# THE EUROPEAN UNION'S APPROACH TOWARDS THE ENTRY OF THIRD-COUNTRY NATIONALS INTO ITS TERRITORY

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**Abstract**
The topic related to the European Union (EU) rules on the free movement of persons is a dynamic one. Part of these dynamic EU rules are also rules concerning the entry of third-country nationals (TCNs) into the EU's territory. The Schengen rules regulate procedures and conditions for entry of third-country nationals for a period of up to ninety days. These rules need to be developed and implemented in line with the fundamental human rights rules. The EU has been criticized for many years for its lack of democratization due to the fact that it did not give binding character rules of the Charter of Fundamental Rights of the EU. The aim of the present research is to analyse the development of Schengen rules for the entry of third-country nationals (TCNs) into the EU's territory in light of their democratization and respect for human rights. The aim is achieved through a historical, descriptive, and analytical approach that allows using the existing Schengen rules for the entry of third-country nationals (TCNs), relevant scientific articles and official documents of the EU's institutions. Analysis of these materials proves that EU member states enjoy wide discretion in respect of implementing the current EU rules as regards entry of TCNs into EU territory. As a result, TCNs obliged to have a visa in order to enter EU territory might be subject to unequal treatment.

**Keywords**
Schengen rules; third-country nationals; human rights; EU.

## 1. INTRODUCTION

The entry of third-country nationals into the European Union (EU) continues to be an important topic for researchers (Sommarribas and Nienaber 2021, Vavoula 2020, Quintel 2018; Bigo and Guild 2016), and this article is an additional contribution to this existing corpus of researches. EU has so far developed quite a huge number of legal acts on the free movement of persons, but there is no total harmonization of national rules on the entry of TCNs into the EU territory. The lack of total harmonization of such rules can cause an unfair and unequal treatment of TCNs by the EU member state because they enjoy large discretion in implementing the Schengen rules on visa requirements for up to 90 days. This discretion of EU member states can have a practical impact on TCNs. The Court of Justice of the European Union (CJEU) states that "national authorities are left with a wide margin of discretion while implementing the conditions for applying the grounds for refusal and the evaluation of the relevant facts, as long as the decision of refusal is substantiated in concrete terms following a complex individual examination of the visa application" (Joined cases C-225/19 and C-226/19). These rules have been quite often subject to criticism from many commentators on European Law (Cholewinski 2002, 2016; Guild 2002). The overall aim of the present research is to analyse the compatibility of Schengen rules with the EU and international law on human rights with a focus on right to equality and non-discrimination on the basis of nationality, race, and religious. Indeed, the focus of this research is to analyse the main entry condition rules on visas and crossing the external European Union border rules, which leave wide discretion to EU member states. This analysis helps determine the practical impacts on some TCNs due to such discretion. For that purpose, historical, analytical and interpretive, and research methods have been used. The historical approach helped describe the historical development process of the EU rules on entry of TCNs into EU territory, while the interpretative and analytical methods

made it possible to analyse and interpret relevant research and EU rules on entry of TCNs into the EU territory in light to human rights and non-discrimination rules. Through an analytical approach, the existing scientific works and legal acts are analysed thoroughly.

## 2. HISTORICAL DEVELOPMENT OF THE EU RULES ON ENTRY OF TCNS INTO THE EU TERRITORY

For the sake of clarity, it is necessary to explain at first the meaning of the term TCNs and the term "EU territory." The term "third-country nationals" used instead of the term alien (Article 62 of TEU), means any person who is not a Union citizen within the meaning of Article 20 (1) of TFEU, which states that EU citizens include all the persons who are nationals of one of the EU Member States (Chalmers et al., 2014, 471). While the EU territory means the territory of those EU member states that are part of the Schengen area, as not all of them are part of it (European Commission 2023; Popa 2016). Cholewinski (2016, 2002, 81-82) states that current EU rules on the entry of TCNs into the EU territory provide different regimes not only between EU citizens and TCNs but also within TCNs themselves. The focus of this research is to analyse rules on entry of TCNs seeking to access EU territory and only for a short-term visit of up to ninety (90) days. Such rules cover among others two main sets of EU rules, those on visa regime, and those on crossing the external EU borders. The following paragraphs details firstly the historical development aspects of such rules.

