

Citizens' Europe: Free Movement, Free Markets, and the Making of Schengen

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Abstract #1 — 300 words

This thesis explores the roots of the 1985 Schengen Agreement and the 1990 convention implementing its terms. The central questions are why the Schengen system emerged, first among France, Germany, and the Benelux states, and how it transformed the principle of free movement of persons.

I use delegate lists, draft agreements, diplomatic memoranda, and confidential annexes — archived in state agencies and closed to public view for thirty years — to explore the backroom dealings that produced the accord. I reveal how free movement developed as a guarantee linked to the market but distinct from economic life — a concept that expressed aspirations for European citizens' rights and that arose within the burgeoning human rights discourse of the postwar era. The account, also drawing on the voices of journalists and judges and unwelcome migrants, sets the development of the Schengen accord, a complex administrative instrument, against the backdrop of global and national events — the end of the Cold War, the fall of the Berlin Wall, cycles of economic recession and recovery, intensifying migration flows, and deepening fear of terrorism. All shaped the boundaries of free movement

I argue that Schengen's crucial innovation was to classify the bearers of the freedom to cross borders as persons rather than as economic actors. Under the accord, all people who were nationals of EC member states became free to traverse Schengen's internal borders. This differed from the 1957 Treaty of Rome, which predicated cross-border mobility on economic pursuits. Shorn of that condition, Schengen reinforced distinctions based on nationality in seeking to pair liberty with security, giving rise to new mechanisms of surveillance and crime control that produced an outcry from non-Europeans in the Schengen space.

The thesis contributes to greater understanding of globalisation and the integration of Europe; security and transnational sovereignty; and citizenship and individual rights.

Citizens' Europe: Free Movement, Free Markets, and the Making of Schengen
Abstract #2 — 2,500 words

This thesis explores the roots of the 1985 Schengen Agreement and the 1990 convention implementing its terms. The central questions are why the Schengen system emerged and how it transformed the principle of free movement of persons.

Such freedom of movement was envisaged at the founding of the European Economic Community in 1957 and guaranteed by the Maastricht Treaty in 1992, enshrined as fundamental to deepening solidarity among the peoples of Europe and to advancing human rights as well as to establishing a common market. But the principle of free movement was secured most palpably by the formation of the Schengen area. An emblem of the European project, this Western European territory of open internal borders emerged from the Schengen Agreement of 1985, which first joined Belgium, France, Luxembourg, the Netherlands, and West Germany. Today, Schengen encompasses 26 European nations, including 22 of the 28 EU members.

Focusing on the formative years before the accord became part of EU law at the end of the twentieth century, I reveal how free movement developed as a guarantee linked to the market but distinct from economic life — a concept that expressed aspirations for European citizens' rights and that arose within the burgeoning human rights discourse of the postwar era. The account traces the principle of free human movement as it was articulated in treaty-drafting, diplomatic paperwork, legislative debates, jurisprudence, the scholarly writing of European rule makers, and also in the claims mounted by inhabitants of the five countries that first comprised the Schengen area. While documenting how the concept of free movement developed in tandem with the EU and its internal market, my study of Schengen's creation aims to cast new light on a longer European effort to transform a continent ravaged by world war

into a zone of liberty, democratic pluralism, and supranational peace. The significance of Schengenland's formation was to ground progress toward a single European market and the union of the European peoples in an expansive territorial domain of free human movement.

The association of Schengen with European integration is now so familiar that it requires an endeavor of historical recovery to understand the conception of free movement of persons at the time of its emergence. Indeed, the plan for Schengen came into being slowly, developing over the course of more than a decade, from a European Council meeting in Fontainebleau in 1984, which set the stage for the gathering of state officials to approve the Schengen Agreement a year later; to the adoption in 1990 of the convention implementing the agreement, which took full effect in 1995; to the signing of the Treaty of Amsterdam in 1997, which incorporated Schengen into EU law. The account sets the development of the Schengen accord, a complex administrative instrument, against the backdrop of global and national events, not least the end of the Cold War, the fall of the Berlin Wall, cycles of economic recession and recovery, an increase in immigration across the Mediterranean world, and intensifying fear of international terrorism. All shaped the boundaries of freedom of movement.

Schengen's crucial innovation was to classify the bearers of transnational freedom of movement as persons rather than as economic actors. Under the accord, all people who were nationals of member states became free to traverse internal borders. This differed from the 1957 Rome Treaty, which spoke of workers in enumerating individual freedoms central to market coordination. It also differed from the 1948 Universal Declaration of Human Rights and a 1963 protocol to the European Convention on Human Rights, which safeguarded movement within the territory of a single nation. Conceptually and geographically, I argue, Schengen transformed the principle of free movement, extending it from the market and nation to the

terrain of what French President François Mitterrand called ‘Citizens’ Europe.’ Subtly, that shift in meaning gave deeper legitimacy to economic integration by lodging the utility of the internal market within the flourishing of a cosmopolitan European community.

At the very moment that Schengen extended the compass of free movement beyond economic actors and nations, it mandated restrictions distinguishing Europeans from non-Europeans to be enforced by signatory states. Under the implementation convention, new security technology, exemplified by the Schengen Information System, augmented state police power to surveil and exclude alien migrants. Schengen’s creation, I argue, fueled the development of the national security state. So, too, it produced an outcry among undocumented immigrants, particularly in France, against their status as ‘sans-papiers,’ or ‘without papers.’ Their lack of papers signified a deeper absence — of a forum for their claims within a transnational landscape in which the nation remained the fundamental guarantor of rights, as well as the enforcer of security, though using mechanisms, such as the Schengen Information System, that reached across national borders

My thesis moves from the negotiating table at European summits to the judge’s dais in courts of law to the street protests of undocumented immigrants as it examines Schengen’s inception and the meanings assigned to free movement. My project combines political, intellectual, legal, and diplomatic history. It includes the voices of statesmen, influential Eurosceptics, students, immigrants, lawyers, journalists, judges, and philosophers. Particular attention is paid to spokespersons in France and Germany because these historic adversaries were the most powerful of Schengen’s founding states and drove the negotiations, as the accord advanced the partnership sought by their leaders, François Mitterrand and Helmut Kohl. I set the development of the Schengen system against the backdrop of national and global events:

the end of the Cold War, economic recession and recovery, shifts in migration flows, and intensifying fear of international terrorism. Each of these circumstances shaped the boundaries of free movement.

The account draws on public statements, private letters, draft agreements, confidential annexes, meeting notes, and agency memoranda archived at state agencies as well as at the European Council and Commission. Because of laws barring access to diplomatic records for 30 years, much of this material has never been studied. Memoirs as well as oral histories with Schengen negotiators also offer perspective on the rules of freedom and exclusion.

Historians have given little attention to the origins of Schengen. The historical study of European integration, still in its infancy, mostly overlooks the accord. Systematic analysis of the endeavors of Schengen's negotiators is absent from influential accounts of postwar Europe. As a history of Schengen, my thesis draws on, but differs from, the methods and findings of political scientists, international relations theorists, and sociologists, whose work has dominated study of the accord.

My project reorients histories of migration, globalisation, and human rights. It offers new insight into the making of European border policy as the continent became a focal point of postwar debates over the role of nation-states in the international system. Led by Alan S. Milward in *The European Rescue of the Nation-State* (1992), historians have shown that national interests predominated in European planning.¹ But this work does not explore how Schengen advanced that end. Uncovering Schengen's origins alters the story of European integration, revealing how the guarantee of free movement of persons became integral to Citizens' Europe while also underwriting the formation of an internal market and enhancing the authority of

¹ Alan S. Milward, *The European Rescue of the Nation-State* (London, 1992).

member states to secure external borders and surveil inhabitants. The Schengen Agreement enabled the circulation of people and goods across the frontiers of Europe. At the same time, in balancing the exigencies of freedom and security, the accord reinforced the distinction between foreigners and Europeans. In uncovering these perplexities, my thesis contributes to greater understanding of globalisation and the integration of Europe; security and transnational sovereignty; and citizenship and individual rights.

The thesis consists of six chapters that proceed chronologically. The core of the account extends from the declaration of plans for Citizens' Europe in 1984 to the burgeoning a decade later of a social movement of undocumented immigrants who protested their exclusion from Schengen's guarantees of free movement across Europe's borders.

Chapter 1, 'In the *Château de Fontainebleau*,' moves from the business of the European Council to the doctrine of free movement as expounded by the European Court of Justice, examining the political and legal context in which Schengen emerged. The account begins with a Council summit at Fontainebleau, in June 1984, where European leaders, led by François Mitterrand and Helmut Kohl, promulgated the idea of Citizens' Europe. This was an expansive notion of European integration that would become a touchstone for the intergovernmental negotiations among France, West Germany, and the Benelux countries that produced the Schengen Agreement a year later. The plans arising from Fontainebleau could not be fully realised at the European level, I argue, because of limits to Community authority under the Rome Treaty. Those limits were made explicit in *Gravier v. City of Liège*, a decision of the European Court of Justice concerning the rights of a Community national seeking vocational education in a sister state, handed down in 1985, just as negotiations were opening on Schengen.

Chapter 2, 'On the Moselle River,' peers inside the negotiations that led to the Schengen Agreement of 1985. It uses evidence from newly opened diplomatic archives to reveal the path taken by the Schengen states in setting out, ahead of Community plans, to abolish common borders and construct a transnational territory where free movement across internal frontiers would be guaranteed to all European nationals, not only economic agents. A creation of intergovernmental treaty-making, separate from Community institutions, Schengen was shaped by economic imperatives and popular unrest, as well as by the aspirations of Europhile statesmen. Drawing on the paperwork produced by diplomats, the chapter examines meetings convened in Paris, Bonn, and Brussels that prepared the way for the signing of the Schengen accord in June 1985, aboard a boat moored on the Moselle River. It analyses how the innovation announced there came to pair a capacious principle of free movement with the primacy of security and distinctions based on nationality.

Chapter 3 'A Return to the Moselle River,' explores the drafting of the Convention Implementing the Schengen Agreement, which was signed in June 1990, an occasion marked by a ritual return to the Moselle River. Again, the account documents the labour of the negotiations, particularly the effort to devise measures aimed at balancing free movement with security: a battery of technical procedures that would reinforce controls at external frontiers, provide for cross-border surveillance and police cooperation, and block illegal immigration into the Schengen area. The chapter addresses developments in European Community law and policy that informed the convention's drafting, as well as the emergence of protest by human rights advocates against Schengen's rules on asylum. It probes conflicts that prolonged the drafting process, which dragged on for five years, and reveals how revolutionary upheaval in Europe impinged on the Schengen laboratory. By the time of the convention's signing, the

Berlin Wall had fallen, and the waning of the Cold War meant that the guarantee of free movement would apply in a world of newly permeable borders, deepening the concern of the Schengen states with security.

Chapter 4, 'The Problem of Sovereignty,' considers the convention's ratification and the earliest organised resistance to its terms. It focuses on France, which was the first state to ratify the charter, in June 1991, but also where 60 deputies brought a claim to the nation's constitutional court, claiming that the accord contravened the French Constitution. The lawsuit amplified arguments made in parliamentary debate, invoking principles of French republicanism that had inspired postwar polemics against integration. The chapter analyses a tradition of Gaullist, anti-Europe thought given classic expression by the author of the 1958 Constitution, Michel Debré. But dissent against Schengen was hardly the preserve of the right. In France, and later in Germany, fierce critiques of the accord came from the left, principally on behalf of asylum seekers denied refuge in the Schengen area.

Chapter 5, 'A Place of Risk,' examines problems of policing and privacy that became yoked to Schengen's guarantee of free movement. It sets the intense preoccupation of the accord's framers with security in the context of heightened fear of acts of global terrorism committed on European soil. The chapter casts light on the establishment of the computerised data file known as the Schengen Information System, or SIS, mandated by the 1990 convention and used to track non-Europeans. It reveals how the surveillance tool became a focal point of concerns about information gathering and individual privacy that animated opposition to Schengen among international human rights organisations. SIS would become a cornerstone of the European Union Agency for Law Enforcement Cooperation, known as Europol, which began limited operations in 1994. Drawing on an oral interview I conducted with Europol's

inaugural head, the chapter links the rise of transnational policing and the formation of a European security state to the abolition of internal border controls under the Schengen accord. It analyses risks associated with both the free movement of persons and the transnational surveillance of migrants crossing Schengen's frontiers.

Chapter 6, 'A *Sans-papier* Declaration of Free Movement as a Human Right,' explores the popular insurgency of non-Europeans laying claim to recognition in the Schengen area. It focuses on the efforts of undocumented persons, migrants without papers — *les sans-papiers* — to obtain rights, beginning with the basic rights to cross national borders, seek asylum, and find refuge. The account centres on an uprising of the *sans-papiers* in Paris, in 1996, and the transnational spread of their protest in a network of resistance enabled by new means of digital communication. Shifting the vantage point away from diplomats, it examines how people categorised as 'aliens' in the Schengen accord conceptualised free movement across borders as a human right. The chapter analyses the sceptical reception of their claims in the European Court of Human Rights, which recognised family bonds as the only defence against unfree movement and the exclusions embedded in Schengen, but also illuminates how the actions of the *sans-papiers* influenced theorists of human rights.

An epilogue turns to moments of retrospective reflection on the accomplishment of free movement as a principle of postwar European integration. Each was laden with distinct symbolism. In 1997, the year Schengen became part of EU law, a report on the free movement of persons prepared for the European Commission extolled the civic ideals of the European project. Its author was Simone Veil, a Holocaust survivor who became the first female president of the European Parliament. In 2007, a half-century after the adoption of the Rome Treaty, a commemoration of the treaty lamented the loss of humanism in the European project.

The author was Catherine Lalumière, a signer of the 1985 Schengen accord on behalf of France. The epilogue concludes by setting the contrasting narratives of ascent and decline against the lessons learned by a sans-papier denied asylum in France. In 2014, as sans-papiers staged a march from France through Luxembourg to Belgium, Ababacar Diop wrote from Senegal of the urgency of protecting the right to privacy against abridgement by regimes of border control. A year later, with the onset of the European refugee crisis, Schengen states began restoring checks at their common borders.

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Abbreviations

Bibliothèque Nationale de France = BNF

European Court of Justice = ECJ

Historical Archives of the European Union = HAEU

Ministère de l'Europe et des Affaires Étrangères = MEAU

Politisches Archiv des Auswärtigen Amts = PAA

Schengen Information System = SIS

INTRODUCTION

From the ravages of the Second World War emerged a project of unifying Western Europe and rejuvenating its national economies. A common market was to sustain a new community of nations, ideally laying a foundation for both the union of its peoples and the pursuit of economic integration. At the heart of that European project lay the principle of free movement — of persons, goods, capital, and services among member states. Such freedom of movement was envisaged at the founding of the European Economic Community in 1957 and guaranteed by the Treaty on European Union in 1992, where it was enshrined as fundamental to respect for human rights and to the accomplishment of a common market. As affirmed by the Treaty of Amsterdam in 1997 and a series of subsequent Community treaties, every citizen of the European Union is entitled to move freely within the territory of the member states.¹

Most concretely, the principle of free movement was secured by the formation of the Schengen area, a territory within which the abolition of checks at the common borders of participating European countries would allow for the circulation of persons and flow of goods without obstruction. An emblem of the European project, this territory of open internal borders emerged from the Schengen Agreement of 1985. The preamble to the agreement establishes that ‘the ever closer union of the peoples of the Member States of the European Communities should find its expression in the freedom to cross internal borders for all nationals of the Member States and in the free movement of goods and services’.² The Schengen area has never been coextensive with the European Community. Border controls

¹ Treaty Establishing the European Economic Community, arts.2,3(c), 25 March 1957, 298 U.N.T.S. 11 (1958) (hereafter Treaty of Rome); Treaty on European Union preamble, Title I, art.B, Title II, art.G(B)(3), 7 February 1992, 31 I.L.M. 247 (hereafter Treaty of Maastricht); Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art.2, §34 (a)-(b), 13 December 2007, 2007 O.J. (C 306) 1 (hereafter Treaty of Lisbon).

² Schengen Agreement, 14 June 1985, Preamble (hereafter Schengen Agreement, 1985).

came down first among the five countries that framed the accord — France, West Germany, and the Benelux states of Belgium, Luxembourg, and the Netherlands. Today, the Schengen area encompasses 26 European nations, including 22 of the 28 EU members, and more than 400 million people.³ Since 1997, the body of rules and agreements that together comprise the ‘Schengen acquis’ has formed part of EU law. According to the European Parliament, Schengen was the ‘key milestone in establishing an internal market with free movement of persons’.⁴ The significance of Schengen’s formation, therefore, was to ground the development of a single European market and the union of the European peoples in an expansive territorial domain of free human movement.

This thesis, ‘Citizens’ Europe: Free Movement, Free Markets, and the Making of Schengen’, is about the promise of the free movement of persons as it was conceptualized, implemented, and tested in the emergence of Schengen as a space without internal frontiers. A ‘laboratory’ was how Schengen was conceived in its formative era by its framers: ‘A laboratory for the free movement of persons in Europe’. It was ‘a model’, explained a Dutch foreign minister, Pieter Dankert, in 1990, ‘a kind of experiment’.⁵ The plan for Schengen came into being slowly, developing over the course of more than a decade, from a European Council meeting in Fontainebleau in 1984, which set the stage for the drafting of the Schengen Agreement a year later; to the adoption in 1990 of the Convention Implementing the Schengen Agreement, which took full effect in 1995; to the signing of the Treaty of Amsterdam in 1997, which unified the rules of the Schengen acquis, European citizenship, and the common market, entering into force in 1999. A resolution on the internal market, set forth by the European

³ EU Immigration Portal, https://ec.europa.eu/immigration/node_en.

⁴ EU Fact Sheets, European Parliament, <http://www.europarl.europa.eu/factsheets/en/home>.

⁵ Joseph Lorent, ‘Moselortschaft Schengen geht in die EG-Geschichte ein’, *Luxemburger Wort*, 20 Juni 1990; Piet Dankert, ‘Discours de Piet Dankert sur la convention d’application de l’accord de Schengen (Schengen, 19 juin 1990)’, *Bulletin de documentation du Service Information et Presse, Ministère d’Etat*, no.3(Luxembourg, 1990), pp.10-11. I have translated into English all quotations from French- and German-language sources.

Parliament in 1990, spoke of Schengen as the ‘first stage in the free movement of people’. A 1999 working document of the European Parliament termed Schengen an ‘experimental garden’ that would set an example for the European community.⁶

The system of free movement derived its name from a pastoral Luxembourg village, Schengen, where vineyards cover the rolling hillsides and a castle dating from the medieval era stands near the town square. The village lies on the banks of the Moselle River, at the tri-point border where France and Germany touch Luxembourg. It was a place of apt symbolism for the creation of a territory without internal frontiers. In June 1985, diplomats of the five signatory states gathered in Schengen to adopt the agreement. In June 1990, delegates returned to the village to sign the convention implementing the accord. Schengen thus came to signify a set of intergovernmental treaties and a physical territory. It also embodied values of cosmopolitanism, and the hope for an open, pluralist European community constituted by free movement. As a geopolitical ‘model’, in the words of its framers, Schengen contrasted with authoritarian ways of life at the twilight of the Cold War. The phrase ‘Schengen spirit’ entered the vocabulary of international politics.⁷

The association of Schengen with European integration is now so familiar that it requires an endeavor of historical recovery to understand the conception of the free movement of persons at the time of its emergence. This study explores the roots of Schengen. It asks why the Schengen system emerged and how it transformed the principle of the free movement of

⁶ Lorent, ‘Moselortschaft Schengen’; Dankert, ‘Discours’; Hubert Blanc, ‘Schengen: Le Chemin de la Libre Circulation en Europe’, *Revue du Marché Commun et de l’ Union européenne*, no.351(October 1991), p.723. On Schengen as a laboratory, see Marie-Claire Caloz-Tschopp, Micheline Fontolliet-Honore, and Lode Van Outrive, *Europe: Montrez Patte Blanche!: Les Nouvelles Frontières du Laboratoire Schengen* (Genève, 1993); Vendelin Hreblay, *La libre circulation des personnes: les accords de Schengen* (Paris, 1994), p.7. On Schengen as an experimental garden, see Elpida Papahatzi, ‘Free Movement of Persons in the European Union: Specific Issues’, (Working Document PE167.028, Brussels, May 1999), p.7.

⁷ ‘Schengen: The First Three Months’, *Statewatch Bulletin*, 5, no.3(May-June 1995), quoted in Ruben Zaiotti, *Cultures of Border Control: Schengen and the Evolution of European Frontiers* (Chicago, 2011), p.103.

persons. Focusing on the formative time before the accord became part of EU law at the end of the twentieth century, it reveals how free movement developed as a guarantee linked to the market but distinct from economic life — a concept that expressed aspirations for European citizens' rights and that arose within the burgeoning human rights discourse of the postwar era.⁸ My account traces the principle of free human movement as it was expressed in treaty-drafting, diplomatic paperwork, legislative debates, jurisprudence, the scholarly writing of European rule makers, and also in the claims mounted by inhabitants of the Schengen states. While documenting how the concept of free movement developed in tandem with the EU and its internal market, this study of Schengen's creation aims to cast new light on a longer European effort to transform a continent devastated by world war into a zone of liberty, democratic pluralism, and supranational peace — an effort that would represent, as a signer of the 1985 accord later said, a barrier 'against all totalitarianisms'.⁹

As a pivotal aspect of European unification, Schengen opened a new chapter in the globalisation of economic exchange, the exercise of transnational sovereignty, and the conceptualisation of individual rights. It was augured by the visionary rhetoric of the leaders of West Germany and France. In a speech to the Bundestag in March 1984, chancellor Helmut Kohl foresaw 'political union' as the basis for 'the ever closer union of European peoples'.¹⁰ And in an address to the European Parliament in May 1984, France's president, François Mitterrand, spoke of unifying the continent's peoples as a democratic project — the creation of 'Citizens' Europe'.¹¹ This was a shift in the language of integration, a phrase evoking a

⁸ On human rights and EU history, see Kiran Klaus Patel, *Projekt Europa: Eine kritische Geschichte* (Munich, 2018).

⁹ Catherine Lalumière, 'La Construction Européenne Au-Delà de L'Économie', '50 Ans Après le Traité de Rome', Special issue, *Revue d'économie financière*, 88 (April 2007), p.197.

¹⁰ 'Bericht der Bundesregierung zur Lage der Nation im geteilten Deutschland', *Bulletin des Presse- und Informationsamtes der Bundesregierung*, no.30(March 1984), p.267.

¹¹ François Mitterrand, Speech to the European Parliament, Strasbourg, 24 May 1984, O.J.E.C., *Debates of the European Parliament*, no.1-314, [s.l.], p.6, https://www.cvce.eu/content/publication/2001/10/19/cdd42d22-fe8e-41bb-bfb7-9b655113ebcf/publishable_en.pdf.

humanistic political program, with ends extending beyond economic union. Under the Treaty of Rome of 1957, the nascent European Economic Community, which then comprised Belgium, France, Italy, Luxembourg, the Netherlands, and West Germany, laid the groundwork for reducing tariff barriers and establishing a common market for goods, capital, labor, and services. The Schengen accord underwrote economic union but also became the symbol of a citizens' Europe where the vision of social solidarity presupposed freedom of movement.

In charting Schengen's early history, this thesis brings to the fore the perplexities raised by the free movement of persons as well as the benefits thought to be gained from the abolition of internal frontiers. It analyses perceptions of the nexus between the mobility of people and the flow of goods, and Schengen's complex meaning as a precursor of both transnational civil society and the European single market. But it also explores deep concerns about security; the procedures devised to fortify Schengenland's external borders, block unlawful immigration, and surveil the movement of foreign nationals; as well as the outcry of undocumented immigrants against their status as 'illegal persons'. The account sets the development of the Schengen accord, a complex administrative instrument, against the backdrop of global and national events — the end of the Cold War, the fall of the Berlin Wall, cycles of economic recession and recovery, an increase in migration flows across the Mediterranean world, and intensifying fear of international terrorism. All shaped the terms of freedom of movement. My project discovers how revolutionary change in Europe, in 1989, became a turning point in Schengen's creation.¹²

Schengen's crucial innovation, I argue, was to classify the bearers of transnational freedom of movement as persons rather than as economic actors. Under the accord, all people

¹² Schwache Glieder, 'Terrorismus', *Der Spiegel*, 27 April 1987; Hreblyay, *Libre circulation*, pp.33-34, 59-82. See Miroslav N. Jovanović, *The Economics of European Integration: Limits and Prospects* (Cheltenham, UK, 2005), p.768.

who were nationals of member states of the European Community became free to traverse the internal borders of the Schengen area. This differed from the Rome Treaty, which spoke of workers in enumerating common market freedoms, predicating cross-border mobility on the pursuit of gainful employment. It also differed from the 1948 Universal Declaration of Human Rights and a 1963 protocol to the European Convention on Human Rights, which safeguarded movement within the territory of a single nation. Conceptually and geographically, I show, Schengen transformed the principle of free movement, extending it from the market and nation to the terrain of what French President François Mitterrand called ‘Citizens’ Europe’. That shift in meaning gave deeper legitimacy to economic integration by lodging the utility of the internal market within the flourishing of a cosmopolitan European community.¹³

At the very moment that Schengen extended the ambit of free movement beyond economic actors and nations, it mandated restrictions distinguishing Europeans from non-Europeans to be enforced by its member states. From the outset, the ideal of freedom of movement in the Schengen area was hedged by security concerns about foreign migrants. The exclusionary logic appeared in its earliest blueprints, as the diplomats who crafted the accord compiled lists of countries from Haiti to Yemen to Madagascar, which allegedly posed immigration threats to Europe. Under the implementing convention, new security technology — the establishment of the Schengen Information System and the use of digital identity files — augmented the police power of member states to track alien migrants, enforce external border checks, and prevent illegal immigration. Schengen’s creation, I argue, fueled the development of the national security state, premising free movement for Europeans across internal borders on procedures of classification, surveillance, and exclusion aimed at foreigners.

¹³ On how a market-based principle of free movement became a right encompassing more than economic pursuits, see Stephen Weatherill, *The Internal Market as a Legal Concept* (Oxford, 2017), p.7.

My thesis moves from the negotiating table at European summits to the judge's dais in courts of law to the street protests of undocumented immigrants as it examines Schengen's inception and the meanings assigned to the free movement of persons across borders. The account combines political, intellectual, legal, and diplomatic history. It addresses the views not only of Schengen's authors but also of influential Eurosceptics; philosophers, lawyers, and journalists; everyday Europeans seeking freedom of movement; and foreigners in the Schengen area, among them asylum seekers. It considers how ordinary inhabitants as well as diplomats became brokers of ideas that crossed national borders.¹⁴ Particular attention is directed to spokespersons in France and Germany, because those historic adversaries were the most powerful of Schengen's founding states and drove the negotiations, as the accord advanced the partnership sought by their leaders, François Mitterrand and Helmut Kohl. My study draws on public statements, private correspondence, draft agreements, confidential annexes, meeting notes, and diplomatic memoranda archived at state agencies as well as at the European Council and the European Commission. Because of rules barring access to diplomatic records for thirty years, much of this material has not been studied. Memoirs as well as oral histories with Schengen negotiators also offer perspective on the principles of freedom and exclusion inscribed in the accord.

Contests that arose in France occupy an important place in this story. France was the first nation to chair Schengen's Central Negotiating Group after the approval of the accord in 1985, and also chaired the critical working group on the movement of persons at pivotal moments — notably in 1989, when the collapse of the Berlin Wall opened new frontiers for migration across Europe. France was also the site of searching public debates over the

¹⁴ On transnational circuits of ideas and the role of plebeian activists, Julius S. Scott, *The Common Wind: Afro-American Currents in the Age of the Haitian Revolution* (London, 2018).

convention's ratification, as well as litigation asserting that the accord violated French national sovereignty. And in Paris, thousands marched with undocumented immigrants, mainly from West Africa and the Maghreb, who refused to be categorised as an alien presence within the Schengen area and claimed free movement as a human right.¹⁵

Historians have given strikingly little attention to the origins of Schengen. The historical study of European integration, still in its infancy, mostly overlooks the accord. It is not examined in influential works, such as Luuk van Middelaar's *The Passage to Europe: How a Continent Became a Union* (2013).¹⁶ Nor is the formation of the Schengen area addressed in scholarship on multi-ethnic Europe. While finding that fear of 'internal "others"', such as 'waves of refugees', has been 'exacerbated by the free movement of people within the EU' and by the ideal of 'Europe without borders', Rita Chin, in *The Crisis of Multiculturalism in Europe* (2017), for example, does not consider how framers of the Schengen accord made freedom contingent on security measures and suppression of illegal immigration.¹⁷ Even in histories of European migration, such as Peter Gatrell's *The Unsettling of Europe: How Migration Reshaped a Continent* (2019), Schengen is termed a 'major turning point' but receives little sustained attention.¹⁸ Systematic analysis of the endeavors of Schengen's negotiators is absent as well from classic accounts of postwar Europe, which simply point to a dualism deftly summed up by Tony Judt in his monumental *Postwar* (2015). 'Thus the Schengen Treaty was a boon for the citizens of participating states, who now moved unhindered across open borders between

¹⁵ For an account stressing Germany's role, see Emmanuel Comte, *The History of the European Migration Regime: Germany's Strategic Hegemony* (Abingdon, 2018).

¹⁶ Luuk van Middelaar, *The Passage to Europe: How a Continent Became a Union*, trans. Liz Waters, (New Haven, 2013). Schengen is also absent from John Gillingham's *European Integration, 1950-2003: Superstate or New Market Economy?* (Cambridge, UK, 2003). On historians arriving late to European integration, see Kiran Klaus Patel, 'Widening and deepening? Recent Advances in European Integration History', *Neue Politische Literatur*, 64,no.2(July 2019), pp.327-357.

¹⁷ Rita Chin, *The Crisis of Multiculturalism in Europe: A History* (Princeton, 2017), p.3.

¹⁸ Peter Gatrell, *The Unsettling of Europe: How Migration Reshaped a Continent* (New York, 2019), p.202.

sovereign states’, Judt wrote. ‘But residents of countries outside the Schengen club were obliged to queue — quite literally — for admission’.¹⁹ Schengen is dealt with simply as a ‘demonstration of the benefits of free movement’ in Konrad H. Jarausch’s *Out of Ashes* (2015). Only its ‘economic dividends’ are noted in Philipp Ther’s *Europe since 1989* (2016).²⁰ How Schengen came to embody the dualism between internal freedom and external control is a guiding question of my study.

This thesis reorients European histories of migration, globalisation, and human rights. It offers new insight into the development of European border policy as the continent became a focal point of postwar debates over the role of democratic nation-states in the international system.²¹ Led by Alan S. Milward in *The European Rescue of the Nation-State* (1992), historians have shown that national interests predominated in European planning.²² But this body of work does not explore how Schengen advanced that end. Notably, Charles S. Maier’s sweeping synthesis, *Once Within Borders: Territories of Power, Wealth, and Belonging* (2016), considers Schengen only in the context of the contemporary crisis of open borders.²³ Likewise, Schengen has been insufficiently investigated by scholars of economic globalisation. In contrast to works on global capitalism that examine the free circulation of commodities, such as the intervention by Jeffrey A. Frieden, my project newly links debates over migration — the circulation of people — to the intensification of trade, the liberation of capital, and the impetus of economic integration.²⁴ My

¹⁹ Tony Judt, *Postwar: A History of Europe since 1945* (London, 2005), p.718.

²⁰ Konrad H. Jarausch *Out of Ashes: A New History of Europe in the Twentieth Century* (Princeton, 2015), p.523; Philipp Ther, *Europe since 1989: A History* (Princeton, 2016), p.126. Schengen is absent from Mark Mazower’s *Dark Continent: Europe’s Twentieth Century* (New York, 2000); Jan-Werner Müller’s *Contesting Democracy: Political Ideas in Twentieth-Century Europe* (New Haven, 2011); Robert O. Paxton and Julie Hessler’s *Europe in the Twentieth Century*, 5th ed. (Boston, 2012).

²¹ Martin Conway, ‘Democracy in Postwar Western Europe: The Triumph of a Political Model’, *European History Quarterly*, 32, no.1(2002), pp.59-84.

²² Alan S. Milward, *The European Rescue of the Nation-State* (London, 1992).

²³ Charles S. Maier, *Once Within Borders: Territories of Power, Wealth, and Belonging Since 1500* (Cambridge, MA, 2016).

²⁴ Jeffrey A. Frieden, *Global Capitalism: Its Fall and Rise in the Twentieth Century* (New York, 2006).

project also contributes to new scholarship on the relationship between human rights guarantees and state sovereignty by addressing economic life. It demonstrates how free market doctrine guided European courts in enshrining free movement as a basis for human flourishing while upholding the authority of states to establish the terms of civic belonging. My thesis aims to shed new light on the nexus of economic rights and human rights.²⁵

As a history of Schengen, my thesis draws on, but differs from, the methods and findings of political scientists, international relations theorists, and sociologists, whose work has dominated study of the accord. It challenges the conclusions put forward by influential social scientists, such as Andrew Moravcsik, that Schengen was primarily a prelude to the internal market, as well as studies of citizenship, state power, and migration that cast the agreement as a unidirectional step toward internationalism.²⁶ An extensive treatment of Schengen appears in the work of political scientist Ruben Zaiotti, most importantly in his *Cultures of Border Control* (2011), yet his work is mainly concerned with testing theories of border formation, setting bureaucratic approaches, such as the ‘incrementalist’ model, against Moravcsik’s intergovernmental approach, which focuses on economic motives.²⁷ Schengen has been the

²⁵ See Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Cambridge, MA., 2018).

²⁶ Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca, N.Y., 1999), pp.353, 474-477. See also Desmond Dinan, ed., *Origins and Evolution of the European Union*, 2nd ed. (Oxford, 2014), p.382; Christopher J. Bickerton, Dermot Hodson, and Uwe Puetter, eds., *The New Intergovernmentalism: States and Supranational Actors in the Post-Maastricht Era* (Oxford, 2015). On Schengen and internationalism, see Yasemin Nuhoglu, *Limits of Citizenship: Migrants and Postnational Membership in Europe* (Chicago, 1994); Peo Hansen and Sandy Brian Hager, *The Politics of European Citizenship: Deepening Contradictions in Social Rights & Migration Policy* (New York, 2010); Willem Maas, *Creating European Citizens* (Lanham, Md, 2006); Christian Joppke, ed., *Challenge to the Nation-State: Immigration in Western Europe and the United States* (Oxford, 1998); David Jacobson, *Rights across Borders: Immigration and the Decline of Citizenship* (Baltimore, 1996); Saskia Sassen, *Guests and Aliens* (New York, 1999). A counterpoint lies in re-securitisation literature, see for example, Bertrand Wert, ‘Security Governance in the Largest Border-Metropolis of the Schengen Area: The Lille ‘Eurodistrict’ Case Study’, *Journal of Borderlands Studies*, 23, no.3(September 2008), pp.95-108.

²⁷ Zaiotti, *Cultures of Border Control*, pp.6, 4. My approach is informed by the work of legal scholar Elspeth Guild, though it does not thoroughly examine Schengen’s origins and treats the intergovernmental approach as a negation of a rights idea; see Elspeth Guild, ‘The Single Market, Movement of Persons and Borders’, in *The Law of the Single European Market: Unpacking the Premises*, ed. Catherine Barnard and Joanne Scott (Oxford, 2002), pp.295-310. On incrementalism, see Jörg Monar, ‘Institutionalizing Freedom, Security and Justice’, in *The Institutions of the European Union*, ed. John Peterson and Michael Shackleton (Oxford, 2002), pp.186-209. On the bureaucratic/testing

subject of detailed critical analysis in a body of work by Didier Bigo, a French political sociologist and theorist of international relations, who focuses on the system's operation, rather than its origins, in finding that Schengen forms a cornerstone of a repressive EU regime of security and immigration control, captured in the image of 'fortress Europe'. While drawing on Bigo's critique, this thesis directs particular attention to the complexities of the principle of free movement at the time of its emergence and to shifting conceptions of its purpose and limits before the Schengen accord entered into force.²⁸

Since the adoption of the Schengen implementing convention in 1990, the consequences of abolishing border controls have drawn growing attention from European scholars. Among the historians to pursue such inquiry is Andreas Pudlat, whose article, 'Der lange Weg zum Schengen-Raum: Ein Prozess im Vier-Phasen-Modell', concentrates primarily on the period after incorporation into EU law in 1997.²⁹ That has been the dominant vantage point in scholarly debates in Europe, where Schengen has been identified as a key factor in the rise of '*Sicherheitshysterie*', or 'security hysteria', for example in the pages of *Kritische Justiz*, as well as a subject of comparative analyses of modes of integration.³⁰ Such debates have mainly been the province of political theorists, geographers, and criminologists, but also of government officials who participated in Schengen's framing. One of the most detailed accounts of the accord's genesis is *La Libre Circulation des Personnes: Les Accords de Schengen* (1994), by Vendelin

approach as a 'garbage can' model, see Virginie Guiraudon, 'The Constitution of a European Immigration Policy Domain: a Political Sociology Approach', *Journal of European Public Policy*, 10, no.2 (January 2003), pp.256-276.

²⁸ See, e.g., Didier Bigo, *Polices en Réseaux: l'expérience européenne* (Paris, 1996); Didier Bigo and Elspeth Guild, 'La mise à l'écart des étrangers. La logique du visa Schengen', *Politique étrangère*, 70, no.2 (2005), pp.445-47.

²⁹ Andreas Pudlat, 'Der lange Weg zum Schengen-Raum: Ein Prozess im Vier-Phasen-Modell', *Journal of European Integration History*, 17, no.2 (2011), pp.303-26. Angela Siebold's periodisation is similar in *ZwischenGrenzen: Die Geschichte des Schengen-Raums aus deutschen, französischen und polnischen Perspektiven* (Paderborn, 2013). See also Andreas Pudlat, *Schengen: zur Manifestation von Grenze und Grenzschutz in Europa* (Hildesheim, 2013).

³⁰ Heiner Busch, 'Europa — ein 'Mekka der Kriminalität'? EG-Grenzöffnung und internationaler Polizeikooperation', *Kritische Justiz*, 23, no.1 (1990), p.1. And for a telling reception in Scandinavian scholarship, see Kjell A. Eliassen and Nick Sitter, 'Ever Closer Cooperation? The Limits of the "Norwegian Method" of European Integration', *Scandinavian Political Studies*, 26, no.2 (2003), pp.125-144.

Hreblay, a French police commissioner and member of his nation's Schengen negotiating group, who highlights the exigencies of security required by the abolition of internal borders.³¹

Hreblay's analysis is a point of departure for this thesis, and has been foundational in some of the studies by political scientists that address Schengen's origins.³²

In tracing Schengen's significance in the establishment of free movement as a principle of European union, my project is indebted to critiques of the EU advanced by the sociologist Wolfgang Streeck and the historian Quinn Slobodian, who theorise integration as a neoliberal project.³³ I seek to deepen understanding of the primacy of market imperatives by uncovering the political and social objectives that shaped the interests of Schengen states in protecting free movement. And in exploring the non-market foundations of market institutions, my approach is informed by Emma Rothschild's study of the moral dimensions of eighteenth-century global commerce.³⁴

The thesis consists of six chapters that proceed chronologically. The core of the account extends from the declaration of plans for Citizens' Europe in 1984 to the burgeoning a decade later of a social movement of undocumented immigrants who protested their exclusion from Schengen's guarantees of free movement across Europe's borders.

Chapter 1, 'In the *Château de Fontainebleau*', moves from the business of the European Council to the doctrine of free movement as expounded by the European Court of Justice,

³¹ Hreblay, *Libre circulation*, pp.7, 31, 32, 6, 10. See Renée Dedecker, 'L'asile et la libre circulation des personnes dans l'accord de Schengen', *Courrier hebdomadaire du CRISP*, 8, no.1393-1394 (1993), pp.1-58; Hans Heiner Kühne, *Kriminalitätsbekämpfung durch innereuropäische Grenzkontrollen?* (Berlin, 1991); Johannes Velling, 'Schengen, Dublin und Maastricht — Etappen auf dem Weg zu einer europäischen Innligrationspolitik', ZEW Discussion Papers, no.93-11, (1993), <https://www.econstor.eu/bitstream/10419/29411/1/256898758.pdf>.

³² Simone Paoli, 'France and the Origins of Schengen: An Interpretation', in 'Peoples and Borders: Seventy Years of Migration in Europe, from Europe, to Europe, 1945-2015', ed. Elena Calandri, Simone Paoli, and Antonio Varsori, special issue, *Journal of European Integration History*, (2017), pp.255-279. See also Simone Paoli, *Frontiera Sud: L'Italia e la nascita dell'Europa di Schengen* (Florence, 2018).

³³ See Wolfgang Streeck, *How Will Capitalism End?: Essays on a Failing System* (London, 2016); Quinn Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (Cambridge, MA, 2018).

³⁴ Emma Rothschild, 'Global Commerce and the Question of Sovereignty in the Eighteenth-Century Provinces', *Modern Intellectual History*, 1, no.1 (April, 2004), pp.3-25.

examining the political and legal context in which Schengen emerged. The account begins with a Council summit at Fontainebleau, in June 1984, where European leaders, led by Mitterrand and Kohl, promulgated the idea of Citizen's Europe. This was an expansive notion of European integration, resting on the pillars of transnational citizenship, abolition of internal borders, and a single market, and it would become a touchstone for the intergovernmental negotiations among France, West Germany, and the Benelux countries that produced the Schengen Agreement a year later. The plans arising from Fontainebleau could not be fully realised at the European level, I argue, because of limits to Community authority under the Rome Treaty. Those limits were made explicit in *Gravier v. City of Liège*, a decision handed down by the European Court of Justice in 1985, just as negotiations were opening on Schengen. In analysing the *Gravier* case, the chapter reveals how a dispute about the study of cartoon art spawned doctrine defining free movement as a right strictly contingent on economic activity, a market paradigm that Schengen would transcend.³⁵

Chapter 2, 'On the Moselle River', peers inside the negotiations that led to the Schengen Agreement of 1985. It uses evidence from newly opened diplomatic archives to reveal the path taken by the Schengen states in setting out, ahead of Community plans, to abolish common borders and construct a transnational territory where free movement across internal frontiers would be guaranteed to all European nationals, not only economic agents. A creation of intergovernmental treaty-making, separate from Community institutions, Schengen was shaped by economic imperatives and popular unrest, as well as by the aspirations of Europhile statesmen. Drawing on the paperwork produced by diplomats, the chapter examines meetings convened in Paris, Bonn, and Brussels that prepared the way for the signing of the Schengen accord in June 1985, aboard a boat moored on the Moselle River. It analyses how the

³⁵ Case 293/83, *Gravier v. City of Liège* (1985) E.C.R. 593.

innovation announced there came to pair a capacious principle of free movement with the primacy of security and distinctions based on nationality.

Chapter 3, 'A Return to the Moselle River', explores the drafting of the Convention Implementing the Schengen Agreement, which was signed in June 1990, an occasion marked by a ritual return to the Moselle River. Again, the account documents the labour of the negotiations, particularly the effort to devise 'compensatory measures' aimed at balancing free movement with security: a battery of technical procedures that would reinforce controls at external frontiers, provide for cross-border surveillance and police cooperation, and block illegal immigration into the Schengen area. The chapter addresses developments in European Community law and policy that informed the convention's drafting, as well as the emergence of protest by human rights advocates against Schengen's rules on asylum. It probes conflicts that prolonged the drafting process, which dragged on for five years, and reveals how revolutionary upheaval in Europe impinged on the Schengen laboratory. By the time of the convention's signing, the Berlin Wall had fallen, and the waning of the Cold War meant that the guarantee of free movement would apply in a world of newly permeable borders, deepening the concern of the Schengen states with security.

Chapter 4, 'The Problem of Sovereignty', considers the convention's ratification and the earliest organised resistance to its terms, which unfolded in national parliaments as lawmakers mounted a set of challenges, which assailed the secrecy of the Schengen negotiations as contrary to democratic process, defended the authority of the nation-state, and condemned the rules on asylum as a violation of human rights. It focuses on France, which was the first state to ratify the charter, in June 1991, but also where 60 deputies brought a claim to the nation's constitutional court, claiming that the accord contravened the French Constitution. The lawsuit amplified arguments made in parliamentary debate, invoking principles of French republicanism

that had inspired postwar polemics against integration. The chapter analyses a tradition of Gaullist, anti-Europe thought given classic expression by the author of the 1958 Constitution, Michel Debré. But dissent against Schengen was hardly the preserve of the right. In France, and later in Germany, fierce critiques of the accord came from the left, principally on behalf of asylum seekers denied refuge in the Schengen area.

Chapter 5, 'A Place of Risk', examines problems of policing and privacy that became yoked to Schengen's guarantee of free movement. It sets the intense preoccupation of the accord's framers with security in the context of heightened fear of acts of global terrorism committed on European soil. The chapter casts light on the establishment of the computerised data file known as the Schengen Information System, or SIS, mandated by the 1990 convention and used to track non-Europeans. It reveals how the surveillance tool became a focal point of concerns about information gathering and individual privacy that animated opposition to Schengen among international human rights organisations. SIS would become a cornerstone of the European Union Agency for Law Enforcement Cooperation, known as Europol, which began limited operations in 1994. Drawing on an oral interview I conducted with Europol's inaugural head, the chapter links the rise of transnational policing and the formation of a European security state to the abolition of internal border controls under the Schengen accord. It analyses risks associated with both the free movement of persons and the transnational surveillance of migrants crossing Schengen's frontiers.

Chapter 6, 'A *Sans-papier* Declaration of Free Movement as a Human Right', explores the popular insurgency of non-Europeans laying claim to recognition in the Schengen area. It focuses on the efforts of undocumented persons, migrants without papers — *les sans-papiers* — to obtain rights, beginning with the basic rights to cross national borders, seek asylum, and find refuge. The account centres on an uprising of the *sans-papiers* in Paris, in 1996, and the

transnational spread of their protest in a network of resistance enabled by new means of digital communication. Shifting the vantage point away from diplomats, it examines how people categorised as ‘aliens’ in the Schengen accord conceptualised free movement across borders as a human right. The chapter analyses the sceptical reception of their claims in the European Court of Human Rights, which recognised family bonds as the only defence against unfree movement and the exclusions embedded in Schengen, but also illuminates how the actions of the sans-papiers influenced theorists of human rights.

An epilogue turns to moments of retrospective reflection on the accomplishment of free movement as a principle of postwar European integration. Each was laden with distinct symbolism. In 1997, the year Schengen became part of EU law, a report on the free movement of persons prepared for the European Commission extolled the civic ideals of the European project. Its author was Simone Veil, a Holocaust survivor who became the first female president of the European Parliament. In 2007, a half-century after the adoption of the Rome Treaty, a commemoration of the treaty lamented the loss of humanism in the European project. The author was Catherine Lalumière, a signer of the 1985 Schengen accord on behalf of France. The epilogue concludes by setting the contrasting narratives of ascent and decline against the lessons learned by a sans-papier denied asylum in France. In 2014, as sans-papiers staged a march from France through Luxembourg to Belgium, Ababacar Diop wrote from Senegal of the urgency of protecting the right to privacy against abridgement by regimes of border control. A year later, with the onset of the European refugee crisis, Schengen states began restoring checks at their common borders.

Uncovering Schengen’s origins alters the story of European integration, revealing how the guarantee of free movement of persons became integral to Citizens’ Europe while also underwriting the formation of an internal market and enhancing the authority of member states

to secure external borders and surveil inhabitants. The Schengen Agreement enabled the circulation of people and goods across the frontiers of Europe. At the same time, in balancing the exigencies of freedom and security, the accord reinforced the distinction between foreigners and Europeans. What I show is that Schengen is a map of modern Europe that makes visible the perplexities of a newfound right of freedom of movement in a transnational territory.

CHAPTER 1 — IN THE *CHÂTEAU DE FONTAINEBLEAU*

A palace once home to French monarchs for some seven centuries was a peculiar setting for a proposal by a socialist statesman for the creation of ‘Citizens’ Europe’. But it was there, at the Château de Fontainebleau, in June 1984, that France’s president, François Mitterrand announced a project for a renewal of the European Community, one promising to respond to the needs of everyday Europeans and deepen their civic bonds. The animating principle of the proposal was freedom of movement for persons crossing Europe’s borders. A year later the principle of free movement would become inscribed in the Schengen Agreement.

‘Voilà’, proclaimed Mitterrand at Fontainebleau, at the close of a European Council meeting held at the resplendent palace, where a commitment emerged to amplify the political and social dimensions of European integration — on the foundations of a common market to construct a vision of Citizens’ Europe. A committee was formed to develop the elements of the project. The aspiration, Mitterrand declared, was ‘to give the political structures of the Community a new impetus, a content, and perhaps also a more precise definition’. Among the innovations foreseen might be a common European passport enabling free movement across the frontiers of the continent.¹

The aspiration for Citizens’ Europe drew on precepts developed at earlier moments of European planning, reaching back to the founding documents of European integration, to the Treaty of Rome, adopted in 1957, which laid the foundation for a common market, at a time of rapid economic growth framed by Cold War competition. The commitments announced at

¹ Présidence de la République, Service de Presse, ‘Conférence de Presse de Monsieur François Mitterrand, Président de la République Française, à l’Issue du Conseil Européen’, 26 June 1984, p.9, Folder 100, BAC 55/1995, Conseil Européen de Fontainebleau 25-26 juin 1984 (hereafter Fontainebleau), Historical Archives, European Commission, Brussels (hereafter Commission).

Fontainebleau were shaped as well by more recent experience, by the emergence of new conceptions of global citizenship and human rights in the 1970s, but also by the stalled progress of European integration due not least to the worldwide economic turmoil of that decade. As the nations of Europe confronted persisting economic recession, in the wake of the collapse of the Bretton Woods monetary system and the jolts of the oil crisis, planning commenced for joining the construction of a Citizens' Europe to the achievement of a common market for the exchange of commodities.²

Impinging on the plans for Citizens' Europe was a decision handed down by the European Court of Justice in February 1985. The decision, in *Gravier v. City of Liège*, made explicit the ambit of Community authority in guaranteeing free movement as an individual right, elaborating the principle set forth in the Rome treaty that the freedom of persons to cross borders depended on market activity— on engaging in gainful work or other economic pursuits. The case involved a French national studying cartoon art in Belgium, who claimed that a fee imposed on her education due solely to her status as a non-Belgian was discriminatory, impeding her free movement across borders. The decision offered a broad interpretation of economic activity, finding that the study of cartoon art counted as vocational training in striking down the fee. At the same time, however, *Gravier* affirmed the limits of freedom of movement granted by the Treaty of Rome, as belonging only to economic actors — as hinging on involvement in the market.³ The landmark decision came down from the court just as formal negotiations began on the accord that would create the Schengen area, illustrating why an intergovernmental agreement to enable the free movement of persons across national borders — irrespective of market motives — would emerge independently of Community institutions,

² See Anil Anwesti, 'The Myth of Eurosclerosis: European Integration in the 1970s', *L'Europe en. Formation*, 353-354, no. 3 (November 2009), pp. 39-53.

³ See *Gravier*.

as France, West Germany and the Benelux states undertook to fulfill the ideals of Fontainebleau by abolishing controls at their common borders.

This chapter explores the evolution of plans for Citizens' Europe at Fontainebleau and the judicial construction of individual rights in *Gravier* in order to understand the political and legal context for the guarantee of free movement announced in the Schengen accord. Fontainebleau offers insight into the ambitions of European leaders on the eve of Schengen. The vision set forth by Mitterrand reflected the theorisation, decades in the making yet not realised in European law, of a community of states oriented around the interests of their citizens, who aspired to work, marry, and travel across borders. Fontainebleau illuminates how plans for free movement and common citizenship gained currency at European summits and in legislative bodies. *Gravier*, meanwhile, illuminates the limits of free movement set by judges in courts of law. The legal dispute, precisely in turning on a topic so seemingly incidental to economic convergence, laid bare the absence of an alternative basis for free movement. It thus made stark what would be novel about Schengen, signed just four months after the decision in the case of the art student, and a year after Fontainebleau.

The summit at Fontainebleau and the *Gravier* case have not been juxtaposed in scholarship on European integration. Each has only a peripheral place in studies of free movement, transnational citizenship, and human rights; and neither has been systematically examined in analysis of the law of the European Community. Fontainebleau had geopolitical significance not fully captured in accounts that address it principally as the site of negotiations over fiscal matters.⁴ Citizens' Europe has not been considered a serious political project,

⁴ See Geoffrey Denton, 'Re-Structuring the EC Budget: Implications of the Fontainebleau Agreement', *Journal of Common Market Studies*, 23, no.2 (December 1984), pp.117-140; Karen M. Anderson, *Social Policy in the European Union* (London, 2015), p.60. For a fuller treatment of Fontainebleau, see Robert O. Keohane and Stanley Hoffman, eds., *The New European Community: Decisionmaking And Institutional Change* (New York, 1991). On European citizenship and Fontainebleau, see, Reiner Marcowitz and Andreas Wilkens, eds., *Une 'Europe des Citoyens': Société*

discounted as a rhetorical tactic of Mitterrand to gain leverage in Community policymaking.⁵ Such dismissal obscures how the concept of Citizens' Europe became a point of departure for Schengen's creation. The doctrinal development announced in *Gravier* went unreported in leading European newspapers, which tracked debates over university fees but not the entitlements of one art student.⁶ The case barely registers in major law journals, and it is absent from influential accounts of European jurisprudence. It is treated only in terms of the evolution of education law but not the legal doctrine shaping free movement.⁷ Almost nowhere do we hear the voices of the judges who decided *Gravier*, as they wrestled with the Court's position in Community governance, and with the role of the market in the making of Europe. Where the case does appear, it is examined only as evidence of an emerging Community-wide education policy.⁸

What Citizens' Europe and *Gravier* jointly reveal is that Schengen emerged in relation to Community planning and within the constraints of Community law. Citizens' Europe was never enshrined in statute or instituted as formal policy — whether at the transnational or national level. Some of its components, such as the idea of a European flag, were quickly implemented; others took longer to realise. It would not be until 1992, for example, that the concept of

Civile et Identité Européenne de 1945 à Nos Jours (Bern, 2014); Nils Jansen, *Binnenmarkt, Privatrecht und Europäische Identität: Eine Historische und Methodische Bestandsaufnahme* (Tübingen, 2004).

⁵ See Michael Burgess, *Federalism and European Union: Political Ideas, Influences, and Strategies in the European Community, 1972-1987* (London, 1991), p.116.

⁶ *Le Monde*, for instance, did not report on *Gravier* in February 1985.

⁷ Some discussion of the case appears in legal journals, such as *Common Market Law Review*, see Philippa Watson, 'Case 293/83, *Gravier v. City of Liège*', *Common Market Law Review*, 24, no.1(1987), pp.89-97; Peter Wytinck, 'The Application of Community Law in Belgium', *ibid.*,30, no.5(1993), pp.981-1020. *Gravier* is absent from Gareth Davies, *Nationality Discrimination in the European Internal Market* (The Hague, 2003); Alec Stone-Sweet, *Judicial Construction of Europe* (New York, 2004); Amrei Müller and Hege Elisabeth Kjos, eds., *Judicial Dialogue and Human Rights* (Cambridge, 2017).

⁸ See Nigel Johnson, 'From Vocational Training to Education: The Development of a No-Frontiers Education Policy for Europe?', *Education and the Law*, 11, no.3 (1999), pp.199-213; Stine Jørgensen, 'The Right to Cross-Border Education in the European Union', *Common Market Law Review*, 46, no.5 (2009), pp.1567-1590. The most extensive treatment is by an E.U. official, Gisella Gori, in 'Mademoiselle Gravier and Equal Access to Education: Success and Boundaries of European Integration' in *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, eds. Fernanda Nicola and Bill Davies (Cambridge, England, 2017), pp.446-470.

European citizenship found formal articulation in the Maastricht Treaty, which gave birth to the modern EU.⁹ But Citizens' Europe was pivotal in articulating a rationale for European union not premised solely on economic activity, which was the only basis that judges in *Gravier* found in Community law for the vindication of individual rights to free movement.

Guaranteeing the free movement of persons — and not just workers — was not a Community project at the time of Schengen's emergence. It was an undertaking, buttressing economic aspirations and yet transcending them, that would depend on the initiative of individual nations. Only inquiring into the origins and limits of Community institutions explains why states remained sovereign over a transnational project of free movement.

Mitterrand's plan for Citizens' Europe turned a meeting about money into a crucible for a new Europe. Britain's objection that it paid too much into agricultural support dominated Council talks at Fontainebleau, demonstrating that the social and political aims of Citizens' Europe were inseparable from financial considerations. 'The English position: Europe okay, check first', blared the headline of *Libération*, the centre-left French newspaper founded by Jean-Paul Sartre.¹⁰ In the telling of the press, the cohesion of the Community was at stake in the budgetary conflict. As *Le Monde* noted, Europe's leaders 'will hardly be able to speak of the political revival of the Community until the question of the budgetary compensation to be granted to the United Kingdom is addressed. If they cannot find a compromise before splitting

⁹ See Treaty of Maastricht.

¹⁰ 'La position anglaise: l'Europe d'accord, le chèque d'abord', *Libération*, 25 juin 1984. See Derek W. Urwin, *The Community of Europe: A History of European Integration Since 1945*, 2nd ed. (London, 1995), p.203.

up, Europe ... will enter a stormy zone'.¹¹ Council talks produced a solution in the form of a rebate awarded to Britain, but in resolving a budget crisis inherited from the past, Fontainebleau left the Community's leaders with a difficult question about the future.¹² 'Europe changes. But to become what?' asked *Le Point*, a French news magazine.¹³

Mitterrand had offered a preview of his answer to that question in a speech before the European Parliament the previous month, in which he proclaimed a vision of European integration that transcended market coordination. A former Vichy bureaucrat who embraced the cause of uniting Europe, the French president dismissed 'petty arguments' — an apparent reference to the budgetary dispute that would occupy Council talks — and declared the initial work of the Community, 'inherited from the war', complete.¹⁴ The question, Mitterrand said, was no longer how to 'reconcile' behind a 'common task', but how Europe might take control of its own 'destiny', investing in electronics, space, transport, and culture. The one area where Europe led the world was in 'human rights', Mitterrand celebrated, only to add a foreboding note: 'we are all concerned about the increasing ground being gained by terrorism and oppression almost everywhere in the world'.¹⁵ He foresaw that new threats would test Europe's most distinctive traditions. To Mitterrand, the question was no less profound than Europe's essence. He quoted American poetry before the European Parliament in announcing of

¹¹ Philippe Lemaître, 'La relance de l'Europe au sommet de Fontainebleau', *Le Monde*, 26 juin 1984.

¹² On the rebate, see Johannes Lindner, *Conflict and Change in EU Budgetary Politics* (Abingdon, 2006), p.125; Gabriel Medina and Clive Potter, 'The Nature and Developments of the Common Agricultural Policy: Lessons for European Integration from the UK Perspective', *Journal of European Integration*, 39, no.4 (June 2017), pp.373-388; Pierre Boulanger and George Philippidis, 'The EU Budget Battle: Assessing the Trade and Welfare Impacts of CAP Budgetary Reform', *Food Policy*, 51 (February 2015), pp.119-130.

¹³ 'Europe: la relance', *Le Point*, 2 juillet 1984.

¹⁴ Philip Short, *Mitterrand: A Study in Ambiguity* (London, 2014), p.86; Ulrich Lappenküper, 'Le plus Germanophile des Chefs d'Etat Français? François Mitterrand und Deutschland 1916–1996', *Historische Zeitschrift*, 297, no.2 (2013), pp.390-416; Antoine Halff, 'When Mitterrand Cozied up to Marshal Petain: French in a Furor over a President's Secret Past', *Forward*, 9 September 1994; Mitterrand Speech, 24 May 1984, p.2.

¹⁵ Mitterrand Speech, 24 May 1984, p.6.

Europe, ‘as Walt Whitman puts it in a line I very much like, it can at last become what it is’, a reference to the motif of becoming in ‘Song of Myself’.¹⁶

The French president was not alone in seeking new meaning for Europe. His Europeanist ally in Germany, Chancellor Helmut Kohl of the Christian Democratic Union, travelled to the French border in March 1984 to deliver remarks anticipating the June elections to the European Parliament. Speaking in Aachen’s town hall, he framed political unification as an international imperative made acutely necessary by the Cold War. ‘The Soviet Union will only get along with the construction of Europe to the extent that we make it a reality’, argued the West German chancellor. Projecting European unity would not only protect the western half of the continent from Soviet ‘hegemonic power’, he argued, but also give hope to people behind the Iron Curtain. ‘We know that a real unification of Europe would also shine on Central and Eastern Europe’, he said. The ideological struggle against communism also gave urgency to the completion of the single market, whose legitimacy rested on a political substructure. ‘It would be a mistake to believe that we can create and maintain in this world a common economic space without ever daring to take the step towards political unity’, the chancellor reasoned. Only a ‘political Europe’, he argued, guaranteed the ‘irreversibility of the unification process’. The market, Kohl observed, did not stand on its own; it rested on values that commerce alone could not sustain.¹⁷

¹⁶ Ibid., p.2; Walt Whitman, ‘Song of Myself (1892)’, <https://www.poetryfoundation.org/poems/45477/song-of-myself-1892-version>.

