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The inadmissibility of restrictions on freedom of movement as punishment for political positions

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Haluk KOÇ, Turkey, Socialist Group

Summary

Freedom of movement between Council of Europe member States is both a legal and a political issue. The Parliamentary Assembly recognises that, in principle, under international law, States have a sovereign right to decide on who shall be allowed to enter their territories. But this right can be limited by treaty law, including the Schengen Agreement.

The Committee on Legal Affairs and Human Rights stresses the link between free movement of persons and freedom of expression. Some member States appear to misuse their right to ban foreigners from entering their respective territory by "blacklisting" certain persons in retaliation for political positions taken. Such practices are difficult to reconcile with the rules on freedom of movement as well as with human rights such as freedom of expression and freedom of assembly and association. Moreover, denial of entry based solely on a person's political positions could also constitute an abuse of the right to determine entry and discrimination within the meaning of Article 14 of the European Convention on Human Rights.

The committee condemns such practices and recalls that States that are also members of the European Union are bound by strict rules within the framework of the European legal order and in particular the Schengen Agreement.

1. Reference to committee: Doc. 11903, Reference 3620 of 20 November 2009.

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A. Draft resolution[2]

1. Freedom of movement between Council of Europe member States is both a legal and a political issue, as shown in Recommendation 1648 (2004) on consequences of European Union enlargement for freedom of movement between Council of Europe member States. The Parliamentary Assembly now wishes to stress the link between free movement of persons and freedom of expression.

2. The Assembly recognises that, in principle, under international law, States have a sovereign right to decide on who shall be allowed to enter their territories. However, this right can be limited by treaty law, including the Schengen Agreements. In addition, a denial of entry based solely on a person's political positions could constitute an abuse of the right to determine entry and discrimination within the meaning of Article 14 of the European Convention on Human Rights (ETS No. 5).

3. Some member States have misused their legal right to determine entry into their territory in order to deny entry to some persons merely as punishment for a political or ideological position they peacefully hold.

4. The Assembly condemns such practices and recalls that States which are also members of the European Union are bound by strict rules within the framework of the European legal order and in particular the Schengen Agreements.

5. The Assembly therefore:

5.1. recalls that freedom of movement is a prerequisite for the enjoyment of many other rights and is an important condition for the free development of a person;

5.2. stresses that freedom of movement should not be restricted as a sanction for the expression of peacefully held political opinions and calls on the member States of the Council of Europe to give full effectiveness to the freedom of expression under Article 10 of the European Convention on Human Rights, by refraining from denying access to their territories on such grounds;

5.3. considers that the legal order of the European Union also does not allow the restriction of free movement of persons within the European Union as a punishment for expressing a political position and reminds European Union member States that resorting to such a practice may give rise to a claim for damages by the individuals concerned;

5.4. stresses that entries into the Schengen Information System must not be misused in order to deny persons who are not nationals of a European Union member State access to the Schengen area as a punishment for expressing a peacefully held political position;

5.5. recalls the Schengen States' duty to provide for swift judicial or administrative review of any entry into the Schengen Information System.

2. Draft resolution adopted by the committee on 12 March 2012.

B. Explanatory memorandum by Mr Koç, rapporteur

1. Procedure to date

1. On 20 November 2009, the Parliamentary Assembly decided to refer to the Committee on Legal Affairs and Human Rights, for report, the motion for a resolution on "The inadmissibility of restrictions on freedom of movement as punishment for political positions" (Doc. 11903). At its meeting of 26 January 2010, the committee appointed me as rapporteur.

2. On 4 October 2011, in order to gain an overview of some aspects of the legal issues of the topic, the committee held an exchange of views with Ms Nuala Mole, founder and Director of the AIRE[3] Centre (London). Ms Mole explained to the committee the legal framework of the Schengen area and the European Union rules on free movement of persons. The rapporteur also received a written contribution by Professor Matthew Happold of the University of Luxembourg on "Article 96 alerts ('unwanted aliens') and the Schengen Information System", which was very helpful for the preparation of this report.

2. The issue at stake

3. Questions of freedom of movement are not new to the Assembly or to our committee. On the eve of the last wave of European Union enlargement, in January 2004, the Assembly adopted Recommendation 1648 (2004) on the consequences of European Union enlargement for freedom of movement between Council of Europe member States.[4] The corresponding report of the Committee on Legal Affairs and Human Rights contains an overview of the work of the Assembly concerning free movement of persons prior to 2004.[5] The specific issue of restricting movement as punishment for the expression of political or ideological views, however, has not previously been dealt with by the Assembly.