The starting point of such rules can be considered the year 1987 when the Single European Act (SEA) enter into force (1987), because these rules are part of the EU rules on free movement of persons that were included into the text of SEA through Art. 8A (now Article 26 TFEU) on "Area without internal borders in which the free movement of goods, persons, services and capital is ensured in accordance to the provision of this Treaty (Treaty on Functioning of the European Union, 2007)." As it was not clear whether this advantage was foreseen for TCNs, an answer to this question was given by six EU member

states (Germany, France, the Benelux countries, and Italy). They agreed to abolish their internal border controls for TCNs by signing the so-called Schengen Agreement (1985). However, the Schengen Agreement (1985) remained outside the framework of the European Community treaties because the UK refused to abolish its border (Steiner & Woods 2003). EU member states later imposed on themselves another task to clarify the TCNs' benefits from the free movement regime, by approving the Convention on Implementing the Schengen Agreement (1985). Two years later, EU member states approved the Treaty on European Union (1992) that made Schengen *aquis* as part of the EU third pillar on Justice and Home Affairs (Geddes 2022; Gortázar 2001, 129). But even this treaty did not solve entirely the question of TCNs due to the fear that it allows the EU member states to implement such rules in an unfair and unequal manner. The Treaty of Amsterdam (1997) included the area of visas, asylum, immigration, and other policies related to the free movement of persons under the first pillar, meaning under the jurisdiction of European Community, and as a legal base for the communitarisation of the Schengen acquis (Apap 2004). After the Amsterdam amendments, it became clear how far the free movement of persons reaches TCNs, and who can enjoy the benefits from Article 14 ECT (ex Art. 8A), now Article 26 TFEU (Cholewinski, 2003). Thus, all TCNs in order to enjoy the benefits resulting from the abolition of internal EU borders have to fulfil the entry conditions. These rules have been very often subject to criticism. There is a lack of transparency, clarity, and precision, and as result, these rules are discriminatory in many aspects. These critics were focused on the primary EU legislation such as Article 62 of TEU, the Schengen acquis, and rules on entry conditions for TCNs.

## 3. EU RULES ON CONDITIONS FOR TCNs TO ENTER EU TERRITORY FOR A SHORT STAY

The Convention on Implementing the Schengen Agreement (SIA) is the most relevant EU legal instrument, which deals with these compensatory measures

that have to be applied by EU member states (1985, arts. 5,6). Based on Article 5 of the SIA, all TCNs wishing to enter the EU territory for a period of no longer than three months, have to fulfil the following conditions and possess the following documents:

a) Possession of passport or valid travel documents;
b) Possession of a visa valid for the duration of foreseen stay-visa application;
c) If required, to produce documents which show the purpose of intended stay and for proving possession of sufficient means for staying there-documents substantiating the purpose and conditions of the planned visit and the means of support for both the period of planned visit and return to the country of origin(c);
d) There is no alert for the purpose of refusing entry regarding this person seeking access to this MS (SIS entries); and
e) Is not or may not be considered to be a threat to public policy, national security or international relations of any of the Member States (SIA 1985).

Analysts of EU law on the entry of TCNs into EU territory consider that such rules divided the world into parts because not all TCNs need to possess a visa to enter the EU territory for a short stay because some of them comes from countries included on the so-called Schengen *white list*. Whereas, TCNs coming from those countries included under the *black list* need to have a Schengen visa for short stay at EU territory (EU Regulation 2018). There is a further division within the last group of TCNs that need a visa because some of them have to possess visa even for transit entry purpose.

Staples (2003) considers that TCNs can be subject to unfair and unequal treatment by the EU member states as they have wide discretion on checking the validity of the passport, or the travel document. Prior to the independence of Kosovo, TCNs from Kosovo travelled with the United Nations Mission in Kosovo travel document. They faced many difficulties from time to time with authorities of some EU countries who were not familiar with this type of travel document. Kosovars had to wait much longer than the other passengers until the carriers of the border plane checked the validity of their travel documents. The carriers of the EU member states have such discretion and can very easily refuse to accept the validity of travel documents as well, and include them in the

Schengen Information System. An extra check on the validity of the travel document is done by the airline personnel and border patrol posted abroad (Guiraundon 2003). This multiplication of pre-boarding controls at the airport is determined only for those TCNs that are considered most likely to constitute an illegal immigration risk.

Moreover, fixing stamps on the travel documents of TCNs at the crossing point of an external border is another part of EU rules that lacks precision and clarity. According the EU Regulation on Schengen Borders Code (562/2006), border authorities of EU member states systematically have to affix stamps on the travel documents of TCNs when they cross external borders. This regulation provides also amendments to Art. 6(2)(e) SIA by providing that EU member states are not obliged in unforeseen circumstances to affix the stamps in the TCNs travel documents in entry checks and exit, but the priority must be set and the entry checks, as a rule, must take priority. These provisions can lead to divergent practices from the EU member states and make it difficult to check whether the conditions relating to the duration of short stays for such TCNs on the territory of the member states are fulfilled.