¹⁷ ‘Discours du Chancelier à l’Europa-Union’, 12 mars 1984, Folder 3, Box 1,971, Direction d’Europe, Ministère de l’Europe et des Affaires Étrangères, La Courneuve, Seine-Saint-Denis, France (hereafter MEAE). On the relationship between European integration and Cold War competition, see, e.g., Corine Defrance, *Entre Guerre Froide et Intégration Européenne: Reconstruction et Intégration, 1945-1963* (Villeneuve-d’Ascq, 2012); John van Oudenaren, *Uniting Europe: European Integration and the Post-Cold War World* (Lanham, Md., 2000); Lars-Erik Cederman, *Constructing Europe’s Identity: The External Dimension* (Boulder, 2001). On Kohl and the European project, see, e.g., Hanns Jürgen Küsters, ‘Helmut Kohl und Frankreich: Einführung’, *Historisch-Politische Mitteilungen*, 20, no.1 (2013), pp.229-242; Paul B. Stares, ed., *The New Germany and the New Europe* (Washington, D.C, 1992); Helmut Kohl, *Deutschlands Zukunft in Europa: Reden und Beiträge des Bundeskanzlers* (Herford, 1990).

At Fontainebleau, Mitterrand reframed the very essence of the Community. It is ‘the Europe of people, the Europe of citizens’, he told the press.¹⁸ *Le Figaro*, the Gaullist French daily, labeled Mitterrand’s notion ‘interesting’, but found it far removed from reality.¹⁹ And it was not only the right-wing press that voiced scepticism. ‘Is it possible to imagine the implementation of a great political project in a period of economic recession, in a period of crisis that by definition exacerbates nationalisms...?’ mused a report in *Le Quotidien de Paris*. The writer warned that Mitterrand operated on ‘a classic but questionable methodology: to transcend the contradictions of the moment... in order to fix one’s gaze on a more noble objective... the construction of political Europe’.²⁰ The French president stood accused of using European idealism as a sleight of hand.

Mitterrand also had to address substantive objections, which reflected France’s shifting political landscape, jolted by right-wing extremism. ‘All is not allowed’, the French president vowed. The assurance came in response to a query from the press: ‘Mr. President, there is a word, if you please, that you have not pronounced ... that is the word ‘terrorism’.... Has the Council not addressed this issue...?’ The threat of terrorism had grown more urgent over the previous 15 years, a point reflected in Mitterrand’s assurance that ‘the free passage of frontiers’ would not impair police observation.²¹ The pressure had been intensified by the recent electoral gains of the Front National, the nationalist, anti-immigrant party founded by Jean-Marie Le Pen. In 1983, the party came to power in the town of Dreux, about 100 kilometres west of Paris.²² The FN, decrying immigration as a threat to French national identity and a source of

¹⁸ Mitterrand, Press Conference, p.8.

¹⁹ Robert de Suzannet, ‘Les Dix face à l’avenir de l’Europe’, *Le Figaro*, 25 juin 1984.

²⁰ Pierre Beylau, ‘L’obsession de Mitterrand’, *Le Quotidien de Paris*, 25 juin 1984.

²¹ Niall Ferguson, ‘Crisis, What Crisis? The 1970s and the Shock of the Global’, in *The Shock of the Global: The 1970s in Perspective*, eds. Niall Ferguson, Charles S. Maier, Erez Manela and Daniel J. Sargent (Cambridge, MA., 2010), p.3; Mitterrand, Press Conference, p.15.

²² See Françoise Gaspard, *Une Petite Ville en France* (Paris, 1990).

criminality, won 10 seats and more than 11 percent of the vote in the European Elections held on 17 June 1984, days before the summit in Fontainebleau.²³ The query of the journalist would come to haunt European border policy, foreshadowing the difficulty of reconciling security and free movement.

The formal conclusions emerging from the Council meeting addressed a range of issues, foremost among them budgetary imbalances highlighted by Britain. The first four points of the conclusions described financial agreements. But the fifth contained a brief commitment to carrying out a European social policy, addressing problems of ‘technological change and social adjustment’. And the sixth was dedicated to Citizens’ Europe. It stretched across several paragraphs and was one of only two themes that required subpoints. ‘The European Council considers it essential that the Community should respond to the expectations of the people of Europe by adopting measures to strengthen and promote its identity and its image both for its citizens and for the rest of the world’, the conclusions stated, echoing Kohl’s argument for trumpeting European influence globally. It called for the creation of a European passport, available to member-state citizens by 1 January 1985. Other ideas included a single document for transporting goods; the ‘abolition of all police and customs formalities for people’ crossing internal borders; the equivalence of European diplomas; heraldic devices, such as a flag and anthem; European sports teams; and youth work in the ‘Third World’. The Council gave authority to an ad hoc committee, composed of representatives of the ten heads of state or government, to study possibly features of Citizens’ Europe and make proposals. The conclusions did not mention terrorism.²⁴

²³ Pierre Bréchon and Subrata Kumar Mitra, ‘The National Front in France: The Emergence of an Extreme Right Protest Movement’, *Comparative Politics*, 25, no.1(October 1992), p.65.

²⁴ European Council Meeting at Fontainebleau, Conclusions of the Presidency, 25-26 June 1984, http://www.consilium.europa.eu/media/20673/1984_june_-_fontainebleau__eng_.pdf.

Rather than a new political authority, what the Council advanced at Fontainebleau was a new political identity. The proposals would turn each individual into a member of a European demos. ‘The first pure European citizen may be on the way’, wrote the Brussels correspondent for *The Daily Telegraph*, Britain’s centre-right daily. ‘He, or she, will travel on a European passport, sing a European anthem, march under a European flag and play for Europe in international sport’. A new sort of being was in gestation: ‘the nation-less European citizen’. By altering the terms of allegiance, so, too, did the proposal promise to transform the terms of legitimate political authority.²⁵

Mitterrand spoke in the language of restoration, not revolution — restoration of the Treaty of Rome. Nicely put Citizens’ Europe would remake the Community, he vowed, ‘by returning to the Treaty or the spirit of the Treaty, but going beyond...’ Here lay the lesson of Fontainebleau, Mitterrand told the press: ‘it was one of the strongest observations of the Fontainebleau meeting to observe that the structures inherited from the Treaty of Rome had to be restored to their full strength...’²⁶ In the Treaty of Rome, he found justification for deeper political and social integration, binding people and not just markets.

The Treaty of Rome was what remained when plans for a supranational political body ran aground in the decade after the war. The European Political Community, championed by the Belgian foreign minister, Paul-Henri Spaak, would have combined the European Coal and Steel Community and the European Defense Community and formed ‘a European Community of a supranational character’.²⁷ But these ideas were stillborn by 1954, rejected by French

²⁵ Alan Osborn, ‘Preparing for the First Euro-Citizen’, *Daily Telegraph*, 28 June 1984. On the link between citizenship and state power, see Saskia Sassen, ‘The Repositioning of Citizenship and Alienage: Emergent Subjects and Spaces for Politics’, *Globalizations*, 2, no.1(2005), pp.79-94.

²⁶ Mitterrand, Press Conference, pp.9, 7.

²⁷ ‘Council of Europe: European Political Community’, *International Organization*, 9, no.2(May 1955), pp.301-302. See also Berthold Rittberger, ‘“No Integration without Representation!” European Integration, Parliamentary Democracy, and Two Forgotten Communities’, *Journal of European Public Policy*, 13, no.8 (2006), pp.1211-1229.

lawmakers fearful for national sovereignty.²⁸ Spaak scaled back his ambitions, authoring a 1956 report proposing a common market and cooperation in the energy, transport, and telecommunications sectors.

In his report, the Belgian diplomat made the case for economic union using the language of individual rights. Addressing labour, he wrote that ‘rights acquired by foreign workers’ would ensure equal employment opportunities. When the gale of creative destruction swept from one state to another, generating lay-offs, ‘workers affected ... have the right’ to resettlement and retraining. He wrote of an ‘unrestricted right’ to obtain, transfer, and use capital. The report recognised ‘the right to create new enterprise’.²⁹ Spaak made individual rights integral to European integration — rights to participate in resurgent western European commerce.³⁰

The common market advanced by the Spaak report was codified in the 1957 Rome Treaty, which established the European Economic Community. At its centre lay a customs union. But it was more than a trading bloc that concerned negotiators in Rome. They went beyond the Spaak report in adopting a body of rules that formed Europe’s constitutional foundation.³¹

The Treaty articulated principles loftier than its limited mandates — particularly in addressing free movement. ‘The abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital’, the document stated, served not just ‘a

²⁸ ‘La C.E.D. est rejetée’, *L’Humanité*, 31 août 1954.

²⁹ Paul-Henri Spaak, *The Brussels Report on the General Common Market* (referred to as the Spaak Report), (Luxembourg, June 1956), pp.19, 18, 19. Paul-Henri Spaak, ‘The Integration of Europe: Dreams and Realities’, *Foreign Affairs*, 29, no.1 (October 1950), pp.94-100; Paul-Henri Spaak, ‘Europe in a Western Community’, *Annals of the American Academy of Political and Social Science*, 282, no.1 (July 1952), pp.45-52; Pierre-Henri Laurent, ‘Paul-Henri Spaak and the Diplomatic Origins of the Common Market, 1955-1956’, *Political Science Quarterly*, 85, no.3 (September 1970), pp.373-396.

³⁰ On the distinction between human rights and social and economic rights, see Samuel Moyn, *The Last Utopia* (Cambridge, Mass., 2010), pp.222-223.

³¹ Robert Schütze, *European Union Law* (Cambridge, 2015), p.13.

harmonious development of economic activities' but also the Community's stability, its expansion, a higher standard of living for its citizens, and 'closer relations between the States'. Yet the endeavour that served this capacious ideal was developing a common economic policy. The treaty's title on free movement addressed only the freedom of workers, and, where the document borrowed Spaak's rights language, it operated within a similar economic framework. 'Migrant workers and their dependants', the Rome Treaty stated, had the 'right' to social security. The treaty recognised the freedom of establishment, meaning 'the right to take up and pursue activities as self-employed persons and to set up ... companies or firms...' And it spoke of 'the right', in the workplace, 'of association, and collective bargaining between employers and workers'.³² The Treaty of Rome did not uniformly locate individual rights in economic life. The treaty made no mention of commercial exchange in suggesting that member states work together to provide, for all Community members, 'the protection of persons and the enjoyment and protection of rights under the same conditions as those accorded by each State to its own nationals'.³³ The language implied that integration required not just economic liberty but fundamental human protections. And it suggested that individual rights were the mechanism for turning privileges attached to national citizenship into universal guarantees.

The idea of placing people at the centre of European union gained prominence in the 1970s, as the continent's leaders examined how a passport union might complement the common market. The consideration of internal mobility coincided with the imposition of new barriers to non-European workers as European economies contracted.³⁴ These measures failed to curb the influx of foreigners, who arrived illegally or as asylum seekers.³⁵ A decade before

³² Treaty of Rome, arts.3, 2, 51, 52, 118.

³³ Treaty of Rome, art.220.

³⁴ See Christoph Rass, 'Temporary Labour Migration and State-Run Recruitment of Foreign Workers in Europe, 1919–1975: A New Migration Regime?' *International Review of Social History*, 57, no.S20 (2012), pp.191-224.

³⁵ Paoli, 'France and the Origins', pp.262-63.

Fontainebleau, the European Council convened in the French capital in 1974, calling for the introduction of a uniform travel document. The idea captured the attention of European leaders the same month that the Soviets introduced new internal passports.³⁶ The Council's members said a passport union would involve consideration of whether 'citizens of the nine Member States could be given special rights as members of the Community'.³⁷ Unrestricted travel implied a zone of common citizenship, demarcated by the possession of individual rights. When the European Commission endorsed the idea, it likened the transit of people to the transit of goods, finding that the 'expression 'Passport Union' ... calls to mind ... the concept of Customs Union'. It reasoned that, 'Establishing a Passport Union would provide arrangements in respect of individuals similar to those provided by a Customs Union in respect of goods'. The report reflected a blunt logic, transposing a paradigm of commercial circulation onto the movement of persons.³⁸

The first formal articulation of Citizens' Europe came in a 1975 report to the European Council by the Belgian prime minister, Leo Tindemans, tasked at the 1974 summit with defining the term 'European Union' — an aspirational title not applied to the Community until 1992. Tindemans understood the urgency of free movement, having fled Belgium when the Nazis invaded in 1940. A lifelong friendship with another refugee from Nazi barbarism, Henry Kissinger, began at Harvard, where Tindemans took a course with the young professor in

³⁶ Their efforts hardly registered in the press. 'Paris Summit Achieved Nothing, Says Haughey', *Irish Times*, 14 December 1974; 'Soviet Announces New Internal Passport System', *New York Times*, 26 December 1974.

³⁷ Paris Summit, Final Communiqué, *Bulletin of the European Communities*, 12(9-10 December 1974), p.3, https://www.cvce.eu/content/publication/1999/1/1/2acd8532-b271-49ed-bf63-bd8131180d6b/publishable_en.pdf.

³⁸ European Commission, 'Report on the establishment of a working party instructed to review the possibility of the establishment of a Passport Union at Community level', *Bulletin of the European Communities Supplement*, 7 (3 July 1975), p.2, https://www.cvce.eu/obj/commission_report_on_the_implementation_of_a_passport_union_3_july_1975-en-ad88dd3f-3ae3-4d50-9a9c-bf99493b3e70.html.

1962.³⁹ In contrast to the ‘real politic’ view of international relations championed by his teacher-cum-friend, Tindemans’ diagnosis of Europe’s ills foregrounded ideology and popular legitimacy. To prevent a ‘return to selfish national attitudes’, Tindemans argued, ‘We must listen to our people. What do the Europeans want? What do they expect from a united Europe?’ He proposed a ‘citizens’ Europe’, recognising that the ‘construction of Europe is not just a form of collaboration between States’ but a ‘*rapprochement* of peoples who wish to go forward together’. Distrust of Europe, induced by the end of postwar economic expansion, demanded a new idea.⁴⁰

Citizens’ Europe had two central elements: ‘Protection of rights’ and ‘External signs of solidarity’. Globalisation had rendered the nation an insufficient guardian of ‘rights and fundamental freedoms’, Tindemans reasoned. Citizens’ Europe entailed the transnational enforcement of liberties, meaning, for example, the right of direct appeal to the European Court of Justice. Such a scheme would return, at the European level, ‘that element of protection and control of our society which is progressively slipping from the grasp of State authority due to the ... internationalisation of social life’. To foster solidarity, Citizens’ Europe was to create a common experience of European life. Tindemans suggested a passport union and cross-border health care. ‘The day that Europeans can move about within the Union, can communicate among themselves and when necessary receive medical care without national frontiers adding to the problems of distance’, the Belgian diplomat predicted, ‘European Union will become for them a discernible reality’. Anything less was merely ‘technocratic Europe’.⁴¹ The report met a subdued response when it was released in 1976. ‘No fanfare for Tindemans’, noted the

³⁹ Dan Bilefsky, ‘Leo Tindemans, 92, Former Prime Minister of Belgium’, *New York Times*, 7 January 2015; Leo Cendrowicz, ‘Leo Tindemans: former Belgian Prime Minister’, *Independent*, 1 January 2015; Leo Tindemans, *De memoires: gedreven door een overtuiging* (Tielt, 2002), p.589.

⁴⁰ Leo Tindemans, ‘Report on European Union, presented to the European Council, December 29, 1975’, *Bulletin of the European Communities*, Supplement 1(1976), pp.2, 11, 26.

⁴¹ Tindemans, ‘Report on European Union’, pp.28, 32, 27, 12.

Guardian.⁴² Instead of inflaming conservative fears of encroachment on national sovereignty, the report drew criticism from left-wing officials for recommending enhanced Community powers at the expense of national economic autonomy.⁴³

The emphasis in the Tindemans report on democratic legitimacy, European identity, and individual rights resonated in the Draft Treaty Establishing the European Union, approved by the European Parliament in 1984 but spurned by the member states. The document's author was Altiero Spinelli, an Italian member of the European Parliament, in the Communist and Allies Group. A disciple of Antonio Gramsci, Spinelli was 20 when he was detained for writing critically about the fascist government. In 1941, he and a fellow prisoner completed 'For a Free and United Europe', a manifesto deploring nationalism and calling for the replacement of sovereign nation-states with a supranational federation. After the war, the former dissident took his case for European federalism to Spaak, but the Belgian statesman had other plans, set forth in his 1956 report.⁴⁴ Spinelli's alternative found articulation three decades later in his Draft Treaty, known as the Spinelli Plan, which recommended a fully federal Europe, based on collective macroeconomic, trade, and foreign policies and central institutions powerful enough to enforce those rules. His emphasis on citizenship prefigured features of Europe that would be formalised by the 1992 Maastricht Treaty.⁴⁵ Unambiguously, the Spinelli Plan stated: 'The citizens of the Member States shall *ipso facto* be citizens of the Union. Citizenship of the Union shall be dependent upon citizenship of a Member State...'⁴⁶ This formula promised to

⁴² John Palmer, 'No Fanfare for Tindemans', *Guardian*, 8 January 1976.

⁴³ 'Little in report on E.E.C. for Socialists', *Irish Times*, 30 January 1976.

⁴⁴ See Christopher Deliso, *Migration, Terrorism, and the Future of a Divided Europe: A Continent Transformed* (Santa Barbara, Calif., 2017), p.35; Richard T. Griffiths, 'The Founding Fathers', in *The Oxford Handbook of the European Union*, eds. Erik Jones, Anand Menon, and Stephen Weatherill (Oxford, 2012), p.187.

⁴⁵ Most scholarship dates European citizenship to Maastricht, though theorized earlier, see Andrew Geddes, *Immigration and European Integration: Towards Fortress Europe?* (Manchester, 2000), p.57.

⁴⁶ 'Draft treaty' establishing the European Union', *Bulletin of the European Communities* 2(14 February 1984) p.5, https://www.cvce.eu/en/obj/draft_treaty_establishing_the_european_union_14_february_1984-en-0c1f92e8-db44-4408-b569-c464cc1e73c9.html.

transform member-state citizens into transnational legal subjects, turning Citizens' Europe from an ideal into a practical description of a transnational populace — one nonetheless premised on national belonging. The press found echoes of the Spinelli Plan, which embraced 'principles of pluralist democracy, respect for human rights and the rule of law', in Mitterrand's speech to the European Parliament before the Fontainebleau summit.⁴⁷

When Mitterrand unveiled his proposal for Citizens' Europe at Fontainebleau, it was Spaak's report, which led to the Treaty of Rome and formed the foundation of the European Community, that the press pointed to as a parallel. The 1956 report had omitted many of the civic and political themes revived by Mitterrand. Without it as a benchmark, however, the litany of recommendations characterising Citizens' Europe resembled only surrealist poetry, observed *Le Matin*, a Paris daily. The newspaper found a counterpart for Mitterrand's catalogue of ideas in 'Jacques Prévert's immortal Inventory', the 1945 poem that records a series of random objects and images, from 'a few flowers' to 'one raccoon ... another raccoon ... five or six raccoons'. Citizens' Europe resembled the inventory, the newspaper quipped, 'despite the absence of a raccoon'.⁴⁸ An Irish journalist labeled Citizens' Europe a 'dream'.⁴⁹

The ad hoc committee on Citizens' Europe, appointed by the European Council at Fontainebleau, bore responsibility for realising Mitterrand's dream. Its chairman was Pietro Adonnino, an Italian member of the European Parliament. Like Spinelli, he won a seat in the

⁴⁷ Draft treaty', p.4; Beylau, 'L'obsession de Mitterrand'.

⁴⁸ "L'inventaire" de l'Europe du Citoyen', *Le Matin*, 27 June 1984; Quoted in William F. Baker, *Jacques Prévert* (New York, 1967), pp.88-89.

⁴⁹ Dennis Kennedy, "'People's Europe' Still a Dream', *Irish Times*, 28 June 1984.

first direct elections of 1979. He was a Christian Democrat, not a communist. Born in 1929, in Rome, Adonnino was an attorney, professor at the Royal Naval Technical Institute in Naples, and president of the International Fiscal Association.⁵⁰ A technocrat, the chairman was clipped in communication. In a letter to the prime minister of Ireland, Garret FitzGerald, then president of the European Council, Adonnino introduced the first report on Citizens' Europe by writing enigmatically that 'the Committee intends to stress the political role it has to play'.⁵¹

The report, issued in March 1985, focused on border checks and the equivalence of university diplomas. Above all, it underscored free movement, equating the circulation of people and the circulation of goods, and finding that both were key to open markets. 'This is a necessary corollary of the programme for the completion of the internal market', the report stated. Implicit was an analogy between people and goods, and an assumption that a market conducive to competition and economies of scale, one in which all factors of production flowed freely, would require human mobility.⁵²

The report also noted prerequisites to free movement, ranging from the harmonisation of taxes to the gradual coordination of policies on third-country nationals. Jacques Delors, the president of the European Commission, had proposed 1992 as the year in which Community institutions should strive, as part of the completion of the internal market, to realise a 'Europe without borders', the report noted. But heads of state and government had promised progress in 1985. The European Council could facilitate this aim, the report advised, by instructing member states to simplify the control of member-state citizens crossing internal borders. Simple visual checks could be used to monitor vehicles proceeding at reduced speed and displaying a

⁵⁰ Pietro Adonnino, European Parliament, http://www.europarl.europa.eu/meps/en/957/PIETRO_ADONNINO_home.html; Emanuele Isidori, *Pedagogia, Sport e Relazioni Internazionali: Dall'analisi del Contesto alla Metodologia di Sviluppo* (Rome, 2016), p.18.

⁵¹ Pietro Adonnino to Dr. Garret FitzGerald, n.d., Folder 1159, BAC 224/1994, Fontainebleau, Commission.

⁵² Ad Hoc Committee on a People's Europe, *Report to the European Council*, 29 and 30 March 1985, 5, Folder 1159, BAC 224/1994, Fontainebleau, Commission.

green sticker featuring a white 'E', which would signal compliance with police as well as fiscal and monetary rules.⁵³ Airports and seaports would prove more complicated, as had been emphasised at the March meeting of the ad hoc committee, where discussion of the free movement of persons took priority. The Danish representative, Torben Mailand Christensen, observed that the European passport could be the non-vehicular counterpart of the green sticker and urged the elimination of all exit checks starting in July.⁵⁴

The committee's second and final report, issued in the summer of 1985, addressed common European identity. It focused on rights, cultural exchange, and Community identity. The rights at stake in the committee's work were political, in contrast to the emphasis on economic guarantees in Spaak's report. They ranged from freedom of speech to the franchise of non-nationals. The committee was preoccupied with facilitating a common European worldview, echoing Tindemans' proposals in examining television and museums and proposing the creation of a Euro-lottery and an academy of science, technology, and art. Especially salient was education — youth exchanges, language courses, sport, and volunteer work. The future of Europe, the report stated, depended on 'the Community's image in the minds of its people'. The report concluded with heraldic devices — iconography and other features to rally support and arouse solidarity. For an emblem, the committee recommended a blue rectangle with twelve stars, variants of which had been used since the 1950s. In deciding on an anthem, the committee deemed 'Ode to Joy', Beethoven's Ninth Symphony, 'representative of the European idea'.⁵⁵

⁵³ Ibid., pp. 5, 6.

⁵⁴ Compte-rendu de la 9ème réunion du Comité ad hoc 'Europe des citoyens' des 4 et 5 mars 1985, Bruxelles, 6 mars 1985, 1, Folder 375, BAC 201/1989, Fontainebleau, Commission.

⁵⁵ Comité ad hoc 'Europe des citoyens', *Rapport au Conseil Européen*, 28-29 June 1985, p. 19, 20, 21, 22, 29, 30 Folder 1159, BAC 224/1994, Fontainebleau, Commission.

At its June 1985 meeting in Milan, the same month that delegates from five member states met in Schengen, the Council adopted the final report virtually wholesale, just as the interim report had been adopted in March. In certain cases, such as the use of the European flag, a change took effect without much delay; a ceremony in 1986 saw the banner rise outside the seat of the European Commission in Brussels. Other recommendations exposed divisions in the European Community — as well as a measure of idealism in aspirations for Citizens' Europe.⁵⁶ National delegations proposed means of qualifying the principle of free movement. Representatives from Greece, Ireland, and Britain were adamant about the retention of systematic passport checks.⁵⁷ Noting that Britain, Denmark, and Greece had dissented from a vote to hold an intergovernmental conference that fall on political reform and free movement, the press warned of a 'Disunited Europe'.⁵⁸ Germany was caught between transatlantic ties and Mitterrand's vision of an independent Western Europe. The British were intractable. The fear in Paris was that the French Socialist's grand vision would produce only trivial results.⁵⁹

Economic planning created less division. At the June meeting, the European Council adopted the Commission's White Paper on the Completion of the Internal Market, which joined Citizens' Europe to the aims of economic harmonisation. The White Paper was a detailed manual on how to turn Europe into an integrated commercial juggernaut. It set forth roughly 300 proposals on the removal of physical, fiscal, and technical barriers by 1992. The White Paper devoted an entire section to the 'new initiative in favour of Community citizens'

⁵⁶ European Council, 'Conclusions, June 28 and 29, 1985', *Bulletin of the European Communities*, Supplement 7(1985), <http://repositori.uji.es/xmlui/bitstream/handle/10234/49877/Suplemento7-85en.pdf?sequence=1>.

⁵⁷ Memo for the members of the Commission, Meeting of the Committee of Permanent Representatives, European Commission, 27 September 1985, 5, Folder 1159, BAC 224/1994, Fontainebleau, Commission.

⁵⁸ "Disunited Europe', *Irish Times*, 1 July 1985, p.11; Nigel Hawkes, 'Defeat for Britain in EEC Split on Reform', *The Observer*, 30 June 1985, p.2.

⁵⁹ La rencontre Kohl-Mitterrand à Konstanztz – preparation pour Milan, n.d., B18779/16 Cooperation Politique Européenne 1984-1985, Archives Diplomatiques: Affaires Etrangères, Commerce Extérieur et Coopération au Développement, Brussels (hereafter ADAE). See Antje Wiener, 'Forging Flexibility — the British 'No' to Schengen', *European Journal of Migration and Law*, 1, no.4 (January 1999), pp.441-63.

but focused mainly on the right to movement tied to work.⁶⁰ Still, the Commission was keenly attuned to the broader stakes of free movement, and in a series of memos addressing Citizens' Europe, it sought to fuse the political project emerging from Fontainebleau and the market initiatives once again underway after the economic troubles of the 1970s. Piecemeal changes, such as reducing the duration of controls, would be insufficient, as the Commission advised the Council following the 1984 meeting at Fontainebleau. For 'the threat of control as it currently stands gives the European citizen the impression of an unfinished or even non-existent Community', the Commission observed. It had issued the same warning, the Commission stated, in an earlier communication on consolidating the internal market, which it had submitted to the Fontainebleau Council. 'In fact, this document, even though its approach is much broader since it concerns the internal market in all its aspects, contains some of the actions expressly mentioned by the European Council of Fontainebleau in favor of the European citizen', the Commission noted. The aims of the internal market, the Commission suggested, subsumed those of Citizens' Europe.⁶¹

Where, then, did the difficulty lie? A September 1985 Commission memo summarised the progress of the previous fifteen months, since Mitterrand had first announced the aims of Citizens' Europe with a simple, 'Voilà'. The report restated the gist of the French President's agenda. It noted that Citizens' Europe meant the extension of rights of free movement and residence — granted by the Treaty of Rome 'only to the self-employed, workers and recipients

⁶⁰ *Completing the Internal Market: White Paper from the Commission to the European Council, June 14, 1985*, COM(85) 310 final, p.25, http://europa.eu/documents/comm/white_papers/pdf/com1985_0310_f_en.pdf, (hereafter *White Paper on Internal Market*). See also Richard K. Abrams, Peter Cornelius, Per L. Hedfors, and Gunnar Tersman, *The Impact of the European Community's Internal Market on the EFTA* (Washington, D.C., 1990), p.5.

⁶¹ 'Projet de Communications de la Commission au Conseil Consacrée aux Suites à Donner aux Conclusions de Fontainebleau Relatives à l'Europe des Citoyens', n.d., 10,11, Folder 50, BAC 314-2014, Fontainebleau, EC; Commission of the European Communities, *Consolidating the Internal Market* (Communication from the Commission to the European Council, Fontainebleau, 25-26 June, 1984), COM (84)/350 final (9 July 1984), pp.2,4, <http://aei.pitt.edu/2803/1/2803.pdf>.

of services' — to ordinary people, such as 'pensioners and others'. The Council gave its approval to the idea. Yet there was no action in the Internal Market Council or the General Affairs Council, two committees of the Council of Ministers, a body that shared legislative authority with the European Parliament.⁶²

The limits of existing Community institutions to realise the vision of Citizens' Europe were underscored by a legal judgment issued in February 1985, in a case involving citizenship, free movement, and the market. 'The problem has been the different interpretation given to the recent judgment of the European Court of Justice... which prohibited discrimination on nationality grounds between students seeking access to vocational training courses', the Commission's General Secretariat explained. The judgment was in *Gravier v. City of Liège*. The Commission construed the court's decision to mean that students had a right of residence in other member states under the Treaty of Rome. But Community member states, along with the European Council's legal service, maintained that the judgment did not speak to a right of residence. At stake in the disagreement was the question of whether there were social protections arising from the Treaty of Rome that Community institutions could enforce, or whether the states remained sovereign over such guarantees as the right to residence and passport-free travel.⁶³

The question of how broadly Community law spoke to social guarantees, such as free movement, stalled plans for Citizens' Europe and laid bare the need for action at the

⁶² European Commission, Meeting of the Committee of Permanent Representatives, 25 September 1985, Memo for the members of the Commission, 27 September 1985, BAC 224/1994 n.1159 (1985), p.2, Commission.

⁶³ European Commission, Meeting of the Committee of Permanent Representatives, p.2.

intergovernmental level. National governments would come to take up the mantle by embarking on the Schengen process. The legal dispute in *Gravier* arose in 1982, when a French woman moved to Belgium to study cartoon art. Françoise Gravier enrolled in a four-year course of higher art education at the *Académie Royale des Beaux-Arts* in Liège, a small city lined with narrow alleyways. She was unmarried, and her parents lived in France.⁶⁴

Gravier's studies provoked a contest over an enrolment fee of 24,622 Belgian Francs that reached the European Court of Justice and altered the legal meaning of education, work, non-discrimination, and free movement. The opinion, delivered on 13 February 1985, opened Europe's borders to students. It assigned the right of free movement to people not involved in traditional labour activity. And it reinforced the doctrine of non-discrimination central to transnational jurisprudence, as well as to an emergent idea of European citizenship affording entitlements across borders. It vindicated individual rights arising from the Treaty of Rome.⁶⁵

But the legal ruling also affirmed the commercial cast of European rights emanating from the Community's founding charter.⁶⁶ Rather than expanding the right to move, the court expanded the definition of activities tied to work authorising movement, enlisting both treaty law and Community statute to uphold economic self-determination rather than social interdependence and universal rights. Gravier did not specifically lodge her argument in the treaty's provisions on free movement; indeed, she had not been barred from entry into Belgium. She looked instead to Article 7, which prohibited discrimination on grounds of nationality, and Article 59, which called for the elimination of obstacles to the freedom to provide services.⁶⁷ Yet the law of free movement pervaded her case. Free movement was indispensable, in her

⁶⁴ Case 293/83, *Gravier v. City of Liège* (1985), Procédure écrite, Instruction, 28 December 1983, 2, Historical Archives, Court of Justice of the European Union, Luxembourg (hereafter ECJ).

⁶⁵ *Gravier*.

⁶⁶ On the constitutionalisation of the Treaty of Rome, see, e.g., Stone-Sweet, *Judicial Construction*, p.65.

⁶⁷ *Gravier*, pp.608,609; Thijmen Koopmans, Rapport d'Audience 2 (1983), *Gravier v. City of Liège*, p.2, ECJ; Luc Misson, 'Observations Présentées par Mademoiselle Gravier', 10 March 1984, p.1, 2, 5, ECJ.

telling, to accessing services. So, too, it was fundamental to the ban on national discrimination, as the circulation of persons was what required their protection in different member states. More broadly, her case shaped the doctrine of free movement by addressing the reach of Community law beyond the realm of the market. This question was at the heart of human mobility — who could guarantee it, on what terms, and to whom. The case testifies to the dominance of economic convergence as the basis of integration, whose aims seemed briefly to broaden at Fontainebleau.

‘All foreign students must be aware that such education is not free of charge’. So declared the arts academy in rejecting Gravier’s request for an exemption from an enrolment fee, called a *minerval*, imposed on foreign students. When she failed to pay, her enrolment was suspended, and her Belgian residence permit lapsed. Before the Tribunal de Première Instance in Liège, Gravier claimed that the minerval ran afoul of two articles of the Treaty of Rome: Article 7, which prohibited discrimination on grounds of nationality, and Article 59, which called for the elimination of obstacles to the freedom to provide services.⁶⁸

Because the case involved interpretation of Community law, the Belgian court sent Gravier’s complaint to the European Court of Justice.⁶⁹ The tribunal noted, however, that resolving the question of services — whether students should be considered consumers of services — was not required to find that education fell within the scope of the Rome Treaty, thus making national discrimination unlawful. The national court’s referral to the European court noted that an earlier case, *Forcheri v. Belgian State*, decided in 1983, had already determined that, ‘in certain circumstances’, charging nationals of other member states for vocational

⁶⁸ *Gravier*, pp.608,609; Koopmans, Rapport, p.2; Luc Misson, ‘Observations’, p.1, 2, 5.

⁶⁹ See Morten Broberg and Niels Fenger, *Preliminary References to the European Court of Justice* (Oxford, 2010).

training ‘may fall within the scope of the Treaty’.⁷⁰ The facts of *Forcheri* differed from those of *Gravier* in that the plaintiff, an Italian national living in Brussels and studying social work, was married to a European official working in that country. Thus the decision in *Forcheri* cited Community law requiring that ‘obstacles to the mobility of workers shall be eliminated, in particular as regards the worker’s right to be joined by his family and the condition for the integration of that family into the host country’.⁷¹ This form of familial connection to a worker in Belgium did not figure in *Gravier*, and the European Court of Justice did not cite the earlier case in reaching its holding, simply noting that the dispute was mentioned in the national court’s referral of the case to the high court.

Rather than relying on precedent, the *Gravier* court cited Community concern with vocational training in considering whether individuals not directly involved in commercial exchange — and not associated with it via marriage — were entitled to move freely. While the Rome Treaty had not made education a Community concern, the Court noted, negotiators had placed vocational training at the heart of their economic vision by calling on the European Council to create ‘a common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market’.⁷² In 1963, the Council set forth principles joining vocational training to the free movement of workers.⁷³ *Gravier*, in arguments submitted to the Court, drew on the *Forcheri* decision, in addition to case law addressing the equivalence of diplomas and access to education for the children of migrant workers. But she distinguished her identity as a student. She was ‘not a

⁷⁰ *Gravier*, pp.609,610; Case 152/82, *Sandro Forcheri and his wife Marisa Forcheri, née Marino v. Belgian State and asbl Institut Supérieur de Sciences Humaines Appliquées – Ecole Ouvrière Supérieure* (1983) E.C.R., pp.2325-26. See also Protocol on Privileges and Immunities of the European Communities, Brussels, 8 April 1965, 1348 U.N.T.S. 14, 13.

⁷¹ *Forcheri*, p.2335.

⁷² Treaty of Rome, art.128.

⁷³ *Forcheri*, pp.2335,2337,2336; Regulation (EEC) No.1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, (1968) O.J. (L257/2), <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31968R1612&from=EN>.

qualified employee or self-employed person or service provider' but a traveller 'for the sole purpose of studying'.⁷⁴ The Court's advocate general, responsible for delivering an advisory opinion, explained how the plaintiff's identity posed an original question for the court. 'The position is different if the would-be student is already a migrant worker or one of his dependants', wrote the advocate general, the British jurist Gordon Slynn.⁷⁵ That the plaintiff was simply a student, not engaged in wealth-producing activity, would seem to demand a reckoning with the limitations of the commercial rationale for free movement.

Though she disclaimed an identity tied to work, Gravier maintained that her actions were vital to Europe's economic aims. She asserted that the free movement of students was an 'indispensable condition' of the free movement of salaried workers, unwilling to stake her case on a non-economic reading of the Treaty of Rome.⁷⁶ Invited to follow up on a provision of the treaty addressing non-profit companies, she contended that it was unconnected to her complaint.⁷⁷ Instead, she focused on what she called 'the service relationship' arising from Article 59 of the treaty, which prohibited restrictions on 'the freedom to provide services ... in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended'. Gravier argued that the service relationship implied the freedom to provide, but also to access, services 'intended' for nationals of another member state. Because 'the study of the art of comic strips undoubtedly constitutes a professional training', she claimed entitlement to arts education as a service. The Court understood her complaint as an explicit rights claim: The French student claimed the 'right', the

⁷⁴ Luc Misson, 'Réponse de Mademoiselle Gravier à la Question Posée par la Court de Justice', 29 août 1984, p.9, 6 ECJ.

⁷⁵ Advocate General Sir Gordon Slynn, [Opinion] 596 (1985), Case 293/83, *Gravier v. City of Liège*, (1985) E.C.R. 596.

⁷⁶ Misson, 'Mademoiselle Gravier', p.16.

⁷⁷ Luc Misson, 'Réponse'.

judges observed, to access education in Belgium ‘under the same conditions as those applicable to nationals of this member state’.⁷⁸

The Commission amplified Gravier’s services claim, calling education ‘an intangible good’ that lay within the customs union installed by the Treaty of Rome. ‘Education is a product of intellectual activity ... that is assessable in money and may be the subject of commercial transactions’, the Commission told the court. Intellectual labour invested education with its value, making it tradable on the market. The student in question therefore represented ‘the classic case’ of the recipient of services — someone who ‘goes to another member state to benefit’ from ‘a particular service’, and proceeds to avail herself of a range of other products, from transport to entertainment. Such a person was a building block of an integrated market, with ‘a right to professional formation’, the Commission’s lawyers reasoned. Professional formation, under Community guidelines, could include anything from educational courses to internships, they noted. Restrictions, such as the minerval, could not stand.⁷⁹

The services claim did not find gain purchase before the court, which would explicitly reject this logic three years later. The court judged in *Belgian State v. Humbel* that state-funded education was not a service. In *Gravier*, the judges did not address the question of services, looking only to the claim of national discrimination.⁸⁰

Answering the charge of national discrimination, Belgium protested that Article 7 could not be construed to prevent states from treating their own citizens more favourably than others. Joined by Denmark and the United Kingdom, Belgium maintained that education was remote from commercial exchange, which alone licensed free movement. Existing European legal texts,

⁷⁸ Treaty of Rome, art.59; Misson, ‘Mademoiselle Gravier’, p.20; Koopmans, Rapport d’Audience, p.7; Scholarship on services is sparse and mainly deals with the freedom to provide services. See, e.g., Jason Coppel and Aidan O’Neill, ‘The European Court of Justice: Taking Rights Seriously?’ *Common Market Law Review*, 29 (1992), pp.669-692.

⁷⁹ Commission Brief, JURR(84) D/01186 Gravier, Bruxelles, 16 mars 1984, pp.19, 28-29, 36, 41, ECJ.

⁸⁰ Case 263/86, *Belgian State v. Humbel* (1988) E.C.R. 5388.

the attorney for the Belgian state argued, ‘regulate only the free movement of persons in the course of their economic activities’.⁸¹ National rules, therefore, held sway. Particularly in educational matters, the national governments argued, ‘each Member State has special responsibilities toward its own nationals’.⁸² Belgium contended that a disparity between foreign students in its schools and its students studying abroad required the fee. Belgium had the highest percentage of students from other European nations, 4.25 percent. By the beginning of the 1980-’81 academic year, only 50,000 European students were undertaking studies in a European country of which they were not citizens. Student mobility was a ‘limited phenomenon’, attorneys for the Commission observed. Among the most common subjects of foreign study were medicine, economics, and languages and culture.⁸³ The United Kingdom, in its brief, reasoned that these fields of study were distinct from ‘such economic activities as a secretarial or language school run for profit’. They were instead aspects of ‘social policy’, with a ‘national benefit’ not defined by ‘commercial factors’.⁸⁴

The Court reasoned that it did not have to look beyond the commercial realm to apply Rome’s anti-discrimination doctrine to Gravier’s case. It did not have to consider education policy in general. At issue was ‘the establishment of a financial barrier’ to access to vocational education ‘for foreign students only’. Two questions drew the Court’s scrutiny: whether vocational training lay within the scope of the 1957 treaty and whether a program in strip cartoon art counted as vocational training.⁸⁵

⁸¹ Koopmans, Rapport d’Audience, p.9; Bernard Perin, ‘Réponse du Royaume de Belgique à la Question Posée par la Court de Justice’, 10 September 1984, 3, 2, ECJ; Proposal for a Council Directive on a Right of Residence for Nationals of Member States in the Territory of Another Member State, COM (1979) 215 Final, O.J. (C207) (31 July 1979); *Gravier*, p.611.

⁸² *Gravier*, p.611.

⁸³ Commission Brief, p.12,14,16,17.

⁸⁴ J.R.J. Braggins, Written observations by the United Kingdom, Case No.293/83, p.15, 16, 17; Koopmans, Rapport d’Audience 2 (1983), p.26.

⁸⁵ *Gravier*, pp.611-612.

The Court held that vocational training lay within the scope of the Treaty of Rome. In contrast to the *Forcheri* precedent, it reached this decision without relying on rights arising from family ties. Instead, the judges expounded on the link between vocational training and economic activity, set out in Community regulations that answered the call issued by Article 128 of the Rome Treaty for a ‘common vocational training policy capable of contributing to the harmonious development both of the national economies and of the common market’.⁸⁶ Vocational training was particularly central to free movement, the Court observed, because it turned Community nationals into qualified workers for whom the grant of unfettered circulation was intended. This made vocational training a concern of the Community, bringing it within the scope of the Article 7 ban on national discrimination.⁸⁷

The second question that the Court had to answer was whether studying cartoon art qualified as vocational training. The judges hardly dwelled on the virtues of the art form, on the relevance of speech bubbles to the free movement of economic agents. They did not cite *Tintin*, a comic that rose from the pages of a conservative, Catholic newspaper in Belgium, *Le Vingtième Siècle*, to global recognition and commercial pre-eminence.⁸⁸ Nevertheless, they concluded bluntly that ‘the term ‘vocational training’ includes courses in strip cartoon art...’⁸⁹ The judges took a broad view, reasoning that vocational training meant preparation for work: ‘any form of education which prepares for a qualification for a particular profession, trade or employment or which provides the necessary training and skills for such a profession, trade or employment is

⁸⁶ Treaty of Rome, art.128. Council Decision 63/266/EEC of 2 April 1963, pp.1338, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31963D0266>; General Guidelines for Drawing up a Community Programme on Vocational Training, OJ (C 81/5) (1971), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31971Y0812&from=EN>; Council Resolution of 13 December 1976 Concerning Measures to be Taken to Improve the Preparation of Young People for Work, O.J. (C 308/1) (1976), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41976X1230&from=EN>.

⁸⁷ *Gravier*, p.613.

⁸⁸ Simon Kuper, ‘Tintin and the War’, *Financial Times*, 21 October 2011.

⁸⁹ *Gravier*, p.614.

vocational training...⁹⁰ The opinion drew on the Council's guidelines from 1963 and 1971, which outlined the importance of vocational training by citing the 'constantly changing needs of the economy' as support for an expansive interpretation. The guidelines spoke of the acquisition of skills necessary to pursue 'a given occupation'. The rules allowed 'basic and advanced training' and, perhaps most tellingly, welcomed programs reflecting 'a general and vocational point of view'. Training, the policies provided, also meant enabling 'the individual to develop his personality'.⁹¹

The language embraced by the Court was redolent of human rights ideas. Individual personality has been central to the development of rights transcending the positive law of states. International law practitioners and scholars call this the 'personalised' approach and point to two references in the 1948 Universal Declaration of Human Rights to the 'free' and 'full development of his personality' as an aim of rights claims. The language appears in both Article 22, which makes the realisation of 'economic, social, and cultural rights' dependent on both 'national effort and international co-operation', and Article 29, which imposes a duty in the community to enable the development of individual personality.⁹² The emphasis on duty as a corollary of the right to develop one's personality also appears in the American Declaration of the Rights and Duties of Man, also known as the Bogota Declaration, signed in the Colombian capital just before the Universal Declaration, making it the first general charter of international human rights.⁹³ The rights emphasised in the European Convention on Human Rights, which came into force in 1953, similarly demonstrate concern for individual personality, which is fundamental to privacy, family life, freedom of thought and association, and education.⁹⁴ The

⁹⁰ Ibid., p.613.

⁹¹ Ibid., pp.613,614. See also Council Decision 63/266/EEC of 2 April 1963.

⁹² Quoted in Loukēs G. Loukaidēs, *Essays on the Developing Law of Human Rights* (Dordrecht: 1995), p.84.

⁹³ Quoted in Loukēs G. Loukaidēs, 'Personality and Privacy under the European Convention on Human Rights', *British Yearbook of International Law*, 61, no.1 (January 1991), p.176.

⁹⁴ See Loukaidēs, 'Personality and Privacy', p.177.

national legal traditions of European states also make personality paramount.⁹⁵ Privacy especially has been intertwined with the legal recognition of individual personality. The first analysis by an international body of the right of privacy, by the U.N. Commission of Human Rights in 1976, found that a ban in Iceland on household dogs did not run counter to respect for private life. Nevertheless, the commission set out an expansive idea of privacy as entailing ‘the development and fulfilment of one’s own personality’.⁹⁶ There was a sphere of individual development and personal fulfilment where the state could not go.

The argument in *Gravier* about vocational training made the question of individual personality primarily about economic self-determination. The judges defended the capacity to pursue an employment qualification and to decide for oneself how to be a productive member of society, based on ‘training and skills’ that might lie across national borders. The postwar conceptualisation of rights has been studied in the context of mobility and displacement; it has even been connected to vocational training. But the examination of human rights in Europe has remained strikingly detached from accounts of the jurisprudence of economic liberty.⁹⁷ *Gravier* challenges interpretations that dismiss postwar human rights doctrine as a cloak for the reassertion of state sovereignty. Instead it suggests that the legal construction of rights as a basis for human flourishing has mainly been guided by the ideology of the free market.⁹⁸

⁹⁵ See, e.g., Edward J. Eberle, ‘Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview’, *Liverpool Law Review*, 33, no.3 (November 2012), pp.201-33.

⁹⁶ Council of Europe, *Yearbook of the European Convention on Human Rights* (The Hague, 1976), p.379. On the relationship between human rights and vocational training, see Val D. Rust, ‘The Right to Education for Employment and Mobility: Norway and Yugoslavia’, in *Human Rights & Education*, ed. N. Bernstein Tarrow (Oxford, 1987), pp.121-138. On the feebleness of human rights claims pertaining to displacement, see, e.g., Gerald Daniel Cohen, *In War’s Wake: Europe’s Displaced Persons in the Postwar Order* (Oxford, 2012), pp.79-99. The ‘EU rights revolution’ is never linked to market integration in R. D. Kelemen, ‘The EU Rights Revolution: Adversarial Legalism and European Integration’ in *The State of the European Union: Law, Politics, and Society*, ed. Tanja A. Börzel and Rachel A. Cichowski (Oxford, 2003), pp.221-50.

⁹⁸ On rights as a ‘battle cry’ of free-market conservatism, see Moyn, *Last Utopia*, p.35.

Gravier became a cornerstone of European education policy, shifting the foundation of the freedom of movement enjoyed by students. The decision prompted other foreign nationals studying in Belgium to bring claims seeking recovery of enrolment payments.⁹⁹ The decision in *Gravier* also helped institutionalise student mobility. It hastened the advent of the Erasmus Programme, the largest system of student exchange in the world, by expanding the meaning of vocational training under Rome's Article 28. This reading allowed the Commission to claim new executive authority, circumventing consultation with the Council of Ministers and the European Parliament, where the objections of member states that already sponsored student exchanges had delayed the programme. Erasmus went into effect for the 1987-88 academic year, sending 3,244 students across Europe for study and training. The dissent of a Community national against state regulation did more to realise the educational aims of Citizens' Europe than had the appeals of the French president at Fontainebleau.¹⁰⁰

Gravier exemplifies judicial policymaking that drew on individual rights claims to strike down national economic regulation and enshrine free commerce as the essence of Europe's union.¹⁰¹ The case unfolded through the logic of negative integration, which the German political scientist Fritz W. Scharpf finds in judicial-led integration imposing economic deregulation rooted in the doctrine of 'direct effect', as set forth by the court in the seminal *Van Gend en Loos* decision in 1963. *Van Gend en Loos v Nederlandse Administratie der Belastingen*, which arose from a tax on the importation of formaldehyde from West Germany to the Netherlands,

⁹⁹ Case 24/86, *Blaisot v. University of Liège* (1988) E.C.R.

¹⁰⁰ See Benjamin Feyen and Ewa Krzaklewska, 'Generation ERASMUS — The New Europeans? A reflection' in *The ERASMUS Phenomenon — Symbol of a New European Generation?*, eds. Benjamin Feyen and Ewa Krzaklewska (Frankfurt am Main, 2013), pp.229-42; Sacha Garben, *EU Higher Education Law: The Bologna Process and Harmonization by Stealth* (Alphen aan den Rijn, The Netherlands, 2011), p.60.

¹⁰¹ On European courts as agents of political and economic change, see Karen Alter, *The European Court's Political Power: Selected Essays* (Oxford, 2009); Christian Joppke, 'Evolution of Alien Rights in the United States, Germany, and the European Union', in *Citizenship Today: Global Perspectives and Practices*, ed. T. Alexander Aleinikoff and Douglas Klusmeyer (Washington, D.C., 2001), pp.36-62.

established that European law creates enforceable individual rights, enjoyed by both natural and legal persons and binding states beyond the duties expressly enumerated in the Rome Treaty. The judges held that the Community ‘constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights’, and whose beneficiaries included individual citizens of the member states. According to Scharpf, the European Court ‘reinterpreted the commitments of member states to create a common market as subjective rights of individuals and firms against these member states’, a reinterpretation that turned private litigants into the ‘enforcers’ of the free market. The Court’s docket became skewed toward anti-regulatory complaints, since only plaintiffs with a direct ‘economic or personal stake in increased factor or personal liberty’ would have an incentive to seek redress.¹⁰²

In *Gravier*, a distinctive dynamic of negative integration operated. In the case of the art student, the Court used a narrow rights claim — the right to study comic art, free of an unequal fee — to declare a sweeping doctrinal change that extended the logic of market deregulation to spheres of life not ordered by a profit motive.¹⁰³ Françoise Gravier was not an economic agent; she said so herself. Yet the Court incorporated her plea into the story of free movement that it told to forbid national discrimination. It was only by turning her into a potential employee or purveyor of goods — into a factor of production — that it saw her as deserving of protection under the Treaty of Rome.¹⁰⁴ A similar equivalence between persons and goods had figured in the European Commission’s endorsement, in 1975, of a passport union as doing ‘in respect of individuals’ what the customs union had done ‘in respect of goods’.¹⁰⁵

¹⁰² Case 26/62, *NV Algemene Transporten Expeditie Onderneming van Gend en Loos v. Netherlands Inland Revenue Administration*, (1963) E.C.R. 12; Fritz W. Scharpf, ‘The Asymmetry of European Integration, or Why the EU Cannot Be a “Social Market Economy”’, *Socio-Economic Review*, 8, no.2 (2010), p.221.

¹⁰³ Though Scharpf doesn’t address *Gravier*, the decision extends the reach of what he calls ‘a neoliberal or ordoliberal “economic constitution”’ to spheres of life outside the market’s calculus. See Scharpf, ‘Asymmetry of European Integration’, p.223.

¹⁰⁴ See *Gravier*.

¹⁰⁵ Report on the establishment of a Passport Union.

Seemingly, the decision gave new salience to social values. So found a European diplomat, Gisella Gori, who argued, in the most extensive existing treatment of the case, that the European Commission saw *Gravier* as a chance ‘to enlist a social dimension to the economic integration’s goal of the treaty’, and to nudge the Court toward a more expansive view of the Treaty of Rome, one protecting not just economic but also social and civic rights.¹⁰⁶ But this is a misreading of the case, which did not broaden free movement beyond workers but rather found that vocational education was connected to productive labour. A legal advisor to the European Commission, Georges Kremlis, who led its work on the case, has since explained that there was no basis for a non-economic defence of Gravier’s right to study in Belgium free of a discriminatory fee. ‘Rome was not a treaty oriented around personal freedoms such as the free movement of people’, he said.¹⁰⁷ *Gravier* did not announce a non-economic foundation for free movement. Rather, it expanded the realm of the market into an area not obviously touched by commercial pursuits.

The *Gravier* decision was rendered in terse and arcane language. Comprised of one judge per member state, the European Court of Justice delivers collective opinions, not airing dissenting views.¹⁰⁸ Words contained not in decisions but in lectures and journal articles authored by judges on the court leading up to their February 1985 decision offer insight into

¹⁰⁶ Gori, ‘Mademoiselle Gravier’, p.451.

¹⁰⁷ Georges Kremlis, phone interview by the author, 19 February 2018.

¹⁰⁸ See, e.g., J.H.H. Weiler, ‘A Quiet Revolution: The European Court of Justice and Its Interlocutors’, *Comparative Political Studies*, 26, no.4 (January 1994), pp.510-34; Clifford J. Carruba, Matthew Gabel, and Charles Hankla, ‘Understanding the Role of the European Court of Justice in European Integration’, *American Political Science Review*, 106, no.10 (February 2012), pp.214-23; Federico Mancini, ‘The Free Movement of Workers in the Case Law of the European Court of Justice’, in *Democracy and Constitutionalism in the European Union: Collected Essays*, ed. Federico Mancini, (Oxford, 2000).

the philosophy infusing *Gravier*. While not addressing the specifics of the student's case, the judges discussed their mandate in candid terms. Rather than the contours of a new legal philosophy, what their ruminations reveal is fealty to the market as the bedrock of the theoretical defence of 'direct effect'.

The president of the Court when *Gravier* was decided, Alexander Mackenzie Stuart, professed to finding perplexities in the supranational legal order, which he termed a 'many-headed Hydra'. A Scottish lawyer and jurist, Mackenzie Stuart was the Court's first judge from a British jurisdiction. His life, he told colleagues, was shaped permanently by his service in the Royal Engineers, which brought him to the Ruhr in northwestern Germany to rebuild bridges after the war.¹⁰⁹ Mackenzie Stuart delivered his most wide-ranging comments on the Court's role in a 1977 lecture at the Institute of Advanced Legal Studies in London. His speech, published under the auspices of the Hamlyn Trust, was philosophical and dense with allusion. At the same time, it was self-reflective, even playful. How, he mused, did Community law affect ordinary Europeans? He advised humility, cautioning against 'too Copernican a view' treating the Court's seat in Luxembourg as the centre of the universe. Still, he observed, 'the impact of Community law on daily life is increasingly evident'. Not only were the central promises of the Treaty of Rome taking effect, but Community law was coming to life in subtler ways, appearing 'in unlikely corners', from 'sewage' to 'holiday beaches', like 'an incoming tide It cannot be held back'.¹¹⁰

By pointing to the inexorable advance of Community law, Mackenzie Stuart reconciled two contrasting understandings of the court — as a neutral arbitrator and as an instrument of

¹⁰⁹ David Edward, 'Lord Mackenzie-Stuart of Dean', Royal Society of Edinburgh, https://www.rse.org.uk/cms/files/fellows/obits_alpha/mackenzie-stuart_lord.pdf.

¹¹⁰ Alexander Mackenzie Stuart, 'The European Communities and the Rule of Law' (Delivered at the Institute of Advanced Legal Studies, London, 1977), p.1.

market integration. He substituted individual rights claims for the will of the Court as the basis of commercial liberty. Two principles defined ‘the essential novelty’ of European law, he argued: its supremacy and its enforcement through individual rights. Both principles figured in his conception of ‘direct effect’ — ‘that Community law can ... create rights in favour of individuals which national courts must protect’. *Gravier* did not draw on *Van Gend en Loos* as precedent, but the logic of the landmark case pervaded the approach of the chief judge.¹¹¹

The role of individual rights claims in his legal philosophy was most apparent in his ruminations about whether courts could settle questions of economics. He parried the ‘allegation’ that a typical problem before the Court was not ‘one of law but economics’ and therefore ‘not a fit matter for judicial treatment’. The Court, he argued, would not encroach on economic policy — refraining from deciding on ‘the merits’ of decisions by the member states but rather on their ‘legality’. He aimed to distinguish law from economics: ‘Legality in this context implies conformity with certain objective standards...’ These standards applied regardless of the substance of the dispute. ‘That the policy is an *economic* policy makes it neither more nor less justiciable’, he affirmed. ‘I certainly disclaim any particular competence even to paddle in the opaque waters of economic theory’, he insisted, ‘but I am obliged to peer into them since the existence of these difficulties can give rise to major problems of principle for the Court...’ The judicial role was enlarged, he reasoned, in areas where the Treaty’s provisions were still coming to life — namely economic and social policy. As policymaking stalled, there was progress in ‘disputes, claims and grievances of those whose commercial transactions have been affected’ Mackenzie Stuart noted. Rights claims thus turned the judiciary into an economic and political actor of last resort. And its role was not merely to apply the mandates of the Treaty of Rome but to grasp its underlying motivations, from which judges could derive

¹¹¹ Stuart, ‘European Communities’, p.18.

‘objective standards’. This was sometimes called ‘the “teleological” approach’, the head judge explained. For his part, he said, he preferred the less pejorative term ‘purposive’.¹¹²

In reflecting on proposals for deepening political integration, Mackenzie Stuart expressed unswerving faith in the free market. He considered ideas introduced by Tindemans in his 1975 report on ‘European Union’, which included the concept of Citizens’ Europe acted upon by Mitterrand. The judge weighed the Belgian statesman’s call for ‘a transfer of competences to common bodies’, underpinned by ‘a transfer of resources from prosperous to less prosperous regions’ — part of Tindemans’ theory that economic and social cohesion were inseparable. But Mackenzie Stuart warned of legal barriers to redistribution. He was sceptical of ‘anything approaching total coercion’, he wrote, for he considered economic liberty sacrosanct. ‘The foundation of the existing Treaty is the market mechanism and if today it is felt that the market mechanism alone is not enough, equally it cannot be eliminated without changing the whole basis of the European Communities’. Nowhere in the literature on the law of the common market is there as blunt an articulation, from a sitting judge, of the market foundations of Europe. To Mackenzie Stuart, the workings of the market could not be subject to policy considerations. A legal order upholding the market, he argued, must be ‘conceived in terms of personal right’. This logic transformed the commercial aspirations of Community citizens into individual rights claims compelling the judges to defend the market as the substratum of integration — indeed of collective European life.¹¹³

Judges who sat with Mackenzie Stuart on the *Gravier* Court shared his perspective on judicial responsibility and the centrality of the free market. In an essay in the *Michigan Law Review*, Ulrich Everling, a German jurist on the Court who had once served in his nation’s

¹¹² Ibid., pp. 16, 18, 82, 91, 77.

¹¹³ Ibid., pp. 115, 117. See Tindemans, *Report on European Union*, p. 13.

Federal Ministry for Economic Affairs, articulated an anti-regulatory role for the Court: ‘securing the Common Market by applying the prohibition of discrimination and restrictions, by guaranteeing the conditions of competition, by ensuring a common position toward other countries and by protecting persons affected by unlawful acts’. Other European aspirations, he judged, arose from the ‘starting point’ of a single market. ‘Running like a red thread through the whole of the Court’s case law is the idea that this core of the Community must remain sacrosanct’, he affirmed. The Court’s sacred duty was safeguarding Europe’s commercial ambitions. Because Everling, like Mackenzie Stuart, grounded these ambitions in the ‘protection of rights’, the Court’s ‘creations’ had roots in the actions of individual plaintiffs.¹¹⁴ Everyday Europeans shaped their Community’s constitutional development by laying claim to economic principles in the Treaty of Rome.¹¹⁵

The accounts of the *Gravier* judges reveal that the doctrine of ‘direct effect’ rested on reconceptualising market freedoms using the language of individual rights.¹¹⁶ Mackenzie Stuart and Everling both spoke to the connection between individual and market liberties. And they espoused a judicial philosophy that made the protection of market freedoms paramount.

But it was Thijmen Koopmans, the Court’s Dutch representative and the rapporteur in the *Gravier* case, who made the connection most explicit, tying commercial freedom to universal human rights. Koopmans was an attorney and jurist, as well as a prominent legal academic and dean of the faculty of law at Leiden University, specialising in civil law. His career brought him

¹¹⁴ Ulrich Everling, ‘The Court of Justice as a Decisionmaking Authority’, *Michigan Law Review*, 82, no.5/6 (April-May 1984), pp.1305, 1308, 1294.

¹¹⁵ On jurisgenerativity, see Seyla Benhabib, *Dignity in Adversity: Human Rights in Troubled Times* (Cambridge, England, 2011).

