

# The Shengen Cooperation Border Security: Between Freedom Of Movement and Illegal Migration

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Joshua Lott / REUTERS

When the Iron Curtain that had divided the European continent for more than half a century lifted, we were given the chance to reunite Europe in freedom, security, and justice, and to enlarge the European Union.<sup>1</sup> It was a long way from the Treaties of Rome in 1957, with a European Community of only 6 member states, to the recent Lisbon Treaty,<sup>2</sup> with a European Union of 27 member states. The Lisbon Treaty was a further step in deepening the European Union. And it will not be the end of this

process of integration of states and nations, which is without precedent in human history. The Lisbon Treaty defines migration policy as a competency of the European Union shared with the member states. EU policy in this area is based on three pillars: the promotion of legal migration, the fight against illegal migration, and the link between migration and development.

The union pursues these objectives on the firm basis of full respect for human rights. We should not forget that more than 50 years ago, the European Union and its member states were pioneers of, for instance, social security for migrant workers. In 1958, the European Council issued two regulations on social security for migrant workers that were subsequently superseded by regulations.<sup>3</sup> Nationals from Iceland,

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Liechtenstein, and Norway are also covered via the European Economic Area (EEA) Agreement.

What does the “Schengen Border Regime” mean? It simply means abolishing internal border controls and intensifying border checks at the external borders of the Schengen area. Since a couple of years ago, you can travel by car from Helsinki to Lisbon without any passport controls or leave Frankfurt Airport for Athens by plane without border controls, complying simply with an airline identity check. Border controls by state authorities only take place if you leave or enter the “Schengen Area.” At the beginning of European integration after the World War II in the 1950s, it seemed to absolutely impossible to

- 1) open borders the between France and Germany and Poland and Germany;
- 2) allow German policemen to follow criminals across the borders to the Netherlands, Belgium, or Denmark;
- 3) issue a common visa for more than one European country;
- 4) follow the same principles concerning asylum; and
- 5) set up a European Police Agency (Europol) to fight international organized crime and terrorism, an agency for judicial cooperation (Eurojust), and “Frontex,” the nucleus of a joint European border police force.

It was the idea of two statesmen, the president of France, François Mitterrand, and the chancellor of the Federal Republic of Germany, Helmut Kohl, to bring their nations and their people together by opening the borders between their states. This led to the “Schengen Agreement,” signed by the heads of state and government of France, Belgium, the Netherlands, Luxembourg, and Germany in the small town of Schengen, Luxembourg, near the Belgian and German border in June 1985.

In June 1990, the “Convention Implementing the Schengen Agreement” was signed by the heads of state and government. Its key points were

- 1) harmonizing provisions related to entry into the “Schengen Area” and short stays in the “Schengen Area” by non-EU citizens, which meant implementing a uniform Schengen visa;
- 2) asylum issues;
- 3) measures to combat cross-border drug- and weapons-related crime;

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- 4) police cooperation; and
- 5) cooperation among Schengen states on judicial matters.

The “Convention Implementing the Schengen Agreement” entered into force in September 1993 and took practical effect in March 1995. When the “Schengen Protocol to the Treaty of Amsterdam” came into effect in May 1999, the Schengen Cooperation, based on an international agreement, was incorporated into the Acquis of the European Union. So the idea of two statesmen, initiated by an international intergovernmental agreement, was sealed by the member states and accepted as a fundamental principal of the European Union: freedom of movement for all citizens of the union within its borders and protection of all citizens against threats by international organized crime from outside the union.<sup>4</sup>

Since 1999, the so-called “Schengen Acquis,” which means the sum of all legislation concerning the Schengen Cooperation, has been an integral part of the Acquis of the European Union. In 2006, the most important former intergovernmental Schengen rules became a new legal framework. So, the Schengen Agreement of 1985 was transformed into the “Schengen Borders Code” of March 15.<sup>5</sup> One can imagine that it was not easy to follow the idea of opening the internal borders in Europe after the Iron Curtain had lifted, because we had to face the danger that thousands of illegal migrants and criminals from Eastern Europe would misuse this new regime.

In 1993, for instance, more than 800 000 people living in Germany had to leave the country because they had entered illegally, most without passports, without visas, and without being asylum seekers or refugees.

We knew from our experience that illegal migration is closely connected with international, cross-border crime: falsification of documents, human smuggling, drug trafficking, and weapons smuggling.

And we were aware that opening the borders inside the Schengen Area should not give rise to more illegal migration, because obviously, illegal migration is not the proper way to escape social misfortune. It makes migrants victims, vulner-

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able to exploitation from the first day of their dreadful journey to what may be the end of their lives, lives endangered by crime, determined by illegal work, and deprived of social security.