### 3.1. Schengen visa for short stays

Similarly, to states, EU as a special legal entity or quasi-state (Pelinka 2011; Anderson and Bigo 2002, 13) has also its own common visa regime the so-called Schengen visa. Since the entry into force of the Amsterdam Treaty, the Schengen visa has become common for all the EU Member States, except for Ireland, Cyprus, Bulgaria and Romania (Spendzharova and Vachudova 2014; Craig and Burca 2011; Kuijper 2000). The last two countries are implementing Schengen rules and will join the Schengen area soon. The term "a common Schengen visa means ''an authorization issued by one of the EU members states to a TCN, who wants to enter EU territory for a period of no more than three months and valid for all EU Member States and four outside of EU" (Regulation (EU) 2018/1806). There are three types of Schengen visas: a) visa for up to three months or 90 days; b) transit visa; and c) airport transit visa (Schengen Agreement 1985). So,

as mentioned above, here we can see further differentiation between TCNs. The issue of the visa requirement is regulated by two separate regulations. Thus, EU Regulation (2018/1806) covers the two first types of visas, whereas Article 3 of EU Regulation (810/2009) regulates the airport transit visa to be issued to a TCN for the purpose of passing from the international zone of one EU member state to another on or form one EU member state to a third country. Furthermore, this type of visa is foreseen for those TCNs that are considered risky for the public order of one of the EU member states, and if a TCN needs to get such a visa is considered risky for the public order of all EU member states international zone of one EU member state to another on or form one EU member state to a third country. Indeed, these rules leave space for different treatment within the group of TCNs wishing to enter the EU territory, and two main parts of them are important to be analysed below: i) rules on the list of third countries; and ii) rules on the procedure and conditions for issuing visas (TFEU, Article 62(2)(b); Kuijper 2000).

### *3.1.1. List of third countries under Black or White list*

Based on Article 62(2) (b) TFEU, it can be said that a further differentiation exists between TCNs coming from countries listed under *white* and *black lists*. What does it mean the term *black* and *white* list? The EU law states that third countries whose nationals need a visa in order to enter the EU territory are listed in the *black* or negative list; whereas in the *white* list are included those third countries whose nationals are exempted from the visa requirement in order to enter the EU territory (Regulation (EU) 2018/1806). Historically, it existed another type of list, the so-called '*grey*' list but does not exist anymore. Annex 1 of the EU Regulation (2018/1806) lists under *black list* 104 countries (two out of them not recognized as states by all EU member states such as Kosovo and the Palestine Territory, whose nationals need a visa to enter EU territory (Table 1).

**Table 1**. List of third countries listed under the Schengen *Black* List

| | | | |
|---|---|---|---|
| Afghanistan | Egypt | North Korea | Papua New Guinea |
| Armenia | Eritrea | Kuwait | Philippines |
| Angola | Eswatini | Kazakhstan | Pakistan |
| Azerbaijan | Ethiopia | Laos | Qatar |
| Algeria | Fiji | Lebanon | Russia |
| Bangladesh | Gabon | Sri Lanka | Rwanda |
| Burkina Faso | Ghana | Liberia | Saudi Arabia |
| Bahrain | The Gambia | Lesotho | Sudan |
| Burundi | Guinea | Libya | Sierra Leone |
| Benin | Equatorial Guine | Mozambique | Senegal |
| Bolivia | Guinea-Bissau | Madagascar | Somalia |
| Bhutan | Guyana | Mali | Suriname |
| Botswana | Haiti | Myanmar/Burma | South Sudan |
| Belarus | Indonesia | Mongolia | São Tomé & Príncipe |
| Dominican Republic | India | Mauritania | Syria |
| D.Republic of the Congo | Iraq | Maldives | Togo |
| Central African Republic | Iran | Morocco | Thailand |
| Congo | Jamaica | Malawi | Tajikistan |
| Côte d'Ivoire | Jordan | Namibia | Turkmenistan |
| Cameroon | Kenya | Niger | Tunisia |
| China | Kyrgyzstan | Nigeria | Turkey |
| Cuba | Cambodia | Nepal | Tanzania |
| Cape Verde | Comoros | Oman | Uganda |
| Chad | Yemen | South Africa | Uzbekistan |
| Djibouti | Kosovo | Zimbabwe | Zambia |
| The Palestine Territory | Vietnam | Ecuador | Belize |

*Source: Author prepared the list based on the data included under Annex 1 of the EU Regulation 2018/1806.*