¹¹⁶ See Scharpf, ‘Asymmetry’; Francesca Martines, ‘Direct Effect of International Agreements of the European Union’, *European Journal of International Law*, 25, no.1 (2014), pp.129-47.

back and forth between the Dutch and European legal systems, including stints in the legal department of the European Council and on the Supreme Court of the Netherlands.¹¹⁷

In a 1985 working paper for the European University Institute, published the month before the decision in *Gravier* and less than half a year before the signing of the Schengen accord, Koopmans considered a political proposal — not Tindemans' report, but Spinelli's 1984 Draft Treaty transforming the European Communities into the 'European Union' with new supranational authority. No change in the Community's identity, Koopmans maintained, could alter 'fundamental market freedoms', a precept of integration at once novel and familiar. Market freedoms were novel in their origins, 'derived from the concept of a common market', Koopmans wrote. But they were familiar as an analogue to traditional human rights. 'They have something in common with human rights', theorised Koopmans. 'It may be true that classical human rights, those, for example, embodied in the European Convention, find their basis in the freedom and dignity of the individual person but some typical market freedoms, like the right to move freely or not to be discriminated against, are not far removed from this same sphere of thought'. By upholding commercial rights, which meant expanding 'the scope of judicial review' over national economic regulation, he reasoned, the Court could also deepen the civic dimension of the European project — 'it would strengthen the "Europe of the citizen"'. Like Everling, he stressed the contributions of citizens in law-making, giving credence to popular aspirations. 'European law', Koopmans wrote, 'cannot be made by lawyers alone'. Rather, plaintiffs' defence of their individual rights prompted the legal protection of market freedom.¹¹⁸

¹¹⁷ 'Prof. Tim Koopmans', Universiteit Leiden, <https://www.universiteitleiden.nl/en/law/institute-of-public-law/tim-koopmans>.

¹¹⁸ Thijmen Koopmans, 'The Judicial System Envisaged in the Draft Treaty' (E.U.I. Working Paper No.85/145, 1985), pp.2, 4, 29, 17, 48.

To understand what transpired in Fontainebleau in June 1984 and what the judges of the European Court of Justice decided in *Gravier* almost a year later is to grasp at once the aspirations for free movement and their limits. Together the summit and the legal verdict help frame the decision of five member states of the European Community to commit, in June 1985, to removing controls at their common borders. Fontainebleau became a powerful rationale for the intergovernmental initiative, while *Gravier* made clear why the individual governments, rather than Community institutions, had authority to guarantee free movement — not just to workers but to all European persons.

Neither the meeting of the European Council nor the judgment of the European court required state action. But the conclusions at Fontainebleau gave urgency to the political and social dimensions of the European project, setting forth Citizens' Europe as grounding for plans to enable cross-border mobility. When the Schengen accord took up the mantle of cross-border mobility in June 1985, it drew explicitly on the conclusions reached at Fontainebleau. It is not that Schengen would have invalidated the enrolment fee at issue in *Gravier*; Schengen did not change requirements for living or working in other Community member states. What it did was set forth non-economic grounds for free movement, thereby fulfilling plans for Citizens' Europe stymied at the Community level for the very reasons made manifest in *Gravier* — the lack of Community authority over questions of human movement unconnected to the market. That is why European planners dwelled on the case, in the telling of the Commission, which cited *Gravier* as the 'problem' for the realisation of Citizens' Europe.¹¹⁹

¹¹⁹ European Commission, 'Meeting of the Committee of Permanent Representatives, p.2.

In aiming to follow through on aims emerging from Fontainebleau, European planners looked not only to the judgments of courts but also to mobilisation at the grassroots level. In July 1984, the month after the Fontainebleau meeting, the Commission pressed European heads of state to move ahead with removing frontier controls. 'It is absolutely essential that the Council should address itself in all haste and with resolution to this matter', whose 'explosive character', the Commission observed, had recently revealed itself in 'events at the borders', where truck drivers had blocked passage in coordinated protests against lengthy customs checks.¹²⁰ In a follow-up communication that autumn, the Commission considered the perspective of 'the European citizen', calling barriers to free movement including customs posts and long lines at internal borders, 'the most visible symbolic expression of the non-existence of Europe'.¹²¹ To give the European project an 'existence' exceeding economic life, the states would have to act outside the institutions of the European Community.

¹²⁰ Consolidating the Internal Market, p.2.

¹²¹ Commission des Communautés Européennes, 'L'Europe des Citoyens: Suives à donner aux conclusions du Conseil européen de Fontainebleau', 24 septembre 1984, p.5, Bac no.50, Folder 44, Commission.

CHAPTER 2 — ON THE MOSELLE RIVER

The abolition of borders across an expanse of Western Europe began with a voyage on the Moselle River. From its source, two thousand feet above sea level in the Ballon d'Alsace mountains of France, the river twists and turns north into Luxembourg and across Germany, branching into tributaries that extend into Belgium. Hundreds of miles downstream, it flows into the Rhine at Koblenz. The Moselle first appeared in the historical record in the writings of Tacitus, who chronicled, in the *Histories*, the Roman upheavals of 69 C.E., the Year of the Four Emperors. The river formed part of the natural environment shaping combat configurations, at a time when much of the European continent fell under the authority of a single sovereign. By the First World War, it demarcated the boundaries of nation-states, separating Imperial Germany from France and Luxembourg. Winding through verdant hills, the Moselle River has traced the course of Europe's transition from a domain of empire, to a warring continent, to a transnational community.¹

Nowhere is the riparian symbolism more apparent than in the Moselle Valley, where the river borders three countries: France, Germany, and Luxembourg. Near the tripoint border that runs through the river lies the village of Schengen, nestled in the valley. On 14 June 1985, diplomats convened there to approve the treaty on free movement that would come to be known as the Schengen Agreement. The parties to the accord were Belgium, France, Luxembourg, the Netherlands, and West Germany. That summer, the presidency of the Central Negotiating Group responsible for devising the accord was held by Luxembourg, the country

¹ Jörg Schmitt-Kilian, *Von Koblenz zu Rhein und Mosel: Orte an und über dem Wasser* (Meßkirch: 2012); Michel Caffier, *La Moselle: Une Rivère et Ses Hommes* (Nancy, 1985); Charles Tower, *Along Germany's River of Romance, the Moselle: The Moselle: The Little Traveled Country of Alsace and Lorraine; Its Personality, Its People, and Its Associations* (New York, 1913).

charged with choosing a place for its proclamation.² Schengen — located at a corner of Luxembourg neighboured by Germany and France — embodied both the natural integration of European nations and the vision of free movement across borders.

Aboard a riverboat on the Moselle, the ceremonial signing of the Schengen Agreement was enacted. The midday sun beat down on the deck of the *Princess Marie-Astrid* as diplomats from the five states gathered inside at a conference table: Robert Goebbels, Luxembourg's state secretary for foreign affairs; Paul de Keersmaeker, Belgium's state secretary for European affairs; Catherine Lalumière, France's state secretary for European affairs; Waldemar Schreckenberger, state secretary to the German Chancellor; and Willem Frederik van Eekelen, Dutch state secretary for foreign affairs.³ A joint press release traced their work to the declaration at Fontainebleau in 1984 of the priority of achieving 'Community belonging and ... solidarity'.⁴

The aspirations of the Schengen Agreement were set forth just before the signing. A statement was delivered by Luxembourg's representative, Robert Goebbels. 'With deep satisfaction', he began, 'I am able to welcome you today to Schengen', a three-country corner, '*Dreiländereck*', that symbolised the aim of 'commonality'. Tersely, he explained the intent of the agreement produced by months of intergovernmental negotiations. The abolition of borders would further both European economic integration and the social cohesion of the European peoples. 'Together we have been able to take a step forward on the path traced by the Treaties of Rome', he said, 'regarding the movement of people, goods, capital and services'. At the same

² Communiqué de Presse, Schengen, 14 June 1985, Folder Signature du Traité, Box 2 Coordination interministérielle pour l'allègement des contrôles aux frontières 1914INVA (hereafter 1914INVA), MEAE.

³ 'Unterzeichnung des Abkommens D-F-Benelux über den schrittweisen Abbau der Grenzkontrollen', 10 June 1985, Folder 141.571, Box 423.55 1u.2, Abbau der Grenzkontrollen, Deutschland-Frankreich-Benelux - von Schengen-Abkommen, 1985-1986 (hereafter Grenzkontrollen), Politisches Archiv des Auswärtigen Amtes, Berlin, Germany (hereafter PAA); Catherine Lalumière, interview by the author, 19 October 2017 (hereafter Lalumière Oral History).

⁴ Communiqué, Schengen, p.1.

time, he affirmed, ‘We have succeeded in developing a set of measures that will directly benefit nationals of the European Communities ... bringing us closer to what is fitting to call the “Europe of Citizens”’.⁵ Schengen thus advanced the development of a common market under the Rome Treaty and the creation of a transnational Citizens’ Europe by enabling the free movement of nationals across the frontiers of member states in a territory without internal borders.

The Schengen accord marked the advent of a new principle of freedom of movement. Schengen allowed persons to move freely across borders — not workers, the category used in the Treaty of Rome and applied by the European Court of Justice in *Gravier*. The freedom of European Community nationals to circulate throughout the Schengen area would not be contingent on market participation, pursuing employment. People would be bearers of that freedom, not simply economic actors.⁶ A fundamental right of persons to free movement within the boundaries of a nation-state was affirmed by international human rights covenants, the Universal Declaration of Human Rights, in 1948, and a 1963 protocol to the European Convention on Human Rights. The Schengen accord amplified the principle of free movement, extending it beyond the needs of the market as well as the borders of the nation, by recognising all persons who were nationals of member states as free to move within a new transnational domain that was envisioned as a basis for Citizens’ Europe.⁷

Under the accord, however, freedom of movement was not uncircumscribed. Abolition

⁵ Discours de Monsieur Robert Goebbels, Secrétaire d’État aux Affaires Étrangères sur L’Accord, *Bulletin de documentation*, 4 (Luxembourg, June-August 1985), p.32 (hereafter ‘Discours Goebbels’).

⁶ Schengen Agreement, 1985. On shift in EU law from a market-based to a rights-based conception of free movement of persons, see Weatherill, *Internal Market*, pp.6-7, which does not address Schengen concerning this development.

⁷ Universal Declaration of Human Rights (1948), <http://www.un.org/en/universal-declaration-human-rights/>; Protocol No.4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Securing Certain Rights and Freedoms Other Than Those Already Included in the Convention and in the First Protocol Thereto art.42, 16 September 1963, E.T.S. No.46 (hereafter Protocol No.4, 1963).

of internal borders was expressly premised on fortification of the external borders of the Schengen area, restrictive immigration rules, and policing of unauthorised migrants, to be enforced by member states. Within the Schengen area, the free movement of persons across frontiers was intended for nationals, for Europeans — and hedged by security measures requiring the assertion of national authority. To member states fell the power of defining the terms of national belonging that set the limits of the transnational Schengen community. At the signing ceremony, a pledge to prevent ‘illegal immigration’ buttressed the declaration that Schengen would ‘benefit nationals’ of a ‘Europe of Citizens’ by expanding freedom of movement.⁸

The words of Goebbels hardly resounded across Europe. His address was recorded in a state bulletin of the Grand Duchy of Luxembourg, which described how the agreement was signed at Schengen.⁹ But the event went entirely unnoticed by much of the European press. A report in France’s *Le Figaro* was virtually alone in underscoring the cultural significance of the moment, as ‘a more than symbolic step towards the unification of Europe’.¹⁰ The French delegate, Catherine Lalumière, recalled that it was only afterwards, by the time the accord finally went into force a decade later, that Schengen ‘became a symbol of liberty’.¹¹

This chapter traces the emergence of the Schengen Agreement of 1985 and the establishment of a new principle of free movement. It explores the origins of the meeting at Schengen and the voyage on the Moselle River, drawing on reams of paperwork produced by government officials of the five founding states that recorded the process of treaty-making. Organised into working groups — immigration, police, transport, and customs — the framers

⁸ Communiqué, Schengen, p.2; Schengen Agreement, 1985, art.17; ‘Discours Goebbels’.

⁹ ‘Discours Goebbels’.

¹⁰ Robert de Suzannet, ‘Europe: allégement des contrôles routiers’, *Le Figaro*, 15 juin 1985.

¹¹ Lalumière Oral History

hammered out the terms of the accord.¹² In doing so, they propounded aims and reflected on the freedom of individuals and the mechanisms of the market, as well as on labour, immigration, national security, and European union, leaving evidence of their ideas among delegate lists, draft agreements, diplomatic memoranda, and confidential annexes — which remained closed to public view for thirty years.

Scholarship on the accord has focused primarily on its outcomes, after it entered into force, in 1995. An extensive literature addresses Schengen's implementation and ramifications, viewed mainly within the context of European integration. The accord began to feature in academic journals following the adoption of the implementing convention in 1990, as national parliaments debated its application. Legal theorists considered how Schengen would reconfigure the law of free movement, while policy experts analysed the implications for asylum practice.¹³

Particular attention has been directed to moments when Schengen's provisions have come under pressure, rather than to the inception of the accord, which is the focus of this chapter. International relations theorists have explored derogations from the mandate of open borders, and economists have quantified the commercial costs of restricting free movement.¹⁴ Writing in the *Revista Universitaria Europea*, Spanish legal scholars Jacqueline Hellman and María José Molina García term Schengen 'the pure essence of the EU, as it is tightly connected to the establishment of the common internal market', finding that restraints on the free movement of people cause 'erosion of the European integration process'.¹⁵ The European refugee crisis of

¹² In directing attention to their everyday labour, I draw on the notion of 'seemingly non-politicised and mundane forms of interaction' in Kiran Klaus Patel and Wolfram Kaiser, 'Continuity and Change in European Cooperation during the Twentieth Century', *Contemporary European History*, 27, no.2 (2018), p.166.

¹³ Alex Gerlach, 'Dubliner Asylrechtskonvention und Schengener Abkommen: Lohnt sich die Ratifikation?' *Zeitschrift für Rechtspolitik*, 26, no.5(Mai 1993), pp.164-166.

¹⁴ See Andreu Olesti Rayo, 'El Espacio Schengen y la reinstauración de los controles en las fronteras interiores de los Estados miembros de la Unión Europea', *Revista d'estudis autonòmics i federals*, no.15 (2012), p.33.

¹⁵ Jacqueline Hellman and María José Molina García, 'La erosión del proceso de integración europea como consecuencia de ciertas restricciones a la libre circulación de personas', *Revista Universitaria Europea*, no.22 (June 2015), p.33.

2015-2016 has spurred research on the Schengen system, much of which is predictive.¹⁶ In appraisals of the accord's efficacy, key debates concern security, human rights, centralised planning, and intergovernmental collaboration. 'No school of thought can be identified that would explore Schengen systematically', finds a recent review of the scholarship.¹⁷

Within the historical literature, there are few accounts that closely probe Schengen's origins or explains why five states of the European Economic Community agreed, in advance of community planning for integration under the Treaty of Rome, to allow free passage among sovereign nations. Moreover, works by historians that give consideration to Schengen tend to rely on the nation-state as a unit of analysis. Influential scholarship on the development of the European migration regime highlights Germany's 'strategic hegemony', while French historians have situated Schengen within a long history of France opening — and closing — its doors to foreigners. Historians of Italy have looked at the effect of the accord on that state's relationship to other Mediterranean countries, viewing Italy as Schengen's 'soft underbelly' once it acceded to the agreement in 1990. Migration scholars have also addressed the non-entry of certain nations, namely Britain, to Schengen, as well as the accord's impact on non-Schengen states. Scholarship on European unification likewise remains preoccupied with issues of national sovereignty.¹⁸

This chapter tells a different story, examining the making of the Schengen Agreement and the remaking of freedom of movement to transcend the logic of the market. This

¹⁶ Serio Carrera, et al., *Die Zukunft des Schengen-Raums: aktuelle Entwicklungen und Herausforderungen des Schengen-Regelungsrahmens seit 2016* (Brussels, June 2018).

¹⁷ Markéta Novotná, 'Schengen Cooperation: What Scholars Make of It', *Journal of Borderlands Studies* (April 2018), p.2.

¹⁸ See Comte, *The History of the European Migration Regime: Germany's Strategic Hegemony*; Libora Oates-Indruchová and Muriel Blaive, 'Introduction: Border Visions and Border Regimes in Cold War Eastern Europe', *Journal of Contemporary History*, 50, no.3 (July 2015), pp.656-59; Catherine Wihtol de Wenden, 'Ouverture et fermeture de la France aux étrangers', *Vingtième Siècle*, no.73 (January-March 2002), 27-38; Ferruccio Pastore, Paola Monzini, and Giuseppe Sciortino, 'Schengen's Soft Underbelly?' *International Migration*, 44, no.4 (2006), pp.95-119; Wiener, 'Forging Flexibility'.

transformation, unstudied in scholarship dealing with Schengen's consequences, is of central concern to my analysis. The chapter begins by returning to Schengen's precursors, a set of intergovernmental pacts that laid the foundation for the agreement, while also taking account of the eruption of popular agitation at border crossings, protests that called for free movement across the frontiers of Europe. It explores the drafting process and the unfolding of negotiations among state officials. And it analyses the text of the agreement, setting the Schengen plan against the still inchoate progress of the European Economic Community. The account illuminates why Schengen became known by Europe's leaders as a 'laboratory for the free movement of persons' that would serve Community efforts to create the institutions of both an internal market and Citizens' Europe.¹⁹

Not quite a decade after the signing of the Schengen agreement in 1985, a member of the negotiating group appointed by France, a police commissioner named Vendelin Hreblay, recalled the undertaking of establishing free movement across borders in a world shaped by the Cold War. 'The iron curtain was still a palpable reality and the "wall of shame" still cut Berlin and Germany in two', he wrote. The notion of freedom of movement 'could evoke fear, scepticism, but also hope'. The portrait opened Hreblay's treatise on Schengen, *La Libre Circulation des Personnes*.²⁰

The agreement signed on the Moselle River expressed two primary aims. Schengen inscribed the ideal of union among the peoples of Europe and the principle, proclaimed in the

¹⁹ Hreblay, *Libre circulation*, p.7.

²⁰ *Ibid.*, p.5.

Treaty of Rome, of the free movement of people, merchandise, capital, and services. It was understood that ‘first and most important ... from which everything flows, is the free movement of persons’. This was the basis for creating the Schengen area as ‘a common space’. Abolition of internal frontiers had ‘a symbolic meaning for people ... of belonging to a new entity’.²¹

The Rome Treaty was not Schengen’s only precursor. The signatories to the accord claimed the mantle of the Fontainebleau European Council meeting of June 1984, even though they acted outside the auspices of the European Community. Prior to Fontainebleau, a letter from France’s president, François Mitterrand, to West Germany’s chancellor, Helmut Kohl, had urged adopting a ‘political perspective’ in renewing the commitment to ‘strengthening of the European Union’, specifying the necessity of ‘freedom of movement of persons, goods and services’.²² This project was an impetus for Fontainebleau, and, in turn, for Schengen. The preamble to the Schengen Agreement gave recognition to Fontainebleau, as well as to the policies of the Benelux Economic Union and a pact signed in Saarbrücken, Germany, in July 1984.²³

The Benelux Economic Union was Schengen’s earliest direct precursor. Established in the Hague in 1958, the Union allowed nationals of the three member states — Belgium, Luxembourg, and the Netherlands — free movement throughout the Benelux area. A subsequent agreement, signed in 1960, fully eliminated internal checks while maintaining controls at the union’s external frontiers.²⁴

²¹ Ibid., pp.6, 9, 7.

²² François Mitterrand to Helmut Kohl, n.d., Folder 136.099, Box 421.26 Europäischer Rat in Fontainebleau, PAA.

²³ Schengen Agreement, 1985.

²⁴ Treaty Instituting the Benelux Economic Union, 3 February 1958, 381 U.N.T.S. 165 (hereafter Benelux Treaty); ‘Benelux’, Luxembourg Government, <https://gouvernement.lu/en/dossiers/2018/benelux.html>.

While heralding ‘economic progress’ as the union’s ‘primary objective’, the Benelux treaty provided for freedom of movement not contingent on economic exchange. Unlike the Rome Treaty, Benelux did not speak of workers. Nor did it restrict the free movement of people to economic actors. It instituted a broad liberty of transit and residence — ‘freedom of movement, sojourn and settlement’ — for nationals of the Benelux states. From that fundamental freedom followed equal treatment throughout the Benelux territory, in the protection of ‘civil rights’ and ‘individual rights and interests’ as well as in freedom of trade and employment, social security benefits, and capital transactions. Benelux recognised non-economic freedoms as inseparable from commercial union.²⁵

Even more significant in Schengen’s origins was the Saarbrücken accord of 1984, a pact between France and West Germany that removed controls at the border crossing between the two countries. A memo on the Schengen Agreement that circulated in West Germany’s foreign office in June 1985 explained that it was ‘analogous ... to the Franco-German accord’.²⁶ The bilateral treaty was signed in the West German city of Saarbrücken. It emerged amid labour uprisings enacted at border crossings, which also became a reference point in the multilateral negotiations that produced the Schengen treaty a year later.

Plans for Franco-German border cooperation were already underway when truck drivers blockaded border crossings across Western Europe, mounting protests against customs checks that delayed their passage. Sometimes the wait at the border lasted as long as twenty hours.²⁷ The labour unrest added fuel to the idea of eliminating controls at the frontier between the historic adversaries, as their leaders joined in envisioning a Citizens’ Europe unified in freedom against the Soviet bloc. For a week in February 1984, the truckers’ barricades halted

²⁵ Benelux Treaty; Hrebly, *Libre circulation*, pp.2-5.

²⁶ ‘Unterzeichnung des Abkommens’, 10 Juni 1985.

²⁷ ‘Wir müssen wie Wölfe sein’, *Spiegel*, 9(1984), p.115.

the movement of goods and people from the English Channel to the Austrian Alps, making all too visible how border checks stood as barriers to the common market. The epicentre of the rebellion was the Mont Blanc Tunnel between France and Italy, where the blockade was most successful in stirring popular anger because it interfered with winter vacationing.²⁸

The agitation made headlines across the globe. The ‘traffic jam’ was said to be ‘an apt metaphor’, a symbol of the ‘political and economic paralysis of the old continent’.²⁹ It became known as the ‘blockade of the 10,000 trucks’, a siege that extended for miles on roads covered with ice and snow. The freight perished in the cold: livestock, milk, millions of eggs. Factories stilled, as the supply of parts stopped. Fuel went undelivered.³⁰

Occurring in the context of rising unemployment across Europe, the insurgency renewed calls for eliminating border controls that impeded the flow of trade and the transit of people. Despite the chaos, the strikers’ cause won the sympathy of the public, becoming ‘*eines nationalen Happenings*’.³¹ The blockade ended as governments pledged to streamline customs checks and to alter regulations of the trucking industry.³² Reports previously commissioned by the European Parliament on the state of the internal market had quantified the costs of customs formalities, estimating that the total price of ‘Non-Europe’ was 50 billion ECU (European Currency Unit), with about 12 billion lost on crossing borders, or between 5-10 percent of the value of the goods traded in the market.³³ But the complex rules and long waits fell most heavily on the truck drivers who made a living by crossing Europe’s borders.³⁴

²⁸ Claude Debons and Joël Le Coq, *Routiers, les raisons de la colère* (Paris, 1997), p.170.

²⁹ Michael Dobbs, ‘Europe Sinks into Paralysis’, *Washington Post*, 26 February 1984; K.N. Malik, ‘Blockades Paralyse French Borders’, *The Times of India*, 24 February 1984.

³⁰ ‘Wir müssen wie Wölfe sein’, p.108; Marci McDonald, ‘The Truckers’ Highway Revolt’, *Maclean’s*, 5 March 1984, p.27.

³¹ ‘Wir müssen wie Wölfe sein’, p.112.

³² E.S. Phelps and J.-P. Fitoussi, ‘Causes of the 1980s Slump in Europe’, *Brookings Papers on Economic Activity*, no.2 (1987): pp.487-520; ‘Wir müssen wie Wölfe sein’, pp.108-109, 112, 115.

³³ Ernst and Whinney, *Research on the ‘Cost of Non-Europe’: Basic Findings*, Vol. 4 (Luxembourg, 1988), p.3.

³⁴ ‘Wir müssen wie Wölfe sein’, p.112.

In the blockade's aftermath, pressure on European officials mounted. The pressure helped propel the Franco-German initiative, whose aims were not limited to facilitating customs checks, as existing scholarship has framed the event. At a meeting of European diplomats in Strasbourg, in May 1984, the French foreign minister, Roland Dumas, warned that the border turmoil had 'traumatised' the public. 'Controls', he said, 'have been unbearable'. Pledging that Mitterrand, the president of the European Council at the time, would pursue integration, he enunciated a 'vow to advance the European social space'.³⁵ For Saarbrücken's framers, easing impediments at border crossings necessarily required a social and political approach.

Notably, the Saarbrücken accord emerged not through European Community decision-making, but through direct cooperation between West Germany and France. Kohl and Mitterrand shared an impatience with Community institutions, as well as a conviction that integration was consistent with national authority, particularly when pursued through intergovernmental cooperation.³⁶ In a speech to the Bundestag on 15 March 1984, Kohl put forward a 'European idea' premised on 'Franco-German friendship' and involving more than market principles. 'Financial effort and political commitment must be seen together', he said.³⁷ Opening borders to allow freedom of movement was critical to this effort. At a meeting in May 1984 in Rambouillet, a commune near Paris, Kohl and Mitterrand set a July deadline for the elimination of border 'formalities', specifying little more about the new procedures of travel. They also advocated creation of separate customs lines for Community and non-Community travellers. At a press conference, Mitterrand extolled the 'spirit of restoring and sensitivity' marking Franco-German relations, as he honoured the fortieth anniversary of the end of the

³⁵ Roland Dumas, 'Progress of European Cooperation', Council of Europe, Committee of Ministers, 74th session, 10 May 1984, 7, Folder 136.099, Box 421.26 Fontainebleau, PAA.

³⁶ Mechthild Bauman, *Der deutsche Fingerabdruck: Die Rolle der deutschen Bundesregierung bei der Europäisierung der Grenzpolitik* (Baden-Baden, 2006), pp.56-57.

³⁷ 'Bericht der Bundesregierung', p.267.

Nazi occupation of France. At that moment, transport ministers from West Germany and the Benelux states were meeting in Neustadt an der Aisch, in southern Germany, to streamline the circulation of merchandise. A month later, Mitterrand and Kohl met again, on the side lines of the Fontainebleau Council, where they authorised their foreign ministers to finalise plans for free movement. The German embassy in France requested that Saarbrücken's provisions 'be made known to the public opinion of the two countries'.³⁸ *Bild*, Germany's top-selling tabloid, ran only a small notice. '*Keine Grenzkontrollen*' (No Border Controls), the news brief stated.³⁹

The treaty approved on 13 July paired the immediate removal of formalities with the long-term goal of transferring controls to the external borders separating France and West Germany from other countries. It provided for a simple visual check regulating vehicles crossing the border at reduced speed, so long as Community nationals affixed a green disc to their windscreen to indicate compliance with police and customs requirements. Both states also pledged to combat illicit trafficking and illegal immigration and to impose common visa requirements for foreign nationals.⁴⁰

The Saarbrücken accord introduced the first steps toward abolishing controls on the movement of all nationals of the European Community. By encompassing all Community nationals, Saarbrücken differed markedly from its antecedents — from Benelux, which applied only to nationals of the three member states, as well as from the Rome Treaty, which applied only to workers within the Community. The breadth of free movement allowed by the bilateral accord signalled a bid for broader participation by member states of the European Community. Signed a month after the commitments to Citizens' Europe made at Fontainebleau,

³⁸ Präsident Mitterrand und Bundeskanzler Dr. Kohl, Pressekonferenz, Paris, 29 May 1984; Ambassade de France, Bonn, 25 Juni 1984, Folder 141.569, Box 423.55 1 u. 2, Grenzkontrollen, PAA; Hans-Hagen Bremer, 'Bald ohne Grenzkontrollen', *Frankfurter Rundschau*, 30 Mai 1984.

³⁹ '*Keine Grenzkontrollen*', *Bild*, 18 Juni 1984.

⁴⁰ Saarbrücken Accord, 13 July 1984, preamble, arts.2, 3, 5, 1401 U.N.T.S. 167 (hereafter Saarbrücken Accord).

Saarbrücken anticipated progress toward European integration spurred by freedom of movement across the borders of Community nations.⁴¹

Under Saarbrücken, however, opening up free movement within Europe entailed sealing off national frontiers to foreigners. While expansively including all Community citizens, the Franco-German plan drew a strict distinction between European nationals and non-nationals. A year before Saarbrücken's signing, police officials of the two nations had begun considering how closer cooperation would promote 'the passage of EC citizens', balanced by ongoing efforts 'to reduce the number of foreigners', according to a Bonn memorandum. A German official underscored the merits of using a 'coordinated information system for the exchange of data, in particular for those unwanted foreigners from third countries'.⁴² The question, then, was how to avert the entry of foreign migrants. A letter from Mitterrand's chief-of-staff, Jean-Louis Bianco, to Kohl's, Waldemar Schreckenberger, indicated that Saarbrücken would rest on the enforcement of existing rules: 'For nationals of non-EC countries, the currently practised border controls will be maintained'.⁴³ But the accord also mandated greater bilateral coordination of customs and police administration. Both nations were obligated to address the problem of foreigners, customs fraud, and irregular movements of capital through increased 'harmonisation of appropriate laws'.⁴⁴

The challenges of reconciling freedom to cross borders with the exclusion of foreign migrants became more profound as Saarbrücken became a model for a broader territory without internal frontiers. In December 1984, the Benelux states proposed to France and West

⁴¹ See Pudlat, 'Der lange Weg zum Schengen-Raum', pp.311-12; Hrebly, *Libre circulation*, p.311.

⁴² Memorandum to Paul Cousseran, 'Zusammenarbeit zwischen der Republik Frankreich und der Bundesrepublik Deutschland auf grenzpolizeilichem Gebiet', 30 September 1983, Folder 141.569, Box, 423.55 1 u. 2 Grenzkontrollen, PAA.

⁴³ Mitteilung von Jean-Louis bianco an Waldemar Schreckenberger, Folder 141.569, Box, 423.55 1 u. 2 Grenzkontrollen, PAA.

⁴⁴ Saarbrücken Accord, arts.5, 10, 15.

Germany that the five nations join together to ease the passage of people and goods across their borders. Addressing both social and economic integration, the proposal drew on Fontainebleau's concept of a Citizens' Europe while also citing the needs of the common market in 'minimising border stoppage time'. The recommendations ranged from simple visual surveillance of vehicles to the full harmonisation of migration and customs policy.⁴⁵

Amid the state papers recording the development of border cooperation, a particularly revelatory memorandum circulated in France's foreign ministry, addressing the Benelux proposal. Titled 'Objectives of the Agreement of 13 July', it bluntly assessed the difficulty of enforcing regulations based on national identity across an area of five countries. 'We must be aware that if we take the path of abolishing checks at the border for Community nationals only, it will be very difficult to distinguish between them and nationals of third countries', the French paper warned. 'The logical conclusion is that to completely abolish internal controls for Community nationals implies that the same thing should be done for the others'. The paper delineated the contours of the problem, pointing to the relationship between national authority and immigration control. Easing checks 'for citizens of the Community', France stressed, 'opens a gap in the systems of protection against illegal immigration ... facilitating the circumvention of national provisions'. An answer to the dilemma, expressed only in confidential paperwork, lay in pairing freedom with greater surveillance: 'The solution of privileging community travellers by freeing them from any obligation of control is only practical if there is an unstoppable means of identifying them for sure'. Among the unequivocal findings was that transnational security required 'total accountability of each of the Member States' and that a

⁴⁵ Memorandum, 12 December 1984, Binder 1a, Schengen Collection, Central Archives of the Council of the European Union, Brussels, Belgium (hereafter Council).

green disc on a windscreen was scarcely a ‘sufficient guarantee’ against the circulation of foreign nationals.⁴⁶

It was a problem, therefore, of the unintended consequences of a capacious principle of free movement of persons. Once the frontiers between nations ceased to serve as sites of legal control, and common borders were dismantled, the distinction between foreign migrants and nationals of the European Community threatened to become illegible in practice. Undetected, non-Europeans would circulate as freely across internal frontiers as Europeans.

Persons, goods, politics — all were at stake as negotiations opened among the five in Brussels on 27 February 1985. ‘Today, the political will of five countries has become evident’, the diplomats declared in a communiqué to the press. A central negotiating group would draft a treaty, and intergovernmental working groups, convening in a series of meetings in Europe’s capitals, would craft procedures. Security measures designed to combat ‘illicit trafficking’ and ‘illegal immigration’ would be a counterpart of the free movement of persons and goods.⁴⁷

The diplomats at the Brussels meeting formed the central negotiating group, and most would sign the accord at Schengen. The Dutch delegate at Brussels, Virginie Korte-van Hemel, the state secretary of justice, would be replaced at Schengen by Willem Frederik van Eekelen.⁴⁸ The set of lead negotiators were all government ministers — state secretaries mainly responsible for foreign affairs — who had entered politics at the local level, their sympathies ranging from

⁴⁶ ‘Objectifs de l’Accord du 13 juillet’, 13 Décembre 1984, p.2, 3, Folder Allègement des contrôles aux frontières: Consultats Franco-allemands (1984), Box 1 1914INVA, MEAE.

⁴⁷ Communiqué to the press, Brussels, 27 February, 1985, included with Fiche Télégraphique, 28 February 1985, Folder Allègement des contrôles aux Frontières: réunion du 27 fév. 1985 à Bruxelles, Box 5 Coordination interministérielle pour l’allègement des contrôles aux frontières 101SUP (hereafter 101SUP), MEAE.

⁴⁸ ‘Discours Goebbels’.

social democratic to centre-right. Goebbels was a journalist who became president of the Luxembourg's league of Young Socialists, a city councilman, and member of the national parliament. In 1984, he was named secretary of state for foreign affairs, international trade, and development cooperation.⁴⁹ Lalumière was a member of France's Radical Party of the Left, a social-liberal faction that became a governing partner of the Socialists in the 1970s. She entered local politics in the Gironde region, after teaching public law at the Pantheon-Sorbonne University, and national politics as a minister of consumption in the cabinet of Pierre Mauroy, appointed in 1981 following Mitterrand's election that year. In 1984, she took on the European portfolio in the foreign ministry.⁵⁰ Schreckenberger had been a professor of public law at the University of Mainz and then held a series of government positions in Germany's southwest state of Rhineland-Palatinate, where he allied with the Christian Democratic Union and rose to become a justice minister. In 1982, he became Kohl's chief of staff, responsible for European policy.⁵¹ De Keersmaecker earned a law degree before beginning his business career at his family's brewery. Representing the centre-right Christian People's Party, he became a local mayor, a member of the Belgium's parliament, a member of the European Parliament, and, beginning in 1981, a member of the government as secretary of state for European affairs and agriculture.⁵² Hemel, also a lawyer, was elected to the Dutch parliament in 1977, as a member of the centre-right Christian Democratic Appeal. Appointed secretary for justice in 1982, she had oversight of immigration and integration.⁵³ Van Eekelen studied law at Utrecht, before joining

⁴⁹ 'Robert Goebbels', Europa Nu, https://www.europa-nu.nl/id/vhzna0ij85u3/robert_goebbels.

⁵⁰ 'Catherine Lalumière' Maison de l'Europe de Paris, <http://www.paris-europe.eu/011-3983-Catherine-Lalumiere-Presidente-de-la-Maison-de-l-Europe-de-Paris.html>.

⁵¹ Mit seiner Unterschrift unter das Schengen-Abkommen schrieb er Geschichte', *Rhein-Neckar-Zeitung*, 8 August 2017, https://www.rnz.de/nachrichten/heidelberg_artikel,-heidelberg-waldemar-schreckenberger-verstorben-mit-seiner-unterschrift-unter-das-schengen-abkommen-s-_arid,294434.html.

⁵² 'Paul De Keersmaecker', Vlaams Parlement, <https://www.vlaamsparlement.be/vlaamse-volksvertegenwoordigers/2301>.

⁵³ 'Virginie Korte-van Hemel', NU.nl, 5 April 2014, <https://www.nu.nl/binnenland/3744458/ex-staatssecretaris-virginie-korte-van-hemel-overleden.html>.

the Dutch foreign civil service. He went on to serve in parliament, representing the centre-right People's Party for Freedom and Democracy, and became state secretary for foreign affairs in 1982.⁵⁴

The diplomats convened in a series of meetings in Europe's capital cities, their work unfolding at a far remove from daily experience at the border crossings of their countries. The stage had been set for their undertaking by preliminary negotiations starting almost a year earlier, in the aftermath of the truck drivers' blockade. The commercial agreement reached in May at Neustadt an der Aisch between West Germany and the Benelux Union provided for the 'simplification' of controls on the transport of goods across their common borders.⁵⁵

Meanwhile, Benelux closely watched Franco-German arrangements, focusing on border cooperation in diplomatic meetings with both nations, and a copy of the Saarbrücken accord was sent to the Benelux secretary general soon after its signing.⁵⁶ When a formal proposal on easing border controls came from Benelux to France and West Germany in a memorandum of 12 December 1984, the foreign ministries circulated procedures for negotiating the complex fusion of the existing Saarbrücken and Benelux agreements, each with its own technical provisions.⁵⁷ Before the official talks opened in February, delegates from France and West Germany met in Bonn to settle on a common posture to adopt in Brussels.⁵⁸

⁵⁴ 'Wim van Eekelen', Indonesia-Nederland Society, <https://www.indonesia-nederland.org/about-us/board-of-trustees/wim-van-eekelen/>.

⁵⁵ Benelux memo of 12 December 1984.

⁵⁶ E. Kaufhold to E.D.J. Kruytbosch, 27 juillet 1984, Box 1a BNL-D-F + gc red cc Bnl, 1984-1985 (hereafter BNL), Council.

⁵⁷ 'Note du Comité de rédaction au Comité de Direction de l'Union économique Benelux', Conseil de l'Union économique, Comité de rédaction, 15 janvier 1985, BNL, Council; 'Note aux membres du Conseil de l'Union économique', 5 février 1985, Conseil de l'Union économique, Comité de rédaction, 1, BNL, Council; Juxtaposition des textes du 'Memorandum Benelux' et des propositions officieuses franco-allemandes (télux du 19.2.85) en matière de simplification des formalités aux frontières, Confidentiel, 27 février 1985, Council (hereafter Juxtaposition des textes du 'Memorandum Benelux').

⁵⁸ Document de travail franco-allemand mis au point le 14 février 1985 à Bonn en prévision de la négociation France-RFA-Benelux sur l'allègement des contrôles aux frontières (Bruxelles 27 février 1985), 1, Binder 1a, Schengen Collection, Council.

The December memorandum declared the aim ‘to achieve within the European framework a lifting of the formalities on the cross-border traffic of persons and goods’.⁵⁹ The five states agreed to work in stages, political and then technical. The first stage would be setting forth ‘*un accord politique global*’ — a global political accord. The second stage would be spelling out the precise terms of the accord’s implementation — ‘*la mise en oeuvre de l’accord politique global*’. By global, the diplomats did not mean a territory without internal borders that would reach across the world. Rather, the idea of the global expressed a universal aspiration that would become concrete in the European project. The declaration of the global accord must be made swiftly, to highlight ‘the political importance of the border operation’, explained the Benelux drafting committee. The second stage, ‘*technique*’, would take longer to resolve ‘divergent positions’. The principal purpose of the 27 February meeting in Brussels was to begin crafting a ‘political declaration by the governments’.⁶⁰

At the Brussels meeting, the diplomats agreed on the urgency of freeing the movement of persons and goods across the common borders of their countries. Unequivocally, the opening of the negotiations that would produce the Schengen accord defined the inseparable social and economic aims of the project: ‘a contribution to “Citizens’ Europe” and to the construction of an internal European market’.⁶¹ The central negotiating group directed the effort, assuming responsibility for writing the accord. A ‘political group’ addressed matters broadly related to the gradual abolition of border controls within the territory comprised by the five countries. The four working groups dealt with specific areas of concern: police and security; the movement of persons, including visas, and immigration; transportation; and customs and

⁵⁹ Benelux memo of 12 December 1984.

⁶⁰ ‘Note du Comité de rédaction au Comité de Direction de l’Union économique Benelux’, pp.1-2; ‘Note aux membres du Conseil de l’Union économique’, p.2.

⁶¹ Conclusions de la réunion tenue à Bruxelles le 27 février 1985, Union Economique Benelux, 6 mars 1985, Folder Allègement des contrôles aux frontières: réunion du 27 fév. 1985 à Bruxelles, Box 5 101SUP, MEAE (hereafter Conclusions de la reunion).

the movement of merchandise.⁶² In particular, the Benelux states pressed for celerity in preparing the accord, while France identified problems to examine, not least battling ‘illegal immigration’. A reason for the summer deadline was to offer ‘tangible results’ before the onset of the summer holidays.⁶³

The press communiqué on the Brussels meeting offered the public an origins story, fashioned as the agreement began to take shape. It described the Fontainebleau conclusions on eliminating police and customs formalities as the point of departure, which led to the Saarbrücken accord and, in turn, to the Benelux proposal to France and West Germany. Labour unrest at Europe’s border crossings had no place in the story. Instead, it affirmed that the movement of people and goods across open borders fostered a European identity by making ‘nationals of member states aware of belonging to the Community’.⁶⁴

Although proceeding independently of European Community institutions, the five-state initiative resonated with the Council’s objectives. By March 1985, an Ad Hoc Committee on a Peoples’ Europe established at Fontainebleau had issued a report to the Council finding that free movement would offer ‘tangible benefits’ to Community citizens while also advancing the completion of the internal market.⁶⁵ The states were reminded of their commercial obligations by the Kangaroo Group, a pro-trade faction in the European Parliament that demanded market integration and was keenly attentive to the lessons of the truckers’ blockade. ‘Constructing the Mont Blanc Tunnel meant getting through 15km of rock’, the group impatiently noted in a

⁶² Fiche Télégraphique, 28 février 1985, in Folder reunion du 27 fév., Box 5 101SUP, MEAE; Conclusions de la réunion, p.3.

⁶³ Conclusions de la réunion.

⁶⁴ Communiqué, Brussels.

⁶⁵ Pietro Adonnino, ‘A People’s Europe: Reports from the ad hoc Committee’, *Bulletin of the European Communities*, Supplement 7(Luxembourg, March 1985), p.5.

letter that reached Bonn just before West German and French diplomats met there to formulate a joint position on the Benelux proposal.⁶⁶

As the drafting of the accord unfolded, the central negotiating group, together with the four working groups, addressed a series of issues, both political and technical, involved in constructing an enlarged transnational area within which both people and goods would cross borders freely. The differences that arose turned on the primacy placed on goods and persons, which held significance for questions of security and sovereignty as well. Under the Fontainebleau conclusion on Citizens' Europe, member states were to adopt dual measures on free movement — a 'single document' for the circulation of goods and the abolition of all border 'formalities' for people crossing intra-community frontiers — no later than the middle of 1985. Accordingly, the Benelux delegation explained that their December proposal gave 'equal significance to the three parts: movement of persons, transportation, and movement of goods'. As Goebbels said, it belonged to the principles of both 'Citizens' Europe' and the 'internal European market'.⁶⁷ But France and West Germany together saw differences in emphasis. Invoking the 'decision of Fontainebleau', Lalumière laid particular stress on the movement of persons, travellers — *'la circulation des voyageurs'*. On the abolition of border controls, she said: 'It is a question in the first place of controls in the area of the movement of travellers'.⁶⁸ Schreckenberger was just as explicit. Expressing support for 'France's conception', he argued that the free movement of persons was the first priority, and not simply that of economic actors. The Federal Republic, he said, was 'in favour of reducing ... in particular before the summer holidays ... the controls on the movement of travellers'. Moreover, West Germany and France were as concerned with crime as with commerce: 'The Federal Republic

⁶⁶ Basil de Ferranti to J. Ruhfus, 6 February 1985, Folder 131.014, Box 12463 Grenzkontrollen, PAA.

⁶⁷ Conclusions de la réunion, p.2.

⁶⁸ Ibid., p 3.

of Germany underscores that, if the Benelux memorandum attaches relatively greater importance to the circulation of goods, the Franco-German accord, on the other hand, puts emphasis on problems of police and security'. Allowing free movement heightened the mutual obligations of the five nations to wage a 'battle against crime', Schreckenberger said.⁶⁹

West Germany and France were acutely concerned with the consequences of the free movement of persons for matters of immigration and asylum. A February diplomatic telegram from Bonn to Paris indicated the currents of alarm that coursed through the initial Brussels meeting. The telegram addressed 'Asylum Seekers in West Germany'. It described an increase of migrants arriving in West Germany — 5,000 in January alone, most of whom were Tamils, from Sri Lanka — and called for stricter laws of asylum that would prevent their entry and transit across Europe.⁷⁰ It said that asylum seekers were roaming through West Berlin, as well as travelling to other countries. 'In Berlin, the refugees buy train tickets for Paris, by which they obtain a transit visa while crossing the border'. It cited reports in the press, from the *Frankfurter Allgemeine Zeitung* to the *Quotidien Economique*, noting the public outcry against the migrants: 'This influx raises serious concerns in public opinion'.⁷¹

The interest of West Germany and France in pairing free movement with security measures was evident as well in a document marked 'confidential' prepared for the opening meeting in Brussels, which juxtaposed a Franco-German working paper page-by-page with Benelux's December proposal. There was basic agreement on most measures, from using green discs on windscreens and dismantling border controls on the weight and dimensions of commercial vehicles to harmonising visa rules and transferring sanitary controls on plants,

⁶⁹ Ibid., p. 3.

⁷⁰ 'Demandeurs d'asile en RFA', Fiche Télégraphique à M. Anglès, 20 février 1985, Folder Allègement des contrôles aux frontières: Négociations franco-allemands, Box 2 1914INVA, MEAE.

⁷¹ 'Demandeurs d'asile'.

animals, and persons from common borders to the interior of each country to avoid traffic jams. But the juxtaposition also illustrated areas of difference.⁷² The Franco-German paper sought harmonised practices among the five countries, within six months, to protect ‘their territories vis-à-vis migratory flows’ and stressed the ‘consequences of removing border controls for matters of immigration’.⁷³ It also proposed a systematic exchange of information to combat crime, pointing to the irregular entry and sojourn of persons as well as to financial fraud and contraband goods. By contrast, the Benelux memorandum provided in the long term for increased cooperation against ‘crime, terrorism, drugs, and illegals’.⁷⁴ On matters of national sovereignty, the differences were even more marked. The Benelux vision of a single, common policy on foreign immigration contrasted with the Franco-German plan simply to harmonise laws enforced by the individual states. Concerning external borders, the French and West German delegations would not permit centralised responsibilities.⁷⁵

As the negotiations continued, the working groups examined a raft of complex issues in seeking to surmount the differences in approach. A French memorandum prepared for a March meeting in Paris provided an inventory of the subjects under consideration, ranging from harmonising taxes on the circulation of merchandise and regulations on the transit of firearms to providing for the expulsion of foreign migrants and cooperating in exchanging information

⁷² Juxtaposition des textes du ‘Memorandum Benelux’ et des propositions officielles franco-allemandes (télux du 19.2.85) en matière de simplification des formalités aux frontières, Confidentiel, 27 février 1985.

⁷³ Juxtaposition des textes du ‘Memorandum Benelux’.

⁷⁴ Ibid.

⁷⁵ Ibid. Conseil de l’Union économique, ‘Note aux membres du Conseil de l’Union économique’, 5 février 1985, Binder 1a, Schengen Collection, Council; Comité Interministeriel pour les Questions de Coopération Economique Européenne, ‘Message pour l’Ambassadeur Représentant Permanent de la France auprès des Communautés Européennes’, 28 May 1985, Folder Marché Intérieur: Session du 10 juin 1985, Box 349, Secrétaire d’Etat auprès du Mre Charge des Affaires Européennes: Mme Catherine Lalumière, 7 décembre 1984 - 17 mars 1986 (hereafter Lalumière Papers), MEAE. On the disjuncture between human flows and capital flows, for example, see Brian Barry and Robert E. Goodin, eds., *Free Movement: Ethical Issues in the Transnational Migration of People and Money* (University Park, Penn., 1992).

without violating privacy rules. The delegates would also establish a list of countries posing ‘a migratory flow problem’ — the ‘undesirables’.⁷⁶

In April meetings, in Brussels and Bonn, points of concern included the meaning of the phrases ‘short term’ and ‘long term’ as used in a draft of the accord and the legal status of ‘the political declaration’ as it would intervene in the jurisdiction of the five states. According to a Benelux memorandum, the diplomats had also begun to determine when the signing of the agreement should occur and whether a prior review within the cabinet of each state was required.⁷⁷ Revisions of the text addressed ambiguities in the terminology of ‘common borders’.⁷⁸ A telegram from West Germany in May to the foreign ministries of the other four states recorded that agreement had been reached on several outstanding issues, including capital controls, tax exemptions, and consultation before agreements with non-contracting countries.⁷⁹ One of the sticking points, between the Netherlands and Germany, was on permits for the transit of commercial goods. The member states ended the standoff by leaving the approval of licenses to bilateral dialogue.⁸⁰ The Dutch prime minister, Ruud Lubbers, wrote to Kohl to express his appreciation that the issue was resolved, saying that a ‘Europe without borders’ should yield benefits for commercial truckers as well as everyday travellers, and that he would direct his delegation to sign the accord.⁸¹

⁷⁶ Jean-Paul Anglès, Réunion à Paris le 12 mars 1985 du ‘Groupe Central de Négociation’, 7 mars 1985, pp.2-5 Binder 1a, Schengen Collection, Council.

⁷⁷ ‘Point 3.b) du Projet d’Ordre du Jour de la Réunion du Comité de Direction du 15 Avril 1985’, Note au Comité de direction de l’Union économique, Union Economique Benelux, 10 avril 1985, BNL, Council.

⁷⁸ ChBk to AA, ‘Abschluss eines Abkommens zum Abbau von Grenzkontrollen zwischen der Bundesrepublik Deutschland, Frankreich und den Benelux-Staaten’, 3 Mai 1985, 1, 2, Folder 463.233, Box 505.MV 820 Schengener Übereinkommen, PAA; Note à l’attention de Monsieur Jean-Paul Anglès, Ministère des Relations Extérieures, 7 Mai 1985, Folder Marché Intérieur: Session du 10 juin 1985, Box 349, Lalumière Papers, MEAE.

⁷⁹ ChBk, Ref. 211, ‘Verhandlungen D-F-Benelux über Abbau der Grenzkontrollen’, 17 Mai 1985, pp.2, 3, Folder 463.233, Box 505.MV 820 Schengener Übereinkommen, PAA.

⁸⁰ Ibid.

⁸¹ Ruud Lubbers to Helmut Kohl, 31 Mai 1985, Folder 463.233, Box 505.MV 820 Schengener Übereinkommen, PAA.

National authority prevailed in all but one critical area of dispute — democratic consent. Because Dutch law made intergovernmental agreements subject to legislative approval, the Hague had proposed that the accord either come before national parliaments for ratification or proceed as a statement of political principles rather than as an international legal commitment. The other delegations objected, fearing that a single national parliament could block the entire agreement. Such unilateral authority could not be ceded to legislatures of the five states. As the director of judicial affairs of France's foreign ministry construed a penultimate draft, 'The project ... does not require the assent of Parliament to enter into force'.⁸² Ultimately, it was the French delegation that introduced compromise language specifying that the accord would apply provisionally after its signing but take full effect following ratification of a later implementing instrument. The concession satisfied the Dutch, based on their view that the accord would be 'politically binding on the governments' without reaching the law of nations.⁸³ A French diplomatic coordinator was relieved to dispose of the matter; as he observed to Luxembourg's ambassador in Paris, French law made no distinction between obligations of the government and of the state. 'Take the example of Saarbrücken: 'it is an agreement between governments; but it commits the state'. But the coordinator confessed to finding the dispute abstruse, 'a fine legal discussion that is way over my head'.⁸⁴

With a signing date set for 14 June, the diplomats finished their work on the accord. The timing complied with the Fontainebleau conclusions, as reiterated by the central negotiating group meeting in Brussels in February. All that remained was the signing ceremony,

⁸² Note à l'attention de Monsieur Jean-Paul Angès.

⁸³ Ambassade van het Koninkrijk der Nederlanden, Paris, 3 June 1985, Folder Accord de Schengen à Cinq: ratification par les Pays-Bas et publication (1985-86), Box 2 1914INVA, MEAE.

⁸⁴ Waldemar Schreckenberger, 'Unterzeichnung des Abkommens'; Ambassade de France en Belgique, 28.5.85, Binder 1b, Schengen Collection, Council; Ambassade van het Koninkrijk der Nederlanden, Paris, 3 June 1985, Folder Accord de Schengen à Cinq: ratification par les Pays-Bas et publication (1985-86), Box 2 1914INVA, MEAE.

which would occur a week before the summer solstice. A memorandum from Schreckenberger about the event circulated in West Germany's foreign office in early June. He returned to the question of international law, explaining that the accord would necessarily acquire greater force than a political declaration. 'We need the binding effect under international law because many specialised agencies of the federal government and the states are involved in the implementation of the agreement', he wrote, adding that only the Dutch were uncertain on this point.⁸⁵ Furthermore, the accord would begin to apply immediately, 'undoubtedly on 15 June'. His plan was to drive from Germany into France, stopping in Strasbourg and from there to Luxembourg, to take part in the signing '*am Dreiländereck*' —at Schengen's triangle border.⁸⁶

The Schengen Agreement was signed on the afternoon of Friday, 14 June 1985. On that day, in 1940, the Germans had entered Paris, beginning the Occupation; now the agreement was to open borders and expand the terrain of free movement within a nascent Citizens' Europe. Again, the diplomats belonging to the central negotiating group convened, signing a bound copy of the agreement. 'We thought we had made life easier for people. Schengen said, at the borders, pass, pass, pass — we won't bother you. In principle, you can pass; and we presume that you're honest', Lalumière recalled of the ceremony. 'It was not an extraordinary event. It wasn't a revolution.... There were obstacles to the principle of free movement, so it reduced the obstacles'.⁸⁷ Schengen was meant to be about everyday life, about crossing borders freely.

⁸⁵ Schreckenberger, 'Unterzeichnung des Abkommens'.

⁸⁶ Ibid.

⁸⁷ Lalumière Oral History

The text of the Schengen Agreement was anything but revolutionary. The ten-page document was prosaically titled ‘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’. As inspiration, the preamble cited the Fontainebleau conclusions, and as precursors, embraced the Saarbrücken and Neustadt pacts of 1984. Schengen’s 33 articles listed the technical measures, short and long term, worked out by the negotiating groups. The political declaration spoke of the union of the peoples of the European Communities and progress toward achieving the free movement of persons, goods, and services. The agreement announced the abolition of common borders among the Schengen states not as a rupture but rather as a fulfilment of founding promises made by the European Communities.⁸⁸

The agreement did not establish any government institutions, whether legislative, executive or judicial. It merely provided for meetings at regular intervals between authorities of members states, as a corollary of cooperation between their police and customs officials. It articulated the compromise reached on ratification, stating that the agreement would be signed without reservation, and would apply provisionally from the day after signing, with ratification to follow. The agreement nowhere mentioned the Treaty of Rome, though it invoked the European Community’s commitment to assuring free movement of commodities and people across internal borders.⁸⁹

As an ultimate goal, the agreement anticipated the complete abolition of checks at the common borders of member states and the transfer of controls to the perimeter of the Schengen area. First, checks would be simplified, as the states expanded cooperation; then,

⁸⁸ Schengen Agreement, 1985.

⁸⁹ Ibid.,preamble, arts.10, 32.

through a longer process of harmonising regulations, internal border controls would be eliminated altogether. The provisions would take effect in stages, short-term changes applying either a day after the agreement's signing, on 15 June, or by 1 July 1985, or by 1 January 1986, and long-term measures by 1 January 1990.⁹⁰

Use of a 'simple visual surveillance' for private vehicles at common border crossings would start immediately, on 15 June, as a 'general rule', enabling the unimpeded flow of traffic. The green disc placed on the windscreen, with a diameter of at least eight centimetres, would signal compliance with 'border police rules' for people and merchandise, including 'carrying only goods permitted under the duty-free arrangements'. As necessary, random checks would apply stricter controls, occurring off the main road so as not to interfere with the passage of other vehicles.⁹¹

Certain measures specifically addressed the transit of goods, supporting economic integration and the workings of an internal market. Provisions on the 'cross-border carriage of goods by road' included allowing visual checks and simplifying license rules for commercial road transport; reducing stopping times, in particular for shipping merchandise by railroad through a 'special routing system'; harmonising value-added taxes; increasing the duty-free allowance on goods and trucking fuel; introducing common customs forms; and waiving controls on the weights and dimensions of commercial vehicles and on driving and rest periods.⁹² A long-term measure concerning 'the movement of goods' was to transfer all checks from common borders to external borders or to within the territories of the Schengen states.⁹³

Other directives merged commercial and social measures, setting up an equivalence

⁹⁰ Ibid., arts.1-5, 11-16, 30-32.

⁹¹ Ibid., arts.2, 3.

⁹² Ibid., arts.11, 13, 15, 23, 21, 22, 25.

⁹³ Ibid., arts.24.

between goods and people as subjects of free movement across borders. The agreement required the Schengen states to guarantee equal treatment of nationals of member states carrying goods across common borders, fusing anti-discrimination doctrine and free-market principles in mandating removal of ‘restrictions on entry to the Member States of goods possession of which is not prohibited for their nationals’.⁹⁴ It also provided for increasing duty-free allowances granted to travellers as well as minimising waiting times at common borders for rail transport and inland waterway traffic, which facilitated the free transit of both merchandise and people carried aboard trains and ships.⁹⁵

The pairing of goods and persons found clearest expression in parallel provisions on data sharing designed to buttress security. A directive on the use of a single customs document mandated collecting information and tracking the transit of ‘goods crossing a common border, through a systematic, automatic exchange of the necessary data’. People were to be tracked similarly, under a provision directing ‘exchange of information’ to prevent the ‘unauthorised entry and residence of persons’ as well as ‘smuggling’ and other illicit traffic.⁹⁶ The agreement required incorporation of unified, systematic data exchange on goods and people into the plan of simplified visual surveillance at common borders.

The Schengen accord enabled the free movement of persons in ways profoundly different from the guarantees granted by other transnational charters. Governing five countries — a great expanse of Western Europe — the accord recognised movement across national frontiers as a freedom of people that transcended economic life. Schengen applied to ‘persons’, sometimes considered as ‘travellers’ or ‘passengers’.⁹⁷ The word ‘worker’ does not appear in the

⁹⁴ Ibid., arts.21(b).

⁹⁵ Ibid., arts.21(a),14,16.

⁹⁶ Ibid., arts.25,9.

⁹⁷ Ibid., preamble, arts.2, 4, 6, 7, 9, 17, 19, 21.

accord. Schengen thus differed from the Treaty of Rome, which recognised four freedoms of movement (of goods, services, capital, and persons) as essential to the common market, and predicated the circulation of persons within the territory of member states strictly on economic activity, the pursuit of gainful employment, as ‘workers’.⁹⁸ Schengen also reached beyond Saarbrücken, extending a bilateral pact into a multinational treaty. And it amplified the principle of free movement enshrined in human rights covenants, transforming a right protected within a single nation-state into a freedom assured within a transnational territory. ‘Everyone has the right to freedom of movement and residence within the borders of each State’, affirmed the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948.⁹⁹ The European Convention on Human Rights reaffirmed that guarantee in a protocol of 1963 declaring, ‘Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement’.¹⁰⁰ Schengen extended the principle of free movement from the operation of the market and the terrain of the nation to the common space of five countries.

The Schengen accord did not use the language of rights. But abolition of a constraint carried a new freedom — and though the accord did not create a human right to cross common borders, it expressly affirmed that abolishing checks at border crossings would afford ‘free movement of persons’.¹⁰¹ It was not a revolutionary document. Yet simply by saying of persons, in Lalumière’s words, ‘at the borders, pass, pass, pass.... In principle, you can pass’, the accord revolutionised the principle of free movement. By making ‘life easier for people’, Schengen enshrined crossing national borders as a freedom of everyday life.¹⁰²

⁹⁸ Treaty of Rome, preamble, arts.2, 3, 9, 48, 59, 67.

⁹⁹ UDHR, art.13.

¹⁰⁰ Protocol No.4, 1963, arts.1, 2.

¹⁰¹ Schengen Agreement, 1985, preamble.

¹⁰² Lalumière Oral History.

The free movement of people enabled by the Schengen Agreement was of the most mundane kind, indeed. The most basic easing of everyday border crossing through use of the green disc would start the day after the signing of the accord. Article 2 declared: ‘With regard to the movement of persons ... the police and customs authorities shall as a general rule carry out simple visual surveillance of private vehicles crossing the common border at reduced speed, without requiring such vehicles to stop’.¹⁰³ Long-term measures regarding ‘the movement of persons’ would completely abolish internal checks and place all controls at external borders. Others provided for increasing duty-free allowances granted to ‘travellers’ and harmonizing rules for ‘travellers’ involving both hotel registration and transit with goods.¹⁰⁴

To be sure, some of Schengen’s provisions on the free movement of persons were steeped in commercial principles, facilitating free trade. An internal market would be advanced by enabling travellers to circulate easily while carrying goods, a green disc expediting the transit of people and the wares in their vehicles. The preamble affirmed the European Community’s aim of ensuring a triad of liberties, ‘the free movement of persons, goods and service’.¹⁰⁵ Yet none of Schengen’s measures limited free movement across common borders to vendors of labour or other economic actors. The accord granted persons freedom to cross borders in pursuit of matters without market value, their lives made easier by the abolition of checks at common borders. Schengen expressed the dual aims of social and economic integration, recognising the free movement of people as a principle linked to market activity but also embodied in the union of the peoples of the European Community — ‘a contribution to “citizens’ Europe” and to the construction of an internal European market’, as the accord’s

¹⁰³ Schengen Agreement, 1985, art.2.

¹⁰⁴ Ibid., arts.4, 6, 17, 21, 19.

