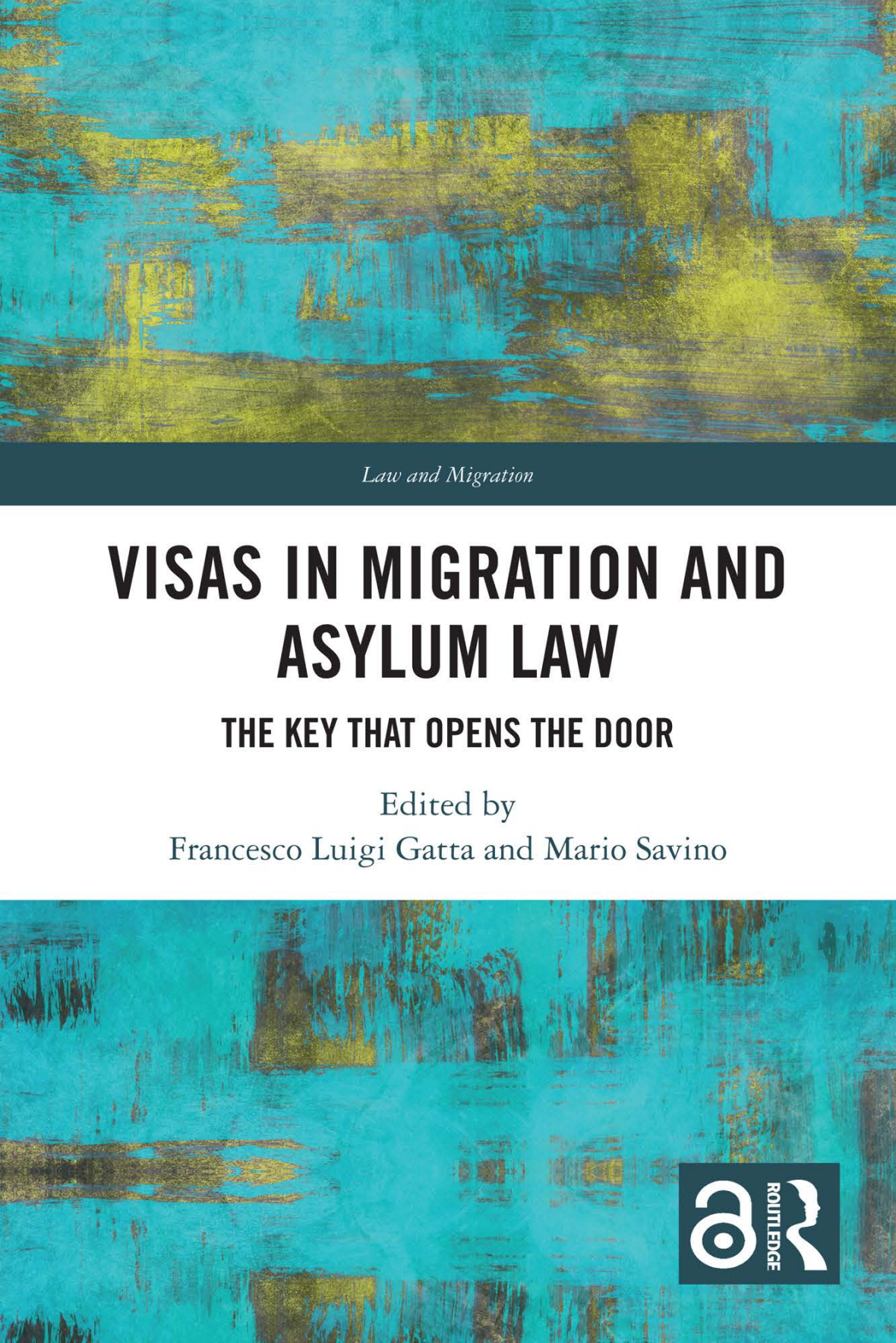




Law and Migration

VISAS IN MIGRATION AND ASYLUM LAW

THE KEY THAT OPENS THE DOOR

Edited by

Francesco Luigi Gatta and Mario Savino



Visas in Migration and Asylum Law

This book explores and discusses the different perspectives stemming from the visa as a tool of international mobility. A visa has a multifaced nature. It is a “key” which allows foreign nationals to reach the door of the State. It is also a tool for the State to govern migration and border control. In humanitarian and international protection terms, it is also a tool for human rights protection. Against this background, this book assesses the legal and socio-political implications arising from the multipurpose nature and scope of visas. It is divided into two parts. The first part focuses on the visa as an instrument for migration control, contextualizing the rationale behind its invention and the legal challenges it raises. The second part focuses on the visa as a tool for asylum, examining its use for humanitarian purposes, including resettlement schemes and emergency-related evacuation initiatives put in place in different legal systems. It will be of interest to academics, researchers, and policy-makers working in the areas of Migration and Asylum Law, International Human Rights Law, and Political Science.

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Law and Migration

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Foreword

From Fortress Mentality to Mobility Facilitation Spirit

François Crépeau

The present collection of chapters provides an excellent overview of how States currently consider visas as a means to control the mobility of foreign individuals through their borders.

I have been asked to provide context to this specialised collection. I will do so from the perspective of the low-wage migrants, that is the undocumented migrants and the temporary migrant workers, especially those with a single-employer work permit.

Indeed, high-wage migrants have always been able to cross borders legally and often easily, thanks either to their own social capital or to that of their employer in the host country. They rarely suffer from legal precarity, economic exclusion, or social isolation. Even if some occasionally encounter difficulties with the authorities of the host country, they are generally in demand all over the planet and can most of the time easily return home.

In the current neo-nationalist populist political environment, many governments are changing the rules regarding the emission of visas, often to respond to electoral anxieties more than to adjust to labour needs. We have thus seen, in 2025, Canadian and American authorities restrict the number of visas emitted for international students and for skilled temporary migrant workers, despite the protests of universities and employers, as well as the dismay of most economists who consider the contribution of these migrants a great source of wealth. Since those high-wage migrants will still be needed tomorrow and since countries are competing for their skills, one can hope that governments with a restrictive attitude will return to facilitating their mobility in the near future.

However, for low-wage migrants, the situation will probably remain dire, although States have outlined what needs to be done to eliminate labour exploitation and enforce labour standards for all workers, regardless of legal status.

After three decades of relatively free transborder mobility between the 1950s and the 1970s, Global North States decided, around 1980, to close their borders to low-wage migration in response to the high inflation, high unemployment, and high interest rates produced by the oil shocks of the 1970s. The

political justification was that the 3D jobs that those migrants would vacate would be occupied by citizens, thus reducing unemployment. However, this never materialised, as citizens did not accept the labour conditions that, for lack of an alternative, low-wage migrant workers do accept.

As a result, two “crises” were almost immediately created. First, there was an “asylum crisis:” the expression “asylum seeker” appears in the media lingo in 1981. Indeed, before the 1980s, people who needed protection almost never asked for refugee status since they could more easily obtain a residence permit and a work permit. Canada offers a good example: it received 600 asylum applications in 1976 and 60,000 in 1986.

Second, there was an “undocumented migrant crisis” in non-delocalisable economic sectors with low-profit margins, such as agriculture, care, construction, extraction, fisheries, and hospitality. Indeed, citizens did not want the jobs of migrant workers, and employers did not want to increase their labour costs by offering better labour conditions to citizens. Since States did not provide the low-wage migrant workers that employers needed, other actors intervened: unscrupulous recruiters and smuggling rings invested in this new underground labour market resulting from the policy change. They offered migrants and employers the mobility options that both groups needed, at a cost mostly borne by the migrants.

The result was that low-wage labour migration – which, before that, had been considered essential to economic growth and was the preserve of departments of labour – became associated with “crisis” and was soon understood as a “security” issue. The Schengen Convention of 1990 was the first international instrument to define undocumented migration as such as an international security issue, on par with drug smuggling, arms trafficking, mafia-type criminality, and terrorism. However, migration policies are ill-equipped to deal with true security issues: this should be left to intelligence and law enforcement agencies.

Over time, migrants were also held responsible for many other social ills, such as urban insecurity, difficult access to healthcare services, or the housing crisis.

In the early 1980s, States thus decided that a policy of stopping “illegal aliens” would reassure their citizenry. This is when visas became important again. During the 30-year post-war boom, visas had been progressively liberalised, reduced, or eliminated, in order to facilitate the movement of migrant workers needed for the reconstruction of Europe and the feeding frenzy of the dominating American economy. Suddenly, visas became politically necessary. Migration being portrayed as a security threat, States needed to show their citizenry that they were putting in place the necessary mechanisms to prevent “undesirable aliens” from coming. The citizens of every country that was producing asylum seekers were slapped with a visa requirement, thus preventing many from embarking at airports. Likewise, bilateral agreements to allow low-wage workers were trimmed or cancelled.

However, States omitted to sanction in parallel most of the local employers exploiting undocumented migrants and asylum seekers working 3D jobs. Indeed, those employers were electors, and their businesses produced taxes. Forcing them to hire only citizens, permanent residents, or migrant workers with a secure and stable status would considerably increase their labour costs: the political and social agency of such workers would quickly lead them to unionise and to collectively bargain their labour conditions.

Although it would make sense in the long term to have a level playing field treating all workers the same, and implementing labour standards equally for all workers, it was not a winning policy proposal in our short electoral cycles. Protecting the rights of non-electors (the migrants) while angering electors (business owners and consumers) was never an electorally sound proposition for short-term-minded governments, however well-meaning individual politicians might be. The result was that in most countries labour standards have often not been applied to workplaces which employ low-wage migrant workers.

Repressive policies against undocumented migration and asylum seekers have targeted the workers, not their employers. Yet it is precisely the pull factor of the job offers that attracts migrants. They would not come if there were no labour market available to them. Indeed, undocumented migrants constituted a workforce that was forced underground in a very precarious situation, always at risk of being denounced, arrested, and deported. Fear of deportation deprived those workers of all political agency, including the capacity to negotiate their labour conditions or protest their labour rights' violations.

Later, States developed single-employer temporary legal migration programmes that all too often create the same precarity: *kafala* in the Middle East, sponsorship in Canada or Australia, "closed" work permits, etc. These programmes put the life of the migrant – and often of their families – in the hands of the employer, as being fired meant losing the work and residence permits.

The combination of migration policies that induce fear of deportation and practices of non-application of labour law results in the creation of lawless zones in which migrants are exploited without being able to protest. Despite all the agency they demonstrate to survive and support their families, the fear of dismissal, denunciation, and deportation prevents most of them from mobilising, publicly protesting, suing in complaint mechanisms or the courts, or unionising.

This deleterious policy combination has led to precarity for these migrant workers, based on the fear of being sent back empty-handed to the country of origin, despite all that the migrants have invested in their migration journey, the debts many have accumulated, and the suffering many have endured. This socially constructed precarity has allowed a considerable reduction in the cost of labour in these sectors – an indirect subsidy generated by State-enforced policies and practices.

This precarity is today structural in the economies of most countries receiving immigration, North and South. It constitutes a conscious strategy for the reduction of the cost of labour. We have thus recreated a lumpenproletariat, in the niche previously occupied by the nineteenth-century industrial workers, the indentured labourers of the British Empire, and the slaves of other regimes.

States have thus proclaimed that “mass migration” is a national and international security risk, thus creating an alarming discourse around “bogus refugees” and “criminal aliens” and, after 9/11, “foreign terrorists.” They have invested ever-increasing amounts in the deterrence and repression of undocumented migration inside their territory, at their borders, and abroad. Indeed, they often have forced countries in the Global South to tighten their own borders and stop undocumented migration on their territory by whatever means, making this a conditionality for continuing their economic cooperation and trade relations.

It is difficult to determine the success of anti-immigration measures without defining first their goals. If the goal is to reduce migration pressure, it is an absolute flop as push and pull factors have not been addressed. If the goal is to reduce the number of migrants arriving, it is neither a success nor a failure, more a series of short-term stabilisations. If the goal is to make migration an important topic in electoral cycles and to win elections on it, it is mostly a success.

Up until the Trump administration in 2025, Global North governments had not taken significant measures to reduce the considerable pull factor for undocumented migration that colossal underground labour markets constituted, for fear of damaging the economy and their re-election prospects. But even the current American immigration policy changes sound more like a vociferous discourse aimed at convincing the electorate of an imminent threat than a well-conceived attempt at reducing the appetite of many employers for cheap migrant labour.

However, what has changed considerably is the domestic administrative law governing immigration. Historically, administrative law was relatively innocuous as it governed government contracts, urban or agricultural zoning, building permits, etc. Over the past decades, immigration law has incorporated evermore language, standards, and institutions which traditionally belonged to criminal law, but without incorporating in parallel the individual procedural and evidentiary guarantees that criminal law has evolved over centuries to protect the innocent, such as the presumption of innocence, the right to a fair trial, habeas corpus, the prohibition of hearsay, the right to an appeal on the facts and law, etc. In countries which do not have the death penalty nor extradite to countries with the death penalty, such as Canada and EU countries, the only judge who can effectively – albeit by mistake – send someone to death, torture, or arbitrary detention is today the immigration judge. The concept

of “cimmigration” was coined by Pr Juliet Stumpf in 2006 to describe this criminalisation of the undesirable migrant under administrative law.

All this to say that visas have become part and parcel of a “securitisation” discourse that associates migration with all kinds of political, economic, or social threats. Most recently in North America, for example and as previously mentioned, governments have considerably reduced the number of visas for international students and temporary migrant workers, to the great distress of universities and many businesses.

This kind of policy choice seems counterproductive as international students often become citizens over time, contributing their skills to increasing the collective wealth, while temporary migrant workers – although often exploited – are currently essential workers in many sectors of the economy, such as agriculture or hospitality. For example, in Quebec, the temporary migrant workers employed by low-wage labour agencies subcontracted by hospitals and elderly care facilities, who were serving as orderlies and caring for patients during the Covid pandemic, were called “guardian angels;” although their labour conditions were never upgraded, many fell ill themselves or even died, and most were not offered a better immigration status.

Yet States know that the current situation is unsustainable over the long term, for many reasons. Undocumented migrants continue to come since they are needed. Too many of them die or are victims of crime along the way. Temporary migrant workers often find themselves exploited as well. Precarity or absence of immigration status creates precarity of social integration for millions of migrants, which is a waste of talent. Creating through policy choices such underground or poorly regulated labour markets breeds exploitation and crime by numerous actors, such as recruiters, smugglers, employers, lodgers, moneylenders, etc. States should realise that policy-induced precarity unnecessarily subsidises criminal networks and breeds crime. If there is a “security” issue related to migration, it is because migrants are most often victims of crime and exploitation, rather than criminals themselves.

States have recognised this unsustainability when 152 member States of the UN General Assembly voted to adopt the Global Compact on Migration (GCM) in 2018. The central recommendation of the GCM is to “facilitate” mobility. In the negotiated English version, this term appears 62 times. The GCM proposes 23 objectives. Most of them aim at integrating migrants, decriminalising their activities, and respecting their rights.

For our purposes here, one key commitment is to enhance the availability and flexibility of pathways for regular migration. This means providing visas, work permits, and residence permits for all foreigners who are needed to work in the host country, at all skill levels. It implies considerably reducing underground labour markets and ensuring that governments take control of most of the mobility market. Migrants will gladly pay for visas and a safe journey, rather than having to risk life and limb by resorting to smugglers or exploitative recruiters.

This is accompanied by other facilitation commitments that complement the first one: to facilitate fair and ethical recruitment and safeguard conditions that ensure decent work; to facilitate changes of employer and modification of conditions or length of stay, without unnecessary red tape, and without fear of arbitrary deportation; to facilitate regularisation of status; to save lives; and to empower migrants and societies to realise full inclusion and social cohesion. This means that providing visas is insufficient, as the practice of kafala in the Gulf States demonstrates, where the exploitation of low-wage migrants is rife despite all of them having legal status. States will need to provide them with a status that allows them to negotiate their labour conditions and to unionise if necessary.

We must therefore aim for a normally regulated labour market, provide equal protection for the rights of all workers, regardless of their migration status, and give all migrant workers a voice in negotiating their working conditions. Essentially, we must aim to allow migrants to come and look for work according to their own priorities, allowing workers and employers to meet freely. States will have to recognise that they are not better placed than employers to determine whether any migrant candidate for 3D jobs is suitable for the position. But they will have to act to ensure that all candidates are protected from exploitative behaviour.

However, these goals cannot be achieved overnight. Forty years of cheap labour practices in non-delocalisable sectors cannot be erased instantaneously: entire economic sectors would collapse under the weight of increased labour costs. These sectors will require a longer structural transition, with investments to support them during this modernisation process, as has been done for other industries.

Unfortunately, there is no long-term strategic planning for human mobility in any country. Our governments plan strategically for 20, 30, or 50 years in all other areas of governance: infrastructure, urban development, transport, energy, food security, health, education, environment, etc. In contrast, migration policies are almost always reactive to current events: “we need IT workers now,” “we need to stop illegal aliens now,” etc. Such changes thus depend on the mood of the mobilisable electorate. For the most part, the constituency that is most vocal on migration issues is essentially made up of citizens who are ideologically determined to oppose immigration – an electorate courted by all politicians, left and right. Most citizens have other priorities when elections come around.

However, as the GCM invites us to do, we will have to think about human mobility in the long term. To do so, we will have to ask ourselves collectively some difficult questions. What population do we want to have on these planned horizons, in terms of numbers for geopolitical reasons, but also in terms of skills for economic reasons? How should we account for the loss of creativity of an ageing population, as well as a growing need for care work? How can we ensure the maintenance of the standard of living and compensate for the differences in wealth? How to better manage social diversity in all its

components: age, gender, ethnicity, religion, etc.? How should we respond to migration emergencies, caused by violence or the environment?

This kind of debate requires the participation of all those affected by these issues. Not simply the minister of immigration or home affairs, but all ministries, all social actors, all institutions, all citizens. This is what the GCM calls “whole-of-government” and “whole-of-society” approaches. In particular, we need to hear from migrants themselves – whatever their status – to bring their lived experience to the debate, as a reality check. Migrants also need a #MeToo movement – in the sense of a broader societal reckoning with perspectives and experiences that have remained marginalised and ignored for far too long.

A key condition for enabling this debate is to reduce the constructed precarity of migrants and to ensure their empowerment, to bring migrants out of the margins and give them “papers” and a regularised status, to recognise the legitimacy of their “voice,” and to provide them with the means to express themselves and to participate in public debates, without the fear of deportation. Unions should play a significant role in carrying the “voice” of the migrants and protecting their rights, as they have done historically for all previous workers in 3-D jobs.

No marginalised group has ever had its rights handed to it by the majority on a silver platter: workers, women, Indigenous peoples, the LGBTQ+ community, minorities, detainees, and many others have had to fight publicly for the recognition of their rights. Migrants do not have the right to vote and rarely speak up publicly for fear of being detected and deported. They therefore do not count in the context of public debate. Unlike citizens, they can neither reward nor punish politicians. The political class is free to say whatever is politically useful against them, since the electorate is not enlightened about the relevant issues: there is no inclusion and effective participation of migrants themselves in the public debate. We cannot even blame most politicians: warts and all, electoral democracies are the best political system ever invented, and politicians – even the best ones – are spurred by electoral incentives, which migrants do not provide.

Migration policies are thus made by non-migrants (elected politicians) for non-migrants (the electorate), just as policies towards women have long been made by committees of men. Most politicians have no intimate knowledge of the intricacies of the complex phenomena involved in migration, and migration policies are reduced to an electoral issue, being too often based on populist prejudices, myths, fantasies, and fears that are conveyed in the public debate, without contradiction, for lack of opposition. This is particularly evident in the prominent role the “security fantasy” plays in discussions of migration, where migrants are increasingly framed as a pernicious – if not existential – threat.

Nothing in the GCM agenda will happen easily nor quickly. Political constraints will remain huge obstacles: the absence of political voice for migrants,

the reluctance to increase labour costs, and the demonisation of migrants in the public discourse will concur to limit progress in the short and medium term.

However, visa policies could play a great role in changing public attitudes towards migrants. Coupled with an investment in better enforcement of labour standards that would reduce the possibility of finding jobs in underground labour markets, as well as an investment in supporting the transition of businesses that currently rely on cheap labour, progressively increasing the number of visas for low-wage workers from countries from which undocumented migration is currently important would lead over time to a durable reduction of such undocumented migration, while responding to the needs of employers. This will not be achieved without the active support of unions, a solid public discourse strategy and a good dose of political courage.

This remarkable collection of chapters on how visas are being used and could be used by States will help the reader understand their versatility, their strengths, and their weaknesses, as well as figure out how visa policies could, over the long term, be shaped to reduce the precarity of low-wage migrants and asylum seekers, and to facilitate human mobility across borders worldwide.

Montreal, 31 October 2025

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The volume also builds upon the longstanding academic activities of the **University of Tuscia’s research group on migration law**, which coordinates the **Accademia di diritto e migrazioni (ADiM)**, a scientific network gathering more than 500 Italian and European scholars in the field of immigration law. Since 2020, the same group has led the activities of the **Jean Monnet Centre of Excellence on the Integration of Migrants in Europe (IntoME, 2020–2026)**, whose interdisciplinary vocation and European outlook have provided an invaluable intellectual environment for the themes explored in this book.

The editors wish to thank all the contributors for their chapters, which—drawing on their rich and diverse expertise—have made it possible to assemble a volume offering a genuinely international perspective on visas, migration and asylum. They also wish to express their gratitude to the team of dedicated researchers who supported the preparation of the volume during their post-doctoral appointments at the University of Tuscia. **Francesco Damosso, Mirko Forti and Francesca Rondine** displayed outstanding commitment and professionalism, assisting in the coordination with all authors, contributing to the editorial process and meticulously formatting the chapters. Their work has been instrumental to the successful finalization of the book.

Introduction

Francesco Luigi Gatta and Mario Savino

The overall idea behind this edited volume is to shed light on a subject that is usually overlooked in migration studies: the visa. Often regarded as a technical and bureaucratic issue, the visa may at first glance appear neither attractive nor capable of stimulating broader theoretical reflection. This is reflected in the relatively limited attention devoted to this subject in the literature.

This volume argues that the visa is, on the contrary, an extremely significant tool for the governance of contemporary migration: it is, as the title in and of itself suggests, the “key” that can open (or lock) the door of a State, by decisively influencing access to the national territory before the journey has even begun.

Based on the need to learn more about this subject, the ambition of this volume is to provide a valuable contribution to fill the gap in the existing research by providing a structured analysis of the visa as a tool for international mobility. This objective is guided by two overarching research questions: (1) how visas are understood and used by the State, in its law and policy, at both national and supranational levels; and (2) to what extent visas can prove to be beneficial for the individual migrant, in light of their needs, including human rights protection and asylum-related mobility.

These questions are reflected in the structure of the volume: two parts, which explore the nexus with migration (“Visas and Migration”), and with asylum (“Visas and Asylum”). Each part is in turn divided into two sections, which address different dimensions of visas as tools for migration and asylum.

More in detail, following the contextualization provided by François Crépeau in his foreword, the first part of the volume aims to examine the flexible and multiform character of visas, which may serve as instruments of migration governance encompassing both policy (first section) and law (second section). The chapters grouped in the former section (“EU Visa Policy”) discuss the instrumental use of visas in Europe to shape immigration policies, foster political interests, and orient international relations, at the same time generating significant implications for both state interests and individual rights. An overview of the relevant dynamics surrounding the visa

2 *Visas in Migration and Asylum Law*

policy of the European Union is provided in the first chapter by Daniel Thym, who examines the origins, the rationale, and the key features of the normative framework on visas as related to the Schengen cooperation experience. In the second chapter, Jonas Bornemann discusses the visa as a tool of international diplomacy, by focusing on the emblematic case of visa reciprocity between the United States and the European Union, especially highlighting the consequences for the Member States of the latter (and their respective citizens) in terms of their (in)equality. The political game associated with visas is further examined in the third chapter, by Dimitry Kochenov, Sarah Ganty, Nurbanu Hayir and Suryapratim Roy, who zoom in on the repercussions of the (mis)use of visas as a retaliation measure enacted by the European Union towards the Russian Federation following the unlawful invasion of Ukraine in 2022.

The second section (“The Legal Challenges”) focuses attention on the legal side of the matter, exploring the legal issues surrounding the operation of modern visa systems. In the first chapter, Mario Savino discusses the interrelation between visas and the principle of due process, showing how visas are capable of affecting the procedural safeguards and substantial rights of migrants and asylum seekers. The second chapter, by Niovi Vavoula, investigates the challenges behind the increasing process of digitalisation of visas and border controls, with a special focus on the implications for human rights. In the third chapter, Aleksandra Ancite-Jepifánova explores the interaction of the visa with the problematic phenomenon of the so-called instrumentalization of migrants, by focusing on the case of Belarus and the deceptive misuse of the visa as a “magnet” to attract migrants and “weaponize” them for political purposes. In the fourth and last chapter, Elspeth Guild and Vasiliki Apatzidou focus on the implications of visas for human rights defenders, assessing how such a mobility tool affects the actors involved in the protection and promotion of human rights.

The chapters included in the second part of the volume explore the extent to which visas may be used as tools for seeking international protection. Different approaches and criteria for granting humanitarian visas are discussed, as well as the challenges and opportunities associated with other asylum-related schemes and techniques. At the same time, the chapters show that the potential of visas as tools for asylum is constrained by significant legal and political factors.

This is confirmed by the broader analysis of the first section (“Seeking Asylum with a Visa”), which examines the challenges of selected visa policies and their potential use as legal and safe pathways for individuals seeking asylum. The first chapter, by Eugénie Delval, Christine Flamand, Caroline Leclercq, Matthieu Lys, Sylvie Sarolea, and Véronique van der Plancke, focuses on the dramatic experience of Gazans and other individuals trapped in the West Bank, highlighting the complexity of their situation from a legal and humanitarian point of view. In the second chapter, Sarah Cosemans delves into the subject of resettlement, which, despite being a more traditional and

known tool used for international protection purposes, is still capable of generating challenges and complex legal and political issues. The third chapter, by Pauline Endres de Oliveira, offers an analysis of visas within the two 2018 UN Global Compacts on migration and on refugees, arguing that, thanks to their flexible nature as soft law instruments, they hold the potential to unlock and shape a more inclusive and coordinated international response on protection pathways. In the fourth chapter, Francesco Gatta and Lorenzo Acconciamezza deal with the question of whether there exists a human right to obtain a visa within the European Convention on Human Rights, by closely looking at the relevant case law of the European Court of Human Rights on migration and border controls. In the last chapter, an overview of visa policies in Africa is provided by Silindile Mlilo, who explains the developments and the challenges surrounding the operationalization of common visa initiatives in a continent where human mobility is crucial.

The second section (“National Visa Policies and Asylum”) is composed of chapters that zoom in on specific visa regimes and policies implemented in selected domestic systems. This dimension allows us to better understand, through a comparative approach, the diversity of legal traditions, socioeconomic attitudes, and political strategies implemented over the years by governments of different geopolitical regions. Accordingly, in the first chapter, Susan Kneebone walks the reader through the systems and policies put in place by Australia. The second chapter, by Elizabeth Hessek and Luna Vives, discusses Canada, a country that is traditionally well-known for the use of legal pathways of mobility. In the third chapter, Luca Galli and Cecilia Siccardi provide an overview of Italy, a country which, despite being at the forefront in terms of migratory pressure, has been experimenting with solutions for safe and organized migration, including in particular via humanitarian visas. The last chapter, by Kit Johnson, is devoted to the United States and the various humanitarian immigration programs developed over time, with reference to specific categories of beneficiaries and countries in crisis.

The volume concludes with some final remarks by Hiroshi Motomura, who summarizes the main challenges behind the conceptual understanding and practical use of visas as tools for international mobility.



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Part I.1

EU Visa Policy



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1 EU Visa Policy

The Invisible First Line of Defence of 'Fortress Europe'

Daniel Thym

1.1 Introduction

Boat arrivals in the Mediterranean and migrants climbing fences are personifications of the European Union's asylum policy. Nevertheless, one seemingly straightforward question is rarely being addressed. A one-way ticket for a flight from Western Africa to the Schengen area can be bought online for less than EUR 300, and flights from the Maghreb are available for less. Why do Nigerians or Tunisians pay significantly more to risk their lives on old ships hardly fit for navigation on the high seas? The answer is simple. Airline staff at the point of departure will deny check-in or boarding to anyone who does not hold a visa for the Schengen area.

More than 100 States feature on the contemporary 'black list' contained in an annex to the Visa List Regulation (EU) 2018/1806; their nationals must be in possession of a visa for legal entry into the Schengen area. This obligation extends to prominent countries of origin of asylum applicants, such as Syria, Afghanistan, Türkiye, Nigeria, Bangladesh, Mali, Iraq, and Iran. EU institutions do not hide their intention to reduce the number of asylum applications. 'Illegal immigration' features amongst the criteria justify the introduction and removal of visa requirements.¹ To this date, the combination of visa requirements and carrier sanctions is the single most effective migration control instrument precisely because they appear to be a matter of course. Most people are probably unaware that friendly airport staff carry out strict and privatised border controls at the check-in counter. The European Union has been instrumental in establishing and spreading such measures of 'remote control'²—or the 'border abroad'³—to an ever-increasing number of Member States and associated countries.

1 See Visa List Regulation (EU) 2018/1806, art 1.

2 Aristide R Zolberg, 'The Great Wall against China' in Jan Lucassen and Leo Lucassen (eds), *Migration, Migration History, and History* (Peter Lang 1997) 291, 308.

3 Elspeth Guild, 'The Border Abroad. Visas and Border Controls' in Kees Groenendijk and others (eds), *In Search of Europe's Borders* (Kluwer 2003) 87.

Anyone trying to decode the significance of the European Union's visa policy as a means of selective entry control will have to understand the legal framework, policy debates, and theoretical queries. With this objective, this contribution starts with a survey of the history of the 'Schengen area' which demonstrates that the harmonisation of visa requirements was a conscious choice of external closure which contrasts with the celebration of 'Schengen' for the abolition of inter-State borders. On this basis, this contribution identifies the institutional forums and legal mechanisms of the invisible legal fortification in the form of visa requirements. We shall see that legal safeguards exist but do not play a major role in practice. Finally, EU institutions are using visa policy as a leverage to increase cooperation with countries of origin and transit in the domains of return and migration management. The novel 'visa leverage' receives much attention, whereas the exportation of visa requirements to neighbouring countries, such as Serbia and Türkiye, is often overlooked and difficult to trace.

1.2 External Closure: The 'Dark Side' of Schengen

Schengen is commonly remembered as a beacon of European integration. Politicians highlight the abolition of internal border controls as one of 'the most cherished rights of EU citizens'.⁴ Article 3(2) TEU lists the 'area ... without internal frontiers' as one of the European Union's major achievements, together with 'appropriate measures' with respect to external border controls, asylum, visas, and crime. These 'flanking measures' have dominated the policy discourse ever since the intergovernmental negotiations about the Convention Implementing the Schengen Agreement, which were concluded in 1990.⁵ Visas featured prominently on the agenda.

1.3 Advancing the Policy Preferences of Asylum Destination Countries

It was no coincidence that Italy did not belong to the avant-garde of countries negotiating the original Schengen rulebook. The French government, in particular, was doubtful as to whether Italy would control its external borders effectively. The government in Paris worried that irregular migrants from the Maghreb countries, in particular, would come to France via Italy. The motivation behind the French position was about classic border controls and visa requirements. Throughout the 1980s, Italy had promoted mobility within the Mediterranean basin by means of visa-free entry from Tunisia and Algeria—in

4 By way of example, Commission Communication 'Striking a Balance on Migration: An Approach that is Both Fair and Firm' COM(2024) 126 final 1.

5 See Convention Implementing the Schengen Agreement of 14 June 1985 (adopted 19 June 1990, entered into force 1 September 1993) [2000] OJ L239/19; hereinafter 'CISA'.

contrast to France where many people with family roots in the Maghreb countries were and are living.

The French worried that Italy would serve as a backdoor for irregular movements. There is little France can do once Tunisians have reached the Franco-Italian border. Reintroducing internal border controls, as France has done repeatedly over the past years, does not change much in practice. Migrants find it comparatively easy to enter France from Italy for the simple reason that an effective border closure is not practically feasible within continental Europe. If, by contrast, Italy requires prior authorisation in the form of a visa, Tunisians who do not fulfil the entry conditions must use smugglers to reach the northern shores of the Mediterranean. That costs a lot of money and is dangerous, thus reducing the number of arrivals. Schengen membership achieved this. Italy had to introduce visa requirements for the Maghreb countries in preparation for membership.⁶

Against this backdrop, the original Schengen cooperation appears in a different light. Classic asylum destination countries in the middle of the continent designed a common rulebook advancing their interests. Political scientists speak of ‘venue shopping’ when intergovernmental collaboration within the original Schengen framework meant that interior ministries could effectively promote the upsurge of control instruments with like-minded peers, thus side-stepping national parliaments.⁷ Debates among the original Schengen countries revolved around ‘flanking measures’ in the form of control instruments to reduce crime and limit irregular movements.⁸ Europeanisation was—and remains—crucial for the design of innovative control instruments in the form of databases and inter-State cooperation; these measures can be more effective than classic border controls at the comparatively permeable internal land borders of the Schengen area.⁹

1.4 Visas as an Early and Effective Control Instrument

Visas featured prominently on the political agenda precisely because the original Schengen members were among the original asylum destination countries within Europe.¹⁰ A first upsurge in the number of arrivals triggered a period of experimentation during which governments introduced novel control

6 See Simone Paoli, ‘The Schengen Agreements and their Impact on Euro-Mediterranean Relations’ (2015) 21 *Journal of European Integration History* 125.

7 See Virginie Guiraudon, ‘European Integration and Migration Policy’ (2000) 38 *Journal of Common Market Studies* 251; and Sandra Lavenex, *The Europeanisation of Refugee Politics* (Ashgate 2002).

8 See the detailed reconstruction of the drafting history by Ruben Zaiotti, *Culture of Border Controls* (University of Chicago Press 2011) chs 4–6.

9 See Daniel Thym, *European Migration Law* (OUP 2023) 304–05.

10 See the dataset of Eiko R Thielemann, ‘Why Asylum Policy Harmonisation Undermines Refugee Burden-Sharing’ (2004) 6 *EJML* 47, 48–54.

instruments, such as border procedures, safe third country schemes, visa requirements, and carrier sanctions.¹¹ A telling example is Türkiye, which was blacklisted in several countries when political tensions before the military coup of 1980 resulted in an increase in asylum applications by its nationals.¹² Visa requirements were complemented by carrier sanctions, to be mentioned hereinafter. Informal cooperation within the Schengen area and different forms of intergovernmental consultations served as a framework for mutual learning and the exchange of ‘best practices’, such as visa requirements and carrier sanctions, by means of informal policy transfer first and supranational asylum and border control legislation later.

When it comes to harmonisation, the move towards a comprehensive common rulebook on visa requirements was a long and winding process along two parallel tracks.¹³ The European Union agreed upon a supranational minimum list of 101 third States under the Treaty of Maastricht,¹⁴ while the parallel coordination within the intergovernmental Schengen area proved more effective. Both visa requirements and carrier sanctions had featured in the original Schengen agreement.¹⁵ On this basis, the ten Schengen members, including Italy after its accession, agreed upon comprehensive ‘black’ and ‘white’ lists, except for Colombia, before the Schengen *acquis* was integrated into the EU framework under the Treaty of Amsterdam.¹⁶

This stability of the black list over many years can hide the element of closure the example of Italy epitomises. The continuity of visa requirements is correct for the original Schengen members which had introduced visa requirements *qua* national legislation early on. Other Member States, by contrast, were obliged to follow their example through the expansion of visa requirements in preparation for Schengen membership and EU accession. The elimination of visa-free mobility between the Southern and the Northern shores of the Mediterranean was followed by the expansion of the ‘paper curtain’¹⁷ towards the East and Southeast in the run-up to the accession of the countries in Central and Eastern Europe. This closure embraces, as we shall see, the Western Balkans and Türkiye which have been tasked with emulating the European Union’s visa requirements for third country nationals.

11 See Adam Luedtke, ‘Migration Governance in Europe’ in Agnieszka Weinar and Others (eds), *The Routledge Handbook of the Politics of Migration in Europe* (Routledge 2019) 15, 16–19.

12 See Case C-221/11 *Demirkan* EU:C:2013:583, paras 17–19; and Jens Vedsted-Hansen, ‘The Legal Condition of Refugees in Denmark’ (1994) 7 *Journal of Refugee Studies* 249, 255.

13 See Kay Hailbronner, *Immigration and Asylum Law and Policy of the European Union* (Kluwer 2000) 133–47.

14 See the first Visa List Regulation (EC) 2317/95 [1995] OJ L234/1; which was readopted as the former Visa List Regulation (EC) No 574/1999 [1999] OJ L72/2 in response to Case C-392/95 *Parliament v Council* EU:C:1997:289.

15 See CISA (n 5) arts 9–17, 26.

16 See Decision SCH/Com-ex (99)13 on the definitive versions of the Common Manual and the Common Consular Instructions [2000] OJ L239/317, annex 1 to appendix I.

17 David Scott FitzGerald, *Refuge beyond Reach* (OUP 2019) 59–63.

From a theoretical perspective, visa requirements exemplify the bifurcated character of (non)privileged mobility in today's globalised world for which the sociologist Zygmunt Bauman coined the phrase 'tourists and vagabonds'.¹⁸ Cosmopolitan internationalists are proud of the collection of visas and entry stamps in their passports which they received when visiting exotic holiday destinations. Such trophies of globetrotting contrast with the lived experience of persons from the global South who find it difficult—if not impossible—to receive a Schengen visa. Iconic manifestations of stratification are images of beaches in Greece and on the Canary Islands showing both sunbathing tourists and refugees leaving rubber boats. Visa requirements are an integral part of the legal, administrative, and technical infrastructure States employ to facilitate the speedy transportation of *bona fide* travellers, while simultaneously obstructing irregular movements.¹⁹

1.4.1 Conditions and Legal Safeguard for 'Schengen Visas'

Legal rules do not materialise out of thin air. Legislation is the result of political compromises and occasional struggles on the road to be taken. An institutional framework is more than a formalistic skeleton: it assigns privileges to shape the outcome to some actors, while limiting the influence of others. In this respect, the supranationalisation of the migration law instruments in the slipstream of the Treaty of Amsterdam meant that the constitutional safeguards of the European Union's legal order would apply, by means of judicial oversight and fundamental rights compliance. None of this turned out to spark a fundamental change of direction. While the legal safeguards benefit *bona fide* travellers, asylum seekers cannot usually invoke human rights or secondary legislation to obtain an entry visa.²⁰

Comments hereinafter concentrate on 'Schengen visas' for short-term travel for up to 90 days.²¹ Residence permits handed out by consulates abroad for longer periods are subject to supranational legislation and domestic laws. Family reunification, by way of example, is governed by the Family Reunification Directive 2003/86/EC; labour migration pathways are covered by EU legislation to a limited extent, mainly for the highly skilled and seasonal workers; humanitarian visas and resettlement quotas are not mandatory under Union law either. That is why the political debate about legal pathways as an alternative to irregular movements by potential asylum applicants is mostly governed by domestic laws.²² In the EU context, the term 'visa' refers

18 See Zygmunt Bauman, *Globalization. The Human Consequences* (Columbia UP 1998) ch 4.

19 See Steffen Mau and Others, *Liberal States and the Freedom of Movement* (Palgrave Macmillan 2012); and Thomas Spijkerboer, 'The Global Mobility Infrastructure' (2018) 20 EJML 452.

20 Comments in this section build upon Thym (n 9) 283–92.

21 Member States may allow admission to their territory (not the Schengen area as a whole) even if the conditions for a 'Schengen visa' are not fulfilled.

22 See the contributions on 'seeking asylum with a visa: utopia?' in this volume.

to short-term stays—in contrast to some segments of the international debate where the term is used as a proxy for legal admission to the territory, irrespective of the length of sojourn.

1.4.2 *Motivation Behind the Visa Requirements*

Criteria for the introduction or revocation of visa requirements comprise ‘a variety of criteria relating, *inter alia*, to illegal immigration, public policy and security, economic benefit ..., and the Union’s external relations’.²³ Notwithstanding this plethora of relevant factors, the black list has been surprisingly stable over the years. Ecuador and Bolivia are rare examples of visa requirements being reintroduced on grounds of illegal migration risk.²⁴ All other instances of delisting essentially concerned enlargement or visa liberalisation, often in return for readmission agreements.²⁵ The Commission has been criticised for the abstract character of country assessments,²⁶ although decisions are more transparent nowadays than under the intergovernmental Schengen framework. At the time, the original Schengen countries had effectively combined existing visa requirements in an exercise of negative accumulation: third States subject to visa requirements for some countries were put on the black list for all others.²⁷

The objective of curbing ‘illegal migration’ draws attention to the motivation to reduce the number of irregular arrivals via the asylum system, as spearheaded by the classic destination countries from the 1980s onwards in line with previous comments. Even a cursory survey shows that prominent countries of origin are blacklisted. On the whole, migration control has become the most important motivation for lifting or introducing visa requirements, although other aspects remain relevant. Think of foreign policy or the promotion of tourism.²⁸ ‘Airport transit visas’ for transit passengers are a distinct category besides regular ‘Schengen visas’. They have traditionally been left out of the Visa List Regulation, in line with earlier limitations of competence. The Visa Code Regulation (EC) No 810/2009 established a minimum black

23 Visa List Regulation (EU) 2018/1806, art 1.

24 See Regulation (EC) No 453/2003 [2003] OJ L69/10, recital 1; and Regulation (EC) No 1932/2006 [2007] OJ L405/23, recital 1.

25 See the survey by Steve Peers, *EU Justice and Home Affairs Law. Vol I* (5th edn, OUP 2023) 180–85; and Annalisa Meloni, *Visa Policy within the European Union Structure* (Springer 2005) 100–07.

26 See Violeta Moreno-Lax, *Accessing Asylum in Europe* (OUP 2017) 90–92.

27 See Annalisa Meloni, ‘The Development of a Common Visa Policy under the Treaty of Amsterdam’ (2005) 42 CML Review 1357, 1365–67.

28 See Commission, ‘Communication: Implementation and Development of the Common Visa Policy to Spur Growth in the EU’ COM(2012) 649 final 3–4; and Rey Koslowski, ‘International Travel’ in Alexander Betts (ed), *Global Migration Governance* (OUP 2011) 109, 120–21.

list, which States may supplement by means of domestic catalogues.²⁹ Afghans and Syrians, for example, require an airport transit visa to board a flight from Istanbul to New York via Frankfurt, in line with the supranational list (for Afghans) and German rules (for Syrians).

Critical observers have highlighted for years that the stratified character of the European Union's visa regime prevents migrants and refugees from the global South from reaching the European continent—an argument strengthened by the postcolonial literature.³⁰ This critique can be translated into legal categories as a potential violation of the principle of equal treatment and could possibly even amount to indirect discrimination on grounds of race or ethnic origin. However, neither the European Court of Human Rights (ECtHR) nor the Court of Justice of the European Union (CJEU) have taken up the criticism of 'passport apartheid'.³¹ Differences in treatment on grounds of nationality do not constitute discrimination on grounds of race or ethnic origin.³² The same conclusion was defended by the International Court of Justice (ICJ) for nationality-based travel restrictions, rejecting the non-binding views of the Committee on the Elimination of All Forms of Racial Discrimination.³³ Settled cases law of the ECtHR and CJEU indicate that future challenges on the basis of the generic equal treatment guarantee, without recourse to the charged accusation of racism, remain an uphill legal struggle.³⁴

1.4.2.1 Entry Conditions in the Visa Code Regulation

Visa requirements are a comparatively crude migration control instrument, categorising countries as a whole on the basis of abstract risk profiles. One step further, individual characteristics of third country nationals become relevant when States examine individual visa applications. Visa requirements do not, in other words, forbid entry categorically; they relegate decisions to consular staff working in embassies abroad. Conditions for issuing 'Schengen visas' for stays of up to 90 days can be found in the Visa Code Regulation (EC) No

29 See Visa Code Regulation (EC) No 810/2009, with later amendments, art 3, annex IV.

30 By way of example, see E Tendayi Achiume, 'Racial Borders' (2022) 110 *Georgetown Law Journal* 445; and the contributions by William T. Worster and Sylvie Sarolea in this volume.

31 Dimitry Kochenov, 'Ending the Passport Apartheid' (2020) 18 *International Journal of Constitutional Law* 1525.

32 See *Abdulaziz, Cabales & Balkandali v the United Kingdom* App nos 9214/80 and Others (ECtHR, 28 May 1985) §§ 85–86; Case C-571/10 *Kamberaj* EU:C:2012:233, paras 48–50; and multiple other judgments which did not even consider the argument.

33 See Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Qatar v United Arab Emirates*) (Judgment No 172, 4 February 2021) §§ 71–105, 109–13.

34 See Maarten den Heijer, 'Visas and Non-Discrimination' (2018) 20 *EJML* 470; and Thym (n 9) 262–66.

810/2009, which applies to full Schengen members only.³⁵ Readers should be careful to work with a consolidated version of the Visa Code Regulation, since the EU institutions have agreed upon several amendments which must be read into the original text.

Schengen visas will be delivered to anyone fulfilling the entry conditions under Article 6(1) of the Schengen Borders Code Regulation (EU) 2016/399. *Ex ante* verification in the visa procedure allows for a thorough examination border guards cannot usually perform at the official crossing points at the external borders of the Schengen area (think of busy terminals at airports like Amsterdam Schiphol or Madrid Barajas). For our purposes, the ‘risk of illegal immigration’ takes centre stage, since the consular staff is entrusted with verifying ‘whether the applicant intends to leave the territory of the Member States before the expiry of the visa’.³⁶ This criterion is meant to counter the phenomenon of ‘overstaying’ which occurs when third country nationals do not respect the obligation to return home.³⁷ Whenever consular staff concludes that an applicant might apply for asylum, or remain on EU territory illegally without doing so, the application will be rejected on grounds of a ‘risk of illegal immigration’.

In order to assess the risk, consular staff considers the purpose of the stay, previous visits, or indirect evidence such as job security, income levels, and family connections.³⁸ If it deems the information provided in the visa application to be insufficient, the consular staff may ask for additional documents or request a personal interview.³⁹ It is sufficient if they have ‘reasonable doubts’ about the willingness to return home; certainty is not required.⁴⁰ The abstract character of the illegal migration risk entails that the consular staff has a certain factual leeway when deciding individual cases.⁴¹ In scenarios of doubt, the ‘veracity and reliability’ of the statements made by the applicant are decisive, mirroring credibility assessments during asylum procedures.⁴² Grounds for refusal must be communicated through a standard form, which resembles a multiple choice test: consular staff have to tick the relevant boxes which list the grounds for refusal in an abstract manner,⁴³ even though space for

35 By contrast, Member States waiting to join the Schengen area are obliged to apply the Visa List Regulation 2018/1806 from day one after EU accession; see Thym (n 9) 282–83.

36 Visa Code Regulation (EC) No 810/2009, with later amendments, art 21(1).

37 See Case C-241/05 *Bot* EU:C:2006:634, para 27.

38 Visa Code Regulation (EC) No 810/2009, with later amendments, arts 14(1)(d), 21(3)(b), 21(4).

39 *Ibid*, art 21(8).

40 See Case C-84/12 *Koushkaki* EU:C:2013:862, para 68.

41 *Ibid*, para 55.

42 Visa Code Regulation (EC) No 810/2009, with later amendments, arts 21(7), 32(1)(a).

43 *Ibid*, annex VI.

additional remarks was extended somewhat in response to a Court judgment.⁴⁴ Nevertheless, the bearing of the case law should not be overestimated. Judges insist on basic reasoning only.⁴⁵

A legal remedy against refusal exists, in accordance with the national laws of the Member State refusing the visa.⁴⁶ Despite the high number of refusals (more than 1.7 million visa applications were not successful in 2024 alone⁴⁷), only a small number of refusals is challenged. This low percentage can be rationalised by practical difficulties in seizing domestic courts from abroad and the absence of immediate benefits, such as admission to the territory. Moreover, legal remedies are of little avail to potential asylum applicants for the simple reason that the desire to apply for asylum does not constitute a legitimate reason why a Schengen visa should be granted. The very idea of the ‘risk of illegal immigration’ benchmark is to filter out potential ‘overstayers’, including asylum applicants. The legal design of the entry conditions prevents Schengen visas from serving as a channel for legal entry. We shall see on the pages that follow that such ‘remote control’ by means of visa requirements and carrier sanctions has been upheld to comply with human rights.

1.4.2.2 *Privatisation of Border Controls via Carrier Sanctions*

Carrier sanctions are meant to render visa requirements effective if transport companies do not allow third country nationals to board a plane or ship unless they fulfil the entry requirements for the final destination. The idea was spearheaded by the United States towards steamboat companies more than a century ago.⁴⁸ Countries on the eastern side of the Atlantic took up the concept four decades ago. While Denmark is usually portrayed as the pioneer from 1983 onwards, Germany had introduced similar rules at the end of 1981 already.⁴⁹ The United Kingdom, France, Italy, Belgium, the Netherlands, and others followed suit thereafter.⁵⁰ Carrier sanctions are a classic example

44 Joined Cases C-225/19 & C-226/19 *Minister van Buitenlandse Zaken* EU:C:2020:951, para 46.

45 See Thym (n 9) 185–86; and the chapter by Mario Savino in this volume.

46 Visa Code Regulation (EC) No 810/2009, with later amendments, art 32(3); and Case C-403/16 *El Hassani* EU:C:2017:960, paras 39–41.

47 See the statistics on short-stay visas, online at https://home-affairs.ec.europa.eu/policies/schengen/visa-policy/short-stay-visas-issued-schengen-countries_en (accessed 1 May 2026).

48 See Bernard Ryan, ‘What Role for Legal Guarantees?’ in Bernard Ryan and Valsamis Mitsilegas (eds), *Extraterritorial Immigration Control* (Martinus Nijhoff 2010) 3, 19.

49 See Section 18(1) Foreigners Law (*Ausländergesetz*), as amended by Article 6(1) Law on Combatting Illegal Employment (*Gesetz zur Bekämpfung der illegalen Beschäftigung*) [1981] Federal Law Gazette (*Bundesgesetzblatt*) I/1390.

50 See António Cruz, *Shifting Responsibility. Carrier Liability in the Member States of the European Union and North America* (Trentham Books 1995) 27–66; and Amnesty International,

of informal policy exchange. They were formalised under the Convention Implementing the Schengen Agreement for the members of the Schengen area and became an obligation for all Member States from the moment of EU accession by means of a Directive adopted in 2001.⁵¹

Carrier sanctions consist of a double obligation. First, transport companies have to organise transportation back home at their own cost whenever third country nationals are refused entry at the border.⁵² However, this obligation is practically irrelevant if passengers apply for asylum, since asylum applicants must be admitted to the territory, or to transit zones, under EU asylum legislation.⁵³ Second, penalties of EUR 3–5000 for each person can be issued whenever companies do not diligently inspect ‘travel documents required for entry’, especially passports and visas.⁵⁴ Passengers can bring lawsuits against transportation companies before domestic courts for denial of boarding and to claim compensation.⁵⁵ In practical terms, however, this will only help those denied boarding mistakenly. Afghans and Nigerians will not usually benefit from the complaint option. The very idea behind carrier sanctions is that they shall be denied boarding without a visa.

Obligations for transport companies aim for preventive effects. The threat of financial sanctions is meant to trigger effective privatised border controls ‘to curb migratory flows and [to] combat illegal immigration’.⁵⁶ There is little doubt that they contribute to this objective. To be sure, some will come to Europe nonetheless by risking their lives, paying piles of money, and suffering exploitation on the journey. Yet, the persistence of irregular migration does not mean that visa requirements and carrier sanctions are practically ineffective. The drivers behind migratory movements are notoriously complex.⁵⁷ Nevertheless, an increase in financial and human transaction costs is likely to reduce the capacity and willingness to embark on the journey. The relevant question is not whether irregular movements persist (or even increase) despite of visa requirements and carrier sanctions but what numbers would come hypothetically if they were lifted.

‘No Flights to Safety. Carrier Sanctions, Airline Employees and the Rights of Refugees’ (ACT 34/021/1997, 1 November 1997) 3–6.

51 See CISA (n 5) art 26, which remains in force; and Carrier Sanctions Directive 2001/51/EC.

52 Ibid, art 26(1)(a); and ibid, arts 2, 3.

53 See Asylum Procedures Directive 2013/32/EU, arts 6, 9; which will be replaced by Asylum Procedures Regulation (EU) 2024/1348, arts 10, 26.

54 See CISA (n 5) art 26(1)(b), (3), (3); and Carrier Sanctions Directive 2001/51/EC, art 4.

55 See Regulation (EC) No 261/2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights [2004] OJ L46/1, arts 2(j), 7–8; and Case C-584/18 *Blue Air – Airline Management Solutions* EU:C:2020:324, paras 87–98.

56 Carrier Sanctions Directive 2001/51/EC, recital 2.

57 For an overview, see Thym (n 9) ch 4.

1.4.2.3 The 'Border Abroad' Beyond the Reach of Human Rights

Carrier sanctions are 'subject to the obligations resulting from [the Refugee Convention]'.⁵⁸ Even so, courts have consistently rejected the idea that they violate international refugee law or human rights obligations. When it comes to the European Convention on Human Rights (ECHR), Article 1 obliges State Parties to secure human rights 'to everyone within their jurisdiction'—a condition not limited to the territory. Extraterritorial action can be covered in 'exceptional circumstances'.⁵⁹ Settled case law obliges States to respect the ECHR whenever they exercise effective control of a geographical area or have factual authority over individuals, for instance after arrest.⁶⁰ On this basis, the ECtHR concluded, in the *Hirsi* judgment, that Italy held jurisdiction over migrants on board of a coastguard vessel.⁶¹ More recently, the Court refused to extend this conclusion to other forms of *de facto* control when border guards are not in physical contact with migrants.⁶² By doing so, judges effectively rejected the notion of functional jurisdiction which critical academics had been promoting.⁶³

With regard to humanitarian visas, the ECtHR's Grand Chamber concluded that the rejection of an application in a consulate abroad does not qualify as an exercise of State jurisdiction. To be sure, the Court highlighted that it might find otherwise in 'exceptional circumstances', for instance for family reunification or nationals seeking diplomatic protection.⁶⁴ Involvement of domestic authorities in the visa procedure or the risk of inhuman or degrading treatment were not, however, considered sufficient.⁶⁵ In a statement of principle, the ECtHR emphasised that 'to find otherwise would amount to enshrining a near-universal application of the Convention ... and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment'.⁶⁶ Against this background, it

58 CISA (n 5) art 26(1).

59 Reaffirmed by *M.N. and Others v Belgium* App no 3599/18 (ECtHR [GC], 5 May 2020) §§ 98, 102.

60 See the summary in *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR [GC], 23 February 2012) §§ 73–75.

61 Ibid, §§ 75–82.

62 See *S.S. and Others v. Italy* App no 21660/18 (ECtHR, 20 May 2025) §§ 78–107; Solon Solomon, 'Migrant Boats on the High Seas and their Interception through Psychologically Coercive Measures' (2019) 37 Netherlands Quarterly of Human Rights 36; for a more generous reading, see *A.S. and others v Italy* Communication no 3042/2017 (HRC, 27 January 2021) Nos 7.4–8.

63 See Violeta Moreno-Lax, 'The Architecture of Functional Jurisdiction' (2020) 21 German Law Journal 385; and Thomas Gammeltoft-Hansen and James C Hathaway, 'Non-Refoulement in a World of Cooperative Deterrence' (2015) 53 Columbia Journal of Transnational Law 235.

64 See *M.N. and Others* (n 59) §§ 101–06.

65 Ibid, §§ 110–23.

66 Ibid, § 124 (references omitted).

appears unlikely that the ECtHR will find visa requirements and carrier sanctions to violate human rights.⁶⁷

In contrast to the ECHR, the Refugee Convention does not define its territorial scope. Many support an extension of the prohibition of refoulement to rejection at the border and—contrary to the US Supreme Court⁶⁸—possibly even extraterritorial *de facto* control over persons or territory.⁶⁹ Such an extension would not, however, go further than settled ECtHR case law. Other guarantees have not traditionally been considered to hinder carrier sanctions, in particular the prohibition of penalties for refugees on account of illegal entry under Article 31 Refugee Convention.⁷⁰

Uncertainties persist regarding the scope of the Charter of Fundamental Rights of the European Union. On the one hand, it can be argued that the Charter emulates the jurisdictional threshold of Article 1 ECHR.⁷¹ On the other hand, the open formulation, in Article 51(1), about the Charter being ‘addressed to the institutions’ and applying to Member States ‘when implementing Union law’, could be read as an implicit statement about extraterritorial scope, also considering that the Court has occasionally found secondary legislation to reach beyond the external borders.⁷² Arguably, one reason for the CJEU’s convoluted reasoning in the *X & X* judgment on humanitarian visas may have been the desire to evade a definite statement on these matters. However, the potential of extraterritorial reach need not result in obligations that go beyond the prohibition of refoulement under the ECHR. The protective reach of Article 19(2) CFREU concerns scenarios of being ‘removed, expelled or extradited’ that can hardly be construed to have a quasi-universal scope of application; the same holds for the right to asylum under Article 18 CFREU, which refers to the Refugee Convention and can hardly be interpreted to embody a guarantee of safe entry into the Schengen area.

67 See Frank McNamara, ‘Member State Responsibility for Migration Control within Third States’ (2013) 15 EJML 319; and also Daniel Thym, ‘The End of Human Rights Dynamism?’ (2020) 32 IJRL 569, 584–88.

68 See *Sale v Haitian Centers Council* 509 US 155 [1993] (judgment of 21 June 1993).

69 See Guy S Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (4th edn, OUP 2021) 307–28; Thomas Gammeltoft-Hansen, *Access to Asylum* (CUP 2011) ch 3.

70 See Gregor Noll, ‘Article 31’ in Andreas Zimmermann and Terje Einarsen (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (2nd edn, OUP 2024) MN 36; and compare Moreno-Lax (n 26) 351–52.

71 See Charter of Fundamental Rights, recital 4, art 52(3), (4); Case C-239/14 *Tall* EU:C:2015:824, paras 53–54; and Stephanie Law, ‘Humanitarian Admission and the Charter of Fundamental Rights’ in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe* (Nomos/Hart 2020) 77, 97–109.

72 See Cathryn Costello and Violeta Moreno-Lax, ‘The Extraterritorial Application of the EU Charter of Fundamental Rights’ in Steve Peers and others (eds), *The EU Charter of Fundamental Rights. A Commentary* (1st edn, CH Beck/Hart/Nomos 2014) 1657.

1.4.3 *International Cooperation: Visas as a Strategic Leverage*

A numerical comparison of the countries on the ‘black list’ for visa requirements shows that 30 were delisted during the first 20 years of the 21st century: at the time of writing, visa requirements existed for 104 third States, less than the 134 after the millennium change.⁷³ What might appear as an exercise in straightforward liberalisation at first sight is the product of complex dynamics. To start with, EU enlargement reduced the number of countries subject to visa requirements. One step further, the European Union has concluded visa liberalisation agreements with neighbouring States, such as Serbia and Georgia, as well as with countries with a low ‘illegal migration risk’, such as Mauritius. With neighbouring States, in particular, ongoing cooperation in visa matters replicates the logic of Schengen accession if the facilitation of short-term mobility goes hand-in-hand with the extension of the European Union’s invisible fortification in the form of visa requirements.⁷⁴

1.4.4 *Visa Liberalisation as a Quid-Pro-Quo for Readmission*

Negotiations on visa liberalisation with neighbours follow the model of enlargement conditionality: third States are expected to fulfil legislative and practical criteria contained in ‘roadmaps’ and ‘action plans’; the Commission regularly reports on the progress made. The benchmarks for visa liberalisation embrace diverse themes ranging from document security to criminal matters and the treatment of minorities.⁷⁵ EU institutions usually insist on the parallel conclusion of readmission agreements. Neighbouring States, in particular, must commit to take back nationals who overstay the period of visa-free travel or apply for asylum without success. Readmission agreements with the Western Balkans countries, Georgia, and Ukraine (before the war) fall into this category.⁷⁶

Once the conditions have been fulfilled, visa facilitation agreements will be signed. They involve lower application fees, relaxed documentary evidence, and the introduction of multi-entry visas.⁷⁷ One step further, EU institutions may start a dialogue on visa ‘liberalisation’ with the objective of eliminating visa requirements, thus going beyond the initial ‘facilitation’ through streamlined procedures.⁷⁸ If this dialogue comes to fruition, visa-free travel

73 Compare Visa List Regulation (EU) 2018/1806, annex I; with former Visa List Regulation (EC) No 539/2001, annex I.

74 Comments in this section build upon Thym (n 9) 285–87, 297–98, 583–86.

75 By way of example, see Commission, ‘Second Report on progress by Turkey in fulfilling the requirements of its visa liberalisation roadmap’ COM(2016) 140 final; and Florian Trauner and Imke Kruse, ‘EC Visa Facilitation and Readmission Agreements’ (2008) 10 EJML 411.

76 For an overview, see Thym (n 9) 537–39.

77 By way of example, see Agreement between the European Community and the Republic of Serbia on the facilitation of the issuance of visas (adopted 18 September 2007, entered into force 1 January 2008) [2007] OJ L334/137.

78 By way of example, see Council conclusions on opening up of a visa liberalisation dialogue with Armenia (Council doc 12489/24, 22 July 2024).

will be introduced by means of supranational legislation. While this step has been promised politically to partner countries, it remains the unilateral decision of the EU institutions from a legal perspective. Fully-fledged visa waiver agreements have only been signed with several small island nations, such as Mauritius or the Seychelles.⁷⁹

The conditionality approach has been working comparatively well in relations with countries for which visa-free entry into the Schengen area has an economic and symbolic value. The Western Balkans is a case in point: cooperation on return proceeds smoothly precisely because governments know that it is connected to visa liberalisation. A generic mechanism allows for the suspension of the visa waiver when return proves problematic or whenever irregular entry or overstaying increases.⁸⁰ This suspension mechanism was introduced when visa liberalisation towards the Western Balkans coincided with a rise in asylum applications during the early 2010s, which were mostly rejected as unfounded.⁸¹ The formal suspension mechanism has not been activated a single time at the time of writing. This has to do with high procedural hurdles, as well as with the effective cooperation of countries of origin. They have close relations with the European Union and its Member States and are eager not to risk visa-free travel, which citizens cherish.

On the basis of the conditionality mechanism, the Commission continuously pursues structured dialogues with third States, thus perpetuating the strategic use of visa-free travel to monitor neighbouring countries even after the conclusion of the original roadmap which had been a precondition for visa liberalisation.⁸² In 2025, a revision of the suspension mechanism was adopted to render it more flexible in response to specific challenges, such as ‘golden passport’ schemes.⁸³ The Pacific island nation of Vanuatu had effectively sold its national passports to rich foreigners from 2015 onwards, after having been whitelisted by the European Union. Visa-free access to the Schengen area was one of the benefits which rendered the golden passport scheme attractive. In 2022, the European Union suspended the visa waiver agreement after several years of diplomatic tensions.⁸⁴

79 They can be found in [2009] OJ L169.

80 See Visa List Regulation (EU) 2018/1806, arts 8–11; which were introduced first by means of Regulation (EU) No 1289/2013 [2013] OJ L347/74; and reformed thereafter by Regulation (EU) 2017/371 [2017] OJ L61/1.

81 See Florian Trauner and Emanuele Manigrassia, ‘When Visa-Free Travel Becomes Difficult to Achieve and Easy to Lose’ (2014) 16 EJML 125, 132–44.

82 See Commission, ‘Seventh Report under the Visa Suspension Mechanism’ COM(2024) 571 final; and Roman Lehner, ‘Gemeinsame Visapolitik’ in Ferdinand Wollenschläger (ed), *Enzyklopädie Europarecht. Band X* (2nd edn Nomos 2021) § 28 MN 14–19.

83 See Regulation (EU) 2025/2441 amending Regulation (EU) 2018/1806 as regards the revision of the suspension mechanism.

84 See Decision (EU) 2022/366 on the partial suspension of the application of the Agreement between the European Union and the Republic of Vanuatu on the short-stay visa waiver [2022] OJ 2022 L69/105.

1.4.4.1 Exporting Visa Requirements to Transit Countries

Anyone looking at a map of the European continent understands intuitively that the Western Balkans and Türkiye, in particular, can serve as an ‘open flank’ for irregular movements if, by way of example, Serbia allows citizens of Burundi and India to fly to Belgrade without applying for a visa beforehand. They can then move on irregularly to the Schengen area via the ‘Western Balkans route’. In comparison to entry via Northern Africa, the physical risk, financial cost, and danger of mistreatment are reduced considerably. Nevertheless, the airport of Benghazi, which is controlled by the military regime in Eastern Libya, serves as a gate of entry for Bangladeshis and Pakistanis to reach Italy with the support of smugglers; they were among the most relevant countries of origin during 2024/25.⁸⁵ While the European Union is comparatively successful in closing the backdoor via the Western Balkans, cooperation with Northern Africa proved less fruitful, partly reflecting the absence of visa liberalisation as a powerful incentive to foster compliance.

For the Western Balkans, the aforementioned dialogue on the suspension of visa liberalisation serves as leverage for policy change. By way of example, Serbia decided to introduce a full visa regime for citizens of Bolivia, Burundi, Guinea-Bissau, Cuba, India, and Tunisia during 2022/23 in response to citizens of these countries using visa-free flights to Belgrade as a gateway for irregular onward movement.⁸⁶ Similar measures are discussed with other accession candidates. Nevertheless, Serbia is the most relevant partner for logistical reasons given its geographic proximity and the availability of direct flight connections. What may sound like an unusual arrangement of external migration control is a long-established practice. An example from the early days of European cooperation in the field of asylum were ‘deals’ West Germany and, later, Sweden and Denmark struck with the Communist regime in East Germany to require nationals of certain countries to show entry visas for Western States before boarding flights bound for East Berlin from where Western Berlin could be reached easily.⁸⁷ The amendment of the visa suspension mechanism adopted in 2025 formalised the non-alignment of the visa regime as a ground for suspension.⁸⁸

85 See the constantly updated data at <https://data.unhcr.org/en/situations/europe-sea-arrivals/location/24521> (accessed 1 May 2026).

86 See ‘Press Conference’ (Justice and Home Affairs Council, 14 October 2022), <https://europa.eu/!rTF6xG> (accessed 1 May 2026); and Commission (n 82) 40.

87 See ‘Interne Sache’ (*Der Spiegel*, 7 July 1985), <https://www.spiegel.de/politik/interne-sache-a-e59f43ac-0002-0001-0000-000013514331> (accessed 1 May 2026); and Heiner Busch, *Grenzenlose Polizei?* (Westfälisches Dampfboot 1995) 10–12.

88 See Regulation (EU) 2025/2441 (n 83) art 8a(1)(f).

Similar negotiations are ongoing with Türkiye,⁸⁹ although the country is much less likely to give in to the demands of the EU side for as long as the original promise of a sincere dialogue on visa liberalisation is effectively suspended.⁹⁰ Türkiye is eager to present itself as a leader of the Muslim world, pursues active marketing as a tourist destination, and aims at positioning Istanbul airport as a hub for international air travel. All these considerations complicate the uncritical replication of the European Union's visa regime. Having said this, neighbouring countries are never just passive recipients of the European Union's instructions only. Türkiye and Morocco, in particular, are countries of transit and destination at the same time. While visa requirements will often respond to the desire of the EU side, they may similarly be motivated by domestic considerations. Public opinion in Türkiye, for instance, has become critical of further arrivals of Syrians and Afghans.

Moreover, the EU institutions have additional instruments of coercion. In the autumn of 2021, the European Union reacted swiftly and decisively when the Belarusian dictator Lukashenko 'instrumentalised' migration in the run-up to the Russian war of aggression against Ukraine (the policy continues to this date). Travel companies sold 'tourist packages', including entry visas, for Belarus to Iraqis, Syrians, and other nationalities. In return for substantial payments, they were flown to Minsk for onward movement towards Poland and Lithuania. EU institutions and the Member States convinced commercial airlines not to cooperate any longer. The subtle threat of limiting access to the lucrative European market was sufficient to persuade Turkish Airlines and FlyDubai, amongst others, to stop flying to Minsk.⁹¹ With regard to individuals and companies located in Belarus, the European Union adopted formal sanctions.⁹² A proposal to establish a generic sanctions regime was proposed by the Commission and continues to be discussed.⁹³

1.4.4.2 'Visa Leverage' in Relations with Third States

The example of subtle threats and formal sanctions against transport operators and the political elite hints at a general consideration: incentives ('carrots')

89 For the original demand, see Commission, '[First] Report on Progress by Turkey in Fulfilling the Requirements of its Visa Liberalisation Roadmap' COM(2014) 646 final 12–15.

90 See Laure Delcour, 'The EU. Shaping Migration Patterns in its Neighbourhood and Beyond' in Dimitry Kochenov and Fabian Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2014) 261, 266–68; and Raúl Hernández i Sagrera, 'Reframing the EU Visa Cooperation with Third Countries' in Didier Bigo, Sergio Carrera, and Elspeth Guild (eds), *Foreigners, Refugees or Minorities?* (Ashgate 2013) 189.

91 See 'Turkish Airlines Risks EU ban over Poland Border Crisis' (*EUobserver*, 9 November 2021).

92 See Regulation (EC) No 765/2006 concerning restrictive measures in respect of Belarus [2006] OJ L134/1, as amended by Regulation (EU) 2021/1985 [2021] OJ L405/1, art 2(6)(a)(i), (b).

93 See Commission Proposal for a Regulation on measures against transport operators that facilitate or engage in trafficking in persons or smuggling of migrants, COM(2021) 753 final.

and sanctions ('sticks') the EU institutions can employ to enlist third States in migration management. Such cooperation comes in many forms, including hurdles for onward movement towards the Schengen area, safe third country arrangements and return hubs, as well as better cooperation on the return of nationals and visa requirements for third States. Italy and the EU institutions would be delighted, for instance, if with Tunisia agreed to replicate of the European Union's visa regime—a move the government in Tunis has repeatedly rejected, despite its active cooperation with the European Union on migration on several fronts.⁹⁴

In most scenarios, such cooperation is not formalised. At the same time, the European Union has introduced a mechanism for using visa policy to foster cooperation in the domain of return. The position of countries benefiting from visa waivers has been mentioned previously with regard to the suspension mechanism for visa-free travel. This 'stick' is not available when the European Union is unwilling to eliminate visa requirements in the first place. Nevertheless, the institutions agreed on a 'visa leverage' during the 2019 revision of the Visa Code Regulation. It allows for sanctions against uncooperative third States, while rewarding what the European Union perceives as good behaviour: the regular visa fee of EUR 80 shall be either increased to EUR 120 or 160 in case of problems and may be lowered to EUR 60 as a reward for cooperation; processing times can be extended or shortened; and benefits for *bona fide* travellers and multi-entry visas can be suspended or extended.⁹⁵ Sanctions were designed to primarily affect politicians, businesspeople, and other members of the elite who might be eligible for Schengen visas.

In its first ever 'visa policy strategy' of January 2026, the Commission emphasised its determination to use the visa leverage more aggressively and to consider the need for legislative change to facilitate such an outcome. Based on Commission reports assessing the performance of third States, The Gambia became the test case, to be followed by Ethiopia: the fee waiver for diplomats and advantages for *bona fide* travellers were suspended;⁹⁶ a temporary increase in application fees for The Gambia was repealed when return flights became easier.⁹⁷ Measures with respect to Iraq, Bangladesh, and Senegal were also proposed by the Commission, although cooperation improved when the prospect

94 The author learnt this during conversations with numerous experts in Tunis during a trip organised by a German political foundation in the autumn of 2024.

95 See Visa Code Regulation (EC) No 810/2009, as amended by Regulation (EU) 2019/1155, art 25a(5), (8); and Salvatore Fabio Nicolosi, 'Refashioning the EU Visa Policy' (2020) 22 EJML 467, 483–89.

96 See Council Implementing Decision (EU) 2021/1781 on the suspension of certain provisions of Regulation (EC) No 810/2009 with respect to The Gambia [2021] OJ L360/124; and Council Implementing Decision (EU) 2024/1341 in respect of Ethiopia OJ L 2024/1341.

97 See Council Implementing Decision (EU) 2022/2459 on the application of an increased visa fee with respect to The Gambia [2022] OJ L321/18; repealed by Council Implementing Decision (EU) 2024/1231 [2022] OJ L 2024/1231.

of sanctions was imminent.⁹⁸ ⁹⁹ Additional leverage concerns the strategic use of development aid and tariffs.¹⁰⁰ We can expect such calls for some incentives (‘carrots’) and meaningful sanctions (‘sticks’) to gain prominence on the European continent in the years to come in response to the open use of threats, such as the imposition of tariffs or military intervention, by President Donald Trump to force countries of origin and transit to cooperate on return or hinder migratory movements towards the United States.

1.5 Conclusion

In recent years, migration control has become a central motivation for visa requirements within Europe, complementing the earlier focus on foreign affairs, security, and trade. To rely on the ‘border abroad’—or ‘remote control’—has tangible benefits for States. Visa procedures permit consular staff to check compliance with admission criteria before individuals show up at the external borders of the Schengen area. Doing so allows for a thorough inspection of the individual case. Most importantly, however, pre-entry clearance avoids the legal and factual difficulties in enforcing migration legislation once a person is physically present, notably by means of forced removal. Europeanisation played a critical role in the proliferation of such pre-arrival measures to an increasing number of Member States and associated countries.

Visa policy has significant repercussions for refugees and other potential asylum seekers. Visa requirements are, together with carrier sanctions, the single most effective instrument States employ to curb irregular movements towards Europe. Afghans will be prohibited from boarding a flight from Tehran or Istanbul to a destination in the Schengen area unless they are in possession of an entry visa. The objective is spelt out openly in the Visa List Regulation (EU) 2018/1806 and the revised version of the Visa Code Regulation (EC) No 810/2009: the ‘risk of illegal migration’, including by potential asylum applicants, serves as a benchmark when ‘blacklisting’ third States whose nationals must be in possession of a visa; it also guides the decision of consular staff decide about whether or not to grant an entry visa. Whereas ‘Schengen visas’ concern short stays of up to 90 days, national visas and residence permits for periods of longer sojourn are handed out in accordance with national laws, as well as selected EU migration law instruments.

Courts have upheld visa requirements, corresponding entry conditions, and carrier sanctions to be compatible with fundamental rights as a matter of principle. To be sure, statutory guarantees and CJEU case law lay down

98 See the Commission Proposals, COM(2021) 412 final; COM(2021) 414 final; and COM(2022) 631 final; as well as Commission Report, ‘Assessment of third countries’ level of cooperation on readmission in 2023’ COM(2024) 340 final 20–23, 67–70, 88–90.

99 See Commission Communication on EU visa policy strategy, COM(2026) 6 final.

100 See Thym (n 9) 584–86.

basic procedural safeguards; in practice, however, they will mainly benefit *bona fide* travellers. They cannot be relied upon to challenge the underlying idea that the ‘risk of illegal migration’ serves as a justification for introducing visa requirements and rejecting individual applications. By putting such an emphasis on visa policy, EU institutions ‘exploit’ the notion of jurisdiction enshrined in Article 1 ECHR. The prohibition of refoulement becomes mandatory whenever someone has reached the external borders of the Schengen area or is under the effective control of State officials—a requirement not fulfilled during the visa procedure. Similarly, attempts at challenging State-specific visa requirements in light of the equal treatment guarantee, including the prohibition of discrimination on grounds of race or ethnic origin, have not been successful before European and international courts.

2 EU Visa Policy and the USA

Cracks in Transatlantic Friendship?

Jonas Bornemann

2.1 The US–EU Visa Liberalisation Row: A Crack in the Transatlantic Friendship?

Visa liberalisation is a privilege routinely extended to citizens of states with whom there are close and, often, friendly relations. Since transatlantic friendship is one of the cornerstones of the EU's geopolitical orientation, it will not be surprising to see that all EU Member States offer visa-free travel to US citizens. Conversely, however, the US Visa Waiver Program applies to nationals of most EU Member States but continues to exclude some others, especially those geographically located in the Southeast of the continent. Currently, Bulgarian and Cypriot nationals find themselves excluded from visa-free travel to the USA.¹ While the outgoing Biden administration had formally included Romania in the US Visa Waiver Program, the Trump administration announced that it would 'pause' this designation until further security checks are carried out.²

The absence of full reciprocity in visa liberalisation between the EU and the USA unveils a crack in transatlantic friendship.³ This conflict has been simmering for years. The US Visa Waiver Program has not automatically been extended to Member States that joined the EU in 2004 and 2007 at the time of their EU accession. At the heart of it, this conflict therefore concerns the difference in treatment that the US visa policy displays *vis-à-vis* EU citizens.⁴

1 For an overview of the Program and the nationals of states that are eligible for a visa waiver, see <<https://travel.state.gov/content/travel/en/us-visas/tourism-visit/visa-waiver-program.html>>.

2 Department of Homeland Security, Notice, available at: <<https://www.dhs.gov/visa-waiver-program>>.

3 This chapter is based on and extends the argument developed in Jonas Bornemann, 'The Price of Transatlantic Friendship. Visa-Reciprocity and EU Citizenship at the CJEU' (*Verfassungsblog*, 2023) <<https://verfassungsblog.de/the-price-of-transatlantic-friendships/>> accessed 2 January 2024.

4 See Marco Stefan, 'The Transatlantic Dispute over Visas. The Need for EU Action in the Face of US Non-Reciprocity, Moving Targets and the Harvesting of EU Citizens' Data' (2017) CEPS Policy Insights 1.

Beyond the practical nuisance and costs associated with having to apply for visas, the exclusion of some EU citizens from visa-free travel carries heavy symbolic weight. Specifically, it begs the question to what extent EU institutions tolerate that a third state treats the nationals of some Member States differently than others – thereby consolidating a sentiment of ‘second-class’ EU citizenship, as it were.⁵

EU institutions have brought this issue to the attention of their US counterparts on several occasions. Yet, the EU has so far refused to reciprocate against the USA. As the Commission has highlighted, the re-imposition of visa requirements for US citizens would detrimentally affect all EU citizens and likewise tarnish EU–US relations more broadly.⁶ Politically, this may be sensible. Legally, however, it raises the question of how far the non-activation of the visa reciprocity mechanism – and, connectedly, the persistent difference in treatment to which some EU citizens are subjected – could be acceptable under EU law. By exploring the legal design and constitutional underpinnings of the reciprocity mechanism, this contribution seeks to answer this question. It argues that the non-activation of the visa reciprocity mechanism throws into relief a disconnect of constitutional nature. While EU visa law forms part of the Schengen acquis and therefore operates in a field of differentiated integration, the reciprocity mechanism is geared at ensuring equal treatment of all EU citizens, including persons whose native Member State does not apply the Schengen acquis in full. This may be one of the reasons for US authorities not to extend visa-free travel to citizens of these Member States, but it may likewise explain the dilemma of the Commission, having to ensure equal treatment of all EU citizens, on the one hand, and sound transatlantic relations, on the other.

The following investigation will proceed in four steps. It will, first, revisit the evolution of EU visa law in the context of the Schengen acquis and the ramifications this creates for third countries (§ 2.2). Second, it will examine the evolution of the visa reciprocity mechanism and discuss a recent judgement of the Court of Justice of the EU that clarified some of the ambiguities surrounding the nature of this mechanism (§ 2.3). Third, the contribution will discuss whether the continued non-activation of the reciprocity mechanism can be accepted legally, and will put forward the view that the current situation may be linked to the delayed Schengen accession of the Member States concerned (§ 2.4). Fourth and last, it will conclude that there is no legal obligation to activate the visa reciprocity mechanism, but that the issue of visa liberalisation

5 For this sentiment, see already Lora Borissova, ‘The Adoption of the Schengen and the Justice and Home Affairs Acquis: The Case of Bulgaria and Romania’ (2003) 8 *European Foreign Affairs Review* 105, 107.

6 Commission, Press release, Visa reciprocity with US and Canada: Commission takes stock of latest developments. 13 July 2016, accessible via: <https://ec.europa.eu/commission/press-corner/detail/en/IP_16_2432>.

may have been one of the motives for ultimately granting full Schengen membership to Romania and Bulgaria (§ 2.5).

2.2 Selectivity, Reciprocity and the Persistence of Bilateral Visa Liberalisation Schemes in the USA

EU visa policy emerged in the fairway of Schengen integration. The abolition of internal border control implied that, once a third country national had entered any of the Member States, (s)he could principally travel the whole of the Schengen area unchecked. Against this backdrop, a common visa policy was developed, which covers different sorts of short-term travel, including the so-called ‘Schengen visa’, permitting stays for periods of 90 days.⁷ Among the elements that the development of a Community visa policy required was the need for participating Member States to decide which third states should benefit from visa liberalisation. By listing third states whose nationals are exempt from the requirement to hold a visa, EU visa law replaced selective visa policies that previously existed in the Member States, although agreement over which states should benefit from visa liberalisation was not always easy to achieve.⁸

Nowadays, the EU’s harmonised visa liberalisation policies are based on both a ‘black list’ and a ‘white list’, indicating the states that get to benefit from visa liberalisation and those that do not.⁹ Aside from the criticism that can be levelled at this practice and corresponding terminology,¹⁰ the emergence of a common visa policy in the Schengen area equally implied that previously established bilateral approaches to visa-free travel had to be redesigned. Internally, the drawing up of a ‘white list’ of visa-exempt third states compelled Schengen states to align their pre-existing visa arrangements.¹¹ But Schengen integration also created ramifications for visa liberalisation policies in third states. Seeing that the EU visa *acquis* is premised on the principle of reciprocity, third countries are required to introduce visa liberalisation to Schengen states *en bloc* and not, selectively, to individual Member States.¹²

Yet, the USA continues to adopt a selective approach to visa-free travel for nationals of Schengen states. Especially with the growing number of EU

7 Regulation (EC) 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code), [2009] OJ L243/1, Art. 2(2)(a).

8 See Lena Laube, ‘The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy’ (2019) 7 *Comparative Migration Studies* 1, 7.

9 Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement [2018] OJ L303/39.

10 See Henk van Houtum, ‘Human Blacklisting. The Global Apartheid of the EU’s External Border Regime’ in France Winddance and Bradley Gardener (eds), *Geographies of Privilege* (Routledge 2013).

11 See Annalisa Meloni, ‘The Development of a Common Visa Policy under the Treaty of Amsterdam’ (2005) 42(5) *Common Market Law Review* 1357, 1368.

12 The reciprocity mechanism will be discussed in detail *infra* at 3.

Member States and increasing economic and political diversity, US authorities continued to require nationals of previously acceded states to apply for a visa.¹³ This approach was first put to practice in relation to Greece, but later featured visibly in relation to several of the Central and Eastern European Member States that had acceded to the EU in 2004 and the years following that date.¹⁴

The bilateral approach that the US authorities employ in relation to EU Member States is reflected in the fact that the US Visa Waiver Program is based on several objective criteria that individual states must fulfil.¹⁵ If they want to benefit from this scheme, they must offer reciprocal travel privileges for US citizens, the refusal rate for non-immigrant visas must be low and the country must issue passport documents that fulfil the latest technical requirements. The US Department of Homeland Security is quick to add, however, that the decision to grant visa-free travel follows a ‘risk-based, multi-layered approach’, aimed *inter alia* at reducing the risk of *mala fide* travel and entry of persons posing a security risk to a minimum.¹⁶ This suggests that the inclusion in the Visa Waiver Program is no legal automatism.¹⁷ Accordingly, a drop in the refusal rate for individual visa applications need not necessarily lead to visa liberalisation. Cyprus, for instance, was not included in the Visa Waiver Program, despite meeting all the criteria.¹⁸ In addition, it is important to note that the refusal rate of visas is essentially driven by the practices of visa authorities acting in broad discretion. Accordingly, these authorities may influence whether a state qualifies for visa liberalisation in the first place.

2.3 The Visa Reciprocity Mechanism

EU visa law determines that the re-imposition of a visa requirement by a third state should, principally, be met with reciprocity. Accordingly, the Visa List Regulation allows the Commission to re-impose a visa requirement for nationals of the third state concerned. In practice, however, the Commission has

13 See Robert Wilson, ‘Growing Dispute over Transatlantic Visa Reciprocity Could Lead to US vs. EU Legal Battle’ (2007) 3(2) South Carolina Journal of International Law and Business 147, 153.

14 See Elspeth Guild and Maja Grundler, ‘The EU Visa Policy: To Deter and to Facilitate’ in Evangelia (Lilian) Tsourdi and Philippe De Bruycker (eds), *Research Handbook on EU Migration and Asylum Law* (Edward Elgar 2022) 394.

15 See Alison Siskin, ‘Visa Waiver Program’ (2015) Congressional Research Service Report prepared for the Members and Committees of the Congress.

16 Department of Homeland Security, U.S. Visa Waiver Program, available at: <<https://www.dhs.gov/visa-waiver-program>>.

17 See Aaron Miller, ‘The 2004 European Union Members and the Visa Waiver Program: Considering Free Trade and National Security’ (2007) 28 University of Pennsylvania Journal of International Law 187, 212.

18 See Katherine Rozmus, ‘The US Visa Waiver Program and the Non-Inclusion of All EU Member States Against the EU Principles of Solidarity and Reciprocity’ in Didier Bigo, Sergio Carrera and Elspeth Guild (eds), *Foreigners, Refugees or Minorities? Rethinking People in the Context of Border Controls and Visas* (Routledge 2016) 172.

been extremely reluctant to make use of this instrument. This begs the question whether the adoption of reciprocal measures would be mandatory, or whether it would afford a measure of discretion to the Commission. While different visions of reciprocity have lingered for a considerable time (3.1.), the EU Court of Justice ultimately resolved the issue by confirming that the Commission has wide discretion to consider whether visa reciprocity may be an expedient means to attain visa-free travel for all EU citizens or not (3.2.).

2.3.1 *Conflicting Visions of Reciprocity: Automatic Activation or Executive Discretion?*

Reciprocity had been a guiding principle in the EU's visa policy from the outset. Already, the original Visa List Regulation included a mechanism to respond to third countries' (re)imposition of a visa requirement.¹⁹ Over the last two decades, however, the reciprocity mechanism has oscillated between two competing visions: one that envisages an automatic activation and another that gives way to diplomatic negotiations and executive latitude.²⁰ Originally, the mechanism was largely designed as an automatism, one that was to be activated whenever a Member State notified the Commission and the Council of a reimposition of a visa requirement by a third country. While the notification remained at the discretion of Member States, the Regulation added that the reciprocity mechanism should be applied in such a situation 'unless the Council [...] decides otherwise'.²¹ This suggests that the mechanism – once activated – should principally apply automatically.

Later versions of the reciprocity mechanism, however, departed from a vision of automatic activation. Following the enlargements of the Union in 2004 and 2007, the Commission had come to consider that automatic reciprocity could lead to serious political repercussions and that, for that reason, the element of diplomacy should be strengthened.²² Accordingly, the revised reciprocity mechanism gave way to a more flexible approach that essentially reversed the legal design of the previous mechanism. It made notification by

19 Council Regulation (EC) 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Visa Regulation 2001) [2001] OJ L81/1, unamended, Art. 1(4).

20 See Annalisa Meloni, 'EU Visa Policy: What Kind of Solidarity?' (2017) 24 *Maastricht Journal of European and Comparative Law* 646, 657.

21 Council Regulation (EC) 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (Visa Regulation 2001) [2001] OJ L81/1, unamended, Art. 1(4), lit. b.

22 See Commission, Proposal for a Council Regulation amending Regulation 539/2001 as regards the reciprocity mechanism' (Explanatory Memorandum) COM(2004) 437 final.

Member States compulsory but afforded the Commission discretion to propose the activation of reciprocity *vis-à-vis* a third state.²³

While this mechanism has been further fleshed out in later reforms, the principled discretion in the activation thereof remained intact. Subsequent reforms vest the Commission with the task of entering into diplomatic negotiations with third countries and seeking to achieve reciprocity, currently, within 90 days.²⁴ Institutionally, the 2013 reform of the reciprocity mechanism moved the authority to institute reciprocal measures from the Member States to the Commission, affording the latter the power to adopt a delegated legal act to this end.²⁵ This gave rise to an action of annulment by the Commission, challenging the EU legislature's choice for a delegated act, arguing that it should have been granted the power to adopt an implementing act instead. The political rationale of the Commission's challenge lay in the fact that a delegated act would have subjected it to the control of the Council and the European Parliament, whereas implementing powers would avoid direct control of EU institutions, subjecting the Commission to control exercised through comitology. The Commission's challenge, however, was ultimately rejected by the Court.²⁶

Under the current reciprocity mechanism, the Commission is authorised to take one of three measures in response to the re-imposition of visa requirements by a third state. It may either adopt an implementing act that suspends visa-free travel 'for certain categories of nationals of the third state concerned', adopt a delegated act temporarily suspending visa exemption, or – through a proposal amending the parent legislative act – seek a permanent removal of the third country from the 'white list'.²⁷ These options indicate that the Visa List Regulation affords the Commission not just the power to activate the reciprocity mechanism, but also to adjust the severity of its response.

2.3.2 *The Discretionary Nature of Activating the Visa Reciprocity Mechanism*

Despite the considerable effort to re-design the visa reciprocity mechanism, the Commission has been extremely reluctant to activate it. In 2009, for instance, Canada reintroduced a visa requirement for Czech nationals as a result of rising asylum application numbers from Czech nationals of Roma origin.²⁸ Still, this did not lead to the activation of the reciprocity mechanism

23 See Meloni (n 20) 658.

24 Regulation (EU) 2018/1806 (Visa List Regulation 2018), Art. 7, lit. (c).

25 This change was introduced by Regulation (EU) 1289/2013 amending Council Regulation (EC) 539/2001 [2013] L347/74.

26 C-88/14, *Commission v European Parliament and Council*, EU:C:2015:499.

27 These options are spelled out in Regulation (EU) 2018/1806 (Visa List Regulation 2018), Art 7, lit. (e), (f) and (h) respectively.

28 See Alejandro Eggenchwiler, 'The Canada-Czech Republic Visa Affair: A Test for Visa Reciprocity and Fundamental Rights in the European Union' (2010) CEPS Papers in Liberty and Security in Europe 1.

by the EU, but rather to a series of negotiations and diplomatic talks, which ultimately resulted in the lifting of the visa requirement in 2013.²⁹ Similarly, the Commission has not taken any reciprocal action against the USA, when it continued to require visas for the entry of citizens of several EU Member States, regardless of the fact that the EU's misgivings had been brought to the attention of US officials on multiple occasions.³⁰

This inaction on the side of the Commission has attracted criticism, not just from the Member States concerned, but likewise from the European Parliament (EP). The EP had repeatedly urged the Commission to activate the visa reciprocity mechanism in relation to the reluctance of US authorities to lift visa requirements for the nationals of all EU Member States.³¹ Specifically, the European Parliament has been of the view that the Commission would be under a legal obligation to activate the reciprocity mechanism in relation to the USA.³² Conversely, the Commission seemed to favour a more reconciliatory approach, aimed at maintaining good relations with the USA and to avoid the severe implications that reimposed visa requirements would entail for both US and all EU citizens and the economies on both sides.³³

Despite the more general shift away from automatic activation of the visa reciprocity mechanism, Article 7 of the current version of the Visa List Regulation did not lend itself to an unequivocal interpretation on this matter. It did not clarify whether the Commission would be under an obligation to activate the reciprocity mechanism once the USA maintained a visa requirement for some EU citizens, or whether considerations of transatlantic friendship and political motives more generally could be considered under the legal framework in place. On the one hand, Article 7 provides that, once a third state introduces a visa requirement for nationals of at least one Member State, the Commission 'shall adopt a delegated act' to temporarily suspend visa liberalisation *vis-à-vis* nationals of that third state. The European Parliament viewed this mandatory 'shall' language as suggesting that the Commission was under an obligation to suspend visa-free travel for US citizens. On the other hand, there are good reasons for a different reading of Article 7. Particularly, the provision includes other sub-paragraphs, which provide that the Commission's

29 For an overview of these events, see Annalisa Meloni, 'EU Visa and Border Control Policies: What Roles for Security and Reciprocity?' in Didier Bigo, Elspeth Guild and Sergio Carrera (eds), *Foreigners, Refugees or Minorities? Rethinking People in the Context of Border Controls and Visas* (Routledge 2013) 162.

30 Commission, 'Defining the position of the Commission following the European Parliament resolution of 22 October 2020 on obligations of the Commission in the field of visa reciprocity and reporting on the state of play', (Communication) COM(2020) 851 final, 22 December 2020.

31 European Parliament resolution of 2 March 2017 on obligations of the Commission in the field of visa reciprocity in accordance with Article 1(4) of Regulation (EC) No 539/2001 (2016/2986(RSP)) [2017] OJ L263/2.

32 *ibid*, point 1.

33 See Stefan (n 4) 10ff.

decision to activate the mechanism should be informed by considerations such as the viability of the external relations of the EU and its Member States with that third state, and the steps taken ‘in the political, economic and commercial fields’.³⁴ These provisions can be read as granting the Commission some discretion in determining whether to activate the reciprocity mechanism or not. Such an interpretation would undo the mandatory ‘shall’ language in Article 7 lit. (f) of the Visa List Regulation, in as much as it renders the activation of the reciprocity mechanism conditional to additional considerations on the side of the Commission.

Ultimately, this question was settled before the EU Court of Justice in autumn 2023. The European Parliament had brought an action for failure to act under Article 265 of the Treaty on the Functioning of the European Union (TFEU) against the Commission, arguing that the latter would be under an obligation to activate the reciprocity mechanism against the USA. The Court, however, sided with the Commission, confirming that the Visa List Regulation affords a measure of discretion in activating the reciprocity mechanism.³⁵ In the light of the structure and context of Article 7, the Court argued that an obligation to automatically activate the reciprocity mechanism would render obsolete the other sub-sections of the provision. Given the ‘particularly sensitive political nature’ of such a retaliative measure,³⁶ the Court concluded that the Commission should not be obliged to automatically activate the reciprocity mechanism.

However, the Court equally clarified that this discretion was not absolute. The judgement stressed that the Commission’s decision whether to activate the reciprocity mechanism must be governed by three criteria mentioned in the other headings of Article 7 of the Visa List Regulation. Accordingly, the exercise of the Commission’s discretion must be motivated, first, by the measures taken by the Member State concerned to attain the objective of visa-free travel with the USA; second, by its own efforts working towards the introduction of visa-free travel for the Member States concerned; and third, the consequences of visa retaliation for the external relations of the EU and its Member States. While the Court stressed the limiting capacity of these criteria for the Commission’s discretion, its review thereof remained very lenient. In the case at hand, it merely confirmed that the Commission ‘took into account’ these criteria,³⁷ without examining in greater detail the motives underlying the Commission’s (in)action or whether the actions taken were suitable to attain that objective. This suggests that the Court does not wish to supersede the political choices of the Commission and prefers to carry out a very limited intensity of review of the latter’s discretion.

34 Visa List Regulation, Article 7, lit. (d) and (b) respectively.

35 Case C-137/21, *European Parliament v Commission* EU:C:2023:625.

36 *ibid*, para 61.

37 *ibid*, para 69.

From the perspective of the European Parliament, this interpretation is regrettable. As the sub-headings in Article 7 of the Visa List Regulation suggest, different rationales could have been detected in the legal design of the reciprocity mechanism. The mandatory ‘shall’ language in lit. (f) insinuates that activation of that mechanism should be automatic, whereas the other sub-headings in Article 7 appear to preclude such an automatic suspension of visa-free travel. The Court’s conclusion that the Commission should have discretion, however, was notably supported by an analysis of the *travaux préparatoires* of Regulation 1289/2013 – the instrument that introduced the visa reciprocity mechanism currently in place. As Advocate General de la Tour had pointed out in his opinion on the case, the legislative drafting history of the norm refuted the assumption that the legislature had intended an automatic activation of the visa reciprocity mechanism.³⁸ By affirming the Commission’s discretion in this regard, the Court accordingly opted for an interpretation of the Visa List Regulation that affords the Commission significant room to broker political solutions to conflicts over visa requirements. Notwithstanding the ‘light touch’ review of the Commission’s efforts in this regard, it will be interesting to see whether the Court will, in the future, interpret the procedural requirement in a stricter manner, in line with its settled case law on judicial review of discretionary decision-making.³⁹

2.4 Inequality of EU Citizens as the Price of Transatlantic Friendship?

It may be seen as a sign of healthy friendships that conflicts are resolved through cooperation, not retaliation. This seems to align with the Commission’s stance towards visa reciprocity with the USA. Ever since the notification of visa requirements for citizens of EU Member States, the Commission has preferred to address the issue of non-reciprocity through diplomatic negotiations rather than a suspension of visa-free travel for US citizens.⁴⁰ This dialogical approach has led to a series of contacts between the Commission, US authorities and representatives of those Member States affected by non-reciprocity. While these contacts may have been more difficult to maintain during the Trump administration and will continue to be strained during Trump’s second term, they gained new traction following the entering into office of the Biden

38 Opinion of AG de la Tour, Case C-137/21 *European Parliament v European Commission* EU:C:2023:625 paras 34–37.

39 Strict review of procedural requirements in the context of discretionary decisions follows, inter alia, from Case C-269/90 *Technische Universität München v Hauptzollamt München-Mitte* EU:C:1991:438, para 14.

40 Commission, Communication ‘Defining the position of the Commission following the European Parliament resolution of 22 October 2020 on obligations of the Commission in the field of visa reciprocity and reporting on the state of play’, COM(2020) 851 final, 22 December 2020.

administration, to the effect that, in autumn 2021, Croatia was included in the US Visa Waiver Program.

Against this backdrop, the Commission likes to present its approach as a ‘result-oriented process’. While this wording seems to imply that full-fledged visa suspension would be incapable of attaining results, the success of visa liberalisation talks with a view to Romanian, Bulgarian and Cypriot nationals has so far remained meagre. This raises the question whether the Commission’s approach in fact sacrifices the principles of equal treatment and solidarity to the maintenance of good relations with the USA (§ 2.4.1). At an intermediate level of analysis, the Commission’s reluctance to invoke the visa reciprocity mechanism warrants a reflection on full Schengen membership and practices of third states that effectively deny equal treatment of EU citizens (§ 2.4.2).

2.4.1 *The Disconnect of EU Visa Policies with the Principles of Solidarity and Equality*

Unlike other areas of migration law, visa policies are still prominently characterised by nationality-based distinctions.⁴¹ In Europe and elsewhere, visa liberalisation premises on individuals’ nationality, waiving the requirement to acquire a visa before entry for nationals of certain states. Although, in the EU, the European Commission has worked to design policies that ‘gradually move from the presumption of risk associated with the applicant’s nationality to an assessment of individual risk’, nationality-based regimes of privileged entry linger. As has been insightfully argued by den Heijer, by European constitutional standards, this form of differential treatment need not necessarily amount to discrimination.⁴² Differential treatment between categories of third country nationals is generally accepted as justified by European and national courts.⁴³

In contrast to differences between third country nationals, however, firm safeguards exist in EU law against discrimination between EU citizens.⁴⁴ Against this backdrop, the Commission’s unwillingness to activate the reciprocity mechanism may be said to taint the equal treatment of Romanian, Bulgarian and Cypriot citizens. To be sure, this difference in treatment between nationals of EU Member States results from the reluctance of the USA to lift visa obligations for EU Member State citizens *en bloc*, not from the Commission’s (in)action *per se*. Nonetheless, by pursuing a strategy of

41 See Steffen Mau, ‘Mobility Citizenship, Inequality, and the Liberal State. The Case of Visa Policies’ (2010) 4(4) *International Journal of Political Sociology* 339, 345.

42 See Maarten den Heijer, ‘Visas and Non-Discrimination’ (2018) 20 *European Journal of Migration and Law* 470.

43 See Jonas Bornemann, ‘Zur Legitimität Und Legitimierung von Ungleichbehandlungen Im Migrationsrecht’ in Daniel Thym (ed), *Deutschland als Einwanderungsland* (Mohr Siebeck 2024) 121ff.

44 Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ L326/47, Articles 18 and 21.

dialogue and diplomatic negotiations, the Commission might be criticised for failing to attach the necessary urgency to the matter of visa liberalisation for the citizens of Romania, Bulgaria and Cyprus.

Against this backdrop, it may be argued that the principle of equal treatment should be read as imposing a positive obligation on the Commission to activate the reciprocity mechanism *vis-à-vis* the USA. After all, preventing situations of differential treatment between EU citizens has been the rationale of the reciprocity mechanism from the start. The Regulation that introduced the regime currently in place stipulates that visa reciprocity should provide ‘a Union response to a situation which [...] subjects its citizens to differing treatment’.⁴⁵ In the Court’s jurisprudence, however, this issue is not addressed. The European Parliament’s action for failure to act was brought exclusively on the basis of the wording and structure of the Visa List Regulation and did not, for that reason, consider the limits that primary law provisions may impose on the Commission’s power to activate the reciprocity mechanism.⁴⁶

Moreover, the secondary law criteria guiding the Commission’s discretion do not translate into strict limitations, let alone a positive obligation on the side of the Commission. While the Court’s emphasis of these standards may be viewed as a gentle reminder that the Commission is not free to do as it pleases, these criteria do not transform its discretion into bounded decision-making.⁴⁷ The Court largely endorses the Commission’s incremental approach, contenting itself with the fact that the Commission and US negotiators had met for work meetings on several occasions and were devising a new approach to the transatlantic partnership more generally. In this vein, the Court’s recent decision consolidates a situation in which the equality of EU citizens is put into cold storage.

The non-activation of the reciprocity clause has also raised questions of solidarity between EU Member States. As Meloni has argued, the Commission’s inability to bring about positive solutions for the affected Member States calls into question the sense of solidarity that should underpin the relationship between EU Member States.⁴⁸ Aside from the prominence attributed to this issue among national audiences in the states concerned,⁴⁹ solidarity is a legal principle that may create legal repercussions for the design and exercise of visa reciprocity measures. Two aspects should be highlighted in this regard.

First, it can be argued that, by virtue of the principle of solidarity, the EU legislature had been compelled to include a mechanism like the one on visa

45 See Regulation (EU) 2018/1806 (Visa List Regulation 2018), recital 2.

46 Case C-137/21 *European Parliament v Commission* EU:C:2023:625.

47 For this view on the interaction of standards of legality in spheres of discretionary power, see Joana Mendes, ‘Bounded Discretion in EU Law: A Limited Judicial Paradigm in a Changing EU’ (2017) 80(3) *The Modern Law Review* 443.

48 See Meloni (n 20) 656ff.

49 See Meloni (n 29) 164.

reciprocity.⁵⁰ Article 80 TFEU stipulates that the EU legislature is to ensure that ‘Union acts [...] contain appropriate measures to give effect to [the principle of solidarity]’. Along these lines, the Commission has emphasised that the mechanism aims to ‘provide for a Union response as an act of solidarity, if a third country [...] applies a visa requirement for nationals of at least one Member State’.⁵¹ For that reason, it can be argued that the reciprocity mechanism may owe much of its existence to the principle of solidarity in Article 80 TFEU.

Second, it seems highly unlikely that the principle of solidarity may be capable of transforming or reducing the scope of discretionary power afforded to the Commission under the reciprocity mechanism. In this respect, the arguments that apply to the principle of equal treatment apply *mutatis mutandis* to the principle of solidarity. From the Court’s jurisprudence, limits to the exercise of the Commission’s discretion are exclusively inferred from the Visa List Regulation itself and not, accordingly, from primary law provisions. Against the backdrop of what has been termed ‘administrative mindset’ of the Court in its interpretation of EU migration law,⁵² doubts should be harboured that future case law would interpret the principle of solidarity in a way that draws limits to the Commission’s exercise of discretion under the reciprocity mechanism.

2.4.2 *The Long Shadow of Delayed Schengen Accession*

The current situation of non-reciprocal visa liberalisation highlights a more fundamental disconnect. It elucidates the disjointed evolution of visa policies as part of the Schengen acquis, on the one hand, and the constitutional legal system of EU law, on the other.⁵³ While the Europeanisation of visa liberalisation originally merely affected Schengen states, the reciprocity mechanism is designed to ensure that ‘all Member States [...] react in common, thus providing a Union response to a situation which affects the Union as a whole and subjects its citizens to different treatment’.⁵⁴ In this sense, the fact that some Member States are continuously precluded from applying the Schengen acquis in full may be said to cast a long shadow that equally tarnishes equal treatment of EU citizens in the context of third states’ visa policies.

On the one hand, it cannot be ruled out that it is merely a coincidence that visa liberalisation is denied to citizens of those EU Member States that do not

50 For this effect, Case C-643/15 and C-647/15 *Slovak Republic and Hungary v Council* EU:C:2017:631, para 252.

51 Regulation (EU) 1289/2013, recital 1.

52 On this tendency, Daniel Thym, ‘Between “Administrative Mindset” and “Constitutional Imagination”: The Role of the Court of Justice in Immigration, Asylum and Border Control Policy’ (2019) 44 *European Law Review* 139.

53 See *supra* at 2.

54 Recital 16 Visa List Regulation.

yet apply the Schengen *acquis* in full. For instance, Ireland is not a Schengen Member and never has been, yet it is included in the US Visa Waiver Program. Similarly, in the past, full Schengen accession of Member States like Poland did not motivate the USA to extend visa liberalisation to Polish citizens. Their inclusion in the Visa Waiver Program only occurred in 2019, thus more than ten years following Polish full membership in Schengen.⁵⁵ On the other hand, it may be argued that a practical connection exists between Schengen accession and the USA's willingness to extend visa-free travel to the citizens of all EU Member States. As the Croatian government explicitly acknowledged, the prospect of full Schengen membership had paved the way for their inclusion in the US Visa Waiver Program.⁵⁶ Accordingly, as long as the Council remained reluctant to rendering the Schengen *acquis* fully applicable to some Member States,⁵⁷ the USA may reasonably point to the lack of trust that EU Member States themselves entertain in relation to citizens of these states to refuse visa liberalisation for nationals of those EU Member States.

Against this backdrop, recent developments regarding Romania's and Bulgaria's Schengen accession may be of paramount significance. After unsuccessful attempts to claim the full application of the Schengen *acquis* in judicial proceedings,⁵⁸ success was ultimately reached politically in December 2023, when the Council decided to lift all limitations on the application of the Schengen *acquis* in Bulgaria and Romania save the lifting of controls at land borders.⁵⁹ Notably, this also includes the field of visa law. Both Member States may issue Schengen visas, entitling individuals to enter and travel the entire Schengen area.⁶⁰ In addition, in December 2024, the Council adopted a Decision authorising the lifting of controls at land borders, thereby abolishing the last (but symbolically, most important) element of Schengen membership.⁶¹ If it is correct to presume that delayed Schengen accession has cast a shadow on visa liberalisation with the USA, the full Schengen membership of

55 For an overview of Poland's path to Schengen membership, see Ryszard Sudół, 'Droga Polski Do Schengen – Osiągnięcia i Wyzwania w Zakresie Zmiany Systemu Ochrony Granicy Zewnętrznej UE' (2018) 3 *Przegląd Europejski* 123.

56 See Government of the Republic of Croatia, Press release 'Božinović: Major Step towards Lifting of US Visa Requirements', 2 August 2021, <<https://vlada.gov.hr/news/bozinovic-major-step-towards-lifting-of-us-visa-requirements/32694>>.

57 For an insightful overview of stalled Schengen accession, see Henriët Baas and Jorrit Rijpma, 'Schengen Purgatory or the Winding Road to Free Travel' (2024) 9 *European Papers* 209.

58 General Court, T-244/23, *Tocmac* EU:T:2023:685 and, on appeal, Case C-786/23 P *Tocmac*, EU:C:2024:588.

59 Council Decision (EU) 2024/210 of 30 December 2023 on the full application of the provisions of the Schengen *acquis* in the Republic of Bulgaria and Romania [2023] OJ L 2024/210.

60 The issuance of Schengen visas fell into the category of acts that, pursuant to Article 4(2) 2005 Act of Accession, had to be unlocked by the Council.

61 Council Decision 2024/3212 of December 2024 setting the date for the lifting of checks on persons at internal land borders with and between the Republic of Bulgaria and Romania.

Romania and Bulgaria may be a strong incentive to end the difference in treatment regarding visa requirements for EU citizens.

Given Romania's and Bulgaria's full Schengen accession, national initiatives addressing the issue of non-reciprocity may prove promising. In addition to the Commission's continued negotiations with US authorities, the governments of the Member States concerned have started actively working towards visa liberalisation – reportedly with some success.⁶² This approach is reflected in the Visa List Regulation, which attributes an active role not just for the Commission but likewise for the governments of the Member State concerned. In its decision whether to activate the reciprocity mechanism, the Court must 'take into account the outcome of the measures taken by the Member States concerned'. In the exercise of its discretion, the Commission is therefore obliged to consider the progress made in bilateral negotiations between national governments and US authorities.⁶³ In the context of these negotiations, the Commission could use the looming threat of visa reciprocity to put a thumb on the scale. In combination with national efforts to lift visa requirements, this may be a powerful lever to sway US authorities to grant visa-free travel to all EU citizens, regardless of their nationality.