There are two issues with this list. First, the Council of the EU and European Parliament normally have their own reasons for inclusion of these countries into the *black* list, but these two institutions never published any report on their reasons. Secondly, territories or entity that were not recognized by some EU

member states, and were not included under *black* list were on the hands of the EU member states, whether to include or not them (Regulation (EU) 2018/1806). TCNs from Kosovo before independence were also required to get a transit visa. The EU member states have the right to decide whether a TCN of such territorial entity is subject to the visa requirement or not. Once an EU member state decides to impose a visa requirement for the territorial entity of such TCN, Article 1the EU institutions have to be informed (European Union Regulation 2018/1806,). Finally, it should be mentioning that Kosovo as a state that has not been recognised by five EU countries (Keil 2018; Economides and Ker-Lindsay 2015) remain the only country in Europe included in the black list even though the European Commission confirmed in 2018 that Kosovo fulfil the conditions for visa liberalisation (European Commission Kosovo Progress Report 2018). So, Kosovo is not yet included on the *white* list despite the fact that all TCNs in Western Balkan countries can enter EU territory for ninety days without a Schengen visa (Table 2). Indeed, the case of Kosovo proofs the incoherent approach of the EU towards the removal of a country from the so-called *black* list, and move to the *white* list. The current *white* list of the EU includes 61 third countries, 2 special administrative regions of the Republic of China, several TCNs that are not British citizens, and Twain.

***Table 2:*** *List of third countries included under the Schengen White List.*

| | | | |
|---|---|---|---|
| North Macedonia | Chile | South Korea | Peru |
| Andorra | Colombia | Saint Lucia | Palau |
| United Arab Emirates | Costa Rica | Monaco | Paraguay |
| Antigua and Barbuda | Dominica | Moldova | Serbia |
| Albania | Micronesia | Montenegro | Solomon Islands |
| Argentina | Grenada | Marshall Islands | Seychelles |
| Australia | Georgia | Mauritius | Singapore |
| Bosnia and Herzegovina | Guatemala | Mexico | San Marino |
| Barbados | Honduras | Malaysia | El Salvador |
| Brunei | Israel | Nicaragua | Timor-Leste |

| | | | |
|---|---|---|---|
| Brazil | Japan | Nauru | Tonga |
| Bahamas | Kiribati | New Zealand | Trinidad and Tobago |
| Canada | Saint Kitts and Nevis | Panama | Tuvalu |
| Ukraine | United States | Holy See | Saint Vincent and the Grenadines |
| United Kingdom | Uruguay | Venezuela | Vanuatu |
| Samoa | Twain | Non-British | Adm. Region of Chine |

*Source: Author prepared the list based on the data included under Annex 1 of the EU Regulation 2018/1806.*

The nationals of those countries that are listed on the *white* list are in a better position than the nationals of those on the *black* list. So, there is a division between TCNs coming from countries included under the *white* list and those from countries listed under the black list. The analysis of the criteria used for listing these countries in the *white* or *black* list explains better such different treatment. So, what is the basis for a county to be included on the *white* or *black* list? Based on Article 1 of the EU Regulation (2018/1806), there are three main groups of criteria for the inclusion of third countries into the *black* or *white* list:

i) Illegal immigration;
ii) public policy and security;
iii) Union's external relations with the relevant third countries.

The two first criteria have to do with the activities of individuals or TCNs, not directly with those of the third countries. Guild (2003, 94) commented that "the Union is in effect stating that nationals of some countries are by definition most likely to be illegal immigrant or criminals than nationals of another country." As concerns the third group of criteria, it relates to the countries 'activities. The two first criteria invert the traditional approach of states in deciding on visa free regime for a particular country, which approach was purely based on inter-state relations (Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America of 2013). In addition, there is another aspect that needs to be pointed out in relation to the first two criteria. The risk assessment for illegal

immigration is based on statistical information, which includes statistical data on illegal entry, illegal residing, and several cases on the refusal of entry into the EU territory. The statistical data found under Schengen Information System (Bellanova and Glouftsios 2022) are open to discussion for two reasons. First, the authorities of EU member states are competent to decide on the inclusion of a TCN's data into the Schengen Information System in compliance with national rules and procedures. It means that EU member states take this decision based on their different information because there are no provisions under EU law that clarify when TCNs' presence causes a threat to a 'public order' of any of the EU Member States (Guiraundon 2003). In addition, the Schengen acquis does not define the terms ''public order', ''security risk', 'crime', or 'illegal immigration,'' by leading to an accumulation of the national concept of these terms (Cholewinski, 2003; Staples 2003). The lack of harmonization of national rules on rights of TCNs (Nagler 2018) and the migration law leaves space for possible different treatment between TCNs (Givens and Luedtke 2004). Lehtonen and Aalto (2017) stated the data included in the Schengen Information System as follows "The "different" legal systems of EU Member States would not guarantee the exclusive legitimate use of the data."

