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The Schengen Convention as a Violation of International Law and the Need for Centralized Adjudication on the Validity of National and Multilateral Asylum Policies for Members of the United Nations

INTRODUCTION

This law of shielding the alien from all wrong is of vital significance . . . The alien was to be protected, not because he was a member of one's family, clan, religious community or people, but because he was a human being. In the alien, therefore, man discovered the idea of humanity.¹

Recent treaties, agreements, and laws either passed or contemplated by many Member States of the European Economic Union (EU) effectively prohibit legal immigration into these countries. All over Western Europe, governments are erecting a new kind of Iron Curtain, this one keeping people out, not in. These new immigration guidelines violate the fundamental standards of human rights as described in the Charter of the United Nations (UN Charter),² the Universal Declaration of Human Rights,³ and various international documents dealing with the subject of immigration and rights of aliens.⁴ With the economic and political upheaval extant in Eastern Europe, Africa, and the Middle East, the need for immigration policies which balance the Member States' interest in protecting their nations' welfare and the immigrants' needs for humanitarian aid is highly apparent. While international law has provided for the protection of individual rights since the middle of this century, it

¹ J.H.H. Weiler, *Thou Shalt Not Oppress A Stranger (Ex. 23:9): On the Judicial Protection of the Human Rights of Non-EC Nationals, A Critique*, in *FREE MOVEMENT OF PERSONS IN EUROPE* 248, 249 (Henry G. Schermers et al. eds., 1993), (quoting J.H. Hertz, *COMMENTARY TO THE PENTATEUCH* 313) (2nd ed. 1980).

² See generally U.N. CHARTER.

³ Universal Declaration of Human Rights, G.A. Res. 217(III), U.N. Doc. 1/777 at art. 1 (1948).

⁴ In this context, the term "aliens" refers to all non-EU nationals.

nevertheless has failed to impact significantly the procedural rights of foreign non-residents seeking entry to Member States.⁵

Ironically, the formerly prosperous and secure Western Europe which these immigrants seek has changed dramatically since the end of the Cold War.⁶ Dealing with political scandals and the worst recession in years, Western Europeans are experiencing a new-found nationalism, which is spurring on the tightening of controls on immigration, asylum, and refugees.⁷ As a result of strict immigration laws throughout the EU, many of those seeking entry into the EU for permanent residency are doing so under the guise of requesting asylum.⁸ Consequently, the EU proposals for a common immigration policy have restricted the asylum criteria greatly. The proposals seek to block entry to those who legitimately deserve the right to emigrate under the provisions of those United Nations (UN) documents such as the UN Charter and the Universal Declaration of Human Rights to which all the EU Member States are signatories.

One such proposal for restricting asylum-seekers from gaining access to EU Member States is found in the Schengen Convention.⁹ This Convention, an agreement whereby asylum seekers can be prohibited from entering all the signatory Member States by means of an unfavorable asylum adjudication in only one State,¹⁰ is a violation of fundamental human rights guaranteed by the UN.¹¹ Despite the fact that this Convention violates the mandates of UN documents, binding on all EU Member States, the current procedures for implementing change within the UN are inadequate to achieve the goal of protecting human rights. Instead of relying on UN Member States to police themselves in matters of human rights, the UN needs to adopt procedures whereby it can both adjudicate the rights of aliens through a central international system and mandate

⁵ H. PATRICK GLENN, *STRANGERS AT THE GATE: REFUGEES, ILLEGAL ENTRANTS AND PROCEDURAL JUSTICE* 6 (1992).

⁶ John Pomfret, *Europe's "Rio Grande" Floods with Refugees; Rich Nations Becoming Inundated by Millions Fleeing War, Poverty*, THE WASHINGTON POST, July 11, 1993, at A20.

⁷ *Id.*

⁸ Ricou Heaton, *The European Community After 1992: The Freedom of Movement of People and Its Limitations*, 25 VAND. J. TRANSNAT'L L. 643, 663 (1992).

⁹ Convention Implementing the Schengen Agreement of June 14, 1985 Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at the Common Borders, June 14, 1985, 30 I.L.M. 68, 73 [hereinafter Schengen Convention].

¹⁰ Schengen Convention, *supra* note 9, art. 30.

¹¹ See generally U.N. CHARTER, *supra* note 2; Universal Declaration of Human Rights, *supra* note 3.

compliance with the result of such adjudication with the help of the international community.

Part I of this note examines the current trend in EU Member States, particularly France and Germany, towards changing existing policies and laws in order to keep out unwanted outsiders. Part II discusses the UN documents which offer protection of human rights for these aliens. Part III explores the effect of the Schengen Convention on the rights of aliens. Part IV discusses how the Schengen Convention violates international law as established through the relevant UN documents as well as the inadequacies of the current systems for dealing with this problem. Finally, part V offers a solution whereby the UN would have the power to adjudicate and enforce the effectuation of the rights to which the EU Member States are bound by virtue of their ratification of the pertinent UN documents concerning human rights.

I. THE IMMIGRATION EXPLOSION AND WESTERN EUROPE'S REACTION TO IT

The EU Member States have been inundated with fifteen million immigrants from 1980 to 1992 alone.¹² Other sources indicate that five to ten million people plan to leave the states of Eastern Europe and the former Soviet Union.¹³ Sparked by Yugoslavia's implosion and Eastern Europe's shaky transition from communism to democracy, the increasing number of immigrants and would-be immigrants into Western Europe has alarmed EU Member States.¹⁴

With the new estimate from the UN High Commissioner for Refugees that the global refugee total is eighteen million, the refugee dilemma has become dangerous.¹⁵ As a result of this explosion, governments of various EU Member States are taking drastic measures to create new laws and strategies to exclude immigrants.¹⁶ Deportations, tightened border controls, and stricter police methods make it difficult for immigrants to enter or remain in Western European countries.¹⁷ In addition to this governmental anti-immi-

¹² Bruce W. Nelan, *Europe Slams the Door*, TIME, July 19, 1993, at 38.

¹³ *Id.*

¹⁴ See generally *id.*

¹⁵ 1993 U.S. DEPARTMENT OF STATE, DEPARTMENT OF STATE DISPATCH, ADDRESSING THE NEEDS OF REFUGEES: A HIGH PRIORITY ON THE POST-COLD WAR ERA, V. 4, No. 28, July 12, 1993, available in LEXIS, Nexis Library, Alleur File.

¹⁶ John Darnton, *Western Europe Is Ending Its Welcome to Immigrants*, N.Y. TIMES, Aug. 10, 1993, at A1.

¹⁷ Ian Davidson, *Europe Tries to Shut the Floodgates*, FIN. TIMES, June 3, 1993, at 3.

gration movement, citizens are staging their own anti-immigration movement in every Western European country except Ireland.¹⁸ The result of this ethnic tension and isolationist attitudes, now prevalent, not only violates the fundamental human rights of those persecuted, but it also prohibits the progress of European unity.¹⁹

A. *Various Reactions from Around the EU*

EU governments, in their determination to keep the foreigners out, are employing regulations, deportations, and gunboats to achieve this goal.²⁰ The backlash of legal restrictions, social ostracism, and xenophobia has discouraged many of the would-be immigrants. The fact that hundreds of thousands are still coming, however, reflects the bleak situation enveloping much of the post-Cold War world.²¹

Initially, the EU Member States tried to deal with this problem individually. The governmental reactions of various Member States range from mild tightening of border controls to a goal of zero immigration.²² Italian officials, despite the call for zero immigration by the powerful opposition group, the Northern League, allow only a fixed number of immigrants each year.²³ Spain has implemented a program whereby it has persuaded Morocco to take back not only Moroccans living illegally in Spain, but also other immigrants who have entered Spain through Morocco.²⁴ Sweden and Denmark have recently announced immigration policies allowing Bosnians, Croats, Macedonians, and Serbs to enter their countries only with a valid visa.²⁵ Greece has repatriated thousands of their 200,000 illegal Albanians.²⁶ Additionally, Great Britain is attempting to tighten its already strict immigration laws with a bill before Parliament that would both tighten the requirements for political asylum and remove the right to appeal by students and tourists whose request for an extension is denied.²⁷

¹⁸ Robin Knight, *Push Comes to Shove*, U.S. NEWS & WORLD REPORT, June 14, 1993, at 64.

