provisional Residence Permit (<i>Machtiging tot Voorlopig Verblijf</i>)
PEP	Protected Entry Procedure
UNHCR	United Nations High Commissioner for Refugees
VFA	Visa Facilitation Agreement

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Executive Summary

Key question and thesis

The EU Charter of Fundamental Rights applies to the institutions and bodies of the EU and the Member States when implementing EU law, regardless of territory, as do the jurisdictional obligations of for example the European Convention on Human Rights (ECHR). Yet, due to the extraterritorial measures implemented as well as the lack of protection-sensitive mechanisms for facilitating entry into the EU territory, potential asylum seekers, refugees and other vulnerable persons with protection needs (hereinafter referred to as protection seekers) are currently being prevented from entering EU territory. The key question is, therefore: how will the EU ensure compliance with its refugee and human rights obligations in light of those EU extraterritorial measures it is implementing?

The core thesis of the present study is that humanitarian visas may offer an alternative to irregular entry routes by providing for the safe and legal entry of third-country nationals. The issuing of humanitarian visas should be regarded as an instrument that complements other Protected Entry Procedures (PEPs) and protection practices, as well as the Common European Asylum System (CEAS), and by no means as a substitute for them.

EU legal framework

Articles 19 and 25 of the Visa Code provide for the possibility to issue humanitarian visas with limited territorial validity (LTV). While Article 19 (4) provides derogations from admissibility requirements to visa applications, Article 25 (1) provides derogations from fulfilment of Schengen visa requirements. In the Visa Code, there is no separate procedure established for the lodging and processing of an application for an LTV visa. Therefore, possible protection needs and human rights issues are examined in 'ordinary' visa applications and refusals of Schengen visas should be without prejudice to Article 25 (1). However, it is unclear whether there is a mandatory assessment of protection needs and human rights issues under Articles 19 (4) and 25 (1), when the admissibility requirements and when the entry conditions are not met. In addition, it is unclear whether appeal is granted in cases of refusal of LTV visas.

While Article 25 (1) of the Visa Code obliges Member States to issue Schengen LTV visas on humanitarian grounds, for reasons of national interest or because of international obligations, under Article 19 (4) of the Visa Code, it is possible to derogate from the admissibility requirements for visa applications on humanitarian grounds or for reasons of national interest. This suggests that there is a clear interplay between Articles 19 (4) and 25 (1). However, there is no automatic link between granting admissibility and issuing an LTV visa on, inter alia, humanitarian grounds in the Visa Code. Notwithstanding this, if a Member State recognises the humanitarian situation to be sufficiently serious as to warrant derogation from admissibility requirements, it seems logical that the humanitarian situation would be sufficiently serious for the Member State to issue an LTV visa.

Consequently, due to the vague and ambiguous wording of Articles 19 (4) and 25 (1), it would indeed be preferable to have the obligations of the Member States and the relationship between these articles clarified in the Visa Code.

EU policy framework

Since 2000, the Commission has repeatedly explored avenues of legal access and protected entry into EU territory for third-country nationals seeking protection. Most recently, in its March 2014 Communication, the Commission recommended that the EU seek to ensure a more orderly arrival of persons with well-founded protection needs and that a coordinated approach to humanitarian visas and common guidelines be pursued.

The European Council's approach has gradually become more security-centred and focused on cooperation with countries of origin and transit. Most recently, in its June 2014 post-Stockholm Guidelines, the European Council endorsed that the actions identified by the Task Force Mediterranean should be fully implemented, one of which includes reinforced legal avenues to Europe.

The European Parliament generally endorsed the well-organised and managed arrival of persons in need of protection and PEPs, and called for a more holistic approach to migration. Most recently, in its Resolution of April 2014 on the mid-term review of the Stockholm Programme, the European Parliament called on the Member States to make use of the current EU law provisions allowing the issuing of humanitarian visas and reiterated its position on the need for a coordinated approach.

The 2014 Commission proposal for a Visa Code extends the possibility for the Member States to cooperate with external service providers. Those tasks that external service providers may be entrusted with relate closely to assessing the admissibility requirements for a visa application laid down in Article 19 (1). The outsourcing of tasks to external service providers seems to illustrate one of the weaknesses of not having established a separate procedure for lodging and processing applications for humanitarian visas in the Visa Code. Accordingly, it is of paramount importance to protection seekers that the use of external service providers will not hinder the further processing of visa applications that do not meet the admissibility requirements.

In addition, the proposal introduces the notion of 'mandatory representation', under which, if the Member State competent to process the visa application is neither present nor represented under a representation arrangement in a given third country, any other Member State present in that country is obliged to process visa applications on its behalf.

National practice

The possibility to issue national type D visas for humanitarian reasons can and has been deployed by nine EU Member States.

The statistics on the Member States' notifications of Schengen type C LTV visas issued do not provide any information about the specific reasons for issuing LTV visas. However, data available in various studies suggest that a number of Member States have applied PEPs, such as the extraterritorial submission of asylum claims, in their national legal order, and that a number of Member States have or have had Schengen visas available for humanitarian reasons. From the data available for the purposes of the present study, it emerges that 16 EU Member States have or have had some type of visa - be it national and/or uniform Schengen and/or LTV Schengen visa - available for humanitarian reasons. Accordingly, 16 EU Member States acknowledge the practical need for some form of humanitarian visa scheme, although most deploy their schemes primarily on an exceptional basis.

Conclusions and policy recommendations

Due to the lack of legal routes of entry to EU territory, the protection and rights mechanisms of the EU *acquis* are rendered inaccessible for genuine refugees, potential asylum seekers and other vulnerable migrants. In light of the fact that those persons resort to irregular, dangerous and undignified journeys; the high human risks and costs of irregular entries; the EU's and the Member States' refugee and human rights obligations and the humanitarian visa scheme already laid down in the Visa Code, it is concluded that the Member States indeed should be encouraged to make use of the provisions on humanitarian visas. Moreover, the Visa Code reform offers an opportunity to inject some clarity and remedy some shortcomings for which purpose, policy recommendations are put forward.

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Introduction

Key question and thesis

The EU Charter of Fundamental Rights applies to the institutions and bodies of the EU and the Member States when implementing EU law, regardless of territory,¹ as do the jurisdictional obligations of for example the European Convention on Human Rights (ECHR).² The key question is, therefore: how will the EU ensure compliance with its refugee and human rights obligations in light of the extraterritorial measures it is implementing?

The core thesis of the present study is that humanitarian visas may offer an alternative to irregular entry routes by providing for the safe and legal entry of third-country nationals. The issuing of humanitarian visas should be regarded as an instrument that complements other Protected Entry Procedures (PEPs) and protection practices, as well as the Common European Asylum System (CEAS), and by no means as a substitute for them.

The concept of humanitarian visas

Humanitarian visas fall within the category of the so-called Protected Entry Procedures which “[...] from the platform of diplomatic representations, [allow] a non-national

- to approach the potential host state outside its territory with a claim for asylum or other form of international protection, and
- to be granted an entry permit in case of a positive response to that claim, be it preliminary or final”.³

There are other PEPs and protection practices that meet individual or collective protection needs outside the territory of the Member States, such as humanitarian admission, temporary protection, diplomatic asylum, extraterritorial processing of asylum applications, humanitarian evacuation, resettlement and Regional Protection Programmes. However, humanitarian visas are distinct insofar as:

- **the individual autonomy of the protection seeker is accorded a central role:** the third-country national directly approaches the diplomatic representation of the potential host state outside its territory with a claim for a humanitarian visa;

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¹ Guild, E. and Carrera, S. et al. (2011), *Implementation of the EU Charter of Fundamental Rights and its Impact on EU Home Affairs Agencies*, Study EP PE 453.196, namely para. 4.3.

² See, e.g., the European Parliament Resolution on the mid-term review of the Stockholm Programme (2013/2024(INI)), P7_TA(2014)0276, 2 April 2014, para. 103; Mole, N. and Meredith, C. (2010), “Asylum and the European Convention on Human Rights”, *Human Rights Files* Vol. 9, Council of Europe; Vandvik, B. (2008), “Extraterritorial border controls and responsibility to protect: a view from ECRE”, *Amsterdam Law Forum*, Vol. 1, No. 1; Guild, E. and Moreno-Lax, V. (December 2013), *Current challenges for international refugee law, with a focus on EU policies and EU co-operation with the UNHCR*, Briefing paper, EP; den Heijer, M. (2011), *Europe and Extraterritorial Asylum*; Moreno-Lax, V. (2008), *Must EU Borders have Doors for Refugees? On the Compatibility of Visas and Carrier Sanctions with Member States’ Obligations to Provide International Protection to Refugees*, CRIDHO Working Paper 2008/03; Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 40ff; and Noll, G. (2005), “Seeking asylum at Embassies: A Right to Entry under International Law?”, *International Journal of Refugee Law*, Vol. 17, No. 3.

³ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, p. 3.

- **the eligibility assessment procedure may be conducted extraterritorially:** the diplomatic representation of the potential host Member State may process a humanitarian visa application in-country to identify, inter alia, protection needs (pre-screening) before the third-country national reaches the border of the Member State concerned. Humanitarian visas thus aim to complement other extraterritorial migration control measures;
- **humanitarian visas are designed to provide safe and legal access to territory:** the granting of a humanitarian visa aims to secure the physical transfer and legal protection (orderly entry) of *bona fide* third-country nationals and thus constitutes a legal alternative to irregular migration channels for third-country nationals;
- **the final determination procedure is conducted territorially:** once a humanitarian visa has been issued and the third-country national has entered the territory of the destination state, he/she may lodge an application for asylum or for other residence permits (e.g. a humanitarian residence permit). The individual asylum procedure or other procedure for a residence permit is thus conducted within the territory of that state. The humanitarian visa thus complements the CEAS, rather than substituting it.⁴

The Schengen *acquis* and the common EU visa policy provide the legal basis for the Member States to issue national long-stay visas at the Member States' discretion, as well as Schengen short-stay visas with limited territorial validity (LTV) on humanitarian grounds, for reasons of national interest or because of international obligations. Since the concept of 'humanitarian grounds' remains undefined in binding EU legal instruments and may include human rights-related issues,⁵ the term 'humanitarian visas' is used in the present study to refer to the issuing of visas on humanitarian grounds as well as because of international obligations, unless otherwise stated.

The categories of third-country nationals for whom humanitarian visas are of relevance: potential asylum seekers, refugees and other vulnerable persons with protection needs (protection seekers)

In 2006, the United Nations High Commissioner for Refugees (UNHCR) launched its 10-Point Plan of Action on Refugee Protection and Mixed Migration, revised in 2007, with the purpose of setting out key areas where protection interventions are called for. This approach, along with the UN High Commissioner's Dialogue on Protection Challenges launched in 2007,⁶ includes not only refugees, but also other vulnerable persons with protection needs, with a recognition that the latter suffer from protection gaps⁷. According to the UNHCR, mixed migration movements are of concern mainly in the Mediterranean basin, the Gulf of Aden, Central America and the Caribbean, Southeast Asia and the Balkans.

'Mixed flows of migration' are defined by the International Organisation for Migration (IOM) as irregular movements constituting "complex population movements including refugees, asylum-seekers, economic migrants and other migrants". Mixed flows thus comprise not only potential asylum seekers and refugees, but also diverse groups of other migrants, such as economic migrants and those who may be particularly vulnerable, including victims of trafficking, smuggled migrants, stranded migrants, unaccompanied (and separated) minors, those subject to violence (including gender-based violence), psychological distress and trauma during the migration process, vulnerable individuals, such as pregnant women, children and the elderly, and migrants detained in transit or upon arrival.⁸ While all persons, irrespective of their immigration status, are covered by human rights instruments, refugees have a distinct legal status under the 1951 UN Convention relating to the status of Refugees and its 1967 Protocol (the Refugee Convention).

⁴ Developed on the basis of Noll, G. et al. (April 2002), *Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests*, The Danish Centre for Human Rights, UNHCR, pp. 3 and 14-17. The responsibility for possible inconsistencies with Noll et al., obviously rests with the present author.

⁵ See para. 1.1.2 below.

⁶ Available at <http://www.unhcr.org/pages/501a39166.html> (accessed 23 June 2014).

⁷ For a detailed analysis, see Betts, A. (August 2008), *New Issues in Refugee Research: Towards a 'soft law' framework for the protection of vulnerable migrants*, Research Paper No. 162, UNHCR.

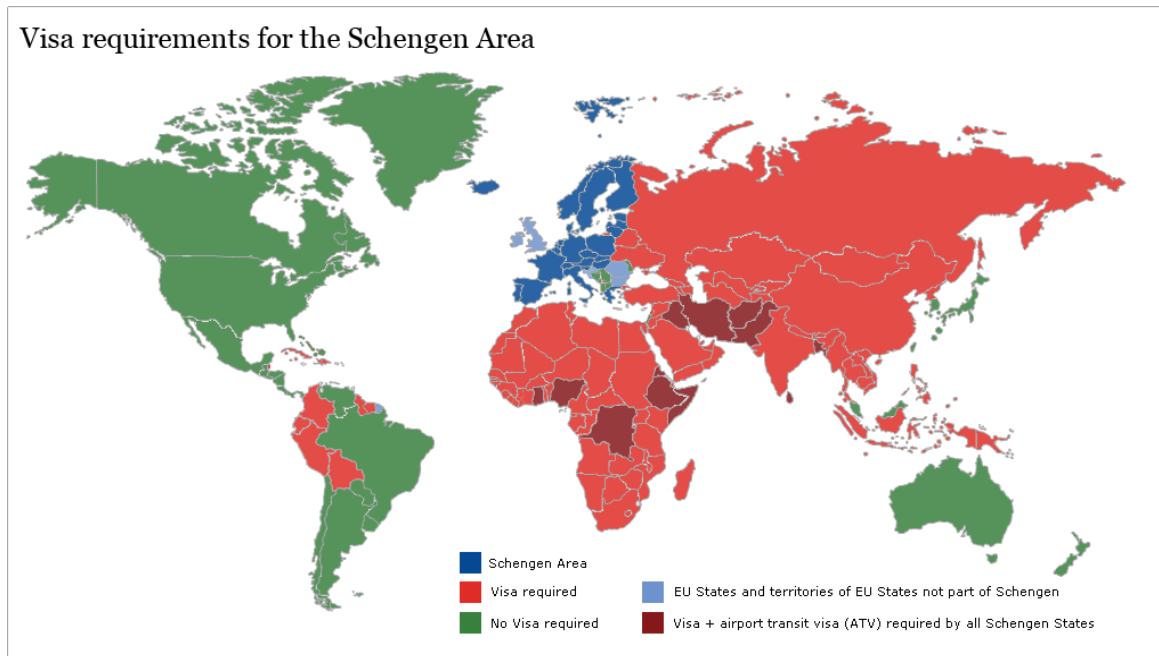
⁸ IOM, *Irregular migration and mixed flows: IOM's approach*, MC/INF/297, International Organisation for Migration, 19 October 2009, paras. 3 and 4, cf. para. 5.

Key issues: no protection-sensitive mechanisms or legal routes of entry for protection purposes

“Migrants who put their lives at risk by crossing the sea in unseaworthy boats to reach the shores of southern Europe highlight an alarming and unresolved chink in the European Union’s protection of core rights of individuals”.⁹ A prerequisite for seeking asylum in the EU under the CEAS is that the potential asylum seeker arrives on the territory of a Member State, including at the border or in the transit zones of that Member State. As EU law does not provide for “[...] ways to facilitate the arrival of asylum seekers [...]”, and as potential asylum seekers are primarily nationals of countries requiring a visa to enter the EU and “[...] often do not qualify for an ordinary visa, they may have to cross the border in an irregular manner”.¹⁰

In terms of visa requirements, in 2013, more than 100 nationalities required a visa to enter the EU, covering more than 80% of the global non-EU population.¹¹ No protection-sensitive mechanisms for facilitating entry into the EU territory are established for potential asylum seekers, refugees and other vulnerable persons with protection needs (hereinafter referred to as protection seekers) that are not covered by the usual schemes facilitating entry into EU territory (namely family reunification, study or work). Crucially, no EU-wide legal routes of entry are available for asylum purposes,¹² meaning that it is impossible to trigger the protection mechanisms of the CEAS. Estimates suggest that 90% of all asylum seekers enter Europe in an irregular manner.¹³

Figure 1. Visa requirements for the Schengen Area



Source: European Commission (available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm (accessed 24 June 2014)).

⁹ FRA, *Fundamental rights at Europe’s southern sea borders*, European Union Agency for Fundamental Rights, 2013, pp. 3 and 10.

¹⁰ FRA, *Handbook on European law relating to asylum, borders and immigration*, European Union Agency for Fundamental Rights, 2013, para. 1.6.

¹¹ Frontex, *Annual Risk Analysis 2013*, European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2013, pp. 14-16.

¹² Guild, E. and Moreno-Lax, V. (December 2013), *Current challenges for international refugee law, with a focus on EU policies and EU co-operation with the UNHCR*, Briefing paper, EP, pp. 5 and 20.

¹³ Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, p. 17.

The general position of the Member States is that their protection obligations are territorial by nature, notwithstanding the fact that human rights and refugee law obligations may be engaged through extraterritorial actions.¹⁴ Thus, in the development and enhancement of EU external and extraterritorial migration and border measures, such as EU visa policy, carrier liability, Immigration Liaison Officers and Frontex, strong emphasis has been put on security and migration control issues, and little regard has been paid to the mixed flows of migration and the refugee and human rights responsibilities of the Member States flowing from the EU Charter of Fundamental Rights, the Refugee Convention and the ECHR. In other words, while the scope of the Member States' powers has been extended beyond their territories, this has not been balanced by the acknowledgement of an equal extension of the scope of the Member States' refugee and human rights responsibilities. This has the potential of undermining the Member States' refugee and human rights obligations, and to render the right to asylum an illusion.

As a result, protection seekers are left with very few choices but to embark upon dangerous, irregular and undignified journeys entailing high human risks and costs. The four Member States most affected by migrant boat arrivals are Greece, Italy, Malta and Spain,¹⁵ as illustrated in Figure 2 below. Irregular entries, of course, are not confined to sea borders, but also occur at land borders. However, the tragic loss of life at sea has obviously focused significant public attention on irregular arrival by sea. For example, many of those persons heading for Sicily do not intend to seek asylum in Italy; they move on towards northern Europe. Most Syrians are heading for Germany, which grants protection to Syrian refugees, or Sweden, where Syrian refugees are being granted asylum and offered reunification with their families.¹⁶ Indeed, as things stood in July 2013, Germany and Sweden were receiving nearly two-thirds of the Syrian protection seekers in Europe.¹⁷ Given the burden on the Member States affected by migratory flows, and the high human risks and costs of irregular migration routes by sea, the UN has repeatedly called for more solidarity and responsibility-sharing measures, as well as the creation of legal migration alternatives in the form of humanitarian visas, PEPs and enhanced family reunification.¹⁸ By way of comparison, in 2013, the UNHCR welcomed the announcement of Brazil that its embassies neighbouring Syria would be providing humanitarian visas, including to family members, to Syrians and other nationals affected by the Syrian conflict and who wished to seek refuge in Brazil. Under this scheme, asylum applications need to be lodged upon arrival in Brazil.¹⁹

¹⁴ Guild, E. and Moreno-Lax, V. (December 2013), *Current challenges for international refugee law, with a focus on EU policies and EU co-operation with the UNHCR*, Briefing paper, EP, p. 23, cf. pp. 13 and 24.