Therefore, the opening of borders *inside* the Schengen Area was only possible by intensifying border checks at its *external* borders. It was not easy to convince, for instance, the governments in Austria, Italy, Spain, Portugal, and Greece to build well-trained, properly equipped border police forces, to join the Schengen Information System, and to sign readmission agreements with countries of origin of illegal migration, before opening the internal border with those EU member states.

“Schengen” has become one of the best success stories in European integration, because we did not make the mistake of straying from the path of this very clear philosophy. The idea of “more freedom of movement and more security via cooperation on the external borders” works.

It has shown that it is capable of tackling even big problems, like the growing illegal migration over the Greek and Italian borders, if its rules are respected and not misinterpreted or even misused. It is, for example, not in line with the idea of Schengen, to grant Schengen visas to migrants from third countries who are not tourists or businesspeople on short visits to one of the Schengen states, but rather people, who definitely want to stay in the Schengen area, to find better living conditions than in their countries of origin, like Tunisia. To prevent this kind of misuse of a brilliant idea, we have to think about how to tackle those problems properly, which might overtax member states concerned. It seems that the Schengen rules need to be adapted to this problem with a quite new dimension:

1) Article 2, Section I of the 1985 Schengen Agreement stated that, for a limited period, national border checks appropriate to the situation shall be carried out at internal borders, where public policy or national security so require.<sup>6</sup>

1) According to Article 23, Number 1 of the Schengen Borders Code, a member state may *exceptionally* re-introduce border control at its internal borders *for a limited period of no more than 30 days where there is a serious threat* to public policy or internal security.<sup>7</sup>

Under those even more restrictive rules of the Schengen Borders Code, it seems not to be possible to solve this problem on a solid legal basis. We need to think about an amendment to Article 23 of the Schengen Borders Code that would explicitly address the problem of a massive influx of migrants or even refugees in a certain region of the Schengen area or a single member state. But there are even bigger threats: let us not forget that since the Munich 1972 Olympic Games, since 9/11 in the United States, and especially today at airports, and in railway and subway stations in Europe and the United States, we have to face and tackle the problem that terrorists cross borders and are determined to commit their awful crimes in their country of destination.

From the point of view of the national state authorities, it must be taken into account every day that the persons they check could be tourists, workers with legal status, asylum seekers, refugees, illegal migrants, criminals, or terrorists. And it is one of the most difficult tasks in national, supra-national, and international policy to find the best way to treat each person decently in accordance with the respective laws and fundamental rights —failures in this very difficult effort included. This is the daily dilemma of the balance of freedom and security, even if legal migrants are concerned.

The necessary measures are not yet complete and need to be updated in accordance with the ongoing change of threats:

- 1) We have to continue our work on an integrated border police of the Schengen member states and hopefully, in the end, of the European Union.
- 2) The “Schengen Information System,” which provides the police at external borders with the information they need, has reached the very limit of its capacity and should be enlarged.
- 3) And we have to pay attention to other areas that have nothing to do with Schengen: it makes no sense to intensify border controls for passengers more and more realizing at the same time that in so-called “Combi” airplanes or even quite normal planes, strictly-inspected passengers sit above decks loaded with almost completely un-inspected cargo.

The concept of an area of freedom, security, and justice already features in previous treaties. However, the Lisbon Treaty gives the union better means of reaching solutions consonant with the scale of the challenges facing it. The Lisbon Treaty confirms the European Union's commitment to developing a common immigration policy. This will ensure a consistent approach to immigration, taking into account the economic and demographic evolution of our continent, and paying due attention to social integration. The treaty also confirms the development of a common European asylum system with the establishment of uniform status and common procedures for all persons in need of international protection.

People will live in a safer Europe as the union can more easily and rapidly make decisions in the field of security. Europe will be more effective in combating terrorism, dealing with criminal gangs, crime prevention, illegal migration, and trafficking in human beings.

The Treaty of Lisbon underlines the Schengen Acquis and shapes the future development of this idea.<sup>8</sup> The treaty replaces Articles 62 to 64 of the former Treaty of the European Union with a new Chapter 2: "Policies on Border Checks, Asylum, and Immigration."

According to the new Article 62, the union shall develop a policy with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders, carrying out checks on persons and efficient monitoring of the crossing of external borders, and the gradual introduction of an integrated management system for external borders.

