

## Features Essay

# Unlawful Nationality-Based Bans from the Schengen Zone: Poland, Finland, and the Baltic States against Russian Citizens and EU Law

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In this Essay, we demonstrate that there is no legal way under current European Union (EU, the Union) law to adopt a citizenship-based ban on entering the Schengen zone. The de facto national-level ban against Russian citizens introduced by Poland, Finland, and the Baltic States breaches EU law. Further, amending the law to allow for a citizenship-based ban goes against the core values the Union is based upon, pitting populist proposals against the rule of law. References to “wholly exceptional circumstances” would not help either. Any proposal to ban Russian citizens’ entry would prevent dissenters and deserters, who are unwilling to contribute to Russian President Vladimir Putin’s war, from seeking refuge in EU territory and imply impermissible discrimination. It is no surprise that such a proposal was defeated in the Council of the EU (Council). After this defeat, however, the Baltic States, Poland, and Finland proceeded to implement such a nationality-based ban on entry at the national level in breach of EU law, using Russian citizenship as a ground for refusal of entry within their borders as well as into other Schengen states. Central to the citizenship-based travel ban is a replacement of the rule of law reasoning with politically motivated retribution, which is prima facie unrelated to any legitimate aim that the measure could achieve. Such a replacement counterproductively strengthens Putin’s totalitarian regime and its military: those unable to flee to Europe may be conscripted for Russia’s war of aggression. The de facto ban, even if outright unlawful, is difficult, in practice, to reverse. This difficulty makes it imperative for other Member States, as well as the

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institutions of the Union, to put sufficient pressure on the violators to save the Schengen system from unlawful populist fragmentation. The Union’s strength is precisely in its safeguards against acting along the populist lines the ban implies, rather than one of its weaknesses, contrary to the alarmist agitation of some Member States. We demonstrate that the debate around the blanket citizenship-based visa and entry ban, as well as the Union’s unwillingness and powerlessness to prevent Member States’ arbitrary replacement of the law with hateful citizenship-based retribution, is a stress-test of the rule of law in the EU.

INTRODUCTION: PUTTING RETRIBUTION BEFORE THE LAW .....	2
I. NO CITIZENSHIP-BASED BAN IS POSSIBLE UNDER THE CURRENT SCHENGEN ACQUIS .....	6
A. The Schengen Visa.....	6
B. Schengen Zone: The Rule Prohibiting Blanket Bans.....	8
C. Citizenship-Based Visa and Entry Bans at the National Level in Practice.....	14
II. “WHOLLY EXCEPTIONAL CIRCUMSTANCES” OF ARTICLE 347 TFEU CANNOT JUSTIFY CITIZENSHIP-BASED ENTRY BANS.....	16
III. NO CITIZENSHIP-BASED ENTRY BAN IS POSSIBLE THROUGH THE AMENDMENT OF THE SCHENGEN <i>ACQUIS</i> .....	21
IV. UNACCEPTABLE CARTE BLANCHE TO VIOLATE FUNDAMENTAL RIGHTS .....	23
A. Citizens Fleeing Mobilization .....	24
B. Family Members .....	26
C. Non-discrimination and equality before the law .....	27
V. RULE OF LAW AND THE LOGIC OF JUST RETRIBUTION .....	29
CONCLUSION: THE LITMUS TEST FOR THE RULE OF LAW IN THE EU.....	32

#### INTRODUCTION: PUTTING RETRIBUTION BEFORE THE LAW

On August 8, 2022, Ukrainian President Volodymyr Zelensky called on Western countries to ban all Russian travelers.<sup>1</sup> While the U.S. government immediately dismissed this initiative as unacceptable, the reaction of the European Union (EU) was different.<sup>2</sup> On the same day, the Prime Minister of Finland, Sanna Marin, asked for an EU-wide ban on Russian citizens entering the Schengen zone, specifically targeting tourists traveling on Russian passports: “[i]t’s not right that at the same time as Russia is waging an aggressive, brutal war of aggression in Europe, Russians can live a normal life, travel in Europe, be tourists. It’s not right.”<sup>3</sup> Following this declaration, Finland started reducing

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1. Isabelle Khurshudyan, *Zelensky Calls on West to Ban all Russian Travelers*, WASH. POST (Aug. 8, 2022), <https://www.washingtonpost.com/world/2022/08/08/ukraine-zelensky-interview-ban-russian-travelers/>.

2. *See U.S. Rejects Ukrainian Call for Blanket Ban on Visas for Russians*, THE GUARDIAN (Aug. 22, 2022), <https://www.theguardian.com/us-news/2022/aug/22/us-rejects-russians-visa-ban-ukraine>.

3. *Finnish PM: EU Should Restrict Russian Tourism*, YLE NEWS (Aug. 8, 2022), <https://yle.fi/news/3-12568274>.

the number of Schengen visas it issued. Schengen visas are short-stay visas that allow access to the thirty-one European countries that are part of the Schengen borderless zone.<sup>4</sup> Russians began to flee en masse when Russia started its “partial mobilization” in September 2022.<sup>5</sup> At the time, Finland issued roughly 100 Schengen visas per day (corresponding to an average of ten percent of Schengen visas issued by the country in August and about three percent of the visas it issued in 2019).<sup>6</sup> Around the same time, Estonia decided to prohibit the entry of Russian citizens holding valid Schengen visas,<sup>7</sup> a further restriction since March 2022 when the Estonian government had stopped issuing Schengen visas to Russians.<sup>8</sup> Similarly, the Latvian embassy in Russia has stopped issuing all visas to Russian citizens for an indefinite period.<sup>9</sup> Poland followed suit applying the visa ban,<sup>10</sup> as did the Czech Republic, which held the EU Presidency at the time the bans were instituted.<sup>11</sup> Likewise, the Netherlands, Bulgaria, Romania, Belgium, and Denmark stopped issuing Schengen visas to Russian citizens by closing their consulates in the Russian Federation.<sup>12</sup> In contrast, Germany and France opposed such a ban.<sup>13</sup> Josep Borrell, the EU High Representative for Foreign Affairs and Security Policy, and the European Commission, threw their weight behind those opposing the ban proposal.<sup>14</sup> In the face of their opposition, the Council decided merely to suspend the Visa Facilitation Agreement with

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4. These countries include 27 Schengen members (23 EU Member States; all EU members except Bulgaria, Cyprus, Ireland, and Romania), 3 European Economic Area countries (Iceland, Norway, and Liechtenstein, and Switzerland), and 4 de facto members that border Schengen members and adhere to the open border policy: Andorra, Monaco, San Marino, and the Vatican City State.

5. Katharina Krebs et al., *Russia Suspends ‘Partial Mobilization’ of Citizens for Ukraine War*, CNN (Nov. 1, 2022, 9:12 AM), <https://www.cnn.com/2022/10/31/europe/russian-mobilization-suspended-intl/index.html>.

6. Ministry for Foreign Affairs of Finland, *Question and Answers, Government Resolution 29 September 2022 on the Restriction of Entry of Russian Citizens* (Sept. 29, 2022), [https://um.fi/documents/35732/0/Periaatep%C3%A4%C3%A4t%C3%B6s\\_ven%C3%A4%C3%A4iste\\_n\\_maahantulo\\_UKK\\_EN.pdf/979d63ff-1490-1c57-f858-cf754477b22d?t=1664449586698](https://um.fi/documents/35732/0/Periaatep%C3%A4%C3%A4t%C3%B6s_ven%C3%A4%C3%A4iste_n_maahantulo_UKK_EN.pdf/979d63ff-1490-1c57-f858-cf754477b22d?t=1664449586698)

7. *Restricting the Entry of Russian Citizens into the Country*, SISEMINISTEERIUM, <https://www.siseministerium.ee/venemaa-kodanike-riiki-sisenemise-piiramine> (last visited June 5, 2023).

8. *Estonian Embassy in Moscow Stops Accepting Visa Applications from Citizens of Russia and Belarus*, EMBASSY EST. MOSCOW (Nov. 11, 2022), <https://moscow.mfa.ee/estonian-embassy-in-moscow-stops-accepting-visa-applications-from-citizens-of-russia-and-belarus/>.

9. *Latvia Indefinitely Stops Issuing Visas to Russian Citizens*, LSM (Aug. 5, 2022), <https://eng.lsm.lv/article/economy/transport/latvia-indefinitely-stops-issuing-visas-to-russian-citizens.a468189/>.

10. *Polish Government to Introduce a Visa Ban for Russian Citizens: Official*, POLSKIE RADIO (Aug. 14, 2022), <https://www.polskieradio.pl/395/9766/Artykul/3019677,Polish-government-to-introduce-a-visa-ban-for-Russian-citizens-official>.

11. Belle de Jong, *Czech EU Presidency Pushes to Ban Visas for Russians*, THE BRUSSELS TIMES (Aug. 12, 2022), <https://www.brusselstimes.com/eu-affairs/271209/czech-eu-presidency-pushes-to-ban-visas-for-russians>.

12. *See Worldwide/Russia: Update on Visa Suspensions for Russian Citizens*, FRAGOMEN (Aug. 30, 2022), <https://www.fragomen.com/insights/worldwiderussia-update-on-visa-suspensions-for-russian-citizens.html>.

13. *Germany and France Oppose EU Visa Ban for Russian Tourists – Document*, REUTERS (Aug. 30, 2022), <https://www.reuters.com/world/europe/germany-france-oppose-eu-visa-ban-russian-tourists-document-2022-08-30/>.

14. *EU’s Borrell: Visa Ban for All Russians Would Lack Necessary Support*, REUTERS (Aug. 28, 2022), <https://www.reuters.com/world/europe/eus-borrell-visa-ban-all-russians-would-lack-necessary-support-2022-08-28/>.

Russia at the end of August 2022.<sup>15</sup>

Disappointed by the Council’s refusal to adopt a visa ban, the three Baltic States, joined by Poland, issued a statement during the 2022 Baltic-Nordic cooperation conference announcing a ban on the entry of Russian citizens.<sup>16</sup> The policy applies even to Russians with valid Schengen visas<sup>17</sup> and contains only a narrow list of exceptions to this otherwise blanket approach.<sup>18</sup>

Legally, this amounts to an outright non-compliance with the EU *acquis*<sup>19</sup> at the national level, as we demonstrate in this Essay. Though this move contradicts EU law, the Commission’s guidelines—released shortly after the joint statement was adopted—did not explicitly repudiate the questionable nature of such a ban in principle.<sup>20</sup> On September 22, 2022, the Finnish Government adopted a “softer” solution through what they called a “partial” ban by “drastically” limiting the capacity to issue Schengen visas to Russian citizens.<sup>21</sup> Finland’s decision to join Poland and the Baltic States effectively closed the land border between the EU and Russia.<sup>22</sup> Currently, the only available entry point at the border that complies with EU law is located between Russia and Norway at the polar circle.<sup>23</sup>

Within the first week of the “partial mobilization” declaration by the

15. *EU Foreign Ministers Agree to Suspend Visa Deal with Russia*, REUTERS (Aug. 31, 2022), <https://www.reuters.com/world/europe/eu-foreign-ministers-agree-suspend-visa-deal-with-russia-top-diplomat-2022-08-31/>; See also Council Decision (EU) No. 2022/333 of 25 February 2022, O.J. (L 54).

16. *Joint Statement of the Prime Ministers of Estonia, Latvia, Lithuania and Poland*, REPUBLIC OF EST. GOV’T (Sep. 8, 2022), <https://valitsus.ee/en/news/joint-statement-prime-ministers-estonia-latvia-lithuania-and-poland>.

17. *Id.* Also see the respective acts implementing this measure in Poland, Latvia, and Lithuania. For Poland: *Rozporządzenie Ministra Spraw Wewnętrznych i Administracji z dnia 19 września 2022 r. zmieniające rozporządzenie w sprawie czasowego zawieszenia lub ograniczenia ruchu granicznego na określonych przejściach granicznych* (Sept. 19, 2022), <https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20220001963>.

For Latvia: *Ministru kabineta rīkojums Nr. 599, Par Krievijas Federācijas pilsoņu ieeļošanu Latvijas Republikā, Rīgā 2022. gada 9. septembrī (prot. Nr. 45 1. §)* (Sept. 9, 2022); see also 22-TA-2695: *Rīkojuma projekts (Vispārīgais) (accompanying explanation)*, <https://tapportals.mk.gov.lv/annotation/7487fdbe-21a9-465b-95b9-0862ebb60ddb#>.

For Lithuania: *Nutarimas dėl nepaprastosis padėties įvedimo 2022 m. rugsėjo 13 d. Nr. XIV-1413 Vilnius*, <https://www.e-tar.lt/portal/lt/legalAct/563bf6b0340311edb4cae1b158f98ea5>.

18. *Joint Statement of the Prime Ministers*, *supra* note 16. These exceptions mainly concern—on paper—dissidents, humanitarian cases, family members (limited to spouses, parents, grandparents, children, and grandchildren, as well as dependents in the case of Latvia and only spouses, children, and dependents in the case of Poland), holders of permanent or long term residence permits in European Economic Area countries and the Swiss confederation, the facilitation of freight and transportation services, diplomatic missions, and Kaliningrad facilitated transit of persons.

19. The EU *acquis* is the totality of written and unwritten EU law in force. See generally Christine Delcourt, *The Acquis Communautaire: Has the Concept Had Its Day?*, 38 COMMON MKT. L. REV. 829 (2001).

20. *Communication Providing Guidelines on General Visa Issuance in Relation to Russian Applicants Following Council Decision (EU) 2022/1500 of 9 September 2022*, at para. 21, COM (2022) 6596 final (Sept. 9, 2022); see also *Providing Guidelines on Controls of Russian Citizens at External Borders*, COM (2022) 7111 final (Sept. 30, 2022).

