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Addressing the Legal Quagmire of Complementary Legal Pathways

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Abstract

Complementary pathways have been offered as a possible solution for facilitating legal admission of people in need of international protection. The current debates about these pathways are characterised by a conceptual and legal quagmire since various issues are invoked and conflated. The objective of this article is to dissect the relevant issues in light of the existing relevant legal frameworks so that some better clarity is achieved. For this purpose, the pathways are compared with resettlement and territorial asylum, to demonstrate their distinctiveness. This possible distinctiveness (i.e., the combination of protection-related and not protection-related considerations) disrupts the existing legal categories for regulating migration. The article shows how the European Convention on Human Rights, EU law and domestic law might respond to this disruption, by examining the granting of visas, the right to leave any country, the right to *non-refoulement*, the right to family life and relevant procedural rights.

Keywords

complementary pathways, humanitarian visas, resettlement, the right to leave any country, *non-refoulement*, right to family life, visa, Schengen Border Code

1. Introduction

Since the adoption of the New York Declaration on Refugees and Migrants, there has been an increased interest in the development of practices aimed to facilitate the admission of individuals in need of international protection.¹ The UN Global Compact on Refugees promotes such a development by noting that '[a]s a complement to resettlement, other pathways for the admission of persons with international protection needs can facilitate access to protection and/or solutions.'² The Compact continues to enumerate examples of such pathways.³ The EU also looks favourably upon such practices since the EU Pact on Migration and Asylum adds the development of 'sustainable legal pathways for those in need of protection' as one of the

¹ New York Declaration for Refugees and Migrants, A/RES/71/1, para. 79.

² Global Compact on Refugees, General Assembly Official Records Seventy-third Session Supplement No. 12 (A/73/12 (Part II)), New York, 2018 (GCR), (*hereinafter* Global Compact on Refugees) paras 94 (emphasis added). The 'and/or' part is notable and it relates to one of the ambiguities surrounding complementary pathways, namely what happens after the admission. See Section 2.2.

³ Global Compact on Refugees, para. 95: 'effective procedures and clear referral pathways for family reunification, or to establish private or community sponsorship programmes that are additional to regular resettlement, including community-based programmes promoted through the Global Refugee Sponsorship Initiative (GRSI). Other contributions in terms of complementary pathways could include humanitarian visas, humanitarian corridors and other humanitarian admission programmes; educational opportunities for refugees (including women and girls) through grant of scholarships and student visas, including through partnerships between governments and academic institutions; and labour mobility opportunities for refugees, including through the identification of refugees with skills that are needed in third countries.'

objectives within the future European migration policy.⁴ In its latest recommendation on the topic, the Commission stated that ‘Member States should contribute to providing legal pathways for those in need of international protection in the spirit of international solidarity with the countries of first asylum or transit and strengthen solidarity between each other.’⁵

The idea itself that States in the West should develop procedures through which people in need of protection can enter legally, as an addition to spontaneous arrivals and territorial asylum,⁶ is not new.⁷ Resettlement itself is such a procedure. Humanitarian visas that might be also part of the resettlement procedure, have been under discussion.⁸ What is perhaps new is the launching of a purportedly overarching idea where different considerations (i.e. protection-related and not protection-related but connected with e.g. labour needs or family links) and objectives are all muddled together under the heading of ‘complementary pathways’ and presented as a possible response to the current challenges. The UNHCR has even made an effort to offer a definition in this way propping the perception that there is actually an overarching unifying idea.⁹

Reading the available policy documents on complementary legal pathways from various actors and the relatively limited academic literature that is predominantly policy-orientated and empirical (i.e., studies about what States actually do),¹⁰ there is only one conclusion that makes itself available. It is a conceptual and legal quagmire since various issues are invoked and conflated with each other. Some of them are somehow related to existing legal norms, others are related to rights enshrined in human rights law instruments, perhaps for creating the impression that these pathways do not or should not operate in a legal vacuum.¹¹ Some of the issues are linked to certain policy objectives, while others to practicalities. Some invocations of the pathways are descriptive since they describe what actually already exists as a matter of state practices; these descriptions are combined with normative statements (i.e., what States should do). Some issues are related to States, others to UNHCR or to non-state actors; some issues might have something to do with EU law, while others do not; but all of them can be found in the mix. Some issues pertain to conditions of entry or to conditions of stay, while others to conditions for prolongation of stay with little efforts to disentangle them. Not to

⁴ European Commission Communication on a New Pact on Migration and Asylum COM 609 final, 23 September 2020 (*hereinafter* the 2020 EU Pact on Migration and Asylum) p. 2.

⁵ Commission recommendation (EU) 2020/1364 of 23 September 2020 on legal pathways to protection in the EU: promoting resettlement, humanitarian admission and other complementary pathways (*hereinafter* the 2020 EU Commission recommendation on legal pathways), para. 1.

⁶ Territorial asylum refers to accessing protection via irregular arrival.

⁷ Noll, G., Fagerlund, J., and Liebaut, F. (2002) *Study of 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*, Danish Centre for Human Rights.

⁸ *Humanitarian Visas: European Added Value Assessment Accompanying the European Parliament's Legislative Own-Initiative Report*, European Parliament Research Service (2018).

⁹ UNHCR Complementary Pathways for Admission of Refugees to Third Countries. Key Considerations (2019) p. 5: ‘Complementary pathways for admission are safe and regulated avenues for refugees that complement resettlement by providing lawful stay in a third country where their international protection needs are met. They are additional to resettlement and do not substitute the protection afforded to refugees under the international protection regime. Complementary pathways include existing admission avenues that refugees may be eligible to apply, but which may require operational adjustments to facilitate refugee access.’ For a similar definition, see European Migration Network EMN Inform ‘Exploring Legal Pathways to Fulfill Labour Needs’ (2021): ‘Complementary pathways are understood as programmes and initiatives that facilitate access to existing legal avenues to the EU for those in need of international protection’.

¹⁰ The literature is policy-orientated. See e.g. Wood, T., 2020. The Role of ‘Complementary Pathways’ in Refugee Protection’. Kaldor Centre for International Refugee Law. Anything close to a robust legal analysis is non-existent so far.

¹¹ ECRE (2017) Protection in Europe: Safe and Legal Access Channels.

mention that the objective of better solidarity has been also added in the mix.¹² Perhaps because often compared with resettlement, ‘vulnerability’ is also mentioned when complementary pathways are deliberated.¹³ Better integration has been also added, which might explain the entanglement between protection and not protection-related considerations.¹⁴ This mixture is understandable given the novelty and the absence of a specific legal framework at international or regional level that could possibly delimit, define and relate in a relatively stable way the pertinent issues, so that we all know what we are actually talking about.

Yet, the conflation of all these issues when the topic of the pathways is discussed, is far from useful for anybody. It is in fact injurious since it hampers any understanding as to whether they are of any value for any relevant individuals and for the States. One can also add that it is detrimental since they can be invoked to support measures that are contrary to individual interests (or at least used against individuals in the analysis of their human rights), including deterrence and externalisation of migration control.¹⁵ While with or without the pathways, States can engage with deterrence and externalisation,¹⁶ the invocation of the pathways does add a nuance. The reason is that they support the argument that deterrence and externalisation themselves do not make Europe an unwelcoming and impenetrable fortress, since arguably there are pathways to enter in legal and safe ways that take consideration of protection needs (although we do not know to what extent this consideration matters, given the above mentioned quagmire). This nuance can have not only political and practice repercussions; it can also affect the legal reasoning in human rights law. This has happened in relationship to the prohibition on collective expulsion of aliens.¹⁷ Such an impact can be also expected in relationship to the right to life.¹⁸ However, to make an argument that there is something (i.e. legal pathways) that can affect policies and legal reasoning, we need to first know what this something is. We need some stability as to its conceptual limits.

In light of the above-described quagmire and its possible implications, my objective is to propose a dissection of the relevant issues. The dissection that aims at better conceptual clarity, is performed from the perspective of the existing relevant legal frameworks. In other words, these frameworks that already regulate various aspect of movement across international borders, offer useful tools. To better understand the challenges related to the pathways, we need therefore some comparisons with concepts and meanings that are relatively stable due to their legal regulation at international, regional and national level. This does not negate the importance of studying the actual practices of States, the policy drivers and the practical challenges. These remain crucial given the discretion that States have whether to have any

¹² EU Pact on Migration and Asylum, p. 22: ‘Safe channels to offer protection to those in need remove incentive to embark on dangerous journeys to reach Europe, as well as demonstrating solidarity with third countries hosting refugees.’

¹³ EU Commission Recommendation on Legal Pathways (2020), para. 11: Member States are invited to consider ‘scaling up other forms of legal pathways for vulnerable people in need of international protection.’

¹⁴ EU Pact on Migration and Asylum p. 23; 2020 EU Commission recommendation recitals 26-29 and para 22.

¹⁵ Bratanova van Harten, E., (2023) Complementary Pathways as ‘Genuine and Effective Access to Means of Legal Entry’ in the Reasoning of the European Court of Human Rights: Legal and Practical Implications. *European Journal of Migration and Law*.

¹⁶ Moreno Lax, V. (2017). *Accessing Asylum in Europe. Extraterritorial Migration Controls and Refugee Rights under EU Law*. Oxford University Press.

¹⁷ In *N.D. and N.T. v Spain* [GC] Application No 8675/15 and 8697/15, 13 February 2020, the GC invoked the existence of the possibility for apply for legal access in Morocco, to support its finding that the expulsion measures against the group of migrants at the Spanish-Morocco border, could not be defined as a collective expulsion. See Bratanova van Harten, E., (2023) Complementary Pathways as ‘Genuine and Effective Access to Means of Legal Entry’ in the Reasoning of the European Court of Human Rights: Legal and Practical Implications. *European Journal of Migration and Law*.

¹⁸ Stoyanova, V., 2020. The Right to Life under the EU Charter and Cooperation with Third States to Combat Human Smuggling. *German Law Journal* (21), p. 436, where an argument is formulated that compliance with the positive obligation to protect life is contingent on the availability of safe possibilities for entry.

pathways and the wide discretion how to actually arrange them in practice. Yet, attaining some analytical clarity at a more abstract level is also important. For this reason, Section 2 tries to understand legal pathways by comparing them with resettlement and territorial asylum. This comparison leads to the conclusion that their distinguishing feature is the combination of protection-related and not protection-related considerations. This combination disrupts the existing legal categories for regulating migration since as Section 3 explains the regulation of the different segments of the movement of people across borders is premised on certain categorisations and distinctions. Section 4 elucidates the significance of these categorisations and distinctions in the regulation of leaving and entering countries. For this purpose, Section 4 invokes international human rights law (i.e. the European Convention on Human Rights (ECHR))¹⁹, EU law and national law. The relationship between individuals, as potential beneficiaries of the pathways, and receiving States as possible owners of obligations, is at the heart of the analysis.

2. The Distinctiveness of Legal Pathways

Although UNHCR tends to use the term ‘complementary pathways’, different labels have been in operation and used by different actors. For the sake of providing few other examples, ‘legal pathways’²⁰ ‘other pathways for admission of persons’²¹ ‘humanitarian admission programs’²² ‘active refugee admission policies’²³ ‘protection entry mechanisms’²⁴ ‘protected entry procedures’²⁵ ‘safe and legal access channels’²⁶ ‘legal entry channels’²⁷ ‘alternative admission pathways’²⁸ can be mentioned. For the sake of this article, I will use the term legal pathways or complementary pathways.

Despite the variety of utilized terms, at least three things emerge from all these labels and the practices included under the labels. First, these are arrangements for allowing and enabling movement that are in some respects similar to legal migration and resettlement (section 2.1). Second, at least in their current articulations, the arrangements do not include serious engagement with what happens after the movement is completed (section 2.2). Third, the arrangements include a mixture of protection-related and not-protection related considerations, which seems to distinguish them from legal migration and resettlement (section 2.3).

2.1. *Allowing and Enabling Movement Similarly to Legal Migration and Resettlement*

Legal pathways refer to mechanisms/practices/arrangements for allowing and enabling people to leave, travel to and enter countries of destination legally. They allow and enable a physical movement by offering a path from one country to another one. This physical movement is

¹⁹ European Convention for the Protection of Human Rights and Fundamental Freedoms 2013 UTS 222.

