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EU Law, Asylum and the Spatialities of Fundamental Rights

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Abstract

This study is a contribution to the field of critical migration law studies. Examining the *externalization* of EU migration and border control, it addresses the *asymmetry* between where EU border control takes place and where the obligation to protect fundamental rights applies under international law and EU law. Instead of offering legal solutions on how to bridge the gap of incoherence, the study contextualizes the asymmetry at two sites of EU migration and border control: the Belgian embassy in Beirut and the border crossing point at Beni-Enzar in Melilla. Addressing these sites as *scenes of spatio-legal interaction*, the study offers examples of how EU migration and border control law interacts with *space*, and how this interaction shapes the asymmetry.

The aim of the study is to critically examine and to demonstrate how the spatio-legal interaction of the EU border regime affects the conditions under which individual rights can be enforced at the EU's external borders. Inspired by legal geography – a field that addresses the complex co-constituting of law and space – this study employs a qualitative legal doctrinal method, analysing the protection of individual rights within the contextual setting of the scenes of spatio-legal interaction. With theoretical perspectives from Massey and Philippopoulos-Mihalopoulos, it applies the concept of *invisibilization* to the EU border regime, subjecting it to theoretical and critical analysis, and demonstrating that fundamental rights – and the state obligations corresponding thereto – are invisibilized through the interaction between law and space. The study concludes that the spatio-legal interaction of the EU border regime generates a web of control, a *borderscape*, that serves to obstruct protection seekers from entering the Union. In borderscape, the border takes a variety of shapes, advancing and retreating in relation to where you are and who you are. It controls space and mobility, but without necessarily triggering the obligation to protect fundamental rights when protection seekers are 'at the border'. Taking account of space and of spatial relationships, this study contributes to an understanding of the conditions under which individual rights can be enforced at the EU's external borders. In the process, it sheds new light on how these borders can be comprehended.

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Kristina Wejstål
Majorna, 16 January 2024

Abbreviations

AFSJ	Area of Freedom, Security and Justice
APD	Asylum Procedures Directive
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CoE	Council of Europe
CPT	European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
CRC	Convention on the Rights of the Child
EASO	European Asylum Support Office
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ECtHR	European Court of Human Rights
EU	European Union
EU Charter	Charter of Fundamental Rights of the European Union
CEAS	Common European Asylum System
CJEU	Court of Justice of the European Union
CRC	Convention on the Rights of the Child
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IOM	International Organization of Migration
LTV	Limited Territorial Visa
RCD	Reception Conditions Directive
RD	Return Directive
SBC	Schengen Borders Code
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UDHR	Universal Declaration of Human Rights
UNHCR	United Nations High Commissioner for Refugees

PART I – INTRODUCTION

1 Fences and Walls

When erecting a fence or building a wall, you immediately disrupt space. You organize a 'spatial relationship' of inside and outside, a centre and a periphery of attention. The gardener fencing the garden may forget that the area left outside used to be part of the same space. Yet, the garden exists as a space beyond the boundary that has been imposed: the flowers and the grass keep their connection and retain their relationship. If one side gets out of water, the vegetation will start to seek it elsewhere – fence or no fence. It lives, grows, and it dies within a spatial relationship of inside and outside.

The location of the gardener's fence may be the consequence of laws relating to property and land. The fence can thus be understood as a materialization of law and of law's spatial embeddedness, a manifestation of how law co-produces the space it governs and how it constructs 'spatio-legal' relationships. Such relationships can be found between the gardens of a village – and also, as we shall see in this study, at sites of migration and border control. The latter are scenes where states, citing their sovereignty and enforcing their rules on migration and border control, fence out and prevent (some) people from entering their territory. In so doing, they generate a relationship of insiders and outsiders. Taming space and mobility through border control – materialized as fences patrolled by armed border guards – or by legal boundaries through the imposition of visa requirements, they redirect those trying to cross the border by regular means into other trajectories. Often dangerous ones.

Being the acts of a gardener or a state, the taming of space and mobility through boundaries and borders interacts not only with people and our social relations, but also with natural landscape. For a protection seeker, mountains and seas can be harsh to cross as natural landscape but even worse when played out as materialization of laws that divide and delineate space and mobility – welcoming some bodies, denying others. When a natural landscape such as the Mediterranean Sea becomes inscribed with legal significance through migration and border control law, it takes the shape of a deadly and

impenetrable spatio-legal border (for some bodies).[1] Yet, the ensuing deaths appear natural – a result of water and unseaworthy boats – rather than being the effect of laws which obstruct migrating subjects from gaining access to the EU by a plane or ferry. As geographers Doreen Massey and Pat Jess point out:

> Natural features are not naturally boundaries. Mountain ranges may form frontier barriers or be the unifying basis for a mountain state; rivers may be boundaries between nations, or their valleys may be the uniting feature of a social community.[2]

Natural landscapes can thus constitute boundaries between states and peoples, or be features uniting people beyond borders. Gardens and states – with their boundaries drawn by law, materialized with or without fences – can be spaces of coexistence.

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[1] Cf. Irus Braverman and others, *The expanding spaces of law: A timely legal geography,* Stanford University Press (2014) on how social space, lived places and landscapes are inscribed with legal significance, p. 1.

[2] Doreen Massey and Pat Jess, *A place in the world? Places, cultures and globalization,* Oxford University Press (1995), p. 68.

Fences and Walls of Migration and Border Control in 2023

* The border fence between North Macedonia and Greece was built by North Macedonia as a response to the refugee 'crisis' and thus not by an EU or Schengen state.

Image (1)[3] Before the Russian invasion of Ukraine, the fall of the Berlin wall and the end of the cold war were thought to have marked the end of the primary east/west bipolarity,

[3] Illustration made by the author. Information on external fences and walls of border control has been collected in Costica Dumbrava, Walls and fences at EU borders, 2022; UNHCR, Border fences and internal border controls in Europe, 2017; and 'Migration: The fences divide Europe: x-ray of the walls with which the EU tries to contain irregular migration' (time.news).

and to have inaugurated a transformation of security politics.[4] Other borders, however were soon erected. Since the beginning of the nineties, the member states of the EU and Schengen have built more than 2000 km of walls and fences in order to prevent people from entering Europe.[5] This is more than 13 times the total length of the Berlin wall. About 13% of EU's external land borders are fenced off.[6] Most of these fences have been put up since the so called 'refugee crisis' of 2015/2016.[7]

1.1 Framing the Study

This study analyses the laws that organize the EU's external border, and the interaction of law and space. In doing so, the study identifies how 'the EU border regime' constructs spaces of exclusion, puts bodies at risk, and distributes mobility and fundamental rights as well as access to EU territory and asylum procedures.[8]

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[4] The concepts of national security and state sovereignty can be traced to the 1648 Peace of Westphalia. The term 'national security' entered general usage at the beginning of the Cold War. No single definition of national security is generally accepted at either the European or global level. The concept must instead be understood according to what is perceived as a threat (traditionally conceived as a military or political threat). Espionage by foreign actors or intervention by foreign powers are commonly thought to constitute legitimate grounds for concern in connection with national security. See Iain Cameron, *National security and the European Convention on Human Rights,* Brill (2000), pages 39 and 56. In Europe today, however, migration too is regarded as a question of security.

[5] The Schengen area encompasses most EU States, except for Bulgaria, Cyprus, Ireland, and Romania. Bulgaria and Romania are in the process of joining the Schengen area. Iceland, Liechtenstein, Norway, and Switzerland have joined the Schengen area as non-EU states.

[6] Dumbrava, Walls and fences at EU borders, 2022.

[7] The problem with using the word 'crisis' here is that it implies a threat, necessitating exceptional measures and crisis-focused policy making. This can serve to normalize violence in migration management. Some scholars prefer to label the situation a 'crisis of governance' or a 'crisis of the common European asylum system'. See e.g. Alison Mountz, *The death of Asylum,* University of Minnesota Press (2020), pages xviii–xx; Leonie Ansems de Vries and Elspeth Guild, 'Seeking refuge in Europe: spaces of transit and the violence of migration management', *Journal of Ethnic and Migration Studies* (2019).

[8] I use the term 'EU border regime' to describe the overall system that controls movement into the EU. Legal sources of the EU border regime include inter alia the Schengen Borders Code, Regulations on Visas and Carrier restrictions, and the Common European Asylum System. I also include third country agreements, arrangements and cooperation aiming at controlling and managing migration to the EU in the term. For a detailed description, see section 1.5.2.1.

A right to enter a state in order to seek asylum there has never been fully recognized in international, or EU human rights and refugee law. In general, the right to seek asylum and the principle of non-refoulement[9], as well as the corresponding state obligations, are subject to the jurisdiction of a state, which in turn as a general rule is tied to the state's territory, thus applying to persons within its bounds. The right to seek asylum and the principle of non-refoulement are therefore not (generally) enforceable until an individual has gained access to the state's territory (meaning in this study, the territory of an EU member state).[10] This 'territoriality' of the right to seek asylum is an explicit provision of the Common European Asylum System (CEAS)[11], which covers

[9] The principle of non-refoulement guarantees that no one should be returned to a country where they would face torture, cruel, inhuman, or degrading treatment or punishment and other irreparable harm. The principle of non-refoulement follows from international, European and EU human rights and refugee law. The ordinary meaning of the French term 'refouler' is to drive back, repel, or re-conduct. See Sir Elihu Lauterpacht and Daniel Bethlehem, *The scope and content of the principle of non-refoulement: Opinion,* Cambridge University Press (2003). See also section 2.1.1.2 in this study for a description of the scope of the principle of non-refoulement.

[10] Refugees who are resettled under the UNHCR's resettlement programme for quota refugees are a rare exception to this rule. Only half of the EU's 27 member states participate in this programme. UNHCR (the Office of the United Nations High Commissioner for Refugees) is the UN's refugee Agency.

[11] The CEAS includes Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (the Asylum Procedures Directive); Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (the Reception Conditions Directive); Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (the Qualification Directive); Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (the Dublin Regulation); and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for

applications for international protection made in the territory, at the border, in the territorial waters, or in the transit zones of the member states.[12] Seeking asylum in the EU, then, requires that the protection seeker[13] is physically

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determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes (the Eurodac Regulation).

[12] The terms of the Dublin Regulation, the Asylum Procedures Directive and the Reception Conditions Directive make clear that they are not to apply to requests for diplomatic or territorial asylum submitted to representations of member states abroad (Article 3(1) of the Dublin Regulation, Article 3(1) and (3) of the Asylum Procedures Directive, and Article 3 (1) and (2) of the Reception Conditions Directive).

[13] I use the term 'protection seeker' in this study for subjects in different stages of fleeing. I have considered other terms, such as asylum-seeker or refugee. These latter terms, however, are tied to certain spatial and temporal conditions. Formally speaking, an asylum-seeker is someone who has applied for asylum in a host country. Said person is an asylum-seeker for as long as that person's case has not yet been decided. This status is therefore temporary. 'Refugee', for its part, does not involve the same formal applicability and temporality. A fleeing subject qualifies as a refugee within the meaning of the Refugee Convention as soon as the criteria contained within that definition are fulfilled. According to the UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (para. 28), that necessarily occurs prior to the time at which a person's refugee status is formally established and recognized. However, refugee status only applies to persons who flee persecution; it does not generally include subjects fleeing from war zones, for example. Furthermore, according to international and European asylum law, a person is only eligible for asylum as a refugee, or for subsidiary protection, when outside their country of origin. Thus, the label of asylum-seeker or refugee may be misleading when used for people who have not yet left their country of origin. Other terms, such as migrant or immigrant, are not appropriate for this study either. 'Migrants', who are people that migrate from one point to another, have several subcategories: e.g., people who migrate due to work, marriage, asylum, family, poverty, etc. The term also carries normatively loaded connotations, of both a socioeconomic and security-related kind (see e.g. Elspeth Guild, *Security and migration in the 21st century,* Malden, MA: Polity (2009), p. 14). Frequently, moreover, it features prefixes like 'regular', 'irregular', 'legal', or 'illegal'. These are connected with the migration discourse in the host state, and with knowledge (or lack thereof) about the migrating persons. (Regular and legal migrants have generally passed through formal processes of the host state, whereas irregular or illegal migrants have arrived without yet passing through those processes.) Based on these several considerations, I have found the term 'protection seeker' to be the most appropriate for this study.

present within the state's territory or at its border. Thus, access to asylum in the EU is dependent on access to territory.

In contrast to the 'territoriality' of the right to seek asylum and the principle of non-refoulement, border and migration control is not just applied within the territory of a member state or at its territorial borders. It is also applied extraterritorially, through its 'externalization' into third countries. This is done through legislation on visas and carrier sanctions, as well as through bilateral and multilateral agreements between states on support for border control and migration management in and by third countries. Externalization disrupts the link between border control and the protection of fundamental rights at borders, and challenges the Westphalian notion of borders – as 'lines' demarcating one territory from another.[14] Under international law and its

[14] Under the Westphalian doctrine of statehood, territorial geography and state sovereignty are understood as determined by static lines demarcating one state from another. Cf. Ayelet Shachar, *The shifting border: Legal cartographies of migration and mobility – Ayelet Shachar in dialogue,* Manchester University Press (2020), p. 17. The notion of 'Westphalian lines' is used in the study to connect the territoriality of fundamental rights to the Westphalian understanding of borders. As this study will make clear, however, a border can never only be understood as a line separating territories. The Westphalian doctrine of statehood furthermore has a colonial and imperial history which has been acknowledged in scholarship on borders. For analyses of the Westphalian doctrine of statehood and the colonial and imperial history of the nation-state and its sovereignty – and thus the colonial construction of borders – see e.g. Nadine El-Enany, *Bordering Britain: Law, race and empire,* Manchester University Press (2020); Radhika Mongia, 'Race, nationality, mobility: A history of the passport', in Antoinette Burton (ed), *After the imperial turn: Thinking with and through the nation* (Duke University Press 2003); Radhika Mongia, *Indian migration and empire: A colonial genealogy of the modern state,* Duke University Press (2018); Nandita Sharma, *Home rule: National sovereignty and the separation of natives and migrants,* Duke University Press (2020); Tendayi E. Achiume, 'Migration as decolonization', *Stanford Law Review* (2019); and Frédéric Mégret, 'The contingency of international migration law: "Freedom of movement", race and imperial legacies', in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in international law* (Oxford University Press 2021). On how colonialism is constitutive of the doctrine of sovereignty, see e.g. Antony Anghie, *Imperialism, sovereignty and the making of international law,* Cambridge University Press (2005); and Tendayi E. Achiume and Asli Bali, 'Race and empire: Legal theory within, through and across national borders', *UCLA Law Review* (2021). On how race operates as a means of enforcing borders, see e.g. Tendayi E. Achiume, 'Racial borders', *Georgetown Law Journal* (2022). The Westphalian lines are however intrinsic in public international law on statehood, territory, and jurisdiction. The Westphalian state is since the 1648 Peace of

concept of jurisdiction, territorial borders serve to distribute fundamental rights afforded to individuals, and states' accountability hereof.[15] When border control is externalized and takes place outside the acting state's territory, a protection seeker can be obstructed by 'a border' without being 'at the border' in the sense that applies under the CEAS, or necessarily within that state's jurisdiction either. There is thus a spatial discrepancy between where border control takes place and where the obligation to protect the right to seek asylum and the principle of non-refoulement applies. This means that border and migration control run on another spatiality than do the right to seek asylum and the principle of non-refoulement, which remain primarily territorial. Due to this 'asymmetry' between where border control takes place and where the obligation to protect fundamental rights applies, the location of a protection seeker will determine that person's ability to access certain rights. The study takes its starting point in this asymmetry.

Westphalia regarded as the primary actor in the international legal order. Under this doctrine, entitlement to statehood is a matter governed by a set of criteria that form customary international law. Following from Article 1 of the Montevideo Convention on the Rights and Duties of States (1933), a state 'as a person of international law should possess the following qualifications: a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with other States'. On the Westphalian doctrine on statehood in international law, see e.g. Jan Wouters, Cedrik Ryngaert, Tom Ruys, Geert de Baere, *International law: a European* perspective, Hart Publishing (2019); Malcolm N. Shaw, *International law,* Cambridge University Press (2021); Malcolm D. Evans, *International Law*, Oxford University Press (2018); and James Crawford, *Brownlie's principles of public international law*, Oxford University Press (2019).

[15] The concept of jurisdiction in international law is a complex concept. Jurisdiction can, as Chimni has noted, serve to promote, or legitimate certain social and political interests, and have significant effect on e.g. class, gender, and race. Chimni notes that 'there is an intimate relationship between the rules and practices of jurisdiction and the historical evolution and development of capitalism and the phenomenon of imperialism'. Chimni further notes that jurisdiction is a 'dynamic social institution which is produced and reproduced through a set of social, cultural and political practices and strategies embedded in particular social formations and the different power of states.' See B.S. Chimni 'The international law of jurisdiction: A TWAIL perspective', *Leiden Journal of International Law* (2022), pages 30 and 37. Chimni refers to R.T. Ford, 'Law's territory: A history of jurisdiction', *Michigan Law Review* 1999. See also Thomas Spijkerboer on how colonial structures contribute to undermining migrant's rights and how coloniality is a structuring element in European migration and human rights law. See Spijkerboer 'Coloniality and Recent European Migration Case Law', in V. Stoyanova and S. Smet (eds) *Migrants' Rights, Populism and Legal Resilience in Europe* (Cambridge University Press 2022).

The thesis is a contribution to the scholarly debate on international and European migration law. In critical migration law studies, the above-mentioned asymmetry is often studied through doctrinal research focusing on state obligations in terms of extraterritorial jurisdiction in relation to the right to seek asylum and the principle of non-refoulement.[16] Such contributions have provided important analyses on the accountability of states involved in extraterritorial border and migration control activities that affect the fundamental rights of protection seekers. This study springs from previous research in the critical migration law field. However, it offers an alternative framing of the asymmetry. Instead of trying to 'solve' the asymmetry by offering legal doctrinal analysis on how to bridge the gap of incoherence, this study contextualizes the asymmetry and analyses how fundamental rights, and the corresponding state obligations, are 'invisibilized' through the EU border regime's 'spatio-legal interaction'. This involves an analysis of how fundamental rights – which do not generally have universal application – are spatially

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[16] See e.g. Maarten den Heijer, *Europe and extraterritorial asylum,* Bloomsbury (2012); Violeta Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law,* Oxford University Press (2017); Violeta Moreno-Lax and Cathryn Costello, 'The extraterritorial application of the Charter: From territoriality to facticity, the effectiveness model', in Peers S and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014); and Gregor Noll, *Negotiating asylum: the EU acquis, extraterritorial protection and the common market of deflection*, Diss. Lund: Univ. (2000). For an overview of extraterritorial asylum and visas for asylum purposes, see Thomas Gammeltoft-Hansen, *Access to asylum: International refugee law and the globalisation of migration control,* Cambridge University Press (2011); den Heijer, *Europe and extraterritorial asylum* (2012); Violeta Moreno-Lax, '*Asylum visas as an obligation under EU Law: Case PPU C-638/16 X, X v État Belge (Part II)*' (2017) EU migration law blog; Ulla Iben Jensen, Humanitarian visas: option or obligation?, 2014; and Gregor Noll, 'Seeking asylum at embassies: A right to entry under international law?', *International Journal of Refugee Law* (2005). For contributions on cooperation and third country agreement, see Kienast, Feith Tan and Vedsted-Hansen 'EU third country arrangements: Human rights compatibility & attribution of responsibility', Asile Project, 2023; Juan Santos Vara, 'Soft international agreements on migration cooperation with third countries: a challenge to democratic and judicial controls in the EU', in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the external dimensions of EU migration policies in times of crisis* (Edward Elgar Publishing Limited 2019); Mariagiulia Giuffré and Violeta Moreno-Lax, 'The rise of consensual containment: from 'contactless control' to 'contactless responsibility' for migratory flows', in Satvinder Singh Juss (ed), *Research handbook on international refugee law* (Edward Elgar Publishing 2019); and Thomas Gammeltoft-Hansen, 'International cooperation on migration control: Towards a research agenda for refugee law', *European Journal of Migration and Law* (2018).

distributed and organized under the EU border regime. The analysis addresses how the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) interpret the concept of jurisdiction under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the field of application of the EU Charter of fundamental rights (EU Charter) with a focus on the spatiality of such instruments' scope of applicability. The study furthermore analyses how social relations of e.g. gender and race, and physical fortifications of the EU's external border and natural landscape 'draw boundaries' that increase the effect of the asymmetry, as well as obstruct access to EU territory and subsequent asylum procedures.[17] This means that the study addresses the legal sources of the EU border regime and the asymmetry as spatially and materially present in the reality that protection seekers 'alter' and live through when trying to access EU territory.[18] From this perspective, the EU border regime, and the asymmetry it expresses, is understood as both spatially 'embedded' in fences, barbwire and in natural landscape, and as 'embodied' by those who seek protection.

Engaging with ideas on the spatiality of law, this study grapples with the question of how the EU border regime shapes and is shaped by the spaces in which and through which it operates. This approach is inspired by legal geography, a field that addresses the complex interplay and co-constitution of space and law. This includes a 'rethinking of law', as well as ideas about law's 'closure'; and it highlights the political nature, social relations, and power conditions of law-making and law enforcement.[19] Legal geographers analyse the co-constitutive relationships of people, space, and law, and often address the question of law's spatiality, 'the spatial distribution of law', and the way in

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[17] According to Massey, boundaries are drawn between 'us' and 'them' and are constructed through and against 'others'. According to Massey not only social relations can form boundaries, but also natural landscapes are part of their production. See Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), p. 68. For a description on how the idea of boundaries is used in this thesis, see section 1.4.

[18] According to Massey, you cannot just pass by or cross space or place, you are instead part of its production. You thus 'alter' space and participate in its continuing production. See Doreen Massey, *For space,* London: SAGE (2005), p. 118.

[19] Tayanah O'Donnell, Daniel F. Robinson and Josephine Gillespie, *Legal geography perspectives and methods,* Routledge (2020).

which spatial settings affect legal implementation and drafting (and vice versa).[20] Scholars such as Irus Braverman,[21] David Delaney,[22] Nicholas Blomley,[23] Davina Cooper,[24] and Mariana Valverde[25] have addressed how law and politics interact with space.[26] Leaning on such contributions, the study analyses the protection of individual rights under asymmetric conditions, and presents a spatio-legal analysis of the EU border regime. In order, moreover, to throw light on the above-mentioned asymmetry as a spatio-legal phenomena, spatial perspectives – mainly those offered by Doreen Massey[27] and

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[20] Luke Bennett and Antonia Layard, 'Legal geography: Becoming spatial detectives', *Geography Compass* (2015), p. 414. See also e.g. Floris de Witte, 'Here be Dragons: Legal geography and EU law', *European Law Open* (2022).

[21] See e.g. Irus Braverman, 'Hidden in plain view: Legal geography from a visual perspective', *Law, culture and the humanities* (2011); and Braverman and others, *The expanding spaces of law: A timely legal geography* (2014).

[22] See e.g. David Delaney, *The spatial, the legal and the pragmatics of world-making: Nomospheric investigations,* Routledge-Cavendish (2010); and David Delaney, 'Beyond the word: Law as a thing of this world', in Jane Holder and Carolyn Harrison (eds), *Law and geography, current legal issues* (Oxford Academic 2003).

[23] See e.g. Nicholas K. Blomley, 'Disentangling law: The practice of bracketing', *Annual Review of Law and Social Science* (2013); Nicholas K. Blomley and Joel C. Bakan, 'Spacing out: towards a critical geography of law', *Osgoode Hall Law Journal* (1992); and Nicholas K. Blomley, *Law, space, and the geographies of power,* Guildford (1994).

[24] See e.g. Davina Cooper, *Governing out of order: Space, law, and the politics of belonging,* Rivers Oram Press (1998).

[25] See e.g. Mariana Valverde, 'Jurisdiction and scale: Legal "technicalities" as resources for theory', *Social & Legal Studies* (2009); and Mariana Valverde, *Chronotopes of law: jurisdiction, scale, and governance,* Abingdon, Oxon, New York, NY: Routledge (2015).

[26] See also Boaventura de Sousa Santos, 'Law: A map of misreading. Toward a postmodern conception of law', *Journal of Law and Society* (1987); Michele Statz and Lisa R. Pruitt, 'To recognize the tyranny of distance: A spatial reading of Whole woman's health v. Hellerstedt', *Environment and Planning A: Economy and Space* (2019); David Harvey, *Social justice and the city,* Edward Arnold (1973); Henri Lefebvre, *The production of space,* Oxford: Basil Blackwell (1991); Michel de Certeau, *The practice of everyday life,* Berkeley: University of California Press (1984); and Dana Cuomo and Katherine Brickell, 'Feminist legal geographies', *Environment and Planning A: Economy and Space* (2019).

[27] Doreen Massey, 'Politics and space/time', *New Left Review* (1992); Doreen Massey, 'Power-geometry and a progressive sense of place', in J Bird and others (eds), *Mapping the futures: local cultures, global change* (Routledge 1993); Doreen Massey, *Space, place and gender,* Oxford: Polity Press (1994); Massey, *For space* (2005); Massey and Jess, *A place in the world? Places, cultures and globalization* (1995).

Andreas Philippopoulos-Mihalopoulos[28] are brought into the study (see section 1.4).

Among other legal scholars, Ayelet Shachar has studied migration and border control from spatial perspectives. Shachar puts forward the notion of a 'shifting border', an adjustable legal construct 'untethered in space', and addresses the development of legal tools that limit the rights of 'migrants' before and after they enter a country's territory.[29] Magdalena Kmak has analysed the multifaceted ways law operates in the context of human mobility, and how human mobility affects law.[30] Sara Keenan has addressed how 'borders' produced by laws on migration and border control attach themselves to individual subjects, and how law operates unevenly depending on who, and where you are.[31] Estelle Evrard, who has studied 'EUropean borderlands' has

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[28] Andreas Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere,* Routledge (2015); and Andreas Philippopoulos-Mihalopoulos, 'And for law: Why space cannot be understood without law', *Law, culture and the humanities* (2018).

[29] Shachar, *The shifting border: Legal cartographies of migration and mobility – Ayelet Shachar in dialogue* (2020). Other spatio-legal interventions on migration and borders have been made by such legal scholars as Irus Braverman, see e.g. Braverman and others, *The expanding spaces of law: A timely legal geography* (2014); Leti Volpp, 'Imaginings of space in immigration law', *Law, culture and the humanities* (2013), and 'Signs of law', in Leti Volpp, Marianne Constable and Bryan Wagner (eds), *Looking for law in all the wrong places: Justice beyond and between* (Fordham University Press 2019); Giuseppe Campesi, *Policing mobility regimes: Frontex and the production of the European borderscape,* Routledge (2021); Pauline Maillet, Alison Mountz and Kira Williams, 'Exclusion through imperio: Entanglements of law and geography in the waiting zone, excised territory and search', *Social & Legal Studies* (2018); Tugba Basaran, 'The outlawed: Landscapes of human rights', in Didier Fassin (ed), *Deepening divides: How territorial borders and social boundaries delineate our world* (Pluto Press 2019); Anna Lundberg and Pia Kjellbom, 'Social work law in nexus with migration law: A legal cartographic analysis of inter-legal spaces of inclusion and exclusion in Swedish legislation', *Nordic Social Work Research* (2021); Anna Lundberg, Anna Lindberg and Mehek Muftee, '"Även om du är analfabet så antar jag att du ändå har en tidsuppfattning som alla andra." En kvalitativ analys av temporala motsättningar i svensk asylbyråkrati', *Sociologisk forskning* (2022); Anna Lundberg and Hedvig Obenius, 'Hur bör rätten kartläggas? En metoddiskussion om kritisk rättskartografi av praktiska verkställighetshinder', *Förvaltningsrättslig tidskrift* (2021); and Jukka Könönen, 'Legal geographies of irregular migration: An outlook on immigration detention', *Population, Space and Place* (2020).

[30] Magdalena Kmak, *Law, migration, and human mobility: Mobile law* (Routledge Taylor & Francis 2024 *forthcoming*).

[31] Sara Keenan, 'A prison around your ankle and a border in every street', in Andreas Philippopoulos-Mihalopoulos (ed), *Handbook of law and theory* (Routledge 2018).

highlighted the importance of not only treating space as a 'contextual factor' when conducting spatio-legal studies on borders, and encourages legal scholars to address law's embeddedness in broader border practices and in the construction of spatiality.[32] Since this study aims at analysing the spatio-legal interaction under the EU border regime, and since it explores how the EU's external border can be understood, given the embeddedness of law in space and the asymmetry under the EU border regime, both the question of how law shapes space and how space shapes law will be addressed. Moreover, Persdotter and Iossa, as well as de Witte, have pointed out spatial thinking as particularly useful 'for understand[ing] the workings of EU law "on the ground"'.[33]

The analytical approach taken in the study has its basis in a qualitative analysis of legal sources of public international law and EU law, performed according to legal doctrinal method, with a focus on analysing the protection of individual rights in two contextual settings (see section 1.5). Being site-specific, the study analyses case law from the ECtHR and the CJEU with respect to events occurring at two different sites, the Belgian embassy in Beirut, Lebanon, and the border crossing point at Beni-Enzar between Morocco and the Spanish enclave of Melilla. The thesis incorporates a wide range of contextual input into the analysis, and e.g. images and maps are addressed to provide an understanding on how law co-produces the spaces it governs, and vice versa.[34] The method and material will enable the study to address the EU border regime as embedded and embodied at the two sites, and to critically examine how fundamental rights become enforceable through the interaction between law and space.

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[32] Evrard, 'Reading EUropean borderlands under the perspective of legal geography and spatial justice', *European Planning Studies* (2021). See also Philippopoulos-Mihalopoulos for a similar reasoning on how spatio-legal studies 'marginalize' space, Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), pages 23–28.

[33] Maria Persdotter and Andrea Iossa, 'On legal geography as an analytical toolbox for EU legal studies', *European Law Open* (2022); and de Witte, 'Here be Dragons: Legal geography and EU law' (2022).

[34] Cf. David Delaney who through 'contextual case law analysis' studies case law as instances of world-making 'on the ground', Delaney, *The spatial, the legal and the pragmatics of world-making: Nomospheric investigations* (2010), p. 194.

The study should prove relevant to the wider field of critical research on border and migration law, and to the field of critical border studies in general, since it contributes with knowledge on how law's abstract promises on fundamental rights are 'invisibilized' when borders are externalized and constructed without recognizing how to guarantee fundamental rights for protection seekers trying to cross them.[35] In the study, the spatio-legal interaction of the EU border regime is analysed as a 'process of invisibilization', and the concept of invisibilization provides a theoretical tool for analysis (see section 1.4.3.1). The study provides a concretization of how the asymmetry takes material form in the physical world – in the shape of fortifications of the border, natural landscape, unequal relations, and death, and provides knowledge on how such materializations contribute to the process of invisibilization of fundamental rights. Such knowledge is relevant to the debate on the asymmetry of EU migration and border control, as well as throws light on the importance of space and of spatial relationships in this area.

1.2 Aim and Research Questions

This is a study of the EU border regime that addresses EU migration and border control in relation to the right to seek asylum and the principle of non-refoulement. The aim of the study is to critically examine and demonstrate how the spatio-legal interaction of the EU border regime affects the conditions under which individual rights can be enforced at the EU's external borders. Accordingly, the thesis explores how the EU's external border can be understood, given the embeddedness of law and the asymmetry between states' extraterritorial actions and the territoriality of the right to seek asylum and the principle of non-refoulement.

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[35] Cf. Shachar, *The shifting border: Legal cartographies of migration and mobility – Ayelet Shachar in dialogue* (2020). Shachar provides a similar perspective on the global use of borders in relation to migration, whereas this study analyses the spatio-legal interaction under the EU's border regime, and how law as a spatio-legal phenomena is embedded in law, in the physical world, natural landscape, and in social relations.

This thesis analyses two sites as 'scenes of interaction' through their legal and contextual constructions – including an array of legal norms on fundamental rights and EU migration and border control – and through the materialization of such norms in the local environments. Both scenes of interaction are the settings for case law from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR).[36] This case law, together with other empirical material, is analysed from a spatio-legal perspective with a focus on how fundamental rights, and corresponding state obligations, are invisibilized under the spatio-legal interaction of the EU border regime.

This study is organized around the following research questions:

1. How does the EU's externalization of migration and border control contribute to the invisibilization of fundamental rights at:
a) The Belgian embassy in Beirut, Lebanon?
b) The border crossing point at Beni-Enzar, Melilla?

2. How does the EU's migration and border control draw boundaries that contribute to the invisibilization of fundamental rights at the two scenes of interaction?

3. How can the EU's external border and the protection of individual rights 'at the border' be understood, given the embeddedness of law in space and the asymmetry between where border control takes place and where the obligation to protect fundamental rights applies?

This study is also situated in time. It focuses on the period immediately before and after what is commonly known as the 'refugee crisis' of 2015/2016. During this 'crisis', a large number of people sought protection in (i.e., access

[36] Judgement of 7 March 2017, PPU X and X v Belgium, C-638/16, EU:C:2017:173; Judgement of the court 5 March 2020, M.N. and Others v Belgium, Application No. 3599/18; and Judgement of the court 13 February 2020 N.D. and N.T. v Spain, Application Nos. 8675/15 and 8697/15.

to) the EU, even as the latter sought to resolve the 'crisis' through 'tougher' migration management, with a heavy focus on control of its borders. This delimitation serves as a legal and contextual framing of a time marked by an increase of forcibly displaced persons and corresponding counteractive control measures introduced by the EU. Accordingly, this thesis does not address questions related to the invasion of Ukraine and the EU's response in relation to migration from Ukraine. Nor does it examine the intensification of border control during the COVID-19 pandemic.

1.3 Structure of the Thesis

The thesis is structured as follows:

PART I – INTRODUCTION

Chapter 1 – This introductory chapter provides the structure and framing of the study, starting with a description of the research problem. It sets out the aim of the study, the research questions it addresses, and the theoretical perspectives and methods it employs.

PART II – GEOGRAPHIES

Chapter 2 – In its first section, this chapter provides a doctrinal study of international and European refugee and human rights law. This doctrinal study provides the starting point for the subsequent analysis in Part III of the thesis. The second section of the chapter addresses the EU border regime and its development, and systematizes international law and EU law of particular relevance to the analysis of the Belgian embassy in Beirut and the border crossing point at Beni-Enzar.

Chapter 3 –This 'site-specific' chapter presents the scenes of interaction and provides, together with the doctrinal study in chapter 2, the study's research material. It shows a selection of images, maps, and screenshots of websites, as well as other examples of how laws on migration and border control takes

form in the digital and physical world – on websites, application forms, in decisions granting or refusing entry, and through physical and natural features such as fences, landscapes, and border crossing points.

PART III – BORDERSCAPE

Chapter 4 – Proceeding from the perspectives presented in chapter 1, this chapter analyses the spatio-legal interaction that takes place under the EU border regime at the Belgian embassy in Beirut and the border crossing point at Beni-Enzar, Melilla. Turning to the data presented in Part II, this chapter focuses particularly on the role of the spatio-legal interaction in the process of invisibilization. Section 4.1 of this chapter addresses research question 1, and section 4.2 research question 2. However, the chapter's different sections of analysis must be read together to provide a full response to the questions posed.

Chapter 5 – The study then turns to how the effect of the spatio-legal interaction under the EU border regime can be understood as a web of control, a 'borderscape'. The notion of borderscape refers to the 'sum' of the spatio-legal interaction that takes place under the EU border regime. It represents a spatio-legal scene in which legal norms emanating from the asymmetry exist as building blocks in the physical world and in social relations. In borderscape the EU's external border appears 'everywhere', significantly affecting the fundamental rights of protection seekers trying to cross it. With its basis in the analysis provided in chapter 4, this chapter addresses research question 3.

Chapter 6 – In the final chapter, the study's methods and theoretical approach are reflected upon while the conclusions of the preceding chapters are revisited and summarized.

1.4 Theory: A Spatio-Legal Approach

Since the 1980s, the relationship between space, place, and the construction of identity has been emphasized, leading to a 'spatial turn' across the

humanities and social sciences.[37] Spatial theories and perspectives from geography have also been introduced and applied within the legal field, drawing attention to the connections between law and spatiality. This inter-disciplinary project is often defined as legal geography. Critical scholarship within this field focuses on the socially constructed nature of space, and the mutually constitutive relationship between law and space. Among other things, legal geographers examine how space and law are reproduced through social relations, how legal practices serve to produce space, and how such practices in turn are shaped by a spatial context.[38] According to Braverman and others, legal geography can be defined as 'a stream of scholarship that makes the inter-connections between law and spatiality, and especially their reciprocal construction, into core objects of inquiry'.[39]

To understand law's interaction with space, and vice versa, we should review some of the most relevant concepts and theoretical tools on which this study relies. The following sections introduce the theoretical framework of the thesis.

1.4.1 Scenes of Interaction

Engaging with spatial theory, this study analyses the spatio-legal interaction under the EU border regime at the Belgian embassy in Beirut and the border crossing point at Beni-Enzar in Melilla. In a theoretical sense, these locations are to be regarded as scenes of (spatio-legal) interaction.

The study's concept of scenes of interaction refers to Massey's understanding of 'place' as a locus and articulation of intersecting social relations, phenomena, and activities in space. The concepts of 'space' and 'place' are essential in geography studies. The two related concepts, like other phenomena, are often understood as a dichotomy. In this dichotomy, 'place' represents a more static geographical site – of the lived, the concrete, and the

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[37] Kathryne Beebe, Angela Davis and Kathryn Gleadle, 'Introduction: Space, place and gendered identities: Feminist history and the spatial turn', *Women's History Review* (2012), p. 524.

[38] O'Donnell, Robinson and Gillespie, *Legal geography perspectives and methods* (2020), pages 3 and 98, referring to e.g. Blomley, *Law, space, and the geographies of power* (1994), p. 51.

[39] Braverman and others, *The expanding spaces of law: A timely legal geography* (2014), p. 1.

embodied; whereas 'space' is an abstract notion, concerned with the social dimensions of place and with (dynamic and socially constructed) interactions and relationships.[40] However, the definitions and understandings of both concepts are broad. Within the field of geography, 'place' is usually thought of as a geographical site, but according to Massey a place is rather a locus of intersections, and its uniqueness is directly dependent on 'interactions with the beyond', and on the specific constellation of interrelations within which that place is set.[41] It is not just a (separated and bounded) physical location, such as a city, a region, or a nation-state.[42] Rather, place is an intersection in space – a moment or articulation 'within the wider power-geometries of space', a 'spatio-temporal' event that changes over time.[43] Massey thus disagrees with essentialist understandings of place that attempt to fix the meaning of particular places – to enclose them and endow them with fixed identities, as bounded places constructed out of inclusion and exclusion.[44] A particular problem with such conceptualizations of place is that they, as Massey frames it, seem to require the 'drawing of boundaries'.[45]

Since the scenes that this study addresses are not primarily understood as geographical sites but rather as 'outcomes' and articulations of the spatio-legal interaction under the EU border regime, Massey's understanding of place could be suitable for the inquiry. However, to avoid association with static and bounded perceptions of place, and in particular to address the spatio-legal interaction, I suggest that the objects of research are 'scenes of interaction'. For example, the Beni-Enzar border crossing point between Morocco and Melilla – a phenomenon constructed in time and space – is a locus of the EU's external border, and a 'scene of spatio-legal interaction' under the EU border regime. Moreover, as this study will demonstrate, the EU's external border can never be understood as fixed at certain geographical locations; rather, it must

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[40] Massey, *For space* (2005), p. 185.

[41] Ibid., p. 67.

[42] Ibid., p. 65.

[43] Ibid., pages 44, 67, 117, and 130; Massey, *Space, place and gender* (1994), p. 121; and Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), p. 54.

[44] Massey, *Space, place and gender* (1994), pages 4 and 169; and Massey, *For space* (2005), p. 67.

[45] Massey, *Space, place and gender* (1994), p. 152.

be understood as a web of control. This web follows the footsteps of protection seekers rather than geographical lines and places that usually represent borders and border crossings points (see chapter 5). Applying the notion of scenes of interaction, this study can address the Belgian embassy in Beirut and the border crossing point at Beni-Enzar in Melilla not as closed or bounded 'places', but instead as scenes of interaction within the larger web of EU migration and border control.[46]

1.4.2 A Collective and Relational Understanding of Space

To analyse the spatio-legal interaction under the EU border regime the study addresses how space is constructed as, and through, relationships articulated at the scenes of interaction. The study's understanding of space relies on Massey's 'collective and relational' understanding of space. Massey understands space as a set of intersecting social relations – a complex web of relations of domination and subordination in which space and mobility are determined by power relations in a 'power-geometry'.[47] Massey argues that the world, and the politics that construct space and respond to it, need to be understood in relational terms: as the product of social relations that are usually unequal and conflictual.[48] All spaces are socially regulated in some way, by social relations and sometimes by explicit rules.[49] Negotiated and 'always contoured through the playing out of unequal social relations', they can both connect and disconnect (just as borders can).[50]

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[46] Cf. with Massey's use of spatial networks, links, and activities in relation to 'location'. At some spatial locations, the interrelation between these phenomena is more distinct and more crucial. Such spatial locations of phenomena are according to Massey caused by, and part of the constitution of a system. Ibid., p. 265, and Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), pages 54–59.

[47] Massey, *Space, place and gender* (1994), p. 265; and Massey, 'Power-geometry and a progressive sense of place' in Bird and others (eds), *Mapping the futures: local cultures, global change*.

[48] Massey, *For space* (2005), p. 10; and Massey, *Space, place and gender* (1994), p. 264.

[49] Massey, *For space* (2005), p. 152. Massey refers for example to public spaces.

[50] Ibid., pages 67 and 153.

Space is furthermore 'collectively produced', through practices which form relations.[51] Such collective production means, according to Massey, that you cannot just cross space, or pass by it; instead you 'alter' it and are part of its production:

> […] while moving (for example, by train), you are not just travelling, through space or across it, you are altering it a little […,] speeding across on-going stories.[52]

Massey's definition of space, as a collective and relational production, is brought into this study. Instead of understanding the phenomena of migration with a disembodied 'state-centred' view, migration is understood with a broader perception, bringing protection seekers into the collective and relational production of space. Protection seekers 'alter' and co-produce space in relation to, inter alia, the shifting laws of the EU border regime. This co-production also takes place in the opposite direction since attempts to control migration and borders adapt to, and interact with migratory movements, and thereby co-produce space.

Massey stresses, however, that the collective and relational production of space does not take place on equal terms. Rather, it interacts with social relations of power.[53] In this regard, Massey's scholarship has particularly focused on gender relations.[54] This entails an understanding of spaces as gendered, and as both reflecting and affecting the ways in which gender is

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[51] Ibid., p. 148.

[52] Ibid., pages 118–119.

[53] Ibid., p. 148.

[54] See e.g. Massey, *Space, place and gender* (1994). The study of gender as a relation has served as a starting point within gender studies in general. Jane Flax claims that gender relations are constituent elements in every aspect of human experience, and that gender relations are shaped and constructed in interaction with other social relations, such as class and race. Jane Flax, 'Postmodernism and gender relations in feminist theory', *Signs* (1987), p. 624. In the same vein, legal theorist Angela Harris argues that 'a unitary, essential woman's experience' cannot be isolated from other realities, such as experiences of race, class, sexuality, etc. See Angela P. Harris, 'Race and essentialism in feminist legal theory', *Stanford Law Review* (1990), p. 585.

constructed and understood.[55] Like other feminist scholars, Massey highlights the role of gender relations – and of 'intersecting relations' such as class – in constructing space.[56] Furthermore, gender relations serve to reinforce as well

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[55] See e.g. Massey, *Space, place and gender* (1994). Feminist scholars have played an important part in the 'spatial turn', with significant contributions on the production of space and gendered dimensions. For example, feminist scholars have addressed the operation of power and the construction of sex and gender, as well as issues of belonging, exclusion, and the creation and maintenance of boundaries in space. See Beebe, Davis and Gleadle, 'Introduction: Space, place and gendered identities: Feminist history and the spatial turn' (2012), p. 525. In legal studies, the relational understanding of space and the focus on intersecting forms of inequality are often defined as 'feminist legal geography'. Work in this area focuses on how law is embedded within norms. It provides tools for analysing law and spatiality, and it focuses on how relations of power and intersecting forms of inequality are constructed, reproduced, and maintained. Such studies often examine the gendered dimensions of law, its everyday materialization in social injustice, how it reproduces power dynamics and inequities that govern and structure gender relations, and the ways in which race, ethnicity, nationality, urbanity/rurality, sexuality, class, and religion 'intersect' with gender to establish differently positioned socio-legal identities. See Cuomo and Brickell, 'Feminist legal geographies' (2019), p. 1045.

[56] Massey, *Space, place and gender* (1994) p. 2. The term 'intersectionality' was coined by Kimberlé Crenshaw, in order to capture the many dimensions of subordination which an individual may experience. Intersectionality is the idea that multiple social identities or relations of inequality – such as gender, race, social class, ethnicity, nationality, sexual orientation, religion, age, and physical and mental ability – 'intersect' with each other and affect people's position in hierarchies. Crenshaw defines intersectionality as 'the multidimensionality of marginalized subjects' lived experiences'. See Kimberle Crenshaw, 'Demarginalizing the intersection of race and sex: A black feminist critique of antidiscrimination doctrine, feminist theory and antiracist politics', *University of Chicago Legal Forum* (1989), p. 139; and 'Mapping the margins: Intersectionality, identity politics, and violence against women of color', *Stanford Law Review* (1991). See also Nira Yuval-Davis, *The politics of belonging: intersectional contestations,* Calif: Sage (2011). The intersectional approach has its origins in 'black feminism': see e.g. Patricia Collins, *Black feminist thought – knowledge, consciousness, and the politics of empowerment,* Routledge (1990); and Audre Lorde, *Sister outsider: Essays and speeches,* Random House US (2012). Intersectional approaches are also found in critical and postcolonial feminist scholarship critical of Western feminists and their construction of 'the other woman'. Audre Lorde argues that the relative privilege of white women has been achieved in part at the cost of black and 'third world women's lives'. Chandra Mohanty contends that neither 'Third World' nor Western feminism are singular or homogeneous in their epistemologies and political goals; see Chandra Mohanty, Ann Russo and Lourdes Torres, *Third world women and the politics of feminism,* Indiana University Press (1991), p. 51. Western feminist scholars have been

as to construct various characteristics of social relations, among other things through the control of space and of identity.[57] Due to spatial and geographic inequality in a society, for example, gender relations and violent exclusion may limit women's mobility and confine them to the domestic sphere – the 'spatial form of the social'.[58] This means that social relations, such as of gender, also can be understood as 'spatial relations' that serve as a basis for the production of boundaries between people.

Massey's collective and relational production of space is cited in this study to address how structural and relational dimensions of inequality and exclusion – based mainly on gender, race, class, and nationality – are intrinsic to the EU border regime, and draw boundaries that impede the mobility of certain subjects and exclude them from access to subsequent asylum procedures in the EU.

1.4.2.1 Space and Time

Massey insists on space as the sphere of relations, of contemporaneous multiplicity, and as non-static, always under construction in an ongoing negotiation.[59] Space is from this perspective a shifting open system, and a social and material construction – a product of relations and embedded practices.[60] Massey's insistence that space is shifting means that a phenomenon cannot be understood only as spatial. Rather, space (and place) must be understood as 'an open ongoing production' integral with time and changing

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criticized for assuming – for example in their studies on women in the Global South – 'the other woman' as a coherent and oppressed group, thereby producing a 'Third World Woman' as a singular monolithic subject. See Chandra Mohanty, 'Under western eyes: Feminist scholarship and colonial discourses', *Feminist Review* (1988), p. 61. See also Ratna Kapur on racist perceptions and stereotypes of 'Third World Women', 'The tragedy of victimization rhetoric: resurrecting the "native" subject in international/post-colonial feminist legal politics', *Harvard Human Rights Journal* (2002); and Gayatri Chakravorty Spivak on how the 'subaltern' remains anonymous and mute by the Eurocentric lens, *Can the subaltern speak?,* Macmillan Education (1988).

[57] Massey, *Space, place and gender* (1994), pages 20 and 179.

[58] Ibid., pages 179 and 254–255.

[59] Massey, *For space* (2005), p. 148.

[60] Ibid., p. 10.

social relations.[61] Neither spaces nor places can be understood as 'static' surfaces, or separated into stabilized, and isolated areas or locations. Rather, space is temporal and shifting: 'the London you left just a half an hour ago […] is not the London of now'.[62]

According to Massey, space and time are inextricably interwoven.[63] Space is not static; nor is time spaceless.[64]

> […] it is not that we cannot make any distinction at all between them (time and space) but that the distinction we do needs to hold the two in tension […].[65]

Time and space, Massey insists, are inseparable and jointly constituted: '[We must] get away from a notion of society as a kind of 3-D (and indeed more usually 2-D) slice which moves through time.'[66] In this framing, space can never be defined as static or as opposed to time. Time and space must rather be thought of together, since 'the imagination of one will have repercussions […] for the imagination of the other […]'.[67]

With this basis in the inseparability of time and space, the scenes of interaction analysed in this study are understood as articulations of intersecting social relations, phenomena, and activities that shift in time. As Valverde has noted, however, legal geographers often reduce time to history, thereby neglecting not just the lived temporality that humans experience, but also the temporalities of law.[68] In this study, therefore, I address law as interacting with,

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[61] Massey, *Space, place and gender* (1994), pages 3 and 55.

[62] Massey, *For space* (2005), p. 118.

[63] Massey, *Space, place and gender* (1994), p. 261.

[64] Ibid., p. 264.

[65] Ibid., p. 261.

[66] Ibid., pages 264–269.

[67] Massey, *For space* (2005), p. 18.

[68] Valverde intervenes in the scholarly discussion on time and space and demonstrates how spatialization and temporalization are intertwined. Valverde questions the tendency of legal scholars focusing on only the spatial and adds the importance of the temporal. See Mariana Valverde, *Chronotopes of law: jurisdiction, scale, and governance* (2015), p. 34; and '"Time thickens, takes on flesh" spatiotemporal dynamics in law', in Irus Braverman and others (eds), *The expanding spaces of law: A timely legal geography* 2014).

and unfolding in, both time and space. This means paying attention both to the history and development of the EU border regime, and to how space and time work through each other to regulate and shape both the construction, and the lived experiences, of the EU's external border. In Part III of the thesis, time is mostly addressed in terms of speed and distance, and attention is drawn to how protection seekers become 'trapped' in both space and time by the EU border regime.[69] I thus highlight that time, as a boundary, provides a precondition for accessing the EU.[70] However, the study mostly uses the term 'space'. This does not entail depriving space of time; rather, I understand space (and law) as imbued with time. At some points however, I explicitly address the different temporalities of law.

1.4.3 The Interaction of Law and Space

Over the course of this thesis, different perspectives on law are used. In part II, where I conduct a doctrinal study of the EU border regime, the concept of law refers to legislation and case law. I refer to these as 'legal sources', or just 'law'. The doctrinal study introduces the legal framework of the EU border regime and deepens our understanding of the asymmetry, as well as establishes the grounds for subsequent analysis. In chapter 4 the interaction between law and space is analysed. In this chapter spatial theory on how law can be understood as a phenomenon both imbued by space, and as embedded and embodied in space, is used to perform a critical analysis of the EU border regime. In chapter 5, the analysis moves beyond the binary of law and space

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[69] Cf. Linn Axelsson, 'Border timespaces: understanding the regulation of international mobility and migration', *Geografiska Annaler: Series B, Human Geography* (2022), p. 5.

[70] In the field of migration and border studies attention has been drawn to how human activities are shaped by temporal and spatial constrains. As Axelsson notes, 'there are only a certain number of locations that individuals can reach and only a certain distance they can travel given their speed of movement and the amount of time they have at their disposal.' ibid., p. 5. For other scholarly contributions on time and temporality in the field of border studies, see e.g. Martina Tazzioli, 'The temporal borders of asylum. Temporality of control in the EU border regime', *Political Geography* (2018); Martijn Stronks, *Grasping legal time: Temporality and European migration law,* Cambridge University Press (2022); and Sandro Mezzadra and Brett Neilson, *Border as method, or, the multiplication of labor,* Duke University Press (2013).

and demonstrates how the sum of the interconnectedness between laws on migration and border control and space can be understood as 'borderscape'.[71]

Adopting the collective and relational perspective on space taken by Massey, I expand the framing of law and its understanding in Part III. In this part of the thesis, I conceive law as an organizer and co-producer of the spaces in which it exists, and which it governs. From this perspective, law cannot be separated from space; rather, it is something that is practised, experienced, and spatially 'altered'. It exists in all dimensions.[72] When we understand law and space as inseparable from each other, we find that we cannot answer the question of what law is only by pointing to a certain legal source.[73] Law is that too but it is also something that expands and takes material form in space, in the natural landscape, and in physical things and bodies that incorporate it and act it out. It is both embedded and embodied.

When analysing the materialization of law, the term 'embedded' is used to describe how law takes material form and 'emplaces' itself in space in the form of physical or natural features – e.g., by giving legal significance to natural landscapes like the Mediterranean Sea through migration and border control law.[74] Whereas the term 'embodied' refers to how intersecting inequalities are

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[71] The study's use of the notion of borderscape sympathizes with, and builds on Perera's understanding of the Australian border as mobile, perspectival, and relational, rather than as a coherent and static line on a map (what I have previously referred to as a Westphalian line). See Perera, 'A Pacific zone?' in Kumar Rajaram and Grundy-Warr (eds), *Borderscapes: Hidden geographies and politics at territory's edge*, p. 206. Borderscape furthermore relies on Philippopoulos-Mihalopoulos's concept 'lawscape'. According to Philippopoulos-Mihalopoulos law and space emerge as lawscape in a process of negotioation of in/visibilization. Law invisibilizes its spatiality and space its legality in this process. Law in the lawscape is thus not just the 'standard, written law'. However it is that too. See Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), pages 67–73.

[72] Cf. Massey, *For space* (2005), pages 118–119.

[73] Cf. Blomley, *Law, space, and the geographies of power* (1994); and Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), p. 73.

[74] Cf. Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), p. 55; Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), p. 68; Volpp, 'Signs of law' in Volpp, Constable and Wagner (eds), *Looking for law in all the wrong places: Justice beyond and between*; and Braverman and others, *The expanding spaces of law: A timely legal geography* (2014). Braverman describes the pairing of law and geography as concerning 'the

constructed through interaction with bodies – bodies on which they are sited.[75] This includes a focus on the legal prerequisites applying in the midst of intersecting social relations, and an emphasis on how nationality, gender, class, and race materialize as boundaries affecting the mobility of protection seekers. In particular, the thesis examines how the social relations and physical characteristics of protection seekers are given meaning under the spatio-legal interaction of the EU border regime, and how law inscribes social relations with legal significance.[76]

This way of understanding law relies on Philippopoulos-Mihalopoulos, who argues that law is always spatially grounded, embodied, and materially present. It can appear in buildings, in landscapes, in written text, in social interaction, and in human bodies.[77] 'Law's materiality', Philippopoulos-Mihalopoulos writes, 'is not just courts and wigs but the way the law emplaces itself, its measures, commands and prohibitions that determine the distance

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hidden stuff that lies behind the physical or spatial site'. Natural landscapes, built environments, machines, and bodies seem to exist as 'empty and static terrains', rather than being understood as power constructs. These 'taken for granted aspects of spatial design' are useful for promoting ideological projects that render power invisible when they are enacted in space. Studying the practices of Israeli border control, Braverman concludes that 'it is precisely because the border is seen as the place of law that it can so well hide various legal projects […;] legal arrangements appear natural or mechanical and thus as inevitable and even invisible.' See Braverman, 'Hidden in plain view: Legal geography from a visual perspective' (2011), p. 2–19.

[75] Feminist scholarship has long positioned the body within an understanding of power and space in various ways, such as in terms of the ability to cross space or to challenge spatial barriers. See e.g. Rachel Silvey, 'Borders, embodiment, and mobility: Feminist migration studies in geography', in Lise Nelson and Joni Seager (eds), *A companion to feminist geography* (Blackwell Publishing Ltd 2005). Other scholarly contributions – especially in feminist, queer, and postcolonial studies – have centred the body as the subject and object of analysis through we can understand how power acts spatially in the world: to control, construct, delimit, gender, racialize, and sexualize the body. See Alison Mountz, 'Political geography III: Bodies', *Progress in Human Geography* (2018), p. 759. Bodies can be thought of as individual entities; or as building blocks for larger units such as families, communities, or nations; or as nodes within broader networks linking characteristics such as skin colour with boundaries that enclose spaces or separate them from the broader world. See e.g. Andrew Herod, *Scale,* Routledge (2011), p. 59.

[76] Cf. Laura L. Ellingson, *Embodiment in qualitative research,* Routledge (2017), p. 2.

[77] Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), p. 66.

and propinquity between bodies'.[78] This understanding of law as materially present fits in well with Massey's understanding of space as concrete, material, real, and lived; as well as with Massey's sense of the role that law plays in the 'drawing of boundaries'.[79]

As Massey notes, boundaries are drawn between 'us' and 'them'.[80] Constructed through and against 'others'; they need an opposition in order to function.[81] Massey claims that boundaries in a sense, are one means of organizing space. They are moreover, or may be, part of the process of place-making.[82] Place-making, according to Massey, involves an attempt to fix the meaning of particular spaces – to enclose them, to endow them with fixed identities, and to portray them as bounded places constructed from boundaries of inclusion and exclusion.[83] The idea is that 'boundaries matter', and that they cut across the social relations that construct social space.[84]

> […] where you were born in relation to them [boundaries] determines your nationality, determines what boundaries you may cross and those you may not. And indeed […] an enormous amount of effort may go into constructing a sense of identity within these bounded areas, whether it be national identity or the current moves towards building of a European identity.[85]

According to Massey not only social relations can form boundaries, but also natural landscapes are part of their production. However, mountains and seas, Massey avers, do not naturally form boundaries. Nor do national borders on

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[78] Ibid., p. 55.

[79] Massey, *For space* (2005), pages 10 and 61; Massey, *Space, place and gender* (1994), p. 15; and Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), p. 68.

[80] Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), p. 67.

[81] Massey, *Space, place and gender* (1994), p. 169.

[82] Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), p. 68.

[83] Massey, *Space, place and gender* (1994), pages 4 and 169.

[84] Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), p. 68.

[85] Ibid., p. 68.

the world atlas, or the lines that mark property and parish on a local map.[86] All boundaries are instead socially constructed; they are a product of society, in the same sense as the other social relations which constitute and organize space. Natural landscapes that 'could be a frontier could also be a unifying feature'.[87] The critical thing, from a spatio-legal perspective, is how social relations and natural landscapes are used, and what (legal) significance is given to and taken from them.[88] Far from being separate from space, law serves to organize and to co-produce it. Law is involved with the drawing of boundaries. Such boundaries limit mobility just as borders do.[89] However, as Massey notes;

> […] these lines do not embody any eternal truth […] rather they are lines drawn by society to serve particular purposes.[90]

Space and place, Massey contends, are produced in a process of negotiation on what relations to allow in the specific constellations of interrelations within which space and place are set.[91]

> Some borders are being dismantled, some renegotiated, and yet others – new ones – are being erected. […] And against what are boundaries erected? What are the relations within

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[86] Ibid.

[87] Ibid.

[88] Cf. Braverman and others, *The expanding spaces of law: A timely legal geography* (2014) on how social space, lived places and landscapes are inscribed with legal significance, p. 1.

[89] Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), p. 68. Borders are generally understood as dividing between, and delimiting states' territories, whereas boundaries are understood as distinguish between groups of people and involve relations of power and inequality on grounds on e.g. gender, class, nationality and race. Cf. Didier Fassin, *Deepening divides: How territorial borders and social boundaries delineate our world,* Pluto press (2019).

[90] Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), p. 68.

[91] Massey, *For space* (2005), pages 67, 153 and 179.

> which the attempt to deny (and admit) entry is carried out? What are the power-geometries here […]?[92]

When we understand space as comprising intersecting social relations of domination and subordination that take material form, law's drawing of boundaries must also be understood as highly affecting protection seekers' mobility and access to the EU.[93] Recognizing the power-geometry of the EU border regime and the material presence of law in space helps us understand the spatio-legal interaction under the EU border regime, and the embeddedness and embodiedness of law in space. It furthermore provides theoretical tools for analysing how law itself is imbued with space and constructed out of spatial relationships. The concept of jurisdiction, the distribution of fundamental rights, and mobility under EU migration and border control laws are indeed spatial.

The focus of this study is on EU migration and border control law, and thus on laws that are closely involved in controlling space, place, and movement (especially, in this case, of protection seekers). Migration is a geographical and spatial phenomenon. It involves the movement of people who cross state borders, who alter new spaces, and who are the subject of spatial control exercised by states. Law is closely involved in the construction and organization of these spaces, because crossing state borders, travelling with carriers, and applying for asylum or a residence permit are all activities that are regulated under international, European, EU and national law on border control and migration.[94] As this study suggests, obstructing and controlling the

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[92] Ibid., p. 179. On the power-geometry of mobility, see also Massey, *Space, place and gender* (1994), p. 149.

[93] Cf. Massey, *Space, place and gender* (1994), pages 152 and 265; and Massey, 'Power-geometry and a progressive sense of place' in Bird and others (eds), *Mapping the futures: local cultures, global change*.

[94] Massey does not deal explicitly with law in connection with the concept of space. Philippopoulos-Mihalopoulos has claimed, in response to Massey's book, *For Space*, that Massey replaces law with politics, and argues on the importance of differentiating between law and politics, not least because of their different temporalities (politics is swifter and more immediate; law runs on a longer temporality). Philippopoulos-Mihalopoulos, 'And for law: Why space cannot be understood without law' (2018), p. 19. Reading Massey

movement of protection seekers into the EU means trying to fix and to stabilize space. When states control space – as when they legislate on border control or carry it out – they both rely on space and manipulate it. In Massey's terms, they reshape and co-produce spatial relations which control mobility by not only borders but, as this study will demonstrate, also through boundaries.

1.4.3.1 The Process of Invisibilization

This study is particularly addressing the asymmetry between states' extra-territorial actions and the territoriality of the right to seek asylum and the principle of non-refoulement. Inspired by Massey and Philippopoulos-Mihalopoulos, the thesis uses the concept of 'invisibilization' to subject this asymmetry to theoretical and critical analysis – as a process of negotiation in which fundamental rights are limited, or indeed made unattainable and unenforceable. This means that the study addresses how the EU border regime, through its spatio-legal interaction, establishes control without triggering the obligation to protect the right to seek asylum and the principle of non-refoulement. This process is referred to as 'invisibilization' and is analysed through an examination of the EU border regime's externalization of migration and border control, and its 'drawing of boundaries' in the context of the two scenes of interaction mentioned above. Moreover, invisibilization appears when law's spatial embeddedness and embodiedness is omitted in legal interpretation and decision-making.

Philippopoulos-Mihalopoulos claims that law and space cannot be separated; instead they are constantly conditioned by each other, and processed in a negotiation of in/visibilization.[95] In this process, law and space

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'through law', Philippopoulos-Mihalopoulos stresses the need to include legal narratives in the definition of space, averring that 'there is little doubt that law is involved in the imposition of boundaries, and that subsequently boundaries are enforced by law', ibid., p. 3. Philippopoulos-Mihalopoulos refers to Julia Chryssostalis, 'Reading Arendt "reading" Schmitt: Reading Nomos Otherwise?', *Feminist Encounters with Legal Philosophy*, Drakopoulou, ed. (London: Routledge, 2013.

[95] Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), p. 73.

emerge as the 'lawscape'.[96] In the lawscape, law invisibilizes its spatiality and space its legality depending on needs and conditions.[97] The lawscape thus appears as more or less legal or more or less spatial at various points. This study's focus on the process of invisibilization relies on this theory, and examines the implicit dependence of the EU border regime on space when it externalizes border control, as well as when law interacts with space and draws boundaries through and within natural features and social relations. The geographies of EU border control (where and how control over movements and mobility takes place) – as well as its physical features, its natural landscapes, and the spatial and social relations of such control – are therefore addressed in terms of space.[98]

Although EU migration and border control take material form and is physically present in space, the study's focus on the process of invisibilization involves more than just paying attention to what *is visible* and what *is not* at the scenes of interaction.[99] It is rather a question of whether fundamental rights

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[96] Ibid., p. 73. The notion of lawscape is also used by Nicole Graham to explicate human-environment relations. See Nicole Graham, *Lawscape,* Routledge (2011); and Graham, 'Sydney's drinking water catchment – a legal geographical analysis of coal mining and water security', in O'Donnell and Gillespie (eds), *Legal geography – perspectives and methods* (Routledge 2020).

[97] Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), p. 73.

[98] Cf. Mountz on how geography is used to 'erode' fundamental rights, including the right to seek asylum. See Alison Mountz, 'Shrinking spaces of asylum: vanishing points where geography is used to inhibit and undermine access to asylum', *Australian Journal of Human Rights* (2013).

[99] Cf. Philippopoulos-Mihalopoulos on how the notions of invisibilization and visibilization address 'ontological presence' rather than 'phenomenological visuality'. See Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), pages 2, 4, 13 and 78. Other scholars use the term 'invisibilization' to address how certain refugee groups, asylum seekers, or border and detention practices are invisibilized; see e.g. Ibid.; and Mountz, *The death of Asylum* (2020). In 'The death of asylum', Mountz focuses on how violence and migration management are 'hidden from view' at remote sites on distant islands. These marginalized zones are invisible to the international community and to mainland national publics, but they are hyper-visible to the people who live on such islands. See also: Braverman, 'Hidden in plain view: Legal geography from a visual perspective' (2011), on legal settings and their visibility and invisibility at the intersection of law and space; Maja Janmyr, 'Sudanese refugees and the "Syrian refugee response" in

'exist' as, or simply *are*, enforceable at the scenes of interaction – or are unenforceable through the process of invisibilization. The focus furthermore encompasses more than analysing if pre-existing obligations of individual rights protection are invisibilized. The thesis rather analyses how the spatio-legal interaction of the EU border regime serves to control and to obstruct protection seekers from entering the Union without triggering the obligation to protect fundamental rights, and to produce a border that is flexible in space and time.

The focus on how the spatio-legal interaction under the EU border regime draws boundaries is tied to Massey's relational understanding of space as a complex web of relations of domination and subordination.[100] This perspective serves as a basis for understanding the power-geometry of the EU's external border and its relational, material, and spatial dimensions. Boundaries, according to Massey, form part of the construction of space, which make them relevant if we are to understand the spatio-legal interaction at the scenes of interaction examined.[101] The issue of boundaries is addressed in the thesis through an analysis of how the EU border regime is embedded and embodied at the scenes of interaction. Physical and natural features, as well as the social relations of protection-seeking subjects, are potential boundaries that can limit mobility and restrict access to EU territory. From this point of view, boundaries can be understood as 'borders' embedded in space and embodied by protection seekers.[102] As the study will demonstrate,

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Lebanon: Racialised hierarchies, processes of invisibilisation, and resistance', *Refugee Survey Quarterly* (2022); and Xavier Ferrer-Gallardo, et al., 'The Borderscape of Punta Tarifa: Concurrent invisibilisation practices at Europe's ultimate Peninsula', *Cultural Geographies* (2015).

[100] Massey, *For space* (2005), p. 119; and Massey, 'Politics and space/time' (1992), cited in O'Donnell, Robinson and Gillespie, *Legal geography perspectives and methods* (2020), p. 4.

[101] Cf. Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), p. 68, on how boundaries are among the social relations that construct space and place.

[102] Cf. Philippopoulos-Mihalopoulos on how bodies embody and 'carry' the law: Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), p. 55; and Khosravi on how the border sticks to the migrant body: Shahram Khosravi, *'Illegal' traveller: An auto-ethnography of borders,* United Kingdom: Springer Nature (2010). See also

such 'borders' do not fall within the scope of the protection of fundamental rights. Thus, the drawing of boundaries through law also forms part of the process of invisibilization.

The spatio-legal perspective opens the way to an understanding of law as a co-producer of the spaces which it governs – or tries to 'tame' – in Massey's words. Taming space, like suppressing what space presents us with 'actually existing multiplicity', means reducing the multiplicity of narratives into a representation of reality.[103] This, according to Massey, is regularly done by taming 'the spatial into the textual and the conceptual; into representation'.[104] Such representations entail a reduction or flattening of our society. It means 'laying things side by side – as if space could be captured as a surface'.[105] Philippopoulos-Mihalopoulos suggests that 'law' is such a representation, a way of taming space. Citing Massey, Philippopoulos-Mihalopoulos suggests that law's textuality aims precisely at laying things side by side, so as to flatten out the complexity of reality and convert it into admissible legal facts on the basis of which a decision can be taken.[106] In this study, the theory that law tames space forms the basis for an analysis of how legal interpretation and decision-making omit law's spatial embeddedness and embodiedness, and how this is a vital component of the process of invisibilization. According, for example, to the Schengen Borders Code (SBC)[107] and the CEAS, the right to seek asylum and the principle of non-refoulement are applicable 'at the

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Bennett and Layard, 'Legal geography: Becoming spatial detectives' (2015), pages 414–419. Portraying legal practices as embedded and embedding, Bennett and Layard contend that a focus on the spatial occurrences of law demonstrates that law is found in space for a reason: it is there to achieve (or to prevent) something. Thus, the presence of law is indicative of moral, political, and resourcing choices – choices made by those with some degree of power over a situation, place, or thing.

[103] Massey, *For space* (2005), page 69.

[104] Ibid., pages 20 and 69–71.

[105] Ibid., p. 27.

[106] Philippopoulos-Mihalopoulos, 'And for law: Why space cannot be understood without law' (2018), pages 4–5. This is accomplished through 'positivist' or 'black-letter' approaches to law, which seek to capture and represent reality by translating it into legal terms, concepts, cases, and decisions – thereby reducing reality's complexity.

[107] 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).

border'. However, these provisions do not acknowledge that there are seas, fences, and guards that obstruct people from approaching the border. When people are impeded from reaching the border (in the shape of a border crossing point, for example), they can never be 'at the border' in the sense that the SBC and the CEAS require for applications for asylum. Law – as in the 'flat' law in texts – is thus given force by its spatial embeddedness. As this thesis will demonstrate, however, such spatial embeddedness is not included in the basis on which decisions and judgements are taken.

1.4.3.2 Borderscape

The relational understanding of space has drawn attention in scholarly contributions on borders. In 'The Expanding Spaces of Law – A Timely Legal Geography', Braverman, Blomley, Delaney, and Kedar invite legal geographers to think of legal spaces relationally. A relational approach, they contend, allows a transformation of our understanding, in which the exploration of state borders and their crossing are defined as a 'process of bordering', with borders understood as nonlinear and fluid rather than fixed.[108] Such a perspective on borders, deviating from the Westphalian notion of borders under international law, has been introduced to the research field in different forms.[109] Shachar has introduced 'the shifting border' as a concept for understanding extra-territorial border control, and for transcending the notion of borders as constant and static.[110] Borders 'move' in order to regulate the mobility of people.[111] Other terms – such as 'border zones', 'borderlands', and 'borderscape' – are used within border studies to distinguish the control

[108] Braverman and others, *The expanding spaces of law: A timely legal geography* (2014), p. 17.

[109] See e.g. Étienne Balibar and Erin M. Williams, 'World borders, political borders', *PMLA* (2002); Étienne Balibar, 'Europe as borderland', *Environment and Planning D: Society and Space* (2009); Étienne Balibar, *Politics and its other scene,* Verso (2002); Chiara Brambilla, 'Exploring the critical potential of the borderscapes concept', *Geopolitics* (2015); and Mountz, *The death of Asylum* (2020).

[110] Cf. Shachar, *The shifting border: Legal cartographies of migration and mobility – Ayelet Shachar in dialogue* (2020), p. 17.

[111] Ibid., p. 7.

apparatus of border policy from the 'demarcation line surrounding national territory'.[112]

The idea of borderscape facilitates an understanding of the border as mobile, perspectival, and relational, rather than as a coherent and static line on a map.[113] From this starting point, scholars study the practices, performances, and discourses that seek to capture, contain, and utilize the border so as to affix a dominant spatiality, temporality, and political agency.[114] 'Borderscape' is not a new term but has been used by scholars from different fields.[115] The use that Kumar Rajaram and Grundy-Warr make of it is closely connected to their understanding of 'landscape' as a constructed space – a notion which they use to explore the shifting nature of borders.[116] Other scholars use the term to encourage an understanding of the processual, de-territorialized, and dispersed nature of borders,[117] to analyse the relationship between justice and borders

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[112] Matthias Schmidt-Sembdner Bernd Kasparek, 'Renationalization and spaces of migration: the European border regime after 2015', in Katharyne Mitchell, Reece Jones and Jennifer L. Fluri (eds), *Handbook on critical geographies of migration* (Edward Elgar Publishing 2020), p. 207. See also Barr on how 'lines' are relational both when they divide and when they connect. Olivia Barr, *A jurisprudence of movement: Common law, walking, unsettling place,* Routledge (2016).

[113] Suvendrini Perera, 'A Pacific zone?', in Prem Kumar Rajaram and Carl Grundy-Warr (eds), *Borderscapes: Hidden geographies and politics at territory's edge* (University of Minnesota Press 2007).

[114] Kumar Rajaram and Grundy-Warr, *Borderscapes: Hidden geographies and politics at territory's edge* (2007), p. x.

[115] The term 'scape' is present in 'landscape', 'borderscape', and 'lawscape'. The term generally denotes a certain scape or scene. The notion of borderscape is thought to have been coined by two performance artists, Guillermo Gómez-Peña and Roberto Sifuentes, who used it for the first time in a performance in 1999, entitled 'Borderscape 2000: Kitsch, Violence, and Shamanism at the End of the Century'. See also Elena Dell' Agnese and Anne-Laure Amilhat Szary, 'Borderscapes: From border landscapes to border aesthetics', *HAL Open Source* (2018).

[116] Kumar Rajaram and Grundy-Warr, *Borderscapes: Hidden geographies and politics at territory's edge* (2007).

[117] See Chiara Brambilla and others, *Borderscaping: Imaginations and practices of border making,* Routledge (2015).

critically,[118] or to analyse borders as sites of violence and struggle.[119] Perera has used the term to describe the Australian 'border zone' as always under process, and as a space of multiple actors and bodies each calling on different histories and experiences. Perera highlights the multiple actors in borderscape: 'the bodies of asylum seekers, living and dead'; and the attempts to organize, control, and terminate their movements.[120] Outlining the 'multi-layered spaces' of an unstable border zone, Perera describes the making and remaking of border space as borderscape.[121]

On the basis of the different concepts and perspectives presented in this study so far, and taking inspiration in Perera's understanding and framing of 'borderscape', the study uses this term to describe the sum of spatio-legal interaction under the EU border regime.[122] The notion of borderscape enables us to address and to grasp the multitude of laws regulating space and mobility, and the embeddedness and embodiedness of law in space. The study elaborates on this notion in chapter 5, citing Philippopoulos-Mihalopoulos's theory on 'lawscape' in which law and space are processed in a negotiation of in/visibilization, and Philippopoulos-Mihalopoulos's understanding of law as spatially grounded and materially present. Moreover, benefitting from Massey's understanding of space as an ongoing process, the study uses the notion of borderscape to provide an alternative framing of the EU border regime and of the EU's external border as shaped by and through space.

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[118] See Sandro Mezzadra and Brett Neilson, 'Borderscapes of differential inclusion: Subjectivity and struggles on the threshold of justice's excess', in Étienne Balibar, Sandro Mezzadra and Ranabir Samaddar (eds), *The borders of justice* (Temple University Press 2011).