¹⁹ Josef Joffe, *The New Europe: Yesterday's Ghosts*, FOREIGN AFF., 1992-1993, available in LEXIS, Nexis Library, Int'l File.

²⁰ Nelan, *supra* note 12, at 38.

²¹ Pomfret, *supra* note 6, at A20.

²² Nelan, *supra* note 12, at 40.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ Nelan, *supra* note 12, at 40.

Among the countries restricting immigration, the controls imposed and threatened by France and Germany have had the greatest impact on the ability of many immigrants to find new homes in the EU.²⁸ Because of their relative wealth, political stability, democratic forms of government, and—prior to these new reforms—respect for human rights, France and Germany have been targets for recent migration.²⁹ To combat this, these two countries have limited immigration to the point where it is nearly impossible to enter these Member States legally.

B. *Germany's Reaction to the Immigration Problem*

Recent changes both locally and globally have wreaked financial hardship on Germany. Seventy percent of the refugees entering the twelve EU Member States are attempting to make their new homes in Germany.³⁰ As a result, Germany has accepted over a million asylum seekers since 1989, with nearly half of that number coming in 1992 alone.³¹ Financing such a huge number of immigrants cost Germany \$8 billion in 1992.³² In addition to shouldering the high cost of infiltrating immigrants, Germany is still struggling to ease the economic recession resulting from the 1989 reunification.³³ Germany also has been the largest contributor by far to the restructuring of the Commonwealth of Independent States (CIS), with more than fifty percent of all foreign aid to the former Soviet Union coming from Germany.³⁴

In addition to, and possibly as a result of, the financial burdens placed on Germany due to the influx of immigrants, the nation is experiencing a surge in xenophobia.³⁵ With seventeen reported homicides and over 2,000 injuries of foreigners and vagrants by extremist skinheads in 1993 alone, the terror has escalated at the hands of organized right-wing Germans.³⁶ The terror, as well as the justice

²⁸ *Id.*

²⁹ GLENN, *supra* note 5, at 1.

³⁰ Andrew Phillips, *The Gates Slam Shut*, MACLEAN'S, June 14, 1993, at 22.

³¹ Davidson, *supra* note 17, at 3.

³² Phillips, *supra* note 30, at 22.

³³ *Kohl Stoops to Conquer*, SACRAMENTO BEE, Sept. 22, 1993, at B6.

³⁴ Thomas Kielinger & Max Otte, *Germany: The Pressured Power*, FOREIGN POL'Y, Summer 1993, available in MAG—ASAP, File No. 47. Germany has contributed more than \$50 billion in aid to the former Soviet Union since 1989, while the United States has given only \$9 billion, and Japan only \$3 billion. *Id.* at 7.

³⁵ Knight, *supra* note 18, at 53–54.

³⁶ Elliot Neaman, *The Escalation of Terror in Germany: Is It Time to Leave?*, TIKKUN, Jan.—Feb. 1993, available in MAG—ASAP, File No. 47.

system's failure to react quickly to the violence, led to a feeling of anarchy among foreigners who, no longer trusting the police to defend them, are arming themselves against such attacks.³⁷

As the largest EU power, Germany's flexible and accommodating positions on matters of contention within the EU concerning the integration of Europe have been relied on both by other Member States and non-Member States alike.³⁸ Contrary to this expectation of cooperation, however, nowhere has the resistance to the influx of immigrants been stronger than in Germany.³⁹ Despite the shadow which lingers over Germany from its Nazi past, both certain citizen groups and the government are sending out a clear signal to foreigners that they are unwanted.

With German politics moving noticeably to the right on the refugee issue, the German parliament on May 26, 1993 voted 521 to 132 with one abstention to change the constitution in such a way as to effectively prohibit legal immigration into Germany.⁴⁰ Article XVI of the German constitution, added in 1949 as a symbolic form of moral compensation to atone for the country's sins in World War II, gives anyone the right to claim asylum in Germany without restriction.⁴¹ This welcoming provision, which states that "politically persecuted persons have a right to asylum,"⁴² predictably enticed a flood of potential refugees from Eastern Europe following the 1989 fall of communism.⁴³ The generous clause served as a loophole which allowed in 438,000 immigrants in 1992.⁴⁴

Under the amended constitution, which went into effect on July 1, 1993,⁴⁵ the nearly universal right of asylum is restricted greatly. Economic migrants, those fleeing their homeland due to economic disaster who make up approximately ninety-five percent of the million refugees who have arrived in Germany since 1990, will no longer be considered refugees.⁴⁶ Additionally, Germany constitution-

³⁷ *Id.*

³⁸ Kielinger, *supra* note 34.

³⁹ Phillips, *supra* note 30, at 19.

⁴⁰ Jonathan Kaufman, *A Fractious Germany Tightens Its Borders*, BOSTON GLOBE, May 27, 1993, at 1.

⁴¹ GRUNDGESETZ [Constitution] [GG] art. XVI, ¶ 2 (F.R.G.), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Albert P. Blaustein & Gisbert H. Flanz eds., 1991).

⁴² GLENN, *supra* note 5, at 10 (quoting GRUNDGESETZ [Constitution] [GG] art. 16, ¶ 2, (F.R.G.)).

⁴³ Phillips, *supra* note 30, at 22.

⁴⁴ Darnton, *supra* note 16, at A8.

⁴⁵ *Id.*

⁴⁶ Nelan, *supra* note 12, at 39.

ally will be permitted to turn back valid asylum seekers who arrive in Germany through a so-called "safe nation."⁴⁷ Through this constitutional amendment, the German government has adopted an unspoken policy of zero immigration.⁴⁸

C. *France's Reaction to the Immigration Problem*

A country of nearly fifty-seven million, France is home to nearly four million legal immigrants and as many as a half million illegal immigrants.⁴⁹ Announcing that France no longer wanted to be a country of immigration, the country's Interior Minister declared that the country has set an objective of zero immigration.⁵⁰ Stemming from a growth in anti-immigrant sentiment, widespread support for the proposal is growing rapidly among government officials and French citizens.⁵¹ The aim of the proposed action is twofold: to tighten France's borders and to expel illegal immigrants.⁵² In July 1993, the government increased the requirements necessary for foreigners to acquire French citizenship.⁵³ All children now born in France to non-French citizens must apply for citizenship between the ages of sixteen and twenty-one, contrary to the previous policy traceable to the French Revolution of automatic granting of citizenship to all those born in France.⁵⁴ Another measure permits police to stop foreigners to check for proper identification.⁵⁵

In addition to these immigration reforms, a constitutional reform bill has altered the asylum requirements for potential refugees.⁵⁶ Under the former constitution, France was required to consider all political asylum requests.⁵⁷ Now, in keeping with the Schengen Con-

⁴⁷ *Id.* at 40. Under the "first safe nation" policy, immigrants who enter Germany through a nation which Germany does not consider politically oppressive will be sent back to the first safe nation they entered in fleeing from their homeland. *Id.* Those countries which Germany deems not politically oppressive include all of Eastern Europe, Russia, and most of the Third World. *Id.*

⁴⁸ *Id.* at 39.