¹⁰⁵ Ibid., preamble.

framers had said in Brussels.¹⁰⁶

The Schengen area created by the accord was therefore a new transnational social space as well as a forum for market exchange. In abolishing the physical barriers dividing the five member states, the accord declared the aim to ‘strengthen solidarity between their peoples’.¹⁰⁷ While underwriting economic unification, Schengen laid the groundwork for a Citizens’ Europe where the vision of social solidarity presupposed freedom of movement.

In principle, the Schengen Agreement afforded free movement only to nationals of the European Community, in keeping with the project of an ‘ever closer union’ among its peoples.¹⁰⁸ Even as the accord recognised ‘persons’ as bearers of the freedom to move across borders within the Schengen states, it expressly restricted that freedom to ‘nationals’. Not nationals of France and Germany and the Benelux Union but European Community nationals, a category of nationality expressing an emergent concept of transnational citizenship. The preamble of the accord declared that the freedom to cross internal borders belonged to ‘nationals of the Member States’ of the Community’.¹⁰⁹ In the Schengen accord, as in the treaties of Rome and Saarbrücken, the grant of free movement attached to European nationality. But the distinction between European nationals and non-nationals was to be secured through new measures to coordinate visa policies and harmonise the law on aliens and conditions for entry into the territories of the Schengen states.¹¹⁰

The Schengen accord made explicit that the free movement of persons depended on the exclusion of ‘foreigners’ — peoples of states that were not members of the European community.¹¹¹ The accord spoke distinctly of illegal immigration as a peril of opening common

¹⁰⁶ Conclusions de la réunion, p.2.

¹⁰⁷ Schengen Agreement, 1985, preamble.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

¹¹⁰ Ibid., arts.7, 20.

¹¹¹ Ibid., arts.7, 20.

borders: ‘the adverse consequences in the field of immigration and security’. Among the measures to take effect by the end of the year were procedures to block the entry of foreign migrants into the Schengen area and prevent ‘unauthorised’ persons from crossing common borders, ‘to ensure the protection of the entire territory of the five States against illegal immigration and activities which could jeopardise security’.¹¹² In requiring procedures to distinguish between nationals and foreigners, the accord expressly addressed the status of Berlin, stipulating, ‘This Agreement shall also apply to Berlin’, the site of Europe’s most perilous border crossings.¹¹³

The exigency of stopping the flow of foreign migrants into and across the Schengen area magnified the importance of the police and security measures enumerated in the accord. In pairing security with free movement, the accord focused on the circulation of non-nationals of the European community, the ‘unauthorised entry and residence of persons’ and the need ‘to safeguard internal security and prevent illegal immigration’.¹¹⁴ Reflecting the findings of the working groups, it directed joint action on measures ranging from international assistance on extradition to ‘hot pursuit’ by police officers to data sharing.¹¹⁵ The system of transnational cooperation on security was designed not to trespass on the authority of the Schengen states, as historians such as Alan S. Milward would later find of European integration, but to operate ‘in accordance with their national laws’.¹¹⁶

On the day of the signing of the Schengen Agreement, the diplomats did not speak of annexes appended to the accord. The annexes contained lists of the countries purportedly posing immigration threats to the European Community — the ‘undesirables’.¹¹⁷ Composed by

¹¹² Ibid., art. 7.

¹¹³ Ibid., art.29.

¹¹⁴ Ibid., arts.7, 9, 17.

¹¹⁵ Ibid., arts.18, 9.

¹¹⁶ Ibid., art 9. See Milward, *The European Rescue of the Nation-State*.

¹¹⁷ Anglès, Réunion à Paris, pp.2, 3, 4, 5.

the framers of the agreement in confronting the problem of migratory flows, the country lists were not enshrined in the accord, but kept confidential. A protocol of June 4, 1985 stated: "The parties have agreed in confidence on the following provisions to clarify and complete the agreement concluded among them on 14 June 1985 in Schengen".¹¹⁸ It was the German delegation that requested that the list of undesirable countries remain secret. Soon, as diplomats of the Schengen states set about devising a convention implementing the provisions of the accord, the lists would be cited as proof of an original intent to 'fight against illegal immigrants'.¹¹⁹

In 1985, the pariah countries ranged from Haiti, South Africa and Yemen to East Germany, Poland, and China.¹²⁰ As the working groups drafted the implementing convention, the country lists would swell to include more than a hundred nations, primarily in Africa and Asia, all of which were identified as producers of undesirable immigrants.¹²¹ When the Schengen Agreement was signed, making everyday life easier for the peoples of the European Community, the confidential annexes prepared for the adverse consequences of the free movement of persons by defining its limits.

The village of Schengen is unremarkable except for its pastoral beauty. It was visited by Goethe when he was writing on perceptions of nature, and Victor Hugo once drew a picture of

¹¹⁸ Projet d'accord à caractère confidentiel complémentaire à l'accord entre les gouvernements des Etats de l'Union Economique Benelux, de la République fédéral d'Allemagne et de la République française relative à la suppression graduelle des contrôles aux frontières communes, 4 juin 1985, Binder 1b, Schengen Collection, Council.

¹¹⁹ Emile Cazimajou, 'Accord de Schengen', Note à l'attention du Cabinet du Ministre des affaires européennes, Paris, 4 novembre 1988, 4, Folder Lettre de M. Joxe (3 nov. 88) (hereafter Joxe), Convention Complémentaire Schengen, Visas nationaux/Reconnaissance, Box 5 Coordination interministérielle pour l'allègement des contrôles aux frontières, 1984-1989, MEAE.

¹²⁰ Projet d'accord à caractère confidentiel.

¹²¹ Papahatzi, 'Free Movement of Persons', p.23.

the tower of a medieval castle that stands near the town square.¹²² In the years after the Second World War, the village was known mainly as a wine-making centre, not a theater of high politics, until the signing of the Schengen Agreement in 1985.

That event made Schengen a landmark in the development of the freedom of persons to cross borders. By abolishing internal frontiers among five countries, the Schengen accord formed a turning-point as well in the progress toward completing the internal European market, which rested on the free circulation of people, goods, capital, and services. So, too, the accord became a symbol of the ideal of a Citizens' Europe, where the everyday freedom of crossing common borders would bind together the European people.

On the eve of the Schengen Agreement's full entry into force, a decade after its signing, the police commissioner Vendelin Hreblay explained why the accord had become an example for the world. His study did not draw on his own experience in helping to draft its rules. Rather, it explored Schengen's significance as an embodiment of free movement and its boundaries. The accord was 'considered with interest not only by all the member countries of the European Communities but also by all countries confronted with problems of cross-border movement', Hreblay observed.¹²³ He set Schengen's abolition of common borders within a long historical arc. 'The first progress of modern democracies was to abolish those internal frontiers.... The progress of the Schengen Agreement is to abolish these same barriers among several countries'.¹²⁴ But not all barriers were removed, and constraints applied to both people and commodities. As Hreblay wrote, the 'free movement of goods or services is not synonymous with unrestricted circulation', and blocking illegal immigration gave the restrictions on persons a

¹²² Johann Wolfgang von Goethe, 'The Experiment as Mediator of Object and Subject', *Nature Institute* (Fall 2010), pp.19-23.

¹²³ Hreblay, *Libre circulation*, p.7.

¹²⁴ *Ibid.*, p.31.

‘more powerful symbolic value’.¹²⁵ Founded on the dual principles of liberty and exclusion, the transnational territory served as a model, a precursor — ‘the laboratory of free movement’.¹²⁶

As a laboratory of free movement, Schengen established both the primacy of the freedom of persons to cross national borders and the necessity of security in a transnational space without internal frontiers. It extended the logic of free movement to apply not simply to economic actors operating within a common market but to persons traveling within the common space. At the same time, the accord guaranteed free movement only to nationals of the European Community, explicitly excluding foreign migrants from its protections. Schengen was a project at once expansively democratic and strictly circumscribed by rules of nationality. Precisely because the accord enlarged the domain of free movement — to all nationals of the European Community simply as persons and across an expanse of Western Europe — it mandated new security procedures. On the eve of the Schengen accord’s incorporation into European Union law under the Treaty of Amsterdam in 1997, Waldemar Schreckenberger recalled the effort to construct ‘a secure, crime-protected transnational space of free movement’.¹²⁷

When the accord began to apply provisionally, in 1985, a new freedom of movement benefited all nationals of the European Community who travelled across the territory that came to be known colloquially as ‘Schengenland’. A day after the signing of the agreement, checkpoints began to come down. As *Nieuwsblad van het Noorden*, a Dutch newspaper, noted,

¹²⁵ Ibid., p.32.

¹²⁶ Ibid., p.7.

¹²⁷ Waldemar Schreckenberger, ‘Von den Schengener Abkommen zu einer gemeinsamen Innen- und Justizpolitik (Die Dritte Säule)’, *Verwaltungs-Archiv*, 88, no.3 (1997), p.401.

‘Today marks the start of easing border control’.¹²⁸ Brief announcements of the accord also appeared in West Germany’s *Süddeutsche Zeitung* and Belgium’s *Le Soir*.¹²⁹

At the end of the month, addressing the Bundestag, Helmut Kohl foresaw greater meaning in the everyday experience of free movement in Western Europe, offering a narrative of postwar history as a process of abolishing divisions between nations. The chancellor spoke of the past, of the ‘inferno of the Second World War’; of the present, ‘the opportunity to be free in Europe’; and of the future, ‘We must make every effort to bring Europe closer to citizens in everyday life’. He heralded the agreement with France and the Benelux states that brought the ‘opening of borders our citizens have always demanded’. And he described the ‘self-evident world’ of a Citizens’ Europe marked by ‘the permeability of borders’.¹³⁰

It would take negotiators another five years to devise the convention implementing the Schengen accord, to establish the long-term complementary measures to secure the borders of the Schengen area and shield the transnational space of free movement against the entry of foreign migrants. By then, Europe had changed profoundly; the fall of the Berlin Wall and the end of the Cold War meant that an agreement forged in 1985 would apply in a world of newly permeable borders, where the free movement of persons evoked alarm about the security of the Schengen states.

¹²⁸ ‘Vandaag begin versoepeling grenscontrole’.

¹²⁹ ‘L’Accord relatif à la suppression graduelle’, p. 32; ‘Fünf EG-Staaten unterzeichnen Grenzerleichterungs-Abkommen’, *Süddeutsche Zeitung*, 15-17 June 1985; ‘Benelux-France-Allemagne: frontières souriantes’, *Le Soir*, 14 juin 1985.

¹³⁰ ‘Rede des Bundeskanzlers, Dr. Helmut Kohl, vor dem Deutschen Bundestag am 27. Juni 1985 über die Zielsetzungen der Europapolitik der Bundesregierung’, *Bulletin der Bundesregierung*, 28, no.75 (Juni 1985): p.658, 662.

CHAPTER 3 — A RETURN TO THE MOSELLE RIVER

On 19 June 1990, European diplomats returned to the village of Schengen to sign a treaty implementing the accord on free movement. Again, as five years earlier, the diplomats gathered aboard a riverboat for the signing ceremony. The 1985 accord was a charter of intent, drafted in half a year. But the 1990 convention specified complex technical measures, designed to balance liberty with security, which took half a decade to negotiate. It was matter-of-factly titled the Convention Implementing the Schengen Agreement of 14 June 1985. People and goods, borders, foreign migrants, crime, surveillance, data exchange, and harmonising national laws — all were matters addressed in the convention. Only one was new, not found in the 1985 treaty: the treatment of asylum seekers, a problem of free movement that blurred the boundary between preventing illegal immigration and protecting human rights.

The convention would not enter into force until ratified by national parliaments of the Schengen states. Yet the symbolism of the treaty signing, as a rite of European integration, drew a throng of dignitaries, including members of the European Parliament. Of the foreign ministers and state secretaries from the Schengen countries, only a Belgian diplomat, Paul de Keersmaecker, had signed the 1985 accord. The convention's other signatories, who had led their countries' negotiating delegations, were Edith Cresson of France; Lutz Stavenhagen of West Germany; Georges Wohlfart of Luxembourg; and Aad Kosto of the Netherlands. As the president of the Central Negotiating Group in June 1990, the Dutch foreign minister, Pieter Dankert, also signed the convention. An ambassador from Italy represented his country's bid for accession to the Schengen accord.¹

The significance of the convention, and the return to the village of Schengen, was set

¹ Dankert, 'Discours'.

forth at the close of the signing ceremony in an address delivered by Pieter Dankert on behalf of the signatory states. ‘Schengen is here and I am happy’, he said. ‘Five years of negotiations have been concluded’. He explained how the long work on the convention had involved ‘inventiveness’ by diplomats, ministries, and translators in devising an agreement ‘that guarantees the abolition of borders’. He celebrated the unity of Europe and the fall of the Berlin Wall, marvelling, ‘Forty years ago who would have imagined that France, Germany, almost reunified, and the Benelux would sign an accord here at Schengen’. And he spoke of Schengen as an example for Europe, ‘a laboratory ... for the enterprise “free movement of persons.”’²

But the ceremonial address was not simply a tribute. It noted flashpoints of conflict that had emerged during the negotiations — within the meetings of diplomats as well as outside their closed doors, as critics of the treaty-making process raised concerns about national sovereignty, migrant rights, and the secrecy of negotiations that lacked democratic safeguards. There were ‘difficulties’, Dankert said, with ‘some national parliaments about the intergovernmental method’ and also with ‘conclusion of the agreement on asylum procedures’. Furthermore, the prospect of German reunification, following the upheavals in Eastern Europe in the autumn of 1989, had prolonged the convention’s drafting. Schengen had been expected to spur economic integration, implemented ‘before the completion of the common European internal market’, but the timing had been disrupted, Dankert acknowledged. ‘An agreement on the abolition of internal borders is a bit more complicated than was thought at the beginning’.³

Impetus for implementing Schengen had come soon after the signing of the 1985 agreement, from amendments to the Treaty of Rome introduced by the Single European Act.

² Dankert, ‘Discours’.

³ Dankert, ‘Discours’; Lorent, ‘Moselortschaft Schengen’; and see ‘Grenzen open? Niet voor 1992’, *Nieuwsblad van het Noorden*, 19 June 1990; ‘L’Europe sans frontières en pointillé’, *L’E Monde*, 20 juin 1990. On conflict over the convention, see ‘Asielakkoord EG tegen wens Kamer getekend’, *Leeuwarder Courant*, 16 June 1990.

Adopted by the European Community in 1986, the act set a deadline of January 1993 to complete an internal market allowing free movement of goods and people. Meanwhile, the European Commission affirmed Schengen's "laboratory" function' in establishing measures for 'liberalisation of the circulation of passengers and goods'.⁴ That was the plan reaffirmed at the convention's signing, 'to practice in the context of Schengen the "free movement of persons"' before the Single European Act deadline.⁵

The signing of the Schengen convention thus promised to drive forward globalisation at the end of the twentieth century, liberalising the movement of people and commodities in a transnational space, appearing as a harbinger of both Citizens' Europe and the internal market. While the drafting of the complex instrument unfolded, European life was altered by world events that impinged on the laboratory of Schengen — as this chapter brings to light. The convention bore the imprint not only of the Iron Curtain's downfall, in articles on German reunification, but also of a surge of foreign migrants into the Schengen states from Africa, Eastern Europe, and the Middle East, which shaped the contested provisions on asylum and national sovereignty.⁶ Indeed, the outside world pressed in at the signing ceremony. As European diplomats enshrined the principle of free movement, security was heightened to restrict a demonstration mounted on the banks of the Moselle River led by *SOS-Racisme*. Schengen had become a subject of agitation on asylum and human rights.⁷

News of the implementing convention circulated across Europe and worldwide. The

⁴ 'Accord de Schengen: Satisfaction du Vice-président Bangemann', Commission des Communautés Européennes, 14 novembre 1989, François Lamoureux, FL-185 Chronos généraux, Historical Archives of the European Union, Florence, Italy (hereafter HAEU).

⁵ Dankert, 'Discours'; Lorent, 'Moselortschaft Schengen'.

⁶ 'Asielakkoord'; 'Grenzen open'. On asylum, Schengen, and migration into Western Europe in the 1980s, see Gil Loescher, 'The European Community and Refugees', *International Affairs*, 65, no.4 (Autumn 1989), pp.617-36; Emmanuel Comte, 'Migration and Regional Interdependence in the Mediterranean, from the Early 1980s to the Mid-1990s', *Journal of European Integration History*, 21, no.1 (2015), pp.109-124.

⁷ Lorent, 'Moselortschaft Schengen'. Patrick R. Ireland, 'Facing the True "Fortress Europe": Immigrant and Politics in the EC', *Journal of Common Market Studies*, 29, no.5 (September 1991), pp.473-75.

Luxemburger Wort hailed ‘the historic signing of the treaty’.⁸ In Paris, *Le Monde* proclaimed the emergence of a ‘Europe without borders’, while also noting the convention’s provision of compensatory security measures, ‘an apparatus that offsets the effects of opening borders’.⁹ *The New York Times* announced, ‘Welcome to Schengenland’.¹⁰ The rhetoric at the signing ceremony resounded across the Atlantic, as recorded in *The Washington Post*: ‘Our accord is a model ... for the free movement of people’.¹¹ But the press accounts also noted divisions that had developed as the negotiations dragged on, regarding illegal immigration, asylum, disparate national legal traditions, and fortification of the Schengen area’s external borders. As Belgium’s *Le Soir* reported, the difficulties involved ‘human rights in ... a high-risk area’ of free movement across common borders.¹²

This chapter traces the efforts of negotiators to produce a Schengen implementing convention that would pair freedom with security, mitigating the risks of abolishing borders with compensatory measures enhancing surveillance and policing, and to finish their labours before the deadline to complete the internal market. Although the intergovernmental negotiations were not public, as in 1985, an abundance of diplomatic memoranda, infrequent statements to the press, and inquiries made by human rights groups shed light on the treaty-making process, which became a forum for transnational argument on the practical meaning of free movement. The chapter sets the convention’s drafting against the backdrop of developments in European Community law and policy, which informed Schengen’s rules on national and supranational authority. Doctrine established by European Commission white papers, judgements of the European Court of Justice, and supplements to the Rome Treaty

⁸ Lorent, ‘Moselortschaft Schengen’.

⁹ ‘L’Europe sans frontières en pointillé’.

¹⁰ ‘5 Western European Countries to Establish a Common Border’, *New York Times*, 20 June 1990.

¹¹ ‘5 EC Nations Agree on Common-Border Rules’, *Washington Post*, 20 June 1990.

¹² ‘L’Europe sans frontières est née...sur le papier’, *Le Soir*, 20 juin 1990.

guided the long course of the negotiations.

The authors of the convention were diplomats, police commissioners, jurists, and economists, who convened in cities across the Schengen area. Again, there were working groups on security, the movement of persons, goods and customs, and transport, as in 1985, but also new subgroups, on asylum and information exchange. As issues of state sovereignty and national security preoccupied the negotiations, ministries of interior and justice came to exert influence equal to that of foreign ministries in determining the rules on free movement and its boundaries.

During the negotiations, centre-right parties held sway in the Schengen area: in West Germany, the Christian Democratic Union; in Belgium, the Christian People's Party; in Luxembourg, the Christian Social People's Party; and in the Netherlands, the Christian Democratic Appeal. The exception was France, where François Mitterrand, a Socialist, held the presidency but cohabitated, from 1986 to 1988, with a neo-Gaullist prime minister, Jacques Chirac, and his conservative parliamentary majority. Domestic politics in France were unsettled as well by the rising electoral threat posed by the Front National, which had captured seats in the National Assembly by 1986. As anti-immigrant populism gained influence in France, guarantees of security and sovereignty took on all the more significance in Schengen negotiations.¹³

While the European Commission gained observer status at the negotiations, the drafting of the implementing convention remained intergovernmental. No authority was vested in supranational institutions, and United Nations officials did not attend the meetings, even as

¹³ Samy Cohen, 'La diplomatie française dans la cohabitation', *Esprit*, 264, no.6(juin 2000), pp. 45-60; Michelle Hale Williams, *The Impact of Radical Right-Wing Parties in West European Democracies* (New York, 2006), p.84; Paoli, 'France and the Origins of Schengen', pp.263, 266-71; Alistair Cole, 'The French Socialists', in *Political Parties and the European Union*, ed. John Gaffney (London, 2002), pp.731-85.

observers. States were sovereign in the laboratory of the Schengen negotiations.¹⁴

The convention's drafting has hardly been a focus of scholarship on Schengen, or of broader studies of European border policy. It has received less attention than has Schengen's incorporation into EU law under the 1997 Treaty of Amsterdam, which entered into force in 1999.¹⁵ For the most part, studies of globalisation in Europe in the late twentieth century have centred on European Community law-making and revisions to the Treaty of Rome, from the Single European Act to the Maastricht Treaty of 1992, which entitled EU citizens to move and reside freely within the territory of the member states.¹⁶ The convention's creation remains obscure in scholarship that uses its provisions to test theories about international law or to investigate particular doctrines, such as *ne bis in idem*, the proscription against double jeopardy.¹⁷ Likewise, research on Schengen's governance framework does not fully explain how the distinctive structure — lacking a legislature, executive, and courts — came into being.¹⁸ It is still the case, as the political sociologist Didier Bigo wrote of Schengen in a 2005 anthology, *Controlling Frontiers: Free Movement Into and Within Europe*, that little study has been given to 'the debate of the eighties and how all these norms were set up'.¹⁹ Overviews of the convention do not account for the complexities of its framing.²⁰

¹⁴ L. Geysmans à Monsieur M. Beaux, 22 décembre 1986, Schengen overleg, Correspondentie, 1984-1987 (hereafter Schengen Collection), Council; Antonio Cruz, *An Insight into Schengen, Trevi and Other European Governmental Bodies*, Briefing Paper 1 (Brussels, 1990), p.4.

¹⁵ Monica den Boer and Laura Corrado, 'For the Record or Off the Record: Comments About the Incorporation of Schengen into the EU', *European Journal of Migration and Law*, 1, no.4 (1999), pp.397-418.

¹⁶ Craig Parsons, 'Revisiting the Single European Act (and the Common Wisdom on Globalization)', *Comparative Political Studies*, 43, no.6 (2010), pp.706-734; Treaty of Maastricht.

¹⁷ Stefann Albrecht Riesenfeld, *Parliamentary Participation in the Making and Operation of Treaties: A Comparative Study* (Leiden, 1994); Wolfgang Schomburg, 'Criminal Matters: Transnational Ne Bis in Idem in Europe — Conflict of Jurisdictions — Transfer of Proceedings', *ERA Forum*, 12, no.3 (2012), pp.311-324.

¹⁸ Sergio Carrera et al., *The Future of the Schengen Area: Latest Developments and Challenges in the Schengen Governance Framework Since 2016*, (PE 604.943, Brussels, 2018); Pierre Berthelet, 'La 'Gouvernance Schengen': Le Sentier Périlleux de la Réforme: Commentaires et Analyses sur les Travaux en Cours', *Revue du Droit de l'Union Européenne*, no.4 (2012), pp.655-678.

¹⁹ Didier Bigo, 'Frontier Controls in the European Union: Who is in Control?' in *Controlling Frontiers: Free Movement Into and Within Europe*, ed. Didier Bigo and Elspeth Guild (Aldershot, 2005), p.66.

²⁰ Lode Van Outrive, 'Historia del Acuerdo y del Convenio de Schengen', *Revista CIDOB d'Afers Internacionals*, no.54 (May 2001), pp.43-61.

In examining the path of the Schengen states to the 1990 convention, this chapter looks beneath the acclamatory rhetoric of a Schengen laboratory. It analyses the aims and apprehensions that marked what France's negotiators described as a 'long march toward "free movement"', pursued as the 'pressure of events continually weighed on the work', and producing Schengen as 'a logic and a method'.²¹ The secretive Schengen negotiations, I argue, reflected the contradictions of the logic and method of free movement — the urgency the European Community assigned to abolishing borders within an internal market but also the fear of border-crossing by foreigners classified as 'undesirables' — contradictions that came to a head and were made public in the conflict over asylum seekers and data exchange. With the fall of the Berlin Wall, which cast into question the eastern frontier of the Schengen area, the contradictions grew more acute. As a most symbolic border became permeable, the liberal principles of free movement and transnationalism that animated Schengen appeared to pose its gravest challenge.

On 14 June 1985, the day of the signing of the first Schengen agreement, the European Commission called for swift action to achieve the economic freedoms articulated in the Treaty of Rome. That included 'abolition of obstacles to the free movement of persons'. The directive by the Commission, the executive authority of the European Community, came in a *White Paper on the completion of the internal market*, which criticised the persistence of barriers, 'the setbacks and delays of the past', the still-inchoate progress toward European integration. Without noting the establishment of the Schengen area, the *White Paper* urged the abolition of internal boundaries

²¹ Hrebly, *Libre circulation*, pp.11, 13; Blanc, 'Schengen', p.723..

and explicitly equated the free movement of persons and merchandise: ‘What is true for goods, is also true for services and for people’.²²

Such an equivalence — between the exchange of goods and the circulation of human beings — had informed the Community’s plodding deliberations on free movement since the adoption of the Treaty of Rome. Although not acted upon, a proposal in 1975 had used the term ‘Passport Union’ in treating free movement as a corollary of a common market, ‘in respect of individuals similar to ... a Customs Union in respect of goods’.²³ The *White Paper* reiterated that Community citizens must have freedom to ‘exercise their economic activities’ across borders. Like Schengen, however, it recognised the free movement of persons, not only economic actors, as an element of liberal markets. ‘Measures to ensure the free movement of individuals must not be restricted to the workforce only’, stated the *White Paper*, explaining the costs of border controls, which put a ‘burden on industry’ and impeded the growth of a ‘broader and deeper Community’. Citing the conclusions of the Fontainebleau Council, and the commitments made to both a people’s Europe and a single market, the *White Paper* offered ‘a double reason for removing the physical barriers — an economic reason and a political reason’. By this dual reasoning, Europe must become ‘more than a free trade area’, for that would not ‘deploy Europe’s immense economic resources to the maximum advantage’, nor ‘satisfy the aspirations of the people of Europe’. It had become axiomatic that economic integration required political union, assuring the free flow of people and goods across borders, as Europe aimed to gain influence in a still-bipolar world.²⁴

The *White Paper* ran parallel to the Schengen agreement also in underscoring the risks of

²² *White Paper on Internal Market*, Provisions 4, 1, 7, 58.

²³ Rapport de la Commission sur la mise en œuvre d’une Union des passeports, *Bulletin des Communautés européennes*, 7, no.75 (Luxembourg: Office des publications officielles des Communautés européennes, 3 juillet 1975), p.2.

²⁴ *White Paper on Internal Market*, Provisions 58, 94, 24, 25, 8, 25, 219, 221.

free movement and the need for compensatory security. While passports, border checkpoints, and baggage searches all indicated a ‘divided market’, eliminating internal barriers would require new ways to assure ‘comparable levels of protection and/or information’, the *White Paper* stated. Crucially, however, it acknowledged the limits of Community authority, pointing out that ‘protective measures’ fell outside the scope of integration defined by the Rome Treaty. Accordingly, new security techniques — ‘means other than controls at the internal frontiers’ — would fall within state sovereignty.²⁵

In the autumn of 1985, as negotiations began on the implementing convention, a trio of the Schengen states — West Germany, France, and the Netherlands — joined with Britain and Denmark in bringing a case to the European Court of Justice to defend the authority of nation-states over the movement of persons. The case, *Germany and Others v. Commission*, challenged a European Commission rule that nations of the European Community consult with each other, as well as with the Commission, when regulating immigration from non-Community nations. The case asked the court to determine the boundaries of supranational and national sovereignty — whether jurisdiction over immigration, involving issues of both security and employment, belonged to Community institutions or to member states.²⁶

The Commission rule concerned the movement, labour, and living conditions of non-Europeans. It required prior review of measures with respect to ‘workers from non-member States and members of their families relating to ... entry, residence and employment, including illegal entry, residence and employment; the achievement of equal treatment in living and working conditions, wages and economic rights; the promotion of integration into the workforce, society and cultural life; and the voluntary return of such persons to their countries

²⁵ *Ibid.*, provisions 24, 12, 11, 27, 29, 27.

²⁶ *Germany, France, Netherlands, Denmark and United Kingdom v. Commission*, Judgment of the Court, (1987) E.C.R., p.3248.

of origin'.²⁷ Some of these were issues on which West Germany, France, and the Benelux countries had just spoken in the Schengen accord. The purpose of the Commission rule was 'achieving progress towards the harmonisation of national legislation on foreigners' — an aim of Schengen.²⁸

In *Germany v. Commission*, the plaintiff nations objected that regulating the movement of foreigners was strictly a prerogative of states. Their argument sounded a theme that would become central in the negotiations on the implementing convention — that migration implicated security concerns at the heart of state power. The grievance was procedural, directed not at the notion of harmonisation but at rule-making by the Commission. As France argued, 'policy on foreign nationals ... involves questions of public security for which the Member States alone are responsible'.²⁹ The plaintiff nations claimed authority to share as well as withhold information, a capacity the Schengen states would undertake to institutionalise through a transnational system of data exchange. Their objection was to mandatory consultation.³⁰

The Court of Justice decided the case in 1987, distinguishing areas of governance controlled by nations from those controlled by European institutions. Security fell exclusively within the authority of nations, the court found, while employment came within the supranational power of the European Community. Because immigration lay at the intersection of those distinct spheres of sovereignty, jurisdiction would vary with circumstance. But the court stipulated that rule-making on foreign migrants lay within the framework of Community cooperation when involving work — 'the situation of workers from non-member countries as

²⁷ Ibid., p.3248.

²⁸ Ibid., p.3248.

²⁹ Ibid., p.3253.

³⁰ Report for the hearing delivered in Joined Cases 281, 283 to 285 and 287/85 (1987) E.C.R., p.3212.

regards their impact on the Community employment market and on working conditions'.³¹

In *Germany v. Commission*, as in the *Gravier* case, the court broadly construed the provisions on work in the Rome Treaty. The questions presented in the cases were markedly different — the scope of the European Commission's authority rather than an art student's freedom of movement. But the court yoked the treaty's allotment of supranational power to economic activity, just as it had the treaty's protection of individual freedom. And in both cases the jurist Alexander Mackenzie Stuart presided over the court. In *Germany v. Commission*, the court recognised the Commission's authority to require consultation on migration policy bearing on market relations and economic life, citing the treaty's mandate, under 'Social policy', that member states 'promote improved working conditions and an improved standard of living for workers' in keeping with 'the functioning of the common market'.³² Further, it reasoned that working and living conditions within the Community would be affected by migration, 'by the policy pursued by the Member States with regard to workers from non-member countries'.³³ The court rejected the notion that immigration regulation fell 'entirely outside the social field', concluding that policy economic in nature was subject to Community rules.³⁴

That conclusion denied neither the legitimacy of security concerns about foreign migrants nor the right of Community member states to control 'public security'. Nor did it find national initiatives on migration necessarily at odds with Community authority, acknowledging member states' authority to legislate on foreign workers 'by adopting national rules or by negotiating international instruments'. Indeed, the reference to international instruments may have been a tacit recognition of the ongoing Schengen negotiations. However, the court

³¹ *Germany v. Commission*, p.3252.

³² *Ibid.* p.3250,

³³ *Ibid.* p.3251.

³⁴ *Ibid.* p.3252.

stressed that the ‘whole field of migration policy’, if touching employment, was not ‘within the scope of public security’.³⁵

As in *Gravier*, therefore, the association with the labour market was critical in *Germany v. Commission*. The court held that the Commission’s rule-making power extended to migration policy only if tied to ‘working conditions’ or the ‘situation of workers’ or the ‘Community employment market’. That authority had been overstepped insofar as the Commission addressed integrating foreign workers into ‘cultural life’. Likewise, it was an overreach of Commission authority to impose rules aimed at non-workers, at ‘immigrant communities in general without distinction between migrant workers and other foreigners’.³⁶ According to the court, control over the movement of persons who were not workers remained the province of states.

The 1987 judgement made newly explicit how work formed the basis of the European Community’s power to regulate the movement of people, both European nationals crossing internal borders and foreign migrants crossing into Europe. Expressly, the court declared security measures and the movement of persons — if non-economic — areas of governance reserved to Community nations. The doctrine articulated in *Germany v. Commission* provided the legal framework for the Schengen states in claiming authority to negotiate an international instrument abolishing borders and balancing security with free movement.

As the court adjudicated the challenge to the Commission’s authority, the European Community sought to hasten economic integration by setting a deadline of 1 January 1993 for completing the internal market, as established by the Single European Act. A supplement to the Rome Treaty, which anticipated the free movement of goods, people, capital, and services in a

³⁵ Ibid. p.3253.

³⁶ Ibid.

common market, the act aimed at realising those four freedoms, while hewing to the *White Paper's* principles. It was adopted in 1986 and took effect in 1987, declaring a 'political will' to achieve the internal market — a realm 'without internal frontiers' — by 1993. The act and Schengen had the 'same goal', found the European Commission, with the Schengen negotiations proving the 'political credibility of the objective of abolishing controls at the internal borders'.³⁷

The Single European Act did not refer to Schengen, but its commitment to abolishing internal frontiers signalled that free movement, as in the Schengen area, would extend to persons, whether workers or not. The act amended the Treaty of Rome by binding the Community not only to a deadline of 'Europe 1992' but to an expansive plan for integration, with the preamble affirming the 'European idea' as an endeavour to 'improve the economic and social situation' and promote 'freedom, equality and social justice', and 'principles of democracy and compliance with the law and with human rights'. Whereas the Rome Treaty had limited free movement to economic actors, the Single European Act anticipated a borderless regime in which market integration would entail unobstructed circulation of both people and commodities. The act stated: 'The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured'.³⁸

The act paired the economic mandate with enhanced supranational authority, vesting the European Parliament with new legislative power and accelerating the European Council's rule-making on the internal market by providing for majority approval rather than unanimity. But it protected member states' authority on the free movement of persons, carving out an exemption to majority rule. Moreover, with respect to the free movement of persons, the act

³⁷ 'Satisfaction du Vice-president Bangemann'.

³⁸ Single European Act, section II, art.13, 17 February 1986, preamble, 25 I.L.M. 503 (1986).

included a ‘Political declaration’ by governments of Community states asserting autonomy to cooperate outside Community law-making — as in the Schengen accord. The declaration applied explicitly to foreign migrants, ‘the entry, movement and residence of nationals of third countries’.³⁹

The Single European Act was advanced by Community institutions as Schengen developed at the intergovernmental level. The deregulatory, free-market agenda became a European priority in the wake of the economic recession of the 1970s. By 1981, the European Commissioner for the Internal Market, Karl-Heinz Narjes, of West Germany, had formulated proposals to reduce trade barriers. That effort soon broadened, as Mitterrand embarked on a European turn, in what appeared to have been an initiative prompted at least in part by the weakening of his domestic coalition, seeking a ‘new political utopia’, as one of his advisers put it.⁴⁰ In concert, France and West Germany played pivotal roles, as with the Schengen accord. Critical to Mitterrand’s aims was the support of Jacques Delors, his powerful finance minister, who became the European Commission’s president in 1985. By then, the diplomat representing France’s pursuit of the internal market was Catherine Lalumière, who also oversaw the Schengen portfolio. On the Commission, Delors worked closely with Britain’s Francis Arthur Cockfield, known as the ‘father of the single market’, on a plan to present to the European Council at a meeting in Milan in June 1985. That plan was the *White Paper on the completion of the internal market*, approved by the Council the day the Schengen accord was signed.⁴¹

The prospect of the Community trailing behind the Schengen states in providing for

³⁹ Ibid. art.18, political declaration on free movement of persons.

⁴⁰ Quoted in Parsons, ‘Revisiting the Single European Act’, p.716.

⁴¹ See *ibid.*, pp.712, 713; Jean de Ruyt, *Le Leadership dans l’Union Européenne* (Louvain, 2015), p.31; Gérard Bossuat, *Faire l’Europe sans Défaire la France: 60 Ans de Politique d’Unité Européenne des Gouvernements et des Présidents de la République Française, 1943-2003* (Brussels, 2005), p.168; Andrew Moravcsik, ‘Negotiating the Single European Act: National Interests and Conventional Statecraft in the European Community’, *International Organization*, 45, no.1 (1991), pp.19-56; Alfonso Mattera, ‘Le Vingtième Anniversaire de l’Europe 1992 et la Décennie d’Or de Jacques Delors’, *Revue du Droit de l’Union Européenne*, no.4 (2012), pp.601-614.

free movement troubled some European leaders. Assessing progress toward European integration in 1985, the Council's president, Italy's Benedetto Craxi, objected to the notion of a 'two-speed Europe', a shorthand indicating disparities in member states' readiness for union. The Community still lacked a framework for free movement, he said, 'though certain Member States had managed to conclude intergovernmental agreements with an identical purpose'. From this vantage point, Schengen's laboratory role made all the more conspicuous divisions within the Community that stalled institutional innovation to prepare for Citizens' Europe.⁴²

Others, however, saw utility in Schengen, as a testing ground for free movement. At a European Council meeting on the internal market, Lalumière noted that altering Community law to allow the free movement of persons would require numerous qualifications to satisfy every member state, which would erode the guarantee. Objections to aspects of the planning were a case in point. Denmark, for instance, dissented from a proposal for separate traffic lanes for Community nationals and foreign travellers, demanding the measure be tested before it burdened all of Europe.⁴³ An internal European Commission memo indicated that the negotiations on the Schengen implementing convention carried great weight for the Community. 'If the Schengen 5 ... fail', wrote a Commission official who had worked on the Single European Act, 'this will be interpreted as the impossibility of arriving in 1992 at the suppression of controls on people in the Community'. Conversely, Schengen's achievement would illustrate the internal market's 'credibility'.⁴⁴

The stakes of the labour on the implementing convention were evident to European

⁴² Etat des travaux à la suite du rapport du comité ad hoc 'Europe des Citoyens', 21 mai 1985, p.2, Folder Marché Intérieur: Session du 10 juin 1985 (hereafter Marché Intérieur), Box 349, Lalumière Papers, MEAE. On two-speed Europe, see, Jean-Claude Pirié, *The Future of Europe: Towards a Two-speed EU?* (Cambridge, 2012).

⁴³ 'Facilitation des contrôles et formalités applicables aux citoyens des Etats membres lors du franchissement des frontières intracommunautaires', Rapport de la Présidence du Comité des Représentants Permanents au Conseil, 5 juin 1985, Marché Intérieur, Box 349, Lalumière Papers, MEAE.

⁴⁴ François Lamoureux, 'Accord de Schengen', Commission des Communautés Européennes, Le Cabinet du Président, 22 janvier 1990, p.2., FL-203 Chronos généraux, HAEU.

planners mindful of the timetable set by the Single European Act. As Pierre de Boissieu, an adviser to a French officer of the European Commission, wrote to diplomats in his country's foreign ministry, transnational freedom of movement was a novel entitlement. 'Who is guaranteed the right of free movement?' asked de Boissieu, who would become an architect of the Maastricht Treaty. 'This question has only been asked recently about people; it has been asked for 30 years about goods, services and capital'. The delayed reckoning with persons reflected the market paradigm of Western Europe's postwar unification, meaning that Community law offered little guidance. In abolishing internal borders, the Schengen states would be creating a new body of rules on free movement and the bearers of that liberty.⁴⁵

Under the Single European Act, the Community had left unstated both the significance of nationality and the responsibilities of member states. The act did not speak of European nationals, but simply of person. And 'persons', as de Boissieu wrote, 'must be understood to mean persons who are in the territory of the Community'. In effect, abolishing internal frontiers would render distinctions of nationality inoperative. There would be 'free movement for all goods, services, capital and persons within the territory of the Community, whatever their nationality of origin', de Boissieu explained. 'Subject to the provisions of the treaty, free movement is, unless otherwise decided, totally independent of nationality questions'. That left member states the task of crafting rules specifying the meaning and limits of free movement, acting through 'intergovernmental cooperation'. De Boissieu's analysis highlights the importance of national rule-making on free movement, a development obscured in studies focusing only on community policymaking. The Single European Act at once bound the Community to completing the internal market and reserved to states the authority over free

⁴⁵ Pierre de Boissieu, 'Interprétation de l'Acte Unique en ce qui concerne la circulation des étrangers', 12 janvier 1989, pp.1-3, Folder Schengen, Groupe Central de Négociation, 1 mars 1989, Box 6 1914INVA, MEAE.

movement within their borders.⁴⁶

When the Single European Act took effect in 1987, no draft of the Schengen implementing convention had been made public. But diplomatic memoranda stressed the reciprocal relationship between Europe 1992 and the Schengen negotiations. As a 1989 French report titled ‘A step toward citizens’ Europe’ explained, Schengen had ‘already put five countries ... on the way to the abolition of borders’, and was ‘very useful to Europe’ as an ‘active Laboratory that gave rise to innumerable meetings, developments, drafts’. But concerns about reconciling transnationalism with national autonomy persisted, the report explained. There were ‘difficult points’, where security would overlap with ‘political sovereignty’ to require limits on free movement, which remained unresolved in the Schengen negotiations, slowing the ‘long march ... toward a Europe without borders’.⁴⁷

On June 14, 1988, delegates from the Schengen states marked the third anniversary of the signing of the Schengen agreement by gathering in Remich, a village on the banks of the Moselle River, just north of Schengen. Without ceremony, the diplomats — state secretaries, signatories of the 1985 accord, and representatives of the European Commission — assessed progress on the implementing convention. A press communiqué announced a draft would be completed by year’s end, giving notice that the text was ‘well advanced’, with much

⁴⁶ De Boissieu, ‘Interprétation de l’Acte Unique’. On community border-crossing rules, see Kingdom of the Netherlands, Case C-68/89 (30 May 1991); John Morijn, ‘Personal Conviction and Strategic Litigation in Wijsenbeek’, in *EU Law Stories: Contextual and Critical Histories of European Jurisprudence*, ed. Fernanda Nicola and Bill Davies (Cambridge, England, 2017), pp.178-200; Elspeth Guild, Steve Peers and Jonathan Tomkin, *The EU Citizenship Directive: A Commentary* (Oxford, 2014), p.99.

⁴⁷ ‘Un pas vers l’Europe des citoyens: La libre circulation des personnes’, mars 1989, Folder Schengen: oct. 86 – déc. 1989, Box 21 101SUP, MEAE.

accomplished in the ‘domains of police and security as well as of the movement of people and goods’.⁴⁸ The communiqué contrasted with the secrecy that shrouded the unfolding of the Schengen negotiations.

Almost a year later, a French diplomat appeared at a meeting of the European Commission to explain why a convention had not yet been produced. ‘For the implementation of this free movement, we have undertaken in the Schengen authorities the elaboration of a convention which, at the moment I am speaking to you, has reached a point where I cannot tell you that it is over, but I can certainly assure you that it is almost over’, reported Emile Cazimajou, France’s inter-ministry coordinator for free movement, who spoke on behalf of the five Schengen states. Reaching agreement on security — ‘so-called compensatory measures’ — was hard going, as Cazimajou put it, ‘the more substantial and the more interesting part’. Describing the negotiators as ‘pioneers’ exploring ‘virgin land’, he pledged that the Schengen states would ‘not take the risk of losing ourselves in swamps from which we may never get out’.⁴⁹

From the outset of the negotiations, diplomats confronted Schengen as a territory of risk — where free movement across common borders intruded on the security and sovereignty of nation-states. The effort of mitigating that risk dissolved the consensus achieved so rapidly in 1985. Devising measures to balance freedom with security, from reinforcing external borders to harmonising national rules on the movement of people and goods, led to five years of intergovernmental disagreement. The conflict disrupted the schedule set by the Schengen negotiating groups: signing the convention in 1988, followed by ratification in 1989, with the

⁴⁸ Communiqué de presse, 14 juin 1988, Folder Schengen: GCN Bonn, 26 oct. 1988, Box 3 101SUP, MEAE.

⁴⁹ Intervention de M. l’Ambassadeur Cazimajou lors de la réunion du Groupe des Coordonnateurs, 12 avril 1989, pp.2, 1, 9, 2, 14, FL-595, HAEU.

treaty entering fully into force by 1 January 1990.⁵⁰

From the outset, too, Schengen's risks were associated with foreign migrants, particularly from countries listed as 'undesirable'. On the movement of persons, the 1985 accord had required long-term 'measures to safeguard internal security and prevent illegal immigration'. It fell to negotiators of the implementing convention to hedge the risks posed by foreigners who, once inside the Schengen area, could not be distinguished from European travellers. 'Neither has their nationality written on their face', as Cazimajou curtly told the French foreign ministry in 1988.⁵¹ Nor was the difference between illegal immigrants and lawful asylum seekers facially apparent. Without procedures of exclusion and surveillance to offset the abolition of internal borders, all persons would move freely across the Schengen states.

Goods, persons, capital, services — all four freedoms of movement listed in the Treaty of Rome were at issue in implementing Schengen. But the negotiations were dominated by the difficulty of setting bounds on the free movement of persons, a guarantee no longer exclusive to workers. A memorandum from the German delegation for a meeting of the working group on goods and customs in October 1985 adumbrated the problem, noting the intersection between Schengen's assurance of free trade and the *White Paper's* provisions on the internal market while envisioning a 'facilitation of systematic and automated data exchange' in place of internal border checkpoints.⁵²

So began the Schengen states' pursuit of new methods of controlling persons within a transitional territory. The work focused on external borders, asylum rules, and visas, as well as

⁵⁰ F. Roelants to E. Cazimajou, 'Exécution de l'Accord de Schengen 1987-1990', 3 décembre 1987, p.2, Box 2 Schengen Collection, Council.

⁵¹ Emile Cazimajou, 'Accord de Schengen', Note à l'attention du Cabinet du Ministre des affaires européennes, p.4 novembre 1988, p.2; 'Note pour l'attention du Cabinet du Ministre d'État', Ministre d'Affaires Étrangères, 16 décembre 1988, Folder Joxe, Box 5 1914INVA, MEAE.

⁵² 'Die Erleichterung der handelspolitischen Grenzformalitäten im Rahmen des Abkommens von Schengen', Arbeitsgruppe 'Zoll und Güterverkehr', 3 Oktober 1985, Folder 141.571, Box 423.55 1 u. 2 Grenzkontrollen, PAA.

on an apparatus for data exchange that became the Schengen Information System. The concern was with the movement of foreign migrants exemplified by the border-crossing of a stateless Palestinian who voyaged as a stowaway from Morocco to France, where he worked as an itinerant laborer for several years, and then took a train to Belgium, where he worked briefly as a painter, and then went by train to the Netherlands, where he applied for and was refused asylum, and from there traveled back and forth to Germany, and then to the United Kingdom, where he again sought asylum but was denied entry and sent back to the Netherlands, which he finally departed, stowed away on a ship bound for Australia.⁵³ His movement was free across the frontiers of the Schengen area.

Work on the implementing convention drew on the template of the 1985 agreement. Again, a Central Negotiating Group oversaw the planning, which was distributed among working groups. The working group on the movement of persons focused on asylum and visas. Security dealt with information exchange, cross-border policing, judicial assistance, and harmonisation of criminal codes. Goods and customs addressed matters ranging from use of the green disc on windscreens to value-added taxes. Transport managed regulations such as diesel taxes, driving standards, and the dimensions of utility vehicles. By the end of 1985, four subgroups had been formed to devise ways to transfer controls to the outer border of the Schengen area. An editorial committee produced drafts of the convention.⁵⁴

Always the work remained closed to public view, with access allowed to representatives of the European Community as observers, but not to international human rights

⁵³ *Refugee Appeal No.1/92 Re SA*, New Zealand: Refugee Status Appeals Authority, 30 April 1992.

⁵⁴ 'Exécution de l'Accord Benelux-Allemagne-France', GCN Bonn BNL-D-F, 28 août 1985, p. 3, Folder 141.571, Box 423.55 1 u. 2 Grenzkontrollen, PAA; 'Exécution de l'Accord Benelux-France-Allemagne', Point III.2 du projet d'ordre du jour de la reunion du conseil de l'Union Economique du 12 juillet. 1985, Union Economique Benelux, 26 juin 1985, pp.1-5, BNL, 1b, Council; Rapport sur l'état des travaux du groupe de travail 'Police et sécurité' dans le cadre de l'Accord de Schengen, 9 juillet 1986, Schengen Collection, Council; 'Contrôles groupés aux postes juxtaposés: 'Etat de la situation', Annexe, Conclusions de la reunion du 12 décembre 1985, Folder 141.571, Box 423.55 1 u. 2 Grenzkontrollen, PAA.

organisations.⁵⁵ Not even when seeking to reconcile disparate national rules on asylum, while adhering to the 1951 Geneva Convention on the Status of Refugees, did Schengen negotiators consult with the UN office on refugees. But the working groups often collaborated. For example, the taskforce on illegal immigration coordinated the planning of the working group on persons with that on security, in designing measures to differentiate the border crossings of foreigners and Europeans.⁵⁶

Ambassadors of the Schengen countries — state secretaries and ministers of justice, foreign affairs, and the interior — convened every six months under a rotating presidency. The intergovernmental summits coincided with domestic initiatives, as each state directed police and transport officials to increase ‘monitoring of migratory flows’. By the autumn of 1985, France and West Germany had sent identical orders to regional police authorities, enclosing lists of ‘undesirable’ countries, as recorded in a memorandum titled ‘Strengthening controls on nationals of sensitive countries on the matter of irregular migration’, and advised the Benelux states to do the same, in preparation for a November meeting in Brussels.⁵⁷

The lists identified the countries whose nationals would be subject to common visa requirements to enter any Schengen state. Visa policy, a seemingly banal technical undertaking, was a critical part of securing Schengen’s external borders, determining not only the terms of entry but also privileges of sojourn, residence, and access to employment and social benefits.⁵⁸

By the end of 1985, the working group on the movement of persons had disseminated a

⁵⁵ Programme de Travail, Groupe de Travail IV, 7 juillet 1987, p.1; Conclusions de la reunion tenue à Bonn le 2 février 1987, Groupe de travail IV, 13 février 1987, p.2, Schengen Collection, Council.

⁵⁶ Conclusions de la reunion mixte du Sous-Groupe 3 ‘Immigration clandestine’ du Groupe de Travail I ‘Police et sécurité’ et du Comité de Rédaction I du Groupe de Travail II ‘Circulation des Personnes’, 28 octobre 1987, Folder GCN Bonn le 23 nov. 87, Box 6 1914INVA, MEAE; Cruz, *An Insight into Schengen*, p.4.

⁵⁷ ‘Renforcement des contrôles à l’égard des ressortissants de pays sensibles en matière d’immigration irrégulière’, Le Ministre de l’Intérieur et de la Décentralisation à Madame et Messieurs les Préfets, Commissaires de la République, 12 Nov. 1985, BNL-D-F, C-OJ-PV NOTES 1985, Council.

⁵⁸ On visas as border control, see Federica Infantino, *Outsourcing Border Control: Politics and Practice of Contracted Visa Policy in Morocco* (New York, 2016).

memorandum on ‘Issuance of visas to third-country nationals posing security problems’. France and West Germany took the lead in forging a joint approach. A confidential communiqué from German officials in the foreign affairs ministry examined the delivery of visas for migrants from countries posing a ‘risk of illegal immigration in Germany and in France’. The two states aimed not only to introduce new visa rules but to ascertain if movement was legitimate, by requiring proof such a hotel reservation or a return ticket. For family visits, there would be inquiry into the ‘degree of close relationship’ with persons living in the country of destination. And data was to be shared on yearly visa requests.⁵⁹

An approach proposed by the Benelux states was categorising ‘undesirable’ countries by level of risk in the areas of illegal immigration and national security, with a 1 indicating a ‘major risk’, 2 a ‘moderate risk’, and 3 a ‘latent risk’. A confidential memorandum of November 1985, regarding the confidential country annexes to the 1985 accord, explained that a ranked inventory would assist in compiling a ‘common list’, bringing greater uniformity to national policies. Under the Benelux system, countries assigned a 1 in both categories, as major risks in security and illegal immigration, included Iran, Iraq, Libya, Morocco, Poland, Suriname, and Tunisia. Others, such as Ethiopia, received a 1 for illegal immigration but only a 3 for security. Conversely, others, such as East Germany, were given a 1 for security, with the risk of illegal immigration still unranked. The 68 countries listed on the annexes in 1985 were distributed across the globe, but almost half were in Africa and the Middle East.⁶⁰

The aim of developing common visa rules, however, revealed differences among the

⁵⁹ ‘Délivrance de visas à des ressortissants de pays tiers, qui posent des problèmes de sécurité’, Concertation entre les pays du Benelux, la R.F.A et la République française, Groupe de travail II: Circulation des personnes, 28 novembre 1985; Lettre du Ministère des Affaires étrangères de la R.F.A. au Ministère français des Relations extérieures, circulaire confidentielle relative à la délivrance de visas, 8 octobre 1985, NLD-D-F, C-OJ-PV NOTES 1985 (hereafter NLD), Council.

⁶⁰ Note de la délégation du Benelux concernant les Annexes 1 et 2 du procès-verbal de signature de l’Accord de Schengen, Annexe, Confidentiel, 4 novembre 1985, Folder 190.351, Box 511.13/ 1 Abkommen ‘Schengen’, PAA.

state delegations. There was disagreement on which countries would be subject to which visa restrictions, as well as on the procedures for checking documents and refusing entry.⁶¹ By 1988, discrepancies in visa obligations threatened to derail the negotiations on removing internal borders. A draft of the convention was unsatisfactory to the French interior minister, Pierre Joxe, who objected to language that would hold France responsible for foreigners entering from Schengen states where they were not subject to a visa requirement. ‘As long as the states party to the Schengen Agreement cannot agree on a common list of countries subject to the visa requirement’, Joxe wrote to Lalumière, ‘France cannot consider easing the controls exercised on its common borders on foreigners outside the Community’.⁶²

By 1989, migrants from all but four of the countries categorised as ‘undesirable’ on the confidential annexes had been subject to visa obligations throughout the Schengen area. Of the remaining four — Yugoslavia, Colombia, Singapore, and Malaysia — Yugoslavia, ranked at 1, as a major risk, for illegal immigration, and at 2, as a moderate risk, for security, proved most controversial. This was because West Germany opposed subjecting its nationals residing in Eastern Europe to a visa requirement. Another point of disagreement was France’s refusal to pair the ‘negative’ annexes with a ‘positive’ list of countries whose nationals would not need visas.⁶³

But there was no disagreement that free movement across the Schengen area would be a privilege allowed only to citizens of the European Community. Distinctions of nationality unaddressed in the Single European Act remained paramount in the planning, notwithstanding the difficulties of establishing visa rules. The abolition of internal borders was always meant to

⁶¹ ‘Accord de Schengen: De la question des visas à la veille du Sommet franco-allemand’, Note à l’attention du Ministre d’Etat, 31 octobre 1989, p.3, Folder Schengen: GCN Bonn, 20 oct. 89, Box 7 1914INVA, MEAE.

⁶² ‘Accord de Schengen: Préparation d’un avant projet de convention complémentaire’, Le Ministre de l’Intérieur à Madame le Ministre des Affaires Européennes, 3 novembre 1988, p. 2, Folder Joxe, Box 5 1914INVA, MEAE.

⁶³ ‘Accord de Schengen: état des travaux de mise en oeuvre de l’Accord’, 20 février 1989, p.4,5, Folder Schengen: GGCN Bonn, 1 mars 1989, Box 6 1914INVA, MEAE.

be predicated on the exclusion of foreign migrants.

The Schengen negotiations also expressed fixed agreement on the feasibility of guaranteeing both security and freedom. At a 1986 meeting of coordinators of free movement, West Germany's Waldemar Schreckenberger, the chancellor's chief of staff, affirmed anew that implementing Schengen would advance the creation of a 'European space' while promising, 'More freedom means more security'. Belgium's Paul de Keersmaecker echoed that assurance, saying, 'security concerns are not necessarily an obstacle'. France's Bernard Bosson, a minister of European affairs, identified the tightening of asylum rules and restrictive visa policy as measures essential to 'reinforcing security'. Robert Goebbels of Luxembourg summarised the conclusions, noting 'questions of security take precedence'.⁶⁴

The divisions on visas nonetheless betrayed deeper strains of conflict. A meeting of the Central Negotiating Group in Bonn, in 1987, became a forum for a declaration that the free movement of persons remained of 'capital importance' but also for adverse scrutiny of the guarantee. Emile Cazimajou wrote of 'problems ... all the more difficult because the five are far from addressing them in the same spirit'. There were 'serious difficulties' raised by plans for controls at external borders as well as by issues ranging from the status of East German nationals to requirements that foreigners give notice of their movements within the Schengen area.⁶⁵ Fissures opened in Franco-German unity. At a meeting of Schengen ministers in the autumn of 1986, it had become apparent that the two most powerful delegations no longer spoke with one voice. While France dwelled on terrorism, West Germany gave priority to

⁶⁴ Réunion du 6 octobre 1986 à Luxembourg, 10 octobre 1986, p.2, 3, Folder Schengen: oct. 86 – déc. 1989, Box 21 101SUP, MEAE.

⁶⁵ Emile Cazimajou, 'Accord de Schengen', 24 novembre 1987; 'Droit de séjour des étrangers', Annexe, Rapport au Groupe de Travail II 'Circulation des personnes', 19 novembre 1987, Folder GCN Bonn le 23 nov. 87, Box 6 1914INVA, MEAE.

clarifying rules on asylum.⁶⁶

Differences widened the following year. On securing external borders, France, supported by the Benelux states, would allow no exceptions to compensatory measures of ‘rigorous control’. But West Germany favoured ‘simple visual monitoring’, in some cases, in order to maintain its bilateral arrangements with Austria and Denmark. Disagreement on German nationality deepened, implicating geopolitical tensions extending beyond the borders of the Schengen area. West Germany sought exemptions from visa obligations required of other foreigners for East Germans who would ‘renounce their identity’ to hold West German passports, but other delegations refused. Disagreement also marked the drafting of rules for foreigners lawfully in the Schengen area, which would permit them to ‘stay and move freely’ for designated lengths of time. France stood alone in opposing a rule requiring foreign migrants to announce themselves within three days of entering a Schengen state. ‘We find this demand excessive’, Cazimajou wrote in a memorandum on border controls, suggesting that the Benelux countries underestimated the difficulty because of their own union.⁶⁷

The prospect of accession to the Schengen accord put further pressure on the negotiations, amplifying the conflict over free movement by raising the question of whether Schengen could withstand its expansion. In 1987, Italy submitted an accession bid.⁶⁸ Schengen’s Central Negotiating Group expressed support for Italian membership — ‘an important contribution to the achievement of an internal European market’ — but hesitated to ‘further slow negotiations’.⁶⁹ Italy’s relationship to Schengen had emerged soon after the signing of the

⁶⁶ Réunion des Ministres et Secrétaires d’Etat responsables de l’accord de Schengen, 6 octobre 1986, Folder Schengen: Ratification Box 22 101SUP, MEAE.

⁶⁷ Cazimajou, ‘Accord de Schengen’.

⁶⁸ See Simone Paoli, ‘The Schengen Agreements and their Impact on Euro-Mediterranean Relations: The Case of Italy and the Maghreb’, *Journal of European Integration History*, 21, no.1 (2015), pp.139-140.

⁶⁹ Robert Goebbels à Son Excellence Monsieur l’Ambassadeur de l’Italie à Luxembourg, 6 juillet 1987, Schengen Collection, Council.

1985 accord, which required consultation on bilateral border initiatives with third states.⁷⁰ A year earlier, after Saarbrücken, Italy had made overtures to France about lifting controls at their common border, but France had temporised, uncertain of Italy's capacity to control its borders and wary of the 800,000 undocumented immigrants estimated to live in Italy. In late June 1985, however, bilateral dialogue began, bringing accession to the fore.⁷¹

Schengen's outer border thus came into question at the mountainous, 515-kilometre frontier between France and Italy. A bilateral meeting in Rome in July 1985 exposed how Italy's approach diverged from the planning of the Schengen countries. A severe crackdown on migratory flows would undermine relations with Maghreb countries, Italy contended.⁷² But France maintained that Italian interests could not displace existing objectives. A Schengen working group formed to study Italy's ability to meet the requirements of the accord, particularly on crime prevention.⁷³ The bilateral discussions faltered over visa requirements, but, in 1987, Italy proposed accession, which heightened concerns about a tide of migrants from undesirable countries crossing through the Schengen area.⁷⁴ At that point, Italy gained observer status at the negotiations, having assented to restrictive measures, adopting new visa obligations for countries in North Africa. The accession request went unanswered, however, as the negotiations stalled over the risks of free movement.⁷⁵

⁷⁰ Compte rendu de la réunion tenue le 18 octobre 1985 à Paris par le Groupe de travail II, Circulation des Personnes, 25 novembre 1985, NLD, Council.

⁷¹ On the rebuke of Italy, see Paoli, 'Schengen Agreements' p.132; Ambassade de France en Luxembourg à Ministère des Affaires Etrangères du Gouvernement Grand-Ducal Luxembourg, 25 juin 1985, p.2, Schengen Collection, Council; Jean-Michel Dumond, Ambassade de France, 21 June 1985, Folder 141.571, Box 423.55 1 u. 2 Grenzkontrollen, PAA.

⁷² Paoli, 'Schengen Agreements', p.137.

⁷³ 'Allègement des contrôles aux frontières entre la France et l'Italie', 25 juillet 1985; Document de travail de la délégation française, 25 juillet 1985; 'Allègement des contrôles aux frontières: ouverture de la négociation avec l'Italie', 29 juillet 1985, Folder Allègement des contrôles aux frontières, Projet d'accord, Box 6 101SUP, MEAE.