21. See Press Release, Minister of Foreign Affairs of Finland (Sept. 29, 2022), [https://um.fi/current-affairs/-/asset\\_publisher/gc654PySnjTX/content/suomi-rajoittaa-voimakkaasti-venalaisten-matkustamista-turismitarikoituksessa-suomeen-valtioneuvoston-periaatepaatoksella](https://um.fi/current-affairs/-/asset_publisher/gc654PySnjTX/content/suomi-rajoittaa-voimakkaasti-venalaisten-matkustamista-turismitarikoituksessa-suomeen-valtioneuvoston-periaatepaatoksella).

22. At the time of writing this Essay, these unlawful bans remain in operation.

23. Maria Kiselëva et al., *Pogranichnik dolgo i sochuvstvvenno zhelal udachi*: kto i kak sejchas ujezhajet iz Rossii, BBC RUSSIAN (Sept. 24, 2022), <https://www.bbc.com/russian/features-63021472>.

Russian government in September 2022, hundreds of thousands of Russian citizens fled the country.<sup>24</sup> Such dissenters, who vote with their feet, are escaping to Armenia, Georgia, Kazakhstan, Azerbaijan, and Mongolia—visa-free destinations for Russian passport holders—because the EU’s borders are effectively closed.<sup>25</sup> The visa bans by Member States that share a border with Russia have prevented countless dissenters and non-supporters of Russian President Vladimir Putin’s regime from escaping Russia, thus potentially adding soldiers to the war machine.<sup>26</sup>

Labeling all Russian visitors as “tourists” is misleading. Schengen visa holders or applicants also include refugees fleeing the terror of the Russian regime. Because the EU does not have a humanitarian visa framework, the Schengen visa is the only way to reach the EU legally. In addition to being dissidents and refugees, Russian citizens who benefit from the Schengen visa are family members of EU citizens, legal residents in the EU, students, and professionals (including journalists, businesspeople, and athletes). Given several generations of common statehood and many mixed marriages between Russians and Ukrainians, an estimated eleven million Russians have close Ukrainian relatives,<sup>27</sup> and millions of Russian citizens identify as members of the Ukrainian nation.<sup>28</sup> Such citizens may be prohibited from entering the EU despite their affinity to Ukraine.<sup>29</sup>

This Essay argues that the EU’s failure to tame the unlawful practices by some of the Member States, in effect, facilitates the actions of Putin’s regime and punishes people who have no proven affinity with the Russian government. Analyzing the direct breaches of EU law at the national level and the consequences of such breaches is the key objective of this contribution.<sup>30</sup> To this end, we analyze the nationality-based visa and entry-ban policy step-by-step as

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24. Matthew Mpoke Bigg, *At Least 200,000 Russians Have Left the Country Since Putin’s Draft Began*, N.Y. TIMES (Sept. 28, 2022), <https://www.nytimes.com/2022/09/29/world/europe/russia-draft-putin.html>.

25. *Id.*

26. See e.g., Ilya Barabanov, “*Jesli by menia posadili na bojevoj vertolët mne by prishlos’ ubivat’*”: Pilot VKS sbezhhal iz Rossii i pogovoril s BBC, BBC RUSS. SERV. (June 8, 2023), <https://www.bbc.com/russian/features-65812907>

27. Valerie Hopkins, *Ukrainians Find That Relatives in Russia Don’t Believe It’s a War*, N.Y. TIMES (Mar. 6, 2022), <https://www.nytimes.com/2022/03/06/world/europe/ukraine-russia-families.html>.

28. See, e.g., Oxana Shevel, *Country Report: Ukraine*, EUDO CITIZENSHIP OBSERVATORY (Aug. 2010), <https://cadmus.eui.eu/bitstream/handle/1814/19641/Ukraine.pdf?sequence=1>; Aleksander Salenko, *Country Report: Russia*, EUDO CITIZENSHIP OBSERVATORY (July 2012), [https://cadmus.eui.eu/bitstream/handle/1814/60230/RSCAS\\_EUDO\\_CIT\\_2012\\_1.pdf](https://cadmus.eui.eu/bitstream/handle/1814/60230/RSCAS_EUDO_CIT_2012_1.pdf).

29. The same applies to the Ukrainians in the territories of the country occupied by Russia who are left without any valid Ukrainian documents: in the absence of Ukrainian consular services they are effectively trapped, since the Russian documents offered in the territories occupied in violation of international law are not recognized by the EU. Cf. Council of the EU Press Release, Council Adopts Decision not to Accept Russian Documents Issued in Ukraine and Georgia (Dec. 8, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/12/08/council-adopts-decision-not-to-accept-russian-documents-issued-in-ukraine-and-georgia/>.

30. The European Commission has shown abundant willingness to ignore the law in an array of sensitive areas over recent years and migration has been one of those areas, where it has tacitly approved torture, mass deprivation of rights, and death at the its land and sea borders. Once permitted, lawlessness creeps in and stays. Dimitry Kochenov & Sarah Ganty, *EU Lawlessness Law: From Indifference to Torture and Killing* (N.Y.U. L. School, Working Paper No. 2, 2022).

it developed and attempt to provide the first holistic legal assessment of the policy. We argue that such a policy violates the EU's fidelity to the rule of law,<sup>31</sup> and, in effect, facilitates Putin's "weaponization of passports" against Ukraine.<sup>32</sup> Visa and entry bans in effect are likely to field more soldiers on the Russian side, to the detriment of the liberal segment of Russian society, who are now held hostage by Putin's regime.

This Essay proceeds, in Part I, by explaining what a Schengen visa is and how it works in the context of EU-Russia relations, followed by a detailed assessment of the illegality of using citizenship as the only ground for banning citizens of a particular country from entering the EU under the law in force. Next, we show why the most fundamental principles of the Schengen *acquis*, such as the individual assessment of applications, cannot be changed with recourse to the "wholly exceptional circumstances" logic of Article 347 of the Treaty on the Functioning of the European Union (TFEU) (the focus of Part II) or via a formal amendment (shown in Part III). Legally impossible at the supranational EU level, the bans imposed at the national level amount to an attack on crucial rights, as we further demonstrate in Part IV. Finally, Part V provides a broader framing of the populist policy aiming to undo the EU's achievements since WWII, characterized by respect for human rights and the rule of law. This Part argues that such a policy aids the Putin regime in the context of its criminal war against Ukraine.

Beyond demonstrating the illegality of citizenship-based visa and entry bans, this Essay shows that such bans do not achieve the aim of diluting Russia's aggression. On the contrary, they counterproductively strengthen Putin's totalitarian regime. The political debate around the visa bans serves as a stress test for the rule of law in the EU.

## I. NO CITIZENSHIP-BASED BAN IS POSSIBLE UNDER THE CURRENT SCHENGEN *ACQUIS*

### A. *The Schengen Visa*

The Schengen visa is one visa, among many others, that twenty-seven full members of the Schengen zone can grant. A Schengen visa permits stays of up to ninety days in any 180-day period.<sup>33</sup> The Schengen visa is unique in that it is valid for the whole European territory of the participating states, as opposed to other visas issued by the EU Member States under national and EU law, such as long-stay visas for students,<sup>34</sup> or visas issued for the non-European territories of

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31. See Laurent Pech, *The Rule of Law as a Well-Established and Well-Defined Principle of EU Law*, 13 HAGUE J. RULE L. 107, 107-38 (2022); Marcus Klamert & Dimitry Kochenov, *Article 2 TEU, in THE TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS – A COMMENTARY* 22, 22-30 (2019).

32. Lily Hyde, *Forced to Fight Your Own People: How Russia is Weaponizing Passports*, POLITICO (Jan. 1, 2023), <https://www.politico.eu/article/ukraine-citizenship-war-russia-weaponize-passport-passportization-mobilization-draft/>.

33. Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas, arts. 1(1), 2(2), 2009 O.J. (L 243) 1 [hereinafter *Visa Code*].

34. Directive (EU) 2016/801 of the European Parliament and of the Council of 11 May 2016 on

the Member States.<sup>35</sup> The Schengen Area includes all the EU member states except Romania, Bulgaria, Ireland, and Cyprus,<sup>36</sup> as well as several third countries, including Iceland, Norway, Switzerland, and Liechtenstein as full members. It also includes Andorra, Monaco, San Marino, and the Vatican City State as de facto members.<sup>37</sup> The Schengen system is relatively open to visa-free travel, compared to the U.S. or the United Kingdom (U.K.) approaches to visa-free travel.<sup>38</sup> Indeed, fewer nationalities (mainly citizens from non-industrialized countries) are required to obtain a Schengen visa prior to travel compared to those who are obliged to acquire a U.S. or a U.K. visa.<sup>39</sup> Schengen countries (but not the de facto members) are competent to issue such visas and are required to act in strict accordance with EU rules enshrined in the Visa Code.<sup>40</sup> The Code is part of the Schengen *acquis*, entirely integrated into EU law since the Treaty of Amsterdam. The Visa Code was last amended in 2020 by “streamlining and improving operational aspects of the visa procedure.”<sup>41</sup>

In 2021, Russian citizens constituted the main group benefiting from Schengen visas.<sup>42</sup> 536,241 Russians received such a visa, and Chinese citizens had the next largest number, with 27,458.<sup>43</sup> The Schengen visa is effectively a visa for Russians. This is unsurprising, given that the citizens of virtually all other nations with similar GDP per capita are not behind the Schengen visa wall and can visit the EU without any visa. The EU abolished visas with post-Soviet nations with which it shares borders, except Russia and Belarus.<sup>44</sup> The fact that Russians and Belarusians need a visa to visit the EU is highly unusual in the context of travel in Europe. Conversations about visa-free travel were dead even before the annexation of Crimea in 2014, beginning with the 2007 Visa

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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 (recast), 2016 O.J. (L 132) 21.

35. Dimitry Kochenov, *The Application of EU Law in the EU’s Overseas Regions, Countries, and Territories After the Entry into Force of the Treaty of Lisbon*, 20 MICH. STATE J. INT’L L. 669 (2012).

36. *Schengen Area*, DIRECTORATE-GEN. FOR MIGRATION AND HOME AFF’S., EUR. COMM’N., [https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area\\_en](https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/schengen-area_en) (last visited Apr. 11, 2023).

37. Francesco Maiani, *Unique, Yet Archetypal Relations Between the European Union and Andorra, Monaco and San Marino*, in THE PROLIFERATION OF PRIVILEGED PARTNERSHIPS BETWEEN THE EUROPEAN UNION AND ITS NEIGHBOURS 87 (2019).

38. See KÁLIN AND KOCHENOV’S QUALITY OF NATIONALITY INDEX 64 (Dimitry Kochenov & Justin Lindeboom eds., 2020) (for a comparison of the visa free travel to the United States and the Schengen Area).

39. *Id.*

40. Visa Code, *supra* note 33.

41. 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 O.J. (L 188) 25.

42. *Visa Statistics: Schengen States Issue 2.4 Million Visas for Short Stays in 2021*, DIRECTORATE-GEN. FOR MIGRATION AND HOME AFF’S., EUR. COMM’N. (June 3, 2022), [https://home-affairs.ec.europa.eu/news/visa-statistics-schengen-states-issue-24-million-visas-short-stays-2021-2022-06-03\\_en](https://home-affairs.ec.europa.eu/news/visa-statistics-schengen-states-issue-24-million-visas-short-stays-2021-2022-06-03_en).

43. *Id.*

44. 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 O.J. (L 303) 39.

Facilitation Agreement between the EU and the Russian Federation.<sup>45</sup> Since the entry into force of this now-suspended—but not renounced—Visa Facilitation Agreement and until August 2022, Russian citizens have benefited from some visa facilitation requirements regarding the issuance of Schengen visas. The Agreement allowed for easier access for Russian citizens, including improvements to the length of the procedure,<sup>46</sup> length of visa validity for some categories of applicants,<sup>47</sup> the documents presented,<sup>48</sup> and the fee for processing visa applications.<sup>49</sup>

Third-country nationals who are required to receive a Schengen visa prior to travel, and those who are entitled to visa-free travel, can enter through any border crossing point in the Schengen Area.<sup>50</sup> Russian citizens in possession of a Schengen visa are, therefore, permitted to cross the land border no matter where they plan to travel in the Schengen zone. However, given the EU’s closure of the airspace with Russia in February, flying to the Schengen zone from Russia is possible only via the countries like Armenia, Georgia, Serbia, Turkey, or the United Arab Emirates, and such travel is quite expensive. Finland, Estonia, Latvia, Lithuania, and Poland (except the northern crossing with Norway) would thus be the easiest crossing points for many bearers of Russian passports to reach other destinations in the EU. Estonia’s Prime Minister, Kaja Kallas, saw this right of Russian citizens as a problem. She tweeted, “[w]hile Schengen countries issue visas, neighbors to Russia carry the burden.”<sup>51</sup> In this Essay, we show that no provision of the current Schengen *acquis* allows for the adoption of a citizenship-based ban on entry or on the issuance of visas using increased transit as a pretext. EU law prohibits refusing a Schengen visa to any foreigner meeting the established issuance criteria, let alone turning such a person away at the border. We first examine the rule clearly prohibiting any blanket nationality-based bans, and then look at the exceptions permitted under the Schengen *acquis*.

### B. Schengen Zone: The Rule Prohibiting Blanket Bans

A blanket ban on visa issuance and entry breaches the rules and foundational principles of the Schengen visa regime. In certain rare exceptions, Schengen states may impose control over internal borders.<sup>52</sup> But, the Schengen *acquis* prohibits the introduction of a citizenship-based ban for either issuance

45. 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, May 17, 2007, 2007 O.J. (L 129) 27 [hereinafter Visa Facilitation Agreement].

46. *See id.* art. 7 (Requiring ten – thirty calendar days as opposed to fifteen – forty-five days).

47. *Id.* art. 5.