[119] See Chiara Brambilla and Reece Jones, 'Rethinking borders, violence, and conflict: From sovereign power to borderscapes as sites of struggles', *Society and Space* (2020).

[120] Perera, 'A Pacific zone? ' in Kumar Rajaram and Grundy-Warr (eds), *Borderscapes: Hidden geographies and politics at territory's edge*, p. 206.

[121] Ibid., p. 206.

[122] Perera's definition of 'borderscape' is also used by e.g. Mezzadra and Neilson in Mezzadra and Neilson, *Border as method, or, the multiplication of labor* (2013); and by Brambilla in Brambilla, 'Exploring the critical potential of the borderscapes concept' (2015).

1.5 Method: A Qualitative Spatio-Legal Analysis

The concept of scenes of interaction is employed in this study to grasp spatio-legal phenomena, relations, and legal intersections of the EU's external border. This thesis addresses two scenes of interaction, which serve as detailed and contextual representations of the EU border regime's spatio-legal interaction.

The following sections address, firstly, the research object of the study, secondly, its research material, and thirdly the methods used for selection and collection of said material. The approach for this study is inspired by legal geography and has its basis in a qualitative legal doctrinal method that entails analysing the protection of individual rights in the contextual setting of the scenes of interaction.[123]

1.5.1 The Research Object

The scenes of interaction analysed – the Belgian embassy in Beirut and the border crossing point at Beni-Enzar, Melilla – both constitute 'the EU's external border', in the sense that the border is produced, maintained, and materialized at these locations. The Belgian embassy is an example of border and migration control that takes place 'extraterritorially' under Schengen visa rules, whereas the border crossing point at Beni-Enzar, Melilla, is an example of an 'external' land border crossing at the EU's 'outer edge'. The two scenes

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[123] Similar approaches are provided by e.g. Delaney who through 'contextual case law analysis' studies case law as instances of world-making 'on the ground'. See Delaney, *The spatial, the legal and the pragmatics of world-making: Nomospheric investigations* (2010), p. 194. Approaches that expand doctrinal legal analysis has also been taken by e.g. Stewart Williams whose case study on the provision of health care for drug users features a variety of data, including case law, websites, research papers, and media reports. Williams analyses policies through legal doctrinal research, a 'close textual reading' of legal narratives, and an examination of the role of jurisdictional spaces and scales. See Stewart Williams 'Space, scale and jurisdiction in health service provision for drug users', in Tayanah O'Donnell, Daniel F. Robinson and Josephine Gillespie (eds), *Legal geography perspectives and methods* (Poutledge 2020), p. 287. In Bennett's and Layard's article 'Legal geography: Becoming spatial detectives' (2015), such approaches are defined as 'legal geographically infused doctrinal method'. Other examples of similar approaches include e.g.: Irus Braverman, 'Hidden in plain view: Legal geography from a visual perspective', *Law, culture and the humanities* (2011); and Davina Cooper, *Governing out of order: Space, law, and the politics of belonging* (1998).

of interaction provide access into EU territory under EU law, and are frequently approached by people who want to enter the EU. As at other border scenes, however, protection seekers (as well as persons who are migrating for various other reasons) are often prevented from entering, and are thereby redirected to 'irregular' border crossings. Thus, the two scenes of interaction are also representations of how border control constructs 'irregular migration'. A central tension is played out at these scenes of interaction: that between migrating protection-seeking subjects on the one hand, and EU measures for controlling migration on the other.

The scenes of interaction offer an opportunity to work with the complexity of the EU border regime within two different contexts. In Melilla the 'border' is highly visible, taking as it does the form of a 10-metre-high fence separating Melilla from Morocco. At the Belgian embassy in Beirut, by contrast, the 'border' runs less visibly within a building, where interviews are conducted, and decisions are made on whom to accept or to reject as a legitimate traveller into the EU under the Visa Code. At both scenes of interaction, moreover, the border expands in space. Under EU visa and carrier regulations, the 'border' stretches into airports and ferry terminals which regulate the conditions for who is allowed to board an aircraft or a ferry heading for the EU. In Melilla, cooperation with Morocco forms a significant part of border control: the Spanish border is controlled not just at the borderline, but inside Morocco as well.

The two scenes of interaction are furthermore examples of how the asymmetry – between the extraterritorial actions of states and the territoriality of the right to seek asylum and the principle of non-refoulement – is negotiated in European courts. The scenes of interaction are the setting, namely, for situations addressed by the CJEU (Case *PPU X and X v Belgium*) and the ECtHR (Case *N.D. and N.T. v Spain,* and *M.N. and Others v Belgium*). These cases are to be regarded as key cases, due to their relevance in the

operationalization of the EU border regime and in the governing of the EU's external border.[124]

1.5.2 The Research Material

The aim of the study is to critically examine and demonstrate how the spatio-legal interaction of the EU border regime affects the conditions under which individual rights can be enforced at the EU's external borders. This is done by analysing the two scenes of interaction through their legal and contextual constructions. The research material in this regard therefore covers both legal sources and contextual sources.

The starting point of this study is the asymmetry between states' extraterritorial actions and the territoriality of the right to seek asylum and the principle of non-refoulement. In order to deepen our understanding of the asymmetry, and to establish the grounds for the analysis, the study conducts a doctrinal study that systematizes fundamental rights under the ECHR, the EU Charter and the CEAS, and EU migration and border control law. This systematization covers legal sources, including case law from the ECtHR and the CJEU. To contextualize the asymmetry and analyse how fundamental rights, and the corresponding state obligations, are affected by the EU border regime's spatio-legal interaction, the doctrinal study especially focuses on legal sources that are relevant for the analysis of the scenes of interaction. This is complemented with other research material that represents the realities that protection seekers alter when trying to cross into the EU at the scenes of interaction. This includes images, maps and screenshots of websites that provide information on how to cross the border at the scenes of interaction. Based on this data, the analysis of the scenes of interaction can address law's spatial distribution of the scope of fundamental rights; how spaces are constructed and embedded by legal means; and discrepancies between the legal

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[124] As Delaney points out, most cases concern issues and disputes that are significant only to the small number of people directly involved; however, since cases are also statements of what '[t]he Law is or requires, some cases can have important implications for tens of millions of people or for the foundational features of governing itself'. Delaney, *The spatial, the legal and the pragmatics of world-making: Nomospheric investigations* (2010), p. 163.

representation of reality that is found in legal sources and the reality that is presented with the contextual material.[125]

1.5.2.1 Identifying Legal Sources

The legal sources that this study turns to are systematized in a doctrinal study in chapter 2 and are then subsequently analysed in chapter 4. The question of asymmetry involves international law; however, this thesis looks mainly at European adaptions of international legal norms; in the ECHR and in EU law. The doctrinal study addresses dominant understandings of fundamental rights and their applicability at border crossings in detail. To identify legal sources of relevance for the doctrinal study, legal doctrinal method is used. With this method treaties, conventions, international custom, general principles, and case law on fundamental rights are identified and systematized.[126] The first part (section 2.1) of the doctrinal study includes legal sources on the right to (seek) asylum and the principle of non-refoulement under the ECHR, the EU Charter, and the CEAS. What is recognised as the 'legal context' or the 'legal framework' of the courts in *PPU X and X v Belgium* (CJEU); *M.N. and Others against Belgium* (ECtHR); and *N.D. and N.T. v Spain* (ECtHR) has been considered when identifying legal sources.[127] Case law on fundamental rights and their applicability at border crossings has been identified with the help of

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[125] Cf. F. von Benda-Beckmann, A. Griffiths and K. von Benda-Beckmann, *Spatializing law: an anthropological geography of law in society,* Ashgate Publishing (2013), p. 5; Braverman, whose work in the field of legal geography e.g. explores law's particular way of 'seeing landscape' and how this translates into the making of space, see Braverman, 'Hidden in plain view: Legal geography from a visual perspective' (2011), p. 20. See also Philippopoulos-Mihalopoulos's claim on how law emplaces itself through materiality: Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), p. 55; and Butler's argument on how norms and regulatory practices produce materializations. See Judith Butler, *Bodies that matter: on the discursive limits of sex,* Routledge (1993), p. 1.

[126] This selection draws from Article 38 of the Statute of the international court of justice. For a detailed description of legal sources under international law, see e.g., Malcolm N. Shaw, *International law* (2021), pages 49–91; Malcolm D. Evans, *International Law* (2018), pages 91–117; and James Crawford, *Brownlie's principles of public international law* (2019), pages 20–44.

[127] In C-638/16, PPU X and X v Belgium (2017) this is described as 'the legal context'; and as 'the legal framework' in M.N. and Others v Belgium (2020) and N.D. and N.T. v Spain (2020).

guides and lists of key cases published by the ECtHR and the CJEU, searches in the HUDOC and CURIA databases, and by scholar contributions within the field.[128] After addressing legal sources on fundamental rights, the doctrinal study turns to legal sources of EU migration and border control (see section 2.2). The method for this inquiry is slightly different from that of international legal sources. Identifying legal sources in this part has been made with a focus on the development of the EU border regime. Relevant sources of EU law include EU primary law, general principles of law, secondary sources of law, agreements, and case law from the CJEU.[129] I have also undertaken a historical account that enables the consideration of the development of these legal sources from their establishment to being adopted as the rules on external and extraterritorial border control of today.[130] This historical descriptions has been made by addressing legal sources from the different phases of the integration of fundamental rights into EU law, the adoption of the Schengen rules, and the development of the CEAS. Special attention is given to the following legal sources: EU visa and carrier rules; agreements on third-country cooperation;

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[128] E.g.; ECtHR's Guide on Article 3 of the European Convention on Human Rights (2021); ECtHR's Guide on Article 4 of Protocol No. 4 to the European Convention on Human Rights (2021); Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) (2007); Peers S and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2021); Moreno-Lax V, *Accessing Asylum in Europe: Extraterritorial Border Controls and Refugee Rights under EU Law* (Oxford University Press 2017); Moreno-Lax V and Costello C, 'The Extraterritorial Application of the Charter: From Territoriality to Facticity, the Effectiveness Model' Peers S and others (eds), *The EU Charter of Fundamental Rights: A Commentary* (Hart Publishing 2014); Lenaerts K, 'Exploring the Limits of the EU Charter of Fundamental Rights', *European Constitutional Law Review* 8, 2012; and den Heijer M, *Europe and extraterritorial asylum* (Bloomsbury 2012).

[129] This enumeration includes what is generally considered as legal sources of EU law. For a description of legal sources and forms of EU law, see e.g. Nigel Foster, *EU Law Directions* (Oxford University Press 2020).

[130] Cf. de Witte who notes that the dominant mode of research on EU law is doctrinal research that is based on legal positivism. This includes exposing norms of EU law on a given subject, how they interact and are put in practice by the legal system. De Witte further notes that the doctrinal legal method should not be narrowly limited but should include the study of institutional practices that are not, or only partially, based on legal norms. This means, according to de Witte, an inclusion of 'the varying practices which EU institutions develop in shaping and implementing the formal legal norms', and a focus on 'how EU law is being made'. Bruno de Witte 'Legal methods for the study of EU institutional practice', *European Constitutional Law Review* (2022), pages 637–638.

border procedures under the CEAS; and conditions of entry set by the Schengen rules.[131] The doctrinal study thus describes the legal framework within which different actors – the EU institutions and bodies, member states, protection seekers, border guards, judges, etc. – act and operate, and lays the ground for the analysis of the scenes of interaction.

The purpose of the doctrinal study is not only to deepen our understanding of the asymmetry, but also to provide a detailed systematization of legal sources of certain relevance to the scenes of interaction. The doctrinal study in chapter 2 includes the following context-specific material regarding the Belgian embassy in Beirut: Case *PPU X and X v Belgium* (CJEU); the Advocate General's opinion in Case *PPU X and X v Belgium*;[132] and Case *M.N. and Others against Belgium* (ECtHR). These cases concerned Syrian families applying for visas at the Beirut embassy in order to travel to Belgium to seek asylum. The doctrinal study also addresses the following: the Community Code on Visas (the Visa Code),[133] which establishes the conditions and procedures for issuing visas for short stays for nationals of third countries who must be in possession of a visa; the Visa List Regulation, which lists the third countries whose nationals must be in possession of a visa;[134] the Carriers

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131 The Schengen rules establish provisions abolishing the internal borders of the Schengen area and strengthening its external borders. The 1985 Agreement and the 1990 Convention together form the 'Schengen acquis' along with the related accession agreements. In 1999 the Schengen acquis was integrated into the EU, becoming EU legislation. See the Schengen acquis – 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. The Schengen Borders Code lays down rules governing border control of persons crossing the external borders of the member states of the Union (Article 1 SBC).

132 Opinion of Advocate General Mengozzi delivered on 7 February 2017, PPU X and X v Belgium, C-638/16, EU:C:2017:93

133 Regulation (EC) No 810/2009 of the European Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas.

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

Directive;[135] the EU Charter;[136] the ECHR; and the Schengen Borders Code (especially the articles under Title II on entry conditions).[137]

Regarding the border crossing point at Beni-Enzar, Melilla, the following material is addressed in the doctrinal study: the 2017 Chamber judgement, and the 2020 Grand Chamber judgement in Case *N.D. and N.T. v Spain* (ECtHR),[138] on the Spanish operation of the border of Melilla; the ECHR (especially Article 3 ECHR and the prohibition of collective expulsion in Article 4 of Protocol No. 4 of the ECHR); the SBC (especially the articles under Title II on entry conditions); the Asylum Procedures Directive;[139] and the Return Directive.[140] In chapter 4 the analysis of this scene of interaction furthermore includes the Spanish Aliens Act, 'Institutional Law No. 4/2000 of 11 January 2000 on the rights and freedoms of aliens in Spain and their social integration (the LOEX)', especially its tenth addition laying down special rules for the interception and removal of migrants in Ceuta and Melilla. In this chapter, I furthermore trace and analyse the legal and political third-country agreements between the EU and Morocco, as well as agreements between Spain and Morocco.

I have moreover consulted material that provides additional information on how to understand the procedural and operational sphere of the scenes of

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135 Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985 (the Carriers Directive), concerning the obligation of carriers to take all necessary means to ensure that third country nationals carried by air, sea or land have the travel documents necessary for entry (in accordance with the SBC) into the territory of the Schengen States.

136 Charter of Fundamental Rights of the European Union 2000/C 364/01.

137 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 (the Schengen Borders Code).

138 Judgement of 3 October 2017, N.D. and N.T. v Spain, Application Nos. 8675/15 and 8697/15; and Judgement of the court 13 February 2020 N.D. and N.T. v Spain, Application Nos. 8675/15 and 8697/15.

139 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (the Asylum Procedures Directive).

140 Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (the Return Directive).

interaction. This data is not included in the doctrinal study in chapter 2 but in the analysis of the scenes of interaction in chapter 4. This material includes the accompanying Visa-issuing Handbook for consular officials;[141] the Common Consular Instructions (CCI);[142] and the Schengen handbook 'Practical Handbook for Border Guards to be used by Member States' competent authorities when carrying out the border control of persons'.[143]

When analysing the spatio-legal interaction under the EU border regime in chapter 4, the legal sources examined in this thesis are to be understood as furnishing data for an analysis of how law spatially divides subjects, distributes fundamental rights, as well as access to EU territory in a spatio-legal arrangement. The analysis in this part of the study addresses legal sources and the courts' choices and negotiations of the asymmetry. This involves an analysis of how the concept of jurisdiction under the ECHR and the field of application of the EU Charter provide for a spatial distribution of the scope of fundamental rights at the scenes of interaction. Moreover, the focus on boundaries in this study (chapter 4) includes a recognition of law's embodiedness, and an analysis of how fleeing subjects encounter legal expectations based on social relations when attempting to cross the border into the EU – in this study, by privileging certain sets of relations.[144] The analysis of the legal sources is therefore attentive to how structural and relational dimensions of inequality and exclusion – based primarily on gender, race, age, class, and nationality – interact with the EU border regime, thereby

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[141] European Commission, Commission Decision C (2010) 1620 final of 19 March 2010 establishing the Handbook for the processing of Visa applications and the modification of issued Visas. The handbook was updated in January 2020; see Annex to the Commission Implementing Decision amending Commission Decision C(2010) 1620 as regards the replacement of the Handbook for the processing of visa applications and the modification of issued visas (Visa Code Handbook I).

[142] Common Consular instructions on Visas for the diplomatic missions and consular posts (2005/C 326/01). The CCI harmonizes the practices of the common visa rules, which are binding for authorities of the member states applying them: e.g., diplomatic missions and consular posts.

[143] Practical Handbook for Border Guards (Schengen Handbook) to be used by Member States' competent authorities when carrying out the border control of persons and replacing Commission Recommendation (C(2019) 7131 final), Brussels, 28 October 2022, C(2022) 7591 final.

[144] Cf. Ellingson, *Embodiment in qualitative research* (2017), p. 2.

disadvantaging certain subjects, and impeding their mobility. This includes a focus on the relations involved in, and played out through law-making in the field of EU migration and border control law, and an unpacking of how law shapes space, as well as is shaped in and through space. When analysing legal sources, attention is paid to how a legal rule affects or may affect the fleeing subject, how law interacts with and through social relations, and what spatio-legal effect and possible boundaries this entails in relation to access to EU territory and subsequent asylum procedures.

1.5.2.2 Collecting Contextual Sources

The method for analysis employed in this study furthermore includes a data collection focused on 'materializations' of the EU border regime at the two scenes of interaction. This approach has its basis in qualitative studies that address law as something that happens on bodies and on other sites which are not separate from the material world.[145] In the field of legal geography, attention to the materiality of law often requires the use of ethnographic methods to analyse a site (or in this study a scene of interaction). This encourages an understanding of law as embedded and embodied in the world, rather than as an abstraction 'hovering above'.[146] The focus on law's embeddedness enables the study to explore how abstract legal texts and norms of migration and border control 'materialize' and take form in the physical world.[147]

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[145] See e.g. Delaney, 'Beyond the word: Law as a thing of this world' in Holder and Harrison (eds), *Law and geography, current legal issues*, p. 78. Robinson O'Donnell and Gillespie argue that 'legal geography helps ground the law in the "world" and in assemblages of socio-spatial-material relations. It is not only about understanding "law-making", but it is also about understanding "world-making", and the interaction between the two […].' O'Donnell, Robinson and Gillespie, *Legal geography perspectives and methods* (2020), p. 4 (referring to Delaney).

[146] Bennett and Layard, 'Legal geography: Becoming spatial detectives' (2015), p. 416.

[147] Law as a discipline and as a professional practice is often understood as 'abstract' and disembodied, rather than as formed in material conditions. Legal geographers, however, analyse how law is entangled and embedded in social and material realities in space. O'Donnell, Robinson and Gillespie, *Legal geography perspectives and methods* (2020), p. 134. NB: O'Donnell, Robinson and Gillespie cite Sarah Keenan, *Subversive property: Law and the*

The method for the data collection in this part is inspired by ethnography.[148] The purpose of the maps, images, and illustrations in this study is to facilitate a wide spatial and contextual understanding of the scenes of interaction. Both scenes of interaction are represented on maps, and described with the help of images from such sources as Google Earth, news media, and the website of the Belgian embassy in Beirut. The aim is to portray and to document operations of the EU border regime in their local, contextual, and relational settings. The images do more than just furnish representations of the physical settings; they also throw light on how inequality and social relations are embedded and embodied at the two scenes of interaction.[149] The broad collection of data in this study enables analysis of how law is co-produced through and within social relations, taking form in the physical world as fences, border guards, natural landscapes, and migrating subjects.

Data on the two scenes of interaction has been collected in the following way. In order to document the Belgian embassy in Beirut, I have followed the online application process for a visa on the Belgian embassy's website. This data collection provides information and a zooming in on how to cross the border into the EU by the means of applying for a visa at the Belgian embassy in Beirut. Screenshots and images of the application and refusal forms explain and document the visa application process used by Belgian authorities. Where the border crossing point at Beni-Enzar is concerned, images of the fences and their construction serve to illustrate the border between Morocco and Melilla. In addition, furthermore, to collecting images of the scene of interaction at Melilla online, I have made a field trip to Melilla, in order to document the physical construction and setting of the border. Melilla is treated in this study as a space where the border is crossed in the physical world. In Beirut,

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production of spaces of belonging, Routledge (2015), p. 10; and Blomley, *Law, space, and the geographies of power* (1994), p. 76. See also Braverman, 'Hidden in plain view: Legal geography from a visual perspective' (2011).

[148] See e.g. Clifford Geertz on 'thick description' in Geertz, *The interpretation of cultures*, Fontana Press (1993).

[149] However, the images themselves are also embedded in social practices – in their creation, in the photo situation, in the motive, and in the observer. Accordingly, the images used in subsequent chapters of this thesis are entangled with social relations. Cf. Vaike Fors and Åsa Bäckström, *Visuella metoder,* Studentlitteratur (2015), p. 49.

by contrast, the crossing initially takes place digitally, through the embassy's visa application system.

Case law from the CJEU and the ECtHR furthermore provides material for understanding the contextual setting of the scenes of interaction.[150] The case law analysed in the study has its basis in the situations of protection seekers trying to cross the EU's external border. As such the judgements include contextual data on the scenes of interaction. The cases provide a representation both of the situations at hand and of the spatio-legal negotiation that takes place in the courts.[151] These temporal and spatial representations of the scenes of interaction have however been adjusted and negotiated by the courts to fit the 'legal realities' – to become something on which a court can base a judgement. The judgements thus provide 'legal representations' of the scenes of interaction.[152] Other contextual sources, separately collected, therefore broadens our understanding of the courts' negotiations and of the reality the applicants altered in the situations that prompted the cases.

The inclusion of contextual sources as research material facilitates an understanding of how law operates in and through the physical and digital spaces that protection seekers alter when trying to reach the EU. Accordingly, the study examines the enforcement of border control through the use of documents, application forms and processes, physical features, natural landscape, guards, fences, and surveillance techniques that seek to organize space and relationships in certain ways.[153]

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[150] Cf. Massey, *For space* (2005), p. 27; Philippopoulos-Mihalopoulos, 'And for law: Why space cannot be understood without law' (2018); pages 10–11; and Delaney, *The spatial, the legal and the pragmatics of world-making: Nomospheric investigations* (2010), p. 160. See also Olivia Barr, who uses criminal cases as 'transcripts of evidence' to describe and redescribe legal materials and space: Barr, *A jurisprudence of movement: Common law, walking, unsettling place* (2016), pages 62 and 89.

[151] Cf. Delaney who describes the document (the judgement) as an 'interesting cultural artifact'. See Delaney, *The spatial, the legal and the pragmatics of world-making: Nomospheric investigations* (2010), p. 163.

[152] Cf. Massey, *For space* (2005), page 69; and Philippopoulos-Mihalopoulos, 'And for law: Why space cannot be understood without law' (2018), pages 4–5.

[153] Cf. Massey, *For space* (2005), p. 65.

PART II – GEOGRAPHIES

2 Legal Sources in Space and Time

Addressing the legal sources of the EU border regime, this chapter systematizes the ways in which associated norms generate geographies of fundamental rights and control. The object is to deepen our understanding of the asymmetry, and to establish the grounds for subsequent analysis. Since laws on migration and border control direct patterns of mobility in space, and since they provide prospects for mobility to different subjects, legal sources are also materializations of spatial relations. The geographies addressed in this chapter are thus geographies of law and its inherent spatial relations.[154]

Concerning the protection of individual rights under the EU border regime, this chapter conducts a doctrinal study of international, European, and EU law of particular relevance to the analysis of the two scenes of interaction examined in Part III (the Belgian embassy in Beirut and the border crossing point at Beni-Enzar in Melilla). The first section of this chapter focuses on norms of international, European, and EU law on refugee and human rights, and their extraterritorial application. The second section of the chapter addresses the EU border regime and its historical development with a certain focus on extraterritorial and external border control under the Schengen rules on entry, the visa requirement, carrier responsibility and border procedures under the CEAS, as well as EU's use of third-country cooperation as a tool for managing migration and border control.

2.1 The Integration of Fundamental Rights into EU Law

This section addresses the relationship between refugee law and human rights and demonstrates how fundamental rights have become part of EU law.

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[154] In Massey's words, this geography is a 'painting of a pipe', an abstraction of reality; but it is also the common ground from which legal analysis usually starts, and upon which guidelines and handbooks used by border guards are produced. Maps of geographies offer order and provide representations of essential structures; however, space (as well as time) is impossible to represent on a map: 'a map of a geography is no more that geography – or that space – than a painting of a pipe is a pipe'. Massey, *For space* (2005), p. 106. Massey's reference here is likely to René Magritte's painting: 'Ceci n'est pas une pipe'.

Refugee law forms part of international human rights law. It can be described as a branch of the human rights field specifically concerned with the special situation of refugees. The Refugee Convention – which consists of the 1951 Convention relating to the Status of Refugees, together with its 1967 protocol – comprises legal norms that apply specifically to refugees. It has been ratified by almost 150 states. The Refugee Convention was drafted after WWII, initially applying only to persons who became refugees as a result of events prior to 1 January 1951 in Europe. This temporal and geographical limitation was removed by the 1967 Protocol.[155]

According to Article 1(A) 2) of the Refugee Convention, expanded by the 1967 Protocol, the definition of a refugee is someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. It bears noting that the Refugee Convention has no committee for monitoring compliance. Instead, the United Nations High Commissioner for Refugees (UNHCR) has supervisory responsibilities in the area. However, the UNHCR cannot enforce the Convention, and there is no formal mechanism for individuals to file complaints under the Convention.

Refugee rights and human rights are intertwined, and refugees also benefit from relevant norms and principles drawn from the human rights field – among them freedom from torture, non-discrimination, and rights for certain groups such as women and children. The United Nations (UN) administers the global human rights system, comprising the Universal Declaration of Human Rights (1948) and nine 'core' human rights treaties.[156] Unlike the

[155] Some states have however not ratified the protocol and e.g. Turkey has ratified the Refugee Convention and the 1967 protocol maintaining the geographical limitation.

[156] The nine 'core' human rights treaties include two general treaties: the human rights covenants from 1966 (the International Covenant on Economic, Social and Cultural

Refugee Convention, state parties' compliance with these treaties is monitored by a system of specialist committees established by each treaty, and under certain conditions individuals can file complaints to these bodies if their rights under the treaties are violated.

Human rights instruments like the 1966 Covenants (the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)) are of relevance for refugees, because they recognize a larger number of rights than the Refugee Convention does. These rights are not limited to citizens; instead they are possessed by all persons, regardless of nationality or statelessness – including asylum-seekers, refugees, migrant workers, and others. Individuals who escape their country of origin often flee a situation where the state has failed to protect human rights. Refugee law can thus provide that person, if the person is able to enter another state, international protection (if granted asylum), and the enjoyment of human rights. Refugee law can therefore be understood, as Hathaway has suggested, as not being immigration law at all, but rather a surrogate or substitute for the protection of human rights.[157]

Migration to the EU today is governed by the Refugee Convention and other international treaty obligations undertaken by the Union or its member states. However, during the establishment of the EU and its first decades of development, fundamental rights were not an issue or an explicit aim. The European Economic Community (now the European Union) was initially established as an international organization for the creation of a common

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Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR)); as well as treaties concerning particular groups, such as the Convention on the Rights of the Child (1989); the UN Convention on the Elimination of all forms of Discrimination Against Women (1979); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); and the Convention on the Rights of Persons with Disabilities (2006). Particular human rights are the subject of some of the treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the International Convention on the Elimination of All Forms of Racial Discrimination (1965); and the International Convention for the Protection of All Persons from Enforced Disappearance (2006).

[157] Hathaway, *The rights of refugees under international law* (2005), p. 5.

market among its member states.[158] Accordingly, explicit provisions on respect for fundamental rights were not considered necessary, and for a long time this matter went unmentioned in the Treaties. Fundamental rights were instead considered to be guaranteed by the ECHR, which most of the member states had already signed. However, in connection with the CJEU's confirmation of the principles of direct effect and supremacy of EU law, discussions arose about the impact that EU law could have on the protection of constitutional values such as fundamental rights. This led the CJEU to affirm respect for fundamental rights as general principles of law.[159] In 1970, in *Internationale Handelsgesellschaft*, the Court held that respect for fundamental rights forms an integral part of the general principles of law protected by the Court, and that the structure and objectives of the Community must ensure it.[160] In 1974, in *J Nold v Commission,* the CJEU reiterated that fundamental rights are an integral part of the general principles of EU law, and that the court is bound to draw inspiration from constitutional traditions common to the member states, and cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those states.[161] To ensure the protection of fundamental rights in the EU, fundamental rights were codified in the EU Charter of fundamental rights in the year 2000. When the Lisbon Treaty entered into force in 2009, the EU Charter became legally binding. The validity of all EU acts must be assessed 'in the light of the provisions of the EU Charter',[162] and Article 6(1) of the Treaty on European

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[158] The study refers to all case law from the EU courts as the CJEU. It also refers to the European Economic Community (EEC) and the European Community (EC) as the EU, and EEC and EC law as EU law.

[159] E.g. in Judgement of 12 November 1969, Erich Stauder v City of Ulm, C-29/69, EU:C:1969:57; Judgement of 17 December 1970, Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, C-11/70, EU:C:1970:114; and Judgement of 14 May 1974, J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities, C-4/73, EU:C:1974:51.

[160] C-11/70, Internationale Handelsgesellschaft (1970), para 4.

[161] C-4/73, Nold (1974).

[162] Judgement of 9 November 2010 Volker und Markus Schecke and Eifert, Joined Cases C-92/09 and C-93/09, EU:C:2010:662, paras 45-46; and Judgement of 1 March 2011, Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres, C-236/09, EU:C:2011:100, para 17.

Union (TEU)[163] specifies that the EU Charter has the same legal value as the Treaties.

The establishment of the EU Charter has not meant that the ECHR has lost its relevance since the ECHR and the case law of ECtHR constitute sources for the interpretation of EU law. Article 6(3) TEU states that fundamental rights, as guaranteed by the ECHR and as they result from the constitutional traditions common to the member states, shall constitute general principles of EU law. In order to ensure consistency between the Charter and the ECHR, Article 52(3) of the Charter affirms that, in so far as the rights in the Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights are the same as those laid down by the ECHR. The reference to the ECHR covers the Convention, the protocols thereto, and case law from the ECtHR.[164] Limitations on fundamental rights must therefore accord with the limitations set out in the ECHR. The Charter adds, moreover, that the scope of the ECHR shall not prevent EU law from providing more extensive protection (Article 52(3)). Furthermore, Article 53 of the Charter states that nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized in the ECHR. Where fundamental rights are concerned, therefore, the Charter should be read together with the ECHR – providing a minimum floor of protection.

The EU's commitments on fundamental rights also follow directly from the Treaties. According to Article 2 TEU, the EU is founded on the values of freedom, democracy, equality, the rule of law, and respect for human dignity and human rights. Furthermore, these principles are to guide the Union in its actions on the international scene (Article 21 TEU). Where asylum is concerned, Article 78(1) of the Treaty on the Functioning of the European Union (TFEU)[165] provides instructions on the development of a common policy on asylum, subsidiary protection, and temporary protection, with a view to guaranteeing that appropriate status is offered to any third-country national

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[163] Consolidated version of the Treaty on European Union OJ C 326.

[164] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

[165] Consolidated version of the Treaty on the Functioning of the European Union OJ C 326.

requiring international protection, and to ensuring that the principle of non-refoulement is followed. EU policy must, Article 78(1) states, be in accordance with the Refugee Convention, its 1967 protocol relating to the status of refugees, and other relevant treaties. For the purposes of Article 78(1) a common European asylum system (CEAS) shall be adopted.[166]

Together with secondary EU law under the CEAS[167] and the Schengen rules, the Refugee Convention, the ECHR, and the EU Charter lay down that fundamental rights must be respected when the Union and its member states conduct migration and border control activities. Human rights commitments are further established at both Union and member state level, since all EU member states are obliged to respect the ECHR as parties to the Convention, and since the ECHR constitutes 'general principles' of EU law that the member states are obliged to respect when applying or implementing EU law (Article 6(3) TEU). The Schengen acquis and other EU law on border and migration control also contain general references to human rights and refugee law, especially the Refugee Convention and the principle of non-refoulement – signalling that the Union and its member states must perform border control in accordance with human rights and refugee law (as per Article 78 TFEU) and the EU Charter.

2.1.1 Fundamental Rights in EU Migration and Border Control Law

The following sections focus on the right to (seek) asylum, the principle of non-refoulement, and the prohibition of collective expulsion under primarily

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[166] The CEAS shall, according to 78 (2), comprise: a uniform status of asylum (78.2 (a)); a uniform status of subsidiary protection (78.2 (b)); temporary protection for displaced persons in the event of a massive inflow (78.2 (c)), common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status (78.2 (d)); criteria and mechanisms for determining which member state is responsible for considering an application for asylum or subsidiary protection (78.2 (e)); standards concerning the conditions for the reception of applicants for asylum or subsidiary protection (78.2 (f)); partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection (78.2 (g)).

[167] The CEAS includes the Asylum Procedures Directive, the Reception Conditions Directive, the Qualification Directive, the Dublin Regulation, and the EURODAC Regulation.

the ECHR, the EU Charter, and the CEAS. Since migration and border control is performed extraterritorially and in cooperation with third countries, the extraterritorial applicability of these rights is also addressed. These sections also present case law of relevance for the analysis of the scenes of interaction in Part III, in particular the ECtHR case: *N.D. and N.T. v Spain*.

2.1.1.1 The Right to (seek) Asylum

Granting asylum has historically been regarded as a voluntary act performed by a sovereign state, and not as a legal entitlement for the individual refugee; nor has the right to be granted asylum ever been fully recognized as a codified right internationally.[168] Article 14 of the 1948 Universal Declaration of Human Rights (UDHR) states that everyone has the right to *seek* and to *enjoy* asylum in other countries from persecution. The UDHR is of a declaratory nature, but the rights enshrined in it represent customary international law and are thus at least in part universally binding.[169]

Although grounded in Article 14 UDHR, the Refugee Convention does not oblige the state parties to the Convention to grant asylum to those in need of international protection. Rather – under the principle of non-refoulement in Article 33 – the Convention prohibits measures that push back people to persecution. However, the scope of non-refoulement under the Refugee Convention is limited to 'refugees' as defined in Article 1. Nevertheless, since recognition as a refugee by the host state is declaratory, Article 33 is also applicable to refugees not formally (or not yet) recognized as refugees in an asylum process. According to the UNHCR's 'Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees':

> A person is a refugee within the meaning of the 1951 Convention as soon as he fulfils the criteria contained in the definition. This would necessarily occur prior to the time at

[168] Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017), p. 338.

[169] See e.g., Hurst Hannum, 'The UDHR in national and international law', *Health and Human Rights* (1996); and The Universal Declaration of Human Rights and its relevance for the European Union, 2018.

> which his refugee status is formally determined. Recognition of his refugee status does not therefore make him a refugee but declares him to be one. He does not become a refugee because of recognition but is recognized because he is a refugee.[170]

The declaratory nature of the refugee definition and the principle of non-refoulement prohibiting the expulsion of not yet recognized refugees impose an obligation to exclude risks of persecution before returning a person. The assessment hereof is part of the asylum procedure, which is why Article 33 of the Refugee Convention is closely connected to the right to seek asylum.[171]

Neither the ECHR nor its protocols explicitly protect the right to asylum. Like Article 33 of the Refugee Convention, however, Article 3 of the ECHR prohibits the return of persons to a state where they face a real risk of being subjected to inhuman or degrading treatment or even torture. Under this logic, a right to enter a country in order to apply for asylum has been recognized in ECtHR case law.[172] In *A.E.A. v. Greece*, the ECtHR concluded that the lodging of an asylum application and the gaining of access to asylum procedures constitute prerequisites for the effective protection for those in need of international protection.[173] In *M.A. and Others v. Lithuania*, the ECtHR held that the failure to allow Chechen applicants to submit asylum applications, and the absence of any examination of their claim before their removal to Belarus, constituted a violation of Article 3 in conjunction with Article 13 of the

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[170] The UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, recital 28.

[171] Cf. Álvaro Botero and Jens Vedsted-Hansen 'Asylum procedure' in Cathrine Costello (ed) et al. *The Oxford handbook of international refugee law* (Oxford University Press 2021), p. 589. Botero and Vedsted-Hansen refer to Andreas Zimmermann and Claudia Mahler, 'Article 1 A, para 2' in Andreas Zimmermann (ed), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. A Commentary* (OUP 2011).

[172] See e.g. Judgement of 26 April 2007, Gebremedhin v France, Application No. 25389/05 (Violation of Article 13 taken in conjunction with Article 3).

[173] Judgement of March 2018, A.E.A. v Greece, Application No. 39034/12 (Violation of Article 13 taken in conjunction with Article 3).

ECHR.[174] The Court did not accept the argument of the Lithuanian government that the applicants 'had not in any way expressed willingness to seek asylum'. The ECtHR declared that a wish to apply for asylum can be expressed in any form, and that states should provide border officers trained to be able to detect and to understand asylum requests.[175]

In contrast to the Refugee Convention and the ECHR, the EU Charter has consolidated an individual right to be granted international protection – a right *to* asylum – in Article 18. Formulated in broad terms, Article 18 is not restricted to 'a right to seek asylum'. It entails more than a procedural right, and it mirrors the duty of member states to admit refugees and to offer an individual right to asylum to those who fulfil the criteria set out by secondary legislation under the CEAS.[176] Under the CEAS, the Qualification Directive states the preconditions for qualifying for international protection, and the Asylum Procedures Directive (APD) provides for common procedures for access to the asylum procedure, as well as for the granting and withdrawing of uniform asylum or subsidiary protection status. The APD obliges member states to arrange for asylum procedures; and the asylum-seeker who expresses a need for international protection has a right to enter a member state if the declaration of intent takes place at the border or within the state's territorial jurisdiction.[177] The APD specifies the obligations of member states to inform people of the opportunity to apply for asylum, as well as to register protection claims (Article 6 and Article 8). Following from Article 6 APD, member states shall ensure that authorities which are likely to receive applications for international protection – such as the police, border guards, immigration

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[174] Judgement of 11 December 2018, M.A. and Others v Lithuania, Application No. 59793/17 (Violation of Article 13 taken in conjunction with Article 3).

[175] Ibid., paras 108–115.

[176] Maarten den Heijer, 'Article 18 – Right to asylum', in Steve Peers and others (eds), *The EU Charter of fundamental rights: A commentary* (Hart Publishing 2021), p. 566.

[177] The recast Asylum Procedures Directive (APD) provides guarantees for access to asylum procedures, and it applies to all applications for international protection made in the territory in question, including at the border, in the territorial waters, or in the transit zones of the member states. It applies as well to the withdrawal of international protection (Article 3). This territorial scope applies in general under the CEAS; see Article 3(1) and (3) of the Asylum Procedures Directive, Article 3(1) and (2) of the Reception Directive, and Article 3(1) of the Dublin Regulation.

authorities, and staff at detention facilities – have the relevant information and receive the level of training appropriate to their tasks and responsibilities. Applicants must also be informed as to where and how applications for international protection may be lodged.

Article 8 (1) of the APD states that, where there are 'indications' that third-country nationals or stateless persons present at border crossing points (including transit zones at external borders) wish to make an application for international protection, member states shall provide them with information on the possibility to do so. Member states shall further make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure. The Schengen Handbook for border guards provides further details, stating that a third-country national must be considered an applicant for international protection if s/he expresses – in any way – fear of persecution or of suffering serious harm if s/he is returned to his/her country of origin or former habitual residence.[178] In line with the ECtHR's case law, the wish for international protection need not be expressed in any particular form. The word 'asylum' does not need to be used; the defining element is the expression of fear of what might happen upon return. In case of doubt about whether a certain declaration can be construed as a wish to apply for asylum, border guards must consult the national authorities responsible for the examination of applications for international protection.[179] Furthermore, no decision to return the applicant may be taken by a border guard without prior consultation with the national authority responsible for the examination of applications for international protection.[180]

Following from the Refugee Convention, the ECHR, the EU Charter, and the CEAS, a protection seeker situated at the border of a member state of the EU invokes responsibilities concerning the right to seek asylum and the principle of non-refoulement. There is no such explicit 'right to enter' under international or European or EU law; however, the right to seek asylum and the principle of non-refoulement do trigger a duty to take positive action to assess individual protection needs and to exclude refoulement risks before

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[178] Practical Handbook for Border Guards, para. 12.1.

[179] Ibid., para. 12.1.

[180] Ibid., para. 12.3.

denying a protection seeker entry. When protection seekers are at the border or have crossed into a member state's territory, they are at the centre of legal obligation and are entitled to institutional resources. Under the CEAS, this includes reception conditions, medical aid, and the right to seek and possibly to receive asylum. As the ECtHR has highlighted in several cases, moreover, problems which states may encounter in managing migratory flows cannot justify recourse to practices incompatible with the Convention or with positive obligations in relation to the right to life; and states are required to organize their border operations accordingly.[181]

2.1.1.2 The Principle of Non-Refoulement

States have – as a matter of well-established international law, and subject to their treaty obligations – the right to control the entry of non-nationals into their territory.[182] However, this right must be exercised with due regard to fundamental rights; and the exclusive right of states to control entry, residence,

[181] See e.g. N.D. and N.T. v Spain (2020); Judgement of 23 February 2012, Hirsi Jamaa and others v Italy, Application No. 27765/09; and Judgement of 2 February 2023, Alhowais v Hungary, Application No. 59435/17. In Alhowais v Hungary (2023) the ECtHR reiterates states' positive obligations in relation to the right to life when they conduct border control. The case concerned an incident where a Syrian national drowned during a border control operation at a river on the Hungarian-Serbian border. The ECtHR held that Hungarian authorities had failed to discharge their positive obligation to protect life, thereby violating Article 2 of the Convention. The Court reiterated that incidents at the Tisza River between Serbia and Hungary had been observed before the event, and it could have been easily predicted that further attempts would be made to cross the river. The circumstances were therefore not exceptional; rather, the case concerned a more or less routine border control operation. The Court found that the Hungarian authorities had sufficient knowledge to evaluate the dangers that the river-crossing presented, and accordingly to organize their border operations carefully. The Court stressed that the problems which states may encounter in managing migratory flows or in the reception of asylum-seekers cannot justify recourse to practices which are not compatible with the Convention or the protocols thereto.

[182] See e.g. Judgement of 24 April 1985, Abdulaziz, Cabales and Balkandali v The United Kingdom, Application No. 15/1983/71/107-109, para 67.

and expulsion must be exercised in compliance with the principle of non-refoulement.[183]

The principle of non-refoulement is the cornerstone of international refugee law. It obliges states to examine whether returning a person would entail a risk for that person of persecution or of exposure to torture or other inhuman or degrading treatment or punishment. The prohibition of refoulement has the status of international customary law[184], and it forms an essential obligation of protection, if not a 'jus cogens' norm.[185] The principle of non-refoulement is an inherent obligation under Article 3 of the ECHR (the prohibition of torture)[186], and is stated in international treaties such as the Refugee Convention (Article 33), the ICCPR (Article 7), and the 1984 UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT, Article 3). The principle of non-refoulement is also enshrined in Article 19(2) of the EU Charter, which states that no one may be removed, expelled, or extradited to a state where he or she faces a serious risk of being subjected to the death penalty, to torture, or to other inhuman or degrading treatment or punishment. This principle forms part of the general principles of EU law,[187] and is expressed in EU secondary law.[188]

Article 33(1) of the Refugee Convention states that:

> No Contracting State shall expel or return ('refouler') a refugee in any manner what so ever to the frontiers of

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[183] See e.g., Judgement of 30 October 1991, Vilvarajah and Others v the United Kingdom, Application Nos. 13163/87, 13164/87, 13165/87, 13447/87, 13448/87, para 102; and Judgement of 28 November 1996, Nsona v The Netherlands, Application No. 23366/94, para 92.

[184] Lauterpacht and Bethlehem, *The scope and content of the principle of non-refoulement: Opinion* (2003), and Hathaway, *The rights of refugees under international law* (2005), p. 363.

[185] Jean Allain, 'The jus cogens nature of non-refoulement', *International Journal of Refugee Law* (2001), pages 533–558.

[186] Judgement of 7 July 1989, Soering v The United Kingdom, Application No. 14038/88.

[187] Judgement of 17 February 2009, Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie, C-465/07, EU:C:2009:94, para. 28.

[188] See e.g., Article 3 b) and Article 4 of the SBC, and Article 21 of the Qualification Directive.

> territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

The applicability of the Refugee Convention is conditioned by the persecution grounds established in Article 1(A) 2) of said Convention, and it is further dependent on the refugee's being outside the country of nationality. Thus, the principle of non-refoulement under the Convention does not apply to a person who has a protection need due to other circumstances than persecution, or is within his or her country of nationality.[189] The Convention furthermore applies derogations in Article 33(2), stating that the benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country. Article 3(1) CAT, however, applies without such derogations, and without the refugee criteria in Article 1 of the Refugee Convention, however only to the risk of torture: 'No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.' Article 1(1) CAT defines torture as:

> […] any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the

[189] The condition of being outside the country of nationality also applies under the EU Qualification Directive. Article 2 (d) of the Qualification Directive concerns refugees and the precondition of being outside the 'country of nationality'. Article 2 (f) refers to persons eligible for subsidiary protection, and to the precondition of being outside 'the country of origin', or – in the case of stateless persons – outside 'former habitual residence'.

> instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

In line with CAT, Article 3 of the ECHR prohibits torture and other inhuman or degrading treatment or punishment. As established in *Soering*, the principle of non-refoulement is an inherent obligation under Article 3 in cases where there is a real risk of exposure to such treatment.[190] The ECtHR uses the definition of torture set out in Article 1(1) CAT. Like CAT, moreover, it is applied without the refugee criteria. Instead, Article 3 ECHR states: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Furthermore, Article 3 applies without the condition that the person at risk has to be outside the country 'of his nationality', and it can be triggered extraterritorially (see section 2.1.1.3.1).[191] The principle of non-refoulement under Article 3 ECHR applies, the ECtHR has clarified, to acts of expulsion, non-admission at the border, and chain refoulement.[192] The prohibition of chain refoulement is of relevance when states expel people to transit countries, since actions that expose a person to the risk of torture as a result of a chain of return through an intermediate country are forbidden under

[190] Soering concerned the extradition of a murder suspect from the UK to the US to face charges of capital punishment. The ECtHR found that the related death row phenomenon did breach Article 3 of the ECHR, and that extradition would therefore violate the prohibition of torture. Soering v The United Kingdom (1989).

[191] See e.g. Judgement of 12 December 2001, Banković and others v Belgium and others, Application No. 52207/99; Judgement of 7 July 2011, Al-Skeini and Others v the United Kingdom, Application No. 55721/07; and Hirsi Jamaa and others v Italy (2012).

[192] See e.g. Judgement of 20 March 1991, Cruz Varas and Others v Sweden, Application No.15576/89; Vilvarajah and Others v the United Kingdom (1991); Judgement of 15 November 1996, Chahal v United Kingdom, Application No. 22414/93; Judgement of 21 October 2014, Sharifi and Others v Italy and Greece Application No.16643/09. See also Hathaway, *The rights of refugees under international law* (2005), p. 363; and Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017), p. 269.

the ECHR.[193] The principle of non-refoulement thus imposes an obligation of result. What matters is that persons at risk, e.g. protection seekers, not be forced – whether directly or indirectly, whether due to an action or to inaction – to territories where their life or freedom is threatened.[194]

2.1.1.2.1 Individual Assessment of Risk

To ensure that the principle of non-refoulement is observed, an individual assessment of risk must take place before expulsion, as part of the asylum procedure. To guarantee an individual assessment of risk, the 'collective expulsion' of aliens is prohibited under Article 19(1) of the EU Charter and Article 4 of Protocol No. 4 to the ECHR.

According to the European Council's guide on Article 4 of Protocol No. 4 to the ECHR, collective expulsion is to be understood as 'any measure compelling aliens, as a group, to leave the country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group'.[195] In *Hirsi,* the ECtHR stated that the purpose of Article 4 of Protocol No. 4 is to prevent states from removing certain aliens without examining their personal circumstances, and thus without enabling them to put forward their arguments against the measure taken by the relevant authority.[196] The ECtHR turned in the case to

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[193] See e.g. Judgement of 2 December 2008, K.R.S. v the United Kingdom, Application No. 32733/08; Judgement of 7 March 2000, T.I. v the United Kingdom, Application No. 43844/98; Hirsi Jamaa and others v Italy (2012); Judgement of 21 January 2011, M.S.S. v Belgium and Greece, no. 30696/09; Judgement of 30 June 2022, Case of A.I. and Others v Poland, Application No. 39028/17; and Judgement of 30 June 2022, Case of A.B. and Others v Poland Application No. 42907/17.

[194] Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017), p. 254; and Noll, *Negotiating asylum: the EU acquis, extraterritorial protection and the common market of deflection* (2000), pages 423–431.

[195] Guide on Article 4 of Protocol No.4 to the European Convention on Human Rights Referring to ECtHR Case law; Judgement of 15 December 2016, Khlaifia and Others v Italy, Application No. 16483/12, para 237; Judgement of 3 July 2014, Georgia v Russia (I) Application No. 13255/07, para 167; Judgement of 23 February 1999, Vedran Andric v Sweden, Application No. 45917/99; Judgement of 5 February 2002, Conka v Belgium, Application No. 51564/99; and Judgement of 26 September 2007, Sultani v France, Application No. 45223/05.

[196] Hirsi Jamaa and others v Italy (2012), para 177.

the travaux préparatoires, noting that, according to the drafters of Protocol No. 4, the word 'expulsion' should be interpreted 'in the generic meaning, in current use (to drive away from a place)'.[197] For an expulsion to be 'collective', there is no requirement that a group comprise any given minimum number of individuals. Thus, the number of persons affected by a measure is irrelevant in determining whether there has been a violation of Article 4 of Protocol No. 4.[198] The defining condition for a violation is instead that no individual assessment has taken place.

In *A.B. and Others and A.I. and Others v. Poland,* the ECtHR concluded that refusing entry without taking proper account of the individual situation of each applicant constitutes collective expulsion in the meaning of Article 4 of Protocol No. 4.[199] The case concerned the collective expulsion of Chechen families at the Poland-Belarus border. Although having submitted written asylum applications and expressed their fear of persecution to the Polish border guards on more than twenty occasions, they were refused entry because they did not have documents authorizing their entry into Poland. The ECtHR found that the Polish authorities had exposed the families to the risk of chain refoulement and to treatment prohibited by Article 3 of the ECHR, and ruled that this violated Article 3 and Article 13 of the ECHR and Article 4 of Protocol No. 4 to the Convention. The Court further stressed that a state cannot deny access to its territory to a person presenting him or herself at a border checkpoint, who alleges that he or she may be subjected to ill-treatment if he or she remains on the territory of the neighbouring state, unless adequate measures are taken to eliminate such a risk. The ECtHR noted too that the refusal of entry without taking account of the individual situation of each applicant was part of a wider policy of returning protection seekers at the Poland-Belarus border. The ruling in *A.B. and Others and A.I. and Others v. Poland* confirms that a state party to the ECHR needs to show proper regard to the individual situation of each protection seeker presenting themselves at the border. If the person alleges that he or she may be subjected to ill-treatment in the state he or she is trying to leave, or as a consequence of

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[197] Ibid., para 174.

[198] N.D. and N.T. v Spain (2020), para 194.

[199] A.I. and Others v Poland (2022) and A.B. and Others v Poland (2022).

expulsion to another state, entry must be provided in order to respect the principle of non-refoulement, the right to *seek*, – as well as the right *to* (enjoy) asylum, and the prohibition of collective expulsion. This applies to all EU member states – both as state parties to the ECHR, the Refugee Convention, and as member states to the EU. Under such circumstances there is a right to enter the state in question, as well as a 'right to leave' the state in which the protection seeker is situated.[200]

In *N.D. and N.T. v Spain*, however, the grand Chamber of the ECtHR found that the lack of an individual removal decision does not necessarily constitute a violation of the Convention. The case concerned Spanish 'operational border' tactics at the Spanish enclave of Melilla, and the collective expulsion of sub-Saharan migrants who had entered Melilla by climbing the border fences.[201] The applicants had been removed from Spanish territory and returned to Morocco against their will in handcuffs by members of the Spanish

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[200] The right to leave is recognized by the UDHR, the ICCPR, and the ECHR. Article 13(2) of the UDHR proclaims the right to leave a country, including one's own. The right to leave is also laid down in Article 12(2) in the ICCPR. This right is not absolute, and Article 12(3) of the ICCPR permits restrictions provided by law which are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others, and which are consistent with the other rights recognized in the Covenant. Article 2(2) of the Protocol no. 4 of the ECHR states that 'everyone shall be free to leave any country, including his own'. Article 2(3) permits restrictions only where they are 'in accordance with the law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others'. Moreno-Lax has pointed out the intersectional character of the right to leave and the prohibition of torture, and argues that the right to leave in order to avoid persecution or serious harm disallows restrictions and imposes a positive obligation – 'a right to flee'. See V. Moreno-Lax, EU external migration policy and the protection of human rights, 2020, p. 18. However, the right to leave – as well as the right to seek asylum – lacks its counterpart (the right to enter another country). As Moreno-Lax notes, this is so since control over admission has been considered intrinsic to state sovereignty. See Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017), p. 341. In the context of the lack of entry rights, Noll has described the right to seek asylum as a 'fictional privilege for refugees'. Gregor Noll, 'Securitising sovereignty? States, refugees, and the regionalisation of international law', in E Newman and J van Selm (eds), *Refugees and forced displacement: international security, human vulnerability, and the state* (United Nations University Press 2003), p. 277.

[201] The Spanish Guardia Civil border control operations protocol of 26 February 2014 introduced the term 'operational border'. See N.D. and N.T. v Spain (2020), para 37.

Guardia Civil.[202] The applicants alleged that they had been refouled to Morocco where they risked ill-treatment, contrary to Article 3 ECHR, and that they had been left without any effective remedy (Article 13 ECHR). They further claimed they had not undergone any identification procedure or been given any opportunity to explain their personal circumstances or to be assisted by lawyers or interpreters. [203] In addition, they asserted they had been victims of collective expulsion, contrary to Article 4 of Protocol No. 4 to the ECHR and Article 13 ECHR, as they had not been able to seek identification as asylum-seekers, to explain their individual circumstances, or to challenge their immediate deportation to Morocco before the Spanish authorities.[204] The 2017 ECtHR Chamber rejected the claim under Article 3 ECHR as manifestly unfounded, although it considered the other complaints to be admissible. The applicants did not claim, the Court observed, to have been subjected to treatment contrary to Article 3 of the ECHR when deported to Morocco. Further, the ECtHR noted, nothing in the file indicated any appearance of violations of Article 3 by the Spanish authorities.[205] On 3 October 2017, the Chamber found that the Spanish action of expelling the applicants without any identification procedure, and without any possibility for said persons to give any details of their individual circumstances, was a violation of Article 4 of Protocol 4 and of Article 13 ECHR in conjunction with the previous protocol.[206]

The 2017 judgement in *N.D. and N.T. v Spain* was subsequently appealed by Spain, and in January 2018 the Grand Chamber Panel accepted the request of the Spanish government that the case be referred to the Grand Chamber. In 2020, the Grand Chamber concluded that the removal of the applicants

[202] Ibid., para 191.

[203] Ibid., para 25.

[204] Troisième Section Dècision, Requêtes nos 8675/15 et 8697/15 N.D. contre l'Espagne et N.T. contre l'Espagne, 7 July 2015.

[205] Ibid.

[206] N.D. and N.T. v Spain (Chamber Judgement, 2017).

qualified as an expulsion in the meaning of Article 4 of Protocol No. 4.[207] However, in assessing the applicants' 'own conduct' as a relevant factor in regard to the protection offered by Article 4 of Protocol No. 4, the ECtHR noted that the prohibition is not violated if the lack of an individual expulsion decision can be attributed to the applicants' own conduct. The Court cited ECtHR case law on collective expulsion – e.g., *Berisha and Haljiti* and *Dritsas and Others* – in which the Court had stated that the lack of active cooperation by an applicant with available procedures for individual examination had prompted it to find that the state in question could not be held responsible for the fact that no such examination had been carried out.[208] With this case law in mind, the ECtHR concluded that the same principles apply to situations where persons take advantage of their large numbers and use force when crossing land borders in an unauthorized manner.[209] In this context, the Court stated that it had to 'take account of whether in the circumstances of the particular case the respondent State provided genuine and effective access to means of legal entry, in particular border procedures'.[210] The ECtHR therefore found it necessary to ascertain whether it had been possible to enter Spain lawfully – in particular to claim protection under Article 3 ECHR – and whether such possibilities had 'existed at the material time and, if so, whether

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[207] N.D. and N.T. v Spain (2020), para 191. According to Guide on Article 4 of Protocol No 4 to the European Convention on Human Rights, the term 'expulsion' refers to 'any forcible removal of an alien from a State's territory, irrespective of the lawfulness of the person's stay, the length he or she has spent in the territory, the location in which he or she was apprehended, his or her status as a migrant or an asylum-seeker or his or her conduct crossing the border. The term has the same meaning as it has in the context of Article 3 of the Convention. Both provisions apply to any situation coming within the jurisdiction of a Contracting State, including to situations or points in time where the authorities of the State in question had not yet examined the existence of grounds entitling the persons concerned to claim protection under these provisions.'

[208] N.D. and N.T. v Spain (2020), para 200. The ECtHR refers to Judgement of 13 February 2020, Berisha and Haljiti v the former Yugoslav Republic of Macedonia, Application No. 18670/03; and Judgement of 1 February 2011, Dritsas and Others v Italy, Application No. 2344/02.

[209] The concept of applicants' 'own conduct' in relation to irregular border crossings was affirmed by the ECtHR in Judgement of 5 April 2022, A.A. and Others v North Macedonia, Application No. 55798/16.

[210] N.D. and N.T. v Spain (2020), para 201.

they were genuinely and effectively accessible to the applicants'.[211] If the applicants had not made use of such legal procedures, but instead crossed the border in an unauthorized manner, only the absence of cogent reasons preventing the use of these procedures could lead to this being regarded as the consequence of the applicants' own conduct, justifying the fact that the Spanish border guards did not identify them individually.[212] The ECtHR noted that Spanish law afforded the applicants 'several possible means of seeking admission to the national territory, either by applying for a visa […] or by applying for international protection, in particular at the Beni-Enzar border crossing point, but also at Spain's diplomatic and consular representations in their countries of origin or transit or else in Morocco.'[213] In light of this, the Court concluded,

> […] it was in fact the applicants who placed themselves in jeopardy by participating in the storming of the Melilla border fences on 13 August 2014, taking advantage of the group's large numbers and using force. They did not make use of the existing legal procedures for gaining lawful entry to Spanish territory in accordance with the provisions of the Schengen Borders Code concerning the crossing of the Schengen Area's external borders.[214]

Due to the fact the applicants in the case did not demonstrate they had been incapable of using the legal procedures available to obtain permission to cross the land border, the ECtHR concluded that the lack of an individual removal decision could be attributed to the applicants' own conduct. Thus, it found, no violation of Article 4 of Protocol No. 4 had occurred.[215]

The concept of applicants' own conduct has drawn further attention from the ECtHR in subsequent case law. In two cases concerned with the Poland-

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[211] Ibid., para 211.

[212] Ibid., para 211.

[213] Ibid., para 212.

[214] Ibid., para 231.

[215] Ibid., paras 204 and 231.

Belarus border – *T.Z. and Others v. Poland*[216] and *M.K. and Others v. Poland*[217] – the Court found violations of Article 3 ECHR and Article 4 Protocol 4 ECHR in connection with Polish collective expulsions to Belarus and serious risks of chain refoulement and ill-treatment. The ECtHR held that a state cannot deny access to its territory to persons who present themselves at a border checkpoint alleging they may be subjected to ill-treatment if they remain in the neighbouring state. The Court noted that the applicants had attempted to cross the border in a legal manner, using an official checkpoint and subjecting themselves to border checks as required by the relevant law.[218] Hence, the Court found, the fact that Poland had refused to entertain their arguments for applying for international protection could not be attributed to their own conduct.[219]

Following from *N.D. and N.T. v Spain* and the cases connected with the Poland-Belarus border, the ECtHR has developed the concept of applicants' own conduct in relation to whether persons have attempted to cross a border in a legal manner, using an official checkpoint and subjecting themselves to border checks.

2.1.1.3 The Extraterritorial Scope of Fundamental Rights

Rights covered under human rights law are generally applicable, and owed to anyone 'within' or 'subject' to a state's jurisdiction.[220] This mostly translates into territorial jurisdiction. Under EU law, the Dublin Regulation, the Asylum Procedures Directive, and the Reception Conditions Directive explicitly state that they do not apply to requests for diplomatic or territorial asylum submitted to representations of member states abroad.[221] This territorial application precludes a right to seek asylum at the embassies of member states

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[216] Judgement of 13 October 2022, T.Z. and Others v Poland, Application No. 41764/17.

[217] Judgement of 23 July 2020, M.K. and Others v Poland Applications Nos. 40503/17, 42902/17 and 43643/17.

[218] For similar reasoning, see also A.B. and Others v Poland (2022) and A.I. and Others v Poland (2022).

[219] M.K. and Others v Poland (2020).

[220] See e.g. the ECHR, the UDHR, and the 1966 Covenants.

[221] See Article 3(1) of the Dublin Regulation, Article 3(1) and (3) of the Asylum Procedures Directive, and Article 3 (1) and (2) of the Reception Conditions Directive.

in third countries. Therefore, providing temporary 'shelter' or granting asylum to protection seekers at the embassies or diplomatic missions of EU member states in third countries is not an obligation under the CEAS. Nor do the EU's own diplomatic posts, delegations, or missions in third countries provide for a clear extraterritorial application of the right to seek asylum at such premises.[222]

Although the right to seek asylum under EU law in general only applies on the territory or at the border of an EU member state, fundamental rights under the ECHR and the EU Charter are granted extraterritorial applicability under certain conditions. The following sections give examples of how the ECtHR and the CJEU have interpreted the extraterritorial application of fundamental rights, and they address case law of relevance for the analysis of the scenes of interaction in Part III – in particular Case *PPU X and X v Belgium* and *M.N. and Others against Belgium*.

2.1.1.3.1 Extraterritorial Jurisdiction under the ECHR

In accordance with Article 1 of the ECHR, rights and freedoms are to be secured to everyone within the jurisdiction of the state parties to the Convention. Jurisdiction under the ECHR is primarily territorial; however, extraterritorial jurisdiction has been recognized by the ECtHR in several cases.[223] In *Bankovic*, the Court stated that, while the Convention had not been

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[222] For an analysis of legal obligations on granting refuge at EU diplomatic missions in third countries under the 1961 Vienna Convention on Diplomatic Relations, see Sanderijn Duquet and Jan Wouters, 'Seeking refuge in EU delegations abroad: A legal imbroglio explored', *European Law Review* (2015). Duquet and Wouters conclude that the principle of non-refoulement can be applied extraterritorially, but that there are different thresholds due to competing obligations under international law, p. 744.

[223] In contrast to the ECHR, the Refugee Convention does not contain any jurisdictional clause. However, the extraterritorial applicability of the Convention is debated. According to Hathaway, the silence of the Convention in this matter speaks for an interpretation of broad applicability. Hathaway notes that 'the fact that the drafters assumed that refoulement was likely to occur at, or from within, a state's borders […] simply reflects the empirical reality that when the Convention was drafted, no country had ever attempted to deter refugees other than from within or at, its own borders'. Hathaway, *The rights of refugees under international law* (2005), p. 336. Other scholars have argued that the

designed to be applied throughout the world, in exceptional cases 'acts of the Contracting States performed, or producing effects, outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 of the Convention'.[224] In this case, the Court conducted an inventory of extraterritorial jurisdiction, including in regard to extradition and expulsion, and noted that the extraterritorial exercise of jurisdiction by a state includes cases involving the activities of its diplomatic or consular agents abroad, and on board craft and vessels registered in or flying the flag of that state.[225]

The ECtHR's case law demonstrates that, in certain circumstances, the use of force by state agents operating outside their territory may bring the persons affected into the jurisdiction of the state in question. In *Al-Skeini*, the Court found that the United Kingdom, through its soldiers engaged in security operations in Basrah, Iraq, during the occupation of Iraq, exercised authority

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terms of Article 33, which prohibit return 'in any manner whatsoever', appear to indicate that protection from refoulement should apply regardless of intent or territorial location. See Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017), p. 253. Other treaties within the human rights field have been thought to apply extraterritorially. In the 1984 Convention Against Torture (CAT), a number of Articles specify the Convention's applicability to any territory under a state's jurisdiction. The Committee against Torture has affirmed that CAT is applicable to situations where a state exercises effective control over non-state territory or individuals. See UN CAT Conclusions and recommendations of the Committee against Torture, CAT/C/USA/CO/2, 25 of July 2006, para. 14. The International Court of Justice and the Human Rights Committee have considered the ICCPR to have extraterritorial application, see ICJ's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, para 109. The UN Convention on the Rights of the Child (CRC) obliges state parties to 'respect and ensure the rights set forth in the present Convention to each child within their jurisdiction' (Article 2.1 CRC). Article 22 CRC proclaims the right of children to 'receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights'. Article 37 CRC indirectly prohibits refoulement of children to places where they face a risk of being tortured. In some cases, then, obligations under the CRC may trigger extraterritorial jurisdiction and involve obligations when minor protection seekers encounter authorities extraterritorially. See Noll, 'Seeking asylum at embassies: A right to entry under international law?' (2005), p. 570.

[224] The ECtHR has repeated that, when states perform or produce effects outside their territory, an exercise of jurisdiction can be established. See in particular Banković and others v Belgium and others (2001), para 67, and 80; Al-Skeini and Others v the United Kingdom (2011); and Hirsi Jamaa and others v Italy (2012).

[225] Banković and others v Belgium and others (2001), paras 67–73.

and control over individuals killed in the course of such security operations, thereby establishing a jurisdictional link between the deceased and the United Kingdom for purposes of Article 1 of the Convention.[226] Other examples of extraterritorial jurisdiction established through the authority and control exercised by state agents over individuals include *Issa and Others v. Turkey*[227] and *Al-Saadoon and Mufdhi v. the United Kingdom*.[228] Extraterritorial jurisdiction has also been regarded as established through the authority and control exercised by state agents over individuals in international waters. In *Medvedyev and Others v. France*, the Court held that the applicants were within French jurisdiction by virtue of the exercise by French agents of full and exclusive control over a ship and its crew from the time of its interception in international waters.[229]

As follows from these examples of ECtHR case law, acts of the contracting states performed or producing effect outside their territories can constitute an exercise of jurisdiction within the meaning of Article 1 ECHR. This does not just include de jure control. As the ECtHR stated, namely, de facto control over persons is also decisive. The Court did not take the view that jurisdiction in the above cases arose solely from the control exercised by the contracting state over the buildings or ships in which the individuals in question were held. What was considered decisive in these cases was instead the exercise of physical power and control over the persons in question.[230]

In the context of migration and border control, the question of extraterritorial application of the principle of non-refoulement under Article 3 of the ECHR arises in situations of migration control in third countries or interception taking place on the high seas. The ECHR's prohibition of ill-

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[226] Al-Skeini and Others v the United Kingdom (2011), para 149.

[227] Judgement of 16 November 2004, Issa and others v Turkey, App No 31821/96 (2004). In this case, the ECtHR noted that jurisdiction can be established by virtue of soldiers' authority and control.

[228] Judgement of 30 June 2009, Al-Saadoon and Mufdhi v the United Kingdom, no. 61498/08. In this case, the ECtHR held that two Iraqi nationals detained in British-controlled military prisons in Iraq fell within the jurisdiction of the United Kingdom. The Court found that the United Kingdom had violated Articles 3, 13 and 34 of the ECHR, paras 86–89.

[229] Judgement of 29 March 2010, Medvedyev and Others v France, no. 3394/03. The ECtHR found that the detention violated Article 5 (1) ECHR, para 67.

[230] Cf. Al-Skeini and Others v the United Kingdom (2011), para 136.

treatment of any kind under Article 3 allows for including acts of extradition, deportation, and expulsion within the scope of potential violations of the Convention. The ECtHR has recognized that, in exceptional situations, such actions can establish extraterritorial jurisdiction. Building on *Al-Skeini*, the ECtHR concluded in *Hirsi* that the removal of aliens carried out in the context of interceptions on the high seas by the authorities of a state in the exercise of their sovereign authority constituted an exercise of jurisdiction within the meaning of Article 1 of the ECHR.[231] The *Hirsi* case concerned eleven Somali nationals and thirteen Eritrean nationals who had been part of a group of some two hundred individuals who left Libya aboard three vessels with the aim of reaching the Italian coast. When the vessels were 35 nautical miles south of Lampedusa, they were intercepted by three ships from the Italian Revenue Police (*Guardia di Finanza*) and the Italian coast guard. The occupants of the intercepted vessels were transferred onto Italian military ships and returned to Tripoli. The applicants alleged that the Italian authorities did not inform them during that voyage of their real destination, and took no steps to identify them. The ECtHR held that, in the period between boarding the ships and being handed over to the Libyan authorities, the applicants had been under the continuous and exclusive de jure and de facto control of the Italian authorities.[232] The Court observed that:

> […] by virtue of the relevant provisions of the law of the sea, a vessel sailing on the high seas is subject to the exclusive jurisdiction of the State of the flag it is flying. This principle of international law has led the Court to recognise, in cases concerning acts carried out on board vessels flying a state's flag, in the same way as registered aircraft, cases of extraterritorial exercise of the jurisdiction of that State[…].[233]

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[231] Hirsi Jamaa and others v Italy (2012).

[232] Ibid., para 81.

[233] Ibid., para 77.

When carrying out returns, state parties to the ECHR are responsible for ensuring that the person in question does not face a real risk of being subjected to treatment contrary to the principle of non-refoulement in Article 3 ECHR. This includes chain refoulement. The ECtHR highlighted in *Hirsi* that, in the event of repatriation, states carrying out returns are obliged to ensure that the intermediary country offers sufficient guarantees to prevent the person concerned being removed without an assessment of the risks faced.[234] The Court observed that such an obligation is all the more important when, as in the case in question, the intermediary country (in this case Libya) is not a state party to the ECHR.[235] Furthermore, the Court reaffirmed that Italy was not exempt from complying with its obligations under Article 3 of the Convention just because the applicants had failed to ask for asylum, or from describing the risks to be faced as a result of the lack of an asylum system in Libya. It reiterated that the Italian authorities should have ascertained how the Libyan authorities were fulfilling their international obligations in relation to the protection of refugees.[236]

In addition, relying further on Article 4 of Protocol No. 4 to the ECHR, the applicants in *Hirsi* stated that they had been the subject of a collective expulsion with no basis in law. The Court found that the travaux préparatoires allowed extraterritorial application of Article 4 of Protocol No. 4, and reiterated that 'problems with managing migratory flows' cannot justify a recourse to practices which are not compatible with the state's obligations under the ECHR. When the effect of a measure prevents migrants from reaching the borders of the state, or even pushes them back to another state, the measure constitutes an exercise of jurisdiction, which entails responsibility in accordance with the ECHR.[237] Furthermore, on the understanding that the interception of migrants on the high seas and their removal to countries of transit or origin constitutes a means of migratory control, the ECtHR stated that:

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[234] Ibid., para 146.

[235] Ibid., para 147.

[236] Ibid., paras 146–147 and 157.

[237] Ibid., paras 174, and 179–180.

> […] the special nature of the maritime environment cannot justify an area outside the law where individuals aren't covered by any legal system capable of affording them enjoyment of the rights and guarantees protected by the Convention which the States have undertaken to secure to everyone within their jurisdiction.[238]

In *N.D. and N.T. v Spain*, the issue of jurisdiction was addressed in relation to the location of the fences between Morocco and Melilla. The Court noted that the exercise of a contracting state's jurisdiction is necessary to trigger responsibility under the ECHR. However, the ECtHR did not consider it necessary to determine whether the fences scaled by the applicants were located on Spanish or on Moroccan territory.[239] Citing *Al-Skeini and Others* and *Hirsi*, the Court stated that even though a state's jurisdiction primarily is territorial, state agents' control and authority over an individual, or acts by a state which produce effects outside of their territory, fall within the scope of Article 1 ECHR. In the case at hand, the Court concluded, the applicants were under the continuous and exclusive control (at least de facto) of the Spanish authorities. Thus, at the point where ground is touched, whether on Spanish territory or in 'no man's land', responsibilities, and obligations under the ECHR lie on Spain.[240]

In its appeal before the Grand Chamber, the Spanish government confirmed that the fences were erected on Spanish territory, and that the fences constituted an 'operational border' designed to prevent entry. However,

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[238] Ibid., para 178, The court refers to Medvedyev and Others v France (2010).

[239] N.D. and N.T. v Spain (2020), para 90.

[240] For similar reasoning by the ECtHR, see Sharifi and Others v. Italy and Greece. The case concerned the interception and immediate deportation of migrants who had boarded vessels for Italy. The ECtHR rejected the governments' objection that Article 4 of Protocol No. 4 was not applicable. Moreover, it did not consider it necessary to determine whether the applicants had been returned after reaching Italian territory or before, since the provision was applicable to both situations in any event. Sharifi and Others v Italy and Greece (2014). The case concerned allegations of indiscriminate expulsion of aliens from Italy to Greece without access having been given to asylum procedures. The ECtHR held that Greece violated Article 13 (the right to an effective remedy) and Article 3. It also held that Italy violated Article 13 and Article 3, as well as Article 4 of Protocol No. 4, paras 210–213.

the Spanish government claimed the system of border control 'limited' Spain's jurisdiction, at a point beginning beyond 'the police line' that formed part of 'measures against persons who [had] crossed the border illegally' within the meaning of the SBC.[241] Since the applicants did not pass the police line before being apprehended and escorted back by the *Guardia Civil*, they did not, according to the Spanish government, enter into Spanish jurisdiction.[242] The ECtHR, however, did not accept this argument, concluding instead that the applicants had been apprehended within Spain's jurisdiction within the meaning of Article 1 of the ECHR.[243] The special nature of migration, the Court noted, cannot justify an area outside the law where individuals are covered by no legal system capable of affording them the enjoyment of rights and guarantees protected by the ECHR.[244] The ECHR 'cannot be selectively restricted to only parts of the territory of a State by means of an artificial reduction in the scope of its territorial jurisdiction. To conclude otherwise would amount to rendering the notion of effective human rights protection underpinning the entire Convention meaningless.'[245]

The extraterritorial applicability of international and European treaties gives rise to complex interpretations in the context of the externalization of border and migration control. Case law from the ECtHR, however, establishes that the Court can provide for extraterritorial jurisdiction when a state party to the Convention exercises authority and control over an individual through its agents.[246] When such links cannot be established, jurisdiction does not arise. This was the situation in *M.N. and Others v Belgium*, in which the consular activities of EU member states in third countries under the SBC and the Visa Code triggered the question of jurisdiction under the ECHR.[247] The applicants in *M.N. and Others v Belgium* were a married couple and their two minor

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[241] N.D. and N.T. v Spain (2020), para 91.

[242] Ibid., para 91.

[243] Ibid., para 190.

[244] Ibid., para 110.

[245] Ibid., para 110.

[246] Cf. e.g. Hirsi Jamaa and others v Italy (2012), para 81.