2.5 Conclusion

The simmering conflict over the USA's visa liberalisation policy *vis-à-vis* EU Member States has exposed cracks in transatlantic friendship. While the Commission is naturally inclined and legally compelled to advocate for visa exemptions for all EU citizens, this effort has not yet resulted in full visa reciprocity between the USA and the EU. For citizens of Romania, Bulgaria and Cyprus, this issue goes far beyond the practical nuisance and financial costs of having to apply for a visa before travelling to the USA. The difference in treatment between EU citizens that results from this situation bears heavy symbolic weight, as it raises the question of how far EU institutions are willing to tolerate a situation that might consolidate a sentiment of second-class EU citizenship for individuals concerned.

The previous sections put forward three observations in this regard. First, the analysis demonstrates that, under the current legal framework in EU visa law, the Commission is not legally obliged to initiate the visa reciprocity mechanism in response to the continued reluctance of US authorities to extend visa-free travel to all EU citizens. As the Court of Justice had confirmed, the reciprocity mechanism is essentially discretionary, to the effect that

62 See Sebastian Rotaru, 'Romanian Government Launches a Campaign for Visa-Free to US' (*EURACTIV* 19 July 2024) <<https://www.euractiv.com/section/politics/news/romanian-government-launches-a-campaign-for-visa-free-to-us/>>; Arbërie Shabani, 'Cyprus Begins Procedures for US Visa Waiver Programme Membership' (*Schengen News*, 2024) <<https://schengen.news/cyprus-begins-procedures-for-us-visa-waiver-programme-membership/>>.

63 Case C-137/21 *European Parliament v Commission* EU:C:2023:625 para 66.

the Commission may decide in which situations it may be most expedient to activate it to attain full visa reciprocity. This discretion is not unfettered, but the Court's review of the Commission's decision-making practice so far has been 'light touch'.

Second, the previous analysis suggests that there is a practical connection between the continued difference in treatment and Schengen accession. The USA's reluctance to extend visa liberalisation seems to be linked to the fact that those states' accession to the Schengen area had continuously been delayed. Accordingly, full Schengen accession of Bulgaria and Romania may serve as a strong incentive to bring negotiations on visa liberalisation for the citizens of these Member States to a successful conclusion. In this sense, the recent extension of full Schengen membership foreshadows efforts at visa liberalisation *vis-à-vis* the citizens of these Member States.

Third, the previous analysis highlights that the attainment of full visa reciprocity between the USA and the EU requires national governments of the Member States concerned to play an active role. Accordingly, the Court of Justice has highlighted that the Commission, in exercising its discretion in the activation of the reciprocity mechanism, should take into consideration the efforts of national governments working towards visa liberalisation of their citizens. In this context, the Commission's discretion to activate the reciprocity mechanism can be used to support national governments in their negotiations with the third state. Short of activation, the discretion that is built into this mechanism may be used to put political pressure, posing a threat of reciprocity in case negotiations fail to bring about a positive result for the EU and nationals of the Member States concerned.

All this suggests that, despite the long-lasting conflict over the USA's reluctance to afford visa-free travel to all EU citizens, some recent developments allow for a more optimistic conclusion. Full Schengen membership of Romania and Bulgaria may pave the way for developments that will facilitate visa-free travel for the citizens of these two Member States. Yet, the decision whether a country is included in the US visa waiver programme is essentially a political one. For that reason, it remains to be seen whether the second Trump administration may extend visa-free travel to Bulgarian citizens and put an end to the pausing of Romania's inclusion in the Visa Waiver Program, thereby putting an end to a dispute that has tarnished transatlantic friendship for a considerable time.

3 Nationality-Based Schengen Visa and Entry Bans

The Case of Russian Citizens

*Sarah Ganty, Nurbanu Hayır,
Dimitry V. Kochenov and Suryapratim Roy*

3.1 Introduction

This chapter shows that any decision to issue a Schengen visa under EU law cannot but stem from an individualized assessment of a visa application under the Schengen *acquis*,¹ and that any decision to cancel or revoke a visa at external Schengen borders must concurrently follow the same principles: EU law leaves no room for collective punishment and retributive logic. Moreover, international human rights law prohibits unjustified discrimination, and holding individuals collectively accountable for the actions of (one of) their state(s) of nationality fails to meet the standards of a legitimate and proportionate justification for refusing a visa or permission to enter the Schengen territory. Nationality-based entry bans, such as those in force in a handful of EU countries against Russian citizens cannot possibly be legal under EU law and international human rights law.

The story behind the current breach of the law is well known. Ukrainian President Volodymyr Zelensky called for banning Russian travelers from the EU already in August 2022.² This led several EU states to consider such a measure as potentially a feasible and justified response to the Russian aggression in Ukraine. The justification for the proposed restrictions rested on two main arguments: (1) that ordinary Russian citizens bear collective responsibility for their country's invasion of Ukraine and (2) that access to the European Union is a privilege – not a right³ – which Russian citizens, under current circumstances, do not merit. Kaja Kallas, the High Representative for Foreign

1 This chapter offers a concise overview of our earlier work on the topic, including Sarah Ganty, Dimitry Kochenov and Suryapratim Roy, 'Unlawful Nationality-Based Bans from the Schengen Zone: Poland, Finland, and the Baltic States against Russian Citizens and EU Law', (2023) 48 *Yale Journal of International Law* Online 1; Nurbanu Hayır, '(Note) Aggressor State, Aggressor Individual and What Law Does/Should Protect' (2024) 45 *Michigan Journal of International Law* 487.

2 Isabelle Khurshudyan, 'Zelensky Calls on West to Ban all Russian Travelers' *The Washington Post*, 8 August 2022.

3 Tweet by Kaja Kallas, Prime Minister of Estonia. <https://twitter.com/kajakallas/status/1556903576726896642?ref_src=twsrc%5Etfw> accessed 4 September 2022.

Affairs and Security Policy, who was then the Prime Minister of Estonia, led the pack.

Contrary to the common discourse, a categorical Schengen entry ban does not only block Russian tourists: xenophobic generalizations have a significantly broader scope. A sizeable portion of Schengen visa applicants are asylum seekers in disagreement with the Russian regime (whose only chance is to travel on an existing Schengen visa to reach the EU), family members of EU citizens, legal EU residents with Russian citizenship or those on international protection status, journalists, businesspeople, dissidents, athletes participating in competitions, students, artists, etc. Moreover, given countless generations of history of common statehood and a huge number of mixed marriages between Russians and Ukrainians, an estimated eleven million Russians have close Ukrainian relatives,⁴ millions of Russian citizens identify as members of the Ukrainian nation,⁵ to say nothing of the hundreds of thousands of Ukrainians fleeing the occupied territories, including the earlier annexed Crimea, who have access solely to Russian documents and no other.

Against this backdrop, this chapter begins by outlining the legal structure of the Schengen visa regime and its emphasis on individualized assessment under the EU Visa Code and Schengen Borders Code. We demonstrate that EU law does not allow systematic visa or entry refusals based solely on nationality. Such measures directly violate the Schengen *acquis*, which mandates individualized decision-making, proportionality and judicial review. Next, we assess whether EU law could be amended to allow such bans and conclude that any such amendment would undermine the constitutional structure of EU law and violate its commitment to fundamental rights. We show that nationality-based bans are at odds with binding international human rights instruments, particularly the European Convention on Human Rights (ECHR) law, International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR). These frameworks prohibit measures that discriminate against groups of foreign nationals in the absence of a lawful aim and

4 Valerie Hopkins, 'Ukrainians Find That Relatives in Russia Don't Believe It's a War' *The New York Times*, 6 March 2022. <<https://www.nytimes.com/2022/03/06/world/europe/ukraine-russia-families.html>> accessed 4 October 2025.

5 Extremely restrictive approach to citizenship in Ukraine, where fighting against multiple citizenship is one of the priorities, causing international tensions long before the war, including with Hungary, as well as the Russian passportization policy in Crimea and elsewhere in the occupied territories of Ukraine are among the numerous factors contributing to the ephemeral distinction between 'Russians' and 'Ukrainians,' should citizenship be taken as a starting point: the usual way this legal status operates. Oxana Shevel, 'Country Report: Ukraine' *EUI RSCAS EUDO Citizenship Observatory*, 2010. <<https://cadmus.eui.eu/bitstream/handle/1814/19641/Ukraine.pdf?sequence=1>> accessed 4 October 2025; Aleksander Salenko, 'Country Report: Russia' *EUI RSCAS EUDO Citizenship Observatory*, 2012. https://cadmus.eui.eu/bitstream/handle/1814/60230/RSCAS_EUDO_CIT_2012_1.pdf, accessed 4 October 2025; Cf. Dmitry Kochenov, *Citizenship* (MIT 2019).

a proportionately tailored response – conditions which, we argue, are not met by the categoric denial of entry for Russian citizens aiming to punish the Russian state’s acts.

3.2 The Schengen Visa System

The Schengen visa is one among several types of visas EU Member States may grant and is limited to 90 days within any 180-day period. What distinguishes the Schengen visa is its validity across the entire Schengen area, unlike national long-stay visas such as those for students.⁶ The area includes all EU Member States except Ireland and Cyprus, and extends to non-EU states such as Iceland, Norway, Switzerland, Liechtenstein and, *de facto*, microstates like Andorra, the Vatican City and Monaco.

Compared with the US or UK visa rules, the Schengen system is relatively open, requiring visas from fewer nationalities.⁷ Yet, it is much more cumbersome and difficult to use in practice, as multiple-entry visas with longer-term validity are not issued by default compared to the UK and US counterparts. Visa issuance is governed by the EU Visa Code,⁸ part of the Schengen *acquis* integrated into EU law since the Treaty of Amsterdam and revised in 2020.⁹ Until 2021, Russian citizens were the primary beneficiaries of Schengen visas (536,241 issued in 2021), followed by Chinese citizens (27,458).¹⁰ Most nationals of countries with comparable GDP per capita to Russia do not require a visa to visit the EU. In essence, given the liberal EU border crossing regime with a relatively long visa-free list, the Schengen visa has been to a large extent a visa for the Russians.

Visa liberalization agreements, achieved with all the European post-Soviet nations except for Russia and Belarus, as well as numerous other states, including all of North America and the majority of the Latin American, Caribbean and Asian nations, exempt a large part of the globe from even applying to diplomatic missions to obtain permissions to travel to the EU. Other non-exempt travelers, like those from Russia, China and the majority of the African states,

6 Directive 2016/801 Conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) [2016] OJ L132/21.

7 Cf. Dimitry Kochenov and Justin Lindeboom (eds), *Kálin and Kochenov’s Quality of Nationality Index* (Hart Publishing, 2020).

8 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) [2009] OJ L 243, 15 September 2009 (hereafter: the Visa Code).

9 Ibid, 25–54.

10 Directorate-General for Migration and Home Affairs, European Commission, ‘Visa statistics: Schengen States issue 2.4 million visas for short stays in 2021’ 3 June 2022. <https://home-affairs.ec.europa.eu/news/visa-statistics-schengen-states-issue-24-million-visas-short-stays-2021-2022-06-03_en> accessed 4 October 2025. The pandemic context has clearly affected these numbers.

have to go through an onerous bureaucratic process to travel to the Schengen zone. Until the invasion of Ukraine, Russia benefited from a Visa Facilitation Agreement that reduced the timelines and fees for obtaining a visa.¹¹ Once a visa is issued, the visa holder can enter from any border crossing point in the Schengen area and travel freely within the Schengen area.

3.3 Individualized Assessment of Visa Applications under the Schengen *Acquis*

As opposed to Schengen internal borders for which control can be reintroduced in some exceptional circumstances¹² – exceptions which have been largely used and abused, according to a recent judgment of the Court of Justice of the European Union (CJEU),¹³ by the Member States – there is no possibility in the Schengen *acquis* to introduce a citizenship-based ban towards the nationals of one country, however exceptional the circumstances either for the issuance of a visa or for entry into the Schengen zone.

3.3.1 *The Rule*

The Visa Code is crystal clear: the grounds for refusal of a Schengen visa are *exhaustively* listed in Article 32(1) of the Code.¹⁴ Among others, they include lack of intention on the part of the applicant to leave the territory of the Member States before the expiry of the visa, false, counterfeit or forged travel documents, no justification for the purpose and conditions of the intended stay, no proof of sufficient means of subsistence, a threat to public policy, internal security or public health or to the international relations of any of the Member States, in particular where an alert has been issued in Member States' national databases for the purpose of refusing entry on the same grounds.

Member States are required to examine each application for a Schengen visa *individually* and, in case of refusal, the reasons should be clearly stated and notified to the applicant.¹⁵ In response, applicants have a right to

11 See Article 7 (1) and (2) of the Visa Facilitation Agreement and Article 23 (1) and (2) of the Schengen Visa Code, regarding the length of the procedure (10 to 30 calendar days as opposed to 15 to 45 days): See also Article 6(1) of the Visa Facilitation Agreement and Article 16(1) of the Schengen Visa Code, regarding the fee for processing visa applications: 35 EUR instead of 80 EUR.

12 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

13 Cases C-368/20 and C-369/20 *Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz* [2022] ECLI: EU:C:2022:298.

14 Case C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* ECLI:EU:C:2013:862, paras. 38 and seq.

15 Article 32(2) of the Schengen Visa Code. See more generally: C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* ECLI:EU:C:2013:862.

appeal.¹⁶ Ergo, it is prohibited to adopt a blanket ban, or automatically refuse *any* citizen of any country whose nationals are still subject to visa. It is true that Member States have wide discretion when assessing the visa application and the grounds of refusal,¹⁷ and of course, the individual character of the assessment can be more or less lenient.¹⁸ However, even in the cases where the CJEU approves of a lenient approach adopted by the Member States, it always implies that the assessment is based on the individual conduct and choice, not merely the color of one's passport. It goes without saying that Russian citizenship is not a choice, and no individual conduct can be inferred solely from the fact that someone is claimed by the Russian Federation as a citizen. The same rules apply for long-stay visas which fall under EU Directives on immigration law.¹⁹

The crux of the whole system is Member States' strict obligation to provide for a meaningful administrative appeal and judicial review procedure against decisions refusing a visa.²⁰ A visa refusal based on threat to public policy, internal security or public health must also follow from an individual decision.²¹ This procedural safeguard creates a basis for justifying the substance of such decisions.²² The concept of 'threat to public policy' has been interpreted as an individually diagnosed ground across a number of Directives governing the situation of third-country nationals.²³ Same goes for the interpretation of 'public policy' ground for the refusal of entry or visa; authorities have more discretion to assess it in the context of free movement law,²⁴ but this breadth does not vitiate the need for individualized assessment. Examples of individual

16 Article 32(3) of the Schengen Visa Code.

17 C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* [2019] ECLI:EU:C:2019:1071, para. 37; C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* [2013] ECLI:EU:C:2013:862 paras. 60–63; C-544/15 *Fahimian* [2017] ECLI:EU:C:2017:255, para. 50.

18 C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* [2019] ECLI:EU:C:2019:1071.

19 Case C-544/15 *Fahimian* [2017] ECLI:EU:C:2017:255, para. 43; Case C-153/14 *Minister van Buitenlandse Zaken v K, A*, [2015] ECLI: EU:C:2015:453. See also: Sarah Ganty, *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'Union européenne. Critique d'une intégration choisie* (Larcier 2021).

20 Case C-949/19 *M.A. v Konsul Rzeczypospolitej Polskiej*, [2021] ECLI:EU:C:2021:186.

21 Case C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* [2019] ECLI:EU:C:2019:1071; Case C-153/14 *Minister van Buitenlandse Zaken v K, A*, [2015] ECLI: EU:C:2015:453.

22 Moshe-Cohen Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59 *American Journal of Comparative Law* 463.

23 Case C-554/13 *Zh. and O.*, [2015] ECLI:EU:C:2015:377, para. 60; C-373/13 *T.* [2015] ECLI:EU:C:2015:413, para. 79.

24 It is strictly limited to 'individual conduct representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member State concerned.' C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* [2019] ECLI:EU:C:2019:1071, para. 42. See also: C-309/18 *Lavorgna* C-309/18, [2019] ECLI:EU:C:2019:350, para. 24; C-414/16 *Egenberger* [2018] ECLI:EU:C:2018:257, para. 68.

conduct that have prompted visa refusals include, for example, having committed a criminal offence²⁵ or, studying in a university cooperating with the Iranian ministry of defense and doing research in a sensitive field of information technology security.²⁶

The threat to public policy or internal security is intrinsically linked to the Schengen Information System as recalled by the CJEU which, by definition, implies an individual assessment:²⁷ even the requirement that a visa refusal has to be entered in the Visa Information System specifying the ground(s) of refusal demonstrates the individual character of the visa process.²⁸ Finally and more importantly, it is also settled case law that not only should authorities assess threats to public policy based on the individual conduct of an applicant, they should also ascertain the proportionate limits to make sure the refusal would not go beyond what is necessary to safeguard public policy. Announcing a blanket visa ban on all Russians – when it's clear they cannot each individually pose a threat to public policy – falls far short of meeting any standard of proportionality. In short, while public policy is a ground for denial of visas for President Putin's officials, denial of visas for an entire nation is unquestionably a violation of EU law.²⁹

Some have argued that the ground of 'threat to international relations of Member States' could potentially be a ground to justify a blanket travel ban.³⁰ It is true that there is no case law interpreting this specific ground. However, using this ground to issue a blanket ban by pretending that the matter is 'unclear' is *prima facie* unlawful per the legislative framework and following analogous case law.³¹ The *acquis* read in the light of case law prescribes individual assessment and prohibits disproportionate legal presumptions. Referring to the grounds of refusal, the Court in *Koushkaki*³² has been clear on the fact that this assessment:

entails complex evaluations based, inter alia, on the personality of that applicant, his integration in the country where he resides, the political, social and economic situation of that country and the potential threat

25 C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* [2019] ECLI:EU:C:2019:1071, para 46.

26 C-544/15 *Fahimian* [2017] ECLI:EU:C:2017:255, para. 48.

27 C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* [2019] ECLI:EU:C:2019:1071, para 40.

28 Article 32(5) Visa Code. C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* ECLI:EU:C:2013:862, paras. 40–41.

29 C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.*, [2019] ECLI:EU:C:2019:1071, para 47.

30 Jonas Bornemann, 'Heated Tempers and Legal Ambiguities: Some (second) Thoughts on an All-out Schengen Ban of Russians' *VerfBlog*, 17 August 2022. <<https://verfassungsblog.de/heated-tempers-and-legal-ambiguities/>> accessed 4 October 2025.

31 C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* [2013] ECLI:EU:C:2013:862.

32 C-544/15 *Fahimian* [2017] ECLI:EU:C:2017:255, para. 41.

posed by the entry of that applicant to public policy, internal security, public health or the international relations of any of the Member States. Such complex evaluations involve predicting the foreseeable conduct of that applicant and must be based on, inter alia, an extensive knowledge of his country of residence and on the analysis of various documents, the authenticity and the veracity of whose content must be checked, and of statements by the applicant, the reliability of which must be assessed, as is provided by Article 21(7) of the Visa Code. In that respect, the diversity of the supporting documents on which the competent authorities may rely, a non-exhaustive list of which is set out in Annex II to that code, and the variety of methods available to those authorities, including interviewing the applicant as provided for in Article 21(8) of that code, *confirm the complex nature of the examination of visa applications.*³³

No ‘international relations’ ground can thus be used to introduce an overly broad citizenship-based disqualification without conducting ‘a complex evaluation’ of the ‘foreseeable conduct’ of individual applicants and still comply with the EU’s *acquis*: international relations in the 21st century are about states, not about the plight of 143,000,000 individuals (and counting, as millions of Crimea residents and refugees from the occupied territories in Ukraine acquire Russian documents). To introduce an ‘international relations’ ground for citizenship-based disqualification would be to attribute fault and project guilt onto all citizens of the errant state. Citizenship is the least foreseeable conduct, as it is randomly assigned and victimizes³⁴ those who happen to hold the unfortunate passports, no matter whether they have ever bothered to visit their country of nationality and no matter how much they would have preferred statelessness to the status they hold.³⁵ This disqualification levies blame on individuals who have had very little choice over their nationality. As Katja Swider has also emphasized,³⁶ international law prohibits renunciations without acquiring another citizenship, while the latter is extremely difficult to do, especially if one’s country is at war. In summary, unilateral measures to deny entry or residence in the Schengen zone uniquely based on a particular citizenship are unquestionably illegal under the Schengen *acquis* as it stands today. This holds true even in the context where EU Member States weaponize security rhetoric against human rights, especially at the borders, crafting

33 C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* [2013] ECLI:EU:C:2013:862, paras. 56–58 (emphasis added).

34 Dimitry Kochenov, ‘The Victims of Citizenship: Feudal Statuses for Sale in the Hypocrisy Republic’ in Dimitry Kochenov and Kristin Surak (eds), *Citizenship and Residence Sales: The Changing Boundaries of Belonging* (Cambridge University Press 2023) 70.

35 Dimitry Kochenov, ‘Statelessness: A Radical Rethinking of the Dominant Citizenism Paradigm’ (2024) 20 *Annual Review of Law and Social Science* 117.

36 Katja Swider, ‘Why End Statelessness’ in Tendayi Bloom, Katherine Tonkiss, Phillip Cole (eds) *Understanding Statelessness* (Routledge 2017).

the system of legal regulation, which is either outright unlawfully³⁷ or under a feeble façade of legality,³⁸ brings huge numbers of non-citizens down.³⁹

3.3.2 *Exceptions – Suspension of Visa Facilitation and Individual Travel Bans*

The existing legal texts exhaustively lay out the reasons and forms of categorical visa measures and travel bans. There are no *categoric* travel bans under the Schengen Visa Code. Categorical measures can concern the suspension of visa facilitation measures under the visa facilitation agreements to safeguard public order, protection of national security or protection of public health⁴⁰ and to achieve sufficient cooperation sufficiently in the field of readmission.⁴¹ Suspension of visa facilitation only means that the beneficiaries of these agreements become subject to the standard rules of the Schengen Visa Code; thus, individual visa application procedures remain intact.⁴²

The second option to limit Schengen visas concerns *individual* travel bans, in particular via common foreign and security policy sanctions.⁴³ This mechanism has been used by the Council towards several people close to Putin.

37 M Grześkowiak, 'The "Guardian of the Treaties" is No More? The European Commission and the 2021 Humanitarian Crisis on Poland-Belarus Border' (2023) 42 *Refugee Survey Quarterly* 81; Sarah Ganty, Aleksandra Ancite-Jepifánova and Dmitry Kochenov, 'EU Lawlessness Law at the EU-Belarusian Border: Torture and Dehumanisation Excused by "Instrumentalisation"' (2019) 16 *The Hague Journal on the Rule of Law* 739.

38 Sarah Ganty and Dmitry Kochenov, 'EU Lawlessness Law' (2024) 30 *Columbia Journal of European Law* 75.

39 Dmitry Kochenov and Sarah Ganty, 'The Death Machine: EU Lawlessness Law that Rules' in Catherine Barnard, Adam Łazowski and Daniel Sarmiento (eds), *The Pursuit of Legal Harmony in a Turbulent Europe. Essays in Honour of Eleanor Sharpston* (Hart Publishing 2024) 67.

40 E.g., Article 15(5) of the Facilitation Agreement EU-Russia, activated by the Council after the break-out of the war on February 25 and suspended the privileges enjoyed by diplomats, related groups and businesspeople. See Council Decision (n 10).

41 Article 25a of the Regulation (EU) 2019/1155 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code) [2019] OJ L188/1.

42 The Commission equally issued guidelines on the issuance of Schengen visas to Russian citizens: EU Commission, Communication Providing guidelines on general visa issuance in relation to Russian applicants following Council Decision (EU) 2022/1500 of 9 September 2022 on the suspension in whole of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation, Brussels, 9 September 2022 C(2022) 6596 final. Unsurprisingly, the guidelines fully honor the principle of individual assessment of all the visa applications.

43 Clara Portela, 'Are European Union Sanctions "Targeted"?' (2016) 29 *Cambridge Review of International Affairs* 912; Francesco Giumelli, Fabian Hoffmann and Anna Książczaková, '(2021) The When, What, Where and Why of European Union Sanctions' (2021) 30 *European Security* 1.

Countless annulment actions, many of them successful, have been brought before the General Court.⁴⁴

3.3.3 De Facto Bans – Entry Denials of Visa Holders

Besides suspending consular visa processing, Estonia, Latvia, Lithuania, Poland and Finland also agreed to close their borders for Russian holders of Schengen visas issued by other Member States due to ‘public security’⁴⁵ with some exceptions for diplomats, dissidents and family members. This work-around to practically invalidate valid Schengen visas is subject to the same principles under the Schengen Borders Code:⁴⁶ Member States can refuse entry only if the visa holder does not comply with some conditions enshrined in the Schengen Borders Code, which is ‘closely connected’ to those in the Visa Code.⁴⁷ The grounds for refusal are listed exhaustively and should be established individually.⁴⁸ Denial of entry despite a valid visa implies, in principle,⁴⁹ that there are grounds for the border officers to cancel or revoke the Schengen visa issued by another country. In other words, a Russian citizen who has a visa issued by France risks having her visa revoked or canceled only because of her Russian citizenship if she tries to enter the Schengen zone via one of the three Baltic states, Finland or Poland.

Not only does this practice violate the Schengen Borders Code, it also greatly endangers the harmonization and uniformity in the Schengen zone, which is a foundational factor in the CJEU’s treatment of questions on the Schengen visa and Schengen border. As explained by the Court, this system:

presupposes that the conditions for the issue of uniform visas are harmonised, which rules out there being differences between the Member States as regards the determination of the grounds for refusal of such visas. In the absence of such harmonisation, the competent authorities of a Member State whose legislation provides for grounds for refusal,

44 Cf. Francesca Finelli, ‘Who Are Russian Oligarchs? Recent Developments in the Case Law of the European Court of Justice’ (2023) 8 *European Papers* 1533. See also, Alexandra Hofer, ‘The EU’s “Massive and Targeted” Sanctions in Response to Russian Aggression, a Contradiction in Terms’ (2024) 25 *Cambridge Yearbook of European Legal Studies* 19.

45 Alexandra Brzozowski, ‘Baltics Agree Regional Measures to Restrict Entry of Russians’ *Euractiv*, September 2022. <<https://www.euractiv.com/section/global-europe/news/baltics-agree-regional-measures-to-restrict-entry-of-russians/>> accessed 4 October 2025.

46 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) OJ L 77, 23 March 2016, 1–52 (hereafter: the Schengen Borders Code).

47 C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* [2019] ECLI:EU:C:2019:1071, paras. 35–36.

48 See Articles 6, 14 of the Schengen Borders Code as well as Part A of Annex V.

49 According to the Schengen Borders Code, see Part A of Annex V.

annulment and revocation which are not provided for in the Visa Code would be required to annul uniform visas issued by another Member State by relying on a ground which the competent authorities of the issuing Member State, when examining the visa application, could not apply to the applicant.⁵⁰

Denying entry of the holders of a uniform Schengen visa by only a group of Schengen states (i.e., Baltic states and Poland) is a paradigmatic example of invalidating uniform Schengen visas on grounds other than those provided under EU law. This practice greatly risks dismantling the principle of cooperation between Member States, and the effective implementation of border control appears as a result.⁵¹

Consequently, the lawfulness of nationality-based visa bans and entry denials in EU law mocks and does violence to the idea of legality and the Rule of Law. In practice, this means that any decision of the Estonian authorities – or those of any other Member State – to base an exclusion of a Russian citizen on citizenship status alone is outright unlawful and has to be struck down immediately by any local court (however bad their track record is in dealing with all things ‘Russian’⁵²): offering an appeal route is also a legal requirement to ensure that the Rule of Law is complied with. One would expect the Commission to react, too, but this is not what can be observed in practice and many other areas where compliance with EU law is imperiled: the Guardian of the Treaties is hidden behind incapacity and politicization of the law.⁵³

3.4 No Blanket Ban Is Possible through the Amendment of the Schengen *Acquis* under EU Law

The question that follows is whether it would be possible to amend the Schengen *acquis* to provide for blanket citizenship-based exclusions. The answer is less straightforward. The matter is within EU competence through the ordinary legislative procedure,⁵⁴ and several amendments have been made to date.⁵⁵ However, substantively, automaticity inherent in categoric bans is

50 C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* [2013] ECLI:EU:C:2013:862, paras. 45–46.

51 Article 17 of the Schengen Borders Code.

52 Dimitry V. Kochenov, Vadim Poleshchuk and Aleksejs Dimitrovs, ‘Do Professional Linguistic Requirements Discriminate? – A Legal Analysis: Estonia and Latvia in the Spotlight’ (2013) 10 *European Yearbook of Minority Issues* 137.

53 K.L. Scheppele, ‘EU Treaties without a Guardian’ (2023) 29(2) *Columbia Journal of European Law* 94.

54 Article 77(2)(a) TFEU.

55 Convention Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and

the antithesis of the whole Schengen visa system. Political will to amend aside, the adoption of a blanket citizenship-based ban would contradict the very *ratio legis* of the Schengen visa system: the individualization of the treatment of visa applications. It would imply a complete change of the rationale underpinning the issuance of Schengen visas, which is based on individual assessment of whether the applicants fulfill the conditions.⁵⁶ The Schengen Convention,⁵⁷ the Common Visa Code,⁵⁸ the Handbook for the processing of visa applications and the modification of issued visas,⁵⁹ as well as the Handbook for the administrative management of visa processing⁶⁰ provide for a strictly individual basis of assessment. Even a previous visa refusal cannot lead to an automatic refusal of a new application.⁶¹

As mentioned earlier, it also follows from the settled CJEU case law that the decision should be individual and that an effective remedy should be provided to the applicant.⁶² Although the principle of good administration as enshrined in the EU Charter of Fundamental Rights (CFR)⁶³ applies only to EU institutions and bodies, it also sets the tone as to the importance of having someone's case handled individually. Moreover, pre-Lisbon CJEU case law recognizes that Member States are bound by the principle of good administration.⁶⁴ In any case, it would be difficult for Member States to ignore this principle as AG Kokott writes: 'the Member States must also have regard to Article 41 CFR when applying Community law.'⁶⁵

The fact that the Schengen visa system is organized on an individual basis is crucial precisely because it allows taking into account and respecting human

the French Republic, on the Gradual Abolition of Checks at their Common Borders (Schengen Implementation Agreement), 19 June 1990.

56 Article 21(1) of the Common Visa Code.

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

58 Regulation (EU) 2019/1155 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code) [2019] OJ L188/1.

59 Annex to the Commission Implementing Decision amending Commission Decision C(2010) 1620 final as regards the replacement of the Handbook for the processing of visa applications and the modification of issued visas (Visa Code Handbook I) C(2020) 395.

60 Annex to the Commission Implementing Decision establishing the Handbook for the administrative management of visa processing and local Schengen cooperation (Visa Code Handbook II) C(2020) 1764.

61 Article 21(9) of the Common Visa Code.

62 Cases C-225/19 and C-226/19 *R.N.N.S. and K.A.*, ECLI: EU:C:2020:951.

63 Article 41 of the EU Charter of Fundamental Rights.

64 See for instance: Case C-428/05 *Laub v Hauptzollamt Hamburg-Jonas* [2007] ECR I-5069, para. 25. See also the analysis and cited case law in: Herwig C.H. Hofmann and Bucura C. Mihaescu, 'The Relation between the Charter's Fundamental Rights and the Unwritten General Principles of EU Law: Good Administration as the Test Case' (2013) 9 *European Constitutional Law Review* 73–101.

65 Opinion of A.G. Kokott in Case C-392/08 *Commission v Spain* ECLI:EU:C:2010:164.

rights when contemplating entry or a visa refusal. By essence, fundamental rights take the individual into account, not any kind of mass category of people. The question of fundamental rights is therefore essential in this case, as recalled in Article 4 of the Schengen Border Code entitled ‘Fundamental Rights.’

In her tweet, Kallas wrote ‘Stop issuing tourist visas to Russians,’ ‘Visiting Europe is a privilege, not a human right.’⁶⁶ Irrespective of whether one buys into the rhetoric of privilege in conferring travel and settlement freedoms, such a view cannot automatically preemptively cancel the rights of more than a hundred million people when EU authorities examine a visa application. An automatic refusal of any application submitted by a Russian citizen would obviously be in contradiction with several human rights guarantees.

It is of utmost importance to recall that among Russian citizens who ask for a Schengen visa, there are not only tourists who were vehemently criticized by the Finnish and Estonian Prime Ministers and other EU leaders, but also people who leave Russia for other reasons: humanitarian grounds, family, work, medical appointments, studies and so on. Not examining these applications on an individual basis would be an attack on an array of fundamental rights, including the right to private and family life (beyond the violation of EU free movement law when family members of EU citizens are involved) and the prohibition of torture and inhuman treatment⁶⁷ and would be difficult, if not impossible, to substantiate under the principle of proportionality. It would also sideline Russian citizens who live in a third country or a non-Schengen EU Member State and apply for Schengen visas (between 150,000 and 300,000 have left Russia⁶⁸ since the start of the war and millions more did so earlier).

More generally, an outright ban also greatly undermines the fundamental principle of equality before the law⁶⁹ and raises important questions of discrimination. Although EU law does not protect third country nationals against discrimination on grounds of nationality, even under the Charter,⁷⁰ international human rights law does not provide a blanket state authority to

66 Tweet by Katja Kallas, Prime Minister of Estonia. Available at: <https://twitter.com/kajakallas/status/1556903576726896642?ref_src=twsrc%5Etfw> accessed 4 September 2022. It is interesting to note that the current Trump administration in the US has recently used very similar language on visas being a privilege and not a right in restricting access of international students to US universities. Marco Rubio, ‘100 Days of an America First State Department’ US Department of State Press Release, 30 April 2025.

67 The humanitarian visa framework would not present a useful alternative as it is introduced to the national systems on the basis of the Visa Code but remains outside the EU competence per the controversial decision in C-638/16 PPU X and X [2017] ECLI:EU:C:2017:173,

68 Karen Gilchrist, ‘A Second Wave of Russians is Fleeing Putin’s Regime’ *CNBC*, 14 July 2022. <<https://www.cnn.com/2022/07/14/russians-flee-putins-regime-after-ukraine-war-in-second-wave-of-migration.html>> accessed 4 October 2025.

69 Article 20 CFR.

70 Joined Cases C-22/08 and C-23/08, *Vatsouras and Koupatantze*, [2009] ECLI:EU:C:2009:344; Case C-930/19 *X. v Belgian State*, [2021] ECLI:EU:C:2021:657.

impose measures exclusively based on the nationality of an individual. The next section explains how the implications of nationality-based measures could breach international human rights law even in the context of migration.

3.5 Categorical Visa Bans and Entry Denials Equally Violate International Human Rights Law

Supporters of the visa bans and entry denials justify their preferences with an aim to restore justice between Russians and Ukrainians, the latter being subjugated to the consequences of aggression by the Russian state, while the former continue their lives as normal.⁷¹ Which is indeed true based on BBC investigations, finding that Ukrainian society is much more significantly affected by the war than the Russian one.⁷² Some also argue that this is a necessary symbolic measure to send a message that unless Russians speak out against the war, they will not be welcome in the West.⁷³ The question then arises whether the Russian state's aggression can be a reason for these blanket measures against Russian citizens. Could symbolic measures against an aggressor state bypass human rights law rules in force by suspending the rights of Russian people? This could, in turn, mean that EU law could also be amended to the effect of enabling visa bans without undermining the international commitments of the EU and Member States. We argue that categorical visa bans breach the prohibition of non-discrimination under international law in the context of migration. Though international law regarding visa policies remains limited, banning the entry of a group of nationals to exert geopolitical pressure on the nationality country would be a clear case of discrimination. We further argue that entry denials could even constitute pushbacks if those arriving on the land border flee persecution in Russia.

3.5.1 Visa Denials

First, 'immigration' is not at all an opt-out from human rights-based square prohibition to discriminate, and any immigration measure that discriminates is subject to scrutiny for justifications. According to the European Court of Human Rights, a difference of treatment on grounds of nationality only

71 Raphael Bossong, 'Why Calls to Ban Russian Tourists from Europe Are Unwise' *Open Democracy*, 6 September 2022 <<http://www.opendemocracy.net/en/odr/europe-visa-ban-on-russians-is-unwise-and-illegal>> accessed 4 October 2025.

72 It is important to note the 'invisible losses' among Russians who are dying, which supports the need for Russians to escape Putin's program. Olga Ivshina, 'Invisible Losses: Tens of Thousands Fighting for Russia are Dying Unnoticed on the Frontline in Ukraine' *BBC News*, 23 February 2025 <<https://www.bbc.com/news/articles/cgkm7lly61do>> accessed 4 October 2025.

73 Natia Seskuria, 'Why the EU Should Ban Russian Tourists' *Foreign Pol'y*, 14 September 2022.

constitutes a suspect criterion which calls for stricter scrutiny based on very weighty reasons,⁷⁴ even in the case of immigration.⁷⁵

The ICERD explicitly provides that state parties are obliged to ensure that their immigration laws ‘do not discriminate against any particular nationality.’⁷⁶ Article 1(2) allows for differentiation between citizens and non-citizens but not among non-citizens. The Committee on the Elimination of Racial Discrimination (“CERD Committee”) emphasized the importance for state parties to guarantee that safeguards against racial discrimination extend to non-citizens irrespective of their immigration status, and stresses that immigration policies cannot ‘have the effect’ of causing discrimination against persons on the basis of race, color, descent or national or ethnic origin.⁷⁷ In two individual communications, where Australia’s suspension of the visa processing for Afghan asylum-seekers and Canada’s draft national act to issue a list of safe countries for expedited asylum requests were at issue, the CERD Committee found that these practices raised concerns of discrimination against non-citizens.⁷⁸ According to the Committee, differential treatment based on citizenship can violate the ICERD if the treatment is not proportionate to the legitimate aim pursued with it.⁷⁹

As to the ICCPR, though the treaty does not acknowledge a right to enter the territory of a state party, the HRC acknowledged that ‘in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise.’⁸⁰ Thus, in

74 Evelien Brouwer and Karin de Vries, ‘Third-country Nationals and Discrimination on the Ground of Nationality: Article 18 TFEU in the context of Article 14 ECHR and EU Migration Law: Time for a New Approach’ in Marjolein van den Brink, Susanne Burri and Jenny Goldschmidt (eds), *Equality and Human Rights: Nothing but Trouble?* (SIM 2015).

75 The Court has not yet ruled on an Article 14 ECHR claim for visa issuance. See Moritz Baumgärtel and Sarah Ganty, ‘On the Basis of Migratory Vulnerability: Reasserting Article 14 of the European Convention on Human Rights for Vulnerable Migrants’ (2022). Cf. *M.a. v Denmark* (ECtHR [GC] 2021). <<https://hudoc.echr.coe.int/eng?i=001-211178>>; *Savran v Denmark* para.187 (ECtHR [GC] 2021), <<https://hudoc.echr.coe.int/eng?i=001-214330>>.

76 International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(3), 7 March 1966, 660 U.N.T.S 169 [hereinafter ICERD].

77 Comm. on the Elimination of Racial Discrimination, *General Recommendation 30: Discrimination Against Non-citizens*, para. 9, CERD/C/64/Misc.11/rev.3 (2004).

78 Comm. on the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, para. 24, U.N. Doc. A/65/18, Supp. No. 18 (2010); Comm. On the Elimination of Racial Discrimination, *Report of the Committee on the Elimination of Racial Discrimination*, para. 15, U.N. Doc. A/67/18, Supp. No. 18 (2012) [hereinafter 2012 CERD Report].

79 2012 CERD Report, *supra* note 98, para. 4.

80 U.N. Off. of High Comm’r for Hum. Rts., CCPR General Comment No. 15: The Position of Aliens Under the Covenant, para. 5 (11 April 1986). <<http://www.refworld.org/docid/45139acfc.html>>.

addition to the ICERD obligation to refrain from disproportionate measures of discrimination, ICCPR emphasizes the related rights attached to traveling, which means that aliens ‘may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence.’⁸¹ The HRC further underscored that the prohibition of discrimination under the ICCPR applies to ‘any field regulated and protected by public authorities.’⁸²

Second, although states retain a broad discretion in justifying the restrictions of human rights for immigration control, nationality-based visa bans for geopolitical pressure fall squarely out of this paradigm. ECtHR affirms that states ‘have the right to control the entry, residence and removal of aliens,’ subject to their treaty obligations.⁸³ In the context of asylum, states have less room to manoeuvre⁸⁴ in diluting this right, whereas in cases concerning the expulsion of settled migrants on criminal grounds,⁸⁵ they maintain broader margins of appreciation. Article 1(3) of ICERD acknowledges that the Convention does not implicate the measures concerning ‘nationality, citizenship or naturalization.’ The Human Rights Committee (HRC) also reiterates that ‘there is significant scope for States parties to enforce their immigration policy.’⁸⁶ The broad discretion granted to states in human rights law concerns primarily the special context of immigration, not sending a signal to a country by punishing citizens due to international relations.

Thus, the prohibition on discrimination applies to matters concerning border controls, and the leeway states have for controlling immigration cannot automatically be extended to instrumentalization of visas for achieving foreign policy objectives without sufficient scrutiny. Nationality-based visa bans must always be proportionate to the objective they pursue.

These provisions do not rule out the possibility of imposing conditions, such as visa requirements, in positive international law norms, but they do not grant a *carte blanche* for regulating entry without regard to the aims and lawful limits of these measures.⁸⁷ Visa applications require individuals to submit documents that enable the authorities to determine whether they pose any sort of a risk to the destination country. Suspending existing visas and any further visa processing based on nationality is a disproportionate measure, given that the risks states aim to avert can be detected *through* the regular visa process, and it cannot be established with certainty that all Russians pose a threat to the

81 Ibid, para. 7.

82 U.N. Off. of High Comm’r for Hum. Rts., CCPR General Comment No. 18: Non-Discrimination, para. 12 (10 November 1989). <<http://www.refworld.org/docid/453883fa8.html>>.

83 *Savran v Denmark* [2021] ECtHR [GC] 57467/15.

84 *Saadi v Italy* [2008] ECtHR [GC] 37201/06 paras 124–125.

85 *Savran v Denmark*, para.187.

86 The Human Rights Committee, *Winata v Australia*, 2001, para 7.3. <https://juris.ohchr.org/casedetails/929/en-US>.

87 Ibid, para. 6.

destination countries in the EU. In fact, the main purpose of visa requirements is to determine the so-called ‘eligibility’ of the traveler.⁸⁸

In the context of the Russo-Ukrainian War, the visa bans have undeniable effects on the right to private life and family life since not all applicants for Schengen visas are tourists; applicants include students, journalists, artists, dissidents and family members of EU citizens who must obtain a visa to travel into the EU.⁸⁹ Without objective justifications, discriminating against Russian nationals in the enjoyment of these rights is not lawful under international human rights law. A retributive rationale alone would not satisfy any of the lawful aims that international human rights treaties enable.

As Russians do not travel exclusively for tourism, making a clear-cut distinction between tourists and others is problematic because the visa ban will inevitably affect a larger group than those traveling for leisure.⁹⁰ This group could include Russian family members of EU citizens and residents, despite assurances that they will not be affected.⁹¹ Introducing exceptions to allow ‘legitimate travel’ turned to a practice of making arbitrary distinctions between relationships and human activities. For example, though the Schengen visa ban imposed by Latvia only permitted visas for humanitarian reasons, such as a serious illness or the funeral of a relative, it was later limited to only funerals, preventing people from visiting their living relatives.⁹² The exceptions to see family members were eventually redefined but excluded unregistered partners and most relatives, such as siblings, cousins, uncles, aunts, nieces, nephews and others.⁹³

Crucially, the exceptions applied only to EU citizens, excluding many ethnic Russians (over 20% of the population in Latvia and Estonia) and making it nearly impossible for Ukrainian refugees in these countries with Russian

88 Nurbanu Hayır, ‘Aggressor State, Aggressor Individual, and What International Law Does/Should Protect’ (2024) 45 *Michigan Journal of International Law* 487.

89 Sarah Ganty, Dimitry Kochenov and Suryapratim Roy, ‘Unlawful Nationality-Based Bans from the Schengen Zone: Poland, Finland, and the Baltic States against Russian Citizens and EU Law’ (2023) 48 *Yale Journal of International Law Online* 5.

90 Aleksandra Ancite-Jepifānova (Jolkina), ‘The Visa Ban, Nikolai and His Russian Sister: Why Schengen Visa Restrictions for Russian Citizens Risk Tearing Families Apart’ *Verfassungsblog*, 29 September 2022. <<http://verfassungsblog.de/the-visa-ban-nikolai-and-his-russian-sister>> accessed 4 October 2025.

91 Ibid.

92 Ibid.

93 ‘Estonian Embassy in Moscow Has Stopped Accepting Visa Applications from Russian Citizens’ *Embassy of Estonia Moscow*, 15 March 2023. <http://moscow.mfa.ee/estonian-embassy-in-moscow-has-stopped-accepting-visa-applications-from-russian-and-belarusian-citizens>; ‘Russian Citizens Travelling to the European Union via Lithuania Will Be Subject to Stricter Controls’ *Ministry of the Interior of the Republic of Lithuania*, 19 September 2022. <http://ru.mfa.lt/ru/en/news/russian-citizens-travelling-to-the-european-union-via-lithuania-will-be-subject-to-stricter-controls>.

relatives to visit family.⁹⁴ In Lithuania and Latvia, non-EU residents could not benefit from family visit exceptions, and in Estonia, the rule was limited to long-term residents.⁹⁵ As a result, without qualifying under these restrictive categories, most Russians cannot legally apply for EU visas unless they reside in a third country and travel for an ‘essential’ purpose.⁹⁶

Blanket visa bans, thus, would violate international human rights law. In contrast, and unlike a blanket ban, excluding *only* some categories of Russians such as officials would align with human rights law: an individual approach is required and should be justified and proportionate. In this case, as underlined by Bornemann, ‘the “sweeping” travel ban would turn out not to be sweeping at all.’⁹⁷

3.5.2 Entry Denials

The human rights issues concerning visa bans would equally be applicable to automatic entry denials based on nationality. Moreover, human rights law enshrines the obligation of *non-refoulement* (Article 7 of the ICCPR,⁹⁸ Article 3 of the ECHR⁹⁹), an obligation not to return individuals to places where they will be subjugated to treatments of this sort. The obligation includes draft evaders,¹⁰⁰ and conscientious objectors more broadly.¹⁰¹ The ECtHR has been

94 ‘Demogrāfija’ *Centrālā statistikas pārvalde*, 16 February 2021. <<http://www.csp.gov.lv/lv/demografija#iedzivotaju-skaitis>> accessed 3 August 2024; ‘RV0222U: Population by Sex, Ethnic Nationality and County, 1 January’ *Statistics Estonia*. <http://andmed.stat.ee/en/stat/rahvastik__rahvastikunaitajad-ja-koosseis__rahvaarv-ja-rahvastiku-koosseis/RV0222U> accessed 3 June 2025.

95 Ancite-Jepifanova (n 90).

96 A European Commission (“EC”) communication did note that ‘Russian visa applicants travelling for essential purposes, including notably family members of EU citizens, dissidents, independent journalists, and civil society representatives, human rights defenders should have the possibility to access the EU.’ *Communication from the Commission Updating Guidelines on General Visa Issuance in Relation to Russian Applicants Following Council Decision (EU) 2022/1500 of 9 September 2022 on the Suspension in Whole of the Application of the Agreement Between the European Community and the Russian Federation on the Facilitation of the Issuance of Visas to the Citizens of the European Union and the Russian Federation; and Providing Guidelines on Controls of Russian Citizens at the External Borders*, COM (2022) 7111 final (30 September 2022) [hereinafter *Communication from the Commission*].

97 Jonas Bornemann, ‘Heated tempers and legal ambiguities: Some (second) thoughts on an all-out Schengen ban of Russians’ *VerfBlog*, 17 August 2022. <https://verfassungsblog.de/heated-tempers-and-legal-ambiguities/>.

98 ICCPR, *supra* note 34, art. 7.

99 ECHR, *supra* note 34, art. 3.

100 U.N. Hum. Rts. Comm., Views of the Hum. Rts. Comm. Under Art. 5, Para. 4 of the Optional Protocol to the Int’l Covenant on Civ. and Pol. Rts. (110th Session), U.N. Doc. CCPR/C/110/D/2007/2010, paras 2.1–3.1 (12 May 2014).

101 *Ulke v Turkey*, App. No. 43973/98, para. 64 (1 January 2006), <http://hudoc.echr.coe.int/eng?i=001-72146>; see also *Savda v Turkey*, App. No. 42730/05 (12 June 2012), <http://hudoc.echr.coe.int/eng-press?i=003-3980699-4625431>; *M.O. v Switzerland*, App. no.

particularly cautious in cases concerning the return of persons to states that are not party to the ECHR. In *M.A. and Others v Lithuania*, Lithuania was found to be in violation of Article 3 of the Convention for failing to assess the safety of an individual's return to Belarus, 'a country that was not a State Party to the ECHR.'¹⁰² Given that Russia ceased to be a party to the ECHR on 16 September 2022,¹⁰³ Russian draft-evaders may be at particular risk in this regard. The ECtHR has also been clear that denying people entry on land borders (e.g., the Belarusian border), without assessing their asylum claims would violate the principle of non-refoulement.¹⁰⁴

3.6 Conclusion

There is no legal way under EU law to impose categoric visa and entry bans based on nationality. EU law on Schengen visas and Schengen borders rests on individual assessment of the case of each traveler. Any amendment to this effect would require an overhaul of the foundational tenets of the Schengen visa system and breach EU law. It would also go against many human rights commitments that EU states uniformly made when they ratified international human rights treaties. A visa and entry ban on a single nationality with a retributive logic constitutes unjustified and disproportionate discrimination. Closure of borders could even amount to the return of a person without analyzing their claim for risk of persecution, in breach of the principle of non-refoulement. Regardless of the reason for applying for a visa and the place where Russian citizens live, the war between Russia and Ukraine does not provide a compelling justification to treat Russian citizens as pariahs unworthy of human rights for no rational reason, especially given that Russia, like most countries worldwide, is not a democracy and that citizenship cannot be chosen or easily renounced.¹⁰⁵ A retributive logic is an unsuitable ground for a complete overhaul of the Schengen visa regime, which was established to guard against, not perpetuate, violations of fundamental rights.

41282/16, paras 70–73 (20 September 2017), <http://hudoc.echr.coe.int/eng?i=001-174424>. The Court nevertheless found that Swiss authorities' evaluation of the asylum application did not violate the Convention. See *ibid.* para. 81.

102 *M.A. and Others v Lithuania*, 59793/17 (ECtHR, 11 December 2018), <https://hudoc.echr.coe.int/eng?i=001-188267> (Article 13).

103 Eur. Ct. H.R., *Resolution of the European Court of Human Rights on the Consequences of the Cessation of Membership of the Russian Federation to the Council of Europe in Light of Article 58 of the European Convention on Human Rights* (22 March 2022). http://www.echr.coe.int/documents/d/echr/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.

104 *M.A. and Others v Lithuania*, 59793/17 (ECtHR, 11 December 2018). <https://hudoc.echr.coe.int/eng?i=001-188267>; *M.K. and Others v Poland*.

105 Dimitry Kochenov, 'Ending the Passport Apartheid. The Alternative to Citizenship is no Citizenship – A Reply' 18 (2020) *International Journal of Constitutional Law* 1525; Joseph H. Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *The Review of Politics* 251.

Part I.2

The Legal Challenges



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4 Visa and Due Process under EU Law

Mario Savino

4.1 Introduction

Visas are an effective instrument of migration control. The visa mechanism regulates a significant proportion of international mobility to Europe. In 2024, Schengen countries granted 11,716,723 visas and refused 1,706,003, with a rejection rate of around 16%, up from an average of 5% in 2014 and 10% in 2019.¹ The question addressed in this chapter is whether visas represent a ‘fair’ instrument.

From a political perspective, visas do not reflect fairness concerns. They rather expose power asymmetries inside and outside the European Union. Within the Union, the ‘Europeanisation’ of visas has been shaped by the national interests of the original Schengen members. Visas feature among the ‘flanking measures’ that have accompanied the implementation of the Schengen Agreement since 1990.² Italy could join Schengen in 1998 only after it had reversed its visa-free entry policy from Algeria and Tunisia, thereby overcoming the French government’s objection that, otherwise, irregular migrants from the Maghreb would have reached France via Italy.³ Over time, aspiring partners had to adjust their visa policies to the national interests of the Schengen avant-garde.

Power asymmetries are even more evident vis-à-vis third countries. Alongside ‘considerations of human rights and fundamental freedoms’, the Visa List Regulation (EU) 2018/1806 legitimises a selection based on utilitarian criteria, ranging from the prevention of illegal immigration and security threats to external relations, regional coherence, reciprocity and ‘economic benefits in terms of tourism and foreign trade’.⁴ Accordingly, the

1 Updated statistics are available here: <https://schengenvisainfo.com/statistics/>.

2 Convention Implementing the Schengen Agreement of 14 June 1985 (adopted 19 June 1990, entered into force 1 September 1993) [2000] OJ L239/19.

3 Simone Paoli, ‘The Schengen Agreements and their Impact on Euro-Mediterranean Relations’ (2015) 21 *Journal of European Integration History* 125.

4 Visa List Regulation (EU) 2018/1806, Art. 1.

European ‘black list’ contains more than 100 countries, including the less wealthy ones and countries of origin of refugees, such as Afghanistan, Iraq, Iran and Syria.⁵ Reducing the number of asylum applications and differentiating between privileged and unwanted mobility on a global scale are openly stated objectives of EU visa policy.⁶ Although morally questionable, the pursuit of these objectives can hardly translate into legal claims. First, the ‘black list’ is contained in a legislative act of general application: individuals cannot easily challenge it, as it only indirectly affects individual rights. Second, neither the case law of the European Court of Human Rights (ECtHR) nor that of the Court of Justice leaves room for challenges based on a potential violation of the principles of equal treatment or indirect discrimination related to race or ethnic origin.⁷

Nonetheless, the question of visa fairness remains legally salient at the individual level. Any third-country national who wishes to travel to an EU Member State is entitled to a ‘fair’ examination of their visa applications. This chapter will address that question from the perspective of EU law and the principle of due process that it embodies. Due process will be broadly understood as covering both the guarantees enshrined in Article 41 of the EU Charter (in particular, the rights to be heard and the obligation to give reasons) and the right to effective judicial remedy (Article 47 EU Charter).⁸ Compliance with these guarantees will be assessed in relation to ‘Schengen visas’ for short-term stays of up to 90 days and with regard to visas issued for longer periods (in particular, for study purposes), to the extent that they are regulated by EU law.⁹

This chapter focuses on a body of case law that is relatively ‘young’ and still evolving, as it emerged gradually over the 15 years following the adoption of the Visa Code Regulation in 2009. The relevant judgments stem from preliminary references submitted to the Court of Justice, predominantly by Belgian, German, Dutch and Polish courts. This pattern suggests that Central and Eastern European Member States play a particularly active role in shaping the interpretation of the Visa Code. The recurrent intervention of those and other Member States, including the Czech, Estonian and Lithuanian

5 Visa List Regulation (EU) 2018/1806, Annex I.

6 Commission, ‘Communication: Implementation and Development of the Common Visa Policy to Spur Growth in the EU’ COM(2012) 649 final. See Steffen Mau, Heike Brabandt, Lena Laube and Christof Roos, *Liberal States and the Freedom of Movement. Selective Borders, Unequal Mobility* (Palgrave Macmillan 2012) and Thomas Spijkerboer, ‘The Global Mobility Infrastructure’ (2018) 20 *EJML* 452.

7 See the chapter on EU visa policy in this volume. See also Maarten den Heijer, ‘Visas and Non-Discrimination’ (2018) 20 *EJML* 470 and Elspeth Guild and Sergio Carrera, ‘EU Borders and their Controls: Preventing Unwanted Movement of People in Europe?’ (CEPS 2013).

8 On administrative due process, its requirements and its rationales, see Giacinto della Cananea, *Due Process of Law Beyond the State: Requirements of Administrative Procedure* (OUP 2016).

9 Daniel Thym, *European Migration Law* (OUP 2023) ch. 11.

governments, highlights the practical and political stakes underlying this technical area of EU law.¹⁰

The analysis proceeds as follows. First, it examines the grounds for refusal provided for in the Visa Code, focusing on the two most frequently invoked grounds – the risk of illegal immigration and the threat to public order – before addressing the sensitive question of whether EU law recognises the right to a visa. The core of the chapter is devoted to the procedural safeguards granted to applicants and the contribution that case law has made to their still incomplete consolidation: in particular, it examines the right to a timely decision, the right to be heard, the right to a reasoned decision and the right to effective judicial protection, which has recently been strengthened but is difficult to apply in composite procedures. The chapter concludes that due process guarantees operate as a partial counterbalance to the broad discretion exercised by Member States.

4.2 The Grounds for Refusal: Is There Any Right to a Visa?

Nationals from third countries included in the ‘black list’ need a visa to enter the territory of the European Union, unless they are family members of Union citizens enjoying a derived right of residence.¹¹ The conditions for issuing a visa are established by the Visa Code and are both formal and substantive.¹²

Formally, an application for a short-term visa is valid when it is lodged no more than three months before the start of the intended visit and complies with the following requirements: that application is presented in the form prescribed by the Visa Code, with a valid travel document, photograph, travel medical insurance and payment of the visa fee; and that the applicant submits documents supporting the purpose of the journey and proof of sufficient means of subsistence for both the duration of the stay and the return.¹³ As the Visa Code requires the collection of biometric identifiers, including fingerprints, the applicant should appear in person, with some exceptions.¹⁴ Where these formal conditions are met, the competent consulate declares the application admissible and examines it on its merits. Otherwise, the application is returned to the applicant, biometric data are destroyed and the fee is reimbursed, unless the application is ‘considered admissible on humanitarian grounds or for reasons of national interest’.¹⁵

10 See also Francesco Luigi Gatta, ‘Politica dei visti e stato di diritto: il difficile equilibrio tra sovranità e garanzie procedurali nella giurisprudenza della Corte di giustizia’ (2021) 6 *European Papers* 607–08.

11 Case C-130/24 *YC v Stadt Wuppertal* [2025], ECLI:EU:C:2025:340.

12 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).

13 Visa Code, arts 9(1), 10(3) and 14(1).

14 Visa Code, art 13.

15 Visa Code, art 19.

As to substance, consular authorities need to ascertain whether the applicant fulfils the other entry conditions set out in the Schengen Borders Code: namely, whether he or she has not received a Schengen Information System (SIS) alert for the purpose of refusing entry and is ‘not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States’.¹⁶ In that context, the substantive assessment concerns two main aspects: the risk to the security of the Member States and the risk of illegal immigration, including whether the applicant intends to leave the territory of the Member States before the expiry of the visa.¹⁷

The Court of Justice has made clear that the list of grounds for refusal established in Article 32(1) of the Visa Code is exhaustive. Member States cannot introduce additional grounds, as this would hinder the objectives of harmonisation and prevention of ‘visa shopping’.¹⁸

However, the competent authorities enjoy a ‘wide discretion’ in the assessment of the applicant’s position. For the Court of Justice, determining whether there is a ground for refusal:

entails complex evaluations based, inter alia, on the personality of that applicant, his integration in the country where he resides, the political, social and economic situation of that country and the potential threat posed by the entry of that applicant to public policy, internal security, public health or the international relations of any of the Member States.¹⁹

In this statement, beyond the questionable reference to the ‘personality of the applicant’ (a parameter that is not mentioned as such in the Visa Code),²⁰ the complexity of the assessment becomes apparent.²¹ The wide discretion of consulates essentially concerns two aspects: the risk of illegal immigration and the risk to security. The criteria guiding the exercise of the discretion are analysed below.

16 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code), art. 6(1). See also Visa Code, art. 21(3).

17 Visa Code, art 21(1).

18 Case C-84/12 *Koushkaki* [2013], ECLI:EU:C:2013:862, paras 38, 45, 53.

19 *Koushkaki* para 56.

20 As noticed by Steve Peers, ‘Do Potential Asylum - Seekers have the Right to a Schengen Visa?’ (*EU Law Analysis*, 20 January 2014) <<https://eulawanalysis.blogspot.com/2014/01/do-potential-asylum-seekers-have-right.html>> last accessed 30 September 2025.

21 This assessment concerns ‘the foreseeable conduct of that applicant’, and requires ‘an extensive knowledge of his country of residence and on the analysis of various documents, the authenticity and the veracity of whose content must be checked and of statements by the applicant, the reliability of which must be assessed’ (*Koushkaki* para 57).

4.2.1 The Risk of Illegal Immigration

Consulates must carry out a predictive assessment on two aspects: whether the applicant is willing to use the visa (e.g. for travel purposes) as a ‘pretext for permanent illegal settlement’ and whether he or she intends to leave the Member State before the visa expires. The first aspect (illegal immigration) is broader than the second (intention to leave) and thus encompasses it. The overlap is confirmed by the elements that the Visa Code Handbook (VCH) recommends taking into account.²²

The Handbook invites consulates to rely on ‘local Schengen cooperation’ in order to define ‘profiles’ of applicants in relation to the different levels of risks they pose.²³ To that end, the general situation in the country of residence must be considered, including the level of poverty, unemployment and political stability. However, even when ‘profiles’ are used, the Handbook requires assessing ‘each individual application (...) on its own merits’. In determining the ‘individual level of stability’, several factors are considered: the existence of family links or personal ties in the country of residence and in the Member States, the employment situation, the salary level and the regularity of family income, the possession of a house/real estate, previous illegal stays or ‘abuse of social welfare’ in the Member States, as well as the ‘credibility of the inviting person or organisation when the invitation letter is presented’.²⁴

In *Koushkaki*, the Court of Justice has confirmed that an individual assessment is always necessary and that it must be based on ‘the general situation in the applicant’s country of residence and the applicant’s individual characteristics’.²⁵ On the one hand, the applicant has the duty to present information enabling such an assessment.²⁶ On the other hand, consulates are not required to be ‘certain’ about the applicant’s intention to leave: for the visa to be issued, it is sufficient to exclude a ‘reasonable doubt’ about that intention, pursuant to Article 32(1)(b) of the Visa Code.²⁷

22 Annex to the Commission Implementing Decision C(2024) 4319, amending Commission Decision C(2010) 1620 as regards the replacement of the Handbook for the processing of visa applications and the modification of issued visas (Visa Code Handbook – VCH) [2024].

23 VCH para 6.13.

24 *ibid.*

25 *Koushkaki* para 69.

26 Pursuant to Article 14(1)(d) of the Visa Code, it is the responsibility of the applicant ‘to provide information, the credibility of which must be established by means of relevant and reliable documents, capable of dispelling doubts (...) which may arise as a result of, inter alia, the general situation in his country of residence or the existence of well-known migration flows between that country and the Member States’ (*Koushkaki* para 72).

27 *Koushkaki* paras 67–68.

4.2.2 *The Threat to Public Order*

In the leading case on the matter,²⁸ Ms Fahimian, a young Iranian national, had applied for a visa in order to pursue a doctorate in information technology at a German university. The German embassy in Tehran refused her visa application on the ground that she represented a threat to public policy within the meaning of Article 6(1)(d) of Directive 2004/114. In the assessment of the German authorities, the fact that she held a Master's degree from an Iranian university cooperating with the government and subject to EU sanctions was sufficient to establish the existence of the threat. The underlying assumption was that the knowledge acquired during her PhD in Germany could have benefited projects sponsored by the Iranian government. However, there were no elements relating to Ms Fahimian's conduct that could support this prognosis.

This would have been sufficient to rule out the risk to public policy if the person concerned had been a Union citizen. According to settled case law, measures taken on grounds of public policy must rely 'exclusively on the personal conduct of the individual concerned' and that conduct must represent a genuine and 'present' threat, following the standard of protection established by Article 27(2) of the Free Movement Directive 2004/38/EC. Nevertheless, in the *Fahimian* case, the Court of Justice established a lower standard for third-country nationals applying for a visa. Drawing on a recital in the Directive on admission for study purposes, it stated that a 'potential' threat, even if not attributable to the applicant's personal conduct, is sufficient grounds for refusing a visa.²⁹

In line with the assessment of the risk of illegal immigration, national authorities enjoy a 'wide discretion' also when they assess whether a visa applicant represents a threat to public policy. Such an assessment involves 'complex evaluations' of several elements, including 'the personality of that applicant, his integration in the country where he resides and the political, social and economic situation of that country', in addition to 'the potential threat to public security represented by the admission of that applicant', qualified as 'the risk that the knowledge acquired' during the period of study in Europe 'might subsequently be used in his country of origin for purposes prejudicial to that public security'.³⁰ Not only can the foreseeable conduct of the applicant be based on elements that go beyond his or her personal conduct: it can also concern a 'potential' threat linked to a possibility (the reuse of knowledge for illegal purposes) that could only materialise upon return to the country of origin.

Given the wide margin of discretion enjoyed by the competent national authorities, the judicial review must be 'limited, as far as that assessment is

28 Case C-544/15 *Fahimian* [2017], ECLI:EU:C:2017:255. On this case, Katharina Eisele, 'Public Security and Admission to the EU of Foreign Students: *Fahimian*' (2018) Common Market Law Review 279.

29 *Fahimian* para 40.

30 *Fahimian* paras 41–42.

concerned, to the absence of manifest error'.³¹ National courts must 'ascertain in particular whether the contested decision is based on a sufficiently solid factual basis'.³² The wide discretion granted to Member States is thus matched by a deferential review of the merits.

The double standard of protection between Union citizens and visa applicants, with regard to measures taken on grounds of public policy or public security, is evident. A first possible explanation is that the dangerousness of a person who has been residing in a Member State for a period of time allows the authorities of that State to base their assessment on information they have gathered directly. It is much more difficult to make that assessment in relation to applicants who may never have stayed in the Member State's territory before, especially if they come from 'hostile' countries, with which the exchange of information is not possible. A second explanation concerns the nature of the legal claim. Unlike EU citizens or third-country nationals who are their family members or long-term residents, in the case of visa applicants there are no fundamental rights at stake.³³ The right to enter a foreign country is not protected as such. How, then, can the legal position of visa applicants be qualified?

4.2.3 *Is There Any Right to a Visa?*

In his opinion in the *Koushkaki* case, Advocate General Mengozzi addressed the question of whether a right to a visa exists as such.³⁴ For him, the Schengen visa is an instrument of foreign and security policy, aimed at controlling entries in a logic of reciprocity with third countries and cooperation with other Member States. Therefore, such a pre-entry authorisation regime cannot imply the existence of a 'subjective right', as this recognition would determine the 'automatic nature' of the grant of a visa. EU legislation rather grants Member States wide discretion and imposes on them only a negative obligation to refuse a visa when the conditions required are not met.³⁵

Some scholars interpret *Koushkaki* as an implicit rejection of this view. For them, by affirming that the list of grounds for refusal is exhaustive, the Court of Justice has rather acknowledged that applicants have a 'right to a visa': when the prescribed conditions are met and none of the grounds for refusal apply, the relevant Member State is obliged to issue the visa.³⁶

³¹ *Fahimian* para 46.

³² *Fahimian* para 45.

³³ See Daniel Thym, 'Public Policy as a Chameleonlike Concept: The Quest for Coherence in the CJEU Case Law on Migration and Union Citizenship' (2024) 9(3) *European Papers* 1366–84.

³⁴ C-84/12 *Koushkaki* [2013], Opinion of AG Mengozzi.

³⁵ Opinion of AG Mengozzi, paras 49–52.

³⁶ Peers (note 20).

However, in the *Hassani* case (2017), Advocate General Bobek has convincingly argued that *Koushkaki* does not imply the existence of a ‘subjective right’, due to the discretion left to the issuing authorities. Visa applicants ‘do not enjoy a right to a visa, nor a right of entry’, but they do have a right to have their application ‘treated and processed in a fair and proper manner’, just as players in a game do not have a ‘right to win the game’, but rather a ‘right to fair play’.³⁷

This view is consistent with the distinction between ‘subjective rights’ and ‘legitimate interests’, well established in legal traditions of countries like Italy. Accordingly, a ‘subjective right’ can only be predicated where the administrative decision is bound, i.e. dependent on the mere verification that certain legal or factual conditions exist (‘if A and B, then C’). Many visa requirements (the formal ones described above) fit this scheme. Many, but not all. Substantive grounds relating to the risk of illegal migration and threat to security, on the contrary, entail *discretionary* power. The authorisation contained in the visa depends on a complex assessment of the facts and on balancing private interests (entering EU territory) with the competing public interests selected by the Visa Code (preserving security and the orderly management of entry flows in cooperation with other Member States). Faced with such discretionary power, the individual position can be more aptly characterised in terms of ‘legitimate interest’: applicants are not entitled to the ‘final benefit’ (the visa), but they rather have a claim to the ‘legal *chance*’, which involves compliance with the rules and principles governing the administrative decision on that benefit.³⁸

A first implication is that, in principle, courts must protect the applicant’s claim to a correct decision, typically by annulling the refusal of a visa when it violates the governing rules and principles. However, courts cannot adjudicate the question on the merits: they cannot grant the visa when its refusal is based on a ‘fair’ exercise of the discretion reserved by the Visa Code to national authorities.

A further implication concerns humanitarian visas. Scholars who support the thesis of the ‘right to a visa’ often conclude that asylum seekers should also be able to rely on that right. This interpretation has obvious moral merits, as it would allow persons in need of protection to arrive in Europe safely.³⁹ However, the Visa Code stipulates a specific condition – namely, the intention to leave the territory of the Member States before the expiry of the visa – that asylum seekers cannot meet, as they could not provide genuine evidence in

37 Case C-403/16 *Hassani* [2017], Opinion of AG Bobek, paras 93–104.

38 Here, reference is made to the concept of legitimate interest elaborated by Leonardo Ferrara, *Lezioni di giustizia amministrativa* (Giappichelli 2025) 217–21, which also provides a comprehensive overview of the long-standing Italian debate on the subject.

39 V. Moreno-Lax, *Accessing Asylum in Europe* (OUP 2017).

this respect. The argument that this condition should not apply to potential asylum seekers, since ‘Article 31 of the Geneva Convention implicitly makes clear that the need to flee persecution justifies breaches of immigration law’,⁴⁰ seems to overlook the difference between asylum seekers’ right to enter EU territory when asylum seekers reach its border and the ‘right’ to obtain a visa: for pragmatic reasons, EU law draws a clear distinction between the two ‘rights’,⁴¹ guaranteeing the former, in compliance with Article 31 of the Geneva Convention, but not the latter.

According to a convergent argument, a ‘right’ to a humanitarian visa can be inferred from Article 25(1) of the Visa Code. This provision allows Member States to issue a humanitarian visa when they deem it necessary ‘on humanitarian grounds (...) because of international obligations’. And Article 32(1)(b) of the Visa Code, while requiring Member States to refuse a visa where there are reasonable doubts as to the applicant’s intention to leave, specifies that this obligation to refuse shall be ‘[w]ithout prejudice to Article 25(1)’. However, in the *X and X* case, the Court of Justice rejected this argument, ruling that visa applications submitted for the purpose of seeking asylum in a Member State do not fall within the scope of the Visa Code, but ‘solely within the scope of national law’.⁴²

A preliminary conclusion can be drawn. Under current EU law, it is not possible to invoke a subjective right in relation to either Schengen visas or humanitarian visas, unless, in the latter case, national laws provide otherwise. Borrowing from Advocate General Bobek, the question to be examined is whether asylum seekers, while not having a ‘right to win the game’, nevertheless have a ‘right to fair play’ that includes procedural guarantees.

4.3 The Due Process Guarantees

In the *Fahimian* judgment, the Court of Justice seems to suggest a sort of compensatory logic, whereby judicial review is limited in substance, given the wide discretion granted to Member States in assessing the main grounds for refusal, but becomes more penetrating in verifying compliance with procedural guarantees.⁴³ In the following pages, the analysis will focus on the individual rights attributable to the principle of administrative due process, in order to verify whether this is indeed the case.

40 Peers (note 20).

41 See Article 30 of the Visa Code: ‘Mere possession of a uniform visa or a visa with limited territorial validity shall not confer an automatic right of entry’.

42 Case C-638/16 PPU, *X and X* [2017] ECLI:EU:C:2017:173, paras 42–44.

43 *Fahimian* para 46.

4.3.1 *The (Weak) Right to a Timely Decision*

Visa applications should be decided within 15 days⁴⁴ and, thus, be lodged at least 15 days before the intended visit.⁴⁵ However, the applicant must act well in advance, for two reasons.

First, the examination of applications may require consultation of central authorities of other Member States when a threat to public policy, internal security, international relations or public health emerges.⁴⁶ The consulted central authorities should reply within seven days. However, in these and other cases, the 15-day time-limit may be extended to 45 days ‘when further scrutiny of the application is needed’.⁴⁷ Given the breadth of this condition, deadlines can easily be extended. In addition, the deadline starts running ‘only when it has been established that the admissibility criteria have been met, and not when the application is submitted by the applicant’.⁴⁸ Therefore, although the 2019 Visa Code reform reduced the maximum period from 60 to 45 days, consulates may still adopt a decision within a very flexible timeframe.

Second, in order to lodge an application, applicants must appear in person, as the collection of their fingerprints is required.⁴⁹ Consulates should allow an appointment within two weeks.⁵⁰ However, in practice, they may delay granting appointments or even fail to respond. The Handbook attempts to counteract the problem by inviting consulates, as well as external service providers who are authorised to collect applications, to ‘cooperate to ensure (if necessary, via staff reinforcement) that this deadline is maintained even in peak season’. The Handbook also urges taking measures ‘to avoid systematic and excessive deadlines for obtaining an appointment’ and suggests establishing ‘fast track’ procedures for categories of applicants, including businesspersons, short-term students and transportation workers, as well as ‘dissidents and/or human rights defenders who urgently need to travel’.⁵¹

Recently, the Court of Justice also acknowledged the problem. In the *Darvate* case, concerning a visa application for study purposes, the Court reiterated that the competent authorities must take a decision within the prescribed time limit and provided guidance on the suspension of the time limit linked to requests for additional information.⁵²

44 Article 23(1) Visa Code.

45 VCH para 2.1.

46 Article 22(1) Visa Code.

47 Article 23(2) Visa Code.

48 VCH para 7.2.

49 Only in ‘justified cases of urgency’, qualified as ‘situations where the visa could not have been applied earlier for reasons that could not have been foreseen by the applicant’, an appointment should be given immediately or direct access to the consulate permitted (Article 9(3) Visa Code and VCH para 2.2.1).

50 Article 9(2) Visa Code.

51 VCH paras 2.2.2–2.2.3.

52 Case C-299/23 *Darvate* [2025], ECLI:EU:C:2025:461, para 42: ‘where the information or documentation supplied in support of the application is incomplete, the competent authori-

Despite these recommendations, the problem of the unpredictability of visa decision times remains. The possibility of obtaining compensation for damage caused by delays due to the inefficiency of consulates is limited, given the variety of approaches taken by national courts to this issue, as well as the costs and obstacles to accessing the Member State's justice system remotely. The problem can only be mitigated by digitising procedures, making it possible to submit applications via accessible platforms (without 'digital barriers') and speeding up the processing of requests through the use of algorithms.⁵³

4.3.2 The (Weak) Right to Be Heard

A key component of administrative due process is that the concerned person can defend his or her interests before the public authority deciding the case. For this reason, that person should have an opportunity to be heard before a decision is taken, especially if it may be unfavourable. However, EU law does not provide for such a guarantee in the context of the visa procedure. The Visa Code states that, during the examination of the application, consulates 'may in justified cases carry out an interview with the applicant and request additional documents'.⁵⁴ Accordingly, interviews are not the rule but the exception, left to the discretion of the consulate, which decides whether to conduct one and how to justify it. Interviews are not even mandatory when the consulate intends to make an unfavourable decision, whereas fairness would require that in such cases applicants be given the opportunity to clarify their position. This implies that the right to be heard is not guaranteed as such.

It is true that, as a rule, the application is submitted in person by the applicant. Therefore, applicants interact with the consular authority to present their case at the beginning of the procedure, which they themselves initiate. Through this preliminary interaction and the documentation submitted, consulates acquire the standard information that is generally needed to decide on the case. This explains why a proper interview is only exceptionally required: it may be necessary only when the case is particularly complex and, thus, the information and the documentation submitted do not allow a final decision to be made on the visa. Only in that case the consulate 'must contact the applicant by telephone or invite him or her for a personal interview at the consulate'.⁵⁵ As specified in the Handbook, in fact, an interview may be needed, in particu-

ties are to notify the applicant within a reasonable period of the additional information that is required and set a reasonable deadline for providing it, which has the effect of suspending the time limit laid down in Article 34(1) until the competent authorities have received the additional information required'.

53 The rules laid down in the ETIAS Regulation, in the 'parallel' area of travel authorisations from visa-exempt countries, could suggest the way forward. On the legal issues raised by the digitalisation of visas, see the chapter by Niovi Vavoula in this volume.

54 Article 21(8) Visa Code.

55 VCH para 6.12, where it is specified that the interview may also be carried out using other forms of communication (e.g. video call).

lar, in order to assess a ‘general migratory risk in a given location’, as well as ‘to ascertain the reliability of the information relating to the application, especially in locations where the number of fake/false documents is high’.⁵⁶

It is precisely in such cases, however, that the absence of a genuine right to be heard creates a gap in the system of safeguards. Only a hearing would give the applicant the opportunity to make his voice heard with regard to the specific circumstances that might lead to a refusal, so as to prevent a decision from being taken solely on the basis of general assumptions that do not apply to the specific case. In this respect, the Handbook’s recommendation not to skip the interview for the sole purpose of ‘minimising processing times’ and to consider that ‘the information gathered through an interview can provide a solid basis for decisions in more difficult cases’⁵⁷ appears insufficient.

4.3.3 *The (Now Established) Right to a Reasoned Decision*

After indicating the reasons justifying the refusal, the Visa Code stipulates that:

[a] decision on refusal and the reasons on which it is based shall be notified to the applicant by means of the standard form set out in Annex VI in the language of the Member State that has taken the final decision on the application and another official language of the institutions of the Union.⁵⁸

The right to a reasoned decision is thus firmly established in the Visa Code. The Court of Justice has reaffirmed the inviolability of this guarantee in relation to visas: although Article 41 of the Charter is not addressed to Member States, the right to good administration reflects a general principle of EU law and ‘encompasses the obligation of the administration to give reasons for its decisions’.⁵⁹

Consulates fulfil the obligation to state reasons by ticking one of the 17 grounds for refusal provided in the standard form attached to the Visa Code, which only allows consular authorities to add further explanations in a section dedicated to ‘additional remarks’. The need for efficiency and standardisation in decision-making thus leads to a very concise motivation, which may be sufficient when the refusal is based on formal grounds, but much less so when the grounds are substantive.

The issue arose even before the adoption of the Visa Code in the case of *Spain v Commission* (2003),⁶⁰ where two family members of EU citizens were denied entry into Spain on the sole ground that they appeared on the list of

56 VCH para 6.12.

57 VCH para 6.12.

58 Article 32(2) Visa Code.

59 Joined Cases C-225/19 and C-226/19 *RNNS* [2020], ECLI:EU:C:2020:951, para 34.

60 Case C-409/00 *Spain v Commission* [2003], ECLI:EU:C:2003:92.

entry bans in the SIS.⁶¹ The question was whether the existence of an entry in the SIS was sufficient to justify the refusal of a visa. The Court of Justice answered in the negative: the entry ban per se does not constitute evidence that there is a security threat justifying the refusal; it is rather an element that must be corroborated by information that permits establishing whether the entry of the applicant might constitute a genuine, present and sufficient threat.⁶² Consequently, the Member State which issued the alert in the SIS ‘should make supplementary information available to the consulting State to enable it to gauge, in the specific case, the gravity of the threat’ and to decide on the visa.⁶³

However, this safeguard is not general in character, but rather depends on the existence of provisions protecting family members of an EU citizen, whose position was relevant in *Commission v Spain* and in similar cases.⁶⁴ For other third country nationals, on the contrary, the mere reference to a SIS alert is sufficient to refuse a visa, without additional information being required.

It is important to note, however, that this limited statement of reasons stems less from a weakness in due process protection than from the double standard applicable to public-policy and public-security assessments. Automatic reliance on an SIS alert in visa matters is generally permitted, whereas a fuller statement of reasons is required where the applicant enjoys enhanced protection under EU law, notably as a family member of a Union citizen.

The scope of the obligation to state reasons changes, in fact, when the refusal of a visa is not based on an entry ban, but on objections from other States concerning security, health or international relations. In such cases, the Handbook itself recommends that consular authorities provide additional information in the standard form, in cooperation with the objecting State.⁶⁵ This prescription aims to align administrative practice with the case law of the Court of Justice.

More recently, in the *RNNS* case (2020), the Court has strengthened the obligation to state reasons in two ways. First, it acknowledged that the obligation of the administration to give reasons for its decisions is an essential component of the right to good administration protected by Article 41 of the Charter: although this provision is only applicable to the EU institutions and not to Member States, it reflects a general principle of EU law.⁶⁶ Second, the obligation to state reasons also entertains a direct connection with the right to effective judicial remedy (Article 47 of the Charter). Since the refusal of a visa in *RNNS* was based on an objection raised on security grounds by

61 Case C-503/03 *Commission v Spain* [2006], ECLI:EU:C:2006:74.

62 *Commission v Spain* para 53.

63 *Commission v Spain* para 56.

64 E.g. with regard to residence permits, C-82/16 *KA* [2018], ECLI:EU:C:2018:308, paras 90–94.

65 VCH para 11.1.

66 *RNNS* para 34.

another Member State, the Court affirmed that the competent authority ‘must indicate’, in the section for ‘additional remarks’, the identity of the Member State that objected, as well as ‘the specific ground for refusal based on that objection accompanied, where appropriate, by the essence of the reasons for that objection’.⁶⁷

Moreover, in the *Perle* case (2024), the Court of Justice reiterated that the obligation to state reasons goes beyond its formal fulfilment and emphasised the connection with the duty of careful investigation and individual assessment. In order to determine whether a visa application is abusive, it is not sufficient to detect partial inconsistencies in the applicant’s plans. It is rather necessary ‘to carry out appropriate checks or require evidence’, as the actual purpose ‘cannot be presumed in the light of certain factors, but must be assessed on a case-by-case basis, following an individual assessment of all the circumstances specific to each application’.⁶⁸ Moreover, the fact that the refusal is based on the specific circumstances of the case cannot exempt the competent authorities ‘from the obligation to communicate those grounds in writing to the applicant’.⁶⁹

To conclude, the right to a reasoned decision refusing a visa can now be considered firmly established in EU law, as an essential component of the right to good administration as a general principle of law. Although the implementation of the principle still suffers in consular practice, this is, per se, an important achievement, particularly given that in some national legislations the obligation to state reasons does not apply generally to visas, particularly when reasons of public policy are at stake.⁷⁰

4.3.4 *The Right to Effective Judicial Protection*

The right to a judge is the single most crucial due process guarantee. Without the oversight of an impartial judge, the applicant is exposed to the risk of arbitrary decisions, which none of the other guarantees examined so far can effectively counteract. Yet, subjecting the refusal of a visa to judicial review means recognising that a third-country national has a meaningful legal claim against the destination country.

67 *RNNS* para 46. The indication has been incorporated into the Handbook, which clarifies that the Member State objecting to the issuing of a visa ‘should readily make the necessary information available to the Member State handling the visa application so as to ensure respect of the standard deadlines for taking decisions on visa applications’ (VCH para 11.2).

68 Case C-14/23 *Perle* [2024], ECLI:EU:C:2024:647, paras 52 and 55.

69 *Perle* para 56.

70 See e.g. Article 4, para 2, of the Italian Legislative Decree No. 286 of 1998 (Consolidated Law on Immigration), according to which, by way of derogation from the general obligation to state reasons, laid down in the law on administrative procedures, ‘for reasons of security or public order, the refusal does not have to be justified’, except for specific categories of visa applications.

In the following sections, we will examine how the Court of Justice has come to affirm the principle of effective judicial protection in this reluctant area (§ 4.3.4.1) and what problems arise from cooperation between different States in the context of visa procedures (§ 4.3.4.22).

4.3.4.1 The Recent Consolidation of the Principle

During negotiations on the 2009 Visa Code, the issue of appeals against visa refusals was the main obstacle to reaching an agreement.⁷¹ On the one hand, the European Parliament insisted on the right to judicial review as an essential guarantee.⁷² On the other hand, many national governments resisted the idea, both for practical reasons, given the risk of overloading the courts with a flood of appeals, and for reasons of principle: the subject of visas is traditionally resistant to the logic of judicial review, due to its proximity to the sphere of international relations and the central importance assigned to the principle of reciprocity.

The result of those negotiations was an elusive provision of the Visa Code, which even the 2019 reform failed to change. According to the minimalist formula of Article 32(3), applicants who have been refused a visa ‘shall have the right to appeal’ against the Member State that has taken the decision ‘in accordance with the national law of that Member State’. In addition to political resistance from governments, the ambiguity of Article 32(3) also stemmed from uncertainty about the nature of the subjective position of the person applying for the visa. Article 47 of the Charter links the principle of effective judicial protection to the existence of a right guaranteed by EU law.

Nevertheless, European institutions have interpreted the provision in the most protective sense. In 2013, the Commission opened infringement proceedings against Member States which, after the introduction of the Visa Code in 2009, had maintained appeal procedures that were administrative rather than judicial in nature.⁷³

Then, in the *El Hassani* case, the Court of Justice dispelled any doubts. It affirmed that, even if Article 32(3) leaves to the Member States the decision on the nature and conditions of the remedies available to visa applicants, national courts must interpret the Visa Code in accordance with Article 47 of

71 Gatta (note 10) 611.

72 Draft Regulation of the European Parliament and of the Council establishing a Community Code on Visas [2009], doc n. 7293/09, 2.

73 In 2013, the Commission initiated proceedings against the Czech Republic, Estonia, Finland, Hungary, Poland and Slovakia, which were closed in subsequent years following compliance by those Member States. In May 2018, the Commission referred Slovakia to the Court of Justice under Article 258 TFEU, withdrawing its appeal in January 2019. On these proceedings, see the Commission press releases MEMO/14/589 of 16 October 2014 and MEMO 14/2130 of 26 November 2014. With regard to Slovakia, see Commission Decision INFR(2012)2237 of 24 January 2019.

the Charter, which stipulates that a remedy can only be effective before an independent and impartial tribunal. Since the conditions of independence and impartiality can only be met by a judicial body and not by an administrative authority deciding on the visa, Member States are required ‘to guarantee, at a certain stage of the proceedings, the possibility to bring the case concerning a final decision refusing a visa before a court’.⁷⁴ The Court, thus, affirms the need for judicial review, by simply assuming that the Visa Code protects applicants’ rights. Although the *El Hassani* judgment does not specifically examine the nature of the applicant’s legal position, its conclusion appears consistent with our finding above: just like any rights, individual positions shaped by norms in the form of legitimate interests also require effective judicial review.⁷⁵

The question of whether the same level of protection established in *El Hassani* for Schengen visas also applies to national long-stay visas has been addressed in the *M.A.* case (2021).⁷⁶ On that occasion, the Court of Justice clarified that, when the request concerns a long-term visa not governed by EU law, it is for national law to define the level of protection, as Article 47 of the Charter cannot be applied. However, in the *M.A.* case, the visa application had been submitted for study purposes, which are covered by Directive (EU) 2016/801. Its Article 34(5) makes clear that any negative decision ‘shall be open to legal challenge (...) in accordance with national law’ and adds that the notification ‘shall specify the court or administrative authority with which an appeal may be lodged’. Although this specification is absent in Article 32(2) of the Visa Code, the Court of Justice makes no distinction. It affirms that, ‘as in the case of Schengen visas’, Member States need to define the nature and conditions of the remedies available in accordance with Article 47 of the Charter, which requires – according to the *El Hassani* formula – ‘the Member States to guarantee, at a certain stage of that procedure, a judicial appeal’.⁷⁷

In the *Vethanayagam* case (2017), the Court of Justice had come close to examining the legal position of the applicant, where it affirms that only the visa applicant (and not the sponsor) has a right to lodge an appeal against the refusal, as he or she is ‘the addressee of that decision, who has a direct and specific interest in bringing an appeal against it’.⁷⁸ However, the European judges did not venture to qualify the legal position.

The nature of the individual position is relevant on another level, concerning the scope of judicial review. In *RNNS*, the Court of Justice affirmed that the judicial review cannot be limited to a merely formal examination of the grounds of refusal. Accordingly, ‘that review must also cover the legality of that decision, taking into account all of the elements in the file, both factual

74 Case C-403/13 *Hassani* [2017], ECLI:EU:C:2017:960 para 41.

75 *Supra*, § 2.3.

76 Case C-949/19 *M.A.* [2021], ECLI:EU:C:2021:186.

77 *M.A.* para 45.

78 Case C-680/17 *Vethanayagam* [2019], ECLI:EU:C:2019:627, para 53.

and legal, on which the competent national authority based that decision’.⁷⁹ At the same time, though, the Court acknowledged that, in examining visa applications, national authorities enjoy a ‘broad discretion’ as regards both the conditions for applying the grounds of refusal and the evaluation of the relevant facts. Therefore, the judicial review is limited ‘to ascertaining whether the contested decision is based on a sufficiently solid factual basis and verifying that it is not vitiated by a manifest error’.⁸⁰

The contradiction is only apparent: judicial review, although not merely formal, cannot allow the judge to interfere with the discretionary assessment that EU law reserves to the competent national authorities. However, that discretion is still recognised in very broad terms: for the Court of Justice, it generally concerns the conditions for applying the grounds for refusal, whereas it should only apply to those grounds that we have described above as substantive (the threat to public order and the risk of illegal immigration): these are the only grounds that involve complex assessments and which, for this reason, cannot be reviewed on their merits by the judge.

It is within these terms that the statement in the *Perle* case (2024) should be understood. In that case, concerning a visa for study purposes, the issue was the extent of the powers of the reviewing court.. Article 34(5) of Directive (EU) 2016/801, as we have seen, only affirms that any negative decision ‘shall be open to legal challenge (...) in accordance with national law’. The question was whether that provision, read in the light of Article 47 of the Charter, implies a judicial review that only consists of an action for annulment or whether the court should rather have the power to substitute its own assessment for that of the competent authorities and, thus, to adopt itself a new decision.⁸¹ After emphasising the practical of the timing for the issuing of study visas and on the need for a new decision to be taken quickly if the previous one has been annulled, the Court of Justice concludes that having ‘jurisdiction only to rule on the annulment (...) is sufficient, in principle, to satisfy the requirements of Article 47 of the Charter’, provided that administrative authorities ‘are bound by the assessment contained in the judgment annulling that decision’.⁸²

This conclusion is consistent with the previous case law. If the court cannot interfere with the complex assessments involved in certain grounds for refusal, as affirmed in *RNNS*, it follows that the national court cannot substitute its own assessment for that of the consular authorities and, therefore, cannot adopt a new decision on its own: when a court annuls the flawed decision, it is up to the administration to adopt a new decision, which may again be a

79 *RNNS* para 48.

80 *RNNS* para 49.

81 Case C-14/23 *Perle* [2024], ECLI:EU:C:2024:647, para 59.

82 *Perle* para 65.

refusal, but on condition that it no longer contains the flaw identified by the court.

The same approach was consolidated in the *Darvate* case (2025). Even when the actual benefit requires compliance with time constraints, Article 47 of the Charter does not require Member States to provide for an urgent appeal procedure or to grant national courts the power to order interim measures. All that effective judicial protection requires is the power of the court to annul the incorrect decision and to obtain compliance with that decision from the administration.⁸³

Therefore, a technically accurate but deferential approach emerges. While it is sound to affirm that the court cannot substitute its own assessment for that of the consulates, what is lacking is compensation for the damage caused to the legal position of the applicant. Every right, even when the law shapes it as a legitimate interest in the correct exercise of discretionary administrative power, requires this form of protection. The Court of Justice, however, is silent on the remedy of compensation, leaving it exclusively to the Member States, on the basis of a broad understanding of the principle of procedural autonomy.

4.3.4.2 *Its (Difficult) Application to Composite Visa Procedures*

In general, the guarantees of due process are difficult to apply to composite administrative procedures that are carried out across different legal orders.⁸⁴ The case of visa procedures requiring cooperation between different States makes no exception.⁸⁵ Two schemes are relevant in this perspective: the representation arrangements and the prior consultation sub-procedure, both regulated by the Visa Code.

4.3.4.2.1 REPRESENTATION AGREEMENTS

Under Article 8 of the Visa Code, representation agreements serve to compensate for the absence of consular offices of an EU Member State in a third country with visa requirements. In this case, that Member State must conclude representation arrangements with Member States that have consulates in that country.

There are two types of representation arrangements. The first is based on a form of limited representation, whereby the agreement concerns solely

⁸³ Case C-299/23 *Darvate* [2025], ECLI:EU:C:2025:461, paras 34 and 39.

⁸⁴ The archetypal case is C-97/91 *Oleificio Borelli* [1992] ECR 1992 I-06313. The concept of composite administrative proceeding has been elaborated by Sabino Cassese, 'European Administrative Proceedings' (2008) 68 *Law and Contemporary Problems* 21–36. See also Herwig Hofmann, 'Decision-Making in EU Administrative Law – The Problem of Composite Procedures' (2009) 61 *Administrative Law Review* 199–221.

⁸⁵ See also Gatta (note 10) 613–17.

the collection of applications and the enrolment of biometric identifiers. In this case, the initial stage of the procedure is conducted by the representing Member State, while the assessment of the relevant elements and the adoption of the decision remain the prerogative of the represented Member State. Under this scheme, it is the responsibility of the latter to provide all the relevant due process guarantees.

More problematic is a second type of arrangement, according to which the represented State delegates the representing State for the purpose of examining applications and issuing visas on behalf of that Member State. Article 8(2) of the Visa Code, repealed in 2019, stipulated that '[t]he consulate of the representing Member State shall, when contemplating refusing a visa, submit the application to the relevant authorities of the represented Member State *in order for them to take the final decision* on the application'. This provision was clearly intended to attribute the responsibility for the unfavourable decision to the represented State, so that formal responsibility for the refusal would coincide with the substantive state interest to prevent the arrival of the concerned person.

However, Article 8(4)(d) – also subsequently repealed – admitted, 'by way of derogation from paragraph 2', that the represented Member State 'may authorise the consulate of the representing Member State *to refuse to issue a visa* after examination of the application'. In fact, there are arrangements that correspond to this derogatory provision, and this is where the problem arises: if the represented State delegates the representing State to carry out the entire visa processing and issuing, including the adoption of a refusal decision, in which State should that decision be challenged?

The Court of Justice addressed this issue in the *Vethanayagam* case (2017).⁸⁶ In that case, the representation arrangement in Sri Lanka between the Netherlands and Switzerland delegated to the latter the refusal of visas and the processing of appeals. Two diametrically opposed positions emerged in that context. The Czech, Danish, Estonian, French, Netherlands, Polish and Swiss governments, along with the Commission, submitted that such a bilateral representation arrangement, concluded under Article 8(4)(d), had the effect of transferring both the decision-making power and the responsibility for dealing with subsequent appeals to the *representing* State. On the contrary, the applicants and the Italian Government argued that the final decision should be attributed to the *represented* State, which would thus be competent to deal with appeals against the refusal.

Advocate General Sharpston supported the latter view. In her opinion, she submitted that the *represented* State remains competent for any appeal against the refusal decision on various grounds, as the representing Member State only acts on its behalf. By contrast, attributing jurisdiction over appeals to the representing State would run into a few drawbacks. First, it would be

86 Case C-680/17 *Vethanayagam* [2019], ECLI:EU:C:2019:627.

inconsistent with the objective of the Visa Code to facilitate access to consulates, as it would require applicants ‘to expend disproportionate effort in order to have access to judicial review’.⁸⁷ Second, although Switzerland is fully associated with the implementation of the Visa Code as it is a development of the Schengen *acquis*,⁸⁸ that solution would prevent national Swiss courts from addressing a request for a preliminary ruling to the Court of Justice so as to ensure uniform application and interpretation of the Visa Code. Third, the equal treatment of applicants seeking admission to the same State territory would be affected, as the competent national judicial authorities would differ depending on whether a Member State has its own consular offices in the third country or relies on representation agreements with other States.⁸⁹

The Court of Justice, however, upheld the opposite view, relying on two arguments. Firstly, the wording of Article 32(3) of the Visa Code provides that ‘appeals shall be conducted against the Member State that has taken the final decision’ and, thus, confirms that it is for the representing State which takes that decision to deal with appeals.⁹⁰ Secondly, although not a Member State of the European Union, Switzerland must process the appeal in a way that is consistent with the fundamental right to effective judicial protection, as it is both ‘a general principle of EU law stemming from the constitutional traditions common to the Member States’, now reaffirmed by Article 47 of the Charter, and a principle ‘enshrined in Articles 6 and 13 of the ECHR’, to which Switzerland is a party.⁹¹

Although the principle of mutual trust is not mentioned in the ruling, the implicit assumption is that representation arrangements allow for a comparable level of protection of fundamental rights to be presumed, as they can only be concluded with other Member States or third States associated with the Schengen *acquis*. The other implicit assumption seems to be that only a court belonging to the same legal system as the decision-making authority can carry out a substantive judicial review and that this, in turn, prevents jurisdictional interference.

The amendments to Article 8 of the Visa Code, adopted after the *Vethanayagam* ruling,⁹² follow the approach of the Court of Justice. Member States are left free to agree, through representation arrangements, on the solutions they consider most appropriate and functional to efficient visa processing. The fact that applicants may find it more difficult in practice to access

87 Case C-680/17 *Vethanayagam* [2019], Opinion of AG Sharpston, para 81.

88 Visa Code, Recital 34.

89 Opinion of AG Sharpston, paras 82–83.

90 *Vethanayagam*, paras 70–73.

91 *Vethanayagam* para 82.

92 By Article 1(6) of Regulation (EU) 2019/1155.

judicial protection in the representing State is a real concern. However, this is unlikely to alter the current balance, provided that judicial protection remains accessible and effective.

4.3.4.2.2 THE PRIOR CONSULTATION SUB-PROCEDURE

Even more complex is the problem arising from the prior consultation provided for as a possible stage of the procedure under Article 22 of the Visa Code. According to this provision, a Member State may consult the central authorities of other Member States in relation to nationals of specific third countries or specific categories of such nationals in order to assess whether a visa applicant may represent a threat to public policy, internal security, international relations or public health.⁹³ If the central authorities consulted do not reply within a week, the silence means that they have no grounds for objecting to the issuing of the visa.⁹⁴ If an objection is raised, it becomes decisive, as the Schengen visa is denied. The only alternative is the issuance of a visa with limited territorial validity.⁹⁵

The issue arising from this prior consultation regime concerns the right to effective judicial protection: how can this right be guaranteed in relation to the objection raised by a Member State other than the one that refuses the visa? Which Member State should carry out a judicial review of the grounds on which the objection is based?

The question has been addressed in the mentioned *RNNS* case (2020). In his opinion, Advocate General Pikamäe proposed two options, both considered compatible with EU law. A first option is to make the remedy available in the Member State that raised the objection. The applicant would have to lodge an ‘ancillary action’ in that Member State, while the main proceedings initiated in the Member State that adopted the refusal decision would be suspended pending the outcome of the incidental appeal, ‘in the interest of the consistency and effectiveness of judicial protection’.⁹⁶ However, the Advocate General does not consider this option as the most appropriate for guaranteeing effective judicial protection, as it would entail the burden of a second appeal in a Member State other than that of his or her destination.

The alternative option would be based on the ‘one-stop’ principle, referred to in more general terms in recital 7 of the Visa Code. Judicial protection would be concentrated in a single Member State, namely the one ‘that has taken the final decision’, in accordance with Article 32(3) and the reasoning of the Court in the *Vethanayagam* ruling. In order to allow for a substantive review of the objection raised in the prior consultation sub-procedure, the

⁹³ Article 22(1) Visa Code.

⁹⁴ Article 22(2) Visa Code.

⁹⁵ Article 25(1)(a)(ii) Visa Code.

⁹⁶ Joined Cases C-225/19 and C-226/19 *RNNS* [2020], Opinion of AG Pikamäe, para 133.

State that raised the objection would have to cooperate by intervening in the court proceedings initiated in the Member State responsible for the final decision or by transferring the relevant information to its central authorities so as to make it available to the competent court.⁹⁷

The Court of Justice, however, rejected the ‘one-stop’ solution recommended by the Advocate General. The basic argument lies in the inherent limitation of ‘transnational’ judicial review, which remained implicit in the *Vethanayagam* judgement. This time, the Court explicitly affirms that ‘the substantive legality of an objection raised by a Member State to the issuing of a visa cannot be reviewed by th[e] courts’ of the Member State which adopted a final decision.⁹⁸ Those courts can only carry out a ‘procedural review’, in this case with the aim of ascertaining whether the procedure of prior consultation has been applied correctly, whether the applicant was correctly identified and whether the obligation to state reasons has been respected.⁹⁹ Therefore, just like in *Vethanayagam*, the Court rules out the possibility for the courts of a Member State to review the ‘substantive legality’ of an act adopted by another Member State (or State associated with the Schengen *acquis*).

The only alternative is, thus, the option of an ‘ancillary action’. Despite the burden of a second appeal that it places on the applicant, the Court clearly points to the solution, where it requires the authorities of the Member State which adopted the final decision ‘to indicate the authority which the applicant may contact in order to ascertain the remedies available to that end in that other Member State’.¹⁰⁰

At the same time, however, the Court seems to leave Member States room for creativity. A concluding passage of the judgment unexpectedly admits the other option as well: the Member State which adopts a final decision, in fact, is free:

to establish procedural rules which help to ensure that the rights of defence and the right of visa applicants to effective remedies are guaranteed, such as a request for information to the competent authorities of the Member States that objected to the issuing of a visa, *the possibility for*

97 Opinion of AG Pikamäe, para 130. Under this option, the Advocate General recommends that, in order to protect the confidentiality of the information provided, the Member State should require the judicial authority to apply – in accordance with the formula already applied by the Court in previous cases, including *Kadi* (Joined Cases C-402/05 P and C-415/05 P *Kadi* [2008], EU:C:2008:461, para 344) – ‘techniques which accommodate, on the one hand, legitimate security concerns about the nature and sources of information taken into account in the adoption of the [decision refusing a visa] concerned and, on the other, the need sufficiently to guarantee to an individual respect for his procedural rights, such as the right to be heard and the requirement for an adversarial process’ (para 106).

98 *RNNS* para 52.

99 *RNNS* para 51.

100 *RNNS* para 52.

*those authorities to intervene in the appeal procedure under Article 32(3) of the Visa Code or any other mechanism ensuring that the appeal brought by those applicants cannot be dismissed definitively without their having had the practical possibility of exercising their rights.*¹⁰¹

Here, the ‘one-stop’ idea resurfaces through the hypothesis that the authorities of the objecting State may intervene in the appeal proceedings initiated in the State that adopted the final decision, if the latter so establishes.

Therefore, for the Court of Justice, the limit of transnational judicial review is not structural and therefore insurmountable. Rather, it is a limit that the Court imposes on itself in order to respect the procedural autonomy of Member States. If, in exercising this autonomy, Member States decide to remove that limit, EU law does not prevent them from doing so. The principle of procedural autonomy therefore seems to be the cornerstone of this case law on the application of the right to effective judicial protection in relation to composite visa procedures.

4.4 Conclusion

This analysis has shown that, in the field of EU visa law, due process operates as a partial counterbalance to the broad discretion exercised by Member States. The grounds for refusal, in particular the risk of irregular migration and threats to public order, are broadly interpreted and subject to deferential judicial review, leaving applicants with limited substantive protection. Due process guarantees, however, have gradually gained consistency. Although the right to a timely decision and the right to be heard remain weak and unevenly applied in consular practice, the right to a reasoned decision is now well established, and the principle of effective judicial protection has been consolidated, even if its application to composite procedures remains complex and fragmented. Overall, the EU legal framework continues to reflect a structural tension between sovereignty and rights, in which procedural safeguards serve less as a tool of empowerment for applicants than as a empowerment for applicants check on executive discretion.

101 *RNNS* para 54 (emphasis added).

5 Digitalising the Visa Procedure

Administrative Efficiency at the Expense of Fundamental Rights?

Niovi Vavoula

5.1 Introduction

Over the past few decades, there has been a notable shift towards digitalisation in migration, asylum and border management at EU level, both by the EU and by individual Member States. This shift is characterised by a growing reliance on modern technologies, such as biometry and large-scale data processing and algorithms. This digital experimentation is tested on non-EU nationals who have arguably very limited leverage, power and opportunities to contest the implementation of these technologies due to their non-participation in policy making. In the administration of visas in particular, digitalisation has progressively become prominent, marked by the establishment and operation of a large-scale IT system that allows the collection, storage and further processing of Schengen visa data through the Visa Information System (VIS), the legal basis of which is Regulation 787/2009,¹ as reformed by Regulation 2021/1134.² More recently, the adoption of the EU digital visa Regulation has added one more layer of digitalisation requiring applicants to submit their visa applications online.³ So far, the visa procedure is not entirely digitalised, particularly as regards the assessment of the application, including the supporting documentation and

1 Regulation (EC) 767/2008 of the European Parliament and of the Council of 9 July 2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) [2008] OJ L 218/60, as amended by 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) [2009] OJ L 243/1 (VIS Regulation).

2 Regulation (EU) 2021/1134 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EC) No 810/2009, (EU) 2016/399, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861, (EU) 2019/817 and (EU) 2019/1896 of the European Parliament and of the Council and repealing Council Decisions 2004/512/EC and 2008/633/JHA, for the purpose of reforming the Visa Information System [2021] OJ L 248/11 (revised VIS Regulation).

3 Regulation (EU) 2023/2685 of the European Parliament and of the Council of 22 November 2023 amending Council Regulation (EC) No 1683/95 as regards the digitalisation of the visa procedure [2023] OJ L 2023/2685.

materials. Consequently, some Member States are further experimenting with human decision-making assisted by algorithms and Artificial Intelligence (AI) – the aim is to categorise applicants in terms of riskiness and thus reallocate human resources to the examination of the most difficult applications.⁴

Against this backdrop, this chapter aims to map the digitalisation of the process and critically analyse the extent to which the incorporation of digital or algorithmic components increases administrative efficiency at the expense of the fundamental rights of visa applicants. To that end, to the more in-depth examination of the most difficult applications the chapter analyses the shift towards digitalisation in the EU visa policy by focusing on three inter-related developments: the operation of the VIS (Section 5.2), the digitalisation of the visa application (Section 5.3) and the use of algorithms to assist human decision-making on a visa application (Section 5.4). As regards the latter, emphasis is placed both on future developments in the EU visa policy, as well as the lessons learnt from the use of such algorithms at the national level through the case study of the Netherlands and, to a lesser extent, of the United Kingdom (Section 5.4). The conclusion in Section 5.6 provides a synopsis of the findings of the research.

5.2 Digitalisation of Visa Procedures – the Case of the VIS

The common visa policy comprises a set of harmonised rules governing: the Visa Code, which establishes procedures and conditions for issuing Schengen visas for intended stays not exceeding 90 days in any 180 days, replacing a complex web of Schengen and EU visa rules;⁵ the ‘black’ and ‘white’ lists of countries, which are periodically revised in view of the, not uncommon, visa waivers;⁶ rules on a uniform visa format;⁷ and the VIS. In turn, the conditions for issuing long-term visas, issued to stay in a Schengen country for between 91 days and a year for various reasons (work, study, etc.), and residence permits, to reside in a Schengen State for more than 90 days, are national competences, except regarding certain purposes of stay.⁸

4 For an overview see Elspeth Guild, Valsamis Mitsilegas and Niovi Vavoula, *Lawless Borders – The Rule of Law Deficit in Immigration Control* (Bristol University Press 2025).

5 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) [2009] OJ L 243/1, as amended.

6 As of May 2025, 107 countries and regions are included in the ‘black-list’.

7 Regulation (EU) 2017/1370 of the European Parliament and of the Council of 4 July 2017 amending Council Regulation (EC) No 1683/95 laying down a uniform format for visas [2017] OJ L 198/24.

8 For example, see Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L 251/12; Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents [2003] OJ L 16/44; Council Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment [2009] OJ L 155/17; Directive 2011/98/EU of the European Parliament and of the Council of 13

The VIS was conceptualised in the aftermath of the 9/11 events⁹ to modernise the administration, issuance and checks of short-stay visas by enabling the exchange of personal data on visa applicants.¹⁰ Its overarching aim is to assist in the development of the common EU visa policy. However, no less than seven wide-ranging sub-purposes are set out: i) facilitating the visa application procedure; ii) preventing ‘visa shopping’; iii) facilitating the fight against fraud; iv) facilitating checks at external border crossing points and within national territory; v) assisting in the identification of persons that do not meet the requirements for entering, staying or residing in a Member State; vi) facilitating the implementation of the Dublin mechanism; and vii) contributing to the prevention of threats to Member States’ internal security.¹¹ The latter objective led to the adoption of a separate instrument: Decision 2008/633/JHA (VIS Decision)¹² laid down the conditions and procedure by which visa data may be consulted by law enforcement authorities and Europol.¹³ The VIS Regulation requires national visa authorities to store in a centralised database certain alphanumeric and biometric data (facial images and fingerprints of applicants above the age of 12)¹⁴ on all Schengen visa

December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L 343/1; Directive 2014/36/EU of the European Parliament and of the Council of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers [2014] OJ L 94/375; Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer [2014] OJ L 157/1; and Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing [2016] OJ L 132/21.