¹⁵ FRA, *Fundamental rights at Europe's southern sea borders*, European Union Agency for Fundamental Rights, 2013, pp. 7, 9 and 19ff.

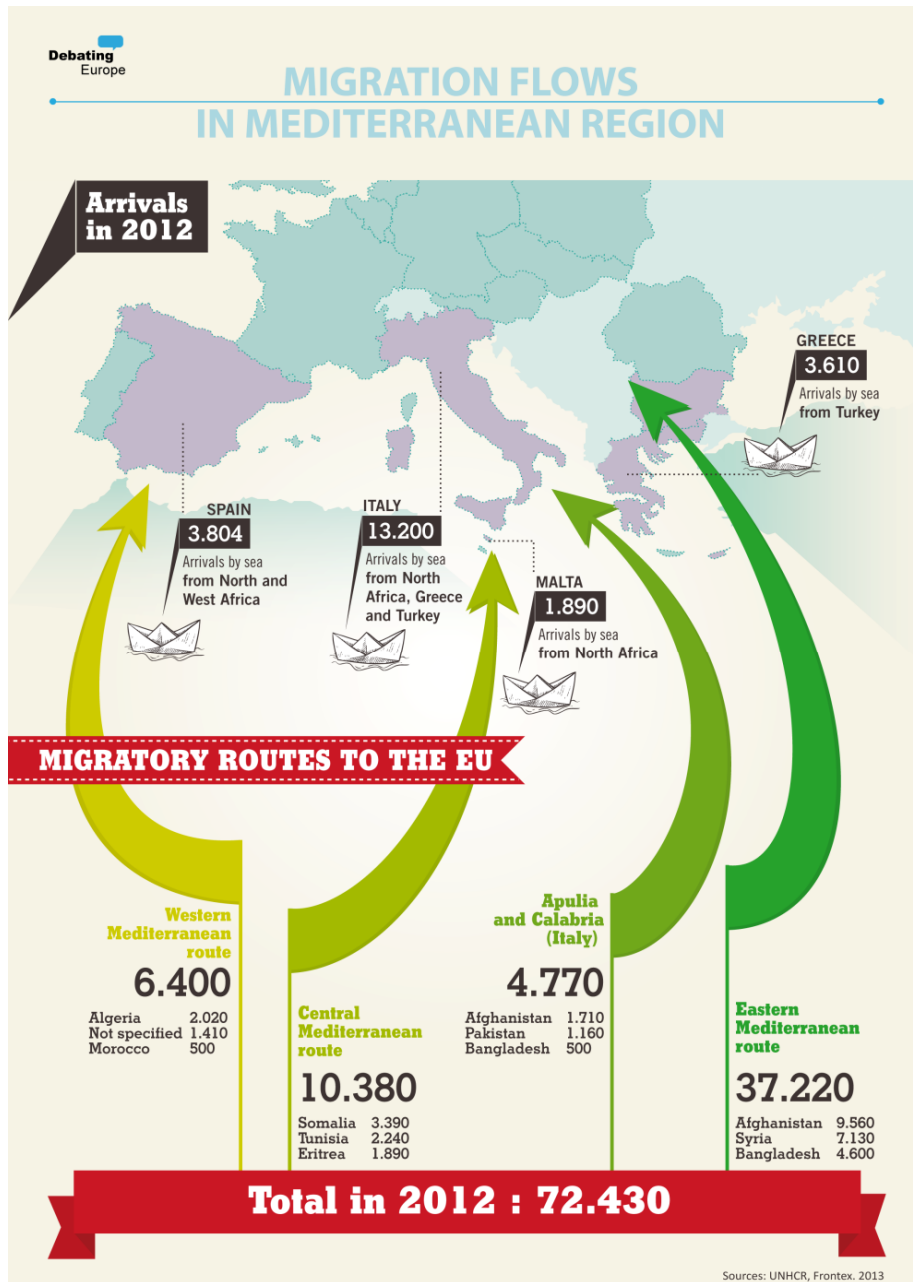
¹⁶ See e.g. articles at <http://www.thedailybeast.com/articles/2014/04/24/refugees-head-to-sicily-in-biblical-exodus.html> and <http://migrantsin crisis.iom.int/out-syria-european-maze> (both accessed 25 June 2014).

¹⁷ See <http://www.unhcr.org/51e7ecc56.html> (accessed 25 June 2014).

¹⁸ UNHCR, Central Mediterranean Sea Initiative (CMSI), *EU solidarity for rescue-at-sea and protection of refugees and migrants*, CMSI Action Plan, UNHCR, 13 May 2014.

¹⁹ See <http://www.unhcr.org/524555689.html> (accessed 25 June 2014).

Figure 2. Migration flows in the Mediterranean region



Source: Debating Europe; Image credits: European Commission (available at <http://www.debatingeurope.eu/2013/11/19/is-there-solidarity-in-europe-over-illegal-immigration> (accessed 24 June 2014)).

This current state of play has been graphically illustrated by a succession of devastating tragedies at sea, of which the Lampedusa tragedy marked a particular nadir. The UNHCR estimates that more than 600 people died in the Mediterranean in 2013 and that more than 59,600 people arrived by sea in 2013. In addition, since October 2013 the Italian Navy-led operation Mare Nostrum has rescued almost 43,000 asylum seekers and migrants.²⁰ Irregular routes of entry and their dangers are not only a grave concern from a humane and refugee and human rights perspective; they also have the unfortunate and undesired effect of increasing the role of human smugglers, while diminishing the impact of EU extraterritorial measures. Therefore, ensuring the orderly entry of protection seekers to the EU should be a top priority.

²⁰ UNHCR, Central Mediterranean Sea Initiative (CMSI), *EU solidarity for rescue-at-sea and protection of refugees and migrants*, CMSI Action Plan, UNHCR, 13 May 2014.

Opportunity for change: Commission proposal for a Visa Code (recast) and calls from the international community to create legal migration alternatives

In light of the recent Commission proposal for a recast of the Visa Code, the repeated calls on the Member States from the UNHCR, European Council on Refugees and Exiles (ECRE) and other actors to create legal migration alternatives and to enhance family reunification,²¹ not to mention the high human risks and costs of irregular migration, the scene is set to place humanitarian visas high on the agenda of the European Parliament.

Thus, the issuing of humanitarian visas may offer an alternative to the current state of play by providing for the safe and legal entry of protection seekers. At the same time, the procedure potentially enhances the Member States' external and extraterritorial migration control by enabling them to conduct protection-sensitive pre-screening before third-country nationals reach the Member States' borders. The issuing of humanitarian visas should therefore be regarded as an instrument that complements other PEPs, protection practices and the CEAS, and by no means as a substitute for them.

Aim and methodology

The aim of the present study is to provide the LIBE Committee with an extensive assessment of the possibility to issue humanitarian visas as provided for in Articles 19 and 25 of the Visa Code, and to ascertain whether this possibility has been used in the past and whether Member States should be encouraged to make use of these provisions. The study concludes by putting forward recommendations for the European Parliament's position on this important issue.

The specific objectives and methodology of the present study are:

- to provide an outline of the EU policy and legal framework on the issuing of humanitarian visas by the EU Member States, for which desk research has been conducted;
- to examine and analyse the possibilities under EU law for the Member States to issue humanitarian visas, for which an analysis of relevant legislation, policy, guidelines and case-law has been carried out;
- to provide a description of national practices of the EU Member States on the issuing of humanitarian visas. To this end, reference has been made to data from, principally, the following studies:
 - EMN (2010), *The different national practices concerning granting of non-EU harmonised protection statuses*, with annex, European Migration Network;
 - EMN (October 2012), *Visa Policy as Migration Channel*, European Migration Network;
 - Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees;
 - Lepola, O. (2011), *Counterbalancing externalized border control for international protection needs: humanitarian visa as a model for safe access to asylum procedures*, University of Birmingham; and
 - Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission;
- to draw conclusions on the extent to which Member States should be encouraged to make use of the provisions on humanitarian visas.

²¹ See e.g. UNHCR, Central Mediterranean Sea Initiative (CMSI), *EU solidarity for rescue-at-sea and protection of refugees and migrants*, CMSI Action Plan, UNHCR, 13 May 2014; ECRE, *Europe ACT NOW - Our Recommendations*, available at <http://www.ecre.org/component/content/article/56-ecre-actions/620-europe-act-now-our-recommendations.html> (accessed 25 June 2014); ECRE (January 2014), *An Open and Safe Europe - What Next?*, ECRE submission to the European Commission Consultation on the Future of Home Affairs Policies; ECRE (December 2007), *Defending Refugees' Access to Protection in Europe*; The Red Cross (2013), *Legal Avenues to Access International Protection in the EU: Recommendations of the National Red Cross Societies of the Member States of the European Union and the International Federation of Red Cross and Red Crescent Societies*, Position Paper; and PERCO (November 2012), *Position on the Need to Create Legal Avenues to Access International Protection within the European Union*, Position Paper, Platform for European Red Cross Cooperation on Refugees, Asylum Seekers and Migrants.

1. EU LEGAL FRAMEWORK: A possibility to issue humanitarian visas?

KEY FINDINGS

- Article 25 (1) of the Visa Code makes it possible to issue Schengen LTV visas on humanitarian grounds, for reasons of national interest or because of international obligations, which importantly correspond to the three exceptional reasons for which a Member State may allow entry pursuant to the Schengen Borders Code. Following an analysis of the wording of the Visa Code and the application by analogy of the recent Court of Justice of the European Union (CJEU) judgment in the *Koushkaki* case, it is concluded that the Visa Code obliges Member States to issue LTV visas when this follows from the Member States' refugee and human rights obligations. Yet, due to the ambiguous wording of Article 25 (1), it would indeed be preferable to have the obligations of the Member States clarified in the Visa Code. In this context, it is important to recall that the EU Charter of Fundamental Rights applies to the institutions and bodies of the EU and the Member States when implementing EU law, regardless of territory, as do the jurisdictional obligations of for example the ECHR.
- Under Article 19 (4) of the Visa Code, it is possible to derogate from the admissibility requirements for visa applications on humanitarian grounds or for reasons of national interest which suggests that there is a clear interplay between Articles 19 (4) and 25 (1). However, there is no automatic link between granting admissibility on, inter alia, humanitarian grounds and issuing an LTV visa on, inter alia, humanitarian grounds in the Visa Code. This notwithstanding, if a Member State has decided to waive standard admissibility requirements for the visa application on humanitarian grounds, it follows that the Member State has recognised that the visa applicant is unable to fulfil the regular requirements for humanitarian reasons. Consequently, it then seems logical that the humanitarian situation would be sufficiently serious for the Member State to issue an LTV visa. Yet, it would indeed be preferable to have the relationship between Article 19 (4) and 25 (1) clarified in the Visa Code; in particular due to the different wording applied in the provisions, including the fact that Article 19 (4) does not explicitly provide for international obligations as a reason for derogation from admissibility requirements.
- Since Article 19 in practice serves as a filter for applications to be processed pursuant to Article 25 (1), the discretion left to the Member States under this article is found to be limited by the Member States' refugee and human rights obligations to the same extent as under Article 25.
- There is no separate procedure established for the lodging and processing of an application for an LTV visa in the Visa Code. Therefore, possible protection needs and human rights issues are examined in 'ordinary' visa applications and refusals of Schengen visas should explicitly be without prejudice to Article 25 (1). However, it is unclear whether there is a mandatory assessment of protection needs and human rights issues under Article 19 (4) and 25 (1) of the Visa Code; and also whether appeal is granted in cases of refusal of LTV visas. Crucially, appeal in cases of non-admissibility is not granted in the Visa Code.
- The concept of humanitarian grounds remains undefined in binding EU instruments.

1.1 Convention implementing the Schengen Agreement and Schengen Borders Code

1.1.1 Common visa policy

The common EU visa policy is derived from the Schengen *acquis*. The Schengen *acquis* is founded on the 1990 Convention implementing the Schengen Agreement of 14 June 1985²² (Schengen Convention),

²² 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 19 June 1990, [2000] OJ L 239/19 (as amended). Europa, *Summaries of EU legislation, Justice, freedom and security, Free movement of persons, asylum and immigration, The Schengen area and cooperation*

providing for the abolition of checks at internal borders and a common policy on external border management, and pursuing the adoption of a common visa policy.²³ The 1997 Protocol to the Treaty of Amsterdam incorporated the Schengen *acquis* into the EU framework in 1999. Henceforth, the EU had exclusive competence in the issuance of short-stay Schengen visas (type C), which is defined as an authorisation issued by a Member State with a view to transit through the international airports of the Member States or stays of no more than 90 days in any 180-day period in that Member State, more or all Member States.²⁴ Article 77 (2) (a) of the Treaty on the Functioning of the European Union (TFEU)²⁵ provides that the European Parliament and the Council shall adopt measures concerning the common policy on visas and other short-stay residence permits.²⁶

The common policy on the abolition of internal border controls, as well as on external border management and control has been further developed by, inter alia, 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 (Schengen Borders Code).²⁷ This governs the entry conditions for persons crossing the Schengen states' external borders as well as the requirements for derogating from those conditions.

at http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/133020_en.htm (accessed 28 May 2014).

²³ Chapter 3 of the Schengen Convention.

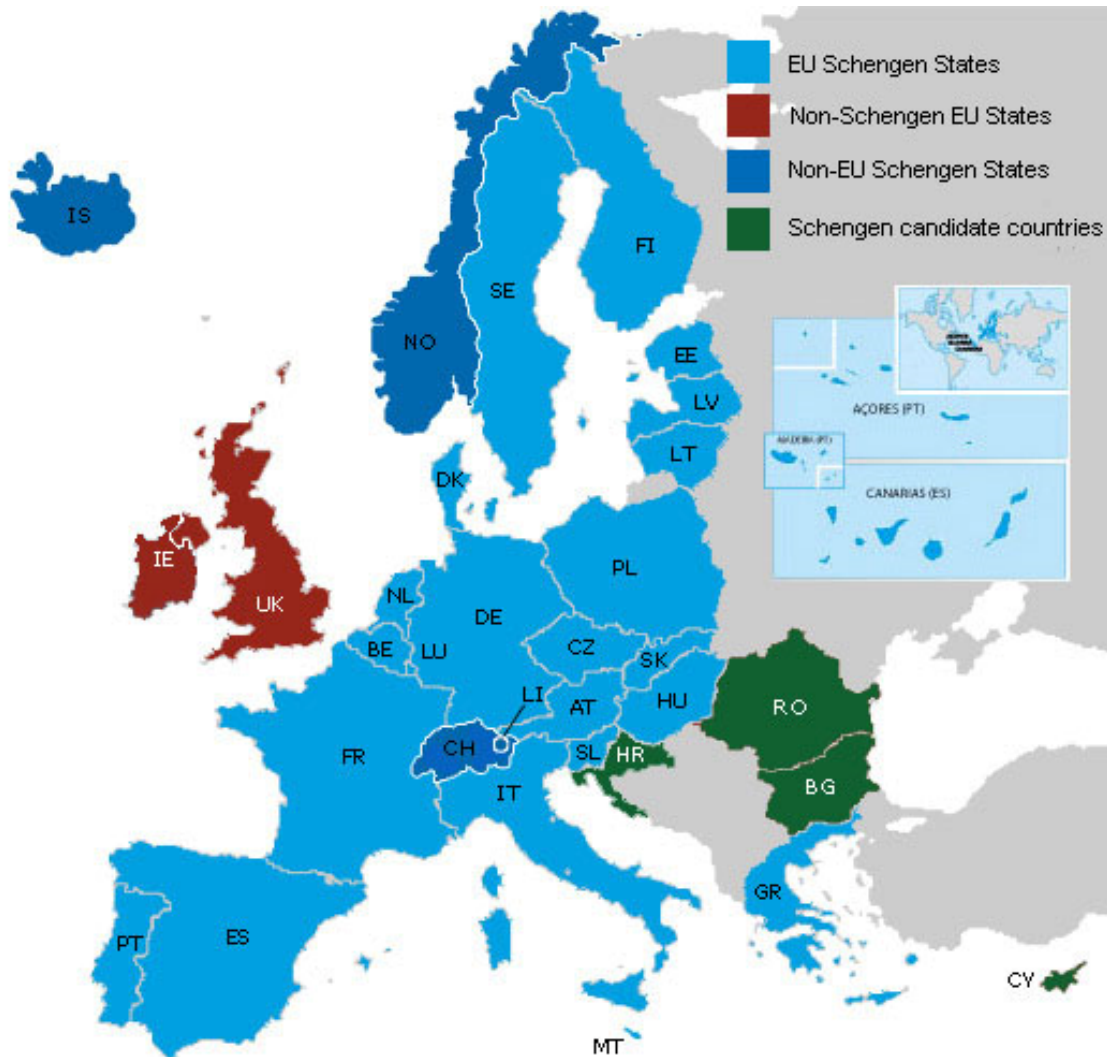
²⁴ Article 2 (2)-(5) of Regulation (EC) No. 810/2009 of the European Parliament and of the Council of 13 July establishing a Community Code on Visas (Visa Code), [2009] OJ L 243/1 (as amended).

²⁵ Consolidated Version of the Treaty on the Functioning of the European Union, [2008] OJ C 115/47.

²⁶ See also Hernández i Sagrera, R. (2014) *The Impact of Visa Liberalisation in Eastern Partnership Countries, Russia and Turkey on Trans-Border Mobility*, EP study, p. 8.

²⁷ [2006] OJ L 105/1 (as amended). Recitals 3 and 4 of the Preamble.

Figure 3. Schengen Area as of 1 July 2013



Source: European Commission (available at http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm (accessed 25 June 2014)).

1.1.2 National long-stay visas and Schengen short-stay LTV visas: discretion and derogations

Issuing of national and Schengen visas

Article 18, 1st indent of the Schengen Convention renders possible the issuing of visas to protection seekers by according the Member States the freedom to issue long-stay visas (type D) for stays exceeding 90 days. As observed by den Heijer, this provision thus implies that Member States may issue **humanitarian or other protection visas** to persons in need of international protection in accordance with their national laws (or Union law).²⁸

In addition, provisions of the Schengen Convention made it possible to issue short-stay visas to protection seekers by providing for derogations from the Schengen visa requirements. Article 15 of the Schengen Convention (since repealed and succeeded by Regulation (EC) No. 810/2009 of the European Parliament and

²⁸ den Heijer, M. (2011), *Europe and Extraterritorial Asylum*, pp. 182-184.

of the Council of 13 July establishing a Community Code on Visas (Visa Code)²⁹ provided that, in principle, short-stay visas may only be issued when a third-country national fulfils the entry conditions laid down in the (now repealed) Article 5 (1). By way of derogation, Article 16 of the Schengen Convention (since repealed and incorporated into the Visa Code), provided that, if a Contracting Party **considers it necessary** to derogate from the principle laid down in Article 15 on **humanitarian grounds**, on grounds of national interest or because of **international obligations**, the visa issued must be of **limited territorial validity**.³⁰

The wording of the (since repealed) Common Consular Instructions (CCI) implies that the Schengen Convention merely provided the option to issue LTV visas: “A visa whose validity is limited to the national territory of one or several Contracting Parties **may** be issued [...]”.³¹ Moreover, the CCI explicitly stated that LTV visas are issued by way of **exception** and that “[...] the Schengen Contracting Parties will not use and abuse the possibility to issue LTVs; this would not be in keeping with the principles and objectives of Schengen”.³² The CCI further foresaw “[...] that the number of LTVs being issued will most probably be small [...]”.³³ Accordingly, the discretion left to the then Contracting Parties must be considered to have been limited by the objectives of Schengen, as well as (explicitly) by those international obligations the Contracting Parties were bound by.

