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Suspending Schengen: Exceptions to the Schengen Agreement and the Legality of France's Decision to Close Its Borders with Italy

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SUSPENDING SCHENGEN: EXCEPTIONS TO THE SCHENGEN
AGREEMENT AND THE LEGALITY OF FRANCE’S DECISION
TO CLOSE ITS BORDERS WITH ITALY

Lauren McClure[†]

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I. Introduction

In early April 2011, a wave of migrants left behind political and social unrest in North Africa for safety and stability in Italy.¹ Faced with hundreds of refugees, the Italian government chose to issue residence permits to facilitate their movement within the rest of Europe.² This move, however, was not exactly welcomed by other member states whose borders now became open to these migrants.³ As a result and in response to these permits, France closed part of its border with Italy, establishing border control checks and halting a train carrying

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¹ Ian Traynor & John Hooper, *France and Italy in call to close EU borders in wake of Arab protests*, THE GUARDIAN, Apr. 27, 2011, <http://www.guardian.co.uk/world/2011/apr/26/eu-borders-arab-protests>.

² See *id.* (discussing the decision by Italy to issue residential permits).

³ See *id.* (explaining the uneasiness bordering countries to Italy, particularly France, had when they decided to issue these permits to these migrants).

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immigrants from Ventimiglia, Italy.⁴ One effect of this border closure was that it caused many to question the Schengen Agreement, one of the European Union's foundational agreements allowing the free movement of peoples within the signatory member states.⁵

Initially signed into treaty on June 14, 1985, the Schengen Agreement ("Schengen" or "the Agreement") consolidated twenty-five European countries into one borderless zone in order to facilitate the free movement of labor and to provide for the new Eurozone economy.⁶ By permitting in its Border Codes a temporary closure by a member state, the European Union through Schengen allows a country to re-erect borders if there are "exceptional circumstances."⁷ However, in the past five years, temporary internal border controls throughout all of Europe have been re-erected a mere twenty-six times.⁸

The actions by France in April 2011 caused an upheaval in the established order under Schengen and created a rift within the EU.⁹ Those governments who have expressed support for France's border closure typically favor more sovereignty for member states and increased border control, both externally and internally.¹⁰ Critics of France's actions, such as the EU Commission, responded by proposing that each member state have less power to re-erect the borders.¹¹ The Commission argued that legislation was needed that would require national gov-

⁴ *Id.*; Sergio Carrera et al., *A Race against Solidarity The Schengen Regime and the Franco-Italian Affair*, CENTRE FOR EUROPEAN POLICY STUDIES 1, 1-2 (Apr. 2011), available at <http://www.epim.info/wp-content/uploads/2011/01/The-Franco-Italian-Affair.pdf>.

⁵ Consolidated Version of the Treaty on the Functioning of the European Union, art. 77, Sep. 5, 2008, 2008 O.J. (C 115/47) [hereinafter TFEU]; see *France seeks change to Schengen border agreement*, BBC NEWS, Apr. 22, 2011, <http://www.bbc.co.uk/news/world-europe-13171403> (explaining the changes sought by France for the Schengen Agreement stemmed from their desire to have more control over their borders and to avoid situations where one state bears a larger burden of immigrants and migrants than other states simply because they remain a border state); see also *Free movement of persons, asylum and immigration*, EUROPA, http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_immigration/index_en.htm (last visited Jan. 5, 2012) (describing the purposes of the Schengen Agreement and explaining the existing aspects of the agreement and its effects on people in the area of immigration and asylum).

⁶ See TFEU, *supra* note 5, art. 77 (explaining what the goals of Schengen would be for the European Union, what changes would be involved and the purpose of doing so); see, e.g., EUROPA, *supra* note 5 (explaining the purposes of the Agreement in creating a borderless area to benefit the member states economically by removing barriers that existed previously and prevent free movement and travel amongst the states).

⁷ See EUROPA, *supra* note 5 (giving the details for when an internal border control can be implemented). Defining an internal border as: "common land borders, including river and lake borders, of EU countries, airports for internal flights, and sea, river and lake ports for regular ferry connections." *Id.*

⁸ *Id.*; see Carrera, *supra* note 4, at 23 (discussing the limited circumstances under which member states have resurrected internal border controls).

⁹ Traynor & Hooper, *supra* note 1; BBC NEWS, *supra* note 5; see Carrera, *supra* note 4, at 9 (discussing the disruption caused after France made the decision to close off its borders temporarily and stop a train carrying migrants and NGO workers due to the threat of a demonstration in support of those migrants).

¹⁰ Traynor & Hooper, *supra* note 1; see Carrera, *supra* note 4, at 10 (explaining that the Commission did not support the idea that the migrants from North Africa constituted a threat to national security).

¹¹ See Traynor & Hooper, *supra* note 1 (finding, rather than Italy or France urged to do, that the North African migrants were not considered an "emergency", and this decision was supported by the large majority of EU countries).

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ernments to seek approval from the Commission before it curbed freedom of movement.¹² Following this proposal, the European Council met in June 2011 and reiterated the importance of common policy and the need for a single European border.¹³

This comment argues first that France's actions were not legal under the Border Codes. Furthermore, it illustrates how France's actions have called into question the fundamental effectiveness of the Schengen Agreement and the cohesiveness of its member states.¹⁴ Part II of this Comment traces the creation of the Schengen Agreement and briefly outlines a member state's ability to temporarily re-introduce internal border controls under limited circumstances.¹⁵ Next, Part III outlines past border control decisions by France as well as relevant ECJ cases, in order to shed light on France's most recent actions.¹⁶ This Part then explains the opposition to France's actions by the European Council and European Commission and the needed changes for the Schengen Agreement.¹⁷

Part IV explains that the border checks and closure were not permissible under the Border Codes, and France's decision to implement them stemmed from long-standing issues with illegal immigration.¹⁸ This Part further argues that, rather than presenting a national security threat, the group of migrants presented a threat only to France's policies and attempts to control its own borders.¹⁹ Part V recommends that the EU act according to its own policy of solidarity by creating a more common policy for internal and external border control, either by altering some of the Border Codes or creating a new EU-controlled system for border controls that applies when a threat to national security exists.²⁰ Finally, Part VI concludes that the member states need to adopt more cohesive and uniform im-

¹² See *id.* (acknowledging the need for improvements and changes to the current Schengen system in order to create a more uniform process, and to avoid divides amongst countries that have different views about what an "emergency" situation really means).

¹³ See BBC NEWS, *supra* note 5 (explaining that the actions by France demonstrated their desire for a more succinct policy on border controls).

¹⁴ See *infra* Part IV (arguing that France's border checks and blockade of the train coming from Italy were not legal under the Border Codes and highlights the existing issues regarding the effectiveness of the Schengen Agreement).

¹⁵ See *infra* Part II (explaining the TFEU, the development of the Schengen Agreement, the Border Codes and Article 23, allowing the temporary re-introduction of internal border controls by a member state).

¹⁶ See *infra* Part III.B-C (discussing the previous border checks instituted by France were found as impermissible by the ECJ and explaining the most recent border checks and closures to prevent North African migrants from entering the border).

¹⁷ See *infra* Part III.A (explaining the position of the Commission and the Council, highlighting the proposals made by the Council to deal with limiting a countries' ability to institute border checks simply because it does not want a certain group of migrants to enter its territory).

¹⁸ See *infra* Part IV.A-B (arguing that the small number of migrants on the train, as well as the estimated number of demonstrators did not constitute a threat to security and the justifications by France came from its desire to limit immigration).

¹⁹ See *infra* Part IV.B (arguing that France's past and present issues with immigration largely influenced its decisions to implement the border checks and to stop the train coming from Italy, rather than actually believing the threat of demonstration could constitute a national security threat).

