

Moving the Borders of Europe

by

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*Mijnheer de Rector Magnificus,
Zeer gewaardeerde toehoorders,*

Introduction: Borders of what? The Weberian State and Post-Westphalian Relations in the Schengen Age

Borders delineate areas within which certain types of order and activities take place. Whether those borders be between ideas, fields of activity or territories the fundamental function of the border as a marker remains constant. In this study I will be looking at borders as regards their function as a line of differentiation for the movement of persons. The border for movement of an individual is the place where a control takes place which is constitutive of whether the individual can pass or not. This study is a search for the position of this border in the law and practice of the European Union. For persons it is the control of the border which is determinant of movement. In both law and practice the border for the movement of persons to and within Europe is no longer consistent with the edges of the physical territory of the Member States.

The Weberian definition of essential characteristics of the state is that which “successfully upholds a claim to the monopoly of the legitimate use of physical force in the enforcement of its order” within a defined territory.¹ The mechanisms of acquiring that claim to a monopoly and the challenges to it have been well mapped.² Intrinsic is the creation of a bureaucracy capable of carrying out the project. The question as to the territory over which the monopoly is claimed is less frequented.³ Building on a Weberian foundation, Torpey investigates how the claim to enforcement of order within a territory requires a claim to monopoly over the legitimate crossing of borders by persons.⁴ This in turn requires the state to claim a monopoly over the identification and means of identification of individuals under its control. The state’s certification of citizenship is a manifestation of this bureaucratic requirement. Thus an intrinsic part of the nation state is the creation of uniform legal re-

1 M. Weber, *The Theory of Social and Economic Organization*, trans. A.M. Henderson & T. Parsons (Free Press: New York: 1964), p. 154.

2 C. Tilly, *The Formation of Nation States in Western Europe* (Princeton University Press: Princeton: 1975) and A. Giddens, *A Contemporary Critique of Historical Materialism*, vol. 2, *The Nation-State and Violence* (University of California Press: Berkeley and Los Angeles: 1985).

3 For example in J. Thompson’s interesting analysis of the variations in the definition of the state between Weber, Tilly and Giddens. She draws out the importance of these variations as regards the capacities of the state for violence. However, the question of territory remains little considered. J. Thompson *Mercenaries, Pirates and Sovereigns State Building and Extraterritorial Violence in Early Modern Europe* (Princeton University Press: Princeton: 1994), p. 8-20.

4 J. Torpey, *The Invention of the Passport Surveillance, Citizenship and the State*, (Cambridge University Press: Cambridge: 2000), p. 4.

gimes for citizens set against the legal regimes applicable to foreigners.⁵ Implicit in the analysis is the convergence of border and territory. The purpose of the bureaucracy is national: consolidation of the claim to a monopoly of violence and to the imposition of order by the government. Its field of activity is the national territory. There is a consistency between border control and the limits of state sovereignty converging on the physical edges of the nation state.⁶

One important physical manifestation of borders results from attempts by individuals to move. The individual, through interaction with state and other actors over the granting or withholding of rights, activates the “border” and engages with the government regarding the position of the border. In the legal specification of borders it is the individual who by his or her activities in relation to movement “finds” the border and as a result of his or her activities causes the interpretation of the border and its control in law. For example, a Polish national driving in her car to Berlin will encounter the EU border for the first time at the physical edge of Germany. A US national arriving at Schiphol airport directly by plane from New York will encounter the EU border first at check-in in New York when his passport is examined by the airline staff and security officers there for the purpose of controlling the EU border. He will then re-encounter the EU border when he must pass through immigration control at Schiphol airport. A Moroccan national first encounters the EU border at the French consulate in Rabat when she seeks a visa. She will then re-encounter the border when she seeks to check in to catch her flight to Paris. She will again find the border when she arrives at Roissy Charles de Gaulle airport and passes through immigration control. So it is the individual who finds the border by virtue of his or her intentions and action relating to movement. But what is the border he or she activates? Dutch law provides at Article 109(4) Aliens Act 1999 that the borders of the Netherlands for the admission of aliens is to be found at the edge of the frontiers of all the Schengen⁷ states. Thus Germany, France, Italy etc are part of Dutch sovereignty for the purpose of the borders for persons. Further, Article 109(5) goes on to provide that “national security” of the Netherlands for these purposes means the national security of all the Schengen states. Returning then to the Weberian definition of the state, the enforcement of order over a defined territory no longer applies to the Member States as regards movement of persons. Access to the territory is controlled by a network of bureaucracies acting in accordance with the principle of cross recognition of their decisions.

The movement of the legal framework of borders to the European Community level changes the relationship of the individual towards the state as regards the disputed relationship of rights in relation to crossing borders. The Member States are no

5 G Noiriël, *Etat, nation et immigration vers une histoire du pouvoir* (Belin: Paris: 2001).

6 Emmanuelle Dardenne & Laurence Weerts, *La communautarisation de la politique d'immigration: déterritorialisation ou permanence des territoires?*, in Paul Magnette & Eric Remacle, *Le nouveau modèle européen*, vol. 2 (2001).

7 In this study I will continue to refer to “Schengen” and the “Schengen acquis” after 1 May 1999 and the entry into force of the Amsterdam Treaty. This is justified on the basis of the continuity of the acquis although technically it has been subsumed into the legal bases accorded by the Council Decision of May 1999 (see below).

longer entitled to exclusive control over the definition and position of borders. The claim to rights by the individual as regards the position and crossing of borders now derives not only from national law but also from European Community law. The individual with rights accruing from the different levels is the catalyst for the redefinition of European borders. Interests between Member States and the Community as regards control of definitions, consolidation of power and the content of “sovereignty” find expression through the settlement of the rights of individuals.

The question of borders, where they are found and how they are crossed raises another fundamental concern both of the academic community and society in general over the past few years: borders as the tangible manifestation of the Westphalian system of inter-state relationships. Sovereignty assumes the right to exclusionary practices within territories defined by borders.⁸ The Peace of Westphalia has become the synonymous with the secularization of Europe which enabled a status quo of non-intervention in internal affairs to develop between states – the activities of governments within their state was no longer the business of the neighbouring state unless certain criteria of external effects were fulfilled.⁹ A number of different pressures and arrangements began, in earnest after 1945, to strip away the facade of inviolability of the government within the territorial boundary of the state. The creation of the European Community, of course, has had a profound effect on the Westphalian principle among the Member States. In particular, the creation of a pyramid of rights and obligations among the individual, the Member State and the European Community changed fundamentally the meaning of borders within the European space. Because of the allocation of rights to individuals exercisable if necessary against states and guaranteed by the European Community, intra-Member State borders lost meaning for a substantial number of persons.¹⁰

The European Community, however, was not the sole actor beyond the nation state level which was eating into the Westphalian sovereignty principle. The development of international human rights treaties laid a foundation for justified interference within states. Risse et al have sought to establish that the system of creation of norms at the international level specifically in the field of human rights has obliged a transformation of state bureaucracies not least as a result of the pressures brought to bear by non-governmental trans-national actors.¹¹ As the Weberian state is subject to transformations, not least trans-national pressures¹² so too the Westphalian system is also in flux. The changes taking place at one level have important consequences for the other. Again the activities of individuals in claiming rights from international

8 P-C. Müller-Graff, Whose Responsibility are Frontiers?, in M. Anderson & E. Bort, *The Frontiers of Europe* (Pinter: London: 1998), p. 11-21.

9 Of course this perspective is simplistic; see A. Cassese, *International Law in a Divided World* (Oxford University Press: Oxford: 1986), p. 34.

10 E. Guild, *Immigration Law in the European Community* (Kluwer Law International: The Hague: 2001).

11 T. Risse, S. Ropp & K. Sikkink, *The Power of Human Rights International Norms and Domestic Change* (Cambridge University Press: Cambridge: 1999).

12 B. Badie, *La fins des territoires* (Fayard: Paris: 1995); M. Anderson, *Frontiers: Territory and State Formation in the Modern World* (Polity Press: Cambridge: 1996).

treaties act as a catalyst in changing the relationship of the state towards its borders. The application of international human rights treaties is central to this question – is it a matter for the state to determine how to fulfil its responsibilities to individuals subject only to inter-state action for lack of compliance or can the individual reach beyond the national level to seek to establish rights whose source is in international treaties through international tribunals? The ambiguity about whether UN treaty bodies responsible for individual complaint mechanisms, such as the UN Human Rights Committee under the Optional Protocol of the International Covenant on Civil and Political Rights are judicial instances or only advisory committees highlights the tension about the individual's role.¹³ By bringing complaints to the UN human rights bodies individuals require the force of the decisions of those bodies to be resolved.

Three aspects of these changes impact directly on the search for borders as regards persons moving. First, economic globalisation now symbolised by the single word “Seattle” incorporates a changed relationship of the state to private actors and the activities of those private actors in the international sphere. Susan Strange's definition of this changing relationship focuses on the loss by the state of power over the means of production, credit, and knowledge.¹⁴ The role of the private sector as regards the definition of effective borders for the movement of persons will be a constant theme in this study. Private actors are increasingly implicated in and carrying out controls on persons relating to the crossing of borders.¹⁵ Equally, the interests of private actors to be able to move their personnel as the means of production through border controls are important to identifying where borders are and the relationship of borders to control of identity. To what extent does the identity of the corporation “compensate” for the “wrong” nationality of the employee it wishes to move across a border? Van Creveld considers that “the threat to the state is not coming from either individuals or from groups of the kind which exercised the functions of government in various communities at various times and places before 1648” but rather from corporations: “in other words from such ‘artificial men’ as share [the state's] own nature but differ from it both in respect to their control over territory and in regard to the exercise of sovereignty”.¹⁶ The fundamentally different relationship to territory of the main competitor of the modern state, the corporation, has consequences for the state's relationship to territory as well.¹⁷ Again, the individual's movement is an im-

13 This ambiguity is clearly apparent in P. Alston & J. Crawford's *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press: Cambridge: 2000).

14 S. Strange, *The Retreat of the State: diffusion of power in the world economy* (Cambridge University Press: Cambridge: 1999). She does not deal with the question of security within the domain of the state though a series of authors now dispute this, see J. Sheptycki, *Issues in Transnational Policing* (Routledge: London: 2000); I. Loader, *Plural Policing and Democratic Governance* (Sage: London: 2000).

15 V. Guiraudon, *Cultures et Conflits*, forthcoming 2001.

16 M. van Creveld, *The Rise and Decline of the State* (Cambridge University Press: Cambridge: 1999), p. 416.

17 The relationship of corporations such as Shell or other large multinationals to territory bears further investigation. There are certainly many similarities with the states' relationship to territory but the lack of effective or lasting responsibility for a territory and the ability to abandon

portant point in the definition of the struggle. The movement of persons has become increasingly differentiated. Legal labour migration is increasingly ceded to the private sector. Competence for defining who is a legal migrant and who an illegal migrant becomes central to the state's claim to a monopoly over movement but is increasingly challenged. For example, tourists complicate and dispute the state's right to define. On the one hand they are part of commercial activities, the much-needed consumers of commercially valuable products thus within the field of definition claimed by corporations. On the other hand they are all potential illegal immigrants and thus intrinsic to the state's capacity to define. The only undisputed territory of definition of the state becomes then the clandestine immigrants arriving in small vehicles evading all control. The commercial interests in this group can effectively be presented as illegitimate (unlike the interests of, for instance, KLM or Air France) and the individuals as the "enemy/victim".¹⁸

Secondly, the political discussion, which is transforming armed conflict into new forms of crime, leads directly to a challenge of sovereignty. The ever-widening debate about legitimacy of action within the Weberian state implicates the post Westphalian norm.¹⁹ The discussion about international peace keeping has moved to international peace making and in turn to preventing crime. The bombardment of Yugoslavia, for example, was accompanied by the vilification of President Milosevic as an international criminal. This representation was re-enforced by the inclusion of his name on the list of persons indicted by the International Criminal Court for the Former Yugoslavia. He is no longer a wicked enemy leader, he is an "international" criminal. The legal basis for this widening is in the interests of security contained in Chapter VII of the UN Charter.²⁰ The expansion of the ethical or moral assessment of armed conflict, which now finds juridical expression in the creation of the International Criminal Court²¹ changes the nature of borders for movement of persons on the ground of international security. Further, international security and prevention of crime become conflated. The debate in April 2001 between the government of Yugo-

one territory and to move to another without losing its legitimacy is one of the main features which differentiate the two: Z. Bauman, *Globalisation, the Human Consequences* (Columbia University Press: New York: 1998).

- 18 This challenge over definition is exemplified by the UK's White Paper *Firmer, Fairer, Faster – A Modern Approach to Immigration and Asylum*, CM 4018, July 1998: "without modernisation and greater operational flexibility, so that resources are targeted more effectively on tackling abuse and clandestine entry rather than routine work, it will become increasingly difficult to maintain effective frontier controls, cope with passenger growth, deliver the kind of service standards that facilitate trade, tourism and education, and maintain the United Kingdom's position as an international hub." Quoted in House of Lords, 7th Report, Session 1998-99, *Schengen and the United Kingdom's Border Controls*, HL Paper 37 (1999), p. 9.
- 19 C. Lynch & M. Loriaux, *Law and Moral Action in World Politics* (University of Minnesota Press: Minneapolis: 2000).
- 20 Article 39: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Article 41 and 42, to maintain or restore international peace and security."
- 21 See C. Bassiouni, *Crimes Against Humanity in International Criminal Law* (Kluwer Law International: The Hague: 2nd ed. 1999), for a full consideration of the history of the Court's creation.

slavia and the Prosecutor of the International Criminal Court for the Former Yugoslavia about where Milosevic should be tried in respect of charges relating to war crimes and crimes against humanity: Belgrade or the Hague, highlights only one small aspect of this discussion. However, it exemplifies how the differentiation of internal and external security becomes increasingly difficult.²² The relationship between borders, movement of persons and security will be the territory on which the EU governments seek to limit the effect of individual rights. Security risks become individual relating to foreign persons not states: the word “security” becomes increasingly difficult to define as it becomes used in more and more disparate contexts. At the very least the borders between individual and collective security have become blurred. While a collective categorisation on the basis of nationality may be useful for the first general assessment of risk, this is only in order to assist in determining the individual risks, which are considered to be more prevalent within certain national groups. The foreign state per se is no longer the security risk – it is the individual. This is no longer the domain of war but of crime or threat of crime.

Finally, and directly related to borders and armed conflict, the changing understanding of the duty on states to admit persons fleeing across borders from a country where they have a well founded fear of persecution on grounds of race, religion, nationality, membership of a social group or political opinion contributes to a changing definition of borders and their controls for persons. The first international human rights treaty, which extends a right to individuals in respect of borders, is the UN Convention relating to the status of refugees 1951 (and its 1967 protocol).²³ Two competing interpretations are at work in Europe regarding the duty of states to provide protection to individuals with a well-founded fear of persecution in their countries of origin or habitual residence. The first interpretation which places the state at the centre is that shared by France and Germany: accountability: refugees are only protected where they are the subject of persecution by the state or state supported (or encouraged) actors.²⁴ The alternative interpretation, shared by the Netherlands and the UK, places the individual first: responsibility: so long as the individual has a well-founded fear of persecution the source of that persecution is irrelevant.²⁵ It is supported by UNHCR, guardian of the Geneva Convention. This perspective gives the individual a right against the host state to cross and remain within the territory of the state. The reach of rights claimed by the individual from the international level within the national territory has changed the debate on borders in Europe. The responsibility for asylum seekers only arises when they cross a border under the Geneva Convention. States seeking to avoid responsibility for asylum seekers thus have an interest in placing their borders, for the purposes of the effective control, in a different place from the borders of sovereignty. One of the most pressing questions in international law and practice is the legitimacy of this differentiation of borders de-

22 D. Bigo, *Polices en Reseaux* (Presses de Sciences-Po: Paris: 1996).

23 The Geneva Convention.

24 B. Huber, *The Application of Human Rights Standards by German Courts to Asylum-Seekers, Refugees and other Migrants*, *European Journal of Migration and Law*, Vol. 2, 2001.

25 *Ex p Adan & Aitseguer*, House of Lords 19 December 2000.

pending on their purpose. The legal right of the EU Member States to redefine their borders for the purposes of determining responsibility for asylum seekers has come under attack from the European Court of Human Rights on the question of the individual's right to protection from return to torture.²⁶

This study re-examines the position of borders for persons and persons for borders. First I will examine how in law, the practice of borders through their control over persons has been moved beyond the borders of the physical territory of the state. They have been moved to the external perimeter of those Member States participating in what used to be the Schengen arrangements,²⁷ now the border-control free territory of Title IV EC. Secondly, I will consider where the effective borders of Europe are for whom: in particular I will consider the identification of categories of persons for whom borders have moved to the territory of countries outside the European Union through the application of visa requirements and carriers sanctions. Thirdly, I will consider the actors engaged in the achievement of the movement of borders through coercion: the state, the supra-national order, the private sector and individuals.

The inter-penetration of the international framework of inter-state relations into the national organisation of order within the state and vice-versa is the subject of this study. The specific field is the control of borders for the movement of persons – how this field in law and practice reveals important transformations at both national and international levels. The contention of this study is that it is by the movement of persons with or claiming rights at different levels that borders are revealed and their validity established or denied. Thus the actors which will be considered here are the government at national level, the European Community, the private sector (corporations), and the individual. The focus will be on the Europe of the 15 EU Member States including their practices outside the territory of the Union.

26 *TI v UK*, European Court of Human Rights, Application no 43844/98, 7 February 2000.

27 I will continue to use the term Schengen to denote the body of law and practice which has been incorporated into the EC Treaty by the Council Decision of May 1999 in accordance with the Schengen Protocol to the Amsterdam Treaty. The legal mechanism of the transformation has been well described by S. Peers (European Journal of Migration and Law, vol. 2, 2001) recently. For the purposes of participation in the Schengen acquis, now implementing Article 62 EC, I will refer to the Member States/Schengen States though for some of these purposes Denmark, Ireland and the UK are excluded by reason of their "opt-in" protocols to the Amsterdam Treaty. According to these protocols they do not participate automatically in any of the Article 62 measures (again with exceptions relating to Denmark) unless they specifically opt to do so.

2. The European Community and Borders

The task of the European Community is to achieve the common market, and an economic and monetary union. In order to do this, it is necessary to achieve “the abolition as between Member States, of obstacles to the free movement of goods, persons, services and capital”.²⁸ The main obstacles to free movement of persons between the Member States are border controls on persons.

Part 3 Title III EC sets out the specific rights granted to individuals within the Community in order to give effect to the abolition of obstacles to their movement – the free movement of workers, the self employed (i.e. establishment) and service providers and recipients, nationals of one Member State within the territory of another. The rights of the individual in each case in the Treaty are circumscribed by the state’s appreciation of the needs of public policy, security and health.²⁹ The transitional period for effect of these rights ended in 1968. So long as the European economy was flourishing issues arising in the courts about free movement of persons were primarily limited to social security co-ordination matters. However, once the downturn took hold after 1973 Member States began seeking to expel migrant workers, including nationals of other Member States. Recourse to rights contained in Community law limiting the right to expel to grounds of public policy, security and health were the territory of dispute between the Member States and the individual. By a series of judgments from 1974 onwards the European Court of Justice, the court of final interpretation of Community law, found in favour of the right of the individual to free movement.³⁰ The subject of the dispute was the definition of public policy, security and health. The Court consolidated, through its decisions, a direct right of the individual to move and to defeat an effort by a Member State to prevent the movement or expel the individual on the basis of Community law unless truly exceptional circumstances apply.³¹ By narrowly limiting the scope of public policy as an exception to the free movement right, the Court privileged the individual over the Member State. The loss of power over individuals by the Member States particularly as regards control of the concept of security led to a high distrust of the Court which would manifest in a challenge to a Decision on immigration consultation issued by the Commission in 1985³² before the Court itself.³³

28 Article 3(c) EC; see also D. Wyatt & A. Dashwood, *European Community Law*, 3rd Edition (Sweet & Maxwell: London: 1993).

29 Article 39 EC and Directive 64/221.

30 41/74 *Van Duyn* [1974] ECR 1337; 67/74 *Bonsignore* [1975] ECR 297; 36/75 *Rutili* [1975] ECR 1219; 48/75 *Royer* [1975] ECR 497; 118/75 *Watson & Belmann* [1976] ECR 1185; 8/77 *Sagulo* [1977] ECR 1495; 30/77 *Bouchereau* [1977] ECR 1999.

31 Indeed, in the *Van Duyn* judgment the Court held for the first time that a Community Directive could have direct effect against a Member State (though not against a private individual). At the time this position was strongly criticised as weakening the power of the Member States to control the entry and residence of foreigners (see D. O’Keeffe, *Practical Difficulties in the Application of Article 48 of the EEC Treaty*, *CMLRev* 19, 1982, p. 35-60.