4. According to the motion, some Council of Europe member States misuse their right to ban nationals of other States from entering their respective territory by "blacklisting" these persons, as "punishment" for the expression of political opinions. It is claimed that in, some cases, those persons had never visited the States "blacklisting" them, which is why they could not have broken their laws. It was only in their own countries that they actively participated in political actions criticising the policies of other States' authorities. According to the motion, their freedom of movement was therefore restricted as a punishment for political criticism, which contradicts the values advocated by the Council of Europe. When the State banning those persons was Party to the Schengen Agreement, the bans were automatically extended to all other Schengen Agreement member States. The motion contends that all Council of Europe member States should protect the right of citizens to freedom of movement as foreseen in the European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe (ETS No. 25).

5. While restrictions are usually imposed for reasons which are less innocuous than holding or expressing certain political views, there are cases in which movement has been restricted for this very reason. A few examples will illustrate such practice.

6. In the spring of 2007, Estonia decided to remove from the centre of Tallinn a Soviet-era bronze statue depicting a heroic soldier. This triggered protests by ethnic Russians in Estonia, including members of the pro-Kremlin group "Nashi". The protests resulted in violent clashes in Estonia, during which more than 40 people were injured and 300 arrested.[6] Estonia then imposed travel bans on some "Nashi" members from Russia for reasons of national security.[7] When Estonia acceded to the Schengen Agreement in December 2007, the travel bans were transferred to the Schengen databases, which henceforth prevented those activists from travelling to any Schengen member State. In December 2008, 488 Russian citizens remained on this "blacklist".

7. In October, 2007, a German expert was refused entry into Russia, allegedly for security reasons, even though he was in possession of a visa.[8] The issue was subsequently resolved and the analyst was allowed entry a month later.[9] His freedom of movement had nevertheless been temporarily restricted.

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3. AIRE = Access on Individual Rights in Europe.
4. See also the report of the Committee on Legal Affairs and Human Rights, Doc. 9979 rev.
5. Ibid., paragraphs 49ff.
6. http://news.bbc.co.uk/2/hi/europe/6598269.stm, 27 April 2007.
7. Finnish Institute of International Affairs (FIIA), "Practise what you preach: the prospects for visa freedom in Russia-EU relations, Report 18/2009, p. 19, www.boell.ru/downloads/Visa_report_EU-Russia_EN.pdf.
8. See www.themoscowtimes.com/news/article/german-analyst-deported-drawing-protest-from-berlin/444978.html.

8. Another example is that of a Greenpeace activist from New Zealand against whom France issued an alert in the Schengen Information System on the ground that she represented a threat to national security because she had demonstrated in the South Pacific against French nuclear testing.[10] And Mr and Mrs Moon, the leaders of the "Unification Church", were the subjects of alerts issued by the German authorities which considered that their visit to Germany would constitute a danger to German youth and thus pose a threat to public order and security.[11]

3. Main legal and human rights concerns

9. The legal assessment of such actions depends on the geographic context in which they take place. Different sets of rules apply in different situations. Depending on these situations, European Union rules or conventions of the Council of Europe may apply and interact with classical norms of public international law.

10. Under the general rules of public international law, notwithstanding norms on asylum, States can determine the terms and conditions under which non-nationals ("aliens") are admitted to their territory. As a consequence, general public international law does not entail a right to enter and to remain in a State of which the individual is not a national.[12]

11. In public international law, the term freedom of movement refers to movements of individuals within a State and from one State to another. This report deals with the latter aspect.

12. This report will not attempt to establish a difference between States not issuing visas and States refusing entry by other means.[13] Nor will it be for this report to deal with the specific issue of United Nations Security Council and European Union anti-terrorism blacklists. Human rights concerns raised by "targeted sanctions" were the subject of a separate report by our former colleague Mr Dick Marty.[14]

3.1. The framework of the Council of Europe

13. The Council of Europe has, since the early years of its existence, been active in the domain of free movement of persons. In this respect, I recall in particular the 1955 European Convention on Establishment[15] (ETS No. 19) and the 1957 European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe (ETS No. 25), along with the European Convention on the Legal Status of Migrant Workers (ETS No. 93) and the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities (ETS No. 106).

14. In particular, the European Agreement on Regulations governing the Movement of Persons between Member States of the Council of Europe, referred to in the motion, which is intended to facilitate personal travel, was signed in Paris on 13 December 1957 and came into force on 1 January 1958. To this day, 16 member States of the Council of Europe have ratified the agreement.[16] The aim of the agreement was to enable the nationals of States parties to enter or leave the territory of another party by all frontiers on presentation of one of the documents listed in the appendix to the agreement. The facilities accorded applied only to visits of not more than three months' duration. The implementation of the agreement was monitored by