[247] Judgement of the court 5 March 2020, M.N. and Others against Belgium, Application No. 3599/18.

children, all Syrian nationals, who had travelled from Aleppo in Syria on 22 August 2016 to the Belgian embassy in Beirut, in order to submit visa applications. The applicants requested limited territorial visas (LTVs) based on Article 25 of the Visa Code. On 13 September 2016, the Belgian *Office des Étrangers* refused to grant visas to the applicants. Since, namely, the avowed intent of the applicants was to lodge an asylum claim upon arrival in Belgium, they could not obtain this type of visa. The *Office des Étrangers* stated that 'granting a visa on humanitarian grounds to an individual who intended to apply for asylum in Belgium would therefore create a precedent which would derogate dangerously from the exceptional nature of the procedure for short-stay visas'.[248] The *Office des Étrangers* added that diplomatic and consular missions were not among the authorities before which an asylum claim could be lodged, and invited the applicants to apply for another type of visa, based on Belgian legislation that would enable them to stay in Belgium for more than 90 days. The applicants subsequently submitted such an application, which the Belgian authorities rejected in December 2016.[249]

The applicants then appealed to the European Court of Human Rights, charging that the refusal of the Belgian authorities to grant them LTVs had exposed them to a situation incompatible with Article 3 of the ECHR – and with no possibility of effectively remedying said situation, as required by Article 13 ECHR. Furthermore, they claimed, they had been denied the right to a fair trial guaranteed by Article 6 of the ECHR.[250] The applicants argued among other things that:

> […] the Belgian courts had found on various occasions that although they were outside Belgian territory, the applicants had been under Belgium's jurisdiction. Indeed, the Court's case-law clearly indicated that the responsibility of the States could be engaged on account of acts by their authorities which produced effects outside the national territory.[251]

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[248] M.N. and Others v Belgium (2020), para 12.

[249] Ibid., paras 12–13.

[250] Ibid., paras 74–75.

[251] Ibid., para 82.

On 5 May 2020, the Grand Chamber of the European Court of Human Rights declared the case of *M.N. and Others v Belgium* to be inadmissible. The Court reiterated that the scope of Article 1 of the ECHR is limited to persons within the jurisdiction of the state parties to the Convention. The applicants had contended that, in processing their visa applications, the Belgian authorities had ruled on the issue of the conditions for entry into the national territory. In so doing, the applicants claimed, said authorities had taken national decisions in respect of the applicants, bringing them under Belgium's jurisdiction.[252] The ECHR accepted the contention that, in ruling on the visa applications, the Belgian authorities had taken decisions on conditions for entry into Belgian territory, and thus had exercised a public power. However, the Court continued, 'this finding is not sufficient to bring the applicants under Belgium's "territorial" jurisdiction within the meaning of Article 1 of the ECHR'. Citing *Banković and Others*,[253] the Court found that the mere fact that decisions taken at national level have an impact on the situation of persons resident abroad is not such as to establish the jurisdiction of the state concerned over persons outside its territory.[254] The Court therefore assessed whether exceptional circumstances existed under which Belgium had exercised extraterritorial jurisdiction in respect of the applicants. Such an assessment includes, according to the Court, an investigation of the facts and an exploration of the link between the applicants and the respondent state, for the purpose of ascertaining whether the latter had effectively exercised authority or control over the applicants.[255] It had not been alleged, the Court noted, that the jurisdictional link arose from any kind of control exercised by the Belgian authorities in Syria or Lebanon.[256] At no time did the diplomatic agents exercise de facto control over the applicants. The applicants had freely chosen to present themselves at the Belgian embassy in Beirut, and to submit their visa applications there. They could have chosen as well to approach any other embassy. They were then free to leave the premises of the Belgian

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[252] Ibid., para 111.

[253] Banković and others v Belgium and others (2001).

[254] M.N. and Others v Belgium (2020), para 112.

[255] Ibid., para 113.

[256] Ibid., para 116.

embassy without any hindrance.[257] The ECtHR noted that this case differed from previous ones, since the administrative proceedings had been brought through the initiative of private individuals with no connection to the state save for the proceedings which they themselves had freely initiated. The Court concluded that the fact that proceedings had been brought at national level did not create an exceptional circumstance sufficient to trigger, unilaterally, an extraterritorial jurisdictional link between the applicants and Belgium within the meaning of Article 1 of the Convention.[258] The effect of finding the application admissible, furthermore, would be to enshrine a near-universal application of the ECHR on the basis of the unilateral choices of individuals, and to impose near unlimited obligations on states to allow entry to persons who might be at risk of ill-treatment outside their jurisdiction.[259] The Court therefore concluded that the applicants had not been within Belgium's jurisdiction, and so it declared the application inadmissible. The Court also stressed, however – citing *N.D. and N.T. v Spain* – that its reasoning in this decision did not prejudice the endeavours of state parties to facilitate access to asylum procedures through embassies and/or consular representatives.[260]

2.1.1.3.2 Extraterritorial Application of the EU Charter

The EU Charter has no jurisdiction clause, such as Article 1 of the ECHR. Instead it sets out, in Article 51(1), its field of application, stating that the provisions of the charter are addressed to the institutions and bodies of the EU with due regard for the principle of subsidiarity and to the member states only when they are implementing EU law.[261] The question is not, therefore,

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[257] Ibid., para 118.

[258] Ibid., paras 121–122.

[259] Ibid., para 123.

[260] Ibid., para 126.

[261] Under the principle of subsidiarity, in areas which do not fall within EU's exclusive competence, the EU shall act only if – and in so far as – the objective of a proposed action cannot be sufficiently achieved by the member states (Article 5.3 TEU). Further, under the principle of proportionality, the content and form of EU action may not go beyond what is necessary to achieve the objectives of the Treaties (Article 5.4 TEU).

whether the Charter applies territorially or extraterritorially, but whether or not the EU or its member states are 'act[ing] within the scope of Union law'.[262]

The EU's institutions and bodies are bound by the Charter whenever the Union exercises its competences – either directly or when its member states are implementing EU law. Where the member states are concerned, the 'Charter Explanations' highlight that:

> […] it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in the context of the Union is only binding on the member states when they act in the scope of Union law […] Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law.[263]

The meaning and the scope of 'implementing Union law' in Article 51(1) has been discussed in the literature and interpreted by the CJEU. In 'Exploring the limits of the EU Charter of fundamental rights', Lenaerts finds that the expression 'only when [Member States] are implementing Union law' should cover all situations where member states fulfil their obligations under the Treaties as well as under secondary EU law: i.e., the Charter applies whenever

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[262] See Judgement of 13 July 1989, Wachauf, C-5/88, EU:C1989:321; Judgement of 18 June 1991, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others, Case C-260/89, EU:C:1991:254; and Judgement of 18 December 1997, Annibaldi, C-309/96, EU:C:1997:631. See also e.g., Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017), p. 472; and Moreno-Lax and Costello, 'The extraterritorial application of the Charter: From territoriality to facticity, the effectiveness model' in Peers and al (eds), *Commentary on the EU Charter of fundamental rights*, pages 1657–1683, on the understanding of human rights obligations in external and extraterritorial situations governed by EU law.

[263] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02) Referring to C-5/88, Wachauf (1989); Case C-260/89, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou; C-309/96, Annibaldi (1997); and Judgement of 13 April 2000 Kjell Karlsson and Others, C-292/97, EU:C:2000:202.

member states fulfil an obligation imposed by EU law.[264] As established by the CJEU, this involves situations where member states implement EU law in order to 'apply a normative scheme put in place by the EU legislator'.[265]

In 'A Commentary on the EU Charter', Ward takes a 'subject matter approach', describing the scope of the Charter's applicability as based on the subject at issue. If some parts of the subject matter in dispute concern substantive EU law, then the Charter applies.[266] In *Fransson*, for instance, the CJEU established that a case need only be 'connected in part' to EU law in order to render the Charter applicable; and it found such a 'direct link' in that case.[267] The Court further made clear that there can be no situations which are covered by EU law but in which fundamental rights are not applicable.[268] In *Melloni*, the CJEU noted the importance of ensuring that fundamental rights are not infringed in areas of EU activity; and it stressed that the reason for pursuing that objective lies in the need to avoid a situation where fundamental rights enjoy varying levels of protection in the member states. Such a situation, namely, would undermine the unity, primacy, and effectiveness of EU law.[269] In *Siragusa*, the Court set out some general rules for determining when national rules are 'implementing EU law' within the meaning of Article 51 of the Charter.[270] The court stated that 'it should be borne in mind that the concept of "implementing Union law", as referred to in Article 51 of the Charter, requires a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the

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[264] Koen Lenaerts, 'Exploring the limits of the EU Charter of fundamental rights', *European Constitutional Law Review* (2012), p. 378; and Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

[265] Lenaerts, 'Exploring the limits of the EU Charter of fundamental rights' (2012) p. 379.

[266] Angela Ward, 'Article 51 – Field of application', in Steve Peers and others (eds), *The EU Charter of fundamental rights: A commentary* (Hart Publishing 2021), p. 1578.

[267] Judgement of 26 February 2013, Åkerberg Fransson, Case C-617/10, EU:C:2013:105 para 24.

[268] C-617/10, Åkerberg Fransson (2013), para 21.

[269] Judgement of 26 February 2013, Stefano Melloni v Minesterio Fiscal, C-399/11, EU:C:2013:107, para 60. For a discussion on Melloni, see: Michael Dougan, 'Judicial review of member state action under the general principles and the Charter: Defining the scope of Union law', *Common Market Law Review* (2015), p. 1230.

[270] Judgement of 6 March 2014, Siragusa, C-206/13, EU:C:2014:126.

other'.[271] The Court identified the following as relevant criteria for the Charter's applicability: whether the national rule is intended to implement EU law; whether said rule pursues objectives other than those covered by EU law (even if it is capable of indirectly affecting EU law); and whether specific rules of EU law exist on the matter or are capable of affecting it.[272] Furthermore, the Court held, the EU Charter does not apply when EU law in the subject area does not impose any obligation on the member states with regard to the situation at issue.[273] The case in *Siragusa* concerned a preliminary ruling on whether Italian rules on national landscape conservation were compatible with the right to property enshrined in Article 17 of the Charter. The CJEU concluded that, since no specific obligations to protect the landscape akin to those laid down by Italian law were imposed on the member states by EU law, the Court had no jurisdiction to answer the referred questions.[274]

The Charter's field of application also embraces situations where member states enjoy discretion in ensuring the implementation of EU law within their territory. This is illustrated in *N.S.*[275] This case concerned the Dublin II Regulation, which allocates jurisdiction for asylum claims made within the EU.[276] Asylum-seekers had entered the UK by way of Greece, whereupon they faced being returned to Greece under the Dublin rules on 'first port of entry'. The claimants argued that, given the serious and documented problems in

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[271] Ibid. Para 24. The Court here refers to Judgement of 29 May 1997, Friedrich Kremzow v Republik Österreich, C-299/95, EU:C:1997:254, para 16. The concept of 'implementing Union law' in Article 51 of the Charter requires, according to Case C-299/95 Kremzow, a certain degree of connection above and beyond the matters covered being closely related or one of those matters having an indirect impact on the other.

[272] C-206/13, Siragusa (2014), para 25. The Court here refers to C-309/96, Annibaldi (1997), paragraphs 21–23; Judgement of 8 November 2012, Yoshikazu Iida v Stadt Ulm Iida, C-40/11, EU:C:2012:691, paragraph 79; and Judgement of the Court 8 May 2013, Kreshnik Ymeraga and Others v Ministre du Travail, de l'Emploi et de l'Immigration, C-87/12, EU:C:2013:291, para 41.

[273] C-206/13, Siragusa (2014). The Court here refers to Judgement of 13 June 1996, Maurin, C-144/95, EU:C:1996:235.

[274] C-206/13, Siragusa (2014), paras 26–36.

[275] Judgement of 21 December 2011, N.S. v Secretary of State for the Home Department and M.E. and Others v Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform, C-411/10 and C-493/10, EU:C:2011:865.

[276] Council Regulation (EC) No 343/2003.

Greece with the asylum process and the treatment of asylum-seekers, the UK could not return them without putting them at risk of being subjected to degrading and inhuman treatment, in breach of Article 4 of the Charter and Article 3 of the ECHR. Thus, the claimants contended, the UK had a duty to exercise its own discretion and to process the asylum claims. The Court ruled that a decision adopted by a member state, on the basis of Article 3(2) of the Dublin II Regulation, on whether to examine an asylum application which is not its responsibility serves to implement EU law. Thus, when deciding whether to exercise discretion – i.e., whether to process the asylum claim – the UK was 'implementing' EU law. The Charter was therefore applicable.[277]

When the situation is instead considered to fall outside the scope of EU law, the EU Charter remains inapplicable. This was the situation in *PPU X and X v Belgium*. The applicants in this case were a married couple with three young children, all of Syrian nationality, living in Aleppo, Syria. On 12 October 2016, the family submitted applications for visas with limited territorial validity, based on Article 25(1) a) of the Visa Code, at the Belgian embassy in Beirut. They returned to Syria the following day. In support of their visa applications, they stated that their purpose in seeking visas was to enable them to leave the besieged city of Aleppo and to apply for asylum in Belgium. Much as in the ECtHR case of *M.N. and Others v Belgium*, the *Office des Étrangers* then rejected their applications pursuant to Article 32(1) b) of the Visa Code, stating inter alia that the applicants intended to stay more than 90 days in Belgium, and that Belgian diplomatic posts are not among the authorities to which foreign nationals can submit an application for asylum.[278] Moreover, according to the *Office des Étrangers*, authorizing the issue of an entry visa to the applicants in the main proceedings, in order for them to be able to lodge an application for asylum in Belgium, would amount to allowing such an application to be submitted to a diplomatic post.[279]

The applicants in *PPU X and X v Belgium* had called upon the referring court to suspend the decision to refuse entry, on the grounds that Article 18 of the EU Charter imposes a positive obligation on the member states to

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[277] C-411/10 and C-493/10, N.S. and M.E. and Others (2011), paras 69 and 123.

[278] C-638/16, PPU X and X v Belgium (2017), para. 21.

[279] Ibid., para. 21.

guarantee the right to asylum; and that granting international protection was the only way to avoid the risk of an infringement of Article 3 of the ECHR and of Article 4 of the Charter (the prohibition of torture and of inhuman or degrading treatment). The applicants criticized the failure of the Belgian authorities to take account, in rejecting their applications for visas, of the risk that Article 3 of the ECHR would be infringed. Indeed, since the Belgian authorities themselves considered the situation of the applicants in the main proceedings to constitute an exceptional humanitarian predicament, the applicants pointed out, that in light of these humanitarian grounds, and given the international obligations of the Kingdom of Belgium, 'the state of necessity' required by Article 25 of the Visa Code was fulfilled. The applicants accordingly averred that EU law acquires the visas to be issued.[280]

The referring court submitted a request for a preliminary ruling to the CJEU concerning the interpretation of the Visa Code and of the EU Charter.[281] The referred questions addressed the international obligations cited in Article 25(1) a) of the Visa Code. In short, the referring court asked if a member state to which an application for an LTV has been submitted required to issue the visa applied for, in cases where a risk has been established of an infringement of Article 4 and/or Article 18 of the Charter, or of another international obligation by which said state is bound? The referring court moreover stated that the applicants were not subject to Belgian jurisdiction

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[280] Opinion of Advocate General Mengozzi, PPU X and X v Belgium, C-638/16, para 34.

[281] The following questions were referred to the CJEU:

'(1) Do the "international obligations" referred to in Article 25(1)(a) of the Visa Code cover all the rights guaranteed by the Charter, including, in particular, those guaranteed by Articles 4 and 18, and do they also cover obligations which bind the Member States, in the light of the ECHR and Article 33 of the Geneva Convention?

'(2) (a) Depending on the answer given to the first question, must Article 25(1)(a) of the Visa Code be interpreted as meaning that, subject to its discretion with regard to the circumstances of the case, a Member State to which an application for a Visa with limited territorial validity has been made is required to issue the Visa applied for, where a risk of infringement of Article 4 and/or Article 18 of the Charter or another international obligation by which it is bound is established?

'(b) Does the existence of links between the applicant and the Member State to which the Visa application was made (for example, family connections, host families, guarantors and sponsors) affect the answer to that question?' C-638/16, PPU X and X v Belgium (2017), para 28.

under Article 1 of the ECHR, and observed that the application of Article 4 of the EU Charter – which contains the same wording as Article 3 of the ECHR – does not depend on the exercise of jurisdiction, but instead on the implementation of EU law.[282] Since the visa applications were based on Article 25(1) of the Visa Code, the contested decisions were adopted pursuant to an EU regulation, and they implemented EU law. However, the referring court continued, the territorial scope of the right of asylum enshrined in Article 18 of the EU Charter must be reckoned controversial in light of Article 3 of the Asylum Procedures Directive.[283] Lastly, in view of the wording of Article 25(1) of the Visa Code, the referring court raised the question of the extent of member states' discretion.[284]

Before considering the referred questions, the Grand Chamber of the CJEU addressed the dispute regarding the jurisdiction of the Court. The Belgian government had claimed that the Court lacked jurisdiction to answer the questions referred for a preliminary ruling, since the situation of the applicants in the main proceedings did not fall within the scope of EU law. The CJEU responded that the question of whether the Code applied to applications such as those at issue was inextricably linked to the answers to be given to the request for a preliminary ruling. Under these circumstances, the Court found, it had jurisdiction to answer the request.[285]

The CJEU thereupon ruled that the lodging of applications for visas in order to obtain international protection falls solely within the scope of national law. It concluded too that, since the situation at issue was not governed by EU law, the provisions of the EU Charter did not apply. A member state to which an application for an LTV has been submitted is thus not required to issue the visa applied for under EU law. It 'would be tantamount', the Court added, 'to allowing third-country nationals to lodge applications for visas on the basis of

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[282] Opinion of Advocate General Mengozzi, PPU X and X v Belgium, C-638/16, paras 26 and 36.

[283] Ibid., para 37. Article 3 of the Asylum Procedures Directive provides for the scope of the Directive, and states that the Directive shall apply to all applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the member states.

[284] Ibid., para 38.

[285] C-638/16, PPU X and X v Belgium (2017), para 37.

the Visa Code in order to obtain international protection in the member state of their choice'.[286] Such an order would undermine the general structure of the system established by the Dublin Regulation. The Court also stressed that the Asylum Procedures Directive is clear on its territorial scope.[287]

Article 1 of the Visa Code, the Court stated:

> […] must be interpreted as meaning that an application for a visa with limited territorial validity made on humanitarian grounds by a third-country national, on the basis of Article 25 of the Visa Code, to the representation of the member state of destination that is within the territory of a third country, with a view to lodging, immediately upon his or her arrival in that member state, an application for international protection and, thereafter, to staying in that member state for more than 90 days in a 180-day period, does not fall within the scope of that Code but, as European Union law currently stands, solely within that of national law.[288]

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[286] Ibid., paras 45 and 48.

[287] The Asylum Procedures Directive applies to applications for international protection made in the territory, including at the border, or in the territorial waters or transit zones of the member states, but not to requests for diplomatic or territorial asylum submitted to the representations of member states (Article 3(1) and (2)). Similarly, the Court added, the territorial application also follows from Article 1 and Article 3 of the Dublin Regulation (Regulation No 604/2013), which impose an obligation on member states to examine any application for international protection made on the territory of a member state, including at the border or in the transit zones, and which establish that the procedures laid down in said Regulation apply exclusively to such applications for international protection. C-638/16, PPU X and X v Belgium (2017), para 49.

[288] C-638/16, PPU X and X v Belgium (2017), para 52. The scope of the Visa Code is addressed in Article 1 stating that the regulation establishes the procedures and conditions for issuing visas for transit through or intended stays in the territory of the member states not exceeding three months in any six-month period. Further Article 1 states that the provisions of the regulation shall apply to any third-country national who must be in possession of a Visa when crossing the external borders of the member states. The CJEU did not discuss the personal scope of the Visa Code but considered LTVs being outside its material scope.

The Charter's field of application also includes actions taken by the EU institutions. Article 51 states that the Charter applies, with due regard for the principle of subsidiarity, primarily to the institutions and bodies of the EU. The term 'institutions' is enshrined in the Treaties, and the expression 'bodies, offices and agencies' is commonly used in them to refer to all of the authorities established by the Treaties or by secondary legislation.[289] Article 13(1) TEU states that the Union's institutions shall be the European Parliament, the European Council, the Council, the European Commission, the Court of Justice of the European Union, the European Central Bank, and the Court of Auditors. All EU institutions and organs are thus bound by the Charter and can be challenged for failing to respect its terms.[290] Such legal action can be initiated before national courts (preliminary rulings under Article 267 TFEU), or before the CJEU (Article 263 TFEU). All legislation shall comply with fundamental rights and can be challenged for breach thereof, even if no national implementation exists that falls within the scope of application of EU law. Otherwise put, all EU legislation is to be interpreted in the light of general principles and fundamental rights, whether member states are implementing it or not.[291]

Article 51(2) emphasizes that the Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties. Thus, the obligation of the Union to respect, protect, and promote fundamental rights only applies to the extent that competences exist in a given field – whether they are exercised within territorial boundaries or without.[292] However, legal review of the compatibility of EU acts or omissions with regard to fundamental rights is restricted to certain acts conducted by the Union's institutions and bodies. We must bear this restriction in mind when seeking to understand the applicability of the EU Charter

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[289] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

[290] Ward, 'Article 51 – Field of application' in Peers and others (eds), *The EU Charter of fundamental rights: A commentary*, p. 1572.

[291] Ibid. p. 1432, and p. 1442. Referring to Judgement of 5 October 2010, PPU J. McB. v L.E., C-400/10, EU:C:2010:582.

[292] Moreno-Lax and Costello, 'The extraterritorial application of the Charter: From territoriality to facticity, the effectiveness model' in Peers and al (eds), *Commentary on the EU Charter of fundamental rights*, p. 1662.

and the CJEU's scrutiny of compliance with the Charter in connection with extraterritorial migration and border control. The CJEU has jurisdiction to review the legality of legislative acts (Article 263 TFEU).[293] This means its jurisdiction is limited to acts that are legally binding and to acts that have legal effect. However, not all of the actions and measures taken by EU institutions, agencies, and other bodies are legally binding acts. Certain agreements with third countries on migration and border control, for instance, are not. Such agreements are accordingly excluded from the EU Charter's field of application, as well as from the CJEU's jurisdiction and legal review.[294] Other EU actions that fall outside the CJEU's jurisdiction and scrutiny of compliance with the EU Charter include those taken under the EU's common foreign and

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[293] According to Article 263 TFEU, the Court of Justice of the European Union shall review the legality of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-à-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-à-vis third parties. It shall for this purpose have jurisdiction in actions brought by a member state, the European Parliament, the Council, or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the Treaties or of any rule of law relating to their application, or misuse of powers. Any natural or legal person may institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures (Article 263 TFEU). Article 265 TFEU provides for infringement procedures if the European Parliament, the European Council, the Council, the Commission, or the European Central Bank, in infringement of the Treaties, fail to act. In such case, the member states and the other institutions of the Union may bring an action before the Court of Justice of the European Union to have the infringement established. The action shall be admissible only if the institution, body, office, or agency concerned has first been called upon to act. This article applies, under the same conditions, to bodies, offices and agencies of the Union which fail to act (Article 265 TFEU).

[294] However, such agreements may have 'legal effect' vis-à-vis third parties (Article 263 TFEU), which could grant jurisdiction to the Court. In France v Commission, France lodged an action for the annulment of the decision by which the Commission concluded a non-binding agreement with the US on Guidelines on regulatory cooperation and transparency. France argued that the agreement amounted to a binding international agreement that only the Council can adopt. Judgement of the Court of 23 March 2004, French Republic v Commission of the European Communities, Case C-233/02, EU:C:2004:173.

security policy (CFSP) and its common security and defence policy (CSDP).[295] Actions taken under the CFSP and the CSDP, including arrangements with and in third countries, can serve to enhance EU border and migration control.

Although the EU Charter has no extraterritorial limitation, but rather corresponds to the scope of EU law, extraterritorial actions undertaken by the Union to accomplish migration and border control may fall outside the Charter's field of application, as well as outside the CJEU's ambit of judicial review, if they are conducted outside the scope of EU law or as acts not considered to have legal effect.

2.2 The Development of the EU Border Regime

The following sections of this chapter address EU migration and border control law, starting with a brief description of its development and harmonization from the 1950s until the early 2020s. The description covers the establishment of the Schengen acquis and of the common European asylum system, and the border and migration control measures initiated in response to the 'refugee crisis' of 2015–2016.

Tracing its origins to the early 1950s, the EU was conceived as a mechanism to avoid war in Europe, through the creation of an internal market

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[295] Article 275 TFEU states that the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy nor with respect to acts adopted on the basis of those provisions. Of Article 42 (1) TEU it follows that the common security and defence policy (CSDP) is an integral part of the common foreign and security policy. However, the Court shall, according to Article 275 TFEU, have jurisdiction to monitor compliance with Article 40 TEU. Article 40 TEU states that the implementation of the CFSP shall not affect the application of the procedures and the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 TFEU. This means that the CJEU through Article 40 TEU has jurisdiction to limit the scope of action under the CFSP. Cf. the ECOWAS case, Judgement of 20 May 2008, Commission v Council (ECOWAS), C-91/05, EU:C:2008:288. In the ECOWAS case, the CJEU annulled a CFSP Decision (Council Decision 2004/833/CFSP) on EU support to the Economic Community of West African States (ECOWAS) in the Framework of the Moratorium on Small Arms and Light Weapons. Based on Article 47 (now Article 40) TEU, the CJEU concluded that the Council's decision should have been adopted under the EC Treaty and not the EU Treaty. Article 40 TEU can thus limit the scope of CFSP actions.

from which obstacles to the four freedoms – of goods, services, persons, and capital – have been removed. Developing a free internal market and instituting freedom of movement for EU citizens have been the primary focus of the European integration process. Citizens from third countries were not addressed until 1968, with the adoption of Council Regulation 1612/68 on freedom of movement for workers within the Community[296], which distinguished the free movement of nationals of the member states from the free movement of third-country nationals.[297] In the 1950s and 1960s, third country nationals were usually seen as an external extra workforce. As Huysmans points out, the legal status of workers was not of certain relevance at the time, and migrants' 'illegality' or lack of legal status was reckoned a 'contribution' to the domestic economy, since it made workers more flexible.[298] In the 1980s, however, a rise in the number of asylum-seekers led to a change in the European discussion on the subject, and migration was increasingly framed in negative terms. The issue of migration became more politicized, and people migrating to Europe were perceived as a 'threat' to national stability in the member states and as a security concern for Europe in general.[299] Within influential member states, the planned abolition of internal borders under the 1985 Schengen Agreement[300] led to concerns in connection with asylum. Cooperation between member states on asylum and immigration was therefore presented as a 'compensatory' arrangement that would safe-

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[296] Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community.

[297] Jef Huysmans, *The politics of insecurity: Fear, migration and asylum in the EU,* Taylor and Francis (2006), p. 66. Article 42 of Regulation (EEC) No 1612/68 concerns non-European workers and reads as follows: 'Workers from such countries or territories who, in accordance with this provision, are pursuing activities as employed persons in the territory of one of those Member States may not invoke the benefit of the provisions of this Regulation in the territory of the other Member States.'

[298] Huysmans, *The politics of insecurity: Fear, migration and asylum in the EU* (2006), p. 65.

[299] Sandra Lavenex, 'The Europeanization of refugee policies: Normative challenges and institutional legacies', *JCMS: Journal of Common Market Studies* (2001), p. 857.

[300] The Schengen Agreement covers the gradual abolition of internal borders between countries, and extended control of the external borders. The 1985 agreement only covered five states: Belgium, France, Germany, Luxembourg, and the Netherlands. It was signed on 14 June 1985 in Schengen, a small village in Southern Luxemburg.

guard internal security in a border-free Europe.[301] Formally, the introduction of a common visa policy in 1990, the creation of a common database and information exchange systems such as the Schengen Information System (SIS), and the facilitation of deportations through readmission agreements with third countries were introduced in the member states. In 1990, the Schengen Agreement was supplemented by the Schengen Convention (the Schengen acquis), which implemented the Schengen Agreement and proposed the abolition of internal border controls and the establishment of a common visa policy. The Schengen Agreement of 1985 did not mention asylum-seekers, but the Schengen acquis of 1990 shifted the focus towards measures for strengthening internal security and imposing stricter controls at the external borders. These changes included several provisions relating to asylum and immigration.[302]

The Schengen acquis was incorporated into EU law with the Treaty of Amsterdam,[303] but it had been operating outside of the EU legal framework before that.[304] The joint function of the Schengen acquis and the Dublin Convention[305] was to strengthen the external border, as well as to create a system for the relocation of asylum-seekers based on the principle of 'first country' (as established under the Dublin Convention). Thus was the ground prepared for today's relocation mechanism within the EU.[306] In order, more-

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[301] Lavenex, 'The Europeanization of refugee policies: Normative challenges and institutional legacies' (2001), p. 857.

[302] See e.g. Chapter 7 in the 1990 Schengen acquis.

[303] Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts. The Treaty of Amsterdam was signed on 2 October 1997 and entered into force on 1 May 1999.

[304] Lavenex, 'The Europeanization of refugee policies: Normative challenges and institutional legacies' (2001), p. 858.

[305] Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities (97/C 254/01), 1990. The ratification process of the Dublin Convention took seven years. The Convention entered into force in 1997, replacing the parallel asylum provisions of the Schengen Agreement.

[306] The system for relocation does not take any account of geographical differences. Most protection seekers enter the EU by sea, which why the member states in the southern

over, to facilitate the implementation of the relocation mechanism, the Eurodac system was launched. By collecting fingerprints, this system would enable the identification of asylum-seekers under the principle of first country.[307]

In 1992, the Treaty on European Union (also known as the Maastricht Treaty) introduced the Third Pillar on Justice and Home Affairs, in which migration was explicitly made the subject of intergovernmental regulation. The Treaty of Amsterdam, which entered into force in 1999, then introduced full harmonization, by transferring immigration and asylum questions from the Third Pillar to the supranational First Pillar. The Amsterdam Treaty did not only incorporated the Schengen acquis, but also stipulated the need for a common European asylum policy. Following from the Amsterdam Treaty, the European Council summit in Tampere in 1999 targeted the aims of introducing an area of freedom, security, and justice, and addressed the question on how to make this area a reality by making full use of the possibilities offered by the Treaty of Amsterdam. The Presidency Conclusions from the summit stressed the need to establish a Common European Asylum System (CEAS), and stated that common policies must offer guarantees to those who seek protection in, or access to, the EU.[308] Citing the freedoms enjoyed by EU citizens, the conclusions argued that it would be 'in contradiction with Europe's traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to the EU's territory'.[309] This

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areas – Greece, Italy, and Spain – are more common as first countries than are other member states. Chapter 7 of the Schengen Agreement from 1990, as well as the Preamble of the Dublin Convention from 1990, reaffirm the obligations of the contracting parties towards the Refugee Convention. The Schengen Agreement obliges the contracting parties to 'undertake to process any application for asylum' lodged within the territory of the member state (Article 29). Article 29, paragraph 2 states that this does not entail a right to enter or stay in the territory, and that every contracting party retains the right to refuse or to expel any applicant for asylum. No reference is made to the principle of non-refoulement.

[307] Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013.

[308] Tampere European Council 15 and 16 October 1999 Presidency Conclusions, Conclusion 3.

[309] Ibid., Conclusion 3.

in turn required the Union to develop common policies on asylum and immigration, while taking into account the need for consistent controls at the external borders to stop illegal immigration, and to combat those who organize it and commit related international crimes.[310]

Between 1999 and 2005, the CEAS was developed into legislative measures for common minimum standards on asylum. Following the Tampere summit, the Hague Programme (a multi-annual Justice and Home Affairs programme) was adopted in 2004, covering the 2005–2009 period.[311] The object of the programme was to strengthen 'freedom, security and justice in the European Union'. Created as it was after 9/11 and the terror attack in Madrid in 2004, it focused heavily on security. The management of 'migration flows', including the fight against 'illegal immigration', would be strengthened through the establishment of a series of security measures effectively linking visa application procedures and entry and exit procedures at external border crossings.[312] The Stockholm Programme, adopted in 2009 and covering the 2010–2014 period, was the third programme in this area. An 'open and secure Europe serving and protecting the citizens' was its goal. It provided a framework for EU action on such issues as asylum, security, the smuggling of migrants, the protection of fundamental rights, and the prevention and combatting of trafficking in human beings.[313] The creation of the CEAS was regarded as accomplished when, in 2013, the second generation of rules on asylum was adopted.[314]

The CEAS has however been under negotiation since 2016. These negotiations have highly been affected by the 'refugee crisis' of 2015–2016. The 'refugee crisis' also initiated a 'new Pact on Migration and Asylum', and the adoption of several new policies on migration and third-country cooperation for preventing migration and strengthening border control. The

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310 Ibid., Conclusion 3.

311 The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, OJ C 53/01.

312 Ibid., para 1.7.2.

313 The Stockholm Programme: An Open and Secure Europe Serving and Protecting Citizens, C115/1.

314 Philippe De Bruycker, '*Towards a new European consensus on migration and asylum*' (2019) EU migration law blog.

new 'Pact', proposed by the European Commission in September 2020, seeks to improve and to speed up procedures throughout the asylum and migration system, including the management of external borders and a fair sharing of responsibility. The 'Pact' encompasses new legislative proposals, including for a new screening Regulation, a new Regulation of asylum and migration management (which should replace, once agreed upon, the current Dublin Regulation), a new crisis and force majeure Regulation, an amendment of the Asylum Procedures Regulation, and a revision of the Eurodac Regulation.[315]

The 'refugee crisis', during which almost 2.6 million asylum applications were lodged within the (then) 28 member states of the EU, has influenced the direction in which the EU border regime has developed. The 'crisis' has been described as both humanitarian and political in nature, and it has challenged the Union's migration and asylum policy as well as the principle of solidarity between its member states.[316] During the 'crisis', member states refused to apply solidarity mechanisms such as the proposed EU quota system, with its mechanisms for relocating asylum-seekers within the EU.[317] Internal border controls were also reinstated, in service to the determination of individual member states to prevent – without consideration of the limitations imposed by the SBC – arrivals. Thousands of people drowned in the Mediterranean Sea en route to the EU. The EU's involvement in third countries was charged with promoting violations of human rights, such as arbitrary detention and

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315 'A new pact on asylum and migration and accompanying legal proposals' (europarl.europa.eu).

316 The principle of solidarity is stated in Article 80 in the Treaty of the functioning of the EU (TFEU). For an analysis of the concept of solidarity in EU asylum law, see Eleni Karageorgiou, *Rethinking solidarity in European asylum law: A critical reading of the key concept in contemporary refugee policy*, Lund University (2018).

317 In September 2015, the European Commission presented a proposal for a Regulation on a permanent crisis relocation mechanism under the Dublin system amending Regulation (EU) No 604/2013 of 26 June 2013 on criteria and mechanisms for determining the Member State responsible for examining international protection applications by third country nationals or a stateless person ('Dublin system'). Factsheet Migration: Solidarity within the EU, 16 October. The proposed relocation mechanism, however, was blocked by the Council.

inhuman or degrading treatment.[318] The core mechanisms of Dublin and Schengen proved unsuitable for the number of people migrating to the EU; and the principle of 'first country', as stated in the Dublin Regulation, exacerbated the lack of solidarity between the member states.[319] Moreover, due to the principle of first country and Greece's geographical location, the asylum system in Greece – already considered by the ECtHR and the CJEU to be dysfunctional and inadequate[320] – collapsed; and Greek (as well as Italian) border guards waved migrants through without registering them in accordance

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[318] In 2019, international lawyers submitted a communication to the International Criminal Court (ICC), calling on the ICC to open an investigation on the EU's involvement in Libya. It accused the EU of crimes against humanity which allegedly resulted from its migration policy in the Mediterranean, 'Communication to the office of the prosecutor of the international criminal court: EU migration policies in the Central Mediterranean and Libya (2014–2019)' (statewatch.org). In 2020, the ICC Chief Prosecutor confirmed to the EU Parliament that the case is being processed by the Office of the Prosecutor (OTP). Shortly thereafter, the prosecutor confirmed that the case had been declared admissible. In 2022, the UN confirmed that EU states are complicit in crimes against humanity committed against 'migrants' in Libya. See the Office of the High Commissioner for Human Rights's report 'Nowhere but back: Assisted return, reintegration and the human rights protection of migrants in Libya', 2022.

[319] The 'refugee crisis' in 2015 showed that neither political ambition nor the system possess the capacity needed if human rights obligations are to be taken seriously. The EU legal framework on asylum does establish mechanisms for extreme situations. The Temporary Protection Directive sets up a scheme for temporary protection if there is a mass influx of displaced people. The Directive is supposed to be 'triggered' when people, due to war, violence, or human-rights violations, are in need of protection, and it promotes a balance of efforts between EU countries in receiving people. The Directive also provides for an evacuation mechanism, and it would allow for the use of 'humanitarian corridors' for displaced persons in need of protection. The Directive does not require compulsory distribution of asylum-seekers across EU member states. The actual triggering requires a Council decision adopted by a qualified majority. The EU Parliament called on the Council to trigger the Directive and its solidarity mechanisms during the 'refugee crisis'. The Directive was however not triggered in 2015–2016, but it was triggered in 2022, due to Russia's invasion of Ukraine. See 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.

[320] M.S.S. v Belgium and Greece (2011); and C-411/10 and C-493/10, N.S. and M.E. and Others (2011).

with the provisions of Eurodac.[321] Scholars have understood the 'crisis' as resulting from an absence of 'sincere cooperation' between the member states and from a failure to respect obligations they owe to each other – such as compliance with the CEAS (including the Dublin regime) and with central norms of the Schengen acquis.[322]

Another outcome of the 'refugee crisis' has been an increased focus on cooperation with third countries (see section 2.2.1.3), as well as a fortification of the external borders with border fences and walls for preventing migration (see image 1 and 52).[323] By 2023, the following EU countries had put up physical barriers along part of their external borders: Bulgaria, Estonia, France,

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[321] Sandra Lavenex, '"Failing forward" Towards which Europe? Organized hypocrisy in the common European asylum system', *JCMS: Journal of Common Market Studies* (2018), p. 1197. See also Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen, 'Understanding the crisis of refugee law: Legal scholarship and the EU asylum system', *Leiden Journal of International Law* (2020), p. 878.

[322] Byrne, Noll and Vedsted-Hansen, 'Understanding the crisis of refugee law: Legal scholarship and the EU asylum system' (2020), p. 877. Pursuant to the principle of sincere cooperation (Article 4.3 TEU), the Union and the member states shall, in full mutual respect, assist each other in carrying out tasks which flow from the treaties. Member states shall moreover take any appropriate measure, general or particular to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union and facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardize the attainment of the Union's objectives. As Byrne, Noll, Vedsted-Hansen have argued, the CEAS legislative instruments, lacking a burden-sharing component, serve to promote burden-shifting behaviour; ibid. p. 884. Furthermore, reception conditions, the processing of asylum claims, and recognition practices and rates differed widely (and they still do) between the member states in what has been described as an 'asylum lottery'. See e.g. ECRE, Asylum statistics in Europe: Factsheet, 2020. During 2018, recognition rates for Iraqis ranged from 94.2% in Italy to 12% in Bulgaria. Regarding people from Afghanistan, recognition rates varied from 98.4% in Italy to 24% in Bulgaria, 33% in Sweden, 50.6% in Belgium, and 52.2% in Germany. The persisting discrepancy in national proceedings has led to an increasing number of suspended Dublin transfers of asylum-seekers to countries where they would be at risk of chain refoulement. According to AIDA, domestic courts ruled against Dublin transfers of Afghan asylum-seekers to Austria, Belgium, Finland, Germany, Norway, and Sweden during 2018, due to the risk those states' restrictive granting of protection to Afghan claims constituted; see AIDA and ECRE 'Asylum statistics 2018: Changing arrivals, same concerns' (ecre.org). The Asylum Information Database (AIDA), a database managed by ECRE, contains information on asylum procedures, reception conditions, detention, and the content of international protection across 23 European countries.

[323] Dumbrava, Walls and fences at EU borders, 2022.

Greece, Hungary, Latvia, Lithuania, Poland, and Spain. In 2022, Finland announced plans to build a fence along part of its border with Russia.[324] Internal fences between EU states have also been constructed. In 2015, Hungary put up a fence at its border with Croatia; Austria at its border with Slovenia in 2015 and with Italy in 2016; and between 2015 and 2020, Slovenia built a razor-wire fence at its border with Croatia.[325] The Schengen state Norway constructed a fence at its border with Russia in 2016. Neighbouring states not part of neither the EU nor Schengen, such as North Macedonia and the UK have built fences as well.[326] The increased interest in physical barriers has prompted member states to call on the European Commission to present legislative proposals allowing for the funding of physical barriers. The main reason given for the erection of border fences is to prevent irregular migration and to combat terrorism.[327]

Following from this development of the EU border regime from the 1950s on, the ability of the sovereign state to include or exclude third-country

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[324] Ibid.

[325] Ibid.

[326] Ibid.

[327] Ibid. The BMVI Regulation establishes an instrument for EU funding on infrastructure, buildings, systems, and services required at border crossing points, and for border surveillance between border crossing points (Annex III 1 (a)) Regulation (EU) 2021/1148 of the European Parliament and of the Council of 7 July 2021. Establishing, as part of the Integrated Border Management Fund, the Instrument for Financial Support for Border Management and Visa Policy. The fund concerns the period from 1 January 2021 to 31 December 2027. One of the BMVI's objectives consists of 'supporting effective European integrated border management at the external borders […] to facilitate legitimate border crossings, to prevent and detect illegal immigration and cross-border crime and to effectively manage migratory flows' (Article 3(2) a)). It follows from Article 4 BMVI that actions funded under the instrument shall be implemented in full compliance with the rights and principles enshrined in 'the Union acquis and the Charter and with the Union's international obligations as regards fundamental rights, in particular by ensuring compliance with the principles of non-discrimination and non-refoulement'. EU funding under this instrument shall complement national, regional, and local interventions (Article 6(1) BMVI). According to the Regulation, legal entities established in a member state, or an overseas country or territory linked to it, and certain third countries, are eligible for EU funding (Article 20 BMVI). However, the European Commission has not confirmed whether the instrument allows for funding the construction or maintenance of border fences; see Dumbrava, Walls and fences at EU borders, 2022.

nationals has been gradually transformed, as cooperation between the member states on asylum and border control has increased. In many areas, the 'lines' on the map that divide member states from each other in terms of territory and power have lost their significance.[328] No longer is asylum and border control the exclusive province of the national law of individual member states, and member state's competence in this area has been conferred from the member states into the EU, and harmonized.[329]

2.2.1 Extraterritorial Migration and Border Control

The Schengen acquis, as incorporated into EU law through the Treaty of Amsterdam, strengthened the external border and laid the basis for today's mechanisms of extraterritorial border control. According to the 1990 Schengen acquis, third-country nationals 'may' be granted entry for stays not exceeding three months if they possess valid travel documents authorising them to cross the border (Article 5). Following from Article 10.1 of the Schengen acquis, a uniform 'Schengen visa' was introduced, valid for the entire territory of the contracting parties for visits not exceeding three months. To ensure the observation of the visa requirement, Article 26 of the Schengen acquis obliges the contracting parties to incorporate provisions on carrier responsibility (with associated penalties) as well as on carrier obligation to take all necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry. Entry conditions and

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[328] The EU is not a state, and EU law does not traditionally refer to the EU as having or being defined by territory. Instead, EU territory and the territorial scope of the treaties are defined by the member states' territories. See Article 52.2 TEU and Article 355 TFEU.

[329] Under EU law the construction of 'competences' distributes the authority to legislate within a particular area, Articles 3–6 TFEU. Article 4(2) j) TFEU, provides that the area of freedom, security and justice is 'shared competence' between the EU and the member states. This area includes the EU's common policy on asylum, immigration, and external border control, Article 67(2) TFEU. Whereas the limits of EU competences are governed by the principle of conferral, the use of EU competences is governed by the principles of subsidiarity and proportionality. Under the principle of conferral, the EU shall act only within the limits of the competences conferred upon it by the member states in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the member states (Article 5 TEU).

visa and carrier requirements are today set out in the SBC, the Visa Code, and the Carriers Directive.

This section describes extraterritorial border control under the visa requirement (2.2.1.1), carrier obligations (2.2.1.2), as well as measures undertaken extraterritorially in and by third countries under third-country cooperation (2.2.1.3). The chapter then turns, in section 2.2.2, to migration and border control at the EU's external borders. The aim of the division between 'extraterritorial' and 'external' is to distinguish laws and actions undertaken extraterritorially in third countries from those undertaken at the external borders of an EU member state.

2.2.1.1 The Visa Requirement

From the early 1980s, visas have been used in combination with carrier responsibility by individual European states, and has since then become mandatory across all EU member states through EU harmonisation.[330] Visa restrictions were the first element in the area of borders, asylum, and immigration to enter EU law, and are directly connected to migration control at an 'early stage'. In 1992, the Maastricht Treaty conferred powers on the Council to adopt a list of countries whose citizens required a visa to enter the EU.[331] Then, with the Amsterdam Treaty, additional powers were given to the Council – to establish a list of countries that were exempt from the visa requirement, and another list of those that were not. These two lists are provided through the Visa List Regulation.[332]

In general, there is a relatively high degree of reciprocity in visa restrictions on the global scale: states either do or do not impose visa restrictions on each other. The EU aims at achieving full visa reciprocity with third countries in

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330 Erika Feller, 'Carrier sanctions and international law', *International Journal of Refugee Law* (1989), pages 48–66.

331 Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017), p. 83.

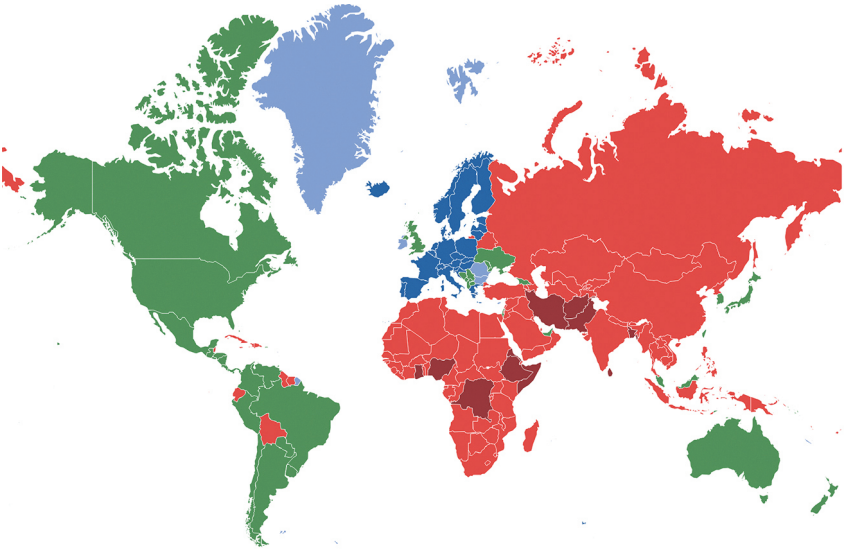
332 Regulation (EU) 2018/1806 of the European Parliament and of the Council of 14 November 2018 listing the third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt from that requirement.

accordance with the Visa List Regulation.[333] On the global scale however, holders of OECD passports meet far fewer restrictions when travelling abroad and have access to more foreign countries than people from non-OECD countries.[334] The EU Visa List Regulation distributes visas in the same vein: it is almost solely countries in the Global North that are exempt from the visa requirement. The countries with the heaviest visa restrictions are often those which are very poor, or that have a highly autocratic regime, or that have a history of violent political conflict (Afghanistan, Iraq, or Somalia, for example).[335] Citizens of the countries from which most protection seekers originate are required to be in possession of a Schengen visa before boarding transport to the Schengen area, as well as of an airport transit visa (ATV) for transiting through a member state.

[333] The Visa List Regulation, Preamble 14. A visa reciprocity mechanism is set out in Article 7 in the Visa List Regulation.

[334] Eric Neumayer, 'Unequal access to foreign spaces: How states use visa restrictions to regulate mobility in a globalized world', *Transactions of the Institute of British Geographers* (2006).

[335] Ibid., page 7.



Blue areas: Schengen
Light blue areas: Territories of EU states, no visa is required for travelling in between EU member states.
Red areas: Third countries whose nationals must be in possession of a visa when crossing the external borders of the EU.
Dark red areas: Third countries whose nationals must be in possession of a visa and of an airport transit visa (ATV) when crossing the external borders of the EU.
Green areas: No visa is required for nationals of these countries when crossing the external borders of the EU.

Image (2): A screenshot of the website of the European Commission [23-08-16], (on file with the author).[336]

A short-stay Schengen visa issued by one of the member states entitles its holder to travel throughout the Schengen area for up to three months. Schengen short-stay visas are applied for at, and issued by, diplomatic missions or consular posts of the member states. According to Article 21(1) of the Visa Code, the examination of a visa application shall ascertain whether the entry conditions set out in the SBC are fulfilled. Particular consideration shall be given to assessing whether the applicant presents a security risk or a risk of

[336] 'European Commission, Migration and Home Affairs' (ec.europa.eu).

'illegal immigration', and whether the applicant intends to leave the territory of the member states before the expiry of the visa. According to Article 32(1) b), a visa shall be refused if there are reasonable doubts as to the applicant's intention to leave the territory before the expiry of the visa.[337] In *Koushkaki*, the CJEU clarified that Article 32(1) of the Visa Code, read in conjunction with Article 21(1) thereof, must be interpreted as meaning that 'the obligation of the competent authorities of a Member State to issue a uniform visa is subject to the condition that there is no reasonable doubt that the applicant intends to leave the territory of the Member States before the expiry of the visa applied for, in the light of the general situation in the applicant's country

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[337] Article 32 Visa Code sets out grounds for refusal. It states:

1. Without prejudice to Article 25(1), a Visa shall be refused: (a) if the applicant: (i) presents a travel document which is false, counterfeit or forged; (ii) does not provide justification for the purpose and conditions of the intended stay; (iii) does not provide proof of sufficient means of subsistence, both for the duration of the intended stay and for the return to his country of origin or residence, or for the transit to a third country into which he is certain to be admitted, or is not in a position to acquire such means lawfully; (iv) has already stayed for three months during the current six-month period on the territory of the Member States on the basis of a uniform Visa or a Visa with limited territorial validity; (v) is a person for whom an alert has been issued in the SIS for the purpose of refusing entry; (vi) is considered to be a threat to public policy, internal security or public health as defined in Article 2(19) of the Schengen Borders Code or to the international relations of any of the Member States, in particular where an alert has been issued in Member States' national databases for the purpose of refusing entry on the same grounds; or (vii) does not provide proof of holding adequate and valid travel medical insurance, where applicable; or (b) if there are reasonable doubts as to the authenticity of the supporting documents submitted by the applicant or the veracity of their contents, the reliability of the statements made by the applicant or his intention to leave the territory of the Member States before the expiry of the Visa applied for.

2. A decision on refusal and the reasons on which it is based shall be notified to the applicant by means of the standard form set out in Annex VI.

3. Applicants who have been refused a Visa shall have the right to appeal. Appeals shall be conducted against the Member State that has taken the final decision on the application and in accordance with the national law of that Member State. Member States shall provide applicants with information regarding the procedure to be followed in the event of an appeal, as specified in Annex VI.

4. In the cases referred to in Article 8(2), the consulate of the representing Member State shall inform the applicant of the decision taken by the represented Member State.

5. Information on a refused Visa shall be entered into the VIS in accordance with Article 12 of the VIS Regulation.

of residence and his individual characteristics, determined in the light of information provided by the applicant'.[338] The CJEU further stated that 'the competent authorities of a Member State cannot refuse, following the examination of an application for a uniform visa, to issue such a visa to an applicant unless one of the grounds for refusal of a visa listed in those provisions can be applied to that applicant'.[339] If an applicant meets the conditions, a visa is to be issued and, as stated in *Koushkaki,* the member states have no discretion in the matter. However, the CJEU also stated that those authorities have a wide discretion in the examination of that application 'so far as concerns the conditions for the application of those provisions and the assessment of the relevant facts, with a view to ascertaining whether one of those grounds for refusal can be applied to the applicant'. The CJEU furthermore obliged the competent authorities to carry out an individual examination of the visa application which 'takes into account the general situation in the applicant's country of residence', together with the applicant's individual level of stability.[340] Such an assessment entails 'complex evaluations based, inter alia, on the personality of the applicant, the applicant's integration in the country of residence, 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'.[341]

The Visa Code also provides for limited territorial visas (LTVs) for e.g. humanitarian reasons (Article 25(1)). An LTV can, according to the Visa Code, be issued exceptionally when a member state concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations (Article 25(1)). The question of how Article 25(1) is to be interpreted in relation to visas sought for the purpose of seeking asylum upon arrival in a member state has been addressed – by the CJEU in *PPU X and X v Belgium*, and by the ECtHR in *M.N. and Others v Belgium*. Following

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[338] Judgement of 19 December 2013, Rahmanian Koushkaki v Bundesrepublik Deutschland, C-84/12, EU:C:2013:862.

[339] Ibid.

[340] Ibid., paras 56 and 69.

[341] Ibid., para 56.

from these cases, an LTV application made at an EU embassy in a third country is considered to fall within the scope of national law, and triggers neither EU law, nor jurisdiction under the ECHR in relation to the applicant's need for international protection.

2.2.1.2 Carrier Obligations and Penalties

In the Convention Implementing the Schengen Agreement of 14 June 1985, the idea of carrier responsibility appeared. It was also regulated in the Carriers Directive later on.[342] Supplementing the Visa Code, the Carriers Directive establishes the obligation of carriers to take all necessary means to ensure that third-country nationals carried by air, sea, or land have the travel documents necessary (in accordance with the SBC) for entering the territory of the Schengen states. Moreover, in addition to said Directive, Directive 2004/82 obligates carriers to communicate passenger data.[343] The Carriers Directive obliges carriers to return third-country nationals who are refused entry by the

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[342] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985. The logic of carrier sanctions is not just regulated in the Carriers Directive; it is also present in related areas. Council Directive 98/41/EC of 18 June 1998 on the registration of persons sailing on board passenger ships operating to or from ports of the Member States of the Community includes provisions on registration, the purpose of which is to ensure that search and rescue and the aftermath of any accident can be dealt with more effectively (Article 1.) The Directive and the SafeSeaNet information system, which do not primarily concern the issue of migration and which emanate from obligations set out in the International Convention on the Safety of Life at Sea (the SOLAS Convention), include obligations and – in line with the Carriers Directive – penalties for carriers breaching the national provisions on passenger data adopted pursuant to the Directive (Article 14). The logic of penalties and information exchange is also incorporated into EU law on the monitoring and information system of vessel traffic; see the Directive 2002/59/EC of the European Parliament and of the Council of 27 June 2002 establishing a Community vessel traffic monitoring and information system and repealing Council Directive 93/75/EEC. The information gathered through these measures shall, in accordance with Annex VI of the SBC, be communicated to border guards or to the national authorities of the receiving member state (3.1.2 Annex VI of the SBC). Border guards shall search the ship and conduct checks on the persons staying aboard only when justified on the basis of an assessment of the risks related to internal security and illegal immigration (3.1.4 Annex VI of the SBC). Through these provisions, safety and life-saving at sea serve as devices for migration control.

[343] Council Directive 2004/82/EC of 29 April 2004 on the obligation of carriers to communicate passenger data.

member state of destination. Carrier obligations and financial penalties are described in the Carriers Directive as essential for 'curbing migratory flows and combating illegal immigration'.[344] Private carrier enterprises, such as airline companies, are thus obliged to perform controls of migrants' documentation before departure and to deny boarding to undocumented people – or bearing the costs of their return in addition to penalties. This logic applies not only to airline carriers but to shipping companies as well. Under the Carriers Directive, member states shall take the necessary steps to ensure the obligation of carriers to return third country nationals, and shall ensure that the penalties applicable to carriers are 'dissuasive, effective, and proportionate'.[345] The Directive also sets out other penalties for carriers that do not comply with their obligations, including temporary suspension or withdrawal of operating licenses, and immobilization, seizure, and confiscation of the means of transport.[346]

Imposing carrier obligations thus 'ensures' that the visa requirement is observed, because no third-country citizen can board a carrier towards the EU without possessing the necessary travel documents.

2.2.1.3 Cooperation with Third Countries

Third countries, such as countries of origin or of transit, have become engaged in EU external cooperation on migration and border control, providing the EU with extraterritorial means of control. Third-country cooperation has been intensified on the EU level; however, individual member states also conclude agreements with third countries in order to enforce control. Italy and Spain, for example, have concluded deals with North African countries. Under third-country cooperation, border and migration control activities are performed by a third country, or together with it. This section describes a selection of extraterritorial activities of this kind.

In an initial response to the 'refugee crisis', the European Commission introduced the '2015 Agenda on Migration', which had a strong focus on

[344] The Carrier Directive, Preambles 1 and 2.

[345] Ibid., Articles 2 and 4. 1.

[346] Ibid., Article 5.

external cooperation and on the 'root causes' of migration.[347] Proposing stronger border management in third countries, the 2015 Agenda added migration as a specific component of ongoing CSDP missions. It also introduced the 'hotspot approach', whereby Frontex, Europol, and the European Asylum Support Office would cooperate 'on the ground with front-line member states to identify, register and fingerprint incoming migrants'.[348] The 2015 Agenda furthermore proposed an EU-wide resettlement scheme to offer resettlement for vulnerable persons from third countries in need of international protection. This resettlement framework, however, was not adopted.[349]

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[347] A European agenda on migration. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, 13 May 2015 COM (2015) 240.

[348] The hotspot approach, mainly used in Italy and Greece, has been criticized for exposing refugees and asylum-seekers to a broad range of rights violations. For an analysis of the implementation of the hotspot approach in the Greek border islands, see Alexandra Bousious and Evie Papada, 'Introducing the EC hotspot approach: A framing analysis of EU's most authoritative crisis policy response', *International Migration* (2020). See further; The Danish Refugee Council: Fundamental rights and the EU hotspot approach: A legal assessment of the implementation of the EU hotspot approach and its potential role in the reformed Common European Asylum System; Martina Tazzioli, 'Containment through mobility: migrants' spatial disobediences and the reshaping of control through the hotspot system', *Journal of Ethnic and Migration Studies* (2018); and Karin Åberg, 'Examining the vulnerability procedure: Group-based determinations at the EU border', *Refugee Survey Quarterly* (2022).

[349] Within the framework of the reform of the Common European Asylum System (CEAS) the Commission submitted a proposal for a Regulation establishing a Union Resettlement Framework in July 2016. Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council COM/2016/0468. The proposal aimed at ensuring the safe and legal arrival of persons in need of international protection to Europe, and at providing for a collective and harmonized approach for resettlement, with a unified procedure and a reduction of divergences among the national practices. One of the declared aims of the framework was to offer a safe alternative to individuals in need of international protection before they resort to dangerous crossings via the Mediterranean in the hands of smuggling networks. However, the legislative proposal was criticized by civil society organizations, due to its reference to maximum numbers for resettlement; and the voluntary commitment of the member states has inspired doubt as to whether the resettlement framework can become

Since the turn of the millennium, the EU has paid greater attention to external relations and external action in the field of migration. The 2015 Agenda fronts this approach, together with the Migration Partnership Framework (MPF), established in 2016, and the Global Approach to Migration and Mobility (GAMM), established in 2005. The MPF is a mechanism under the 2015 Agenda that provides a framework for partnership with third countries. It focuses on cooperation that combine 'all instruments and tools available to the EU and its Member States'.[350] Placing migration at the top of the Union's priorities for external relations, the MPF seeks to save 'lives in the Mediterranean Sea, [to] increase rates of return to countries of origin and transit, and [to] enable migrants and refugees to stay close to home avoiding taking dangerous journeys'.[351] One example of such a partnership is cooperation with Libya. In January 2017, the Commission called for measures to strengthen the Libyan coast guard and to reinforce the Libyan border. The Commission stressed the importance of coordinated action by the Union, in close cooperation with member states (especially Italy and Malta), by mobilizing all the tools available at EU level with a coherent joined-up approach'.[352] Although not considered a safe third country,[353] Libya offers an

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an adequate 'legal channel' to asylum, especially given the great global need for resettlement. The EU resettlement framework has not yet been adopted; instead it has been operating ad hoc. See Factsheet Delivering on resettlement: 16 October 2019.

[350] 'New migration partnership framework external component of migration policy' (europarl.europa.eu).

[351] Ibid.

[352] Joint Communication to the European Parliament, the European Council and the Council - Migration on the Central Mediterranean route: Managing flows, saving lives, p. 3.

[353] In December 2016, the United Nations Support Mission in Libya reported that Libya has not decriminalized irregular migration, nor ratified the 1951 Refugee Convention and its 1967 Protocol, nor adopted a national asylum law. In spite of having ratified the 1969 OAU Convention relating to refugees, moreover, it does not have a functioning national asylum system. Cooperation with Libya on maritime operations and border control also gives rise to concerns regarding international maritime law. UNHCR notes that, according to international maritime law, disembarkation is to occur in a predictable manner in a place of safety and in conditions that uphold respect for the human rights of those who are rescued, including adherence to the principle of non-refoulement. In light of the

example of how border and migration control is designed through cooperation with the EU and its individual member states.[354] This includes the use of

security situation in general, and the particular risks for foreign nationals (of arbitrary and unlawful detention in substandard conditions in state-run detention centres), and in view of reports of serious violations and abuses against asylum-seekers, refugees, and migrants by among others militias, traffickers, and smugglers), the UNHCR does not consider that Libya meets the criteria for being designated as a place of safety for the purpose of disembarkation following rescue at sea. See UNHCR, Position on the designation of Libya as a safe third country and as a place of safety for the purpose of disembarkation following rescue at sea, September 2020. For a criticism of third-country cooperation with Libya, see the legal submission put forward to the International Criminal Court (ICC) in May 2019, in which the EU was accused of 'crimes against humanity'. 'Communication to the office of the prosecutor of the international criminal court: EU migration policies in the Central Mediterranean and Libya (2014–2019)' (statewatch.org).

354 There are several operations and agreements where cooperation with Libya is involved, such as the Migration Partnership Framework; Operation European Union Naval Force Mediterranean (EUNAVFOR) Sophia; and the European Union Border Assistance Mission (EUBAM) established in 2013 under the Common Security and Defence Policy (CSDP), supporting Libyan authorities in 'improving and developing the security of the country's borders'. EUBAM supports the Libyan authorities in disrupting organized criminal networks engaged in human trafficking and terrorism, advises the Libyan authorities on the development of a national integrated border management strategy, supports capacity building, strategic planning, and coordination among relevant Libyan authorities. Other cooperation with Libya is organized around single member states deploying financial support from EU funds, such as the Memorandum of understanding (MoU) between Italy and Libya (2017) covering inter alia 'the fight against illegal immigration', human trafficking, and border security. The Italian party provides for the financing of the initiatives mentioned in this MoU, with the support of available funds from the European Union. See the Memorandum of understanding on cooperation in the fields of development, the fight against illegal immigration, human trafficking and fuel smuggling and on reinforcing the security of borders between the State of Libya and the Italian Republic. This MoU has been declared unconstitutional and incompatible with human rights, refugee law, and maritime law obligations by the Trapani Tribunal; and Libya cannot be considered as a place of safety for the purposes of disembarkation (Tribunale di Trapani, 3.6.2019). Italy is also involved under the EUTFA in cooperation with Libyan authorities in the 'Support to Integrated border and migration management in Libya' (SIBMMIL) project, which aims at reducing migration into the EU. See 'Support to Integrated border and migration management in Libya – First phase' (ec.europa.eu) and 'Support to Integrated border and migration management in Libya – Second phase' (ec.europa.eu).

maritime operations and drone surveillance to report smuggling operations or migrant vessels in distress to the Libyan coast guard.[355]

Partnership is not a new concept. The 2005 approach, GAMM, describes 'mobility partnership' as the principal framework for cooperation in the area of migration and mobility between the EU and its partners. The primary focus is on partnerships with the countries in the EU's neighbourhood.[356] GAMM aims at developing a coherent and comprehensive migration policy for the EU – one that gives priority to asylum, to legal migration and mobility, and to the fight against irregular migration. GAMM states that border control and the fight against irregular migration are a precondition for legal migration, and that 'safe and secure migration is undermined by those who operate outside the legal framework'.[357] However, the issue of how protection seekers can be secured legal pathways into the Union is not addressed under GAMM. An example of cooperation under GAMM is the 2013 mobility partnership agreement between the EU and Morocco. The focus of this 'political declaration' is on legal migration, on migration and development, and on the 'fight' against irregular migration.[358] Another measure established under GAMM is the European Union Emergency Trust Fund for Africa (EUTFA), the aim of which is to foster 'stability and to contribute to better migration

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[355] See e.g. Operation Sophia, which was launched in 2015 to support Triton, a Frontex led operation to support Italy. On 31 March 2020, Operation Sophia was terminated and replaced by Operation EUNAVFOR Irini.

[356] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The Global Approach to Migration and Mobility, Brussels, 18.11.2011 COM(2011) 743, p. 10.

[357] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: The Global Approach to Migration and Mobility (SEC (2011) 1353)

[358] 'European Commission: Migration and mobility partnership signed between the EU and Morocco' ec.europa.eu 13-06-07. See also the EU-Morocco Association Agreement, which entered into force in 2000, and includes provisions on dialogue regarding migration, illegal migration, and return (Article 69); and the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part. Cooperation with Morocco further takes place through regional dialogues under the Rabat Process and through the African Union. Morocco is also a recipient of EU funding for migration under the European Union Emergency Trust Fund for Africa and other financing instruments – i.e., the Asylum, Migration and Integration Fund (AMIF).

management in African countries, including by addressing the root causes of destabilisation, forced displacement and irregular migration'.[359] The EUTFA, launched in November 2015 by European and African partners at the Valletta Summit on Migration, is an example of how the EU organizes migration management and development aid through the same projects. The EUTFA supports border management in several African states.[360]

Other cooperative arrangements with third countries revolve around the return of migrants. Under the concept of 'readmission', the EU cooperates actively with countries of return, particularly through readmission agreements and readmission arrangements. When the Treaty of Amsterdam came into force in 1999, the EU was empowered to conclude readmission agreements.[361] These establish procedures for the return of persons who do not fulfil, or who no longer fulfil, the conditions for entry, presence, or residence in the EU. They are concluded both by the EU and by individual member states; however, readmission agreements between the EU and a third country supersede those of any EU member state with the same country. The EU has concluded 18 readmission agreements so far,[362] and six non-binding readmission arrange-

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[359] 'Emergency Trust Fund for Africa' (ec.europa.eu).

[360] Ibid. The Valletta summit on migration brought together European and African Heads of State and Government to strengthen cooperation and address the question of migration. It recognized that migration is a shared responsibility of countries of origin, transit, and destination.

[361] Readmission Agreements are negotiated with a third country on the basis of a negotiating mandate which the Council grants the Commission. The Commission (as the lead), together with the European External Action Service (EEAS), is responsible for negotiating Readmission Agreements and improving cooperation with third countries on readmission. Readmission Agreements are adopted by a Council decision, after the European Parliament has given its consent. In the case of legally non-binding 'readmission arrangements' the Commission requests authorization from the Council before starting negotiation, and the Council must confirm the outcome. The consent of the European Parliament is not required. When in force, a readmission agreement is monitored by a Joint Readmission Committee comprising experts and representatives from EU member states and the third country. Similarly, readmission arrangements are monitored by Joint Working Groups. See EU readmission cooperation with third countries: relevant actions yielded limited results, 2017.

[362] This includes Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Cape Verde, Georgia, Hong Kong, Macao, Moldova, Montenegro, North Macedonia, Pakistan, Russia, Serbia, Sri Lanka, Turkey, and Ukraine.

ments.[363] Cooperation on return and readmission is also channelled through the EUTFA and can include efforts to increase assisted voluntary return to countries of origin before 'irregular migrants' reach Europe.[364]

An example of cooperation around readmission is the 'EU-Turkey Statement'. On 18 March 2016, the EU 'Heads of State' and Turkish leaders agreed on the EU-Turkey Statement, which aimed at ending 'irregular migration' from Turkey to the EU. The statement sought to offer safe, organized, and legal channels to Europe for Syrian refugees. Under cooperation between the EU and Turkey, all asylum-seekers entering the EU from Turkey without authorization will be returned to Turkey; and for every Syrian refugee returned by the EU to Turkey, another Syrian who has not entered the Union irregularly will be resettled from Turkey to the EU. In the *EU-Turkey Statement Case*, the resettlement mechanism established by the Statement was the subject of a case brought before the CJEU by three asylum-seekers.[365] The General Court of the European Union (the court of first instance in cases directed at EU institutions) concluded that the Statement had not been adopted by any of the EU institutions, but rather by the member states negotiating with Turkey in their capacity as actors under international law. The Statement was thus to be regarded as having been concluded by the 'heads of state of the member states', who on this occasion did not constitute the European Council.[366] The Court accordingly ruled that neither the European Council nor any other EU institution had concluded the agreement with the Turkish government. In the absence, therefore, of any act by an EU institution, the Court lacked jurisdiction to hear the case. It could not rule,

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[363] Afghanistan, Bangladesh, Ethiopia, Gambia, Guinea, and Ivory Coast. Negotiations for readmission agreements with China, Morocco, Nigeria, and Tunisia are under way, as stated by the Commission in June 2021. See the Communication from the Commission to the European Parliament and the Council: Enhancing cooperation on return and readmission as part of a fair, effective and comprehensive EU migration policy, Brussels, 10.2.2021 COM (2021) 56.

[364] Fourth Progress Report on the Partnership Framework with Third Countries under the European Agenda on Migration, 13 June 2017 COM (2017) 350, p. 16.

[365] Order of the General Court of 28 February 2017, NF v European Council, T-192/16, EU:T:2017:128, NG v European Council, T-193/16, EU:T:2017:129 and NW v European Council, T-257/16, EU:T:2017:130.

[366] Ibid., para 69.

namely, on the lawfulness of an international agreement concluded by the member states.[367] This judgement was appealed to the Court of Justice. On 12 September 2018, the latter found the appeal to be manifestly inadmissible.[368]

The EU-Turkey Statement involves economic funding to Turkey, as well as EU promises on visa facilitations for Turkish citizens. Visa facilitations are used by the EU when negotiating readmission agreements with third countries. Article 25(a) of Regulation (EU) 2019/1155 on the Visa Code connects visas with the level of cooperation shown by third countries on readmission. According to said Article, a third country that cooperates sufficiently on readmission can be granted visa facilitations, such as a reduction in the visa fee, a reduction in processing time, or an increase in the period of validity of multiple entry visas.[369] Readmission plays several roles in the externalization of migration. Visa facilities, financial funding, and 'development aid' – as under the EUTFA or in partnerships on migration or mobility – become incentives to cooperate sufficiently on readmission, such as through exit controls conducted in countries of origin and transit. The same link features in the EU-Turkey Statement, as well as in negotiations on readmission and in informal methods of cooperation with other third countries, including states from which protection seekers originate like Afghanistan, Ethiopia, Mali, Nigeria, and Senegal.[370]

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[367] Ibid.

[368] Order of the Court of 12 September 2018, NF and Others v European Council, Joined Cases C-208/17 P, C-209/17 P and C-210/17 P, EU:C:2018:705. For an analysis of the CJEU case and the EU-Turkey statement, see Thomas Spijkerboer, 'Bifurcation of people, bifurcation of law: externalization of migration policy before the EU court of justice', *Journal of Refugee Studies* (2017).

[369] 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).

[370] Mariagiulia Giuffré, *The readmission of asylum seekers under international law,* Bloomsbury Publishing Plc (2020), p. 166.

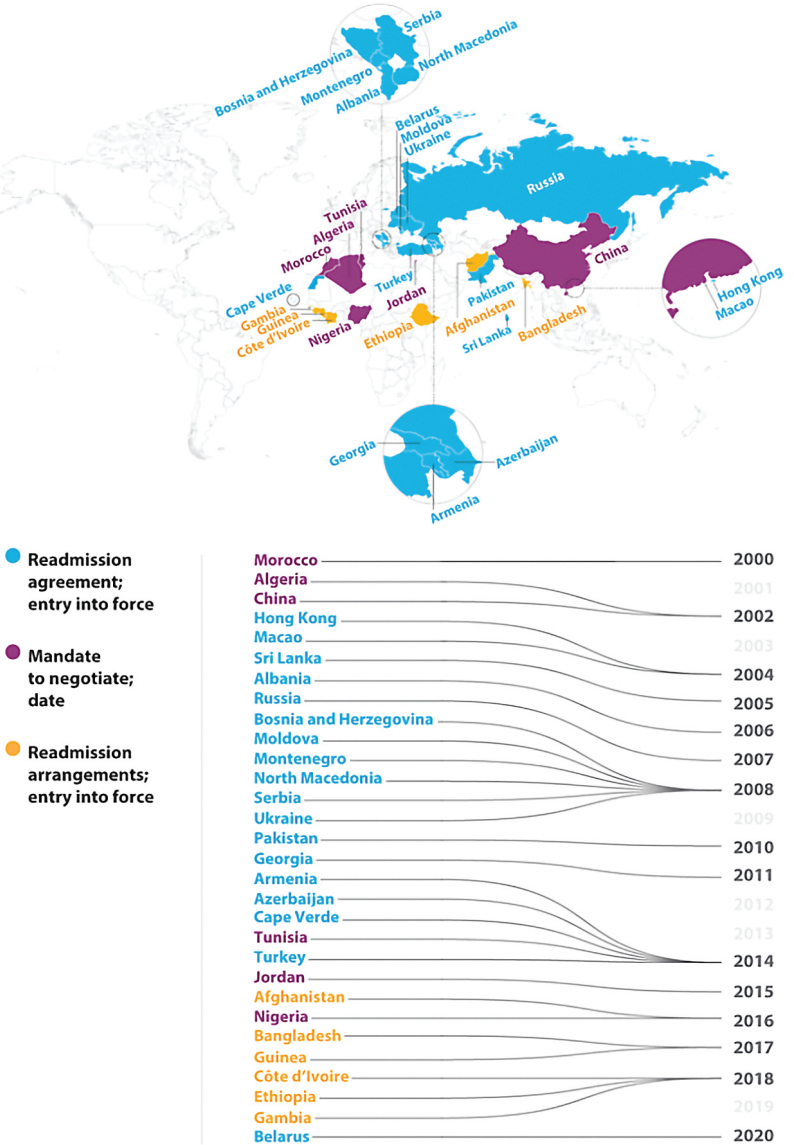

Image (3), on file with the author. EU readmission agreements and non-binding readmission arrangements.[371]

Border and migration control is also conducted by the European Border and Coast Guard Agency, commonly known as Frontex. Following from the European Border and Coast Guard Regulation (EBCG),[372] Frontex has a mandate to conduct various activities of border surveillance and control, including in cooperation with third countries.[373] The EBCG calls on Frontex and the member states to cooperate with third countries in integrated border management (IBM), with a particular focus on neighbouring third countries and on third countries which have been identified as countries of origin or transit for 'illegal' immigration.[374]

Frontex's mandate has been strengthened. In November 2019, the Council officially adopted the Commission's proposal on reinforcing the European Border and Coast Guard. The latter was given a stronger mandate on returns; empowered to cooperate more closely with non-EU countries, including those beyond the EU's immediate neighbourhood; and supplied with a gradually expanding standing corps, with up to 10,000 operational staff by 2027.[375] Under the EBCG, border management teams from the standing

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[371] Special Report 17/21 EU Readmission cooperation with third countries, 2021, Figure 3.

[372] Article 7 of The EBCG Regulation.