²⁰ See *infra* Part V (recommending that rather than being seen as a problem, immigration issues should be dealt with by establishing more cohesive policies for EU member states that are part of the

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migration policies in order for the Schengen Agreement to continue to be an effective and important policy in the EU.²¹

II. Background

A. Treaty on the Function of the European Union (“TFEU”): Creation of the Schengen Agreement

Established in 1997 as part of European Union law, the Schengen Agreement effectively removed individual member states’ rights to enforce national borders and instead created a borderless area consisting of over 400 million people in twenty-five countries.²² Under Schengen, the EU was to further develop a common policy that would disable any controls over internal borders of the signatory parties, while also overseeing an integrated system for managing the area’s external borders.²³ Before Schengen was incorporated into EU law, the right to move among and reside freely within the various member states was not one many states encouraged, and administrative formalities existed preventing easy travel by citizens, visitors, and immigrants alike.²⁴ For this reason, it is helpful to understand the purpose of the Schengen Agreement for the European Union and the

Schengen Agreement, either by altering the terms of Article 23 under the Codes, or by creating an EU-based system to deal with situations where the national security of a state might actually be threatened).

²¹ See *infra* Part VI (concluding that the Schengen Agreement and the Border Codes, in their current form, are not able to operate as effectively as they could if the member states had common policies and more specified guidelines under the Border Codes).

²² See TFEU, *supra* note 5, art. 77 (outlining the Schengen agreement and its policies and procedures under European Union law).

²³ *Id.* The TFEU lists the following duties for the EU to adopt and follow as part of creation of the Schengen Agreement:

1. The Union shall develop a policy with a view to: (a) ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders (b) carrying out checks on persons and efficient monitoring of the crossing of external borders (c) gradual introduction of an integrated management system for external borders.

2. For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures concerning: (a) the common policy on visas and other short-stay residence permits; (b) the checks to which persons crossing external borders are subject; (c) the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period; (d) any measure necessary for the gradual establishment of an integrated management system for external borders; (e) the absence of any controls on persons, whatever their nationality, when crossing internal borders.

Visas are issued to non-EU citizens for a number of reasons, but most commonly, re-unification of family, employment and education.

3. If action by the Union should prove necessary to facilitate the exercise of the right referred to in Article 20(2)(a), and if the Treaties have not provided the necessary powers, the Council, acting in accordance with a special legislative procedure, may adopt provisions concerning passports, identity cards, residence permits or any other such document. The Council shall act unanimously after consulting the European Parliament.

4. This Article shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

Id.

²⁴ See EUROPA, *supra* note 5 (explaining the rights of citizens that exist for themselves and their family members to move and reside freely within the territory of the member states and the encouragement of this movement across the member states).

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exception under Article 23 of the Border Codes allowing the re-introduction of internal border controls.²⁵

The overall purpose of Schengen was to enable the free movement of goods and labor.²⁶ By doing so, the Agreement was also meant to increase the likelihood of long-term success of the new union.²⁷ Initially agreed upon by five of the ten original member states,²⁸ the Agreement now automatically incorporates itself into each new member country's laws and safeguards the free movement of people, essentially allowing the EU to operate as a single state for travel purposes, similar to the United States.²⁹

As part of the TFEU requirements,³⁰ the EU created an agency known as FRONTEX to administer border controls.³¹ As a specialized and independent body within the EU, FRONTEX coordinates cooperation among the member states in the field of border security.³² Ultimately, its purpose is to complement and provide particular added value to the national border management systems of the member states.³³ Through cooperation with FRONTEX, member states have amended their national border policies to allow free movement and travel, while at the same time organizing operations in favor of border control due to FRONTEX's expanding presence.³⁴

B. Ability to Temporarily Re-erect Internal Borders by an Individual Country

In March 2006, several years after Schengen itself was codified, the Schengen Border Codes were adopted to improve border-related policy management and

²⁵ See *infra* Part II.B (outlining the exceptions under Article 23 under the Schengen Border Codes).

²⁶ See *id.* (outlining the Schengen Agreement, and the requirements of each member state in eliminating internal borders and applying the common rules and procedures outlined therein); see also EUROPA, *supra* note 5 (explaining that the goals of the Agreement, by eliminating internal borders and finding the free movement of people as a fundamental right and one that would enable the EU to flourish).

²⁷ EUROPA, *supra* note 5. Signatory parties to the Schengen Agreement include the original five countries France, Germany, Belgium, Luxembourg and the Netherlands, with Italy joining on November 27, 1990, Spain and Portugal joining on June 25, 1991, followed by Greece on November 6, 1992 and Austria, Denmark, Finland and Sweden in 1995 and 1996. *Id.* The Czech Republic, Estonia, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia joined on 21 December 2007, followed by Switzerland in 2008. *Id.* The last two countries, United Kingdom and Ireland, can take part in some aspects of the Schengen agreement if the Schengen Member States and the government representative of the country in question vote unanimously in favor within the Council. *Id.*

²⁸ See *id.* (citing the original signatory parties included France, Germany, Luxembourg, Belgium and the Netherlands).

²⁹ See TFEU, *supra* note 5, art. 77 (explaining that by eliminating internal borders, one single external border would exist, facilitating its goals of freedom, justice and security).

³⁰ TFEU, *supra* note 5, art.77.

³¹ See What is Frontex?, FRONTEX: EUROPEAN UNION AGENCY, <http://www.frontex.europa.eu/> (last visited Jan. 6, 2012) (explaining the work of the agency for the EU is to "coordinate the operational cooperation between Member States in the field of border security").

³² *Id.*

³³ *Id.*

³⁴ See, e.g., Martin Schain, *The Border: The Immigration Dilemma and the State in France*, Biennial Conference of the European Union Studies Association, 17 (Mar. 3-5, 2011) (describing the state of France and the effectiveness of the efforts to control immigration).

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still remain an important part of a unified approach to internal and external border supervision within the Union.³⁵ As part of these Codes, and despite Schengen's policy of eradicating internal border controls, a temporary reintroduction of border control at internal borders by a state is permissible under limited circumstances.³⁶ Under the Border Codes, when "a serious threat to security or public policy" arises, a country can set up border controls for a limited period of thirty days.³⁷ Whenever a country decides that such actions are necessary, it is also required to notify the European Commission and European Parliament of this action.³⁸

However, over the past five years, the re-erection of border controls by member states has highlighted some of the flaws in the Schengen Agreement.³⁹ Now, ten years after its implementation, many countries – including France, Germany, Italy, and Denmark – have called into question the effectiveness of Schengen.⁴⁰ It is mostly true that border controls are invoked temporarily by states only when they are hosting major events, such as major international sporting events like the World Cup⁴¹ or European football championships.⁴² Invariably, these situations deal with a huge, one-time entry of foreigners into an individual country.⁴³ However, there is no requirement in the Codes that a country be hosting a major event

³⁵ See Regulation No. 562/2006 of the Eur. Parl. and of the Council of 15 March 2006, 2006 O.J. (L 105) 1-32. [hereinafter Schengen Border Codes] (modifying the existing legislation on border checks in the EU and intended to improve the border management aspect of the Schengen Agreement by providing rules regarding internal and external borders); see also TFEU, *supra* note 4, art. 77 (outlining the Schengen Agreement, requirements for member states to adopt and maintain cohesive border policies).

³⁶ See Schengen Border Codes, *supra* note 35, Annex VI § 1.1.2 (explaining the reintroduction of internal borders is permissible, but only in "exceptional" circumstances" and only for a period of no more than thirty days).