The concept of ‘humanitarian grounds’ remains undefined

As observed by Noll et al., in 2002, humanitarian grounds “[...] remain undefined in the Schengen Convention [as well as in the Schengen Borders Code and the Visa Code], but it is contextually clear that the **grant of visas to alleviate threats** to the applicant’s **human rights** are covered by the term”.³⁴

The guidelines laid down in the non-binding Visa Handbook³⁵ issued after those observations were made provide an example of humanitarian grounds that may exceptionally lead to an examination of an otherwise inadmissible application, as well as examples of humanitarian reasons that must lead to the extension of visas. In this context, the meaning of the terms ‘humanitarian grounds’ and ‘humanitarian reasons’ appears to be identical. Accordingly, examples of humanitarian grounds are:

“[a] Philippine national urgently needs to travel to Spain where a relative has been victim of a serious accident. His travel document is only valid for one month beyond the intended date of return”.³⁶

And examples of humanitarian reasons are:

“sudden serious illness of the person concerned (meaning that the person is unable to travel) or sudden serious illness or death of a close relative living in a Member State”.³⁷

In the guidelines laid down in the Schengen Handbook, humanitarian grounds are likewise explained by way of examples in the context of visas issued at the border:

“[s]udden serious illness of a close relative or of other close persons; [d]eath of a close relative or of other close persons; [e]ntry required so that initial medical and/or psychological care and, by way of

²⁹ [2009] OJ L 243/1 (as amended). Article 56 (1) of the Visa Code.

³⁰ Article 56 (1) of the Visa Code. This Article has been succeeded by Article 25 (1) of the Visa Code, see below para. 1.2.

³¹ Common Consular Instructions on visas for the diplomatic missions and consular posts, [2002] OJ C 313/1, Part V.3 (emphasis added). Repealed by Article 56 (2) (a) of the Visa Code.

³² Cf. Moreno-Lax, V. (2008), *Must EU Borders have Doors for Refugees? On the Compatibility of Visas and Carrier Sanctions with Member States’ Obligations to Provide International Protection to Refugees*, CRIDHO Working Paper 2008/03, p. 11.

³³ Annex 14, 1.1.a-b of the CCI.

³⁴ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, p. 235 (emphasis added).

³⁵ Part II, para. 4.1.2 of the Consolidated version of the Handbook for the processing of visa applications and the modification of issued visas based on Commission decision C(2010) 1620 of 19 March 2010 and Commission implementing decision C(2011) 5501 of 4 August 2011.

³⁶ Visa Handbook, Part II, para. 4.7, p. 38.

³⁷ Visa Handbook, Part III, para. 1.1, p. 99.

exception, follow-up treatment can be provided in the Schengen State concerned, in particular following an accident such as shipwreck in waters close to a Schengen State, or other rescue and disaster situations”.³⁸

Consequently, the Handbooks focus on **health-related issues** rather than protection-related issues when defining the concepts of humanitarian grounds and reasons.

By way of comparison, examples of the concept of **international obligations** are not provided in the Visa Handbook, though they are in the Schengen Handbook:

“for example, if a person asks for asylum or is otherwise in need of international protection”.³⁹

Consequently, the Schengen Handbook focuses on **protection-related issues** to define international obligations.

1.1.3 Derogations from entry conditions

Rights flowing from a Schengen visa: the right to seek entry or transit

As can be seen from Article 2 (2) of the Visa Code, being issued with a visa means that a third-country national may seek entry into or transit through a Member State. Due to sanctions imposed on carriers of persons not issued with the necessary visas and/or travel documents to the territory of the EU, a visa may be regarded as a prerequisite, not only for seeking entry into or transit through the Member States, but for starting a journey.⁴⁰

Hence, although “[i]n the examination of an application for a uniform visa, it shall be ascertained [inter alia] whether the applicant fulfils the entry conditions set out in Article 5 (1) (a), (c), (d) and (e) of the Schengen Borders Code[...]”,⁴¹ the mere “[...] possession of a uniform visa or a visa with limited territorial validity [does not] confer an automatic right of entry [into a Member State]”⁴² as “[...] the possession of a visa merely allows the holder to present himself at the external border”.⁴³ Thus, a holder of a visa needs to fulfil specific entry conditions when seeking entry for intended short stays or transit at a border crossing point, depending on the visa issued.

Authorisation to enter on humanitarian grounds, grounds of national interest or because of international obligations: Schengen Borders Code Article 5 (4) (c)

By way of derogation to the requirement to fulfil entry conditions, Article 5 (2) of the Schengen Convention (since repealed by the Schengen Borders Code⁴⁴) allowed the Member States to grant entry at the border when a Contracting Party considered it necessary on humanitarian grounds, on grounds of national interest or because of international obligations. Moreover, the rules on entry conditions were without prejudice to the application of special provisions concerning the right of asylum or of the provisions laid down in Article 18 on long-stay visas.

The essence of Article 5 (2) of the Schengen Convention has been taken up in Article 5 (4) (c) of the Schengen Borders Code, which allows for derogation from the entry conditions laid down in Article 5 (1) of the Code. Article 5 (4) (c) reads:

³⁸ Section I, Para. 7.5, p. 48 of Commission Recommendation: establishing a common “Practical Handbook for Border Guards (Schengen Handbook)” to be used by the Member States’ competent authorities when carrying out the border control of persons C(2006) 5186, 6 November 2006.

³⁹ Section I, Para. 6.2, p. 39.

⁴⁰ See ECRE (December 2007), *Defending Refugees’ Access to Protection in Europe*, p. 28f.

⁴¹ Article 21 (1) of the Visa Code and den Heijer, M. (2011), *Europe and Extraterritorial Asylum*, p. 183.

⁴² Article 30 of the Visa Code.

⁴³ Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM(2006) 403 final, 19 July 2006, para. 8, comments on Article 24 (now Article 30).

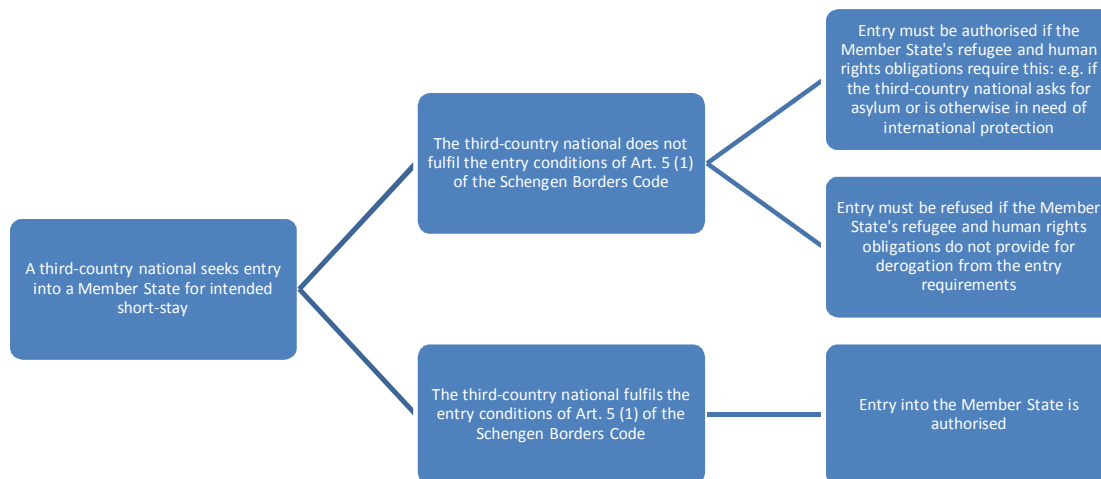
⁴⁴ Article 39 (1).

“third-country nationals who do not fulfil one or more of the conditions laid down in paragraph 1 **may** be authorised by a Member State to enter its territory on **humanitarian grounds**, on grounds of national interest or because of **international obligations** [...]” (emphasis added).

Article 5 (4) must be read in conjunction with Article 13 (1) of the Schengen Borders Code which provides that refusal of third-country nationals who do not fulfil all the entry conditions and do not belong to the categories of persons referred to in Article 5 (4) shall be **without prejudice** to the application of special provisions concerning **the right of asylum** and to **international protection** or the issuing of long-stay visas.

The use of the term ‘**may**’ in Article 5 (4) (c) implies that the Member States enjoy leeway in determining whether to grant authorisation to enter, inter alia, on humanitarian grounds or because of international obligations. In the quest to ascertain the degree of discretion, reference to the Schengen *acquis* as well as to human rights obligations becomes relevant. Given the reference in Article 5 (4) (c) of the Schengen Borders Code to humanitarian grounds and international obligations and in Article 13 (1) to the right of asylum and international protection, the degree of discretion left to the Member States must be considered to be limited by the scope and content of the very same international obligations by which the Member States are bound. Whether the Member States are **obliged** to allow entry into their territories in those instances therefore depends on whether there is a basis for this in the Member States’ **refugee and human rights obligations**.⁴⁵

Figure 4. Main elements of the procedure with regard to fulfilment of, and derogation from, the entry conditions of the Schengen Borders Code



Consequently, under Articles 5 (4) (c) and 13 (1), the Member States may authorise entry into their territory even where, for example, a protection seeker has not been issued with a visa. Therefore, although protection seekers may not be *de jure* exempt from pre-frontier visa requirements under the Schengen *acquis* or the visa legal framework,⁴⁶ protection seekers may *de facto* be exempt from visa requirements upon entry pursuant to the Schengen Borders Code. As observed by den Heijer, this exemption from the visa requirement kicks in only at the very moment the visa requirement is enforced. This may raise question marks in terms of refugee and human rights obligations where the visa requirement is enforced not through the verification of compliance with the entry conditions, but by means of other border control measures, such as carrier sanctions and Immigration Liaison Officers.⁴⁷

Furthermore, as far as international obligations are concerned, Articles 3 (b), 3a, 5 (4) (c) and 13 (1) affirm the general rule that the Schengen Borders Code does not prejudice the rights of, inter alia, protection seekers. This means that the Member States must derogate from the entry conditions “[...] for example, if a

⁴⁵ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, p. 58, though this deals with the now repealed Article 5 (2) of the Schengen Convention.

⁴⁶ See below para. 1.2.

⁴⁷ den Heijer, M. (2011), *Europe and Extraterritorial Asylum*, pp. 183-184.

person asks for asylum or is otherwise in need of international protection [...]” and “[t]he nature of the examination [of the application for international protection] must be determined in accordance with [...] [the] Directive on asylum procedures”.⁴⁸

1.2 Visa List Regulation and Visa Code

1.2.1 Visa requirements; procedures and conditions for issuing Schengen short-stay visas

The common EU visa policy requires nationals of certain non-EU countries to be issued with a Schengen visa when seeking to cross the external borders of the Member States and travelling to the Schengen area for short stays. This common list of non-EU countries whose nationals are subject to a visa requirement is a further development of the Schengen *acquis* and is enshrined in 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 (Visa List Regulation), which entered into force in 2001 and fully harmonised the EU’s visa policy in terms of visa requirements for third-country nationals.⁴⁹ Annex I to the Visa List Regulation lists the nationalities that require a visa for a short stay in the Schengen Area, and Annex II lists those who do not.⁵⁰

The procedures and conditions for issuing Schengen visas for short-stays in and transit through the territories of Member States are established in the Visa Code, which entered into force in 2010. The Visa Code is thus a further development of the Schengen *acquis* and declares that the establishment of a ‘common corpus’ of legislation is one of the fundamental components in the further development of the common visa policy. Moreover, the Visa Code’s objective is to ensure a harmonised application of the common visa policy.⁵¹

The Visa Code applies to any third-country national listed in the Visa List Regulation who must be in possession of a visa when crossing the external borders of a Member State. The Visa Code also lists the non-EU countries whose nationals must hold an airport transit visa.⁵²

Such (type C) Schengen visas may be issued as a:

- (a) **uniform visa**, meaning “[...] a visa valid for the entire territory of the Member States [...]”;⁵³
- (b) visa with **limited territorial validity** (LTV visa) meaning “[...] a visa valid for the territory of one or more Member States but not all Member States [...]”;⁵⁴ or
- (c) **airport transit visa**, meaning “[...] a visa valid for transit through the international transit areas of one or more of the Member States [...]”.⁵⁵

Applications for Schengen visas: no separate procedure is established for LTV visas

Although an LTV visa is one of the types of visas mentioned in the Visa Code, for example in Article 23 (4), there is no procedure in place or system established under the Visa Code for lodging or processing an

⁴⁸ Part II, paras. 6.2 and 10 of the Schengen Handbook. See also den Heijer, M. (2011), *Europe and Extraterritorial Asylum*, p. 205, though den Heijer does not deal with Article 3a since it had not yet been adopted at the time. See also Recital 20 in the Preamble of the Schengen Borders Code.

⁴⁹ [2001] OJ L 81/1 (as amended). Recitals 2-3 and 12 of the Preamble. Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, p. 57.

⁵⁰ Article 1 (1)-(2) of the Visa List Regulation.

⁵¹ Recitals 3 and 18 of the Preamble, cf. Recital 38.

⁵² Article 1 (2)-(3). Europa, *Summaries of EU legislation, Justice, freedom and security, Free movement of persons, asylum and immigration, Visa Code* at http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/jl0028_en.htm (accessed 27 May 2014).

⁵³ Article 2 (3) of the Visa Code.

⁵⁴ Article 2 (4), cf. article 25 (2), of the Visa Code.

⁵⁵ Article 2 (5) of the Visa Code.

application for an LTV visa on, inter alia, humanitarian grounds or because of international obligations.⁵⁶ Consequently, it is unclear whether the Member States are obliged under the Visa Code to **initiate an assessment** under Articles 19 (4) and 25 (1). Accordingly, the fact that refusals of Schengen visas should explicitly be without prejudice to Article 25 (1)⁵⁷ indicates that Member States are obliged to assess possible humanitarian grounds and international obligations; yet the terminology of the provisions in question is rather vague, when compared to, for example, Article 21 (1), which is unambiguous in requiring Member States to ascertain and assess the fulfilment of entry conditions and risks when examining applications for uniform visas.⁵⁸ This rather complex and, in respect of some crucial aspects, unclear ‘LTV visa procedure’ is illustrated below in Figure 5.

An LTV visa thus appears not be a separate and independent type of visa as such, but rather, “[...] it enshrines the discretionary power of the [...] Member States”.⁵⁹ Therefore, possible protection needs and human rights issues are examined in ‘ordinary’ visa applications – once it is established that the applicant does not fulfil the entry conditions required for the issuance of uniform visas.⁶⁰ In addition, Article 25 (1) of the Visa Code constitutes the only provision reiterating the safeguards contained in the Schengen Borders Code⁶¹.

Since there is no separate LTV visa procedure established as such, it remains unclear whether **appeal** in cases of refusals of LTV visas is granted under Article 32 (3) of the Visa Code. If appeal is not granted, this seems highly problematic given that “[i]mportant interests may be at stake and a lack of judicial control may facilitate arbitrariness” and “[t]he [CJEU] has repeatedly stressed the important principle of Community law of the right to effective judicial protection”.⁶²

1.2.2 Derogations from admissibility requirements and Schengen visa requirements: LTV visas

Derogations from admissibility requirements on humanitarian grounds: Article 19 (4)

Obviously, having one’s application for a Schengen visa declared admissible is the first obstacle to overcome,⁶³ and protection seekers are often unlikely to be in a position to for example supply the documents required or to possess the requisite funds for Schengen visas applications. In this respect, Article 19 of the Visa Code lays down rules on the admissibility of applications for Schengen visas.

An application for a Schengen visa that does not meet the admissibility requirements set out in the Visa Code (application form signed and completed on time, valid travel document, photograph, visa fee paid and biometric data collected) may be considered admissible on humanitarian grounds or for reasons of national interest by the competent authorities pursuant to Article 19 (4) of the Visa Code, which reads:

“By way of derogation, an application that does not meet the requirements set out in paragraph 1 **may** be considered admissible on **humanitarian grounds** or for reasons of national interest”.
(Emphasis added.)

Furthermore, the visa fee may be waived or reduced, inter alia, for humanitarian reasons.⁶⁴

⁵⁶ Compare Article 14 (1) and (2) of the Visa Code: “[w]hen applying for a uniform visa/an airport transit visa” and Article 21 (1) and (6) “[i]n the examination of an application for a uniform visa/an airport transit visa”.

⁵⁷ Article 32 (1) of the Visa Code.

⁵⁸ See more below para. 1.2.2.1 on this provision which was recently subjected to an analysis by the CJEU in the *Koushkaki* case (C-84/12).

⁵⁹ Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, p. 27.

⁶⁰ Compare Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, p. 226 on the passive approach of the study’s fifth proposal on a flexible use of the visa regime (see below para. 2.1.2).

⁶¹ Compare Article 21 (1) and (6).

⁶² Standing committee of experts on international immigration, refugee and criminal law (February 2007), *Note on the draft proposal for a Community Code on Visas, COM (2006) 403 final; 2006/0142 (COD)*, Utrecht, para. b.1.

⁶³ Cf. Article 19 (2) of the Visa Code.

⁶⁴ Article 16 (6) of the Visa Code.

In cases of non-admissibility, **appeal** is not granted under the Visa Code, which seems highly problematic given the fact that inadmissibility is a material refusal of an application which “[...] effectively bars a person from entering a European country of destination”.⁶⁵

Derogations from Schengen visa requirements on humanitarian grounds, grounds of national interest or because of international obligations: Article 25 (1)

With regard to visa requirements for protection seekers, the Visa List Regulation does not explicitly allow for exemptions from the visa requirement in its exhaustive listing in Article 4. However, Recital 8 of the Preamble provides that Member States may exempt certain categories of persons from the visa requirement or impose it on them in accordance with public international law or custom in specific cases.⁶⁶

By contrast, the operational Article 25 (1) of the Visa Code explicitly provides for the issuance of short-stay visas with limited territorial validity on humanitarian grounds, for reasons of national interest or because of international obligations, which notably correspond to the three exceptional reasons for which a Member State may allow entry into its territory pursuant to Article 5 (4) (c) of the Schengen Borders Code.⁶⁷ Thus, as the safeguards provided in the Schengen Borders Code are reiterated in Article 25 (1) of the Visa Code, there is a clear interplay between the Schengen Borders Code and the Visa Code.

Article 25 (1) of the Visa Code reads:

- “1. A visa with limited territorial validity **shall** be issued **exceptionally**, in the following cases:
- (a) when the Member State concerned **considers it necessary on humanitarian grounds**, for reasons of national interest or because of **international obligations**,
 - (i) to derogate from the principle that the **entry conditions** laid down in Article 5 (1) (a), (c), (d) and (e) of the Schengen Borders Code must be fulfilled;
 - (ii) to issue a visa despite an objection by the Member State consulted in accordance with Article 22 to the issuing of a uniform visa; or
 - (iii) to issue a visa for reasons of urgency, although the prior consultation in accordance with Article 22 has not been carried out;
 - b) when for reasons deemed justified by the consulate, a new visa is issued for a stay during the same 180-day period to an applicant who, over this 180-day period, has already used a uniform visa or a visa with limited territorial validity allowing for a stay of 90 days”⁶⁸. (Emphasis added.)

In addition, an LTV visa may, in exceptional cases, be issued at the external border of a Member State in accordance with Article 25 to applicants not fulfilling the conditions laid down in the Schengen Borders Code or to applicants regarding whom prior consultation is required in accordance with Article 22 of the Visa Code.⁶⁹

⁶⁵ Standing committee of experts on international immigration, refugee and criminal law (February 2007), *Note on the draft proposal for a Community Code on Visas, COM (2006) 403 final; 2006/0142 (COD)*, Utrecht, para. b.1.

