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## Efforts Toward “An Ever Closer” European Union Confront Immigration Barriers

GIOVANNA I. WOLF\*

The single European market envisioned by the Treaty establishing the European Economic Community has evolved from the limited focus on economic unity to the greater goal of social and political unity. This change in focus is illustrated (at least symbolically) by the evolution of the name given to this collaboration which has changed from “European Economic Community” to “European Community” and most recently to “European Union” (EU) or “the Union.”<sup>1</sup> But what is in a name? The EU is home to millions of non-EU nationals whose status in the Union remains unclear.

At minimum, there is an acknowledgment that the free movement of *persons* (as opposed to just *workers* or *citizens*) is essential to achieve a single internal market.<sup>2</sup> “There can scarcely be any doubt that the completion of the internal market, which is the ultimate purpose of the Union, depends, in part, on the creation of a common regime on a number of issues pertaining to non-European immigration and national rules and policies relating to [third-country nationals].”<sup>3</sup> Indeed this goal of free movement of persons is one of the “Four Freedoms” guaranteed by the Treaty on European Union (EU Treaty).<sup>4</sup> This paper will discuss some of the developments and setbacks that continue to challenge the formation of a truly united European Union.

Although the EU Treaty provides for the principle of free movement of persons, the scope of this guarantee and the manner of its implementation are matters on which the Member States have yet to agree. Underlying the disagreement is whether the free movement of “persons” includes both EU and

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1. Treaty on European Union, Feb. 7, 1992, art. A, 31 I.L.M. 247, 255 [hereinafter EU Treaty].

2. The Commission has taken the position that “free movement of . . . persons in Article 8A [now 7A] refers to all persons whether or not they are economically active and irrespective of their nationality.” Kay Hailbronner, *Visa Regulations and Third-Country Nationals in EC Law*, 31 COMMON MKT. L. REV. 969, 975 (1994). See also EU Treaty, *supra* note 1, art. B, 31 I.L.M. at 255 (promoting the establishment of a market “without internal frontiers”).

3. Marie-Claire S.F.G. Foblets, *Europe and Its Aliens After Maastricht: The Painful Move to Substantive Harmonization of Member-States’ Policies Towards Third-Country Nationals*, 42 AM. J. COMP. L. 783, 787 (1994).

4. EU Treaty, *supra* note 1, art. 3, 31 I.L.M. at 257. The four freedoms are “the free movement of goods, persons, services, and capital.” *Id.*

non-EU nationals and to what extent Member States retain the right to discriminate against non-EU nationals.<sup>5</sup> The problem for non-EU nationals is two-fold. First, the free movement of persons is stated as a general principle, which depends on Member State action to give it effect. Second, issues of immigration and asylum policy are specifically grouped under the "Third Pillar" (Justice and Home Affairs) of the EU Treaty as matters of common interest.<sup>6</sup> As such, they depend upon intergovernmental cooperation between the Member States and fall outside the jurisdiction of the Community institutions.<sup>7</sup>

Unless Member States take measures that would implement the guarantees or declarations made in the EU Treaty, individuals cannot derive rights from the treaty itself. For this reason, the European Court of Justice (ECJ), despite its incorporation of the principles of the European Convention of Human Rights (ECHR)<sup>8</sup> as a Community norm, has been reluctant to review questions concerning violations of rights of non-EU nationals.<sup>9</sup> As a result, the ECHR offers minimal protection for non-EU nationals and only in limited circumstances. For example, the preservation of family unity under Article 8 may protect an alien from deportation but only so long as the interests of a citizen are being affected.<sup>10</sup>

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5. See the discussion in Hailbronner, *supra* note 2, at 974-78. See also Foblets, *supra* note 3, at 789-90. Note that the status of non-EU nationals with long-term residency has been determined to be equal to that of nationals, at least regarding certain social services and working conditions. Council Resolution on the Status of Third Country Nationals Residing on a Long-Term Basis in the Territory of the Member States, 1996 O.J. (C 80) 2.

