

UNIVERSITY OF LEUVEN

European Master's Degree in Human Rights and Democratisation
2015/2016

Humanitarian Visa: An innovating approach on
visa admissibility based on humanitarian
grounds for asylum seekers.

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ABSTRACT

The present research intends to analyse the European Union law with regard to “Protected Entry Procedures” for individuals who need international protection in order to entering EU territory. The focus of this study is the asylum seekers’ issues, more specifically how the EU Visa Code provides the “asylum status” based on humanitarian grounds stated on articles 25 (1) and 19 (4).

Currently, the European Union is facing one of the highest mass movements of asylum seekers during the last years. The European Community has adopted measures in order to grant refugees status through a Common European Asylum System among its Member States; and, for those asylum seekers that are within the EU territory. However, the law does not safeguard those who need legal channels to reach a Member State.

Therefore, this study examines the implementation of the humanitarian visa by the Member States’ practices in order to offer safe legal entry for asylum seekers, where the Member States meet their obligations under international human rights instruments. Likewise, we attempt to analyse how the European Community is trying to stimulate the Member States to make use of the humanitarian visa. This research proposes a recast on the EU Visa Code in order to harmonise the issuing of humanitarian visas.

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THE RESEARCH QUESTION

The present study aims to critically assess the implementation of the visa based on humanitarian grounds as a valuable means to guarantee the human rights of asylum seekers. More specifically, the research project relies on the legal framework provided a Protected Entry Procedure by the EU Visa Code and the International Human Rights treaties.

To comply with international obligations and the European Parliament's recommendations¹, articles 19 (4) and 25 (1) of the EU Visa Policy have been designed to facilitate the procedures of issuing visas based on humanitarian grounds. The research hypothesis concerns the possibility of modifying the text of article 19 (4) in order to extend the application of humanitarian visas.

Since no other authority may guarantee an effective legal entry procedures for those who seek asylum within the European Union, a modification of the text of Art. 19 (4) appears to be necessary. The goal of this research is to evaluate and support a mandatory EU visa based on humanitarian grounds.

¹ THE PUBLICATIONS OFFICE OF THE EUROPEAN UNION. *On the mid-term of the Stockholm Program 2014*. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0153+0+DOC+XML+V0//EN> (Consulted on 10 April 2016).

INTRODUCTION

The world remains highly unsafe for millions of human beings. An estimated 59,5 million people are currently forcibly displaced worldwide as a result of persistent and new conflicts in different parts of the world, becoming the highest displacement on record.² According to United Nations High Commissioner for Refugees (UNHCR) dating from the end of 2014, of this number of forcibly displaced people worldwide, 19.5 million were refugees³, 1,8 million were asylum seekers⁴ and 38.2 million were internally displaced persons⁵.

Within this scenario, the amounts of people who seek asylum are not likely to diminish in the foreseeable future. Europe has been experiencing one of the highest mass movements of refugees during the past years. The number of forcibly displaced persons has indeed been increasing according to the last report from the United Nations High Commissioner for Refugees (UNCHR). By early November of 2015, more than 790,000 people had arrived in Europe by sea in 2015. The number of arrivals in Greece was 13 times higher in 2015 than the total number of arrivals in 2014.⁶

Due to a lack of legal routes for migration, since the beginning of 2016 the approximate number of asylum seekers and migrants that lost their lives at sea rested at 737⁷. These circumstances create a challenging situation resulting in the disregard of the principles of human rights such as the “right to life, liberty and the security of person” according to article 3 of the Universal Declaration of Human Rights.

The data illustrate the crisis that the European Union has been tackling. The traditional mechanisms for asylum procedures framed in European Union Law and in conformity with the 1951 Convention relating to the status of Refugees (GCR) are undermined by this scenario.

² UNHCR AGENCY. *Global Report 2014*. 18 June 2015. Available at: <http://unhcr.org/556725e69.html> (Consulted on 10 April 2016).

³ 1st Chapter, p.6.

⁴ Idem.

⁵ Idem.

⁶ UNHCR AGENCY. *Europe, Global Appeal 2016 - 2017*. Available at: <http://www.unhcr.org/564da0e5a.html> (Consulted on 12 April 2016).

⁷ UNHCR AGENCY. *Refugee/Migrants Emergency Response – Mediterranean*. Available at <http://data.unhcr.org/mediterranean/regional.php> (Consulted on 17 April 2016).

Under these circumstances, in 2014 the European Parliament called for establishing a better legal access to the EU for asylum seekers and migrants in order to develop an integrated border management and visa policy, respecting the principle of solidarity.⁸

Currently, the EU Visa Code⁹ governs the visa application process. It provides the legal, but very limited possibility to apply for a visa issued on humanitarian ground under article 19 (4) and 25 (1) of this Regulation.

This EU Visa Code based on humanitarian grounds suggests a “Protected Entry Procedure” for those who seek asylum on the EU territory, which may provide an alternative and effective remedy that ensure safe, legal and organised entry route to the European Union in order to avoid irregular and dangerous migration channels.¹⁰ Likewise, this regulation allows tackling the human trafficking and smuggling of asylum seekers with the aim of stopping further tragedies at the Mediterranean Sea.

Moreover, a “humanitarian visa”¹¹ might ensure that Member States meet their international human rights obligations such as the right to seek and to enjoy asylum according to article 14 of the Universal Declaration of Human Rights (UDHR) enforced by the 1951 Convention Relating to the Status of Refugees, as well as the right to life and security under article 3 of the UDHR also enforced by the article 6, 7 and 9 of the 1966 International Covenant on Civil and Political Rights.

However, the admissibility of a visa based on humanitarian grounds remains uncertain. Article 19 (4) of the EU Visa Code does not ensure effective application of the humanitarian visa, because the admissibility relies upon the discretion of the Member States, although article 25 (1) strengthen the idea that visa with limited territorial valid shall be issued exceptionally on humanitarian grounds for reasons of national interest or because of international obligations.

The first chapter of this study explores the definitions of refugees and asylum-seekers in EU law and asylum procedures such as The EU Asylum Procedure Directive, the Subsidiary Protection, and a preliminary concept of the visa issued on humanitarian

⁸ EUROPEAN PARLIAMENT. *On the mid-term of the Stockholm Program 2014*. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0153+0+DOC+XML+V0//EN> (Consulted on 10 April 2016).

⁹ Regulation (EC) No 810/2009.

¹⁰ JENSEN, 2014, p.9.

¹¹ The term “humanitarian visa” will be used to refer to the visa issued on humanitarian grounds.

grounds. Moreover, this chapter describes the evolution of these definitions over the course of the last century.

Regarding the challenges posed by the current refugee crisis, the second chapter describes the effects of the Syrian Refugees flow in the Middle East and at the Mediterranean Sea and how the European Union policy is handling the situation.

Finally, the centrepiece of this study, the third chapter focuses on the concept of humanitarian visa and its benefits under the current refugee crisis in the European Union. It also examines whether the existing EU Visa Code actually obliges Member States to issue humanitarian visa, and the national practices of the Member States regarding the visa based on humanitarian grounds.

1) THE PROTECTION MECHANISM FOR ASYLUM SEEKERS

1.1) THE NANSEN PASSPORT

The concept of forced migration is not a new phenomenon. The right to seek asylum or to grant people protection can be documented as far back as around 600 A.D.¹² In particular, the right to seek asylum in holy places was first codified by King Ethelbert of Kent, which was a new legal model to protect those who seek protection in a third-country¹³.

The notion of asylum seeker progressed through the Middle Ages yet did not fully develop until the eighteenth century, when the concept of “nationality” became meaningful and people crossing borders were obliged to provide identification.¹⁴

Hence, in the year of 1921, an idea was emerging to create a document as an identity card that works as a passport recognized through international agreement. This document was named “Nansen Passport” in honour of Mr. Fridtjof Nansen, who was the League of Nations’ High Commissioner for Russian refugees.¹⁵

¹² BENEDEK, 2012, p.466.

¹³ NADEAU, 2008, p. 17.

¹⁴ Idem.

¹⁵ THE NATIONAL ARCHIVES OF NORWAY, *Nansen the Humanist*, at <http://www.arkivverket.no/eng/Using-the-Archives/Online-Exhibitions/The-Nansen-Passport/Nansen-the-humanist> (Consulted on 06 February 2016).

The Nansen Passport was invented to provide protection for the first big wave of refugees produced by the Russian totalitarian regime in 1917. This passport sought to help 1.5 million Russians who fled the Russian Revolution of 1917 and its subsequent civil war.¹⁶

This was an important mechanism during the Russian Revolution of 1920s. The Russian refugees obtained the right to travel, since the Iron Curtain was the most visible demonstration that the right to move freely outside of your own country was not part of the rights of the socialist regime and the attempts of crossing borders were considered crime.¹⁷

Due to the persecutions of totalitarian regimes during the 1920s and 1930s, the Nansen Passport had to be extended to new groups of refugees and stateless persons, victims of the persecutions from that time.¹⁸ For instance, Mr Nansen, subsequently expanded the passport to include one million Armenians fleeing the Armenian Genocide in 1923, and several years later it also incorporated the Assyrians and Turks under protection of the Nansen Passport.¹⁹

Thus, the High Commission for Russian Refugees, under the direction of Mr Fridtjof Nansen, had the responsibility to define these minority groups in order to be granted with the Nansen Passport through the cooperation and approval of the League of Nations.²⁰

Consequently, The League of Nations decided to cooperate and authorize the creation of The Nansen International Office for Refugees, whose the operational activities began in 1931. This office was considered the successor of the first international agency dealing with refugees, the High Commission for Russian Refugees of 1921, established by the League of Nations.²¹ After the Second World War, which had produced a huge wave of

¹⁶ NADEAU, 2008, p. 18.

¹⁷ HIERONYMI, 2003, p. 39.

¹⁸ Idem, p. 41

¹⁹ Idem.

²⁰ NADEAU, 2008, p. 18.

²¹ HABERMAN, F. W et al. *Nansen International Office for Refugees – History*. Available at http://www.nobelprize.org/nobel_prizes/peace/laureates/1938/nansen-history.html (Consulted on 07 February 2016).

people seeking asylum in other States around Europe, the Nansen Passport had to be reformulated to attend those who were fleeing from or because of totalitarian regimes.²² Consequently, another organization entitled *Intergovernmental Committee for Refugees*, which was created during the Second World War by the Allied Powers, adopted a resolution in 1944, which recommended the adoption and issue of an internationally recognized travel document for those which do not enjoy protection from their country of origin.²³

These recommendations followed the model of the pre-war Nansen Passport²⁴, which, as result, has become the basis for article 28 of the 1951 Refugee Convention²⁵, which holds that the “Contracting State shall issue to refugees lawfully staying in their territory travel documents for the purpose of travel outside their territory (...).”

In conclusion, the introduction of the Nansen Passport is remarkable, because this document brought some sort of legal status for refugees, together with the possibility to find a job and additionally to be granted financial and legal aid by The League of Nations and the Intergovernmental Committee for Refugees.²⁶

Therefore, the creation and the diffusion of the Nansen Passport has been one of the most important aspects during the 1920s and 1930s, since it brought an international legal instrument to protect asylum seekers and refugees. Moreover, The Nansen Passport left an important legacy regarding the right to asylum, as it was the first refugee passport that had international recognition by The League of Nations.²⁷

1.2) THE DEFINITION OF ASYLUM SEEKER AND REFUGEE.

Although the Nansen Passport covered the refugee flow during the First and Second World War, The League of Nations did not establish an international tool to recognize properly the meaning and the status of a Refugee until 1951.

²² HIERONYMI, 2003, p. 38

²³ Idem, pp. 40-41.

²⁴ Idem, p. 41

²⁵ The 1951 Geneva Convention Relating to the Status of Refugees

²⁶ UNHCR AGENCY. *The Nansen Refugee Award*. Geneva, 2002 Available at <http://www.unhcr.org/nansen/50374a386.html> (Consulted on 07 February 2016).

²⁷ UNHCR AGENCY. *Nansen – a man of action and vision*. Geneva, 2009. Available at: <http://www.unhcr.org/4aae50086.html> (Consulted on 4 May 2016).

In that year, the United Nations developed the United Nations Convention relating to the Status of the Refugees²⁸, which was based on article 14 of the Universal Declaration of Human Rights 1948 (UDHR) that recognizes the right of persons to seek asylum from persecution in other countries²⁹. This convention is the centrepiece of international refugee protection today.

The concepts of refugees and asylum seekers are not to be mistaken for the definition of migrant. Migrant is a wide-ranging term in general, which refers to persons that choose to leave their country to a foreign country for a certain length of time for a variety of reasons that do not fall into the scope of the 1951 Geneva Convention.³⁰ Thus, it is important to stress that there is a difference between the terms refugee and asylum seeker and their implications.

The 1951 Convention relating to the status of Refugees under article 1 (2) defines a refugee as:

“a person who, being outside his/her country of nationality or habitual residence, has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership in a particular social group or political opinion, and he/she is unable or unwilling to avail herself/himself of the protection of that country or to return there, owing to the fear of persecution.”

As can be seen, the refugee’s status is limited. Individuals who seek refuge for other reasons than those mentioned in the Convention are not protected under the 1951 Geneva Convention. To deserve the status of refugee a person must be facing a serious threat to her/his fundamental interests, not simply the risks faced in ordinary life in a society that normally protects basic human rights.³¹ For instance, the refugee status cannot be extended to economic migrants, because they do not fall under the scope of application of The 1951 Geneva Convention.

Following the main idea of article 1, additional instruments were put in place to clarify and extend the meaning of refugee such as the Subsidiary Protection under article 15 of

²⁸ The 1951 Geneva Convention relating to the Status of Refugees.

²⁹ UNITED NATIONS GENERAL ASSEMBLY. *The Universal Declaration of Human Rights*. December 1948. Available at: <http://www.un.org/en/universal-declaration-human-rights/> (Consulted on 06 April 2016).

³⁰ UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES (UNHCR). *UNHCR viewpoint: refugees or migrants – Which is right?*. Geneva, 2015. Available at: <http://www.unhcr.org/55df0e556.html> (Consulted on 4 May 2016).

³¹ CARENS, 2013, p. 200.

the Qualification Directive (2011/95/EU) and article 2 of the 1969 OAU Refugee Convention³², once they supply the definition of refugee to include those who fled from war or other violence in their home country.

On the other hand, asylum seekers are defined as individuals who formally applied for protection in another country, but whose claims have not yet been evaluated or concluded in an asylum procedure. Thus, the national authorities have the duty to evaluate the asylum procedure in order to determine which asylum seeker will be granted international protection.³³

The Asylum seekers to who are denied refugee statuses may be sent back to their country of origin, as long as extraditions and deportations do not constitute a breach of the *non-refoulement* principle.³⁴ According to Slingenberg,³⁵ asylum seekers “might not be able or not willing to invoke the protection of their country of nationality or origin, while it has not yet been determined whether they qualify for international protection”.

However, an exception was created under article 33 (2) by the 1951 Geneva Convention, which states that an asylum seeker may not claim the *non-refoulement* principle, in case of an individual that “has been convicted by a final judgement of a particularly serious crime” or if this person poses a possible threat to the community of that country.

Hence, asylum seekers can be protected from expulsions by the *non-refoulement* principle, even if they are not yet allowed to enjoy international protection as a refugee, since their application procedure is pending a conclusion by the national authorities, they are allowed to stay in the host country until a final conclusion of their asylum application.

³² UNITED NATIONS GENERAL ASSEMBLY. *OAU Governing the Specific Aspects of Refugee Problems in Africa*. 1969. Available at: <http://www.unhcr.org/45dc1a682.html> (Consulted on 07 April 2016).

³³ BENEDEK, 2012, p. 468.

³⁴ *Idem*.

³⁵ SLINGENBERG, 2014, p. 1.

1.2.1) CONCEPTS UNDER EUROPEAN UNION LAW.

The European Union (EU), as a regional politico-economic union, has settled certain norms based on the concepts of asylum seekers and refugees in order to create protective measures and definitions. It means that the Geneva Convention is not the only treaty-law based on this topic.

Under the European Union Charter of Fundamental Rights, article 18 provides the right to asylum for those who seek protection in one of the Member States in order to be granting a refugee status, and article 19 of this Charter states the prohibition of *refoulement*.