³⁷ Schengen Border Codes, *supra* note 35. More than thirty days is permissible under the Codes "for the foreseeable duration of the serious threat if its duration exceeds the period of 30 days, in accordance with the procedure laid down in Article 24 or, in urgent cases, with that laid down in Article 25." *Id.* ¶ 1. The duration of the control need not exceed what is necessary to respond to the threat, and if the threat continues beyond the permissible time then that state may prolong "provided for in paragraph 1, the Member State may prolong border control on the same grounds as those referred to in paragraph 1 and, taking into account any new elements, for renewable periods of up to 30 days, in accordance with the procedure laid down in Article 26." *Id.* ¶ 2.

³⁸ See *id.* (explaining the necessary actions, informing both Commission and Parliament, that need to be taken by a state who decides to re-erect internal borders under these Codes).

³⁹ See Ian Traynor, EU Executive to Stop Countries Bringing Back Border Controls, *THE GUARDIAN*, Sept. 6, 2011, <http://www.guardian.co.uk/world/2011/sep/06/eu-executive-countries-border-controls> (explaining the implications for resurrection of border controls, and the rarity of such an occurrence).

⁴⁰ See Traynor and Hooper, *supra* note 1.

⁴¹ *Id.* (explaining that the huge influx created by an event, such as the World Cup, could constitute a reason of national security, permissible under the Border Codes); see also FRONTEx, PRESS PACK (May 2011) 29, available at www.frontex.europa.eu/download/.../presspack_2011-05_final.pdf (showing the occasions when a member state has enabled border control, with the help of joint border operations by Frontex, for reasons of national security during the World Cup). *In 2006, Denmark, with the help of Frontex, implemented border controls for the 2006 World Cup.* *Id.*

⁴² *Id.*

⁴³ See *id.* (describing the events where countries have typically re-introduced border controls, sporting events a large majority due to the number of entrants who will temporarily be in the country for that event, and the need for security during this time).

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in order to re-introduce border controls.⁴⁴ The introduction of border controls in these types of situations has caused countries to question the Agreement's ability to control influxes of migration.⁴⁵ Due to these concerns, several nations issued requests for a common policy solution to migration problems.⁴⁶

III. Discussion

Currently, under the Schengen Agreement, the general rule of free movement has exceptions.⁴⁷ These exceptions include the ability of a member state to exercise police powers in order to "check" the territory, but these checks may not rise to the level of a typical border control in most countries.⁴⁸ The Border Codes also stipulate that any check conducted along an internal border must take place "irrespective of nationality."⁴⁹ Therefore, France's decision to close its border with Italy and to block a train full of migrants from North Africa would likely be

⁴⁴ Schengen Border Codes, *supra* note 35 (referencing both Article 21 and 23, allowing the re-introduction of border controls or checks).

⁴⁵ See Traynor, *supra* note 39 (discussing the countries, such as Germany, who deal with immigrants and migrants every day, and who have questioned the complaints of other countries like Italy and France who claim that influxes of migrants affect national security).

⁴⁶ See Traynor & Hooper *supra* note 1 (explaining that while France and Italy call for change to the Schengen system and more independent actions in terms of border security and controls for member states, other countries, such as Germany and Sweden strongly oppose these ideas and have little sympathy for Italy and the increase influx of migrants because both countries much higher numbers of asylum seekers and less restrictive immigration policies).

⁴⁷ Schengen Border Codes, *supra* note 35, art. 21. Checks within the territory:
The abolition of border control at internal borders shall not affect:

(a) the exercise of police powers by the competent authorities of the Member States under national law, insofar as the exercise of those powers does not have an effect equivalent to border checks; that shall also apply in border areas. Within the meaning of the first sentence, the exercise of police powers may not, in particular, be considered equivalent to the exercise of border checks when the police measures:

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

(b) security checks on persons carried out at ports and airports by the competent authorities under the law of each Member State, by port or airport officials or carriers, provided that such checks are also carried out on persons travelling within a Member State;

(c) the possibility for a Member State to provide by law for an obligation to hold or carry papers and documents;

(d) the obligation on third-country nationals to report their presence on the territory of any Member State pursuant to the provisions of Article 22 of the Schengen Convention.

Id.

⁴⁸ See *id.* (explaining that the objective of the police checks must not have border control as its objective, otherwise those checks could constitute border checks, instead of just police power "check" and outside the exceptions under these Codes).

⁴⁹ See *id.*, art. 20 (outlining the rules for crossing internal borders, indicating that they may be crossed "at any point without a border check on persons, irrespective of their nationality, being carried out").

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considered outside this realm of exceptions.⁵⁰ A certain nationality of migrants cannot constitute a real “security threat.”⁵¹ Previous ECJ decisions involving the Schengen Agreement shed light on France’s decision to implement border checks and closures, which directly impacted the viability and effectiveness of the Agreement.⁵² Finally, discussion at the EU Council’s meeting addressing France’s actions resulted in its ultimate proposals to alter the Schengen Agreement.⁵³

A. The European Court of Justice (“ECJ”) and Violations of the Schengen Border Codes

Under the Schengen Border Codes, a country’s use of police powers to “check” borders is limited under Article 21, particularly in light of recent cases brought before the European Court of Justice.⁵⁴ When dealing with cases in which a country has been accused of violating the Border Codes by instituting border checks, the ECJ has often found these checks could be considered border control measures.⁵⁵

⁵⁰ Traynor & Hooper, *supra* note 1; see BBC NEWS, *supra* note 5 (discussing France’s decision to close its borders and block a train coming from Ventimiglia, Italy, carrying migrants and NGO workers); see also Carrera, *supra* note 4, at 1 (discussing the internal border checks held back hundreds of migrants who held temporary residential permits coming from Italy).

⁵¹ Schengen Border Codes, *supra* note 35, art. 23 (outlining the temporary re-introduction of internal border control under Chapter II, Article 23).

⁵² See *infra* Part III.A-B (discussing the ECJ decision in Melki and the recent checks implemented by France); see Carrera, *supra* note 4, at 3 (explaining the re-introduction of border controls went beyond what is permissible under the Border Codes and rather represented an instance of anti-immigration measures by France, highlighting the ineffectiveness of the Schengen system as a whole in allowing “border free” travel by all who are permitted).

⁵³ See *infra* Part III.C (discussing the proposals made by the Council and its invited recommendations by the Commission regarding the Schengen Agreement and the Schengen Border Codes).

⁵⁴ Schengen Border Codes, *supra* note 35, art. 21; Joined Cases, C-188/10 Aziz Melki v. Fr. & C-189/10 Sélim Abdeli v. Fr., 2010 E.C.R. 00000 (June 22, 2010) [hereinafter *Joined Cases, Melki & Abdeli*]; see European Union, EUROPA.EU, http://europa.eu/about-eu/institutions-bodies/court-justice/index_en.htm (last visited Jan. 16, 2012) (explaining the five most common cases brought before the European Union). The following are the most common types of cases:

requests for a preliminary ruling – when national courts ask the Court of Justice to interpret a point of EU law

actions for failure to fulfil[] an obligation – brought against EU governments for not applying EU law

actions for annulment – against EU laws thought to violate the EU treaties or fundamental rights

actions for failure to act – against EU institutions for failing to make decisions required of them

direct actions – brought by individuals, companies or organisations against EU decisions or actions

Id.

⁵⁵ See Carrera, *supra* note 4, at 12 (outlining the ECJ and the Melki case where the police powers imposed by the French were found to have exceeded their powers and were rather actually disguised as border checks, something not permissible under the Border Codes).