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9. See http://de.rian.ru/politics/20111008/260869969.html.
10. The activist was consequently refused entry to the Netherlands: see the presentation of H. Staples, "Judicial control on the EU border", ILPA/Meijers Committee Conference, 11 and 12 May 2011, London, cited in Joanna Parkin, "The difficult road to the Schengen Information System II: the legacy of 'laboratories' and the cost for fundamental rights and the rule of law", Centre for European Policy Studies, April 2011, p. 6, www.ceps.eu/ceps/download/4373.
11. For further details, see Evelien Brouwer, "The other side of Moon: the Schengen Information System and human rights: a task for national courts", Centre for European Policy Studies, Working Document No. 288, April 2008, www.ceps.be/ceps/download/1471.
12. Eckart Klein, "Movement, freedom of, international protection", *Max Planck Encyclopaedia of Public International Law 2011*, p. 1: www.mpepil.com/ViewPdf/epil/entries/law-9780199231690-e851.pdf?stylesheet=EPIL-display-full.xsl.
13. I would, however, draw your attention to the *Economist*, 31 December 2011, "Keep out: Europe's restrictive visa policies irk some big neighbours": www.economist.com/node/21542224.
14. See the report on the United Nations Security Council and European Union blacklists, Doc. 11454, and Resolution 1597 (2008) and Recommendation 1824 (2008).
15. The texts of Council of Europe conventions are available on the Treaty Office website: www.conventions.coe.int.
16. The member States of the Council of Europe which have ratified the agreement are: Austria, Belgium, France, Germany, Greece, Italy, Lichtenstein, Luxembourg, Malta, the Netherlands, Portugal, Slovenia, Spain, Switzerland, Turkey and Ukraine. Moreover, Cyprus and the Republic of Moldova have signed but not ratified the agreement.

three successive committees of experts and subsequently abandoned in 1991, due to difficulties with regard to the functioning of the agreement.[17] We can therefore safely assume that the agreement is *de facto* no longer applicable.

15. Article 2 of Protocol No. 4 to the European Convention on Human Rights (ETS No. 46), entitled "Freedom of movement", provides for a right to freely move within a country once lawfully there and for the right to leave any country. It does not, however, deal with the right of entry into a country, which is at issue in this report. Besides, this protocol has not been acceded to by all member States of the Council of Europe.[18]

16. Otherwise, the rights enshrined in the European Convention on Human Rights (ETS No. 5, "the Convention") do not in themselves give a general right to enter a specific member State of the Council of Europe. Indeed, the European Court of Human Rights ("the Court") has held that decisions regarding the entry, residence and expulsion of aliens do not fall within the scope of the "fair trial" guarantee of Article 6.1, as they do not concern civil rights or obligations or a criminal charge.[19]

17. Nor, according to the Court, does the respect for private and family life under Article 8 of the Convention guarantee, in general, the right of an alien to enter or to reside in a particular country.[20] However, the Court has held that, in specific situations, a person could rely on Article 8 of the Convention in order to enter and reside in a member State for the purposes of joining their family.[21] This clearly indicates that member States' right to determine aliens' entry into their territory can be limited in certain circumstances.

18. So far, there seems to be no case founding a right of entry on freedom of expression under Article 10 of the Convention.

19. That said, a denial of entry based solely on a person's political positions could possibly constitute an abuse of the right to determine entry and discrimination within the meaning of Article 14 of the Convention.

3.2. The EU legal framework

3.2.1. Intra-EU situations

20. Insofar as actions referred to in the motion take place within the European Union, that is to say that an EU member State refuses entry into its territory to the national of another member State or of a third-State national falling under EU law, the EU rules on free movement apply. Here, Article 3(2) of the Treaty on European Union (TEU) provides for an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime. Furthermore, Article 26(2) of the Treaty on the Functioning of the European Union (TFEU) states that the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured.

21. More specifically, the Treaty on the Functioning of the European Union provides, in its Articles 18 (non-discrimination), 20 (Union citizenship), 45 (free movement of workers), 49 (freedom of establishment) and 56 (freedom to provide services), for a set of legally enforceable rules which allow Union citizens to move and reside freely within the Union. Mainly as a result of the case law of the Court of Justice of the European Union, these rights have been gradually decoupled from the context of economic activity.[22] Directive 2004/38/EC[23] fleshes these issues out in more detail.[24]

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17. Please see the decision of the Committee of Minister on "Freedom of movement between the Council of Europe member States – Follow-up to the 112th Ministerial Session". The committees, which were responsible for the monitoring of this agreement, had previously pointed to several difficulties with regard to its functioning.
18. 43 of the 47 member States have ratified the protocol, see: http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=046&CM=8&DF=09/01/2012&CL=ENG.
19. See *Dalea v. France*, Application No. 964/07, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=863599&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (in French only).
20. Ibid.
21. See *Sen v. the Netherlands*, Application No. 31465/96, http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=31465/96&sessionid=92235107&skin=hudoc-fr (in French only).
22. See judgment of 17 September 2002, C-413/99, *Baumbast v. Secretary of State for the Home Department*, ECR I-7091, http://curia.europa.eu/juris/document/document.jsf?text=&docid=47668&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&part=1&cid=1020980-.