²⁰ 2020 EU Commission recommendation on legal pathways.

²¹ Global Compact on Refugees.

²² Leboeuf, L., [Legal Pathways to Protection: Towards a Common and Comprehensive Approach? – EU Immigration and Asylum Law and Policy \(eumigrationlawblog.eu\)](https://eumigrationlawblog.eu/legal-pathways-to-protection-towards-a-common-and-comprehensive-approach/)

²³ AutorInnen, K., Welfens, N., Engler, M., Garnier, A., Endres de Oliveira P., and Kleist, O., [Active Refugee Admission Policies in Europe: Exploring an Emerging Research Field – Netzwerk Fluchtforschung](https://netzwerk-fluchtforschung.de/active-refugee-admission-policies-in-europe-exploring-an-emerging-research-field/)

²⁴ UNHCR, Central Mediterranean Sea Initiative Action Plan [531990199.pdf \(unhcr.org\)](https://www.unhcr.org/refworld/doc/531990199.pdf) ; UNHCR Central Mediterranean Sea Initiative EU Solidary for rescue-at-sea and protection of refugees and migrants [538d73704.pdf \(refworld.org\)](https://www.refworld.org/doc/538d73704.pdf)

²⁵ UNHCR Central Mediterranean Sea Initiative EU Solidary for rescue-at-sea and protection of refugees and migrants [538d73704.pdf \(refworld.org\)](https://www.refworld.org/doc/538d73704.pdf)

²⁶ Protection in Europe: Safe and Legal Access Channels ECRE [Policy-Papers-01.pdf \(ecre.org\)](https://www.ecre.org/policy-papers-01.pdf).

²⁷ Legal Entry Channels to the EU for Persons in Need of International Protection: a Toolbox (2015) EU Fundamental Rights Agency, p. 5.

²⁸ The Expert Council of German Foundations on Integration and Migration Research Unit, ‘What Next for Global Refugee Policy?’ Policy Brief 2018-1.

allowed and enabled by the second country (i.e. the potential receiving country that is also the country of destination and thus protection), since this country organizes some procedures. Individuals (i.e. the beneficiaries) physically located in the first country (country of origin or first country of asylum) can access these procedures, although they are not within the jurisdiction of the receiving country. In this way, legal pathways resemble legal migration and resettlement, while at the same time being distinct from territorial asylum. The latter necessary implies that the individual (i.e. the potential beneficiary of protection) comes within the jurisdiction of the destination country so that a procedure for examining his/her protection claim can be triggered. In contrast, legal pathways presuppose availability and access to a procedure without a jurisdictional attachment between the individual and the country of protection. Given the absence of a jurisdictional link, their regulation by human rights law becomes problematic. The reason is that the beneficiaries are not entitled to invoke any rights that might correspond to any obligations of the receiving country under human rights law. This is a point to which I will return below. The role of law (i.e. human rights law) in the beginning of the movement subsides, which is arguably offset by greater role of politics and facticity (i.e. the political decision to allow and enable physical movement). In comparison, territorial asylum often implies physical movement that is not regulated, at least not from the perspective of the countries of destination. Facticity governs here, up until the point when the person is physically in contact with the receiving State, which can trigger the jurisdictional link and constitute the person as a holder of human rights opposable against this State.²⁹

2.2. No Focus on What Happens after the Movement

Although legal pathways are meant to complement resettlement, they are different from resettlement. The latter has been long practiced as a humanitarian response to the situation of vulnerable persons;³⁰ it normally includes not only a procedure for enabling and allowing movement and thus legal entry, but also a permanent residence in the destination country. In this sense, resettlement is a bundle of guarantees related to both the movement, including the entry, and the stay/residence. Admittedly, given the wide scope of discretion as to how different States organize and condition resettlement, this comparison is not entirely stable. Practices can change and permanent residence made not available after resettlement.³¹ Yet, generally, resettlement is a bundle, which means that it is not only a pathway *to* another State; it does not only guarantee a destination, but also a place of permanent stay. As to legal pathways, it is clear that they can offer a destination, but the conditions regulating the initial stay (i.e., type of residence permit), the duration of the stay (i.e., duration of the permit), the prolongation of the stay (i.e. requirements for prolongation of the permit or for being granted a new type of a permit), and the rights attached to the different permits in terms of access to welfare and the labour market, are up for grabs. These conditions are within the discretion of each State and they might differ depending on the type of the pathway.

It could be argued that all these conditions should not have a central role in the efforts by different actors to promote complementary pathways, since the focus should rather be on the pathways, i.e., on having arrangements that enable and allow safe movement from one point to another, and once having reached the point of destination, the rest will arrange itself. If people were packages, perhaps this proposition might hold. Since they are not, migration law *links* the conditions for entry with the conditions for the initial stay, prolongation of the stay and any

²⁹ *Hirsi Jamaa and Others v Italy* [GC] Application No 27765/09, 23 February 2012, para.81.

³⁰ Although States are free to determine who to resettle, the focus has been on vulnerable persons. UNHCR Resettlement Handbook (2011) Chapter 6.

³¹ Ineli-Ciger, M., 2022. Is Resettlement still a Durable Solution?. *European Journal of Migration and Law* p. 27; 'What Next for Global Refugee Policy? Opportunities and Limits of Resettlement at Global, European and National Levels' The Expert Council on Integration and Migration Policy Brief 2018-1.

rights pursuant to the national labour or welfare law.³² The conditions are accordingly bundled. Perhaps the bundle does not have to include permanent residence, as in resettlement. In any case, however, allowing and enabling entry requires considerations of what happens thereafter. In current articulations of complementary pathways by different actors,³³ the question as to the duration of the stay/residence and the conditions for prolongation of this stay/residence do not seem to be in the focus.³⁴

2.3. Mixture of Protection-related and not Protection-related Considerations

Similarly to resettlement, complementary pathways have humanitarian underpinnings, which makes them relevant to individuals in need of protection. However, their protection-related basis is muddled with other considerations (e.g. family connections, labour and educational possibilities).³⁵ This raises the question whether, for example, humanitarian visas should be included within the overarching concept of legal pathways, since the former have been perceived as exclusively related to protection.³⁶ The wider question is how to integrate and interrelate all these different considerations (protection-related and not protection-related). Relatedly, should one of them be given priority over others? At which point in the movement (i.e. eligibility criteria for selection performed in the third country or determining the conditions for stay after arrival) should the consideration matter? At which point in the movement should one of them be given priority over the others?³⁷

Similar questions can arise in the context of resettlement given the discretion that States have regarding the eligibility of beneficiaries, which again makes the distinctiveness of legal pathways questionable. Having introduced this caveat, it can be still fairly strongly stated that resettlement is generally about protection.³⁸ In contrast, legal pathways have appeared on the political horizon *precisely* because they are possibilities that mix types of migration that have been traditionally kept in separate silos.³⁹ It is worthwhile to observe that national migration

³² For these linkages in the context of the asylum, see Stoyanova, V., 2022. Temporariness of Refugee Protection: For What and in Whose Interest? Cessation of Status as Related to Revocation of Residence Permits. *Maastricht Journal of European and Comparative Law*, p. 527; In the context of EU labour migration, see Peers, S. (2022). Migration for Labour Purposes: the EUs Piecemeal Approach, in *Research Handbook on EU Migration and Asylum Law*. E Tsourdi and P De Bruycker (Eds.) Elgar Publishing, p. 327.

³³ See Global Compact on Refugees, para 94 where the inclusion of the phrase ‘and/or’ makes the connection between complementary pathways and solutions, ambiguous. In its policy documents, UNHCR has linked the pathways with solutions framed as ‘third country solutions’ or ‘long-term solutions’, but not necessary with ‘durable solutions.’ See UNHCR Complementary Pathways for Admission of Refugees to Third Countries. Key Considerations (2019) pp. 5-7. See also ECRE (2017) Protection in Europe: Safe and Legal Access Channels, where the focus is on access to territory. Here it is relevant to also note that there are no consistent articulations and definitions of the pathways, an issued mentioned in the Introduction.

³⁴ This conclusion is based on how relevant actors, such as UNHCR, frame and discuss complementary pathways. The conclusion is not based on empirical studies about some specific practices organized by some States, where not only the conditions for entry, but also the conditions for the residence including the possibility for permanent residence, are arranged.

³⁵ The selection criteria for resettlement might not be limited to vulnerability, but also include family links and integration prospects. Hashimoto, N., 2018. Refugee Resettlement as an Alternative to Asylum. *Refugee Survey Quarterly* (37), p. 170.

³⁶ See Noll, G., Fagerlund, J., and Liebaut, F., (2002) *Study of 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*, Danish Centre for Human Rights, p. 20.

³⁷ Similar questions can also be asked regarding conditions for prolongation of stay and access to welfare.

³⁸ de Boer, T., and Zieck, M., 2020. The Legal Abyss of Discretion in the Resettlement of Refugees. *International Journal of Refugee Law* (32), p. 61.

³⁹ Refugee lawyers have been careful to keep the labour migration and asylum conceptually separate, mostly for fear that the grant of asylum will be made conditional on the manpower needs of the labour market. Noll, G., (2008). The Asylum System, Migrant Workers and the Informal Labour Market, in *Swedish Studies in European Law*. T. Bull and P. Cramer (Eds.) Hart Publishing, p. 1.

law and EU law traditionally place non-nationals in specific categories (labour, education, family, international protection) and shuffling categories is not easy to legally manage. Law is predicated on these categorizations. When the categories are disrupted, the question arises how to use the available legal tools or do we need new ones to regulate movement that does not strictly fit within one of the categories.⁴⁰ The objective of the next section is to explore how the available tools are of any relevance and help and what kind of questions they prompt us to ask regarding the pathways.

3. Law and Movement across International Borders

To better understand how law regulates movement across international borders, five segments of this movement need to be distinguished. The first one is leaving/exiting a country. The second segment is access to the territory of another country. However, since the human rights law jurisdiction of the intended country of destination is triggered upon effective control, it might also be relevant to frame this second segment as placing oneself within this country's effective control.⁴¹ The third segment relates to the conditions for the initial stay in the territory of the country of destination. The last two segments concern the prolongation of this stay in the territory of the country of destination and the possible removal from this country.

Legal pathways raise questions in relation to each one of these five segments. Since, as already mentioned above the focus has been on exiting third countries and accessing countries of destination, I will focus on these two in Section 4. The segments are bundled since, for example, the specific type of visa used for entering a country predetermines the conditions for the initial stay or the intention behind the stay might predetermine whether visa would be issued.⁴² The segments are also bundled since the conditions for allowing entry (i.e., issuance of a visa) are assessed far away from the actual border that needs to be crossed for the purposes of entry. This means that leaving might not be possible without having a visa.⁴³

⁴⁰ Interestingly, in some documents it is assumed that the existing migration categories can be simply used for people in need of international protection. See Exploring Legal Pathways to Fulfill Labour Needs (European Migration Network, 2021), where it is stated that '[c]omplementary pathways are understood as programmes and initiatives that facilitate access to *existing legal avenues* to the EU for those in need of international protection [emphasis added].' See also 2020 EU Commission recommendation on legal pathways, para 31: 'To facilitate access to the right to family reunification *in line with the Family Reunification Directive*, Member States are encouraged to put in place family reunification assistance programmes that improve access to information and simplify the visa application process [emphasis added].' One can doubt whether it is sufficient for existing legal avenues to be simply opened to people who accidentally also happen to be in need of protection, to be worthy of being conceptualized as complementary pathways. Some specific measures targeted for people in need of protection are necessary, so that the new label and conceptualization has an independent value and is worthy of all the attention.

⁴¹ The trigger of the jurisdictional threshold under Article 1 of the ECHR, has been an object of an extensive discussion. For present purposes, it suffices to quote *Al-Skeini and Others v the United Kingdom* [GC] Application No 55721/07, 7 July 2011, para 137: 'whenever the State, through its agents, exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section I of the Convention that are relevant to the situation of that individual.'

⁴² EU law, as interpreted by the ECJ in *X. and X. v Belgium*, Case C-638/16 PPU, 7 March 2017, bundles the conditions for being issued a visa (i.e., not having the intention to stay longer than 90 days) with the actual stay. In this sense, the basis on which an entry is allowed has to be valid throughout the entire stay. The entry and the stay are therefore in one single package and cannot be taken apart. The approach by the Advocate General Mengozzi in his opinion in *X. and X. v Belgium*, was just the opposite. He reasoned that the family would not stay longer than 90 days in Belgium *on the basis* of a visa issued under the EU Visa Code, since once having entered they would apply for protection and their stay in Belgium would be on a different basis. In this sense, access and basis for stay are two separate issues.