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In a case known as *Melki*,⁵⁶ the ECJ ruled on a challenge to recently adopted French national legislation.⁵⁷ The legislation allowed authorities to check the identity of any person within French national territory, or within an area of 20 kilometers of any surrounding Schengen member state.⁵⁸ The ECJ found that these police checks were functionally border controls in disguise, a violation of the Border Codes.⁵⁹ By granting French police the power to check a person's identity, solely because that person is within 20 kilometers of a border, France essentially authorized a border control.⁶⁰ Because the French legislation did not provide a framework for the power guaranteeing that it would not have an effect "equivalent to border checks," the legislation was found impermissible under the Codes.⁶¹

B. France's Decision to Implement Border Checks in April 2011

Despite the ECJ ruling in *Melki*, France implemented the latest round of border checks in early spring 2011 to counter Italy's issuance of residential permits to Tunisian migrants.⁶² The permits, which served as a means to allow travel among the EU countries, enabled them to settle not only in Italy, but elsewhere in the EU as well.⁶³ Under current EU law, Article 5 of the Schengen Border Codes expressly allows a member state to issue a permit to any third-country national that is holding valid travel documents, which will then allow that person to freely move across EU member state lines.⁶⁴

⁵⁶ Joined Cases, *Melki & Abdeli*, supra note 54; see Carrera, supra note 4, at 12 (highlighting the previous actions of France in attempting to control and check at its borders and showing that *Melki* merely demonstrated one of likely many instances where actions by the French were more than a "sporadic police checks").

⁵⁷ See Carrera, supra note 4, at 12 (stating that the French national legislation allowed police authorities to check identity of persons within 20 km of a Schengen member state border).

⁵⁸ *Id.*

⁵⁹ *Id.*; Joined Cases, *Melki & Abdeli*, supra note 54.

⁶⁰ Joined Cases, *Melki & Abdeli*, supra note 54; see Carrera, supra note 4, at 12 (finding that rather than being a type of "spot check" as permitted under Article 21 of the Border Codes, the actions, according to the ECJ, constituted border checks in violation of Article 23).

⁶¹ Joined Cases, *Melki & Abdeli*, supra note 54.

⁶² Traynor and Hooper, supra note 1; see Carrera, supra note 4, at 12 (insisting that the actions by France in April 2011 similarly mimic the actions taken in the *Melki* case where the ECJ found an impermissible border controls being used by the French police).

⁶³ Schengen Border Codes, supra note 35, art. 5 (permitting the issuance of temporary residence permits to third-country nationals so long as they had the proper paperwork and so long as "they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States").

⁶⁴ Schengen Border Codes, supra note 35, art. 5. The conditions listed under Article 5 for third-country nationals are as follows:

1. For stays not exceeding three months per six-month period, the entry conditions for third-country nationals shall be the following:

(a) they are in possession of a valid travel document or documents authorising them to cross the border;

(b) they are in possession of a valid visa, if required pursuant to Council Regulation (EC) No 539/2001 of 15 March 2001 listing the third countries whose nationals must be in possession

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Though the legality of the decision by Italy was not questioned by EU officials,⁶⁵ France's Minister of Interior Claude Guéant wrote a "circular" on April 6, 2011 to challenge the permits.⁶⁶ The publication argued that the Schengen rules must be strictly interpreted, limiting the number of resident permits to be issued, and the settlement of the Tunisian migrants should have been blocked by other European countries, despite their possession of temporary permits.⁶⁷ France also gave instructions to its police that checks of immigrants crossing the border were permitted, and in order to be admitted immigrants must hold valid documents and prove sufficient financial resources.⁶⁸

Two weeks later, France blocked the train from Italy carrying the Tunisian migrants, which also included activists supporting the free movement of these

of visas when crossing the external borders and those whose nationals are exempt from that requirement [17], except where they hold a valid residence permit;

(c) they justify the purpose and conditions of the intended stay, and they have sufficient means of subsistence, both for the duration of the intended stay and for the return to their country of origin or transit to a third country into which they are certain to be admitted, or are in a position to acquire such means lawfully;

(d) they are not persons for whom an alert has been issued in the SIS for the purposes of refusing entry;

(e) they are not considered to be a threat to public policy, internal security, public health or the international relations of any of the Member States, in particular where no alert has been issued in Member States' national data bases for the purposes of refusing entry on the same grounds.

Id.; see Carrera, *supra* note 4, at 9 (explaining that despite the allowance by the Codes for member states to issue permits for humanitarian reasons under Article 5, the Commission still questioned the granting of an automatic right of free movement within the Schengen area that these permits deemed to give the North African migrants).

⁶⁵ See Carrera, *supra* note 4, at 8 (concluding the actions by Italy may not have been legal under the Codes, despite Italy's insistence that it had followed the requirements). Italy was required to notify the Commission in advance about the issuance of the permits and the decree permitting the travel within Schengen. *Id.* at 9. Italy may have complied with this obligation, and it still retains its own power to issue permits as it sees fit, but those actions must also comply with a recent Council decision regarding asylum and immigration, Decision 2006/688/EC. *Id.*; see, e.g., Council Regulation, 1030/1002, 2002 O.J. (L 157) 1 (EC) (establishing format for permits issued to third-country nationals, stipulating what must be contained in those permits).

⁶⁶ Carrera, *supra* note 4, at 6; see Ministère de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration, *Autorisations de séjour délivrées a ressortissants de pays tiers par les Etats membres de Schengen* [Temporary residence permits to third-country nationals by the Schengen member states], Apr. 6, 2011 (ordering a stricter interpretation of the rules that govern the way third-party nationals are treated in the context of immigration and arguing that the proper documents are necessary), available at <http://www.lefigaro.fr/assets/pdf/110407-circulaire-gueant.pdf>. Ministère de l'intérieur, de l'outre-mer, des collectivités territoriales et de l'immigration, *Autorisations de séjour délivrées a ressortissants de pays tiers par les Etats membres de Schengen* [Temporary residence permits to third-country nationals by the Schengen member states], Apr. 6, 2011, available at <http://www.lefigaro.fr/assets/pdf/110407-circulaire-gueant.pdf> (ordering a stricter interpretation of the rules that govern the way third-party nationals are treated in the context of immigration and arguing that the proper documents are necessary).

⁶⁷ Sophie Pilgrim, *Rome Talks Tackle Concern over Open-Border Policy*, FRANCE24, (Apr. 28, 2011), <http://www.france24.com/en/20110425-schengen-under-threat-no-just-sarkozy-berlusconi-migrant-spat-italy-france>; Carrera, *supra* note 4, at 5.

⁶⁸ See Carrera, *supra* note 4, at 6 (requiring the documentation and prove proof of financial resources by France is part of Article 5 of the Border Codes, and not an individual requirement by France alone, but one which is independently listed under the Codes).

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immigrants.⁶⁹ Invoking its powers and rights under the Border Codes,⁷⁰ France justified its actions and defined planned demonstrations as “risques de trouble manifeste à l’ordre,” translated as a “threat to national security”.⁷¹ The French government framed the decision as a matter of public policy and couched its reasoning in the context of the Codes.⁷² In addition to its already existing rights under the Codes, France also called for further amendments that would allow a temporary suspension of the agreement entirely, giving it – and any country facing a similar situation – more independent power over border control.⁷³

C. The EU Council-EU Summit on June 23-24, 2011 to Discuss France’s Actions

As a result of France’s decisions, many other member states began to question the security exceptions to the Schengen Agreement.⁷⁴ Italy, for its part, questioned whether France had the right to perform the checks and closure, suggesting that it had violated the Schengen Agreement, as it had previously in *Melki*.⁷⁵ Although this was not the first time a country had re-introduced internal border checks, France’s actions represented one of the first times a country did so to prevent a specific group of people from entering its borders by defining their entrance as a national “threat to security.”⁷⁶

The European Union Council met after the April 2011 events to discuss the closure and to make recommendations for further changes to the Schengen Agreement and the Border Codes that would make them more cohesive and effective.⁷⁷ At its first meeting in early June 2011, the EU Council emphasized the

⁶⁹ Traynor & Hooper *supra* note 1; *see* Carrera, *supra* note 4, at 14 (discussing whether France’s actions were appropriate within the context of “serious threat” and whether that situation required the immediate action that was taken by the French government in blocking the train coming from Ventimiglia).