The European Parliament and the Council shall adopt measures concerning the common policy on visas and other short-stay residence permits, the checks to which persons crossing external borders are subject, the conditions under which nationals of third countries shall have the freedom to travel within the union for a short period, any measure necessary for the gradual establishment of an integrated management system for external borders, and the absence of any controls on persons, whatever their nationality, when crossing internal borders.<sup>9</sup>

The union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *nonrefoulement*. This policy must be in accordance with the Geneva Convention of 1951 and the Pro-

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TOCOL of 1967 relating to the status of refugees, and other relevant treaties.<sup>10</sup>

According to Article 63a, the union shall develop a common immigration policy aimed at ensuring the efficient management of migration flows, fair treatment of third-country nationals residing legally in member states, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

The union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfil the conditions for entry, presence, or residence in the territory of one of the member states.

Particularly, the so-called Return Directive, which entered into force in December 2008 and has to be implemented in national law by the member states until December 2010, has been characterized by numerous Latin American countries as an "unfriendly act." They assume that the directive criminalizes illegal immigration, will impose new sanctions, criminalize migrants, and will have the consequence that all immigrants will be removed immediately.

This is not true, because the directive does not impose any criminal punishment. There is no EU legislation regarding criminalization of third-country nationals illegally entering or staying in the European Union. It remains within the competency of the member states to decide on the application of such matters. By the way, until 2008 it was considered a crime in Mexico to be an illegal migrant, which could carry a penalty of up to 10 years in prison.

The only sanction imposed by the Return Directive is the prohibition of re-entry into the European Union for a certain period. Illegal immigrants are already subject to the possibility of being expelled. The difference, once the directive comes into force in all member states, is that illegal migrants will enjoy a full range of rights, for instance the right to get a written decision and information about the possible remedies, linguistic assistance, legal aid, emergency health care, education of minors, etc.

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“Schengen” is not a “model” for other regions of our planet. But it is an example of how problems between states can be solved, even between Mexico, the United States, and Canada. Against this background, it is not impossible to one day open the internal borders among those three countries. “Schengen” is not Tijuana, and it is not San Diego. Mexico has to face two quite different problems concerning migration:

- 1) Mexico is both a country of destination and of transit as far as migrants from the South are concerned.
- 2) But Mexico is also a country of origin of migration —legal and illegal— to its neighbor in the North.

And this represents an enormous responsibility and challenge for the Mexican government: to manage the migration from the South and the emigration of fellow citizens to the North.

“Schengen” stands for an idea: trusting each other; helping each other against threats; being watchful to live together in freedom, security, and justice; and unconditionally respecting human rights. And this idea is not limited to the European continent. ■■■

#### NOTES

<sup>1</sup> The precondition for this historic operation was to make the European Union fit for opening its doors to 12 new member states. “Fit” in this context means to facilitate and accelerate the decision-making process in the community and in the union; to make clear which competencies must be located on a European level and which competencies have to be dealt with by the member states, and to improve the democratic legitimacy of the various bodies of the community and the union.

<sup>2</sup> The Lisbon Treaty came into force in December 2009.

<sup>3</sup> Regulation 1408/71, supplemented by implementing Regulation 574/72.

<sup>4</sup> Mitterrand and Kohl’s idea was so attractive that, since 1995, the so-called “Schengen Area” has expanded several times: Austria acceded in 1997; the Nordic countries, Denmark, Sweden, and Finland, joined in 2000 and Norway as well as Iceland were invited as associate members; in December 2007, the European Council decided to include the new EU member states of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia; and, beginning this year, even a third non-EU country, Switzerland, is associated with the Schengen Area.

<sup>5</sup> Regulation (EC) 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders, *Official Journal of the European Union*, April 13, 2006, L 105/1.

<sup>6</sup> The Contracting Party may, after consulting the other Contracting Parties, decide that if public policy or national security requires immediate action, the Contracting Party concerned shall take the necessary measures and at the earliest opportunity shall inform the other Contracting Parties thereof.

<sup>7</sup> “...or 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. 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.”

<sup>8</sup> According to Article 61, the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration, and external border control, based on solidarity between Member States, which is fair toward third-country nationals. The Union shall endeavor to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws. The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security, and justice. It shall be open to Member States to organize between themselves such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations (Article 61 F).

<sup>9</sup> Those articles shall not affect the competence of the member states concerning the geographical demarcation of their borders, in accordance with international law.

<sup>10</sup> The European Parliament and the Council shall adopt measures for a common European asylum system comprising a uniform status of asylum for nationals of third countries, valid throughout the union; a uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection; a common system of temporary protection for displaced persons in the event of a massive inflow; common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status; criteria and mechanisms for determining which member state is responsible for considering an application for asylum or subsidiary protection; standards concerning the conditions for the reception of applicants for asylum or subsidiary protection and partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.