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Dissecting a Populist Proposal  
and its Unlawful Implementation  
by Poland and the Baltic States**

**Working Paper No. 160**

**September 2022**

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Working Paper no. 160

The Centre on Migration, Policy & Society  
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## Funding / acknowledgement / disclaimer

COMPAS does not have a Centre view and does not aim to present one. All views expressed in the document are solely those of the authors and do not necessarily reflect the views of funders, those providing feedback, COMPAS or the University of Oxford. *Competing interests: The author(s) declare none.*

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## Abstract

We demonstrate that there is no legal way under current EU law to adopt a citizenship-based ban against Russians and Belarusians acquiring Schengen visas and entering EU territory. Further amending the law to allow for a citizenship-based ban could go against the core values the Union is based upon, pitting populist proposals against the Rule of Law. This is the reason behind the move by the Baltic States and Poland to implement a de facto ban at the national level illegally using Russian citizenship as a ground for refusal of entry in breach of EU law, following their defeat in Council on the matter. The necessity of other Member States and institutions of the Union to put sufficient pressure to save the Schengen system from unlawful populist fragmentation emerges as an imperative in current circumstances. The Union's strength is precisely in its inability to act along the populist lines the ban implies, rather than one of its weaknesses, as conveyed by the alarmist agitation of the Baltic States and Poland. Central to the citizenship-based travel ban is a replacement of reason required by the Rule of Law with randomly assigned retribution, on the face of it unrelated to any legitimate aims that could be achieved by the measure. The replacement of the Rule of Law with retribution, in turn, counterproductively strengthens Putin's totalitarian regime. Initial attempts of adding Belarusians to the proposed visa ban are particularly cynical and should receive much stricter scrutiny still, given the climate of repression in the country that is not at war with Ukraine and has not even recognized the annexation of Crimea. We demonstrate that the whole debate around the visa ban, as well as the Union's de facto powerlessness in the face of the Member States' arbitrary replacement of the law with hateful citizenship-based retribution is a stress test of the Rule of Law in the EU.

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## Putting retribution above EU law: An introduction

As Moscow's invasion of Ukraine continues, EU Member States are contemplating new sanctions. On August 8, 2022, Volodymyr Zelensky, Ukraine's president, called on Western countries to ban all Russian travelers.<sup>1</sup> The US government dismissed the initiative as unacceptable – the EU's reaction 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 from entering the Schengen zone, targeting tourists travelling on Russian passports more specifically: 'It'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,' Marin opined.<sup>3</sup> In the meantime, Estonia decided to refuse issuing visas or residence permits to Russian students,<sup>4</sup> limiting them to Russian workers, and the Latvian embassy in Russia has simply stopped issuing visas to Russian citizens for an indefinite period of time.<sup>5</sup> Poland followed suit supporting the ban,<sup>6</sup> as did the Czech Republic, holding EU Presidency,<sup>7</sup> and the Netherlands.<sup>8</sup> Malta, Belgium

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<sup>1</sup> Isabelle Khurshudyan, 'Zelensky Calls on West to Ban all Russian Travelers,' *The Washington Post*, August 8, 2022.

<sup>2</sup> U.S. Department of State, Department Press Briefing – September 7, 2022. Available at: [https://www.state.gov/?post\\_type=state\\_briefing&pp=92333Assignment](https://www.state.gov/?post_type=state_briefing&pp=92333Assignment). See also: 'US rejects Ukrainian call for blanket ban on visas for Russians', *The Guardian*, 22 August 2022. Available at: <https://www.theguardian.com/us-news/2022/aug/22/us-rejects-russians-visa-ban-ukraine>.

<sup>3</sup> 'Finnish PM: EU should restrict Russian tourism,' *YLE News*, August 8, 2022. Available at: <https://yle.fi/news/3-12568274>.

<sup>4</sup> Camille Gijs, 'Estonia stops issuing visas to Russian tourists,' *Politico*, August 11, 2022. Available at: <https://www.politico.eu/article/estonia-stop-issuing-visa-russian-tourist/>.

<sup>5</sup> 'Latvia Indefinitely Stops Issuing Visas to Russian Citizens,' *LSM*, August 5, 2022. Available at: <https://eng.lsm.lv/article/society/society/lsm-launches-english-language-service.a90048/>.

<sup>6</sup> 'Polish government to introduce a visa ban for Russian citizens: official,' *Polskie Radio*, August 14, 2022. Available at: <https://www.polskieradio.pl/395/9766/Artykul/3019677,Polish-government-to-introduce-a-visa-ban-for-Russian-citizens-official>.

<sup>7</sup> Belle de Jong, 'Czech EU Presidency pushes to ban visas for Russians,' *The Brussels Times*, August 12, 2022. Available at: <https://www.brusselstimes.com/eu-affairs/271209/czech-eu-presidency-pushes-to-ban-visas-for-russians>.

<sup>8</sup> 'Netherlands in favor of banning Russian tourists from EU,' *Reuters*, August 30, 2022. Available at: <https://www.reuters.com/world/netherlands-favor-banning-russian-tourists-eu-minister-2022-08-30/>.

and Denmark have already stopped issuing visas to Russian citizens through their consulates in the Russian Federation by the time the issue arose.<sup>9</sup> Labelling all Russian visitors as ‘tourists’ is misleading. Schengen visas holders or applicants are also refugees fleeing the terror of the Russian regime (the visa being the only way to reach the EU legally for them), family members of EU citizens, Russians legally living in the EU or refugees, journalists, business people, dissidents, athletes participating in competitions, students, artists etc. Moreover, given several generations of history of common statehood and a huge amount of mixed marriages between Russians and Ukrainians, an estimated 11 million Russians have close Ukrainian relatives,<sup>10</sup> millions of Russian citizens identify as members of the Ukrainian nation.<sup>11</sup> Such citizens, despite their affinity to Ukraine, are also sought to be prohibited from entering the EU.

The purely citizenship-based ban on travel has not only been put on the agenda of the EU: it is being materialized, and the issue has rightly generated significant debate.<sup>12</sup> The Council meeting on August 31, 2022 had the citizenship-based ban

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<sup>9</sup> For a recent update on visa bans and suspensions, see ‘Worldwide/Russia: Update on Visa Suspensions for Russian Citizens,’ *Fragomen*, August 30, 2022.

Available at: <https://www.fragomen.com/insights/worldwiderussia-update-on-visa-suspensions-for-russian-citizens.html>.

<sup>10</sup> Valerie Hopkins, ‘Ukrainians Find That Relatives in Russia Don’t Believe It’s a War’, *The New York Times*, March 6, 2022. Available at: <https://www.nytimes.com/2022/03/06/world/europe/ukraine-russia-families.html>

<sup>11</sup> Extremely restrictive approach to citizenship in Ukraine, where fighting against multiple citizenship is one of the priorities, causing international tensions long before the war, including with Hungary, as well as the Russian passportisation policy in the Crimea and elsewhere in the occupied territories of Ukraine are among the numerous factors contributing to the ephemeral distinction between ‘Russians’ and ‘Ukrainians’, should citizenship be taken as a starting point: the usual way this legal status operates. Oxana Shevel, ‘Country Report: Ukraine’, EUI RSCAS EUDO Citizenship Observatory, 2010. Available at: <https://cadmus.eui.eu/bitstream/handle/1814/19641/Ukraine.pdf?sequence=1>; Aleksander Salenko, ‘Country Report: Russia’, EUI RSCAS EUDO Citizenship Observatory, 2012. Available at: [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). Cf. Dimitry Kochenov, *Citizenship* (MIT 2019).

<sup>12</sup> The *Verfassungsblog* curated a debate on ‘European Visas for Russian citizens?’ Available at: <https://verfassungsblog.de/category/debates/european-visa-for-russian-tourists-debates/>; Steven Erlanger and Neil MacFarquhar, ‘Europeans Debate Barring Russian Tourists Over the Invasion of Ukraine,’ *New York Times*, August 19, 2022. Available at: <https://www.nytimes.com/2022/08/19/world/europe/europe->

formally on the agenda. The idea of the ban failed to harness sufficient support at the EU level, Hungary, Germany and France making up the most significant opposition to the ban – the former significantly criticized for its position,<sup>13</sup> while the latter two respected for it.<sup>14</sup> The official EU-level ban is thus not there (for now), but the populist counter-productive attempt to introduce it demands serious scrutiny. This is especially given the ongoing non-compliance with the EU *acquis* at the national level – the story of Estonia, Latvia, Lithuania, Poland and, potentially, Finland – can produce the effects *de facto* amounting to the replication of the effects of such a ban, which has *not* been introduced in practice via legal means. The first sign of this came in the form of a joint statement of the Baltic States and Poland at the fringes of the Baltic-Nordic cooperation conference on September 7, officially published on September 8: the four countries agreed to ignore the fact that they have been outvoted in Council on the matter of the ban and introduce citizenship-based restrictions at the national level anyway,<sup>15</sup> thus directly breaching EU law, as this paper will demonstrate. When asked for a comment, the Finnish foreign minister has rightly rhetorically queried, ‘can you actually cancel the whole of Schengen principles?’<sup>16</sup>

The realization that one cannot cancel Schengen principles does not come at a surprise: the whole point of EU decision-making procedures is that those who

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[russia-tourists-visas-ukraine.html](#); ‘Will the European Union impose a visa ban on Russian tourists?’ *Meduza*, August 19, 2022. Available at: <https://meduza.io/en/cards/will-the-european-union-impose-a-visa-ban-on-russian-tourists>.

