

The Schengen Cooperation According to the Lisbon Treaty A Model for the Americas?

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Thierry Roge/Reuters

The European Parliament in Brussels.

I have worked in European affairs for 25 years. Those years covered the Single European Act of 1986, the Treaty of Maastricht of 1992, the Treaty of Amsterdam of 1997 and the Treaty of Nice of 2001.

Those treaties have in common that they adjust the basic laws of the European Community and the European Union to the fundamental changes in the political situation in Europe. The lifting of the Iron Curtain, which had divided this continent for more than half a century, gave us the

chance to reunite Europe in freedom, security and justice, and to enlarge the European Union.

The precondition for this historic operation was to make the European Union fit to open its doors to 12 new member states. "Fit" in this context means:

- facilitating and accelerating the decision-making process in the Community and in the Union;
- clarifying which competences have to be located on a European level and which ones have to be dealt with by the member states; and
- improving the democratic legitimacy of the various Community and Union bodies.

But these ambitious goals were not achieved because the majority of member states refused to hand over more of their

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sovereignty. Again and again, they were not courageous enough to make the big leap to greater integration, more transparency and more democracy in the Community and the Union.

The European Council of Nice in December 2000 adopted a “Declaration for the Future of the Union,” which opened the door for more transparency, democracy and efficiency, crowned by a Charter of Fundamental Rights. In December 2001, the European Council in Laeken inaugurated a European covenant to design a “Treaty for a Constitution for Europe.” In October 2004 the heads of state signed a treaty to establish a “Constitution for Europe.” But France and the Netherlands rejected the treaty by referenda; and other member states stopped ratification of the treaty.

In the first half of 2007, the German presidency opened the way for a compromise by the Berlin Declaration, on the fiftieth anniversary of the signing of the Treaties of Rome in 1957. In December 2007, the Lisbon Treaty was signed by 27 heads of member states. After problems in Ireland, Poland and the Czech Republic, the Lisbon Treaty came into force in December 2009.

It was a long way from the Treaties of Rome in 1957 to this Reform Treaty. And this will not be the end of this integration process of states and nations, unparalleled in human history.

What does this mean for the citizens of the European Union? I will try to explain it by the implications of the Lisbon Treaty in the fields of justice and home affairs. Let us dream together just for a couple of seconds:

- Can you imagine traveling by car from Mexico City to Anchorage without a visa or any passport controls?
- Can you imagine leaving the Benito Juárez Airport for Lima by plane without border controls and just an identity check by the airline?

This is the Schengen Border Regime explained in the shortest possible way: abolishing internal border controls and intensifying border checks at the external borders of the respective area.

At the beginning of European integration after World War II in the fiftieth year of the twentieth century, it seemed absolutely impossible

- to open borders between France and Germany;
- to abolish border controls between Poland and Germany;
- to allow German police to follow criminals across the borders to the Netherlands, Belgium or Denmark;
- to issue a common visa for more than one European country;
- to follow the same principles concerning political asylum;
- to establish a European Police Agency (Europol) to fight international organized crime and terrorism and an agency for judicial cooperation (Eurojust).

It was an idea of two statesmen, the president of the French Republic, 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, which was signed by the heads of state of France, Belgium, the Netherlands, Luxembourg and Germany in the small town of Schengen, Luxembourg, near the Belgian-German border in June 1985. In June 1990, the Convention Implementing the Schengen Agreement was signed by the heads of state. Its key points were:

- Harmonizing provisions relating to entry into the Schengen Area and short stays in there by non-EU citizens, which meant implementing a uniform Schengen visa;
- Asylum matters;
- Measures to combat cross-border drug- and weapons-related crime.
- Police cooperation; and
- Cooperation among Schengen states on judicial matters.

The Convention Implementing the Schengen Agreement entered into force in September 1993 and took practical ef-

The Treaty of Lisbon states that 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.

fect in March 1995. With the entry into force of the Schengen Protocol to the Treaty of Amsterdam in May 1999, Schengen Cooperation, based on an international agreement, was incorporated into the Law of the European Union.

So the idea of two statesmen, executed by an international inter-governmental agreement, was sealed by the member states by accepting this idea as a fundamental principle of the European Union: freedom of movement for all its citizens within its borders, and protection of all citizens against threats by international organized crime from outside them.