⁴³ Zieck, M., 2018. Refugees and the Right to Freedom of Movement: From Flight to Return. *Michigan Journal of International Law*, p. 19 and 44 'states may frustrate the right of individuals to leave their country of origin, albeit only with a view to controlling entry into their territories.'

The focus on leaving and accessing countries of destination is without prejudice to the complicated questions that arise in relation to the last three segments – conditions for the initial stay, prolongation of the stay and removal. The authorization of the initial stay implies that residence permits need to be issued and the national legislation needs to determine the ground for these permits. For example, if a person is granted a refugee status, this status is the ground for a residence permit.⁴⁴ If a person is a family member, the family link is also another ground for issuing a permit.⁴⁵ Normally, the national legislation allows one ground for a permit.⁴⁶ Under the national legislation, beneficiaries of the pathways might use the already available grounds, or given the distinctiveness of the arrangements for allowing and enabling their entry, distinctive grounds for permits might have to be introduced at national level. If the national legislation contains flexible grounds, this flexibility might also be used for accommodating the specific arrangements that might characterize the complementary pathways, so that permits are issued. The permit issued determines not only the duration of legal stay, but also access to rights, benefits and services. For example, in Italy individuals who arrived via the so called ‘humanitarian corridors’, were not granted status different from refugee status or subsidiary protection status; they were, however offered reception arrangements distinct from those offered to individuals who irregularly arrived in the country.⁴⁷ The national immigration legislation therefore can grant access to rights, benefits and services depending on the pathways of arrival. In this sense, the national legislator can introduce various distinctions and decide how any of these apply specifically to beneficiaries of complementary pathways.

The initial permit might be an object of specific conditions as to its prolongation. Prolongation of the stay raises question about whether the initial permit granted can be prolonged and under what conditions. It can also raise the question whether the person can switch the basis of the permit without being required to leave the country.

As to the last segment regarding removal of beneficiaries of complementary pathways, this demands engagement with at least the following questions: Under what conditions can beneficiaries be removed from the territory of the receiving country? Where can they be returned to? Should these questions be answered differently depending of the type of pathway used for entry? Besides the general prohibition on *non-refoulement* and, in exceptional circumstances the right to family life, should return of beneficiaries be regulated differently in comparison with how more generally return of aliens is regulated? As to the question of which country can persons be returned to, should this be the first country of asylum? If yes, does this mean that there needs to be a readmission agreement between the two relevant States that includes readmission of non-nationals, given that the individual who has benefited from the pathway does not have a right to return to the first country of asylum? Is such an agreement a precondition for the very existence of a legal pathway in the first place?

Another important clarification is due regarding the segments. Some aspects of the segments might be an object of regulation, while others are left to the discretion of States from

⁴⁴ Article 24, 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) OJ L 337, 20.12.2011 (*hereinafter* the EU Qualification Directive).

⁴⁵ Article 13(2), Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification OJ L 251, 3.10.2003 (*hereinafter* the EU Family Reunification Directive).

⁴⁶ A person cannot have a residence permit on two grounds (e.g., refugee status and family links) at the same time. See, for example, the interpretation of the Swedish Aliens Act by the Migration Court of Appeal in the judgment MIG 207:31 and by the Swedish Migration Agency in Rättsligt ställningstagande Hantering av ansökningar om uppehållstillstånd på flera grunder och ansökningar om uppehållstillstånd som görs av en utlänning som redan har uppehållstillstånd RS/083/2021.

⁴⁷ Bianchini, K. (2020). Humanitarian Admission to Italy through Humanitarian Visas and Corridors, in: *Humanitarian Admission to Europe. The Law Between Promises and Constraints*. M. Foblets and L. Leboeuf (Eds.) Nomos 2020, pp. 157 and 175.

the perspective of international and EU law. As to those aspects that are regulated, we need to make a distinction as to the type of regulation. If human rights law is relevant, this implies that individuals can claim certain rights. If there are indeed relevant human rights law provisions, two additional questions arise. First, which country owns obligations corresponding to these rights? The answer to this question brings us back to the jurisdictional threshold in human rights law. The second question is what the content and the scope of these obligations could be: what concrete measures are States as holders of obligations legally required to take? The core question here is whether these measures can be specified so that the content of the obligation necessarily demands arrangements for allowing and enabling leaving and entry.

If human rights law is not relevant, there might be international instruments that regulate state-to-state relations that might be pertinent given the transborder nature of the movement.⁴⁸ In addition, since EU has competence in the area of migration and asylum and has legislated on some aspects, EU law also intervenes as a framework that governs the conduct of EU Member States. A relevant question then is whether EU law demands certain measures or prohibits them. If EU law actually prohibits certain measures, what is the scope of the prohibition? In the alternative, does EU law allow measures without demanding them as a matter of EU law obligations? The role of EU law is further complicated by the role of the EU Charter.⁴⁹ If Member States implement EU law, they have to comply with the EU Charter. Which rights from the Charter might be relevant and what obligations might the Charter impose? Could these obligations be specified to such a degree as to include arrangements for allowing and enabling entry?

Finally, if we assume that neither international law nor EU law might impose any demands on States as to the arrangements of the pathways, some aspects might be an object of regulation at the domestic level. In fact, given that the objective pursued is *legal* access, there must be some national legal regulation of the access and the stay on the national territory. While the arrangements might be purely based on discretionary practices as to the selection and the eligibility, domestic law must play a role for regulating the entry and the stay.

Any better understanding of complementary pathway has to seriously consider these questions and all the distinctions that they imply. Appreciating all their complexities is not possible within the limits of this article, which implies that the analysis below does not claim comprehensiveness. It does however show the importance of the distinctions in relation to the first two segments of the movement mentioned above.

4. Leaving and Entry

As already suggested, the first two segments of the movement, i.e. leaving and entry, can be reviewed from the perspective of human rights law (Section 4.1), EU law (Section 4.2) and domestic law (Section 4.3).

4.1. Human Rights Law

Starting with human rights law, at least four relevant rights can be identified: the right to leave any country, the right to *non-refoulement*, procedural rights and the right to family life.⁵⁰

⁴⁸ The agreement between the EU Member States and Turkey (the so called EU-Turkey Statement of 18 March 2016 [EU-Turkey statement, 18 March 2016 - Consilium \(europa.eu\)](https://ec.europa.eu/external-affairs/docs/default-source/eu-turkey-statement-18-march-2016.pdf?sfvrsn=1)) is an example of such an international instrument that regulates the relationship between States. Besides this relationship, the organization of the pathways might involve agreements about the involvement of non-state actors such as UNHCR and non-governmental organizations. See van Selm, J., 2023. Whose Pathways are They? The Top-down/Bottom-up Conundrum of Complementary Pathways for Refugees. *European Journal of Migration and Law*.

⁴⁹ Charter of Fundamental Rights of the European Union [2012] OJ C326/391.

⁵⁰ Another right that might be also relevant concerns the prohibition on collective expulsion. See Bratanova van Harten, E., (2023) Complementary Pathways as ‘Genuine and Effective Access to Means of Legal Entry’ in the

4.1.1. The Right to Leave any Country

The right to leave any country, including one's own,⁵¹ can be an object of legitimate limitations. It is questionable, however, whether practical or legal impossibilities to enter other countries, can justify limitations of this right.⁵² In this sense, having or not having a pathway *to* somewhere else (i.e. another country) should not matter as a justification that can be invoked by the country on whose territory the person is, to limit the right. Countries of destination are not holders of obligations corresponding to this right given the absence of a jurisdictional link. Any measures that allow and enable leaving undertaken by these countries are therefore not measures that can form the content of any obligations.

A relevant aspect here is that that the beneficiaries of complementary pathways might be limited to individuals who have already left their countries of origin and are located in so-called first countries of asylum or transit countries. In this sense, the pathways are not *from* countries of origin.⁵³ What could be the justifications for this? I can identify at least two. The first one is that complementary pathways are represented as having *inter alia* the objective of burden sharing: by having these pathways in place, the West arguably alleviates the burden that first countries of asylum carry of hosting many people in need of protection. This illustrates how the justification can impact the personal scope by possibly limiting the beneficiaries to those that have already left their countries of origin.

The second possible justification is of a legal character since it is related to the refugee law regime grounded on the Refugee Convention. It relates to the question whether the scope of the beneficiaries of the legal pathways should be limited to refugees. If yes, to be a refugee in accordance with the definition in the Refugee Convention, the person should have left the country of origin. We can try to investigate the justifications as to why alienage was made a necessary requirement in the refugee definition and ask the question whether the same justifications are relevant and thus the same requirement should be applied to possible beneficiaries of the legal pathways. One of the justifications was not intervening in the sovereignty of the countries of origin.⁵⁴ This justification might also be relevant in the context of complementary pathways since they might imply extension of decision making in the territory of other States. If these other States are however first countries of asylum, such an extension might be less problematic. In any case, all of this suggests that some form of cooperation is required between receiving countries, on the one hand, and countries of first asylum/transit on the other, so that the pathways can be operationalized. Such cooperation concerns state-to-state relationships. When it comes to the state-individual relationship, as already mentioned above, the right to leave does not trigger obligations consisting of measures by potential countries of destination to facilitate leaving, which explains the discretionary nature of the complementary pathways from the perspective of human rights law.

Neither does the right to leave relate to legal possibilities for entering a specific country. The right to enter a country is limited to one's own country.⁵⁵ Even if a person physically reaches the territory of the country of destination, in this way physically crossing the border,

Reasoning of the European Court of Human Rights: Legal and Practical Implications. *European Journal of Migration and Law*.

⁵¹ Article 2(2) of Protocol 4 to the European Convention on Human Rights (ECHR).

⁵² Guild E., and Stoyanova, V., 2018. The Human Right to Leave Any Country: A Right to Be Delivered. *European Yearbook on Human Right*, p. 373; Stoyanova, V., 2020. The Right to Leave Any Country and the Interplay between Jurisdiction and Proportionality in Human Rights Law. *International Journal of Refugee Law* (32) p. 403.

⁵³ For this reasons UNHCR calls them 'third country solutions'. UNHCR The Three-Year Strategy on Resettlement and Complementary Pathways (2019) p.7

⁵⁴ Hathaway, J. and Foster, M. (2014) *The Law of Refugee Status*. Cambridge University Press, p. 17.

⁵⁵ Article 3(2) of Protocol 4 to the European Convention on Human Rights (ECHR).

this does not mean that he/she has entered the country in the sense of the national legislation. Formulating a protection claim and participating in proceedings for examining such a claim, does not necessary imply an authorization to enter the country.⁵⁶ Yet, while establishing a physical contact with the authorities of the receiving country does not necessary imply a legal entry, it is a key threshold moment for human rights law. The reason is that the person can invoke the human rights law obligations of this country, including the obligation of *non-refoulement*.

4.1.2. The Right to *Non-refoulement*

Besides the right to leave, the right to asylum and the right to *non-refoulement* should be also mentioned. Given the questionable status of the right to asylum, the focus will be on *non-refoulement*.⁵⁷ Arguments have been formulated that *non-refoulement* implies a negative obligation owed by countries of destination to abstain from preventing leaving countries.⁵⁸ Even if any extended interpretation of the jurisdiction threshold in human rights law is invoked,⁵⁹ an argument that these States also owe a positive obligation to facilitate leaving by for example arranging a complementary pathway, is hard to accept. Not to mention that if the beneficiaries of complementary pathways are limited to persons located in first countries of asylum, any causation between the failure to facilitate leaving and risk of ill-treatment, is weakened.⁶⁰ More specifically, denial of measures allowing and enabling leaving does not expose the person to *refoulement* since the person can remain in the country of first asylum.