48. *Id.* art. 4.

49. *Id.* art. 6(1).

50. 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, 2016 O.J. (L 77) 1 [hereinafter Schengen Borders Code], arts. 2(2), 5, 6.

51. @kajakallas, TWITTER (Aug. 9, 2022, 3:21 AM EST), <https://twitter.com/kajakallas/status/1556903576726896642>.

52. Schengen Borders Code, *supra* note 50; *See generally*, Case C-368/20, NW v Landespolizeidirektion Steiermark, 2022 ECLI:EU:C:2022:298; Case C-369/20, NW v Bezirkshauptmannschaft Leibnitz, 2022 ECLI:EU:C:2022:298 (April 26, 2022).



of visa or entry in the Schengen zone, even in exceptional circumstances.

The Visa Code is unambiguous: the grounds for refusal of a Schengen visa are exhaustively listed in Article 32(1).<sup>53</sup> Among others, they include: lack of applicant intention to leave the territory of the member states before the expiration date of the visa; falsified travel documents; lack of justified purpose for the intended stay; no proof of sufficient means of subsistence; and active threat to public policy; internal security; public health or international relations.<sup>54</sup> The Court of Justice of the EU (CJEU) has been clear that “the competent authorities cannot refuse to issue a uniform visa unless one of the grounds for refusal [in the Visa Code] applies to the applicant.”<sup>55</sup>

Member states are required to examine each application for a Schengen visa individually and, in case of refusal, the reasons should be clearly stated in a notification to the applicant.<sup>56</sup> In the case of refusal, applicants have a right to appeal.<sup>57</sup> Together, these rules effectively bar a blanket ban or automatic refusal based on citizenship. While member states have wide discretion when assessing the visa application and the grounds of refusal,<sup>58</sup> all decisions must be made with respect to the applicant’s individual conduct and choice.<sup>59</sup>

The same rules apply to long-stay visas, which fall under EU immigration law directives.<sup>60</sup> The CJEU has been abundantly clear that visa decisions should be made on a case-by-case basis due to an assessment of all the elements of the applicant’s situation.<sup>61</sup> Member states should take into account the personal circumstances of the applicant, even when someone does not comply with the required conditions, such as passing integration tests (i.e., a language proficiency test and an examination in the knowledge of the host country) as in the case of the Family Reunification Directive.<sup>62</sup> The focus on individual assessments and the corollary need for justified decisions for visa denials in the Schengen and long-term visa procedures also implies that member states are always under an unconditional obligation to provide an appeal option for visa refusals.<sup>63</sup> Moreover, even when a member state intends to refuse a Schengen or a long-stay visa under an EU immigration directive for reasons linked to a threat to public policy, internal security, or public health, they must do so on an individual

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53. Visa Code, *supra* note 33, art. 32(1); *see also* Case C-84/12 *Rahmanian Koushaki v Bundesrepublik Deutschland*, ECLI:EU:C:2013:862, ¶ 38 et. seq. (Dec. 19, 2013).

54. Visa Code, *supra* note 33, art. 32(1).

55. Case C-84/12, *supra* note 53, at 55.

56. Visa Code, *supra* note 33, art. 32(2).

57. *Id.* art. 32(3).

58. Case C-84/12, *supra* note 53, at 60-63; Case C-544/15, *Sahar Fahimian v Bundesrepublik Deutschland*, ECLI:EU:C:2017:255, ¶ 50 (Apr. 4, 2017).

59. *See generally* Case C-380/18, *Staatssecretaris van Justitie en Veiligheid v E.P.* ECLI:EU:C:2019:1071 (Dec. 12, 2019).

60. *See, e.g.*, Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification, October 10, 2003 O.J. (L 251) 12 [hereinafter: Council Directive 2003/86], art. 17.

61. Case C-544/15, *supra* note 58, at 43.

62. Council Directive 2003/86, *supra* note 60; *see generally* Case C-153/14, *Minister van Buitenlandse Zaken v K & A* ECLI: EU:C:2015:453 (July 9, 2015).

63. Case C-949/19, *M.A. v Konsul Rzeczypospolitej Polskiej*, ECLI:EU:C:2021:186, ¶ 48 (Mar. 10, 2021).

basis.<sup>64</sup>

The principles and rules of management of the external Schengen Border are not different from the issuance of visas: member states can refuse the entry of a Schengen visa holder only if a person does not comply with conditions enshrined in the Schengen Borders Code,<sup>65</sup> which are materially similar to those in the Visa Code.<sup>66</sup> The grounds for refusal are listed exhaustively and should be considered individually.<sup>67</sup>

One of the permitted grounds for refusal of visa issuance and entry is a “threat to public policy.”<sup>68</sup> This ground for refusal is particularly relevant to the Schengen visa ban on Russian citizens, since the Baltic States and Poland invoked the ground to justify the ban.<sup>69</sup> The CJEU has interpreted “threat to public policy” as a ground for refusing visas to third-country nationals only through individual assessment.<sup>70</sup> States have a wider discretion to ascertain threats to public policy posed by non-EU nationals in the context of the Schengen visa regime than they have in the context of EU free movement law—which roughly concerns the free movement of EU nationals. In the former case, it suffices for a threat to public policy to cause merely a potential risk if it involves serious crimes.<sup>71</sup> Nevertheless, an examination of individual conduct is still required to assess the presence of such threats. Examples of individual conduct that have prompted visa refusals include the commission of a criminal offense<sup>72</sup> or studying cybersecurity in a university that cooperates with the Iranian Ministry of Defense.<sup>73</sup> Moreover, any visa refusal must be entered in the Visa Information System specifying the grounds for refusal and confirming the individual character of the refusal.<sup>74</sup> Finally, it is firmly settled in law that in addition to being based on individual conduct, a visa denial must be proportionate.<sup>75</sup> In other words, restrictions should not exceed what is necessary to safeguard public policy.

In contrast to the requirements discussed above, the blanket ban adopted by the Baltic States and Poland on grounds of public policy and national security

64. Case C-153/14, *supra* note 62.

65. Schengen Borders Code, *supra* note 50.

66. Case C-380/18, *supra* note 59, at 35-36 (finding that the Schengen Borders Code and the Visa Code are “closely connected”).

67. Schengen Borders Code, *supra* note 50, art. 4, 14.

68. *Id.* art. 6.

69. *Poland Joins Baltic Pledge to Ban Most Russians By Late September*, RADIO FREE EUR. RADIO LIBERTY (Sep. 8, 2022), <https://www.rferl.org/a/poand-baltics-ban-russians/32024490.html>.

70. 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-309/18 Lavorgna C-309/18, ECLI:EU:C:2019:350, ¶ 24 (May 2, 2019); C-414/16 Egenberger v Evangelisches Werk für Diakonie und Entwicklung ECLI:EU:C:2018:257, ¶ 68 (April 17, 2018).

71. *Id.*

72. C-380/18, *supra* note 59, ¶ 46.

73. C-544/15, *supra* note 58, ¶ 48.

74. Visa Code, *supra* note 33, art. 32(5); C-84/12, *supra* note 53, at 40-41. The Court has clarified that a visa refusal implies an individual assessment to have been carried out. C-380/18, *supra* note 59, ¶ 40.

75. See discussion in Part II.

presumes that all Russians constitute a threat.<sup>76</sup> This policy rejects individual examination and the possibility of invoking personal circumstances. It also inherently ignores the proportionality principle required to satisfy a public policy exception.<sup>77</sup> Indeed, beyond contributing to the criminal war effort by restricting the mobility of non-supporters, the visa ban is essentially an indictment of ordinary Russian citizens, which distracts from the culpability of the government. While public policy grounds could be sufficient to refuse Schengen visas to Putin’s officials, such refusal would still require thorough scrutiny based on individual circumstances and proportionality.<sup>78</sup> But the wholesale adoption of a visa policy targeting Russian nationals only because of their citizenship status is unquestionably a violation of EU law.<sup>79</sup>

Given the highly questionable legality of an outright nationality-based ban grounded in the public policy exception, the Finnish Government adopted a “softer” solution on September 22, 2022, through a ban targeting only Russian “tourists,” while listing ten “special groups” as not targeted.<sup>80</sup> Such a partial ban equally contravenes EU law and is not sufficient to honour the individual assessment and proportionality requirements. The “tourists” group is not defined and it is unclear whether people who do not fall within the non-targeted categories, such as, for instance, the siblings of EU citizens or permanent residents, fall within the “tourist” category. The partial ban was motivated by the “Russian mobilization and the rapidly increasing volume of tourists arriving in Finland and transiting via Finland.”<sup>81</sup> Notwithstanding the political motivations, dilution of the ban through the label “partial” does not mean that the ban is legal.

In the context of the Russo-Ukrainian War, some commentators have argued that the ground of “threat to international relations of Member States” could potentially justify a blanket citizenship-based travel ban.<sup>82</sup> Finland invoked precisely this ground to justify its partial ban, stating that “[t]here is a risk that citizens of the Russian Federation who use Finland as a transit country will have a negative impact on Schengen cooperation and Finland’s international relations, especially with those EU countries that share a land border with Russia.”<sup>83</sup> This reasoning fails to convince.

It is true that neither the Visa Code nor the Schengen Regulation define the phrase “international relations,” and there is no case law to date that explains or

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76. *Joint Statement of the Prime Ministers of Estonia, Latvia, Lithuania and Poland*, REPUBLIC EST. GOV’T (Sept. 8, 2022), <https://valitsus.ee/en/news/joint-statement-prime-ministers-estonia-latvia-lithuania-and-poland>.

77. The centrality of proportionality in national practice on public policy exceptions was clearly pointed out by the Court. C-380/18, *supra* note 59, ¶ 47.

78. Commission Communication C(2022) 6596 final, ¶¶ 10, 19, 27 and 33.

79. C-380/18, *supra* note 59, ¶ 47.

80. See Press Release, Ministry of Foreign Affairs of Finland, Finnish Government Issues a Resolution to Strongly Restrict Entry of Russian Tourists into Finland (Sept. 29, 2022), [https://um.fi/current-affairs/-/asset\\_publisher/gc654PySnjTX/content/suomi-rajoittaa-voimakkaasti-venalaisten-matkustamista-turismitarkoituksessa-suomeen-valtionuuvoston-periaatepaatoksella](https://um.fi/current-affairs/-/asset_publisher/gc654PySnjTX/content/suomi-rajoittaa-voimakkaasti-venalaisten-matkustamista-turismitarkoituksessa-suomeen-valtionuuvoston-periaatepaatoksella).

81. *Id.*

82. Jonas Bornemann, *Heated Tempers and Legal Ambiguities: Some (Second) Thoughts on an All-Out Schengen Ban of Russians*, VERFBLOG (Aug. 17, 2022), <https://verfassungsblog.de/heated-tempers-and-legal-ambiguities/>.

83. *Questions and Answers*, *supra* note 6.

defines this specific ground. However, following the centrality of individual assessments, proportionality, and need for an appeal procedure in the legislative framework and analogous case-law,<sup>84</sup> a blanket citizenship-based ban is prima facie unlawful. The *acquis* demands individual assessment and disallows disproportionate legal presumptions of what constitutes a threat, such as merely traveling on a Russian passport. Referring to the grounds of refusal, the CJEU in *Koushkaki v Bundesrepublik Deutschland*<sup>85</sup> established the necessary complexity of evaluating each individual situation:

[T]he assessment of the individual position of a visa applicant, with a view to determining whether there is a ground for refusal of his application, *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.*

57. 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.

58. 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*.<sup>86</sup>

Consequently, the “threat to international relations” ground for refusing a visa also unquestionably calls for in-depth evaluation of each applicant’s situation. States cannot use this ground to introduce a purely citizenship-based disqualification without conducting “a complex evaluation” of the “foreseeable conduct” of individual applicants, since they must still comply with the EU’s *acquis*.<sup>87</sup> We submit that the way Finland has used the ground of “threat to international relations” to deny Russian “tourists” entry to Finland and other Schengen countries subject to “individual overall considerations”<sup>88</sup> is spurious at best. When Finnair denies boarding to anyone with a Russian passport on their flights anywhere in Europe,<sup>89</sup> it effectively institutes a blanket citizenship-based ban, leaving no scope for individual assessment or an appeal. This is not much different from the unlawful ban in Poland and the Baltic States and the policies adopted by LOT—the Polish national carrier.<sup>90</sup>

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84. C-544/15, *supra* note 58, ¶ 41.

85. C-84/12, *supra* note 53.

86. *Id.* ¶¶ 56-58 (emphasis added).

87. *Id.*, ¶ 57.

88. *Questions and Answers*, *supra* note 6.

89. See *Finnair Refused Boarding of Russians in Dusseldorf*, SCHENGENVISA NEWS (Oct. 5, 2022), <https://www.schengenvisa.info.com/news/finnair-refused-boarding-of-russians-in-dusseldorf/>.

90. Testimonies emerged that LOT systematically refuses to serve Russian citizens. This included even a well-known Russian opposition journalist working for the BBC in possession of a residence visa of an EU Member State (D) on top of a Schengen visa (C), who was travelling to the Netherlands transiting via Warsaw airport. See Petr Kozlov (@petrkozlov), TWITTER (27 May 2023), <https://twitter.com/petrkozlov/status/1662423265992687616?ext=HHwWgIC2veHJpIuAAAA>. No

Even in the most generous scenario of individual consideration, which would allow an applicant to invoke individual circumstances, these restrictions imply a reversal of the burden of proof. Under Finland’s policy, Russian “tourists” are a presumed threat to the international relations of Finland *unless* they assert compelling personal circumstances. The assessment would be “à décharge.” In other words, a Russian tourist is an assumed threat to international relations unless they prove their innocence. In contrast, all the individual assessments brought before the CJEU in visa cases have been “à charge,”—applicants are presumed innocent, unless the Schengen State has proof of threat based on individual circumstances. While merely holding a particular citizenship is not enough, the Commission suggested that some *categories* of Russian applicants could be a potential threat to the international relations of any Member States.<sup>91</sup> However, it is most instructive that, as opposed to the Finnish State, the Commission still adopted an “à charge” examination: “[m]ember States should examine whether Russian visa applicants whose stated purpose of travel is tourism could be connected to or otherwise support the regime and therefore constitute an increased risk in terms of promoting propaganda for the war and/or lobbying for the interests of the Russian government.”<sup>92</sup> In short, the ban adopted by Finland based on the ground of “threat to international relations”—assuming that Finnish authorities take into account individual circumstances and foreseeable conducts—falls short of the minimal requirements of the law as it suggests, at best, a reversal of the burden of proof through an “à décharge” approach, which violates the Visa Code.