22. Obviously, there may be exceptions to this rule of free movement of persons. Member States can invoke grounds of public policy, public security and public health. Such restrictions must, however, be interpreted narrowly. They must be based exclusively on the personal conduct of the individual concerned. They must also comply with fundamental rights. Even previous criminal convictions are not in themselves sufficient grounds for such measures. The Court of Justice has thus held that the public policy reservation constitutes a derogation from the rule of free movement, which as such shall be interpreted strictly, and that its scope cannot be determined unilaterally by each EU member State.[25] Consequently, measures taken on grounds of public policy and public security can justify a restriction of freedom of movement only if there is a genuine and sufficiently serious threat affecting one of the fundamental interests of society. European Union member States may refuse entry into their territory only to those citizens of other EU countries (and third-country nationals lawfully resident in other EU countries) whose presence would, in itself, constitute a danger for public policy, public security or public health.[26]

23. As regards restrictions of movement that could be seen as punishment for political positions, there is one case currently pending before the Court of Justice of the European Union: on 8 July 2010, Hungary brought an action against the Slovak Republic. Hungary is asking the Court of Justice to declare that the Slovak Republic has failed in its obligations under EU law by not allowing the Hungarian President to enter the Slovak Republic.[27] I shall refrain from commenting on this specific situation given that proceedings are ongoing before the Court. I should like to point out, however, that the European Commission, which is entrusted with the role of impartial guardian of the treaties, has intervened in this case in favour of the Slovak Republic.[28] I should also like to underline that cases such as the one at issue, in which States rather than the European Commission initiate infringement proceedings against other States, are extremely rare before the Court of Justice. This is only the fourth such case in the history of the European Union.

24. It emerges that, as far as intra-EU situations are concerned, member States cannot restrict movement on the sole basis of a person's political positions. As has been shown, the threshold under EU law for restricting free movement is very high. Such a practice would directly infringe primary and secondary EU law and could lead to proceedings before the Court of Justice. It can also trigger a claim to State liability to pay damages to those concerned. According to established European Union Court of Justice case law, individuals suffering loss or injury may collect damages whenever the particular rule of EU law violated was intended to confer rights upon them, the breach was sufficiently serious and there was a direct causal link between the breach and the damage sustained by the individual concerned, regardless of whether the treaties themselves or secondary law were breached.[29]

3.2.2. Schengen area

25. Regarding movements of persons between an EU member State and a third country not falling under the jurisdiction of EU law, the so-called Schengen regime applies. This regime does not provide for the right of a third-country national to enter the European Union, but it sets out the technical framework in which member States police their external borders (that is to say borders with countries outside the Schengen area) and alert each other in order to prevent access of unwanted persons to the Schengen area.

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23. Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the member States amending Regulation (EEC) No. 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ L 158, 30 April 2004, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:158:0077:0123:EN:PDF.

24. All of these provisions also apply within the European Economic Area, comprising, in addition to the EU member States, Iceland, Norway and Liechtenstein.

25. There is an abundant and constant case law to this effect. See, for example, the judgment of 29 April 2004, joined cases C-482/01 and C-493/01, *Orfanopoulos and Others v. Land Baden-Württemberg*, ECR I-5257, http://curia.europa.eu/juris/document/document.jsf?text=&docid=48717&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&part=1&cid=780369.

26. See Article 27 of Directive 2004/38/EC.

27. See *Republic of Hungary v. Slovak Republic*, Case C-364/10, action brought on 8 July 2010: http://curia.europa.eu/juris/document/document.jsf?text=&docid=83057&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=783002.

28. See order of the President of the Court of 28 January 2011, http://curia.europa.eu/juris/document/document.jsf?text=&docid=82962&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=780745 (in French only).

29. See, for example, the judgment of 5 March 1996, Joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur v. Germany* and *The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and Others*, ECR I-1029, http://curia.europa.eu/juris/showPdf.jsf?text=&docid=81389&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=780790.

3.2.2.1. The Schengen system

26. The first Schengen Agreement[30] was concluded on 14 June 1985 by France, Germany and the three Benelux States with the aim of gradually abolishing controls at the common borders, in order to promote the free movement of goods and persons. This initial agreement provided for the replacement of passport controls with visual checks of vehicles, which would be able to cross borders without stopping by travelling at reduced speed through border posts.

27. The abolition of border controls among the countries in the Schengen area necessarily implied the creation and protection of a common external border. It is for this reason that, on 19 June 1990, the same States also adopted the Convention implementing the Schengen Agreement ("the Schengen Convention").[31] In view of the possible security deficit resulting from the abolition of border controls, this convention, which came into force on 26 March 1995 for the original signatory countries, plus Spain and Portugal, introduced compensatory measures with regard to asylum and co-operation between police, judicial and customs authorities. It therefore largely consisted of measures regarding rules on external border controls, harmonised rules for visas, and police co-operation. It also provided for the creation of the Schengen Information System (SIS), which allows the competent national authorities of all participating States to access data on individuals who are not entitled to enter the Schengen area. This system will be examined in more detail below.