⁴⁹ *Id.*

⁵⁰ Davidson, *supra* note 17, at 3.

⁵¹ Phillips, *supra* note 30, at 22.

⁵² Nelan, *supra* note 12, at 39.

⁵³ *Id.*

⁵⁴ Darnton, *supra* note 16, at A8.

⁵⁵ Nelan, *supra* note 12, at 39.

⁵⁶ *Government to Reform Constitution on Political Asylum*, AGENCE FRANCE PRESSE, Oct. 20, 1993, available in LEXIS, News Library, Int'l File.

⁵⁷ LA CONSTITUTION [CONST.], pmbl., translated in CONSTITUTIONS OF NATIONS, V. II, 8

vention, France may, but is no longer required to, adjudicate asylum requests from foreigners who have been rejected by another member of the Schengen Group.⁵⁸

II. THE SCHENGEN CONVENTION—THE EU'S ATTEMPT TO MAKE ITS OWN IMMIGRATION LAWS

While always a major goal of the EU, freedom of movement is a privilege that the EU wants to limit to EU nationals only.⁵⁹ EU Member States have been at odds concerning the status of immigration law in the EU as well as the feasibility of making uniform laws for the Community as a whole.

One of the first steps taken by the EU Member States to create a common Community immigration policy was the signing by eleven of the Member States of the so-called Dublin Convention in June, 1990.⁶⁰ The Convention, which will not take effect until the third month after its ratification by the twelfth Member State, sets out procedures and criteria for determining which Member State is responsible for examining an asylum application.⁶¹ The Convention states that a request for asylum should be handled in the country where the refugee arrives, rather than having the person pass from government to government.⁶²

The next attempt at integrating EU immigration policies came as a part of what was supposed to be the EU's greatest integrationist measure—the Maastricht Treaty.⁶³ As the successor to both the Com-

(France) (Amos J. Peaslee ed., 1950). "Anyone persecuted because of his activities in the cause of freedom has the right of asylum within the territories of the Republic." *Id.*

⁵⁸ *Government to Reform Constitution on Political Asylum*, *supra* note 56. France's decision to alter its constitution was a result of the asylum provisions of the Schengen Convention. Because the Convention allows a Group nation to deny automatically applicants who have been turned down by other Group nations, without this constitutional amendment France would be besieged with asylum seekers taking advantage of the guaranteed consideration. Paul Taylor, *EC Ministers Agree Feb. 1 Deadline for Open Borders*, REUTERS, available in LEXIS, News Library, Int'l File.

⁵⁹ See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 3(c) available in DOCUMENTS FOR EUROPEAN COMMUNITY LAW & CONSTITUTIONS IN PERSPECTIVE 40, 41 (Eric Stein et al. eds., 1976); Single European Act, 1987 O.J. (L 169) 1, art. 13. (for proposition that freedom of movement has always been a goal of the EU).

⁶⁰ See generally Convention Determining the State Responsible for Examining Applications for Asylum Lodged in one of the Member States of the European Communities, done at Dublin, 15 June 1990, 30 I.L.M. 425.

⁶¹ *Id.* art. 3.

⁶² *Id.* art. 3, ¶ 6.

⁶³ Treaty on European Union, Feb. 7, 1992, 1992 O.J. C191/1 [hereinafter Maastricht Treaty].

mon Market of 1958 and the free movement of trade implemented by the 1987 Single European Act, this Treaty was slated to create a cohesive political and economic union.⁶⁴ One of the Treaty's two aims is the implementation of a common foreign and security policy.⁶⁵ Among the aims of the Treaty's common foreign and security policy are, "to preserve peace . . . in accordance with the principles of the United Nations Charter" and "to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms."⁶⁶ Despite the Maastricht Treaty's commitment to protect human rights in accordance with the dictates of the United Nations, the Treaty offers no concrete methods for doing so, leaving the EU Member States to form coalitions on their own which do not comport with the structures of international law.⁶⁷

A. *The Background of the Schengen Convention*

The Schengen Agreement of 1985 stemmed from the earlier Saarbrücken Agreement of 1984 eliminating controls at the mutual borders of France and the Federal Republic of Germany.⁶⁸ After the Benelux states joined the negotiations, the original Schengen Agreement of 1985 emerged signed by Belgium, France, the Federal Republic of Germany, Luxembourg, and the Netherlands on June 14, 1985.⁶⁹ Five years later on June 14, 1990, these same countries signed the Schengen Convention (Convention) as a means of applying the Schengen Agreement.⁷⁰ Subsequent to the signing of the Convention, the Schengen Group grew with the accession of Italy in December, 1990 and the accession of Portugal and Spain in June, 1991.⁷¹

The Schengen Agreement addresses all issues relating to the circulation of persons.⁷² Among the measures adopted by it, the Con-

⁶⁴ Walter Goldstein, *Europe after Maastricht; A Premature Treaty*, FOREIGN AFF., Winter 1992, available in LEXIS, News Library, Int'l File.

⁶⁵ *Id.*

⁶⁶ Maastricht Treaty, *supra* note 63, Tit. V, art. J.1.

⁶⁷ See generally Maastricht Treaty, *supra* note 63.

⁶⁸ J.P.H. Donner, *Abolition of Border Controls*, in FREE MOVEMENT OF PERSONS IN EUROPE 5, 9 (Henry G. Schermers et al. eds., 1993).

⁶⁹ Agreement Between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Controls at the Common Frontiers, June 14, 1985, 30 I.L.M. 73 [hereinafter Schengen Agreement].

⁷⁰ See generally, Schengen Convention, *supra* note 9.

⁷¹ Donner, *supra* note 68, at 9.

⁷² Jaap W. de Zwaan, *Institutional Problems and Free Movement of Persons; The Legal and*

vention provides for the abolition of identification checks at internal EU borders, the unification of controls at the external borders of the Schengen nations, the introduction of principles for a joint policy on visas, requirements for determining which of the Schengen countries is responsible for asylum applications submitted to one of the Schengen countries, procedures for joint workings between the police and the judiciaries of the Schengen countries, and the establishment of a centralized information system (SIS).⁷³ The Agreement provides for the ultimate abolition of all border controls within the area of the signatories, and the strengthening of all external borders of the Schengen Group.⁷⁴

The Schengen Agreement is not an EU agreement, but rather a forum for those EU Member States that choose to participate. Nevertheless, as only Denmark and the United Kingdom are reluctant to join, the Schengen Agreement is largely an EU document.⁷⁵ As a result of this widespread participation, the agreement represents the basis for the implementation of its provisions among the entire EU twelve.⁷⁶ Additionally, because of the need for simple procedures, uniform interpretation and legal protection, all of which are nearly impossible to attain through multilateral agreements, it is likely that Member States will formally integrate this Convention into the process of Community decisions and Community law.⁷⁷

The central scheme of the Convention establishes the complete freedom for any person to cross the internal borders of any member of the Schengen Group.⁷⁸ The Convention provides for a uniform level of control and uniform conditions of entry at the external frontiers of Schengen territory.⁷⁹ "The relevant dispositions are conceived on the basis of the principle that the actual and juridical conditions of entry at the external frontiers should be uniform, but that the aim of uniformity should be subordinated to imperative needs of national policy."⁸⁰ Thus, the Convention will defer to national policies for compelling reasons.

Political Framework for Cooperation, in *FREE MOVEMENT OF PERSONS IN EUROPE* 335, 344 (Henry G. Schermers, et al. eds., 1993).