<sup>13</sup> Lili Bayer, ‘Hungary Breeds Unquiet on Ukraine’s Western Front’, *Politico*, September 1, 2022. Available at: <https://www.politico.eu/article/hungary-unquiet-ukraine-russia-western-front/>.

<sup>14</sup> Christopher Pitchers and Jorge Liboreiro, ‘Germany and France Join Forces against Growing Calls for EU Visa Ban for Russians’, *Euronews*, 30 August 2022. Available at: <https://www.euronews.com/my-europe/2022/08/30/germany-and-france-join-forces-against-growing-calls-for-eu-visa-ban-for-russians>

<sup>15</sup> Joint statement of the prime ministers of Estonia, Latvia, Lithuania and Poland, 8 September 2022. Available at: <https://valitsus.ee/en/news/joint-statement-prime-ministers-estonia-latvia-lithuania-and-poland>.

<sup>16</sup> Alexandra Brzozowski, ‘Baltics agree regional measures to restrict entry of Russians’, *Euractiv*, 7 September 2022: <https://www.euractiv.com/section/global-europe/news/baltics-agree-regional-measures-to-restrict-entry-of-russians/>.

failed to push their point through are fully bound by the law. Mass breaches of key elements of EU migration *acquis* committed in times of a large-scale military conflict at Europe's gates can go unpunished for years, making the *de facto* ban yet more important to prevent.<sup>17</sup> Critical scrutiny of Baltic States' and Poland's open call for lawlessness under the banner of just retribution, which quickly turns into adherence to lawlessness in practice threatening the very fabric of Schengen cooperation is crucially important. Such scrutiny needs to happen even if it is bound to be unpopular in populist pro-ban circles that argue, without listing a single valid legal point, that human rights should be dismissed in the face of foreign policy priorities.<sup>18</sup> Contributing to such scrutiny of the calls for lawlessness as well as direct breaches of EU law at the national level is the key objective of this contribution.<sup>19</sup>

Adopting restrictions exclusively based on citizenship is far from proper in a world that cherishes human rights, where citizenship itself, constitutes the main factor of inequalities around the globe.<sup>20</sup> A blood-based totalitarian status<sup>21</sup> ascribed at

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<sup>17</sup> Petra Bárd and Dimitry V. Kochenov, 'Law as a Pretext to Wave the Rule of Law Goodbye? The Case for an EU Constitutional Awakening' (2022) *European Law Journal* [forthcoming]. Available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/eulj.12435>.

<sup>18</sup> E.g., Nicoli Francesco, *Why Restricting Tourist Visas to Russians is Legitimate: Sanctions, EU law and conditional gradualism of travel rights*, *VerfBlog*, 2022/8/16, <https://verfassungsblog.de/why-restricting-tourist-visas-to-russians-is-legitimate/>.

<sup>19</sup> The European Commission has shown abundant willingness to ignore the law in an array of sensitive areas over the last years and migration has been one of those areas, where it has tacitly approved torture, mass deprivation of rights and occasional causing of death at the Belarusian border. Once permitted, lawlessness creeps in and stays. Cf. Aleksandra Jolkina, 'Trapped in the Lawless Zone', *VerfBlog* 2 May 2022. Available at: <https://verfassungsblog.de/trapped-in-a-lawless-zone/>; Dimitry Kochenov and Barbara Grabowska-Moroz, 'The EU's Face in Łukašenka's Mirror', *VerfBlog* 26 April 2022. Available at: <https://verfassungsblog.de/the-eus-face-in-lukasenkas-mirror/>; Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1.

<sup>20</sup> Branko Milanovic, *Global Inequality: A new approach for the age of globalization* (Harvard University Press 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: Dimitry Kochenov and Justin Lindeboom, 'Empirical Assessment of the Quality of Nationalities', 4 *European Journal of Comparative Law and Governance*, 2017, 314.

<sup>21</sup> Dimitry Kochenov, *Citizenship* (MIT 2019).



birth in a lottery-like fashion,<sup>22</sup> which usually cannot be refused, no matter how much harm and embarrassment it causes the bearer,<sup>23</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 the current state of global approaches to law.<sup>24</sup>

Moving beyond the foundational assumptions of contemporary constitutionalism, citizenship-based exclusions from Schengen also raise issues of basic legality. Pressured by several Member States, the EU Commission has rightly declared early on that it cannot decide to limit the issuance of Schengen visas to Russian citizens.<sup>25</sup> The failure of the Council to back the ban is thus not just a reflection of the lack of political will: it is also an expression of respect for the Rule of Law. Indeed, current EU law does not provide for a possibility of such a ban, as we show below. Moreover – and crucially – the law as it stands does not seem to be open to an amendment, which would allow for the introduction of such a ban, as such an amendment would amount to an unconstitutional undoing to the key fundamentals of the EU legal order. Worse still, the bans of this kind or any serious discussions of such bans is nothing but a populist repackaging of Putinist narrative, as Mikhail Khodorkovsky equally observed,<sup>26</sup> assisting the assault on freedom of expression and human rights and thus antithetical to the objectives of European integration.

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<sup>22</sup> Ayelet Shachar, *The Birthright Lottery* (Harvard University Press 2009).

<sup>23</sup> Katja Swider, *A Rights-Based Approach to Statelessness* (PhD thesis, University of Amsterdam, 2018).

<sup>24</sup> Dimitry Kochenov, 'Abstract Citizenship in the Age of Concrete Human Rights', in Mark Tushnet and Dimitry Kochenov (Eds), *Research Handbook of the Politics of Constitutionalism* (Edward Elgar, 2023, forthcoming).

<sup>25</sup> 'EU Cannot Completely Ban Issuance of Schengen Visas to Russian Nationals', *Schengen Visa News*, 1 August 2022. Available at: <https://www.schengenvisainfo.com/news/eu-cannot-completely-ban-issuance-of-schengen-visas-to-russian-nationals/>.

<sup>26</sup> Mikhail Khodorkovski, 'A Visa Ban Would Fall into Moscow's Trap', *Politico*, September 6, 2022. Available at: <https://www.politico.eu/person/mikhail-khodorkovsky/>.

The very fact of having this idea discussed is deeply troubling at several levels. Josep Borrell, the EU High Representative for Foreign Affairs and Security Policy, as well as the Commission, threw their weight behind those opposing this initiative by some of the Baltic states. As a result, the Council meeting decided to suspend the Visa Facilitation Agreement with Russia,<sup>27</sup> and stopped there, underlining, through the Czech Foreign Affairs Minister that the suspension was but a ‘first step’<sup>28</sup> and aims at ‘significantly reducing the number of new visas to be issued to Russian citizens by EU Member States and preventing potential visa shopping by Russian citizens’.<sup>29</sup> The ban has not been repudiated in principle and is thus tentatively still on the cards. Falling short of repudiating the unlawful initiative resulted in the threats to the integrity of the Schengen system, as additional questionable strategies in line with the visa ban idea have just been adopted by three Baltic States – Lithuania, Latvia and Estonia, joined by Poland – in an attempt to undo the practical effects of being outvoted in Council: an entry ban implying systematic refusals of entry to any Russian citizen holder of a Schengen visa delivered by other Member States is what the new policy of these states amounts to.<sup>30</sup> The obvious outright illegality of this approach puts the entire Schengen system at risk.

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<sup>27</sup> ‘EU Foreign Ministers Agree to Suspend Visa Deal with Russia,’ *Reuters*, August 31, 2022. Available at: <https://www.reuters.com/world/europe/eu-foreign-ministers-agree-suspend-visa-deal-with-russia-top-diplomat-2022-08-31/>; Council Decision (EU) 2022/333 of 25 February 2022 on the partial suspension 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 [2022] OJ L54/1.

<sup>28</sup> Maria Udrescu, ‘EU Member States Seal Deal on Restricting Visas for Russians,’ *Le Monde*, 1 September, 2022. Available at: [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).

<sup>29</sup> EU 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, Brussels, 6 September 2022 COM(2022) 661 final.

<sup>30</sup> With the exception of Russian citizens crossing the border for humanitarian and family reasons, lorry drivers and diplomats: Alexandra Brzozowski, ‘Baltics agree regional measures to restrict entry of Russians’,

## Broader context and the structure of the argument that follows

Unquestionably, the horrible crimes perpetrated by the Russian state should be punished, Russian military capacity diminished. Some EU actions related to the war in Ukraine were praised – and rightly so. One of the most important breakthroughs is the record-time activation<sup>31</sup> of the temporary protection directive<sup>32</sup> to help Ukrainian refugees. Sanctions against the Russian regime and its puppets were equally applauded. However, the approach of sanctioning, among those close to Putin, only Russian citizens and leaving all kind of Schröders out is problematic,<sup>33</sup> just like the focus on the oligarchs, who are as powerless,<sup>34</sup> it appears, as their poorer brethren. Indeed, Branko Milanovic seems to be right in stating that the fact that the most powerful businessmen in the country are powerless to trigger a shift in Putin’s policy in the face of the most unprecedented sanctions seems to be teaching an important lesson: Russia’s authoritarianism is *not* an oligarchy.<sup>35</sup>

Presenting a citizenship-based visa ban as a sanctioning option is not acceptable, as we demonstrate below. To make this point we focus on the issue of the lawfulness of citizenship-based bans in the context of EU *acquis* and place the blanket citizenship-based ban approach in the context of the broader Rule of Law

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*Euractiv*, 7 September 2022: <https://www.euractiv.com/section/global-europe/news/baltics-agree-regional-measures-to-restrict-entry-of-russians/>.

