

Schengen Acquis: The Development of the Right to Free Movement of Persons within the European Union Legal Framework and the Necessary Reforms to Adapt to Evolving Security Threats in the Region

KAELA MCCABE*

Student Article

I. INTRODUCTION

The creation of the Schengen area marked one of the grandest and most tangible achievements of the European Community.¹ The ability to control one's national borders—one of the most important aspects of sovereignty—had been a cornerstone of politics and a basis for wars in Europe.² With the signing of the Schengen Agreement in 1985, the initial signatories abolished checks at the internal borders and created a single external border.³ The signing of this agreement constituted a significant step towards greater unity through freedom of movement for persons.⁴ As the area steadily grew to include most of the European Union, EU citizens and non-EU citizens alike have enjoyed traveling throughout the zone without enduring customs or passport controls.⁵

The lack of internal border checks, however, creates a threat to national security for the Member States within the Schengen area.⁶ The Schengen *acquis*—the collection of rules and regulations for the Schengen area—contemplates the tendency of Member States to resort to internal border protection and allows for Member States to take action against threats to national security.⁷ The European Commission has outlined ways this can be accomplished unilaterally, through Member States cooperation, or with the aid of EU security agencies.⁸

* Juris Doctor Candidate, 2016, Creighton University School of Law.

¹ See *infra* notes 17-109 and accompanying text.

² See *id.*

³ See *id.*

⁴ See *id.* (discussing the history and development of the Schengen Agreement).

⁵ See *id.*

⁶ See *infra* notes 110-225 and accompanying text.

⁷ See *id.*

⁸ See *id.*

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

The recent influx of refugees from Syria and other Middle Eastern countries is testing the limits of the security measures pursuant to the Schengen Agreement.⁹ Since the beginning of 2015, hundreds of thousands of refugees have been entering the Schengen area through its external border and traveling throughout the area to reach countries with the best social system to support them.¹⁰ In response, several Schengen area countries have reinstated border controls.¹¹ These actions have shown the flexibility of the Schengen acquis in allowing Member States to maintain protection of internal borders within the Schengen area but also cast doubt on the effectiveness of the Schengen acquis in abolishing border checks within the EU.¹²

As distrust and frustration builds among Member States, the question becomes whether the Schengen Agreement will continue to be enforced or whether this crisis has put in motion a preference by states to unilaterally protect their borders for national security and economic reasons.¹³ First, this paper will address the history and development of the Schengen Agreement.¹⁴ Next, it will explore the built-in flexibility of the Schengen Agreement, including the right to reinstate borders and to perform police checks near borders.¹⁵ Finally, it will assess what changes need to be made to the Schengen Agreement in the face of the current refugee crisis so that it will remain effective in the future as security risks to the European Union evolve.¹⁶

II. OVERVIEW OF THE SCHENGEN AGREEMENT

A. HISTORY OF THE SCHENGEN AGREEMENT

The Schengen Agreement of 1985 created the Schengen area in Europe which is defined as “a territory where the free movement of persons is guaranteed.”¹⁷ The European countries that signed the Schengen Agreement agreed

⁹ See *infra* notes 226-68 and accompanying text.

¹⁰ See *id.* (discussing the challenges to the Schengen Agreement posed by the refugee crisis).

¹¹ See *id.*

¹² See *id.*

¹³ See *infra* notes 269-82 and accompanying text.

¹⁴ See *infra* notes 17-109 and accompanying text.

¹⁵ See *infra* notes 110-225 and accompanying text.

¹⁶ See *infra* notes 269-82 and accompanying text.

¹⁷ *The Schengen Area and Cooperation*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:l33020&from=EN> (last updated Aug. 3, 2009) (last visited Mar. 31, 2016).

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

to abolish “all internal borders in lieu of a single external border.”¹⁸ Due to its success among original signatories, the Schengen Agreement was incorporated into the European Union legal framework by the Treaty of Amsterdam on May 1, 1999.¹⁹ The Schengen regulation has continued to be developed through EU legislation, including the Schengen Convention and the Schengen Borders Code.²⁰

Similar to the start of the European Union, which was a result of the European Coal and Steel Community between Germany and France, the foundation for the Schengen Agreement came out of a bilateral agreement between the German and French leaders.²¹ Throughout the early 1980’s, the idea of creating a passport-free zone in the European Community was met with resistance.²² Denmark, Greece, Ireland and the UK resisted the idea of free movement of persons.²³ Some nations preferred to have a system that only applied to European Union citizens while keeping internal border controls for non-EU citizens.²⁴ Other nations envisioned free movement for everyone.²⁵ This debate ultimately deadlocked the Council.²⁶

In response to the lack of action at the EC level, the former French president Francois Mitterand and the former German chancellor Helmut Kohl signed the Saarbrücken Agreement removing border checks between the two countries in 1984.²⁷ The following year, Germany and France signed the Schengen Agreement of 1985 with Belgium, the Netherlands, and Luxembourg.²⁸ The agreement was named Schengen after the town in the Luxembourg where it was signed.²⁹ While

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *Citizenship Pathways and Border Protection: EU Schengen Area*, LIBRARY OF CONGRESS, <http://www.loc.gov/law/help/citizenship-pathways/euschengen.php> (last updated July 30, 2015).

²¹ Robert Fischer, *THE EUROPEANIZATION OF MIGRATION POLICY: THE SCHENGEN ACQUIS BETWEEN THE PRIORITIES OF LEGAL HARMONIZATION AND FRAGMENTATION* 37 (2012).

²² Ulrich Krotz & Joachim Schild, *SHAPING EUROPE: FRANCE, GERMANY, AND EMBEDDED BILATERALISM FROM THE ELYSÉE TO THE TWENTY-FIRST CENTURY POLITICS* 171 (2012).

²³ *Id.*

²⁴ *The Schengen Area and Cooperation*, *supra* note 17.

²⁵ *Id.*

²⁶ Krotz & Schild, *supra* note 22.

²⁷ Fischer, *supra* note 21.

²⁸ *Id.*

²⁹ *The Schengen Area and Cooperation*, *supra* note 17.

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

the agreement had been signed, it would not be enforceable until the signatories had agreed to the implementation of the agreement.³⁰

In 1990, the Convention Implementing the Schengen Agreement was drafted to supplement the Schengen Agreement of 1985 and set forth the “arrangements and safeguards for implementing the freedom of movement.”³¹ The Convention laid out the mechanisms for implementing the uniform Schengen visa, determining in which state an asylum application would be submitted, and outlining measures to address cross-border crime, police cooperation, and judicial cooperation.³² The Schengen Agreement and these associated regulations became known as the “Schengen acquis.”³³

Once the necessary technical and legal prerequisites of the Schengen acquis were put into place in each of the signatory Member States, the Convention took effect in 1995.³⁴ The border-free Schengen area gradually created tangible benefits for the members including crime-related information exchange and travel free of border controls.³⁵ This led to a “process of both deepening and widening of the Schengen cooperation.”³⁶ As the benefits of the Schengen area became apparent to other countries, there was a steady expansion of the area to include more EU Member and non-Member States.³⁷ There was also increased cooperation and joint legislation on more Schengen-related issues among Member States.³⁸ The deepening and widening of Schengen cooperation gradually led to its inclusion into the European Union legal framework.³⁹

³⁰ Gerrit Huybregts, *The Schengen Agreement and the Schengen Acquis: 25 Years of Evolution*, 16 ERA F.: J. ACAD. EUR. L. 379, 380 (2015).

³¹ European Commission Press Release MEMO/10/249, The European Union celebrates the 25th anniversary of the Schengen Area (June 11, 2010).

³² *The Schengen Agreement*, GERMAN FEDERAL FOREIGN OFFICE (Dec. 12, 2013), http://www.auswaertiges-amt.de/EN/EinreiseUndAufenthalt/Schengen_node.html.

³³ *Id.*

³⁴ *The Schengen Area and Cooperation*, *supra* note 17.

³⁵ European Commission, THE SCHENGEN AREA 5 (Dec. 12, 2008), http://biblio.central.ucv.ro/bib_web/bib_pdf/EU_books/0056.pdf.

³⁶ Krotz & Schild, *supra* note 22, at 171.

³⁷ *Id.*

³⁸ *The Schengen Area and Cooperation*, *supra* note 17.

³⁹ *Id.*; Fischer, *supra* note 21, at 38.