⁷⁰ Schengen Border Codes, *supra* note 35, art. 23.

⁷¹ Traynor & Hooper, *supra* note 1; Carrera, *supra* note 4, at 15 (citing a quote by French Minister of the Interior, Claude Geuant that the possible demonstration could create civil unrest and arguing that this interpretation of unrest was widely interpreted by the French and was likely not a threat to “public policy” as the French government and Interior Minister tried to argue).

⁷² Carrera, *supra* note 4, at 15.

⁷³ *See* BBC NEWS, *supra* note 5 (outlining the French government’s belief that not only was the governance of Schengen failing, but also citing an official that there was a “need to reflect on a mechanism that will allow a temporary suspension of the agreement, in case of a systemic failure of an external (EU) border”).

⁷⁴ *See* Traynor, *supra* note 39 (discussing the different opinions EU member states have regarding the Schengen Agreement and the exceptions allowed under the Border Codes, particularly by France, Germany and Italy, who were not in support with the Commission’s recommendations distinguishing between foreseeable and unforeseeable events in allowing a member state to act independently).

⁷⁵ *See* Carrera, *supra* note 4, at 12 (showing the past attempts by France in order to enable border checks by their own police forces near the borders, that the ECJ found was actually an attempt at border controls and was not permissible under the Border Codes, Article 21).

⁷⁶ *Id.* at 14.

⁷⁷ Press Release, European Council, European Council 23/24 (June 24, 2011), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=DOC/11/4&format=HTML&aged=0&language=EN&guiLanguage=en> [hereinafter EC Press Release June 2011]; *see Proposal amending Regulation (EC) No. 562/2006 of the European Parliament and of the Council establishing a Community Code on the*

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importance of enforcing common rules and stressed the need for an effective and reliable monitoring and evaluation system.⁷⁸

In order to be effective, the proposed evaluation system would have to be EU-based and would involve experts from the member states, the Commission, and competent agencies.⁷⁹ In addition to these experts, the Council invited the Commission to report regularly on the results of evaluations and, where necessary, to propose measures to respond to any deficiencies it identifies.⁸⁰ The Council also decided that a mechanism should be introduced in order to respond to exceptional circumstances that could put the overall functioning of Schengen cooperation at risk.⁸¹ This mechanism would be comprised of a series of measures to be applied in a gradual, differentiated, and coordinated manner to assist a member state facing heavy pressure at the external borders.⁸² Finally, the Council recognized that a safeguard clause could be introduced as a last resort to allow the exceptional reintroduction of internal border controls in truly critical situations, namely those in which a member state is no longer able to comply with its obligations under the Schengen rules.⁸³ Ultimately, after these recommendations, the Council conceded that responsibility for the control and surveillance of the external borders lies with the individual member states acting in the common interest of all member states and therefore recognized the importance of applying the same standards evenly.⁸⁴

rules governing the movement of persons across borders (Schengen Borders Code) and the Convention implementing the Schengen Agreement, arts. 21-22, COM(2011) 118 final, Brussels, 10 March 2011, available at <http://ec.europa.eu/home-affairs/news/intro/docs/SBC%20amendment%20EN.pdf> [hereinafter Proposal Amending Schengen Borders Code] (proposing a repeal of Article 22 of the Border Codes, making a reference to it in Article 21(d) instead, but not affecting the right of states to provide checks to fight illegal immigration set out in (a) to (c)).

⁷⁸ See EC Press Release June 2011, *supra* note 77 (discussing the importance of creating an EU-based evaluation system in order to improve the overall system and create more uniform policies in the area of border control and security); see also Carrera, *supra* note 4, at 10 (explaining the meeting of the Council to discuss the actions by France in April 2011).

⁷⁹ EC Press Release June 2011, *supra* note 77.

⁸⁰ *Id.*; see Carrera, *supra* note 4, at 10 (explaining the desire of the Council to have input made by the Commission regarding the actions by France in closing its border and instituting its checks).

⁸¹ See EC Press Release June 2011, *supra* note 77 (explaining the mechanism recommended by the Commission to aid a member state struggling with control or pressure from their external border, and to not leave that member state to deal with the problem on their own).

⁸² See *id.* (finding these measures could include inspection visits and technical and financial support, as well as assistance, coordination and intervention from Frontex).

⁸³ See *id.* (discussing the need still for some sort of last resort in order to please all groups of member states). The safeguard clause would be for “a strictly limited scope and period of time” and would enable member states that needed to react in “urgent cases” to do so without affecting the rights of persons under the Agreement and TFEU. *Id.*

⁸⁴ *Id.*; see Carrera, *supra* note 4, at 5-7 (discussing the actions by France in dealing with the migrants coming from Italy further created a divide amongst EU countries who either favor stricter Schengen rules and more approval by the Commission, or for countries that deal with a greater influx of immigrants and migrants regularly, such as Germany or Austria). After the actions by France, other states like Austria, Germany and Belgium threatened a re-introduction of border checks, highlighting the problems with Schengen and its consistency among member states and calling to question whether a violation of the “spirit” of the Agreement could and would be tolerated. *Id.* at 6.

IV. Analysis

A. The Influx of Tunisian Migrants Was Not an “Exceptional” Circumstance

Because France temporarily closed its border with Italy for a reason not contemplated by the Border Codes, it was not a legal action under the Schengen Agreement.⁸⁵ Despite France’s justifications for instituting the checks and closures, its overall actions were not permissible under the Codes because the North African migrants were not a threat to national security.⁸⁶ Under the Border Codes, the actions taken constituted more than sporadic police controls within the French territory or “spot-checks” at the border with Italy, either of which could have been permissible under Article 21 of the Codes.⁸⁷ Rather, they constituted a systematic reintroduction of internal border checks with Italy,⁸⁸ the main objective of which was to erect a barrier that would keep out Tunisian immigrants holding an Italian temporary-residence permit.⁸⁹ The Schengen regime operates through an understanding of cooperation and closeness that requires all member states to follow the codes, thus guaranteeing that the functions of the regime will be met and the regime itself will maintain its legitimacy.⁹⁰ However, in relation to immigration, the lack of cooperation – and the readiness to abandon the Codes – when it comes to third-country nationals highlight the existing problems under Schengen.⁹¹

⁸⁵ *Id.*; see Press Release, Statement by Commissioner Malmström, European Commission Midday Press Briefing of (Apr. 1, 2011), available at <http://ec.europa.eu/avservices/player/streaming.cfm?type=ebsvod&sid=177156> (releasing the official view of the EU Commission regarding the group of migrants from North Africa and the actions by both France and Italy).

⁸⁶ See *infra* Part IV.A-B (arguing that the group of migrants coming from Italy could not have constituted a threat, per Article 23, and France’s justifications were likely based on its desire to limit immigration).

⁸⁷ See Schengen Border Codes, *supra* note 35, art. 21 (allowing border checks only so long “as the exercise of those powers does not have an effect equivalent to border checks”); see also Carrera, *supra* note 4, at 12-14 (arguing the border closures and checks performed by France were more than the “sporadic” checks, but were actually more similar to the actions in *Melki*).

⁸⁸ See Schengen Border Codes, *supra* note 35, art. 23 (outlining what constitutes the re-introduction of internal border checks under the Codes and what is permissible for a member state); see also Carrera, *supra* note 4, at 14 (finding that Italy’s actions constituted border controls and the Tunisian migrants did not represent a threat to security, as required by Article 23 of the Codes, and therefore the re-introduction was not permissible).

⁸⁹ See Carrera, *supra* note 4, at 11 (describing the conditions under which France pushed back against the entrance of the immigrants, occurring not long after France publicly announced a policy to expel immigrants from its territory).

