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## The European Community After 1992: The Freedom of Movement of People and its Limitations

Ricou Heaton

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# NOTES

## The European Community After 1992: The Freedom of Movement of People and Its Limitations

### ABSTRACT

*The end of 1992 has attained significance as the time when borders and barriers to the free movement of people within the European Community (EC) should dissolve. This Note examines those actions taken by EC institutions and member states that are determining the nature of this freedom. This Note explains the major EC institutions and the steps they have taken with respect to freedom of movement. This Note also describes the Schengen Convention, an agreement between eight EC states that provides a blueprint for dismantling internal borders and strengthening external ones. The author discusses how member states' desire to control who enters their territory will effectively prevent the free movement of people in the EC. The author concludes that certain nationals of non-EC states need recognition and protection for their right of free movement.*

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I. INTRODUCTION

The Single European Act<sup>1</sup> (SEA) modified the Treaty Establishing the European Economic Community (EEC Treaty)<sup>2</sup> and called for the creation of an internal market with no barriers to the free movement of people within the states of the European Community (EC).<sup>3</sup> The language of SEA appears to expand significantly this freedom which the EEC Treaty previously limited to nationals of EC member states in their roles as economic actors.<sup>4</sup> Popular understanding of SEA, however,

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1. Single European Act, 1987 O.J. (L 169) 1 [hereinafter SEA].

2. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [hereinafter EEC TREATY].

3. SEA, *supra* note 1, art. 13 (Article 13 of the SEA has been incorporated as article 8a in the 1987 amended version of the EEC Treaty). The European Community (EC) consists of three distinct entities, the European Coal and Steel Community, the European Economic Community (EEC), and the European Atomic Energy Community. 1 GREGG MYLES, EEC BRIEF 1-7 (rev. 1992) [hereinafter EEC BRIEF]. The following states belong to the EC: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and the United Kingdom. *Id.*

4. For example, article 3(c) of the EEC Treaty calls for "the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital." EEC TREATY art. 3(c). This "freedom," however, is limited to the purposes stated in article 2, which set out the task of the Community as "promot[ing] throughout the Community a harmonious development of economic activit[y]." EEC TREATY art. 2.

Articles 48-51 of the EEC Treaty, which address freedom of movement, limit this freedom to people acting in their economic capacities. As the Honorable Lord MacKen-

conflicts with the EC's interpretation and assumes SEA supports unrestricted freedom of movement, allowing people to move as freely around the EC as they can within their own states.<sup>5</sup> The EC will have to conform its interpretation of SEA to this popular conception to maintain popular support for its programs, a support which would decrease if this freedom, one of the most visible benefits of the common market, is restricted to businesses.<sup>6</sup>

An expansive freedom of movement would necessitate radical changes. Controlled borders serve as filters which can sieve out unwanted people and goods. If states wish to eliminate interior border controls, they must toughen exterior controls to prevent unwanted elements from spreading throughout the EC.<sup>7</sup> EC member states would have to harmonize various criminal laws and improve police cooperation. States would also have to change laws and regulations that currently discriminate against foreign labor by favoring the home state's nationals over those of another EC state. The states of the EC have already taken steps along these lines, steps which map the likely shape of freedom of movement as it will exist after 1992.

These actions will ease travel and improve business efficiency.<sup>8</sup> The EC is likely to fail, however, in creating a market free of substantial barriers to the free movement of people. This failure will result from the likely exclusion of most aliens<sup>9</sup> from the pool of people granted free

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zie stated, "it is the Community *worker* whose movements are protected by Community law, not the Community *citizen*." Hon. Lord MacKenzie Stuart, *Problems of the European Community—Transatlantic Parallels*, 36 INT'L L & COMP. L.Q. 183, 191 (1987).

5. See Neil Gibbs, J.M. Dider & Assoc. S.C., *Removal of Border Controls in the Single Market, 1992 - THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION*, Oct. 6, 1989, vol 1., No. 13, at 13, available in LEXIS, Nexis Library, Omni File [hereinafter *Removal of Border Controls*] (noting the importance of extending the benefits of barrier removal beyond business interests to maintain popular support for European integration).

6. See *id.*

7. Marc Van der Woude & Philip Mead, *Free Movement of the Tourist in Community Law*, 25 COMMON MKT. L. REV. 117, 125-26 (1988).

8. The Commission studied the effects of barriers on the free movement of people, goods, and capital. It concluded that price reductions and improved efficiency would save 100 billion European Currency Units (ECUs) in direct costs and add another 100 billion ECUs to the economy. RALPH H. FOLSOM, *EUROPEAN COMMUNITY LAW IN A NUTSHELL* 22-23 (1992). The gross domestic product of the EC should increase 4.5 to 7% consumer prices should decline 4.5 to 6%, and 1.75 to 5 million jobs should be created. *Id.* at 23.

9. In this context, "aliens" means those people who are not nationals of any member state of the EC.

movement as well as restrictive interpretations of what "free movement" means.

This Note analyzes what freedom of movement will mean in the EC after 1992. In addition, this Note evaluates actions of EC member states through EC institutions and intergovernmental agreements that affect the scope of freedom of movement. Finally, this Note shows how concerns over immigration and sovereignty will hinder the development of free movement and thwart the EC's goal of a market without frontiers.

## II. EC PROTECTION OF THE FREEDOM OF MOVEMENT

### A. *EC Institutions Responsible for Promoting Freedom of Movement*

Four institutions oversee the creation and maintenance of EC law and render decisions binding upon member states, institutions and individuals: the Council of Ministers (Council), the European Commission (Commission), Parliament, and the Court of Justice (Court).<sup>10</sup>

The Council and Commission share legislative authority.<sup>11</sup> The Commission drafts proposals and submits them to the Council, which in turn, when dealing with important matters, consults with Parliament before adopting a proposal into law.<sup>12</sup> If Parliament amends the proposal, Parliament returns the proposal to the Commission, which reevaluates the proposal and resubmits it to the Council.<sup>13</sup> If Parliament acts upon a proposal without amending it, then the proposal goes directly to the Council for a vote.<sup>14</sup> Parliament's main power in this legislative area stems from the requirement that the Council may adopt a proposal that

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10. P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW 15 (5th ed. 1990). See generally JOSEPHINE STEINER, TEXTBOOK ON EEC LAW (1988); FOLSOM, *supra* note 8, at 23.

11. MATHIJSEN, *supra* note 10, at 44-45. Article 189 of the EEC Treaty provides that "the Council and the Commission shall, in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions. EEC TREATY art. 189.

12. See MATHIJSEN, *supra* note 10, at 20-21. With respect to freedom of movement, Parliament can expect to be consulted on numerous measures. Article 7 of the EEC Treaty provides that the Council must consult with Parliament before adopting a proposal prohibiting discrimination on grounds of nationality. EEC TREATY art. 7. Article 49 imposes a similar requirement on the Council for directives or regulations intended to promote freedom of movement of workers. Similar requirements exist for measures affecting freedom of establishment and the provision of services. *Id.* art. 49; see also *id.* arts. 54(1), (2), 56(2), 57(1), (2), 63(1), (2).

13. MATHIJSEN, *supra* note 10, at 21.

14. *Id.*

Parliament has rejected only by a unanimous vote.<sup>15</sup> A simple or qualified majority vote in the Council will suffice to adopt a proposal as a regulation or directive. Regulations directly bind the member states while directives come into force only after a state incorporates the directive into domestic law through an official action such as a presidential decree or legislative act.<sup>16</sup> The Commission exercises executive branch functions and acts as the enforcer of EC law. The Commission can bring any EC member state before the Court when it believes that state is not abiding by its EEC Treaty obligations.<sup>17</sup> The Court then ensures that "in the interpretation and application of this Treaty the law is observed."<sup>18</sup>

### B. *EC Protection of Freedom of Movement*

Freedom of movement has always been a basic aim of the EC, as the EEC Treaty and the SEA specifically state.<sup>19</sup> Article 8a of the EEC Treaty,<sup>20</sup> recently added under the SEA, commits the member states of the EC to establishing a market with freedom of movement for people and without internal barriers. This article supplements article 48 of the EEC Treaty, which grants workers the right to move freely throughout the EC in order to pursue offers of employment and the concomitant right to remain in any member state to continue employment.<sup>21</sup> By al-

15. *Id.*

16. *See FOLSOM, supra* note 8, at 27-29. Article 189 of the EEC Treaty states that "[a] regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods." EEC TREATY art. 189.

17. EEC TREATY art. 169.

18. *Id.* art. 164.

19. *See id.* arts. 3(c), 8(a); SEA, *supra* note 1, art. 13, at 7.

20. Article 8a states that "[t]he Community shall adopt measures with the aim of progressively establishing the internal market . . . [which] shall comprise an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured in accordance with the provisions of this treaty." EEC TREATY art. 8a.

21. *Id.* art. 48(3)(a), (b). Article 48 of the EEC Treaty states:

1. Freedom of movement for workers shall be secured within the Community . . .
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
  - (a) to accept offers of employment actually made;
  - (b) to move freely within the territory of Member States for this purpose;
  - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by

lowing this freedom, the EC member states sought to improve their citizens' standard of living and to hasten political integration.<sup>22</sup> To ensure progress toward these ends, the EC made article 48 applicable in the courts of member states<sup>23</sup> and authorized the Council under article 49 to enact directives<sup>24</sup> to help establish workers' freedom of movement,<sup>25</sup> a freedom requiring the elimination of physical barriers to movement across borders and purpose-specific restrictions inhibiting interstate movement for work, tourism, study, or retirement.<sup>26</sup>

## 1. Border Controls

Progress by the EC in eliminating border controls has been slight because states are reluctant to relinquish the authority to determine who or what can enter their territory.<sup>27</sup> Most progress has originated in inter-governmental agreements outside the purview of the EC, most notably through the Schengen Convention.<sup>28</sup> The SEA emphasizes the pre-eminence of individual state authority in this area by providing that member states may take necessary action to control immigration or crime.<sup>29</sup>

While border checks still exist, the EC has helped make passage through them easier for certain classes of persons.<sup>30</sup> A national of an EC member state has the right to move to another member state to accept employment. Workers may take with them their dependent children,

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law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

*Id.* art. 48.

The EEC Treaty provision limits its application to nationals of EC member states. David Stoelting, *The European Court of Justice and the Scope of Workers' Freedom of Movement in the European Economic Community*, 6 AM. U. J. INT'L L. & POL'Y 179, 182 (1991).

22. See Stoelting, *supra* note 21, at 181.

23. See *id.*

24. EEC TREATY art. 49.

25. Stoelting, *supra* note 21, at 181.

26. In this context, "physical barriers" means immigration and customs controls that involve checking documents or conducting searches at a border.

27. *Removal of Border Controls*, *supra* note 5.