The *non-refoulement* principle is protected in the Treaty on the Functioning of the European Union (TFEU) by article 78 (1). The provision of this article emphasizes the compromise of the European Union to develop a common asylum policy, ensuring compliance with the principle of *non-refoulement*.³⁶ Likewise, the Charter of Fundamental Rights of the European Union guarantees this principle, inasmuch as article 18 provides that the right to asylum should be in accordance with the 1951 Geneva Convention.³⁷

Moreover, the European Convention of Human Rights (ECHR) highlights this principle under article 3. In certain circumstances this article may have an extraterritorial effect according to the European Court of Human Rights (EtCHR). In the *Soehring Case*³⁸, the Strasbourg Court recognized that a Contracting Party shall not expose an individual to a possibility of ill-treatment in a country outside the jurisdiction of the Member State. As an illustration, the *Soehring Case* concerned about a German man who was facing a possible ‘inhuman treatment’, owing to the fact that he would be deported to the United States where he was running a real risk of being sentenced to ‘death penalty’.³⁹

Under European Union law, asylum seekers have the right to stay in the territory of a Member State until a decision on the asylum application is taken by the State⁴⁰. To

³⁶ LENAERTS & VAN NUFFEL, 2011, p.322.

³⁷ “The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 (...)”.

³⁸ *Soehring v. United Kingdom* (ECTHR, 1989).

³⁹ JACOBS, WHITE & OVEY, 2014. p. 179

⁴⁰ FRA(b), 2014, p. 43.

reinforce this notion, the EU Asylum Procedures Directive (2013/32/EU), under article 9 (1), states that asylum seekers are “allowed to remain in the Member State, for the sole purpose of the procedure, until the determining authority has made a decision in accordance with the procedures”, although there are exceptions provided by the EU Asylum Procedures Directive (2013/32/EU) under article 9 (2).

Besides article 18 of the EU Charter of Fundamental Rights, the definition of asylum seekers is also extended by EU law through the Qualification Directive (2011/95/EU) under article 1⁴¹, as a person eligible for Subsidiary Protection. The qualification for subsidiary protection applies to those who are facing “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”, according to article 15 of the Directive.

1.3) THE PROCEDURES TO PROTECTION FOR ASYLUM SEEKERS

Under the scope of international law, forcibly displaced people that seek asylum in a third country are granted with protections. There are indeed several universal and regional treaties that provide protection and guarantees for asylum seekers. In addition, the existence of international organisations such as the United Nations High Commissioner for Refugees contributes to develop standards and practices among the Contracting States.

The 1951 Geneva Convention Relating to the Status of Refugees and 1967 Protocol are recognized by the international community as instruments to protect individuals that seek asylum in a third country, which were ratified by 142 States parties, including all Member States of the European Union.⁴²

The Convention does not offer special tools or procedures, owing to its “non-self-executing” problem on the enjoyment of most Convention rights. The implementation of the norms will depend on the Contracting State’s practice that is to say that the

⁴¹ “For the qualification of third-country nationals or stateless persons as beneficiaries of international protection for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted.”

⁴² UNHCR AGENCY, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, available at: <http://www.refworld.org/docid/4f33c8d92.html> (Consulted on 5 June 2016).

sovereignty of a Contracting State will prevail over putting into practice the rules of the 1951 Refugee Convention.⁴³

Therefore, the procedures to acquire protection as an asylum seeker are applied in accordance with the sovereign competence of the Contracting State. With this in mind, a Contracting State has the power to exercise its own jurisdiction over its territory, it can decide who among the asylum seekers can be eligible for the status of refugee or not.⁴⁴ This competence must be exercised within and according to the 1951 Refugee Convention, but the states right to control the admission of refugees is limited, since these do not fit in the concept of a regular migrant.

On the other hand, the 1951 Refugee Convention has an important role concerning its administrative measures. States have to provide certain facilities to refugees, including the administrative assistance, identity papers - for those who do not possess a valid passport and travel documents -, grant of permission - to transfer assets - and facilitation of naturalization.⁴⁵ Moreover, article 31 of the 1951 Refugee Convention prescribes freedom from penalties, for illegal entries, and freedom from expulsion, save on the most serious grounds.

Therefore, in the context of the European Union, the definition of asylum seekers and its procedures are regulated by a plural combination of Member State's domestic law and its national practices, the EU law, the European Convention on Human Rights (ECHR) and other obligations entered by European states.

1.3.1) THE EU ASYLUM PROCEDURES DIRECTIVE

The asylum seeker's procedures on the EU territory are regulated by the EU Asylum Procedures Directive (2013/32/EU). It sets out detailed rules for the Member States on minimum standards for granting and withdrawing international protection for asylum seekers. This Directive, under article 3, applies to individuals that seek asylum in the

⁴³ Goodwin-Gill, 2014, p.40

⁴⁴ Idem.

⁴⁵ UNITED NATIONS GENERAL ASSEMBLY. *Convention and Protocol relating to the status of Refugees*. Geneva: 1951. Available at: <http://www.unhcr.org/3b66c2aa10.html> (Consulted on 06 April 2016).

territory of EU Member States, including at “borders, in territorial waters and in transit zones”. Moreover, asylum seekers and their dependants shall make an application to an authority competent in one of the Member States to have access to the asylum procedures according to article 6 of the EU Asylum Procedures Directive.

The Member States have the responsibility to evaluate an asylum application that is defined by the Dublin Regulation.⁴⁶ The Member States should comply with the criteria established by the Regulation. “If another Member State is responsible for examining the application, the Regulation sets forth the transfer procedure to this Member State.”⁴⁷

In the meantime, the applicants are allowed to remain in the Member State until the determining authority of a Member State has made a decision in accordance with the asylum application and the national authorities are not allowed to deport or expel the applicant from the country.⁴⁸

Although this may be true, exceptions to the “right to remain” can be made in case of certain repeated applications or when the applicant will surrender or extradite under article 9 (1) of the EU Asylum Procedures Directive. A Member State is allowed to extradite an applicant to a third country, only when a national authority’s decision might not constitute a violation under the principle of *non-refoulement*.⁴⁹

Applicants need to be given an interview under articles 14 and 15 of the EU Asylum Procedures Directive. The interviews must follow the requirements settled under article 15, which ensures appropriate confidentiality. The personal interview usually takes place without the presence of family members, except if the authorities consider it relevant for asylum procedure examination. According to article 15, the interviews must be personal and confidential; it must take place without the presence of family members, except in cases where the authorities consider it relevant for the asylum procedure examination.

Moreover, article 15 (3) (a) of the EU Asylum Procedures Directive “ensures that the person who conducts the interview is competent to take account of the personal and

⁴⁶ Regulation EU n. 604/2013.

⁴⁷ FRA(b), 2014, p. 106.

⁴⁸ BENEDEK, 2012, pp. 467-468

⁴⁹ Idem.

general circumstances surrounding the application, including the applicant's cultural origin, gender, sexual orientation, gender identity or vulnerability”.

The interviews with unaccompanied minors shall be conducted in a child-appropriate manner according to article 15 (3) (e). The category of unaccompanied minors is granted special guarantees under article 25 of the Directive. The law ensures that the Member States need to provide a legal representative in order to represent or assist the unaccompanied minor.⁵⁰ Likewise, article 25 (a) states that it is mandatory that the representative for an unaccompanied minor takes into account the best interests of the child as a primary condition. The minors shall be informed about the meaning of a personal interview and possible consequences that may occur.

Article 17 of the EU Asylum Procedures Directive obliges the authorities to make the reports accessible to the applicant and provide to them the opportunity to make arguments, where they can ensure clarification orally or in writing in order to amend any mistranslations or misconceptions in the report.

The decisions and examination of an application shall be taken “individually, objectively and impartiality” under article 10 (3) (a) of the EU Asylum Procedures Directive. The Handbook of European Law to asylum, borders and immigration also held that: “According to article 10 of the EU Asylum Procedures Directive, applications should not automatically be rejected by the quasi-judicial or administrative body responsible for taking first instance decisions for failure to submit an application as soon as possible (...)”⁵¹

According to article 12 (1) (a) of the EU Asylum Procedures Directive, applicants must be informed of every step of their applications and follow it in a language, which could be their mother tongue or another that it could be understandable. Otherwise, under article 12 (1) (b) of the Directive, the authorities should request the services of an interpreter “whenever necessary”.⁵²

Applicants are allowed, in the meantime, to communicate with UNHCR or other organisations that can provide legal advice according to article 12 (1) (c) of the EU

⁵⁰ EU Asylum Procedures Directive (2013/32/EU). Article 15 & 25. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32013L0032> (Consulted on 15 April 2016).

⁵¹ FRA(b), 2014, p. 98.

⁵² Idem.

Asylum Procedures Directive .⁵³ Moreover, international organisations such as UNHCR can provide information to the authorities regarding the general situation of the country of the applicant and even the countries that the applicant has transited, according to article 10 (3) (b) of the Directive.

The authorities must take into consideration that the examination procedure shall be concluded “within six months of the lodging of the application”, according to article 31 (3) of the EU Asylum Procedures Directive. However, there are exceptions listed in Article 31 (3) of the Directive with regard to complex cases due to facts and law, a large amount of simultaneous application, making it difficult to conclude them within six months or the failure of the applicant to meet his/her obligations framed in article 13 of the Directive. However, if a decision cannot be taken within the “time-limit of six months”, the applicant has the right to be informed of the delay along with the necessary information that justifies the reason of the delay, according to the article 31 (6) (a) and (b) of the EU Asylum Procedures Directive.

The authorities shall issue the conclusion of a decision translated in a language that the applicants are able to understand when they are not represented or assisted by a legal adviser or another person entitled to assist him or her, according to the article 12 (1) (f) of the EU Asylum Procedures Directive.⁵⁴ If the competent authorities accept the application, those who qualify for asylum have the right to have the refugee status recognised under article 13 of the Qualification Directive (2011/95/EU).

On the other hand in case of refusal of the asylum application, individuals must have access to a practical and effective remedy before a court or a tribunal, according to article 46 of the Directive. As stated by Peers et al. (2015), the right to an effective remedy under article 46 of the Directive was “derived from article 13 of the European Convention on Human Rights, which held that everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy”, as well as article 47 of the EU Charter of the Fundamental Rights.⁵⁵

⁵³ Idem.

⁵⁴ Idem.

⁵⁵ PEERS et Al., 2015, p.286-287.

This remedy constitutes a protective measure for an applicant in order to avoid that he or she be expelled after a negative decision made by the authorities. Peers et Al (2015) also state that article 46 requires remedies to have “automatic suspensive effect”, which means that an applicant must have the right to remain in EU territory until a court or tribunal issues a new outcome.⁵⁶

Moreover, article 46 (2) of the Directive provides that applicants recognised by the authorities as “eligible for subsidiary protection” have the right to appeal a decision that considered the application as “unfounded in relation to the refugee status.”

1.3.2) SUBSIDIARY PROTECTION

Another important form of international protection that can be provided to those who seek asylum in the European Union is Subsidiary Protection. This qualification is legally protected under article 18 of the Qualification Directive (2011/95/EU). Moreover, the procedure to apply the norms of subsidiary protection is under the Member States decision, since directives are fully binding after they are addressed into a Member States` legal system.⁵⁷

Article 15 of the Qualification Directive (2011/95/EU) defines that an individual who seeks asylum may be granted Subsidiary Protection. The preconditions for those who might be considered eligible for subsidiary protection are defined by article 2 (f) of the Qualification Directive (2011/95/EU). According to this provision, a person that cannot be granted refugee status might be eligible for subsidiary protection if there are substantial grounds to believe that in case of returning to his or her country of origin he or she will face ‘real risk of suffering serious harm.’

The “serious harm” set out by article 2 (f) of the Directive exists when a person is facing a real risk of death penalty or execution, torture or inhuman degrading treatment and serious and individual threat of his/her life in case this person returns to his or her county of origin, under article 15 of the Directive.

Although this may be true, article 17 of the Directive states that an applicant may be

⁵⁶ Idem, p.287.

⁵⁷ LENAERTS & VAN NUFFEL, 2011, p.897.

withdrawn from being granted with subsidiary protection, in case of this person committed a crime against peace, war crime or a serious crime in his or her country of origin. Moreover, article 16 provides the circumstances in which ‘subsidiary protection status may be withdrawn’. The “cessation” can occur when the circumstances of a person who seeks subsidiary protection no longer exist or “have changed to such a degree that protection is no longer required”.

Regarding subsidiary protection, the provisions in the Qualification Directive (2011/95/EU) are an attempt to give effect to Member States’ obligation under an assortment of international human rights law, precisely article 3 of the ECHR, which prohibits torture and “inhuman or degrading treatment or punishment”, but also the UN Convention Against Torture, according to Peers & Rogers (2006).⁵⁸

In 2004, the term “subsidiary protection” in EU law suggested an inferiority of status in comparison to refugee status, because the nature of this protection was more temporary under the Qualification Directive (2004/83/EC).⁵⁹ However, international organisations such as UNCHR and the European Council on Refugees and Exiles (ECRE) argued that the differentiation between refugee status and subsidiary protections was unjustified, for the reason that people who are eligible for subsidiary protection are also facing serious risk of suffering serious harm.⁶⁰

Therefore, the recast of the Qualification Directive (2011/95/EU) brought a new perspective for “Subsidiary Protection” in order to set an equal level or at least close to the rights of refugees under article 20 (2). This new provision aims to eliminate distinctions and ensures “non-discrimination” among refugee status and subsidiary protection, according to Recital 17⁶¹ of the Qualification Directive⁶².

⁵⁸ PEERS & ROGERS, 2006, p.338

⁵⁹ Idem.

⁶⁰ PEERS et Al., 2015, p.157.

⁶¹ “With respect to the treatment of persons falling within the scope of this Directive, Member States are bound by obligations under instruments of international law to which they are party, including in particular those that prohibit discrimination.”

⁶² PEERS et Al., 2015, p.157.

1.4) THE VISA ISSUED ON HUMANITARIAN GROUNDS.

There is an alternative procedure that is not often being used by the Member States. It is the visa issued on humanitarian grounds that can be granted to those who seek asylum in the European Union. This instrument is also known as “Humanitarian Visa”. This concept was introduced by Regulation (EC) N. 810/2009 of the European Parliament and by the Council of Europe in order to establish a Community Code on Visas.

According to article 25 (1) of this regulation, the Visa Code allows Member States to issue a Schengen Limited Territorial Validity (LTV) visa based on humanitarian grounds, for reasons of national interest or international obligations under necessary circumstances. Moreover, article 19 (4) of the Visa Code states a possibility to derogate from the admissibility requirements for visa applications “based on humanitarian grounds or for reasons of national interest.”

“Humanitarian grounds” is a broader concept, which was not defined by the EU Visa Code. According to Noll et al (2002) “‘Humanitarian grounds’ remain undefined in the Schengen Convention, but it is contextually clear that the grant of visas to alleviate threats to the applicant’s human rights are covered by the term”.⁶³ Thus, it provides the possibility to Member States to include those who seek asylum in the European Union. The EU visa policy has a different approach with regard to the 1951 Refugee Convention. This regulation does not make a reference to the refugee status, but only to concerns on humanitarian grounds, which can include people who seek for asylum in the EU territory.⁶⁴

Moreover, according to Den Heijer (2012) “issuing of long stay visas remains at the discretion of Member States”⁶⁵, which means that a Member States has the power to decide the issuing of any visa based on their own reasons and judgements through their diplomatic representations.

It is important to highlight that the EU’s visa policy does not provide favourable treatment to refugees, as asylum seekers are not exempted from the visa requirement to

⁶³ NOLL et. Al, 2002, p.232.

⁶⁴ DEN HEIJER, 2012, p. 173.

⁶⁵ Idem, p. 174

get into the EU territory.⁶⁶

The concept of the visa issued on humanitarian grounds falls in the scope of the so-called “Protected Entry Procedures”. These procedures allow an asylum seeker to apply for a visa in a platform of diplomatic representation to approach a State with an asylum claim or any other reason that could be linked to ‘humanitarian grounds’.⁶⁷

There is no specific procedure defined by EU law that could create a standard scheme for all Member States. According to Jensen (2014), “the lack of any monitoring on humanitarian visa procedures makes it difficult to assess the extent to which Member States are making use of the provisions of the visa issued on humanitarian grounds.”⁶⁸

Thus, the duty to issue the humanitarian visa belongs to the Member States’ embassies in a third country that are free to choose whether a person can be granted a humanitarian visa without external interference from other Member States.