⁹⁰ See *e.g.*, Schengen Border Codes, *supra* note 35, art. 16 (describing the requirements of “Cooperation between Member States” as a requirement to “assist each other” and cooperate and maintain effective border control implementation of Articles 6-15 through the exchange of information).

⁹¹ See Carrera, *supra* note 4, at 12-14 (discussing the other member states issues with the current Schengen system only allowing border checks and controls in a situation of threat to security or public policy); see also Traynor, *supra* note 39 (outlining the differing views between the EU in dealing with third-country nationals, a more strict option for border control for member states favored by the Commission, with a more independent option for border power for member states by countries like France).

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When evaluated alongside previous border controls by EU member states in times of crisis,⁹² it is evident that France's handling of the influx of Tunisians is of a different character.⁹³ In the past, while some political demonstrations, terrorist threats, and ceremonies of national importance have all been cited as grounds for re-imposing border controls,⁹⁴ only a small number of cases since the 1990s have been linked to the desire to restrict immigration of a specific group.⁹⁵ For the most part, member states have abided by the Border Codes, and in particular Article 23, which only allows border controls when national officials believe a serious threat to security or public policy arises.⁹⁶ The Codes have typically restricted a member of the Schengen Agreement from preventing certain groups deemed undesirable from entering its borders, and have allowed such actions only in very limited circumstances.⁹⁷

Despite France's concerns about the possibility of a demonstration disrupting the social order, the small number of migrants attempting to enter France in April 2011 shows that this fear was unsubstantiated.⁹⁸ First, there was no evidence that the planned demonstration would have been anything but peaceful.⁹⁹ Second, the small number of people involved in the demonstration – approximately sixty migrants on the train, joined by a group of about three hundred protestors from Italy

⁹² See Carrera, *supra* note 4, at 23 (listing in Table A1 the re-introduction of internal border controls since 1995 by EU member states, noting that the list itself is not an exhaustive list but demonstrates the member states who have invoked these types of controls).

⁹³ See *id.* at 13 (citing previous examples of Germany and 2006 football World Cup, various international political meetings, including Italy's reinstatement of border checks during the 2009 G8 summit in L'Aquila).

⁹⁴ See *id.* at 23 (citing examples of reasons for reintroducing border controls); see e.g., K. Groenendijk, *Reinstatement of Controls at the Internal Borders of Europe: Why and Against Whom?*, 10 EUR. L. J. 150, 158 (Mar. 2004) (discussing the reasons for re-introductions of internal border controls by EU member states).

⁹⁵ Carrera, *supra* note 4, at 23. The appendix of this article discusses the previous recorded re-introductions of border controls. *Id.* Since 1995, few border control actions have involved the restriction of a specific immigrant group. *Id.* For example, in March 1999 France re-introduced border control to block a demonstration in support of undocumented immigrants in Paris to prevent the crossing of Albanians and Italians to participate in the demonstration. *Id.* Additionally, Belgium from December 2000 to January 2001 resurrected border controls due to "risk of a sudden, temporary increase in asylum seekers." *Id.* at 24; see e.g., Groenendijk, *supra* note 94, at 158 (citing the re-introduction of border checks by France in March 1999).

⁹⁶ Schengen Border Codes, *supra* note 35, art. 23.

⁹⁷ *Id.* (limiting the action by member states by stating that the "scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat").

⁹⁸ See Carrera, *supra* note 4, at 14 (citing the total number of immigrants from North Africa subject to French border controls as only a few hundred, and "no more than" four hundred); see also *Migrant Train Delay Causes European Diplomatic Rift*, CNN (Apr. 18, 2011), http://articles.cnn.com/2011-04-18/world/italy.france.tunisia.migrants_1_migrants-tunisians-lampedusa?_s=PM:WORLD (discussing the small amount of immigrants actually attempting to enter France by train, around sixty, and the total number actually possibly entering from the crisis itself, around only three hundred).

⁹⁹ CNN, *supra* note 98; see Carrera, *supra* note 4, at 15 (arguing that the small number of migrants and actual estimated demonstrators could not constitute a security threat within the meaning of Article 23).

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and France – further supported the notion that the situation could not be labeled as an emergency or a threat to national security.¹⁰⁰

Between January and April 2011, Italy had already issued thousands of temporary visas, and an estimated twenty-five thousand people had crossed its borders.¹⁰¹ Compared to the average number of permits issued across the EU every year, these figures are relatively low.¹⁰² For example, in 2009, the EU issued just over two million residence permits to non-EU citizens, or fewer than two hundred thousand per month.¹⁰³ Therefore, comparing the total entering the EU with those entering Italy individually, along with the three hundred or so migrants from April, the “emergency” situation appears to be somewhat exaggerated.¹⁰⁴ Rather than responding to an imminent threat, France was performing border controls disguised as routine checks, in direct violation of the letter of the Border Codes and the spirit of the Schengen Agreement.¹⁰⁵

Issuing its opinion on the matter, the EU and its Commissioner for Home Affairs Cecilia Malstrom concluded that the influx did not constitute an emergency within the meaning of Article 23.¹⁰⁶ Both the Commission and Malstrom

¹⁰⁰ See CNN, *supra* note 98 (estimating around sixty migrants from Tunisia were on the train that was blockaded from entering France, while around three hundred Italians and French formed a group known as “Train for dignity” to support those migrants attempting to enter France at that time).

¹⁰¹ *France seeks change to Schengen border agreement*, BBC NEWS, Apr. 22, 2011, <http://www.bbc.co.uk/news/world-europe-13171403>; see Carrera, *supra* note 389, at 6 (discussing the implications of justifying the border controls in terms of national security, when in actuality the conflict and reasons behind it is more political); see Medhi Chebil, *Migrant Spat Puts Strain on EU Open Borders*, FRANCE24 (Apr. 19, 2011), <http://www.france24.com/en/20110419-tunisia-migrant-train-blockade-comes-under-legal-attack-ventimiglia-french-police-italy>. (explaining that some legal experts believe the targeting specifically of these North African migrants was illegal, and could spark a discrimination lawsuit, further jeopardizing France’s ability and policy of restricting these movements across borders). Brigitte Espuche, a legal expert from the French rights group Anafé, told France24.com that “[p]olice forces are aware that it [continued targeting of North Africans] would be completely illegal. When reports emerged on February 21 that an internal note calling for the control of Tunisian nationals was put up in the Cannes police station, it was pulled down the next day.” *Id.*

¹⁰² See Lucilla Scarnicchia, *Residence Permits Issued to Non-Eu Citizens in 2009*, Eurostat 43/2011, EUROPEAN COMM’N. (Sept. 1, 2011), http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-11-043/EN/KS-SF-11-043-EN.PDF [hereinafter Residence Permits, Eurostat] (citing statistics from 2009, the issuance of over two million new residence permits across the EU to third-country nationals, describing these statistics involved fewer employment permits and for family reasons, while increasing for the purposes of education); see also Carrera, *supra* note 4, at 14 (stating these statistics highlight that a real “emergency” cannot be constituted by a small group of an estimated three hundred people).

¹⁰³ Scarnicchia, *supra* note 102 (explaining that the main three reasons for permits issued by member states are family, education and employment, and in 2009 France predominantly issued family permits, while Italy predominantly issued permits for employment).

¹⁰⁴ See *id.* (explaining the reasons for issuing residence permits in 2009, including family re-unification, employment, and education). According to the statistics, France issued 193,500 total residence permits in 2009, while Italy issued 506,833 permits. *Id.* The large majority of Italian permits issued were marked as “employment permits”, constituting 46.6% of its total permits issued. *Id.* In terms of population, however, Cyprus issued the highest number of permits at year, followed by UK and Sweden. *Id.*

¹⁰⁵ See Carrera, *supra* note 4, at 11-12 (giving the background of border control by the French government in relation to migrants and the declarations made by them that they would refuse to accept undocumented immigrants from North Africa).