⁷⁴ Ruben Zaiotti, 'The Italo-French Row over Schengen, Critical Junctures, and the Future of Europe's Border Regime', *Journal of Borderlands Studies*, 28, no.3 (2013), p.344.

⁷⁵ *Ibid.*, p.345. See also Ruben Zaiotti, 'Chronic Anxiety: Schengen and the Fear of Enlargement', in *The EU and the Eurozone Crisis: Policy Challenges and Strategic Choices*, ed. Finn Laursen (Farnham, Surrey, 2013), p.162. Bettino Craxi's

Slowly, Schengen took shape as a system of dualisms — of freedom and security, of unity and exclusion, and of transnational intercourse and national sovereignty. The authority reserved to member states of the European Community, as recognised in the decisions of the Court of Justice, was asserted repeatedly by the Schengen states in striving to harmonise their national codes on migration, asylum, customs, social welfare, criminal justice, and protection of privacy, which undergirded the abolition of internal borders. There was ‘no supranational structure at the Schengen level’, as the Benelux secretary general wrote in a 1986 letter to officials in France’s foreign office. The ‘political responsibility’ lay with ‘the signatories’.⁷⁶

Safeguards for national autonomy figured in many proposals. For example, on the initiative of the Benelux countries, the working group on persons sought a common fund, with each state tithed, to cover the costs of deporting unwanted immigrants. National authorities alone, however, would decide on the removal and carry out the deportation.⁷⁷ As a communiqué in France’s interior ministry declared, ‘Each party undertook to exercise particularly vigilant control’.⁷⁸

But divisions became pronounced on sovereignty as well. Minutes from a meeting of the working group on persons held at The Hague in January 1987 recorded conflict over security at Schengen’s perimeter. West Germany and France were ‘of the opinion that the control of external borders must remain within national jurisdiction’, while the Benelux countries proposed border control as ‘a common task with a view to the most uniform application of the conditions of entry of foreigners into the territory of the five countries’. A

socialist government splintered and Italy became isolated in hesitating to adopt restrictive policies. Spain had already followed the Schengen states in more closely monitoring third-country nationals.

⁷⁶ L. Geysmans à Monsieur M. Beaux, 22 décembre 1986, Schengen Collection, Council.

⁷⁷ Rapport au Groupe de Travail II ‘Circulation des Personnes’, Bruxelles, le 19 novembre 1987, Folder GCN Bonn le 23 nov. 87, Box 6 1914INVA, MEAE.

⁷⁸ ‘Renforcement des contrôles à l’égard des ressortissants de pays sensibles en matière d’immigration irrégulière’, Ministère de l’Intérieur et de la Décentralisation, 12 novembre 1985, BNL-D-F, C-OJ-PV NOTES 1985, Council.

compromise provided for national authority over external borders based on rules determined in common.⁷⁹

In the autumn of 1988, with border measures still unresolved, the working group on persons drew up a list of ‘indispensable conditions’ for abolishing internal controls. Visas, asylum, data exchange, rules governing the sojourn and removal of foreign migrants — all were preconditions still in dispute.⁸⁰ By the end of the year, not even a full draft of the convention was done. France’s defence officials were unyielding on both security and national authority, insisting on maintaining controls on foreigners at French borders until negotiators devised an effective system of security.⁸¹ Rifts deepened over the rules for entry into the Schengen area, particularly the obligation of foreigners to announce arrival. France alone would require declaration at the border, on arrival in the country, rather than in the interior, as checks came down at internal frontiers. Ultimately, the French delegation conceded the point on declaration of entry, as instructed by France’s interior ministry, while refusing to remove all internal border controls, at least for a period of transition, insisting on ‘respect for ... national legislation’.⁸²

Meanwhile, Schengen statesmen celebrated their project, enthusing about the creation of a ‘vast space of freedom’ embodying the ‘values of the European democracies.’⁸³ Others spoke more pragmatically of a ‘Europe without frontiers’ producing ‘economic benefits’ that

⁷⁹ Procès-verbal de la réunion du Groupe de travail II ‘Circulation des personnes’, tenue à la Haye les 13 et 14 janvier 1987, Folder Négociation à Cinq: groupe de travail 2 (visas immigration), 1985-1987, Box 1 1914INVA, MEAE.

⁸⁰ Inventaire des conditions indispensables pour l’abolition des contrôles aux frontières communes des Cinq Etats Contractants dans le domaine de la circulation des personnes, Groupe de Travail II ‘Circulation des Personnes’, le 20 octobre 1988, Folder Joxe, Box 5 1914INVA, MEAE.

⁸¹ Préparation d’un avant projet de convention complémentaire, Le Ministre de l’Intérieur à Madame le Ministre des Affaires Européennes, 3 novembre 1988, p.2, Folder Joxe, Box 5 1914INVA, MEAE. See Paoli, ‘France and the Origins of Schengen’, pp.270-71.

⁸² Cazimajou, ‘Accord de Schengen: différence avec le Ministre de l’Intérieur’, p.3,4,5; Intervention de M. Pierre Joxe, Ministre de l’Intérieur, à l’Assemblée Nationale le 29 mai 1989 dans le débat sur le projet de loi relative aux conditions de séjour et d’entrée des étrangers en France, 29 mai 1989, p.1, 9, 10, Folder Schengen: Débat français, 1986-1989, Box 5 1914INVA, MEAE.

⁸³ Dossier d’Information – Mai 1989, Le Ministre Délégué Chargé des Affaires Européennes, Folder Colloque Conseil d’Etat – Europe, Mai 1989, Box 5 1914INVA, MEAE.

would outweigh the ‘disadvantages associated with the free movement of people’, as the Dutch minister of justice said.⁸⁴ France’s interior minister proclaimed the power of Schengen states to exclude, ‘reinforced by the fact that the Single European Act, like the Schengen Agreement, does not directly provide ... for the free movement of third-country nationals’.⁸⁵ Always distinctions of nationality were counted as hedges for Schengen as a space of freedom.

The convention’s ratification had been projected for 1989, but the scope of free movement remained undefined by then. In preparation for a European Council meeting, a French memorandum admitted the dilemmas of balancing liberty, security, and international norms: ‘we have to reconcile two contradictory imperatives: on the one hand to preserve the security of a territory very exposed, especially by its multiple physical borders, to illegal immigration, to terrorism ... on the other hand, to prevent ... conditions that undermine certain essential safeguards with respect, for example, to civil liberties, judicial procedure’.⁸⁶ A report produced in April 1989 for the Central Negotiating Group indicated that basic rules for removing internal controls were not yet settled. For instance, the Netherlands proposed free movement only across land borders, with controls kept at seaports and airports, but the other delegations would allow it at any ‘strictly internal’ border-crossing, such as a Berlin-Paris flight. Other disputed provisions included punishments for aiding illegal migration and the accountability of transit companies, whose liability would interfere with commerce.⁸⁷

It was also in April 1989 that the risks of asylum seekers in the Schengen area became a

⁸⁴ Discours de M. Korthals Altes, ministre néerlandais de la Justice, 16 mars 1989, p.6, 7, Folder Schengen: GCN, Paris 2-3 mai 89 dossier préparatoire, Box 6 1914INVA, MEAE.

⁸⁵ Intervention de M. Pierre Joxe, p.41.

⁸⁶ ‘Libre circulations des personnes en Europe’, 17 avril 1989, Folder Réunion Interministérielle: Préparatoire au Conseil Restreint du 19 avril 1989, Box 8 101SUP, MEAE.

⁸⁷ ‘Négociation de Schengen: Les points à négocier au niveau ministériel’, 19 avril 1989; Folder Réunion Interministérielle: Préparatoire au Conseil Restreint du 19 avril 1989, Box 8 101SUP, MEAE; ‘Projet de convention complémentaire à l’accord de Schengen relative à la circulation des personnes: statut de Berlin’, 19 avril 1989, Folder Schengen: GCN Paris 2-3 Mai 89 dossier préparatoire, Box 6 1914INVA, MEAE.

prominent point of conflict, with the risks viewed in contrasting ways — allowing entry as encouraging illegal immigration, barring entry as violating human rights. The veil was lifted from the negotiations on asylum at a conference on refugee policy held in the Dutch city of Zeist. It was organised by the European Council on Refugees and Exiles and attended by delegates from non-governmental organisations and international refugee agencies. Pieter Dankert, who was then a European Parliament member and leading Dutch negotiator on Schengen, delivered the opening address. ‘It is still unclear what 1992 will bring Europe’, he began. ‘Schengen ... may show the way’. Then he spoke of barriers against asylum seekers. ‘What is going on has less to do with the needs of a Europe free of internal borders than with the wish of most West European countries to stop the flood’. A draft of the implementing convention, he revealed, left national rules on asylum untouched. Yet he explained that in an area without internal borders, ‘admission of an alien in one member state has consequences for the other member states’. And he warned that non-harmonisation would make the most restrictive practices the norm: ‘national sovereignty automatically leads us to the lowest level’. Such an outcome would contradict a ‘liberal tradition’, Dankert said, and ‘cannot be in the interest of asylum seekers’.⁸⁸

Traces of the conflict on asylum that coursed through the Schengen negotiations appeared in a memorandum of 18 April 1989. There was agreement on the broad contours of asylum procedure, namely that the main aim was stopping migrants from circulating across the Schengen area lodging claim after claim for asylum, and that common measures would not encroach on national sovereignty. The dissension centred on the extent of free movement that would be allowed to asylum seekers as the Schengen countries waged a ‘battle against multiple

⁸⁸ European Consultation on Refugees and Exiles, ed., *Refugee Policy in a Unifying Europe: Seminar Held in Zeist, Netherlands, 5-7 April 1989* (London, 1989), pp.4, 6.

or fraudulent claims ... of “refugees in orbit.” All of which was explained in the April memorandum, on ‘Franco-German relations and questions related to asylum law.’⁸⁹

The negotiations were shaped by alarm about asylum seekers entering Schengen in a ‘massive influx’. The surge was greatest in West Germany and France. The number of migrants seeking refugee status rose in West Germany from 60,000 in 1987 to 103,000 in 1988, with 150,000 projected in 1989. In France, the increase was also sharp, from 27,000 in 1987 to 34,000 in 1988, with 50,000 projected in 1989. In both countries, the asylum seekers were reportedly ‘foreigners coming and staying irregularly’, and in both countries, the fear was that abolishing internal borders would have ‘aggravating effects’. But the French and West German delegations differed on whether asylum seekers waiting to have their cases decided would enjoy free movement across the frontiers of the Schengen states. France favoured wide latitude: ‘in the name of the principle of free movement and not to give too restrictive a turn to the work in progress ... the applicants could circulate on the territory of all state parties to the Schengen Agreement in the same conditions as foreigners established regularly in one of these states’. But West Germany sought restrictions to bar migrants awaiting asylum decisions from crossing borders, a prohibition replicating its domestic law. The objection was that free movement would increase incentives to claim sanctuary, adding to Schengen’s ‘attraction effect’.⁹⁰

Not only the sheer scale of asylum demands accounted for the split between West Germany and France. So, too, did the tenor of domestic politics, with France’s Socialist government, in 1989, hesitant to use the Schengen accord to limit asylum.⁹¹ But the conflict also reflected wider geopolitical developments and the problem of proximity to the Soviet bloc. By

⁸⁹ ‘Relations franco-allemandes et questions relatives au droit d’asile’, 18 avril 1989, Folder Réunion Interministérielle: Préparatoire au Conseil Restreint du 19 avril 1989, Box 8 101SUP, MEAE. See Jean Rossetto, ‘Le Droit d’asile en Europe - Évolution contemporaine’, *Annuaire Français de Droit International*, 39 (1993), p.923.

⁹⁰ ‘Relations franco-allemandes’. On asylum pressure, see Loescher, ‘European Community and Refugees’.

⁹¹ See Paoli, ‘France and the Origins of Schengen’, p.271.

1989, more than half of the asylum seekers in West Germany came from countries in Eastern Europe, making the ambit of free movement inseparable from the dynamics of the Cold War.⁹²

When the Berlin Wall fell in November 1989, the signing of the Schengen implementing convention was again postponed. As a final draft of the convention neared completion, the schedule for the signing had been reset, to December 1989. But the revolution that brought down the Iron Curtain, reverberating across Eastern Europe and auguring the reunification of Germany, halted the work on Schengen. Never did the pressure of events weigh more on the planning for free movement. The fall of the Wall, in the waning days of the Cold War, recast the risks of abolishing frontiers. For the Schengen countries, it highlighted the exigency of compensatory measures to secure external borders and control the flow of persons across a newly porous continent, where barriers were suddenly collapsing. A new ‘German question’ arose, as Schengen’s perimeter shifted eastward.

The perplexities posed by Berlin had figured in the Schengen accord of 1985, a year that saw the opening of new paths toward détente between West and East, fostered by the launching of *perestroika* in Soviet Russia.⁹³ But, as the Schengen states announced free movement as a cornerstone of Citizens’ Europe, the demarcation dividing Germany remained fixed in place, symbolised by the isolation of West Berlin. Participation in Schengen meant, for West Germany, the inclusion of its part of the divided capital in the expanse of territory where

⁹² ‘Relations franco-allemandes’.

⁹³ See Robert English, *Russia and the Idea of the West: Gorbachev, Intellectuals, and the End of the Cold War* (New York, 2000); David Childs, *The Fall of the GDR: Germany’s Road to Unity* (London, 2001); Eric Solsten, ed., *Germany: A Country Study*, 3rd ed. (Washington, D.C., 1995), p.116.

European nationals were entitled to move freely, even though West Berlin shared no borders with other Schengen states. ‘This agreement shall also apply to Berlin’, stated Article 29 of the accord, which vested West Germany alone with the authority to alter that guarantee, except in the event of a ‘contrary declaration’ issued to other member states within three months of the accord’s entry into force. In principle, the question of Berlin had been settled.⁹⁴

But ‘*Das Berlin-Problem*’ arose. The city, as West German diplomats explained in 1986, operated as a valve of unwanted movement out of Eastern Europe, a point of departure for ‘asylum tourism’. By then, West Germany was already coping with a spike in visa overstays and asylum requests. Nonetheless, consular officials warned that a crackdown would be impractical because of the volume of traffic moving between Berlin and West Germany. There were also legal hurdles, given constitutional protections of the right to asylum established by West Germany’s postwar Basic Law.⁹⁵ Diplomats such as Hanspeter Hellbeck, whose prior postings included mainland China, viewed Schengen as a source of solutions to the *Berlin-Problem*, welcoming efforts to harmonise asylum policy across Europe as a critical aspect of the ‘project of de-bordering’.⁹⁶

Initially, Berlin was a minor theme of the negotiations on the implementing convention. This was especially apparent at a 1987 meeting on a preliminary draft of the convention attended by ministers and state secretaries of the Schengen countries. Held in Berlin, the meeting marked the city’s 750th anniversary. Yet the question of free movement there did not emerge; rather, the discussions, led by Waldemar Schreckenberger, embraced ‘common controls

⁹⁴ Convention Implementing the Schengen Agreement, 19 June 1990, (hereafter Schengen Implementing Convention).

⁹⁵ Basic Law for the Federal Republic of Germany, (1949), art.16a.

⁹⁶ Hanspeter Hellbeck, ‘Asylantenfrage’, 28 July 1986, pp.3-4, 10, Folder 131.014, Box 12463 Grenzkontrollen, PAA.

and surveillance' at external borders.⁹⁷ Within the working groups, recurring arguments on the treatment of German nationals in Eastern Europe and the modes of securing Schengen's perimeter yielded only affirmations that provisions on free movement of persons would 'apply to the land of Berlin'.⁹⁸ The Berlin border drew little attention.

Until the autumn of 1989. As thousands of East Germans escaped to Hungary, Austria, Poland, and Czechoslovakia, seeking asylum in West German embassies, and mass protests led to the collapse of the German Democratic Republic, the turmoil engulfed the Schengen negotiations. In early November, more than a million East Germans took to the streets, demanding democracy, free expression, and freedom to travel, proclaiming 'We are the people'.⁹⁹ With the fall of the Wall on 9 November, scrutiny turned to Berlin, which stood at the external frontier of the Schengen area of open borders. In the days just after the Wall came down, as many as three million citizens of East Germany travelled to West Berlin and other towns nearby.¹⁰⁰ By early December, West Germany had proposed a declaration reaffirming that the Schengen accord would apply to Berlin once the implementing convention entered into force in West Germany. It sought support from the Bonn Group, an influential circle of diplomats from France, Britain, the United States, and West Germany formed after the war to consult on Berlin and the entire German question. A telegram of 4 December 1989 titled 'Accord de Schengen. "Question de Berlin"', sent from Bonn to the French foreign ministry, by

⁹⁷ Réunion des Ministres et Secrétaires d'Etat Chargés de l'Exécution de l'Accord de Schengen du 17 Décembre 1987 à Berlin, Folder Schengen: oct. 86 – déc. 1989, Box 21 101SUP, MEAE.

⁹⁸ Isabelle Renouard, 'Projet de convention complémentaire à l'accord de Schengen relative à la circulation des personnes: statut de Berlin', 19 avril 1989, Folder Schengen Groupe Central de Négociation, Paris, 2-3 Mai 89 (hereafter GCN Paris); Cazimajou, 'Accord de Schengen'; 'Droit de séjour des étrangers', Annexe, Rapport au Groupe de Travail II 'Circulation des personnes', 19 novembre 1987, GCN Paris, Box 6 1914INVA, MEAE.

⁹⁹ See Charles S. Maier, *Dissolution: The Crisis of Communism and the End of East Germany* (Princeton, N.J.: 1999), especially pp.108-67; Childs, *Fall of the GDR*, pp.64-91; Solsten, *Germany*, pp.113-33; Hans-Hermann Hertle, 'The Fall of the Wall: The Unintended Self-Dissolution of East Germany's Ruling Regime', *Cold War International History Project Bulletin*, 12/13 (Fall/Winter 2001), pp.131-164.

¹⁰⁰ Mary Elise Sarotte, *The Collapse: The Accidental Opening of the Berlin Wall* (New York: 2014), p.167; Lewis J. Edinger, *From Bonn to Berlin: German Politics in Transition* (New York: 1998), p.13.

France's ambassador, Serge Boidevaux, explained that the declaration would also ensure that the rights and responsibilities of France, Britain, and the United States regarding Berlin would be unaltered. West Germany asked the Bonn Group to endorse the declaration 'swiftly', so the convention could be initialed on 6 December and signed on 15 December. The Americans and British advised that Schengen should proceed as planned while further deliberation was given to the declaration on the allies' obligations.¹⁰¹ Suddenly, the Berlin problem made Schengen a subject of transatlantic consultation.

Simultaneously, the magnitude of human movement, which would redraw the map of Europe, impinged on the work inside the Schengen laboratory. West Germany, which then held the presidency of the Schengen states, proposed to its partners a set of measures prompted by the opening of the border in Berlin — a unilateral declaration that East Germany was not a 'foreign country in relation to the Federal Republic of Germany', that East Germans would not count as foreign nationals, and that all Germans entering West Germany would be exempt from visa requirements and authorisation for residence. Further, as recorded in memoranda from a Central Negotiating Group meeting in Bonn on 11 December, West Germany proposed the declaration as an annex to the convention. It would therefore not require the signature of Schengen delegates. But France dissented.¹⁰² The issue was still not resolved when an invitation to the convention signing went out from Luxembourg on 12 December. It was to be held at the chapel of the Schengen castle, on 15 December. After a brief press conference, wrote Luxembourg's lead negotiator, Alphonse Berns, the delegations would dine at Léa Linster, a

¹⁰¹ 'Accord de Schengen, "Question de Berlin"', 4 décembre 1989, Folder GCN Bruxelles 4-6 déc. 1989, Box 4 101SUP, MEAE. On the Bonn Group, see Petri Hakkarainen, *A State of Pace in Europe: West Germany and the CSCE, 1966-1975* (New York, 2011), pp.5, 85-99, 124, 171-73, 226-30.

¹⁰² Note de la Présidence allemande, 11 décembre 1989; E. Cazimajou, 'A propos des déclarations de la RFA au sujet de la Rda', 12 décembre 1989, Folder Schengen: GCN, 13 déc. 1989, Box 4 101SUP, MEAE.

Michelin-star restaurant, in the nearby village of Frisange.¹⁰³

The German question, however, eluded settlement. The convention's signing was postponed on the eve of the ceremony. West Germany requested the delay — 'an additional time of reflection' in light of developments in East Germany.¹⁰⁴ At a meeting in Bonn on 13 December, the Central Negotiating Group gave recognition to the idea of one German nationality, declared in the Basic Law of the Federal Republic, with the other Schengen states assenting to the free movement of all German persons, not only to enter into West Germany but to cross the entire Schengen area without visas, provided that West Germany would subject foreigners to the convention's security regime.¹⁰⁵ But there was no agreement on the declaration that East Germany was not a 'foreign country' with respect to West Germany. For that declaration would extend the Schengen area across a border that ran from the Baltic Sea to Czechoslovakia, bringing about 100,000 square kilometres of Eastern European territory within the guarantees of free movement.¹⁰⁶

Schengen's German question was all the more momentous because the implementing convention promised to be the first international treaty to speak to the status of East Germany following the fall of the Berlin Wall.¹⁰⁷ On 15 December, the day set for the signing, the Schengen states issued a 'Common Declaration' of intent to continue negotiations. There would be further debate on several disputed issues, from asylum to privacy protections, regulation of

¹⁰³ Alphonse Berns to Emile Cazimajou, 12 décembre 1989, pp.4-6, Folder Schengen: GCN, 13 déc. 1989, Box 4, 101SUP, MEAE. On Léa Linster, see Ulf Meyer zu Kueingdorf, ed., *Mal was Leichtes - Das Frauen-Kochbuch: 33 x eine Frau mit Genuss* (Niedernhausen, 2010), p.96.

¹⁰⁴ F. Braun, Note à l'attention de M. Brunner et M. Lamy, Commission des Communautés Européennes, 18 décembre 1989, François Lamoureux, FL-195 Chronos généraux, HAEU.

¹⁰⁵ Jan de Ceuster, Compte-rendu du Réunion, Commission, 15 décembre 1989, FL-195, HAEU; E. Cazimajou, Note pour le Ministre d'Etat, 19 décembre 1989, Folder Schengen: GCN, 13 déc. 1989, Box 4 101SUP, MEAE; de Ceuster, 'Compte-rendu du Réunion'.

¹⁰⁶ E. Cazimajou 'Accord de Schengen: Echec de la négociation relative à la convention d. application de l'accord', 18 décembre 1989, Folder GCN Bruxelles 4-6 déc. 1989, Box 4 101SUP, MEAE; E. Cazimajou, Note pour le Ministre d'Etat; Stephen R. Burant, ed., *East Germany: A Country Study* (Washington, D.C.: 1988), pp.xxi-ii.

¹⁰⁷ Cazimajou 'Accord de Schengen: Echec de la négociation'; Cazimajou, Note pour le Ministre d'Etat. See 'L'Europe sans frontières est née', *Le Soir*.

the commercial transport of goods, and cooperation against tax fraud.¹⁰⁸ But the cause for the postponement was ‘difficulties of German origin’, as Emile Cazimajou wrote in a telegram of 18 December, describing the ‘failure of the negotiation’ in an account sent to foreign ministries of the Schengen states as well as of Italy, Spain, and Britain. ‘The German difficulty was sorting out the question of the relations between the FRG and the GDR in the climate created by the unexpected events in the Eastern European countries’, he wrote. ‘Finally, in the night of 13 to 14 December, Bonn took the initiative to break off the discussion’. In vain, that night, the negotiation was ‘*tête-à-tête* between the heads of the German and French delegations’.¹⁰⁹ A proposal from Lutz Stavenhagen of West Germany, for a 15 December meeting of Schengen foreign ministers in Luxembourg to hear a statement from his government on the opening of the inter-German border, was rejected by the other Schengen states. Early in the year, Cazimajou had assured the European Commission that the convention was nearly complete. But as 1989 ended, he wrote bleakly of ‘a peripeteia’ — a sudden change of circumstance — warning that the Single European Act would be thwarted under a ‘failure of Schengen’.¹¹⁰

The irony of a treaty that guaranteed free movement and abolished borders foundering because of a wall’s collapse was not lost on the European press. Mordant criticism came from *Le Monde*. ‘Europe without borders stumbles in Schengen’, blared a headline on 15 December. ‘Paradoxically’, the paper reported, the obstacle was ‘freedom to come and go reclaimed in the East’.¹¹¹ The negotiations remained closed to the press, but the mass migration of people across Eastern Europe’s frontiers into West Germany drew attention to the unfinished accord and the dual risks of lifting internal controls and securing external borders. By the summer of 1989,

¹⁰⁸ Déclaration commune des Ministres et Secrétaires d’Etat réunis à Schengen le 15 décembre 1989, Folder GCN, 13 déc. 1989, Box 4 101SUP, MEAE; Cruz, *Insight into Schengen*, p.6.

¹⁰⁹ Cazimajou ‘Echec de la négociation’.

¹¹⁰ Cazimajou, Note pour le Ministre d’Etat. See Jean Quatremer, ‘L’Europe sans Frontières Trebuche a Schengen’, *Le Monde*, 15 décembre 1989.

¹¹¹ ‘Coup de Tonnerre sur les Frontières’, *Le Monde*, 15 décembre 1989; Quatremer, ‘L’Europe sans Frontières’.

Schengen was a topic of increasingly adverse commentary. What was supposed to be a ‘signal for the citizens of Europe’, announced the *Deutsches Allgemeines Sonntagsblatt*, was going ‘down the drain’ — ‘Im Eimer’.¹¹² The critiques came from across the political spectrum: from impatient European integrationists; from refugee advocates who called for greater protection for asylum seekers in a frontierless space of liberty; and from Eurosceptic nationalists who claimed that Schengen would open the floodgates to illegal immigrants. The negotiating groups took note of the commentary. ‘Detrimental to human rights’, ‘repressive’, ‘dangerous laxity’ — all were indictments, as Cazimajou observed, found in the ‘press campaign ... against the Schengen Agreement’.¹¹³

Berlin appeared as an inflection point, even before the Wall fell.¹¹⁴ The city was said to symbolise the impossibility of balancing free movement with security — how abolishing borders would leave the Schengen countries vulnerable to undesired migrants or require surveillance that would threaten individual privacy. The delay achieving ‘a borderless Europe’, as a piece in *Der Spiegel* balefully titled ‘Big Brother Replaces the Publican’ argued in July 1989, ‘reveals the gap between political wishful thinking and practical reason, between Euro-populism and the sense of the feasible’.¹¹⁵ In October, while celebrating the revolutionary ‘exodus from the GDR’, *Der Spiegel* pointed to the difficulty of implementing security in the Schengen area: ‘the free ride for free citizens has far-reaching consequences for ... national search methods’.¹¹⁶ In France, the criticism of Schengen increased during the autumn of 1989. The accord would

¹¹² Peter Zudeick, ‘Im Eimer’, *Deutsches Allgemeines Sonntagsblatt*, September 1989.

¹¹³ Emile Cazimajou, ‘La Presse et l’Accord de Schengen’, Note à l’Attention du Cabinet du Ministre d’Etat’, 16 mai 1989, Folder Schengen, Presse (1988-89) Box 5 1914INVA, MEAE.

¹¹⁴ See *Der Spiegel*’s coverage: ‘DDR-Flüchtlinge: Umfassender Beistand’, 11 September 1989; ‘Eine Zeit geht zu Ende’, 4 September 1989; ‘Berlin: Mompers Landsuche in der DDR’, 25 September 1989; ‘Berlin – gefährlich für die Sache des Friedens’, 2 October, 1989; ‘Berlin – Prüfstein für unseren Mut’, 9 Oktober 1989; ‘Dann wird die Mauer fallen’, 16 Oktober 1989; ‘Berlin: Leben auf Parkbänken’, 23 Oktober 1989; ‘Es ist eine Revolution’, 6 November 1989.

¹¹⁵ ‘Big Brother ersetzt den Zöllner’, *Spiegel*, 10 Juli 1989.

¹¹⁶ ‘Ostblock – Sieg der Vernunft’, *Spiegel*, 9 Oktober 1989; ‘Magisches Datum’, *ibid.*, 9 Oktober 1989.

‘pose serious dangers ... of immigration by Turkish workers, many in the FRG ... which can only accentuate the arrival of Germans from the east’, a Gaullist leader, Bernard-Claude Savy, wrote in a September communiqué disseminated by the political club *Avenir et Liberté*.¹¹⁷ A week after the wall fell, *Présent*, a French fundamentalist Catholic newspaper with close ties to the Front National, attacked the dismantling of borders, free movement, illegal immigration, the secret negotiations of ‘obscure technocrats’, and the ‘euphoria’ surrounding supra-nationalism, in a column titled ‘In the Fog of the “Schengen Territory.”’ Alongside it appeared a tirade against the abuse of asylum rights by ‘thousands of foreigners’, ascribing the ‘immigration-invasion’ to ‘ideology ... socialist ideology, globalist ideology, third-world ideology, the ideology of so-called anti-racism, the soft ideology of totalitarian humanitarianism, all contained in the religion of modern times, of our dechristianised and secularized times: the false religion of human rights’. Completing the triptych was a story on the Berlin Wall. *Présent* warned, ‘We sail in full fog’.¹¹⁸

Le Monde used a different atmospheric metaphor, describing Schengen’s postponement in December 1989 as a ‘thunderbolt on the borders’. It reported on the events leading to the nocturnal breakdown of negotiations on the status of East Germany: the disagreements over security — ‘police cooperation’ and ‘harmonisation of legislation on foreigners’ and ‘right of refuge’, politicised by growing popular awareness of ‘non-European immigrants, particularly of Muslims, whether Turks, Iranians, Pakistanis or North Africans’ — and then the cataclysm in Eastern Europe, the ‘Berlin Wall in ruins’ and the ‘iron curtain a museum piece’. Here was an

¹¹⁷ Bernard-Claude Savy, ‘L’Accord de Schengen n’est plus Secret’, communiqué, *Avenir et Liberté*, Septembre 1989, Folder Schengen, Presse (1988-89) Box 5 1914INVA, MEAE.

¹¹⁸ ‘Des milliers d’étrangers abusent du droit d’asile’, *Présent*, 16 novembre 1989; Jeanne Smits, ‘Dans le brouillard du “territoire Schengen”’, *Présent*, 16 novembre 1989. See Patrick Weil, ‘Immigration and The Rise of Racism in France: The Contradictions in Mitterrand’s Policies’, *French Politics and Society*, 9, no.3/4 (Summer/Fall 1991), pp.82-100; Pierre-André Taguieff and Patrick Weil “‘Immigration”, fait national et “citoyenneté””, *Esprit*, 161, no.5(May 1990), pp.87-102; Gaspard, *Une Petite Ville en France*. On *Présent*, see James Shields, *The Extreme Right in France: From Pétain to Le Pen* (London: 2007), pp.181, 221.

‘irony of history ... the arrival of East Germans on the European scene ... delays the disappearance of border controls’. Schengen had been struck by a ‘Teutonic thunderbolt’.¹¹⁹ *Le Monde* quoted an unnamed negotiator: ‘Schengen may well go down in history as the city where Europe failed’.¹²⁰

But other negotiators spoke on the record of the difficulty of the German question for Schengen. There was disquietude about the future, about free movement, about European integration — about whether Schengen’s eastern border would ‘pass on the Elbe or on the Oder’, as Luxembourg’s Robert Goebbels, who had presided over Schengen’s signing in 1985, told the press. ‘The way things are going, it will be better to be a commodity or capital in 1993 than a person’.¹²¹ The fall of the Berlin Wall made visible to the world the difference between goods and persons as subjects of free movement in a single market operating across Schengen’s borderless interior.

In March 1990, negotiations resumed on the implementing convention, following the first — and only — free parliamentary elections held in East Germany, which brought the Christian Democratic Union to power and endorsed its platform of reunification with the West.¹²² A letter on behalf of the West German delegation, from Lutz Stavenhagen to Pieter Dankert, the Central Negotiating Group’s chairperson at the time, proposed the five countries renew discussions based on the text drafted in late 1989, with three essential amendments — inclusion of East Germany in the convention, greater protection for data privacy in accordance with national law, and waiver of visa requirements for Eastern Bloc countries undergoing democratic change. ‘Recent developments have led the Federal Republic of Germany and the

¹¹⁹ ‘Coup de Tonnerre’.

¹²⁰ ‘Quatremer, L’Europe sans Frontieres’.

¹²¹ Ibid.

¹²² See Maier, *Dissolution*, pp.195-214.

German Democratic Republic to consider unification in the short term', Stavenhagen wrote, expressing confidence that a 'unified Germany will remain incorporated in the European Community'.¹²³

The West German overture anticipated that the Schengen delegations would recognise the unity of Germany as well as reforms sweeping across the countries of Eastern Europe. 'Already today, during the transitional period, the GDR is not considered as a foreign state in relation to the Federal Republic of Germany.... German nationals may freely enter the Federal territory and move freely within the Schengen area', Stavenhagen wrote, adding that West Germany intended 'soon to abolish visa requirements for Hungarian and Czechoslovak nationals'.¹²⁴ France, however, appeared to take a guarded approach to Germany's aims, as described in notes from a meeting at the Elysée Palace in Paris on 20 January 1990, between the French president François Mitterrand and the British prime minister Margaret Thatcher. According to British diplomatic correspondence marked 'Secret and Personal', Mitterrand said of the December impasse on Schengen that 'Chancellor Kohl had telephoned him to complain that the French were dragging their feet and must sign the agreement. He had given the necessary instructions to the French Interior Minister, only to find the next day that the Germans were insisting on expanding the agreement automatically to include East Germany. The Germans could not be allowed to throw their weight around like this'. Reportedly, Mitterrand spoke apprehensively of German ambitions, doubting that 'Europe was yet ready for German reunification', observing:

The sudden prospect of reunification had delivered a sort of mental shock to the Germans. Its effect had been to turn them once again into the 'bad' Germans they used to be. They were behaving with a certain brutality and concentrating on reunification to the exclusion of everything else.... Of course the Germans had the right to self-determination. But they did not have the right to upset the political realities of Europe.

¹²³ Lutz Stavenhagen to Piet Dankert, Lettre du Président de la Délégation de la République Fédérale d'Allemagne au Secrétaire Général de l'Union Economique Benelux, 22 mars 1990, Folder Protection des Données, Box 23 101SUP, MEAE.

¹²⁴ Ibid.

Nonetheless, Mitterrand apparently saw inevitability in Germany's transformation. 'There was a logic to reunification', he allegedly said. 'It would be stupid to say no to reunification. In reality there was no force in Europe which could stop it happening. None of us were going to declare war on Germany'. That logic would imply East Germany's inclusion in Schengen.¹²⁵

Nothing in West Germany's bid to resume negotiations hinted at the depth of bilateral tensions with France, or opposition from other Schengen states. On the contrary, it declared the Schengen accord would manifest, within an international European framework, the new status of Germany, on the verge of reunification. 'Schengen plays a signal role in this context', Stavenhagen's letter claimed. 'In the case of the unification of the two German states, it will apply equally to the present territory of the German Democratic Republic'.¹²⁶ The notion was that Schengen's guarantees of freedom and security would be a model for the European Community in confronting the German question.

By April, the Central Negotiating Group had agreed to proceed with signing the implementing convention, while continuing to revise its provisions. In May, ministers of the Schengen states were still negotiating the terms of compromise on Germany, as well as on asylum, visas, data exchange, and procedures for ratifying the convention. Meanwhile, the Office of the United Nations High Commissioner for Refugees was made privy to a draft of the convention. In early June, a briefing paper by Churches Committee for Migrants in Europe revealed that the refugee agency declined to certify that Schengen did not contravene the Geneva Convention. By then, the implementing convention was still unsigned.¹²⁷

¹²⁵ Mr. Powell to Mr. Wall, 20 January 1990, in *German Unification 1989-90: Documents on British Policy Overseas*, series 3, vol. 7, ed. Patrick Salmon, Keith Hamilton, and Stephen Robert Twigge (London: 2011), pp.215-18. See Paoli, 'France and the Origins of Schengen', pp.255-279.

¹²⁶ Stavenhagen to Dankert.

¹²⁷ Cruz, *Insight into Schengen*, pp.6-8.

The Convention Implementing the Schengen Agreement of 14 June 1985 was signed on 19 June 1990. A week earlier, on 13 June 1990, the official destruction of the Berlin Wall began, along Bernauer Strasse, where it crossed through the neighborhoods of Mitte and Kreuzberg, Treptow and Neukölln.¹²⁸ Both events were laden with symbolism for European integration. The signing ceremony at Schengen, the return to the tripoint border running through the Moselle River, memorialised the commitment of states to abolishing frontiers within a transnational territory. But the formal leveling of the Wall vindicated the revolutionary meaning of the free movement of persons.

The implementing convention, a charter of rules and regulations, did not reiterate the statements of political intent that introduced the 1985 accord. Tersely, the convention's preamble declared the aim of the Schengen countries to enable the circulation of people and goods — 'to abolish checks at their common borders on the movement of persons and facilitate the transport and movement of goods at those borders' — citing the market objectives of the Treaty of Rome and Single European Act, 'that the internal market shall comprise an area without internal frontiers'. The convention enumerated measures to achieve those goals while abating the risks of open borders and free movement. Article 1 defined key terms, such as 'border check' and 'aliens' and 'asylum seeker' and 'third state' and 'internal borders' and 'external borders'. Of the convention's 142 articles, 74 concerned security and surveillance.¹²⁹

¹²⁸ 'Chronicle 13 June 1990', Chronik der Mauer, Zentrum für Zeithistorische Forschung Potsdam e.V., Bundeszentrale für politische Bildung, and Deutschlandradio, http://www.chronik-der-mauer.de/en/chronicle/_year1990/_month6/?moc=1.

¹²⁹ Schengen Implementing Convention, preamble.

A settlement of the German question, anticipating reunification, appeared at the end of the convention, among the ‘Declarations’ adopted at the time of signing. West Germany prevailed in most of its proposals. A joint declaration provided, ‘after the unification of the two German States, the scope of the Convention shall under international law also extend to the current territory of the German Democratic Republic’. It also accepted West Germany’s unilateral declarations that East Germany was ‘not a foreign country in relation to the Federal Republic of Germany’ and that rules on border checks with a ‘third state’ would not apply between the two Germanies.¹³⁰ But nothing was said of waiving visas for all German nationals in Eastern Europe, even when all German territory became part of Schengen.

A right of persons to free movement was not created by the implementing convention, nor had it been promised in the 1985 accord. Yet the abolition of borders had plainly carried a new freedom, as was explicitly envisioned in the 1985 affirmation that lifting controls would enable the ‘free movement of persons’.¹³¹ No such language appeared in the convention, however. Only a chapter on ‘aliens’, which detailed the rules restricting their border-crossing, used the phrase ‘may move freely’ — but as bounded by the temporal limits of visa requirements.¹³²

The shifts in language reflect the weight of security measures in the convention. The 1985 accord connected the flow of people and commodities across Schengen’s frontiers — ‘the free movement of persons, goods and services’ — with the solidarity of Europeans, proclaiming the ‘freedom to cross borders’ for all nationals of the European Community as an expression of the ‘ever closer union of the peoples of the Member States’.¹³³ But the word

¹³⁰ Ibid., final act: declaration on the scope of the convention, declarations by the Federal Republic of Germany.

¹³¹ Schengen Agreement, 1985, preamble.

¹³² Schengen Implementing Convention, arts.19, 20, 21.

¹³³ Schengen Agreement, 1985, preamble.

‘freedom’ appeared nowhere in the implementing convention. Nor did the association of crossing common borders with the political project of European union. Rather the convention set out provisions limiting the movement of persons, from visa requirements, to checks at external borders, to the use of the information system in issuing alerts, to rules on aliens.¹³⁴ An alien meant ‘any person other than a national’ of member states of the European Community.¹³⁵

The restrictions on movement began in the convention’s first chapter, on ‘Crossing Internal Borders’. It allowed such crossing without checks on persons along all internal borders, which include land borders, seaports for ferry connections, and airports for internal flights.¹³⁶ But the grant of movement was immediately qualified by a measure permitting the Schengen states to reassert national checks at internal borders for a limited time, as required by ‘public policy or national security’. The limits on crossing internal borders were reinforced by a provision allowing the ‘exercise of police powers’, by a Schengen state across its territory, with respect to aliens. Likewise, the elimination of checks on persons left intact national laws on identification papers, ‘the requirement to hold, carry and produce permits and documents’.¹³⁷ While giving no deference to free movement as a human right, the convention expressly allowed derogation of the privilege of crossing internal borders for reasons of national security, thereby recognising extensive grounds for denial of freedom of movement by the nation-state.¹³⁸

Where rights language figured in the convention, it did not concern the movement of individual citizens, even Europeans. It applied in four other domains — the power of states, the treatment of asylum seekers, the transit of aliens, and the privacy of data subjects. The

¹³⁴ Schengen Implementing Convention, see, for example, arts.9, 2, 92, 3.

¹³⁵ *Ibid.*, art.1.

¹³⁶ *Ibid.*, arts.2, 1.

¹³⁷ *Ibid.*, art.2.

¹³⁸ *Ibid.*, art.2.

convention ensured the sovereignty of the Schengen countries, affirming states' rights to legislate on aliens; decide asylum cases, recognise refugee status, or deny entry of and expel asylum seekers; search and access data through Schengen's information system; and restrict the territorial validity of visas. It also recognised the right of asylum, as guaranteed by the Geneva Convention, and the right of asylum seekers to request information exchanged about them and demand corrections or deletions of false information. Aliens were entitled to formal extradition proceedings. And use of information by Schengen states could not violate the rights of data subjects, as protected by a Council of Europe convention on the processing of personal data.¹³⁹

Neither a legislature nor a system of law and courts for the Schengen area was created by the convention; rather, in keeping with the 1985 accord, it required the enforcement of common measures by harmonising of national rules and cooperation in surveillance, security, and customs procedures, while also recognising state autonomy in regulating immigration and policing external borders.¹⁴⁰ Consequently, the convention did not provide for adjudicating between the rights claims of states and persons — as, for example, in the case of asylum seekers appealing expulsion from Schengen countries. That left redress to be sought first in national courts and finally in the European Court of Human Rights. The only administrative body established was a Schengen 'executive committee', composed of one representative from each Schengen state and responsible for overseeing the implementation process.¹⁴¹ The convention did not include a clause sought by the European Commission recognising the supremacy of Community law.¹⁴²

¹³⁹ Ibid., arts.1, 5, 10, 20, 23, 29, 35, 38, 66, 101, 109, 114, 115, 136.

¹⁴⁰ Ibid., arts.7, 9, 30, 115, 120, 122, 123, 39, 44, 4, 47, 70, 125.

¹⁴¹ Ibid., arts.131, 132, 133.

¹⁴² Ibid., art.142; Adrian Fortescue, Note to Mr. Bangemann, Vice-President, Commission des Communautés Européennes, 10 novembre 1989, p.3, FL-595, HAEU.

The pairing of state sovereignty and intergovernmental cooperation framed the entire convention. It was central, for example, in the crucial rules on Crossing External Borders — restrictive measures that provided compensatory security for movement across Schengen’s frontierless interior by transferring controls to the perimeter. Checks at external borders were to graft together independent national policing with common surveillance procedures, applying ‘uniform principles, within the scope of national powers and national law’.¹⁴³ Crossing external land and sea borders could occur only at designated places and times, with the states obliged to punish breaches and increase controls, deploying ‘mobile units to carry out external border surveillance’ and ‘enough suitably qualified officers to carry out checks’.¹⁴⁴ But surveillance was not left solely to individual states; it was a joint obligation requiring common techniques and harmonised regulations, maintained by ‘constant, close cooperation with a view to the effective implementation of checks’.¹⁴⁵

With great specificity, the convention set out procedures for imposing checks on persons crossing external borders, explicating the fusion of uniform rules and national powers in the work of identity detection. The checks applied not only to people entering and exiting the Schengen area, but to objects and vehicles in their possession, requiring presentation of travel documents, and, always, closest scrutiny of ‘aliens’ in motion across Europe. ‘All persons shall undergo at least one such check in order to establish their identities... On entry, aliens shall be subject to a thorough check.... On exit, the checks shall be carried out... under the law on aliens in order to detect and prevent threats to the national security and public policy.... Such checks shall always be carried out on aliens’, the convention stated, mandating that searches

¹⁴³ Schengen Implementing Convention, art.6.

¹⁴⁴ *Ibid.*, art.6.

¹⁴⁵ *Ibid.*, art.7.

adhere to ‘national law’.¹⁴⁶

Additional, highly technical security measures extended the fortification of Schengen’s external border, concerning methods of surveillance; the movement of aliens; applications for asylum; criminal wrongs and extradition; and the operation of the Schengen Information System. No aspect of the convention spoke more forcefully to the primacy of compensatory security than the agenda for crime prevention. The basic premise was that open borders would not thwart law enforcement. Repeatedly, the principle of national discretion was joined with directives on common procedures. A section on Police and Security began, ‘Police authorities shall, in compliance with national law and within the scope of their powers, assist each other for the purposes of preventing and detecting criminal offences’.¹⁴⁷ On high crimes — murder, rape, arson, forgery of money, extortion, and human trafficking — the convention authorised police to cross Schengen’s internal borders to pursue surveillance without prior authorisation, for as long as five hours, but required surveillance to cease at the request of the state where it occurred.¹⁴⁸ Similar rules extended to cross-border ‘hot pursuit’ of persons escaping from custody or detected in the act of committing a high crime. When suspects were arrested and questioned, becoming targets of criminal prosecution rather than agents of movement across the Schengen area, ‘relevant rules of national law shall apply’.¹⁴⁹

Moreover, as a blueprint for transnational criminal law, the convention prescribed use of powerful surveillance technologies, through the creation of the Schengen Information System, a network of transnational data exchange. It provided for widening frequency bands, standardising communications equipment, and installing ‘telephone, radio, and telex lines... for

¹⁴⁶ Ibid., art.6.

¹⁴⁷ Ibid., art.39.

¹⁴⁸ Ibid., art.40.

¹⁴⁹ Ibid., art.41. The provisions on cross-border surveillance and hot pursuit reflected compromises offered by French delegation in 1989 in light of the accord’s likely expansion to Italy and Spain, nations with criminal procedures differing from those of the five. See ‘Satisfaction du Vice-president Bangemann’.

the timely transmission of information for the purposes of cross-border surveillance and hot pursuit'.¹⁵⁰ The information system would be based in Strasbourg, France, with each Schengen state establishing a national section, enabling an 'automated search procedure' and 'access to alerts on persons and property for the purposes of border checks', with alerts constituting requests for provisional arrest under the extradition process. 'Data on aliens' would be accessible to all Schengen states via the information system, used 'in accordance with national law'.¹⁵¹

On visas, the obligations restricting the movement of aliens into and across the Schengen area, which had provoked such deep disagreement during the negotiations, the convention struck a balance between national authority and uniform rules, providing for harmonising laws by consent as well as for 'common policy'. It included no country lists of third states whose nationals were subject to the common visa rules, nor did it refer to a ranking of states by risk or annexes of undesirables; those inventories remained shrouded in the papers of the negotiating groups. A common visa would be introduced for short stays of as long as three months, for aliens who met the common conditions to cross borders — justification for the stay, proof of subsistence, and no record of security alerts — that would require expulsion at the visa's expiration. National visas would continue for long stays, allowing transit across internal borders to the country issuing the visa. Non-compliance with the common rules would be allowed in 'exceptional cases', for 'overriding reasons of national policy'.¹⁵²

The movement of goods, less freighted with security risks, occupied only a few brief articles of the convention, despite the importance of commodity exchange in the internal market. Cooperation in free trade was to occur through 'simplification' of compliance with

¹⁵⁰ Schengen Implementing Convention, art.44.

¹⁵¹ *Ibid.*, arts.92-96, 64.

¹⁵² *Ibid.*, arts.9, 10, 15, 5, 17, 18, 23.

existing national standards, with the Schengen states obliged to 'jointly ensure that their laws, regulations or administrative provisions do not unjustifiably impede the movement of goods at internal borders'. The convention encouraged customs clearance inside each state, rather than at common borders, requiring simplification on items ranging from commercial transport permits to animal health checks, while entirely waiving inspections for some goods, including fresh fruit and cut flowers 'suitable for ornamental purposes'.¹⁵³ But states were allowed to restore more robust controls, to prevent the transit of dangerous goods or the spread of 'harmful organisms'. On the movement of goods across external borders, the convention instructed harmonising formalities and monitoring compliance based on 'uniform principles'.¹⁵⁴ Overall, it introduced modest technical adjustments to lift burdens on commerce, presuming an increase in duty-free allowances. 'The number and intensity of checks on goods carried by travelers when crossing internal borders', the convention declared, 'shall be reduced to the lowest level possible'.¹⁵⁵

Where the convention did closely regulate goods, the rules supported security, policing, and crime prevention. Enforcement of value-added taxes and customs duties formed part of 'Mutual Assistance in Criminal Matters'; prevention of illicit drug trafficking concerned surveillance at external borders. Extraordinarily detailed rules on acquiring, using, manufacturing, transporting, and dealing in firearms and ammunitions also came within the provisions on security, not the movement of goods in Schengen's internal market, and applied to both people and corporations. Prohibited devices included 'firearms normally used as weapons of war' and 'automatic firearms'. Again, the common rules were paired with national autonomy, but in the case of guns only to allow Schengen states to 'adopt more stringent

¹⁵³ Ibid., art.120, art2 para.4, art.121, final act: joint declaration on art.121

¹⁵⁴ Ibid., arts.121, 120, 3.

¹⁵⁵ Ibid., art.124, final act: joint declaration by the ministers and state secretaries.

laws'.¹⁵⁶

Security was paramount as well in the terms for both ratification of the convention and accession to the accord. The convention would be submitted to the Schengen states for 'ratification, acceptance or approval', but no process was delineated, simply that the affirming instruments would be deposited in Luxembourg and that the entire convention would take effect within three months after deposit of the final instrument. But a joint declaration required security as a precondition for implementation, stipulating that the convention would enter into force once 'checks at external borders are effective'.¹⁵⁷ The convention also provided for Schengen's geographical expansion through accession agreements. But accession was restricted to member states of the European Community, a limit that paralleled Schengen's grant of free movement only to nationals of European Community countries.¹⁵⁸

Persons, goods, borders, security, surveillance — in each field the convention resolved divisive issues. No 'positive' list of non-Community countries — whose nationals would be exempt from visa requirements to enter the Schengen area — appeared in the convention. That common approach, refused by France, ran contrary to the balance struck between state authority over immigration and harmonisation of national practices. Disagreement on tracking the movement of aliens across internal borders was resolved by a provision requiring declaration of entry into the territory of each Schengen state, but allowing states to set terms for the declaration. Despite West German opposition, the convention required checks at all external borders. Overcoming Dutch objections, it reinforced security by requiring penalties for transport companies involved in the unlawful entry of aliens, as well as for persons aiding illegal

¹⁵⁶ Ibid., art.50, 77, 79, 81, 89, 90.

¹⁵⁷ Ibid., art.139, final act: joint declaration on art.139.

¹⁵⁸ Ibid., art.40

immigration for ‘financial gain’.¹⁵⁹ On cross-border ‘hot pursuit’, it set no rules on space or time, but required ending the pursuit when requested by the state where it occurs. This was a compromise put forward by France, which reconciled security with the inviolability of state borders and was viewed as a lynchpin of eventual accession by Italy and Spain, nations that maintained criminal procedures at variance with those of the five Schengen countries.¹⁶⁰

Compromises also reconciled information exchange with data privacy, as well as state autonomy with international norms. The convention assured the authority of national law in use of the Schengen Information System while setting uniform limits on storing, transmitting, and copying personal data, binding Schengen states to protect privacy by adopting guarantees to augment European protocols on the Automatic Processing of Personal Data.¹⁶¹

It was on the problem of asylum that the convention explicitly hewed to directives of the European Council. A Final Act of the convention sets forth a Joint Declaration that the Schengen states would ‘draw up an inventory of national policies on asylum with a view to achieving harmonisation’, echoing almost verbatim a conclusion of the European Council in 1989.¹⁶² The Schengen states deferred to the Council’s approach, resolving to catalogue national differences in asylum procedures, ‘in accordance with their constitutional right’.¹⁶³ Under the Joint Declaration, any effort of harmonising rules on asylum would await an inventory of national differences.

Otherwise, the main settlement reached on asylum was allocating responsibility for

¹⁵⁹ Ibid., art.22, 27.

¹⁶⁰ Ibid., art.41. See ‘Satisfaction du Vice-président Bangemann’.

¹⁶¹ Ibid., arts.104, 100, 112, 118, 128-130, 126. And see Lettre du Président de la Délégation de la République Fédérale d’Allemagne, art.126.

¹⁶² Schengen Implementing Convention, final act: joint declaration on national asylum policies; Conclusions, Session du Conseil européen, Strasbourg, 8 et 9 décembre 1989, *Conclusions des Sessions Du Conseil Européen (1975-1990)*, (European Council, 1989), pp.346, 348-49.

¹⁶³ De Ceuster, ‘Compte-rendu du Réunion’; ‘Déclaration Commune des Ministres et Secrétaires d’Etat réunis à Schengen le 15 décembre 1989’, in ‘Note à l’attention de M. Brunner’.

reviewing applications by asylum seekers. The convention assigned a single state responsibility, based on grants of visas or residency to migrants, but, if no grants existed, by country of first entry. If no proof of first entry existed, responsibility would lie with the state where the asylum application was brought. Not only would the system curtail asylum seekers from roving across the Schengen area in search of refuge, but also hold states accountable for the migrants' entry. The convention obliged states to 'take back an alien' denied its asylum, who crossed into other Schengen states without authorisation, as well as to process asylum claims of family members of migrants granted refuge. It affirmed international commitments under the Geneva Convention, but imposed no standards for asylum decisions, recognising national sovereignty.¹⁶⁴

Accountability of a single state was likewise the core principle of the 1990 Dublin Convention on asylum, whose framing by the European Community coincided with the Schengen negotiations. However, the Dublin instrument cited a 'common humanitarian tradition' of refugee protection under the Geneva obligations, as well as the aim of ensuring 'the free movement of persons' in an area without internal frontiers.¹⁶⁵ By contrast, the implementing convention expressly declared a right to exclude — 'to refuse entry or to expel asylum seekers' — and provided that no Schengen country is bound to offer refuge on its soil.¹⁶⁶

What made no imprint on the Schengen convention were criticisms of its asylum rules —neither challenges emerging at the Zeist refugee seminar in April 1989, nor later that year at a meeting held in Strasbourg titled 'Colloquy on Human Rights without Frontiers'. The Council

¹⁶⁴ Schengen Implementing Convention, arts.28-38. See Rossetto, 'Le Droit d'asile en Europe', pp.923-24.

¹⁶⁵ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member-States of the European Communities, preamble, 15 June 1990, 1997 O.J. (C 254) 1 (hereafter Dublin Convention). On the Dublin Convention, see José J. Bolten, 'From Schengen to Dublin: The New Frontiers of Refugee Law', in *Schengen: Internationalisation of Central Chapters of the Law on Aliens, Refugees, Privacy, Security and the Police*, ed. H. Meijers and J.D.M. Steenbergen (Deventer, The Netherlands, 1991), pp.8-36; Agnès Hurwitz, 'The 1990 Dublin Convention: A Comprehensive Assessment', *International Journal of Refugee Law*, 11, no.4 (1999), pp.646-677.

¹⁶⁶ Schengen Implementing Convention, art.29. See Blanc, 'Schengen', pp.722-26.

of Europe, an international body that had drafted the European Convention on Human Rights, convened the colloquy, which was attended by ministers of justice, immigration and police authorities, and ambassadors from across Europe, as well as representatives from the United Nations, non-governmental organisations, church groups, and refugee agencies. A draft of the Schengen convention had found its way, unofficially, to colloquy participants, who argued that both the asylum rules and the secrecy of the negotiations contravened fundamental rights.¹⁶⁷

The principle of asylum embraced at the colloquy was *non-refoulement*: not refusing entry to asylum seekers, nor returning or expelling them to countries where their lives or freedom would be in danger. As an officer of the United Nations refugee agency advised, ‘The international community has been unanimous in stressing the fundamental importance of the principle of *non-refoulement*’.¹⁶⁸ The argument was forcefully made by a leader of *France Terre d’Asile*, an asylum aid group. ‘To refuse entry is to refuse asylum’, said François Julien-Lafferrière. ‘It would be a serious violation of human rights to compel an asylum seeker to find refuge in the first country in which he sets foot, without leaving him the slightest choice’. European states displayed an ‘unfortunate tendency to “unload” the burden’ of asylum seekers, ‘to place obstacles in their way’. It was as if state went about ‘organising — or more often improvising — games of ping-pong in which they forget the balls are human beings’. And this was a “philosophy” ... found, unfortunately, in the draft agreement drawn up by the Schengen Group’.¹⁶⁹ There was agreement that the Schengen convention ran athwart the tenets of international covenants — that the exclusion of non-Europeans had ‘racist overtones’, the

¹⁶⁷ Committee of Experts for the Promotion of Education and Information in the Field of Human Rights, *Colloquy: Human Rights without Frontiers: Strasbourg, 30 November – 1 December 1989: Proceedings* (Strasbourg, 1989). On unofficial access to convention draft, see François Julien-Lafferrière, ‘The Treatment of Refugees and Asylum Seekers at Points of Entry’, in *Colloquy*, p.33,n.14. On the colloquy, see ‘Appendix II Conclusions and Recommendations of the Colloquy “Human Rights without Frontiers”’, *Netherlands Quarterly of Human Rights*, 8, no 1 (March 1990), pp.85-87.

¹⁶⁸ G. Coles, ‘Speech’, in *Colloquy*, p.8.

¹⁶⁹ Julien-Lafferrière, ‘Treatment of Refugees’, pp.26-28.

information system would threaten ‘the rights and freedom of asylum-seekers’, and the secret negotiations were ‘patently undemocratic’.¹⁷⁰ Schengen’s ‘shadow’ was said to darken the ‘European Fortress’.¹⁷¹

Irony lay in the presence of an author of the 1985 Schengen accord at the human rights colloquy. Having come to occupy the office of secretary general of the Council of Europe, acting as host to the colloquy, Catherine Lalumière gave the opening address. She too criticised the exclusion of foreigners from the territory of free movement as a violation of human rights. ‘The temptation is for our countries to put a brake on this immigration’, she said, ‘by the Schengen group, for instance ... of avoiding being swamped by what is felt to be too great and dangerous an influx’. She spoke of needing to learn ‘from history and not confer the benefits of our major instruments mostly on nationals, to the near exclusion of other people’. She spoke of contradictions: ‘preaching the major principles as if they were sacred and then to practice the opposite’ — as if ‘some people are more equal than others’. Bluntly she said of the boundaries of free movement: ‘We tend to keep human rights for our own nationals’.¹⁷²

On the day of the signing of the implementing convention, a set of declarations adopted by the Schengen states were appended to the document. The declarations clarified and completed the provisions of the accord, as had the annexes listing the ‘undesirable’ countries in 1985. But, unlike the secret annexes, the declarations were public statements enshrined in the convention’s Final Act. The declarations covered many issues, from tulips and onions to simplifying extradition, drawing up the inventory of national asylum practices, and extending the accord to East Germany. But none recognised the principle of *non-refoulement*. Nor did the

¹⁷⁰ Simon Towle, ‘European Refugee Policy: Schengen v. European Convention of Human Rights’, in *Colloquy*, pp.210-13. On the secrecy of negotiations, see Julien-Lafferrière, ‘Treatment of Refugees’, p.33,n.14.

¹⁷¹ Peter Nobel, ‘Problems Relating to the Reception of Migrants at Entry Points: Rights and Education of New Arrivals’, in *Colloquy*, p.49.

¹⁷² Catherine Lalumière, ‘Welcome Speech’, in *Colloquy*, p.6.

term human rights appear in the implementing convention.¹⁷³

Not quite a year after the signing of the Schengen convention, marked by the ritual of return to the Moselle Valley, the Central Negotiating Committee sent a dossier of materials on ratification to the national parliaments of the Schengen states. Dated May 1991, the dossier described the origins and aims of the accord, tracing how the ‘Schengen spirit’ emerged from commitments made at Fontainebleau, developed as a pledge of intent under the 1985 agreement, and became realised in the implementing convention. The dossier did not recount the long labour of the negotiations or the internecine conflict that broke suddenly into the open after the fall of the Berlin Wall. Triumphant, the dossier explained that Schengen was ‘a regime of free movement, valuable for all persons’ — not ‘an enclave within the borders of the European Community’ but a ‘laboratory’ for a ‘space of freedom’.¹⁷⁴

When the ratification dossier was distributed, the Schengen states included Italy, and discussions with Spain and Portugal were underway.¹⁷⁵ In November 1990, in Paris, the accession agreement with Italy had been signed. A month earlier, Germany had been reunified into one country. By the time debate on ratification of the convention began in national parliaments, the Schengen area extended east to the Oder River and protruded south into the Mediterranean Sea. Countries classified as undesirables — Czechoslovakia and Poland to the east, Algeria, Libya, and Tunisia to the south, all designated security risks — were now

¹⁷³ Schengen Implementing Convention, final act: joint declaration on art.121, declaration on scope of the convention, joint declaration, declaration by ministers and state secretaries.

¹⁷⁴ ‘Convention d’Application de l’Accord de Schengen’, Dossier d’Information – mai 1991, p.1-7, Folder Liste des conventions, Box 26 101SUP, MEAE.