The policy could comport with the Visa Code if only some categories of Russians seeking visas were excluded, such as government officials, because “the ‘sweeping’ travel ban would turn out not to be sweeping at all.”<sup>93</sup> People would be excluded not because of their citizenship, but rather because of their functions or their proximity to power. This rationale operates differently from a blanket travel ban based on citizenship only in that the state would need to show that the applicants are likely to constitute a threat for international relations or for national security or public policy due to their functions.

Finally, in addition to marshaling legal arguments against the ban, even affording serious consideration of such a ban at the EU level—in contrast to the principled position against such bans adopted by the U.S. government—is deeply problematic. In August 2022, the Council and the Commission underlined that the suspension of the Visa Facilitation Agreement with Russia was but a “first step.”<sup>94</sup> It established that the suspension of the Agreement aims to both “significantly reduc[e] the number of new visas to be issued to Russian citizens

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individual assessment of any kind is possible if the national airline is on instructions to view Russian citizenship as sufficient to prevent someone in possession of a valid Schengen visa from travelling, resulting in a direct breach of EU law.

91. Commission Communication, *supra* note 78, at 28.

92. *Id.*

93. Bornemann, *supra* note 82.

94. Maria Udrescu, *EU Member States Seal Deal on Restricting Visas for Russians*, LE MONDE (Sept. 1, 2022), [https://www.lemonde.fr/en/international/article/2022/09/01/eu-member-states-seal-deal-on-restricting-visas-for-russians\\_5995520\\_4.html](https://www.lemonde.fr/en/international/article/2022/09/01/eu-member-states-seal-deal-on-restricting-visas-for-russians_5995520_4.html).

by EU Member States and prevent[] potential visa shopping by Russian citizens.”<sup>95</sup> Given that it was as clear as day that the EU member states outvoted in the Council would still try to push the ban which failed to harness EU-level support through recalcitrant national policies violating EU law, it is regrettable that the Council missed the opportunity to issue an explicit repudiation of the ban, thereby preserving the Schengen *acquis* from erosion. To make matters worse, the Commission does not fulfill its function as the guardian of EU law as the national-level bans breaking EU law have not given rise to any infringement actions.<sup>96</sup> In response to complaints, the Commission has clarified, wrongly, that it has no competence to pursue such violations, thereby taking the side of the perpetrator states.<sup>97</sup>

To conclude, the Schengen *acquis* as it stands allows ample room for *individual* travel bans, in particular via common foreign and security policy sanctions.<sup>98</sup> The Council has used this mechanism toward several people close to Putin. Annulment requests are currently pending before the General Court.<sup>99</sup>

### C. Citizenship-Based Visa and Entry Bans at the National Level in Practice

The obvious risk—that instead of an open nationality-based ban, some Member States could abuse their wide discretion and systematically refuse Schengen visas for Russian citizens on vague public policy, internal security, or international relations grounds—has materialized. Yet, any state that openly refuses visas based on nationality commits a violation of EU law<sup>100</sup> and raises

95. Commission Proposal for a Council Decision 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, COM (2022) 661 final (Sept. 6, 2022).

96. This behavior has characterized the performance of duties by the von der Leyen Commission across different fields. Kim Lane Scheppelle, *The Treaties Without a Guardian: The European Commission and the Rule of Law*, 29 COLUM. J. EUR. L. 93 (2023); R. Daniel Kelemen & Tommaso Pavone, *The Curious Case of the EU’s Disappearing Infringements*, POLITICO (Jan.13, 2022), <https://www.politico.eu/article/curious-case-eu-disappearing-infringements/>.

97. For example, a letter from Corinna Ulrich, Head of Unit at the European Commission, in reply to complaint HOME.B.1/AS CHAP(2022)00395 lodged by a citizen of Finland in response to the Finnish nationality-based entry ban. In response to a systematic violation of EU law by Finland, Miss Ulrich wrote that “[t]he investigation of inappropriate or disproportionate behaviour by border guards falls exclusively within the competence of the concerned Member State’s authorities, in this case Finland, and the competent national courts” (on file with the authors).

98. Clara Portela, *Are European Union Sanctions “Targeted”?*, 29 CAMBRIDGE REV. INT’L AFFS. 912 (2016); Francesco Giumelli et al., *The When, What, Where and Why of European Union Sanctions*, 30 EUR. SEC. I (2021).

99. At the time of writing, more than twenty cases were pending before the General Court. See the following pending cases: Case T-390/22, *Mndoians v Council*; Case T-364/22, *Shulgina v Council*; Case T-362/22, *Bazhaev v Council*; Case T-360/22, *Berezkin v Council*; Case T-335/22, *Khudaverdyan v Council*, T-326/22, *Konov v Council*). Recently, the General Court annulled the Council decision putting the name of the applicant on the sanctions list—which restricts the entry on the territory of the Member States and freezes her funds—because of an error of assessment by the Council. See Case T-212/22, *Prigozhina v Council* (March 23, 2023).

100. A case in point is Estonia unlawfully discriminating against Russian students. *Estonia Will No Longer Issue Visas or Residence Permits to Russian Students, Restricts Them for Russian and Belarusian Workers*, SCHENGENVISAINFO (July 28, 2022), <https://www.schengenvisa.info/news/estonia-will-no-longer-issue-visas-or-residence-permits-to->

important concerns in terms of fundamental rights. While such a violation could in theory be challenged, it would be immensely difficult to do so in practice. Moreover, challenging a visa refusal on an individual basis can take months or years, making the visa application process seem hopeless in certain cases. Such an unfair delay of the visa process may deter otherwise qualified applicants from seeking a visa.

Following the predictable lack of support for the nationality-based visa and entry bans at the supranational level that risked to breach the law, several Member States have put in place other practices which amount to an unlawful citizenship-based visa and entry ban in breach of EU law. Exceeding the “mere” visa-ban, Estonia, Latvia, Lithuania, and Poland have agreed to close their borders to Russian holders of Schengen visas issued by other Member States, citing “public security issues” as their justification.<sup>101</sup> Similarly, following the announcement of the partial mobilization of citizens by the Russian government, Finland decided to strongly restrict the entry of Russian citizens, including holders of valid Schengen visas issued by other Member States, invoking the ground of threat to international relations.<sup>102</sup>

The national-level, citizenship-based entry-ban practice raises serious legal issues in light of the Schengen System. Refusing the holder of a Schengen Visa to cross borders might imply that the border guard will cancel or revoke the Schengen Visa issued by another country.<sup>103</sup> For example, a Russian citizen who has a visa issued by France risks having her visa revoked or canceled based on her Russian citizenship if she tries to enter the Schengen zone via one of the three Baltic States or Poland. This practice clearly undermines EU law and greatly endangers the Schengen system’s foundational emphasis on harmonization. As the CJEU explained in *Koushkaki*:

[This system] presupposes that the conditions for the issue of uniform visas are harmonized, which rules out there being differences between the Member States as regards the determination of the grounds for refusal of such visas.

46. In the absence of such harmonization, the competent authorities of a Member State whose legislation provides for grounds for refusal, 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.<sup>104</sup>

The three Baltic States and Poland thus threaten to dismantle the system of cooperation and harmonization, which is at the heart of EU law.

There is a practical dimension to querying the *de facto* ban at a national level. Mass breaches of EU migration law committed in times of a military

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russian-students-restricts-them-for-russian-belarussian-workers/.

101. Alexandra Brzozowski, *Baltics Agree Regional Measures to Restrict Entry of Russians*, EURACTIV (Sept. 7, 2022), <https://www.euractiv.com/section/global-europe/news/baltics-agree-regional-measures-to-restrict-entry-of-russians/>.

102. See Press Release, *supra* note 80.

103. See Schengen Borders Code, *supra* note 50, at Part A of Annex V.

104. C-84/12, *supra* note 53, ¶¶ 45-46.

conflict at the EU's gates may go unpunished for years.<sup>105</sup> Such violations implicate private actors, in addition to requiring the border police to act unlawfully. For instance, air carriers have been actively involved in the implementation of the unlawful ban when they refuse Russian citizens—including holders of long-term residence permits in EU Member States<sup>106</sup>—to board flights to Finland, the Baltic states, and Poland.<sup>107</sup> This is true even for flights originating at airports *within* the Schengen zone, without crossing the Schengen border.<sup>108</sup> As a result, there are flagrant violations not only of key rights guaranteed to long-term residents by EU law, but also consumer rights and Schengen rules.<sup>109</sup> The integrity and proper functioning of the Schengen Area is thereby significantly undermined, if not put into question.

In sum, nationality-based visa and entry bans in EU law are unlawful. This would be true for any nationality and not restricted to the current crisis in Ukraine. In practice, 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 unlawful and must be struck down immediately by any local court. In this vein, a Latvian court has granted asylum to a Russian citizen crossing without any visa despite the entry ban.<sup>110</sup> Moreover, Member States must retain a meaningful appeal route to ensure compliance with the rule of law.<sup>111</sup> In the next Parts, we address two ways that we anticipate the citizenship-based entry ban will be defended: characterizing the Russian invasion as a “wholly exceptional circumstance” under Article 347 TFEU and amending the Schengen *acquis*.

## II. “WHOLLY EXCEPTIONAL CIRCUMSTANCES” OF ARTICLE 347 TFEU

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105. Petra Bárd & Dimitry V. Kochenov, *Law as a Pretext to Wave the Rule of Law Goodbye? The Case for an EU Constitutional Awakening*, 27 EUR. L. J. 31 (2021).

106. See, e.g., *Finnair Refused Boarding*, *supra* note 89.

107. *Id.*

108. *Id.*

109. The Schengen Convention provides that the carrier shall be obliged to take all the necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territories of the Contracting Party. Schengen Agreement and Convention art. 26, June 19, 1990; see also Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, 2001 O.J. (L 187). However, these provisions are not supposed to be triggered in the case of Russian citizens in possession of a valid Schengen visa since they are in possession of valid documents. Some of the Russian citizens in possession of a valid Schengen visa were even prevented from boarding while traveling *within* the Schengen zone which makes the practices of air carriers towards them at odds with the Schengen Regulations. Russian citizens who are victims of such unlawful practices by air carriers could claim compensation from the air carrier, among others. See Regulation (EC) No 261/2004 of the European Parliament and of the Council of 11 February 2004 establishing common rules on compensation and assistance to passengers in the event of denied boarding and of cancellation or long delay of flights, and repealing Regulation No 295/91, 2004 O.J. (L 46) 1.

110. Maria Kugel, *Disillusioned Army Reservist and Ex-Cop Who Fled Russia Gets Latvian Reprieve, Says He “Doesn’t Want to Kill and Die,”* RADIO FREE EUR. RADIO LIBERTY (Jan. 8, 2023 8:52 PM GMT), <https://www.rferl.org/a/russia-fleeing-war-latvia-asylum/32214509.html>; Ilya Barabanov, “*Jesli by menia posadili na bojevoj vertolët mne by prishlos’ ubivat’*”: Pilot VKS sbezhäl iz Rossii i pogovoril s BBC, BBC RUSS. SERV. (June 8, 2023), <https://www.bbc.com/russian/features-65812907>.

111. Case C-403/16, Soufiane El Hassani v Minister Spraw Zagranicznych, ECLI:EU:C:2017:960, ¶ 42 (Dec. 13, 2017).



## CANNOT JUSTIFY CITIZENSHIP-BASED ENTRY BANS

We have argued above that nationality-based entry bans are unlawful under the Schengen *acquis*. We now turn to the question of derogation from the *acquis*. Member States may claim that a ban is justified by invoking some far-reaching and exceptional clause in the EU treaties that would allow for a de facto suspension of the central tenets of the law in force. Given that the ban is unlawful, it could be justified only if there is a suspension of law. Article 347 TFEU could potentially be the basis for such a suspension.

Article 347 TFEU provides an “exceptional clause” that could affect the binding nature of European Union law and its uniform application.<sup>112</sup> The TFEU enshrines several public and internal security exceptions concerning the free movement of goods (Art. 36), workers (Art. 45(2)), and services (Art. 62), as well the right of establishment (Art. 52) and the areas of freedom, security, and justice (Art. 72).<sup>113</sup> The exceptional clause of Article 347 TFEU remains one of the more obscure provisions of the Treaty, which has only received an in-depth analysis by a renowned scholar and has not been interpreted or applied by CJEU beyond one Advocate General’s Opinion in almost half a century.<sup>114</sup> As Professor Panos Koutrakos observes, “the wording of Article 297 EC [Article 347 TFEU] seems to suggest that its scope is unlimited.”<sup>115</sup> Thus, in contrast with other exceptions under specific instruments that permit derogations from particular aspects of EU law, Article 347 appears to permit derogations from EU law in general.<sup>116</sup> The provision does not, however, provide a *carte blanche* to derogate; rather, “the right of the Member States to invoke this ‘wholly exceptional clause’ must be exercised in accordance with both substantive and procedural requirements.”<sup>117</sup> Building on such analysis, we demonstrate that Article 347 TFEU does not offer a sound legal ground to justify citizenship-based entry bans.