32 OJ 1985 L 217/25.

33 281/85, 283-85/85, 287/85 *Germany & Ors v Commission* [1987] ECR 2625.

Economic challenges, which began to crystallise in the early 1980s, changed the debate. The renewed concerns about the competitiveness of the European market in comparison with the new Tiger economies of the far East led to a commitment to revitalise the common market project and the new appellation: the internal market. Although the objective of the common market remained consistent from the commencement of the Community in 1957, the approach to borders and their control changed. The preparatory work towards the new push for the Community led to the first major intergovernmental conference on re-negotiation of the Treaties between June 1985 and February 1986. The result was the Single European Act (SEA). Article 14³⁴ inserted into the Treaty by the SEA which determined the internal market as “an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured” became the flash point of the issue of Member States versus Community control of persons and in particular third country nationals.

The deadline for implementation was set for 31.12.92. It was not achieved. However, what is important is the principle: the borders were to move. The new area comprised of the physical territory of the Member States combined would have no internal frontiers. The manifestation of the lack of internal frontiers is free movement of various kinds: goods, persons, services and capital. This meant that internal border controls were to be abolished. As the end of the deadline for implementation approached, it was apparent that the objective was not nearing completion. The stumbling block however was not the free movement of goods, services or capital. It was exclusively as regards persons.³⁵ The UK’s House of Lords Select Committee on the European Communities held an inquiry into the completion of the internal market. It received evidence from various officials who made it clear that an internal market without internal frontiers was fully possible for goods, services and capital. The mechanism of the frontier for goods: customs controls were capable of abolition and replacement by random checks. However, border controls on persons could not safely be abolished.³⁶ The reason: this would give rise to an increased security risk.

The Article 14 arrangement would give the EU one border – the external border between the Member States and third countries. Each Member State would share part of that border. Even Member States lacking physical contiguity with the others such as Greece would be part of the internal border as regards, for instance, direct flights and ships to and from other Member States. But as regards land borders they would have only an EU border. Even Member States surrounded by other Member States such as Luxembourg, would participate in the external border through international flights, though otherwise they would lack a frontier at all.

This fundamental movement of the border was disputed on security grounds not only in the UK. In France there was substantial opposition to a regime which would

34 This article started life as Article 8A then after the entry into force of the Maastricht Treaty became Article 7A. With the Amsterdam Treaty it became Article 14.

35 European Commission, *Abolition of Border Controls Communication to the Council and the Parliament*, SEC(92) 877 final.

36 House of Lords Select Committee on the European Communities: 1992: *Border Controls on Persons*, Session 1988-9, 22nd Report: 1992 (HL Paper 90).

have such important security implications.³⁷ The defeat of Article 14 between 1993 and 1997 can be attributable to this resistance by the interior ministries over the meaning of security for the movement of persons. The separation of the problem of borders for persons from borders for other purposes is, to no small extent, a result of the 1993 settlement of Article 14. Borders for goods, services and capital become separated from borders for the purposes of movement of persons. The interests of corporations doing business in the EU are accommodated by the achievement of a frontier free territory for the movement of these three commodities.³⁸ The internal market could be completed as regards the first three, the fourth remained highly disputed. After the implementation date of the internal market, individuals challenged the continued application of border controls on their movement within the Union. The answer finally given in 1999 by the European Court of Justice denied the individual's claim to rights in favour of the state's claim to security. There is no automatic legal effect to the provision for persons to cross intra-Member State borders.³⁹ The Court accepted that the lack of harmonisation of conditions for the crossing of external borders was fatal to the individual's claim: until the space is consistently controlled from external security risks, intra Member State border controls on persons are lawful.

I would pause to consider further the judgment: control over where the border is as regards persons is an important power. The Commission and some Member States were in dispute about the position of that power. The EC Treaty which is the framework for the struggle provided as a result of the SEA, power to the Commission only for the question of intra Member State borders. If the borders for the movement of persons were to be moved to the external EU border, there was no provision for the Community to control that border. In 1987 the fields of immigration and asylum, i.e. the movement of third country nationals into the Community remained fully within the jurisdiction of the Member States. Thus the interest of the Commission to seek abolition of the internal borders for persons is limited. Even after the Maastricht Treaty entered into force in November 1993, the Community's control over the external border remained extremely feeble as the subject was contained in the Third Pillar of the Treaty on European Union; the intergovernmental pillar. The Member States remained in the driving seat as regards the definition of the external frontier.⁴⁰

37 P. Masson & X. de Villepin, *Rapport de la Commission de contrôle du Sénat sur la mise en place et le fonctionnement de la convention d'application de l'accord de Schengen du 14 Juin 1985*, No. 167, 26.06.91.

38 Of course issues regarding free movement of services, goods and capital would continue to arise before the Court of Justice, for instance *Alpine Investments* regarding consumer protection in the face of uncontrolled movement of services; the meaning of obstacles in a frontier free Europe for goods in C-267/91 & 268/91 *Keck & Mithuard* [1993] ECR I-6097 and the treatment of capital for fiscal purposes. However, the principle of control free movement is not challenged.

39 C-378/97 *Wijsembeek* [1999] ECR I-6207.

40 It is thus ironic that it was exactly this failure to agree the contours of the external frontier that lead the Member States to be unable to sign an intergovernmental agreement on borders (the External Frontiers Convention). The dispute between the UK and Spain over the status of the borders of Gibraltar would permanently prevent this convention being adopted. Instead a core of

The claim of the individual moving within the territory to the benefit of frontier free travel was opposed by those Member States which expressed a view. The Commission had only a weak interest in supporting the individual because it did not have clear competence over external borders. The result of the acquisition of rights by the individual would not strengthen its position of power in relation to the Member States over the definition of borders. In fact, the Commission had failed to act at all to propose legislation on abolition of frontier controls until the European Parliament brought a case before the Court of Justice against it for failure to fulfil its Treaty obligations as a result.⁴¹ Hence when the Court of Justice came to consider and reject the individual's claim, the outcome was not fundamental to the balance of power between the Community and the Member States as regards the articulation of the border for persons. Indeed, by the time the Court handed down its judgment the Community had once again been transformed as regards the balance of power in this field by the Treaty of Amsterdam. The cursory manner in which the Court dealt with the issue has been criticised on other grounds.⁴² I would suggest that the failure of the individual's claim may also rest with the fact that he or she is not, in this case, critical to the settlement of power. It is when the individual holds this place of determinant of the legal battle that he or she is likely to be able successfully to claim rights. It is the individual's position as an intermediary in the settlement of powers between the Community and the Member States through the judicial system which may result in the acquisition of rights.

While the abolition of borders for goods, services and capital proceeded smoothly within the EC Treaty subject to the control of the Commission, the Member States acted differently as regards persons. The newly separated borders for persons were not considered appropriate for Community regulation, notwithstanding the wording of Article 14 EC. The distrust of the Member States interior ministries of the Commission, but most of all of the Court of Justice, dates back to their loss of control over the meaning of security for the purposes of movement of workers through the 1970s and early 1980s. The reaction was to oppose any move by the Commission to extend its control in the field of immigration. Although the Commission's White Paper on the internal market included an annex on immigration and asylum, the first step by the Commission to set up a system of exchange of information on legislation regarding immigration by third country nationals (in 1985) was the subject of an attack by five Member States. The fact that the Court of Justice found in favour of the Commission on virtually all aspects of its Decision did not endear the Court to the interior ministries.⁴³

It is often suggested that the development of an intergovernmental framework for the abolition of border controls on persons between the Member States was the

Member States proceeded intergovernmentally through the Schengen Agreement 1985, the subject of the next chapter.

41 The case was withdrawn when the Commission introduced measures in 1995, just as the case was progressing towards its hearing.

42 H. Staples, *Nederlands Tijdschrift voor Europees Recht* 2000, p. 1-6.

43 *Germany & Ors v Commission*, supra.

result of obstinacy of some Member States, such as the UK, to the principle. There must be some doubt as to whether this is the whole story. The decision to act inter-governmentally was taken between 1984 when President Mitterand and Chancellor Kohl announced at the Saarbrücken border that they would abolish border controls between the two countries in order to defuse industrial action by the transport industry over delays and 1985 when the first Schengen Agreement was signed.⁴⁴ The Commission's White Paper on the internal market had not yet been published. Nor indeed had the Commission's Decision on information exchange, which would so outrage interior ministries. While the Saarbrücken announcement was made in the context of a transport ministry initiative it was rapidly taken over by the interior ministries on grounds of the serious security consequences which abolition of border controls would have.⁴⁵

The development from the Saarbrücken statement to the Schengen Agreement 1985 was characterised by a move from transport ministry control to interior ministry control and from two Member States to five: Belgium, France, Germany, Luxembourg and the Netherlands. Central to the first development was the issue of persons and security, to the second commercial interests – the transport industry in the Benelux feared the loss of markets if it were left out of the free movement territory. The balance of power between the Community and the Member States would find a rather symbolic expression in this field. Between the signing of the Schengen Agreement in 1985; its Implementing Agreement in 1990 and the TEU 1993, the competences as regards customs controls and goods of the Schengen Agreements were removed to Community law. Only people and security remained intergovernmental. The Member States got control over security and individuals, the Community got control over corporate interests: goods, services and capital.

44 D. Bigo, *Polices en Reseaux* (Presses de Sciences-Po: Paris: 1996).

45 D. Bigo, *Polices en Reseaux* (Presses de Sciences-Po: Paris: 1996).

3. Where are the borders: moving the borders of sovereignty and the borders for persons; the Schengen approach

Schengen is a small town in Luxembourg but its name has become synonymous with the agreement, which abolished border controls between five original parties⁴⁶ (Member States of the European Union) and established a system for common conditions of entry and exclusion of third country nationals⁴⁷ into the combined territory. The Schengen acquis, the incorporation of which into EC law was made possible by the so-named protocol to the Amsterdam Treaty and now published in the Official Journal consists of:

1. The Agreement signed in Schengen on 14 June 1985, between the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders;
2. The Convention, signed in Schengen on 19 June 1990 between the Kingdom of Belgium, the Federal Republic of Germany, the French Republic, the Grand Duchy of Luxembourg and the Kingdom of the Netherlands, implementing the Agreement on the gradual abolition of checks at their common borders, signed in Schengen on 14 June 1985, with related Final Act and common declarations;
3. The Accession Protocols and Agreements to the 1985 Agreement and the 1990 Implementation Convention with Italy (signed in Paris on 27 November 1990), Spain and Portugal (signed in Bonn on 25 June 1991) and Denmark, Finland and Sweden (signed in Luxembourg on 19 December 1996), with related Final Acts and declarations;
4. Decisions and declarations adopted by the Executive Committee established by the 1990 Implementation Convention, as well as acts adopted for the implementation of the Convention by the organs upon which the Executive Committee has conferred decision making powers.

The initial Schengen Agreement of 14 June 1985 created a framework for the abolition of border controls on persons and goods between participating states. It was supplemented by the Schengen Implementing Agreement 1990 which set out the detailed provisions on the abolition of border controls between the participating states, the application of controls at the common external border of the participating states, provisions on division of responsibility in respect of asylum⁴⁸ and provisions on police co-operation. The creation of the Schengen system arose from an economic pressure not least from the transport industry to remove obstacles to cross-border trade

46 Belgium, France, Germany, Luxembourg and the Netherlands. Italy joined almost immediately thereafter.

47 I.e. persons who are not nationals of any Member State of the European Union.

48 These provisions were superseded by the Convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities (Dublin Convention) 14 June 1990, when it came into force in September 1997.

within the European Union.⁴⁹ It was foreshadowed by the European Commission's White Paper on the Completion of the Single Market.⁵⁰

The Implementing Agreement entered into force in September 1993 but was not applied in any Schengen state until 26 March 1995. Even after that date France maintained border checks on persons moving between France and the other Schengen states. The abolition of border controls was achieved with Greece in March 2000 and the Nordic states in December 2000.

The title of the Implementing Agreement, which covers free movement of persons, contains seven chapters:

1. crossing internal borders (Article 2);
2. crossing external borders (Articles 3-8);
3. visas (Articles 9-17) and visas for long visits, (Article 18);
4. short term free movement of third country nationals (Articles 19-24);
5. residence permits (Article 25);
6. organised travel (Articles 26-27);
7. responsibility for examining asylum applications (Articles 28-38 – superseded by the Dublin Convention when it entered into force in September 1997).

The legal basis of the Schengen Information System is found in Articles 92-119, creating a database on objects and persons.

Over the next 12 years all other Member States of the European Union acceded to the Schengen instruments with the exception of the UK and Ireland. While the abolition of intra Member State border controls, *inter alia*, on persons was part of the internal market embodied in Article 14 EC, the priority of Community law was never officially used to impede the Schengen system. Rather it was given legitimacy through the use of the comparison with an “avant garde” or experiment for the Community to adopt later. The argument was that the Schengen arrangement was legitimate, as it would enable the difficulties with the system to be dealt with in a controlled environment. It could then be used as the blueprint for the whole of the Community.⁵¹ In fact the incorporation into Community law could hardly be messier or more difficult. The Commission has suggested that in its opinion all the so-called *acquis* must be replaced by Community legislation adopted in accordance with the Treaty rules in Title IV EC.⁵²

The operation of Schengen was the responsibility of the Executive Committee established by the instruments. The Executive Committee was assisted by a small secretariat based at the Benelux Secretariat. Like the EU's Third Pillar, the Executive

49 D. Bigo, *Polices en Réseaux* (Presses de Sciences-Po: Paris: 1996).

50 D. Papademetriou, *Coming Together or Pulling Apart? The European Union's Struggle with Immigration and Asylum* (Carnegie Endowment for Peace: 1996).

51 C. Elsen, Schengen et la coopération dans les domaines de la justice et des affaires intérieurs. Besoins actuels et options futures, in M. den Boer, *The Implementation of Schengen: First the Widening, Now the Deepening* (EIPA: Maastricht: 1997).

52 European Commission Staff Working Paper: *Visa Policy Consequent upon the Treaty of Amsterdam and the Integration of the Schengen Acquis into the European Union*, SEC (1999), 1213; Brussels 16.07.99.

was aided by working groups on specific areas. Like the Third Pillar, the lack of a strong institutional structure meant there was only limited co-ordination on implementation and interpretation of the agreement.

The Amsterdam Treaty which came into force on 1 May 1999 attaches a Protocol on Schengen to the EC and EU Treaties which in effect provides for the insertion of the Schengen Agreement 1985, the Schengen Implementing Convention 1990 and the decisions of the Executive Committee made under the two agreements into the EC Treaty insofar as they involve borders and third country nationals. The same Protocol provides for moving into the Third Pillar of the Treaty on European Union those provisions of Schengen relating to policing and criminal judicial co-operation. The UK, Ireland and Denmark all negotiated protocols which permit them to remain outside of the new European Community rules on borders and third country nationals. Ireland and the UK may decide in each instance whether they wish to participate or not case by case in the new regime.⁵³

By decisions of the Council of 12 May 1999, the Council allocated a legal base within the new EC Treaty as amended by the Amsterdam Treaty for the Schengen *acquis* as identified in its decision.⁵⁴ Accordingly, the European Community has inherited the Schengen border *acquis* which has been transferred in a somewhat less than systematic manner into new Title IV of the EC Treaty: visas, asylum, immigration and other policies related to free movement of persons. The legal base for most of the Schengen border *acquis* which has been transferred into the EC Treaty is Article 62(1),⁵⁵ Article 62(2)(a) and (b),⁵⁶ Article 62(3),⁵⁷ Article 63(3)⁵⁸ while having respect to Article 64(1) the internal security reserve of the Member States.⁵⁹

53 See also, House of Lords, European Communities, 31st Report, Session 1997-98, *Incorporating the Schengen acquis into the European Union* (London: 1998).

54 Council Decision concerning the definition of the Schengen *acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the Treaty on European Union, the legal base for each of the provisions or decisions which constitute the Schengen *acquis*, 8056/99 and 8054/99, Brussels, 12 May 1999.

55 “The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of 5 years after the entry into force of the Treaty of Amsterdam, adopt: (1) measures with a view to ensuring, in compliance with Article 14, the absence of any controls on persons, be they citizens of the Union or nationals of third countries, when crossing internal borders.”

56 “The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of 5 years after the entry into force of the Treaty of Amsterdam, adopt: (2) measures on the crossing of the external borders of the Member States which shall establish: (a) standards and procedures to be followed by Member States in carrying out checks on persons at such borders; (b) rules on visas for intended stays of no more than 3 months, including: (i) the list of third countries whose nationals must be in possession of visas for crossing the external borders and those whose nationals are exempt from that requirement; (ii) the procedures and conditions which for issuing visas by Member States; paragraph (iii) a uniform format for visas; (iv) rules on a uniform visa.”

57 “The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of 5 years after the entry into force of the Treaty of Amsterdam, adopt: (3) measures setting out the conditions under which nationals of third countries shall have the freedom to travel within the territory of the Member States during a period of no more than 3 months.”

58 “The Council, acting in accordance with the procedure referred to in Article 67, shall, within a period of 5 years after the entry into force of the Treaty of Amsterdam, adopt: (3) measures on immigration policy within the following areas: (a) conditions on entry and residence, and stan-

As regards movement of persons, the Schengen system is based on three principles which are achieved through the deployment of four tools.

The Principles

1. No third country national should gain access to the territory of the Schengen states (with or without a short stay visa) if he or she might constitute a security risk for any one of the states;
2. A presumption that entry across one Schengen external border constitutes admission to the whole territory and an assumption (not as high as a presumption in law) that a short stay visa issued by any participating state will be recognised for entry to the common territory for the purpose of admission (there are explicit exceptions justifying refusal specifically on security grounds);
3. Once within the common territory, the person is entitled (subject again to security exceptions) to move within the whole of the territory for three months out of every six without a further control at the internal borders of the participating states.

The Tools

1. The Schengen Information System;
2. A common list of countries whose nationals require visas to come to the common territory for short stays (visits of up to three months); and a common list of those excluded from the requirement. The definitive black and white lists were achieved in December 1998.
3. A common format, rules on issue and meaning for a short stay visas;
4. Carrier sanctions.

The focus of the system is to ensure that persons who are or might be considered unwanted by any participating state are not permitted into the territory. Thus the rules focus on who must be excluded and provide little guidance on who should be admitted. Because the underlying principle of the system is cross recognition of national decisions rather than harmonisation, finding legal mechanisms to achieve this has unexpected implications. The lifting of border controls between the states means that positive decisions on admission of persons are likely to be respected by default – the parties have fewer identity checks on the crossing of borders.⁶⁰ The cross recognition of negative decisions requires more specific measures. When the concept of internal security, the primary reason for refusal of admission of an individual into the

dards on procedures with the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion; (b) illegal immigration and illegal residence, including repatriation of legal residents.”

59 “This Title shall not affect the exercise of the responsibilities incumbent on the Member States with regard to the maintenance of law and order and the safeguarding of internal security.”

60 But see K. Groenendijk’s presentation on the maintenance of internal checks on persons after the entry into force of the Schengen Implementing Agreement 1990: Article 62 EC and EU Borders: Conference 11/12 May 2001, ILPA/Meijers Committee, London.

combined territory, is not harmonised any examination of the grounds for refusal of an individual by another state needs to be avoided. In the Netherlands the legal mechanism to achieve this is Article 109(4) and (5) Aliens Act 1999 which places the Dutch border for the movement of persons at the extremities of the frontiers of all the Member States and incorporates the internal security of all Member States into Dutch internal security.

At the first level of exclusion are those persons on the common list of persons not to be admitted. The grounds for inclusion on the excludables list will be considered below. The list is maintained electronically in the Schengen Information System and is made up of all persons signalled for the purpose by any of the Schengen states according to their national understanding of the criteria for inclusion and their national interpretation of public order and security.

The first step for determining access to the territory is whether a person has achieved sufficient personal notoriety in any one Member State to be included in the system. Persons whose behaviour justifies their exclusion from the territory are defined by Article 96 Schengen Implementing Agreement. The individual will normally have been within the territory of the Union for an Article 96 entry to have been made against him or her.⁶¹ The definition of these persons for exclusion seems primarily based on what they did or represented while they were within the territory. It is here that the divergent conceptions of what constitutes a risk and what is security in the Member States become central. What is perceived as a security risk in one state is not necessarily the same in another. This difference of perception of risk as it relates to an individual's activities the last time he or she was within the Union will be the territory where national courts begin to question the legitimacy of the system. This will be considered in the next section.