6. EU Treaty, *supra* note 1, Title VI, art. K.1, 31 I.L.M. at 327. The 1996 Inter-Governmental Conference (IGC) will consider whether the field of immigration and asylum should be moved from the third pillar to the first in order to place these matters within the competence of Community institutions. Undoubtedly this proposal will face opposition and is noted only to highlight potential changes to the EU Treaty.

7. Community institutions such as the Commission and Council cannot make policy decisions regarding matters reserved to the member states under the Third Pillar.

8. Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, Europ. T.S. No. 5 [hereinafter ECHR](entered into force Sept. 3, 1953).

9. See EU Treaty, *supra* note 1, art. F, para. 2, 31 I.L.M. at 256 (confirming the incorporation of the ECHR as general principles of Community law). For an analysis of the implications of the ECHR on the free movement of persons in the EU, see Henry G. Schermers, *Human Rights and Free Movement of Persons: The Role of the European Commission and Court of Human Rights*, in *FREE MOVEMENT OF PERSONS IN EUROPE* 235 (Schermers, et al. eds., 1993).

10. For an argument that the ECJ can legitimately be more active in protecting the rights of non-EU nationals, see J.H.H. Weiler, *Thou Shalt Not Oppress A Stranger (EX. 23:9): On the Judicial Protection of the Human Rights of Non-EC Nationals--A Critique*, in *FREE MOVEMENT OF PERSONS IN EUROPE*, *supra* note 9, 248. See also *Should Court of Justice Have More Say on Asylum?*, European Report, Jan. 20, 1996, available in LEXIS, Eurcom Library, EURRPT File (reporting on a proposal urged by the Netherlands,

While the Member States have been unable to agree on how to implement the free movement of persons at the Community level, progress has been made at the regional level in the form of intergovernmental agreements.<sup>11</sup> Most notable is the Schengen Convention of 1990 (Schengen) in which ten of the fifteen current EU members agreed to abolish internal frontiers and cooperate in an effort to enforce external borders.<sup>12</sup> Schengen essentially served as an "experimental garden"<sup>13</sup> or "dress rehearsal"<sup>14</sup> for Union-wide integration. The measures agreed upon generally encompass harmonization of immigration, visa, and asylum policies; cooperation in policing external borders and enforcing laws; and establishing the Schengen Information System.<sup>15</sup> Of primary significance for conferring rights on non-EU nationals in Schengen is Article 21 which recognizes their right of free movement within the Schengen territory "once they have been admitted to the territory by one of the Schengen countries."<sup>16</sup> The question remains as to what will constitute lawful admission. Criteria for uniform visa policies need to be ironed out,<sup>17</sup> as well as the harmonization of immigration policy.

Integration of immigration policy at the Community level has been a hot topic. The European Parliament (EP) has been urging the Commission to prioritize harmonization efforts.<sup>18</sup> The Council has used its right of initiative

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which would give the ECJ some power to interpret the Dublin Convention, *infra* note 11, and make preliminary decisions).

11. See, e.g., Convention Applying the June 14, 1985 Schengen Agreement on the Gradual Abolition of Checks at the Common Borders, June 19, 1990, 30 I.L.M. 68 (1991) [hereinafter Schengen Convention]; Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities, June 15, 1990, 30 I.L.M. 425 (1991) [hereinafter Dublin Convention]. Note that intergovernmental agreements such as the Schengen and the Dublin Convention are not necessarily positive steps. They have been criticized for being a means of side-stepping the Union institutions thus limiting the "legal protection granted by them to [third-country nationals] within their territory." Foblets, *supra* note 3, at 792.

12. The Schengen Group consists of Belgium, Germany, France, Luxembourg, the Netherlands, Italy, Spain, Portugal, and Greece. Austria has been granted observer status and Denmark has requested observer status. *The Implementation of the Convention Applying the Schengen Agreement*, RAPID, Mar. 27, 1995, available in LEXIS, Nexis Library, NEWS File.

13. Aleidus Woltjer, *Schengen: The Way of No Return?*, 2 MAASTRICHT J. COMP. L. 256, 259 (1995).

14. Foblets, *supra* note 3, at 796.

15. RAPID, *supra* note 12. It should be noted that issues regarding asylum policy are now governed by the Dublin Convention. Woltjer, *supra* note 13, at 262-63.