28. Although ultimately serving the EEC Treaty goal of free movement of goods and persons, the Schengen area first developed in a purely intergovernmental form, outside the legal framework of the European Community. This changed when the Schengen Agreement was incorporated into the EU legal order by the Treaty of Amsterdam,[32] as an aspect of the "Area of freedom, security and justice". Henceforth, the provisions were split between the EU's supranational "first pillar" and the largely intergovernmental "third pillar". Aspects relating to the free movement of persons such as visa and immigration policy were placed within the first pillar, in the chapter following the corresponding internal market provisions, while security measures found their way into the third pillar.

29. In addition to this, a protocol to the Treaty of Amsterdam[33] provided for a legal basis to incorporate the Schengen treaties and implementing measures (the so-called Schengen *Acquis*) into the law of the European Union.[34] The protocol still exists today.[35] The three-pillar structure was subsequently abolished by the Treaty of Lisbon. This has had important consequences as regards decision-making procedures and judicial review.[36]

30. The Schengen area now encompasses 22 EU member States[37] and four non-member States.[38] Cyprus, Ireland and the United Kingdom remain outside, as presently do Bulgaria and Romania, the applications of the latter two having been postponed in September 2011.[39]

3.2.2.2. "Blacklisting" in the Schengen Information System

31. The motion for a resolution refers to "blacklisting" in the context of the Schengen Agreement. I would like to clarify this term.

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30. 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 checks at their common borders, signed at Schengen on 14 June 1985.
31. Convention Implementing the Schengen Agreement of 14 June 1985, OJ L 239, 22 September 2000, pp. 19-62, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:42000A0922%2802%29:EN:HTML.
32. The treaty entered into force on 1 May 1999.
33. In the hierarchy of norms of the EU legal order, protocols enjoy the same legal status as the founding treaties, see Article 51 of the TEU.
34. See also Council Decision 1999/435/EC of 20 May 1999 concerning the definition of the Schengen *Acquis* for the purpose of determining, in conformity with the relevant provisions of the Treaty establishing the European Community and the European Union, the legal basis for each of the provisions or decisions which constitute the *acquis*, OJ L 176/1 of 10 July 1999, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31999D0435:EN:HTML.
35. Protocol (No. 19) on the Schengen *Acquis* integrated into the framework of the European Union, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:12008M/PRO/19:EN:HTML.
36. There are, however, transitional measures. For example, the Court of Justice will not have fully fledged jurisdiction regarding areas formerly in the third pillar until 2014.
37. Austria, Belgium, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, the Slovak Republic, Slovenia, Spain and Sweden.
38. Iceland, Liechtenstein, Norway and Switzerland.
39. For current political issues surrounding the Schengen system, see the *Economist,* 28 April 2011, "Another project in trouble": www.economist.com/node/18618525.

32. The abolition of controls on internal borders between Schengen States is compensated for by stricter controls on the external borders and by the imposition of various preventive measures. In addition to the traditional visa procedure, an electronic database, the Schengen Information System (SIS), was established under Article 92 of the Schengen Convention to assist border controls. This database, which constitutes the centrepiece of the Schengen regime, contains details of persons who have committed serious crimes, as well as those who have been denied entry to the Schengen area before.[40] It is used by member States' national authorities to exchange data on various categories of persons and property. Its purpose is to uphold public policy and public security, including national security, in the territories of the contracting parties and to apply the provisions of this convention relating to the movement of persons in those territories, using information communicated via this system.[41]

33. "Schengen blacklisting" is a colloquial expression for referring to an alert in the Schengen Information System for refusal of entry into the Schengen area. Such alerts are known as "Article 96 alerts", due to the article numbering in the Schengen Convention. Alerts in the SIS on refusal of entry for non-EU nationals are a matter for the competent administrative authorities or courts of the Schengen member States, using rules of procedure set down by national law.[42]

34. Any Schengen member State may issue such alerts, which other member States are obliged to respect.[43] The grounds on which a member State may issue an alert for the purposes of refusing entry are set out in Article 96 of the Schengen Convention. In particular, Article 96(2) provides that decisions by the competent national authorities may be based on a threat to public policy or public security or to national security which the presence of an alien may pose. The article goes on to give examples,[44] such as persons convicted or suspected of (on "serious grounds") having committed, or considered likely (on the basis of "clear evidence") to commit, criminal offences. The wording of the provisions ("This situation may arise in particular …") indicates that the list of examples is illustrative, not exhaustive.[45] The grounds for issuing alerts are thus very broad.

35. Refusals of entry may also be entered in the SIS due to the fact that the third-country national has been subject to earlier measures such as deportation, refusal of entry or removal which have not been rescinded or suspended, accompanied by a prohibition on entry.