<sup>31</sup> Council Implementing Decision (EU) 2022/382 of 4 March 2022 establishing the existence of a mass influx of displaced persons from Ukraine within the meaning of Article 5 of Directive 2001/55/EC, and having the effect of introducing temporary protection [2022] OJ L71/1.

<sup>32</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof [2001] OJ L212/12.

<sup>33</sup> Dimitry V. Kochenov, ‘Sanctions for Abramovich, but Schröder Goes Scot-Free,’ *Verfassungsblog*, March 11, 2022. Available at: <https://verfassungsblog.de/sanctions-for-abramovich-but-schroder-goes-scot-free/>.

<sup>34</sup> Branko Milanovic, ‘The End of the End of History: What have we learned so far?’ March 2, 2022. Available at: <https://glineq.blogspot.com/2022/03/the-end-of-end-of-history-what-have-we.html>.

<sup>35</sup> *Id.*

issues in the EU – a democracy of means<sup>36</sup> that has not been effective in ensuring that the idea of legality reigns supreme across its legal orders;<sup>37</sup> a sad deficiency that has implicated all the institutions in several instances,<sup>38</sup> including, most importantly, the CJEU.<sup>39</sup> This deficiency is regarded as permissible by all the Member States, as not a single action in defense of the Rule of Law has so far been initiated at the national level.<sup>40</sup> This would be particularly important in the context where the Commission's inaction, if not dereliction of duties, has been plaguing the key values of the Union for years now,<sup>41</sup> eroding EU constitutionalism in broad daylight. The war in Ukraine has made the EU Rule of Law situation worse, as it has been pro-actively deployed as a pretext to intensify the Rule of Law degradation:<sup>42</sup> the citizenship-based ban proposal is thus not

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<sup>36</sup> Gareth Davies, 'Social Legitimacy and Purposive Power: The end, the means and the consent of the people' in Dimitry V. Kochenov, Gráinne de Búrca and Andrew Williams (Eds) *Europe's Justice Deficit?* (Hart Publishing 2015) 259.

<sup>37</sup> Dimitry V. Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34 *Yearbook of European Law* 82; Kim L. Scheppelle, 'Autocratic Legalism' (2015) 85 *University of Chicago Law Review* 545; András Sajó, *Ruling by Cheating: Governance in Illiberal Democracy* (CUP 2021).

<sup>38</sup> Dimitry V. Kochenov, Amichai Magen, Laurent Pech, 'Introduction: The Great Rule of Law Debate in the EU' (2016) 54 *Journal of Common Market Studies* 1045; Dimitry V. Kochenov, 'Elephants in the Room: The European Commission's 2019 Communication on the Rule of Law' (2019) 11 *Hague Journal of the Rule of Law* 423.

<sup>39</sup> Dimitry V. Kochenov and Petra Bárd, 'Kirchberg Salami Lost in Bosphorus: The Multiplication of Judicial Independence Standards and the Future of the Rule of Law in Europe' (2022) *Journal of Common Market Studies* [forthcoming]; Dimitry V. Kochenov and Graham Butler, 'Independence of the Court of Justice of the European Union: Unchecked Member States Power after the Sharpston Affair' (2022) *European Law Review* [forthcoming]. Available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/eulj.12434>; Justin Lindeboom, 'Is the Primacy of EU Law Based on the Equality of the Member States? A Comment on the CJEU's Press Release Following the *PSPP* Judgment' (2020) 21 *German Law Journal* 1032.

<sup>40</sup> Article 259 TFEU still awaits its first invocation in the context of the breakdown of EU values. Dimitry V. Kochenov, 'Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool' (2015) 7 *Hague Journal of the Rule of Law* 153.

<sup>41</sup> Laurent Pech, Patryk Wachowiec and Dariusz Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action' (2021) 13 *Hague Journal on the Rule of Law* 1; Kim Lane Scheppelle, Dimitry V. Kochenov, Barbara Grabowska-Moroz, 'EU Values Are Law, after All: Enforcing EU values through systemic infringement actions by the European Commission and the Member States of the European Union' (2020) 39 *Yearbook of European Law* 3.

<sup>42</sup> Petra Bárd and Dimitry V. Kochenov, 'Law as a Pretext to Wave the Rule of Law Goodbye? The Case for an EU Constitutional Awakening' (2022) *European Law Journal* [forthcoming]. Available at: <https://onlinelibrary.wiley.com/doi/full/10.1111/eulj.12435>

exceptional in this context. The timing is particularly bad for a populist move, which could amount to a renewed assault on the Rule of Law in the EU and render the Schengen system dysfunctional in the process. The underlying rationale for the ban is the WWI ‘enemy alien’<sup>43</sup> logic, where all Russian civilians are enemy aliens, and must be treated with suspicion. This is so even if the EU is not at war with Russia at all, paying billions to Putin’s regime every month.<sup>44</sup> In any event, the populist construction of an ‘enemy alien’ is antithetical to the EU’s constitutional core, which also informs its visa and migration law.

This article splits into two parts, which could be presented as two steps of the same argument. In step one, we provide a detailed assessment of (il)legality of the proposed ban under the law in force, only to move, in step two, to a broader framing to the populist proposals aiming to undo the EU’s achievements after WWII characterized by the respect for human rights, and the Rule of Law.

We demonstrate that there is no legal way under current EU law to adopt a blanket citizenship-based ban against Russians acquiring Schengen visas and entering the Schengen area. Further, amending the law to allow for a blanket citizenship-based ban could go against the core of the values the Union, as it is based upon preferring populist proposals to the Rule of Law. Importantly, the inability to act along such populist lines is the EU’s strength, rather than one of its weaknesses, since there can be no conceivable logical reason to act in this way. Indeed, central to the blanket citizenship-based travel ban proposals is a replacement of reason required by the Rule of Law with randomly assigned retribution on the face of it unrelated to any legitimate aims to be achieved by

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<sup>43</sup> Daniela Caglioti, *War and Citizenship: Enemy Aliens and National Belonging from the French Revolution to the First World War* (CUP 2020).

<sup>44</sup> Centre for Research on Energy and Clean Air, *Financing Putin’s war on Europe: Fossil fuel imports from Russia in the first two months of the invasion* (CREA, 2022). Available at: <https://energyandcleanair.org/publication/russian-fossil-exports-first-two-months/>.

the measure. This replacement of the Rule of Law with retribution, in turn, counterproductively strengthens Putin's totalitarian regime. The whole debate around the visa bans, to us, is a stress test of the Rule of Law in the EU.

## **PART I: THE ILLEGALITY OF CITIZENSHIP-BASED ENTRY BANS**

### ***The visa for the Russians: some basic background***

The so-called Schengen visa is one visa among many others that EU Member States can grant and cannot exceed 90 days in any 180-day period. The Schengen visa is peculiar in that it is valid for the whole Schengen area, as opposed to other visas delivered by Member States under national and EU law, such as long-stay visas for students.<sup>45</sup> The Schengen area comprises all the EU Members, except Romania, Bulgaria, Croatia, Ireland and Cyprus. It includes several third countries (Iceland, Norway, Switzerland and Lichtenstein and, de facto, Andorra, Monaco, San Marino, and the Vatican City State). The Schengen system is relatively open for visa-free travel, compared with the US or the UK approaches to visa-free travel, as fewer nationalities are required to acquire a Schengen visa prior to travel compared with those obliged to get a US or a UK visa.<sup>46</sup> Schengen countries are the ones competent to deliver such visas, according to EU rules enshrined in the Visa Code<sup>47</sup>, which is part of the Schengen *acquis* entirely integrated into EU law since the Treaty of Amsterdam and reformed in 2020.<sup>48</sup> Until 2021, Russian citizens constituted the main group benefiting from Schengen visas, 536,241 in

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<sup>45</sup> Directive 2016/801 Conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) [2016] OJ L132/21.

<sup>46</sup> Cf. Dimitry Kochenov and Justin Lindeboom (Eds), *Kälin and Kochenov's Quality of Nationality Index* (Oxford: Hart Publishing, 2020).

<sup>47</sup> Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas (Visa Code) OJ L 243, 15 September 2009 (hereafter: the Visa Code).

<sup>48</sup> 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) OJ L 188, 12 July 2019, p. 25–54.

2021, the second group being Chinese citizens (27,458 in 2021).<sup>49</sup> This is effectively a visa for Russians. This fact is not surprising, since 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. As any other foreign policy tool, the Schengen visa system is a political instrument.

In fact, the true visa facilitation is the abolition of visas. This is what the EU has achieved with *all* the post-Soviet nations, which it borders with, with the sole exception of Russia and Belarus. The very fact, thus, that Russians and Belarusians need a visa to visit the EU is highly unusual in the context of travel in Europe, but the visa-free travel conversations have been dead even before the annexation of Crimea, a Visa Facilitation Agreement between the EU and the Russian Federation, in force since January 2007,<sup>50</sup> taking their place. Since the entry into force of this now suspended – but not renounced – Visa Facilitation Agreement, and until recently, Russian citizens have benefited from some facilitations regarding the issuance of Schengen visas regarding the length of the procedure (10 to 30 calendar days as opposed to 15 to 45 days)<sup>51</sup> and the fee for processing visa applications: 35 EUR instead of 80 EUR.<sup>52</sup> Of course, the involvement of commercial visa centres in the process made this part of the Agreement somewhat ephemeral, as the EU allows visas to be a profit-making industry for third parties by inflating visa fees. Moreover, some groups of Russians citizens, including journalists, diplomats, official delegations, business people,

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<sup>49</sup> Directorate-General for Migration and Home Affairs, European Commission, 'Visa statistics: Schengen States issue 2.4 million visas for short stays in 2021,' June 3, 2022. Available at: [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). The pandemic context has clearly affected these numbers.