16. Woltjer, *supra* note 13, at 263.

17. For an analysis on the developments in the area of visa requirements, see Hailbonner, *supra* note 2.

18. The EP urged the Commission to play a more active role by setting up a Framework-Directive, which provides specific directives on issues of immigration and also provides that asylum-seekers and refugees be handled through a community based system. *Immigration and Asylum Policies Have Gradually*

under Article K.3 of the EU Treaty<sup>19</sup> to issue recommendations that may facilitate the process.<sup>20</sup> Likewise, the Commission has proposed three draft Directives on the elimination of internal barriers.<sup>21</sup> However, these measures place a greater emphasis on controlling illegal immigration which inevitably restricts movement of non-EU nationals. Measures such as visas and identity checks would impede rather than promote free movement within the EU. Currently pending resolution as a Community measure is the Convention on the Crossing of External Frontiers,<sup>22</sup> a measure addressing some of these concerns about free movement.

Despite the apparent sense of urgency on the part of the Union, social integration has progressed slowly. Even the Schengen measures, which finally came into force in March of 1995, have experienced setbacks. France, a Schengen country, raised security concerns to justify temporary reestablishment of some of the internal checks abolished by Schengen.<sup>23</sup> Motivated, perhaps by increasing acts of terrorism, France insists both on tighter controls at external borders and tougher visa laws in other Schengen countries.<sup>24</sup> More recently, Spain moved to control crime on its own terms by refusing to comply with an extradition order and threatened to suspend the Schengen provisions on legal cooperation.<sup>25</sup>

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to *Become Community Based*, Agence Europe, Sep. 30, 1995, available in LEXIS, Europe Library, ALLEUR File. See also *Bid to Harmonise EU Residency Rules for Immigrants*, European Social Policy, Oct. 12, 1995, available in LEXIS, Europe Library, ALLEUR File.

19. EU Treaty, *supra* note 1, art. K.3, para. 2.

20. See, e.g., Council Recommendation of 22 December 1995 on Concerted Action and Cooperation in Carrying Out Expulsion Measures, 1996 O.J. (C 5) 3; Council Recommendation of 22 December 1995 on Harmonizing Means of Combating Illegal Immigration and Illegal Employment and Improving the Relevant Means of Control, 1996 O.J. (C 5) 1; Council Regulation (EC) No. 2317/95 of 25 September 1995 Determining the Third Countries Whose Nationals Must be in Possession of Visas When Crossing the External Borders of the Member States, 1995 O.J. (L 234) 1.

21. The package would require the abolition of national laws imposing duties on transportation companies to conduct internal controls, create a substantive right for all nationals including third country nationals to travel within the EU without discrimination, and amend provisions requiring identity documents. *Border Controls: European Commission to Go Head to Head with U.K. Over Border Controls*, Eurowatch, July 28, 1995, available in LEXIS, Europe Library, EURWCH File.

22. Proposal for a Regulation, Based on Article 100e of the Treaty Establishing the European Community, Determining the Third Countries Whose Nationals Must Be in Possession of a Visa When Crossing the External Borders of the Member States, 1994 O.J. (C 11) 16.

23. *Schengen: France Keeps Its Guard Up*, TRANSPORT EUROPE, July 20, 1995, available in LEXIS, Eurocom Library, EURSOC File.

24. Peter Shard, *Bombs May Put Paid to Free Borders Says Chirac*, DAILY MAIL, Sept. 6, 1995, available in LEXIS, World Library, ALLWLD File.

25. Janet McEvoy, *European Border Accord Hits New Snags*, Reuters World Service, Feb. 9, 1996, available in LEXIS, Nexis Library, WLDNWS File.

Efforts at the Community level have also been frustrated. Fearing both a loss of national sovereignty and security due to its geographic situation as an island, Britain has voiced the greatest resistance against efforts to abolish border controls.<sup>26</sup> Regarding security concerns, it should be noted that the measures set forth in Schengen and the proposed Commission Directives are aimed at abolishing *internal frontiers*. As a condition precedent, they take into account the necessity of supplementing lack of internal checks with increased enforcement at external borders. Enforcement of immigration and police concerns would be dealt with by Community (or intergovernmental) cooperation at all points of initial entry.