36. The member State that has entered the alert has full responsibility for the continuing relevance and lawfulness of the alert and its ultimate deletion once it no longer fulfils a lawful purpose.

37. Member States are furthermore bound by the Schengen Border Code.[46] Article 5 of this regulation sets out the entry conditions for third-country nationals, which include being in possession of a valid visa and not being subject of an alert in the Schengen Information System for refusal of entry. This means, in particular, that member States are under an obligation to implement a refusal of entry which has been entered in the SIS by another member State. Article 13 of the Schengen Border Code sets out the conditions for refusal of entry and the substantiated decision stating the precise reasons for the refusal given by means of a standard form, filled in by the authority empowered by national law to refuse entry. The completed standard form shall be handed to the third-country national concerned, who shall acknowledge receipt of the decision to refuse entry by means of that form.

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40. A second technical version of this system (SIS II) is currently under development under the responsibility of the European Commission. Its deployment is currently planned in the first quarter of 2013. For further information, see: www.europarl.europa.eu/registre/docs_autres_institutions/commission_europeenne/sec/2010/1138/COM_SEC(2010)1138_EN.pdf.

41. Article 93, Schengen Convention.

42. The European Commission is thus not a user of the system. Furthermore, there is no legal basis or technical opportunity for access to alerts by the Commission.

43. Article 106(1) of the Schengen Convention provides that: "[o]nly the Contracting Party issuing the alert shall be authorised to modify, add to, correct or delete data which it has entered". See also Article 94(4).

44. In particular in the case of a third-country national who has been convicted of an offence carrying a penalty involving deprivation of liberty of at least one year, a third-country national in respect of whom there are serious grounds for believing that he has committed serious criminal offences or in respect of whom there is clear evidence of an intention to commit such offences in the territory of the jurisdiction concerned.

45. Alerts can also be issued on the basis of immigration law decisions regarding the deportation, refusal of entry or removal of a person: see Article 96(2), Schengen Convention.

46. Regulation (EC) No. 562/2006 establishing a Community Code on rules governing the movement of persons across borders, 15 March 2006, OJ L 105, 13 April 2006, pp. 1-32, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:105:0001:01:EN:HTML.

38. Going beyond such situations, a member State may only exceptionally permit such a person to enter on humanitarian grounds, on grounds of national interest, or because of international obligations.[47] It is obvious, however, that, in many cases, these exceptions are likely to be inoperative. If a person does not need a visa to travel into the Schengen area, or has had a visa issued prior to an alert being issued, he or she will first find out about the listing when entry is refused at the border post, where an exception is most unlikely to be made. The consequences may be even more serious when a person is already in the Schengen area, resulting in his or her detention and/or removal.

39. In practice, member States vary considerably in their use of Article 96 alerts. According to the most recent statistics, as of 1 January 2011, a total of 716 767 "unwanted alien" alerts were recorded on the SIS database under Article 96.[48] No breakdown by member State is provided, but it is believed that the majority of those alerts were issued by only a small number of States.[49] In its 2005 report, the Schengen Joint Supervisory Committee called for harmonising the reasons for creating Article 96 alerts in the different member States,[50] and its most recent report indicates that only limited progress has been made in this and other respects.[51]

40. It is also clear that at least some member States interpret their powers under Article 96 widely. Both Germany and Italy have adopted a practice of issuing Article 96 alerts in relation to all failed asylum seekers.[52]

41. This situation is somewhat attenuated for third-country nationals who are spouses of EU member State nationals. Here, the Court of Justice of the European Union has held that they cannot be refused entry into the territory of a Schengen State nor be refused to be issued a visa on the sole ground that they are persons for whom alerts have been entered into the SIS. In such a situation, EU member States are under an obligation to verify "whether the presence of those persons constituted a genuine, present and sufficiently serious threat to one of the fundamental interests of society".[53] In other words, placing persons in the SIS cannot eclipse their rights as the spouses of EU nationals under free movement rules.

42. In general, however, listing persons in the SIS system is problematic. It is one thing for a State to deny a person a visa and thus to prevent that person from entering its own territory. It is quite another for that State to enter the person into the SIS, thereby preventing him or her from entering the whole Schengen area. This may well interfere with that person's rights, for example the right to respect for private life under Article 8 of the European Convention on Human Rights by recording personal data and using such data to prevent the person concerned from entering other countries. Such interference must always be justified under Article 8.2 of the Convention, which may not always be the case in view of the broadly worded grounds for entering an SIS alert. In particular, Schengen member States (all of which are parties to the European Convention on Human Rights) should not be permitted to enter a person into the SIS merely because that person holds political views which are uncomfortable for that member State's authorities. In my view, States which resort to such practices contravene both Article 96 of the Schengen Convention and Article 10 of the European Convention on Human Rights.