The second step relates to persons who have not yet been identified as an individual risk to any state but who might be one. The intention is to identify groups of persons more likely than others to include persons who might constitute a risk. This group then is the subject of an additional level of control over their potential access to the territory of the Union. The tool is the visa list which on the basis of nationality categorises persons as more or less likely to be a risk. For those persons who, on the basis of their nationality are considered a potential security risk, a special control in the form of a visa requirement is imposed. This has the effect of moving the effective border for these persons to their own state. In section 5 I will consider in some depth the rules on the basis of which the Community defines which countries nationals are a sufficiently likely security risk to be on the list. The system of justification reverses the relationship of the individual and the state. It is no longer the Community's relationship with the state which determines the treatment of its nationals. Rather it is the assessment of the individuals which determines the state's characterisation. The state's claim to sovereignty as the determiner of order internally within its territory and thus of its relations with other states is no longer relevant.

61 It is possible to justify inclusion of someone who has never been in the EU but this appears to be the exception to the rule from those cases which have come before the courts.

The enforcement mechanism is the implication of carriers in the system through sanctions for carrying persons who need visas but do not have them. I will return to this manifestation of the effective border in part 6. The Member States distance themselves from the mechanisms of control abroad by devolving it to the private sector.

The third step is identifying who, within the *prima facie* suspect group should get visas. A comparison may be made between the policing technique of profiling: anticipating who is likely to be a criminal (or become a criminal). The purpose of the mechanisms is to anticipate through a profile of risk, who is likely if he or she were given a visa to come to the EU territory to be a risk (which of course raises the important question of the definition of a risk and of security). In interviews with officials both at national and Community level,⁶² it became apparent that a number of aids are provided to consular staff in consulates of the Member States abroad. First the formalisation of a system of consular co-operation facilitates the regular meeting of visa officers of the EU states (including Ireland and the UK) in capitals around the world.⁶³ Meetings take place normally at least once during each 6 month presidency of the Union. Within this context of co-operation, information is exchanged on persons who are considered “bona fides”. This is reflected in the Common Consular Instructions which provide: “In order to assess the applicant’s good faith, the mission or post shall check whether the applicant is recognised as a person of good faith within the framework of consular co-operation...”.⁶⁴ It appears that in addition to the bona fides information exchanged, mala fides persons are also identified. As regards the identification of risk categories, the Common Consular Instructions provides: “it is necessary to be particularly vigilant when dealing with ‘risk categories’ in other words unemployed persons, and those with no regular income etc.”.⁶⁵ Thus the most precise categorisation on mala fides persons who are profiled as a risk are the poor. These are the persons who will always menace the Member States’ security.

There is an extension of the bona fides/mala fides profile beyond the individual. In this extension the private sector is categorised as bona or mala fides and thus the individuals using their services are categorised by their choices as consumers. Travel

62 Interviews with French Foreign Affairs ministry officials carried out in the context of research on Schengen visas for the Institut des Hautes Etudes de Sécurité Intérieure, March 2001; with Community officials June 2000 and February 2001.

63 The Council’s Recommendation made in the Third Pillar on local consular co-operation regarding visas promotes ‘local co-operation on visas, involving an exchange of information on the criteria for issuing visas and an exchange of information on risks to national security and public order or the risk of clandestine immigration’ (Article 1 OJ 1996 C 80/1). Controls on the propriety of information are not included even though the Recommendation continues ‘their consular services should exchange information to help determine the good faith of visa applicants and their reputation, it being understood that the fact that the applicant has obtained a visa for another Member State does not exempt the authorities from examining individually the visa application and performing the verification required for the purposes of security, public order and clandestine immigration control’ (Article 6). The concepts of public order and clandestine immigration control are not defined.

64 OJ 2000 L 238/332, point 1.5.

65 OJ 2000 L 238/329, point V.

agencies accept responsibility for submitting many visa applications for their customers. Indeed, in some countries, such as the Ukraine, I was told that the vast majority of applications for visas are submitted by travel agencies.⁶⁶ The success or failure of these applications is heavily dependent on the relationship of the agency with the consular officials. Information on agencies is exchanged within the framework of the common consular co-operation. The Common Consular Instructions refer to this practice as regards personal interviews: “This requirement may be waived in cases where...a reputable and trustworthy body is able to vouch for the good faith of those persons concerned”.⁶⁷ It was indicated in interviews that there is some information that airline choice is also taken into account as an indicator of bona fides. If the individual has bought a ticket with the national carrier or the major carrier of a country, his or her bona fides are strengthened. I would add that the comments about this practice were negative. The officials considered this practice improper but they appeared to be aware of its existence. This means that the bona fides or mala fides of the individual may be the result of a disagreement with a visa officer in another consulate than the one where the application is directed. Further it may result from a poor consumer choice about which travel agency or airline to use.

Thus the SIS list of excluded persons as security risks is supplemented by information held in consulates on persons considered risky. This information is in turn supplemented by information about travel agencies, which are risky and possibly even airlines. In such an atmosphere of extreme concern about security even in the absence of apparently objective justification what happens to the individual, what chance has he or she of reversing a negative decision? The Schengen system enjoyed a legal basis – the treaties, a rule making mechanism – the Executive Committee – but lacked a system for ensuring consistency of application and coherence. The problem began to manifest first through complaints of individuals entered in the SIS under Article 96. The inconsistencies of national interpretation of the criteria both by officials and courts would cause increasingly serious problems.

Following the insertion of the system into the European Community and Union, the framework of coherence has changed. By inserting an intergovernmental system into a highly legally structured supra-national framework a number of consequences flow. First, the interstate regulation of duties no longer applies. While it is not yet clear exactly what the legal status of the Schengen *acquis* is in Community law nonetheless it has been inserted into a system where rights to individuals is the field within which state versus Community tensions are frequently resolved. In this highly structured legal framework within which the individual plays a critical activating role, consistency is ultimately provided by the Court of Justice through its interpretation of the provisions of law and their effects.

In the insertion of the Schengen *acquis* special arrangements were made regarding the ECJ. First as regards all the border and visa related provisions, Article 68

66 Interviews with French Foreign Affairs ministry officials carried out in the context of research on Schengen visas for the Institut des Hautes Etudes de Sécurité Intérieure, March 2001; with Community officials June 2000 and February 2001.

67 OJ 2000 L 238/328.

EC⁶⁸ limits the Court's jurisdiction by restricting to courts against whose decisions there is no judicial remedy under national law, the right to make references within the Title. This limitation will have the effect of slowing down the inevitable coherence, as cases will have to pass through all levels of national appeals before arriving at a court competent to ask a question.⁶⁹ Secondly, as regards the SIS no agreement could be reached on its inclusion in the First Pillar thus by default it fell into the Third Pillar. The Third Pillar is subject to the ECJ's jurisdiction⁷⁰ only in accordance with declarations made by the Member States (Article 35 TEU).

68 Article 68 EC

1. Article 234 shall apply to this Title under the following circumstances and conditions: where a question on the interpretation of this Title or on the validity or interpretation of acts of the institutions of the Community based on this Title is raised in a case pending before a court or a tribunal of a Member State against whose decision there is no judicial remedy under national law, that court or tribunal shall, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon.
2. In any event, the Court of Justice shall not have jurisdiction to rule on any measure or decision taken pursuant to Article 62(1) relating to the maintenance of law and order and the safeguarding of internal security.
3. The Council, the Commission or a Member State may request the Court of Justice to give a ruling on a question of interpretation of this Title or of acts of the institutions of the Community based on this Title. The ruling given by Court of Justice in response to such a request shall not apply to judgments of courts or tribunals of the Member States which have become *res judicata*.

69 E. Guild & S. Peers, Deference or Defiance? The European Court of Justice's jurisdiction over immigration and asylum, in E. Guild & C. Harlow, *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart: Oxford: 2001).

70 Article 35 TEU

1. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this Article to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.
2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.
3. A Member State making a declaration pursuant to paragraph 2 shall specify that either: (a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment, or (b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.
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4. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this Article to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.
5. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.
6. A Member State making a declaration pursuant to paragraph 2 shall specify that either: (a) any court or tribunal of that State against whose decisions there is no judicial remedy under

Within the Schengen system of mutual recognition of nationally constructed concepts of internal security threats has been created. The field in which it operates is sensitive – including issues of civil liberties such as data protection and access to information and human rights such as family life and asylum. The principle of recognition means that an individual will be excluded by all the states even when he or she only satisfies the exclusion criteria of one.⁷¹ In the intergovernmental framework only national courts are competent to adjudicate the lawfulness of the security appreciation of the state. During the Schengen period, national courts varied increasingly as regards their assessment of the system (see section 4). The insertion into the EC and EU Treaties of the Schengen system entails a common interpretation of the lawfulness of national appreciation of risk. The tension between civil liberties and human rights and a network of grounds of exclusion must now be supervised by the supra-national court: the ECJ. Over the shoulder of the ECJ with ultimate responsibility for the protection of human rights, *inter alia* among the Member States, is the European Court of Human Rights which until now has tended to accept the special legal regime of the Union though appears increasingly ready to assess its effectiveness in human rights protection.⁷²

The reconstruction of borders in the Schengen system entailed a shift in the appreciation of individuals. The importance of identifying security risks whether specifically defined in respect of individuals or collectively defined as regards all nationals of some states took on increasing importance. Linking national assessments of security while protecting those assessments from examination was central to the Schengen system. However, with the communitarisation of the acquis, the role of the individual takes on a new importance. The highly structured legal regime of the Community encourages the use of judicial dispute mechanisms to resolve tensions over the position of power through the protection of individual rights. The insertion of a system based on a very loose assessment of security risk into this environment, itself liable to human rights compliance is likely to change the relationships of states to borders, the Community and individuals.

national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment, or (b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

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71 H. Staples referred to a celebrated case in the Netherlands where a New Zealand national, a Greenpeace activist, was excluded from the Netherlands on the basis of a SIS entry against her by France. The legitimacy of the French appreciation of an internal security risk was not accepted by the Dutch public; presentation: Judicial Control of the EU Border: ILPA/Meijers Committee Conference: 11 & 12 May 2001, London.

72 A special issue of the European Journal on Immigration and Law will be published in June 2001 on this issue with contributions *inter alia* by P. Cullen, T. Eicke and E. Steendijk.

4. The legal mechanisms – collectively specifying the individual: The Schengen Information System

The EU objective as regards movement of persons is the creation of a common territory without internal borders (at least not at the frontiers between the Member States)⁷³ accompanied by one common external frontier. The management of the external border is considered by all the institutional actors⁷⁴ as fundamental to the achievement of the abolition of borders internally.⁷⁵ The first step considered necessary in the legal system which the Community has inherited for the achievement of abolition of border controls, is the identification and exclusion of those who are known security risks.

The mechanism adopted was the Schengen Information System. This is a network database which covers a number of different aspects of information on persons. For my purposes, I will only be considering those persons entered on the SIS for the purposes of excluding them from the territory of the Union Article 96 Schengen Implementing Agreement (minus the two non-participating Member States). The physical mechanism of the database and how it works has been well described in the Justice Report on it.⁷⁶ In effect it brings together the national lists of persons to be excluded from the territory of the Member States into one network which is accessed on line by border guards where individuals arrive at the common external border and by visa officials in consulates abroad before the issuing of visas. For those consulates which do not have on-line access, CD-ROMs are sent regularly to the consulates containing the whole of the database.⁷⁷

The rules on what information can be inserted into the SIS under this heading – inadmissible persons – is contained in Article 96 Implementing Agreement.⁷⁸ The

73 As regards controls within the Member States see K. Groenendijk, *Internal Controls*, paper presented at ILPA/Meijers Committee Conference on Article 62 and Borders, 11 & 12 May 2001, London.

74 With the possible exception of the European Parliament.

75 It was this argument which the intervening Member States and the Council put to the Court of Justice in the *Wijsembeek* (supra) case where the applicant sought to establish the direct effect of Article 14 EC as requiring the abolition of internal border controls irrespective of the achievement of the external regime. The Court of Justice agreed with the Member States and the Council – the completion of the external frontier controls in common is a prerequisite for the direct effect of Article 14.

76 Justice, *The Schengen Information System: A human rights audit* (Justice: London: 2000).

77 W. van de Rijt, Administrator, Council of the European Union, ERA Seminar: Schengen in the Nordic States, Helsinki, 7-8 December 2000.

78 1. Data on aliens for whom an alert has been issued for the purpose of refusing entry shall be entered on the basis of a national alert resulting from decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law.
2. Decisions may be based on a threat to public policy or public security or to national security which the presence of the alien in national territory may pose.

This situation may arise in particular in the case of:

(a) An alien who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year;

◇

basis is national law. Those participating states apply their national rules on the basis of their lists of inadmissible aliens.⁷⁹ These lists are then tied together through the SIS network comprised of a national SIS bureau, which manages the national list, and a central SIS bureau which makes sure the bits are connected.⁸⁰ The legal rules are those of each Member State, the examples given are for guidance, they are not constitutive. The obligation is to insert data on aliens to be refused entry. The means by which the authorities of a Member State arrive at a decision to enter the data are within the exclusive control of the Member State authorities. Thus a Member State could have reasons other than security for including a person on the list and this would not offend Article 96. The principle at work is cross-recognition in a rather pure form. The constraints on who may be inserted are exclusively those which apply at the national level. There is no attempt to restrict or harmonise what is permissible at the national level. But whatever happens at that level is then to be recognised as valid by the other states. Indeed, all aspects of the system are based on cross-recognition of the laws and practices of other Member States.⁸¹

(b) An alien in respect of whom there are serious grounds for believing that he has committed serious criminal offences including those referred to in Article 71, or in respect of whom there is clear evidence of an intention to commit such offences in the territory of a Contracting Party.

3. Decision may also be based on the fact that the alien has been subject to measures involving deportation, refusal of entry or removal which have not been rescinded or suspended, including or accompanied by a prohibition on entry or, where applicable, a prohibition on residence, based on a failure to comply with national regulations on the entry or residence of aliens.

79 Among the first to express concern about the network nature of the assessment of risk was H. Steenbergen, Schengen and the movement of persons, in H. Meijers et al, *Schengen: Internationalisation of central chapters of the law on aliens, refugees, security and the police* (Tjeenk Willink-Kluwer: Utrecht: 1991).

80 Justice, *The Schengen Information System: a human rights audit* (Justice: London: 2000).

81 A review of the provisions of the Schengen Implementing Agreement regarding the SIS reveals the following: National law and the Schengen Information System (SIS):

- (a) information and border, customs and police checks carried out in accordance with national law: Article 92;
- (b) exclusion from undertakings to take action under the SIS is governed by national law: Article 94(4);
- (c) check on arrest for extradition is governed by national law: Article 95;
- (d) inclusion of data on aliens is governed by national law: Article 96;
- (e) communication of information is governed by national law: Article 98;
- (f) data on persons and vehicles and making an alert is governed by national law: Article 99;
- (g) taking measures on objects found is governed by national law: Article 100;
- (h) access to data on system is governed by national law: Article 101;
- (i) use of data on SIS is governed by national law: Article 102;
- (j) alerts are governed by national law: Article 104;
- (k) rights of persons regarding data is subject to national law: Article 109;
- (l) national legal remedies only apply: Article 111;
- (m) review period for storage of data where shorter than 3 years is governed by national law: Article 112;
- (n) designation of a supervisory authority over data is governed by national law: Article 114;
- (o) supervision of technical support function of SIS by the joint supervisory authority is governed by national law: Article 115;
- (p) liability for damage caused by misuse of data and reimbursement between states is governed by national law: Article 116;

◇

Thus Article 96 entries are about persons who, by their actions or activities, are considered by the national authorities of each participating state to be a threat of sufficient severity that the individuals should not be admitted to the territory. The persons are identified individually as a threat according to the interpretation of threat which applies at the national level.⁸² In so far as general categories of risk are included these are determined at the national level, not the SIS level. The Article 96 persons are primarily those who have been within the territory of the Union at some time and have been excluded by a participating state on the basis of their activities. The category is unlikely to include substantial numbers of persons who have never come to the Union, though this is in theory possible in respect of persons suspected of serious crimes under Article 96(2)(b). Persons who have arrived at the frontier and have been refused admission may be included, but again in this case it is their specific activities in relation to the territory of a state which is critical.

As at 23 May 2000, the date of the last report of the Schengen Joint Supervisory Authority there were 9.7 million entries in all categories on the central SIS.⁸³ The vast majority of entries have been made by France (3.1 million), Germany (2.8 million) and Italy (2.2 million). The Netherlands has just under 1 million entries in all categories. The majority of these entries relate to objects not persons. When only entries relating to persons under Article 96 are considered, the distribution is quite different:

1999

At	Be	De	Es	Fr	Gr	It	Lux	Nl	Pt	Total
28,469	636	389,513	12,365	59,920	49,031	200,031	238	8,373	1,771	760347

Thus France, which has a very large number of entries under all categories, has relatively few on persons in this category. The countries most concerned, according to the Article 96 figures, about persons who have been on the territory or tried to enter the territory, are Germany and Italy. In the case of Germany, the threat which foreigners represent has been much discussed elsewhere.⁸⁴ The arrival in Germany of increasingly substantial numbers of asylum seekers⁸⁴ and Aussiedler (ethnic Germans

(q) decisions on whether or what information will be provided to a “data subject” is governed by national law: Article 127;

(r) instruction of a supervisory authority to monitor protection of personal data is governed by national law: Article 128.

82 The lack of precision as to the meaning of security against which threats must be excluded in the SIS is apparent in the French Ministry of Defence report on the notion of security in European law. While the meaning of security within the EC context is set out at length, as regards the SIS the references is only to the national level. Ministère de la défense, direction des affaires juridiques, *La notion de sécurité en droit européen*, September 1999.

83 Joint Supervisory Authority, Schengen, *Report*, Brussels 18 July 2000 – SCHAC 2533/1/00 Rev 1.

84 G. Noll, The Non-Admission and Return of Protection Seekers in Germany, *International Journal of Refugee Law*, Vol 9: 1997, p. 415-451.

from Central and Eastern Europe and beyond)⁸⁵ from 1989 onwards is undoubtedly important to the perception of “foreigners” as a threat. The object of public disquiet focussed the right of asylum. The exclusion of own nationals, the Aussiedler, from entering the state or redefining the “foreign” Germans as foreigners not Germans was politically not possible. Over 1992 –3 a dramatic national debate led to a constitutional amendment (required *inter alia* by the Schengen acquis) removing the absolute character of the right to asylum in article 16A Grundgesetz.⁸⁶ One of the by-products of this heated debate, which had seared German society, is the perception of foreigners abusing the asylum system as an important source of security threat. The security which has been placed at risk is the cohesion of German public opinion; the threat is individuals who by their arrival and claim for asylum threaten that cohesion. Thus rejected asylum seekers in the German construction of risk rank highly. Accordingly, they were inserted into the SIS. Other Member States with a different relationship to asylum such as France have difficulty accommodating the German perspective. I will return to this below when considering the court decisions.

In the case of Italy it is less clear where the pressure to include in the SIS substantial numbers of persons under Article 96 has come from. Certainly Italy has been the focus of a substantial amount of criticism by other Schengen states for “lax” control of the external frontier.⁸⁷ A search on the Italian government website under the heading “Schengen visa” instead of turning up the conditions for obtaining a visa or an application form brings up a series of reports from the Italian ministry of foreign affairs regarding official investigations of allegations of corruption by Italian officials in the issue of Schengen visas and the measures taken in respect of the allegations.⁸⁸ Whether the response has been to demonstrate greater seriousness as regards illegal immigration through an increased use of the SIS is unclear. Certainly Italian entries are beginning to be questioned by courts in Austria. Practitioners in other countries are also reporting problems surrounding Italian entries.⁸⁹

For a system based on cross recognition there is then a constant danger that the appreciation of security risk will diverge so greatly between states as no longer to be sustainable. This is what is happening in some participating states. The test of the system of cross recognition of definition of risk has come at the border between security and human rights. Where an individual’s details have been entered on the SIS on the basis of a national appreciation of security risk a tension arises when the indi-

85 C.A. Groenendijk, Regulating ethnic migration: the case of the Aussiedler, *New Community* (23) 1997, p. 461-482.

86 J. Henkel, Schwerpunkte der Neuregelung des Asylrechts in Deutschland, in K. Barwig et al., *Vom Ausländer zum Bürger, Problemanzeigen in Ausländer-, Asyl- und Staatsangehörigkeitsrecht* (Nomos Verl.: Baden-Baden: 1994).

87 Around the operational entry of Italy into the Schengen system on 26.10.1997 there were substantial press reports across Europe about this issue: see for instance Agence France Presse January 10, 1998. Further, it appears that the Italian security services share one database. Thus it may have taken Italy substantially more time to insert the contents of the database on the SIS but the result, when complete, was an explosion of figures: D. Bigo, Migration and Security, in V. Guiraudon & C. Joppke, *Migration in Europe* (Routledge: London: forthcoming).