[373] Regulation (EU) No 1052/2013 establishing the European Border Surveillance System provides for 'a common framework for the exchange of information and for the cooperation between Member States and Frontex in order to improve situational awareness and to increase reaction capability at the external borders of the Member States of the Union ("external borders") for the purpose of detecting, preventing and combating illegal immigration and cross-border crime and contributing to ensuring the protection and saving the lives of migrants (EUROSUR)', Article 1. The EUROSUR Regulation has been replaced and integrated into Regulation (EU) 2019/1896, on the European border and Coast guard (Frontex), which carries revised provisions on EUROSUR.

[374] The EBCG Regulation, Article 71 (1) and Article 3 (1) (g). According to Article 71 (2), of the EBCG Regulation, the Agency shall provide technical and operational assistance to third countries within the framework of the external action policy of the EU, including with regard to the protection of fundamental rights and personal data and with regard to the principle of non-refoulement. Further, Article 71 (3) of the EBCG Regulation states that Frontex and member states shall comply with EU law, including where cooperation with third countries takes place on the territory of those third countries. Article 74 (1) of the EBCG Regulation provides Frontex with the opportunity to coordinate operational cooperation between member states and third countries and provide technical and operational assistance to third countries in the context of integrated border management.

[375] Ibid., Preamble 5.

corps can exercise executive powers in a third country, under the concept of 'status agreements'.[376] The EBCG further provides for 'working arrangements',[377] which have been signed with 18 countries.[378] Frontex also has a mandate to negotiate working arrangements with a further eight countries, including Libya. Working arrangements concern the management of operational cooperation. They can include cooperation on border checks, border surveillance, risk analysis, the exchange of data, and training activities relating to border management. Furthermore, Frontex cooperates with third countries through 'targeted technical assistance projects', which support the efforts of third countries to build up 'their capacities in the field of border security and management'.[379] These cooperative schemes involve several countries, including some – such as Libya – with strong human rights concerns.[380]

The use of extraterritorial measures to prevent arrivals, as during the 'refugee crisis', is not a new phenomenon under the EU border regime. The Presidency Conclusions from the meeting of the European Council in Tampere (1999) called for a 'stronger external action', and stressed the need for more efficient management of migration at all stages, 'in close co-operation with countries of origin and transit.'[381] The conclusions further expressed a determination to tackle illegal immigration 'at its source', and underlined the

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376 Article 73 (3) and Article 76(1) of the EBCG. Such an agreement shall be concluded by the Union with the third country concerned based on the procedure following from Article 218 of the TFEU. Such status agreements have been established with mostly Balkan countries: Albania (agreement in force as of 1 May 2019), Bosnia and Herzegovina (agreement pending signature), Montenegro (agreement in force as of 1 July 2020), the Republic of North Macedonia (agreement pending signature), and Serbia (agreement in force as of 1 May 2021), 'Infographic – Border management: agreements with non-EU countries' (consilium.europa.eu).

377 Article 73 (4) of the EBCG.

378 Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Canada, Cape Verde, Georgia, Kosovo, the former Yugoslav Republic of Macedonia, Moldova, Montenegro, Nigeria, the Russian Federation, Serbia, Turkey, Ukraine, and the United States. See 'Other partners and projects' (frontex.europa.eu).

379 Ibid.

380 For the full list of cooperating countries, see ibid.

381 Tampere Presidency Conclusions (1999), para 22.

need to use all competences and instruments at the disposal of the EU.[382] The 'stronger external action' sought in the conclusions from Tampere increased during the 'refugee crisis', and remains today. Like other states in the Global North, the EU and its member states have introduced extraterritorial measures in third countries, for the purpose of preventing and controlling migration at different stages. This 'externalization' of border control takes place through legislation on visas and carrier sanctions, as well as through agreements between states for supporting border control and migration management in and by third countries. There are also other instances of external EU cooperation with third countries on border and migration control than those described in this chapter, such as those involving cooperation and dialogue in third countries by 'liaison officers'.[383] EU enlargement as well plays an important role in these developments. When, for example, countries in Central and Eastern Europe were preparing for membership, they had to incorporate EU migration and border control rules. This was one of the central preconditions for membership, as the Union expanded from 15 to 25 and later 28 (27 since Brexit) member states.[384]

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[382] Ibid., paras 23 and 59.

[383] Member states have established Liaison officers at Airports to assist private transport companies as document advisers; see Article 20 of the Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, and the Republic of Austria on the stepping up of cross-border cooperation, particularly in combating terrorism, cross-border crime and illegal migration. The Convention was signed on 27 May 2005. The Convention is not considered to be EU law. However, member states, the Commission, EU agencies, and Frontex deal with immigration-related issues in third countries through liaison officers under Regulation (EU) 2019/1240 of the European Parliament and of the Council of 20 June 2019 on the creation of a European network of immigration liaison officers (recast).

[384] Byrne, Noll and Vedsted-Hansen, 'Understanding the crisis of refugee law: Legal scholarship and the EU asylum system' (2020), p. 872; Sandra Lavenex, 'Shifting up and out: the foreign policy of European immigration control', *West European politics* (2006), p. 334; Sandra Lavenex and Uçarer M. Emek, 'The external dimension of Europeanization: The case of immigration policies', *Cooperation and Conflict: Journal of the Nordic International Studies Association* (2004), p. 428; and Sandra Lavenex, *Safe Third Countries: Extending the EU Asylum and Immigration Policies to Central and Eastern Europe* (1999).

2.2.2 External Migration and Border Control

The following sections describe migration and border control at the EU's external border. They address the Schengen Borders Code (2.2.2.1), the concept of 'border procedures' under the CEAS, and safeguards for protection seekers situated at a member state's territorial border (2.2.2.2).

2.2.2.1 The Schengen Borders Code (SBC)

Freedom of movement within the EU is essential under the Treaties. This freedom forms, together with the absence of internal border controls within the Schengen area, the basis for external border control and rules on entry. Article 3(2) TEU states that 'The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime.' Objectives regarding border control are furthermore presented in Article 77 (1) TFEU, stating that '[t]he Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders; (b) carrying out checks on persons and efficient monitoring of the crossing of external borders; and (c) gradually introducing an integrated management system for external borders'.[385] The SBC serves as a framework on how to ensure such an area.

Article 1 of the SBC states that the Regulation provides for the absence of internal border control, and that it lays down rules governing the border control of persons crossing the external borders of the member states of the

[385] In Title V of the TFEU, the area of freedom, security, and justice (AFSJ) is established. Article 67 (1) states the EU's commitment to establishing such an area with respect for fundamental rights and the different legal systems and traditions of the member states, ensuring the absence of internal border controls for persons and framing a common policy on asylum, immigration, and external border control, based on solidarity between member states, which is fair towards third-country nationals (Article 67(2)) of the TFEU).

EU.[386] The SBC defines entry conditions for third-country nationals and furnishes overall guidance on whom to let in and under what conditions. Travellers are 'legitimate' under EU law if they fulfil entry conditions and undergo security checks. Such persons are to be let in; others are not. The SBC includes common rules on entry requirements, the duration of stays, and external border checks on persons. Internal border crossings are within its scope, but the Regulation mostly relates to the crossing of external borders.

Article 3 under Title I states: 'The SBC shall apply to any person crossing the internal or external borders of Member States, without prejudice to: (a) the rights of persons enjoying the right of free movement under EU law; and (b) the rights of refugees and persons requesting international protection, in particular as regards *non-refoulement*.' Article 4 SBC requires member states to act in compliance with the EU Charter, the Refugee Convention, and 'obligations related to access to international protection, in particular the principle of *non-refoulement*'. Member states are to deploy appropriate staff and sufficient resources to carry out border control at the external borders, in accordance with Articles 7 through 14 of the SBC. The object is to ensure a high, efficient, and uniform level of control at their external borders. Article 7 states that border guards shall, 'in the performance of their duties, fully respect human dignity, in particular in cases involving vulnerable persons. Any measures taken in the performance of their duties shall be proportionate to the objectives pursued by such measures.' While carrying out border checks, border guards shall not 'discriminate against persons on grounds of sex, racial or ethnic origin, religion or belief, disability, age, or sexual orientation.' According to the SBC and the EBCG, member states are the main actors responsible for the management of their sections of the external borders.[387] Under Article 36 of the EBCG, however, a member state may request assistance from Frontex in carrying out its obligations with regard to external border control. Upon request from a member state, Frontex can launch a joint

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[386] Member states such as Belgium and Germany with no external land border cannot apply Title II of the Schengen Borders Code, including entry conditions and refusal of entry provisions for persons crossing by land. However, international airports in all member states usually constitute external borders.

[387] Article 7 of the EBCG.

operation to meet upcoming challenges, including on 'illegal immigration', or provide enhanced technical and operational assistance.[388]

In Annex VI to the SBC, the Code sets out specific rules applying at various types of border crossing, such as at international airports and at railway and sea borders. 'External borders may be crossed only at border crossing points and during the fixed opening hours' (Article 5(1) SBC). 'Cross-border movement at external borders shall be subject to checks by border guards' (Article 8(1)). 'All persons shall undergo a minimum check to establish their identities on the basis of the production or presentation of their travel documents. Such a minimum check shall consist of a rapid and straightforward verification, where appropriate by using technical devices and by consulting, in the relevant databases, information exclusively on stolen, misappropriated, lost, and invalidated documents, of the validity of the document authorising the legitimate holder to cross the border and of the presence of signs of falsification or counterfeiting' (Article 8(2)). According to Article 8(3), third-country nationals shall be subject, in addition to the minimum check, to thorough checks including 'verification of the conditions governing entry laid down in Article 6(1) and, where applicable, of documents authorising residence and the pursuit of a professional activity'. Under Article 6, entry conditions for third-country nationals include, for intended stays on the territory of the member states, the possession of a valid travel document and of a valid visa (if required in accordance with the Visa List Regulation). Such persons must furthermore 'justify the purpose and conditions of the intended stay, and […] have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully'.[389] According to Article 14(1), a 'third-country national who does not fulfil all the entry conditions laid down in Article 6(1) and does not belong to the categories of persons referred to in Article 6(5) shall be refused entry to the territories of the Member States'. Article 14(2) states that entry 'may only be refused by a substantiated decision stating the precise reasons for the refusal'. According to Article 14(3), persons who are

[388] Article 37 of the EBCG.

[389] See Article 6 SBC for a full list of entry conditions.

'refused entry shall have the right to appeal'. Border guards must provide the person concerned with a written indication on procedures for appeal, together with information on representatives competent to act on said person's behalf (legal assistance).[390]

The SBC provides for a general rule of refusal of entry if the entry conditions under Article 6 are not fulfilled. However, third-country nationals who do not fulfil one or more of the conditions may be allowed entry by a member state 'on humanitarian grounds, on grounds of national interest or because of international obligations' (Article 6(5) c)). This construction offers member states a possibility of admitting third-country nationals, including protection seekers into their territories. A refusal shall further, according to Article 14(1), 'be without prejudice to the application of special provisions concerning the right of asylum and to international protection'. Such special provisions regarding asylum-seekers are not specified in the SBC, but instead in the rules on border procedures set out in the CEAS.

2.2.2.2 Border Procedures under the CEAS

When a protection seeker crosses into an EU member state, or requests to enter a member state's territory at a border crossing point, several procedural arrangements are activated that apply at the border under the APD and the Return Directive (RD). In this situation, as we saw earlier in this chapter, a protection seeker has a right to seek asylum and to be protected from refoulement.

At the external border, entry into a member state and admission to asylum procedures are connected. The APD establishes, in Article 43(1), that member states may provide for procedures to decide on the admissibility of an asylum application made at the border. A 'border procedure' is conducted prior to, or in the context of, a decision on the right of the protection seeker to enter the territory 'legally'. According to the CJEU, the objective of a border procedure is to enable member states, in well-defined circumstances, to provide for admissibility and/or substantive examination procedures in connection with

[390] Detailed rules governing refusal of entry are given in Annex V, Part A of the SBC and in the non-binding Commission recommendation, the Schengen Handbook. Practical Handbook for Border Guards, part two 1.3 (border checks), and 8.7 (refusal of entry).

'applications for international protection made at the border or in a transit zone of a Member State prior to a decision on an applicant's entry to its territory'.[391] Member states may, in accordance with Article 31(8) APD, conduct a full examination of an application before deciding whether to grant entry. While the asylum application is being processed, the applicant 'shall be allowed to remain in the Member State, for the sole purpose of the procedure' (Article 9 APD). In most cases, the border procedure includes detention and/or restrictions on freedom of movement.[392] If a person is refused entry under this procedure, the refusal must follow the safeguards provided for in the SBC.

The obligation of member states under the SBC – to provide persons refused entry with a refusal decision and with legal assistance – also applies to persons who have crossed the border 'irregularly'. In such situations, the person concerned shall, in accordance with Article 13 of the SBC, 'be apprehended and made subject to procedures respecting the Directive 2008/115/EC' (the Return Directive). The RD sets out common standards and procedures to be applied when 'illegally' present third-country nationals are returned from a member state (Article 1), including in the case of returns to a country of transit in accordance with EU or bilateral readmission agreements or other arrangements (Article 3(3) RD). Member states are to implement the Directive in accordance with the safeguards stated in Article 5. These include respecting the principle of non-refoulement and showing due regard to the needs of family life, the best interests of the child, and the state of health of the person subject to the return decision. Moreover, when issuing a return decision regarding any third-country national staying 'illegally' on its territory, in accordance with Article 6 of the RD, the member state shall

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391 Judgement of 14 May 2020, Országos Idegenrendészeti Főigazgatóság Dél-alföldi Regionális Igazgatóság, Case C-924/19 PPU and C-925/19 PPU, EU:C:2020:367, paras 236–248.

392 Galina Cornelisse and Marcelle Reneman, Asylum procedures at the border – European implementation assessment, 2020, p. 76. Grounds for detention of an asylum applicant in the context of a border procedure are established in Article 8(3) c) in the Reception Conditions Directive, which states that an applicant may be detained in order to decide, in the context of a procedure, on the applicant's right to enter the territory. See also Article 5 (1) f) of the ECHR.

comply with procedural safeguards. Decisions on removal shall be issued in writing and give reasons in fact and in law, as well as information about available legal remedies (Article 12(1) RD). According to Article 13(1) of the RD, the 'third-country national concerned shall be afforded an effective remedy to appeal against or seek review of decisions related to return'. According to Article 13(3), said person 'shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance'. Such legal assistance and/or representation shall be 'granted on request free of charge in accordance with relevant national legislation or rules regarding legal aid' (Article 13(4)). Following from *Khaled Boudjlida v. Préfet des Pyrénées-Atlantiques* (CJEU), third-country nationals are entitled to express their view on the legality of their stay before a decision on return is adopted.[393] The right to be heard is not explicitly provided for in the RD, but it is a fundamental principle of EU law under the EU Charter.[394]

However, according to Article 2(2) a) of the RD, a member state may decide not to apply the Directive to third-country nationals who are subject to a refusal of entry in accordance with the SBC[395], or who are apprehended or intercepted in connection with the irregular crossing by land, sea or air of the external border of a member state, and who have not subsequently obtained an authorization or a right to stay in that member state. In *Affum,* the CJEU clarified that Article 2(2) a) concerns third-country nationals who are apprehended or intercepted at the time of the irregular crossing of the border, or near that border after it has been crossed.[396] The Advocate General noted

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[393] Judgement of 11 December 2014, Khaled Boudjlida v Préfet des Pyrénées-Atlantiques, C-249/13, EU:C:2014:2032, paras 28–35.

[394] Articles 41, 47 and 48 of the EU Charter. See C-249/13, Khaled Boudjlida (2014), paras 28–35.

[395] The Return Directive refers to refusals under Article 13 in Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code – no longer in force). Article 13 is replaced by Article 14 in 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).

[396] Judgement of 7 June 2016, Sélina Affum v Préfet du Pas-de-Calais and Procureur général de la Cour d'appel de Douai, C-47/15, EU:C:2016:408.

in *Affum* that this 'implies a direct temporal and spatial link with that crossing of the border'.[397] In such cases, member states may apply simplified national return procedures, subject to compliance with the conditions laid down in Article 4(4) of the RD, which include safeguards on treatment and protection. Coercive measures used to carry out the removal of a third-country national who resists removal shall be implemented, as provided for in national legislation, in accordance with fundamental rights and with due respect for the dignity and physical integrity of the person concerned. They must further be proportionate, and they may not involve unreasonable force. Member states may also postpone the removal of irregular migrants under Article 4(4) RD, taking account of the physical state or mental capacity of the persons in question. Safeguards relating to emergency health care, the needs of 'vulnerable persons', and certain detention conditions shall be ensured pending return (Article 4(4) a) RD).[398] Finally, member states that decide not to apply the RD shall respect the principle of non-refoulement (Article 4(4) b).

2.3 Summary

The EU has introduced a wide variety of control mechanisms that apply extraterritorially in third countries. These include visa and carrier rules, as well as cooperation with third countries aimed at managing migration and controlling borders. When EU institutions or EU member states act extraterritorially within the scope of EU law, the EU Charter is applicable. However, not all extraterritorial migration and border control is regarded as following from EU law or from legally binding acts. Take the case of a protection seeker who, in an attempt to travel to the EU in order to seek asylum there, applies for an LTV at an embassy in a third country. This triggers

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[397] Opinion of Advocate General Szpunar delivered on 2 February 2016, Affum, C-47/15, EU:C:2016:68, para 41.

[398] The RD includes the following in the definition of vulnerable persons: minors; unaccompanied minors; disabled people; elderly people; pregnant women; single parents with minor children; and persons who have been subjected to torture, rape, or other serious forms of psychological, physical or sexual violence (Article 3 RD).

neither jurisdiction under the ECHR nor the application of EU law or the EU Charter. The EU Charter, however, can be triggered extraterritorially if the action falls within the scope of EU law; and jurisdiction under Article 1 of the ECHR can be established if the acting state has authority and control over the individual concerned. Thus, it cannot be excluded that fundamental rights apply in the Union's extraterritorial actions (see *Hirsi Jamaa and others v Italy* (2012) for example), although the externalization of border and migration control makes for a complex construction under established law on fundamental rights.

When a protection seeker is situated instead at the external border of an EU member state, the situation falls within the scope of the CEAS. Safeguards on fundamental rights accordingly apply, in accordance with both EU law and the ECHR since all member states are parties to the Convention. In such a situation, before refusing entry to an individual who lacks the required travel documents (such as a visa), the member state must assess whether the person in question has a need for protection. This follows from the right to seek asylum and the principle of non-refoulement, as stated in several human rights treaties such as the ECHR, and as set forth in the EU Charter and secondary EU law under the CEAS. The right to seek asylum and the principle of non-refoulement require states to offer arriving persons an opportunity to seek asylum, and to enjoy protection if the need for it can be established. In practice, this means that a protection seeker must be given an opportunity to lodge an asylum application. Furthermore, a wish to apply for asylum can be expressed in any form, and states must provide border officers trained to be able to detect and to understand asylum requests.[399] These safeguards also apply to people who have crossed the EU border irregularly. Furthermore, proper regard must be paid to the individual situation of each applicant, in accordance with the prohibition of collective expulsion set out in Article 4 of Protocol No. 4 of the ECHR. However, states can require applicants to make use of existing legal procedures for gaining lawful entry; and if the lack of an individual removal decision can be attributed to the applicant's own conduct, then Article 4 of Protocol No. 4 is not violated. Moreover, as the ECtHR has highlighted in several cases, problems which states may encounter in managing

[399] M.A. and Others v Lithuania (2018).

migratory flows cannot justify recourse to practices which are incompatible with the ECHR and with positive obligations in relation to the right to life.[400]

It is time to leave the geographies of fundamental rights and of EU border and migration control. Equipped now with a deeper understanding of the asymmetry between where control takes place and where the obligation to protect fundamental rights applies, let us address the scenes of interaction and law's materializations in space.

[400] See e.g. N.D. and N.T. v. Spain (2020), and Alhowais v Hungary (2023).

3 Migration and Border Control in Space and Time: The Scenes of interaction

This chapter is 'site-specific'. It presents the scenes of interaction, through a selection of images, maps, formal decisions, screenshots of websites, and other examples of how migration and border control law unfold in space and time. The chapter focuses on physical and relational materializations of the asymmetry in migration and border control law: e.g., fences, decisions, natural landscapes, and fortifications hereof. The aim of the broad collection of data is to facilitate an analysis of how law is co-produced through and within relations, shaping relations and existing in the physical world. The focus on the materiality of law allows for an understanding of law as embedded and embodied in space. The data collected follows the situations in *PPU X and X v Belgium, M.N. and Others v Belgium*, and *N.D. and N.T. v Spain*.

The chapter addresses the Belgian embassy in Beirut (3.1) and the border crossing point at Beni-Enzar in Melilla (3.2). Both sections start by 'setting the scene'. The idea is to establish the data contextually – at a certain scene of interaction of the EU's external border where relations, law and border management intersect – and briefly to address how these intersections affect a protection seeker.[401] Then, having introduced the scene of interaction, the chapter presents the data.

[401] Cf. Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), p. 61.

3.1 The Belgian Embassy in Beirut

Image (4): A screenshot from Google Maps [220128], (on file with the author).

3.1.1 Setting the Scene

Imagine that you are fleeing persecution or violence. Perhaps you are Syrian, and your plan is to escape from your country across the border with Lebanon. The border used to be open, as part of a bilateral agreement between Lebanon and Syria in 1993 that established free movement between the two countries. But that is no longer the case.[402] In order to cross the border between the two

[402] See Maja Janmyr, 'Precarity in exile: The legal status of Syrian refugees in Lebanon', *Refugee Survey Quarterly* (2016); and Human Rights Watch Report: How Lebanon's Residency Rules Facilitate Abuse of Syrian Refugees. 'I Just Wanted to be Treated like a Person'. At the start of the conflict in Syria, Lebanon largely operated an 'open door' policy towards Syrian nationals wishing to enter the country. As part of the 1993 bilateral agreement for Economic and Social Cooperation and Coordination between Lebanon and Syria, establishing principles of free movement of goods and people, and granting freedom of work, residence, and economic activity for nationals of both countries, Syrians were generally allowed to enter Lebanon without a visa; and they could renew residencies free of charge. In January 2015 this openness ended, and the new border regulations that came into force denied entry to many fleeing Syrian nationals, and new residency

countries, you will need to apply for a Lebanese visa – and be granted one. This requirement follows from the restrictions imposed by the Lebanese government in 2015.[403]

Lebanon is the world's largest 'refugee host' per capita, but it has not signed the Refugee Convention.[404] The situation for protection seekers in the country is complex. Restrictions on legal residency expose you to the risk of arrest and detention, and hamper access to education, health care, and social services.[405] So, even if you are granted the visa and you cross into Lebanon, you probably will not be able to reside in that country legally, or to seek asylum there. You will need to move further to be able to seek and to acquire international protection – perhaps in the EU.

During the summer of 2015, several hundred Syrian nationals of Christian faith were issued LTVs by the Belgian authorities. This might inspire you.[406] Or maybe you have no need for inspiration; maybe you're just desperate. To 'alter' the Belgian embassy in Beirut (a building, a place easily tracked on a map), to get help to travel to Belgium, to the EU, you need to start at the

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regulations required restrictive and costly residency renewals for protection seekers already settled in Lebanon. According to the Human Rights Watch (HRW) these new regulations sort Syrians seeking to renew residency permits into two categories: those registered with the UNHCR; and those who, not being registered, need to find a Lebanese sponsor to remain legally in the country. For many Syrians this has meant a loss of legal status that, according to HRW, puts refugees at risk of arrest, and if detained, of being subjected to ill-treatment in detention. Further, HRW has found that the new regulations make refugees vulnerable to labour and sexual exploitation by employers, and to those to whom they owe their legal status. Especially women and children are vulnerable to workplace abuse, and many Syrian refugee children – favoured by employers because they supply cheap labour – end up working to support their families. HRW also points to a worsened risk that Syrian children will become stateless, because their parents cannot register their births in the country if they do not have legal status.

[403] New restrictions on Syrian nationals' access to Lebanon took effect on 5 January 2015. 'Lebanon further restricts Syrian refugees' access to its territory' (ecre.org).

[404] 'UNHCR fact sheet Lebanon January 2021' (unhcr.org).

[405] Ibid.; and Human Rights Watch Report: How Lebanon's Residency Rules Facilitate Abuse of Syrian Refugees. 'I Just Wanted to be Treated like a Person'.

[406] As Advocate General Mengozzi notes in his opinion in Case C638/16, this may have inspired the applicants (and affected the Belgian authorities and courts) in the case. Opinion of Advocate General Mengozzi, PPU X and X v Belgium, C-638/16, para 111.

embassy's website.[407] In this digital space, you need to apply for a visa. Then, after submitting your application, you need to visit the embassy, and the embassy staff need to assess your application. What happens – in the interaction within and beyond the square metres of the embassy and its digital extension – has implications. With the visa, you can travel in a way that is not 'irregular'; you can leave a place from which you need to flee; you can board a flight that takes you to another place – where you and your family may have a chance to live free of the fear the Syrian war has brought you.

The embassy itself consists of a bundle of laws and relations, a sphere of multiplicity, a space. This space is the product of its interactions. The abstract laws take material shape and presence in the building, and potentially in the form of a visa stamp in your passport. Moreover, as you enter this space – digitally through the website and then physically in the building in Beirut – you alter the scene of these interactions, you become a co-producer of this space. You alter relations – not just with the consular staff who interview you, but also with the laws that divide mobile subjects into wanted and unwanted travellers. As in the requirements of the Visa Code which – operating in the midst of class, gender, and nationality – give rise to boundaries played out in the staff's assessment of your application.

The Belgian embassy in Beirut is a spatio-legal intersection. For you – a subject, a body, a bundle of bodies, a family with a need for protection – law is not just an abstract discourse. In fact, it is nothing but law that requires you to alter this space, to apply for a visa, and subsequently to seek asylum. The law – in this case the Visa Code – cannot be detached from the website, or from the building. Nor can it be detached from the spaces that law simultaneously co-produces: the rubber boat, the Mediterranean waters, the border guards, the fences and walls – the 'irregular' spaces you may need to face if your application is denied.

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[407] According to Massey, you cannot just pass by or cross a space or a place; instead you are part of its production. You thus 'alter' space, and participate in its continuing production, Massey, *For space* (2005), p. 118. Article 4 of the Visa Code states that member states should be present or represented for visa purposes in all third countries whose nationals are subject to visa requirements.

3.1.2 Materializations in Space and Time

This section addresses, in the context of the Belgian embassy in Beirut, the externalization of migration and border control and the construction of the EU's external border. It presents data collected mainly from the embassy's website, from its visa application system, and from the cases of *PPU X and X v Belgium* (CJEU) and *M.N. and Others v Belgium* (ECtHR). This data describes the spatio-legal setting of the situations that prompted the cases, as well as of other situations involving protection seekers who want to travel to the EU by regular means, and who thus need to adapt to the EU visa requirement. Since this scene of interaction is a place that primarily and initially is visited online (due to the requirement that a visa application be submitted online), no physical visit to the Belgian embassy in Beirut has taken place.

To 'zoom in' on the spatio-legal interaction of the EU border regime within the context of the Belgian embassy in Beirut, I have collected information on how to leave Syria by applying for a visa at that embassy. This collection took place during 2022. The data stays close to the situation of the applicants in *PPU X and X v Belgium* (CJEU) and in *M.N. and Others v Belgium* (ECtHR), which involved two Syrian families with minor children who, seeking to escape the armed conflict in Syria, travelled from that country to the Belgian embassy in Beirut in 2016, in order to submit visa applications based on Article 25 of the Visa Code (LTVs).

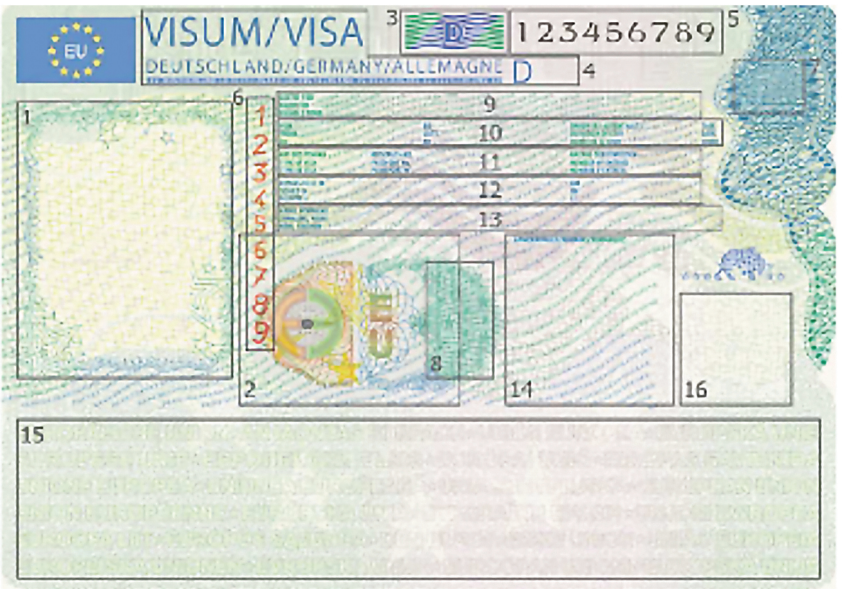


Image (5): The Schengen visa stamp.[408]

The visa requirement constitutes a 'first border' that operates already within the country of origin, distinguishing 'legitimate' travellers from 'illegitimate' ones. The visa requirement is strict, with no explicit derogation or special provisions for persons in need of international protection. Instead, protection seekers are included in the broad concept of 'third-country nationals', meaning any persons who are not citizens of the EU.[409] Third-country nationals who want to travel to the EU by regular means of transport need to be in possession of a Schengen visa (unless, that is, citizens of their country are exempt from that requirement in the Visa List Regulation). If you are a citizen of a war-torn state, or of a state with weak human-rights protection, you most probably need to be in possession of a visa (see image 2). Under the visa rules, possessing a valid visa is a condition for being able to travel by regular means. Possessing a

[408] Regulation (EU) 2017/1370 of the European Parliament and of the Council of 4 July 2017 amending Council Regulation (EC) No 1683/95 laying down a uniform format for Visas, Annex.

[409] Article 2 (1) of the Visa Code.

passport without the visa can be meaningless on the 'global mobility infrastructure'.[410]

Schengen short-stay visas are applied for at, and issued by, diplomatic missions or consular posts of a member state. In many cases, these are located at an embassy in a third country. Since the Schengen countries have closed their diplomatic missions in Syria, citizens of that country need to travel outside Syria in order to apply for a visa – such as to the Belgian embassy in Beirut.

Image (6): A screenshot of the website of schengenvisas.com [221007] (on file with the author).[411] As follows from the Visa List Regulation and from the information in the image, Syrian citizens need to hold a valid Schengen visa in order to travel to the EU. The

[410] Spijkerboer has suggested the concept of a 'global mobility infrastructure', describing it as a system connecting 'every point in the world with every other point in the world'. See Thomas Spijkerboer, 'The global mobility infrastructure: Reconceptualising the externalisation of migration control', *European Journal of Migration and Law* (2018), p. 464.

[411] 'Schengen visa for citizens of Syria' (schengenvisas.com).

information in the screenshot indicates the difficulties that Syrians meet in attempting to access the global mobility infrastructure and to travel by regular means to the EU.

I began my collection of data online at the Belgian embassy's website, in an attempt to find information on how to seek asylum, and on how to travel to Belgium to do so. The website, which displays the colours of the Belgian flag (black, yellow, and red), has headlines for information on various matters: e.g., consular services, legalisation of documents, vaccination, and on how to travel to Belgium. However, while the website directs visitors to Facebook and to Belgian tourist-information sites, no links point them to humanitarian visas or to asylum. A search for 'asylum' yields no instructions on how to travel to Belgium in order to seek protection.[412]

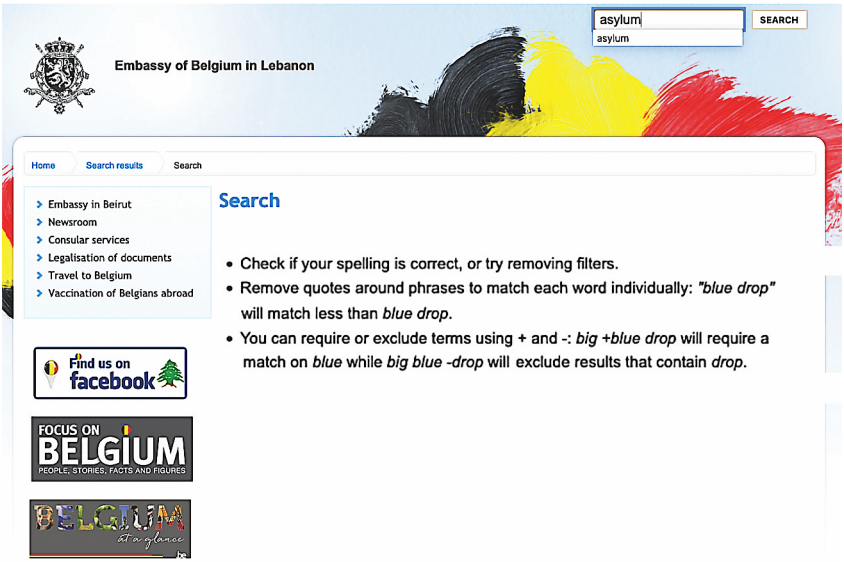
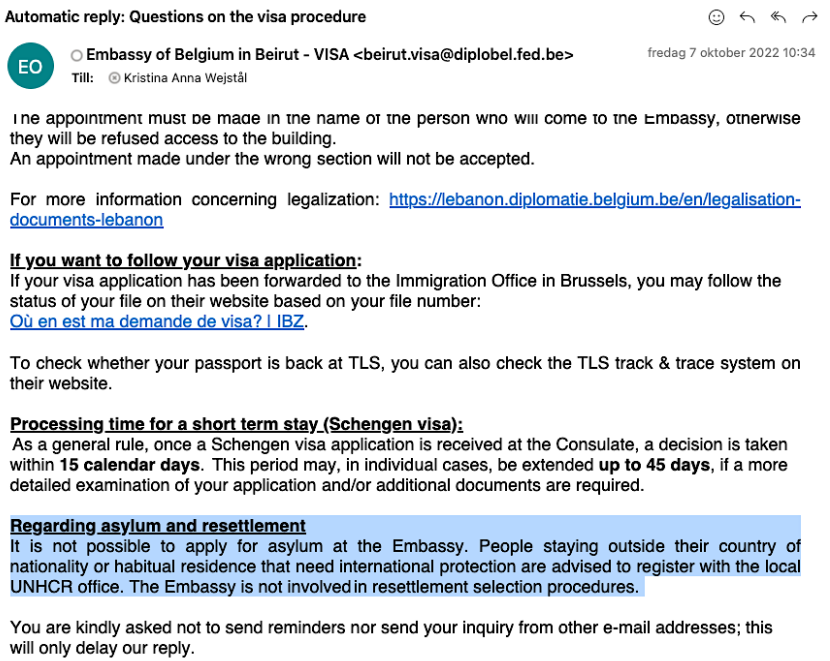


Image (7): A screenshot of the website of the Belgian embassy in Beirut [221001] (on file with the author).

[412] The screenshots of the website were taken after PPU X and X v Belgium and M.N. and Others v Belgium were settled, and after the situations that prompted them. This data might thus deviate from the information that the applicants were provided in 2016.

Since the website provides no information on asylum, I emailed the embassy and asked if it is possible to seek asylum there. I never received any response to that email from the embassy, apart from the automatic reply I got immediately after having sent my message. That automatic reply gave some information on asylum and resettlement, and it seemed to say that one cannot apply for asylum at the embassy. Instead, it advised persons who are staying outside their country of nationality or habitual residence, and who are in need of international protection, should register with the local UNHCR office.



Automatic reply: Questions on the visa procedure

EO

Embassy of Belgium in Beirut - VISA <beirut.visa@diplobel.fed.be>

fredag 7 oktober 2022 10:34

Till: Kristina Anna Wejstål

The appointment must be made in the name of the person who will come to the Embassy, otherwise they will be refused access to the building.
An appointment made under the wrong section will not be accepted.

For more information concerning legalization: https://lebanon.diplomatie.belgium.be/en/legalisation-documents-lebanon

If you want to follow your visa application:
If your visa application has been forwarded to the Immigration Office in Brussels, you may follow the status of your file on their website based on your file number:
Où en est ma demande de visa? | IBZ.

To check whether your passport is back at TLS, you can also check the TLS track & trace system on their website.

Processing time for a short term stay (Schengen visa):
As a general rule, once a Schengen visa application is received at the Consulate, a decision is taken within **15 calendar days**. This period may, in individual cases, be extended **up to 45 days**, if a more detailed examination of your application and/or additional documents are required.

Regarding asylum and resettlement
It is not possible to apply for asylum at the Embassy. People staying outside their country of nationality or habitual residence that need international protection are advised to register with the local UNHCR office. The Embassy is not involved in resettlement selection procedures.

You are kindly asked not to send reminders nor send your inquiry from other e-mail addresses; this will only delay our reply.

Image (8): A screenshot of the embassy's reply to the author [221007], (on file with the author).[413]

The UNHCR, however, states that such registration has been suspended for Syrians.

[413] Automatic reply received on 7 October 2022. On file with the author.

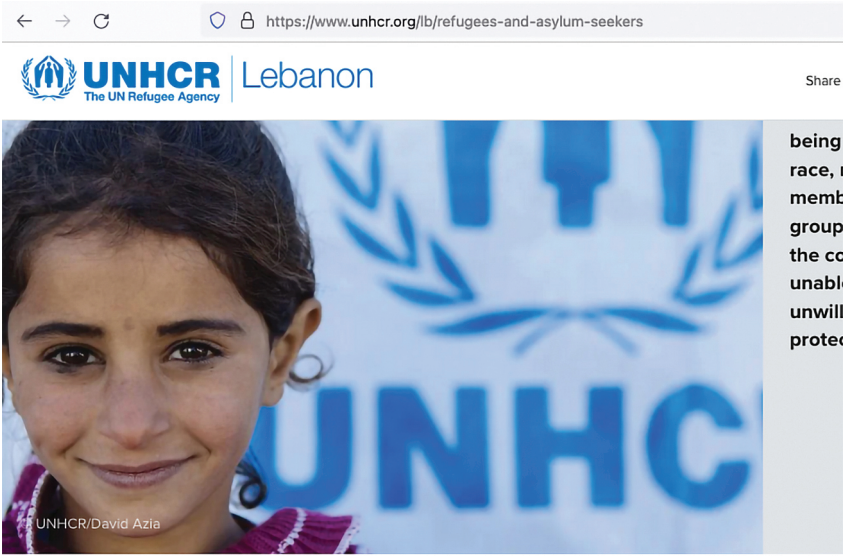


Image (9): A screenshot of the website of UNHCR Lebanon [221007], (on file with the author).[414]

Since one cannot apply for asylum at the embassy, I turn instead to the website's information on visas. Under 'Travel to Belgium', information is

[414] 'UNHCR Lebanon: Refugees and asylum seekers' (unhcr.org).

provided on how to apply for a Schengen visa to Belgium and Luxemburg. Since 2021, the reception of visa applications for Belgium and Luxemburg has been delegated to a third party – TLScontact – which has a 'Visa Application Centre' in Beirut. TLScontact provides administrative visa and consular services for governments, with a network of 150 'Visa Application Centres' in 90 countries.[415] Decision-making, however, remains with the governments using the service.

Image (10): A screenshot of the website of the Belgian embassy in Beirut [221001] (on file with the author).[416]

[415] 'TLScontact' (tlscontact.com).

[416] 'Embassy of Belgium in Beirut' (lebanon.diplomatie.belgium.be).

The visa application must be submitted no earlier than 6 months before the intended date of travel, and no later than 15 days before it. Information on the visa requirement for Syrian (and Lebanese) passport-holders is provided by TLScontact.

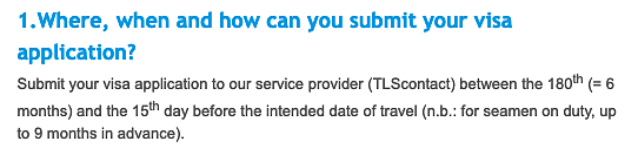


Image (11): A screenshot of the website of the Belgian embassy in Beirut [221006] (on file with the author).[417]

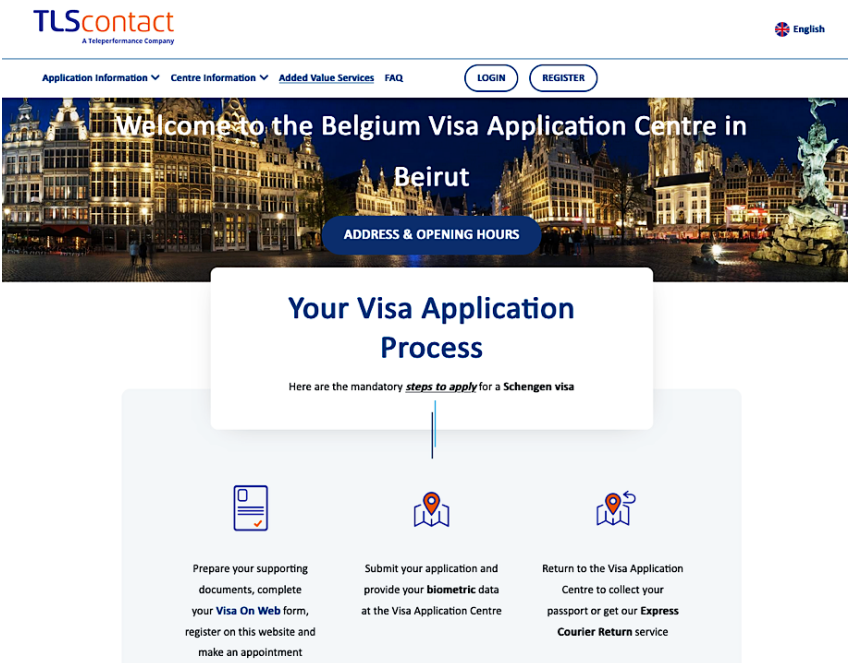


Image (12): A screenshot of the website of TLScontact in Lebanon [221007] (on file with the author).[418]

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[417] Ibid.

[418] 'TLScontact' (tlscontact.com).

Image (13): A screenshot of the website of TLScontact in Lebanon [221006], (on file with the author).[419]

Submitting the electronic visa application form is the first step that one needs to take in order to cross the border into the EU (in this case into Belgium). The application must be submitted online. As follows from the automatic reply, moreover, all visa applications must be introduced via TLScontact, and 'no visa application will be accepted directly at the Embassy.' In order to study the Belgian application form and to see what information I can receive, I create an account and start the application procedure.

[419] Ibid.

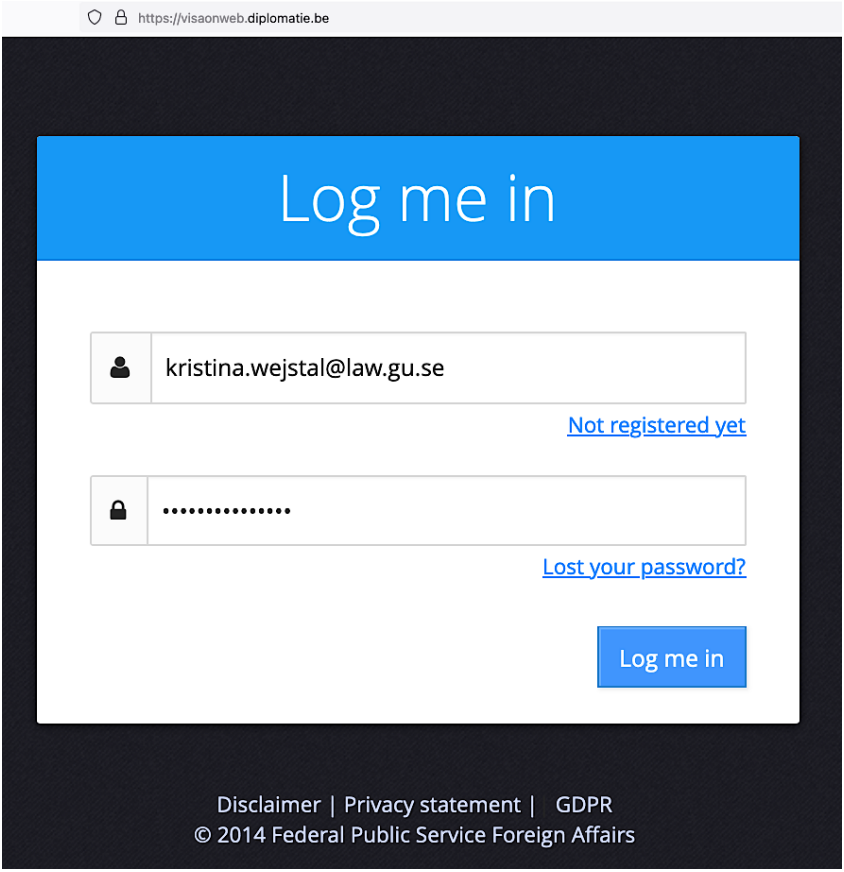
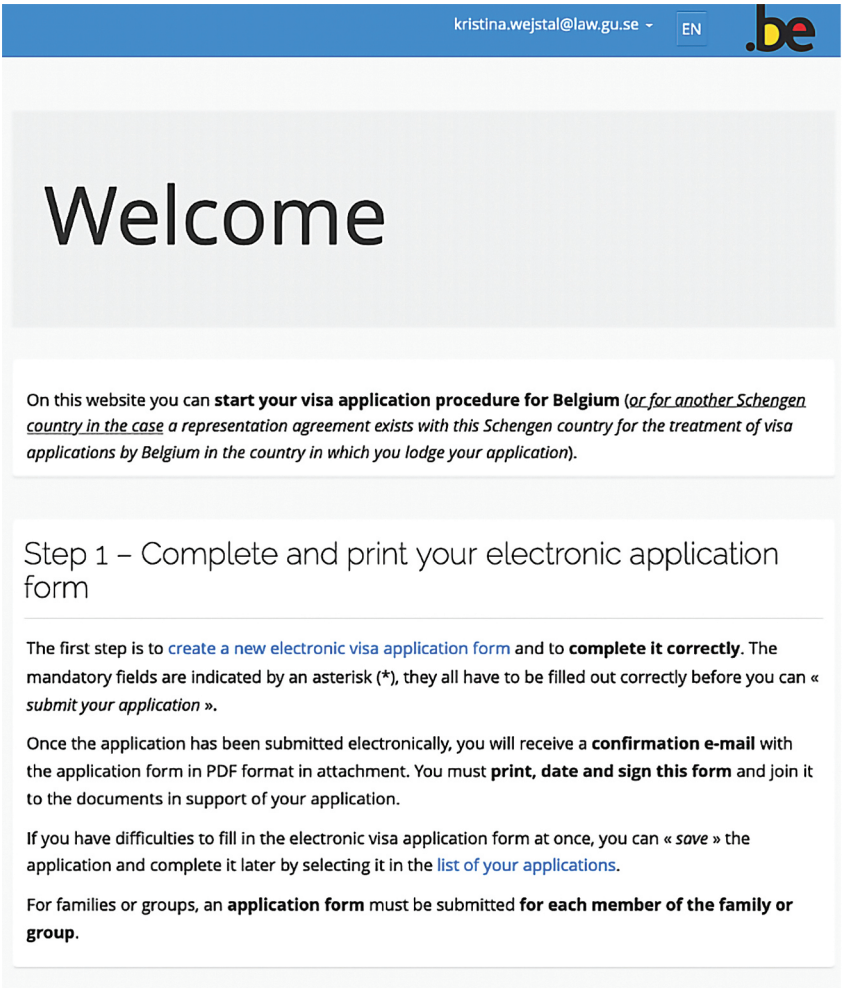


Image (14): A screenshot of the online visa application form on the website of the Belgian embassy in Lebanon [221003], (on file with the author).[420]

[420] 'Visa application for Belgium' (visaonweb.diplomatie.be).


kristina.wejstal@law.gu.se
EN
.be
Welcome
On this website you can start your visa application procedure for Belgium (or for another Schengen country in the case a representation agreement exists with this Schengen country for the treatment of visa applications by Belgium in the country in which you lodge your application).
Step 1 – Complete and print your electronic application form
The first step is to create a new electronic visa application form and to complete it correctly. The mandatory fields are indicated by an asterisk (*), they all have to be filled out correctly before you can « submit your application ».
Once the application has been submitted electronically, you will receive a confirmation e-mail with the application form in PDF format in attachment. You must print, date and sign this form and join it to the documents in support of your application.
If you have difficulties to fill in the electronic visa application form at once, you can « save » the application and complete it later by selecting it in the list of your applications.
For families or groups, an application form must be submitted for each member of the family or group.

Step 2 – Make an appointment

As a **general rule**, the visa application needs to be lodged based on an **appointment**:

- For the countries where Belgium does not use an external service provider, the application is lodged at **the Embassy / the general Consulate of Belgium**. The functionality *« make an appointment »* will appear once the application has been submitted.
- For the countries where Belgium uses an **external service provider**, the application is generally lodged at the authorized centre for the deposit of visa applications that you have chosen in the application form. In order to do this you will have to create an account on the site of the external service provider and then make an appointment.

For more details, and possible exceptions, please consult the instructions given on the website of the Embassy / the general Consulate of Belgium or the external service provider.

Step 3 – Lodging of the application

If you are late or do not show up for your appointment, you will need to make a new one.

The day you lodge your application, you will submit your **passport** or other recognised travel document, the printed, signed and dated **application form** and **any other supporting document** that is required.

Your **biometric data** (fingerprints and "*live*" photo) will be captured and you will be asked to **pay the visa fee** (except in case of gratuity) **and**, if applicable, the **service fee** that will be charged by the external service provider.

Note

As a **general rule**, the registration of the fingerprints is mandatory for applications for short stay visa (maximum 90 days, type C, Schengen) and for long stay visa (more than 90 days, type D, Belgian) and this therefore requires the applicant to **appear in person**.

However, the registration of the fingerprints is not required in the following cases:

- Children under the age of 12 for short stay visa (6 years for long stay visa)
- For lodging a short stay visa application, if you have already applied for a Schengen visa less than 59 months ago and if your fingerprints were registered on that occasion. In this case, they can be copied from the European Visa Information System (VIS).

For more details, and possible exceptions, please consult the instructions given on the website of the Embassy / the general Consulate of Belgium or the external service provider.

Image (15): A screenshot of the online visa application form on the website of the Belgian embassy in Beirut [221003], (on file with the author).[421]

When submitting a visa application, one can file an application for a short-stay (C) or a long-stay (D) visa, and fill in 'humanitarian reasons' for the stay under both options.

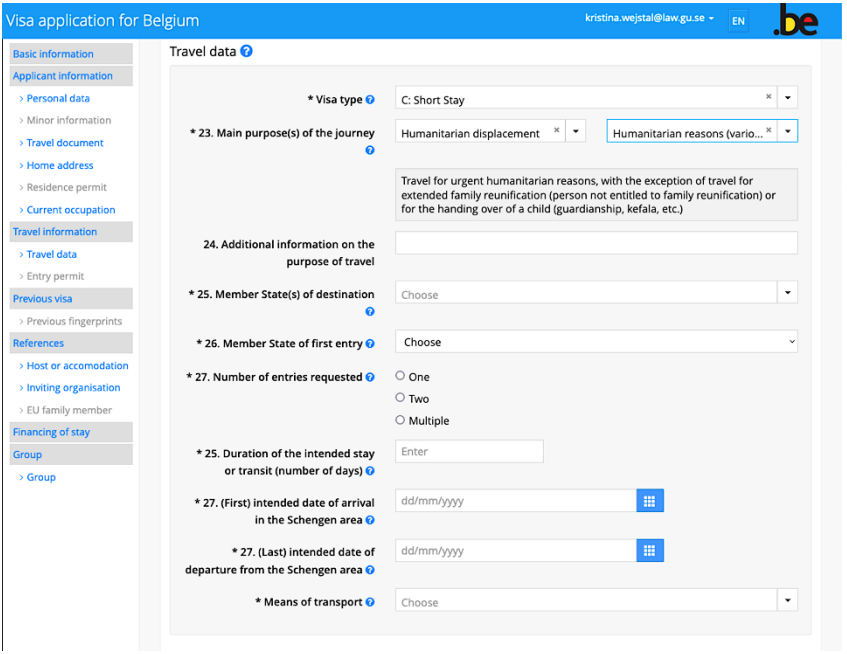


Image (16): 'Visa Type C: Short Stay'. A screenshot of the online visa application form on the website of the Belgian embassy in Beirut [221003], (on file with the author).

[421] Ibid.

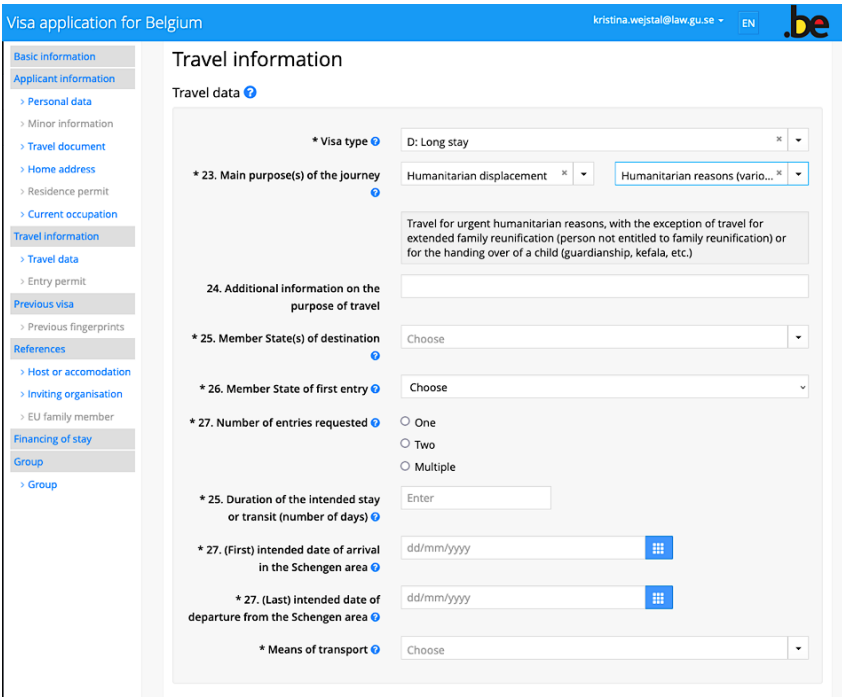


Image (17): 'Visa Type D: Long Stay'. A screenshot of the online visa application form on the website of the Belgian embassy in Beirut [221003], (on file with the author).

Once the application has been submitted electronically, the form must be printed, dated, signed, and joined with other documents in support of the application.[422] For families or groups, an application form must be submitted for each member. Then, after the application has been submitted, an appointment at the 'Visa Application Centre' in Beirut must be booked. The application is lodged at this appointment, and biometric data (through fingerprints and a 'live' photo) is captured. As a rule, registering fingerprints is mandatory both for a short-stay visa (maximum 90 days, type C, Schengen) and for a long-stay one (more than 90 days, type D, Belgian). This is why

[422] Ibid.

applicants must appear in person. Furthermore, the visa fee must be paid at this appointment.[423] These requirements follow from the Visa Code.[424]

The Belgian online application form is based on the Visa Code, which provides in Annex I for a harmonized form for collecting personal data on the applicant. This includes information on the applicant's name, address, nationality, and socioeconomic and family situation, as well as on his/her travel documents and information set out therein. The form also requires information on the applicant's destination, on the purpose of the journey, and on his/her previous travels to the Schengen area. Every Schengen state has a national version of this form, although all request the same information.[425]

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[423] Ibid.

[424] As follows from the Visa Code, an applicant must normally lodge an application three months before the intended journey (Article 9) and must normally appear in person when lodging the application (Article 21(8) of the Visa Code and Chapter III (4) in the Common Consular Instructions on Visas). The applicant must further show a valid travel document (Article 12), pay the visa fee (Article 16), and submit supporting documents proving the purpose of the journey (Article 14). Further, the applicant must support proof of sufficient means for the stay and the return (Article 21(3)b)), and of valid and adequate travel medical insurance (Article 15). All of these conditions must be fulfilled. Particular consideration must be given to assessing whether the applicant presents an immigration or security risk (Article 21(1)).

[425] 'Schengen visas' (schengenvisas.com).

'ANNEX I

Harmonised application form

APPLICATION FOR SCHENGEN VISA

This application form is free

(1)

Family members of EU, EEA or CH citizens shall not fill in fields no. 21, 22, 30, 31 and 32 (marked with *).

Fields 1-3 shall be filled in in accordance with the data in the travel document.

<table>
<tr><td colspan="3">1. Surname (Family name):</td><td rowspan="3">FOR OFFICIAL USE ONLY
Date of application:
Application number:</td></tr>
<tr><td colspan="3">2. Surname at birth (Former family name(s)):</td></tr>
<tr><td colspan="3">3. First name(s) (Given name(s)):</td></tr>
<tr><td>4.Date of birth (day-month-year):</td><td>5.Place of birth:
6.Country of birth:</td><td>7.Current nationality:
Nationality at birth, if different:
Other nationalities:</td><td>Application lodged at:
☐ Embassy/consulate
☐ Service provider
☐ Commercial intermediary</td></tr>
<tr><td>8.Sex:
☐ Male ☐ Female</td><td colspan="2">9. Civil status:
☐ Single ☐ Married ☐ Registered Partnership ☐ Separated ☐ Divorced ☐ Widow(er) ☐ Other (please specify):</td><td>☐ Border (Name):
…
…
☐ Other:</td></tr>
<tr><td colspan="3">10. Parental authority (in case of minors) /legal guardian (surname, first name, address, if different from applicant's, telephone no., e-mail address, and nationality):</td><td>File handled by:</td></tr>
<tr><td colspan="3">11. National identity number, where applicable:</td><td rowspan="2">Supporting documents:
☐ Travel document
☐ Means of subsistence
☐ Invitation</td></tr>
<tr><td colspan="3">12. Type of travel document:
☐ Ordinary passport ☐ Diplomatic passport ☐ Service passport ☐ Official passport ☐ Special passport
☐ Other travel document (please specify):</td></tr>
<tr><td>13.Number of travel document:</td><td>14.Date of issue:</td><td>15.Valid until:</td><td>16.Issued by (country):</td><td rowspan="8">☐ TMI
☐ Means of transport
☐ Other:
Visa decision:
☐ Refused
☐ Issued:
☐ A
☐ C
☐ LTV
☐ Valid:
From:
Until:</td></tr>
<tr><td colspan="4">17. Personal data of the family member who is an EU, EEA or CH citizen if applicable</td></tr>
<tr><td colspan="2">Surname (Family name):</td><td colspan="2">First name(s) (Given name(s)):</td></tr>
<tr><td>Date of birth (day-month-year):</td><td colspan="2">Nationality:</td><td>Number of travel document or ID card:</td></tr>
<tr><td colspan="4">18. Family relationship with an EU, EEA or CH citizen if applicable:
☐ spouse ☐ child ☐ grandchild ☐ dependent ascendant
☐ Registered Partnership ☐ other:</td></tr>
<tr><td colspan="3">19.Applicant's home address and e-mail address:</td><td>Telephone no.:</td></tr>
<tr><td colspan="4">20. Residence in a country other than the country of current nationality:
☐ No
☐ Yes. Residence permit or equivalent … No … Valid until …</td></tr>
</table>

*21.Current occupation:		Number of entries: □ 1 □ 2 □ Multiple Number of days:
*22.Employer and employer's address and telephone number. For students, name and address of educational establishment:		
23. Purpose(s) of the journey: □ Tourism □ Business □ Visiting family or friends □ Cultural □ Sports □ Official visit □ Medical reasons □ Study □ Airport transit □ Other (please specify):		
24. Additional information on purpose of stay:		
25.Member State of main destination (and other Member States of destination, if applicable):	26.Member State of first entry:	
27. Number of entries requested: □ Single entry □ Two entries □ Multiple entries Intended date of arrival of the first intended stay in the Schengen area: Intended date of departure from the Schengen area after the first intended stay:		
28. Fingerprints collected previously for the purpose of applying for a Schengen visa: □ No □ Yes. Date, if known … Visa sticker number, if known …		
29. Entry permit for the final country of destination, where applicable: Issued by … Valid from … until …		
*30.Surname and first name of the inviting person(s) in the Member State(s). If not applicable, name of hotel(s) or temporary accommodation(s) in the Member State(s):		
Address and e-mail address of inviting person(s)/hotel(s)/temporary accommodation(s):	Telephone no.:	
*31.Name and address of inviting company/organisation:		
Surname, first name, address, telephone no., and e-mail address of contact person in company/organisation:	Telephone no. of company/organisation:	
*32.Cost of travelling and living during the applicant's stay is covered:		
□by the applicant himself/herself Means of support: □Cash □Traveller's cheques □Credit card □Pre-paid accommodation □Pre-paid transport □Other (please specify):	□by a sponsor (host, company, organisation), please specify: … □ referred to in field 30 or 31 … □ other (please specify): Means of support: □Cash □Accommodation provided □All expenses covered during the stay □Pre-paid transport □Other (please specify):	
I am aware that the visa fee is not refunded if the visa is refused.		
Applicable in case a multiple-entry visa is applied for: I am aware of the need to have an adequate travel medical insurance for my first stay and any subsequent visits to the territory of Member States.		

I am aware of and consent to the following: the collection of the data required by this application form and the taking of my photograph and, if applicable, the taking of fingerprints, are mandatory for the examination of the application; and any personal data concerning me which appear on the application form, as well as my fingerprints and my photograph will be supplied to the relevant authorities of the Member States and processed by those authorities, for the purposes of a decision on my application. Such data as well as data concerning the decision taken on my application or a decision whether to annul, revoke or extend a visa issued will be entered into, and stored in the Visa Information System (VIS) for a maximum period of five years, during which it will be accessible to the visa authorities and the authorities competent for carrying out checks on visas at external borders and within the Member States, immigration and asylum authorities in the Member States for the purposes of verifying whether the conditions for the legal entry into, stay and residence on the territory of the Member States are fulfilled, of identifying persons who do not or who no longer fulfil these conditions, of examining an asylum application and of determining responsibility for such examination. Under certain conditions the data will be also available to designated authorities of the Member States and to Europol for the purpose of the prevention, detection and investigation of terrorist offences and of other serious criminal offences. The authority of the Member State responsible for processing the data is: [(…)]. I am aware that I have the right to obtain, in any of the Member States, notification of the data relating to me recorded in the VIS and of the Member State which transmitted the data, and to request that data relating to me which are inaccurate be corrected and that data relating to me processed unlawfully be deleted. At my express request, the authority examining my application will inform me of the manner in which I may exercise my right to check the personal data concerning me and have them corrected or deleted, including the related remedies according to the national law of the Member State concerned. The national supervisory authority of that Member State [contact details: …] will hear claims concerning the protection of personal data. I declare that to the best of my knowledge all particulars supplied by me are correct and complete. I am aware that any false statements will lead to my application being rejected or to the annulment of a visa already granted and may also render me liable to prosecution under the law of the Member State which deals with the application. I undertake to leave the territory of the Member States before the expiry of the visa, if granted. I have been informed that possession of a visa is only one of the prerequisites for entry into the European territory of the Member States. The mere fact that a visa has been granted to me does not mean that I will be entitled to compensation if I fail to comply with the relevant provisions of Article 6(1) of Regulation (EU) No 2016/399 (Schengen Borders Code) and I am therefore refused entry. The prerequisites for entry will be checked again on entry into the European territory of the Member States.

Place and date:	Signature: (signature of parental authority/legal guardian, if applicable):

'.

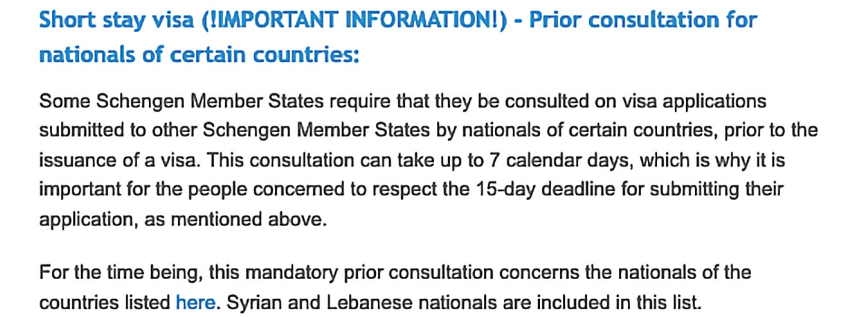
(1) No logo is required for Norway, Iceland, Liechtenstein and Switzerland.

Image (18): Harmonised application form for a Schengen visa.[426]

Besides having to undergo the application procedure, applicants from Syria are subject to prior consultation in accordance with Article 22 of the Visa Code. Prior consultation takes place when a member state requires the central authorities of other member states to consult its central authorities when examining visa applications lodged by nationals of specific third countries or by specific categories among such nationals – e.g., refugees and stateless persons. When a third country is listed, it means that at least one member state requires such prior consultation.[427] Syrian citizens are on the list.

[426] Annex I of The Visa Code. Including changes made through Regulation (EU) 2019/1155.

[427] 'Migration and Home Affairs' (home-affairs.ec.europa.eu).



Short stay visa (!IMPORTANT INFORMATION!) - Prior consultation for nationals of certain countries:

Some Schengen Member States require that they be consulted on visa applications submitted to other Schengen Member States by nationals of certain countries, prior to the issuance of a visa. This consultation can take up to 7 calendar days, which is why it is important for the people concerned to respect the 15-day deadline for submitting their application, as mentioned above.

For the time being, this mandatory prior consultation concerns the nationals of the countries listed here. Syrian and Lebanese nationals are included in this list.

Image (19): A screenshot of the website of the Belgian embassy in Beirut [221006], (on file with the author).[428]

The visa application form supplies the basis for the assessment of the visa application. The risk of immigration must be assessed, as must the likelihood that the applicant will leave the member state prior to the expiry of the visa. The assessment of the individual's stability, and of the applicant's intention to 'leave the territory' under Article 21(1) of the Visa Code, includes a number of factors. According to the Visa Handbook, the person's level of stability depends inter alia on marital status; on employment situation; on possession or lack thereof of a home/real estate; on family links or other personal ties in the country of residence; on family links or other personal ties in the member states; on regularity and level of the income (from employment, self-employment, pensions, investments, etc.) accruing to the applicant or to his/her spouse, children, or dependants; and on social status in the country of residence (e.g., lawyer, medical doctor, university professor, NGO representative; public office-holder).[429] The Handbook points out too that the situation in these regards may vary, depending on the applicant's country of residence.[430] The TLScontact website describes this information as 'essential

[428] 'Embassy of Belgium in Beirut' (lebanon.diplomatie.belgium.be).

[429] The Visa Code Handbook, p. 70.

[430] Ibid., p. 67.

to correctly judge the intention of the applicant to leave the Schengen area before the expiry of his/her visa'.[431]

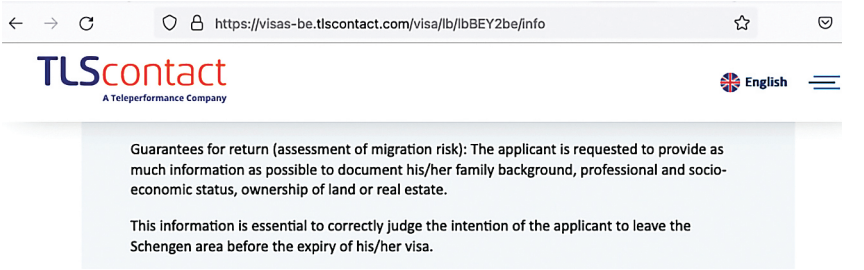


Image (20): A screenshot of the website of TLScontact in Lebanon [221006], (on file with the author).[432]

If there are 'reasonable doubts' as to the applicant's intention to leave the territory of the member states before the expiry of the visa, the application will be refused. The Visa Code provides for a harmonized form of visa refusal.

[431] 'TLScontact' (tlscontact.com).

[432] Ibid.

ANNEX III

'ANNEX VI


(1)

STANDARD FORM FOR NOTIFYING REASONS FOR REFUSAL, ANNULMENT OR REVOCATION OF A VISA

REFUSAL/ANNULMENT/REVOCATION OF VISA

Ms/Mr .....,

☐ The ..... embassy/consulate-general/consulate/[other competent authority] in ..... [on behalf of (name of represented Member State)];

☐ [Other competent authority] of .....;

☐ The authorities responsible for checks on persons at .....

has/have

☐ examined your application;

☐ examined your visa, number: ....., issued: ..... [date/month/year].

☐ The visa has been refused ☐ The visa has been annulled ☐ The visa has been revoked

This decision is based on the following reason(s):

1. ☐ a false/counterfeit/forged travel document was presented
2. ☐ justification for the purpose and conditions of the intended stay was not provided
3. ☐ you have not provided proof of sufficient means of subsistence, for the duration of the intended stay or for the return to the country of origin or residence, or for the transit to a third country into which you are certain to be admitted
4. ☐ you have not provided proof that you are in a position to lawfully acquire sufficient means of subsistence, for the duration of the intended stay or for the return to the country of origin or residence, or for the transit to a third country into which you are certain to be admitted
5. ☐ you have already stayed for 90 days during the current 180-day period on the territory of the Member States on the basis of a uniform visa or a visa with limited territorial validity
6. ☐ an alert has been issued in the Schengen Information System (SIS) for the purpose of refusing entry by ..... (indication of Member State)
7. ☐ one or more Member States consider you to be a threat to public policy or internal security
8. ☐ one or more Member States consider you to be a threat to public health as defined in point (21) of Article 2 of Regulation (EU) No 2016/399 (Schengen Borders Code)

(1) No logo is required for Norway, Iceland, Liechtenstein and Switzerland.

9. ☐ one or more Member States consider you to be a threat to their international relations

10. ☐ the information submitted regarding the justification for the purpose and conditions of the intended stay was not reliable

11. ☐ there are reasonable doubts as to the reliability of the statements made as regards ..... (please specify)

12. ☐ there are reasonable doubts as to the reliability, as to the authenticity of the supporting documents submitted or as to the veracity of their contents

13. ☐ there are reasonable doubts as to your intention to leave the territory of the Member States before the expiry of the visa

14. ☐ sufficient proof that you have not been in a position to apply for a visa in advance, justifying application for a visa at the border, was not provided

15. ☐ justification for the purpose and conditions of the intended airport transit was not provided

16 ☐ you have not provided proof of possession of adequate and valid travel medical insurance

17. ☐ revocation of the visa was requested by the visa holder (2).

Additional remarks:

.....

.....

.....

.....

.....

You may appeal against the decision to refuse/annul/revoke a visa.

The rules on appeal against decisions on refusal/annulment/revocation of a visa are set out in (reference to national law):

.....

Competent authority with which an appeal may be lodged (contact details):

.....

Information on the procedure to follow can be found at (contact details):

.....

An appeal must be lodged within (indication of time-limit):

.....

Date and stamp of embassy/consulate-general/consulate/of the authorities responsible for checks on persons/of other competent authorities:

Signature of person concerned (3): .....'.

(2) Revocation of a visa based on this reason is not subject to the right of appeal.
(3) If required by national law.

Image (21): Standard form for notifying reasons for refusal, annulment, or revocation of a visa.[433]

The visa stamp in the passport is a precondition not only for crossing the EU's external border, but for boarding an airplane as well. One effect of the carrier restrictions triggered at the point of embarkation is to improve the efficiency of the visa rules. These restrictions help maintain the admission conditions of the SBC by making sure that everyone who boards a plane is also in possession of a visa.

Under the requirements of carrier responsibility enshrined in the Carriers Directive, carrier personnel must perform border control.[434] The Carriers Directive lays down the obligation of carriers to take all necessary means to ensure that third-country nationals carried by air, sea, or land have the travel documents necessary for entry into the territory of the Schengen states. In the Beirut area, such control can take place at the Beirut–Rafic Hariri International Airport. Although direct flights to Brussels leave almost daily from that airport, people without the necessary travel documents are not allowed to board a plane there.

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[433] Annex VI of The Visa Code. Including changes made through Regulation (EU) 2019/1155.

[434] This order has been questioned since its establishment, due to its effect on protection seekers. During the 1998 International Civil Aviation Organization (ICAO) Assembly, the organization addressed a complaint filed by the International Transport Federation requesting ICAO to consult the UNHCR on the compatibility of carrier obligations in light of the Refugee Convention, arguing that carrier liability laws have the effect of obstructing people genuinely at risk from arriving in a safe country and seeking protection. A32-WP/54, EC/7, 2/6/98, at 1–2. Referred to in Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017), p. 150. The International Civil Aviation Organization (ICAO) is a UN specialized agency, established by States in 1944 to manage the administration and governance of the Convention on International Civil Aviation (the Chicago Convention).

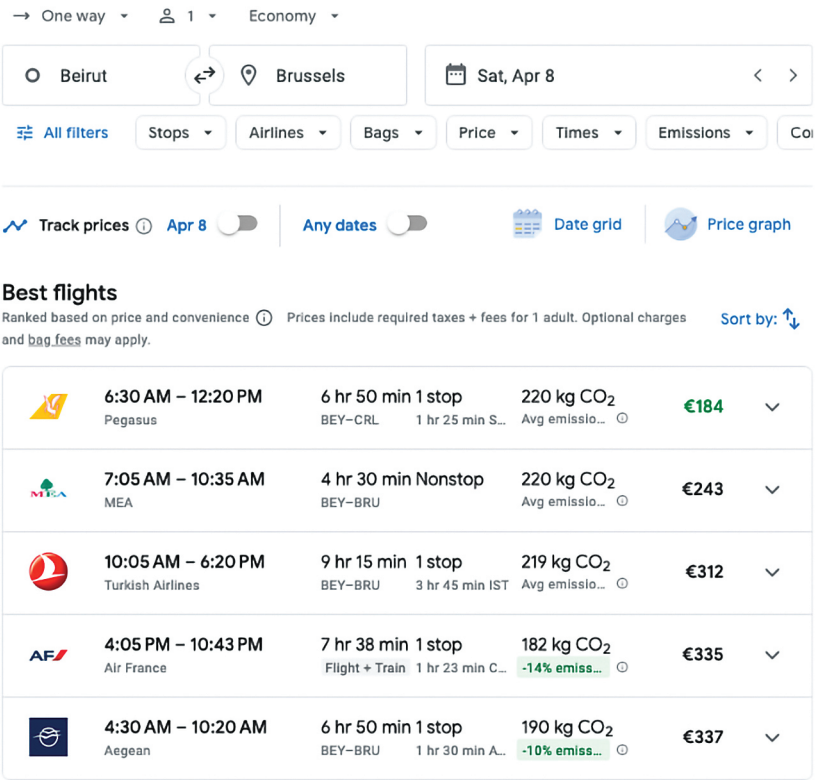

Image (22): A screenshot of a Google search on flights to Brussels from Beirut [230404], (on file with the author).