¹⁷⁵ Ibid., p.2.

proximate to the external borders of Schengen's space of freedom.¹⁷⁶

France was the first country to ratify the convention, in June 1991. Nonetheless, the parliamentary debates brought forth deep antagonisms, as the French coordinator for European free movement, Hubert Blanc, wrote in an essay on Schengen for the *Revue du Marché Commun*. The conflict revolved around the predicaments of sovereignty and migration, Blanc explained, 'in a space without internal borders ensuring the free movement of persons'. He had assisted in the negotiations on the convention, and he remarked that all who contributed to 'the Schengen work had the feeling of facing a difficult challenge'. Accomplishing ratification by the French parliament had not been simple, either, he wrote. The debates were 'very dense'.¹⁷⁷

At the time of the convention's signing, the difficulties of ratification had not been unexpected. In his ceremonial address, Pieter Dankert had offered a cautionary tale, as he alluded to disagreement on asylum and scepticism about the legitimacy of the intergovernmental method.¹⁷⁸ While he spoke, a protest on the banks of the Moselle River, by transnational immigrants' rights groups, agitated against racism and the fate of political prisoners.¹⁷⁹ Ratification would bring into the harsh light of parliamentary debate opposing views of Schengen — a transnational space embodying the principle of free movements; a European fortress abridging the guarantee of human rights.¹⁸⁰ It would entail a democratic public reckoning with the transformative measures negotiated behind closed doors. Beginning in France, ratification would test whether Schengen conformed with both national law and international covenants.

¹⁷⁶ 'Note de la délégation du Benelux concernant les Annexes 1 et 2'.

¹⁷⁷ Blanc, 'Schengen'.

¹⁷⁸ Dankert, 'Discours'.

¹⁷⁹ 'Lorent, 'Moselortschaft Schengen'.

¹⁸⁰ See Didier Bigo, 'Europe Passoire et Europe Forteresse: La Sécurisation/Humanitarisation de L'immigration', in *Immigration et Racisme en Europe*, ed. Andrea Rea (Bruxelles, 1998), pp.203-41.

CHAPTER 4 — THE PROBLEM OF SOVEREIGNTY

‘Parliament is here, not on a boat!’ thundered a French lawmaker in June 1991, a year after diplomats from France, West Germany, and the Benelux states boarded the *Princess Marie-Astrid* to sign the Schengen implementing convention. The lawmaker was Pierre Mazeaud, a deputy from the conservative, neo-Gaullist Rally for the Republic. He spoke during parliamentary debate on the convention’s ratification.

The process of ratification among the first five states, stretching from 1991 to 1993, crystallised opposition to Schengen, whose creation had involved scant popular dialogue and depended on no plebiscite. Public discussion of sovereignty, security, asylum, and privacy — virtually absent from Schengen’s development over the course of five years — became heated in the consideration of whether to approve the rules for the expansion of open borders. The contest over ratification was the belated, and lone, democratic test to which the Schengen project was subject.

No national parliament put the brakes on Schengen. Not even the Dutch — whose Schengen delegation had expressed misgivings in 1985 about endorsing the original accord without parliamentary consent — rejected the terms of free movement. The Dutch did subject the original accord to parliamentary approval, though not before its adoption; a vote occurred, without any debate, before the accord’s full entry into force in the spring of 1986.¹ Government ministers in no other Schengen state submitted to questioning by their national parliaments until 1989, by which time the implementing convention was virtually complete.² All five of the original states ratified the convention by the summer of 1993, paving the way for its full entry

¹ Bolten, ‘Schengen to Dublin’, p.9.

² Antonio Cruz, *Schengen, Ad Hoc Immigration Group and Other European Intergovernmental Bodies in View of a Europe without Internal Borders* (Bruxelles, 1993), p.6.

into force in 1995, a decade after the first signing ceremony on the Moselle River, and five years after the reprise in 1990.

This chapter explores ratification of the implementing convention. The process was pivotal because it enabled Schengen's adoption, supplying a measure of democratic legitimacy to the project of free movement. Less obvious is how ratification tested national sovereignty, requiring amendments to national asylum laws to conform to the principle of the country of first entry, which was announced in Schengen and codified in the Dublin regulation. It was in the area of asylum, I find, that Schengen most plainly threatened democratic autonomy, perversely in the interest of preserving national authority over the movement of refugees and other persons.

The ratification process has been overlooked in existing accounts of Schengen, free movement, and European border policy.³ Votes in the national parliaments receive passing mention in accounts addressing criticism of Schengen or discussing aspects of the accord's governance that came into focus during the ratification debates, such as the absence of independent judicial control.⁴ Studies of European policing take note of ratification as a turning-point in the development of new mechanisms of transnational security while obscuring problems of asylum and human rights, which this chapter brings to the fore.⁵ Accounts that do address asylum state the outcome of ratification, and how it required changes to national law, without delving into the bitter debates that accompanied those amendments.⁶ Ratification has

³ For an exception, see Alexis Pauly, *Les Accords de Schengen: Abolition des Frontières Intérieures ou Menace pour les Libertés Publiques?* (Maastricht, 1993).

⁴ See Chantal Joubert and Hans Bevers, *Schengen Investigated: A Comparative Interpretation of the Schengen Provisions on International Police Cooperation in the Light of the European Convention on Human Rights* (The Hague, 1996), pp.36-37.

⁵ See Evelien Brouwer, *Digital Borders and Real Rights: Effective Remedies for Third-Country Nationals in the Schengen Information System* (Leiden, 2008); Stephen Kabera Karanja, *Transparency and Proportionality in the Schengen Information System and Border Control Co-operation* (Leiden, 2008).

⁶ Ingrid Boccardi, *Europe and Refugees: Towards an EU Asylum Policy* (The Hague, 2002), p.39.

been invoked in scholarship on treaty-making and international law, but only peripherally, as a point of comparison.⁷

I return Schengen's ratification to its central place in the story of free movement in Europe. I go inside the parliamentary debates that produced majorities for Schengen, revealing how democratic approval became a critical juncture in the reckoning with the removal of border controls, planning for which unfolded behind closed doors. The debates expose conflict inherent in the pairing of freedom and security that defined the Schengen system.

The conflict was most apparent in France, the member state that is the focus of this chapter. It was in France that the secretive nature of Schengen negotiations first provoked outrage, capturing the attention of the press. *Le Figaro* decried '*le secret de Schengen*'.⁸ France was also the first state to take up ratification. And France was the lone state where ratification engendered a legal challenge reaching the nation's highest constitutional authority, the *Conseil Constitutionnel*, or the Constitutional Council. The complaint, which became Case no. 91-294 DC, drew on principles of national republicanism invoked in arguments against Europe in the postwar era, including the polemics of Michel Debré, the author of the 1958 French constitution.⁹

Opposition to ratification was also pronounced in other member states, as well as in the European Parliament, which began to evaluate the Schengen system as negotiators completed

⁷ See Christoph Hönnige, Sascha Kneip, and Astrid Lorenz, eds., *Verfassungswandel im Mehrebenensystem* (Wiesbaden 2011); Pierre Michel Eisemann, ed., *L'intégration du Droit International et Communautaire dans l'Ordre Juridique National* (The Hague, 1996).

⁸ 'Le secret de Schengen', *Le Figaro*, 14 mai 1989.

⁹ Case no.91-294 DC figures in existing studies as an uncomplicated endorsement of Schengen, see Boccardi, *Europe and Refugees*. Scholarship focuses on later cases testing the convention's specific provisions, see Elspeth Guild, 'Adjudicating Schengen: National Judicial Control in France', *European Journal of Migration and Law*, 1, no.4 (1999), pp.419-39. Case 91-294 DC is treated somewhat more extensively in French-language scholarship, see Patrick Gaïa, 'Commentaire de la décision du Conseil constitutionnel no.91-294 du 25 juillet 1991: loi autorisant l'approbation de la convention d'application de l'Accord de Schengen, du 14 juin 1985', *Revue de la Recherche Juridique*, 17, no.1 (1992), pp.25-54.

their work toward the end of the 1980s. But it was the nation-states that controlled the fate of the intergovernmental agreement. Critics in Germany argued that the exclusionary logic of the accord, and the constitutional changes that it compelled, evoked the darkest days of the country's past. Belgium's Council of State, the country's highest administrative court, queried provisions of the convention granting decision-making authority to the Schengen Executive Committee. The equivalent court in the Netherlands at first advised the Dutch government not to ratify the agreement because of the provision requiring the country of first entry to adjudicate asylum cases.¹⁰

The opposition centred on a common claim. The argument, which united left- and right-wing critics of the border deal, was that Schengen trespassed on the authority of the nation-state to keep unwanted persons out or to welcome those whom it was duty-bound to protect. The critiques announced in legislative debate were echoed by nongovernmental groups, which saw danger in new, multinational mechanisms to secure the Schengen space.

The criticism did not prevent Schengen's ratification. Parliamentary resistance fell short. The French legal challenge foundered in court. But the democratic contest revealed what a simple vote tally could not — that Schengen elicited controversy from the moment it emerged from behind closed doors, controversy not limited to the charge of open borders, which has dominated the contemporary debate. The controversy that burst forth with ratification illuminates the logic of the accord more fully than had its architects, who did not fully foresee how the pact would redefine the powers and obligations of member states by loosening the borders among them. Those powers, and those obligations, involved not simply the movement of persons but their most fundamental rights.

¹⁰ Cherubini, *Asylum Law*, p.172.

Although expressing aspirations for transnational citizenship, as well as the imperative of transnational security, the Schengen accord did not gain the approval of a transnational demos. Because it was negotiated among member states, the agreement did not come before the European Parliament or the European Council. This fact was bluntly stated by a centre-right French lawmaker, Alain Lamassoure, who noted that there ‘would have been parliamentary control, by the European Parliament’, if the agreement had been negotiated at the Community level. Instead, it only required the endorsement of national parliaments.¹¹

Still, the European Parliament, the sole Community institution directly elected by citizens, did not fall silent on the accord. European lawmakers issued a series of resolutions on Schengen, beginning before the implementing convention was even finalised. A trio of nonbinding motions captured the body’s evolving views of Schengen, as disapproval gave way to qualified support for the removal of internal controls. Already anticipating the accord’s extension across Europe, the lawmakers grappled with Schengen’s consequences for free movement and human rights. Implicitly, they also called attention to the absence of democratic restraint commensurate with Schengen’s transnational reach.

In November 1989, in a moment of crisis for Schengen planning, as the Berlin Wall came down and Germany prepared to ask its partners for a delay in the signing of the convention, the European Parliament implored the states not to approve the implementing convention. The concerns of the legislative body centred on a ‘negative effect’ on refugees and migrant workers, who would be subject to the ‘legislation of the most restrictive state’ once

¹¹ Discussion de deux Projets de Loi devant l’Assemblée nationale, 2e séance du 3 juin 1991 in Tristane Mage, ‘Schengen: un modèle pour la construction européenne’, Tome II, May 1992 (hereafter National Assembly), p.178, François-Mitterrand Library, Bibliothèque Nationale de France, Paris, France (hereafter BNF).

various national policies were harmonised. The fear was of a race to the bottom, creating incentives to do the bare minimum whether in sheltering refugees under the 1951 Geneva Convention or in protecting the ‘private life’ of people living in the Schengen area, who were newly vulnerable to techniques of surveillance and cross-border information sharing. That moves to reassert control over the flow of people were made without democratic input was especially alarming to European lawmakers. The resolution accused negotiators of attempting to ‘avoid a parliamentary and public debate on a vital question for the Europe we want to create and for the legal protection and fundamental rights of people living in the European Community’. Members of the European Parliament said they were ‘concerned that secret debates, without democratic parliamentary control over questions of police, internal and external security and immigration ... violate [Community] conventions and democratic principles’. The potential breach of humanitarian law went beyond the five Schengen states alone, European lawmakers warned. The provisions under consideration by the Schengen parties, they envisioned, ‘would probably be adopted by the rest of the Community after 1992’.¹²

By the following spring, as negotiators put the convention back on track, European lawmakers changed their tune. They did not go so far as to endorse ratification. But they did not oppose it, either. A new resolution, issued in March 1990, similarly underscored concerns about human rights, particularly with respect to asylum and individual privacy. Yet it also offered the transnational body’s ‘collaboration and its support’ in the realisation of free movement, while calling on other Community institutions to take a more active role as well.

¹² Résolution sur la signature du protocole additionnel à l’Accord de Schengen, 23 novembre 1989, Journal officiel des Communautés européennes, 27.12.89, B, I, Annexe 7, Rapport fait au nom de la commission de contrôle chargée d’examiner la mise en place et le fonctionnement de la convention d’application de l’accord de Schengen du 14 juin 1985, créée en vertu d’une résolution adoptée par le Sénat le 26 juin 1991, Sénat, 12 décembre 1991.

Specifically, the lawmakers asked that the European Commission, as the ‘guardian’ of international treaties, ensure respect for humanitarian law. Suggesting that supranational institutions were necessary to check modes of transnational security, they underlined ‘the necessity of guaranteeing respect for human rights on the Community level, parallel to the development of cooperation among police services and the exchange of information’. These measures — police cooperation and information exchange — were among the aspects of the Schengen convention that had caused ‘important national reservations’ requiring a delay in approval, as the parliamentary resolution stated. Schengen, however, was not the final answer, the lawmakers noted. It was only a ‘preliminary step toward the free movement of persons’. They described free movement as a fulfilment of the promise of Citizens’ Europe, citing the conclusions reached at Fontainebleau in 1984. Citizens’ Europe, they said, was ‘indispensable’.¹³

More than a year after the convention’s adoption, a parliamentary resolution on free movement illuminated obstacles to the extension of Schengen across the European Community. The communication was issued by the European Parliament’s political commission in October 1991. With the ratification process already underway in the member states, agreement about critical aspects of human movement and its regulation — not just among Schengen states but in the Community at large — proved elusive. The Council had not found consensus on a measure addressing the crossing of external borders, European lawmakers noted, as a result of an Anglo-Spanish disagreement over Gibraltar. The resolution warned of a backlog of legislative obligations arising from the Schengen process — involving issues as disparate as the protection of personal data and the development of an immigration charter

¹³ Résolution du Parlement européen du 14 mars 1990 sur la libre circulation des personnes dans le marché intérieur, *Journal officiel des Communautés européennes*, 17.4.90, 4,7,3,A,B,C, Annexe 8, Rapport fait au nom de la commission de contrôle chargée d’examiner la mise en place et le fonctionnement de la convention d’application de l’accord de Schengen du 14 juin 1985, créée en vertu d’une résolution adoptée par le Sénat le 26 juin 1991, Sénat, 12 décembre 1991.

enumerating the rights and responsibilities of immigrants in Europe. In Dublin, Community member states had committed to the new asylum system set forth in Schengen, yet they disagreed on how to interpret the provisions.¹⁴

The European Parliament suggested that democracy was at the core of Schengen's flaws. The body laid blame on the process through which the accord was negotiated, finding that the 'democratic deficit', as the parliamentary communication put it, explained the inability of states to put free movement into practice. At the most fundamental level, no state had a clear mandate from its citizens. The international body viewed Schengen as a step forward in the achievement of promises set forth in the Treaty of Rome, but it warned that further steps would be halting.¹⁵ This view had been aired earlier the same year by Martin Bangemann, the Commission vice-president, who delivered a blistering critique of the intergovernmental process in an appearance before the European Parliament. He pressed members of the transnational body to be tougher on the officials responsible for negotiating the accord. 'You should be on the look-out for your real enemy', he said. 'I would describe him as a died-in-the-wool bureaucrat from one of the national ministries...' If planning for Citizens' Europe had failed to include the voices of ordinary citizens, that oversight was the fault of the individual member states, he argued. 'Up to now, it has merely been a question of co-operation between governments', he said of plans to compensate for the removal of border controls. 'Why the devil don't you take the necessary steps to give a vigorous prod to a number of your colleagues in the national parliaments ... as they should, after all, ratify all this!'¹⁶

¹⁴ Xavier de Villepin, 'Libre circulation des personnes dans la Communauté', *Commission Politique, Communication aux Membres*, 22 octobre 1991, Annexe 9, Rapport fait au nom de la commission de contrôle chargée d'examiner la mise en place et le fonctionnement de la convention d'application de l'accord de Schengen du 14 juin 1985, créée en vertu d'une résolution adoptée par le Sénat le 26 juin 1991, Sénat, 12 décembre 1991.

¹⁵ Xavier de Villepin, 'Libre circulation'.

¹⁶ Quoted in Cruz, *Schengen*, p.7.

Ratification of the implementing convention in France's National Assembly marked a turning-point in the development of the pact. France gave Schengen its first democratic endorsement. It also played host to the first public reckoning with the accord's meaning. Schengen's architects had proclaimed its aims aboard the *Princess Marie Astrid* — as Mazeaud, the conservative lawmaker, noted with indignation — and in laconic communiqués as their planning unfolded, including at the three-year anniversary in Remich. For several years, however, the process producing the accord was scarcely known, even as controls began to disappear from internal borders. The piecemeal nature of the changes — with the Benelux arrangement already in place, and with the Franco-German Saarbrücken agreement preceding Schengen by about a year — meant that they hardly marked a rupture in the lives of everyday Europeans.

It was an unexpected discovery by a French lawmaker that turned Schengen into a cause célèbre. Paul Masson, a Rally for the Republic lawmaker from the Loiret department in north-central France, demanded an explanation when he discovered details of Schengen planning in an interior ministry budget. 'It was as rapporteur for the interior's budget that my attention was drawn ... to the mention made, on the back of one page, to agreements made in Schengen between France, the Federal Republic of Germany, Belgium, the Netherlands and Luxembourg', the conservative senator told *Valeurs Actuelles*, a conservative weekly, in the spring of 1989.¹⁷ Appearing in parliament to answer questions about the deal-making, Edith Cresson, the French minister who would sign the convention the following year, told

¹⁷ Eric Branca, 'Le secret sur les accords de Schengen', *Valeurs Actuelles*, 16 mai 1989.

lawmakers, ‘We wanted Schengen because the talks of the 12 didn’t go fast enough’.¹⁸ Masson was not satisfied, envisioning the ‘entry on our territory of terrorist bands similar to those which bloodied Paris in September 1986’. The warning evoked a wave of terrorist violence that began at a Paris Marks & Spencer in February 1985 and reached a climax the following autumn with a bombing campaign in department stores and restaurants, in Paris city hall and a police prefecture, underscoring the threat of terrorism in a moment of rapid globalisation.¹⁹

Masson’s finding set off sustained public criticism of the Schengen planning. The right-wing press seethed. ‘Mitterrand’s secretive policy destroys French sovereignty’, blared the headline in *Présent*, a daily aligned with the National Front. The newspaper retold Schengen’s origin story, not with the triumphalism that marked the rhetoric of diplomats but with an air of scandal. ‘On 14 June 1985, on a small boat moored in the Moselle, in the village of Schengen in Luxembourg (population 300), Catherine Lalumière, secretary of state for European affairs, signed in the greatest secrecy, in the name of François Mitterrand and together with her counterparts in Germany, Belgium, Holland and Luxembourg, agreements aimed at the outright removal, on 1 January 1990, of physical borders among the signatory states, and therefore of all possibility of controlling the movement of people and goods’. The notice took considerable liberties with the details of the accord, but few readers knew better.²⁰ ‘Who knows of Schengen?’ asked *Valueurs Actuelles*. ‘In France, no one, except some insiders ... Nobody, until the other week when Mr. Paul Masson ... revealed its name’.²¹

It was not true that no one knew of Schengen before Masson’s discovery and the resulting public outcry. For one, the 1985 accord had been published in France’s Official

¹⁸ ‘Le Problème de l’Application des ‘Accords de Schengen’ de 1985 soulevé par le Sénateur R.P.R. Paul Masson’, *Bulletin Quotidien*, 16 mai 1989, 22, FL – 595, HAEU.

¹⁹ Branca, ‘Le secret sur les accords de Schengen’.

²⁰ Yves Daoudal, ‘Immigrés, terroristes, produits extra-européens: la France livrée à toutes les invasions’, *Présent*, 18 mai 1989.

²¹ Branca, ‘Secret sur les accords de Schengen’.

Journal in August 1986. But ignorance of the planning was so widespread that Pierre Joxe, the Socialist interior minister, was moved to declare, in remarks before the National Assembly, that he was familiar with the accord. 'First of all, I would like to reassure our Assembly', Joxe said, 'by informing it that as interior minister I am perfectly aware of the Schengen Agreement'. The affirmation was necessary because of the 'secrecy that surrounds this agreement', as Joxe put it. He noted that the negotiations were still ongoing and vowed that the French delegation would protect national sovereignty.²²

Apprehension about Schengen was not unique to the right. An asylum advocacy group, the *Commission de Sauvegarde du Droit d'Asile*, or the Committee for the Protection of the Right of Asylum, had seen a preliminary draft of the agreement the previous year, and its leaders, too, warned of Schengen's adverse consequences, but for asylum seekers who would be declared '*persona non grata*' in all states if they were denied protections in one. The group 'regretted that these questions were not being debated in Parliament and that concerned organisations (the Office of the United Nations High Commissioner for Refugees, associations...) have not been consulted'. From legislative chambers to the offices of advocacy groups, unease about Schengen mounted. It was Masson who wrote to Joxe, the interior minister, demanding that the text of the convention be transmitted to Parliament.²³

²² Intervention de Joxe, p.41.

²³ 'Des associations s'inquiètent du sort future des demandeurs d'asile', *Le Monde*, 26 avril 1989.

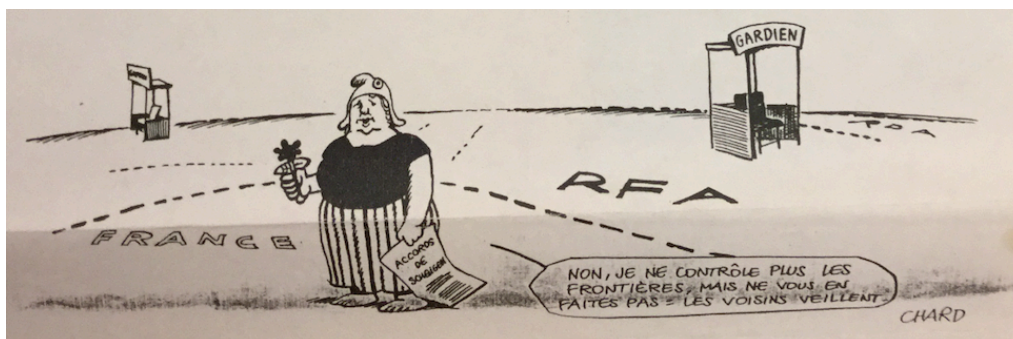


Figure 1. 'Accords de Schengen'. A cartoon on the front page of *Présent* on 18 May 1989 depicts empty customs posts at Western European borders while advising ironically, 'The neighbours are watching'. *Présent*, 18 mai 1989.



Figure 2. 'Le Secret sur les accords de Schengen'. The cover of *Valeurs Actuelles*, a conservative weekly, on 16 May 1989 depicts a criminal passing through a defunct customs check. *Valeurs Actuelles*, 16 mai 1989.

The government brought the implementing convention before parliament for ratification in May 1991, almost a year after the second signing ceremony in the Moselle valley. The National Assembly began debate early the following month. Mazeaud, the conservative, led the parliamentary assault on Schengen, joined by a faction from his party and from the centre-right Union for French Democracy, centre-right groupings that otherwise mostly favoured the agreement. Opposition to Schengen united the political extremes, joining the Communists and members of the National Front. The governing Socialists overwhelmingly backed the accord, which cleared the chamber by a vote of 495 to 61. Later that month, the Senate gave its approval to the convention as well.²⁴

The lopsided vote did not reflect the fierce antagonism to Schengen voiced in legislative debate. The criticism found grounding in the 1958 constitution, which introduced the Fifth Republic. 'I am one of those who believe that the primacy of the constitution must prevail, especially in Parliament', proclaimed Mazeaud. 'It is the Constitutional Council that will decide'. Already the lawyer and jurist, who was head of the National Assembly's legal commission, predicted a constitutional showdown over Schengen.²⁵ His characterisation of the process producing the accord did not go unchallenged. Michelle Pezet, a Socialist, noted that a press conference had been held in 1985 in Schengen, and that four lawmakers had been in attendance. 'We are 577 deputies!' replied Mazeaud. Pezet allowed that little of substance was communicated to the public, acknowledging, 'it is regrettable that the press was given absolutely no indication of what was decided at the time'. Scarcely did Schengen's architects communicate how their project would reorient the powers of the state and the freedoms of its citizens.²⁶

²⁴ National Assembly, pp.170, 341. Gilles Paris, 'La construction européenne: Les sénateurs approuvent les accords de Schengen malgré des inquiétudes sur leurs conséquences', *Le Monde*, 29 juin 1991.

²⁵ National Assembly, p.206, 232.

²⁶ *Ibid.*, p.170.

These were the themes — sovereignty, security, asylum, and individual freedom — that came to the fore in legislative debate. Deputies favouring the agreement noted that France was already intertwined with its neighbours, while emphasising opportunities for member states to deviate from Schengen’s rules. ‘It is in Brussels that the objectives of agricultural policy are decided ... in Luxembourg that disputes within the Community are settled’, observed François Loncle, a Socialist and the lead advocate for Schengen. His ally, Elisabeth Guigou, described Schengen as a novel solution to intensifying problems of illegal immigration and the international drug trade. She appealed to a sense of urgency. ‘Should we stop the Schengen train to wait for our six other partners, at the risk of doing nothing and losing the momentum that had been created since 1985?’ she asked. ‘Of course not!’ a fellow Socialist answered. ‘That would be the worst decision!’ another chimed in.²⁷ Guigou emphasised new limits on the entry and movement of third-state nationals, such as the requirement that they announce themselves upon arrival in a new Schengen state. At the same time, she denied an opposition between France’s generous asylum laws — ‘France is traditionally a land of asylum and it intends to remain so’ — and Schengen’s rules for assigning responsibility for refugees.²⁸ And she denied any violation of national sovereignty. ‘From my point of view’, she maintained, ‘there is not a single transfer of jurisdiction in the text’.²⁹

The pairing of internal freedom and external security promised by advocates of Schengen inspired vehement opposition to the agreement. The right viewed the coupling as unworkable; the left claimed it was unethical. The National Front’s Marie-France Stirbois spoke sarcastically of ‘new ‘friends’ — Zairians, Indonesians, Iranians already resident in neighbouring Schengen states, who would rush into France once controls disappeared entirely.

²⁷ Ibid., p.197.

²⁸ Ibid., p.259, 189, 198.

²⁹ Ibid., p.249.

‘Our country will no longer have its own borders’, one of her allies contended.³⁰ On the other end of the political spectrum, there was equal concern about intrusive policing and asylum rights. Jean-Claude Lefort, a Communist, warned that tightened external security, including new obligations placed on transport companies, involved ‘the transfer of police powers to private persons’ and amounted to ‘a violation of human rights’. He also dismissed the notion that assigning requests for asylum to the country of first entry preserved the capacity of other states to elect to examine claims outside their remit, arguing that the new rules gave states cover to do the bare minimum. He asked: ‘in the reductive logic of the text, can we seriously think that such a decision will frequently be made?’ Instead, Lefort predicted, states would use the narrow allocation of national responsibility to shirk their international obligations.³¹

Heated rhetoric underlined the stakes of ratification. Interruptions and taunts punctuated endorsements of the agreement, as well as broadsides against it. Debate raged over the meaning of a border. Even when the discussion descended into quarrelling, it remained highly substantive, even philosophical:

Mr. Michel Pezet: Just because there are not police controls at the border doesn’t mean it ceases to exist!

Ms. Nicole Catala: It becomes abstract!

Ms. Marie-France Stirbois: It will be a sieve for a border.

Mr. Michel Pezet: The border remains as a legal entity of public law.

Ms. Nicole Catala: It is dematerialised!

Bernard Bosson of the centre-right Union for French Democracy observed that European frontiers had long ceased to resemble ‘the Great Wall of China’. But did a mere legal classification have any force? A Rally for the Republic lawmaker, in response to a claim that

³⁰ Ibid., pp.320, 307.

³¹ Ibid., pp.283, 282.

unpoliced borders were still ‘institutions of law’, scoffed, ‘you confuse the nation and the land registry’. The comparison elicited laughter in the chamber.³²

The two sides seemed to see in the same text two contrasting plans for France. At the nub of the difference lay conflicting interpretations of Schengen’s origins and its relationship to the economic agenda of early European planning. Michel Vauzelle, the Socialist president of the Foreign Affairs Commission, argued that Schengen realised Mitterrand’s call for a non-economic dimension of the European project: ‘This agreement and this convention show that Europe is not only a market ... it is first and foremost a human Europe’. He celebrated Schengen as the basis for a ‘European legal area’ where rights and freedoms would reach across borders. Schengen was a ‘laboratory’, said Pezet, a Socialist, in which political liberties could be joined to market freedom in the European Community.³³

The other side cast the accord’s civic rationale — its aspirations for Citizens’ Europe — as a guise for the market’s penetration into domains of national autonomy and individual freedom. This revisionist account of Schengen’s genesis found an articulate advocate in Rally for the Republic’s Nicole Catala, a former law professor. She agreed with Vauzelle, the Socialist, that the agreement’s ‘raison d’être’ was not equivalent to that of the Treaty of Rome, which, she pointed out, ‘established the free movement of persons, but for economic purposes’. Schengen departed from that motive, she granted, but in order to erect a fortress around Community nationals. She claimed: ‘The text you present to us ... is in fact, under the seductive exterior of a Europe of citizens, a security device’. The alternative to the commercial logic of circulation, Catala suggested, was not universal human sociability but exclusion, policed under the pretence

³² Ibid., pp.231, 288, 231.

³³ Ibid., pp.268, 171, 182.

of new collective citizenship. In embracing this line of attack, the Gaullists found common cause with the Communists.³⁴

The primary objection of the agreement's right-wing critics, however, was that it interfered with national sovereignty. These deputies announced themselves as Gaullists, as heirs to the general's struggle for an independent France and guardians of what French historian Sudhir Hazareesingh terms 'the supreme sociological myth' of the nation, one and indivisible.³⁵ 'You will understand that the Gaullist that I am ... is attached to his country', exclaimed Mazeaud at the end of his two-hour testimony. 'And being attached to one's country does not mean that one is against Europe! It simply means clarifying the conditions of the Europe of tomorrow'. The Europe envisioned by Schengen, he argued, ignored the lessons of the past — lessons reaching back before the German occupation, all the way to the trials of the Middle Ages. 'Eighteen centuries have been necessary to realise our unity, the indivisibility of the Republic, to consecrate the notion of national sovereignty in our constitution', he argued. In making the nation sovereign, Mazeaud insisted, the constitution made French people free. 'This notion of national sovereignty is the affirmation of our freedom', he argued. With Schengen, he protested, 'We bind our hands!'³⁶

The debate went beyond the minutiae of the Schengen system, exposing divergent interpretations of European history. Schengen's supporters cast the disappearance of European borders as the culmination of efforts to overcome the greatest sins not just of the twentieth century, but of all time. 'The genius of the fathers of Europe was to imagine, for the first time in the history of the planet, this new structure ... avoiding the formidable excesses of nationalism', argued Bosson, the centre-right lawmaker who represented Haute-Savoie, on the

³⁴ Ibid., p.308.

³⁵ Sudhir Hazareesingh, *In the Shadow of the General: Modern France and the Myth of De Gaulle* (Oxford, 2012), p.10.

³⁶ National Assembly, pp.241, 242, 214, 240.

border with Switzerland. In particular, he saw Schengen as a moral rejoinder to the Second World War, as well as a way to surmount the polarities of the Cold War. ‘In the West, we must accelerate the course of history’, Bosson argued. As for the inhabitants of Central and Eastern Europe, for whom history had stalled, Bosson promised, Schengen would lay the groundwork for ‘a political Europe capable of welcoming them’.³⁷ Jacques Toubon, a Rally for the Republic lawmaker, spoke for fellow centre-right deputies in arguing that Schengen was necessary to stitch Western Europe together and outpace the Soviets, who would continue, he predicted, to put ‘tremendous pressure on Western Europe’.³⁸

Schengen’s detractors drew a different lesson from the century’s greatest traumas. They condemned the agreement as the undoing of French independence, wrested from the Axis Powers and secured in postwar constitutions. ‘I cannot accept that any authority other than the French state ensures our security’, protested Christian Estrosi of Rally for the Republic. His opponents accused him of parroting Jean-Marie Le Pen, the leader of the National Front. But Estrosi had a different model in mind — Charles Pasqua, the Gaullist interior minister and the namesake of a restrictive immigration law approved in 1986 but mostly repealed three years later. ‘I am convinced of the need to build the Europe of tomorrow’, Estrosi maintained. ‘But ... we must first reinstate the Pasqua law in the area of security and immigration’. The relationship between the Schengen provisions and the Pasqua measures would prove pivotal, defining the nexus of open borders and immigration control that shaped the terms of everyday life under a system of free movement.³⁹

The historical debate shaped divergent reactions to contemporary political transformation. Bosson gave voice to optimism that Western institutions could incorporate

³⁷ *Ibid.*, p.287.

³⁸ *Ibid.*, p.274.

³⁹ *Ibid.*, p.327.

Central and Eastern European people. The Gaullists were most adamant in opposing this view; they feared that the collapse of Cold War political geography would unleash migratory pressure that Western nations could not endure. Rally for the Republic deputies cited a police report showing that the year 1990 had seen a 700 percent increase in the number of Soviet nationals residing illegally in France. The Socialists responded by declaring their opponents opposed to the liberation of the eastern half of the continent. ‘You want to rebuild the Berlin Wall?’ asked Loncle. The leading Socialist deputy offered an alternative vision, invoking John F. Kennedy’s promise of a ‘new frontier’ in asking: ‘how not to situate the Schengen Convention in the context of European construction, in the guiding thread of a long march ... from the Treaty of Rome to the Single Act ... to the common market of 1 January 1993, to the political, economic and monetary union ... in short, to a ‘new European frontier’, to this European space, the best possible place for creating new relations between peoples, new answers to major demographic, ecological, scientific, cultural and human challenges?’⁴⁰ He described Schengen as the ineluctable outcome of European integration, while a critic said it was only a ‘milestone in the process of dissolving our national identity’.⁴¹ If Schengen represented Europe’s future, its critics worried that the French nation would soon become a relic of the past.

The political centre carried the convention, ensuring its approval in the National Assembly, which presaged passage in the upper chamber as well. A single Socialist, Jean-Michel Boucheron of the Ille-et-Vilaine department, opposed the accord, breaking with 263 members of his party. Centre-right factions produced majorities for Schengen, absorbing the dissent mounted by a Gaullist bloc in their midst. The Communists and members of the National Front stood firmly against the agreement, which passed 495 to 61.⁴²

⁴⁰ Ibid., pp.267, 309, 158, 313.

⁴¹ Ibid., p.337.

⁴² Ibid., p.341.

While endorsing the convention, French lawmakers foresaw that realising its provisions would prove arduous. The National Assembly set up a ‘control commission’ to oversee Schengen’s implementation. The commission was tasked with correcting mistakes in the drafting stage, soliciting public input, incorporating the insights of government ministers, and insisting on certain priorities in the implementation process. Among the mistakes it identified were a democratic deficit, a technocratic excess, and a ‘legal imbroglio’. It enumerated priorities from mastery of the external borders to the containment of migratory flows, from the control of drug trafficking to the protection of personal data.

The Schengen accord represented a chance to reshape the ‘often tragic destiny of our continent’, observed the commission’s rapporteur in announcing its mandate. Xavier de Villepin had fought in the French Resistance and was a member of the centre-right Union for French Democracy. He saw in Schengen an opportunity to incubate civic principles alongside principles of the free market, in a laboratory that would ‘make a Europe of citizens, after a Europe of the common market’. The difficulty confronting states preparing to put Schengen’s aspirations into practice, however, arose from the equivalence between people and goods that underpinned the treaty. ‘It may have been wrong to deal with the free movement of people as we dealt with the free movement of goods’, de Villepin wrote. ‘Because people are not goods. They transport not only their identity and their nationality, but also their history, their language, their traditions, their religion, and also their fears or their fantasies’. Ratification was only the first step in ensuring that Schengen itself was little more than a fantasy.⁴³

⁴³ Xavier de Villepin, ‘Explications’, 41, 22 octobre 1991, Rapport fait au nom de la commission de contrôle chargée d’examiner la mise en place et le fonctionnement de la convention d’application de l’accord de Schengen du 14 juin 1985, créée en vertu d’une résolution adoptée par le Sénat le 26 juin 1991, Sénat, 12 décembre 1991.

Not even a month went by before French lawmakers who had failed to stop Schengen in parliament turned to the judiciary. At the end of June, sixty deputies in the National Assembly brought a claim against Schengen to the Constitutional Council. As with the legislative opposition, the judicial complaint united deputies across party lines, from the Communists to centre-right groups to the National Front.

Speaking in a collective voice, and amplifying claims made in the National Assembly earlier that month, the deputies argued that Schengen entailed an unconstitutional transfer of national sovereignty to foreign and supranational powers. They claimed that the removal of internal controls as well as the compensating security infrastructure were unconstitutional under the Fifth Republic's founding document. Both offended national sovereignty in all three 'sectors' enumerated by the complaint: the state's duty to ensure respect for the institutions of the republic; the continuity of the state; and the guarantee of the rights and freedoms of citizens.⁴⁴ An institution's power was null, they reasoned, if the domain of its exercise was indistinct. The deputies' second argument linked the continuity of the state to 'the life of the nation', stressing demography in claiming that Schengen undermined France's nationality law, which made every child born on French soil a citizen. They reasoned: "The principle was easily conceived when French authorities were masters of the control of the entry and exit of the territory; it is quite different with the Schengen agreements'. Third, they argued that porous borders threatened 'the survival of our social protection system', the bedrock of the democratic

⁴⁴ Saisine par 60 députés, 29 June 1991, CC decision No.91-294 DC, 25 July 1991, I.1, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/1991/91-294-dc/saisine-par-60-deputes.103079.html>. The distinction between an unconstitutional transfer and a mere limitation of sovereignty arose from a 1976 decision. CC Decision No.76-71 DC, 29-30 December 1976, 31, *Journal Officiel de la République Française*, (31 December 1976), p.7651.

welfare state.⁴⁵ To prove that Schengen involved not just a limitation but a transfer of national sovereignty, the deputies pointed particularly to cross-border policing, a subject that held prominence in criticism of the accord. Schengen took the capacity to decide who could enter French territory from the national police, the deputies protested, and transferred it to the state in which the ‘alien’ was first admitted.⁴⁶

The implementing convention of 1990 violated the French Constitution even more flagrantly than had the original accord, the deputies claimed. The gravest constitutional failing of the convention, according to the complaint, lay precisely in its attempt to compensate for the deficits of the original pact. The convention’s focus was on police and judicial cooperation — an implicit recognition, the complaint held, that Schengen imperilled security. The deputies argued that ‘countervailing measures’, the very provisions designed to prevent ‘the new area of freedom’ from becoming a zone of lawlessness, succeeded only in undermining national sovereignty. They assailed measures addressing policing and mutual legal assistance, raising alarm about a system of multilateral cooperation permitting authorities in one state to continue surveillance and pursuit of a suspect in another without prior authorisation.⁴⁷ This procedure, the deputies argued, allowed foreign agents to trespass on the most essential duties of the state. It represented an ‘amputation’.⁴⁸

The complaint held that the convention impinged on the power of the French nation not just to police its own borders but also to open them to refugees, reiterating the diverse grounds for opposition to Schengen articulated in parliamentary debate. The criteria for adjudicating asylum claims outlined in the convention were vague, the deputies complained, and

⁴⁵ Saisine, I.1.

⁴⁶ Ibid., I.1,I.2.

⁴⁷ Schengen Convention, arts.40.2, 41.1.

⁴⁸ Saisine, II.

did not entail sufficient guarantee that refugees would gain the protection guaranteed by the 1951 Geneva Convention. Again, the problem was over-compensation to prevent asylum seekers from submitting claims in multiple states — playing the market in a process of asylum tourism. ‘In particular, the compensation mechanism for the principle of free movement intended to preserve public order and security appears manifestly disproportionate to the detriment of individual freedoms’, the deputies wrote. They worried, too, about individual privacy — about how confidential information concerning an asylum application, passed among the member states, might be misused and reach authorities in the country of origin.⁴⁹

At the centre of privacy concerns lay the Schengen Information System, the computerised database designed to support police cooperation and external border control. Deputies argued that the promise to make the records of criminal suspects available to participating states threatened the right to ‘private and family life’ enshrined in the European Convention on Human Rights.⁵⁰ The deputies warned of ‘other State Parties that do not always guarantee an equivalent level of protection for individuals...’⁵¹ Here, too, the dissenting lawmakers returned to their central claim — that the French nation lacked control, in violation of the 1958 constitution.

Though his name appears nowhere in the complaint — he had left the National Assembly by the time of Schengen’s ratification — the arguments presented to the Constitutional Council bear the imprint of Debré, who authored the constitution said to prohibit Schengen. Debré served as the Fifth Republic’s first prime minister — and later its justice minister, economy minister, foreign affairs minister, defence minister, as well as a long-

⁴⁹ Ibid.

⁵⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Europ, 213 U.N.T.S. 221, p.8, https://www.echr.coe.int/Documents/Convention_ENG.pdf (hereafter ECHR).

⁵¹ Saisine, II.

serving deputy. A onetime professor of law in Paris, Debré was a Roman Catholic and the son of a prominent Jewish professor of medicine. As a Resistance leader during the war, Debré was responsible for naming replacements for Vichy bureaucrats in preparation for liberation. He typified Gaullism in his devotion to the memory of the general.⁵²

Debré's political thought, expressed in memoirs and reverential reflections on French republicanism, pervaded the case against Schengen, whose genealogy finds no place in existing studies of Euroscepticism in France. Debré's final work, published three years before his death in 1996, recorded conversations with the French president, weighing such decisions as granting independence to Algeria in 1962. In a January 1962 discussion, De Gaulle asked the prime minister how he envisioned France's future. Debré did not mince words, expressing 'deep pessimism'. He advised De Gaulle that European integration represented 'the end of France'.⁵³

Debré's pessimism was forged in the Vichy years. In *La Mort de l'État Républicain*, published in 1947, he considered how democratic states destroy themselves, using the collaborationist government as a case study. 'A crime is being committed before our eyes: the state — our French state, our republican state — is dying, and it is being assassinated', Debré wrote. 'However, we know the assassins, their faces are familiar to us and we know their names: our adversaries, our friends, ourselves'.⁵⁴ Debré insisted on France's complicity in the annihilation of its sovereignty. So, too, would he point to self-destruction as the impulse behind European integration.

The law professor and statesman rooted his objections to Europe in a theory of constitutional sovereignty that interpreted the nation as the direct expression of the popular will. To advance 'the dignity of the individual', sovereignty required a definition of the

⁵² See Hazareesingh, *In the Shadow of the General*, p. 45.

⁵³ Michel Debré, *Entretiens avec le Général De Gaulle, 1961-1969* (Paris, 1993), pp.57-58.

⁵⁴ Michel Debré, *La Mort de l'État Républicain* (Paris, 1947), p.9.

individual whose dignity was at stake, he wrote in a 1950 account of how republics derive their power, *La République et Son Pouvoir*. The first republics, he explained, employed ‘natural or historical boundaries’, but the conception shifted in the past century to ‘men of a certain land, a certain language, a certain colour, a certain blood’. The first limit could be indistinct, he explained, while the second had moral defects. But the failure of liberalism, he claimed, lay in sweeping away power’s national foundations. ‘Power ceased to be national because it was liberal’, he wrote. He recognised the need for a union of states but insisted that it preserve ‘solid national foundations’, calling the defence of national law the ‘first duty of the citizen’. Debré argued: ‘If France does not want, by betraying itself, to betray the free world of which it is a necessary pillar, it must redo its system of government according to the laws of the Republic’. These ideas would inspire his constitution for the Fifth Republic, a text used as a cudgel against European treaties. Following a preamble introducing the solemn proclamation of ‘The French people’, the document’s first title announced, ‘National sovereignty shall vest in the people’.⁵⁵

For Debré, the right to self-government enshrined in the constitution gave French citizens the power to resist absorption into Europe. He urged them to choose ‘hope’, titling his 1979 case against European unification *Français Choisissons l’Espoir*, or *The French Choose Hope*. The book details his efforts to narrow the terms of European coordination, explaining how he supported Franco-German rapprochement but, as a former Resistance leader, stood firmly against economic and military harmonisation. ‘My ambition is not to write history’, he explained. ‘I am a fighter of politics and, among other struggles, the fighter of a living Europe against a Europe led astray by ... weaknesses or egotisms’. His aim was to use his three decades of experience ‘at the heart of European debates’ to ‘trace the progress of a thought ... a strong,

⁵⁵ 1958 CONST., FR., preamble, art.1.2, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/english/constitution/constitution-of-4-october-1958.25742.html#TitleVI>.

free, respected republic'. The story began in the 1950s. The abortive European Defence Community, he argued, was anathema to 'the very idea of a French nation', its collapse a victory for 'patriotism'. He had equally harsh words for Euratom, a joint European market for nuclear power, and for the economic prescriptions of the Treaty of Rome, which Debré — best known for defending France's independent nuclear deterrent — described as 'internal customs disarmament'. He denounced common economic policy as a 'mutation', prefiguring the use of the term 'amputation' to describe methods of transnational in the complaint against Schengen.⁵⁶

Most fervently, Debré resisted 'supranational Europe', which he counterposed to 'the national idea' espoused by De Gaulle. Supranationalism, he contended, had gained purchase in the 1970s, when the country's leaders responded to economic, demographic, and political troubles by seeking absolution beyond France. The turn to international institutions, he argued, represented a 'modern expression of a desire to constrain France, which has taken and will always take a thousand faces, including in the past those of the Holy Roman Empire and the temporal power of the Papacy'. Seeing lessons in the Middle Ages, Debré anticipated the sweeping historical account offered by Mazeaud, whose argument for 'national sovereignty' invoked 'eighteen centuries' of European history.⁵⁷

When Debré retired from the National Assembly in 1988, he did not leave his opposition to Schengen entirely unstated, though his antagonism to the system of open borders surely could have been inferred from his body of work. He had registered his disapproval just a year after the accord was signed, before it became a cause célèbre. During an immigration debate in 1986, the Rally for the Republic deputy made a discovery, which he described in a letter to France's foreign ministry. 'The discussion of the draft law on the conditions of entry

⁵⁶ Michel Debré, *Français Choisissons l'Espoir* (Paris, 1979), pp.14, 9, 10.

⁵⁷ Debré, *Français Choisissons l'Espoir*, pp.11, 12, 13, 11, 13.

and residence of foreigners in France made me discover the agreement between France and Germany, signed 13 July 1984, and made me realize that similar agreements were going on with other countries, our neighbours', Debré wrote in July 1986, referring to the Saarbrücken accord and, it would seem, the Schengen accord. He was blunt: 'The attack on national sovereignty is direct and unconstitutional'. He highlighted the problem of police power, seeing in the removal of controls at internal borders evidence that 'the supranational ideology blinds many minds'. In reply, the government focused on a procedural point about parliamentary approval, saying democratic consent was not necessary under the constitution so long as the agreements involved only 'regulatory power' testing 'practical arrangements for border control of Community nationals'.⁵⁸ But internal government notes on the immigration debate acknowledged the logic in Debré's objection. 'Admittedly, it is regrettable that the two agreements have the effect of immediately easing controls at the common frontiers before the harmonisation of controls at the external borders has been negotiated', the foreign ministry allowed. Faintly, the memorandum expressed the government's hope that 'these agreements can be the instrument for realistically responding to the problem'. Neither Debré nor the government could have predicted then that the compensatory measures designed to respond to the removal of controls would only exacerbate fear for national sovereignty.⁵⁹

A small announcement in the press noted Debré's protest, while overlooking the details of the border plans condemned by the lawmaker. *Le Monde* documented how Debré 'sees in these European complications an attack on national sovereignty'. Standing with Debré in his demand for parliamentary oversight, according to the newspaper, was Mazeaud, who would

⁵⁸ Michel Debré to 'Affaires Etrangères: Cabinet du Ministre', 11 juillet 1986 and Marie-Reine d'Haussey, 'Accords sur les contrôles frontaliers: Projet de réponse à M. Michel Debré', 1 août 1986, Folder Schengen, Débat français 1986-1989, Box 5 1914INVA, MEAE.

⁵⁹ Synthèse de la réunion du mardi 12 août sur les questions de visa et de circulation dans le cadre européen, 27 août 1986, Folder Visas Immigration, Box 1 1914INVA, MEAE.

lead opposition to Schengen in the National Assembly and before the Constitutional Council.⁶⁰ Alongside Mazeaud in his dissent against the agreement stood Debré's twin sons, Jean-Louis and Bernard Debré, who joined the National Assembly two years before their father left public life. Their names both appeared on the judicial complaint lodged in June 1991. French opposition to Schengen was quite literally Debré's progeny.⁶¹

France's Constitutional Council found Schengen consistent with the constitution authored by Debré. The court declined to invalidate parliament's decision to ratify the convention, judging, 'The law authorising the approval of the convention implementing the Schengen Agreement of 14 June 1985 between the governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual elimination of controls at the common borders is not contrary to the constitution'.⁶²

Jacques Robert, the Algiers-born jurist and Council member responsible for investigating the complaint, went further. He called Schengen the 'prefiguration of the Europe of tomorrow'. Answering both right- and left-wing critics of the accord, he argued, 'Schengen is neither a sieve nor a fortress. Schengen is the Europe of people'. He outlined the five major themes of the convention: visa policy; the fight against illegal immigration; police, judicial, and customs cooperation; the exchange of information; and the right to asylum. State action was required in these areas, he reasoned, because supranational jurisdiction was limited. He celebrated that the agreement, although it was negotiated among member states, was already guiding Community-wide policy, most notably the adoption of the Dublin regulation in June 1990.⁶³

⁶⁰ 'L'Europe contre la France', *Le Monde*, 12 juillet 1986.

⁶¹ Saisine.

⁶² Decision No.91-294 DC, 25 July 1991, Constitutional Court, 25 juillet 1991, p.26 (Jacques Robert, Rapporteur, Conference resulted in decision No.91-294 DC, http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/decisions/PV/pv1991-07-25.pdf), (hereafter Decision No.91-294).

⁶³ *Ibid.*, pp.26, 9.

But Robert was also straightforward about Schengen's limits. The convention, he stated bluntly, 'does not create any new international organisation'. The Schengen Executive Committee was intergovernmental, and its decisions would be subordinate to Community law. The treaty was not accompanied by the complete harmonisation of national law, he acknowledged, arguing that Schengen could serve as an 'incentive' for additional coordination. And he pointed to an example of a federal system: 'The United States shows that we can build a united space without compromising the constitutional particularities of the parties'.⁶⁴

The opinion handed down on 25 July 1991 was hardly an unequivocal endorsement. Robert gave the court an exhaustive account of the objections to Schengen, as expressed in the complaint as well as in popular debate. It was said that Schengen would create 'pipelines of illegal immigration', as Robert reported, with great prescience — that Italy served as an 'antechamber' for Africans journeying to France and that the Dutch were disinclined to 'drive back illegals'. At times, fellow judges rejected the rapporteur's attempt to reconcile the convention to the constitution. 'That leaves me wanting', one admitted in response to an assurance that foreign police, authorised to operate on French territory, would follow strict protocol. But others wondered whether opposition to Schengen had been overstated. 'Mr. Mazeaud is in the minority', emphasised Maurice Faure, a judge who had been a Resistance fighter, a local mayor, a deputy, and a senator. He concluded with a point, however, that he knew would intensify criticism of Schengen — that French lawmakers were constrained in responding to the accord. Because Schengen was the product of delicate intergovernmental negotiations, he noted, 'we would demolish everything if we changed one line'. It was an implicit acknowledgment that France's hands were tied.⁶⁵

⁶⁴ Ibid., p.10.

⁶⁵ Ibid., p.21.

Similar constraints applied to the decision-making of the court. Even as the judges turned back the constitutional challenge, they insisted on limits to Schengen's application. They refused to endorse the independent authority of the Schengen Executive Committee, holding that national courts would continue to have jurisdiction over measures taken by French authorities carrying out the Committee's decisions.⁶⁶ This condition, observed *Le Monde*, was the only 'interpretative reservation that the Council could afford'. Schengen would run aground, the paper pointed out, on individual national restrictions. 'Measured approval becomes a refusal'.⁶⁷

The court's judgment included an acknowledgement that Schengen had altered the authority of the nation-state. The judges denied that the agreement entailed a transfer of sovereignty but not that it shifted the terms, as well as the domain, of its exercise. The text's 142 articles, Robert observed, 'all deal with ... the exercise of state sovereignty in key areas'. By addressing problems of 'police cooperation, visas, the right of asylum', Schengen filled a void, he argued, left by the Community, which lacked power in these areas. The agreement ensured 'the protection of national sovereignty', he submitted, because it enlisted transnational cooperation 'very specifically aimed at filling gaps in our country'. Nowhere was state control more apparent, he argued, than in asylum policy, where 'there is no standardisation of legislation. Each state will examine the application on the basis of its national law'. Amplifying national discretion in asylum cases gave states new licence to guard their external borders. 'Opening internal borders means transferring and strengthening controls at the external borders', Robert maintained, repeating the credo of the convention's framers.⁶⁸

⁶⁶ Ibid., p.34.

⁶⁷ Thierry Brehier, 'Les accords de Schengen n'impliquent pas de transfert de souveraineté', *Le Monde*, 27 juillet 1991.

⁶⁸ Decision No.91-294, pp.8, 9, 10, 12, 3.

It was not to be the court's final word on Schengen, or on the security infrastructure set forth in the convention. Two years after its judgment in Case no. 91-294 DC, the Constitutional Council decided Case no. 93-325 DC, invalidating portions of the Pasqua law of 1993, which had replaced the 1986 measure mostly rolled back by the Socialists. In a landmark decision, the court found that provisions curtailing the right of asylum appeal and enabling the automatic return of refugees — provisions inspired by the Schengen convention and the Dublin regulation — ran counter to the French Constitution.⁶⁹ The judges spoke of the rights of non-citizens: 'while the legislature is entitled to enact specific provisions applying to aliens, it behooves it to respect the fundamental rights and freedoms secured by the Constitution to all persons residing in the territory of the Republic'. Most notably, the Constitutional Council vindicated the ability of aliens to claim rights, citing the Geneva Convention but relying primarily on principles of universal human dignity and equal protection inscribed in the 1789 Declaration of Rights of Man and the Citizen, as well as on the responsibility to succour refugees inscribed in the French Constitution.⁷⁰

Was the court's account of human rights obligations consistent with a state's authority under Schengen to avoid asylum claims originating in other member states? Schengen permitted a state to refuse a claim on the sole basis that a refugee had passed through another signatory state — and it inspired the provision of the Pasqua law forbidding an appeal in such a case. In

⁶⁹ On Schengen and restrictive asylum measures, see James F. Hollifield, 'Immigration and the Republican Tradition in France' in *Controlling Immigration: A Global Perspective*, 3rd ed., ed. James Hollifield, Philip L. Martin, and Pia Orrenius (Stanford, 2014), pp.157-87. On Dublin and 'the mechanism of deflection', see Gregor Noll, *Negotiating Asylum: The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (The Hague, 2000), p.317.

⁷⁰ CC Decision No.93-325 DC, 13 August 1993, 2, <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/93325DCa93325dc.pdf>. On the decision's importance for the Conseil as 'the protector of individual liberties', see Susan Soltesz, 'Implications of the Conseil Constitutionnel's Immigration and Asylum Decision of August 1993', *Boston College International and Comparative Law Review*, 8, no.1 (December 1995), p.279.

declaring this provision of the Pasqua measure unconstitutional, the court appeared to cast doubt on Schengen.

The constitutional problem was acknowledged in the fall of 1993, when the French Parliament amended the 1958 Constitution. A new Article 53-1 contained two paragraphs, the first explicitly recognising the authority of European agreements to regulate responsibility over asylum claims and the second protecting France's discretionary power to grant asylum to anyone 'persecuted for his action in pursuit of freedom'.⁷¹ Lawmakers aimed to reconcile the tension between national control and international obligation, buttressing Schengen's legal foundations after the decision from the Constitutional Council. Socialist and Communist deputies opposed the change, refusing to reconcile the tension illuminated by the court. They insisted on international obligation. Among them was Jean-Claude Lefort, the Communist deputy who had foretold during the 1991 debate that things would turn out this way: 'Torn between the logic of freedom and the logic of security, the text ended up privileging the latter to the detriment of the former'.⁷²

France and its partners ratified the implementing convention over the express objections of international institutions, nongovernmental groups and human rights associations. These entities, which had largely been excluded from the process of drafting the convention, began to sound the alarm about its terms as drafts circulated toward the end of the 1980s. The

⁷¹ Bernard Philippe, 'La Réunion du Congrès à Versailles pour Réformer le Droit d'Asile: L'application des accords européens de Schengen reste problématique', *Le Monde*, 20 novembre 1993; 1958 CONST. 53.1. See also Boccardi, *Europe and Refugees*, p.39.

⁷² National Assembly, p.280.

Committee for the Protection of the Right of Asylum, in France, had obtained a draft in 1988. A preliminary text became a focal point of debate at the Council of Europe's summit in Strasbourg in late November and early December of 1989. Criticism intensified in the new decade, as ratification debates began in the member states.

The French representative of the United Nations High Commissioner for Refugees raised objections to Schengen as parliamentary debate began in June 1991. In a statement to the Foreign Affairs Commission, Antoine Noël recalled that the Office of the High Commissioner had been allowed the chance to 'make its observations' to the Schengen states, mostly through 'informal consultations', and was 'pleased that some of its comments had been taken into account...' He welcomed the multiple references to the 1951 Geneva Convention included in the implementing convention. But he expressed 'real fear' that adherence to the tenets of international law would be impossible under the restrictive terms that characterised the Schengen accord. Specifically, he predicted that new visa requirements would impede a refugee's ability to find safety in Europe. Access to territory was necessary in order to access the procedure for requesting asylum on that territory. 'Our main concern', Noël wrote, 'is to reconcile ... the legitimate interest in providing greater freedom of movement for people on the one hand, and the very particular situation of the asylum seeker who does not necessarily and always have a passport, a proper entry visa, or adequate means of subsistence'. He affirmed that the Office of the High Commissioner stood ready to assist in developing 'concrete measures' for the protection of asylum in the Schengen framework.⁷³

The objections of the international body were echoed by secular human rights organisations as well as religious groups. Amnesty International bluntly asked lawmakers not to

⁷³ Intervention de M. Antoine Noël, délégué pour la France du Haut Commissaire des Nations Unies pour les Réfugiés, devant la commission, le 5 juin 1991, Annex No.1, pp.447, 494, BNF.

ratify the convention. A statement issued in June 1991 warned that the measures set forth in the multinational agreement — including the assignment of responsibility to the country of first entry, the insistence on uniform visa obligations, and the requirement of penalties for those who facilitated unlawful entry — amounted to ‘an obstacle to free access ... for every asylum seeker fleeing a country where he or she risks being a prisoner of conscience, subjected to torture, executed or “disappeared,” and who seeks protection in one of the signatory states’. The human rights organisation implored the governments to conduct a fuller consultation with independent legal experts.⁷⁴

The nongovernmental organisation had been raising doubts with Schengen states, as well as with members of the European Commission and European Parliament, since 1988, but to little avail. Opportunities for meaningful dialogue were limited, the group noted, because final drafts of the convention were not made available until after the treaty was signed, and ‘the texts of the treaties themselves cannot be changed’. Amnesty International voiced concern that, ‘so far as it is aware, non-governmental agencies have not been consulted by the bodies drafting the conventions in as systematic way as they should on issues of such fundamental importance’. It claimed that the convention failed a crucial test. ‘Governments have an obligation to ensure that any measures they adopt to control immigration into their territories are compatible with international standards, in particular standards concerning the protection of refugees and the prevention of human rights violations’. Amnesty International said it was the responsibility of Schengen states to ‘take practical steps’ to demonstrate that new, transnational rules for entry on their territory would not put asylum seekers at risk.⁷⁵ Members of the ‘Schengen Group’, Amnesty International noted in its 1991 report, had done little to assuage concerns. The report,

⁷⁴ Convention d’application de l’accord de Schengen: Préoccupations d’Amnesty International, June 1991, Annex No.2, p.497, BNF.

⁷⁵ ‘Europe: Harmonization of Asylum Policy: Amnesty International’s Concerns’, *Summary* (November 1990), pp.17, 12, 13.

which marked the thirtieth anniversary of the international human rights organisation's founding, documented 'concern at the lack of essential safeguards in these texts to protect the rights of asylum-seekers and refugees and the absence of sufficient public discussion and parliamentary consultation'. Globally, there was fear about what the so-called 'Schengen Group' had wrought.⁷⁶

This fear was captured in a 1993 briefing paper issued by the Churches Committee for Migrants in Europe. The Churches Committee, founded in 1964, comprised Protestant, Anglican, and Orthodox churches and operated in more than a dozen European states, maintaining contacts with the Council of Europe and the United Nations, as well as with various EU institutions. Its aim was to stimulate discussion about migration within churches, and to communicate to European institutions the concerns of the religious community for migrants. Briefing Paper 12, authored by a writer for the Migration News Sheet, Antonio Cruz, was titled, *Schengen, Ad Hoc Immigration Group and Other European Intergovernmental Bodies in View of a Europe without Internal Borders*. It began with the statement of a blunt fact — that 'the realisation of a Europe without internal borders has proved to be a lot more complex and complicated than its promoters had imagined'. The 'offsetting measures' developed to address the complexity, however, 'raise questions for human rights'. The Churches Committee dispersed blame for the delay in efforts to address these questions.⁷⁷ That the work of negotiators was 'virtually unknown to the public' led to 'accusations that the Group had been for years involved in "clandestine" activities without the knowledge of human rights agencies or even the national parliaments of the Member States'. Much was made of the exclusion of the United Nations, but the international body did not request to participate until 1989, Cruz noted. He faulted the

⁷⁶ *Amnesty International Report 1991* (London, 1991), pp.18-19.