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

B. SCHENGEN AGREEMENT INTEGRATED INTO EUROPEAN UNION LEGAL FRAMEWORK

The Schengen Agreement was absorbed into European Community law with the Treaty of Amsterdam in 1999.⁴⁰ Integration of the Schengen acquis into the Treaty of Amsterdam empowered the Council to implement and build upon the policies of the Schengen Agreement and provided the Court of Justice of the European Community ("ECJ") jurisdiction to enforce it.⁴¹ However, the Treaty of Amsterdam explicitly stated that the jurisdiction of the ECJ did not extend to matters of internal security related to the Schengen Convention.⁴²

The Treaty of Amsterdam emphasized that the integration of the Schengen Agreement would lead to "enhancing European integration" and "enabling the European Union to develop more rapidly into an area of freedom, security and justice."⁴³ The Treaty also made admission for candidate Member States into the European Union dependent upon acceptance of the Schengen acquis.⁴⁴ Article 8 of the Treaty stated that the Schengen acquis "must be accepted in full by all States candidates for admission."⁴⁵ Despite this hardline statement, the Treaty included several exceptions: (1) Ireland and the United Kingdom; (2) Denmark; and (3) Non-EU Member States.⁴⁶

1. *The Special Arrangement of Ireland and the United Kingdom*

Ireland and the United Kingdom did not agree to the Schengen acquis and were thus not bound by the provision in the Treaty of Amsterdam.⁴⁷ However, the Treaty kept the door open to their admission, stating in Article 4 that "Ireland and the United Kingdom of Great Britain . . . may at any time request to take part in some or all of the provisions of this acquis."⁴⁸ Unlike other states, this provision

⁴⁰ See Treaty of Amsterdam amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. (C 340) 01 [hereinafter Treaty of Amsterdam].

⁴¹ *Id.* at 19.

⁴² Simon Hix & Bjorn Hoyland, *THE POLITICAL SYSTEM OF THE EUROPEAN UNION* 278 (3d ed. 2011); Treaty of Amsterdam, *supra* note 40, arts. K.7.

⁴³ Treaty of Amsterdam, Protocol B (Protocol integrating the Schengen acquis into the framework of the European Union).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 93.

⁴⁸ *Id.*

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

allows Ireland and the UK to take part in only some of the provisions without accepting the full *acquis*.⁴⁹

Neither country has accepted the Schengen *acquis* nor participated in common border policies with the European Union.⁵⁰ Ireland and the United Kingdom already participate in the Common Travel Area which allows for free movement of persons between the two countries.⁵¹ Therefore, if Ireland joins Schengen independent of the United Kingdom, it will no longer have an open border with the UK.⁵² The country's leaders have repeatedly stated that such a move is not in their best interest.⁵³

However, both countries have agreed to police cooperation with the Schengen countries.⁵⁴ The ECJ has limited the extent of this police cooperation if the countries continue to refuse to adopt the Schengen *acquis*.⁵⁵ In 2000, the UK petitioned the Council to also have access to the Visa Information System—a coordinated database that collects and processes data for visa applicants to the Schengen area—and argued that the VIS was within police cooperation and not one of the Schengen *acquis*.⁵⁶ The ECJ ruled that the VIS was an integral part of the Schengen *acquis* and the UK could only gain access to it if it agreed to the rest of the Schengen *acquis*.⁵⁷ The Court stated that the Member States that are signatories to the Schengen *acquis* are not required “to provide for special adaptation measures for the other Member States which have not taken part in the adoption of the measures relating to earlier stages of the *acquis*’ evolution.”⁵⁸ This ruling indicates that the ECJ may have reached a limit in allowing Ireland and the UK to accept only some of the Schengen *acquis* without accepting both the benefits and burdens of the full *acquis*.⁵⁹

⁴⁹ Huybreghts, *supra* note 30, at 382.

⁵⁰ *Schengen and the Common Travel Area*, The Scottish Gov’t, <http://www.gov.scot/Publications/2013/11/5894/16> (last updated Dec. 6, 2013).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Case C-482/08, *United Kingdom v. Council*, 2010 E.C.R I-10435, I-10440.

⁵⁵ *See Id.*

⁵⁶ *See id.* at I-10450.

⁵⁷ *Id.* at I-10455-56.

⁵⁸ *Id.* at I-10457.

⁵⁹ *See generally id.* (discussing how if the VIS were merely a police cooperation measure rather than an element of the common policy, it “would enable all the Member States to participate in the laying down of the detailed rules for

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

2. *The Special Position of Denmark*

Similarly, the Treaty of Amsterdam states that Denmark is in a special position to accept only some of the provisions of the Schengen acquis.⁶⁰ Denmark fully implements the Schengen acquis, but it does not agree to the “implementation and application of future decisions taken under the Agreement.”⁶¹ It will decide on a “case-by-case basis whether to participate in the further development of the acquis under international law” and whether to implement “Community law developed without its participation into its national law.”⁶² The Treaty gives Denmark “a period of 6 months after the Council has decided on a proposal or initiative to build upon the Schengen acquis” to decide if it will implement the Council decision or not.⁶³ However, Denmark must “implement certain measures relating to the common visa policy.”⁶⁴

3. *Non-EU Member States as Associated Countries*

The Treaty also lays out the process for including non-EU member states into the Schengen area.⁶⁵ Iceland and Norway, neither of which are members of the European Union, were included in the Treaty of Amsterdam as indicating their “intention to become bound” by the Schengen Agreement.⁶⁶ Countries that are not members of the European Union but are bound by the Schengen acquis are referred to as Associated Countries.⁶⁷ Both Switzerland and Liechtenstein joined later as Associated Countries.⁶⁸

Following the signing of the Treaty of Amsterdam, there was confusion over “whether new legislation based on the Treaties would become a development

consultation of the VIS, even though some of them did not participate in the definition of the principles which governed the establishment of that database on visas, are not obliged to enter in the system the data for all visa applications received by them, and do not contribute to the management or financing of the system.”).

⁶⁰ Treaty of Amsterdam, Protocol B (Protocol on the position of Denmark).

⁶¹ *The Schengen Agreement*, *supra* note 32; *see also id.*

⁶² *The Schengen Agreement*, *supra* note 32.

⁶³ Treaty of Amsterdam, Protocol B (Protocol on the position of Denmark).

⁶⁴ *The Schengen Agreement*, *supra* note 32; *see also id.*

⁶⁵ *See* Treaty of Amsterdam, Protocol B (Protocol integrating the Schengen acquis into the framework of the European Union).

⁶⁶ *Id.*

⁶⁷ *See* Huybrechts, *supra* note 30, at 381 (discussing the integration of Non-EU Member States into the Schengen area).

⁶⁸ *Id.* at 386.

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

of the Schengen acquis.”⁶⁹ If so, then the Associated Countries would “automatically become associated with parts of the European Union law not regulated in the Schengen Convention.”⁷⁰ To resolve this confusion, the Council of the European Union issued a decision in May 1999 on the “implementation, application and development of the Schengen acquis” for Associated Countries.⁷¹ The decision listed the areas for closer cooperation that were regarded as “Schengen-relevant”: border policy, data protection, the Schengen Information System, limited police cooperation, judicial cooperation and the integrated visa policy.⁷² The Council signed Association Agreements with each of the Associated Countries separately which enables them “to cooperate through the Mixed Committee” when issues related to the Schengen Agreement are being discussed.⁷³ This allows Associated Countries to be “fully involved in the decision-shaping process of Schengen-relevant EU/EC measures, but decision taking will take place in the Council bodies.”⁷⁴ Associated Countries may draft proposals, but those must be introduced by the Commission or a Member State of the European Union.⁷⁵

C. DEVELOPMENT OF THE SCHENGEN ACQUIS WITHIN THE EU LEGAL FRAMEWORK

Since its integration into the Treaty of Amsterdam, the Schengen area has become “a cornerstone of European unity, along with the euro and a single market.”⁷⁶ Free movement of persons within the Schengen area is now listed as a “fundamental right guaranteed by the EU to its citizens.”⁷⁷ This has been the result

⁶⁹ *Id.* at 381.

⁷⁰ *Id.*

⁷¹ Council Decision 1999/439, 1999 O.J. (L 176) 36.

⁷² *Id.* at 31-32.

⁷³ Bernd Martenczuk & Servaas van Thiel, JUSTICE, LIBERTY, SECURITY: NEW CHALLENGES FOR EU EXTERNAL RELATIONS 151 (2008).

⁷⁴ *Id.* at 153.

⁷⁵ *Id.*

⁷⁶ Melissa Eddy & Dan Bilefsky, *Austria, Slovakia, and the Netherlands Introduce Border Controls*, N.Y. TIMES (Sept. 15, 2016), http://www.nytimes.com/2015/09/15/world/europe/europe-migrants-germany.html?_r=0.

⁷⁷ *Schengen Area*, EUROPEAN COMMISSION, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/index_en.htm (last updated Jan. 29, 2016).