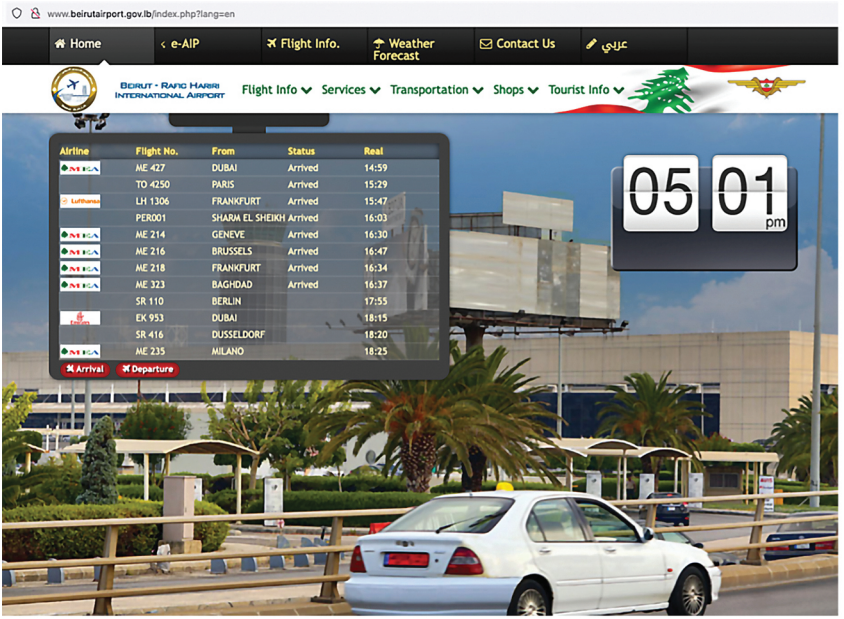

Image (23): A screenshot of the website of the Beirut Airport in Lebanon [221003], (on file with the author).[435]

To sum up. The Visa List Regulation allows for no visa-free travel by Syrian citizens. Syrians therefore need to lodge a visa application under the Visa Code, and must be granted a visa before crossing the border into an EU member state. However, neither Belgium nor any other EU member state has an embassy or consulate in Syria. Accordingly, Syrian citizens must lodge their application in another country – in this case Lebanon.

According to the data collected, there is no possibility of applying for asylum directly at the Beirut embassy, or of registering as a refugee through the UNHCR in Lebanon. In order to travel to Belgium, a Syrian citizens must file a visa application through 'TLScontact'. When filing that application, it is possible to choose between a short-stay visa (C) and a long-stay visa (D). In either case, moreover, it is possible to submit that the purpose with the visit is

[435] 'Beirut - Rafic Hariri international airport' (beirutairport.gov.lb).

humanitarian. Then, to complete the application process, the visa fee needs to be paid and a visit to the embassy in Beirut needs to be arranged. Visiting Beirut requires permission to enter Lebanon. Syrian citizens must therefore apply for and be granted a visa to cross the border between Syria and Lebanon. This requirement is part of restrictions imposed by the Lebanese government in 2015.

Once all these steps are completed, the application is assessed. If there are 'reasonable doubts' about the person's 'intention to leave the territory' of the member states before expiry of the visa, the application is refused. Without a visa, Syrian citizens cannot travel to the Schengen area by regular means. If a person without the requested documents would try to board a plane to Brussels at Beirut–Rafic Hariri International Airport, carrier personnel will likely prevent that person from that.

3.2 The Border Crossing Point at Beni-Enzar

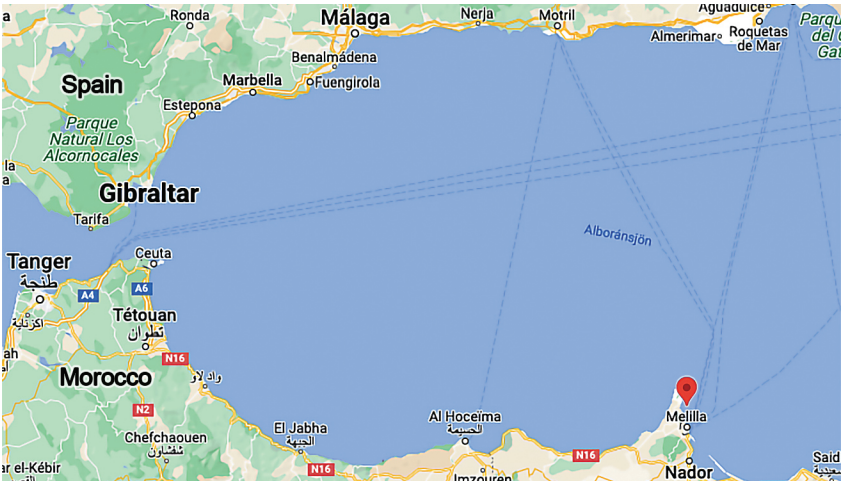

Image (24): A screenshot from Google Maps [221004], (on file with the author).

3.2.1 Setting the Scene

You approach the border between Morocco and Melilla in your reach for the border crossing point at Beni-Enzar. You may have undertaken a trans-Saharan journey that lasted for years.[436] This is the front line. If you are allowed to cross the border and leave Morocco, you will enter EU territory in the shape of the Spanish enclave Melilla. Spain is one of the primary ports of entry into the EU; however, it is also by far the member state with the highest number of refusals of entry at the border.[437] The number of asylum applications made

[436] Said Saddiki, 'The fences of Ceuta and Melilla', *World of walls: The structure, roles and effectiveness of separation barriers* (Open Book Publishers 2017).

[437] Refusals at the Spanish borders: 203,025 persons in 2017, 230,540 persons in 2018, and 493 455 persons in 2019. These numbers, available through Eurostat, include all refusals at air, sea, and land borders; but almost all refusals take place at the land borders, Eurostat, Statistics explained: Enforcement of immigration legislation statistics, 2020. According to ECRE, Ceuta and Melilla account for most of the Spanish refusals. Since

at the border crossing at Beni-Enzar is low, especially for people from sub-Sahara. Moreover, it is claimed, border controls carried out by Moroccan police on their side of the border obstruct access to the crossing point for persons of sub-Saharan origin. Between 1 January 2015 and 31 May 2017, only 2 out of 8,972 persons seeking asylum in Ceuta and Melilla were of sub-Saharan origin.[438]

The border surrounding Melilla forms an exception to the maritime border (i.e., the Mediterranean Sea) that separates Spain from Morocco. The border at Melilla, a city which covers 12 km^2 and has 86,000 residents, constitutes one of the two land borders that separate Europe from Africa. The other land border is at Ceuta, another Spanish enclave in Morocco. Controlled by Spain since 1497, Melilla is a colonial remnant. Morocco has never, since gaining independence in 1956, ceased calling for the restoration to it of all Spanish-controlled territories in the north of the country.[439]

Since the late 1990s, in an attempt to prevent migration, the Spanish authorities have erected a multi-fence barrier along the 13-km-long land border that separates Melilla from Morocco. Some sections of these fences reach as high as ten metres. Nor have efforts ever ceased to strengthen the fences through the use of new technologies.[440] This space – a piece of the EU in Africa – is not just separated from Morocco by the fences that surround it on land; it is also cut off from Morocco by piers covered with barbwire that stretch out into the water. The border fence could be described as a tool of spatial control constructed in steel and concrete, and fortified by surveillance

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refusals at the land borders of the Spanish enclaves do not include an assessment of a border crossing subject's reasons, such as protection seeking, the numbers don't tell us how many were crossing the border in order to seek asylum. ECRE, Country report: Spain, 2019, p. 24.

438 AIDA & ECRE, Country Report: Access to the territory and push backs – Spain.

439 Said Saddiki, 'Border fences as anti-immigration device: A comparative view of American and Spanish policies', in Elisabeth Vallet (ed), *Borders, fences and walls: states of insecurity* (Farnham: Ashgate 2014), p. 181; and Said Saddiki, *World of walls: The structure, roles and effectiveness of separation barriers,* OpenBook Publishers (2017), p. 57.

440 Such as with infrared cameras, optical instruments, acoustic sensor devices, watchtowers, and radar systems. See Saddiki, 'Border fences as anti-immigration device: A comparative view of American and Spanish policies' in Vallet (ed), *Borders, fences and walls: states of insecurity*, p. 181.

techniques and armed border guards. People scale these fences. You might need to do that too. Some make it over them; others are caught on top of them, or trapped in between them in what looks like no-man's-land, but which in fact is Spanish soil. Others die from falling, or from cuts inflicted by the razor-sharp 'concertinas' on top of the wires, which inscribe the border on the climbing bodies. For the guards who control them, the fences are a workplace. For people wishing to cross into Melilla, they present a risky opportunity. For the EU, they are a site where entry is prevented.

In 2019 sub-Saharan Africa hosted more than 26 per cent of the world's refugee population, and more than 18 million people in the region were of concern to the UNHCR.[441] This number has furthermore increased, due among other things to human-rights violations and insecurities in the Central African Republic, the Democratic Republic of the Congo, Ethiopia, Nigeria, and South Sudan. We can reasonably assume, in view of this, that many of the people wishing to cross the border between Morocco and the Spanish enclaves are protection seekers.

When you approach the border between Morocco and Melilla, you alter a multiplicity of relations. Not just with the Spanish or Moroccan border guards, with their willingness (or lack thereof) to allow entry when the moment comes – but also with the laws and third-country agreements with Morocco on migration and border management that divide mobile subjects into wanted and unwanted travellers. You also alter and embody the norms that govern who can flee, who has access to the various means of fleeing, who has the resources required, and who has the body that can swim, row, climb, and survive.

3.2.2 Materializations in Space and Time

This section addresses the externalization of migration and border control, and the construction of the EU's external border at Melilla. Melilla, situated at the 'outer edge' of the EU, provides a land border between Morocco and Spain. To zoom in on Melilla, I have gathered information and photos during a field trip, as well as online and through *N.D. and N.T. v Spain* (ECtHR). The aim of

441 'UNHCR Africa' (unhcr.org).

the data is to contextualize the land border between Morocco and Melilla. A protection seeker situated 'at the border', such as at this land border, is supposed to trigger fundamental rights following from the ECHR, the SBC, and the CEAS. When collecting data, I have therefore chosen images and information that show the border and the 'accessibility' of the border crossing point.

The field trip was conducted at the end of May 2022. The purpose was to document the border fences with photographs. Since taking pictures of the border fences is prohibited on the Moroccan side of the borderline, I took all of the photos in Melilla. During the trip, I had various conversations with people I met and contacted, including the Melilla office of the UNHCR. These conversations had an important function: they gave me the opportunity to obtain information, to ask questions, and to develop and confirm my own understanding of the context.

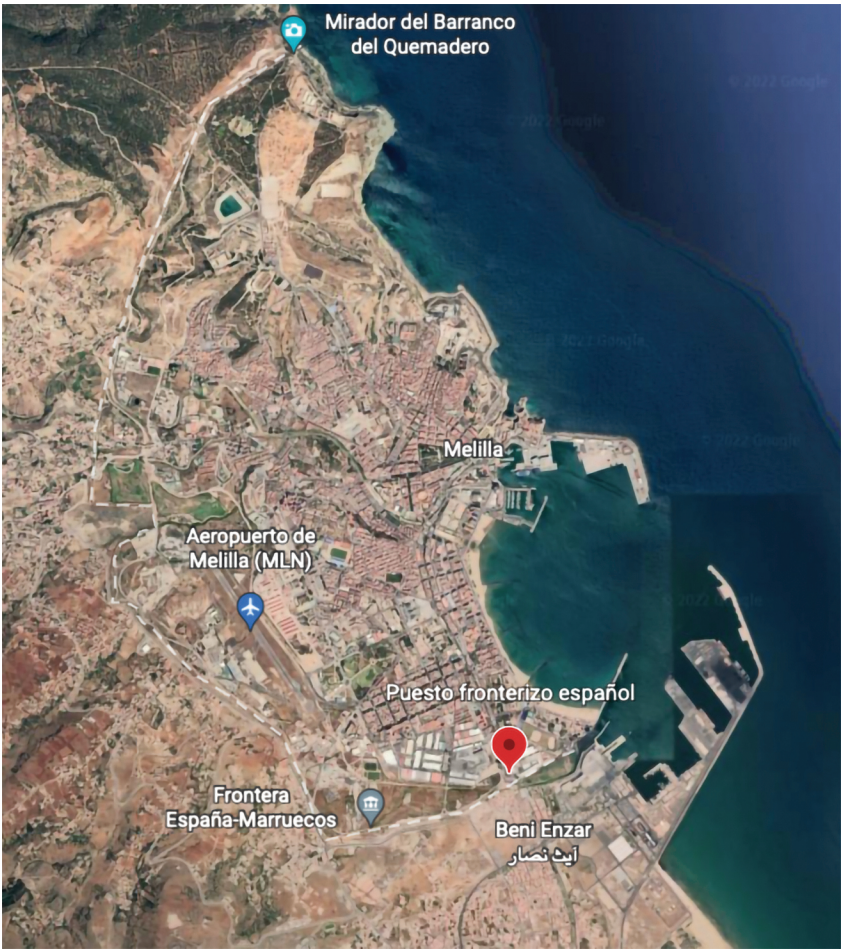

Image (25): A screenshot from Google Earth [221006], (on file with the author).

Due to Melilla's geographical position, this space provides a scene of interaction for EU and Spanish action aiming at controlling migration. It is also a destination for people wishing to enter the EU through the enclave. Morocco is often described as a transit country for people from sub-Sahara.[442]

[442] Saddiki, 'The fences of Ceuta and Melilla', *World of walls: The structure, roles and effectiveness of separation barriers*.

However, the main nationalities of the persons who seek asylum in Melilla are Algerian, Moroccan, Palestinian, Syrian, and Yemini.[443]

The EU has always supported Spanish border control in Melilla, both politically and financially.[444] In order to prevent irregular migration, the Spanish authorities have built an almost impenetrable barrier within their own territory along the border separating Melilla from Morocco.[445] With funding in part from the EU, the current fences were erected in 1993.[446]

Image (26) Melilla's multi-fence barrier. Photograph taken by the author in May 2022.

[443] UNHCR, Supplementary observations by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain before the Grand Chamber of the European Court of Human Rights, 5 April 2018.

[444] Saddiki, *World of walls: The structure, roles and effectiveness of separation barriers* (2017), p. 37.

[445] Saddiki, 'Border fences as anti-immigration device: A comparative view of American and Spanish policies' in Vallet (ed), *Borders, fences and walls: states of insecurity*, p. 181.

[446] Polly Pallister-Wilkins, 'The tensions of the Ceuta and Melilla border fences', in Paolo Gaibazzi, Stephan Dünnwald and Alice Bellagamba (eds), *EurAfrican borders and migration management* (Palgrave Macmillan 2017), p. 64.

The territorial location of the fences was disputed in the case of *N.D. and N.T. v. Spain* from 2017. The Spanish government argued that the applicants were neither within Spanish territory, nor Spanish jurisdiction when apprehended and expelled after crossing into Melilla by climbing the fences.[447] In its submission to the Grand Chamber, the Spanish government however clarified that the fences stand on Spanish territory, but that Spanish jurisdiction begins 'beyond the police line' that forms part of 'measures against persons who (had) crossed the border illegally' within the meaning of the SBC.[448] The ECtHR, however, rejected this argument, both in the Chamber judgement in *N.D. and N.T. v Spain* from 2017 and in the Grand Chamber judgement from 2020. Citing the concept of jurisdiction in public international law, as well as its earlier case law,[449] the Court averred that the applicants had been apprehended within Spain's jurisdiction within the meaning of Article 1 of the Convention.[450]

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[447] N.D. and N.T. v Spain (2017), para 44.

[448] N.D. and N.T. v Spain (2020), para 91. Spain referred to Article 13(1) Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders, the Schengen Borders Code (no longer in force). According to Article 13(1) a third-country national who does not fulfil all the entry conditions laid down in Article 5(1) and does not belong to the categories of persons referred to in Article 5(4) shall be refused entry to the territories of the member states. This shall be without prejudice to the application of special provisions concerning the right of asylum and to international protection or the issue of long-stay visas. The same provision can be found in Article 14(1) of Regulation (EU) 2016/399 (the SBC).

[449] Judgement of 8 July 2004, Ilascu and Others v Moldova and Russia, Application No. 48787/99; Judgement of 8 April 2004, Assanidze v Georgia, Application No. 71503/01; Al-Skeini and Others v the United Kingdom (2011); and Hirsi Jamaa and others v Italy (2012).

[450] N.D. and N.T. v Spain (2020), para 190.

Image (27): A screenshot from the website of 'European Space Imaging' that supplies Spain with surveillance technology [230131], (on file with the author).[451]

Since 2014, the physical border construction has included three parallel fences on the Melilla side of the border. When the applicants in *N.D. and N.T. v Spain* climbed the fences, on 13 August 2014, the barrier consisted of a slightly concave, six-metre-high fence, as well as a three-dimensional network of cables (known as 'Sirga Tridimensional'). This was followed by a second, oscillating fence, three metres high, and after that by a six-metre-high fence. On the 'Moroccan' side, moreover, there were two barbwire fences.

[451] 'Border control in Melilla: A very high resolution look' (euspaceimaging.com).

Image (28): A screenshot of 'Sirga Tridimensional' from the online newspaper, elDiario.es [211206] (on file with the author).[452] The Sirga Tridimensional is a structure of 12,000 kilometres of steel cables tied to stakes of different heights (between one and three metres). Its aim is to prevent passage by tightening when any weight is placed on it (including that of blankets or ladders that could facilitate climbing over them). In 2021, Spain started to remove the Sirga Tridimensional.[453]

The construction of the multi-fence barrier is an ongoing project. The height and equipment of the fences vary between different places along the border.

[452] '12 kilómetros de alambre, cuchillas y mallas para contener el sueño europeo' (elDiario.es) 20-03-10.

[453] 'Melilla comienza la retirada de la sirga tridimensional de la valla de Melilla, la llamada "tercera alambrada"' (europapress.es) 23-05-04.

Image (29): Melilla's multi-fence barrier. This photo, from May 2022, was taken by the author at a Muslim cemetery in Melilla ('Cementerio de Sidi Guariach'), from which one can see a nearby cemetery on the other side of the fence.

Image (30): Melilla's multi-fence barrier. Photograph taken by the author in May 2022, from the golf course in Melilla.

Image (31): Melilla's multi-fence barrier. Photograph taken by the author in May 2022.

Gates have been built into the fences at regular intervals to provide access to the area between them.[454]

Image (32): People who cross the fences are returned to Morocco through special doors, which are scattered throughout the fences and are distinct from border crossing points.[455] Photograph taken by the author in May 2022.

Between 2019 and 2021, the fences were reinforced by a 10-metre-high metallic structure covering the border between Beni-Enzar and Dique Sur, which in time will extend to the points that the Minister of Interior considers the 'most vulnerable'.[456]

Image (33): Melilla's multi-fence barrier. The fence separating Melilla from Morocco is higher at some places. This photo was taken by the author in May 2022, from a place close to the Beni-Enzar border crossing point at Ctra. Del Dique Sur.

[454] See N.D. and N.T. v Spain (2020), para 16; UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights, 2015; and 'Border control in Melilla: A very high resolution look' (euspaceimaging.com).

[455] Report dated 3 September 2018 of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Spain, 18–24 March 2018 (SG/Inf(2018)25) cited in N.D. and N.T. v Spain (2020), para 58.

[456] AIDA & ECRE, Country Report: Access to the territory and push backs – Spain.

Spanish Guardia Civil has the task of patrolling the land border and the coast to prevent irregular entry.[457] The *Guardia Civil* has institutionalized cooperation with the Moroccan Gendarmerie. However, it has no formal cooperation with the Moroccan Auxiliary Forces ('MAF'), which have the prime responsibility for border surveillance on the Moroccan side.[458]

Image (34): A screenshot of the website of GlobalSecurity.org [230131], (on file with the author).[459]

According to Article 13 SBC, the main purpose of border surveillance is to prevent unauthorized border crossings, to counter cross-border criminality, and to take measures against persons who have crossed the border 'illegally'. Persons who have crossed a border 'illegally' and have no right to stay on the territory of the member state concerned are to be apprehended, and made

[457] N.D. and N.T. v Spain (2020), para 17.

[458] CPT, Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2015, cited in N.D. and N.T. v Spain (2020), paras 55–56.

[459] 'Global Security Melilla' (Globalsecurity.org).

subject to procedures in accordance with the Return Directive. Article 13(4) SBC states that border guards shall use stationary or mobile units to carry out border surveillance, and that surveillance shall be carried out in such a way as to prevent and discourage persons from circumventing the checks at border crossing points. Surveillance between border crossing points shall be carried out by border guards whose numbers and methods shall be adapted to existing or foreseen risks and threats. This shall involve frequent and sudden changes in surveillance periods, so as to ensure that unauthorized border crossings are always at risk of being detected (Article 13(3)). Places known or perceived to be sensitive shall be surveyed by stationary or mobile units, or by technical and electronic means.

Image (35): Border control road. Roads allowing for border patrols flank the fences on both sides, and the Spanish and Moroccan border guards are equipped with weapons.[460] This road was patrolled by a Guardia Civil car seconds before the photo was taken. Photograph taken by the author in May 2022.

[460] Pallister-Wilkins, 'The tensions of the Ceuta and Melilla border fences' in Gaibazzi, Dünnwald and Bellagamba (eds), *EurAfrican borders and migration management*, p. 70.

The six-metre-high fences are often topped with barbwire or coils of razor-sharp 'concertinas'. Concertinas are a type of barbwire, formed into large coils, which are often used for prison barriers and in military operations. The controversial coils were first introduced in 2005, but they were removed two years later, due to wounds that people had sustained when they tried to climb them. They were however reintroduced in 2013.[461]

Image (36): Photo of bloody clothes at the Melilla border fence. This picture was shown in an article from 2018. Screenshot from the website of BBC [230131], (on file with the author).[462]

[461] 'Ceuta and Melilla: Spain wants rid of anti-migrant razor wire' (bbc.com) 23-05-04 and 'Spanish border fences: The end of barbed wire dividing Europe from north Africa' (Forbes.com) 23-05-04.

[462] 'Ceuta and Melilla: Spain wants rid of anti-migrant razor wire' (bbc.com) 23-05-04.

Image (37): Concertinas. Photograph taken by the author in May 2022.

During my visit in May 2022, the concertinas on the 'Spanish side' were being removed and replaced with 'peines invertidos'. These semi-circular metal structures are supposed to be 'less bloody', yet efficient at preventing people from scaling the fences.[463] However, the concertinas on the 'Moroccan side' of the fences remain. This renovation is part of a 'modernization' of the fences, which will include the introduction of further surveillance technologies to 'secure the border', among them the use of drones.[464] Investments are also being made in biometric technologies such as facial recognition.[465]

Image (38): Uninstalled 'Peines invertidos'. Photograph taken by the author in May 2022.

[463] 'El plan para la valla de Melilla tras los últimos saltos: "peines invertidos", sensores y cámaras' (elconfidencial.com) 22-06-10.

[464] See ibid., 'Melilla: Deployment of drones to monitor borders with Morocco' (moroccoworldnews.com) 23-05-04, and ECRE, Country report: Spain, 2022.

[465] The Spanish government has allocated 4.1 million euros for the deployment of facial recognition surveillance tools at the border crossing points of Ceuta and Melilla. The instalment is still ongoing. See ECRE, Country report: Spain, 2022, p. 22.

Image (39): Installed 'peines invertidos'. Photograph taken by the author in May 2022.

Image (40): Melilla's multi-fence barrier. Watch towers are placed at intervals along the border fences. Photo taken by the author in May 2022.

In addition to the fences, a sophisticated CCTV system with infrared cameras has been installed, together with movement sensors; and most of the fences are equipped with anti-climbing grids.[466] More than just the fences, moreover, are under surveillance. Melilla is surrounded by fences on the one side and water on the other. Surveillance mechanisms have therefore been put in place, to prevent people from swimming to Melilla or reaching it by boat. The Integrated System of External Surveillance (Spanish acronym: SIVE) is designed to detect and to identify any vessel approaching the Spanish coast. According to the *Guardia Civil*, which operates the system, its purpose is to 'intercept alleged delinquents and provide assistance to irregular migrants'.[467] The SIVE uses helicopters, patrol boats, infrared optics, thermal cameras, night viewfinders, long-distance radar systems, and advanced sensors that can detect heartbeats from a distance.[468]

[466] N.D. and N.T. v Spain (2020), para 16.

[467] UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights, 2015, p. 4.

[468] Saddiki, 'Border fences as anti-immigration device: A comparative view of American and Spanish policies' in Vallet (ed), *Borders, fences and walls: states of insecurity*, p. 186.

Image (41): Melilla is close to the port of Beni-Enzar, but is separated from Morocco by piers and the breakwater shown here, which prolongs the borderline into the sea. Photograph taken by the author in May 2022.

Image (42): The piers and the breakwater shown from above. Screenshot from Google Maps [221004], (on file with the author).

Image (43): Melilla's multi-fence barrier. The closed walking pier stretches out from the 'Playa de la Hípica', a beach in the south of Melilla. As part of the border construction, the pier is equipped with fences and surveillance devices. Photograph taken by the author in May 2022.

At Melilla's northern end – near an overlook known as the 'Mirador del Barranco del Quemadero' (see image 25), and far from any buildings other than those used for border control – the fences run parallel, embedded in the steep and rocky hills, following the landscape into the waters of the Mediterranean Sea.

Image (44): Photograph taken by the author in May 2022.

Since the opening of the Spanish asylum office in 2014, you can seek asylum on the Spanish side of the border crossing point – if, that is, you can reach it. To reach the Beni-Enzar border crossing point from Morocco, you have to pass through three Moroccan police check points. The distance between the first Moroccan check point and the border crossing point, according to Forensic Architecture, is more than 300 metres. To pass these checks, you need to show valid travel documents on both the Moroccan and the Spanish side. However, access to these points appears to be granted on a differential basis to people of differing appearance. According to Forensic Architecture and other sources, namely, it is impossible to reach this area if you do not look

European or Moroccan.[469] People of sub-Saharan nationalities in particular are prevented from reaching the border crossing area.[470]

Image (45): A screenshot from a study on pushbacks in Melilla by Forensic Architecture [230504], (on file with the author).[471]

[469] Ibid. See also third-party interveners in N.D. and N.T. v. Spain; and Elsa Tyszler, 'Humanitarianism and black female bodies: violence and intimacy at the Moroccan–Spanish border', *The Journal of North African Studies* (2020).

[470] CoE Commissioner for Human Rights: Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights, Applications No. 8675/15 and No. 8697/15, N.D. v. Spain and N.T. v. Spain, 12 November 2015. According to the CoE Commissioner for Human Rights, the ordinary border posts between Morocco and the enclaves are not accessible for migrants of sub-Saharan origin. See also the 2018 third party intervention: CoE Commissioner for Human Rights: Third party intervention by the Council of Europe Commissioner for Human Rights under Article 36, paragraph 3, of the European Convention on Human Rights. Applications No. 8675/15 and No. 8697/15 N.D. v. Spain and N.T. v. Spain, 22 March 2018, para 33.

[471] 'Pushbacks in Melilla: ND and NT v. Spain' (Forensic-Architecture.org). The image is used with permission from Forensic Architecture.

Image (46): Beni-Enzar border crossing point. The border crossing point was closed during the COVID-19 pandemic, but it had recently been reopened when I visited Melilla in May 2022. However, the visa-free passage for people from Nador and Tetuan was not yet activated, so all who wished to cross into Melilla had to be a citizen of a Schengen state, or to be in possession of a valid Schengen visa, to pass the multiple checks on the Moroccan and Spanish sides. Photograph taken by the author in May 2022, from the Melilla side.

Due to agreements between Spain and Morocco, and Spanish visa derogations under the Spanish Schengen Accession Agreement, specific visa exemptions for local border traffic into Ceuta and Melilla are provided for Moroccan nationals from the provinces of Tetuan and Nador.[472]

[472] The Schengen acquis – Agreement on the Accession of the Kingdom of Spain to the 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 signed at Schengen on 19 June 1990, to which the Italian Republic acceded by the Agreement signed at Paris on 27 November 1990. See III (1) 'Declaration on the towns of Ceuta and Melilla'.

Image (47): Melilla golf course. Photograph taken by José Palazón in 2014 (on file with the author).[473]

Comparing statistics from the Spanish authorities, we find that, between the end of 2014 and December 2017, 11,150 asylum-seekers from Middle Eastern and North African countries were registered at the Beni-Enzar border post. By sharp contrast, only 35 asylum-seekers from sub-Saharan Africa were registered there during the same period.[474]

According to UNHCR, the breakdown from this figure of 35 was as follows: In 2015 there were none. In 2016, a Guinean woman tried to reach

[473] Golfers swing while migrants sit on top of a fence during an attempt to cross the border fences separating Morocco and the Spanish enclave of Melilla. 22 October 2014. Photographer José Palazón. Used with permission of the photographer.

[474] According to the Spanish Ministry of Interior the main nationalities of asylum-seekers at the Beni-Enzar border post are Syrian (9,397), Palestinian (904), Moroccan (446), Yemeni (209) and Algerian (82). See UNHCR, Supplementary observations by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain before the Grand Chamber of the European Court of Human Rights, 5 April 2018, para 2.2.2.

Spain by irregular means, hidden in a vehicle. After being detected she was transferred to the reception centre in Melilla, and some days later her asylum claim was submitted at the border crossing point in Beni-Enzar. In 2017, finally, 34 asylum applications were formalized at the border post in Beni-Enzar after the persons in question had been transferred from Isla de Tierra (one of the small uninhabited islets of Chafarinas under Spanish sovereignty, very close to the Moroccan coast), where they had arrived on 4 August 2017.[475] It would thus appear, judging from this breakdown, that no sub-Saharan asylum-seekers applied initially for asylum at the Beni-Enzar border crossing point during the period in question. Rather, it was at a later occasion that they went through the formal process of filing an application at that border crossing point.

Image (48): Photograph taken by the author in May 2022, from the Melilla golf course. The golf course is situated near the CETI, where people who have applied for asylum stay while awaiting approval to leave Melilla for Spain. Flights with small propeller planes depart daily for mainland Spain.

[475] Ibid. Of the 34 asylum applications formalized at the border post in Beni-Enzar in 2017, 21 concerned citizens of the Ivory Coast, eight concerned citizens of Gambia, two concerned citizens of the Central African Republic, two concerned citizens of Cameroon, and one concerned a citizen of Sierra Leone.

People heading to Europe often stay in informal migrant camps on Mount Gourougou, just outside Nador in Morocco. In *N.D. and N.T. v. Spain*, the first applicant (N.D., a Malian national) left his village in Mali in 2012, on account of the armed conflict in that country. Arriving in Morocco in March 2013, he reportedly lived in the informal migrant camps on Mount Gourougou, close to the border with Melilla. The second applicant (N.T., a national of Côte d'Ivoire) arrived in Morocco in late 2012, and stayed as well at those migrant camps.[476]

Image (49): A screenshot from Google Maps [221004], (on file with the author).

To sum up. The land border between Morocco and Melilla is reinforced by a 13-km multi-fence barrier equipped with surveillance techniques and controlled by border guards. The fences were constructed in 1993, and they

[476] N.D. and N.T. v Spain (2020), paras 22–23.

stand on Spanish soil. They were built by Spain, but they were supported and partly funded by the EU. They consisted in 2014 of three parallel fences, but the manner of their construction has changed over time. In 2021, for example, the height of the fences was at some sections raised from 6 to 10 metres. Other features of the fences, such as concertinas and surveillance techniques, also vary in time and space.

The border has a crossing point at Beni-Enzar. Access to this point appears, however, to be granted on a differential basis to different people. People from sub-Saharan Africa in particular seem to be prevented from accessing this border crossing point. The denial of access to people from south of the Sahara is mirrored as well in the statistics on asylum applications submitted at Beni-Enzar, of which only a very low number are for people from sub-Saharan Africa.

PART III – BORDERSCAPE

4 The Spatio-Legal Interaction of the EU Border Regime

This study takes its starting point in the asymmetry between states' extraterritorial migration and border control on the one hand, and the territoriality of fundamental rights on the other. This chapter applies the theoretical perspectives provided in Chapter 1 to analyse the Belgian embassy in Beirut and the border crossing point at Beni-Enzar, Melilla. Turning to the data presented in Part II, the analysis addresses the interaction between law and space and uses the concept of invisibilization to theoretically and critically analyse the asymmetry as a negotiation in which fundamental rights are limited or made unattainable and unenforceable (see section 4.1). The analysis furthermore explores how EU migration and border control law is embedded in the physical world and in social relations – how it materializes as 'borders of boundaries' between protection seekers and the EU (see section 4.2). From these entry points, the thesis demonstrates how law co-produces and governs space and mobility, and how it excludes certain subjects and geographical locations by framing them as outside the scope of fundamental rights.

4.1 The Process of Invisibilization: The Geography of Legal Sources

In the following sections, the study turns to the scenes of interaction, and analyses how the externalization of migration and border control invisibilizes the right to seek asylum and the principle of non-refoulement. The analysis addresses how the asymmetry constructs a discrepancy between the EU's external border as 'a site of control' on the one hand, and as 'a site where the CEAS and the ECHR are enforceable' on the other. As this analysis demonstrates, invisibilization of fundamental rights is an effect of the spatio-legal interaction of the EU border regime and forms an intrinsic part – a building block – of the EU border regime (see section 4.1.3).

4.1.1 The Belgian Embassy in Beirut

What is at stake at this scene of interaction is captured in *PPU X and X v Belgium* and *M.N. and Others v Belgium*, and can be understood from various

perspectives within or outside common legal language: as a question of the spatial scope of fundamental rights and EU member states' accountability; as involving acts of agency by two Syrian families who, in response to their desperate situation in a war-torn Aleppo, tried to use the legal means provided for travelling to the EU in order to escape war and persecution; or as an intersection of becoming 'legal' or 'illegal' – as having or not having access to regular means of mobility, being able or unable to flee and to travel fast and safely. Addressing *PPU X and X v Belgium* and *M.N. and Others v Belgium*, this introductory section demonstrates how the EU's visa rules 'trap' Syrian protection seekers situated in Syria or in transit in Lebanon. It further shows how the visa requirement reduces protection seekers' prospects of seeking asylum in the EU and gaining protection from risks.

Most refugees in Lebanon are Syrians, like the applicants in *PPU X and X v Belgium* and *M.N. and Others v Belgium*. According to Lebanese government estimates, there are 1.5 million Syrian refugees in Lebanon.[477] Since 2015, however, it has been hard for protection seekers from Syria to enter Lebanon or to gain international protection (asylum) there.[478] Neither can protection be achieved in Syria, nor can asylum in the EU be sought from outside the territories of the member states. The Belgian embassy, accordingly, offers an important opportunity – in the form of a gateway to the EU. If the embassy issues a visa to a protection seeker, that person can travel to the EU and seek asylum there. Due to its function in this regard, the Belgian embassy in Beirut can be understood as a node of the EU's external border that both controls the border and provides access to EU territory. The embassy does not look like a border crossing point per se. However, the embassy's website, building, and personnel can be understood as materializations of the EU's external border and of the EU border regime – as can the decisions produced and received by protection seekers here.

Notwithstanding the role of EU embassies in deciding on entry into the EU, the CEAS is not applicable to requests for asylum submitted to member

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[477] 'UNHCR Lebanon' (unhcr.org).

[478] Seeking refuge is not among the valid reasons for entry Lebanon other than in exceptional circumstances approved by the Ministry of Social Affairs, 'UNHCR Lebanon: Refugees and asylum seekers' (unhcr.org).

states' representations abroad.[479] These spaces are not included in the CEAS's definition of 'at the border'. Furthermore, the website of the Belgian embassy in Beirut does not provide any information on how to apply for asylum there (image 7).[480] Emailing the embassy elicits an automatic reply explaining that it is not possible to apply for asylum at the embassy, and that protection seekers should instead register with the local UNHCR office (image 8). However, registering is not possible if you are Syrian, because the Lebanese government suspended the registration of Syrian refugees by UNHCR in 2015 (image 9).[481] Under these conditions – the risks of remaining in Syria, and the lack of possibilities to seek asylum in Lebanon – mobility becomes a precondition for acquiring protection. A visa can provide the needed mobility. Without a visa, however, regular travel to the EU is impossible; and a lack of the required documents materializes as a border when a protection seeker tries to board a plane at the Beirut-Rafic Hariri International Airport without them (images 22–23).

Article 25(1) a) of the Visa Code seems to provide for safe and regular travel to the EU for humanitarian reasons or due to international obligations. Such a visa could furnish a regular route from Syria and Lebanon. However, the website of the Beirut embassy provides no information on how to apply for a visa due to humanitarian reasons (in the form of an LTV). One only discovers this possibility after initiating a visa application (images 16–17). It was such an application that the applicants in both *PPU X and X v Belgium* and *M.N. and Others v Belgium* initiated at this scene of interaction.[482]

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[479] The CEAS explicitly reduces its scope to 'applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of the member states'. The Dublin Regulation, the Asylum Procedures Directive, and the Reception Conditions Directive specify that they do not apply to requests for diplomatic or territorial asylum submitted to representations of member states abroad. Article 3(1) the Dublin Regulation, Article 3(1) and (3) the Asylum Procedures Directive, and Article 3 (1) and (2) the Reception Conditions Directive.

[480] Since the embassy's website may have changed since 2016, the collected data from the website probably does not correspond to the website at the time the applicants in PPU X and X v Belgium and M.N. and Others v Belgium applied for visas.

[481] 'UNHCR Lebanon: Refugees and asylum seekers' (unhcr.org).

[482] C-638/16, PPU X and X v Belgium (2017), para 19; and M.N. and Others v Belgium (2020), para 10.

The two cases – *PPU X and X v Belgium* and *M.N. and Others v Belgium* – concerned Syrian families who wanted to escape the war in Syria and to travel to Belgium in order to seek asylum there. Both families submitted they were at risk in Syria. One of the applicants in the main proceedings in *PPU X and X v Belgium* claimed to have been abducted by a terrorist group, then beaten and tortured, and finally released following the payment of a ransom. The applicants in the case stressed the precarious security situation in Syria in general and in Aleppo in particular, and the fact that, being Orthodox Christians, they were at risk of persecution on account of their religious beliefs. It was impossible for them, moreover, to register as refugees in neighbouring countries, due among other things to the closure of the border between Lebanon and Syria.[483] In *M.N. and Others v Belgium*, the applicants claimed they faced a situation of absolute emergency, in terms of both security and living conditions, due to the armed conflict in Syria and more specifically the intensive bombardment of Aleppo. Their house in Aleppo had been destroyed by bombing; they had taken shelter in the house of an uncle who had fled Syria; the war situation had made access to food, water, and electricity very difficult; and their children could no longer attend school. They desired, therefore, to leave Aleppo, to obtain visas to travel to Belgium, and to apply for asylum in that country.[484] In both cases, the families were denied visas to travel to Belgium.

To address the rejection of these visa applications as a spatial phenomenon, we should bring into the analysis the fact that the risks described by the applicants in the two cases were not questioned by Belgium, and that asylum would most probably have been granted if the applicants had been situated on Belgian territory. In fact, due to the situation in Syria at the time, it would have been in line with Belgium's obligations under the CEAS, the EU Charter, and the ECHR to consider the applicants eligible for asylum. Thus the two families concerned, had they been within Belgium's territorial jurisdiction, would have been granted the right to seek asylum, as well as protection from expulsion under the principle of non-refoulement. Due to this spatial delineation – between being within Belgian territory and filing a visa

[483] C-638/16, PPU X and X v Belgium (2017), paras 19–20.

[484] M.N. and Others v Belgium (2020), para 10.

application at the embassy in Beirut – the cases may be said to involve negotiation of the spatial distribution of the scope of fundamental rights.

In section 4.1.1.1, I will demonstrate how the spatial distribution of the scope of fundamental rights is negotiated in *PPU X and X v Belgium* and in *M.N. and Others v Belgium.* In the subsequent section, 4.1.1.2, these examples are analysed as a process of invisibilization. Moreover, in section 4.1.1.3 the privatization of border control provides an additional example of how delegation of migration and border control forms part of the process of invisibilization at this scene of interaction.

4.1.1.1 The Spatial Distribution of the Scope of Fundamental Rights

The visa requirement under EU law provides an example on how externalization invisibilizes the right to seek asylum and the principle of non-refoulement. In the case of LTVs, this invisibilization entails a framing of LTVs as outside the field of application of the EU Charter (*PPU X and X v Belgium*) and of jurisdiction under the ECHR (*M.N. and Others v Belgium*). The EU Charter, and the rights stipulated therein, thus become inapplicable to the situation of protection seekers attempting to reach the EU by applying for a visa at an EU member state's embassy in a third country. Since this situation is not seen as occurring within that state's jurisdiction, neither the ECHR is triggered.[485] Let us turn now to how this spatial distribution of the scope of fundamental rights takes place.

[485] The question of whether protection seekers applying for a visa at an embassy or consulate trigger the non-refoulement principle under the ECHR or EU law is not new. It has been analysed in relation to the outcome of *PPU X and X v Belgium* and *M.N. and Others against Belgium* by e.g. Moreno-Lax, '*Asylum visas as an obligation under EU Law: Case PPU C-638/16 X, X v État Belge (Part II)*' (2017) EU migration law blog; Thomas Gammeltoft-Hansen and Nikolas Feith Tan, '*Adjudicating old questions in refugee law: MN and Others v Belgium and the limits of extraterritorial refoulement*' (2020) EU Migration Law Blog; Vladislava Stoyanova, 'M.N. and Others v Belgium: no ECHR protection from refoulement by issuing visas' (2020) EJIL Talk! Blog of the European Journal of International Law; and Moritz Baumgärtel, 'Reaching the dead-end: M.N. and others and the question of humanitarian visas' (2020) Strasbourg Observers.

4.1.1.1.1 The EU Charter: PPU X and X v Belgium

The question of whether the issuance or refusal of an LTV on the basis of Article 25 of the Visa Code triggers the application of the EU Charter can be understood as decisive in connection with the negotiation of fundamental rights in the exercise of extraterritorial border control by EU member states under the visa requirement. The most relevant question in this negotiation is whether or not decision-making under Article 25(1) a) of the Visa Code is to be understood as implementing EU law. This is because Article 51 of the EU Charter states that, when implementing EU law, member states must respect fundamental rights such as the right to asylum and the principle of non-refoulement. This issue was also addressed by the CJEU in *PPU X and X v Belgium*.

The referred questions in *PPU X and X v Belgium* concerned the interpretation of Article 25(1) a) of the Visa Code. According to the Article, a visa with limited territorial validity shall be issued exceptionally when the member state concerned considers it necessary on humanitarian grounds, or for reasons of national interest, or due to international obligations. In such situations, member states can derogate from the entry conditions laid down in the SBC and issue an LTV providing entry to a single EU member state – not to the whole Schengen area (Article 2(4) of the Visa Code). This derogation has support in the SBC, which according to Article 3(b) SBC applies 'without prejudice to the rights of refugees and persons requesting international protection'. Exceptions on account of 'humanitarian grounds, on grounds of national interest or because of international obligations' are also enshrined in Article 6(5) c) SBC), which Article 25 of the Visa Code cites. Until *PPU X and X v Belgium*, the question of whether these exceptions include an obligation for member states to issue an LTV had not been under the CJEU's scrutiny. Nor had the question of whether member states' assessment of the 'necessity and exceptionality' involved – and thus their margin of appreciation under Article 25 – is limited by their refugee and human-rights obligations.

In the opinion of Advocate General Mengozzi, Article 25(1) a) of the Visa Code enables the member states – under the specific conditions that it lays

down – to preclude all the grounds for refusal listed in Article 32(1) a) and b) of the Code.[486]

> The intention of the EU legislature, as reflected in those provisions, is clear. The expression 'without prejudice to Article 25(1)', set out in Article 32 of the Visa Code can have only one meaning, namely that, specifically, of authorising the application of Article 25(1) a) of the Visa Code and thus the issue of a Visa with limited territorial validity, notwithstanding the grounds for refusal listed in Article 32(1) a) and b) of that code.[487]

Mengozzi stressed that the case provided the CJEU with an opportunity to make clear that a member state implements EU law when it adopts a decision in relation to an application for an LTV, whereupon the rights guaranteed by the EU Charter must be respected. The Advocate General argued that, by issuing or refusing to issue an LTV on the basis of Article 25 of the Visa Code, authorities of the member states adopt a decision concerning a document authorizing the crossing of the Union's external border, which is subject to a harmonized set of rules. They are therefore acting within the framework of EU law, and pursuant to it. Mengozzi stated, furthermore, that this conclusion cannot be called in question by the possible recognition of a member state's discretion in applying Article 25(1) a) of the Visa Code.[488] By adopting a decision under Article 25 of the Visa Code, the authorities of a member state implement EU law for purposes of Article 51(1) of the EU Charter, so they shall respect the rights guaranteed by the EU Charter.[489] The Court must therefore conclude, Mengozzi argued, that respect for those rights – particularly that enshrined in Article 4 of the Charter: the prohibition of torture – implies the existence of a 'positive obligation' on the part of member states to issue an LTV when there are substantial grounds for believing that a refusal

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[486] Opinion of Advocate General Mengozzi, PPU X and X v Belgium, C-638/16, para 119.

[487] Ibid., para 119.

[488] Ibid., paras 80–81.

[489] Ibid., para 84.

to do so will have the direct consequence of exposing persons seeking international protection to such treatment.[490] Refusing to issue an LTV would deprive protection seekers of a 'legal route' to exercise their right to seek international protection.[491] Notwithstanding Mengozzi's opinion, the CJEU ruled that the issuance of an LTV is to be handled outside EU law, and thus outside the applicability of the EU Charter.[492] The right to seek asylum and the principle of non-refoulement as guaranteed by the EU Charter were thus considered as out of application to this situation.

In other case law EU Charter applicability has been given a broad interpretation. The Charter is applicable whenever the member states or the EU 'act within the scope of Union law'[493] or 'fulfil their obligations under […] EU law'.[494] In light of this, the conclusion reached by the CJEU must be said to embody a narrow interpretation of the scope of EU law – one that disregards the fact that the visa requirement for border crossings for third-country nationals from certain countries has its basis in the Schengen acquis, and that the process of applying for a visa is governed by the Visa Code. When a member state decides on an LTV, its decision – being made within a framework of harmonized rules on border control and entry conditions – is thus (at least) closely connected to EU law. However, the idea that visas (including LTVs) might be understood as EU law due to the visa requirement

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[490] Ibid., paras 3 and 139.

[491] Ibid., conclusion 1 and 2. Moreno Lax has also argued along such lines, stating that the effect of Article 25 in the Visa Code is to carve out an exception to 'normal' exclusion rules defined in Article 32 in the Visa Code, and to enumerate the circumstances in which a visa should 'normally' be denied when there are reasonable doubts about the intention to leave the territory of the member states before the expiry of the visa applied for. Article 25 in the Visa Code should thus be read as creating a parallel and exceptional regime to cater for member state obligations arising inter alia in the context of 'the right to asylum and to international protection', as established in the SBC. Moreno-Lax, '*Asylum visas as an obligation under EU Law: Case PPU C-638/16 X, X v État Belge (Part II)'* (2017) EU migration law blog. In this understanding, the member state concerned has a duty under EU law to issue a visa when the applicant will otherwise be exposed to a real risk of refoulement.

[492] C-638/16, PPU X and X v Belgium (2017), para 45.

[493] C-5/88, Wachauf (1989); Case C-260/89, Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou; and C-309/96, Annibaldi (1997).

[494] Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

per se was not considered in this case. Instead, the CJEU concluded, LTVs fall solely within the scope of national law. The Court thus distinguished between, on the one hand, the visa requirement that applies to any third-country national, who under EU law must be in possession of a visa when crossing the Union's external border (Article 1(2) of the Visa Code in relation to the Visa List Regulation), and, on the other, the application and the assessment hereof – that under some circumstances only is a question of national law.

I would submit that, in this case, the CJEU interpreted the scope of the Charter differently from how it did in *Siragusa*, *Fransson, N.S.* and *Melloni* (see section 2.1.1.3.2). In *PPU X and X v Belgium*, namely, it treated the regulation of humanitarian visas as a competence of the member states, without addressing the fact that the visa requirement follows from substantial EU law.[495] The Court understood 'the situation' as not being governed by EU law, although the EU visa requirement applies to any third-country national who must be in possession of a visa when crossing the EU's external border.[496] In *Fransson*, the CJEU established that, in order to trigger the applicability of the EU Charter, the situation at hand only needs to be connected in part to EU law.[497] With a less narrow interpretation of the situation in *PPU X and X v Belgium*, the CJEU could have pointed to the visa requirement, and averred that it establishes such a connection per se. Due to the principle of the supremacy of EU law, member states are compelled to require a visa for third-country nationals under the Visa Code, as well as under the entry requirements that follow from the SBC.[498] Thus, when member states are implementing these rules, they are 'fulfil[ling] an obligation imposed by EU law' – which

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[495] Cf. C-206/13, Siragusa (2014); and C-617/10, Åkerberg Fransson (2013).

[496] Article 1(2) of the Visa Code.

[497] C-617/10, Åkerberg Fransson (2013), para 24; and C-299/95, Kremzow (1997).

[498] The principle of the supremacy of EU law requires domestic courts to disapply provisions of national law that conflict with supreme EU law. The principle must be applied to all national acts, including a member state's constitution, whether they were adopted before or after the EU act in question. See Judgement of 15 July 1964, Flaminio Costa v E.N.E.L. Case 6/64, EU:C:1964:66; C-11/70, Internationale Handelsgesellschaft (1970); Judgement of 9 March 1978, Simmenthal, C-106/77, EU:C:1978:31; and Judgement of 13 November 1990, Marleasing SA v La Comercial Internacional de Alimentacion SA, C-106/89, EU:C:1990:310.

normally triggers the applicability of the EU Charter.[499] In *Siragusa*, the CJEU set out some general rules for determining when national rules are 'implementing EU law' for purposes of Article 51 of the EU Charter.[500] In *Siragusa*, the Court stated that, since no specific obligations to protect the landscape were imposed (in that case) on the member states by EU law, it had no jurisdiction to answer the question.[501] In regard to LTVs, the Court could have used its conclusion in *Siragusa* e contrario, with the general visa requirement under the Visa Code and the SBC constituting such a 'specific obligation imposed on the member states by EU law' to require 'any third-country national' to be in possession of a visa when crossing the Union's external border. Under such an interpretation, the situation could have been understood as governed by EU law, which would have rendered the EU Charter applicable. The connection to EU law was also highlighted by the CJEU when it stated that it had jurisdiction to grant the request for a preliminary ruling. The application in question, the Court noted, had been submitted under the Visa Code. Accordingly, the question referred to the Court was linked to the Visa Code, thereby giving the Court jurisdiction.[502] The CJEU thus acknowledged a link that, in view of the conclusions set out in *Siragusa* and *Fransson*, could have included LTVs within the scope of 'implementing EU law', thereby triggering the applicability of the Charter.

In *N.S.*,[503] furthermore, the CJEU ruled that the Charter is applicable when a member state decides on whether to exercise discretion.[504] The Court

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[499] Cf. Lenaerts, 'Exploring the limits of the EU Charter of fundamental rights' (2012), p. 378, and Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

[500] C-206/13, Siragusa (2014), para 79; and Case C-87/12 C-87/12, Ymeraga and Others (2013), para 41.

[501] C-206/13, Siragusa (2014), paras 26–36. Siragusa concerned a preliminary ruling on the compatibility of Italian national landscape conservation rules with the right to property enshrined in Article 17 of the Charter.

[502] C-638/16, PPU X and X v Belgium (2017), para 37.

[503] C-411/10 and C-493/10, N.S. and M.E. and Others (2011).

[504] The CJEU ruled that the decision adopted by a member state on the basis of Article 3(2) of the Dublin Regulation (EC) No 343/2003, on whether to examine an asylum application which is not its responsibility according to the criteria laid down in Chapter III

stated in that case that Article 3(2) of the Dublin Regulation 'grants Member States a discretionary power which forms an integral part of the Common European Asylum System'.[505] The Court further pointed out that this discretionary power 'must be exercised in accordance with the other provisions of that regulation', and that the member state deciding to use its discretion must inform the other member states concerned.[506] The Court could have reasoned that Belgium was implementing EU law when deciding on LTVs. After all, Article 25 of the Visa Code has similarities with Article 3(2) of the Dublin Regulation, and it affords member states discretion on humanitarian grounds, or due to national interest or international obligations. Moreover, the issuance of visas is an integral part of the Schengen rules on entry, and Article 25(4) imposes an obligation on member states to inform the other member states when issuing an LTV. Furthermore, the question of member states' discretion relates to the CJEU's reasoning in *Melloni*. In this case, the Court highlighted the importance of ensuring that fundamental rights are not infringed in areas of 'EU activity', and of guaranteeing that a certain level of protection is given to fundamental rights in the member states, so that the unity, primacy, and effectiveness of EU law are not undermined.[507] If, namely, the issuance of LTVs is regarded solely as a national competence, and the EU visa requirement under EU law is understood as an 'EU activity', then the varying willingness of different member states to issue LTVs may result in a situation where – when it comes to the assessment of LTV applications lodged by protection seekers – fundamental rights are accorded unequal levels of protection in different member states.

Instead, the Court's judgement in *PPU X and X v Belgium* led to a discrepancy whereby the requirement of EU law on visas is maintained for protection seekers, whereas by contrast fundamental rights become 'optional' – a matter solely for the member states. Within this discrepancy, the

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of that Regulation, implements European Union law for the purposes of Article 6 TEU and Article 51 of the Charter, and thus found that when deciding whether to exercise discretion, i.e. whether to process the asylum claim, the UK was implementing EU law, whereupon the Charter was applicable. Ibid. paras 69 and 123.

[505] Ibid., para 65.

[506] Ibid., paras 66–67.

[507] C-399/11, Melloni (2013), paras 55–64.

applicability of the EU Charter would have been important, providing equal guarantees on fundamental rights when the member states implement EU law in the form of entry conditions under the Visa Code and the SBC.[508]

Guarantees under the EU Charter are not supposed to be limited by spatial boundaries. However, although the applicability of the EU Charter follows the scope of EU law – and not territorial jurisdiction – the geographic location of the 'rights-holder' does seem to be significant. In *Fransson, N.S.*, and *Melloni*, the individual rights-holders were all situated within the territory of an EU member state (rather than being, as in *PPU X and X v Belgium*, in a third country). In *PPU X and X v Belgium*, the CJEU claimed it would undermine the system established by the CEAS and the Dublin rules if third-country nationals were allowed to submit visa applications in a third country when the purpose of the trip is to seek asylum upon arrival.[509] It would appear, therefore, that the scope of the right to seek asylum under EU law figured decisively in the Court's conclusion, as did the territoriality of this right under the CEAS.[510]

The judgement of the Court in *PPU X and X v Belgium* relied on a distinction between LTVs and Schengen visas, even though both types of visas follow from the visa requirement in general.[511] The Belgian embassy in Beirut, however, did not make such a distinction. As Mengozzi noted, the Belgian authorities classified, examined, and processed the applications of the applicants in the main proceedings as applications for visas under the Visa Code. Moreover, although the applications concerned LTVs under Article 25 of the Visa Code, the contested decisions were drawn up using an 'application

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[508] The establishment of the EU Charter and the codification thereof follows from member state concerns about the impact EU law could have on constitutional values such as fundamental rights. This led the European Court of Justice, through its case law, to affirm the principle of respect for 'fundamental rights' as general principles of law. Rights and freedoms therefore also became valid as part of EU law; see C-11/70, Internationale Handelsgesellschaft (1970); and C-4/73, Nold (1974). Fundamental rights have since then been codified through the drafting of the EU Charter and its entry into force.

[509] C-638/16, PPU X and X v Belgium (2017), para 48.

[510] Cf. Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015) on how law invisibilizes its spatiality depending on needs and conditions, p. 2.

[511] The CJEU however stated that the Belgian authorities were wrong to describe the applications at issue in the main proceedings as applications for short-term visas. C-638/16, PPU X and X v Belgium (2017), para 50.

form for a short-stay visa decision', and the refusal to issue the visas was based on one of the grounds stated in Article 32(1) b) of the Visa Code.[512]

The fact that the application process appears to comprise a single system also follows from the data collected in this study. In the digital space of the embassy website and within the digital application system, the possibility of applying for a short- or a long-stay visa is revealed when one starts to file the application (images 16–17). One can apply on the same application form for both short- and long-stay visas on humanitarian grounds. The form does thus not distinguish between national visas based on Belgian law and visas issued under the Visa Code, but only between short- and long-stay visas. The Belgian application form is moreover based on the harmonized application form in Annex I of the Visa Code. Under point 23 in the harmonized application form on Schengen visas (image 18), several boxes appear for indicating the 'Main purpose(s) of the journey', each corresponding to a particular reason for the journey (study, tourism, official visit, medical reasons, etc.). The last box contains the section 'Other (please specify)'. On this harmonized form, the applicant can state that his/her application is based on humanitarian grounds. In the part of the application form for official use only – under the heading of 'Visa decision' (image 18) – the issuance of an LTV furthermore appears as one of the possible options in the event of a positive decision. Nothing on the harmonized form in Annex I of the Visa Code, or on the online application form at the embassy website, indicates that the issuance of a visa on humanitarian grounds is to be handled outside of EU law. Rather, the Belgian form for applying for the visa needed to enter the Union appear to comprise a single system – one that 'fulfils Belgium's obligation under EU law'.[513]

However, what appears in the digital space as a single system must, from the point of the CJEU, be divided into two separate systems – the one falling within the scope of the Charter, the other not. As if there is no connection between them and to the visa requirement in general. EU law requires the possession of a visa. However, the judgement in *PPU X and X v Belgium* detaches this requirement from the effect that this 'EU activity' has on fundamental rights and their applicability and enforcement. As seen above,

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[512] Opinion of Advocate General Mengozzi, PPU X and X v Belgium, C-638/16, para 49.

[513] Cf. Explanations Relating to the Charter of Fundamental Rights (2007/C 303/02).

namely, the protection of fundamental rights may end up being unequal in different member states, where the assessment of applications for LTVs is concerned.[514]

Furthermore, the distinction between competences regarding LTVs and Schengen visas involves a distinction between the visa application process (which is handled at the Belgian embassy as one system) and the assessment of the application. Since LTVs fall under the competence of the member states, the assessment is to be made according to national law. As seen in *PPU X and X v Belgium*, however, the Belgian *Office des Étrangers* had rejected the applications pursuant to Article 32(1) b) of the Visa Code (and not, in other words, according to national law).[515] The use of a single system for visa applications at the Belgian embassy, and the rejection in the case at hand of applications according to the Visa Code, reinforce the sense that LTVs are closely connected to – indeed part of – EU law.[516]

In order, moreover, to strengthen the contention that LTVs fall outside the scope of EU law, the CJEU noted – as did the Belgian government and the European Commission – that no legislative acts had been adopted by the EU legislature on the basis of Article 79(2) a) TFEU with regard to the issuance of long-term visas and residence permits to third-country nationals on humanitarian grounds.[517] The lack of such legislation was considered to strengthen the argument that such visas per se fall outside of EU law. Instead, however, the fact that no EU legislation on the issuance of humanitarian visas or residence permits has been adopted in accordance with Article 79(2) a) TFEU could be framed as pointing to a missing piece within the larger system of migration and border control. Through its visa requirement, namely, the system excludes protection seekers and others who need to travel to the EU for humanitarian reasons, at the same time that the Union has failed to compensate for this effect by adopting any legislation for the issuance of

514 Cf. C-399/11, Melloni (2013).

515 C-638/16, PPU X and X v Belgium (2017), para. 21.

516 Cf. C-617/10, Åkerberg Fransson (2013); and C-206/13, Siragusa (2014).

517 C-638/16, PPU X and X v Belgium (2017), para 44.

humanitarian visas.[518] If, instead of viewing 'the situation' from a state-centred perspective, we seek to understand it from the standpoint of the protection seeker, then the situation in question – whereby protection seekers at risk are prevented from travelling to the EU by regular means – stands out as constructed by EU law (i.e., as established in accordance with the entry conditions set out by the SBC and the visa rules). The Court's conclusion – that the situation at issue in the main proceedings was not governed by EU law – omitted the fact that all third-country nationals listed in the EU Visa List Regulation are required to have a visa in order to board a carrier and to cross the external border of the Union.[519] The visa requirement thus traps people, and the same risk that would lead to the granting of asylum in a member state can be used under the visa rules as a reason to refuse access to the global mobility infrastructure.

In *PPU X and X v Belgium*, the CJEU made it clear that, under the EU visa requirement relating to visa applications by protection seekers, the obligation to ensure that fundamental rights are protected is either optional or does not apply. This despite Preamble 29 of the Visa Code, which guarantees the protection for fundamental rights that is demanded by the ECHR and the EU

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[518] Humanitarian visas under Article 25 in the Visa Code are used by the EU member states, but they do not appear to be used on a general basis to provide access to asylum. Iben Jensen, 'Humanitarian visas: option or obligation?', 2014. Humanitarian visas have long been discussed in the political debate and in the literature as a compensation for the effect of visa and carrier rules, see e.g.; Noll, 'Seeking asylum at embassies: A right to entry under international law?' (2005); Peers, 'Do potential asylum-seekers have the right to a Schengen visa?' (eulawanalysis.blogspot.com); and Gregor Noll, Jessica Fagerlund and Fabrice Liebaut, 'Study on the feasibility of processing asylum claims outside the EU against the background of the common European asylum system and the goal of a common asylum procedure', (2002); Moreno-Lax, '*Asylum visas as an obligation under EU Law: Case PPU C-638/16 X, X v État Belge (Part II)*' (2017) EU migration law blog; and Duquet and Wouters, 'Seeking refuge in EU delegations abroad: A legal imbroglio explored' (2015). Such discussions have not led, however, to any EU regulations on visas specifically aimed at protection seekers. As Moreno-Lax has pointed out, the harmonization of visa rules in the Visa Code has paradoxically led to the unilateral dismantlement of existing LTV grounds, reinforcing the perception that asylum-visas are optional, 'despite extraterritorial obligations'. See Moreno-Lax, '*Asylum visas as an obligation under EU Law: Case PPU C-638/16 X, X v État Belge (Part II)*' (2017) EU migration law blog, p. 109.

[519] C-638/16, PPU X and X v Belgium (2017), para 45.

Charter; and despite many other solemn declarations that have been made on the need to respect these rights when the common European asylum and border control system is developed and implemented.[520] The CJEU's ruling in *PPU X and X v Belgium*, and the inapplicability of the EU Charter in this border crossing situation, are examples of how the asymmetry of the EU border regime effectively invisibilizes rights – though the way in which it combines, on the one hand, the territorial spatiality of fundamental rights, and, on the other, the extraterritorial application of migration and border control. This example of spatio-legal interaction under the EU border regime will be furthermore explored in 4.1.1.2.

4.1.1.1.2 The ECHR: M.N. and Others v Belgium

The consular activities of EU member states under the SBC and the Visa Code further raise the issue of jurisdiction under the ECHR. In *M.N. and Others v Belgium*, the ECtHR addressed the question of whether such activities involve an exercise of extraterritorial jurisdiction under the ECHR.[521]

According to the applicants in the case, the Belgian state bodies which had dealt with their visa applications had reached decisions in their capacity as diplomatic agents or as officials of the *Office des Étrangers*, under the supervision of the Belgian authorities. When making their decisions, the applicants averred, these agents were thus exercising a state function of border control. Since the decisions concerned conditions of entry into Belgian territory, they were necessarily a manifestation of Belgian jurisdiction, regardless of where they were made, and regardless of whether the authorities in question exercised de facto or physical control over the individuals concerned.[522] In support of their argument, the applicants drew attention to the ECtHR's case-law established since *Soering v. the United Kingdom*[523], and in which the ECtHR has found that a state party to the convention could be held responsible for the extraterritorial consequences of a decision in relation to risks of torture.[524]

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[520] See, e.g., the conclusions from Tampere and Articles 67 and 78 TFEU.

[521] M.N. and Others v Belgium (2020).

[522] Ibid., para 83.

[523] Soering v The United Kingdom (1989).

[524] M.N. and Others v Belgium (2020), para 84.

According to the Belgian government, the refusal to issue short-stay visas to the applicants had not produced any effects outside Belgian territory, as the only effect of the decision had been to prevent the persons in question from entering Belgian territory for a short stay, with no impact on their situation in Lebanon or Syria.[525] Nor, according to the Belgian government, had the diplomatic agents who had handled the visa application exercised any form of authority or control over the applicants, who had been free to come and go.[526] The ECtHR accepted that, in ruling on the applicants' visa applications, the Belgian authorities had taken decisions on conditions for entry into Belgian territory, and in so doing had exercised a public power. However, the Court ruled, this finding was 'not sufficient to bring the applicants under Belgium's "territorial" jurisdiction within the meaning of Article 1 of the Convention'.[527] The mere fact that decisions taken at national level have an impact on the situation of persons resident abroad was not, in the judgement of the Court, enough to establish jurisdiction over persons outside Belgian territory.[528]

Since jurisdiction under Article 1 was not established, fundamental rights under the ECHR were not triggered. However, the effect of denying visas in this situation could, with another understanding – one that centres human rights and refugee law, as well as the protection seeker's perspective and needs – be argued to have the same effect as extraterritorial interdiction, as in *Hirsi*.[529] The embassies of member states do not generally have control over persons who apply for visas, and extraterritorial jurisdiction of the ECHR is thus not generally triggered. Yet, at this scene of interaction and in this legal

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[525] Ibid., para 80.

[526] Ibid., para 80.

[527] Ibid., para 112. The ECtHR referred to Banković and Others, para 75. For an analysis of the ECtHR's jurisdictional threshold and its definition of public power, see Vladislava Stoyanova, '*M.N. and Others v Belgium: no ECHR protection from refoulement by issuing visas*' (2020) EJIL Talk! Blog of the European Journal of International Law.

[528] M.N. and Others v Belgium (2020), para 112.

[529] Cf. Moreno-Lax's reasoning on the denial of boarding as a form of 'extraterritorial interdiction', since the measure has the equivalent effect, resulting ultimately in preventing migrants from reaching a state or even in pushing them back to another state where a risk of refoulement may be present. Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017), p. 313. See also Hirsi Jamaa and others v Italy (2012), para 180.

intersection, such an extraterritorial decision per se can have a great effect on applicants' lives and on the protection afforded them. This is because denying mobility, by refusing a visa, pushes protection seekers back to a situation where they might be at risk. When sufficient protection cannot be had either in Syria or in Lebanon, the Belgian state has – through its embassy and its sovereign right to decide on entry – de facto control over the applicants as 'protection seekers at risk', even though it does not have full control over their physical bodies. When the Belgian government argued that the only effect of refusing short-term visas had been to prevent the applicants from a short stay in Belgium, with no impact on their situation in Lebanon or Syria, the effect of the visa requirement on the protection seekers is omitted. Moreno Lax has argued that individual visa refusals can give rise to an issue under Article 3 ECHR. The claim is that, when entry depends on a visa, the state has complete 'authority and control' (the ECtHR's definition of extraterritorial jurisdiction[530]); thus, the issuance or refusal of visas cannot but be considered an act of 'jurisdiction' under Article 1 of the ECHR, with a potential to hamper the effectiveness of non-refoulement.[531] The Court ruled, however, that border control performed extraterritorially by means of the visa requirement does not trigger jurisdiction under the ECHR, and thus no obligations under the Convention either. This notwithstanding the risks that the applicants faced, nor the impact that refusing a visa has on a person at risk. The jurisdictional question, and thus also the territorial spatiality of the ECHR is thus decisive in the distribution of fundamental rights at this scene of interaction.

4.1.1.2 Law's Spatial Dependency: The Courts' Negotiations

This section brings the analysis of the two court cases together, analysing the spatial distribution of the scope of fundamental rights and law's spatial dependency as a process of invisibilization.

Both *PPU X and X v Belgium* and *M.N. and Others v Belgium* provide examples of how the spatial location of protection seekers (in these cases at

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[530] Cf. e.g. Hirsi Jamaa and others v Italy (2012).

[531] Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017), p. 309.

the Belgian embassy in Beirut) affects the distribution of rights. Since the protection seekers in these cases were in a third country (thus outside the EU), the right to seek asylum and the principle of non-refoulement were not considered applicable – whether under the ECHR, the EU Charter, or the CEAS. However, if the families had instead been situated within the territory of an EU member state, they would in all likelihood have been considered eligible for asylum under the same legal sources.

Under the ECHR, the spatiality of rights can be understood as achieved through the legal concept of jurisdiction. Jurisdiction divides space into fragments or manageable portions. This fragmentation of space most often means that jurisdiction remains territorial in relation to the applicability of fundamental rights. This spatialization of rights is manifested in the territoriality of the right to seek asylum under the CEAS, and permeates extraterritorial action controlling migration and borders without triggering jurisdiction under the ECHR. The decisions of the embassy in Beirut and of the courts in *PPU X and X v Belgium* and *M.N. and Others v Belgium* are in keeping with this spatialization of fundamental rights. Maintaining it by reserving rights under EU and European law for certain subjects at certain locations, while excluding protection seekers trapped by EU extraterritorial migration and border control.

The CJEU and the ECtHR handled the question of the spatial distribution of the scope of fundamental rights in a similar way. In *M.N. and Others v Belgium* the ECtHR cautioned that accepting the application admissible would result in:

> […] a near-universal application of the Convention on the basis of the unilateral choices of any individual, irrespective of where in the world they find themselves, [thereby creating] an unlimited obligation on the Contracting States to allow entry to an individual who might be at risk of ill-treatment contrary to the Convention outside their jurisdiction […] The individual in question could create a jurisdictional link by submitting an application and thus give

> rise, in certain scenarios, to an obligation under Article 3 which would not otherwise exist.[532]

The CJEU also stressed how visa applications submitted by protection seekers could result in a unilateral choice for individuals in relation to the CEAS. Such an approach:

> […] would be tantamount to allowing third-country nationals to lodge applications for visas on the basis of the Visa Code in order to obtain international protection in the Member State of their choice, which would undermine the general structure of the system established by Regulation No 604/2013 [the Dublin Regulation].[533]

The Court further noted:

> […] that to conclude otherwise would mean that Member States are required, on the basis of the Visa Code, de facto to allow third-country nationals to submit applications for international protection to the representations of Member States that are within the territory of a third country.[534]

The CJEU's argumentation highlights the spatial conditionality and the territorial scope of the right to seek asylum under EU law. The Visa Code is not intended, the Court noted, to harmonize laws on international protection.[535] The priority was thus put on not affecting the exclusive territoriality of the right to seek asylum under the CEAS, even though the situation did not explicitly concern any application for asylum, but rather an application for a visa – for which the relevant entry conditions apply to 'all' third-country nationals listed in the Visa List Regulation.

Externalization relies on space, and the conclusions of both courts implicitly referred to the territorial spatiality of fundamental rights. The

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[532] M.N. and Others v Belgium (2020), para 123.

[533] C-638/16, PPU X and X v Belgium (2017), para 48.

[534] Ibid., para 49.

[535] Ibid., para 49.

ECtHR cited the inherent spatiality of the ECHR under Article 1 of the Convention, while the CJEU cited the scope of EU law. Since the field of application of the EU Charter follows the scope of EU law rather than territoriality, the spatial scope of the EU Charter is potentially broader than that of the ECHR. The judgement in *PPU X and X v Belgium* is therefore essential for understanding how the EU organizes mobility and recognizes the applicability of fundamental rights and obligations in relation to the visa rules. As follows from the CJEU, however, it appears that the territorial spatiality of the CEAS forms a crucial argument in the distribution of fundamental rights, and that also the scope of the EU Charter can be spatially distributed and fragmented.

The lack of clearly stated commitments on how to guarantee fundamental rights under the EU visa rules makes for a spatial distribution of the scope of rights. Under this geography, the right to (seek) asylum is provided at some spatial locations (often within EU territory) but made invisible at others, such as the Belgian embassy in Beirut.[536] In *PPU X and X v Belgium*, the CJEU concluded that the EU Charter was inapplicable, leaving member states with a visa requirement under EU law, but with no explicit obligations under said law to guarantee the fundamental rights of protection seekers when implementing and applying the Visa Code. The state, in this case Belgium, was not legally obliged (under EU law and the ECHR) to do anything to assist the families in question, although they primarily wanted access to Belgium through visas, and secondarily to seek asylum since they were at risk. Migration and border control applying at this scene of interaction is thus organized in such a way that fundamental rights do not become applicable and thus neither enforceable, even though the situations at hand represent a reality embodied by protection seekers at risk, and played out under the EU border regime and the visa requirement. The families in *PPU X and X v Belgium* and *M.N. and Others v Belgium* were obstructed from travelling into the EU by the visa rules. Externalization through the visa requirement thus limited the families' mobility and possibilities of seeking asylum in the EU; even as Belgium (and other EU member states) are able through externalization to maintain control

[536] Cf. Valverde, 'Jurisdiction and scale: Legal "technicalities" as resources for theory' (2009).

over individuals free of any corresponding obligations in relation to the effects arising from this control. Lebanon, moreover, offers no protection, so the applicants in both *PPU X and X v Belgium* and *M.N. and Others v Belgium* ended up being trapped in a space of exclusion where asylum could not be gained either in Lebanon or in Belgium.[537]

The outcome of the two cases reinforces the construction of this scene of interaction as an extraterritorial 'border crossing point' where protection seekers can neither seek asylum nor gain protection through the principle of non-refoulement. Furthermore, the outcomes of the cases generate incentives for externalization through visa requirements, since the issuance of visas for protection seekers is not an obligation under either EU law or the ECHR. The asymmetry has thus deepened as a result of the outcomes of the two cases. When the EU visa requirement is handled without harmonized safeguards on fundamental rights, each of the member states will tend to decide – given the lack of solidarity among the member states and a general unwillingness to host protection seekers – not to issue visas in situations of this kind, for fear of becoming a destination country for protection seekers.

The invisibilization of rights at this scene of interaction takes place under the asymmetry of EU migration and border control law, and the analysis hereof reveals the dependence of the EU border regime on space. Both *PPU X and X v Belgium* and *M.N. and Others v Belgium* target the question of where rights are to be triggered, and manifest the spatiality of law. The protection of individual rights is thus a spatial issue. The EU border regime interacts with and through this spatiality, invisibilizing fundamental rights.

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[537] From the perspective of the protection seeking subject, moreover, a visa refusal denies the right to leave a country. The right to leave is recognized in Article 13(2) UDHR, Article 12(2) ICCPR and Article 2(2) of the Protocol no 4 of the ECHR. The right to leave is essential in refugee law, since the Refugee Convention applies to persons who are 'outside the country of his nationality' (Article 1(A) 2). As Hathaway has noted, the principle of non-refoulement does not include a constraint on actions performed by other states than those of the persons' nationality, denying 'would-be refugees the ability to leave their own state'. This construct, as Hathaway has noted, a gap between the duty of non-refoulement and a broader notion of access to asylum. Hathaway, *The rights of refugees under international law* (2005), p. 307. Thus, whereas other states can prevent people from leaving a country of origin without violating the Refugee Convention, the country of origin cannot conduct such interdiction without risk of violating the right to leave as recognized in the UDHR, the ICCPR, and the ECHR.

4.1.1.3 Delegation of Migration and Border Control: Privatization

Not far from the Belgian embassy in Beirut, the Beirut–Rafic Hariri International Airport constitutes another 'border' of this scene of interaction. Its operations are played out under the rules on carrier responsibilities. The visa requirement is enforced at airports, and a person without the necessary travel documents cannot board a plane to an EU member state.[538] If a carrier allows a third-country national to board without documents, and that person is then refused entry upon arrival, the carrier is fined and obliged to return the person. Carrier responsibility (established by Article 26 of the 1990 Schengen acquis and the 2001 Carrier Directive[539]) shifts border control through a delegation of state tasks and responsibilities into private spaces run by logics other than those of a concern with human rights.[540] When border control is done by public authorities, the state can be held accountable for not ensuring the rights of protection seekers. When private actors are involved, the delegation of responsibility becomes more complex. The delegation of border control is another example of how the EU border regime interacts with space

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[538] Entry conditions for third country nationals for intended stays on the territory of the member states under Article 6 SBC, include a valid travel document, a valid visa (if required in accordance with the Visa List Regulation (Regulation (EU) 2018/1806), a justification of the purpose and conditions of the intended stay, sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully. These conditions are not exhaustive. Further conditions must be met; see Article 6 of the SBC.