Nevertheless, positive practices regarding the implementation of the humanitarian visa are under progress, according to a research requested by LIBE Committee. There are 16 EU Member States that have been implementing the visa type D based on humanitarian grounds for asylum seekers.⁶⁹ Among these Member States are : Italy, Finland, Malta and Portugal. Moreover, they have been issuing the Schengen LTV visa based on humanitarian grounds with regard to “protected-related reasons” for those who seek to gain entry on the EU territory.⁷⁰

At first glance this procedure could be an innovating response to the refugee crisis, although its implementation has not approached a common standard among all Member States of the European Union.

The number of asylum seekers and migrants attempting to reach Europe through the Mediterranean has increased drastically throughout the last years.⁷¹ Considering these circumstances in the European Union, the humanitarian visa might be an alternative solution to assist those who need a protective entry into the European Union and to be granted refugee status.

⁶⁶ DEN HEIJER, 2012, p. 174.

⁶⁷ JENSEN, 2014, p.8.

⁶⁸ Idem, p.7.

⁶⁹ Idem, p.48.

⁷⁰ Idem..

⁷¹ See 2nd Chapter, p.28.

1.4.1) THE HUMANITARIAN VISA AND THE CEAS.

The EU law provides that Member States shall implement laws and practices in order to guarantee that asylum seekers have the possibility to be granted refugee status on the EU territory. Article 78 of the Treaty on the Functioning of the European Union states that: “the Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*(...).”

The Common European Asylum System (CEAS), which includes the EU Asylum Procedures Directive and the Qualification Directive (2011/95/EU), shall be implemented on Member States’ domestic legal system by using their own method of implementation freely, provided that they must follow the European Union intentions respecting the core of the Directives.⁷²

However, the Regulation (EC) N. 810/2009 is not part of the CEAS. The European Union Parliament and the Council of the European Union created this instrument in order to establish a community code on visa as a EU Visa Code. However, a visa issued on humanitarian grounds may open a possibility to complement the CEAS.⁷³

As it was framed on this chapter, the EU Asylum Procedures Directive and the Qualification Directive (2011/95/EU) apply to asylum seekers that are within on the EU territory, but it does not concern for those who are outside the EU and intend to seek asylum in a EU Member State. There is no obligation under these Directives to apply for a third country national outside the borders of the EU.

The humanitarian visa does not intend to be a new tool for asylum application, neither has the intention to substitute the CEAS, but it is useful in order to provide “Protected Entry Procedures” for asylum seekers due to the fact that many asylum seekers are facing dangerous and irregular routes.⁷⁴ Thus, the humanitarian visa could ensure that an asylum seeker arrives in a protective legal way to the EU territory, where he or she would have the possibility to apply for an asylum application.

⁷² LENAERTS & VAN NUFFEL, 2011, p.897.

⁷³ JENSEN, 2014, p.9.

⁷⁴ See 2nd Chapter, p.28.

It is essential to take into account the existence of the humanitarian visa through the Regulation (EC) N. 810/2009, since a considerable number of asylum seekers are trying to reach the EU territory by irregular routes, which can result in serious human rights violation, as it will be analysed in the next chapter.

Therefore, the second chapter of this study focuses on the facts of the current refugee crisis in Middle East and the European Union in order to point out the breaches of the human dignity of the Syrian refugees and how the European Union has been dealing with the great number of refugees on the shores of the Member States.

2) THE REFUGEE CRISIS IN EUROPE AND THE EU ACCOUNTABILITY

2.1) THE REFUGEE CRISIS IN THE MEDITERRANEAN SEA

The European Union has been going through a difficult time because of the current refugee crisis in the Mediterranean Sea and this phenomenon is not likely to diminish in the foreseeable future.

The primary cause of this current flow is the Syrian civil war, which is responsible for a large amount of people wanting to seek asylum in third-countries in order to be protected against the threats in their country of origin. The country has been into a civil war for the past five years. It started with the hope of the 2011 Syrian Spring protests against the Syrian regime of President Bashar Al-Assad.⁷⁵

When anti-government protests erupted in Syria President Bashar Al-Assad refused to renounce his power and initiated a violent counter attack against the insurgents and anti-government groups with the aim to re-establish his government.⁷⁶ Moreover, in the same year of 2011, the President created another battlefield against insurgent groups.⁷⁷

One of the insurgent group is known as the Islamic State in Iraq and the Levant (ISIL),

⁷⁵ ENCICLOPAEDIA BRITANICA, *Islamic State in Iraq and the Levant (ISIS)*, available at <http://www.britannica.com/topic/Islamic-State-in-Iraq-and-the-Levant>. (Consulted on 9 May 2016).

⁷⁶ AUERBACH, *Islamic State of Iraq and Syria (ISIS)*. Available at <http://eds.b.ebscohost.com/eds/detail/detail?sid=dd73285e-4773-466b-be26-6d799c80fae1%40sessionmgr110&vid=12&hid=104&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=98779567&db=ers> (Consulted on 9 May 2016).

⁷⁷ Idem.

and it was created during the Iraq War from 2003-2011 in order to maintain control over western Iraq.⁷⁸

During the declared war between the Syrian government against ISIL, the insurgent group could expand its dominant influence over the eastern region of Syria, so that this area remained outside of the government's control during the conflicts.

ISIL thus began to improve its power over Syria and control the region; as a result, the insurgent group changed its name to Islamic State of Iraq and Syria (ISIS).⁷⁹ Thus, this insurgent group claimed that the regions of western Iraq and eastern Syria must be controlled by the group and should be recognised as a single Islamic state or a "caliphate" in 2014.⁸⁰

Therefore, they became the most dominant group in that region and in order to topple the government and establish its power, this group has been responsible for committing several atrocities against the population, including targeting, kidnapping, and executing civilians, according to Human Rights Watch in its Global Report 2015.⁸¹

Due to the ongoing tension between the Syrian government and ISIS, Syria has turned into a vulnerable country for the civilian population. The United Nations High Commissioner for Human Rights issued a report on August 2014, in which it affirmed that 191.369 people were killed in Syria during the years of 2011 until 2014.⁸²

Moreover, a Syrian local group provided information to Human Rights Watch regarding the large number of death until October 2015, which was about 250.000 people.⁸³ This number represents an increase of over 30% compared to the 2014 OHCHR report.

⁷⁸ ENCICLOPAEDIA BRITANICA, *Islamic State in Iraq and the Levant (ISIS)*, available at <http://www.britannica.com/topic/Islamic-State-in-Iraq-and-the-Levant>. (Consulted on 9 May 2016).

⁷⁹ AUERBACH, *Islamic State of Iraq and Syria (ISIS)*. Available at <http://eds.b.ebscohost.com/eds/detail/detail?sid=dd73285e-4773-466b-be26-6d799c80fae1%40sessionmgr110&vid=12&hid=104&bdata=JnNpdGU9ZWRzLWxpdmU%3d#AN=98779567&db=ers> (Consulted on 9 May 2016).

⁸⁰ *Idem*.

⁸¹ HUMAN RIGHTS WATCH, *Global Report 2015*, Available at <https://www.hrw.org/world-report/2015/country-chapters/syria> (Consulted on 9 May 2016).

⁸² OHCHR *Updated Statistical Analysis of Documentation of Killings in the Syrian Arab Republic*. United Nations, Geneva, 2014. Available at: <http://www.ohchr.org/Documents/Countries/SY/HRDAGUpdatedReportAug2014.pdf#sthash.7xWfxXE7.dpuf> (Consulted on 9 May 2016).

⁸³ HUMAN RIGHTS WATCH. *Syria*. Available at: <https://www.hrw.org/middle-east/n-africa/syria> (Consulted on 9 May 2016)

ISIS and the Syrian government, therefore have a major role in the current refugee crisis. The 2015-16 Amnesty International Report disclosed information regarding unlawful killings, abductions, and indiscriminate attacks against civilians, denying the population to get access to medical facilities, as well as executing attacks on medical facilities perpetrated by ISIS in eastern Syria.⁸⁴

As can be seen, according to the facts, the Syrian population have no alternative but to flee from their own country in order to seek asylum in other countries that are considered safer for the moment. They started to pour into neighbouring countries such as Lebanon, Jordan, Iraq, Turkey and Egypt.

2.1.1) THE SITUATION OF SYRIAN REFUGEES ON NEIGHBOURING COUNTRIES AND EGYPT

The Lebanese government adopted an open border policy with the aim to host the Syrian asylum-seekers in 2013. Moreover, the Government decided to not settle the Syrians in refugee camps, but to allocate them within the States' communities in order to have access to work.⁸⁵ However, the number of Syrians looking for asylum has highly increased in the country. According to UNHCR, by the end of December 2013, the number of refugees in Lebanon was almost 800.000 people.⁸⁶ As a result, the policy adopted by the Lebanese government has started to become challenging.

Hence, most of the Syrians refugees have been settled in poor areas of Lebanon, where the job opportunities are tight and the living conditions are considered precarious. According to Loveless (2013), "all available housing is full or over-full and refugees are setting up unsanitary shanty settlements."⁸⁷

The lack of resources to allocate the Syrians refugees has resulted in the appearance of informal refugees' camp in the region of "Beka'a Valley and the North". These settlements have been breeding grounds for diseases and the refugees have not received

⁸⁴ AMNESTY INTERNATIONAL, 2016, p. 352-354.

⁸⁵ LOVELESS, J. 2013, p. 66.

⁸⁶ UNHCR AGENCY. *Registration Trends for Syrians (April 2016)* . Available at <http://data.unhcr.org/syrianrefugees/country.php?id=122> (Consulted on 9 May 2016).

⁸⁷ LOVELESS, J. 2013, p. 66.

sufficient financial support from the government in order to provide better standards of living.⁸⁸

According to the 2015-16 Amnesty International Report, the Lebanese government has changed the open-border policy and started to refuse the entry of Syrian refugees in the country. Also, the authorities have started to deny to renewal of resident permissions from Syrians refugees that arrived in the country before January 2015. As a result, they have remained in Lebanon without a legal status, and now they are facing the risk of being deported.⁸⁹

The situation of Syrian refugees in other neighboring countries in the Middle East, such as Jordan, is quite similar to Lebanon. Jordan has received almost 642.868 refugees, according to the last update in April from the UNHCR.⁹⁰

The UNHCR report on the Welfare of Syrian refugees pointed out that living conditions in the refugee camps in Jordan are quite problematic due to the growing numbers of refugees that have been coming to the region. At the time, the country was totally not prepared to receive a huge number of Syrians.⁹¹ Under this report, “in 2014, 7 in 10 registered Syrian refugees living in Jordan and Lebanon could be considered poor”. Moreover, it also held that the refugees concentrated in Jordan were poorer than those in Lebanon and the precarious condition tended to increase during the years 2013 until 2015.⁹²

The concept of poverty under Syrian refugees on Jordan camps might be defined as the lack of basic resources that aim to provide good standards of living concerning food nutrition, salubrious accommodations, health, security and also the access to education.⁹³

In the same fashion, the 2015-16 Amnesty International Report held that the Jordanian authorities have begun to “deny the entry of 12.000 refugees from Syria, who as a result have remained in dire conditions in the desert area on the Jordanian side of the border

⁸⁸ *Idem*, p.67

⁸⁹ AMNESTY INTERNATIONAL, 2016, p. 229.

⁹⁰ UNHCR AGENCY. *Registration Trends for Syrians (April 2016)*. Available at <http://data.unhcr.org/syrianrefugees/country.php?id=107> (Consulted on 10 May 2016).

⁹¹ UNHCR AGENCY, 2014, p. xvi.

⁹² *Idem*.

⁹³ *Idem*, p.21.

with Syria”⁹⁴. The justification given by the government is that the State cannot receive refugees anymore, because the country already exceeded the capacity to host new asylum-seekers.⁹⁵

As a result, Lebanon and Jordan have identical concerns regarding the Syrian refugees. Both countries have exceeded their capacities to receive the refugees and, correspondingly, they are creating barriers restricting the entry of refugees.

Another neighboring country that has a significant role on the refugee crisis is Iraq. It is important to highlight that the Iraqi population has also been threatened and affected by the conflicts in the western region promoted by ISIS, which has resulted in 3.2 million Internally Displaced Persons (IDPs) in the country.⁹⁶ Iraq has been confronted with a great number of IDP after the ISIS invasion in the western region. According to the Amnesty International Annual Report 2015-16, almost 500.000 IDP were denied to reach the city of Baghdad by the local authorities.⁹⁷

However, the flow of Syrian refugees in Iraq has reached over 244.642 people by the year of 2015. Most of the refugees have been allocated to shelters in the Kurdistan Region.⁹⁸

The Kurdistan Regional Government (KRG), in partnership with international organisations, has been providing better conditions to the refugee camps with regard to shelter, nutrition, health, access to education and protective measures in order to safeguard the rights of women and children.⁹⁹ Therefore, besides the best practices regarding Syrian Refugees, Iraq is facing a challenge situation concerning to provide good standards of protection to IDP.

⁹⁴ AMNESTY INTERNATIONAL, 2016, p. 212.

⁹⁵ Idem.

⁹⁶ 3RP. *Information Kit: Syrian Refugees – Iraq: Humanitarian Inter-Agency Interventions*. UNHCR Agency. Geneva 2015. Available at: <http://data.unhcr.org/syrianrefugees/download.php?id=10500> (Consulted on 10 May 2016).

⁹⁷ AMNESTY INTERNATIONAL, 2016, p. 198.

⁹⁸ Idem

⁹⁹ UNHCR AGENCY 2014 *Syria Regional Response Plan: Iraq*. Available at <http://www.unhcr.org/syriarrp6/docs/syria-rrp6-iraq-response-plan.pdf> (consulted on 10 May 2016).

More than 4.5 million refugees from Syria are hosted in neighbouring countries in the Middle East, just Turkey hosts over 2.5 million people. The country has the largest Syrian refugee population worldwide.¹⁰⁰

The Turkish government has been providing decent facilities in refugee camps for almost 230.000 among 2.5 million Syrian refugees in the country.¹⁰¹ However, the other 2.27 million people have been renegaded to live outside the refugee camps without receiving aid from the authorities. They do not have proper legal access to work in the country either, according to Amnesty International Report 2015.¹⁰²

The right to work in Turkey is restricted, because most Syrian refugees have been granted “temporary protection”. This status does not allow Syrian refugees to have access to the labour market, since they are not legally allowed to work.¹⁰³ As a result, several Syrian refugees are working in the country illegally, in order to find a way to survive.¹⁰⁴

The Syrians refugees are granted “temporary protection” in Turkey, given that the country ratified the 1951 Refugee Convention with reservations, in other words, the Syrian refugees are not granted refugees status in Turkey.¹⁰⁵

Moreover, the Turkish government has not been doing efforts in order to provide education for Syrian refugees children. The Human Rights Watch report states that “Turkish government schools are officially available to all Syrian primary and secondary school-age students registered for “temporary protection,” but at time of writing more than 400.000 children—over two-thirds of all Syrian children in Turkey—were receiving no form of education.”¹⁰⁶

¹⁰⁰ AMNESTY INTERNATIONAL, *Syria's Refugee Crisis in Number*. Available at: <https://www.amnesty.org/en/latest/news/2016/02/syrias-refugee-crisis-in-numbers/> (Consulted on 10 May 2016).

¹⁰¹ AMNESTY INTERNATIONAL, 2016, p. 373.

¹⁰² Idem.

¹⁰³ BINDINGER, 2015, 228.

¹⁰⁴ AMNESTY INTERNATIONAL, 2016, p. 373.

¹⁰⁵ BINDINGER, 2015, 227.

¹⁰⁶ HUMAN RIGHTS WATCH. *Turkey. Events of 2015*. Available at <https://www.hrw.org/world-report/2016/country-chapters/turkey#331939> (Consulted on 11 May 2016).

However, the Turkish government issued a new regulation in January 2016, which permits Syrian refugees who have been in Turkey for at least six months to work and receive at least one minimum wage as a salary.¹⁰⁷

Despite the efforts of Turkey to keep good standards of living to Syrian Refugees, the country has been using violent methods at its borders in order to avoid the entry of Syrian refugees.

According to Human Rights Watch, “during the months of March and April 2016, Turkish border guards used violence against Syrian asylum seekers and smugglers, killing five people, including a child, and seriously injuring 14 others, according to victims, witnesses, and Syrian locals interviewed by Human Rights Watch.”¹⁰⁸

As can be seen, the Turkish practices and norms are quite harsh for the refugee population. Thus, most of the Syrians are trying to reach the Southern Europe in order to ensure decent living conditions.