- 9 Anneliese Baldaccini, ‘Counter-Terrorism and the EU Strategy for Border Security: Framing Suspects with Biometric Documents and Databases’ (2008) 10(1) *European Journal of Migration and Law* 31, 32.
- 10 Council Decision 2004/512/EC of 8 June 2004 establishing the Visa Information System (VIS) [2004] OJ L 213/5.
- 11 On the ancillary character of law enforcement access see Case C-482/08 *UK v Council* [2010] ECR I-10413.
- 12 Council Decision 2008/633/JHA of 23 June 2008 concerning access for consultation of the Visa Information System (VIS) by designated authorities of Member States and by Europol for the purposes of the prevention, detection and investigation of terrorist offences and of other serious criminal offences [2008] OJ L 218/129 (VIS Decision). The need for a separate EU instrument is attributed to the then pillar structure.
- 13 See Niovi Vavoula, ‘Consultation of EU Immigration Databases for Law Enforcement Purposes: A Privacy and Data Protection Assessment’ (2020) 22 *European Journal of Migration and Law* 139.
- 14 Regulation (EC) 390/2009 of the European Parliament and of the Council of 23 April 2009 amending the Common Consular Instructions on visas for diplomatic missions and consular posts in relation to the introduction of biometrics including provisions on the organisation

applicants¹⁵ and records of visas issued, revoked, annulled, extended or refused. The data are stored for five years (in case an application is refused) or for five years following the expiration of the visa (in case of successful applications).¹⁶ A primary function is to facilitate the management and examination of Schengen visa applications and to assist visa, border, asylum and migration authorities in rapidly and effectively checking the necessary information on third-country nationals who need visas to travel to the European Union. Whereas in the past someone whose visa application had been rejected by one country's consulate could continue applying to other consulates (visa shopping), the VIS prevents this, as it stores information on previous applications, and on reasons for rejections. The VIS may be accessed extraterritorially by consulates, at border checkpoints regulating mobility, and on national territory for immigration checks, asylum applications and law enforcement purposes. As Glouftsiou has pointed out, the VIS 'allows for the digital interconnection of different space, where international mobility is filtered – for example, airports, land borders and consulates of the Member States in third countries where individuals apply for Schengen visas – as well as for the coordination of control practices enacted in those spaces'.¹⁷

Regulation (EU) 2021/1134 has extended the personal scope of the VIS to long-stay visa applicants and residence permits applicants, whose personal data were not collected by an EU IT system before.¹⁸ The revised rules lowered the minimum fingerprinting age from 12 to six years old. Additional purposes to the system were added: (a) contributing to the correct identification of individuals; (b) assisting in the identification of persons who have gone missing, were abducted or were victims of trafficking; and (c) supporting the objectives of SIS as regards alerts on third-country nationals subject to refusals of entry, persons wanted for arrest, surrender or extradition purposes, missing persons or vulnerable persons, persons sought to assist with judicial procedures and persons wanted for discreet checks, inquiry checks or specific checks. Bizarrely, next to the purpose of 'prevention of threats to the internal security of any of the Member States', based on which the consultation of VIS data for law enforcement purposes is foreseen, is a separate objective to 'contribute to the prevention, detection and investigation of terrorist offences or of other serious criminal offences'.¹⁹ Transfers of VIS data to third countries

of the reception and processing of visa applications [2009] OJ L131/1. See also Visa Code, art 13.

15 Including 'transit', 'airport transit' (of a limited territorial validity) and 'long-stay' (valid concurrently as short-stay visas).

16 VIS Regulation, art 23.

17 Georgios Glouftsiou, 'Designing Digital Borders – The Visa Information System (VIS)' in Marijn Hoijtink and Matthias Leese (eds), *Technology and Agency in International Relations* (Routledge 2019) 165.

18 Revised VIS Regulation, art 22a.

19 *ibid* art 2(1).

are permissible for the purposes of return and resettlement, provided that certain conditions are fulfilled.²⁰

Most importantly, the personal data provided by Schengen and long-stay visa and residence permits applicants will be automatically checked against the other IT systems,²¹ Europol data and specific Interpol databases, namely the Stolen and Lost Travel Document database (SLTD) and the Interpol Documents Associated with Notices databases (TDAWN). This cross-checking will be facilitated by one of the interoperability components – the European Search Portal (ESP).²² Furthermore, the automatic check will take place against so-called specific risk indicators, enabling profiling of Schengen visa applicants only;²³ and a dedicated watchlist of persons suspected of terrorist or serious crime.²⁴ Whereas automated processing of applications against databases and the watchlist will assist in identifying known individuals, specific risk indicators aim to identify persons who are unknown to the competent national authorities. Flagging an applicant as a potential risk may occur not because of any specific actions he or she has engaged in, but because he or she displays particular category traits which are pre-determined as risky.

The responsibility to define, establish, assess in advance, implement, evaluate, revise and delete the so-called specific risk indicators lies with the ETIAS (European Travel Information and Authorisation System) Central Unit, set up within the EBCG (European Border and Coast Guard) Agency.²⁵ The Commission must first define the risks through a delegated act, taking into consideration statistics from EES and VIS, information from Member States, epidemiological surveillance information and risk assessments provided by the European Centre for Disease Prevention and Control and disease outbreaks reported by the World Health Organization.²⁶ This should result in a set of characteristics of specific groups of travellers associated with these

20 *ibid* art 33.

21 As regards the SIS, cross-checking will take place against all alerts except those concerning objects for seizure or use as evidence in criminal proceedings. With regard to the EES, the VIS must verify whether the applicant is being, or has previously been, reported as an overstayer or as having been refused entry, or whether the intended stay of the applicant will exceed the maximum duration of authorised stay within the Member States, irrespective of any possible stays authorised under a national long-stay visa or residence permit. With ETIAS, the check will concern whether a travel authorisation has been issued, refused, annulled or revoked, or the data provided correspond to data in the ETIAS watchlist. The query will check whether the applicant is registered in Eurodac or Europol databases. The VIS will also verify whether the applicant has been convicted in the previous 25 years for terrorist offences, or during the previous 15 years for other serious criminal offences.

22 Revised VIS Regulation, art 9a and 22b.

23 *ibid* art 9j.

24 *Ibid* art 9a and 22b.

25 *ibid* art 9j(6).

26 *ibid* art 9j(2).

risks.²⁷ The Commission must also specify through an implementing act the risks on which the indicators must be based. The risks, which must be reviewed every six months at least, will assist the ETIAS Central Unit to establish a set of indicators which are based on demographic and socio-economic characteristics of visa travellers, consisting of one or several of: (a) the age range, sex and nationality; (b) the country and city of residence; (c) the Member States of destination; (d) the Member State of first entry; (e) the purpose of travel; and (f) the current occupation (job group).²⁸ The specific risk indicators must be targeted and proportionate.²⁹ They may under no circumstances be based solely on a person's sex or age, nor based on sensitive data, such as a person's colour, race, ethnic or social origin, genetic features, language, political or any other opinion, religion or philosophical belief, trade union membership, membership of a national minority, property, birth, disability or sexual orientation. It is unclear whether any of the two non-legislative acts have been adopted and if adopted they are not publicly available.

Even if automated processing does not reveal any hits with other information systems or databases or algorithm, the visa application will be processed manually at national level and there is no automated positive decision-making. Overall, a very complex procedure will ensue, involving different national authorities and potentially Europol depending on where the hit comes from (e.g. if the hit derives from a SIS alert then the SIRENE Bureau will have to be consulted)³⁰ and in general the hits are distinguished between the immigration-related and the law enforcement ones.

5.3 Appraising the VIS from a Fundamental Rights Perspective

The establishment, operation and reconfiguration of the VIS has attracted criticism regarding its compatibility with fundamental rights, primarily the rights to respect for private life and personal data protection, as enshrined in Articles 7 and 8 respectively of the EU Charter of Fundamental Rights. This subsection will provide an anthology of some key challenges of the VIS as regards these rights, focusing on the (expanded) personal scope of the database, the categories of personal data processed, law enforcement access and automated processing of visa data for the examination of visa applications.

5.3.1 Personal Scope

The extension of the VIS to long-stay visa and residence permits applicants raises concerns as to whether this was a justified and proportionate approach.

²⁷ *ibid* art 9j(4).

²⁸ *ibid* art 9j(3).

²⁹ *ibid* art 9j(5).

³⁰ *ibid* art 9c–9g.

In any case, it constitutes an indirect partial harmonisation of the national rules on the issuance of residence permits and long-stay visas.

As the European Agency for Fundamental Rights (FRA) has indicated, the characteristics of those living in the European Union on a long-term or permanent basis are considerably different from those of tourists, students, researchers or business travellers. In fact, the longer the residence of a third-country national, the more their status should come closer to that of an EU national.³¹ The official justification has been that this expansion addresses the difficulty in ascertaining the authenticity of a document and its legitimate relationship with its bearer, given the lack of harmonisation of documents.³² The option to increase the security of documents was discarded because ‘it would not be helpful with improving security through better information exchange’, which is the second objective of the centralised storage of personal data related to long-stay visas and residence permits.³³ In particular, the Impact Assessment states that

in order to be able to assess whether the person could pose a threat to the security of the Member States or whether he could be an identity fraudster, it is important to have access to relevant information on the previous applications made by that person and which were rejected by other Member States on grounds of national security or because of established fraudulent claims (of identity or documents).³⁴

The relevance of information on prior applications for a comprehensive assessment of the risk posed by a third-country national wishing to enter the European Union is undeniable. Nonetheless, the Feasibility Study could not quantify the frequency or consequences of partially informed decisions. There is no clear picture as to how many security or migration threats could have been avoided.³⁵ The lack of evidence calls into question the necessity for the centralised storage of data on *all* long-stay and residence permit applicants. One idea was to use the VIS to store the personal data of third-country nationals entering the European Union with a long-stay visa or residence permit *for the first time*.³⁶ The VIS

31 FRA, ‘The Revised Visa Information System and its Fundamental Rights Implications – Opinion of the European Union Agency for Fundamental Rights’ (30 August 2018) 25.

32 *ibid.*

33 Commission, ‘Staff Working Document – Impact Assessment accompanying the document Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) No 767/2008 concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) and Regulation 810/2009 establishing a Community Code on Visas (Visa Code)’ (Impact Assessment for revised VIS SWD(2018) 195 final, 45.

34 *ibid.* 19.

35 Commission, ‘Feasibility Study to Include in a Repository of Documents for Long-stay Visas, Residence and Local Border Traffic Permits’ (2017) 60.

36 FRA (n 31) 28.

would store only short-stay and long-stay visas, and Member States would have a duty to issue a visa (for short or long stay) to those third-country nationals who now enter the European Union with a residence permit issued at diplomatic or consular representations. Member States could still request information on residence permit holders through bilateral cooperation. Another idea from the European Data Protection Supervisor (EDPS) was to store information only of individuals whose application is refused because they have been considered to pose a threat to public policy, internal security or public health or have presented documents which were fraudulently acquired, falsified or tampered with and whose data correspond to data stored in another system or where doubts remain concerning their identity.³⁷ These somewhat contradictory approaches could work to achieve the stated purposes, therefore centralised storage without exceptions or limitations raises concerns regarding its compatibility with the principle of proportionality; a similar effect could have been achieved by alternative and less intrusive measures. The approach preferred could lead to the conclusion that the stated objectives were no more than a pretext to expand surveillance of movement to cover virtually all third-country nationals.

5.3.2 Personal Data Processed

As regards the personal data processed in the VIS, there exist various data protection challenges, particularly as regards data quality. The reliability of visa data is affected by spelling errors, lack of documents or lack of training – key issues affecting the VIS.³⁸ Based on interviews with diplomatic mission and consular staff, as well as external service providers, the FRA found that the VIS sometimes generates wrong matches (43% of the respondents) or contains inaccurate or out-of-date data (53% of the respondents).³⁹ Similar findings emerged from interviews with border guards, with 60% of the 139 respondents saying the data is ‘sometimes’ inaccurate, incorrect or not updated and 9% indicating this is ‘often’ the case.⁴⁰ Border guards also said that persons who should be included in the VIS, as they have applied for a visa frequently, could not be found in the system.⁴¹ Similarly, the Commission’s evaluation of the VIS noted ‘missing information’ from application files, which may be responsible for delays at external border crossing points.⁴²

37 EDPS, ‘Opinion 9/2018 on the Proposal for a New Regulation on the Visa Information System’ (12 December 2018) 10.

38 See Niovi Vavoula, *Immigration and Privacy in the Law of the European Union: The Case of Information Systems* (Brill 2022) 279–287.

39 FRA, ‘Under Watchful Eyes: Biometrics, EU IT Systems and Fundamental Rights’ (2018) 82.

40 *ibid* 83.

41 *ibid*.

42 Commission, ‘The implementation of Regulation (EC) No 767/2008 of the European Parliament and of the Council establishing the Visa Information System (VIS), the use of fingerprints at external borders and the use of biometrics in the visa application procedure/

The processing of two categories of biometric data – fingerprints and facial images – for verification of one’s identity also raises data protection concerns. In *A, B and P*, concerning the processing of biometric data of Turkish nationals in a Dutch database, the Court of Justice of the European Union (CJEU) indirectly accepted the processing of biometric data in VIS without further reflection.⁴³ However, as the evaluation of the VIS indicates, many difficulties occurred in connection with the quality of the applicants’ fingerprints, due to parameters such as climate, age, dust, hard manual labour and work with chemicals.⁴⁴ Although the VIS Regulation includes a provision distinguishing between factual (e.g. not yet technologically feasible) and legal (e.g. exemption due to age restrictions) reasons for fingerprints not being provided,⁴⁵ it is reported that Member States have not always acted in compliance with the rules on how to indicate the relevant reasons, which affects the quality and accuracy of the data stored, and thus the reporting on it as well.⁴⁶ This may adversely affect the final decision on a visa application and any subsequent applications. Indeed, the evaluation indicates ‘a slow general increase of the relative proportion of cases in which a visa was refused when it was physically impossible to collect fingerprints in the total number of visas refused’.⁴⁷ This may be interpreted as meaning that the registration of fingerprints is an indication of the trustworthiness of the applicant, but of course other considerations play an important role in the assessment of an application. The future reliability of biometric data in VIS is also problematic when considering that the fingerprinting threshold is the age of six and it is unclear whether children’s fingerprints, which may change as children grow older, can lead to increased false matches.⁴⁸

5.3.3 *Law Enforcement Access*

Another issue that has attracted criticism concerns law enforcement access to VIS data. Until the 2021 revision, the proportionality concerns on the VIS rules regulating law enforcement access were particularly acute: although certain safeguards were included (e.g. the existence of specific conditions regarding access and the verification of the conditions by a designated body, a central access point), the relevant provisions allowed for extensive

REFIT Evaluation’ (COM(2016) 655 final; ‘Staff Working Document – Evaluation of the implementation of Regulation (EC) No 767/2008 of the European Parliament and Council concerning the Visa Information System (VIS) and the exchange of data between Member States on short-stay visas (VIS Regulation) / REFIT Evaluation’ SWD(2016) 328 final, 33.

43 Case C-70/18 *Staatsecretaris van Justitie en Veiligheid v A, B and P* ECLI:EU:C:2019:823.

44 Commission (n 42) 105.

45 VIS Regulation, art 8(5).

46 Commission (n 42) 106.

47 *ibid* 112–113.

48 Vavoula (n 38) 285–287.

interpretation.⁴⁹ In particular, the independence of the central access point as a verifying authority has been uncertain. With regard to the procedure for consulting the data, the designated authorities had to submit a reasoned electronic request to an authority (a Central Access Point or in the case of Eurodac the Verifying Authority) to ascertain that the conditions for obtaining access were met. Nevertheless, this procedure has not been in line with the criteria set out in *Digital Rights Ireland*,⁵⁰ *Tele2*⁵¹ and Opinion 1/15,⁵² where the CJEU required that law enforcement access to the data depend on prior review carried out by a court or an independent administrative body. Considering that requesting and verifying authorities may be part of the same law enforcement agency (for example, different departments within a police agency), the independence and objectivity of the decision of necessity of access has been jeopardised. The rules on Europol access and the transfer of data to third parties were also unclear, due to the lack of specific conditions for access as in the case of national law enforcement authorities. Moreover, the inherent risk of false matches, increased with a large database like the VIS, has meant that there have been serious repercussions for individuals wrongfully implicated in criminal investigations.

Following the 2021 revision, the conditions and procedure for law enforcement access are more aligned to the rules on law enforcement access found in the legal instruments of other IT systems. First, greater emphasis is placed on the independent verification of law enforcement requests, although it remains difficult to ensure this takes place in an adequate manner. Second, law enforcement access to the records of children below the age of 14 is prohibited, unless it is in the best interests of the child. However, the ‘best interests of the child’ notion leaves wide room for interpretation, and it remains to be seen how this provision will be used in practice. It is also important to acknowledge that data of residence permit holders for a period of ten years are not available for law enforcement access.⁵³

Yet, the revised VIS Regulation allows barrier-free law enforcement access for the purposes of the identification of persons who have gone missing, were abducted or were identified as victims of trafficking in human beings.⁵⁴ Arguably, a speedy and simplified access process is needed here, as these persons need assistance and their legitimate interests must be protected. Essentially,

49 *ibid* 290–298.

50 Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others* ECLI:EU:C:2014:238, para 62.

51 Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och Telestyrelsen, and Secretary of State for the Home Department v Tom Watson, Peter Brice, Geoffrey Lewis* ECLI:EU:C:2016:970, para 120.

52 Opinion 1/15 ECLI:EU:C:2017:592, para 202.

53 Revised VIS Regulation, art 6(2e).

54 *ibid* art 22p.

this clause distinguishes human trafficking from other offences; in cases of trafficking, it is expected that law enforcement authorities will have recourse to simplified rules, but in connection with the victims, not for the identification of perpetrators or accomplices. Wider access to contribute to investigating specific cases of human trafficking, which would have circumvented these conditions, was rightly discarded as an option.⁵⁵ However, the clause may potentially be expanded to cover other circumstances in the future, leading to the watering down of safeguards. Abuse of the clause to take in the related – yet distinct – case of smuggling cannot be excluded either.⁵⁶

5.3.4 *Automated Processing of Visa Applications*

Important legal challenges are raised by the automated processing of visa data in the examination of visa applications. First, the vague term ‘algorithm’ is preferred, perhaps to avoid the loaded term of ‘AI’ or as leaving this issue open for introducing AI in the operationalisation of the systems in the future. Even the term algorithm has been contested: Frontex has insisted that it would actually be more appropriate to refer to ‘filtering queries’ than algorithms, and that no sophisticated analysis methods or any form of AI are involved in the risk assessment.⁵⁷ As Zandstra and Brouwer stress, this approach is at odds with the very wording of the legal instruments and exemplifies the politics around the use of AI in this field, aimed at blurring the landscape and ultimately obstructing scrutiny.⁵⁸

Second, automated processing of visa applications raises concerns about discrimination against groups of visa applicants. Whereas the use of protected characteristics is not permissible, specific groups of travellers are likely to be disadvantaged compared to others based on proxies of such characteristics (namely age, sex, nationality or social origin and combinations thereof), resulting in indirect discrimination and a presumption of ‘guilt’.⁵⁹ The principle of individualised assessment of applications and the duty to give reasons, an

⁵⁵ FRA (n 31) 70.

⁵⁶ Vavoula (n 38) 300.

⁵⁷ Charly Derave, Nathan Genicot and Nina Hetmanska, ‘The Risks of Trustworthy Artificial Intelligence: The Case of the European Travel Information and Authorisation System (2022) 13(3) European Journal of Risk Regulation 389.

⁵⁸ Timo Zandstra and Evelien Brouwer, ‘Fundamental Rights at the Digital Border: ETIAS, the Right to Data Protection, and the CJEU’s PNR Judgment’ (*Verfassungsblog*, 24 June 2022) <https://verfassungsblog.de/digital-border/> accessed 5 May 2025.

⁵⁹ For an analysis see Niovi Vavoula, ‘Tr-AI-nsforming Migration, Asylum and Border Management in the EU: The Roles of the AI Act, Interoperable Large-scale IT Systems and EU Migration Agencies’ (Computer Law & Security Review, forthcoming 2026); Niovi Vavoula, ‘Algorithmic Profiling and Ineffective Remedies: The Cases of ETIAS and VIS’ (2023) 3 ASYL 13; Alexandra Karaiskou and Niovi Vavoula, ‘Extrajudicial and Judicial Remedies in Algorithm-Assisted Decision-Making: The Case of EU IT Systems for Migration and Security’ (2026) 63(2) Common Market Law Review 371.

essential requirement of good administration as a general principle of EU law, enshrined in Article 41(2c) of the EU Charter of Fundamental Rights, may be compromised to the extent that adverse decisions are adopted primarily on the basis of such profiles.⁶⁰ Moreover, even if the facts of each case are taken into consideration during the manual assessment, the automated “hits” produced by ETIAS or the revised VIS are likely to impair independent human evaluation.⁶¹ As documented by empirical studies, human decision-makers are prone to interpret information in line with their pre-existing biases, especially if their judgment is corroborated by automated recommendations, and to disregard contravening indications, eventually leading to selective algorithmic adherence and empty cycles of manual assessments. The potential of anchoring biases, whereby the human decision-maker is heavily influenced by the first piece of evidence available to them, which can be the algorithmic output, cannot be sidelined either.⁶²

In light of the significant concerns regarding the use of automated processing of visa data, seeking effective judicial remedies in line with Article 47 of the EU Charter of Fundamental Rights is of paramount importance also for safeguarding the rule of law. In accordance with the Visa Code, refused visa applicants have the right to appeal against the refusal, annulment or revocation of travel authorisations or visas in the Member State that issued them according to its national law.⁶³ As acknowledged by the CJEU in *Ligue des droits humains*, Member States must ensure that the affected person can understand how those criteria and those programmes work, without necessarily disclosing to him/her what these are during the administrative procedure, so that he/she can ‘decide with full knowledge of the relevant facts whether or not to exercise his or her right to [...] judicial redress’.⁶⁴ The CJEU also

60 Karaiskou and Vavoula (n 59); See also Case C-255/90, *Jean-Louis Burban v European Parliament* (31 March 1992) ECR I-2253; Case T-167/94, *Detlef Nölle v Council of the European Union and Commission of European Communities* (18 September 1995) ECR II-2589; Case T-231/97, *New Europe Consulting and Michael P. Brown v Commission of the European Communities* (9 July 1999) ECR II-2403.

61 Saar Alon-Barkat and Madalina Busuioc, ‘Human-AI Interactions in Public Sector Decision-Making: “Automation Bias” and “Selective Adherence” to Algorithmic Advice’ (2023) 33 (1) *Journal of Public Administration Research and Theory* 153; Linda J Skitka, Kathleen L Mosier and Mark Burdick, ‘Does Automation Bias Decision-Making?’ (1999) 51 (5) *International Journal of Human-Computer Studies* 991; Kathleen L Mosier and Linda J Skitka, ‘Automation Use and Automation Bias’ (1999) 43 *Proceedings of the Human Factors and Ergonomics Society Annual Meeting* 344; Ben Green and Yiling Chen, ‘Disparate Interactions: An Algorithm-in-the-Loop Analysis of Fairness in Risk Assessments’ (2019) *Proceedings of the Conference on Fairness, Accountability, and Transparency*.

62 See Guild, Mitsilegas and Vavoula (n 4).

63 Revised VIS Regulation, art. 9c(6) mentions that ‘[t]he competent visa authority shall in no circumstances take a decision automatically on the basis of a hit based on specific risk indicators. The competent visa authority shall individually assess the security, illegal immigration and high epidemic risks in all cases’.

64 Case C-817/19 *Ligue des droits humains ASBL v Conseil des ministres* [2022], para 210.

clarified that the competent national court and the person concerned, unless in case of threats to State security, must have the opportunity to examine all the grounds and evidence on the basis of which the decision was taken.⁶⁵ This interpretation necessarily imposes an obligation on the administration to provide meaningful information to the person concerned, along with the statement of reasons, indicating that their personal data have been subjected to automated processing. The Court's interpretation also seems to imply not only the provision of meaningful information about the logic of the algorithmic operation in general, but most importantly the explanation of the algorithmic decision in the case at hand, including the types of personal data automatically processed and the rationale of the automated decision in relation to the individual circumstances of the affected person.⁶⁶

In the case of the VIS, the examination of a Schengen visa application entails information and materials beyond the requirements of the VIS, in accordance with the Visa Code. A potential rejection of a Schengen visa application based on the use of algorithms has not been accompanied by any changes in the information provided to rejected applicants. Annex VI of the Visa Code includes the standard form for refusal of visa applications, but it was not adapted to the introduction of algorithmic profiling through VIS. The form contains 17 boxes, each corresponding to one or more grounds set out in the Visa Code for refusing, annulling or revoking a visa, which the competent national authorities are to tick with a view to informing the visa applicant of the reasons for the decision to refuse a visa. Four of these grounds may be used to refuse a visa application based on algorithmic profiling, namely where 'one or more Member States consider you to be a threat to public policy or internal security', 'one or more Member States consider you to be a threat to public health', 'one or more Member States consider you to be a threat to their international relations' and that 'there are reasonable doubts as to your intention to leave the territory of the Member States before the expiry of the visa'. Without additional information on whether the decision is related to an algorithm, the refused applicant will have significant difficulties understanding the underlying reasons behind the refusal. Although there is a section on 'additional remarks', this does not appear to be mandatory for visa authorities. In *R.N.N.S. and K.A. v Minister van Buitenlandse Zaken*, the CJEU explained that in cases of objections to granting a visa, in the section of the standard form entitled 'Remarks', the identity of the Member State(s) that objected to the issuing of a visa and the specific ground for refusal based on that objection, accompanied, where appropriate, by the essence of the reasons for that objection, must be provided.⁶⁷ The findings of the Court could be applied by analogy in the case of algorithmic profiling to enable individuals

65 *ibid* para 211.

66 Karaïskou and Vavoula (n 59).

67 Joined Cases C-225/19 and C-226/19 *R.N.N.S and K.A.* ECLI:EU:C:2020:951.

to ascertain the reasons upon which the decision taken in relation to them is based. A revision of the Common Consular Instructions, lastly updated in 2003,⁶⁸ could also be envisaged to reflect these changes.

5.4 The Digital Visa

5.4.1 *Partial Digitalisation and Challenges*

In accordance with the Visa Code, the issuance of a Schengen visa has traditionally required the physical presence of the applicant. The visa process was digitalised partially when it came to the processing of the application by consulates or central national authorities and the recording of the outcome in the VIS as well as the use of visa data for facilitating border checks of visa holders or immigration checks on national territory. Yet, the pre-processing step of lodging an application and the issuance of the visa to the applicant by means of a visa sticker remained paper-based.

The concept of e-visas emerged in the 2018 Commission Communication,⁶⁹ which announced a feasibility study on digital visa procedures and the intention to assess options and promote pilot projects to prepare the ground for future proposals. Indeed, in the 2019 revision of the Visa Code, the co-legislators explicitly stated the aim of developing a common solution in the future to allow Schengen visa applications to be lodged online, thereby making full use of recent legal and technological developments. Indeed, Recital 5 of Regulation 2019/1155 stated that '[w]here possible, Member States should allow for application forms to be completed and submitted electronically' and where possible applicants could sign the application form electronically, where electronic signature is recognised by the competent Member State.⁷⁰ The heavily paper-based visa procedure was deemed a burden primarily to national authorities issuing visas, which was precisely the reason why some of them had already implemented digital solutions, to provide applicants with a modernised and presumably user-friendly application procedure and to improve the efficiency of handling visa applications. The challenges of the paper-based steps in the visa procedure were also predominantly evident during the COVID-19 pandemic, which resulted in slowing down Schengen visa operations worldwide, partly due to the difficulty of receiving visa applicants in consulates and in Visa Application Centres.

68 Common Consular Instructions on visas for the diplomatic missions and consular posts [2002] OJ C 313.

69 Commission, 'Communication from the Commission to the European Parliament and the Council – Adapting the Common Visa Policy to New Challenges' COM(2018) 251 final.

70 Regulation (EU) 2019/1155 of the European Parliament and of the Council of 20 June 2019 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code) [2019] OJ L 188.

5.4.2 *The Digital Visa Regulation*

The Commission adopted a proposal on the digitalisation of EU visas on 27 May 2022,⁷¹ aimed to modernise, simplify and harmonise the visa application process by digitalising the visa procedure, to reduce risks of (identity) fraud and forgery and to facilitate the verification process at the border through digitalisation. The relevant rules were adopted on 13 November 2023, with Regulation 2023/2667 primarily amending the Visa Code⁷² and the VIS rules, and Regulation 2023/2685 on the digital format of visas.

The revised rules foresee the creation of the EU Visa Application Platform (EU VAP) as a single platform for visa applicants to apply for a visa online, regardless of the Member State of destination. The tool will automatically determine the Member State for examining an application, particularly in cases where the applicant intends to visit several Member States.⁷³ Member States may allow the following categories of persons to lodge an application without using the EU VAP: (a) third-country nationals for humanitarian reasons; (b) third-country nationals in justified individual cases or in cases of force majeure; and (c) heads of State or government and members of a national government with accompanying spouses, and the members of their official delegation when they are invited by Member States' governments or by international organisations for an official purpose, sovereigns and other senior members of a royal family, when they are invited by Member States' governments or by international organisations for an official purpose.⁷⁴ Similarly, family members of EU citizens or beneficiaries of free movement are entitled to choose between an online and an person visa application.⁷⁵ The creation of a website to apply for Schengen visas will create a single access point for visa applicants to file their applications, upload electronic copies of their travel documents along with other supporting materials and pay visa fees.

The digitalisation of the visa procedure is not complete. First-time visa applicants must appear in person as well as for the collection of their biometric data, namely a facial image and a full set of fingerprints, where so required

71 Commission, 'Proposal for a Regulation of the European Parliament and of the Council amending Regulations (EC) No 767/2008, (EC) No 810/2009 and (EU) 2017/2226 of the European Parliament and of the Council, Council Regulations (EC) No 1683/95, (EC) No 333/2002, (EC) No 693/2003 and (EC) No 694/2003 and Convention implementing the Schengen Agreement, as regards the digitalisation of the visa procedure COM(2022) 658 final.

72 Regulation (EU) 2023/2667 of the European Parliament and of the Council of 22 November 2023 amending Regulations (EC) No 767/2008, (EC) No 810/2009 and (EU) 2017/2226 of the European Parliament and of the Council, Council Regulations (EC) No 693/2003 and (EC) No 694/2003 and Convention implementing the Schengen Agreement, as regards the digitalisation of the visa procedure [2023] PJ L 2023/2667.

73 Recital 6 states that in such cases, Member States would only need to check whether the tool determined the correct competent Member State.

74 Digital Visa Regulation, art 9.

75 Ibid art 7c.

under the Visa Code. Such requirement concerns individuals over the age of six. Applicants must also appear in person for the verification of their travel document.⁷⁶ In addition, in case of doubt concerning the travel document, supporting documents or both, or in individual cases in a particular location where there is a high incidence of fraudulent documents, Member States may require on the basis of a preliminary assessment that the applicant appear in person.⁷⁷ Furthermore, the visa sticker will be replaced with a cryptographically signed barcode.

The benefits of the digitalised visa procedure are noticeable: the visa procedure will presumably become more modernised, harmonised and secure, reducing the risk of fraud associated with physical visa stickers⁷⁸ or loss of papers. Digitalisation of different procedures is also expected to diminish administrative burdens and costs.

However, the digitalisation of visas is more than meets the eye. First, the EU VAP is explicitly referred to as temporarily storing the data provided by the applicant. For instance, Recital 34 states that '[d]ata stored in the EU VAP should be safeguarded using privacy-enhancing implementation measures'.⁷⁹ The modalities of such storage in the EU VAP are somewhat unclear, in particular as regards the deletion time of the data stored in the EU VAP and the subjects authorised to access it.

Second, the EU VAP will inevitably increase requirements for accuracy and timeliness of information and documents submitted to the authorities. The online procedure would increase the burden on visa applicants who will most likely not be able to submit the application online unless all fields and all supporting documentation are submitted. Whereas in the past there was a possibility for applicants not to be fully completed, now the burden will be placed on the applicants who must come by the necessary information and materials to support their visa application. This signifies that the burden of ensuring data quality is shifted primarily onto the visa applicants, who aside from the production and display of the necessary proofs of relevant documentation must also ensure that spelling or grammatical mistakes are omitted. To this effect, data quality checks will be conducted upon submission to verify the quality of the data.⁸⁰ The complexity of the process may well become a discouraging factor for visa applicants. The hurdles imposed on visa applicants are also evident from the fact that the information provided in the VIS is also increased; the VIS will additionally store information such as the email and telephone number (and, if the application is made by a duly authorised person,

⁷⁶ Visa Code, art 12.

⁷⁷ Ibid art 10(1a).

⁷⁸ For example, see 'FIA Told to Stop Misuse of Stolen Schengen Visa Sticker' (30 June 2021) <https://www.dawn.com/news/1632210> accessed 5 May 2025.

⁷⁹ Also see Recital 37.

⁸⁰ Digital Visa Regulation, recital 27.

his/her information) and the IP address.⁸¹ Only the biometric data will be collected by national authorities (or external service providers) and they will thus remain responsible for ensuring their data quality.

Third, the Regulation does not seem to take into account that, notwithstanding the fact that the visa process has been significantly harmonised, there remain various exceptions and divergent rules at the national level, which must somehow be considered by the EU VAP. In particular, if a visa-requiring traveller visits several countries during his or her short stay, the system must check not only the responsible Member State for the examination of the visa application, but also the number of days spent in each country to calculate the amount of financial resources needed, with the daily minimum amount not being the same for every Schengen state.⁸² Another issue concerns the national exceptions regarding the visa waiver – for example, some Schengen states do not apply the visa waiver if the third-country national is due to take employment, or for airline and ship crews holders of diplomatic or service passports. In addition, a harmonised list with sufficient clarity and preciseness must be displayed – the existence of common consular lists of generic and vague content is insufficient. The same applies also to supporting documents, for instance as regards the type of invitation that the visa applicant must hold. These issues may add to the questions that applicants have for the authorities and complexify rather than simplify the process.

The Digital Visa Regulation attempts to strike the balance between modernisation to the benefit of national authorities and convenience for applicants. According to Recital 8, applicants must be provided with up-to-date and easily accessible information and the conditions for entry on the territory of the Member States, in formats that take into account visual impairments. Furthermore, a guidance tool is foreseen so that applicants can find all the necessary information regarding visa requirements and procedures, including whether and what type of visa is required; the visa fee; the Member State competent for assessing the application; the supporting documents required; whether an appointment is necessary to collect biometric identifiers; and whether it is possible to apply online without an appointment. The EU VAP should provide the applicants with documents in a printable format and should include a communication mechanism, such as a chatbot, to answer questions of the applicants.

That chatbot will not constitute the only means by which the applicant could get information on the visa procedure. The EU VAP should also provide information on the processing of personal data in the context of the VIS, and

81 Even though, according to Recital 19, a flagged IP address alone or the potential duplication of IP addresses is not to be of relevance for the purpose of the examination of the application.

82 See ‘Will Going Digital Really Simplify Applying for a Schengen Visa?’ (*Euronews*, 18 April 2024) <https://www.euronews.com/2024/04/18/will-going-digital-really-simplify-applying-for-a-schengen-visa> accessed 5 May 2025.

it should allow secure electronic communication between the applicant and the competent consulate or the central authorities of the competent Member State, if additional documents or an interview with the applicant are necessary.

Yet, the visa procedure is not a straightforward one: the potential of consulates being inundated with queries due to the complexity of the process cannot be discarded and might well lead to increased workload for consular staff. In light of the fact that the procedure will become increasingly complex for applicants, the fact that a chatbot is not sufficient on its own to support the provision of information to them is welcome, yet it is unclear how many tasks will be outsourced to chatbots and how easy it will be for applicants to reach out to human officers for the provision of information. As a result, it may be the case that individuals will be further discouraged and hindered in applying for a visa.

5.5 The Use of AI to Further Streamline the Visa Process

5.5.1 *Towards an AI-Powered Visa Procedure?*

Whereas the revised VIS Regulation foresees the use of algorithms for pre-screening Schengen visa applicants, a 2020 study on ‘Opportunities and Challenges for the Use of Artificial Intelligence in Border Control, Migration and Security’ identified additional AI-reliant tools to be used for streamlining the visa application process both for applicants and case workers, as well as for improved and deeper background checks.⁸³ These tools involve the development of (a) a chatbot supporting the visa application process by taking in information, answering questions posed by the applicant and ensuring data quality; (b) the triaging of applications using individual risk assessment for ‘rapid, more efficient risk analysis’; (c) the identification of irregular travelling patterns, constituting an additional piece of risk analysis to identify *mala fide* travellers; and (d) the creation of a personalised application form with tailor-made questions for the applicant creating an augmented application form.⁸⁴ Interestingly, the study commissioned from Deloitte considers that, whereas initiatives under (a) and (d) would require legislative intervention, initiatives (b) and (c) would not need an additional legal basis at EU level and could be rolled out at any point in the future – in fact, as the chapter will show below, the Netherlands is already experimenting with visa triaging. It is disputable whether such reforms in the visa examination process in accordance with EU-wide AI tools can be deployed at national level without further harmonisation. These may result in completely fragmentary procedures and rules at national level to triage the applications based on different criteria. It is also possible that Member States exchange practices amongst themselves

83 Commission, ‘Opportunities and Challenges for the Use of Artificial Intelligence in Border Control, Migration and Security’ (2020).

84 *ibid* 16–19.

in the deployment of such tools in a form of cross-fertilisation without the involvement of the EU legislature.

Whereas a reference to the chatbot tool has already been included in the Digital Visa Regulation, the other initiatives are quite novel in their approach and raise acute human rights challenges, in terms of privacy and data protection, non-discrimination and even the right to seek asylum. In general, the training of these AI tools requires the use of significant amounts of data and it is unclear how these will be compiled, leading to further concerns regarding possible biases in the statistical or personal data used for that purpose (e.g. too little or inaccurate data). Inaccurate model outputs, in particular false positives, may impede decision making or cause some travellers to be the subject of unnecessary background checks. Presumably, the Common Repository for Reporting and Statistics (CRRS), one of the interoperability components, could be useful in this respect, whose purposes remain highly vague under the Interoperability Regulations. This even concerns the identification of irregular travelling patterns, whereby the AI-reliant model would also require data to be provided by different airlines. In this respect, the statistical data from airlines could also be compiled because – pursuant to Article 38(5) of Regulation 2025/12 on the collection and transfer of advance passenger information for enhancing and facilitating external border checks⁸⁵ – the CRRS shall provide eu-LISA with statistical information on (a) the nationality, sex and year of birth of the passenger; (b) the date and the initial point of embarkation, the date and airport of departure and the date and airport of arrival; (c) the type of travel document, the three-letter code of the issuing country and the date of expiry of the validity of the travel document; (d) the number of passengers checked in on the same flight; (e) the code of the air carrier operating the flight; (f) whether the flight is a scheduled or a non-scheduled flight; (g) whether API data were transferred immediately after flight closure; (h) whether the personal data of the passenger are accurate, complete and up to date; and (i) the technical means used to capture the API data. In conjunction with data from the IT systems and data collected at the borders by Member States, it may be possible to identify such patterns, demonstrating that the true potential of interoperability is unlimited.

Furthermore, the development of personalised application forms signifies that, in respect of specific groups of visa applicants, additional categories of personal data will have to be collected, stored and further processed by national authorities in examining the application. There need to be compelling reasons why the existing categories of personal data are not sufficient for assessing a

⁸⁵ Regulation (EU) 2025/12 of the European Parliament and of the Council of 19 December 2024 on the collection and transfer of advance passenger information for enhancing and facilitating external border checks, amending Regulations (EU) 2018/1726 and (EU) 2019/817, and repealing Council Directive 2004/82/EC [2025] OJ L 2025/12.

visa application, which the current legislative framework does not offer, raising doubts about the proportionality to the aim pursued and the violation of the principle of data minimisation of data protection law. This development may also lead to the discriminatory treatment of specific groups of travellers flagged as potentially risky to require the provision of additional information for the assessment of their application.

In addition, as with the use of algorithms under VIS for flagging potentially risky visa applicants, the triaging of visa applications raises significant challenges as regards the principle of non-discrimination against specific groups of individuals. The triaging of visa applications for risk prediction is a technique which can be significantly developed due to technological evolution, whereby applications are categorised based on the degree of risk posed by applicants. However, it shifts the assessment focus from a person's individual behaviour to his/her socio-demographic identity and can result in exclusion from opportunities simply because of who he/she is and whether his/her characteristics match the profiles of other individuals who have been deemed in the past as risky, rather than the actual risky behaviour he/she may display. This probabilistic logic devoid of concrete evidence can result in high false error rates, which, according to the Court of Justice of the European Union (CJEU), require heightened safeguards as regards the reliance on the algorithmic output.⁸⁶ The 'human in the loop' principle may prove to be an insufficient safeguard in cases where the individuals involved are themselves biased against specific groups of individuals. It is true that even without the use of algorithms, discriminatory decisions exist and in fact codifying those biases in an actionable algorithm can bring them to the fore for further investigation and possibly reverting longstanding unlawful practices. However, one might take into account that in the meantime, millions of visa applicants will continue to be disadvantaged. Furthermore, possible systemic biases may not be discovered at all due to lack of interest in scrutinising their existence and impact because it is impossible to review and monitor millions of procedures on a yearly basis and third, even if biases are uncovered it is unclear whether there will be any change.

5.5.2 Lessons from the Member States

The risks of indirect and/or intersectional discrimination are more than a hypothetical scenario. There already exist two examples of triaging visa applications in European countries, both of which have attracted criticism as to their opacity and discriminatory impact.

⁸⁶ *Ligue des droits humains ASBL v Conseil des ministres* (n 90).

5.5.2.1 *The Case of the UK Visa Triaging Algorithm*

In the case of the United Kingdom, in 2020, two NGOs challenged the use of a UK Home Office algorithm designed to sift through visa applications as a tool for assisting visa officers working in selected West African states to reach decisions quickly. This is another form of a ‘traffic light method’,⁸⁷ whereby markers such as nationality, country of birth, age, travel history, etc., were used to assign colour codes sorting applications into those needing further scrutiny and those eligible for approval, by classifying them as red (‘high risk’), amber (‘medium risk’) or green (‘low risk’).⁸⁸ A red etiquette to a visa application would entail heightened suspicion by the visa officer, resulting almost always in an automatic rejection – in a similar fashion as the Netherlands, where there was a high correlation between the output of the algorithm and the final decision by the visa officer.⁸⁹ An application coloured in amber would be further examined and a green one would result in virtually automatic approval.⁹⁰

Furthermore, an inevitable feedback loop emerged in the making: visa decision rates determined the countries on the list of ‘suspected nationalities’, heightening the likelihood of rejection for applicants from these countries.⁹¹ This approach constitutes a form of digitalised, structured discrimination possibly on the grounds of ethnic origin and race.⁹² The litigation was an opportunity to disclose the inner workings of the streaming tool, but the Home Office chose to scrap the tool and seal the black box rather than defend it before the Administrative Court. The challenge was thus settled, and the Home Secretary Priti Patel has pledged a full review of the system, including for issues of ‘unconscious bias’ and discrimination.⁹³

87 Independent Chief Inspector of Borders and Immigration, ‘An inspection of the Home Office’s Network Consolidation Programme and the “Onshoring” of Visa Processing and Decision Making to the UK’ (September 2018–August 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/863627/ICIBI_An_inspection_of_the_Home_Office_s_Network_Consolidation_Programme.pdf accessed 5 May 2025.

88 For an analysis, see Catriona Barclay and Elspeth Guild, ‘Brexit, Personal Data and Aliens’ (2023) 37(3) *Immigration, Asylum and Nationality Law* 271.

89 *ibid.*

90 In the litigation, it was alleged that a secret list of nationalities in respect of which any application made by a person from one of those countries was classified as red and thus would result in quasi-automatic refusal. See Barclay and Guild (n 88).

91 Racism and Technology Center, ‘Racist Technology in Action: The UK Home Office’s Sorting Algorithm and the Racist Violence of Borders’ (2024) <https://racismandtechnology.center/2024/04/01/racist-technology-in-action-the-uk-home-offices-sorting-algorithm-and-the-racist-violence-of-borders/> accessed 5 May 2025; Foxglove, ‘Home Office Says it will Abandon Racist Algorithm – After we Sued them’ (*Foxglove*, 4 August 2020) <https://www.foxglove.org.uk/2020/08/04/home-office-says-it-will-abandon-its-racist-visa-algorithm-after-we-sued-them/> accessed 5 May 2025.

92 *ibid.*

93 *ibid.*

The case of the Netherlands merits more detailed analysis due to the non-discrimination concerns and the lack of transparency as to the *actual* deployment of AI tools or simpler algorithms, which do not fall within the definition of AI under the AI Act and OECD.⁹⁴ The section below will delve into the specifics of this example.

5.5.2.2 *The Case of the Dutch ‘Informatie Ondersteund Beslissen (IOB)’ Triaging Algorithm*

The algorithm, referred to internally as Informatie Ondersteund Beslissen (IOB), has been deployed by the Dutch Ministry of Foreign Affairs since 2015 as a profiling system designed to calculate the risk score of short-stay (Schengen) visa applicants applying to enter the Netherlands and, consequently, the Schengen area.⁹⁵ Its deployment, driven by interests in cutting costs, was completely secretive and unknown to the public and resulted in the profiling of millions of visa applicants using variables like nationality, gender and age.⁹⁶

In the Dutch case, applications were categorised in ‘low risk’, ‘moderate risk’ and ‘high risk’, converted into tracks: fast track, regular track and intensive track, a method commonly known as ‘triaging’. Applicants scored as ‘high risk’ were automatically moved to an ‘intensive track’ that can involve extensive investigation and delay. The Data Protection Officer of the Ministry warned of potential ethnic discrimination and advised the Ministry to ‘immediately stop profiling visa applicants to distinguish them partly on the basis of nationality and then treating them unequally on the basis of that distinction’.⁹⁷

Indeed, the Dutch algorithm has resulted in family members of Dutch citizens with a migration background being prevented from securing a short-stay visa. Especially applicants from Suriname and Morocco found significant obstacles in obtaining a visa.⁹⁸ Officials claim that the risk profiles are also

94 ‘UK Home Office to Stop Using Racist Visa Algorithm’ (UK Immigration Lawyers) <https://www.ukimmigration.law/home-office-to-stop-using-racist-visa-algorithm/> accessed 5 May 2025.

95 ‘Ethnic Profiling – Whistleblower Reveals Netherlands’ Use of Secret and Potentially Illegal Algorithm to Score Visa Applicants’ (Lighthouse Reports, 23 April 2023) <https://www.lighthousereports.com/investigation/ethnic-profiling/> accessed 5 May 2025.

96 Rijksorganisatie voor Ontwikkeling Digitalisering en Innovatie, ‘Bias-toetsing “Kort Verblijf Visa” Aanvragen’ (April 2023) <<https://racismandtechnology.center/wp-content/uploads/202304-rijks-ict-gilde-bias-toetsing-kort-verblijf-visum-aanvragen.pdf>> accessed 5 May 2025; Racism and Criminology Center, ‘Dutch Ministry of Foreign Affairs Dislikes the Conclusions of a Solid Report that Marks Their Visa Process as Discriminatory So Buys a Shoddy Report Saying the Opposite’ (May 2024) <<https://racismandtechnology.center/2024/05/28/dutch-ministry-of-foreign-affairs-dislikes-the-conclusions-of-a-solid-report-that-marks-their-visa-process-as-discriminatory-so-buys-a-shoddy-report-saying-the-opposite/>> accessed 5 May 2025.

97 Lighthouse Reports (n 95).

98 *ibid.* Examples of so-called ‘risk profiles’ used by the algorithm include Surinamese men aged between 26-40 who applied from Paramaribo and unmarried Nepalese men aged around 35-40 who applied for a tourist visa.

based on data from third parties to see if a group of individuals from the same nationalities attempted to apply for asylum. Overall, statistical data from the Ministry suggest that being flagged as a high risk can carry significant consequences: 33% of applications in the intensive ‘high risk’ track were rejected, whereas only 3.5% of applications in the normal ‘low risk’ track were rejected. The intensive track also signifies that the examination of the visa application is prolonged for months, thus creating a discouraging, hostile environment of extreme bureaucracy.⁹⁹

The reference to the vaguer term ‘algorithm’ blurs the picture as to the use of AI, thus putting into question whether the protective safeguards of the AI Act will apply once the Regulation comes into force. Indeed, all sources consulted on the operation and the discrimination challenges posed by the Dutch tool make no reference to the term AI. This includes the study commissioned by the Ministry and conducted by auditors who provided an *ex post* rubber-stamping of the algorithm, which recommended a continuation of the practice subject to certain recommendations and modifications.¹⁰⁰ The study found that there was no disproportionate discrimination based on age, marital status or gender. Notwithstanding the concerns regarding specific nationalities, the study only found that the risk profiles in connection to nationals of Yemen displayed bias due to the rejection rates in respect of their applications. It also revealed a ‘notable correlation between BAO Profile and visa application outcomes’: in other words, visa officers heavily relied on the outcome of the algorithm in their final decision-making on the application, which describes automation bias.

The lack of information as to the nature of the algorithm has significant implications in the application of the AI Act, and on ensuring accountability, for example through proper supervision (e.g. data protection authorities). The secrecy concerning the precise nature and complexity of the tools used to assist, streamline and standardise human decision-making adds to the inherent opacity of the AI systems, whereby individuals do not know how exactly the AI tool reaches the recommendation, what criteria are taken into consideration, how these weigh against each other and what safeguards are in place to prevent violations of fundamental rights, notably discriminatory treatment. Without knowledge as to whether and to what extent those algorithms qualify as AI or not, it becomes impossible for individuals to foresee whether, how and which law applies, raising significant challenges for legal certainty and foreseeability.

⁹⁹ *ibid.*

¹⁰⁰ SigmaRed, ‘Report on Algorithmic Bias Assessment’ (7 February 2024) <https://racismandtechnology.center/wp-content/uploads/2024/02/27-sigmared-report-algorithmic-bias-visum-aanvragen.pdf> accessed 5 May 2025.

5.6 Conclusion

This chapter highlighted the different facets of digitalising the administration of Schengen visas under EU and national law. It demonstrated that the EU common visa policy increasingly relies on modern technologies, from relatively simple solutions, such as the increase of security features in the Schengen visa stickers, to biometry and centralised storage of visa data to modernise and progressively digitalise the visa process.

Digitalisation through the establishment, operation and reconfiguration of the VIS has undergone significant reforms, including the expansion of the applicable rules beyond the contours of EU law to concern as much as possible also applicable for long-stay visas and residence permits, under the justification of increasing the efficiency of the checks at the external borders and to expand the fingerprinting requirements to children above six years old. The chapter stressed how the VIS raises significant concerns regarding the rights to privacy and personal data protection, stemming not only from the legislation, but also from the practical implementation of the rules.

In addition, automated processing of visa applications raises additional concerns regarding the right to effective remedies and the principle of non-discrimination. This is because it formalises and legitimises a highly discretionary decision-making process by public officers and allows for the harmonisation and, to an extent, mutual recognition of the nationally defined risks towards an EU data-driven policy which defines risk statistically.¹⁰¹ A related addition to the digital arsenal is the EU digital visa, which takes digitalisation to the next step by requiring visa applicants to apply online for a visa, disregarding potential digital literacy issues as well as national discrepancies in the application of the Schengen visa rules and without full clarity on how the digital visa will operate.

Finally, lack of clarity and mounting discrimination concerns are also evident in the national implementation of algorithms to sort visa applications into categories of riskiness. As this chapter highlighted, experimentation with modern technologies has not been accompanied by robust safeguards for visa applicants, who are left to navigate this increasingly complex system, which seems to become more streamlined unilaterally – for the national authorities. Administrative efficiency and re-allocation of resources towards the substantial assessment of applications seem to be the primary concern at the expense of visa applicants, whose power and agency seem to be diminishing under the illusion that technology promotes objectivity and neutrality when in practice it can systematise and legitimise biases, irrationality and injustice.

101 Annalisa Meloni and Ismini Mathioudaki, 'Inference' in Silvan Pollozek and others (eds), *Migration Data Matters. A Keyword Approach to the Datafication of Migration and Border Control* (Liverpool University Press forthcoming 2026).

6 Visas as a Tool of ‘Migrant Instrumentalisation’?

The EU–Belarus Border Crisis Reconsidered

Aleksandra Ancite-Jepifánova

6.1 Introduction

It was July 2021 when, in anticipation of the Taliban takeover, a family of nine fled Afghanistan. Having paid \$70,000 to intermediaries who promised to transport them to Europe, they were driven to the border with Tajikistan. During the following weeks, with drivers and vehicles constantly changing, they managed to make their way through Uzbekistan, Kazakhstan, and across Russia. ‘They were mostly driving at night, at a very high speed and away from major roads. As we drove through Russia, no one stopped us’, Rohullah, a father of five, later told me in an interview.¹

It was the second half of August when they ultimately crossed from Russia into Belarus and continued onwards to its border with Latvia, an EU Member State. The drivers dropped them in the forest, showed them the direction, and told them they were a short walk away from Latvian border guards who would take the family to a refugee camp.

The reality, however, proved drastically different. Rohullah’s family had arrived at the EU’s external border during a period of heightened securitisation. In response to what was described as the ‘instrumentalisation of migrants’ by the Belarusian regime, Latvia had suspended the right to seek asylum and authorised systematic pushbacks. Although the family had travelled irregularly and never obtained Russian or Belarusian visas – nor had any other contact with Russian or Belarusian authorities – they were pushed back and forth between Latvian and Belarusian forces for weeks, eventually becoming separated. Rohullah, his wife, and their five young children were exceptionally admitted into Latvia and subsequently granted asylum. Two other members

1 I interviewed Rohullah as part of my study on the situation at the EU–Belarus border. The interview was conducted in person in November 2021. For ethical and security reasons, the names of my interlocutors, as they appear here and elsewhere in the text, have been changed to protect their identities. For more details on the research and methodology, see, e.g., Aleksandra Ancite-Jepifánova, ‘Beyond the “Hybrid Attack” Paradigm: EU–Belarus Border Crisis and the Erosion of Asylum-Seeker Rights in Latvia, Lithuania and Poland’ (2024) 15(2) *Avant*.

of his extended family, young adult males, were ultimately forced to remain in the forest for seven months.²

This case exposes the contradictions and harsh realities underlying the official narratives of ‘migrant instrumentalisation’ and ‘hybrid threats’, which have been invoked by EU Member States bordering Belarus to justify derogations from the core principles of both EU and international refugee protection regimes. The roots of the border crisis can be traced back to the summer of 2021, when, following the EU’s imposition of sanctions on Minsk, Belarus increased the issuance of visas to nationals of refugee-producing countries, leading to a rise in arrivals to Minsk *en route* to the EU’s external borders. In response, the governments of Latvia, Lithuania, and Poland – each sharing a land border with Belarus – introduced a series of restrictive measures that severely curtailed access to asylum and formalised the practice of systematic pushbacks, in clear contradiction with EU asylum law and international human rights obligations.³ The result has been a proliferation of human rights violations, whereby the EU’s eastern frontier has increasingly become a securitised exclusion zone marked by border violence, disappearances, and deaths.⁴ Even more disturbing is the fact that these national-level policies have received both indirect support and formal endorsement at the EU level, culminating in the incorporation of the instrumentalisation concept into EU hard law.⁵

This chapter seeks to unpack and critically examine the notion of migrant instrumentalisation in the context of the EU’s eastern border, focusing on one element that frequently appears in official and legal discourses: the visa policies of Belarus and Russia, which are often cited by EU and Member State political actors as key tools of ‘instrumentalisation’. The chapter investigates whether, and to what extent, these visa regimes can be meaningfully understood in such terms, and assesses how these claims correspond to conditions on the ground. Among other sources, the analysis draws on findings from my research into the EU–Belarus border crisis, which combines legal analysis with fieldwork

2 For more details, see Aleksandra Ancite-Jepifánova, ‘Seven Months in the Freezing Forest: Why Events at the Latvian-Belarus Border Were Long Hidden From the Public’ (*VerfBlog*, 15 November 2022) <<https://verfassungsblog.de/seven-months-in-the-freezing-forest/>> accessed 31 July 2025.

3 See Section 6.2.2 for more details.

4 For an analysis and criticism of the Member State policies see, e.g., Amnesty International, *Lithuania: Forced out or Locked up. Refugees and Migrants Abused and Abandoned* (2022) <<https://www.amnesty.org/en/documents/eur53/5735/2022/en/>> accessed 31 July 2025; Amnesty International, *Latvia: Return Home or Never Leave the Woods. Refugees and Migrants Arbitrarily Detained, Beaten and Coerced into ‘Voluntary’ Returns* (2022) <<https://www.amnesty.org/en/documents/eur52/5913/2022/en/>> accessed 31 July 2025; Aleksandra Ancite-Jepifánova, ‘Beyond the “Hybrid Attack” Paradigm’ (n 1); Egala/Oxfam, *Brutal Barriers: Pushbacks, Violence and the Violation of Human Rights on the Poland-Belarus Border* (2025) <https://oi-files-d8-prod.s3.eu-west-2.amazonaws.com/s3fs-public/2025-03/Brutal%20Barriers%20report_0.pdf> accessed 31 July 2025.

5 See Section 6.3.1 for more details.

conducted in all three EU Member States bordering Belarus. This includes approximately 20 in-depth interviews with legal practitioners and humanitarian aid volunteers, as well as over 40 interviews with non-EU nationals from the Middle East and North Africa (MENA) region who attempted to cross into the EU from Belarus.⁶

The chapter is structured into two main parts. The first provides a timeline and outlines the key phases of the EU–Belarus border crisis, linking migration routes and patterns to the visa regimes of Belarus and Russia. It begins with an overview of the situation at the EU–Belarus border prior to summer 2021, continues with the period from summer to the end of 2021 – when people crossing irregularly from Belarus most frequently entered the country directly with Belarusian visas – and then turns to the period from early 2022 onward, when the majority of individuals seeking to reach the EU began arriving in Belarus via Russia. The second part engages in a critical analysis of discourses that frame Belarusian and Russian visa regimes as tools of ‘migrant instrumentalisation’. It situates this narrative within the broader context of EU externalisation and containment policies, including restrictive EU visa rules, and examines it alongside Russian migration policies and visa practices. The analysis also considers the agency of foreign nationals themselves and assesses whether and to what extent official discourses correspond to the actual situation on the ground.

6.2 Situation at the EU Border with Belarus and Russia: Timeline of Events

6.2.1 *Situation Before Summer 2021*

Contrary to how recent discourses on ‘migrant instrumentalisation’ often portray it, irregular migration from Belarus to the EU is not a new development. Since the 1990s, Belarus has functioned as an important transit country for foreign nationals – particularly from Russia, Central Asia, the Caucasus, and countries like Afghanistan – seeking irregular entry into the EU, often with the

6 Interviews with non-EU nationals were conducted predominantly between November 2021 and April 2022 and included Iraqi, Syrian, Afghan, and other nationalities. Interviews with legal practitioners and volunteers took place in 2023. I have also remained in contact with my interlocutors, continuing to exchange information online. For research findings and a more detailed discussion of the methodology, see, e.g., Aleksandra Ancite-Jepifánova, ‘Trapped in a Lawless Zone: Forgotten Refugees at the Latvia-Belarus Border’ (*VerfBlog*, 2 May 2022) <<https://verfassungsblog.de/trapped-in-a-lawless-zone/>> accessed 31 July 2025; Aleksandra Ancite-Jepifánova, ‘Seven Months in the Freezing Forest’ (n 2); Aleksandra Ancite-Jepifánova, ‘Migrant Instrumentalisation: Facts and Fictions: Realities On the Ground at the EU-Belarus Border’ (*VerfBlog*, 21 September 2023) <<https://verfassungsblog.de/migrant-instrumentalisation-facts-and-fictions/>> accessed 31 July 2025; Aleksandra Ancite-Jepifánova, ‘Beyond the “Hybrid Attack” Paradigm’ (n 1); The present chapter also, where appropriate, draws on unpublished findings from my research.

aim of applying for asylum. This route was primarily shaped by geography, the absence of internal border controls between Belarus and Russia,⁷ and restrictive EU visa policies that made regular access to the EU nearly impossible for many. For example, this route was frequently used by Russian nationals fleeing persecution, especially from Chechnya, as well as nationals of Central Asian states who benefited from visa-free access to Russia, as well as those transiting through Russia irregularly.⁸

At the time, such movements in official discourses were not labelled as forms of ‘instrumentalisation’ or ‘hybrid threats’. During this period, instead, the EU had long sought cooperation with Belarus in managing and controlling irregular migration. From the early 2000s onward, the EU allocated over €80 million to Belarus for border management and security initiatives.⁹ Following a protracted negotiation process, the EU and Belarus reached a readmission agreement in 2020, requiring Belarus to take back third-country nationals who had entered the EU after transiting through or staying in its territory.¹⁰

While a substantial share of individuals entering the EU from Belarus aimed to continue towards Western Europe, some did seek protection in the bordering Member States, with their numbers fluctuating over the years. Notably, reports of asylum access being obstructed at these borders predate the 2021 crisis. At Poland’s Terespol crossing, for instance, border officials regularly denied non-Belarusians the opportunity to lodge asylum claims, instead returning them to Belarus.¹¹ Between 2017 and 2019 alone, nearly 76,000 individuals, primarily nationals of Russia and Tajikistan, were refused entry at this crossing.¹² Such deterrence practices contributed significantly to the decline in asylum applications registered in Poland in the years preceding the 2021 border developments.¹³ Similarly low application numbers were also recorded in Lithuania and Latvia during this period.¹⁴

7 In 1995, border control on the Russian–Belarusian border was abolished following the signing of the Treaty of Friendship, Neighborhood and Cooperation (21 February 1995) between the two countries. Available at: <https://base.spininform.ru/show_doc.fwx?rgn=25444> accessed 14 November 2025.

8 See, e.g., Katsiaryna Yakouchyk and Alexandra M. Schmid, ‘EU–Belarus Cooperation in Border Management: Mechanisms and Forms of Norm Transfer’ in Raphael Bossong and Helena Carrapico (eds), *EU Borders and Shifting Internal Security: Technology, Externalization and Accountability* (Springer 2016).

9 Ibid 129–133.

10 Agreement between the European Union and the Republic of Belarus on the readmission of persons residing without authorisation, ST/12160/2019/INIT, OJ L 181, 9.6.2020, Article 4(1)(c).

11 Witold Klaus and Monika Szulecka, ‘Departing or Being Deported? Poland’s Approach Towards Humanitarian Migrants’ (2023) 36(3) *Journal of Refugee Studies* 467, 473.

12 Ibid.

13 In 2018–2019, Poland, a country with a population of around 37 million, registered as few as approximately 4,000 asylum claims annually. Ibid, 473.

14 For example, over the period from 2018 to 2020 Latvia registered less than 200 asylum applications per year. For the statistics on Latvia and Lithuania, see European Migration Network,

An illustrative episode predating 2021 that has been described in terms of ‘migrant instrumentalisation’ at the EU’s eastern borders occurred in late 2015 and early 2016, during the height of the so-called refugee crisis. At that time, several thousand foreign nationals originating from Syria, Afghanistan, Iraq, and various other countries attempted to reach the EU via the so-called Arctic route, through Norway and then Finland, where Russian border officers initially did not restrict the departure of individuals lacking Schengen visas. Available research, however, indicates that the Arctic route was not orchestrated by the Russian state and that Russian border control practices were less restrictive than presumed by Finnish and Norwegian officials at the time. Rather, the route appears to have emerged within the broader context of refugee movements, offering a comparatively safer and cheaper alternative to the hazardous journeys across the Mediterranean or through the Balkans.¹⁵

Evidence suggests that protection seekers formed a mixed group and typically arrived at the border through their own agency, taking advantage of the relatively easy visa regimes between Russia and their countries of origin (for example, Syrian nationals could still acquire Russian visas – see Section 6.3.2 for further details), and were assisted by local or transnational intermediaries. The group also included people who had lived in Russia for extended periods of time. Although in 2015–2016 fewer than five per cent of asylum seekers in Finland arrived via the Arctic route, Finnish public and political discourse portrayed it as an instance of Russian hybrid interference and an attempt to instrumentalise migration.¹⁶ The route was effectively closed following a meeting between the Finnish and Russian presidents, after which the two states temporarily shut two Arctic border crossing points to third-country nationals.¹⁷

6.2.2 *Summer 2021–End of 2021*

As noted in Section 6.2.1, in the years leading up to 2021, the number of asylum applications in EU countries bordering Belarus remained relatively low. However, this began to change in the summer of 2021, when irregular border

Lithuania: EMN Country Factsheet 2019 (2020) <https://www.emn.lt/uploads/Products/product_1550/17_lithuania_country_factsheet_2019_en.pdf> accessed 20 May 2026; Latvian Office of Citizenship and Migration Affairs, Statistics on Asylum Seekers (01.01.1998 – 31.12.2025) <<https://www.pmlp.gov.lv/en/statistics-asylum-seekers>> accessed 20 May 2026.

15 Arild Moe and Lars Rowe, ‘Asylstrømmen fra Russland til Norge i 2015: Bevisst russisk politikk?’ (2016) 30(2) *Nordisk Østforum*, 80; Joni Virkkunen and Minna Piipponen, ‘Informal Practices and the Rule of Law: Russia, Migration and the “Arctic Route”’ in Rano Turaeva and Rustamjon Urinboyev (eds), *Labour, Mobility and Informal Practices in Russia, Central Asia and Eastern Europe* (Routledge 2021).

16 Joni Virkkunen and Minna Piipponen, ‘Informal Practices and the Rule of Law’ (n 15), 195.

17 ‘Finland and Russia finalize temporary border restrictions’ (*DW*, 23 March 2016) <<https://www.dw.com/en/finland-and-russia-finalize-temporary-border-restrictions/a-19135796>> accessed 31 July 2025. Prior to that, Norwegian authorities negotiated an agreement with Russia to prevent third-country nationals without valid visas from entering Norwegian territory, after which the asylum seekers’ route shifted to Finland.

crossings from Belarus into Latvia, Lithuania, and Poland increased – mainly involving nationals of Middle Eastern and African countries. For instance, in July 2021 alone, Lithuania intercepted and detained nearly 3,000 people who had crossed the border irregularly from Belarus. This marked a significant rise compared to the approximately 80 individuals apprehended at the same border throughout the entire year of 2020.¹⁸

In the official discourses of EU Member States bordering Belarus, the surge in irregular border crossings in the summer of 2021 was attributed to deliberate actions by the Belarusian regime. These were seen as retaliation for EU sanctions imposed after the violent crackdown on protests against the disputed 2020 presidential election and the forced diversion of a Ryanair flight in May 2021 to arrest a journalist and prominent critic of the Belarusian government. Shortly thereafter, in June 2021, Belarus suspended its readmission agreement with the EU. A few weeks earlier, Belarusian authoritarian leader Alexander Lukashenko had publicly declared that Belarus would no longer prevent migrants from entering the EU. Following the EU's strong reaction to the Ryanair incident, he stated: 'We were stopping drugs and migrants – now you will catch them and eat them yourselves'.¹⁹

In the EU Member States bordering Belarus, the rise in border crossings was subsequently framed as 'migrant instrumentalisation' or 'weaponisation' by the Belarusian regime, described as part of an alleged 'hybrid attack' on the EU. Within this narrative, irregular border crossers were portrayed through racialised discourses as 'living weapons', 'economic migrants' rather than 'real refugees', or passive 'pawns' in a geopolitical game.²⁰

Despite the relatively modest number of irregular border crossings in absolute terms, Latvia, Lithuania, and Poland responded by introducing radical legislative measures that enable these states to heavily restrict or entirely suspend the right to claim asylum for those crossing irregularly from Belarus, while also allowing pushbacks. These actions clearly contravene their EU and international human rights obligations, most notably the right to seek asylum, which is guaranteed under EU law, in particular under Article 18 of the EU Charter of Fundamental Rights (EUCFR) and the Asylum Procedures Directive (2013/32/EU). This right applies regardless of the applicant's

18 ECRE, *Extraordinary Responses: Legislative Changes in Lithuania* (Legal Note N11, 2021), 2 <<https://ecre.org/wp-content/uploads/2021/09/Legal-Note-11.pdf>> accessed 31 July 2025.

19 'Belarusian Leader Defends His Action to Divert Flight' (*The Independent*, 25 May 2021) <<https://www.independent.co.uk/news/world/europe/belarusian-leader-defends-his-action-to-divert-flight-alexander-lukashenko-european-union-ukraine-kyiv-ryanair-b1854076.html>> accessed 31 July 2025.

20 For an analysis of the framing, see Artem Graban, 'Instrumentalisation of Fear and Securitisation of "Eastern Borders Route": The Case of Poland-Belarus "Border Crisis"' (2023) 33(2) *European Security* 236, 249–251; Sandra Hagelin, 'Framing Entangled Borders in the Baltic States' (2023) 39(6) *Journal of Borderlands Studies* 1101; Joanna Szylo-Kwas, 'Two Crises – Framing Messages about the Crisis on the Polish-Belarusian Border' (2023) 10(4) *Res Rhetorica* 118.

mode of entry.²¹ The right to seek asylum is intrinsically linked to the non-derogable principle of *non-refoulement*, which forbids returning individuals to territories where they risk torture or other inhuman or degrading treatment. This principle constitutes a fundamental pillar of international refugee protection and is reflected in multiple legal instruments, most prominently Article 33(1) of the 1951 Refugee Convention (Geneva Convention), Article 3 of the European Convention on Human Rights (ECHR), Article 78 of the Treaty on the Functioning of the European Union (TFEU), and Article 19 of the EUCFR. The implementation of the legislation, adopted by Poland, Latvia, and Lithuania, has led to massive human rights violations, drawing strong condemnation from numerous human rights bodies and organisations, including the UN Refugee Agency (UNHCR),²² the Council of Europe Commissioner for Human Rights,²³ and Amnesty International.²⁴

The relaxation of visa requirements in Belarus for nationals of refugee-producing countries has been cited by policymakers in EU Member States as one of the key elements of ‘migrant instrumentalisation’. For example, this argument was explicitly presented by Lithuania in its submission to the International Court of Justice (ICJ), where, in May 2025, it initiated proceedings against Belarus. Lithuania claimed that Belarus violated the Protocol against the Smuggling of Migrants by Land, Sea and Air, which supplements the UN Convention against Transnational Organized Crime.

In its submission, Lithuania detailed the *modus operandi* of what it described as Belarus’ instrumentalisation strategy. Drawing on media reports and other sources, the submission outlined how travel agencies in refugee-producing or hosting countries began offering ‘tour packages’ to Minsk, including airfare, visas, accommodation, and the assistance of intermediaries who later helped foreign nationals cross into the EU irregularly. It underlined that these agencies often applied for short-term visas on behalf of their clients, citing tourism or medical treatment as the stated purpose of visit. Lithuania

21 This has been confirmed by the seminal CJEU ruling in Case C-72/22PPU *M.A. v Valstybės sienos apsaugos tarnyba* ECLI:EU:C:2022:505.

22 UNHCR, UNHCR observations on the Order of the Cabinet of Ministers of the Republic of Latvia on the Declaration of Emergency Situation (No 518) (2021) <<https://www.refworld.org/legal/natlegcomments/unhcr/2021/en/124040>> accessed 31 July 2025.

23 Commissioner for Human Rights, ‘Poland Needs to Respect its International Human Rights Obligations on the Belarusian Border, says Commissioner O’Flaherty’ (23 September 2024) <<https://rb.gy/k7q793>> accessed 31 July 2025.

24 Amnesty International, *Lithuania: Forced out or Locked up* (n 4); Amnesty International, *Latvia: Return Home or Never Leave the Woods* (n 4). For an analysis see also Aleksandra Ancite-Jepifānova, ‘Unpacking the “Migrant Instrumentalisation” Narrative: Law and Politics of Refugee Exclusion at the EU-Belarus Border’ CEU Democracy Institute Working Paper, 2025/32 <https://democracyinstitute.ceu.edu/sites/default/files/article/attachment/2025-10/Aleksandra%20Ancite-Jepifanova_Unpacking%20the%20%20%20%20Migrant%20Instrumentalisation_%20Narrative_CEU%20DI%20WP%2032%202025.pdf> accessed 14 November 2025.

particularly highlighted the role of the Belarusian state-owned tourism company *Tsentrkurort*, which was said to have streamlined visa issuance for Iraqi nationals.²⁵ The submission alleged that Belarus deliberately simplified its visa regime and collaborated with private firms to ‘facilitate mass irregular migration’, with visas ultimately being ‘misused’ to enter Lithuania unlawfully.²⁶ Other elements of this alleged strategy, as highlighted in Lithuania’s ICJ submission, included the opening of new air routes and an increase in flights to Minsk.²⁷ The submission also cited extensive evidence that the Belarusian authorities either failed to prevent or actively facilitated irregular border crossings, at times reportedly using force to push non-nationals across the EU’s external border.²⁸

6.2.3 Early 2022–Onwards

Available evidence indicates that the situation along the Belarus–EU border has undergone significant transformation since the crisis began in the summer of 2021. Already by late 2021, under EU pressure, several international airlines introduced discriminatory restrictions that prevented nationals of countries like Iraq, Syria, and Yemen from boarding flights to Minsk. Around the same time, the Iraqi government organised several ‘repatriation’ flights to return hundreds of Iraqi nationals from Belarus.²⁹

Although these measures led to a decline in irregular border crossings from Belarus compared to 2021, the route has remained actively used. However, whereas most non-EU nationals in 2021 entered Belarus directly with Belarusian visas, since around early 2022 the majority of people seeking to cross into the EU have typically first travelled to Russia – often holding Russian visas or entering under visa-free arrangements – before continuing overland into Belarus. By 2022, this Russia–Belarus transit route had clearly become the dominant pathway for those attempting to enter the EU irregularly via Belarus.³⁰

25 *Republic of Lithuania v Republic of Belarus*, Application Instituting Proceedings (ICJ, 19 May 2025) vol I, paras 29–34 <<https://www.icj-cij.org/sites/default/files/case-related/200/200-20250519-app-01-00-en.pdf>> accessed 31 July 2025.

26 *Ibid* para 65.

27 *Ibid* para 36.

28 *Ibid* paras 39–42.

29 Emma Wallis, ‘More Migrants Flown Back to Iraq from Belarus’ (*InfoMigrants*, 6 December 2018) <<https://www.infomigrants.net/en/post/37025/more-migrants-flown-back-to-iraq-from-belarus>> accessed 31 July 2025.

30 This pattern has been confirmed by various sources, including my interviews with humanitarian aid volunteers assisting protection seekers at the border. See, e.g., Humana Constanta, *Humanitarian Crisis in Belarus and the European Union Border in 2023-24: A Structural Analysis and Perspectives* (2025) <<https://humanconstanta.org/wp-content/uploads/2025/04/humanitarian-crisis-in-belarus-.pdf>> accessed 31 July 2025. During my research, I also

This shift in migration patterns, however, has often been neglected in official narratives on ‘migrant instrumentalisation’. For example, in its submission to the ICJ, Lithuania does not specify the time frame during which foreign nationals predominantly relied on short-term Belarusian visas issued as part of travel packages, thereby creating the misleading impression that this *modus operandi* by Belarus is still ongoing. Nevertheless, even when this shift is acknowledged, the transit route through Russia continues to be linked to narratives of migrant instrumentalisation and hybrid threats, a discourse that has intensified following the Russian invasion of Ukraine and carries a strong securitised dimension. The Polish authorities, for instance, have repeatedly claimed that the movement of people attempting to cross the Belarusian border is ‘artificially created’, in part through the facilitation of tourist visas for nationals of refugee-producing countries.³¹ Polish Prime Minister Donald Tusk notably alleged: ‘It is the Russian state, not some murky business, that is behind the organisation of the recruitment, transport, and attempts to smuggle thousands of people into Europe’, emphasising that the vast majority of those crossing the Polish border irregularly possess Russian visas.³² Such narratives have also been echoed at the EU level. For example, Monique Pariat, the European Commission’s Director-General for Migration and Home Affairs, noted that EU Member States have reported a significant number of irregular arrivals holding ‘Russian visas or entry stamps’, linking this trend to ongoing ‘hybrid threats’ at the EU’s external borders.³³

Moreover, since early 2022, EU Member States bordering Belarus have transformed initially temporary responses to alleged instrumentalisation into permanent legal frameworks. In spring 2023, Lithuania amended its State Border Law to authorise pushbacks during a declared ‘extreme situation’ caused by irregular migration.³⁴ This move formalised ongoing practices

had the opportunity to see numerous short-term Russian visas issued to nationals of Middle Eastern countries, often granted for purposes including tourism, study, or private visits.

31 Natasha Mellersh, ‘“Brutal Barriers”? A Closer Look at the EU’s Eastern Border’ (*InfoMigrants*, 26 May 2025) <<https://www.infomigrants.net/en/post/64063/brutal-barriers-a-closer-look-at-the-eus-eastern-border>> accessed 31 July 2025.

32 Marion MacGregor, ‘Russia Alleged to Be Smuggling Migrants to Europe in “Hybrid Attack”’ (*InfoMigrants*, 22 May 2024) <<https://www.infomigrants.net/en/post/57253/russia-alleged-to-be-smuggling-migrants-to-europe-in-hybrid-attack>> accessed 31 July 2025.

33 Eleonora Vasques, ‘Russia Encourages Migrants to Cross Belarus to the EU, Baltic States Warn’ (*Euractiv*, 5 May 2023) <<https://www.euractiv.com/section/politics/news/russia-encourages-migrants-to-cross-belarus-to-the-eu-baltic-states-warn/>> accessed 31 July 2025. See also Council of the European Union, Document 5234/25 (16 January 2025) <<https://www.statewatch.org/media/4714/eu-council-emwp-eastern-land-route-5234-25.pdf>> accessed 31 July 2025.

34 Lietuvos Respublikos valstybės sienos ir jos apsaugos įstatymo Nr. VIII-1666 1, 2, 4, 10, 11, 14, 15, 16, 18, 23, 26 straipsnių pakeitimo ir įstatymo papildymo 23-1 straipsniu ir nauju IX skyriumi įstatymas (TAR, 2023-04-26, Nr. 2023-08044) <<https://www.infollex.lt/ta/849616>> accessed 31 July 2025.

and was soon mirrored by Latvia.³⁵ Finland echoed this approach, first closing its border with Russia and later passing legislation authorising pushbacks in response to a late 2023 incident involving several hundred third-country nationals who attempted to cross the Russian-Finnish border.³⁶ Further, despite the liberal, pro-European coalition coming to power in Poland after the October 2023 elections, the new government strengthened, rather than reversed, the country's hardline migration policies. In early 2025, it amended the law to permit the suspension of the right to claim asylum in cases of alleged instrumentalisation,³⁷ despite clear conflicts with the Polish Constitution, EU law, and international human rights standards.³⁸

At the EU level, the most significant development has been the adoption of the Crisis and Force Majeure Regulation,³⁹ which is part of the New Pact on Migration and Asylum and shall apply from 1 July 2026. The Regulation formally codifies the instrumentalisation concept,⁴⁰ allowing Member States to delay asylum registration, expand the use of border procedures, and increase detention in such scenarios. Although the Regulation stops short of explicitly permitting pushbacks or the suspension of asylum rights, it offers only minimal procedural safeguards.⁴¹

35 Grozījums Latvijas Republikas valsts robežas likumā (22.06.2023, *Latvijas Vēstnesis*, no. 125) <<https://www.vestnesis.lv/op/2023/125.5>> accessed 31 July 2025; Grozījums Latvijas Republikas valsts robežas likumā (22.06.2023, *Latvijas Vēstnesis*, no. 125) <<https://www.vestnesis.lv/op/2023/125.5>> accessed 31 July 2025.

36 For analysis and criticism, see Jaana Palander and Mehrnoosh Farzambar, 'Border Crisis as a Crisis of Law: National Security & Mobility Rights at the Eastern Border of Finland' (*IACL-AIDC Blog*, 11 July 2024) <<https://blog-iacl-aidc.org/2024-posts/2024/7/11/border-crisis-as-a-crisis-of-law-national-security-amp-mobility-rights-at-the-eastern-border-of-finland>> accessed 31 July 2025; Jukka Kōnönen, 'Beyond the Northeastern Border Spectacle: The Instrumentalisation of Hybrid Threats to Suspend Asylum Law' (*Border Criminologies Blog*, 11 March 2025) <<https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2025/03/beyond-northeastern-border-spectacle>> accessed 31 July 2025.

37 Art.1. Zmiana ustawy o udzieleniu cudzoziemcom ochrony na terytorium Rzeczypospolitej Polskiej (Dz.U.2025.389, Wersja od 26.03.2025) <<https://sip.lex.pl/akty-prawne/dzu-dziennik-ustaw/zmiana-ustawy-o-udzielaniu-cudzoziemcom-ochrony-na-terytorium-22125980/art-1>> accessed 31 July 2025.

38 For criticism see Maciej Grześkowiak, 'Poland's Ban on Asylum – A New Low' (*EUobserver*, 28 February 2025) <<https://euobserver.com/migration/ard2ed88b7>> accessed 31 July 2025.

39 Regulation (EU) 2024/1359 of the European Parliament and of the Council of 14 May 2024 addressing situations of crisis and force majeure in the field of migration and asylum and amending Regulation (EU) 2021/1147 [2024] *OJ L2024/1359*.

40 See Section 6.3.1 for more details.

41 For an analysis see, e.g., Violeta Moreno-Lax, 'The "Crisification" of Migration Law: Insights from the EU External Border' (2023) Queen Mary Law Research Paper No. 403/2023 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4577364> accessed 31 July 2025.

6.3 Visas and the Narrative of Migrant Instrumentalisation: A Critical Reappraisal

6.3.1 Conceptual and Legal Challenges

A general observation regarding the instrumentalisation narrative in EU legal and political discourses is that it operates as a simplified and generalised framing that serves to deflect attention from the EU's own externalisation and containment policies. These policies, which aim to prevent nationals of refugee-producing countries from reaching EU territory, are heavily reliant on restrictive visa regimes and the near-total absence of legal pathways for protection seekers. It is these barriers, rather than the actions of Belarusian authorities, that primarily compel people to resort to dangerous and irregular routes in their efforts to access protection in Europe. The route through Belarus represents only one such example. It is no coincidence that passports from countries such as Afghanistan, Syria, and Iraq rank among the lowest globally in terms of mobility rights. Nationals of these states – precisely those most likely to qualify for international protection – require visas to access most countries worldwide, and securing a visa to enter states in the so-called Global North, including EU Member States, is extremely difficult.⁴² From the perspective of global mobility alone, and irrespective of the instrumentalisation context, the comparatively liberal visa regimes of Belarus and Russia may be viewed in a positive light for the access they provide to cross-border movement, particularly against the backdrop of global passport inequality.⁴³

The instrumentalisation narrative, by contrast, effectively allows for the exclusion of foreign nationals from fundamental rights protections based solely on the route they take to reach the EU. This framing overlooks the structural drivers behind irregular journeys and largely depicts individuals as passive subjects. However, empirical evidence challenges this portrayal, demonstrating that many of those affected exhibit considerable agency in shaping their journeys, actively navigating and attempting to overcome global mobility constraints. Several of my interviewees, for instance, selected the Belarus route because it was seen as comparatively safer – often after failed attempts to reach the EU through alternative pathways. Farooq, a protection seeker who

42 See Global Passport Power Rank 2025 <<https://www.passportindex.org/byRank.php>> accessed 31 July 2025. For a discussion on the EU externalisation and containment policies see, e.g., Valsamis Mitsilegas, 'The EU External Border as a Site of Preventive (In)justice' (2022) 28 (4–6) *European Law Journal*, 263; Violeta Moreno-Lax, 'Crisis as (Asylum) Governance: The Evolving Normalisation of Non-access to Protection in the EU' (2024) 9(1) *European Papers*, 179; Ermioni Xanthopoulou, 'Mapping EU Externalisation Devices through a Critical Eye' (2024) 26(1) *Journal of Migration and Law*, 108.

43 This holds true regardless of the level of protection Belarus and Russia offer to third-country nationals, insofar as global mobility denotes a broader conceptual terrain encompassing entry and residence through regular, semi-regular, or irregular means and is closely tied to an individual's agency to move – even when the resulting living conditions may be inadequate or far from decent. See Section 6.3.2. for more details on living conditions in Russia.

was eventually returned to Iraq after spending two and a half months at the Latvia–Belarus border, described his experience as follows:

I am a Kurd from Mosul. I wanted to become a refugee in Europe because I have been threatened by some groups in Iraq. They want to kill me. In 2018, I tried to go to Europe via Turkey but Turkish border guards beat me up, put me in jail for ten days and returned [me] back to Iraq. In 2020, I went to Greece but Greek commandos caught me near Saloniki and sent me back to Turkey. And Turkey again sent me back to Iraq. This time I tried to go to Latvia – I paid \$1,800 to get to Minsk. Now I am back but I will keep trying to move to Europe – anywhere safe.

Furthermore, from a legal standpoint, the concept of instrumentalisation remains overly broad and imprecise, significantly undermining legal certainty – even where attempts have been made to define it explicitly. Under the Crisis, Force Majeure and Instrumentalisation Regulation, a ‘situation of instrumentalisation’ is defined as one in which a:

third country or hostile non-state actor encourages or facilitates the movement of third-country nationals or stateless persons to the EU’s external borders or into a Member State, with the aim of destabilising the Union or a Member State, and where such actions are likely to threaten essential state functions, including the maintenance of public order or the safeguarding of national security.⁴⁴

One of the core issues with this definition is the ambiguity surrounding what it means to ‘encourage or facilitate’ the movement of foreign nationals to the EU’s external borders. If interpreted to include the issuance of visas to individuals who would otherwise be unable to enter the EU – or the introduction of visa-free regimes with specific third countries – such a reading risks encroaching on the sovereign right of states to regulate the entry and stay of foreign nationals, including through the operation of independent visa policies.⁴⁵ The requirement to demonstrate that a third country acted with the intention of destabilising the EU is equally problematic. Since visas are generally issued for ordinary purposes such as tourism, education, employment, or private visits, attributing a destabilising intent to a country’s more permissive visa policy is inevitably subjective and undermines legal certainty. Even if a more permissive visa regime is politically motivated or intended to exert diplomatic pressure, imputing a destabilising intent remains a highly generalised judgement. This

⁴⁴ Reg 2024/1359, art 4(b).

⁴⁵ ECtHR Judgment of 28 May 1985, *Abdulaziz, Cabales & Balkandali v. UK*, Applications nos. 9214/80, 9473/81 and 9474/81, § 67.

framing risks portraying all recipients of Belarusian or Russian visas who later attempt to cross into the EU irregularly as being ‘instrumentalised’, thereby disregarding their individual circumstances, personal agency, and the diverse motivations behind their journeys.

6.3.2 *Russian Visas*

From a legal standpoint, allegations that Belarus deliberately relaxed its visa regime for nationals of certain countries to exert pressure on the EU are difficult to substantiate and should be approached with caution. Even aside from legal considerations, it is important to emphasise that the alleged Belarusian facilitation of migration through visa issuance appears to be short-lived, occurring primarily between the summer of 2021 and late that year or early 2022. As outlined in Section 6.2.3, since early 2022, foreign nationals have most frequently arrived at the Belarus–EU border using Russian visas or by transiting through Russia without a visa. In this context, claims that Russia deliberately manipulates its visa policy as a geopolitical tool to destabilise the EU warrant especially careful scrutiny.

Individuals arriving irregularly from Belarus via Russia represent a diverse range of nationalities, including Syrian, Afghan, Iraqi, Iranian, Somali, Indian, Bangladeshi, Yemeni, Turkish, Cuban, and Sri Lankan nationals,⁴⁶ and their circumstances of entering Russia vary. In this context, it is important to emphasise that Russia has a large and diverse foreign-born population⁴⁷ and remains a significant destination country. According to official statistics, in both 2023 and 2024 Russia recorded over 15 million entries by foreign nationals each year. In 2024 alone, Russian authorities issued an estimated 1.4 million visas to individuals from abroad.⁴⁸ Russia has also recently expanded its electronic visa regime, which now applies to nationals of over 60 countries, including China, India, and Iran.⁴⁹ In 2024, China accounted for the highest number of visas issued (over 550,000) followed by Turkmenistan, Saudi Arabia, India, Türkiye, and Germany. The purposes of travel varied: for example, while most Turkish and German nationals entered on tourist visas, nearly half of the paper visas issued to Indian nationals (22,600 in total) were for

46 See, e.g., Council of the European Union, Document 5234/25 (n 33). These nationalities have also been mentioned by my interlocutors.

47 As of 2020, Russia had the fourth-largest foreign-born population worldwide, following the US, Germany, and Saudi Arabia. IOM, World Migration Report 2022 (2022) <<https://publications.iom.int/books/world-migration-report-2022>> accessed 31 July 2025.

48 For the statistics see, ‘Rossiya v 2024 godu uvelichila vydachu viz inostrantsam na 40 % . Kto poluchaet razresheniya na v’ezd’ (RBK, 15.04.2025) (in Russian) <https://www.rbc.ru/business/15/04/2025/67fcf4f99a794769945b186f?from=from_main_9> accessed 31 July 2025.

49 The list of states whose nationals can apply for a Russian e-visa is published on the website of the Consular Department of the Russian Ministry of Foreign Affairs <https://electronic-visa.kdmid.ru/country_en.html> accessed 31 July 2025.

employment.⁵⁰ In addition, Russia maintains visa-free entry arrangements with numerous countries, particularly members of the Commonwealth of Independent States (CIS), as well as politically aligned states such as Cuba and several others in Latin America.⁵¹

For nationals of countries not eligible for e-visas, traditional visa application procedures remain relatively accessible and are often more permissive than those of the EU. This includes nationals of refugee-producing countries, for whom obtaining EU entry visas is exceptionally difficult. Following the outbreak of the civil war in Syria in 2011, for example, Russia remained one of the few countries that continued to issue tourist visas to Syrian passport holders.⁵² Such migration routes are frequently facilitated by informal networks and intermediaries, with recurrent reports of low-level corruption at Russian consulates – dating back well before 2022. Russian refugee support organisations have documented cases in which Syrian families paid several thousand dollars for tourist visas.⁵³ Similar patterns have been observed among nationals of African countries.⁵⁴ Student visas also remain a common entry route. For example, the Russian government allocates a limited number of scholarships each year for foreign students, including individuals from Afghanistan and Iraq.⁵⁵ There is also the possibility to study in Russia on a fee-paying basis or to enrol in Russian language courses. However, the use of student or business visas has also frequently been linked to low-level corrupt practices involving intermediaries, local officials, and consulates.

It is not uncommon for such schemes to be used by foreign nationals to enter Russia and subsequently travel to the Belarusian border with the EU. These dynamics have been extensively documented in media reports. One illustrative case involved two Syrian nationals fleeing military conscription, who obtained student visas from the Russian consulate in Damascus. They

50 'Rossiya v 2024 godu uvelichila vydachu viz inostrantsam na 40 %' (n 48).

51 'Informatsiya o vizovom/bezvizovom rezhime poezdok grazhdan po razlichnym vidam pasportov, ustanovlennom mezhdunarodnymi soglasheniyami, a takzhe odnostoronnnimi resheniyami vlastey' (as of 24 July 2025) (in Russian) <<https://www.kdmid.ru/info-for-traveling-abroad/reference-information-for-traveling-abroad/list-of-countries-with-simplified-entry/>> accessed 31 July 2025.

52 See, e.g., Ekaterina Fomina, 'Syrian Refugees in Russia Have to Fight for Their Rights' (*Open Democracy*, 02 November 2017) <<https://www.opendemocracy.net/en/odr/syrian-refugees-in-russia/>> accessed 31 July 2025.

53 Ibid.

54 'Kak ustroena zhizn' siriiskikh i drugikh bezhentssev v Rossii' (Civic Assistance Committee, 28 July 2015) (in Russian) <<https://refugee.ru/news/kak-ustroena-zhizn-sirijskih-i-drugih-bezhentssev-v-rossii/>> accessed 31 July 2025.

55 'Passports and visas for Russia issued to 365 Afghan scholarship students' (*Ariana News*, 21 October 2022) <<https://www.ariananews.af/passports-and-visas-for-russia-issued-to-365-afghan-scholarship-students/>> accessed 31 July 2025; 'Russia to offer 70 Scholarships to Kurdistan Region Students for 2025-2026 Academic Year' (*Kurdistan24*, 8 October 2024) <<https://www.kurdistan24.net/en/story/805295/russia-to-offer-70-scholarships-to-kurdistan-region-students-for-2025-2026-academic-year>> accessed 31 July 2025.

paid \$2,500 and \$3,000, respectively, to intermediaries who arranged university invitations and prepared the necessary documents. After flying from Damascus to Moscow, the Syrians continued their journey to Belarus and then onwards to the EU border.⁵⁶

A similar case involved a programme launched by the Russian Embassy in Djibouti, which offered law enforcement training for Somali police officers. Investigations later revealed that senior Somali police officials had allegedly sold visas on the black market. These visas were then purchased by people who used them to enter Russia and attempt onward travel to the EU via Belarus.⁵⁷

Moreover, while many individuals crossing from Belarus used Russia solely as a transit country *en route* to the EU, others initially entered with the intention of settling in Russia. Interviews conducted during the course of my research indicate that those attempting to cross the Belarus–EU border are not necessarily recent arrivals. Rather, many have resided in Russia for extended periods and have subsequently abandoned efforts to regularise their legal status or decided to seek protection in the EU due to deteriorating conditions in Russia, including an increasingly repressive human rights environment.⁵⁸

These cases highlight the fact that, although Russia may be comparatively easier to enter for certain nationalities, it remains largely inhospitable as a destination country. Although entry into Russia may be facilitated through visa-free regimes or corrupt consular practices, asylum approval rates remain exceedingly low.⁵⁹ The prevailing living conditions are challenging and, when combined with pervasive informality and corruption, frequently compel foreign nationals to overstay their visas and engage in irregular employment. Many reside in precarious circumstances, subject to continual threats of deportation and systemic obstacles such as police harassment, extortion, and racialised violence. For example, although Russia currently hosts thousands of Syrians and Afghans who arrived at different times, many have lived there for

56 Vadikh El-Khayek, ‘Oni podpisali chto-to, sami ne ponyali, chto. A tut im govoryat: v armiyu’ (*Novaya Gazeta*, 1 February 2024 (in Russian) <<https://novayagazeta.ru/articles/2024/02/01/oni-podpisali-chto-to-sami-ne-poniali-chto-a-tut-im-govoriat-v-armiiu>> accessed 31 July 2025).

57 See ‘Somalia-Russia Partnership Sparks Immigration Crisis in Europe, Finland Suffers Most’ (*HornObserver*, 19 November 2023) <<https://hornobserver.com/articles/2523/Somalia-Russia-partnership-sparks-immigration-crisis-in-Europe-Finland-suffers-most>> accessed 31 July 2025.

58 Similar patterns were observed during the incident at the Russian borders with Norway and Finland in late 2015 to early 2016, as described in Section 6.2.1. See Joni Virkkunen and Minna Piipponen, ‘Informal Practices and the Rule of Law’ (n 15).

59 ‘Migratsionnye itogi 2024 goda: MVD Rossii priznalo bezhentsami 12 chelovek, 5,3 tysyachi poluchili status “vremennoe ubezhishche”’ (Civic Assistance Committee, 28 February 2025) (in Russian) <<https://refugee.ru/en/dokladyi/migratsionnye-itogi-2024-goda-mvd-rossii-priznalo-bezhencami-12-chelovek-53-tysyachi-poluchili-status-vremennoe-ubezhishhe>> accessed 31 July 2025.

extended periods in a state of legal limbo.⁶⁰ Furthermore, since the outbreak of the war in Ukraine in 2022, Russian authorities have increasingly sought to recruit foreign nationals – particularly those detained in immigration centres or in precarious legal situations – to fight in the conflict. In return, these individuals are promised legal status or Russian citizenship.⁶¹

The ECtHR case of *C.O.C.G. and Others v Lithuania*⁶² vividly illustrates these dynamics. The applicants, Cuban nationals who fled Cuba due to well-founded fears of persecution, initially travelled to Russia under the visa-free regime. Despite their attempts to establish themselves in Russia, they faced persistent police harassment, demands for bribes, and threats of deportation. Finding it untenable to live safely in Russia, they travelled to Belarus and sought to cross into Lithuania to claim asylum. However, they were subjected to multiple pushbacks by Lithuanian authorities, who denied them the opportunity to submit asylum applications and left them stranded in the border area for extended periods.⁶³

6.3.3 *Interlinkages between Visa Policies and Other Alleged Tools of Instrumentalisation*

As the analysis above has shown, people crossing from Belarus have consistently formed a highly diverse group in terms of nationality, mode of entry into Belarus or Russia, and personal circumstances. Given the high number of visas issued annually by Russia, its relatively liberal visa policy, and the persistence of low-level corruption, the claim that a small number of individuals entering the EU via Belarus⁶⁴ are deliberately issued Russian visas to pressure

60 See, e.g., ‘Kak ustroena zhizn’ siriiskikh i drugikh bezhentsv v Rossii’ (Civic Assistance Committee, 28 July 2015) (n 54); Ivan Aleksandrov, ‘Rossiya: afganskije bezhentsy v zalozhnikakh u byurokratii i ksenofobii’ (*eurasianet*, 24 January 2022) (in Russian) <<https://shorturl.at/zbqG>> accessed 31 July 2025. For a discussion on the precarious living conditions faced by migrants and protection seekers in Russia, see, e.g., Joni Virkkunen and Minna Piipponen, ‘Informal Practices and the Rule of Law’ (n 15), Rano Turaeva, ‘Capitalising Precarity: Well-being of Migrants in Russia’ (2023) 27(3) *Journal of Labor and Society*, 397.

61 Hanna Sokolova-Stekh, ‘How Russia is recruiting foreigners to fight in Ukraine’ (*DW*, 22 August 2024) <<https://www.dw.com/en/how-russia-is-recruiting-foreigners-to-fight-in-ukraine/a-70019040>> accessed 31 July 2025; Mikhail Kalinin, ‘Lost in Translation: How African Migrants are Tricked and Threatened into Russian Military Service’ (*The Insider*, 7 November 2024) <<https://theinsider.ru/en/politics/276018>> accessed 31 July 2025.

62 *C.O.C.G. and Others v Lithuania* (Application No. 17764/22). The case is pending before the ECtHR at the time of writing (May 2026).

63 Unpublished case materials, on file with the author.

64 In 2021, at the peak of the crisis, Polish border guards recorded fewer than 40,000 ‘attempts of illegal border crossings’ from Belarus. Straż Graniczna [Polish Border Guard], ‘W 2021 r. granicę polsko-białoruską próbowano nielegalnie przekroczyć 39 670 razy, w 2020 r. nielegalnych przekroczeń było 129, w 2019 r.—20, w 2018 r.—4’ (X, 04 January 2022) <https://x.com/Straż_Graniczna/status/1478327785903038469> accessed 31 July 2025. In the following years, the numbers have sharply decreased and, at certain times, dropped close to zero. See, e.g., Adriana Sas, ‘Number of Attempts to Illegally Cross the Polish-Belarusian border

the EU is unsustainable. This assertion becomes even less tenable by the fact that many individuals initially intended to remain in Russia but chose to leave due to harsh living conditions and human rights violations. Similar patterns – albeit, perhaps, to a lesser extent – have also been observed in Belarus: for example, students from various African countries arrived on student visas to pursue higher education, but many found themselves in precarious situations due to restrictions on work and the inability to pay tuition, prompting them to attempt to cross into the EU.⁶⁵

Moreover, measures targeting perceived instrumentalisation are blanket in nature and affect even those who never obtained Belarusian or Russian visas. By imposing sweeping restrictions on asylum, EU Member States effectively imply that all foreign nationals crossing irregularly from Belarus are being ‘instrumentalised’, regardless of their actual circumstances. Even within the limited timeframe of the 2021 border events, the notion of a homogeneous group is misleading. While most did arrive with Belarusian visas, others – such as Rohullah (as described in the introduction) and various other groups – transited through Belarus without visas, relying on smuggling networks operating along long-established irregular Central Asian-Russian routes.

When considering the period from 2022 onwards – and while a detailed analysis of other aspects of perceived migrant instrumentalisation, such as the transportation of third-country nationals to the border or the failure to prevent irregular crossings, falls outside the scope of this chapter – certain observations can nevertheless be made. These observations further support the argument that Russian visa policies are not driven by an intent to exert pressure on the EU. Rather, the evidence points to a proliferation of smuggling networks since the onset of the crisis in 2021 – networks that already existed prior to 2021 but have since expanded. This expansion appears to be facilitated by Belarus’ failure to prevent irregular border crossings, as well as by low-level corruption at various stages of the migration process, including within travel agencies, local authorities, and Russian consulates abroad.

Interviews conducted in the course of this research, alongside media reports, suggest that the majority of individuals crossing from Belarus are transported to the border by intermediaries of varied backgrounds who operate as non-state actors, although some undertake the journey independently. Demonstrating direct involvement by Russian or Belarusian state authorities in these operations would require concrete evidence of state-level coordination or complicity within specific fixer networks – an extremely challenging, if not impossible, undertaking.

in Poland from August 2021 to January 2025’ (*Statista*, 3 February 2025) <<https://www.statista.com/statistics/1271292/poland-attempts-of-illegal-crossing-of-the-polish-belarusian-border/>> accessed 31 July 2025.

65 Humana Constanta, *Humanitarian Crisis in Belarus and the European Union Border in 2023–24* (n 30), 6.

Furthermore, the current *modus operandi* of Belarusian authorities contradicts the notion of a deliberate, centralised, and organised state policy to transport people to the border. Unlike their earlier negligence towards transit foreigners during 2021–2022, Belarusian authorities have increasingly engaged in irregularly detaining individuals within their territory in subsequent years, with many being deported back to Russia, from where they originally travelled.⁶⁶

A related, though distinct, issue often considered part of the perceived instrumentalisation is the *modus operandi* of Belarusian authorities at the border. While there is currently no evidence that Russian or Belarusian authorities systematically organise trips to Belarus or transport non-EU nationals to the border, Belarusian border guards nevertheless continue to fail to prevent irregular crossings into the EU. In many cases, they also prohibit non-EU nationals from leaving the border zone, forcing repeated attempts to cross into the EU, mirroring pushback practices by their EU Member State counterparts. Labelling such practices – particularly the mere failure to prevent irregular crossings – as migrant instrumentalisation, however, is legally problematic. It should be emphasised that international human rights law does not impose an obligation on state authorities to prevent individuals from crossing irregularly into neighbouring states. On the contrary, the 1951 Refugee Convention recognises that many refugees may arrive irregularly and expressly prohibits penalising those seeking protection for irregular entry (Article 31).

Similar considerations also apply to the incident at the Russian-Finnish border in 2023, mentioned in Section 6.2.3. When several hundred third-country nationals attempted to cross the Russian-Finnish border to claim asylum in Finland, the Finnish government labelled it as migrant instrumentalisation.⁶⁷ However, there is no credible evidence to support the claim that this route was deliberately organised by the Russian state. Instead, it appears to have been used by fixer networks after Russia terminated its border agreement with Finland amid rising tensions with Helsinki following the Russian invasion of Ukraine⁶⁸ and ceased preventing foreigners without valid Schengen visas from entering Finland.

Multiple media reports indicate that fixer networks soon began operating the route, with information circulating widely on social media and in internet chat groups. Some foreign nationals involved had previously made unsuccessful attempts to enter the EU via Belarus and later sought entry via Finland, sometimes independently and without intermediaries.⁶⁹ Another factor

66 Ibid 14, 16.

67 See n 15 for more details.

68 Thomas Nilsen, 'Russia Terminates Cross-border Agreement with Finland' (*The Barents Observer*, 22 October 2023) <<https://www.thebarentsobserver.com/life-and-public/russia-terminates-crossborder-agreement-with-finland/152712/>> accessed 31 July 2025.

69 See, e.g., Oleg Boldyrev, 'Russia Luring Migrants from Finnish Border for War in Ukraine' (*BBC Russian*, 7 December 2023) <<https://www.bbc.com/news/world-europe-67647379>> accessed 31 July 2025.

undermining claims of a coordinated Russian state strategy to facilitate these movements is that, near the Finnish border, Russian authorities frequently conducted police checks. In late 2023, at least 230 individuals were arrested in Karelia alone – one of three Russian regions bordering Finland – for remaining in Russia without valid visas. Numerous reports also indicate that, while in pre-deportation detention, some of these foreign nationals were approached by military recruiters and pressured to sign army contracts as a means of avoiding deportation.⁷⁰

6.4 Conclusion

This chapter has examined the relationship between visa policies as migration management tools and the concept of migrant instrumentalisation through the EU–Belarus border crisis. In summer 2021, after EU imposed sanctions on Minsk, Belarus increased visa issuance to nationals from refugee-producing countries, enabled their passage to the EU border, and ceased preventing irregular crossings, causing the rise in irregular arrivals in the EU. Latvia, Lithuania, and Poland framed this as deliberate ‘instrumentalisation’ by Belarus and Russia to destabilise the EU, using this narrative to justify severe restrictions on the right to seek asylum that violate EU and international law. Over the subsequent years, the temporary measures became permanent and have been indirectly supported and formally endorsed by the EU, which culminated in embedding the instrumentalisation concept into EU hard law.

The relaxation of visa requirements in Belarus has been cited by EU policy-makers as a key element of ‘migrant instrumentalisation’. However, this narrative diverts attention from the EU’s own restrictive visa policies and lack of legal protection routes, which force many protection seekers from countries like Iraq, Syria, and Afghanistan to attempt dangerous irregular journeys, including via Belarus. The instrumentalisation framing excludes foreign nationals from rights protections solely based on their route, ignoring the structural causes of irregular migration and the active agency of many people on the move who choose routes like Belarus as comparatively safer alternatives after failed attempts elsewhere.

Second, establishing an aim to destabilise the EU is challenging and undermines legal certainty, as visas are officially issued for ordinary purposes such as tourism, study, or work. Even if a more relaxed visa regime is politically motivated, attributing a deliberate intent to destabilise the EU is subjective, overly broad, and nearly impossible to substantiate from a legal perspective. This risks

70 Ibid; Sergei Romashenko, ‘Iz Murmanskoi oblasti deportiruyut migrantov iz Indii i Sirii’ (DW, 15 January 2024) (in Russian) <<https://www.dw.com/ru/iz-murmanskoy-oblasti-deportiruyut-migrantov-iz-indii-i-sirii/a-67983752>> accessed 31 July 2025. Shaun Walker and Faisal Ali, ‘Beaten and Conscripted into Putin’s Army: A Somali Refugee Attempts to Reach Europe’ <<https://www.theguardian.com/world/article/2024/jul/29/somali-refugee-reach-eu-putin-russia-germany>> accessed 31 July 2025.

unfairly categorising all Belarusian or Russian visa holders who subsequently cross into the EU irregularly as ‘instrumentalised’, disregarding their individual circumstances and agency.

Crucially, available evidence shows that the situation at the Belarus–EU border has changed significantly since the crisis began in summer 2021. While most non-EU nationals initially entered Belarus directly with Belarusian visas, a notable shift occurred around early 2022. Since then, the majority have travelled first to Russia – often using Russian visas or visa-free arrangements – before crossing overland into Belarus. By 2022, this Russia–Belarus transit route had become the dominant pathway for irregular entry into the EU via Belarus. Currently, however, there are no clear indications that Russia operates a centrally coordinated visa policy aimed specifically at pressuring the EU. Such assertions oversimplify complex migration dynamics and overlook important factors such as decentralised corruption, the role of fixer networks, the agency of migrants, and established regional mobility patterns.

Those crossing into the EU from Belarus represent a highly diverse group. Russia issues over a million visas annually, including to nationals from refugee-producing countries, and maintains visa-free arrangements with many states, making its visa policy generally more permissive than that of the EU. It is therefore unsurprising that some foreign nationals obtain Russian visas through informal channels involving low-level corruption – with the aim of crossing into the EU via Belarus after entering Russia. Moreover, many of those seeking to cross from Belarus have lived in Russia for extended periods, only attempting irregular entry into the EU after facing harsh living conditions, systemic harassment by authorities, low asylum approval rates, and legal precarity in Russia. Additionally, some arrive at the EU–Belarus border via Russia without holding any visas, travelling irregularly. These observations further undermine the assumption that Russian visa policies are designed to exert pressure on the EU. Rather, the evidence points to an expansion of fixer networks since the border crisis began in 2021 – networks that existed beforehand but have grown. This expansion appears to be facilitated by Belarus’ continuous failure to prevent irregular border crossings, alongside low-level corruption throughout the migration process, including in travel agencies, local authorities, and Russian consulates abroad.