The open distinction made by EU rules on entry of TCNs into its territory, through the inclusion of their countries in the *white* or *black* list based on nationality, would become visible to have an indirect adverse impact on large groups of persons distinguished by reference to their race or colour and religion. This can be argued by the fact that the majority of non-white people living in the world have to possess a visa in order to enter the EU territory (all African countries are on the *black* list). The same situation is with people from Islamic countries or people with Islamic faith since most of the Muslim countries are on the blacklist except for Brunei, Malaysia, and Singapore (Table 1, 2). It should be also stated that 95% of people living in Kosovo declared themselves Muslims (Mehmeti 2015) and they need to have a visa to enter EU territory. These distinctions can be interpreted as a risk for indirect discrimination between TCNs based on their race and religion. Moreover, Kosovo is the only country from the Western Balkan countries that are not removed yet from this black list and its citizens remains the only ones within the region that need to have visa to

enter the EU territory (Brezar 2002, Musliu 2019). Even though European Commission (2018) confirmed that Kosovo has fulfilled all the criteria required for the visa liberalization process, the Council did not agree. It is only in march 2023, the Council approved the European Commission's proposal on visa-free travel for Kosovars (Council of EU 2023). The promise is that January 2024 will be the date when Kosovars will enter EU territory without a visa. Thus, the road for visa liberation for Kosovo lasted mostly among Western Balkan countries and it took sixteen years. It remains to be seen if such a promise will be kept by the EU after 15 years.

*3.1.2. Procedure and Conditions for issuing Schengen visas*

Further indirect discrimination in relation to the entry of TCNs can be found within the group of TCNs that are subject to visa requirements. This indirect discrimination can be seen based on individual cases during the visa application procedure. First, the rules on the duration of the visa application procedure are not harmonized under EU rules, and it depends on the rules of each EU member state. So, it is up to the EU member states to decide how long it will take for a TCN to take a response for visa application. There is a lack of a common deadline for the duration of the visa application procedure. Second, the discretion is left to EU member states by rules on conditions for issuing visas. The wording of the rules on conditions for issuing visas for TCNs placed under Articles 15 and 5(1)(a)(c)-(e) SIA leave discretion to EU member states as follows:

- Article 5 of SIA provides that a visa 'may be issued' if the conditions under Art.5 (1) (a) (c)-(e) SIA have been met by any of TCNs for the purpose of entry into the EU. The word 'may be issued' argue the fact that EU member states are not obliged to issue a visa for a TCN (Hailbronner 2000, 144). A particular TCN can be subject to indirect discrimination and unfair treatment.
- Article 5 (1)(c) of SIA provides that TCNs "produce, if necessary, documents justifying the purpose and conditions of the intended stay and that they

have sufficient means of subsistence both for the period of the intended stay and for the return to their country of origin or transit to a third State into which they are certain to be admitted, or are in a position to acquire such means lawfully." The word 'if necessary' leaves it at the discretion of the EU member states to decide whether or not a TCN has to provide such a document. The risk might be if some EU member states require these documents from some TCNs, and from others not. As result, some TCNs will get a visa, while those that have been asked to provide such documents may not get the visa in case, they fail to provide them.

- Article 5 (1)(d) of SIA provides that a TCN "shall not be persons for whom an alert has been issued to refuse entry." The EU member states have the discretion through their consular authorities to consult the Schengen Information System and to check if an alert exits for a TCN. The decision to insert information in this system is taken by EU member states as foreseen under their national legislation. Although, Article 96 (2) of SIA (2000) instructs EU member states on the grounds to be considered while taking a decision to qualify a visa applicant as a threat to public order, it gives a wide margin of appreciation to them concerning the determination of grounds for registration in Schengen Information System. The list of cases about the threat of 'public order' is provided under Art. 96 (2) SIA, and it is not exhaustive and EU member states can add to it (Hailbronner 2000,150). As result, EU member states may introduce additional grounds to refuse entry for a TCN, provided that they reflect public order concerns.
- Article 5 (1)(e) states that visa could be refused if a TCN is considered as a threat to 'public order, national security or international relations' of any of the EU Member States. The concept of public order is not a harmonized, but it differs from one EU Member State to another (Salomon and Rijpma 2021, Kessedjian 2007, 28; Hailbronner 2000,151; Opinion of advocate on Case C-554/13). The discretion for those countries in respect of determining what can be considered as threat to 'public order' is very wide.

3.2. Common External EU borders and discretions left to the Member States

The granting of visas to the TCNs for entry into EU territory does not mean that the so-called common external EU border is open for them *per se*. As Guild (2003) rightly argued, a short-stay visa permits TCNs only to arrive at the borders of an issuing EU member state. It depends on the discretion of the border authorities to allow them or not. This EU rules on common requirements for crossing the external EU borders (Article 3 of SIA 1985), and those on the uniform principle that has to be applied in carrying out controls on movements across the external border (Article 6 of SIA 1985) gives also discretion to the EU member states to implement them.