The text of Article 347 is truly far-reaching and should thus be analyzed in-depth in the context of the ongoing visa and entry bans controversy. The Article provides that:

Member States shall consult each other with a view to taking together the steps needed to prevent the functioning of the internal market being affected by measures which a Member State may be called upon to take in the event of serious internal disturbances affecting the maintenance of law and order, in the event of war, serious international tension constituting a threat of war, or in order to carry out obligations

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112. Treaty on the Functioning of the European Union art. 347, Oct. 26, 2012 [hereinafter TFEU].

113. See *Joined Cases C-715/17, C-718/17, and C-719/17, Commission v Poland (and others)*, ECLI:EU:C:2020:257, ¶ 143 (Apr. 2, 2020); see also *Case C-461/05, Commission v. Denmark*, ECLI:EU:C:2009:783, ¶ 51 (Dec. 15, 2009); *Case C-38/06, Commission v Portugal*, ECLI:EU:C:2010:108, ¶ 62 (Mar. 4, 2010).

114. *Case C-120/90, Commission v Greece*, ECLI:EU:C:1995:109, ¶ 9 (Apr. 6, 1995) (Opinion of Advocate General Jacobs).

115. Panos Koutrakos, *Is Article 297 EC a “Reserve of Sovereignty”?*, 37 COMMON MKT. L. REV. 1339, 1340 (2000).

116. *Id.* at 1340.

117. *Id.* at 1361.

it has accepted for the purpose of maintaining peace and international security.<sup>118</sup>

This provision was invoked by Member States primarily in the 1960s and 1970s as a legal basis for sanctions related to trade measures on third countries to achieve foreign policy objectives.<sup>119</sup> The Article was used to “exercise pressure on a third State to end a violation of international law or maintain peace and security,”<sup>120</sup> since there was no trade sanctions vehicle at the supranational level at that time. A provision for trade sanctions was later introduced with Article 228a of the Treaty establishing the European Economic Community, inserted by the Treaty of Maastricht in 1992. The current version of this article is Article 215 TFEU, which has been triggered against Russia in the past months.<sup>121</sup>

Unsurprisingly, no case law exists to define the scope of Article 347 TFEU, especially in the context of non-economic sanctions targeting mobility rights of all the citizens of a particular country. The scope of the article has been tested in two cases so far: when Italy and Ireland refused to apply the European Economic Community embargo against Argentina in the early 1980s, and when, in 1994, Greece prohibited the trade of products from and for the Republic of Macedonia (Former Yugoslav Republic of Macedonia (FYROM)).<sup>122</sup> In the latter case, the Commission started infringement proceedings against Greece, but withdrew it once Greece lifted the embargo.<sup>123</sup> As the Commission withdrew the case, there was no judgment, and all we have by way of analysis is the opinion of Advocate General Francis Jacobs, which was issued before the case was closed. Sir Francis found that Greece made proper use of its powers on grounds of proportionality, especially because the embargo was not likely to have a perceptible impact on the competitive situation in the European Community.<sup>124</sup> To our knowledge, states have never invoked Article 347 TFEU to justify measures that restrict the free movement of persons, as opposed to goods.

The three grounds enshrined in Article 347 TFEU are extreme and go beyond the public or internal security grounds. The Article requires “a *wholly* exceptional situation,” in the words of the CJEU itself,<sup>125</sup> with a “limited” character that does not lend itself to “a wide interpretation.”<sup>126</sup> This exceptional character is evidenced by the “special procedure” of infringement provided in Article 348(2) TFEU, where the Commission and Member States are empowered

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118. TFEU, *supra* note 112, art. 347.

119. This was done via its earlier Article 224 EEC and Article 297 EC emanations.

120. Koutrakos, *supra* note 115, at 1343.

121. See *EU Sanctions Against Russia Explained*, COUNCIL EUR. UNION, <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/#sanctions>.

122. Koutrakos, *supra* note 115, at 1347.

123. For a discussion, see generally Jean-Pierre Puissechot, *The Court of Justice and International Action by the European Community: The Example of the Embargo against the Former Yugoslavia*, 20 *FORDHAM INT'L L.J.* 1557 (1996).

124. Case C-120/90, *supra* note 114, ¶ 72 (opinion of Advocate General Jacobs).

125. Case C-222/84, *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary*, ECLI:EU:C:1986:206, ¶ 27 (May 15 1986); see also Case C-273/97, *Angela Maria Sirdar v. The Army Board and Secretary of State for Defence*, ECLI:EU:C:1999:523, ¶ 19 (Oct. 26, 1999).

126. *Id.* ¶ 26.

to bring a matter directly to the CJEU if it considers that another Member State is making improper use of the powers provided for in Article 347.<sup>127</sup> This bypasses the procedures set out in Articles 258 and 259 on “traditional infringement actions.”<sup>128</sup>

Drawing on the centrality of proportionality in Advocate General Jacobs’ opinion, and the procedure in Article 348 to challenge decisions taken by Member States under Article 347, it becomes evident that viewing Article 347 as a catch-all clause is misleading. Article 347 does not provide “a reserve of sovereignty” for Member States to take any measure they feel appropriate, bypassing procedures under the EU treaties and oversight by the Court.<sup>129</sup> On the contrary, this clause calls for an even more restrictive interpretation than other provisions on public or internal security precisely because of its wholly exceptional character. The clause encompasses two important limits: one procedural and one normative.

Procedurally, Article 347 TFEU is accompanied by special requirements whereby any Member State intent on triggering this provision is under an obligation to consult other Member States with “frank exchange of information, but also a genuine will to protect the common market,”<sup>130</sup> and this exchange would take place before any Member State takes national measures by triggering Article 347. This explains why the question of application of Article 347 TFEU is moot in the case of the citizenship-based ban imposed by the Baltic States, Poland, and Finland: at no point have they triggered—or even invoked—this provision and consulted the other Member States. Triggering this provision unilaterally or even as a subgroup of Member States would be a violation of EU law.

Even if Article 347 TFEU is deemed applicable, it must be interpreted strictly, as recently recalled by the CJEU.<sup>131</sup> In the words of Advocate General Jacobs, the serious internal disturbances affecting the maintenance of law and order—the most relevant ground for the citizenship ban—should “be read as envisaging a breakdown of public order on a scale much vaster than the type of civil unrest which might justify recourse to Article 36.”<sup>132</sup> Only “a situation

127. TFEU, *supra* note 112, art. 348.

128. *Id.* arts. 258, 259.

129. Koutrakos, *supra* note 115, at 1342.

130. *Id.* at 1356; *see also* Manuel Kellerbauer, *Article 347 TFEU*, in *THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS 2054, 2054-55* (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin eds., 2019).

131. *Joined Cases*, *supra* note 113, ¶ 144 (“In addition, the derogation provided for in Article 72 TFEU must, as is provided in settled case-law, *inter alia* in respect of the derogations provided for in Articles 346 and 347 TFEU, be interpreted strictly.”); *see also* Case C-461/05, *Commission v. Denmark*, ECLI:EU:C:2009:783, ¶ 52 (Dec. 15, 2009); Case C-38/06, *Commission v Portugal*, ECLI:EU:C:2010:108, ¶ 63 (Mar. 4, 2010).

132. Case C-120/90, *supra* note 114, ¶ 47 (Apr. 6, 1995) (opinion of Advocate General Jacobs). Article 36 states: “[t]he provisions of Articles 34 and 35 [which prohibit quantitative restrictions on imports and exports] shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.” TFEU, *supra* note 112, art. 36.

verging on a total collapse of internal security” should be read to meet the requirement, “otherwise it would be difficult to justify recourse to a sweeping derogation which is capable of authorizing the suspension of all of the ordinary rules governing the common market.”<sup>133</sup> The national security situation of the Baltic states, Finland, and Poland is arguably different from that of other Member States due to the common border they share with Russia. Although the EU and these states are not at war, there are international tensions that might be seen as a threat of war. But even then, it is inconceivable to suggest that the internal security of these states could be on the verge of a total collapse. A few thousand Russian citizens trying to enter or transit via the country—to avoid conscription, visit their uncles and sisters, study, or travel—can hardly lead to state collapse.

It may be argued that the Court has limited control over the extreme and unpredictable nature of the specific conditions that trigger Article 347 TFEU. This would lend support to the claim that Member States’ subjective assessment of appropriateness in triggering the provision should be respected, and the Court should exercise restraint in interfering. However, as Koutrakos notes:

in a significant number of cases with foreign policy and security dimensions, the Court did not absolve itself from its duty to exercise its jurisdiction in order to make sure that the ‘law is observed.’ In doing so, it sought to ensure the effectiveness of Community law without impinging upon the right of the Member States to protect their security.<sup>134</sup>

In this vein, any measure adopted under Article 347 TFEU should not only aim at genuinely protecting public order, but also comply with the principle of proportionality.<sup>135</sup> As previously noted, the Baltic States, Poland, and Finland have the possibility to refuse visa and entry on the ground of public security and international relations, by taking into account all the individual circumstances of the specific applications being assessed. This is what the CJEU noted when, Hungary, Poland, and the Czech Republic invoked Article 72 TFEU as an “internal security” excuse for not complying with a decision related to relocation of asylum seekers.<sup>136</sup> The Court observed that Member States can invoke the national security or public order grounds in denying an application for international protection, only if there is specific evidence for doing so. There needs to be consistent, objective, and specific evidence that provides grounds for suspecting that the applicant in question actually or potentially represents such a danger. Further, those authorities furnishing such evidence need to carry out an assessment of the facts in the light of an overall examination of all the circumstances of the individual case concerned.<sup>137</sup> Consequently, the argument brought under Article 72 TFEU to avoid allowing relocation was unsuccessful.<sup>138</sup>

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133. Case C-120/90, *supra* note 114, ¶ 47 (Apr. 6, 1995) (opinion of Advocate General Jacobs).

134. Koutrakos, *supra* note 115, at 1355.

135. Case C-120/90, *supra* note 114, ¶¶ 62, 65 (opinion of Advocate General Jacobs).

136. Article 72 states: “This Title shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security.” TFEU, *supra* note 112, art. 72.

137. Joined Cases, *supra* note 113, ¶¶ 158, 159.

138. Advocate General Sharpston’s opinion on the interpretation of Article 72 is on point: “EU

As opposed to an embargo on goods, a visa and entry ban is likely to have important EU law and human rights implications that will impact not only Russian citizens but also EU citizens. Under the visa and entry ban, the non-recognition of valid visas issued by other Member States paralyzes mutual trust within the EU, and the current policy disrupts the whole Schengen system. This disruption has far-reaching implications. The proportionality of the citizenship-based entry bans toward Russian citizens would be very difficult, if not impossible, to substantiate under Article 347 TFEU or any other public or internal security exception.

### III. NO CITIZENSHIP-BASED ENTRY BAN IS POSSIBLE THROUGH THE AMENDMENT OF THE SCHENGEN *ACQUIS*

Given the restrictions on Member States to impose unilateral blanket citizenship-based visa and entry bans, Estonia has sought to lobby the EU for the inclusion of a visa ban within the supranational sanctions framework, implying the amendment of the Schengen *acquis*. Finland, and the Czech Republic—which held the EU presidency during the period described—have also joined this call. The sanctions route would amount to removing the individual approach of EU migration policy, replacing it with a citizenship-based approach (even if *de facto*, rather than *de jure*). We show in this part that such a replacement would be an affront to EU law and the human rights logic underpinning EU law today.<sup>139</sup>

The EU is authorized to adopt measures concerning the common policy on visas and short-stay residence permits, in accordance with the ordinary legislative procedure.<sup>140</sup> The Schengen *acquis* is fully part of EU law and can be modified on that basis. In fact, the Convention implementing the Schengen Agreement<sup>141</sup> has been modified several times already and additional regulations developing the Schengen *acquis* have been adopted and regularly amended, among them the Visa Code.<sup>142</sup>

Political will and the possibility to amend aside, the adoption of a blanket citizenship-based ban would contradict the legal foundations of the Schengen visa system: individualized treatment of visa applications and subjecting each

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law itself provides the Member State with abundant means of protecting its legitimate national security or public order concerns *in relation to a particular applicant* within the framework of its EU law obligations. EU law does not, however, permit a Member State peremptorily to disregard those obligations and, as it were, to put up a sign reading ‘*chasse gardée*’ (roughly translatable as, ‘private hunting—keep out’).” Cases C-715/17 Commission v Poland, C-718/17 Commission v Hungary, and C-719/17 Commission v Czech Republic, ECLI:EU:C:2019:917, ¶ 223 (Oct. 31, 2019) (opinion of Advocate General Sharpston).

139. Kochenov & Ganty, *supra* note 30, at 34–50; Barbara Grabowska-Moroz & Dimitry Kochenov, *The Loss of Face for All Those Concerned: EU Rule of Law in the Context of the “Migration Crisis”*, in *MIGRANTS’ RIGHTS, POPULISM AND LEGAL RESILIENCE IN EUROPE* 187 (Vladislava Stoyanova & Stijn Smet eds., 2022).

140. TFEU, *supra* note 112, art. 77(2)(a).

141. Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common Borders, June 19, 1990 [hereinafter Schengen Implementation Agreement].