[539] Council Directive 2001/51/EC of 28 June 2001 supplementing the provisions of Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985, and Article 26 of the Convention implementing the Schengen Agreement of 14 June 1985.

[540] The shift of public tasks into the private sphere is a phenomenon within EU migration and border control. The EU has moreover e.g. outsourced border control and border surveillance to private security companies. See Micol Sagal Ambroso, '*Offshoring and outsourcing border control: The EU's use of private military and security companies*' (2022) blogs.eui.eu; 'Concerns over states contracting private security companies in migration situations' (ohchr.org); and Martin Lemberg-Pedersen, 'Private security companies and the European borderscapes', in Thomas Gammeltoft-Hansen and Ninna Nyberg Sørensen (eds), *The migration industry and the commercialization of international migration* (Routledge 2011).

and invisibilizes the right to seek asylum and the principle of non-refoulement.[541]

When a person is suffering persecution or fleeing war, the denial of boarding can have severe consequences for that person. In a study on carrier sanctions in the Netherlands and the UK, Spijkerboer and Baird describe carrier sanctions as part of a normative landscape which governs 'indifference' towards the lives of migrants and refugees, and they argue that the refusal of boarding can result in a denial of refugee protection or in death if the person refused boarding subsequently tries to reach the destination state in an irregular manner.[542] Spijkerboer and Baird note that:

> While it is evident that subjective rights of identifiable persons are violated, this cannot be addressed in the current legal framework because no actor who is accountable or responsible for these harms can be identified. As a result, there is a man-made rights violation, but no accountability and responsibility.[543]

Commitments in relation to human rights and refugee law are stated in Preamble 3 of the Carriers Directive, which declares that the application of the Directive is 'without prejudice to the obligations resulting from the Geneva Convention relating to the Status of Refugees'. The commitment is repeated in Article 4(2), which states that penalties applicable to carriers are without prejudice to member states' obligations in cases where a third-country national seeks international protection. These commitments are however not materialized in practice, since protection seekers in general are not allowed

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[541] Since 15 September 2021, the Belgian visa application process is provided by the private actor 'TLScontact'. This also constitutes a delegation of border control onto a third party. This study does however not cover this, or such, delegation of control.

[542] Theodore Baird and Thomas Spijkerboer, 'Carrier sanctions and the conflicting legal obligations of carriers: Addressing human rights leakage', *Amsterdam Law Forum* (2019), p. 7. The article refers to Sophie Scholten, *The privatisation of immigration control through carrier sanctions: The role of private transport companies in Dutch and British immigration control,* Koninglijke Brill (2015).

[543] Baird and Spijkerboer, 'Carrier sanctions and the conflicting legal obligations of carriers: Addressing human rights leakage' (2019), p. 9.

boarding, due to the risk of fines for the carrier. Although entry conditions under the SBC apply to any person crossing the internal or external borders of member states 'without prejudice to persons requesting international protection',[544] and since carriers usually perform a service usually considered necessary for border crossings, explicit rights or obligations regarding protection seekers have not been provided in either the SBC or the Carriers Directive.[545] There are furthermore no fines imposed on carriers denying boarding to third-country nationals who aim to seek international protection in the EU upon arrival. The incentives are thus disproportionately distributed, and profit-oriented carrier companies can reduce their margin of error by denying boarding to avoid financial loss.[546]

The EU has legislated for the implementation by member states of the Carriers Directive without providing specific provisions safeguarding protection seekers' access. Furthermore, although implemented by the member states, the border control activity that follows from the Directive is performed by private actors. This creates a gap where responsibility for

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[544] Article 3 of the SBC.

[545] Article 4 SBC states that, when applying the Code, member states shall act in full compliance with relevant EU law, including the EU Charter, relevant international law, including the Refugee Convention, obligations related to access to international protection, in particular the principle of non-refoulement, and fundamental rights. The Article further states that, in accordance with the general principles of EU law, decisions under the regulation shall be taken on an individual basis. Carrier companies, however, are not public state authorities with a mandate to take these kinds of individual decision. The delegation of responsibility for the obligations following from the SBC and the carriers Directive must therefore, to have relevance at all, remain within the state. Cf. Tilman Rodenhäuser, 'Another brick in the wall: Carrier sanctions and the privatization of immigration control', *International Journal of Refugee Law* (2014).

[546] Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017). The introduction of carrier responsibility was strongly opposed by the UNHCR, which stated that forcing carriers to verify visas and other travel documentation helps to shift the burden of determining the need for protection to those whose motivation is to avoid monetary penalties on their corporate employer, rather than to provide protection to individuals. See 'UNHCR position on conventions recently concluded in Europe (Dublin and Schengen conventions)' (unhcr.org), cited by Moreno Lax, p. 124.

potential human rights breaches is difficult to establish.[547] Within this discrepancy, the applicability of the EU Charter is of great importance, since it provides guarantees on fundamental rights when member states implement EU law (Article 51 of the EU Charter). Even when delegating an assignment, the EU institutions and the EU member states are bound to their international and EU legal commitments, including the EU Charter, since member states through their delegation to private carriers are implementing EU law. The member states thus must implement the Carrier Directive in a manner that respects the EU Charter. Of particular relevance in the situation of protection seekers is the principle of non-refoulement (Article 19(2)). However, such implementation is not effectively materialized, and no derogations have been introduced which are applicable for protection seekers so as to enable boarding when a person is at risk. The Carriers Directive does not provide for such special provisions, and protection seekers are not able to embark without visas and other required documents. Thus, the Carriers Directive does not guarantee fundamental rights other than in its 'text'. The consequence of this is that private companies carry out controls of travel documents without having clear obligations as regards non-refoulement when proper documents are missing and the person concerned has a need for protection. Border control is thus conducted without the safeguards stated in the SBC, which allows admission to Schengen territory on humanitarian grounds or because of international obligations.[548] Carrier responsibility thus constitutes a delegation of border control to private, commercial transport companies – denying protection seekers regular transport, risking the right to an efficient

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[547] Gammeltoft-Hansen has described extraterritorialisation and commercialization as an 'asset' for states, claiming that the territorial structures underpinning the international refugee regime not only provide an incentive to extraterritorialize migration control, but also make it attractive to engage in cooperation with third countries and private actors so that migration control can be shifted into other states that perform migration control at a lower cost. This offshoring and outsourcing of migration control includes a growing commercialization of sovereignty, much as tax havens and offshore economies simultaneously reduce acting states' responsibilities and shift legal obligations onto third states and private actors. Gammeltoft-Hansen labels this 'jurisdiction shopping'. See Gammeltoft-Hansen, *Access to asylum: International refugee law and the globalisation of migration control* (2011), p. 31.

[548] Articles 3, 6 and 14 of the SBC.

remedy, and in the prolongation preventing protection seekers from entering and gaining access to national asylum procedures in the EU.

As with the embassies and consulates of member states in third countries, the CEAS is not applicable at airports in third countries. Therefore, protection seekers cannot claim rights emanating from the CEAS with effect at these locations. The structural role of carriers is part of the design of the EU visa requirement under the Schengen acquis. This adds an extra control mechanism under which the right to seek asylum and the principle of non-refoulement are further detached through delegation from EU extraterritorial migration and border control. The spatial scope of the Carriers Directive is broad, since it includes all carriers bringing people into the EU's member states. The visa requirement and the responsibilities and sanctions put on carriers provide for a border control which operates 'everywhere' that a person without the required documents tries to board a ferry or a plane heading to the EU. EU migration and border control is thus extended from the territorial edges of the EU member states into airports and ferry terminals through which the EU's external border confines protection seekers to a limbo, denying access to fast flights and possible protection in the EU. The 'border' operating through the visa and carrier rules provides control that obstructs protection seekers from arriving to the member states' territories – and the territorial scope of the CEAS and the ECHR. In the same way as with the visa requirement, carrier responsibility deepens the asymmetry, and provides additional locations of extraterritorial migration and border control, which further invisibilizes fundamental rights.

4.1.2 The Border Crossing Point at Beni-Enzar

The border crossing between Morocco and Melilla provides a scene of interaction where the CEAS, and thus also the EU Charter, is applicable because protection seekers who reach the EU's external border at Melilla are 'at the border' in the meaning of the CEAS. This means that the protection seeker who enters Melilla, or is positioned at the border between Morocco and Melilla should have access to asylum procedures and reception conditions in accordance with the CEAS. Furthermore, since the border fences are built entirely on Spanish territory, territorial jurisdiction under the ECHR applies, and individual protection needs are to be assessed in line with Article 3 of the

ECHR (see sections 2.1.1.1 and 2.1.1.2). Moreover, the border between Morocco and Melilla is a land border; thus access to it should not be impacted by water or other natural features (images 24–25).[549]

However, this description of the protection of individual rights at the border between Morocco and Melilla is not a reality for all persons seeking protection. As this analysis will demonstrate, the spatio-legal interaction of border control in Melilla does not materialize effective norms of fundamental rights. These norms are instead hidden in steel, barbwire, and large numbers of border guards on both sides of the fences (images 26–40). The behaviour of people crossing the border fences to seek asylum within Melilla does not provide that information or setting either – why would protection seekers climb the fences if they can seek asylum at the Beni-Enzar border crossing point? Fundamental norms on the right to seek asylum and the principle of non-refoulement are not built into the setting at this scene of interaction. If these norms apply here, as the Spanish government submitted that they do before the ECtHR in *N.D. and N.T. v Spain*, they are well hidden. Rather, Melilla is to be understood as a materialization of unequal relations and an attempt to fortify a certain spatiality. Norms on migration and border control are spatially grounded through the fences; they are embedded and materially present. The border is hypervisible, affixing the distance between people with the help of a fence paid by both Spain and the EU, located on Spanish territory on the African continent, and set up in such a way as especially to prevent arrivals from sub-Saharan Africa.[550]

Spanish control of the enclave has led to controversies, and international media and NGOs have repeatedly paid attention to the issue. In fact, several cases have been reported concerning refusal of entry, refoulement, collective expulsions, and pushbacks, including incidents involving up to a thousand

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549 Cf. Estela Schindel on how nature can be an active factor in the infrastructures of borders. See Schindel, 'Death by 'nature': The European border regime and the spatial production of slow violence', *Politics and Space* (2022).

550 According to Saddiki, the Melilla border fences were built to obstruct the arrival of sub-Saharan immigrants, not Moroccans. Moroccans, namely, are allowed to enter Melilla under visa- exception rules, and Moroccans that overstay their visas can be readmitted to Morocco under the 1992 Readmission Agreement between Spain and Morocco. See Saddiki, *World of walls: The structure, roles and effectiveness of separation barriers* (2017), p. 51.

people in 2018, and a hundred people in 2019 and 2020.[551] In June 2022, more than 20 persons died when they were obstructed from scaling the fences by both Moroccan and Spanish border guards.[552] The possibility of rejecting people when they are trying to cross the border has been legally reinforced by the 2015 amendments to the Spanish Aliens Act. These amendments introduced the possibility of rejecting third-country nationals who cross the border 'illegally', and they include a specific regulation concerning the special regimes that apply in Ceuta and Melilla. Individuals who are detected at the borders of Ceuta and Melilla can be turned back under the Act's concept of 'rejections at the border' in order to 'avoid their illegal entry' into Spain.[553] The amendments included a declaration stating that these rejections will be performed in a manner respecting international law on human rights and international protection recognised by Spain.[554] Despite such obligations and commitments in the Spanish Aliens Act, the amendment and the operationalization hereof have been criticized by the UNHCR, ECRE, and the Council of Europe Commissioner for Human Rights for legalizing pushbacks and for

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[551] ECRE, Country report: Spain, 2019, p. 21. See also CEAR, Refugees and migrants in Spain: The invisible walls beyond the southern border, 2017.

[552] The number of deaths vary in different reports. The CoE Commissioner for Human Rights states that at least 23 people lost their lives; see CoE Commissioner for Human Rights Dunja Mijatović's letter to Mr Fernando Grande-Marlaska Gómez, Minister of Interior of Spain.

[553] Institutional Law no. 4/2015 of 30 March 2015 on the protection of citizens' safety.

[554] Institutional Law no. 4/2015 introduced the tenth additional provision into the LOEX. The provision has been in force since 1 April 2015 (after the events in N.D. and N.T. v Spain). It lays down special rules for the interception and removal of migrants in Ceuta and Melilla. The provisions in question read as follows:

'1. Aliens attempting to penetrate the border containment structures in order to cross the border in an unauthorised manner, and whose presence is detected within the territorial demarcation lines of Ceuta or Melilla, may be returned in order to prevent their illegal entry into Spain.

'2. Their return shall in all cases be carried out in compliance with the international rules on human rights and international protection recognised by Spain.

'3. Applications for international protection shall be submitted in the places provided for that purpose at the border crossing points; the procedure shall conform to the standards laid down concerning international protection.'

ignoring human rights and international law obligations.[555] Persons interdicted in the border area when trying to cross the border into Melilla irregularly fall under the concept of rejections at the border and are returned to Morocco through passages (image 32) controlled by border guards, without having their individual rights and possible asylum claims assessed.[556] This was also the situation in *N.D. and N.T. v Spain*.

The first applicant (N.D.) stated before the ECtHR that he had managed to reach the top of the inner fence and had remained there until the afternoon. The second applicant (N.T.) said that he had been struck by a stone while climbing the outer fence and had fallen, but subsequently managed to get to the top of the inner fence, where he had remained for eight hours. The applicants later climbed down the fence with the help of Spanish officials who provided them with ladders. When reaching the ground, they were allegedly apprehended by *Guardia Civil* officials who handcuffed them, took them back to Morocco without any individual assessment, and handed them over to the Moroccan authorities. The applicants alleged that they did not undergo any identification procedure. Nor were they given any opportunity to explain their personal circumstances or to be assisted by lawyers or interpreters.[557]

When no individual assessment takes place, the principle of non-refoulement cannot be guaranteed. Nor is the protection seeker given a chance to seek asylum. The analysis in the following sections addresses the spatial distribution of the scope of fundamental rights under the Spanish practices of rejections at the border and the ECtHR's concept of an applicant's 'own conduct' (section 4.1.2.1), and cooperation on migration and border control with Morocco (section 4.1.2.2).

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[555] See UNHCR Spain, 'UNHCR/ACNUR: Enmienda a ley de extranjería vincula gestión fronteriza y respeto de obligaciones internacionales' (acnur.org); ECRE, 'Spain: New law giving legal cover to pushbacks in Ceuta and Melilla threats the right to asylum' (ecre.org), 27 March 2015; and Third party intervention by the Council of Europe Commissioner for Human Rights. The amendments in the Aliens Act have been subject to review by the Constitutional Court in Spain. After analysing the constitutional doctrine and the ECtHR's jurisprudence, the Constitutional Court concluded that the law is in line with the Spanish Constitution. See Tribunal Constitucional, Recurso de incostitcuionalidad STC 2015-2896, 19 November 2020.

[556] ECRE, Country report: Spain, 2019, p. 23.

[557] N.D. and N.T. v Spain (2020), para 25.

4.1.2.1 The Spatial Distribution of the Scope of Fundamental Rights

In *N.D. and N.T. v. Spain*, the ECtHR addressed the immediate and forcible return of aliens from a land border, following an attempt by a large number of people to cross the Melilla border in an unauthorized manner and 'en masse' for the first time.[558] The forcible return took place without the persons involved being identified and without individual risks being assessed before the persons in question were pushed back to Morocco. The Spanish government claimed that the system of border control at Melilla 'limited' Spain's jurisdiction, beginning beyond 'the police line'.[559] Since the applicants did not pass this line before being apprehended and escorted back to Morocco by the *Guardia Civil*, they had not, according to the Spanish government, entered Spanish jurisdiction.[560] The ECtHR, however, rejected this argument, concluding instead that the applicants had been apprehended within Spain's jurisdiction within the meaning of Article 1 in the Convention.[561] Notwithstanding the Court's objection, however, the Spanish operation of the border manifests how Spanish jurisdiction under the ECHR can be, and is, treated as a flexible and manipulable spatial construction.

4.1.2.1.1 Spanish Rejections at the Border

This section analyses how Spanish 'rejections at the border' are part of the spatio-legal interaction of this scene of interaction; and it addresses how border control, through such management, invisibilizes the right to seek asylum and the principle of non-refoulement.

At the point that a person approaches or is detected by a border guard 'at the border' in Melilla, Spain is subject to responsibilities and obligations under the ECHR, as well as provisions under the CEAS and the EU Charter.[562] Having crossed into a member state's jurisdiction, the protection seeker is at the centre of legal obligation and is entitled to certain institutional resources,

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[558] Ibid., para 166.

[559] Ibid., para 91.

[560] Ibid., para 91.

[561] Ibid., para 190.

[562] Article 1 of the ECHR and Articles 8, 9, 11 and 12 of the Asylum Procedures Directive.

including from the CEAS. This includes inter alia reception conditions, medical aid, legal assistance, the right to seek and possibly receive asylum, and the right to remain in the member state pending the examination of a potential asylum application.

In the context of border crossings, Article 8 of the APD translates the right to seek asylum as well as the principle of non-refoulement into an obligation for member states to provide information about asylum procedures under the precondition of 'indications' from a person crossing the border. Thus, the Article does not impose a general obligation to provide information on access to asylum procedures; that is only necessary when there are indications. This leaves wide discretion to the potentially subjective assessment of individual border guards regarding what indications to include.[563] The EU agencies, the European Asylum Support Office (EASO), and the European Border and Coast Guard (Frontex) however take a more pragmatic view – highlighting that, to comply with Article 8 APD, border officials 'have to be proactive in identifying such a person, inform him/her about the right to apply for asylum and advise him/her on how to make the application'.[564]

Access to asylum procedures is connected to the decision on entry into a member state's territory, and the right to seek asylum forms a derogation to the SBC's entry conditions (see section 2.2.2). Under Article 43(1) APD, member states may conduct a full examination of an application for international protection as part of the 'border procedure', before making a

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[563] Cf. AIDA & ECRE, Access to protection in Europe: Border controls and entry into the territory.

[564] EASO, Practical guide: Access to the asylum procedure, EASO and Frontex, 2016. Moreover, in 2014 Frontex published a report in which it highlighted the complexity of the decisions made by border guards: 'An EU border guard has on average just 12 seconds to decide whether the traveller in front of them is legitimate or not, or to assess if their documents are genuine. For tens of thousands of people each year, refusal at the border post can change a life. Those 12 seconds may also be the only time that a victim of human trafficking comes into contact with law enforcement authorities before they descend into the "underground" where the darkest kinds of exploitation can occur. The border guard's decision, in other words, can have the profoundest consequences for the individual standing before them […]'. See Frontex, Twelve seconds to decide: In search of excellence, Frontex and the principle of best practice, 2014. The guide is an operational information tool for border officials, not a legally binding act.

decision on entry.[565] In Spain, the border procedure is limited to assessing whether an application is manifestly unfounded or not.[566] The border procedure is applied to requests for international protection at the Melilla land border, in order to assess whether the applicant should be granted access to the territory for the purpose of the asylum procedure or not.[567] Under the border procedure, the applicant has not formally entered Spanish territory, and the border procedure inevitably (both in law and in practice) involves an examination of the facts presented by the applicant to substantiate his or her request for international protection.[568] This assessment is done within very short time limits, as compared with regular asylum procedures. Moreover, even though access to free legal assistance in the border procedure is mandatory and guaranteed by Spanish law,[569] cases concerning refusal of entry at the Melilla border – in particular involving sub-Saharan nationals who have

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[565] Such full examinations take place in Italy, Greece, Hungary and Portugal. Cornelisse and Reneman, Asylum procedures at the border – European implementation assessment, 2020, p. 175.

[566] The partial procedure is also used in France and Germany. Ibid., p. 175. In some member states, applicants are denied entry while their applications are being processed without the relevant member state's qualifying the measure as a border procedure in line with Article 43 in the Procedures Directive. Ibid., p. 43. The differences in how member states conduct border procedures show that member states do not share a common understanding of what a 'border procedure' is. This lack of a common understanding risks undermining the safeguards connected with the procedure. When an entry procedure is not recognized as an entry procedure, those safeguards may be overlooked and invisibilized. The provision regarding the assessment of protection needs at the border, like that applying in connection with 'indications' perceived at the border, is vague and thus subject to arbitrariness.

[567] In Spain, a border procedure is applied to all asylum-seekers who ask for international protection at airports, maritime ports, land borders, and detention centres (Centro the Internamiento de Extranjeros (CIE)). When an applicant requests international protection at e.g., the border crossing point between Morocco and Melilla, the border procedure is applied; whereas when applications submitted in a Migrant Temporary Stay Centres 'Centros de Estancia Temporal para Immigrants' (CETI) in Melilla, the application is considered to have been made on Spanish territory, and is therefore processed through the regular asylum procedure. This has been clarified by the Audiencia Nacional in Decision SAN 1780/2017, 24 April 2017. See EASO, Border procedures for asylum applications in EU+ countries, 2020, p. 44.

[568] AIDA & ECRE, Country Report: Border procedure (border and transit zones), 2021.

[569] Article 16(2) Asylum Act.

scaled the border fences – are not assessed individually, and legal assistance is not provided.[570] Thus, the safeguards following from the APD do not seem to be followed in practice in Melilla. This is especially evident in relation to persons who are intercepted when trying to scale the border fences under the practices of 'rejections at the border'. In such situations, the border procedure seems to apply arbitrarily.[571]

Safeguards in accordance with the SBC and the CEAS also apply when entry is denied to persons who have crossed the border irregularly. As established by the CJEU, this includes the right of such persons to express their view on the legality of their stay before a decision on return is adopted.[572] Article 1 of the RD sets out common standards and procedures to be applied when 'illegally staying third-country nationals' are returned. As follows from Article 2 (2) a) RD, a member state may decide not to apply the Directive to third-country nationals who are apprehended or intercepted in connection with an irregular crossing of the EU's external border. Nevertheless, the simplified national return procedures applied in such circumstances are still subject to compliance with the conditions laid down in Article 4 (4) of the RD, including the obligation to respect fundamental guarantees and to consider the needs of vulnerable persons (Article 4). According to Article 4 (4) b), furthermore, the principle of non-refoulement shall be respected when third-country nationals are excluded from the scope of the Directive. These procedures and safeguards do however not seem to be respected at the Melilla borderlands either. According to the fact-finding mission to Melilla of the

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570 AIDA & ECRE, Country Report: Border procedure (border and transit zones), 2021. There are no available statistics on the number of border procedures being applied at each location in Spain. According to the Spanish Ministry of the Interior, a total of 9,184 applications were processed under a border procedure in 2019. These applications were initiated at the Spanish borders and from within detention centres. See EASO, Border procedures for asylum applications in EU+ countries, 2020.

571 According to ECRE, the border procedure was applied to persons who had scaled the fences into Melilla in March 2022, but not in June the same year. See ECRE, Country report: Spain, 2022, p. 67.

572 See, in particular C-249/13, Khaled Boudjlida (2014), paras 28–35. The principles established by the case law of the CJEU concerning the right to be heard under the Return Directive are set out in detail in the ECtHR judgment Khlaifia and Others v Italy (2016), paras 42–45.

Council of Europe's Special Representative of the Secretary General on migration and refugees, the Spanish *Guardia Civil* has explained that people who jump the fences do not communicate with the authorities, and the *Guardia Civil* does not seek to establish communication with them either. Thus, no claims for international protection are or can be expressed while people are climbing or being intercepted. The fact-finding mission furthermore stated that there is no access to interpreters, lawyers, or asylum offices, and that people are returned to Morocco without any identification or registration taking place.[573] When people are not heard before being returned, such factors as potential vulnerability, a need for protection, or a person's age will not be noticed, and safeguards in relation to said factors will not be triggered.[574] When no individual assessment takes place, the operation must be defined as a pushback. Such actions do per se include an unwillingness to carry out an individualized examination, and are forbidden under EU, European, and international law.[575]

In April 2018, the UNHCR noted that, since the entry into force of the 2015 amendments in the Spanish Aliens Act, pushbacks at the Melilla and Ceuta land borders had continued to be reported on a regular basis. The UNHCR estimated that, in several incidents in Ceuta and Melilla between April 2015 and April 2018, 1,500 persons had been returned without any proper individual identification procedure having been conducted.[576] The commitments following from the amendments in the Aliens Act had thus not

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[573] N.D. and N.T. v Spain (2020), para 58. See also AIDA & ECRE, Country Report: Border procedure (border and transit zones) 2021, and EASO, Border procedures for asylum applications in EU+ countries, 2020.

[574] That age is not checked before return was confirmed in my conversation with the UNHCR in Melilla and it was addressed by the UN Committee on the rights of the child in its decision of 1 February 2019, D.D. v. Spain, CRC/C/80/D/4/2016.

[575] Cf. Hanaa Hakiki, '*N.D. and N.T. v. Spain: defining Strasbourg's position on push backs at land borders?*' strasbourgobservers.com.

[576] UNHCR, Supplementary observations by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain before the Grand Chamber of the European Court of Human Rights, 5 April 2018. UNHCR's estimate of the number of persons who have been subjected to pushbacks is based on border monitoring it has conducted, as well as on related follow-up activities (through the collection of individual testimonies, reports from civil society organizations in Morocco, and media and press statements by local government authorities).

been fully implemented in Melilla, the UNHCR put forward. Nor had the duty to ensure that 'rejections at the border' are in compliance with international human rights standards, and that asylum claims can be lodged and processed at the border posts.

> Operating arrangements allowing for the identification of persons in need of international protection through fair and efficient asylum procedures, including where relevant, admissibility procedures, without discrimination, are still lacking at these border posts and legal and safe access to such procedures remains effectively impossible for people from sub-Saharan Africa.[577]

In *N.D. and N.T. v Spain*, the ECtHR reiterated that the effectiveness of the Convention requires that states make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border.[578] When refusals take place without individual assessments, as in *N.D. and N.T. v Spain*, the safeguards provided under the ECHR as well as the SBC and the CEAS cannot be applied. The concept of rejections at the border in Melilla seems to be a widespread practice under which individual assessment in line with the CEAS and the ECHR is not provided. However, the situation in *N.D. and N.T. v Spain*, and Spanish compliance with EU law, has not been reviewed by the CJEU; and Spanish accountability for a lack of compliance with the mentioned obligations under EU law has not been established.

Rejections at the border without any individual assessment affect the enforcement of the principle of non-refoulement and the right to seek asylum. Although Spain considers Morocco a 'safe third country', people who are returned to Morocco risk ending up with no possibility of seeking asylum and gaining protection. In *N.D. and NT v Spain*, the applicants argued that the Moroccan authorities had not recognized any international protection mechanism until 2013, and later activities by the Moroccan Office for

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[577] Ibid.

[578] N.D. and N.T. v Spain (2020), paras 209–210.

Refugees and Stateless Persons had been confined to regularizing the status of refugees who had already been recognized by the UNHCR.[579] The Spanish Commission for Assistance to Refugees (CEAR) intervened in the case, stating, in line with the applicants' claims, that the legal framework in Morocco regarding international protection was inadequate.[580] Since the ratification in 1956 of the Geneva Convention Relating to the Status of Refugees, no asylum law had been passed in Morocco. In practice, the UNHCR office in Rabat had dealt with asylum applications since 2013. According to the CEAR, however, most migrants trying to reach the UNHCR office in Rabat were arrested and detained, preventing them from applying for protection.[581] N.D. and N.T. further claimed that other states in the area lacked effective refugee protection systems or were unsafe countries in that regard (e.g. Algeria, Mali, and Mauritania). In the applicants' view, the possibility of applying for international protection in third countries did not constitute an effective remedy, and in any event it was non-existent.[582] Thus, according to the information provided by the applicants and by third-party interveners in the case, the lack of access to Melilla and to asylum procedures in the EU situates the applicants outside the scope of the right to seek asylum and the principle of non-refoulement in general – leaving protection-seeking subjects with no actual possibility of seeking asylum and gaining protection, and trapped in a 'waiting room' in Morocco.[583]

The Spanish concept of rejections at the border relies on Spain's definition of Morocco as a 'safe third country' – a definition that allows Spain to expel persons to Morocco without per se triggering the prohibition of torture and

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[579] Ibid. para 118; and Sergio Carrera, Jean-Pièrre Cassarino and Nora El Qadim, 'EU-Morocco cooperation on readmission, borders and protection: A model to follow?' (2016) *CEPS Papers in Liberty and Security in Europe*.

[580] N.D. and N.T. v Spain (2020), para 158.

[581] Ibid., para 158.

[582] Ibid., para 118.

[583] Cf. Saddiki, *World of walls: The structure, roles and effectiveness of separation barriers* (2017). Saddiki states that sub-Saharan African immigrants who intend to use Morocco simply as a transit route may find that the transit country becomes the host country, in which large numbers of people failing or not venturing to enter Europe have built temporary settlements on Moroccan territory near Ceuta and Melilla: '[I]t is a place where seekers live who cannot reach their Eldorado nor can they return to their home countries.'

the principle of non-refoulement.[584] The ECtHR's decision in *N.D. and NT v Spain*, rejecting the Article 3 claims as manifestly unfounded, supports this definition of Morocco, and constitutes an important part of Spanish practices of rejecting third-country nationals so to prevent their 'illegal entry'.[585] Another piece of this puzzle seems to follow from the 1992 readmission agreement between Spain and Morocco, under which the parties are obliged to accept the return of migrants who 'illegally' have crossed the border.[586] Thus, the 2015 amendments to the Spanish Aliens Act establish the grounds for rejection at the border, and the readmission agreement between Spain and Morocco regulates how such decisions are to be executed. Under the readmission agreement, Spain can apply this 'operationalization of the border' and maintain the fences as an impenetrable line of demarcation. Although the Spanish Aliens Act and the readmission agreement between Spain and Morocco include procedural guarantees for fundamental rights, the UNHCR's understanding is that none of these guarantees were applied to returns at the border in Melilla at the time of the situation in *N.D. and N.T. v Spain*.[587]

Notwithstanding the ECtHR decision on the claims made under Article 3, the principle of non-refoulement is of relevance at border crossings, because it obliges states to conduct an individual risk assessment in order to identify persons in need of protection before returning a person to any country, and

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[584] The Spanish court, Audiencia Nacional, has ruled on various occasions that Morocco is a safe third country. It has cited the country's 'advanced status' under the European Neighbourhood Policy as indicative of its safety. See Audiencia Nacional, Decision SAN 428/2018, 2 February 2018; and AIDA & ECRE, Country Report: Safe third country.

[585] The ECtHR rejected the claim under Article 3 ECHR as manifestly unfounded, but considered the other complaints admissible, noting that the applicants, who were returned to Morocco, did not claim to have been subjected to treatment contrary to Article 3 of the ECHR when deported to Morocco. Further, the ECtHR noted that nothing in the file indicated any violations of Article 3 by the Spanish authorities. See Troisième Section Dècision, Requêtes nos 8675/15 et 8697/15 ND contre l'Espagne et NT contre l'Espagne, 7 July 2015; and N.D. and N.T. v Spain (2020), para 4.

[586] Agreement between the Kingdom of Spain and the Kingdom of Morocco on the movement of people, the transit and the readmission of foreigners who have entered illegally (1992).

[587] UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights, 2015, section 2.2.4.

to provide access to asylum procedures if such are needed. Without such an assessment, the principle of non-refoulement and the right to seek asylum cannot be assured.

Although the border between Morocco and Melilla is a land border, the border as a place where rights and safeguards under the CEAS, the EU Charter, and the ECHR apply is not materialized. Instead, the border is made flexible and shifting due to practices of rejections at the border, the definition of Morocco as a safe third country, and the readmission agreement between Spain and Morocco. Another piece of this border construction is provided by the ECtHR's reasoning and conclusions on how the lack of an individual removal decision can be attributed to the protection seeker's own conduct. We turn to that question now.

4.1.2.1.2 Theoretic and Illusionary rights: The Protection Seeker's Own Conduct

In *N.D. and N.T. v Spain*, the ECtHR reiterated that the effectiveness of the Convention requires that states make available genuine and effective access to means of legal entry, in particular border procedures for those who have arrived at the border. Those means should allow all persons who face persecution to submit an application for protection, based in particular on Article 3 of the ECHR, under conditions which ensure that the application is processed in a manner consistent with international norms, including the ECHR. The absence of such appropriate arrangements renders all the ECHR provisions designed to protect individuals who face a genuine risk of persecution ineffective.[588] The Court moreover noted that, where such arrangements exist and secure the right to request protection under the ECHR (and in particular Article 3) in a genuine and effective manner, the Convention does not prevent states, in the fulfilment of their obligation to control borders, from requiring applications for such protection to be submitted at the existing border crossing points.[589] The border crossing point at Beni-Enzar is the only entry point into Melilla with an asylum office. As several reports have shown, however, this border crossing point is not accessible for people from sub-

[588] N.D. and N.T. v Spain (2020), paras 209–210.

[589] N.D. and N.T. v Spain (2020), paras 209–210.

Saharan Africa. This section provides an example of how the contextual and spatial setting of law is omitted in the negotiation of accountability for the protection of fundamental rights, and how such omission invisibilizes fundamental rights.

In *N.D. and N.T. v Spain*, the ECtHR considered that the lack of individual removal decisions could:

> […] be attributed to the fact that the applicants, if they indeed wished to assert rights under the Convention, did not make use of the official entry procedures existing for that purpose, and was thus a consequence of their own conduct […]. Accordingly, there has been no violation of Article 4 of Protocol No. 4.[590]

The Court noted that Spanish law afforded the applicants several possible means of seeking admission – by applying for a visa, by applying for international protection at the Beni-Enzar border crossing point, or by applying at Spain's diplomatic and consular representations in their countries of origin or transit or else in Morocco.[591] Since the applicants did not use these means for seeking admission, the question of their 'own conduct' was activated, leading in principle to their 'loss of rights'. The Spanish government submitted that the applicants in *N.D. and N.T. v. Spain*:

> […] had in no way demonstrated that they had been incapable of using the numerous legal procedures available in order to obtain permission to cross the border into Spain. The Government argued that it was open to any alien wishing to enter Spain in order to claim asylum or international protection in general to submit such a claim at the Beni-Enzar border crossing point (section 21 of Law no. 12/2009 […]) or at the Spanish embassy in Rabat or the Spanish consulates in Morocco (in particular in Nador), or a Spanish embassy or consulate in another country (section 38

[590] Ibid., para 231.

[591] Ibid., para 212.

> of Law no. 12/2009 […]). Hence the applicants could – if they had needed to claim asylum or obtain international protection on other grounds – have submitted such a claim to the aforementioned institutions […].[592]

The submission from the Spanish government relies on Spanish law that seemingly provides, at least in text, for a right to seek asylum or for legal pathways to such procedures. However, the asylum office at the Beni-Enzar border crossing point was set up on 1 September 2014, after the events of *N.D. and N.T. v Spain*. Notwithstanding this fact, the Spanish government claimed that even before that, a legal avenue to that effect had been established, and that 'twenty-one asylum applications had been lodged between 1 January and 31 August 2014 in Melilla, including six asylum applications lodged at the Beni-Enzar border crossing point […]'.[593] After the opening of the asylum office at Beni-Enzar, 404 asylum applications were submitted between 1 September and 31 December 2014 at that border crossing point – thus far more than the six applications submitted in the first eight months of 2014. Furthermore, as the Commissioner for Human Rights of the Council of Europe indicated, citing the 2014 annual report of the Spanish Ombudsman, those 404 applications were all submitted by Syrian refugees at a time when the Syrian crisis had intensified; and not a single asylum request from persons from sub-Saharan Africa was submitted at Beni-Enzar during the four months in question.[594] Nor, according to the statistics, did the number of applications for asylum from persons from sub-Saharan Africa increase after 1 September 2014, unlike the number from Syrian nationals.

As the ECtHR saw it, however, the uncontested statistics presented in the case did not allow for the conclusion that Spain had not provided genuine and effective access to the border crossing point. The Court stated that the applicants' general allegation – that it was not possible at the material time for anyone to claim asylum at the Beni-Enzar border post – was insufficient to

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[592] Ibid., para 204.

[593] According to the Spanish government, the people who had applied for asylum came from Algeria, Burkina Faso, Cameroon, Congo, Côte d'Ivoire and Somalia. Ibid., para 213.

[594] Ibid., paras 215–216.

invalidate this conclusion.[595] The applicants contested the assertion of the Spanish government that it had afforded them genuine and effective legal options for obtaining lawful entry into Spain. They also stressed the impossibility of gaining access to most of the locations mentioned by the government, especially for individuals from sub-Saharan Africa.[596] The Court was not affected by reports on the practice of the *Guardia Civil* of notifying Moroccan authorities, who obstructed not only persons approaching the fences, but also those who approached official border crossing points such as that at Beni-Enzar.[597] Nor did the ECtHR give weight to the various reports, particularly from the UNHCR and the Commissioner for Human Rights of the Council of Europe, which noted that in practice it was physically impossible or very difficult for persons from sub-Saharan Africa staying in Morocco to approach the Beni-Enzar border crossing point. The reports mention racial profiling or severe passport checks on the Moroccan side as an explanation for these difficulties (see section 4.2.2.1).[598]

The ECtHR reasoned that 'none of these reports suggest that the Spanish government was in any way responsible for this state of affairs'.[599] The Court further highlighted that the practice of the *Guardia Civil* of notifying Moroccan authorities of any movements at the Melilla fence, who in turn prevented people in Moroccan territory from jumping the fence, appeared to apply only at unauthorized border crossings, and that nothing suggested a similar situation prevailed at official border crossing points, including that at Beni-

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[595] Ibid., para 217.

[596] Ibid., para 205.

[597] Ibid., paras 217–219.

[598] The lack of access to the border crossing point can be compared to the situation in Shahzad v Hungary. That case concerned a group of twelve Pakistani nationals, including the applicant, who had entered Hungary irregularly by cutting a hole in the border fence between Hungary and Serbia, and who later were pushed back to Serbia by Hungarian police officers. The ECtHR found that the applicant had not created a disruptive situation, and noted that the applicant did not have genuine or effective access to a means of legal entry – the only border crossing point were located 40 kilometres or more away – and access to that point was limited to 15 applicants for international protection per transit zone a day; and it required prior registration on a waiting list. See Judgement of 8 July 2021, Shahzad v Hungary, Application No. 12625/17, paras 60–65.

[599] Ibid., para 218.

Enzar.[600] The applicants claimed they had been chased by Moroccan officers when trying to approach the border crossing point at Beni-Enzar.[601] The Court, however, stressed that the applicants did not claim they had tried to enter Spanish territory by legal means; and that it was only at the hearing before the Grand Chamber that they alleged that they had tried to approach Beni-Enzar but had been 'chased by Moroccan officers'. Since the applicants did not claim at any point 'that the obstacles encountered were the responsibility of the Spanish authorities', the Court declared itself unpersuaded that the applicants had had the required cogent reasons for not using the border crossing point at Beni-Enzar.[602] The lack of an individual removal decision, therefore, could be attributed to their own conduct.[603]

The ECtHR insisted on asserting the possibilities available to the applicants to enter Spain lawfully 'in particular with a view to claiming protection under Article 3', and if such possibilities 'existed at the material time and, if so, whether they were genuinely and effectively accessible to the applicants'.[604] Despite the insistence of the Court, the assessment of the Spanish law and practice did not engage with the realities of the applicants, their individual situation, or their prospects for actually crossing the border at Beni-Enzar or for obtaining a visa, or apply for asylum at a Spanish embassy.[605] Since N.D. and N.T. are nationals of Mali and of Côte d'Ivoire respectively,

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[600] Ibid., para 219.

[601] Ibid., para 220.

[602] Ibid.

[603] Ibid., para 231.

[604] Ibid., para 211.

[605] According to ECRE and AIDA, applications for international protection could not be lodged at Spanish embassies or consular representations until the year of 2020. This was so although Article 38 of the Spanish Asylum Act foresees that possibility. Through a landmark judgement of October 2020, the Spanish Supreme Court overturned previous practices and officially recognized the right to apply for asylum at embassies and consulates. See Judgement of the Spanish Supreme Court of 15 October 2020, Sala de lo Contencioso, STS 3445/2020. The Supreme Court specified that Ambassadors and Consuls have the duty to assess whether the integrity of the applicant is at risk, in which case he or she must be transferred to Spain accordingly. According to ECRE and AIDA there are however no reports of asylum applications being registered and processed at Spanish embassies in third countries. Country report: Spain, 2022, p. 17.

they are not allowed to travel to the EU without a visa.[606] As seen in the analysis of the visa requirement in section 4.1.1, the use of the visa as a means of entering the EU and seeking asylum there is clearly limited. As we know from *PPU X and X v Belgium* and *M.N. and Others v Belgium*, no obligations in relation to the right to seek asylum and the principle of non-refoulement follow from EU law or from the ECHR in relation to the assessment of visa applications submitted by protection seekers at the embassies of EU member states in third countries. The ECtHR thus referred the applicants to a space outside the scope of the Convention and of EU law.

The ECtHR reaffirmed the obligations set out in the Convention, noting that:

> […] it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective […] Hence, the domestic rules governing border control may not render inoperative or ineffective the rights guaranteed by the Convention and the Protocols thereto […].[607]

Although not assessing the accessibility of the legal channels into the EU proposed by Spain, the Court applied the criterion of the applicants' 'own conduct' in relation to these suggestions. As Papageorgopoulos has argued, 'the Court seems to walk on a subsidiarity path simply looking into whether domestic authorities have tried to engage with their Convention obligations […] rather than asserting whether such engagement was indeed not "theoretical and illusory"'.[608] The Court thus relied on Spain's suggested gateways into the EU without assessing whether these suggested routes were practical and effective for protection seekers from sub-Saharan Africa. Such

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[606] See the Visa List Regulation.

[607] N.D. and N.T. v Spain (2020), para 171.

[608] Stavros Papageorgopoulos, 'N.D. and N.T. v. Spain: do hot returns require cold decision-making?' (2020) asylumlawdatabase.eu. See also Sergio Carrera, 'The Strasbourg court judgement N.D. and N.T. v Spain: A carte blanche to push backs at EU external borders?', *Robert Schuman Centre for Advanced Studies Migration Policy Centre* (2020) on the concept of applicants' own conduct.

an understanding detaches the situation from commitments and obligations under the CEAS, and from the realities of this scene of interaction – characterized by third-country engagement, social relations, policies, and operations aimed at preventing migration. When understanding the situation without such perspectives, the right to seek asylum as well as the principle of non-refoulement become empty promises rather than materialized norms that provide protection to those in need.

The outcome in *N.D. and N.T. v Spain* further risks legitimizing collective pushbacks. Operational border tactics that include the removal of people without individual assessment do generally interfere with the principle of non-refoulement, and the judgement risks invisibilizing safeguards in relation to the right to seek asylum and the principle of non-refoulement.[609] When collective pushbacks are legitimized, there will not be any individual assessment of potential risks under Article 3. Obligations in relation to the absolute prohibition of non-refoulement will thus be invisibilized, and the Spanish operationalization of border control, including through pushbacks and rejections at the border, will be accepted as a legitimate approach in European migration and border control.[610] Under the Spanish operationalization of the border, border guards do not establish contact with persons who try to scale the fences. There is thus no attempt to conduct any assessment of risks. As Hakiki has noted, the cases that the Court cited in its assessment of the applicants' own conduct in relation to Article 4 protocol 4 ECHR emanate from situations where the authorities had at least attempted to assess the applicants' circumstances.[611] The judgement in *N.D. and N.T. v Spain* leaves Spain with no obligation in that regard.

In *Hirsi Jamaa v Italy*, the ECtHR reiterated that 'problems with managing migratory flows cannot justify having recourse to practices which are not

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[609] As Thym has argued, the judgement in N.D. and N.T. v Spain and the concept of applicants' 'own conduct' should not be read as applying to Article 3, due to the Article's absolute character prohibiting torture, including refoulement. See Daniel Thym, '*A restrictionist revolution? A counter-intuitive reading of the ECtHR's N.D. & N.T. judgment on 'hot expulsions' at the Spanish-Moroccan border*' (2020) verfassungsblog.de.

[610] Cf. A.E.A. v Greece (2018); and M.A. and Others v Lithuania (2018).

[611] Hakiki, '*N.D. and N.T. v. Spain: defining Strasbourg's position on push backs at land borders?* strasbourgobservers.com.

compatible with the State's obligations under the Convention'. In the same judgement the ECtHR stated that, in the context of interceptions on the high seas, preventing migrants from reaching the borders of a state and pushing them back to another state engages responsibility under Article 4 of Protocol No. 4.[612] In *N.D. and N.T. v Spain*, however, the ECtHR found that the conduct of the people trying to cross the border justified the acts of the Spanish authorities, even though the action conducted by Spain included a pushback manoeuvre. When people cross into Melilla or are at the border, the principle of non-refoulement and the right to seek asylum are applicable and must be guaranteed under the CEAS and the ECHR. In such situations, the people in question have crossed the border between outside and inside and altered a space of inclusion – the centre of legal obligation – where rights under European and EU law are applicable and enforceable. When these subjects are not afforded the ability – and the right – to apply for asylum, and an individual assessment of risk, their spatio-legal position can rather be framed as that of outsiders, or that of subjects trapped in a sphere of exclusion even when 'within'. They are thus, when pushed back, excluded from both territory and the enjoyment of fundamental rights.

As the applicants and the third-party intervenors pointed out in *N.D. and NT v Spain*, access to the border crossing in Beni-Enzar was obstructed by Moroccan border guards; and persons from sub-Saharan Africa did not appear to have access to the border crossing point. If this information is factual, then the right to seek asylum does not seem – for certain persons – to be legally enforceable. Not in Morocco, since the possibility to seek asylum there is limited; not at an EU member state's embassy; not at the border crossing point at Beni-Enzar; and not if intercepted by Moroccan or Spanish border guards at the fence. This obstruction of entry occurs despite the obligations that follow from the SBC and the CEAS. The safeguards for fundamental rights of these laws are invisibilized; while other parts of the legal design of border control are highly materialized and visible – as in fences with no gateways for protection seekers, and in violent and sometimes fatal situations (see section 4.2.2).

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[612] Hirsi Jamaa and others v Italy (2012), paras 179–180.

The ECtHR only assessed the 'legal representation' of this scene of interaction. The playing out of it is thereby neglected, as are the realities that protection seekers alter when they approach Melilla in order to seek asylum. The Court's reasoning regarding applicants' 'own conduct' manifests a blindness to these realities, invisibilizing fundamental rights.[613]

4.1.2.2 Delegation of Migration and Border Control: Cooperation with Morocco

This section turns to the EU's use of third-country and bilateral cooperation with Morocco, and provides an example of how cooperation with Morocco establishes a 'contact-less' migration and border control that invisibilizes fundamental rights.

The ECtHR highlighted in *N.D. and N.T. v. Spain* that the applicants did not claim at any point that the obstacles they encountered when trying to access the border crossing point were the responsibility of the Spanish authorities.[614]

> In the present case, even assuming that difficulties existed in physically approaching this border crossing point on the Moroccan side, no responsibility of the respondent State for this situation has been established before the Court.[615]

However, the Court did not assess cooperation on migration and border control between Spain and Morocco. Instead, it concluded that 'none of these reports suggest that the Spanish Government was in any way responsible for this state of affairs'.[616] The Court further stressed that the ECHR does not imply a general duty for a contracting state to 'bring persons into its own jurisdiction'.[617]

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[613] After N.D. and N.T. v Spain, the ECtHR has developed the concept of applicants' own conduct in e.g. Ibid. and A.A. and Others v North Macadonia (2022), see section 2.1.1.2.1.

[614] N.D. and N.T. v Spain (2020), para 220.

[615] Ibid., para 221.

[616] Ibid., para 218.

[617] Ibid., para 221.

Notwithstanding what was submitted to the Court, EU and Spanish cooperation with Morocco is institutionalized, and has been for decades. This cooperation includes bilateral agreements between Morocco and Spain, such as the 1992 readmission agreement between Spain and Morocco, as well as third-country agreements between the EU and Morocco. EU cooperation with Morocco comprises several measures, among them the non-legally binding political declaration on a mobility partnership between the EU and Morocco (2013).[618] The focus of this agreement with Morocco on mobility partnership is on legal migration, on migration and development, and on the 'fight' against irregular migration. The agreement sets out a series of political objectives and envisions several initiatives for ensuring 'that the movement of persons is managed as effectively as possible'.[619] These measures include negotiations between the EU and Morocco on facilitating the issuance of visas for certain groups of people, and an agreement for the return of irregular migrants (readmission).

Building on the 2013 mobility partnership, the EU-Morocco Joint declaration (2019) called for enhanced consultation and balanced cooperation on mobility and migration. The aim was to take 'the partnership forward in a flexible manner', regarding consultation and cooperation on mobility, migration, and the 'fight against irregular migration'.[620] Proclaiming that the management of migration requires sustained and common efforts, it set out a series of joint objectives, including return, readmission, and reintegration; the facilitation of visas; an improvement in the mobility of professionals; the prevention of and fight against irregular migration and trafficking in human beings; a raised awareness of the risks tied to irregular migration; a stepping-

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618 Council of the EU, Joint declaration establishing a Mobility Partnership between the Kingdom of Morocco and the European Union and its Member States (2013). In 2013, the Commission framed the use of Mobility Partnerships between the EU and Morocco as a 'flexible and non-legally binding framework for ensuring that the movement of people between the EU and a third country can be managed effectively'. 'European Commission: Migration and mobility partnership signed between the EU and Morocco' ec.europa.eu 13-06-07.

619 'European Commission: Migration and mobility partnership signed between the EU and Morocco' ec.europa.eu 13-06-07.

620 Council of the EU: Joint declaration by the European Union and Morocco for the fourteenth meeting of the Association Council, 2019.

up of the management of the Union's sea and land borders; and the development of mutually beneficial human exchanges, in particular for students, young workers, and young volunteers.[621] In 2022, the partnership between the EU and Morocco was renewed, and a new operational anti-smuggling partnership between the EU Commission and Morocco was established. The partnership particularly concerns 'support for border management, enhanced police cooperation (including joint investigations), awareness-raising on the dangers of unlawful migration and enhanced cooperation with EU agencies responsible for home affairs'.[622] The partnership also comprises funding to Morocco for the 2021-2027 period.[623] The press release following the renewal of the partnership stated that, during the first half of 2022 alone, Morocco had prevented more than 26,000 'irregular departures'.[624]

Other aspects of cooperation with Morocco are enhanced under the EU Trust Fund for Africa (EUTFA). Morocco receives funding to support Moroccan migration policies that take into account 'Morocco's strategic geographical location in Africa'.[625] Funding under the EUTFA involves

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[621] Ibid. Although the Commission was granted a mandate from the Council to negotiate a readmission agreement with Morocco in 2000, such an agreement has not yet been concluded, despite additional offers to Morocco. See Carrera, Cassarino and El Qadim, 'EU-Morocco cooperation on readmission, borders and protection: A model to follow?' (2016) *CEPS Papers in Liberty and Security in Europe*. Morocco has also rejected initiatives from the EU concerning 'offshore asylum processing' and 'regional disembarkation' centres in the country, as well as 'warehousing of migrants in immigration detention facilities'. See 'OHCHR: UN expert commends Morocco's international leadership on migration but urges immediate action on domestic racial inequality' (ohchr.org).

[622] 'European Commission: Joint press release: European Commission and Morocco launch renewed partnership on migration and tackling human smuggling networks' ec.europa.eu 22-07-08.

[623] Ibid.

[624] Ibid.

[625] 'Emergency Trust Fund for Africa: North Africa' (ec.europa.eu). This includes several projects on both a national and regional basis, which are described as aiming at protecting vulnerable migrants and refugees, 'saving lives' through institutional support for migration management, and creating economic opportunities as alternatives to irregular migration. Under regional programmes, such as the BMP Maghreb program – which seeks to

institutional support for migration management, as well as programmes to increase the integration of border management and to improve its capacity.[626] The largest amount of money is distributed under programmes that focus on strengthening national institutions of border management; supporting the actions of the Moroccan authorities on the management of migratory flows, including the strengthening of integrated border management; and generally promoting programmes and actions aimed at improving migration and border management.[627] The EU-Morocco Association Agreement (2000) provides for further cooperation in this area.[628]

The cooperation between Morocco and Spain involves the EU and is supported by it. Thus, the lack of efficient safeguards and the situation in Melilla are not just the responsibility of those two countries. Furthermore, the fact that people arrived in record numbers in May 2021 (mostly to Ceuta but also to Melilla), when Morocco temporarily stopped controlling the exit of persons from its territory, due to a 'diplomatic punishment', speaks to the effect of externalizing border control through 'exit control' conducted by a third country.[629] The European Parliament has in a resolution stated that it

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'mitigate vulnerabilities arising from irregular migration and to combat irregular migration' – the EUTFA aims at 'enhancing the institutional framework of Morocco and Tunisia to protect, monitor and manage the borders, in line with internationals standards and human rights that identifies and mitigates risks to rights holders at borders, while ensuring the free movement of bona fide travellers and goods'. The programme provides support to 'strategic development, purchase and maintenance of priority equipment, capacity building and development of necessary standards and procedures at national level'. 'Emergency Trust Fund for Africa: Maghreb' (ec.europa.eu).

[626] 'Emergency Trust Fund for Africa: Morocco' (europa.eu).

[627] Ibid.

[628] The EU-Morocco Association Agreement entered into force in 2000, including provisions on dialogue covering migration, illegal migration, and return (Article 69). See also the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part. Cooperation with Morocco further takes place through regional dialogues under the Rabat Process.

[629] 'Migrants reach Spain's Ceuta enclave in record numbers' (bbc.com) 22-03-10; and 'Explainer: How did the migrant crisis in Spain's city of Ceuta occur and what is going to happen now?' (elpais.com) 22-10-03. According to *El Pais*, the apparent motive was

'Rejects Morocco's use of border control and migration, and unaccompanied minors in particular, as political pressure against a Member State of the EU[…]'.[630] Taken together, these factors – the extensive cooperation with Morocco, the possibility of using border control as a means of political pressure, the high number of prevented entries under the EU and Morocco partnership, and the inaccessibility of the border crossing point at Beni-Enzar for persons from sub-Saharan Africa – point to (in the words of the CAT committee)[631] an 'undeniable cause-effect' relationship between on the one hand the actions taken by the EU, Spain, and Morocco, and on the other the 'choices' made by people to climb over the fences instead of 'using' the regular passage at Beni-Enzar.

The EU's use of third-country cooperation and non-legally binding agreements, such as the 2013 mobility partnership between the EU and Morocco, is a complex matter in the light of EU constitutional law. These policies involve an informalization of cooperation, from which actors like the European Parliament are excluded.[632] Another complexity is that non-legally

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Spain's decision to admit Brahim Ghali into the country for medical treatment while he was suffering from Covid-19. Ghali is the Secretary-General of the Popular Front for the Liberation of Saguia el-Hamra and Río de Oro (Polisario Front), a liberation movement for the Sahrawi people. See also 'Atlantic route and Spain: Ceuta court rejects deportations of children to Morocco – One in three journeys end deadly on the Canary route' (ecre.org).

630 European Parliament resolution of 10 June 2021 on the breach of the UN Convention on the Rights of the Child and the use of minors by the Moroccan authorities in the migratory crisis in Ceuta (2021/2747(RSP)), 2021.

631 Decision of the Committee against Torture of 25 November 2011 under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (forty-seventh session) concerning Communication No. 368/2008, para 10.1. In its decision the Committee noted on the 'undeniable cause-effect' relationship between the death of Mr. Sonko who tried to enter Ceuta by swimming and the actions taken by the Spanish Civil Guard officers.

632 The EU may, under Article 216 TFEU, conclude an agreement with one or more third countries or international organizations that involves the European Parliament. Such agreements are binding upon the institutions of the EU and upon its member states (Article 216 (2) TFEU). Agreements between the EU and third countries or international organizations shall be negotiated and concluded in accordance with the procedure provided for in Article 218 TFEU. This procedure includes authorization on the opening

binding agreements bypass the EU Charter. According to Article 51, the provisions of the Charter apply to the institutions[633], bodies, offices, and agencies of the Union, and to the member states only when they are implementing EU law. When an EU institution, such as the European Commission, concludes agreements, issues statements, makes working arrangements, or provides financial support on migration and border control with third countries under forms that do not constitute formal law or have legally binding effect; but which instead constitute non-legally binding agreements or operational or 'soft law' instruments, like the 2013 Mobility partnership agreement, the Charter is not triggered and thus does not apply.[634] The use of non-legally binding agreements further means that fundamental rights are unenforceable for individuals affected by the application of said agreements; and that the CJEU has no jurisdiction to review their validity, since the Court only has jurisdiction to review the validity of legislative acts (Article 263 TFEU).[635] Extraterritorial migration and border control in third countries does neither generally, under established law as it stands, trigger the application of extraterritorial jurisdiction either. Therefore, the ECHR too is inapplicable.

The use of soft law instruments such as 'mobility or migration partnerships', 'declarations', and 'statements' is probably seen as an efficient tool for concluding agreements on migration control. They offer flexibility and informality – a shorter temporality than is offered by 'hard law'. These

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of negotiations from the Council (Article 218(2) TFEU), consent from or consulting of the European Parliament (Article 218(6) TFEU), as well as immediate and full information to the European Parliament of all stages of the procedure. The CJEU may also be consulted on the compatibility of the agreement with European law (Article 218(11) TFEU).

633 Article 51 of the Charter addresses institutions, bodies, offices and agencies of the Union. Article 13(1) TEU states that the institutions of the EU are the European Parliament, the European Council, the European Commission, the CJEU, the European Central Bank and the Court of Auditors.

634 Cf. Ward, 'Article 51 – Field of application' in Peers and others (eds), *The EU Charter of fundamental rights: A commentary*, p. 1575.

635 Cf. e.g. Juan Santos Vara, 'Soft international agreements on migration cooperation with third countries: a challenge to democratic and judicial controls in the EU', in Sergio Carrera, Juan Santos Vara and Tineke Strik (eds), *Constitutionalising the external dimensions of EU migration policies in times of crisis* (Edward Elgar Publishing Limited 2019).

constructions are played out, however, in the midst of the tension between migrating subjects and an EU that for the most part wishes to prevent migration. Operating outside the legal framework, these constructions evade scrutiny by the CJEU, and they bypass the legislative processes and democratic institutions of the Union. They create vacuums – spaces where fundamental rights become fictional privileges that are not enforceable for those in need.[636] Non-binding agreements may be flexible and fast, but they thus side-line guarantees on fundamental rights, blur attributability further, and prevent access to effective remedies for those affected. Under third-country cooperation, the border between Morocco and Melilla becomes flexible and shifting, whereas the applicability of fundamental rights remains static and territorial under the ECHR, the CEAS, and the EU Charter. Such cooperation thus relies on the territorial spatiality of fundamental rights and constitutes another component in the process of invisibilization. The choice of instrument – of a statement, declaration, or partnership equivalent to 'soft law' – reduces accountability in connection with violations of fundamental rights. Such constructions are less transparent than 'hard law', making judicial and democratic scrutiny a difficult task. The complexity and the legal uncertainty

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[636] When EU agents operates in non-EU states which are not state parties to the ECHR, the third country involved cannot be responsible under the ECHR or EU law. Only the acting/outsourcing EU state can be. State responsibility for wrongful acts is also regulated under other instruments and in accordance with the UN International Law Commission (ILC) Articles on state responsibility for wrongful acts, under which each cooperating state can be held responsible. Responsibility under ILC is not diminished or reduced by the fact that a plurality of states is involved in the wrongful act. On the relevance of the International Law Commission and the Articles on the Responsibility of States for Internationally Wrongful Acts, see e.g. den Heijer, *Europe and extraterritorial asylum* (2012). den Heijer explores case law and legal doctrine on the extraterritorial applicability of human rights, focusing especially on how the notions of 'territory' and 'jurisdiction' have been incorporated into human rights law as well as the international law regime, the Law on State Responsibility, and the allocation of international responsibilities for wrongful conduct when a plurality of international actors is involved in the conduct. See also Gammeltoft-Hansen, *Access to asylum: International refugee law and the globalisation of migration control* (2011); Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017); Nora Markard 'The right to leave by sea: Legal limits on EU migration control by third countries' *The European Journal of International Law* (2016); and Kienast, Feith Tan and Vedsted-Hansen 'EU third country arrangements: Human rights compatibility & attribution of responsibility', Asile Project, 2023.

of when extraterritorial jurisdiction and thereby obligations arise facilitates the evasion of attributability to the EU, and in this case Spain. The ECtHR, however, did not assess this complexity in *N.D. and N.T. v Spain*.

Human-rights violations in the field of border and migration control can be left unsanctioned under cooperative arrangements with third countries, due to the difficulties associated with linking the measures undertaken to those obligated by the law. By involving third countries in this way, the EU or a member state lack authority and control over the persons concerned.[637] Notwithstanding this lack of authority and control, however, the financing and coordination of migration control by EU actors serve to construct borders that prevent people from entering the Union. This may involve several violations of fundamental rights, at least by proxy, through a 'contact-less' control over the people concerned.[638] By de-territorializing and externalizing border control through third-country cooperation, the EU acts within, and through, the territoriality of fundamental rights, reinforcing the exclusion and weak status of protection seekers.[639]

Non-legally binding third-country agreements function as a building block in the construction of border control at Melilla. The mixture of different actors

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[637] Cf. the ECtHR's definition of extraterritorial jurisdiction in e.g. Hirsi Jamaa and others v Italy (2012) and Al-Skeini and Others v the United Kingdom (2011).

[638] Cf. Mariagiulia Giuffré and Violeta Moreno-Lax, 'The rise of consensual containment: from 'contactless control' to 'contactless responsibility' for migratory flows', in Satvinder Singh Juss (ed), *Research handbook on international refugee law* (Edward Elgar Publishing 2019); Nora Markard 'The right to leave by sea: Legal limits on EU migration control by third countries' (2016); and Thomas Gammeltoft-Hansen, 'International cooperation on migration control: Towards a research agenda for refugee law', *European Journal of Migration and Law* (2018), p. 379. Gammeltoft-Hansen has noted that cooperation involving the ordering or encouraging of another state's authorities to block or pull back people that are trying to cross borders can be argued to produce an 'extraterritorial effect'. Under international and European law, 'extraterritorial effects jurisdiction' can be established in situations where the responsible state produces extraterritorial effects without being extraterritorially present itself, and without the requirement of having authority and control over the individual concerned. Similarly, Gammeltoft-Hansen points out that financing, training, and providing equipment for migration control carried out by third states can 'be argued to produce extraterritorial effects if there is a sufficiently direct link between funding and breach of obligation.'

[639] Cf. Shachar describes this as the 'shifting border'. See Shachar, *The shifting border: Legal cartographies of migration and mobility – Ayelet Shachar in dialogue* (2020).

and agreements results in a scheme where responsibility for possible breaches of fundamental rights is hard to trace to any particular actor or state. Spain's construction of the border relies on its relationship with Morocco and its ability to push control into Morocco's hands. The EU's external border at this scene of interaction is designed within this flexible spatiality – constructed and re-constructed in relation to the territoriality of rights and the complexity of attributability under extraterritorial arrangements. Despite the firmness of the border fences between Morocco and Melilla, the third-country cooperation at this scene of interaction both blurs the borderline, while simultaneously externalizing it to Morocco.

In this spatio-legal interaction, this scene of interaction presents a variety of realities, rights, and levels of protection, separated from each other by a borderline penetrable for some bodies but impassable for others. The analysis reveals that EU and Spanish migration and border control is permeated by the asymmetry and rely on the ability to act extraterritorially. This invisibilization takes place although migration and border control in Melilla is enforced at an external 'land border', where rights under the ECHR and the CEAS are supposed to be triggered. The spatio-legal interaction of this scene of interaction manifests a gap between EU legislation on access to asylum procedures when a person is 'at the border', and the realities of how the EU border regime is being played out. In this construction, the readmission agreement between Spain and Morocco, the concept of rejections at the border, the physical construction of the fences, the concept of applicants' own conduct, and third-country cooperation all play an important part in maintaining control over certain groups who wish to cross into Melilla.

Due to law's interaction with space, the EU can offer a system within its territories – Spain and Melilla included – that protects fundamental rights to a certain degree, while at the same time efficiently distancing and denying people access to it.[640]

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[640] The fact that the 'system' of control is efficient is manifested in the following. In 2019, the Moroccan government claimed it had obstructed the arrival of 70,000 migrants into Spain with its security forces. See ECRE, Country report: Spain, 2019, p. 33. Furthermore, according to the European Commission, Morocco prevented more than

4.1.3 The Spatio-Legal Asymmetry

The territorial spatiality of the right to seek asylum and the principle of non-refoulement under the CEAS, the EU Charter, and the ECHR is intrinsic to the process of invisibilization. It is a question of law's interaction with, and dependence on space. Fundamental rights under the EU Charter and the ECHR provide different spatialities, being applicable under different logics. They thus provide 'geographies of fundamental rights', under which the EU can distribute rights and organize its interests. When the EU negotiates its border regime in relation to these spatialities, the right to seek asylum and the principle of non-refoulement can be rendered inapplicable. With such an outcome, neither individual rights nor state accountability can be enforced, and fundamental rights are invisibilized. This negotiation takes place when the EU decides on whether an agreement with a third country should be legally binding or not, and in the judgements that this study addresses.

In the case law analysed, the different legal interpretations and outcomes – from the Advocate General and the CJEU in case *PPU X and X v Belgium*, and from the Chamber and the Grand Chamber in *N.D. and N.T. v Spain* – demonstrate how courts furnish an arena for negotiation.[641] Courts and judges are spatio-legal actors at such intersections, interpreting and developing the EU border regime.[642] The negotiation between different legal interpretations and possible outcomes is evident in *PPU X and X v Belgium*, in which the

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26,000 'irregular departures' in the first half of the year 2022. See 'European Commission: Joint press release: European Commission and Morocco launch renewed partnership on migration and tackling human smuggling networks' ec.europa.eu 22-07-08.

641 Cf. Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), p. 73; Massey, *For space* (2005) p. 179; and Valverde, 'Jurisdiction and scale: Legal "technicalities" as resources for theory' (2009), p. 145. Valverde has contributed to the field of pluralistic legal areas, and shown how the choice of scale tend to invisibilize other scales. Massey has noted that the control of what trajectories will be allowed in the co-production of space takes place in a negotiation.

642 Cf. Delaney on lawyers and judges as 'nomospheric' technicians who operate under significant constraints. However, Delaney claims that these constraints are rarely absolutely determinative of outcomes. The work such persons do is creative and often innovative, and the materials they work with are amenable to diverse reworkings. See Delaney, *The spatial, the legal and the pragmatics of world-making: Nomospheric investigations* (2010), p. 158.

Advocate General argued that the EU Charter was applicable and that humanitarian visas should be granted; whereas the CJEU ruled that the issuance of visas under Article 25(1) a) falls outside the scope of EU law and thus of the EU Charter as well. In *N.D. and N.T. v Spain*, the Chamber held in 2017 that there had been a violation of Article 4 of Protocol No. 4, as well as of Article 13 of the ECHR read in conjunction with Article 4 of Protocol No. 4; whereas the Grand Chamber concluded in 2020 that the lack of an individual removal decision could be attributed to the applicants' 'own conduct', whereupon no violation of Article 4 of Protocol No. 4 could be found. I would suggest that these outcomes are connected to the question of which objectives are given priority in the spatial distribution of the scope of fundamental rights, and that every judgement is the result of interpretation and of a negotiation of legal norms and interests. This negotiation concerns the asymmetry, and whether or not it should be bridged by the extraterritorial applicability of fundamental rights. The legal interpretations provided on this question by the Advocate General in *PPU X and X v Belgium*, and by the Chamber in *N.D. and N.T. v. Spain* (2017), would have changed and reduced the effect of the asymmetry, as well as providing another direction for the ongoing negotiation of the EU border regime.

Moreover, the negotiation in *PPU X and X v Belgium* involved more than just the Court and the parties to the dispute. Member states who participated at the hearing before the CJEU gave expression to concerns about being overwhelmed by applications for humanitarian visas lodged on the basis of the Visa Code.[643] These concerns and interests, emanating from a securitized understanding of migration, thus interacted with international, EU, and member state law. The issues at stake in *PPU X and X v Belgium* concerned protection seekers (in this case a family from Aleppo, Syria) as well as a fear on the part of member states of (what sounds like a natural disaster) 'an uncontrolled flood of applications for humanitarian Visas'.[644] The CJEU's judgement can be understood as a negotiation of these concerns – a negotiation taking place within a pluralistic legal order, and concluding that the

[643] Opinion of Advocate General Mengozzi, PPU X and X v Belgium, C-638/16, para 172.

[644] Ibid.

EU border regime should not allow for any derogations for protection seekers under EU law. Decisions concerning such exceptions should instead lie in national hands. The difference between the CJEU's judgement and the Advocate General's opinion shows how legal interpretation is a question of 'choices' – a negotiation between different interpretations and understandings. It is also a choice between different levels of competence (EU versus member state), and a negotiation of whether and where a burden of obligation should be placed in relation to the rights of protection seekers approaching the embassies of member states abroad.[645] The negotiation is not just legal; it is also spatial. Following from the mentioned case law, the CJEU and the Grand Chamber of the ECtHR concluded that the border crossing situations at hand did not give rise to obligations in connection with fundamental rights under the EU Charter or the ECHR, even though protection seekers' prospects of crossing the EU's external border, seeking asylum, and gaining protection from the risk of refoulement were at stake in the situations at hand. Instead, the interests of EU actors – in maintaining control while keeping individual rights at the border crossing points unenforceable – prevailed.

The inherent spatialization of fundamental rights explains the concentration of the EU border regime on external borders and extraterritorial migration and border control. Under the ECHR, the concept of jurisdiction organizes responsibility and obligations in relation to human rights. However, since fundamental rights – such as the right to seek asylum and the principle of non-refoulement – do not enjoy universal application, they can be spatially controlled and distributed. The EU's external border relies on this. When border control is externalized and operated as a network of external border control under third-country cooperation, the concept of jurisdiction (when territorially interpreted) loses its ability to coordinate responsibility. Jurisdiction and the obligations of states risk instead becoming an argument for escaping what they are supposed to coordinate. This occurs when a state 'moves' its border. The most prominent example of such an organization can be seen in *N.D. and N.T. v Spain*, where the Spanish government claimed that,

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[645] See Valverde for an analysis of pluralistic legal orders operating at different scales. Valverde, 'Jurisdiction and scale: Legal "technicalities" as resources for theory' (2009), p. 142.

while the fences were located on Spanish territory, Spanish jurisdiction began 'beyond the police line' that formed part of 'measures against persons who (had) crossed the border illegally' within the meaning of the SBC.[646] Under the ECHR's spatial distribution of rights, such an understanding of the concept of jurisdiction would allow the Spanish authorities to move the borderline on a case-by-case basis and to delimit their jurisdiction depending on their will and need. While this argument was not accepted by the ECtHR, it illustrates how law's spatiality affects not only legal design but also the contextual setting of the scene of interaction and the operation of border control. However, the most common way of 'moving' borders is through the externalization of migration and border control. By these means, control can be exercised without establishing jurisdiction or accountability for possible breaches of human rights (e.g., subjecting persons to the risk of refoulement, as in *PPU X and X v Belgium* and *M.N. and Others v Belgium*). The externalization of border control can thus be seen as a response to the territoriality of fundamental rights, and as providing EU actors with control over mobility through external and extraterritorial measures not triggering jurisdiction.[647] The spatiality of the ECHR thus operates in a much wider arena, and can be used with another aim than that of the protection of fundamental rights (which the ECHR was established to protect). Under the asymmetry of the EU border regime, the spatiality of the ECHR can thus contribute to the invisibilization of fundamental rights rather than protecting them.

The invisibilization of fundamental rights 'at the border' is moreover evident when we focus on the lack of opportunities for protection seekers to cross the EU's external borders to seek asylum by regular entry. In fact, most asylum-seekers enter the EU in an irregular manner. According to the European Parliament, up to 90% of those granted international protection in the EU have reached it through irregular means: scaling fences, hiding in cars,

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[646] N.D. and N.T. v Spain (2020), para 91.

[647] Cf. Valverde, 'Jurisdiction and scale: Legal "technicalities" as resources for theory' (2009).

crossing the Mediterranean Sea, or being smuggled or trafficked.[648] This fact – that most people applying for asylum in the EU cross the external border in an irregular manner – reveals a border regime which is not designed to make regular entry available to protection seekers. Another example of the invisibilization of fundamental rights 'at the border' is the correspondence between the nationalities of those who attempt an 'illegal border crossing' and the nationalities of asylum-seekers in the EU. Since 2013, Syria has been the most common country of origin among asylum-seekers in the Union, as well as among the persons detected at 'illegal' border crossings. Until 2019, most of the people detected at irregular border crossings were Syrian.[649] Syrians are also asylum-seekers with few exceptions; and they have been eligible, due to the situation in Syria, for asylum as refugees or for subsidiary protection. According to many reports, moreover, illicit pushbacks have been undertaken, and protection seekers have been prevented from requesting asylum.[650] Such

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[648] European Parliament resolution of 11 December 2018 with recommendations to the Commission on Humanitarian Visas (2018/2271(INL)), para E. This number has also been referred to in Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017), p. 44.

[649] Irregular border crossings increased sharply during 2013, with Syrians, Eritreans, and Afghans being the most numerous. Ibid., p. 79. These nationalities correspond to the top nationalities of registered asylum-seekers in the EU over the same time. These numbers consolidated during 2014 and 2015, and in 2019 Syrians were still the largest nationality detected at 'illegal' border crossings. See Frontex, Risk analysis for 2019. In 2020–2021, Syrians were among the top two nationalities detected at 'illegal' border crossings. Between 2013 and 2022, moreover, Syrians were the main country of citizenship of asylum-seekers in the EU Member States. See Eurostat, Statistics explained: Number of asylum applicants drop in 2018; and Eurostat, Statistics explained: Annual asylum statistics, 2023.

[650] The Parliamentary Assembly of the Council of Europe, adopted on 28 June 2019 a resolution targeting pushback policies and practice in Council of Europe member states, see Resolution 2299 (2019) of the Parliamentary Assembly of the Council of Europe, adopted on 28 June 2019: Pushback policies and practice in Council of Europe member states. The resolution addresses member state's concentration on guarding frontiers, and notes that people are refused entry and are expelled without any individual assessment, and that such practices have become a documented phenomenon at Europe's borders, as well as on the territory of member states further inland. The resolution states that these practices are widespread, and in some countries systematic, whereupon these pushbacks,

reports, and the necessity of resorting to irregular means in order to cross the EU's border, point to an external border that, in a wide range of ways, denies access and invisibilizes fundamental rights 'at the border'.

Within the asymmetry – between where control takes place and where the obligation to protect fundamental rights applies – the externalization of border control has developed, and with it the invisibilization of fundamental rights. Driven by a 'securitization' of migration and an explicit aim of reducing and 'combatting migration', the control of the EU's external border has gained more and more resources and political focus.[651] The reinforced focus on external action under the EU border regime institutionalizes and deepens the asymmetry, and further detaches the fictional privilege of seeking asylum from protection seekers not yet within the EU.[652] Under externalization, protection seekers are trapped in exclusion and distanced from EU territory, while the ability to cross the EU's external border is essential for the enjoyment of fundamental rights. The SBC, visa requirements, and carrier sanctions establish the basis for externalization, together with third-country cooperation; and while border control has been externalized, the right to seek asylum and the principle of non-refoulement remain territorial. Furthermore, EU harmonization and the Schengen acquis shift the locus of border control from the member state borders to the external and extraterritorial borders of the

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risking refoulement, can be considered part of national policies rather than incidental actions. The Assembly also connects these practices, taking place at frontline states, with the shortcomings of the Dublin Regulation and the failure of attempts to introduce fair responsibility-sharing in Europe.