One of the most famous routes to reach the EU territory is the cross-land border between Turkey and Greece. But, the Turkish government has been exercising strict control over the borders in order to avoid that the Syrian refugees get the chance to cross it and arrive in Greece.¹⁰⁹

On September 2015, the country detained almost 200 refugees that were accused of travelling illegally around the country. According to the Amnesty International, many of these refugees were forced to leave the country and return to Syria or Iraq.¹¹⁰

Notwithstanding the fact that the Turkish government has been adopting restrictive policies, on 7 March 2016 the European Union and Turkey adopted a cooperation agreement with regard to the large flow of Syrian refugees trying to seek asylum in Europe.¹¹¹

¹⁰⁷ UNHCR AGENCY. High Commissioner welcomes Turkish work permits for Syrian refugees. Available at: <http://www.unhcr.org/569ca19c6.html> (Consulted on 12 May 2016).

¹⁰⁸ HUMAN RIGHTS WATCH. *Turkey: Border Guards Kill and Injure Asylum seekers*. <https://www.hrw.org/news/2016/05/10/turkey-border-guards-kill-and-injure-asylum-seekers> (Consulted on 11 May 2016).

¹⁰⁹ HUMAN RIGHTS WATCH. *Turkey. Events of 2015*. Available at <https://www.hrw.org/world-report/2016/country-chapters/turkey#331939> (Consulted on 12 May 2016).

¹¹⁰ AMNESTY INTERNATIONAL, 2016, p. 373.

¹¹¹ GENERAL SECRETARIAT OF THE COUNCIL OF THE EUROPE UNION. *EU-Turkey Statement*. Press Release 144/16. Available at: <http://www.consilium.europa.eu/en/press/press-releases/2016/03/18-eu-turkey-statement/> (Consulted on 12 May 2016)

The agreement states that the European Union will afford 3 billion euro for the Turkish government to invest in the refugee camps facilities in order to provide better standards of living for the Syrian refugees and increase the number of places in the camps.¹¹²

Besides Syria's neighbouring countries, Egypt is also hosting asylum-seekers and refugees. The country has received almost 119.665 Syrian refugees in Cairo, according to the last update of the UN High Commissioner for Refugees.¹¹³

In September 2015, the UNHCR raised a survey concerning the living conditions of the Syrians on refugee camps in Egypt. The results disclosed that most of them are living in precarious conditions in the region, so that 90% of the Syrian refugees are "on or below the poverty line set by UNHCR."¹¹⁴

Alongside the poverty conditions that Syrian refugees are dealing in the country, the Egyptian authorities have committed several human rights violations against the refugee population, according to Amnesty International. In August 2015, this NGO reported that the Syrian refugees have been discriminated against by public authorities, and local authorities were executing arbitrary arrests and detention.¹¹⁵ Likewise, the use of lethal force by Egyptian border authorities against Syrian refugees has been widespread, owing to a considerable number of Syrian refugees that have begun to leave the country with the hope to seek asylum in the European Union territory.¹¹⁶ The most noteworthy case was the Syrian eight-years-old girl who got shot by the authorities while she was attempting to escape the country with her family.¹¹⁷

In essence, the countries neighbouring Syria and Egypt are facing real struggles concerning the current refugee's crisis. There are 4.8 million Syrian refugees hosted in these countries, whose policies and practices have been considered ineffective with regard to the refugee's claims. Therefore, since 2013, a large number of Syrian refugees

¹¹² Idem.

¹¹³ UNHCR AGENCY. *Registration Trends for Syrians (March 2016)*. Available at <http://data.unhcr.org/syrianrefugees/country.php?id=8> (Consulted on 12 May 2016).

¹¹⁴ MIDDLE EAST EYE. *UN: 90 percent of Egypt's Syrian refugees living in poverty*. Available at: <http://www.middleeasteye.net/news/un-almost-90-percent-egypt-s-syrian-refugees-severely-vulnerable-1629992316#sthash.kz3D5nqK.dpuf> (Consulted on 12 May 2016)

¹¹⁵ AMNESTY INTERNATIONAL, *Syria: Voices in Crisis*. Available at: <https://www.amnesty.org/en/documents/mde24/2352/2015/en/> (Consulted on 12 May 2016).

¹¹⁶ Idem.

¹¹⁷ THE TELEGRAPH. *Fleeing Syria for Europe: Safaa's Fatal Journey*. Available at: <http://s.telegraph.co.uk/graphics/projects/safaas-journey/> (Consulted on 12 May 2016).

have been trying to seek asylum in EU territory where they hope to find better standards of living, job opportunities and education.

2.1.2) THE SYRIAN REFUGEES IN THE MEDITERRANEAN SEA AND THE EU.

The Mediterranean Sea has become a new route for those who seek asylum in times of conflicts. Many asylum seekers are trying to reach EU territory due to the lack of enough protection for all Syrian Refugees in Middle East. The major countries in European Union, where asylum seekers arrive from North Africa and Middle East, are Greece, Italy and, to a lesser extent, Spain.¹¹⁸

Despite the large number of Syrian asylum seekers who try to reach the EU territory by the Mediterranean Sea, the UNHCR held that other Middle Eastern asylum seekers and migrants, such as Afghanis, Iraqis and Pakistanis, are also taking the same routes such as the Syrians Refugees.¹¹⁹

In 2015, the numbers of asylum seekers that arrived on the EU territory by the Mediterranean Sea were 1.015.078 people.¹²⁰ This amount represents an increasing of 363% compared to the number of people that reached EU territory through the Mediterranean in 2014, which were almost 216.054 people.

The UNHCR also stated that 46% of people who arrived in the EU territory since the beginning of 2016 by the Mediterranean Sea were men, while the proportional numbers of children and women were respectively 35% and 20%.¹²¹

The growing numbers in 2015 might be explained by the arrival of Syrian refugees fleeing from the civil war, which represented 49% of the arrivals in Greece among 853.723 of people that had arrived by the Mediterranean Sea.¹²²

¹¹⁸ UNHCR AGENCY. *Refugees/Migrants Emergency Response - Mediterranean* (April 2016) Available at: <http://data.unhcr.org/mediterranean/regional.php> (Consulted on 13 May 2016).

¹¹⁹ UNHCR AGENCY. *Refugees/Migrants Emergency Response - Mediterranean* (April 2016) Available at: <http://data.unhcr.org/mediterranean/regional.php> (Consulted on 13 May 2016).

¹²⁰ Idem.

¹²¹ Idem.

¹²² Idem.

The UN High Commissioner for Refugees carried out a survey with the Syrian Refugees in Greece in April 2015 in order to learn and discover the reasons that motivated them to move to Greece. According to the data, 60% of the responders “said that they had previously spent time in Turkey” and “two thirds of those questioned said they had received no assistance there, and the majority had left because of unemployment and the lack of financial assistance”.¹²³ Moreover, this research also suggested that 90% of the responders felt motivated to seek asylum in the European Union, mainly in the Member States of Germany and Sweden, because they hope to find better settings of aid support and job opportunities in these countries.¹²⁴

According to a research promoted by the European Statistic (Eurostat), “in 2015, the highest number of first time applicants was registered in Germany (with 441 800 first time applicants, or 35% of all first time applicants in the EU Member States), followed by Hungary (174 400, or 14%), Sweden (156 100, or 12%), Austria (85 500, or 7%), Italy (83 200, or 7%) and France (70 600, or 6%).”¹²⁵

Therefore, this massive flow of refugees might be explained by the fact that Middle Eastern countries are unable to offer high standards of assistance to Syrian refugees, owing to the conditions of gaining access to health, work and good living facilities are far from being acceptable.

Thousands of refugees in Egypt and Turkey have been smuggled at the borders by human traffickers with the promise to get into EU territory. The mode of transport involves flimsy vessels or irregular ships, which leaves the shores completely overcrowded.¹²⁶

¹²³ UNHCR AGENCY. *The sea route to Europe: The Mediterranean passage in the age of refugee*. Available at: <http://www.unhcr.org/5592bd059.html> (Consulted on 13 May 2016).

¹²⁴ Idem.

¹²⁵ EUROSTAT PRESS OFFICE. The Record number of over 1.2 million first time asylum seekers registered in 2015. Available at: <http://ec.europa.eu/eurostat/documents/2995521/7203832/3-04032016-AP-EN.pdf/790eba01-381c-4163-bcd2-a54959b99ed6> (Consulted on 12 June 2016).

¹²⁶ UNHCR AGENCY. *Latest deaths on Mediterranean highlight urgent need for increased rescue capacity*. Available at: <http://www.unhcr.org/552e603f9.html> (Consulted on 15 May 2016).

The conditions of these transports are considered dangerous, taking more than 3.700 deaths according to the accurate data of the UNHCR in 2015. Likewise, almost 2886¹²⁷ people lost their life or disappeared in the Mediterranean Sea so far.¹²⁸

The famous case of the three-year-old-Kurdish boy drowned on the shores of The Greek Mediterranean Sea, Aylan Kurdi, called the attention of the authorities from the European Union regarding the number of deaths at sea. As well, other international organisations such as UNICEF alleged that more than 340 children has drowned in the Mediterranean Sea, since they could not be granted with safe entrance in the EU territory.¹²⁹

Moreover, a study promoted by the International Organisation for Migration (IOM) states that the higher numbers of death are concentrated on the Central Mediterranean Sea, which was responsible for almost 76% of the death during the year of 2015.¹³⁰ During the year of 2015, almost 2900 people died or disappeared at the Central Mediterranean Sea while they were trying to reach Italy.¹³¹ The asylum seekers who survive the dangerous journey may also suffer certain abuses or restrictions committed by local authorities when they arrive in a Member State territory.

Due to the large number of asylum seekers coming to the sea borders of the EU territory, some Member States have been applying the policy of “pushback” against them. According to an article published by Duncan Breen, “pushbacks constitute irregular returns of refugees or migrants to neighbouring states from within a state’s territory without any form of individual screening, or rejection at the border of people seeking international protection.”¹³²

¹²⁷ This data was updated on June 2016. Since then, there is no new information about the number of deaths.

¹²⁸ UNHCR AGENCY. *Refugees/Migrants Emergency Response - Mediterranean* (June 2016) Available at: <http://data.unhcr.org/mediterranean/regional.php> (Consulted on 28 June 2016).

¹²⁹ UNHCR AGENCY. *With growing numbers of child deaths at sea, UN agencies call for enhancing safety for refugees and migrants* Available at: <http://www.unhcr.org/56c6e7676.html> (Consulted on 15 May 2016).

¹³⁰ IOM. *Mediterranean Sea: Data of Missing Migrants*. Available at: <http://missingmigrants.iom.int/mediterranean> (Consulted on 16 May 2016).

¹³¹ AMNESTY INTERNATIONAL, 2016, p. 204.

¹³² BREEN, 2016, p.21.

For instance, 2015-16 Amnesty International Annual Report held that the Greek authorities perpetrated 11 cases of pushbacks of asylum seekers at the land and sea borders of Greece-Turkey during the months of November 2014 until the end of August 2015.¹³³

Likewise, Amnesty International reported similar cases of pushbacks committed by the National Authorities in Bulgaria at the border with Turkey.¹³⁴ According to data gathered by the Human Rights Watch, the Bulgarian government planned a new policy named “Containment Plan” in order to avoid irregular entry at the borders.

The Containment Plan plans to reinforce maximum security at the border “entailed deploying an additional 1,500 police officers at the border, supplemented by a contingent of guest guards from other EU member states through the EU’s external border control agency, Frontex, and the construction of a fence along a 33-kilometer stretch of the Turkish border.”¹³⁵

As a result, approximately 519 asylum seekers and migrants have been pushed back at the Bulgaria-Turkey border in 2014. The National authorities arrested them when they tried to cross the Turkish border and immediately returned them to Turkey without given them the opportunity to apply for asylum.¹³⁶

In 2014, the UN High Commissioner on Refugees gathered information based on interviews with asylum seekers and migrants regarding the treatment by the Bulgarian authorities. According to their report, a group of 12 Iraqi people were denied entry to the country and had their belongings confiscated, and they were wounded by the border authorities.¹³⁷

In Italy, Amnesty International reported a deep concern about the reception conditions of the large number of individuals who have been arrived in Italy by the Central

¹³³ AMNESTY INTERNATIONAL, 2016, p. 168.

¹³⁴ Idem, 96.

¹³⁵ HUMAN RIGHTS WATCH. *Containment Plan: Bulgaria’s Pushbacks and Detention of Syrian and Other Asylum Seekers and Migrants*. Available at <https://www.hrw.org/report/2014/04/28/containment-plan/bulgarias-pushbacks-and-detention-syrian-and-other-asylum-seekers> (Consulted on 17 May 2016).

¹³⁶ Idem.

¹³⁷ UNHCR AGENCY. *UNHCR calls for an investigation into the death of two Iraqis at the Bulgaria-Turkey border, raises concerns over border practices*. Available at: <http://www.unhcr.org/551a70379.html> (Consulted on 17 May 2016).

Mediterranean Sea. According to the report, the Italian government developed a proposal that consists in reallocating the asylum seekers in other reception centres around the country. This policy has faced many complaints from some communities in Italy, which resulted, in July 2014, in violent attacks against the reception centres in Northeast Italy.¹³⁸

According to the Human Rights Watch report in the events of 2015, the reception centres for asylum seekers in Italy are not considered fully adequate to host unaccompanied minors. The country registered almost 7.600 unaccompanied minors who had arrived until August 2015.¹³⁹

Moreover, the Italian government applied a new policy to resettle asylum seekers from a specific nationality to another EU Member State that would provide reception conditions to them. However, the national authorities in Sicily have issued deportation orders upon the arrival of some asylum seekers in the region, for the reason that the authorities did not recognise that they would be granted refugee status. These expulsions can be considered as arbitrary, since the asylum seekers did not have the “opportunity to seek asylum or receive information regarding their rights”.¹⁴⁰

As can be seen, the general concern in the current refugee crisis on the Mediterranean Sea focuses on the irregular routes where asylum seekers risk their life in order to arrive in the EU territory. A huge number of people lost their life on the Mediterranean Sea while they were transported in unsafe vessels used by human traffickers. This current situation is of grave concern for the European Union. The refugees are getting into a vulnerable situation when they reach the EU territory, since they have no previous authorization from the country of destination to enter in a Member State territory. Consequently, the arbitrary expulsion from the local authorities against the refugees tends to increase and result in severe human rights violations.

¹³⁸ AMNESTY INTERNATIONAL, 2016, p. 205.

¹³⁹ HUMAN RIGHTS WATCH, *European Union. Events of 2015*. Available at: <https://www.hrw.org/world-report/2016/country-chapters/european-union-0#1007e1> (Consulted on 17 May 2016).

¹⁴⁰ AMNESTY INTERNATIONAL, 2016, p. 205.

2.2) THE HUMAN RIGHTS OBLIGATIONS UNDER THE REFUGEE CRISIS

The international community has expressed serious concern at the refugee crisis. It has caused several human rights breaches, in the field of international law regarding the rights of the asylum seekers and refugees. Across the Middle Eastern countries, millions of Syrian refugees have been suffering abuses and violations against their human rights. The right to seek asylum is guaranteed in article 14 of the 1948 Universal Declaration of Human Rights (UDHR). The provision holds that “everyone has the right to seek and to enjoy in other countries asylum from persecution”.

Although this might be interpreted as a measure of protection for asylum seekers, the right to seek asylum under article 14 of the UDHR works as a matter of recognition and not as a duty. In matter of fact,¹⁴¹ the UDHR is not considered as a Treaty-Law itself, since all the rights of the Declaration are not legally binding for the Member States of the United Nations.

However, some scholars have the opinion that the UDHR might be constituted as international customary law, because some Member States of the UN has incorporated the provisions from the Declaration into their domestic laws.¹⁴² According to these scholars, the UDHR is a “codification of pre-existing customary laws”, which gives the idea that the rules framed in the UDHR were based on legal states practices from the Member States and also through *opinio juris*, which means that a State is obliged to a certain act, even though the State cannot prove its practice under the legal system.¹⁴³

The UDHR might be seen as an inspiration in order to create Treaty-laws with regard to the Human Rights defined by this document, for instance, the fundamental rights framed in the UDHR have brought the elaboration of Covenants and Conventions such as the 1966 International Covenant on Civil and Political Rights (ICCPR) and even the 1951 Refugee Convention.

¹⁴¹ DE FEYTER & GOMÉS ISA, p.192, 2009.

¹⁴² Idem, p.225.