7 Visas and Their Meaning and Consequences for Human Rights Defenders

Elsbeth Guild and Vasiliki Apatzidou

7.1 Introduction

In this chapter, we will examine the relationship between the promotion and protection of human rights defenders (HRDs) and border controls and visa regimes. Our focus is on the EU, a regional institution which is responsible for the development and management of a common visa policy for its Member States.¹ It is juridically accepted in Europe that visas as such are an obstacle to travel across international borders.² Mandatory visa regimes are applied to some countries, but not to others mainly on the basis of international relations between the countries, security considerations, and since the end of the 20th century, for reasons of migration management and control. The tension which we examine in this chapter relates to two competing objectives expressed in EU law and policy. On the one hand, the EU is a very vocal and important actor internationally in the promotion and defence of HRDs.³ As we set out in this introduction, the EU commitment to the work of HRDs as central to the protection of democracy and human rights is substantial. But, on the other hand, its concern with border controls and the management of migration is resulting in many HRDs being unable to obtain visas to enter the EU, even when they are seeking to get away from repressive entities which are targeting them on account of the work that they may have been carrying out with the support of EU funding. The evident contradictions between two policy fields of the EU, support for human rights defenders and border control, have the effect of weakening EU policy coherence and make the EU an easy target for allegations of hypocrisy – the EU supports HRDs abroad but does not allow

1 Treaty on the Functioning of the European Union (2012) OJ C 326/47, art 77.

2 C-202/13, *McCarthy v Secretary of State for the Home Department* [2014] EU:C:2014:2450.

3 The UN Declaration on Human Rights Defenders defines human rights defenders (HRDs) as individuals or groups who act to promote, protect or strive for the protection and realisation of human rights and fundamental freedoms through peaceful means. This definition has been adopted by the EU institutions, in particular the European Parliament, see in <<https://www.ohchr.org/en/special-procedures/sr-human-rights-defenders/declaration-human-rights-defenders>> accessed 15 October 2024.

them to come to the EU for protection when they need it. We will examine the elements of this tension in this chapter.

We will do this in four steps. First we will consider the institutional setting within EU law and particularly the European Parliament as regards bringing pressure to bear on reform of the treatment of HRDs. Then we examine the arguments regarding the need for mobility for HRDs, and why as a group they merit special treatment. We then set out why the current EU visa system is inapt to the needs of HRDs and then finish the chapter with recommendations on how to improve the visa regime to fulfil the EU's political commitments to HRDs. The argument set out in this chapter is that the EU institutions have acknowledged the pressing need for HRDs to travel to the EU and the institutions have committed themselves to improving the situation which at the moment is inadequate to meet this recognised need. This may seem like a simple argument on the delivery of a political plan well articulated. But it runs counter to another political trend well developed in EU spheres towards ever greater securitisation of EU borders and heightened suspicions of every alien who seeks to enter the EU irrespective of the ostensible merits of the application. In order to realise the EU institutions' commitments to HRDs it will be necessary to address the logic of suspicion and find ways around it to achieve mobility for HRDs.

7.2 The Institutional Setting

The EU institutions have committed themselves to the protection and defence of HRDs. The EU Parliament has promoted the approach of guidelines to provide a framework for EU efforts to assist and promote HRDs' work. Guidelines were first adopted in 2004 and revised in 2008 and 2023.⁴ They have gradually become the framework of reference for EU institutions, EU delegations, Member States' diplomatic missions and EU leaders to promote and ensure respect for the rights of HRDs and to protect HRDs at risk of attacks and threats from state and non-state actors.⁵ The guidelines were followed by the adoption of the 2012 EU strategic framework on human rights and democracy.⁶ This was implemented through three successive action plans which have provided a vision, principles and actionable measures for the EU's support for the promotion of human rights globally and the implementation of the guidelines. In 2023, the Parliament updated its guidelines emphasising the importance of HRDs in the international community and the EU's duties

4 Council of the European Union, 'Ensuring Protection – European Union Guidelines on Human Rights Defenders' 16332/2/08 (Brussels, 10 June 2009) <st16332-re02.en08.doc> accessed 15 October 2024.

5 See EU Guidelines on Human Rights Defenders (16 February 2021) <EU Guidelines on Human Rights Defenders (2020) | EEAS> accessed 15 October 2024.

6 Council of the European Union, 'EU Strategic Framework and Action Plan on Human Rights and Democracy' (Luxembourg, 25 June 2012).

towards them.⁷ The current guidelines state that: ‘HRDs are essential allies in the EU’s efforts to protect and promote human rights, democracy and the rule of law and prevent conflicts worldwide. It is therefore in the core interest of the EU and its Member States to support their work and protect them’ (recital B).⁸

The EU’s commitment to the protection of HRDs and the promotion of their work has not simply been a matter of statements and declarations. These have been followed by a wide range of instruments to support HRDs, from coordination tools to financial aid, among which is the European Instrument for Democracy and Human Rights (EIDHR), which was previously the main EU financial instrument used to support HRDs, including through both emergency grants, the EU’s HRD protection mechanism, and the support of ProtectDefenders.eu, a non-governmental organisations (NGO) funded generously by the EU to provide assistance on the ground to HRDs.⁹ The EIDHR was replaced by a thematic programme on human rights and democracy as part of the Neighbourhood, Development and International Cooperation Instrument [Global Europe (NDICI)], within which the respect for human rights, democracy and the rule of law is a cross-cutting objective and is also promoted through the work of the European Endowment for Democracy.

In terms of financing, the EU has dedicated more than EUR 186 million under the EIDHR to support human rights and HRDs in situations in which they were most at risk during the 2014–2020 period.¹⁰ A further indicative amount of EUR 326 million was earmarked under the NDICI’s thematic programme on human rights and democracy to support HRDs and counter the shrinking space for civil society during the 2021–2027 period.¹¹ Additionally, 1,600 HRDs have been supported under the EU emergency grant scheme between 2010–2023.¹² The EU has also sought to mainstream HRD support not least through trade policy review which in 2021 committed the EU to taking a more assertive stance in defending its interests and values, notably the promotion and protection of human rights.¹³ The Commission’s trade and

7 European Parliament, ‘Resolution of 16 March 2023 on the EU Guidelines on Human Rights Defenders (2021/2204 (INI)) (C/2023/409)’ (23 November 2023) <European Parliament resolution of 16 March 2023 on the EU Guidelines on Human Rights Defenders (2021/2204(INI))> accessed 15 October 2024.

8 Ibid.

9 The ProtectDefenders.eu initiative has been allocated around EUR 35 million of EU funding and has supported around 55,000 HRDs since 2015, including 8,700 in 2021 according to the European Parliament <<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52023IP0086>> accessed 15 October 2024.

10 European Parliament (n 7).

11 EEAS, ‘The New “NDICI – Global Europe” (2021–2027)’ (17 March 2022) <https://www.eeas.europa.eu/eeas/new-ndici-global-europe-2021-2027_en> accessed 15 October 2024.

12 European Parliament (n 7).

13 European Commission, ‘Trade Policy Review: An Open, Sustainable and Assertive Trade Policy’ (2021) <https://trade.ec.europa.eu/access-to-markets/en/country-assets/tradoc_159428.pdf> accessed 15 October 2024.

sustainable development (TSD) review provides for increased monitoring of TSD commitments in trade agreements, a strengthened role for civil society and improved enforcement of these agreements.¹⁴

The European Parliament has been particularly cognisant of the challenges which HRDs face. It noted in the current Guidelines that there has been a substantial increase in the number, range and severity of attacks on HRDs and their families and lawyers in recent years.¹⁵ According to several international and NGOs, the number of HRDs killed in 2020 and 2021 respectively varies between 331 and 358, and since under-reporting is common, the actual figure is both unknown and likely to be much higher.¹⁶ A high number of those killed were environmental defenders,¹⁷ with more than half of those killings occurring in only three countries: Colombia, Mexico and the Philippines. The number of HRDs killed in Colombia reached a record high in 2022, and was particularly high in the last part of that year.¹⁸ According to the European Parliament, a large number of HRDs are under threat and attack because they have raised concerns about the adverse human rights impacts of business operations, including in the context of large development projects that affect access to land and livelihoods.¹⁹ It confirmed that in the second decade of the 21st century, the majority of the HRDs targeted and/or murdered by state and non-state actors were working on land, water, environmental and indigenous peoples' rights.²⁰

In perhaps a more challenging statement, the Parliament noted that authoritarian governments, but also a worrying number of long-established democratic countries across the world, including within the EU, are increasingly adopting new kinds of tactics and restrictive measures against HRDs in order to censor their work and silence and harass them. Such measures include strategic lawsuits against public participation, restrictive government policies, defamation campaigns, discrimination and intimidation or violence,

14 European Commission, 'The Power of Trade Partnerships: Together for Green and Just Economic Growth' (Press Release, 22 June 2022) <https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_22_3921/IP_22_3921_EN.pdf> accessed 15 October 2024.

15 EU Guidelines on Human Rights Defenders (n 5).

16 Frontline Defenders, 'Global Analysis' (23 February 2023) <Global Analysis 2021 | Front Line Defenders> accessed 15 October 2024.

17 The UN Economic Commission for Europe, *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention), specifically refers to the situation of HRDs; See also Núria Saura-Freixes, 'Environmental Human Rights Defenders, the Rule of Law and the Human Right to a Healthy, Clean, and Sustainable Environment: Last Trends and Challenges' (2022) 8(1) UNIO-EU Law Journal 53.

18 Reuters, 'Colombia Killings of Social Leaders hit Record in 2022' (23 January 2023) <Colombia killings of social leaders hit record in 2022 -ombudsman | Reuters> accessed 15 October 2024.

19 European Parliament (n 7).

20 *ibid.*

including killings, abductions, arbitrary arrest and detention. It considered that there was developing, in 2023, a climate of impunity for violations committed against HRDs that is prevailing in numerous countries around the world which needed to be countered.

After setting out the challenges and the EU commitment to the defence of HRDs, the Parliament stressed that the EU's policy framework in support of HRDs, which has developed over the past two decades with the Guidelines at its core, underlines the significant impact of the Guidelines in increasing awareness and understanding of the role of HRDs as indispensable and central partners for the EU's foreign, human rights and democracy support policy, and in focusing and enhancing efforts to prioritise and streamline the protection of HRDs across the EU's external action. In light of the importance which EU institutions, most notably the Parliament, have placed on the work of HRDs and their protection, it is surprising that there has been so little attention paid to the need for HRDs to cross international borders and enter the EU as part of their work and for their protection when antagonistic governments and entities target them. As mentioned above, the facilitation of HRDs' entry to the EU runs counter to other EU policies which seek to make admission to the EU subject to ever more difficult for all but so-called trusted travellers: basically wealthy nationals from non-mandatory visa countries who have an acknowledged track record of bringing economic benefits to the EU. HRD mobility is necessary to support democracy and human rights around the world, rather different objectives than the exclusively economic ones which currently dominate EU policy around admission. In the next section we will examine these mobility needs.

7.2.1 The Necessity of Mobility for Human Rights Defenders

For HRDs, mobility is not simply a professional convenience: it is a critical component of their work, and in many cases, their personal safety.²¹ Mobility enables HRDs to engage in transnational advocacy, participate in human rights forums, and collaborate face-to-face with other HRDs, civil society and state institutions. The European Union (EU), in particular, offers HRDs a platform to engage with major international organisations such as the United Nations, the Council of Europe, and the EU itself, which play crucial roles in shaping human rights policy. Additionally, the EU is home to many international NGOs and human rights organisations. HRDs often come to the EU to collaborate with these organisations, participate in joint projects and share information that strengthens global human rights advocacy efforts.

21 Annalisa Meloni, Jennifer Gaspar and Ali Feruz, 'Human Rights Defenders in EU Visa Policy: Recommendations for Reform' (2020) CEELI Institute <Human Rights Defenders in EU Visa Policy: Recommendations for Reform | CEELI Institute> accessed 15 October 2024.

The types of mobility HRDs require to access the EU can be categorised into three groups.²² First, there are HRDs who travel to the EU for short-term stays, often requiring a visa unless they come from visa-exempt countries.²³ The key legal instrument in such cases is the EU Visa Code Regulation, which establishes the conditions and procedures that Member States must adhere to when issuing Schengen visas – meaning of a duration not exceeding 90 days in any 180-day period.²⁴ These short stays usually involve attending conferences, seminars, workshops, and other advocacy-related events. In addition, HRDs may require short-term mobility for other reasons, such as participating in capacity-building programmes, attending training sessions to enhance their advocacy skills or engaging in meetings with policymakers and international organisations to influence human rights policies. This type of mobility, which is also the focus of this chapter, is crucial for HRDs to network, share knowledge, and raise awareness about pressing human rights issues.

Beyond the immediate need for short-term mobility within the EU, HRDs may also require extended stays. These longer periods of residence could be for academic purposes, such as attending universities or engaging in research and study. Additionally, HRDs may seek work opportunities within the EU, allowing them to contribute to human rights projects while benefiting from the relative safety and resources available in the EU. Furthermore, the demanding nature of their work frequently subjects HRDs to prolonged periods of intense stress, anxiety, and psychological strain.²⁵ Many witness human rights abuse first-hand and work closely with victims of such violations. Under these pressures, HRDs may greatly benefit from taking time in a safe environment to rest, recover, and recharge.²⁶ Extended mobility for rest and respite enables them to regain their strength, develop new skills, and return to their human rights work with renewed energy and resilience. These HRDs who seek longer-term mobility may require extended visas or long-term authorisations such as residence permits.

22 See in Elspeth Guild, Niovi Vavoula and Vasiliki Apatzidou, ‘Enhancing the Protection of Human Rights Defenders: Facilitating Access to the EU and supporting HRDs from Third Countries’ (European Parliament, January 2024) <Enhancing the protection of human rights defenders (HRDs): Facilitating access to the EU and supporting HRDs from third countries (europa.eu)> accessed 15 October 2024.

23 Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) [2018] OJ L 303.

24 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) [2009] OJ L 243.

25 EU Fundamental Rights Agency (FRA), ‘Protecting Human Rights Defenders at Risk: EU Entry, Stay and Support’ (11 July 2023) <Protecting human rights defenders at risk: EU entry, stay and support | European Union Agency for Fundamental Rights (europa.eu)> accessed 15 October 2024.

26 *ibid.*

Finally, for those HRDs facing persecution, mobility often becomes a matter of survival. HRDs working under repressive regimes are frequently targeted with legal harassment, arbitrary detention, and even life-threatening violence. In such dire situations, the ability to leave their country quickly and seek refuge abroad is crucial. Mobility provides these HRDs with a lifeline, allowing them to escape immediate danger and find safety in the EU, where they can continue their work without fear. The EU asylum system, which remains outside the scope of this chapter, is of paramount importance in such instances.²⁷

In summary, mobility is vital for HRDs, whether for short-term advocacy efforts or long-term protection and recovery. Each of these mobility types engages Member States' visa officers, border and immigration (or asylum) administrators and state bodies responsible for determining entry and residence in the EU and its Member States.²⁸ Unfortunately, this administrative process often becomes an overwhelming obstacle for HRDs.²⁹ In reality, HRDs face many challenges to access the EU, as the next section will analyse. EU visa policy has been built on principles of facilitating economically beneficial mobility, hindering the mobility of those who are not (relatively) wealthy or economically valuable and stopping the mobility of persons suspected of being security threats. In this constellation of priorities, the promotion by HRDs of democracy and human rights needs to find its place.

7.3 The Challenges of EU Visa Policy for HRDs

EU visa policy was designed as one of the fundamental components of the intended development of the common border control-free policy within the area of the Member States. On account of disagreements among some Member States, the policy, although formally included in the EU treaties of the time, was developed within an intergovernmental setting, known generically as Schengen, which took place alongside the EU commencing in 1985 and ending in 1999 when it was incorporated into the EU formally. The EU institutions perceive a common visa policy as a necessary flanking measure to the achievement of a border control-free area among the Member States (and some select neighbours). It is stated to be part of a multi-layer system aimed at facilitating legitimate travel and tackling illegal immigration through further harmonisation of national legislation and handling practices at local consular missions, and to strengthen the EU's Area of Freedom, Security and Justice.³⁰

27 See European Commission, Common European Asylum System, in <Common European Asylum System – European Commission (europa.eu)> accessed 15 October 2024.

28 Guild, Vavoula and Apatzidou (n 22).

29 Meloni, Gaspar and Feruz (n 21).

30 Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) PE/50/2018/REV/1 [2018] OJ L 303, 28.11.2018, art 1.

It is based on the principle that all countries in the world can be categorised according to whether their nationals should be subject to, or exempt from, a mandatory visa requirement for entry into the EU. This division is made on the basis of a considered, case-by-case assessment of a variety of criteria but is always subject to a reciprocity requirement.³¹ The main criteria for the case-by-case decision on each country are the status of illegal immigration (to the EU from that country), public policy and security, economic benefit, in particular in terms of tourism and foreign trade, and the EU's external relations with third countries, including considerations of human rights and fundamental freedoms, as well as the implications of regional coherence and reciprocity. Exemption from the visa requirement automatically applies to holders of local border traffic permits, third-country national school pupils travelling in the context of a school excursion as members of a group of school pupils accompanied by a teacher and recognised refugees and stateless persons and other persons who do not hold the nationality of any country, who reside in a Member State and who are holders of a travel document issued by that Member State. Member States may provide for exceptions from the visa requirement in other cases.³²

When the EU visa instruments are examined from the perspective of access of HRDs to the EU territory, the critical criterion is the nationality of the HRD. Where the person has an EU (or EEA) passport, travel will be particularly simple. The individual will have a right to enter the EU through any of the Member States, to stay in any Member State so long as he or she wishes (so long as he or she does not become an unreasonable burden on the social assistance system of the host Member State).³³ He or she can always go to his/her EU state of nationality if necessary, on account of indigence. Many EU countries permit multiple nationality (though not all), so a person may be a citizen of an EU country (for instance France or Italy) but also a citizen of the country where the HRD is carrying out his or her work (such as Colombia or Uganda).

If the individual has a passport of an EU visa 'white-list' country, then the obstacles that he or she will encounter travelling to the EU will be those of the electronic travel authorisation system. For white-list HRDs nationals travelling

31 *ibid* recital 3.

32 Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement (codification) PE/50/2018/REV/1 [2018] OJ L 303, art 4.

33 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (Text with EEA relevance) [2004] OJ L 158, art 14.

to the EU, it can be fairly straightforward as they do not need to carry out the preliminary steps of obtaining a visa. However, this facility is gradually being eroded by the EU's implementation of an electronic travel authorisation requirement for all non-visa nationals, an authorisation which must be obtained in advance. Known as ETIAS, it is intended that extensive AI tools will be used to sift through applications.³⁴ The general criteria which these tools are being designed around are set out in relevant EU legislation but the way in which they will be operated leaves many questions regarding how algorithmic bias will be avoided or corrected. The possibility for prejudicial and fallacious information to be provided by states of origin which may seek to diminish the ability of HRDs to travel for political reasons (such as publicising human rights abuses in their state) influencing AI tools as a relevant risk factor is substantial.³⁵

Assuming that the HRD manages to get the ETIAS, at the EU border the person will need to satisfy the following conditions of entry contained in the EU Borders Code:³⁶

- (a) possession of a valid travel document entitling the holder to cross the border satisfying the following criteria:
 - (i) extension of its validity at least three months after the intended date of departure from the territory of the Member States (in a justified case of emergency, this obligation may be waived);
 - (ii) document issued within the previous 10 years;
- (b) justification of the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;
- (c) evidence that they are not persons for whom an alert has been issued in the Schengen Information System³⁷ for the purposes of refusing entry;

34 Regulation (EU) 2018/1240 of the European Parliament and of the Council of 12 September 2018 establishing a European Travel Information and Authorisation System (ETIAS) and amending Regulations (EU) No 1077/2011, (EU) No 515/2014, (EU) 2016/399, (EU) 2016/1624 and (EU) 2017/2226 PE/21/2018/REV/1 [2018] OJ L 236.

35 Niovi Vavoula, 'Artificial Intelligence (AI) at Schengen Borders: Automated Processing, Algorithmic Profiling and Facial Recognition in the Era of Techno-Solutionism' (2021) 23(4) *European Journal of Migration and Law* 457; and Niovi Vavoula, 'Interoperability of EU Information Systems: The Deathblow to the Rights to Privacy and Personal Data Protection of Third-country Nationals?' (2020) 26(1) *European Public Law*.

36 Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) [2016] OJ L 77, art 6(1).

37 This is the EU database which includes all the details of persons to be refused entry to the EU on security grounds.

- (d) evidence that they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national databases for the purposes of refusing entry on the same grounds.

There is a non-suspensive appeal right in the event that the individual is refused entry. However, refusal of entry is a very rare occurrence at the EU external border where people present themselves at a border control post.³⁸

If the HRD is a citizen of a country on the EU's visa 'black-list', then before travel the person will have to establish that he or she comes within the terms of the visa requirements. For short stays (90 days out of every 180), the Visa Code (an EU regulation) states that the person must satisfy the following requirements:

- (a) that the travel document presented is not false, counterfeit or forged;
- (b) the applicant's justification for the purpose and conditions of the intended stay is valid, and that he has sufficient means of subsistence, both for the duration of the intended stay and for the return to his country of origin or residence, or for the transit to a third country into which he is certain to be admitted, or is in a position to acquire such means lawfully;
- (c) the applicant is a person for whom an alert has been issued in the Schengen Information System (SIS) for the purpose of refusing entry;
- (d) the applicant is not considered to be a threat to public policy, internal security or public health as defined in Article 2(19) of the Schengen Borders Code or to the international relations of any of the Member States, in particular where no alert has been issued in Member States' national databases for the purpose of refusing entry on the same grounds;
- (e) the applicant is in possession of adequate and valid travel medical insurance, where applicable, covering the period of the intended stay, or, if a multiple-entry visa is applied for, the period of the first intended visit.

The difference in language between the two sets of requirements is notable. Where the individual is able to arrive visa-free at an EU border (or already has a visa) the language is neutral. Where the individual is seeking a visa, the language is much more negative. For instance, even as regards the presentation of the passport, the language used is that the individual must prove that it is not false, counterfeit or forged (three very pejorative words which are not found in the Borders Code). For HRDs who often work in precarious sectors for low wages, these criteria may well be impossible to fulfil.

38 Elspeth Guild, 'Interrogating Europe's Borders: Reflections from an Academic Career' Val-edicatory Lecture (6 September 2019).

HRDs encounter numerous specific barriers when trying to access the EU, in addition to the broader challenges posed by EU visa policies. A significant issue is the lack of awareness among HRDs regarding the complexities of the EU visa application process, which can lead to confusion and difficulty in obtaining necessary documentation. Additionally, many HRDs operate in high-risk situations, where securing formal documents is often impossible due to threats from both state and non-state actors, complicating their ability to prove their purpose and financial means for travel.³⁹ Furthermore, they often face bureaucratic obstacles, such as lengthy processing times and inconsistent application of rules by consulates, which may result in delays or arbitrary refusals.⁴⁰ Language barriers also complicate the process, as many HRDs may not speak the official EU languages, hindering their ability to submit applications or communicate effectively with authorities. For those from countries with strained relations with the EU, additional scrutiny can further restrict their travel. Even if granted a visa, HRDs may still confront challenges at the border, where stringent checks and the discretionary powers of border officials can lead to misinterpretations of their intentions, potentially influenced by political pressures.

There is no provision for HRDs or flexibility built into either regime for their circumstances. Thus, there is no intersection between the EU's commitment to their protection and its willingness to facilitate their admission. This is anomalous. In the next section we will examine what can be done to resolve this problem.

7.4 Recommendations for Improving EU Visa Policy for Human Rights Defenders

The previous section analysed how, despite their crucial work, HRDs often face challenges in obtaining visas to access the EU. The aim of this part is to propose a series of visa facilitation measures designed to improve HRDs' access to the EU. The starting point is the need to recognise HRDs as a visa facilitation category which would allow Member States to apply a number of facilitations either already envisaged in the Visa Code, which is a quite flexible instrument leaving in many cases discretion to the authorities or amend the Visa Code. Notably, the Visa Code Handbook was amended in June 2024 and it now provides numerous examples of how the provisions of the Visa Code can be interpreted flexibly to support HRDs.⁴¹ However, the definition of human rights defenders is quite broad, and while international and EU bodies

³⁹ FRA (n 25).

⁴⁰ Meloni, Gaspar and Feruz (n 21).

⁴¹ European Commission, Annex to the Commission Implementing Decision amending Commission Decision C (2010) 1620 final as regards the replacement of the Handbook for the processing of visa applications and the modification of issued visas (Visa Handbook I), C(2024) 4319 final.

have deliberately provided a very wide and inclusive definition of HRDs for visa, borders and immigration officials to carry out their functions properly, they must have the ability to carry out identification with the highest degree of accuracy. The advantages of using a broad definition that includes many different types of HRDs, such as street artists and landless agricultural workers, are significant because it ensures that a wide range of people receive the protection they need. However, the disadvantages are considerable for visa/border/migration control officials whose main job is not identifying HRDs, but determining who should and should not be allowed to enter the EU, a strong focus being on preventing irregular migration and safeguarding national security.⁴² Hence, a key challenge is designing a system which is sufficiently precise to identify correctly those HRDs who are entitled to receive facilitated treatment in visa/border/migration procedures.

7.5 The Need for Acute Identification of HRDs

Facilitating the mobility of HRDs starts with the need to establish a clear and accurate identification process. Both the EU and UN have well-established definitions of HRDs, but their recognition must be operationalised to ensure proper support.⁴³ To address this issue, the authors of this chapter have elsewhere proposed the establishment of a formalised system for verifying and certifying HRDs through ‘trusted third parties’, such as recognised non-governmental organisations (NGOs), ProtectDefenders, and Council of Europe (CoE) and international bodies (e.g., the UN and Council of Europe).⁴⁴ These institutions should be tasked with providing letters of support to HRDs, which would function as official documentation verifying the HRD’s status. Such a system would not only streamline the visa process, but also provide a presumption of credibility for HRDs, reducing the burden on both applicants and visa/migration/border authorities. Furthermore, this identification system would mitigate risks of arbitrary decisions by visa officers who may lack the expertise or contextual knowledge to assess an individual’s HRD status accurately. By centralising and formalising the verification process, it would ensure consistency and transparency, building trust among all stakeholders involved.

To further enhance the effectiveness of this process, a robust communication mechanism should be established for cases where visa officers still have reasonable doubts about an individual’s HRD status. In such instances, visa

42 For an analysis, see in Guild, Vavoula and Apatzidou (n 22).

43 For an EU definition, see in EU Guidelines on Human Rights Defenders 2008, Council doc. 16332/2/08 REV 2, 10 June 2009, para. II.3 which also refers to a UN definition provided in Article 1 of the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognised Human Rights and Fundamental Freedoms (UN Declaration on Human Rights Defenders), 9 December 1998, A/RES/53/144 (8 March 1999).

44 Guild, Vavoula and Apatzidou (n 22).

officers would be instructed to immediately consult the European External Action Service (EEAS) officer designated for HRD cases,⁴⁵ or alternatively, refer to Protect Defenders, the EU mechanism tasked with providing support and protection to HRDs globally.⁴⁶ This dual system of verification would ensure that concerns are swiftly addressed without causing undue delays or compromising the HRD's ability to travel.

Crucially, while a letter of support from a trusted third party would facilitate visa procedures for HRDs, individuals who do not possess such documentation should not be excluded or disadvantaged. Many HRDs, particularly those operating in highly repressive environments, may lack connections to formal organisations or institutions capable of issuing such letters. To address this issue, alternative referral pathways should be established to ensure that all HRDs have access to visa exemption or facilitation mechanisms, regardless of their formal affiliations. These pathways could involve collaboration with regional HRD networks, grassroots organisations, or other actors capable of verifying an individual's HRD status.

7.6 Proposed Visa Facilitation Measures for HRDs

Upon recognition of their status, HRDs should have access to a number of facilitations overcoming the barriers highlighted in the previous section. Firstly, Article 10 of the Visa Code specifies the general rules for lodging visa applications. This provision initially required the in-person lodging of a visa application. By way of a positive development, the 2019 amendment to the Visa Code made possible the electronic lodging of an application, where it is available.⁴⁷ However, an in-person appearance is still necessary for the collection of fingerprints. As HRDs may face difficulties in travelling to consulates or external service providers, as certain Member States do not even have a consulate where the applicant resides, or the consulate is not easily accessible, all Member States need to establish electronic visa application systems. An online secure application system would make the application process safer and more accessible to HRDs.

Additionally, according to Article 6 Visa Code, only applications lodged by persons who reside legally in the jurisdiction of the competent consulate should be accepted. However, paragraph 2 of the same article provides for an exception when a third-country national is legally present, but not residing in the jurisdiction of that state if the applicant has provided justification

45 For the role of EEAS, see in <Human rights defenders | EEAS (europa.eu)> accessed 15 September 2024.

46 See in ProtectDefenders website <ProtectDefenders.eu – You have the right to defend rights> accessed 15 September 2024.

47 See Visa Code, art. 10 and art 11(1).

for lodging the application at that consulate.⁴⁸ HRDs should have the ability to make an application to the EU system from another country, perhaps a neighbouring country to which they can easily have access. This is particularly important in cases where their activism might lead to biases or unfair treatment within their home country's system or if there is a risk or anticipated risk related to their human rights work if they remain in their home country. Hence, this discretion envisaged in the Visa Code should be used for HRDs. Specific examples which concern HRDs are also included in the revised Visa Code Handbook.⁴⁹

Moving on the application procedure, it is important to treat HRDs as *bona fide* applicants throughout the whole process. As specified in the Visa Code Handbook:

A '*bona fide*' applicant is an individual applicant known to the consulate for his/her integrity and reliability (in particular the lawful use of previous visas), and for whom there is no doubt that he/she will fulfil the entry conditions at the time of the crossing of the external borders of the Member States. Consulates may waive the requirement to present documents regarding the purpose of the journey, accommodation and the means of subsistence in the case of '*bona fide*' applicants.⁵⁰

This provision grants Member States the discretion to refrain from rejecting a visa application due to the absence of documents required under Articles 10 to 15 of the Visa Code. For HRDs, obtaining some of these documents, such as proof of sufficient means of subsistence, may be challenging. By recognising HRDs as *bona fide* applicants, their applications can be safeguarded from being denied on formal grounds, such as incomplete documentation. It is a positive development that the revised Visa Code Handbook specifies that 'Consulates may choose to apply the same principles to grant "bona fide" status to *human rights defenders*, journalists and dissidents, based on designations by reliable inviting organisations'.⁵¹ By treating HRDs as *bona fide* applicants, it is ensured that their visa application will not be rejected due to the absence of official documentation.

To further support HRDs, it is proposed to either waive or reduce the application fee for HRDs, recognising the significance of their work and the potential financial barriers they may face. According to the Handbook:

48 Visa Code, art 6(2): 'A consulate of the competent Member State shall examine and decide on an application lodged by a third-country national legally present but not residing in its jurisdiction, *if the applicant has provided justification* for lodging the application at that consulate'.

49 Visa Code Handbook 31. The example concerns an HRD from Egypt who is temporarily staying in Armenia and should be able to apply for a visa in Armenia.

50 Visa Code Handbook 61.

51 *ibid.*

EU Member States may decide to waive or reduce the visa fee in individual cases based on particular interests to promote cultural or sporting interests as well as interests in the field of foreign policy, development policy and other areas of vital public interest or for humanitarian reasons or because of international obligations.⁵²

In the case of humanitarian reasons, the revised Visa Code Handbook provides some specific examples among which HRDs (e.g., in the case of visa applicants from a disadvantaged background, dissidents and/or *human rights defenders*).⁵³

Thereafter, the Visa Code regulates the timeframe both for lodging and examining visa applications. HRDs may need to have the opportunity to apply for visas and leave their countries immediately, and they need to know that their applications will be processed without unnecessary delays. In this context, a fast-track procedure to expedite their applications should be implemented. This could involve setting shorter lodging and processing times. Article 9 of the Visa Code, for example, grants Member States discretion ‘in justified individual cases of urgency’ to allow the application to be lodged fewer than 15 days before the visit. An example concerning HRDs has been added to the revised Visa Code Handbook.⁵⁴ Additionally, the decision on HRDs’ applications should be taken without unnecessary delays. It is also mentioned in the revised Handbook that a fast-track procedure could be used also for dissidents and/or *human rights defenders* who urgently need to travel, for example, to avoid a temporary risk of harm before election periods or ahead of the launch of a specific initiative.⁵⁵

A visa may be refused for the reasons outlined in Article 32 of the Visa Code. However, as previously mentioned, HRDs should not have their visas denied on the basis of being unable to demonstrate sufficient means of subsistence. HRDs with a letter of support from trusted third parties should be recognised as *bona fide* applicants, and the requirement for excessive documentation should be waived. If entry conditions are not fully met, the Visa Code permits Member States to assess whether exceptional circumstances justify a derogation from the general rules, allowing for the issuance of a visa with limited territorial validity.⁵⁶ This provision could also be applicable for HRDs.

Regarding the necessary risk assessment conducted under Article 21 to determine whether an applicant poses a risk of illegal migration or a threat to state security, it is important to note that a criminal record – sometimes requested as part of the visa application – should not automatically lead to

⁵² Visa Code Handbook 45.

⁵³ *ibid.*

⁵⁴ Visa Code Handbook 33.

⁵⁵ Visa Code Handbook 34.

⁵⁶ Visa Code, art 25.

the rejection of an HRD's application. HRDs are often subject to criminal prosecution in their home countries, and in such cases, a thorough examination of the application should be made. As part of the visa application process, checks with the Visa Information System (VIS), the Schengen Information System (SIS), and other EU and international databases should be carried out.⁵⁷ However, special care must be taken to ensure that HRDs do not face additional barriers during this process.

Lastly, as part of the application procedure, if a visa is refused, applicants have the right to appeal under Article 32(3) of the Visa Code. Member States have already been required to establish appeal procedures that guarantee an effective, judicial remedy. These procedures need to be prompt, transparent, efficient, and easily accessible, enabling applicants to challenge a refusal decision effectively. Ensuring a fair and streamlined appeals process is essential for protecting the rights of HRDs. However, it is important to note that EU visa law remains vague, general, and not particularly protective of visa applicants. This lack of specificity has necessitated the intervention of the Court of Justice of the European Union (CJEU), which has, over the years, expanded procedural guarantees for applicants through its case law. In particular, the CJEU has interpreted Article 32 of the Visa Code to strengthen applicants' rights in cases of visa refusal.⁵⁸

Another important aspect is the possibility provided in Article 35 of the Visa Code, which is relevant as it gives Member States the discretion to issue visas at the external borders in exceptional cases. This could be enormously helpful for HRDs who may need to leave their country urgently due to immediate danger. This is why this has been added to the revised Code Handbook which foresees that, 'Upon the decision of the competent Member State, dissidents, journalists and/or *human rights defenders* at imminent risk, when such risk is of a temporary nature and there is no doubt that the applicant intends to leave the territory of the Member States at the expiry of the visa' should be allowed to lodge an application at external borders.⁵⁹

Additionally, one of the most crucial possibilities envisaged in the Visa Code is the possibility of granting multiple-entry visas. Issuing multiple-entry visas for HRDs will give them flexibility to exercise their tasks and maintain frequent contact with EU-based organisations and stakeholders.⁶⁰ According to the FRA study, this is also beneficial for HRDs mentally: 'Simply knowing about the opportunity to relocate can constitute a very effective form of support, empowering them to continue their work knowing that they have

57 Visa Code, art 21.

58 See for example, Case C-403/16 Soufiane El Hassani v Minister Spraw Zagranicznych [2017] ECLI:EU:C:2017:960.

59 Visa Code Handbook 140.

60 See Visa Code art 24.

an exit strategy in place'.⁶¹ The inclusion of specific examples in the revised Handbook which concern human rights defenders frequent travellers is a positive development.

Finally, the Visa Code makes provision for the extension of the issued visa. In the Handbook (part V), it is stated that:

[I]n case a visa holder who is already present on the territory of the Member States is unable to leave before the expiry of his/her visa for reasons of force majeure, humanitarian reasons or serious personal reasons, he/she should address the request for extension of the visa to the competent authorities of the Member State where he/she is present even if that is not the Member State whose consulate issued the visa.⁶²

This provision may apply to HRDs in situations where they are facing difficult circumstances that prevent their immediate departure from the EU. This is also added in the revised Handbook, 'Examples of humanitarian reasons include sudden serious threats against human rights defenders in their country of origin, for example, following an intervention at a conference abroad'.⁶³

7.7 Conclusion

This chapter has explored the intricate relationship between the promotion and protection of Human Rights Defenders and the EU's border control and visa regimes. The EU's dual commitment to supporting HRDs while simultaneously managing migration has led to significant policy contradictions that hinder the very individuals the EU seeks to protect. The chapter concludes by emphasising the need for a more balanced approach that addresses the tension between the EU's visa policies and its support for Human Rights Defenders. While the EU has made strong commitments to uphold human rights and democracy by supporting HRDs, the current stringent visa policy and border control measures often contradict these commitments by restricting the ability of HRDs to seek entry and support within the EU.

To resolve these contradictions, the chapter advocates for recognising HRDs as a distinct category within the visa framework, with specific provisions to facilitate their access. By implementing clear identification processes and easing visa requirements for HRDs, the EU can better fulfil its obligation to protect those who protect human rights. This approach aims to strike a balance between security concerns and the need to make the EU a safe place for HRDs, ultimately creating a more consistent and flexible EU visa policy. Such

61 FRA (n 25).

62 Visa Code Handbook 146.

63 *ibid.*

reforms would not only strengthen the EU's human rights agenda but also enhance the EU's credibility on the global stage.

Specifically, a range of provisions within the Visa Regulation, Visa Code and Visa Code Handbook offer significant opportunities to facilitate the entry of HRDs into the EU. The role of trusted third parties is pivotal in this context, as they can assist in identifying and certifying HRDs, thereby alleviating the burden on immigration, border, and visa officers. A significant positive development in the Visa Code Handbook is the explicit inclusion of provisions addressing the credibility of the inviting person or organisation when an invitation letter is presented. The handbook clarifies that this assessment can take into account the purpose of the trip – such as private visits or business – and the guarantees provided by the inviting entity.⁶⁴ Notably, for categories such as human rights defenders, journalists, and dissidents, the handbook highlights the importance of information from trusted civil society organisations as a key factor in assessing credibility. This aligns closely with our proposal for a trusted third-party system, which would formalise and streamline the role of such organisations in verifying the status of vulnerable individuals, ensuring a more efficient and fair visa application process.

However, as this chapter has discussed, HRDs often have both immediate and long-term needs, including for purposes such as employment, education, or rest and respite. Accordingly, a flexible application of directives such as the Blue Card Directive⁶⁵ and the Students and Researchers Directive⁶⁶ should be considered too, in order to address these long-term needs effectively. Furthermore, the authors have previously advocated for the establishment of an HRD-specific directive to streamline long-term stay for HRDs within the EU.⁶⁷ For those seeking asylum – a scenario that signifies an inability to return to their countries – a nuanced interpretation of the Qualification Directive⁶⁸

64 Visa Code Handbook 78.

65 Directive (EU) 2021/1883 of the European Parliament and of the Council of 20 October 2021 on the conditions of entry and residence of third-country nationals for the purpose of highly qualified employment, and repealing Council Directive 2009/50/EC [2021] OJ L 382.

66 Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing [2016] OJ L 132.

67 Guild, Vavoula and Apatzidou (n 22).

68 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337.

(recently replaced by a regulation)⁶⁹ would be essential. Finally, any legislative adjustments must be complemented by targeted policy actions, increased funding for supporting NGOs and HRDs themselves, as well as enhanced training and awareness efforts to underscore the vital role of HRDs and the challenges they face.

69 Regulation (EU) 2024/1347 of the European Parliament and of the Council of 14 May 2024 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted, amending Council Directive 2003/109/EC and repealing Directive 2011/95/EU of the European Parliament and of the Council [2024] OJ L, 2024/1347.

Part II

Visa and Asylum



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Part II.1

Seeking Asylum with a Visa



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8 Gazans

Perpetual Refugees on the Run

*Eugénie Delval, Christine Flamand,
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8.1 Two Million People Trapped in the Gaza Strip

8.1.1 *An Appalling Humanitarian Situation*

Nearly 1.9 million individuals, constituting approximately 85% of Gaza's population, have been forcibly displaced, often experiencing multiple displacements.² A substantial report dated November 14, 2024, by Human Rights Watch, entitled 'Hopeless, Starving, and Besieged: Israel's Forced Displacement of Palestinians in Gaza,' denounced Israel's pervasive human rights abuses and the complete absence of any viable refuge in the region.³

Behind the alarming numbers are stories of impossible escapes, blocked roads, destroyed infrastructure, and families trapped in a closed enclave. Evacuation orders move the population from one place to another, often from Charybdis to Scylla.⁴ Despite limited access to Gaza, journalists have managed to tell the story of some of the displaced, like Hussein, whose story appeared in *L'Echo*, a Belgian newspaper, on October 5, 2024. Following his story reveals the many attempts at escape, the dilemma between staying together at all costs or separating for the safety of his wife and children, and the payment of 13,000 US dollars⁵ for their

1 The authors would like to thank Annie Fourny for her careful review.

2 See the appalling and concordant figures from IGOs and NGOs. For example, Norwegian Refugee Council, 'Humanity is being erased in Gaza' (7 November 2024) <www.nrc.no/news/2024/november/humanity-is-being-erased-in-gaza/>.

3 Human Rights Watch, "'Hopeless, Starving, and Besieged' – Israel's Forced Displacement of Palestinians in Gaza' (November 2024) <www.hrw.org/sites/default/files/media_2024/11/gaza_displacement1124web_0.pdf>.

4 'Between Scylla and Charybdis' refers to being caught between two equally dangerous or undesirable options, originating from Homer's *Odyssey* where sailors had to navigate between a six-headed monster (Scylla) and a deadly whirlpool (Charybdis).

5 According to journalistic sources, the average cost of a single passage is reported to be between \$5,000 and \$7,000 per person. See in particular Hélène Sallon, OCCRP, and Saheeh Masr, 'Guerre Israël-Hamas: échapper à l'enfer de Gaza, un racket à 7 000 dollars' *Le Monde* (25 January 2024) <www.lemonde.fr/international/article/2024/01/25/guerre-israel-hamas-echapper-a-l-enfer-de-gaza-un-racket-a-7-000-dollars_6212910_3210.html>; 'How Much Do Palestinians Pay to Get Out of Gaza?' *The Economist* (25 April 2024).

passage to Egypt.⁶ Subsequently, Hussein found himself alone, struggling to survive while trying to keep in touch with his family. Before reading this article, take the time to follow Hussein's journey, never to forget that behind the legal battles and legal controversies lie real lives. Even the most striking words and images require the depth that human stories provide.⁷

In the aftermath of the Hamas terrorist attacks on Israeli territory on October 7, 2023, Israel enforced a blockade on the Gaza Strip and initiated a major military intervention, which included numerous bombardments. The high intensity of the armed conflict led to a catastrophic humanitarian situation, with the almost total destruction of infrastructure in a closed territory. According to data from the United Nations Office for the Coordination of Humanitarian Affairs (OCHA),⁸ as of January 8, 2025 – 460 days following the onset of the Israeli offensive – the death toll among Palestinian civilians stood at nearly 45,936, including over 15,000 children. Furthermore, the tally of wounded individuals approached 105,000, with more than 23,000 of them also being children.⁹ It is estimated that tens of thousands of individuals remain unaccounted for. The situation is further exacerbated by malnutrition, inadequate access to water and healthcare, and harsh climatic conditions.¹⁰

6 By October 5, 2024, it was estimated that 120,000 Palestinians from Gaza had entered Egypt. The newspaper *Le devoir* published a headline that read: 'Quitter l'Égypte, mais pour aller où? L'épineuse question des réfugiés palestiniens' (5 October 2024) <www.ledevoir.com/monde/moyen-orient/821166/quitter-egypte-mais-aller-ou-epineuse-question-refugies-palestiniens>.

7 See in particular Julie Saada, 'Récits et contre-récits dans le droit. Usages et critiques du narrativisme juridique dans la Critical Race Theory' (2021) 108(2) *Droit et société* 319–35 <<https://doi.org/10.3917/drs1.108.0319>>; see also the project by Krizna Gomez and Thomas Coombes, *Be the Narrative: How Changing the Narrative Could Revolutionize What It Means to Do Human Rights* (Commons Library 2019) https://commonslibrary.org/wp-content/uploads/Be-The-Narrative-How-Changing-the-Narrative-Could-Revolutionize-What-it-Means-to-do-Human-Rights_2019.pdf accessed 4 October 2025.

8 The figures are derived from the reports published on a near-daily basis by OCHA. More specifically, the figures are drawn from the following three reports: 'Reported Impact Snapshot | Gaza Strip' (8 January 2025) <www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-8-january-2025>; 'Reported Impact Snapshot | Gaza Strip' (7 August 2024) <www.ochaopt.org/content/reported-impact-snapshot-gaza-strip-7-august-2024>; 'Humanitarian Situation Update #203 | Gaza Strip' (12 August 2024) <www.ochaopt.org/content/humanitarian-situation-update-203-gaza-strip>. It should also be noted that The Lancet published a study on January 9, 2025, which estimated that the number of deaths caused by traumatic injuries in Gaza from October 7, 2023, to June 30, 2024, would be between 55,298 and 78,525. The Lancet's estimated death toll, up to that date, stands at 64,260, representing a 41% increase compared to the Ministry of Health's reported figures. This figure constitutes 2.9% of Gaza's pre-war population, or approximately 'one in 35 inhabitants,' according to the study. See <[www.thelancet.com/journals/lancet/article/PIIS0140-6736\(24\)02678-3/fulltext](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(24)02678-3/fulltext)>.

9 According to data presented by UNICEF (26 November 2024) <www.unicef.fr/article/israel-palestine-les-enfants-paient-le-prix-de-la-guerre/>.

10 The unprecedented number of women and children killed in Gaza does not include the approximately 20,000 individuals whose remains have not been identified, who are missing, or who have been buried under the rubble. According to estimates by UNICEF, a child is

Despite two legally binding International Court of Justice (ICJ) orders requiring Israel to prevent genocidal acts, ensure humanitarian access, and refrain from military actions that harm Palestinians as a protected group, Israel has continued its intensive bombardment of areas with high concentrations of starving Palestinian civilians.¹¹ On May 20, 2024, the Prosecutor of the International Criminal Court (ICC) formally announced the submission of applications for arrest warrants for Hamas leaders responsible for the attacks of October 7, 2023, and for Israeli leaders who may be responsible for war crimes and crimes against humanity. These arrest warrants were formally issued on November 21, 2024.¹² A few days earlier, the United Nations Special Committee to Investigate Israeli Practices determined that Israel's military tactics in Gaza could be classified as genocidal, including the utilisation of starvation as a deliberate instrument of warfare.¹³

8.1.2 *Decades of Legal Vulnerability*

To fully grasp the depth of Gaza's current humanitarian catastrophe, it is essential to understand that this is not merely a crisis affecting a general civilian population, but one overwhelming a community where three-quarters of

reported to be injured or killed every ten minutes (UNICEF, 'Guerre Israël-Palestine: six mois de tragédie pour les enfants' [7 May 2024] <www.unicef.fr/article/israel-palestine-les-enfants-paient-le-prix-de-la-guerre/>).

- 11 ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v Israel*), Order, 26 January 2024; ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (*South Africa v Israel*), Order, 28 March 2024. In the first order, the ICJ ordered Israel to: (1) take all measures within its power to prevent genocidal acts including killing, causing serious harm, inflicting destructive conditions of life, and preventing births within the Palestinian group; (2) ensure its military does not commit such acts; (3) prevent and punish direct and public incitement to genocide; (4) take immediate measures to enable provision of basic services and humanitarian assistance; (5) preserve evidence related to genocide allegations; and (6) submit monthly reports on compliance. In the second one, the Court reaffirmed all previous measures and added new requirements that Israel must 'take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points.'
- 12 See the International Criminal Court's website for current proceedings: <www.icc-cpi.int/fr/documents?f%5B0%5D=court_record_situation_name%3A786>.
- 13 United Nations, 'Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories,' report A/78/553 (25 October 2023). See also the Amnesty International report, 'Israel/Occupied Palestinian Territory: "You Feel Like You Are Subhuman": Israel's Genocide Against Palestinians in Gaza' (5 December 2024) <www.amnesty.org/en/documents/mde15/8668/2024/en/>.

residents are refugees living under a unique international protection regime that differs fundamentally from standard refugee frameworks worldwide.

The ongoing crisis in Gaza has profoundly impacted a population that has already been significantly vulnerable for an extensive period of time, both in reality and in legal terms. It should be noted that 75% of Gazans are refugees, a situation that has frequently led to the designation of Gaza as either a substantial refugee camp or a collection of such settlements, such as Jabaliya or Nuseirat. These locales have long since lost their capacity to provide even temporary refuge, having become, in effect, Gazan neighbourhoods in which a significant portion of the population, forcibly displaced since 1948, lives generation after generation.¹⁴

Despite their distinct legal issues, it is crucial to recall the status of Palestinian refugees in order to understand the implications of their precarious legal status for the effectiveness of existing protective mechanisms. In contrast to other refugee populations globally, the primary responsibility for Palestinian refugees falls under the United Nations Relief and Works Agency for Palestine Refugees (UNRWA¹⁵) and not the Office of the United Nations High Commissioner for Refugees (UNHCR). This agency, established in the aftermath of the 1948 Arab–Israeli conflict,¹⁶ aims to implement direct assistance programmes for Palestinian refugees.¹⁷ The beneficiaries of UNRWA's programmes are defined as individuals who had their habitual place of residence in Palestine between June 1946 and May 1948, and who were dis-

14 See Laure Stephan, 'Dans les archives de l'UNRWA, le récit intime des réfugiés palestiniens, de la Nakba à aujourd'hui – L'agence onusienne poursuit la numérisation de ses innombrables documents administratifs avec l'ambition de retracer les arbres généalogiques de cinq générations de réfugiés' *Le Monde* (19 August 2024) <www.lemonde.fr/international/article/2024/08/19/dans-les-archives-de-l-unrwa-le-recit-intime-des-refugies-palestiniens-de-la-nakba-a-aujourd-hui_6285945_3210.html>.

15 UNRWA was established by UN General Assembly Resolution 302 (IV) of 8 December 1949 'to carry out [...] direct relief and works programmes' for Palestine refugees. The Agency began its activities on 1 May 1950. UNRWA was created in 1949 by the UN following the first Arab–Israeli conflict. Its mission is to assist and protect Palestinian refugees registered in its area of operation, pending a durable solution to their situation. The agency serves around 5.9 million Palestinians, descendants of the more than 700,000 people displaced when Israel was created in 1948. It operates in the Palestinian territories, Lebanon, Jordan, and Syria, providing essential services such as education, healthcare, and emergency aid.

16 A conflict that broke out in the aftermath of Israel's declaration of independence on May 14, 1948. The conflict marked the first significant armed confrontation between Jewish forces and an alliance of Arab states, comprising Egypt, Jordan, Syria, Iraq, Lebanon, Saudi Arabia, and others, who collectively objected to the establishment of the State of Israel within the context of the partition plan for Palestine proposed by the United Nations in 1947. The war culminated in the establishment of the State of Israel and the displacement of hundreds of thousands of Palestinians, often referred to as Palestinian refugees. A significant number were compelled to flee or were forcibly displaced from their homes during the war. See Ibrahim Abu-Lughod, 'The War of 1948: Disputed Perspectives and Outcomes' (1989) 18(2) *Journal of Palestine Studies* 119–27.

17 UN General Assembly, Resolution 302, A/RES/302 (IV), 8 December 1949.

placed from their homes and livelihoods as a result of the 1948 conflict. This status is hereditary, being passed on to the descendants of registered refugees. Consequently, it has persisted for several decades. According to recent data, approximately 1.7 million Gazans, constituting 75% of the total population of 2.3 million, are registered as refugees with UNRWA. This status confers limited protection, as UNRWA's mandate is fundamentally humanitarian and intended to be temporary, with periodic extensions of three years. The exclusion of Palestinian refugees from UNHCR's mandate is associated with the three durable solutions available to refugees: naturalisation in the host country, resettlement in a third country, or voluntary repatriation. However, these options are seldom applicable to Palestinian refugees under UNRWA's jurisdiction. The host countries (Jordan, Lebanon, and Syria) generally reject naturalisation and resettlement, while Israel refuses repatriation. This unique situation has led to the protracted absence of a resolution to the status of Palestinian refugees, resulting in a state of legal limbo.

The UNRWA is tasked with the responsibility of ensuring 'dignified' living conditions by addressing the fundamental needs of individuals under its protection. These needs cover health,¹⁸ education, and subsistence, taking into account the specific needs of vulnerable groups.¹⁹ UNRWA's mandate does not encompass tasks such as resettlement, which are the responsibility of UNHCR. The mandate of UNRWA was extended by a resolution of the United Nations General Assembly until June 30, 2026.²⁰ However, the organisation's operational scope is anticipated to undergo significant limitations in the future. Recent legislation passed by the Israeli Parliament includes two pieces of legislation that directly impact the operational capacity of UNRWA.²¹ The UN Security Council has cautioned Israel that this legislation 'seeks to ban UNRWA's presence and operations in the territory of Israel, revoking its privileges and immunities, in violation of international law.'²² The UN Secretary-

18 See the analysis in the case C-294/22 *OFFRA v SW* [2023] EU:C:2023:733.

19 Case C-563/22 *LN and SN* [2024] EU:C:2024:494, para 79.

20 UN, Resolution adopted by the General Assembly on 12 December 2022, A/RES/77/123.

21 See the Letter dated 28 October 2024 from the Secretary-General addressed to the President of the General Assembly, A/79/558 <<https://digitallibrary.un.org/record/4065050>>.

22 Statement of Philippe Lazzarini on 9 October 2024 at the United Nations Security Council, www.unrwa.org/newsroom/official-statements/statement-philippe-lazzarini-commissioner-general-unrwa-united-nations-security-council accessed 4 October 2025. See also the Security Council Press Statement on United Nations Relief and Works Agency for Palestine Refugees in Near East, 30 October 2024, SC/15874. If UNRWA ceases to operate, Mr. Lazzarini warned, 'the only alternative is that the onus and the responsibility goes back to the occupying power, meaning that Israel will be responsible to provide these critical services' (UN, 'UNRWA Chief: Agency Enduring "Darkest Moment," as Israeli Laws Threaten Operations' [13 November 2024] <<https://news.un.org/en/story/2024/11/1156941>>). See also his remarks at the Observance of the International Day of Solidarity with the Palestinian People (1 December 2024) <www.unrwa.org/newsroom/official-statements/remarks-philippe-lazzarini-commissioner-general-unrwa> accessed 4 October 2025.

General called the potential decision a ‘catastrophe,’ and warned that it would ‘stifle efforts to relieve suffering and reduce tensions in Gaza and the occupied territories.’²³ He warned that ‘Operationally, the entire humanitarian response in Gaza – which rests on UNRWA’s infrastructure – may disintegrate.’²⁴ On December 24, 2024, a new request for an advisory opinion on this issue was submitted to the International Court of Justice.²⁵

As you will discover later in this contribution, being covered by the UNRWA mandate excludes one from the protection of the Geneva Convention of 28 May 1951 and the UNHCR mandate, at least in the geographical area of the former’s mandate. A similar exclusion is applicable to the stateless status under the 1954 New York Convention.²⁶

8.2 ‘No Exit in Gaza’²⁷

The dire circumstances in Gaza inevitably create a need for international protection. It is, however, extremely difficult for Gazans to claim this need, as it is impossible to apply for international protection from one’s country of origin at a third country embassy or consulate. There are no opportunities to leave Gaza. Gaza is under siege and access is restricted. This has led to a situation where both the entry and exit of individuals, including those seeking humanitarian aid, are effectively impossible. The Rafah crossing, utilised by Hussein’s wife and children, permits only a limited number of individuals to travel in and out of the region. These individuals primarily include foreign passport holders, some of the seriously injured and their escorts, and others who have paid exorbitant fees to traverse Egypt in order to seek refuge elsewhere.

Prior to becoming eligible for international protection, the first challenge facing Gazans is gaining effective access to it. The obstacles they face are both factual and legal in nature. The security situation in the Gaza Strip significantly restricts movement. The blockade imposed on Gaza, coupled with the closure

23 ‘Le Secrétaire général de l’ONU a qualifié le 8 octobre cette potentielle décision de “catastrophe.” Il a averti qu’elle “étoufferait les efforts pour soulager la souffrance humaine et les tensions à Gaza et dans l’ensemble du territoire palestinien occupé” (UN, ‘*Lourdes menaces d’Israël sur UNRWA et l’aide aux Palestiniens*’ [10 October 2024]).

24 See UNRWA Independent Review, ‘Colonna’ report, <www.un.org/sites/un2.un.org/files/2024/04/unrwa_independent_review_on_neutrality.pdf>.

25 UN General Assembly Resolution A/RES/79/232, ‘Request for an advisory opinion of the International Court of Justice on the obligations of Israel in relation to the presence and activities of the United Nations, other international organisations and third States,’ adopted 19 December 2024.

26 ‘This Convention shall not apply: (i) To persons who are at present receiving from organs or agencies of the United Nations other than the United Nations High Commissioner for Refugees protection or assistance so long as they are receiving such protection or assistance.’

27 Human Rights Watch, ‘No Exit in Gaza. Left With No Other Options, Residents Should Have a Right to Flee,’ <www.hrw.org/news/2024/04/01/no-exit-gaza> accessed 4 October 2025.

of multiple crossing points, makes it extremely difficult for individuals to leave the territory. Those seeking international protection face not only physical barriers but also administrative hurdles, as consular services necessary for visa applications are largely inaccessible within Gaza (see below, at A).

Furthermore, the complexity of individual cases further influences the ability of Gazans to seek asylum. The situation varies depending on the legal status of the person, their documentation, and the specific protection mechanisms available to them. Some may attempt to leave through Egypt or Jordan, while others seek family reunification or humanitarian visas. Each of these pathways presents distinct challenges, making it essential to analyse the different scenarios faced by asylum seekers in Gaza (see below, at B).

Beyond the practical barriers, there are significant legal challenges. While international law guarantees the right to leave one's country, it does not establish a corresponding right to enter another state's territory – even for those seeking asylum. This legal ambiguity creates a critical gap in protection for Gazans. The question of whether international law grants individuals a right to enter a third country for the purpose of seeking asylum will be analysed in detail (see below, at C).

Moreover, the role of national courts in interpreting international and European human rights law is crucial in asylum cases. A key example is Belgium, where national jurisprudence has shaped the legal framework governing visa applications for individuals facing serious risks in Gaza. Examining how Belgian courts have interpreted these obligations provides valuable insights into the broader legal debate surrounding access to protection (see below, at D).

Finally, this chapter will explore whether Palestinian refugees receive equal access to resettlement opportunities under the principle of non-discrimination. Unlike other displaced populations, Palestinian refugees often face additional legal and political barriers when seeking international protection. This section will assess whether existing resettlement mechanisms ensure fair treatment or whether discriminatory practices persist (see below, at E).

8.2.1 *Factual Obstacles: The Security Context in the Gaza Strip*

In order to apply for international protection, a person must have already left their country of origin and submitted an application in a third country where they have gained access. However, European States generally require a personal appearance at a diplomatic or consular post to apply for a visa (humanitarian or for family reunification²⁸), to legally travel to the territory of a third country (and, if necessary, to lodge an application for international protection).

28 Although the 2023 *Afrin* ruling by the Court of Justice of the European Union has changed the situation for family reunion visas (see below): Case C-1/23 PPU *X. and Others v État belge (Afrin)* [2023] EU:C:2023:296.

Presently, fulfilling this personal appearance requirement is rendered *de facto* impossible. With regard to Belgium, there is no Belgian diplomatic or consular post in the Gaza Strip where Palestinians can apply for a visa for Belgium. The nearest diplomatic posts where Palestinians can apply for a Belgian visa are the Belgian Embassy in Tel Aviv, the Belgian Consulate in Jerusalem, or the Belgian Embassy in Cairo. This situation is consistent across all EU Member States.

Even before the offensive of October 7, 2023, it was extremely complicated for Palestinians in Gaza to travel to any diplomatic mission, given the severe restrictions imposed by Israel on their freedom of movement. In the case of Belgium, an external service provider, TLS Global, was responsible for registering visa applications and transmitting the documentation to the relevant Belgian consular authorities via an online portal. Following this process, TLS Global would then facilitate the delivery of the passport and visa to the applicants.

Even prior to the attacks of 7 October 2023, movement out of the Gaza Strip was heavily constrained, requiring authorisation to cross multiple checkpoints controlled by Israeli and Egyptian authorities, with exit permits granted only in limited and often opaque circumstances. Since the attacks of 7 October 2023, all border crossings from the Gaza Strip have been effectively sealed, including the closure of the TLS centre, which has rendered the submission of visa applications impossible. The Rafah crossing – Gaza’s only remaining access point to the outside world – permits only limited and highly restricted movement, generally confined to humanitarian aid, individuals requiring urgent medical evacuation, and a narrow category of foreign passport holders. The process lacks transparency and is governed by arbitrary criteria. As a result, the overwhelming majority of Gaza’s population faces insurmountable obstacles to exiting the territory, including in cases where individuals may have legitimate claims to international protection. This situation amounts, in practice, to a denial of access to asylum procedures and undermines the fundamental right to seek international protection.

8.2.2 *Different Scenarios*

Three different scenarios can be identified, each with its own specific challenges:

1. Palestinians who already possess a status in a third country, including citizens, refugees, and stateless persons recognised in a third country, are theoretically entitled to enter. However, three significant obstacles remain: actual exit from Gaza, transit through a third country, and assistance from European authorities for evacuation.
2. Palestinians with close family ties in a third country may be eligible for a family reunification visa. This provision applies to members of the nuclear family of a recognised citizen, refugee, or stateless person in a Member

State of the EU. However, this scenario gives rise to two issues: the practical feasibility of submitting the application, and the same challenges of exit from Gaza and transit as in the first scenario.

3. For Palestinians devoid of pre-existing connections to a third country – that is to say, those lacking either nationality or family ties in a third country – the sole authorised exit option is to secure a humanitarian visa for international protection. However, this option is also hampered by the logistical challenges of actual exit and transit.

These three scenarios highlight a common issue: beyond the crucial question of physical exit from Gaza, there is the question of the right of entry and transit to third countries for people in need of international protection. This complex issue will be addressed next.

8.2.3 Legal Obstacles: Is There a Right to Enter the Territory of a Third Country to Seek International Protection?

In the absence (or near-absence) of legal and safe channels for accessing the territory of a third country in order to seek international protection, the only solution that does not involve illegal and often perilous crossings is to apply for humanitarian visas (1). However, the absence of specific criteria for granting such visas at the European or international level raises the question of whether a subjective right to be issued with a humanitarian visa can be derived from the right to life and the prohibition of torture, and/or possibly from the right to respect for private and family life. The European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) have ruled against the aforementioned claims regarding the first two rights (2). Nevertheless, the ECtHR has repeatedly ruled that States have a positive obligation to authorise entry into their territory in order to preserve family unity (3).

8.2.4 Lack of Safe and Legal Access to the Territory of a Third Country in Order to Seek International Protection: The Question of Humanitarian Visas

The limited number of legal and secure access routes to international protection in Europe – such as refugee resettlement²⁹ – is not sufficiently developed in relation to the number of people in need of protection. In instances where legal migration channels, independent from the necessity of international

29 UNHCR, *Resettlement Handbook* (Geneva, July 2011) <www.unhcr.org/us/sites/en-us/files/legacy-pdf/46f7c0ee2.pdf>, 3: ‘Resettlement involves the selection and transfer of refugees from a State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status.’

protection, are inaccessible, such as family reunification³⁰ or single work permits³¹ – third-country nationals seeking international protection who are unable, or unwilling, to undertake irregular migratory paths – including traversing the Mediterranean Sea – often resort to humanitarian visa applications.

The concept of a humanitarian visa originates from EU law, and its provisions are either explicitly or implicitly incorporated into national legislation or practices. In European law, Article 25 of the Visa Code provides for the possibility for Member States to issue a humanitarian visa. This article stipulates that Member States may issue a visa with limited territorial validity, even in instances where the criteria outlined in the Visa Code are not met, if they consider ‘it necessary on humanitarian grounds, for reasons of national interest or because of international obligations.’³²

The Visa Code grants a substantial degree of discretion to Member States. For instance, under Belgian law, humanitarian visas are not codified as such, and are instead subject to the discretionary powers of the Secretary of State for Asylum and Migration, as outlined in article 9 of the law of December 15, 1980.³³ There are no specific procedures or criteria for granting such visas. In practice, the issuance of humanitarian visas in Belgium occurs in four primary scenarios:³⁴

For ‘resettlement’ of persons with UNHCR refugee status.

To extend family reunification (outside the strict conditions for family reunification, to include other family members).

For urgent humanitarian, medical, or professional reasons.

For the implementation of a rescue and aid operation for migrants in urgent need of international protection.

Within the EU, two main categories of humanitarian visas exist: short-term visas (valid for less than 90 days) and long-term visas (exceeding 90 days). Although neither category grants an automatic or permanent right of residence, both serve as legal pathways enabling individuals to access the territory of a Member State for protection-related reasons. Specifically, these visas allow applicants to enter the EU for the purpose of initiating administrative

30 Directive 2003/86/EC of 22 September 2003 on the right to family reunification [2003] OJ L251.

31 Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State [2011] OJ L343.

32 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) [2009] OJ L243.

33 Belgian law of 15 December 1980 on access to the territory, residence, settlement and removal of foreigners.

34 Myria, ‘Les visas humanitaires. Frontières et droits fondamentaux’ MyriaDocs #4, <www.myria.be/files/Myriadocs4_Visas_humanitaires.pdf> accessed 4 October 2025.

procedures, such as lodging an asylum claim or requesting international protection, which may ultimately lead to the granting of refugee status or another form of protection under EU or national law.³⁵

Given that there are no criteria for granting a humanitarian visa, can we assume that there is a subjective right to obtain such a visa in order to lodge an application for international protection in a third country?

8.2.5 A *Right of Entry Based on the Right to Life and/or the Prohibition of Torture and Other Inhuman and Degrading Treatment*

The challenge in this instance stems from the scope of application of these two human rights within the framework of both EU law and the law of the European Convention on Human Rights (ECHR).

In its *X. and X. v Belgium* judgment of March 7, 2017,³⁶ the CJEU ruled that an application for a short-stay visa lodged by a third-country national (a Syrian citizen) on humanitarian grounds within the mission of a Member State of destination (Belgium) in the territory of a third country (Lebanon), with the intention of lodging an application for international protection on arrival in that Member State and, as a result, residing in that Member State on a long-term basis, did not fall within the scope of application of EU law. The Visa Code was adopted on the basis of Article 62 of the Treaty on the Functioning of the European Union (TFEU), which applies exclusively to visas for stays of up to 90 days. The CJEU determined that applications for humanitarian visas, lodged with the intention of subsequently seeking international protection in a particular country, were, in essence, driven by the objective of acquiring a residence permit with a duration that exceeded the 90-day limit. The Visa Code, which is not intended to harmonise national legislation on international protection, does not oblige Member States to permit third-country nationals to submit international protection applications at Member State representations in third countries. Moreover, the instruments relating to European asylum law do not have extraterritorial application. Article 3(1)(2) of Directive 2013/32 applies exclusively to requests for international protection made within the territorial boundaries of Member States, including at borders and in transit zones. However, it does not apply to requests for diplomatic or territorial asylum from the diplomatic representations of Member States.³⁷ Articles

35 See notably Luc Leboeuf and Marie-Claire Foblets (eds), *Humanitarian Admission to Europe: The Law Between Promises and Constraints* (vol 30, Nomos, 2020).

36 Case C-638/16 PPU *X. and X.* [2017] EU:C:2017:173. For a commentary on this decision, see Sylvie Sarolea, Jean-Yves Carlier and Luc Leboeuf, 'Délivrer un visa humanitaire visant à obtenir une protection internationale au titre de l'asile ne relève pas du droit de l'Union: *X. et X.*, ou quand le silence est signe de faiblesse' [March 2017] *Cahiers de l'EDEM* 3–9.

37 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) [2013] OJ L180.

1 and 3 of Regulation 604/2013 (so-called Dublin regulation) mandate that Member States only examine applications made on their territory.³⁸

The CJEU held that applications for humanitarian visas submitted for the purpose of seeking international protection do not fall within the scope of the EU Visa Code. Consequently, the Court concluded that there is no EU legislation obliging Member States to issue visas or long-term residence permits on humanitarian grounds. Such matters remain within the exclusive competence of national law, allowing each Member State to determine – at its discretion – whether and under what conditions to issue such visas.

In a subsequent case of a similar nature, the ECtHR was called upon to rule on the obligation to issue humanitarian visas in order to seek international protection in a third country. The Court held that the rights enshrined in Articles 2 and 3 ECHR (right to life and prohibition of torture and inhuman and degrading treatment) only impose an obligation on States parties towards persons under their jurisdiction within the meaning of Article 1 ECHR. In its *M.N. and Others v Belgium* inadmissibility decision of May 5, 2020, the ECtHR ruled that States did not exercise their jurisdiction when they decide on humanitarian visa applications submitted by foreign nationals to their embassies or consulates to be granted legal and safe access to their territory in order to lodge an application for international protection.³⁹ The Court found that there were no exceptional circumstances that could lead to the conclusion that the requested State had extraterritorial jurisdiction, since there was no pre-existing link between Belgium and the applicants for humanitarian visas. The Convention does not establish an obligation to grant humanitarian visas. Conversely, adopting an alternative interpretation would imply a widespread implementation of the Convention's provisions. This determination constitutes a 'political' decision, widely criticised within legal circles.⁴⁰ It serves to reinforce the EU's 'politique d'obstruction menée par l'Union européenne en matière d'accès aux procédures de l'asile'⁴¹ thereby increasing the legal challenges to the establishment of legal channels for accessing the EU's territory.

38 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) [2013] OJ L180.

39 *M.N. and Others v Belgium* App no 3599/19 (ECtHR, 5 May 2020).

40 See eg Émilie Lenain, 'Il était une fois, un visa obligatoire qui n'existait pas. Quand les Cours européennes dansent la polka autour des lacunes du droit' (7 November 2020) *La revue des droits de l'homme*; Jean-Yves Carlier, Laura Cools, Eleonora Frasca, Francesco Gatta and Sylvie Sarolea, 'Humanitarian Visa: Does the Suspended Step of the Stork Become a Hunting Permit?' *Cahiers de l'EDEM* (June 2020); Eugénie Delval, 'Humanitarian Visas for International Protection Purposes: The Myth of a Universal Application of Human Rights Law' (*Verfassungsblog* 31 July 2024) <<https://verfassungsblog.de/humanitarian-visas/>> accessed 4 October 2025.

41 Lenain (n 40) 6.

Moreover, it heightens the risk of arbitrary decision-making in the issuance of humanitarian visas, particularly in contexts involving the submission of applications for international protection.

The two European courts have demonstrated a strict and formalistic approach, showing little regard for teleological interpretations of human rights. The current state of international and European human rights law, as interpreted by the ECtHR and the CJEU,⁴² leaves foreign nationals who request humanitarian visas for the purposes of international protection with no subjective right to be granted such visas.

Moreover, given that the CJEU and the ECtHR have ruled that States are under no affirmative obligation to grant humanitarian visas for the purpose of international protection, it is difficult to envision a scenario in which they would rule that States have an obligation to accept applications for humanitarian visas, for instance by electronic means. Consequently, there is no right to apply for, nor is there any possibility of being granted, a humanitarian visa based exclusively on the need for international protection.

8.2.6 *A Right of Entry Based on the Right to Respect for Private and Family Life*

The ‘family reunification’ visa under European law gives rise to questions regarding its implementation. Some applicants may avail themselves of the right to family reunification guaranteed by European law.⁴³ It is a legal means of migration when there is a need for international protection, even if applications for entry are not directly based on this need, but rather on the existence of family ties. However, this possibility is reserved only for certain very limited categories of third-country nationals.

The primary restriction on the right to family reunification is that it is limited to migrants who fall within the scope of European law. This includes EU citizens who have exercised their freedom of movement (Directive 2004/38⁴⁴)

42 Other international bodies, such as the Human Rights Committee, are more open to the extraterritorial application of human rights. However, these committees have not yet had the opportunity to address the potential obligations of states with regard to legal and secure channels of access to international protection. Jean-Yves Carlier and Sylvie Sarolea, ‘Des frontières aux droits ou des droits aux frontières? – La décision de la Cour européenne des droits de l’homme *M.N. c. Belgique* du 5 mai 2020 sur les visas humanitaires’ (2020) 39 *Journal des tribunaux* 821–25.

43 Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158; Dir 2003/86.

44 See Matthieu Lys, ‘Le regroupement familial des citoyens européens’ in Nathalie Dandoy and Geoffrey Willems (eds), *Les grands arrêts du droit au respect de la vie familiale* (Larcier 2022) 711–36.

and third-country nationals (Directive 2003/86).⁴⁵ These individuals benefit from a genuine subjective right to family reunification conferred by European law. However, European law does not apply to 'sedentary' European citizens, for example the family members of a Belgian who has not moved within Europe, such as his Palestinian wife.

A second important limitation is the restrictive definition of family members eligible for family reunification. EU citizens are covered by Directive 2004/38: spouse or equivalent partner, descendants under the age of 21 or dependent descendants, dependent ascendants, and parents of a dependent minor EU citizen.⁴⁶ Directive 2003/86, which applies to third-country nationals, is even more restrictive, limiting its scope to the nuclear family unit: the spouse or partner (over 21 years of age), joint minor children or those of the spouse/partner, disabled adult children, and the ascendants of a refugee minor.⁴⁷ In Belgium, family members of Belgian citizens are regarded as third-country nationals for the purpose of family reunification and are not considered EU citizens.⁴⁸ These definitions frequently exclude extended family ties, such as collateral relatives or grandparent/grandchild relationships, which can pose challenges in the context of fragmented families.

The third limitation is that this right to family reunification is contingent upon a series of economic conditions (e.g., sufficient income, adequate housing, etc.). These conditions render the right inaccessible to all family members included in the aforementioned categories.

With these limits in place, family members of a Union citizen who meet the conditions laid down by European law enjoy a genuine right to family reunification. But this right must be asserted. As previously mentioned, the absence of diplomatic or consular posts in Gaza has eliminated the possibility of submitting applications. The requirement to submit an application for a family reunification visa in person to a diplomatic or consular post was challenged before the CJEU in the recent case of *Afrin v Belgium*. The court's judgment prohibits Member States from implementing:

national legislation which requires that, for the purposes of submitting an application for entry and residence with a view to family reunification, that the sponsor's family members, in particular those of a recognised refugee, appear in person at the diplomatic or consular post of a Member State competent in respect of the place of their temporary or permanent

45 See Sylvie Sarolea, 'Le regroupement familial des ressortissants de pays tiers' in Dandoy and Willems (n 44) 689–710.

46 See art 2 of Dir 2004/38.

47 Dir 2003/86, 12–18.

48 This is known as 'reverse discrimination.' See Matthieu Lys, 'La nouvelle loi belge sur le regroupement familial: le droit européen et le droit belge autorisent-ils la discrimination à rebours?' [2012] *Rev. b. dr. const.*, 27–53.

residence abroad, including in a situation where it is impossible or excessively difficult for them to travel to that post.⁴⁹

It follows that an application for a visa for the purpose of family reunification should be able to be submitted electronically when it is impossible or excessively difficult for the applicant to physically go to the diplomatic or consular post of a Member State, as is the case today for the vast majority of Gazans who are unable to leave the Gaza Strip.

In addition to individuals who benefit from the *right* to family reunification, applications for humanitarian visas are also submitted by those who do not benefit from the right to family reunification but who invoke family or private ties in support of their application.

In addition to the safety concerns in their country of origin and their need for international protection, many applicants invoke the existence of family or private ties with persons residing in a third country and holding a valid residence permit (nationality, refugee status, etc.) without strictly meeting the conditions for a family reunification visa. Examples include siblings, grandparents, adult ascendants, and adult descendants.

For these applicants, the only available option is to apply for a humanitarian visa, invoking, in addition to the possible violation of Article 3 ECHR linked to the local security situation, links with a third country of destination falling within the scope of Article 8 ECHR, without, however, meeting the conditions laid down by EU law for the recognition of a subjective right to family reunification. The question, therefore, remains: do such individuals possess the right to submit an application for and subsequently obtain a humanitarian visa from this state?

Unlike Articles 2 and 3 ECHR, which face significant limitations in terms of territorial and extraterritorial application in the context of humanitarian visa requests, Article 8 ECHR has a more established territorial reach. Specifically,

49 *Afrin* (n 28) para 38; on this case, see Luc Leboeuf, Nicole Decabooter and Ina Vandenberghe, 'Les États membres ne peuvent exiger, sans exception, une comparution personnelle au sein d'un consulat à l'étranger aux fins d'introduire une demande de regroupement familial' [May 2023] *Cahiers de l'EDEM*. On the consequences of the *Afrin* ruling, see Myria, 'Note – Une année de pratique belge depuis l'arrêt *Afrin*' (26 October 2024). Myria concludes that it is necessary to continue to advocate for a legal regime that incorporates an alternative method of introduction as a principle and not as an exception. In practical terms, this could entail the systematic option of lodging an application by digital means at a diplomatic mission or from Belgium by the reference person. Myria asserts that this approach is essential for ensuring a sufficiently efficient and fair procedure, as stipulated in the directive on family reunification. This is particularly crucial given the limited resources available at diplomatic posts and associated services. This systematic facilitation of application submission aligns with the recommendations of international bodies and the practices in effect in other EU Member States. Finally, enabling visa applications to be submitted electronically can also be regarded as a logical step in the process of digitising administrative procedures (Myria, 'La migration en chiffres et en droits 2024' <www.myria.be/files/2024_MYRIA_Droit_de_vivre_en_famille.pdf>).

when a State examines a humanitarian visa application grounded in family or private life, and the sponsor resides legally on its territory, the State must take into account its obligation to respect the right to private and family life as protected under Article 8 ECHR. This obligation applies territorially, as it concerns the rights of individuals already present within the State's jurisdiction – namely, the family members seeking to be reunited.

According to the jurisprudence of the European Court of Human Rights, under certain circumstances, States Parties have a positive obligation to reunite families by allowing access to their territory for family members who are foreign nationals. For example, the Court explains that:

the extent of a State's obligation to admit to its territory relatives of settled immigrants will vary according to the particular circumstances of the persons involved and the general interest [...]. Article 8 (art. 8) cannot be considered to impose on a State a general obligation to respect the choice by married couples of the country of their matrimonial residence and to authorise family reunion in its territory.⁵⁰

However, the Court does not rule out the possibility that such an obligation may exist in certain specific circumstances, stating that 'In order to establish the scope of the State's obligations, the facts of the case must be considered.'⁵¹ In particular, the Court stresses the need to take into account the extent to which family life is being disrupted and whether there are 'insurmountable obstacles' or major obstacles to the family living in the country of origin of one or more of the persons concerned who wish to enter its territory.⁵² In certain instances, obstacles to the preservation of family life in the country of origin have been derived directly from the risk of persecution emanating from that country, or from the situation of violence and war prevailing there.⁵³ From the perspective of Article 8 ECHR, there is a positive obligation on the part of the States that have received visa applications to issue the requested visas, with the aim of preserving family life, if this is not possible elsewhere. The non-extraterritorial application of Articles 2 and 3 is addressed by the territorial application of Article 8, facilitated by the presence of relatives within the terri-

⁵⁰ *Gül v Switzerland*, App no 23218/94 (ECtHR, 19 February 1996) para 38.

⁵¹ *ibid.*

⁵² In this sense, see *Şen v the Netherlands*, App no 31465/96 (ECtHR, 21 December 2001) para 40; *Rodriguez da Silva v the Netherlands*, App no 50435/99 (ECtHR, 31 January 2006) para 39; *Antwi and Others v Norway*, App no 26940/10 (ECtHR, 14 February 2012) para 89; *Jeunesse v The Netherlands*, App no 12738/10 (ECtHR, 4 December 2012) para 107; *M.A. v Denmark*, App no 6697/18 (ECtHR, 9 July 2021) para 134.

⁵³ For example: *Tuqabo-Tekle and Others v the Netherlands*, App No 60665/00 (ECtHR, 1 December 2005) paras 47–48; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, App no 13178/03 (ECtHR, 12 October 2006) para 75; *Mugenzi v France*, App no 52701/09 (ECtHR, 10 July 2014) para 53.

tory of a Member State. This establishes a connection that was lacking in *M.N.* However, the Strasbourg Court has not yet addressed the question of whether such a request can be made electronically. The Court's teleological approach to imposing an obligation to issue a visa where it is impossible or unreasonably difficult to pursue family life elsewhere could form the basis of an obligation to provide for electronic submission arrangements for these visas, which, strictly speaking, are not 'family reunification' visas.

8.2.7 *Interpretation of International and European Human Rights Law by National Courts: The Example of Belgium*

8.2.7.1 *Obligation to Process Family-Based Humanitarian Visa Applications Electronically*

The Belgian courts have received a number of requests to order the Belgian State to allow applications for humanitarian visas to be submitted by any means of telecommunication for Gazans who do not qualify for family reunification and who wish to join family members legally residing in Belgium.

In its first three decisions of February 2, 2024,⁵⁴ the Court of First Instance ruled that even if these persons do not enjoy a right to family reunification under EU law, they can be recognised as 'family members' on the basis of Article 8 ECHR.⁵⁵ It is the responsibility of the authorities (in this case the Belgian Aliens Office) that decide on humanitarian visa applications to respect Article 8 ECHR. The Belgian parties to the case may rely on this provision, while the others, although not subject to Belgian jurisdiction within the meaning of Article 1 ECHR, may bring an action for liability against the Belgian State on the basis of Article 1382 of the Civil Code.⁵⁶ The claim in question

54 Civ. Bruxelles, ref., ord. 2023/320/C, 2023/321/C and 2023/323/C, pronounced on 2 February 2024.

55 These were the adult ascendants of Palestinians legally residing in Belgium as recognised refugees or authorised to stay indefinitely.

56 'Si l'administration commet une faute, que ce soit en violant un droit subjectif de l'étranger ou même en l'absence d'un tel droit, en n'exerçant pas son pouvoir discrétionnaire comme une autorité administrative, normalement soigneuse et prudente placée dans les mêmes circonstances l'aurait fait, l'étranger peut s'en prévaloir. Par conséquent, les parties demandereses sont en droit, même si elles ne peuvent faire valoir les dispositions de la CEDH, d'introduire une citation sur la base de l'article 1382 du Code civil (...). La lésion d'un intérêt légitime ou la perte d'une chance causée par la faute, crée le droit à réparation qui, une fois constitué, ramène à la première hypothèse; dans ce cas, le droit lésé devient celui d'exiger la réparation. Or, c'est en substance ce qu'invoquent les parties demandereses lorsqu'elles reprochent à l'État belge de violer l'article 9 de la loi du 15 décembre 1980 (...) en exigeant leur comparution personnelle, dès le stade de l'introduction de la demande, dans un poste diplomatique ou consulaire existant à Gaza ou inaccessible au Caire, ce qui les empêche *de facto* de déposer la moindre demande. C'est ce qui amène les parties demandereses à solliciter à titre de réparation que les modalités pratiques de dépôt de leur demande soient assouplies.' Free translation: 'If the administration commits a fault – whether by violating a subjective right of the foreign national, or even in the absence of such a right – by failing to exercise its discretionary power

pertains to the protection of a subjective right (the possibility of applying for a visa) and not the granting of a right of residence.

With respect to the principle of the separation of powers, the judge emphasised that it was not for him to substitute himself for the competent authorities and to assess the existence or closeness of family ties justifying the granting or not of a humanitarian visa. However, the court did note the Belgian State's requirement for applicants for humanitarian visas to appear in person. While acknowledging that family ties are not presumed and may not benefit from the protections of Article 8 ECHR, the court held that the failure to examine such relationships, and therefore to provide the protections derived from them, undermines the principle of respect for Article 8 ECHR.⁵⁷ Compliance with Article 8 ECHR 'impose *prima facie* à tout le moins de permettre un tel examen,' and requires the Belgian State to allow humanitarian visa applications based on family ties to be submitted electronically. The requirement to appear in person, without exception, deprives direct descendants of the possibility of proving the existence of special dependency ties to be protected within the meaning of Article 8 ECHR.

In a subsequent order dated March 15, 2024, the Court of First Instance clarified, on the basis of the *Haydarie v The Netherlands* judgment handed down by the Strasbourg Court on October 20, 2005, that its jurisdiction under Article 8 ECHR applies both to the intervening party, the Belgian family member who is recognised as a refugee in Belgium, and to the members of his family living in Gaza. The order adds that the refusal to allow the visa application to be submitted by e-mail:

porte également atteinte en apparence à l'article 13 de la CEDH, dont peuvent se prévaloir les parties demanderesse et intervenantes dès lors qu'elles disposent *prima facie* d'un grief défendable sous l'angle de l'article 8 de la CEDH. Le recours effectif peut prendre la forme d'une demande de titre de séjour, comme l'a reconnu la Cour européenne des

in the manner that a normally diligent and prudent administrative authority would have done under the same circumstances, the foreign national may rely on that fault. Consequently, the applicant parties are entitled, even if they cannot invoke the provisions of the ECHR, to bring a claim based on Article 1382 of the Civil Code (...). The infringement of a legitimate interest or the loss of an opportunity caused by the fault gives rise to a right to reparation, which, once established, leads back to the first hypothesis; in such a case, the infringed right becomes the right to claim compensation. This is, in substance, what the applicant parties allege when they accuse the Belgian State of violating Article 9 of the Law of 15 December 1980 (...) by requiring their personal appearance, from the very outset of the application process, at a diplomatic or consular post located either in Gaza or at an inaccessible location in Cairo, which effectively prevents them from submitting any application. It is on this basis that the applicant parties are requesting, by way of reparation, that the practical modalities for lodging their application be relaxed.'

57 Civ. Bruxelles, ref., ord. 2023/323/C, pronounced on 2 February 2024, para 33; see also Civ. Bruxelles, ref., ord. 2024/24/C, pronounced on 15 March 2024, para 25.

droits de l'homme dans l'affaire G.R. c. Pays-Bas.⁵⁸ L'attitude excessive-ment formaliste de l'État belge dans le cas présent, qui refuse toute alternative à la comparution personnelle dès l'introduction de la demande de visa alors qu'une telle comparution est impossible, les prive d'un tel recours effectif.⁵⁹

The Court of First Instance, once again considering an application for interim measures in a case involving applications for humanitarian visas based on family ties that fall outside the ambit of the right to family reunification, proceeded in a similar manner, though employing distinct reasoning. This order, dated June 19, 2024, was based on a territorial interpretation of Article 8 of the European Convention on Human Rights, instead of on the obligation to respect Article 8 in the context of Belgian law. Citing the potential obligation incumbent upon States to facilitate family reunification and, by extension, to permit the entry of foreign nationals into their respective territories, the court ruled that the competent administrative authority must carry out a rigorous examination of the case in the light of Article 8 to decide whether such a positive obligation binds the State. The court reiterated that it was not its responsibility to conduct the examination itself. However, it underlined that the applicants' right to family life, as protected by Article 8 ECHR, was in jeopardy due to the competent authority's refusal to consider the humanitarian visa application that the applicants had submitted via email. Consequently, the court judged that the authority had not conducted a thorough examination of the application and the circumstances of the case in the context of Article 8 ECHR.⁶⁰ The judge also ordered the Belgian State to permit applications for humanitarian visas based on family ties to be submitted via any means of telecommunication, given the inability of individuals from Gaza to appear in person before the relevant consulate or embassy.

The various sentences that were issued⁶¹ were all appealed, and the Brussels Court of Appeal handed down several rulings on December 30 and 31, 2024. These rulings affirmed an injunction against the Belgian State, requiring the

58 *G.R. v the Netherlands*, App no 22251/07 (ECtHR, 10 January 2012) para 46: 'There is no doubt that the procedure for obtaining a residence permit was "effective in law" in that the applicant was fully entitled to make use of it and in that it was capable of yielding the result sought by the applicant, namely a right under domestic law for him to reside in the Netherlands with his family. The issue is whether it was "available in practice," given the financial threshold which the applicant states he found insuperable.'

59 Civ. Bruxelles, ref., ord. 2024/24/C (n 57) para 24.

60 Civ. Bruxelles, ref., ord. 2024/124/C, pronounced on 19 June 2024, para 24. Similarly: Civ. Bruxelles, ref., ord. 2024/123/C, pronounced on 19 June 2024.

61 In addition to those already mentioned, see also Civ. Bruxelles, ref., ord. 2024/72/C, pronounced on 24 April 2024; Civ. Bruxelles, ref., ord. 2024/118/C, pronounced on 7 June 2024 (in which the French-speaking Court of First Instance of Brussels ordered the Belgian State 'de considérer le courriel adressé par l'avocat des parties demanderesse au consulat de Belgique à Jérusalem le 19 mars 2024 comme une demande de visa humanitaire fondée sur

establishment of ‘procédures qu’il estimerait adéquates pour permettre aux parties intimées de former leur demande de visa de type D,⁶² sans requérir d’elles leur comparution personnelle.’ The Court’s mandate stipulates that these procedures must be ‘souples, rapides et efficaces’ as outlined in Article 8 ECHR. However, in the interest of separation of powers, the Court of Appeal did not require the Belgian State to adopt the digital route, although in the grounds of its various judgments it always states that the refusal to allow the D visa application to be submitted by e-mail is ‘*prima facie* contraire à l’article 8 de la CEDH.’⁶³ Nevertheless, there is a marked regression from the jurisprudence of the Court of First Instance with regard to the establishment of the subjective rights of the parties: according to the Court of Appeal, Article 8 ECHR establishes a subjective right only for the refugee recognised in Belgium (or the Belgian),⁶⁴ not for the resident who has obtained residence via family reunification, and not at all for family residing in Gaza. Furthermore, in these rulings, the Court rejected the request of certain respondents to rule on the visa application within a defined reasonable time (9 months from the date of submission⁶⁵), on the grounds that the law does not provide for a time limit for processing.

The Belgian government’s January 2025 announcement of its decision to appeal the rulings indicates a refusal to relax the rules governing the introduction of D visas. On October 1, 2024, the Secretary of State for Asylum and Migration’s confirmation before the Federal Parliament of her decision to withhold authorisation for the submission of humanitarian visa applications via

l’article 9 de la loi du 5 décembre 1980 valablement introduite et donc de l’enregistrer comme telle’).

62 A Visa D, also known as a national long-stay visa, is a type of visa issued by EU Member States (particularly Schengen countries) that allows stays longer than 90 days, typically for periods ranging from three months to one year.

63 C.A. Bruxelles (1^{re} ch. aff. Civ.), 30 December 2024, 2024/KR/10, para 33; C.A. Bruxelles (1^{re} ch. aff. Civ.), 30 December 2024, 2024/KR/11, para 33; C.A. Bruxelles (1^{re} ch. aff. Civ.), 30 December 2024, 2024/KR/12, para 33; C.A. Bruxelles (1^{re} ch. aff. Civ.), 30 December 2024, 2024/KR/23, para 34; C.A. Bruxelles (1^{re} ch. aff. Civ.), 30 December 2024, 2024/KR/30, para 27; C.A. Bruxelles (1^{re} ch. aff. Civ.), 30 December 2024, 2024/KR/34, para 33; C.A. Bruxelles (1^{re} ch. aff. Civ.), 31 December 2024, 2024/KR/47, para 38.

64 The Court of Appeal cites the July 9, 2021 judgment of the Grand Chamber of the ECtHR in the case of *M.A. v Denmark*, as well as Resolution 2243 (2018) of October 11, 2018, of the Parliamentary Assembly of the Council of Europe on the family reunification of refugees and migrants in member states, as well as the thematic document published in June 2017 by the Council of Europe Commissioner for Human Rights, entitled ‘Realising the right to family reunification of refugees in Europe.’

65 The respondents formulated this time limit by analogy with that applied to applications for family reunification with third-country nationals under art 10 of the law of 15 December 1980, which must be processed within nine months (art 10 of the law of 15 December 1980). The respondents added that the principle of reasonable time requires the administration to make its decision within a reasonable time, even in the absence of a text imposing a fixed deadline; see Patrick Goffaux, *Dictionnaire de droit administratif* (2nd ed., Bruylant 2016) 196.

email was met with concerns regarding a considerable increase in the workload of diplomatic and consular posts.⁶⁶ However, in its March 15, 2024, ruling, the Court of First Instance noted that the Belgian State had acknowledged during the hearing that ‘la vérification identitaire, lorsqu’elle est réalisée dès l’introduction de la demande, permet un “écrémage” des demandes de visa’ *and it clearly ruled that* ‘un tel motif, de commodité plus que de nécessité’ was not valid.⁶⁷

8.2.8 Assistance in Leaving Gaza

In addition to the question of the submission of applications for humanitarian visas, the judge was tasked with ruling on the matter of the actual exit from the Gaza Strip for individuals in possession of visas. Beginning in October 2023, Belgium initiated a programme to facilitate the repatriation of Belgians, recognised refugees in Belgium, and their nuclear families from the Gaza Strip via Egypt.⁶⁸ Specifically, Belgium compiled a list of individuals deemed eligible for repatriation, after confirming their eligibility. This list was subsequently transmitted to the Israeli authorities, who determined whether the individuals could leave the Gaza Strip. If authorised, the list was then conveyed to the Egyptian authorities for their approval. In the case before the Court of First Instance, the applicant and his immediate family members (spouse and children) were residing in the Gaza Strip. In November 2023, the applicant was

66 ‘Een veralgemening van het indienen van een aanvraag voor een humanitair visum per mail is vandaag onwenselijk. Gezinshereniging is een recht dat in de wet wordt verduidelijkt, een humanitair visum is dat niet. Dat is een gunst waarvoor bij wet geen criteria zijn vastgelegd. Een dergelijke uitbreiding zou een enorme stijging van de werklast voor de diplomatie en consulaire posten met zich meebrengen, ten koste van andere categorieën van aanvragers.’ Free translation: ‘A generalisation of submitting a humanitarian visa application by mail today is undesirable. Family reunification is a right clarified by law; a humanitarian visa is not. It is a favour for which no criteria are established by law. Such an extension would involve a huge increase in the workload for diplomatic and consular missions, at the expense of other categories of applicants’ <www.lachambre.be/doc/CCRI/pdf/56/ic009.pdf> 7. With regard to the number of visa applications submitted by Gazans since October 2023, the Secretary of State for Asylum and Migration declared in Parliament on November 6, 2024, that ‘Entre le 8 octobre 2023 et fin septembre, 53 demandes de visa de court séjour pour raisons humanitaires ont été introduites de même que 559 demandes de visa de long séjour pour raisons humanitaires (363 pour raisons humanitaires et 196 pour regroupement familial élargi). Dans ce même cadre, 20 décisions positives et 33 décisions négatives ont été rendues pour des visas de court séjour, et 178 décisions positives et 147 décisions négatives ont été rendues pour des visas de long séjour.’ See <www.lachambre.be/doc/CCRI/pdf/56/ic032.pdf> 34.

67 Civ. Bruxelles, ref., ord. 2024/24/C (n 57): ‘[U]n tel motif, de commodité plus que de nécessité, ne permet pas de conclure que la vérification identitaire ne saurait être réalisée efficacement à un stade ultérieur. L’on sait du reste qu’un contrôle ultérieur est possible, dès lors qu’il s’agit de la pratique désormais admise pour les membres de la famille nucléaire d’un regroupant en Belgique.’

68 Information available on the Belgian Aliens Office website <<https://dofi.ibz.be/fr/news/gaza-evacuation-et-demandes-de-visa>>.

granted a ‘single permit’ by the Belgian State, valid for a period of one year. Subsequently, in December 2023, the applicant’s wife and children submitted an electronic application for a visa for family reunification. In January 2024, the Belgian Aliens Office authorised the Belgian Embassy in Cairo to issue family reunion visas, which were subsequently issued to all family members (single permits and family reunion visas). However, due to their physical presence in the Gaza Strip, a region from which it was virtually impossible to depart, despite possessing the necessary documentation, the applicants argued that their registration on the Belgian evacuation lists was the sole means of ensuring the practical benefits of their family reunification visas, which would allow them to reach the Belgian territory. However, the Belgian State argued that, in view of the aforementioned eligibility criteria (i.e., repatriation assistance exclusively for Belgians, recognised refugees in Belgium, and their nuclear families), the applicant and his family members could not, at that time, benefit from repatriation assistance, as their visas did not automatically entitle them to active assistance.

The judge noted that the single permit issued to the applicant had been granted pursuant to the European Directive 2011/98, which establishes a single application procedure for a single permit. Consequently, the Belgian State implemented Union law within the meaning of Article 51 of the Charter of Fundamental Rights of the European Union. The court’s decision was based on the provisions of the Charter, particularly Article 2, which protects the right to life and requires States to take preventive and practical measures to protect life. The court determined that the Belgian State was obligated to inform the Israeli and Egyptian authorities about the data concerning the applicants.⁶⁹ The judge concluded that this obligation did not constitute an unbearable or excessive burden, as it was sufficient to transmit a simple message to these foreign authorities, with whom the Belgian State was already in contact for identical procedures. The court further concluded that the State was under a positive obligation to include the details of applicants to whom visas had been issued in evacuation lists sent to the Israeli and Egyptian authorities, in accordance with Union law.

8.2.9 Beyond Gaza, the Time of Digitisation for Migrants and Refugees, Too

The impediment to submitting an in-person visa application is not confined to the ongoing conflict in Gaza, but is instead a general phenomenon, with numerous instances in which consulates, embassies, and other operators are inaccessible. The Brussels Court of Appeal provided a ruling on an application for family reunification submitted by an Eritrean refugee and his family, thereby offering a case in point. The Court’s examination focused on the legality of the Belgian State’s refusal to exempt the family from a personal

⁶⁹ Civ. Bruxelles, ref., ord. 24/344/C, pronounced on 13 March 2024, paras 22 and 24.

appearance to submit their visa application, considering the extreme difficulties involved in departing from Eritrea. The applicant, recognised as a refugee in Belgium, sought the right to family reunification for his wife and minor children, who had remained in Eritrea. Belgium does not have a diplomatic or consular post in Eritrea.⁷⁰

The Aliens Office is regularly informed of attempts to cross the border, detention in a military camp, and his wife's detention. The claimant alleged a violation of the right to family reunification, urgency due to the prolonged separation from the family, and, as compensation, the possibility of applying remotely. The Belgian State contests the court's competence and complains of a lack of concrete evidence to support the alleged difficulties. The court disagreed, concluding that the Belgian State had not adequately examined the facts and had exercised its discretion in a manifestly unreasonable manner. The court recognised the urgency of the case and determined that dispensation from personal appearance was the appropriate remedy for the damages caused by the Belgian State's unlawful decision. The judgment had to be enforced within three days, subject to a fine. This case law establishes a novel precedent by holding that dispensation from personal appearance can be ordered as a measure of reparation in kind for damage caused by an illegal administrative decision.

The digitisation of such procedures appears to be in accordance with the European and national trend towards virtualisation, the purpose of which is to facilitate procedures and access to justice, thereby enabling the effectiveness of the subjective rights of people who are unable to attend in person. This inclination was underscored as early as 2000 by the Council of Europe, which encouraged the initiation of electronic proceedings.⁷¹ In 2021, the EU unveiled its Digital Decade strategy, aiming to have 100% of public services transitioned to online platforms by 2030.⁷² Consequently, the 2019 general policy declarations of the nation's federal and federated entities unambiguously conveyed a commitment to the dematerialisation of public services. This transformation is fundamentally driven by the imperative to 'promote maximum simplification

70 'Depuis la décision de reconnaissance du statut de réfugié, sa femme et ses enfants tentent de quitter l'Érythrée afin d'introduire une demande de visa en vue d'un regroupement familial avec leur mari et leur père. (...) Il ne leur est toutefois pas possible de quitter le pays légalement, vu les obstacles à l'obtention des documents nécessaires pour quitter le pays légalement (...), de sorte qu'ils doivent traverser la frontière de manière illégale. Sans succès jusqu'à présent, malgré plusieurs tentatives (...). Les difficultés rencontrées par [son épouse et leurs trois enfants] pour sortir d'Érythrée sont confirmées par des rapports de sources officielles concernant l'Érythrée.'

71 Recommendation Rec(2001)3 of the Committee of Ministers to member states on the delivery of court and other legal services to the citizen through the use of new technologies [2001] para 3, <<https://search.coe.int/cm?i=09000016805e2aa7>>.

72 European Commission, 'Europe's Digital Decade: digital targets for 2030' (2021) <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/europe-fit-digital-age/europes-digital-decade-digital-targets-2030_en>.

of procedures, dematerialisation, reduction of file processing times, facilitation of access to information, reduction of travel and administrative costs, and realisation of an environmentally sustainable administration.⁷³ These rationales are directly applicable in the context of ensuring the safeguarding of individual rights in matters pertaining to migration.

8.2.10 *Two Obligations Enshrined in Civil Law*

Civil judges have been tasked with addressing the gaps in the case law of the two European courts and the limitations on the powers of administrative judges.⁷⁴ They have done so by enshrining two obligations. Firstly, the Belgian State is under a positive obligation to allow applications for humanitarian visas based on family ties to be submitted electronically under Article 8 ECHR. This obligation goes one step further than the obligations deriving from the *Afrin* ruling, which are limited to family reunification under EU law. Conversely, the case law underscores a positive obligation to include individuals who have already been granted a visa on evacuation lists transmitted to the Israeli and Egyptian authorities, as stipulated in Article 2 of the Charter of Fundamental Rights. This obligation addresses the issue of actual exit from the territory, a matter previously overlooked by the two European courts.

However, certain situations remain excluded from the protection of international and European human rights law. Firstly, the obligation to allow applications for humanitarian visas is only formulated in the context of Article 8 and only covers applications based on family or private ties with persons legally resident in Belgium. Consequently, requests for humanitarian visas based solely on a need for international protection, for example in a specific medical context, are excluded. Conversely, the positive obligation to place

73 Free translation. Joint policy statement by the Government of the Brussels-Capital Region and the College of the Joint Community Commission, legislature 2019–2024, 108–09. See also the parliamentary work on the joint decree and ordinance of the Brussels-Capital Region, the Joint Community Commission and the French Community Commission on the digital transition of public authorities: ‘la numérisation des opérations internes des administrations publiques représentera un réel avantage de rapidité de traitement, d’augmentation de la sécurité et de la quasi-disparition des pertes de dossiers. De même, la numérisation permettra l’automatisation du recours aux droits des citoyens et représentera sur le long terme pour les usagers une diminution de leurs charges administratives.’ (*Doc. parl.*, Parl. RBC, Projet de décret et ordonnance conjoints de la Région de Bruxelles-Capitale, la Commission communautaire commune et la Commission communautaire française relatifs à la transition numérique des autorités publiques, 2023–2024, A-758/1 et B-164/1, Séance du 2 octobre 2023, Exposé des motifs, 1).

74 The civil judge rules on the basis of the existence of subjective rights, which the administrative judge, the Aliens Litigation Council, is unable to protect sufficiently by simply annulling the decision. On the combination of the powers of the civil and administrative courts, see Jean-Yves Carlier and Sylvie Sarolea, *Précis de droit des étrangers* (Larcier 2016) paras 752 ff.

individuals on evacuation lists is outlined under the Charter of Fundamental Rights. However, this obligation, as delineated in Article 51, is applicable to Member States exclusively in instances where they are ‘implementing Union law.’ Therefore, while single permits and visas granted for family reunification purposes unquestionably implement Union law, humanitarian visas granted for purely humanitarian purposes do not fall within the scope of Union law,⁷⁵ as the CJEU decided in its *X. and X. v Belgium* judgment referenced above, as do humanitarian visas granted on the basis of family ties, which are certainly covered by Article 8 ECHR, but not by the right to family reunification under European law. Consequently, in such instances, the Belgian State would not bear a positive obligation to be present at the exit from the territory to ensure the useful effect of these humanitarian visas.

8.2.11 *Access to Resettlement for Palestinian Refugees under the Principle of Non-Discrimination*

Resettlement is a process through which refugees are able to access protection. It involves the selection and transfer of refugees from a State in which they have sought protection (the State of first asylum⁷⁶) to another state that accepts them as refugees with permanent resident status (the State of resettlement⁷⁷).⁷⁸ Resettlement is identified as one of the three durable solutions, alongside local integration and voluntary repatriation. The pre-selection of the most vulnerable refugees is typically conducted by the UNHCR in most Western countries, and is followed by a selection process conducted by the resettlement State.

Resettlement is not generally available to Palestinian refugees, the majority of whom are under the exclusive mandate of UNRWA. This agency was originally charged with the dual mission of providing humanitarian assistance and support for local integration and limited resettlement as possible alternatives to return (and compensation).⁷⁹ However, the realisation of these objectives met with opposition from Palestinian refugees and host countries to the first programmes developed in the 1950s. These programmes, primarily emphasising local integration and resettlement of refugees due to the challenges associated with ensuring their return, failed to address the Palestinians’ primary aspira-

75 Directive 2011/98; Directive 2003/86.

76 These are generally states close to the conflict zone that are taking in large numbers of refugees, who have no prospects for the future. Among the countries of first asylum for people fleeing the conflict in Syria are: Lebanon, Jordan, and Egypt.

77 Among the largest resettlement countries are the USA, Canada, Australia, Sweden, Norway, Germany, the Netherlands, and France.

78 UNHCR, *Resettlement Handbook* (n 29) 3.

79 UN General Assembly, ‘194 (III). Palestine – Progress Report of the United Nations Mediator’ A/RES/194, 11 December 1948 <www.refworld.org/legal/resolution/unga/1948/en/86836>.

tion of returning home. Consequently, UNRWA abstained from intervening in these domains. This resulted in Palestinian refugees becoming the sole category of forcibly displaced individuals without an institution responsible for promoting durable solutions to their situation.⁸⁰

As a result, UNRWA's mandate does not encompass resettlement, while UNHCR's mandate excludes individuals under UNRWA's jurisdiction.⁸¹ Only in exceptional circumstances, as discussed below, can Palestinian refugees access resettlement (1). This situation gives rise to questions regarding the principles of equality and non-discrimination (2). It is also essential to consider the unique circumstances of Palestinian refugees, which may impede their resettlement (3).

8.2.11.1 *Conditions of Access to Resettlement for Palestinian Refugees*

There are several approaches to the subject of resettlement for Palestinian refugees.

8.2.11.1.1 PALESTINIAN REFUGEES NOT REGISTERED WITH UNRWA

Not all Palestinian refugees are registered with UNRWA. This agency provides services only to Palestinian refugees residing in its five areas of operation: the West Bank, Gaza Strip, Lebanon, Jordan, and Syria. In addition, to be registered with UNRWA, it is necessary to meet specific criteria defined by the agency. For example, only descendants of Palestinians who fled or were displaced during the 1948 Arab–Israeli war (the Nakba) are eligible for registration. This means that some Palestinians displaced by other conflicts, or those who have never registered with UNRWA, do not benefit from the organisation's services.⁸² For these Palestinian refugees not registered with UNRWA, identification by UNHCR for resettlement is possible.

80 Francesca Albanese and Lex Takkenberg, 'UNRWA and the Palestinian Refugees: Protecting Refugee Rights While Structurally Addressing the Agency's Financially Unsustainable Modus Operandi' (February 2023) 138 RSC 10.

81 UN General Assembly, Resolution No 428(V) – Statute of the UNHCR, para 7(c); art 1D of the Geneva Convention of 28 July 1951 Relating to the Status of Refugees and Protocol of New York of 21 January 1967, *United Nations Treaty Series*, vol 189, 50 and vol 606, 267 (Geneva Convention).

82 Palestine refugees are people whose usual place of residence was Palestine between June 1946 and May 1948, and who lost their homes and livelihoods as a result of the 1948 Arab–Israeli conflict. UNRWA's services are aimed at all those living in its area of operation who meet this definition, are registered with the agency and are in need of assistance. Descendants of the original Palestine refugees are also entitled to registration. UNRWA, 'Who we are' <www.unrwa.org/who-we-are#block-menu-block-10>.

8.2.11.1.2 REFUGEES REGISTERED WITH UNRWA OUTSIDE AREAS WHERE THE
AGENCY IS ACTIVE

A considerable number of refugees are registered with UNRWA because they were initially identified in an area where UNRWA is active. However, they subsequently migrated to an area where UNRWA is not active. A notable example of this phenomenon is Palestinian refugees in Turkey, Iraq, or Egypt.⁸³ In some cases, these Palestinian refugees may also be identified by UNHCR for resettlement.

8.2.11.1.3 REFUGEES REGISTERED WITH UNRWA IN AREAS WHERE THE AGENCY IS
ACTIVE

According to a note from UNRWA's Legal Affairs Department, refugees registered with the agency and present in a State where it is active may be identified by UNRWA in the course of fulfilling its mandate as 'high-risk cases with exceptional protection needs that it is not in a position to deal with directly.' In such circumstances, the agency may consider approaching a competent partner organisation, such as the UNHCR, on a strictly humanitarian and case-by-case basis. However, the decision regarding the provision of further assistance, if any, rests with the partner organisation. Depending on the circumstances, and following a thorough assessment by the UNHCR, resettlement and other means of admission to third countries may be considered. However, the note provides two clarifications. First, the absence of access to services or the inadequacy of UNRWA's coverage of needs does not, in and of itself, constitute a high-risk case with exceptional protection needs that merits referral to the UNHCR. Second, given the strict separation of mandates regarding Palestinian refugees in UNRWA's area of operation, referrals to the UNHCR are exceptional, and UNRWA does not have a procedure for Palestinian refugees to request referral to the UNHCR.⁸⁴ Furthermore, even in the event that UNRWA were to refer a Palestinian refugee to UNHCR, the services that UNHCR could provide 'would depend on and be determined by its mandate and capacities.' This suggests uncertainty regarding the referral process. Specifically, it raises the question of whether a refugee who meets UNRWA's stringent criteria and is referred to UNHCR by UNRWA would ultimately be referred to the programme, given the terms of UNHCR's mandate, which excludes Palestinian refugees.