88 Search conducted: 10.10.2000: www.esteri.it/eng/archives/arch.

89 C. Rodier, GISTI, France, May 2001.

vidual applies for entry (or a visa) to another Member State. In those cases where a question of human rights arises the courts in some states have become increasingly reluctant to accept, without an independent judicial assessment, the SIS entry. Issues relating to asylum seekers were otherwise regulated in the Schengen system.⁹⁰ The compatibility of the Schengen system with the Member States obligation to provide protection to persons fearing persecution and torture is the most pressing challenge which must be resolved by the EU. This will be considered separately below in section 7. The rights of family members to visit or indeed enjoy reunion with other family members in the Union will be considered here.

As the Schengen system only applies to short stays of three months or less, in principle it does not apply to applications for long stay visas for the purposes of family reunification. However, as the French Conseil d'Etat noted, by granting a long stay visa for family reunion purposes to an individual, there are inevitable consequences for the Schengen space.⁹¹ The individual is admitted to the territory of one state and thus has free circulation rights in the totality of the territory. Further he or she will be eligible under national law for a residence permit. By Article 25 Implementing Agreement, such a residence permit shall not be issued until the state has consulted with the state which put the person on the SIS and taken into account the other state's interests. The residence permit shall be issued for substantive reasons only, "notably on humanitarian grounds or by reason of international commitments." Thus the system designed around short stay visas has substantial consequences for long stay visas and residence.

So far the courts which have shown the greatest suspicion of the SIS have been French. In June 1999 the French Conseil d'Etat handed down judgment in two cases which would have lasting consequences for the system. In the first case, *Hamssaoui* (no 198344), the applicant for a visa was a Moroccan national. She sought a visit visa to go to France to visit her daughter who was married to a French national and with whom she had a child. The grandmother was refused the visa because her name had been entered on the SIS. No further grounds were given. She appealed against the decision to the Conseil d'Etat. The court held that the refusal had to be quashed as it failed to provide sufficient information for Mrs Hamssaoui to know on what basis her details had been entered. She was entitled to information as to the country which had placed her details on the system and the reasons. The details must be sufficient to permit the national judge (i.e. the French administrative judge) to review the legality of the entry. The same day the court decided the case of *Forabosco* (no 190384), a Romanian national who had married a French national and sought a visa to come to France for family reunification. It was refused as her details had been entered on the SIS. Again the Conseil d'Etat held that she was entitled to sufficient information regarding the entry to enable the national judge to consider the lawfulness of the entry.

90 These, in turn were overtaken by the entry into force of the Dublin Convention on the state responsible for an asylum application made in one of the Member States in September 1997.

91 *Forabosco*, Conseil d'Etat 09.06.99 (no 190384).

In both cases the SIS entry had been made by Germany because the individual had applied for asylum which application had been rejected. As the German authorities had not received notification that the individual had left the territory her name had been inserted on the SIS as a person who had stayed unlawfully in Germany (the presumption). The position of the French court was that it was incumbent on a French judge to assess the lawfulness of the entry on the SIS made by another Member State. In the absence of a supra national judicial authority, it was for the national courts to determine the lawfulness of the executive, whether that be the national executive of the state or that of one of its partners. These decisions modify substantially the fundamental nature of the Schengen system. The “pure” cross-recognition nature has been refuted by the final instance court of one Member State.

Not all Member States’ courts have been so bold.⁹² However, the approach of the Conseil d’Etat indicates the fundamental weakness of the system of uncontrolled cross recognition of threat. The value of family visits or reunion may be assessed in one state as substantially more important as a factor when compared with the risk created by an unsuccessful asylum application. The appreciation by a national court of the activities of the administration of other states regarding the SIS has been, perhaps inadvertently, encouraged by Article 111 Implementing Agreement:

Any person may, in the territory of each Contracting Party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving them; The Contracting Parties undertake mutually to enforce final decisions taken by the courts or authorities referred to in paragraph 1, without prejudice to the provisions of Article 116.

However, the consequences for the integrity of the system are self-evident. The very strong expression of view about the French Conseil d’Etat’s position expressed by at least one official of the Council is indicative of the problem.⁹³ Nonetheless, the Court’s approach is implicit in a system based on cross-recognition and aggregation of national definition of risks. The Schengen borders *acquis* under its new legal base in Title IV EC⁹⁴ will now be subject to the jurisdiction of the European Court of Justice as regards its interpretation. However, as mentioned in the last section, the SIS

92 The Netherlands: Arrondissementsrechtbank ’s-Gravenhage, zittingsplaats Haarlem, 18 August 1999: A US national had been reported for refusal of admission in the SIS by the German authorities on the grounds that his application of a residence permit was not accompanied by proof of health insurance and he had received public benefits, consequently he was expelled from Germany. The Dutch court held that Article 96 prevented it from considering the facts of the case; although there was no clear evidence of when the data had been reported, the time limit of storage of data did appear to the court to have been exceeded; it found that the right of appeal contained in Article 111 could not be interpreted as meaning that the person has a right of access to the territory to exercise the appeal right.

93 Intervention by N. Bracke, administrator, Council of the European Union, ERA Seminar on Schengen in the Nordic States: Helsinki, 7-9 December 2000.

94 Of Part 3 of the Treaty. I will refer to this as Title IV hereafter.

does not fall into Title IV EC, rather it remains in the Third Pillar of the TEU. Thus the provisions of Article 35 TEU apply to the Court's jurisdiction over it.

The fundamental problem, which underlies the weakness of the SIS, is the lack of control over the contents of the definition of risk and threat. In section 2, I examined how within the EC Treaty framework of free movement of workers, the ECJ deprived the Member States of control over the definition of public policy, security and health on the basis of the EC legislator's directive (64/221). The reason which the Court gave was consistent: the rights of persons moving within the Union must enjoy a high and consistent level of protection, the exceptions which limit those rights on the basis of a national appreciation of security risk must be controlled by the Court and interpreted narrowly. The challenge of the Schengen system is the basis on which common control of the definition of risk should be founded. The need for a common interpretation of risk and this of the reasons for exclusion of the individual arises from two sources:

1. The principle of equality of treatment: the European legal system is founded on the principle that like situations must be treated similarly and unlike situations must be treated differently.⁹⁵ Indeed it has been suggested that this right to equal treatment is one of the most fundamental principles of Community law.⁹⁶ So long as the definition and appreciation of security risk is allowed to vary according to national preoccupations, there can be no equality of treatment of the individuals excluded on the basis of their personal behaviour.
2. The tension between rights and the grounds for their limitation: while international courts have been very cautious about suggesting that there are rights of entry for foreigners in international law outside the sphere of asylum⁹⁷ the effect of some judgments in particular of the European Court of Human Rights is to give a right of residence with which a right of entry is implicit.⁹⁸ With EC law, rights of entry have been widely granted not only to Community nationals but also to their third country national family members and employees and under third country agreements.⁹⁹ Cholewinski has argued that through the Schengen *acquis* the detailed rules on access to the territory which apply constitute an expectation that when met, entry to the EU states will be granted.¹⁰⁰

The gradual development of a right of admission for foreigners through human rights law and EC law provides the framework against which the definition of the grounds for exclusion must be controlled. To the extent that there is a right of admission for

95 156/78 *Newth* [1979] ECR 1941.

96 See introduction by Advocate General F.G. Jacobs, in A. Dashwood & S. O'Leary, *The Principle of Equal Treatment in EC Law* (Sweet & Maxwell: London: 1997).

97 *D v UK*, European Court of Human Rights, judgment: 2 May 1997.

98 *Ciliz v the Netherlands* European Court of Human Rights, judgment: 11 July 2000.

99 E. Guild, *Immigration Law in the European Community* (Kluwer Law International: The Hague: 2001).

100 R. Cholewinski, ILPA/Meijers Committee Conference on Article 62 and Borders, London, 11 & 12 May 2001.

foreigners, the grounds of security must be consistent across the Union in order to safeguard the coherence of the right.

The borders of sovereignty engage, at a most basic level, the perception of security and risk. One of the most important symbolic functions of borders is that they provide within a territory security to those resident or belonging within them. The legitimacy of the exercise of bureaucratic power within a territory is closely associated with this promise to provide security. Thus the definition of what security is and its appreciation at the border involves the state's claim to control. So long as this appreciation of security remains within national control, the state's legitimacy is not at risk. Where the state 'sub-contracts' the exercise of security to other actors, either state or private, the question is one of trust and confidence in the carrying out of the instructions not the instructions themselves. However, the interpretation by some national courts and the communitarisation of the Schengen *acquis* has brought the definition of security and risk itself into question. That challenge is intensified by the increasing reach of supra-national human rights law into the arena.

5. Moving the control of borders further: visas

So far I have looked at the categorisation of individuals on the basis of their status as “belonging” to the Union by virtue of citizenship, or exclusion from the Union on the basis of their personal behaviour. It is now time to look at the categorisation of individuals and the determination of their possible access to the Union territory not on the basis of their own behaviour or nationality but on an assessment of a category which has been determined as a potential security risk and into which the individual falls. The creation of a common designation of countries, whose nationals require visas to come to the territory of the Union and those who do not, will now be examined. In particular in this section I will look at what visas are; the reasons why countries are placed on the common visa list and the reasons given for why they are removed.

Until the Maastricht Treaty, the question of visas for third country nationals only arose in one situation in Community law and there by virtue of subsidiary legislation relating to the procedures under which Community national migrant workers¹⁰¹ and their family members of any nationality may exercise their free movement right. Article 3(2) of Directive 68/360 permits the Member States to require a visa (or equivalent document) from third country national members of the family of a migrant Community national but requires the Member States to “accord to such persons every facility for obtaining any necessary visas.” Therefore the existing provision is permissive not mandatory, allowing Member States to impose a visa requirement, but where they do require such a visa placing an obligation on the Member States in favour of the third country national to provide every facility for the issue of such a visa. Further Article 9(2) of the Directive requires that such visas be issued free of charge.

When called upon to rule on what a visa or equivalent requirement is for the purposes of the Directive, the Court of Justice held that it covered any formality for the purpose of granting leave to enter the territory of a Member State which is coupled with a passport or identity card check at the frontier, whatever may be the place or time at which that leave is granted and in whatever form it may be granted.¹⁰² However, a visa is no longer a single concept.

What is a visa?

Article 39 EC: any formality for the purpose of granting leave to enter the territory of a Member State which is coupled with a passport or identity card check at the frontier, whatever may be the place or time at which that leave is granted and in whatever form it may be granted.¹⁰³

101 Or of the self employed and service providers and recipients under Directive 73/148 which mirrors Directive 68/360 in this regard.

102 157/79 *Pieck* [1980] ECR 2171.

103 157/79 *Pieck* [1980] ECR 2171.

Article 62 EC: For the purposes of the Visa Regulation ‘visa’ shall mean an authorisation given or a decision taken by a Member State which is required for entry into its territory with a view to: an intended stay in that Member State of no more than three months in all; or transit through the territory of that Member State or several Member States, except for transit through international zones of airports and transfers between airports in a Member State.¹⁰⁴ A short stay visa is a document affixed to passports or travel documents which *prima facie* permits the holder to arrive at the border of the issuing state and, subject to further checks, to pass that border for a period of time; these visas prohibit employment but permit economic activities such as attending meetings with clients or customers and settling contracts.¹⁰⁵ However, this short stay “Schengen” visa¹⁰⁶ is by no means uniform, though Article 11 of the Schengen Implementing Agreement defines it as such. In fact as the Schengen Common Consular Instructions make clear, it consists of:

1. a travel visa valid for one or more entries provided that neither the length of a continuous visit nor the total length of successive visits exceeds three months in any half-year, from the date of first entry;
2. a visa valid for one year entitling a three month visit during any half year and several entries;
3. a visa valid for more than one year but for a maximum of five years entitling a three month visit during any half year and several entries;
4. airport transit visas which entitle an alien to pass through the international transit area of airports;
5. transit visas which entitle aliens who are travelling from one third state to another to pass through the territories of the parties;
6. transit visas issued to a group of aliens provided that they entry and leave the territory as a group;
7. group visas limited to a maximum of 30 days stay on the territory for groups of between 5 and 50 persons travelling on a group passport provided they enter and leave the territory as a group.

Excluded from the above definition of the uniform visa are long stay visas, visas with territorial validity and visas issued at the border, all of which are provided for in the Common Consular Instructions.¹⁰⁷

Following the incorporation of the Schengen borders *acquis* into the EC Treaty a new regulation on the countries whose nationals require a visa to enter the territory for a short stay and those who do not was adopted by the Council in March 2001.¹⁰⁸ As with the previous visa regulation, this one divides the world into two categories: those persons who are required to obtain visas before leaving their country of origin

104 Article 5 Regulation 2317/95; repeated in the new visa regulation OJ 2001 L 81/1.

105 OJ 2001 L 81/1.

106 The allocation of this part of the Schengen *acquis* to Article 62 EC appears to communitarise the Schengen visa as an Article 62 visa.

107 OJ 2000 L 239/327.

108 OJ 2001 L 81/1.

if they seek to come to the Union territory and those who do not.¹⁰⁹ Both groups will, on arrival, face the same border controls.¹¹⁰ But those who do not require visas may simply board a plane or bus or get into the car and start driving. For them the border does not necessarily arrive until they reach the physical external frontier. For those who require a visa, there is no possibility to just get on a plane or bus – the requirements of transporters prevent that (I will return to this point below in section 6). If they are so bold as to get into their cars and start driving they will be turned back at the physical frontier for failure to have the necessary visa.¹¹¹

For these persons, the border of the Union starts within their own territory – at the consulates of the Member States. It is here where they must establish whether they should be permitted to enter the Union. Thus the question: why some countries are on the mandatory visa black list and others are on the white list is critical to understanding where the Union border is and why. As I have developed above, the border of the Member States has moved from their physical frontier to one common external frontier (excepting those states not participating).¹¹² This new frontier applies to everyone, irrespective of their nationality. However, another border has also been established which applies only on the basis of nationality: the border for visa nationals which is at the consulate. Once the individual has obtained a visa, then there is a presumption that he or she will be admitted to the combined territory. Even if the visa was issued by the German consulate and the individual is seeking to enter the combined territory through France, in the absence of strong countervailing circumstances, the visa issued by the Germans is equivalent to one issued by the French.¹¹³ Indeed the format is the same, though the Schengen visa does indicate which country issued it.

The control takes place, for visa nationals then, at EU consulates within the individual's own state, followed by a complementary control at the common external border of any one of the participating states.¹¹⁴ There is no further formal control on movement within the territory.¹¹⁵ The type of control which takes place and the reason for it are fundamental to an investigation of borders in the Union. Two questions arise: first what are the criteria for inclusion of a state on the white or black list? To

109 Though the category of visa nationals subdivides into those who only need a visa to entry to territory and those who, in addition, are required to have a visa to transit through the territory.

110 Article 6 Schengen Implementing Agreement 1990.

111 There is the power to issue visas at the border but according to French officials this power is used for seamen arriving at ports without visas because they have been on ships unable to get to consulates.

112 Confusingly, for the purposes of the Visa Regulation only Ireland and the UK are able to remain outside the system. Denmark is included in the ambit of the Regulation which is now subject to adoption by qualified majority voting in the Council.

113 Article 10 Schengen Implementing Agreement.

114 As regards countries whose nationals are considered particularly risky, Member States reinforce the visa requirement by placing immigration officers at the airports of such countries working with the airline staff to ensure that only the truly "bona fides" passengers can leave their state of origin.

115 Neither the question of the internal controls nor the power to continue mobile controls within a 20 kilometre radius of the physical state borders are considered here.

seek some insight into this question I will analyse the arguments presented by the Commission in its explanatory memorandum to the new visa Regulation. As points of change are those which are most susceptible to revealing reasons, I will consider in some depth the removal of countries from the black list – in particular the cases of Bulgaria and Romania which countries were only removed from the black list in the latest regulation, and Colombia which was added to the black list in the latest regulation. The second question is what criteria are used to determine which individuals among the class of visa nationals are to be granted visas. To what extent are the criteria the result of cross recognition of national practices and to what extent do they actually constitute a common system. I will not deal with this question here but refer the reader to my analysis elsewhere.¹¹⁶

Black and White Lists

By a series of regulations adopted in Community law, the list of countries whose nationals must have a visa in order to enter the territory of the Member States is common to all Member States (except the two which have opted out).¹¹⁷ It similarly includes a standard list of those countries whose nationals do not require a visa to enter a Member State. According to the explanatory memorandum to the most recent the Regulation, the reason for the inclusion and exclusion of certain countries from the list is as follows:

“To determine whether nationals of a third country are subject to the visa requirement or exempted from it, regard should be had to a set of criteria that can be grouped under three main headings:

- illegal immigration: the visas rule constitute an essential instrument for controlling migratory flows. Here, reference can be made to a number of relevant sources of statistical information and indicators to assess the risk of illegal migratory flows (such as information and/or statistics on illegal residence, cases of refusal of admission to the territory, expulsion measures, and clandestine immigration and labour networks), to assess the reliability of travel documents issued by the relevant third country and to consider the impact of readmission agreements with those countries;

- public policy: conclusions reached in the police Cupertino context among others may highlight specific salient features of certain types of crime. Depending on the seriousness, regularity and territorial extent of the relevant forms of crime, imposing the visa requirement could be a possible response worth considering. Threats to public order may in some cases be so serious as even to jeopardise domestic security in one or more Member States. If the visa requirement was imposed in a show of solidarity by the other Member States, this could again be an appropriate response;

116 E. Guild, Implementing Schengen: the Visa Instruments, *Immigration and International Employment Law*, No. 4, Autumn 2000, p. 10-13.

117 OJ 2001 L 81/1. There is still a small number of countries in limbo, such as South Africa, but at least officially the “grey” list of countries whose nationals require visas to enter only some Schengen states has been abolished.

- international relations: the option for or against imposing the visa requirement in respect of a given third country can be a means of underlining the type of relations which the Union is intending to establish or maintain with it. But the Union's relations with a single country in isolation are rarely at stake here. Most commonly it is the relationship with a group of countries, and the option in favour of a given visa regime also has implications in terms of regional coherence. The choice of visa regime can also reflect the specific position of a Member State in relation to a third country, to which the other Member States adhere in a spirit of solidarity. The reciprocity criterion, applied by States individually and separately in the traditional form of relations under public international law, now has to be used by reason of the constraints of the Union's external relations with third countries. Given the extreme diversity of situations in third countries and their relations with the European Union and the Member States, the criteria set out here cannot be applied automatically, by means of coefficients fixed in advance. They must be seen as decision-making instruments to be used flexibly and pragmatically, being weighted variably on a case-by-case basis."¹¹⁸

There are 131 countries and three territories on the black list. The white list contains 43 (plus two territories). Individuals from these countries are divided into those who are likely to be a security risk or not. The reasons given by the Commission for the inclusion of countries on the two lists has not changed substantially since the Community gained competence for the list with the entry into force of the Maastricht Treaty. In fact, the lists were, to a substantial extent, inherited from the Schengen lists, the first of which appears to have been adopted in 1993. It is less clear whether the Commission also inherited the reasons for inclusion and exclusion on the black and white lists also from the Schengen acquis. Nonetheless, the reasons seem to have slipped into Community orthodoxy with little critical analysis. In my opinion they deserve some consideration, albeit belated.

In considering the three reasons which the Commission provides for inclusion of countries on the black list the first two relate specifically to the activities of individuals: illegal immigration and crime. Only the third ground relates to countries: interstate relations where the actions of governments determine whether their nationals received preferential treatment. Individuals are no longer considered on the basis of the policies of their state of nationality. They are not protected by their state, indeed the actions of the state of nationality are only relevant in one instance. The state is not exclusively capable of achieving the conditions favourable to the abolition of visa requirements for its nationals. It might be questioned whether an assessment of the grounds for inclusion on a visa black list such as those presented by the Commission do not attack the principle of sovereignty of countries outside the Union.

To return, however, to the first two grounds: risk of illegal immigration and crime, these are grounds which related to the behaviour of individuals. When used as reasons for placing visa requirements on all nationals of a country, the Union is in effect stating that nationals of some countries are by definition more likely to be illegal immigrants or criminals than nationals of other countries. This assessment of risk is not connected to the individual behaviour of the person who seeks to travel. The

118 Document 500PC0027: Commission Proposal – COM (2000) 027 final.

individual's behaviour vis-à-vis the Member States is the subject of the SIS. Here the approach is one of profiling: who is likely to be a risk. This profile is not based on individual characteristics, such as statements of intention or activities, but on nationality, to what state does the individual belong?