28. See *infra* subpart III(A).

29. SEA, General Declaration on Articles 13 to 19 of the Single European Act, *supra* note 1, at 25.

30. See Council Regulation 1612/68, 1968 O.J. SPEC. ED. 475; Council Directive 68/360, 1968 O.J. SPEC. ED. 485.

spouses, and ascendent direct relatives of the worker and the spouse.<sup>31</sup> Member states must allow entry to people to whom this regulation applies upon their production of a valid identification document or passport if they are EC nationals or a visa if they are non-nationals.<sup>32</sup>

## 2. Purpose-Specific Restrictions

The SEA provides that the EC member states may take measures they consider necessary to control immigration from non-member states, to combat terrorism, crime, drug trafficking, and illicit trading in works of art and antiques.<sup>33</sup> Title II of the EEC Treaty, which governs the free movement of people, limits that freedom to workers,<sup>34</sup> the self-employed,<sup>35</sup> and providers of services.<sup>36</sup>

Under the popular conception of freedom of movement, people are able to cross frontiers, to integrate themselves in a member state not only as workers, but also as tourists, students, or retirees. Codifying this conception requires the elimination of rules and regulations hostile to such movement.<sup>37</sup> The EC must also establish regulations which assure social security benefits to those who change their state of residence and prohibit discrimination on the basis of nationality. EC institutions must expand freedom of movement to encompass more than the simple right of workers to peregrinate around Europe in search of employment.

Article 48 of the EEC Treaty provides that the "[f]reedom of movement for workers . . . shall entail the abolition of any discrimination based on nationality" of member state workers.<sup>38</sup> This article proscribes discrimination, direct or indirect, against nationals of other EC member states.<sup>39</sup> It promotes movement by mandating that the worker with the

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31. See 2 EEC BRIEF, *supra* note 3, § 2-(03) at 2-59.

32. See Council Directive 68/360, *supra* note 30.

33. SEA, General Declaration on Articles 13 to 19 of the Single European Act, *supra* note 1, at 25.

34. EEC TREATY art. 48.

35. *Id.* art. 52.

36. *Id.* art. 59.

37. See Stoelting, *supra* note 21, at 184; see also Stuart, *supra* note 4, at 191-92.

38. EEC TREATY art. 48.

39. Gillian Morris et al., *Free Movement and the Public Sector*, 19 INDUS. L.J. 20, 21-22 (1990). "Once in employment, non-nationals may not be treated differently from nationals on grounds of nationality in respect of any conditions of employment or work, including remuneration, dismissal, or, in the event of unemployment, reinstatement or re-employment. It is also a breach of EC law to apply conditions which are indirectly discriminatory; that is, which have a prejudicial impact on nationals of other Member States even though they apply equally to nationals of the State in question." *Id.* at 22.



right to reside in another member state will have the same opportunity to obtain employment as does a resident national.<sup>40</sup>

While workers must be nationals of a member state to be covered by article 48, their families derive their rights from their relationship to workers.<sup>41</sup> This means that unemployed family members need not be EC nationals to gain the same freedom of movement as the worker from whom they derive their rights.<sup>42</sup> Although family members have the right to participate in any activity that employed persons may enjoy,<sup>43</sup> their rights terminate when the EC national's rights as a worker terminate.<sup>44</sup>

The Court has broadly interpreted the qualifications necessary to be classified as a worker; for instance, part-time workers and the unemployed who are seeking work enjoy the protection of article 48.<sup>45</sup> The Court has determined that article 48 establishes the right to enter another state to search for work,<sup>46</sup> but the right of residence still depends on finding work.<sup>47</sup> This qualification means the right to search only justifies a three-month stay.<sup>48</sup> To expedite the employment search, however, the Commission has organized a clearing house for collecting and pairing job vacancies with applications from EC nationals.<sup>49</sup>

The EC has matched its active participation in expanding employment opportunities with efforts to protect social security benefits.<sup>50</sup> The EEC Treaty and its implementing legislation protect workers' social security benefits.<sup>51</sup> Currently, EC legislation protects unemployment, ma-

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40. See *id.*; EEC TREATY art. 48(3). Once workers have entered a state, they can obtain a residence permit by showing proof of employment. The Treaty requires that the permit be valid throughout the entire territory of the issuing state for a term of at least five years and be automatically renewable. See Council Regulation 1612/68, *supra* note 30, at 477; see also STEINER, *supra* note 10, at 152.

41. See STEINER, *supra* note 10, at 149.

42. *Id.* at 149; see *supra* text accompanying note 32.

43. 2 EEC BRIEF, *supra* note 3, § 2(03), at 2-59.

44. See STEINER, *supra* note 10, at 154.

45. See FOLSOM, *supra* note 8, at 131; STEINER, *supra* note 10, at 149; see also Case 75/63, Hoekstra (nee Unger) v. B.B.D.A., 1964 E.C.R. 177, 3 C.M.L.R. 319 (1964).

46. See Case 48/75, The State v. Royer, 1976 E.C.R. 497, 2 C.M.L.R. 619 (1976).

47. STEINER, *supra* note 10, at 153.

48. *Id.*

49. 2 EEC BRIEF, *supra* note 3, § 2(07), at 2-64, 2-65.

50. EEC TREATY art. 51. Article 51 states in part that "[t]he Council shall . . . adopt such measures in the field of social security as are necessary to provide freedom of movement for workers." *Id.*

51. Stoelting, *supra* note 21, at 184.

ternal, and sickness benefits along with pensions for old age and death.<sup>52</sup> The powers of the EC in this field are extensive<sup>53</sup> and have been used to assure that

“Workers” have the right to stay in a Member State “for the purpose of employment” and to take up available employment “with the same priority” as nationals. They are also entitled to equal treatment with nationals as regards housing, training and other social benefits. Workers’ families may join them in the State where they are employed and their children must be given access to educational courses under the same conditions as nationals.<sup>54</sup>

Article 48 does, however, contain exceptions to free movement for reasons of public policy, public security, and public health.<sup>55</sup> The directive implementing article 48 has been crafted to prevent them from becoming major impediments to the free flow of workers within the EC.<sup>56</sup> Directive 64/221 prohibits the exclusion of an individual on public policy or security grounds except on the basis of the individual’s personal conduct.<sup>57</sup> The standard for exclusion because of personal conduct is difficult to meet: an individual must engage in activities the state has clearly indicated it finds socially harmful and has taken administrative measures to prohibit.<sup>58</sup> Furthermore, the public policy exception includes an additional restriction prohibiting its application for economic reasons.<sup>59</sup>

As for public health, the only infirmities which can justify a refusal to allow entry or residence to an EC national are such things as highly contagious diseases, drug addiction, and severe mental impairment.<sup>60</sup> Moreover, important procedural protections exist for those affected by these exceptions. For example, when a state refuses a request for residence, the person affected may remain in the state until the state renders

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52. Regulation 1408/71 effectuates article 51 of the EEC Treaty. *Id.* at 184-85. The EC regulation works by allowing each member state to keep its social security system but requires that workers be credited for the past contributions they have made to any member state. *Id.* at 185.

53. “As a French appeals court recognized in 1964, EEC social security regulations are absolutely compulsory, apply directly in all member states, and replace all bilateral agreements completed between member states.” *Id.* at 186.

54. Morris et al., *supra* note 39, at 21 (citations omitted).

55. EEC TREATY art. 48(3).

56. Council Directive 64/221, 1964 O.J. SPEC. ED 117.

57. *Id.* This public policy exception has been narrowly construed by the Court. See Case 30/77, Regina v. Bouctereau, 1977 E.C.R. 1989, 2 C.M.L.R. 800 (1977).

58. STEINER, *supra* note 10, at 185.

59. Stoelting, *supra* note 21, at 191.

60. STEINER, *supra* note 10, at 185.

its decision regarding expulsion.<sup>61</sup> The expelled individual has the right to know on what grounds the state made its decision.<sup>62</sup> Perhaps most importantly, the state must make "all domestic public law remedies" available for the expelled individual's defense.<sup>63</sup>

Freedom of movement under article 58 does not apply to employment in the public sector.<sup>64</sup> Because of the potential scope of this exception, it should come as no surprise that "it has been exploited by member States . . . [and] that the Court of Justice has given it the narrowest scope."<sup>65</sup> The Court has established that the only public service jobs that qualify as ones which a state may reserve to its nationals are those in which employees exercise official authority and safeguard the general interests of the state.<sup>66</sup> In practice, this exception applies only to those employees who owe "a special allegiance to the state" in sensitive areas such as the military, police, judiciary, and the upper ranks of the civil service.<sup>67</sup>

The self-employed enjoy significant rights under article 52 of the EEC Treaty. Article 52 states that "restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State shall be abolished."<sup>68</sup> This right "carries with it nearly the same bundle of national treatment rights and exceptions associated with employed workers."<sup>69</sup>

By viewing tourists as receivers of services warranting the protection of the EEC Treaty, the Court has widened the scope of freedom of movement to include people who are not working.<sup>70</sup> The Court adopted this view in 1984 in the case of *Luisi & Carbone v. Ministero del Tesoro*.<sup>71</sup> In *Luisi & Carbone* the Court held that Article 59 of the EEC Treaty, which guarantees the right to provide services, "[includes] the freedom, for recipients of services, to go to another member State in or-

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61. Council Directive 64/221, *supra* note 56, art. 5(1).

62. *Id.* art. 6.

63. STEINER, *supra* note 10, at 188.

64. EEC TREATY art. 48(4).

65. STEINER, *supra* note 10, at 164.

66. *Id.*; *see also* Case 152/73, *Sotgiu v. Deutsche Bundespost*, 1974 E.C.R. 153; Case 149/79, *Commission v. Belgium*, 1982 E.C.R. 1845, 2 C.M.L.R. 413 (1982).

67. STEINER, *supra* note 10, at 165.

68. EEC TREATY art. 52.

69. FOLSOM, *supra* note 8, at 134.

70. *Van der Woude & Mead*, *supra* note 7, at 118-19.

71. *Joined Cases 286/82 & 26/83 Luisi & Carbone v. Ministero del Tesoro*, 1984 E.C.R. 377, 3 C.M.L.R. 52 (1985). Luisi and Carbone were Italian nationals who had taken more foreign currency out of the country than Italian law permitted. They had taken this money out of Italy to pay their tourism expenses and, in Luisi's case, to purchase medical treatment. *Id.*

der to receive a service there, without being obstructed by restrictions."<sup>72</sup> The Court ruled that recipients of services include those traveling for purposes of tourism, medical treatment, education, or business.<sup>73</sup> Apparently, the acceptable length of such stays in an EC state is the time during which a person is actually receiving service, or for someone who is merely a potential recipient of service, three months.<sup>74</sup>

The EC shift toward regarding freedom of movement as independent of economic activity is reflected in EC Directives 90/364,<sup>75</sup> 90/365,<sup>76</sup> and 90/366,<sup>77</sup> which extend the right of residence to nonworkers.<sup>78</sup> Directive 90/364, known in some circles as the Playboy Directive because it favors the financially secure,<sup>79</sup> grants the right of residence in other EC states to EC nationals and their families who have not otherwise obtained that right. To qualify, nationals and their family members must show that they have health insurance and have "sufficient resources to avoid becoming a burden on the social security system of the host Member State during their period of residence."<sup>80</sup> The right of residence will last as long as the affected individuals meet these conditions.<sup>81</sup> Directives 90/365 and 90/366 extend the right of residence, with the same requirements, to retirees and students.<sup>82</sup> These directives required implementation by member states by June 30, 1992.<sup>83</sup>

72. STEINER, *supra* note 10, at 177.

73. *Id.*

74. Van der Woude & Mead, *supra* note 7, at 130.

The right to stay in another Member State corresponds to the duration of the received service. A residence document (right of abode) has to be issued when the stay lasts longer than three months. . . .