The latter category of Palestinian refugees – who are under UNRWA's mandate and present in areas where the agency is active – therefore have difficult, if not impossible, access to resettlement, unlike people displaced by the same conflict. This situation raises questions of equality and non-discrimination.

⁸³ *ibid.*

⁸⁴ Note from the UNRWA Department of Legal Affairs, 4 April 2019.

8.2.11.1.4 INDIRECT DISCRIMINATION

Indirect discrimination can occur when an apparently neutral criterion puts people with a particular protected characteristic at a disadvantage compared to others.⁸⁵ Nationality or national origin is a protected characteristic. Palestinian refugees find themselves at a disadvantage compared to other people displaced by the same conflict, due to the norm whereby the pre-selection of refugees for resettlement programmes is carried out by the UNHCR (an apparently neutral criterion).

8.2.11.1.5 JURISPRUDENCE

This argument was presented to the UK Court of Appeal by a Palestinian refugee who had been granted protection in Lebanon and wished to be resettled in the UK.⁸⁶ The judge conducted a proportionality test to determine whether the discrimination could be justified. The judge determined that the interference was proportionate, primarily due to the fact that the UNHCR is the entity best positioned to identify, prepare, verify, and assess the resettlement needs of refugees on the ground. The judge concluded that no less intrusive means could have been used to achieve the programme's objective. The pre-selection of refugees by the local British Embassy or Home Office, or by any of the non-governmental organisations (NGOs) active in the region, could not have offered the security, reliability, speed, and consistency that the use of UNHCR brings. The infringement of the claimants' rights is not disproportionate to the likely benefit. In contrast to other individuals displaced by the Syrian conflict, Palestinian refugees are beneficiaries of their own relief organisation. The fact that UNRWA's resources and capacity to assist Palestinian refugees are limited is not pertinent.⁸⁷ This reasoning can be criticised on multiple grounds.

8.2.11.1.6 PROPORTIONALITY

Firstly, it is precisely UNRWA's limited capacity to assist Palestinian refugees due to a lack of material and financial resources,⁸⁸ combined with the differential treatment of Palestinian refugees compared to other people displaced by the same conflict, that directly contributes to the particular vulnerability

85 Emmanuelle Bribosia, Isabelle Rorive and Sébastien van Drooghenbroeck, *Droit de la non-discrimination – Avancées et enjeux* (Bruylant, 2016).

86 *Turani, Marouf and Ahmad v Secretary of State for the Home Department* [2019] EWHC 1586 (Admin); *R (Turani and Marouf) v Secretary of State for the Home Department* [2021] EWCA Civ 348; *R (on the application of Marouf) v Secretary of State for the Home Department* [2023] UKSC 23.

87 *Turani, Marouf and Ahmad* [2019] (n 86) para 122, confirmed by *Turani and Marouf* [2021] (n 86) paras 75–80, 89–94, 95.

88 UNRWA depends mainly on donations and is currently facing an unprecedented deficit in the funds needed to provide its essential services (UNRWA, 'How we are funded' <www.unrwa.org/how-you-can-help/how-we-are-funded>).

of Palestinian refugees. UNRWA's mandate is more limited and clearly not equivalent to that of UNHCR.⁸⁹ The services provided by UNRWA are more akin to humanitarian aid designed to ensure the survival of Palestinian refugees.⁹⁰ The UNHCR's mandate covers not only the coordination of emergency humanitarian assistance but also the protection of refugees (notably against refoulement), certain stateless persons, and internally displaced persons. It also includes the search for durable solutions such as voluntary repatriation, local integration and resettlement.⁹¹

8.2.11.1.7 NECESSITY

Secondly, the possibility of pre-selection by the authorities of the resettlement State, or by NGOs active in the State of first asylum, may be regarded as a promising alternative. Significant resettlement States, including Norway, Canada, and, until recently, the USA, permit NGOs to undertake resettlement referrals beyond the scope of the UNHCR mandate, while maintaining the UNHCR as the primary referral agency. These provisions were established to address the limitations of UNRWA's mandate.

8.2.11.2 *The Specific Situation of Palestinians Facing Resettlement*

While the reasoning developed above tends to prove the existence of indirect discrimination against certain Palestinian refugees in their access to resettlement, there are several legal and political obstacles to the implementation of this durable solution for Palestinian refugees. Firstly, their particular legal and geopolitical situation can lead to confusion due to the uncertain status of territories such as Gaza and the West Bank. Some refugees are displaced within the Gaza Strip. If they seek protection elsewhere, this is not resettlement, since they have not transited through a State of first asylum. Moreover, this territory is partially occupied by Israel, which is opposed to the return of Palestinian refugees and would like to move them, or 'resettle' them, but this is not resettlement in the technical sense of refugee law, since Israel cannot be considered a State of first asylum.⁹²

89 *Turani and Marouf* [2021] (n 86) para 74.

90 These services include education, healthcare, relief and community assistance services, infrastructure and camp improvement, microfinance (loans for economic projects), and emergency response, including in times of armed conflict. (UNRWA, 'How we spend funds' <www.unrwa.org/how-you-can-help/how-we-spend-funds>).

91 Resolution No 428(V) (n 81) para 1; see also UNHCR, Emergency Handbook, 'UNHCR's Mandate for Refugees and Stateless Persons, and its Role in IDP Situations' <<https://emergency.unhcr.org/protection/legal-framework/unhcr%E2%80%99s-mandate-refugees-and-stateless-persons-and-its-role-idp-situations>>.

92 The use of the term resettlement is complicated by the situation in Gaza. We are talking about Palestinians from Gaza, i.e., people who are in their state of origin (Palestine), to other states: DRC, Rwanda, and Chad. This is not 'resettlement,' as it is a transfer from the conflict zone to a state of first asylum; it is not resettlement, but well a first asylum (Aimée-Noël Mbiyozo,

Finally, from a political point of view, many Palestinians (who are eligible for resettlement, see point 2 above) refuse resettlement in a third country, as this could mean losing their right of return to Israel. The right of return is enshrined in UN General Assembly Resolution 194,⁹³ and the Palestinians do not want to give up this claim by choosing resettlement in another country. Consequently, considering a revision of UNRWA's or UNHCR's mandate, or alternative solutions such as using the authorities of the State of resettlement or NGOs active within the State of first asylum to enable the resettlement of Palestinian refugees, does not seem to meet their needs. The humanitarian agenda, which seeks to offer a durable protection solution, does not resonate with these refugees, who prefer to remain in countries of asylum while asserting their right to return, rather than accept resettlement.⁹⁴

8.3 Conclusions

Prior to October 2023, the legal status of Gazans was essentially perpetual, characterised by their confinement to a secondary status, devoid of both nationality and recognition as stateless individuals. The vicissitudes of Palestinian nationality in the absence of a territory, a place of return, and recognition of the Palestinian State further complicated the legal situation.⁹⁵ This situation, already precarious for decades, has worsened considerably in the wake of recent events, precipitating an unparalleled humanitarian crisis for the population. The distinct legal status of Palestinian refugees, primarily under the jurisdiction of UNRWA as opposed to UNHCR, further complicates their access to effective international protection.

The challenges associated with departing Gaza are both practical and legal in nature. The closure of border crossings and the limited availability of consular services significantly impede any effort to exit the territory. From a legal standpoint, the absence of a recognised right of entry into third countries to seek international protection constitutes a substantial impediment. Recent rulings by the CJEU and the ECtHR have established that States are not

'Les pays africains ne devraient pas envisager l'accueil de Palestiniens déplacés de force' [January 2024] <<https://issafrica.org/fr/iss-today/les-pays-africains-ne-devraient-pas-envisager-laccueil-de-palestiniens-deplaces-de-force>>).

93 See Resolution 194 (n 79); See also UN, 'The Right of Return of the Palestinian,' ST/SG/SER/F2, New York, 1979.

94 'UNHCR Senior Legal Officer, Division of International Protection,' interview, 19 November 2024, Geneva, Switzerland.

95 On the different statuses of Palestinians, see Nansen's analysis, 'Origine ou nationalité palestinienne?', <<https://nansen-refugee.be/wp-content/uploads/2024/03/2024-1-NANSEN-Note-art.10-CNB-3.pdf>>; Delphine Papin, Victor Simonnet, Francesca Fattori and Jean-Philippe Lefief, 'Les multiples réalités de l'identité palestinienne. Citoyen palestinien ou d'Israël, résident de Jérusalem, réfugié... à chaque statut ses droits et ses interdictions' *Le Monde* (4 April 2024) <www.lemonde.fr/international/article/2024/04/04/les-multiples-realites-de-l-identite-palestinienne_6083349_3211.html>.

obligated to grant humanitarian visas, even in cases of urgent need for international protection. This restrictive stance significantly curtails the legal options available to Gazans seeking refuge, with family reunification, while offering a potential avenue for some, remaining limited in scope and application due to restrictive definitions of eligible family members and the economic conditions imposed, thereby reducing its accessibility.

Even when the conditions are met, access to a place to lodge an application adds an almost insurmountable barrier to an already highly restrictive legal framework. Faced with these obstacles, Belgium's national courts attempt to give substance to rights that are concrete and effective, rather than abstract and illusory, in line with the now well-known requirement of the Strasbourg Court.⁹⁶ The intervention of both the administrative judge and the civil courts in this case exemplifies a persistent challenge in migration litigation: the efficacy of judicial redress. The Aliens Litigation Council is constrained by the limitations of legal oversight, a circumstance that frequently results in a parallel appeal to the civil courts, despite the ambiguity of outcomes. This proliferation of procedures once again calls into question the relevance of maintaining a distinction between marginal control of legality and full contentious control in an area involving subjective rights. Indeed, the complexity of migration issues does not lend itself to a judge whose power is limited to annulling decisions, without being able to provide concrete solutions to the problems identified.

Faced with these multiple challenges, it is urgent to rethink international protection mechanisms to adapt them to crisis situations such as the one in Gaza. This must involve the creation of legal and secure channels of access to protection, the easing of conditions for family reunification, and a broader interpretation of States' human rights obligations in humanitarian emergencies.

The question of the right to asylum after October 2023 is a complex one, raising significant concerns about the viability of this right in the most challenging circumstances. It poses the question of whether a right to international protection exists for individuals confronted with its negation, ensnared in contexts of extreme violence. In such contexts, the impediments to seeking refuge are such that individuals face a denial of asylum at the nexus of the failure to remain, the impossibility of departure, and the inability to seek refuge elsewhere.

96 *Airey v Ireland* App No 6289/73 (ECtHR, 9 October 1979).

9 Resettlement

Protection or Control?

Sara Cosemans

9.1 Introduction

Refugee resettlement, one of the three “durable solutions” in the international refugee regime, is often framed as a humanitarian practice. Legal scholars frequently celebrate it as a humane and orderly pathway for refugee protection – one that provides refugees with legal entry through visas, and a route to permanent status.¹ While the term “visa” is often associated with individual mobility, its role in state-sanctioned and internationally coordinated resettlement has remained underexplored. Resettlement programs typically rely on special visa categories or exceptional entry mechanisms, such as humanitarian visas, parole, or diplomatic agreements, which facilitate legal access for selected groups. In that sense, resettlement represents a form of “collective visa diplomacy,” where state interests, international burden-sharing, and logistical feasibility converge to enable legal entry for those otherwise excluded.

Yet despite its legal structure, the visa dimension of resettlement has received little historical analysis, especially in relation to its role as a geopolitical instrument. The discretionary nature and geopolitical entanglements of resettlement demand closer scrutiny, since its origins lie not only in postwar legal innovation but also in older strategies of population control and imperial governance. Recent historical scholarship shows that the international refugee regime has long used resettlement to reinforce imperial and economic hierarchies, not to subvert them.² This chapter brings these perspectives into dialogue by tracing how resettlement, far from being a neutral tool of protection, has historically served as a control mechanism – used by powerful states to manage, disperse, and depoliticize refugee populations while maintaining humanitarian legitimacy.

From the late eighteenth century onward, resettlement was regularly used to manage, and often marginalize, populations within empires. In many cases,

1 Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility* (MUP 2020); Marjoleine Zieck, *Resettlement as Protection: Integrating Resettlement of Refugees in International Refugee Law* (EEP 2024).

2 Laura Robson, *Human Capital: A History of Putting Refugees to Work* (Verso 2023).

it was less a form of protection than a method of displacement. Before the codification of refugee law after the Second World War, resettlement existed as a set of improvised, often coercive practices. Modern states and empires used the concept to regulate unwanted mobility and reassert territorial and demographic control – whether by removing “surplus populations,” displacing minorities, or relocating workers to strategic frontiers. This was especially true in settler colonies, where states actively recruited immigrants to populate newly claimed territories and expel indigenous populations.

The idea that population movement could be managed for economic and political ends was not new in the twentieth century, but after World War I it was codified into international practice. The League of Nations introduced “resettlement” as a technocratic, humanitarian solution to displacement, while simultaneously treating refugees as mobile labor. As Laura Robson has shown, internationalist refugee policy – especially under the League and the ILO – was from the beginning entangled with imperial economic projects and the containment of labor unrest. Refugees were viewed less as rights-bearing individuals than as assets to be “placed” for development.

In the current refugee regime, which emerged with the Statute of the Office of the United Nations High Commissioner for Refugees in 1950 and 1951 Convention relating to the Status of Refugees, resettlement seemed increasingly less arbitrary, serving more humanitarian purposes. In the decades following the Second World War, resettlement guaranteed permanent homes for those displaced by the war, and – later – for the new refugees of the Cold War. In the 1970s, the practice was used, for the first time, for refugees from the Global South. In the 1980s, however, refugee scholars started to argue against the “exilic bias” – i.e. the assumption that migration to the West was always the best solution.³ James Hathaway then proposed replacing resettlement with temporary protection in the region of origin and eventual repatriation, designed to exert pressure for reforms in the refugee producing states.⁴ Alexander Aleinikoff quickly warned about the dangers of such “source-control bias,” which would make refugee law “more about containment of migration than about improved protection of refugees.”⁵ Bhupinder Chimni, from a postcolonial perspective, later linked these shifts to the rise of

3 Gervase J.L. Coles, ‘The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry’ in Alan Eric Nash and John Peters Humphrey (eds), *Human Rights and the Protection of Refugees Under International Law: Proceedings of a Conference Held in Montreal, November 29-December 2, 1987* (Institute for Research on Public Policy 1988).

4 James C. Hathaway, ‘Reconceiving Refugee Law as Human Rights Protection’ (1991) 4 J. Refug. Stud. 113.

5 T. Alexander Aleinikoff, ‘State-Centered Refugee Law: From Resettlement to Containment Refugees and Asylum’ (1992) 14 Im. & Nat. L. Rev. 187 (Emphasis in original).

involuntary repatriation: a reversal of the rights embedded in refugee law itself, as it violated the non-refoulement principle.⁶

In the past two decades, this source-control bias has even become more pronounced. As a result, the use of visa-based pathways for resettlement has grown more selective and security-driven. Humanitarian visas in the EU, for example, remain the exception rather than the rule, while the United States has increasingly relied on extensive vetting procedures and country-specific eligibility frameworks. These trends reflect a broader shift toward containment and control, even within legal migration channels.⁷

This chapter takes a *longue durée* approach to resettlement, tracing its development from imperial contexts to the international refugee regime that emerged in the mid-twentieth century. The first section explores how resettlement functioned prior to the formation of the UNHCR and the 1951 Refugee Convention. The second paragraph explains how resettlement became institutionalized in the current regime. The third section, on the period from 1970 onwards – with a special focus on the cases of the Ugandan Asians, refugees from Chile, and refugees from Indochina – argues that, even in the new refugee regime, resettlement was often employed not to share responsibility, but to limit it. That section further reflects on the shrinking of resettlement as a group-based solution after 1979, and considers its afterlives within the international refugee system today. Overall, the chapter examines how resettlement functioned as a strategy for immigration control, postcolonial boundary management, and geopolitical signaling, even as it was framed in humanitarian terms.

9.2 Resettlement Before 1950

The contemporary meaning of the word resettlement – “the settlement of people in a different place” – emerged in English in the late eighteenth century, when the “act to settle again” was first connected to the concept of population.⁸ Around the same time, the term appeared in the Russian Empire: the ‘Pale of Settlement’ (*cherta osedlosti*) marked the territory where the Tsarist regime forced Jews to resettle from 1791 until the collapse of the empire in 1917.⁹

By the late nineteenth century, population politics became even more dominant, shaped by the rise of nationalism and colonialism. States increasingly classified and governed people in ethnic, racial, and national terms,

6 B. S. Chimni, ‘From Resettlement to Involuntary Repatriation: Towards a Critical History of Durable Solutions to Refugee Problems’ (2004) 23 RSQ (Emphasis added).

7 Shachar (n 1).

8 Samuel Hull Wilcoke, *Nieuw en volkomen woordenboek der Nederduitsche en Engelsch taalen ...: in twee deelen* (first published in 1798).

9 Robert Geraci, ‘Pragmatism and Prejudice: Revisiting the Origin of the Pale of Jewish Settlement and Its Historiography’ (2019) 91 J. Mod. Hist. 797.

as populations to be “protected, deported, or civilized.”¹⁰ Nationalization encouraged the ethnic homogenization – or “the unmixing of peoples” in the words of the famous British imperial administrator and foreign minister Lord Curzon – particularly in the Balkans.¹¹ Resettlement was often imposed rather than chosen, not only in the Russian and Ottoman Empires, but also in the overseas empires such as the British.¹²

The League of Nations was the first international body to frame these efforts in the language of humanitarianism, introducing resettlement as a technocratic solution to mass displacement. However, these new humanitarian sensitivities had already emerged during the First World War, when the British government devised the plan to resettle Belgian refugees from Britain to Chile and South Africa – still with the objective to control this population rather than to protect it.¹³ The most well-known case was perhaps one for which no satisfactory migration solution was found during the war: the genocide of Armenians in 1915 on Ottoman territory.¹⁴ Many survivors got stuck in refugee camps without real prospects at a “durable solution,” until the Soviet government and American philanthropists orchestrated their relocation to the Soviet Republic of Armenia.¹⁵ These efforts combined demographic engineering with economic expansion, mirroring later refugee policies in their emphasis on labor, frontier development, and ethnic sorting.¹⁶

The postwar chaos of the early 1920s prompted the League of Nations to establish its first formal response to mass displacement. In 1921, the League appointed Fridtjof Nansen as High Commissioner for Refugees.¹⁷ His office was tasked with defining the legal status of stateless refugees and finding

10 Eric D. Weitz, ‘From the Vienna to the Paris System: International Politics and the Entangled Histories of Human Rights, Forced Deportations, and Civilizing Missions’ (2008) 113 AHR 1319.

11 Donald Bloxham, ‘The Great Unweaving: Forced Population Movement in Europe, 1875–1949’ in Richard Bessel and Claudia B. Haake (eds), *Removing Peoples: Forced Removal in the Modern World* (OUP/German Historical Institute London 2009) 167–208; Peter Gatrell, *A Whole Empire Walking: Refugees in Russia during World War I* (IU Press 2005) 33–48.

12 Jane McCabe, *Race, Tea and Colonial Resettlement: Imperial Families, Interrupted* (Bloomsbury Academic 2017).

13 The plan fell through because the Belgian government needed the refugees in the reconstruction of the country and called them back after the war. Pierre Purseigle, ‘“A Wave on to Our Shores:” The Exile and Resettlement of Refugees from the Western Front, 1914–1918’ (2007) 16 *Contemp. Eur. Hist.* 427–44; Peter Gatrell, *The Making of the Modern Refugee* (OUP 2013) 47.

14 Philipp Ther, *The Outsiders. Refugees in Europe since 1492* (PUP 2019) 44–47.

15 Gatrell (n 13) 59–62.

16 Note here that attempts by the League of Nations to resettle survivors of the Armenian genocide in Australia and Latin America failed.

17 The first group under Nansen’s responsibility was that of the Russian refugees. His mandate was then extended to the Armenian, the Assyrian, the Assyro-Chaldean, and assimilated refugees. See Ivor C. Jackson, ‘Dr. Fridtjof Nansen a Pioneer in the International Protection of Refugees’ (2003) 22 *RSQ* 19.

durable solutions through repatriation, employment, or resettlement. The Nansen Passport, introduced in 1922, allowed refugees to travel internationally but did not guarantee protection or permanent settlement. While it is often seen as a humanitarian innovation, its use depended entirely on the discretion of receiving states. Nevertheless, the Nansen passport was recognized by most states until the 1940s as a valid legal status. As historian Mira Siegelberg has shown, interwar jurists and philosophers, including Hannah Arendt, believed that refugees' freedom of movement would grant them more protection than being (forcefully) placed under the protection of another state.¹⁸ However, that was not the direction in which the general refugee regime was heading.

In 1923, Nansen's mandate was expanded to organize the resettlement of the Greek refugees after the Treaty of Lausanne, which ended the Greco-Turkish War.¹⁹ The compulsory exchange of populations between Greece and Turkey occurred at the expense of 1.5 million people who were uprooted on either side of the Turkish and Greek border.²⁰ Nansen became responsible for humanitarian assistance to the refugees, who suffered tremendous hardship upon the exchange, but in fact, he himself had also been one of the architects of the population swap.²¹ Overseen by a bilateral commission and sanctioned by the League, this was resettlement as ethno-nationalist engineering.²² It reinforced the idea that "unmixing" populations could serve as a legitimate postwar solution to conflict, even if it meant mass displacement and the denial of individual rights.

From the mid-1920s onward, the League began outsourcing parts of its refugee mandate. While the High Commissioner retained responsibility for legal status, the International Labour Organization (ILO) assumed control over employment and resettlement. These schemes were limited by migration restrictions and underfunding, and their success relied on deals with receiving states and private actors, not binding commitments. Still, the logic was clear: refugees were to be redistributed globally to meet labor demands, especially in Latin America and parts of the colonial world, where they would remain politically marginal and economically useful.²³

18 Mira L. Siegelberg, *Statelessness: A Modern History* (HUP 2020) 62–64, 81–82, 88, 175, 186.

19 Claudena M. Skran, *Refugees in Inter-War Europe: The Emergence of a Regime* (Clarendon Press 1995) 158–59.

20 Weitz (n 10) 1336–38.

21 Vincent Chetail, 'Fridtjof Nansen and the International Protection of Refugees: An Introduction' (2003) 22 RSQ 5; See also Roland Huntford, *Fridtjof Nansen and the unmixing of Greeks and Turks in 1924* (Det Norske Videnskaps-Akademi 1998).

22 Volker Prott, *The Politics of Self-Determination: Remaking Territories and National Identities in Europe, 1917–1923* (OUP 2016).

23 Michael Robert Marrus, *The Unwanted: European Refugees from the First World War Through the Cold War* (TUP 1985) 112; Yann Stricker, "International Migration" between Empire and Nation. The Statistical Construction of an Ambiguous Global Category in the International Labour Office in the 1920s' (2019) 19 *Ethnicities* 472–73.

This division of labor institutionalized a key feature of the interwar regime: the transformation of refugee protection into an imperial labor placement scheme. The ILO's "Refugee Service," launched in 1925, effectively became a matching system for employers and displaced populations, often operating far from Europe. As Robson emphasizes, refugees were not treated as rights-bearing individuals but as "mobile, temporary, essentially rights-less laborers."²⁴ Internationalism claimed technical neutrality, but in practice served the geopolitical interests of dominant states. From its inception, it was aligned with imperial capitalism.

Internationalism could not withstand the violence of fascism that came to dominate the interwar period. Even when the precariousness of European Jews under Nazism became clear, the international community proved unwilling to offer resettlement opportunities. The Evian Conference of 1938 exposed the limits of humanitarian rhetoric: national migration policy trumped solidarity.²⁵ The symbolic failure of Evian and the ensuing tragedy of the Holocaust became a moral touchstone in later decades, particularly during the Indochinese refugee crisis, but did not generate new strategies for international resettlement at the time.²⁶ The one partial exception was resettlement to Mandatory Palestine, permitted under British immigration quotas between 1933 and 1937. But even this was restricted: priority was given to "capitalist" migrants with sufficient means, and the total numbers remained modest.²⁷ Elsewhere, Jewish refugees saw the borders closing on all sides.

Yet the lack of resettlement did not mean the absence of resettlement planning. Behind the scenes, President Franklin D. Roosevelt initiated the M Project, a secret wartime effort to devise a master geopolitical plan for the relocation of refugees, especially Jews, from Europe. The M Project commissioned a series of classified studies exploring global settlement possibilities. These included geographic surveys, demographic analyses, and appraisals of earlier colonization schemes. It paralleled (and sometimes directly mirrored) Nazi resettlement schemes (like plans to resettle Jews in Angola or Madagascar). None were implemented, but the project reflected the persistence of colonial and racialized thinking about refugee management.²⁸

Like the pre-war resettlement initiatives, the M Project imagined refugees not as rights-bearing individuals but as settlers and laborers. Its proposals

24 Robson (n 2) 44.

25 Frank Caestecker and Bob Moore (eds), *Refugees from Nazi Germany and the Liberal European States* (Berghahn Books 2010); See also Skran (n 19) 230–40.

26 Gil Loescher and John A. Scanlan, *Calculated Kindness: Refugees and America's Half-Open Door, 1945 to the Present* (Free Press 1986) 145; Tony R.J. Kushner and Katharine Knox, *Refugees in an Age of Genocide: Global, National, and Local Perspectives During the Twentieth Century* (Psychology Press 1999) 310.

27 H. B. M. Murphy, 'The Resettlement of Jewish Refugees in Israel, with Special Reference to Those Known as Displaced Persons' (1951) 5 *Population Studies* 154.

28 Robson (n 2) chap 5.

envisioned relocating refugees to “underpopulated” or “marginal” regions, especially in Latin America and Africa, to support agricultural development and frontier expansion. The terminology of “colonization” appeared frequently, echoing interwar settlement language and reinforcing the idea that surplus populations could be made useful in the global South.²⁹ The preferred refugee was young, white, and agricultural – a figure who would serve both economic goals and geopolitical interests.

Palestine again loomed large in this imaginary. M Project researchers viewed Zionist agricultural and industrial settlements as exemplary models of refugee integration. These projects indeed combined labor, productivity, and the building of national territory into a coherent strategy. Yet, as Robson argues, this form of resettlement functioned more as imperial deflection than justice: it responded to one crisis (European Jews) while laying the foundations for another (Palestinian displacement).³⁰

The M Project was shut down in 1945, in part due to President Truman’s unease with its implications. But its core assumptions – about racial fitness, economic utility, and spatial engineering – endured. They would re-emerge in postwar refugee policy, especially in the labor-first approach of the International Refugee Organization (IRO) and in the Western support of Israel as a national-territorial solution to the (Jewish) refugee problem.³¹

The displacement of the Second World War brought resettlement to the forefront of refugee protection, albeit not immediately. The majority of some 11 million people displaced across Europe and Asia were eventually repatriated, but a significant group of 1.5 million Displaced Persons – many of them Jewish survivors, political exiles, or people from Soviet-controlled territories – refused or were unable to return. Their fate shaped the next major phase in the history of refugee resettlement.

Initially, the task of managing displaced persons fell to the United Nations Relief and Rehabilitation Administration (UNRRA), created in 1943. UNRRA prioritized repatriation as the preferred solution, sometimes pursuing it aggressively.³² As the Yalta agreement made way for the Cold War, repatriation to the Soviet Union became increasingly problematic for London and Washington, but resettlement was outside the scope of UNRRA’s mandate. In 1946, a new UN agency with a limited mandate was created especially for that purpose, the

29 On the language of colonization, see also: Jane McAdam, ‘Relocation and Resettlement from Colonisation to Climate Change: The Perennial Solution to “Danger Zones”’ (2015) 3 *Lond. Rev. Int. Law* 93.

30 Robson (n 2) 117–18.

31 *Ibid* 138.

32 Mark Elliott, *Pawns of Yalta: Soviet Refugees and America’s Role in Their Repatriation* (UIP 1982) 146.

International Refugee Organization (IRO).³³ On 1 July 1947, IRO became responsible for the resettlement of the so-called “last million.”³⁴

The IRO marked a turning point in international refugee governance. Unlike the League-era bodies, it was operational, with a large budget, a staff of 5,600, a chartered fleet of ships, and agreements with dozens of resettlement states.³⁵ Between 1947 and 1951, the IRO resettled more than one million refugees to over 50 countries, but it did not fundamentally challenge the logic of selectivity and control.

Resettlement under the IRO was shaped above all by labor demand. Western European countries with labor shortages set strict eligibility criteria and sent recruitment teams to refugee camps. The programs excluded the elderly, disabled, and “unproductive” refugees, while prioritizing the young, healthy, and able-bodied. Some schemes, such as the Belgian Operation Black Diamond, and the British Operation Balt Cygnet and Westward Ho!, openly recruited refugees for work in industries, mines, and domestic labor.³⁶ Refugees were often given two-year contracts and treated as temporary labor migrants. The idea that refugee resettlement could both absorb surplus populations and contribute to development tied humanitarianism to global strategies of resource and territory management. As mentioned above, this echoed older imperial vocabularies of colonization and racialized labor utility.³⁷

The IRO ceased operations in 1951, having resettled those deemed “non-repatriable.” The combination of the emerging Cold War – which encouraged Western states to absorb Eastern European escapees of communism, as they became seen – and severe postwar labor shortages formed the ideal circumstances for resettlement to traditional immigration destinations, such as the United States, Canada, Australia, Argentina, and some liberal European states.³⁸ However, the economic need-driven approach prioritized the choice for resettling the fit and able, leaving behind a “hard core,” a derogatory label that had already emerged in 1946 for refugees with physical, mental, or social disabilities (e.g. a criminal record). When IRO’s short-term mandate ended in 1949, over 110,000 people remained in camps in Europe, while over 426,000

33 Jessica Reinisch, ‘Old Wine in New Bottles? UNRRA and the Mid-Century World of Refugees’ in Matthew Frank and Jessica Reinisch (eds), *Refugees in Europe, 1919–1959: A Forty Years’ Crisis?* (Bloomsbury Publishing 2017) 164.

34 Louise W. Holborn, *The International Refugee Organization, a Specialized Agency of the United Nations: Its History and Work, 1946–1952* (OUP 1956).

35 Zieck (n 1) 75.

36 Diana Kay and Robert Miles, *Refugees or Migrant Workers? European Volunteer Workers in Britain, 1946–1951* (Routledge 1992); Frank Caestecker and Lieselotte Luyckx, ‘Hoe de Belgische mijnindustrie een nieuw thuis aan vluchtelingen-mijnwerkers aanbood (1947–1951)’ (2019) 4 RBPH 1299.

37 Robson (n 2) 170.

38 Gatrell (n 13) 91; Klaus Neumann, *Across the Seas: Australia’s Response to Refugees: A History* (Black Inc. 2015) 104; Laura Madokoro, *Elusive Refuge. Chinese Migrants in the Cold War* (HUP 2016) 8; Ther (n 14) 169–84.

refugees under IRO's mandate saw their situation unresolved.³⁹ Population control, or rather immigration control, limited the scope of its resettlement operations.

9.3 Resettlement in the Current Refugee Regime

In 1950, the IRO was succeeded by two institutions that shaped refugee policy in the postwar period: the United Nations High Commissioner for Refugees (UNHCR) and the Provisional Committee for the Movement of Migrants from Europe (PICMME), currently known as the International Organization for Migration (IOM). UNHCR assumed responsibility for refugee protection; PICMME took over the IRO's resettlement operations and fleet. While often portrayed as competitors, the two agencies worked closely in many refugee resettlement contexts.⁴⁰

UNHCR, founded in 1950 and operational by 1951, was consciously designed as the opposite of the IRO: non-operational, modestly funded, and mandated only for three years.⁴¹ Its role was legal protection and advocacy, not resettlement or repatriation. While the IRO had been able to organize resettlement, the UNHCR had no such power. Resettlement would now only take place if states offered places, and selection would remain their prerogative.⁴² This shift signaled a return to state-centered responsibility, which was also reflected in a major legal innovation: the 1951 Convention Relating to the Status of Refugees. The Refugee Convention placed responsibility for refugee recognition squarely in the realm of states.⁴³ The 1951 Refugee Convention codified the definition of a refugee and outlined states' obligations, including the three "durable solutions:" repatriation, integration, and resettlement. Moreover, in the emerging Cold War context, geopolitics – internal solidarity with ideological allies and hostility toward adversaries – would become central.

Meanwhile, international migration governance was delegated to a new organization: the Provisional Intergovernmental Committee for the Movement of Migrants from Europe (PICMME), created in 1951 to continue transport

39 Gerard Daniel Cohen, *In War's Wake. Europe's Displaced Persons in the Postwar Order* (Oxford Studies in International History, OUP 2011) 112.

40 Jérôme Elie, 'The Historical Roots of Cooperation between the UN High Commissioner for Refugees and the International Organization for Migration' (2010) 16 *Glob. Gov.* 352.

41 Paul Weis, 'The International Protection of Refugees' (1954) 48 *AJIL* 211. Subsequent General Assembly and ECOSOC Resolutions prolonged the UNHCR's lifespan, until in 2003 it was given the mandate to operate "until the refugee problem is solved." See United Nations High Commissioner for Refugees, 'Self-Study Module 1: An Introduction to International Protection. Protecting Persons of Concern to UNHCR' (*Refworld*, 2005) <<https://www.refworld.org/docid/4214cb4f2.html>> accessed 6 September 2021.

42 Zieck (n 1) 279, 289–90.

43 Vincent Chetail, 'Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law' in Ruth Rubio-Marín (ed), *Human Rights and Immigration* (OUP 2014) 42.

and logistical coordination. In 1953, PICMME became the Intergovernmental Committee on European Migration (ICEM, in 1980 renamed ICM) and, in 1989, the IOM.⁴⁴ Unlike the UNHCR, these agencies were operational but not concerned with refugee rights. Throughout the 1950s, UNHCR would become more occupied with the promotion of the resettlement of “unemployable”, while ICEM managed the migration of the fit and able (including refugees), creating a division of labor between refugee protection and migration.⁴⁵ This division of labor was both formal and functional. While UNHCR was mandated to identify and protect refugees under international law, ICEM was tasked with organizing the physical transport and logistical processing of migrants, including some refugees. In practice, UNHCR would determine eligibility and liaise with host states, while ICEM ensured visas, medical checks, and transit. This arrangement, though pragmatic, blurred the lines between refugee protection and labor-oriented migration management, especially for resettled groups.⁴⁶

Both institutions emerged from a Western, Cold War perspective – the Soviet Union and its satellites refused to get involved in either of IRO’s successors.⁴⁷ In fact, however, resettlement continued to fulfill both functions of protection and population control. ICEM in particular catered to the immigration needs of traditional resettlement countries, especially the United States. It connected traditional immigration destinations (the former white settler colonies and Latin American states), with emigration countries like Italy, Greece, and Turkey, and Western states seeking labor migrants on a large scale for the first time, such as Belgium, France, and Western Germany.⁴⁸ Resettlement was still framed less as protection than as a strategy for managing population movements in ways that served geopolitical and economic objectives.⁴⁹

44 Richard Perruchoud, ‘From the Intergovernmental Committee for European Migration to the International Organization for Migration’ (1989) 1 IJRL 501–17; Dimitris Parsanoglou and Yannis Papadopoulos, ‘Regulating Human Mobility through Networking and Outsourcing: ICEM, IOs and NGOs during the 1950s’ (2019) 5 J. Migr. Hist. 332–52; Megan Bradley, *The International Organization for Migration: Challenges, Commitments, Complexities* (Routledge 2020).

45 Katy Long, ‘When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection’ (2013) 1 Migr. Stud. 5

46 Marianne Ducasse-Rogier, *The International Organization for Migration 1951–2001* (IOM 2001); Jérôme Elie, ‘The Historical Roots of Cooperation between the UN High Commissioner for Refugees and the International Organization for Migration’ 2010 16 Glob. Gov. 345–60; Megan Bradley, ‘The International Organization for Migration (IOM): Gaining Power in the Forced Migration Regime’ (2017) 33 Refuge: CJR 97

47 Elie (n 46) 346.

48 Marianne Ducasse-Rogier (n 46) 4; Lina Venturas (ed), *International “Migration Management” in the Early Cold War: The Intergovernmental Committee for European Migration* (University of the Peloponnese 2015) 6–7.

49 Ibid 6.

Despite the legal innovations of this period, resettlement thus remained a state-driven, discretionary, and often exploitative practice. Labor shortages made refugees temporarily useful, but the system excluded those who could not work. The regime may have changed its institutional shape, but its underlying logic – resettlement as containment and control – remained intact.

While UNHCR was initially created as a temporary agency to deal with Europe's "residue" refugees, its mandate soon expanded. The first real test of the new regime came in 1956, when the Hungarian Uprising led more than 170,000 refugees to flee to Austria and 20,000 to Yugoslavia. Although the 1951 Convention had originally focused on World War II refugees, international lawyers interpreted Hungary's communist takeover in 1949 as meeting the Convention's criteria.⁵⁰ Upon the request of the Austrian government, which saw itself "overburdened" with the sudden arrival of the Hungarian refugees, UNHCR saw an opportunity for expanding its relevance. Together with ICEM and a number of NGOs (most notably the United States Escapee Program, USEP), it became involved in the first large resettlement operation under the new refugee regime.⁵¹ Eventually some 230,000 refugees resettled in 36 countries apart from Austria and Yugoslavia.⁵² The Hungarian case is exemplary for a function that resettlement would presume more often in the new refugee regime: international solidarity (or "burden sharing" in contemporary parlance) with states unable or unwilling to provide protection to large groups of refugees upon sudden arrival.⁵³

The Hungarian case demonstrated that, under Cold War pressures, resettlement could be mobilized rapidly to serve both humanitarian and strategic goals. It also marked a turning point in solidarity with the earlier mentioned "hard core" for whom little progress had been made in the first years of UNHCR's existence.⁵⁴ It was not until World Refugee Year (1959–1960) that the camps started to "clear." Then, a large coalition of states, including small states with strong humanitarian agendas like Denmark and New Zealand,

50 Marjoleine Zieck, 'The 1956 Hungarian Refugee Emergency, an Early and Instructive Case of Resettlement' (2013) 5 ALF 45. These lawyers claimed that the flight from Hungary was a result of "events occurring before 1 January 1951." This phrase put a temporary limitation on the refugee definition in the 1951 Convention, effectively reducing refugees to World War II refugees. See also: Paul Weis, 'The Convention Relating to the Status of Stateless Persons' (1961) 2 ICLQ 264.

51 Louise W. Holborn, *Refugees: A Problem of Our Time: The Work of the United Nations High Commissioner for Refugees, 1951–1972*, vol. I (The Scarecrow Press 1975), chap. 16. The Hungarian crisis thus predated the resettlement of the refugees that had seen their chances of resettlement linger after the Second World War.

52 Ibid 402.

53 Astri Suhrke, 'Burden-Sharing during Refugee Emergencies: The Logic of Collective versus National Action' (1998) 11 J. Refug. Stud. 396.

54 Jeroen Corduwener, *Riemen om de kin! Biografie van mr.dr. Gerrit Jan van Heuven Goedhart* (Bakker 2011).

resettled Europe's "residue" refugees.⁵⁵ It seemed like protection needs had finally gained the upper hand over population control imperatives, although the new reality of the Cold War acted as a strong motivator. The United States and other Western powers now saw resettlement as a tool to demonstrate ideological and moral superiority over the Soviet bloc.⁵⁶

The late 1950s and early 1960s expanded the geographic reach of the refugee regime. High Commissioner Auguste Lindt extended protection to Algerians in 1957. By 1960, the major Western players recognized that refugee crises were not unique to Europe and urged UNHCR to devote attention to emerging refugee situations on other continents.⁵⁷ This shift led to the 1967 Protocol Relating to the Status of Refugees, which removed the Convention's temporal limitations. It laid the groundwork for UNHCR's involvement in global refugee crises, now predominantly situated outside Europe.⁵⁸

However, this did not mean that resettlement opportunities were extended automatically. For refugees from the Global South with the wrong ideological profile, like the Algerians, there was no place in the Western resettlement states.⁵⁹ Similarly, the United States selectively resettled Cubans escaping Fidel Castro's regime while blocking Haitians running from the (American allied) Duvalier dictatorships.⁶⁰ In the 1960s, a two-tier refugee system emerged where small numbers of European refugees remained eligible for resettlement in the Global North, while Middle Eastern, African, and Asian refugees – now the majority – suffered confinement in their own region. This regime of containment, "a fully-fledged carceral system," was based on the experience of the Palestinians, who had been contained and exploited as cheap laborers since their flight from their homelands in the 1940s.⁶¹

This shift also coincided with a liberalization of the international labor migration regime in the 1960s, which made the resettlement of refugee laborers less viable, because refugees had more rights (however limited) compared to "migrant laborers who had no such claim on international protection."⁶² Resettlement lost its utility as a tool of imperial labor placement and became a political liability – useful only in highly visible, high-stakes situations where moral legitimacy or diplomatic deflection was urgently needed. Contrary to

55 Gatrell (n 13) 113.

56 Loescher and Scanlan (n 26).

57 Gil Loescher, *The UNHCR and World Politics: A Perilous Path* (OUP 2001) 91; Gatrell (n 13) chaps 4–6.

58 Jakob Schönhagen, 'Internationale Flüchtlingspolitik' in Jakob Schönhagen and Ulrich Herbert (eds.), *Migration Und Migrationspolitik in Europa 1945–2020* (Wallstein Verlag 2023) 41–47.

59 Zieck (n 1) 106.

60 Loescher and Scanlan (n 26) 69.

61 Robson (n 2) 217.

62 Ibid 194.

expectations, however, the 1970s saw “renewed importance of resettlement” and this time resettled refugees predominantly came from the Global South.⁶³ It later turned out to be the last period in which resettlement played such a prominent role.

9.4 Resettlement Since 1970

The 1970s are often remembered as a high point in international refugee resettlement. But rather than marking a turning point toward humanitarian commitment, the decade revealed the extent to which resettlement served to contain crises, redistribute responsibility, and reinforce geopolitical alliances.

The first group resettled by UNHCR in the 1970s were the Ugandan Asians expelled by Idi Amin from Uganda in 1972. These UK passport holders of South Asian origin had long occupied a middle position in the colonial hierarchy – privileged above the African population but subordinate to Europeans.⁶⁴ After independence, they were increasingly perceived as a comprador class complicit in empire, and thus rendered undesirable by East African leaders.⁶⁵ Postcolonial governments in Kenya, Uganda, and Tanzania began passing legislation restricting their rights, prompting steady outmigration to the United Kingdom. In response, the British government began to tighten immigration rules.⁶⁶

Amin’s sudden expulsion order for some 50,000 Asians within 90 days created a political crisis in Westminster. Admitting large numbers would appear weak to public opinion, but refusing entry to British passport holders risked reputational damage.⁶⁷ The solution was a diplomatic strategy of dispersal. The United Kingdom divided the expelled Asians into categories based on passport status and negotiated bilateral agreements to redistribute them internationally. While it accepted responsibility for some 27,000 citizens, it refused to admit around 10,000 British Protected Persons⁶⁸ – rendering them stateless and transferring responsibility to the international community.

63 Loescher (n 57) 164.

64 Yashpal Tandon and Arnold Raphael, *The New Position of East Africa’s Asians: Problems of a Displaced Minority* (Rev. Report 16, Minority Rights Group 1978).

65 The term “comprador class” derives from T. M. Luhrmann, *The Good Parsi: The Fate of a Colonial Elite in a Postcolonial Society* (HUP 1996) 17–18. I use the term “undesirable” here after Paddy Hillyard, *Suspect Community: People’s Experiences of the Prevention of Terrorism Act* (Pluto Press 1993).

66 Randall Hansen, ‘The Kenyan Asians, British Politics, and the Commonwealth Immigrants Act, 1968’ (1999) 42 Hist. J. 809; Mahmood Mamdani, *From Citizen to Refugee: Uganda Asians Come to Britain* (2nd ed. Pambazuka Press 2011).

67 Sara Cosemans, ‘The Politics of Dispersal: Turning Ugandan Colonial Subjects into Postcolonial Refugees (1967–76)’ (2018) 6 Migr. Stud. 99.

68 Tandon and Raphael (n 64) 17; Sara Cosemans, ‘Undesirable British East African Asians. Nationality, Statelessness, and Refugeehood after Empire’ (2022) 40 M&M 210.

UNHCR's involvement followed these British diplomatic efforts. Though the expelled Asians were technically still within their country of habitual residence and did thus not classify as refugees under the 1951 Convention⁶⁹ – and UNHCR had no formal mandate over stateless persons at the time – officials agreed to recognize them as *prima facie* refugees once they crossed the border. ICEM and the International Committee of the Red Cross (ICRC) arranged transport and travel documentation, including visas; UNHCR coordinated temporary reception in camps across Europe. By 1976, the group had been dispersed across more than 25 countries (following previous bilateral agreements negotiated by the British government), most notably Canada and India.⁷⁰

What appeared to be an emergency humanitarian response was, in fact, a post-imperial containment strategy. The case illustrates how resettlement could be used not to share responsibility, but to obscure it, recasting a colonial legacy as a global refugee crisis. In other words, UNHCR's involvement was not a spontaneous humanitarian response but the result of British political strategy: dispersal, deflection, and the internationalization of a postcolonial crisis.

Chile is one of the rare cases in which UNHCR took the lead in protecting refugees through resettlement. After the 1973 military coup, the Pinochet regime targeted thousands of political refugees previously recognized by the Allende government, many of whom were nationals of other Latin American countries.⁷¹ UNHCR, invoking its mandate to protect refugees where states were unwilling or unable to do so, coordinated shelter and resettlement efforts within weeks of the coup. Working with local NGOs, the agency created a network of safe havens inside Chile and, with ICEM and the ICRC (like it had done in Uganda), arranged the resettlement of over 4,500 refugees by early 1974.⁷²

Yet this apparent display of humanitarian resolve soon gave way to more ambivalent politics. Once the junta realized that international organizations were willing to evacuate dissidents, it began actively facilitating departures – not just of recognized refugees, but of Chilean citizens. What began as a protection strategy quickly blurred into a strategy of political exile. Under the

69 The 1951 Refugee Convention defines a refugee as someone “outside the country of his nationality.” ‘Statute of the Office of the United Nations High Commissioner for Refugees’ (1950) Pub. L. No. General Assembly Resolution 428 (V) Art. 6B.

70 Cosemans, ‘The Politics of Dispersal’ (n 67); Cosemans, ‘Undesirable’ (n 68).

71 Lina Callejas Ramírez and Julio Jáuregui Medina, ‘¿El asilo contra la opresión? Análisis crítico de la evolución del asilo en Chile’ (2011) 17 D y H 119; Carmen Norambuena, Adriana Palomera and Ana Lopez, ‘Brazilians in Chile during the Military Dictatorship: Double Refuge 1973–1975’ (2018) 22 Hist. Unisinos 453.

72 Yannek E. Smith, ‘Una perspectiva institucional del proceso de asilo para los refugiados y perseguidos políticos en Chile después del Golpe de Estado’ (Museo de la Memoria y de los Derechos Humanos 2013).

banner of “freedom of movement,” supported by Western allies such as the United States and the United Kingdom, the regime found in resettlement a way to remove internal opposition while deflecting international scrutiny into more gruesome human rights abuses such as torture.⁷³

This dynamic also influenced the geography of resettlement. Lacking a primary destination country, Chilean refugees were dispersed across dozens of states, including in the communist bloc – a notable development that expanded UNHCR’s operational footprint across Cold War divides.⁷⁴ The United Kingdom and United States actively avoided accepting Chilean refugees, employing stalling tactics and redirection strategies to shift responsibility elsewhere. While they nominally supported resettlement as a humanitarian gesture, their actual admissions were minimal and politically selective.⁷⁵ In the US case, early admissions focused on anti-communist exiles from the Soviet bloc who had resettled in Chile in the 1950s – individuals whose politics aligned conveniently with American Cold War interests.⁷⁶

Between 1973 and 1980, UNHCR resettled over 23,000 people connected to the Chilean crisis, while ICEM resettled another 20,000 who fell outside the UNHCR mandate. Many others fled independently, forming a far-reaching Chilean diaspora.⁷⁷ The Chile case reveals how resettlement, though initiated as a response to a rights violation, could be co-opted as a tool for political containment – benefiting authoritarian regimes and Western powers alike, while reinforcing UNHCR’s operational reach. In short, UNHCR protection became instrumentalized by the Chilean junta and its Western allies as a tool of exile rather than asylum.

In numerical terms, resettlement from Uganda and Chile pales in comparison to Indochina. The end of the Vietnam War in April 1975 triggered the largest refugee resettlement operation from the Global South.⁷⁸ Over 2.5 million Indochinese – 1.9 million under UNHCR auspices – were resettled

73 Sara Cosemans, *Reinventing Resettlement. Dispersal, Exclusion and Containment of Refugees in the 1970s* (Forthcoming) chap 3.

74 Fernando Camacho Padilla, ‘Los Asilados de Las Embajadas de Europa Occidental En Chile Tras El Golpe Militar y Sus Consecuencias Diplomáticas: El Caso de Suecia’ (2006) 81 ERLACS 21; Claudia Rojas Mira and Alessandro Santoni, ‘Geografía Política Del Exilio Chileno: Los Diferentes Rostros de La Solidaridad’ (2013) 21 Perf. Latinoam. 123.

75 Loescher and Scanlan (n 26) 95–96; Grace Livingstone, *Britain and the Dictatorships of Argentina and Chile, 1973–82* (Security, Conflict and Cooperation in the Contemporary World, Palgrave Macmillan 2018) 21–22.

76 Cosemans (n 73) chap 6.

77 UNHCR, *The State of the World’s Refugees, 2000: Fifty Years of Humanitarian Action* (OUP 2000) 127; Thomas C. Wright and Rody Oñate Zúñiga, ‘Chilean Political Exile’ (2007) 34 LAP 31.

78 Aristide R. Zolberg, Astri Suhrke and Sergio Aguayo, *Escape from Violence: Conflict and the Refugee Crisis in the Developing World* (OUP 1989) 160.

from Vietnam, Laos, and Cambodia between 1975 and 2000.⁷⁹ As in Chile, the exodus occurred in phases. The United States arranged the evacuation of 134,000 individuals at the war's end, including 50,000 designated as "high risk." UNHCR monitored transit camps in Guam but played only a minor role initially.⁸⁰

In early May 1975, people began fleeing Vietnam, mostly to Thailand. Some came by boat; others over land.⁸¹ They were housed in expanding camps for "displaced persons," as Thailand and other countries – none signatories to the Refugee Convention – refused to label them refugees. UNHCR hesitated to intervene, fearing tensions with both the new Vietnamese communist governments and the non-signatory host states.⁸² Still, in May 1975 it launched an appeal for international resettlement. In this first phase, 11,000 went to the United States, 5,200 to Canada, 4,500 to France, 700 to Australia, and 1,200 Cambodian Muslims to Malaysia.⁸³

Outflows remained limited until late 1977 due to Vietnam's containment policies, consisting of re-education camps and forced agricultural reforms. Larger numbers arrived in Thailand and Malaysia, where pushbacks became common. Indonesia, the Philippines, and Hong Kong were more accepting;⁸⁴ Japan and Singapore refused all arrivals.⁸⁵ Media coverage of deaths at sea eventually spurred broader international concern.⁸⁶ American parole programs became the main channel for resettlement in this period.⁸⁷ France, acting independently, prioritized those with ties to the colonial past or skills needed in the labor market.⁸⁸ Despite an early call for resettlement by the UN Secretary General, UNHCR kept largely aloof in the effort.

79 W. Courtland Robinson, *Terms of Refuge: The Indochinese Exodus and the International Response* (Zed Books 1999) 18; Sucheng Chan, 'Politics and the Indochinese Refugee Exodus, 1975–1997' in Sucheng Chan (ed), *Remapping Asian American History* (Rowman Altamira 2003) 174.

80 Jana K. Lipman, "'Give Us a Ship': The Vietnamese Repatriate Movement on Guam, 1975' (2012) 64 *Am. Q.* 1.

81 Chan (n 79) 173.

82 Sara Cosemans and Trinh Van Vinh, 'Refugee status as taboo: how humanitarian intervention impeded refugee recognition in Vietnam before the Orderly Departure Program (1979)' (2025) 27 *Interv. Int. J. Postcolon. Stud.* 964.

83 Robinson (n 79) 24.

84 Chan (n 79) 177.

85 Ayako Sahara, 'Globalized Humanitarianism: U.S. Imperial Formation in Asia and the Pacific through the Indochinese Refugee Problem' (DPhil thesis, University of California San Diego, 2012) chap. 4.

86 Y  n L   Espiritu, 'Toward a Critical Refugee Study: The Vietnamese Refugee Subject in US Scholarship' (2006) 1 *J. Vietnam. Stud.* 412.

87 Chan (n 79) 177–87.

88 Karen Akoka, 'France: Boat People Brought by Plane' in Becky Taylor et al. (eds.), *When Boat People Were Resettled, 1975–1983: A Comparative History of European and Israeli Responses to*

UNHCR's initial reluctance to intervene in Indochina was not simply logistical—it reflected a broader institutional discomfort with applying the “refugee” label in Cold War contexts. In Vietnam especially, the refugee designation was diplomatically sensitive, as it implied criticism of the new communist regime with which UNHCR sought to build relations. As I have argued elsewhere, refugee status itself became a kind of taboo, deliberately avoided in favor of more neutral humanitarian language. This caution was not purely political: it also served to advance UNHCR's long-term goal of expanding its presence in the Global South and the communist bloc.⁸⁹ In this sense, the Indochinese crisis marked not only a humanitarian turning point, but a moment of strategic institutional growth.

By late 1978, the situation worsened. Vietnam's invasion of Cambodia generated new refugee flows, and Hanoi expelled hundreds of thousands of ethnic Chinese (Hoa). Refugees arrived by land and sea; some large ships were stranded in Southeast Asia, prompting Malaysia and Indonesia to demand resettlement pledges from the West before allowing docking.⁹⁰

At the initiative of British Prime Minister Margaret Thatcher, who was concerned about the mounting refugee crisis in the British crown colony Hong Kong, an international conference convened in Geneva in June 1979.⁹¹ This led to the Orderly Departure Program (ODP) in 1979: Vietnam agreed to curb irregular departures, first-asylum countries pledged temporary protection, and resettlement countries committed to admissions.⁹² Though only 125,000 refugees were resettled in the program's first eight years, more than half a million were eventually resettled through the ODP in over 30 countries.⁹³ While it did reduce deaths at sea and offer safer alternatives, it also curtailed the right to leave – one of the core promises of postwar human rights.⁹⁴

The 1979 ODP marked a turning point. While the program has often been portrayed as a model of humanitarian diplomacy, it fundamentally inverted the refugee regime: protection was extended not to those who had already fled but

the South-East Asian Refugee Crisis (Palgrave Studies in Migration History, Palgrave Macmillan 2021) 49.

89 Cosemans and Vinh (n 82).

90 Chan (n 79) 187–200; Sara E. Davies, ‘Saving Refugees or Saving Borders? Southeast Asian States and the Indochinese Refugee Crisis’ (2006) 18 *Glob. Change Peace Secur.* 3.

91 Becky Taylor, ‘“Our Most Foreign Refugees:” Refugees from Vietnam in Britain’ in Becky Taylor et al. (eds.), *When Boat People Were Resettled, 1975–1983: A Comparative History of European and Israeli Responses to the South-East Asian Refugee Crisis* (Palgrave Studies in Migration History, Palgrave Macmillan 2021) 117.

92 Judith Kumin, ‘Orderly Departure from Vietnam: Cold War Anomaly or Humanitarian Innovation?’ (2008) 27 *RSQ* 104.

93 *Ibid* 105.

94 Sara Cosemans, ‘“An Agreement to Limit a Basic Human Right:” How the Orderly Departure Programme Reduced Freedom of Movement for Refugees from Vietnam (1979)’ 2025 *Cold War Hist.* <<https://doi.org/10.1080/14682745.2024.2384354>> accessed 21 January 2025.

to those still inside Vietnam.⁹⁵ By restricting spontaneous movement in exchange for controlled resettlement, the ODP prioritized migration management over refugee rights. It also underscored that refugee status was a political designation, not a legal constant. The Vietnamese example, far from affirming resettlement as a protective tool, reveals how it was deployed to manage borders, control narratives, and serve institutional interests – at the expense of refugees themselves.

The end of the 1970s did not mark the end of refugee resettlement from Vietnam. On the contrary, the ODP was soon followed by a series of structured initiatives – including DISERO and, most notably, the Comprehensive Plan of Action (CPA) adopted in 1989.⁹⁶ This period saw UNHCR shift from ad hoc responses toward more systematized, legalistic frameworks that sought to treat resettlement as a tool of protection rather than simply of international burden-sharing. Yet the effectiveness of these initiatives remained deeply uneven. While over 500,000 Vietnamese were resettled under the CPA, later programs largely failed.⁹⁷ The same pattern recurred: structured programs relied on political momentum, tight coordination, and the willingness of resettlement states to follow through. Absent these conditions, protection was reduced to containment.

The post-ODP years marked a shift in the global refugee regime. While structured resettlement efforts continued, they did so in a context increasingly shaped by labor migration, rising securitization, and declining political will. As international labor migration expanded in the 1980s and 1990s, refugee resettlement became less attractive to states. Resettled refugees often arrived with legal rights and social support needs that were increasingly viewed as economic liabilities. The earlier logic of resettlement as a form of imperial development gave way to a logic of containment and control. What had once been framed as solidarity became narrowly targeted, individualized, and exceptional.

In the 1990s, growing numbers of refugees from the former Eastern Bloc and Central Africa remained trapped in protracted displacement. Failures to protect them in “safe zones,” such as in Bosnia-Herzegovina, prompted UNHCR to revive interest in resettlement.⁹⁸ In 1995, it convened the Working Group on

95 Note how the Ugandan Asian and Chilean resettlement movements formed important precedents that informed the drafters of the ODP, as did the Orderly Departure Program from Cuba, which the American government had negotiated in the 1960s: ‘Cuba and United States: Agreement on Refugees’ (1965) 4 ILM 1118.

96 Luise Druke, ‘Vietnamese Boat People in Singapore - Creation of the Disembarkation Resettlement Offer (DISERO) Contributed to Rescue at Sea of over 67,000’ in Luise Druke (ed), *Innovations in Refugee Protection: A Compendium of UNHCR’s 60 Years- Including Case Studies on IT Communities, Vietnamese Boatpeople, Chilean Exile and Namibian Repatriation* (Lang 2014) 193–287.

97 Alexander Betts, *Protection by Persuasion: International Cooperation in the Refugee Regime* (Cornell University Press 2009).

98 Mikhael Barutciski, ‘The Reinforcement of Non-Admission Policies and the Subversion of UNHCR: Displacement and Internal Assistance in Bosnia-Herzegovina (1992–94)’ (1996) 8 IJRL 49.

Resettlement – renamed the Annual Tripartite Consultations on Resettlement (ATCR) in 2001 – to reframe resettlement as a tool of protection. While these efforts did not generate large-scale state commitments, they helped shift focus to the resettlement of highly vulnerable individuals. Group-based protection gave way to individualized vetting and selection. In theory, humanitarian needs of the displaced ought to trump the political, economic, and strategic needs of states – both resettlement states and countries of first asylum.⁹⁹ In practice, resettlement fell victim to the “humanitarian marketplace” idea in which only the most vulnerable can receive resettlement assistance.¹⁰⁰

Some high-profile programs followed, including the resettlement of Bhutanese refugees from Nepal (2007–2016), limited programs for Iraqis and Colombians, and intra-regional Latin American efforts from 2004. Yet many other attempts failed. Agreements to resettle refugees in Cambodia, Benin, or Burkina Faso fell apart or delivered negligible results. In Australia’s deal with Cambodia, only one of ten resettled persons stayed.¹⁰¹ Despite UNHCR’s emphasis on protection, most resettlement offers continued to reflect the strategic interests of states rather than refugee needs.

This logic was institutionalized in a series of “refugee swap deals.” The 2011 Australia–Malaysia agreement proposed trading asylum seekers for pre-approved refugees; the 2016 EU–Turkey Statement followed a similar model. Both were hailed as pragmatic innovations, but neither delivered. The Australian High Court struck down the first; the second produced only limited resettlement from Turkey to the EU.¹⁰² Despite the rhetoric of protection, these deals served to reinforce containment, shift responsibility away from the Global North, and further marginalize resettlement as a global response to displacement.

9.5 Conclusion

Resettlement has long been presented as the most orderly and humane solution to forced displacement. Yet its history suggests otherwise. From its origins in imperial governance to its institutionalization under the League of Nations, and its Cold War-era global expansion, resettlement has consistently served as a tool of population control, labor exploitation, and geopolitical signaling. While legal frameworks such as the 1951 Refugee Convention and

99 Bessa, Thais. ‘From Political Instrument to Protection Tool? Resettlement of Refugees and North-South Relations’ (2009) 26 *Refugee* (Toronto) 95–96; UNHCR, ‘The History of Resettlement. Celebrating 25 Years of the ATCR’ (2019) 9–13.

100 Jeff Crisp, ‘Refugees, Persons of Concern, and People on the Move: The Broadening Boundaries of UNHCR’ (2009) 76 *Refugee* (Toronto) 73–76.

101 Zieck (n 1) 166–77.

102 Naoko Hashimoto, ‘Refugee Resettlement as an Alternative to Asylum’ (2018) 37 *RSQ* 162; Michele Tantardini and Juliette Tolay, ‘Does Performance Matter in Migration Governance? The Case of the 2016 EU-Turkey Statement’ (2020) 43 *IJPA* 137.

the 1967 Protocol have enshrined the idea of resettlement as protection, in practice it has always been deeply selective, politically contingent, and structurally unequal.

While resettlement offers one of the few legal migration channels for refugees – including the visas, protections, and eventual rights associated with regular status – it has never served as a viable alternative to asylum. Precisely because the practice is so limited, selective, and contingent on political will, it cannot replace systems that tolerate or regulate unauthorized arrival. Historically, resettlement has worked best as a tool of migration control rather than protection. Even if it remains one of the most effective ways to ensure the safety of individual refugees, its application has always depended on exceptional circumstances and political incentives that are deeply shaped by historically contingent context. As such, resettlement operates not as a replacement for broader asylum access, but as a reflection of its constraints.

Legal scholars continue to view resettlement as a vital – if underused – component of refugee protection. And indeed, the idea of offering legal, permanent status to refugees through resettlement remains compelling. But as this chapter has shown, the failures of resettlement are not just technical or political; they are historical. They stem from the very logics that have guided its development: racialized selectivity, labor-oriented placement, and strategic delegation of responsibility.

Laura Robson's concept of "putting refugees to work" helps us see these patterns across time and space. Resettlement has never been about restoring agency to refugees, but about turning them into assets, whether for colonial development, Cold War diplomacy, or contemporary containment. While Robson rightly sees the 1970s as a moment of global ambition, I have argued that this ambition was itself built on unequal foundations and geopolitical calculus. The dramatic failure of more recent resettlement efforts confirms not a break with the past, but a continuation of these same patterns under new labels.

Today, resettlement functions less as a durable solution and more as a diagnostic tool – a canary in the coalmine of global refugee policy. Its marginality reflects the broader retreat from rights-based approaches, the securitization of borders, and the dominance of deterrence and containment. Understanding this history does not mean rejecting resettlement altogether, but recognizing its limitations. If resettlement is to play a meaningful role in the future, it must be disentangled from its imperial past and reconceived not as a gesture of international goodwill, but as a genuine commitment to justice.

10 Unlocking Access to Protection under the UN Global Compacts

Do Humanitarian Visas Hold the Key?

*Pauline Endres de Oliveira and
Nikolas Feith Tan*

10.1 Introduction

Access to international protection remains a major global challenge. With over 120 million displaced persons worldwide, including 31.6 million refugees and 6.9 million asylum seekers, the need for protection is both individual and collective.¹ In the EU, however, access is often irregular and perilous. In 2024 alone, 2,475 people went missing in the Mediterranean and over 30,000 have died on this route since 2014.² These figures highlight the urgent need for safe and legal pathways to protection. This contribution argues that, amid increasingly restrictive asylum policies, humanitarian visas can play a pivotal role in addressing this need within the international protection system.

While the right to leave any country, including one's own, is protected under Article 12(2) of the International Covenant on Civil and Political Rights (ICCPR) and Article 2(2) of Protocol No. 4 to the European Convention on Human Rights (ECHR), and the right to seek asylum is recognised in Article 14 of the Universal Declaration of Human Rights (UDHR) and Article 18 of the EU Charter of Fundamental Rights, international law does not establish a general right to enter a specific state for the purpose of seeking asylum. Individuals in need of protection are typically dependent on visa-free entry or the successful application for a visa in order to access a country of refuge through regular and safe means. For instance, a person fleeing armed conflict in Syria cannot legally travel to most European countries without first obtaining a visa. In practice, securing any type of visa without protective scope, as a tourist or work visa, is often extremely difficult. This significantly limits access to asylum through regular pathways. Here, humanitarian visas may hold the key, as they allow individuals to approach an embassy to be granted access to territorial protection.

1 UNHCR, 'Global Trends Report 2023' <www.unhcr.org/global-trends-report-2023> accessed 18 April 2025. We use the term 'refugees' to refer to people who qualify for protection under the 1951 Refugee Convention or international human rights law. The views expressed in this chapter are those of the authors and do not necessarily reflect those of the United Nations or UNHCR.

2 IOM, 'Mediterranean Missing Migrants Project' <<https://missingmigrants.iom.int/region/mediterranean>> accessed 13 May 2025.

Against this background, the chapter highlights the relevance of both UN Global Compacts as soft law instruments that might influence the development of safe access to protection through humanitarian visa schemes. The 2018 UN Global Compact on Refugees (GCR)³ is a main point of reference for global efforts to share responsibility for refugees between states.⁴ The Compact represents the international political will to strengthen cooperation on refugee protection and solidarity with host countries.⁵ Less recognised with regard to refugees,⁶ but nevertheless relevant for some individuals seeking protection, is the Global Compact for Safe, Orderly and Regular Migration (GCM)⁷ of the same year.⁸ The Compacts, which both emerged from the 2016 New York Declaration, are interrelated. They represent international consensus with regard to the opening of safe pathways to protection at the time of their adoption,⁹ including a focus on humanitarian visas.¹⁰ Nevertheless, the normative impact of the Compacts largely remains to be seen, including due to changes in state practice in the area of asylum and migration management.¹¹

3 UN General Assembly, 'Global Compact on Refugees' (2018) UN Doc A/RES/73/151 (GCR).

4 Thomas Gammeltoft-Hansen, 'The Normative Impact of the Global Compact on Refugees' (2019) 30 IJRL 605; Jane McAdam, 'The Global Compacts on Refugees and Migration: A New Era for International Protection?' (2019) 30 IJRL 571; BS Chimni, 'Global Compact on Refugees: One Step Forward, Two Steps Back' (2019) 30 IJRL 630; Volker Türk, 'The Promise and Potential of the Global Compact on Refugees' (2019) 30 IJRL 575; Gillian D Triggs and Patrick CJ Wall, '"The Makings of a Success": The Global Compact on Refugees and the Inaugural Global Refugee Forum' (2020) 32 IJRL 283; for a critical view on the bifurcation of the Compacts with a view to refugees and migrants see Cathryn Costello, 'Refugees and (Other) Migrants: Will the Global Compacts Ensure Safe Flight and Onward Mobility for Refugees?' (2019) 30 IJRL 643.

5 GCR UN General Assembly (n 3) 2ff, 7f, 18f, 36f.

6 The GCR refers to refugees under the 1951 *Convention Relating to the Status of Refugees* (United Nations, Treaty Series, vol. 189, p. 137, 28 July 1951) and regional refugee treaties, namely the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (United Nations, Treaty Series, vol. 1001, No. 14691) and the 1984 Cartagena Declaration on Refugees.

7 UN General Assembly, 'Global Compact for Safe, Orderly and Regular Migration' (2018) UN Doc A/RES/73/195 (GCM).

8 Jürgen Bast, Pauline Endres de Oliveira and Janna Wessels, 'Enhancing the Rights of Protection-Seeking Migrants through the Global Compact for Migration: The Case of EU Asylum Policy' (2023) 35 IJRL 461, 463.

9 For a definition see Endres de Oliveira, *Safe Access to Asylum in Europe - Normative Assessment of Safe Pathways to Protection in the Legal Context of the European Union* (Nomos 2024) 31.

10 GCR UN General Assembly (n 3) paras 94–96; GCM UN General Assembly (n 7) Objective 5.

11 On the impact of the GCR in the EU see Sergio Carrera Nunez, Eleni Karageorgiou, Gamze Ovacik and Nikolas Feith Tan, *Global Asylum Governance and the European Union's Role: Rights and Responsibility in the Implementation of the United Nations Global Compact on Refugees* (Springer Nature Switzerland 2025); on the GCM see Bast, Endres de Oliveira and Wessels (n 8).

Humanitarian visa schemes may work in two ways: either a person who applies for and receives a visa while abroad is granted direct access to a protection status after arriving in the destination state or, alternatively, the applicant undergoes a preliminary protection assessment by the embassy, receives a short-term visa to access the destination state territory and is then able to file a claim through the national asylum procedure after arrival. Humanitarian visas are thus a form of pre-entry processing, defined as the ‘full or preliminary pre-arrival processing of an asylum claim by the authorities of one state while an asylum-seeker is in another country’.¹² As such, humanitarian visas have the potential to walk the line between the control interests of states, on the one hand, and the need for safe and regular access to protection on behalf of protection seekers, on the other. This is in line with the objectives of the Global Compacts, both fostering international solidarity and cooperation and promoting enhanced protection of refugees as well as individuals forced to flee on grounds not covered by the Refugee Convention.

The chapter starts by outlining the complementary role of both Global Compacts for the international protection system and the facilitation of access to protection, including the role of humanitarian visas as set out in the Compacts (10.2). The chapter then provides an overview of how humanitarian visas are currently used by states, outlining that practices in the EU are generally ad hoc, small scale and based on restrictive selection criteria, without taking the Compacts into consideration (10.3). Against this backdrop, the chapter presents key principles based on the objectives of the Global Compacts to guide future humanitarian visa schemes, especially in response to forms of displacement caused by natural disasters or climate change (10.4).

10.2 Facilitating Access to Protection: The Relevance of the Global Compacts

This section sets out the relevance of the GCR and the GCM with respect to enhancing access to protection through humanitarian visas. The Compacts are complementary, with both instruments including humanitarian visa schemes as safe pathways to a destination State.¹³ The section first explores the main objectives of the GCR regarding access to protection (10.2.1.), to then discuss the relevant objectives of the GCM in relation to climate-induced displacement (10.2.2.).

12 Madeline Garlick, ‘The Potential and Pitfalls of Extraterritorial Processing of Asylum Claims’ (*Migration Policy Institute*, 2015) <www.migrationpolicy.org/news/potential-and-pitfalls-extraterritorial-processing-asylum-claims> accessed 18 April 2025.

13 Bast, Endres de Oliveira and Wessels (n 8) 467.

10.2.1 Access to Protection under the Global Compact on Refugees: Enhancing Responsibility-Sharing

The GCR is a global attempt to enhance responsibility-sharing and solidarity within the international protection system. The lack of a binding or detailed international responsibility-sharing mechanism for the protection of refugees is well known, with no substantive obligations on states to cooperate in the implementation of the 1951 Refugee Convention.¹⁴ While an explicitly non-binding instrument, paragraph 5 of the GCR reiterates that the Compact is ‘grounded in the international refugee protection regime, centred on the cardinal principle of non-refoulement, and at the core of which is the 1951 Convention and its 1967 Protocol’, as well as various regional protection instruments.¹⁵ Paragraph 7 of the GCR lists four main overall objectives: (i) ease pressure on host countries, (ii) enhance refugee self-reliance, (iii) expand access to third country solutions and (iv) support conditions in countries of origin for return in safety and dignity. While the GCR does not impose new or binding commitments on states, it reiterates possible solutions to overcome the gaps in responsibility-sharing and access to protection. Thus, the third objective supporting third country solutions in the form of resettlement and complementary pathways is particularly relevant to this contribution.

Resettlement is one of the three internationally recognised durable solutions allowing for responsibility-sharing brokered by UNHCR.¹⁶ Resettlement involves the ‘transfer of refugees from one State in which they have sought protection to a third State which has agreed to admit them – as refugees – with permanent residence status’.¹⁷ UNHCR defines complementary pathways to admission as mobility avenues that ‘complement resettlement by providing lawful stay in a third country where their international protection needs are met’.¹⁸ These pathways can have a primarily humanitarian scope, or focus on other grounds for access, such as family reunification, education programmes, scholarships or labour mobility schemes.¹⁹ The GCR identifies complementary

14 Michael W Doyle, ‘Responsibility Sharing: From Principle to Policy’ (2019) 30 IJRL 618, 621f.

15 On the potential of the GCR due to its foundation in binding international law see Geoff Gilbert, ‘Not Bound but Committed: Operationalizing the Global Compact on Refugees’ (2019) 57 International Migration 27.

16 UNHCR, ‘UNHCR Resettlement Handbook’ (2011) 3.

17 *ibid.*

18 UNHCR, ‘Complementary Pathways for Admission of Refugees to Third Countries: Key Considerations’ 5 <www.refworld.org/reference/themreport/unhcr/2019/en/122635> accessed 18 April 2025.

19 OECD and UNHCR, *Safe Pathways for Refugees I: OECD-UNHCR Study on Third Country Solutions for Refugees: Family Reunification, Study Programmes and Labour Mobility* (Organisation for Economic Cooperation and Development 2018) <www.oecd-ilibrary.org/social-issues-migration-health/safe-pathways-for-refugees-i_0b9ac9fe-en> accessed 18 April 2025.

pathways as comprising humanitarian visas, family reunification, private refugee sponsorship, as well as labour and educational opportunities for refugees.²⁰

In calling for safe pathways, the GCR remains focused on refugees and does not cover the field of all types of forced migration. Even though the refugee definition has expanded over the years, for instance to individuals forced to flee domestic abuse,²¹ many individuals displaced worldwide are not directly covered by the Refugee Convention, including individuals forced to flee due to climate change or natural disasters,²² often displaced within their countries of origin.²³

10.2.2 The Complementary Role of the Global Compact for Safe Orderly and Regular Migration: Access to Protection for Individuals Fleeing Natural Disasters and Climate Change

In contrast to the GCR, with its focus on refugees, the GCM has a focus on individuals at all stages of migration, independent of their status. The human rights standards specified by the GCM, which all build upon legal obligations under international law,²⁴ apply to all migrants, including asylum seekers, refugees and all other categories of protection. A number of the GCM's objectives impact the rights of asylum seekers and refugees, notably enhanced legal migration pathways (Objective 5), but also the strengthened cooperation on smuggling (Objective 9), integrated border management (Objective 11), the use of immigration detention as a last resort (Objective 13) and the provision of basic services independent of status (Objective 15). These objectives apply

20 GCR UN General Assembly (n 3) paras 7 and 95.

21 See further James C Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd ed., Cambridge Univ Press 2014) 362 ff.

22 On the developments of international law with a view to the protection of individuals displaced due to climate change see Jane McAdam and Ben Saul, 'An Insecure Climate for Human Security? Climate-Induced Displacement and International Law' in Alice Edwards and Carla Ferstman (eds), *Human Security and Non-Citizens: Law, Policy and International Affairs* (Cambridge University Press 2010) 375; Jane McAdam, 'Protecting People Displaced by the Impacts of Climate Change: The UN Human Rights Committee and the Principle of Non-refoulement' (2020) 114 AJIL 708; David Cantor and others, 'International Protection, Disasters and Climate Change' (2024) 36 IJRL 176; Jolanda van der Vliet, 'Climate Refugees': A Legal Mapping Exercise' *Climate Refugees* (Routledge 2018) 16, 22; Beatriz Felipe Pérez, 'Beyond the Shortcomings of International Law: A Proposal for the Legal Protection of Climate Migrants' *Climate Refugees* (Routledge 2018) 218; Refugee Law Initiative, 'Refugee Law Initiative Declaration on International Protection in the Context of Disasters and Climate Change' (2024) 36 IJRL 169; Carmen G Gonzalez, 'Climate Justice and Climate Displacement: Evaluating the Emerging Legal and Policy Responses' (2019) 36 WILJ.

23 Among the total of 46.9 million new internal displacements registered in 2023, 56 per cent were triggered by disasters; see Migration Data Portal, <www.migrationdataportal.org/themes/environmental-migration> accessed 18 April 2025.

24 GCM UN General Assembly (n 7) Preamble, paras 1 and 2.

to all migrants without prejudice to the specific protection granted to refugees under the international protection regime.²⁵

Particularly with a view to access to protection, the GCR cannot be read in isolation from the GCM.²⁶ In its Objective 5, the GCM suggests expanding and diversifying pathways for safe, orderly and regular migration, including pathways without humanitarian scope, such as labour and academic mobility schemes and other educational opportunities. These pathways are crucial to provide migrants safe access to destination states. However, these pathways are independent of any need for protection and therefore do not address specific vulnerabilities or provide a protection status upon arrival.

Additionally, the GCM puts a focus on pathways for ‘migrants compelled to leave their countries of origin owing to sudden-onset natural disasters and other precarious situations’.²⁷ To this end, the GCM specifies that humanitarian visas may be used as ‘solutions for migrants compelled to leave their countries of origin owing to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation’.²⁸ The GCM recommends investing in immigration administration for handling visa application processes, as for instance in the European visa facilitation and liberalisation programmes.²⁹ The protective scope of the GCM is one of its most innovative elements, with ‘explicit recognition of the nexus between disasters triggered by natural hazards [...] and migration’.³⁰ As will be discussed in the following, the complementary nature of the Compacts may impact State practice on humanitarian visas as key instruments granting access to protection.

10.3 The Humanitarian Visa as a Key Instrument for Granting Access to Protection in Europe and Beyond

The term ‘humanitarian visa’ is an umbrella term which refers to any visa granted on humanitarian grounds. These grounds can be various, from cases of illness to family relations or (international) protection reasons. The purpose of this section is to focus on humanitarian visa schemes which grant access to protection seekers in the EU (10.3.1), as well as other regional contexts (10.3.2), including where humanitarian visas are used as pathways for protection seekers fleeing natural disasters or climate change.

25 GCM UN General Assembly (n 7) Preamble, para 4.

26 Bast, Endres de Oliveira and Wessels (n 8) 467.

27 GCM UN General Assembly (n 7) Objective 5(g).

28 See GCM UN General Assembly (n 7) Objective 5(g) and (h).

29 See further François Crépeau, ‘Towards a Mobile and Diverse World: “Facilitating Mobility” as a Central Objective of the Global Compact on Migration’ (2019) 30 *IJRL* 650, 652.

30 Walter Kälin, ‘The Global Compact on Migration: A Ray of Hope for Disaster-Displaced Persons’ (2019) 30 *IJRL* 664.

10.3.1 *Humanitarian Admission to Europe: Global Compacts in the Shadows of EU Law and Policy*

Despite their specific scope enhancing access to territory and protection, the Compacts have so far received little attention in EU law and practice.³¹ While the EU played a leading role in the negotiation process of the GCM, taking the highly politicised discussions on migration to the international level, late negotiations were characterised by rising concerns of EU Member States about GCM objectives clashing with their national interests.³² The negotiation process ultimately exposed deep divisions among Member States and cohesion began to unravel along the way. Ultimately, not all EU Member States endorsed the GCM, based on concerns about national sovereignty and possible implications for national migration policies.³³

The overall tendency to turn to national policies and practices to escape the structural issues of EU migration and asylum policy has also influenced the parallel negotiation process of the Common European Asylum System (CEAS) from 2016 onwards.³⁴ The new resettlement regulation only refers to the GCR, not the GCM.³⁵ Moreover, the GCM in particular lacks relevance in the implementation processes of reforming the CEAS.³⁶ The GCM's review process is almost exclusively dominated by states, which has also led

- 31 For a critical discussion see Bast, Endres de Oliveira and Wessels (n 8); Evan Easton-Calabria, 'The Global Compact on Refugees and the EU's New Pact on Migration and Asylum: The Ripples of Responsibility-Sharing' in Andrew Geddes and Sergio Carrera (eds), *The EU Pact on Migration and Asylum in Light of the United Nations Global Compact on Refugees: International Experiences on Containment and Mobility and Their Impacts on Trust and Rights* (Publications Office of the European Union 2021); Galina Cornelisse and Marcelle Reneman, 'Border Procedures in the European Union: How the Pact Ignored the Compacts' (2022) 11 *Laws* 38; Sergio Carrera Nunez and others, 'Conclusions: The Interplay Between Containment and Mobility in Asylum Governance' in Sergio Carrera Nunez and others (eds), *Global Asylum Governance and the European Union's Role: Rights and Responsibility in the Implementation of the United Nations Global Compact on Refugees* (Springer Nature Switzerland 2025).
- 32 Diego Badell Sánchez, 'The EU, Migration and Contestation: The UN Global Compact for Migration, from Consensus to Dissensus' (2021) 6 *Global Affairs* 347, 355ff.; for a critical discussion of the inherent tensions of the GCM and following difficulties of implementation see Susan P Murphy, 'Hard Borders and Soft Agreements: Evaluating Governance within the Global Compact for Migration' (2022) 44 *TWQ* 460.
- 33 EU Member States that voted against the GCM include Hungary, Poland and the Czech Republic. Austria abstained from the vote; see <<https://press.un.org/en/2018/ga12113.doc.htm>> accessed 18 April 2025.
- 34 For an overview see Daniel Thym (ed), *Reforming the Common European Asylum System: Opportunities, Pitfalls, and Downsides of the Commission Proposals for a New Pact on Migration and Asylum* (Nomos 2022).
- 35 Regulation (EU) 2024/1350 of the European Parliament and of the Council of 14 May 2024 establishing a Union Resettlement and Humanitarian Admission Framework, and amending Regulation (EU) 2021/1147 2024 recital 4.
- 36 For a critical view see Colin Rajah and Bram Frouws, 'The Global Compact for Migration Six Years On: Time for a Shake-Up?' (*Mixed Migration Centre*, 25 October 2024) <<https://>

to a hesitant or even sceptical reception of the GCM by domestic civil society actors.³⁷

While the need for specifically addressing displacement due to climate change and natural disasters, including providing adequate protection, has been pointed out by the European Commission,³⁸ this did not influence the reform process of the CEAS.³⁹ As an analysis of the role of the EU in the GCM implementation process shows, EU law and policy reflect the aim to ‘avoid any new international obligations beyond what has already been codified in the EU migration acquis’.⁴⁰ There are, however, efforts to promote resettlement and humanitarian pathways in line with the third objective of the GCR. For instance, in December 2023, the EU stated its commitment at the Global Refugee Forum ‘to promoting safe and legal pathways for those in need of international protection [...] [f]or 2024–2025, 14 Member States affirmed their commitment [...] by pledging collectively 61,000 places for resettlement and humanitarian admission combined’.⁴¹

Still, engaging in resettlement and humanitarian visas lies at the discretion of national authorities as there is no legal obligation to issue a humanitarian visa under EU law.⁴² There is Article 19(4) of the EU Visa Code,⁴³ which foresees a derogation from the admissibility criteria inter alia ‘on humanitarian grounds’ and Article 25(1) EU Visa Code that provides Member States with the exceptional possibility to issue a humanitarian visa with limited territorial validity (LTV) of a 90-day duration. Still, these provisions are not significantly made use of by Member States, fearing that permanent humanitarian visas, independent of quotas or restrictive eligibility criteria, would open them up

mixedmigration.org/the-global-compact-for-migration-six-years-on-time-for-a-shake-up/> accessed 18 April 2025.

37 Jürgen Bast, Janna Wessels and Anuscheh Farahat, ‘The Dynamic Relationship between the Global Compact for Migration and Human Rights Law’ (2024) 29 MRM 23, 36ff; Younous Arbaoui, ‘The Impact of the Marrakech Compact for Migration in Morocco: The Role of the Government and of Civil Society’ (2022) 55 VRÜ / WCL 19, 27ff.

38 Publications Office of the European Union, ‘Addressing Displacement and Migration Related to Disasters, Climate Change and Environmental Degradation: Commission Staff Working Document’ 21f. <<https://data.europa.eu/doi/10.2795/302703>> accessed 18 April 2025.

39 For a critical assessment see Alicia Scodanibbio, ‘Climate Justice and Human Mobility: Bridging EU Commitments and Policies’ 3 <https://www.egmontinstitute.be/app/uploads/2024/06/Alicia-Scodanibbio_Policy_Brief_347.pdf> accessed 18 April 2025.

40 Tamás Molnár, ‘The EU Shaping the Global Compact for Safe, Orderly and Regular Migration: The Glass Half Full or Half Empty?’ (2020) 16 IJLC 321, 366.

41 ‘Pledges & Contributions’ (*The Global Compact on Refugees*, UNHCR, 10 December 2023) <<http://globalcompactrefugees.org/pledges-contributions>> accessed 18 April 2025.

42 *X and X v État belge* [2017] ECJ Case C-638/16 PPU.

43 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) 2009.

to lengthy and resource-intensive human rights and procedural obligations.⁴⁴ Only a few Member States offer humanitarian visa schemes, reflecting discretionary and exceptional practice,⁴⁵ with many humanitarian visas issued due to illness or family relations, rather than with a focus on protection-related claims.⁴⁶

Examples of humanitarian visa schemes explicitly aiming at enhancing the goals of the GCR are the humanitarian corridors, a community sponsorship programme implemented by the Community of Sant'Egidio in Italy.⁴⁷ Individuals receive a preliminary screening and can then travel to Italy with a humanitarian visa to apply for asylum in safety. In December 2021, the Community of Sant'Egidio signed a Memorandum of Understanding with UNHCR, inter alia facilitating better humanitarian access and emergency responses to people in need.⁴⁸ In Germany, a Member State with a long tradition of humanitarian visas, there are several humanitarian visa schemes that are in line with the protective scope of the GCR, recently with a particular focus on emergency evacuations from Afghanistan.⁴⁹ However, an assessment of

44 A respective argument was, for instance, brought forward by Belgium and other EU Member States in the case *X and X v État belge* (n 42). For a discussion of the development of the jurisprudence see Daniel Thym, 'The End of Human Rights Dynamism? Judgments of the ECtHR on "Hot Returns" and Humanitarian Visas as a Focal Point of Contemporary European Asylum Law and Policy' (2020) 32 *IJRL* 569; Barry Weiner, 'Theory and Practice for Humanitarian Visas in Court of Justice of the European Union and European Court of Human Rights' (2023) 2 *YEL* 496; *X and X v État belge* [2017] ECJ Case C-638/16 PPU.

45 On state discretion see Silvia Morgades-Gil, 'Humanitarian Visas and Discretionary Choices in the EU: Policies on Visas and on International Protection' (2019) 23 *SYBIL* 273.

46 For an overview see Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Nomos 2020); Gregor Noll, Jessica Fagerlund and Fabrice Liebaut, 'Study on the Feasibility of Processing Asylum Claims Outside the EU Against the Background of the Common European Asylum System and the Goal of a Common Asylum Procedure' <www.refworld.org/reference/themreport/eucommission/2002/en/115567> accessed 18 April 2025; Ulla Iben Jensen, 'Humanitarian Visas: Option or Obligation?' [2014] Policy Department C: Citizens' Rights and Constitutional Affairs European Parliament <www.europarl.europa.eu/studies> accessed 18 April 2025.

47 See Humanitarian Corridors in figures, 14 January 2022, <www.santegidio.org/downloads/EN-Humanitarian-corridors-20220114.pdf> accessed 18 April 2025; see also <<https://globalcompactrefugees.org/gcr-action/countries/italy>> accessed 18 November 2025; for a discussion of these schemes see Katia Bianchini, 'Chapter 4: Humanitarian Admission to Italy through Humanitarian Visas and Corridors' in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe* (Nomos Verlagsgesellschaft mbH & Co KG 2020) <<https://www.nomos-elibrary.de/index.php?doi=10.5771/9783845298603-155>> accessed 16 April 2025. Carola Ricci, 'The Necessity for Alternative Legal Pathways: The Best Practice of Humanitarian Corridors Opened by Private Sponsors in Italy' (2020) 21 *GLJ* 265.

48 See UNHCR, announcements, <www.unhcr.org/news/announcements/unhcr-and-community-santegidio-sign-agreement-address-refugee-challenge-globally> accessed 18 April 2025.

49 For an overview see the information provided by the German government, <<https://www.bmi.bund.de/EN/topics/migration/asylum-refugee-protection/humanitarian-admission-programmes/humanitarian-admission-programmes-node.html>> accessed 22 October 2024; on the relevance of Germany as a country promoting GCR objectives see <<https://globalcompactrefugees.org/gcr-action/countries/germany>> accessed 16 April 2025.

German humanitarian visa schemes in law and practice shows that some programmes are characterised by inconsistent information and practice regarding access to the procedures, changing roles of external actors, a lack of transparency with a view to eligibility requirements and security assessments, lengthy procedures and a lack of judicial review.⁵⁰

Apart from these built-in challenges of humanitarian visa procedures, they may also form part of deterrence policies. The 2016 EU-Turkey Statement,⁵¹ for instance, may be seen as an example of how humanitarian visas can be instrumentalised as an incentive to halt irregular migration to the EU. The notorious ‘one-to-one’ scheme entailed resettling one Syrian asylum seeker from Turkey to the EU in return for each Syrian asylum seeker returned from the Greek islands to Turkey.⁵² However, the one-to-one nature of the scheme has never been realised in practice and it is unclear to what extent the programme has had a deterrent effect.⁵³ Still, the third country cooperation underlying the EU-Turkey Statement is an example of policies aiming at externalising protection responsibilities.

The current focus in the EU lies on post-entry processing in the form of extraterritorial asylum processing as, for instance, foreseen by the Italy-Albania agreement,⁵⁴ or by expanding the safe third country concept to delegate

50 Pauline Endres de Oliveira and Johanna Mantel, ‘Humanitarian Visas and Admission Programmes. Legal Situation and Practice in Germany’ [2023] International Refugee Assistance Project.

51 European Council, ‘EU-Turkey Statement’ (18 March 2016) <www.consilium.europa.eu/en/press/press-releases/2016/03/18/eu-turkey-statement/> accessed 18 April 2025; Mauro Gatti and Andrea Ott, ‘The EU-Turkey Statement: Legal Nature and Compatibility with EU Institutional Law’ in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the External Dimensions of EU Migration Policies in Times of Crisis* (Edward Elgar Publishing 2019).

52 European Council (n 51) action point 2).

53 Since 2020, Turkey has not taken back any asylum seekers from Greece and prior to the COVID-19 pandemic, the number of protection seekers admitted to Europe (25,560 between April 2016 and December 2019) by far exceeded the numbers of individuals returned from Greece to Turkey (2,140 between April 2016 and March 2020), see Statewatch, ‘EU-Turkey: 369 Syrians Deported to Turkey through EU Fund for Refugees’ (18 May 2020) <www.statewatch.org/news/2020/may/eu-turkey-369-syrians-deported-to-turkey-through-eu-fund-for-refugees/> accessed 16 April 2025; UNHCR, ‘Returns from Greece to Turkey (under EU-Turkey Statement) as of 31 March 2020’ (1 April 2020) <<https://data.unhcr.org/en/documents/details/75075>> accessed 18 April 2025.

54 Government of the Italian Republic and the Council of Ministers of the Albanian Republic, ‘Italy-Albania Protocol, Law No. 14/24’ <www.dirittoimmigrazione cittadinanza.it/archivio-saggi-commenti/saggi/fascicolo-n-1-2024-1/1414-il-protocollo-italia-albania-e-il-diritto-dell-unione-europea-una-relazione-complicata/file> accessed 27 November 2024; Inga Agatha Broerse, ‘The Italy-Albania Agreement: Externalising Asylum Procedures in Violation of Human Rights’ (2024) 26 VU Migration Law Series 1; Eleonora Celoria and Andreina De Leo, ‘Il Protocollo Italia-Albania e Il Diritto Dell’Unione Europea: Una Relazione Complicata’ (2024) 1/2024 Diritto, Immigrazione e Cittadinanza 1; Andreina De Leo, ‘Managing

responsibility for processing and protection to third states.⁵⁵ Critical academics and civil society actors point to the complexity of the issue, associating extra-territorial processing with deterrence and outsourcing of protection responsibilities.⁵⁶ Thus, the legal and political developments on access to protection in the EU mark a significant shift from the GCR's objectives of more equitable responsibility-sharing through resettlement and complementary pathways, as well as the GCM objective of enhancing the availability of safe and regular pathways, including pathways with a broader protective scope.

10.3.2 *The Global Relevance of the Compacts: Responsibility-Sharing and Humanitarian Admission of Individuals Forced to Flee Due to Natural Disasters and Climate Change*

At the international level, a range of states engage in humanitarian visa schemes. Brazil, for instance, has served GCR objectives by launching humanitarian visas specifically for protection seekers from Syria,⁵⁷ Afghanistan,⁵⁸ and Ukraine.⁵⁹ Standing out as a so-called 'champion country' of the GCM implementation process, Canada has been strongly supporting the Compact objectives.⁶⁰ By promoting the implementation of legal pathways such as private

Migration the Italian Way' [2024] Verfassungsblog <<https://verfassungsblog.de/managing-migration-the-italian-way/>> accessed 27 November 2024.

55 On the safe third country concept see Daniel Thym, *European Migration Law* (Oxford Univ Press 2023) 383f.

56 See, for instance, Lorena Stella Martini Megerisi Tarek, 'Road to Nowhere: Why Europe's Border Externalisation Is a Dead End' (*ECFR*, 14 December 2023) <<https://ecfr.eu/publication/road-to-nowhere-why-europes-border-externalisation-is-a-dead-end/>> accessed 17 April 2025; Ermioni Xanthopoulou, 'Mapping EU Externalisation Devices through a Critical Eye' (2024) 26 *EJML* 108; Agnese Pacciardi and Joakim Berndtsson, 'EU Border Externalisation and Security Outsourcing: Exploring the Migration Industry in Libya' (2022) 48 *JEMS* 4010; Annick Pijnenburg, 'Externalisation of Migration Control: Impunity or Accountability for Human Rights Violations?' (2024) 71 *NILR* 59; Pro Asyl, 'Out of Sight, out of Mind: Externalisation of Migration and Refugee Policies' (5 August 2016) <www.proasyl.de/en/news/out-of-sight-out-of-mind-externalisation-and-regionalisation-of-migration-and-refugee-policy/> accessed 17 April 2025.

57 Liliana Lyra Jubilut, Andre de Lima Madureira and Camila Sombra Muiños de Andrade, 'Humanitarian Visas: Building on Brazil's Experience' [2016] *Forced Migration Review*; UNHCR, 'UNHCR Welcomes Brazil Humanitarian Visas for Syrians Fleeing Conflict' (27 September 2013) <www.unhcr.org/us/news/briefing-notes/unhcr-welcomes-brazil-humanitarian-visas-syrians-fleeing-conflict> accessed 18 April 2025.

58 Brazilian Ministry of Foreign Affairs, 'Humanitarian Visas for Afghans – Ministério Das Relações Exteriores' (1 December 2021) <www.gov.br/mre/en/contact-us/press-area/press-releases/humanitarian-visas-for-afghans> accessed 18 April 2025.

59 Agência Brasil, 'Brazil Announces Humanitarian Passport for Ukrainian Refugees' (*Agência Brasil*, 1 March 2022) <<https://agenciabrasil.ebc.com.br/en/internacional/noticia/2022-02/brazil-will-allow-ukrainians-access-humanitarian-passport>> accessed 22 March 2022.

60 United Nations Network on Migration, *Champion Countries Initiative Information Note*, 11 December 2023, <<https://migrationnetwork.un.org/system/files/docs/Champion>

sponsorship and labour mobility schemes, Canada has also set the agenda for other countries to follow.

Finding a balance between migration control interests and enhancing access to protection is a constant challenge, as can also be observed in other national contexts. In the US, for instance, the Obama administration established the Central American Minors (CAM) Refugee and Parole programme, which allowed children and youth who were under the age of 21 and had a qualifying parent in the US to be assessed for protection needs in Central America by US officials and, if found to require protection, to be granted access to the US.⁶¹ Similar to the findings regarding the German admission schemes, the ad hoc nature of these programmes means they are time-limited and subject to changes in destination state politics. The CAM programme, for instance, was discontinued under the first Trump administration and then revived under the Biden administration.⁶²

Examples of visa procedures broadening the protective scope to individuals forced to flee due to natural disasters and climate change in line with GCM Objective 5 are the visa opportunities offered by Canada and the US to victims of typhoon Haiyan in the Philippines in 2013.⁶³ There are further examples in the Americas. Since 2012, Brazil has been providing humanitarian admission to Haitians affected by environmental disasters and pledged in 2019 to explore measures ‘to offer regular migratory pathways for persons who are not eligible as refugees, in particular through the concession of humanitarian visas and residence for Haitian nationals’.⁶⁴ Moreover, Migration Law in Brazil (Law 13.445/2017) contains a provision for humanitarian visas allowing for, *inter alia*, the reception of individuals from countries experiencing environmental disasters.⁶⁵ As can be observed in Argentina, the commitment to address displacement caused by natural disasters, the adverse effects of climate change and environmental degradation in the GCM enables policy interventions and action by states.⁶⁶ Since 2022, Argentina has provided three-year humanitarian visas to climate-displaced people from Central America, the Caribbean and

%20countries%20initiative_Information%20Note%20%28updated%29_Feb%202024.pdf> accessed 17 April 2025.

61 Molly Fee and Claire Higgins, ‘The Risks of “In-Country” Processing: An Assessment of the US Central American Minors Program’ (*World Refugee and Migration Council*, 18 October 2021) <<https://zunokscx.elementor.cloud/publications/research-paper/the-risks-of-in-country-processing/>> accessed 18 April 2025.

62 Mark Greenberg and others, ‘Relaunching the Central American Minors Program: Opportunities to Enhance Child Safety and Family Reunification’ [2021] Migration Policy Institute 1 <www.migrationpolicy.org/sites/default/files/publications/cam-program-2021-english_final.pdf> accessed 18 April 2025.

63 See further Denise Margaret S Matias, ‘Climate Humanitarian Visa: International Migration Opportunities as Post-Disaster Humanitarian Intervention’ (2020) 160 *Climatic Change* 143.

64 ‘Pledges & Contributions’ (n 41).

65 Lei nº 13.445, de 24 de maio de 2017. Art 14.

66 See further Cantor and others (n 22) 176, 179.

Mexico.⁶⁷ In the Americas more broadly, the Cartagena+40 Process, marking 40 years since the Cartagena Declaration, includes a focus on humanitarian admission in the context of disasters and climate change.⁶⁸ In the Pacific, Australia and Tuvalu recently announced a bilateral mobility treaty, providing humanitarian visas to Tuvaluan nationals affected by climate change and natural disasters.⁶⁹ Australia has also launched the Pacific Engagement Visa,⁷⁰ which is seen as an approach towards a ‘climate change humanitarian visa’.⁷¹

Despite these examples, the growing numbers of forced displacement worldwide still require respective efforts to establish and scale up safe and legal pathways to protection, particularly in the European context.⁷² The next section will therefore further explore the potential of the Global Compacts in informing the implementation of humanitarian visa schemes.

10.4 The Potential of the Global Compacts for the Future of Humanitarian Visa Schemes

Building on the previous section’s discussion of the Global Compact’s role in promoting humanitarian visas in the context of climate-related protection, this final substantive section outlines a principled approach to guide future humanitarian visa schemes in alignment with the objectives of the GCR and the GCM. As discussed above, such visa programmes typically rely on political will rather than legal obligation. In this context, the Global Compacts play a vital role as expressions of international political consensus and as emerging

67 Ministerio del Interior de Argentina/Migraciones/PDD, ‘Policy Brief: Leading Initiatives by Argentina to Address Displacement in the Context of Disasters and Climate Change’ (*Platform on Disaster Displacement*, 2 February 2023) <<https://disasterdisplacement.org/resource/policy-brief-leading-initiatives-by-argentina-to-address-displacement-in-the-context-of-disasters-and-climate-change/>> accessed 25 April 2025.

68 See, for example, Center for Gender & Refugee Studies, *How the Cartagena +40 Process Can Improve Protection for Cross-Border Climate Displacement*, 31 July 2024.

69 Australian Government Department of Foreign Affairs and Trade, ‘Australia-Tuvalu Falepili Union Treaty’ <www.dfat.gov.au/geo/tuvalu/australia-tuvalu-falepili-union-treaty> accessed 22 April 2025; Jane McAdam, ‘Australia’s Offer of Climate Migration to Tuvalu Residents is Groundbreaking – And Could be a Lifeline Across the Pacific’ (*The Conversation*, 11 November 2023) <<http://theconversation.com/australias-offer-of-climate-migration-to-tuvalu-residents-is-groundbreaking-and-could-be-a-lifeline-across-the-pacific-217514>> accessed 22 April 2025.

70 See the information provided by the Australian Government, Department of Foreign Affairs and Trade, <www.dfat.gov.au/geo/pacific/people-connections/people-connections-in-the-pacific/pacific-engagement-visa> accessed 18 April 2025.

71 Abul Rizvi, ‘Is the Pacific Engagement Visa Australia’s First Climate Change Humanitarian Visa?’ (*Pearls and Irritations - John Mendue’s Public Policy Journal*, 3 November 2022) <<https://johnmenadue.com/is-the-pacific-engagement-visa-australias-first-climate-change-humanitarian-visa/>> accessed 18 April 2025.

72 UN Economic and Social Council, Report of the Regional Review of the Global Compact for Safe, Orderly and Regular Migration for the Economic Commission for Europe region on its second session, Geneva, 11 March 2024, 6 para 4.

soft law instruments shaping the international protection landscape. This approach also recognises the humanitarian imperative for safe access to protection and acknowledges that many protection seekers are fleeing serious harm beyond the traditional refugee framework, including threats from disasters and climate change. As Guild, Allinson and Busuttil note in relation to EU law, the Compacts can function both as internationally endorsed tools for interpreting existing human rights law and as new instruments in EU development policy.⁷³

Within this framework, international cooperation is central, with paragraph 28 of the GCM emphasising the need for greater transparency and accessibility in migration procedures, including entry, admission and stay. Paragraph 94 of the GCR, in turn, emphasises the need for solidarity with countries hosting large numbers of refugees through complementary pathways (including humanitarian visas) on a ‘more systematic, organised, sustainable and gender-responsive basis’. This is crucial, as any humanitarian visa scheme depends on cooperation between the host country and the intended destination country, given the latter’s limited operational presence and lack of territorial sovereignty in the host state. In light of these considerations, this section draws on the potential of the Compacts to define the personal scope of humanitarian visa schemes (10.4.1), with a particular focus on the role of the GCM in this regard. The section also discusses the Compacts’ role in shaping the legal frameworks for providing protection upon arrival in a destination state (10.4.2).

10.4.1 Enhancing the Protective Scope of Humanitarian Visas

Both Compacts call for the establishment of humanitarian visa schemes and are at the same time of value with a view to the protective scope of such schemes in case of implementation. Against the backdrop of the tension between state interests and individual rights and protection needs, existing analysis of various humanitarian visa schemes in the EU highlights the pitfalls of a wide margin of discretion, leading to restrictive admission criteria, but also acknowledges its value in enabling such programmes in the first place.⁷⁴ The wide margin of discretion states have when implementing humanitarian visa schemes may be an asset for rapidly responding to crisis situations and be more politically viable than programmes with broader criteria. At the same time, eligibility criteria and a lack of transparency in the admission process can undermine access for individuals most in need of an admission, as the analysis of German admission schemes has shown.⁷⁵ The implementation of humanitarian visa schemes

73 Elspeth Guild, Kathryn Allinson and Nicolette Busuttil, ‘The UN Global Compacts and the Common European Asylum System: Coherence or Friction?’ (2022) 11 *Laws* 35, 2.

74 Endres de Oliveira (n 9) 196.

75 Endres de Oliveira and Mantel (n 50).

may grant access to selected individuals, but not to otherwise eligible persons.⁷⁶

The wide margin of discretion may also be exercised in a protection-oriented manner by opening visa schemes to address the needs of protection seekers affected by new forms of displacement, such as those driven by climate change or natural disasters.⁷⁷ For instance, recent jurisprudence recognises the role of international human rights law in protecting against harms caused by climate change under the *non-refoulement* principle, notably the Human Rights Committee in the *Teitiota Case*.⁷⁸ Still, the contours of international legal obligations vis-à-vis climate displacement remain in development.⁷⁹ At the level of policy, indeed, the GCM already recommends the provision of solutions for migrants compelled to leave their countries of origin due to natural disasters and the adverse effects of climate change. Under the GCR, humanitarian visa schemes should be more widely available to refugees, including where international protection needs arise on the basis of climate and disaster displacement.⁸⁰ Expanding such pathways also reflects the Compact's commitment to more equitable responsibility sharing – particularly relevant given that 75 per cent of the world's refugees are currently hosted in the Global South.⁸¹ In this vein, in 2024 UNHCR's Executive Committee passed a conclusion on resettlement on complementary pathways, calling on states to 'facilitate all possible complementary pathways [...] including humanitarian pathways, based on broad protection, vulnerability and context-specific criteria'.⁸²

10.4.2 *Status Provided by Humanitarian Visas*

There remains the question of which legal status is afforded by humanitarian visas upon arrival in a destination state. Clearly, differentiated approaches are necessary here. As noted at the outset, humanitarian visas may function in two ways – either granting immediate protection status after arriving in the

76 Pauline Endres de Oliveira and Nikolas Feith Tan, *External Processing: A tool to expand protection or a further restriction to territorial asylum?* (Migration Policy Institute 2023) 21.

77 Bast, Endres de Oliveira and Wessels (n 8) 464; see also Mariam Traore Chazalnoel and Dina Ionesco, 'Advancing the Global Governance of Climate Migration through the United Nations Framework Convention on Climate Change and the Global Compact on Migration: Perspectives from the International Organization for Migration' in Simon Behrmann and Avidan Kent (eds), *Climate Refugees: Beyond the Legal Impasse?* (Routledge 2018) 103, 109.

78 Human Rights Committee, *Teitiota v New Zealand*, Communication No 2728/2016 (7 January 2020).

79 Cantor and others (n 22).

80 Refugee Law Initiative (n 22); Cantor and others (n 22).

81 UNHCR, 'Global Trends Report 2023' (n 1).

82 UNHCR Executive Committee of the High Commissioner's Programme, 'Conclusion No. 117 (LXXV): Durable Solutions and Complementary Pathways' para f <<https://www.refworld.org/policy/exconc/excom/2024/en/148870>> accessed 2 April 2025.

destination state or channelling the protection seeker into the national asylum procedure. In the latter case, the efficiency of humanitarian visas as a protection tool may be enhanced by utilising *prima facie* or manifestly well-founded procedures after arrival in the destination state. Such processes generally refer to asylum applications that, on their face, clearly indicate that the individual meets the definition of a refugee under the Refugee Convention or complementary protection under European or international human rights law.⁸³

For example, under the Italian Humanitarian Corridors programme, beneficiaries receive a 90-day visa for humanitarian reasons under Article 25 of the EU Visa Code. Upon arrival, beneficiaries enter the Italian asylum system – so far all receiving international protection and thus a secure legal status.⁸⁴ In Germany, all existing humanitarian admission pathways result in the issuance of a humanitarian residence permit immediately upon arrival. This has the advantage of granting protection seekers direct access to the rights associated with their respective status without requiring them to first undergo an asylum procedure. It also conserves administrative resources by avoiding duplication of procedures. For certain groups, such as human rights defenders who may wish to return to their country at any time, temporary protection without the need to claim asylum can be a sensible solution.⁸⁵ At the same time, however, individuals who do not initially undergo an asylum procedure and receive a status that does not fully reflect their protection needs may later apply for asylum to obtain a more favourable legal position – for instance, one that facilitates family reunification or access to a refugee passport.⁸⁶ A study of Germany's admission programmes for Syrian protection seekers since 2013 illustrates how the pursuit of Convention refugee status often leads to subsequent asylum applications.⁸⁷ This might strain administrative capacities and run counter to the actual purpose of offering protection-oriented regular and safe pathways, as well as resource efficiency from the perspective of the destination state.⁸⁸

83 UNHCR, 'Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status. HCR/GIP/15/11' (2015) para 1 <<https://www.unhcr.org/jp/wp-content/uploads/sites/34/2017/07/Guidelines-on-International-Protection-No.-11.pdf>> accessed 3 December 2024; *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (2019) para 10 <<https://www.unhcr.org/media/handbook-procedures-and-criteria-determining-refugee-status-under-1951-convention-and-1967>> accessed 2 April 2025; Nikolas Feith Tan and Meltem Ineli-Cigar, 'Beyond Derogations in the EU Crisis Regulation: Making Expedited Procedures for Manifestly Well-Founded Asylum Claims Work in Practice' [2024] EJML.