The Commission's first ground is stated to be the risk of illegal immigration. The Commission makes reference to illegal migratory flows and information and/or statistics on illegal residence, cases of refusal of admission to the territory, expulsion measures and clandestine immigration and labour networks. Some analysis of this rather heterogeneous list is merited. First there is reference to illegal migratory flows. It is notoriously difficult to establish very much at all about migration flows as regards legality. Stocks are more susceptible to analysis. The terms of reference of legal versus illegal migratory flows require further definition. Is the Commission intending to refer to little pateras arriving on the Spanish coast with persons on board whom, for the most part, it is impossible to attribute nationalities? Or is the Commission referring to persons who arrive lawfully as tourists from the US and who stay a little longer than is permitted or take some part time work picking fruit during the summer holiday in Europe? Secondly, the Commission refers to 'information' and 'statistics' as if the two are equally valuable. Statistics relating to irregular entry, stay and work are problematic – unless they are based exclusively on convictions for these offences they lack credibility.¹¹⁹ The Commission seeks to base its assessment of risk on information of other kinds, such as newspaper reports, information from diplomatic missions etc. Information about illegal residence on the territory of a Member State on the basis of the nationality of the individual illegally residing is not generally publicly available.¹²⁰ Further the categorisation of persons as illegally residing varies from one Member State to another. In some debates Germany refers to persons with tolerated status as illegal residing. In other debates, the UK includes all persons whose asylum applications have been definitively rejected.¹²¹ However, for the most part these persons are waiting to be expelled, an action which is in the control of the state. As they have no funds to leave the territory they must await the state's pleasure in expelling them. To base decisions about nationalities as risks on such uncertain and heterogeneous figures may be rash. In short, the grounds relating to the individual behaviour seem rather arbitrary.

119 The ECJ recognised this difficulty as regards the application of the subsidiary legislation granting work and residence rights to Turkish workers under the EEC Turkey Association Agreement. Mr Kol claimed to enjoy a right of protection under the legislation (Decision 1/80) while the German Government argued that he was not protected as his residence has been based on fraud. The Court stressed that an allegation of fraud would be insufficient to justify an interference with the rights acquired under the Decision. In finding that Mr Kol had not acquired the rights, it stressed twice that he had been convicted of the fraud by a court C-285/95 *Kol* [1997] ECR I-3069.

120 The UK is an exception in so far as it publishes statistics broken down on the basis of nationality of persons apprehended and treated as irregular migrants. However, one of many difficulties with these figures is that they include, for instance, persons who arrived irregularly on the territory but subsequently applied for asylum.

121 Speech by J. Straw, Secretary of State for the Home Department, 25 April 2001.

The final two grounds under this first heading of reasons for inclusion on the black list are reliability of travel documents and impact of readmission agreements. These two aspects, at least, are subject to some control by states. It would appear that if a state does not produce travel documents, which the Union considers sufficient, then its citizens will be penalised. If the lack of reliability arises from evidence of substantial forging of travel documents because of a security failure this may be justified. However, if it is related to the unwillingness of states, for example, to produce travel documents which are easily machine-readable by the Schengen terminals, this would be questionable. The ground of the effectiveness of readmission agreements is also somewhat suspect. If one considers the effectiveness of the most high profile of readmission agreements of the Member States – the Dublin Convention regarding which state is responsible for considering an asylum application – one has an example of a system in substantial disarray.¹²² Successful transfer of asylum seekers under the Convention has fallen to just over 1% of asylum seekers within the Union. In view of the difficulties of getting transfers accepted the numbers of requests for transfer among the Member States has fallen in 2000 and shows no sign of increasing.¹²³ In light of the problems which the Member States have been unable to resolve among themselves in respect of a rather straight forward readmission agreement it seems rather unhelpful to use the effectiveness of much less precise agreements with third countries as a basis of assessing whether a visa requirement is appropriate.¹²⁴

Turning then to the second ground, crime, the Commission suggests that specific features of certain types of crime are relevant as they are revealed in police co-operation. The Commission suggests that the seriousness, regularity and territorial extent of the relevant forms of crime are relevant. It is unclear whether these factors apply to the Member States or the territory of the third country. If one takes, for example, the use of soft drugs, the recent legalisation of personal use of marijuana in Belgium following the Dutch lead in comparison with the French or Greek approach to the same issue, it would be difficult to find an EU consensus on ‘seriousness’ in this field. This is a ground relating to activities which may or may not be lawful within the territory in which they are carried out. It would seem that an EU definition of what is criminal behaviour is intended to be imposed on third countries. On the basis of that assessment individuals with that nationality are categorised as a potential risk, thus appropriate objects of visa requirements.

The profile of the individuals holding a specific nationality is determined and on the basis of the determination that all individuals coming from that state are categorised as risks. It is then through the processing of visa applications that the participating states can be satisfied that a particular individual is an exception to the princi-

122 N. Blake, *The Dublin Convention and Rights of Asylum Seekers in the European Union*, in E. Guild & C. Harlow, *Implementing Amsterdam: Immigration and Asylum Rights in EC Law* (Hart: Oxford: 2001).

123 M. Heinonen, *The Dublin Convention in Statistics*, EIPA Seminar on the Dublin Convention: 25-27 April 2001, Maastricht.

124 Initial research by GISTI indicates that the readmission agreements between France and the Maghreb countries have little practical effect.

ple and does not constitute a threat to the EU territory. The placing of the individual at the centre of the assessment to the exclusion of the state changes the relationship of the states between themselves and of individuals in respect of their state of citizenship and the EU state to which they seek to go.

Further, the network foundation of the system is clearly indicated by the arguments of the Commission in relation to crime as a threat justifying the imposition of a visa requirement on all nationals of a state. The Commission states “Threats to public order may in some cases be so serious as even to jeopardise domestic security in one or more Member States. If the visa requirement was imposed in a show of solidarity by the other Member States, this could again be an appropriate response.” Thus the appreciation by one Member State of its security is implicitly accepted by the other Member States. There is no harmonisation of the concept of threats to public order. However, the national definition of any Member State may be upheld by solidarity.

The third ground presented by the Commission, international relations, falls within the traditional territory of visas as an inter-state measure, the weight of which falls on individuals as the objects of state protection. However, the Commission’s argument regarding inter-state relations is original. It states that rarely will the decision be taken on grounds of relations with an individual country but rather with the countries in a region. It is the relationship of the Union with a group of countries which is the key exercised in the interests of regional coherence. What does the Commission mean by the interests of regional coherence? This could be interpreted as a reference to a Huntingtonian view of the world as one where the clash of civilisations is determined by blocks of identity based on religion.¹²⁵ Further the traditional inter-state approach is abandoned for a group of states whose interests may or may not coincide. The Union is imposing its model of international relations – regional coherence – on other regions irrespective of whether they have in place the structures for determining and achieving common interest. Because the Union is a regional entity so it will treat other regions as coherent entities notwithstanding the fact that those regions are composed of states which reject the principle of common regional interest.

The Countries

What, then, are the countries on the black list whose nationals are by definition suspect as risks either to immigration or public security through crime? Almost all of Africa is on the black list – whether this is on account of a regional determination or otherwise is not apparent. Most of South America is on the white list other than the non Spanish or Portuguese speaking countries: Guyana, Guinea, and Surinam which are on the black list. The exceptions are Colombia and Peru which are also on the black list.¹²⁶ The English speaking Caribbean islands are all on the black list. Not one country whose population is primarily Islamic is on the white list with the exception

125 S. Huntington, *Clash of Civilizations*, *Foreign Affairs* 72/3 (1993), p. 22-49.

126 As are the Dominican Republic and Cuba on the black list.

of Brunei. All of the tiny island states of the Pacific are on the black list including the very rich states such as Tuvalu. Three non-state territories or territories not recognised as states by all Member States are on the black list: East Timor, Palestinian Authority and Taiwan. Two non-state territories are on the white list: Hong Kong and Macao. This mix of countries certainly does not follow a regional principle: for instance, China is on the black list but Hong Kong and Macao on the white list.

The principles, which the Commission has set out for placing countries on one or other of the lists, are sufficiently large to provide a justification for the treatment of different countries. However, the lack of a requirement to justify the treatment of each country separately means that it is impossible to tell which part of which justification is in action. Thus it is difficult to challenge any particular categorisation. However, the addition of Colombia to the black list was the subject of heated discussion in the Council and Spain abstained from voting on the regulation which was widely criticised in Latin America, *inter alia* by Gabriel Garcia Marquez, a winner of the Nobel Prize for literature.¹²⁷ Certainly there was no report published by the Commission or the Council as to why Colombia was to be added to the black list. No explanation is provided in the Commission's explanatory memorandum. According to a non-governmental organisation which has followed closely the events, not even the Colombian consulates in the Member States were provided with any report relating to the reasons for inclusion. It has been suggested that the reason was because of the risk of illegal immigration and crime in the form of drugs but in the absence of a published report, the strength or weakness of these grounds cannot be fully tested.¹²⁸ The move of EU borders to within the territory of foreign states takes place unilaterally by decision without published reasons of the Council.

Because the list is not reasoned, one view of its contents is that in respect of race and religion almost all countries, the majority of whose population is either black or Muslim are on the list. Further, it could be suggested that those prejudices are supplemented by a second level of privilege or discrimination: wealth. I have already referred, in section 3, to the definition of risk categories in the Common Consular Instructions as "unemployed persons, and those with no regular income".¹²⁹ The definition of the poor as a risk in comparison with the rich who are by definition not a risk would find support in certain recent proposals before the Council on length of visits to the Union. A proposal by the Portuguese Presidency¹³⁰ would permit the Community to enter into agreements with third countries to extend beyond three months the period for travel within the territory of the Union for nationals of the contracting parties.¹³¹ The pressure for the proposal came as a result of dissatisfaction by US nationals,¹³² nationals of a country with a high GDP, unhappy that whereas before the

127 Migration News Sheet, April 2001, p. 3.

128 Migration News Sheet, April 2001, p. 3.

129 OJ 2000 L 238/332, point 1.5.

130 OJ 2000 C 164/6.

131 It is questionable whether this is even actually possible in view of the fact that the three month period is now stated in Article 62(2)(b) EC.

132 Presumably US nationals were finding themselves overstaying their visas. Pressure was brought to bear on the US government which in turn sought a special arrangement for its nationals so that

commencement of the Schengen arrangements they were entitled to travel for three months within each of the Member States separately, after the entry into force of the arrangements they are restricted to three months in the combined territory of all the Member States.¹³³

Returning then to the Visa Regulation, the decision to remove two countries, Bulgaria and Romania, from the black list has been accompanied by a report on each of the two countries setting out the considerations taken into account. These reports are specific to the two countries on two grounds: first both countries are in the Central and Eastern European region, Bulgaria with a land border to the Union (with Greece). Secondly, both are candidate countries for enlargement of the Union to the east. Mandatory visa requirements were only placed on these two countries in September 1995 as a result of a decision of the justice and interior affairs ministers of the EU. The reason given then was the lack of security conditions and the risk of illegal immigration.¹³⁴ The European Parliament attacked the decision not least on the basis of lack of equal treatment with the other Central and Eastern European countries of Poland, Hungary, the Czech Republic and Slovakia. In the space of six years the European Union, though the application of visa requirements, which have been very unpopular in the countries concerned,¹³⁵ placed itself in the position of requiring substantial concessions on a wide variety of issues relating to borders and movement of persons as the price for removing the visa requirement.

The maintenance of visa requirements for Bulgarian and Romanian nationals was exceptional. None of the other candidate countries (with the exception of Turkey) is still subjected to a visa requirement. Thus the issues of border controls and visas in the cases of Romania and Bulgaria are closely linked. As will be discussed below, it is hardly imaginable that the Union would apply the type of criteria used in the reports as regards the decision on visa requirements for other countries not in such a specific relationship of power with the Union. Nonetheless, a review of the two reports provides some important insights into the factors which were considered critical to the question of visa requirements for these two states.

The two reports vary between themselves substantially. The Bulgaria report¹³⁶ is substantially shorter than the Romanian one.¹³⁷ The Bulgaria report consists of four

they would have more time lawfully as visitors within the Member States without becoming illegally present. The fact that sufficient pressure was brought to bear on the Portuguese government that it proposed the adoption of measures which would permit such bilateral changes to the meaning of "visitor" evidences the difference of perspective on who should and who should not be allowed to remain in the Union on the basis of wealth.

133 S. Peers, Legislative Update, *European Journal of Migration and Law*, Vol. 3, No. 1 (2001).

134 European Dialogue: Jan-Feb 1996 issue 1: Politics and Current Affairs: www.europa.eu.int/comm/dg10.

135 A opinion poll in Bulgaria in November 2000 showed that 94% of Bulgarians gave the visa problem the highest priority for the year 2000: quote by E. Jileva, *Implementing Schengen: visa issuing in Bulgaria*, unpublished.

136 Report from the Commission to the Council regarding Bulgaria in the perspective of the adoption of the regulation determining the list of third countries whose nationals must be in possession of visas when crossing the external borders and those whose nationals are exempt of that requirement COM(2001) 61 final, 02.02.01, Brussels.

main sections: (1) the legal framework and administrative practice of Bulgarian borders, including visa policy – does the Bulgarian visa list correspond to that of the Union and border surveillance, carrier sanctions, sanctions for illegal migration to the Member States and sanctions on facilitators of illegal migration to the Member States; (2) repatriation of Bulgarian nationals to Bulgaria – are Member States having trouble repatriating Bulgarians to Bulgaria? (3) additional measures such as technical equipment at borders, co-operation with Greece and including tour operators; (4) conclusions. The Romania report has six parts: (1) border controls, including institution building, investment in technology, legal provisions, visa policy and others; (2) travel document safety – are Romanian passports sufficiently secure? (3) migration policy: Romanian citizenship, carriers liability, expulsion of aliens, readmission agreements, repatriation to Romania; (5) conclusions.

The Bulgaria report in section 1 notes the following matters as relevant to the lifting of the visa requirement:

1. Bulgaria introduced new passports which meet the requirements of the EU as regards safety measures against forgery;
2. the abolition of facilities for issuing visas at the border;¹³⁸ criminal sanctions and fines for irregular border crossing and forged documents;
3. sanctions concerning illegal emigration to the Member States: thus Bulgaria has introduced legislation into its law making it a criminal offence in Bulgaria to offend against the immigration law of any Member State, over which immigration laws the Bulgarian government has no control;
4. sanctions concerning the facilitation of illegal immigration/emigration;
5. Bulgaria is aligning its visa policy to that of the Union – it is in the process of introducing visa requirements for Georgians, Russians, Ukrainians and Tunisian. It is only seeking to maintain, for the moment, a visa free regime with the Federal Republic of Yugoslavia and Macedonia;
6. The staffing and equipment at Bulgarian borders.

Under section 2, repatriation of illegal residents to Bulgaria, the Commission notes as relevant to the decision whether to maintain or abolish visa requirements that Bulgaria has readmission agreements in force with 10 Member States and six other states; further readmission agreements are in the process of conclusion. The signing of readmission agreements with each of the Member States which wishes such an agreement, was of primary importance in the press releases regarding the lifting of visa requirements for the Baltic states.¹³⁹ Further, more readmission agreements are being negotiated with many other countries.

137 Intermediate report on visa issues (Romania), COM(2001) 61 final, 02.02.2001, Brussels, Vol. II.

138 Such facilities are widely used outside the European Union as they permit countries to maintain the reciprocity of visa requirements without entailing the great expense of maintaining visa officers in third countries.

139 Baltic News Service, 15 & 16 December 1998: "Estonian Justice Minister Paul Varul and interior ministers of Latvia and Lithuania signed readmission agreements between Germany and the Baltic countries in Berlin on Wednesday. The agreement is one of the preconditions to mutual

In section 3 additional measures to be taken by Bulgaria are set out. These include more computerised control systems at border posts; an action plan with Greece; more legislation on carriers sanctions to provide for penalties on carriers who take persons *out* of Bulgaria which persons do not have the necessary documents to enter wherever they are going. Here again is an example of an export of cross-recognition. The Bulgarian government has no control over what documents may or may not be required by the border officials in another state. However, they are planning to pass legislation, on the approval of the Commission, which would place sanctions on carriers leaving Bulgaria with persons who are ultimately refused admission to the country of destination. Clearly the Commission has in mind the EU Member States, yet as is clear from the Schengen acquis, it is by no means self evident when an individual will be admitted by one Member State or another into the common territory.

Finally, there is mention of an information campaign to Bulgarian citizens advising them of the limits of their new visa free travel right. No mention is made of similarly informing them of their rights to self-employment in the Member States under the Europe Agreements.¹⁴⁰ An oblique passage refers to working contacts between the Bulgarian authorities, the tour operators association and the consulates of the Member States. Exactly what is intended is unclear. However, as discussed in section 3 above, French ministry of foreign affairs officials indicated that tour operators play a central role in obtaining visas for those using their services. In order to be able to provide their services and reduce loss-making risks, they have developed close links with consular staff in many obligatory visa countries. The degree of reliance which consular staff place on the presentation of visa applications from certain tour operators in preference to others has importance commercial consequences for the operators. In the context of local consular co-operation consular officials exchange information about the reliability of tour operators as visa intermediaries.¹⁴¹ I will return to this theme later when looking at the role of the private sector in the movement of borders in Europe in the next section.

Turning then to the longer report on Romania, the first part deals with matters relating to border controls. It notes with approval that a unified border police has

abolition of visas." "Estonia is making rapid headway towards the abolition of visas with the Schengen countries and is busily signing readmission agreements, a necessary precondition to the abolition of visas." The speed at which these agreements were signed is curious: "Estonia has sent to all the Schengen countries draft agreements on the readmission of persons illegally arriving in the country and on the mutual abolition of visas. Estonia recently signed with Italy an agreement on the readmission of persons illegally arriving in the country, a precondition to the abolition of visas. Talks concerning this agreement with the Benelux countries have been concluded. On Thursday and Friday an Estonian delegation is holding talks in Paris with the aim of signing a similar agreement with France. Talks with a number of other countries for the signing of agreements on the readmission of persons illegally arriving in the country will start in the next few months." Baltic News Service, June 11, 1998.

140 E. Guild, *A Practitioners Guide to the Central and Eastern Europe Agreements: the Right of Establishment* (ILPA/BSG: London: 1996).

141 Interviews carried out with French Ministry of Foreign Affairs officials, March 2001 in the context of research carried out for the Institut des Hautes Etudes de Sécurité Intérieure on Schengen visas.

been established along with a long-term programme of professionalisation of the border police. Further the substantial investment in technical equipment mainly focussed at Southern Ukraine and Moldova are noted. It is worth remembering at this point that the Commission is considering no more than the lifting of a mandatory visa requirement for short stay visas on a country which shares no common border with the Union. Under the heading legal provisions and statistics related to border crossing, over the period 1998-2000, 10,524 foreign nationals were forbidden from leaving Romania. 2,333 had an onward destination of an EU state. The majority were nationals of Afghanistan, Iraq, Iran, Pakistan, Turkey and China. The reason for preventing their departure was primarily travel document irregularities. Over the same period, 27,407 Romanian nationals were forbidden from leaving Romania. The reason of criminal investigations, false documents, persons hidden in vehicles and travel document irregularity accounted for 7,356 cases. No questions are asked as to why the other 20,000 Romanians were prohibited from leaving their country nor answers provided. If human rights were even a minor consideration in the calculation of the European Union at least a reference might be included to the right to leave one's country found *inter alia* in Article 2 Protocol 4, European Convention on Human Rights. The report considers the procedures regarding passengers in international transit in Romanian airports approving of new provisions to require transit visas of nationals of certain countries.

In the second section, the report considers Romania's visa policy. The report states: "86 countries which have a visa obligation for their citizens and whose nationals display high migration tendencies are subject to a restrictive visa regime, the entry on Romanian territory being granted only if the citizens from these countries have a certified invitation and a bank guarantee at the disposal of the Romanian authorities to be used in the case of repatriation. Visas are issued only after the authenticity of the invitations is confirmed." The use of the phrase "high migration tendencies" is rather unfortunate. For anyone resident in Western Europe the first nationality which comes to mind as having "high migration tendencies" are US nationals. These are the same nationals whose government through the Portuguese presidency has been pressing for special agreements to permit their extended residence in the EU. Equally, it is highly unlikely that US nationals are intended to be included in the phrase. Further the documentary requirements, including bank guarantees at the disposal of the government go far beyond anything contained in the Schengen Common Consular Instructions. Thus the exported border is intended to be more strictly controlled than the Member State's 'external' border.

On account of history and relations, there has been an arrangement between Romania and Moldova that their citizens may pass the mutual border on presentation of an identity card. The report expresses satisfaction that this regime is being phased out, first Moldavians will require passports to enter Romania by 1 July 2001. Subsequently the Commission expects Romania to apply visa requirements to Moldavians. The other countries whose nationals do not require visa to enter Romania but are subject to such an obligation in the EU are Bosnians, Yugoslavs, Macedonians, Turks, Russians and Ukrainians. The Commission expects Romanian to introduce

visa requirements for these nationals. The restructuring of Romanian ties is evident here. The link of common identity with the Moldavians expressed in law through the relaxed frontier requirement must be abandoned if the Romanians wish to claim an EU identity. Because the EU has placed Moldova on the “risk” list of nationals who must always get a visas, the common identity of the Romanians with them can no longer be maintained without causing Romania to be a risk identity. Before the Romanians will be allowed to travel for three months to the EU without having to obtain a visa in advance they must accept that Moldavians are a risk as a category and begin the process of their exclusion from Romania.