651 Securitization of migration is the process through which migration becomes understood and presented as a security issue. According to securitization theory, an issue can be considered securitized only if when the audience accepts it as such, or when it tolerates actions not otherwise regarded as legitimate. A security act is an interaction between the 'securitizer' and the audience, from which the 'securitizer' obtains – if the securitization is successful – permission to override rules otherwise bound seen as binding. See Barry Buzan, *Security: a new framework for analysis,* Boulder, Colorado: Lynne Rienner (1998), p. 26. See also Jennifer Hyndman on how securitization and neo-liberalization politicize borders, Hyndman J, 'The geopolitics of migration and mobility', *Geopolitics*, 17:2, 2012.

652 In the context of the lack of entry rights, Noll has described the right to seek asylum as a 'fictional privilege' for refugees. See Noll, 'Securitising sovereignty? States, refugees, and the regionalisation of international law' in Newman and van Selm (eds), *Refugees and forced displacement: international security, human vulnerability, and the state*, p. 277.

EU. This reconfigures border control and asylum, which become regularized in a harmonized legal system. Individual member states, moreover, may grow reluctant to apply generous rules for the issuance of humanitarian visas on the national level. This shift opens the way to different legal interpretations that make it possible for EU actors to choose what to centre: the protection of fundamental rights, or the 'prevention' of migration.

Through the process of invisibilization, borders are maintained and controlled in ways that do not trigger the obligation to protect fundamental rights. The border thus functions as a control mechanism obstructing mobility and access to the EU, but without triggering safeguards for the rights of protection seekers 'at the border'. Under this asymmetry, the spatiality of fundamental rights becomes a building block in the EU border regime. The protection for individual rights under the ECHR and the EU Charter does not. The border regime is thus connected to and dependent on space in the process of invisibilization.

4.2 The Process of Invisibilization: The Embeddedness and Embodiedness of Law in Space

This part of the chapter demonstrates how the EU border regime is played out as 'boundaries' that limit and demarcate mobility and access to EU territory.[653] From this point of view, boundaries can be understood as 'borders' that protection seekers who try to reach the EU embody. Since these borders are not included within the scope of application of fundamental rights, the focus on boundaries provides this thesis with an additional dimension of law's interaction with space and the process of invisibilization.

Using the concept of boundaries, this chapter addresses law's embeddedness in the physical world and in intersecting social relations. The focus is on how physical things and natural landscapes, as well as structural and relational dimensions of inequality and exclusion, interact with law to

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[653] Massey has defined mobility and control in relation to power, and noted the power-geometry of mobility – that different social groups and different individuals are placed in very distinct locations in relation to flows and interconnections. See Massey, *Space, place and gender* (1994) p. 149.

disadvantage or exclude certain subjects from mobility and access to subsequent asylum procedures in the EU. The following sections address how this spatio-legal interaction constructs spaces of control and exclusion, materializing as fences, pushbacks, violence, and refusal decisions. The analysis demonstrates that law is embedded and embodied in space, and moreover that law is imbued with space and enforced in an interaction with the protection seeker's social relations. In the concluding section of this chapter, the study relates the issue of boundaries to the concept of invisibilization, and concludes that boundaries are part of the production of the EU's external border and integral to the process of invisibilization. The analysis further addresses how protection seekers' social relations become 'spatio-legal positions' in relation to the power-geometry of the EU's external border and the prospects of different subjects to 'cross it'.

4.2.1 The Belgian Embassy in Beirut

Space can be understood as a flow of interconnections and interrelations where bodies, law, and landscapes connect and interact. This understanding involves the infrastructures that human subjects move within and alter when travelling as tourists, workers, businesspeople, and protection seekers. Some travel fast in a 'time-space compression'; while others travel slowly, at high risk and high cost.[654] These spaces and infrastructures are typically regulated by laws that provide access for some bodies but not others. Spijkerboer speaks of a 'global mobility infrastructure' that connects 'every point in the world with every other point in the world'; and which consists of laws, services, and physical structures that enable some people to move across the globe at high speed, low risk, and low cost.[655] The issue of global mobility, according to

[654] Cf. Massey, *Space, place and gender* (1994), p. 149 on time-space compression.

[655] Spijkerboer, 'The global mobility infrastructure: Reconceptualising the externalisation of migration control' (2018), p. 464.

Spijkerboer, is a dilemma for the Global North, which strongly desires mobility but does not want to lose control over migration.[656]

> If any world citizen can turn up at an airport in the global North within 48 hours after leaving her or his home, States in the global North risk losing control over the population present on their territory.[657]

Faced with this dilemma, countries in the global North have decided to have the best of both worlds: 'Instead of controlling access to their territory, they have sought to control access to the global mobility infrastructure – regardless of territory'.[658] Under the EU border regime, such control is primarily constructed through the visa requirement and carrier sanctions, obstructing and distancing protection seekers' access to the global mobility infrastructure. To gain access as a protection seeker to cheap flights and safe, regular travel to the EU, you need to be in possession of a certain type of passport: the privileged one you get as the citizen of a state whose nationals are not required to obtain a visa; or a passport the spatial scope of which has been extended by a Schengen visa; or a limited territorial visa (LTV). Such visas can be applied for at the Belgian embassy in Beirut.

However, as demonstrated in the analysis in section 4.1.1, applying for, and receiving a visa as a protection seeker is not a simple procedure but a question of migration and border control. At this scene of interaction, the protection seeker meets the EU's external border digitally – in the shape of the website of the Belgian embassy; the Belgium visa application centre (TLSContact); instructions on how to apply for a visa (images 10–13); and later on physically, when being interviewed and when receiving the embassy's decision. The border of this scene of interaction is not hypervisible, but it

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656 Spijkerboer notes that, when cross-border movement is presented as desirable, the term 'mobility' is used. When such movement is considered problematic or potentially unwanted, by contrast, the term 'migration' is used. Spijkerboer refers to M. van Ostaijen, 'Between migration and mobility discourses: the performative potential of intra-European movement', 11 *Critical Policy Studies,* 2017, p. 166–190.

657 Spijkerboer, 'The global mobility infrastructure: Reconceptualising the externalisation of migration control' (2018), p. 457.

658 Ibid., p. 457.

exists as a space of selection and exclusion, taking material form in refusal decisions (image 21) and in the impossibility of boarding a carrier without a valid visa. Thus, the EU's external border is not bound under the visa requirement to the physical location of the embassy, and the clash between border and bodies does not appear at first sight to have the same physical implications as in Melilla. The refusal of a visa takes the form of a document, a decision – not of a fence equipped with 'concertinas' (images 36–37). Notwithstanding this, the border of this scene of interaction obstructs the mobility of protection seekers, who need to adapt to it.[659] This adaptation often involves dangerous, time-consuming, and irregular forms of travel – the opposite to time-space compression.

Given the power-geometry of space and of mobility, the EU's visa rules privilege certain subjects and exclude or marginalize others. This is not just a concern for protection seekers in relation to fundamental rights and non-discrimination; it is also a question of who has access to the global mobility infrastructure on a general level. Of particular interest for this study is the situation in this regard of protection seekers who apply for a visa at the Belgian embassy, with or without explicitly stating that the purpose of their visit is to seek asylum, and thus the question of how the border of this scene of interaction is spatio-legally produced in relation to protection seekers.[660] The following sections examine the visa requirement under the EU border regime and focus on how the asymmetry is embedded and embodied at the scene of interaction. The analysis deepens the understanding provided in section 4.1 of how the visa rules impose boundaries that exclude protection seekers from EU territory. Following from the analysis conducted under 4.1, the analysis treats the application system as 'one system' that involves LTVs, Schengen

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[659] Cf. Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), p. 55.

[660] Some protection seekers apply for a Schengen visa but act as if the purpose of travelling is something other than international protection. This can be described as resistance or as a 'hacking' of the EU border regime, a refusal to accept law's delineation of mobility and bodies – affording a rare opportunity to travel safely and to avoid fleeing by irregular and dangerous means. Franck and Vigneswaran understand the political content of migrants' efforts to move between legality and illegality as a form of 'hacking'. See Anja K Franck and Darshan Vigneswaran, 'Hacking migration control: Repurposing and reprogramming deportability', *Security Dialogue* (2021).

visas, and the preconditions that follow from the Visa Code. We turn now to how this system is played out under the EU's visa rules in relation to the 'immigration risk' posed by certain travellers (section 4.2.1.1), in relation to the process of lodging a visa application (section 4.2.1.2), and in relation to the assessment of it (section 4.2.1.3).

4.2.1.1 The 'Immigration Risk'

Visas are not considered a tool for providing the mobility that protection seekers need to flee and to gain protection. Instead, the visa requirement under the EU border regime divides travellers and detaches protection seekers from 'regular' infrastructures for mobility (or forces protection seekers to use false documents and to present false objectives for their trip). Due to the territoriality of asylum and the visa rules' focus on 'immigration risk', the protection seeker applying for a visa at the Belgian embassy in Beirut, with the explicit purpose of seeking asylum upon arrival in Belgium, is most certainly prevented from accessing the global mobility infrastructure. This was the result in *PPU X and X v Belgium* and in *M.N. and Others v Belgium*.

As part of managing the 'immigration risk', the Visa List Regulation provides for a list of countries whose citizens are required to have a visa to enter the Schengen area and which whose citizens are not. Citizens from countries from which most protection seekers originate, such as Afghanistan, Iran, Iraq, and Syria, must have a Schengen visa in order to board a plane or ferry to the Schengen Area. Other persons, by contrast – often the citizens of countries that are economically and socially advantaged, such as Australia and the United States – can enter a Schengen state without a visa, or can apply for one upon arrival. Thereby enjoying access to the global mobility infrastructure without needing to obtain prior permission through the visa process. The Visa List Regulation has been revised several times, in order to maintain an updated control over migration from certain countries. The Regulation can be used as a flexible tool to obstruct the arrival of people from certain countries. The border generated by the visa requirement is thus mobile and re-constructible, providing the EU with the power to design and to fix a certain spatiality of mobility. The criteria for adding a country to one of the two lists in the

Regulation are based on a 'case-by-case assessment of a variety of criteria'.[661] The Regulation gives no further explanation of what criteria are to be included in this case-by-case assessment. In the earlier version of this Regulation, however, the criteria were explicit, and the assessment was supposed to relate to issues such as 'illegal' migration, public policy, security, and the Union's relations with third countries.[662] Moreover, the Visa List Regulation is based on a global South/North delineation; and it has been criticized for bias in relation to race and religion, since most of the countries whose citizens are required to have a visa have a black or Muslim majority (see image 2).[663] This organization under the Visa List Regulation gives the EU extraterritorial control over mobility, thereby restricting the mobility of certain groups already in their countries of origin or in transit (such as in Syria or when Syrian nationals are in transit in Lebanon). Under the Visa List Regulation, nationality is thus given legal significance, affecting the ability of fleeing subjects to leave a country by regular means of travel.

The Visa Code sets out specific procedures and conditions facilitating the issuance of visas in some situations, such as in connection with the Olympic Games and Paralympic Games.[664] Thus, the Visa Code provides for a differentiation of requirements in certain circumstances. Asylum visas, however, are not a reality under the Visa Code. Rather, the global mobility infrastructure under the visa rules constructs a power-geometry of mobility,

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[661] Preamble 3 of the Visa List Regulation.

[662] See Council Regulation (EC) No 539/2001. Recital 5 of this Regulation states that 'the determination of those third countries whose nationals are subject to the visa requirement, and those exempt from it, is governed by a considered, case-by-case assessment of a variety of criteria relating inter alia to illegal immigration, public policy and security, and to the European Union's external relations with third countries, consideration also being given to the implications of regional coherence and reciprocity. Provision should be made for a Community mechanism enabling this principle of reciprocity to be implemented if one of the third countries included in Annex II to this Regulation decides to make the nationals of one or more Member States subject to the visa obligation.'

[663] Didier Bigo and Elspeth Guild, *Controlling frontiers: Free movement into and within Europe,* Routledge (2005), p. 19; and Achiume, 'Racial borders' (2022).

[664] The Visa Code, Article 49.

placing different groups in very distinct categories in relation to flows and interconnections, and constructing boundaries.[665]

The focus of the Visa Code and of the Visa List Regulation on obstructing 'illegal migration' and 'immigration risk' give rise to an exclusion of protection seekers, who are denied access to the global mobility infrastructure and thus to fast and regular means of travel. Thus, the visa requirement constructs boundaries to the mobility of many subjects – through the requirement that the citizens of some states be in possession of a visa; through the requirement that applicants not be an 'immigration risk'; and subsequently through the obligation placed on carriers to prevent persons without the necessary travel documents from boarding a plane or ferry – impeding protection seekers who apply for a visa at the Belgian embassy in Beirut from making use of the global mobility infrastructure.

4.2.1.2 The Lodging of the Application

This section looks at the practical boundaries emanating from preconditions under the Visa Code. The analysis provides examples of how the visa rules are embedded within the contexts in which they are played out; and of how boundaries result from war, distance, closed embassies, deadlines, time limits, and the already limited mobility of certain subjects.

The granting of a visa is dependent on certain privileges, and the Visa Code is an example of how the EU's external border organizes space and mobility in a power-geometry. The Visa Code's prerequisites both apply within and reproduce social relations in all phases of application. If, for example, a person wants to leave a country with a visa and by regular means of travel, that person will have to travel to an embassy to get the application processed. According to Article 9(1) of the Visa Code, applications shall be lodged no more than six months before the start of the intended visit, and applicants may be required to obtain an appointment for lodging the application (Article 9(2) of the Visa Code). This is the case at the Belgian embassy in Beirut (images 12 and 15). In addition to the lodging of the application, submission of a passport or other recognized travel document is required, together with the printed, signed, and dated application form and other supporting documents. During

[665] Cf. Massey, *Space, place and gender* (1994), p. 149.

the appointment, biometric data (fingerprints and photo) will be captured, and the visa fee will be charged. These requirements follow from articles 10–17 of the Visa Code. In 'justified cases', furthermore, consulates may carry out an interview with the applicant and request additional documents during the examination of the application (Article 21(8) of the Visa Code). According to the 'Common Consular instructions on Visas', a personal interview shall be conducted as a general rule in order for the applicant to explain the reasons for the application verbally, especially when there are doubts concerning the actual purpose of the visit or the applicant's intention to return to the country of departure.[666] The applicant also needs to fulfil requirements regarding a regular income, family links, and social status (see section 4.2.1.3).

In practical terms, the Visa Code has implications for certain subjects. It requires the person's presence, which presupposes the privilege of being able to travel freely within one's country of origin, or if necessary (as in the case of Syrian nationals), to cross borders into another state – a privilege strongly connected to the stability of the countries through which one is travelling, and to intersecting relations such as gender and class. Not being able to travel freely can clearly prevent a person, already at the early stage of travelling to the embassy, from applying for a visa. Other possible obstacles follow from the travel document condition in Article 12 of the Visa Code, since holding a passport at all – especially one considered valid by EU member states – is a privilege not available to all.[667] For Syrian citizens, who need to obtain an appointment at the Belgian embassy in Beirut, the border crossing into Lebanon constitutes an additional obstacle. To get permission to travel to Lebanon from Syria, you need to apply for and be granted a Lebanese visa. This requirement is part of restrictions imposed by the Lebanese government in 2015. Requirements such as that of being personally present at the embassy are moreover time-consuming. The agency, movements, and 'autonomous

[666] Common Consular instructions on Visas, Chapter III, 4.

[667] The passports of some citizens are not accepted as valid travel and identity documents by the member states.

temporalities' of protection seekers are thus disrupted in several ways by the provisions of the Visa Code.[668]

The process of applying for a visa at the consulate of a member state is furthermore not adjusted to take account of conflict areas or war zones. In those areas the EU's member states have generally withdrawn any consular presence they might have had. As seen in image 6, for example, all EU diplomatic missions and consular posts in Syria have been closed.[669] According to Article 8.1 of the Visa Code, EU member states are allowed to represent each other, and they shall endeavour to conclude representation arrangements with member states that have consulates in that country. However, member states are not obliged to have a diplomatic presence throughout the world in accordance with Article 8(5) of the Visa Code. When diplomatic posts and embassies are closed in the country of origin, such as in Syria, applicants can be referred to member states' embassies in other countries. That does not mean, however, that protection seekers are always given legal permission to travel freely into those other states. After all, citizens of war-torn countries are often denied permission to cross borders, due to restrictions imposed by neighbouring states (e.g., Lebanon and Turkey in relation to Syria).[670] The complexity of the practical effects arising from the lack of a member state's presence was addressed by Advocate General Mengozzi in his opinion in *PPU X and X v Belgium*.

> Moreover, the spectre, raised by a large number of the governments which participated at the hearing before the Court, of the Member States' consular representations being overwhelmed by an uncontrolled flood of applications for humanitarian Visas […] Apart from the fact that the

668 Cf. Tazzioli, 'Containment through mobility: migrants' spatial disobediences and the reshaping of control through the hotspot system' (2018), p. 14, on temporalities in migration and border control in Greece and Italy. See also Axelsson, 'Border timespaces: understanding the regulation of international mobility and migration' (2022) on how time and space work through each other to shape what it means to 'move'.

669 'Overview of member states' diplomatic missions and consular posts responsible for processing visa applications and representation arrangements' (ec.europa.eu).

670 In relation to the EU-Turkey Statement, Turkey built a wall obstructing movement from Syria into Turkey. At the same time, Lebanon closed its borders to Syria.

> argument is clearly not of a legal nature, the practical obstacles to lodging such applications must certainly not be underestimated, even if I not do not condone them. The situation of the applicants in the main proceedings provides a remarkable illustration of this. They were obliged to obtain an appointment at the consulate of the Kingdom of Belgium in Lebanon, a prerequisite for being granted safe passage of 48 hours on the Lebanese territory after May 2015, travel hundreds of kilometres in a country at war and in chaos to arrive in Beirut and present themselves in person at that consulate, in order to satisfy the requirement of the latter and, finally, to return to Syria to wait for the decision of the Belgian authorities! Moreover, although it is highly probable that the applicants in the main proceedings applied to the consulate of the Kingdom of Belgium in Beirut after becoming aware of the highly-publicized operation during which, in the summer of 2015, several hundred Syrian nationals, of Christian faith and from Aleppo, were issued Visas with limited territorial validity by the Belgian authorities, the Belgian Government has not reported a massive influx of applications of that type, overwhelming its diplomatic representations in the States neighbouring Syria, following that operation.[671]

If a protection seeker has left his or her country of origin and is in transit in a third country further boundaries following from the Visa Code can arise.

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[671] Opinion of Advocate General Mengozzi, PPU X and X v Belgium, C-638/16, para 172. As cited in M.N. and Others v Belgium (paras 48–51) however, Myria – an independent Belgian public institution – carried out research in 2017 and 2019 on the practice of issuing Visas on humanitarian grounds. Myria noted that, until the CJEU's judgment on 7 March 2017, short-stay visas could be issued on humanitarian grounds to individuals. The issuing of these visas concerned individuals who were in medical or humanitarian circumstances, protection seekers invited by Belgian authorities to submit an asylum claim in Belgium, beneficiaries of resettlement programmes like that run by the UNHCR, and asylum-seekers who had been involved in exceptional rescue operations. The majority of so-called 'humanitarian' visas were, according to Myria, issued to family members who did not meet the legal requirements for family reunion.

According to Article 6(1) of the Visa Code, an application shall be examined and decided on by the consulate of the competent member state in whose jurisdiction the applicant legally resides. The requirement of legal residence within the jurisdiction of 'the consulate of the competent member state' constitutes such a potential boundary. If a protection seeker has managed to leave Syria, legal presence or legal residency is not given in Lebanon. On the contrary, Syrians need to have a Lebanese sponsor to remain in the country legally.[672] For many Syrians, this has meant a loss of legal status and residence which can exclude them from applying for a visa. However, exceptions exist, and a member state consulate must examine an application lodged by a third-country national not resident in its jurisdiction if the applicant is legally present and has provided justification for lodging the application at that consulate (Article 6(2) of the Visa Code). According to the Visa Handbook, 'legally present' means the applicant is entitled to stay temporarily in the jurisdiction on the basis of the legislation of the third country where he/she is present for e.g. a short stay, while maintaining his/her permanent residence in another third country.[673] In such a situation, where the applicant is legally present but not resident, it is for the consulate to determine whether the justification presented by the applicant is acceptable.[674] The Handbook provides examples of acceptable justifications. Acceptable justifications for fleeing subjects who cannot reach a consulate in their country of origin due to war or persecution are however not included as examples. However, if a protection seeker in transit has managed to get permission to stay temporarily in the transit country and thus is legally present, such as Syrians who have been granted a Lebanese visa, exceptions on where to apply for a visa are applicable and a consulate can determine the justification presented by the applicant as acceptable. Under such conditions, the process provided only includes the opportunity of applying for a visa, without any obligation for the member state to grant a visa

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672 See Janmyr, 'Precarity in exile: The legal status of Syrian refugees in Lebanon' (2016); 'Lebanon further restricts Syrian refugees' access to its territory' (ecre.org); and Human Rights Watch Report: How Lebanon's Residency Rules Facilitate Abuse of Syrian Refugees. 'I Just Wanted to be Treated like a Person'.

673 The Visa Code Handbook, p. 24.

674 Ibid., p. 24.

for asylum purposes (as follows from Case *PPU X and X v Belgium* and *M.N. and Others v Belgium*). Nevertheless, on a general level, the requirements regarding residence in the jurisdiction of the consulate, or of being legally present and providing a justification for lodging the application at that consulate, provide member states with additional grounds for refusing to assess visa applications from protection seekers in transit outside their country of origin.

Furthermore, since qualifying for asylum requires that the protection seeker be outside the country of origin, as stipulated by both the Refugee Convention (Article 1(A) 2)) and the EU Qualification Directive (Article 2(d) and (f)), the Visa Code constructs a 'Catch 22'. Protection seekers cannot qualify as eligible for asylum when within their country of origin; nor can they gain access to the global infrastructure from their country of origin, due to the 'immigration risk' they pose under the Visa Code. The spatial scope of a protection seeker's mobility is thus heavily reduced, and the requirement that one be outside the country of origin itself generates an incentive for member states to take measures to prevent people from leaving the country of origin (such as imposing visa requirements and withdrawing consular presence).[675] When a protection seeker has left the country of origin, s/he can at least theoretically qualify for asylum in accordance with international and EU asylum law, since the formal requirement of being outside the country of origin is fulfilled. In such a situation, the general rule stipulating that a visa application be filed at a consulate of the member state in whose jurisdiction the applicant legally resides can prevent protection seekers without legal residency in a transit country from applying.[676]

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[675] Obstructing people from leaving is not forbidden under the Refugee Convention, due to its applicability to persons who 'are outside the country of [their] nationality' (Article 1(A)2). As Hathaway has argued, Article 33 of the Refugee Convention 'is incapable of invalidating the classic tool of non-entrée: Visa controls imposed on the nationals of refugee-producing states enforced by carrier sanctions'. Hathaway, *The rights of refugees under international law* (2005), p. 310.

[676] The 'Common Consular Instructions on Visas' further states that visa applications lodged by non-residents shall, when there are doubts concerning the person's intentions, in particular concerning a potential migration 'risk', be issued only after consultation with

As seen in the examples in this section, the process involved can prevent protection seekers from lodging visa applications at an embassy. When the requirements of the Visa Code are played out in practice, the lack of embassies in war-torn countries and the need for personal attendance and legal residency materialize as boundaries that can prevent protection seekers from gaining access to the global mobility infrastructure.

4.2.1.3 The Individual Assessment

As follows from the earlier sections, the visa requirement is played out in relation to citizenship, race, and religion under the Visa List Regulation. Furthermore, in the process during which the application is assessed, social relations are involved – in connection with requirements relating to the individual's level of stability and intention to 'leave the territory of the Member States before the expiry of the visa applied for'.[677] This section offers an analysis of how intersecting social relations can constitute boundaries during the individual assessment of a visa application.

The conditions for obtaining a Schengen visa (which is valid for 3 months) correspond to the entry conditions set out in Article 6 SBC. Following from Article 21(1) of the Visa Code, the examination of a Schengen visa application shall ascertain whether the applicant fulfils the entry conditions set out in the Schengen Borders Code. Particular consideration shall be given to assessing whether the applicant presents a risk of 'illegal immigration' or a risk to the security of the member states, and whether the applicant intends to leave the territory of the member states before the expiry of the visa applied for. According to Article 32(1) b) of the Visa Code, a visa shall be refused if there are reasonable doubts as to the authenticity of the supporting documents submitted by the applicant, the reliability of the statements, or the applicant's intention to leave the member states. If the 'intention to leave' cannot be verified, the applicant constitutes an 'immigration risk' and the visa application is denied. In *Koushkaki*, the CJEU clarified that Article 32(1) of the Visa Code,

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the diplomatic mission or consular post of the applicant's state of residence and/or its central authority. If persecution by the state is involved, such consultation can be highly risky for the applicant – whose intention to flee is thereby revealed. See the Common Consular instructions on Visas, Chapter II, 3. 'Visa applications lodged by non-residents'.

[677] Article 21(1) of the Visa Code.

read in conjunction with Article 21(1), must be interpreted as meaning that the obligation of the competent authorities of a member state to issue a uniform visa is subject to the condition that there is no reasonable doubt that the applicant intends to leave the territory of the member states before the expiry of the visa applied for. The intention to leave should be assessed in light of the applicant's individual characteristics and in light of the general situation prevailing in the applicant's country of residence, as ascertained from the information provided by the applicant.[678]

The Visa Handbook lays down operational instructions – 'guidelines, best practices and recommendations' – for how member states' consular staff are to proceed when examining and making decisions on visa applications.[679] According to the Visa Handbook, the assessment should focus on marital status; on employment situation; on possession or lack thereof of a home/real estate; on family links or other personal ties in the country of residence; on family links or other personal ties in the member states; on regularity and level of the income (from employment, self-employment, pensions, investments, etc.) accruing to the applicant or to his/her spouse, children, or dependants; and on social status in the country of residence (e.g., lawyer, medical doctor, university professor, NGO representative; public office-holder).[680] As seen in image 20, the website of TLScontact (the visa application centre' in Beirut) defines this information as 'essential' for correctly judging the intention of the applicant to leave the Schengen area before expiry of the visa. Further factors to be considered in the assessment include previous illegal stays in the member states; previous abuse of social welfare in the member states; the credibility of persons who have issued letters of invitation; and a succession of different visa applications (for short-stay or long-stay visas) presented for unrelated purposes.[681] The aim of the assessment of these factors is to scrutinize the applicant's connection with the country of residence and intention to leave the

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[678] C-84/12, Koushkaki (2013).

[679] The Handbook is drawn up on the basis of Article 51 of the Visa Code. It neither creates any legally binding obligations upon member states, nor establishes any new rights and obligations. Rather, it aims to ensure a harmonized application of the legal provisions. The Visa Code Handbook, p. 2.

[680] Ibid., p. 70.

[681] Ibid.

member states before expiry of the visa. The stronger the attachment to the country of residence, and the more stable socio-economic situation, the lower the 'risk' of migration. Under such circumstances, the intention to leave the member state before expiry of the visa is considered more credible.

Procedurally, the requirements of the Visa Code prerequisites position the visa assessment profoundly in the midst of intersecting social relations. Class is a decisive factor in the assessment of the intention to leave the host state, due to the legal requirements' interconnectedness with issues such as owning property, receiving regular income, having an occupation of a certain status, etc.[682] Thus the assessment especially impedes subjects with low or irregular income, indicating that class is a determinant for travelling by regular means of transport under the Visa Code. Gender too is indirectly decisive: women generally have lower income, own less property, and are lower in social status than men.[683] With the conditions set by the Visa Code, mobility on a general level thus becomes dependant on having a stable socio-economic situation. Furthermore, requirements for a certain marital status can impede access to the global infrastructure for persons living in relationships not accepted in the country of origin. Such requirements reproduce certain norms on family constellations and sexuality, and they can be framed as a repetition of norms, constituting the conditions for the subject – offering or denying a subject mobility, access to the global mobility infrastructure, and regular travel under the EU visa rules.[684]

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[682] Under current policies, statistics on issued visas aggregated in relation to gender are not accessible.

[683] According to the World Economic Forum, women own less than 20% of the world's land. In the Middle East and North Africa, women lack constitutional and statutory property rights. See Monique Villa, 'Women own less than 20% of the world's land. It's time to give them equal property rights' (2017) World Economic Forum, weforum.org. At the global level, more men (74%) than women (47%) participate in the labour force. For example, the rate of women's participation in Iraq's labour force was 11% in 2017 – the lowest rate in the world after Yemen. See UN Department of Economic and Social Affairs Statistics: Women and men in the labour force.

[684] As Butler has contended, law generates sanctioned and unsanctioned sexual practices and arrangements. See Butler, *Bodies that matter: on the discursive limits of sex* (1993), p. 95. Or in Dana Cuomo's and Katherine Brickell's words, 'law reproduces gender relations,

Citizenship constitutes a further boundary, not only formally under the Visa List Regulation but as a condition bound to the situation in the country of residence. The situation in a country of residence does, on a general level, constitute a boundary for obtaining a visa for a person originating from a war-torn country, such as Syria, since the situation in the country of residence forms part of the assessment of the applicant's individual situation and 'immigration risk'.[685] While including citizens from stable countries as 'eligible to travel', the visa assessment involves reluctance towards other countries, whose citizens' spatial mobility remains conditioned and marginalized. The more unstable the situation is in the country of residence, the more likely it is that a person will be refused a visa. The fact that the assessment includes stability in the country of residence is also addressed in the Handbook. Consulates should, as part of local Schengen cooperation, define 'profiles' of applicants presenting a specific risk, taking account of local conditions and of the general situation in the country of residence, as in connection with politically unstable areas, high levels of unemployment, and widespread poverty.[686] However, the Handbook also states that each individual application shall be assessed on its own merits, irrespective of possible 'profiles' that have been drawn up.[687] Notwithstanding such an individual assessment, the decision regarding a Syrian's visa application at the Belgian embassy in Beirut will likely be heavily affected by the situation in Syria, since war affects the stability of the socio-economic situation in general, and constitutes per se a basis for refusal, due to the 'immigration risk' entailed.

The Belgian embassy in Beirut provides an entry point to the global mobility infrastructure and subsequent access to EU territory and asylum procedures. As this analysis has demonstrated, the 'border' of this scene of interaction expands on social relations and creates inequality and exclusion in relation to the global mobility infrastructure. Welcoming some travellers to the

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intersecting with sexuality, class, family status, ethnicity, nationality, and religion, thereby establishing differently positioned socio-legal identities.' See Cuomo and Brickell, 'Feminist legal geographies' (2019), p. 1045.

685 C-84/12, Koushkaki (2013).

686 The Visa Code Handbook, p. 70.

687 Ibid.

centre of the global mobility infrastructure, consigning others to exclusion and a limited spatial scope of mobility. As an outcome of the visa rules embeddedness in space, and law's quiet privileging of certain subjects, mobility becomes differentiated in a power-geometry where social relations are decisive for who is granted access to the global mobility infrastructure as a legitimate traveller.[688] Law is thus not only embedded in space but also imbued with space, and enforced in an interaction with the protection seeker's social relations. Some subjects are trapped in their countries of origin due to a lack of available and open embassies or consular posts therein; by their limited possibility to cross borders into neighbouring countries in which the EU member states are present; by a lack of possibilities to file an online application; or a lack of a valid passport. Others are refused access to the global mobility infrastructure due to them coming from an unstable area; or because they are poor, lack employment, a home, family links or other personal ties in the country of residence qualifying them as connected enough to their countries of origin so to not pose an 'immigration risk'. If posing such a 'risk' – access to the global mobility infrastructure is refused, and only irregular travelling remains as an option. If specific conditions for protection seekers were established under the Visa Code, social relations of gender, class, family status would not be as decisive in the assessment of a visa application. When instead the requirements of the Visa Code apply in the midst of social relations, the already weak socio-economic position of some subjects is reinforced, and further exclusion takes place.

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[688] Cf. Spijkerboer, 'The global mobility infrastructure: Reconceptualising the externalisation of migration control' (2018), p. 452 and 469. Spijkerboer describes the exclusion of some travellers from the global mobility infrastructure as stratification based on nationality, race, class, and gender, and has urged that the indirect gender discrimination of the visa system must be discussed in light of the prohibition of gender discrimination. Spijkerboer states that it is time to question the ways in which international law 'embodies discrimination', and cites Article 26 of the International Covenant on Civil and Political Rights (ICCPR), as well as the Convention on the Elimination of all forms of Discrimination against Women (CEDAW).

4.2.2 The Border Crossing Point at Beni-Enzar

The following sections address the embeddedness and embodiedness of the EU border regime in the Melilla borderlands and contribute to a deeper understanding of how border control practices divide people and exclude protection seekers from EU territory. These sections build on the previous analysis in section 4.1.2, and focus on how the spatio-legal interaction of this scene of interaction imposes boundaries in relation to access to the border crossing point at Beni-Enzar (section 4.2.2.1), and on how intersecting social relations and violence impose preconditions for crossing the border into Melilla (section 4.2.2.2).

When the laws of the EU border regime are translated from abstract legal text into the realities that the protection seeker alters when approaching Melilla, border and migration control materializes as fences, walls, and other fortifications embedded in the physical world, limiting access to Melilla. This includes not only man-made fortifications such as border fences, but natural landscapes like the Mediterranean Sea as well. The waters of the Mediterranean Sea are inscribed with legal significance, constituting a dangerous border for people who use them as a site of resistance – through risky attempts to access the Spanish enclave by swimming or by boat – and imposing an additional line of demarcation prolonging the land-based fences.[689] The dangers and the barrier arising from this by nature created boundary are fortified by piers and fences integrated into the natural landscape (images 41–43). At Mirador del Barranco del Quemadero in the north of Melilla (image 44), the fences are embedded in the steep and rocky landscape, and they stretch out into the water. Laws and practices on migration and border control are thus embedded in the natural landscape, fortifying exclusion and control.

The EU border regime makes active use of the geographical variation, social relations, and inequality that are presented to it at this scene.[690] As demonstrated in section 4.1.2, the border between Morocco and Melilla is constructed with both a static and flexible spatiality, with firm fences and a

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[689] In 2022, 169 persons arrived in Melilla by sea. ECRE, Country report: Spain, 2022, p. 25. See also 'Swimming to Melilla: "Migrants think it's faster but, above all, it's very dangerous"' (InfoMigrants.net).

[690] Cf. Massey, *Space, place and gender* (1994), p. 23.

range of operational practices that affect access to the border crossing point at Beni-Enzar. The fences delineate the borderline, but cooperation with Morocco and the concept of 'rejections at the border' add a 'flexible' control – detached from territory and the borderline. The border moreover divides people by boundaries arising from social relations, and a spatial relationship between 'inside and outside' the EU is played out at this scene of interaction. The embeddedness of that relationship in practices of material engagement involves not only the fences, but also the people trying to cross it and those trying to control it.[691] The aim of preventing the entry of unwanted subjects is visible, and the border makes for a heavy deterrent. On what can be described as disputed land, the fences, equipped with concertinas and barbwire, interact with bodies of border guards and migrating subjects (image 47) and technical instruments monitor and control the border (image 40). The space is concrete, and the border does not hide; instead it stretches out, manifesting its efficiency in the delineation of space.

Describing the fences at Melilla and Ceuta as more than just a land border between two neighbouring countries, Saddiki notes that the two countries represent:

> […] an ex-colonizer and an ex-colonized, respectively, two peoples (Spaniards and Moroccans), two nations (Western and Arab), two religions (Christianity and Islam), two continents (Europe and Africa), and two regions (Western Europe and Arab Maghreb).[692]

At the same time, Saddiki reminds us that the 'Mediterranean basin has been for centuries a space of coexistence between the people on both sides, acting as a bridge between them regardless their ethnic, cultural and religious traditions'.[693] When studying the spatio-legal interaction of the border between Morocco and Melilla, we can understand this 'space of coexistence' as 'disrupted' by fences and border guards that fix and fortify a certain spatiality

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691 Cf. Massey, *For space* (2005), pages 10 and 61.

692 Saddiki, *World of walls: The structure, roles and effectiveness of separation barriers* (2017), p. 16.

693 Ibid., para 39.

that closes off Spain from Morocco. To some extent, however, the space of coexistence does remain – through visa exemptions for local border traffic between Morocco and Melilla.[694]

4.2.2.1 Approaching the Border Crossing Point

Like the visa requirement under the Visa Code, the border at Melilla is constructed in the midst of social relations. According to the report in *ND. and N.T. v Spain* from the Council of Europe's Special Representative of the Secretary General on migration and refugees, the persons who cross the border at the Beni-Enzar border crossing point in order to seek asylum are mostly Algerian, Palestinian, Syrian, or from other North African countries.[695] Furthermore, the Special Representative underlined, persons from sub-Saharan Africa are effectively prevented from approaching the border crossing point by Moroccan authorities, resulting in a lack of access to asylum procedures.[696] Other intervenors in *ND. and N.T. v Spain* noted that persons from certain countries were prevented from gaining access to the border crossing point by Moroccan police 'for reasons of racial profiling'.[697] The limited access to the border crossing point has also been highlighted by scholars, who have underlined the difficulties that people from sub-Saharan

[694] The Spanish Schengen Accession Agreement provides for specific visa exemptions for local border traffic between Ceuta and Melilla on the one hand and the Moroccan provinces of Tetuan and Nador on the other, as well certain visa arrangements for other Moroccan nationals on exclusive visas for Ceuta and Melilla, and finally obligations for Spain to conduct checks on identity and documents on sea and air connections departing from Ceuta and Melilla for Spain or for other Schengen states. Article 41 of the SBC gives precedence to specific agreements between Spain and its enclaves, stating: 'The provisions of this Regulation shall not affect the special rules applying to the cities of Ceuta and Melilla, as defined in the Declaration by the Kingdom of Spain on the cities of Ceuta and Melilla in the Final Act to the Agreement on the Accession of the Kingdom of Spain to the Convention implementing the Schengen Agreement of 14 June 1985', The Spanish Schengen Accession Agreement.

[695] N.D. and N.T. v Spain (2020), para 58. Also other t

[696] Ibid., para 58.

[697] Ibid., para 163.

Africa meet when approaching the border at Ceuta and Melilla.[698] Tyszler has noted that people from Algeria or Syria, for instance, manage with greater or lesser ease to use the same roads as Moroccans to access the enclaves through border posts, because they 'look' like them.[699] Tyszler concludes that skin colour is a factor facilitating or blocking access to the border crossings.[700] In line with Tyszler, Achiume submits that border management in Morocco relies heavily on the individual's embodiment of race. In northern Morocco, close to Melilla, black people are subject to 'interior immigration enforcement' that sometimes involves their forcible transportation to the south of Morocco.[701] In some cases, Achiume notes, not even legal documentation can override 'the presumption of illegality encoded in their Blackness'.[702] The issue of racial profiling in Moroccan border management has also been raised by NGOs, such as Amnesty International and the CEAR.[703] According to the Council of Europe's Special Representative, Spanish authorities themselves have suggested that a possible explanation for the differential access is 'the sizable daily flows of persons involved in the so-called "atypical trade" who cross the border daily in Melilla'.[704] The racial delineation thus seems to be connected to the visa exemptions for local border traffic that provide access to Melilla for certain Moroccans, and to the border crossing point for those (such as Syrians) who 'look like them'. Under the visa exemptions, skin colour becomes

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[698] See e.g. Third party intervention by the Council of Europe Commissioner for Human Rights, at para 142 in N.D. and N.T. v Spain (2020); Joint third party intervention made by the AIRE Centre, Amnesty International, ECRE, the Dutch Council for refugees and the International Commission of Jurists in N.D. and N.T. v. Spain (2020), para 160; and AIDA and ECRE country report on Spain ECRE, Country report: Spain, 2019.

[699] Such access is usually provided through the use of falsified or bought documents. See Elsa Tyszler, 'From controlling mobilities to control over women's bodies: gendered effects of EU border externalization in Morocco', *Comparative Migration Studies 7* (2019), p. 6; and Tyszler, 'Humanitarianism and black female bodies: violence and intimacy at the Moroccan–Spanish border' (2020).

[700] Tyszler, 'Humanitarianism and black female bodies: violence and intimacy at the Moroccan–Spanish border' (2020).

[701] Achiume, 'Racial borders' (2022), p. 484.

[702] Ibid. p. 485.

[703] N.D. and N.T. v Spain (2020), para 163.

[704] Ibid., para 58.

a decisive factor in accessing the border crossing at Beni-Enzar, redirecting people from south of the Saharan to irregular routes, such as that involved with an attempt to climb the border fences (see image 47).

The prevention by Moroccan authorities of black people from gaining access to the border crossing point at Beni-Enzar constitutes a clear obstacle to access to the EU and to asylum procedures. Moreover, data from the Spanish authorities confirms this pattern, indicating that individuals from sub-Saharan countries are underrepresented among asylum-seekers at Melilla's border crossing point (see the statistics presented in sections 3.2.2 and 4.1.2). The AIDA and ECRE country report on Spain also notes the increase in the number of attempts to climb border fences, connecting this increase to the fact that migrants and asylum-seekers, especially those from sub-Saharan Africa, still face huge obstacles in accessing the border crossing point due to severe checks by Moroccan police on the Moroccan side of the border.[705] The difficulty of reaching the border crossing point was also addressed in *N.D. and N.T. v Spain*. The applicants, N.D. and N.T., claimed there was no mechanism for them to enter Spanish territory lawfully, and that the official border crossing point at Beni-Enzar was not accessible to migrants from sub-Saharan Africa.[706] Without access to ordinary border posts, people instead cross the border irregularly – by hiding in cars, climbing fences, or employing smugglers. Others turn to the Atlantic route. However, for those who lack economic resources, who cannot afford a sea crossing, the Melilla fences provide a dangerous and almost impenetrable, but still 'cheap', route to the EU.[707]

The lack of regular options for entry into the EU constructs and reinforces the 'illegalization' of migration and of migrating subjects. Since some protection seekers seem to have no other option than resorting to irregular means to cross the EU's external border, they are forced to alter what under the current securitized discourse is defined as 'illegality', and to resort to 'illegal' border crossings. The border between Morocco and Melilla provides an

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[705] AIDA and ECRE country report on Spain ECRE, Country report: Spain, 2019.

[706] N.D. and N.T. v Spain (2020), para 117.

[707] Since it is free of charge, the land crossing into the Spanish enclaves of Ceuta and Melilla has always been used by the poorest, who cannot afford sea crossings. See 'The Melilla border deaths represent a new phase in the bloody story of fortress Europe' (statewatch.org).

example of the amplifying effect of the illegalization of migration. When hardly any 'doors' are built for entry into the EU, people will resort to climbing the walls – leading in turn to a reinforcement of security at those walls. Higher, more dangerous, and more 'aggressive' walls are erected, accompanied by a framing of migrating subjects 'as risks', instead of as 'under risk' and in need of an efficient route to international protection.[708] These effects do not derive solely from the policies pursued by Spain and the EU; rather, they are co-produced with the people who try to resist and to penetrate the EU's external border at this scene of interaction. Climbing the fences can be understood as a negotiation of unequal relations, a reshaping of the spatial exclusion produced by the EU border regime. What people construct by jumping the fences is a sort of alternative to the dominant spatial and relational order that the fences delineate. People 'may not be simply resigning themselves to exclusion, but potentially escaping institutions of migration control, and thereby reshaping these same institutions'.[709] The ceaseless renovating and heightening of the fences is a response to this. As Pallister has noted, the fences in practice are 'products and thus representations of the tensions between flows and blockages that are inherent in the act of bordering'.[710] The interaction within space between different bodies – both human (migrating subjects and border guards) and in the form of materialized law, as seen in the fences and their lack of entry points – reinforces illegalization and violence,

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[708] See inter alia N.D. and N.T. v. Spain. At the ECtHR, the Spanish government described its response to the situation in N.D. and N.T. v. Spain as an act of self-defence. The Spanish Government cited Spain's inherent right as a member state of the United Nations, of individual or collective self-defence when under armed attack. The ECtHR noted that Spain has not indicated that it has referred the matter to the Security Council of the United Nations, as anticipated by Article 51 of the UN Charter in such cases. In the circumstances of the case, the Court saw no need to pursue this argument further. N.D. and N.T. v Spain (2020), para 166. On migrating subjects 'as risks' instead of as 'under risk', see Harriet Gray and Anja K Franck, 'Refugees as/at risk: The gendered and racialized underpinnings of securitization in British media narratives', *Security Dialogue* (2019).

[709] Franck and Vigneswaran, 'Hacking migration control: Repurposing and reprogramming deportability' (2021), p. 4.

[710] Pallister-Wilkins, 'The tensions of the Ceuta and Melilla border fences' in Gaibazzi, Dünnwald and Bellagamba (eds), *EurAfrican borders and migration management*, p. 64. Referring to Mezzadra and Neilson, *Border as method, or, the multiplication of labor* (2013).

resulting in still higher fences and even stricter measures to deter people from crossing the border. The targets of border control (i.e., protection seekers) are thus – under the illegalization of migration – part of the collective production of the border, as well as of the relations within the spaces in which the border materializes. If the operation of the border took place in full accordance with human rights and refugee law commitments, without racial profiling, and with fewer preventive measures, then the relational dimensions at the border might change and the explosiveness would possibly diminish, in turn changing the physical setting and the materialization of the border. When fences are built higher and higher instead, the explosiveness and the 'force of movement' are amplified in the same direction. Law, bodies, operational border tactics, material constructions such as barbwire fences – all are connected in space in a relational interdependency, co-producing the border.

The spatialization of control in Melilla most strongly and clearly defines its 'other'; and the fences are constructed through an interaction with 'the outside', preventing entry and the enjoyment of fundamental rights by certain 'outsiders'.[711] However, the Court's reasoning in *N.D. and N.T. v Spain* addressed the fences without questioning the role of the physical barriers in relation to the enforcement of fundamental rights. Nor did the Court scrutinize the role of the fences in relation to third-country cooperation with Morocco. The ECtHR, on the other hand, depicted the fences as a place where people stormed 'en masse' into Melilla.[712] If border control in Melilla and the fences had been understood as a relational and collective activity that takes material form, the question of Spain's responsibility in relation to fundamental rights and the role of the fences in closing access to territory could instead have been addressed within the setting of the situation. I would suggest that racial profiling, third-country cooperation, and the embeddedness and embodiedness of law in space are interconnected, and that together they constructed the situation seen in *N.D. and N.T. v Spain*, as well as similar events both before and after. From this point of view, the construction of the fences can be understood as a product of conflicting and unequal relations; and the judgement in *N.D. and N.T. v Spain* can be framed as the outcome of such

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[711] Cf. Massey, *Space, place and gender* (1994), p. 169.

[712] N.D. and N.T. v Spain (2020), para 166.

relations, legitimizing racial demarcation and the exclusion of sub-Saharan subjects in Spain's operationalization of the border in Melilla. In this operationalization, sub-Saharan protection seekers are first excluded from ordinary border crossings, and then – when they take the only route available to them (the irregular one) – they become legitimate targets of collective pushback due to the concept of applicants' 'own conduct' enunciated by the ECtHR. However, racial profiling in relation to the border crossing point at Beni-Enzar is not done by EU or Spanish officials directly; rather, it seems to follow from third-country agreements with Morocco on border control and migration management. This scene of interaction is thus co-produced by several different spatio-legal building blocks: the embeddedness in natural and physical features, such as water, fences, and surveillance techniques; as well as agreements with Morocco, funding from the EU, and legal norms on border control and territorial jurisdiction. As seen in the previous analysis of this scene of interaction (section 4.1.2), protection seekers approaching the border crossing point at Beni-Enzar alter and embody this interaction without enjoying any clear protection of their individual rights.

4.2.2.2 Violence and Intersecting Relations in the Border Crossing Situation

In the spatio-legal interaction of this scene of interaction, some subjects are able with greater or lesser ease to access the border crossing point and to seek asylum there. This possibility is conditioned, however, by nationality and by skin colour. Then age, gender, physical ability, and family situation enter the picture – as factors that decide who is able to cross the border by irregular means like climbing or swimming. This section analyses how violence and intersecting social relations affect access to Melilla, and gives examples of how such boundaries are played out at this scene of interaction.

Irregular routes into Europe are often described as dangerous, not only due to the method of travel per se (walking through mountain passages, travelling in unsafe boats or lorries), but also due to the risk of being subjected

to violence and sexual abuse.[713] Furthermore, the 'illegalization' of migration has been thought to justify violence against migrants, in the form for example of heavy-handed interventions by police and border guards.[714] There are frequent reports of violence by Moroccan and Spanish authorities at the Melilla border. Violence also occurs in migrant camps in Morocco, as well as when people approach the border fences or try to scale them.[715] On 24 June 2022, at least 23 people lost their lives and hundreds were injured when trying to enter Melilla by climbing the fences. The attempt involved around 2000 people, of whom 133 succeeded in crossing the border; others were violently pushed back by Spanish authorities.[716] According to eyewitnesses, Moroccan and Spanish security officers used batons, guns, stones, and teargas to prevent people from climbing the fences. Reports also claim that the ones who managed to climb the fences were pushed back to the Moroccan side. People died from falling from the fences due to the use of teargas; others were crushed in the violent situation. The Moroccan Human Rights Association reported

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[713] According to The Women's Refugee Commission sexual violence is 'commonplace' along the Mediterranean route, and sexual violence is perpetrated in ways that involve and impact both women and men. See The Women's Refugee Commission, 'More Than One Million Pains: Sexual Violence Against Men and Boys on the Central Mediterranean Route to Italy'.

[714] de Vries and Guild, 'Seeking refuge in Europe: spaces of transit and the violence of migration management' (2019), p. 6.

[715] Violence towards fleeing persons also involves gunfire and death when Moroccan authorities prevent the departure of boats carrying people to the Canary Islands. In 2018, the Moroccan navy killed a woman and injured three persons after shooting at a migrant boat. In September 2022, Moroccan authorities open gunfire at a boat carrying migrants, leaving one woman dead and many persons injured. See. E.g., 'Atlantic route and Spain: Moroccan forces open fire against migrants amid strengthened cooperation with EU and Spain, frozen investigation of Melilla tragedy and alarming death toll on Atlantic' (ecre.org).

[716] The number of deaths varies as between different reports. The CoE Commissioner for Human Rights states that at least 23 people lost their lives; see CoE Commissioner for Human Rights Dunja Mijatović's letter to Mr Fernando Grande-Marlaska Gómez, Minister of Interior of Spain; 'Morocco: 18 migrants die in attempt to enter Spain's Melilla' (aljazeera.com) 22-06-24; and ECRE Weekly Bulletin 08.07.2022 with references cited therein; 'Atlantic route and Spain: Deadly tragedy at Melilla border causes local protests and international outcry – More deaths on the Atlantic' (ecre.org). The report from ECRE states that at least 37 people lost their lives during the event. Moroccan and Spanish security officers were also injured. See ECRE, Country report: Spain, 2022, p. 12.

that the bodies of both injured and dead were left piled on the ground, and that no assistance was forthcoming from the ambulances present on the site.[717] According to a report from the Nador branch of the Association, the people involved were from war zones in Chad, South Sudan, and Sudan; and they were mostly asylum-seekers who had been in Morocco for months and in some cases for years.[718] Following these events, Morocco responded with waves of arrests of migrants.[719] Commenting on the situation, Fernando

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[717] 'The Melilla border deaths represent a new phase in the bloody story of fortress Europe' (statewatch.org); and 'Morocco: 18 migrants die in attempt to enter Spain's Melilla' (aljazeera.com) 22-06-24.

[718] See 'The Melilla border deaths represent a new phase in the bloody story of fortress Europe' (statewatch.org). The event on 24 June 2022 led to demonstrations and protests in both Morocco and Spain, with Moroccans demanding that the Moroccan state stop acting as Europe's border police. The violence has been denounced and a full investigation demanded by the by the International Organization for Migration (IOM); the UN Refugee Council (UNHCR); the African Union Commission (AUC); the UN Committee on Migrant Workers (CMW); the CoE Commissioner for Human Rights; and the European Commissioner for Home Affairs, Ylva Johansson. See 'Atlantic route and Spain: Deadly tragedy at Melilla border causes local protests and international outcry – More deaths on the Atlantic' (ecre.org). In July 2022, the CoE Commissioner for Human Rights Dunja Mijatović addressed the Minister of Interior of Spain in a letter regarding the events connected to the attempted crossings of the fence in Melilla on 24 June, and urged Spanish authorities to conduct an independent, full, and effective investigation of the deaths and violence at this event. The Minister of the Interior of Spain, Fernando Grande-Marlaska, replied to the Commissioner's letter, arguing that the event 'put the traditional mechanisms for combating human trafficking to the test, given the extreme danger of the criminal networks and the risks they are prepared to create'. He described Morocco as a strategic and committed partner of the European Union with which the partnership on migration has had a long and proven track record, with Morocco's operational efforts preventing tens of thousands of irregular departures to Europe. See Fernando Grande-Marlaska, Minister of Interior of Spain's letter to Ms. Dunja Mijatović, Commissioner for Human Rights of the Council of Europe. However, proposals aimed at creating a commission of inquiry to clarify the causes surrounding the deaths and violence that occurred on Melilla's border on 24 June 2022, were blocked by the Spanish Parliament. See 'Atlantic route and Spain: Moroccan forces open fire against migrants amid strengthened cooperation with EU and Spain, frozen investigation of Melilla tragedy and alarming death toll on Atlantic' (ecre.org); and 'El PSOE y el PP vetan la comisión de investigación sobre Melilla' (elpais.com) 22-11-18.

[719] 'EU southern borders: Spain and EU funding for Morocco amid crack-down on migrants, IOM reports thousands of deaths on the Atlantic and Mediterranean as

Grande-Marlaska, Spanish Minister for the Interior, claimed that all procedures for expulsion, refoulement, and denial of entry into Spain were carried out with full respect for the guarantees recognized in the legal system, including the treaties ratified by Spain, and that the special regime for Ceuta and Melilla was operationalized in accordance with the ECHR, as declared by the Grand Chamber in the judgment *N.D. and N.T. v Spain* in 2020. The Minister also cited *N.D. and N.T. v Spain* and the Court's recognition that Spain makes legal procedures available to persons applying for admission to its national territory.[720]

The link between the heavy control and securitization of borders and the corresponding increase in risk for protection seekers has been noted by NGOs and by scholars in the research field, who have called attention to violence, slavery, trafficking, and sexual abuse as risks endured by protection seekers on route to the EU. They stress that the ability to cope with structural violence has become a factor in determining who is able to reach the EU.[721] When protection seekers are not able to travel to the EU by regular means, migration becomes dangerous, and migrants' vulnerability is worsened. Melilla can be lethal for persons trying to cross into the enclave. It is not just that the fences

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tragedies continue, Italy funds the so-called Libyan coastguard amid protests over migration cooperation' (ecre.org). 13 persons who participated in the attempts to cross the border into Melilla on 24 June 2022 have been prosecuted, among other things for 'participation in a criminal gang of illegal immigration', 'illegal entry into Morocco', and 'violence against law enforcement officers'. They were sentenced to prison to three years. See 'Atlantic route and Spain: EU's strategic partner toughens prison sentences of 13 migrants, border & migration policies blamed for loss of lives on migratory routes, vulnerable migrants exposed to "levels of exploitation close to slavery" in Canary islands' (ecre.org).

[720] See Fernando Grande-Marlaska, Minister of Interior of Spain's letter to Ms Dunja Mijatović, Commissioner for Human Rights of the Council of Europe.

[721] See e.g. Alison Gerard and Sharon Pickering, 'Gender, securitization and transit: Refugee women and the journey to the EU', *Journal of Refugee Studies* (2014); Sharon Pickering and Brandy Cochrane, 'Irregular border-crossing deaths and gender: Where, how and why women die crossing borders', *Theoretical Criminology* (2013); The Women's Refugee Commission: More Than One Million Pains: Sexual Violence Against Men and Boys on the Central Mediterranean Route to Italy; Leanne Weber and Sharon Pickering, *Globalization and borders: Death at the global frontier,* London: Palgrave Macmillan Limited (2011); and Alison Gerard, *The securitization of migration and refugee women,* London: Routledge (2014).

are scenes of violence; migrating subjects are also targets of violence along the Melilla beach and in the waters adjoining the enclave. The *Guardia Civil* has fired rubber bullets from the beach at persons attempting to swim from Moroccan territory to Melilla, to force them back to Morocco; people have drowned as a result.[722] All who take an irregular route to the EU risk being subjected to violence; however, some risks are particularly tied to the protection seeker's body. According to the UNHCR, trying to enter the enclaves can be even more dangerous for children, women, and people with special needs (such as the elderly or the disabled).[723] The protection seeker's social relations thus affect access into Melilla and what dangers that follows from this route.

Children who travel unaccompanied or who get separated from their families are subject to particular danger. Children face greater risk than their adult counterparts of sickness, injury, violence, kidnapping, trafficking, and exploitation (including sexual exploitation).[724] The majority of families with children who cross into Melilla at the Beni-Enzar border crossing point are Syrians.[725] Moroccan officials do not seem, however, to differentiate between particularly vulnerable groups, and sub-Saharan children staying in informal camps in Morocco are obstructed from accessing the Beni-Enzar border crossing point in the same way as adults.[726] The UN Committee on the Rights of the Child has scrutinized the border situation at Melilla in relation to the Convention on the Rights of the Child. In its decision in *D.D. v. Spain* (2019), which concerned a complaint brought by a Malian national who was returned from Melilla to Morocco as an unaccompanied asylum seeking minor, the

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[722] See Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 2015, cited in N.D. and N.T. v Spain (2020), para 48. In the situation to which this report refers, not all of the persons were able to swim back to Morocco, and 15 people drowned.

[723] UNHCR, Submission by the Office of the United Nations High Commissioner for Refugees in the cases of N.D. and N.T. v. Spain (Appl. Nos 8675/15 and 8697/15) before the European Court of Human Rights, 2015, para 2.3.1.

[724] IOM, Fatal Journeys Volume 3 Part I, 2017, p. 16.

[725] 'Child-friendly space at the Spanish border of Beni Enzar in Melilla' (globalcompactrefugees.org).

[726] 'Children in border and asylum procedures: Push backs of migrant children at the border' (humanium.org).

committee concluded that several of the rights enumerated in the Convention on the Rights of the Child had been violated by Spain.[727] After fleeing the war in Mali, the applicant had jumped the border fence between Morocco and Melilla. Like N.D. and N.T., he was apprehended by the *Guardia Civil* at the fence and immediately sent back to Morocco without any identification process. He was neither identified as a minor nor given the opportunity to apply for asylum or to receive legal assistance. The Spanish government argued that he had not yet arrived on Spanish territory. The Committee rejected this argument, however, and established (in the same way that the ECtHR did in *N.D. and N.T. v Spain*) that he was under the authority or effective control of Spain. The Committee highlighted the general obligation of states to take all necessary steps to identify unaccompanied minors as soon as possible, particularly at the border. The Committee concluded that, to prevent such violations in the future, Spain needed to amend its legislation authorizing summary expulsions in Ceuta and Melilla. It also ordered Spain to compensate the complainant for the harm he had suffered.[728]

Women are also particularly vulnerable in the border crossing situation. Tyszler has argued that the externalization of the EU's borders in Africa aggravates violence against women, by creating a continuum of spaces in which irregularized women must resist and/or negotiate asymmetries of gender, race, and class in order to cross borders.[729] Irregular entry into the EU

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[727] UN Committee on the rights of the child, D.D. v. Spain (2019). The violations of the CRC concerned were in relation to the best interest of the child (Article 3), special protection and assistance as an unaccompanied minor (Article 20), and freedom from torture (Article 37).

[728] Ibid.

[729] Tyszler, 'Humanitarianism and black female bodies: violence and intimacy at the Moroccan–Spanish border' (2020). Other research points to a relationship between gendered violence and border controls in general. See e.g. Gerard, *The securitization of migration and refugee women* (2014), p. 62; and Pickering and Cochrane, 'Irregular border-crossing deaths and gender: Where, how and why women die crossing borders' (2013), p. 43. The International Organisation for Migration (IOM) states that women in general are exposed to sexual and gender-based violence at every stage of the migration process, regardless of age, marital status, or preparation for travel; and they are therefore at greater risk of human rights abuses and death during migration than men. Furthermore, women

is gendered in general, as seen in the demographics displayed below (image 50). Melilla is no exception in this regard. As Tyszler has noted, women and children are present at border crossings, but climbing the fences is framed as something 'for men'.[730] Women and children hide in cars instead, or use the sea route in order to access the enclave.[731] Boundaries in relation to the crossing of borders thus appear in irregularized spaces as well.

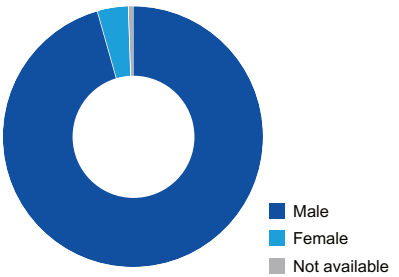

Image (50): Demographics of individuals identified at EU's external borders as having attempted 'clandestine entry' at land and sea in 2021.[732]

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are often forced to provide sexual services when negotiating border crossings. IOM further notes that women who are migrating without a network, pregnant women, and nursing women, teenage girls, unaccompanied children, elderly persons, and people with disabilities are particularly targets of discrimination and exploitation, increasing the risk they face and complicating access to legal protection. See IOM, Fatal Journeys Volume 3 Part I, 2017, p. 16. Gender-based violence and other types of gender-related discrimination and persecution can also explain why women flee; and according to the UN's Committee on the Elimination of All Forms of Discrimination against Women, three of the main reasons why women leave sub-Saharan Africa are gender-based violence, forced marriage, and female genital mutilation.

[730] Tyszler, 'From controlling mobilities to control over women's bodies: gendered effects of EU border externalization in Morocco' (2019). The fact that this route into Melilla is exclusively taken by men has also been confirmed in conversation with UNHCR in Melilla. One can also possible to observe this gendered pattern when studying published photos of people scaling the fences, or when visiting the border area close to the fences.

[731] Ibid. This has also been confirmed in conversation with UNHCR staff in Melilla, as well as through other data collected in relation to gender and irregular entry into Melilla. See e.g. '3 migrants hidden in cars at Spain-Morocco border caught' (arabnews.com) 23-05-10; and 'Like a glove: Migrant girl, 17, found hiding in the glove compartment of car trying to enter Spain from Morocco without documents' (thesun.co.uk) 23-05-10.

[732] Frontex, Risk analysis for 2022/2023, 2022.

Although the fences make for a firm borderline, the border at this scene of interaction should rather be understood as a spatial network of control that operates in both Melilla and Morocco. The fences as well as the water and the rocky hills are not just physical things and natural landscapes. Legal meanings and assignments are also embedded within them. The outcome of the spatio-legal interaction at this scene of interaction must thus be understood as a space of control that fixes and fortifies a certain spatiality where violence and intersecting social relations construct boundaries that affect who can enter the enclave. In the interaction between subjects' social relations and the EU border regime, it is primarily the skin covering the body that materializes as a 'line' of separation and exclusion. This line is flexible, and it extends into Morocco through third-country cooperation. Protection seekers' access to Melilla and to subsequent asylum procedures are generally obstructed at this scene by third-country cooperation and by border fences. However, visa exemptions under the Spanish Schengen Accession Agreement provide access to Melilla for certain Moroccans and for those who 'look like them'.[733] Irregular routes into the enclave, moreover, embody an intersection of social relations that further confine some bodies by limiting their mobility.

The EU is often imagined as a space of free movement for goods, services, capital, and persons. It has secured such relatively free internal flows, however, through the construction of external controls and the obstruction of certain subjects' movements. This spatial closure is starkly evident in Melilla. However, the EU's ambitions for coherence, for an internally secured space, and for freedom of flows within itself are a manipulation. They are a taming

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[733] Border control in Melilla is detached from the 'borderline' under third-country cooperation, but the border also extends – or bleeds – into Spain (cf. Shachar, *The shifting border: Legal cartographies of migration and mobility – Ayelet Shachar in dialogue* (2020)). This occurs through the legitimizing of pushbacks taking place within Spanish jurisdiction, but also through the obstruction of further mobility of those persons who succeed in scaling the fences, since these people are commonly detained in the enclave without any possibility of reaching mainland Spain. Detention is a sort of spatial exclusion that constitutes another border, or a spatial expansion of the border, reinforcing the understanding of this scene as a space of exclusion and control. According to the Spanish Supreme Court, the limiting of asylum-seekers' right to move freely across Spanish territory has no justification in domestic or EU law. See ECRE, Country report: Spain, 2019.

of space and place that is played out as, and on the basis of, unequal social relations. The physical reality of this scene of interaction reinforces this delineation of people. A border construction – that uses a wide range of technical and physical devices, and border guards on both sides of the fences – encloses Melilla. However, neither subjects nor space or place can be understood as 'closed' or static; rather, they must be seen as relational, interdependent, and in a state of becoming. Despite the fact that the EU is trying by multiple means to prevent certain subjects from migrating, and although the route to the Union is framed by violence, death, refusals, and pushbacks, people continue to move. They take new routes and risks, they continue to jump the fences into Melilla, and thus they resist the closure of the enclave.

4.2.3 The Power-Geometry of the EU's External Border: Borders of Boundaries

The sections below address boundaries as an effect of the spatio-legal interaction at the scenes, and they relate the issue of boundaries to the concept of invisibilization. The analysis concludes that the EU border regime constructs and relies on boundaries that are integral to the process of invisibilization. Furthermore, protection seekers 'meet' the border at different locations according to their social relations. These social relations become 'spatio-legal positions' in relation to the power-geometry of the EU's external border.

When the legal sources of the EU border regime are translated from abstract legal text into the realities the protection seeker confronts, border and migration control law materializes as fences, walls, and other fortifications of state borders that intersect with social relations and with physical and natural features. Legal norms emanating from the asymmetry in international and European migration and refugee law thus exist as building blocks of 'normative values' embedded in the scenes of interaction – materialized in space in various shapes and with varying degrees of visibility. In Melilla, the embeddedness of law is highly visible, and the physical place is suffused with control. By contrast, the construction of the border at the Belgian embassy in Beirut is more hidden. It takes place within a building, through individual assessments under the Visa Code, and through the embassy's decisions to grant or to refuse access to the global mobility infrastructure. However, the

principle of non-refoulement and the right to seek asylum are not visibly embedded and enforceable in either scene of interaction. Rather, the EU border regime seems to materialize and to play out in ways that do not trigger such commitments.

In the spatio-legal interaction at the two scenes of interaction, it is not just that law expands in space as it is embedded and embodied. It is also that space is present everywhere in law, in legal interpretation, and in the enforcement of EU migration and border control.[734] The most prominent example of this can be seen in the spatial concept of jurisdiction under which the geography of fundamental rights is played out, as well as in law's involvement with social relations. At the Belgian embassy in Beirut, the situatedness of protection seekers as outside EU territory is crucial for the non-applicability of individual rights protection; and the social relations of the visa applicant are decisive in the individual assessment. The Melilla border is controlled not just through externalization and a racial delineation of people, but also by means of fences and natural fortifications along the borderline, such as the water and the steep and rocky hills. Space is thus integral to EU migration and border control law and to law's delineation of different subjects' mobility.

The reliance of law on space is manifested in the dependence of the EU border regime on social relations, as seen in the playing out of border control in Melilla and under the Visa Code. However, mobility is always constrained by a subject's social relations; and it varies in time across axes of race, nationality, gender, family situation, and class. It is furthermore shaped by laws and practices that manage and control mobility.[735] The ability to migrate is thus not something owned by the individual person alone; it is conditioned by laws, infrastructures, family or household decisions, and structures of social

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[734] Cf. e.g., Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015); and Delaney, *The spatial, the legal and the pragmatics of world-making: Nomospheric investigations* (2010), p. 162.

[735] Cf. e.g. Massey, *Space, place and gender* (1994), p. 150; Massey, 'Power-geometry and a progressive sense of place' in Bird and others (eds), *Mapping the futures: local cultures, global change*; Jennifer Hyndman, 'Mind the gap: bridging feminist and political geography through geopolitics', *Political Geography* (2004), p. 316; and Beebe, Davis and Gleadle, 'Introduction: Space, place and gendered identities: Feminist history and the spatial turn' (2012), p. 524.

relations. Individual and legal status, units such as the family or household, and other structures such as gender and class affect the fleeing subject's mobility. Mobility is thus connected to social relations and the shifting spatiality of such relations.[736] It provides preconditions for the playing out of law and the effect of law.[737] Under the Visa Code, law organizes mobility by inscribing social relations with legal significance. In general, the visa requirement excludes protection seekers from access to the global mobility infrastructure, while including those who do not constitute an 'immigration risk'. In addition, if a subject does not have a strong connection in the home country, such as a well-paid job, family ties, property, etc., that person is even more likely to be prevented from travelling by the requirements set out in the Visa Code. In Melilla, third-country cooperation with Morocco obstructs sub-Saharans from reaching the border crossing point at Beni-Enzar, leaving them only with irregular ways of crossing the border. The practices in question thus confer legal significance on skin colour. Law thus both affects and constructs space and the social relations therein – as seen in the previous analysis – law reproduces and reinforces already existing social relations and the spatial scope of such relations.[738]

Within irregularized spaces, furthermore, additional power geometries and inequities are present. To survive an unauthorized border crossing under the current border regime – as in Melilla, or in the irregularized spaces to which protection seekers who are denied a visa often turn – physical strength is required. Only young, healthy, and strong people are therefore likely to risk such a journey. Borders thus select when they are crossed in an irregular manner too. Moreover, in contrast to the global mobility infrastructure, the irregular routes offer costly, complicated, dangerous, and time-consuming journeys. Those seeking access to the EU must be prepared to wait for an

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[736] On the spatial form of the social, see Massey, *Space, place and gender* (1994), pages 254–255.

[737] Cf. e.g. Massey, *For space* (2005), p. 166; and Judith Butler, *Gender trouble. Feminism and the subversion of identity,* Routledge (1990), p. 33. Butler understands the body not as a ready-made surface waiting for signification, but instead as 'a set of boundaries, individual and social, politically signified and maintained'.

[738] Cf. Massey on how class and gender relations and the geographical variety thereof, are significant elements in the production of space, Massey, *Space, place and gender* (1994), p. 2.

appointment at an embassy; to wait for the embassy to decide on their application, or if denied to resort to the services of smugglers and document-forgers; to cross the Mediterranean in a rubber boat; to wait at the Gourougou mountain camp for a chance to jump the fences at Melilla; to be held in detention or confined in a CETI in Melilla and not allowed to leave for mainland Spain – in brief, to endure risks, evade border guards, escape surveillance, and defy violence and death.[739] Time and danger thus arise as boundaries that protection seekers must live through and survive.[740]

The fact that migration – including for the purpose of seeking asylum – is becoming increasingly difficult and dangerous has the effect of deciding who reaches EU territory, and who ultimately has access to international protection. Studies on migration to the EU suggest, for example, that the current border regime 'privileges' young, able, male bodies, and discouraging women, children, and old people.[741] The dangers and insecurities involved, and the varying forms of gender-specific violence and insecurity that are experienced by refugees in transit and destination countries, affect mobility and access. Thus, a subject's social relations and ability to cope with the dangers and insecurities entailed in these routes become a precondition for fleeing. That boundaries in relation to access to the EU follow from intersecting gender and age relations becomes evident when we study statistics for first-time asylum

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[739] Like prisoners sentenced to a certain time in jail, protection seekers heading towards the EU are caught in a space imbued with time. Crossing into Melilla takes time. People on the way to Europe often stay for years in informal migrant camps in Morocco, such as on Gourougou mountain just outside Nador. After crossing into Melilla, moreover, protection seekers wait again to be granted mobility to mainland Spain. See 'The Melilla border deaths represent a new phase in the bloody story of fortress Europe' (statewatch.org).

[740] Hyndman has noted on how time affects women's mobility and possibilities to flee, see Hyndman, 'Mind the gap: bridging feminist and political geography through geopolitics' (2004). See also Stronks, *Grasping legal time: Temporality and European migration law* (2022) on how European migration law involves with 'temporal governance' as an operation of power.

[741] See e.g. Weber and Pickering, *Globalization and borders: Death at the global frontier* (2011); Pickering and Cochrane, 'Irregular border-crossing deaths and gender: Where, how and why women die crossing borders' (2013); Gerard, *The securitization of migration and refugee women* (2014); Jane Freedman, 'Sexual and gender-based violence against refugee women: a hidden aspect of the refugee "crisis"', *Reproductive Health Matters* (2016); and Khosravi, *'Illegal' traveller: An auto-ethnography of borders* (2010).

applications submitted in the 28 EU member states between 2013 and 2019. Only a third of the applicants were women; and of the unaccompanied children who applied for asylum in the EU during the same period, only 8 to 9 percent were girls.[742] In 2020, 36% of first-time asylum applicants in the 27 EU member states were women, 30% in 2021, and 29% in 2022.[743] Unaccompanied girls accounted for 11.5% of the total number of unaccompanied asylum-seekers in the 27 member states in 2020, for 6.9% in 2021, and for 6.3% in 2022.[744] These proportions do not correspond to those in the global refugee population, in which men and women are almost equally represented.[745] Such intersecting relations of gender and age are not static, however. Nor are they just a result of already existing social relations of inequality in countries of origin. These relations can also be explained by the operation of the EU border regime within and through such already existing relations. Law is the outcome of political processes. When law changes, the behaviour and relations of those who are affected by it change as well.[746] In 2016, for example more women and children crossed into Europe than in 2015. This indicates that restrictions on family reunification in EU member states (this was the response of several member states to the 'refugee crisis') had the effect of changing the demographics of migration, with a larger number of women and children boarding unsafe transports across the

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[742] Eurostat, Asylum applicants considered to be unaccompanied minors by citizenship, age and sex – annual data, 2023.

[743] Eurostat, Asylum applicants by type of applicant, citizenship, age and sex – annual aggregated data, 2023.

[744] Eurostat, Asylum applicants considered to be unaccompanied minors by citizenship, age and sex – annual data, 2023.

[745] UNHCR, Global trends report, 2022.

[746] See e.g. how the introduction of Temporary Protection Visas (TPVs) in Australia in 1999 changed border-crossing demographics. TPVs were explicitly introduced as a deterrent against unauthorized boat arrivals, and people arriving by boat were no longer eligible for permanent protection visas or for family reunification. Pickering and Cochrane noted that the deterrent power of TPVs and other restrictive border controls can have resulted in a change in the age and gender composition of passengers making risky voyages by boat to Australia. After the change of in the law, namely, unauthorized vessels became larger, transporting complete family units, including pregnant women and young children. See Pickering and Cochrane, 'Irregular border-crossing deaths and gender: Where, how and why women die crossing borders' (2013), p. 35.

Mediterranean Sea.[747] Feminist studies of geography and migration have examined how relations of gender shape such unequal geographies of mobility and displacement, and how migration both reflects and reinforces social organization along lines of gender, race, class, nationality, and sexuality.[748] Law and space are connected in a relational interdependency. When law changes, space and its relational dimensions change as well. The converse is also true – when, for example, migrants 'hack' the EU border regime – law adjusts to the new situation. Since both space and law are integral with time and constructed out of social relations, the spatio-legal interaction is never still. Instead it is dynamic, in a shifting power-geometry that imposes boundaries and affects access to EU territory and to subsequent asylum procedures.[749]

The analysis of the EU border regime reveals a spatio-legal interaction that reinforces and fixes already unequal spatialities and social relations (see image 47), by obstructing mobility for certain subjects.[750] Through such actions, the EU excludes some while including others. The border thus expands within and out of social relations, reinforcing already existing power-geometries by locating some relations outside the frame of inclusion. Such spatial relations of inequality furnish another dominant building block of the EU border regime.