84 Ricci, 'The Necessity for Alternative Legal Pathways: The Best Practice of Humanitarian Corridors Opened by Private Sponsors in Italy' (n 47).

85 Endres de Oliveira and Mantel (n 50) 61.

86 Pauline Endres de Oliveira, 'Humanitarian Admission to Germany – Access vs. Rights?' in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe: The Law between Promises and Constraints* (Nomos 2020) 217.

87 Endres de Oliveira and Mantel (n 50).

88 Endres de Oliveira (n 9) 207 ff.

In terms of ultimate legal status, however, under the GCR resettlement is a durable solution providing permanent protection to refugees who benefit from it. The legal status of refugees accessing complementary pathways is, however, less certain. Rather than providing a durable solution in the form of permanent protection, humanitarian visas are envisaged to provide ‘lawful stay in a third country where their international protection needs are met’, a term left undefined in the GCR.⁸⁹ With respect to protection for persons fleeing climate change or natural disasters, a medium-term solution may lie in expanding the status of international protection, currently limited to refugee protection and subsidiary protection in the legal context of the EU,⁹⁰ to a status of humanitarian protection.⁹¹

10.5 Conclusions

In today’s globalised world, with extraterritorialised borders and primarily territorial protection systems, the humanitarian visa is a key instrument for making the international protection framework effective. Humanitarian visa schemes provide for state control over admission, while at the same time facilitating regulated entry and safety to those in need of protection. While both Compacts hold the potential of informing the development of the international protection system with a view to access to protection through humanitarian visas, the GCM is of particular value when it comes to the protection of individuals forced to flee due to natural disasters or climate change, as many of these protection seekers may not be presently protected by the international protection system. Although the Compacts are not legally binding, they represent a political consensus on providing access to protection and may have legal effects if taken into account by states when developing new laws and policies on access to protection.

In the legal context of the EU, the Compacts have so far received little attention. Existing practices of humanitarian visa schemes are highly discretionary, temporary and limited in their personal and numerical scope. Humanitarian visa practices lack transparency – applicants are not necessarily given reasons for a negative decision and, in some cases, may not be informed about a negative decision at all. As a consequence, decisions are generally not subject to

89 UNHCR, ‘Complementary Pathways for Admission of Refugees to Third Countries’ (n 18) 5.

90 See Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) 2011 arts 1, 9, 15.

91 See also Clara Probst, ‘Environmental Migrants and the Common European Asylum System: Possible Impacts of the Teitiota Case’ (2023) 2023/01 Nijmegen Migration Law Working Papers 16.

judicial review, leaving individual applicants without recourse. While current EU humanitarian visa schemes are mostly restrictive and ad hoc, building on existing initiatives in terms of non-discrimination, safety, individual rights and responding to new causes of displacement is necessary and possible. As can already be observed in the context of humanitarian visa schemes in the Americas, the Global Compacts have a pivotal role to play in this regard.

11 Entry Visas and the European Convention on Human Rights

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11.1 Introduction: Entry Visas as a Condition for Enjoying Human Rights

International human rights bodies have repeatedly stressed the fundamental importance of the right to life, due to the fact that its ‘effective protection is the prerequisite for the enjoyment of all other human rights’.¹ Unfortunately, reality shows that being alive is naturally a necessary,² but legally insufficient, condition for exercising the rights set out in international treaties, given the territorial and personal limits to their applicability.³ Protection of human rights, indeed, might depend on *where* the person finds themselves. In this regard, the European Court of Human Rights (ECtHR or ‘the Court’) has clearly held that ‘the legal obligations arising for States under the [European Convention on Human Rights (ECHR or ‘the Convention’)] extend to those individuals *currently alive* who, at a given time, *fall within the jurisdiction* of a given Contracting Party’.⁴ Apart from some limited exceptions concerning

1 UN Human Rights Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, UN Doc. CCPR/C/GC/36 of 30 October 2018, para 2. See *African Commission on Human and Peoples’ Rights v Republic of Kenya* App no 6/2012, (African Court of Human and Peoples’ Rights, 26 May 2017) para 152, according to which it is the ‘cornerstone on which the realisation of all other rights and freedoms depend’; *Case of ‘Street Children’ (Villagran-Morales et al) v Guatemala* (Inter-American Court of Human Rights, 19 November 1999) para 144: ‘the exercise of this right is essential for the exercise of all other human rights. If it is not respected, all rights lack meaning’.

2 This is without prejudice for the ongoing lively debate concerning the question whether also individuals or groups which are not alive yet, such as future generations, also enjoy rights under international human rights treaties; see, for example, A Nolan, ‘Children and Generations’ Rights before the Courts: The Vexed Question of Definitions’ (2024) 3 Transnational Environmental Law 522 ff.

3 E Delval, ‘Humanitarian Visas for International Protection Purposes: The Myth of a Universal Application of Human Rights Law’ (31 July 2024), <<https://verfassungsblog.de/humanitarian-visas/>> (last accessed 1 September 2025).

4 *Verein Klima Seniorinnen Schweiz and Others v Switzerland* App no 53600/20 (ECtHR, 9 April 2024), para 420, emphasis added. This follows from the text of Article 1 ECHR: if, on the one hand, the engagement undertaken by a Contracting State to ‘secure’ the listed rights

situations in which jurisdiction is said to exist extr territorially,⁵ the Court has repeatedly stressed that ‘a State’s jurisdictional competence is *primarily territorial*’ and that ‘[i]t is presumed to be exercised normally throughout the territory of the State concerned’.⁶ In this context, even being a citizen of a given State who finds him or herself outside the territory of the State in question is insufficient to attract such an individual within the jurisdictional competence of his or her national State.⁷ This means that, ultimately, in order to enjoy the rights enshrined in the ECHR, an individual must, in principle, be capable of entering the territory of a given State party.⁸

In normal circumstances, this might prove (relatively) easy for the *nationals* of the State in question, given that, under Article 3, para 2, of Protocol No 4, ‘[n]o one shall be deprived of the right to enter the territory of the State of which he [or she] is a national’.⁹ The situation, on the contrary, is rather different for *aliens*, since no provision of the ECHR or its protocols

and freedoms extends, *in abstracto*, to ‘everyone’; on the other hand, such a commitment is limited, *in concreto*, to persons falling within its ‘jurisdiction’. The latter, therefore, is an essential ‘threshold criterion’, notably a ‘*conditio sine qua non*’, or ‘necessary condition for a Contracting State to be held responsible for acts or omissions imputable to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention’ (*Catan and Others v the Republic of Moldova and Russia* App nos 43370/04 and 2 others (ECtHR, 19 October 2012) para 103).

5 E.g. through the exercise of authority and control by the State over territories (*Al-Skeini and Others v the United Kingdom* App no 55721/07 (ECtHR, 7 July 2011), paras 143–150) or persons (*Hassan v the United Kingdom* App no 29750/09 (ECtHR, 16 September 2014), paras 75–80) abroad, or through the institution of domestic proceedings concerning events which happened abroad (*Güzelyurtlu and Others v Cyprus and Turkey* App no 36925/07 (ECtHR, 29 January 2019), para 188).

6 *Ilascu and Others v Moldova and Russia* App. no 48787/99 (ECtHR, 8 July 2004), para 312, emphasis added.

7 *H.F. and Others v France* App nos 24383/19 and 44234/20 (ECtHR, 14 September 2022), paras 198–203; but see, *L.H. and Others v France* UN Doc. CRC/C/85/D/79/2019 and others (UN Committee on the Rights of the Child, 2 November 2020), para 9.7, which considered that the fact of being the State of nationality of children located abroad coupled with that State’s capability and power to protect the rights of the children in question by repatriating them or providing consular responses sufficed to attract those children within the State’s jurisdiction.

8 See B Cali, L Bianku and I Motoc (eds.), *Migration and the European Convention on Human Rights* (Oxford University Press 2021) 8, where one reads: ‘a limitation of international human rights law with regard to migration is related to the jurisdictional requirements of this body of law. Those who are on the move voluntarily or involuntarily, must first fall within the jurisdiction of a State to claim rights from that State under international human rights law’. For a comparison between the approach of the European and the Inter-American courts on human rights on migration-related matters, see M-B Dembour, *When Humans Become Migrants* (Oxford University Press 2015).

9 This is a right which can be invoked exclusively towards the State of one’s own nationality (*H.F. and Others v France*, paras 244–245) and which, by its very nature, is not open to being exercised by third parties (ECommHR, *Association ‘Regele Mihai’ v Romania* (dec.) App no 26916/95, 4 September 1995).

confers a right to enter into the territory of a third State. This seems to be in line with the general assumption according to which, under international law, if, on the one hand, there is a right to *emigrate* and leave one's country, there is no corresponding right to *immigrate* and enter a given country.¹⁰ The 'territoriality' of protection is confirmed by guarantees provided in the treaty itself. For instance, the applicability of Article 1 of Protocol No 7, which stipulates procedural safeguards relating to the expulsion of aliens, is specifically limited to aliens lawfully *resident* in the territory of a State.¹¹ For its part, the prohibition of collective expulsion of aliens, set out in Article 4 of Protocol No 4, presupposes that the individuals are already on the territory of the State,¹² or at least reached the State's borders and are not admitted to enter its territory,¹³ or otherwise are under the physical authority and control of the State's authorities even outside its borders.¹⁴

More generally, the Court has admitted that aliens are attracted within a State's jurisdiction when they are subjected to border checks and other procedures aimed at granting or refusing them entry into the territory;¹⁵ but, once again, this presupposes that the individuals in question make it to the State's border. The ECHR, therefore, is formally silent on the issues of *how* individuals can reach and enter the State's territory in order to trigger its applicability and *if* Contracting parties have an obligation to allow foreigners to be legally entitled to enter their territories.

Against this background, this chapter intends to address the above-mentioned issues with specific regard to *visas*, conceived as instruments of controlled international mobility, which allow the legal transit to or entry of a person at the borders of the State that has authorised the issuance of the visa. In this vein, a visa might serve as a 'bridge' between the individual and the State, enabling the contact of the former with the territory of the latter and, therefore, potentially the establishment of the jurisdictional link that is required to trigger the applicability of the ECHR. The key question is whether

10 Even though a minority of scholars argue in favour of the existence, in particular circumstances, of a right to entry in a given country. For a discussion on this topic see, *inter alia*, V Chetail, *International Migration Law* (Oxford 2019) 92–103; R Higgins 'The Right in International Law of an Individual to Enter, Stay in and Leave a Country' (1973) 3 *International Affairs* 341–357.

11 *Muhammad and Muhammad v Romania* App no 80982/12 (ECtHR, 15 October 2020), para 91.

12 *Çonka v Belgium* App no 51564/99 (ECtHR, 5 February 2002), para 60.

13 *N.D. and N.T. v Spain* App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020), para 187.

14 *Hirsi Jamaa and Others v Italy* App no 27765/09 (ECtHR, 23 February 2012), paras 169–82; *M.A. and Z.R. v Cyprus* App no 39090/20 (ECtHR, 8 October 2024), para 63.

15 See, among many others, *M.A. and Others v Lithuania* App no 59793/17, (ECtHR, 11 December 2018, para 70; *M.K. and Others v Poland* App nos 40503/17 and 2 others (ECtHR, 23 July 2020), paras 129–132; *D.A. and Others v Poland* App no 51246/17 (ECtHR, 8 July 2021), para 33.

the ECHR provides for *a right* to obtain an entry visa¹⁶ to access the territory of a given State party in order to exercise, once arrived there, the rights and freedoms set out in the Convention.¹⁷

Before embarking on the analysis of the Court's approach to this issue, one must first and foremost note that, since its early case-law, the ECtHR has made it very clear that, when dealing with immigration, it must take into account that 'as a matter of well-established international law and subject to its treaty obligations, a State has the right to control the entry of non-nationals into its territory'.¹⁸ This assumption has consolidated over the years, becoming like a mantra, a *leitmotif* of the Court's case-law, further adding that such a right extends to control of 'the entry, residence and expulsion of aliens'.¹⁹ In the light of this principle, the Court has consistently held that '[t]he Convention does not guarantee the right of an alien to enter or to reside in a particular country'²⁰ and that '[t]he corollary of a State's right to control immigration is the duty of aliens [...] to submit to immigration controls and procedures and leave the territory of the Contracting State when so ordered if they are lawfully denied entry or residence'.²¹ Moreover, the Court has also clarified that the breadth of the Convention obligations must be determined by taking into account that immigration control is a legitimate aim,²² which serves the general interests of the economic well-being of a country and in respect of which, therefore, a wide margin of appreciation is usually allowed to the States parties.²³

16 For a definition, see, for example, case no C-157/79, *Regina v Pieck*, [1980] EU:C:1980:179, para 10: 'the phrase "entry visa or equivalent requirement" covers any formality for the purpose of granting leave to enter the territory of a Member State which is coupled with a passport or identity card check at the frontier, whatever might be the place or time at which that leave is granted and in whatever form it might be granted'.

17 For an early attempt to identify a right to enter a State's territory in order to seek asylum there (an interpretation subsequently expressly rejected by the ECtHR), see G Noll, 'Seeking Asylum at Embassies: A Right to Entry under International Law?' (2005) 3 International Journal of Refugee Law 42.

18 *Abdulaziz, Cabales and Balkandali v the United Kingdom* [Plenary] App no 9214 and 2 others (ECtHR, 28 May 1985), para 67.

19 *Hirsi Jamaa and Others v Italy* App no 27765/09, para 113; *Ilias and Ahmed v Hungary* App no 47287/15 (ECtHR, 21 November 2019), para 125; *Mansouri v Italy* (dec.) App no 63386/16, (ECtHR, 29 April 2024), para 113.

20 *Nunez v Norway* App no 55597/09 (ECtHR, 28 June 2011), para 66; *Alneel v Norway* (dec.) App no 14368/22 (ECtHR, 3 April 2025), para 59.

21 *Jeunesse v the Netherlands* App no 12738/10, (ECtHR, 3 October 2014), para 100.

22 *M.A. v Denmark* App no 6697/18 (ECtHR, 9 July 2021), para 142.

23 *Biao v Denmark* App no 38590/10 (ECtHR, 24 May 2016), para 117. On the very wide role of the Court's doctrine of the margin of appreciation in respect to migration issues, see B Mac Crorie and G Santomauro, 'The Margin of Appreciation of States in the European Convention on Human Rights and Additional Protocol No. 15', in D Moya and G Milios (eds.), *Aliens before the European Court of Human Rights. Ensuring Minimum Standard of Human Rights Protection* (Leiden 2021) 249.

Decades of this approach have shaped a solid body of jurisprudence that, in immigration matters, is unequivocally marked by a State-centric perspective. Such an approach, or ‘Strasbourg reversal’,²⁴ inevitably influences the entire Court’s case-law also with regard to the question of whether Member States might be under an obligation, for some reason, to issue entry visas in order to allow aliens to enter their territories. As we will see, the relevant case-law shows that, while no such obligation exists in respect of aliens who have no connection at all with the requested State (Section 2), it might arise in respect of aliens who have private or family life connections within the territory of the requested State (Section 3). In other situations, while the Convention does not impose as such an obligation, the possibility of obtaining visas is assessed by the Court as a condition for ruling on the legitimacy of other measures adopted by the State in the field of the control of migration (Section 4).

11.2 The Non-Existence of a Universal Human Right to Obtain an Entry Visa

The relevant case-law shows that the ECHR does not set out any general or universal human right for aliens to obtain entry visas, in the absence of any connecting factor with the requested State, and even when the request is grounded on relevant reasons, including humanitarian ones. The cornerstone of the migration-related jurisprudence steadfastly rests on the States’ sovereign prerogatives to control entry into their national territory.²⁵

This assumption was made crystal clear even before the Court came into operation. The European Commission on Human Rights (ECmHR or the Commission), indeed, affirmed it already back in 1957, in *X v Sweden*, probably the first case involving a request for a visa as an instrumental means to exercise a right safeguarded by the ECHR.²⁶ In this case the applicant, a Polish national residing in Germany, wished to enter Sweden, where his wife was living with their son and where she had commenced a suit for divorce before the Stockholm court. The applicant was denied a visa to enter Sweden and, consequently, he could not take part in the proceedings for the couple’s reconciliation, nor in the subsequent lawsuit, following which the judicial separation was pronounced, together with the decision to grant the

24 *Dembour* (n 8) 4. The ‘Strasbourg reversal’ theory points to the fact that, in the migration-related case-law, the Court applies ‘a problematic logical inversion from a human rights perspective’, in the sense that ‘the Court conceives of the rights guaranteed in the Convention as exceptions which temper the general principle of state sovereignty regarding migration control, rather than the Court conceiving the state control prerogative as tempering human rights norms which would themselves be the foundational principle’.

25 N. Hayir ‘Non-Member Migrants in Spaceless Zones: The Spatial Membership Frame of Embassies and Consulates in the European Court of Human Rights (2025) 29 *The International Journal of Human Rights* 1–23.

26 *X v Sweden* App no 172/56 (ECmHR, decision of inadmissibility of 20 December 1957).

child's custody in favour of the mother. In the applicant's view, the Swedish authorities' refusal to grant him a visa had resulted in the impossibility of appearing in person before the Stockholm court, in breach of the right to a fair trial enshrined in Article 6 ECHR; and, as a further consequence, in the loss of his child's custody, in breach of the right to family life guaranteed by Article 8 ECHR.²⁷ If the visa had been granted, would the family's fate have been different? Would the couple have reconciled, and would their son have lived his youth under one roof with both parents? We do not know that, of course. All we know is what the Commission, when dismissing the application, very plainly explained: 'in respect of the applicant's complaint that he was cut off from his wife and child by being denied entry into Sweden, the right to enter a country is not, as such, included among the rights and freedoms set forth in the Convention'.²⁸

This categorical *closure* of the respondent State's door to aliens finding themselves outside the territory and wishing to reach it to exercise the Convention rights has been coherently and consistently reiterated in the subsequent case-law of the Court.

For example, in the case of *Demir*, the Court dealt with the argument that Article 2 of Protocol No. 4 to the Convention had been breached because of the French authorities' dismissal of a visa request in order to undertake medical treatment in France. The Court noted that this provision guarantees, in its first paragraph, the right to freely circulate within the State's territory and, in its second paragraph, the right to leave any country. Accordingly, the Court considered that it does not confer a right to obtain a visa allowing a person to enter and stay in a given State, with the consequence that one cannot rely on this provision to challenge the refusal of domestic authorities to grant a visa.²⁹

The subsequent case of *Abdul Wahab Khan v the United Kingdom* concerned a Pakistani national who had been living in the UK on the basis of a student visa, but who had voluntarily left the country after having been arrested on terrorism suspicions. While he was living in Pakistan, the UK Secretary of State cancelled the applicant's leave to remain in the country on national security grounds. The applicant appealed the decision before the competent domestic courts, but his claims were dismissed. Before the ECtHR, he complained that the decision not to (re)admit him on British territory had exposed him to the risk of ill-treatment in Pakistan, in alleged breach of Articles 2 (the right to life) and 3 (the prohibition of torture and inhuman and degrading treatment) of the Convention, and that the cancellation of his leave to remain had breached

27 Ibid, 212, in the Applicant's submission, he was 'unable to present himself in Sweden because of the negative attitude adopted towards him by the Swedish immigration authorities, who refused him an entry visa, although he had clearly stated the reason why he required to enter Sweden'.

28 Ibid, 215.

29 *Demir v France* App no. 3041/02 (ECtHR, 4 April 2006) para 23.

Article 8 (the right to private life), given the strength of his private life in the UK. The Court, however, noted that the applicant was not under the UK's jurisdiction, given that he had returned voluntarily to Pakistan, and that neither of the two principal exceptions to territorial jurisdiction applied,³⁰ since he was not complaining about acts of British diplomatic and consular agents in Pakistan and that he remained free to go about his life in the country without any control by UK agents.³¹ In this respect, the Court further held that 'there is no principled reason to distinguish between, on the one hand, someone who was in the jurisdiction of a Contracting State but voluntarily left that jurisdiction and, on the other, someone who was never in the jurisdiction of that State'. It also clarified that the Convention does not entail an 'unlimited obligation on Contracting States to allow entry to an individual who might be at real risk of ill-treatment contrary to Article 3, regardless of where in the world that individual might find himself', and that '[t]he same is true for similar risks of detention and trial contrary to Articles 5 and 6 of Convention'.³² Lastly, the Court considered that a jurisdictional link could not be established on the mere basis of the fact that the applicant had instituted proceedings against the decision to cancel his leave to enter the territory.³³

More recently, in the case of *M.N. and Others v Belgium*, the Court dealt with an application lodged by a Syrian family who, having fled Aleppo because of the (then) ongoing war, had travelled to the Belgian embassy in Beirut, where they had submitted a visa application aimed at obtaining leave to enter the Belgian territory with the purpose of claiming asylum there. The authorities had dismissed the request, noting that the conditions for obtaining the 'humanitarian visa' requested by the applicants had not been met.³⁴ The applicants impugned the dismissal before the competent Belgian courts, and eventually obtained a judgment ordering the Belgian State to issue them with

30 As explained above (see *supra*, Section 1), those exceptions are either the 'territorial' model of extraterritorial jurisdiction (where the State exercises effective control over a territory), or the 'personal' model (where the State exercises authority and control over a person abroad).

31 *Abdul Wahab Khan v the United Kingdom* (dec.) App no 11987/11 (ECtHR, 28 January 2014), para 25.

32 *Ibid*, para 27.

33 *Ibid*, para 28: 'The mere fact that the applicant availed himself of his right to appeal against the decision to cancel his leave to remain has no direct bearing on whether his complaints relating to the alleged real risk of his ill-treatment, detention and trial in Pakistan fall within the jurisdiction of the United Kingdom'.

34 In particular, the type of visa requested by the applicants is regulated under EU Law, namely the EU Visa Code (Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas), which, under Article 25, §. 1, letter a), provides for the issuance of a visa with limited territorial validity (i.e. valid only in the territory of the issuing State) due to humanitarian grounds. These visas are intended only for persons wishing to travel for a short period of time (no more than three months) to the territory of a Schengen State for reasons beyond their control, such as the illness or death of a relative, and who had no intention of settling permanently in the State in question.

the visas. The domestic court considered that, in the applicants' circumstances, the refusal to grant them a visa would have potentially entailed serious repercussions in the light of Article 3 ECHR. However, the judgment was not enforced, notwithstanding the applicants' attempts in this respect, including by lodging further enforcement proceedings.

Before the ECtHR, they mainly complained that the Belgian authorities' refusal to issue them with 'humanitarian visas' had exposed them to risk of ill-treatment, in breach of Article 3 ECHR, with no possibility of remedying it effectively, as required by Article 13 ECHR. However, the Court, sitting as the judicial formation of Grand Chamber, considered that the applicants could not invoke the protection set out in Article 3 of the Convention, since they were not under Belgium's jurisdiction for the purpose of Article 1 ECHR. In this respect, the Court admitted that, in ruling on the applicants' visa applications, the Belgian authorities had taken decisions concerning the conditions for entry to Belgian territory and, in so doing, 'exercised public power'; however, the Court considered that this was not enough since, according to its well-established case-law, '[t]he mere fact that decisions taken at national level had an impact on the situation of persons resident abroad is also not such as to establish the jurisdiction of the State concerned over those persons outside its territory'.³⁵ In the Court's view, it was necessary to assess whether there were other links capable of justifying the conclusion that Belgium exercised authority and control over the applicants. However, the Court noted that the applicants had never been within Belgium's national territory and had not claimed to have any pre-existing ties of family or private life with that country;³⁶ that the Belgian authorities had never exercised any kind of control in Syrian or Lebanese territory;³⁷ and that the mere consular function of receiving and issuing visas did not amount to exercising jurisdiction, since the agents of the embassy had not exercised any control over the applicants, who 'freely chose to present themselves at the Belgian embassy in Beirut, and to submit their visa applications there – as indeed they could have chosen to approach any other embassy; [and that] they were then free to leave the premises of the Belgian embassy without any hindrance'.³⁸ Lastly, the Court clarified that the mere fact of having brought proceedings at the domestic level with a view to securing the applicants' entry into Belgium could not establish a jurisdictional link, given that those were 'administrative proceedings brought at the initiative of private individuals who have no connection with the State concerned except for proceedings which they themselves freely initiated, and without the choice of this State, namely Belgium, being imposed by any treaty obligation'.³⁹

35 *M.N. and Others v Belgium* (dec.) App no 3599/18 (ECtHR, 5 May 2020), para 112.

36 *Ibid.*, para 115.

37 *Ibid.*, para 116.

38 *Ibid.*, para 118.

39 *Ibid.*, para 122.

In this regard, it must be noted that there was some support in the international practice for the applicants' argument according to which, in exercising the State's function of border control through consular agents, in respect of which the State had 'full, exclusive and uninterrupted authority',⁴⁰ the State was exercising jurisdiction. In particular, according to the *functional* model of extraterritorial jurisdiction,⁴¹ a State would be under a treaty obligation where it 'can reasonably have the power to control the enjoyment of the alleged victims' rights'.⁴² For example, the UN Human Rights Committee applied the said model to hold that States have a positive obligation to take measures 'having a direct and reasonably foreseeable impact on the right to life of individuals outside their territory'.⁴³ However, although it has sometimes implicitly acknowledged such a functional model,⁴⁴ in *M.N. and Others* the Grand Chamber expressly rejected a similar approach, observing that it would have established a nearly universal obligation for European States to issue humanitarian visas to whoever finds themselves in danger wherever in the world:⁴⁵

to find otherwise would amount to enshrining a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, and therefore to create an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction [...]. If the fact that a State Party rules on an immigration application is sufficient to bring the individual making the application under its jurisdiction, precisely such an obligation would be created. The individual in question could create a jurisdictional link by submitting an application and thus give rise, in certain scenarios, to an obligation under Article 3 which would not otherwise exist. Such an extension of the Convention's scope of application would also have the

40 Ibid, para 85.

41 L. Acconciamezza, 'The Case-Law of the ECtHR in the Light of the Principle of Systemic Harmonisation' in P. Czech, L. Heschl, K. Lucas, M. Nowak and G. Oberleitner (eds), *European Yearbook on Human Rights* (Intersentia 2021) 569, 575.

42 C. Danisi, 'Delving into Extraterritorial Jurisdiction in the European Court of Human Rights' Decision on Humanitarian Visa' (2020) Quaderni di SIDIBlog 285, 293.

43 *A.S. et al v Italy*, UN Doc. CCPR/C/130/D3042/2017 (UN Human Rights Committee, 4 November 2020).

44 See, for example, *Carter v Russia* App no 20914/07 (ECtHR, 21 September 2021), para 161, where the Court considered that the administration of poison to an individual by the State's agents abroad 'amounted to the exercise of physical power and control over his life in a situation of proximate targeting'.

45 This argument had been specifically advanced by 11 States Parties to the Convention (the Czech Republic, Croatia, Denmark, France, Germany, Hungary, Latvia, the Netherlands, Norway, Slovakia and the UK) which had intervened as third parties in the proceedings (*M.N. and Others v Belgium* App no 3599/18, paras 86–90).

effect of negating the well-established principle of public international law, recognised by the Court, according to which the States Parties, subject to their treaty obligations, including the Convention, have the right to control the entry, residence and expulsion of aliens.⁴⁶

Therefore, while clarifying that its finding was not aimed at prejudicing ‘the endeavours made by the States Parties to facilitate access to asylum procedures through their embassies and/or consular representations’,⁴⁷ the Court concluded that the applicants were not, for the purposes of the Convention, under Belgium’s jurisdiction.

The applicants further alleged a violation of Article 6 ECHR, which guarantees the right to a fair trial, in the light of the impossibility to obtain the enforcement of the domestic judgment which had ordered the State to issue them with the visas. In this respect, it must be recalled that, for the said provision to be applicable, it is necessary to ascertain whether the right claimed is ‘civil’ within the autonomous Convention-meaning,⁴⁸ and that the Court has consistently held that every decision concerning immigration and the entry, residence and removal of aliens does not concern a ‘civil’ right.⁴⁹ Accordingly, in *M.N. and Others* the Grand Chamber found that the proceedings in question, concerning the issuance of a visa, could not be considered civil in nature.⁵⁰ It admitted that the proceedings subsequently brought by the applicants did not concern the issuance of the visas themselves, but the domestic authorities’ failure to enforce the judicial decision which had ordered them to issue the visas, but considered that ‘the object of those proceedings was solely to continue the proceedings challenging the merits of the authorities’ decisions refusing to issue the visas’,⁵¹ and that they ‘shared the same nature as the procedure for granting the visas requested by the applicants’.⁵² Accordingly, the Court concluded that Article 6 was not applicable.

As a result, the ECHR does not confer any substantive or procedural right to aliens who find themselves outside a State’s territory, when those aliens, in the absence of any connection with that State, request a visa in order to enter its territory. On the one hand, the Convention cannot be invoked in order to

46 *M.N. and Others v Belgium* App no 3599/18, paras 123–124.

47 *Ibid*, para 126.

48 *Grzęda v Poland* App no 43572/18 (ECtHR, 15 March 2022), para 287.

49 *Maanouia v France* App no 39652/98 (ECtHR, 5 October 2000), para 40: ‘decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant’s civil rights or obligations or of a criminal charge against him [or her], within the meaning of Article 6 para 1 of the Convention’; *Mamatkulov and Askarov v Turkey* App nos 46827/99 and 46951/99 (ECtHR, 4 February 2005), para 82.

50 *M.N. and Others v Belgium* App no 3599/18, para 137.

51 *Ibid*, para 138.

52 *Ibid*, para 139.

oblige the domestic authorities to issue such a visa and, on the other hand, the judicial proceedings concerning whether such a visa should or should not be issued are not covered by the procedural protection set out in the Convention itself.

The said approach is in line with that of the Court of Justice of the European Union, which in 2017, in a factually similar case, held – sitting, once again, in its highest judicial formation of Grand Chamber – that the issuing of long-stay visas (such as those intended to reach the EU and then apply for asylum there) falls solely within the scope of the Member States' national law (since, as EU law currently stands, no measure had been adopted by the EU legislature with regard to the conditions governing the issue by Member States of long-term visas and residence permits on humanitarian grounds).⁵³

An opposite theory, in the sense of the existence of an actual obligation for States to issue visas in favour of individuals being in life-threatening situations, had been sustained in both the European Courts. In the above-mentioned case before the EU Court of Justice, Advocate General Paolo Mengozzi supported this view.⁵⁴ Before the ECtHR, this position was advocated by Judge Pinto de Albuquerque, in the case of *Hirsi Jamaa and Others v Italy*.⁵⁵ However, as shown above, these attempts to theorise a *positive obligation* to issue, under certain conditions, visas in favour of aliens finding themselves outside States' jurisdiction have failed. As things stand, the European Grand Chambers consider that, although some minimum procedural safeguards – notably, the need for an individualised assessment, the right to a reasoned decision and the right to effective remedies – are provided under EU law,⁵⁶ the decision as to whether to issue a visa rests within States' sovereign prerogatives, which remain very reluctant to accept international and EU obligations in this matter.⁵⁷

An additional trend is observable with regard to European States' attempts to escape their ECHR obligations by delegating their public functions to third

53 C-638/16 PPU, *X and X v Belgium*, [2017] EU:C:2017:173.

54 Opinion of Advocate General Mengozzi, delivered on 7 February 2017, *X and X v Belgium*, case C-638/16 PPU, para 174.

55 *Hirsi Jamaa and Others v Italy* App no 27765/09, concurring Opinion of Judge Pinto de Albuquerque: 'States cannot turn a blind eye to an evident need for protection. For instance, if a person in danger of being tortured in his or her country asks for asylum in an embassy of a State bound by the European Convention on Human Rights, *a visa to enter the territory of that State has to be granted*, in order to allow the launching of a proper asylum procedure in the receiving State. This will not be a merely humanitarian response, deriving from the good will and discretion of the State. A *positive duty to protect* will then arise under Article 3. In other words, a country's visa policy is subject to its obligations under international human rights law'.

56 Cases C-225/19 and C-226/19, *Minister van Buitenlandse Zaken (R.N.N.S. and K.A.)*, [2020] EU:C:2020:951.

57 FL Gatta 'Politica dei Visti e Stato di Diritto: Il Difficile Equilibrio tra Sovranità e Garanzie Procedurali nella Giurisprudenza della Corte di Giustizia' (2021)1 *European Papers* 599, 617.

States, such as border control and prevention of irregular entry in their national territory. The reality shows an increasing recourse to collaboration with key partners, third countries geographically located at the core of migratory flows to Europe, with which States party to the ECHR actively cooperate in migration-related matters. These ‘gatekeepers’ are mandated with tasks and functions which might have a direct and significant impact on aliens’ and migrants’ rights and freedoms. In this respect, the Court has formally and generally reiterated that ‘notwithstanding the right of States to establish their own immigration policies, problems with managing migratory flows cannot justify having recourse to practices which are incompatible with their obligations under the Convention’.⁵⁸ The Court, furthermore, highlighted the ‘risks associated with the implementation of this outsourcing policy’ and called ‘on States to fulfil their obligations under public international law’.⁵⁹ However, as the recent case-law shows, apart from such general remarks, although they might sound positive and encouraging, the Court declared itself incompetent to deal with these issues, refraining to ‘interfere’ with States’ externalisation of border control practices. It thereby confirmed that States retain (at least under the Convention) their power to design policies to control migration which escape their human rights obligations and cannot, on the basis of those very same obligations, be obliged to allow aliens to enter their territories.

11.3 Entry Visas as a Pre-Condition for Exercising Certain Convention Rights in Specific Circumstances

The situation is different where an alien is attracted within the State’s jurisdiction either because he or she is already on the territory or because he or she has some connecting factors (mainly family ties) with that territory. In a similar scenario, the Court’s case-law admits that States may, under certain circumstances, be required to allow the entry of an individual when such entry is a pre-condition for his or her exercise of certain Convention rights, in particular the right to respect for family life, set out in Article 8 of the Convention. However, the Court specified ‘that positive obligation rests, in large part, on the fact that one of the family members/applicants is already in the Contracting State and is being prevented from enjoying his or her family life with their relative because that relative has been denied entry to the Contracting State’.⁶⁰ In this sense, the Court made clear that ‘family reunification is about the interests of insiders (citizens and permanent residents) to be joined by their migrant

58 *S.S. and Others v Italy* App no 21660/18 (ECtHR, 20 May 2025), para 111, in which the Court considered that it had no jurisdiction to deal with the applicants’ allegations that they had been subjected to a so-called *refoulement* by proxy, given that the Italian authorities had responded to a call from them, while in distress at sea, by delegating the search and rescue operation to the Libyan coast guard, which had subsequently pulled them back to Libya.

59 *Ibid*, para 110.

60 *Abdul Wahab Khan v the United Kingdom* App no 11987/11, para 27.

partners, and not outsiders (migrant partners) who want to be admitted',⁶¹ irrespective of whether the 'insiders' are the applicants to the Court or not.

That obligation was envisaged in *Abdulaziz, Cabales and Balkandali*, the very first case in which the Court was required to assess whether the right to family life could be invoked in order to identify a State's obligation to admit to its territory relatives (in that case, the husbands) of settled migrants. However, in that case the Court further added that the duty imposed by such provision 'cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by married couples of the country of their matrimonial residence and to accept the non-national spouses for settlement in that country'.⁶² Having observed that the applicants had contracted marriage only after having settled in the UK, and that they had not shown that there were obstacles to establishing family life in their own or their husbands' home countries, the Court considered that the applicants could have known, when they decided to marry, that their husbands would have required leave to enter the British territory and that this could have been refused. Accordingly, the Court concluded that there had been no breach of the applicants' right to respect for their family life. However, the Court found a violation of Article 8, in conjunction with Article 14 of the Convention, since the domestic legislation entailed that it was easier for a man settled in the country than for a woman in the same situation to obtain permission for their non-national spouse to enter or to remain in the country for settlement, considering that this amounted to discrimination on the ground of sex.⁶³

As the subsequent case-law clarified, in these types of cases, the relevant question is whether the domestic authorities are under a positive obligation to grant an alien leave to enter and reside in the State's territory in order to enable him or her to maintain and develop family life in that territory.⁶⁴ In this respect, the Court held that, while the Convention does not entail a general obligation to authorise family reunification of migrants, a similar obligation might arise on the basis of the specific circumstances of the case:

Article 8 does not entail a general obligation for a State to respect immigrants' choice of the country of their residence and to authorise family reunion in its territory. Nevertheless, in a case which concerns family life as well as immigration, the extent of a State's obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest [...]. Factors to be taken into account in this context are the

61 B de Hart, 'Love Thy Neighbour: Family Reunification and the Rights of Insiders' (2009) 1 European Journal of Migration and Law 235, 235.

62 *Abdulaziz, Cabales and Balkandali v the United Kingdom* App no 9214 and 2 others, para 68.

63 *Ibid*, para 82–83.

64 *Ahmut v the Netherlands* App no 21702/93 (ECtHR, 28 November 1996), para 63.

extent to which family life is effectively ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of one or more of them and whether there are factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion.⁶⁵

Recently, the Grand Chamber of the Court made some important clarifications.⁶⁶ On the one hand, it acknowledged its ‘reluctan[ce] to find that there was a positive obligation on the part of the member State to grant family reunification when one or several of the following circumstances [...] were present’.⁶⁷ (i) family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host State would from the outset be precarious; (ii) the person requesting family reunification had limited ties to the host country, which by implication was usually the case, when he or she had only stayed there for a short time, or stayed there illegally;⁶⁸ (iii) there were no insurmountable obstacles in the way of the family living in the country of origin of the person requesting family reunification; and (iv) the person requesting family reunification (the sponsor) could not demonstrate that he or she had sufficient independent and lasting income, other than welfare benefits, to provide for the basic cost of subsistence of his or her family members.

On the other hand, the Grand Chamber admitted to be ‘prepared to find that there was a positive obligation on the part of the member State to grant family reunification when several of the following circumstances [...] were cumulatively present’.⁶⁹ (i) the person requesting family reunification had achieved settled status in the host country or had strong ties with that country; (ii) family life had already been created when the requesting person achieved settled status in the host country; (iii) both the person requesting family reunification and the family member concerned were already staying in the host country; (iv) children were involved, since their interests must be afforded significant weight; and (v) there were insurmountable or major

65 *Nunez v Norway* App no 55597/09, para 70; *Butt v Norway* App no 47017/09 (ECtHR, 4 December 2012), para 78; *Jeunesse v the Netherlands* App no 12738/10, para 107.

66 For a critical position against the excessively restrictive approach of the Court on this matter, see G Milios, ‘The Immigrants’ and Refugees’ Right to “Family Life”: How Relevant are the Principles Applied by the European Court of Human Rights?’ (2018) 3 *International Journal of Minority and Group Rights*, 40.

67 *M.A. v Denmark* App no 6697/18, para 134.

68 In this regard, the Court noted that to date there have been no cases in which the Court has found an obligation on the part of the member State to grant family reunification to an alien, who had only been granted a short-term residence or temporary residence permit, with a family member who had not entered the host country.

69 *M.A. v Denmark* App no 6697/18, para 135.

obstacles in the way of the family living in the country of origin of the person requesting family reunification.

From a procedural point of view, the Court held that, while it might be accepted that the issuing of visas to those entitled to obtain them is not automatic, the relevant decision-making processes must offer sufficient guarantees of flexibility (for instance in relation to the use and admissibility of evidence of the existence of family ties), promptness and effectiveness in order to secure the right to family life and, in particular, cannot last too long.⁷⁰ Moreover, such a procedure must allow ‘an individualised fair-balance assessment of the interest of family unity in the light of the concrete situation of the persons concerned’,⁷¹ taking into account the situation in the country of origin, with a view to determining the actual prospect of return there or the likely duration of obstacles thereto.⁷²

One of the salient issues concerns the existence of a sufficiently strong ‘family tie’ between the alien living on the territory of the State and the alien who requests an entry visa in order to maintain and develop there his or her family life. Of course, the relationship created by a genuine marriage, irrespective of cohabitation, and the relationship with the children born of such union, are regarded as family life.⁷³ The same applies to same-sex partners.⁷⁴ However, ‘marriages of convenience’ do not attract the application of Article 8 and, therefore, cannot be invoked for the purpose of family reunification.⁷⁵ By contrast, although admitting that the marriage of a minor could give rise to a family relationship, the Court considered that the domestic authorities could, with the purpose of combating forced marriage, subordinate the issuance of an entry visa and residence permit to the proof that the marriage was entered into voluntarily or to the reach of a statutory age requirement.⁷⁶

In any case, the possibility of obtaining entry in the territory of the State is ‘normally limited to the core family’, given that, according to the Court’s case-law, ‘there will be no family life between parents and adult children or adult siblings unless they can demonstrate additional elements of dependence, involving more than the normal emotional ties’.⁷⁷ Those ‘additional elements’, which must be assessed on the basis of all the facts occurring prior to the date

70 See *Tanda-Muzinga v France* App no 2260/10 (ECtHR, 10 July 2014), para 82, and *Senigo Longue and Others v France* App no 19113/09 (ECtHR, 10 July 2014), where procedures which lasted, respectively, three years and five months and six years, were considered excessive by the Court.

71 *B.F. and Others v Switzerland* App nos 13258/18 and 3 others (ECtHR, 4 July 2023), para 90.

72 *M.A. v Denmark* App no 6697/18, paras 192–193.

73 *Berrehab v the Netherlands* App no 10730/84 (ECtHR, 21 June 1988), para 21.

74 *Taddeucci and McCall v Italy* App no 51362/09 (ECtHR, 30 June 2016), para 98.

75 *Schembri v Malta* App no 66297/13 (ECtHR, 19 September 2017), para 53.

76 *Alneel v Norway* (dec.) App no 14368/22, para 70.

77 *Kumari v the Netherlands* (dec.) App no 44051/20 (ECtHR, 19 November 2024), para 35.

that the decision regarding the request for family reunification became final,⁷⁸ have been found to exist, for example, in respect of young adults who were still living with their parents and had not yet started a family of their own, also in the light of a situation of financial dependency,⁷⁹ or where adults had a physical or mental disability or illness of sufficient seriousness and were in need of constant care and support from other family members.⁸⁰ By contrast, the Court considered that less serious diseases, which did not fully incapacitate the person, were insufficient to establish a right to family reunification.⁸¹ Other elements that played a role in the Court's analysis of 'additional elements of dependency' in a migration context include, for example, the fact that the person with whom ties were claimed was the only surviving relation, or the fact that substantial links with the country of origin continued to exist; the presence of family members who can provide care - or other viable alternatives - in the country of origin or where the person requiring care and support lives may also be such an element.⁸²

As regards the formalities and conditions requested by the domestic laws of the Contracting States, they might vary in the light of the nature of the issues and the seriousness of the interests at stake.⁸³ In this respect, the Court clarified that 'the family unity is an essential right of refugees and that family reunion is an essential element in enabling persons who have fled persecution to resume a normal life' and, as a consequence, noted that 'there exists a consensus at international and European level on the need for refugees to benefit from a family reunification procedure that is more favourable than that foreseen for other aliens'.⁸⁴ Those conditions might differ depending on the situation. Accordingly, stricter conditions (such as waiting periods) might be admitted for granting family reunification to aliens benefitting from subsidiary

78 *Martinez Alvarado v the Netherlands* App no 4470/21 (ECtHR, 10 December 2024), para 45. However, when one of the family members was a minor at the time the request for family reunification was lodged, the question of the existence of family life must be assessed on the basis of the situation as it obtained on that date, in order to avoid that a child 'ages out' pending the proceedings (*El-Ghatet v Switzerland* App no 56971/10 (ECtHR, 8 November 2016, para 51).

79 *Sevran v Denmark* (GC) App no 57467/15 (ECtHR, 7 December 2021), para 174.

80 See the abundant case-law cited in *Martinez Alvarado v the Netherlands* App no 4470/21, para 39, a case in which the Court considered that those elements existed in respect of an intellectually disabled man, fully dependent on the daily care of others, who accordingly was recognised as having a right to obtain family reunification with his adult sisters, all long-term residents of the Netherlands or Dutch citizens.

81 See the cases cited in *Kumari v the Netherlands* (dec.) App no 44051/20, para 39, a case in which the Court considered that the mental distress caused by the premature death of a child was not sufficient in this respect.

82 See the cases summarised in ECtHR, *Martinez Alvarado v the Netherlands* App no 4470/21, para 43.

83 *M.A. v Denmark* App no 6697/18, para 140.

84 *Tanda-Muzinga v France* App no 2260/10, para 75; *M.A. v Denmark* App no 6697/18, para 53; *B.F. and Others v Switzerland* App nos 13258/18 and 3 others, paras 90 and 97–98.

protection rather than refugee status.⁸⁵ Similarly, the Court found that it was admissible for domestic legislation to provide that – as a condition for granting family reunification to refugees *sur place* (notably, those in respect of whom the grounds for their refugee status arose following their departure from their countries of origin and as a result of their own actions) – a requirement of non-reliance on social assistance, although it held that this condition had to be applied with a certain degree of flexibility and on the basis of an individualised assessment.⁸⁶

To conclude on the point, the Convention recognises some limited rights to aliens wishing to obtain leave to enter into the territory of a State. However, those rights are not autonomously conferred to those aliens, but rather appear to be instrumental to allow other individuals – citizens, settled migrants or refugees – to exercise their right to family life. This right, however, might be legitimately restricted by States on the basis of security concerns and financial interests.

11.4 Entry Visas as a Condition for the Legitimacy of Migration Control Measures

Much more often, in the Strasbourg case-law the possibility of obtaining an entry visa is not presented as a right of the person in question, but is rather assessed in order to rule on the question whether certain measures adopted by States in the field of migration control – notably collective expulsions (Section 4.1) and expulsions of settled migrants (Section 4.2) – are compatible with the requirements of the Convention.

11.4.1 Entry Visa Requests as an ‘Obligation’ for Aliens

Obtaining a visa to enter a given country is not a right *per se* protected by the Convention. On the contrary, applying for an entry visa may represent an *obligation* for aliens. The recent case-law in the field of migration and border control, indeed, shows that, in order for the applicant to be protected by some guarantees of the Convention, they must apply for a visa to be entitled to legally enter the territory of the respondent State. If they fail to do so, without a cogent reason, they might be excluded from the scope of protection of key

85 *M.A. v Denmark* App no 6697/18, para 153.

86 *B.F. and Others v Switzerland* Apps nos 13258/18 and 3 others, para 126. In *Dabo v Sweden* App no 12510/18 (ECtHR, 18 January 2024), the Court also accepted the imposition of a maintenance requirement in respect of refugees, taking into account that the domestic legislation admitted full or partial exception to this requirement on the basis of “special grounds”; in the same sense, *D.H. and Others v Sweden* App no 34210/19 (ECtHR, 25 July 2024) and *Okubamichael Debru v Sweden* App no 49755/18 (ECtHR, 25 July 2024); *S.F. v Finland* App no 35276/20 (ECtHR, 8 October 2024).

safeguards provided for under the ECHR, namely the prohibition of collective expulsion *ex* Article 4 of Protocol No. 4.

The ECtHR has introduced such an innovative requirement in the leading case *N.D. and N.T.*, concerning the applicants' push-back at the Spanish-Moroccan border of Melilla, a Spanish enclave located in the north of the African continent. While the Chamber, in its 2017 judgment, had unanimously found a violation of the prohibition of collective expulsion,⁸⁷ in 2020 the Grand Chamber overturned the decision, excluding a violation of Article 4 of Protocol No. 4.⁸⁸ The mismatch between the two judgments does not lie in a different understanding of the factual background of the case. The applicants had been collectively expelled without a prior individualised assessment of

87 *N.D. and N.T. v Spain* App nos 8675/15 and 8697/15 (ECtHR, 3 October 2017).

88 *N.D. and N.T. v Spain* (GC) App nos 8675/15 and 8697/15 (ECtHR, 13 February 2020).

The Grand Chamber's decision sparked very sharp criticism in the academic literature. For comments and analyses, see C Bosch Marsch, 'Backsliding on the Protection of Migrants' Rights? The Evolutive Interpretation of the Prohibition of Collective Expulsion by the European Court of Human Rights' (2021) 35(4) *Immigration, Asylum and Nationality L* 315–336; S Carrera, 'The Strasbourg Court Judgement *N.D. and N.T. v Spain*: A Carte Blanche to Push Backs at EU External Borders?' (2020/21) *EUI Working Paper RSCAS*; M Di Filippo, 'Walking the (Barbed) Wire of the Prohibition of Collective Expulsion: An Assessment of the Strasbourg Case Law' (2020) 2 *Diritti Umani e Diritto Internazionale* 479–509; C Hruschka, 'Hot Returns Remain Contrary to the ECHR: ND & NT before the ECHR' (2020) *EU Immigration and Asylum L and Pol* <<https://eumigrationlawblog.eu/hot-returns-remain-contrary-to-the-echr-nd-nt-before-the-echr/>> accessed 1 September 2025; A Lübke, 'The Elephant in the Room: Effective Guarantee of Non-Refoulement after ECtHR *N.D. and N.T.*' (19 February 2020) <<https://verfassungsblog.de/the-elephant-in-the-room/>> accessed 1 September 2025; N. Markard, 'A Hole of Unclear Dimensions: Reading ND and NT v. Spain' (2020) *EU Immigration and Asylum L and Pol* <<https://www.eumigrationlawblog.eu/a-hole-of-unclear-dimensions-reading-nd-and-nt-v-spain/>> accessed 1 September 2025; P Maximilian, D Schmalz, '"Unlawful" may not Mean Rightless: The Shocking ECtHR Grand Chamber judgment in case *N.D. and N.T.*' (14 February 2020) <<https://verfassungsblog.de/unlawful-may-not-mean-rightless/>> accessed 1 September 2025; C Oviedo Moreno, 'A Painful Slap from the ECtHR and an Urgent Opportunity for Spain' (14 February 2020) <<https://verfassungsblog.de/a-painful-slap-from-the-ecthr-and-an-urgent-opportunity-for-spain/>> accessed 1 September 2025; A Sardo, 'Border Walls, Pushbacks, and the Prohibition of Collective Expulsions: The Case of *N.D. and N.T. v. Spain*' (2021) 23(3) *European J of Migration and L* 308–331; L Riemer, 'The ECtHR as a Drowning 'Island of Hope'? Its Impending Reversal of the Interpretation of Collective Expulsion is a Warning Signal' (19 February 2019) <<https://verfassungsblog.de/the-ecthr-as-a-drowning-island-of-hope-its-impending-reversal-of-the-interpretation-of-collective-expulsion-is-a-warning-signal/>> accessed 1 September 2025; D Thym, 'A Restrictionist Revolution? A Counter-Intuitive Reading of the ECtHR's *N.D. & N.T.*-Judgment on "Hot Expulsions"' (2020) *EU Immigration and Asylum L and Pol* <<https://eumigrationlawblog.eu/a-restrictionist-revolution-a-counter-intuitive-reading-of-the-ecthrs-n-d-n-t-judgment-on-hot-expulsions/>> accessed 1 September 2025; R Wissing, 'Push Backs of "Badly Behaving" Migrants at Spanish Border are Not Collective Expulsions (But Might Still be Illegal Refoulements)' (25 February 2020) <<https://strasbourgothers.com/2020/02/25/push-backs-of-badly-behaving-migrants-at-spanish-border-are-not-collective-expulsions-but-might-still-be-illegal-refoulements/>> accessed 1 September 2025.

their personal situation from Spain to Morocco. Yet, the Grand Chamber reversed the verdict by introducing a brand-new exception to the prohibition of collective expulsion of aliens, based on the so-called ‘own culpable conduct’ of the applicants. Since they had not made use of the legal entry options made available by Spain, and had, on the contrary, attempted to cross the border in an unlawful, clandestine and violent manner, the protection offered by Article 4 of Protocol No. 4 could not be triggered, and the collective expulsion performed by Spanish authorities could be excused.

In designing this new exception, the actual possibility to request a visa to enter the respondent State’s territory played a significant role. The Grand Chamber relied, *inter alia*, on the circumstance that the applicants could have applied for an entry visa at one of the Spanish embassies, either in their countries of origin or in one of the countries they had travelled through. It further noted that Spain had bilateral *ad hoc* agreements in force with the applicants’ countries of origin for the issuance of special working visas.⁸⁹ Since the respondent State had made available means of legal entry, the applicants should have used them, instead of crossing the border irregularly.

The Court additionally clarified – and this is one of the most problematic points of the judgment – that the mentioned means of legal entry must be assessed in terms of their *actual accessibility* and *concrete usability*. After having made clear, on multiple occasions,⁹⁰ that States must ensure options for legal entry into the territory, the Grand Chamber indeed explains that its role is to ascertain ‘whether they were genuinely and effectively accessible to the applicants’.⁹¹ In the case at hand, the ECtHR concluded that Spain had fulfilled such a requirement, despite the significant and contrary evidence injected in the proceedings by authoritative third-party interveners (such as the UNHCR or the Council of Europe’s Commissioner for Human Rights), which had clearly pointed to the material inaccessibility for the applicants of the means of legal entry in question.⁹² The new requirement was thus assessed in a formalistic and abstract manner: the Court limited itself to ascertaining the *de jure* existence of legal means of entry, which were provided *on paper* under the pertinent Spanish legislation, refraining from evaluating the *de facto* availability of these very same legal avenues.⁹³

89 The Spanish Government produced various statistics in this respect, persuading the Court about the visa being a valid and usable entry option (cfr. para 228: ‘At the hearing before the Grand Chamber, the Government gave concrete figures showing that a considerable number of working visas had been issued to citizens of Mali and Côte d’Ivoire in the relevant period’).

90 Ibid, see para 201 and, similarly, paras 210, 211, 231, 242.

91 Ibid, para 211.

92 Ibid, para 218. For the Grand Chamber the abundant evidence provided by the third party interveners was ‘not conclusive’.

93 Against the evidence produced during the proceedings, the Grand Chamber plainly observed that ‘the Spanish consulate in Nador is only 13.5 km from Beni Enzar and hence from the

A similar approach has been maintained throughout the subsequent case-law on collective expulsions at land borders, where the Court has only made desultory considerations on the availability of means of legal entry, such as in the 2020 judgment in *M.K. and Others v Poland*.⁹⁴ In other cases, as in *Asady and Others v Slovakia*,⁹⁵ or in *M.H. and Others v Croatia*,⁹⁶ beside the accessibility of entry procedures at borders, the availability of ‘external’ legal avenues to enter the respondent State’s territory has also been addressed, including via embassies or consulates abroad. While in the former case this was done in a separate opinion, in the latter a more rigorous examination of the matter was carried out: significantly, the Court, following an assessment of the regularity of the Croatian border procedures, deepened the analysis of the legal accessibility to the territory by assessing, on its own motion, whether other options to enter Croatia from abroad were available, such as via the State’s embassy in Serbia, i.e. the intermediate country the applicants had transited in.⁹⁷ Although visas are not explicitly mentioned, these judgments somehow show the Court’s willingness to assess the actual possibility for the applicants to make use of legal options to enter the territory ‘from a distance’, i.e. by interacting with the competent State diplomatic missions and consulates abroad.

On the contrary, a direct assessment of visas as a feasible instrument to access the State territory has been carried out in *M.A. and Z.R. v Cyprus*.⁹⁸

location of the storming of the fences [of Melilla], and that ‘the applicants [...] could easily have travelled there’ (para 227).

94 *M.K. and Others v Poland* App nos 40503/17 and 2 others. For an analysis of the judgment, see U Brandl, P Czech, ‘A Human Right to Seek Refuge at Europe’s External Borders: The ECtHR Adjusts its Case Law in *M.K. v. Poland*’ (2020) EU Immigration and Asylum L and Pol <<https://eumigrationlawblog.eu/a-human-right-to-seek-refuge-at-europes-external-borders-the-ecthr-adjusts-its-case-law-in-m-k-vs-poland/>> accessed 1 September 2025; FL Gatta, ‘Systematic Push Back of ‘Well Behaving’ Asylum Seekers at the Polish Border: *M.K. and Others v. Poland*’ (7 October 2020) <<https://strasbourgobservers.com/2020/10/07/systematic-push-back-of-well-behaving-asylum-seekers-at-the-polish-border-m-k-and-others-v-poland/>> accessed 1 September 2025.

95 *Asady and Others v Slovakia* App no 24917/15 (ECtHR, 24 March 2020). See, in particular, the Joint Dissenting Opinion of Judges Lemmens, Keller and Schembri Orland, where it is remarked *a contrario*, by comparison with *N.D. and N.T. v Spain*, that Slovakia did not provide for a similar possibility of seeking international protection at diplomatic missions and consulates abroad (para 21).

96 *M.H. and Others v Croatia* App nos 15670/18 and 43115/18 (ECtHR, 18 November 2021).

97 *M.H. and Others v. Croatia* App nos 15670/18 and 43115/18, para 302: ‘Lastly, the Court notes that the Government have not argued that the applicants could have submitted an application for international protection in the Croatian embassy in Serbia. Thus, such a legal avenue should be regarded as not available in this case’.

98 *M.A. and Z.R. v Cyprus* App no 39090/20. For analyses of and comments on the judgment, see J Alpes, G Baranowska, ‘What’s beneath the iceberg in *M.A. and Z.R. v Cyprus*: The erasure of pushback evidence at borders’ (8 October 2024) <<https://blogs.law.ox.ac.uk/border-criminologies-blog/blog-post/2024/10/whats-beneath-iceberg-ma-and-zr-v-cyprus-erasure>> accessed 14 September 2025; I. Kienzle, J. Kießling, ‘Evidently Unlawful,

The case concerned two Syrian nationals, who, from an UNHCR-led refugee camp in Lebanon, tried to reach Cyprus via sea. They were intercepted by the Cypriot coast guard and summarily returned to Lebanon in application of a bilateral agreement on the informal repatriation of migrants. As the applicants were complaining, *inter alia*, of a violation of the prohibition of collective expulsion of aliens, the respondent Government invoked the abovementioned ‘own culpable conduct’ exception. It argued that the two Syrians had failed to apply for an entry visa, which would have enabled them to legally accede to Cyprus and then, once there, to apply for asylum. Having failed to do so, the applicants could not be protected by Article 4 of Protocol No. 4 due to their own culpable and negligent conduct.

This line of argumentation may resonate with the exception of the failed exhaustion of domestic remedies, a card that States typically play before the ECtHR. Indeed, going back to *N.D. and N.T. v Spain* and looking closer at the Grand Chamber’s judgment, one would discover that the missed request of a visa by the applicants had been invoked by the Spanish government exactly as a form of non-exhaustion of an available domestic remedy.⁹⁹ In such a case, the Grand Chamber did not formally equate an entry visa, or other means of legal entry into Spain, to a domestic, legal remedy, considering these procedures ‘as alternatives to illegal entry rather than as remedies’.¹⁰⁰ Regardless of the qualification, in *N.D. and N.T.* the applicants had nevertheless been ‘sanctioned’ for not having ‘exhausted’ those legal procedures.

If one considers the ‘duty’ to exhaust these means of legal entry, including applications for entry visas, the decisive point, crucially, becomes *how* this requirement has to be assessed. While in the Spanish case the Court limited itself to a formalistic check on whether an entry visa was an option available *in abstracto*, in *M.A. and Z.R. v Cyprus* it examined the actual accessibility *in concreto* of the same option in the light of the applicants’ particular circumstances, excluding its usability and effectiveness.

Such an approach reveals a pragmatic, flexible and human rights-oriented attitude, which can be found in the general method the Court adopts with the rule on (in)admissibility of an application due to the (non-)exhaustion of domestic remedies. If, on the one hand, this represents a common rule of international procedural law, on the other hand, the Court has tried to

yet Difficult to Evidence: *M.A. and Z.R. v. Cyprus* Advances Strasbourg’s Case Law on Pushbacks’ (22 October 2024) <<https://strasbourgobservers.com/2024/10/22/evidently-unlawful-yet-difficult-to-evidence-m-a-and-z-r-v-cyprus-advances-strasbourgs-case-law-on-pushbacks/>> accessed 14 September 2025.

⁹⁹ See the section of the judgment on the Government’s preliminary objections, under the heading ‘exhaustion of domestic remedy’, where, as the very first argument put forward by Spain, one can read: ‘In the Government’ submission, the two applicants could have tried to obtain entry visas for Spain in their respective countries of origin’ (*N.D. and N.T. v Spain* App nos 8675/15 and 8697/15, para 115).

¹⁰⁰ Para 120.

apply it with some degree of flexibility and without excessive formalism.¹⁰¹ In this respect, it takes realistic account, in addition to the formal and abstract existence of the remedy in the domestic legal system, also of the context and of the personal circumstances of the applicant.¹⁰² As a consolidated body of case-law shows, the only remedies that an applicant is required to exhaust are those that, among other requirements, are *sufficient* (i.e. sufficiently certain not only in theory but also in practice); *available* (i.e. in the sense that the applicant can avail themselves of it by the time they introduce the application); and *effective* (i.e. capable of providing means of redressing the alleged wrong).

By relying on a similar *rationale*, such an approach can be applied, *mutatis mutandis*, to cases of collective expulsions and to the requirement of the availability of means of legal entry into the respondent State's territory. In *M.A. and Z.R. v Cyprus*, thus, the Court 'absolved' the applicants from requesting an entry visa, since this was not an available and effective 'remedy' to be 'exhausted' before trying to enter the respondent State's national territory. The Court observed:

As regards the Government's arguments that the applicants could have entered Cyprus by lawful means, and that they could have applied for an entry visa, the Court notes that the nature of an entry visa, subject to financial and other requirements, *could not constitute a genuine and effective possibility for the present applicants* to submit their reasons (asylum) against expulsion, as required by Article 4 of Protocol No. 4.¹⁰³

In that case, applying for an entry visa was not a feasible option, given the applicants' peculiar circumstances: the two Syrians, because of the war, had fled their country of origin and were forced to live in a refugee camp without jobs or documentation.¹⁰⁴ As a consequence, the 'own culpable conduct' could not apply, and the collective expulsions of the applicants have been found to be in breach of the ECHR.

The approach applied in *M.A. and Z.R. v Cyprus*, ultimately, marks a welcome change in the *modus operandi* and *decidendi* in matters relating to

101 *Cardot v. France* App no 11069/84 (ECtHR, 19 March 1991), para 34. See, however, the recent decision in *Mansouri v. Italy*, specifically relating to migration and border control: *Mansouri v. Italy* (GC, decision of inadmissibility) App no 63386/16 (ECtHR, 29 April 2025). For a critique of the Court's approach with regard to the rule of the exhaustion of domestic remedies, see L. Acconciamezza, 'The Presumption of Effectiveness of Domestic Remedies in *Mansouri v. Italy*. How Far Can Subsidiarity Go in this Field?' (23 May 2025) <https://strasbourgobservers.com/2025/05/23/the-presumption-of-effectiveness-of-domestic-remedies-in-mansouri-v-italy-how-far-can-subsidiarity-go-in-this-field/> accessed 14 September 2025.

102 *Mikolajova v. Slovakia* App no 4479/03 (ECtHR, 18 January 2011), para 30.

103 *M.A. and Z.R. v Cyprus* App no 39090/20, para 118, emphasis added.

104 Paras 6 and 105.

collective expulsions of aliens and, most notably, in respect of the requirement of the availability and usability of legal entry avenues into the State territory. Indeed, since its introduction in the 2020 *N.D. and N.T.* Grand Chamber's judgment, such a condition has always been assessed exclusively from a formalistic and abstract perspective. The Court essentially kept looking only at the domestic legislation of the respondent State, in order to ascertain whether means of legal entry (including visas) were provided for, and if that was the case, the same means of legal entry became 'automatically' available for the applicants, who, for their part, consequently *had* to use and 'exhaust' them.

The turn in the Court's case-law has been recently confirmed in the case of *H.Q. and Others v Hungary*, where the Court dealt with the 'embassy procedure' originally designed by the Hungarian legislation to cope with the Covid-19 emergency. According to the Court, this procedure could not be considered a genuine means of legal entry, for several reasons. First, it required even aliens who had lawfully entered the territory, but subsequently intended to lodge an application for international protection, to leave the Hungarian territory and submit such a request at the Hungarian embassies in Kyiv or Belgrade.¹⁰⁵ Secondly, a genuine and effective examination of the requests was not guaranteed, thus leading to uncertainty, lack of transparency and the risk of arbitrary application.¹⁰⁶ Interestingly, the Court did not limit itself to finding that the 'one's culpable conduct' exception was inapplicable due to the lack of genuine means of legal entry. It also found a breach of the State's procedural obligations under Article 3 ECHR not to expel an alien without an individualised assessment as to the availability of an adequate asylum procedure in the destination country (in that case, Serbia).¹⁰⁷ The Court, thus, ordered the State to adopt general measures under Article 46 ECHR and considered that the domestic legislation in force:

upholds the same system of collective expulsions and denial of access to the asylum procedure which is incompatible with the guarantees enshrined in the Convention. Reiterating its findings regarding the ongoing failure of the respondent State to comply with the Convention [...], the Court stresses the urgent need for the Hungarian authorities to take immediate and appropriate measures to prevent any further instances of collective expulsions and ensure genuine and effective access to the international protection procedure for those seeking such protection.¹⁰⁸

105 *H.Q. and Others v Hungary* App nos 46084/21 and 2 others (ECtHR, 24 June 2025), paras 115 and 121.

106 *Ibid.*, para 120.

107 *Ibid.*, para 141.

108 *Ibid.*, para 164.

Although these developments do not entail a right to obtain a visa to enter a given State, they are to be welcomed, as they point to the necessity of a realistic, fact-based and coherent evaluation of the circumstances of the case, in order to assess whether an entry visa could have been a real option for the applicants wishing to enter the respondent State's territory and invoke the ECHR rights.

11.4.2 Entry Visa as a Requirement for the Proportionality of Expulsions of Settled Migrants

In another series of cases, the Court assessed whether an individual would be entitled to obtain an entry visa as a condition for ruling on the question whether the expulsion of a settled migrant from the territory of a State Party was compatible with Article 8 ECHR.

In this respect, the Court has consistently held that 'in pursuance of their task of maintaining public order, Contracting States have the power to expel an alien convicted of criminal offences'.¹⁰⁹ However, the expulsion of a settled migrant might, depending on the circumstances, entail an interference with his or her right to 'family life', on the basis of the existence of strict family relationships on the territory of the State in question,¹¹⁰ or right to 'private life', in the light of the degree of social and cultural inclusion in that State.¹¹¹ Accordingly, even if, on the one hand, 'a non-national holds a very strong residence status and has attained a high degree of integration, his or her position cannot be equated with that of a national when it comes to the [...] power of the Contracting States to expel aliens', 'there are circumstances where the expulsion of an alien will give rise to a violation of that provision'.¹¹² Those circumstances are to be assessed in the light of a series of criteria, such as the nature and seriousness of the crimes committed by the person in question and the solidity of the applicant's social, cultural and family ties with the host country and the country of destination. One of the relevant criteria is also the duration of a ban on re-entry which is issued together with the expulsion order.¹¹³

In some cases, it might be difficult to establish the right balance between, on the one hand, the interest in public and national security invoked by the State in order to justify an expulsion and, on the other hand, the strong family and private life relationships of the alien in question in the territory of the State from which he or she is going to be expelled. In those borderline cases, the Court has relied on the unlimited duration of a ban on re-entry as

¹⁰⁹ *Maslov v Austria* (GC) App no 1638/03 (ECtHR, 23 June 2008), para 68.

¹¹⁰ *Slivenko v Latvia* (GC) App no 48321/99 (ECtHR, 9 October 2003), para 94.

¹¹¹ *Ibid.*, para 95.

¹¹² *Üner v the Netherlands* (GC) App no 46410/99 (ECtHR, 18 October 2006), para 56.

¹¹³ *Khan v. Denmark*, App no 26957/19 (ECtHR, 12 January 2021), para 79.

a circumstance demonstrating the lack of proportionality of the measure or, by contrast, it has considered the limited duration of the exclusion measure to be a factor weighing in favour of its proportionality.¹¹⁴ An expulsion measure might be considered proportionate even in a situation where, in spite of the indefinite duration of that measure, possibilities remained for the applicants to enter the returning State, for example on the basis of a tourist visa.¹¹⁵

The possibility of obtaining, at the expiry of the ban on re-entry, an entry visa has been recently identified as a circumstance capable of determining whether the expulsion order of some long-term settled migrants was compatible with the rights enshrined in Article 8. In particular, the Court confirmed the legitimacy of the expulsion order where it considered that, in the light of the family relationships of the persons in question in the territory of the State, they had a reasonable prospect of obtaining, at the expiry of the exclusion period, an entry visa in order to enter into the territory of the State.¹¹⁶ In *Al-Habeeb v Denmark*, in particular, while the applicant contended that his prospect to re-enter Denmark remained purely theoretical (especially in the light of the very low chances of being granted a visa, being an Iraqi national with a significant criminal record), the respondent Government emphasised that ‘the status of a country belonging to a specific visa group [Iraq in that case] could also change over the years’.¹¹⁷ The Court was ready to accept such a possibility – however remote its actual capacity to materialise was – and unanimously excluded a violation of Article 8 ECHR.

By contrast, in the case of *Sharafane v Denmark*, it noted that, since the applicant had no spouse or partner in the territory of the State, he would not have been eligible for a residence permit on family, work or education grounds, and therefore his only possibility of re-entering the territory was on the basis of a request for an entry visa. However, on the basis of the Danish legislation of visa requirements for entering the territory, the requirements for obtaining a visa depended on the citizenship of the person applying.¹¹⁸ Being the applicant an Afghan national, the domestic legislation provided that he could be entitled to a visa only for ‘exceptional circumstances’, such as the death or terminal illness of a family member living in Denmark,¹¹⁹ as also demonstrated by the available statistics.¹²⁰ Accordingly, the Court considered that, even after the expiry of the six-year ban on re-entry imposed on the applicant, the possibility for him of re-entering the territory of the State remained ‘purely theoretical’

114 *Savran v Denmark* (GC) App no 57367/15 (ECtHR, 7 December 2021), para 199.

115 *Vasquez v Switzerland* App no 1785/08 (ECtHR, 26 November 2013), para 50.

116 *Al-Habeeb v Denmark* App no 14171/23 (ECtHR, 12 November 2024), para 73; *Savuran v Denmark* App no 3645/23 (ECtHR, 12 November 2024), para 40; *Winther v Denmark* App no 9588/21 (ECtHR, 12 November 2024).

117 *Al-Habeeb v Denmark* App no 14171/23, para 47.

118 *Sharafane v Denmark* App no 5199/23 (ECtHR, 12 November 2024), para 67.

119 *Ibid*, para 68.

120 *Ibid*, para 70.

and that, accordingly, he had been actually imposed a *de facto* permanent ban on re-entry, which made the expulsion order disproportionate.¹²¹

11.5 Conclusion

In the ECHR system there seems to be little room for successfully claiming a ‘right’ to obtain a visa, in order to enter a Contracting State and exercise, once on its territory, the rights and freedoms guaranteed under the Convention. The Strasbourg human rights machinery is, and remains, steadfastly based on the territorial-jurisdictional condition of applicability as per Article 1 ECHR. An alien who is outside Europe, therefore, is excluded from the scope of protection of the Convention.

The entire body of the ECtHR’s migration-related case-law is permeated by the ‘untouchable’ premise of the legitimacy and importance of border controls¹²² and limitations of migratory flows.¹²³ It is true that the Court has recently made it clear that ‘[w]hile [...] tackling abuse of the asylum system and combating migrant smuggling are indeed legitimate objectives, [...] the problems which States may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the Protocols thereto’.¹²⁴ However, episodic statements of care and concern about migrants’ and asylum seekers’ rights cannot overturn decades of steady and solid deference to States’ sovereignty in the area of border surveillance and control of the national territory. States’ security concerns and their plans to reduce irregular migratory flows weigh a lot more in the Court’s assessment of whether the Convention rights and freedoms have been respected in migration cases. This applies also to those situations in which providing aliens with an entry visa might be the very crucial and sole condition to concretely safeguard their human dignity and essential human rights.

In some limited circumstances the Court might call States to establish – although in a rather vague and abstract manner – safe and legal means of legal access to their territories.¹²⁵ Such findings, however, are definitely far from acknowledging the existence of an obligation for States to grant access to their national territories. Recent case-law developments, indeed, show that the ECHR is not capable of fully guaranteeing such a possibility.

121 Ibid, para 73.

122 JT Theilen, ‘Framing Migration in Human Rights: How the Reasoning of the European Court of Human Rights Legitimizes Border Regimes’ (2025) 2(27) *European J of Migration and L*, 66ff, 69: ‘ECtHR’s case-law as a whole, including the more progressive cases with findings of a human rights violation, is structurally conservative at a deeper level in that it legitimates the foundations of European border regimes through its reasoning’.

123 *Mansouri v. Italy* (GC, decision of inadmissibility) App no 63386/16, para 113.

124 *H.Q. and Others v Hungary* App nos 46084/21 and 2 others, para 120.

125 Ibid, para 164.

12 Visa and Mobility in Africa

Challenges and Way Ahead

Silindile Nanzile Mlilo

12.1 Introduction

Travel visas have long been regarded as regulatory mechanisms that both facilitate and restrict human mobility. Torpey¹ argues that visas serve as a critical instrument in migration policies, increasingly recognised as the “first line of defense” employed by states to regulate the entry of non-citizens deemed undesirable.² Furthermore, Torpey posits that visa regimes constitute a principal means through which states assert their monopoly over the legitimate regulation of movement. As such, the discussion of visas, especially within the space of migration governance and mobility, is important. This is because, despite the significant role of visas in migration governance and global mobility, Mau, Gulzau, Laube and Zaun contend that, while migration policies have been extensively examined in comparative research, less attention has been paid to the global shifts in border policies concerning short-term mobility, which constitutes the majority of cross-border movements.³

This trend is equally evident in the African context where, with the exception of the African Development Bank’s (AfDB) annual Visa Openness Index report, there remains a paucity of exploratory studies and literature on visa policies and travel in Africa. The majority of existing studies have predominantly focused on free movement protocols within Africa, particularly at the level of Regional Economic Communities (RECs). While these studies provide valuable insights into the extent of mobility within the region, this chapter contributes to these discussions by situating visa regimes as a crucial dimension of migration research, given that visa restrictions directly reflect states’ control over mobility. Moreover, the chapter aims to enhance our understanding of

1 John Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (Cambridge University Press 2000)

2 Ibid [1] (John Torpey)

3 Mau, Steffan, Gulzau, Fabian, Laube, Lene and Zaun, Natascha ‘The Global Mobility Divide: How Visa Policies have Evolved Over Time’ (2015) 41(8) *Journal of Ethnic and Migration Studies* 1192–1213.

these issues, particularly within the African context and alongside long held discussions concerning the promotion and adoption of free movement within the region.

The chapter further analyses the evolution of visa policies on the continent and examines the trajectory of efforts towards free movement. By drawing on case studies from various African countries, the chapter identifies both the challenges and opportunities associated with existing visa regimes. Ultimately, it proposes strategic pathways towards a visa-free Africa, aligning with the aspirations articulated in the African Union's Agenda 2063. In contributing to an African perspective on migration and mobility discourse in this body of work, this chapter highlights the implications of visa policies for migrants in Africa and underscores the necessity of achieving integrated mobility as a cornerstone for sustainable development and regional cooperation.

12.2 Historical Context of Visas

12.2.1 Evolution of Visas: Persia, China and the British Aliens Act

The discussion or evolution of visa concepts dates back to ancient civilisations such as Persia and China.⁴ According to Dolph, in Persia, caravanse-rais required travellers to carry a "caravanserai pass" for safe passage, while in China, foreign visitors had to obtain "tech-passes" to enter its borders.⁵ These early practices served as the first mechanisms for regulating movement. By the 19th century, visa systems became more formalised. The British Aliens Act was among the first modern legislations to introduce entry permits, while the League of Nations Convention of 1920 laid the groundwork for standardised passport formats and visa regulations.⁶ Hence, Fok is of the view that the history of visas not only reflects a compelling narrative of diplomacy, security and the evolution of global mobility but has also driven efforts toward the standardisation of passport and visa regulations in response to the increasing volume of international travel.⁷

12.2.2 Shift in Visa Policies After World War II

Following the end of World War II, Fok states that visa requirements further expanded as states sought to regulate immigration and enhance national security. Dolph concurs and states that the post-World War II period marked

4 Maeghan Dolph, 'Tracing the history of travel visas: Evolution and global impact' *Fox News* (9 March 2024) <<https://www.foxnews.com/world/tracing-history-of-travel-visas>> accessed 9 March 2025.

5 Fox Fok, 'All we need to know: The History of Visas' *Medium* (11 September 2023) <<https://medium.com/@editorialfox/all-we-need-to-know-the-history-of-visas-43e110754562>> accessed 9 March 2025.

6 Dolph (n 4).

7 Fok (n 5).

a pivotal shift in visa policies, as the establishment of the United Nations in 1945 facilitated global agreements that promoted international cooperation. This resulted in the categorisation of visas based on diplomatic, tourism and employment purposes.⁸ Hence, Torpey contends that before the 20th century, most states were primarily concerned with restricting emigration rather than regulating immigration.⁹ However, this position shifted in the 20th century as countries began to impose stricter regulations and to monitor those coming into their countries.

12.2.3 Emergence of Free Movement and Schengen Visa Agreements

Another significant development in the 20th century was the emergence of free movement, most notably marked by the 1985 Schengen Agreement. This agreement abolished internal border controls among participating European countries and introduced a common visa policy, fundamentally reshaping patterns of mobility within the region.¹⁰ Moreover, in the 21st century, visa regulations have continued to evolve with the advent of electronic visas (e-visas), designed to streamline the application process, and the rollout of visa waiver programmes, which facilitate entry for travellers from eligible countries.¹¹ As such, with the exception of countries that offer visa on arrival, typically the process follows that when entering a country that requires a visa, individuals normally submit an application in their home country through the embassy or consulate of their intended destination and are subjected to providing comprehensive details of their reasons for travel with accompanying supporting documents to determine eligibility.

This system, according to Broeders and Hampshire (2013), functions as a form of “remote control” or “pre-emptive mobility governance” that allows the state to regulate movement by restricting individuals even before they begin their journey.¹² In this instance, pre-emptive mobility governance refers to a digital-era form of regulating movement in which states assess and filter potential travellers before they reach the border, often using security databases, biometric screening and information-sharing.¹³ In the context of visas, this might involve denying an application based on pre-travel risk assessments, such as flagged security concerns or past immigration violations. Moreover, as already stated, although visa regimes are primarily designed to regulate the entry of tourists and temporary visitors, they also serve as tools for migration control. Hence, Schoorl and other authors are of the view that in recent

8 Dolph (n 4).

9 Torpey (n 1).

10 Fok (n 5).

11 Ibid.

12 Dennis Broeders and James Hampshire, ‘Dreaming of Seamless Borders: ICTs and the Pre-emptive Governance of Mobility in Europe’ (2013) 16 *JEMS* 17.

13 Ibid.

decades, travel visa regulations have been increasingly used to restrict the entry of potential asylum seekers and overstayers, who are considered a major source of unauthorised stay.¹⁴

12.2.4 *Inequalities in Visa Regimes and Mobility Governance*

The expansion and widespread adoption of visa regimes globally has sparked debates on inequality, as access to international mobility remains uneven. Wealthier countries or those with strong diplomatic ties and bilateral agreements often experience fewer restrictions at border controls, while individuals from economically disadvantaged nations or those with limited diplomatic relations face greater challenges, including stringent visa requirements. In agreement, Czaika and others highlight that the current perception or focus is on how citizenship and identification papers significantly impact travel experiences, with passport holders from wealthy or allied nations enjoying seamless border crossings, often through automated systems.¹⁵ In contrast, travellers from poorer or politically unstable countries, particularly in the so-called Global South, face lengthy immigration procedures and stringent visa requirements.¹⁶ Hence, the authors argue that this reflects structural inequalities in global mobility, where individuals from these regions are often perceived as security or immigration risks.¹⁷

In another study, Czaika and other scholars analysed visa waiver policies across 150 countries from 1969 to 2010 and found that, despite a general increase in visa-free mobility, global inequality has deepened. Their findings indicate and support other studies that show that while citizens of wealthy Organisation for Economic Co-operation and Development (OECD) countries have gained greater mobility rights, those from poorer regions, particularly Africa and Asia, continue to face significant restrictions; thus, the authors refer to this disparity as the global mobility divide.¹⁸ Hence, Tendayi Achiume argues that contemporary migration governance represents a continuation of colonial power structures. She contends that the issue is not only who is permitted to move, but also who controls mobility and whose interests such control serves. Achiume characterises this as a form of racialised global apartheid, whereby former colonial powers maintain dominance through legal,

14 Jeroen Schoorl, Liesbeth Heering, Inge Esveltdt, Gijs Beets, Rob van der Erf, Anke Bosch, Helga de Valk and Bart de Bruijn, *Push and Pull Factors of International Migration: A Comparative Report* (Eurostat, European Communities 2000).

15 Mathias Czaika, Hein de Haas and Maria Villares-Varela, *The Global Evolution of Travel Visa Regimes: An Analysis Based on the DEMIG VISA Database* (DEMIG Project Paper 30, International Migration Institute 2017).

16 Czaika and others (n 15).

17 Ibid.

18 Mathias Czaika, Hein de Haas and Maria Villares-Varela, 'The Global Evolution of Travel Visa Regimes' (2018) 44 *Population and Development Review* 589.

technological and physical border regimes that disproportionately restrict Africans and other racialised populations.¹⁹

In the same breath, Czaika and others, in their 2017 study, caution us against taking a simplistic approach in analysing the North-South mobility divide when it comes to visa regimes that do not take into account the complexities of global visa regimes.²⁰ The authors further support their argument by highlighting that travellers from Europe and North America often require visas for destinations such as countries located in sub-Saharan Africa, or Russia, China and India, often facing similar border controls.²¹ Additionally, regional blocs like the Economic Community of West African States (ECOWAS), East African Community (EAC), South African Development Community (SADC), the Gulf Cooperation Council (GCC) and the European Union (EU) facilitate free movement internally while maintaining visa requirements for outsiders.

For these reasons, Czaika and colleagues argue that visa regimes are shaped by complex geopolitical dynamics rather than a simple North-South divide. Understanding mobility in Africa therefore requires situating it within broader global debates on the origins and evolution of visa policies. Hence, Czaika and others emphasise that visas are not only instruments for regulating entry and exit but are also expressions of wider political and economic trends and enduring inequalities in global power relations.²²

12.3 Current Visa and Mobility Landscape in Africa

A bulk of the literature on migration in Africa has alluded to the fact that while mobility and migration occur in Africa, most migration occurs within the African continent.²³ Accordingly, the Africa Center for Strategic Studies estimates that over 80% of African migrants move within the continent and that Africa accounts for just 14% of the global migrant population, compared to 41% from Asia and 24% from Europe.²⁴ Despite these facts, the current literature on visa regimes in Africa is relatively scarce and fragmented compared to studies on migration policies in Europe or North America. However, there is still some research within the region that is often embedded in broader

19 E Tendayi Achiume, 'Migration as Decolonization' (2019) 71(6) *Stanford Law Review* 1509.

20 Czaika and others (n 16).

21 Ibid.

22 Ibid.

23 Francizca Zanker and Amanda Bisong, *Contested Mobility Norms in Africa* (Heinrich Böll Foundation, April 2024) <https://hoa.boell.org/sites/default/files/2024-11/e-paper_contested_mobility_norms_in_africa_endf.pdf> accessed 28 February 2025.

24 Africa Center for Strategic Studies, 'African Migration Trends to Watch in 2023' (9 January 2023) <<https://africacenter.org/spotlight/african-migration-trends-to-watch-in-2023/#:~:text=African%20migration%20has%20been%20on,expected%20to%20continue%20in%202023>> accessed 23 September 2025.

discussions on migration governance,²⁵ regional integration (free movement)²⁶ and border controls.²⁷

12.3.1 *Paucity of Knowledge on Visas in Africa*

Part of the reason for this paucity in knowledge can be attributed to several factors. Firstly, a large portion of the literature's focus is on informal migration, refugee movements or labour migration rather than formal visa policies. Secondly, oftentimes, visa regimes are discussed within the context of regional integration, especially within the context of RECs, e.g. ECOWAS, EAC, Common Market for Eastern and Southern Africa (COMESA) and SADC, etc.²⁸ Although important, the shortfall with this approach is that a comprehensive analysis of Africa-wide visa policies remains limited. However, as stated, reports such as the AfDB's AVOI²⁹ play an important role in bridging this gap. The report provides important policy insights through assessing how open African countries are to travellers from other African nations by analysing visa requirements and highlighting which countries facilitate intra-African mobility the most.³⁰

12.3.2 *Limited Empirical Data and Policy Transparency*

Thirdly, another challenge regarding the paucity of information on visa regimes in Africa has to do with the issue of limited empirical data and policy transparency.³¹ This is because a variety of factors (such as the lack of transparency in African states' visa policies, coupled with limited data on visa rejection rates, processing times and mobility impacts, especially for South-South migration) hinder comprehensive comparative analysis.³² Fourthly, as mentioned in the previous section, a lot of the literature has concentrated on the North-South

25 Michael Mutava, *An Analysis of Trends and Patterns of Migration in Africa* (New South Institute, 2023) <<https://nsi.org.za/wp-content/uploads/2023/11/An-analysis-of-trends-and-patterns-of-migration-in-Africa.pdf>> accessed 9 March 2025.

26 Aderanti Adepoju, *Migration in Sub-Saharan Africa* (Current African Issues 37, Nordic Africa Institute 2005)

27 Celestine Bassey and Oshita Oshita, *Governance and Border Security in Africa* (Malthouse Press 2010)

28 Henry Kibet Mutai, 'Regional Trade Integration Strategies under SADC and the EAC: A Comparative Analysis' (2011) SADC Law Journal 81.

29 African Development Bank, *Africa Visa Openness Report 2022* (AVOI, 2022); African Development Bank, *Africa Visa Openness Report 2023* (AVOI, 2023); African Development Bank, *Africa Visa Openness Report 2024* (AVOI, 2024).

30 Ibid [28] (African Development Bank AVOI 2022, 2023, 2024)

31 Tove van Lennep, *Migration V: Policy Recommendations for the South African Migration Regime* (HSF Brief, Helen Suzman Foundation, 2019) <<https://www.hsf.org.za/publications/hsf-briefs/policy-recommendations-for-the-south-african-migration-regime>> accessed 20 August 2025.

32 (AfDB, 2023).

mobility divide instead of intra-African travel and especially centres on examining how African travellers face visa restrictions when they travel to Europe or North America.³³ Furthermore, as mentioned, although more studies are beginning to direct their attention to intra-African mobility, it is usually within the context of regional free movement frameworks. Finally, another reason is that there is an emerging body of research on studies concerned with e-visas and visa liberalisation, especially in countries such as Rwanda, Seychelles, Benin, the Gambia and most recently Ghana.³⁴ As mentioned, reports such as the AVOI by the AFDB are leading in this space although academic engagement is still developing.

12.4 Free Movement in Africa

The growing number of studies on free movement within Africa highlights its significance in advancing Agenda 2063, which prioritises regional integration. Free movement is seen as a key pillar of this vision.³⁵ As part of this, the 2016 African Passport and 2018 Free Movement of Persons project aims to remove travel, work and residency barriers, pushing for reforms in restrictive migration laws and encouraging member states to ease visa requirements for seamless mobility across the continent.³⁶

This concept of the free movement of people was initially introduced in the Treaty Establishing the African Economic Community (AEC), the Abuja Treaty, which was established in 1989 but signed in 1991 and entered into force in 1994. This makes it the first framework under the former OAU, now African Union (AU) to recognise the free movement of people and capital as key principles.³⁷ However, unlike Europe, Africa has not yet developed a comprehensive legal framework to regulate the movement of people across its borders. As such, Zanker and Bisong state that the AU's priorities on migration and mobility are mostly outlined in the Abuja Treaty (1989) and various policy frameworks.³⁸ These key frameworks include the 2006 African Common Position on Migration and Development and the revised AU Migration Policy Frameworks of 2008 and 2018, which provide non-binding guidelines.³⁹

33 Ibid [15] (Mathias Czaika and others).

34 Africa Visa Openness Report 2024 (African Union and African Development Bank Group, November 2024) <https://www.wathi.org/laboratoire/choix_de_wathi/africa-visa-openness-report-2024-african-union-and-african-development-bank-group-november-2024/> accessed 20 August 2025.

35 African Union, Agenda 2063: The Africa We Want (Overview) <<https://www.au.int/en/agenda2063/overview>> accessed 20 August 2025.

36 African Union (2020) Visa Free Africa, <https://au.int/en/visa-free-africa>.

37 Ottilia Anna Maunganidze, *Freedom of Movement: Unlocking Africa's Development Potential* (Policy Brief 111, Institute for Security Studies, 2017) <<https://issafrica.s3.amazonaws.com/site/uploads/policy-brief111.pdf>>.

38 Zanker and Bisong (n 23)

39 Ibid.

The 2018 African Union Protocol on Free Movement of Persons, Right of Residence, and Right of Establishment, also known as the AU Free Movement Protocol (AU FMP), enshrines the right to free movement, residence and establishment, alongside initiatives such as the single African passport and the Open Skies agreement.⁴⁰ These frameworks, although not directly relating to visa regimes in Africa, address issues of migration governance and mobility in Africa. Moreover, they balance diverse national interests, allowing AU member states to implement policies at their own pace, both individually and through RECs.⁴¹

At present, the free movement of people between African states is regulated by two economic communities: AEC and the RECs.⁴² RECs, including the COMESA, EAC, Economic Community of Central African States (ECCAS), ECOWAS, the Intergovernmental Authority on Development (IGAD), SADC and the West African Economic and Monetary Union (UEMOA), have introduced protocols and mechanisms to facilitate regional free movement, the right of residence and establishment.⁴³ Among the RECs, the EAC and ECOWAS are considered the most advanced as both have made significant progress in terms of free movement in their respective regions.⁴⁴ Both RECs have established binding legal frameworks, strong political commitment and practical measures such as visa-free travel and regional passports that formalise long-standing mobility patterns although challenges still persist. Regions such as the SADC and North African countries still need to make more strides in this respect. Moreover, although there is a regional agreement on free movement in Africa through the AU FMP, its implementation faces resistance as it still has relatively few ratifications. This reluctance is largely driven by state concerns over security, loss of sovereignty in border control, fears of irregular migration and anxieties about potential economic disparities and job competition. Political sensitivities around national identity and uneven levels of development across the continent also contribute to the hesitation to ratify and implement the Protocol.

Instead, member states have focused more on bilateral agreements for movement between specific countries and on tightening migration security. For example, South Africa has of recent entered into bilateral agreements with

40 Ibid.

41 Ibid.

42 Tamara Wood, *The Role of Free Movement of Persons Agreements in Addressing Disaster Displacement: A Study of Africa* (Platform on Disaster Displacement 2019) <https://disasterdisplacement.org/wp-content/uploads/2019/06/52846_PDD_FreeMovement_web-single_compressed.pdf> accessed 19 March 2025.

43 African Development Bank, 'Visa Restrictions and Economic Consequences in Africa' (2013) <<https://blogs.afdb.org/fr/afdb-championing-inclusive-growth-across-africa/post/visa-restrictions-and-economic-consequences-in-africa-11987>> accessed 18 March 2025.

44 Ibid [37] (African Development Bank).

Kenya⁴⁵ and Ghana⁴⁶ and Botswana entered into an agreement with Namibia to enable citizens of both countries to travel without a passport but only with an identity document.⁴⁷ Furthermore, in 2023 the SADC secretariat revealed its plans to develop a unified visa system for the region as part of its SADC Tourism Programme 2030.⁴⁸ This project was piloted in five member countries that included Angola, Mozambique, South Africa and Zimbabwe, with the aim of developing ease of visitor movement; however, its implementation has not yet taken full effect.⁴⁹

The strides towards visa liberalisation taken by member states are encouraging, although more needs to be done to ensure ease of travel on the continent. This is because, while talks of free movement within the region have gained momentum, the AfDB argues that African countries continue to remain closed off to each other, hence making travel within the continent difficult. Furthermore, the AfDB highlights that Africa has some of the strictest visa requirements globally, with intra-African travel being more restricted for African citizens than travel within Europe or North America. It is for these reasons that Agenda 2063, through the AU FMP aims to remove some of these barriers.

12.5 The AU Free Movement of Persons Protocol (FMP)

The 2018 Protocol on the Free Movement of Persons, Right of Residence, and Right of Establishment (AU Free Movement Protocol, or AU FMP) is a flagship initiative of the African Union's Agenda 2063. Its aim is to facilitate free movement across the continent, boost intra-African trade and tourism and improve migration management in coordination with national and regional frameworks. Despite its potential, the AU FMP faces serious hurdles in ratification. Since 2018, only 32 of 55 AU member states have signed, and just four—Mali, Niger, Rwanda and São Tomé and Príncipe—have ratified. The

45 Gerhard Erasmus, 'Kenya and South Africa Sign Deals to Deepen Bilateral Relations' (TRALAC Blog, 14 November 2022) <<https://www.tralac.org/blog/article/15802-kenya-and-south-africa-sign-deals-to-deepen-bilateral-relations.html>> accessed 20 August 2025.

46 Cyril Ramaphosa, 'Opening Remarks by President Cyril Ramaphosa on the Occasion of the Second Session of the South Africa-Ghana Bi-National Commission (BNC)' *The Presidency* (12 March 2024) <<https://www.thepresidency.gov.za/opening-remarks-president-cyril-ramaphosa-occasion-second-session-south-africa-ghana-bi-national>> accessed 20 August 2025.

47 Gerhard Erasmus and Trudi Hartzenberg, 'Botswana and Namibia Concluded an Agreement on the Movement of Persons' (*TRALAC Blog*, 2 June 2023) <<https://www.tralac.org/blog/article/15940-botswana-and-namibia-concluded-an-agreement-on-the-movement-of-persons.html>> accessed 20 August 2025.

48 'SADC Pilots Regional Visa' *Zimbabwe Independent* (20 May 2023) <<https://www.newsday.co.zw/theindependent/local-news/article/200011800/sadc-pilots-regional-visa>> accessed 18 March 2025,

49 Ibid.

Protocol requires 15 ratifications to enter into force, leaving a significant gap. Notably, countries such as Seychelles and Benin have declined to sign the protocol but have instead unilaterally liberalised their visa policies, granting visa-free access to all African nationals.

12.6 Challenges to Visa and Mobility in Africa

Resistance to signing and ratifying the AU FMP has been noted especially among larger nations such as Algeria, Egypt, Nigeria, South Africa and Ethiopia.⁵⁰ Several reasons for this lack of enthusiasm or uptake have been well documented by several scholars. These include, but are not limited to, social, political and economic reasons.

12.6.1 Lack of Political Will

Issues relating to inconsistent political will to follow through on agreements and protocols over time by member states have been one of the reasons for resistance.⁵¹ Chime and others are of the view that this can be attributed to the differences in ideology which may explain why some member states have been slow to implement regional free movement protocols as well as many governments' resistance to relinquishing even partial control over their borders, despite the fact that such agreements do not compromise national sovereignty.⁵² This can be seen as a form of sovereignty concerns and protectionism by member states with regard to their borders. Due to the lack of a proper understanding of the Protocol, there is a perception that ratifying the AU FMP may result in member states losing control of who they can and cannot allow to enter their territory. However, contrary to this, the AU FMP contains a provision for the member states to decide and make regulations that suit their contexts.

12.6.2 Security

Other issues that have been noted include national security concerns. Many member states defend their position not to adopt the AU FMP due to fears that

50 Silindile Mlilo et al., *Opening up Africa for Africans: A Proposal in Support of the Protocol for the Free Movement of Persons* (Policy Brief 2023/17, School of Transnational Governance, European University Institute 2023) <https://www.researchgate.net/publication/374875609_POLICY_BRIEF_-_OPENING_UP_AFRICA_FOR_AFRICANS_A_PROPOSAL_IN_SUPPORT_OF_THE_PROTOCOL_FOR_THE_FREE_MOVEMENT_OF_PERSONS> accessed 18 March 2025.

51 Milo et al (n 50).

52 Chime, Ikechukwu, Edith Nwosu, Emmanuel Onyeabor, Collins Ajibo, Richards, Newman, Nwodo Fochi; Nwafor Ndubuisi, 'The AU Free Movement Protocol: Challenges in Its Implementation' (2023) 68(1) *Journal of African Law* 3 <<https://doi.org/10.1017/S002185532300030X>> accessed 18 March 2025.

the free movement of people will increase security challenges, including terrorism, organised crime and human-, arms- and drug-trafficking. The current insurgencies and cross-border terrorist threats in the Sahel, Lake Chad Basin and the Horn of Africa regions, for example, have resulted in the reluctance and the tightening of border controls by some member states.⁵³ As noted, the SADC and North Africa regions are among the least supportive of the AU FMP, with what one would consider unrealistic conditions for ratification.⁵⁴

For example, the SADC region has a memorandum from the Department of Home Affairs (DHA), publicly available online, that outlines the shared position of SADC member states regarding the prerequisites for implementing the AU FMP. These prerequisites include reducing economic inequalities, promoting peace, security and political stability, and developing effective civil registration and border management systems. Additionally, these systems must be interoperable with Interpol's red notice database, UN warning lists and individual national lists of prohibited or undesirable persons to enhance security and migration governance.⁵⁵

Mlilo and other scholars contend that, while these conditions are essential for mitigating security and employment-related challenges, which are a legitimate cause for concern in the African region, it is impractical to require their full realisation before implementing the AU FMP.⁵⁶ As such, the aforementioned authors are of the view that achieving these prerequisites would necessitate significant time and substantial financial investment, potentially delaying implementation for several years. Therefore, the AU and its member states should adopt a phased approach, progressively addressing these concerns while advancing the protocol's core objectives.⁵⁷

12.6.3 Economic Disparities and Labour Market Pressures

Another challenge in ratifying the AU FMP is the concern over economic disparities and labour market pressures. Larger economies fear that once the protocol is enforced, unrestricted movement may lead to an influx of job seekers, exacerbating competition in already saturated labour markets. Taking the SADC region again as an example, South Africa, as the region's largest economy, fears an influx of low-skilled migrants could increase job competition and social tensions in an environment of high unemployment and with

⁵³ Milo et al (n 50).

⁵⁴ Ibid.

⁵⁵ Government of South Africa, Department of Home Affairs, South African Position on the Implementation of the African Union (AU) Agenda 2062 as it Relates to the Migration, Regional Integration and Africa Passport, November 2017 <https://pmg.org.za/files/171128BRIEFING_NOTES.docx>.

⁵⁶ Milo et al (n 50).

⁵⁷ Ibid.

high levels of inequality that fuels xenophobic violent attacks on migrants and anti-migrant sentiments.⁵⁸ The issue of economic pushback is not unique to the SADC region. For example, regions such as the ECOWAS experienced a wave of expulsions, with the most notorious being the Western African wave in 1969 and 1985 between Ghana and Nigeria.⁵⁹

12.6.4 Administrative and Bureaucratic Complexities

Beyond the political, economic, infrastructural and social challenges already highlighted, several practical and operational obstacles further hinder the ratification and implementation of the AU FMP. Another significant issue is the administrative and bureaucratic complexity involved in transitioning from restrictive national migration policies to a unified continental framework.⁶⁰ According to the International Organization for Migration (IOM), many states lack the institutional capacity to efficiently process and manage increased mobility, particularly in regions where civil registration systems remain weak.⁶¹ As Adepoju argues, without strong governance structures, the risk of irregular migration and identity fraud increases, further discouraging states from committing to the protocol.⁶² Additionally, inconsistent political commitment has slowed progress, as member states prioritise bilateral and regional agreements over a continental approach.⁶³ This fragmented response weakens the collective momentum needed for widespread adoption of the protocol.

12.6.5 Resource Constraints and Public Perceptions

A final challenge is the financial burden of implementing the necessary reforms required for efficient migration governance and mobility, which also remains

58 Statistics South Africa, 'Most Migrants to South Africa Come from the SADC Region for Employment' (26 March 2024) <<https://www.statssa.gov.za/?p=17111>> accessed 16 March 2025.

59 Samuel Fury Childs Daly, 'Ghana Must Go: Nativism and the Politics of Expulsion in West Africa, 1969-1985' (2023) 259(1) *Past & Present* 229, 259(1) <<https://academic.oup.com/past/article/259/1/229/6652271>> accessed 16 March 2025.

60 E Achiume Tendayi and Loren Landau, The African Union migration and regional integration framework (Policy & Practice Brief No 36, ACCORD, 10 November 2015) <<https://www.accord.org.za/publication/the-african-union-migration-and-regional-integration-framework>> accessed 20 August 2025.

61 International Organization for Migration, *Institutional Strategy on Legal Identity* (IOM, 2021) <https://mena.iom.int/sites/g/files/tmzbdl686/files/documents/Legal-Identity-Strategy_0_0.pdf> accessed 20 August 2025.

62 Adepoju (n 26).

63 African Union Commission, Status of Ratification of the AU Free Movement Protocol (AU Publications 2021).

a key obstacle. According to UNECA, establishing secure digital identity systems, improving border infrastructure and harmonising legal frameworks require substantial investment and the fiscal capacity to undertake such reforms without external support: something that many countries lack.⁶⁴ Finally, while the protocol aims to enhance regional integration and cultural exchange, public perception and misinformation about migration continue to fuel resistance at both the policy and societal levels. Without strong public awareness campaigns and government-led advocacy, opposition to free movement is likely to persist.

To address these concerns, the IOM proposes that well-regulated labour migration frameworks within the free movement framework could ensure equitable and lawful access to employment opportunities, potentially reducing xenophobic tensions.⁶⁵ However, the IOM continues to stress that the impact of migration on local communities must be continuously monitored and assessed, as their concerns are legitimate and should not be overlooked.⁶⁶ Moreover, because there is a lot of misunderstanding on the AU FMP and its implementation, there is therefore a need to educate and inform member states as well as the public on the aims of the Protocol and what it can potentially achieve once it is fully adopted and implemented. As such, the support of the public is also crucial in this aspect. This will require a strategic action plan focused on public awareness, stakeholder engagement and advocacy. Furthermore, in this respect, key efforts should include sensitising communities, promoting respect for migrants' rights and addressing migration-related concerns to foster a more informed and inclusive approach to mobility.⁶⁷

12.7 Opportunities and Best Practices for Advancing the AU FMP

Despite the challenges in ratifying and implementing the AU FMP, several opportunities and best practices can be leveraged to facilitate its adoption and enhance regional mobility. These opportunities span trade, technology, labour, tourism, education and development finance.

64 United Nations Economic Commission for Africa, *Africa's Free Movement Agenda: Progress and Challenges* (UNECA 2023).

65 International Organization for Migration, *African Union Continental Free Movement of Persons Protocol: Implications for Migration Governance in Africa* (IOM, 2017) <<https://www.iom.int/sites/g/files/tmzbd1486/files/2019-01/S-20-10%20-%20African%20Union%20Continental%20free%20movement%20of%20persons.pdf>> accessed 20 August 2025.

66 Ibid.

67 Mlilo and others (n 50).

12.7.1 Trade and Economic Opportunities

According to UNECA estimates, by 2050, Africa's economy could reach \$29 trillion.⁶⁸ Furthermore, UNECA has outlined some of the opportunities offered by AfCFTA, which include:

- delivering substantial economic benefits for Africa, including expanding a market of 1.2 billion people with a combined GDP of \$2.5 trillion,
- increasing intra-African trade by over 50%,
- generating welfare gains of approximately \$65 billion (2.64% of GDP in 2018 terms),
- boosting wages for both skilled and unskilled workers,
- driving export diversification and industrialisation,
- enhancing foreign direct investment (FDI) attractiveness,
- and contribute to structural economic transformation.

Given its great potential for promoting free trade and boosting the economic development of member states, it is important that efforts towards promoting free trade in the region go hand in hand with the promotion of the easing movement as well, because, as the former President of the AfDB, Dr. Akinwunmi A. Adesina, stressed, “apart from the fact that you need connectivity, you also need to have freedom for people to move from one place to the other. I believe we cannot say we have borderless trade when we put up barriers for people to travel.”⁶⁹ Hence, the importance of ensuring effective mobility in the region cannot be overstated, as it presents implications for other AU protocols focused on regional integration.

12.7.2 Technology-Driven Migration Management

Advancements in technology-driven migration management also present a viable pathway for improved mobility governance.⁷⁰ The adoption of e-visas, biometric identification systems and digital visa application platforms enhances security, efficiency and accessibility, reducing bureaucratic barriers

68 Tralac, n.d. Fact Sheet on the African Continental Free Trade Area (AfCFTA) Benefits for Africa and Nigeria, <<https://www.tralac.org/documents/resources/african-union/2026-fact-sheet-on-the-afcfta-benefits-for-africa-and-nigeria-notn-june-2018-1/file.html>> accessed 20 August 2025.

69 Africa Visa Openness Report 2024 (African Union & African Development Bank Group, November 2024) <https://www.wathi.org/laboratoire/choix_de_wathi/africa-visa-openness-report-2024-african-union-and-african-development-bank-group-november-2024/> accessed 20 August 2025.

70 Ana Beduschi, ‘International Migration Management in the Age of Artificial Intelligence’ (2021) 9(3) *Migration Studies* 576 <<https://academic.oup.com/migration/article/9/3/576/5732839>> accessed 20 August 2025.

while ensuring effective monitoring of migration flows.⁷¹ Furthermore, several African countries have implemented progressive visa policies with positive economic and social outcomes. Nations such as Rwanda, Mauritius and Seychelles, which have liberalised visa regimes for African travellers, have reported increased tourism and investment, highlighting the potential benefits of free movement when managed effectively. These successful case studies offer valuable insights into scalable best practices that can guide broader continental efforts.

12.7.3 Labour Mobility and Skills Matching

While concerns over labour market dynamics contribute to member states' hesitancy in adopting the AU FMP, the protocol also presents significant opportunities for optimising labour markets across the continent. Its implementation could enhance labour market efficiency by enabling a better match between skills and job opportunities, addressing regional skills shortages and fostering knowledge and technology transfer.⁷² This, in turn, would drive productivity and innovation. Labour mobility is a key component of the AU FMP, with the protocol containing 11 provisions specifically addressing labour mobility. Notably, Article 14 guarantees the right of individuals to seek and accept employment in any member state without discrimination, subject to the host country's laws and policies. This provision underscores the protocol's potential to create a more integrated and dynamic labour market within Africa.⁷³

12.7.4 Tourism and Regional Trade

Studies have well documented the benefits of visa liberalisation and visa openness and their potential to significantly boost tourism within Africa, fostering economic benefits for multiple sectors.⁷⁴ For example, according to the World Economic Forum (WEF), Seychelles, one of the few African countries with a completely visa-free policy, experienced a 7% annual increase in international tourism between 2009 and 2014. Similarly, Rwanda, a strong advocate for

71 Bianca Cassaro, *The Impact of Digitalization on Migration Processes: The European Union and a Case Study of Syrian Migration* (Master's thesis, LUISS University, academic year 2022/2023) <https://tesi.luiss.it/39248/1/648522_CASSARO_BIANCA.pdf> accessed 20 September 2025.

72 Milo and others (n 50).

73 International Labour Organization, 'The AU Free Movement of Persons Protocol' (ILO, 17 February 2019) <<https://www.ilo.org/resource/au-free-movement-persons-protocol>> accessed 20 August 2025.

74 Anyasor, M.O; Okocha, R.E; Agina, E.K, Nwankwo, U.C, (2021); UNWTO, 2016; AFDB, 2017; WEF, 2017; Volker, 2018; Adinegara, 2018; Upadhyay, 2016; Bertoli & Moraga, 2018.

Visa Free Africa, at times implemented a visa-on-arrival policy for all African citizens, leading to a 24% increase in tourism arrivals.⁷⁵ Additionally, the WEF contends that Rwanda's removal of work permit requirements for East African citizens significantly boosted regional trade, with commerce between Rwanda, Kenya and Uganda increasing by at least 50%.⁷⁶ These examples demonstrate the economic advantages of visa liberalisation and labour mobility in fostering tourism, trade and regional economic integration. Thus, the protocol has the potential to also promote cultural exchange and heritage tourism, while enabling the development of cross-border tourism circuits and experiences that enhance Africa's appeal as a unified travel destination.

12.7.5 Education and Knowledge Exchange and Remittance

The final two opportunities that the AU FMP presents are in the areas of education and knowledge exchange and remittance benefits. In terms of knowledge exchange, the Protocol can help strengthen collaboration and research partnerships between African institutions through increasing the mobility of students, scholars and researchers. Moreover, the mobility aspect can help contribute to fostering a shared pan-African identity and cultural exchange that can foster regional integration. Easing movement on the continent has great prospects for higher remittance flows in the region, which can benefit the sending country. This aspect also underscores migration as a form of development for the African region due to some of these benefits, which contrasts with the way it has been securitised and restricted.