¹⁴³ Idem, p.226

Still, not all Middle Eastern countries have ratified the Treaties concerning the safeguard of asylum seekers and the recognition of refugee status. Countries such as Iraq, Lebanon and Jordan have not yet ratified the 1951 Refugee Convention.¹⁴⁴

Nonetheless, those countries have developed domestic policies to provide protection for asylum seekers and refugees. For instance, the authorities of the Kurdish area in Iraq have adopted new measures in order to grant refugee status to Syrians, such as the Law 21-2010 in which provides better aid for asylum seekers in the region, as well as social assistance (in order to grant legal access for Syrian refugees to enrol in public schools) and job opportunities: to tackle irregular work in the region.¹⁴⁵

Jordan also made an agreement with the UN High Commissioner of Refugees in 1998, precisely a Memorandum Of Understanding (MOU) that allows refugees to remain in Jordan for the maximum period of six months. After this period, the refugees shall be resettled into another country with the coordination of the UNHCR.¹⁴⁶ Moreover, the MOU stresses the concept of refugee status and also incorporates the principle of *non-refoulement* for asylum seekers.¹⁴⁷

The country is still committing breaches of this principle; Amnesty International reported that Jordan had denied the entry of new Syrian asylum seekers when they arrived at the borders of the country.¹⁴⁸ As was explained in the previous chapter, the principle of *non-refoulement* ensures that an asylum seeker will not be sent back to his or her country of origin where he or she faces an imminent risk of life.

Lebanon has also signed the MOU agreement, but the country has not yet ratified the 1951 Refugee Convention. The Lebanese norms recognise the right to seek asylum

¹⁴⁴ UNHCR AGENCY, *States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol*. Available at: <http://www.unhcr.org/3b73b0d63.html> (Consulted on 18 May 2016).

¹⁴⁵ THE LAW LIBRARY OF CONGRESS, *Legal Status of Refugees: Egypt, Jordan, Lebanon, and Iraq*. Available at: https://www.loc.gov/law/help/refugees/legal-status-refugees.php#_ftn21 (Consulted on 18 May, 2016).

¹⁴⁶ UNHCR AGENCY, *Global Appeal 2012-2013*. Available at: <http://www.unhcr.org/4ec231020.pdf> (Consulted on 18 May 2016).

¹⁴⁷ *Idem*.

¹⁴⁸ AMNESTY INTERNATIONAL, 2016, p. 212.

according to UDHR as an international customary law; and, the Lebanese Constitution similarly frames this recognition.¹⁴⁹

Despite the efforts to implement the domestic law, Amnesty International has reported the increasing number of Syrian refugees that could not extend their residence permit in Lebanon.¹⁵⁰ This situation might lead to a large number of refugees without legal residence, who may face the risk to be expelled from the country. Consequently, it can result in a foreseeable breach on the principle of *non-refoulement*.

Iraq, Jordan and Lebanon has been experiencing serious difficulties with regard to tackling poverty in refugees camps; and, they do still need to provide job opportunities for those who seek asylum in order to corroborate the right to work, which is an essential human right, recognised by the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), under article 6. Iraq, Jordan and Lebanon are also Contracting State of this Covenant, so they must comply in their national practices a better access to legal job opportunities for Syrian Refugees.

Moreover, the ICESCR states the right to adequate standards of living in article 11 and the right of everyone to education under article 13. Iraq, Lebanon and Jordan shall accomplish with the ICESCR, once they are legally binding through its provisions.

Although these countries have been attempting to tackle these problems, a foreseeable solution can be financial aid from international organisations, such as the UNHCR. In 2016, this organisation provided the Middle East with a budget of 1.8 million dollars in order to invest in several projects in the region, in which were included the Syrian refugee crisis.¹⁵¹

On the other hand, Egypt and Turkey are Contracting States of the 1951 Refugee Convention, even though the situation concerning human rights in these countries might be seen legally critical.

The Egyptian authorities have been violating the right to life provided by article 6 of the ICCPR, which held that “no one shall be arbitrarily deprived of his life”. The allegation

¹⁴⁹ ACAPS, *Legal Status of Individuals fleeing Syria. 2013*. Available at: <http://reliefweb.int/report/syrian-arab-republic/legal-status-individuals-fleeing-syria-syria-needs-analysis-project-june> (Consulted on 18 May 2016).

¹⁵⁰ AMNESTY INTERNATIONAL, 2016, p. 229.

¹⁵¹ UNHCR AGENCY, *Global Focus, UNHCR Operation Worldwide*. Available at: <http://reporting.unhcr.org/node/36> (Consulted on 18 May 2016).

of arbitrary deprivation of a person's life based on the use of lethal force against Syrian Refugees on the borders of the country. According to Amnesty International, the national security forces killed 20 Sudanese and Syrian refugees while they were trying to leave Egypt.¹⁵²

Besides, the national authorities have also committed arbitrary arrest and detention of the asylum seekers in the region and it also constitutes a breach of article 9 of the ICCPR, as it states: "no one shall be subjected to arbitrary arrest or detention".¹⁵³

Moreover, in the year 2014, the Egyptian authorities were planning to deport a certain number of Syrian refugees under the excuse that they were "illegal migrants" in the country.¹⁵⁴

This example illustrates a misunderstanding by the Egyptian government in the attempt to label the Syrian Refugees as Illegal migrants. Migrants and refugees are different concepts under the 1951 Refugee Convention. Moreover, article 32 of the Convention held that a refugee shall not be expelled from the host-country save on grounds of national security; and, article 33 ensures the principle of *non-refoulement*, which involves the prohibition of expulsion or return of a refugee to a country where she or he is facing a threat.

Among the Middle Eastern countries, Turkey has a special role in human rights law. The country is a Contracting Party of the 1951 Refugee Convention, but the ratification was made with reservations in accordance with article 42 of the Convention. The country just recognises the refugee status for asylum seekers when the individual is fleeing from Europe. Asylum seekers who come from outside the European continent are granted a "temporary asylum seeker status" in order to be eligible for "temporary protection".¹⁵⁵ Moreover, Turkey is also a Contracting Party of the European Convention on Human Rights (ECHR); the country ratified the Convention in 1954.

¹⁵² AMNESTY INTERNATIONAL, 2016, p. 148.

¹⁵³ AMNESTY INTERNATIONAL, *Egypt: Halt plans to forcibly return Syrian refugees and asylum seekers, end unlawful detentions* Available at: <https://www.amnesty.org/en/latest/news/2014/04/egypt-halt-plans-deport-syrian-refugees-and-end-unlawful-detentions/> Consulted on 18 May 2016).

¹⁵⁴ Idem.

¹⁵⁵ ACAPS, *Legal Status of Individuals fleeing Syria. 2013*. Available at: <http://reliefweb.int/report/syrian-arab-republic/legal-status-individuals-fleeing-syria-syria-needs-analysis-project-june> (Consulted on 18 May 2016).

In the same way as Egypt in the current refugee crisis, the Turkish government has committed breaches regarding international human rights treaties and the refugee law. The case of the Turkish security force using lethal force against Syrian asylum seekers and smugglers falls within the scope of article 6 of the ICCPR and article 2 (a) of the ECHR. The use of disproportional force is considered unlawful and it is a serious violence against the Syrian refugees.

According to Amnesty International, the forcible deportation of Syrian Refugees to their country of origin is a violation of the principle of *non-refoulement*, under article 33 of the 1951 Refugee Convention. This case is also in violation of article 3 of the ECHR regarding the prohibition of torture or ill treatment, for the reason that this article has extraterritorial effects.¹⁵⁶

Also at the borders of Turkey-Bulgaria and Greece, the pushbacks are not likely to end. Bulgarian and Greek officers disrespect article 18 of the EU Charter of Fundamental Rights about the right to provide asylum for those who seek it. Although the Charter on Fundamental Rights is not a Treaty Law itself, “the Lisbon Treaty conferred on the Charter the same legal force as the Treaties”.¹⁵⁷

Collective expulsions are related to a violation of article 3 of the ECHR, as well as article 33 of the 1951 Refugee Convention. These provisions are considered “non-derogable”, which means that the Member States are not allowed to justify pushbacks and collective expulsions.¹⁵⁸ Therefore, these actions of the Member States are not legitimate, because they violate international human rights law to which all the Member States have to respect.

The breach of *non-refoulement* is established in the case *Hirsi Jamaa and Other v. Italy*¹⁵⁹. Italy was condemned by The European Court of Human Rights (ECtHR), whose sentence decided that collective expulsions are a breach of article 3 of the ECHR. Similarly, the Amnesty International’s Head of Refugee and Migrants’ Rights., Mr. Sherif Elsayed-Ali, held that “even on the high seas, international human rights norms

¹⁵⁶ *Soehring Case*. (ECTHR, 1989).

¹⁵⁷ LENAERTS & VAN NUFFEL, 2011, p.832.

¹⁵⁸ FRA(c), 2015, p.21.

¹⁵⁹ *Hirsi Jamaa and Other v. Italy* (ECTHR, 2009).

still apply, including the principle of *non-refoulement*, which prohibits returning people to a country where they run the risk of human rights abuses.”¹⁶⁰

The Syrian Refugees have been taking illegal routes in order to arrive upon the southern region of Europe. Most of them are renegade to be trafficked by smugglers across the borders of North Africa and Turkey in unsafe precarious vessels, so that a vast number of refugees end up losing their lives in the Mediterranean Sea.

Certain human rights obligations shall be performed by European Union in order to avoid the death of the refugees. A study conducted by the Policy Department of the European Parliament pointed out that individuals that are at risk at sea within the jurisdiction of a Member State might require rescue and assistance from the competent authorities of this country, according to article 98 of the United Nations Convention on the Law of the Sea (UNCLOS).¹⁶¹ Thus, there is not the least doubt that Member States have the duty to provide aid for those who arrive at the sea, even if they keep coming under circumstances of irregular routes.

Moreover, the Policy Department study stressed the importance of the Palermo Convention as a significant instrument in order to tackle the smuggling of refugees in Mediterranean Sea.¹⁶² As stated in article 2 of this convention, this Protocol aims to “prevent and combat trafficking in persons (...), protect and assist the victims of such trafficking, with full respect for their human rights (...)” with the cooperation of all the Member States who signed this Convention.

Therefore, these international instruments bring out the accountability of the European Union regarding the human rights protection of most of the refugees who reach the EU through illegal routes on the Mediterranean Sea. To illustrate it, article 78 (2) (g) of the TFEU¹⁶³ holds the EU law might ensure cooperation with third countries to provide

¹⁶⁰ EUROPEAN DATABASE OF ASYLUM LAW. *Hirsi Jamaa and Other v. Italy*, Application N. 27765/09. Comments on the case. Available at: <http://www.asylumlawdatabase.eu/en/content/ecthr-hirsi-jamaa-and-others-v-italy-gc-application-no-2776509> (Consulted on 19 May 2016).

¹⁶¹ FRA(c), 2015, p.26.

¹⁶² *Idem*, p. 27.

¹⁶³ “Partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.”

manage inflows of people, and even to provide the possibility to Protected Entry Procedures for asylum seekers who cannot reach the EU territory.¹⁶⁴

The European Union has been taking initiatives to prevent refugee smuggling and loss of life at Mediterranean Sea. The Council of Europe, under the Council Decision (CFSP) 2015/972, has launched the “European Union military operation in the southern Central Mediterranean (EUNAVFOR MED)”.¹⁶⁵ This program aims to use military operations from EU Member States to intercept and arrest vessels controlled by human traffickers on the Mediterranean Sea in order to end the refugees smuggling and trafficking network. Moreover, the EUNAVFOR MED set as a goal: “to reduce the further loss of lives at sea”.¹⁶⁶

Although the EU has been working to tackle the illegal routes followed by the Syrian Refugees, for the reason to save their lives, this policy might not be the best practice regarding protective measures for asylum seekers and refugees.

2.3) THE ROLE OF HUMANITARIAN VISA ON THE REFUGEE CRISIS

It is a fact that 4.8 Syrian Refugees are hosted in the Middle East. The region cannot solve this problem due to the lack of resources and the numbers of human rights breaches are of great concern. Most of the Syrians refugees are trying to reach the EU territory to find better standards of living conditions, since the lack of resources and human rights practices in the Middle East has becoming critical for them.

The lack of legal routes for refugees, as well as the lack of permission to enter the EU territory, are pressing issues in the current refugee crisis. According to the 2015 Annual Risk Analysis issued by the FRONTEX, more than 80% of non-EU population needs a visa to entry in the EU territory,¹⁶⁷ which includes the entire African and Middle Eastern

¹⁶⁴ PEERS et al, 2015, p.671.

¹⁶⁵ THE COUNCIL OF THE EUROPEAN UNION. *European Union Naval Force – Mediterranean Operation Sophia*. May 2016. Available at: http://www.eeas.europa.eu/csdp/missions-and-operations/eunavfor-med/pdf/factsheet_eunavfor_med_en.pdf (Consulted on 19 May 2016).

¹⁶⁶ Idem.

¹⁶⁷ FRONTEX, 2015, p.15.

Continents, except Israel and the United Arab Emirates.¹⁶⁸

The EU policy has adopted severe policies in order to refuse the entering of people in irregular situation. One of these policies is with regard to the Council Directive (2004/82/EC) on the obligations of carriers to communicate the passenger's data. In agreement with article 1 of this Directive, the goal of this norm is to improve border controls in the EU territory and tackle irregular migration.

This Directive so-called "Air Carrier Sanctions" has also the purpose of acting as a border control under article 2 (c), which states: "a check carried out at a border in response exclusively to an intention to cross that border, regardless of any other consideration." If an air company does not accomplish with the Directive provisions, whether they have not transmitted a fully passenger's data or transmitted a false data, the Member State shall take the necessary measures to impose sanctions against the air-company, according to article 4 of the Directive. The sanction provided in article 4 of this Directive may vary from fines between 3000 euro until 5000 euro or even a temporary suspension or withdrawal of the operating license.¹⁶⁹

Thus, the Council Directive (2004/82/EC) brings more boundaries concerning the situation of asylum seekers who are not exempted to require a visa to entry in the EU territory. This could be one of the facts that explain why a large number of Syrian refugees coming from North Africa and Middle East are facing dangerous illegal migration channels: they do not have another alternative.

According to a working document from the Committee on Civil Liberties, Justice and Home Affairs of the European Union Parliament, the humanitarian visa could be a solution for this case, since it will provide an international protection for asylum seekers in order to reach a EU Member State territory, where they will have the chance to apply for an asylum procedure.¹⁷⁰

¹⁶⁸ THE EUROPEAN UNION COMMISSION. *Visa Policy*. Migration and Home Affairs. Available at: http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/visa-policy/index_en.htm (Consulted on 10 June 2016).

¹⁶⁹ ROSSI DAL POZZO, 2015, p.104.

¹⁷⁰ THE PUBLICATIONS OFFICE OF THE EUROPEAN UNION PARLIAMENT. *On the mid-term of the Stockholm Program 2014*. Committee on Legal Affairs, Committee on Civil Liberties, Justice and Home Affairs and Committee on Constitutional Affairs. Geneva, 2014. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0153+0+DOC+XML+V0//EN> (Consulted on 10 April 2016).

Moreover, in 2014 the UNHCR Central Mediterranean Sea Initiative (CMSI) has made recommendations to European Union regarding the tragedies at the Mediterranean Sea. One of the recommendations suggests that EU should provide legal protective measures for asylum seekers and make use of EU Visa code to provide humanitarian visa for them.¹⁷¹

Although the humanitarian visa has an important role in the current refugee crisis, the Member States do not yet meet a harmonization of the EU Visa Code based on articles 25 (1) and 19 (4). It is not clear whether the visa based on humanitarian grounds is an obligation or not.

Therefore, the humanitarian can be an important instrument whereby refugees might have the chance to reach the EU without having their human rights violated by illegal routes or denial of entry at the borders. The next chapter will focus on the visa issued on humanitarian grounds with regard to its practices in European Union.

3) THE HUMANITARIAN VISA

3.1) PROTECTED ENTRY PROCEDURE

As we have already seen in the previous chapters of the present study, it is necessary to highlight that one of the main goals of the humanitarian visa is to provide protective measures to asylum seekers. The visa issued on humanitarian grounds does not have the legal power to grant someone refugee status, such as the EU Asylum Procedures Directive and the Qualification Directive (2011/95/EU), but it does complement the asylum procedures offering “Protected Entry Procedure”.