<sup>50</sup> 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 OJ L 129, 17 May 2007, p. 27–34.

<sup>51</sup> See Article 7 (1) and (2) of the Visa Facilitation Agreement and Article 23 (1) and (2) of the Schengen Visa Code.

<sup>52</sup> See Article 6(1) of the Visa Facilitation Agreement and Article 16(1) of the Schengen Visa Code.



students, persons participating in scientific, cultural and artistic activities, participants in international sports events, and close relatives of EU citizens and Russian citizens legally residing in EU territory, and the like benefited from additional facilitation measures for the issuances of Schengen visas as for the documentary evidence to be presented,<sup>53</sup> the waiving of the visa fee<sup>54</sup> or the possibility to receive a multi entry visa up to two years<sup>55</sup> or even five years for spouses and children as well as members of national and regional Governments and Parliaments, Constitutional Courts and Supreme Court.<sup>56</sup> Crucially, it should be kept in mind that the majority of the ordinary citizens of other nations at a similar level of socio-economic development are not required to acquire Schengen visas at all in order to travel to the Schengen zone. This agreement is part of a broad network of instruments<sup>57</sup> used as bargaining tools with third countries. In the Russian case, it was directly tied to a readmission agreement,<sup>58</sup> which was concluded in parallel and entered into force on the same day, increasing the expediency with which the EU would be allowed to send more people to Putin's Russia.

Third-country nationals who are required to receive a Schengen visa prior to travel, just as those like the citizens of Mauritius, Moldova, or Timor-Leste, who are entitled to travel visa-free, can enter from any border crossing point in the Schengen area. Kaja Kallas, Estonia's Prime Minister, sees it as a problem: "while Schengen countries issue visas, neighbours to Russia carry the burden", she wrote on Twitter.<sup>59</sup> Since the opening of the Imatra border crossing point

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<sup>53</sup> See Article 4 of the Visa Facilitation Agreement.

<sup>54</sup> Article 6(3) of the Visa Facilitation Agreement.

<sup>55</sup> Article 5(2) of the Visa Facilitation Agreement.

<sup>56</sup> Article 5(1) of the Visa Facilitation Agreement.

<sup>57</sup> For an overview, see: [https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/visa-policy\\_en](https://home-affairs.ec.europa.eu/policies/schengen-borders-and-visa/visa-policy_en).

<sup>58</sup> Agreement between the European Community and the Russian Federation on readmission - Joint Declarations [2007] OJ L129/40.

<sup>59</sup> <https://twitter.com/kajakallas/status/1556903576726896642> (last accessed September 4, 2022).



between Finland and Russia in early July, when both Finland and Russia have COVID-19 restrictions at the border, Russian citizens in possession of a Schengen visa tend to cross via this specific point. This is not at all surprising, given the EU's closure of the airspace with Russia in February: flying via Armenia, Serbia, Turkey or the UAE is quite expensive. Finland, Estonia, Latvia, Lithuania and Poland (leaving the northern crossing with Norway out) are thus the easiest crossing points for many bearers of Russian passports to reach other destinations in the EU. This is exactly what these countries intend to stop, in breach of EU law by replicating a failed EU-level proposal at the national level.

### **No citizenship-based ban possible under the current Schengen *acquis* as it stands**

Does the fact that Russian citizens cross more frequently through a particular set of land border-crossing points following the closure of the airspace justify the adoption of a citizenship-based ban championed by Latvia and Estonia? Not at all, if we remain within the realm of legality, as no provision of the current Schengen *acquis* would allow for the adoption of a citizenship-based ban on entry or on the issuance of visas. EU law prohibits systematically refusing a Schengen visa to any Russian applicant meeting the issuance criteria established in law, let alone turning such a person away at the border. Let us first look at the rule and then at the exceptions.

#### ***The rule***

It is beyond any doubt that any blanket ban that implies an automatic refusal of a Schengen visa to a Russian citizen based on the citizenship that person holds is unlawful. Not only is it in violation of the now suspended 2007 Facilitation Agreement, but more fundamentally it is in breach of the rules and foundational principles of the entire Schengen visa regime. As opposed to Schengen internal borders for which control can be reintroduced in some exceptional

circumstances<sup>60</sup> – exceptions which have been largely used and abused, according to a recent judgment of the CJEU,<sup>61</sup> by the Member States since 2015 – there is no possibility in the Schengen acquis to introduce a citizenship-based ban towards the nationals of one country, however exceptional the circumstances whether for the issuance of visa or for the entry in the Schengen zone.

The Visa Code is crystal clear: the grounds for refusal of a Schengen visa are listed exhaustively in Article 32(1) of the Code.<sup>62</sup> Among others, they include lack of intention on the part of the applicant to leave the territory of the Member States before the expiry of the visa, false, counterfeit or forged travel documents, no justification for the purpose and conditions of the intended stay, no proof of sufficient means of subsistence, a threat to public policy, internal security or public health or to the international relations of any of the Member States, in particular where an alert has been issued in Member States' national databases for the purpose of refusing entry on the same grounds.

Member States are required to examine each application for a Schengen visa *individually* and, in case of refusal, the reasons should be clearly stated and notified to the applicant.<sup>63</sup> In response, applicants have a right to appeal.<sup>64</sup> Consequently, it is prohibited to adopt a blanket ban, or automatically refuse *any* citizen of any country whose nationals are still subject to visa. It is true that

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<sup>60</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) [2016] OJ L77/1.

<sup>61</sup> Cases C-368/20 and C-369/20 *Landespolizeidirektion Steiermark and Bezirkshauptmannschaft Leibnitz*, ECLI:EU:C:2022:298.

<sup>62</sup> Case C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* ECLI:EU:C:2013:862, paras. 38 and seq.

<sup>63</sup> Article 32(2). See more generally: C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* ECLI:EU:C:2013:862.

<sup>64</sup> Article 32(3).

Member States have a wide discretion when assessing the visa application and the grounds of refusal,<sup>65</sup> and of course, the individual character of the assessment can be more or less lenient.<sup>66</sup> However, even in the cases where the ECJ adopts a lenient approach, it always implies an individual conduct and choice. Russian citizenship is not a choice and no individual conduct can be inferred from the only fact that someone is Russian.<sup>67</sup>

The same rules apply for long-stay visas that fall under EU immigration law Directives. The ECJ has been abundantly clear that visa decisions should be *individual*, based on an assessment of all the elements of the applicant's situation.<sup>68</sup> In some cases, 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 as in the case of the family reunification Directive.<sup>69</sup>

The crucial starting point underpinning the functioning of the whole system is that the Member States are always under an unconditional strict obligation to provide for a meaningful appeal procedure against decisions refusing a visa.<sup>70</sup> 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 should do so on an individual basis.<sup>71</sup> The

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<sup>65</sup> C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* ECLI:EU:C:2019:1071, para 37; C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* ECLI:EU:C:2013:862 paras. 60-63; C-544/15 *Fahimian* ECLI:EU:C:2017:255, para. 50.

<sup>66</sup> C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* ECLI:EU:C:2019:1071.

<sup>67</sup> It is therefore surprising that some scholars find any potential parallel between case and the general visa ban.

<sup>68</sup> C-544/15 *Fahimian* ECLI:EU:C:2017:255, para. 43.

<sup>69</sup> Case C-153/14 *Minister van Buitenlandse Zaken v K, A*, ECLI: EU:C:2015:453. See also: Sarah Ganty, *L'intégration des citoyens européens et des ressortissants de pays tiers en droit de l'Union européenne. Critique d'une intégration choisie*, Larcier, Collect. Droit de l'Union européenne (2021).

<sup>70</sup> Case C-949/19 *M.A. v Konsul Rzeczypospolitej Polskiej*, ECLI:EU:C:2021:186.

<sup>71</sup> C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* ECLI:EU:C:2019:1071; Case C-153/14 *Minister van Buitenlandse Zaken v K, A*, ECLI: EU:C:2015:453.

concept of ‘threat to public policy’ has been interpreted in the same ‘individual’ way in the context of a number of directives governing the situation of third-country nationals.<sup>72</sup> This is not different with the interpretation of ‘public policy’ ground for the refusal of entry or visa: an individual assessment linked to an individual conduct is required. Even though it can be interpreted more broadly than in the in the context of free movement law<sup>73</sup>, an examination of an individual conduct is still required. Examples of individual conduct that have prompted visa refusals are having committed a criminal offence<sup>74</sup> or, studying in a university cooperating with the Iranian ministry of defence, and doing research in a sensitive field of information technology security.<sup>75</sup>

The threat to public policy or internal security is intrinsically linked to the Schengen Information System as recalled by the Court, which, by definition implies an individual assessment:<sup>76</sup> even the visa refusal has to be entered in the Visa Information System specifying the ground(s) of refusal, confirming the individual character of it.<sup>77</sup> Finally and more importantly, it is also settled case-law that in addition to the individual conduct on the basis of which the threat to public policy should be assessed, this assessment should be proportionate i.e. should not go beyond what is necessary to safeguard public policy. It is difficult to imagine how the proportionality of such a blanket ban would be substantiated to satisfy a public policy exception. In short, while the ground of public policy

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<sup>72</sup> C-554/13 *Zh. and O.*, ECLI:EU:C:2015:377, para. 60; C-373/13 *T.* ECLI:EU:C:2015:413, para. 79.