12.8 The Way Ahead: Policy Recommendations

To further the implementation of the AU FMP, a collaborative approach involving governments, regional bodies, civil society and the private sector is essential. It is crucial for governments to focus on harmonising visa policies across the continent by standardising entry requirements, reducing costs and simplifying visa application processes. These measures would enhance accessibility, encourage compliance with the protocol and promote greater regional mobility. Moreover, regional bodies have a crucial role to play in strengthening cooperation on mobility frameworks. Adopting the African Union passport would facilitate seamless movement across the continent, reinforcing regional integration and economic collaboration. Enhanced coordination of the RECs is also necessary to align national policies with broader continental objectives.

75 Hassan El-Houry, 'Africans Need the Freedom to Travel in Their Own Continent. Here's Why' *World Economic Forum* (21 January 2018) <<https://www.weforum.org/stories/2018/01/africans-need-the-freedom-to-travel-in-their-own-continent-heres-why/>> accessed 18 March 2025.

76 Ibid.

Civil society and the private sector can contribute by advocating for inclusive mobility policies that prioritise human rights and economic opportunity. Additionally, leveraging partnerships in the business sector and aviation industry to improve infrastructure and streamline migration processes would ensure that the benefits of free movement are effectively realised while addressing concerns related to security and labour market dynamics. A concerted effort among all these stakeholders is essential to overcoming existing barriers and ensuring that the AU's vision for free movement becomes a reality.

Public awareness is crucial not only to highlight the net benefits of migration and mobility on the continent but in understanding how easing movement in the region will be dealt with and its potential benefits for the ordinary citizen in terms of social and economic opportunities. Furthermore, it is imperative to clarify and alleviate concerns surrounding issues of porous borders, security and employment concerns among individuals who fear that free movement will result in an influx of migrants in their territory. This is important especially for member states with larger economies.

12.9 Conclusion

This chapter has examined visa regimes and free movement in Africa, assessing their current state and implications for regional integration. While dedicated academic research on visa policies remains limited, substantial literature addresses regional integration through the AU FMP and RECs. Understanding Africa's approach to visa regimes is essential for shaping effective migration governance, mobility policies and regulatory frameworks.

The discussions also highlighted both challenges and opportunities within Africa's mobility frameworks. Restrictive visa regimes continue to hinder economic integration, labour mobility and regional cooperation. Yet progressive policies, such as those of Seychelles and Rwanda, illustrate the benefits of open borders in boosting tourism, trade and investment. Although the AU FMP faces political and economic resistance, it provides a framework for optimising labour markets, addressing skills shortages and facilitating knowledge exchange.

Key priorities emerging from this chapter include:

- the importance of removing barriers and harmonising visa policies to ensure national frameworks align with regional agreements to promote mobility and integration,
- the urgency of addressing challenges related to costs, bureaucracy and security through reducing application fees, streamlining procedures and balancing efficient processing with robust security,

- unlocking economic and social benefits through leveraging easing of movement to expand trade, tourism, labour opportunities and knowledge exchange,
- promoting equitable mobility governance by ensuring visa and migration frameworks avoid replicating global or colonial inequalities.

Through collective action to remove barriers, Africa can progress towards a visa-free continent that strengthens economic, political and social ties, benefiting all its citizens.



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Part II.2

National Visa Policies and Asylum



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13 Refugees and Humanitarian Admissions in Australia

Between Control and Management

Susan Kneebone

13.1 Introduction: Situating Australia's Humanitarian Program

In Australia, a country of controlled immigration, resettlement of refugees *and* humanitarian protection are practised separately and 'strategically'¹ as an aspect of a managed migration programme which demonises and discourages onshore asylum seekers or 'boat people' as they are known in the Australian lexicon.² Under this policy, preference is given to offshore entrants, including refugees selected for resettlement, and other humanitarian entrants proposed by an Australian citizen or permanent resident. This chapter narrates an interlinked story of refugee protection, humanitarianism and migration to demonstrate how the focus of Australia's current Humanitarian Program was shaped by intersecting objectives around nation-building, migration policy and Australia's international reputation. I demonstrate how Australia's policy on refugees and humanitarian entrants evolved in tandem with overall post-World War II migration policy, beginning with policy on refugees, then known as 'displaced persons', and its reluctant signing of the 1951 Refugee Convention relating to the Status of Refugees in 1954. I explain how the formal Humanitarian Program which evolved in the 1970s and which was developed in the 1980s arose from the legacy of humanitarianism practised in post-World War II, and how these experiences have shaped subsequent Australian refugee and migration policy.

This development of the Humanitarian Program tracks Australia's development as a nation and is an important story about interlinked law and policy on refugees, humanitarian entrants and migration. In this story of controlled or

1 I thank the following for research assistance in preparing this chapter: the Melbourne Law School Library Service (Abbey Lay), Dr Nathan Gardner Molina, and Hannah Gordon. This research arises from funding received under an Australian Research Council grant DP220101675, 'The role of community sponsorship for refugee in Australia'. Susan Kneebone and Audrey Macklin, 'Resettlement' in Cathryn Costello, Jane McAdam and Michelle Foster (eds), *The Oxford Handbook of Refugee Law* (OUP 2021) Chapter 60, 1080–1098; Joanne Van Selm, 'The Strategic Use of Resettlement: Changing the Face of Protection?' (2004) 22 (1) *Refugee* 39.

2 Susan Kneebone, Chapter 4 'The Australian Story: Asylum Seekers Outside the Law' in *Refugees, Asylum Seekers and the Rule of Law* (Cambridge University Press, 2009) 171–227.

managed migration which includes restrictive policies on refugees and asylum seekers, the Humanitarian Program provides flexibility to enable the state to decide who will be privileged as a humanitarian entrant. I argue that it is situated between control and management of the composition of the population, and is prioritised over refugee protection and Australia's obligations under the Refugee Convention.

This story has important implications for other countries or regions which aim to develop humanitarian entry programmes. Australia's experience provides a salutary lesson on the danger of reifying humanitarianism as a panacea for responses to forced migration. I show that policy on humanitarian entry was developed purposively in the 1970s as a qualification to obligations to refugees, due to reluctant acceptance of the refugee category. Initially, humanitarian entry provided a discretion that enabled the government to select entrants by prioritising family ties and social cohesion,³ which was also a key objective of the overall migration programme and settler narrative that prevailed in the post-World War II period. Through an examination of early records, including Annual Reports of the Department of Immigration dating from 1976 and other reports, I aim to show a continuity of linking forced migration and humanitarian entry with family or community up to the early 1980s. In the late 1980s and 1990s, the story changes as the focus of migration policy shifts from a primary focus on social cohesion to a stronger focus on skilled migration and economic outcomes. Further, family reunion remains a strong element of the current Humanitarian Program.

13.2 'Displaced Persons', the IRO and Australian Narratives of Displacement

*Australia has a tradition of accepting refugees and displaced persons.*⁴

*Refugees have been a recognised component of immigration programmes since 1947.*⁵

The 'displaced persons' narrative is the entry point to this story. It also provides a connection to current debates about the link between complementary pathways through work visas,⁶ and humanitarianism and refugeehood. In some Australian literature, the common trope is that when Australia entered into an agreement with the International Refugee Organisation (IRO) to

3 Parliament of Australia, Department of Immigration and Ethnic Affairs, *Review '76* (Parliamentary Paper No 394 of 1976) (*Review '76*) 24 refers to the need for migrants to follow 'Australian ways ... and ... Australian lifestyles'. Paradoxically, in this period the focus of the immigration portfolio shifted to ethnic affairs and multiculturalism.

4 Parliament of Australia, Australian Population and Immigration Council, *Immigration Policies and Australia's Population: A Green Paper* (Parliamentary Paper No 41 of 1977) (*Green Paper '77*) 40.

5 Ibid 42.

6 Emiliya Bratanova van Harten, 'Complementary Pathways at the Crossroads Between Migration and Asylum: Enhancing or Diluting the International Refugee Regime?' (2025) 44 (4) *Refugee Survey Quarterly* 469–494.

select and admit refugees and displaced persons from camps in Europe in July 1947, this was primarily motivated by the need for labour, especially for large-scale national projects.⁷

The IRO which operated from 1946–1952 had a mandate to plan large scale resettlement⁸ of the estimated 20–30 million persons who had been displaced during World War II, plus another 9.5 million Germans and another four million ‘war fugitives’.⁹ It arose out of the ashes of both the US backed Intergovernmental Committee on Refugees (IGCR) which was formed in 1939 and which was intended to develop selective ‘opportunities for permanent resettlement’¹⁰ and the USSR supported UN Relief and Rehabilitation Agency (UNRRA) 1942–1946 which was focused on repatriation and had assisted seven million displaced persons.¹¹ By contrast the IRO was ‘dedicated first and foremost to securing prescribed solutions for refugees’.¹² Its Constitution clearly connected humanitarian aid and paid work to the resolution of the refugee problem.¹³ The Preamble to the 1946 IRO Constitution stated that the refugees ‘should be put to useful employment in order to avoid the evil and anti-social consequences of continued idleness’. This reflected the resettlement experiences in the interwar years (1921–1939), and was eventually recognised in Article 17 of the Refugee Convention (the right to work).¹⁴

The IRO 1946 Constitution empowered it to enter into resettlement agreements with host and destination countries in relation to ‘genuine refugees and displaced persons’.¹⁵ The caseload it inherited from UNRRA was resettled within its first year.¹⁶ During the operation of the IRO, the US resettled 31.7% of eligible persons; Australia 17.5%; Israel 12.7%; Canada 11.9% and Britain 8.3% respectively.¹⁷ Developed states took advantage of the IRO’s

7 Barry York, *Australia and Refugees, 1901–2002: An Annotated Chronology Based on Official Sources* (Chronology No 2, Parliamentary Library, Parliament of Australia, 2003) (York, Chronology No 2) 2, 10; Andrew Markus (1984) 47 *Labour History* 73–90.

8 International Refugee Organisation Constitution 1946 Art 10. See Kneebone and Macklin (n 1) 1085–1087.

9 Gil Loescher, ‘International Recognition of Refugees’ in *The UNHCR and World Politics: A Perilous Path* (OUP 2001) Chapter 2 34.

10 Rieko Karatini, ‘How History Separated Migrant and Refugee Regimes: In Search of their Institutional Origins’ (2005) 17 (3) *IJRL* 517–541, 527 citing Eric Estorick, ‘The Evian Conference and the Intergovernmental Committee’ (1939) 203 *The Annals of American Academy of Political and Social Science* 138.

11 Katy Long, ‘When Refugees Stopped Being Migrants: Movement, Labour and Humanitarian Protection’ (2013) 1 *Migration Studies* 4, 14; James C Hathaway, ‘The Evolution of Refugee Status in International Law: 1920–1950’ (1984) 30 *Comparative and Int LQ* 348, 370–372.

12 Megan Bradley, Laura Madaokoro, Merve Erdilmen and Christopher Chanco, ‘Whither the Refugees? International Organisations and “Solutions” to Displacement 1921–60’ (2022) 41 *Refugee Survey Quarterly* 159–195, 177.

13 Ibid.

14 Kneebone and Macklin (n 1) 1082.

15 Ibid, 1084–1086.

16 Loescher (n 9) 40.

17 Ibid.

bulk resettlement programme to fill their needs for post-war reconstruction as an individualised definition of a refugee was being drafted by the United Nations. The refugees were generally known as Displaced Persons and largely employed as labour migrants on large-scale construction projects in remote parts of Australia (such as the Snowy Mountains and Tasmanian Hydro-Electric Schemes), and as agricultural workers in other countries. In Australia, the UK and Canada, Displaced Persons were required to enter contracts that often created conditions tantamount to indentured labour.¹⁸ In Australia's case it entered into an agreement with the IRO to bring some 170,700 'assisted refugees' to Australia between 1947–1954.¹⁹

A second bow to the narrative around Displaced Persons and Australia's engagement with the IRO is that it did not involve a commitment to take 'refugees' as defined in the 1951 Refugee Convention²⁰ (which was in any event at that stage in the draft process). The quotations from the *Green Paper* produced by the Australian Population and Immigration Council in 1977 suggest a seamless history of refugee protection, but this is not quite accurate. Importantly, the 1951 Refugee Convention replaced group-defined protection (which reflected the inter-war resettlement experiences) with an individual right to asylum.²¹ Moreover, the view that displaced persons were not refugees is challenged by retrospective recognition in reports beginning in 1976 that they are part of Australia's history of refugee protection.²² For example, in the 'first ever' report of the Department of Immigration and Ethnic Affairs (1976), Australia's pre-World War II refugee populations are acknowledged: it is stated that in the months before the war, Australia 95% of 7,700 arrivals were refugees.²³

18 Andrew Markus, (1984) 47 *Labour History* 73–90, 88. Long (n 11) 14–15.

19 Elbritt Karlsen, Janet Phillips and Elsa Koleh, 'Background Note: Seeking asylum, Australia's humanitarian program' (Parliament of Australia, Department of Parliamentary Services) 21 January 2011, 28 use this term and cite figures sourced from the Department of Immigration in 2001.

20 Klaus Neumann, *Australia's Response to Refugees: A History* (Black Inc 2015) 100–101,

21 Kneebone and Macklin (n 1) 1085; Laura Barnett, 'Global Governance and the Evolution of the International Refugee Regime' (2002) 14 (2/3) *International Journal of Refugee Law* 238.

22 Ann-Mari Jordens, *Redefining Australians: Immigration Citizenship and National Identity* (Hale and Iremonger 1995) explains at 27 that as at 1946 Australia had not agreed to take refugees and that the Displaced Persons were taken as a humanitarian gesture but she also describes them as 'refugees'; *ibid* 29; Karlsen et al 2011 (n 19), Appendix B, 28 (label as 'assisted refugees'); James Jupp, *Exile or Refuge? The Settlement of Refugee Humanitarian and Displaced Immigrants*, Centre for Immigration and Multicultural Studies. ANU, (Commonwealth of Australia, AGPS Canberra 1994) 8. See also Parliament of Australia, Department of Immigration and Ethnic Affairs, *Review '79* (Parliamentary Paper 358 of 1979) (*Review '79*) Appendix G 91 which refers to 'refugees or displaced persons'. This description is repeated in subsequent *Reviews* and in other official reports.

23 *Review '76* (n 3) 7 applying the definition in the 1951 Convention relating to the Status of Refugees; Department of Immigration and Multicultural Affairs *Refugee and Humanitarian-*

In the case of Australia, detailed historical studies by scholars such as Egon Kunz,²⁴ who built on the work of earlier immigration scholars such as Jerzy Zubrzycki,²⁵ link engagement with the IRO with the need for post-war national growth rather than 'immediate workforce needs';²⁶ that it was a pragmatic decision born out of necessity²⁷ but also a deliberate decision by then Minister for Immigration, Arthur Calwell, to shift the focus of immigration to population and nation building to serve this higher purpose; that it was largely a political tool designed to prevent the growth of unfavourable attitudes to immigration, to ensure a 'green light for further mass intakes'. In 1947 Australia's population of 7.5 million (compared to 22 million today) were (and are) largely urban dwellers with the greatest concentrations in the three eastern major cities of Sydney, Melbourne and Brisbane. As is explained below, from 1901 Australia practised a selective 'white' immigration policy so that most immigration was British or European. Australia thus actively chose European Displaced Persons; the largest categories being Polish and Yugoslav entrants.²⁸

Kunz argues that although the displaced persons program had important implications for the post-war economy, it was a secondary consideration; that nation building through immigration was an act of defence.²⁹ In this framing, the displaced persons were not competing with local labour, and fitted into the narrative of a 'settler nation' as permanent residents who would not disturb social cohesion.³⁰ In the first Department of Immigration Report in 1976, it was stated quite categorically that Australia had never accepted migrant or guest workers.³¹ This report made it clear that the focus of the immigration programme remained on permanent 'settlers' and building up Australia's population. An enquiry into Australia's population growth, begun in 1970, was triggered by a fall in Australia's natural population growth during the 1960s.

ism Issues: Australia's Response (Commonwealth of Australia, 2000) ('*Australia's Humanitarian Response 2000*') 8 describes 'Displaced Persons from Eastern Europe 1947–54' as part of the 'waves of refugees to Australia'.

24 Egon F Kunz, *Displaced Persons: Calwell's New Australians* (Australian National University Press 1988).

25 https://tasa.org.au/content.aspx?page_id=22&club_id=671860&module_id=357703.

26 Kunz (n 24) xviii.

27 Ibid 17; Kunz states that 'when Australia became a signatory to the constitution of the International Refugee Organisation (IRO) on 13 May 1947, there was no hint given to the Australian public that any IRO refugees would be admitted'.

28 Kunz (n 24) Table 4.1 43. Poles 37%, Yugoslavs 14% and Latvians 11% – see *Green Paper* (n 4) 40.

29 Kunz (n 24) 143.

30 Ibid (n 24) 144, Kunz explains that Displaced Persons were portrayed in the press as 'intelligent, educated, appreciative and clean-cut'. Many subsequently became leaders of industry in Australia.

31 *Review '76* (n 3) 6 explains that Australia has not accepted the guest worker model.

The *Green Paper* presented in 1977³² was designed to stimulate public debates on immigration and population policies to ascertain community attitudes. In another report in 1982, on ‘Refugees’ contribution to Australia’, it was stated that ‘since 1945 more than 400,000 refugees and displaced persons’ had arrived in Australia;³³ that altogether 21,847 ‘settlers’ arrived under ‘Refugee and Special Humanitarian programs’ amounting to 19% of all settler arrivals.³⁴

Moreover, as time passes and Australians become more interested in their history, stories are emerging about the refugee backgrounds of many displaced persons such as Olegas Truchanas from Lithuania who was employed by Electrolytic Zinc Co and later for the Hydro Electric Commission in Tasmania. He was active in the Lithuanian resistance movement during World War II and studied Law. Because of his family background he was considered a target of persecution.³⁵ His story is amongst many that are detailed in Kunz’s study and in more recent publications.³⁶

Nevertheless, despite the clarity provided around the ‘displaced persons’ ‘refugee’ narrative in Department of Immigration Reports and other reports from the 1970s, in 1981 Storer would write:³⁷

Migration programs to Australia were and still are essentially for economic purposes: to provide unskilled labour, initially to develop industries and now for jobs considered ‘socially undesirable’ to Australian born workers ... [humanitarian and refugee] post war immigration was based on the needs of developing post war secondary industry both for brawn and brain-power.³⁸

13.3 Australia Signs the 1951 Refugee Convention: ‘The Quest for “Wriggle Room”’

Although it offered a haven to many refugees from the Asia-Pacific region during World War II, this did not necessarily lead to their permanent settlement

32 *Green Paper* (n 4).

33 Parliament of Australia, Department of Immigration and Ethnic Affairs, *Review ’80–81* (Parliamentary Paper No 58 of 1982) (*Review ’80–81*) 47.

34 *Ibid* 40.

35 Queen Victoria Museum and Art Gallery (Launceston Tasmania), This Vanishing World: the Photography of Olegas Truchanas 2024 <<https://adb.anu.edu.au/biography/truchanas-olegas-11882>> accessed 4 October 2025.

36 Sheila Fitzpatrick, *Lost Souls: Soviet Displaced Persons and the Birth of the Cold War* (Princeton University Press 2024).

37 Des Storer, *Migrant Families in Australia: A review of some social and demographic trends of non Anglo Saxon migrants 1947–81* (Working Paper 3 October 1981 Institute of Family Studies).

38 *Ibid* 1.

in post-war Australia.³⁹ As the following section of this chapter illustrates, in reality the refugee category provided a challenge to the imperative of control over entry. In this section I explain Australia's reluctance to embrace the refugee category.

Australia had actively participated in the drafting process of the 1948 Universal Declaration on Human Rights (UDHR), but its first engagement with the process of drafting the 1951 Refugee Convention was as a member state to the Conference of Plenipotentiaries held 2–25 July 1951. In his seminal article on Australia's engagement, Palmer, a former senior adviser of the Department of Immigration, notes that the instructions given to the representatives of Australia to the Conference were to 'proceed cautiously, avoid making controversial amendments and to make no commitment on the grant of asylum'.⁴⁰ This inauspicious engagement with the drafting process illustrates Australia's reluctant acceptance of the refugee-asylum seeker category.

Australia's engagement with the Conference debates shows how Australia conceived refugees at the time of drafting the convention. Firstly, throughout the Conference the representatives from Australia insisted that refugees should be considered and treated in largely the same manner as any other migrants to Australia. Concerns were raised and amendments suggested regarding non-discrimination provisions in the draft Convention that seemed to provide refugees with rights equal to citizens and in turn greater than other 'aliens' within the country.⁴¹ This included the proposal (and subsequent withdrawal) of an additional article stating that 'Nothing in this Convention shall be deemed to confer upon a refugee any rights greater than those enjoyed by other aliens'.⁴² Specifically, requirements to provide travel documents to refugees and limitations on withholding documents from refugees proved to be a major sticking point for the representatives from Australia.⁴³

39 York (n 7) 10. Eg *The War Time Refugees Removal Act 1949* (Commonwealth of Australia) was intended to authorise the forcible removal of non-European refugees (consistent with the extant White Australia Policy).

40 David Palmer, 'The quest for "wriggle room": Australia and the Refugee Convention 1951–73' (2009) 63(2) *Australian Journal of International Affairs* 290–308, 294 DOI: 10.1080/10357710902895178.

41 Conference of the Plenipotentiaries of the Status of Refugees and Stateless Persons: Fifth Session (4 July 1951) UN Doc A/CONF.2/SR.4, 4–5, 15–16; Conference of the Plenipotentiaries of the Status of Refugees and Stateless Persons: Sixth Session (4 July 1951) UN Doc A/CONF.2/SR.6, 5–7; Conference of the Plenipotentiaries of the Status of Refugees and Stateless Persons: Twelfth Session (9 July 1951) UN Doc A/CONF.2/SR.12, 6–10; Conference of the Plenipotentiaries of the Status of Refugees and Stateless Persons: Twenty Sixth Session (18 July 1951) UN Doc A/CONF.2/SR.26, 9–10.

42 See 'Australia: Proposal for Additional Article 3(c)' (3 July 1951) UN Doc 1/CONF.2/19.

43 Conference of the Plenipotentiaries of the Status of Refugees and Stateless Persons: Twelfth Session (9 July 1951) UN Doc A/CONF.2/SR.12, 6–10; Conference of the Plenipotentiaries of the Status of Refugees and Stateless Persons: Seventeenth Session (12 July 1951) UN Doc A/CONF.2/SR.17, 7, 11–12.

Further, concerns were raised regarding the ability of the Australian government to impose conditions of entry on refugees. Specifically, the Australian representatives were preoccupied with the impacts of the proposed Convention on the continuation of the labour contract schemes under the Displaced Persons Resettlement Scheme described above that required refugees to be employed for a two-year period in roles determined by the Government of Australia.⁴⁴

Control over flows of refugees to Australia was also expressed. Australia wished to maintain the power to expel refugees from its territory on policy grounds and to maintain control over who it determined to admit as a refugee.⁴⁵ Further, Australia expressed support for an amendment introduced by France to allow states to limit the geographic application of the Convention to Europe. Australia supported making this geographic limitation explicit in the definition of a refugee in the Convention to ensure that countries were not 'asked to buy a pig in a poke'.⁴⁶ Until the 1967 Protocol⁴⁷ made it clear that the Refugee Convention applied globally, the refugee definition applied only to European refugees. However, subsequently Australia accepted cohorts of refugees mainly (but not exclusively) from Europe.⁴⁸

For example, Australia resettled refugees such as 14,000 White Russians between 1947–1954,⁴⁹ about 15,000 Hungarians after the 1956 uprising,⁵⁰ and 6,000 Czechs after the 1968 Soviet invasion;⁵¹ 18,000 Lebanese after the 1974 civil war; and refugees of many nationalities in Austria (mainly Yugoslavs) from 1969–1970.⁵² Moreover, in 1973–1974 Australia responded to a request of the UNHCR and resettled 1,000 refugees from South America following the fall of the Allende government.⁵³ These crises followed coups d'état and civil wars, including in Turkey in 1974, as the *Green Paper* noted.⁵⁴

44 See Conference of the Plenipotentiaries of the Status of Refugees and Stateless Persons: Third Session (3 July 1951) UN Doc A/CONF.2/SR.3, 18–21; Conference of the Plenipotentiaries of the Status of Refugees and Stateless Persons: Ninth Session (6 July 1951) UN Doc A/CONF.2/SR.9, 18–20; Conference of the Plenipotentiaries of the Status of Refugees and Stateless Persons: Eleventh Session (9 July 1951) UN Doc A/CONF.2/SR.11, 16–17.

45 Conference of the Plenipotentiaries of the Status of Refugees and Stateless Persons: Fifteenth Session (11 July 1951) UN Doc A/CONF.2/SR.15, 11, 12, 17.

46 Conference of the Plenipotentiaries of the Status of Refugees and Stateless Persons: Twenty First Session (14 July 1951) UN Doc A/CONF.2/SR.21, 17.

47 Australia signed the 1967 Protocol in 1973.

48 *Review* '76 (n 3) 26 notes that an 'influx' of more than 2,500 East Timorese 'evacuees' was 'evacuated' to Darwin (in the north of Australia).

49 *Australia's Humanitarian Response* 2000 (n 23) 8.

50 Marjoleine Zieck, 'The 1956 Hungarian Refugee Emergency, an Early and Instructive Case of Resettlement' (2013) 5(2) *Amsterdam Law Forum* 45, 59. According to Zieck, Australia took 11,680 refugees in contrast to the US (40,650).

51 *Green Paper* '77 (n 4) 40; *Australia's Humanitarian Response* 2000 (n 23) 8.

52 *Ibid.*

53 *Ibid.*

54 *Green Paper* '77 (n 4) 40.

In this period, the refugee was arguably understood as a victim of Cold War politics and resettlement responses were formulated on that basis.⁵⁵ Generally, such refugees were admitted under general immigration schemes such as the Special Passage Assistance Programme (SPAP) introduced in 1966 to cover migrants, including refugees who were not covered by existing schemes, such as the Intergovernmental Committee for European Migration (ICEM) refugee assisted passage scheme.⁵⁶ In relation to the 1956 Hungarian refugees, the 1957 Yearbook Australia noted that '[t]he Australian migration representative in Austria was instructed to begin selection of the refugees immediately, and was advised that *normal standards should be applied with understanding and flexibility; in addition, he was authorized to select a number of compassionate cases such as children and persons over the normal age limits*'.⁵⁷

13.4 Humanitarian Exceptionalism: the 'Settler' Narrative and Family Reunion

*We must fill this country or we shall lose it.*⁵⁸

In this section, which continues the story of Australia's humanitarian and refugee resettlement responses from the early 1970s to the late 1980s, it is argued that the responses linked family reunion and refugee resettlement policies to the narrative of a 'settler' nation and social cohesion. At this time Australia was self-described as a 'settler nation', which simply meant entry for permanent settlement, rather than, for example, as guest workers or temporary migrants. Migration was managed through 'assisted passages' for selected (mainly British) migrants. As explained above, cohorts of refugees arrived in a similar way.

But as the refugee 'problem' escalated from the late 1970s and into the 1980s, refugee policy was separated from broader discretionary humanitarian responses. This narrative is consistent with the policy that was formulated in 1977, which prioritised Australia's choice of humanitarian entrants over refugees, reflecting a desire to control the composition of the Australian community, as the following discussion illustrates.

The nucleus of this development is Australia's response to the Indochina crisis arising from the fall of Saigon (Ho Chi Minh City) in April 1975. This

55 Zieck (n 50), Barnett (n 21), Kneebone and Macklin (n 1) 1086, York (n 7) 2, Sev A Ozdowski, 'The Law, Immigration and Human Rights: Changing the Australian Immigration Control System' (1985) 19(3) International Migration Review 535.

56 See Special Passage Assistance Programme – SPAP – Implementation part 1 and 2, NAA A446, 1972/77836, 1960561, 323–324, 91.

57 Australian Bureau of Statistics, Yearbook Australia (1957) 579 (emphasis added).

58 Arthur Calwell, Minister for Immigration; CPHD vol 204, p 141, 8 September 1949 cited by Jordens (n 22), 26. Robert Lancy, 'Law and Policy in Immigration MAP Paper 49', The Clearing House on Migration Issues Richmond (March 1986) 16 states that Australia's main motive was to build its population.

coincided with a constitutional leadership crisis which led to the replacement of the then Prime Minister of Australia, Gough Whitlam, by Malcolm Fraser in November 1975.

13.5 The Development of Humanitarian Policy in the 1970s: the Legislative Vacuum

Australia's humanitarian policy developed in the 1970s in immediate response to the fall of Saigon (subsequently Ho Chi Minh City), and was further refined in the 1980s. Importantly, in contrast to Canada at this same juncture, Australia's legislation and policy on migration and refugees were undeveloped.⁵⁹ Further, Australian legislation on migration was scant, and policy developed through practice which is reported in annual Department of Immigration reports or 'Reviews of Activities', dating from 1976. Refugee and humanitarian policy was framed largely as an extension of general migration policy which focused on social cohesion and communities through family reunion.

In 1976 legislation dealing with migration was sparse. In 1958, a few years after Australia had signed the Refugee Convention, it created a new Migration Act which repealed the infamous Immigration Restriction Act, 1901 which had introduced a 'dictation test' administered over the first part of the 20th century to implement the White Australia policy. This first major amendment in 1958 of the 1901 Act abolished the controversial dictation test, introduced a simpler system of entry permits and provided some additional safeguards for the rights of the individual.⁶⁰ In his Second Reading Speech, the Hon. Alec Downer, then Minister for Immigration, described the 1958 Act as machinery legislation designed:

to consolidate and amend Australia's immigration statutes. It is nothing to do with the government's current immigration policy; its primary concern is with the mechanism by which national policy is implemented ... it is a technical document arranged in four parts, containing 67 clauses. The more material portions are those dealing with immigration, deportation, and the emigration of children and aborigines.

Until the first report of the Department of Immigration and Ethnic Affairs was produced in 1976,⁶¹ there was no coherent statement of immigration policy. In the 1960s and 1970s Australia was gradually becoming internationalised.

59 Geoffrey Cameron, 'Reluctant Partnership: A Political History of Private Sponsorship in Canada' (1947–1980) in Shauna Labman and Geoffrey Cameron eds, *Strangers to Neighbours: Refugee Sponsorship in Context*, (McGill Queens University Press 2020) Chapter 1.

60 Ozdowski (n 55) 538.

61 *Review '76* (n 3).

This was a period in which the White Australia policy was practised selectively as Australia slowly opened up to immigration from Asia.⁶² In 1973 the new Whitlam government had started to dismantle the White Australia policy when Whitlam announced that future immigration policy would not demarcate between immigrants on the basis of race, colour or nationality.⁶³ In 1974 Whitlam's government had signed the UN Protocol Relating to the Status of Refugees, which formally committed Australia, for the first time, to obligations to non-European refugees and asylum-seekers. Importantly in this period, the Whitlam government accepted large numbers of refugees from South America. It was also noted for enacting the Racial Discrimination Act 1975, which completed the task of dismantling the racist White Australia policy,⁶⁴ which was Whitlam's enduring legacy.⁶⁵

In the initial response to the fall of Saigon by the Whitlam Government in April and May of 1975, the then Minister for Labour and Immigration, the Hon Clyde Cameron MP, announced three categories of Vietnamese citizens eligible for temporary entry into Australia:

- Spouses and children of Vietnamese students already in Australia;
- Spouses and under 21-year-old children of Australian citizens, subject to completion of citizenship formalities; and
- Vietnamese citizens with a long and close association with the Australian presence in Vietnam whose lives are considered to be in danger.

These categories emphasise family reunion or connection to an existing community through sponsorship⁶⁶ as an important element of migration policy, one which persisted until 1988 when the Hawke Government shifted the focus toward skilled migration.⁶⁷ Family reunion, which was paired with social cohesion, was also a focus of the first report of the Department of Immigration produced in 1976.

62 In Parliament of Australia, Department of Immigration and Ethnic Affairs, *Review '77* (Parliamentary Paper No 340 of 1977) (*Review 1977*), 12 it is reported that 14% of all migration is from Asia, although the predominant group (England/Ireland) is 33%. Importantly, family reunion accounted for 28.4%.

63 James Jupp (ed), *The Australian People: An Encyclopedia of the Nation, its People and Their Origins* (Cambridge University Press, 2001) 119.

64 Katrina Stats 'Welcome to Australia? A reappraisal of the Fraser government's approach to refugees, 1975–83', (2015) 69(1) *Australian Journal of International Affairs* 69–87, 73.

65 Sara Dehm and Anthea Vogl, 'Immigration Amnesties in Australia: Lessons for Law Reform from Past Campaigns' (2022) 44(3) *Sydney Law Review* 381, 393; Stats (n 64) 69–87, 73.

66 *Review '76* (n 3) 15. Parliament of Australia, 'Australia and the Refugee Problem', Report of Joint Standing Committee on Foreign Affairs and Defence (Parliamentary Paper No 329 of 1976) 5.1.

67 Parliament of Australia, Department of Immigration and Ethnic Affairs, *Review '88* (Parliamentary Paper No 254 of 1987–88) (*Review '88*) 187.

In the 'first ever' report, there is a reconstruction of the narrative of Australia's postwar migration policies and fascinating tables showing a steady increase in Asian migration in that period.⁶⁸ Although the main focus on 'entry for permanent settlement' was directed at 'assisted' European arrivals, the report states:

'The individual's capacity to meet the criteria for entry is the determining factor. Race, religion or nationality are not factors influencing the decision'.⁶⁹

This change in attitude had been hastened by Australia's involvement in the Indo-Chinese war and the need to recognise some responsibility for the ensuing refugee problem.⁷⁰ The *1976 Review* claimed that in Australian policy provision 'has always existed for':

- Reunion of families;
- Refugees;
- Children entering for adoption.⁷¹

Notably in this list, family reunion, which subsequently becomes paired with humanitarianism in policy responses, precedes the refugee category.

In addition to Indochinese refugees, in the 1975–1976 period Australia also admitted 15,000 Lebanese and 2,500 East Timorese⁷² from 'refugee type situations'.⁷³ The Lebanese who were described as 'refugees' (in contrast to the East Timorese who were labelled 'evacuees')⁷⁴ were granted entry under relaxed family reunion criteria.⁷⁵

In the *1976 Review* the focus was on population growth and the ability of Australia to absorb new populations.⁷⁶ In this report it was explained that Australia had not confined its help to people coming within the strict scope of the refugee definition, but had also extended it to persons fleeing 'adverse circumstances or natural disasters'.⁷⁷ It referred to Rhodesians and students from Indochina present in Australia being granted temporary protection on

68 *Review '76* (n 3) – see details re students 6; new citizens 28.

69 *Ibid* 6.

70 Australia's involvement in the Orderly Departure Program (ODP) and the Comprehensive Plan of Action (CPA) – normalised resettlement and control rather than asylum seeking: Susan Kneebone and Felicity Rawlings-Sanaei, 'Introduction: Regionalism as a Response to a Global Challenge' in Susan Kneebone and Felicity Rawlings-Sanaei (eds), *New Regionalism and Asylum Seekers. Challenges Ahead*, Berghahn Books, 2007, 11–17.

71 *Review '76* (n 3) 6

72 *Ibid* 26.

73 *Ibid* 9.

74 *Ibid* 26

75 *Review '79* (n 22), 26, Appendix G 91.

76 E.g. *Review '76* (n 3) 10, 24.

77 *Ibid* 8.

‘humanitarian grounds’. In this statement there is a conflation of refugees and ‘humanitarian’.

13.6 The 1977 Policy and the Beginning of Formalised Responses

Whereas in the first (1976) *Review* there is deference given to the refugee category, in the next (1977) *Review* this position is clarified. 1977 marks the beginning of a substantial change in migration policy – possibly in response to low numbers of ‘settler’ migrants and increasing numbers of persons entering Australia ‘for reasons other than permanent migration’,⁷⁸ and a ‘growing tendency to circumvent immigration procedures’⁷⁹ amidst an increase in air movements.⁸⁰ Moreover, in April 1976 the first boat carrying refugees arrived, the first of 56 boats to arrive over the next six years.⁸¹ The term ‘boat people’ came into use as a term to describe spontaneous ‘asylum seekers’.⁸² In the same year the Joint Standing Committee on Foreign Affairs and Defence issued a report, *Australia and the Refugee Problem*, based on a 1975 investigation of Australia’s response to Vietnamese refugees under the Whitlam government. The report emphasised the ‘complete lack of policy for the acceptance of people into Australia as refugees rather than as normal migrants’ and urgently recommended ‘an approved and comprehensive set of policy guidelines and the establishment of appropriate machinery’ to be applied to refugee situations.⁸³

Following a visit to Thailand in February 1977,⁸⁴ the Minister for Immigration, Mackellar, announced the implementation of a comprehensive refugee policy in Parliament on 24 May 1977.⁸⁵ This new four-point policy was based on the following principles:⁸⁶

1. That Australia recognises its humanitarian responsibility and commitment to admit refugees for resettlement;
2. That the decision to accept refugees must always remain with the government of Australia;
3. That special assistance would often be needed for the movement and resettlement of refugees; and
4. That it might not be in the interests of some refugees to settle in Australia, and that their interests might be better served by resettlement elsewhere.

78 *Review* ’77 (n 62) 2.

79 *Ibid.*, 3.

80 *Ibid.*, 3, 20 – this led to an amnesty in 1976 see Dehm and Vogl (n 65).

81 York (n 7) 17.

82 Susan Kneebone and Sharon Pickering, ‘Australia and the Pacific Region’, in Kneebone and Rawlings-Sanaei eds (n 70) 167–187.

83 *Australia and the Refugee Problem* (1977) (n 66) 77; 89.

84 *Review* ’77 (n 62) 7.

85 Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 24 May 1977, 1713–1716 (Michael Mackellar).

86 *Review* ’77 (n 62) 8.

A key element of the new policy related to the acceptance of people in 'refugee-type situations who do not fall strictly within the UNHCR mandate or within Convention definitions'.⁸⁷ This was the beginning of the humanitarian policy.

In commenting upon the 1977 refugee policy in 1986 (which is much closer to the 'event' than today), migration scholar Robert Lancy⁸⁸ suggested that it was 'a careful restatement of disparate policy attitudes which had evolved over a long period and reflected Australia's own experiences with refugees'.⁸⁹ He suggested that in Australia the 'most debated issue is social cohesiveness and harmony'⁹⁰ and further that 'a humanitarian attitude reinforces Australia's credibility as a responsible member of the international community'.⁹¹ In her assessment of the Fraser government's response to the Indochina crisis, Stats makes a similar comment about the Fraser and 'previous governments' being motivated by their 'international reputation and the desire to maintain control, or the perception of it, over who could come to Australia and how they came'.⁹² This last point is made strongly in 1978 in *Review '78*⁹³ which begins by pointing out the constitutional basis of Australia's right to control entry⁹⁴ and the perception that 'many hundreds of thousands of people wish to settle in Australia'.⁹⁵

In May 1977, Minister Mackellar also announced procedural reforms which began to be implemented in 1978. The Department of Refugee Services (DORS)⁹⁶ was established, along with a Standing Inter-departmental Committee on Refugees to advise the Minister for Immigration and Ethnic Affairs on a range of refugee issues and to regularly review the refugee intake.⁹⁷ A separate Refugee and Special Programs Branch was created within the Department of Immigration.⁹⁸

In June 1978 the government announced further new policies, which essentially extended family reunion (thereby reinforcing its importance as a guiding principle for migration policy) and ensured that immigration policies

87 Mackellar (n 85).

88 Lancy (n 58).

89 Ibid 13.

90 Ibid 5.

91 Ibid 14. This echoes Parliament of Australia, Department of Immigration and Ethnic Affairs, *Review '78* (Parliamentary Paper No 358 of 1978) (*Review '78*) where concern re 'Australia's credibility as a civilised, compassionate nation' was expressed: ibid 26.

92 Stats 2015 (n 64) 83.

93 *Review '78* (n 91).

94 Ibid 1. See also Lancy (n 58).

95 Ibid.

96 Claire Higgins, 'New Evidence on Refugee Status Determination in Australia, 1978–1983' (2016) *Refugee Survey Quarterly* 1–23, concludes that 'there is evidence that on a very small number of occasions external political and strategic interests informed deliberations'.

97 *Review '78* (n 91) 28.

98 Ibid.

are 'responsible to humanitarian, compassionate and other special needs'.⁹⁹ These policies reflected the discussion in the 1977 *Green Paper* which linked family ties as an integral part of immigration policies for both 'humanitarian and social' reasons.¹⁰⁰ In 1978 the government introduced a 'points' system to ensure that prospective immigrants have the skills and qualities to satisfy Australia's needs.¹⁰¹

In *Review* '78 the government set out nine new principles for migration which again stressed the right to control entry plus the need for social cohesiveness.¹⁰² Principle 2 put forward the 'benefit to the Australian community and the social and economic ... requirements' as the primary criteria for immigration selection, but excepted 'people admitted as refugees and for family reunion'. In this report there is a very sympathetic discussion of refugee issues and also reference to special (humanitarian) programmes operating in the 1977–1978 period for Soviet Jews, White Russians from China, East Timorese from Portugal and Lebanese people.¹⁰³

Anticipating the coming storm created by multicultural policies¹⁰⁴ since Whitlam's dismantling of the White Australia policy, the eighth point states that 'enclave settlement will not be encouraged'.¹⁰⁵ The final (9th) point stresses the importance of integration (which is an outcome of family reunion).

13.7 Internationalisation and the Special Humanitarian Program 1979–1983

In the following year¹⁰⁶ the tone shifted again and the annual *Review* '79 report lengthened (from 36 pages in 1976 to 96 in 1979). At this point Australia was deeply enmeshed in the implementation of the Comprehensive Plan of Action for Indochinese Refugees:¹⁰⁷ it was stated that Australia's strong humanitarian commitment is '*reinforced* by the Refugee Convention and Protocol'.¹⁰⁸ That is, this suggests that humanitarian commitments include those undertaken by signing the Refugee Convention: that refugee protection is a subsidiary to Australia's humanitarian responses.

99 Ibid 1. This statement is replicated in the 1977 *Green Paper* (n 4) where it is stated (ibid 31) that Australia has the right to determine its own immigration laws and to permit entry flexibly on 'compelling compassionate or humanitarian factors'.

100 *Green Paper* (n 4) 32.

101 *Review* '78 (n 91) 1, 13, 18.

102 Ibid, 11.

103 Ibid, 28.

104 Parliament of Australia, *Report on Post-arrival Programs and Services for Migrants* (Parliamentary Paper No 164\1978) May 1978 ('the Galbally Report') refers to Australia as being at a 'critical stage in the development of a cohesive, united, multicultural nation', ibid 2.

105 *Review* '78 (n 91) 12.

106 *Review* '79 (n 22).

107 Kneebone and Rawlings-Sanaci, Introduction to *New Regionalism* (n 70) 1–24.

108 *Review* '79 (n 22) 11 – emphasis added.

By 1980 the landscape of refugee and humanitarian protection and resettlement had changed. For example, the Community Refugee Settlement Scheme (CRSS)¹⁰⁹ had been established to ‘give the community an opportunity to become directly involved in the settlement of refugees and their successful integration’; and to encourage ‘greater community awareness of the problem of refugees’.¹¹⁰ In *Review* 81, it was reported that in the 1980–1981 period altogether 21,847 people arrived under Australia’s refugee and special humanitarian programs’, amounting to 19.6% of all ‘settler’ arrivals in that period.¹¹¹

Further, in 1980, the Special Humanitarian Program (SHP) was introduced. This was to apply to ‘individual members of minority groups with relatives resident here, or with close association with Australia, ... [that are] suffering human rights violations or serious discrimination’, but who are not considered refugees within the UNHCR definition.¹¹² The SHP (formally established in the latter half of 1981),¹¹³ also incorporated two groups under ‘special humanitarian programs’ for Soviet Jews and East Timorese. This last group was treated differently – individuals needed to be nominated by relatives in Australia able to offer accommodation and support. It was reported that of the 2,000 expected to qualify under the ‘relaxed [family reunion] criteria’, some 1,192 were approved for entry in 1980–1981.¹¹⁴ Importantly in relation to both groups, the ability to integrate was a key factor, and was satisfied either by similarity with existing cohorts in Australia or by direct family support. By this point the overall pattern of Humanitarian Program was set: it applied both to individuals and to groups or cohorts of forced migrants and family connections were an important element of the policy.

The 1982–1983 annual Department of Immigration review,¹¹⁵ heralded the path to the future SHP and refugee policy. This was a period of economic downturn and a contracting labour market leading to a reduction in new ‘settlers’.¹¹⁶ Assisted passages for settlers were being phased out¹¹⁷ and multiculturalism was testing the ‘social compact’¹¹⁸ and the narrative of ‘social cohesion’. In 1981 Storer claimed that as a result of recent migration, the ‘traditional extended family was under threat’¹¹⁹ and that there were increasing

109 *Review* 81 (n 33) 4, 20.

110 *Ibid* 20.

111 *Ibid* 40.

112 *Ibid* 49.

113 *Ibid* 47.

114 *Ibid* 49.

115 Parliament of Australia, Department of Immigration and Ethnic Affairs, *Review* 83 (Parliamentary Paper No 360 of 83) (*Review* 83).

116 *Ibid* 19.

117 *Ibid* 16.

118 Jupp (n 22) 35 points out that there was a shift from assimilation and multiculturalism in the early 1970s, following the 1978 Galbally Report (n 104).

119 Storer (n 37) 10.

interfamilial conflicts ‘over social mores, values, and priorities concerning the preservation of traditional ethnic identity’.¹²⁰

Yet the SHP, which was described as a ‘complement to the refugee program’, continued for the Indochinese, from Latin America (including Salvadoreans),¹²¹ East Timor and Eastern Europe¹²² and for Soviet Jewish people.¹²³ Australia accepted more than 155,000 Indochinese refugees after 1975, and 17,000 Poles who came during the Solidarity and martial law period in the 1980s. In 1983–1984 Australia accepted some 1,500 refugees from Chile, El Salvador and Uruguay.¹²⁴

13.8 The Way to the Present

In this section I show how the narrative of cohesion was further tested by a ‘spat’ between the legislature, intent on maintaining government control over entrants, and an independent judiciary. In 1980 the 1958 Migration Act was amended to specify in s6A(1)(e) that a ground for an onshore entry permit included ‘strong compassionate and humanitarian grounds’.¹²⁵ At this time an entry permit denoted permission to enter Australia and was separate from a visa, which was issued overseas and amounted only to permission to travel. It was not until September 1994 that the ‘old system’ of entry permits was abandoned and the Migration Act was amended to require all non-citizens entering Australia to hold a valid visa.¹²⁶

The application of s6A(1)(e) to individual entrants pitted the judiciary against the government and challenged the latter’s established control over humanitarian entrants. It was repealed in 1989, at which point there were 8,000 applications pending. The key contention about the provision was whether ‘compassionate’ and ‘humanitarian’ should be read as a composite expression, or were they alternative requirements? According to the Director of the Department of Immigration at the time, the former was the intended meaning. As Evan Arthur pointed out, the government wanted to interpret the composite expression flexibly, to align with established policy and political considerations.¹²⁷

The departmental guidelines for s6A(1)(e) distinguished between the ‘compassionate’ and ‘humanitarian’ grounds. ‘Compassionate’ grounds were

120 Ibid 12.

121 Claire Higgins, ‘Australia’s Little-Known In-Country Program in Latin America’, (2014) 33 (1) Refugee Survey Quarterly 8–24.

122 *Review* ’83 (n 115) 27, 29.

123 Ibid 31.

124 Higgins (n 121).

125 Migration Act 1958, s6A. Note that in the *Green Paper* (n 4) the report used the expression ‘compassionate or humanitarian factors’ (ibid 31).

126 Mary Crock, *Immigration and Refugee Law in Australia* (The Federation Press 1998) 52–53.

127 Evan Arthur, ‘The Impact of Administrative Law on Humanitarian Decision-Making’ (1991) 66 Canberra Bulletin of Public Administration 90–96.

linked to the family reunion elements of migration policy, as well as to 'severe misfortune and sufferings which individuals experience in their personal lives as a result of unusual or distressing circumstances personal to them'. By contrast, 'humanitarian' grounds encompassed human rights violations, such as where 'an individual [is] being disadvantaged as a result of membership of some group or last permanent residence'.¹²⁸

However, the judges of the Federal Court interpreted the expression differently. In 1989 in the leading case of *Damouni*¹²⁹ French J found that there was little to be gained from distinguishing between 'compassionate' and 'humanitarian' grounds, since the 'term is a collocation which ultimately invites a normative judgment'.¹³⁰ In *Dahlan*,¹³¹ Hill J said:

The words are very broad. Compassion is an emotion akin to pity; it is felt when the circumstances of others excite our sympathy so that we suffer with them. Hence compassionate grounds will exist when the circumstances of an applicant are such as to enliven in the reasonable man his compassion. *By humanitarian grounds are meant no doubt grounds the denial of which would be inhumane having regard to the ordinary views of mankind.*¹³²

But Arthur's view (for the government) was that:

Unlike Australia's refugee protection mechanisms, provisions such as s6A(1)(e) are not the product of any international obligation. The Australian Government provides opportunities for people who are of humanitarian concern to remain in this country not because of any international treaty obligation but because there is a consensus among the Australian population (albeit often a fragile consensus) that this is a reasonable thing to do.¹³³

Whilst Jane McAdam agrees with this reasoning,¹³⁴ with hindsight there is much to be said for the judicial interpretation of s6A(1)(e). The history of

128 Jane McAdam, 'From Humanitarian Discretion to Complementary Protection – Reflections on the Emergence of Human Rights-based Refugee Protection in Australia' (2011) 18 Australian International Law Journal 53, 59–60.

129 *Damouni* (1989) 87 ALR 97, 102.

130 *Ibid* 102–103.

131 *Dahlan* (1989) 217 ALR 1.

132 *Ibid* 133.

133 Arthur (n 127) 90. Note that Art 6A(c) provided a right to apply for an entry permit where: 'he is the holder of a temporary entry permit which is in force and the Minister has determined, by instrument in writing, that he has the status of refugee within the meaning of the Convention relating to the Status of Refugees'.

134 McAdam (n 128) 63.

the development of Australia's Humanitarian Program illustrates that it was regarded as a discretionary element to supplement or complement Australia's migration and refugee policy. Commitments to refugees were regarded as a secondary consideration to the Humanitarian Program which until the early 1980s was regarded as an extension of the 'settler' narrative and framed around family reunion and community cohesion. The departmental guidelines recognised a connection between family reunion and 'compassion'; they also recognised a link between 'humanitarian' responses and the human rights obligations which Australia owed under international law.¹³⁵

In the 1980s, changes in migration law arose from episodes such as the s6A(1)(c) one, and as a system of Administrative Law was established. There were increasing calls for the broad discretions in the 1958 Migration Act to be codified. For example, in the 1985 Human Rights Commission's Report No 13 on 'Human Rights and the Migration Act 1958',¹³⁶ the Commission recommended that: 'a detailed, consolidated statement of current immigration policy which forms the basis for the issue of visas be publicly available, and regularly brought up to date'.¹³⁷

In the same report there was discussion of Australia's fulfilment of its obligations under the Refugee Convention. According to the report, 'Australia considers that it has sovereign responsibility to administer its refugee policies in accordance with its own priorities and criteria'.¹³⁸ Citing a submission by the Department of Immigration that:

Successive governments have reaffirmed the need for Australia to make its own selection of applicants both on the basis of humanitarian needs (i.e. claims to refugee status as assessed by Australia within its own procedures and its own experience) as well as on other criteria such as links with Australia.¹³⁹

The report summarised Australia's decision about resettlement (from offshore) under the Humanitarian Program as being based on three priorities:

- 1 People who have family in Australia;
- 2 Those who have close links with Australia; and
- 3 Those with resettlement potential or humanitarian claims.¹⁴⁰

135 This battle between the courts and the executive over human rights and refugee issues presaged later struggles from the 1990s over the scope of refugee law; Kneebone (n 2).

136 Australian Government Publishing Service, Human Rights Commission: Report No 13, *Human Rights and the Migration Act 1958* (1985) ('HRC Report No 13 1958').

137 Ibid, para 88, 28. Australia has subsequently legislatively redefined the Refugee Convention definition in the *Migration Act 1958*.

138 HRC Report No 13 1958 (n 136) para 120, 35.

139 Ibid para 120, 35.

140 Ibid para 121, 36.

These views expressed by the Department of Immigration illustrate how important it was to the government to retain discretion and control over refugee and humanitarian entrants. It also illustrates the continuing importance of family ties and social cohesion – constant features of Australian policy.

In 1989 the 1958 Migration Act was substantially amended to transform the migration legislation from a “shell” generating broad discretions to a detailed code of immigration rules.¹⁴¹ In the 1990s the Special Humanitarian Program evolved as new visas were created but for which broad discretions remain in the application of their criteria. The first two subclasses were the direct descendants of the 1980s Special Humanitarian Program: subclass 200 (Refugee) for those wanting to be resettled from outside Australia; subclass 201 (in-country Special Humanitarian Program). In 1989, the year that the UNHCR created the Woman at Risk program,¹⁴² the Women at Risk Visa was created.¹⁴³ In 1991–1992 two further categories were created: the Emergency Rescue (or Special Assistance Category) for specific groups;¹⁴⁴ and the Global Special Humanitarian Program (subclass 202).¹⁴⁵ The ‘refugee’ category is covered by subclasses 200, 201, 203 and 204.

The Global Special Humanitarian Program (subclass 202) is available for persons ‘subject to substantial discrimination amounting to gross violation of their human rights’. It is intended for people with links to Australia and is currently the visa that is available under the Community Support Program (CSP), one of Australia’s community sponsorship programs.¹⁴⁶ Entry under subclass 202 must be supported by an Australian (or eligible New Zealand) citizen, or permanent resident. It operates in tandem with ‘split family’ provisions to enable the entry of immediate family members of particular visa holders, such as refugees.¹⁴⁷ The CSP currently operates as a de facto diaspora family reunion pathway.

In 1996 the Australian Migration Program was officially divided into two distinct programmes – one for skilled and family migration and the Humanitarian Program for refugees and those in humanitarian need, as described above.¹⁴⁸ One feature of the ‘modern’ Humanitarian Program as it has developed since the 1990s is that it distinguishes between onshore (asylum seekers) and

141 Sean Cooney, *The Transformation of Migration Law* (Australian Government Publishing Service 1995) 1.

142 <https://www.ssi.org.au/wp-content/uploads/2023/05/Women-at-risk-fact-sheet.pdf>.

143 Subclass 204.

144 Subclass 203 used e.g. in 1991–1992 for East Timorese, Yugoslavia; 97–98, 98–99 mostly Kosovar refugees.

145 Subclass 202 includes sub-programs for ‘particular groups’ e.g. Ahmadis in Pakistan and many others.

146 See <https://immi.homeaffairs.gov.au/what-we-do/refugee-and-humanitarian-program/community-support-program/overview> (accessed 14 May 2025).

147 Karlsen et al (n 19) 12–13. Applications proposed under the CSP have the highest priority in this sub-class.

148 Ibid 7.

offshore humanitarian entrants.¹⁴⁹ Since 1996–1997 the two components (onshore and offshore humanitarian entrants) have been numerically linked because the size of the offshore refugee resettlement programme is linked to the onshore component.

In recent years, successive Ministers for Immigration have created and then repealed categories of humanitarian visas to suit their policies, whether it be for reasons of deterrence or for use as temporary devices.¹⁵⁰ Crock and Berg suggest that:

The prevailing feature of different categories of refugee and humanitarian visas is the extent of the government's control over the selection and admission of offshore applicants. The Minister can stop the issue of visas when the program is fully subscribed. The criteria for entry can be adjusted to immediate needs.¹⁵¹

13.9 Conclusion

The 1980s Humanitarian Program did not develop in a vacuum but rather evolved from Australia's experience with 'forced migration' post-World War II. The early features of the programme are reflected in its current operation. First, there is a reluctant acceptance of the refugee category and of the notion of asylum seeking; secondly, there is a persistent concern with the composition of the community and social cohesion. Thirdly, there is an enduring focus on the right to control entry to Australia; humanitarian considerations which are broader than the Refugee Convention definition of a refugee ensure a measure of flexibility about who should be allowed to enter Australia.¹⁵²

At the same time, Australia has always been aware of its international reputation, which the Humanitarian Program allows it to portray positively. In *Review 78* it was pointed out that 'Australia's credibility as a civilised, compassionate nation is under test'. In the administration of the Humanitarian Program, the Australian government is always conscious of the need to balance

149 Sahar Okhovat, Asher Hirsch, Khanh Hoang and Rebecca Dowd, 'Rethinking Resettlement and Family Reunion in Australia' (2017) 42(4) *Alternative Law Journal* 273 <<https://www.refugeecouncil.org.au/wp-content/uploads/2018/12/Rethinking-resettlement-and-family-reunion-in-Australia.pdf>> accessed 4 October 2025.

150 Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law Policy and Practice in Australia* (The Federation Press, 2011) 331–332, paras 12.2, 12.3 e.g. the Temporary Protection Visa category that was created during the Pacific Plan – see Susan Kneebone, 'The Pacific Plan: the Provision of 'Effective Protection'' (2006) 18(3, 4) *International Journal of Refugee Law* 696–721.

151 Crock and Berg (n 150) 332 [12.14].

152 *Green Paper* 1977 (n 4) 41.

its reputation as a 'good international citizen' against its domestic policies and its need to control who enters.¹⁵³

The major difference between the 'old' and the 'modern' humanitarian programmes is that the focus on family reunion has been modified. Crock claims that until 1996 over half of all immigration to Australia was based on this criterion.¹⁵⁴ The early experience of Australia's migration programme was framed around social cohesion, family reunion and sponsorship, which is replicated in the current Global Special Humanitarian Program (subclass 202). It has been described as a 'kind of fast-track family reunion for people who have [already] been resettled'.¹⁵⁵

This case study of the development of the Australian Humanitarian Program and its policy in the post-World War II period up to the 1970s and early 80s illustrates its pragmatic and flexible features which do not totally conform to the ideal of international solidarity and responsibility-sharing, or the principle of 'identifying refugees with the greatest protection needs'.¹⁵⁶ Rather than illustrating humanitarian governance as involving 'care and control', it illustrates humanitarian governance between 'control (of entry) and management' of the composition of the Australian population.

153 Interviews conducted with former Department of Immigration officials and UNHCR officers under ARC Project DP220101675, 'The role of community sponsorship for refugees in Australia'.

154 Crock (n 126) 68.

155 Interview conducted under DP22.

156 Tamara Wood and Claire Higgins, Special humanitarian intakes: Enhancing protection through targeted refugee resettlement POLICY BRIEF 7 Andrew & Renata Kaldor Centre for International Refugee Law (December 2018).

14 Canada's Visa Regime

A Global Model at a Crossroads

Elizabeth Hessek and Luna Vives

14.1 Introduction

Canada is seen internationally as a paradigm of good migration governance: a country that has struck a fine balance between selecting the best and brightest to help its economy grow and protecting those fleeing violence and war. Recent immigrants make up 23% of the Canadian population,¹ and Canada consistently ranks first or second globally for the total number of refugees resettled within its territory.² Between 1979 and 2022, more than 837,110 refugees resettled in Canada.³ Over 397,000 of these individuals (47%) came to Canada through private refugee sponsorship⁴ – an innovative Canadian policy established in 1978 that serves as an international model of an alternative pathway to refugee resettlement in which the state shares financial and logistical responsibilities with private citizens.⁵

Two important aspects of Canada's immigration system explored in this chapter are a national policy supporting multiculturalism and the country's highly dynamic visa regime. A visa is an official document produced by the state that ostensibly allows a person to enter the territory of a country and, in some cases, remain and work there. The two broad categories of visas are visitor visas, which are not meant to lead to settlement in the national territory, and resident visas, which can be either temporary or permanent.⁶ Because of its location – its cold ocean geography and the role of the United States as a *cordon sanitaire* for migrants travelling by land – Canada has had a greater capacity

1 Statistics Canada, *2021 Census of Population* (n. 98-316-X2021001, released 15 November 2023).

2 IOM, 'Migration and Migrants: A Global Overview' (*World Migration Report* 2024).

3 Geoffrey Cameron, 'Private Sponsorship Prefigured: Religious Groups and Canada's Cold War Refugee Policy' (2024) *Journal of Refugee Studies* feae051.

4 Ibid.

5 UNHCR, 'Global Refugee Sponsorship Initiative Promotes Canada's Private Refugee Sponsorship Model' (16 December 2016) <unhcr.org/news/news-releases/global-refugee-sponsorship-initiative-promotes-canadas-private-refugee> accessed 7 January 2025; Daniel Salazar, 'Private Refugee Sponsorship: Lessons and Questions from Canada' (USCRI, February 2023).

6 Immigration and Refugee Protection Regulations 2002, 2, d 1.

than other destination countries to select migrants abroad through its sophisticated visa regime.⁷ In other words, few people arrive in Canada without travel documents. And yet, Canada welcomes more foreign arrivals than the majority of destination countries: in 2022, the government issued nearly five million new travel documents for visitors, students, and temporary workers; resettled 46,608 new refugees; and admitted 444,708 new permanent residents.⁸

This ambitious formula has worked relatively well for almost half a century. Today, however, both this system and the multicultural ideals behind it are at a crossroads. Drastic changes to Canada's myriad visa programs in 2024 may prove to be a watershed moment for the country. This chapter will analyse these changes and explore the shifting ground of a Canadian national identity rooted in multiculturalism and humanitarianism.

14.2 Immigrant visas in Canada: a (Very) Brief History

Canada's contemporary visa regime is rooted in the adoption of "multiculturalism" as a cornerstone of Canadian identity in the 1970s, under the government of Pierre Elliott Trudeau. The policy was initially meant to uphold the rights of the Francophone minority in a mainly Anglophone country, but eventually led to official support for a rapidly growing cultural diversity. Multiculturalism was written into law over the following decade, mainly through section 27 of the *Canadian Charter for Rights and Freedoms* (1982) – the most visible part of Canada's Constitution⁹ – and the *Canadian Multiculturalism Act* (1988). Although not without criticism, this policy has become one of the foundations of contemporary Canadian identity. In 2021, a national survey of Canadians' attitudes towards immigrants and refugees found that nearly half (48%) of survey respondents cited Canada's multiculturalism, including its acceptance of immigrants and refugees, as the defining characteristic of the country. Canada's multiculturalism was cited over 20% more frequently than other aspects of Canadian life, including democracy and peace (cited by 25% of respondents), natural resources (20%), and social services (10%). Indeed, "for most Canadians, [multiculturalism] is also a common sense, everyday part of their understanding of themselves and their country."¹⁰

7 Jeffrey G. Reitz, 'The distinctiveness of Canadian immigration experience' (2012) 46(5) *Patterns of Prejudice*, 518; Triadafilos Triadafilopoulos, 'The Foundations, Limits, and Consequences of Immigration Exceptionalism in Canada' (2021) 51(1) *American Review of Canadian Studies*, 3.

8 IRCC, *2023 Annual Report to Parliament on Immigration* (Government of Canada 2023).

9 The Canadian Constitution was adopted in 1982 after an effort by the Canadian government to "patriate" powers still held by British parliament. The 1982 *Constitution Act* gave Canada complete independence from Britain. The *Canadian Charter for Rights and Freedoms* is part of the Constitution and holds legal supremacy.

10 Michael Adams, '50 Years of Multiculturalism: It's as Canadian as Maple Syrup' (*Canadian Geographic*, 7 October 2021) <canadiangeographic.ca/articles/50-years-of-multiculturalism-its-as-canadian-as-maple-syrup/> accessed 13 November 2024.

The consensus around diversity as a foundation of Canada's collective identity is in sharp contrast with Canada's first immigration policies, which were explicitly racist. For example, the 1885 *Chinese Immigration Act* sought to limit Chinese immigration following the construction of the Canadian Pacific Railway, completed largely by Chinese workers. The 1910 *Immigration Act* restricted access to Canadian territory to ships that made a "continuous journey" from their ports of departure – this was implemented to deny entry to British Indian subjects. During a debate in the House of Commons in 1914, Canadian Prime Minister Sir Wilfrid Laurier summed up public perspective on Canadian nationalism by plainly stating that "the people of Canada want to have a white country."¹¹ The second *Chinese Immigration Act* of 1923 completely banned the entry of Chinese people into Canada. At the onset of World War II, the country adopted policies that required new immigrants to have agricultural experience in a successful effort to block the arrival of Jewish people.¹² At the same time, the federal government activated the 1914 *War Measures Act* to allow for the internment of "enemy aliens." Following Japan's attacks on Pearl Harbour in 1941, the director of Canada's Immigration Branch justified the detainment of 22,000 Canadians of Japanese ancestry – 90% of the total Japanese-Canadian population¹³ – by explaining that, "Canada... places greater emphasis on race than upon citizenship."¹⁴

In the aftermath of the atrocities of World War II, as decolonisation broke up global empires and Canada helped draft the Universal Declaration of Human Rights for the newly established United Nations, explicit racism in immigration policy became anathema in liberal democracies. Canada, like many nation-states adapting to the post-colonial world, "turned to a rationalized approach to immigrant admission, inventing 'points systems' and 'lotteries' to sort applicants on the basis of criteria that could be distanced from the racist past."¹⁵ In this approach, applicants for permanent residency accumulate points based on their language skills, level of education, and professional experience. This rational approach to nation-building both depended upon and bolstered multiculturalism as an existential ingredient of Canada's collective identity: in theory, anyone with enough points to quickly integrate into the

11 Nandita Sharma, *Home Rule: National Sovereignty and the Separation of Natives and Migrants* (Duke University Press 2020) 76.

12 Irving Abella and Harold Troper, *None is Too Many: Canada and the Jews of Europe, 1933–1948* (New Jewish Press 2023).

13 James J. Marsh, 'Japanese Canadian Internment: Prisoners in their own Country,' (*The Canadian Encyclopedia*, 23 February 2012) <thecanadianencyclopedia.ca/en/article/japanese-internment-banished-and-beyond-tears-feature> accessed 13 November 2024.

14 Sharma (n 11) 111.

15 Catherine Dauvergne, *The New Politics of Immigration and the End of Settler Societies* (Cambridge University Press 2016) 19.

Canadian labour force could belong in the nation, regardless of their national origin and ethnic or racial background.¹⁶

Today, Immigration, Refugee, and Citizenship Canada (IRCC), the department in charge of all aspects of federal policy related to migration and citizenship, offers over 80 pathways for people to receive visas to come to Canada. The visa system groups resident visas into three large categories: economic class, family reunification class, and humanitarian class. Each one of those broad groups is in turn divided into many more categories that include ever-shifting temporary and permanent visas programs.¹⁷ As the architect of this complex labyrinth of pathways, IRCC's vision statement acknowledges that "immigration has been crucial in shaping Canada into the diverse and prosperous nation it is today and, looking forward, stands to be equally fundamental to Canada's future social cohesion and economic prosperity."¹⁸

Referencing the economic potential of immigrants is telling of the central role that labour has in the country's promotion of multiculturalism. While visa programs exist for refugees and family members regardless of their ability to participate in Canada's in-demand job sectors, the main goal of Canada's immigration policy is to feed the country's hungry economy, whose expansion has long outpaced natural demographic growth.¹⁹ Thus, Canada's 2025–2027 immigration plan, which steadily decreases immigration target numbers, allocates a growing share of permanent resident admissions to economic immigrants.²⁰ The plan aims to admit 395,000 total permanent residents in 2025: economic class admissions will reach 232,150 (59%), family class admissions will reach 94,500 (24%), and humanitarian admissions will reach 68,350 (17%). By 2027, the total number of admissions will drop to 365,000, but economic class admissions will be proportionately higher at 225,350 (62%), family class admissions dropping to 81,000 (22%), and humanitarian admissions falling to 58,650 (16%). The latter group is not linked to Canada's labour force needs but to its international obligations; yet, the government is outsourcing the financial burden of these new arrivals: of the 58,650 spots reserved for humanitarian classes in 2027, 36% will depend on private sponsors taking the initiative to support a refugee.

16 Rupaleem Bhuyan, Daphne Jeyapal, Jane Ku, Izumi Sakamoto and Elena Chou, 'Branding 'Canadian Experience' in Immigration Policy: Nation Building in a Neoliberal Era' (2015) 18 *Journal of International Migration and Integration*, 47.

17 Immigration and Refugee Protection Regulations 2002, 6; 7; 8.

18 IRCC, *Mandate – Immigration, Refugees and Citizenship Canada* (Government of Canada 4 December 2017) <canada.ca/en/immigration-refugees-citizenship/corporate/mandate.html> accessed 13 November 2024.

19 IRCC, *An Immigration Plan to Grow the Economy* (Government of Canada 1 November 2022) <canada.ca/en/immigration-refugees-citizenship/news/2022/11/an-immigration-plan-to-grow-the-economy.html>.

20 IRCC, *2024 Annual Report to Parliament on Immigration* (Government of Canada 2024) 4.

Decreasing target numbers for immigration between 2025 and 2027 is a direct reaction to the Canadian public's increasing opposition to migration. Indeed, the 2025–2027 numbers are *revisions* to the 2024–2026 plan which sought to increase immigration targets to admit 500,000 permanent residents annually by 2026. When the Government announced the 2024–2026 numbers, the IRCC was aware that “the media and the public are currently voicing concerns about the immigration system and linking international student rates and temporary resident intake in particular to housing and other absorptive capacity issues,” but they believed that “Canadians are more likely to see immigration as having a positive effect on the availability of labour and economic growth, but a negative impact on healthcare, and especially on the availability of housing.”²¹ The reaction to the announcement was so negative, however, that it provoked a sudden change of direction for the IRCC. In addition to reversing its position on increasing permanent resident admissions, the Government also pledged to reduce temporary migration to Canada, capping international student visas at 305,900 in 2027 – down from 682,889 in 2023, a 55% reduction, and capping temporary worker arrivals at 237,700 in 2027 – down from 949,270 in 2023 – a 75% decrease.²²

The Canadian public's negative reaction to the Government's proposed increase in permanent resident admissions aligns with data collected in Environics Institute's 2023 update to the national survey on attitudes on immigration. Two years after survey respondents overwhelmingly cited multiculturalism as definitive of Canadian identity, for the first time ever, a growing number of survey respondents stated that there was too much immigration into the country. Importantly, feelings about Canadian multiculturalism did not wane: in 2023, survey respondents were much less likely to say that immigration poses a threat to Canada's culture and values than they were in previous surveys, and 42% of respondents said that immigrants make their community a better place. At the same time, 38% of respondents stated that there was too much immigration in the country because “immigrants drive up housing costs” nationally²³ – an unproven talking point circulating in the media as rising housing prices began to affect the Canadian middle class.

The survey results reveal a growing paradox between “good” local-scale immigration that allows Canadians to claim multiculturalism as a value and “bad” national-scale immigration that must be capped for national wellbeing. The IRCC's policy reversal in the face of increased opposition to migration demonstrates that Canada is not immune to the use of migrants for electoral

21 IRCC, *CIMM – Immigration Levels Plan for 2024-2026* (Government of Canada 7 November 2023) <canada.ca/en/immigration-refugees-citizenship/corporate/transparency/committees/cimm-nov-07-2023/immigration-levels-plan-2024-2026.html> accessed 13 November 2024.

22 Ibid.

23 The Environics Institute for Survey Research, *Canadian Public Opinion About Immigration and Refugees – Fall 2023* (Focus Canada, Century Initiative, 2023) 8.

purposes. Multicultural and humanitarian values may underpin Canadian nationalism, but Canadian migration governance continues to be shaped by often racist perceptions of the economic impact of migration at the expense of humanitarian ideals and responsibilities. The following sections will consider this paradox at work in each of Canada's major visa programs.

14.3 Addressing Economic Needs: Work Visas à la Carte

The Canadian economy needs immigrant labour to survive. Natural increase of the Canadian population – the number of births minus the number of deaths in the country – has steadily declined since the 1960s. As in many industrialised nations, Canadian population projections underscore that a continued low birth rate and an ageing population will weaken the country's economic production and strain its social programs. To address this looming threat, for decades the Canadian state has encouraged certain highly curated forms of economic immigration. In fact, since 1999, immigration has outpaced natural increase as the driver of Canadian population growth.²⁴ Both the threat of population loss to the economy and the opportunity offered by increased migration have long been acknowledged across the Canadian political spectrum, and, though anti-immigrant sentiment is growing in Canada, public opinion generally embraces immigration as good for the country's economy.²⁵ The key question is not if migration is beneficial, but which economic migrants should be encouraged to come to Canada, and for how long. The answer to this question is an ad hoc collection of immigration programs regularly tailored to respond to Canada's bespoke economic vision. These programs include, for example, visas that offer migrants permanent residency either upon arrival in Canada or after having lived in Canada with a temporary visa; visas for "skilled" and "low-income" temporary workers that can (but do not always) offer pathways to permanent residency; and visas for seasonal workers that preclude long stays within the territory.

The majority of current visa programs that contain a pathway to permanent residency favour "skilled" foreign workers whose professions, education, language skills, and age fit into the government's vision of Canadian economic growth for the medium and long term. IRCC defines a skilled worker as someone with at least one year of continuous paid work in occupations that require a university degree, a college diploma, or more than six months of on-the-job training.²⁶ Each visa program for skilled workers responds to specific and

24 Statistics Canada, 'Population Growth: Migratory Increase Overtakes Natural Increase' (14 October 2014) <www150.statcan.gc.ca/n1/pub/11-630-x/11-630-x2014001-eng.htm#archived> accessed 13 November 2024.

25 Mireille Paquet and Andrea Lawlor, 'Numbers and Images: Representations of Immigration and Public Attitudes about Immigration in Canada' (2022) 55(4) *Canadian Journal of Political Science/Revue Canadienne de Science Politique* 827.

26 Immigration and Refugee Protection Regulations 2002, 6.

timely economic needs of Canada and its provinces. For example, the Atlantic Immigration Program is a federal program that specifically addresses labour needs in Canada's four Atlantic provinces which have historically struggled with population decline. The program helps designated employers hire foreign workers for jobs they haven't been able to fill locally. Atlantic Immigration Program visa recipients acquire permanent residency upon arrival. The IRCC's target processing time for this program is eight months.

More broadly, Provincial Nominee Programs (PNPs) decentralise migration governance by allowing Canada's 13 provinces and territories to establish their own economic goals and nominate skilled migrants to settle in the province and help achieve these goals.²⁷ Some PNPs offer temporary visas that are easily turned into permanent residency while others provincial nominees immediately receive permanent residency upon arrival in Canada. Target application processing time for PNPs is 12 months. Another program targeting skilled workers, the Start-up Visa Program,²⁸ offers permanent residency to immigrant entrepreneurs whose business proposals are supported by a designated Canadian venture capital fund. Processing time is 40 months.

The fastest way for potential immigrants to access permanent residency in Canada is the federal Express Entry program. Express Entry offers fast-tracked visa processing to the most desirable categories of migrant workers based on their professional skills, experience, or previous employment in Canada. As of 2024, application processing times average five months.²⁹ The Express Entry system manages three sub-programs that place people defined as skilled workers into different categories. These are the Canadian Experience Class, for people with at least one year of skilled work experience completed in Canada under a temporary work permit; the Federal Skilled Workers Program, which does not require Canadian work experience; and the Federal Skilled Trades Program, which requires applicants to have two years of full-time work in a specific trade sought by Canada as well as a Canadian job offer. Each program uses a points system to determine if an applicant will receive an invitation to apply for permanent residency.

Once basic requirements of each Express Entry program are met, additional factors are measured to calculate a final score for applicants. Advanced language skills, higher education, longer work experience, younger age, arranged employment in Canada, and "adaptability" all increase an applicant's

27 Excepting Québec and Nunavut which do not have Provincial Nominee Programs, each province and territory manages its own PNP. Examples include the Yukon's PNP <yukon.ca/en/immigrate-yukon?>, Manitoba's PNP <immigratemanitoba.com/immigrate/>, and Nova Scotia's PNP <novascotiaimmigration.com/move-here/?>, accessed 7 January 2025.

28 Information about the Start-Up Visa Program available at <canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/start-visa.html> accessed 7 January 2025.

29 It is important to note that due to an agreement with the federal government, the Province of Quebec manages its immigration decisions separate from the federal programs, and processing times tend to be longer.

eligibility. Adaptability is understood as the applicant or their spouse having previously studied or worked in Canada or having relatives in Canada. If an applicant receives a score of 67/100 after all these factors are measured, their application moves into the Express Entry pool where it will undergo a different evaluation, the Comprehensive Ranking System (CRS), which measures similar qualifications to establish a score out of 1,200. The IRCC invites the candidates in the pool with the highest CRS scores to apply for permanent residence during rounds of invitations that occur periodically for each Express Entry Program. The ranking system puts extra onus on applicants to improve their potential scores while also refusing to define a threshold for which to aim. Applicants are always in direct competition with the other applicants ranked in the pool.

The Express Entry system allows the federal government, provincial governments, and employers to cherry-pick eligible workers waiting in the candidate pool. The federal government ranks applications and may direct applicants to PNPs when they meet a province's labour market needs (non-express entry processes also exist for each province with a program) or to ad hoc programs used to address time-sensitive labour needs. In 2024, the government issued invitations to apply for permanent residency to people in the Express Entry pool with French-language proficiency looking to settle outside Quebec, healthcare specialists, scientists, transportation workers, farm supervisors, and butchers.³⁰

These programs favour those with previous work experience in Canada – that is, candidates who previously had a temporary visa. Foreign work experience in high-skilled sectors only counts for points in the Express Entry system if it is accompanied by additional Canadian work experience or advanced proficiency in English or French. Even then, a candidate will only receive 50 extra points for foreign work experience.³¹ Having more than five years of Canadian work experience counts for 80 points. Two of the most effective ways to increase points for Express Entry ranking are by having a provincial nomination or an offer of employment with a Canadian company, opportunities that typically require spending extended time in Canada to establish these professional relationships.

Researchers have often referred to this as Canada's two-step immigration system, which is part of a larger global trend of staggered immigrant integration: governments are establishing multi-stage paths to permanent residency

30 IRCC, 'Ministerial Instructions Respecting Invitations to Apply for Permanent Residence under the Express Entry System' (16 September 2024) <canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/ministerial-instructions/express-entry-rounds.html> accessed 13 November 2024.

31 IRCC, 'Eligibility for Express Entry Programs: Comprehensive Ranking System (CRS) Criteria' (13 June 2024) <canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/express-entry/eligibility/criteria-comprehensive-ranking-system/grid.html> accessed 13 November 2024.

(and eventually, in some cases, citizenship) that begin with more precarious temporary statuses.³² In the case of Canada, the various programs offering temporary visas fall under one of two larger programs: the Temporary Foreign Worker Program (TFWP) for jobs that address labour shortages and the International Mobility Program for jobs that promote Canada's economic and social objectives. These programs are more sensitive to evolving economic needs and political priorities than those conveying permanent residency. In a bid to support the development of Francophone communities across Canada, the Francophone Mobility Program (launched in 2016) made it easier for employers outside of Quebec to hire French-speaking temporary foreign workers. Between June 2016 and December 2020, 5,700 temporary work permits were issued to Francophone workers, 1,080 of whom were able to transition to permanent residency.³³ In 2023, the program expanded to include all workers regardless of skill class (with the exception of agricultural workers). The Agri-Food Pilot, launched in 2020, responded to the Canadian agricultural sector's need for a reliable workforce. The pilot aims to retain low-wage foreign workers with Canadian agricultural experience by providing them with an opportunity to become permanent residents. In 2023, IRCC extended the pilot and announced that it would expand open work permit access to family members of Agri-Food Pilot applicants.

The pliability of temporary migration programs also means that they can be modified quickly in response to the politicisation of migration and its instrumentalisation for electoral purposes. For example, typically spouses and common-law partners of international students coming to Canada have been eligible for temporary open work permits that allow permit-holders to work for any Canadian employer for the length of their partner's study permit. In 2024, amid growing anti-immigration public opinion, the government changed the rules to only allow the spouses and partners of international students enrolled in master's and doctoral programs to apply for open work permits. Spouses of undergraduate and college students are no longer eligible. The IRCC Minister, Marc Miller, explained the change as a move to prevent potential abuses of the programs and to lower the number of applicants for temporary visas in the face of a tremendous backlog.³⁴ He did not elaborate on why the government believed that people working legally in Canada while their spouse is legally studying may constitute an abuse of the system, however. Political parties at the federal and provincial levels instrumentalised other

32 Catherine Schmidt, Heather Bergen, Oula Hajjar, Lindsay Larios, Delphine Nakache, Rupaleem Bhuyan and Jill Hanley, 'Navigating Bureaucratic Violence in Canada's Two-step Immigration System' (2023) 49(19) *Journal of Ethnic and Migration Studies*, 4887.

33 IRCC, Canada expands the Francophone Mobility Program to Increase Francophone Immigration (15 June 2023) <canada.ca/en/immigration-refugees-citizenship/news/2023/06/canada-expands-the-francophone-mobility-program-to-increase-francophone-immigration.html> accessed 13 November 2024.

34 CIMM, *CIMM Meeting No. 93* (28 February 2024, Video recording).

temporary migration programs, making sudden and drastic cuts in the run-up to major elections. In late 2024, the government announced plans to limit work permit eligibility to spouses of foreign workers in management or professional occupations or in sectors with labour shortages.

The adaptability of these programs has also served to introduce progressive adjustments when revelations of migrant exploitation are taken seriously. The evolution of Canada's visa programs for foreign caregivers is instructive. Early programs like the Foreign Domestic Movement (1981) and the Live-in Caregiver Program (1992) offered a pathway to permanent residency, but the programs only offered closed work permits (tied to a specific employer), thus trapping foreign caregivers in potentially abusive workplaces.³⁵ In 2014, the government began testing a series of pilot programs to address this and other issues. The first pilot, instituted by the Conservative Harper government, removed the requirement that caregivers live in their employer's home, but also removed any pathway to permanent residency. The following program launched by the Liberal government in 2019 reinstituted the pathway to permanent residency, but inefficiencies in IRCC increased processing times to such an extent that when the program ended in June 2024, "most migrant care workers who applied remain[ed] in prolonged temporary status and at high risk of labour exploitation."³⁶ A new pilot program will allow care workers to directly access permanent residency status upon arrival in Canada, but it is unclear when this program will begin or how the government will tackle the existing backlog of care workers who have applied to transition from temporary workers to permanent residents. Unfortunately, because of the changes that each government effected on migrant caregiver programs since 2014, "many care workers have been unable to transition into these pilot programs due to [shifting requirements]. As a result, many migrant care workers have fallen out of regular status and become undocumented."³⁷

Other programs have been tweaked to remove potential for abuse, with mixed results. An example is the low-income stream of the TFWP, in particular its agriculture stream. Researchers and activists have been denouncing abuses in the TFWP for decades,³⁸ and a 2024 United Nations report described it as

35 Geraldine Pratt, *Working Feminism* (Edinburgh University Press 2004).

36 Jennifer E. Shaw, Anita Minh, Alicia Massie, Ethel Tungohan, Rupa Banerjee and Migrant Care Worker Precarity Project Team, *Ensuring the Success of the New Care Worker Pilots: Applying Lessons from the Past* (22, Canada Excellence Research Chair in Migration & Integration Policy Brief, Toronto Metropolitan University 2024).

37 Alicia Massie, Anita Minh and Jennifer E. Shaw, 'Canada's Broken Promises to Migrant Care Workers' (*PolicyNote* 18 June 2024) <policynote.ca/care-workers/> accessed 13 November 2024.

38 See Harsha Walia, 'Transient Servitude: Migrant Labour in Canada and the Apartheid of Citizenship' (2010) 51(1) *Race & Class* 71; Catherine Dauvergne and Sarah Marsden, 'The Ideology of Temporary Labour Migration in the Post-Global Era' in Ayelet Shachar and Geoffrey Brahm Levey (eds), *Citizenship Studies* (v. 18.2 Routledge 2012) 224.

a “breeding ground for contemporary forms of slavery.”³⁹ Simultaneously, the media have blamed temporary workers for recent increases in the Canadian unemployment rate.⁴⁰ In response, the federal government has introduced changes to reduce potential exploitation and respond to concerns about Canadian unemployment. As of September 2024, employers in areas where the unemployment rate is 6% or higher will not be able to hire low-wage foreign workers (except for jobs in agriculture, food processing, construction, and healthcare); no employer will be allowed to hire more than 10% of their total workforce through the TFWP; and the maximum duration of a low-wage stream work permit will be reduced to one year.

Beyond reacting to allegations of abuse, changes to the TFWP are part of the government's goal to decrease the number of temporary residents from 6.5% of Canada's total population to 5% by 2026. The fact that temporary workers in agriculture, food processing, construction, and healthcare are mostly exempt from these changes suggests that the government is making these cuts for political reasons, trying to please both employers who have become dependent on temporary foreign workers and an electorate that regards this group with increasing suspicion. In line with this reduction of temporary residents, the federal government has also introduced new restrictions on international student visas.

14.4 Subsidizing Institutions: International Student Visas

The Canadian government has historically facilitated pathways to permanent residency for graduates from Canadian educational institutions. Holding a Canadian diploma garners points in the Express Entry pool, and Canada's post-graduation work permit allows foreign graduates to stay in Canada and work for up to three years – leading to an even higher CRS score. Since the 2000s, Canadian policy has specifically built the education-to-immigration pipeline to achieve its economic aims. However, international students' footing in the system has been fragile since at least the 1970s, when they were first categorised as migrants. As the Canadian public becomes increasingly anti-migration, international students are beginning to feel that fragility. Major changes to student visa programs launched in 2024 may prove to be momentary political manoeuvring, but they could also be the bellwether for deep and lasting transformation of Canada's immigration policies.

Prior to Canada's passing of the 1976 *Immigration Act*, international students could apply for permanent resident status while they pursued their

39 Tomoya Obokata, *Visit to Canada: Report of the Special Rapporteur on Contemporary Forms of Slavery, Including its Causes and Consequences* (UNHRC, A/HRC/57/46/Add.1, 2024).

40 Jay Zhao-Murray and Aimee Look, ‘Temporary Residents, New Immigrants Push up Canada Unemployment’ (*Economic Times* 7 July 2024); Michael Higgins, ‘Trudeau's Zombie TFW Policy is Sucking the Life Out of Canada's Youth’ (*National Post* 28 August 2024).

studies. This changed in the wake of student protests against institutionalised racism at Sir George Williams University, after which international students were designated as visitors prohibited from applying for resident status while in Canada.⁴¹ This was the first instance of international students serving as scapegoats for uncomfortable changes to dominant Canadian society. International students' new status as visitors also allowed public universities to charge them a higher tuition based solely on the fact that they were not residents/citizens.⁴² Across Canada, tuition for international students dramatically increased in proportion to tuition for domestic students. Universities instituted tuition differentiation in part to weather cuts to provincial funding in the 1980s, and by the 1990s, they were actively recruiting international students to make up for budget shortfalls. Differential fees "reinforced the place of international students as outsiders who could serve Canadian interests by helping to fund its public post-secondary system."⁴³

By the early 2000s, the financial incentive for Canadian universities to enrol international students spurred the federal government to invest in student recruitment programs abroad. Simultaneously, Canadian policymakers began to see the utility in encouraging "skilled" foreign workers to immigrate to Canada to counteract decreasing natural replacement among Canadian nationals and help achieve the government's economic goals. In an about-face from the *Immigration Act* of 1976, the *Immigration and Refugee Protection Act* of 2001 explicitly defined international students as a class of foreign nationals eligible for permanent residency after meeting certain requirements. The government introduced the Canadian Experience Class program of Express Entry in 2008 and encouraged international students to apply. By 2013, 93% of student visa holders had transitioned to permanent residency.⁴⁴

The instrumentalisation of migration policy to harness the economic potential of foreign students enabled Canada to exceed its stated goals. Government strategy documents released in 2014 aimed to attract 450,000 international students by 2022. Canadian institutions exceeded this number in 2017. In 2022, IRCC issued 807,750 study permits. Students from India received 319,000 of these permits (39.5%) and students from China received 100,010 (12.4%). The Philippines, France, Nigeria, Iran, South Korea, Vietnam, Mexico, and the United States were also primary sending countries of

41 Ronald Cummings and Nalini Mohabir (eds), *The Fire that Time: Transnational Black Radicalism and the Sir George Williams Occupation* (Black Rose Books 2020).

42 Dale McCartney, 'A Brief History of 50 Years of International Student Policy in Canada' (2021) 51(3) *Canadian Journal of Higher Education / Revue Canadienne d'enseignement Supérieur* 33.

43 Ibid 39.

44 Soma Chatterjee, 'International students in Canada: A Lesson from History' (*Academic Matters* 29 April 2024) <academicmatters.ca/international-students-in-canada-a-lesson-from-history-2/> accessed 13 November 2024.

international students in 2022.⁴⁵ By this time, many institutions where foreign students enrolled depended on their tuition to operate, and Canada's higher education system had the highest proportion of international students of any country worldwide.⁴⁶

The rapid growth of the international student population between 2014 and 2022 coincided with an affordable housing crisis across Canada. The crisis was especially visible in cities where international students concentrated. Media coverage began blaming international students for straining the rental market and abusing the same education-to-immigration pipeline that the government had spent over two decades developing.⁴⁷ Public opinion followed suit, and in 2024 the federal government announced reforms to curb the growth of international students.

The government painted the changes as actions taken to "strengthen Canada's temporary residence programs and migration pathways," and claimed that they were protecting foreign students from labour exploitation that previous policies had enabled.⁴⁸ The government doubled the financial requirement that study permit applicants needed to meet; introduced a provincial letter of acceptance requirement that elongated the application process; made certain diplomas ineligible for post-graduation work permits; reduced the number of hours international students were allowed to work off-campus; and set provincial intake caps on international student permits. The initial cap on study permits announced in January 2024 was set at 360,000 new permits, a 35% decrease from 2023. In September 2024, the government announced a further reduction in the intake cap for 2025 based on a 10% reduction from the 2024 target.

Universities across the country voiced their concern that their finances may not be viable without the income from international students' tuition fees, which has come to supplement and stand in for public funding. Much like the agricultural sector, universities have become dependent on migration, even if in different ways. The government responded to these concerns by underlining the responsibility of the provinces to financially support higher education and by admonishing universities for developing budgets on the backs of

45 Statistica Research Department, "Top Ten Origin Countries of Study Permit Holders with a Valid Permit in Canada in 2022" (*Statistica* 4 July 2024) <statista.com/statistics/555132/top-10-origin-countries-of-international-students-at-years-end-canada/> accessed 7 January 2025.

46 Lisa Brunner, L. & Roopa Trilokekar, "International Students as Problems and Solutions" (*University Affairs* 1 February 2024) <universityaffairs.ca/opinion/in-my-opinion/international-students-as-problems-and-solutions> accessed 13 November 2024.

47 See *supra*, n 23 and 25.

48 IRCC, "Actions Taken to Strengthen Canada's Temporary Residence Programs and Migration Pathways" (18 September 2024) <canada.ca/en/immigration-refugees-citizenship/news/2024/09/actions-taken-to-strengthen-canadas-temporary-residence-programs-and-migration-pathways.html> accessed 13 November 2024.

international students. More critical voices have acknowledged that treating international students as scapegoats, capping the number of study permits, and restricting access to immigration pathways for certain groups of temporary residents is part of a long history of nationalist Canadian immigration policy. The arrival – and explicit recruitment – of international students in Canadian higher education over the past quarter century has convinced Canadians that their country is a global destination for the brightest minds. As political winds shift, so, too, do the policies that built this identity.

14.5 Meeting International Obligations: Humanitarian Protection

Beyond Canada's status as a premier academic destination, its status as a haven for people in need of international protection is also in question following the recent changes to visa policies. As a signatory to the 1951 Geneva Convention on the status of refugees, Canada has accepted international responsibility to protect people fleeing persecution in their countries of origin. As seen above, Canada consistently ranks first or second in terms of global refugee resettlement, and its refugee resettlement programs serve as a model for other refugee-receiving countries. Between 2015 and 2024, most of the refugees resettled in Canada were citizens of Syria (102,240 resettled refugees), Afghanistan (60,740), Eritrea (53,525), Iraq (23,980), Somalia (18,695), Democratic Republic of the Congo (15,180), and Ethiopia (10,200).⁴⁹ The United Nations High Commissioner for Refugees (UNHCR) defines refugee resettlement as "Resettlement is the transfer of refugees from an asylum country to another State, that has agreed to admit them and ultimately grant them permanent residence."⁵⁰ Three countries are part of the equation: the first country that the refugee fled, the second country where they sought temporary asylum, and the third country where they will permanently settle. Importantly, the resettlement process begins when a refugee is outside of the third country – in this case, Canada. Refugees are selected for resettlement, which differentiates them from asylum seekers asking for protection from within Canada, as we shall see.

There are three primary programs for refugee resettlement in Canada, each defined by who is financially supporting the refugees selected to arrive in Canada. In each program, refugees are referred to Canada after registering with the UNHCR or another referral organisation in their country of asylum, they receive a permanent resident visa upon arrival in Canadian territory, and they are supported financially for up to one year. In the Government-Assisted

49 IRCC, 'Canada - Admissions of Resettled Refugees by Country of Citizenship and Immigration Category, January 2015 - November 2024' (30 November 2024).

50 UNHCR, 'Resettlement' <[unhcr.org/what-we-do/build-better-futures/long-term-solution/s/resettlement](https://www.unhcr.org/what-we-do/build-better-futures/long-term-solution/s/resettlement)>.

Refugees (GAR) program, the Government of Canada or the province of Quebec funds non-governmental agencies to provide support services to resettled refugees. The Privately Sponsored Refugee (PSR) program enables Canadian citizens, permanent residents, and organisations to select and financially support refugees in their communities. Finally, the Blended Visa Office-Referred (BVOR) program pairs six months of the Government's financial support with six months of financial support and 12 months of social, emotional and settlement support from private sponsors.

Including private Canadian citizens and permanent residents in the solution to achieving Canada's international responsibilities and addressing the growing number of refugees worldwide is a novel approach to forced migration governance that has inspired other countries (the United States' Welcome Corps program is based on Canada's PSR program) and helped Canadians see themselves as a beacon of humanitarianism in the world. Private sponsors can be sponsorship agreement holders (SAH) – often religious or cultural organisations that signed an agreement with the Government of Canada to sponsor refugees and help them settle in their communities; groups of five or more individuals; or private organisations and corporations. Government support of citizen solidarity with refugees can be seen in stark contrast to the criminalisation of acts of solidarity towards undocumented migrants and asylum seekers in certain European contexts.⁵¹

Private sponsorship of refugees offers several benefits. For example, the Canadian PSR program allows sponsors to select the refugees they will sponsor by name, a particularity that allows for family reunification and the protection of specific groups of people in danger. For instance, certain SAHs exclusively select LGBTQ refugees to resettle in Canada. The BVOR program, in contrast, does not allow naming. BVOR sponsors are responsible for refugees selected by the Government. In both the PSR and BVOR programs, however, refugees arrive in Canada with an established support group of sponsors ready to work together through the trials of resettlement. This means that private sponsorship relieves the Government of the financial and administrative burdens of resettlement while enabling Canada to position itself as a generous humanitarian actor worldwide.

At the same time, scholars and activists have levied critiques of aspects of the PSR and BVOR programs.⁵² First, there is the issue of what the state gains from these programs. Beyond financial relief, Canada has used private resettlement to reduce the number of refugees resettled in the country. In theory,

51 Cetta Mainwaring and Daniela DeBono, 'Criminalizing Solidarity: Search and Rescue in a Neo-colonial Sea' (2021) 39(5) *Environment and Planning C Politics and Space*, 1030; ReSOMA, *The Criminalisation of Solidarity in Europe* (Migration Policy Group 2020).

52 Patti Tamara Lenard, 'Resettling Refugees: Is Private Sponsorship a Just Way Forward?' (2016) 12(3) *Journal of Global Ethics*, 300; Emine Fidan Elcioglu, 'Neoliberal Fatigue: The Effects of Private Refugee Sponsorship on Canadians' *Political Consciousness* (2023) 49(1) *Critical Sociology*, 97.

private sponsorship respects the principle of additionality – the number of privately sponsored refugees is over and above the number of refugees that the government commits to resettling each year. Yet, since 2013 private sponsorship has outpaced resettlement numbers achieved by the GAR and BVOR programs, leading to concerns about the privatisation of refugee resettlement in Canada. The Government's refugee resettlement targets for 2025–2027 decrease resettlement across all categories, but government-assisted refugees will fall to 15,250 (from 21,115 in 2024, a 28% decrease) while the target for private sponsorship will fall to 21,000 in 2027 (from 28,250 in 2024, a 25% decrease).⁵³ The BVOR target remains at 100 visas throughout this period (from 250 in 2024). These changes put the PSR program's core principle of additionality into question. Furthermore, recent changes also cast doubt on whether private sponsors have any agency in Canada's resettlement programs: despite continued participation of private citizens with the desire and ability to sponsor refugees, in November 2024 the Government paused new refugee sponsorship through 31 December 2026 to achieve its lowered resettlement targets.⁵⁴

Other scholars have raised ethical concerns about the role of private citizens in selecting which refugees are deserving of protection within Canada in the form of a permanent residency visa.⁵⁵ Discrepancies between GAR and PSR's countries of origin are potentially indicative of private motivations for resettlement weighing more heavily than internationally determined vulnerability: between 2019 and 2024, 38% and 22% of GAR were Syrian and Afghan citizens, respectively. During the same period, 25% and 17% of PSR came from these two countries. Conversely, 28% of PSR held Eritrean citizenship. Only 3% of GAR were Eritrean.⁵⁶

Ethical questions about Canada's perceived role as a global leader in international protection – specifically regarding who is considered deserving of Canada's protection – also arise in relation to a relatively new refugee resettlement program, the Economic Mobility Pathways Pilot (EMPP). The EMPP began in April 2018 and was expanded in 2021 after showing proof of concept. It is explicitly described as not a humanitarian program, but rather a form of economic migration targeting refugees. The Government's concept

53 IRCC (n 23), *CIMM – Immigration Levels Plan for 2024-2026*.

54 IRCC, 'Temporary Pause on Intake of Refugee Sponsorship Applications from Groups of Five and Community Sponsors' (21 November 2025) <canada.ca/en/immigration-refugees-citizenship/news/notices/temporary-pause-extended-refugee-sponsorship-applications-groups-five.html> accessed 19 May 2026.

55 Anna Korteweg, Shauna Labman and Audrey Macklin, 'Humanitarian Bargains: Private Refugee Sponsorship and the Limits of Humanitarian Reason' (2023) 49(15) *Journal of Ethnic and Migration Studies*, 3958; Patti T. Lenard, 'The Ethics of Citizen Selection of Refugees for Admission and Resettlement' (2020) 37(5) *Journal of Applied Philosophy*, 731.

56 IRCC, 'Admissions of Resettled Refugees by Country of Citizenship and Immigration Category, January 2015 - November 2024' (18 May 2024).

was to leverage existing economic immigration programs to provide an alternate pathway for refugees to come to Canada based on their ability to fill Canadian labour market needs rather than their vulnerability and need for protection. The EMPP exclusively considers employers' labour needs.⁵⁷ There are currently no safeguards in the EMPP that prevent companies affected by the Government's cap on temporary foreign workers from replacing these workers with refugees, though researchers are making recommendations to the Government to address these inequalities.⁵⁸ As it stands, the EMPP provides cheap labour to Canadian businesses while reducing the percentage of temporary residents in the country as intended by the Government. Multiplying the ways refugees can find safety and stability is a positive outcome, but the instrumentalisation of vulnerable refugees to achieve Canadian economic goals is fundamentally contrary to the spirit of Canada's international responsibilities and the nationalist image of a humanitarian country.

Canada's refugee resettlement programs receive the most attention from the international community, but there are also pathways for people seeking international protection to apply for asylum and permanent residency from within Canada. A major difference between pathways taken by asylum seekers and refugee resettlement is that resettled refugees are selected by the Government of Canada or Canadians to receive permanent residency visas. Asylum seekers arrive in Canada spontaneously, regardless of their perceived deservingness or utility to Canada's economic strategy. People can petition Canada for refugee status in two ways: in person when they arrive at a Canadian port of entry (PoE) or online if they are already in Canada. There is no time limit to apply for refugee status from within Canada; however, people subject to a removal order, which can occur by overstaying a temporary residency permit, are not eligible to make a refugee claim.⁵⁹

Ports of entry include airports, seaports or official PoE along the land border.⁶⁰ At these PoE, Canadian Border Service agents can immediately process a refugee claim and decide if it is eligible to be referred to the Refugee Protection Division. In practice, there are significant limitations to placing in-person claims at the border. Canada has signed the Safe Third Country Agreement

57 Roberto Cortinovis and Andrew Fallone, 'Country Report CANADA An Analysis of the Private Sponsorship of Refugees (PSR) Program and the Economic Mobility Pathways Pilot (EMPP)' (*ASILE* 2022) <asileproject.eu/wp-content/uploads/2022/05/D4.2_Canada-Interim-Country-Report-1.pdf> accessed 98 January 2025.

58 Daniel Wagner, 'What Canada Gets Right (and Wrong) in Economic Pathways for Displaced Talent' (2023) 15 Toronto Metropolitan University CERC-Migration Policy Briefs.

59 IRCC, 'Application Guide for Inland Refugee Claims' (14 February 2024) <canada.ca/en/immigration-refugees-citizenship/services/application/application-forms-guides/guide-0174-inland-refugee-claims-portal.html> accessed 7 January 2025.

60 CBSA, 'Traveller Volumes by Port of Entry and Month' (17 December 2024) <open.canada.ca/data/en/dataset/1b1c2b92-b388-47d9-87d4-01aee8d3c3e4/resource/22653cdd-d1e2-4c04-9d11-61b5cdd79b4e> accessed 08 January 2025.

(STCA) with the United States in late 2004. The STCA, modelled after the EU's Dublin regulation, establishes both countries as safe places for displaced people, and asserts that refugees must make their claim in the first safe country they arrive in. Furthermore, a refugee claimant intercepted in Canada within two weeks of having been in the United States will be returned.⁶¹ The STCA effectively makes refugee claims submitted at the US-Canada land border ineligible for processing. Thus, most refugees who can make a claim at a PoE are those wealthy enough to afford a plane ticket to Canada and lucky enough to receive or not need a visitor visa to take the flight.

For decades, a loophole in the STCA allowed people crossing the land border via unofficial crossings to make a refugee claim in Canada despite having previously been in the United States. In 2022, 39,540 asylum seekers entered Canada between official PoE.⁶² To decrease spontaneous arrivals, Canada and the United States amended the STCA to make it effective throughout the entire 4,000-mile land border, not just at official PoE. The change successfully decreased the number of refugee claims made at the land border from an average of 165 per day in March 2023 to an average of 13 per day⁶³ but overall numbers of refugee claims increased. Many people continue to cross the border illegally and hide for two weeks until they are newly eligible to make a refugee claim from within Canada. The number of people making claims at airports also increased significantly, leading Canada to make other changes to visa policy. In 2023, 17% of asylum claims made in Canada came from Mexican citizens who benefited from visa-free travel to Canada since 2016 (IRCC 2024). In February 2024, the Government announced that it was implementing visa requirements for Mexican nationals to strengthen the in-Canada asylum system.

These patchwork responses to immigration phenomena encourage an interrogation of Canada's humanitarian characterisation, but they also showcase the flexibility and adaptability of Canada's migration governance. In many situations, this flexibility is a lifeline for people caught in unpredictable geopolitical crises.

14.6 Adapting to Emerging Crises: Ad Hoc Visa Solutions

As the pilot programs to encourage certain types of economic and humanitarian immigration reveal, Canadian immigration governance is a fruitful area for policy innovation. Based partly on the country's humanitarian and

61 Additional Protocol to the Agreement between the Government of Canada and the Government of the United States of America for cooperation in the examination of refugee status claims from nationals of third countries 2023.

62 IRCC, 'Asylum Claimants by Year – 2022' (30 December 2024) <canada.ca/en/immigration-refugees-citizenship/services/refugees/asylum-claims/asylum-claims-2022.html> accessed 7 January 2025.

63 IRCC (n 50) 'Actions Taken.'

multicultural identity, partly on its physical situation far from the epicentre of most global crises, and partly on its own economic and political strategies, Canada has implemented a myriad of ad hoc visa solutions to respond to geopolitical situations as they emerge. Typically, these programs have no defined end date, but are extended or retired based on processing capacity, political salience, and the ongoing nature of the crisis. A brief overview of some recently developed visa programs illuminates how Canada uses immigration policy tools in a rapidly evolving geopolitical context.

In the lead up to the Taliban overthrowing the Islamic Republic of Afghanistan in the summer of 2021, the Canadian government was “seized with urgency” to ensure the protection of Afghans who worked alongside Canadians during the war.⁶⁴ On July 23, 2021, the Government of Canada announced a special program to resettle Afghans who were integral to Canada’s efforts in Afghanistan. Eligible Afghans would be resettled through Canada’s GAR program, but their applications would have priority, and, unlike typical GARs, they would not need to have registered as a refugee with UNHCR or another referral agency in their country of asylum. Waiving refugee referrals enabled Canada to welcome the first Afghans resettled through the special program less than two weeks later, on August 4. On August 13, the Government announced it would expedite the resettlement of an additional 20,000 “vulnerable” Afghans forced to flee Afghanistan. This group included women leaders, human rights defenders, journalists, persecuted religious minorities, LGBTI individuals, and family members of previously resettled interpreters.

The special program for Afghans was described by officials as stemming from core Canadian beliefs in humanitarianism. The IRCC minister at the time, Marco E. L. Mendicino, stated “[o]ffering refuge to the world’s most vulnerable speaks to who we are as Canadians, particularly in times of crisis,” and he branded the program as a Canadian offensive against the violence abroad stating, “The situation in Afghanistan is heartbreaking, and Canada will not stand idly by.”⁶⁵ The special measures allowed Canada to quickly respond to the deteriorating conditions in Afghanistan. Six months after the Government announced the program, 10,000 Afghans arrived in Canada. Over 20,000 were resettled by September 2022, and 40,000 by November 2023 when the program was closed to new applications. The program also galvanised Canadians to act – private sponsors resettled 13,210 Afghans in 80 communities across the country. The Government ultimately exceeded its resettlement target,

64 IRCC, ‘Canada Welcomes First Afghan Refugees Resettled through the Special Immigration Program’ (4 August 2021) <canada.ca/en/immigration-refugees-citizenship/news/2021/08/canada-welcomes-first-afghan-refugees-resettled-through-the-special-immigration-program.html> accessed 13 November 2024.

65 IRCC, ‘Canada Expands Resettlement Program to Bring more Afghans to Safety’ (13 August 2021) <canada.ca/en/immigration-refugees-citizenship/news/2021/08/canada-expands-resettlement-program-to-bring-more-afghans-to-safety.html> accessed 13 November 2024.

offering permanent residency to 55,195 Afghans though government and private resettlement by December 2024.⁶⁶

The special program for Afghans enabled Canada to quickly resettle people in need of protection. However, as a program that specifically targeted people who worked with Canadian forces in Afghanistan and people that Canadian policy deemed vulnerable, the ad hoc special program's determination of deservingness responded to what was politically salient for Canadians observing the program. When Russian forces invaded Ukraine six months later, a second ad hoc program to help Ukrainians in need of protection implemented a different approach to migration governance that did not question the deservingness of program users.

The Canada-Ukraine Authorization for Emergency Travel (CUAET) was introduced in March 2022. It offered free, extended temporary visas for Canada to Ukrainians and their family members. Under CUAET, the standard six-month visitor visa was extended to three years, CUAET temporary visa holders were allowed to work and study in Canada, and their applications would be processed in 14 days. A key difference between CUAET and Canada's resettlement programs is that Ukrainians were not considered refugees and did not receive permanent residency upon arrival. This distinction allowed for two important conditions desired by displaced Ukrainians. First, people arriving with CUAET temporary visas were allowed to return to Ukraine without losing their temporary status. Refugees are barred from returning to their country of origin. Secondly, there was no limit on the number of temporary CUAET visas, work, and study applications that the Canadian government could process and approve. The IRCC received 1,189,320 between March 17, 2022, and April 1, 2024, and approved 962,612 (81%) of them. Of these, 298,128 people ultimately arrived in Canada as temporary residents.⁶⁷

The special program established for Ukrainians offered protection to over five times more people than the program established for Afghans in roughly the same timeframe. Though Ukrainians arrived as temporary residents, they were offered free resettlement services for the duration of their temporary visa, blurring the line between visitor and immigrant. Furthermore, the IRCC explicitly states that CUAET visa holders' Canadian work experience and education can be used to gain points for permanent residency applications. One year into the special program, the Government enacted new regulations to streamline permanent residency for CUAET visa holders with Canadian

66 IRCC, '#WelcomeAfghans: Key Figures' (17 December 2024) <canada.ca/en/immigration-refugees-citizenship/services/refugees/afghanistan/key-figures.html> accessed 7 January 2025.

67 IRCC, 'Canada-Ukraine Authorization for Emergency Travel: Key Figures' (26 July 2024) <canada.ca/en/immigration-refugees-citizenship/services/immigrate-canada/ukraine-measures/key-figures.html> accessed 13 November 2024.

family members. The program contains multiple pathways for protection that fit Ukrainian nationals and their families' varied needs.