Thus, individuals as beneficiaries of services are freely allowed to enter and leave Member States, though the right to stay as a mere potential recipient of services is limited to three months.

*Id.* at 129-30.

75. Council Directive 90/364, 1990 O.J. (L 180) 26.

76. Council Directive 90/365, 1990 O.J. (L 180) 28.

77. Council Directive 90/366, 1990 O.J. (L 180) 30.

78. J.D.M. Steenbergen, *Schengen and the Movement of Persons, in* SCHENGEN: INTERNATIONALISATION OF CENTRAL CHAPTERS OF THE LAW OF ALIENS, REFUGEES, PRIVACY, SECURITY AND THE POLICE 57, 59 (J.D.M. Steenbergen ed. & H.A. Alexander et al., trans., 1991) [hereinafter SCHENGEN CHAPTERS].

79. 2 EEC BRIEF, *supra* note 3, § 2(08), at 2-67.

80. *Id.*

81. *Id.*

82. *Id.* at 2-67, 2-68.

83. *Id.* at 2-68. As of early October, 1992, only Spain appears to have incorporated these three directives into its law. See *News in Brief*, EUROWATCH, July 10, 1992. The Court annulled on the grounds that it was illegally made, but the Court ruled that it

### C. *Limitations on EC Protection of Freedom of Movement*

Through expansive interpretation of the EEC Treaty, "virtually every citizen of a Community Member State crossing a border belongs to a group of persons that can legally move freely throughout the Community."<sup>84</sup> EC nationals can move freely as tourists and take up residence throughout the Community to work, study, or retire. When a state denies their rights to freedom of movement, they have access to legal procedures which will protect them from arbitrary expulsion from another state's territory.<sup>85</sup>

The problem with the EC actions promoting freedom of movement is that people who are residents but not nationals of EC states derive little benefit from the measures. While the EC member states should provide for the interests of their own citizens first, ignoring the needs of the EC's nine million legally resident aliens cannot be justified.<sup>86</sup> Technically, resident legal aliens can only gain EC rights by having a national as a family member,<sup>87</sup> even though article 8a of the EEC Treaty arguably grants them a much more extensive right, providing as it does, "a sound legal basis for the free movement of the individual" irrespective of nationality.<sup>88</sup>

Regulating the treatment of aliens attempting to enter a state or already within a state's territory has been a longstanding weakness of the EC because its member states desire to maintain control over the movement of aliens.<sup>89</sup> The EEC Treaty, as modified by the SEA, specifically excludes immigration from the domain of EC regulation, proclaiming that "[n]othing in these provisions shall affect the right of Member States to take such measures as they consider necessary for the purpose of controlling immigration from third countries."<sup>90</sup> Furthermore, the Court has shown a reluctance "to expand the rights of non-European

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shall continue in effect until new legislation can be adopted. Brick Court Chambers, *The Week in Luxembourg: UK 'Net Book' Agreement Contravenes EC Law*, FIN. TIMES (London), July 14, 1992, at 14.

84. John P. Stigi, III, Note, *The Elimination of European Community Border Formalities*, 27 VA. J. INT'L L. 369, 377 (1987).

85. See *supra* notes 61-63 and accompanying text.

86. *Immigration, What Controls?*, DAILY TELEGRAPH (London), May 12, 1992, at 17, available in LEXIS, Nexis Library, Omni File.

87. See *supra* notes 41-44 and accompanying text.

88. Van der Woude & Mead, *supra* note 7, at 121.

89. Stoelting, *supra* note 21, at 196-97.

90. SEA, General Declaration on Articles 13 to 19 of the Single European Act, *supra* note 1, at 25.

workers who reside in the EEC."<sup>91</sup> The Court manifested this attitude when it determined that an agreement between Turkey and the EEC was not binding on EC members, a decision which resulted in the impairment of the Turks' freedom of movement.<sup>92</sup> This decision appears to stem from the Court's reluctance to act in a politically charged arena without the support of member states.<sup>93</sup>

Two of the primary reasons for the Court's disposition are the sensitive nature of the treatment of foreigners and member state's reluctance to allow the EC to extend rights to non-nationals.<sup>94</sup> To its credit, the EC has tried to extend the freedom of movement to aliens, albeit in a limited way. For example, the Commission has supported extending the principle of non-discrimination to permanent residents so that "they [can] work in member states other than the one in which they have been granted their status."<sup>95</sup> The Commission has also proposed issuing permanent residency cards to immigrants who have lived for a specified minimum amount of time within a member state.<sup>96</sup> These moves and others like them, however, have had little success.<sup>97</sup> The EC will be unable to progress much further in this direction because the member states do not want the EC to determine their immigration policy for them.<sup>98</sup>

In the face of this resistance from member states, perseverance by the EC will be politically untenable, even though it may be legally defensible. Recent events support this proposition. At an EC summit in December 1991, the EC failed to agree on a "common EC policy on asylum seekers" because individual states did not want to relinquish control over determining who would be allowed to enter their territory.<sup>99</sup> By rejecting the Maastricht Treaty, Danish voters weakened the Commission to the point where it had to bow to Britain's demand that it continue checking the passports of EC nationals entering the territory.<sup>100</sup> The member

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91. Stoelting, *supra* note 21, at 183.

92. *Id.* Case 12/86, *Meryem Demirel v. Stadt Schwabisch Gmnd*, 1987 E.C.R. 3719.

93. *See* Stoelting, *supra* note 21, at 183.

94. *Id.* at 183, 197.

95. *Immigration: New European Commission Communication*, EUR. REP., Oct. 9, 1991, at 9.

96. *Id.*

97. The European Parliament's suggestion that immigrants be allowed to vote after residing for five years in the EC collided with the German high court's ruling which struck down a municipal law along those lines. Stoelting, *supra* note 21, at 183-84.

98. *Id.* at 183, 196-97.

99. *See* Heidi Larson, *Europe Pulls Up the Welcome Mat*, S.F. CHRON., Feb. 8, 1992, at A20.

100. Boris Johnson, *Britain Wins Right to Keep Border Check*, DAILY TELEGRAPH (London), Sept. 3, 1992, at 1, available in LEXIS, Nexis Library, Omni File.

states prefer maintaining control over determining who enters their territory through intergovernmental agreements, the most important of which is the Schengen Convention.

### III. THE SCHENGEN CONVENTION AND FREEDOM OF MOVEMENT

#### A. *Background of the Schengen Convention*

The Schengen Agreements, named after the eponymous town in Luxembourg where they were signed, resulted from the desire of the French and German governments to grant EC nationals freedom of movement between their two states.<sup>101</sup> The Benelux states<sup>102</sup> joined France and Germany in negotiations, and the five states signed the Schengen Agreement of 1985.<sup>103</sup> Under this agreement, negotiations were undertaken with the goal of shifting border controls from internal to external borders. This work resulted in the Convention Implementing the Schengen Agreement of 14 June 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at Their Common Borders (Convention).<sup>104</sup>

Once the Convention was ready for signature, more EC member states decided to join. Spain, Portugal, and Italy<sup>105</sup> have signed the Convention, and Greece has obtained observer status, which is likely to result in full membership by the end of 1992.<sup>106</sup> Article 140 of the Convention restricts future membership to other EC states.<sup>107</sup>

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101. Julian J.E. Schutte, *Schengen: Its Meaning for the Free Movement of Persons in Europe*, 28 COMMON MKT. L. REV. 549, 549 (1991).

102. The Benelux states include Belgium, the Netherlands, and Luxembourg.

103. Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the Gradual Abolition of Checks at Common Borders, 33 EUR. Y.B. (BENELUX) 17 (1985).

104. Convention Implementing the Schengen Agreement of June 14, 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 The Common Borders, June 14, 1985, 1990 TRACTATENBLAD 145 (Neth.), 30 I.L.M. 68, 73 (1991) [hereinafter Schengen Convention].

105. Spain and Portugal signed the Convention on June 25, 1991. Ian Murray, *Border Formalities*, THE TIMES (London), June 26, 1991. Italy signed it on Nov. 27, 1990. *Political News: National and Party Developments, Foreign Affairs*, COUNTRY REP., Dec. 10, 1990.

106. *Schengen Agreements: Greece to Become an Observer in Preparation for Accession*, EUR. REP., Dec. 21, 1991, at 8; see also *Social Affairs*, EUROSOCPE, Sept. 3, 1992, § 6.4.

107. Schengen Convention, *supra* note 104, art. 140(1), 30 I.L.M. at 142.

The Convention will come into force approximately one month after the five original signatory states have ratified it.<sup>108</sup> At present, France, Spain, Portugal, Luxembourg,<sup>109</sup> and the Netherlands<sup>110</sup> have ratified the Convention. Politicking will delay German ratification because the Christian Democrats are using the Convention as a means to force a constitutional change in that state's liberal asylum policy.<sup>111</sup> The Convention exists outside the framework of the EC, but it serves as a model, and probably as a substitute, for future EC action.<sup>112</sup>

Although the Convention ostensibly aims at furthering the EC goal of providing freedom of movement, the primary concern of the Convention is to create external border controls and procedures for admitting people to the territory of the Schengen states.<sup>113</sup> The reason for this lies in the fact that the Convention drafters "recognized that the regulation of the law on free circulation and the free movement of persons is a matter of [EC] law in so far as nationals of EC Member States are concerned and should not be affected by 'Schengen-law.'"<sup>114</sup>

One of the ironies of the Convention is that it seems likely to shrink the scope of the freedom of movement available to many of those currently residing within those states that are signatories to the Convention. The Convention establishes sanctions for allowing entry of inadmissible persons, methods to harmonize visa policies, procedures to determine which state will process asylum applications, and more rigorous external border controls.<sup>115</sup> This toughening of entry standards reflects the fact

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108. Ronald Van De Krol, *The Lisbon Summit: Dutch MPs Pass Treaty on Borders*, FIN. TIMES, June 26, 1992, at 2; see also Schengen Convention, *supra* note 104, 30 I.L.M. at 141. The Convention will come into effect "on the first day of the second month following" ratification by the signatory states. *Schengen Agreements: France Ratifies Testing Ground for Europe*; EUR. REP., June 8, 1991, at 1; *Schengen Agreements: Greece to be Admitted as Observer*, EUR. REP., Nov. 1, 1991, at 1.

109. *Social Affairs*, *supra* note 106, at § 6.4.

110. *EC: Dutch MPs Ratify Schengen Agreement*, REUTERS TEXTLINE AGENCE EUROPE, June 27, 1992, available in LEXIS, Europe Library, Alleur File.