⁷³ *Id.*

⁷⁴ See generally, Schengen Agreement, *supra* note 69.

⁷⁵ Joost P. van Iersel, *Free Movement of Persons—Democratic Control*, in *FREE MOVEMENT OF PERSONS IN EUROPE* 369, 376 (Henry G. Schermers et al. eds., 1993).

⁷⁶ de Zwaan, *supra* note 72, at 344.

⁷⁷ Donner, *supra* note 68, at 26.

⁷⁸ Schengen Convention, *supra* note 9, art. 2(1).

⁷⁹ Donner, *supra* note 68, at 11.

⁸⁰ *Id.*

B. *Effect of Schengen Agreement on the Rights of Aliens*

A member of the Schengen Group can derogate from the uniform conditions of entry for which the Convention provides, and admit those who do not meet the Group's standards "on humanitarian grounds or in the national interest or because of *international obligations*."⁸¹ Any alien admitted under this provision, however, will be restricted to the territory of the Schengen country concerned.⁸² Likewise, the criteria for determining the Schengen country responsible for examining an asylum application are in accord with the Convention's provisions concerning the rights to entry and freedom of movement—the Schengen country that granted entry to the applicant is responsible and must either admit that person to residence or expel the applicant.⁸³

In mandating a centralized process for determining asylum applications, Article 30 of the Convention provides criteria for determining which Schengen country should review the asylum application.⁸⁴ If a state has issued an asylum applicant a visa or residence permit, that state will be responsible for processing the application.⁸⁵ If the

⁸¹ Schengen Convention, *supra* note 9, art. 5(2) (emphasis added).

⁸² *Id.*

⁸³ Schengen Convention, *supra* note 9, arts. 33, 34; Donner, *supra* note 68, at 14–15.

⁸⁴ Schengen Convention, *supra* note 9, art. 30.

⁸⁵ *Id.* art. 30(1)(a). Article 30 of the Convention reads as follows:

1. The Contracting Party responsible for the processing of an application for asylum shall be determined as follows: a) If a Contracting Party has issued to the applicant for asylum a visa of any type, or a residence permit, it shall be responsible for processing the application. If the visa was issued on the authorization of another Contracting Party, the Contracting Party who gave the authorization shall be responsible. b) If two or more Contracting Parties have issued to the applicant for asylum a visa of any type or a residence permit, the Contracting Party responsible shall be the one which issued the visa or the residence permit that will expire last. c) As long as the applicant for asylum has not left the territory of the Contracting Parties the responsibility defined in accordance with (a) and (b) shall subsist even if the period of validity of the visa of any type of the residence permit has expired. If the applicant for asylum has left the territory of the Contracting States after the issue of the visa or the residence permit, these documents shall be the basis for the responsibility as defined in (a) and (b) unless they have expired in the interval under national provisions. d) If the Contracting Parties exempt the applicant for asylum from the requirement for a visa, the Contracting Party across the external borders of which the applicant for asylum has entered the territory of the Contracting Parties shall be responsible. Until the harmonization of visa policies is completed, and if the applicant for asylum is exempted from the requirement for a visa by certain Contracting Parties only, the Contracting Party across the external border of which the applicant for asylum has entered the territory of the Contracting Parties by means of an exemption from the requirement of a visa shall be responsible, subject to (a), (b) and (c). If the application for asylum is submitted to a Contracting Party which

applicant enters Schengen territory without proper documentation, the state whose borders the applicant crossed to get into Schengen territory will be responsible.⁸⁶ Whichever Schengen country is responsible for determining asylum eligibility under these procedures will process the application in accordance with its own national law.⁸⁷

Additionally, the Schengen states have determined that one state's decision to refuse asylum will be binding on all states.⁸⁸ Thus, a refugee who desires asylum in any one of the Schengen countries can be expelled from all Schengen countries simultaneously if the applicant does not meet the necessary criteria in the country designated to process his or her application.⁸⁹ Consequently, to prepare for the time when the Schengen Convention takes effect, many EU Member States are passing legislation which serves to reduce greatly the number of asylum applicants who meet their national asylum procedures.⁹⁰

Article 29, however, provides that the right of the Group States to admit or refuse entry must be in accordance with its international commitments.⁹¹ Article 28 also acknowledges the Group's obligations under international law:

has issued a transit visa to the applicant—whether the applicant has passed passport checks or not—and if the transit visa was issued after the country of transit has ascertained from the consular or diplomatic authorities of the Contracting Party of destination that the applicant for asylum fulfilled the conditions for entry into the Contracting Party of destination, the Contracting Party of destination shall be responsible for processing the application. f) If an alien whose application for asylum is already being processed by one of the Contracting Parties submits a new application the Contracting Party responsible shall be the one processing the first application. g) If an alien on whose previous application for asylum a Contracting Party has already taken a final decision submits a new application, the Contracting Party responsible shall be the one that processed the previous request unless the applicant has left the territory of the Contracting Parties. 2. If a Contracting Party has undertaken the processing of an application for asylum in accordance with Article 29(4) the Contracting Party responsible under paragraph 1 of the present Article shall be relieved of its obligations. 3. If the Contracting Party responsible cannot be determined by means of the criteria laid down in paragraphs 1 and 2 the Contracting Party to which the application for asylum was submitted shall be responsible.

Id.

⁸⁶ *Id.* art. 30 (1)(e).

⁸⁷ *Id.* art. 32.

⁸⁸ Heaton, *supra* note 8, at 665.

⁸⁹ *See id.* at 666.

⁹⁰ *Id.*

⁹¹ Schengen Convention, *supra* note 9, art. 29(2). Article 29(2) of the Convention reads as follows:

This obligation shall not bind a Contracting Party to authorize every applicant for asylum to enter or remain within its territory. Every Contracting Party shall retain

The Contracting Parties hereby reaffirm their obligations under the Geneva Convention of 28 July 1951 relating to the Status of Refugees as amended by the New York Protocol of 31 January 1967, without any geographical restriction on the scope of these instruments, as also their commitment to co-operate with the United Nations High Commissioner for Refugees in the implementation of those instruments.⁹²

Thus, the Schengen Convention purported to adhere to international policies concerning the rights of aliens.

III. THE UNITED NATIONS AND THE EFFECT OF GUARANTEED HUMAN RIGHTS ON IMMIGRATION ISSUES

Adopted on June 26, 1945 of the United Nations Organization, the UN Charter was the first multilateral treaty to deal with the broad spectrum of human rights.⁹³ While the international law overseen by the United Nations has long recognized that States have an obligation to treat aliens humanely,⁹⁴ no express language of the UN Charter deals with the rights of aliens *per se*.⁹⁵ Despite the silence on the issue of aliens, the preamble as well as articles 1, 55, and 56 of the UN Charter are important statements regarding human rights generally.⁹⁶ The preamble to the UN Charter provides the document with a human rights theme:

We the peoples of the United Nations determined . . . to reaffirm faith in fundamental human rights, in the dignity and worth of the human person in the equal rights of men and women and of nations large and small . . . have resolved to combine our efforts to accomplish these aims. . . .⁹⁷

Article 1, which sets out the purposes of the United Nations, states that its purpose is "to co-operate . . . in promoting respect for hu-

the right to refuse entry or to expel any applicant for asylum to a Third State on the basis of its national provisions and in accordance with its international commitments.

Id.

⁹² *Id.* art. 28.

⁹³ PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* 42 (1983).

⁹⁴ *Id.* at 11-12.

⁹⁵ See generally U.N. CHARTER, *supra* note 2.