The flexibility of temporary visa programs to achieve Canada's humanitarian and political goals is also clear in the country's response to political unrest in Iran during the same time period that it implemented special visa programs for Afghans and Ukrainians. Following the murder of Mahsa Amini in September 2022,⁶⁸ the Government of Canada released a statement on "its unequivocal and ongoing support for the brave women, students, and people of Iran."⁶⁹ Finding sufficient public policy considerations to justify exempting Iranians from certain immigration restrictions, the Government displayed its support not by creating a special program to resettle Iranian refugees, but by making it easier for Iranian visitors, workers, and students in Canada to extend their temporary visas and move between temporary resident streams without fees. Iranians who entered Canada on a tourist visa, for example, would be able to transform their tourist visa into an open work permit to stay in Canada beyond the standard six months granted by the tourist visa. This Canadian work experience would also bolster future applications for permanent residency. These exemptions to temporary resident visa policy, established in February 2023 and extended in 2024, are especially striking as policymakers simultaneously sought to reduce the number of temporary residents in Canada to 5% of the population as described above. The flexibility of ad hoc immigration policy, especially policy addressing temporary residency, has allowed Canada and Canadians to develop a national identity of supporting those who deserve protection and opportunity while closing off immigration pathways to those who no longer serve Canada's economic and political goals.

14.7 Conclusion

In countries across the globe, national communities are adopting anti-immigration politics. Recent surveys indicate that Canadians are not immune to this trend. Yet, Canadians remain steadfast in claiming multiculturalism and humanitarianism as core aspects of their national identity. With over 80 pathways to obtain a visa to Canada, the country is seen internationally as a positive model for immigration management and refugee resettlement.

68 Mahsa Amini was a 22-year-old Kurdish-Iranian woman who died in a hospital in Tehran on 16 September 2022 after being detained and severely beaten by Iran's morality police. Her death sparked the largest protests in Iran since 2009. Government crackdowns on public protests have led to widespread arrests and deaths. For more information, see BBC, 'Iran: A Really Simple Guide to the Protests' (15 September 2023) <[bbc.com/news/world-middle-east-63240911](https://www.bbc.com/news/world-middle-east-63240911)>.

69 IRCC, 'Temporary Public Policy for Nationals of Iran in Canada as Temporary Residents' (23 February 2023) <[canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/public-policies/iran-nationals-extend-stay.htm](https://canada.ca/en/immigration-refugees-citizenship/corporate/mandate/policies-operational-instructions-agreements/public-policies/iran-nationals-extend-stay.html)l> accessed 13 November 2024.

However, the numerous changes made to visa programs in 2024, including the temporary moratorium of parts of Canada's celebrated private refugee sponsorship program, may prove to be a turning point in the country's approach to immigration. At present, Canada is no longer aiming to increase visa-holders to support a growing economy, but rather is decreasing target numbers to respond to public perceptions of too much migration. While long-term transformation of the country's migration governance remains an open question, the recent changes have an immediate dehumanising impact on the lives of people seeking visas to Canada. Changes to work permit eligibility for spouses of visa holders are emblematic of this dynamic. In September 2024, the Government announced that only spouses of highly skilled workers (C-suite executives, scientists, engineers, lawyers, professors and technicians), or of workers in key sectors with labour shortages, would be eligible for work permits. "Low-skilled" visa holders have the dehumanising obligation to leave their families behind when they come to work in Canada.

The dehumanisation of migration governance in Canada is also seen in emerging practices of automatization in decision-making procedures.⁷⁰ In 2019, as the Government of Canada began to increase its use of artificial intelligence to make administrative decisions, it released a directive to ensure that new technologies complied with procedural fairness. Researchers exploring how fair automatization of migration decisions has been have found that automated systems meant to streamline procedures in fact multiply the actors involved in decision-making – software and algorithm developers now exercise discretion in IRCC decisions.⁷¹ Questions of automation bias also come to the forefront: how obligation IRCC officers' analyses of immigration applications altered by the dehumanised assessments of AI tools?

Further research is needed to understand the long-term impact of dehumanising policies on Canadian visa programs. These changes may shift with political winds, or they may usher in a new era of Canadian migration governance more aligned with global trends than with Canadian ideology of multiculturalism. Canada's points-based migration system intended to move away from explicitly racist decisions and position Canada as a global beacon

70 Tuba Bircan and Emre Eren Korkmaz, 'Big Data for Whose Sake? Governing Migration through Artificial Intelligence' (2021) 8 *Humanities and Social Sciences Communications*, 241; Lucia Nalbandian, 'Increasing the Accountability of Automated Decision-making Systems: An Assessment of the Automated Decision-making System Introduced in Canada's Temporary Resident Visa Immigration Stream' (2022) 10 *Journal of Responsible Technology*, 10023; Damilola Awotula, 'Automated Immigration and Administrative Law in Canada: Assessing the Immigration, Refugee Citizenship Canada's TRVs Advanced Analytics Program' (2023) McGill SGI Research Papers in Business, Finance, Law and Society Research, 2024-13.

71 Danièle Bélanger, 'The Introduction of Automation and the Changing Contours of Immigration Officer Discretion' [Conference presentation] (*Les effets de l'automatisation et de l'IA sur l'immigration au Canada*, Obvia, 27 September 2024) <obvia.ca/evenements/les-effets-de-l-automatisation-et-de-lia-sur-limmigration-au-canada> accessed 13 November 2024.

of individual human rights, but recent changes may reveal the superficiality of Canada as fundamentally open-minded and humanitarian. As politicisation of migration grows in Canada, as elsewhere, future surveys of Canadian public opinion about immigration and refugees should question if the multiculturalism and humanitarianism that define Canadian national identity are real values that inform migration governance or merely nationalist cant that reflects the policy goals of an earlier era.

15 Country Focus

Italy

Luca Galli and Cecilia Siccardi

15.1 Introduction

Since 2014, 30,000 people have died crossing the Mediterranean: the Sicilian Channel, the stretch of sea between Libya and Lampedusa, is the world's deadliest route.¹ However, data show that only a few people have yet entered Italy through legal entry pathways: from 2015 to 2023, approximately 8,000 individuals have benefited from resettlement programmes² and private sponsorship mechanisms.³

Therefore, a reflection on legal entry routes and humanitarian visas in the Italian system is surely needed. This chapter aims indeed to analyse how humanitarian pathways work, how they have enabled protection seekers to enter Italy legally and safely and what their strengths and flaws are.

In particular, the existing pathways are based on three different sources. The first route is structured around a legislative instrument, adopted in 2023, which introduced limited possibilities to safely access the national territory (Article 1, section 5-*bis* of Legislative Decree No 20/2023). This pathway, however, does not fill the legislative gap that still exists in that respect.

A second pathway is administrative in its nature, as it ensures the legal entry of asylum seekers through the so-called Humanitarian Corridors, *ad hoc* protocols signed between the competent Ministries and a number of religious associations.

A third pathway has been instead opened by the judiciary in individual cases. In a series of rulings, the Court of Rome has recognised the right of entry aimed at applying for international protection in favour of applicants located abroad, under Article 10, section 3, of the Italian Constitution or Article 25 of the European Code on Visas (Regulation No 810/2009).

1 See IOM, *Missing Migrants Project* (2024) <<https://missingmigrants.iom.int/data>> accessed 4 December 2024.

2 See UNHCR, *Resettlement Data Finder* (2024) <<https://rsq.unhcr.org/>> accessed 4 December 2024.

3 The Community of Sant'Egidio reports 5,248 entries via humanitarian corridors by 2023 (press release 2023).

In the following paragraphs, these three pathways—the “legislative” (§ 15.3), the “administrative” (§ 15.4) and the “judicial” ones (§ 15.5)—will be analysed, after an overview of the constitutional framework (§ 15.2).

15.2 Constitutional Principles

The following constitutional principles come into play in this matter. Firstly, the principles related to the entry of foreigners into the territory of the State (Article 10, sections 2 and 3, of the Constitution) and to border control (Article 117, section 2, letter q, of the Constitution). Secondly, the principles concerning the entry of asylum seekers.

With regard to the entry of foreigners into the state’s territory, the Constitutional Court has long since made clear that the legal status of citizens differs from the legal status of foreign nationals. Unlike a citizen, ‘a foreigner may come to live in the [Italian] territory, as well as in other states, only with specific authorisations and for a period of time that is generally limited, unless he obtains the right to prolonged residence’.⁴

The Italian migration policy thus finds its constitutional foundation in the State’s “inescapable task” of safeguarding the borders within the ‘rules established for an orderly flow of migration and adequate reception’.⁵ In addition, border and migration control is designed to protect other constitutional principles elaborated in the constitutional jurisprudence, such as “defence of the national community”, security, public order and collective health.⁶

With regard to the entry of asylum seekers, the constitutional basis is to be found in Article 10, section 3, of the Constitution, which states that ‘a foreign national, who is denied—in his or her country—the enjoyment of the democratic freedoms established by this Constitution, shall be entitled to the right of asylum in the Republic under such conditions as shall be established by law’.

According to a widespread academic interpretation,⁷ this provision entrusts persons seeking protection with a full right to enter the territory of the State. Third country nationals have the right to enter the Italian territory to apply for asylum when they find themselves in a situation where their fundamental freedoms, as enshrined in the Italian Constitution, cannot be enjoyed.⁸ Following this reading, the Court of Cassation has defined the right to obtain

4 Italian Constitutional Court No 104-1969. On constitutional principles related to border control, see Marilisa D’Amico and Cecilia Siccardi, ‘La tutela dei diritti costituzionali ai confini’ in Marilisa D’Amico, Maurizio Ambrosini and Emilia Perassi (eds), *Confini, Migrazioni e Diritti umani* (Milano University Press 2022).

5 Italian Constitutional Court No 353-1997.

6 *Ex multis*, Italian Constitutional Court No 148-2008.

7 E.g. Marco Benvenuti, *Il diritto d’asilo nell’ordinamento costituzionale italiano. Un’introduzione* (Cedam 2007) 127; Paolo Bonetti and Livio Neri, ‘Il diritto d’asilo’ in Bruno Nascimbene (ed), *Diritto degli Stranieri* (Cedam 2004) 1140.

8 Carlo Esposito, ‘Asilo (diritto di) (dir. cost.)’, *Enciclopedia del Diritto* (1958) 224.

asylum under Article 10, section 3, as ‘a perfect subjective right’, from which it derives a right to ‘enter the territory of the State in order to be admitted to the procedure for examining the application for recognition’.⁹

Even based on these statements by the judiciary, scholars have questioned the consequences of the direct applicability of Article 10, paragraph 3 of the Constitution.¹⁰

On the one hand, it has been claimed that the right of entry, thus, constitutes the minimum necessary content of the constitutional right of asylum.¹¹ In order to make this right effective, some scholars have argued that the application for asylum could also be made from abroad, since the prerequisite for the recognition of the right under Article 10, section 3, is not the presence of the foreigner on the territory, but the condition of being unable to exercise democratic freedoms as guaranteed by the Italian Constitution.¹² Other scholars, while confirming the direct applicability of Article 10, paragraph 3 of the Constitution, argue that this does not mean that Italy is bound to examine applications submitted from all over the world by foreigners invoking the impediment of constitutional freedoms.¹³ This issue was first addressed by the Court of Rome in the late 1990s. The Kurdish *leader* Ocalan, by then imprisoned in Turkey,¹⁴ applied for asylum in Italy by invoking direct application of Article 10, paragraph 3 of the Italian Constitution, despite the absence of a national law implementing that. The Court of Rome affirmed his right to asylum, considering his presence on the territory ‘not a necessary condition for obtaining the right itself’.¹⁵

On the other hand, the right to apply for asylum abroad is no longer consistent with the Common European Asylum System (CEAS), which generally requires physical presence within the territory or at the border of a Member State, being notoriously based on a strictly territorial approach to asylum.¹⁶

9 Italian Court of Cassation No 4674-1997 and No 25028-2005.

10 All constitutional principles are directly applicable in court, even in the absence of implementing legislation, as the Constitutional Court has clarified since its first ruling: Italian Constitutional Court No 1-1956.

11 E.g. Marco Benvenuti (n 7); Paolo Bonetti and Livio Neri, ‘Il diritto d’asilo’ in Bruno Nascimbene (ed), *Diritto degli Stranieri* (Cedam 2004) 1140.

12 This is a thesis supported by many, see again Carlo Esposito (n 8) 222. According to the author, the impediment of the guaranteed freedoms of the Italian Constitution is sufficient for ‘Italy to open the doors to allow them to enjoy those same freedoms in our country’. See also Benvenuti (n 7) 125.

13 Paolo Morozzo della Rocca, ‘Sul diritto al rilascio del visto per motivi umanitari’ in Mario Savino and Daniela Vitiello (eds), *Asilo e immigrazione tra tentativi di riforma e supplenza dei giudici: un bilancio* (Editoriale Scientifica 2023) 222.

14 Reference is made to the well-known case No 49565-1999 (Court of Rome). The text of the judgment is published in *Rivista di diritto internazionale* (2000) 249. See also Italian Court of Cassation Nos 26720-2019; 16362-2016; 10686-2012.

15 Ibid.

16 See the following Section 3 of this chapter, and especially notes n 26 and 27. In doctrine, on the application and the recognition procedure of the application for protection, see Gianluca Famiglietti, *Il richiedente protezione davanti ai suoi “giudici”* (Giappichelli 2021).

Accordingly, the Italian Court of Cassation made clear that the constitutional right of asylum is now fully implemented by the instruments of protection derived from the EU asylum law (refugee *status* and subsidiary protection) and the national residual protection (special protection).¹⁷

Therefore, today it is no longer possible to apply for asylum from abroad, as Ocalan's lawyers had done in the 1990s, since the Italian judges consider Article 10, paragraph 3 of the Constitution to be completely implemented by the forms of protection provided by the CEAS, which can only be applied for within the territory of one of the EU states.

In order to allow asylum seekers to safely arrive in Italy and avoid long and dangerous journeys to the European borders, the legislator must provide for instruments that are consistent with the CEAS. These instruments include the humanitarian pathways described in the following paragraphs, which do not have an organic discipline in the Italian legal system.

15.3 The Issuance of Humanitarian Visas as an Exercise of Public Power: Is the Principle of Legality Satisfied?

Moving from the constitutional perspective to the concrete actions of public administrations needed to grant humanitarian visas, the existence of specific tools provided by the legislator assumes a critical importance. The possibility for Article 10, section 3, of the Italian Constitution to serve as an adequate basis for diplomatic services to recognise the right of entry into the Italian territory for asylum purposes remains a contested issue.

On the one hand, the Italian Cassation court, as mentioned, has held that Article 10, section 3, finds full realisation in the forms of protection established under domestic law (refugee status, subsidiary protection and the national residual protection). Consequently, additional protections for asylum seekers might not be directly connected to this Article of the Italian Constitution which also explicitly requires the legislator to specify the conditions and the modalities in which the right to asylum can be articulated within the national jurisdiction.¹⁸

17 Since 2012, the jurisprudence of legitimacy has come to affirm that the right to asylum 'is entirely implemented and regulated through the provision provided for by the refugee *status*, subsidiary protection and the right to the issuance of a humanitarian permit'; see Italian Court of Cassation Nos 10686-2012; 16362-2016; 28015-2017; 4455-2018.

18 'A foreign national, who is denied—in his or her country—the enjoyment of the democratic freedoms established by this Constitution, shall be entitled to the right of asylum in the Republic *under such conditions as shall be established by law*' (emphasis added). On this topic, see Paolo Morozzo della Rocca, 'Sul diritto al rilascio del visto per motivi umanitari' in Mario Savino and Daniela Vitiello (eds), *Asilo e immigrazione tra tentativi di riforma e supplenza dei giudici: un bilancio* (Editoriale Scientifica 2023); Paolo Morozzo della Rocca and Mirko Sossai, 'Chiedere asilo da lontano' (2022) <<https://www.questionegiustizia.it/articolo/chiedere-asilo-da-lontano>> accessed 23 November 2024; Giulia Del Turco and Mario Savino, 'Chi è

On the other hand, the principle of legality dictates that any exercise of administrative power must be grounded in a specific legal provision, which expressly assigns the power to the public body and defines its terms and contents.¹⁹ Consequently, this principle implies that the issuance of humanitarian visas—representing an exercise of authorising power—requires an explicit regulation.

15.3.1 *The Lack of Foundations for Humanitarian Visas in EU Law*

Article 25 of Regulation No 810/2009²⁰ ‘exceptionally’ authorises the issuance of a visa with limited territorial validity ‘when the Member State concerned considers it necessary on *humanitarian grounds*, for reasons of national interest or *because of international obligations*’ (emphasis added).

It is well known that two landmark decisions—one by the Court of Justice of the European Union (CJEU)²¹ and the other by the European Court of Human Rights (ECtHR)²²—have significantly restricted the possibility for a

stato illegittimamente respinto ha diritto di rientrare in Italia?’ (January 2020) <<https://www.adimblog.com/2020/01/31/chi-e-stato-illegittimamente-respinto-ha-diritto-di-rientrare-in-italia/>> accessed 23 November 2024; Esposito (n 8). *Contra*, Claudio Panzera, ‘L’accesso al diritto d’asilo. Problemi e prospettive’ (2023) 1 *Diritto immigrazione e cittadinanza* 22 who affirms that ‘the constitutional provision does not become “crystallized” once and for all in the specific forms of protections through which it is (partially) implemented; rather, it retains an inexhaustible nomogenetic capacity’.

19 The principle of legality finds expression in Article 1 of Law No 241/1990, which states that administrative activity must pursue the objectives established by law. It is also indirectly derived from constitutional provisions. Specifically, Article 113 of the Italian Constitution, concerning the justiciability of administrative acts, assumes that the judiciary must find in the law an objective standard against which to review the contested acts. The principle of legality also receives implicit recognition in the European Treaties (Article 19 TEU and Article 262 TFEU). See, *ex pluribus*, Marcello Clarich, *Manuale di diritto amministrativo* (il Mulino 2024).

20 Parliament and Council Regulation No 810/2009 [2009] OJ L 243/2009 establishing a Community Code on Visas (“Visa Code”).

21 Case C-638/16 PPU *X and X v Belgium* [2017] OJ C 38/2017. On this decision, see Francesco L. Gatta, ‘I visti umanitari tra l’immobilismo dell’Unione europea, l’attesa per Strasburgo e l’esempio (da replicare) dell’Italia’ (2020) *Rivista di Diritti Comparati* 152; Francesco L. Gatta, ‘La “saga” dei visti umanitari tra le Corti di Lussemburgo e Strasburgo, passando per il legislatore dell’Unione europea e le prassi degli Stati membri’ (2019) *Diritti fondamentali* 11; Chiara Favilli, ‘Visti umanitari e protezione internazionale: così vicini così lontani’ (2017) *Diritti umani e Diritto internazionale* 553; Adele Del Guercio, ‘La sentenza X. e X. della Corte di giustizia sul rilascio del visto umanitario: analisi critica di un’occasione persa’ (2017) *European Papers* 271.

22 *M.N. and Others against Belgium* App No 3599/18 (ECtHR, 5 May 2020). On this decision, see *ex pluribus* Adele Del Guercio, ‘Canali di accesso protetto al territorio dell’Unione europea: un bilancio alla luce del nuovo Patto su immigrazione e asilo’ (2021) *Diritti umani e diritto internazionale* 129, 159; Anna Liguori, ‘Two Courts But A Similar Outcome—No Humanitarian Visas’ in Giuseppe Cataldi, Adele Del Guercio and Anna Liguori (eds), *Migration And Asylum Policies Systems Challenges And Perspectives* (Editoriale Scientifica 2020);

Member State to rely on Article 25 as a ground for its consulates to recognise diplomatic asylum.

According to the European Court of Justice, the wording of that provision should preclude any mandatory visa issuance even in the presence of an individual with protection needs. Furthermore, an authorisation of entry to apply for asylum would exceed the scope of Regulation No 810/2009, as it regards only short-term visas.²³ Consequently, Article 25 neither obliges nor could be used to ensure protected pathways for asylum seekers, being left to the States the option to regulate the matter.²⁴

Moreover, according to the ECtHR, no obligation to grant humanitarian visas abroad could be grounded on the ECHR, since States cannot be considered to have jurisdiction abroad. According to Article 1 of the Convention, jurisdiction has essentially a territorial nature. Therefore, embassies and consulates in third States are beyond its reach: extraterritorial jurisdiction could be found only in the presence of an element of connection between the individual and the State, such as his nationality or the exercise of *de facto* control over the person by public officials. These elements are all considered non-existent in the case of third country nationals demanding visas on humanitarian grounds at embassies, where diplomatic officers do not exercise control over their ability to enter and leave the office.²⁵

Neither the 2024 Pact on Migration and Asylum has altered this framework. The new Asylum Procedure Regulation,²⁶ replacing Directive 2013/32/EU,²⁷ reiterates the 2013 approach that the requests for international protection must be submitted ‘in the territory of the Member States, including at the

Fabrizia Camplone, ‘La sentenza M. N. e al. C. Belgio alla luce di X e X: la conferma della prudenza delle Corti o impulso allo sviluppo di canali di ingresso legali europei?’ (2020) *Diritto immigrazione e cittadinanza* 240; Alice Riccardi, ‘Falsa partenza per i visti umanitari di fronte alla Corte europea dei diritti umani’ (June 2020) <<https://www.adimblog.com/2020/06/30/falsa-partenza-per-i-visti-umanitari-di-fronte-alla-corte-europea-dei-diritti-umani/>> accessed 23 November 2024.

23 For an opposing view see, *ex pluribus*, Adele Del Guercio (n 22), according to whom it remains opportune to distinguish between the short-term entry needed to apply for protection and the eventual subsequent long-term stay that might be a consequence of the acceptance of the asylum application.

24 Paras 44 and 51 of the Decision.

25 For a different opinion on the existence of state jurisdiction, see Cecilia Siccardi, ‘La giurisprudenza ordinaria sull’accesso dei richiedenti asilo al territorio nazionale’ in Mario Savino and Daniela Vitiello (eds), *Asilo e immigrazione tra tentativi di riforma e supplenza dei giudici: un bilancio* (Editoriale Scientifica 2023) and Flavio V Virzi, *L’extraterritorialità nel diritto amministrativo. Una ricerca sulla regolazione delle attività oltre il territorio dello stato* (Jovene 2023) 138.

26 Parliament and Council Regulation No 2024/1348, [2024] OJ L 2024/1348 establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU.

27 Directive of the Parliament and of the Council 2013/32/EU [2013] OJ L 180/2013 on common procedures for granting and withdrawing international protection.

external border, on the territorial sea or in the transit zones of the Member States' (Article 2, section 1). It further specifies that 'this Regulation does not apply to applications for international protection and to requests for diplomatic or territorial asylum submitted to representations of Member States', confirming that Union law does extend to extraterritorial claims for asylum.²⁸

More relevant, from the perspective of creating safe entry routes for asylum seekers, is Regulation No 2024/1350, establishing a 'Union Resettlement and Humanitarian Admission Framework'. While this Regulation introduces a first common set of procedures, admission criteria and planning mechanisms for resettlement,²⁹ it expressly denies the establishment of 'a right for third-country nationals or stateless persons to request admission, or to be admitted, to the territory of a Member State' (Article 1, section 2), as well as any new 'obligation on Member States to admit a third-country national or a stateless person' (Article 1, section 2). Rather than commanding the issuance of visas to individuals in a state of need, the new Regulation only refers to entry mechanisms "octroyed" by the Member States. It is up to them to decide if, when and where to contribute to the Union Resettlement and Humanitarian Admission Plan on a voluntary basis.³⁰

15.3.2 *The Regulatory Vacuum on the National Level*

At domestic level, the general provisions governing (long-term) visas are set out in Article 4 of Legislative Decree No 286/1998 and Article 5 of Presidential Decree No 394/1999, which define visas as authorisations granted by diplomatic offices to allow entry into Italian territory.³¹

28 In the same sense, see also Parliament and Council Regulation No 2024/1351, [2024] OJ L 2024/1351 on asylum and migration management, amending Regulations No 2021/1147 and No 2021/1060 and repealing Regulation No 604/2013, whose Article 16 equally admits that 'Member States shall examine an application for international protection by a third-country national or a stateless person *who applies on the territory of any one of them*, including at the border or in the transit zones' (emphasis added).

29 See in particular Articles 5 (Eligibility for admission), 6 (Grounds for refusing admission), 8 (Union Resettlement and Humanitarian Admission Plan) and 9 (Admission procedure).

30 Several factors, indeed, confirm this "granted from above" nature—and not "asked from below", as the visas—of the tools addressed by Regulation No 2024/1350: from the *ex ante* planning of the number of entries allowed (Article 8), to the predetermination of regions or third countries from which Union resettlement or humanitarian admission is to occur (Article 4), without overlooking the express responsibility of Member States to identify beneficiaries, in cooperation with international bodies, and inform them of the pending admission procedure (Article 9).

31 On the Italian regulation of visa, see Guido Savio, 'Il diritto amministrativo dell'ingresso e del soggiorno' in Paolo Morozzo della Rocca (ed), *Immigrazione asilo e cittadinanza* (Maggioli 2023).

Another secondary source (Interministerial Decree No 850/2011) lists the types of visas corresponding to the different reasons for entry.³² The list confirms that asylum needs are not considered *per se* by the Italian regulation. Humanitarian reasons could have some relevance only for medical treatment and tourism visas. In the first case, the visa—granted to foreigners in need of medical treatment provided by Italian public or private health care institutions—could also be issued in the context of the so-called ‘humanitarian programs’ (*sub* Article 36, section 2, Legislative Decree No 286/1998), addressed to help individuals living in countries with inadequate medical facilities.³³ In the second case, Decree No 850/2011 refers to minors participating in ‘hospitality programs of tourist-humanitarian nature’, which are generally aimed at a short-term presence of the minors in Italy, where the grant of the visa presupposes their return to the nation of origin.³⁴ As a consequence, neither of these visas can be used for asylum seekers, whose safety is threatened in their State of origin.

A missed opportunity to address this gap arose with the so-called “Cutro Decree”.³⁵ In re-designing the normative framework for the definition of economic migrants’ entry quotas, it admitted the possibility that a portion of these entries could be reserved for refugees and stateless persons recognised by UNHCR or the competent authorities in the countries of first asylum/transit (Article 1, section 5-*bis*). However, this innovative choice has many fragilities: first of all, the inclusion of refugees’ quota is not mandatory, nor is there a minimum number of humanitarian entries to be ensured.³⁶ Furthermore, the Cutro Decree makes a substantial assimilation between economic and humanitarian migrants, denying the specificities (and the legal regime of greater protection) peculiar to the latter category:³⁷ the entry and the stay in Italy are allowed through the release of a visa (first) and a residence permit (then) which is provided only for “work reasons” and not for international protection.

32 According to Article 1 of the Decree, a visa could be granted for the following reasons: adoption, business, medical treatment, diplomatic, sports, invitation, self-employment, subordinate employment, mission, family reasons, religious reasons, re-entry, elective residence, research, study, airport transit, transit, transportation, tourism, working holiday, volunteer.

33 Interministerial Decree No 850/2011, Attachment A, section 3.

34 Interministerial Decree No 850/2011, Attachment A, section 19.

35 Legislative Decree No 20/2023. For an analysis of the topics relevant to this study, see Panzera (n 18) 25.

36 In the first “legal entry flows decree” (Decree of the President of the Council of Ministers of 27 September 2023) adopted to implement the Cutro Decree for the 2023-2025 period, only 750 of the 452,000 total entries were reserved for individuals in need of international protection.

37 May it suffice to mention that a residence permit for refugee status or subsidiary protection is valid for five years (Article 23 Legislative Decree No 251/2007), while a permit for subordinate work reasons is valid for a maximum of two years (Article 5, section 3-*bis*, Legislative Decree No 286/1998).

An amendment proposed at the time of the conversion of the Cutro Decree into Law No 50/2023³⁸ provided for the introduction of a specific regime (a new Article 4-*ter* would have been added within the Legislative Decree No 286/1998) on entry visas for humanitarian reasons, to be issued to foreigners or stateless persons satisfying certain requirements (substantially coinciding with the requisites for international protection or for the other forms of protection offered by the Italian legislation) who had applied for it. These visas would have become the ordinary tool to allow entry for the beneficiaries of public (and private) resettlement and urgent evacuation programmes, allowing individuals to apply for protection.³⁹ The amendment has been rejected, leaving the Italian authorities without a discipline empowering them to issue visas capable of ensuring a safe entry route to third country nationals in need of asylum.

15.4 Humanitarian Corridors as a Public-Private Solution

Despite this context of regulatory vacuum, Italy has issued, on several occasions, visas to asylum seekers so that they could safely reach its territory. For instance, three “informal” resettlement operations took place from Libya between 2007 and 2010, allowing 150 Eritrean refugees to arrive in Italy, while in 2009 160 Palestinian refugees living in the *Al Tanf* camp at the Syrian-Iraqi border were safely transferred, in all these cases through a “flexible” release of visas for tourism/courtesy.⁴⁰

However, the most stable and widespread use of humanitarian visas is that associated with the experiment of “Humanitarian Corridors”, which originated in Italy itself.

In particular, the Humanitarian Corridors project refers to a specific manifestation of the private sponsorship system, which itself falls within the broader framework of “safe pathways” for asylum seekers. Specifically, private sponsorship represents a subset of the category of resettlements, with its primary distinguishing feature being that, unlike resettlements where the public authorities of the host state directly manage all necessary actions (such as selecting beneficiaries in the third country, organising their transfer to the

38 Senate of the Republic, 19th Legislature, 1st Committee on Constitutional Affairs, sitting No 44 (afternoon), 28 March 2023, amendments 6.0.6 and 6.0.7 <www.senato.it/leg/19/BGT/Schede/FascicoloSchedeDDL/ebook/55280.pdf> accessed 23 November 2024.

39 See section 4 of the proposed Article 4-*bis*.

40 Unlike the cases mentioned above, in March 2011, two humanitarian evacuations were held from Libya to ensure safety for 108 refugees originating from Eritrea and Ethiopia but, due to time constraints, no visa was issued to these individuals who applied for asylum upon arrival. On this and the other mentioned experiences, see Katia Bianchini, ‘Humanitarian Admission to Italy through Humanitarian Visas and Corridors’ in Marie-Claire Foblets and Luc Leboeuf (eds), *Humanitarian Admission to Europe. The Law between Promises and Constraints* (Nomos 2020).

host state and preparing reception and social inclusion pathways), sponsorships involve a substantial “outsourcing” to private entities.⁴¹

The main goals of the Humanitarian Corridors clearly derive from their just-described nature: in addition to saving human lives, by avoiding the dangerous boat-crossing of the Mediterranean Sea, they could also allow for more efficient regulation of migration flows, thereby permitting a better organisation of reception and integration services. Furthermore, they ensure a saving of public resources by transferring costs and investments to private entities. Finally, there is also the aim of guaranteeing a more direct involvement of civil society in managing the migration phenomenon. This active participation is intended to create a closer connection between migrants and local communities, thereby improving the outcomes of inclusion processes.⁴²

Focusing on the concrete experiences, the Corridors have been firstly introduced through an agreement (the so-called “memorandum of understanding”) signed in 2015 between a small group of faith-based organisations and the Ministries of the Interior and Foreign Affairs. Without any prior amendment or integration of the existing legal framework but relying almost exclusively on the already mentioned Article 25 of Regulation No 810/2009, this agreement defined the legal and operational structure of the Humanitarian Corridors. This structure involved, on the one hand, the State’s commitment to issue one thousand humanitarian visas to Syrian refugees located in Lebanon under Article 25; on the other hand, the commitment of private entities to handle the identification of beneficiaries, their transfer and their reception and integration into Italian society.⁴³ The success of this initial memorandum led to its replication, in favour of vulnerable individuals located in other geographic areas: these included evacuations from Ethiopia (2017), Libya (2018), the Greek island of Lesbos (2020) and Afghanistan (2021).

41 For a broader analysis of resettlement and sponsorship mechanisms, see Cecilia Siccardi, ‘Quali vie di ingresso legali per i richiedenti protezione in Europa? Contesto europeo e costituzionale’ (2022) *Diritto immigrazione e cittadinanza* 74; Francesco L. Gatta, ‘Vie di accesso legale alla protezione internazionale nell’Unione europea: iniziative e insufficienti risultati della politica europea di asilo’ (2018) *Diritto immigrazione e cittadinanza* 1; Suasan Fratzke, ‘Engaging communities in refugee protection. The potential of private sponsorship in Europe’ (2017) Migration Policy Institute Europe <https://migrant-integration.ec.europa.eu/library-document/engaging-communities-refugee-protection-potential-private-sponsorship-europe_en> accessed 23 November 2024.

42 On the role of active citizenship in migrant integration, also with regard to Humanitarian Corridors, Luca Galli, *La coprogrammazione e la coprogettazione dei servizi di integrazione dei migranti Paradigmi di coinvolgimento della società civile nei percorsi di inclusione sociale* (Giappichelli 2022).

43 For a reconstruction of the history and features of Humanitarian Corridors, see Donata Boronovo Re, ‘I visti con validità territoriale limitata: l’esempio dei corridoi umanitari nella Provincia autonoma di Trento’ (2019) *Le Regioni* 1725; Paolo Morozzo della Rocca, ‘I due protocolli d’intesa sui “Corridoi umanitari” tra alcuni enti di ispirazione religiosa ed il Governo ed il loro possibile impatto sulle politiche migratorie’ (2017) *Diritto immigrazione e cittadinanza* 1.

However, the limited scope—both in terms of sponsors and beneficiaries (restricted to specific geographic areas and amounting to approximately 5,000 individuals after nearly ten years since the program’s inception)⁴⁴—confirms the exceptional nature of private sponsorship within the Italian legal system. It is typically implemented only in response to international situations of extreme severity and significant media attention. Nor can the 2023 amendments to Article 1-*sexies*, paragraph 1-*bis*, of Legislative Decree No 416/1989 (introduced by the already mentioned Cutro Decree) be seen as a step towards normalising private sponsorship. The Decree merely acknowledged (for the first time by the legislator) the existence of the Humanitarian Corridors, just granting the possibility for ‘applicants for international protection who entered the national territory pursuant to memoranda for the implementation of Humanitarian Corridors’ to access the public “migrant reception and integration system” (*Servizio di Accoglienza e Integrazione*—SAI), but missing the opportunity to introduce an effective regulation of the mechanism, which remains solely based on the obligations set each time by the public-private agreements.

Regarding the specific contents of the memoranda, they define the characteristics of the private sponsors, legitimising their role as interlocutors with the Government in proposing projects. Sponsors must be third sector organisations with specific expertise in migration matters, prior experience in reception and integration activities for asylum seekers and refugees and a presence in areas with significant transit of displaced persons heading to Europe. Additionally, the agreements determine the geographic areas of operation, outline the commitments of central administrations (such as the Ministry of the Interior’s responsibility for security checks to ensure the conditions for issuing visas under Article 25 of Regulation No 810/2009, and the Ministry of Foreign Affairs’ responsibility for granting these visas) and set forth the obligations of private organisations.

The latter are primarily tasked with identifying beneficiaries according to the criteria outlined in the memoranda: (a) the need for international protection, as evidenced by *prima facie* recognition of refugee status by UNHCR under the 1951 Geneva Convention or by being a person forced to leave their country due to a well-founded fear of severe harm; or (b) additional conditions of vulnerability. While these are essential criteria, further “preferential” factors may contribute to successful selection. These include, above all, pre-existing ties with Italian society, deemed indicative of genuine prospects for stable integration within the host community (in other words, the presence of

44 The actual significance of this number becomes clear when compared, for instance, to the landings on Italian shores, which in 2023 amounted to approximately 158,000 migrants and in 2024 to over 60,000; see Ministero dell’Interno, ‘Sbarchi e accoglienza dei migranti: tutti i dati’ (22 November 2024) <www.interno.gov.it/sites/default/files/2024-11/cruscotto_statistico_giornaliero_22-11-2024.pdf> accessed 23 November 2024.

family or social networks in Italy is viewed favourably as a support for migrant integration).

Shifting from the criteria to their application, the initiative is primarily driven by organisations such as UNHCR, UNRWA, IOM, the Italian Red Cross, religious communities and local associations, which identify potential candidates to be included in the selection process and present them to the sponsor organisations. This is followed by an investigative phase, during which the third sector organisations verify the candidates' vulnerability through interviews, truth-checking of their statements and background checks on their judicial records. Subsequently, a list of selected beneficiaries is prepared, based on which the ministerial authorities carry out the additional verifications required before issuing visas under Article 25 of Regulation No 810/2009. The sponsor organisations are then responsible for coordinating pre-departure activities and organising the transfer to Italy of the selected individuals,⁴⁵ who—after landing—will have to apply for international protection and begin the integration pathways, again entrusted to private sponsors.⁴⁶

Overall, while the outcome of the Humanitarian Corridors is undoubtedly commendable—having translated into the rescue of thousands of individuals—certain critical issues arise regarding the legal compliance of this system.

Firstly, the application of Article 25 of Regulation No 810/2009 made within the Corridors seems in contrast with European jurisprudence. As seen before, the CJEU has clearly denied that that legal basis could be used to allow the entry of asylum seekers, pertaining to the competence of Member States to introduce *ad hoc* instruments within their domestic law.

Secondly, private sponsors are entrusted with a *de facto* “filtering power” to determine which individuals will benefit from the right of asylum in Italy. This has given rise to concerns regarding the “opacity” of the process, as it appears to be exempt from the principles of due process and procedural fairness.⁴⁷ For instance, exclusion from the selection procedure for access to the Humanitarian Corridors may occur simply through non-consideration in the list of beneficiaries, without the need for such a decision to be accompanied by specific, reasoned explanations. Furthermore, there is no formalised legal

45 For a more detailed description of the procedure, see Comunità di Sant'Egidio, ‘Corridoi Umanitari: le procedure di implementazione per la loro estensione su scala europea (2019)’ <www.humanitariancorridor.org/wp-content/uploads/2019/12/REPORT_ITA_WEB.pdf> accessed 30 July 2025.

46 On the integration pathways subsequent to the arrival of Corridors' beneficiaries, Luca Galli, ‘Quale ruolo degli attori pubblici nella sponsorship private dei rifugiati? Una riflessione sull'esperienza italiana alla luce di quella canadese’ (2022) *Diritto immigrazione e cittadinanza* 134.

47 In this sense Siccardi (n 41) 103 and Michela Tuozzo, ‘Corridoi umanitari: chiaroscuri del processo selettivo e della tutela dei diritti’ (February 2024) <<https://www.adimblog.com/2024/02/29/corridoi-umanitari-chiaroscuri-del-processo-selettivo-e-della-garanzia-dei-diritti/>> accessed 23 November 2024.

mechanism that guarantees transparency in the decisions made by the promoting entities—such as, among others, the right to access procedural documents. Nor is the outcome of these procedures subject to challenge before Italian courts.

Analysing the reasons behind these shortcomings, two main circumstances emerge. On the one hand, the lack of a normative framework governing the Humanitarian Corridors is evident. As mentioned, no primary or secondary legal provisions exist to detail (and constrain) the operation of this mechanism. On the other hand, the delegation of selection procedures to private entities seems to allow these processes to escape the rules and principles that must govern the action of public administrations. While acknowledging the difficulties of guaranteeing rights and remedies for procedures conducted outside national borders,⁴⁸ a realistic understanding of the Humanitarian Corridors should view them not as an (impermissible) instance of “border privatization” but rather as a mechanism of public-private shared border governance.

This would legitimise framing the selective actions of sponsors within the context of “private exercise of public functions”,⁴⁹ thus making necessary the introduction of legislative solutions ensuring the establishment of a visa that actually allows entry of asylum seekers, an effective and informed participation of candidates in the procedures and at least a tangible administrative oversight of the definition of the list of beneficiaries, if not the possibility of challenging the choices made by the private sponsors in front of the national courts.

15.5 The Role of Judges and the Recognition of Entry Visas for Humanitarian Reasons

Judges have actively promoted the issuing of humanitarian visas by Italian authorities. The relevant case law on the subject has developed in two stages, examined below: the first one, aimed at identifying the legal basis for the adoption of humanitarian visas; and the second one, aimed at defining the limits of this jurisprudential ‘path’.

15.5.1 The Recognition of Humanitarian Visas by Judges

The first set of rulings of the Court of Rome that have authorised the legal and safe entry into Italy of applicants for protection located abroad,⁵⁰ concern persons requesting entry into Italy for various “humanitarian” reasons, such as vulnerable persons, persons unjustly rejected at the border by Italian

48 On this topic, recently, Virzi (n 25).

49 Lately, Leonardo Parona, *L'esercizio privato di funzioni pubbliche: limiti e regime nel diritto italiano e statunitense* (Giappichelli 2023).

50 On this topic, please refer to Siccardi (n 25) and Virzi (n 25) 138.

authorities, Afghan citizens whose freedoms are in danger or human rights defenders persecuted in their countries of origin.

In this jurisprudence, it is appropriate to distinguish at least two strands: some rulings have recognised humanitarian visas under Article 25 of Regulation No 810/2009, whereas others have granted or denied the right to enter the territory of the State in order to seek protection under Art. 10, section 3, of the Italian Constitution.

Within the first strand of rulings, the Court of Rome allowed the entry into Italy of individuals, including minors, who are in a particularly vulnerable situation,⁵¹ as well as persons at serious risk of persecution, mainly located in Afghanistan. In those cases, the Court of Rome affirmed that situations of vulnerability or risk to human rights trigger ‘what—if for the state authorities constitutes a mere faculty—for the judge of fundamental rights represents instead *a dutiful activity*’.⁵² Therefore, the Court of Rome ordered the Ministry of Foreign Affairs to grant humanitarian visas under Article 25 of the Visa Code.

In a second strand of rulings, the Court of Rome authorised the entry of applicants for protection directly on the basis of Article 10, section 3, of the Italian Constitution. The *leading case* is the November 2019 judgment on the claim for damages of a group of persons pushed back at sea to Libya by the Italian authorities.⁵³

The Court motivated its decision considering that ‘the right of asylum referred to in Article 10, section 3, of the Italian Constitution can be declined in terms of a right to enter the territory of the State in order to be admitted to the procedure for the recognition of international protection’. Once the right of entry has been established, the Court left to the competent administrative authority the task to ‘identify, in the exercise of its discretion, the most appropriate means to protect the reasons of the plaintiffs (including the granting of a visa under Article 25 of Regulation No 810/2009)’.⁵⁴ Therefore, the Court of Rome identified in Article 10, paragraph 3 of the Constitution the basis of the right of entry of applicants for protection in the territory of the State and in Article 25 of the Visa Code a suitable legal basis for the issuing of the visa.

Those rulings have been criticised for two main reasons: because the court ordered the administration to issue a type of visa that is not expressly regulated in national law; and because, by relying on the general clause of Article 10 of the Constitution, this jurisprudence has a very broad scope, potentially allowing entry into Italy to all those who apply for a humanitarian visa abroad.⁵⁵

51 See Court of Rome No 4290-2019; on which see Morozzo della Rocca and Sossai (n 18) 4.

52 See Court of Rome No 62652-2021. On the matter, let us refer to Siccardi (n 41).

53 See Court of Rome No 22917/-2019.

54 Ibid. This reading of Article 10, section 3 has also been taken up in other cases, such as Court of Rome No 15094-1-2022.

55 See Savino and Del Turco (n 18).

Among the various arguments, a crucial one was related to the impossibility of judicial application of Article 25 of the Visa Code, in the absence of national implementing legislation. The Court of Rome itself acknowledged, also in light of the judgment of the Court of Justice *X and X v. Belgium*, that humanitarian visas ‘cannot be said to exist in practice under Italian law, nor to be provided for or imposed by European Union legislation’.⁵⁶

15.5.2 *The Limits to the “Jurisprudential” Recognition of Visas for Humanitarian Reasons*

Whereas the first set of cases recognised the right to enter on humanitarian grounds without any particular conditions, subsequent case law began to identify specific requisites for granting a humanitarian visa and to set limits on judicial review in this area.

A preliminary question that has arisen in doctrine and jurisprudence concerns when Italian jurisdiction can be deemed to exist and in which cases an Italian authority abroad should be held responsible for granting a humanitarian visa.⁵⁷

It became apparent in the case-law that the applicability of the right of entry for the purpose of seeking asylum necessarily presupposes the issue of jurisdiction and ‘therefore the acquisition of a position of responsibility by the Italian State over the person of the asylum seeker’.⁵⁸

Contrary to the rulings referred to in the previous subparagraph, judges also come to realise that Article 10, section 3, of the Italian Constitution and Article 25 of the Visa Code cannot impose, as such, ‘the recognition *tout court* of an undifferentiated duty of protection against anyone who turns, wherever and however, to the Italian State’. Italian jurisdiction cannot ‘arise on the basis of the mere choice of the applicant to turn to one rather than another diplomatic authority’.⁵⁹ Accordingly, ‘appropriate criteria must be identified to define the minimum conditions’ both for the right of entry to be claimed in a court, and for the State’s corresponding duty to grant it.⁶⁰

In order to identify these criteria, the Court of Rome relied on the notion of jurisdiction, as elaborated by the European Court of Human Rights with regard to Article 1 ECHR, as well as on the notion enshrined in Article 51 of the EU Charter of Fundamental Rights. Briefly put, in order for the Italian jurisdiction (and therefore liability) to be found, it is necessary that ‘additional factors, other than the mere request for the issue of a visa, exist’ and ‘these factors must be capable of determining a qualified relationship between the State

⁵⁶ Court of Rome No 75658-2022. In a similar sense, Court of Rome Nos 73550-2022; 13480-2022; 11276-2022.

⁵⁷ See Morozzo della Rocca and Sossai (18) 4.

⁵⁸ See Court of Rome No 23824-2022.

⁵⁹ Ibid.

⁶⁰ Ibid.

(as the party obliged) and a specific individual (holding a right) in a particular context'.⁶¹ Such a 'qualified relationship' may be established in different ways: through 'effective control' (typically, after access to national borders), through 'the use of force or authority' or through 'the impact of a regulation, even external, which implies the emergence of a duty to intervene' (see the duties arising from the "law of the sea").⁶² Following those criteria, a series of rulings either recognised⁶³ or denied⁶⁴ the entry of applicants for protection in Italy.

In addition to the requirement for the existence of jurisdiction, the Court of Rome has identified substantial conditions for the recognition of the visa, such as family ties in Italy,⁶⁵ condition of vulnerability,⁶⁶ minor age,⁶⁷ unlawful refoulement.⁶⁸

These decisions have, on the one hand, had the merit of drawing the boundaries of the Italian State's responsibility for the protection of individuals in vulnerable situations; on the other hand, they set additional conditions that are not expressly provided for either by law (including Article 25 of the Visa Code) nor by the Italian Constitution (according to its Article 10, the only prerequisite for requesting asylum is the obstruction of constitutional freedoms).

15.6 Conclusion

The persisting absence of a national (and European) legal framework on humanitarian visas is the most evident result of this analysis. The only (contested) legal basis for the issuance of humanitarian visas is the general clause of Article 10, section 3, of the Italian Constitution: according to some lower courts (and legal scholars), it recognises the right to enter the territory of the State to those who find themselves in a situation of violation of his or her basic freedoms. Indeed, apart from the attempt proposed by the Cutro Decree in 2023, protected entry routes have never been recognised within the national law.

The other pathways, namely the "administrative" and the "judicial" ones, while occasionally granting humanitarian visas to vulnerable people outside Italy, cannot fill the legislative vacuum. In the absence of a legislative legal basis, public administrations and judges risk going beyond their role, exceeding what is currently allowed by law. This not only involves tensions with the principle of legality—and with the legislative power—it also compromises

61 Ibid.

62 Ibid.

63 Court of Rome No 17732-2023.

64 See Court of Rome No 23824-2022.

65 Court of Rome Nos 34336-2023; 52019-2023; 18757-2024.

66 Court of Rome No 477-2024.

67 Court of Rome No 21667-2023.

68 Court of Rome No 18757-2023.

the position of protection seekers. With regard to the “administrative route” (humanitarian corridors), the lack of a legislative framework deprives them of procedural guarantees.⁶⁹ With regard to the “judicial route”, the admission itself depends on the different sensitivities of judges, entailing the risk of unequal treatment.⁷⁰

As a result, for asylum seekers outside Italy, the Italian territory resembles a “distant mirage”, attainable only at the cost of endangering their own

69 See Galli (n 46).

70 See Siccardi (n 25).

16 Humanitarian Immigration Programs of the United States

*Kit Johnson*¹

Millions of vulnerable noncitizens, from all corners of the globe, have benefited from the United States' varied humanitarian immigration programs.² They have traveled to the United States by air from refugee camps in Africa and walked to the U.S. border from South America to escape persecution and obtain protection from the United States under the programs outlined in Part 1. Within the United States, noncitizen survivors of family violence have fled their abusive households and been protected by the country's immigration laws discussed in Part 2. The United States has worked to alleviate the suffering of noncitizen victims of sex and labour trafficking as well as noncitizen victims of certain crimes committed within the United States by opening the immigration pathways considered in Part 3. Sometimes, the relief provided by the United States is temporary rather than permanent. For example, noncitizens can come to the United States on a temporary basis for medical treatment unavailable in their home countries, as discussed in Parts 3 and 4. A noncitizen can also be allowed within U.S. borders to pursue a claim for asylum, as addressed in Part 4. Finally, the United States has developed an immigration program with an eye not towards individuals in need of care, but towards countries in crisis. Part 4 details the circumstances under which the United States allows certain noncitizens to remain stateside when their respective home nations simply cannot cope with their return due to natural disaster or war.

Unfortunately, there are U.S. politicians and political influencers who believe that "America is for Americans and Americans only."³ Such individuals

1 I am grateful for the thoughtful feedback of Eric E. Johnson, Trisha Bunce, Aryn Kerr, and Michael Waters on this chapter.

2 The U.S. refugee program alone, discussed in Part 1, has welcomed more than 3.3 million people into the United States since 1980. 'U.S. Annual Refugee Resettlement Ceilings and Number of Refugees Admitted, 1980-Present' (*MPI*) <www.migrationpolicy.org/programs/data-hub/charts/us-refugee-resettlement> accessed 27 August 2025.

3 This quote comes from Stephen Miller, an American political advisor serving as Deputy Chief of Staff for Policy in the second administration of President Donald J. Trump. Miller made the statement during a political rally at Madison Square Garden in New York City on 27 October

tend to critique these U.S. humanitarian efforts on the basis that the programs are vulnerable to fraud.⁴ Despite such claims, there is scant empirical evidence of fraud.⁵ In fact, each one of the U.S. immigration programs considered in this chapter has changed—and continues to change—the lives of vulnerable individuals in need of aid.

16.1 The Refugee and Asylum Programs of the United States

The United States provides protection to individuals seeking refuge from specific types of persecution through two different, but related, programs. The *refugee* program applies to noncitizens living overseas. Through its provisions, more than 3.3 million individuals have found shelter in the United States since 1980.⁶ The *asylum* program applies to noncitizens who are either already present in the United States or who seek protection when they arrive at our nation's border. It has provided status to more than 850,000 individuals since 1990.⁷

Both the refugee and asylum programs require noncitizen applicants to satisfy the statutory definition of “refugee:” “any person who is outside any country of such person’s nationality ... and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion[.]”⁸

The U.S. definition of “refugee” mirrors the definition of “refugee” found in the 1951 United Nations Convention and Protocol Relating to the Status of Refugees.⁹ Although the United States participated in drafting the UN defi-

2024. Kit Johnson, ‘Stephen Miller: “America Is for Americans and Americans Only”’ (*ImmigrationProf Blog*, 27 October 2024) <<https://lawprofessors.typepad.com/immigration/2024/10/stephen-miller-america-is-for-americans-and-americans-only.html>>.

4 Elliot Spagat, ‘Top Trump Adviser Wants More Nations to Field Asylum Claims’ (*AP*, 23 October 2020) <<https://apnews.com/article/donald-trump-virus-outbreak-united-states-immigration-central-america-8e23710ebe0a24837cf2cc0d4147a877>> (quoting Stephen Miller as being concerned regarding “asylum fraud, asylum shopping and asylum abuse on a global scale”).

5 See notes 44–46, 71, 84–89, and accompanying text.

6 MPI (n 2)–.

7 Office of Homeland Security Statistics, ‘2023 Yearbook,’ tbl 16 (*US DHS*) <<https://ohss.dhs.gov/topics/immigration/yearbook/2023>> accessed 27 August 2025.

8 Immigration and Nationality Act (INA) § 101(a)(42), 8 USC § 1101(a)(42).

9 Convention Relating to the Status of Refugees (28 July 1951) 19 UNTS 137, art. 1A(2); Protocol Relating to the Status of Refugees (31 January 1967) 606 UNTS 267, art. 1(2). Other countries take a more generous approach to refugees. Mexico’s asylum law, for example, extends protections to those persecuted on the basis of gender. Ley de Migración, Diario Oficial de la Federación, 25 May 2011 (Mexico). And, as a signatory to the Cartagena Declaration, Mexico also provides protection to those who have fled their country because their life, safety, or freedom was threatened by generalized violence, foreign aggression, internal

nition, it took 29 years for the United States to put in place its own comprehensive refugee and asylum program.¹⁰ Prior to this implementation in 1980, the United States took an ad hoc approach to accepting refugees.¹¹

The current U.S. refugee program focuses on individuals fleeing from their respective countries of origin to another non-U.S. nation, often settling in a refugee camp. The United Nations High Commissioner for Refugees (UNHCR) estimates that there are 36.8 million refugees worldwide,¹² 73% of whom live in refugee camps hosted by low- and middle-income countries.¹³ The United States, unquestionably a high-income country, touts itself as the “largest single provider of humanitarian assistance worldwide,” contributing “nearly \$13 billion” to humanitarian efforts in 2021 alone.¹⁴ But when it comes to rehoming refugees, the United States is notably restrictive. Pursuant to statute, the president sets annual quotas on refugee admissions after consultation with Congress and in consideration of what is “justified by humanitarian concerns or is otherwise in the national interest.”¹⁵ The largest number of refugee admissions ever authorized was 231,700 in fiscal year 1980, the first year of the U.S. refugee program.¹⁶ The nadir was 15,000 in fiscal year 2021, a figure set by then-outgoing President Donald J. Trump. Actual admissions have been even lower.¹⁷

The refugee process begins when a displaced individual registers with UNHCR, which evaluates whether the individual qualifies as a refugee under international law and whether that individual would benefit from relocation to a third country.¹⁸ The UNHCR—as well as other entities including U.S. embassies and various nongovernmental organizations—can refer qualified applicants to the U.S. Refugee Admissions Program (USRAP). USRAP then confirms that the referred individual qualifies as a refugee and determines whether the referred individual falls into one of four priorities of “spe-

conflict, massive human rights violations, or other circumstances that have gravely disturbed public order. ‘Cartagena Declaration on Refugees’ (UNHCR, 22 November 1984) <www.unhcr.org/us/sites/en-us/files/legacy-pdf/45dc19084.pdf>.

10 Refugee Act of 1980, Pub L No 96-212, 94 Stat 102 (1980).

11 Ira J. Kurzban, ‘A Critical Analysis of Refugee Law’ (1982) 36 U Miami L Rev 865, 867–869.

12 ‘Refugee Data Finder: Key Indicators’ (UNHCR, 12 June 2025) <www.unhcr.org/refugee-statistics> accessed 27 August 2025

13 ‘Refugee Data Finder: Data Insights: Key Facts for Countries Hosting the World’s Refugees’ (UNHCR) <www.unhcr.org/refugee-statistics/insights/explainers/refugee-hosting-metrics.html> accessed 27 August 2025.

14 ‘Refugee and Humanitarian Assistance’ (U.S. Department of State) <<https://2021-2025.state.gov/policy-issues/refugee-and-humanitarian-assistance/>> accessed 27 August 2025.

15 INA § 207(a)(2), 8 USC § 1157(a)(2).

16 MPI (n 2).

17 The largest number of refugee admissions took place in 1980: 207,116. Ibid. The lowest number of refugee admissions took place in 2021: 11,411. Ibid.

18 ‘U.S. Refugee Admissions Program’ (U.S. Department of State) <<https://2021-2025.state.gov/refugee-admissions/>> accessed 27 August 2025.

cial humanitarian concern” to the United States: (1) individuals referred by designated entities, by virtue of their circumstances and apparent need for resettlement, (2) groups designated by the Department of State, by virtue of their circumstances and apparent need for resettlement, (3) individuals reuniting with family already in the United States, and (4) individuals referred by private U.S. sponsors who will receive post-arrival support and services from those sponsors.¹⁹

Prioritized individuals must complete rigorous security vetting, which includes checking biodata against available documents and databases, collecting biometrics such as fingerprints and iris scans, and completing in-person interviews. In addition to security screening, applicants are evaluated for legal eligibility. Reviewers determine whether applicants fall within the U.S. definition of “refugee” and whether they are disqualified from the U.S. refugee program due to, for example, their criminal history. This complex process can take years to complete.²⁰ If successful, the individual selected, along with their spouse and children,²¹ will be relocated from the refugee camp to the United States. Once stateside, a U.S. resettlement agency will take responsibility for the refugee’s first 90 days in the country and arrange housing, employment, and schooling.

Asylees, in contrast to refugees, seek protection once they are already inside the United States—whether having entered lawfully or surreptitiously—or request relief from authorities at a U.S. port of entry.²² Those already present in the United States who are not in removal proceedings²³ can initiate the process by filing an *affirmative* application for asylum with U.S. Citizenship and Immigration Services (USCIS). USCIS employs specially trained asylum officers who vet affirmative applications. Noncitizens who request asylum at the U.S. border follow a different path. They are screened for “credible fear” of persecution, which is something less than they would need to establish to make a successful claim for asylum. Instead of filing an affirmative application, those who sufficiently establish their fear are put into removal proceedings where they can then make a *defensive* application for asylum that will be adjudicated by an immigration judge.²⁴ Both affirmative and defensive

19 ‘The United States Refugee Admissions Program (USRAP) Consultation and Worldwide Processing Priorities’ (USCIS) <www.uscis.gov/humanitarian/refugees-and-asylum/usrap> accessed 6 January 2025.

20 Stella Burch Elias, ‘The Perils and Possibilities of Refugee Federalism’ (2016) 66 Am U L Rev 353.

21 A “child,” under U.S. immigration law, is one who is unmarried and under the age of 21. INA § 101(b)(1), 8 USC § 1101(b)(1). Throughout this chapter, the words “child” and “children” should be understood in light of this narrow, statutory definition.

22 INA § 208(a), 8 USC § 1158(a).

23 “Removal” is often colloquially called “deportation.” Either word denotes the U.S. process for expelling noncitizens from the country.

24 Note that if an affirmative application is denied, the case will be referred to an immigration judge for determination of whether the applicant should be removed from the United States.

asylum applications require consideration of the same criteria applicable to refugee applicants: evaluation of whether they meet the U.S. definition of “refugee” and whether they are statutorily disqualified from obtaining asylum. Noncitizens who lose their claim for asylum are removed from the United States.²⁵ Noncitizens who win their asylum case gain asylee status following comprehensive security screenings.

Although there are no numerical restrictions on asylee status, the numbers remain low. In fiscal year 2023, the United States granted 22,300 affirmative asylum applications and 32,050 defensive asylum applications.²⁶ In addition, 4,790 family members of asylees in the United States and 13,930 family members abroad received asylee status.²⁷ In contrast, the United States resettled over 100,000 refugees in fiscal year 2024.²⁸

After one year in the United States as a refugee or asylee, individuals in both groups can apply to become lawful permanent residents (LPRs) of the United States.²⁹ Not everyone takes this step. In 2021, only 56,400 refugees and asylees became LPRs.³⁰ In 2023, that number grew to 99,360.³¹ There are many potential explanations for why certain refugees and asylees do not apply for LPR status. Some may be statutorily ineligible for LPR status.³² Others

In the context of that removal proceeding, the applicant can re-litigate the issue of asylum with a defensive application before the immigration judge. Noah Schofield and Amanda Yap, ‘Asylees: 2023’ (*Office of Homeland Security Statistics*, October 2024) <https://ohss.dhs.gov/sites/default/files/2024-10/2024_1002_ohss_asylees_fy2023.pdf>.

25 More precisely, a noncitizen who files a defensive application for asylum and who has that claim, as well as any other claims to relief, denied, will be removed from the United States. A noncitizen who files an affirmative application for asylum while in some other valid immigration status, say, as a lawfully admitted international student, will continue in that student status until it ends. A noncitizen who files an affirmative application while undocumented will be placed in removal proceedings where, as discussed at note 23, they can then file a defensive application for asylum.

26 Schofield and Yap (n 24).

27 Ibid.

28 Muzaffar Chishti, Kathleen Bush-Joseph, and Madeleine Greene, ‘How the Rebuilt U.S. System Resettled the Most Refugees in 30 Years’ (*MPI*, 30 October 2024) <www.migrationpolicy.org/article/rebuilt-us-refugee-resettlement-biden>.

29 INA § 209(a)-(b), 8 USC 1159(a)-(b). By statute, refugees “shall” apply for LPR status after one year whereas asylees “may” apply for LPR status after a year. Ibid.

30 Alicia Ward, ‘U.S. Lawful Permanent Residents: 2023’ (*Office of Homeland Security Statistics*, September 2024) 7 tbl 2 <https://ohss.dhs.gov/sites/default/files/2024-09/2024_0906_pley_lawful_permanent_residents_fy2023.pdf>.

31 Ibid.

32 For example, a child who receives derivative asylee status when their parent obtains asylum would become ineligible for LPR status if they married before adjusting to LPR status because marriage would render that individual no longer a child for purposes of immigration law. See n 20 (explaining the definition of a child for purposes of immigration law). Heather L. Scavone, ‘A Duty to Protect But Not to Provide: Bringing the American Dream Within Reach of Asylees in the U.S.’ (2016) 41 *Harbinger* 209, 216 (identifying this scenario as one that could prevent an asylee from achieving LPR status).

may be unable to find counsel to assist in filing the necessary paperwork.³³ Application fees and associated costs may present a particular barrier for asylees to become LPRs.³⁴ Those refugees and asylees who overcome these barriers to obtain LPR status are given an immigrant visa, which means they are unrestricted in how long they can stay in the United States and in what activities they can undertake while here. And, most notably, LPRs have a path to U.S. citizenship.³⁵

Perhaps the most contentious of the U.S. humanitarian immigrant programs, the refugee and asylum programs spark ongoing policy disagreements. Some contend the programs bring terrorists and fraudsters into the United States. Others argue that the programs' system-wide political biases keep vulnerable noncitizens from obtaining the protection they need from the United States.

The risk of admitting terrorists is a frequent critique of the U.S. refugee and asylum programs.³⁶ Program detractors cite as an example the Tsarnaev brothers whose bombs near the finish line of the 2013 Boston Marathon killed three and injured 264. Anzor Tsarnaev came to the United States in 2002. Anzor applied for and was granted asylum for himself, his wife, and their four children, the bombers among them—though the brothers were just 8 and 16 at the time.³⁷ The terrorism narrative gained its strongest support in 2017 when then-President Trump issued an executive order suspending travel from several majority-Muslim nations with the stated goal of “protect[ing] the American people from terrorist attacks by foreign nationals admitted to the United States.”³⁸ Defenders of the refugee program, in contrast, note that the United States “screens and vets refugees more stringently than any

33 There is a shortage of immigration lawyers in the United States. Edgar Sandoval, ‘A New Challenge for Asylum Seekers: Lawyer Shortages’ (*NY Times*, 19 March 2024) (“Nonprofit legal aid groups and thousands of volunteer lawyers have provided free help, but lawyers say they can only do so much unpaid work — and there are far fewer qualified lawyers than clients.”).

34 Lindsay Harris, ‘From Surviving to Thriving? An Investigation of Asylee Integration in the United States’ (2016) 40 *N.Y.U. Rev of L & Soc Change* 29, 70–72 (concluding that application fees of more than \$1,000 per family member, while waivable on a case-by-case basis, coupled with necessary medical examination fees, prevent eligible asylees from filing for LPR status).

35 INA § 316, 8 USC § 1427.

36 Elias (n 20) 358.

37 Inspectors General of the Intelligence Community and others, ‘Unclassified Summary of Information Handling and Sharing Prior to the April 15, 2013 Boston Marathon Bombings’ (*United States Intelligence Community* (10 April 2014) <<https://oig.justice.gov/reports/2014/s1404.pdf>> accessed 4 October 2025).

38 Exec Order No 13769, 82 Fed Reg 8977 (27 January 2017); ‘Presidential Determination on Refugee Admissions for Fiscal Year 2021, Memorandum for the Secretary of State,’ 85 Fed Reg 71219 (27 October 2020) (“The threat to United States national security and public safety posed by the admission of refugees from high-risk areas of terrorist presence or control is significant and cannot be fully mitigated at this time”).

other group allowed to enter the country.”³⁹ Indeed, not one refugee has been implicated in a fatal terrorist attack in the United States since the passage of the Refugee Act of 1980.⁴⁰ And only four asylees since 1975 have been implicated in U.S. terrorist attacks, two of whom are the Tsarnaev brothers.⁴¹ That is true even though initial screening at the border is less thorough given that asylum seekers show up at the U.S. border without notice and thus cannot be subject to the depth of screening that refugees encounter before arriving in the United States.⁴²

Another oft-lobbed critique by U.S. asylum critics is that the program fails to adequately detect fraud.⁴³ Detractors worry that noncitizens who are not “true” asylees, but rather “economic migrants,” will unscrupulously seek to benefit from the asylum program.⁴⁴ Supporters of the program counter that asylum fraud is rare.⁴⁵ For example, in 2014, immigration judges granted asylum to 8,775 individuals and opened just seven investigations into asylum fraud.⁴⁶ Supporters further note that noncitizens who have experienced real violence and fear may nonetheless fail to receive relief in the United States

39 ‘Refugee Resettlement—Security Screening Information’ (*Human Rights First*, 1 February 2017) <<https://humanrightsfirst.org/library/refugee-resettlement-security-screening-information>> accessed 4 October 2025.

40 Alex Nowrasteh, ‘Terrorism and Immigration: A Risk Analysis’ (*Cato Institute*, 13 September 2016) 13. Nowrasteh found that “refugee terrorists” from Cuba murdered three people in the United States prior to passage of the Refugee Act of 1980. *Ibid*.

41 *Ibid* 14.

42 ‘Final Report: DHS Needs to Improve Its Screening and Vetting of Asylum Seekers and Non-citizens Applying for Admission into the United States (Redacted)’ (*US DHS OIG*, 2024) <www.oig.dhs.gov/sites/default/files/assets/2024-06/OIG-24-27-Jun24-Redacted.pdf> accessed 4 October 2025. Noncitizens go through additional security screening as part of their asylum application process. ‘Vetting, Security, and Fraud Screening in Asylum Process’ (*Human Rights First*, 4 December 2015) <<https://humanrightsfirst.org/library/vetting-security-and-fraud-screening-in-asylum-process/>> accessed 4 October 2025.

43 Todd Bensman and Bryan Griffith, ‘Video: U.S. Enabling Mass Asylum and Humanitarian Permit Fraud at the Southern Border’ (*CIS*, 3 May 2023) <<https://cis.org/Video/US-Enabling-Mass-Fraud-Southern-Border>> accessed 4 October 2025.

44 Robert Law, ‘Expert Insight: Examining The Asylum Fraud Loophole’ (*Am First Pol’y Inst*, 5 April 2023) <www.americafirstpolicy.com/issues/expert-insight-examining-the-asylum-fraud-loophole> accessed 4 October 2025. (“Many people looking to come to the U.S. for jobs, who are known as economic migrants, were coached to say ‘asylum’ or ‘credible fear’ to block their prompt removal no matter how dubious their claims for asylum were.”); Donica Phifer, ‘Donald Trump Calls Asylum Claims a “Big Fat Con Job.” Says Mexico Should Stop Migrant Caravans from Traveling to U.S. Border’ (*Newsweek*, 29 March 2019) <www.newsweek.com/donald-trump-calls-asylum-claims-big-fat-con-job-says-mexico-should-stop-1379453> accessed 4 October 2025.

45 ‘Fact Sheet: Asylum Fraud and Immigration Court Absentia Rates’ (*Nat’l Immigr F*, 8 October 2021) <<https://immigrationforum.org/article/fact-sheet-asylum-fraud-and-immigration-court-absentia-rates>> accessed 4 October 2025.

46 *Ibid*.

because of specific legal ineligibilities.⁴⁷ Denial rates, therefore, are not reliable indicators of fraudulent applications.

A very different critique of the U.S. refugee and asylum programs is that of political bias. For example, prior to the passage of the Refugee Act of 1980, the United States prioritized the admission of refugees fleeing communism and the Middle East—key Cold War concerns for the country.⁴⁸ Even after 1980, this sort of politicization did not necessarily change. In 1990, the United States settled a lawsuit brought by a group of organizations contending that asylum seekers from El Salvador and Guatemala were disadvantaged compared to similarly situated individuals fleeing Nicaragua's socialist government.⁴⁹ Some of the system's political biases are statutorily assured. The Lautenberg Amendment,⁵⁰ which has been renewed every year since 1990, makes it easier for specified religious minorities to receive asylum than other asylum applicants.⁵¹ Initially applied to Jews fleeing the former Soviet Union, the Lautenberg Amendment has since expanded to cover Christians, Baha'is, and Zoroastrians fleeing Iran.

The U.S. refugee and asylum programs are also subject to the vagaries of internal U.S. politics. As discussed above, presidents have wide statutorily granted discretion to limit the annual number of refugee admissions.⁵² In terms of asylees, recent U.S. presidents from both political parties have taken structural steps to thwart asylum seekers without regard to the merits of their claims for protection. President Obama sought to discourage asylum-seeking families from Central America by placing families in detention facilities upon arrival in the country.⁵³ In his first term in office, President Trump sought to deny asylum to noncitizens who traveled through a third country on their way to the United States—effectively precluding Central American claims.⁵⁴ President Biden sought to bar access to asylum based on demand by allowing applications only when the number of “daily encounters at the U.S.-Mexico border falls below 1,500 people per day over ... 28 consecutive days.”⁵⁵ The

47 Ibid.

48 Kurzban (n 11).

49 Susan Bibler Coutin, ‘Falling Outside: Excavating the History of Central American Asylum Seekers’ (2011) 36 *L. & Soc Inquiry* 569 (discussing the “ABC Settlement”)

50 Democratic Senator Frank Lautenberg of New Jersey and Democratic Representative Bruce Morrison of Connecticut were the primary sponsors of what has become known as the Lautenberg Amendment. Victor Rosenberg, ‘Refugee Status for Soviet Jewish Immigrants to the United States’ (2015) 2 *Touro L Rev* 419, 433.

51 ‘Lautenberg Program Reauthorized for 2024’ (*IRC*, 30 May 2024) <www.rescue.org/announcement/lautenberg-program-reauthorized-2024> accessed 4 October 2025.

52 See notes 14–16 and accompanying text.

53 ‘Court Cases: *RILR v. Johnson*’ (*ACLU*, 31 July 2015) <www.aclu.org/cases/rilr-v-johnson> accessed 4 October 2025.

54 ‘Court Cases: *East Bay v. Barr*’ (*ACLU*, 16 February 2021) <www.aclu.org/cases/east-bay-v-barr>.

55 ‘ACLU Reaction to Biden Administration’s Changes to Most Recent Asylum Ban’ (*ACLU*, 30 September 2024) <www.aclu.org/press-releases/aclu-reaction-to-biden-administrations-changes-to-most-recent-asylum-ban> accessed 4 October 2025.

American Civil Liberties Union sued each administration over the legality of these programs, all of which were nakedly directed at reducing the number of asylum seekers seeking protection from the United States.⁵⁶

Finally, the critique of “political bias” can mean more than even national agendas—whether externally or internally focused. There are vast disparities among immigration judges in their grant and denial rates of asylum cases.⁵⁷ These disparities suggest that the granting of asylum is a luck-driven process that may turn on the views, temperaments, and biases of individual asylum adjudicators.⁵⁸

Despite these criticisms, the U.S. refugee and asylum programs—out of all the country’s humanitarian immigration programs—provide protection to the largest number of noncitizens annually.

16.2 U.S. Protections for Victims of Family Violence

In addition to its refugee and asylum programs that provide humanitarian relief to noncitizens affected by certain forms of either state-sponsored or state-ignored violence, the United States also provides humanitarian relief to noncitizens affected by family violence. The Violence Against Women Act (VAWA)⁵⁹ gives a pathway to lawful permanent resident status for noncitizens abused by their U.S. citizen or LPR spouse or parent and for noncitizen parents abused by their adult U.S. citizen child.⁶⁰ VAWA protects far fewer people than the U.S. refugee and asylee programs. Fewer than 10,000 noncitizens benefit from VAWA annually.⁶¹

U.S. immigration law authorizes its citizens to apply for family-based immigrant visas for their noncitizen spouses, children, and parents.⁶² LPRs in the

56 See notes 52–54.

57 ‘Judge-by-Judge Asylum Decisions in Immigration Courts: FY 2019-2024’ (*TRAC Immigration*, 7 November 2024) <<https://tracreports.org/immigration/reports/judgereports/>> accessed 4 October 2025. Immigration Judges Monique Harris and Bruce Imbacuan, both of Houston, had the highest denial rates in the country during the reporting period, denying 100% of the more than 100 asylum cases each had before them. *Ibid.* Immigration Judge Elisa C. Brasil of San Francisco had the highest grant rate in the country during the reporting period, granting 98.1% of the 158 asylum cases before her. *Ibid.*

58 Mica Rosenberg, Reade Levinson and Ryan McNeill, ‘They Fled Danger at Home to Make a High-Stakes Bet on U.S. Immigration Courts’ (*Reuters*, 17 October 2017) <www.reuters.com/investigates/special-report/usa-immigration-asylum/> accessed 4 October 2025. (“Differences among judges and courts can render the system unfair and even inhumane”).

59 Violence Against Women Act (VAWA) of 1994, Pub L No 103-322, tit IV, 108 Stat 1796, 1902.

60 Notably, it is possible to make a valid claim for asylum based upon family violence. In such cases, however, the violence occurs overseas, and the state generally must refuse to intervene on behalf of the victim. *In re A-R-C-G-*, 26 I & N Dec 388 (BIA 2014).

61 William A. Kandel, ‘Immigration Provisions of the Violence Against Women Act (VAWA)’ (*CRS*, 9 August 2013) R42477 1–2.

62 INA § 201(b)(2)(A)(i), 8 USC § 1151(b)(2)(A)(i) (defining such family as “immediate relatives” exempt from numerical restrictions on family-based visas). U.S. citizens can also seek

United States can also apply for family-based immigrant visas for their spouses and children.⁶³ In both cases, the U.S. citizen or LPR is the “petitioner” for the visa, while their noncitizen family member is the “beneficiary” of the visa. An abusive petitioner can maintain control over a potential beneficiary by refusing to file for immigration benefits on their behalf. Even when benefits are applied for and received, spouses who have been married less than two years are subject to additional controls. Such spouses receive only “conditional” permanent residence, and the citizen or LPR spouse must jointly file paperwork with the government to remove the conditions on the beneficiary’s status.⁶⁴ This required joint filing is another opportunity for an abusive petitioner to exercise control over the visa beneficiary.

In the 1990s, U.S. legislators became worried that the family-based visa structure could lead some noncitizens to remain in abusive relationships so as not to jeopardize their immigration status in the United States.⁶⁵ Congress sought to address that concern with VAWA. VAWA authorized family-based visa beneficiaries to “self-petition” for visa benefits if they could establish that they: (1) have or had a qualifying relationship with the abuser; (2) are eligible for immigrant classification as an immediate relative or under certain family-sponsored preference categories; (3) reside or have resided with the abuser; (4) have been subjected to “battery” or “extreme cruelty” during the qualifying relationship; (5) are a person of “good moral character”; and, for self-petitioning spouses only, (6) entered into the marriage in good faith.⁶⁶ This new path to LPR status was created to free visa beneficiaries from the grip of family violence.

In addition to the self-petition process, VAWA authorizes a unique form of relief from removal for certain abused noncitizens in immigration court proceedings—VAWA cancellation of removal. An abused noncitizen may end up in immigration proceedings for any number of reasons. For example, their abusive family member may never have filed for a visa on their behalf, leaving them present in the United States without authorization and subject to removal due to their unauthorized presence in the country.⁶⁷ Whatever the reason for the removal action, noncitizens found removable do not necessar-

family-based visas for other family members, though on a numerically restricted basis. INA § 203(a), 8 USC § 1101(a). However, these other family members are outside the reach of VAWA.

63 INA § 203(a)(2), 8 USC § 1101(a)(2).

64 INA § 216, 8 USC § 1186(a).

65 Mariela Olivares, ‘Battered by Law: The Political Subordination of Immigrant Women’ (2014) *Am U L Rev* 231.

66 INA § 204(a)(1)(A), 8 USC § 1154(a)(1)(A); ‘Fiscal Year 2023: Immigration Applications and Petitions Made by Victims of Abuse’ (USCIS, 2024) <www.uscis.gov/sites/default/files/document/reports/fy23_immigration_applications_made_by_victims_of_abuse.pdf> accessed 4 October 2025.

67 INA § 212(a)(6), 8 USC § 1182(a)(6).

ily have to be removed from the country if they can establish their eligibility for relief from removal. “Cancellation of removal” is a particularly good form of relief from removal as, if granted, it gives the applicant the status of lawful permanent resident.⁶⁸

VAWA-based cancellation of removal, like the VAWA self-petition, requires proof of a qualifying family relationship; the applicant must be the spouse or child of a U.S. citizen or LPR or the parent of an adult U.S. citizen.⁶⁹ Relief also requires proof that the noncitizen has been “battered or subject to extreme cruelty” by their U.S. citizen or LPR family member and that the noncitizen is a person of “good moral character.” In addition to these criteria, VAWA cancellation requires: (1) continuous physical presence in the United States for three or more years, (2) that removal would result in “extreme hardship” to the noncitizen, the noncitizen’s child, or the noncitizen’s parents, (3) proof that the noncitizen is not removable under a litany of grounds largely related to crime, fraud, and terrorism, and (4) that the noncitizen merits a favorable exercise of discretion.⁷⁰

When a VAWA self-petition or VAWA cancellation is granted, the noncitizen receives LPR status. And LPR status provides a pathway to U.S. citizenship. Thus, VAWA is a U.S. humanitarian immigration program that provides long-term security to its beneficiaries.

Critics of the VAWA programs again tend to focus on fraud.⁷¹ Skeptics worry that VAWA may incentivize noncitizens to report abuse when none exists. Proponents of the programs, in contrast, point to a lack of clear evidence that VAWA applications have been subject to fraud.⁷²

Supporters of the VAWA programs also raise critiques about how these programs operate in practice. One salient critique is that the proof required to obtain VAWA status is too strict. When one flees family violence, they argue, it is unlikely that a victim will stop to gather the documents needed to establish that the underlying marriage was entered into in good faith, proof of battery and abuse, or evidence of their own good moral character.⁷³

In terms of numbers, the United States granted 7,819 VAWA self-petitions in fiscal year 2023.⁷⁴ There are no ready numbers for VAWA cancellation of removal grants because that particular form of VAWA relief is a specific subset of a more generic form of relief known as non-LPR cancellation of

68 INA § 240A, 8 USC § 1229b.

69 INA § 240A(b)(2), 8 USC § 1129b(b)(2).

70 Ann Block, Michelle Méndez and Rebecca Scholtz, ‘VAWA Cancellation of Removal’ (NIPLG, March 2023) <www.ilrc.org/sites/default/files/2023-03/VAWA%20Cancellation%20of%20Removal.pdf> accessed 4 October 2025.

71 Kandel (n 61) 1–2.

72 Ibid 10.

73 Ibid.

74 USCIS, Fiscal Year 2023 (n 66).

removal.⁷⁵ All non-LPR cancellation of removal petitions, including VAWA petitions, are subject to an annual cap of 4,000.⁷⁶ A judge who wants to grant VAWA cancellation cannot do so if the cap has been met; the court must “reserve” a decision until the cap is lifted, which may take years. Regardless, it is apparent that VAWA relief represents only a fraction of the humanitarian immigration relief granted annually by the United States and trails far behind the numbers attributable to the United States’ refugee and asylum programs.

16.3 Nonimmigrant Humanitarian Programs of the United States

The United States maintains several “nonimmigrant” visa programs that can be fairly characterized as humanitarian. Most nonimmigrant visas offer no direct pathway to U.S. citizenship, which makes them different from the immigrant visas that refugees and asylees can get after a year and that are awarded to successful VAWA self-petitioners and to those who receive VAWA cancellation. While exact numbers are hard to parse, more than 10,000, and perhaps fewer than 20,000, nonimmigrant visas are awarded annually under various humanitarian programs.

Interestingly, the United States has two nonimmigrant visas that can lead to immigrant visas providing a pathway to U.S. citizenship: the U visa and the T visa. Both are open only to noncitizens who have been the victims of specified crimes in the United States.

There are 10,000 U visas available annually⁷⁷ to noncitizens who have “suffered substantial physical or mental abuse as the result of having been a victim of” specific criminal activity in the United States.⁷⁸ This visa became law with the passage of the Battered Immigrant Women Protection Act of 2000 (BIWPA).⁷⁹ As the title of the enacting legislation suggests, the U visa offers another avenue for protecting noncitizens from family violence. But the U visa is broader than that. It also offers protection to victims of non-family violence and some non-violent crimes.⁸⁰ This visa also requires the noncitizen to be

75 As might be inferred from the phrase “non-LPR cancellation of removal,” the U.S. also has another form of cancellation of removal specifically for individuals who already have LPR status. INA § 240A(a), 8 USC § 1229b(a).

76 INA § 240A(e), 8 USC § 1229b(e).

77 INA § 214(p)(2), 8 USC § 1184(p)(2).

78 INA § 101(a)(15)(U), 8 USC § 1101(a)(15)(U).

79 Battered Immigrant Women Protection Act of 2000, Pub L No 106-386, tit V, § 1513, 114 Stat 1518, 1533–1537.

80 ‘Victims of Criminal Activity: U Nonimmigrant Status’ (USCIS, 2 April 2024) <www.uscis.gov/humanitarian/victims-of-criminal-activity-u-nonimmigrant-status> (listing “qualifying criminal activities” as abduction, abusive sexual contact, blackmail, domestic violence, extortion, false imprisonment, female genital mutilation, felonious assault, fraud in foreign labour contracting, hostage, incest, involuntary servitude, kidnapping, manslaughter, murder, obstruction of justice, peonage, perjury, prostitution, rape, sexual assault, sexual exploitation,

“helpful” to law enforcement in investigating or prosecuting the applicable criminal conduct.

U-visa recipients can bring their spouse and children to the United States. Additionally, minors who receive U visas can bring their parents and minor siblings to the United States. The U-visa beneficiary can also apply for LPR status after three years in the United States—the first step on their path towards U.S. citizenship.

There are 5,000 T visas available annually⁸¹ to noncitizens who have been the victim of a “severe form of trafficking in persons,” which includes labour trafficking as well as commercial sex trafficking of minors.⁸² The T visa was created in 2000 as part of the federal Trafficking Victims Protection Act (TVPA).⁸³ Lawmakers recognized the unique vulnerabilities of trafficked non-citizens who might be isolated, unfamiliar with the English language, and fearful of law enforcement agencies.⁸⁴ In response, Congress created a pathway to regularize the immigration of noncitizens physically present in the United States “on account of their trafficking.” If possible, as part of this process, the noncitizen should also comply with “any reasonable request for assistance” regarding the investigation and prosecution of the trafficking. Finally, the noncitizen must establish that they would “suffer extreme hardship involving unusual and severe harm upon removal.”

As with the U visa, a T-visa grant allows the benefiting noncitizen to bring their spouse and children to the United States. Likewise, minor victims can bring their parents and minor siblings to the United States. In addition, if it is determined that certain other relatives face a “present danger of retaliation” due to the visa recipient’s escape from and cooperation in prosecuting the trafficking, they too may be able to come to the United States under the T visa provisions. Also like the U visa, the noncitizen beneficiary of a T visa can apply for LPR status after three years. And, as explained previously, LPR status puts noncitizens on a path towards U.S. citizenship.

The U and T visas are not without controversy. In what is a clear refrain throughout this chapter, humanitarian nonimmigrant visa skeptics, particularly of the U-visa program, worry about fraud.⁸⁵ Supporters of these programs

slave trade, stalking, torture, trafficking, witness tampering, unlawful criminal restraint, and other related crimes).

81 INA § 214(o)(2), 8 USC § 1184(o)(2).

82 INA § 101(a)(15)(T), 8 USC § 1101(a)(15)(T); 22 USC § 7102(11).

83 Victims of Trafficking and Violence Protection Act of 2000, Pub L No 106-386, 114 Stat 1464.

84 Corie O’Rourke, Cory Sagduyu and Katherine Soltis, ‘Present Yet Unprotected: USCIS’s Misinterpretation of the T Visa’s Physical Presence Requirement and Failure to Protect Trafficking Survivors’ (2021) 3 AILA L J 53, 55–56.

85 ‘USCIS’ U Visa Program Is Not Managed Effectively and Is Susceptible to Fraud (Redacted),’ (*US DHS OIG*, 2022) OIG-22-10 <www.oig.dhs.gov/sites/default/files/assets/2022-01/OIG-22-10-Jan22-Redacted.pdf> (identifying “10 USCIS approved petitions with forged, unauthorized, altered or suspicious law enforcement certifications”); Imogene Mankin,

counter that they are “too slow and onerous” to inspire fraudulent applications.⁸⁶ In the past six years, the wait time for a U visa has ranged from over 3.5 years to just under five years.⁸⁷ The lengthy wait is the result of more individuals qualifying for U visas annually than the 10,000 available visas will allow.⁸⁸ In contrast, the average wait time for a T visa over the past six years has ranged from a year to a year and a half. The shorter wait is the result of fewer individuals applying for the T visa. Indeed, the statutory cap of 5,000 T visas has never been reached.⁸⁹ Further, noncitizen applicants for these visas have no authorization to be present in the United States while they await their visas and may not receive authorization from the government to work in the United States during these lengthy wait times. The years of “legal limbo” facing U and T visa applicants deter fraud.⁹⁰

There is another important nonimmigrant visa that can be used for humanitarian reasons: the B2 visa.⁹¹ The B2 visa is the U.S. tourist visa. This visa is, as one would expect, typically used by individuals coming to the United States to visit popular sights or to see friends and family. Think Disneyland, the Grand Canyon, or grandkids. However, the B2 visa is also used for medical tourism.⁹² Some individuals come to the United States to seek medical care that is unavailable in their home country. For example, in 2020, the family of Alusine, Isatu, Hassanatu, and Hussainatu Jollah traveled from Freetown, Sierra Leone to New York-Presbyterian Morgan Stanley Children’s Hospital so the children, five-month-old conjoined twins, could undergo a complex separation surgery.⁹³ Other noncitizens travel to the United States for less extraordinary medical care, such as imaging services, in order to avoid lengthy wait times

‘Abuse-in(g) The System: How Accusations of U Visa Fraud and Brady Disclosures Perpetuate Further Violence Against Undocumented Victims of Domestic Abuse’ (2017) 27 Berkeley La Raza L J 40, 46–47 (citing politicians’ fears regarding U visa fraud)

86 Mankin (n 85) 49.

87 ‘Historical National Median Processing Time (in Months) for All USCIS Offices for Select Forms by Fiscal Year’ (USCIS) < <https://egov.uscis.gov/processing-times/historic-pt> > accessed 31 October 2024

88 Ibid.

89 ‘Characteristics of T Nonimmigrant Status (T Visa) Applicants Fact Sheet’ (USCIS) 4 tbl 1 <www.uscis.gov/sites/default/files/document/fact-sheets/Characteristics_of_T_Nonimmigrant_Status_TVisa_Applicants_FactSheet_FY08_FY22.pdf> accessed 25 August 2025. In fiscal year 2022, just over 3,000 T visas were granted. Id. The next highest grant was in fiscal year 2020, with 2,000 T visas granted, and the lowest in recent years was in fiscal year 2008, with just 410 T visas granted. Ibid.

90 Mankin (n 85) 48–49.

91 INA § 101(a)(15)(B), 8 USC § 1101(a)(15)(B).

92 Kit Johnson, ‘Theories of Immigration Law’ (2014) 46 Ariz State L J 1211, 1221–1223.

93 ‘Inside the Successful Separation Surgery of Conjoined Twins’ (Columbia University Irving Medical Center, 10 December 2021) <www.cuimc.columbia.edu/news/inside-successful-separation-surgery-conjoined-twins> accessed 4 October 2025. The National Institutes of Health maintains a website providing information to educate international patients and caregivers on how to obtain a B-2 visa in order to participate in the NIH Clinical Center’s

abroad.⁹⁴ Noncitizens may also use the B2 visa to visit loved ones hospitalized in the United States or to provide care for a sick relative. Recipients of the B2 visa are granted a limited time to be present in the United States. At the end of their approved time, recipients must return to their country of origin. The B2 visa provides no path to long-term status in the United States.

Because the B2 visa is used for multiple purposes, it is impossible to disaggregate how many individuals utilize this program for humanitarian reasons. Thousands of people are granted a B2 annually and the numbers change year to year: from nearly 30,000 in 2019 to less than a tenth of that in 2021.⁹⁵ Even more individuals are granted combination B1/B2 visas, which allow noncitizens to engage in both business and tourism: from over 6.4 million in 2019 to over 1.3 million in 2021.⁹⁶ It is possible that even some of these B1/B2 visa holders utilized their visas to seek care for themselves or to provide care to others.

16.4 Non-Visa Humanitarian Programs of the United States

Beyond the immigrant and nonimmigrant visa options outlined in Parts 1–3 above, the United States maintains non-visa programs that provide humanitarian relief to noncitizens: namely, parole and temporary protected status.

Parole is a mechanism by which the United States allows noncitizens to physically enter the country under the supervision of the Department of Homeland Security (DHS).⁹⁷ While the parolee is known to the government to be physically present in the country, they are not considered to have been “admitted,”⁹⁸ a formality with consequences across immigration law.

Parole was first used by President Dwight D. Eisenhower in 1956 to allow 30,000 Hungarian refugees into the United States.⁹⁹ In the years since, parole has been used to facilitate the entry of refugees from Haiti, Cuba, Vietnam,

research. ‘B-2 Visa Information’ (*NIH Clinical Center*) <www.cc.nih.gov/patient-info/visa> accessed 8 November 2024.

94 Marty Stempniak, ‘US Radiology Providers Catering to Patients Facing Long Wait Times for Imaging in Canada’ (*Radiology Bus*, 16 September 2024) <<https://radiologybusiness.com/topics/healthcare-management/medical-practice-management/us-radiology-providers-catering-patients-facing-long-wait-times-imaging-canada>> accessed 4 October 2025.

95 ‘Nonimmigrant Visas Issued by Classification: FY 2019–2023,’ tbl XV(B) (*U.S. Department of State*) <https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2023AnnualReport/FY2023_AR_TableXVB.pdf> accessed 25 August 2025.

96 Ibid.

97 INA § 212(d)(5), 8 USC 1182(d)(5).

98 INA § 101(a)(13), 8 USC § 1101(a)(13).

99 ‘Fact Sheet: The Use of Parole Under Immigration Law’ (*American Immigration Council*, April 2024) 3 <www.americanimmigrationcouncil.org/sites/default/files/research/the_use_of_parole_under_immigration_law_2024.pdf> accessed 4 October 2025.

Cambodia, Laos, Afghanistan, and Ukraine, among others.¹⁰⁰ The United States granted humanitarian parole to just under 400,000 noncitizens in the first ten months of the 2024 fiscal year and just over 380,000 in the prior fiscal year.¹⁰¹ It is estimated that over one million noncitizens are present in the United States with parole.¹⁰²

Today, the grant of parole is frequently associated with the asylum process discussed in Part 1 of this chapter. Noncitizens who present themselves at the U.S. border to request asylum are initially taken into the custody of the Department of Homeland Security. Under certain circumstances, they may be paroled into the United States with the understanding that they will continue to pursue their case for asylum in the context of a removal proceeding. In addition to granting asylum seekers parole, the United States grants “humanitarian parole” to other noncitizens for reasons as varied as obtaining medical treatment, providing critical care to a family member, or attending a funeral.¹⁰³

The other significant non-visa humanitarian immigration program of the United States is Temporary Protected Status (TPS), an invention of the Immigration Act of 1990.¹⁰⁴ The United States grants TPS to citizens of foreign countries that the Attorney General has designated as unsafe due to armed conflict, natural disasters, or other “extraordinary and temporary conditions.”¹⁰⁵ TPS is a large program. Over 870,000 noncitizens in the United States have TPS status,¹⁰⁶ and it is estimated that more than 300,000 other noncitizens in the United States are eligible for TPS status.¹⁰⁷

100 Ibid; Idean Salehyan, ‘Presidential Election Could Help Decide Fate of the 70,000 Afghans Living Temporarily in the US’ (*The Conversation*, 21 October 2024) <<https://theconversation.com/presidential-election-could-help-decide-fate-of-the-70-000-afghans-living-temporarily-in-the-us-233941>>; Zolan Kanno-Youngs, ‘For People Fleeing War, U.S. Immigration Fight Has Real-Life Consequences’ (*NY Times*, 26 January 2024)

101 ‘Who Is Being Given Humanitarian Parole to Temporarily Enter the Country: Latest Data’ (*TRAC Immigration*, 6 September 2024) <<https://tracreports.org/reports/749/>> accessed 4 October 2025.

102 Jeanne Batalova, ‘Frequently Requested Statistics on Immigrants and Immigration in the United States’ (*MPI*, 13 March 2024) <www.migrationpolicy.org/article/frequently-requested-statistics-immigrants-and-immigration-united-states-2024#refugees-asylum-seekers>.

103 ‘Humanitarian or Significant Public Benefit Parole for Noncitizens Outside the United States’ (*USCIS*, 11 October 2024) <www.uscis.gov/humanitarian/humanitarian_parole> (choose “Eligibility for Parole”) accessed 4 October 2025.

104 Immigration Act of 1990, Pub L No 101-649, § 302, 104 Stat 4978, 5036-8.

105 INA § 244, 8 USC § 1254a.

106 ‘Temporary Protected Status: Calendar Year 2023 Annual Report,’ 4 tbl 2 (*USCIS*, 2024) <www.uscis.gov/sites/default/files/document/reports/TPS_CY23_Congressional_Report.pdf>.

107 Mohamad Moslimani, ‘How Temporary Protected Status Has Expanded Under the Biden Administration’ (*Pew Rsch Ctr*, 29 March 2024) <www.pewresearch.org/short-reads/2024/03/29/how-temporary-protected-status-has-expanded-under-the-biden-administration/> accessed 4 October 2025.

With TPS, qualified individuals receive authorization for an 18-month stay in the United States during which they will not be deported and are allowed to lawfully work in the country. As soon as TPS is lifted, however, grantees are expected to return to their countries of origin. TPS does not provide a path to LPR status and thereby U.S. citizenship. At present, the United States has TPS programs in place for nationals of Afghanistan, Myanmar, Cameroon, El Salvador, Ethiopia, Haiti, Honduras, Nepal, Nicaragua, Somalia, South Sudan, Sudan, Syria, Ukraine, Venezuela, and Yemen.¹⁰⁸

A central critique of TPS is that the program has not functioned as a temporary one for many noncitizens. The United States designated Nicaragua for TPS in 1991,¹⁰⁹ Honduras in 1999,¹¹⁰ and El Salvador in 2001.¹¹¹ Each of those designations has been renewed regularly and continues in place today.¹¹² Proponents of these programs counter that the eligibility for TPS remains tied to the ability of an individual to establish continuous physical presence in the United States from the original date of designation, such that the number of covered individuals has not grown. Moreover, the countries themselves remain unsafe for return, a requirement for TPS designation.

16.5 Conclusion

The United States uses a variety of immigration programs to address humanitarian concerns, both international and domestic. While every program requires individual applications and, as such, focuses on the needs of the impacted non-citizen, many programs respond to larger-scale humanitarian conflicts. For example, when the United States accepts a refugee—discussed in Part 1—from the Kutupalong Expansion Site in Bangladesh, it is accepting one of the nearly one million Rohingya refugees who have fled genocidal violence at the hands of Myanmar's Rakhine State that aims to eliminate the entire population of Rohingya.¹¹³ Similarly, in designating Ukraine for TPS, as discussed in Part 4,

108 'Temporary Protected Status' (*USCIS*, 17 October 2024) <www.uscis.gov/humanitarian/temporary-protected-status> (choose "Countries Currently Designated for TPS") accessed 4 October 2025.

109 'Temporary Protected Status Designated Country: Nicaragua' (*USCIS*, 11 October 2024) <www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-nicaragua>.

110 'Temporary Protected Status Designated Country: Honduras' (*USCIS*, 11 October 2024) <www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-honduras>.

111 'Temporary Protected Status Designated Country: El Salvador' (*USCIS*, 11 October 2024) <www.uscis.gov/humanitarian/temporary-protected-status/temporary-protected-status-designated-country-el-salvador>.

112 In 2025, the second Trump administration sought to end TPS status for many countries, including Nicaragua and Honduras. Litigation surrounding those terminations is ongoing.

113 'Refugee Camps' (*USA for UNHCR*) <www.unrefugees.org/refugee-facts/camps/> accessed 4 November 2024.

the United States intended to protect that nation as a whole from needing to deal with noncitizen returnees during the chaotic time of its war with Russia.¹¹⁴

Other U.S. immigration programs look to protect noncitizens from small-scale human suffering. For example, the B2 visa discussed in Part 3 and the humanitarian parole program discussed in Part 4 both allow noncitizens to enter the country for medical treatment unavailable in their home countries. The VAWA programs discussed in Part 2 protect noncitizens in the United States who are being abused by the very family members who would otherwise control the fate of their immigration status. The U and T visas examined in Part 3 offer protections to noncitizens who have suffered exploitation and violence within the United States. And, finally, the asylum program discussed in Part 1 and the related parole programs discussed in Part 4 allow individual applicants from any country in the world to seek protection in the United States based on fear of persecution abroad.

Every U.S. humanitarian immigration program faces criticism. Fraud is a frequent concern among U.S. lawmakers. Yet, as discussed in this chapter, there is scant evidence of actual fraud among the programs and abundant evidence that these programs have provided much-needed protection for millions of vulnerable noncitizens.¹¹⁵

114 'Secretary Mayorkas Extends and Redesignates Temporary Protected Status for Ukraine' (USCIS, 18 August 2023) <www.uscis.gov/newsroom/news-releases/secretary-mayorkas-extends-and-redesignates-temporary-protected-status-for-ukraine> accessed 4 October 2025.

115 See notes 5, 6, 25–27, 60, 73–74, 76, 80, 92–93, 99–101, 106, and accompanying text.

Conclusion

Hiroshi Motomura

This volume on visas comes at a most opportune time. As the editors explain in introducing this book, visas are much more important in the global regulation and management of migration than many observers have appreciated. It is high time that the topic gets the comprehensive and global treatment that it deserves—and this book provides.

As an afterword to conclude this collection of contributions, this short essay takes stock of the visa as a phenomenon and as an institution. I hope to situate visas among key broader themes in government responses to migration. To do so, I will interpret the evolution of migration politics in the past several decades. I will then explain how this evolution is essential for understanding the importance of visas today.

I write principally about developments in the United States, but I do so with the hope that readers around the world will recognize analogous developments in many regions and countries. Indeed, similar tensions and responses arise in some form in many or most countries around the world. Visas hold much promise as an aspect of wise responses to migration. But visas also come with some risks and perils that I will identify.

1. The Problem of Migration Decision-Making at the Physical Border

First, let me offer some observations about the promise of visas. I begin by suggesting that much of the political polarization that besets immigration policy around the world has its source in problems that arise at national borders in the physical sense—at a land frontier or on a shoreline.

To explain how this association between immigration policy and the physical border emerged, a look at recent history is essential.¹ Migration patterns changed considerably in the first two decades of the twenty-first century. Migrants became more able—albeit often at great cost and great danger—to

1 On these developments, see Hiroshi Motomura, *What Does Immigration Law Do?*, Carnegie Endowment for International Peace, May 7, 2025.

travel to lands that just a generation earlier had been inaccessible. Mobile phones let migrants communicate about the routes to use, both to reach their intended destinations and to avoid frontier controls and other perils.

These developments took place against immigration laws in many destination countries that offered only limited lawful pathways to seek admission. This was certainly true in countries that did not see themselves as “countries of immigration” at all. The only lawful way to start a new life there was through some form of admission as a refugee or asylum seeker. Other countries have had a general self-perception as countries of immigration. But lawful admission to many of these countries—the United States among them—is difficult or impossible for migrants who do not have close relatives there.²

Under these circumstances, the new migration patterns became migration by people who sought asylum. They had no other options in their quest for protection. Due to basic features of destination countries’ overall approach to human migration—especially the absence of labor migration pathways—asylum was their only option. As a result, new migration patterns soon turned into a “crisis” of asylum.

But governments typically offer humanitarian protection only to a limited few. To have any hope of protection through asylum, migrants had to reach a country’s physical border. Some did so, and governments granted many of their asylum applications. Other migrants won protection in some other form, typically more limited, through statuses that fall short of durable residence. These in-between statuses have included parole in the United States and subsidiary protection in European Union countries.³

Inherent in this pattern of government responses is requiring asylum seekers to travel to the destination country’s physical border. Governments then let in some applicants who became highly visible in border communities in the destination country, such as El Paso, Texas, in the United States. Governments forced other applicants to stay outside the physical border, but such policies made migrants highly visible at the threshold of entry, for example in Ciudad Juarez, Mexico.⁴ In this way, new migration patterns led to an “asylum crisis,” which then became a “border crisis.”

The situation at the physical border exacerbated the political (and typically) partisan polarization that had already put immigration policy in many countries into gridlock. Concentrating newcomers at the physical border and in border communities ensured that questions about the reception of newcomers would

2 See Hiroshi Motomura, *Borders and Belonging: Toward a Fair Immigration Policy* (Oxford 2025) 85–93.

3 See Immigration and Nationality Act § 212(d)(5), 8 U.S.C. § 1182(d)(5); Hiroshi Motomura, *Borders and Belonging: Toward a Fair Immigration Policy* (Oxford Univ. Press 2025) 22–28; Hiroshi Motomura, *The Future of Humanitarian Protection in the United States*, Carnegie Endowment for International Peace, Sept. 25, 2025.

4 See *Securing Our Borders*, Exec. Order 14165 § 6 (Jan. 20, 2025), 90 Fed. Reg. 8467, 8468 (Jan. 30, 2025) (Migration Protection Protocols).

arise against the backdrop of an extremely cramped definition of a destination country's "capacity" to receive newcomers.

Especially in retrospect, the debate over responses to migrants could have been much less polarized—and even become a forthright conversation—if migration had not been principally funneled into the asylum system. And that pressure on the asylum system would not have disabled debate as badly if alternative forms of humanitarian protection had been available without the journey to the physical border of the destination country.

For example, the refugee admissions program in the United States makes decisions based on applications that migrants can file far outside U.S. physical borders.⁵ Approved applicants can then travel to the United States to be admitted.

Other forms of humanitarian protection in the United States have a similar virtue. The Biden administration's "CHNV" program let in migrants who were seeking protection from Cuba, Nicaragua, Haiti, and Venezuela. Similar Biden-era programs benefited migrants from Afghanistan and Ukraine. Migrants could file applications in their home countries to seek humanitarian protection in the United States as a way of escaping political, security, and environmental crises in their home countries.⁶

These non-asylum programs—and similar humanitarian protection programs in many countries—have shortcomings that I do not mean to gloss over. But I emphasize a shared fundamental feature: that they take pressure off the physical border by separating the decision to protect from the physical border.

A closely related feature is that private sponsors ease the arrival of migrants through local support, often through job offers, in receiving communities far from the physical border. This expands a destination country's perception of its "capacity" by distancing reception decisions from the physical border itself.

In short, new migration patterns did not need to generate "asylum crisis." And any "asylum crisis" did not need to become a "border crisis." But as the tragic consequence of this causal chain, the perception of a "border crisis" has enabled politicians to transform problems at the border into what they have been calling an "invasion."

Many of the Executive Orders and other official documents issued by the Trump administration in 2025 refer to "invasion."⁷ Viewing migration as "invasion" has led to disturbing politics. If migrants are "invaders," then it

5 See Immigration and Nationality Act § 207, 8 U.S.C. § 1157.

6 See 88 Fed. Reg. 26329 (2023) (Cuba); 88 Fed. Reg. 1243 (2023) (Haiti); 88 Fed. Reg. 1255 (2023) (Nicaragua); and 87 Fed. Reg. 63507 (2022) (Venezuela).

7 See *Protecting The American People Against Invasion*, Exec. Order 14159, 90 Fed. Reg. 8443 (Jan. 20, 2025); *Invocation of the Alien Enemies Act Regarding the Invasion of the United States by Tren de Aragua*, Proclamation 10903, 90 Fed. Reg. 13033 (Mar. 14, 2025); Proclamation 10888, *Guaranteeing the States Protection Against Invasion*, Proclamation 10888, 90 Fed. Reg. 8333 (Jan. 20, 2025).

becomes natural for governments to declare an “emergency” for which extreme measures are not only justified but also the only option. This perspective led to troops in Los Angeles for immigration enforcement,⁸ and soon thereafter to troops in Washington, D.C., to address a “crime emergency,” dropping the pretense to enforce immigration laws.⁹ This is a route to martial law.

2. The Role of Visas in Relieving Pressure on the Physical Border

In undoing this harm, an essential response is to relieve the pressure on the physical border that results when new migration patterns put pressure on asylum, which then puts pressure on the border and leads to claims of “invasion” and “emergency.”

I have mentioned refugee admissions and other decisions to offer humanitarian protection based on decisions far outside a country’s physical borders. Just as importantly, visas have an essential role to play in relieving pressure on the physical border. Visas are a form of pre-approval that takes pressure off the physical border, with several positive consequences.

One is to allow measured government decision-making away from the pressure cooker of the physical border. Another is to let migrants make their humanitarian protection claims under circumstances that free them from some of the extreme duress they face in border situations. Relatedly, making decisions away from the physical border makes protection available to migrants that may lack the means or health to reach a country’s border to seek protection. And making decisions far outside the physical border enables more cooperation among countries to offer humanitarian protection to migrants in need.

The history of visas in the United States illustrates these effects. Until the 1920s, the U.S. admissions system operated without visas. European immigrants had first to get to Ellis Island in New York harbor.¹⁰ (This was a period of Asian exclusion.)¹¹

The predictable consequence of locating admission decisions on the physical border at Ellis Island was that the U.S. government excluded some migrants—on various grounds that included illness and prearranged work (which was prohibited)—after they had reached the threshold of admission. Some had to sail back to Europe. Families had to decide whether some family members would stay in America while others went back.

8 See *Memorandum on Department of Defense Security for the Protection of Department of Homeland Security Functions* (June 7, 2025).

9 See *Additional Measures To Address the Crime Emergency in the District of Columbia*, Exec. Order 14339, 90 Fed. Reg. 42121 (Aug. 25, 2025).

10 See Ayelet Shachar, *The Shifting Border: Legal Cartographies of Migration and Mobility* (Manchester 2020) 63–64; Aristide R. Zolberg, *A Nation By Design: Immigration Policy in the Fashioning of America* (Harvard 2008) 110–13, 264–67.

11 See Hiroshi Motomura, *Americans in Waiting: The Lost Story of Immigration and Citizenship in the United States* (Oxford 2006) 24–37.

When the U.S. government decided to issue or deny visas in sending countries, migrants would get a decision before they left Europe. This history shows how visas are a significant way to relieve pressure on the physical border—and to head off the descent into perceptions of “invasion,” then “emergency,” and perhaps authoritarianism.

At the same time, visas come with perils that deserve discussion. One is that because visas move decisions away from the physical border, visas can make it difficult for disappointed applicants to challenge visa denials as the product of an unfair process. Reaching a destination country often enables claims to enhanced procedural protection against mistakes or bias. In contrast, government decisions made in distant lands typically have little or none of the transparency and procedural fairness that may be available to migrants who reach a destination country’s physical border.¹²

In the United States, the doctrine of consular nonreviewability means that decisions outside the United States to deny visas are not reviewable in U.S. courts.¹³ Exceptions to this doctrine have emerged over time, but the U.S. Supreme Court’s 2024 decision in *Department of State v. Muñoz*¹⁴ made it clear that consular denial of a visa is beyond meaningful judicial scrutiny. This is true even when the challenger is the disappointed applicant’s U.S. citizen spouse.

In addition, externalization of borders—not only through visas, but also as the result of diplomatic arrangements to manage migration—means that the traditional secrecy surrounding diplomacy insulates decisions from public scrutiny.

My point is that visas are neither an unqualified positive nor an unqualified negative. Visas come with flaws and perils. But visas also have virtues that become evident when we see visas as the alternative to severe pressure on the physical border, with deeply troubling consequences of the perception of a “border crisis.”

What is clear is that visas are important, and that a great deal is at stake when visas are under discussion. Serious consideration of their virtues and flaws must be part of generating wise visa policies in the years to come. This volume is a comprehensive and nuanced contribution to these discussions.

12 On this aspect of diplomatic discussions, see Hiroshi Motomura, *Borders and Belonging: Toward a Fair Immigration Policy* (Oxford 2025) 145–46.

13 For discussion, see *American Academy of Religion v. Napolitano*, 573 F.3d 115, 123–25 (2d Cir. 2009).

14 See 602 U.S. 899 (2024).



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