111. See *SPD: Amendments of Right to Asylum Only Acceptable in European Context*, THIS WEEK IN GERMANY, May 15, 1992. The German Constitution gives political refugees the right of asylum in Germany. *CDU Threatens Delay in Schengen Treaty Ratification*, AGENCE FRANCE PRESSE, Apr. 18, 1992, available in LEXIS, Nexis Library, Omni File.

112. *Freedom of Movement for People: Bangemann Cheerful About the Outlook*, EUR. REP., Sept. 14, 1991, at 9. Members of European Parliament "are worried that the Schengen Agreement leaves the Community as an entity little wiggle room to find a solution which is very different to the compromise which the signatories have found." *Id.*

113. H. Meijers, *Introduction*, in SCHENGEN CHAPTERS, *supra* note 78, at 1.

114. Schutte, *supra* note 101, at 566.

115. See Meijers, *supra* note 113, at 1-8; Antonio Cruz, *Compatibility of Carrier*



that the Schengen states are cooperating, not because they want to promote freedom of movement, but rather because they want to prevent nationals of non-EC states from arriving.<sup>116</sup>

### B. *Shifting Internal Borders to External Frontiers*

The Schengen approach to promoting freedom of movement stresses the importance of shifting border controls from internal to external frontiers. The Schengen states would eliminate internal border controls only by strengthening external ones to such a degree that individual states will not feel that their security is threatened.<sup>117</sup>

Although the Convention appears to set ambitious goals for the elimination of internal frontiers in article 2(1) by stating that "[i]nternal borders may be crossed at any point without any checks on persons being carried out," the balance of article 2 suggests a more modest approach. First, article 2(2) provides that for reasons of "public policy or national security" a state may conduct identification checks at internal borders.<sup>118</sup> While article 2 requires consultation with the bordering state before reinstating border checks, it does not require the affected state's agreement.<sup>119</sup> Furthermore, if a state believes the need for checks is great enough, it may forego consultation.<sup>120</sup> This policy effectively permits states to reinstate checks at their discretion because the Convention does not empower any authority to determine whether a state has a valid reason for resuming border checks.

Article 2(3) presents a more serious problem, however, because it states that "[the] abolition of checks on persons at internal borders shall

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*Sanctions in Four Community States with International Civil Aviation and Human Rights Obligations*, in SCHENGEN CHAPTERS, *supra* note 78, at 37.

116. Steenbergen, *supra* note 78, at 60.

117. According to the Schengen Convention, "internal borders shall mean the common land borders of the Contracting Parties, their airports for internal flights and their sea ports for regular trans-shipment connections exclusively from or to other ports within the territories of the Contracting Parties not calling at any ports outside those territories." Schengen Convention, *supra* note 104, art. 1, 30 I.L.M. at 84. As for external borders, they "shall mean the Contracting Parties' land and sea borders and their airports and sea ports, provided they are not internal borders." *Id.* at 85.

118. *Id.* art. 2(2), at 86.

119. Schengen Convention article 2(2) provides that, "[W]here public policy or national security so require, however, a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation will be carried out at internal borders." *Id.*

120. *See id.* The article states that "[i]f public policy or national security require immediate action, the Contracting Party concerned shall take the necessary measures and shall inform the other Contracting Parties thereof at the earliest opportunity." *Id.*

not affect . . . Article 22.”<sup>121</sup> This exception makes the elimination of internal borders illusory in many respects for non-EC nationals because article 22<sup>122</sup> requires them to report to the appropriate national authority upon crossing the border or soon thereafter.<sup>123</sup>

Mandating that aliens register after crossing a border assures that they will still be subject to checks because “[t]he obligation to report to the authorities of the State one visits just at the border or shortly after crossing comes down to a replacement of one form of control by another.”<sup>124</sup> Such a duty on the part of aliens will retard efforts to eliminate border checks for nationals because “as long as the structures for carrying out checks remain in place at frontiers, checks will be carried out.”<sup>125</sup> In practice, this requirement could easily lead to particularly intense scrutiny of EC nationals of non-European ancestry.<sup>126</sup>

121. *Id.* art. 2(3), at 86.

122. Article 22(1) states that “[a]n alien who has legally entered the territory of one of the Contracting Parties shall be obliged to declare himself, in accordance with the conditions imposed by each Contracting Party, to the competent authorities of the Contracting Party the territory of which he enters. Such declaration may be made . . . either on entry or, within three working days of entry, within the territory of the Contracting Party which he enters.” *Id.* art. 22(1), at 93. Article 22(2) extends this requirement to aliens resident in a Contracting Party entering the territory of another. *Id.* art. 22(2), at 93. Article 1 defines an alien as “any person other than a national of a Member State of the European Communities.” *Id.* art. 1, at 85.

123. What reporting to authorities will mean will vary, because article 22 leaves to each state the decision of how to manage aliens. The purpose of this reporting requirement is to register and control aliens; therefore, reporting procedures will probably reflect that aim. See T. Hoogenboom, *Free Movement of Non-EC Nationals, Schengen and Beyond*, in SCHENGEN CHAPTERS, *supra* note 78, at 74, 81-84.

124. Steenbergen, *supra* note 78, at 54.

125. *Single Market: Commission Keeps up the Pressure*, EUR. INTELLIGENCE, Dec. 1990, at 1.

126. One Dutch lawyer has written that “[c]ontrol and supervision will primarily be generated by outward appearances. Born Dutch nationals of, for example, Antillean, Surinamese or Chinese origin, or naturalized Dutch citizens who look foreign will in all probability run the greatest risk of being stopped, checked on and registered.” Hoogenboom, *supra* note 123, at 82; see also Alecia McKenzie, *Europe: EC Nationals Complain About Border Checks*, INTER PRESS SERVICE, Aug. 7, 1992, available in LEXIS, Nexis Library, Omni File. Steenbergen, *supra* note 78, at 66, notes that:

The admission requirements provided for in the Schengen Convention . . . may generally be described as possession of valid travel documents and sufficient means of support, not being reported as a person not to be permitted entry, and not considered a threat to public order, national security and the international relations of a Party. . . .

. . . The notions ‘sufficient means of support’ and ‘threat to public order’ are sufficiently vague to influence ones impression of the aliens credibility. This situa-

### C. *Entering Schengen Territory*

The Schengen Convention rests upon the premise that states must strengthen external frontiers so that internal frontiers may dissolve. Accordingly, the Convention makes entry through external borders more difficult. Searches of incoming travelers will be more thorough, more states will require visas, states will sanction air carriers for bringing in people without proper documentation, and asylum policies will undergo changes.<sup>127</sup>

Article 3 limits points and times of access to Schengen territory by requiring that "[e]xternal borders may in principle be crossed only at border crossing points during the fixed opening hours."<sup>128</sup> These checks will be more rigorous than those that currently exist, especially for non-nationals. Article 6 requires that when aliens enter Schengen territory, they will be subject to checks on their persons, belongings, vehicles and travel documents;<sup>129</sup> in addition, checks will be conducted to detect and prevent threats to national security or public policy.<sup>130</sup> EC nationals' documents will undergo scrutiny,<sup>131</sup> but their persons will not be subject to the mandatory searches to which aliens must submit.<sup>132</sup> These provisions ensure that entry into Schengen territory will become a more time consuming process for aliens and, to a lesser degree, EC nationals.

The Schengen states would prefer, however, to shift controls over aliens beyond external borders through strict visa requirements and sanctions.<sup>133</sup> By requiring a visa, a state would determine whether aliens may enter its territory before they leave their own state. The visa procedure facilitates excluding aliens because it is easier to deny a visa than it is to refuse admittance to an alien at a state's doorstep.<sup>134</sup>

The Schengen states have decided to adopt a uniform visa procedure,

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tion of subjectivising the requirements can result in a border guard discriminating between the rich and the poor, the black and the white, etc.

127. See discussion subpart III(C).

128. Schengen Convention, *supra* note 104, art. 3, 30 I.L.M. at 86.

129. *Id.* art. 6, at 88.

130. *Id.*

131. *Id.*

132. See *id.* Searches for EC nationals will be performed on the basis of the relevant legislation of the contracting state into which admission is sought. The Convention, in article 1, distinguishes between EC and non-EC nationals, not between Schengen and non-Schengen nationals. See Schengen Convention, *supra* note 104, art. 1, 30 I.L.M. at 84-85; see also Steenbergen, *supra* note 78, at 61.

133. Steenbergen, *supra* note 78, at 63.

134. *Id.* at 69. Furthermore, the difficulty in appealing a visa denial may deter subsequent attempts at entry.

but until that occurs they will continue to recognize each others' visas.<sup>135</sup> Article 9 requires that, except for "overriding reasons of national policy," the contracting states will jointly amend visa requirements. This requirement impairs the ability of a Schengen state to unilaterally affect the flow of people from a non-Schengen state.<sup>136</sup>

Visas under the Convention will have different effects depending on whether aliens apply for a short-term visa (three months or less) or a long-term visa (more than three months). For short visits, the Schengen states have undertaken to introduce a "uniform visa valid for the entire territory of the Contracting Parties."<sup>137</sup> This short-term visa will improve freedom of movement for aliens because it will be valid throughout the territory of all the contracting states. This visa will save aliens from the considerable expense and delay that are often involved in obtaining multiple visas.<sup>138</sup>

The Schengen Convention provides that signatory states are to adopt a common policy with respect to the issuance of short-term visas.<sup>139</sup> Even though the Convention has not yet entered into force, this provision has already led the contracting parties to consolidate into a master list the states from which each of them require a visa. This aggregation has helped increase the number of states for which the Schengen states require visas to 110<sup>140</sup> and means that harmonizing visa policies has forced contracting parties to make their states more difficult to enter for a growing number of people.<sup>141</sup>

The Schengen Convention only minimally affects visas for long visits. The Convention makes no attempt to harmonize policies for long-term visas or to provide for uniform visas: "[v]isas for visits of more than three months shall be national visas issued by one of the Contracting Parties in accordance with its own legislation."<sup>142</sup> The long-term visas allow their holders to stay in the issuing state for extended periods, however, these

135. See Schengen Convention, *supra* note 104, art. 10(2), 30 I.L.M. at 89.

136. *Id.* art. 9(2), at 89.

137. *Id.* art. 10(1), at 89.

138. Steenbergen, *supra* note 78, at 64.

139. Under article 9, "[t]he Contracting Parties undertake to adopt a common policy on the movement of persons and . . . on the arrangements for [short-term] visas . . . [and] pursue by common agreement the harmonization of their policies on visas." Schengen Convention, *supra* note 104, art. 9(1), 30 I.L.M. at 89.

140. *Schengen Agreements: Spain and Portugal Join*, EUR. REP., JUNE 26, 1991, at 2.

141. Italy and Spain serve as models. After they acceded to the Convention, they both began to require visas from citizens of Algeria, Morocco, and Tunisia. *Id.*

142. Schengen Convention, *supra* note 104, art. 18, 30 I.L.M. at 91.

visas only entitle the holder to travel through other Schengen states for the purpose of reaching the state that issued the visa.<sup>143</sup> Because those visas restrict movement to the state which issued the visas, they represent to their holders no gain in the freedom of movement.