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

of a steady development of Schengen-related legislation within the EU legal framework.⁷⁸

With the admission of new members to the Schengen area and guidance needed for increased cooperation, the European Union updated the rules and regulations of the Convention.⁷⁹ In 2006, the European Parliament and the Council passed Regulation (EC) No 562/2006 which established “a Community Code on the rules governing the movement of persons across borders,” commonly known as the Schengen Borders Code (“the Code”).⁸⁰ The Code added to and repealed parts of the Schengen Convention.⁸¹ The Code emphasized the need for members to remove all obstacles to the free movement of people and goods across borders within the area.⁸² However, the Code laid out improved measures for “integrated management of the external borders.”⁸³ Member states need to lay down “conditions, criteria and detailed rules governing checks at border crossing points” and “designate the national service or services responsible for border-control tasks in accordance with their national law.”⁸⁴ The Code also allows for security checks to be carried out at airports.⁸⁵

The role of the Schengen area continues to be an essential part of the EU legal order as evidenced by its prominence in the 2012 Treaty on the Functioning of the European Union (“TFEU”).⁸⁶ Article 67 of the TFEU outlined the general provisions of the EU, which included providing “an area of freedom, security and justice” and “ensur[ing] the absence of border controls for persons.”⁸⁷ The TFEU also emphasized that freedom of movement within the EU is achieved in conjunction with “a common policy on asylum, immigration and external border

⁷⁸ *See id.*

⁷⁹ *The Schengen Area and Cooperation*, *supra* note 17.

⁸⁰ *See* Council Regulation 562/2006, 2006 O.J. (L 105).

⁸¹ Huybrechts, *supra* note 30, at 383.

⁸² *See* Council Regulation 562/2006, 2006 O.J. (L 105).

⁸³ *Id.* (Preamble no. 4).

⁸⁴ *Id.* (Preamble nos. 8, 12).

⁸⁵ The European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex), *FRONTEx AT-A-GLANCE* 10 (2015), http://frontex.europa.eu/assets/Publications/General/Frontex_at_a_Glance.pdf.

⁸⁶ *See generally* Consolidated Version of the Treaty on the Functioning of the European Union, Oct. 26, 2012, 2012 O.J. (C 326) 11 [hereinafter TFEU].

⁸⁷ *Id.* at art. 67

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

control, based on solidarity between Member States.”⁸⁸ Furthermore, the TFEU stated the EU “shall endeavour to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation.”⁸⁹ The intertwining of freedom of movement and these security measures in the TFEU indicate how the Schengen Agreement has grown beyond merely eliminating internal borders and now facilitates important information exchange to combat security risks.⁹⁰

D. CURRENT MEMBERS OF THE SCHENGEN AREA AND NATIONS WITH APPROVAL PENDING

The benefits of the Schengen area have provided an incentive for nearly all of the EU Member states to join.⁹¹ The Schengen area gradually widened to incorporate almost all Member States of the European Union.⁹² Italy joined the agreement in 1990, followed by Spain and Portugal in 1991.⁹³ Between 1992 and 1996, Greece, Austria, Denmark, Finland, and Sweden signed the agreement.⁹⁴ In 2007, Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia joined; Norway and Iceland joined the Schengen area in 1999 as associated countries.⁹⁵ Switzerland and Lichtenstein became associated countries in 2008.⁹⁶ Only six of the twenty-eight EU Member States are not within the Schengen zone: Bulgaria, Croatia, Cyprus, Romania, Ireland and the UK.⁹⁷ Of those, Romania, Bulgaria, Croatia, and Cyprus have expressed an interest in joining

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See generally* TFEU.

⁹¹ *The Schengen Area and Cooperation*, *supra* note 17.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *The Schengen Agreement*, *supra* note 32.

⁹⁶ *The Schengen Area and Cooperation*, *supra* note 17.

⁹⁷ *Schengen: Controversial EU Free Movement Deal Explained*, BBC (Sept. 14, 2015), <http://www.bbc.com/news/world-europe-13194723>.

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

and are awaiting approval for admittance.⁹⁸ In order to join the border-free area, there must be a unanimous vote of its current 26 members.⁹⁹

Romania and Bulgaria began their process to join the Schengen acquis in 2010.¹⁰⁰ Germany, the Netherlands, and Finland have voiced concern about Romania and Bulgaria joining because “both countries have serious corruption issues, and thus do not meet the key conditions for admission.”¹⁰¹ There is concern in their ability to secure the outer borders of the Schengen area, especially Romania’s border on the Black Sea.¹⁰² In September 2015, both Romania and Bulgaria attempted to speed the process by offering to take in thousands of refugees in exchange for admittance into the Schengen area.¹⁰³ The offer has not been accepted by the European Union and Romania and Bulgaria continue to wait for admission.¹⁰⁴

Croatia is adapting its border system to the Schengen requirements and hopes to be included in the Schengen area soon.¹⁰⁵ In July 2015, Croatia began its

⁹⁸ Schengen Visa Info, *Schengen Area Countries List*, <http://www.schengenvisa.info.com/schengen-visa-countries-list/> (last visited Apr. 7, 2016).

⁹⁹ *Germany Blocks Schengen Membership for Bulgaria, Romania*, DEUTSCHE WELLE (Mar. 7, 2013), <http://www.dw.com/en/germany-blocks-schengen-membership-for-bulgaria-romania/a-16656037>.

¹⁰⁰ Marian Chiriac, *Romania Withdraws Bid to Join Schengen Area*, BALKAN INSIGHT (Oct. 7, 2015), <http://www.balkaninsight.com/en/article/romania-bulgaria-face-new-delay-on-joining-schengen-space-10-06-2015>.

¹⁰¹ *Id.*

¹⁰² *Schengen Enlargement to Increase Illegal Migration: Europol*, EU BUSINESS (June 14, 2011), <http://www.eubusiness.com/news-eu/bulgaria-romania.amv>; *Waiting to Join Schengen: Romania a New Gateway to Migrants’ Heaven and Hell*, EURONEWS (Apr. 10, 2015), <http://www.euronews.com/2015/04/10/waiting-to-join-schengen-romania-a-new-gateway-to-migrants-heaven-and-hell/>.

¹⁰³ Georgi Gotev, *Romania to Accept Refugees If Admitted to Schengen*, EURACTIV (Sept. 8, 2015), <http://www.euractiv.com/sections/justice-home-affairs/romania-accept-refugees-if-admitted-schengen-317426>.

¹⁰⁴ *Id.*

¹⁰⁵ *Commission Report to the European Parliament and the Council on Seventh Bi-annual Report on the Functioning of the Schengen area 1 November 2014 - 30 April 2015*, at 10, COM (2015) 236 final (May 29, 2015).

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

Schengen Area membership application and declared its readiness for Schengen evaluation and intent to lift control at its internal borders.¹⁰⁶

Cyprus has also not been accepted into the Schengen area.¹⁰⁷ Due to the tense political situation in the northern part of the island that is occupied by Turkish forces, Cyprus is unable to “exercise effective control over the occupied areas of the Republic.”¹⁰⁸ The internal border dispute has thus brought a halt to its accession into the Schengen area.¹⁰⁹

III. THE FLEXIBILITY OF THE SCHENGEN AGREEMENT TO ALLOW NATIONS TO PROTECT INTERNAL BORDERS

The implementation of the Schengen Agreement has led to the abolition of checks at the common borders within the European Union, but with freedom of movement comes an increased risk to national security.¹¹⁰ Since its inception, the Schengen Agreement has incorporated coordination between the police and the judiciary among signatories to ensure that the lack of border controls does not undermine a nation’s ability to protect itself.¹¹¹ Finding a balance between the necessity for Member States to protect themselves from cross-border crime and the free movement of people has been a continuous process for the European Union.¹¹² In response, the EU has implemented security measures in various forms both on its internal and external borders.¹¹³

¹⁰⁶ *Croatia Starts Schengen Area Membership Application*, CROATIA WEEK (July 2, 2015), <http://www.croatiaweek.com/croatia-starts-schengen-area-membership-application/>.

¹⁰⁷ *Schengen: Controversial EU Free Movement Deal Explained*, *supra* note 97.

¹⁰⁸ *Travel Information*, EMBASSY OF THE REPUBLIC OF CYPRUS, HELSINKI, FINLAND, http://www.cyprusembassy.fi/main/index.php?p=Consular_Section/8.

¹⁰⁹ Steffen Minter, *IRREGULAR IMMIGRATION: AN ECONOMIC ANALYSIS OF POLICIES IN THE EU 25* (Mohr Siebeck, ed., 2015).

¹¹⁰ *See generally The Schengen Area and Cooperation*, *supra* note 17 (“In order to reconcile freedom and security, this freedom of movement was accompanied by so-called ‘compensatory’ measures. This involved improving cooperation and coordination between the police and the judicial authorities in order to safeguard internal security and, in particular, to fight organised crime. With this in mind, the Schengen Information System (SIS) was set up.”).