The idea of Mitterrand and Kohl was so attractive that since 1995, there have been several expansions of the so-called Schengen Area: 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.

The so-called “Schengen Acquis,” which means the sum of all legislation concerning the Schengen Cooperation since 1999, is an integral part of the Acquis of the European Union. 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. Schengen nevertheless has become one of the best success stories in European integration. The idea of “more freedom of movement and more security via cooperation at the external borders” works, but the necessary measures are not yet complete and need to be updated as threats continually change.

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. We need an integrated border police provided by the Schengen members. The Schengen Information System, which provides the police on external borders with the information they need, has reached the very limit of its capacity and needs to be enlarged.

The concept of an area of freedom, security and justice already features in the previous treaties. However, the Lisbon Treaty gives the Union better means of reaching solutions in accordance with the scale of the challenges facing it. Regarding justice, freedom and security, several improvements are made with the Lisbon Treaty. In this area, the Lisbon Treaty is a major step forward. On almost all relevant issues qualified-majority voting will be used.¹ This means that it will be easier to make decisions at European level in this field. Furthermore, new legislation in this field will fall under the jurisdiction of the European Court of Justice, giving citizens extra protection.

The Lisbon Treaty confirms the European Union’s commitment to the development of a common immigration policy. This will ensure a consistent approach on immigration, taking into account our continent’s economic and demographic evolution, and giving due attention to social integration. The treaty also confirms the development of a common European asylum system with the establishment of a uniform status and common procedures for all persons in need of international protection.

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

The Treaty of Lisbon underlines the Schengen Acquis and shapes the future development of this idea: according to Article 61f, 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

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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.

The Lisbon 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.

Those articles shall not affect the competence of the member states concerning the geographical demarcation of their borders, in accordance with international law. 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 *non-refoulement*.² This policy must be in accordance with the Geneva Convention of 1951 and the Protocol of 1967 relating to the status of refugees and other relevant treaties.

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 granting and withdrawing 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.

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 fulfill the conditions for entry, presence or residence in the territory of one of the member states.

The European Parliament and the Council may establish measures to provide incentives and support for the action of member states with a view to promoting the integration of third-country nationals residing legally in their territories, excluding any harmonization of the laws and regulations of the member states. This shall not affect the right of member states to determine volumes of admission of third-country

nationals coming from third countries to their territory in order to seek work, whether employed or self-employed.

Schengen is not a model for other regions of our planet. But it is an example of how a vision is able to move ahead even against strong resentments. Together with the four fundamental freedoms of the internal market, implemented by the Maastricht Treaty in 1992, this idea opens the way for free movement of goods, services, capital and persons for about 480 million citizens of the European Union. And it guarantees the protection of all citizens against threats by international organized crime from outside the Union.

Like in Europe, in the Americas, the idea of a free trade area became a reality at the same time: the North American Free Trade Agreement (NAFTA) between Canada, the United States and Mexico was signed in December 1992. It entered into force in January 1994. Article 102 enumerates the only trade-related objectives of this agreement. But let us once again dream for just a couple of seconds: Can you imagine this agreement amended by an article stating that even the freedom of movement of people between Mexico, the United States and Canada is granted? Can you imagine the internal borders between those three countries opening up and no longer being points of border controls?

Sometimes dreams come true, if we work hard on them. I admit it: Schengen is not a small town in the Americas; it is not Tijuana; and it is not San Diego. But it stands for an idea:

- trusting each other;
- helping each other against threats; and
- living together in freedom, security and justice. ■■■

NOTES

¹ Qualified majority voting replaced unanimous voting in the EU system, making decision-making easier. According to the European Union glossary, qualified majority voting is defined as follows: "After 1 January 2007, following enlargement of the Union, the qualified majority went up to 255 votes out of a total of 345, representing a majority of the Member States. Moreover, a Member State may request verification that the QM represents at least 62% of the total population of the Union. If this is not the case, the decision is not adopted." http://europa.eu/scadplus/glossary/qualified_majority_en.htm [Editor's Note.]

² *Non-refoulement* is the principle of international law forbidding the expulsion of a refugee to a place where he/she might be expected to suffer persecution. [Editor's Note.]

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