The Convention authorizes sanctions against air carriers as an additional method to prevent potential immigrants or asylum seekers from entering Schengen territory. Article 26 of the Convention justifies this approach by requiring signatory states to penalize carriers who transport aliens from a third state into a Schengen state.<sup>144</sup> Four of the Schengen states—Belgium, France, Denmark, and Germany—have legislation that provides monetary penalties for carriers bringing in persons with forged passports, invalid entry visas, or invalid travel documents.<sup>145</sup> Belgian law sanctions carriers that transport to Belgium five or more passengers who do not hold valid entry documents with fines of BF 80,000.<sup>146</sup> French law provides for sanctions against air carriers of up to 10,000 francs for each passenger a carrier brings into the state “without the proper papers.”<sup>147</sup> This law, in line with article 26, requires carriers to pay for the upkeep of such passengers while they are in France and to return them to their point of embarkation.<sup>148</sup> Danish and German laws follow these same broad outlines.<sup>149</sup>

Having arrived at an external frontier, persons seeking entry for a short visit must meet article 5 documentation requirements. According to article 5, aliens must have valid travel documents<sup>150</sup> as well as documents “substantiating the purpose and the conditions of the planned visit.”<sup>151</sup> In addition, aliens must show that they possess sufficient means to support themselves for the length of their planned stay and to pay for

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143. Such a visa shall “enable its holder to transit through the territories of the other Contracting Parties in order to proceed to the territory of the Contracting Party which issued the visa.” *Id.*

144. *Id.* art. 26(2), at 95.

145. See generally Cruz, *supra* note 115, at 37. Britain, while not a Schengen state, has similar sanctions, has assessed large fines, and is planning to double the fine per illegal immigrant passenger. *Refugees or Economic Migrants?*, DAILY TELEGRAPH (London), Feb. 10, 1991, at 5, available in LEXIS, Nexis Library, Omni File.

146. Cruz, *supra* note 115, at 39. While no carrier has been found guilty of violating this law as of 1990, a more stringent law assessing fines from bringing in one or more passengers without valid documents should soon come into effect. *Id.*

147. *France Adopts Leftist Immigration Bill with Rightist Votes*, AGENCE FRANCE PRESSE, Jan. 17, 1992, available in LEXIS, Nexis Library, Omni File.

148. *Id.*

149. See Cruz, *supra* note 115, at 40-46.

150. Schengen Convention, *supra* note 104, art. 5(1)(a), 30 I.L.M. at 87.

151. *Id.* art. 5(1)(c), at 87.

their return to their state of origin.<sup>152</sup> A state may refuse entry to aliens listed in the Schengen Information Service<sup>153</sup> or the corresponding national list, or if they pose a "threat to public policy, national security or the international relations of any of the Contracting Parties."<sup>154</sup>

For the asylum applicant, the Convention provides complicated procedures for entry.<sup>155</sup> These procedures aim at discouraging asylum seekers because strict immigration laws throughout Western Europe have forced those desiring to reside permanently in Western Europe to do so under the pretense of claiming asylum.<sup>156</sup> The Convention permits one member state to determine if an individual has proven a need for asylum.<sup>157</sup> Article 30 sets out the criteria for determining which state should review the asylum application. If a state has issued a visa or residence permit to the applicant, that state shall make the determination.<sup>158</sup> If the applicant does not have proper documentation, then the state whose external frontier the applicant crossed to enter Schengen territory shall have the responsibility of making the determination.<sup>159</sup>

#### D. *Limitations of the Convention in Promoting Freedom of Movement*

The Schengen Convention serves to expand border controls rather than abolish them.<sup>160</sup> While internal controls still exist for much of the population, external searches are more rigorous, and grounds for refusing entry to an alien are growing as each state's grounds for refusing entry accumulate.<sup>161</sup> The lack of democratic supranational institutions to

152. *Id.*

153. *Id.* art. 5(1)(d), at 87.

154. *Id.* art. 5(1)(e), at 87.

155. *Id.* arts. 28-38, at 95-100.

156. Ray Moseley, *Spared Immigrant Tide, Europe Remains Wary*, CHI. TRIB., Feb. 16, 1992, at 1.

157. Schengen Convention, *supra* note 104, art. 29(3), 30 I.L.M. at 96.

158. *Id.* art. 30, at 96-97.

159. *Id.*

160. Meijers, *supra* note 113, at 1.

161. *Id.* at 1-2. The Convention provides:

An alien wishing at this moment to enter the Netherlands had to meet the conditions spelt out in the Dutch Aliens Act. The authorities are not entitled to refuse entry to an alien actually fulfilling these requirements. After the 1990 Schengen Convention having entered into force this same alien will not only have to fulfill the Dutch conditions but also the German, the French and all the conditions imposed by the other States who are parties to the Convention. One of the conditions for admission into the Netherlands is that the alien is not considered a threat to the Dutch public order. Under the Convention, he is (in principle) also not to be

oversee the Convention's implementation and to assure a uniform voice in its enforcement and interpretation will exacerbate these problems.<sup>162</sup>

The softening of internal border controls, even for EC nationals, may never materialize. National border controls remain necessary to allow member states to exclude people whom the Schengen Information system or state lists report as unwanted.<sup>163</sup> In addition, the EC "accepts that spot checks inside Member States or at borders to prevent organised crime and drug trafficking will always be possible."<sup>164</sup> The result of implementing the Convention is, therefore, not simply a transfer of checks from one border to another, but rather "the introduction of an extra common border control besides a national control on persons."<sup>165</sup>

Another inconsistency with the EC goal of a market without internal frontiers arises from the fact that some external Schengen borders, where checks will be toughened, form part of the internal frontiers of the EC.<sup>166</sup> At these borders, non-EC nationals, whether or not residents, will be subject to thorough searches<sup>167</sup> which, in practice, means EC citizens will undergo at least a cursory examination so states may determine their citizenship.<sup>168</sup>

Even if aliens meet the requirements for entry, the Convention "does not provide for a right of admission for the alien who fulfills all requirements for a short stay, [and] it obliges States to refuse admission to the alien who fails to meet all the requirements."<sup>169</sup> Aliens may not even have the right to appeal a decision barring entry.<sup>170</sup> The Convention will actually abolish the right of an alien to enter the Benelux states for a

admitted if he is a threat to the public order of one of the other Schengen States.

. . . This principle of cumulation runs through the whole regulation of cross-border movement of persons provided for in the 1990 Schengen Convention.

*Id.* at 2.

162. *Id.* at 6.

163. Steenbergen, *supra* note 78, at 71.

164. *The Week in Europe: Maastricht Defended*, ORIGIN UNIVERSAL NEWS SERVICES LTD., Sept. 10, 1992, available in LEXIS, Nexis Library, Omni File.

165. Steenbergen, *supra* note 78, at 71-72.

166. These toughened external frontiers will include Germany's border with Denmark and airports and seaports receiving flights or ships from the United Kingdom, Ireland, Denmark, and Greece.

167. See *infra* notes 128-32 and accompanying text.

168. Tom Walker, *Baker Says Border Controls Must Stay*, THE TIMES (London), June 14, 1991, at 2; see also Sinan Fisek, *Immigration, Europe's Grassroots Woe, Could End on Maastricht Backburner*, AGENCE FRANCE PRESSE, Nov. 29, 1991, available in LEXIS, Nexis Library, Omni File.

169. Steenbergen, *supra* note 78, at 63.

170. *Id.* at 68.

short stay even after meeting their requirements.<sup>171</sup>

The Convention also will reduce opportunities to obtain asylum.<sup>172</sup> Given the growing opposition to asylum seekers, whose increasing numbers have made European states eager to curb their rights, this comes as no surprise.<sup>173</sup> The reluctance to grant asylum has prompted the Schengen states to shift most admission procedures to diplomatic missions in the asylum seekers' states of origin to reduce the number of people who leave their states to claim asylum in Europe.<sup>174</sup> This shift also saves time and money because acceptance rates for asylum applicants are low, and judicial determination of their status can take months or years.<sup>175</sup> The Schengen states would rather decide the fates of these people by rejecting their visa applications than by expelling them after a painfully slow review process once they arrive in the state.<sup>176</sup>

Asylum applicants will suffer further because they have no recourse to a centralized judiciary which would protect them from arbitrary treatment.<sup>177</sup> The likelihood of arbitrary treatment is evident in the Convention's failure to guarantee that a state will decide asylum claims on their merits and will grant refugees' requests to enter or stay in such state once they meet all applicable requirements.<sup>178</sup> A central authority whose decision would bind all states would better protect aliens because under the Convention, contracting states need not abide by another state's decision to grant an asylum request.<sup>179</sup> The Schengen states have made it clear, however, that they will consider one state's decision to refuse asylum as binding upon them all.<sup>180</sup>

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171. *Id.* at 64.

172. José Bolten, *From Schengen to Dublin: The New Frontiers of Refugee Law*, in SCHENGEN CHAPTERS, *supra* note 78, at 25.

173. See *Immigration: New European Commission Communication*, *supra* note 95, at 9.

174. Steenbergen, *supra* note 78, at 63.

175. *Id.* at 73.

176. Tyler Marshall, *Asylum-Seekers Flood Munich, Stir Crisis*, L.A. TIMES, Feb. 18, 1992, at A4; see also Moseley, *supra* note 156, at 1.

177. Bolten, *supra* note 172, at 34-35. People will be kept from entering a state by refusing them a visa when they apply or by refusing them entry when they arrive at a border with a valid visa, since such a visa does not give its holder the right to enter the territory of the issuing state. *Id.* at 64. Germany has expressed its desire to have asylum seekers apply for asylum before they leave for Germany. *Scores, Chores, and Goblins; For Mr. Kohl and the Christian Democrats, It Is Make-or-Break*, THE ECONOMIST, May 23, 1992, at 11 (Survey).

178. Bolten, *supra* note 172, at 24-25.

179. Schengen Convention, *supra* note 104, art. 29(2), 30 I.L.M. at 95.

180. Bolten, *supra* note 172, at 26.



Because the Schengen states voluntarily bind themselves with respect to decisions to refuse asylum, enforcement of the Convention will reduce to one the number of states that will consider an asylum seeker's application, and that one state may refuse asylum without even examining the application on its merits. Such a procedure endangers asylum seekers' freedom of movement by worsening their chances of entering Schengen territory.

The lack of democratic oversight and supranational judicial control in the Convention enables its member states to deviate from their Convention obligations.<sup>181</sup> The Convention does establish an Executive Committee composed of appointed ministers from each member state that will make decisions about the application and interpretation of the Convention.<sup>182</sup> The requirement that the committee can only act unanimously, however, will hamper its effectiveness.<sup>183</sup>

Legislation which certain Schengen states have passed in preparation for the time when the Convention comes into force illustrates the contracting states' intent to restrict aliens' freedom of movement. For example, recent French legislation calls for sanctions against air carriers that bring passengers without valid documentation into France.<sup>184</sup> Amnesty International criticized this type of legislation because it forces airlines "to become 'the judges of the chances of success of bids at seeking [political] asylum.'" <sup>185</sup> Furthermore, these sanctions place an unfair burden on airline personnel by asking them to act as immigration officers, which they are not competent to do.<sup>186</sup> Acting under financial pressures, airline personnel have been known to "conduct . . . unauthorized removals of asylum seekers."<sup>187</sup> Airlines have pointed out that these sanctions fail to take into account the difficulty of determining whether documents are forged or valid.<sup>188</sup> The Danish government underscored the difficulty of this task by recommending that the airlines use "microscopes and ultra-

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181. EC involvement in the Convention could remedy this problem. *See Cruz, supra* note 115, at 54; *see also infra* subparts III(B), (C).