142. See Visa Code, *supra* note 33.

individual assessment and decision to strict and clear legal requirements.<sup>143</sup> The Schengen Convention,<sup>144</sup> the Common Visa Code,<sup>145</sup> the Handbook for the processing of visa applications and the modification of issued visas,<sup>146</sup> and the Handbook for the administrative management of visa processing<sup>147</sup> all provide for a strictly individual basis of assessment. Even a previous visa refusal cannot lead to an automatic refusal of a new application.<sup>148</sup> As mentioned earlier, the settled case law of the CJEU reinforces that decisions should be individual and that an effective remedy should be provided to the applicant.<sup>149</sup> Although the principle of good administration as enshrined in the EU Charter of Fundamental Rights (CFR)<sup>150</sup> 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 case law of the CJEU recognizes that Member States are bound by the principle of good administration.<sup>151</sup> In any case, it would be difficult for Member States to ignore this principle. As Advocate General Kokott writes: “the Member States must also have regard to Article 41 CFR when applying Community law.”<sup>152</sup>

The fact that the Schengen visa system is organized on an individual basis and that any applicant may invoke personal circumstances is crucial to the system. This feature allows authorities to take into account an applicant's holistic personal story and maintain respect for human rights when contemplating entry or visa refusal. In essence, an eye toward fundamental rights in the visa process guarantees focus on the individual rather than on groups or categories of people. The question of fundamental rights is therefore essential in this case, as recalled in Article 4 of the Schengen Border Code on “Fundamental Rights.” A focus on fundamental rights would prevent a blanket citizenship ban, present or future, even under EU law—let alone international law. Indeed, adopting restrictions on entry exclusively based on citizenship amounts to excluding the holders of particular passports from a range of crucial rights, including the right to seek asylum. This practice is far from proper in a legal system that cherishes human rights.

Citizenship itself constitutes the main factor of inequalities around the

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143. *See id.*, art. 21(1).

144. Schengen Implementation Agreement, *supra* note 141.

145. Visa Code, *supra* note 33.

146. 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, Jan. 28, 2020 [hereinafter Visa Code Handbook I].

147. Annex to the Commission Implementing Decision Establishing the Handbook for the Administrative Management of Visa Processing and Local Schengen Cooperation, Mar. 25, 2020 [hereinafter Visa Code Handbook II].

148. Visa Code *supra* note 33, art. 21(9).

149. Cases C-225/19 and C-226/19, R.N.N.S. and K.A. v Minter van Buitenlandse Zaken, 2020 ECLI: EU:C:2020:951 (Nov. 24, 2020).

150. European Union Charter of Fundamental Rights art. 41, Dec. 1, 2009 [hereinafter CFR].

151. *See, e.g.*, Case C-428/05 Laub v Hauptzollamt Hamburg-Jonas, 2007 E.C.R. I-5069, ¶ 25. For more information, see the analysis and cited caselaw in Herwig C.H. Hofmann & 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*, 9 EUR. CONST. L. REV 73 (2013).

152. Case C-392/08, Commission v Spain, 2010 E.C.R. I-2537.

globe.<sup>153</sup> A blood-based totalitarian status<sup>154</sup> ascribed at birth in a lottery-like fashion,<sup>155</sup> which usually cannot be refused, no matter how much harm and embarrassment it causes the bearer,<sup>156</sup> is not a matter of choice and is a natural antithesis of the individualist approach to rights required by the human-rights rationale underpinning EU law.<sup>157</sup> Visa and entry bans against Russian citizens imposed by Member States, or consideration of such bans by EU institutions is a populist repackaging of a Putinist narrative,<sup>158</sup> assisting the assault on human rights, and thus antithetical to the objectives of European integration, as Parts IV and V set out to demonstrate.

#### IV. UNACCEPTABLE CARTE BLANCHE TO VIOLATE FUNDAMENTAL RIGHTS

In her tweet, Kaja Kallas, the Prime Minister of Estonia, wrote: “[s]top issuing tourist visas to Russians. Visiting Europe is a privilege, not a human right.”<sup>159</sup> Even if she is correct that there is no fundamental right to *receive* a Schengen visa, it does not mean that fundamental rights are inapplicable to the more than a hundred million people she happens to be tweeting against when their visa applications are *assessed*. An automatic refusal of any application submitted by Russian citizens would contradict several human rights guarantees. Russian citizens who apply for Schengen visas are not only tourists, who have been vehemently criticized by the Finnish and Estonian Prime Ministers and other EU leaders, but also people who leave Russia for humanitarian reasons, family, work, medical appointments, studies, and many other circumstances.<sup>160</sup> Refusing to examine these applications on an individual basis violates an array of fundamental rights, including the right to private and family life, and the prohibition of torture and inhuman treatment, and the prohibition of discrimination on grounds of nationality and ethnic origin, among others.<sup>161</sup> It

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153. BRANKO MILANOVIC, *GLOBAL INEQUALITY: A NEW APPROACH FOR THE AGE OF GLOBALIZATION* 118–53 (2018). Differences in the amount of rights different citizenships bring are irreconcilable, locking the unfortunate—the majority of the world’s population—in the spaces of no opportunity. See Dimitry Kochenov & Justin Lindeboom, *Empirical Assessment of the Quality of Nationalities*, 4 EUR. J. COMPAR. L. & GOVERNANCE 314 (2017).

154. See DIMITRY KOCHENOV, *CITIZENSHIP* 38–59 (2019).

155. See AYELET SHACHAR, *THE BIRTHRIGHT LOTTERY: CITIZENSHIP AND GLOBAL INEQUALITY* 1–17 (2009).

156. Katja Swider, *A Rights-Based Approach to Statelessness* (2018) (Ph.D. dissertation, University of Amsterdam).

157. Dimitry Kochenov, *Abstract Citizenship in the Age of Concrete Human Rights*, in *RESEARCH HANDBOOK OF THE POLITICS OF CONSTITUTIONALISM* (Mark Tushnet & Dimitry Kochenov eds., forthcoming 2023).

158. Mikhail Khodorkovski, *A Visa Ban Would Fall into Moscow’s Trap*, *POLITICO* (Sept. 6, 2022), <https://www.politico.eu/article/visa-ban-fall-moscow-trap/>.

159. Kaja Kallas (@kajakallas), *TWITTER* (Aug. 9, 2022, 3:21 AM), [https://twitter.com/kajakallas/status/1556903576726896642?ref\\_src=twsrc%5Etfw](https://twitter.com/kajakallas/status/1556903576726896642?ref_src=twsrc%5Etfw).

160. Aleksandra Jolkina, *The Visa Ban, Nikolai and His Russian Sister: Why Schengen Visa Restrictions for Russian Citizens Risk Tearing Families Apart*, *VERFBLOG* (Sept. 29, 2022), <https://verfassungsblog.de/the-visa-ban-nikolai-and-his-russian-sister/>.

161. Humanitarian visas would be deprived of any sense if a particular nationality ends up excluded. Moreover, although not a competence of the EU, the applications for humanitarian visas are to proceed on the basis of the Visa Code according to CJEU’s decision in case C-638/16 PPU, X and X v. Etat Belge ECLI:EU:C:2017:173 (Mar. 7, 2017).

also violates the EU free movement law, when family members of EU citizens are involved.<sup>162</sup> The ban also sidelines Russian citizens who live in a third country or a non-Schengen EU Member State and apply for Schengen visas—many of whom have never resided in the Russian Federation.<sup>163</sup> It would be difficult, if not impossible, to substantiate such infringements under the principle of proportionality whether under the current Schengen *acquis* or in the event it was amended. In what follows we zoom in on the deserters and Russians fleeing mobilization; the situation of the Russian family members of EU citizens and permanent residents; and arguments based on nationality and ethnic discrimination.

#### A. Citizens Fleeing Mobilization

On September 21, 2022, Vladimir Putin announced a “partial-mobilization” of Russian citizens to fight in Ukraine.<sup>164</sup> Within one week of the announcement, 200,000 Russians fled the country, creating miles of backlogged cars and people at the Mongolian, Kazakhstani, Georgian, Finnish, and other borders.<sup>165</sup> The situation prompted the Lithuanian Foreign Minister to declare that Lithuania will not grant asylum to Russians simply because they are being mobilized for the war.<sup>166</sup> Estonia, Latvia, and Poland followed by turning away Russian deserters—including those with a Schengen visa—making it impossible for many Russian citizens to apply for asylum protection in the EU.

This situation constitutes a violation of fundamental rights protected by EU law, including the prohibition of inhuman and degrading treatment,<sup>167</sup> the right to asylum,<sup>168</sup> and the right to non-refoulement. As Maarten den Heijer argues, the “claims of Russian draft evaders to asylum are rather potent” and EU

162. See CHIARA BERNERI, FAMILY REUNIFICATION IN THE EU: THE MOVEMENT AND RESIDENCE RIGHTS OF THIRD COUNTRY NATIONAL FAMILY MEMBERS OF EU CITIZENS (2017).

163. Between 700,000 and 1,200,000 people left Russia in the year following the war as millions more did so earlier. See Karen Gilchrist, *A Second Wave of Russians Is Fleeing Putin’s Regime*, CNBC (July 14, 2022) <https://www.cnbc.com/2022/07/14/russians-flee-putins-regime-after-ukraine-war-in-second-wave-of-migration.html>; Olga R. Gulina, *Emigration from Russia after 24 February 2022: Main Patterns and Developments*, Prague Process Policy Brief (June 2023), <https://www.pragueprocess.eu/en/resources/repository/34-briefs/377-emigration-from-russia-after-24-february-2022-main-patterns-and-developments>.

164. Pjotr Sauer, *Putin Announces Partial Mobilization and Threatens Nuclear Retaliation in Escalation of Ukraine War*, THE GUARDIAN (Sept. 21, 2022), <https://www.theguardian.com/world/2022/sep/21/putin-announces-partial-mobilisation-in-russia-in-escalation-of-ukraine-war>.

165. Matthew Mpoke Bigg, *At Least 200,000 Russians Have Left the Country Since Putin’s Draft Began*, N.Y. TIMES (Sept. 28, 2022), <https://www.nytimes.com/2022/09/29/world/europe/russia-draft-putin.html>.

166. *Lithuania Will Not Give Asylum to Russians Mobilized for War, Says FM*, LITH. RADIO & TELEVISION (Sept. 26, 2022), <https://www.lrt.lt/en/news-in-english/19/1786892/lithuania-will-not-give-asylum-to-russians-mobilised-for-war-says-fm>. But see the story of a Russian military pilot who managed to lodge an asylum claim in Lithuania, because he was not willing to take part in the criminal war. Ilya Barabanov, “*Jesli by menia posadili na bojevoj vertolët mne by prishlos’ ubivat’*”: Pilot VKS sbezhal iz Rossii i pogovoril s BBC, BBC RUSS. SERV. (June 8, 2023), <https://www.bbc.com/russian/features-65812907>.

167. CFR, *supra* note 150, art. 4.

168. *Id.* art. 18.



countries should open their borders to them.<sup>169</sup> International law and, more specifically, the UN 1951 Refugee Convention and its 1967 protocol support this position.<sup>170</sup>

Anyone, including Russian citizens, who has a well-founded fear of persecution on grounds of race, religion, political opinion, nationality, or particular social group, provided that they have not committed war crimes, are refugees under international law.<sup>171</sup> In contrast to the claims of Baltic States authorities, a person's position for or against a war is irrelevant to their status.<sup>172</sup> Like any other individual, Russian deserters or draft evaders who may be prosecuted or punished for refusal to perform military service receive refugee protection when such military service would include crimes under *jus ad bellum* or *jus in bello*.<sup>173</sup> According to the CJEU, benefiting from such a protection does not require a person to state their refusal through a particular procedure when there is no possibility for the person to refuse to perform military service.<sup>174</sup> In fact, fleeing a country can itself be considered an act of refusal.<sup>175</sup> Russian citizens who fled the mobilization are thus likely to qualify as refugees since the war violates international law.<sup>176</sup>

International law places importance on the fact that deserters and draft evaders are given alternatives to military service in national systems when determining whether refusal to perform military service gives rise to asylum claims.<sup>177</sup> Russia does not provide any such alternatives.<sup>178</sup> Instead, refusing to serve in the Russian army carries a penalty of up to fifteen years of imprisonment,<sup>179</sup> and the number of criminal prosecutions has risen steeply.<sup>180</sup> Thus, Russian citizens who present themselves at a border crossing and claim that they are fleeing military conscription must be given the opportunity to lodge an asylum claim and cannot be returned to a country where they face a credible risk of torture or cruel, inhuman, or degrading treatment or punishment and other

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169. Maarten den Heijer, *Why EU Countries Should Open Their Borders to Russian Draft-Evaders*, VERFBLOG (Sept. 26, 2022), <https://verfassungsblog.de/why-eu-countries-should-open-their-borders-to-russian-draft-evaders/>.

170. Tom Dannenbaum, *The Legal Obligation to Recognize Russian Deserters as Refugees*, VERFBLOG, (Mar. 2, 2022), <https://verfassungsblog.de/the-legal-obligation-to-recognize-russian-deserters-as-refugees/>.

171. *Id.*

172. Den Heijer, *supra* note 169.

173. Council 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), art. 9(2)(e), 2011 O.J. (L 337); *see also* Case C-472/13, *Shepherd v Bundesrepublik Deutschland* ECLI:EU:C:2015:117 (Feb. 26, 2015).

174. Case C-238/19, *EZ v Bundesrepublik Deutschland*, ECLI:EU:C:2020:945 (Nov. 19, 2020).

175. *Id.* ¶ 32.

176. Dannenbaum, *supra* note 170.

177. *Over 1,000 Russian Protesters Arrested After Putin Mobilizes More Troops*, N.Y. TIMES (Sept. 27, 2022), <https://www.nytimes.com/live/2022/09/21/world/russia-ukraine-war-putin>.