### *3.2.1. Rules on crossing the EU external border*

The EU rules on crossing the EU external border are covered by the SIA and the Common Manual on crossing the External Borders, and according to Article 3 (1) of SIA 'External borders may in principle be crossed only at the border crossing point and during the fixed opening hours.'' The paragraph itself does not give any margin of appreciation to EU member states, however, when one reads it together with Article 1 of SIA on border definition, it is obvious that EU Member States have the discretion to determine where the 'border crossing point' will be. Moreover, EU Member States based on paragraph 2 of the Article 3 of SIA should 'introduce penalties for an unauthorized crossing of the external border.' It gives them the authority to decide which penalties should be imposed on those TCNs that breach the abovementioned rules (Mitsilegas 2022; Dirkx 2008, 19; Wagner 1998).

### *3.2.2. Standards for border controls*

The EU standards for border controls are foreseen under Article 6 of SIA, according to which the competent authorities at the external EU border have to execute controls on cross-border movement 'in compliance with uniform principle, within the scope of national powers and national law' (Cholewinski

2002, 84; Dirkx 2008; Mitsilegas 2022). The reference to the national law makes it possible to EU Member States to decide how to carry out controls on TCNs at the crossing points of the external EU border. In addition, these common standards provided by this article state that TCNs from countries included on the blacklist are subject to a thorough check as defined in point (a) of this article (SIA 2000, Article 6). The Schengen acquis and guiding documents on the management of the EU's external borders (Bux and Maciejewski 2022), provide even stricter rules, e.g. TCNs at the airport controls have to go through controls on entry and exit whereas EU citizens and the group of TCNs exempted from visa requirement are only subject to entry control. It stipulates border authorities make arbitrary treatment among TCNs (Cholewinski 2002, 83-85).

## 4. A LACK OF COHERENT APPROACH FROM EU SIDE TOWARDS ENTRY OF TCNs INTO THE EU

The lack of total harmonization of the EU member states' rules on entry of TCNs into the EU territory for a short period of up to 90 days, seems to create "a largely neglected quality of democracy' as stated by BlancoSío-López (2020). These rules leave space for arbitrariness and a non-coherent approach to the entry of TCNs into the EU territory. Although the Treaty of Amsterdam tried to develop a coherent approach by including Schengen acquis as part of EU law, the EU rules concerning visa and external borders are leading to a risk of different treatment between TCNs in the consulate and at their external border. The question is whether these EU rules are in breach of any of the EU and International laws on human rights and the principle of non-discrimination. As stated above, the Republic of Kosovo as the only country in Europe to be part of the blacklist, proofs easily how EU rules on listing countries on the so-called white and black lists are not implemented in a fair and equal manner. The sub-section below elaborates on how the implementation of such rules created an incoherent approach from the EU side towards the entry of TCNs, and how the

discretion left to the EU member states might lead to the breach of the EU and international law on human rights.

4.1. Human rights principle as universal principle and EU law

International and EU rules regarding the protection of human rights can be infringed by the EU rules on the entry of TCNs into the EU territory. The CJEU accepted and recognized the protection of fundamental human rights as a general principle of EU law in 1996 through the Stauder case (CJEU-C 29/69), a principle that was not expressly foreseen under EU Treaties at that time. The EU legal system, as sui generis, is also governed by its own general principles including the principle of non-discrimination and equality (Craig and De Burca 2003), which means different treatment between two persons or a group of persons who are in the same situation and should be treated in the same manner (Article 1a of TEU, ext Art. 12(2) ECT); Craig and De Burca (2003). According to Reich, et al (2003) when an EU member state treats a TCN in a discriminatory way, even though these measures taken by this EU member state are not breaching any provisions established under the catalogue of the free movement rules, a TCN is protected by the non-discrimination rules. However, EU member states governments have always interpreted this article in a way that it covers only EU nationals (Palomar 2005 source tjeter), because the Article 1s of TEU (2007) prohibits discriminatory measures only on the ground of nationality but does not explicitly provide that TCN nationals are protected by it. Moreover, Weingerl (2022) argue that according to Craig and De Burca (2003), EU member states in applying EU rules in relation to the entry of TCNs do treat TCNs differently as they considered that this differentiation based on nationality is ''in accordance'' with Community rules. In addition, the Court of Human Rights through case *C. v. Belgium* (1996) has come to the same conclusion, by arguing that the EU regime is a '*special legal order*.' Based on that, it is not possible to establish that current EU rules concerning the entry of TCN are in breach of this article. The Article 5b TFEU (ex-Article 13 introduced by Treaty of Amsterdam of 1997), extended the scope of this principle by providing additional grounds

for prohibition of discrimination such as: "discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sex orientation." For the purpose of implementing this article, the EU Council has adopted the Race Directive (2000), and the so-called Framework Directive (2000/78/EC). But there are two central points to addressed with regard to Article 5b TFEU. First, its scope does not provide nationality as a ground nor does it refer to Article 1s of TEU. Second, its wording makes clear that this article does not have a direct effect. As concerns Article 18 TFEU that prohibits discrimination on ground of nationality, Weingerl (2022) has argued that this principle does not have apply to TCNs.