182. Meijers, *supra* note 113, at 5. Decisions of the Executive Committee must be unanimous. Schengen Convention, *supra* note 104, arts. 131-33, 30 I.L.M. at 140.

183. *Id.*

184. *France Adopts Leftist Immigration Bill With Rightist Votes, supra* note 147.

185. *Id.*

186. *See Cruz, supra* note 115, at 41.

187. David Burgess, *Asylum by Ordeal*, 141 *NEW L.J.* 50, 51 (1991). Mr. Burgess, an immigration lawyer, noted that "[t]he most depressing aspects for the lawyers involved have been the ingenuity and worse, the apparent enthusiasm that airline staff have brought to this work." *Id.*

188. *Cruz, supra* note 115, at 41.

violet rays to detect forgeries."<sup>189</sup>

Another disturbing aspect of the French legislation is that it establishes "transit zones" at border posts to hold foreigners arriving in France without proper papers for up to 30 days.<sup>190</sup> Amnesty International considers the effect of these zones to be to "prevent . . . access to (French) territory and the procedures that determine the refugee status of people fleeing persecution."<sup>191</sup> This buttresses the notion that the Convention will diminish democratic procedures and judicial process and make entry for aliens increasingly difficult by preventing access to institutions which would protect them from arbitrary or unconscionable action.

Other Schengen states have moved to restrict aliens' rights in preparation for the Convention coming into effect. Portugal has drafted legislation which would make it more difficult for an alien to receive a visa or residence permit and easier for the state to expel an illegal alien.<sup>192</sup> Italian law now allows border police to turn away asylum seekers before they have the opportunity to formally apply for asylum.<sup>193</sup> Germany is debating whether to amend its Constitution to make asylum more difficult to obtain.<sup>194</sup>

While the Schengen states move to reshape their domestic law to fit the contours of the Convention, progress toward the Convention's implementation has slowed because of inertia, technical problems, and concerns over data protection.<sup>195</sup> The Convention will not become effective until March 1993 at the earliest because of problems in establishing the Schengen Information System (SIS),<sup>196</sup> a computerized database which will maintain the names of people contracting states deem inadmissible.<sup>197</sup> National authorities with access to the SIS will use it to prevent listed people from entering or staying in their state.<sup>198</sup> Schengen states

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189. *Id.* at 42.

190. *France Adopts Leftist Immigration Bill With Rightist Votes*, *supra* note 147.

191. *Id.*

192. *Portugal to Tighten Frontier Controls, Ratify Schengen Accord*, REUTERS LIBR. REP., Jan. 16, 1992, available in LEXIS, Nexis Library, Omni File.

193. Moseley, *supra* note 156, at 1.

194. *See supra* note 114 and accompanying text.

195. Stephen Nisbet, *EC "Schengen" Borders Plan Falls Behind Schedule*, REUTERS LIBR. REP., Jan. 22, 1992, available in LEXIS, Nexis Library, Omni File.

196. *See id.*

197. *Europe: Computing Looks at the Proposed Criminal Intelligence Computer Systems in the Run-Up to 1992*, REUTERS TEXTLINE COMPUTING, Jan. 31, 1991, available in LEXIS, Nexis library, Omni files.

198. *See Schengen Convention*, *supra* note 104, art. 5(d), 30 I.L.M. at 87. Contained within this system will be over 800,000 national police cases in addition to infor-

must complete this system, the "keystone" of the Convention, in order to fully comply with the terms of the Convention.<sup>199</sup>

A final problem with the Convention's treatment of the free movement of people within signatory states is the state's disingenuous claims regarding their purpose. While the contracting parties profess freedom of movement to be the reason for the Convention, in reality they consider this freedom to be a secondary concern. The Convention is primarily concerned with stemming the flow of undesirable aliens across external borders.<sup>200</sup> Another motive of the signatory states centers on political concerns, as some of these states view the Convention as a means of "[cementing] the westward look of German diplomacy."<sup>201</sup> The signatory states may interpret and apply the Convention to serve these purposes rather than to promote the goal of freedom of movement.

### E. *The Convention as a Model for Future EC Action*

The Convention's system for controlling movement will be the model, if not the substitute, for future EC action in this area. Upon signing the Convention, the ministers of the signatory states announced that "[t]he Contracting Parties are of the opinion that the present Convention constitutes an important step towards the realization of an area without internal borders and shall adopt it as their starting point for further activities undertaken by the Member States of the European Communities."<sup>202</sup>

The Convention will serve as a "fallback position" and establish the parameters of the free market if EC action toward that end slows.<sup>203</sup> In fact, EC progress has slowed. The EC has failed in its attempts to harmonize immigration policies.<sup>204</sup> A convention on asylum requests and a proposed convention on external borders are mired in disputes.<sup>205</sup> Inter-

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mation vital to the control of immigration and goods. Julia Hayley, *Six Nation Schengen Accord, A Year Old and a Year Late*, REUTERS LIBR. REP., June 17, 1991, available in LEXIS, Nexis Library, Omni File.

199. *Id.*

200. See Meijers, *supra* note 113, at 1.

201. Nisbet, *supra* note 195. This type of diplomacy seeks to keep German power from being directed at its neighbors and undermining their independence. *Thatcher Says No to Germany and Maastricht Treaty*, REUTERS LIBR. REP., Oct. 8, 1992, available in LEXIS, Nexis Library, Omni File.

202. Schutte, *supra* note 101, at 567.

203. Nisbet, *supra* note 195.

204. SEA, General Declaration on Articles 13 to 19 of the Single European Act, *supra* note 1, at 25.

205. See Nisbet, *supra* note 195.

governmental agreements<sup>206</sup> such as the Convention, coupled with internal dissension, hinder the EC's progress and increase the likelihood the Convention will emerge as the "de facto standard."<sup>207</sup> Indeed, the EC, despite its initial concerns, has realized the Convention presents the best prospect for a unified policy on freedom of movement and has given the Convention its stamp of approval.<sup>208</sup>

The EC member states feel more comfortable with an intergovernmental agreement because they are reluctant to relinquish control of their borders to the EC, because to do so means losing their direct ability to bar entry of "illegal immigrants and criminals."<sup>209</sup> Because police matters are outside the jurisdiction of the EC,<sup>210</sup> member states must maintain their authority over criminal matters.

Another reason the Convention should eclipse EC efforts to promote freedom of movement is that Britain, Denmark, and Ireland have rejected membership in the Convention.<sup>211</sup> Britain is concerned about protecting its borders,<sup>212</sup> and the lack of British membership could serve to prevent the EC from ever assuming the functions over which the Convention has exerted control.<sup>213</sup> Fear that joining the Schengen arrangement could jeopardize the current passport-free travel between Britain and Ireland has motivated Ireland to reject it.<sup>214</sup> Denmark has been con-

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206. Bolten, *supra* note 172, at 15.

207. Hayley, *supra* note 198.

208. *Schengen Agreements: France Ratifies Testing Ground for Europe*, *supra* note 108, at 1. This attitude is reflected in a statement of German Interior Minister Rudolf Seiters: "[f]or Germany, the joining of as many other EC members as possible would be the best and quickest way to progress along the path to a European market without internal borders in the framework of the 12." *Bonn Cabinet Approves Open Border Pact but Split on Asylum*, REUTERS LIBR. REP., Feb. 12, 1992, available in LEXIS, Nexis Library, Omni File.

209. Rone Tempest, *One Europe: The Dream of Unity; Changing Lifestyles; A System Bordering on Chaos; Free Movement Between Countries May Open the Door to Crime and Terrorism*, L.A. TIMES, Feb. 4, 1992, at 7. German authorities made 23,000 arrests and seized three tons of drugs in 1990 at borders with France and the Benelux states. *Id.*

210. *See id.*

211. Suzanne Perry, *EC Works to Remove Border Controls in Europe*, REUTERS LIBR. REP., Jan. 16, 1992, available in LEXIS, Nexis Library, Omni File.

212. Boris Johnson, *EC Anger at British Stand on Frontiers*, DAILY TELEGRAPH (London), Jan. 30, 1992, at 1, available in LEXIS, Nexis Library, Omni File.

213. Nisbet, *supra* note 195.

214. Boris Johnson, *Britain Defies Brussels in Passport Row*, DAILY TELEGRAPH (London), May 12, 1992, at 1, available in LEXIS, Nexis Library, Omni File. There have been indications that Ireland may now support abolishing checks on people arriving from other EC states. *Id.*

cerned that the "open borders" of the Schengen Convention would force the termination of its free travel scheme with Sweden and Norway and would injure merchants who might lose customers to Germany, where the VAT is much lower.<sup>215</sup> Because Denmark is the only EC state sharing borders with any Schengen state, the ability of the states outside the Convention to "force the others to make concessions in such areas as the right of free circulation, [and] the methods of border control at the external borders," will be extremely limited.<sup>216</sup> This lack of leverage indicates that the Convention will become not a "forerunner" of more extensive arrangements under article 8a of the EEC Treaty, but will become "the very realization of those objectives" embodied in the SEA.<sup>217</sup>

#### IV. IMMIGRATION AND SOVEREIGNTY BASED BARRIERS TO THE EXPANSION OF FREEDOM OF MOVEMENT IN THE EC

##### A. *Immigration into the EC*

The EC is of two minds concerning immigration: it desires immigration because some European states are experiencing very low population growth, and it discourages immigration because it cannot accommodate the vast number of people seeking refuge within its borders. This tension is reflected in its immigration policies and practices described below.

##### 1. Extent of Immigration

European states need immigrants to replenish their decreasing populations and to fill low-paying jobs nationals are unwilling to take.<sup>218</sup> France alone will need 315,000 immigrants per year to keep its work force size stable as the population shrinks.<sup>219</sup> Millions of immigrants from Eastern Europe and Africa have been travelling to Europe to fill this population void, many by claiming asylum to avoid strict immigration laws.<sup>220</sup>

The pace of immigration into Europe has accelerated. Germany received a record 256,000 requests for asylum in 1991,<sup>221</sup> and it expects as

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215. Maurice Weaver & David Black, *Shut the Gate, Open the Door*, DAILY TELEGRAPH (London), May 12, 1992, at 17, available in LEXIS, Nexis Library, Omni File.

216. Schutte, *supra* note 101, at 568.

217. *Id.*

218. See Nick Cohen, *Beneath the Underclass*, THE INDEPENDENT (London), Feb. 2, 1992, at 2, available in LEXIS, Nexis Library, Omni File.