The report continues: safety measures in procedures are considered; the manufacture of Romanian passports meets with approval in the report – the mechanisms are sufficiently advanced to meet the EU’s requirements. The legal provisions for issuing passports and identity documents is reviewed as well as the way blank documents are stored and stolen documents accounted for.

In the next section, 4, migration policy is under review. The lack of legal measures is the subject of negative comment in the report. In particular it notes that there were 6,960 asylum applications submitted in the EU and North America by Romanian nationals in 2000. This figure is produced in the context of a lax exit policy rather than in the context of concern about human rights protection in Romania.¹⁴² The legal possibilities for Romanian nationals to renounce their citizenship are considered. The report points out that in a number of EU states Romanians have renounced their citizenship (certified by the consulate) and thus made themselves unremovable. The Commission’s report express some satisfaction with the answers provided by the Romanian authorities (i.e. that there is no power to consulates to give such certificates) but it is apparent that further efforts are expected, (perhaps in increasing the numbers of persons who are not allowed to leave the country). Carriers sanctions only apply as regards persons being brought to Romanian without correct travel documents. However, the Commission does not explicitly criticise the fact that legislation is lacking making it an offence for carriers to take people out of Romanian without whatever travel documents might be required at the destination. The report notes the strengthening of legal provisions for the expulsion of irregular foreigners and for their detention pending expulsion. The report provides statistics about numbers of irregulars, a subject on which reputable experts are very reticent. It states “it is estimated that around 40,000 aliens cross the [Romanian] border illegally with the purpose of reaching the EU; according to the Romanian authorities, 20,000-30,000 aliens are temporarily staying in Romania waiting for an opportunity to move westwards. Most of the illegal immigrants come from Asia and Africa.” There are no references given for this information which combines all of the main security fears of the EU in two sentences: illegals from black and Muslim countries waiting at the borders for a chance to creep into the EU.

142 Again one must wonder about those 20,000 Romanians who tried to leave Romania but were refused exit.

The result of these two reports is that Bulgarian nationals no longer require, as from March 2001, visas to travel to EU countries. Romanians still require short stay visas to come to the EU even though their country is no longer formally on the black list. A decision will be taken in June 2001 on whether in fact to remove the visa requirement as regards Romania. As the Commission report concludes: "the Commission will continue to co-operate with the Romanian authorities in order to identify the commitments Romania is prepared to take, what means it will use to fulfil these commitments, as well as a timetable...". The weight of the commitments which the EU has extracted from both the Bulgarian and Romanian authorities is considerable. They have permitted their systems of immigration to be reviewed and judged. They have agreed to the restructuring of their relations with their closest neighbours. They have agreed to adopt the EU's definition of security risk. As if that were not enough, they have agreed to implement the Member States laws even where it is highly uncertain what those laws are.

The movement of the EU border into the territory of third countries thus transforms the relationship of the states. The decision to move EU borders to the interior of other states is taken unilaterally by the Council without consultation with the state concerned or even the publication of a report explaining the reasons for the decision, as the case of Colombia indicates. But the insertion of EU borders into the interior of foreign countries has long term consequences for those states. The Westphalian principle of the integrity of the state against interference from other states begins to dissolve. Because the EU border was moved within the territory of Bulgaria and Romania any relaxation of that border by the removal of visa requirements entitles the Member States to require the restructuring of the Romanian and Bulgarian borders. Because the Westphalian principle of non-intervention has been weakened so the Weberian state is transformed. Bulgaria and Romania must redesign their bureaucracies as regards their borders to fulfil the EU norms. Technical equipment, organisation of border guards and critically passports are submitted to the EU model. Even the state's bureaucratic control over the identity of its nationals: the issue of identity documents, is subordinated to the EU check. The structure of the state's relationship of identity within its region is changed. For Romanians, Moldavians must now be excluded and transformed into a potential security risk.¹⁴³ Fundamental to the EU's claim to control its borders wherever they are placed is the imposition of the EU composite definition of risk and security.

143 This control over state identity applies equally within the EU territory as the inclusion of Colombia, notwithstanding the links of Spain with that country, on the black list indicates.

6. Making the visa system work: carriers sanctions

There were over 1.7 billion border crossings into and out of the Schengen territory in 1997.¹⁴⁴ With the enlargement of the Schengen participants that number has now certainly been exceeded. The practicalities of controlling such a number of persons, arriving by all sorts of means of transport and staying any period of time from a few minutes to a lifetime has become increasingly challenging for states. As the political value of controlling persons rises, the incapacity of the state mechanisms available to carry out this function becomes increasingly apparent. The changing relationship of the state with the corporate sector has also important consequences for borders. Globalisation is about the increase in transnational commercial activities. Bauman is not alone in suggesting that “the ‘economy’ is progressively exempt from political control; indeed the prime meaning conveyed by the term ‘economy’ is ‘the area of the non-political’. Whatever has been left of politics is expected to be dealt with, as in the good old days, by the state – but whatever is concerned with economic life the state is not allowed to touch: any attempt in this direction would be met with prompt and furious punitive action from the world markets.”¹⁴⁵ As the interests of corporations in the movement of persons increases encompassing not only their employees but also consultants which they use, customers and tourists, the space for states to define as unwanted some third country nationals becomes increasingly complex and potentially highly charged.

Two problems arise: first refusing admission to individuals who have arrived at the frontiers becomes increasingly difficult in simple practical terms: at a busy road crossing or airport, the mere pressure of arrivals makes it impossible to refuse many people. Where would one put them? There are limited facilities at road crossings or at airports to hold persons. The French use of zones d’attentes graphically exemplifies this problem – the use of hotels around French airports as a solution for “parking” the unwanted pending getting rid of them is fraught with problems.¹⁴⁶ Secondly, choosing which persons to refuse admission to is increasingly difficult as the corporate sector’s interest in movement of persons increases. The steady flow of press reports and questions in Parliaments about prominent or rich persons who come to be refused admission at frontiers for reasons which appear unjustified is particularly unwelcome. Thus there is a strong incentive to seek other ways of carrying out frontier controls where the state agencies are less immediately implicated in the problems which may arise. The mechanism adopted and inserted into the Schengen Imple-

144 D. Bigo, *Frontiers and Security in the European Union*, in M Anderson & E Bort, *The Frontiers of Europe* (Pinter: London: 1998), p. 148. He discusses in some depth the figures of movement in the territory.

145 Z. Bauman, *Globalisation: the Human Consequences* (Columbia University Press: New York: 1998); see also S. Strange, *Retreat of the State: The Diffusion of Power in the World Economy* (Cambridge University Press: Cambridge: 1996).

146 See ANAFE, *Rapport sur la zone d’attente de l’aéroport Roissy Charles De Gaulle*, Paris, février 2000; M. Faure, *Voyage au pays de la double peine* (Esprit Frapper: Paris: 2001).

menting Agreement as a requirement for all states is the coercion of the private sector into carrying out the controls: carrier sanctions: Article 26(1)(a) and (2).¹⁴⁷

Cruz has analysed how the states implemented this obligation in national law, including the variations in interpretation which made consistency uncertain at best.¹⁴⁸

What I wish to stress here is that the duty to ensure that persons do not arrive at the physical borders of the states without the necessary documentation required by the state, is moved to the carriers. It is their responsibility to ensure that individuals have the required documents. Thus their role is not only to police the border abroad created by the visa system – by making sure that people who need visas have them before they are allowed carriage – but to form the border abroad for those persons who do not require visas.

In August 2000 the French Presidency of the EU proposed a Directive concerning the harmonisation of financial penalties imposed on carriers transporting into the territory of the Member States third country nationals not in possession of the documents necessary for admission.¹⁴⁹ The proposal builds on the carriers sanctions provisions of the Schengen acquis and among other things would establish a minimum fine per inadmissible person of Euro 2,000. The proposal has been widely analysed and criticised by non-governmental organisations.¹⁵⁰ For the purposes of this section I will consider Article 26 Schengen Implementing Agreement as it is in force. The considerations relevant to it, however, will equally apply should the French proposal be adopted.

147 1. The Contracting Parties undertake, subject to the obligations resulting from their accession to the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, to incorporate the following rules into their national law:

(a) If aliens are refused entry into the territory of one of the Contracting Parties, the carrier which brought them to the external border by air, sea or land shall be obliged immediately to assume responsibility for them again. At the request of the border surveillance authorities the carrier shall be obliged to return the aliens to the Third State from which they were transported or to the Third State, which issued the travel document on which they travelled or to any other Third State to which they are certain to be admitted.

(b) The carrier shall be obliged to take all the necessary measures to ensure that an alien carried by air or sea is in possession of the travel documents required for entry into the territories of the Contracting parties.

2. The Contracting Parties undertake, subject to the obligations resulting from their accession to the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, and in accordance with their constitutional law, to impose penalties on carriers which transport aliens who do not possess the necessary travel documents by air or sea from a Third State to their territories.

3. Paragraphs 1(b) and 2 shall also apply to international carriers transporting groups overland by coach, with the exception of border traffic.

148 A. Cruz, *Shifting Responsibility: Carriers liability in the Member States of the European Union and North America* (Trentham: Stoke on Trent: 1995).

149 OJ 2000 C 269/8.

150 *Inter alia* Immigration Law Practitioners Association October 2000; Justice, October 2000; the Refugee Council (UK); Amnesty International European Union Association; the Standing Committee of Experts on international immigration, refugee and criminal law (Netherlands – the Meijers Committee).

For the white list nationals, passengers must have travel documents meeting the following criteria:

1. They are genuine and still valid.¹⁵¹ Variations at national level on implementation meant that various different possible defences were left open to carriers regarding forgeries depending on the quality. While some states provided for strict liability others permitted a defence that the document was of good quality albeit a forgery.¹⁵²
2. The document belongs to the individual using it. This is a matter of appreciation by the carrier's staff.

In respect of these white list travellers, the primary immigration control takes place before they are allowed on the carrier. The control which they go through on arrival in the EU tends to be a light control.¹⁵³ In cases where a more in depth examination is carried out at the physical frontier of the state, the choice of whom to examine is made on a random basis – not every passenger is checked beyond a quick passport check and at most one or two questions. The pressures of busy airports and roads do not permit more. Thus the important check is the one carried out by the private company. The state is distanced from the actual control itself.

For black list nationals, the carriers must make a further check that the individual has a visa issued by either the state of destination or another Schengen state. However, in this case the state will have already checked the individual through the visa issuing process. The interest of the carrier is then to verify that the visa which has been affixed is genuine. As regards the genuineness of the document it can rely on the state to determine this aspect.

Thus it is for the carrier to require sight of the documents, to check them and if necessary to make further enquiries of the individual regarding the documents. The weight with which these inquiries are made depends on the nature of national legislation and in some cases the relationship of the carrier to the destination state. Where carriers have been the subject of substantial numbers of fines in a Schengen state, passengers travelling on its flights are likely to receive more attention. The destination from which the carrier comes may also be determinant of the level of control exercised. At Frankfurt airport, for example, flights from certain destinations, may be subject to special checks of travel documents at the steps of the plane before the passengers disembark. This practice is also carried out elsewhere in the Union at the discretion of the border officials on appreciation of risk. However, in all cases it is for the staff of the carrier to carry out the initial check and test. The failure to carry out the test properly, which leads to carrying an individual who is refused admission to a

151 Indeed, validity may not be sufficient. Increasingly on instructions by states carriers are insisting that the travel document has at least six months of validity left before its expiry date before the date of proposed travel.

152 A. Cruz, *supra*.

153 See R. Cholewinski's analysis of the Schengen Common Border Manual: there appears to be an important distinction between light and intensive controls which recognises that few will be subject to the later: presentation at ILPA/Meijers Committee conference on Article 62 and EU Borders, 11 & 12 May 2001, London.

state, will lead to penalties including: (1) a duty to take charge of the individual. The exact meaning of this obligation is unclear. Carriers do not have the power to imprison individuals against their will thus the coercive action of detention can only be carried out by the state though the cost of detention can be charged to the carrier; (2) the duty to take the individual back to the country of origin or the country which issued the travel documents; (3) fines for carrying the individual in the first place.

While there have been occasional protests by carriers about penalties, for instance KLM in 2000 regarding a rather substantial collections of fines,¹⁵⁴ and Hoverspeed in the UK regarding the continued imposition of fines of carriers by sea between France and the UK when Eurostar train services were exempt¹⁵⁵ these have not been substantial. It is unclear to what extent private lobbying has taken place. In any event, the efforts have not been sufficient to prevent the proposal of a Directive of the subject which includes some of the stricter provisions. The only exception where lobbying does seem to have been successful is that train services were excluded from Article 26 Schengen Implementing Agreement and have equally been excluded from the proposal for a Directive. It is understood the reason for this relates to the French Government's acceptance of the arguments put forward by SNCF, the French state owned train company, which found favour in other states which considered train services an exception.

Instead the carriers work with the governments on how to carry out the controls. National guidelines are issued to carriers on how to carry out their functions and training is provided on documents. Further, carriers which carry out extra controls, such as gate checks on travel documents at the door of the airplane, have been assured protection from sanctions by some Schengen states.¹⁵⁶ In busy airports which are used as hubs, many airlines use the services of private agencies which carry out an additional check for them on all passengers. This has the effect of diffusing the responsibility for these rather intrusive checks both as regards the risk of sanctions from the destination state and as regards the irritation of passengers. In respect of the guidelines provided by state officials to carriers, difficulties have been encountered. For example, in a court challenge in 2000 by Hoverspeed against the UK Government over the carriers sanctions, the guidelines were produced in court. The judge noted that among the arguments of the company against the guidelines were the following:

"Impossibly high standards are set by the respondent [the UK authorities] for Hoverspeed to observe in identifying false documentation. Extensive guidance is given, such as to take particular care in the case of those carrying Dutch documents particularly if they are on a coach, those carrying Portuguese or Italian identity cards with poor print or of an unusual colour, French passengers travelling from Ostend, those car-

154 See H. Staples, Adjudicating Schengen in the Netherlands, *European Journal of Migration and Law*, 2000, No. 1, p. 65-70.

155 The UK Government as a result withdrew the immunity of Eurostar from the carrier sanctions legislation.

156 See R. Cholewinski, *supra*.

rying Dutch documents who are not of 'typical Dutch appearance', and groups arriving late for sailings or flights.”¹⁵⁷

The UK Government is in the process of redrafting the guidelines following criticism. However, it is clear that guidelines such as these expose private carriers to allegations of discrimination on the basis of race or ethnic origin by disappointed passengers.¹⁵⁸ The adoption at Community level of a Directive implementing the principle of equal treatment between persons irrespective of racial or ethnic origin¹⁵⁹ may complicate the position of private carriers. Article 3 makes the Directive applicable to access to and supply of goods and services which are available to the public, including transport services. Article 2 provides that there shall be no direct or indirect discrimination based on racial or ethnic origin within the scope of the Directive. The scope is however limited as regards third country nationals: “This Directive does not cover difference of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third country nationals and stateless persons concerned.” How this exception will be interpreted is a matter for the Court of Justice. However, it would take a very wide interpretation of the exception in the Directive to permit private carriers to discriminate against persons on the basis of their ethnic origin as is proposed to them by, for instance, the former UK guidelines.

According to the Common Consular Instructions, visa applications should be made to the state which will be the principal destination of the passenger.¹⁶⁰ So long as the individual has a genuine Schengen visa then the destination state need not necessarily be the issuing state.¹⁶¹ Cases have been reported where states have refused admission to individuals with Schengen visas issued by other participating states but these cases appear to be rare.¹⁶² Thus for the carrier there is a strong interest that passengers have Schengen visas issued by any participating state as this reduces their commercial risk.

It is at this point that another commercial agent enters the stage as regards reducing the commercial risks for carriers and facilitating the movement of persons. Just as carriers engage, at airports, the services of other agencies to check documents and confirm that the passengers are likely to be accepted in the country of destination, so inside countries of origin agencies are increasingly responsible for preparing and present visa applications for individuals. The agencies may be associated with carriers directly or indirectly. In countries which are considered difficult, such as the

157 *R v SSHD ex p Hoverspeed* [1999] INLR 591.

158 Indeed, the Hoverspeed litigation appears to have started as a result of a claim for compensation against the company for racial discrimination brought by an individual.

159 OJ 2000 L 180/22.

160 OJ 2000 L 239/324.

161 Article 10 Schengen Implementing Agreement.

162 Practitioners have reported three or four such cases. I have not been able to find statistics relevant to such refusals. At least one case was challenged before the Amsterdam court but the individual's challenge was rejected.

Ukraine, travel agencies account of the vast majority of Schengen visa applications made to EU consulates.¹⁶³ In addition to the provisions of the Common Consular Instructions for the issue of group visas “issued to a group of aliens formed prior to the decision to travel, provided the members of the group enter the territory, stay there and leave the territory as a group”,¹⁶⁴ there are also provisions for one of the most tiresome tasks of consular visa officers, the individual interviews, to be waived where “a reputable and trustworthy body is able to vouch for the good faith of those persons concerned”.¹⁶⁵

The status of reputable and trustworthy body, then takes on a commercial value for the agency. Where a travel agency can acquire this reputation with the consular officials it can submit applications and obtain visas for its clients – a substantial benefit both for its clients and the carriers. Certainty that a ticket issued will not need to be changed, that timetables and load factors critical to profitability for carriers will be respected comes with being able to predict with a fair degree of certainty that the passenger will receive a visa before the proposed departure date. Carriers have little possibility of selling cheaply fixed date seats to increase load factors in countries where the chance of getting a visa is uncertain. The cost of providing services to such countries as the Ukraine then are higher than to white list countries such as Switzerland.¹⁶⁶ According to interviews with officials, in the context of consular co-operation meetings within capitals such as Kiev, one of the points of exchange of information is the reliability of different travel agencies.¹⁶⁷

Thus as commercial interests in the Schengen state encourage the close co-operation of carriers with officials in seeking to avoid the possibility of carriers’ fines and sanctions, so to in the country of origin a system is set in place which favours close co-operation between agencies in the country and officials of the consulates in search of ways to reduce the exposure of the commercial sector to fines and sanctions. While the Schengen rules themselves and the laws of the Schengen states have no official status the Ukraine¹⁶⁸ structuring of commercial interests to benefit those agencies and companies sensitive to the objectives of the Schengen states means that no official legal provisions are necessary. The private sector has a series of substantial incentives which apply starting from the travel agency and finishing at the exit of the carrier to ensure that the policy is carried out to the satisfaction of the Schengen states. Carriers or agencies which take an independent position, or indeed as a result of the relationship with the country of origin refuse to be compliant suffer

163 Interview with French Foreign Affairs Ministry officials carried out in the context of research on Schengen visas for the Institut des Hautes Etudes de Sécurité Intérieure, March 2001.

164 OJ 2000 L 239/323.

165 OJ 2000 L 239/328.

166 In this way too, then the poor are excluded as the application of visa requirements indirectly causes the cost of travel to go up.

167 Interviews with French Foreign Affairs ministry officials and officials of the European Commission carried out in the context of research on Schengen visas for the Institut des Hautes Etudes de Sécurité Intérieure.

168 Of course the existence of readmission agreements between the Ukraine and each of the Schengen states individually means that there is in fact a certain reach of law extraterritorially, however, the effectiveness of such readmission agreements is questionable.

increased operating costs as a result of the inability to predict the issue of visas, admission to the Schengen state or the likelihood of fines.

The movement of the EU border to the interior of third countries is on the one hand policed by the private sector and on the other hand extended by it. Commercial interests in movement are moved to the private sector to resolve – the travel agency and carrier's relationship with the individual seeking to move determines whether the individual can move or not. In order to carry out this commercial exchange successfully, both the travel agency and the carrier enters into various relationships with the institutions of Schengen states where the private sector's commercial interests are engaged to achieve the state's political objectives. The travel agency which is on the bona fides list of the consulates can charge higher fees for its services as it is more likely to be able to deliver the service: trouble free travel to the Member States. The carrier which has established a special relationship of trust with the Member State, can reduce its transaction costs on moving people and reduce its exposure to fines. The relationship intimately engages the state actors but at a distance. It is the private sector which implements in its commercial interests. This implementation takes place within the territory of the third state, permitting the Member States by a practice at a distance to carry out immigration controls on all persons while they are still in their country of departure. While countries may not admit Member State's immigration officers to carry out a control at the places of departure (though there appears to be increasing use of such liaison officers and an emphasis by Member States to enter into arrangements with third countries to place their staff within the territory of other countries) or the cost of such arrangements are too high, the private sector is coerced into carrying out this function. It becomes the mechanism whereby the Member States apply their law within the territory of other countries.