⁹⁶ RICHARD B. LILlich, *THE HUMAN RIGHTS OF ALIENS IN CONTEMPORARY INTERNATIONAL LAW* 41 (1984).

⁹⁷ U.N. CHARTER pmb1.

man rights and fundamental freedoms for all.”⁹⁸ Article 55 provides that the United Nations shall promote “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”⁹⁹ Article 56 asserts that “all Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.”¹⁰⁰

The legal effect of the UN Charter is one of obligation—with every member of the United Nations bound by articles 55 and 56, as a matter of international law, to respect and observe human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.¹⁰¹ It may be a valid argument that the principle that discrimination against aliens is impermissible in all but a few, narrowly-defined instances is implicit in the very concept of human rights and fundamental freedoms.¹⁰² In addition to this fundamental ideal, post-Charter UN initiatives¹⁰³ have developed the content of the international human rights clauses granting additional and more concrete protection to aliens.¹⁰⁴

A. *The Universal Declaration of Human Rights*

The Universal Declaration of Human Rights (Declaration) is one document which affords protection to aliens.¹⁰⁵ While the Declaration was not originally conceived as imposing legal obligations on states,¹⁰⁶ some argue that since the time of its inception the Declaration has achieved status as an agreed statement of international law to which all states should adhere.¹⁰⁷ Others argue that because

⁹⁸ *Id.* art. 1.

⁹⁹ *Id.* art. 55.

¹⁰⁰ *Id.* art. 56.

¹⁰¹ INTERNATIONAL LAW OF HUMAN RIGHTS, *supra* note 93, at 63.

¹⁰² *Id.*

¹⁰³ These U.N. initiatives include the Universal Declaration of Human Rights, *supra* note 3; the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171; and the International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3.

¹⁰⁴ LILLICH, *supra* note 96, at 23.

¹⁰⁵ A.H. ROBERTSON, HUMAN RIGHTS IN THE WORLD 25 (1972). The Universal Declaration of Human Rights was adopted by Resolution 217 (III) of the General Assembly as a “Bill of Rights” intended as a means of strengthening the human rights provisions of the UN Charter. *Id.*

¹⁰⁶ A.H. ROBERTSON & J.G. MERRILLS, HUMAN RIGHTS IN THE WORLD 26 (1989). “[T]he General Assembly proclaims this Universal Declaration of Human Rights as a common standard of *achievement* for all peoples and all nations.” *Id.* (emphasis added).

¹⁰⁷ *Id.* The idea that the Declaration is law was reaffirmed in 1960 by the adoption of the

it is merely a declaration, it is not, by itself, legally binding on its signatories.¹⁰⁸ Both sides of the dispute agree, however, that the Declaration provides the international standards which states are expected to follow in the treatment of both citizens and foreigners. It is also agreed that the Declaration represents an authoritative interpretation of the law of human rights that is legally binding on the states as rights envisaged in the Charter.¹⁰⁹

The very first article of the Declaration proclaims that “[a]ll human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”¹¹⁰ This article embodies the principle of international solidarity which establishes that: 1) the alien is a person of concern to the international community as a whole; 2) there is an obligation on the international front to extend refuge to all those forced to flee situations of social disharmony and violence and to treat such people with human dignity; and 3) states have a duty to share the responsibility of finding solutions for those who have been deprived of a community in which to live.¹¹¹

By embodying universal terms such as “all human beings,” “everyone,” and “no one,” the Declaration imparts rights to all people equally.¹¹² Thus, aliens, as well as nationals, are entitled to all the rights proffered in the document. Several of the rights conferred in the Declaration refer to the plight of the alien. For instance, article 2 of the Declaration prohibits discrimination:

Declaration on Colonialism in that year which provided that “all States shall observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration of Human Rights” *Id.* Additionally, the Declaration on the Elimination of Racial Discrimination unanimously adopted in 1963 contained a similar provision. *Id.*

¹⁰⁸Ahcene Boulesbaa, *A Comparative Study Between the International Law and the United States Supreme Court Standards for Equal and Human Rights in the Treatment of Aliens*, 4 GEO. IMMIGR. L.J. 445, 457, quoting Professor H. Waldock, *General Course on Public International Law*, 106 Recueil Des Cours 1, 199 (1962-II)

[T]he Declaration has received such wide recognition both on the international plane and in national systems that it can fairly be regarded as an embodiment of generally accepted concepts of human rights, and we may accordingly refer to it for indications of the content of the human rights envisaged in the Charter.

Id.

¹⁰⁹PAUL SIEGHART, *THE LAWFUL RIGHTS OF MANKIND* 73 (1985).

¹¹⁰Universal Declaration of Human Rights, *supra* note 3, art. 1.

¹¹¹J.N. Saxena, *Problems of Refugees in the Developing Countries and the Need for International Burden Sharing*, in *INTERNATIONAL LAW IN TRANSITION* 100 (R.S. Pathak & R.P. Dhokalia eds., 1992).

¹¹²*See generally* Universal Declaration of Human Rights, *supra* note 3.

[e]veryone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.¹¹³

In addition to this broad provision against discrimination, the Declaration provides that “[e]veryone has the right to freedom of movement and residence within the borders of each State”;¹¹⁴ “[e]veryone has the right to seek and enjoy in other countries asylum from persecution”;¹¹⁵ and “[n]o one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.”¹¹⁶ Furthermore, the Declaration proclaims that all people have a right to housing, medical care, and social services,¹¹⁷ as well as a right to a free education.¹¹⁸

B. *The UN Covenants Regarding Human Rights and the International Bill of Rights*

The Declaration was only the first step of what is called the “International Bill of Rights.”¹¹⁹ The International Bill of Rights is made up of three documents in addition to the Declaration: the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social, and Cultural Rights, and the Optional Protocol to the International Covenant on Civil and Political Rights.¹²⁰ Unlike the Declaration, the two Covenants and the Optional Protocol indisputably are legally binding on the states which have ratified them.¹²¹ Therefore, once a state has ratified and thus become bound by one or both of these Covenants, any subsequent violation of any human right conferred by the Covenant is

¹¹³ *Id.*

¹¹⁴ *Id.* art. 13(1).

¹¹⁵ *Id.* art. 14(2).

¹¹⁶ *Id.* art. 15(2).

¹¹⁷ *Id.* art. 25(2).

¹¹⁸ Universal Declaration of Human Rights, *supra* note 3, art. 26.

¹¹⁹ LILLICH, *supra* note 96, at 44.

¹²⁰ *Id.* at 44–45.

¹²¹ *Id.* at 45.

not merely immoral, but rather is a governmental breach by the state of its legal obligations under international law.¹²²

In addition to being legally binding, these documents vary from the Declaration in two important aspects. First, because they are drafted in a more "legalistic" fashion than the articles of the Declaration, they provide states with a clearer statement of the nature of the right conferred and set out specified circumstances under which states may restrict these rights.¹²³ Secondly, unlike the Declaration, these Covenants contain provisions that refer specifically to aliens.¹²⁴

1. The International Covenant on Civil and Political Rights

Often referred to as the most authoritative international human rights instrument,¹²⁵ the International Covenant on Civil and Political Rights protects more rights than other comparable international law instruments and provides broader and more enterprising definitions for the rights protected.¹²⁶ The Covenant's anti-discrimination provision prohibits any form of discrimination whatsoever:

[e]ach State Party . . . undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹²⁷

Expanding on this prohibition, the Covenant prohibits derogation of the document's policies except in dire situations:

[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties . . . may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and

¹²² International Law of Human Rights, *supra* note 93, at 66.

¹²³ LILLICH, *supra* note 96, at 45.