3.2.2.3. Legal challenges to "blacklisting" in the Schengen Information System

43. But matters do not end there. Given that being listed as an "unwanted alien" in the SIS database can have serious consequences for an individual, possibly resulting in the denial of a visa, refusal of entry, detention and/or removal, possibilities do exist for a person to challenge his or her listing. Article 109 of the Schengen Convention provides that individuals have the right to access data relating to them entered into the

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47. Article 5(4)(c), ibid.
48. Council of the European Union, "Note: Schengen Information System database statistics", 1 January 2011, 6434/1/11 REV 1, Brussels, 4 March 2011.
49. See memorandum by JUSTICE, paragraph 27, House of Lords European Union Committee, 9th Report of Session 2006-7, «Schengen Information System II (SIS II): Report with Evidence», HL Paper 49, p. 132: www.publications.parliament.uk/pa/ld200607/ldselect/ldeucom/49/49.pdf.
50. "Report of the Schengen Joint Supervisory Authority on an inspection of the use of Article 96 alerts in the Schengen Information System", Brussels, 20 June 2005, p. 9, www.statewatch.org/news/2005/sep/jsa-sis-art96-rep.pdf.
51. "Report of the Schengen Joint Supervisory Authority on the follow-up of the recommendations concerning the use of Article 96 alerts in the Schengen Information System", Report 10-11 Rev.01, Brussels, 26 November 2010, p. 11, www.statewatch.org/news/2011/jan/eu-sis-article-96-alerts-report.pdf.
52. See memorandum by JUSTICE, op. cit. This practice was held to be contrary to the provisions of the article by the French Conseil d'Etat in the case of Mr and Ms Forabosco, 17 CE, 9 June 1999.
53. See judgment of 31 January 2006, C-503/03, and *Commission of the European Communities v. Spain*, ECR I-1097, and paragraph 59; http://curia.europa.eu/juris/document/document.jsf?text=&docid=55480&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&part=1&cid=680717.

SIS. They have the right to have factually inaccurate data corrected and unlawfully stored data deleted.[54] To that end, any person may, in the territory of each Schengen Contracting Party, bring before the courts or the authority competent under national law an action to correct, delete or obtain information or to obtain compensation in connection with an alert involving him or her.[55] The right "shall be exercised in accordance with the law of the Contracting Party before which they invoke that right" and, "communication of information... shall be refused if this is indispensable for the performance of a lawful task in connection with the alert".[56]

44. The wording of the provisions strongly suggests that a person has the right to bring such an action in the courts or before the national data protection authority (if that is the body competent under that State's national law) of any Schengen member State, not just the one which has issued the alert. Moreover, member States undertake "mutually" to enforce "final decisions" in such cases, which would require that the relevant national authority of the State issuing an alert is bound to comply with a decision concerning the alert taken by the courts or national data protection authority of another member State.[57] Indeed, this appears to have been the view of the Court of Justice in *Van Strateen v. the Netherlands*.[58]

45. In addition, individuals frequently bring administrative law appeals seeking to challenge decisions to deny them visas or refuse them entry on the ground that they have been wrongly entered into the SIS, that the details entered are incorrect, or that they are not the person listed. Such proceedings consequently amount to collateral challenges to the original listing decisions.

46. In practice, however, matters are less clear-cut. Firstly, authorities of one member State are often reluctant to review the decisions of the authorities of another. Secondly, when they do so, the latter authorities may be unwilling to enforce the former's decisions. It can also be difficult to determine the extent to which decisions have been complied with. Even when proceedings are brought in the member State which issued the alert, difficulties can arise, with access to information being refused, for example, on national security grounds (under Article 109(2) of the Schengen Convention: "Communication of information … shall be refused if this is indispensable for the performance of a lawful task in connection with the alert").[59] Challenges to listings (or against administrative decisions based on an individual having been listed) are consequently likely to be time-consuming and of dubious efficacy.

47. I would like to illustrate this by way of some examples.

48. In the Mr and Ms Forabosco case, the French Conseil d'Etat quashed decisions denying Ms Forabosco a visa due to her being listed in the SIS by the German authorities on the sole basis that her application for asylum in German had been rejected. The Conseil d'Etat held that this fact was not a reason for refusal of entry under Article 96 of the Schengen Convention.[60]

49. The case of the Moons (Sun Myung X (Moon)), however, was more complicated. Here, the Conseil d'Etat held that, on the basis of the information provided by the German authorities as to why they had listed the Moons in the SIS, the French authorities were justified "without committing a manifest error of appreciation" in concluding that the Article 96 alerts were not marred by any error of law or fact.[61] The Moons were similarly unsuccessful before the Dutch courts, although they did persuade the Belgian courts that they should be allowed into Belgium to attend a Unification Church conference. However, they were only able to regularise their situation in Belgium when they were able to persuade the German courts that their listing was unlawful, and consequently to require the German authorities to delete the alerts from the SIS database.[62]