¹¹¹ *Id.*

¹¹² *See id.*

¹¹³ *Id.*

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

A. INTERNAL BORDER SECURITY

1. *Requirements for Member State Admission into the Schengen Acquis*

To ensure the safety of the Schengen area, the European Union requires that new members to the area are not only interested in joining, but must ultimately prove their “trust and solidarity” before being allowed admission into the area.¹¹⁴ Applicants are evaluated by Member States on the “quality of [their] border controls and visa systems.”¹¹⁵ The applicant must be able to demonstrate that it can control its “external border on behalf of the other Schengen states.”¹¹⁶ It must be able to demonstrate that it can cooperate well with other Schengen states “in order to maintain a high level of security once internal border controls are abolished.”¹¹⁷ It must show its ability to apply the established Schengen rules on “land, sea and air border controls, visa issuing, police cooperation and personal data protection.”¹¹⁸ Finally it must show it can “connect to and use the Schengen Information System (SIS) and Visa Information System (VIS).”¹¹⁹ Once a country joins, it is evaluated every five years “to ensure it maintains the necessary standards.”¹²⁰

2. *Schengen Information System*

Article 39 of the Schengen Agreement established the general requirement of police cooperation within the Schengen area.¹²¹ Title IV of the Convention Implementing the Schengen Agreement effected this cooperation with the Schengen Information System (“SIS”).¹²² The SIS is the main mechanism for

¹¹⁴ Frontex, *supra* note 85, at 8.

¹¹⁵ *Id.*

¹¹⁶ European Commission, EUROPE WITHOUT BORDERS: THE SCHENGEN AREA 5, http://ec.europa.eu/dgs/home-affairs/e-library/docs/schengen_brochure/schengen_brochure_dr3111126_en.pdf (last visited Apr. 7, 2016).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Frontex, *supra* note 85, at 8.

¹²¹ Stephen Kabera Karanja, TRANSPARENCY AND PROPORTIONALITY IN THE SCHENGEN INFORMATION SYSTEM AND BORDER CONTROL COOPERATION 55 (2008).

¹²² *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*

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

cooperation on security within the Schengen area.¹²³ SIS is a database used by authorities of the Schengen member countries to share information.¹²⁴ The Convention further elaborated that SIS is an “automated search procedure, to have access to alerts on persons and property for the purposes of border checks and other police and customs checks carried out within the country.”¹²⁵ The SIS includes cross border cooperation for “persons who may have been involved in a serious crime or may not have the right to enter or stay in the EU.”¹²⁶ It allows members to share information on missing persons, in particular children.¹²⁷ Members also share “information on certain property, such as banknotes, cars, vans, firearms and identity documents that may have been stolen, misappropriated or lost.”¹²⁸

3. *Hot Pursuit*

The Convention also gave police of signatory states the ability to cross borders as part of protecting their national security.¹²⁹ Police officers from one Member State are permitted to enter another Member State in hot pursuit of a suspected criminal.¹³⁰ Hot pursuit allows police officers of one Member State who catch individuals in the act of committing serious offenses “to pursue the perpetrators across the border and detain them on the territory of another Schengen state.”¹³¹ While police can detain the perpetrator, they have no authority to apprehend the individual.¹³² The hot pursuit must cease as soon as the Member State in which the pursuit is occurring requests.¹³³ The police must notify the Member State in which the hot pursuit takes place and the local authorities will

Common Borders, Ger.-Fr., June 14, 1985, 2000 O.J. (L 239) [hereinafter *Convention*].

¹²³ Karanja, *supra* note 121, at 55.

¹²⁴ *Id.*

¹²⁵ *Convention*, *supra* note 122, art. 92.

¹²⁶ Emilio De Capitani, *The Schengen System After Lisbon: From Cooperation To Integration*, 15 Acad. of Eur. Law 101, 105 (2014).

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Convention*, *supra* note 122, art. 41.

¹³⁰ *Id.*

¹³¹ European Commission, *supra* note 116.

¹³² *Convention*, *supra* note 122, art. 41.

¹³³ *Id.*

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

convene to apprehend the person.¹³⁴ Thus, hot pursuit provides a way for police-cooperation across borders to ensure internal border security.¹³⁵

4. *Reinstate Border Controls*

The Schengen Code allows for Member State authorities to reinstate internal border controls for a limited period.¹³⁶ In order to do this, a Member State must show that it believes “there is a serious threat to public policy or internal security.”¹³⁷ This must be limited to 30 days or “for the foreseeable duration of the serious threat if its duration exceeds the period of 30 days.”¹³⁸ In order to reinstate internal borders, a Member State must notify other Member States and the Commission as soon as possible.¹³⁹ The Member State must list the events that constitute a serious threat and have a consultation with the Commission and Member States at least 15 days before reinstating borders to discuss the proportionality of the threat to reinstating the borders.¹⁴⁰ In urgent cases, a Member state may “exceptionally and immediately reintroduce border control at internal borders.”¹⁴¹ The Member State must notify the other Member States and the Commission without delay with the reasons for closing the borders.¹⁴² When a Member State reinstates border controls, the Commission monitors the situation to ensure the Member States’ response is proportional to the threat and keeps the European Parliament and the Council fully informed.¹⁴³

In the past, countries have resorted to reinstating internal border controls as a “reaction to intense migrant flow or during large-scale sports events, such as the Olympics and international football championships, or high-level political

¹³⁴ *Id.*

¹³⁵ *See id.*

¹³⁶ Council Regulation No 562/2006, 2006 O.J. (L 105), art. 23.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at art. 24.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at art 25.

¹⁴² *Id.*

¹⁴³ European Commission Press Release IP/15/5638, European Commission Statement Following the Temporary Reintroduction of Border Controls by Germany, Particularly at the German-Austrian Border (Sept. 15, 2015).

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

events.”¹⁴⁴ It is not uncommon for Member States to reinstate border controls; it has been done seven times since 2013.¹⁴⁵

The Code states that the limited period of 30 days may be prolonged on the same grounds used initially by the Member State.¹⁴⁶ The period may be renewed for periods of up to 30 days and any new elements that the Member State reports will be taken into account.¹⁴⁷ The Member State must supply all the relevant information for prolonging the border control to the other Member States and the Commission.¹⁴⁸ If the Member State prolongs border control three consecutive times, the Member State may be directed to report to the European Parliament.¹⁴⁹

The decision to reinstate borders must also be communicated to the public in a transparent way unless “there are overriding security reasons for not doing so.”¹⁵⁰ The Code requires that a Member State present a report to the Commission, European Parliament, and other Member States on the “operation of the checks” and “effectiveness of the reintroduction” once the border controls have been lifted.¹⁵¹ However, Member States, may at their request, keep the information relating to the reintroduction and prolongation of border controls confidential in these reports.¹⁵²

5. *Case Study: Police Enforcement near Internal Borders*

The Code allows for Member States to protect themselves against security threats via exercise of police powers “insofar as the exercise of those powers does not have an effect equivalent to border checks.”¹⁵³ In 2010, the European Court of Justice (“ECJ”) significantly strengthened the power of Member States to control the people coming inside their borders under this clause of the Code.¹⁵⁴ In cases C-188/10 and C-189/10, Mr. Melki and Mr. Abdeli, Algerian nationals, who were in France illegally and put in detention after police control near the Belgian border, brought suit against the French government, claiming the police control constituted

¹⁴⁴ Frontex, *supra* note 85, at 11.

¹⁴⁵ Eddy & Bilefsky, *supra* note 76.

¹⁴⁶ Council Regulation No 562/2006, 2006 O.J. (L 105), art. 23.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at art. 26.

¹⁴⁹ *Id.* at art. 27.

¹⁵⁰ *Id.* at art. 30.

¹⁵¹ *Id.* at art. 29.

¹⁵² *Id.* at art. 31.

¹⁵³ *Id.* at art. 21.

¹⁵⁴ See Joined Cases 188 & 189/10, In re Melki, 2010 E.C.R. I-05667.

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

a border control within the Schengen area.¹⁵⁵ The French police acted according to Article 78-2, paragraph 4 of the French Criminal Code of Procedure, which provides:

“[I]n an area between the land border of France and the States party to ... Schengen ... and a line drawn 20 kilometers inside that border, and in the publicly accessible areas of ports, airports, and railways or bus stations open to international traffic, the identity of any person may also be checked ... in order to ascertain whether the obligations laid down by law to hold, carry, and produce papers and documents are observed.”¹⁵⁶

The plaintiffs claimed that the French regulation violated the Treaty of Lisbon which abolished internal border controls and “made freedom of movement for persons absolute, irrespective of the nationality of the persons concerned.”¹⁵⁷ The French government argued that the provision was justified by the need to combat crime, much of which happens near border crossings.¹⁵⁸

The ECJ reiterated the definition of ‘border checks’ as stated in the Code as checks that must be “carried out at border crossing points, to ensure that persons may be authorized to enter the territory of the Member State.”¹⁵⁹ The ECJ held that the identity checks authorized by this national legislation “are carried out not ‘at borders’ but within the national territory” and are not carried out “at the time when the border is crossed,” thus they do not fit the definition of border checks.¹⁶⁰ Rather, they are an “exercise of police powers by the competent authorities of a Member State” done within the territory of that Member State, which is expressly authorized in Article 21 of the TFEU.¹⁶¹ Additionally, the ECJ ruled that the national legislation related to checking whether individuals were carrying the required papers and documents was not the same objective as border control.¹⁶²

The ECJ acknowledged that such a regulation cannot “have an effect equivalent to border checks” and that such checks on international trains or toll

¹⁵⁵ *See id.*

¹⁵⁶ Code de procédure pénale [C. Pr. Pén.][Criminal Procedure Code] art. 78-2 (Fr.).