¹⁰⁶ See Press Release by Malmström, *supra* note 85 (stating, as the Commissioner for Home Affairs, the official view of the EU institutions regarding the actions of border closures and checks by France, and

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reinforced the idea that Schengen means “no borders,”¹⁰⁷ and allowing border checks by a member state is only a last resort effort to protect a state under “serious threat,” something the Tunisian migrants did not present.¹⁰⁸ Ultimately, the Commission decided that in order to prevent further similar actions by other member states seeking to bar a certain group from entering its borders, changes to the Schengen Agreement were not only desirable, but a necessary step for the future cohesion of the EU.¹⁰⁹

B. France’s Political Issues with Immigration Influenced the Closing of Its Borders

Rather than posing a security threat to France, the group of migrants from Tunisia represented a threat of a different kind – and one that France has been struggling to cope with since the beginning of Schengen.¹¹⁰ In fact, not long before the incident in April, the French government announced a policy that would expel thousands of “irregular” immigrants from the country.¹¹¹ This announcement came after a long and continuous struggle France has faced in dealing with illegal immigration.¹¹² The policy began by addressing around twenty-five thousand “irregular” immigrants and removed them from France during the first three months of 2011, just before the border closures and checks in April.¹¹³

Along with the adoption of that policy, France has made an effort over the past decade to concentrate on protecting its borders by encouraging a new system of issuing visas and by increasing cooperation with transportation authorities, differ-

finding that the group of migrants did not constitute an “emergency” within the meaning of Article 23 and therefore the temporary internal border controls by France were not permissible under Schengen).

¹⁰⁷ *Id.*; TFEU, *supra* note 5, art. 77.

¹⁰⁸ Press Release by Malmström, *supra* note 85; see Carrera, *supra* note 4, at 15 (agreeing that, while France holds some discretion in determining what constitutes “public policy” and threats to security, the small group of demonstrators and immigrants, totaling around three hundred people, proportionally were not nearly comparable to other scenarios where border checks and controls constituted a serious threat). Additionally adding that, by signing on to the Treaty of Lisbon, the jurisdiction of the Court of Justice was expanded to rule of public policy “measures/exceptions” concerning checks at the internal borders and under the Codes. *Id.*

¹⁰⁹ Press Release by Malmström, *supra* note 85; see *EU clears France, Italy over Schengen row*, EURACTIV (July 26, 2011), <http://www.euractiv.com/justice/eu-clears-france-italy-schengen-row-news-506763> (discussing the Commission’s ultimate conclusion that France and Italy did not violate Schengen *per se*, but rather violated the “spirit” of the Agreement in their dealing with the Tunisian migrants).

¹¹⁰ See Schain, *supra* note 34, at 9-10 (explaining the political context regarding the French government’s desire to control immigration, particularly after Schengen, and the diminishing foreign population since 1982, particularly the North African population).

¹¹¹ See Carrera, *supra* note 4, at 11-12 (discussing the policy released in 2011 announcing the removal of undocumented immigrants from the French territory in 2011, including removals from January to April); see also Schain, *supra* note 34, at 17-18 (explaining that France, even before the agreement to abolish border controls within Schengen, had intended to strengthen its controls at “external” borders and the struggle over what rights immigrants an asylum-seekers do have is ongoing).

¹¹² See Schain, *supra* note 34, at 9-10 (explaining that immigration has always been an important issue in France, particularly after the opening of internal borders after the Schengen agreement).

¹¹³ Carrera, *supra* note 89, at 11.

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ent police organizations, and others.¹¹⁴ Additionally, its continued efforts to cooperate with and participate in FRONTEX operations, like “joint return” of illegal immigrants, demonstrate France’s overall desire to limit and exclude migrants.¹¹⁵ Taken as a whole, these actions demonstrate France’s struggle with immigration and its desire to control its own borders, despite the mandates of the Schengen Agreement.¹¹⁶

V. Proposal

By allowing the temporary suspension of the Schengen Agreement, the goal of a cohesive EU is threatened, and its image in the international community will continue to be questioned.¹¹⁷ The proposals for amendments of the Schengen Agreement presented by groups of member states and the Commission itself demonstrates the divide present among EU members as to whether the Agreement can continue to exist in its current form.¹¹⁸ This divide is particularly evident in light of countries like France, which favor stricter immigration and border policies and more independent member state control, and which have taken individual action to ensure they retain some power in relation to their borders.¹¹⁹

As a result of this divisiveness – and a desire for complete exclusion by some states – some European institutions have begun to provide arenas for the development of exclusionary policies,¹²⁰ and have allowed these types of border shut-

¹¹⁴ Schain, *supra* note 34, at 9; see Carrera, *supra* note 4, at 23 (discussing the increased efforts at border protection was particularly seen at airports, as a way to begin strengthening its “external” crossings and dealing with the new visa system).

¹¹⁵ See Schain, *supra* note 34, at 23 (describing the evolving institutions dealing with immigration control are designed to exclude and limit migrants, despite the actual lack of problem of illegal immigration in France, and the policies are focused on linking the idea of illegal entry, and identity and security).

¹¹⁶ See Schain, *supra* note 34, at 17 (explaining France’s concern with illegal immigration and the role Frontex has played in helping France organize operations to return undocumented immigrants, also aiding and pressuring EU countries on the borders to block entry of migrants who might otherwise find their way to France).

¹¹⁷ See Carrera, *supra* note 4, at 12.

¹¹⁸ See Traynor & Hooper, *supra* note 1 (stating that the Commission, recognizing the divide amongst EU countries regarding the issue of immigration and the “borderless” zone of travel that Schengen provides, was drawing up proposals to alter the system); see also Carrera, *supra* note 4, at 19 (discussing that the differences in opinions regarding immigration is a “race to the bottom” in regards to Italy and France, and the consistency and legitimacy of the migration policy across Europe is at stake now); see e.g., TFEU, *supra* note 5, art. 80 (stipulating implementation of the policies of the EU “shall be governed by the principle of solidarity and fair sharing of responsibility”).

¹¹⁹ Schain, *supra* note 34, at 24. Other countries like the UK, Germany, and Netherlands have also started to deepen their own concerns with national identity and have developed “debates” that clearly place immigrants outside their own national community. *Id.*; see Carrera, *supra* note 4, at 12-14 (discussing *Melki* and other attempts by France to institute border checks and controls independently from EU policies on immigration).

¹²⁰ See Schain, *supra* note 34, at 21 (discussing the participation of France with FRONTEX operations, explaining the increasingly difficult requirements for visa applications to enter France, and the creation of a special police unit under the Ministry of the Interior). The Central Directorate of the Frontier Police (DCPAF) is a special police unit created in 1999 to “control the frontier”, and since 2005 has been in cooperation with FRONTEX. *Id.* at 21-22. FRONTEX’s operations within Europe have also expanded, with a budget expansion of over eighty-two million Euros from 2005 to 2009. *Id.* at 22.

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downs by EU countries.¹²¹ The organization permitting the largest number of “exclusion” policies is FRONTEX, an institution that, since 2005, has become important in dealing with immigration issues.¹²² Exclusion has largely been seen through joint efforts, often with the support of France, to engage in enforcement of border controls and “joint return” operations to deal with undocumented immigrants.¹²³ France continues to enforce its position against illegal immigration, boasting a record number of illegal immigrants expelled in 2011, nearing almost forty thousand.¹²⁴ Therefore, if these types of developments continue and FRONTEX continues to expand with the support and engagement of countries like France, the exclusionary image of Europe among the international community will only increase.¹²⁵

In order to prevent greater fracturing and even more border suspensions, the EU must take action.¹²⁶ In truth, with its focus on common policies and principles, the foundation of the EU is based on the notion of “solidarity,” and in the end all member states must be willing to cede some degree of autonomy for the Union as a whole to function.¹²⁷ One possible solution is for the EU to limit the scope of the phrase “serious threat to public policy or internal security” as currently listed in Article 23 of the Schengen Border Codes.¹²⁸ The general lan-

¹²¹ Schain, *supra* note 34, at 22.