The idea of Protected Entry Procedure is not a new phenomenon on the scope of the European Union. The EU Community started to become aware of human trafficking and smuggling activities within the borders of the EU territory.¹⁷² Therefore, the European

¹⁷¹ UNHCR AGENCY. *Central Mediterranean Sea Initiative (CMSI): EU solidarity for rescue-at-sea and protection of refugees and migrants*, 13 May 2014, available at: <http://www.refworld.org/docid/538d73704.html> (Consulted on 11 June 2016).

¹⁷² GARLICK, 2006, p.611.

Council elaborated the 1999 Tampere Conclusions with the aim to develop the European Union as an “area of freedom, security and justice by making the full use of the possibilities offered by the Treaty of Amsterdam”.¹⁷³

The Tampere Conclusion called the European Parliament to establish a common migration and asylum policies to stop irregular migration flow and international criminal activities concerning human trafficking. The conclusion under paragraph 3, holds that a common migration and asylum policy “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.”¹⁷⁴ The protected entry idea was demanded on the 1999 Tampere Conclusion, even though the idea behind guarantee protection to asylum seekers should have a better approach under the concept of Protected Entry Procedure.

The Danish Centre for Human Rights, on behalf of the European Commission, promoted in 2002 a “study on the feasibility of processing asylum claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure”. This study elaborated proposals to the EU in order to develop protected entry procedure for third nationals.¹⁷⁵ The study analysed the concept under Protected Entry Procedure that was defined as “a concept of arrangements allowing 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”.¹⁷⁶

One of the proposals mentioned by the 2002 Feasibility study¹⁷⁷ in order to provide Protected Entry Procedure is the flexibility under the Schengen Visa, which means that the decisions from the Member States diplomatic representation, in order to grant a visa, should obey international human rights standards, such as: “Refugees in need of legal protection because of imminent danger of *refoulement*” or “Persons present in their

¹⁷³THE PUBLICATIONS OFFICE OF THE EUROPEAN UNION, *Tampere European Council 15 and 16 October*. Available at: http://www.europarl.europa.eu/summits/tam_en.htm (Consulted on 11 June 2016).

¹⁷⁴ Idem.

¹⁷⁵ JENSEN, 2014, pp.30-31

¹⁷⁶ NOLL et al, 2002, p.10.

¹⁷⁷ “Study on the feasibility of processing asylum claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure”.

country of origin or habitual residence and at risk of persecution.”¹⁷⁸

Likewise, the study suggests a proposal of a Protected Entry Procedure towards a “Schengen Asylum Visa”, which proposes a harmonisation among the Member States with regard to protective measures for the visa application.¹⁷⁹

Subsequently, in 2003, the European Commission approved the study promoted by the Danish Centre; and, for the first time the Commission issued a communication to the European Union Parliament, making references to ‘protected entry schemes’ as an important measure for a Common asylum and migration policy.¹⁸⁰ Nowadays, the European Commission accepts the Protected Entry Procedures concept as a complement approach under the humanitarian visa and the common guidelines on asylum procedures and migration.¹⁸¹

This adoption of the concept from the 2002 Feasibility, studied in this report, may indicate that the EU community has been creating an awareness under the necessity of a protection entry measures for non-EU population.”¹⁸²

Moreover, in 2012, the Italian Refugee Council issued a report about protecting entry in European Union, through which refers to a flexible use of the Visa Code under article 25 (1) of the Regulation (EC) N. 810/2009 for the purpose of humanitarian grounds and individuals who need international protection.¹⁸³

However, the idea of improving the humanitarian visa as a Protected Entry Procedure in the European Union came with the adoption with the Stockholm Programme in the Council of the European Union.

3.1.1) THE GUIDELINES OF THE STOCKHOLM PROGRAMME

The European Council elaborated the 2009 Draft Stockholm Programme with a similar goal to the 1999 Tampere Conclusion towards the development on the areas of freedom, security and justice affairs. The draft was based on the Commission Communication of

¹⁷⁸ NOLL et al, 2002, p.225.

¹⁷⁹ Idem, pp. 244-250.

¹⁸⁰ JENSEN, 2014, p.31.

¹⁸¹ PEERS et al, 2015, p.667.

¹⁸² HEIN & DE DONATO, 2012, p.27.

¹⁸³ HEIN & DE DONATO, 2012, p.27.

June 2009; its objective was to emphasize an effective implementation and enforcement of freedom and security procedures so as to comply with international protections considerations and human rights assertions regarding “responsibility, solidarity and partnership in migration and asylum matters”. For this reason, the 2009 Draft Stockholm Programme had as its final purpose to create common policies within the EU Member States.¹⁸⁴

Moreover, the 2009 Communication from the Commission takes into consideration the visa policy in the EU, under paragraph 4.2.3.3. The new EU visa code (Regulation (EC) N. 810/2009) shall entry into force so as to create a Common European Schengen visa.¹⁸⁵

And, finally, paragraph 5.2.3 of the 2009 Communication from the Commission of the European Communities pointed out the necessity of solidarity with non-member countries concerning the refugee flow, in order to provide “access to protection and adherence to the principle of *non-refoulement*”. Likewise, it took into consideration that the Member States shall offer Protected Entry Procedures regarding the visa issued on humanitarian grounds, which 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”.¹⁸⁶

Hence, after the Communication of the Commission to create the Draft for the 2009 Stockholm Programme, the official document addressed the importance to develop a common visa policy among the EU Member States. Regarding the idea of enforcement of the humanitarian visa, the Draft did not mention the necessity of the implementation of the visa based on humanitarian grounds; however, the Stockholm Programme held the matter of a comprehensive European migration policy, in which shall include individuals who seek international protection so as to ensure access to “legally safe and

¹⁸⁴ COMMISSION OF THE EUROPEAN COMMUNITIES. *Communication from the Commission to the European Parliament and the Council. An area of freedom, security and justice serving the citizen*. COM (2009) 262. Brussels, 2009, paragraph 4.2.3.1 Available at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/communication_2009_0262_final_1.pdf (Consulted on 11 June 2016)

¹⁸⁵ Idem.

¹⁸⁶ Idem.

efficient asylum procedures”, according to paragraph 1.1.¹⁸⁷

Therefore, the 2009 Stockholm Programme provided a common understanding under the need of legal and safe asylum procedures for non-EU populations who need international protection regarding their situation, such as asylum seekers. Moreover, the 2009 Stockholm Programme intends to implement solidarity basis among the EU Member States, under paragraph 5.2.2. of the Draft.¹⁸⁸ The Programme calls for sharing responsibility and solidarity, regarding the EU Common asylum system, and the support of other Member States that have been facing with a large flow of asylum seekers in their territory.¹⁸⁹

In 2014, 5 years after the 2009 Stockholm Programme, the European Parliament called on the Member States for a “on the mid-term review of the Stockholm Programme”. The Commission emphasized the need of Protection Entry Procedures under the EU Visa Code, under paragraph 82 of the mid-term review, which provides that Member States shall “make use of the current provisions of the Visa Code and the Schengen Borders Code allowing the issuing of humanitarian visas, and to facilitate the provision of temporary shelter for human rights defenders at risk in third countries”.¹⁹⁰

Although the EU Visa code, under articles 25 (1) and 19 (4), does not offer an explicit obligation to Member States in order to derogate the humanitarian visa, the mid-term review of the Stockholm Programme has a relevant role for the Member States to accomplish with the commitments. Thus, the 2009 Stockholm Programme with regard to protection entry procedures, might complement the 2014 mid-term review of the Stockholm Guideline.

After the Resolution of October 2013 on migratory flows in the Mediterranean Sea, the European Commission’s concerns about the safety of individuals who seek the EU territory on illegal routes came to light. The report pointed out the significant amount of

¹⁸⁷ THE COUNCIL OF THE EUROPEAN UNION. *The Stockholm Programme – An open and secure Europe serving the citizen*. 14449/09, JAI 679. Brussels: 2009. Available at: <http://register.consilium.europa.eu/doc/srv?l=EN&f=ST%2014449%202009%20INIT>. (Consulted on 12 June 2016).

¹⁸⁸ Idem.

¹⁸⁹ Idem.

¹⁹⁰ THE PUBLICATIONS OFFICE OF THE EUROPEAN UNION. *On the mid-term of the Stockholm Program 2014*. Available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0153+0+DOC+XML+V0//EN> (Consulted on 10 April 2016).

people who lost their lives in the shores of the Italian island of Lampedusa, in 2013. As a result, the European Parliament stressed the need of legal protection, such as the EU Visa Code that could make possible to issue humanitarian visa for individuals on need of international protection.¹⁹¹

Thus, the Commission decided to implement “on the mid-term review of the Stockholm Programme” a feasible solution for the lack of Protection Entry Procedures for asylum seekers, with the ideas drafted on the 2009 Communication from the Commission of the European Communities regarding the humanitarian visa.¹⁹²

The Stockholm Programme is a five-year plan guideline, considered as soft-law for the EU Member States; albeit as a long-term political tool, the guideline has a significant role on practices under common asylum procedures and migration in the EU. However, an important issue still lies upon a common implementation of the humanitarian visa and whether the existing EU Visa Code actually obliges Member States to issue humanitarian visa.

3.2) THE COMPATIBILITY OF HUMANITARIAN VISA AND LEGAL FRAMEWORK

The European Parliament and the Council of Europe establish the Regulation (EC) n. 810/2009 with the aim to create a Community Code Visas among the Member States. This regulation is inspired under article 62 (a) and (b) by the Treaty establishing the European Community (EC), which focuses on creating standards and procedures relating to the external borders of the Member States and specific rules for short stay visas that do not exceed 3 months. Moreover, the preamble of the Regulation stresses “the establishment of a *common corpus* of legislation” with the aim to tackle irregular migration and harmonize the Member States’ practice concerning visa policies and consular issues. As it was framed in the first chapter of the present study, the humanitarian visa finds its legal basis under articles 25 (1) and 19 (4) of the Regulation (EC) n. 810/2009.

¹⁹¹ JENSEN, 2014, p.35.

¹⁹² Idem.

Article 25 (1) of the EU Visa Code allows a Member State to issue visas with Limited Territorial Validity (LTV), which means that the visa is limited and valid just for the Member State required and not for all of the Member States in EU territory; unless if another Member State is in accordance to permit that people granted LTV visa can move into its territory.¹⁹³ Moreover, article 25 (1) is issued as an exception case, when “a Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations”.

At first glance, the contents under article 25 (1) of the EU visa code has similarities with article 5 (4) (c) of the Schengen Border Code, which states “third-country nationals who do not fulfill one or more of the conditions laid down in paragraph 1 may be authorized by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations”. The content is almost the same, but the article 25 (1) expands the means to be granted humanitarian visa in particular situations; for instance, a Schengen state has limits to be represented by another Schengen state in diplomatic representations.¹⁹⁴

The Visa Code Handbook will define the concept of humanitarian grounds as a residual component if a visa applicant does not fulfill the admissibility criteria under article 19 (1) of the EU Visa Code. Same decision can be taken if a Member State considers as necessary to issue a LTV visa on humanitarian grounds, for reasons of national interests or international obligations.¹⁹⁵

As it was explained in the first chapter of this present study, the concept of humanitarian visa seems to be broader and unclear, but when this definition is aligned with reasons of international obligations the humanitarian grounds might have an approach with several treaty-laws regarding obligations that EU and its Member States are obliged to cooperate.

As reported by Peers et al (2015), Protection Entry Procedures shall be according to

¹⁹³ DEN MEIJER, 2012, p. 173.

¹⁹⁴ NOLL et al, 2002, p.58.

¹⁹⁵ THE EUROPEAN COMMISSION. *Comission Decision of 19.3.2010 establishing the Handbook for the processing of visa applications and the modification*. C(2010) 1620 final, Brussels: 2010, pp.42-43. Available at: http://ec.europa.eu/home-affairs/policies/borders/docs/c_2010_1620_en.pdf. (Consulted on 13 June 2016).

international human rights bodies concerning international protection for asylum seekers and refugees, for the reason that “extraterritoriality does not prevent human rights obligations from being engaged under certain conditions. International human rights bodies consider that the exercise of ‘effective control’ over an area in a foreign territory or over persons abroad constitutes the trigger of State responsibility.”¹⁹⁶ Thus, humanitarian grounds might be related to individuals that are alleging in a visa application the need of an international protection, since they are facing a real threat from their country of origin.

However, under the perspective of EU law, there is no rule to enforce Member States to issue a humanitarian visa for applicants. The provisions under article 25 (1) is clear that the LTV visa shall be issued in exception cases when a Member States, through their diplomatic representations, considers it necessary on humanitarian grounds.

Moreover, to understand the legal framework based on article 25 (1), article 19 (4) defines the admissibility of humanitarian visas under the EU Visa code. The admissibility of any EU application for a visa is under the competence of a Member States’ consulate, according to article 10 of the EU visa code.¹⁹⁷ The rules of admissibility are listed under article 19, which lays down the rules of all the requirements that a visa applicant should follow in order to be granted.

With regard to humanitarian visa, article 19 (4) stresses: “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.” Once again, the provision regarding humanitarian grounds is conditioned under the discretionary of a Member State. The derogation will be consented by a consular office from the final destination of the visa applicant. Moreover, in case of refusal of a visa application, where a consular representative declares that an application is inadmissible, the applicant has no right to appeal against a consular decision, according to article 19 (3); in case of inadmissibility, the competent consulate shall “return the application

¹⁹⁶ PEERS et al, 2015, p.672

¹⁹⁷ THE EUROPEAN COMMISSION. *Comission Decision of 19.3.2010 establishing the Handbook for the processing of visa applications and the modification*. C(2010) 1620 final, Brussels: 2010, p.42. Available at: http://ec.europa.eu/home-affairs/policies/borders/docs/c_2010_1620_en.pdf. (Consulted on 13 June 2016).

form and any document submitted by the applicant” and “not examine the application”. Article 32 (3) of the EU Visa code grants a possibility to appeal a denied visa application, but it shall be conducted against a “Member State that has taken the final decision on the application and in accordance with the national law of that Member State.” This provision seems to be quite complex due to the right of appealing seems to be unclear with regard to a Member States’ consent in order to grant it, for the reason that the right to effective judicial protection shall be in compliance with the EU law under articles 13 of the ECHR and 47 of the EUCFR, but there is no obligation to make it available for a visa applicant outside the EU territory.¹⁹⁸

Therefore, in a first analyses under the provisions of article 25 (1) and 19 (4) of the EU Visa code, it seems to remain a possibility to issue a visa based on humanitarian grounds for reasons of international obligations. But the law does not provide an explicit obligation for consulates to issue a humanitarian visa; the decision under this admissibility remains to a “degree of discretion afforded to a Member State”.¹⁹⁹

Moreover, the EU Visa code was amended by the Regulation n. 81/2009 of the European Parliament and the Council regarding the Visa Information System (VIS) under the Schengen Borders Code. The VIS is a mechanism that permits a creation of a common database policy with the aim to exchange information among the Member States regarding data of individuals applying for an Schengen Visa. The VIS has started to be implemented in Diplomatic Representations in North Africa and the Middle East.²⁰⁰ This mechanism is quite relevant within the EU Visa Code with regard to the exchange of information, which can facilitate and reinforce the use of the humanitarian visa, over the fact that checkpoints and diplomatic representations are aware of the applicant’s situation ensuring his or her protected entry in the country.

¹⁹⁸ PEERS et al, 2015, p.671.

¹⁹⁹ JENSEN, 2014, p.25.

²⁰⁰ THE EUROPEAN UNION COMMISSION. *Visa Information System (VIS)*. Available at: http://ec.europa.eu/dgs/home-affairs/e-library/docs/vis_factsheet/visa_information_system_factsheet_disclaimer_ec_lr_en.pdf. (Consulted on 9 July 2016).

3.2.1) THE KOUSHKAKI CASE

The LTV visa has its procedures for admissibility on the grounds of article 19 (4) of the EU Visa code. The decision for acceptance or refusal of a humanitarian visa is done by “the head of a diplomatic mission or by central authorities” from a competent Member States’ consulate on the grounds of their discretion.²⁰¹

At first glance, the humanitarian visa does not enforce an obligation for Member States to grant a visa applicant. However, there is a lack between the provision on article 25 (1) and 19 (4) whether the obligation should be taken into account or not. Regarding the grammatical interpretation of article 25 (1): “a visa with limited territorial validity shall be issued exceptionally”. The term “shall” denotes a duty from a Member State to issue a LTV, which is different from the term “may” that could denote an exemption by the law.²⁰² Thus, the LTV visa based on humanitarian grounds is not considered an exceptional option, but an exceptional case in which the competent authorities should take into account.