⁶⁶ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 57-58.

⁶⁷ As observed by Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, p. 58, though this deals with the now repealed Article 16 of the Schengen Convention. See para. 1.1.3 above.

⁶⁸ Cf. also Article 32 about grounds for refusal of visas (such as false or forged documents, lack of proof of sufficient means of subsistence etc.) which is explicitly said to apply without prejudice to Article 25 (1).

⁶⁹ Article 35 (4)-(5) of the Visa Code. Cf. Article 4 (1)-(3). Cf. Article 5 (4) (b) of the Schengen Borders Code. In this context, regarding refusals of visas and the issuance of LTV visas at the external border, respectively, the guidelines laid down in respectively Part II, para. 12, and Part IV, para. 1.6, of the Visa Handbook provide that:

“In case the entry conditions are not fulfilled, it should be assessed whether the circumstances justify that a derogation is exceptionally made from the general rule, and a visa with limited territorial validity (LTV) can be issued [...]. If it is not considered justified to derogate from the general rule, the visa shall be refused”. And “[i]n case the entry conditions are not fulfilled, it should be assessed whether the circumstances justify that derogation is exceptionally made from the general rule, and a visa with limited territorial validity may be issued [...]. If it is not considered justified to derogate from the general rule, the visa shall be refused”.

Article 25 (1) was introduced into the Visa Code to consolidate in a single article all the provisions concerning the issuance of LTV visas previously contained in the Schengen Convention and the CCI.⁷⁰ According to the Commission, the fact that the provisions concerning LTV visas were scattered around in various legal instruments led to “[...] uncertainty as to the conditions for issuing this type of visa and to a certain degree of misuse and varying practices among Member States”.⁷¹

As observed by Peers, “[t]he important point is that an LTV visa can be issued where the usual conditions for issuing a visa are not met, for instance where there is insufficient evidence of an intention to return to the country of origin. Obviously, where a person has a genuine protection need, a reluctance to return to her country of origin is perfectly understandable; indeed, it is built into the very definition of refugee or subsidiary protection status (i.e. a well-founded fear of suffering persecution or serious harm in that country)”.⁷² In line with this, according to the Preamble of the Visa Code, the Code “[...] respects fundamental rights and observes the principles recognised in particular by the Council of Europe’s Convention for the Protection of Human Rights and Fundamental Freedoms and by the Charter of Fundamental Rights of the European Union”.⁷³ The Code does not, however, make explicit reference to the Refugee Convention.

Upon examining Articles 19 (4) and 25 (1), a complex and, in respect of some crucial aspects, unclear procedure emerges, as illustrated in Figure 5 below. The ‘LTV visa procedure’ is examined in greater depth below.

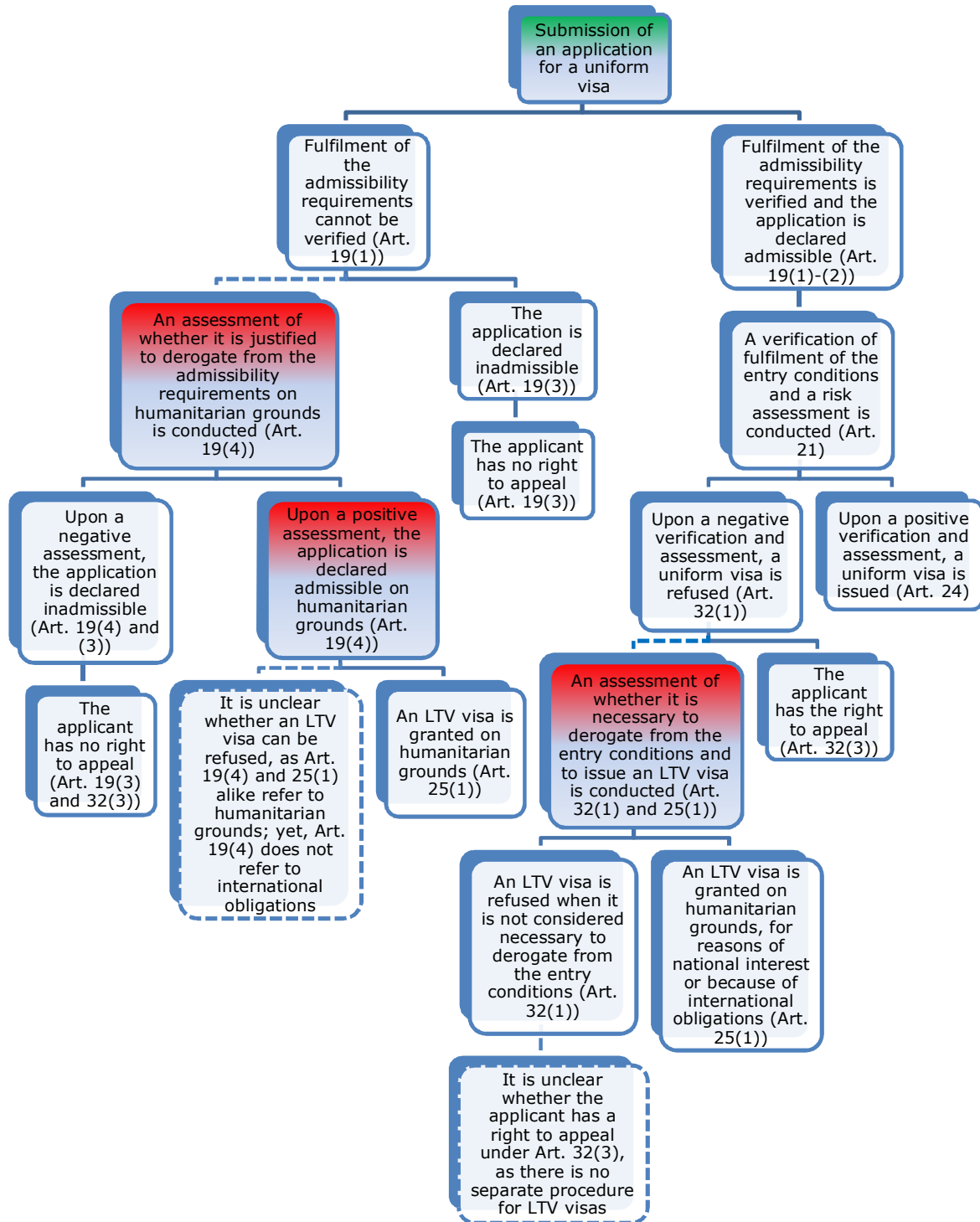
⁷⁰ See above para. 1.1.

⁷¹ Draft proposal for a Regulation of the European Parliament and of the Council establishing a Community Code on Visas, COM(2006) 403 final, 19 July 2006, para. 4, cf. para. 8, comments to Article 21.

⁷² Peers, S. (2014), “External processing of applications for international protection in the EU”, *EU Law Analysis*.

⁷³ Preamble 29 of the Visa Code.

Figure 5. 'LTV visa procedure' when a third-country national submits an application for a uniform visa. Unclear obligations and elements are illustrated with dotted lines. Crucial steps in terms of the granting of LTV visas are highlighted in red.



Source: Author's own diagram.

1.2.2.1 Analysis of Articles 19 (4) and 25 (1) of the Visa Code

Article 19 (4): interaction with and filter for visa applications to be processed under Article 25 (1)

In examining the **degree of discretion** afforded to the Member States under Article 19 (4), the use of the term ‘**may**’ implies that Member States are free to decide whether to derogate from the admissibility requirements. It is, in other words, optional - at least pursuant to the Visa Code.

From the wording of the articles, it appears that there is a clear **interplay** between Article 19 (4) and Article 25 (1) as both articles alike refer to humanitarian grounds and reasons of national interest as grounds for derogations.

However, despite the obvious interplay, there is no automatic link between granting admissibility on humanitarian grounds or for reasons of national interest and issuing an LTV visa on humanitarian grounds or for reasons of national interest in the Visa Code. Thus, the guidelines laid down in the non-binding Visa Handbook state that

“[t]ravel documents issued more than 10 years prior to the visa application should in principle not be accepted and applications based on such travel documents not be considered admissible. However, exceptions may be made on humanitarian grounds or for reasons of national interest. If, **eventually**, a positive decision is taken on the [visa] application, a visa with limited territorial validity allowing the holder only to travel to the issuing Member State should be issued”.⁷⁴ (Emphasis added.)

Beyond travel documents issued more than 10 years prior to the visa application, the Handbook addresses the issue of admissibility with regard to how to treat forged travel documents. In this respect, the Handbook states that if an applicant presents a forged travel document and the forgery is detected at the moment of the submission of the application, or when the consulate establishes whether the application is admissible or not, the application should be considered admissible and the visa refused.⁷⁵ However, Article 32 (1) (a) (i) provides that a visa shall be refused if the applicant presents a travel document that is false, counterfeit or forged without prejudice to Article 25 (1).⁷⁶

Notwithstanding the fact that the Visa Code or Visa Handbook do not address the issue of whether exceptions made on, inter alia, humanitarian grounds to consider the application admissible should automatically lead to the issuance of LTV visas, the fact that Article 25 (1) and Article 19 (4) alike refer to **humanitarian grounds** (and national interest) shows that the articles share the same basis for exceptions in this regard. In addition, Article 25 (1) does not lay down requirements additional to those of Article 19 (4). If a Member State has decided to waive standard admissibility requirements for the visa application on humanitarian grounds, it follows that the Member State has recognised that the visa applicant is unable to fulfil the regular requirements for humanitarian reasons (e.g. fleeing a conflict). Thus, if the Member State recognises the humanitarian situation to be sufficiently serious as to warrant a derogation from admissibility requirements, then it seems logical that the humanitarian situation would be sufficiently serious for the Member State to ‘consider it necessary’ to issue an LTV visa. Yet, it would indeed be preferable to have the relationship between Article 19 (4) and 25 (1) clarified in the Visa Code; in particular due to the different wording applied in the provisions (‘may’ versus ‘shall’) and the fact that – as opposed to Article 25 (1) – Article 19 (4) does not explicitly provide **international obligations** as grounds for derogating from admissibility requirements.⁷⁷

Whilst Article 25 (1) is dealt with below, at this stage it is important to note that since Article 19 in practice serves as a **filter** for applications to be processed pursuant to Article 25 (1), the discretion left to the Member States may very well be limited by the Member States’ **refugee and human rights obligations** to the same extent as under Article 25.

⁷⁴ Part II, para. 4.1.2 of Consolidated version of the Handbook for the processing of visa applications and the modification of issued visas based on Commission decision C(2010) 1620 of 19 March 2010 and Commission implementing decision C(2011) 5501 of 4 August 2011. Cf. Article 12 (c) requiring travel documents to have been issued within the previous 10 years.

⁷⁵ Visa Handbook Part II, section 4.1.4.

⁷⁶ Cf. Article 31 of the Refugee Convention.

⁷⁷ See, however, Preamble 29 of the Visa Code and para. 1.1.2. above on the concept of humanitarian grounds.

Article 25 (1): obliging the Member States to issue LTV visas when this follows from their refugee and human rights obligations

In examining the **degree of discretion** afforded to the Member States under Article 25 (1), the wording ‘**shall**’, ‘**considers it necessary**’ and ‘**exceptionally**’ warrants closer scrutiny. In this context, and as clearly articulated by Peers, the recent CJEU ruling in the *Koushkaki* case⁷⁸ entails that “[...] in principle an ordinary [uniform] Schengen visa must be issued when the applicant satisfies the criteria to obtain one, subject to a wide degree of discretion for Member States’ authorities to assess whether those criteria are satisfied. Does the same rule apply to LTV visas? At first sight, it does, due to the word ‘shall’, although that is qualified by the words ‘considers it necessary’”.⁷⁹ In addition, due regard must be paid to the word ‘exceptionally’; likewise qualifying the word ‘shall’.⁸⁰

The main question arising from the *Koushkaki* judgment of particular relevance to the present study is thus whether that judgment applies by analogy to the issuing of LTV visas. In this context, Peers suggests that “[...] following *Koushkaki* it could be argued that Member States are obliged to issue a visa with limited territorial validity [...]”.⁸¹

When applying a comparative and contextual reading of the articles of the Visa Code, the term ‘**shall**’ in Article 25 of the Visa Code is unambiguous compared to other articles of the Code, which allow for optional exemptions by applying the term ‘**may**’.⁸² In this regard, Article 25 (1) is aligned with other articles in the Visa Code that do not allow for optional exemptions.⁸³ In particular, the articles dealt with by the CJEU in the *Koushkaki* case likewise use the term ‘**shall**’,⁸⁴ and the CJEU concluded that “[t]he intention of the European Union legislature to leave a **wide discretion** to those authorities is apparent, moreover, from the very wording of Articles 21 (1) and 32 (1) of that code, provisions which **oblige** those authorities to ‘[assess] whether the applicant presents a risk of illegal immigration’ and to give ‘particular consideration’ to certain aspects of his situation and to determine whether there are ‘reasonable doubts’ as regards certain factors”.⁸⁵ As observed by Peers, the CJEU’s ruling can thus be summarised as requiring “[...] national authorities [...] [to] issue the visa if the conditions are satisfied,” yet “[...] those authorities have a lot of discretion left when they apply those criteria”.⁸⁶

As indicated above, the word ‘**exceptionally**’ implies that the possibility to issue LTV visas should be deployed only rarely by the Member States. Moreover, the wording ‘**considers it necessary**’ and the assessment inherent therein obviously leaves a wide discretion to the Member States.

In this context, an interesting aspect is the characteristics common to both Article 33 (1) and Article 25 (1) of the Visa Code. Under Article 33 (1), it is **mandatory** for the Member States to **extend** an issued visa for, inter alia, **humanitarian reasons** (equivalent to humanitarian grounds⁸⁷) after having performed an assessment of the evidence presented by the visa holder. Accordingly, Article 33 (1) reads:

“The period of validity and/or the duration of stay of an issued visa **shall** be extended where the competent authorities of a Member State **consider** that a visa holder has provided proof of force majeure or **humanitarian reasons** preventing him from leaving the territory of the Member State before the expiry of the period of validity of or the duration of stay authorised by the visa. [...]” (Emphasis added.)

⁷⁸ Case C-84/12, 19 December 2013.

⁷⁹ Peers, S. (2014), “External processing of applications for international protection in the EU”, *EU Law Analysis*.

⁸⁰ See para. 1.1.2 above on the repealed CCI.

⁸¹ Peers, S. (2014), “Do potential asylum-seekers have the right to a Schengen visa?”, *EU Law Analysis*.

⁸² See e.g. Articles 16 (5)-(6), 17 (1), 19 (4), 22 (1), 23 (2)-(3), 25 (2), 35 (1) and 35 (5), 2nd intent: ‘may’.

⁸³ See e.g. Articles 1 (2), 3 (1), 6 (1), 7, 9 (1), 10, 11, 12, 13, 14, 15, 16 (1)-(4), 17 (2)-(5), 18, 19 (1)-(3), 20, 21, 22 (2)-(5), 23 (1), (4), 24, 25 (2)-(5), 32, 33 (1) and 35 (5), 1st intent: ‘shall’.

⁸⁴ Articles 21 (1) and 32 (1).

⁸⁵ Para. 61. Emphasis added.

⁸⁶ Peers, S. (2014), “Do potential asylum-seekers have the right to a Schengen visa?”, *EU Law Analysis*.

⁸⁷ See para. 1.1.2 above.

Thus, the Visa Handbook specifically mentions the fact that extension for humanitarian reasons is mandatory - as opposed to under the Visa Facilitation Agreements (VFAs), where extension is mandatory only for reasons of *force majeure*. Yet, the Handbook also provides that third-country nationals covered by VFAs “[...] also benefit from the more generous provisions of the Visa Code”.⁸⁸

Moreover, Peers suggests that “[a]rguably, the binding nature of the relevant international obligations, along with the EU Charter of Fundamental Rights and the use of the word ‘shall’ [in Article 25 (1) of the Visa Code], override the discretion suggested by the words ‘consider it necessary.’ If this argument is correct, then the *Koushkaki* judgment has opened a significant crack in the wall of ‘Fortress Europe’ for would-be asylum-seekers”.⁸⁹ Peers’ line of reasoning seems convincing in light of the analysis conducted above. It is further corroborated by three facts. Firstly, an LTV visa is one of the types of short-stay visas referred to in the Visa Code. Secondly, a decisive factor for the CJEU in the *Koushkaki* judgment was the objectives set out in Recitals 3 and 18 of the Preamble to the Visa Code: “[...] the facilitation of legitimate travel [...]” and “[...] to ensure a harmonised application of the legislative provisions to prevent ‘visa shopping’ [...]”.⁹⁰ And thirdly, the explicit reference in Article 25 (1) of the Visa Code to humanitarian grounds and international obligations must be considered explicitly to limit the degree of discretion afforded to the Member States.

Consequently, it may be concluded that provided the assumptions about the application by analogy of the *Koushkaki* judgment hold true, the Visa Code **obliges** Member States to exceptionally issue LTV visas when this follows from their **refugee and human rights obligations**. In this respect, the Member States’ assessments of the necessity as well as the exceptionality - and thus their margin of appreciation - are limited by their refugee and human rights obligations.⁹¹ Yet, due to the ambiguous wording of Article 25 (1) (‘shall’ versus ‘consider it necessary’ and ‘exceptionally’), it would indeed be preferable to have the obligations of the Member States clarified in Article 25 (1). In this context, it is important to recall that the EU Charter of Fundamental Rights applies to the institutions and bodies of the EU and the Member States when implementing EU law, regardless of territory, as do the jurisdictional obligations imposed on the Member States under for example the ECHR.

⁸⁸ Para. 1.1, p. 99.

⁸⁹ Peers, S. (2014), “Do potential asylum-seekers have the right to a Schengen visa?”, *EU Law Analysis*.

⁹⁰ Paras. 52-53.

⁹¹ Standing committee of experts on international immigration, refugee and criminal law (February 2007), *Note on the draft proposal for a Community Code on Visas, COM (2006) 403 final; 2006/0142 (COD)*, Utrecht, para. c; and Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, p. 58, though this deals with the now repealed Articles 5 (2), 15 and 16 of the Schengen Convention.