50. It appears that the European Court of Human Rights is taking a rather cautious approach with respect to challenging an SIS listing and does not appear to see an infringement of rights under the Convention. This became apparent in *Dalea v. France*, where the Court held that the application was inadmissible.[63]

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54. Article 110, Schengen Convention, op. cit.
55. Article 111(1), ibid.
56. Article 109(1) and (2), ibid.
57. It will be recalled that it is only the State issuing an alert that can modify, add to, correct or delete it from the SIS.
58. Judgment of 28 September 2006, C-150/05, ECR I-9327, http://curia.europa.eu/juris/document/document.jsf?text=&docid=65194&pageIndex=0&doclang=en&mode=doc&dir=&occ=first&part=1&cid=1024584. The case concerned an Article 95 alert.
59. See *Dalea v. France*, Admissibility Decision No. 964/07, 2 February 2010, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=863599&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.
60. Op. cit.
61. CE, ass., 6 November 2002.
62. For full details, see Brouwer, op. cit.

3.2.3. Outlook

51. We have seen that Schengen member States have quite a wide discretion as to who they list as "unwanted aliens" in the SIS database, and the methods by which that discretion can be controlled are, in practice, rather limited. This is not satisfactory. It has become apparent that once entered into the SIS, being "delisted" is a rather burdensome process, and I submit that the currently available legal remedies are far from satisfactory. In particular, when a person is entered into the system exclusively because of his or her political views and therefore for reasons not covered by Article 96 of the Schengen Convention, States are duty-bound to provide for an effective and efficient remedy, in line with Article 109 of the Schengen Convention.

52. Two developments may, however, contribute to improving the situation in the future.

53. The first arises from the replacement of the SIS by a new database, SIS II. Although SIS II was scheduled to be launched in 2006, the project has been dogged by delays, cost overruns and political controversy.[64] It presently appears that SIS II will not be operational until 2013 at the earliest. However, Regulation 1987/2006, which will control the operation of the new database, does make some changes to the system of listing established under the Schengen Convention. The criteria for listing remain essentially the same.[65] However, an alert can only be issued "on the basis of an individual assessment"[66] (which means that national authorities cannot automatically issue an alert against a person on the basis that that person has been the subject of another decision) and "before issuing an alert, member States shall determine whether the case is adequate, relevant and important enough to warrant entry of the alert in SIS II".[67]

54. Secondly, as from 2014, the Treaty of Lisbon places former "third pillar" activities under the supervision of the Court of Justice of the European Union. The impact of this development is difficult to foresee at this stage. Denials of visas or refusals of entry have generally not been considered by the European Court of Human Rights to infringe individual rights protected under the European Convention on Human Rights, with the exception of family reunification under Article 8 of the Convention, as mentioned above. It remains to be seen whether the Court of Justice, in applying the Charter of Fundamental Rights, is prepared to go further than the European Court of Human Rights. In any event, the Lisbon Treaty may lead to further harmonisation of national rules and procedures as regards access to data, as the Charter of Fundamental Rights provides that "[e]veryone has the right of access to data which has been collected concerning him or her, and the right to have it rectified".[68]

4. Conclusion

55. Freedom of movement should not be restricted as punishment for expressing political views which do not incite violence. The member States of the Council of Europe, having signed up to the European Convention on Human Rights, which provides for freedom of expression in its Article 10, should give full effectiveness to this right by not indirectly restricting freedom of expression through denial of entry to their territories. In addition, freedom of movement is a prerequisite for the enjoyment of many rights, as well as an important condition for the free development of a person.

56. As regards the legal order of the European Union, free movement constitutes a fundamental freedom which can only be restricted in rare and clearly defined circumstances. A restriction of freedom of movement from one member State to another as a punishment for a political position which is held and expressed peacefully does not constitute a serious threat to a fundamental interest of society and is thus illegal in the EU legal order. Member States that practice such restrictions risk being taken to Court by those affected and having to pay damages.

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63. *Dalea v. France*, Application No. 964/07, http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=863599&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 (in French only).

64. See "House of Lords European Union Committee, 9th Report of Session 2006-7, Schengen Information System II (SIS II) – Report with evidence", HL Paper 49; and Parkin, op. cit.

65. Article 24, Regulation (EC) No. 1987/2006 on the establishment, operation and use of the second generation Schengen Information System (SIS II), 20 December 2006, OJ L 381/4, 28 December 2006, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:381:0004:01:EN:HTML.

66. Article 24(1), ibid.

67. Article 21, ibid.

68. Article 8(2), Charter of Fundamental Rights of the European Union, OJ C 303/1, 14 December 2007.

57. With respect to the Schengen regime, I would like to recall that entries into the SIS must under no circumstances be misused in order to deny persons who are not nationals of an EU member State access to the Schengen area on grounds that violate the rights protected by the European Convention on Human Rights and the principles upheld by the Council of Europe. Furthermore, Schengen member States are under a duty to genuinely provide for swift judicial review of any entry into the database.