178. *Id.*

179. *Id.*

180. Matvej Biriukov, *Chislo ugovolnykh del za ukloenije ot armii vyroslo do maksimuma za pocti 10 let*, FORBES (Oct. 2, 2022), <https://www.forbes.ru/society/478671-cislo-ugolovnyh-del-za-ukloenije-ot-armii-vyroslo-do-maksimuma-za-pocti-10-let>.

irreparable harm.<sup>181</sup> In other words, refusing entry to Russian deserters solely because they are Russian is nothing but an unlawful collective pushback.<sup>182</sup>

While EU Member States continue to deny asylum to Russians fleeing military service,<sup>183</sup> Latvian national courts have upheld the law in the face of this unlawful policy.<sup>184</sup> The case in point, concerned someone who walked past the border through the forest without a visa and was thus not turned away, surrendering himself to the police already in the depth of Latvian territory.<sup>185</sup> In the absolute majority of the cases, whereby Russians are turned away at the border under the unlawful citizenship-based visa and entry ban and blocked from lodging an appeal, Member States applying such bans are purposefully undermining their own system of human rights protection, systematically breaching EU and international law.

### B. Family Members

The right to private and family life enshrined in Article 7 of the CFR<sup>186</sup> and Article 8 of the European Convention on Human Rights (ECHR) might also be infringed by policies that narrow the definition of family members of EU citizens holding Russian passports.<sup>187</sup> While Poland, Finland, and the Baltic States have created a few exceptions to the visa ban for special categories of family members of Russian citizens, membership in the categories is strictly defined.<sup>188</sup> For example, Aleksandra Jolkina rightly observes that many close relatives such as siblings, cousins, uncles, nieces, and friends do not benefit from the exceptions to the visa ban granted to family members from Russia. They, therefore, fall under the ban and are prevented from visiting their loved ones. This policy creates “an arbitrary distinction between acceptable and unacceptable relationships for visiting purposes.”<sup>189</sup> While Finland has created exceptions for Russian family members of EU citizens, Finnish authorities still do not seem to consider personal circumstances at all, amounting to refusal of a visa or entry.

181. Penelope Mathew, *Chapter 50 – Non Refoulement*, in THE OXFORD HANDBOOK OF INTERNATIONAL REFUGEE LAW 899–916 (Cathryn Costello, Michelle Foster & Jane McAdam eds., 2021).

182. European Convention on Human Rights art. 4, protocol 4, Sept. 4, 1953. Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto, art. 4, Sep. 16, 1963, Europ.T.S. No. 46.

183. For a critical analysis of the most recent Dutch example, see Maarten den Heijer, *The Dutch Asylum Policy for Russian Draft Evaders*, VERFBLOG (Jan. 10, 2023), <https://verfassungsblog.de/the-dutch-asylum-policy-for-russian-draft-evaders/>.

184. Maria Kugel, *Disillusioned Army Reservist and Ex-Cop Who Fled Russia Gets Latvian Reprieve, Says He “Doesn’t Want to Kill and Die”*, RADIO FREE EUR. RADIO LIBERTY (Jan. 8, 2023), <https://www.rferl.org/a/russia-fleeing-war-latvia-asylum/32214509.html>.

185. *Id.*

186. CFR, *supra* note 150, art. 7.

187. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 8, Nov. 4, 1950, Europ.T.S. No. 5; 213 U.N.T.S. 221.

188. Spouses, children, parents, grand-parents, grandchildren, and persons “dependent” are eligible, while others are not. For an example of the distinction between who is and who is not a family member recognized by Finland, see *Frequently Asked Questions About Restrictions on Entry*, RAJA, <https://raja.fi/en/faq-about-restrictions-on-entry#1> (last visited Apr. 11, 2023).

189. Jolkina, *supra* note 160.

The nationality of the applicant is the only consideration. The policy concerns not only people coming from Russia, but also Russian citizens living abroad—sometimes for years, sometimes forever. In these circumstances, the right to private and family life is likely to be violated. There *is* settled case law of the European Court of Human Rights on the obligation to take into account all the individual circumstances at stake and to carefully balance the competing interests at stake.<sup>190</sup> A balancing test that requires an assessment of the individual interests at stake should warrant a greater look at extended family relationships.

### C. *Non-discrimination and equality before the law*

An outright ban also undermines the fundamental principle of equality before the law<sup>191</sup> and raises important questions of discrimination. EU law—including the CFR—does not explicitly protect third country nationals against discrimination on grounds of nationality.<sup>192</sup> The European Court of Human Rights, has held, however, that a difference of treatment on grounds of nationality constitutes a suspect criterion which calls for stricter scrutiny.<sup>193</sup> Under ECHR law, a person’s nationality, religion, gender, race, ethnic origin, sexual orientation, or any of the grounds mentioned under Article 14 cannot, on their own, constitute a threat to public policy, international security, or international relations.<sup>194</sup> Therefore, an outright nationality ban based on the stereotyped view that all Russian citizens constitute a threat could potentially amount to discrimination on grounds of nationality. This presumption of discrimination is reinforced by the fact that some of the states issuing blanket bans on visas for Russian citizens have a history of anti-minority constitutionalism against Russians.<sup>195</sup>

Further, the bans implicate discrimination based on ethnic origin. Although immigration matters are outside of the scope of the so-called EU Race Equality

190. See, e.g., I.M. v. Switzerland, App. No. 23887/16, ¶¶ 75–76.

191. CFR, *supra* note 150, art. 20.

192. Cases C-22/08 and C-23/08, Vatsouras and Koupatantze, ECLI:EU:C:2009:344 (Jun. 4, 2009); Case C-930/19, X v État Belge, ECLI:EU:C:2021:657 (Sep. 2, 2021). Indeed, often discrimination, precisely, is what EU law requires. Dimitry Kochenov & Martijn van den Brink, *Pretending There Is No Union: Non-Derivative Quasi-Citizenship Rights of Third-Country Nationals in the EU*, in DEGREES OF FREE MOVEMENT AND CITIZENSHIP 66–100 (Daniel Thym & Marleen Zoetewij Turhan eds., 2015).

193. Evelien Brouwer & 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 EQUALITY AND HUMAN RIGHTS: NOTHING BUT TROUBLE? 123–146 (Marjolein van den Brink, Susanne Burri & Jenny Goldschmidt eds., 2015).

194. *Id.* at 133–35. The European Commission showed abundant willingness to discriminate, however. In one example, it recommended that all the member states consider revoking citizenship and migration statuses acquired by, specifically, Russian and Belarusian citizens based on investment. Commission’s Recommendation C (2022) 2028 final. Such a recommendation, although not binding, is unlawful on the face of it, as Professor Jessurun d’Oliveira has also clarified. Hans Ulrich Jessurun d’Oliveira, *Golden Passports: European Commission and European Parliament Reports Built on Quicksand* 8 (Oxford COMPAS Working Paper WP-23-162, 2023).

195. Dimitry V. Kochenov et al., *Do Professional Linguistic Requirements Discriminate? – A Legal Analysis: Estonia and Latvia in the Spotlight*, 10 EUR. Y.B. MIN. ISS. 137 (2013); VADIM POLESHCHUK, CHANCE TO SURVIVE: MINORITY RIGHTS IN ESTONIA AND LATVIA (2009).

Directive,<sup>196</sup> Article 21(1) of the CFR prohibits discrimination on the ground of race and ethnic origin.<sup>197</sup> Although the CJEU adopts a restrictive understanding of discrimination on grounds of ethnicity and ethnic group,<sup>198</sup> in the case of visa bans it is possible to identify that Russian citizens are disadvantaged based on their ethnic group, no matter how diverse that ethnic group may be. We acknowledge, however, the difficulty of establishing that difference of treatment on the ground of nationality amounts to an ethnic or racial discrimination if the CFR is interpreted in the light of case law of the International Court of Justice (ICJ). In interpreting the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and its prohibition of race or ethnic discrimination against migrants, the ICJ does not account for the relationship between nationality and race or ethnic discrimination. In its admissibility ruling in *Qatar v UAE*, which concerns measures taken by the UAE against only Qatari nationals (e.g., entry bans and collective expulsions), the ICJ adjudged that the term “national origins” does not encompass nationality.<sup>199</sup> To arrive at this decision, it referred to the highly contested and critiqued *Nottebohm* case:

The Court observes that the definition of racial discrimination in the Convention includes “national or ethnic origin.” These references to “origin” denote, respectively, a person’s bond to a national or ethnic group at birth, whereas nationality is a legal attribute which is within the discretionary power of the State and can change during a person’s lifetime (*Nottebohm (Liechtenstein v. Guatemala)*).<sup>200</sup>

Scholars have criticized this ruling for its failure to “consider how nationality discrimination may constitute prohibited race discrimination.”<sup>201</sup> Indeed, the Court’s reasoning assumed that treatment based on race (which includes national origin) and nationality were mutually exclusive.<sup>202</sup> This interpretation fails to acknowledge that there may be an overlap between nationality and national or ethnic origin. Indeed, some legal systems include “nationality” in the definition of race, or treat “national origin” and “nationality” as synonymous.<sup>203</sup> We argue that the current visa ban is likely to amount to ethnic discrimination, especially in states such as Latvia or Estonia where there has been historic discrimination against Russians as a minority group.<sup>204</sup>

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196. Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, art. 3(2), 2000 O.J. (L 180) (EC).

197. Denis Martin, *Article 21 CFR*, in *THE EU TREATIES AND THE CHARTER OF FUNDAMENTAL RIGHTS: A COMMENTARY*, 2164–67 (Manuel Kellerbauer, Marcus Klamert & Jonathan Tomkin eds., 2d ed. 2023).

198. Case C-94/20, *Land Oberösterreich v KV*, ECLI:EU:C:2021:477 (June 10, 2021).

199. ICJ, *Qatar v U.A.E.*, Judgment of 4 February 2021, ¶¶ 74 – 105. Many thanks to Alexander Hogenboom for drawing our attention on this case.

200. *Id.* ¶ 81.

201. Cathryn Costello & Michelle Foster, *Race Discrimination Effaced at the International Court of Justice*, 115 *AJIL UNBOUND* 339 (2021).

202. *Qatar v U.A.E.*, *supra* note 199, ¶ 96.

203. Cathryn Costello & Michelle Foster, *(Some) Refugees Welcome: When is Differentiating Between Refugees Unlawful Discrimination?*, 22 *INT’L J. DISCRIMINATION & L.* 244, 248 (2022).

204. For an account of the systematic way in which an ethnic electorate was constructed in Estonia, see Richard C. Vissek, *Creating the Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia*, 38 *HARV. INT’L L.J.* 315 (1997). *Cf.* Dimitry V. Kochenov et al., *Do Professional*

Ultimately, the war between Russia and Ukraine is not a compelling justification to treat Russian citizens as pariahs unworthy of human rights, given that Russia, like the majority of countries in the world, is not a democracy and that citizenship cannot be chosen or easily renounced. Retributive logic is an unsuitable ground for a complete overhaul of the Schengen visa regime, which seeks to diminish, rather than boost, violations of fundamental rights. In the next and last Part, we argue that the EU's inability to tame the unlawful practices by some of the Member States in effect facilitates the actions of Putin's regime and punishes people who have no proven affinity with the Russian government.

## V. RULE OF LAW AND THE LOGIC OF JUST RETRIBUTION

We have demonstrated that in all EU Member States without any exceptions any blanket citizenship-based visa and entry bans are unlawful. The law of the Union is clear: the purpose of the rule of law is that the law should temper power.<sup>205</sup> The whole point of the rule of law as an institutional ideal consists of a simple fact that political demands cannot supersede the law, and legal principles survive political expediency.<sup>206</sup> While the protection of Russian citizens' rights or privileges is a worthy cause, the central issue here is the protection of EU law against populist attacks and emotional responses to nearby conflict. Any attempt to whitewash the idea of citizenship-based bans as legally feasible<sup>207</sup> is repugnant to the idea of the rule of law: the law is there to *limit* such theorizing, rather than enable it—this is precisely what distinguishes Putin's Russia, especially after it left the Council of Europe,<sup>208</sup> from the EU.

Suspension of visas and prohibition of entry also harms the rule of law by punishing and proscribing the movement of people who wish to vote with their feet and flee authoritarian regimes. Blanket citizenship-based bans are repugnant to the logic of contemporary EU law, which respects human rights and takes the individual as the starting point. Exclusions can only be justified through the extension of sanctions lists, which require that individuals be clearly identified and reasons for the ban clearly stated. That clarity is essential for courts to have the opportunity to assess the legitimacy of sanctions measures.

The justifications for the various types of citizenship-based bans share three key assumptions: (1) Russian citizens are directly responsible for the invasion of Ukraine; (2) entering the EU is a privilege,<sup>209</sup> which Russian citizens

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*Linguistic Requirements Discriminate? – A Legal Analysis: Estonia and Latvia in the Spotlight*, 10 EUR. Y.B. MINORITY ISSUES 137 (2013).

205. Martin Krygier, *Tempering Power*, in CONSTITUTIONALISM AND THE RULE OF LAW: BRIDGING IDEALISM AND REALISM IN CONSTITUTIONALISM AND THE RULE OF LAW 34–59 (Maurice Adams, Anne Meuwese & Ernst Hirsch Ballin eds., 2016).

206. Gianluigi Palombella, *The Rule of Law as an Institutional Ideal*, in RULE OF LAW AND DEMOCRACY: INQUIRIES INTO INTERNAL AND EXTERNAL ISSUES 3 (Leonardo Morlino & Gianluigi Palombella eds., 2010).

207. Merijn Chamon, *Why Banning Russian Tourists from Schengen Might not Be Unlawful*, VERFBLOG (Aug. 17, 2022), <https://verfassungsblog.de/not-unlawful/>.

208. Resolution CM/Res(2022)3 on Legal and Financial Consequences of the Cessation of Membership of the Russian Federation in the Council of Europe, March 23, 2022.