2. EU POLICY: Towards a common framework for the issuing of humanitarian visas?

KEY FINDINGS

- Since 2000, the Commission has repeatedly explored avenues of legal access to EU territory for third-country nationals seeking protection, as mandated by the Tampere European Council Conclusions of 1999. In particular, the Commission launched a feasibility study on the processing of asylum claims outside the EU, carried out by the Danish Centre for Human Rights in 2002. With its March 2003 and June 2003 Communications, the Commission launched the notion of a harmonised system of PEPs as part of a comprehensive approach to ensure a more orderly and managed entry into the EU of persons in need of protection. Due to the lack of common perspective and confidence among Member States with regard to PEPs, the Commission made no reference to the idea of an EU PEP mechanism in its Communication of June 2004. Not until June 2008 did the Commission mention PEPs again, when it announced that it would examine PEPs and the flexible use of the visa regime, based on protection considerations. In its Communication of June 2009, the Commission again brought up the issue of protected entry and for the first time explicitly mentioned humanitarian visas with a clear indication that procedures for PEPs and the issuing of humanitarian visas should be established. In its April 2010 Action Plan to implement the Stockholm Programme, the Commission aimed to adopt a Communication on new approaches concerning access to asylum procedures targeting main transit countries in 2013, as well as a Communication on a new concept of the European visa policy in 2014. There has been no Communication on new approaches to access to asylum procedures targeting main transit countries, however, with no apparent plans to produce one. Following the Lampedusa tragedy in October 2013 and the subsequent Justice and Home Affairs Council later that month, the Task Force Mediterranean was set up, chaired by the Commission. In the Commission Communication of December 2013, the Commission launched 38 lines of action that were developed by the Task Force Mediterranean, including for the Commission to explore further possibilities for protected entry into the EU, which could include, inter alia, guidelines on a common approach to humanitarian permits/visas. In its Communication of March 2014, the Commission recommended that the EU seek to ensure a more orderly arrival of persons with well-founded protection needs and that a coordinated approach to humanitarian visas and common guidelines be pursued.
- The European Council's approach has gradually become more security-centred and focused on cooperation with countries of origin and transit. In the Stockholm Programme of December 2009, the European Council reaffirmed the position expressed in the European Pact on Immigration and Asylum, and called for the further development of integrated border management and the combating of 'illegal' migration, inviting the Commission to explore new approaches to access to asylum procedures. However, the European Council did not explicitly endorse the Commission's notion of facilitating PEPs and humanitarian visas; any new initiatives should provide for the Member States to participate on a voluntary basis. In its 2013 Brussels European Council, the European Council welcomed the 38 lines of action proposed by the Commission and developed by the Task Force Mediterranean, yet highlighted other actions to be taken than those relating to access to EU territory. In its June 2014 post-Stockholm Guidelines, the European Council did not explicitly endorse the Commission's notion of reinforced legal avenues to Europe and a coordinated approach to humanitarian visas and common guidelines. Yet, the European Council did endorse that the actions identified by the Task Force Mediterranean should be fully implemented, one of which include reinforced legal avenues to Europe.
- The European Parliament generally endorsed the well-organised and managed arrival of persons in need of protection and PEPs in its Resolutions of April 2004 and March 2009. In its Resolution of October 2013, the European Parliament emphasised the possibilities provided in EU law for the issuing of humanitarian visas and called for a more holistic approach to migration as well as a coordinated approach based on solidarity and responsibility, supported by common instruments. In its Resolution of April 2014, the European Parliament called on the Member States to make use of the current EU law provisions allowing the issuing of humanitarian visas and reiterated its position on the need for a coordinated approach based on solidarity and responsibility in preventing another tragedy. Moreover, the

European Parliament sought to steer away from the security-centred approach by calling for a human-rights approach to EU migration and border management while recalling the extraterritorial application of the ECHR.

- The 2014 Commission proposal for a Visa Code (recast) extends the possibility for the Member States to cooperate with external service providers. Those tasks that external service providers may be entrusted with relate closely to assessing the admissibility requirements for a visa application laid down in Article 19 (1). Given the possibility to derogate from the admissibility requirements laid down in Article 19 (1) on, inter alia, humanitarian grounds pursuant to Article 19 (4), it is concluded that the outsourcing of tasks to external service providers seems to illustrate one of the weaknesses of not having established a separate procedure for lodging and processing applications for humanitarian visas in the Visa Code. Accordingly, since Article 19 in practice serves as a filter for applications to be processed under Article 25 (1), it is of paramount importance to protection seekers that the use of external service providers will not hinder the further processing of visa applications that do not meet the admissibility requirements, but which may have benefited from a waiver from the admissibility requirements had a proper assessment of possible humanitarian grounds been conducted. In addition, the proposal introduces the notion of ‘mandatory representation’, under which, if the Member State competent to process the visa application is neither present nor represented under a representation arrangement in a given third country, any other Member State present in that country is obliged to process visa applications on its behalf. Moreover, consulates of representing Member States are no longer obliged, as a rule, to present the application to the relevant authorities of the represented Member State in order for them to take the final decision on potential refusal of a visa.

2.1 From the Tampere Conclusions to the post-Stockholm Guidelines

2.1.1 *A comprehensive approach to an effective common immigration policy: Exploring avenues of legal access to EU territory for third-country nationals in need of protection*

The conclusions of the Tampere European Council of 1999 already stressed the importance of striking a balance between migration/border control and protection in developing common policies on asylum and immigration:

“It would be in contradiction with Europe’s traditions to deny such freedom [as conferred on Union citizens] to those whose circumstances lead them **justifiably to seek access to our territory**. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes. These common policies must be based on principles which are both clear to our own citizens and also **offer guarantees** to those who **seek protection in or access to** the European Union”.⁹² (Emphasis added.)

And the aim of this common approach was, inter alia, to achieve

“[...] an open and secure European Union, **fully committed** to the obligations of the **Geneva Refugee Convention** and other relevant **human rights instruments**, and able to respond to humanitarian needs on the basis of solidarity”.⁹³ (Emphasis added.)

Moreover, the Tampere Conclusions called for a further development of a common active visa policy, and, where necessary, the development of common EU visa issuing offices.⁹⁴

⁹² Presidency Conclusions at the Tampere European Council 15-16 October 1999, Conclusion 3. Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, p. 30. In fact, and as observed by den Heijer, the Tampere Conclusions confirmed the comprehensive approach to an effective Union immigration policy proposed by the Commission back in 1994, integrating the external dimension into the Union’s immigration and asylum policy, European Commission, Communication from the Commission to the Council and the European Parliament on immigration and asylum policies, COM(1994) 23 final, 23 February 1994. den Heijer, M. (2011), *Europe and Extraterritorial Asylum*, p. 177.

⁹³ *Supra*, Tampere Conclusions, Conclusion 4.

As mandated by the European Council in its Tampere Conclusions,⁹⁵ the Commission explored avenues of legal access to EU territory for third-country nationals seeking protection alongside the creation of the CEAS. Accordingly, the Commission Communications of November 2000 and November 2001 emphasised and reiterated the need for a comprehensive and balanced approach to the common immigration policy, ensuring sufficient refugee protection within a system of efficient countermeasures against irregular migratory flows.⁹⁶

Subsequently, and as announced in its Communication of November 2001, the Commission launched feasibility studies on those themes, and in particular a feasibility study on the processing of asylum requests made outside the EU.⁹⁷

2.1.2 PEPs: Offering a framework for facilitating the safe and legal access of third-country nationals to EU territory

In 2002, the Danish Centre for Human Rights carried out the study on behalf of the European Commission on the feasibility of processing asylum claims outside the EU against the backdrop of the common European asylum system and the goal of a common asylum procedure.⁹⁸ The study outlines and examines practice and the legal framework on the use of PEPs in a selection of European states and in three non-European states, as well as the international and European legal framework of relevance to protection seekers and PEPs.⁹⁹

The study finds that

“[l]egal obligations under human rights instruments such as the ECHR suggest that states may find themselves obliged to allow access to their territories in exceptional situations. Where such access is denied, claimants may rely on the right to a remedy. These are further reasons supporting the conception and operation of formalised Protected Entry Procedures, which offer a framework for handling such exceptional claims. Protected Entry Procedures would be coherent with the *acquis* as it stands today. Nothing in the present *acquis* curtails the freedom of individual Member States to provide for a Protected Entry Procedure at a unilateral level. Furthermore, there is a Community competence for developing a joint normative framework.” Moreover, “[t]his study suggests that EU Member States consider Protected Entry Procedures as part of a comprehensive approach, complementary to existing territorial asylum systems”.¹⁰⁰

Against this background, the study presents five proposals that Member States could consider when developing PEPs in the future, including a) the **flexible use of the visa regime**, b) a **gradual harmonisation** through a Directive based on best practices and c) the introduction of a **Schengen Asylum Visa**.¹⁰¹ The proposal for a flexible use of the visa regime provides for a gradual development of EU visa policies with systematic, yet initially informal, discretion for Member States in granting short-term visas based on

⁹⁴ Supra, para. 22.

⁹⁵ Supra, para. 15.

⁹⁶ Communication from the Commission to the Council and the European Parliament: Towards a common asylum procedure and a uniform status, valid throughout the Union, for persons granted asylum, COM(2000) 755 final, 22 November 2000, in particular paras. 1.2, 2.3.1 and 2.3.2, and Communication from the Commission to the Council and the European Parliament on a common policy on illegal immigration, COM(2001) 672 final, 15 November 2001, in particular part II, para. 3.2. Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 31-32; and Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, p. 31.

⁹⁷ Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, pp. 31-32; and Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, p. 3.

⁹⁸ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission.

⁹⁹ The feasibility study drew on information provided in an earlier study on PEPs: Noll, G. et al. (April 2002), *Safe Avenues to Asylum? The Actual and Potential Role of EU Diplomatic Representations in Processing Asylum Requests*, The Danish Centre for Human Rights, UNHCR.

¹⁰⁰ Supra, pp. 4 and 5.

¹⁰¹ Supra, pp. 5-6, proposal one, four and five, respectively.

protection considerations, with a focus on “[...] strategic developments rather than sketching detailed legal instruments [...]”. By contrast, the proposals for a gradual harmonisation through a Directive based on best practices and for a Schengen Asylum Visa are legal in nature.

The proposal on a **gradual harmonisation** through a Directive based on best practices “[...] aims at a Union-wide dissemination of best practices, while largely retaining a unilateral focus. It has been given the form of a [‘Protection Visa Directive’].” The proposal entails that short-term entry visas of limited territorial validity may be granted on protection grounds at the discretion of the Member States’ national authorities. The ‘Protection Visa Directive’ would lay down minimum standards for the Member States to grant protection visas (i.e. a visa granted on humanitarian grounds pursuant to the then Article 5 (2) of the Schengen Convention) to protection seekers. This PEP would complement the ordinary territorial asylum procedures and be integrated into those procedures to the maximum extent possible. This would mean, for example, that “[...] the Asylum Procedures Directive [...] shall apply [...]” after the extraterritorial filing (including in the country of origin) of a claim for a protection visa and the entry into the territory of a Member State.¹⁰²

The proposal for a **Schengen Asylum Visa** is the most ambitious and formal in nature insofar as it seeks “[...] to regulate the allocation of responsibility to process applications for protection visas among Member States” and since it has “[...] been cast in the form of a Regulation,” establishing criteria and mechanisms for determining the Member State responsible for examining an application for a protection visa lodged at a diplomatic representation of a Member State. The proposal builds on the basic framework established by the proposed ‘Protection Visa Directive’ and opens up the possibility of using a representation mechanism in the processing of protection visas. The system established would complement the ordinary territorial asylum procedures entailing, for example, that the procedure would be regulated by the Asylum Procedures Directive upon entry.¹⁰³

2.1.3 Commission follow-up to the feasibility study

Following on from the feasibility study, the Commission adopted a Communication in March 2003 within which the term ‘**protected entry schemes**’ was applied for the first time explicitly by the Commission as part of a comprehensive approach. The Commission proposed that the suggestions contained in the feasibility study be carefully examined and evaluated, particularly as regards the role of the Member States, which had not yet reached consensus. Moreover, given the diverse and inconsistent practice in the Member States, diminishing the impact of protected entry schemes, the Commission argued that there was a strong case for harmonisation in this area, and recommended that

“[...] more detailed serious thought be given to the **question of access to the territories** of Member States for persons **in need of international protection** and compatibility between stronger protection for these people and respect for the principle of non-refoulement on the one hand and measures to combat illegal immigration, trafficking in human beings and external border control measures on the other”.¹⁰⁴ (Emphasis added.)

In its subsequent Communication of June 2003, the Commission identified three policy objectives, including the **orderly** and **managed arrival** of persons in need of international protection into the EU. It proposed to further explore the viability of setting up of an EU Regional Task Force to undertake certain functions, such as resettlement and PEPs, and the gradual harmonisation through a Directive based on best practices,¹⁰⁵ both of which had been proposed in the feasibility study. In particular, the Commission suggested that

“[...] the strategic use and the **introduction of Protected Entry Procedures** and Resettlement Schemes should be considered.” (Emphasis added.)

¹⁰² Supra, pp. 6 and 232-244.

¹⁰³ Supra, pp. 5-6, 223, 225 and 244-251.

¹⁰⁴ Communication from the Commission to the Council and the European Parliament on the common asylum policy and the Agenda for protection (Second Commission report on the implementation of Communication COM(2000) 755 final of 22 November 2000), COM(2003) 152 final, 26 March 2003, p. 16.

¹⁰⁵ Communication from the Commission to the Council and the European Parliament: Towards more accessible, equitable and managed asylum systems, COM(2003) 315 final, 3 June 2003, para. 6.1.2.3, pp. 14-16.

It goes on to ask the European Parliament, Council and the European Council to endorse specific elements identified in the Communication, such as **managed arrival in the EU**, and a **legislative instrument on PEPs**.¹⁰⁶

At the 2003 Thessaloniki European Council, the European Council took note of the Commission Communication and invited the Commission to

“[...] explore all parameters in order to **ensure more orderly and managed entry** in the EU of persons in need of international protection [...]”.¹⁰⁷ (Emphasis added.)

This was followed by the EU Italian Presidency seminar: ‘Towards more orderly and managed entry in the EU of persons in need of international protection,’ held in Rome on 13 and 14 October 2003, where Member States’ representatives discussed the findings of the feasibility study. During this seminar, “[...] it became clear [...] that with regard to the potential of Protected Entry Procedures, there is **not the same level of common perspective and confidence among Member States** as exists vis-à-vis resettlement”,¹⁰⁸ and the study was “[...] found too radical and did not get political support” amongst the Member States.¹⁰⁹ The European Parliament, on the other hand, was positive towards the notion of PEPs.¹¹⁰

The Commission’s response to Thessaloniki Conclusion 26 on resettlement was a Communication adopted later in June 2004.¹¹¹ Due to the lack of common perspective and confidence among Member States with regard to PEPs, the Commission **dropped the idea of suggesting an EU PEP mechanism** as a stand-alone policy proposal.¹¹² Instead, the Commission proposed the introduction of EU Resettlement Schemes and EU Regional Protection Programmes.¹¹³

Not until June 2008 did the Commission mention PEPs again.¹¹⁴ While reiterating the principle of a comprehensive and balanced migration policy, the Commission stated, as part of its overarching objectives, that the CEAS should

“ensure **access for those in need of protection**: asylum in the EU must remain accessible. Legitimate measures introduced to curb irregular migration and protect external borders should avoid preventing refugees’ access to protection in the EU while ensuring a respect for fundamental rights of all migrants. This equally translates into efforts to facilitate access to protection outside the territory of the EU;” and “ensure **coherence with other policies** that have an impact on international protection, notably: border control, the fight against illegal immigration and return policies”.¹¹⁵

¹⁰⁶ Supra, Part VII, pp. 21-22.

¹⁰⁷ Presidency Conclusions at the Thessaloniki European Council 19-20 June 2003, Conclusion 26. Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, pp. 33-34.

¹⁰⁸ Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin: “Improving access to durable solutions,” COM(2004) 410 final, 4 June 2004, para. 35.

¹⁰⁹ Lepola, O. (2011), *Counterbalancing externalized border control for international protection needs: humanitarian visa as a model for safe access to asylum procedures*, University of Birmingham, part 5.2.

¹¹⁰ European Parliament Resolution on the Communication from the Commission to the Council and the European Parliament entitled “towards more accessible, equitable and managed asylum systems” (COM(2003) 315 - C5-0373/2003 - 2003/2155(INI)), P5_TA(2004) 0260, 1 April 2004, para. 29.

¹¹¹ Communication from the Commission to the Council and the European Parliament on the managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin: “Improving access to durable solutions,” COM(2004) 410 final, 4 June 2004.

¹¹² Supra, para. 35. Cf. den Heijer, M. (2011), *Europe and Extraterritorial Asylum* pp. 197-198; and ECRE (December 2007), *Defending Refugees’ Access to Protection in Europe*, p. 51.

¹¹³ Supra, COM(2004) 410 final, paras. 56-57 and 59.

¹¹⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of Regions: Policy Plan on Asylum - an integrated approach to protection across the EU, COM(2008) 360 final, 17 June 2008. Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, pp. 35-36.

¹¹⁵ Supra, COM(2008) 360 final, para. 2, pp. 3-4.

Moreover, while citing the 2002 feasibility study and reiterating the Tampere Conclusions as well as its previous Communications, the Commission announced that it would examine **PEPs** and the **flexible use of the visa regime**, based on protection considerations, and stated that there was room for common action in this area, which should lead to better access to protection and reduce smuggling.¹¹⁶

In the Council of the European Union's European Pact on Immigration and Asylum of September 2008, the Council of the European Union responded to the Commission Communication of June 2008 and reaffirmed that

“[...] migration and asylum policies **must comply with the norms of international law**, particularly those that concern human rights, human dignity and refugees.” (Emphasis added.)

In addition, the Council of the European Union made the commitment to make border controls more effective and stressed that

“[...] the necessary strengthening of European border controls **should not prevent access to protection systems** by those people entitled to benefit under them”.¹¹⁷ (Emphasis added.)

In its Resolution of March 2009 on the Commission Communication of June 2008, the European Parliament noted

“[...] with great interest the idea of setting up ‘**Protected Entry Procedures**’ and strongly encourages the Commission to give due consideration to the specific procedures for and the practical implications of such measures”.¹¹⁸ (Emphasis added.)

2.1.4 The Stockholm Programme

In the run-up to the adoption of the Stockholm Programme, the Commission issued another Communication in June 2009,¹¹⁹ in which it emphasised the need to balance security measures with human rights and international protection considerations:

“Development of **integrated border management** requires the continued modernisation of the Schengen *acquis* and increased cooperation in order to ensure better coordination of the objectives of controlling the different flows (goods and people). Maintaining a high level of internal security must go hand in hand with absolute respect for human rights and international protection”.

Moreover, the Commission pointed to the entry into force of the **Visa Code**, again mentioning the issue of protected entry and for the first time explicitly mentioned **humanitarian visas**, with a reference to the need to establish procedures for PEPs and the issuing of humanitarian visas:

“**Access to protection** and adherence to the principle of *non refoulement* must be assured.” And “[i]n this context new forms of responsibility for protection might be considered. **Procedures for protected entry and the issuing of humanitarian visas should be facilitated**, including calling on the aid of diplomatic representations or any other structure set up within the framework of a global mobility management strategy”.¹²⁰ (Emphasis added.)

On the basis of the Commission Communication of June 2009, the European Council adopted the Stockholm Programme in December 2009.¹²¹ In the Programme, the European Council reaffirmed the position expressed in the European Pact on Immigration and Asylum and called for the further development of integrated border management and greater efforts to combat ‘illegal’ migration, encouraged the establishment of a common visa application procedure and invited the Commission to explore

¹¹⁶ Supra, para. 5.2.3, pp. 10-11.

¹¹⁷ 24 September 2008 (07.10) (OR.fr), 134440/08, pp. 3-4, 9 and 11.

¹¹⁸ European Parliament Resolution on the future of the Common European Asylum System (2008/2305(INI)), P6_TA(2009)0087, 10 March 2009, para. 49. Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, p. 36.

¹¹⁹ Communication from the Commission to the European Parliament and the Council: An area of freedom, security and justice serving the citizen, COM(2009) 262 final, 10 June 2009.

¹²⁰ Supra, paras. 4.2.3.1, 4.2.3.3 and 5.2.3, respectively

¹²¹ The Stockholm Programme - an open and secure Europe serving and protecting citizens, [2010] OJ C 115/1. Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, pp. 36-37.

“[...] **new approaches concerning access to asylum procedures** targeting main countries of transit, such as protection programmes for particular groups or certain procedures for examination of applications for asylum, in which Member States could participate on a **voluntary basis**”.¹²² (Emphasis added.)