¹²² See e.g., *What is Frontex?*, *supra* note 31 (giving information regarding FRONTEX, its operations and its functions within the EU as whole).

¹²³ See Schain, *supra* note 34, at 22 (discussing that some of these “joint return” missions, aimed at returning undocumented immigrants, were largely participated in by France, who took part in sixteen of the total thirty-two operations performed); see also Sylvie Corbet, *France Expels Record Number of Illegal Immigrants*, ABC NEWS (Jan 10, 2012), <http://abcnews.go.com/International/wireStory/frances-expulsions-immigrants-rise-2011-15328523> (discussing the statistics recently cited by France and President Sarkozy, as an attempt to target anti-immigrant voters by citing the record for number of immigrants expelled, “32,912 illegal immigrants in 2011, up 17.5 percent from 2010”).

¹²⁴ See Corbet, *supra* note 123 (citing France’s desire to increase the number of expelled to thirty-five thousand for 2012).

¹²⁵ Schain, *supra* note 34, at 22; see Carrera, *supra* note 4, at 20 (explaining that by viewing immigration as a burden, as France seems to do, the idea of solidarity slips further away and the need for a common immigration policy becomes more evident).

¹²⁶ See Carrera, *supra* note 4, at 20 (arguing that if the EU fails to act strongly and “on time” the rules and principles of the EU and the Schengen Agreement will only continue to be undermined and could ultimately create tension between EU and non-EU countries, particularly with those countries whose nationals are subject to the policies of immigration that are seen as repressive).

¹²⁷ See TFEU, *supra* note 5, art. 80 (outlining the principle of solidarity in relation to the policies of the Union, particularly after the signing of the Treaty of Lisbon). Article 80 states that implementation of policies:

shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States. Whenever necessary, the Union acts adopted pursuant to this Chapter shall contain appropriate measures to give effect to this principle.

Id.; see also Groenendijk, *supra* note 94, at 158 (arguing that an integral part of European integration was the Schengen Agreement and any attempts to empower member states to alter the rules of the Agreement would undermine this integration that is one of the “great success stories of the EU”).

¹²⁸ Schengen Border Codes, *supra* note 35, art. 23; see Carrera, *supra* note 4, at 20 (suggesting the revision of the Border Codes in way that does not follow the “nationalistic and opportunistic goals” of France and Italy, but by attempting to reinforce Schengen by defining “security” more thoroughly); see, e.g., *Sarkozy, Berlusconi to propose Schengen “upgrade”*, EURACTIV, Apr. 26, 2011, <http://www.euractiv.com/en/future-eu/sarkozy-berlusconi-propose-schengen-upgrade-news-504292> (discussing the

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guage of Article 23 allows border controls “[w]here there is a serious threat to public policy or internal security.”¹²⁹ By outlining specific instances where a member state can institute internal border checks, rather than generally stating the possibility of a threat, individual power by member states can be simultaneously enhanced and limited in a way to create a more cohesive and uniform policy.¹³⁰

Additionally, the EU could create an option in the Codes for a member state to request a border check patrolled by the EU, rather than by its own national police.¹³¹ This border check, already permissible under Article 21,¹³² would provide more control to EU institutions.¹³³ Particularly, the Commission would be able to better determine how to deal with a possible threat to security like that claimed by France, one that is not actually a threat within the meaning of Article 23.¹³⁴

However, either option leave countries like France and Italy, which seek amendments to Schengen that would allow more member state discretion, without any real options for their own border control.¹³⁵ The freedom of movement and need for labor migration ultimately cannot be seen as a “burden to share,”¹³⁶ but rather as an opportunity to choose between interests – autonomy of each member state or the survival of Europe as a whole – and member states must

goals of France and Italy to change Schengen, even going so far as to propose a clause that allows the temporary suspension of Schengen as a whole in a limited number of circumstances).

¹²⁹ Schengen Border Codes, *supra* note 35, art. 23.

¹³⁰ See Carrera, *supra* note 4, at 21 (concluding that any attempts to widen a member state’s power under Schengen would undermine the law principles of the EU, but also the EU treaties in general, and would create problems for EU integration); see also Groenendijk, *supra* note 94, at 158 (citing common policy and solidarity as essential aspects for the functioning of the EU).

¹³¹ See Carrera, *supra* note 4, at 20 (suggesting the creation of an appropriate monitoring system to ensure implementation of EU border laws across Schengen’s external borders).

¹³² See Schengen Border Codes, *supra* note 35, art. 21 (defining the “checks within the territory” permissible under the Border Codes).

¹³³ Schengen Border Codes, *supra* note 35, art. 21; see Carrera, *supra* note 4, at 20 (highlighting the importance of action by the EU institutions, particularly the Commission, in controlling and operating in the area of immigration policy in order to ensure proper implementation exists across all EU member states, and that fundamental human rights are a central priority in this area of policy).

¹³⁴ Schengen Border Codes, *supra* note 35, art. 23; see Carrera, *supra* note 4, at 20 (discussing the importance of and strategy against “populist and nationalist anti-immigration rhetoric” that many member states have demonstrated and re-defining what is and can be considered a “security threat”). Additionally, immigration should not be seen a threat to security, but rather the freedom of movement should be seen as a chance to enhance a common policy, thereby enhancing the EU market and its competitiveness. *Id.*

¹³⁵ See Carrera, *supra* note 4, at 21 (explaining that what is more important is for control to remain in the hands of the EU institutions in dealing with the creation and maintenance of common EU immigration policy); see also Traynor & Hooper, *supra* note 1 (highlighting the proposed amendments by France and Italy, demonstrating their desire for more control over policies under the Schengen Agreement).

¹³⁶ Carrera, *supra* note 4, at 20; see Schain, *supra* note 34, at 8 (discussing the viewpoint of those who view immigration as “burden”, or a “menace” that Europe is unable to deal with through its Schengen Agreement). A number of publications, for example that of Christopher Caldwell, address the vision that Europe has no way to “combat this rising ‘menace’” that is immigration. *Id.*; see generally, CHRISTOPHER CALDWELL, REFLECTIONS OF THE REVOLUTION IN EUROPE: IMMIGRATION, ISLAM AND THE WEST (Doubleday 2009) (arguing that Europe has no political will to find the means to combat the “menace” that is illegal immigration and it doesn’t have the ability to control “its frontiers”).

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decide whether it is worth giving up enough autonomy in order to have one overall border.¹³⁷

VI. Conclusion

France's temporary border checks and controls in April 2011 were illegal under the Border Codes and called into question the future of the Schengen Agreement in dealing with migration issues. Essentially, the situation between France and Italy highlighted the problems faced by the European Union stemming from a lack of common policy for internal and external border control as required under the Schengen Agreement. Particularly, the EU has no obvious means to deal with member states' actions in deciding whether an influx of migrants constitutes a threat to security or public policy under Article 23. This lack of specificity under the Codes has created a divide among member countries as to whether amendments to Schengen are needed and whether control should be focused in the hands of the institutions themselves or the member states.

For now, the EU must decide which direction it would like to take in dealing with Schengen and border control. If countries like France continue to desire individual power and control over their borders and continue to institute border checks and controls in non-emergency situations, the future of Schengen will be unclear and will continue to threaten the cohesiveness of the European Union.

¹³⁷ See Carrera, *supra* note 4, at 20 (arguing that rather than being a problem, the development of EU immigration policy "would be coherent with Europe's labour market needs and competitiveness" and would ensure openness, flexibility, and compatibility with the other various EU policies).