¹⁵⁷ *In re Melki* at I-5734.

¹⁵⁸ *Id.* at I-5737.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at I-5708

¹⁶² *Id.* at I-5707.

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

ways “could constituted evidence of an equivalent effect.”¹⁶³ According to Article 21 of the Code, police checks do not constitute an equivalent effect to border checks if they:

- (i) do not have border control as an objective, (ii) are based on general police information and experience regarding possible threats to public security and aim, in particular, to combat cross-border crime, (iii) are devised and executed in a manner clearly distinct from systematic checks on persons at the external borders, or (iv) are carried out on the basis of spot-checks¹⁶⁴

In the Court’s analysis of equivalent effect, the ECJ upheld the provision that allowed for police action exclusively within 20 kilometers of the border and occurred on public transportation crossing borders, regardless of the person’s behavior or the surrounding circumstances.¹⁶⁵ It found that such facts did “not suffice, in itself, to find that the exercise of that power had an equivalent effect within the meaning of Article 21(a).”¹⁶⁶ Despite finding that this national legislation did not have an effect equivalent to a border control, the ECJ did not provide any guidelines for practical implementation that would avoid having the effect equivalent to a border check.¹⁶⁷

This ECJ ruling clarified the ability of national governments to police their borders so long as the national governments could claim an alternative reason for the police action beyond border control.¹⁶⁸ The ECJ condoned the police control even if it is exclusively limited to areas near borders.¹⁶⁹ Following this case, the European Commission issued a report on the application of the Code and affirmed that areas around the borders “present a particular risk for cross-border crime, so the frequency and intensity of police checks may be higher.”¹⁷⁰ The European

¹⁶³ *Id.* at I-5737.

¹⁶⁴ Council Regulation No 562/2006, 2006 O.J. (L 105), art. 21.

¹⁶⁵ *See In re Melki.*

¹⁶⁶ *Id.* at I-5738.

¹⁶⁷ *See generally id.* (failing to set forth any guidelines for practical implementation).

¹⁶⁸ *See id.*

¹⁶⁹ *See id.*

¹⁷⁰ *Commission Report to the European Parliament and the Council on the Application of Title III (Internal Borders) of Regulation (EC) No 562/2006 Establishing a Community Code on the Rules Governing the Movement of Persons Across Borders (Schengen Borders Code)*, at 3, COM (2010) 554 final (Nov. 13, 2010) [hereinafter *Commission Report on Application of Title III*].

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

Commission limits the checks in that they must be “based on concrete and factual police information and experience as regards threats to public security and must not be systematic.”¹⁷¹ In a survey done by the European Commission, most Member States acknowledged that they “carry out non-systematic, random police checks on the basis of risk assessments of the security situation.”¹⁷² Member States reported that these police checks are often done in cooperation with neighboring states or in joint patrols.¹⁷³

German, Greek, Netherlands, and Slovak’s governments expressed support of systematic police checks in border areas if they remained in compliance with Article 21 of the Code.¹⁷⁴ This case shows how France, Germany, and the Netherlands—who were founding members of the Schengen area—have become proponents of increased police power along the borders.¹⁷⁵ In contrast, the Czech government vehemently opposed such border policing, calling them “disguised border controls.”¹⁷⁶ Following the *In re Melki* ruling, the Commission issued a report stressing Member States “to adapt [their national legislation] to the ruling of the Court of Justice in the *Melki* case as soon as possible.”¹⁷⁷

B. EXTERNAL BORDER CONTROL

The widening of the Schengen area to the states with land, sea, and air borders with non-EU nations increases the potential risk to internal security.¹⁷⁸ Once an individual enters the Schengen area, the lack of border checks throughout the area make traveling easier, and detection of individuals and goods much more challenging.¹⁷⁹ Therefore, securing the external border of the Schengen area is a major security concern for which all of the Schengen states are responsible.¹⁸⁰ The ability of Member States with external borders to protect their national borders implicates the internal security of the rest of the Schengen states.¹⁸¹ As a result, the

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* at 4.

¹⁷⁴ *In re Melki* at I-5735.

¹⁷⁵ *See id.*

¹⁷⁶ *Id.* at I-5735.

¹⁷⁷ Commission Report on Application of Title III, *supra* note 170, at 10.

¹⁷⁸ *The Schengen Agreement*, *supra* note 32.

¹⁷⁹ *Borders and Security*, EUROPEAN COMMISSION 3, http://europa.eu/pol/pdf/flipbook/en/borders_and_security_en.pdf.

¹⁸⁰ *The Schengen Agreement*, *supra* note 32.

¹⁸¹ *Id.*

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

Schengen Agreement allows for various ways that the Member States may cooperate to ensure the external borders are adequately protected.¹⁸²

1. *Visa Information System*

Despite the security risks, it is necessary for business and tourism that the European economies be easily accessible.¹⁸³ Additionally, the external borders must remain open to individuals “seeking refuge from war and persecution.”¹⁸⁴ Therefore, the Schengen states must balance admission with security through common rules on visa requirements and issuance.¹⁸⁵ These requirements and procedures are outlined in the Schengen Code and allow individuals into the Schengen area via an external border.¹⁸⁶ The requirements include: possessing a valid travel document; possessing a valid visa, if required; having a justified purpose for the stay and to have sufficient funds to support oneself; not having an alert issued in the Schengen Information System; and not being “considered a threat to public policy, internal security, public health or the international relations of EU countries.”¹⁸⁷ On October 11, 2014, the European Commission issued an additional requirement pursuant to the Visa Information System that Member States must check fingerprints to ensure that the visa holder matches the information stored in VIS.¹⁸⁸

2. *Financial Assistance to Member States with External Borders*

Once a Member State is admitted into the Schengen area, the European Commission allots financial assistance to the countries specifically to strengthen their border controls on the external border.¹⁸⁹ In the most recent accession of Member States to the European Union in 2004, the European Commission implemented the Schengen Facility to facilitate EU financial support for external

¹⁸² *Id.*

¹⁸³ European Commission, *supra* note 116, at 8.

¹⁸⁴ *Id.*

¹⁸⁵ *See Id.*

¹⁸⁶ *See* Council Regulation No 562/2006, 2006 O.J. (L 105).

¹⁸⁷ Frontex, *supra* note 85, at 10.

¹⁸⁸ *Commission Report to the European Parliament and the Council on Seventh bi-annual report on the functioning of the Schengen area 1 November 2014 - 30 April 2015*, at 12, COM (2015) 236 final (May 29, 2015).

¹⁸⁹ *Commission Report to the Council and the European Parliament on Implementation of the Schengen Facility (2004-2006)*, at 2, COM (2013) 115 final (March 12, 2013).

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

borders.¹⁹⁰ The Schengen Facility gave over 1 billion euros to Estonia, Hungary, Latvia, Lithuania, Poland, the Slovak Republic and Slovenia “to finance measures at the EU’s new external borders to implement the Schengen acquis and external border control.”¹⁹¹ The funds could only be used for constructing or renovating “border crossing infrastructure and related buildings,” “operating equipment,” “training of border guards,” and assistance towards “logistics and operations.”¹⁹² The Commission oversees the projects in the Member States implemented by the funds in order to ensure the funds are used appropriately.¹⁹³

In 2007, the European Parliament and the Council set up the External Borders Fund to further fund the protection of the external borders of the EU.¹⁹⁴ From 2007-2013, the Fund allotted €1820 million to Member States with external borders.¹⁹⁵ The funds were used to improve “efficient management of flows of persons at external borders,” “coordination between border crossing points,” and “surveillance tasks and registration mechanisms at external borders.”¹⁹⁶

3. *Schengen Information System for External Threats*

As mentioned prior in regards to ensuring internal security, Member States also utilize the Schengen Information System (“SIS”) to share information on threats to external border security.¹⁹⁷ A Member State may issue an alert for the purposes of refusing entry to a person which the other Member States can then access.¹⁹⁸ The person must be deemed by the Member State to be a threat to public

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 4.

¹⁹³ *Id.* at 7.

¹⁹⁴ *External Borders Funds*, EUR. COMM’N MIGRATION AND HOME AFF., http://ec.europa.eu/dgs/home-affairs/financing/fundings/migration-asylum-borders/external-borders-fund/index_en.htm. (last updated June 20, 2014).