209. Kaja Kallas (@kajakallas), TWITTER (Aug. 9, 2022, 3:21 AM), [https://twitter.com/kajakallas/status/1556903576726896642?ref\\_src=twsrc%5Etfw](https://twitter.com/kajakallas/status/1556903576726896642?ref_src=twsrc%5Etfw).

do not currently deserve; and (3) Russian citizens should pay for the atrocities committed in Ukraine.<sup>210</sup> Exceptions to the ban are proposed for some categories of people who have preexisting ties with the EU, or whose circumstances may qualify them for refugee or asylum seeker status. The logic of this sentiment is captured by a former Russian politician who is now a dissident: “[i]f you want this privilege, do something in Russia first, earn this privilege, make some bold move, and then leave.”<sup>211</sup> Other than those who deserve to be in Europe because they have proved themselves, “the West doesn’t want Russians partying in the streets of Europe.”<sup>212</sup>

The visa bans are also motivated by national security concerns. As the Czech Foreign Minister argued, a visa ban could help “decrease the influence of the Russian secret service in the EU.”<sup>213</sup> The Czech President, Petr Pavel, went even further, proposing “close observation” of all Russian citizens in the EU, apparently modelled on the U.S. internment camps used to detain Japanese Americans during WWII.<sup>214</sup> Missing in the security discourse on the visa and entry ban is whether it can be effective, whether dissenters inside Russia have any real possibility to dissent,<sup>215</sup> and whether people seeking to leave Russia for the EU, sometimes risking their lives, are all merely partygoers or potential members of the Russian secret service. In contrast with the sanctions imposed until now, which have sought to target the state and people acting on behalf of the state, the visa and entry ban targets *all* Russians.<sup>216</sup>

The justifications for the visa and entry bans follow the logic of retribution: such bans target people *qua* people. After more than seventy-five years of human rights progress, the logic of both world wars is back. The EU, following Putin himself, emerges as the unlikely promoter of violence against people by virtue

210. See for instance the Latvian explanations regarding the adoption of the ban, which aims to “motivate the Russian Federation to stop the committed violations of international law and fully compensate for the violations already committed.” 22-TA-2695: Rīkojuma projekts (Vispārīgais).

211. Reported in Andrew Roth and Piotr Sauer, “*The West Doesn’t Want Russians Partying in the Streets of Europe*”: Calls Grow for a Visa Ban, THE GUARDIAN (Aug. 13, 2022), <https://www.theguardian.com/world/2022/aug/13/europe-russians-tourist-visa-ban-ukraine-war>.

212. *Id.*

213. Statement by Czech Foreign Affairs Minister Jan Lipavský, reported in De Jong, *supra* note 11.

214. Nicolas Samut, *We Should Monitor All Russians Living in the West, Czech Leader Says*, POLITICO (June 15, 2023), <https://www.politico.eu/article/petr-pavel-russia-czech-republic-surveillance/>.

215. Tatyana Margolin & Yelena V. Litvinov, *Putin Can’t Live with Dissent – That’s Why He’s Trying to Silence His Critics*, OPENDEMOCRACY, (Mar. 2, 2022) <https://www.opendemocracy.net/en/odr/putin-cant-live-with-dissent-thats-why-hes-trying-to-silence-his-critics/>; Anvi Lohia, *Russia: Suppressing Dissent and Evading Accountability* DEMOCRATIC EROSION, (Mar. 1, 2022) <https://www.democratic-erosion.com/2022/03/01/russia-suppressing-dissent-and-evading-accountability/>.

216. Regarding the sanctions imposed, it may be noted that many of the super-rich, especially those who distanced themselves from their country of origin, were sanctioned for no clear reason, given that Russia is not an oligarchy (as we now see) and that the ‘oligarchs’ could not stop the war in any case. Branko Milanovic, *The End of the End of History: What Have We Learned So Far?*, GLINEQ (Mar. 2, 2022), <https://glineq.blogspot.com/2022/03/the-end-of-end-of-history-what-have-we.html>. Nationality and ethnic origin seem to be informing the sanctions list a great deal—not so much the close connection to the regime as such. Dimitry Kochenov, *Sanctions for Abramovich, but Schröder Goes Scot-Free: Linking Sanctions, Citizenship, the Rule of Law and the Values of the European Union*, VERFBLOG (11 March 2022), <https://verfassungsblog.de/sanctions-for-abramovich-but-schroeder-goes-scot-free/>.

of their ethnicity and nationality. The targeting of enemy aliens, and populist discourse to support such targeting, is a mode of governance often used in war time in the world of the past predating the ascent of human rights. The fact remains, however, that the EU and its member states have not officially entered into war with Russia. Furthermore, the populist moves to categorize and punish people *en masse* are precisely what EU law—as well as any other modern constitutional system—was designed to make impossible.

The blanket citizenship-based visa and entry ban—and the discourse surrounding it—punish an enormous group of people *en masse*. This approach facilitates the wrongdoing of the criminal regime that the EU intends to punish and achieves a result precisely opposite to the EU’s interests. Thus, the ban is not just unlawful, it also has deeply problematic consequences: it helps the Putin regime reach its goals of further closing down the country and entrapping its population inside of Russia. The twin tools of inciting divisiveness within closed borders and attributing state violence to the “will of the people” have historically been the primary mechanisms of perpetuating state-sponsored violence and helping legitimize repugnant dictators. The visa and entry bans also create a stigma toward Russians among the population of EU states, breed resentment towards the EU among Russians, and shift the focus away from hard economic choices that could arguably make a dent in Putin’s resolve. Further, blaming Russian citizens for the invasion of Ukraine significantly legitimizes the Putin government, as he is wrongly perceived to give voice to the preferences of all Russian people.

Both the suggestion to restrict the immigration of Russian citizens into Europe and the Russian government’s condemnation of such immigration are ironic because restrictions on the emigration of Russian citizens has been a tool of state control used by the Russian state.<sup>217</sup> Russia has only recently started to observe international law on emigration.<sup>218</sup> Authorities at Russian borders have instituted numerous prohibitions on emigration for citizens who could be drafted as part of the mobilization effort.<sup>219</sup> History is repeating itself: by maintaining a hold on emigration via exit visas, autocratic states like the former U.S.S.R. could control the flow of capital, information, and disgruntled citizens, thereby maintaining a climate of fear and marginalization of dissent.<sup>220</sup> Recent scholarship on exit restrictions demonstrates that, while emigration leads to increased dissent and mobilization, the presence of exit visas allows governments a means to identify, manage, and target potential dissidents.<sup>221</sup> Thus, allowing Schengen visas only on particular grounds of dissent would allow the Russian authorities to clearly target dissidents revealed through the

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217. ANDREA CHANDLER, INSTITUTIONS OF ISOLATION: BORDER CONTROLS IN THE SOVIET UNION AND ITS SUCCESSOR STATES, 1917–1993, 3–14 (1998).

218. Dimitry V. Kochenov, *The Right to Leave Any Country Including Your Own in International Law*, 28 CONN. J. INT’L L. 43 (2012).

219. Viktorija Safonova & Marija Kiselëva, “My vyshli iz ocheredi i smirilis,” *Kogo i pochemu ne vypuskajut iz Rossii*, BBC WORLD (Sep. 26, 2022), <https://www.bbc.com/russian/features-63040738>.

220. CHANDLER, *supra* note 217.

221. Hans Lueders, *A Little Lift in the Iron Curtain: Emigration Restrictions and the Stability of Closed Regimes* (2022), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3541908](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3541908).

application process. Actual dissent or protest in Russia to fulfill the conditions of an entry visa proposed by Estonia and Finland is dangerous, if not impossible, given the risk of repression.

Moreover, law and policy have an expressive function—they affect opinion and behavior outside the specific contours of a particular policy.<sup>222</sup> An increasingly prevalent feature of the populist turn globally is governance through incitement.<sup>223</sup> While political leaders may not directly advocate violence and humiliation of communities through explicit laws, they may discredit or lend support to types of discourse that lead to that violence or humiliation. From the statements surrounding visa bans, European leaders portray Russian citizens as genocidal or as spies seeking to infiltrate Europe.<sup>224</sup> These leaders and their visa and entry bans send the message that Russian individuals have not earned the privilege to enter Europe, and that they must prove their capacity to enter Europe by explicitly turning against the Russian state. It is therefore only through defection that a Russian could overcome their Russian tendencies and become European. Simply put, Russians are not people *qua* people. What we are observing is the “blood and soil” justification behind a global passport apartheid<sup>225</sup> via fortress Europe operating at its purest. This is why suspicions will be raised if a Russian seeks to enter, live, and work in the European Union.<sup>226</sup>

#### CONCLUSION: THE LITMUS TEST FOR THE RULE OF LAW IN THE EU

The debate around nationality-based entry bans and the Union’s de facto powerlessness in the face of Member States’ arbitrary replacement of the law with citizenship-based retribution is a stress test for the rule of law in the EU. In this Essay, we have put forward two primary arguments. First, a blanket nationality-based visa and entry ban is unlawful under EU law as it stands. Such a ban cannot become lawful either by amending the law or through recourse to the “wholly exceptional circumstances” logic because a nationality-based visa ban necessarily breaches fundamental rights that are core to the EU. Second,

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222. Different perspectives on legal expressivism are collected in a *Maryland Law Review* symposium on the subject. See 60 MD. L. REV. (2001), <https://digitalcommons.law.umaryland.edu/mlr/vol60/iss3/>. For the view that it is important to have a hold on the consequences of legal expressions, see Suryapratim Roy, *Constitutive Reasons and Consequences of Expressive Norms*, 34 INT’L J. FOR SEMIOTICS L. 389 (2020).

223. Richard Ashby Wilson & Jordan Kiper, *Incitement in an Era of Populism: Updating Brandenburg After Charlottesville*, 5 U. PA. J. L. & PUB. AFFS. 56 (2020); Katarina Pettersson, *The Discursive Denial of Racism by Finnish Populist Radical Right Politicians Accused of Anti-Muslim Hate-Speech*, in NOSTALGIA AND HOPE: INTERSECTIONS BETWEEN POLITICS OF CULTURE, WELFARE, AND MIGRATION IN EUROPE 35 (Ov Cristian Norocel, Anders Hellström & Martin Bak Jørgensen eds., 2020); Suryapratim Roy, *Never Any End to an Event: Review Article on Law and Historical Memory*, 13 J. COMPAR. L. 132, 136 (2018).

224. See discussion earlier on the sentiment expressed by the Czech Foreign Minister on Russian spies infiltrating Europe. Statement by Czech Foreign Affairs Minister Jan Lipavský, reported in De Jong, *supra* note 11.

225. Dimitry V Kochenov, *Ending the Passport Apartheid: The Alternative to Citizenship Is No Citizenship—A Reply*, 18 INT’L J. CONST. L. 1525 (2020).

226. Victor Jack, *Russian Students in Europe Face Discrimination — and Pressure from Moscow*, POLITICO (Jul. 16, 2022), <https://www.politico.eu/article/university-russia-student-europe-against-sanction-threat-discrimination/>.



such a ban follows a retributive logic that counterproductively strengthens Putin's position and, in effect, supports the continuing invasion of Ukraine.

On the legality of the visa ban, we have demonstrated how the ban does violence to EU migration law, specifically the Schengen *acquis*, and to human rights law. The Schengen *acquis* does not accommodate a citizenship-based ban. Instead, it demands that visa and entry applications be considered on an individual basis, taking into account the conduct and choices of each applicant. A meaningful appeals procedure is also key. Exceptions such as threats to public policy and international relations also require in-depth evaluation of individual applicants' situation. The individual approach to EU migration law would prevent amendments to law to allow for citizenship-based bans. And any attempts to justify the departure from the law by "wholly exceptional circumstances" referred to in Article 347 TFEU should fail.

Further, such bans would violate human rights law on several counts. Contrary to the characterization by columnists and politicians, not all Russians are "tourists"; Russians seek to enter Member States for different reasons such as humanitarian grounds, medical grounds, to study and work, and maintain close relations. Crucially, they may also choose to vote with their feet against a murderous authoritarian regime. A blanket ban—even with exceptions—would be violative of the right to private and family life, among an array of other rights. Specifically, given the "partial mobilization" of Russian citizens to participate in crimes of aggression against Ukraine, an entry ban would make any refugee and asylum law inapplicable to Russian deserters, thus going against the letter and the spirit of EU and relevant international law protections. Further, given the anti-minority constitutionalism targeting Russian-speaking minorities in some of the EU Member States that seek to ban entry of Russian citizens, it may be argued that there would be discrimination premised on ethnic origin and nationality. Any consideration of a departure from the human rights logic the EU is built upon corrodes the EU's commitment to the rule of law.

Banning the entry of Russian citizens shifts focus from governmental culpability to blaming ordinary citizens of an authoritarian country for the invasion of Ukraine. A blanket visa ban impacts individuals unfairly. This serves governments advocating for such bans by helping them garner popular support easily, especially when there has been historical anti-Russian sentiment. Moreover, the bans serve Putin's regime by locking dissenters and deserters into Russia, revealing dissidents through the visa application process, and shifting the focus away from political and economic sanctions that are more difficult to achieve but arguably more effective.

The need for other Member States and institutions of the Union to put pressure on recalcitrant Member States to save the Schengen system from unlawful populist fragmentation emerges as an imperative in the current circumstances. The Commission's position, which is currently *de facto* on the side of the minority of Member States breaking the law following a defeat in Council, is bound to change. Indeed, the Union's strength lies in its resistance to acting along the populist lines that the Schengen visa and entry ban implies. But the absence of willingness and the powerlessness of the EU and its Member

States to call to order the recalcitrant states (including with the threat of infringement actions) opens the way for disconcerting impunity. This is a litmus test for the rule of law. The citizenship-based travel ban is a replacement of reason with randomly assigned retribution unrelated to any legitimate aims. The replacement of the rule of law with retribution, in turn, is a direct attack on the core values of the EU and counterproductively strengthens Putin's authoritarian regime, which is in direct contradiction to the objectives that the EU and its Member States seek to achieve.