Does anything change once a destination country decides to arrange a complementary pathway by actually facilitating leaving? The answer must be negative, since by participating in a procedure that has been arranged by this country, the person does not bring himself/herself within this country's jurisdiction for the purposes of human rights law.⁶¹ If these arrangements, however, imply some physical effective control over territory or potential beneficiaries, possibilities might be open for triggering the jurisdictional threshold in human rights law.⁶²

Even if such possibilities are realized, given the 'divided and tailored' approach to jurisdiction,⁶³ it can be questioned whether the destination country owes any positive obligations whose *specific content* implies concrete measures to facilitate leaving. The Grand Chamber judgment in *H.F. and Others v France* is useful to illustrate this. It concerned French

⁵⁶ den Heijer, M., 2022. The Pitfalls of Border Procedures. *Common Market Law Review* (59) p. 641.

⁵⁷ It is questionable whether there is a right to asylum in international law to start with. This has been investigated elsewhere. See Noll, G., 2005. Seeking Asylum at Embassies: A Right to Entry under International Law. *International Journal of Refugee Law*, p. 547.

⁵⁸ Moreno-Lax, V., 2020. The Architecture of Functional Jurisdiction: Unpacking Contactless Control – On Public Powers, *SS v Italy*, and the "Operational Model. *German Law Journal* (21) p. 385.

⁵⁹ Jackson, M., 2016. Freeing *Soering*: The ECHR, State Complicity in Torture and Jurisdiction. *European Journal of International Law* (27) p. 817; Altwicker, T., 2018. Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts. *European Journal of International Law* (29) p. 590; Raible, L. (2020) *Human Rights Unbound: A Theory of Extraterritoriality*. Oxford University Press, p. 130.

⁶⁰ The causation in the context of positive obligations, see Stoyanova, V., 2018. Causation between State Omission and Harm within the Framework of Positive Obligations under the European Convention on Human Rights. *Human Rights Law Review* 18(2), p. 309.

⁶¹ *M.N. and Others v Belgium* [GC] Application no 3599/18, 5 March 2020 (decision), para 123: 'the mere fact that an applicant brings proceedings in a State Party with which he has no connecting tie cannot suffice to establish that State's jurisdiction over him'.

⁶² Such forms of control can possibly trigger the personal or the territorial models of jurisdiction, as these were conceptualized in *Al-Skeini and Others v the United Kingdom* [GC] Application No 55721/07, 7 July 2011.

⁶³ For the acceptance of this approach, see Joint Partly Dissenting Opinion of Judges Grozev, Ranzoni and Eicke in *Hanan v Germany* [GC] Application No 4871/16, 16 February 2021, para. 18; *H.F. and Others v France* [GC] Application No 24384/19 and 44234/20, 14 September 2022, para. 186.

nationals detained in camps in Syria, who argued that the refusal by France to facilitate their repatriation breached their right to enter their own country. Admittedly, their nationality combined with other factors was crucial for triggering the jurisdictional threshold in relation to the specific right invoked. As to the obligation owed by France, it was limited to having a non-arbitrary decision-making procedure for assessing requests for repatriation. Notably, the content of the obligation as formulated by the ECtHR did not include actual measures to facilitate repatriation.

The relevant point here is that even in the unlikely case where the jurisdictional threshold is found triggered and human rights possible to invoke against the country of destination, the content of any corresponding obligations can be very limited. Such a content might not include measures of actually allowing and enabling leaving, unless it can be proven that such measures are the only way of fulfilling obligations. All of this demonstrates that even if we ignore the jurisdictional threshold, it might be hard to specify obligations with a content that includes concrete arrangements of allowing and enabling leaving and entry.

4.1.3. Procedural Rights

How about any procedural obligations? If we assume that somehow the hurdle with the jurisdictional threshold can be overcome, might it be the case that once the destination country decides to actually arrange a complementary pathway by actually facilitating leaving, it owes any procedural positive obligations to possible beneficiaries? The ECHR contains provisions that explicitly confer procedural rights, such as Article 6 (the right to fair trial). This right is however not applicable to asylum and immigration proceedings,⁶⁴ which seems to make it irrelevant to the beneficiaries of any pathways.

Article 13 of the ECHR that enshrines the right to effective remedy, also imposes procedural obligations. This right, however, is linked with the substantive rights in the ECHR since the person who invokes it has to demonstrate an arguable violation of a substantive right.⁶⁵ The question then arises which substantive rights could possibly be affected (i.e., arguably violated) in the complementary pathway procedure. As already suggested above, *non-refoulement* under Article 3 might not be a very promising candidate given the weak causation. Again here it needs to be mentioned that in *M.N. and Others v Belgium*, the ECtHR Grand Chamber rejected the idea of imposition of any obligations via a procedural backdoor.⁶⁶

Article 8 might be more promising given that, first, States might arrange complementary pathways based on family links and that, second, the ECtHR has applied Article 8 to situations of admissions of family members for the purposes of family reunification.⁶⁷ It should also be

⁶⁴ *Maaouia v France* Application No 39652/98, 5 October 2000, para. 40.

⁶⁵ Reiertsen, M. (2022). *Effective Domestic Remedies and the European Court of Human Rights*. Cambridge University Press, p. 5.

⁶⁶ The absence of a jurisdictional link means that the respondent State does not hold any obligations.

⁶⁷ Most recent cases are *M.A. v Denmark* [GC] Application no 6697/18, 9 July 2021, para. 132; *M.T. and Others v Sweden* Application no 22105/18, 20 October 2022. It is relevant here to note that in *M.N. and Others v Belgium* [GC] para 109, the circumstances of the applicants, who sought entry to be protected from *non-refoulement* under Article 3, were distinguished from circumstances where non-nationals apply for visas and residence permits for the purposes of family reunification. Circumstances involving family reunification ‘contained an international element’ but ‘did not involve extraterritoriality for the purposes of Article 1 of the Convention,’ since ‘the jurisdictional link resulted from a pre-existing family or private life that this State [the addressee of a family reunification visa] had a duty to protect.’ *M.N. and Others v Belgium*, para 109. In circumstances of visa applications for family reunification, the jurisdictional link with the State in question is present, since the applicant lives there and wishes to be joined by family members, or the applicant’s family lives in this State and the applicant wishes to join them. See also *Nessa and Others v Finland* Application no 31862/02, 6 May 2003 (decision); *Schembri v Malta* Application no 66297/13, 19 Sept 2017 (decision).

kept in mind that Article 8, without necessarily in conjunction with Article 13, can impose procedural obligations.⁶⁸

4.1.4. The Right to Family Life

Any engagement with Article 8 ECHR has to start with the recognition that this provision does not impose on a State a general obligation to authorize family reunification on its territory.⁶⁹ If admission to territory were to form the content of an obligation under Article 8 that is owed specifically to an applicant, this is subject to certain conditions. One of them is, for example, ‘whether there are insurmountable obstacles in the way of the family life in the country of origin of the alien concerned.’⁷⁰ When the family member to be admitted ‘remains in a country characterized by arbitrary violent attacks and ill-treatment of civilians’,⁷¹ this can constitute such an insurmountable obstacle. If complementary pathways are from countries of first asylum, this factor might not be fulfilled. At the same time, however, there might be ‘insurmountable obstacles’ for family life in the first country of asylum, since for example, the sponsor might not be able to return there. In this case, family life might be only possible to ensure if the family member moves to the sponsor.

Admittedly, ‘insurmountable obstacles’ is just one of the factors (although a very important one) taken into considerations by the Court in the family reunification admission cases under Article 8.⁷² It would be beyond the scope of the article to examine all the other factors and their application in the case law. It suffices to note that the question of admission of family members under Article 8 implies a very individual-centered assessment,⁷³ which denotes a lot of flexibility. Yet this assessment does combine family links with protection needs, which makes it very interesting from the perspective of the development of complementary pathways. However, given the nature of human rights law (i.e. it is centered on the individual), Article 8 cannot as a matter of principle be used for imposing an obligation of having such pathways. The assessment under Article 8 is very much dependent on the legal regulations that States are willing to adopt and the conditions and the distinctions introduced there in.⁷⁴ Article 8 can be used, though, for challenging the conditions and the distinctions in individual cases, including by complementing considerations of protection needs and family links, for the purposes of admission of family members.

⁶⁸ See generally Brems, E. and Lavrysen, L., 2013. Procedural Justice in the Human Rights Adjudication: The European Court of Human Rights. *Human Rights Quarterly*, p. 176, where Article 8 has been referred to as ‘a laboratory for procedural justice issues.’

⁶⁹ *M.A. v Denmark* [GC] Application no 6697/18, 9 July 2021, para. 132.

⁷⁰ *M.A. v Denmark* [GC] para 132.

⁷¹ *M.M.T. and Others v Sweden* Application no 22105/18, 20 October 2022, para. 67 and 77.

⁷² *Tanda-Muzinga v France* Application no 2260/10, 10 July 2014, para. 74: ‘The arrival [in France] of his wife and children [...], was the only means by which family life could resume’.

⁷³ *M.A. v Denmark* [GC] para 132: ‘[...] in a case which concerns family life as well as immigration, the extent of a State’s obligations to admit to its territory relatives of persons residing there will vary according to the particular circumstances of the persons involved and the general interest and is subject to a fair balance that has to be struck between the competing interests involved. Factors to be taken into account in this context are the extent to which family life would effectively be ruptured, the extent of the ties in the Contracting State, whether there are insurmountable obstacles in the way of the family living in the country of origin of the alien concerned and whether there are factors of immigration control.’

⁷⁴ After *M.A. v Denmark* [GC], it has become very clear that despite the individual-centered assessment and the flexibility that it implies, the role of Article 8 is very dependent on how States have agreed to regulate family reunification and the different conditions and distinctions made by the national legislation and the relevant EU law. See, for example, the more favourable conditions for family reunification for refugees under the EU Family Reunification Directive. *M.A. v Denmark* [GC] para 177.

As much importantly, Article 8 imposes procedural obligations upon States to the effect that the decision-making process leading to a decision/measure that affects family life, must be underpinned by procedural safeguards, including consideration of the factors developed in the Court's case law.⁷⁵ Granting of a visa or a refusal to grant one are such decisions. The Court has indeed found violations of Article 8 on the ground that the national decision making process regarding granting of visas 'did not offer the guarantees of flexibility, promptness and effectiveness required in order to secure the right to respect for family life.'⁷⁶

Two caveats are due at this juncture. First, the procedural guarantees were applied in cases where the affected individuals had a right to family reunification under the national legislation.⁷⁷ It is thus an open question how and to what extent Article 8 ECHR would impose procedural guarantees in cases where the national legislation does not offer such a strong *substantive* protection of family reunification.⁷⁸ If a State therefore organizes a complementary pathway based on family links that is not formalized, based on State discretion and with no substantive legal protection, it can be doubted whether any procedural guarantees can be imposed as a matter of Article 8 ECHR.⁷⁹ This intertwinement between substance and procedure, leads to me to the second caveat. Namely, even if procedural safeguards are afforded as a matter of human rights law, this does not necessary mean that the State is under the obligation to ensure a specific outcome, namely admission to its territory.

4.2. EU Law

Contrary to human rights law, the application of EU law and the Charter is arguably not restricted by a jurisdictional threshold similar to the one in the ECHR.⁸⁰ Does this change anything from the perspective of leaving and entry? As I will show below, in some respects EU law is not only unhelpful, but due to its rationale,⁸¹ it complicates matters. In other respects, however, and more specifically given that it has regulated family reunification, EU law can facilitate admissions.

The application of the Charter is determined by its Article 51(1) that stipulates that '[t]he provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.' There are two relevant questions at this point. The first one is whether Member State are implementing EU law when they take any measures, such as issuance or denial of visas that affect the possibility of leaving and entry? The second one is

⁷⁵ *M.A. v Denmark* [GC] para 137-9 and 146.

⁷⁶ *Tanda-Muzinga v France* Application no 2260/10, 10 July 2014, para. 82; *Senigo Longue and Others v France* Application no 19113/09, 10 July 2014, para. 75.

⁷⁷ *Tanda-Muzinga v France*, para 75: 'family unity is an essential right of refugees'.

⁷⁸ *M.A. v Denmark* [GC] para 146 might be helpful here since the Court noted that 'the procedural requirements under Article 8 for the processing of family reunion request of refugees should apply equally to beneficiaries of subsidiary protection.' The latter group does not generally enjoy the same substantive right to family reunification as refugees. Beneficiaries of subsidiary protection are, for example, excluded from the scope of the EU Family Reunification Directive. Yet, the Court held that while the scope of the substantive protection might vary, the procedural protection ought to be the same.