¹²⁴ *Id.*; see generally International Covenant on Civil and Political Rights, *supra* note 103; the International Covenant on Economic, Social and Cultural Rights, *supra* note 103.

¹²⁵ HURST HANNUM, THE RIGHT TO LEAVE AND RETURN IN INTERNATIONAL LAW AND PRACTICE 19 (1987).

¹²⁶ ROBERTSON & MERRILLS, *supra* note 106 at 36.

¹²⁷ International Covenant on Civil and Political Rights, *supra* note 103, art. 2(1).

do not involve discrimination solely on the ground of race, colour, sex, language, religion and social origin.¹²⁸

In addition to this broad anti-discrimination provision, the International Covenant on Civil and Political Rights provides both a substantive and a procedural law pertaining specifically to the rights of aliens.¹²⁹ Article 12 of the Covenant provides legal aliens substantive rights: “[e]veryone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”¹³⁰ Article 13 guarantees procedural rights for aliens facing expulsion:

[a]n alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.¹³¹

Along with these alien-specific rights, the Covenant provides generally that “[e]veryone has the right to liberty and security of the person”;¹³² “[a]ll persons shall be equal before the courts and tribunals”;¹³³ and “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor or reputation.”¹³⁴

2. The International Covenant on Economic, Social, and Cultural Rights

Less favorable to aliens than its counterpart, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights bestows states with affirmative duties to provide for those within its borders.¹³⁵ Although the

¹²⁸ *Id.* art. 4(1).

¹²⁹ *See generally*, International Covenant on Civil and Political Rights, *supra* note 103.

¹³⁰ *Id.* art. 12.

¹³¹ *Id.* art. 13.

¹³² International Covenant on Civil and Political Rights, *supra* note 103, art. 9.

¹³³ *Id.* art. 14.

¹³⁴ *Id.* art. 17.

¹³⁵ LILLICH, *supra* note 96, at 47.

Covenant, like its counterpart, has a broad anti-discrimination provision,¹³⁶ Article 4 of the Covenant allows states in certain situations to restrict rights conferred by it.¹³⁷ Declaring that the rights may be subjected to "such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society,"¹³⁸ the article seems to leave open a door for state parties to limit certain rights. While the justification for "promoting the general welfare in a democratic society" may require threats to national security, public order, and public health, the Covenant does not define this phrase and, as a result, the ramifications for aliens are unclear.¹³⁹

3. Current Remedies for Violations of International Law

One of the most troubling problems for the international community is the apparent gap between internationally proclaimed standards for the protection of human rights and the actual protection afforded those rights.¹⁴⁰ In its Resolution 34/175 of 17 December 1979, the General Assembly of the United Nations stated that "mass and flagrant violations of human rights are of special concern to the United Nations."¹⁴¹ Nevertheless, because many UN Member States have failed to incorporate these standards into national governmental systems or to assimilate them as a part of national culture, the international community faces a great challenge to make certain that universally proclaimed standards are fused into the society of every nation.¹⁴²

In spite of the great need for intervention on the part of the United Nations, the organs of the United Nations are inadequate to deal with urgent situations of human rights such as the treatment of aliens wishing to enter EU Member States via any of the Schengen Group territory.¹⁴³ The United Nations is working on programs to

¹³⁶ International Covenant on Economic, Social and Political Rights, *supra* note 103, art. 2(2).

¹³⁷ GUY S. GOODWIN-GILL, INTERNATIONAL LAW AND THE MOVEMENT OF PERSONS BETWEEN STATES 68 (1978).

¹³⁸ International Covenant on Economic, Social and Political Rights, *supra* note 103, art. 4.

¹³⁹ See GOODWIN-GILL, *supra* note 137, at 68.

¹⁴⁰ B.G. RAMCHARAN, THE CONCEPT AND PRESENT STATUS OF THE INTERNATIONAL PROTECTION OF HUMAN RIGHTS FORTY YEARS AFTER THE UNIVERSAL DECLARATION 242 (1989).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 243. In 1980, the then-director of the United Nations Division of Human Rights,

increase the effectiveness of its treaties and standards. Despite these efforts, a coherent and effective United Nations policy for responding to urgent situations of human rights violations has yet to be achieved.¹⁴⁴

4. Economic and Social Council

An essential component of the UN's scheme of enforcement of international law is the Economic and Social Council (ECOSOC).¹⁴⁵ Made up entirely of governmental representatives from fifty-four of the UN's Member States and elected by the General Assembly, ECOSOC drafted the two covenants on human rights.¹⁴⁶ ECOSOC has also established a Commission on Human Rights which is responsible for reviewing the vast number of human rights violations reported to the United Nations each year.¹⁴⁷

In addition to reviewing complaint reports, ECOSOC has supervisory authority over the International Covenant on Economic, Social and Cultural Rights.¹⁴⁸ This authority permits ECOSOC to consider whether states parties to the Covenant have complied with the provisions of the Covenant by adopting measures and by making progress towards recognizing the rights protected in the Covenant.¹⁴⁹ Upon reviewing the states' reports, ECOSOC may refer the reports to the Commission for further study and may make recommenda-

Theo C. van Boven, in an address to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, stated:

[W]e are frequently faced in the United Nations with serious and urgent problems of violations of human rights which arise in different parts of the world but, apart from statements of the Secretary General issued in a humanitarian spirit, or the exercise of his good offices in certain cases, the Organization is mostly unable to take action in a situation where every day counts heavily notwithstanding the hope and expectation of the international community for such action . . . in my view this is a major deficiency in the arrangements of the United Nations for dealing with situations of gross violations

Id.

¹⁴⁴ *Id.* at 245.

¹⁴⁵ THE LAWFUL RIGHTS OF MANKIND, *supra* note 109, at 95.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* Despite the power to review such complaints, the Commission, nevertheless, can merely investigate or do a thorough study of only those violations which reveal "a consistent pattern of gross and reliably attested violations of human rights and fundamental freedoms" in a "particular situation." *Id.* After such an investigation or study, the Commission may submit reports and recommendations to ECOSOC only, and not to the offending country. *Id.* at 96.

¹⁴⁸ International Covenant on Economic, Social and Cultural Rights, *supra* note 103, art. 16.

¹⁴⁹ *Id.*

tions to the General Assembly.¹⁵⁰ Despite this authority, ECOSOC, to date, has exercised neither.¹⁵¹

5. General Assembly

Article 13 of the UN Charter expressly grants power to the General Assembly.¹⁵² The General Assembly has the ability to study and recommend initiatives for international cooperation in the economic, social, cultural, educational, and health fields, and for promoting the realization of human rights and fundamental freedoms absent any form of discrimination.¹⁵³ The powers of the General Assembly are very limited: to discuss any question or matter concerning human rights;¹⁵⁴ to initiate studies for the purpose of "assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion";¹⁵⁵ to make recommendations for the same purpose;¹⁵⁶ to draft international conventions;¹⁵⁷ to "establish such subsidiary organs as it deems necessary for the performance of its functions";¹⁵⁸ and to coordinate and stimulate the action of the other UN organs.¹⁵⁹

While the General Assembly is allowed to "intervene" on a state's sovereignty in cases of large scale and massive violations of human rights, the extent of this intervention is limited to merely evaluating recommendations and solicitations to the state concerned or to assist the state in terminating the suspect practices.¹⁶⁰ Because the Assembly receives reports from the Human Rights Committee, the Committee on Economic, Social, and Cultural Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination Against Women, and the Committee Against Torture, it is the only body able to recommend reforms of the system of accountability for human rights violations within the

¹⁵⁰ THE LAWFUL RIGHTS OF MANKIND, *supra* note 109, at 96.