⁷⁷ Cruz, *Schengen*, p.3.

Schengen states for insufficient ‘public relations’, but he also made note of the ‘virtual absence of interest in the activities of the Group on the part of the media, and, as a result, of human rights associations’. What he termed ‘media apathy’ persisted until mid-1989, and, even then, information about ministerial meetings was published only in the newspaper of the host country. Press conferences served little purpose, he observed, since members of the press hardly ‘bothered to attend’. Similarly, there was little use in the text of the 1985 accord being available upon request because ‘almost no association in support of immigrants or refugees had asked for it’. For almost five years, there had been scant public discussion of the removal of border controls because of the secrecy of the planning for the implementing convention and a lack of interest in what the planning entailed.⁷⁸

Suddenly, the full extent of the agreement had been thrust upon the public. ‘The question today’, Cruz argued, ‘is whether the Schengen project can still be implemented as planned...’ At risk, ultimately, was ‘one of its initial and fundamental aims, namely the complete suppression of internal borders’, endangered by ‘checks’ of a new kind — not at internal borders but nonetheless penetrating to the inside of member states, where modes of surveillance as well as restrictions imposed by uniform visa obligations would have force. Complete removal of controls, he predicted, ‘will certainly not happen in 1993’, as originally envisioned. In fact, free movement would not be realised until the external borders of the Schengen area were fortified to the satisfaction of the agreement’s parties. Immigration control had not been the lone rationale for Schengen. But it had become the essential condition for its enactment.⁷⁹

⁷⁸ Cruz, *Schengen*, pp.3-6.

⁷⁹ *Ibid.*, p.14, 15.

By the time the Churches Committee had issued its briefing paper, all five of the original Schengen states had ratified the implementing convention, except for Germany. Nowhere was the process as fraught as in France, where it resulted in a constitutional challenge mounted by lawmakers seeking to invalidate an act of parliament. Yet the process was hardly seamless in France's partners, where the difficulty of reconciling national law with the principle of the country of first entry — a principle incorporated into Schengen at the request of the Germans — emerged as a central source of strife.

Of the Benelux states, the Netherlands proved most sceptical of Schengen. It had been the Dutch delegation that had expressed reservations about signing the 1985 accord without parliamentary approval, and the Dutch were alone in submitting the original accord, after signing, to national lawmakers. Following the signing of the implementing convention in 1990, a Dutch court, the *Raad van State*, advised parliament not to ratify the agreement because of the mechanism it set forth for deciding which state was accountable for a given asylum claim — a procedure that allowed the Netherlands 'to delegate to another State the task of determining whether an individual is a refugee', the court reasoned.⁸⁰ Two years later, it reversed its position and endorsed ratification, though it maintained its misgivings about the agreement's compatibility with the 1951 Geneva convention, sacrosanct under Dutch law.⁸¹

Plans for the Schengen Executive Committee, the intergovernmental body with control over the convention's implementation, also evoked scepticism from national judicial bodies. The Dutch court raised concerns about its vast powers, which appeared to combine executive

⁸⁰ Quoted in Francesco Cherubini, *Asylum Law in the European Union* (Abingdon, 2015), p.172.

⁸¹ John Benyon, Lynne Turnbull, Andrew Willis, Rachel Woodward, and Adrian Beck, *Police Co-operation in Europe: An Investigation* (Leicester, 1993), p.140.

with legislative as well as judicial authority. France's Constitutional Council had also expressed objections to the Executive Committee, as did the highest judicial authority in Belgium, the *Conseil d'Etat*.⁸² Dutch lawmakers secured veto power over decisions taken by the Executive Committee. In 1992, they adopted a resolution suggesting that a supranational authority, such as the European Court of Justice, gain jurisdiction over disputes among the member states.⁸³ The suggestion had a mixed reception, gaining the support of certain political factions within other member states, such as the centre-left Social Democratic Party in Germany. But when the Amsterdam Treaty joined Schengen to the EU in 1997, an accompanying protocol stipulated that Europe's top court, while enjoying widespread jurisdiction over EU rules, would have no say when it came to 'law and order and the safeguarding of internal security'.⁸⁴ Through its entry into force and incorporation into the EU, the accord on free movement continued to illuminate a tension between the primacy of international law and the inviolability of the nation-state.

This was the tension, involving international rules and national autonomy, at stake in the controversy over asylum, which was responsible for Germany's delay in ratifying the Schengen convention. Whereas the need to amend the French constitution became clear only after ratification, a possible conflict between the multinational accord and the protections enshrined in national law was at the heart of the controversy over ratification in Germany. The controversy crested in the spring of 1992.

Germany's parliamentary debate on Schengen revolved around the issue of asylum. The thematic shift, from enabling free movement to regulating the reception of foreigners, was summed up by Wolfgang Zeitlmann of the governing coalition, which joined the centre-right

⁸² Cruz, *Schengen*, p.11.

⁸³ Claude Gueydan, 'Cooperation between Member States of the European Community in the Fight against Terrorism', in *Terrorism and International Law*, ed. Rosalyn Higgins and Maurice Flory (London, 1997), p.116.

⁸⁴ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (1997) (hereafter Treaty of Amsterdam), <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:11997D/TXT>.

bloc — the Christian Democratic Union and its Bavarian sister party, the Christian Social Union — and the liberal Free Democratic Party. ‘This Schengen Agreement of 19 June 1990’, he said, provides for the ‘abolition of checks on persons at the borders within the European Community. But we are now basically in an asylum debate, and that is because, as a result of the abolition of border controls, it will be easier for asylum seekers to migrate to another member state within the EC’.⁸⁵

The conservatives, under Kohl’s leadership, demanded that Schengen’s ratification be joined to a constitutional amendment qualifying the right to asylum under the postwar constitution, denying safe haven to those entering Germany from a safe third country and those fleeing economic destitution. The Basic Law, approved in 1949, guaranteed protection, without restrictions, to all those ‘persecuted on political grounds’, as stipulated in Article 16a.⁸⁶ To maintain such a stance, while other Schengen states moved to examine only those claims from asylum seekers first entering on their territory, would turn Germany into the ‘reserve asylum country on this continent’, warned Erwin Marschewski, a conservative.⁸⁷ Edmund Stoiber, the minister president of Bavaria, argued that ‘ratification without a sufficient change in the constitution makes it possible for other contracting parties to unload at our expense’.⁸⁸ The number of asylum claims in Germany was already climbing, clocking in at 438,000 in 1992, a year in which Germany absorbed about 70 percent of all refugees in the European Community. These trends troubled some Social Democrats, in addition to the conservatives.⁸⁹ ‘We all know’, said a Social Democrat, that ‘immigration had reached proportions that are no longer

⁸⁵ Deutscher Bundestag, Plenarprotokoll 12/89, p.7338,(30 April 1992) (hereafter Plenarprotokoll 12/89).

⁸⁶ Quoted in Kay Hailbronner, ‘Asylum Law Reform in the German Constitution’, *American University International Law Review*, 9, no.4 (1994), p.159.

⁸⁷ Plenarprotokoll 12/89, pp.7298, 7317.

⁸⁸ *Ibid.*, p.7325.

⁸⁹ Hailbronner, ‘Asylum Law Reform’, p.160.

sustainable'.⁹⁰ Racially motivated attacks on foreigners were rising, as well. Ulrich Briefs, an unaffiliated lawmaker, announced in the Bundestag debate the return of 'German nationalism and racism'.⁹¹

Support for Schengen united the government and a broad cross-section of the opposition. Rudolf Seiters, the conservative interior minister, framed the debate as a 'test bench' for the internal market, as well as a 'crossroads for German domestic politics', whose normalisation depended on the integration of Western Europe. Following the 'dissolution of the European postwar order', he observed, 'European citizens today enjoy a degree of free movement that appeared inconceivable just a few years ago'. Schengen, he argued, ensured that freedom would be paired with new opportunities to improve European security, namely through the Schengen Information System. He defended the need to coordinate asylum rules, reasoning that 'whoever says yes to a Europe without borders must also say yes to a common European asylum policy'.⁹² The Social Democrats joined the conservatives in celebrating the convention, an achievement, its members emphasised, arising from Kohl's cooperation with Mitterrand, a Socialist. The party welcomed measures compensating for the removal of border controls, including plans for cross-border information exchange. A European solution for the 'free movement of people', said the Social Democrat Gerd Wartenberg, should have generated a feeling of 'euphoria'.⁹³

But the atmosphere in parliament was anything but euphoric. Centre-left and liberal parties, in and out of government, decried the effort to link Schengen's ratification to changes in asylum rules. 'We Free Democrats say yes to the Schengen Agreement, to the

⁹⁰ Plenarprotokoll 12/89, p.7317.

⁹¹ Ibid., p.7340.

⁹² Ibid., pp.7296-7297.

⁹³ Ibid., p.7300.

implementation of the Schengen Convention, yes without any ifs or buts, without any addition’, proclaimed Wolfgang Lüder of the liberal FDP, hailing ‘freedom of travel’ as well as ‘security for citizens’.⁹⁴ A moment celebrated by Seiters as a ‘crossroads’ was described by Konrad Weiß of Alliance 90/The Greens as ‘a dark day in the young history of our reunified country’, eliciting shouts of disagreement from the conservatives. The guarantee that the ‘politically persecuted enjoy asylum’, declared Weiß, a former film director and civil rights activist in the GDR, ‘was and is one of the most precious sentences ever written in the German language’. The language existed, he contended, because Germans were ‘shaken by guilt’. It allowed Germany’s return to the ‘family of nations’, providing a foundation for ‘democratic Germany’. Weiß asked fellow lawmakers: ‘do you want to build a new wall around Germany, a wall around Europe?’ His words were denounced as ‘nonsense’.⁹⁵ But he found support from the Left party, whose Gregor Gysi refused a central premise of the asylum debate — the need to ferret out claims without merit and block so-called ‘economic refugees’. He denied the existence of ‘asylum abuse’, arguing, ‘What this means is that citizens apply for asylum, and the application turns out to be unfounded.... It is quite normal for application to be made to court that turn out to be unfounded’. The effort to disqualify entire categories of people, dismissed as ‘economic refugees’, threatened moral catastrophe, he claimed, recalling the refusal of other European states to shelter Jews between 1933 and 1945 ‘on the grounds that they are economic refugees’. He intoned: ‘the first human right is still the right to life’.⁹⁶

That affirmation carried little weight with the governing conservative bloc. Some plainly denied the existence of an absolute right to asylum. ‘If you think’, Stoiber, the Bavarian minister said, ‘that there is a fundamental right of asylum in Europe, then I say to you: You are

⁹⁴ Ibid., p.7310.

⁹⁵ Ibid.

⁹⁶ Ibid., p.7307, 7306, 7307.

mistaken'.⁹⁷ Others maintained that the prized provision of the constitution was unthreatened by the desired changes. 'Asylum will continue to exist', promised Hans Klein, the Bundestag's vice-president.⁹⁸ Johannes Gerster, another conservative, was adamant: 'Our fundamental right must be adapted to international agreements'.⁹⁹ Of Schengen's merits, the lawmakers were equally direct. 'I very much welcome the fact that, with the Schengen Agreement, the majority of the EC member states have found, in anticipation of Community legislation, rules which genuinely allow freedom of movement for Community citizens, while applying uniform rules to non-Community nationals', said Gero Pfennig, a conservative trained in the law, envisioning the formal establishment of EU citizenship under the Maastricht Treaty, which Schengen could underpin.¹⁰⁰ For all the agreement's virtues, another lawyer, Wolfgang Schäuble, the conservative leader in the Bundestag, pledged to withhold his faction's support absent a simultaneous amendment to the Basic Law. 'It's a good step forward', he said. But the agreement came with 'duties', he added, as well as with 'rights'.¹⁰¹

Conservative intransigence paid off. A flood of asylum claims in the summer of 1992, combined with the perpetration of xenophobic violence against refugees, convinced the Social-Democratic leadership to back constitutional reform, in exchange for a promised liberalisation of German citizenship requirements, in addition to other concessions.¹⁰² At the end of the year, the government mustered the required two-thirds majority for constitutional changes that retained Article 16a, allowing that, 'Anybody persecuted on political grounds shall enjoy the right of asylum', but added limitations. The new article provided that asylum was not owed to

⁹⁷ Ibid., p.7325.

⁹⁸ Ibid., p.7305.

⁹⁹ Ibid., p.7330.

¹⁰⁰ Ibid., p.7342.

¹⁰¹ Ibid., 7313.

¹⁰² Matthew J. Gibney, *The Ethics and Politics of Asylum: Liberal Democracy and the Response to Refugees* (Cambridge, England, 2004), p.102.

anyone entering from another member state of the European Communities, or a safe third country found to be following the guidelines of the 1951 Geneva Convention. The changes took effect in July 1993, and ratification of the Schengen convention occurred the very same month. Formally, the accord entered into force at the beginning of September, though its provisions could not go into effect practically until various technical and legal requirements were met, such as the development of data banks and the guarantee of data protection. That would take another two years.¹⁰³

In the debate in France's National Assembly, Jacques Toubon, the conservative lawmaker, asked whether the agreement on the removal of border controls deserved the lore that surrounded it. 'Schengen is becoming a myth', he said. The small town in Luxembourg was not equivalent to Alesia, the city captured by Julius Caesar during the Gallic Wars. It was not Pavia, the location of the epic confrontation of the Italian War of 1521–1526. It was not Versailles or Rapallo or Rome. 'Schengen', he said, 'deserves neither this excess of honour nor this indignity'. The Gaullists, he said, were interested in two priorities: the sovereignty of the nation, and the safety of its people.¹⁰⁴

The signing of the accord on open borders in 1985 had made Schengen a landmark in the development of free movement. But it was during the ratification process that Schengen took on the aura of legend, entering the pantheon of places in Europe that gave their names to foundational European treaties, from Rome to Amsterdam to Lisbon. Schengen had come to

¹⁰³ Cruz, *Schengen*, p.7; See also Hailbronner, 'Asylum Law Reform'.

¹⁰⁴ National Assembly, p.272.

matter greatly for the future of Europe. It earned distinction as the site of momentous decisions about the ease with which persons, goods, and capital could circulate — too momentous, some protested, to be decided by state functionaries on a boat.

Schengen's renown, however, turned even more powerfully on the multiple competing interpretations that it invited. No one could agree on what Schengen meant. Where one political faction foresaw unchecked immigration across open borders, another saw pervasive and punishing restrictions — competing interpretations captured by the opposition between 'Fortress Europe' and 'Sieve Europe'. While some prized the enhancement of state power, others inveighed against limitations on national authority. While some celebrated the cosmopolitan aspirations of the agreement, others assailed it as an abdication of international responsibility. In France, the divide was so profound as to engender a constitutional challenge drawing on archetypical arguments against European integration articulated by the father of the 1958 constitution, Michel Debré. His two sons joined the legal complaint, mounted unsuccessfully in 1991, shortly after French ratification. One, Jean-Louis Debré, would come to assume a leading role in defending severe immigration laws designed to compensate for the loss of control over internal borders under the Schengen accord.

Ratifying the implementing convention brought to public view a border regime devised behind closed doors, turning Schengen into a symbol of the most vexed aspects of European integration — immigration and asylum, sovereignty and human rights, economic competitiveness and civic solidarity. The approval that lawmakers ultimately gave to the accord did not stifle the outcry produced during democratic deliberations. Out of the debate emerged piercing accounts of what had occurred in Schengen and what would become of Europe.

No armed battle had been waged in Schengen. But power had changed hands. What happened in Schengen, said Ulrich Griefs, the unaffiliated lawmaker accountable to no bloc in the Bundestag, was a 'step into the European surveillance state'.¹⁰⁵

¹⁰⁵ Plenarprotokoll 12/89, p.7341.

CHAPTER 5 — A PLACE OF RISK

Marks & Spencer, the British emporium of choice for everything from haberdashery to birthday cakes, opened its first international store in Paris in February 1975. It stood on the teeming Boulevard Haussmann, a commercial artery cut through the warren of ancient streets by Georges-Eugène Haussmann as part of the nineteenth-century renovation of Paris. The Paris store embodied transnational retail — a bedrock of the globalizing postwar economy.¹

A decade after the migration of Marks & Spencer to France, as European diplomats were devising the 1985 Schengen accord, and as the European Court of Justice was affirming the right of students to cross state lines to pursue schooling in the *Gravier* case, a bomb went off inside the Parisian outpost of the British department store. The explosive detonated in the food department on 23 February 1985, at 9:31 a.m., one minute after doors opened to shoppers. One person died and fifteen others were wounded in the blast.²

It was not the first time that Marks & Spencer had been rocked by explosives. A flagship London store had also been a target of violence.³ But the 1985 Paris bombing — directed by the 15 May Organization, a Palestinian terrorist group — claimed a life for the first time, and marked the beginning of a wave of violence that would convulse the French capital for more than a year and extend to other nations.⁴ As Schengen took shape, Paris became the epicentre of a European confrontation with terror that was as global in reach as was commerce.

¹ ‘How M&S Expanded Internationally and Engaged with Customers Around the World’, Marks and Spencer Company Archive, <https://marksintime.marksandspencer.com/download?id=2842>. See also Jean-Claude Fauveau, *Le Monde de la Distribution: Les 100 Plus Grands Groupes et Leurs Implantations Européennes* (Paris, 1994).

² ‘Quinze blessés dont deux grièvement’, *Le Monde*, 25 février 1985.

³ See Oliver Schröm, *Im Schatten des Schakals: Carloos und die Wegbereiter des Internationalen Terrorismus* (Berlin, 2002), p.27.

⁴ ‘Habib Maamar devant la cour d’assises spéciale de Paris Un terrorisme “utilitaire”’, *Le Monde*, 15 décembre 1989.

The bloodshed would have profound political consequences, pervading the project of creating Citizens' Europe and the single market and generating debate about how to balance transnational security and human rights, which unfolded in national parliaments considering ratification of the Schengen implementing convention.⁵ By no means was postwar Europe a world purged of political violence. But the Paris bombing of Marks & Spencer signalled a shift in the geopolitics of terror, which reinforced conceptions of Europe as a place of risk — risk heightened by the impending removal of border controls. On the eve of the signing of the Schengen treaty, in June 1985, an airport bombing executed by the Arab Revolutionary Organization left three dead in Frankfurt, a financial hub of Europe.⁶

The crisis inaugurated by the terror at Marks & Spencer did not prompt calls to arrest the spread of global commerce, but it did lead European states to crack down on shopping, for visas, as well as on so-called asylum tourism, or the much-feared practice of claimants seeking protection in multiple states. It was the Schengen pact that transformed efforts of nations to seal their borders against non-Europeans into a transnational pledge to prevent third-country nationals, barred from one state, from entering another.⁷ As the rising tide of violence highlighted the new civilian targets of Islamic radicalism, thwarting visa shopping and asylum tourism became rationales for Schengen's policing infrastructure.

At the centre of that infrastructure was the Schengen Information System, a security apparatus designed to balance free movement with surveillance — to pair the lifting of physical

⁵ This legacy is barely considered in accounts of the roots of contemporary global terrorism. See, e.g., Florence Gaub, 'Trends in Terrorism', European Union Institute for Security Studies, March 2017, https://www.iss.europa.eu/sites/default/files/EUISSFiles/Alert_4_Terrorism_in_Europe_0.pdf.

⁶ This legacy is barely addressed in studies of the rise of global terrorism, see, Florence Gaub, 'Trends in Terrorism', European Union Institute for Security Studies, March 2017, https://www.iss.europa.eu/sites/default/files/EUISSFiles/Alert_4_Terrorism_in_Europe_0.pdf.

⁷ On civilian targets of Islamic terrorism, see Gabriel A. Almond, R. Scott Appleby, and Emmanuel Sivan, *Strong Religion: The Rise of Fundamentalisms around the World* (Chicago, 2003), pp.145-190. The 1985 and 1986 attacks are an early window into dynamics explored by Petter Nesser, *Islamic Terrorism in Europe* (London, 2015).

barriers with the gathering of personal data. Porous internal borders were said to require not just a shared list of countries whose nationals were to be excluded and joint rules for adjudicating asylum claims. They would also necessitate common procedures for tracking persons denied entry, primarily through new modes of international data exchange.

By converting immigration procedures into instruments of counter-terrorism, Schengen's system of policing in turn shaped the emergence of Europol — the European Union Agency for Law Enforcement Cooperation. Schengen came to institutionalise a body of conflicting aspirations, for free movement and border control; for human rights and state security; for individual privacy and detection through digital surveillance. Creating a zone of freedom premised on excluding non-Europeans, it expressed the perplexities of policing transnational Citizens' Europe, long before Europol commenced limited operations as a multinational crime-fighting agency in 1994, under the justice and home affairs pillar envisioned in the 1992 Maastricht Treaty. Commencing full activities in 1999, and expanded after the September 11 attacks, Europol emerged at the same site in Strasbourg as the Schengen Information System, or the SIS, the centralised system of data collection that flowed from the removal of internal border checks and that remains integral to transnational policing.⁸

But Europol's roots in Schengen have not been fully examined. Police cooperation did not arise without precedent in the Maastricht negotiations, nor evolve suddenly after 9/11, a moment that made plain its urgency. But these are the turning points that dominate scholarship on cross-border security, obscuring tools and practices introduced by Schengen, tools that go to the heart of ongoing debates over surveillance, globalisation, and individual freedom.⁹

⁸ See Rachel Woodward, 'Establishing Europol', *European Journal on Criminal Policy and Research*, 1, no.4(1993), pp.7-33.

⁹ See Shoshana Zuboff, *The Age of Surveillance Capitalism: The Fight for a Human Future at the New Frontier of Power* (London, 2019). On the emphasis on Maastricht and 9/11, see Armand Mattelart, *The Globalization of Surveillance: The Origin of the Securitarian Order*, trans. Susan Gruenheck Taponier and James A. Cohen (Cambridge, England, 2010), p.163, 164; Bigo, 'Frontier Controls', p.66; Malcolm Anderson, et al., *Policing the European Union* (Oxford,

‘Establishing Europol’, a 1993 article by the geographer Rachel Woodward, notes that Schengen was central to the agency’s formation but does not examine the accord and the system of information exchange that it generated, pointing to a paucity of sources on the agency’s development.¹⁰ Scholarship in criminology and international relations debates Europol’s moral justification and measures its effectiveness against other policing arrangements, also marginalising precursors.¹¹ *Digital Borders and Real Rights: Effective Remedies for Third-Country Nationals in the Schengen Information System* (2008), by the migration law expert Evelien Renate Brouwer, provides a manual for resistance to the overreach of government authority, rather than an inquiry into the motives of European governments in collecting data about the people who move across their borders.¹² Scholarship that delves more deeply into the history of free movement focuses primarily on Community initiatives and thus hardly explores Schengen, which was developed outside the framework of European law.¹³ Since then, the accord has become so deeply woven into EU law that its influence on transnational security and policing has all but disappeared from view.

This chapter recovers that lost history by tracing the development of Europol to the Schengen Agreement, examining in particular the development of the Schengen Information System and the contest over policing and privacy that the transnational computer file provoked,

1995); Malcom Anderson and Joanna Apap, eds., *Police and Justice Co-Operation and the New European Borders* (The Hague, 2002). Authoritative legal and political science studies acknowledge earlier antecedents but mostly focus on the post-1992 period. See Stephen Rozée, Christian Kaunert and Sarah Leonard, ‘Is Europol a Comprehensive Policing Actor?’ *Perspectives on European Politics and Society*, 14, no.3 (2013), pp.372-387. Some accounts begin even later, with the Lisbon Treaty’s entry into force in 2009. See Maria Bergström and Anna Jonsson Cornell, eds., *European Police and Criminal Law Co-operation* (Oxford, 2014); Malcolm Anderson and Monica den Boer, eds., *Policing Across National Boundaries* (London, 1994).

¹⁰ Woodward, ‘Establishing Europol’, p.8.

¹¹ On social-science debates, see Rozée, Kaunert and Leonard, ‘Is Europol a Comprehensive Policing Actor?’; Julia Jansson, ‘Building Resilience, Demolishing Accountability? The Role of Europol in Counter-terrorism’, *Policing and Society* 38, no.4(2018), pp.432-447; Alexandra de Moor and Gert Vermeulen, ‘Europol, quoi de neuf? Une Approche Critique de la Décision Europol’, *Revue Internationale de Droit Pénal*, 82, no.1-2(2011), pp.157-187.

¹² Brouwer, *Digital Borders*, p.4.

¹³ See Holly Wyatt-Walter, *The European Community and the Security Dilemma, 1979-92* (New York, 1997).

a contest that spilled from diplomatic summits to legislative debates to the world of academia and the press — and that lives on in the battle over spying, social media, and state regulation. To explain Schengen’s contribution to transnational policing, I draw on meeting notes and diplomatic telegrams forming part of the arcana of Schengen negotiations; contemporaneous speeches and articles by security officials and privacy advocates; and an interview with Europol’s inaugural head, Jürgen Storbeck. I explore questions of origins and motivations at stake in the development of new policing tools, namely the SIS, rather than their operation, governance, and shortcomings — considerations that drive existing scholarship.¹⁴

Out of the Schengen laboratory, I argue, emerged a transnational panopticon of the information age, which augmented the policing power of the state as it lost control at its territorial borders. The guarantee of national security was etched not at the borders among nations but at the boundary between Europeans and non-Europeans. Schengen vested the power to police this distinction in the nation-state, even as the accord breathed life into a new conception of transnational citizenship, one that would be enshrined in Maastricht.¹⁵ A study of the surveillance architecture set up by Schengen therefore confounds the schism between ‘Sieve Europe’, which captured alarm about open borders, and ‘Fortress Europe’, which expressed opposition to new barriers to immigration.¹⁶ Meanwhile, a gap opened between new transnational instruments of surveillance and data exchange under the information system and enduring national sovereignty over the administration of justice, raising concerns about the exercise of democratic self-determination.

¹⁴ See Mariana Mihailescu and Marinela Lazarica, ‘The Process of Romania’s Accession to the Schengen Space: The Schengen Information System’, *Anale. Seria Științe Economice. Timișoara*, no.17 (2011), pp.335-42; Georgios Glouftsiotis, ‘Governing circulation through technology within EU border security practice-networks’, *Mobilities*, 13, no.2 (2018), pp.185-199; Shiraz Mahmood, ‘The Schengen Information System: An Inequitable Data Protection Regime’, *International Journal of Refugee Law*, 7, no.2 (January 1995), pp.179-200.

¹⁵ On state infrastructure, see Michael Mann, ‘The Autonomous Power of the State: Its Origins, Mechanisms and Results’, *European Journal of Sociology* 25, no.2 (1984), pp.185-213.

¹⁶ See Bigo, ‘Frontier Controls’, p.67,72.

The removal of border controls called into question venerable beliefs about state authority and collective life — among them a Weberian notion of security as coterminous with national territory.¹⁷ Joint policing, bolstered by data exchange, lay at the centre of the effort by Schengen states to redesign what the political philosopher Michael Walzer has termed ‘*communities of character*, historically stable, ongoing associations of men and women with some special commitment to one another and some special sense of their common life’.¹⁸ Walzer explains that such communities depend on the capacity to decide on their own composition and thus, within certain moral constraints, to exclude unwanted persons. Under Schengen, with Europe’s communities constituted less rigidly by national borders, associational life came to rest ever more explicitly on distinctions of identity and, by proxy, race.¹⁹ Maintaining these distinctions involved the creation of an expanding web of checks, data collection and surveillance — at the external border, in the interior of states, and even in the home countries of foreigners likely to travel.²⁰ Such measures brought Europe closer to what penologists have call a ‘dossier society’.²¹

The making of Schengen thus joined free movement to intrusive policing procedures critical to the reconstitution of state power in an era of globalisation. At the same time, it reconciled the disestablishment of national borders with the imperative of national security, revealing why Europol stopped short of full-scale federal policing. It was the nation that maintained ‘knowledge of the files’, to borrow Max Weber’s phrase, even as those files, which

¹⁷ Max Weber, ‘Politics as a Vocation’, in *From Max Weber: Essays in Sociology*, ed. and trans. H.H. Gerth and C. Wright Mills (London, 1991): pp.77-128.

¹⁸ Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (Oxford, 1983), pp.44,61.

¹⁹ On identity in post-Cold War immigration debates, see Barry Buzan, ‘New Patterns of Global Security in the Twenty-First Century’, *International Affairs*, 67, no.3 (July 1991), pp.431-51.

²⁰ Ayse Ceyhan, ‘Policing by Dossier: Identification and Surveillance in an Era of Uncertainty and Fear’, in *Controlling Frontiers: Free Movement Into and Within Europe*, ed. Didier Bigo and Elspeth Guild (Aldershot, 2005), p.218.

²¹ Kenneth C. Laudon, *The Dossier Society: Value Choices in the Design of National Information Systems* (New York, 1986).

the German sociologist viewed as critical to the development of the modern state, transcended national boundaries.²²

When Helmut Kohl, the conservative chancellor of Germany, proposed the creation of a European policing unit at the meeting of the Community's heads of state in June 1991, the same month that France undertook debate on Schengen's ratification, the idea seemed to come out of nowhere. It shocked his counterparts in the European Council, gathered in Luxembourg. The proposal, drawing on the example of the American FBI, seemed to presume a depth of political integration that his contemporaries were unprepared to accept. It came as a surprise even to members of his own government, including his interior minister, Wolfgang Schäuble.²³

The plan's audacity lent it strength, bolstered in part by advantages enjoyed by Kohl at home. The chancellor benefited from his broad authority to set policy guidelines for his cabinet ministers, a power, known as *Richtlinienkompetenz*, assigned to the head of the government by the Basic Law. His mandate for bold initiatives at the EU level was further buttressed by widespread consensus among German political parties in favour of closer integration, a unity not found in France.²⁴ Support was not unqualified, however. Martin Bangemann, a leader of the liberal Free Democratic Party and European commissioner for the internal market, had criticised the idea of a European police unit when it was considered in 1989 as a possible

²² Weber, 'Technical Advantages of Bureaucratic Organization', in *Essays in Sociology*, p. 214.

²³ Woodward, 'Establishing Europol', p.12. See also Rhodri Jeffreys-Jones, 'The Idea of a European FBI', in *Strategic Intelligence: Counterintelligence and Counterterrorism, Defending the National against Hostile Forces, Intelligence and the Quest for Security, Vol. 4*, ed. Loch K. Johnson (Westport, Conn., 2007), p.73.

²⁴ See Penelope Turnbull and Wayne Sandholtz, 'Policing and Immigration: The Creation of New Policy Spaces', in *The Institutionalization of Europe*, ed. Alec Stone-Sweet, Wayne Sandholtz, and Neil Fligstein (Oxford, 2001), pp.209, 210.

solution to fear about removing border controls. ‘The idea of a European FBI creates serious problems for a number of countries, including the rights of citizens and regulations governing police data’, he said. The warning anticipated two of the most vexing questions that Schengen would present in preparing the way for Europol.²⁵

These qualms did not dissuade Kohl, who enjoyed a mandate from his landslide victory in the 1990 elections and whose ideas benefited from broad public approval. Eighty-one percent of Germans supported coordinating political asylum and immigration policy, and an overwhelming majority also favoured common defence, according to a 1992 Eurobarometer survey.²⁶ It was the West German delegation, during Schengen negotiations the previous decade, that had put forward the plan to narrow responsibility for asylum claims. And it was Germany that had requested a delay in the approval of the Schengen implementing convention to assuage its partners that a gap in security would not open where the Berlin Wall once stood, as well as to secure their approval for language in the convention anticipating reunification. The achievement of reunification in the fall of 1990 affirmed Germany’s commitment to security cooperation as a precept of post-Cold War politics. Vowing that ‘a united Germany will be the cornerstone of the peaceful European order’, Kohl went so far as to proclaim, ‘We are willing to transfer Germany’s sovereign powers to the European Community’. Sovereignty was located most concretely in the power of the police.²⁷

Kohl’s proposal in Luxembourg hardly entailed centralisation on such a scale. The primary focus of the force that he envisioned would be drug trafficking and international crime. In essence, Europol would enable a joint response to violence waged not between global super-

²⁵ John Palmer, ‘EEC Border Controls May Be Scrapped’, *Guardian*, 24 February 1989.

²⁶ Commission of the European Communities, *Eurobarometer: Public Opinion in the European Community*, no.38 (December 1992), p.33, http://ec.europa.eu/commfrontoffice/publicopinion/archives/eb/eb38/eb38_en.pdf.

²⁷ Speech by German Chancellor Helmut Kohl to the Second Summit of CSCE, 19-21 November 1990, Organization for Security and Co-operation in Europe (website), pp.1, 2, <https://www.osce.org/mc/16153?download=true>.

powers but within a new community of states. In the view of the agency's first director, Jürgen Storbek, 'Kohl wanted to be a forerunner'.²⁸

The chancellor's counterparts in Luxembourg lacked an equivalent mandate for a counter-offer, even though they hardly all shared his vision. In Britain, opposition derived from the position of senior police officials. 'The time is not right to consider a European Police Force', Sir Peter Imbert, a former Metropolitan Police Commissioner, had insisted in 1989, when planning for the removal of border controls had briefly spurred consideration of the idea. Advocates of such an arrangement, he said, 'are perhaps expecting us to run before we have shown we can walk'.²⁹ Fellow heads of state viewed Kohl's proposal as a first offer, one that required further study because of its lack of detail, which perversely made it difficult to dismiss out of hand. Moreover, the proposal was advanced late at night, as Council members grew tired of debate.³⁰ Annexed to the conclusions of the Council meeting was a commitment to 'full establishment of a Central European Criminal Investigation Office ("Europol")' by the end of 1993.³¹

It is no coincidence that the endorsement came the same month that the convention on Schengen's implementation gained parliamentary approval in France. The convention's first adoption was a milestone in the effort to collectivise crime control. The Luxembourg conclusions arising from Kohl's impromptu overture hailed progress on the removal of border controls, foreseeing that free movement across all member states could be achieved once an agreement was reached 'on the crossing of their external borders', an objective being advanced

²⁸ Jürgen Storbek, interview with author, 18 February 2019 (hereafter Storbek Oral History).

²⁹ Woodward, 'Establishing Europol', p.11, 12.

³⁰ Patrick le Jeune, *Europol* (Paper presented to the Joint Sessions of Workshops, European Consortium for Political Research, Limerick, 30 March-4 April 1992), pp.3-4; Monica den Boer, 'The Quest for European Policing: Rhetoric and Justification in a Disorderly Debate', *Policing across National Boundaries*, p.180.

³¹ Annex 1, Presidency Conclusions, European Council, 28 and 29 June 1991, Luxembourg (hereafter Luxembourg annex).

in the laboratory of Schengen.³² So, too, in the conclusions, the Council called for discussion about how to safeguard data privacy, expressing concern for ‘the protection of individuals in relation to the processing of personal data’. And it envisioned that achievements in these areas, central to preparing for the completion of the internal market, would unfold in part by ‘establishing Union citizenship as a fundamental element in the construction of Europe’.³³ Policing a community was inseparable from deciding who belonged in it.

The tentative embrace of joint policing efforts hardly augured an instant transformation of Europe’s anti-crime agenda, yet it planted the seeds for a supranational organisation far beyond what some member states were initially willing to accept. In the months after Kohl’s proposal gained approval in Luxembourg, and as ministers looked ahead to Maastricht, it remained unclear what joint policing would entail. Perhaps, some suggested, agents would simply learn how to pronounce certain words in foreign languages. ‘Another view has a somewhat sinister “Europol” seizing people and searching houses at the behest of another country’s police, and spiriting them into a foreign police cell’, as *The Guardian* explained. The British held out hope that a European police force would mean little more than an intergovernmental pledge to boost collaboration. David Bowe, a British member of the European Parliament and the chair of the body’s committee on drug trafficking and organized crime, promised that Europol was ‘a long way down the road’.³⁴ Others disputed such assurances, taking their arguments to the press. The central aim animating Europol, whether the organisation resembled the American FBI or not, required a supranational structure, argued Will Hutton, a political economist and prominent commentator in Britain. ‘How long will it be before the coordinating police body needs to take action on its own if it wants to crack, say, a

³² Luxembourg annex, p.10.

³³ *Ibid.*, p.10, 3.

³⁴ Duncan Campbell, ‘Police Consider “Europol” to Catch ‘Euro-crooks’’, *Guardian*, 29 November 1991.

European-wide drugs ring?’ he asked. To make connections and trace leads, he reasoned, the agency would need to operate at a level transcending national authorities. ‘Willy nilly it must become a federal institution’.³⁵

Europol would take shape in two stages. The Council anticipated the initial instalment of relay stations for the exchange of information and the sharing of expertise among national police forces. The underlying motivation — to develop shared norms and foster a common institutional culture — would infuse Europol’s agenda, illustrated perhaps most clearly by the European Police College, or CEPOL, established in 2000 and currently located in Budapest. The mission of the institution, as defined by the European Council, is to ‘support and develop a European approach to the main problems facing Member States in the fight against crime’. Its charter speaks of the ‘cross-border dimensions’ of crime prevention.³⁶ In the second phase, agents of Europol would gain the power to act within the member states, on issues such as drug trafficking and organised crime. A working group developed these plans, which became part of the conclusions reached in Maastricht in 1992, before a separate Europol convention won approval in 1995. The absence of a detailed set of policy prescriptions meant that plans were modelled closely on existing institutions, such as the federal *Bundeskriminalamt* in Germany, or those that were just beginning to emerge, such as the Schengen Information System.

Europol had deep historical roots, even though Kohl’s proposal in June 1991 surprised members of the European Council. In fact, the initiative crowned a century-long quest to foster cooperation in the maintenance of state security. More immediately, it emerged from the removal of internal borders, embodied by Schengen, that made acute the risks of transnational

³⁵ Will Hutton, ‘The Reluctant Europeans Playing for More Time’, *Guardian*, 1 July 1991.

³⁶ Council Decision of 22 December 2000 establishing a European Police College (CEPOL), art.6, O.J. (L 336/2), (2000).

crime, brought home by the wave of violence inaugurated at Boulevard Haussmann's Marks & Spencer in 1985.

Just as Kohl situated his vision of European security in a longer drama of the European twentieth century, and Germany's place in it, the meeting in Luxembourg in 1991 of the European Council did not mark the dawn of international policing, which instead has its origins a century earlier. In 1898, the International Anti-Anarchist Conference brought 54 delegates representing 21 countries to Rome for discussions about anarchist terrorism. The month-long summit helped spur a 25-year anti-anarchist crusade pursued by virtually every European power.³⁷ But it was not until 1923 that the aspiration for collective police action was institutionalised, in the International Criminal Police Commission, created by the representatives of 20 nations meeting in Vienna. The Nazi takeover of Austria in 1938 ended the ICPC, as it was known. After the war, the Belgian police led the way in resuscitating the commission, hosting delegates from nearly 20 of the former ICPC states in Brussels. With Austria under Soviet control, Paris became the group's new home.³⁸

The revived commission was known as Interpol, and its scope quickly expanded beyond Europe, comprising 78 states by 1968. Today, Interpol has 194 member countries, each of which has pledged to 'ensure and promote the widest possible mutual assistance between all criminal police authorities within the limits of the laws existing in the different countries and in the spirit of the "Universal Declaration of Human Rights."³⁹ The loose association is built on a system of colour-coded notices, alerting parties to everything from missing persons to suspects wanted for serious crimes.⁴⁰

³⁷ Richard Bach Jensen, 'The International Anti-Anarchist Conference of 1898 and the Origins of Interpol', *Journal of Contemporary History*, 16, no.2 (April 1981), pp.323-347.

³⁸ Alain Guyomarch, 'Problems and Prospects for European Police Cooperation after Maastricht', *Policing and Society: An International Journal*, 5, no.3 (1995), pp.249-61.

³⁹ Constitution of the ICPO-INTERPOL, art.2, I/CONS/GA/1956 (2017).

⁴⁰ Malcolm Anderson, 'The Agenda for Police Cooperation', *Policing across National Boundaries*, p.11.

But European police officials found Interpol wanting, especially in tackling terrorism and international drug trafficking. Its shortcomings were most apparent in European nations, which accounted for the majority of communications on Interpol's network.⁴¹ Some of the problems were technical. Through much of the 1980s, Interpol relied on Morse code as the basis of an expansive radio network. Behind the transmission of urgent policing priorities sat operators punching telegraph keys by hand. Upgrades were too costly, straining a budget that drew on contributions from the individual states.⁴² Some of the member nations were so underdeveloped that they lacked means of communication beyond the postal service, which was therefore the only platform for messages that needed to reach the entire roster of states. 'Interpol was a post office', said Storbeck, who worked at the organisation between 1980 and 1983.⁴³

It was in Germany in 1974 that these concerns were first aired, at a meeting of the *Bund Deutscher Kriminalbeamter*, the association of criminal investigative officers. The police officials met in Wiesbaden, the home of the *Bundeskriminalamt*, or the Federal Criminal Police Office. The head of the office, Horst Herold, argued that Interpol required full-scale modernisation. He acknowledged, however, that these tasks were perhaps better left with the European Community, which could facilitate standardisation of disparate policing rules that frustrated Interpol's work. The central complaint was that Interpol, while assisting Western European governments in the fight against crime, was ill-equipped to anticipate evolving threats to those states newly bound by the removal of border checkpoints. Worries about cross-border crime

⁴¹ John Benyon, et al., 'Understanding Police Cooperation in Europe: Setting a Framework for Analysis', in *Policing Across National Boundaries*, p.56.

⁴¹ Mario Savino, 'Global Administrative Law Meets 'Soft' Powers: The Uncomfortable Case of Interpol Red Notices', *New York University Journal of International Law and Politics* 43, no.2 (2010), p.290.

⁴² Michael Fooner, *Interpol: Issues in World Crime and International Justice* (New York, 1989), p.149, 150.

⁴³ Storbeck Oral History. See also Jürgen Storbeck, 'Zwischenstaatliche Zusammenarbeit im Polizeialltag aus der Sicht einer Zentrale', in *Verbrechensbekämpfung in Europäischer Dimension* (Wiesbaden, 1992), p.155.

caused German police officials to point to Europe as the best plane on which to harmonise criminal law and coordinate investigative agents; Europe was large enough to account for the sweep of the problem but small enough to ensure shared aims. Rolf Grunert, the head of the German association, even suggested the possibility of European agents with investigative powers of their own.⁴⁴

At first, plans developed within the structure of Interpol, but they depended crucially on steps taken independently toward the protection of free movement, which culminated in Schengen in 1985. European Regional Conferences, which began in 1967, grew in importance as dissatisfaction with the international body mounted in the late 1970s and early 1980s. At a conference in 1981, the German delegation suggested amalgamating the activities of the various National Central Bureaus into a larger regional bureau. A working group took on the task of studying the idea and reported back to the conference in 1984, the same year that the German and French leaders met in Saarbrücken to proclaim the elimination of checks at their common border and a promise to jointly tackle ‘drugs, crime, and the irregular entry of people’.⁴⁵ The agreement reached in the western German city — the most consequential precursor to Schengen — was also the turning point in plans for police cooperation binding European states. The meeting between Kohl and Mitterrand came as a surprise to police officials, who gathered later that year, two-hundred and fifty miles away in Paris, and decided, ‘We have to fight to overcome the risk of open borders’, as Storbeck recalled. The right to move was guaranteed for all Community citizens moving between the two states, not just their own nationals. In spite of the pledge to combat crime, sufficient attention had not been paid to

⁴⁴ Cyrille Fijnaut, ‘Police Co-operation within Western Europe’, in *The Containment of Organised Crime and Terrorism: Thirty-Five Years of Research on Police, Judicial and Administrative Cooperation*, ed. Cyrille J.C.F. Fijnaut (Leiden, 2016), pp.48, 49.

⁴⁵ Paul Norman, ‘The European Dimension’, in *Law, Power, and Justice in England and Wales*, ed. Ian K. McKenzie (Westport, Conn., 1998), p.96; Saarbrücken Accord, preamble, art.2, 3, 5.

means of binding the two police forces, Storbeck added. ‘They hadn’t thought about the security risks. We came up with it’.⁴⁶

Until then, on-the-ground collaboration among European police agents was informal and ad hoc. Storbeck, as head of the Bundeskriminalamt, sent his deputy to live in Paris to learn about the French response to Action Directe, the far-left terrorist organisation that resembled the Baader-Meinhof Group in Germany. There, the German deputy found a spot at a café near the Élysée Palace where he knew French police went for coffee. He struck up conversations, learning about their work and exchanging recommendations. Informal conversation was also the primary means by which police chiefs from Aachen in Germany, Liège in Belgium, and Maastricht in the Netherlands stayed abreast of activity at the tripoint joining their three countries. They met once a month to trade notes about figures on their most-wanted lists.⁴⁷

With the announcement of plans for free movement between France and Germany, which would soon come to encompass the Benelux states, police officials moved decisively to organise themselves. In 1985, as Schengen gained approval by the first five member states, Interpol’s European Regional Conference acted on the proposals of the working group, creating a European Secretariat, alongside a Technical Committee for Cooperation in Europe, both of which came into existence in 1986. ‘Suddenly, Europe specifically was the agenda’, Storbeck said.⁴⁸ Though it succeeded in deepening regional cooperation, the European Secretariat could not address more fundamental criticism of the services provided by Interpol — or avert encroachment by European planning, both at the supranational and the intergovernmental level.

⁴⁶ Storbeck Oral History.

⁴⁷ Storbeck Oral History; Peter Andreas and Ethan Nadelmann, *Policing the Globe: Criminalization and Crime Control in International Relations* (Oxford, 2006), p.99; James Sheptycki, *Transnational Crime and Policing: Selected Essays* (Abingdon, England, 2011), p.52.

⁴⁸ Norman, ‘European Dimension’; Storbeck Oral History.

Tacit support for Kohl's vision arose from the infrastructure of Schengen negotiations, which brought policing officials from five of the Community's member states together to craft measures to preserve security in a border-less Europe.⁴⁹ Already during the expedited talks that yielded the 1985 accord, the working group tasked with issues of police and security envisioned European police cooperation transcending Interpol — cooperation based crucially on the exchange of information. A meeting of the working group in Bonn, at the end of March 1985, was especially clarifying. Draft minutes of the discussions, sent via telex from the Federal Republic's interior ministry to the corresponding ministries in the other four states, recorded the assessments of the state of police cooperation and plans for the future. Participants noted that collaboration was already taking place but was often informal, among local services operating in adjacent districts. That would have to change once borders came down. 'Police collaboration will have to be accentuated as the border controls are alleviated', the group decided, stressing in particular 'contacts between immigration services'. They vowed: 'Illegal immigrants cannot be returned to another EC member state, but must be returned to their countries of origin'. This would require coordination between border police and immigration officials to ensure an immigrant barred from one state could not slip into another. Interpol networks were insufficient. 'The collaboration must go beyond the framework of Interpol and become much more formal', the group declared. 'It will include regular discussions between the central services of the different specialised sectors'. Members of the working group pledged to distribute the names and addresses of the various competent authorities in their states whose involvement in such discussions would be required.⁵⁰

⁴⁹ Turnbull and Sandholtz, 'Policing and Immigration', p.203

⁵⁰ Téléx du Ministère de l'Intérieur de la R.F.A. aux Ministères compétents des pays du Benelux et de la France, 9 avril 1985, Binder 2 Schengen, correspondentie, 1984-1987, Council.

Police cooperation as envisioned in the Schengen accord would not amalgamate the authority of states but seek to enhance the power of each. One of the primary drafters of the 1985 document was Gilbert Guillaume, the French foreign ministry's director of legal affairs. He prepared a draft of the agreement, circulated a month before its signing, with a discussion of police cooperation that mirrored the language in the final version, stipulating that the parties would 'strengthen cooperation among their customs and police authorities, notably in the fight against crime ... against the irregular entry and stay of people and against customs fraud and contraband'. The analysis of state security and international violence underlying this proposal was later set forth in a law journal rather than an intergovernmental treaty. In the *International and Comparative Law Quarterly*, Guillaume reasoned that the globalisation of terror had 'propelled States to the forefront of the international arena', as 'they alone are entitled to deploy violence legitimately'. The document he drafted, as the Schengen states prepared to remove internal borders, hardly recommended transferring that legitimacy to the international level. Instead, it sought to augment the capabilities of each state through international mutual legal assistance, extradition agreements, and criminal pursuit at common borders.⁵¹

The reinforcement of police cooperation, to compensate for porous borders, found realisation among the Schengen states before the agreement took full effect. The removal of border controls propelled new bilateral plans to root out terrorism. The urgency, government ministers argued, arose from the movement across borders. 'For a long time, criminals have stopped at our borders', Friedrich Zimmermann, West Germany's interior minister, said in the spring of 1987, as he joined his French counterpart, Charles Pasqua, in announcing a new framework for Franco-German cooperation to halt terrorism. Appearing in Paris, the two

⁵¹ Gilbert Guillaume, note à l'attention de Monsieur Jean-Paul Angles, 7 mai 1985, Folder Marché Intérieur – Session du 10 juin 1985, Box 349 Secretariat d'état Catherine Lalumière, MEAE; Gilbert Guillaume, 'Terrorism and International Law', *International & Comparative Law Quarterly* 53, no.3(July 2004), p.548.

ministers did not expatiate on the details of the agreement, which broadly promised to expand information sharing and enable cross-border pursuit of criminals. When it came to the rationale for the agreement, however, Zimmermann, a conservative politician who had been a lieutenant in the German army during the Second World War, spoke plainly of the violence buffeting the continent. ‘The most recent terrorist events ... have highlighted the ideological and technical rapprochement of terrorist groups’, he said. ‘To fight against them more effectively, it is necessary to establish an equally close collaboration of the police, especially in the operational field’. The new accord, would be ‘an engine, and an example’, Zimmermann predicted, ‘for intensified cooperation between Western European police’. At the end of the month, there was a meeting of the Trevi group, named for the fountain in Rome and later supplied with the title ‘Terrorism, Radicalism, Extremism, Violence’, in Brussels — a meeting, suggested the French newspaper *Le Matin*, ‘during which the Franco-German agreement could be a model’.⁵²

Just as anarchism had vexed diplomats in Rome in 1898, transnational criminal gangs preoccupied the Trevi group, an intergovernmental brain trust that tracked emerging threats to Europe. Founded in the Italian capital in 1975, the group was tasked by the Council of European Ministers with examining problems of terrorism and drug trafficking. It was only with the protection of free movement by Schengen in 1985, inseparable from the promise of an expanse of internal freedom made by the Single European Act in 1986, that the group’s remit came to include immigration.⁵³ At first, its meetings, which brought together European interior ministers and other intelligence officials, were ad hoc, and police officials were overlooked,

⁵² Jean-Marc Ancian, ‘Paris et Bonn renforcent antiterroriste’, *Le Matin*, 9 avril 1987, Coupures de Presse de Parlement européen, CPPE-2019 2019 01/04/198704/1987 - 28/04/1987 Juridique et des droits des citoyens, HAEU. See Eva Oberloskamp, *Codename TREVI: Terrorismusbekämpfung und die Anfänge einer europäischen Innenpolitik in den 1970er Jahren* (Berlin, 2016).

⁵³ François Julien-Laferrrière, ‘Entry, Residence and Employment of Foreigners in the Community’, in *What Kind of Criminal Policy for Europe?*, ed. Mireille Delmas-Marty, Mark A. Summers, and Ginette Mongin (The Hague, 1996), p.53.

Storbeck said. But the eruption of terrorist violence in 1985 and 1986 provoked more regular dialogue. At an April 1986 meeting in the Hague, participants decided that they would meet at least twice a year — just as the short-term measures announced in Schengen were taking effect.⁵⁴ Trevi, which operated in secret until 1989, is widely understood as a precursor to Europol, but Schengen, in turn, influenced Trevi.⁵⁵ The group's agenda, before it was institutionalised by the Maastricht Treaty in 1992, became intertwined with the negotiations over the 1985 accord on free movement, where the realisation that removing border controls would create a security problem first became acute.

The much-anticipated meeting of law enforcement in Brussels in April 1987, on the heels of the Franco-German accord on counter-terrorism, addressed information exchange, immigration, and cross-border criminal pursuit. The interior ministers explored means of strengthening controls at external borders — as well as cooperation between police services — to halt illegal immigration. Belgium, which chaired the meeting, pushed for the circulation of information about immigrants already flagged for removal from one member state, thereby empowering other states to turn back new arrivals. Delegates gave their support to national plans to institute financial penalties for airlines and other transit companies responsible for facilitating illegal entry — ‘a European answer to a European problem’, proclaimed the British home secretary’ — which the Schengen implementing convention would generalise across the expanse of open borders. A common visa system was also discussed, and ministers considered ways of differentiating control of European citizens and foreign nationals at airports and maritime borders. Finally, they weighed possible exceptions to the law of extradition,

⁵⁴ ‘Le Groupe “Trevi” en réunion à Bruxelles’, *La Libre Belgique*, 27 avril 1987, CPPE – 2019, HAEU; Storbeck Oral History.

⁵⁵ See Richard Clutterbuck, *Terrorism, Drugs and Crime in Europe after 1992* (London, 1992).

increasingly viewed as a lynchpin of criminal justice within an area of free movement. The French newspaper *Libération* called the meeting ‘the first step toward a European police’.⁵⁶

As Trevi’s focus grew to include the movement of people, its agenda increasingly overlapped with the work preoccupying Schengen negotiators, vividly illustrating the convergence of free movement and crime control. European press remarked on Trevi’s expansive purview. ‘Drugs, terrorism and ... immigration’, mused a headline in *La Libre Belgique*.⁵⁷ These were the same issues discussed by Schengen negotiators in Berlin in December 1987, at the meeting commemorating the 750th anniversary of the city. Waldemar Schreckenberger, Kohl’s chief of staff and point person on Schengen, chaired the discussion, making police and security the primary considerations. The Schengen delegates agreed on measures concerning drug trafficking; mutual legal aid in the pursuit of transnational criminals, chiefly terrorists; and the exchange of information. Joined to these initiatives would be directives on surveying Schengen’s external borders to block illegal entry and common means of controlling the movements of non-citizens once within the expanse of freedom.⁵⁸ Trevi officials came to see Schengen as a vessel for realising their own work, which remained largely advisory. In March 1989, recognising as one of their chief concerns ‘the consequences of the bringing down of internal border controls for the movements of terrorists’, they requested a meeting with Schengen diplomats. The summons represented an acknowledgment that problems of policing, security, and the movement of people required a solution at the ‘political

⁵⁶ ‘Le Groupe “Trevi”’, *La Libre Belgique*, ‘Première étape pour une police européenne’, *Libération*, 29 avril 1987.

⁵⁷ Alain Hevrendt, ‘Drogue, terrorisme et... immigration: Les ministres européens voudraient harmoniser les procédures. Simple?’ *La Libre Belgique*, 9 avril 1987.

⁵⁸ ‘Réunion des Ministres et Secrétaires d’État’, 17 décembre 1987, Folder Schengen, Oct. 86-Déc. 1989, Box 21 101SUP, MEAE.

level', in other words where states were negotiating binding agreements that were expected to eventually apply across Western Europe.⁵⁹

What emerged from dialogue with Schengen negotiators that spring was a Trevi working group on the security challenges brought on by the free movement of people, which took its cues from the committees devising the Schengen implementing convention. The group, Trevi '92, unveiled an 'Action Programme' the following June, as requested in the influential Palma Document that emerged from the European Council in June 1989, and for which the Schengen convention, adopted that same June in the Moselle Valley, was a model.⁶⁰ 'The studies conducted by the twelve are naturally inspired by Schengen's solutions and align with them on the essentials', wrote Hubert Blanc, a French negotiator at Schengen.⁶¹ The Action Programme closely resembled the Schengen convention, stressing the need for information exchange and multilateral officer training.⁶²

Indeed, as the implementing convention took shape in the pivotal year of 1989, Schengen negotiators became more precise in their plans for European police cooperation, weighing the need for a new policing unit that could fill the gaps left by Interpol. In April, France took stock of discussions among the five Schengen states, which it was chairing at the time, as well as of the twelve members of the European Council, the presidency of which would pass from Spain's Felipe González to France's Mitterrand, both socialists, in July. This was the

⁵⁹ Pierre Joxe to Edith Cresson, 16 mars 1989, Folder Réunions Informelles des Ministres de l'Intérieur organisés par Pierre Joxe, Box 5 1914INVA, MEAE; Régis de Gouttes, 'Compte rendu de la réunion du groupe 'coopération dans la lutte contre le terrorisme international', 1 juin 1989, p.5, Folder Terrorisme, 1989-90, Box 23 101SUP, MEAE.

⁶⁰ Joanna Apap, *The Rights of Immigrant Workers in the European Union: An Evaluation of the EU Public Policy Process and the Legal Status of Labour Immigrants from the Maghreb Countries in the New Receiving States* (The Hague, 2002), p.21.

⁶¹ Blanc, 'Schengen', p.723.

⁶² Wyatt-Walter, *European Community*, p.143; Martin Elvins, *Anti-Drugs Policies of the European Union: Transnational Decision-Making and the Politics of Expertise* (Basingstoke, U.K., 2003), p.88; "'The Palma Document', Free Movement of Persons. A Report to the European Council by the Coordinators' Group', (Madrid, June 1989), pp.12-16, <http://www.statewatch.org/semDOC/assets/files/keytexts/ktch1.pdf>.

year that Europe's *Daily Bulletin* recorded the consensus view that the removal of controls was 'conceivable only accompanied' by a new framework for securing a border-less domain.⁶³

Annexed to the French report, prepared by the foreign ministry's legal affairs unit, was a memorandum titled 'Observations on the notion of "European federal police."' The document traced the genesis of the formulation, 'publicly evoked on a few occasions by Chancellor Kohl and Felipe González'. It invoked the American FBI and the German Bundeskriminalamt, the federal criminal police office, as points of reference. These examples distilled the legal, institutional, and political presuppositions of 'such an organisation', as the French ministry observed. The existence of a European federal police force, the document noted, would require federal laws in Europe, the enforcement of which would be its primary function. Along with federal laws, it would involve the 'definition of a European legal person', the document stated, whom the federal police could pursue, or on behalf of whom federal authorities could conduct investigations. European police would ultimately lack purpose without judicial organisations — 'Federal Court, Federal Prosecutor's Office' — to try the accused arrested by the federal police, the document asserted, though it did not explain how such bodies would interact with existing tribunals, such as the European Court of Justice. Finally, the document argued that a 'responsible political authority', such as the attorney general in the United States, would be necessary to oversee the operations of the federal police force. The French memorandum did not issue a verdict on the notion of a European federal police. But it enumerated the obstacles that became stark as part of the Schengen negotiations. Plans for free movement helped pave the way for Kohl's proposal while simultaneously shedding light on why the idea seemed quixotic when presented to the European Council in 1991.⁶⁴

⁶³ Accord de Schengen (II), Bulletin Quotidien, 30 novembre 1989, p.22, FL – 595, HAEU.

⁶⁴ 'Libre circulation des personnes en Europe', Ministère des Affaires Etrangères, 17 avril 1989, Folder Réunion Interministérielle Préparatoire au Conseil Restreint du 19 avril 1989, Box 8 101SUP, MEAE.

There was no mention of Europol in the Schengen implementing convention — a term that would not emerge until later. But the document did more than call for enhanced police cooperation. It envisioned the creation of a new authority to manage cross-border operations. That was because of changes made in December 1989, as Mikhail Gorbachev and George H.W. Bush declared the end of the Cold War, and as West Germany asked for a delay in the adoption of the Schengen implementing convention. Schengen ministers gathered to discuss final outstanding issues in the convention. A change had to be made to an article on police cooperation, as the Belgian delegation lodged an objection to the role assigned to Interpol. The central negotiating group instead designated ‘an authority to be determined’.⁶⁵ The wording was slightly different in the final text of the convention, which stipulated, in Article 40, that a request for assistance in cross-border surveillance of a criminal suspect ‘must be sent to an authority designated by each of the Contracting Parties and empowered to grant or to pass on the requested authorisation’.⁶⁶ This function would be fulfilled by Europol, whose 1995 authorising convention enumerated its ‘principal tasks’. They included ‘to facilitate the exchange of information between the Member States’, as well as ‘to aid investigation in the Member States by forwarding all relevant information to the national units’.⁶⁷ As the press would later document, ‘Interpol, the longstanding body for handling legal and policing matters, is being bypassed’.⁶⁸ It was Europol that would take its place in Europe, premised centrally on the computerised exchange of information.

⁶⁵ Jan de Ceuster, ‘Réunion du Groupe Central de Négociation’, Commission des Communautés Européennes, 15 décembre 1989, FL-595, HAEU.

⁶⁶ Schengen Implementing Convention, art.40.

⁶⁷ Council Act of 26 July 1995 drawing up the Convention based on Article K.3 of the Treaty on European Union, on the establishment of a European Police Office, art.3 (1,4), O.J.(C316/01)(1995), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995F1127\(01\)&from=ES](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31995F1127(01)&from=ES), (hereafter Europol Convention).