⁷⁹ This relates to the nature of the procedural guarantees developed under Article 8. In particular, they are not independent and self-standing; they are rather instrumental for achieving better protection of substantive guarantees. In this light, it might make little sense to have procedural guarantees, when there is no substantive protection in any case. On the not self-standing nature of the procedural guarantees developed under Article 8, see Brems, E., (2014). *Procedural Protection. An Examination of Procedural Safeguards Read into Substantive Convention Rights*, in: *Shaping Rights in the European Convention on Human Rights*. E. Brems and J. Gerards (Eds.) Cambridge University Press, p. 137, 158.

⁸⁰ Costello C., and Moreno-Lax, V., (2014). *The Extraterritorial Application of the EU Charter of Fundamental Rights*, in: *The EU Charter of Fundamental Rights. A Commentary*. S. Peers (Ed.) Hart Publishing, pp. 1657-1684.

⁸¹ Ensuring freedom of movement within the Schengen area, harmonization of the conditions for entry in the area and harmonization of the conditions for granting international protection.

which rights protected by the Charter might be affected by such measures that are arguably in implementation of EU.

It is pertinent here to note that the Charter does not contain a right to leave any country. Possible other candidates are the right not to be subjected to *refoulement*, the right to asylum, and to family life. Given the questionable independent standing of the second one,⁸² the rights to *non-refoulement* and family life, including any procedural guarantees that these rights could imply, appear promising candidates. Without prejudice to any more extensive protection the Charter might offer in comparison with the ECHR,⁸³ the forthcoming analysis will center on the first question (i.e. whether Member State are implementing EU law), not only because the rights were addressed in the previous section, but also because the first question is key.

As to this key question, it is relevant to first note that the Reception Conditions and the Asylum Procedures Directives are clear to the effect that they do not apply outside the EU territory.⁸⁴ They cannot therefore trigger the application of the Charter. The Qualification Directive does not contain any provisions concerning allowing and enabling leaving. Therefore, similarly to the Refugee Convention,⁸⁵ the EU asylum law does not concern itself with allowing and enabling leaving countries and entry to possible countries of asylum. The EU, however, has harmonized its short-stay visa requirements in its Community Code on Visas. It is therefore relevant to first examine how the Code regulates the issuance of visas (Section 4.2.1), how this regulation relates to the Common European Asylum System (Section 4.2.2), how authorizations to enter relate to the common Schengen area (Section 4.2.3) and how any EU regulation of legal migration might be pertinent (Section 4.2.4).⁸⁶ Finally, one type of legal migration that has been specifically regulated by EU law is family reunification. In what ways the EU Family Reunification Directive, as interpreted in light of the Charter, allows admissions grounded on family links and protection needs, will be also examined (Section 4.2.5).

4.2.1. Visas in EU Law

The Community Code on Visas lists the third country nationals who have to be in possession of visas ‘for transit or intended stays on the territory of the Member State not exceeding 90 days

⁸² The right to asylum in the Charter has questionable independent standing given that it refers to the Refugee Convention, where the terms ‘asylum’ has no ‘operative significance.’ See Noll, G., 2005. Seeking Asylum at Embassies: A Right to Entry under International Law. *International Journal of Refugee Law* p. 547. The Refugee Convention itself does not concern itself with how people leave, travel to and access territory of countries of protection. The core obligation under the Convention is the prohibition of *refoulement*. We are therefore left with the question of whether the content of the obligation not to *refoule* might be specified to include measures of facilitating leaving and arrival. See Gil-Bazo, M., 2008. The Charter of Fundamental Rights of the EU and the Right to be Granted Asylum in the Union’s Law. *Refugee Survey Quarterly* 27(3) p. 33-52.

⁸³ Article 47 of the EU Charter (i.e., the right to an effective remedy and fair trial) is not confined to disputes relating to civil rights and obligations and to criminal proceedings, which makes it wider than Article 6 ECHR and thus applicable to immigration procedures laid down in EU law (e.g. applications for visas under the EU Visa Code, asylum procedures and family reunification under the EU Family Reunification Directive). The Charter also contains the right to good administration in its Article 41.

⁸⁴ Article 3(2), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ 2013 L 180/60; Article 3(2) 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), OJ 2013 L 180/96.

⁸⁵ *European Roma Rights Centre and Others v. the Immigration Officer at Prague Airport and the Secretary of State for the Home Department*, [2003] EWCA Civ 666, United Kingdom: Court of Appeal (England and Wales), 20 May 2003, para 37.

⁸⁶ The potential adoption of the EU Resettlement Framework Regulation can expand the scope of EU law and trigger the protection of the EU Charter. See Bratanova van Harten, E., (2023) The New EU Resettlement Framework: the Ugly Duckling of the EU Asylum Acquis? *EU Law Analysis*.

in any 180-day period'.⁸⁷ Persons in need of international protection are not exempted from the visa requirement. At the same time, having a visa is a necessary precondition for leaving a country and entering a Member States as part of the operation of a legal pathway. This means that the pathways to deserve their label as legal pathways *and to be in implementation of EU law*, have to somehow fit within one of the categories of visas and the relevant requirements, as regulated by the Visa Code.

The Visa Code defines a visa as 'an authorization issued by a Member State with a view to transit through or an intended stay on the territory of the Member States.'⁸⁸ The Code regulates three types of visas: 'uniform visas' (i.e. Schengen visas), 'visas with limited territorial validity' that are not valid for the territory of all Member States, and 'airport transit visas.'⁸⁹ Given the specific conditions as to when uniform visas can be issued,⁹⁰ the Member States are prohibited by EU law to use the uniform visas option for the purposes of allowing and enabling third-country nationals with protection needs to have a legal pathway. The same is valid for the transit visas. Certainly, an applicant can fulfill all the conditions for these visas and accidentally happen to be at the same time in need of international protection, a need that he/she might express only once having reached the Member State's territory. However, in this case, the granting of a visa has nothing to do with protection and in this sense, it is not a measure of allowing and enabling a legal pathway.

We are therefore left with the option for limited territorial validity visa. Article 25 of the Visa Code provides that '[a] visa with limited territorial validity shall be issued exceptionally [...] when the Member State concerned considers it necessary on humanitarian grounds, for reasons of national interest or because of international obligations.' In *X and X v Belgium*, the Court of Justice clarified that such a visa has to be also a short-term visa. If the applicant for the visa *intends* to stay for more than 90 days, even if the application is formally submitted on the basis of Article 25 of the Code, the application falls outside the scope of the Code. In other words, the purpose of the application differs from that of a short-term visa. It is only the latter that the EU has legislated about. The Court added that

[...] since [...] no measure has been adopted, to date, by the EU legislature on the basis of Article 79(2)(a) TFEU, with regard to the conditions governing the issue by Member States of long-term visas and residence permits on humanitarian grounds, the applications at issue in the main proceedings fall solely within the scope of national law.⁹¹

It follows then that *Member States are allowed under EU law to use the humanitarian visa option* under the Visa Code to allow and enable legal pathways *provided that* the intended stay does not exceed three months in any six-month period. Such an arrangement is not prohibited by EU law and if Member States take advantage of it, the Charter applies. However, if the arrangement implies an intended stay for a longer period, this arrangement is not in implementation of the Visa Code and the Charter accordingly does not apply.

Applying for international protection and having international protection needs can be understood to necessary imply that the intention is to stay longer. Here it is also relevant to mention that rights from the Charter, such as for example the right to *non-refoulement*, cannot

⁸⁷ Article 19(1), Regulation (EC) No 810/2009 of the Parliament and of the Council of 13 July 2009 establishing a Community Code on Visas OJ 2009 L 243, (*hereinafter* the EU Visa Code) p.1.

⁸⁸ Article 2(2), EU Visa Code.

⁸⁹ Pursuant to Article 35 of the EU Visa Code, 'in exceptional cases, visas may be issued at border crossing points'

⁹⁰ Articles 14 and 15, EU Visa Code.

⁹¹ *X and X v Belgium* C-638/16 PPU, 7 March 2017, para. 44

be independently invoked to create new EU rules on the issuance of humanitarian visas for longer intended stays.

Although the Visa Code is limited to short stay visas, which makes it questionable whether it offers any tools relevant to the arrangement of complementary pathways, it is still worthwhile to ask whether there is an obligation under EU law to issue a humanitarian visa for intended stay *not* exceeding three months. Since Article 25(1) of the Visa Code stipulates that ‘a visa with limited territorial validity *shall* be issued ... because of international obligations’, a proposition can be anticipated that an applicant has a right to such a visa.⁹² Two arguments militate against such a proposition. First, in *Koushkaki*, the ECJ stopped short of holding that an applicant for a visa under the Visa Code has a right to a Schengen visa if the entry conditions (as indicated in Article 21(1) of the Code) are satisfied and there are no grounds for refusing the visa pursuant to Article 32(1) of the Visa Code.⁹³ The same argument can be applied by analogy to visas with limited territorial validity.

Second, given the ruling in *M.N. and Others v Belgium*, the reference to ‘international obligations’ in Article 25(1) of the Visa Code is not helpful since given the absence of a jurisdictional link, the Member State does not owe any obligations under the ECHR. This interpretation, however, seems to make the inclusion of ‘international obligations’ in Article 25(1) of the Visa Code meaningless. Perhaps not entirely so, given the analysis in Section 4.1.4 above. In particular, Article 8 ECHR can impose obligations to the effect of allowing a family member access. However, such obligations under Article 8 can be assumed to presuppose long-term stays. We are therefore left with the unanswered question what these ‘international obligations’ in the sense of Article 25(1) of the Visa Code, might be that *necessarily* imply only an intention by the beneficiary for a short stay.

To recap, I clarified that EU law *prohibits* Member States to issue visas with limited territorial validity under the Visa Code when the intended stay is more than 90 days.⁹⁴ When the intended stay is no more than 90 days, EU law *allows* Member States to issue visas with limited territorial validity under the Visa Code. If they choose to do it, Member States will not violate EU law; they are not, however, obliged to issue the short-term visa. At the same time, EU has not legislated on visas for intended stay of more than 90 days. This means that when developing pathways that imply stays longer than 90, Member States are not implementing EU law and the Charter is irrelevant.

4.2.2. Visas and the Common European Asylum System

Having explained what EU law allows and prohibits in terms of issuance of visas under the Visa Code, another question also needs to be raised here: Does EU law *prohibit* Member States to issue any visas for the purpose of applying for ‘international protection’ as defined in EU

⁹² Article 19(4) of the EU Visa Code provides only for a discretion to treat an inadmissible application as admissible ‘on humanitarian grounds’. In contrast, Article 25(1) of the Visa Code uses ‘shall’ and it refers to ‘international obligations’. For these two reasons, it is more ambiguous.

⁹³ *Rahmanian Koushkaki v Bundesrepublik Deutschland* Case C-84/12, 19 December 2013, para. 78: ‘the Visa Code must be interpreted as not precluding a provision of the legislation of a Member State, [...], which provides that, [...] the competent authorities have the power to issue a uniform visa to the applicant, but does not state that they are obliged to issue that visa, [...]’.

⁹⁴ In practice, Member States do invoke Article 25(1) of the EU Visa Code as a basis to issue visas for protection purposes. See Jensen, U., ‘Humanitarian Visas: Option or Obligation?’ Study for the LIBE Committee of the European Parliament p. 43; Bianchini, K. (2020). Humanitarian Admission to Italy through Humanitarian Visas and Corridors, in *Humanitarian Admission to Europe. The Law Between Promises and Constraints*. M. Foblets and L. Leboeuf (Eds.) Nomos, p. 162; Bodart, S. (2020). Humanitarian Admission to Belgium, in in *Humanitarian Admission to Europe. The Law Between Promises and Constraints*. M. Foblets and L. Leboeuf (Eds.) Nomos, p. 227.

law and more specifically in the EU Qualification Directive? Paragraph 44 from *X and X v Belgium* suggests that Member States are free to issue visas/permits or any authorizations on humanitarian grounds. While such authorizations fall outside EU law, they might be allowed and regulated by national law. The relevant question here is how these national arrangements that might allow and enable pathways, relate to the Common European Asylum System that among other things has harmonized the qualification for refugee and subsidiary protection statuses. These two statuses are defined in Article 2(a) of the Qualification Directive as ‘international protection’.