Since the United Kingdom is situated outside of continental Europe, the elimination of barriers within the EU should make special provisions that would treat the United Kingdom as a "border state." This has been done for example, by Article 138 of the Schengen Convention which limits its application to the European territory.<sup>27</sup> Much like States which border the continental EU territory, the United Kingdom will have a special role in policing points of initial entry based on its status as a "border state" because its entire perimeter remains vulnerable. But security concerns are not the only points of contention for the United Kingdom. In order to fully cooperate with the free movement of persons, it necessarily will have to cede autonomy in the area of immigration and asylum policy. This remains a political issue awaiting resolution. The notion of Community-level measures, as proposed in the External Border Convention, has made the United Kingdom more inclined to join the more limited arrangement of Schengen.<sup>28</sup>

On the more specific issue of asylum policy, some progress toward harmonization has been achieved. The Dublin Convention is an example of a common effort at dealing with such problems as "asylum shopping"<sup>29</sup> by requiring that requests for asylum be handled at the country of initial entry, unless the applicant has "close connections" with another country where asylum is sought. Restrictions on asylum serve to deter persons from making unfounded claims of asylum or evading deportation by moving from one EU country to another. Controlling asylum may be a necessary and legitimate goal

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26. *Border Controls*, *supra* note 21.

27. Common borders between Schengen parties, which lay outside the territorial limits remain unaffected. Woltjer, *supra* note 13, at 264.

28. *Id.* at 263-64.

29. "Asylum shopping" describes the practice of applying for asylum in more than one country to increase the chance that one will be granted. Foblets, *supra* note 3, at 793.

considering national concerns about unemployment and depletion of social resources. Furthermore, if unrestricted free movement of persons legally within the EU is to occur, it will be necessary to restrict asylum-seekers from further movement outside the country of entry and make a final determination on their legal status.

On the other hand, "first-country" restrictions, such as those found in the Dublin Convention, potentially feed the "fortress Europe" stereotype. A policy of "keeping others out" undermines free market goals and may not be reconciled with human rights guarantees. Commentators have criticized the Dublin Convention for countering a State's responsibility toward refugees under the Geneva Convention,<sup>30</sup> namely, the obligation of the State where asylum is sought to make an independent evaluation on the merits.<sup>31</sup> Limiting jurisdiction on matters of asylum to the country of initial entry, some argue, "is contrary to the protection granted by the Geneva Convention."<sup>32</sup>

A more positive approach would be to deal with the root problems of immigration. One such effort is underway with the recent agreement to establish a free trade zone between the EU and Mediterranean States by 2010.<sup>33</sup>

As part of the agreement, the EU states have agreed to invest 6 million Eurodollars in an attempt to prop up the Mediterranean State economies. The rationale is that "by improving living standards in the Mediterranean rim countries, their own economies would be spared the pressure of illegal immigration."<sup>34</sup> It is an ambitious goal whose effectiveness remains to be seen. Assuming economic stability can be realized, immigration for non-economic reasons will still have to be dealt with. Also, questions remain as to the extent which free trade can accommodate restrictions on the free movement of persons.<sup>35</sup>

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30. United Nations Convention on the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137, amended by Protocol Relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267.

31. See Foblets, *supra* note 3, at 793.

32. *Id.* at 795.

33. See Richard Waddington, *Syrian Spat Delays Euro-Med Conference Declaration*, Reuters World Service, Nov. 28, 1995, available in LEXIS, Nexis Library, WLDNWS File. The 11 Mediterranean States are Algeria, Cyprus, Egypt, Israel, Jordan, Lebanon, Malta, Morocco, Syria, Tunisia and Turkey, plus the Palestinian autonomous Territories. *Id.*

34. *Algeria Tells EU to Dismantle Trade Barriers*, Reuters World Service, Nov. 28, 1995, available in LEXIS, Nexis Library, WLDNWS File [hereinafter *Algeria*].