Thus, to clarify the role of discretion from the Member States, the *Koushkaki Case*²⁰³ makes an analogy to show a viability to issue a humanitarian visa as a matter of an exceptional case. The case refers to an Iranian citizen, Mr. Koushkaki, which had applied to a EU Visa Code in order to travel to Germany to visit his brother, but his application was denied due to the German authorities believed that Mr. Koushkaki did not have the intentions to come back to Iran. The applicant alleged that the Germany embassy did not examined his application according to the EU Visa Code under articles 21(1) and 32(1) of Regulation (EC) No 810/2009, over the fact that the authorities had decided outside the grounds of the EU Visa Code.²⁰⁴

²⁰¹ HEIN & DE DONATO, 2012, p. 27

²⁰² JENSEN, 2014, p.26.

²⁰³ *Koushkaki Case* (CJEU, 2013).

²⁰⁴ PEERS, *Do potential asylum - seekers have the right to a Schengen visa?* EU Analysis Law. Available at: <http://eulawanalysis.blogspot.be/2014/01/do-potential-asylum-seekers-have-right.html> (Consulted on 14 June 2016).

The Court of Justice of the European Union (CJEU) had decided under this case that:

“In addition, the facilitation of legitimate travel, which is referred to in recital 3 in the preamble to the Visa Code, would be jeopardized **if a Member State could decide, according to its discretion, to refuse a visa to an applicant who meets all the conditions for issue set by the Visa Code by adding a ground for refusal to those listed in Articles 32(1) and 35(6) of that code, even though the European Union legislature did not consider that such a ground was sufficient to prevent third country nationals obtaining a uniform visa.**”²⁰⁵ (Bold added).

Moreover, the Grand Chamber had decided that:

“Articles 23(4), 32(1) and 35(6) of Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) must be interpreted as meaning that **the competent authorities of a Member State cannot refuse, following the examination of an application for a uniform visa, to issue such a visa to an applicant unless one of the grounds for refusal of a visa listed in those provisions can be applied to that applicant (...).**”²⁰⁶ (Bold added).

According to the judgment of the CJEU, Member States are “limiting” the possibility of the use of discretion in order to grant a visa to an applicant, over the fact that the authorities might not refuse a visa based on its wide discretion, if the examination of a visa falls into the scope of the EU Visa Code provisions. Moreover, the diplomatic representations should take into consideration the “personality of the applicant, his or her integration in the country of origin, the 'political, social and economic situation of that country' and the possible threat to public policy, internal security, public health or international relations of the Member States”²⁰⁷ in order to make a decision under the visa application.

The *Koushkaki* case sets a precedent as an analogy for LTV visas based on humanitarian grounds, for the reason that discretion of a Member State should be attached to the provision by article 25 (1), in order to evaluate a visa application. If an applicant proves that his or her reason is based on humanitarian grounds for the purpose of international protection, the Member State shall approve his or her application. The derogations work as a matter of exception, but not as an option based on a limitation by

²⁰⁵ *Koushkaki Case* (CJEU, 2013), paragraph 52.

²⁰⁶ *Idem*, paragraph 79 (1).

²⁰⁷ PEERS, *Do potential asylum - seekers have the right to a Schengen visa?* EU Analysis Law. Available at: <http://eulawanalysis.blogspot.be/2014/01/do-potential-asylum-seekers-have-right.html> (Consulted on 14 June 2016).

the competent authorities' discretion.²⁰⁸

Therefore, in the case of an asylum seeker who needs a LTV visa to take legal routes to a EU territory, a diplomatic representation should not deny his or her application. This understanding is based on international obligations, such as article 33 (1) of the 1951 Refugee Convention, in order to avoid expels or returns, and even “the right to asylum” provided by the EU Charter of Fundamental Rights. The refusal of a EU visa might concerns when an applicant does not fulfill the requirements on article 25 (1) of the EU Visa Code. Thus, according to this analogy, there is a possibility to issue humanitarian visas for asylum seekers and other individuals who need Protected Entry Procedures.

3.3) THE MEMBER STATES PRACTICES ON HUMANITARIAN VISAS

Besides the legal framework regarding the humanitarian visa, the Member States practices should be analyzed in order to present the role of Protected Entry Procedures for those who cannot reach the EU territory without authorization of a Member State.

This part of this study will be based on LIBE Commission²⁰⁹ study regarding the humanitarian visa and the national practices of the Member States, and by the Italian Refugee Council report²¹⁰, which pointed out the Member States actions in the use of humanitarian visas. Currently, there are 16 EU Member States that have issued visas based on humanitarian reasons.²¹¹ 7 Member States have already issued the LTV visa or uniform Schengen visa related to humanitarian grounds, although their practices are not directly linked with the EU Visa Code, but simply in accordance to their domestic laws.²¹² This study will focus on the issuing of LTV visa whether it represents or not a safe measure for individuals who need protected entry procedures.

²⁰⁸ PEERS, *Do potential asylum - seekers have the right to a Schengen visa?* EU Analysis Law. Available at: <http://eulawanalysis.blogspot.be/2014/01/do-potential-asylum-seekers-have-right.html> (Consulted on 14 June 2016).

²⁰⁹ JENSEN, U. I. *Humanitarian Visas: Option or Obligation?* Policy Department Citizens' Rights and Constitutional Affairs. Brussels: European Union, 2014. Available at <http://www.europarl.europa.eu/studies>. (Consulted on 25 February 2016.).

²¹⁰ HEIN, C. & DE DONATO, M. *Exploring avenues for protected entry in Europe*. The Italian Ministry of Interior. Cooperativa Sociale Inlavoro ONLUS, Italia, 2012. 142 pages.

²¹¹ JENSEN, 2014, p.41.

²¹² Idem.

3.3.1) AUSTRIA

The Austrian government has adopted Protected Entry Procedures since the 1990s, when its domestic legal system introduced the Asylum Act of 1991, in which provided “the possibility to submit at an Austrian diplomatic or Consular representation: an asylum application or request extension of international protection to core family members of recognised refugees”.²¹³ The visa application was just limited to entry authorizations, which granted asylum seekers with a “time limited Schengen short-stay visa”.²¹⁴

However, the Austrian authorities decided to revoke the Protected Entry Procedures for asylum seekers who seek for legal entry in the country, for the reason that the procedure had become onerous for the country, since the other Member States were not providing legal access to their territory through visa applications.²¹⁵ Therefore, the government established a limitation under the Protected Entry Procedures to only allow entry visas with purpose for “family reunification and cancelled for asylum seekers.”²¹⁶

The standards based on the discretion of the consular authorities to issue an entry visa for asylum seekers were based on the 1951 Refugee Convention, according to article 1 A (2) or article 15 to the Qualification Directive (2011/95/EU). An applicant may apply for an eligible refugee or not, for the reason that the visa would not grant refugee status, but it would provide a legal entry so that an individual has the chance to apply for asylum application in Austria.²¹⁷ However, according to the report provided by Hein & De Donato, the applications in local diplomatic representations are settled in the applicant’s country of origin or in a third states, but “in practice, applications filled in the country of origin were routinely rejected”.²¹⁸

Therefore, there is no information regarding the use of humanitarian visa provided by the EU Visa Code. Although the Austrian domestic law still provides Protected Entry

²¹³ HEIN & DE DONATO, 2012, p,38-39.

²¹⁴ JENSEN, 2014, p.45

²¹⁵ HEIN & DE DONATO, 2012, p,39.

²¹⁶ JENSEN, 2014, p.45

²¹⁷ Idem.

²¹⁸ HEIN & DE DONATO, 2012, p,39.

Procedures, the national practice has been granting an entry visa for a few special cases that usually concerns family reunifications.²¹⁹

3.3.2) BELGIUM

A research provided by the European Migration Network (EMN), in December 2011, regarding humanitarian visa, stresses that there is not a specific legislation concerning Protection Entry Procedures in Belgium: the diplomatic representatives decided to issue a visa based on humanitarian grounds upon a discretionary basis in exceptional cases.²²⁰ According to the studies from the Danish Centre of Human Rights, individuals willing to apply for Protection Entry Procedures must go to a diplomatic representation in order to request a visa in Belgium. However, the representative authority does not have the power to decide under this visa application; a consult to the Belgium authorities will be needed for a final decision. In case of a positive answer on the visa request, individuals will have access to information concerning the Belgium asylum procedure,²²¹ and they will be granted with a national type D visa (long-term).²²²

As a matter of a national practice, according to the EMN, humanitarian visas usually are conceded to specific persons, such as foreigner politicians or “clear cut cases of protection needed, sometimes after Belgian authorities have been contacted with the UNHCR”.²²³

Likewise, Belgium has granted humanitarian visas with different purpose from Protection Entry Procedures, but based on the definition of humanitarian grounds. For instance, in 1994, the Belgian government has granted humanitarian transit visa during the “Silverback Operation”, for Nationals of Rwanda in order to offer legal entry into

²¹⁹ JENSEN, 2014, p.45

²²⁰ EUROPEAN MIGRATION NETWORK, EU and non-EU harmonised protection statuses in Belgium. EMN, Brussels: 2011. Available at: http://www.emnbelgium.be/sites/default/files/publications/eu_and_non-eu_harmonised_protection_statuses_in_belgium_0.pdf (Consulted on 15 June 2016), p 41.

²²¹ NOLL et al, p.108.

²²² JENSEN, 2014, p.41-42.

²²³ EUROPEAN MIGRATION NETWORK, EU and non-EU harmonised protection statuses in Belgium. EMN, Brussels: 2011. Available at: http://www.emnbelgium.be/sites/default/files/publications/eu_and_non-eu_harmonised_protection_statuses_in_belgium_0.pdf (Consulted on 15 June 2016), p.41.

the country with the aim to grant temporary stay to Rwandan, and the case of “Palestinian children in need of specialized medical care”.²²⁴

3.3.3) DENMARK

The Danish government institutionalized Protected Entry Procedures as an *ad-hoc* element, which does not concern the provisions based on EU Visa Code regarding humanitarian visas. The *ad-hoc* procedures were based on political agreements between Denmark and, more specifically, Iraq and Afghanistan. Moreover, the country has been issuing entry visa as an exceptional occasion for Iraqis and Afghans, whose special relations with Danish government grant some special treatments.²²⁵

The procedures to issue an entry visa have been granted to individuals who had close connections with the Danish authorities, in which they are “invited “to the country “on the basis of a pre-screening process by an *ad-hoc* interministerial delegation assessing connections to Denmark and potential security risks they might pose if afforded visa”. In case of a positive evaluation from the interministerial delegation, the person is allowed to apply for asylum procedures in Denmark.²²⁶

On the grounds of the Danish government, the humanitarian visa is quite narrow. First of all, it is limited to a certain category of people regarding their nationality, such as Iraqis and Afghans; and, there is also no possibility to appeal from a decision made by the consular authorities. The only possibility to consider a review under an entry visa application is an approaching with the Ministry of Foreign Affairs in Copenhagen, which has the power to evaluate the decision of the application.²²⁷

During the period between 1997-2001, the national authorities accepted just 331 cases in order to grant entry visas for asylum seekers ‘visa applicants, according to the Danish Immigration Service. However, in the period from 2007 to 2012, the Danish Immigration Service has received almost 1202 cases of people seeking for Protection

²²⁴ Idem, p.25.

²²⁵ Idem, p.47.

²²⁶ HEIN & DE DONATO, 2012, p,39.

²²⁷ Idem.

Entry Procedures in order to grant refugee status in Denmark.²²⁸ Thus, the use of visa based on humanitarian grounds for those who need international protection may sound insufficient and narrow.

3.3.4) FRANCE

Until 2002, France had a special procedure based on domestic law to grant humanitarian visa for asylum seekers. The system operates as an exceptional procedure so-called “asylum visa” or *visa au titre de l’asile*, and the visa applicant might apply for it in diplomatic or consulate representations.²²⁹ The asylum visa is not considered as a type of visa by the French law, it is just a matter of adaptation through regular short-terms and long-term visas or even tourist and student visas in order to an applicant be granted entry permits in the country.²³⁰

Although the state may allow the issuing of an asylum visa, this entry visa does not grant refugee status neither is considered a safeguard for asylum procedures. Individuals must apply for an asylum application when they arrive in France.²³¹

The national practices until 2002 were not recorded into statistic in order to provide information concerning the number of applicants that were granted asylum visa. According to the French Ministry of Foreign Affairs, almost 120 to 160 cases “were forwarded by the embassies and two-thirds of these were subject to a positive decision”. Nowadays, the French government practices are based on lodging entry permission on the border of the states such as airport or harbors for asylum seekers. The admission to enter in the country is conducted by The French Office for the Protection of Refugees and Stateless People (OFPRA) through interviewing asylum seekers and formulating “a binding opinion that is communicated to the Ministry of Interior. If OFPRA issues a positive opinion, the Ministry has no choice but to authorize the entry on the French

²²⁸ Idem, p.43.

²²⁹ NOLL et al, p.108.

²³⁰ JENSEN, 2014, p.45

²³¹ NOLL et al, p.108.

territory”.²³² However, in case of denial, the authorities in the border should issue a temporary visa of 8 days in order to provide legal access for an eligible asylum seeker in the country.²³³

Although France provides safeguards to asylum seekers, there is no guarantee with regard to the French diplomatic representations on issuing visa based on Protected Entry Procedures. Thus, some asylum seekers could face boundaries in order to access the borders of the country, mainly because of the restrictive rules from the European Union, such as the Air Carrier Sanctions.²³⁴

3.3.5) ITALY

The Italian embassies had issued LTV visa based on humanitarian grounds for 150 Eritrean refugees in Libya with the recognition of the UNHCR, in the years from 2007 to 2010. The visas were based as exceptional tourism visas in order to grant Protection entry for asylum seekers, because the Italian legal system did not have visa application that could have granted international protection based on humanitarian grounds during that time. Moreover, the Italian government applied the same procedures for 160 Palestinian refugees that were living in the border of Syria-Iraqi in 2009.²³⁵

In 1994 and 2004, the Italian Refugee Council proposed to the Italian parliament to include Protection Entry Procedures and Resettlement Programme in the Italian legislation in order to create a legal force under these issues. However, the Parliament has not yet decided under this proposal.²³⁶ Thus, the visa based on international protection for asylum seekers still remains in political decisions, although the EU Visa code might provide a legal framework under this issue.

²³² ASYLUM INFORMATION DATABASE (AIDA). *Short overview of the Asylum Procedure*. Available at: <http://www.asylumineurope.org/reports/country/France/asylum-procedure/general/short-overview-asylum-procedure> (Consulted on 15 June 2016).

²³³ Idem.

²³⁴ ROSSI DAL POZZO, 2015, p.104.

²³⁵ HEIN & DE DONATO, 2012, p.45.

²³⁶ Idem.

3.3.6) THE NETHERLANDS

Until 2003, the Dutch government was issuing visa based on Protected Entry Procedures for asylum seekers under a domestic law so-called ‘Regular Provisional Residence Permit (MVV)²³⁷ at consulate and diplomatic representations in the country of origin or in a third country. This visa was created to grant the possibility of applying for residence permit in the Netherlands, but not formally for individuals who seek asylum in the country.²³⁸ Thus, the MVV also became as a provisional “sojourn” with asylum purpose as an exceptional protection authorized by diplomatic representations.²³⁹

According to the Dutch General Administrative Law Act, the Ministry of Foreign Affairs conducts the procedure of the MVV, which has the legal power to issuing the visa, but not to grant refugee status.²⁴⁰ The applications were evaluated by the Ministry of Foreign Affairs in partnership with the Ministry of Justice, whether they can determine if an applicant is eligible for asylum or not, in order to issue the MVV. If an individual was granted MVV for asylum purpose, once the asylum seekers arrive in the Netherlands, they are obliged to “lodge a formal asylum claim” in order to start their asylum application.²⁴¹

Equally to other Member States, the Netherlands did not issue any official statistic regarding the number of MVV that had been issued for asylum purpose. However, statistics provided by the Danish Centre for Human Rights suggests that the number of positive decisions relating MVVs issued on asylum purpose were almost 11 between the years of 1998 and 2001.²⁴²

²³⁷ Machtiging tot Voorlopig Verblijf.

²³⁸ JENSEN, 2014, p.46.

²³⁹ HEIN & DE DONATO, 2012, p.47.