This question is relevant since in *X and X v Belgium* the ECJ did not only say that an application for a visa with the intention to apply for international protection, is not a short-term visa in the sense of the Visa Code. The ECJ went on to add ‘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’ ‘would undermine the general structure of the system established by Regulation No 604/2013 [the Dublin Regulation].’⁹⁵ It is pertinent, however, to note that any national arrangements that allow entry *combined* with the granting or the possibility to apply for ‘international protection’ (understood as refugee or subsidiary protection status in the sense of the EU Qualification Directive), would then undermine the Dublin Regulation.⁹⁶ Will it be contrary to EU law to then combine such national arrangements with the granting of ‘international protection’ as defined in the EU Qualification Directive?

To engage with this question, it is pertinent to cite the following paragraph from *X and X v Belgium*

it is apparent from Article 3(1) and (2) of Directive 2013/32 that that directive applies 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, but not to requests for diplomatic or territorial asylum submitted to the representations of Member States.⁹⁷

Can this be interpreted to the effect that since EU has legislated and harmonized ‘international protection’ in the form of refugee and subsidiary protection statuses, it will be contrary to EU law if these statuses and the rights attached to them, are also extended to people who come to a Member State via complementary pathways (i.e. via national arrangements not covered by the Visa Code)? It is important to highlight here that the Qualification Directive itself does not contain any references to any geographical limitations (i.e. territory, border, territorial waters or transit zones). This can support a negative answer to the posed question.

Even if a person coming to the EU via a pathway arranged by a Member State, cannot be granted refugee status and subsidiary protection in the sense of the EU Qualification Directive, this person might still be a refugee in the sense of the Refugee Convention. Here it is pertinent to note that in *M v Ministerstvo vnitra* the Court distinguished between, on the one hand, ‘refuge status’ as regulated by EU law and, on the other, being a refugee in the sense of the Refugee Convention.⁹⁸ This distinction was introduced by the ECJ to ensure that the Qualification Directive is interpreted in a way that it compatible with the Refugee Convention

⁹⁵ *X. and X. v Belgium*, para 48.

⁹⁶ 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).

⁹⁷ *X. and X. v Belgium*, para 49.

⁹⁸ *M v. Ministerstvo vnitra and X. and X. v Commissaire général aux réfugiés et aux apatrides*, Joined Case C-391/16, C-77/17 and C/78/17, 14 May 2019.

regarding the end of the status.⁹⁹ Yet, the introduction of such a distinction as a matter of principle, might be used to support an argument that a person coming via a pathways can only be a refugee in the sense of the Refugee Convention, and not necessary entitled to the rights and benefits attached to ‘refugee status’ in the sense of the Qualification Directive.¹⁰⁰ In any case, the beneficiaries might be eligible for other national protection statuses that are not an object of EU law regulation.

To summarize, not only is EU law not helpful for developing complementary pathways, but in light of the reasoning in *X. and X. v Belgium* questions can be also raised as to the linkages between, on the one hand, any national arrangements that enable legal entry into the territory of Member States, and the Common European Asylum System. In particular, doubts have arisen as to whether the beneficiaries of any such arrangements are covered by the Qualification Directive. If excluded, the Charter does not apply either.

4.2.3. Visas and Entry in the Common Schengen Area

EU law causes complications not only regarding the protection status that any beneficiaries of the pathways might be granted. Further difficulties seem to be caused because the entry is into the EU common area (i.e. the Schengen area). It is therefore relevant to reflect what implications this might have for any arrangements for allowing and enabling entry as part of complementary pathways.

As already explained in Section 4.2.1 above, the Visa Code does not impose an obligation upon the Member States to issue a visa. Neither does the mere possession of a visa entitle the holder to enter.¹⁰¹ The holder of the visa can seek entry and transit towards the destination, but entry can still be denied.¹⁰² However, having a visa is one of the necessary conditions for being allowed entry and the core conditions for issuing a visa are the same as the conditions for being allowed entry, as laid down in the Schengen Border Code.¹⁰³

The Schengen Border Code contains the rules for the crossing of the internal and external borders of the Member States. Given the creation of the EU common area of free movement, entry in the EU is a complicated matter since the following questions might arise: Is it entry via the external Schengen border of a Member State only for the purpose of stay in this very Member State? Is it entry via an external Schengen border of a Member State for the purpose of a stay in another Member State given that it is the latter than has issued the authorization (visa or residence permit)? In this second scenario, the first Member State will only be a transit State that might have to allow entry for the purposes of the transit.

Article 6(5) of the Border Code regulates entry for stays longer than 90 days. In particular, Article 6(5)(a) of the Border Code stipulates that third-country nationals ‘who hold a residence permit or a long-stay visa *shall* be authorized to enter the territory of the other Member States for transit purposes so that they may reach the territory of the Member State which issued the residence permit or the long-stay visa. [...]’ The concept of ‘residence permit’

⁹⁹ The source of inconsistency was that the grounds for ending ‘refugee status’ under Article 14(4) of the Qualification Directive were wider than those in Article 1(C) of the Refugee Convention that regulates cessation.

¹⁰⁰ Such an argument could be weakened by para 89 of *X. and X. v Belgium*, where the Court stated that ‘Member States are to grant refugee status to all third-country nationals or stateless persons who satisfy the material conditions for qualification of a refugee in accordance with Chapters II and III of that directive [the Qualification Directive], without having any discretion in that respect’.

¹⁰¹ A visa does not confer an automatic right to enter. See Article 30, EU Visa Code. See also Meloni, A. 2009. The Community Code on Visas: Harmonisation at Last?. *European Law Review* (34), p. 681.

¹⁰² See Common Consular Instructions on Visas for Diplomatic Missions and Consular Posts [EUR-Lex - 52003XG1219\(01\) - EN \(europa.eu\)](#)

¹⁰³ 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).

is defined in Article 2(16) of the Border Code. It includes documents issued by a Member State to third country nationals authorizing a stay on its territory. Importantly, temporary permits issued pending examination of a first application for a residence permit or an application for asylum are *excluded* from the definition. This means that ‘temporary residence permit issued pending examination of a first application for a residence permit or an application for asylum cannot be used to enter the Schengen area.’¹⁰⁴ It follows then that provisional/temporary authorizations cannot be used to transit by crossing the external Schengen border of one Member State to enter another Member State (i.e. the one that has issued these authorizations).

Article 14 of the Border Code regulates the refusals of entry and it applies to all third-country nationals who wish to enter a Member State via an external Schengen border.¹⁰⁵ Member States are under the obligation to refuse entry if the conditions under Article 14 of the Border Code are not fulfilled. For a third country national *not* to be refused entry, he or she has to be in possession of a Schengen visa and meet the other relevant requirements, *or* hold a residence permit or a long stay visa, *or* be issued with a visa at the border *or* invoke international obligations (e.g. international protection).¹⁰⁶

Pulling the strings together, for beneficiaries of any complementary pathways not to be denied entry in the Schengen area via a transit Member State, they must *not* be in a possession of temporary and provisional authorizations (permits or visas). Rather they have to be holders of a residence permit or a long stay visa as conditioned by the national legislation of the Member State of intended destination. They can be also holders of residence permits on the basis of EU law (e.g. the Family Reunification Directive).

Does the Border Code in any way affect the type of authorization that the Member State of intended destination has to issue to beneficiaries so that they can *directly* enter its territory via its external borders? Does the Border Code allow this Member State to allow entry even if only a provisional permit is issued or only a visa for the purposes of applying for protection after entry? To engage with these questions, we need to look at Articles 6(5)(c) and 14(1) of the Border Code. The first one stipulates that third-country nationals ‘*may* be authorized by a Member State to enter its territory on humanitarian grounds, on grounds of national interest or because of international obligations.’ Article 14(1) of the Border Code adds that refusals of entry ‘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.’

Overall, it is not entirely clear what type of authorization the Member State has to issue to beneficiaries so that the Member State is not obliged by the Border Code to deny entry. Given the invocation of the right to asylum and international protection, temporary provisional permits so that beneficiaries can apply for a long-term permit after entry, might suffice for directly entering the Member State. However, such permits will arguably not be in implementation of the Border Code and thus outside the reach of the Charter.

¹⁰⁴ *Association nationale d'assistance aux frontières pour les étrangers (ANAFE) v. Ministre de l'Intérieur, de l'Outre-mer, des Collectivités territoriales et de l'Immigration*, Case 606/10, 14 June 2012, para 63. At para 68: ‘the reason for that exclusion is because the issue of a temporary residence permit or temporary residence authorisation is an indication that it has not yet been determined whether the conditions for entry into the territory of the Schengen area or for the grant of refugee status have been met and, accordingly, the holders of such documents are not authorised to move freely in that area and are not exempt from a visa requirement in the event of re-entry into the Schengen area.’

¹⁰⁵ Opinion of Advocate General Trstenjak Case-606/10, para 23.

¹⁰⁶ For a discussion as to whether all of these imply that the third-country national has the right to enter, see Progin-Theuerkauf, S. and Epiney, A. (2022). Schengen Border Code Regulation (EU) 2016/399, in *EU Immigration and Asylum Law*. D. Thym and Hailbronner (Eds.), Beck/Hart/Nomos, p. 239.

4.2.4. Visas and Entry for other Purposes

The Visa Code and the Schengen Border Code are not the only EU law instrument pertinent to the regulation of entry. The EU has legislated in certain areas regarding legal migration. Given that as explained in Section 2.3., legal pathways do not have an exclusive protection focus, it is relevant to ask whether these other EU law instruments that regulate legal migration for labour, family or study, might be relevant to authorizing entry and intended stay exceeding a period of 90 days? While, as clarified in Section 4.2.1, the EU Visa Code does not contain rules on conditions for stays longer than 90 days,¹⁰⁷ the sectorial EU directives that regulate legal migration do.¹⁰⁸

Here it is also relevant to mention Article 18 of CISA that stipulates that '[v]isas for stays exceeding 90 days (long-stay visas) shall be national visas issued by one of the Member States in accordance with *its national law or Union law*.'¹⁰⁹ Long-stay visas issued in accordance with national law are not governed by EU law and the Charter does not apply.¹¹⁰ The sectorial directives contain a lot of flexibility in terms of their framing,¹¹¹ which complicates the question whether by taking certain measures the Member States are actually implementing them. Yet, generally, it can be accepted that if the visa application falls within the scope of one of the sectorial directives, the Charter applies. For example, in *M.A.*, the ECJ held that 'decisions refusing visas for the purpose of studies that is covered by Directive 2016/801, EU law, in particular Article 34(5) of that directive, read in light of Article 47 of the

¹⁰⁷ There is a situation where the EU Visa Code applies to intended stays that exceed 90 days. This situation involves third country nationals who are family members of EU nationals falling within the scope of the Directive 2004/38/EC on the right of EU citizens and their family members to move and reside freely within the EU. See *Commission v Spain* Case C-157/03, 14 April 2005 and *Mouvement contre le racisme, l'antisémitisme et la xénophobie ASBL (MRAX) Case C-459/99*, 25 July 2002, para. 56. Similar interpretation, however, has not been applied to family members of third country nationals who reside in a Member State and who seek family reunification based on the Family Reunification Directive. Visa in the sense of the latter Directive is necessary a long-stay visa and Member States, once having approved the family reunification, are obliged to grant family members 'every facility for obtaining the requisite visas.'

¹⁰⁸ EU Family Reunification Directive; Directive 2009/50/EC of 25 May 2009 on the conditions of entry and residence of third-country nationals for the purposes of highly qualified employment OJ L 155, 18 June 2009; Directive 2011/98/EU of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State OJ L 343, 23 December 2011; Directive 2014/36/EU of 26 February 2014 on the conditions of entry and stay of third-country nationals for the purpose of employment as seasonal workers OJ L 94, 28 March 2014; Directive 2014/66/EU of 15 May 2014 on the conditions of entry and residence of third-country nationals in the framework of an intra-corporate transfer OJ L 157, 27 May 2014; Directive (EU) 2016/801 of 11 May 2016 on the conditions of entry and residence of third-country nationals for the purposes of research, studies, training, voluntary service, pupil exchange schemes or educational projects and au pairing (recast) OJ L 132, 21 May 2016.