<sup>73</sup> It is strictly limited to ‘individual conduct representing a genuine, present and sufficiently serious threat affecting one of the fundamental interests of the society of the Member State concerned’. C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* ECLI:EU:C:2019:1071, para. 42. See also: C-309/18 *Lavorgna* C-309/18, ECLI:EU:C:2019:350, para. 24; C-414/16 *Egenberger* ECLI:EU:C:2018:257, para. 68.

<sup>74</sup> C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* ECLI:EU:C:2019:1071, para 46.

<sup>75</sup> C-544/15 *Fahimian* ECLI:EU:C:2017:255, para. 48.

<sup>76</sup> C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* ECLI:EU:C:2019:1071, para 40.

<sup>77</sup> Article 32(5) Visa Code. C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* ECLI:EU:C:2013:862, paras. 40-41

could be a ground to refuse Schengen visas to Putin's officials, to announce 'we do not issue visas to Russians' is unquestionably a violation of EU law.<sup>78</sup>

Some have argued that the ground of 'threat to international relations of Member States' could potentially be a ground to justify a blanket travel ban.<sup>79</sup> It is true that there is no case law interpreting this specific ground. However, using this ground to issue a blanket-ban by pretending that the matter is 'unclear' is *prima facie* unlawful per the legislative framework and, following analogous case law.<sup>80</sup> The *acquis* read in the light of case law prescribes individual assessment and disallows disproportionate legal presumptions. Referring to the grounds of refusal, the Court in *Koushkaki*<sup>81</sup> has been clear on the fact that:

'the 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.* 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,

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<sup>78</sup> C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.*, ECLI:EU:C:2019:1071, para 47.

<sup>79</sup> Jonas Bornemann, 'Heated tempers and legal ambiguities: Some (second) thoughts on an all-out Schengen ban of Russians', *VerfBlog*, 2022/8/17, <https://verfassungsblog.de/heated-tempers-and-legal-ambiguities/>.

<sup>80</sup> C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* ECLI:EU:C:2013:862.

<sup>81</sup> C-544/15 *Fahimian* ECLI:EU:C:2017:255, para. 41.

as is provided by Article 21(7) of the Visa Code. In that respect, the diversity of the supporting documents on which the competent authorities may rely, a non-exhaustive list of which is set out in Annex II to that code, and the variety of methods available to those authorities, including interviewing the applicant as provided for in Article 21(8) of that code, *confirm the complex nature of the examination of visa applications*.<sup>82</sup>

No 'international relations' ground can thus be used, to introduce a purely citizenship-based disqualification without conducting 'a complex evaluation' of the 'foreseeable conduct' of individual applicants, and still comply with the EU's *acquis*: international relations in the 21<sup>st</sup> century are about states, not about projecting guilt on 140.000.000 individuals randomly holding a particular legal status, who are victims of citizenship,<sup>83</sup> no matter whether they have ever bothered to visit their country of nationality and no matter how much they would have preferred statelessness to the status they hold. International law enslaves, as Katja Swider has also shown<sup>84</sup>: it prohibits renunciations without acquiring another citizenship, while the latter is extremely difficult to do, especially if one's country is at war. In summary, unilateral measures to deny entry or residence in the Schengen zone uniquely based on a particular citizenship are unquestionably illegal under the Schengen *acquis* as it stands today.

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<sup>82</sup> C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* ECLI:EU:C:2013:862, paras. 56-58 (emphasis added).

<sup>83</sup> Dimitry V. Kochenov, 'Victims of Citizenship: Feudal Statuses for Sale in the Hypocrisy Republic' *COMPAS Working Paper* 156, December 2021.

<sup>84</sup> Katja Swider, 'Why End Statelessness' in Tendayi Bloom, Katherine Tonkiss, Phillip Cole (Eds) *Understanding Statelessness* (Routledge 2017).

## **The exceptions**

Exceptions to the Schengen visa rules regarding restrictions and bans are exhaustively set out in the legal texts. Such exceptions can relate, firstly, to the suspension of the Facilitation Agreement (and not the Schengen visa issuance itself), resulting in the suspension of the facilitation conditions. Two ways to suspend agreement privileges are available. Firstly, Article 15(5) of the Facilitation Agreement EU-Russia stipulates that each Party may suspend the Agreement in whole or in part for reasons of public order, protection of national security or protection of public health. This clause was activated by the Council<sup>85</sup> just after the breakout of the war on February 25 and suspended the privileges enjoyed by diplomats, related groups and business people. Pressured by the Baltic States, the Council reached a political Agreement to suspend the Facilitation agreement fully on August 31, 2022, on which the EU Commission followed up one week later by a proposal for a Council decision of such a suspension,<sup>86</sup> the Council concurring one day later.<sup>87</sup> As a result, the standard rules of the Schengen Visa Code apply to all Russian citizens.<sup>88</sup>

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<sup>85</sup> Council Decision (n 10).

<sup>86</sup> EU 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, Brussels, 6 September 2022 COM(2022) 661 final.

<sup>87</sup> Council Decision (EU) 2022/1500 of 9 September 2022 on the suspension in whole of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation *OJ L 234I*, 9 September 2022.

<sup>88</sup> The Commission equally issued guidelines on the issuance of Schengen visas to Russian citizens: EU Commission, Communication Providing guidelines on general visa issuance in relation to Russian applicants following Council Decision (EU) 2022/1500 of 9 September 2022 on the suspension in whole of the application of the Agreement between the European Community and the Russian Federation on the facilitation of the issuance of visas to the citizens of the European Union and the Russian Federation, Brussels, 9 September 2022 C(2022) 6596 final. Unsurprisingly, the guidelines fully honour the principle of individual assessment of all the visa applications.

The new full suspension of this Facilitation Agreement mainly affects specific categories of Russian citizens far removed from military violence; among them are students, researchers, athletes and journalists. The Commission seems aware of this and promised to address this issue in upcoming guidelines given ‘the importance of such categories of travelers for the EU and of continuing people-to-people contacts’.<sup>89</sup>

Secondly, Article 25a of the Visa Code<sup>90</sup> empowers the Council to suspend (part of) these privileges or impose higher visa fees when the country is not cooperating sufficiently in the field of readmission, exacerbating potential ‘selectivity effects of the visa policy by discriminating between individual cases owing to the political performance of the country of nationality.’<sup>91</sup> To our knowledge, this mechanism has never been used against Russia and, in any case, does not foresee bans solely based on a particular nationality.

The second option to limit Schengen visas concerns *individual* travel bans, in particular via common foreign and security policy sanctions.<sup>92</sup> This mechanism has been used by the Council toward several people close to Putin. Annulment requests are currently pending before the General Court.<sup>93</sup>

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<sup>89</sup> EU 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, Brussels, 6 September 2022 COM(2022) 661 final.

<sup>90</sup> Regulation (EU) 2019/1155 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code) [2019] OJ L188/1.

<sup>91</sup> Salvatore F. Nicolosi, ‘Refashioning the EU Visa Policy: A new turn of the screw to Cooperation on Readmission and to Discrimination?’ (2020) 22 *European Journal of Migration and the Law* 467, 490.

<sup>92</sup> Clara Portela, ‘Are European Union sanctions “targeted”?’ (2016) 29 *Cambridge Review of International Affairs* 912; Francesco Giumelli, Fabian Hoffmann & Anna Książczaková, ‘(2021) The when, what, where and why of European Union sanctions’ (2021) 30 *European Security* 1.

<sup>93</sup> At the time of writing, more than 20 cases were pending before the General Court (see for instance, the following pending cases: T-390/22, *Mndoiants v Council*; T-364/22, *Shulgin v Council*; T-362/22, *Bazhaev v Council*; T-360/22, *Berezkin v Council*; T-335/22, *Khudaverdyan v Council*, T-326/22, *Konov v Council* etc.).



It is necessary to keep in mind that, crucially, the Visa Facilitation Agreement does not concern the grounds on which a visa can be refused: the declarations about the significant reduction of visas to Russians following the decision to suspend the Agreement appears, at best, as a way to feed EU populist politicians' rhetoric or worse - as an implicit green-light given to Member States to use their margin of appreciation to limit the issuance of visas to Russian citizens. There is obviously a 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 phony public policy, internal security or international relations grounds as a way of irrational collective retribution, unknown to EU law. Such systematic practice besides violating EU law also raises important concerns in terms of fundamental rights as explained below. Despite such patent illegality, such unilateral measures would be difficult to challenge in practice: while any state that does not even pretend to issue a refusal on an individual basis, like Estonia unlawfully discriminating against Russian students, is committing a violation of EU law, which is possible to capture and challenge due to its blunt nature, even if this would be immensely difficult in practice. Moreover, although EU law provides for an effective remedy before national Courts, challenging a visa refusal on an individual basis can take months or years, making the visa application hopeless in certain cases.

Other practices which amount to an unlawful citizenship-based visa ban in breach of EU law have been but in place by some Member States. Besides some states closing their consulates simply making it materially impossible to apply for a visa, Estonia, Latvia and Lithuania accompanied by Poland have just agreed to close their borders for Russians holders of Schengen visas issued by other

Member States for “public security issue”<sup>94</sup> with some exceptions for diplomats, dissidents and family members.