¹⁹⁵ Decision No. 574/2007/EC of the European Parliament and of the Council of 23 May 2007 Establishing the External Borders Fund for the Period 2007 to 2013 as part of the General Programme “Solidarity and Management of Migration Flows,” O.J. (L 144) 26.

¹⁹⁶ *External Borders Fund: Summaries of EU Legislation (2007-2013)*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=uriserv:l14571> (last updated June 10, 2010).

¹⁹⁷ *The Schengen Area and Cooperation*, *supra* note 17.

¹⁹⁸ *Schengen Information System*, EUROPEAN COMMISSION, http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/index_en.htm (last updated Dec. 16, 2015).

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

policy, public security, or national security.¹⁹⁹ Once a Member State issues an alert in the SIS against a person, that person's entry is automatically refused throughout the Schengen area pursuant to Article 96 of the Code.²⁰⁰ Refusal is automatic even if "the alien is the spouse of a national of a Member State."²⁰¹ However, a third-country national who is a family member of a European Union citizen "is covered by Community law on freedom of movement."²⁰² The complications of automatic refusal under the original SIS system—which did not require explanations from Member States for denying entry—and the freedom of movement under Community law are addressed in the following case.²⁰³

4. *Case Study: Member State Ability to Deny Entry to the Schengen Area*

In *Commission v. Spain*, the ECJ clarified the ability of Member States to deny entry to persons who appear on the list in the SIS I of persons not to be permitted entry but who are also family members of EU citizens and thus covered by Community law on freedom of movement.²⁰⁴ In this case, Spanish authorities refused entry and visas to two Algerian nationals who had family and spouses in the European Union.²⁰⁵ However, there were no reasons listed in the SIS I for why there was an alert entered on these individuals and therefore why they were denied entry into the Schengen area.²⁰⁶ Spain argued that Member States "are obliged, in accordance with Articles 5 and 15 of the CISA, to refuse entry or a visa to an alien for whom an alert has been issued for the purposes of refusing him entry," regardless of the reasons given.²⁰⁷ The ECJ found this "automatic refusal" to be contrary to the laws of the free of movement of persons.²⁰⁸ Rather, a family member of an EU citizen may only be listed on the SIS I for entry refusal if he or she is a "genuine and sufficiently serious threat affecting one of the fundamental interests

¹⁹⁹ Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the Establishment, Operation and Use of the Second Generation Schengen Information System (SIS II), art. 24, <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R1987&from=EN>.

²⁰⁰ European Commission Legal Service, *Summaries of Important Judgments* (April 2006), http://ec.europa.eu/dgs/legal_service/arrets/03c503_en.pdf.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See Case C-503/03, *Comm'n v. Spain*, 2006 E.C.R. I-1123.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at I-1133.

²⁰⁶ *Id.* at I-1134.

²⁰⁷ *Id.* at I-1136.

²⁰⁸ *Id.*

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

of society.”²⁰⁹ The ECJ found that Spanish officials did not fulfil their obligations because they had not analyzed the situation to determine whether the two Algerian nationals “constituted a genuine, present and sufficiently serious threat.”²¹⁰

Following this case, the European Commission strengthened the role of supplementary information with the adoption of the Second Generation Schengen Information System (“SIS II”) in 2013.²¹¹ SIS II created the Supplementary Information Request at the National Entries (“Sirene Bureaux”) which is responsible for ensuring there is sufficient “supplementary information exchange and coordination of activities” in relation to SIS alerts.²¹² In addition, SIS II allows cooperation on “biometrics, new types of alerts, the possibility to link different alerts (such as an alert on a person and a vehicle) and a facility for direct queries on the system.”²¹³ The new system also established “European Arrest Warrants (EAW), which are recognised as having the same legal value as the originals.”²¹⁴ The EAW are intended to make it easier and quicker for Member State authorities to arrest dangerous persons regardless of what country issues the warrant.²¹⁵ The improved SIS II system has provided Member States with a dynamic database for greater coordination in security matters.²¹⁶

²⁰⁹ *Id.* at I-1137.

²¹⁰ *Id.* at I-1141.

²¹¹ See Regulation (EC) No. 1987/2006 of the European Parliament and of the Council of 20 December 2006 on the Establishment, Operation and Use of the Second Generation Schengen Information System (SIS II), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006R1987&from=EN>.

²¹² *SIRENE Cooperation*, EUR. COMM’N MIGRATION AND HOME AFF., http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system/sirene-cooperation/index_en.htm (last updated June 23, 2015).

²¹³ *Glossary*, EUR. COMM’N MIGRATION AND HOME AFF., http://ec.europa.eu/dgs/home-affairs/e-library/glossary/index_s_en.htm#SecondgenerationSchengenInformationSystem (SIS II) (last updated Feb. 19, 2014).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ See *Second Generation Schengen Information System (SIS II) – Former 1st Pillar Regulation: Summaries of EU Legislation*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:114544> last updated July 13, 2010).

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

5. *Member State Cooperation in a European Union Border Control Agency*

The European Union established a border control agency to protect its external borders.²¹⁷ In 2004, the EU created the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (Frontex) as the European border control agency for the external border of the Schengen zone.²¹⁸ Frontex “reinforces and streamlines national border authorities.”²¹⁹ Schengen countries are required to deploy appropriate staff and resources in sufficient numbers to ensure a “high and uniform level of control” at their external borders.²²⁰ To coordinate Frontex in times of migratory crisis, the European Union established the Rapid Border Intervention Teams mechanism (RABIT) in 2007.²²¹ RABIT is intended to assist Member States in the case of an “urgent and exceptional migratory pressure” at its external borders from “large numbers of third-country nationals trying to enter illegally.”²²² Once a Member State requests for RABIT, Frontex has five days to assess whether the situation requires EU-wide assistance on the external border.²²³ If Frontex determines there is a sufficient migratory pressure, all “Member States are obliged to send border guards if requested, unless they themselves face an exceptional

²¹⁷ *Origin*, FRONTEX, <http://frontex.europa.eu/about-frontex/origin/> (last visited Apr. 15, 2016).

²¹⁸ Council Regulation 2007/2004 of 26 October 2004 Establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, 2004 O.J. (L 349) (EC).

²¹⁹ *Mission and Tasks*, FRONTEX, <http://frontex.europa.eu/about-frontex/origin/> (last visited Apr. 13, 2016).

²²⁰ *Frontex*, *supra* note 85, at 11.

²²¹ *RABIT Operation 2010 Evaluation Report*, EUROPEAN AGENCY FOR THE MANAGEMENT OF OPERATIONAL COOPERATION AT THE EXTERNAL BORDERS OF THE MEMBER STATES OF THE EUROPEAN UNION, (Aug. 2013), at 1, http://frontex.europa.eu/assets/Attachments_News/background_rabits_english.pdf.

²²² European Commission Press Release Memo/07/142, FRONTEX and RABITS: the European Union is Stepping up its Operational Efforts Combating Illegal Immigration (Apr. 20, 2007).

²²³ *Id*

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

situation.”²²⁴ The host Member State has command over the Frontex team and the team must follow the Schengen Borders Code.²²⁵

IV. THE IMPACT OF THE MIGRANT CRISIS ON THE SCHENGEN AREA

As with other achievements by the European Union, integration is precariously counterbalanced with the right to national sovereignty, and the migrant crisis has exposed the amount of power that still remains at a national level in the regulation of internal borders of Member States.²²⁶ Coined as “one of the worst humanitarian disasters since the 1940s,” the migration crisis has overwhelmed Europe and put immense pressure on the security of the Schengen area.²²⁷ Hundreds of thousands of “desperate people fleeing war and poverty converge to form an unstoppable human river flowing northward, usually to Germany or Sweden.”²²⁸ The majority of the migrants consist of Sunni refugees fleeing the Assad regime in Syria, Christians and Yazidis escaping the violence of the Islamic State, and many others fleeing poverty and oppression in their African and Middle Eastern countries.²²⁹

A. UNILATERAL INTERNAL BORDER PROTECTION BY MEMBER STATES

The diverging roles of national governments on migration policies and policing has exposed a tendency of Member States to resort to unilateral internal border protection.²³⁰ Several Member States have re-imposed border controls in

²²⁴ European Commission, *Leaders Meeting Western Balkans Route* (2015), http://ec.europa.eu/news/2015/docs/factsheet_rabit.pdf.

²²⁵ *Id.*

²²⁶ See Andrew Higgins, *As Europe Wrangles of Migrant Relocation, Reality Moves Faster*, N.Y. TIMES (Sept. 23, 2015), http://www.nytimes.com/2015/09/24/world/europe/as-europe-wrangles-over-migrant-relocation-reality-moves-faster.html?_r=0.

²²⁷ Walter Russell Mead, *The Roots of the Migration Crisis*, WALL ST. J., (Sept. 11, 2015 2:16 PM), <http://www.wsj.com/articles/the-roots-of-the-migration-crisis-1441995372>.