¹⁰⁹ 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 (OJ 2000 L 239, p. 19), which was signed in Schengen on 19 June 1990 and entered into force on 26 March 1995, as amended by Regulation (EU) No 610/2013 of the European Parliament and of the Council of 26 June 2013 (OJ 2013 L 182, p. 1) ('the CISA'). Article 18(2) of CISA adds that '[l]ong-stay visas shall have a period of validity of no more than one year. If a Member State allows an alien to stay for more than one year, the long-stay visa shall be replaced before the expiry of its period of validity by a residence permit.'

¹¹⁰ The EU has not adopted measures on the basis of Article 79(2) TFEU. *M.A. v Konsul Rzeczypospolitej Polskiej w N.*, Case C-949/19, 10 March 2021, paras. 34-35.

¹¹¹ Farcy, J., 2020. Labour Immigration Policy in the European Union. *European Journal of Migration and Law* (22), p. 198.

Charter, requires the Member States to provide for an appeal procedure against such decisions [...].¹¹²

Although Article 47 of the Charter can increase the procedural guarantees, it is questionable whether any protection-related considerations can be part of these guarantees when applied to procedures falling within the scope of the sectorial directives. These legal instruments concern labour and study related migration. If a third country national's visa application fulfills the relevant requirements in the respective directive, this has little to do with protection. The applicant might incidentally happen to be a person in need of international protection, but this is legally irrelevant for the purposes of leaving a country and should not be perceived as part of a protection arrangement.

Could, however, the Family Reunification Directive imply a different conclusion? Could this directive somehow facilitate complementary pathways and be the vehicle for placing them within the scope of the Charter in this way ensuring their subjection to some guarantees? These are the questions at the heart of the next section.

4.2.5. Entry for the Purpose of Family Reunification

In its recommendation on legal pathways, the EU Commission seems to assume that the Family Reunification Directive facilitates the pathways. The recommendation notes that

To facilitate access to the right to family reunification *in line with the Family Reunification Directive*, Member States are encouraged to put in place family reunification assistance programmes that improve access to information and simplify the visa application process. In addition, *for cases falling outside the scope of the Family Reunification Directive*, Member States are invited to set up humanitarian admission programmes, such as family-based sponsorship.¹¹³

In the recommendation, facilitation of family reunification, admission of 'vulnerable people in need of international protection' and community sponsorship, are all examples of 'humanitarian admissions'.¹¹⁴ It is not clear, however, how family reunification as a humanitarian admission, relates to protection needs. Neither is it clear how any humanitarian considerations and/or protection needs relate to being a member of a family of a person already in the receiving State. What is, however, clear is that according to the Commission recommendation's language, the family reunification pathway is divided into two arrangements. The first one is 'family reunification assistance programmes' that fall within the scope of the Family Reunification Directive. The second arrangement is 'family-based sponsorships.' I will examine both of these arrangements below.¹¹⁵

4.2.5.1. 'Family Reunification Assistance Programmes'

¹¹² *M.A. v Konsul Rzeczypospolitej Polskiej w N.*, Case C-949/19, 10 March 2021, para. 46.

¹¹³ Commission Recommendation (EU) 2020/1364 of 23 September 2020, para 31 from the preamble (emphasis added). See also para 12.

¹¹⁴ Commission Recommendation (EU) 2020/1364 of 23 September 2020, para 19-22. The recommendation distinguishes these three examples from 'complementary pathways for those in need of international protection linked to education and work.'

¹¹⁵ This is without prejudice to the possibility that admission of family members as a complementary legal pathway can be conceptualized differently from how the Commission has done in its recommendation. Yet, the recommendation is still a document that offers one possible conceptualization that can be subjected to an analysis as to how it relates EU law and the Charter.

To better understand the ‘family reunification assistance programmes’, the following questions are relevant to ask: Do these ‘programmes’ add anything new to the right of family reunification of refugees under the EU Family Reunification Directive? Do the measures of improving access to information and simplification of the application process add anything to the existing EU law? As a starting point, it can be mentioned that Member States have a lot of discretion as to how to arrange family reunification. Within this discretion, they can choose how to simplify the process. In this sense, the EU Family Reunification Directive *does not prevent* Member States from assisting family reunification of third country nationals. It is questionable whether calling this a complementary pathway is worthwhile. For arrangements to carry this distinctive label and conceptualization, it is not enough that family reunification schemes exist and they are open to persons who also happen to be in need of protection. There needs to be some specific measures to be taken towards persons (i.e. those that will join the sponsor) in need of protection in the family reunification scheme. The Family Reunification Directive has clearly recognized the specificity of refugees as sponsors. The idea of the complementary pathways to be worthy of its self-standing existence, a recognition of the specificity of the family members as regards their protection needs, has to be somehow factored in.

It could be argued that the Family Reunification Directive as interpreted by the ECJ in light of the Charter has indirectly recognized this latter specificity. The Court in various contexts has indicated that Member States have to make an individual case-by-case assessment of applications for family reunification,¹¹⁶ which can imply consideration of any protection needs of family members. As I will discuss below, the ECJ has also delivered judgments under the directive with reference to the Charter, in favour of family reunification in this way facilitating it and expanding the beneficiaries. Given that the sponsors are themselves refugees, it could be inferred that their family members might also have protection needs. In this sense, facilitation of family reunification, facilitates pathways for admission.

Examples of such favorable interpretations include *B.M.M, B.S., B.M. and B.M.O. v Belgium* where the ECJ held that Article 4(1) of the directive ‘must be interpreted as meaning that the date which should be referred to for the purpose of determining whether an unmarried third-country national or refugee is a minor child, within the meaning of that provision, is that of the submission of the application for entry and residence for the purposes of family reunification of minor children.’¹¹⁷ The ECJ also clarified that ‘an application for family reunification cannot be rejected on the sole ground that the child concerned has reached majority during court proceedings.’¹¹⁸ Another example emerges from *Bundesrepublik Deutschland v SW, BL, BC* where it was held that Article 16(1)(a) of the directive precludes national legislation that requires that a refugee sponsor is still a minor on the date of the decision on the application for entry and residence for the purpose of family reunification submitted by the sponsor’s parents.¹¹⁹ In *Bundesrepublik Deutschland v XC*, the ECJ further clarified that in order to determine whether the child of a sponsor having a refugee status is a minor, the relevant date is the date on which the sponsor’s asylum application was submitted. The fact that the child reached the age of majority before the sponsor was granted refugee status and before the application for family reunification was submitted, is irrelevant.¹²⁰

Bundesrepublik Deutschland v SW, BL, BC and *Bundesrepublik Deutschland v XC* addressed another restriction on the right to family reunification, namely the one expressed in

¹¹⁶ *G.S and V.G. v Staatssecretaris van Justitie en Veiligheid*, Cases C-381/18 and C-382/18, 12 December 2019, para 70.

¹¹⁷ *B.M.M, B.S., B.M. and B.M.O. v Belgium* Joined Cases C-133/16, C-136/19 and C-137/19, 16 July 2020, para. 47.

¹¹⁸ *B.M.M, B.S., B.M. and B.M.O. v Belgium* Joined Cases C-133/16, C-136/19 and C-137/19, 16 July 2020, para. 55.

¹¹⁹ *Bundesrepublik Deutschland v SW, BL, BC* C-273/20, C-355/20, C-273/20, C-355/20, 1 August 2022, para. 49.

¹²⁰ *Bundesrepublik Deutschland v XC* C-279/20, 1 August 2022, para. 54.

Article 16(1)(b) of the Family Reunification Directive. This provision stipulates that Member States may reject an application for entry and residence for the purpose of family reunification ‘where the sponsor and his/her family member(s) do not or no longer live in a real marital or family relationship.’ On the one hand, the ECJ confirmed that ‘legal parent/child relationship is not sufficient on its own.’¹²¹ On the other hand, the Court also observed it is not necessary for the child and the parent to cohabit in a single household or to live under the same roof in order for that parent or for the child to qualify for family reunification: ‘Occasional visits, in so far as they are possible, and regular contact of any kind may be sufficient to consider that those persons are reconstructing personal and emotional relationships and to establish the existence of a real family relationship.’¹²² Furthermore, nor can the child and the parent be required to support each other financially. Importantly, the separation resulting from the specific situation of refugees, was also highlighted in the reasoning. Such a separation that was due to the flight, cannot be a basis for the finding that there was no real family life.¹²³

Besides expanding the beneficiaries, the interpretation of the directive has also been in favor of simplification of the process. Article 11(2) of the Family Reunification Directive is relevant here. It concerns the difficulties that refugees face to provide documents proving family relationship. The issue came to the fore in *E. v Staatssecretaris van Veiligheid en Justitie*,¹²⁴ that concerned a woman with subsidiary protection status in the Netherlands who claimed to be the aunt and the guardian of a minor child, on whose behalf she applied for family reunification. The child of Eritrean nationality resided in Sudan. The ECJ held that

the lack of official documentary evidence of the family relationship and the potential implausibility of the explanations provided in that regard must be regarded as mere elements to be taken into account in the case-by-case assessment of all the relevant elements of the specific case.¹²⁵

This implies flexibility that can be to the benefit of the applicants. The ECJ also added clarifications as to the requirement for a case-by-case assessment:

[...] none of the information in the file before the Court reveals that the State Secretary took account of E.’s age, *his situation as a refugee in Sudan*, the country in which he was, according to the statements made by A., placed into a foster family without any family ties, or that child’s best interests, as they appear in such circumstances. If A.’s claims were to prove truthful, granting the application for family reunification at issue in the main proceedings could be *the only means* of ensuring that E. has the opportunity to grow up in a family environment. As stated in paragraph 59 of the present judgment, such circumstances are liable to influence the extent and intensity of the examination required.¹²⁶

The above quotation shows how the specific situation of the family member, i.e. a refugee in a third country, should be taken into account in the application for family reunification.

¹²¹ *Bundesrepublik Deutschland v SW, BL, BC* C-273/20, C-355/20, C-273/20, C-355/20, 1 August 2022, para 62; *Bundesrepublik Deutschland v XC* C-279/20, 1 August 2022, para. 69.

¹²² *Bundesrepublik Deutschland v XC* Case C-279/20, 1 August 2022, para. 69.

¹²³ *Bundesrepublik Deutschland v SW, BL, BC* Cases C-273/20, C-355/20, C-273/20, C-355/20, 1 August 2022, para. 62; *Bundesrepublik Deutschland v XC* C-279/20, 1 August 2022, para. 69.

¹²⁴ *E. v Staatssecretaris van Veiligheid en Justitie* Case C-635/17, 13 March 2019.

¹²⁵ *E. v Staatssecretaris van Veiligheid en Justitie* Case C-635/17, 13 March 2019, para 68.

¹²⁶ *E. v Staatssecretaris van Veiligheid en Justitie* Case C-635/17, 13 March 2019, para 77 (emphasis added).

Another illustration of simplification of the process concerns the interpretation of the three-month time limit within which refugees must apply for reunification to be eligible for more favorable conditions. The ECJ has interpreted this time limitation with some flexibility: the national legislation must lay down that such a ground (i.e. not complying with the three-month time limit) for refusing family reunification ‘cannot apply to situations in which particular circumstances render the late submission of the initial application objectively excusable.’¹²⁷ It remains to be seen when delays will be assessed as ‘objectively excusable.’ It cannot be excluded that delays due to protection risks faced by family members, are accepted as excusable.

In sum, family reunification in the sense of the Family Reunification Directive offers a pathway that although grounded on family links, might be interpreted flexibly to include protection-related needs of the family members. Yet, this is not its primary objective. In addition, it is crucial to underscore that the directive includes multiple limitations and requirements so that family reunification is allowed. The ECJ has been clear to the effect that the Charter, and in particular its Article 7 that protects the right to family life, cannot simply remove these limitations and requirements.¹²⁸ This means that any flexibility that allows the combination of family links and protection needs is preconditioned by these limitations.

4.2.5.2. ‘Family Based Sponsorships’

As already mentioned above, according to the Commission the ‘family based sponsorships’ are the second example of a pathway based on family links. According to the conceptualization in Commission’s recommendation, ‘family based sponsorships’ fall outside the scope of the Family Reunification Directive. It needs to be noted initially that an assumption that there is a crystal clear clarity as to which cases fall outside the scope of the Directive is incorrect. Many of the directive’s provisions are facultative, which means that Member States have discretion whether to actually apply many of the limitations introduced in the directive’s text. However, when Member States exercises discretion by, for example, allowing admission of extended family members, they are still implementing the directive.¹²⁹ It is therefore relevant to more carefully scrutinize Article 10(2) of the Family Reunification Directive that stipulates that ‘The Member States may authorise family reunification of other family members not referred to in Article 4, if they are dependent on the refugee.’ Sponsorship schemes are precisely based on such a dependency.