¹⁵¹ *Id.*

¹⁵² U.N. CHARTER art. 13.

¹⁵³ RAMCHARAN, *supra* note 140, at 248.

¹⁵⁴ U.N. CHARTER arts. 55(c), 60.

¹⁵⁵ *Id.* art. 13(1)(b).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* art. 62(3).

¹⁵⁸ *Id.* art. 22.

¹⁵⁹ U.N. CHARTER arts. 58, 66.

¹⁶⁰ Antonio Cassese, *The General Assembly: Historical Perspective 1945-1989*, in THE UNITED NATIONS AND HUMAN RIGHTS 4, 25, 48 (Philip Alston ed., 1992).

boundaries defined by the relevant treaties.¹⁶¹ Despite this unique supervisory role, the General Assembly has no effective method to enforce the outcome of its recommendations.¹⁶²

IV. EU'S IMMIGRATION POLICIES AS A VIOLATION OF INTERNATIONAL LAW

International law can and does infringe upon the jurisdiction of national law in the sphere of alien ingress for the purpose of determining standards and stipulating obligations for all states to follow with regard to the treatment of aliens.¹⁶³ Recently, the use of treaties to provide guarantees for the international protection of human rights has become widespread. As a result, there is a new urgency surrounding state responsibility for violations of these treaties.¹⁶⁴ Because of its ramifications on the rights of aliens, the Schengen asylum policy demands intervention by international lawmakers into the national law of the members of the Schengen Group.

There are two basic rules on the general law of international responsibility: "1) the breach of any international obligation constitutes an illegal act or international tort; and 2) the commission of an international tort involves the duty of reparation."¹⁶⁵ The breach of international law which the EU Member States are committing in changing their alien laws constitutes an international tort which the international community must prohibit in order to maintain the goal of the United Nations—to provide human rights for all human beings. In order to comport with these rules of international responsibility, however, the international community needs adjudicative control over such international agreements which violate human rights law such as the Schengen Convention.

The Schengen policy of disposing of an asylum applicant by barring him or her from all Schengen countries at once is in direct conflict with article 14(1) of the Universal Declaration of Human Rights which states that, "every one has the right to seek and enjoy in other countries asylum from persecution."¹⁶⁶ By eliminating an alien's ability to repatriate in ten countries at once—practically all of Western Europe, this right is effectively stricken. Additionally, in

¹⁶¹ John Quinn, *The General Assembly into the 1990's*, in *THE UNITED NATIONS AND HUMAN RIGHTS* 68 (Philip Alston ed., 1992).

¹⁶² *Id.* at 96.

¹⁶³ GERASSIMOS FOURLANOS, *SOVEREIGNTY AND THE INGRESS OF ALIENS* 59 (1987).

¹⁶⁴ RAMCHARAN, *supra* note 140, at 277.

¹⁶⁵ *Id.*

¹⁶⁶ Universal Declaration of Human Rights, *supra* note 3, art. 14(1).

allowing the Schengen Group to determine which nation is to review the asylum application according to the country through which the alien entered the Group, the Schengen Group is effectively prohibiting asylum to any refugees who enter the Group through France or Germany due to the newly-imposed constitutional amendments which narrow the requirements for asylum eligibility. The absence of harmonized rules on the recognition of refugees constitutes a violation of international law.

The right to asylum is one of the most ancient forms of human rights.¹⁶⁷ Narrowing the definition of persecution to the point where the right no longer exists grossly violates human rights and cannot go unrecognized. The Schengen Convention's violations of the human rights of aliens are twofold: first, so as not to be inundated with applicant requests which their co-signatories rejected, the agreement encourages unfair immigration policies by forcing its signatories to stiffen asylum policies; second, the Schengen Convention compounds this violation by prohibiting asylum applicants access to the forum of their choice.¹⁶⁸

The implementation of the Schengen Convention is in direct opposition to article 56 of the UN Charter which states that all members pledge themselves to take joint and separate action to achieve the goals set forth in article 55—to promote “universal respect for, and observance of, human rights and fundamental freedoms for all”¹⁶⁹ Instead of cooperating to achieve the goals of the United Nations, the Schengen Convention is a cooperative effort to impede these goals. Additionally, the Schengen Convention violates article 2 of the Declaration which prohibits discrimination on the basis of “. . . political or other opinion, national or social origin, property, birth or other status” notwithstanding any limitation of sovereignty.¹⁷⁰ Article 14(2) of the Declaration proclaims the right of everyone to “seek and enjoy” asylum from persecution in other countries.¹⁷¹ Article 30 of the Convention prohibits aliens from seeking, and thereby enjoying, asylum in all but one country of the Group.¹⁷²

¹⁶⁷ Francis A. Gabor, *Reflections on the Freedom of Movement in Light of the Dismantled "Iron Curtain,"* 65 TUL. L. REV. 849, 850 (1991).

¹⁶⁸ See generally Schengen Convention, *supra* note 9, art. 30. The applicant has no choice as to which member of the Schengen group processes his or her asylum claim.

¹⁶⁹ See U.N. CHARTER arts. 55, 56.

¹⁷⁰ Universal Declaration of Human Rights, *supra* note 3, art. 2.

¹⁷¹ *Id.* art 14(2).

¹⁷² See generally Schengen Convention, *supra* note 9, art. 30.

The Schengen Convention also violates portions of the two covenants on human rights to which all members of the EU, and thus, the Schengen Group are parties. Article 2(1) of the International Covenant on Civil and Political Rights binds all signatories to ensure that all individuals under its territory be given all rights recognized in the Covenant without discrimination of any kind including national origin, birth, or other status.¹⁷³ Furthermore, the Covenant allows derogation from these obligations only in emergency situations.¹⁷⁴

Article 4 of the International Covenant on Economic, Social and Cultural Rights does allow a state party to derogate from the rights it confers to all people if such derogation is for the purpose of promoting the general welfare in a democratic society.¹⁷⁵ It is difficult to perceive, however, how the general welfare of a democratic society could be improved by prohibiting fellow human beings from a fair opportunity to freedom, safety, and the economic means to survive. By ratifying the treaty, as all EU Member States have, a state is pledging to abide by the provisions of the treaty; namely, to guarantee certain rights to all persons.¹⁷⁶

Equal protection of the laws is a fundamental principle of international law.¹⁷⁷ Likewise, the right to a remedy for a breach of international law is fundamental.¹⁷⁸ Aliens, however, lack a sufficient remedy for violations of fundamental rights effected by the Schengen Convention. The right to adjudication in the state which refused an

¹⁷³ International Covenant on Civil and Political Rights, *supra* note 103, art. 2(1).

¹⁷⁴ *Id.* art. 4(1).

¹⁷⁵ International Covenant on Economic, Social and Political Rights, *supra* note 103, art. 4.

¹⁷⁶ THE LAWFUL RIGHTS OF MANKIND, *supra* note 109, at 73.

¹⁷⁷ Universal Declaration of Human Rights, *supra* note 3, art. 7. Article 7 of the Universal Declaration of Human Rights reads as follows: “[a]ll are equal before the law and are entitled without any discrimination to the equal protection of the law” *Id.* Article 26 of the International Covenant on Civil and Political Rights reads as follows:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination in any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status.

International Covenant on Civil and Political Rights, *supra* note 103, art. 26.

¹⁷⁸ Universal Declaration of Human Rights, *supra* note 3, art. 8. Article 8 of the Universal Declaration of Human Rights reads as follows: “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.” Universal Declaration of Human Rights, *supra* note 3, art. 8; *see also* International Covenant on Civil and Political Rights, *supra* note 103, art. 26.

alien's asylum application is insufficient, because the applicant is being denied access to the asylum protection of nine other nations.