### 4.2. Race Directive and non-discrimination of TCNs

The Race Directive covers racial and ethnic discrimination and prohibits direct and indirect discrimination based on race and ethnic origin, but it does not apply to the EU rules and conditions on entry of TCNs into the EU territory (paragraph 2 of Article 3). If TCNs subject to visa requirement are denied to enter into the EU territory unjustly cannot rely on this directive. Should an exemption be interpreted narrowly? According to Reich et al. (2003), a different treatment among TCNs based on nationality may amount to indirect discrimination on grounds of racial or ethnic origin and must be treated as such *per se*. Of course, indirect discrimination as a concept is difficult to be defined. The element of intention is not necessary. The reason is that the intention in all cases is very hard to be proved, and instead of providing the existence of an intention to discriminate, an '*effects test*' applies (Reich et al 20003). Bell (2004) explains the term '*effects test*' by stating that the "indirect discrimination shifts the focus from formal equal treatment towards an examination of the effects in practice of rules and procedures on different groups." The discrimination towards TCNs is possible to be established for two reasons: first, the criteria for determining whether some TCNs need a visa or not are unreasonable because they refer to race and religion, and the criteria for determining which country should be subject to a visa requirement; second, TCNs in individual cases may

be subject to discrimination due to the EU members states authorities' practice. To establish such a test of discriminatory effects for some rules, statistical data are one of the sufficient tools that can be used (Reich et al., 2003). The indirectness must be judged by objective and typical fact constellations 'screening' that other TCNs on the black list are treated less favourably than another group of TCNs on the *white* list due to the EU visa rules. The distinction made by criteria determining on what basis a country is placed on the *white* or *black* list is unjustified because they are unreasonable and not objective. As long as nationality, race or religion are the main criteria for listing third countries into these lists, there is no justified reason for such distinction (Crowel 2003). The issue of statistical data is another ground for establishing the indirect discrimination, and it can be seen from the Table no.1, the majority of the Islamic and African countries are in the black list or subject to visa requirements. This proofs the possibility for existence of an indirect discrimination towards TCNs subject to visa requirement, based on the race and religion.

### 4.3. TCNs and application of the principle of non-discrimination

Moreover, this principle of non-discrimination and protection of human rights are already part of international law. It is part of customary international law and prohibits all types of discrimination against persons, irrespective of their nationality. Thus, all TCNs subject to visa requirement are protected by this universal principle, in case they are treated differently by consular authorities during the visa application procedures, or during border controls at the external EU borders. Although, the European Convention on Human Rights (ECHR) was not formally part of the EU law, the CJEU recognized rights guaranteed under it through case law. The CJEU has often made reference to the case law of the European Court for Human Rights (CHR), and the two first cases were *Nold* (1974) and *Hauer* (1979). EU institutions through a Joint Declaration have supported the ECJ's reference-recognition of rights enshrined in the ECHR as part of general principles of EC law (Craig and G. De Burca 2003). Even though this was not a legally binding instrument, it was symbolically important.

Currently, the Article 6 (3) of TEU provide "Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law." In addition, all the EU Member States have already agreed to comply with the principles of human rights as all of them are signatories of the ECHR. Thus, although, there is a wide discretion left to the EU member states about the application of EU rules concerning entry of TCNs, which is justified by universal principles of international law-sovereignty control, the ECHR could limit this discretion about the EU rules area (Cholewinski 2003). Even in 1986 (Commission v. Germany C- 294/86), the CJEU confirmed that all EU member states, when interpreting and implementing Community law, are obliged to act in accordance with fundamental human rights set out in the ECHR (see also Judgement C-219/91 - Ter Voort).