7. Reaching into the European State: Border Pressures and International Asylum Obligations

Under the Geneva Convention, a refugee is a person already outside his or her country of origin or habitual residence. Thus someone who has not yet escaped is not covered by the convention. There is no international obligation arising from the Geneva Convention to provide for a system for issuing visas to asylum seekers so they can leave their country of origin to become refugees in the host State. The only international obligation on the Member States which relates to seeking asylum is contained in Article 14(1) Universal Declaration of Human Rights.¹⁶⁹ As a Declaration its force is limited. Thus the issue of state obligations to provide protection to refugees is intimately linked to borders. Until and unless a person crosses a frontier out of his or her country he or she does not come with a class which in international law is capable of being a refugee. He or she remains at best an internally displaced person. Thus the first issue is to identify where the effective border for a person fleeing persecution is between the state of persecution and the state of refuge. If the effective border is to be found within the state of persecution itself then in international law the person cannot be a refugee for the purposes of claiming a right to protection which includes a right not to be expelled.

The second question which arises relates to state responsibilities once the individual has exited the state of persecution. Before any questions of determination of the claim to protection from persecution arises, the question of borders and responsibility must be settled. How many borders may a refugee pass before exhausting his or her right to protection from the state of refuge? For example, if a refugee flees his or her country of origin to a neighbouring country and then moves from that country to the next and onwards until arriving in an EU Member State, does the international obligation of protection apply to the Member State notwithstanding the number of frontiers crossed?

The third question which refugees raise as regards borders is the effect of the internal market. If the EU territory has abolished frontiers for persons moving within the combined territory, where are the frontiers of obligation under the Geneva Convention? What are the consequences of the EU abolition of intra state frontiers on their international commitment?

Before examining how the Member States have sought to answer these questions, I will briefly look at asylum statistics in the EU. Who are these asylum seekers? The European concern about refugees over the last decade comes with the arrival of substantial numbers after the fall of the Berlin Wall. The change in political value of refugees coincides with a substantial increase in numbers of refugees moving from East to West over borders formerly firmly closed from the Communist side.

169 "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

Refugees in Europe: 1989-98¹⁷⁰

	1989	1991	1993	1995	1998
Europe	788,720	1,173,160	2,679,200	2,100,980	2,667,830
Germany	150,700	383,900	1,068,000	569,000	949,200
France	188,300	170,000	183,000	170,200	140,200
Netherlands	27,200	21,300	33,200	72,000	131,800
UK	100,000	100,000	79,400	20,400	116,100

The EU Member States provide protection for a substantially different number of persons between 1989 and 1998. The big change takes place between 1989 and 1993 after which the overall numbers do not change so dramatically though their distribution among the Member States does. These changes will inform the development of borders both external and internal to the EU and its Member States.

In 1999 387,000 persons got refugee status in the EU. That number increased marginally to just under 390,000 in 2000. This is equivalent to 1.03% of the EU population in 1999 and 1.04% in 2000.¹⁷¹ The top ten countries of origin of asylum seekers to Europe in 2000 were:

Nationality	Applications : 1999	Applications : 2000	Change: % 1999-2000	Rank : 1999
Yugoslavia, F.R.	115,850	42,250	-63.5%	1
Iraq	30,810	34,680	12.6%	2
Afghanistan	23,590	28,790	22.0%	3
Iran	12,100	27,060	123.6%	7
Turkey	19,220	23,540	22.5%	4
Russia	11,390	15,140	32.9%	8
China	11,010	13,210	20.0%	9
Sri Lanka	12,640	12,600	-0.3%	6
Bosnia/Ha	6,560	11,110	69.4%	16
Somalia	14,250	10,600	-25.6%	5

All of these countries are to be found on the Visa Regulation black list. Thus for them the effective border to the EU is within their own state of persecution at the EU consulate. Because the effective border is within the territory they are not and cannot claim to be refugees within the Geneva Convention definition. In the Common Consular Instructions, the criteria for a visa for a short stay excludes the possibility that an asylum seeker might qualify not least as the person must intend to leave the territory before the end of his or her three month stay. This will never be the case for an asylum seeker. Of course it is open to an asylum seeker to attempt to get an EU visa

170 UNHCR: Statistics: www.unhcr.ch/statist/1998.

171 Asylum Applications Submitted in Europe 2000, United Nations High Commissioner for Refugees (UNHCR) January 2001 www.unhcr.ch/statist/0002euro/text.htm.

in any event. However, assuming the person has a well-founded fear of persecution in the country of origin, the act of going to a foreign consulate may be risky. Practices adopted by EU consulates exacerbate this risk. For example, in 1998 in response to allegations of corruption at some Italian consulates the Italian Ministry of Foreign Affairs announced “in countries where conditions are particularly difficult and characterised by political, economic and social situations that encourage the proliferation of cases of local corruption, further measures have been adopted in order to guarantee maximum transparency in the procedures of access by the public and the receiving of visa applications, through the creation of lists of weekly scheduled appointments (*by name*) posted on the outside walls of consular offices...”¹⁷² (emphasis provided). Thus anyone wishing to know who is seeking a visa to go to Italy need go no further than the consulate walls. This procedure, as the ministry explains is applied in “difficult” countries. No doubt those countries which produce refugees might so be categorised.

The sanctions on carriers discussed in the preceding section exclude the possibility of asylum seekers being able to leave the state lawfully. Thus not surprisingly, asylum seekers increasingly arrive irregularly in EU states. By reason of that fact of irregular entry then, the actions of individual asylum seekers become the justification for the Commission to propose the inclusion of their state on the visa black list. But are these persons the ‘bogus’ asylum seekers which the press in some EU states so loves to hate? I will here look at the statistics provided by UNHCR regarding the grant of protection as a refugee to persons coming from the top five sending countries. I have used the UNCHR statistics which show rates by country for the five Member States receiving the largest number of persons from each of the top five sending states. This list of EU states changes depending on the state of origin of the asylum seeker. While Germany and the UK are always on the list other Member States vary. There are two aspects of these figures which are very important: first the generally high levels of protection which are granted to persons of these nationalities; secondly, the wide variations in percentages of persons granted protection by different EU Member States. The first issue raises questions about the legitimacy of the press and, unfortunately some politicians, claims that asylum seekers are mainly ‘bogus’. The second issue raises questions as to whether the EU can be considered one territory for asylum seekers where they are likely to be treated so differently depending on where in the combined territory they find themselves.

The grant of protection only includes those recognised as a refugee. This is to avoid the possibility of ‘double counting’. In some countries such as the UK and the Netherlands it is a not uncommon practice that an individual may be granted a less durable status than recognition as a refugee in one year and then as a result of an administrative event such as a change of policy or a reconsideration of the file, the individual may be recognised as a refugee and counted again as such. The statistics provided have a two year time gap – the application rates are for the year 2000, the recognition rates are for the 1998. This is the result of the lack of more recent data on

172 www.esteri.it/arch_press/pressfebruary98/c24feb98e.htm.

recognition rates available from UNHCR. Nonetheless, the consistency of the sending countries and the lack of substantial positive developments in them with the exception of Yugoslavia may mean that when the applications made in 2000 are considered they should enjoy about the same rate of recognition.

Refugee Recognition Rates: 1998

Yugoslavia FR

Member State	% of applications ¹⁷³	% given protection ¹⁷⁴
Germany	26.7	2
UK	13.5	64
Belgium	11.6	27
Netherlds	9.1	6
France	4.7	21

Iraq

Member State	% of applications ¹⁷⁵	% given protection
Germany	33.8	37
UK	20.4	92
Sweden	10.1	75
Netherlds	8.0	50
Austria	6.8	3

Afghanistan

Member State	% of applications ¹⁷⁶	% given protection
Germany	18.8	34
UK	18.1	95
Netherlds	17.6	57
Austria	14.6	16
Denmark	4.4	60

173 Made in the EU in 2000.

174 I.e. recognised as a refugee in accordance with the Geneva Convention.

175 Made in the EU in 2000.

176 Made in the EU in 2000.

Iran

Member State	% of applications ¹⁷⁷	% given protection
UK	19.1	77
Germany	18.1	21
Belgium	11.8	N/a
Austria	9.5	10
Netherlands	9.4	24

Turkey

Member State	% of applications ¹⁷⁸	% given protection
Germany	38.1	14
UK	16.7	6
France	15.0	24
Netherlands	9.7	9
Belgium	3.6	23

The case of Yugoslavia is subject to substantial change so important that I will not comment on it specifically but more directly to that of Iraq. Iraq is the second most common source of refugees in Europe. The UK has a recognition rate of 92% while Austria's is 3% yet both countries are in the top five EU states for receiving asylum seekers from Iraq.

95% of Afghans whose applications were determined in the UK got protection though the UK accounted for 18.1% of the EU applications. Austria on the other hand provided protection to 16% of Afghans applying for asylum while it was responsible for 14.6% of EU applications. Turning to Iran, again the UK and Austria represented the widest divergence on protection: 77% of Iranians getting protection in the former and 10% in the latter. Yet in 2000 19.1% of Iranians seeking protection in the EU did so in the UK while 9.5% did so in Austria. Finally, Turkey presents an interesting picture. France and the UK received in 2000 very similar percentages of asylum seekers at 15% for the former and 16.7% for the latter. Yet the protection rate is very different at 24% for France and 6% for the UK. Further, the 1998 recognition rate does not seem to have had any substantial effect on the choice of EU state in which to apply for asylum made by the individual asylum seeker. Despite the 18% difference in recognition rate between France and the UK regarding Turkish asylum seekers in 1998, in 2000 both countries received very similar numbers of new applicants from Turkey.

177 Made in the EU in 2000.

178 Made in the EU in 2000.

Thus the possibility of obtaining protection in any one of the 15 Member States varies substantially depending on where a person is coming from. The appreciation of risk is not self evidently consistent. In view of the numbers of persons involved, variations in their individual situations is not likely to be so substantial as to account for the difference. An explanation for the differences in appreciation needs to be sought in the relation of each Member State with the country of origin of the asylum seeker.

I will now return to the question of refugees and borders. The legal mechanisms regarding responsibility for asylum seekers at the border are nuanced. At the European level, the first substantial effort to allocate responsibility for asylum seekers is found in the Dublin Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities 1990 which finally entered into force on 1 September 1997.¹⁷⁹ The Convention is based on two principles: first that the Member States are entitled to pool their responsibility for asylum seekers. Even though each Member State is separately a signatory to the Geneva Convention (and the other two relevant conventions¹⁸⁰) a decision on an asylum application by one of them absolves all the others from any duty to consider an asylum application by the same individual.¹⁸¹ This position, particularly in the absence of a consistent interpretation of the term “refugee” among the Member States, has been challenged by the European Court of Human Rights.¹⁸²

The intention that the visa regime should apply specifically to exclude the possibility that asylum seekers reach the European Union is evident in the list of countries whose nationals are under an even more stringent visa regime than the others: that is to say whose nationals must get visas even if they are only transiting through a Member State en route to a third country. This list is short: in the proposal of the Finnish Presidency of the Union for a Regulation on airport transit arrangements (Autumn 1999) the countries included are: Afghanistan, Iran, Iraq, Democratic Republic of the Congo, Nigeria, Ethiopia, Eritrea, Somalia, Ghana and Sri Lanka. Five of these are on the top ten countries of asylum applicants in the European Union.

Thus the visa system operates so as to hinder asylum seekers getting to the territory of the Member States lawfully in order to seek asylum. This system is enforced through the private sector (see preceding section). In addition, a mechanism has been created for determining which Member State is responsible for considering an asylum application. In the absence of unusual factors (such as the possession of a visa or residence permit or a first-degree family member recognised as a refugee in one Member State) responsibility lies with the first Member State through which the

179 For a review of the Dublin Convention see G. Noll, Formalism vs Empiricism: Some Reflections on the Dublin Convention on the Occasion of Recent European Case Law, *Nordic Journal of International Law*, Vol. 70, No. 1 (2001); A. Hurwitz, The 1990 Dublin Convention: A Comprehensive Assessment International, *Journal of Refugee Law*, Vol. 11 (1999), p. 646-677.

180 The European Convention on Human Rights and the UN Convention against Torture.

181 Article 3(2) Dublin Convention, OJ 1997 C 254/1.

182 *TI v UK*, European Court of Human Rights, *supra*.

asylum seeker arrived in the Union.¹⁸³ In the light of the increasingly stringent provisions regarding visas and carriers sanctions, the idea was that asylum seekers would only be entering the Union over the land borders. Thus, at the time of the negotiation of the agreement though less so at the time of its signature, the responsibility for caring for asylum seekers was intended to fall on the Southern European countries – Greece, Spain, Italy whose border controls were considered suspect in any event.¹⁸⁴ Of course the changes to Central and Eastern Europe meant the opening up of Germany's Eastern border and a flood of asylum seekers appearing there, much to the chagrin of the German government.¹⁸⁵

This policy was refined two years later with the adoption of a Resolution on manifestly unfounded applications for asylum¹⁸⁶ and a Resolution on a harmonised approach to questions concerning host third countries.¹⁸⁷ Together with the Conclusions on countries in which there is generally no serious risk of persecution these two Resolutions were interlocking. First, the Member States announced jointly their policy and interpretation of the Geneva Convention that an asylum seeker does not have a choice as to which state to address his or her asylum claim. The Member States considered that the Geneva Convention only prohibits return to the country of persecution, not to any other country. Accordingly, the Member States took the view that there is a duty on an asylum seeker to seek protection in the *first* safe country through which he or she passes. In light of the obstacles placed in the way of an asylum seeker ever getting to a Member State in the first instance, the chances appeared fairly good that the person would have to travel through some other country on the way. Having thus placed the duty on an asylum seeker to seek protection in the first safe state he or she came to when in flight, the secondly policy could be introduced: any asylum seeker arriving in a Member State who had passed through such a safe third country would have his or her asylum application categorised as manifestly unfounded (as the person did not need asylum in the Member State but could seek it elsewhere) and no substantive determination of the case was required. Further the procedural guarantees could be truncated as in theory at least the individ-

183 Articles 5-7 Dublin Convention.

184 “The Dublin Convention establishes a link between the performance of controls on entry to the territory of the Member States and responsibility for subsequent applications for asylum. ...The criteria set out in Articles 5-7 of the Dublin Convention are based on the premise that the Member State which is responsible for controlling a person's entry onto the territory of the Member States should also be responsible for considering any subsequent asylum application. The questions which arise are first whether this is an appropriate basis for allocating responsibility and second whether it can be achieved effectively.” European Commission Staff Working Paper: *Revising the Dublin Convention*, SEC (2000) 522, paras 24-25. J. van der Klaauw, *The Dublin Convention: A Difficult Start* in M. den Boer, *Schengen's Final Days?* (EIPA: Maastricht: 1998), p. 77-92.

185 For a discussion of this see G. Noll, *supra*.

186 E. Guild & J. Niessen, *The Developing Immigration and Asylum Policies of the European Union* (Kluwer Law International: The Hague/London: 1996), p. 141-147.

187 E. Guild & J. Niessen, *The Developing Immigration and Asylum Policies of the European Union* (Kluwer Law International: The Hague/London: 1996), p. 161-165.

ual would be returned to the safe third country and would have all the necessary guarantees there.¹⁸⁸

Therefore the Member States agreed a definition of what a safe country is – by reference primarily to the states on the borders of the Member States (states far away were not particularly relevant) in the Conclusions and adopted a Resolution on manifestly unfounded applications so that persons seeking asylum at the borders of the Union could be rejected immediately and pushed back into the adjacent state.¹⁸⁹ To make the system operational in the light of possible objections from border states on the Union a system of readmission agreements was embarked upon where by neighbouring states were induced to enter into agreements undertaking to take back persons who had travelled through their state to the Union.¹⁹⁰ The whole system, of course, came unstuck rapidly as asylum seekers began to appear without any travel documents or any credible story about how they had arrived in the Member State where they applied for asylum.¹⁹¹ However, the lack of an explanation of the travel route was particularly unfortunate for the asylum seeker as the conviction of the authorities that the asylum seeker was lying about the means of arrival inevitably tainted the consideration of the substantive case of the individual to credibility as regards his or her claim to a well founded fear of persecution or torture.

The border for refugees seeking protection in the European Union is thus complicated. It is not self evident where it is to be found. For some, it is in the country of origin, so they never become refugees. For others who are outside the state of origin, it may in fact be at the border of the state of origin with a neighbouring country as it is there that the EU border will require the individual to return for the consideration of the asylum application. Once within the territory of the EU, unlike for all other persons for whom the territory has been combined, the borders between the Member States remain definitive. The refugee must remain on one side of an invisible border which will be notified to him or her by an official in accordance with rules which are sufficiently complex to keep judges in many Member States rather busy.¹⁹² The refugee will have only one EU border for his or her claim will not be considered substantively in any other Member State than the one which the states allocate, but it is not the refugee who can chose which is the border he or she crosses. Further the consequences of the allocation of that border on whether the individual gets protection will vary greatly. If the border for an Iraqi happens to be found in the UK or Sweden

188 E. Guild, The impetus to harmonise: asylum policy in the European Union, in F. Nicholson & P. Twomey, *Refugee Rights and Realities* (CUP:Cambridge: 1999), p. 313-335; D. Winterbourne, P. Shah & C. Doebbler, Refugees and safe countries of origin: appeals, judicial review and human rights, *I&NL&P*, Vol. 10, No. 4, 1996, p. 123-135.

189 For a discussion of the issues for Central and Eastern European countries see M. Fullerton, E. Sik & J. Toth (Eds), *Refugees and Migrants: Hungary at a Crossroads* (Institute for Political Sciences of the Hungarian Academy of Sciences: Budapest: 1995).

190 Recommendation concerning a specimen bilateral readmission agreement between a Member State of the European Union and a third country, OJ 1996 C 274/21.

191 G. Noll & J. Vedsted-Hansen, Non-Communitarians: Refugee and Asylum Policies, in P. Alston, *The EU and Human Rights* (OUP: Oxford: 1999), p. 359-410.

192 See Section 4 on national jurisprudence on the Dublin Convention in C. Marinho, *The Dublin Convention on Asylum: Its Essence, Implementation and Prospects* (EIPA: Maastricht: 2000).

he has a very good likelihood of getting protection (i.e. 92% and 75% respectively). However, if that border is in Austria, he or she only has a 3% chance of recognition as a refugee and protection from expulsion which it entails.

The EU border for asylum seekers, then, is a particularly unclear border. It may be found in many places, within the state of persecution, in a neighbouring state, at the outer edge of the EU or within the territory of the Union. What then is the principle which determines where the asylum seeker's border is? The determining factor is the responsibility of a Member State. The first border is that the asylum seeker never becomes a refugee as he or she never escapes the border of the country of persecution; the second border is that the asylum seeker remains outside the Union in any third country which is determined as safe by the Member States; the third border is within the Union, a border of the relations of power among the Member States: the asylum seekers are to remain on the edges of the Union in the states which carelessly allowed them access. The underlying principle is to limit the borders of the international responsibility to refugee protection under the Geneva Convention to countries outside the Union, or if unavoidably within the Union, to the southern Member States. The engagement of the Member States is both common and conflicting: common where the asylum seeker is to be kept out of the Union, conflicting when allocating responsibility within the Union. Thus the policy both unites and divides Member States at the same time. The conflicts are expressed through the differences among the administrations of the Member States responsible for the application of the policy. The lack of agreement about where the borders of responsibility for asylum seekers are to be found constitutes one of the gravest challenges to the EU's border policy.

8. Beyond visas: Licencing the Private Sector? The European Services Forum

It is now time to return to the issue addressed in section 6, the engagement of the private sector with borders. In the earlier section I considered the engagement of the private sector in the maintenance and development of the new borders abroad. The interdependency of the state and private sector in establishing these new borders manifests in those parts of the private sector engagement primarily in the movement of persons. Here I will look at the interests of the private sector which is not engaged directly with the state in moving persons but rather is inhibited by the establishment of new borders. The interest of the private sector in the new borders is a manifestation of globalisation. The aspect of this term which has come to include so many interpretations, of relevance here is the elevation of the interest in movement in search of economic gains above that of the nation state to exercise its controls across and within its borders. It is the process “through which sovereign nation states are criss-crossed and undermined by transnational actors with varying prospects of power, orientations, identities and networks”.¹⁹³

The problem of commercial security in the movement of persons has become more and more problematic for the private sector as the increasing emphasis in Europe has been to prevent access to the territory of undesirable travellers. As the European Union adds countries to the list of those whose nationals must have visas in order to come to Europe for any purpose, so visa requirements are placed on European nationals going to those countries, the principle of reciprocity. In so far as the application of EU rules on visas and borders appear arbitrary to nationals of other states, so pressure mounts in those other states to treat EU nationals similarly. The interests of states to assert their claims to sovereignty are not of primary interest to the commercial sector unless the argument of sovereignty result in benefits, for instance reduced competition. Political and social constraints on the change of nationality of companies, for instance, can be an important reality. As Wyatt-Walker discusses the take over the British IT company ICL by the Japanese company Fujitsu in 1990 resulted in ICL’s partial exclusion from the benefits of Community research and development projects. The approach of the Japanese parent was to guarantee the independence of the UK subsidiary and to promise its floatation within a set period as a result of which the “British” character of the company was politically and socially accepted and ICL was readmitted to the EU charmed circle of R & D companies in the field.¹⁹⁴ The longer term strategy of the corporate sector, however, is to seek international rules which limit the power, even of the EU, to privilege companies based in EU states primarily within the World Trade Organisation.