²²⁸ Andrew Higgins, *As Europe Wrangles of Migrant Relocation, Reality Moves Faster*, N.Y. TIMES (Sept. 23, 2015), http://www.nytimes.com/2015/09/24/world/europe/as-europe-wrangles-over-migrant-relocation-reality-moves-faster.html?_r=0.

²²⁹ Mead, *supra* 227.

²³⁰ See generally Merkel - *Need Joint Refugee Policy for EU Schengen System to Work*, REUTERS (Jan. 7, 2016), <http://www.reuters.com/article/europe-migrants-germany-idUSB4N0ZO02E20160107> (“I don't want to issue any concrete

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

response to the influx of migrants.²³¹ While the Schengen agreement allows for protection of internal borders under certain circumstances, the extent of measures taken and the time period of these measures brings into question whether the Member States continue to abide by the Schengen acquis.²³² The actions of Hungary, Germany, Austria, and France have been the most influential in the chain reaction of Member States closing borders.²³³

Hungary became the focus as an entry point for migrants due to its location as a Member State with an external Schengen area border.²³⁴ Migrants coming from Africa and the Middle East primarily use the Western Balkans Migration Route and attempt to enter the Schengen area via the Hungarian border with Serbia.²³⁵ Hungary has been under scrutiny for its apparent “inability to control the flow of people across its southern border with Serbia.”²³⁶ As the country became overwhelmed with the migrants entering its weakly guarded border, Hungary “dropped visa checks on foreigners buying train tickets for the wealthier countries to the west, particularly Germany.”²³⁷ In an attempt to stem the flow of migrants, the Hungarian parliament passed a new immigration law on September 15, 2015 which imposes imprisonment for illegal border crossings and rapid deportation of

warnings here, or say “what happens if,” but I do want to say that a Schengen system can only work if there is joint responsibility for taking in refugees and joint responsibility for protecting the external borders,’ Merkel told a joint news conference with Romanian Prime Minister Dacian Cioloș.”).

²³¹ *Schengen: Controversial EU Free Movement Deal Explained*, supra 97.

²³² See generally Leo Cendrowicz, *The End of Schengen? Restrictions by Denmark and Sweden are 'Threatening Europe's Passport-Free Zone'*, INDEPENDENT (Jan. 4, 2016), <http://www.independent.co.uk/news/world/europe/the-end-of-schengen-restrictions-by-denmark-and-sweden-are-threatening-europes-passport-free-zone-a6796696.html> (explaining the various border controls reinstated in Europe through unilateral action by Member States and including a quote by German foreign ministry spokesman Martin Schaefer that “Schengen is very important but it is in danger.”).

²³³ See *Schengen: Controversial EU Free Movement Deal Explained*, supra note 97.

²³⁴ *Id.*

²³⁵ *Why is EU Struggling with Migrants and Asylum?*, BBC (Mar. 3, 2016), <http://www.bbc.com/news/world-europe-24583286>.

²³⁶ *Hundreds Break Past Police At Hungary Border For Long March North*, THE HUFFINGTON POST, (Sept. 7, 2015), http://www.huffingtonpost.com/entry/refugees-hungary-border_55edf746e4b002d5c07667a2.

²³⁷ *Id.*

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

“economic migrants.”²³⁸ Hungary also constructed a 13-foot high fence along its 110 mile border with Serbia.²³⁹ Despite these efforts, the response in Hungary indicated to other Member States the EU’s inability to establish effective border controls on the external borders.²⁴⁰ Frontex issued a statement in October 2015 that EU member states “provided the bloc’s Frontex border agency with less than half the personnel it has requested for deployment to migrant hotspots.”²⁴¹ This failure initially to protect the external borders of the Schengen area caused distrust among Member States in the Schengen area, resulting in more internal border protection.²⁴²

Despite Germany’s initial acceptance of unregistered refugees, the large numbers pouring into the country overwhelmed its capacity and caused Germany to re-instate its borders.²⁴³ On September 13, 2015, Germany re-instated border controls, especially on the border with the Czech Republic, Poland, and Austria, and halted all railway traffic to and from Austria.²⁴⁴ This started a chain reaction in which Austria, the Czech Republic, and the Netherlands followed shortly thereafter.²⁴⁵

²³⁸ Krisztina Than & Ivana Sekularac, *Hungary Shuts EU Border, Taking Migrant Crisis into Its Own Hands*, REUTERS (Sept. 15, 2015), <http://uk.reuters.com/article/uk-europe-migrants-hungary-idUKKCN0RE2DS20150915>.

²³⁹ Matt Moffett & Margit Feher, *Migrants Stream Into Hungary, as Fence Rises on Serbian Border*, WALL ST. J. (Sept. 13, 2015), <http://www.wsj.com/articles/migrants-stream-into-hungary-as-fence-rises-on-serbian-border-1442107194>.

²⁴⁰ Than & Sekularac, *supra* note 238.

²⁴¹ *EU States Give "Frontex" Under Half of Needed Border Guards*, THE BALTIC COURSE (Oct. 21, 2015), <http://www.baltic-course.com/eng/legislation/?doc=111943>.

²⁴² *Migrant Crisis: EU Launches New Border Force Plan*, BBC (Dec. 15, 2015), <http://www.bbc.com/news/world-europe-35093827>.

²⁴³ *Refugee Crisis: Germany Reinstates Controls at Austrian Border*, THE GUARDIAN (Sept. 13, 2015), <http://www.theguardian.com/world/2015/sep/13/germany-to-close-borders-exit-schengen-emergency-measures>.

²⁴⁴ *Id.*

²⁴⁵ Eddy & Bilefsky, *supra* note 76; Morgan Winsor, *EU Refugee Crisis: Czech Republic Beefs up Security on Austrian Border After Germany Reimposes Controls*, INT’L BUS. TIMES (Sept. 13, 2015), <http://www.ibtimes.com/eu-refugee-crisis-czech-republic-beefs-security-austrian-border-after-germany-2094564>.

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

Austria has no external Schengen borders, but its internal borders with Hungary, Slovenia, and Germany made it a major corridor for migrants entering from the Baltic region seeking to reach Germany and Sweden.²⁴⁶ In response to Germany's announcement on the previous day, Austrian officials announced they would be closing the border with Hungary for up to six months on September 14, 2015.²⁴⁷ The Austrian government deployed over 2,000 soldiers to patrol and conduct border checks along the border between Hungary and Austria.²⁴⁸ Austria also announced the construction of a razor wire fence along a 2.5 miles stretch on the border with Slovenia that has been a corridor for migrants.²⁴⁹ In addition to this initial border fence, Austria announced a plan to put "Phase 2" of the fence into effect to cover more of the Slovenian border "if the Slovenian measures do not work and it comes to illegal border crossings."²⁵⁰ Both Hungary and Slovenia are members of the Schengen area.²⁵¹

France reinstated border controls on November 13, 2015, shortly after terrorist attacks in Paris.²⁵² This response was regarded as a safety measure after the attack.²⁵³ The French government could not clarify whether the border checks would be "temporary or indefinite, but expected they would last for a considerable period of time."²⁵⁴

As Member States lose faith in the security of the external borders and the security within neighboring Member states, the crisis threatens to destabilize the

²⁴⁶ See *Europe Migrants: Tracing Perilous Balkan Route to Germany*, BBC (Aug. 26, 2015), <http://www.bbc.com/news/world-europe-34039968>.

²⁴⁷ Eddy & Bilefsky, *supra* note 76.

²⁴⁸ Sarah Almukhtar et al., *Closing the Back Door to Europe*, N.Y. TIMES (Oct. 16, 2015), <http://www.nytimes.com/interactive/2015/09/15/world/europe/migrant-borders-europe.html>.

²⁴⁹ Francois Murphy, *Austria Plans Border Fence with Slovenia to Control Migrant Flow*, HUFFINGTON POST (Nov. 13, 2015), http://www.huffingtonpost.com/entry/austria-plans-border-fence-with-slovenia-to-control-migrant-flow_5645e7a9e4b0603773489317.

²⁵⁰ *Id.*

²⁵¹ *The Schengen Area and Cooperation*, *supra* note 17.

²⁵² Peter Foster, *Paris Attacks: France to Call for Effective Suspension of Schengen Open Borders*, THE TELEGRAPH (Nov. 16, 2015), <http://www.telegraph.co.uk/news/worldnews/europe/france/11998301/Paris-attacks-France-to-call-for-effective-suspension-of-Schengen-open-borders.html>.