Indeed, the non-discrimination rules foreseen under the ECHR are very broad and prohibit different treatment, and it covers all persons. The ECHR as a whole is to prohibit arbitrary treatment between persons. The arbitrary treatment of fundamental rights generates unjust treatment, such as the unjustified refusal of TCNs to enter the EU territory. So, if this is the case, TCNs shall be protected by the ECHR and by the Lisbon Treaty as well. According to Article 5 of the ECHR, a TCN is subject to unjustified discriminatory treatment if the national authorities at the external border (for example on boarding a plane) examine whether a person is a non-citizen or not during their entry to EU territory (at border crossing point i.e., at the airport). Article 8 (1) of the ECHR grants protection for TCNs in case they are required to mention their reasons or motivations for entry, which is considered interference in private life and cannot be justified under Article 8 (2) of the ECHR (Cholewinski 2003). Moreover, the current EU rules can be in violation of the Article 13 of ECHR by not ensuring an effective remedy in order to challenge violations of their rights when the national authorities at the border have taken an unjustified decision in relation to their entry. What about Article 14 of the ECHR and its accessory nature? Any discrimination not made pursuant to a legitimate aim or objective grounds will be a breach of Article 14 of ECHR, which provides that "The enjoyment of the

rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." The list of grounds is not exhaustive, and the case of European Court of Human Rights Abdulaziz Cabales and Balkandali (1985) emphasized that within the meaning of Article 14 of the ECHR the notion of discrimination includes all general cases where a person or group of persons was treated less favourably than another without proper justification. This article has no independent existence but it is linked with some other substantive provisions on human rights as it was clearly explained in the case of Rasmussen v Denmark (1984). For example, if TCNs consider that their rights have been violated based on other substantive norms of that Convention, as mentioned above in Art.8 ECHR, they can be protected by the rights from the point of view of discrimination granted under Article14. There are several questions, used as a test, which clarify this issue of the relation between Article 14 and others, as follows: Do the facts of the individual case fall under the scope of one of the other substantive provisions of the Convention? Was there divergent treatment? Did this divergent treatment concern individuals or groups of individuals place in analogous situations? Did the divergence of treatment have a reasonable justification, or did it pursue a legitimate aim and was there a reasonable relationship of proportionality between that aim and the means employed to attain it? As it can be seen from the above, all the answers to those questions can be positive in case of TCNs, who are subject to visa requirement, and they can claim the current EU rules concerning the entry of TCNs into the EU territory are in breach of Article 14 of ECHR.

## 4.CONCLUSIONS

The above analysis of the current EU rules concerning the entry of TCNs into the EU territory indicates that EU member states enjoy wide discretion in implementing these rules. The possibility that competent authorities of EU member states will apply these rules in an unfair and discriminatory manner is

apparent, and as a result, a group of TCNs can be refused to enter the EU territory. Article 5 of SIA proves that EU member states have wide discretion in deciding whether a TCN has satisfied these conditions or not for the purpose of having access to the EU territory.

EU member states check the validity of the passport (as an entry condition) that a TCN should possess for the purpose of entry into the EU territory. As a result, some TCNs can be subject to unfair treatment by national carriers to board planes, boats, buses, or trains. As an example, it was the case of Kosovo's citizens before independence, who used to have special travel documents issued by UNMIK. Similar cases can happen with people from other territories not recognized by one or more EU member states. These TCNs could be exposed to a potential risk that some EU member states may not recognize their travel documents or they can have some doubt about it.

Despite the fact that EU has developed Schengen acquis, EU member states based on their national rules will decide which TCN should possess a visa to enter the EU territory. A decision of listing a country in *black* or *white* list will be based on the assessment of whether the nationals of the particular county could pose a threat to the 'public order' of that EU member state. Considering the fact that the term of 'public order' is not defined at the EU law level, but it depends on national laws, the possibility to treat differently some TCNs in the same situation is unquestionable.

The wording of the Schengen rules on the conditions for granting a visa for TCNs is very vague, leaving a considerable margin of appreciation to consular authorities to refuse visa requests to TCNs. As argued above Article 5 (1) SIA, as a main rule on conditions for issuing visas, allows EU Member States to refuse entry of TCNs (subject to visa requirement) even though a TCN satisfied the relevant conditions.

The above mention entry conditions are applicable also on crossing the external EU border by TCNs, because granting (if it is granted) a visa to TCNs, it does not mean that they can enter immediately the EU territory. Thus, when TCNs in possession of a Schengen visa arrives at the airport of the EU Member States, they can be subject to 'a thorough check,' which means that they will be subject to entry and exit controls carried out by the border personnel.

In addition, the analysis of the compatibility of current EU rules on entry of TCN into the EU territory with the European Union Race Directive indicates that the non-discrimination rules were not taken into consideration during their drafting process by the EU authorities, and national authorities do see these rules as unbinding on this part of EU rules. Thus, some TCNs subject to visa requirements can be and might have been indirectly discriminating based on race and religion. However, EU member states are part of ECHR, and the principle of non-discrimination is a universal principle of international law. As result, unjustified and possibly different treatment among TCNs can be sanctioned based on this principle.

Finally, current EU rules concerning entry of TCNs into the EU most suitably can be characterized by the differential desire to promote the 'good' movement of persons and to restrict the 'bad' movement of persons and the respect for human rights in the Union has been largely declaratory in the past – now it must become effective.

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