35. Yasser Talaat and Noredine Boutar, *Mediterranean: Migration Issue Divides Region's Nations*, Inter Press Service, Nov. 28, 1995, available in LEXIS, Nexis Library, WLDNWS File. Algerian Foreign Minister Salah Dembri questioned the effectiveness of the Euro-Med free trade zone since Europe insists on "erect[ing] walls" to prevent the free movement of people. *Algeria*, *supra* note 34.

Ultimately, a restrictive approach to immigration and asylum policies may be necessary to achieve their harmonization. As one author observed, "[t]he official view of the Member States is that completion of the single market--the integration of the communitarian rules that in the near future will govern the Union--can only succeed if non-European immigration is drastically limited."<sup>36</sup> Such limitations have occurred in the area of asylum. The Office of European Statistics reported a decline in requests for asylum by over fifty percent since 1992.<sup>37</sup> It appears that the reduction is due in large part to more stringent legislation on the part of Member States.<sup>38</sup>

This trend may be an indication of a "race to the bottom" in which harmonization is achieved at the cost of more rigid immigration and asylum policies. The Schengen Convention reflects this trend even though it does not explicitly require harmonization of immigration policies. "Out of fear of being less restrictive than the other Schengen countries, every state party carefully tried to level down its regulations on entry and residence of aliens in order to avoid an unwanted influx of immigrants and asylum seekers, attracted by more favourable conditions."<sup>39</sup> Other EU Member States have also undertaken a tightening of their national immigration and asylum laws. For example, Britain recently amended its immigration law, which among its many restrictions, limits asylum-seekers' right to appeal and gives immigration officers greater power to investigate and deport immigrants.<sup>40</sup> Italy's immigration reforms impose severe criminal penalties on the employers of undocumented immigrants.<sup>41</sup> France is also confronting its immigration

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36. Foblets, *supra* note 3, at 788. See also Christopher Vincenzi, *Cooperation in Aliens Law: The Implications for Individual Rights Enforcement*, in *FREE MOVEMENT OF PERSONS IN EUROPE*, *supra* note 9, at 227, 230 ("a common policy on visas . . . [is] likely to be on the basis of the common denominator of the least generous criteria.").

37. *Immigration: Fewer Requests for Asylum in the EU*, European Information Service European Report, Feb. 6, 1996, available in LEXIS, Nexis Library, WLDNWS File. The largest percentage of asylum seekers are coming from the former Yugoslavia; others include Turkey, Romania, Iran, Somalia, Zaire, and Afghanistan. *Id.*

38. *Id.*

39. Woltjer, *supra* note 13, at 273. The author illustrates how this phenomenon of "tacit harmonization" has occurred in Germany and the Netherlands. *Id.* at 273-76.

40. See Asylum and Immigration Act, 1996, ch. 49 (Eng.).

41. Barry James, *Europeans Are Shutting the Door Ever Tighter on Asylum-Seekers*, *International Herald Tribune*, Nov. 24, 1995, available in LEXIS, Nexis Library, WLDNWS File.

problems with equal vigor under its Pasqua Laws.<sup>42</sup> Stricter immigration laws have also been proposed in Italy, Switzerland, and Austria.<sup>43</sup>

Cutting back on immigration may now be a reflection of a State's fear of losing control over economic and social matters should immigration later be relegated to Community law. There is also an indication that a hard-line immigration policy is viewed as a winning political platform when a country is faced with increasing crime and unemployment rates. Perhaps more liberal immigration and asylum policies would more likely be tolerated as long as Member States have some assurance that they will retain the right to amend their policies to adjust for political or economic demands.

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42. Ian Davidson, *Divide and Rule: French Policy on Illegal Immigration Obscures the Real Issues*, FIN. TIMES, Aug. 30, 1995, at 14.

43. See, e.g., Cathryn J. Prince, *A Haven for Foreigners May Say "Go Home,"* CHRISTIAN SCI. MONITOR, Oct. 11, 1995; Ray Mosley, *Britain Retools Immigrant Laws: Asylum Seekers Face New Hurdles*, CHI. TRIB., Jan. 21, 1996, at C9.