Accordingly, the European Council did not explicitly endorse the Commission’s notion of facilitating PEPs and humanitarian visa and “[c]rucially, the reference to responsibility has disappeared, considering that Member States should participate in any resulting initiative not due to any legal obligation, but ‘on a voluntary basis’”.¹²³

In April 2010, the Commission adopted its Action Plan to implement the Stockholm Programme.¹²⁴ As one of the actions to be taken in the field of the external dimension of asylum, the Commission stated that it aimed to adopt a **Communication on new approaches concerning access to asylum procedures targeting main transit countries** in 2013.¹²⁵ In addition, and with regard to visa policy, the Commission aimed to adopt a Communication in 2014 on a new concept of the European visa policy, which would assess the possibility of establishing a common European issuing mechanism for short-term visas. The planned Communication on new approaches concerning access to asylum procedures targeting main transit countries is, however, yet to materialise, and on 30 September 2013, the EU Home Affairs Twitter profile announced that “[t]here are for the time being no concrete plans for the adoption of such a Communication”.¹²⁶

In its Resolution of April 2014 on the mid-term review of the Stockholm Programme, the European Parliament expressed

“[...] deep sadness and regret at the tragic loss of life at the borders of the EU, particularly in the Mediterranean Sea; reiterates its opinion that the events off Lampedusa should be a turning point for the EU, and that the only way to prevent another tragedy is to adopt a **coordinated approach** based on solidarity and responsibility, supported by **common instruments**.” (Emphasis added.)

It went on to call

“[...] on the Member States to make use of the current provisions of the Visa Code and the Schengen Borders Code allowing the issuing of **humanitarian visas** [...]” (Emphasis added.)

Moreover, the European Parliament called for

“[...] a **human-rights-based approach** to EU migration and border management such that the rights of regular and irregular migrants and other vulnerable groups are always the first consideration; recalls the **extraterritorial application of the European Convention on Human Rights** in the implementation of EU migration policy, as ruled by the European Court of Human Rights”.¹²⁷ (Emphasis added.)

¹²² Supra, The Stockholm Programme, paras. 5.1 and 6.2.3. den Heijer, M. (2011), *Europe and Extraterritorial Asylum*, p. 180.

¹²³ Guild, E. and Moreno-Lax, V. (December 2013), *Current challenges for international refugee law, with a focus on EU policies and EU co-operation with the UNHCR*, Briefing paper, EP, part 5.3.

¹²⁴ Communication from the Commission to the European Parliament, the Council, the European and Social Committee and the Committee of the Regions: Delivering an area of freedom, security and justice for Europe’s citizens - Action Plan Implementing the Stockholm Programme, COM(2010) 171 final, 20 March 2010.

¹²⁵ Lepola, O. (2011), *Counterbalancing externalized border control for international protection needs: humanitarian visa as a model for safe access to asylum procedures*, University of Birmingham, part 3.

¹²⁶ Response available at <https://twitter.com/RickardOlseke/status/384595410372673536>. See also Commission response of 6 August 2012 to a Parliamentary question stating that the Commission Work Programme for 2013 will announce an appropriate timing for the initiative, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2012-006207&language=EN> (both accessed 10 June 2014). However, no such initiative appears to have been included in either the 2013 or the 2014 Work Programmes.

¹²⁷ European Resolution on the mid-term review of the Stockholm Programme (2013/2024(INI)), P7_TA(2014)0276, 2 April 2014, paras. 76, 83 and 103, respectively.

2.1.5 *The Task Force Mediterranean: identifying areas of actions on migration and asylum*

The tragedy off the Italian island of Lampedusa on 3 October 2013, where more than 350 people lost their lives, put trans-Mediterranean migration back at the top of the EU political agenda.¹²⁸ Following the Justice and Home Affairs Council of 7-8 October 2013, the Task Force Mediterranean was set up under the auspices of the Commission.

In its Resolution of October 2013 on migratory flows in the Mediterranean, with particular attention to the tragic events off Lampedusa, the European Parliament welcomed the Commission's intention to establish a task force on the issue of migratory flows in the Mediterranean and insists that Parliament should be involved in such a task. In addition, the European Parliament emphasised that

“[...] **EU legislation provides some tools**, such as the Visa Code and the Schengen Borders Code, which make it possible to **grant humanitarian visas**”. (Emphasis added.)

The European Parliament, moreover, called

“[...] on the Member States to take measures to enable asylum seekers to access the Union asylum system in a safe and fair manner”.

And noted that

“[...] legal entry into the EU is preferable to a more dangerous irregular entry, which could entail human trafficking risks and loss of life”.

It then called for

“[...] a more **holistic approach** to migration in order to ensure that issues interlinked with migration can be dealt with in a comprehensive manner”. (Emphasis added.)

And was of the opinion that

“[...] Lampedusa should be a turning point for Europe and that the only way of preventing another tragedy is to **adopt a coordinated approach** based on solidarity and responsibility, with the support of **common instruments**”.¹²⁹ (Emphasis added.)

“The main emphasis of the Task Force [Mediterranean], unfortunately, but perhaps unsurprisingly, was on preventing migrants and refugees from heading for and entering into the EU. The Commission Communication on the work of the Task Force [of December 2013], however, properly emphasised the need to explore creative solutions, including providing alternative avenues of entry to potential asylum seekers”.¹³⁰

Indeed, in its December 2013 Communication on the work of the Task Force, the Commission argued for a holistic approach and identified five main areas of action to be feed into that integrated approach to the Mediterranean, including **reinforced legal avenues to Europe**.¹³¹

Thus, 38 lines of action have been developed by the Task Force Mediterranean, including for the Commission to explore

“[...] further possibilities for protected entry in the EU in the context of the reflection on the future priorities in the Home Affairs area after the expiry of the Stockholm Programme. These could include: (a) **guidelines on a common approach to humanitarian permits/visas** (b) feasibility study on possible joint processing of protection claims outside of the European Union without

¹²⁸ Manrique Gil, M. et al. (March 2014), *Mediterranean flows into Europe: Migration and the EU's foreign policy*, in-depth analysis, DG EXPO, EP, p. 4.

¹²⁹ European Parliament Resolution on migratory flows in the Mediterranean, with particular attention to the tragic events off Lampedusa (2013/2827(RSP)), P7_TA-PROV(2013)0448, 23 October 2013, paras. 5, G, 21, 22, 23 and 2, respectively.

¹³⁰ Diedring, M. (January 2014), *An Open and Safe Europe – What Next? Legal Routes to Access Asylum in Europe Workshop*, p. 1.

¹³¹ Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean, COM(2013) 869 final, 4 December 2013, p. 2.

prejudice to the existing right of access to asylum procedures in the EU. EASO, FRA and Frontex and, where relevant, UNHCR, ILO or IOM, should be involved in the execution of these tasks”.¹³² (Emphasis added.)

The European Council welcomed the actions proposed by the Commission at its 2013 summit in Brussels. The European Council thus called for the mobilisation of all efforts in order to implement actions proposed with a clear timeframe to be indicated by the Commission, yet placed emphasis on actions other than those relating to access to EU territory. In addition, the European Council invited the Commission to regularly monitor the implementation of the operational actions and confirmed that it will return to the issue in June 2014 when strategic guidelines will be defined.¹³³

2.1.6 The post-Stockholm Guidelines

In March 2014, the Commission adopted a Communication aimed at identifying challenges and measures to be discussed with the European Parliament and the Council. The Communication was to be taken into account by the European Council in drafting its post-Stockholm Guidelines for the Area of Freedom, Security and Justice.¹³⁴ In preparing that Communication, the Commission consulted stakeholders and interested parties and also hosted a stakeholder conference in January 2014¹³⁵. One of the stakeholder contributions to this conference was the Legal Routes to Access Asylum in Europe Workshop hosted by the Secretary-General of ECRE.¹³⁶ In respect of humanitarian visas, ECRE stated that

“**EU guidelines on a common approach to the application of Article 25 of the EU Visa Code** allowing for the issuing of short-stay visa with limited territorial validity on humanitarian grounds could further promote the use of this provision as a concrete tool to ensure legal and safe access to the EU for protection purposes. At the same time, the pooling of resources to enhance the capacities of Member States’ embassies and consular posts to process requests for humanitarian visa and/or protected entry procedures should be encouraged”.¹³⁷ (Emphasis added.)

¹³² Supra, COM(2013) 869 final, para. 2.4, p. 13.

¹³³ Conclusions at the European Council 19-20 December 2013, Conclusions 41 and 42.

¹³⁴ Communication from the Commission to the European Parliament, the Council, The European Economic and Social Committee and the Committee of the Regions: An open and safe Europe: making it happen, COM(2014) 154 final, 11 March 2014.

¹³⁵ See http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/future-of-home-affairs/high-conference-jan-2014/index_en.htm (accessed 12 June 2014).

¹³⁶ Diedring, M. (January 2014), *An Open and Safe Europe – What Next? Legal Routes to Access Asylum in Europe Workshop*; and ECRE (January 2014), *An Open and Safe Europe - What Next?*, ECRE submission to the European Commission Consultation on the Future of Home Affairs Policies.

¹³⁷ Supra, ECRE submission, p. 16.

Photo from the high-level conference: ‘An Open and Safe Europe - What Next?’ Held on January 29-30, 2014, hosted by the European Commission



Source: European Commission (available at http://ec.europa.eu/dgs/home-affairs/e-library/multimedia/photos/index_en.htm#P-024974 (accessed 26 June 2014)).

In its March 2014 Communication, under the heading ‘Addressing External Legal Challenges and Legal Routes to Access Asylum in the EU,’ the Commission stated that

“[t]he EU should seek to ensure a **more orderly arrival** of persons with well-founded protection needs, reducing the scope for human smuggling and human tragedies. [...] Protected Entry Procedures - enabling people to request protection without undertaking a potentially lethal journey to reach the EU border - could complement resettlement, starting with a **coordinated approach to humanitarian visas and common guidelines**”.¹³⁸ (Emphasis added.)

As mandated by the European Council,¹³⁹ in its May 2014 Staff Working Document, the Commission presented an overview of the main actions and initiatives identified by the Task Force Mediterranean taken so far.¹⁴⁰

At its summit in Brussels in June 2014, the European Council defined the strategic guidelines of key priorities for the next five years within the area of Freedom, Security and Justice.¹⁴¹ In its conclusions, the European Council reaffirmed that a comprehensive approach to migration, asylum and borders policy is required,

“[...] optimising the benefits of legal migration and offering protection to those in need while tackling irregular migration resolutely and managing EU’s external borders efficiently”.

¹³⁸ Supra, COM(2014) 154 final, para. 3.4, pp. 7-8.

¹³⁹ Conclusions at the European Council 19-20 December 2013, Conclusion 42.

¹⁴⁰ Commission Staff Working Document: Implementation of the Communication on the Work of the Task Force Mediterranean, SWD(2014) 173 final, Parts 1/2 and 2/2, 22 May 2014.

¹⁴¹ European Council, Conclusions at the European Council 26-27 June 2014.

Moreover, the European Council stated that addressing the roots of irregular migration flows is an essential part of EU migration policy, which,

“[...] together with the prevention and tackling of irregular migration, will help avoid the loss of lives of migrants undertaking hazardous journeys”.

In addition, cooperation with countries of origin and transit must be intensified and migration policies must become

“[...] a much stronger integral part of the Union’s external and development policies [...]”.

And, among other things, the focus should be put on

“[...] **fully implementing** the actions identified by the **Task Force Mediterranean**”. (Emphasis added.)

While requiring Integrated Border Management to be modernised, Frontex’ operational assistance reinforced and its reactivity increased, and that the possibilities of enhancing the external border control and surveillance by setting up a European system of border guards to be studied, the European Council identified the need of the common visa policy

“[...] to be modernised by facilitating legitimate travel and reinforced local Schengen consular cooperation while maintaining a high level of security and implementing the new Schengen governance system”.¹⁴²

Accordingly, the European Council did not explicitly endorse the Commission’s notion of reinforced legal avenues to Europe and a coordinated approach to humanitarian visas and common guidelines. Yet, the European Council did endorse that the actions identified by the Task Force Mediterranean should be fully implemented, one of which include reinforced legal avenues to Europe.¹⁴³

2.2 Commission proposal for a Visa Code

In April 2014, the Commission proposed a recast of the Visa Code;¹⁴⁴ a proposal focusing almost exclusively on financial and security issues.¹⁴⁵ Apart from the fact that the Commission did not use this opportunity to introduce substantial amendments to Articles 19 (4) and 25 (1) on humanitarian visas, two elements of the proposal are of relevance to the present study. Firstly, the proposal extends the possibility for the Member States to cooperate with external service providers in Article 38 (3) (with the arrangements for that cooperation laid down in Article 41) and, at the same time, scraps the obligation for Member States to maintain ‘direct access’ for applications to be submitted at Member State consulates by deleting Article 17 (5). In addition, the proposal introduces the notion of ‘mandatory representation’ in Article 5, for the purposes of ensuring geographical coverage in visa processing.¹⁴⁶

Since the notion of ‘mandatory representation’ and the outsourcing of tasks relating to visa applications to external service providers raise issues of relevance to the object of the present study, these elements of the Commission proposal are examined below.

¹⁴² Supra, Conclusions 5, 8 and 9, respectively.

¹⁴³ For a detailed analysis of the post-Stockholm Guidelines, see Carrera, S. and Guild, E. (July 2014), *The European Council’s Guidelines for the Area of Freedom, Security and Justice 2020: Subverting the ‘Lisbonisation’ of Justice and Home Affairs?* CEPS Essay, No. 13, arguing that the Guidelines are mainly driven by the interests and agendas of national Ministries of Interior and Justice and are only ‘strategic’ to the extent that they aim at first, re-injecting ‘intergovernmentalism’ or bringing back the old EU Third Pillar ways of working to the new EU institutional setting of the Area of Freedom, Justice and Security and second, at sidelining the EU Charter of Fundamental Rights and rule of law.

¹⁴⁴ Proposal for a Regulation of the European Parliament and of the Council on the Union Code on Visas (Visa Code) (recast) {SWD(2014) 67 final} {SWD(2014) 68 final}, COM(2014) 164 final, 1 April 2014.

¹⁴⁵ Report from the Commission to the European Parliament and the Council: A smarter visa policy for economic growth {SWD(2014) 101 final}, COM(2014) 165 final, 01 April 2014. See also Communication from the Commission to the Council and the European Parliament: Implementation and development of the common visa policy to spur growth in the EU, COM(2012) 649 final, 07 November 2012.

¹⁴⁶ Supra, COM(2014) 164 final, respectively pp. 8 and 4-5.

2.2.1 Extension of the possibility of outsourcing tasks to external service providers

According to the proposed Article 38 (3), cooperation with external service providers is no longer to be a ‘last resort solution’. In addition, Member States are no longer obliged to maintain the possibility of ‘direct access’ for all applicants to lodge their applications directly at Member State consulates (deletion of Article 17 (5)).

External service providers may be designated to

- provide general information on visa requirements and application forms;
- inform the applicant of the required supporting documents;
- collect data and applications (including biometric identifiers) and transmit the application to the consulate;
- collect the visa fee;
- manage appointments for the applicant, where applicable, at the consulate or with the external service provider;
- collect the travel documents, including a refusal notification if applicable, from the consulate and return them to the applicant.

External service providers may, on the other hand, not be entrusted with, inter alia, the examination of applications, interviews and the decision on applications.¹⁴⁷

The tasks that external service providers may be entrusted with thus relate closely to the admissibility requirements for a visa application laid down in Article 19 (1). As outlined above, it is possible to derogate from the admissibility requirements laid down in Article 19 (1) on, inter alia, humanitarian grounds pursuant to Article 19 (4). As such, the outsourcing of tasks to external service providers seems to illustrate one of the weaknesses of not having established a separate procedure for lodging and processing applications on humanitarian visas in the Visa Code (see Figure 5). Indeed, in para. 1.2.2.1 above, it was concluded that Article 19 in practice serves as a filter for applications to be processed under Article 25 (1). It is therefore of paramount importance to protection seekers that the use of external service providers will not hinder the further processing of visa applications that do not meet the admissibility requirements, but which may have benefited from a waiver from the admissibility requirements had a proper assessment of possible humanitarian grounds been conducted.

A mechanism that may potentially ensure that such assessments are conducted has been proposed in Article 41 (12). Pursuant to this provision, the Member States shall report on an annual basis to the Commission on cooperation with external service providers, including on the monitoring of external service providers.¹⁴⁸

2.2.2 ‘Mandatory representation’

According to the Commission, under the notion of ‘mandatory representation’, if the Member State competent to process the visa application is neither present, nor represented under a representation arrangement in a given third country, any other Member State present in that country is obliged to process visa applications on its behalf. The stated aim is to ensure geographical coverage in any third country where there is at least one consulate present to process visa applications.¹⁴⁹

The proposed Article 5 (2) provides that, in cases of ‘mandatory representation’, applicants are entitled to lodge their application at

- a) the consulate of one of the Member States of destination of the planned visit,
- b) the consulate of the Member State of first entry, if point a) is not applicable,
- c) in all other cases at the consulate of any of the Member States that are present in the country concerned.

No changes that appear to be of particular relevance to the object of this study have been proposed to Article 5 (1) (a) on the Member State competent for examining and deciding on an application for a uniform visa,

¹⁴⁷ Supra, Article 41 (3) and (5).

¹⁴⁸ Supra, pp. 8, 17, 25.

¹⁴⁹ Supra, pp. 4-5.

but the current Article 8 governing representation arrangements has been deleted and replaced by Article 39. With Article 8 (4) (d) and (2) repealed, consulates of representing Member States are no longer obliged, as a rule, to present the application to the relevant authorities of the represented Member State in order for them to take the final decision on potential refusal of a visa.

In addition, Article 39 (8) takes up the substance of Article 8 (9), which provides that if the consulate of the representing Member State cooperates with external service providers or with accredited commercial intermediaries, that cooperation shall include applications covered by representation arrangements.

3. NATIONAL PRACTICE: Have humanitarian LTV Schengen visas been used in the past?

KEY FINDINGS

- From the data available for the purposes of the present study, it emerges that 16 EU Member States have or have had some type of visa - be it national and/or uniform Schengen and/or LTV Schengen visa - available for humanitarian reasons.
- Although strictly outside the scope of the present study, it should be noted that the possibility to issue national type D visas for humanitarian reasons can and has been deployed by eight Schengen EU Member States (Belgium, Germany, France, Hungary, Italy, Latvia, Luxembourg and Poland). In France, Italy and Latvia, these visas can and have been (France and Italy) issued in emergency situations, such as the Haiti earthquake in 2010, after the attack on Christians in Iraq in Baghdad Cathedral in 2010 (France), and with the recent influx of North African migrants following the Arab Spring (Italy). In addition, the UK previously made it possible to apply for a national visa from abroad for the purposes of seeking asylum in the UK.
- In 2013, the Member States' notifications on visas applied for and issued suggest that the number of Schengen type C LTV visas issued by the Member States totalled 176,948. In 2012, this figure was 298,117 LTV visas. These statistics do not, however, provide any information about the specific reasons for issuing LTV visas. However, data available in various studies suggest that a number of Member States have applied PEPs, such as the extraterritorial submission of asylum claims, in their national legal order, and that a number of Member States have or have had Schengen visas available for humanitarian reasons.
- LTV Schengen visas for humanitarian reasons may be or have been granted in four EU Member States for humanitarian reasons (Finland, Italy, Malta and Portugal), including protection-related reasons (Italy, Malta and Portugal) and medical reasons (Portugal). These visas have offered a complementary channel for access to territory, generally on an exceptional basis. In Finland, such LTV visas have been issued to persons who had to travel to Finland for the purpose of being heard in international court cases - such as in the so-called Rwanda case. In Italy, visas cannot formally be issued for asylum purposes, but Italy informally allows access in exceptional cases. Accordingly, LTV visas were issued for tourism/courtesy reasons to respectively 150 Eritrean refugees from Libya recognised under the UNHCR mandate in 2007 and 2010 and 160 Palestinian refugees recognised under the UNHCR mandate and living in the Al Tanf camp situated at the Syrian-Iraqi border in 2009. In Malta, a number of LTV visas were issued on humanitarian grounds to persons who required evacuation from Libya due to the armed conflict in 2011.
- In addition, six EU Member States have or have had either uniform or LTV Schengen visas and/or national visas available for humanitarian reasons, including protection-related reasons (Austria, Denmark, France, Poland, Spain and the Netherlands), medical reasons (Poland) and family reunification purposes (Austria and the Netherlands). Unfortunately, it is not always clear from the information available to the present author which type of visa has been granted by a given Member State. In addition, it must be recalled that Articles 19 and 25 of the Visa Code entered into force only in 2010, which explains the data categorisation. Those Member States may issue or have issued visas on the basis of formal schemes (Austria, France, Poland and the Netherlands), or on the basis of ad hoc or exceptional schemes (Denmark and Spain).