219. Ray Moseley, *European Right Profits from Fear of Immigrants*, CHI. TRIB., Feb. 17, 1992, at 1.

220. See *supra* note 156 and accompanying text.

221. *German Cabinet Approves Schengen Accord Despite Split Over Asylum Rights*,

many as 500,000 this year.<sup>222</sup> Some 500,000 illegal aliens reside in Germany, 200,000 of whom arrived in 1991 alone.<sup>223</sup> These aliens supplement the two million legally resident foreign workers.<sup>224</sup> Since 1989, a million people have moved from eastern to western Germany, and this "internal migration" is continuing at the pace of 20,000 per month.<sup>225</sup>

Other European states have had similar experiences. Britain has seen the number of asylum applicants jump tenfold in the 1980s, to a rate of 30,000 per year.<sup>226</sup> France received almost 50,000 asylum applicants in 1990, while Italy rejected 60,000 that same year.<sup>227</sup> France's minority population has reached 4.5 million, with most of those coming from North Africa's Maghreb region.<sup>228</sup> Italy has seen its population of immigrants from the Third World rise from 100,000 in the early 1980s to possibly one million today,<sup>229</sup> a quarter of whom are from North Africa.<sup>230</sup> Spain has seen "a sharp increase in the number of illegal immigrants" arriving from North Africa which the government "fears . . . could turn into a flood."<sup>231</sup>

Immigration will continue because the West European economies are dependent on cheap labor, especially for labor intensive industries such as textiles and tourism.<sup>232</sup> Small businesses require such labor to compete with larger ones whose manufacturing centers are in areas where

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AGENCE FRANCE PRESSE, Feb. 12, 1992, available in LEXIS, Nexis Library, Omni File. Individuals seeking to live in Germany and other EC states often try to do so by claiming asylum and thereby avoiding strict immigration laws. Moseley, *supra* note 219, at 1.

222. *Far-right Leader Favoured as Chancellor-Poll*, REUTERS LIBR. REP., Sept. 12, 1992, available in LEXIS, Nexis Library, Omni File.

223. *Schaeuble Calls for European Solution to Asylum Problem; Many Voices Speak Out in Defense of Foreigners*, WK. IN GERMANY, Nov. 1, 1991, available in LEXIS, Nexis Library, Omni File.

224. *Id.*

225. Marshall, *supra* note 176, at A4.

226. David Wastell, *Refugees or Economic Migrants?* DAILY TELEGRAPH (London), Feb. 10, 1991, at 5, available in LEXIS, Nexis Library, Omni File.

227. *Id.*

228. *Id.* 800,000 of these are Algerians, 1.5 million are from other African countries, which has helped make Islam the second largest religion in France. Moseley, *supra* note 219, at 1.

229. Alexander Stille, *No Blacks Need Apply*, THE ATLANTIC, Feb. 1992, at 28.

230. Alan Cowell, *Attacks on Immigrants Raise Concern in Italy*, N.Y. TIMES, Feb. 9, 1992, at 21.

231. Frank Smith, *Spain Tries to Stem Migrant Tide*, THE TIMES (London), Feb. 14, 1992, at 9.

232. Cohen, *supra* note 218, at 2.

labor is less costly.<sup>233</sup> These needs have helped bring eleven million immigrants to the EC.<sup>234</sup> Political events in Eastern Europe and the poverty, political strife, and "galloping population growth" of North Africa<sup>235</sup> will ensure that a steady stream of immigrants will be arriving at Europe's door for years to come: "[the EC] commissioners are . . . gearing up for greatly increased spending on the . . . regions of the Mediterranean and Eastern Europe. Both the Mediterranean and Eastern Europe present the threat of economic and political disaster, followed by unstoppable immigration."<sup>236</sup>

The collapse of the Soviet Union could generate some three million immigrants in Western Europe in the near future.<sup>237</sup> Surveys conducted in Eastern Europe indicate that as many as thirteen million people "definitely" or "probably" intend to emigrate westward,<sup>238</sup> and over 1.3 million people have left this region since 1989.<sup>239</sup> This trend will not cease until Eastern Europe develops an economic base strong enough to eradicate the incentive for its people to leave.<sup>240</sup> Even conservative estimates place the number of potential emigrants at 4.8 million over the next six years.<sup>241</sup>

The children of aliens within the EC represent another exploding population source.<sup>242</sup> Because the immigrants tend to have larger families than do Western Europeans, immigrants account for ten percent of the births in Europe today, although they comprise only 2.5 percent of

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233. *Id.*

234. This total is comprised of 8 million foreign residents and approximately 3 million illegal immigrants. See Moseley, *supra* note 156, at 1; Fisek, *supra* note 168.

235. Smith, *supra* note 231, at 9.

236. Boris Johnson, *Britain Heads for Row Over EC Budget Rise*, DAILY TELEGRAPH (London), Jan. 20, 1992, at 7, available in LEXIS, Nexis Library, Omni File. The only solution [to the immigration problem] is to help these people live in their own countries." Moseley, *supra* note 156, at 1.

237. Anthony Robinson, *Europe Warned it Must Act on Immigration*, FIN. TIMES (London), Jan. 14, 1992, at I2.

238. David Buchan, *E. Europeans Pessimistic About Effect of Reform*, FIN. TIMES (London), Jan. 29, 1992, at I2 (reporting the results of surveys conducted in Albania, Bulgaria, Czechoslovakia, Estonia, European Russia, Hungary, Latvia, Lithuania, Poland, and Romania).

239. Andrew Gumbel, *Growing Hostility to Immigrants Tarnishes Image of New Europe*, REUTERS LIBR. REP., Oct. 31, 1991, available in LEXIS, Nexis Library, Omni File.

240. John Follain, *EC Hopes to Keep East Europeans at Home by Economic Aid*, REUTERS LIBR. REP., Dec. 7, 1990, available in LEXIS, Nexis Library, Omni File.

241. See Moseley, *supra* note 156.

242. See *id.*

the population.<sup>243</sup>

The magnitude of this population problem is evident in the schemes some states have devised to help alleviate it. Various South American states have expressed a desire to absorb immigrants from Eastern Europe, with at least one state, Argentina, expecting payment from the EC for each person it accepts.<sup>244</sup> The European Commission finds these proposals "attractive" and has arranged for "specialist units in Brussels to draft proposals for the mass migration"<sup>245</sup> even though such an exercise could easily cost the EC billions of dollars.<sup>246</sup> A program such as the South American proposal could be in place as early as the end of 1992.<sup>247</sup>

The cost of this scheme and others like it suggests that opening internal borders will require the EC states to discourage entry through their external borders by either improving their neighbors' living conditions or by rejecting prospective immigrants at their borders. Germany has offered to pay the Ukraine and Russia to prevent ethnic Germans, whose numbers could run as high as twelve million when mixed marriages and relatives are taken into account,<sup>248</sup> from emigrating to Germany.<sup>249</sup> Russia and Germany have even signed a treaty which will re-establish an autonomous region along the Volga River for settlement by ethnic

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243. *Id.* There are 7 million immigrant children in Europe, and their numbers are growing by 400,000 a year, an increase the International Labor Organization has termed "a demographic time bomb." *Id.*

244. See *Argentina, EC to Discuss E. European Immigration*, REUTERS LIBR. REP., Jan. 31, 1992, at 11, available in LEXIS, Nexis Library, Omni File. The countries indicating an interest in recruiting East Europeans in addition to Argentina are Bolivia, Chile, Paraguay, Uruguay, and Venezuela. *Id.* Tom Walker, *Argentina Asks for Europe's Overflow*, THE TIMES (London), Feb. 1, 1992. In February 1992, Argentinean President Carlos Menem met with EC President Jacques Delors to discuss the proposal and the price, an estimated \$20,000 per immigrant. *Id.*

245. Walker, *supra* note 244.

246. The estimated cost for settling 100,000 immigrants in Argentina could reach \$2 billion. *Argentina, EC to Discuss E. European Immigration*, *supra* note 244.

247. *Argentina Will Accept European Immigrants in Return for Funds*, NOTIMEX MEX. NEWS SERVICE, Feb. 1, 1992, available in LEXIS, Nexis Library, Omni File.

248. Konstantin Isakov, *How Many Germans Will Germany Accept?*, MOSCOW NEWS, Feb. 5, 1992, available in LEXIS, Nexis Library, Omni File. The number of people eligible to enter Germany could be as high as 12 million when relatives and spouses of ethnic Germans are included. *Id.*

249. *Most Ethnic Germans in Ex-Soviet Union Want to Go Home*, REUTERS LIBR. REP., Feb. 10, 1992, available in LEXIS, Nexis Library, Omni File; Christopher Beauduffe, *Ukraine to Resettle Ethnic Germans from Former Soviet Union*, AGENCE FRANCE PRESSE, Feb. 4, 1992, available in LEXIS, Nexis Library, Omni File.



Germans.<sup>250</sup>

## 2. Public Hostility to Immigration

Throughout Europe, nationalist parties favoring xenophobic anti-immigrant programs have become increasingly popular. Attacks on foreigners have resulted in deaths and injuries in numerous EC states.<sup>251</sup> An anti-immigrant far-right party in Belgium captured over ten percent of the vote in a recent national election.<sup>252</sup> In France, the far-right National Front captured fifteen percent of the vote in the latest elections, and other more mainstream politicians have begun to adopt elements of its "virulently xenophobic" immigration policies.<sup>253</sup> In Germany, the once subdued far-right antiforeigner Republican Party has regained momentum, and public hostility against immigrants has risen steadily.<sup>254</sup>

The extent of xenophobic sentiments is revealed in polls indicating that "[e]ighty percent of West Germans, 70 percent of French and 66 percent of Britons object to new immigrants."<sup>255</sup> In the face of rising violence against foreigners, the German government has confessed it can

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250. *German Region on Volga River to Be Revived*, L.A. TIMES, July 11, 1992, at A8.

251. At least six foreigners have been killed in Germany over the last few years, and many others have been seriously wounded. See *Schaeuble Calls for European Solution to Asylum Problem; Many Voices Speak Out in Defense of Foreigners*, *supra* note 223. On the first anniversary of German unification, neo-Nazis and skinheads attacked hundreds of foreign workers and burned numerous hostels where such workers lived. Gumbel, *supra* note 239.

252. Moseley, *supra* note 219, at 1. The party, known as Vlaams Blok, wants to expel the 400,000 immigrants currently in the country. *Id.*

253. *Ugly Nationalism*, THE ECONOMIST, Sept. 28, 1991, at 20. The National Front in France has won 10 seats in the European Parliament and won 13 to 16 percent of the vote in January by-elections, substantially increasing its share of the vote from the 9.6 percent it received in the 1988 elections. Moseley, *supra* note 219, at 1.

254. *Far-Right Leader Favoured as Chancellor-Poll*, *supra* note 222. Public hostility has resulted in violence and atrocity, for example, a young Pole in Berlin was attacked by skinheads who cut his tongue out. Moseley, *supra* note 219, at 1.