Article 10(2) was an object of interpretation in *TB v Bevándorlási és Menekültügyi Hivatal*,¹³⁰ where its optional nature was first noted. It was also observed that if Member States decide to actually implement it, they have ‘significant latitude with regard to determining those members of a refugee’s family, [...] whom the Member States wish to allow to be reunited with the refugee residing on their territory.’¹³¹ This latitude is, however, limited.

¹²⁷ *K, B v Staatssecretaris van Veiligheid en Justitie* Case C-380/17, 7 November 2018, para 66.

¹²⁸ *TB v Bevándorlási és Menekültügyi Hivatal* Case C-519/18, 12 December 2019, para 65; *Mimoun Khachab v Subdelegación del Gobierno en Álava*, Case C-558/14, 21 April 2016, para 28.

¹²⁹ ‘The fact that an EU regulation recognizes that Member States have discretion does not preclude, as the Court made clear in the judgment of 21 December 2011, *N. S. and Others* (C-411/10 and C-493/10, EU:C:2011:865, paragraphs 68 and 69), acts adopted in the exercise of that discretion falling within the scope of the implementation of EU law, for the purposes of Article 51(1) of the Charter, where it is apparent that that discretion forms an integral part of the system of rules established by the regulation in question and must be exercised in compliance with the other provisions of that regulation.

¹³⁰ *TB v Bevándorlási és Menekültügyi Hivatal* Case C-519/18, 12 December 2019

¹³¹ *TB v Bevándorlási és Menekültügyi Hivatal* Case C-519/18, 12 December 2019, para 40.

The first limitation is that Member States are not allowed under the Directive to allow family members that are not dependent on the refugee.¹³² The second limitation is that Member States do not have full discretion as to how to interpret the requirement for dependency on the refugee. In *TB v Bevándorlási és Menekültügyi Hivatal*, the ECJ held that the following conditions need to be cumulatively fulfilled so that it can be determined that the extended family member is dependent on the refugee:

first, having regard to his or her financial and social conditions, the family member is not in a position to support himself or herself in his or her State of origin or the country whence he or she came, and *secondly*, it is ascertained that the family member's material support is actually provided by the refugee, *or that*, having regard to all the relevant circumstances, such as the degree of relationship of the family member concerned with the refugee, the nature and solidity of the family member's other family relationship and the age and financial situation of his or her other relatives, *the refugee appears as the family member most able to provide the material support required.*¹³³

The second condition is tailored to the special situation of refugees as sponsors,¹³⁴ since notably, there is no requirement that the refugee *actually* provides material support to the extended family member at the time of application for family reunification.¹³⁵

At the same time, the ECJ added that Member States 'may lay down *additional* requirements relating to the nature of the relationship of dependency required.'¹³⁶ This is justifiable in light of the discretionary nature of Article 10(2) of the Family Reunification Directive. Yet, in exercising this discretion, Member States do implement EU law, which also means that the Charter applies.¹³⁷

In what way is, however, the Charter useful? As already mentioned above, the Charter cannot deprive the Member States of the discretion that they have as to the conditions for allowing reunification with extended family members.¹³⁸ Yet, *TB v Bevándorlási és Menekültügyi Hivatal* makes it clear that the Charter is relevant in that when Member States exercise discretion under Article 10(2) of the Family Reunification Directive, they 'must not prevent an application for family reunification from being examined on a case-by-case basis, and that examination must also be carried out having regard to the special situation of refugees.'¹³⁹

¹³² Member States can allow admission of family members that are not dependent; however, this will be in accordance with their national legislation and not in implementation of the directive. *TB v Bevándorlási és Menekültügyi Hivatal* Case C-519/18, 12 December 2019, para. 43; See also Article 3(5), Family Reunification Directive.

¹³³ *TB v Bevándorlási és Menekültügyi Hivatal* Case C-519/18, 12 December 2019, para 52 (emphasis added).

¹³⁴ *TB v Bevándorlási és Menekültügyi Hivatal* Case C-519/18, 12 December 2019, para 50: 'special attention should be paid to the situation of refugees, since they have been obliged to feel their country and cannot conceivably lead a normal family life there, they may have been separated from their family for a long period of time before being granted refugee status, and it is often impossible or dangerous for refugees or their family members to produce official documents, or to contact the authorities of their country of origin.'

¹³⁵ *TB v Bevándorlási és Menekültügyi Hivatal* Case C-519/18, 12 December 2019, para 51: 'It cannot be precluded that the refugee is unable, or no longer able, to provide such support because of factors beyond his or her control, such as the physical impossibility of supplying the necessary funds or the fear of endangering the safety of the members of his or her family by entering into contact with them.'

¹³⁶ *TB v Bevándorlási és Menekültügyi Hivatal* Case C-519/18, 12 December 2019, para 55 (emphasis added).

¹³⁷ *TB v Bevándorlási és Menekültügyi Hivatal* Case C-519/18, 12 December 2019, para 61.

¹³⁸ *TB v Bevándorlási és Menekültügyi Hivatal* Case C-519/18, 12 December 2019, para 65.

¹³⁹ *TB v Bevándorlási és Menekültügyi Hivatal* Case C-519/18, 12 December 2019, para 67. One can doubt the usefulness of the Charter since the Court of Justice seems to reach the same conclusion regarding these two guarantees (case-by-case review and regard to the special situation of refugees), even without at all referring to the Charter.

In sum, sponsorships that imply allowing admission based on some form of dependency, could also fall within the scope of EU law. In this case, individual assessment that can take into consideration both family links and protection needs for the purposes of admission, might be required. If they do not fall within the scope of EU law, they are left to the discretion of the State, which, as already explained in Section 4.1., can in some ways be limited by human rights law.

4.3. Domestic Law

Unless visas and permits fit within the visa categories of the Visa Code or within one of the above-mentioned sectorial directives including the Family Reunification Directive, authorizations for entry are governed by the national legislation of the Member States.¹⁴⁰ They can make arrangements by granting visas, residence permits or provisional residence permits issued pending an examination of an application for a permit, for stays exceeding 90 days. Member States can determine the degree of inclusiveness (i.e., the scope of beneficiaries and how being a beneficiary depends on protection related and non-protection related considerations). Similarly, Member States can have varying degrees of formalization and regulation of these arrangements. It might be the case that the person can invoke rights under the national legislation that facilitate leaving and entry,¹⁴¹ which will make examination of the pathways from the perspective of national legislation a very interesting and possibly a fruitful object of study.

Whether as a matter of policy choices and practical arrangements not stabilized in legal arrangements or as a matter of legal regulations, Member States as countries of destination are faced with certain choices as to the operationalization of the arrangements. These choices relate at least to the following questions. First, are the protection needs and any other not protection related considerations assessed *prior to leaving* when potential beneficiaries are still on the territory of the first country of asylum? If this question is answered in the affirmative,¹⁴² protection needs have to be assessed in a manner that is different from the protection procedures normally applied at the border or in the territory. In the context of normal territorial protection procedures, the individual is a holder of rights corresponding to obligations owed by the receiving State since he/she is within the latter's jurisdiction, and the procedure incorporates certain guarantees. The absence of guarantees makes the procedure in the context of complementary pathways of a very different nature. More specifically, the usual argument applied to territorial procedures that favor wide procedural guarantees, seems to be disrupted here. Full scale procedural guarantees imply longer processing times, which might be acceptable given that the applicant is on the territory of the receiving country and thus safe. If he or she is outside the territory and thus likely exposed to risks, fast processing might be important.

A second question concerns the distinctiveness of the arrangements due to the addition of considerations not related to protection needs. Are these considerations integrated in the procedure prior to leaving or at a later stage? Might it be the case that at the initial point of the pathways (exit/leaving the country), some of the considerations (humanitarian/protection needs) are given prominence while others (e.g., family ties) have secondary importance?¹⁴³

¹⁴⁰ Under Article 79(2)(a) TFEU, the EU has the competence to legislate, but it has not done so.

¹⁴¹ See Luigi Gatta, F., 'A "way out" of the human rights situation in Libya: the humanitarian visa as a tool to guarantee the rights to health and to family unity' Cahiers de l'EDM (August 2019).

¹⁴² This is a likely arrangement since destination States want to avoid the risk of being reached by individuals who might not qualify for legal entry.

¹⁴³ The choices made will be also indicative as to the actual purposes served by complementary pathways. If they are accepted as actually being a way of showing solidarity with first countries of asylum, it is protection-related considerations that should matter. If considerations not related to protection needs are given prominence in the arrangements, questions need to be asked about the rationale of the pathways.

While in determining the conditions of the initial stay, i.e., the duration of residence permit granted, the order of prioritization is reversed? An option is also possible for granting some form of provisional temporary permits and authorization, while any protection and non-protection related considerations are fully examined only after entry in the country of destination. Certain questions pertaining to the physical movement also arise. More specifically, who bears the costs for travelling? The role of the destination country can be limited to removal of barriers by issuing of a visa, while any costs related to the physical movement are covered by the beneficiary. The choice here might be dependent on the role of the non-protection related considerations.¹⁴⁴

Member States have different options at their disposal as to how to combine the authorization for entry with the authorization of the stay. One possibility is that after entry and upon arrival, the beneficiaries must immediately lodge an application for international protection. Another option is that a residence permit is issued on national humanitarian grounds immediately upon arrival without an asylum procedure.¹⁴⁵ This option might be relevant when the beneficiaries are assumed to be in need of protection and they have been selected based on additional criteria such as family links.

5. Conclusion

The above-mentioned questions are meant to be illustrative and no comprehensiveness is intended. All of them, however, reveal that the combination of protection-related and not protection-related considerations in the selection of beneficiaries, which is the distinguishing feature of complementary pathways, is a source of complication. While indeed in reality people move for various reasons and different reasons might dominate at various points in the movement, the law places individuals in different categories depending on the reasons and the modes of arrival. Complementary pathways seem to disrupt these categorizations due to the combination of protection-relation and not protection-related considerations.¹⁴⁶ The question at the heart of this article was how the law, including human rights law and EU law, responds to this disruption.

At the domestic level, although States have a lot of flexibility to shape any complementary pathways, they still face challenges given the disruption of the usual legal categories and grounds for entry and stay. As to international law and more specifically human rights law, the pertinent question is whether the ECHR exerts any restraints on the domestic flexibility. The limits of ECHR emerge here with full power, as reflected in the requirement for a jurisdiction link with any beneficiaries so that the rights under the ECHR can be opposable to destination States. Yet, I did identify a situation where ECHR might actually impose certain restraints. This relates to the right to family life that can actually facilitate admission of family members. Importantly, the assessment as to whether denial of admission is contrary to Article 8 ECHR, can include a combination of family-related and protection-related considerations.

As to EU law, my conclusion is that, first, EU law causes complications additional to the one already mentioned above (i.e. disruption of the categories). In particular, it might not allow Member States to issue specific types of visa, to allow transit or even to grant ‘international protection’ in the sense of EU law, to beneficiaries. The role of the Charter is also complicated. The reason is not solely that the question whether it applies might not have an

¹⁴⁴ Normally, in case of a visa for work, all the costs are born by the person.

¹⁴⁵ This has been applied in Germany. See Endres de Oliveria, P. (2020). Humanitarian Admission to Germany – Access vs. Rights?, in *Humanitarian Admission to Europe. The Law Between Promises and Constraints*. M. Foblets and L Leboeuf (Eds.) Nomos, p. 201.

¹⁴⁶ On the fragmentation of international migration law, see Chetail, V. (2019) *International Migration Law*. Oxford University Press.

easy answer. The role of the Charter is also uncertain since the rights enshrined therein cannot be used for removing the restrictive requirements articulated in the text of the Family Reunification Directive that might impede legal entry. Yet, the Charter seems to facilitate an interpretation of these requirements that is flexible and, in this way, possibly sensitive not only to considerations about family links, but also to the protection needs of the family members to be admitted.