3.1 National long-stay visas issued for humanitarian reasons

As described in para. 1.1.2 above, the issuing of long-stay visas remains at the discretion of the Member States pursuant to Article 18 of the Schengen Convention. Consequently, long-stay visas may be issued in accordance with national law or Union law.

Although it falls outside the scope of the present study to account for national practice on the issuing of long-stay visas, in order to paint the full picture, it should be observed that the possibility to issue national visas for humanitarian reasons is deployed by nine EU Member States, including one non-Schengen EU Member State. In addition, it should be noted that national type D visas “[...] are either a prerequisite for a subsequent residence or other permit to stay, or are considered a residence title themselves, depending on the visa legislation in a Member State, as well as provisions in EU legislation [...]”.¹⁵⁰

3.1.1 Member States that have or have had national visas available for humanitarian reasons

From a study carried out by the European Migration Network (EMN) in 2012, it appears that Belgium,¹⁵¹ Germany,¹⁵² France, Hungary, Italy, Latvia, Luxembourg and Poland have national type D visas “[...] at their disposal for humanitarian reasons. In France, Italy and Latvia, these visas can be issued in emergency situations [...]. In Italy, national type D visas were issued on the occasion of the recent North African flow of migration following the Arab Spring”.¹⁵³ In France, “[i]n the case of specific events, instructions are given to the consulates concerned to facilitate the issue of visas to some categories of applicants. This was the case for the Haiti earthquake in 2010 and after the attack on Christians in Iraq, in Baghdad Cathedral, in 2010”.¹⁵⁴ And, in 2001, between 80 and 90% of the approximately 25,000 Algerians who applied for asylum in France held a visa issued by French representations in Algeria.¹⁵⁵ In Belgium,¹⁵⁶ Italy¹⁵⁷ and Poland¹⁵⁸ such national type D visas may also be issued for the purposes of medical treatment.

¹⁵⁰ EMN (October 2012), *Visa Policy as Migration Channel*, European Migration Network, p. 13, cf. pp. 20-29.

¹⁵¹ As it stood in December 2009, such visas were delivered to very specific persons (e.g. high-profile persons, such as foreign politicians, opposition leaders) or clear-cut cases of protection needs, sometimes after Belgian authorities have been contacted by UNHCR. Apart from asylum-related cases, humanitarian visas are granted in other cases, for example to Rwandan nationals fleeing the genocide in 1994 and to Palestinian children in need of specialised medical care; BE EMN NCP (December 2009), *EU and non-EU harmonised protection statuses in Belgium*, Belgian National Contact Point to the European Migration Network, p. 40, cf. pp. 19 and 25. Cf. EMN (2010), *The different national practices concerning granting of non-EU harmonised protection statuses*, European Migration Network, p. 33; Lepola, O. (2011), *Counterbalancing externalized border control for international protection needs: humanitarian visa as a model for safe access to asylum procedures*, University of Birmingham, part. 5.1; and Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 4, 169-170 and 252.

¹⁵² ‘Admission from abroad’ may be granted in exceptional cases for a) reasons of international law or for pressing humanitarian reasons and b) the safeguarding of the political interests of the Federal Republic of Germany. In addition, the German Federal Authorities have been granted the authority to admit the entry of a group of foreigners who would otherwise have no regular possibilities of arriving to Germany when special political considerations apply. This provision provided the basis for admittance of *inter alia* ‘Boat People’ from Vietnam in the 1980s, Jewish immigrants from the former Soviet Union in the 1990s and persons under resettlement schemes, such as 2,500 refugees from Iraq who had fled to Jordan and Syria in 2008; DE EMN NCP (April 2009), *The Granting of Non-EU Harmonised Protection Statuses in Germany*, German National Contact Point to the European Migration Network, pp. 24-25, 27-28, 51-55; DE EMN NCP (2012), *Visa Policy as Migration Channel*, German National Contact Point to the European Migration Network, pp. 43-44; EMN (2010), *The different national practices concerning granting of non-EU harmonised protection statuses*, European Migration Network, p. 82; and Lepola, O. (2011), *Counterbalancing externalized border control for international protection needs: humanitarian visa as a model for safe access to asylum procedures*, University of Birmingham, part. 5.1.

¹⁵³ EMN (October 2012), *Visa Policy as Migration Channel*, European Migration, pp. 19 and 25. Cf. Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 4, 169-172 and 252.

¹⁵⁴ FR EMN NCP (July 2011), *Visa policy as migration channel*, French National Contact Point of the European Migration Network, p. 10. Lepola, O. (2011), *Counterbalancing externalized border control for international protection needs: humanitarian visa as a model for safe access to asylum procedures*, University of Birmingham, part. 5.1.

¹⁵⁵ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, p. 224.

¹⁵⁶ See note 170 above.

¹⁵⁷ EMN (October 2012), *Visa Policy as Migration Channel*, European Migration Network, pp. 25-26.

In addition, in 2002, the United Kingdom (a non-Schengen EU Member State) made it possible to apply for an entry clearance (national visa) from abroad for the purposes of seeking asylum in the UK.¹⁵⁹ The policy guidance on the discretionary referral to the UK Border Agency of asylum applications from abroad has, however, been withdrawn, and such applications will no longer be considered.¹⁶⁰

3.2 Schengen short-stay visas issued on humanitarian grounds

As described in para. 1.2.2 above, Article 25 of the Visa Code provides the legal basis for Member States to issue LTV visas on humanitarian grounds, for reasons of national interest or because of international obligations. In 2013, the Member States' notifications on visas applied for and issued suggest that the total number of Schengen type C LTV visas issued by the Member States amounted to 176.948. In 2012, the figure was 298.117 LTV visas.¹⁶¹ The statistics do not, however, provide any information as regards the specific reasons for issuing LTV visas, and the Commission indicates that it does not have detailed information as to those reasons.¹⁶²

With no official statistics available on the issuing of humanitarian Schengen visas, this study refers to the data available in the various studies on this subject. Indeed, those studies suggest that a number of Member States have applied PEPs, such as the extraterritorial submission of asylum claims, in their national legal order, and in particular that a number of Member States have issued or may issue Schengen visas for humanitarian reasons.¹⁶³ Such visas may be granted in the form of **LTV Schengen visas for humanitarian reasons** (Finland, Italy, Malta and Portugal), including **protection-related reasons** (Italy, Malta and Portugal) and **medical reasons** (Portugal). They constitute a complementary channel for access to territory and are issued by and large on an **exceptional basis**.

Unfortunately, it is not always clear from the information available which type of visa (uniform Schengen or LTV Schengen short-stay visa *or* national long-stay visa) has been granted by a given Member State. In addition, it must be recalled that Articles 19 and 25 of Visa Code entered into force only in 2010. Therefore, a special paragraph is dedicated to those additional six Member States allowing access through either **LTV or uniform Schengen short-stay visas and/or national long-stay visas for humanitarian reasons**, including **protection-related reasons** (Austria, Denmark, France, Poland, Spain and the Netherlands), **medical reasons** (Poland) and **family reunification purposes** (Austria and the Netherlands).

The data on the state of play at national, as extracted from various studies, is explained in the following sections.

¹⁵⁸ EMN (2010), *The different national practices concerning granting of non-EU harmonised protection statuses*, European Migration Network, p. 42, note 96; p. 43, note 104; and pp. 46-47.

¹⁵⁹ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 149-156.

¹⁶⁰ See https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257377/applicationsfromabroad.pdf (accessed 22 June 2014).

¹⁶¹ Statistics published on http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm (accessed 11 June 2014).

¹⁶² Answer from the Commission to a Parliamentary question, 9 August 2013, available at <http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2013-007729&language=EN>. Prior to this, a similar question was addressed to the Council (referring to the Commission) on 28 June 2013; see <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2013-007728+0+DOC+XML+V0//EN&language=EN> (both accessed 11 June 2014).

¹⁶³ As Switzerland is not an EU Member State, it has been deemed outside the scope of the present study to account for practice in Switzerland. However, it should be observed that Switzerland applies a highly formalised system of PEP; see Lepola, O. (2011), *Counterbalancing externalized border control for international protection needs: humanitarian visa as a model for safe access to asylum procedures*, University of Birmingham, part. 5.1; Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, pp. 52-60; and Oxfam GB (2005), *Foreign Territory: The Internationalisation of EU Asylum Policy*, p. 45.

3.3 Description of national practice on humanitarian visas

3.3.1 Member States that have or have had LTV Schengen visas available for humanitarian reasons

For protection-related reasons or medical reasons by large on an exceptional basis

In **Finland**, Section 25 of the Aliens Act rendered possible the issuing of LTV visas for humanitarian reasons by embassies until 2011. The aforementioned provision regulated the requirements for issuing LTV Schengen visas, and the Finnish Ministry of Foreign Affairs has considerable autonomy in guiding visa policy implemented by the embassies. Such LTV visas have been issued to, for instance, persons who had to travel to Finland for the purposes of being heard in international court cases - for example in the so-called Rwanda case. Such visas appear to have been issued on an exceptional basis. Section 25 was abolished in 2011 by an amendment to the Aliens Act. However, the amended Section 17 refers directly to the Visa Code and “[...] presents those visa-related actions to which the Visa Code is applied”.¹⁶⁴

In **Italy**, LTV visas were issued by Italian embassies for tourism/courtesy reasons to 150 Eritrean refugees from Libya recognised under the UNHCR mandate in 2007 and 2010 and 160 Palestinian refugees recognised under the UNHCR mandate and living in the Al Tanf camp situated at the Syrian-Iraqi border in 2009. The visas were issued as part of ‘informal’ resettlement operations, and upon arrival in Italy, the refugees were admitted to the ordinary asylum procedure. Italian law does not provide for visas to be issued for asylum purposes, but Italy thus informally allows access in exceptional cases. In addition, Italy has, on numerous occasions, adopted mechanisms to allow the entry and access of protection seekers to asylum on the basis of political decisions.¹⁶⁵

In **Malta**, a number of LTV visas were issued on humanitarian grounds to persons who required evacuation from Libya due to the armed conflict in 2011. Although Maltese legislation does not clearly provide for visas to be issued for asylum purposes, LTV visas have thus been granted on humanitarian grounds in exceptional circumstances.¹⁶⁶

In **Portugal**, LTV visas can be granted at border posts and recognised by a dispatch issued for humanitarian reasons (or national interest) by the Portuguese Ministry for Internal Administration for the purposes of entry and temporary stay in Portugal in exceptional circumstances. This visa regime is of “[...] an instrumental nature with regard to eventually accessing any of the protection statuses envisaged in national legislation”.¹⁶⁷ Such visas are issued to third-country nationals who do not meet the usual legal requirements, for example to “[...] those affected by sudden, severe illness and/or require [sic] medical assistance; illegal passengers on ships; shipwreck victims; and undocumented asylum seekers”.¹⁶⁸ In addition, LTV visas in the form of ‘Temporary Stay Visas’ may be issued by consulates to third-country nationals who require medical treatment and to their assisting and accompanying family members. The validity of such visas is three months, and visas may be extended whenever justified.¹⁶⁹ Moreover, as things stood in 2002, although Portugal did not have a formal procedure for submitting asylum applications at embassies, Portugal was – in

¹⁶⁴ Lepola, O. (2011), *Counterbalancing externalized border control for international protection needs: humanitarian visa as a model for safe access to asylum procedures*, University of Birmingham, part. 5.1.

¹⁶⁵ Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, pp. 44-45; and Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 4, 169-171 and 252.

¹⁶⁶ Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, p. 46.

¹⁶⁷ PT EMN NCP (2009), *Protection Statuses Complementing EU Legislation Regarding Immigration and Asylum in Portugal*, Portugal National Contact Point to the European Migration Network, p. 14.

¹⁶⁸ EMN (2010), *The different national practices concerning granting of non-EU harmonised protection statuses*, European Migration Network, pp. 38-39.

¹⁶⁹ PT EMN NCP (2009), *Protection Statuses Complementing EU Legislation Regarding Immigration and Asylum in Portugal*, Portugal National Contact Point to the European Migration Network, pp. 5, 18, 22-23, 26 and 29; and EMN (2010), *The different national practices concerning granting of non-EU harmonised protection statuses*, European Migration Network, p. 42, note 96, and p. 46.

exceptional circumstances and on a case-by-case basis – able to allow access by issuing entry visas. In 2002, Portugal had no experience with persons asking for protection at its diplomatic representations.¹⁷⁰

3.3.2 Member States that have or have had Schengen short-stay and/or national long-stay visas available for humanitarian reasons

For protection-related reasons or medical reasons on the basis of formal schemes

In **Austria**, since 1991 it has been possible for diplomatic or consular representations abroad to grant an entry visa to a) asylum seekers submitting an extraterritorial asylum application (in principle both inside and outside the country of origin) and likely to be granted asylum in the territorial asylum procedure as a Convention refugee after formally lodging an asylum application upon arrival in Austria and b) core family members requesting extension of international protection abroad. In 2003/2004, the PEP was formally limited to family reunification cases and cancelled for asylum seekers.¹⁷¹ Until then, asylum applications lodged with an embassy were automatically regarded applications for an entry authorisation, and the entry visa granted was usually a time-limited Schengen short-stay visa (type C) or a national long-stay visa (type D). Austria applied what is known as the he ‘likelihood standard’, used during a pre-screening and material assessment conducted to determine whether the applicant was likely to qualify under the Convention refugee definition (and not under the principle of *non-refoulement* in Article 33 of the Refugee Convention). This assessment was conducted without prejudice to the outcome of the territorial proceedings. The applicant was not protected by the Austrian representation while his/her application was being processed (average time was one month).

Although the Austrian system was law-based and highly formalised, practice with regard to protection seekers developed to become more restrictive than the legislator’s original intention. In practice, the Austrian procedure thus mainly served family reunification purposes, and entry visas on mere protection grounds - i.e. to persons without family connections in Austria - were granted in very few cases.¹⁷²

In **France**, at least until 2002, a non-law-based, yet formalised system of PEP, was operated. Under this system, French diplomatic and consulate representations receiving asylum applications abroad (inside and outside countries of origin) may issue ‘asylum visas’ on a discretionary and exceptional basis. The ‘asylum visa’ procedure formally separate from that of the territorial asylum procedure - initiated upon the territorial lodging of an asylum application - and asylum visas were granted without prejudice to the outcome of the territorial asylum proceedings. The issuing of such visas was based on protection issues, though links to France were considered as a positive element. Unless the applicant was in need of immediate protection and thus transferred to France, the applicant was not protected during the processing of his/her application.

As things stood in 2002, such visas were usually issued in the form of a regular short-term (type C) or long-term visas (type D). ‘Asylum visas’ did not exist officially and successful applicants were thus granted other types of visas, such as tourist, student, short-term or long-term visas. The representation could decide to forward applications for ‘asylum visas’ to the Ministry of Foreign Affairs, in which case the Ministry conducted a preliminary investigation to assess whether the claim fell under the general criteria for being granted refugee status or territorial asylum in France. In 2002, no official statistics were available. However, the French Ministry of Foreign Affairs estimated that about 120 to 160 cases were forwarded by the embassies and that two-thirds of these were subject to a positive decision.¹⁷³

In **Poland**, a residence visa may be issued in the shape of a uniform short-stay visa or a Polish long-stay visa (see para. 3.1 above) for the purposes of arrival for humanitarian reasons or national interest. Such visas are issued mainly where a foreigner’s entry into Poland is required for medical reasons, such as the need to

¹⁷⁰ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 4, 169-171 and 252.

¹⁷¹ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 95-106; and Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, pp. 38-39.

¹⁷² Ibid.

¹⁷³ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 107-117.

undergo a lifesaving medical procedure. The period of stay on the basis of such a visa may not exceed three months, although visas may be extended in special circumstances. In addition, a ‘special visa’, in the form of a residence visa, may be issued to third-country nationals who apply for asylum from abroad through a consulate to allow them entry into Poland and access to the asylum procedure. Both schemes are law-based.¹⁷⁴

In the Netherlands, until 2003, a law-based PEP provided for visas to be granted by embassies or consulates abroad (inside and outside the country of origin) for asylum purposes. The Dutch PEP entailed a double procedure under which a protection seeker lodged an application at diplomatic representations not formally for asylum, but for a ‘Regular Provisional Residence Permit’ (MVV, *Machtiging tot Voorlopig Verblijf*) with a validity of three months. The MVV granted entry into the Netherlands with the purpose of applying for a residence permit.¹⁷⁵ “Until the entry into force of the Visa Code, the MVV could be issued independently, but also in combination with an entry visa (Type D + C visa). This enabled the third-country national to travel in the Schengen area for a period of three months following the date of issue during the period in which the application for the residence permit was processed”. Hence, “[i]n order to prevent transit problems in those days [prior to the entry into force of the Visa Code], a positive decision to an application for an MVV in practice often resulted in the issuance of a Type D + C visa; a combination of a long-stay national visa (MVV) with a short-stay Schengen Type C visa”.¹⁷⁶ With regard to the safety of the applicant during the processing of his/her application, there were no specific procedures in place. However, it was possible to fast-track the examination of the procedure and also to process applications almost immediately in cases of urgency.¹⁷⁷

The application for an MVV lodged for asylum purposes enabled the authorities to verify prima facie compliance with entry and residence conditions and was thus directly related to the subsequent issuing of a residence permit. The Ministry of Foreign Affairs assumed formal responsibility for such applications in the Netherlands, and applications were examined by a special unit within the Ministry of Justice. If the assessment determined that the applicant would be eligible for asylum, an MVV was issued. Once on Dutch soil, a formal application for asylum was submitted by the protection seeker. This was, however, merely a formality, and applications were only very rarely rejected.¹⁷⁸ The procedure was based exclusively on protection considerations and only in exceptional circumstances was an MVV granted for humanitarian reasons (in this context meaning for reasons (of civil war or trauma, for example) that the Netherlands considered outside the scope of conventions ratified by the Netherlands, such as the Refugee Convention, the ECHR and the Convention Against Torture (CAT). Non-official statistics suggest that a very limited number of MVVs were issued for asylum purposes (9 in 1998, 8 in 1999, 5 in 2000 and 1 in 2001).¹⁷⁹

At least until March 2012, the MVV was still part of the Dutch migration system for family reunification in the asylum procedure, yet without a requirement for the application for an MVV to be followed by a

¹⁷⁴ PL EMN NCP (2010), *Granting non-EU harmonised protection statuses to foreigners in Poland*, Polish National Contact Point to the European Migration Network, pp. 23-25, 36 and 48; EMN (2010), *The different national practices concerning granting of non-EU harmonised protection statuses*, European Migration Network, p. 19, note 37; and LIBE 104, *Migration and asylum in Central and Eastern Europe*, part 2, available at http://www.europarl.europa.eu/workingpapers/libe/104/poland_en.htm (accessed 17 June 2014).