255. Moseley, *supra* note 219, at 1. A recent survey of Germans concluded that "[o]ne-quarter of Germans agree fully or in large part with the rightist extremist slogan 'Foreigners Out'. . . . More than half of at least 2,000 people surveyed said the extremist rallying cry 'Germany for the Germans' was justified to a great extent." *Poll: German Extremists Gaining*, CHI. TRIB., Sept. 12, 1992, at C4. A perhaps even more disturbing poll result was obtained by an unscientific phone-in poll conducted by Bild newspaper which asked Germans who they thought their next leader should be. Almost a quarter-million calls were made with the result that Franz Schoenhuber, head of the Republican Party and a proud veteran of the Waffen-SS, trounced Chancellor Kohl 39% to 23%. *Far-Right Leader Favoured as Chancellor-Poll*, *supra* note 222.

no longer guarantee the safety of non-Germans.<sup>256</sup>

The worsening European economy will cause hostility to increase as competition for jobs between foreigners and natives intensifies.<sup>257</sup> Europe's economic growth rate has slowed dramatically over the last few years, and prospects for a quick turnaround are bleak. Moreover, the costs of German absorption of the former East Germany will hinder European growth for years, as German interest rates are kept high to prevent inflation and to spread the economic impact of financing the rebuilding over all of Europe.<sup>258</sup>

#### B. *Immigration and Sovereignty Concerns of EC Member States Preventing Further Action to Expand the Freedom of Movement*

In response to pressure from member states, the EC has begun to retreat from its liberal interpretation of free movement with regard to aliens and is supporting intergovernmental agreements restricting freedom of movement for certain people. It is also developing a more conservative position to bring itself into alignment with the views held by its member states.<sup>259</sup>

The EC member states have demonstrated their intention to restrict the rights of aliens through legislation<sup>260</sup> and through the Convention rather than<sup>261</sup> through EC institutions because the treatment of aliens is an extremely explosive political issue and the member states deny the EC the power to act in this field.<sup>262</sup>

British intransigence regarding EC action in immigration and alien control remains particularly firm.<sup>263</sup> The British government considers

256. Leslie Millin, *Trouble in New Germany; Immigrants Keep Eastern Germans from Getting Work*, THE GAZETTE, Jan. 20, 1992, at B3.

257. Moseley, *supra* note 219.

258. Robert J. Samuelson, *Europe's Boom Has Come and Gone*, WASH. POST, Feb. 12, 1992, at A23; *see also* Stanley Reed, *Is Europe's Express Train to Unity Slowing Down?*, BUS. WK., Feb. 3, 1992, at 46. These high German interest rates led to turmoil in the European Monetary System which led to the pound and lira being devalued, the United Kingdom leaving the EMS, and hostility between the UK and Germany. *See* Helmut Schmidt, *Personal View: How to Repair the Anglo-German Rift*, FIN. TIMES (London), Oct. 9, 1992, at 21; Peter Marsh, *Leigh-Pemberton Defends Tactics*, FIN. TIMES (London), Oct. 19, 1992, at 13.

259. *See infra* notes 278-84 and accompanying text.

260. *See supra* notes 144-47 and accompanying text.

261. *See supra* subparts III(B), (C).

262. *See* SEA, General Declaration on Articles 13 to 19 of the Single European Act, *supra* note 1, at 25.

263. Johnson, *supra* note 212, at 1. As Home Secretary Mr. Baker eloquently phrased his country's position, "Britain will not surrender the advantages of being an

the idea of replacing frontier checks with checks only at the exterior EC border "unacceptable"<sup>264</sup> because it believes that the SEA has left it free "to take [its] own precautions against the entry of terrorists, crime, drugs and rabies."<sup>265</sup> Britain also asserts not only that its island geography justifies the maintenance of its own border controls,<sup>266</sup> but that allowing EC authority in this area would be "a dangerous concession to the federalist instincts" of the other EC states.<sup>267</sup>

Britain wants to continue to check non-EC citizens, which necessarily means EC citizens will remain subject to checks along with non-EC citizens because the two cannot be differentiated on sight.<sup>268</sup> Denmark and Ireland have expressed similar desires with regard to their ability "to control non-EC (and thus, in practice, EC) citizens and to undertake anti-terrorist and drug checks at sea and airports."<sup>269</sup>

Non-Schengen states see little advantage in signing the Convention because joining will simply make them susceptible to the forced reception of immigrants who have entered other Schengen states. This is a legitimate concern, especially since Germany wants other states to join the Convention so they can take refugees Germany cannot accommodate.<sup>270</sup> Quite simply, the most likely effect of joining the Convention would be the opening up of Britain and other states to more immigrants, which is exactly what they are trying to avoid.

If the EC cannot act, the result will be intergovernmental agreements such as the Convention. Such agreements are less protective of the freedom of movement than EC action, as events in Germany illustrate.<sup>271</sup> Political pressure abounds to revise the Constitution to make asylum more difficult before ratification of the Convention because of fears that more refugees might try to enter the state "after border checks are removed."<sup>272</sup> Chancellor Kohl, with the support of thirteen cabinet minis-

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island, which makes it easier to control drugs, terrorists, illegal immigrants and rabid dogs." *Id.*; see also *On Border Guard*, DAILY TELEGRAPH (London), Jan. 31, 1992, at 16, available in LEXIS, Nexis Library, Omni File; David Buchan, *UK May Face Court Action if it Continues EC Passport Checks*, FIN. TIMES (London), Feb. 12, 1992, at I2.

264. *On Border Guard*, *supra* note 263, at 16; see also Jonathan Petre, *Voluntary ID Cards Urged by Police*, DAILY TELEGRAPH (London), Feb. 13, 1992, at 6, available in LEXIS, Nexis Library, Omni File.

265. *On Border Guard*, *supra* note 263, at 16.

266. Walker, *supra* note 168, at 2.

267. *Removal of Border Controls*, *supra* note 5, at 13.

268. Walker, *supra* note 168, at 2.

269. Buchan, *supra* note 238, at I2.

270. Fisek, *supra* note 168.

271. See *supra* notes 149, 179, 194 and accompanying text.

272. *Treaty Held Hostage*, THE TENNESSEAN, Feb. 13, 1992, at A6.

ters, stated "that the asylum regulations contained in the Schengen agreement made it necessary that the German constitutional guarantee of asylum<sup>273</sup> for the politically-persecuted be made more restrictive."<sup>274</sup>

The latest efforts by the EC to bring border controls within its purview have failed. The EC treaty signed at Maastricht on February 7, 1992, left the immigration<sup>275</sup> and asylum issues for resolution at the intergovernmental level.<sup>276</sup> Even "[e]fforts to harmonise immigration policies have faltered," and progress toward a common visa policy has stalled because of a dispute between Spain and the United Kingdom.<sup>277</sup>

While the EC claims its involvement in controlling illegal immigration will be necessary to solve that problem,<sup>278</sup> its member states' actions are not consistent with this assertion. The European Parliament recently blocked a financial agreement which would have provided assistance to Morocco,<sup>279</sup> a vote which contradicted the EC's avowed aim of improving the conditions of neighboring states so their citizens will not emigrate.<sup>280</sup> Moreover, the EC itself has recommended compilation of a list of states whose nationals would face automatic denial of asylum.<sup>281</sup>

The desire of EC institutions to guard their sovereignty has led the Court to change its view that the freedom of movement is a fundamental right of people. Now the Court believes that "[t]he free movement of . . . workers and all the other policies laid down in the EEC Treaty are not an end in themselves: they are a means to serve the achievement of European union. EC law must be interpreted accordingly."<sup>282</sup>

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273. Article 16 of the German Constitution states that "politically persecuted persons will be given [the] right of asylum." *German Cabinet Approves Schengen Accord Despite Split Over Asylum Rights*, *supra* note 221; see also John Eisenhammer, *German Hitch Over Open EC Borders*, *THE INDEPENDENT* (London), Jan. 23, 1992, at 12. Under current German law, the claims of all asylum seekers have to be reviewed, regardless of whether another country, even a Schengen country, has already signed it. *Id.*

274. *Bonn Cabinet Supports Ratification of Schengen Agreement, Divided on Asylum Issue*, *THIS WEEK IN GERMANY*, Feb. 14, 1992, available in LEXIS, Nexis Library, Omni File.

275. *EC Treaty at a Glance*, *REUTERS LIBR. REP.*, Feb. 6, 1992, available in LEXIS, Nexis Library, Omni File.

276. *New European Treaty is Signed in Maastricht*, *PR Newswire*, Feb. 7, 1992, available in LEXIS, Nexis Library, Omni File.

277. Perry, *supra* note 211.

278. Smith, *supra* note 231, at 9.

279. *Id.*

280. See *supra* note 236 and accompanying text.

281. Moseley, *supra* note 156, at 1.

282. *Unionist Coup D'Etat*, *BUS. L. BRIEF*, Jan. 1992, available in LEXIS, Nexis Library, Omni File.

The Court used this reasoning to invalidate an agreement between the EC and the European Free Trade Association (EFTA) which would have created the European Economic Area (EEA), which would have led in turn to an expansion of the free movement of persons to the states of the EFTA.<sup>283</sup> The reason for the Court's adoption of this new view of the freedom of movement appears to have been its desire to prevent the creation of a new court with potentially greater power than its own.<sup>284</sup>

The positions of the EC and its member states bode ill for freedom of movement. In their attempts to stem immigration and retain control over who enters their territory, they will halt further liberalization of the freedom of movement. Aliens in particular will find their ability to move to and within the EC impaired as the EC makes asylum increasingly more difficult to receive.

## V. CONCLUSION

Many people stand to benefit substantially from the actions being taken to dismantle internal EC borders. EC nationals and their families will be able to travel to other member states to visit, live, or work with few constraints. The situation for aliens, however, will deteriorate. To enter EC territory, or at least that of the Schengen states, aliens will have to undergo intensive searches. The documents necessary for entry will become more difficult to obtain as member states try to stop immigration by preventing potential immigrants from ever arriving in Europe.

1992 offers the proposal of a "Fortress Europe," an area where EC nationals have an expanded freedom of movement but aliens, particularly those from Eastern Europe and Africa, find themselves subject increasingly to restrictions of their freedom of movement.<sup>285</sup> While this "fortress" is being built in an attempt to keep out immigrants, its construction does not change the fact that Europe's dependency on migrant labor will continue.<sup>286</sup>

The conditions these aliens will be living under in a Europe without internal barriers may be harsh. The EC states will devise systems which will allow them to use these aliens for labor without having to extend to them commensurate rights of residence.<sup>287</sup> Freedom of movement for aliens, then, will be less than for EC nationals. At the very least the EC

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283. *Id.*

284. *Id.*

285. Cohen, *supra* note 218, at 2.

286. *Id.*

287. *Id.*

should grant legally resident aliens rights commensurate with their national neighbors.

In addition to extending rights to these aliens, an additional measure is needed to improve the conditions of aliens residing or trying to enter the Schengen states—the guarantee that asylum applicants will have access to judicial procedures whereby their claims can be adjudicated by a neutral tribunal on the basis of their substantive merit. Only by fairly examining each individual's claim will the EC states avoid their regrettable tendency to view applicants as nuisances rather than as people in need of protection from oppression.

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