193 U. Beck, *What is Globalisation?* (Polity Press: Cambridge: 2000), p. 11.

194 A. Wyatt-Walker, *Globalisation, Corporate Identity and EU Technology Policy*, in W. Coleman & G. Underhill, *Regulation and Global Economic Integration* (Routledge: London: 1998), p. 141-157.

The increasing role of transnational corporations in the economic and political life of countries has been the subject of much recent discussion and debate. The pressures on the one hand for greater liberalisation of trade in the WTO and on the other hand, for more control over protection of the consumer, environment and community interests has moulded the debate on globalisation over the past decade.¹⁹⁵ I have considered elsewhere the association of transnational companies with trade ministries, from which, in many cases they have sprung as the result of privatisation.¹⁹⁶ However, the lack of links between transnational corporations and interior ministries, and the latter's relative hostility to corporate demands to import foreign labour has left the corporate sector less than satisfied. While in some EU countries there has been a substantial change to public policy on labour migration (for instance the UK) in the majority it remains a field in principle closed and where movement of personnel is permitted as an exception to the rule. The resulting reciprocity in countries outside the EU is both a consequence and a continuing obstacle to transnational company's operations. Unless they can ensure the presence of their personnel within a country, the risk of setting up a base in that country becomes difficult to calculate. Transnational corporations too, are affected by the imposition of visa requirements and practices as these affect the easy or difficulty with which they may enjoy access to other countries.

So long as the countries to which transnational corporations seek access remain countries to which visa requirements do not apply there is less difficulty. The statistics on the explosion of cross border trade in services over the past twenty years indicates that the main effect of this trade is between developed countries of the first world with substantial service trade between Europe, North America and the far East, in particular Japan but with increasing importance in Malaysia, Thailand and the other Tiger economies. However, this pattern is widening to include other countries such as India and China.¹⁹⁷ Commercial services alone account for 20% of world exports and the EU accounts of 26% of total global services transactions. Thus access for EU nationals to these countries in the light of substantial obstacles constructed in the spirit of reciprocity become increasing problematic.

Another problem also begins to emerge: transnational corporations want to deploy in the European offices nationals of countries which are considered to be among the highest security risks by the interior ministries such as Sri Lanka, India and Russia.¹⁹⁸ The introduction of a new immigration category in Germany for information technology experts was accompanied by much publicity that German industry was targeting the Indian subcontinent – a source of excellent skills in this field. However, that same country: India, fulfils the threat conditions to be included on the Visa

195 N. Klein, *No Logo* (Picador: New York: 2000).

196 E. Guild, *Intersecting Worlds? The European Community and the International Framework of Labour Migration*, International Studies Association Conference: April 2000, Los Angeles.

197 B. Chane-Kune & N. Mulder, *L'ouverture internationale des services*, in CEPII, *L'économie mondiale 2000* (La Decouverte: Paris: 2000).

198 For an overview of some OECD policies see B. Christian, *Facilitating High-Skilled Migration to Advanced Industrial Countries: Comparative Policies* (Georgetown University Institute for the Study of International Migration: Washington: 2000).

Regulation black list. The conflict which is created encompasses not only the transnational corporation but also at least two ministries: trade which is seeking to facilitate economic activities and the success of “its” companies, and interior ministries which are concerned about excluding persons who on the basis of their nationality have been defined as a likely security risk.

It is not only as employers seeking to move personnel internationally that transnational corporations encounter obstacles in the form of borders. Those corporations engaged in services industries may be highly dependent on the ability of their customers to move – to receive services in other states. I have already considered the growing interdependency of the travel industry with parts of the Member States’ bureaucracies in order to overcome commercial risks relating to the changing borders (section 6). However, this obstacle to commercial interests does not stop at that sector. While the consequences are not so immediate for other sectors nonetheless they create uncertainty which is both integral and inimical to commercial transactions.

In this framework, it is the fact of nationality – the defining feature upon which the Visa Regulation is based – which is the problem. The response from transnational corporations takes a number of forms. Of importance here is the development of a new international legal framework for movement of persons, dominated by economic activity, the General Agreement on Trade in Services, annexed to the WTO Agreement. The GATS provides for liberalisation of movement of services. Which are defined as including four “modes”:

1. Where the service provider and recipient stay put and the service moves: for example television across borders;
2. Where the service provider remains in one state and the recipient moves: this includes the tourist who moves to the hotelier; one of the problematic areas of the new framework of migration;
3. Where the service provider sends an employee to an establishment in another state: this is the mode of greatest interest to the transnational corporation – the ease with which it can send its personnel irrespective of their nationality from one state to another;
4. Where the service provider him or herself goes from one state to another: this is of interest only to the small service provider and thus not normally an issue for transnational corporations though it can become a problem where the corporation seeks the services of an independent contractor in a number of countries successively.

Within mode 2 the solution for the movement of recipients of services is found. In mode 3 there is the promise of a solution for the corporation with a personnel problem. However, the annexes of the GATS limit the effectiveness of the right to move in two ways, first many sectors of economic activity, and almost all which are important to transnational companies, are excluded from the right; secondly the definition of persons who may benefit is highly circumscribed in the annexes on a country by country basis. Thus the benefit is limited but the principle has been established – a new way of arranging for movement of persons.

In 2000 a revision of the GATS annexes and exclusions was opened in accordance with the provisions of the agreement. A number of large transnational corporations established the European Service Forum as a mechanism to get their views heard in the GATS 2000 round, including on the issue of movement of persons. The ESF considers itself to be an ngo though it represents the interests of over 50 transnational corporations and 36 European trade federations which are based in EU states. The ESF is currently lobbying the European Commission in the GATS 2000 round. Its position, echoing a recent proposal by the European Commission for the movement of third country national personnel within the EU, is that a GATS card should be created. It would be available to transnational corporations on certain conditions. The card would have the effect of permitting the company to deploy an employee of any nationality in one of its establishments in any WTO country. It would take the place of or require the automatic issue of visas, work and residence permits for the period of the employment.¹⁹⁹

Thus what the ESF is asking for, supported by many EU based transnational corporations and under consideration by the European Commission, is that the criterion of nationality of an individual as the defining feature in determining risk or security should be changed. In its place, employment by a company should be the determining feature. If the individual is employed by Philips then his or her nationality which would normally be the criterion of inclusion or exclusion would be irrelevant, the determining characteristic of the individual for the purposes of being able to move, reside, and work instead would be his or her employment relationship with a corporation.

The status of the corporation would be decisive of the individual's ability to move or not. The individual's nationality would not longer count. So the corporation's nationality as a WTO beneficiary would determine the status of the employee. The "wrong" nationality of the employee would be remedied by the "right" nationality of the corporation. Further, the corporation would take the position of the state in determining who can move and for how long and under what circumstances.

This solution would have many advantages for companies. The security of corporations would be increased in relation to the state's control over borders. This would apply equally in the European Union and elsewhere. One of the risks associated with transnational commercial operations would be diminished – the uncertainty of whether the company will be able to deploy its personnel where it wishes. One can easily see how the system could extend further to cover consultants and customers of companies as well. Additionally, the control of the corporation over its personnel is substantially increased. It is no longer the state either of nationality or of residence which controls the individual's ability to move.

The consequences for ideas of nationality, allegiance and citizenship are also substantial. The remaining rights connected with citizenship which have not been subsumed into international human rights are the rights of movement across borders,

199 European Services Forum, *The Temporary Movement of Key Personnel: Second Position Paper*, 24 October 2000 (Brussels).

security of residence, protection against expulsion and political participation.²⁰⁰ The first, in the new framework would come within the power of the employer through the operation of an international convention. The place of the individual and his or her power in relation to the employer then becomes perhaps even more important than the individual's position vis-à-vis the state. However, those persons of no interest to corporations are left within the control of the state of nationality and the host state. The interests of corporations are directly related to the question of profit and value. An individual is of interest to a corporation in relation to his or her skills and abilities or economic strength. If the individual has neither wealth nor skills of interest to a corporation then he or she is excluded from the new world of corporate-determined movement across borders.

If the individual seeks nonetheless to move, it is likely that the corporate assessment of utility will also inform the state. As I have already pointed out, if an individual is poor then for the purposes of the EU border he or she is by definition a security risk. If additionally, he or she has no skills of interest to the corporate sector, then by reasons of the lack of commercial interest the state may conclude that the individual is properly a risk and thus to be excluded. However, the interests of companies and states regarding individuals will undoubtedly diverge as well. The power to avoid state constructed obstacles to movement of persons of interest to companies may be welcomed. But when the individual ceases to have interest for the company, the state regains responsibility, for instance where the individual loses his or her job or retires. Thus there is little interest for the company to take over more than some limited functions of the state's control of borders.

The involvement of the corporate sector in movement of persons includes a number of different strands. For those sectors most dependent financially on movement of persons, there is a strong incentive to find solutions with the EU states individually to carry out their policies at the borders, wherever those are to be found. However, that part of the European corporate sector affected by the reciprocity measures regarding borders which follow the EU shifting of borders, their controls and the definition of risk (put into place by other companies) have an interest in avoiding altogether the state controls. The mechanism adopted for this is through the World Trade Organisation's GATS – the replacement of the individual's nationality as the defining feature in favour of a corporate identity, evidenced by a corporate identity card.

This represents a rather different modification of the Westphalian and Weberian state. As van Creveld has argued, it is these "artificial men" which share the nature of the state but differ as regards their control over territory and the exercise of sovereignty which constitute the main competitors of the state. In the new campaign of the corporate sector in response to the obstacle of borders they are challenging both the principle of Westphalian state and the Weberian state. The corporation demands the

200 The question of political participation and the legitimacy of political institutions is also under re-consideration in the European Union, see D. Beetham & C. Lord, *Legitimacy and the European Union* (Longman: Harlow: 1998).

right to control the frontier of the state as regards the movement of persons within its sphere of interest. The state would no longer be responsible for the control of its frontier wherever it may be found but only for a select group of people: those whose presence the corporation confirms to the state is in the interests of the state. This is a fundamental intrusion into the state – the corporation defines the right of residence of those on the territory or with access to the territory of the state. It is also the corporation which takes over control from the Weberian state of the bureaucracy of control. The company determines, chooses, certifies who is to move and who is not. The value of the identity is related to the corporation not the country. What is left to the nation state are those persons in whom the company has no interest. In this model it is the borders of sovereignty which move.

9. Conclusions

In this study I have examined the meaning of borders for the movement of persons in European Community law. The borders which I am interested in are those which individuals activate by virtue of their movement. These borders find their definition by the controls which surround the individual's action or intended action. An individual of whatever nationality no longer activates a control mechanism when crossing the border between the Netherlands and Germany. A border may be activated within the territory of one of the two states if the individual seeks to undertake certain activities but the movement in itself does not trigger the border. The legal expression of this new meaning of borders for persons in the Netherlands is Article 109(4) and (5) Aliens Act 1999. Not only does Article 109(4) provide that the entry of an alien into the territory of the Member States means entry into the Netherlands, but Article 109(5) provides that the Dutch national security means the national security of all these states. The border for persons is more and more intimately linked to the border of security as it becomes less and less attached to the border of the territory. However, in so doing it also changes the meaning of security and threat.

Thus the first step in the Europeanisation of borders for the movement of persons has been to disassociate those borders from the borders of sovereignty of the Member States. Borders have been the symbolic evidence of sovereignty and belonging. The recognition in Article 3 Protocol 4 European Convention on Human Rights of the right of individuals to enter their state of nationality coupled with the absence of any other internationally recognised right under other circumstances to enter a state²⁰¹ is the legal expression of this state of sovereignty. The creation in Community law of rights of entry and residence for nationals of other Member States (Articles 3, 14 and 39-49 EC) was the first step towards the deconstruction of the border of sovereignty. The creation of citizenship of the Union constituted a reconstruction of the equation by widening citizenship to accommodate the new European physical border for persons. My examination has not, however, focussed on this aspect of the European border, the important events of which occur between 1968 and 1993, but rather to the border for third country nationals which starts to take shape from 1985 and only now is beginning to have consequences as Community law. However, it is from that first reconstitution of the Community border that the concept of public security begins to become Europeanised as well.

Borders, then, are the trip-wire of sovereignty. To understand where the borders are one needs to examine where an individual by the action of movement causes the control to take place. Both states and their legal systems require territorial borders within which to operate. At the outset of this study I considered the definition of the state, which notwithstanding nuances of difference among Weber, Tilley and Giddens is always encapsulated into a specific physical territory. This examination of the development of European law regarding borders and their control for persons chal-

201 I will return shortly to the exception of asylum.

lenges this perspective. The Europeanisation of borders has meant that the territory which the border controls is no longer synonymous with the border of sovereignty. The EU border is not found at the physical borders among the Member States. Common academic wisdom declares that EU border control is to be found at the external perimeter of the combined territory of the Member States. However, again this view is not consistent with the research which I have undertaken.

It appears from an examination of European law on borders for persons, that the borders are no longer defined in terms of the territory which they “contain” but in respect of the people moving across them. The borders are no longer a physical place but a legal one. Because they have been transformed into a legal space no longer found in a physical place defined by sovereignty, there is less and less consistency in their application to the individual. Instead of the individual coming to the border and being subjected to the control mechanism, a legal border which is constructed from many different provisions of law applicable in different situations finds the individual on the basis of his or her characteristics. The European border then is designed and determined by the characteristics of the individual seeking to cross it in law. The only unifying aspect of the European border is that it finds individuals seeking to come to the territory of the Union.

In section 4, I have considered how the border becomes personalised for persons who have been signalled on the Schengen Information System for the purpose of exclusion from the EU territory. Here primarily persons who have been within the territory of the Union are entered on a database according to the rules and definitions applicable in each Member State. The principle informing the entry of details is the security of each Member State individually. But that appreciation of security varies substantially among the participating states. By linking a heterogeneous group of information, a database is created which defines the possibility of an individual to come to the territory of the participating states. The border of sovereignty is expressed through the control of insertion of information on the database. But that border for the individual is defined by relation to some characteristic he or she has, i.e. a refused asylum application in Germany or the name, nationality and date of birth of a persons entered on the SIS.²⁰² But where this border may physically be found will vary. It may be within the country of origin if the individual applies for a visa, it may be at the airport of an EU state or it may find the individual within the territory of a Member State, for instance when he or she applies for asylum. This is a personal border which is constructed for a territory on the basis of a Member State’s appreciation of security risk.

Borders move somewhat differently in EC law depending on the nationality of the individual seeking to move. In section 5, I considered how Community law on

202 A problem which was acknowledged in a number of interviews undertaken for this study was that of individuals with the same details as a person on the SIS. This is particularly problematic in countries where there have been practices of registering children born in villages and small towns only once a year and thus their dates of birth being consistently stated as one date: 01.01. So long as someone with the same name, nationality and date of birth has been entered on the SIS, everyone sharing those characteristics will be barred for the Union.

visas has become a new border triggered by the efforts of persons to move. Here the appreciation of security risk or threat is on the basis of projections regarding the activities of individuals whose link is their nationality, the definition is collective. The transformation of visas from a tool of foreign policy to a border takes place with their Europeanisation. Individuals as groups are defined as a risk or not on the basis of their nationality. If there is an assessment that they are a risk, then there is a presumption that the security of the Member States is threatened by them. It is then for each individual within that category to establish that he or she personally is not a risk and thus escapes the nationality identity. The assessment of risk is based on information which is not public. However, the risk is one constructed from an aggregation of Member State's individual appreciation. Annex 5(b) of the Common Consular Instructions (which has remained confidential), contains the key to this national assessment of risk. There each Member State notifies the others of which nationalities on the visa list are of specific interest to it. Any application for a visa by a national of a country on the Annex 5(b) list must be notified to the Member State which has expressed an interest. This phenomenon reveals two important realities: first the construction of risk by nationality is on the basis of a Member State by Member State assessment; secondly, Member States do not trust one another to carry out the security assessment of an individual, national of one of "their" countries of threat. The EU border moves to within the third state as regards visa nationals but it continues to be manipulated from a distance by different Member States guarding their understanding of risks.

In the visa model, the border is still a point of contact between the individual and the state albeit a border moved within the territory of a third state. In section 6 I have examined how the border takes on a new aspect: it is manifested through the contact of an individual with a private company, a carrier or travel agency or other. For non-visa nationals, the control of the EU space is carried out by private actors working on behalf of the Member States. While the mechanisms for engaging the co-operation of the private actors are part of Community law (Article 26 Schengen Implementing Agreement), the specific instructions from the state to the carrier remain national. Thus the face of the border is no longer that of a state official but of an airline employee or a travel agent. The risk of fines and loss of privileged status encourages the private actor carrying out the border control to do so in a manner even more efficient than the state. The instructions are more than adequately carried out as the sanction attacks the exclusive interest of the private actor: profitability.

I have also considered another aspect of the movement of the border to within the territory of third states: the consequences for the sovereignty of those states on whose territory the border has moved. In considering how countries are added to the mandatory visa list or taken off that list, I have attempted to demonstrate how the successful export of a border gives the exporting state a claim to control or at least be involved in matters relating to that border. Once the border has been moved to within the territory of a third country any relaxation of that border has a high price. For instance in considering the removal of countries from the mandatory visa list, the Community has considered it legitimate to inspect and assess the efficiency of the

borders of third state and its means of identifying its own nationals. It has required a restructuring of the nationality identity of the third country by demanding the imposition of visas by that country on other countries in the region and elsewhere. Thus the borders of sovereignty of the third state are engaged by the act of moving the EU border within its territory.

The international obligations of the Member States to refugees present one of the points of immediate conflict regarding the displacement of borders. The international definition of a refugee as outside the territory of the country of persecution means that the movement of the EU border within that territory deprives the individual of the chance of being defined as a refugee. It is in respect of this duty to provide protection to persons at risk of persecution and torture that the greatest disquiet about the movement of EU borders is being expressed. Not only do the EU borders move within third states for asylum seekers, they also reappear among the Member States determining where and how an asylum seeker may seek protection. Yet these intra-Member State borders which apply only to asylum seekers apply to them for one purpose only: that of determining state responsibility. They disappear again as soon as the asylum seeker tries to make a second application for asylum in another one of the Member States.

Finally I have looked at how the private sector wider than that directly involved in the field of movement has reacted to the changing nature of European borders. Transitional corporations, increasingly inconvenienced by the unexpected and unwanted appearance of EU borders are now demanding the right to designate those persons of interest to them as exempt from the EU borders wherever they may be found. The definition of nationality as the profile of risk and the personalisation of borders constitute an obstacle to transactions across borders. In the European Union, the association of transnational corporations concerned about service provision has proposed that the “wrong” nationality of an individual of interest to them, for instance as an employee, should be compensated for by the “right” nationality of the company. Thus the identity of the corporation would become the identity of the individual. The expression of sovereignty contained in citizenship would be modified – it would no longer be the exclusive domain of natural persons and states but of legal persons and states. The assessment of risk and security would attach to the corporation not the individual.

The changing nature and place of European borders is characterised by their de-linking from territory. These new borders may be found anywhere. They apply to persons not on the basis of their physical position but on the basis of their nationality and individual characteristics. The law of borders is no longer homogeneous. Instead it has become increasingly like the legal order of the French Ancien Régime, dependent on the personal characteristics of the individual.²⁰³ Further they are controlled by a variety of different agents – Member States on behalf of one another,

203 J-F. Dubost & P. Sahlins, *Et si on faisait payer les étrangers? Louis XIV, les immigrés et quelques autres* (Flammarion: Paris: 1999), as quoted in G. Noiriel, *Etat, nationalité et immigration vers une histoire du pouvoir* (Belin: Paris: 2001).

private actors on behalf of Member States individually and third countries on behalf of Member States. As they become increasingly complex and difficult to identify so the more powerful of the private sector seek to be exempted from their application at all.

These legal developments express a very fundamental change to the nature of the Westphalian state the borders of whose sovereignty are the definition of its territory. Because the Westphalian state is being transformed so too the Weberian state of bureaucracy as the expression of and limits to the state is transformed. Many actors are operating at borders in many different places, but the state bureaucracy is no longer determinant of the process nor controls either directly or indirectly those borders. The borders of the European Community have become the trip-wire of a transformed concept of sovereignty. The most important challenge in respect of these changing borders is the right of an individual to know where these borders are and to have remedies where these borders conflict with his or her human rights.

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