²⁴⁰ Idem.

²⁴¹ HEIN & DE DONATO, 2012, p.47.

²⁴² NOLL et al, p.126.

3.3.7) SPAIN

The Spanish government does not have a proper domestic law in order to grant asylum seekers under international protection. The diplomatic representations are able to issue a visa based on humanitarian ground as an exceptional measure for Protection Entry Procedure.²⁴³ Since 2009, the diplomatic representations situated in third countries have been allowed to receive asylum applications in order to grant international protection for asylum seekers in Spain. However, the asylum application is not allowed to be conducted in the applicant's country of origin, but exclusively in a third country.²⁴⁴

The representative's authorities are allowed to decide whether an applicant is eligible for asylum or not according to their own discretion based under the criteria of the 1951 Refugee Convention, but the formal application, regarding the status of an asylum seekers, shall be conducted once the applicant arrives in the Spanish territory.²⁴⁵

Notwithstanding, the numbers of individuals that have been granted Protection Entry Procedure as asylum seekers are quite low. In 2009, "only 83 people sought asylum at embassies, less than 7% of the total".

3.3.8) CONCLUSION

As it can be seen, the Member States are making their national practice implementing domestic laws or/and policies based on limited discretionary, in which they have or had been issued Protected Entry Procedures for those who need international protection, mainly asylum seekers.

There is no definition or a common standard that would define whether asylum seekers should be granted humanitarian visa. The term "humanitarian grounds" has been implemented on minimum grounds according to a Member State's interpretation. For instance, Denmark does not grant visa issued on humanitarian grounds²⁴⁶ and Belgium

²⁴³ JENSEN, 2014, p.47.

²⁴⁴ HEIN & DE DONATO, 2012, p.51.

²⁴⁵ Idem.

²⁴⁶ See 3rd Chapter, pp.57-58

extends the meaning of humanitarian grounds for those who need medical care.²⁴⁷ Thus, there is no legal definition or obligation for humanitarian visas for asylum seekers. However, as a feasible solution, Member States should create a standard definition for “humanitarian grounds” in order to englobe all the possible definitions for the term, mainly to include the asylum seekers.

Likewise, there is a lack of information issued by the Member States’ diplomatic representations that makes difficult to create an assessment on how Member States are making the use of the visa issued on humanitarian grounds, based on the EU Visa Code. However, most of the Member States have national practice under their domestic laws or policies, based on the EU Visa Code or not.

A hypothetical solution for the lack of information regarding the practices of the Member States would be the VIS mechanism. Under article 13 (5) of the EU Visa Code, the biometric identification storages fingerprints of the visa applicants, which contains the personal data regarding the visa application on its database. Moreover, the Regulation n. 81/2009 on article 1 (ad) provides that Member States shall “transmit once a year of the application of point (ab), to the European Parliament and the Commission, which shall include the number of third-country nationals who were checked in the VIS using the number of the visa sticker only and the length of the waiting time referred to in point”. If this provision could be extend for all the visa applicants, the European Parliament would have a better statistic regarding the number of visas issued on humanitarian grounds.

Therefore, it is not feasible to harmonize the visa policy regarding the humanitarian visa, since the EU Visa Code does not grant humanitarian visas as an obligation. However, the Member States should take into consideration the situation of people who need international protection, considering to make humanitarian visas an effective instrument for those who seek safe routes and arrive in EU territory, as it was mention on the mid-term of the Stockholm Programme. Member States might provide the humanitarian visas in their national practices in order to comply with their human rights obligations.

²⁴⁷ The case of Palestinian children who are in need of specialized medical care. See 3rd Chapter, pp. 56-57.

3.4) THE HUMANITARIAN VISA IN SOUTH AMERICA

Humanitarian visa also has a different approach outside the European Union legal system, with a certain common thread, in order to grant the possibility for those who need international protection. In South America, specifically in Brazil and Argentina, humanitarian visas have been issued for the purpose of providing legal routes for asylum seekers and facilitating asylum procedures to grant refugee status.

In 2013, the Brazilian government issued the Normative Resolution N. 17/2013, in which permits that Syrian asylum seekers apply for refugee status according to article 1²⁴⁸:

“The appropriate visa may be granted, on humanitarian grounds ...to the individuals affected by the armed conflict in the Syrian Arab Republic who wish to seek refuge in Brazil.(...)For the purposes of this Resolution, humanitarian reasons are considered to be those resulting from the deterioration of people’s living conditions on Syrian territory or in the border regions as a result of the armed conflict in the Syrian Arab Republic.”²⁴⁹

The announcement of this Resolution was made by the Brazil’s National Committee for Refugees (CONARE), which has the duty to develop policies related to refugee issues and coordinate the admissibility of Syrian asylum seekers in the country. Moreover, the Committee held that Syrian asylum seekers are able to request for a humanitarian visa in a Brazilian embassy in Syria or in neighboring countries without bureaucratic procedures.²⁵⁰

According to the UNHCR data, the country received almost 280 Syrians refugees in 2013²⁵¹; and, since August 2015 the numbers of Syrian refugees has increased to 5700 people.²⁵² The reason behind the growing number might be justified by the “speedy

²⁴⁸ This article was translated by Calegari & Baeninger in their article: “From Syria to Brazil”.

²⁴⁹ CALEGARI & BAENINGER, 2016, p.96.

²⁵⁰ UNHCR AGENCY. UN refugee agency welcomes Brazil announcement of humanitarian visas for Syrians. Available at: <http://www.unhcr.org/524555689.html> (Consulted on 15 June 2016).

²⁵¹ Idem.

²⁵² FRA (d). *Legal entry channels to the EU for persons in need of international protection: a toolbox*. European Union Agency for Fundamental Rights. Brussels: 02/2015. Available at: <http://fra.europa.eu/en/publication/2015/legal-entry-channels-eu-persons-need-international-protection->

recognition of Refugee status, the eligibility rate of 100%, and the minimum bureaucracy”.²⁵³

The humanitarian visa in Brazil is not a new phenomenon under the Syrian refugee crisis. Since 2011, the country has a special agreement with Haiti in order to grant humanitarian visas for Haitians population. Since then, the country has received almost 43.000 Haitians. Moreover, this special agreement also provides to Haitians a “Permanent Residency” in the country and, additionally, the access to legal work and benefits of Brazilian social programs.²⁵⁴

The country has bilateral relations with Haiti, since Brazil joined in the United Nations Mission for Haiti Stabilization (MINUSTAH), in 2004, with the purpose to provide peacekeeping forces in the country, and to afford economic aid in order to reconstruct the damages due to the Haiti’s earthquake in 2010.²⁵⁵

Although Haitians do not qualify for refugee status according to the 1951 Refugee Convention, the Brazilian Resolution n. 9474/1997 extends the meaning of refugee based on article 1, III, which recognizes as a refugee: a person that was forced to leave his or her country due to serious violation of human rights.²⁵⁶ This is a broader concept compared with article 1 of the 1951 Refugee Convention, as it facilitates the reception of individuals who suffer any threat in his or her country of origin.

In the same fashion as in South America, the Argentinian government approved a special program so-called “Programa Siria”, in 2014, to facilitate the entry of the Syrian asylum seekers in the country for the reasons based on humanitarian grounds. This program is based on the immigration law n. 25871/2003 under article 34, which

toolbox. (Consulted on 13 June 2016).

²⁵³ Idem.

²⁵⁴ THE RIO TIMES. *Permanent Residency granted to 43000 Haitians in Brazil*. Available at: <http://riotimesonline.com/brazil-news/rio-politics/brazils-government-grants-haitians-permanent-residency/#> (Consulted on 15 June 2016).

²⁵⁵ ITAMARATY. *Republic of Haiti*. Ministry of Foreign Affairs. Available at: http://www.itamaraty.gov.br/index.php?option=com_content&view=article&id=11032&Itemid=478&cod_pais=HTI&tipo=ficha_pais&lang=en (Consulted on 9 July 2016)

²⁵⁶ D’URSO. (in portuguese) *A Questão dos Refugiados e do visto humanitário*. JusBrasil. Available at: <http://flaviodurso.jusbrasil.com.br/artigos/121521315/a-questao-dos-refugiados-e-do-visto-humanitario> (Consulted on 15 June 2016).

authorizes a legal entry of foreigners in the country based on humanitarian reasons²⁵⁷

The Argentinian special program provides an entry visa that allows a temporary residency in the country for two years, which may be renewed for just one more year under the status of “Permanent Residency”.²⁵⁸ Currently, Argentina is hosting 286 Syrian Refugees in the country among 3200 refugees in total. The Syrian refugees were the first minority group to be granted Protected Entry Procedure in the country.²⁵⁹

Therefore, the national practices from Brazil and Argentina should be considered as a model to be followed by other States, for the reason that good practices of granting visas based on humanitarian grounds show compliance to human rights, such as the right to security, according to article 9 of the ICCPR. Likewise, positive actions under the humanitarian visa shall complement the 1951 Refugee Convention in order to facilitate a refugee status.

Thus, the South American contribution to grant humanitarian visas to asylum seekers is an example of the use of Protected Entry Procedures. Following this comparison, the European Union should reinforce the Member State’s practice in order to grant humanitarian visas to asylum seekers, finding that the results of the implementation of the domestic laws of Brazil and Argentina has disclosed that asylum seekers are reaching the countries with safe.

²⁵⁷ MICROJURIS. (in Spanish) Se aprueba el “Programa Siria” para facilitar el ingreso a la República Argentina por razones humanitarias de extranjeros afectados por el conflicto armado de la República Árabe Siria. Ed. Argentina. Available at: <https://aldiaargentina.microjuris.com/2014/10/21/se-aprueba-el-programa-siria-para-facilitar-el-ingreso-a-la-republica-argentina-por-razones-humanitarias-de-extranjeros-afectados-por-el-conflicto-armado-de-la-republica-arabe-siria/> (Consulted on 15 June 2016).

²⁵⁸ TELÁM. *Requirements for special migration program for Syrian refugees*. Available at: <http://www.telam.com.ar/english/notas/201509/5382-requirements-for-special-migration-program-for-syrian-refugees.html> (Consulted on 15 June 2016);

²⁵⁹ SICREMI. Argentina, General Index. Organization of American States. Available at: <http://www.migracionoea.org/index.php/en/general-index-2015/46-sicremi/publicacion-2014/informe-parte-ii-eng/594-argentina.html> (Consulted on 15 June 2016).

CONCLUSION

The present study has offered an evaluated perspective on humanitarian visas: an important instrument that might uphold the human dignity of individuals who are facing dangerous alternatives in order to find an asylum in EU.

In Europe, the concept of international protection for refugees was born with the creation and diffusion of the Nansen Passport, during the 1920s and 1930s. The Nansen Passport was the first legal instrument recognized by the League of Nations that had the aiming to offer an opportunity for asylum seekers to have a legal status and provide safe entry.

Nowadays, the European Union is facing a massive flow of persons who seek asylum in the EU territory. The recent events in the Middle East and Egypt, with regard to the civil war in Syria and Iraq, have caused a wide dispersion of the civil population around the Middle East and North African countries, which are hosting 4.8 million Syrian Refugees in total. Under this scenario, Middle East and Egypt are facing problems to implement effective policies to offer better standards of living for the Syrian people. Moreover, several human rights breaches against the refugees have been occurring around Middle East and Egypt. Thus, a vast number of Syrian refugees have been tried to seek asylum in the EU territory, believing that they would find better receptions and conditions of living.

However, most of the Syrians refugees are risking their lives in the Mediterranean Sea in order to arrive in the European Union. The losses of lives that have been reported by international human rights organisations have been increasing along the years, and the European Union initiative to prevent illegal channels for asylum seekers are not sufficient due to the large number of asylum seekers who are trying to reach the EU territory. Moreover, the EU policy, such as the “Air Carrier Sanctions”, hampers the access for individuals who need a visa to get into EU. Thus, most of the asylum seekers do not have any means of protection.

With this in mind, the humanitarian visa might offer Protected Entry Procedures for asylum seekers and individuals who need international protection to reach the EU territory, since this visa permits that individuals approach an eligible host state in its

diplomatic representations with a claim for an international protection for entry conditions, in order to avoid unsafe migration channels. This protective mechanism is important for the European Union so as to implement effective policies regarding the Common European Asylum System.

Although the EU complies with its obligations with regard to the 1951 Refugee Convention through the EU Asylum Procedure Directive and Subsidiary Protection, these provisions just apply to asylum seekers that are within the EU territory, under compliance of *non-refoulement* principle. However, Member States do not have obligations to protect asylum seekers outside the EU territory. The humanitarian visa does not grant refugee status for asylum seekers or even replace the EU Asylum Procedure Directive and Subsidiary Protection, but it does complement the CEAS, for the reason that potential asylum seekers might find protection outside the EU regarding the entry procedures.

Thus, the EU Visa Code, under articles 25 (1) and 19 (4), ensures a visa based on humanitarian grounds for asylum seekers. The EU Visa Code was developed to create a common visa policy among the Member States. However, it remains unclear the use of humanitarian visas by the Member States under their national practices and the legal conception, whether a humanitarian visa is just exceptional for special cases or an obligation for Member States.

In the political field, the European Union has emphasized the necessity of the Member States to put into practice the visa based on humanitarian grounds, as it was decided “on the mid-term review of the Stockholm Programme”, under paragraph 82, in which the European Parliament consents that Member States shall make the use of the visa based on humanitarian grounds in order to solve the tragedies in the Mediterranean Sea. The solidarity among the Member States remains an important issue to implement the humanitarian visa based on the EU Visa Code.

However, the legal framework of the EU Visa Code on articles 25 (1) and 19 (4) does not ensure an obligation for Member States, for the reason that the provisions consider the admissibility of the humanitarian visa based on exceptional reasons²⁶⁰, which shall

²⁶⁰ Article 19 (4) of the EU Visa Code states that admissibility of a visa “may” be considered based on humanitarian grounds.

be derogated by the diplomatic representations.

Although the *Koushkaki case* (CJEU, 2013) states that a diplomatic representation shall issue a visa if an applicant meets all the conditions to be grant, the CJEU may set a precedent for a visa applicant regarding humanitarian grounds. Yet, it seems unclear by the law whether a Member State is bound to issue a humanitarian visa or not.

A feasible solution to safeguard the possibility to issue a visa based on humanitarian grounds would be a recast on article 19 (4) of the EU Visa Code, which would amend a consistent provision under the visa admissibility that allows individuals to be granted humanitarian visa when they fulfil the criteria required under article 25 (1) of the EU Visa Code. This could be a hypothetical solution in order to harmonise the issuing of humanitarian visas by the diplomatic representations.

On the other hand, the Member States' practices remain unclear to assess. First of all, there is a lack of information by the Diplomatic services; if a Member States is making using of the EU Visa Code. Currently, there are 16 EU Member States that had or have been issuing the humanitarian visa based on studies provided by the LIBE Commission.²⁶¹ Therefore, information regarding the use of the humanitarian visa should be a viable solution through the VIS mechanism in order to exchange data among the diplomatic representations and the European Parliament. This procedure would help to elucidate the EU and further policies concerning the use of the humanitarian visa.

Moreover, Member States have different concepts under "humanitarian grounds", since it is a wide-range concept. Thus, it necessary to clarify the meaning of this definition whether a humanitarian visa can be issued on asylum claims, for medical reasons, or any other justification that could fall into the scope of humanitarian grounds. The Member States should gather all the available concepts on humanitarian grounds in order to issue humanitarian visas, mainly when it regards reasons under asylum claims. Therefore, the EU is calling the Member States to make a greater use of the humanitarian visa, mainly to avoid further tragedies at the Mediterranean Sea. The visa based on humanitarian grounds is an innovating approach for potential asylum seekers that are not able to access the Protected Entry Procedures, for the reason that Member

²⁶¹ JENSEN, 2014, pp.41-50.

States are not very willing to comply with the existing provisions on the EU Visa Code. The humanitarian visa *per se* is not a mandatory instrument, but the European Community is bounded by the external dimension of international human rights regarding asylum seekers, such as the right to life and security under article 3 of the UDHR enforced by articles 6,7 and 9 of the 1966 International Covenant on Civil and Political Rights. Likewise, the European Union Parliament and the Council shall stimulate the Member States to issue humanitarian visas in order to comply with article 14 of the EU Charter of Fundamental Rights regarding the right to asylum. Thus, humanitarian visas might be an effective instrument in order to grant international protection and diminish further tragedies at the Mediterranean Sea.

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