¹⁷⁵ Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, p. 47; and Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 117-128.

¹⁷⁶ NL EMN NCP (March 2012), *Visa policy as migration channel in The Netherlands*, Dutch National Contact Point to the European Migration Network, respectively p. 47 and p. 27.

¹⁷⁷ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, p. 126.

¹⁷⁸ NL EMN NCP (March 2012), *Visa policy as migration channel in The Netherlands*, Dutch National Contact Point to the European Migration Network, pp. 11, 16, 19 and 23ff; Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 117-128; and Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, pp. 47-49.

¹⁷⁹ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 119, 123 and 126.

subsequent application for a residence permit.¹⁸⁰ Since 2003, the possibility for protection seekers to apply for protection outside Dutch territory has, however, been limited to resettlement and diplomatic asylum. In addition, the Netherlands has used tourist visas as a safer alternative to diplomatic asylum where the latter could cause diplomatic issues. This method was deployed by the Netherlands in relation to Indonesians under communist regimes, who were granted protection status upon arrival in the Netherlands.¹⁸¹

For protection-related reasons on the basis of ad hoc or exceptional schemes

In **Denmark**, *ad hoc* visa schemes were established in 2007 and 2013 on the basis of political agreements. The agreements aimed at ensuring access to Danish territory - and the subsequent admittance to the asylum procedure - of a number of interpreters and other persons employed by the Danish armed forces in Iraq and Afghanistan, as well as their family members. The procedure entailed a “[...] pre-screening process by an ad hoc inter-ministerial delegation assessing connections to Denmark and potential security risks [...]”. The applicants were then invited to Denmark, and following this procedure, the immigration authorities were to process the cases under the usual rules and procedures.¹⁸² No information is available on the types of visa issued.

Following the arrival of the Iraqi interpreters and other Iraqis that had worked for the Danish forces in Iraq, approximately 400 Iraqis were granted subsidiary protection status in Denmark under the territorial asylum procedure.¹⁸³

In **Spain**, an asylum request from abroad has no longer been part of the ordinary asylum system since 2009 and is thus considered as an exceptional case. Asylum applications lodged at diplomatic representations abroad are therefore regarded as applications for exceptional entry permits. Ambassadors have discretionary powers to authorise transfer to Spain where the applicant is lodging an application with a diplomatic representation located in a country of which the applicant is not a national and where the applicant’s physical integrity is actually endangered. Upon arrival in Spain, a formal asylum application may be lodged. In 2012, the regulatory decree governing the more detailed conditions and procedures for such applications had not yet been adopted, and no information was available on the type of entry permit granted (uniform/LTV Schengen visa or national visa, or possibly a temporary residence permit on, for example, humanitarian grounds).¹⁸⁴

Under the previous procedure allowing for asylum applications to be lodged at diplomatic or consular representations abroad, a visa was, as a rule, issued only after a positive decision on asylum from the Minister of Interior. However, in cases of immediate risk, asylum visas facilitating urgent transfer to Spain could be issued by diplomatic or consular representations. No information is available on the type of visa issued.¹⁸⁵

¹⁸⁰ The procedure has recently been succeeded by the ‘Entry and Residence Procedure,’ merging the MVV and the application for a residence permit into one procedure. NL EMN NCP (March 2012), *Visa policy as migration channel in The Netherlands*, Dutch National Contact Point to the European Migration Network, pp. 31ff and 53-54.

¹⁸¹ Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, pp. 46-47 and 49.

¹⁸² Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, p. 41; *Aftale om håndtering af situationen for irakiske tolke m.v.*, Copenhagen 27 July 2007, (The Defence Committee, the Committee on Foreign Policy, 2012-13, FOU Alm. del, Bilag 143, UPN Alm. del, Bilag 173), available at <http://www.ft.dk/samling/20121/almdel/upn/bilag/173/1233422.pdf>; and *Aftale om håndtering af situationen for tolke og andre lokalt ansatte i Afghanistan*, Copenhagen 22 May 2013 (The Defence Committee, the Committee on Foreign Policy, 2012-13, FOU, Alm. del, Bilag 159, UPN Alm. del, Bilag 237), p. 2, available at <http://www.ft.dk/samling/20121/almdel/fou/bilag/159/1252606/index.htm> (both accessed 22 June 2014).

¹⁸³ Reply from the then Ministry of Refugees, Immigration and Integration Affairs to a Parliamentary question in 2011: The Committee for Immigration and Integration policy, 2010-11), UUI, Alm. del, final reply to question 199, 25 February 2011, p. 3, available at <http://www.ft.dk/samling/20101/almdel/UUI/spm/199/svar/783737/962190/index.htm> (accessed 22 June 2014).

¹⁸⁴ Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, p. 51.

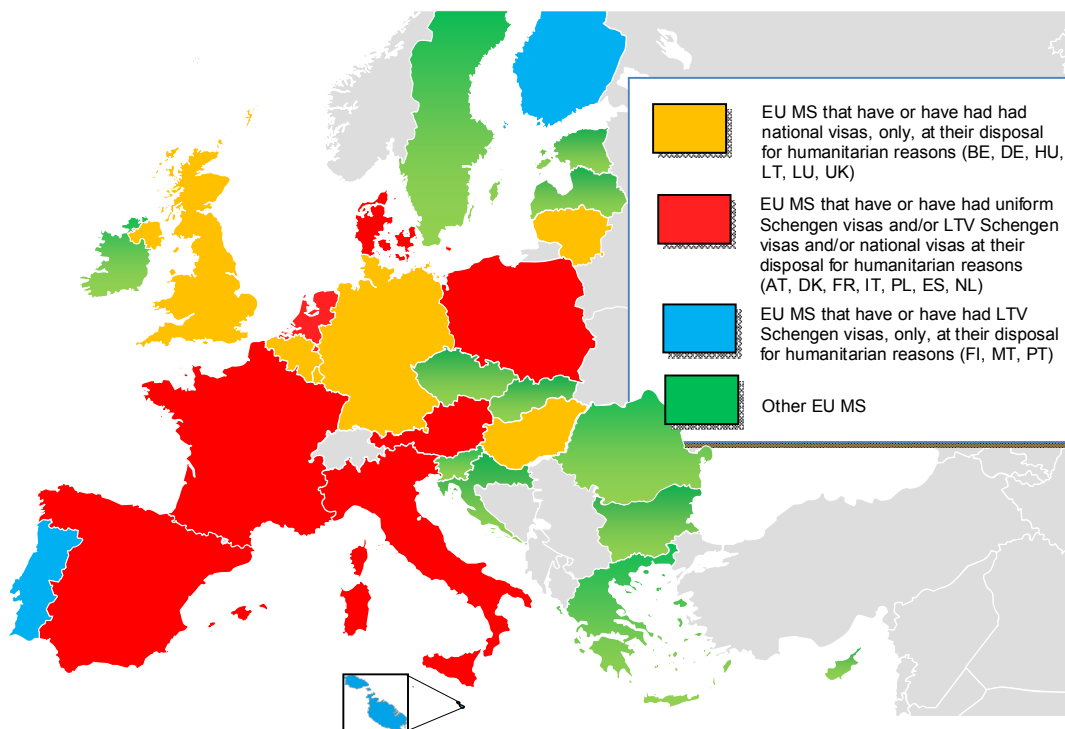
¹⁸⁵ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, pp. 138-148; and Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, pp. 50-51.

3.4 Conclusions on national practice on humanitarian visas

The findings of the study suggest that nine EU Member States have or have had national type D visas available for humanitarian reasons (Belgium, Germany, France, Hungary, Italy, Latvia, Luxembourg, Poland and the non-Schengen Member State United Kingdom), including protection-related reasons and medical reasons (Belgium, Italy and Poland only in the latter case). The findings, moreover, suggest that Schengen visas for humanitarian reasons may be granted or have been granted in the form of Schengen LTV visas in four EU Member States for humanitarian reasons (Finland, Italy, Malta and Portugal), including protection-related reasons (Italy, Malta and Portugal) and medical reasons (Portugal). In addition, six EU Member States have or have had either uniform or LTV Schengen visas and/or national visas available for humanitarian reasons, including protection-related reasons (Austria, Denmark, France, Poland, Spain and the Netherlands¹⁸⁶), medical reasons (Poland) and family reunification purposes (Austria and the Netherlands).

The findings thus suggest that more than half of the EU Member States, including one non-Schengen EU Member State, have or have had some type of visa - be it national and/or uniform Schengen and/or LTV Schengen - available for humanitarian reasons, as illustrated below in Figure 6. Accordingly, 16 EU Member States acknowledge the practical need for some form of humanitarian visa scheme, although most deploy their schemes primarily on an exceptional basis.

Figure 6. The 16 EU Member States that have or have had visas at their disposal for humanitarian reasons



Source: Author's own diagram.

¹⁸⁶ Please note that, in this context, the Netherlands considered reasons (e.g. for reasons of civil war or trauma) outside the scope of conventions ratified by the Netherlands, such as the Refugee Convention, ECHR and CAT, as humanitarian rather than protection reasons.

4. Conclusions and policy recommendations

4.1 Conclusions: Should Member States be encouraged to make use of the provisions on humanitarian visas?

Key point: Article 25 obliges the Member States to issue humanitarian LTV visas

The findings of the study suggest that Article 25 (1) of the Visa Code obliges Member States to issue LTV visas on, inter alia, humanitarian grounds or because of international obligations to the extent this follows from the Member States' refugee and human rights obligations, and thus that the discretion left to the Member States is limited by their refugee and human rights obligations. In this context, it is important to recall that the EU Charter of Fundamental Rights applies to the institutions and bodies of the EU and the Member States when implementing EU law, regardless of territory, as do the jurisdictional obligations of for example the ECHR.

Key point: Article 19 (4) links with Article 25 (1)

In addition, the findings suggest that there is an obvious and logical interplay between Articles 19 (4) and 25 (1), yet no automatic link between granting admissibility on, inter alia, humanitarian grounds and issuing an LTV visa on, inter alia, humanitarian grounds in the Visa Code. Consequently, the lack of consistency between the formal and the material provisions on humanitarian visas has the potential to hinder the examination of applications. In addition, appeal in cases of non-admissibility is not granted in the Visa Code.

Key point: the Visa Code remains unclear and provides for no separate humanitarian visa procedure

Another finding of the study suggests that the obligation under Article 25 (1) is not sufficiently ensured through, or enshrined in, formal procedures. Thus, no separate procedure is established for the lodging and processing of humanitarian LTV visa applications in the Visa Code, notwithstanding the fact that refusals of visas should be without prejudice to Article 25 (1) and the fundamental rights safeguards inherent therein (which correspond to the safeguards of the Schengen Borders Code). Figure 5 illustrates the weaknesses of the absence of an independent humanitarian LTV visa procedure, and two critical consequences may be derived from the lack of a separate procedure. First, it is unclear whether Member States are obliged to initiate assessments under Articles 19 (4) and 25 (1); and second, it is unclear whether appeal is granted in cases of refusal of LTV visas. Consequently, the Visa Code reform offers an opportunity to inject some clarity and remedy some shortcomings.

Key point: Member States have implemented humanitarian visa schemes, albeit in divergent ways, but are reluctant to support EU initiatives

Without gaining the political support of the Member States, over the past decade the Commission repeatedly encouraged the Member States to engage in the development of common guidelines and procedures for the issuing of humanitarian visas as a way of ensuring the more orderly arrival of persons with well-founded protection needs. As examples of some of the Commission's more recent efforts, one of the 38 lines of action developed by the Task Force Mediterranean, as mentioned in COM(2013) 869, is for the Commission to explore, inter alia, guidelines on a common approach to humanitarian permits/visas. In addition, in its recent Communication of March 2014, COM(2014) 154, the Commission explicitly called for a coordinated approach to humanitarian visas and common guidelines as a starting point for enabling people to request protection without undertaking a potentially lethal journey to reach the EU border.

Yet, the findings of the study suggest that more than half of the EU Member States have or have had some type of visa, be it national and/or uniform Schengen and/or LTV Schengen at their disposal for humanitarian purposes, as illustrated in Figure 6. Accordingly, 16 EU Member States, including one non-Schengen Member State, acknowledge the need for some type of a humanitarian visa scheme in their practices, albeit by and large deployed on an exceptional basis. The findings moreover suggest that four EU Member States have issued or may issue LTV visas for protection-related reasons or medical reasons, by and large on an exceptional basis.

The lack of political support to EU initiatives points to, inter alia, the practical constraints of issuing humanitarian visas which must be given due consideration. This includes fears, although apparently

unfounded, of “[...] massively boosted caseloads”,¹⁸⁷ the question on what the pull factor of being consistent with human rights obligations may be, issues regarding embassy capacity and resources and burden-sharing. The necessity of considering burden-sharing as part of a coordinated approach is clearly illustrated by statements made by the Austrian government. In 2002, the Austrian government thus stated that it “[...] would be interested to cooperate with other Member States on a harmonised scheme for externalised processing, on condition that applicants are equitably distributed amongst Member States, and that all Member States would engage in the scheme”.¹⁸⁸ And the argument for abolishing the Austrian PEP for Convention refugees in 2004 was that it “[...] was too burdensome for Austria considering that other EU Member States did not offer such a possibility”.¹⁸⁹ Also, although being issued with a humanitarian visa enables third-country nationals to start a journey, what would happen, say, to those persons in a transit country such as Libya where there have been allegations of torture against would-be asylum seekers?

Conclusion: Member States should be encouraged to make use of the provisions on humanitarian visas

Due to the lack of legal routes of entry to EU territory, the protection and rights mechanisms of the EU *acquis* are rendered inaccessible for genuine refugees, potential asylum seekers and other vulnerable migrants. In light of the fact that those persons resort to irregular, dangerous and undignified journeys; the high human risks and costs of irregular entries; the EU’s and the Member States’ refugee and human rights obligations and the humanitarian visa scheme already laid down in the Visa Code, it can be concluded that the Member States indeed should be encouraged to make use of the provisions on humanitarian visas.

4.2 Policy recommendations

Against this background it is recommended that the European Parliament:

As regards general issues

1. maintains and demands a holistic and human-rights based approach to EU migration and border management and control, while recalling and stressing the extraterritorial and jurisdictional fundamental rights obligations of the Member States;
2. insists that the Member States comply with their obligations under the Visa Code to issue humanitarian visas in accordance with the Member States’ refugee and human rights obligations;
3. insists that the issuing of humanitarian visas is conducted on the basis of a protection-sensitive pre-screening procedure and without prejudice to the rights of spontaneous asylum seekers, and hence that humanitarian visas constitute an instrument complementary to other PEPs, protection practices and the CEAS, and by no means a substitute;
4. supports the Commission in its ongoing efforts to ensure the more orderly arrival of persons, and in its efforts to develop a coordinated approach to humanitarian visas and common guidelines as a starting point for enabling people to request protection without having to undertake a potentially fatal journey to reach the EU border. The Member States’ experiences with humanitarian visa schemes may serve as an inspiration, and such a scheme may draw on the competences of EASO and FRA, for example, and also the UNHCR;
5. encourages the Commission to adopt its Communication on new approaches concerning access to asylum procedures targeting main transit countries as envisaged in COM(2010) 171;

As regards the Visa Code reform specifically

6. calls for a monitoring mechanism to be established on the Member States’ issuing of humanitarian Schengen visas, involving the obligation for Member States to provide statistics and other relevant

¹⁸⁷ Noll, G. et al. (2002), *Study on the feasibility of processing asylum claims outside the EU*, The Danish Centre for Human Rights, European Commission, p. 4.

¹⁸⁸ *Supra*, p. 96.

¹⁸⁹ Facchi, L. (ed.) (2012), *Exploring avenues for protected entry in Europe*, Italian Council for Refugees, p. 39.

information on their issuing of humanitarian Schengen visas. Such monitoring may serve the purpose of ensuring a more consistent and liberalised application of humanitarian Schengen visas;

7. calls for coherence between the formal and the material provisions on humanitarian visas: the conditions on which a visa application, not fulfilling the admissibility requirements, may be declared admissible, should correspond to the conditions on which a humanitarian visa may be issued to ensure that the formal provisions do not hinder the examination of applications under the material provisions. International obligations should thus explicitly be one of the conditions on which a visa application, not fulfilling the admissibility requirements, may be declared admissible in Article 19;

calls for the establishment of a proper and independent formal procedure for the lodging and processing of applications for humanitarian Schengen visas in the Visa Code with a view to ensuring the fundamental rights safeguards in Article 25 (1) and the obligation of the Member States to issue humanitarian LTV visas. A proper formal procedure should entail the express obligation of Member States to initiate an assessment under Article 25 (1); corresponding to the obligation in, for example, Article 21 (1), which requires Member States, in unambiguous wording, to ascertain and assess the fulfilment of entry conditions and risks when examining applications for uniform visas. Thus, such procedure should ensure that in the examination of visa applications, it shall be ascertained whether it is justified to derogate from fulfilment of the Schengen visa requirements on humanitarian grounds or because of international obligations. A proper formal procedure should moreover ensure that the filtering effect of Article 19 does not hinder the processing of those visas that may be declared admissible on humanitarian grounds or because of international obligations. Therefore, this procedure should entail a mechanism in Article 19 providing for the mandatory assessment of whether it is justified to derogate from the admissibility requirements on humanitarian grounds or because of international obligations, while ensuring that those applications that eventually are declared admissibility be examined;

8. calls for the express access to effective remedies of visa applicants in cases of refusal of humanitarian visas in accordance with fundamental rights obligations, and for the express access to effective remedies of visa applicants in cases of non-admissibility of visa applications. Appeal should thus explicitly be granted in cases of refusal of humanitarian LTV visas and non-admissibility;
9. considers whether an independent and separate scheme on humanitarian visas should provide for such visas to be granted in the format of uniform visas, rather than in the form of visas with limited territorial validity;
10. calls for the express obligation that visa applications must reach the state authorities of the competent Member State when Member States are under ‘mandatory representation’;

CALLS FOR THE EXPRESS OBLIGATION THAT VISA APPLICATIONS NOT MEETING THE ADMISSIBILITY REQUIREMENTS MUST REACH STATE AUTHORITIES IN SITUATIONS OF COOPERATION WITH EXTERNAL SERVICE PROVIDERS IN ORDER FOR THOSE STATE AUTHORITIES TO PERFORM AN ASSESSMENT OF WHETHER IT IS JUSTIFIED TO DEROGATE FROM THE ADMISSIBILITY REQUIREMENTS ON HUMANITARIAN GROUNDS OR BECAUSE OF INTERNATIONAL OBLIGATIONS. THIS OBLIGATION COULD BUILD ON A MECHANISM ESTABLISHED FOR ENSURING THAT AN ASSESSMENT IS CARRIED OUT OF WHETHER IT IS JUSTIFIED TO DEROGATE FROM THE ADMISSIBILITY REQUIREMENTS ON HUMANITARIAN GROUNDS OR BECAUSE OF INTERNATIONAL OBLIGATIONS, AS MENTIONED IN RECOMMENDATION 8.

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