This practice also raises serious legal issues in light of the Schengen System. The organization at the external Schengen Border is not different from the issuance of visa: Member States can refuse the entry of a Schengen visa holder only if he does not comply with some conditions enshrined in the Schengen Borders Code<sup>95</sup> which are basically the same as in the Visa Code (they are ‘closely connected’ as per the Court’s words<sup>96</sup>). The grounds of refusal are listed exhaustively and should be appreciated individually.<sup>97</sup> Refusing the holder of a Schengen Visa to cross the borders implies, in principle,<sup>98</sup> that the border guard will cancel or revoke the Schengen Visa issued by another country. In other words, a Russian citizen who has a visa issued by France risks having her visa revoked or cancelled only because of her Russian citizenship if she tries to enter the Schengen zone via one of the three Baltic States or Poland. Beyond the fact that such practice goes clearly against EU law for the reasons explained above regarding the visa ban, it also greatly endangers the whole Schengen system which is based on harmonization: as explained by the Court, this system:

‘presupposes that the conditions for the issue of uniform visas are harmonised, which rules out there being differences between the Member States as regards the determination of the grounds for refusal of such visas. In the absence of such harmonisation, the

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<sup>94</sup> Alexandra Brzozowski, ‘Baltics agree regional measures to restrict entry of Russians’, *Euractiv*, 7 September 2022: <https://www.euractiv.com/section/global-europe/news/baltics-agree-regional-measures-to-restrict-entry-of-russians/>.

<sup>95</sup> Regulation (EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification) OJ L 77, 23 March 2016, p. 1–52 (hereafter: the Schengen Borders Code).

<sup>96</sup> C-380/18 *Staatssecretaris van Justitie en Veiligheid v E.P.* ECLI:EU:C:2019:1071, paras. 35–36.

<sup>97</sup> See Articles 6, 14 of the Schengen Borders Code as well as Part A of Annex V.

<sup>98</sup> According to the Schengen Borders Code see Part A of Annex V.

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>99</sup>

This is nothing different from what the three Baltic States and Poland have just decided to implement. In short, the principle of Cooperation between Member States with a view to the effective implementation of border control appears to be completely dismantled as a result.<sup>100</sup>

To sum up: the lawfulness of nationality-based visa bans in EU law is deeply questionable. In practice this means that any decision of the Estonian authorities – or those of any other Member State – to base an exclusion of a Russian or a Belarusian citizen on citizenship status alone is outright unlawful, and has to be struck down immediately by any local court (however bad their track-record is in dealing with all things ‘Russian’<sup>101</sup>): offering an appeal route is also a legal requirement to ensure that the Rule of Law is complied with. This has prompted Estonia and other WWI-minded nations to look to the EU for the inclusion of visa policy within the supranational sanctions framework. Finland has joined this call to deny entry into the EU for Russian citizens. The Czech Republic – which currently holds the EU Presidency – has also joined this call.

Further, even if a sanctions route could be contemplated, it seems to be clear that removing the individual approach from EU migration policy, replacing it

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<sup>99</sup> C-84/12 *Rahmanian Koushkaki v Bundesrepublik Deutschland* ECLI:EU:C:2013:862, paras. 45-46.

<sup>100</sup> Article 17 of the Schengen Borders Code.

<sup>101</sup> Dimitry V. Kochenov, Vadim Poleshchuk, and Aleksejs Dimitrovs, ‘Do Professional Linguistic Requirements Discriminate? – A Legal Analysis: Estonia and Latvia in the spotlight’ (2013) 10 *European Yearbook of Minority Issues* 137.

with a citizenship-based approach (even if *de facto*, rather than *de iure*) would be an attempt to undo the human rights logic underpinning EU law today.<sup>102</sup>

### **No blanket ban is possible through the amendment of the Schengen *acquis***

The question that follows is whether it would be possible to amend the Schengen *acquis* to provide for blanket citizenship-based exclusions. The answer is less straightforward. The EU is competent to adopt measures concerning the common policy on visas and short-stay residence permits, in accordance with the ordinary legislative procedure.<sup>103</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>104</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.

Automaticity is the anti-thesis of the whole Schengen visa system. Political will and the possibility to amend aside, the adoption of a blanket citizenship-based ban would contradict the very *ratio legis* of the Schengen visa system: the individualisation of the treatment of visa applications. It would imply a complete change of the rationale underpinning the issuance of Schengen visas, which is based on individual assessment of whether the applicants fulfil the conditions.<sup>105</sup>

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<sup>102</sup> Barbara Grabowska-Moroz and Dimitry V. Kochenov, 'The Loss of Face for Everyone Concerned: EU Rule of Law in the context of the 'Migration Crisis' RECONNECT Working Paper No. 14 (Leuven), June 2021. Available at: [https://reconnect-europe.eu/wp-content/uploads/2021/06/WOP14\\_Kochenov\\_BGM.pdf](https://reconnect-europe.eu/wp-content/uploads/2021/06/WOP14_Kochenov_BGM.pdf).

<sup>103</sup> Article 77(2)(a) TFEU.

<sup>104</sup> 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 (Schengen Implementation Agreement), 19 June 1990.

<sup>105</sup> Article 21(1) of the Common Visa Code.

The Schengen Convention,<sup>106</sup> the Common Visa Code,<sup>107</sup> the Handbook for the processing of visa applications and the modification of issued visas,<sup>108</sup> as well as the Handbook for the administrative management of visa processing<sup>109</sup> provide for a strictly individual basis of assessment. Even a previous visa refusal cannot lead to an automatic refusal of a new application.<sup>110</sup> As mentioned earlier, it also transpires from a settled case law of the ECJ that the decision should be individual and that an effective remedy should be provided to the applicant.<sup>111</sup> Although the principle of good administration as enshrined in the EU Charter of Fundamental Rights (CFR)<sup>112</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>113</sup> In any case, it would be difficult for Member States to ignore this principle as AG Kokott writes, 'the Member States must also have regard to Article 41 CFR when applying Community law'.<sup>114</sup>

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

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<sup>106</sup> Agreement between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders, Schengen Agreement, 14 June 1985.

<sup>107</sup> Regulation (EU) 2019/1155 amending Regulation (EC) No 810/2009 establishing a Community Code on Visas (Visa Code) [2019] OJ L188/1.

<sup>108</sup> Annex to the Commission Implementing Decision amending Commission Decision C(2010) 1620 final as regards the replacement of the Handbook for the processing of visa applications and the modification of issued visas (Visa Code Handbook I) C(2020) 395.

<sup>109</sup> Annex to the Commission Implementing Decision establishing the Handbook for the administrative management of visa processing and local Schengen cooperation (Visa Code Handbook II) C(2020) 1764.

<sup>110</sup> Article 21(9) of the Common Visa Code.

<sup>111</sup> Cases C-225/19 and C-226/19 *R.N.N.S. and K.A.*, ECLI: EU:C:2020:951.

<sup>112</sup> Article 41 of the EU Charter of Fundamental Rights .

<sup>113</sup> See for instance: Case C-428/05 *Laub v. Hauptzollamt Hamburg-Jonas* [2007] ECR I-5069, para. 25. See also the analysis and cited the case-law 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' (2013) 9 *European Constitutional Law Review*, p. 73-101.

<sup>114</sup> Opinion of A.G. Kokott in Case C-392/08 *Commission v Spain* ECLI:EU:C:2010:164.

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

In her tweet, Kaja Kallas wrote, “Stop issuing tourist visas to Russians,” “Visiting Europe is a privilege, not a human right.”<sup>115</sup> If she is right that there is no fundamental right to receive a Schengen visa, it does not also mean that fundamental rights do not apply to more than a hundred million people she happens to be tweeting against, when examining and assessing a visa application. An automatic refusal of any application submitted by a Russian citizen would obviously be in contradiction with several human rights guarantees. It is of utmost importance to recall that among Russian citizens who ask for a Schengen visa, there are not only tourists who were criticized vehemently by the Finnish and Estonian Prime Ministers and other EU leaders, but also people who leave Russia for other reasons: humanitarian grounds, family, work, medical appointments, studies, and so on. Not examining these applications on an individual basis would be an attack on an array of fundamental rights, including the right to private and family life (beyond the violation of EU free movement law when family members of EU citizens are involved) and the prohibition of torture and inhuman treatment<sup>116</sup> and would be difficult, if not

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<sup>115</sup> Tweet by Kaja Kallas, Prime Minister of Estonia. Available at:

[https://twitter.com/kajakallas/status/1556903576726896642?ref\\_src=twsrc%5Etfw](https://twitter.com/kajakallas/status/1556903576726896642?ref_src=twsrc%5Etfw) (last accessed September 4, 2022).

<sup>116</sup> And the humanitarian visa would not be of great help here since it is not a competence of the EU even though the application is introduced on the basis of the Visa Code according to the controversial decision in C-638/16 PPU X and X ECLI:EU:C:2017:173. And the humanitarian visa would not be of great help here since it is not a competence of the EU even though the application is introduced on the basis of the Visa Code according to the controversial decision in C-638/16 PPU X and X ECLI:EU:C:2017:173. And the humanitarian visa would not be of great help here since it is not a competence of the EU even though the application is introduced on the basis of the Visa Code according to the controversial decision in C-638/16 PPU X and X ECLI:EU:C:2017:173.

impossible, to substantiate under the principle of proportionality. It would also sideline Russian citizens who live in a third country or a non-Schengen EU Member State and apply for Schengen visas (between 150,000 and 300,000 have left Russia<sup>117</sup> since the start of the war and millions more did so earlier).