Article 15(2) of the Declaration protects aliens from arbitrary denial of the right to change nationalities.¹⁷⁹ The right to change nationalities is arbitrarily removed by denying aliens the right to seek asylum adjudication in all but one country of the Schengen group. In addition, article 14 of the International Covenant on Civil and Political Rights' provision that all persons shall be equal before the courts presumes that all people are entitled to access the courts.¹⁸⁰

Article 7 of the EEC Treaty prohibits discrimination against anyone on the grounds of nationality.¹⁸¹ Article 26 of the International Covenant on Civil and Political Rights declares that all persons are equal before the law and entitled without discrimination to equal protection of the law.¹⁸² All Member States of the EU are bound by the International Covenant on Civil and Political Rights,¹⁸³ and thus subject to international jurisdiction for any breach of international law.¹⁸⁴

Nevertheless, despite these fundamental protections of human rights to which the EU Member States are bound, immigrants wishing to enter the EU are not afforded these protections. This unfairness arises as follows: because most non-EU nationals enter Schengen Group States under the national immigration rules of each individual state without any nexus to the Community, they fall outside the protection of Community law.¹⁸⁵ Thus, aliens seeking entry into an EU Member State must deal separately with each State's alien laws and judicial system, with no Community-wide right of appeal.

With the advent of the Schengen Convention, the rights of these aliens are further limited. Instead of an opportunity to choose a state in which the alien would like to gain asylum or one which has relatively permissive asylum laws, the Schengen Group decides under what nation's law the application is to be processed.¹⁸⁶ This policy constitutes a violation of article 26 of the International Covenant on Civil and Political Rights; therefore, article 26 deserves protection under international law.¹⁸⁷

¹⁷⁹ Universal Declaration of Human Rights, *supra* note 3, art. 15(2).

¹⁸⁰ International Covenant on Civil and Political Rights, *supra* note 103, art. 14.

¹⁸¹ EEC TREATY, *supra* note 59, art. 7.

¹⁸² International Covenant on Civil and Political Rights, *supra* note 103, art. 26.

¹⁸³ THE LAWFUL RIGHTS OF MANKIND, *supra* note 109, at 241-44.

¹⁸⁴ See generally *id.*

¹⁸⁵ Weiler, *supra* note 1, at 254.

¹⁸⁶ Schengen Convention, *supra* note 9, art. 30.

¹⁸⁷ See International Covenant on Civil and Political Rights, *supra* note 103, art. 26.

Additionally, while provided in form by all members of the Schengen Group, in practice, the right of appeal is very limited for those seeking asylum in the Schengen territory. Refugees denied asylum in the Schengen territory by means of a French or German adjudication of their application have an uphill fight. While France has created an appeal commission to review negative refugee determinations made by the immigration counsel, the jurisdiction of the appellate review board is consultative only.¹⁸⁸ Thus, its judgments consist merely of recommendations to the Minister of the Interior regarding whether or not to enforce the proposed measures intended for the particular applicant.¹⁸⁹ While asylum applicants in Germany are entitled to a full right of appeal to a single judge of the German Administrative Court (Verwaltungsgericht) for negative determination of refugee status, the success rate for such appeals is less than ten percent.¹⁹⁰ By making asylum so difficult to achieve in the two largest Schengen States, the Convention is denying aliens their right to adjudication of asylum applications in violation of international law.

V. THE NEED FOR A UN JUDICIARY TO BOTH ADJUDICATE VIOLATIONS OF HUMAN RIGHTS AND MANDATE CHANGE

Because the Schengen Convention is not part of Community law and, therefore, immune to adjudication by the Court of Justice, there is no common authority or court responsible for immigration and asylum law and policy within the entire Schengen territory. As a result, an alien denied entry into the Schengen territory by means of a negative finding in one state of the Group has no Group-wide recourse to claims of discrimination in violation of his or her human rights. Therefore, there is a need for an international common authority in this field, not only to protect the rights of those with valid asylum claims who are kept out of the Schengen territory, but also to provide an international judiciary to comport with international law. Without a remedy, a right is worthless.

¹⁸⁸ GLENN, *supra* note 5, at 76–77.

¹⁸⁹ *Id.* at 77. The review board, Commission des recours des refugies, sits in a panel of three members composed of a member of the Conseil d'Etat sitting as Chair, a member of the OFPRA (the French immigration counsel) and a member of the staff of the United Nations High Commissioner for Refugees. *Id.* While the appellant may be represented by counsel and an interpreter, the Commission, nevertheless, provides neither and legal aid is unavailable. *Id.*

¹⁹⁰ *Id.* at 78.

International law has undoubtedly developed significantly in the forty-five years since the 1948 signing of the Declaration. The range and number of international bodies given the power to supervise the performance of international obligations has, however, led to conflicting opinions concerning the nature and extent of the rights of aliens. This concept needs to be clarified if states are expected to conform their laws to the dictates of international treaties, covenants, and declarations.¹⁹¹ The UN efficiently “promotes” human rights. Nevertheless, relying on the conscience of EU nations to protect the rights of aliens during a tumultuous time when these states are struggling to survive recession and to achieve economic union is not only idealistic but jeopardizes the lives of aliens who need the protection that these states can and should offer.

The ability of the Schengen states to be impartial in adopting laws and ratifying agreements concerning the status of aliens in their territory is minimal. The only procedure by which aliens can be treated humanely and in accordance with the international obligations of human rights is to institute a procedure whereby an international tribunal will have adjudicatory powers over the validity of the asylum procedures of all Member States of the United Nations. Under this theory, an appointed body of the United Nations will be established to review asylum laws and procedures enacted by UN Member States. If the reviewing body determines that a Member State’s laws violate international law, the offending state will be required to appear before an international court for a full adjudication of the validity of the law in question. If the international court finds that the law violates international law or treaties, the state will be ordered to restructure the law to comport with international standards of human rights or it will risk suspension of membership in the United Nations. Such a procedure will not only protect the aliens but will also protect states from each other. Instead of trying to pass stricter laws than their neighbors, as the Schengen Group is doing, states will be trying to make laws that comport with the UN standards to avoid the adjudicatory process.

¹⁹¹ These international organizations range from independent bodies such as “the United Nations Committee on Human Rights, to groups of governmental representatives such as the UN Commission; from courts like the European and Inter-American Courts of Human Rights, to quasi-judicial and non-judicial bodies like various regional commissions and the two UN bodies”; and task-specific bodies such as the UN Committee on the Elimination of Discrimination against Women and the European Convention for the Prevention of Torture. ROBERTSON & MERRILLS, *supra* note 106, at 289.

CONCLUSION

The fall of Communism, civil wars, economic recession, and the advent of ease in travel for foreigners has undoubtedly resulted in an immigration crisis in Western Europe. The right to protection for those without a homeland is fundamental to a civilized society and cannot be compromised. Aliens are being discriminated against because they do not have fair access to adjudication by a nation of their own choice. This discrimination is further fostered by the race in Western Europe to change asylum procedures to keep out unwanted foreigners. The attitude towards aliens in the EU, an area which only recently held itself out as a refuge for aliens, is unconscionable. Consequently, the United Nations should not be forced to watch, with its hands tied, these states keep out desperate aliens. The future of the United Nations rests on the ability of Member States to cooperate to achieve the goals of the organization. Without an international court to effect binding decisions on these nations, the damage to the international human rights standards will be irreparable. The desire to help those less fortunate must survive through both fortune and adversity.

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