²⁵³ *Id.*

²⁵⁴ *Id.*

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

Schengen area and further the disillusionment of relations between Member States.²⁵⁵ In addition to Hungary, Austria, Germany, and France, the Czech Republic, Slovakia, the Netherlands, and Sweden have also reinstated border controls.²⁵⁶

B. THE EUROPEAN UNION RESPONSE

In response to so many nations closing borders to halt the flow of migrants, the EU Commission President, Jean-Claude Juncker, called free movement under Schengen “a unique symbol of European integration” in his State of the Union Address on September 9, 2015, and demanded “better joint management of our external borders and more solidarity in coping” with the influx.²⁵⁷ There is concern that Member States will extend the temporary reinstatement of borders to permanent borders.²⁵⁸ The European Council President showed his acknowledgment of the threat but his confidence in the system in his announcement that “Saving Schengen is a race against time. And we are determined to win that race.”²⁵⁹ Therefore, the European Union leaders have set forth a plan for joint action.²⁶⁰

After months of massive numbers of migrants illegally entering the external borders of the Schengen area, it became clear that Member States acting individually would not solve the migration problem affecting all of the European Union.²⁶¹ Therefore, on October 25, 2015, European Union leaders met to discuss

²⁵⁵ Ian Traynor & Helena Smith, *EU Border Controls: Schengen Scheme on the Brink after Amsterdam Talks*, THE GUARDIAN (Jan. 26, 2016), <http://www.theguardian.com/world/2016/jan/25/refugee-crisis-schengen-area-scheme-brink-amsterdam-talks>.

²⁵⁶ Almukhtar, *supra* note 248.

²⁵⁷ European Commission Press Release IP/15/5638, *supra* note 143.

²⁵⁸ Simon Marks & Silvia Amaro, *Analysis: Brussels Attacks Raise New Worries over Future of Schengen*, EURO INSIGHT (Mar. 23, 2016), <https://euroinsight.mni-news.com/posts/analysis-brussels-attacks-raise-new-worries-over-future-of-schengen-2717>.

²⁵⁹ Alastair MacDonald, *Europe's 'Race Against Time' on Migrants Leads to Turkey*, REUTERS (Nov. 12, 2015), <http://uk.reuters.com/article/uk-europe-migrants-eu-idUKKCN0T11GZ20151112>.

²⁶⁰ See European Commission IP/15/5904, Meeting on the Western Balkans Migration Route: Leaders Agree on 17-Point Plan of Action (Oct. 25, 2015), http://europa.eu/rapid/press-release_IP-15-5904_en.htm.

²⁶¹ *Id.*

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

a way to cope with the flow from the Western Balkans Migration Route.²⁶² Following this meeting, the European Commission President, Jean-Claude Juncker, announced that the countries had agreed on a “17-point plan of pragmatic and operational measures to ensure people are not left to fend for themselves in the rain and cold.”²⁶³ One of the major aspects of this plan is border management.²⁶⁴

The 17-point plan seeks to increase efforts by Member States to manage external borders of the European Union almost exclusively by use of Frontex.²⁶⁵ The plan includes “upscaling the Poseidon Sea Joint Operation in Greece,” an operation by Frontex; “reinforcing Frontex support at the border between Bulgaria and Turkey;” “strengthening border cooperation between Greece and the former Yugoslav Republic of Macedonia, with increased UNHCR engagement;” “Frontex support for Greece at its external land border;” “Working together with Frontex to monitor border crossings and support registration and fingerprinting at the Croatian-Serbian border crossing points;” “Strengthening the Frontex Western Balkans Risk Analysis Network with intensified reporting from all participants;” and engaging, where appropriate “the Rapid Border Intervention Team (RABIT) mechanism, which should be duly equipped.”²⁶⁶ The 17-point plan also emphasizes “the principle of refusing entry to third country nationals who do not confirm a wish to apply for international protection (in line with international and EU refugee law).”²⁶⁷ The joint agreement on the 17-point plan indicates that Member States are willing to cooperate on protecting the external borders as an alternative to unilaterally protecting internal borders.²⁶⁸

V. THE FUTURE OF THE SCHENGEN AREA

The Schengen acquis are designed to be a flexible, sophisticated set of rules that Member States can utilize both to facilitate free movement of persons and use

²⁶² *Leaders Meet on Refugee Flows Along the Western Balkan Route*, EUROPEAN COMMISSION (Oct. 25, 2015), http://ec.europa.eu/news/2015/10/20151025_en.htm.

²⁶³ European Commission Press Release IP/15/5904, *supra* note 260.

²⁶⁴ *Id.*

²⁶⁵ *Leaders' Statement, Leaders' Meeting on Refugee Flows Along the Western Balkans Route*, EUR-LEX, at 3, http://ec.europa.eu/news/2015/docs/leader_statement_final.pdf.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

²⁶⁸ See Susannah Cullinane, *Migrant Crisis: Leaders Agree to 17-Point Plan on European Route*, CNN (Oct. 26, 2015), <http://www.cnn.com/2015/10/26/europe/europe-migrant-crisis/>.

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

as a source of power to reinstate border controls.²⁶⁹ The *acquis* are not only used in ensuring freedom of movement but also providing uniformity in important areas such as visa requirements, police cooperation, and sharing of important security information.²⁷⁰ They ensure uniformity in business, traveling, and security while also allowing certain members to tailor their membership to their specific needs.²⁷¹ They allow EU and non-EU citizens to experience a tangible aspect of the EU with significant benefits.²⁷²

While there is uniformity in certain aspects of the application Schengen *acquis*, there is a lack of homogenized protection of external borders.²⁷³ The lack of protection of external borders is a weakness of the application the Schengen *acquis* that undermines the security of its internal borders.²⁷⁴ This has led to distrust among Member States that the Schengen area is secure and they have thus resorted to closing internal borders in times of crisis.²⁷⁵ Therefore, improved coordination on protection of external borders will be a focus in reforming Schengen.²⁷⁶ As evidenced by the 17-point plan agreed on by EU leaders, joint action at the external borders is a weakness in the Schengen area that Member States recognize and are attempting to remedy through increased cooperation.²⁷⁷ This will be a focus in the continued evolution of the Schengen *acquis*.²⁷⁸

Recent actions by Member States reinstating border controls have made critics question whether Schengen *acquis* are at risk of becoming obsolete.²⁷⁹

²⁶⁹ See *Schengen Borders Code*, EUR-LEX, <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:114514&from=EN> (last updated Mar. 14, 2014).

²⁷⁰ *Id.*

²⁷¹ *Schengen Area*, *supra* note 77; see also Huybreghts, *supra* note 30, at 382.

²⁷² European Commission, *supra* note 116, at 3.

²⁷³ European Commission Press Release IP/15/6327, A European Border and Coast Guard to Protect Europe's External Borders (Dec. 15, 2015), http://europa.eu/rapid/press-release_IP-15-6327_en.htm?locale=EN.

²⁷⁴ *Id.*

²⁷⁵ See *Schengen: Controversial EU Free Movement Deal Explained*, *supra* note 97.

²⁷⁶ See European Commission Press Release IP/15/6327, *supra* note 273.

²⁷⁷ See Cullinane, *supra* note 268.

²⁷⁸ See European Commission Press Release IP/15/6327, *supra* note 273.

²⁷⁹ See Simon Shuster, *Free Travel in Europe Could Be a Casualty of the Paris Attacks*, TIME (Nov. 14, 2015), <http://time.com/4113238/paris-attacks-european-union-borders/>; Romil Patel, *Schengen: Europe Faces 'Race Against Time' to Save*

*CREIGHTON INTERNATIONAL
AND COMPARATIVE LAW JOURNAL*

Reinstatement of border checks, while appearing to be in total contravention of the Schengen acquis, is an important aspect of the agreement that has often been used by countries and followed by a re-opening of borders once a crisis has passed.²⁸⁰ So long as the border checks remain temporary, the recent actions by Member States to reinstate border controls are within the power of Member States under the Schengen acquis.²⁸¹ The question that the European Commission needs to answer is how long these border controls can remain “temporary” and what sanctions the European Union can impose on signatories to the Schengen acquis that continue to have border controls beyond a “temporary” amount of time.²⁸²

VI. CONCLUSION

The Schengen area is one of the greatest accomplishments of the European Union. Since the initial Schengen Agreement, the Member State signatories have contemplated how to balance security with free movement of persons. Therefore, while the Migrant Crisis and other security threats have shown the tendency of states to resort to reinstating border controls, the benefits of the Schengen acquis make a total breakdown of the system unlikely. Rather, these tests will help the acquis adapt to new security threats so that nations can more effectively protect their internal borders while remaining signatories of the Schengen acquis. A coordinated response in protecting the external borders is a key component to ensuring the safety of the internal borders. Borderless travel within the European Union is a major achievement and its founders, Germany and France, will not let it slip away. Rather, they will lead in reforming it to meet the evolving security needs of the region.

Passport-Free Travel Zone, INT’L BUS. TIMES (Nov. 13, 2015), <http://www.ibtimes.co.uk/schengen-europe-faces-race-against-time-save-passport-free-travel-zone-1528485>.

²⁸⁰ Frontex, *supra* note 85, at 11.

²⁸¹ Council Regulation 562/2006, 2006 O.J. (L 105), art. 23.

²⁸² *See id.* at Preamble.