More generally, an outright ban also greatly undermines the fundamental principle of equality before the law<sup>118</sup> and raises important questions of discrimination. Although EU law does not protect third country nationals against discrimination on grounds of nationality, even under the Charter,<sup>119</sup> the European Court on Human Rights, on the contrary, considers that a difference of treatment on grounds of nationality only constitutes a suspect criterion that calls for stricter scrutiny based on very weighty reasons.<sup>120</sup> However, none of the rare immigration cases decided based on Article 14 ECHR and the grounds of nationality, concerned denials of residence permit or visas.<sup>121</sup>

What's more, Article 21(1) CFR prohibits discrimination on the ground of ethnic origin. Although the ECJ adopts a restrictive understanding of discrimination on grounds of ethnicity and ethnic group,<sup>122</sup> it is not difficult to identify persons of a given ethnic origin who are at a disadvantage: 'Russian citizens' will obviously constitute a reference to an ethnic group in this context.

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<sup>117</sup> Karen Gilchrist, 'A Second Wave of Russians is Fleeing Putin's Regime,' *CNBC*, July 14 2022. Available at: <https://www.cnbc.com/2022/07/14/russians-flee-putins-regime-after-ukraine-war-in-second-wave-of-migration.html>.

<sup>118</sup> Article 20 CFR.

<sup>119</sup> Cases *C-22/08* and *C-23/08, Vatsouras and Koupatantze*, ECLI:EU:C:2009:344; Case *C-930/19 X. v. Belgian State*, ECLI:EU:C:2021:657.

<sup>120</sup> Evelien Brouwer and Karin de Vries, 'Third-country Nationals and Discrimination on the Ground of Nationality: Article 18 TFEU in the context of Article 14 ECHR and EU migration law: Time for a new approach' in Marjolein van den Brink, Susanne Burri, & Jenny Goldschmidt (Eds.), *Equality and Human Rights: nothing but trouble?* (Utrecht: SIM 2015).

<sup>121</sup> See Moritz Baumgärtel and Sarah Ganty, 'On the Basis of Migratory Vulnerability: Reasserting Article 14 of the European Convention on Human Rights for Vulnerable Migrants' (2022). Available at: <https://ssrn.com/abstract=4167342>

<sup>122</sup> Case *C-94/20 Land Oberösterreich v KV*, ECLI:EU:C:2021:477.

Excluding *only* some categories of Russians such as officials is different from a blanket travel ban: an individual approach is required and should be justified and proportionate. In this case, as underlined by Bornemann “the ‘sweeping’ travel ban would turn out not to be sweeping at all”.<sup>123</sup>

In any case, the reason for applying for a visa and the place where Russian citizens live notwithstanding, the war between Russia and Ukraine is not a compelling justification to treat Russian citizens as pariahs unworthy of human rights for no rational reason, given that Russia, like the majority of countries in the world, is not a democracy and that citizenship cannot be chosen or easily renounced.<sup>124</sup> Vile retributive logic is an unsuitable ground for a complete overhaul of the Schengen visa regime, established to diminish, rather than to boost violations of fundamental rights.

## PART II: THE BROADER POPULIST CONTEXT

### Rule of Law and the logic of just retribution

Be it the Baltic States, Poland, or any other Member State, blanket citizenship-based visa refusals are unlawful. We take it as beyond any doubt that any honest proportionality assessment of whatever grounds allowed in the law simply cannot conclude that more than 140,000,000 people, who happen to possess Russian citizenship and no other<sup>125</sup> could be rationally targeted in pursuit of a sufficiently clear and attainable goal. The law of the Union as we read it is clear:

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<sup>123</sup> Jonas Bornemann, ‘Heated tempers and legal ambiguities: Some (second) thoughts on an all-out Schengen ban of Russians’, *VerfBlog*, 2022/8/17, <https://verfassungsblog.de/heated-tempers-and-legal-ambiguities/>.

<sup>124</sup> Dimitry V Kochenov, ‘Ending the Passport Apartheid. The alternative to citizenship is no citizenship—A reply’ (2020) 18:4 *International Journal of Constitutional Law* 1525; Joseph H. Carens, ‘Aliens and Citizens: The Case for Open Borders’ (1987) 49 *The Review of Politics* 251.

<sup>125</sup> Indeed, should this not be the case, they will most likely not need a visa, travelling in their capacity of Brits, Kittitians or Israelis.



the whole point of the rule of law, agreeing with Martin Krygier, is that the law should temper power.<sup>126</sup> Political will cannot supersede the Rule of Law, unlike what some commentators claim:<sup>127</sup> the whole point is that legal principles survive political expediency, least there is no more rule of law.<sup>128</sup> At issue, thus, is not defending Russian citizens' rights or privileges. At issue is making sure that our law withstands populist attacks fueled by the passions of watching the news about a war at our border, rather than further away. On this count any contribution, of which there are now plenty, attempting to whitewash the idea of such bans as legally feasible is repugnant to the idea of the Rule of Law: the law is there to *limit* such theorizing, rather than enable it – precisely what distinguishes Putin's Russia, especially after it left the Council of Europe,<sup>129</sup> from the EU today.

Worse still, whatever type of a visa is suspended officially on illegal grounds, any such suspension harms those who wish to vote with their feet. In addition, there have been plenty, both in Russia and Belarus. Sergey Lagodinsky is right: helping those wishing to escape the regime as much as possible is indispensable.<sup>130</sup> It is indispensable to realize, in this context, that while blanket citizenship-based bans are repugnant to the logic of contemporary law, which is human rights-aware by definition and thus takes the individual as the starting point, extension of sanctions lists is always the way to go, as long as individuals are clearly named

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<sup>126</sup> Martin Krygier, 'Tempering Power' in Maurice Adams, Anne Meuwese and Ernst Hirsch Ballin (Eds) *Constitutionalism and the Rule of Law: Bridging Idealism and Realism in Constitutionalism and the Rule of Law* (CUP 2016).

<sup>127</sup> Merijn Chamon, *Why Banning Russian Tourists from Schengen Might not Be Unlawful*, *VerfBlog*, 2022/8/17, <https://verfassungsblog.de/not-unlawful/>.

<sup>128</sup> Gianluigi Palombella, 'The Rule of Law as an institutional ideal', in Leonardo Morlino and Gianluigi Palombella (Eds), *Rule of Law and Democracy: Inquiries into Internal and External Issues* (Leiden: Brill, 2010) 3.

<sup>129</sup> 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 15, 2022.

<sup>130</sup> Sergey Lagodinski on twitter: <https://twitter.com/SLagodinsky/status/1557707967453069312>.

and reasons for the bans are compelling enough for the courts in the EU to uphold the measures (not a difficult test to meet, if not an irrelevant one in practice,<sup>131</sup> but a hugely important fundamental starting point in principle).

The justification for the proposed bans, which now appear to potentially concern all types of visas and residence permits, each of which has to be treated differently by law, nevertheless appears to have two common elements: (1) ordinary Russian citizens are directly responsible for the invasion of Ukraine; and (2) entering EU is a privilege,<sup>132</sup> which Russian citizens do not currently deserve. Exceptions to the ban are proposed for some categories of people who already have ties with the EU, approach the status of refugee, or asylum seekers. The logic is captured in this sentiment: ‘If you want this privilege, do something in Russia first, earn this privilege, make some bold move, and then leave.’<sup>133</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>134</sup> the Czech Foreign Minister adds the concern that a visa ban could help ‘decrease the influence of the Russian secret service in the EU.’<sup>135</sup> Missing in the discourse on the visa ban is whether it will be effective, whether dissenters inside Russia have any real possibility to dissent,<sup>136</sup> and whether people who seek to leave Russia for

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<sup>131</sup> See Dimitry V. Kochenov, ‘Sanctions for Abramovich, but Schröder Goes Scot-Free’ *Verfassungsblog*, March 11, 2022. Available at: <https://verfassungsblog.de/sanctions-for-abramovich-but-schroder-goes-scot-free/>.

<sup>132</sup> Tweet by Kaja Kallas, Prime Minister of Estonia. Available at: [https://twitter.com/kajakallas/status/1556903576726896642?ref\\_src=twsrc%5Etfw](https://twitter.com/kajakallas/status/1556903576726896642?ref_src=twsrc%5Etfw) (last accessed September 4, 2022).

<sup>133</sup> 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*, August 13, 2022.

<sup>134</sup> Ibid.

<sup>135</sup> Statement by Czech Foreign Affairs Minister Jan Lipavský, reported in Belle de Jong, “Czech EU Presidency pushes to ban visas for Russians” *The Brussels Times*, August 12, 2022. Available at: <https://www.brusselstimes.com/eu-affairs/271209/czech-eu-presidency-pushes-to-ban-visas-for-russians>.

<sup>136</sup> Tatyana Margolin and Yelena V. Litvinov, ‘Putin Can’t Live with Dissent – That’s why he’s trying to silence his critics’ *OpenDemocracy*, March 2, 2022. Available at: <https://www.opendemocracy.net/en/odr/putin-cant-live-with-dissent-thats-why-hes-trying-to-silence-his-critics/>; Anvi Lohia, ‘Russia: Suppressing Dissent

the EU are all partygoers and potential members of the Russian secret service. In contrast with the sanctions imposed till now that sought to target the state and people acting on behalf of the state (it may be mentioned though that the super-rich were sanctioned for no outright clear reason, given that Russia is not an oligarchy and the 'oligarchs' could not stop the war in any case), the visa ban targets all Russians.

As the justifications above demonstrate, we are dealing with the logic of retribution: **the visa ban move targets people qua people**. After more than 75 years of human rights, the logic of the great world wars is back. The EU, following Putin himself, emerges as its potential unlikely promoter. The targeting of enemy aliens, and populist discourse to support such targeting, is unquestionably the mode of governance in wartime. However, EU has not officially entered any war with Russia, and the majority of the nationalist supporters of the pre-constitutional logic behind such bans would of course be wise enough not to support changing this. Further, war or no war, the populist move to categorise and punish people *en masse* is precisely what EU law – as well as any other modern constitutional system – was designed to make impossible.