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[747] In 2015, about 30 % of the population on the move were women and children; whereas in 2016, women and children made up nearly 60% of refugees and other migrants crossing into Europe. See CoE Commissioner for Human Rights: Human rights of refugee and migrant women and girls need to be better protected.

[748] Silvey, 'Borders, embodiment, and mobility: Feminist migration studies in geography' in Nelson and Seager (eds), *A companion to feminist geography* (2005), p. 138. Feminist geography studies on migration show, for example, that women's (often sole) responsibility for childcare constrains mobility and shapes their resettlement options. Hyndman has addressed the situation of refugees in Kenyan refugee camps far away from consular posts where applications for visa or refugee resettlement can be lodged. See Hyndman, 'Mind the gap: bridging feminist and political geography through geopolitics' (2004), p. 316. Other factors affecting mobility pointed out in migration studies are related to the 'androcentric' framing of the protection seeker – which, together with family situation, inadequate resources, social position, and reduced access to informal and formal structures that facilitate migration – most likely impede women's flight. See Jacqueline Bhabha, 'Demography and rights: Women, children and access to asylum', *International Journal of Refugee Law* (2004), p. 235.

[749] Cf. Massey, *Space, place and gender* (1994), p. 3.

[750] Cf. Ibid. p. 149.

4.2.3.1 Spatio-Legal Positions of the Border

The externalization of border control and the invisibilization of fundamental rights obstruct the mobility of protection seekers in general (see section 4.1). Furthermore, this building block of the EU border regime intersects with and expands on social relations in a power-geometry. Gender and other social relations play out in the spatio-legal interaction of the EU border regime, affecting and further shaping mobility and access to the EU. The lack of special entry provisions for protection seekers, and the invisibilization of rights amplify 'the body' and a subject's social relations.[751] The EU border regime is part of the construction of these spaces – as a driver of exclusion and confinement, and as a reproducer and exaggerator of already existing social relations.

Social relations are entailed in the legal prerequisites of the Visa Code. Visa applications are more readily granted, for instance, if the applicant has a stable family situation, a steady and well-paid job, and so on. The converse applies as well, which results not just in a boundary but also in a border that obstructs mobility. Boundaries thus become borders.[752] These borders operate far from the territorial borders of the EU, yet they operate as if materially concrete when they play out. They materialize in visa refusals that confine people in countries of origin or of transit, thereby denying access to the EU. Law is thus involved in the imposition of boundaries, and does also subsequently enforce them through law – as in the decision not to issue a visa or to deny a person permission to board a plane.[753] These boundaries, co-produced by the EU border regime, become explicit borders when they are played out in real life –

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[751] Cf. Lauren Martin, who notes that the 'respatialization' of the EU's external border multiplies the possibilities for exclusion, and that it changes the relationship between states, subjects, and mobile bodies. See Lauren Martin, 'Security', in John Agnew (ed), *The Wiley Blackwell companion to political geography* (John Wiley & Sons 2015).

[752] Cf. Massey and Jess, who argue that borderlines do not embody any eternal truth of places; rather, they are socially constructed lines that enclose open and porous places. See Massey and Jess, *A place in the world? Places, cultures and globalization* (1995). Massey also highlights that attempts to establish boundaries, stabilize, 'label' and 'secure the identity of places'. Massey, *Space, place and gender* (1994). See also Butler, who points out that the forcible reiteration of norms subsequently take material form, Butler, *Bodies that matter: on the discursive limits of sex* (1993).

[753] Cf. Philippopoulos-Mihalopoulos, 'And for law: Why space cannot be understood without law' (2018), p. 3.

borders that divide subjects in an unequal geography of mobility. In this geography, the border is experienced at different positions according to a person's intersecting social relations.[754] Some persons can travel without applying for a visa under the Visa List Regulation, and be 'at the border' in the meaning of the CEAS and the ECHR upon arrival in an EU member state; whereas others cannot visit an embassy to lodge an application due to war, or because of gender or class relations that obstruct their mobility in the country of origin or transit.[755] The EU border regime provides mobility for some; indeed it shows a clear interest in centring a certain kind of mobility. Protection seekers without the prerogative of access to the global mobility infrastructure, however, are obstructed and excluded. In this geography, social relations become 'spatio-legal positions' in the power-geometry of the EU's external border.[756] In Melilla, for instance, social relations of race affect where it is that fleeing subjects meet the border (the location for the enforcement of EU migration and border control). Some meet it at the border crossing point at Beni-Enzar. Others do so at the fences, at the police line, or when being prevented from accessing the border crossing point. Also at this scene of interaction, social relations become spatio-legal positions in relation to the EU's external border.

The construction and organization of the EU border regime thus produces a border tied to the social relations of protection seekers. 'Borders' under the EU border regime, then, can never be understood just as lines that demarcate one territory from another. Rather, they must be seen as legal norms emanating from the asymmetry in international, European, and EU migration and refugee law. They form building blocks of 'normative values' in the

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754 Cf. Massey on how social relations are experienced and interpreted differently according to what position in space in which a subject is situated. See Massey, *Space, place and gender* (1994), p. 3.

755 Cf. Massey who notes that mobility, and control over mobility, both reflect and reinforce power. 'It is not simply a question of unequal distribution, that some people move more than others, and that some have more control than others. It is that the mobility and control of some groups can actively weaken other people. Differential mobility can weaken the leverage of the already weak. The time-space compression of some groups can undermine the power of others'. See ibid., p. 150.

756 Cf. Massey on how different groups of workers have different positions in spatial structures of production; ibid. pages 3 and 102.

physical world and in social relations, as embodied by protection seekers under relations of inequality.[757] They produce boundaries that stabilize the 'identity of place' by taming space.[758] Boundaries materialize as a border for the protection seeking subject, yet without falling within the scope of the CEAS or under the jurisdiction of the ECHR. Thus, the Syrian protection seeker who is refused a visa under the Visa Code is not 'at the border' within the meaning of the CEAS. Nor is the protection seeker from south of the Sahara who is impeded by Moroccan border guards when trying to enter Melilla. The right to seek asylum and the principle of non-refoulement are thus disconnected from border control at these 'spatio-legal positions' of the EU's external border. Boundaries thus constitute another effect of the spatio-legal interaction under the EU border regime that invisibilizes fundamental rights.

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[757] Scholars have highlighted the effect of border politics and legislation and how 'the border' attaches itself to the migrant's racialized and gendered body as the latter both crosses and carries borders within and outside territories and jurisdiction. Khosravi has described this as 'being the border'. See Khosravi, *'Illegal' traveller: An auto-ethnography of borders* (2010), p. 99. Khosravi refers to Balibar, *Politics and its other scene* (2002). In the same vein, Bibler Coutin points to the complex relationships between bodies, law, and space, arguing that the spatial reconfiguration of the border also occurs within territories, and that law (through legal status) is mapped onto bodies and situates migrants as outside of national territory even when they are physically within it. See Susan Bibler Coutin, 'Confined within: National territories as zones of confinement', *Political Geography* (2010), p. 201. See also Blomley and Bakan, who analyse American and Canadian decisions on federalism and worker safety, with particular emphasis on their construction and reification of spatial boundaries and legal categories. Like Bibler Coutin, moreover, they comment on how certain people are frequently 'spaced out' and denied protection, by virtue of their supposed 'geo-legal' location. See Blomley and Bakan, 'Spacing out: towards a critical geography of law' (1992). The stickiness of 'the border' is connected to what Philippopoulos-Mihalopoulos has noted about law and bodies – how bodies carry and bringing out the law or adapting to law even when the law is not there or is not immediately visible. Philippopoulos-Mihalopoulos states that 'Law is carried by and within the bodies. It does not exist somewhere out there – there is no out there. All is space; all is continuum. Bodies embody the law, carry the law with them in their moves and pauses, take the law with them when they withdraw'. See Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), p. 55.

[758] Cf. Massey and Jess, *A place in the world? Places, cultures and globalization* (1995).

5 From Border to Borderscape

This chapter seeks to answer research question 3 and to provide an understanding of the EU's external border and the protection of individual rights 'at the border', given the embeddedness of law and the asymmetry between where border control takes place and where the obligation to protect fundamental rights applies.

Having its basis in the doctrinal study presented in chapter 2 and in the previous analysis in chapter 4, this chapter submits that the EU's external border is an ongoing production of inclusion and exclusion in space and time; and it frames the 'sum' of the interaction between law and space as 'borderscape'. Moreover, the analysis in this chapter expands the spatial scope of the scenes of interaction and demonstrates how the EU's external border appears 'everywhere' (see section 5.1). The border does so, however, without triggering any obligation to protect the fundamental rights of protection seekers who are 'at the border' and who try to cross it. In borderscape, the EU's external border is detached from territory; it appears as a 'web' of migration and border control. This web expands in time and space and is constituted from norms of migration and border control law that provide building blocks or 'strings' of varying temporality in the physical world and in social relations – taming space and mobility. The effect of this spatio-legal interaction, and of the process of invisibilization it entails, is a securitized and unequal geography of mobility. Some subjects travel quickly and safely; others do so slowly and under danger. In section 5.2 the analysis addresses law's spatial embeddedness and embodiedness as omitted in legal interpretation and decision-making, and notes that such omission is part of the process of invisibilization. The analysis furthermore addresses the irregular spaces of borderscape as mutually constituted under the EU border regime. The last section of this chapter (5.3) concludes that the notion of borderscape offers an understanding of the EU's external border that takes account of the asymmetry and of the embeddedness of law.

5.1 The Spatial Relationship between 'Insiders and Outsiders'

Massey describes space as a complex 'web of relations of domination and subordination'.[759] The analysis in this section returns to the various external and extraterritorial means of migration and border control employed by the EU border regime that has been examined throughout the study. The result of the broad effect such control has is a 'web' of control that obstructs mobility through spatial boundaries and borders, and that targets protection seekers who sometimes are very far from EU territory. Addressing the EU's external border as a web of control, this section suggests that the relationship between 'insiders and outsiders' constitutes the basis for this web and the ongoing production of borderscape. Border control is thus understood as a relational activity, forming a 'web of relations of domination and subordination'. The analysis also examines how this relationship – and the spatialization thereof – is governed and enforced by legal mechanisms imbued with time and constructed with long or short temporalities in relation to their objectives.[760]

The connection between free internal movement and external control under EU law generates a dominant spatial relationship, providing the foundation for the EU border regime and the division of mobile subjects into insiders and outsiders. This division is primarily played out between on the one hand EU citizens, who enjoy the privilege of free movement within the Union, and on the other hand third-country citizens who generally do not. This relationship has historical and colonial roots, and as Mégret notes, the freedom of movement has always been 'a coded enterprise' that operates in very different ways depending on whether the mobility at stake is that of 'Europeans or non-Europeans'.[761]

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[759] Massey, *Space, place and gender* (1994), p. 265.

[760] Cf. Valverde, *Chronotopes of law: jurisdiction, scale, and governance* (2015).

[761] Addressing the question on how the past continues to structure the present, Mégret suggests that mobility is shaped by the logics of empire, and that decolonisation and the migrating of 'non-whites' to the old imperial metropolis prompted restriction on mobility and the raising of 'walls'. Mégret furthermore submits the idea that the freedom of movement and its 'whiteness' has served as a crucial signifier for racialization reflected in the 'hyper-mobility' in the Global North and in the reduced South-North mobility. See

Turning to the establishment of the EU border regime, the spatial relationship between insiders and outsiders is set out explicitly in the TEU, the 1990 Schengen Convention, and in the conclusions from the 1999 European Council summit in Tampere. Article 3(2) TEU proclaims that the Union shall offer its citizens an area of freedom, security, and justice without internal frontiers, and within which the free movement of persons is 'ensured' through appropriate measures with respect to external border control, asylum, immigration, and the prevention and combating of crime. Thus, securing the freedom of EU citizens requires that others – non-EU citizens – be controlled. The operative assumption is that 'freedom' cannot be guaranteed without strong external controls. Article 3(2) TEU can therefore be understood as a set of explicit instructions on how to design and organize such spatial relationships. Article 67(2) TFEU[762] does the same, as do the SBC (in greater detail), the visa requirements, and the carriers' rules. Under these conditions of spatial openness for some and spatial closure for others, asylum-seekers and other migrants 'need' to be controlled, so as to minimize the 'risk' that they will set foot in the border-free EU.[763] Border and migration control thus constitutes a relational activity, controlling the mobility of certain subjects, as well as a legal (and political) manipulation of space that operates within the relationship between insiders and outsiders. Within this relationship, the EU strives for flow and freedom of movement within the Union, but under the condition of being closed, a 'container' which is disconnected from 'the outside', that denies flow to certain subjects, that stabilizes control, and that guards space from unwanted movement and mobility.[764] This spatial relationship makes for a foundation from which control mechanisms aimed at 'distancing' and 'othering' third-country citizens can spring.

Frédéric Mégret, 'The contingency of international migration law: "Freedom of movement", race and imperial legacies', in Ingo Venzke and Kevin Jon Heller (eds), *Contingency in international law* (Oxford University Press 2021), pages 180–195.

762 Article 67(2) TFEU states that the area of freedom, security and justice shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration, and external border control, based on solidarity between member states, which is fair towards third-country nationals.

763 Cf. Massey, 'Power-geometry and a progressive sense of place' in Bird and others (eds), *Mapping the futures: local cultures, global change*, p. 67.

764 Cf. Ibid., p. 67; and Massey, *For space* (2005), p. 166.

As an outcome of this relationship, the late 1990s saw the establishment of the CEAS. The CEAS did however not develop out of a pure human-rights discourse, but was rather framed in accordance with the logic of the internal market, and conceived as a compensatory measure for guarding internal security and free movement in a border-free EU 'from protection seekers travelling around in the union, applying for asylum in all member states'.[765] The reason for establishing the CEAS, according to the 1999 conclusions from the European Council summit in Tampere, was to ensure 'an open and secure European Union, fully committed to the obligations of the Refugee Convention and other relevant human rights instruments, [and] able to respond to humanitarian needs on the basis of solidarity'.[766] However, the strife to achieve this balancing act has receded, and control and surveillance have come to overshadow refugee protection and human rights.[767] Increasingly, therefore, EU actors have put a heavier stress on externalizing migration control and on building border walls and fences, to 'secure' the Union and prevent arrivals of 'unwanted' third country nationals (see image 1).

In the 1999–2013 period, during which the CEAS was being established, the heavy focus on border and migration control was intensified. This was due among other things to '9/11', as well as terrorist attacks in the EU after the turn of the millennium. These incidents made an expansion of security practices possible, along with an amplification of the 'insecurities', including fatalities, that accompany them, which the subjects of migration and border

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[765] Huysmans has highlighted the relational aspects of this development, claiming that, if the CEAS had developed within a humanitarian framing instead of as a security question, it would have introduced different relations towards refugees – allowing for compassion and rights instead of fear and exclusion. See Huysmans, *The politics of insecurity: Fear, migration and asylum in the EU* (2006), p. xii. See also Peter Boeles, *European migration law,* Intersentia (2009), p. 316; Lavenex, 'The Europeanization of refugee policies: Normative challenges and institutional legacies' (2001), p. 858; and Meriam Chatty, *Migranternas medborgarskap EU:s medborgarskapande från Romförhandlingarna till idag,* Örebro universitet (2015).

[766] Tampere Presidency Conclusions (1999), Conclusion 4.

[767] Chatty, *Migranternas medborgarskap EU:s medborgarskapande från Romförhandlingarna till idag* (2015), p. 189.

control embody.[768] Subsequently, the so-called refugee crisis led to stepped-up external action by the Union, often in the form of soft-law solutions beyond the reach of legal scrutiny and bereft of protection for individual rights. However, while the 'crisis' of 2015–2016 has now passed, its narrative is still being maintained and the use of soft-law instruments continues. Under this narrative, 'illegal' migration is thought to justify the erection of barbwire-equipped fences, and the use of other control mechanisms too, in order to counter the 'threat' of migration.[769] By contrast, the construction of a border regime that protects fundamental rights is not seen as a priority. Under this securitization and illegalization of migration, measures not otherwise seen as

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[768] Martin, 'Security' in Agnew (ed), *The Wiley Blackwell companion to political geography*; Huysmans, *The politics of insecurity: Fear, migration and asylum in the EU* (2006); Gerard, *The securitization of migration and refugee women* (2014); and Bigo and Guild, *Controlling frontiers: Free movement into and within Europe* (2005).

[769] The frequent use of terms such as 'illegal migrants' in political debate or EU legislation, and the association of terrorist attacks with migration, generate suspicion towards migrants and contribute to a heightened anxiety about 'the other', who is increasingly viewed as a threat to national security. See e.g. Ratna Kapur, 'Travel plans: border crossings and the rights of transnational migrants', *Harvard Human Rights Journal* (2005); and Tugba Basaran, 'The saved and the drowned: Governing indifference in the name of security', *Security Dialogue* (2015). The EU's aim of ensuring its external borders is often portrayed as a question of national security. The notion of 'national' in national security can refer to the state or to the nation pointing to the political community a system of governance or something beyond that – a cultural or ethnic identity placing individuals in a collective. National security is thus closely connected to the concept of national identity or to the assumption of a single shared national identity. The assumption of a single national identity, and of a need to protect it, makes migration a target for national security concerns, and ultimately an incentive for securitization. The challenge that migration poses to unitary conceptions of national identity, and the question of refugees' rights in relation to state sovereignty, have deep historical roots and have provoked political debate for years. See e.g. Fiona B. Adamson, 'Crossing borders: International migration and national security', *International Security* (2006), p. 180; D Krasner, Stephen, *Sovereignty: organised hypocrisy,* Princeton University Press (1999); Saskia Sassen, *Globalization and its discontents: [essays on the new mobility of people and money],* New York: New Press (1998); and Saskia Sassen, *Losing control? Sovereignty in the age of globalization,* New York: Columbia University Press (1996).

legitimate can be taken, putting protection seekers at a distance, and deepening the division between insiders and outsiders.[770]

5.1.1 Temporalities of Control

With its foundation in the relationship between insiders and outsiders, the EU border regime focuses on strengthening border control through both external and extraterritorial means. This includes a battery of control measures – of varying legal status and temporality – that co-produce and give shape to relations of exclusion and control. Entry conditions following from the SBC, and from visa and carrier requirements, reinforce the spatio-legal relationship of insiders and outsiders, producing strings of a larger web of extraterritorial control deeply stamped by the global division between north and south (see image 2). By these means, EU actors are able to apply migration and border control at any point where a subject may try to access the global mobility infrastructure (e.g., by applying for a visa to an EU member state, or trying to board a plane bound for one). Through the Visa List Regulation, moreover, the EU can add countries torn by war or whose citizens face persecution, to prevent the entry of citizens therefrom. The EU's external border is thereby flexible and mobile, with the visa requirement serving as a tool for maintaining a certain spatiality of mobility from which protection seekers remain excluded. With these extraterritorial measures of migration and border control, the EU's external border reaches into countries of origin and of transit, redrawing the Westphalian notion of borders on which the obligation to protect fundamental rights relies, and cancelling the mobility of protection seekers.

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[770] Several scholars within securitization studies have claimed that the securitization of migration affects not just the persons pointed out as 'the other' or as 'a threat', but EU citizens as well. In 'The Saved and the Drowned', Basaran argues that 'classifying people as unauthorized, irregular, illegal, and/or criminal creates suspicion, stigmatization, and feelings of distrust towards these populations.' Moreover, legal rules and norms change the normative landscape and authorize the creation of distinctions between individuals – who is worth rescuing and who is not? See Basaran, 'The saved and the drowned: Governing indifference in the name of security' (2015), p. 9. See also Zrinka Bralo and John Morrison, 'Immigrants, refugees and racism: Europeans and their denial', in Elspeth Guild and Joanne van Selm (eds), *International migration and security* (Routledge 2005); and Gerard, *The securitization of migration and refugee women* (2014).

The EU's most flexible ways of conducting extraterritorial migration and border control work via third-country cooperation, under which border control is carried out in countries of origin or of transit. Such cooperation is founded on the division between insiders and outsiders, and it is typically marked by a shorter temporality than its more static legal counterparts addressed above. Third-country cooperation is often conducted on a 'soft-law' basis providing for bilateral or non-binding agreements between the EU or its member states on the one hand, and third countries on the other. The agreement between the EU and Morocco is an example; that between Spain and Morocco is another. Such agreements can take the form of declarations, statements, or action plans on migration, external border control, and return policies.[771] The EU has a wide variety of such arrangements. One example is the 2017 Memorandum of Understanding ('MoU') between Italy and Libya for 'stemming irregular migration'.[772] This document takes the form of a non-binding agreement between Italy and Libya; however, the EU supports the arrangement financially and politically. Other examples of such informal cooperation include the 2016 EU-Afghanistan Joint Way Forward (JWF),[773] as well as its replacement from 2021, the Joint Declaration on Migration Cooperation between Afghanistan and the EU (JDMC). Neither the JWF nor the JDMC are intended to 'create legal rights or obligations under international or domestic law'.[774] The complexity of third-country cooperation can furthermore be exemplified by the EU-Turkey Statement of 2016, which is yet another example of how non-legally binding cooperation forms a central part

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[771] Since such agreements are not legally binding, the EU Charter becomes inapplicable, and the legality of the cooperative arrangement cannot be reviewed by the CJEU, because the CJEU only has jurisdiction to review the legality of legislative acts (Article 263 TFEU). However, such agreements may have 'legal effect' vis-à-vis third parties (Article 263 TFEU) in such a way as to grant the Court jurisdiction.

[772] Memorandum of understanding between the State of Libya and the Italian Republic.

[773] The JWF concerns cooperation on preventing irregular migration to the EU, with financial support being provided to Afghanistan in return for preventing further irregular migration. The JWF also involves EU support for building up the capacity of Afghan law enforcement agencies, as well as specific support for drafting and enacting effective legislation on migrant smuggling. Joint Way Forward on migration issues between Afghanistan and the EU, 2016.

[774] Joint Declaration on Migration Cooperation between Afghanistan and the EU, 2021.

of the EU's external border.[775] The Statement was issued by the EU 'Heads of State' (at this occasion not constituting the European Council) and by Turkey, thereby falling outside the scope of EU law and of CJEU scrutiny.[776]

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[775] The EU-Turkey Statement is based on the concepts of 'readmission' and of 'safe third countries'. The concept of safe third countries follows inter alia from Article 38 in the Asylum Procedures Directive, and it is used by some member states under EU law to return protection seekers to countries of origin or transit. The construction of the EU-Turkey Statement presupposes that Turkey is such a safe third country. See Bialasiewicz and Maessen for an analysis of how the EU-Turkey Statement contributes to a 'geographical sorting' of legal and humanitarian protection; Luiza Bialasiewicz and Enno Maessen, 'Scaling rights: the 'Turkey deal' and the divided geographies of European responsibility', *Patterns of Prejudice* (2018); and Molinari for an analysis of third-country cooperation on readmission, Caterina Molinari, 'Sincere cooperation between EU and member states in the field of readmission: The more the merrier?', *Cambridge Yearbook of European Legal Studies* (2021). The EU-Turkey statement has been described as a 'new management scheme', detrimental to the right to seek asylum, based on the blocking of migration by transit countries in return for financial support from the EU. See e.g. De Bruycker, '*Towards a new European consensus on migration and asylum*' (2019) EU migration law blog. Further, the Statement can be understood as a legalization and normalization of Greek authorities' pushbacks of protection seekers, a measure frequently observed. See e.g.: the communicated case L.H.M. and others v Greece, application no. 30520/17; UNHCR, Desperate Journeys – Refugees and migrants arriving in Europe and at Europe's borders, 2018; ECRE, Country report: Greece, 2018; CPT, Preliminary observations made by the CPT which visited Greece from 10 to 19 April 2018; Greek Council for Refugees: Reports of systematic pushbacks in the Evros region; Human Rights Watch: Greece: Violent Pushbacks at Turkey Border; and ECRE, Country report: Greece, 2019. See also the Order of the General Court of 7 April 2022, SS and ST v Frontex, T-282/21, EU:T:2022:235 concerning a pushback situation. The case was submitted to the CJEU on behalf of two asylum-seekers in May 2021. The infringement process, initiated under Article 265 TFEU, claims that Frontex 'failed to act' by not suspending or terminating its activities in the Aegean Sea Region within the meaning of Article 46, Regulation (EU) 2019/1896 of the European Parliament and of the Council of 13 November 2019 on the European Border and Coast Guard and repealing Regulations (EU) No 1052/2013 and (EU) 2016/1624, obliging such action if there are violations of fundamental rights or international protection obligations related to the activity concerned, that are of a serious nature or are likely to persist. Further, the applicants allege that the failure of the Agency to act in the context of Article 265 TFEU concerns the applicants directly and individually, as they had been abducted from EU soil and forcibly transferred back to sea, abandoned on unworthy vessels causing serious risk to life; unlawful refoulement, collective expulsion, and prevention of access to asylum; and 'Taking the EU to court over its migration policy' (front-lex-eu).

[776] Order of the General Court of 28 February 2017, NF v European Council, T-192/16, NG v European Council, T-193/16, and NW v European Council, T-257/16; and C-208/17 P, C-209/17 P and C-210/17 P, NF and Others v European Council (2018).

The EU border regime features control mechanisms of varying method and temporality. Policies applied under third-country cooperation, with the non-legally binding agreements it entails, operate swiftly; and they are mixed together with measures of more ponderous temporality, such as the Schengen rules of entry and territorially restricted protections for fundamental rights under the CEAS and the ECHR. This variation in temporality is a key element in the co-production of the EU border regime – a building block in the construction and maintenance of the relationship between insiders and outsiders, and to the closure of EU territory.

5.1.2 The Border is Not Fixed in Time or Space

As seen in the previous section, the EU's external border operates at a wide range of temporalities, and the web of control that it constitutes does not correspond to the actual geographical area of the member states. Spaces of exclusion expand as a result, and protection seekers can be confronted with the EU's external border (and become 'outsiders' thereby) already when they first try to leave the country of origin or of transit. The visa requirements in general, with their broad (indeed global) scope of application, are strings in this relational web of extraterritorial migration and border control. The same may be said of the EU-Turkey statement, of informal agreements like those with Morocco, and of EU policies in Libya and Afghanistan. Other examples include the EUTFA, CSDP operations, readmission agreements, working agreements and arrangements, and status agreements concluded by Frontex (image 3).[777] With such agreements, arrangements, and operations, the EU can

[777] In general, these 'strings' of the web apply without individual rights protection and supervision by the CJEU. In accordance with Article 275 TFEU, the CJEU's jurisdiction does not apply to actions taken under the EU's common foreign and security policy (CFSP), which moreover includes the common security and defence policy (CSDP). Article 275 TFEU states that the Court of Justice of the European Union shall not have jurisdiction with respect to the provisions relating to the common foreign and security policy, nor with respect to acts adopted on the basis of those provisions. It follows from Article 42(1) TEU that the common security and defence policy (CSDP) is an integral part of the common foreign and security policy. Action under the CFSP and the CSDP enhances EU border and migration control, including arrangements with third countries

be involved wherever people on the run direct their steps towards the EU.[778] Moreover, the strings of this web of externalization have implications for the protection of fundamental rights of people at risk, since 'chain externalization' can result, whereby several non-EU states increase their border controls and refuse entry to protection seekers. Developments in connection with the EU-Turkey Statement are an example of this. Turkey built a wall to prevent the entry of people from Syria, and Lebanon closed its border with Syria at the same time. Such interactive responses among several actors reinforce exclusion, reduce mobility, and sharply restrict access to asylum procedures in the EU or elsewhere. The strings of the web of control multiply.

When the EU acts through externalization, the border expands from the territorial edges of the member states into third countries, and it becomes flexible and 'spatio-legally positioned' in relation to the protection seeker's social relations (see section 4.2.3.1). Such expansion relies on space and invisibilizes fundamental rights. Under the notion of the Westphalian system of governance – deeply incorporated in international law on statehood and territory – law and space are supposed to neatly map onto each other. Externalization disrupts such notions, as well as undermines the protection of

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such as CFSP and CSDP missions. Through the exclusion of such action from the Court's scrutiny, CSDP missions such as the EU 'Sophia' in the Mediterranean Sea are in general exempt from judicial review by the CJEU. However, the Court shall, according to Article 275 TFEU, have jurisdiction to monitor compliance with Article 40 TEU. Article 40 TEU states that the implementation of the CFSP shall not affect the application of the procedures or the extent of the powers of the institutions laid down by the Treaties for the exercise of the Union competences referred to in Articles 3 to 6 of the TFEU. This means that the CJEU through Article 40 TEU has jurisdiction to limit the scope of actions under the CFSP. Cf. C-91/05, Commission v Council (ECOWAS) (2008) in the ECOWAS case, in which the CJEU annulled a CFSP Decision (Council Decision 2004/833/CFSP) and concluded that the Council's decision should have been adopted under the EC Treaty and not the EU Treaty. Article 40 TEU can thus limit the scope of actions taken under the CFSP.

[778] The EU's use of readmission agreements and arrangements, and Frontex's working arrangements and status agreements, account for a large portion of border control. If transit countries do not apply efficient border controls, migrants will be returned to that country.

individual rights and the distribution of accountability.[779] This disruption is apparent under the EU border regime, which spins a web of 'borders' that appears outside the ECHR's scope of jurisdiction and the field of application of the CEAS. Under this design, the EU's external border is not fixed in time or space. Rather, it appears 'everywhere' as 'borderscape'. Rooted in relations of exclusion, it is co-produced and repeated as a space of complex spatial and temporal legal activity.[780]

In borderscape, the EU's external border cannot be seen as a sharp line. It constitutes, rather, a diffuse and networked apparatus of control that, as demonstrated in chapter 4, expands on natural landscapes and social relations.[781] The effect of this is an ongoing process in which the EU's external border 'moves' with the footsteps of protection seekers, rather than remaining static and territorial.[782] Under this flexible border construction, the border rather divides people than territory, and obstructs movement without providing protection for individual rights 'at the border'. Under such circumstances, as Goodwin-Gill has noted, obligations and responsibilities

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[779] However, as Chimni has noted, the concept of jurisdiction has – although its technical and neutral framing – always served to promote or legitimate certain interests. See B.S. Chimni 'The international law of jurisdiction: A TWAIL perspective', *Leiden Journal of International Law* (2022).

[780] Cf. Graham, 'Sydney's drinking water catchment – a legal geographical analysis of coal mining and water security' in O'Donnell and Gillespie (eds), *Legal geography – perspectives and methods*; and Kumar Rajaram and Grundy-Warr, *Borderscapes: Hidden geographies and politics at territory's edge* (2007); and Philippopoulos Mihalopoulos notion of lawscape, Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015).

[781] Cf. Walters, 'Mapping Schengenland: Denaturalizing the border' (2002), in which Walter frames EU border and migration control as a 'networked, control apparatus', p. 573.

[782] Cf. Olivia Barr on how common law moves with the subject, Barr, *A jurisprudence of movement: Common law, walking, unsettling place* (2016), p. 224; and Magdalena Kmak on how human mobility makes law mobile. See Kmak, *Law, migration, and human mobility: Mobile law* (Routledge Taylor & Francis 2024 *forthcoming*). On the 'shifting border', see Shachar, *The shifting border: Legal cartographies of migration and mobility – Ayelet Shachar in dialogue* (2020). See also Nail on how the movement of the border should be understood not as a metaphor, but instead as literal and actual movement. Nail highlights territorial conflicts, border management, and technology as means by which the border moves; and addresses the border's connection to natural landscapes – how the movement of rivers, waters, and trees is part of what moves the border. Thomas Nail, *Theory of the border,* Oxford University Press (2016), p. 6–7.

must be mediated by the principle of attribution, being localized in the acts of state agents rather than in physical territory.[783] This principle, however, has not been applied. Instead, as demonstrated in the analysis earlier of *PPU X and X v État Belgium*, *N.D. and N.T. v Spain*, and *M.N. and Others v Belgium*, being positioned 'at the border' is not always enough for crucial human rights instruments, such as the ECHR or the EU Charter, to be triggered.

When we see the EU border regime and the EU's external border as borderscape and an ongoing process in time and space, we understand the scenes of interaction as articulations of moments of borderscape that take material and relational form.[784] In this ongoing process, EU migration and border control shifts over time and adapts to new realities, and gives shape to new realities as well. New states are added to the Visa List Regulation, and the border fences at Melilla adapt to the attempts of protection seekers to scale them. Representations of borderscape – such as the descriptions and findings in *PPU X and X v État Belgium*, *N.D. and N.T. v Spain*, and *M.N. and Others v Belgium* – contain temporal and spatial representations of the two scenes of interaction analysed. These judgements thus hold 'the world still'.[785] In addition, however, these representations are part of the ongoing process of borderscape, and the judgements of the courts set out new directions and norms that affect the subsequent operationalization of EU migration and border control – and protection seekers' access to the EU.

5.2 Taming Space: Omitting the Embeddedness and Embodiedness of Law in Space

If we are fully to grasp the EU's external border, we must understand that the 'illegalization' of migration has its foundation in the relationship between insiders and outsiders, and frames protection seekers as 'a risk', instead of as

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[783] Goodwin-Gill, 'The admission of refugees', in Plender (ed), *Issues in international migration law* (Brill 2015), p. 116, cited by Moreno-Lax in Moreno-Lax, *Accessing asylum in Europe: Extraterritorial border controls and refugee rights under EU Law* (2017), p. 333.

[784] Cf. Massey, *Space, place and gender* (1994), p. 5.

[785] Cf. Massey and Jess, *A place in the world? Places, cultures and globalization* (1995), p. 38.

'at risk and in need of international protection'.[786] In this study, the illegalization of protection seekers is understood as an outcome of the laws of the EU border regime, and as an interrelated phenomenon to the process of invisibilization. The invisibilization of fundamental rights leaves the protection seeker in confinement, in a space of exclusion and immobility. Moving and migrating requires that irregular paths be explored and taken, often with the help of smugglers. These irregular spaces – the mountains, the Mediterranean, the smugglers, the boats, the lost lives – are spaces of borderscape that protection seekers need to alter and to live through (and possibly die in). The following sections turns to the embeddedness and embodiedness of law in borderscape, and to the discrepancy between the legal representations of reality that legal sources and case law provide, and the realities that protection seekers alter and embody in borderscape.

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[786] Prior to Spain's hosting of a NATO summit in June 2022, that country pushed for the inclusion of irregular migration as a 'hybrid threat' in the new policy roadmap for the military alliance. See 'Atlantic route and Spain: Push for inclusion of irregular migration as threat to NATO, old routes remain deadly and new deadly routes emerge amid tensions over western Sahara' (ecre.org). Furthermore, the frequent use of the term 'illegal' in EU policies when referring to migrating subjects or to practices such as 'illegal crossing' implies criminality. See e.g. the Carriers Directive, which aims at 'curbing migratory flows and combating illegal immigration'. The Carrier Directive, recital 2. The term 'illegal' has been frequently used in EU law – e.g., as an explanation for a legislative act or a justification for restrictions on the rights of migrants and asylum-seekers. See e.g. the SBC Preamble 6, Regulation No 514/2014 Preamble (1), Directive 2013/33 Article 8 (d), and Directive 2008/115/EC. Another example of a discourse depicting migration as a threat is seen in the use of aquatic terminology or of metaphors that normally refer to natural disasters. Metaphors like 'migratory flows', 'waves', 'floods of migrants', and 'opening the floodgates for other refugees' are frequently used in political, media, and academic discourse. Such language marginalizes alternative terms that do not signal crisis in the same way. As Tsouloka notes, 'The metaphor is very clear: the waves of migrants will reach without delay the borders of the developed countries which, if they do not seek to protect themselves in time, will risk seeing them flood their territory and destroy everything on their way'. Anastassia Tsoukala, 'Looking at migrants as enemies', in Didier Bigo and Elspeth Guild (eds), *Controlling frontiers: Free movement into and within Europe* (Routledge 2005), p. 174.

5.2.1 'Illegality': an Inherent Part of Borderscape

To evade and to get disentangled from the networked apparatus of control, and to eventually get access to asylum procedures within EU territory, protection seekers need to alter the irregular spaces of borderscape. Under the lack of access to the EU, the death and dangers entailed in these spaces are preconditions for fleeing. Such insecurities can, together with the illegalization of migration and the lack of rescue efforts to people in distress, be understood as additional dimensions of controlling movement towards the EU. These insecurities are not visible in the written law of the EU border regime. However, they exist in the irregular spaces protection seekers need to alter.

The logic and rhetoric used in law are always situated in the social world, co-produced by space and time. The notion of 'illegality', a complex and powerful construction, labels some mobile subjects as excluded. Using the label neglects the lived realities that protection seekers face, as well as the lack of special provisions for entry into the Union. De Genova describes illegality as a juridical status entailing a certain social relation to the state; as such, migrant illegality is pre-eminently a political identity, defined largely by deportability.[787] Other scholars describe illegality as a legal, racial, and spatial condition constructed and applied along lines of race, gender, and class.[788] Law, however, has a neutral appearance, which renders certain ideological assumptions invisible and hides the subjects and relations controlled and co-constructed by law.[789] The EU border regime extends its borders 'everywhere'; however, these borders fail to recognize how to guarantee admission and fundamental rights for protection seekers trying to cross them. When admission is denied, protection seekers must alter and embody the lack of access to the EU – illegality and irregularity – in order to reach protection in

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[787] Nicholas De Genova, 'Migrant 'illegality' and deportability in everyday life', *Annual Review of Anthropology* (2002).

[788] Andrea Flores, Kevin Escudero and Edelina Burciaga, 'Legal–spatial consciousness: A legal geography framework for examining migrant illegality', *Law & Policy* (2019).

[789] Cf. scholars in feminist legal studies, who often criticize the portrayal of the subjects of law as independent, equal, autonomous, and 'un-gendered'. Such a presumption, they claim, shapes our understanding of law and disconnects law from lived realities. See Eva-Maria Svensson, *Genus och rätt: En problematisering av föreställningen om rätten* Iustus Förlag (1997), p. 300.

the EU. These routes and the dangers and risks connected to them are often thought of as unconnected to the EU border regime. As this thesis suggests, however, these routes must be understood as mutually constitutive of the EU border regime, and as an inherent part of borderscape. The irregular spaces are an effect of the EU border regime, and they are continually reproduced through the process of invisibilization. However, in these spaces, borderscape appears as spatial rather than legal. That does not mean that laws on migration and border control, and the lack of laws on entry, do not hide here.[790]

As is clear from the analysis herein of the scene of interaction in Beirut, protection seekers without visas have no access to asylum procedures in Lebanon. Instead they must return to Syria or embark upon the irregular spaces of borderscape in hopes of achieving mobility and subsequently gaining protection. This was highlighted by Advocate General Mengozzi, who noted that the applicants in *PPU X and X v Belgium* did not have the option to stay in Syria; nor were they resigned to becoming 'illegal' refugees in Lebanon.[791]

> It cannot be denied, in the light of the information in the case, that the applicants would have obtained the international protection that they seek if they had succeeded in overcoming the obstacles of an illegal journey, which would have been as dangerous as it was exhausting and managed in spite of everything to reach Belgium. The refusal to issue the Visa sought thus has the direct consequence of encouraging the applicants in the main proceedings to put their lives at risk, including those of their three young children, to exercise their right to international protection. […] refusing to issue a visa […] ultimately amounts to directly encouraging the applicants in the main proceedings, in order to be able to claim the right to international protection on the territory of a Member State, to trust their lives with those against whom the EU and its

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[790] Cf. Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015), p. 73.
[791] Opinion of Advocate General Mengozzi, PPU X and X v Belgium, C-638/16, para 159.

> Member States are currently deploying, particularly in the Mediterranean, considerable operational and financial efforts to curb and dismantle criminal activities![792]

When we see the irregular spaces of borderscape as mutually constitutive of the EU border regime, we understand illegality as a product of the laws that seek to combat it, rather than an autonomous phenomenon.[793] People are forced, through law, into what often is defined as illegality or 'illegal border crossing'.[794] The effect of the EU border regime, with its lack of clear and effective provisions for entry, is thus to reframe certain subjects – from eligible protection seekers to 'illegal' border crossers – even though persons who seek to cross the border in order to gain international protection, are in fact performing a 'legal act'.[795] In turn, protection seekers' circumvention or 'hacking' of the EU border regime calls forth new laws, new agreements, and higher walls, to which mobile subjects must adjust again and again, in a continually repeated cycle. Moreover, since the EU border regime operates through a web of borders, illegalization can take place everywhere in borderscape. If the EU's external border had a different power-geometry, in which protection seekers were allowed to board airplanes and to access border crossing points, then the notion of illegality would become at least to some extent superfluous, since migrating subjects would be able to cross borders and to seek asylum upon arrival, fully in accordance with the CEAS. The

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[792] Ibid. paras 159, and 172–173.

[793] Cf. Cathryn Costello, *The human rights of migrants and refugees in European law,* Oxford (2015).

[794] Cf Basaran's notion of being 'outlawed', and the implications of that position for security and the protection of human rights; Basaran, 'The outlawed: Landscapes of human rights' in Fassin (ed), *Deepening divides: How territorial borders and social boundaries delineate our world*, p. 349.

[795] The frequent description of migration as 'illegal' is complex. Such language implies that crossing an external border is a criminal act. Yet Article 31(1) of the 1951 Convention relating to the Status of Refugees explicitly forbids the imposition of penalties, on account of asylum-seekers' entry or presence without authorization, if the persons in question come directly from a territory where their life or freedom is threatened in the sense set out in Article 1 of the Convention.

current border regime sooner constructs illegality than 'combats' it. It only redirects people by irregularizing them.[796]

5.2.2 Legal Representations of Reality

This section addresses the judiciary's omission of the spatial embeddedness and embodiedness of law as a component of the process of invisibilization and the construction of the EU's external border.

The EU's external border is not static. Instead it is temporal and shifting, processed in a negotiation of different interests and with more or less legal visibility. This process is an ongoing encounter that tames space and takes material form. Several sections of the outer borders of the EU and Schengen area have been fortified with the help of walls similar to those at Melilla (see image 1). These physical walls, fences, and barbwire constructions are often accompanied by natural landscapes such as forests, seas, or mountains, which reinforce the effect of the physical and legal border constructions.[797] Border control is materialized as an infrastructure of border guards, patrols, visa refusals, and drones played out in space. Due to the Schengen entry conditions, and the lack of access to the global mobility infrastructure, the waters of the Mediterranean constitute such a barrier – a maritime border patrolled by e.g. the hovering drones and naval operations of Frontex. With the deployment of drones, North African authorities can be informed on move-

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[796] Spijkerboer notes that human smuggling has increased consistently alongside the intensified control over the global mobility infrastructure. Spijkerboer, 'The global mobility infrastructure: Reconceptualising the externalisation of migration control' (2018), p. 461. Referring to T. Last et al., 'Deaths at the borders database: evidence of deceased migrants' bodies found along the southern external borders of the European Union', 43(5) Journal of Ethnic and Migration Studies 2017, p. 693–712. Migration and border control law that contributes to the irregularization of people furthermore generates insecurities of concern for the EU, such as border crimes that take place at the border or in the EU. The preventive measures taken by the EU do not stop migration; instead they track people into riskier routes and into smuggler networks – which are often associated with other border crimes such as trafficking and smuggling of illegal goods. See Frontex, 'Cross border crime' (frontex.europa.eu).

[797] See Schindel on how 'nature' can be produced, mobilized, and instrumentalized as an active factor in the infrastructure of border enforcement, generating spatialized forms of slow violence; Schindel, 'Death by "nature": The European border regime and the spatial production of slow violence' (2022).

ment towards the EU member states and contact-less control over migrating subjects can be established. Since no EU officials or state personnel are involved (such as when physically present on a rescue ship), and the sole act of the EU member state in question is to inform other states about persons in distress, the monitoring actor can avoid jurisdiction under the ECHR. This is so since no authority or control over the protection seeker is established under the lens of the drone.[798] Both water and air are thus embedded with control, and the natural landscape furnishes an important part in the co-production of borderscape.

In borderscape the laws of the EU border regime are embedded, embodied, and materially present – sometimes more visibly, sometimes less. Laws on migration and border control can be spatially hypervisible, as in the visa refusal form or when a border guard denies entry at a border crossing point due to a lack or required documents. This does not mean, however, that law does not exist in the mountains or in the Mediterranean or anywhere else through which protection seekers need to pass en route to the EU when they are denied access to the global mobility infrastructure. Law is there as well, acted out as spaces of exclusion – borderscape – but hidden in plain sight, as a natural landscape.[799] In borderscape, the embeddedness of law in natural landscapes and physical features serves to hide law and to invisibilize fundamental rights, and the border appears as part of nature or as a physical

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[798] The choice to deploy drones rather than to enforce better rescue at sea can be understood in relation to the Hirsi Jamaa and others v Italy (2012) case. This ECtHR case concerned Somali and Eritrean migrants travelling from Libya who were intercepted at sea by Italian authorities and sent back to Libya. Returning them to Libya without examining their case exposed them to a risk of ill treatment and amounted to a forbidden collective expulsion under the ECHR. However, the activity of monitoring does establish a link which could give rise to obligations regarding fundamental rights, especially in cases where no rescue activity is activated or when other vessels than the closest rescue vessel are told to conduct the rescue. A state receiving a distress call from a boat on the high seas has a duty to intervene even if the boat is outside its territorial or SAR waters (SAR zones are functional zones in accordance with Article 98(2) United Nations Convention on the Law of the Sea (UNCLOS). Such situations can be understood as establishing a factual relationship of contact-less control. Contact-less control is part of the spatio-legal interaction of border control in Melilla, because Spanish border guards survey the border and delegate the intervention to Morocco (see section 4.1.2.3).

[799] Cf. Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015).

construction.[800] From this perspective, we can understand the prolongation of the border into the water outside Beni-Enzar through piers, fences and a breakwater. These physical constructions extend the border, making the water more dangerous and materializing the embeddedness of law in space. We can also understand the dead bodies in the Mediterranean – and the neglect to rescue terrified passengers aboard capsizing ships[801], as well as the redirection of SOS alerts[802] from sinking or drifting vessels in open waters – as an outcome of the process of invisibilization. The danger posed by the water hides the legal significance given to the Mediterranean. Lives seem to be taken by the sea, rather than being lost because people are denied permission to board an airplane or a proper boat.

The fact that law is embedded in space is however not visible when we study legal sources and case law. According to the SBC and the CEAS, for instance, the right to seek asylum is applicable 'at the border', and entry rules are to be applied without prejudice to the principle of non-refoulement. These provisions thus fail to acknowledge that it will be seas, fences, guards, profit-making carrier companies, and third-country cooperative schemes that

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[800] Cf. Khosravi, *'Illegal' traveller: An auto-ethnography of borders* (2010), p. 1; and Braverman, who notes that the invisibility of law in space is strongly aligned with arrangements of power. When nature is portrayed as innocent, legal constructions appear neutral and power relations are rendered invisible. See Braverman, 'Hidden in plain view: Legal geography from a visual perspective' (2011), p. 7.

[801] For example, the 'Adriana' (a fishing vessel) carrying about 750 persons was left drifting and it finally capsized, while dozens of European officials and coast guard crews monitored the situation. Satellite imagery, sealed court documents, radio signals, and interviews with survivors show that the death of more than 600 persons aboard the ship could have been prevented during the 13 hours that the ship was being monitored by Frontex. The ship had left Libya on the 9th of June 2023, and it was on its way to Italy when it sank off the coast of Greece, on 14th of June. See e.g. 'Everyone knew the migrant ship was doomed. No one helped' *The New York Times* (nytimes.com) 230706.

[802] A joint investigation by Lighthouse-Report, Der Spiegel, Libération, and ARD has concluded that Frontex plays a crucial role in the Libyan coastguard's interception and return of people fleeing Libya. This includes a number of cases where Frontex airplanes were nearby and likely aware of boats in distress that were later intercepted by Libyan patrol boats. (NB: commercial or NGO vessels were present in the area and could have carried out a faster rescue, had they been alerted.) The data further reveals that Frontex watched while at least 91 people went missing and are presumed to have drowned. See 'Med: Investigations reveal Frontex' complicity in interceptions and returns to horrors in Libya' (ecre.org).

obstruct people from approaching the border. When people are prevented from reaching the border, or when the border takes the shape of air or water, they can never be 'at the border' in the sense required by the CEAS or the ECHR. Law – as in 'flat law' – does not represent reality fairly or accurately.[803] Through law, reality is instead captured, represented, and 'translated' into legal language, concepts, cases, and decisions. Such 'legal representations of reality' neglect the complexity of reality.[804] They also omit space and the dependence of law upon it. However, if law is understood as embedded in the reality that protection seekers experience and embody, then legal interpretations and decision-making can be provided that properly recognize the spatial settings and the realities of EU border control.

Notwithstanding the embeddedness of law, the courts have relied on a legal representation of reality, as the analysis of case law herein has demonstrated. When judgements are based on such representations, the realities faced by protection-seeking subjects are omitted and invisibilized, as are the norms regarding fundamental rights that otherwise apply within EU territory. Through space, law is invisibilized, and vice versa. The fact that law is spatial – that it is dependent on, and operates constantly through space – is invisibilized as well. We have seen examples of how the CJEU and the ECtHR resort to legal representations of reality instead of understanding the situations at hand within their spatio-legal context. In *PPU X and X v Belgium* and *M.N. and others v Belgium*, the courts remained state-centred, relying on doctrinal concepts of jurisdiction and the applicability of the EU Charter, rather than addressing the risks of war, torture, and persecution that the applicants faced. It bears stressing, moreover, that these are risks that, if the applicants were present on the territory of an EU member state, would have rendered them eligible for asylum under the CEAS. Instead, however, the applicants were present at the Belgian embassy in Beirut. The risks at stake were, therefore, subordinated under the spatialities of jurisdiction and EU Charter applicability.

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[803] Cf. Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015); and Philippopoulos-Mihalopoulos, 'And for law: Why space cannot be understood without law' (2018).

[804] Cf. Philippopoulos-Mihalopoulos, 'And for law: Why space cannot be understood without law' (2018).

In *N.D. and N.T. v Spain*, the ECtHR did not measure the force of the fences at Melilla in the same way that it did the force of the people who scaled them 'en masse'. It treated the fences more as a neutral fact than as an obstacle to the protection of individual rights under the ECHR. Nor did it address the role of the Spanish fences in the escalating violence. The presence of the fences – built on Spanish soil – per se serves to obstruct border crossing, and thus effective protection for fundamental rights as well. Such physical features, taken together with the restrictions on the access of sub-Saharan Africans to Melilla, reinforce the invisibilization of fundamental rights. These realities do however not figure in the ECtHR's legal representation of the situation.

In *N.D. and N.T. v Spain*, furthermore, the ECtHR avoided the complexity of the applicants' effective access to means of legal entry into Spain. Despite reiterating that '[…] it should be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective […]'[805] the Court accepted the 'realities of law' – not the realities faced by the applicants. Without assessing whether the legal pathways offered by Spain were genuinely and effectively – i.e., in practice – accessible to the applicants, the Court concluded that Spanish law afforded the applicants 'several possible means of seeking admission to the national territory, either by applying for a visa […] or by applying for international protection, in particular at the Beni-Enzar border crossing point, but also at Spain's diplomatic and consular representations in their countries of origin or transit or else in Morocco'.[806] A decision of this kind relies on a perception of embassies as places where asylum can be claimed – an opportunity which generally is not available, as shown in the analysis of how borderscape is played out at the Belgian embassy in Beirut. Courts thus flatten out the complexity of reality, converting it into admissible legal facts on the basis of which judgements can be reached.[807] When space is treated as one-dimensional and portrayed as a flat surface – a complete product and a coherent closed system

[805] N.D. and N.T. v Spain (2020), para 171.

[806] N.D. and N.T. v Spain (2020), para 212.

[807] Philippopoulos-Mihalopoulos, 'And for law: Why space cannot be understood without law' (2018), p. 5.

– space is tamed and colonized, and the embeddedness and embodiedness of law is disregarded, as are the realities faced by protection seekers.[808]

Nor does law, as a representation of reality, deal with the question of life and death in its account of mobile subjects under the EU border regime. Otherwise put, it deals with this question in a way that fails to protect the right to life or to safeguard against refoulement.[809] As Philippopoulos-Mihalopoulos has noted, 'acting on a need to eat despite having no money to buy food is irrelevant to law, unless translated into a legal event that would involve illegal possession through theft.'[810] Just as hunger is not a legal concept under the EU border regime, neither is death. Nor are the absent, injured, or interrupted bodies that law has prevented from boarding regular means of transport or from accessing EU territory. Those bodies are absent from the written law. Until the EU, or Frontex, or a certain member state, or some other legal subject has been found responsible for these deaths, realities of this kind are not translated into law. Once such a translation is made, the lack of any rescue effort for the 750 persons aboard the 'Adriana' on 14 June 2023, or the drowning of a Syrian child off the coast of Lesbos, can be addressed by law as a 'failure to act' and to safeguard fundamental rights. However, when fundamental rights and the embeddedness of law are invisibilized, the question of life and death always becomes the responsibility of somebody else – of another state, or of the smugglers, or even of the child or the child's parents. Or perhaps it is the responsibility of no one at all? The EU border regime maintains this uncertainty, operating its control through and by means of it.

If we understand the laws of the EU border regime as redirecting bodies into irregular spaces, we realize that the deaths in the Atlantic and the Mediterranean are not unconnected to the EU border regime. Rather, bodies carry the law. They embody border control and the effects of the illegalization of border crossings.[811] In Morocco, some protection seekers scale the dangerous

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[808] Cf. Massey, *For space* (2005); and de Certeau, *The practice of everyday life* (1984), p. 121.

[809] Cf. Alhowais v Hungary (2023) on positive obligations in states' enforcement of border control.

[810] Philippopoulos-Mihalopoulos, 'And for law: Why space cannot be understood without law' (2018), p. 5.

[811] Cf. Philippopoulos-Mihalopoulos, *Spatial justice: body, lawscape, atmosphere* (2015).

border fences in order to enter Melilla and cross into the EU. Others risk their lives on the Atlantic in an attempt to reach the Canary Islands – a route, mainly used by people from sub-Saharan Africa, which claims thousands of lives each year.[812] People also die in the Mediterranean Sea. On that route, between 2014 and July 2023, more than 27,000 persons were reported dead or missing.[813] The vast majority of deaths occur at sea, usually when people are trying to evade border controls.[814] According to Spijkerboer and Baird, the most reliable data shows that the overwhelming majority of the victims of European border deaths are African men between 20 and 40 years of age.[815] Spijkerboer and Baird describe border deaths as an example of 'structural risk' or 'structural violence', which arises due to carrier rules. The harm suffered is not random. It displays a definite pattern, it springs from a structural source, and it afflicts marginalized people in particular.[816]

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[812] According to the NGO 'Caminande Fronteras' more than 4000 people died on route to the Canary Islands in 2021. A total of 22,316 people reached the islands in 2021. See 'Braving the Atlantic: Refugees and migrants risk death to reach the Canary Islands' *Al Jazeera* (aljazeera.com). In 2022, 1,784 people lost their lives on the route to the Canary Islands. See 'Atlantic route and Spain: EU's strategic partner toughens prison sentences of 13 migrants, border & migration policies blamed for loss of lives on migratory routes, vulnerable migrants exposed to "levels of exploitation close to slavery" in Canary islands' (ecre.org). NGOs have reported that up to 20 % of the ones attempting to cross by the Atlantic route lose their lives. See 'Atlantic route and Spain: One in five Canary route journeys end deadly, Spanish rescue service restarts reporting, law reform lets young new arrivals work' (ecre.org). The percentage of women arriving at the Canaries rose from 5% in 2020 to 14% in 2021. See ibid. This crossing has been used more frequently since 2020 – a development which has been linked to an increase in EU-led efforts in North Africa and the Mediterranean to prevent migration. See 'Atlantic route: More deaths on dangerous journeys, smugglers evade Moroccan authorities, women increasingly risk their lives at sea' (ecre.org).

[813] 'Deaths during migration recorded since 2014, by region of incident' (missiongmigrants.iom.int).

[814] Thomas Spijkerboer, 'Wasted lives. Borders and the right to life of people crossing them', *Nordic Journal of International Law* (2017), p. 2.

[815] Baird and Spijkerboer, 'Carrier sanctions and the conflicting legal obligations of carriers: Addressing human rights leakage' (2019), p. 12.

[816] Ibid., p. 12.

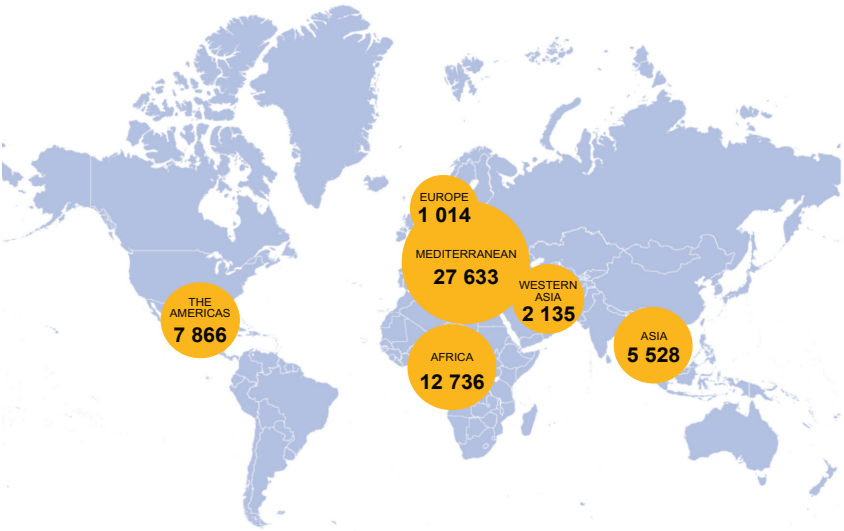

Image (51): Lives lost during migration since 2014.[817] Although preventive measures are often framed as lifesaving in character, thousands of people have lost their lives.

Even if death has not been translated into law, the EU does employ narratives of death and insecurity when promoting border and migration control. It portrays border management and third-country agreements as 'lifesaving' projects. Notwithstanding this focus, however, this lifesaving project does not seem as a practical matter to protect either lives or fundamental rights. Instead it prevents movement, and it redirects death away from the beaches and waters of EU member states. If the need to save lives and the right to seek asylum are to be taken seriously, then the question of life and death in connection with migration and border control must be translated into specific rules that impose obligations and ensure accountability. Otherwise, these deaths will remain unaddressed by law. As it stands now, these lives are not safeguarded by the EU Charter or the ECHR; nor do they figure in the legal representation

[817] 'Deaths during migration recorded since 2014, by region of incident' (missingmigrants.iom.int). Image used with permission from IOM's Missing Migrants Project. The data is from July 2023.

of reality proffered by the EU border regime, other than as fictive promises to save lives, asylum, and protect human rights. Furthermore, law and legal interpretation must acknowledge their own embeddedness and embodiedness. Law must not seek to understand or to solve legal conflicts in a manner abstracted from its spatio-legal context. For example, being 'at the border' – and thus the obligation to protect fundamental rights – must be defined under the CEAS and the ECHR in a fashion as spatially flexible as migration and border control is. When we fail to recognize the realities that are faced by protection seekers and co-produced by the spatio-legal interaction under the EU border regime, we fail to connect the violence and dangers of borderscape with said regime, thereby invisibilizing the lethal effect of the lack of protection for individual rights in borderscape. What might be hidden (from legal texts and from attributability) is not non-existent, but rather invisibilized; and it must be made visible and acknowledged.

5.3 Understanding the EU's External Border

From the analysis made in the previous chapters, the study suggests that the notion of borderscape offers an understanding of the EU's external border that takes account of the asymmetry and of the embeddedness of law. Borderscape is the sum of spatio-legal interaction under the EU border regime and emerges from the process of invisibilization. Borderscape is not a place that you can track on a map. Rather, it is an ongoing process, a continuum expanding and retracting in space, a web of control that governs space and bodies. It may seem to be an abstract notion, yet it is a reality: a question of life and death, and a process by which lakes, mountains, seas, and bodies are infused with legal significance. It is a way of understanding EU border control without ignoring space, and without ignoring law. In borderscape the border can appear and obstruct movements 'everywhere' without recognizing how to guarantee fundamental rights for protection seekers trying to cross it. The border can appear at the 'police line' in Melilla; at an exit control in a third country; in boarding procedures at an airport. As a relational phenomenon, the border appears as materialized in relation to the fleeing subject's skin colour, nationality, class, and gender, and it can take various forms: as teargas; as the Schengen Borders Code; as visa refusals; as the dangers that protection

seekers must endure when crossing mountains or the Mediterranean Sea; or as multi-barrier fences and walls.

Image (52): Walls and Fences of Border Control 2023: Zooming In. When erecting a fence or building a wall, you immediately disrupt space. You organize a spatial relationship of inside and outside.[818]

[818] This collage was made by the author from images taken by her and collected online at: sofiaglobe.com; ipsnews.net; commons.wikimedia.org; globalsecurity.org; snapshotsfromtheborders.eu; ekathimerini.com; eng.lsm.lv; lrt.lt; mil.in.ua;

6. Conclusions

The aim of this study has been to critically examine and demonstrate how the spatio-legal interaction of the EU border regime affects the conditions under which individual rights can be enforced at the EU's external borders. This thesis has addressed dominant understandings of the applicability of fundamental rights at border crossings, and explored how the EU's external border can be understood, given the embeddedness of law in space and the asymmetry between where border control takes place and where the obligation to protect fundamental rights applies. With theoretical perspectives from Massey and Philippopoulos-Mihalopoulos, the study has showed that the EU border regime, the asymmetry, and the EU's external border can be studied and understood as spatial phenomena. By analysing the Belgian embassy in Beirut and the border crossing point at Beni-Enzar in Melilla as scenes of interaction, the thesis has identified how the spatio-legal interaction under the EU border regime invisibilizes fundamental rights and prevents protection seekers from having access to EU territory and subsequent asylum procedures. In this final chapter, the study's methods and theoretical approach are reflected upon while the conclusions of the preceding chapters are revisited and summarized.

The main argument in the thesis is that the EU border regime, through its interaction with space, invisibilizes fundamental rights and provides for a web of control, a borderscape, that serves to obstruct protection seekers from entering the Union. In borderscape the EU's external border appears in a variety of shapes – expanding and retracting in space – and operates in relation to *where* you are, and *who* you are. Despite its effect on the conditions under which individual rights can be enforced, this web controls space and protection seekers' access to EU territory and asylum procedures without necessarily triggering the obligation to protect the fundamental rights of those at risk.

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zocalopublicsquare.org; thebarentsobserver.com. From the upper left and down; Lithuania, France, Ceuta, Bulgaria, Greece, Norway, Latvia, Slovenia, Estonia, Poland, Hungary, and Melilla.

The study has sought to contribute to the debate in the field of critical migration law on the asymmetry of the EU border regime by analysing the spatio-legal interaction of said regime. The thesis has used the concept of invisibilization to subject the asymmetry to theoretical and critical analysis – as a process of negotiation in which fundamental rights are limited, or indeed made unattainable and unenforceable. Instead of trying to 'solve' the asymmetry by offering legal doctrinal analysis on how to bridge this incoherence, this thesis has analysed how fundamental rights, and corresponding state obligations, are invisibilized under the EU border regime's interaction with space. As demonstrated throughout the thesis, the process of invisibilization forms an intrinsic part – a building block – of the EU border regime. The study has demonstrated how the EU border regime relies on space and is enforced through geography, physical features, natural landscapes, and social relations of e.g. nationality, gender, race, and class. Such knowledge – taking account of space and of spatial relationships – provides input to the debate on EU migration and border control and throws new light on the question of how the EU border regime and the EU's external border can be understood.

Fundamental rights under the ECHR and the EU Charter lack universal application. Therefore, they can be spatially distributed and organized. In response to research question 1, the thesis has demonstrated how externalization of migration and border control – e.g., through third-country cooperation and visa and carrier rules – serves to deepen the asymmetry and to spatially distribute the scope of fundamental rights. At the Belgian embassy in Beirut extraterritorial border control, imposed in the form of visa requirements and carrier rules, disrupts the link between border control and the obligation to protect fundamental rights. In Melilla, third-country cooperation with Morocco, and Spanish practices of 'rejections at the border' effectively prevents people (especially from sub-Saharan Africa) from accessing the border crossing point at Beni-Enzar. Third-country cooperation, as in Melilla, is another form of externalization that prevents individuals from falling within the territorial scope of fundamental rights. At both scenes of interaction protection seekers' possibilities of being 'at the border' – in the sense that the CEAS and the ECHR require for the applicability and enforcement of said rights – are prevented. The case law analysed, *PPU X and X v Belgium*, *M.N. and Others v Belgium* and *N.D. and N.T. v Spain* manifest how externalization (in its different forms) of border control efficiently prevents protection seekers

from having access to EU territory. Moreover, the conclusions drawn in this thesis have wider implications, and spark ideas for future research. This is so since the same phenomena can be found, namely, at other scenes of interaction along the EU's external border: e.g., at the Greek-Turkish border, at the Polish-Belarusian border, and in the arrangements for third-country co-operation with Libya.

The asymmetry that follows from the externalisation of migration and border control, as addressed under research question 1, is widely recognized by legal scholarship not using the particular theoretical perspectives used in this thesis. This means that one could, perhaps, question the added value of this study. However, this thesis springs from previous research and expands the understanding of the asymmetry through the theoretical perspectives brought by Massey and Philippopoulos-Mihalopoulos. Adapting spatial perspectives on the EU border regime has proven useful to the overall aim and approach of the thesis, and to particularly address the scenes of interaction. The study's concept of scenes of interaction builds on Massey's theory on place and has, together with the study's methods, provided an efficient tool to analyse the spatio-legal co-production of the EU's external border at the scenes of interaction in detail. This has been done by studying legal and contextual sources with a focus on how law is embedded and embodied at the scenes of interaction, and thus how law and space play out and are co-produced in an interaction. This approach has moreover been essential when analysing case law and to understand the situations that prompted the cases, as well as to highlight and analyse the courts' spatial distribution of the scope of fundamental rights. The approach moreover provides for tools to manifest both law's abstraction from, and invisibilization of, the spatial realities it operates within, and the judiciary's omission of this process.

In the case law analysed, the interpretation of legal sources and the contextual settings of the scenes of interaction are intertwined. The outcomes, in the form of the courts' judgements, are an effect of this intertwinement. The theoretical perspective and the study's methods allow me to be specific about the details of the scenes of interaction, and to demonstrate the courts' omission of law's spatial dependency. Every scene of interaction is produced within its specific spatial context, as are the courts' judgements. However, in the legal reasoning of the courts, the legal interpretation seems to 'hover

above' and hide the outcomes' specific spatial embeddedness and the risk facing the applicants, by relying on abstract legal reasoning and a flat, legal representation of the situations at hand. Law, and legal representations of what is at stake in the cases, thus serve to invisibilize both space and risk. E.g. in *PPU X and X v Belgium* and *M.N. and Others v Belgium* the questions of EU Charter applicability and jurisdiction were given priority to the risks faced by the applicants. By such legal interpretations – intertwined with the fact that the applicants were protection seekers situated outside EU territory – the coherency of the CEAS, its territoriality and rules on first country under the Dublin Regulation were maintained. Moreover, the outcome of *M.N. and Others v Belgium* consolidated state sovereignty regarding the decision of granting the right to enter its territory. Another outcome in the case would have, as the ECtHR notes in its judgement, placed such decision-making in the hands of individuals and their unilateral choices. In Melilla, third-country cooperation and the harshness and efficiency of the fences were evasively handled so that the ECHR and its fourth protocol could remain an instrument guaranteeing not 'rights that are theoretical or illusory but rights that are practical and effective'.[819] However, under the conditionality of 'own conduct', and thus only accessible to those who can gain access to the border crossing point at Beni-Enzar or succeed with a visa or asylum application at an embassy in a third country – a requirement that in reality excludes most (if not all) sub-Saharan protection seekers. In contrast, the opinion of Advocate General Mengozzi in *PPU X and X v Belgium* and the 2017 judgement of the Chamber in *N.D. and N.T. v Spain*, provide different outcomes. Mengozzi's opinion and the 2017 judgement dealt with space, the protection seekers' realities, and the risks at stake, in completely different ways compared to the CJEU and the Grand Chamber of the ECtHR. This demonstrates that decision-making, legal interpretation and judging is dependent on how courts handle and negotiate not only legal sources but also the spatial specificities of the scenes of interaction. Through the outcomes in *PPU X and X v Belgium*, *M.N. and Others v Belgium* and *N.D. and N.T. v Spain* the courts fix the scenes of interaction as spaces of exclusion, and expand the distance of certain bodies in time and space. The judgements moreover affect the ongoing production of the scenes

[819] N.D. and N.T. v Spain (2020), para 171.

of interaction; the realities protection seekers alter when approaching the Beni-Enzar border crossing point or when visiting the website of the Belgian embassy in Beirut and its extended arm 'TLScontact'. The study's focus on the spatio-legal interaction at two different scenes has demonstrated how law, legal interpretation and decision-making is imbued by space, but also how law and legal decision-making co-produce the spaces which it governs. With this knowledge – achieved through the study's theoretical perspective and methods – the scenes of interaction cannot be understood as only geographical places, nor can the judgements be understood as only case law, but rather as 'outcomes', and articulations of the on-going production of the EU border regime.

The methods and theoretical approach of the thesis have proved efficient in analysing how borders are constructed as spatial phenomena as well as in demonstrating law's embeddedness and embodiedness in space. Massey's notion of space as collectively and relationally produced has been used throughout the study. This theory of space has been suitable for understanding how the scenes of interaction are constantly produced and reproduced by the interaction of law and space, and thus in part by the protection seeking subjects themselves. The perspectives brought into the study from Massey have manifested how protection seekers, as well as other subjects, both embody laws on migration and border control, and are part of the continuing production of the scenes of interaction. As the analysis has demonstrated, borders demarcate between people and are as such relational and spatial phenomena that shifts in time. The doctrinal study in chapter 2 and the contextual description in chapter 3 have provided the basis for analysing the EU's external border as a power-geometry that is produced and enforced in relation to the protection seeker's social relations. By inscribing social relations with legal significance, the EU border regime draws boundaries between protection seekers and the EU – boundaries which, from the perspective of the protection seeker – play out as borders that diminish and obstruct mobility, as well as invisibilizes fundamental rights. Existing boundaries of social relations – which already affect a subject's mobility – are reinforced and subsequently enforced by the EU border regime. Since the EU's external border is constructed as a web of control, disconnected from EU territory, protection seekers can face the EU's external border in its varying shapes already when trying to leave the country of origin or of transit. The result is an

unequal geography of mobility. In this geography, the EU's external border appears as 'spatio-legally positioned' in relation to the social relations of protection seekers. Law's uneven operation, and the asymmetry, does thus not only depend on where you are, but also on who you are. Law however invisibilizes the spatiality of this selectivity and appears as objective in its text and case law. In turn, when protection seekers try to enter the EU, borders do not always appear as law, but as social relations of e.g. nationality, class, gender, and race that disadvantage or exclude certain subjects from gaining access to EU territory and subsequent asylum procedures. This process thus, with Philippopoulos-Mihalopoulos's words, provides for a negotiation in which law invisibilizes its spatiality and space its legality.

The analysis in connection with research question 2 has moreover demonstrated that this negotiation also takes place when the EU border regime interacts with physical features and natural landscapes. By inscribing natural landscapes with legal significance and by fortifying borderlines with fences and guards, the EU has imposed further restrictions on access to its territory. The border fences that separate Morocco from the Spanish enclave of Melilla are the most prominent example hereof. The waters of the Mediterranean Sea too can be understood as a border – under the visa and carrier requirements and the Schengen rules on entry – a maritime barrier patrolled by naval operations and drones in the air, assisted by strong treacherous currents and dangerous waves. The EU border regime, then, exists almost everywhere. Its laws are highly visible in the case of visa rejections and boarding refusals, in the concertinas on top of the Melilla fences, but they are also embedded in natural landscapes like the Mediterranean Sea, across which irregularized protection seekers must undertake a dangerous journey to reach the EU. When the border takes the shape of natural landscape, both migration and border control as legal phenomena, and fundamental rights, are invisibilized. What is left is instead space and the lived realities hereof. The embeddedness and embodiedness of law thus serve to invisibilize law. The analysis in this thesis however only concerns two scenes of the EU border regime's spatio-legal interaction. How the embeddedness of law in natural landscape and in physical features affects the conditions under which individual rights can be enforced at the EU's external borders deserve further research initiatives and analysis. Especially since the EU and Schengen states

have built more than 2000 km of walls and fences since the so called 'refugee crisis' to prevent people from entering Europe.

The third research question posed in this study concerns how the EU's external border and the protection of individual rights 'at the border' are to be understood given the embeddedness of law and the asymmetry between where border control takes place and where the obligation to protect fundamental rights applies. The study concludes with the suggestion that we must understand the EU's external border as borderscape. This notion offers an understanding of the EU's external border that explains the causes and the ongoing production of the asymmetry, the embeddedness of law in space, and in turn, how the EU border regime and its borders are shaped by the spaces in which they operate. It is thus a way of understanding law and space together. The idea of borderscape is an adaptation and amalgamation of previous research. The theories and ideas that have been the most influential in this study are Perera's use of the notion (borderscape) to facilitate an understanding of the border as mobile, perspectival, and relational; Philippopoulos-Mihalopoulos's theory on lawscape in which law and space constantly are conditioned by each other and processed in a negotiation of in/visibilization; and Massey's notion of space as an ongoing collective and relational production that is concrete, material, real, and lived. With its basis in these theoretical perspectives, the study cites the idea of borderscape to refer to the sum of spatio-legal interaction under the EU border regime. As such borderscape is an ongoing process, a continuum expanding and retracting in space, a web of control that governs space and bodies.

Massey describes space as a complex web of relations of domination and subordination. In the study this theory is used to frame EU border control as a spatial relationship between insiders and outsiders from which control mechanisms of different temporalities aimed at 'distancing' and 'othering' third-country citizens spring. Borderscape is thus also a question about relations and their shifting spatialities, and how law is imbued by, and maintains relations. The relationship between insiders and outsiders has historical and colonial roots, and the border operates in very different ways depending on whether the mobility at stake is that of 'insiders' or 'outsiders', Europeans or non-Europeans. Borderscape provides an explanation that demonstrates the EU border regime's deeply involvement in the relational activity of creating divisions between people, and the notion of borderscape

takes account of the realities of protection seekers under this relationship – without depriving such realities from their interconnectedness to the shifting laws of the EU border regime and the operationalisation hereof. In borderscape the border follows the footsteps of protection seekers rather than territorial lines. Law adapts to protection seekers, and protection seekers adapt to law in a continuum. The border is spatio-legally positioned in relation to the social relations of protection seekers, and can appear 'everywhere' and in various forms – a web of control that governs space and bodies through law, social relations, natural landscape, and physical features – however without necessarily triggering the obligation to protect the fundamental rights of protection seekers who are at it.

The aim of this study has been to critically examine and demonstrate how the spatio-legal interaction of the EU border regime affects the conditions under which individual rights can be enforced at the EU's external borders. Borderscape is the result of the spatio-legal interaction and the invisibilization of fundamental rights it entails, and as such borderscape affects both the conditions under which individual rights can, or cannot, be enforced, and provides answers to the question of how we can understand the EU's external border.

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