### **Assisting the Putin regime through lawlessness**

The blanket visa ban – and the discourse surrounding it – punish an enormous randomly construed group of people *en masse*. We argue that this ban facilitates the autocratic state, the result precisely opposite to what the EU, including Estonia and Latvia, should be seeking in the current circumstances. The ban is not just unlawful but has deeply problematic consequences: it helps the Putin regime reach its goals of further closing down the country, entrapping the

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and Evading Accountability', *Democratic Erosion*, March 1, 2022. Available at: <https://www.democratic-erosion.com/2022/03/01/russia-suppressing-dissent-and-evading-accountability/>.

population inside, Soviet-style, where free speech, any form of political dissent, let alone freethinking, is eradicated. 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.

Despite the current Russian government condemning such visa bans,<sup>137</sup> such moves may only serve to strengthen Putin and his circle. In terms of discrete advantages, those who are discontent with the government are now locked in and brutalized if they seek to dissent. A visa ban spreads resentment about Russians among people in EU states and simultaneously about the EU among Russians, shifts a focus away from hard economic choices that could arguably make a dent in Putin's resolve. More generally speaking, blaming Russian citizens for the invasion of Ukraine significantly legitimizes the Putin government, as he is then 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 the same are ironic, as historically restrictions on emigration of Russian citizens has been a tool of state control of choice.<sup>138</sup> International law on leaving the country<sup>139</sup> has only recently been observed in Russia, and one of Putin's goals at this point would of course be to depart from it again. By having a hold on emigration via exit visas, autocratic states like the former USSR could control the flow of capital, information and disgruntled citizens, thereby maintaining the climate of fear and marginalization

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<sup>137</sup> Radio Free Europe/Radio Liberty, "Kremlin Lashes Out At European Leaders For Supporting Visa Ban For All Russians," August 9, 2022. Available at: <https://www.rferl.org/a/kremlin-lashes-out-europe-leaders-russian-visa-ban/31980424.html>.

<sup>138</sup> Andrea Chandler, *Institutions of Isolation: Border Controls in the Soviet Union and Its Successor States, 1917-1993* (McGill-Queen's University Press 1998).

<sup>139</sup> Dimitry V. Kochenov, 'The Right to Leave Any Country Including Your Own in International Law' (2012) 28 *Connecticut Journal of International Law* 43.

of dissent. Recent works on exit restrictions demonstrate 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>140</sup> Thus, if the suggestion to allow Schengen visas only on particular grounds of dissent were to be put in place, this would allow the Russian authorities to target dissidents clearly, as they would be revealed through the application process. In the absence of exit visas in Russia, the granting of entry visas by requiring travelers to reveal their political preferences would assist the Putin government in identifying dissenters at the border. Thus, while actual dissent or protest inside Russia to fulfill the conditions of an entry visa proposed by Estonia and Finland is next to impossible given evidence of repression, the requirement to reveal preferences in order to enter the EU puts anyone seeking to dissent in double jeopardy.

Yet another point needs to be made in the context of viewing the proposed ban as a helping hand extended to legitimize the Putin regime and help oppression. Law and policy have an expressive function – they affect opinion and behavior outside the specific contours of a particular policy.<sup>141</sup> An increasingly prevalent feature of the populist turn globally is governance through incitement.<sup>142</sup> While political leaders sometimes may not be able to advocate violence and

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<sup>140</sup> Hans Leuders, 'A Little Lift in the Iron Curtain: Emigration restrictions and the stability of closed regimes'. Available at: [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3541908](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3541908).

<sup>141</sup> Different perspectives on legal expressivism are collected in a *Maryland Law Review* symposium on the subject. Available at: <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' (2020) 34 *International Journal for the Semiotics of Law* 389.

<sup>142</sup> Richard Ashby Wilson and Jordan Kiper, 'Incitement in an Era of Populism: Updating Brandenburg After Charlottesville' (2020) 5 *University of Pennsylvania Journal of Law & Public Affairs* 56; Katarina Pettersson, 'The Discursive Denial of Racism by Finnish Populist Radical Right Politicians Accused of Anti-Muslim Hate-Speech' in Ov Cristian Norocel, Anders Hellström, Martin Bak Jørgensen (Eds) *Nostalgia and Hope: Intersections between Politics of Culture, Welfare, and Migration in Europe* (Springer 2020) 35; Suryapratim Roy, 'Never any End to an Event: Review article on law and historical memory' (2018) 13 *Journal of Comparative Law* 132, 136

humiliation of communities through explicit laws, such means are achieved through lending support to certain discourses, or discrediting them. From the statements surrounding visa bans, it appears that Russian citizens have genocidal inclinations, are spies seeking to infiltrate Europe, and have not yet earned the privilege to enter Europe as individuals. They need to prove their capacity to enter Europe by explicitly turning against the Russian state. In this therefore through defection that a Russian could overcome one's Russian tendencies and become European. Simply put, Russians are not people *qua* people. It is the 'blood and soil' justification behind a global passport apartheid<sup>143</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 Europe.<sup>144</sup>

Despite scholars such as Jussi Lassila pointing out how a visa ban might be counterproductive,<sup>145</sup> it may be asked why it is being advocated. One explanation is that it's quick solidarity with President Zelensky. However, this does not explain why states have not been quick to accept the president's other suggestions such as no flight zones, gas import bans and the like: the EU continues bankrolling the war, as the Russian gains due to the high energy prices<sup>146</sup> by far outweigh the military and civilian help that Ukraine gets.<sup>147</sup> To us, there appear to be two explanations – first, blaming foreigners in relation to one's

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<sup>143</sup> Kochenov (n 125).

<sup>144</sup> Victor Jack, "Russian students in Europe face discrimination — and pressure from Moscow", *Politico*, July 16, 2022. Available at: <https://www.politico.eu/article/university-russia-student-europe-against-sanction-threat-discrimination/>.

<sup>145</sup> Lassila interview with Yleisradio Oy reported in "Finland to consider restricting tourist visas for Russians", *YLE News*, August 14, 2022. Available at: <https://yle.fi/news/3-12575674>.

<sup>146</sup> Centre for Research on Energy and Clean Air, *Financing Putin's war on Europe: Fossil fuel imports from Russia in the first two months of the invasion* (CREA, 2022). Available at: <https://energyandcleanair.org/publication/russian-fossil-exports-first-two-months/>.

<sup>147</sup> Statement by Josep Borrell Fontelles, High Representative of the Union for Foreign Affairs and Security Policy, reported in Jennifer Rankin, "€1bn for Ukraine, €35bn for Russian energy: top EU diplomat calls out funding gap", *The Guardian*, April 6, 2022. Available at: <https://www.theguardian.com/world/2022/apr/06/1bn-for-ukraine-35bn-for-russian-energy-eu-chief-calls-out-funding-gap>.

own borders provides easy popularity for the incumbent government both inside the state and outside due to the moral capital that such a move would entail.<sup>148</sup> For Estonia and Latvia, this move has the added advantage of appealing to negative sentiments about Russians in such territories as well as an anti-minority constitutionalism at the heart of these states, which are multi-ethnic societies denying own *de facto* nature in their constitutions while creating ethnic electorates.<sup>149</sup> The second, it shifts focus away from sanctions that entail less-popular economic choices. Overall, the move would blame, scapegoat and incite people, which would only strengthen incumbent governments inside and outside Russia.

## **An outright populist assault on EU law is the litmus test for the Rule of Law in the EU: Conclusion**

The whole debate around the visa ban, as well as the Union's *de facto* powerlessness in the face of the Member States' arbitrary replacement of the law with hateful citizenship-based retribution is a stress test of the Rule of Law in the EU.

Any *en masse* visa ban follows a retribution logic that counterproductively strengthens Putin's position, and in effect abets the continuing invasion of Ukraine. Any consideration of a departure from the human rights logic the EU is built upon, let alone outright defiance of EU law by a handful of Member States outvoted in Council corrodes the EU's commitment to the Rule of Law.

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<sup>148</sup> Busby argues that the selection of moral causes by governments cannot always be explained by short-term economic interests, and is more granular. Joshua W. Busby, *Moral Movements and Foreign Policy* (CUP 2010).

<sup>149</sup> For an account of the systematic way in which an ethnic electorate was constructed in Estonia, see Richard C. Visok, 'Creating the Ethnic Electorate through Legal Restorationism: Citizenship Rights in Estonia' (1997) 38 *Harvard International Law Journal* 315.

We demonstrated that there is no legal way under current EU law to adopt a citizenship-based ban against Russians and Belarusians acquiring Schengen visas and entering EU territory. More still: amending the law to allow for a citizenship-based ban could go against the core values the Union is based upon, pitting the populist proposals against the Rule of Law. This is the reason behind the move by the Baltic States and Poland to implement a *de facto* ban at the national level illegally using Russian citizenship as a ground of refusal of entry in breach of EU law following their defeat in Council on the matter.

The necessity of other Member States and institutions of the Union to put sufficient pressure to save the Schengen system from unlawful populist fragmentation emerges as an imperative in current circumstances. The Union's strength is precisely in its inability to act along the populist lines the ban implies, rather than one of its weaknesses, as the alarmist agitation of the Baltic States and Poland against the law alleges. Central to the citizenship-based travel ban is a replacement of reason required by the Rule of Law with randomly assigned retribution, which on the face of it is unrelated to any legitimate aims to be achieved by the measure. The replacement of the Rule of Law with retribution, in turn, counterproductively strengthens Putin's authoritarian regime.



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