⁶⁸ ‘A Europe to Be Steeped in Racism’, *Guardian*, 28 January 1991.

What Schengen contributed most concretely to Europol were the instruments and procedures of information exchange — as well as a framework for its regulation — under the Schengen Information System. The Europol convention, adopted in 1995, provided that, ‘In order to perform its tasks, Europol shall establish and maintain a computerized information system. The information system, into which Member States, represented by their national units and liaison officers, may directly input data in compliance with their national procedures, and into which Europol may directly input data ... shall be directly accessible for consultation by national units, liaison officers, the Director, the Deputy Directors and duly empowered Europol officials’. Discussion of the information system occupied 21 of the convention’s 47 articles. The task, however, was mainly scaling up a system developed in the Schengen laboratory.⁶⁹

It was within the Schengen area that the multilateral exchange of computerised information first emerged as a vital mechanism of policing no longer confined to national borders. Deliberations over data exchange that figured in planning for the Schengen implementing convention also shaped dialogue at the Community level, which found its way into the pages of the European press. As the *Deutsches Allgemeines Sonntagsblatt* observed in the fall of 1989, ‘the border barrier is to be replaced by the computer terminal’.⁷⁰ The SIS database promised to augment the data available to states about the individuals newly empowered to move across their borders — whether they bore this right explicitly, as a European national, or enjoyed it de facto because of the removal of controls. For the first time, the computerised system would make such data available automatically to participating states. ‘At the heart of

⁶⁹ Europol Convention, art.7 (1).

⁷⁰ Zudeick, ‘Im Eimer’.

interstate police cooperation is the exchange of information', observed Storbeck, the inaugural head of Europol.⁷¹ Its role was fundamental because the collection and exchange of data promised to replace the function once served by regular border checks.

The computerised file, originally limited to data on people and goods insufficient to ground transnational criminal intelligence, ultimately spurred a burgeoning network of information sharing that came to include fingerprints and photographs enabling discreet surveillance targeting asylum seekers. The effort to limit would-be refugees to the country of first arrival, developed during the course of Schengen negotiations and realised in the Dublin Regulation, gave rise to the European Dactyloscopy, or Eurodac, a registry of the fingerprints of asylum seekers and irregular border-crossers.⁷² The Norwegian sociologist Thomas Mathiesen wrote that the 'history of the issue of fingerprinting "illegal immigrants" shows how Schengen and Eurodac concerns are intertwined'. It is for this reason that Mathiesen labelled Schengen the "centre of gravity" among the various systems' that defined post-Cold War policing.⁷³ Writing in 1992, a French police official, Michel Giot-Mikkelsen, described Schengen as the 'world premiere' in 'merging and exploiting operational information'. No other project had gone as far.⁷⁴ As Brouwer documented, most of the personal data stored in the SIS since its inception in 1995 involved third-country nationals who were to be refused entry to the

⁷¹ Storbeck, 'Zwischenstaatliche Zusammenarbeit', p.155.

⁷² Scholars trace the legal basis of the biometric system to Dublin, which in turn drew on Schengen. See Dennis Broeders, *Breaking Down Anonymity: Digital Surveillance of Irregular Migrants in Germany and the Netherlands* (Amsterdam, 2009), p.176; Karanja, *Transparency and Proportionality*, p.267.

⁷³ Thomas Mathiesen, 'On Globalisation of Control: Towards an Integrated Surveillance System in Europe', *Statematch*, November 1999, p.18, 3.

⁷⁴ Michel Giot-Mikkelsen, 'Polizeilicher Informationsaustausch im EG-Binnenmarkt', in *Verbrechensbekämpfung in Europäischer Dimension*, ed. Deutschland Bundeskriminalamt (Wiesbaden, 1992), p.151.

Schengen states.⁷⁵ Even today, the European Commission calls the SIS ‘the most widely used and largest information sharing system for security and border management in Europe’.⁷⁶

As a large-scale computerised file, the SIS fulfilled the promise made by Schengen states in 1985 to ‘improve the exchange of information’, especially when it might aid partner states in ‘the fight against crime’.⁷⁷ But the original document was bare of specifics. Even the name ‘Schengen Information System’ had not yet come into use. The plan for the multinational data file came into being slowly, developing over the course of the five years spent negotiating the implementing convention, drawing crucially on national examples. Ultimately, the convention was not just a technical blueprint for data collection and exchange. It took on broader meaning, provoking a debate about the challenges posed by a transnational security apparatus to the privacy of the individual as well as the autonomy of the nation-state, matters core to self-determination.

Even before the signing of the 1985 Schengen accord, which did not expound on the theme of data sharing, negotiators understood keenly that such a tool carried benefits, as well as risks. At the critical Bonn meeting of the police and security working group, in March 1985, delegates took up the issue of the exchange of information during their discussion of police collaboration. As summarised by the West German delegation, the talks found that, ‘One of the key areas for improving collaboration will be the establishment of information exchange’. Sending data more efficiently across borders would be particularly useful, negotiators said, in the ‘fight against crime’, and in particular the ‘fight against illegal entry’. They enumerated three categories of information relevant to criminal prosecution: non-personal information, personal

⁷⁵ Brouwer, *Digital Borders*, p.1.

⁷⁶ ‘Schengen Information System’, European Commission, https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen-information-system_en.

⁷⁷ Schengen Agreement, 1985, art.9.

information not restricting the ‘freedom of persons’, and personal information that ‘must lead to a restriction of personal liberty’. The exchange of information would be especially relevant where criminal activity crossed borders, they affirmed, which might mean a national of one state coming under suspicion in another or suspicious activity in one state originating in another. As pressing as these scenarios would be, the negotiators reasoned that an automatic link between data files of the different states would be ‘impossible’. There were too many obstacles, not simply technical but also legal. The dilemmas were so pervasive and so deeply rooted — ‘all states face serious legal problems inherent in computerised data protection’, the German summary stated — that the negotiators wondered whether it would be necessary to draft a ‘specific convention of public international law’ addressing the quandaries of transnational linkages, the power of the state, and the protection of the individual. ‘This goal cannot be achieved in the short term’, the meeting’s draft summary affirmed. The participants agreed that the ‘need for information and the nature of its transmission ... will have to be detailed in future meetings’. They concluded that legal certainty about data exchange was not a prerequisite to the guarantee of free movement. Instead, the draft summary explains, ‘the working group considers that it is possible to ease the formalities for crossing the intra-Community borders before a definitive solution is found to these problems’. From the start the architects of transnational data exchange saw that such an apparatus posed risks to the rule of law and the rights of the individual. Their decision to press ahead with the removal of internal border controls illuminates the process driving the development of policing infrastructure, as the imperative of open borders came to compel ad hoc, compensatory measures.⁷⁸

Many of the states already used centralised systems of electronic data exchange, at least on the national level. The most instructive model was in West Germany, a federal republic that

⁷⁸ Téléx du Ministère de l’Intérieur de la R.F.A.

nurtured a powerful police force, authorised, for example, to make use of an advanced file-matching strategy, called *Rasterfahndung*, to identify terrorists with the Red Army Faction.⁷⁹ An information system for the police, called *Informationssystem der Polizei*, or INPOL, was set up in 1972, administered jointly by the federal government and the *länder*, or states. The Bundeskriminalamt assumed the role of the central office for the system of data exchange, hosting a network in Wiesbaden with links to files in each of the states, easily consulted when checking travellers entering the country.⁸⁰ France had two central sites for the storage of information, one with the National Police and the other with the National Gendarmerie, with both agencies equipped to draw on common data to refuse entry to ineligible persons. And automated systems already managed roughly 40 percent of cross-border freight traffic. Luxembourg, by contrast, did not use electronic data collection in service of controlling immigration. The Benelux states as a collective used a shared file in monitoring their external borders, but it was not computerised.⁸¹

Additional differences marked the approach of the different Schengen states to the use of data in immigration control. For instance, France rigorously applied reports of ineligibility in its network, such that an officer was empowered to invalidate an otherwise valid visa if it conflicted with an alert. By contrast, Luxembourg directed officers to contact its ministry of justice if a conflict between a visa allowance and a report of ineligibility surfaced. Most states

⁷⁹ See Jürgen Simon and Jürgen Taeger, *Rasterfahndung: Entwicklung, Inhalt und Grenzen einer kriminalpolizeilichen Fahndungsmethode* (Baden-Baden, 1981); Peter Becker, *Dem Täter auf der Spur: Eine Geschichte der Kriminalistik* (Darmstadt, 2005).

⁸⁰ The system's basic features still characterise INPOL-neu, introduced in 2003. K.-F. Koch and H. Risch, 'The Bundeskriminalamt: The German Federal Criminal Police Office', in *Police Research in the Federal Republic of Germany: 15 Years Research Within the 'Bundeskriminalamt'*, ed. R.V. Clarke (Berlin: 1991), p.5; 'European data network', *New Scientist*, 5 January 1984, p.13.

⁸¹ Réponse des delegations au questionnaire sur les besoins du système informatisé, 27 août 1990, Folder Réunion du Groupe des Coordonnateurs, Bruxelles – 23 juillet 1990 et 13 sept 1990, Box 13 101SUP, MEAE; Conclusions de la réunion tenue à Bonn le 2 février 1987, Folder SIS (système d'information Schengen), 1988-1989, Box 5 1914INVA, MEAE.

included in police alerts an estimation of the level of danger presented by a concerned individual — and whether the person was, for example, armed or violent. The Dutch said this specification was not necessary. There were also technical differences, such as whether files were cleared automatically, and how the clustering of files shaped the response to a glitch.⁸²

It was in November 1985 that the Schengen states agreed to consider using electronic equipment to facilitate the exchange of information among their respective national authorities. The proposal came from the West German delegation. The idea was to study ‘not only the technical but also the legal aspects’ involved in giving the various member states immediate access to data about people as well as goods.⁸³

Increasing attention to data exchange among the Schengen states was mirrored at the Community level. Here, too, Schengen was a laboratory. Justice and interior ministers committed in principle to a common network for police cooperation, but resistance was mounted by certain national policing officials ‘jealous for their sovereignty’, as regional French daily *Le Républicain Lorrain*, based in Metz, near the Moselle River, reported. The newspaper recorded progress at the intergovernmental level, laying the groundwork for a ‘European super-police’.⁸⁴ The Trevi group, the European Commission would report, based its study of a common automatic system of information exchange ‘on the model of Schengen’.⁸⁵

A permanent Schengen working group on information exchange was set up in December 1987 to plan for the ‘search union’, as police and security officials described the initiative in a report to the central negotiating group. The system would bind member states whose internal borders were projected to ‘lose their filter character after the removal of

⁸² Réponse des délégations.

⁸³ Exécution de l’Accord’, Comité de coordination Benelux, 13 novembre 1985, BNL, Council.

⁸⁴ ‘Vers une “Europe des polices”’, *Le Républicain Lorrain*, 29 avril 1987.

⁸⁵ ‘Heure de vérité’, Commission des Communautés Européennes, Cabinet du Président, 23 janvier 1990, FL – 185, HAEU.

controls'.⁸⁶ The task force, called the 'Standing Working Group on the Schengen Information System', began its work in February 1988. Planning was conducted in a common language, English, rather than in translation, which was otherwise standard procedure in negotiations. Membership included policing and information technology experts from each country. The group's first task was to study the feasibility of the envisaged system and its technical composition, preparing a report that was adopted by the Schengen ministers toward the end of 1988.⁸⁷ As they worked, they kept Interpol at arm's length, in spite of the organisation's offer of assistance, illustrating how actively officials involved in Schengen's planning envisioned not simply enhanced police cooperation but a new framework for its operation. The structure of their planning work helped anticipate the formation of Europol.⁸⁸

Agreement on most technical details came relatively easily. The working group's report stated that a multinational file, which it termed the Schengen Information System, was possible and made its aim the storage and exchange of data for use in crime control, as well as in the delivery of visas and the approval of residence and working permits. The group elected to set up five separate files, anchored in a central database. National authorities would be empowered to report persons or goods in the system based on considerations of public order or national security. An alert would then exist through the multinational network. The SIS was envisioned as a hit/no-hit system, allowing an officer to determine if a person or object was listed in the database, and, if so, what action to take. Possibilities included arrest for extradition; refusal of entry because of non-admission in another member state; seizure of goods; and discreet check

⁸⁶ Rapport au Groupe central de négociation, Union Economique Benelux, 4 décembre 1986, Binder Schengen overleg, correspondentie, 1984-1987, Council. See also Hrebly, *Libre circulation*, pp.95-96.

⁸⁷ Note relative au projet de traité conventionnel dans le domaine de la protection des données concernant le Système d'Information Schengen (S.I.S.), CNIL, 18 novembre 1988, Folder SIS – CNIL (1988-89), 18 novembre 1988, Folder SIS – CNIL (1988-89), Box 5 1914INVA, MEAE.

⁸⁸ Conclusions de la réunion tenue à Bonn le 23 novembre 1987, 15 décembre 1987, Binder SCH/C, 1985-1988, V-OJ-PV, Council.

as part of a surveillance request. In some cases, the aim would simply be to locate a missing person.⁸⁹ Twenty-four hours a day, police, border control, customs, judicial, visa, and vehicle registration officials in the contracting states — as well as certain European agencies, including, eventually, Europol — would have access to the file.⁹⁰

The implementing convention approved in June 1990 provides in great specificity for the computerised file. It is termed a ‘joint information system’, in which each state creates a national section, all supported by a ‘technical service function’ in a centralised location. The declared aim is enabling authorities in the Schengen states, ‘by means of an automated search process, to have access to alerts on persons and property for the purpose of border and police checks’. For example, any nation could issue an alert on refusing entry based on a threat to national security.⁹¹ The purpose of the database, as the implementing convention would explain, was to ‘maintain public policy and public security, including national security’, by tracking the movement of wanted or missing persons and objects across the Schengen area.⁹² It would enable ‘discreet surveillance’, as the French foreign ministry’s secretary general explained, that would enable authorities, ‘on the occasion of police checks’, to convey information to a requesting state, such as the location of the person concerned, the vehicle used, and the objects transported.⁹³

The central database would be located in Strasbourg. The French had initially submitted Paris as a candidate for the host city, while the Benelux states threw their weight behind Luxembourg. Luxembourg withdrew and pledged its support to Paris, in exchange for a concession from the French on limits to the authority of the police to pursue criminal suspects

⁸⁹ Hrebly, *Libre circulation*, pp.98-101.

⁹⁰ Brouwer, *Digital Borders*, p.49, 50.

⁹¹ Schengen Implementing Convention, arts.92, 1.

⁹² *Ibid.*, art.93

⁹³ François Scheer to Renaud Denoix de Saint Marc, 18 avril 1989, Folder Réunion du Groupe des Coordonnateurs, Bruxelles – 23 juillet 1990 et 13 sept 1990, Box 13 101SUP, MEAE.

beyond their own national territory.⁹⁴ But the French city closer to the German border ultimately won out among negotiators in 1989. The cost of the system was estimated at ECU 1.8 million, with an annual cost of ECU 0.7 million.⁹⁵ Only after approval of the implementing convention did the permanent working group release a request for proposals for the development of the computer technology required for the SIS. At first, the experts gravitated toward a French-American consortium. But the governments insisted on using domestic companies for a project that was to be an emblem of European identity. The project went to a consortium, that included the Anglo-French IT company Sema Group, the French computer company Groupe Bull, and Germany's Siemens Nixdorf Informationssysteme.⁹⁶

How quickly data added by one state would be available to the others, and for what purposes, were among the most difficult questions that confronted experts in the permanent working group. France pressed for delayed transmission, especially of information underwriting extradition. The Germans feared that such a stipulation would introduce unnecessary chokeholds into a system designed to overcome barriers to information sharing. 'In a general way, the discussion was conducted in a positive climate', the SIS working group reported. But agreement on the rules for data exchange remained an obstacle. Talks encountered difficulty when experts broached questions of national law, revealing profound differences among the states. France hesitated, requesting a pause in the negotiations at the end of 1988, in order to consult its data protection authority and develop a position addressing national autonomy and individual rights. Planning for the SIS had reached a rockier phase.⁹⁷

⁹⁴ 'Satisfaction du Bangemann'.

⁹⁵ E. Cazimajou, 'Accord de Schengen', 20 février 1989, Folder Schengen Groupe central de négociation, 1 mars 1989, Box 6 1914INVA, MEAE.

⁹⁶ Brouwer, *Digital Borders*, p.51.

⁹⁷ Compte-rendu de la réunion du sous-groupe 4 'échange de renseignements', 22 et 24 mars 1989, Folder SIS (système d'information Schengen), 1988-1989, Box 5 1914INVA, MEAE; Cazimajou, 'Accord de Schengen'.

The problem that confronted negotiators, as they prepared to finalise their work on the implementing convention, was that the SIS threatened to trench on both national authority and individual privacy. The Standing Working Group on the Schengen Information System understood the need to provide for means of data protection, but differences in national approaches were marked. France and West Germany each had comprehensive legislation regulating police files. Luxembourg had a statement of principles, and the Netherlands was in the process of drafting a measure. But in Belgium, there were no applicable rules.

France's data protection agency, the Commission nationale de l'informatique, or CNIL, led the way in sounding the alarm about the SIS. Responding to the inquiry from France's Schengen delegation in November 1988, the CNIL bluntly warned that 'a French citizen arrested in Belgium will not have the right to access and rectify information concerning him in the SIS'. Based on the draft convention viewed by the Commission, it stated in no uncertain terms: 'The rights of persons will be fixed by national laws'. This promised to leave individuals who were subject to surveillance vulnerable to shifting rules depending on the territory in which they found themselves.⁹⁸

The capacity to access and rectify information about oneself was already a central cause of privacy advocates. Notably, the principle was couched in the language of self-determination, especially in the Federal Republic, where '*Selbstbestimmung*' had entered the lexicon of privacy debates in 1983, a year before the pivotal Saarbrücken Accord between France and West Germany. That was the year that West Germany's Constitutional Court suspended the execution of a census, finding there was potential for abuse in the collection and processing of

⁹⁸ Note relative au projet de traité.

personal data. At risk, the court found, was ‘Selbstbestimmung’, or self-determination. The judgement stated that rights protected by the German constitution included protection against ‘unlimited collection, storage, use and disclosure of his/her personal data’, which entailed the ‘capacity of the individual to determine in principle the disclosure and use of his/her personal data’. In the context of data privacy, self-determination meant not collective, anti-colonial autonomy but a personal right.⁹⁹

Self-determination became a focal point of the criticism of the SIS. In Germany, the data protection officer Thilo Weichert argued that the implementing convention contained insufficient safeguards for this essential personal freedom. Schengen’s rules for the processing of personal data, he wrote in 1990, were ‘not suitable to ensure a constitutionally required minimum standard for the protection of informational self-determination’. The lack of self-determination that put privacy at risk in the Schengen area was, at bottom, a crisis of democratic self-government, he reasoned. ‘Democratic control of the SIS is impossible’, he contended. ‘Such a Europeanisation of police and prosecution conflicts with the national constitutional order’. Weichert identified a conflict between democracy and transnational policing.¹⁰⁰

Concerns about the SIS thus joined the two meanings of self-determination — the collective power to self-govern and the personal right to be sovereign over oneself, including in the digital realm. Both meanings were evoked by exponents of data privacy. Data protection, reasoned the French foreign ministry’s secretary general, ‘responds to a dual concern for the protection of individual freedom and respect for national sovereignty’.¹⁰¹ Jacques Fauvet, the

⁹⁹ Bundesverfassungsgericht, 1 BvR 209/83, Guidelines 1, 2, 15 Dec. 1983. On self-determination as an anti-colonial project, see Moyn, *Last Utopia*, p.67.

¹⁰⁰ Thilo Weichert, ‘Das geplante Schengen-Informationssystem’, *Computer und Recht*, no.1 (1990), p.62, 66.

¹⁰¹ Scheer to Denoix de Saint Marc.

head of the CNIL, addressed a letter to Emile Cazimajou, France's Schengen coordinator, in February 1989, reporting on the conclusions of a summit on Schengen and data protection that brought together representatives from the various data commissions in France, West Germany, and Luxembourg, as well as officials from Belgium and the Netherlands. 'It is important', Fauvet argued, 'for public opinion to see the Schengen Agreement as creating an area of freedom more than a police area. Recognising a right of access and rectification ... could help to spread this idea. Experience shows that even if this right is not exercised, it constitutes a warning that makes police services more vigilant with regard to the quality of the information recorded'.¹⁰²

The declaration issued as a result of the summit stressed the need to protect individual rights, even in areas where the SIS served vital security interests. The document dwelled on the 'law of foreigners and the right of asylum' in particular, observing that the exchange of data would become salient in these realms because of the need to adopt 'common procedures'. It would be incumbent on data protection officers, the declaration noted, to 'ensure in all areas that new cross-border data flows and international information systems can only be achieved if the basic data protection requirements are met in all contracting parties'. Among relevant requirements, the document emphasised the right of access and rectification as well as the need to precisely define the content and purpose of common data banks. The 1981 Council of Europe convention on Automatic Processing of Personal Data offered only 'minimum requirements', the document advised. It called for 'independent bodies' to oversee the collection, storage, and exchange of personal data.¹⁰³

¹⁰² Jacques Fauvet to Emile Cazimajou, 14 février 1989, Folder Schengen: Groupe Central Négociation, 26 oct. 1988, Box 3 101SUP, MEAE.

¹⁰³ Déclaration en matière de protection des données nominatives en relation avec le projet d'un système d'information commun des états signataires de l'accord de Schengen, 17 mars 1989, Folder Réunion Interministérielle: Préparatoire au Conseil Restreint du 19 avril 1989, Box 8 101SUP, MEAE.

Especially central for privacy advocates were questions of governance and oversight of the SIS. It was agreed at the summit, Fauvet wrote, that the convention should provide for the establishment of an independent, multinational commission, whose members would be chosen by the national data commissions, not national governments. ‘This resolution’, Fauvet judged, ‘seemed preferable to that of entrusting the control of the system’ to a national body alone.¹⁰⁴

The recommendation was not realised in the implementing convention, which explicitly specified that the right of individuals to gain access to their data files was to be governed by the law of each Schengen state. So, too, only a nation issuing an alert would be responsible for ensuring the data was accurate and would have the authority to alter, correct, or delete the data. The convention vested ‘any person’ with the power to bring a claim to ‘correct, delete, or obtain information ... in connection with an alert involving them’, but it vested ‘the authority competent under national law’ with the power to adjudicate such a claim, rather than international courts or a new international body. In the absence of transnational institutions, the protection of personal data, as information crossed borders, depended on national law. Each contracting party was to set up an authority responsible simply for managing the data in its portion of the SIS; a joint supervisory authority, comprised of two members of each national authority, would resolve disputes among them.¹⁰⁵

A single article in the convention addressed individual rights and self-determination. It banned collecting certain types of data, including information revealing racial origin, political opinions, religious beliefs, and health and sexual life, and thus adhered to the 1981 Council of Europe convention on Automatic Processing of Personal Data. Such protection, however, would not stop discriminatory checks premised on racial difference, as critics of the agreement

¹⁰⁴ Fauvet to Cazimajou, 14 février 1989.

¹⁰⁵ Schengen Implementing Convention, art.111.

anticipated. In the British press, which expected the file's extension to non-Schengen states, a warning was issued: 'As there are fewer checks on you as you cross frontiers, the more there will be whenever you come into contact with officialdom — without you even knowing about it. In particular, life will become harder for black people resident in Europe'.¹⁰⁶ This fact was understood keenly by non-Europeans, who anticipated increased difficulty moving through Europe. *Jeune Afrique Économie*, the African news magazine, posed a question fundamental to Schengen: 'won't the doors of Europe be more difficult to open in 1993 than they are today?'¹⁰⁷ The query was prescient. Since the file's inauguration in 1995, most of the personal data stored in the SIS has concerned non-Europeans — gathered to enable their exclusion from the territory of participating states.¹⁰⁸

Schengen's proponents hardly conceded the point that the accord on free movement endangered data privacy. A response to Jacques Fauvet came from France's director of legal affairs, who argued that Schengen would strengthen individual rights. 'It is clear that, in spite of its difficulties, the construction of an area common to the five states ... must be an opportunity for progress and not a regression in the field of civil liberties', the state minister wrote in the spring of 1989.¹⁰⁹ A meeting of the police and security working group following the data protection summit reflected a new consensus among delegates. As a summary explained, 'the need to emphasise the concepts of privacy and personal liberty is now not disputed'. The German delegation, 'formerly on the defensive, has even shown a great initiative in this direction'. France remained concerned for 'the principle of national sovereignty' as a component of data protection. Negotiations over the surveillance system were vexed, reported

¹⁰⁶ Jolyon Jenkins, 'Foreign Exchange', *New Statesman & Society*, 28 July 1989.

¹⁰⁷ Christophe Deschamps, 'L'Europe en un Visa', *Jeune Afrique Économie*, septembre 1990, Folder Schengen: Deuxième Semestres 1990, Box 2 101SUP, MEAE.

¹⁰⁸ Brouwer, *Digital Borders*, p.1.

¹⁰⁹ Jean-Pierre Puissoche, 'Réponse du Ministre d'Etat au Président de la CNIL', 28 mars 1989, Folder Schengen: Groupe Central Négociation, 26 oct. 1988, Box 3 101SUP, MEAE.

Le Monde that spring, because the agreement ‘touches two ultra-sensitive areas: The security of citizens and individual liberties’. Charles Josselin, a Socialist politician who helmed France’s parliamentary committee on European affairs, noted that the accord on free movement exposed a clash between a ‘libertarian culture’ — ‘we do not like cops, we do not like controls’ — and a ‘security syndrome’. The convention sought to marry these impulses, pairing freedom and security and promising a new sort of invisible yet omnipresent policing.¹¹⁰

The deference to state sovereignty was marked. Schengen did not create new norms of data protection, instead ‘asking all state parties to align themselves with the highest degree of protection of civil liberties’, as a circular accompanying the convention noted. The insistence on best practices by the individual parties, the document explained, was part of a broader effort to set ‘verifiable legal limits on the exercise of police co-operation’.¹¹¹ Rather than requiring ratification of the 1981 convention on data processing, the convention required each contracting party to ‘adopt the necessary national provisions in order to achieve a level of protection of personal data’ equivalent to the protections stipulated in the international convention.¹¹²

These measures were sufficient not only to create consensus among Schengen delegates but also to satisfy the powerful executive arm of the European Community, which prized the SIS as a model and dismissed concerns about data protection. The European Commission backed the surveillance structure in the critical year of 1989, as questions mounted about individual privacy, which proved one of the final obstacles to the approval of the convention. ‘The SIS’, reported the Commission’s vice president, Martin Bangemann, the German liberal

¹¹⁰ ‘Comment Concilier Sécurité et Libertés’, *Le Monde*, 9 avril 1989.

¹¹¹ ‘Comment Schengen S’Inscrit dans la Perspective Européenne de 1993’, p.3, Folder Liste des conventions, Box 26 101SUP, MEAE.

¹¹² Schengen Implementing Convention, arts.102-118.

who had initially expressed scepticism about a transnational police file, ‘is the key to the security aspect, allowing effective and in-depth cooperation between the police services of the Schengen partners, designed to compensate for the abolition of checks at the borders’. The problem of protecting personal data, ‘which is becoming more and more acute, must not block the system’, he argued.¹¹³ Jacques Delors, the Commission’s president, expressed a similar view the following year, observing that the Community at large was studying a common system of information exchange ‘on the model of Schengen’. The threat to ‘fundamental rights’, he claimed, was a ‘false trial’ given existing legal protections maintained by the individual states.¹¹⁴

Community institutions were not in lockstep, however. The European Parliament foresaw intrusion on civil liberties, especially as data came to be used not simply to guarantee compliance with visa and customs rules but for broader policing efforts. A June 1990 resolution, issued as the member states prepared to consider ratification of the convention, highlighted objections to the computerised information system. The European parliamentarians most feared the file’s broader utilisation, urging the five nations not to approve the agreement ‘until it is guaranteed that Interpol will be completely excluded’ from the database.¹¹⁵ Yet ten years after the formal launch of the SIS, a 2005 amendment to the convention made the system’s data available to Europol, the agency that had supplanted Interpol in Europe.¹¹⁶

Privacy and the protection of personal data remained an active area of European policymaking. The General Data Protection Regulation, adopted in April 2016 and enforceable

¹¹³ ‘Satisfaction du Bangemann’.

¹¹⁴ ‘Heure du verité’.

¹¹⁵ European Parliament, ‘Resolution sur l’accord de Schengen et la Convention sur le droit d’asile et le statut de réfugié du groupe ad hoc “immigration”’, 14 June 1990, Folder Schengen: Deuxième Semestres 1990, Box 22 101SUP, MEAE.

¹¹⁶ Council Decision 2005/211/JHA of 24 February 2005 concerning the introduction of some new functions for the Schengen Information System, including in the fight against terrorism, O.J. (L 68/44) (2005), <https://publications.europa.eu/en/publication-detail/-/publication/d0258379-0f37-4aa8-a2d9-666467d18005/language-en>.

as of May 2018, superseded Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, which was adopted by the European Parliament and the European Council in 1995, the same year that Schengen entered fully into force. It was not legally binding but designed to be transposed into national law. ‘Whereas data-processing systems are designed to serve man’, the directive began, specifying that such systems had to respect the ‘fundamental rights and freedoms’ of all, ‘whatever the nationality or residence of natural persons’. It noted that the free movement of goods, persons, services, and capital critical to the ‘functioning of an internal market’ meant also that ‘personal data should be able to flow freely’. Above all, the directive instructed member states to ‘determine more precisely the conditions under which the processing of personal data is lawful’. Possible standards included the consent of the data subject or the clear public interest served by the data processing. The directive set forth special guardrails for the transfer of data to third countries — those outside the European Community — specifying that an ‘adequate level of protection’ had to be in place. The stipulation reflected fears that personal data, once beyond the scope of European control, might be subject to abuse, including in the case of requests for asylum.¹¹⁷

Where Schengen’s architects saw in the SIS a solution to the risks posed by free movement, critics warned of risks to human rights and democracy precisely because national authorities could not properly check a system of transnational information exchange. They pointed to a gaping jurisdictional asymmetry, eroding principles of self-government and the autonomy of individuals founded on both privacy and free movement. Among those who espoused this view was the president of France’s human rights league, Yves Jouffa, a French

¹¹⁷ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, arts.7, 25, O.J. (L 281) (1995), 31-350.

Jew who evaded Nazi capture as a member of the resistance and began practicing law after the Second World War. Writing about Schengen in *Le Monde*, in the late spring of 1989, Jouffa highlighted the disjuncture between the power afforded by international security techniques and the inefficacy of national legal protections in critiquing the ‘spatial extension, or the very territorialisation of police power’ in plans for the information system. He argued: ‘To any new power of the police — and therefore of the state — must correspond a new control capable of combating it immediately and effectively if it is wrongly exercised’. He rooted his argument in the ‘very logic of human rights’, based on the principle of ‘no power without control’, as he claimed that Schengen’s security apparatus posed a risk to principles of self-government. ‘This is a crucial democratic issue’, he wrote, adding, ‘What is an authoritarian regime if not a regime in which the police take precedence over justice?’¹¹⁸ His concerns would find echoes later that fall, in speeches at the colloquy on ‘Human Rights without Frontiers’. It was a view that gained prominence, too, in the left-wing press. In 1991, *L’Humanité*, once an organ of the French Communist Party, lamented the advent of a ‘police and judicial area “Schengen.”’ An agreement designed to bring down borders, the newspaper claimed, instead represented ‘a new wall in Europe’.¹¹⁹

In the summer of 1991, as Europol gained approval in the European Council, based on Kohl’s comparison to the American FBI, the analogy was linked explicitly to the Schengen accord. Jean Boissonnat, a prominent French financial journalist, wrote in the weekly *La Tribune* of the agreement: ‘It changes everything’. Far from providing easy access for drug traffickers, terrorists, and ‘gangsters of all kinds’, he observed, ‘Schengen led to the establishment of a common police, a sort of European FBI’, embracing the parallel drawn by Kohl. Immigration

¹¹⁸ Yves Jouffa, Roland Kessous, and Gérard Soulier, ‘Contrôler la Police’, *Le Monde*, 4 mai 1989.

¹¹⁹ Jean-Michel Cordier, ‘Un Nouveau Mur en Europe’, *L’Humanité*, 4 juin 1991.

rules would be become stricter, he predicted, as ‘each state will be too happy to take shelter’ behind common rules, most notably on asylum. Remarkably, the journalist went so far as to characterise the guarantee of free movement as the first step toward collective European defence. Boissonnat, taking an extreme view, called Schengen ‘an embryo of a European army’. He saw defence cooperation as the necessary result of removing border controls. ‘Because when several countries decree that there are no more borders between them, and that the border of each one vis-à-vis the outside world is everyone’s, they decide ipso facto that their armed forces cannot defend one without defending all’, he wrote, concluding, ‘either this army will have its own existence, or Schengen will have no meaning’.¹²⁰ Schengen succeeded not only in binding national police forces. It was also understood by observers at the time as a union between domestic policing practices and modes of military defence necessary to preserve national security in a world of receding national borders.

After the meeting of the European Council in June 1991, in Luxembourg, where heads of state agreed to set up a European police agency by 1993, eight members of the European Parliament addressed a query to the European Commission. The subject was ‘EUROPOL: European Central Police Force’. They asked: ‘To what kind of parliamentary control will “Europol” be subject? What will be the legal basis for this body and pursuant to which articles of the Treaty will it be set up?’ They continued: ‘What powers will it have, what will be its relations with the national police forces and what kinds of criminal offences will it be responsible for investigating?’ Supranational institutions had been given no explicit authority

¹²⁰ Jean Boissonnat, ‘Au-delà de Schengen’, *La Tribune*, 4 juin 1991.

over the transnational police office, much less its central system of automated data exchange, which remained accountable to member states alone.¹²¹

A response came in April 1992, after the Maastricht Treaty had enshrined Europol in Community law. It was ‘for the purpose of achieving ... the free movement of persons’, the Maastricht Treaty stated, that member states would undertake ‘the organization of a Union-wide system for exchanging information within a European Police Office (Europol)’.¹²²

Information exchange as a tool of transnational policing was justified as a necessary component of free movement, a social as well as economic enterprise that was driven by the member states and subject to limited supranational regulation, as affirmed in the 1987 Commission case before the European Court of Justice. The logic of intergovernmental enterprise lay at the heart of the reply by the Commission, which was authored by vice-president Bangemann. He argued that ‘responsibility’ for formulating Europol was lodged ‘within the framework of intergovernmental cooperation’.¹²³ If parliamentary control on transnational policing were to exist, it would be exerted at the level of national governments — the same level at which border controls first came down, providing the impetus for transnational policing.

Schengen profoundly shaped the development of data-enhanced policing. By guaranteeing free movement across an expanse of open borders, the accord supplied the central rationale for new mechanisms of control premised on digital surveillance, rather than physical checkpoints. The compensatory measures that became the condition for the accord’s approval formed the bedrock of Europe-wide security as institutionalised by Europol. The agency, which

¹²¹ Written question No.2591/91, ‘Subject: EUROPOL: European Central Police Force’, Parlement européen – Troisième législature (PE-3) 6607, HAEU.

¹²² Treaty of Maastricht, art.K.1,9.

¹²³ Written question No.2591/91, Answer given by Mr. Bangemann on behalf of the Commission, 3 April 1992, PE3 6606, HAEU.

first evoked comparisons to the American FBI in planning for Schengen in the 1980s, began limited operations on the eve of Schengen's entry into force in 1995.

Schengen's influence was deeper still. It entrusted the legitimacy of a transnational security apparatus to national actors. These actors were distinguished by varied legal traditions and diverse domestic politics. So, too, Schengen left the definition of European nationality — and the privileges it afforded — up to the nation-state, under a framework that would be codified by Maastricht. Transnational protection was defined exclusively by national belonging. 'Is it feasible to plan such a "federal" police force in the absence of a genuine European federation and without real European citizenship?' the members of the European Parliament asked.¹²⁴ Later in the decade, the question would be reframed by those beyond the pale of European citizenship, who assailed the the system of transnational information exchange as a threat to human rights.

Plans to protect free movement had begun with the proclamation of Citizens' Europe. But the removal of border controls that followed from that aim gave national authorities new power to secure the distinction between Europeans and non-Europeans — without democratic restraint at the new, transnational level at which authorities were authorised to operate. In the future of free movement within the Schengen territory, lawyers, lawmakers, privacy advocates, and everyday subjects of government surveillance saw risks to self-determination that would go unchecked if democratic institutions were overpowered by a transnational security system, one designed to identify and expel foreigners who did not belong. Their lack of belonging was made evident by a simple physical absence — of papers.

¹²⁴ Ibid.

CHAPTER 6 — A *SANS-PAPIER* DECLARATION OF FREE MOVEMENT AS A HUMAN RIGHT

On 28 June 1996, several hundred undocumented immigrants began an occupation of Saint-Bernard de la Chapelle, a church on the outskirts of Paris, in a neighbourhood known as the Goutte d'Or, or Drop of Gold, which had long been home to the city's working classes. The men and women who took refuge in the church laboured as cleaners, construction workers, caterers, and coders. They were young and old; many had children. They were nationals of countries mainly in West Africa, countries on the Schengen list of undesirables. Some had been denied asylum. Inside the church, a magnificent neo-gothic building constructed a century earlier, the migrants claimed a space for themselves in a territory where they were designated illegal, or '*clandestins*'.¹

What they named themselves were the '*sans-papiers*', or 'without papers' — the documents authorising residence in France and granting permission to work.² It was this lack, this '*sans*', that the migrants placed at the centre of their self-conception and their claims for recognition. They were the foreigners meant to be excluded from the Schengen area, and denied the benefit of free movement across its common borders. Emerging from the shadows of illegality, the *sans-papiers* dissented against the Pasqua laws, France's restrictive immigration codes that served to compensate for the abolition of internal border controls. For people who were *sans-papiers*, Schengen was a laboratory of unfree movement.

This chapter explores the ordeal of unfree movement confronted by non-Europeans in the Schengen area. It addresses the hedges against open borders that developed from the

¹ Philippe Bernard, 'Des "sans-papiers" investissent une église parisienne', *Le Monde*, 30 juin 1996.

² On naming of the *sans-papiers*, see Salih Akin, 'Sans-papiers: une dénomination dans cinq quotidiens nationaux de mars à août 1997', in 'Perspectives croisées sur l'immigration', ed. Jacqueline Dahlem and Gabrielle Varro, special issue, *Mots* no.60 (1999), pp.59-75.

implementing convention and were sustained by the Schengen Information System and Europol. And it traces the insurgency of the sans-papiers, who claimed free movement as a human right. It analyses protest that burst from the Saint-Bernard church into the public spaces of Paris and moved across Europe, taking account of arguments set forth by the sans-papiers, particularly by the Senegalese migrants Ababacar Diop and Madjiguène Cissé, who became their principal spokespersons. By considering the acts and the speech — or *parole* — of the excluded in the new, transnational space of Citizens' Europe, I reveal a Schengen story about something different than the construction of the European Union. The uprising of the sans-papiers was nothing less than a conflict over citizenship, immigration, asylum, and the guarantee of free movement.³ That conflict unfolded not only in diplomatic summits, national parliaments, and European courts but in places as sacred as churches and as profane as the streets of Paris. It exposed the costs of Schengen's logic of freedom and exclusion.

By calling themselves 'sans', the migrants echoed the sans-culottes, who had transformed their lack of trousers into a symbol of revolutionary class identity and rights claims. In France, as across the Schengen countries, the sans-papiers were outcasts seeking a 'right to have rights', in the classic formulation of Hannah Arendt, who studied the condition of the stateless after the Second World War. As Arendt wrote, 'The fundamental deprivation of human rights is manifested first and above all in the deprivation of a place in the world'.⁴ Rights entailed a place to be — but also within which to move.

At the Saint-Bernard church, the sans-papiers claimed refuge denied to persons classified as illegal by the French state.⁵ There, they built what French anthropologists and

³ On speech and space in sans-papier mobilisation, see Daniel Veron, 'Quand les sans-papiers prennent la parole: Espaces d'interlocution et énonciation du tort', *Variations*, no.18 (April 2013).

⁴ Hannah Arendt, *The Origins of Totalitarianism* (New York, 1951), p.296.

⁵ On sanctuary and 'nonpersons', see Linda Rabben, *Sanctuary and Asylum: A Social and Political History* (Seattle, 2016), p.219.

geographers came to term, ‘*La ville des sans-papiers*’, or ‘The city of the sans-papiers’.⁶ But on 23 August 1996, the sans-papiers were forcibly removed from their sanctuary. That night, 20,000 people marched in Paris in support of the unfree migrants.⁷ It was a landmark in the transnational protest of the sans-papiers. As the movement took root in Germany, activists proclaimed ‘*Kein Mensch ist illegal*’, or ‘No one is illegal’. The protest persists to the present day, compelling attention to the barriers against the movement of persons that stand in opposition to the free flow of commodities and capital in an era of ascendant globalisation.⁸ At the time of the Saint-Bernard occupation, the sans-papiers’ mobilisation was not aimed only or always at Schengen. Yet Schengen was its terrain — as a symbol and as a place of germinal significance in Europe’s establishment of free movement and its boundaries.

The unfree movement of the sans-papiers, driven out from their refuge in Saint-Bernard by the invasion of the Parisian police, prompted a legal challenge that tested the balance between the rules of national security and the guarantees of international law. Mounted by the sans-papier Madiguène Cissé, it reached the European Court of Human Rights at the century’s end. But the court gave scant recognition to the claims of the undocumented to rights of free movement, carving out an exception only to protect family life.⁹

In examining the origins, aspirations, and outcomes of the Saint-Bernard protest, this chapter draws on legislative debates, judicial decisions, press accounts, contemporary documentaries, and narratives written by sans-papier migrants. It juxtaposes the arguments of

⁶ Stefan Le Courant, ‘La Ville des Sans-papiers: Frontières Mouvantes et Gouvernements des Marges’, *L’Homme*, no.219-220 (July/December 2016), pp.209-32. On ‘right to the city’, see David Harvey, *Rebel Cities: From the Right to the City to the Urban Revolution* (London, 2012).

⁷ Thomas Nail, ‘Sanctuary, Solidarity, Status!’ in *Open Borders: In Defense of Free Movement*, ed. Reece Jones (Athens, Ga., 2019), p.25.

⁸ On continuing struggles in Germany, see Bernard Schmid, ‘L’Allemagne Aussi Régularise’, *Plein Droit*, 73, no.2 (2007), pp.31-34. On people and capital, see Robert E. Goodin, ‘If people were money...’ in *Free Movement*, ed. Barry and Goodin, pp.6-22.

⁹ *Cissé v. France*, European Court of Human Rights, Application no.51346/99, (9 April 2002).

lawmakers and illegal aliens. The account illuminates how the expansive principle of free movement articulated by the Senegalese migrants Cissé and Diop found affirmation in the work of moral and political philosophers, who defended the cause of the sans-papiers and incorporated their ideas into theories of human rights, citizenship, and state violence.

In the extensive literature on the sans-papiers, no attention has been directed to the connections between the occupation at Saint-Bernard and the abolition of border controls in the Schengen states and the guarantee of free movement for European nationals. It has not been documented how France's Pasqua laws — which provoked the sans-papier movement — arose as an effort to manage the risk posed by the Schengen accord. In doing so, this chapter is informed by but differs from social scientific studies that have overlooked questions of origins in investigating the actions of the sans-papiers within the classificatory framework of social movement theory.¹⁰ For instance, Johanna Siméant's *La Cause des Sans-Papiers* categorises the protest activity in terms of so-called contentious politics, enlisting paradigms of relative frustration and resource mobilisation.¹¹ My account is informed as well by the interpretative approach of sociologists and political theorists. The French sociologist Smaïn Laacher addresses the discursive construction of nationhood, hospitality, and desirability in sans-papier aspirations, and the struggle over papers has been read as a quest for recognition, both juridical and social, as conceptualised by the German philosopher Axel Honneth.¹² But historians have

¹⁰ See Anne McNevin, 'Political Belonging in a Neoliberal Era: The Struggle of the Sans-Papiers', *Citizenship Studies*, 10, no.2 (May 2006), pp.135-51. Geographers and anthropologists have studied spatial organisation, insecurity, and state power, see Le Courant, 'La Ville des Sans-papiers'. Comparative studies abound, including Holk Stobbe, *Undokumentierte Migration in Deutschland und den Vereinigten Staaten: Interne Migrationskontrollen und die Handlungsspielräume von Sans Papiers* (Göttingen, 2004); Justus Uitermark and Walter Nicholls, 'From Politicization to Policing: The Rise and Decline of New Social Movements in Amsterdam and Paris', *Antipode*, 446, no.4 (2014), pp.970-91. See also Matthew Carr, *Fortress Europe: Dispatches from a Gated Continent* (New York, 2016).

¹¹ Johanna Siméant, *La Cause des Sans-papiers* (Paris, 1998). See also Charles Tilly and Sidney Tarrow, *Contentious Politics* (Boulder, Colo., 2006).

¹² Smaïn Laacher, *Mythologie du Sans-papiers* (Paris, 2009); Lecture critique: 'La lutte pour la reconnaissance - Axel Honneth Paris, Cerf, Coll. 'Passages', Traduit de l'allemand par Pierre Rusch', *Recherches familiales*, no.1 (2004), pp.149-55, <https://www.cairn.info/revue-recherches-familiales-2004-1-page-149.htm>.

not analysed the claims of the sans-papiers at Saint-Bernard, much less traced their resistance to the limits of free movement across borders or their pursuit of recognition in the European Court of Human Rights.¹³

When Schengen abolished borders, allowing free movement to persons by virtue of their nationality, not simply as workers, migrants to its territory encountered new restrictions enforced at external frontiers as well as policing that penetrated into workplaces, homes, and houses of worship. Persons entitled to traverse Citizens' Europe were not workers without papers, who were rendered 'illegal' as Europe prepared to realise a single market where people, goods, capital, and services would circulate freely. France's Pasqua laws, enacted after Schengen's formation and seeking 'zero immigration', expressed a draconian response to the risks of open borders.¹⁴ By exploring the sans-papiers' insurgency as Schengen's history, this chapter reveals how the creation of a transnational territory of free movement evoked transnational protest against unfree movement.

The August confrontation inside the Saint-Bernard church marked the climax of a conflict between the sans-papiers and the French government that had been intensifying for almost half a year. The conflict emerged from the French government's effort to gain greater authority over immigration and asylum as border controls fell across Western Europe. The anti-

¹³ Peter Gatrell addressed the main aims of the sans-papiers in studying migration and European transformation, see *Unsettling of Europe*, pp.248,330. French historians have focused on a longer contest between the metropole and former colonial subjects, see Gregory Mann, 'Immigrants and Arguments in France and West Africa', *Comparative Studies in Society and History*, 45, no.2 (April 2003), pp.362-85.

¹⁴ 'Un entretien avec Charles Pasqua', *Le Monde*, 2 juin 1993.

immigrant policies made it harder for foreign migrants to live and work in France, engendering their protest.

The battle lines were drawn across town from Saint-Bernard in the church of Saint-Ambroise, where hundreds of Africans living in France without papers first gathered on 18 March 1996. *Le Monde* called the act of occupation ‘unprecedented’.¹⁵ The immigrants were mostly from Mali, but also from Mauritania, Côte d’Ivoire, Senegal and Guinea. They demanded the regularisation of their immigration status and the right to work free from the fear of seizure and deportation. One-hundred and sixty-five people remained in the church overnight. Some began a hunger strike.¹⁶

The encampment lasted for four days before police conducted a raid at dawn. ‘Women here, men here’, officers shouted. They also enforced a racial separation, as authorities removed the mostly white journalists and representatives of humanitarian organisations from the crowd of dark-skinned church dwellers.¹⁷ Two different authorities aimed to create order amid chaos. Inside the church stood a police prefect, Philippe Massoni, orchestrating the removal efforts, while Jacques Gaillot, the Bishop of Évreux, preached from beyond the metal barricades. ‘When I see that, I’m ashamed’, the religious leader proclaimed. ‘Even a church is no longer a place of welcome for people’. Abbé Pierre, a Catholic priest and Resistance fighter during the Second World War, cautioned the sans-papiers not to respond with violence. ‘Resist the temptation of anger, be non-violent’, he counselled. Then, he spoke into a mobile phone,

¹⁵ ‘Trois cents Africains sans papiers occupent une église à Paris’, *Le Monde*, 20 mars 1996.

¹⁶ Philippe Bernard, ‘Les trois cents Africains qui occupaient une église à Paris ont été évacués par les CRS’, *Le Monde*, 23 mars 1996 (hereafter Bernard, ‘évacués’).

¹⁷ Bernard ‘évacués’. On the racial categorisation enforced by French police, see Simon Behrman, *Law and Asylum: Space, Subject, Resistance* (Abingdon, 2018), p.206.

delivering the same message to an adviser to Prime Minister Alain Juppé. Forty-three people were detained and subject to identity checks.¹⁸

The conflict over papers and unfree movement that erupted inside the religious sanctuary arose from restrictive immigration laws bearing the name of Charles Pasqua, the former interior minister, a Gaullist who justified the hard-line measures by pointing to the removal of border controls under the Schengen Agreement. The measures he was championing, he said in legislative debate in 1993, responded to the ‘consequences of the recent achievements of European cooperation’, namely by ‘the Schengen group’, placing an emphasis on the five countries that had stepped out ahead of the rest of Europe in pledging to remove controls at their common borders. The commitment to free movement, he said, ‘must be the springboard for more rigorous and better-coordinated actions’. The measures, which were crafted by the interior ministry and approved in the National Assembly, withheld legal residence and work permits, among other provisions.¹⁹

The Pasqua laws crowned the French government’s undertaking, two decades in the making, to arrest the flow of immigrants that had brought workers from North Africa and other former colonies to power the postwar economic recovery.²⁰ In the 1970s, the oil shocks that slowed growth led governments across Western Europe to close their doors to guest workers.²¹ The changes announced in 1974 suspended new labour immigration from countries outside the European Community, justified based on the notion that France had reached its

¹⁸ Bernard ‘évacués’; Philippe Bernard, ‘Jacques Toubon accepte d’exempter de poursuites les familles des sans-papiers’, *Le Monde*, 3 février 1996.

¹⁹ Débats Parlementaires, Assemblée Nationale, 1 séance du 15 juin 1993, <http://archives.assemblee-nationale.fr/10/cri/1992-1993-ordinaire2/052.pdf> (hereafter Débats, 15 juin).

²⁰ On the reversal, see Rosemarie Scullion, ‘Vicious Circles: Immigration and National Identity in Twentieth-Century France’, *SubStance*, 24, no.1/2, issue 76/77 (1995), pp.30-48.

²¹ James F. Hollifield, *Immigrants, Markets, and States: The Political Economy of Postwar Europe* (Cambridge, Mass., 1992), pp.57,58; James F. Hollifield, ‘L’Etat Français et l’Immigration: Problèmes de Mise en Oeuvre d’Une Politique Publique’, *Revue Française de Science Politique*, 42, no. 6(December 1992), pp.943-963. See also Taguieff and Weil, “‘Immigration.’”

‘threshold of tolerance’ — a powerful rationale for conservative retrenchment under president Valéry Giscard d’Estaing.²² French restrictions were not as categorical as they were in other nations, such as Germany. The French government, which had previously encouraged permanent immigration, permitted exceptions, recognising that certain industries, namely mining and construction, required a continued source of cheap labour. Seasonal recruitment was still allowed in other sectors, such as agriculture. Still, the number of new work permits fell dramatically, even as the population of ethnic minorities continued to expand naturally, as well as through family reunification.²³

Shifts in postwar immigration policy had previously prompted mobilisation of the excluded. At the end of 1972, as oil prices began to rise, economic dislocation led the interior ministry to clamp down on migration flows and threaten those lacking status with deportation. Random identity checks expanded, instilling fear in immigrant communities. With the help of the chaplain of the Young Christian Workers in Valence, in southeast France, nineteen Tunisians began a hunger strike. On Christmas Eve, the parish priests of four nearby churches rang the bells in solidarity with the strike. As news of the protest spread nationally, the government, in a bid to tamp down public outrage, regularised the status of the nineteen immigrants. The standoff was a preview of how the government’s intensifying efforts to curtail immigration would bring the undocumented out of the shadows, leading to a nationwide contest over the privileges of citizenship, the responsibilities of the state, and the rights of non-nationals.²⁴

²² On d’Estaing’s conservative policy, see Chin, *Crisis of Multiculturalism*, pp.113-14.

²³ Gary P. Freeman, ‘Immigrant Labour and Racial Conflict: The Role of the State’, in *Migrants in Modern France: Population Mobility in the Later 19th and 20th Centuries*, ed. Philip E. Ogden and Paul E. White (London, 1989), pp.166,167; Hollifield, *Immigrants, Markets, and States*, pp.74-83.

²⁴ Béatrice Theiller, Roseline Sestacq, and Eva Lumanisha, *La République à l’Ecole des Sans-Papiers: Trajectoires et Devenir de Sans-papiers Régularisés* (Paris, 2008), p.19; Vittorio Longhi, *The Immigrant War: A Global Movement against Discrimination and Exploitation* (Bristol, 2013), p.61; Karen Wirsig, ‘Stepping out of the Shadows in France’, 20

But it was the Pasqua laws that brought the struggle between the state and immigrant outsiders to a head, forcing a reckoning with France's retreat from its position as a place of welcome for foreigners — a post-revolutionary tradition rooted in universal ideas of human rights, reaffirmed after the Second World War. There were two components of the legislation. The first Pasqua law, approved in 1986, the year after the initial Schengen accord was signed, tightened residency restrictions and facilitated deportations, including by denying automatic citizenship to children born in France — revoking a right that dated to the era of the French Revolution.²⁵ Some of these changes were rolled back in 1989 by Pasqua's Socialist successor, Pierre Joxe, only to be reinstated by the second Pasqua law, introduced in 1993, as borders were poised to come down across the European Community to enable the internal market's completion. The second law made it more difficult for immigrants to attain regular status. Seeking to discourage migrants from settling in France, it withheld social care and changed the appeals process for unfavourable immigration decisions.²⁶ A coda to the Pasqua laws came in 1996, bearing the name of the new interior minister, Jean-Louis Debré, a son of former prime minister Michel Debré. The Debré law, motivated in part by difficulties accompanying the entry into force of Schengen in 1995, required private citizens to notify the government if they were sheltering non-European immigrants. So, too, the measure was thought to respond to the uprising of the *sans-papiers*, designed to choke off support for the undocumented.²⁷

October 2010, <https://socialistworker.org/2010/10/20/out-of-the-shadows-in-france>. See also Gérard Moreau, 'Vingt Ans de Politique d'Immigration', *Revue Française des Affaires Sociales*, 51, no.2(April-June 1997), pp.17-28.

²⁵ 'Les conséquences de la loi du 9 septembre 1986 sur l'entrée et le séjour des étrangers', *Hommes & Migrations*, 1118(1989), pp.22-28.

²⁶ Edwige Rude-Antoine, 'Statut juridique et devenir des jeunes étrangers non européens', *Hommes & Migrations*, 1178, 1 (1994), pp.35-40; Mann, 'Immigrants and Arguments'; Emmanuelle Néraudau-d'Unienville, *Ordre Public et Droit des Etrangers en Europe: La Notion d'Ordre Public en Droit des Etrangers à l'Aune de la Construction Européenne* (Brussels, 2006), p.31; Alec G. Hargreaves, *Multi-Ethnic France: Immigration, Politics, Culture and Society*, 2nd ed. (London, 2007), p.180.

²⁷ On Debré's opposition to Schengen, see Sandra Lavenez, *The Europeanisation of Refugee Policies: Between Human Rights and Internal Security* (Aldershot, 2001), p.186; Thierry Blin, 'Une approche de la construction des cadres de l'action de "Saint Bernard" au mouvement contre le projet de loi Debré', *Année Sociologique*, 50, no.1 (2000), p.119. On the Debré measure as a response to *sans-papiers* mobilisation, see Behrman, *Law and Asylum*, p.207.

Pasqua's aim was unambiguous — to halt immigration. 'France has been a country of immigration; it doesn't want to be one anymore', the measure's author said in June 1993, declaring the goal of 'zero immigration'.²⁸ The legislation was not able to achieve that outcome, but it got close, reducing immigration into France to fewer than 100,000 people per year between 1993 and 1999 — among the lowest rates in nearly half a century. At the same time, the decision to do away with citizenship as a right obtained by birth swelled the population of young and undocumented people.²⁹ As for removals, the year 1994 saw 11,281 return to their home countries; 10,058 were returned in 1995. Still, this was a fraction of the number of immigrants whose deportations were ordered by French prefects but thwarted because many immigrants lacked documents dictating where they should go. The numbers were disappointing to the government, whose attempt to control immigration unfolded in the context of a rising electoral threat from the Front National, led by Jean-Marie Le Pen.³⁰

Legislative debate in the summer of 1993 reveals that the removal of border controls under Schengen was a crucial justification for the Pasqua laws. Right-wing lawmakers complained that the number of immigrants seized at the border outstripped the number returned to their home countries, and argued that a more rigorous national response was required to compensate for inaction at the international level. To be sure, they acknowledged that national controls alone were no longer sufficient. 'The control of migratory flows only on French borders no longer makes sense and would not function outside the European framework', said Jean-Pierre Philibert, a deputy with the right-wing Union for French Democracy. Yet the strengthening of controls at external borders promised by Schengen had

²⁸ 'Un entretien avec Charles Pasqua'.

²⁹ See Christopher Rudolph, *National Security and Immigration: Policy Development in the United States and Western Europe Since 1945* (Stanford, 2006), p.156; Eleonore Kofman, Madalina Rogoz, and Florence Lévy, 'Family Migration Policies in France', *NODE Policy Report* (Vienna, BMWF/ICMPD, 2010), p.5.

³⁰ Philippe Bernard, 'En 1995, le nombre d'étrangers 'sans papiers' reconduits à la frontière a chuté de 10%', *Le Monde*, 5 mars 1996; James A. Winders, *Paris African: Rhythms of the African Diaspora* (New York, 2006), p.108.

not yet been fully achieved, making national action crucial. The legislation was aimed at preventing abuse of French munificence, he argued, in the form of fraudulent asylum claims or ‘marriages of convenience’.³¹ Just as Schengen was a laboratory of free movement, so, too, French lawmakers hoped, the Pasqua measure might be a model for immigration enforcement. Jacques Myard, another conservative, echoed Philibert in recognising the international dimension of migration control. ‘France is only an element of the problem’, he said. Nevertheless, he reasoned, ‘we can set an example at the European level’. France and its partner nations have ‘already signed the Schengen Agreement, which is a good agreement but that seems to me to have gaps’. Echoing right-wing arguments levelled against Schengen in the debate over ratification, the lawmaker argued that the signatory states, in the rush to protect human mobility, had left themselves defenceless. ‘It was useless to confuse freedom of movement with lack of control’, he observed, accusing the government of ‘wanting to remove the controls at the internal borders too quickly’. France had to assert its authority, Myard declared, as applause rang out among the Gaullist, right-wing deputies.³²

Next to speak in the assembly debate was Pasqua, whose full title was Minister of the Interior and Territorial Planning, capturing his authority over the physical integrity of the nation. He began by seeking to reconcile the competing identities and obligations of the state. ‘France is a republican state’, he said. ‘France is also a state of law. France is, first and foremost, a country conscious of its history ... and proud of the idea that it represents, in the eyes of other countries, that which invented the rights of man and the rights of peoples to self-determination’. Its vaunted traditions notwithstanding, France had limits, he emphasised, in reasoning that echoed the ‘threshold’ argument that gained currency in the Giscard d’Estaing

³¹ Débats, 15 juin, pp.1609, 1610.

³² Ibid., p.1613.

era. 'France is not an El Dorado for all', Pasqua said. It was not, he noted, 'a new frontier for all the misfortunes of the world'. Its international obligations, Pasqua said, would not stop France from maintaining 'control over its identity'. France, he promised, 'intends to define for itself the situation, the nature, the origin of those who are or will be associated with the national community, in the spirit of the Republic's values'. Arguments reaching further back than the 1970s seemed to figure in his language, which recalled the anti-European polemics authored by the elder Debré, who saw himself as the guardian of De Gaulle's legacy. For both interior ministers, republicanism meant the right of the French people to control the composition of their own national community. This right to self-government, Pasqua argued, gave the state its power to exclude.³³

Included in Pasqua's defence of his legislation was a guarantee that it would not affect the fundamental right to asylum inscribed in the Geneva convention and incorporated into French law. Rather, he said, the measure clarified the state's authority to prevent abuse of its humanitarian guarantees. Safe haven in France, he allowed, could not be refused for reasons outlined in the legislation. But he envisioned that international agreements might help clarify the scope of national responsibility. In particular, he hailed the adoption of the Dublin regulation, which resonated with the 'the Schengen Accord of 19 June 1990', he said. Schengen and Dublin signalled the beginning, Pasqua said, of a 'common European policy', one that he welcomed because it appeared to be in line with new French restrictions.³⁴

Where the Pasqua law encountered legal trouble, it turned out, was in heeding principles proclaimed in Schengen. The French Constitutional Council, the same court where deputies

³³ Ibid., p.1613.

³⁴ Ibid., p.1615. Racial exclusion was the key motivation for tightening asylum rules, argues the sociologist Steve Garner in 'The European Union and the Racialization of Immigration, 1985-2006', *Race/Ethnicity: Multidisciplinary Global Contexts*, 1, no.1 (Autumn 2007), pp.61-87.

had taken their case against Schengen, invalidated several provisions of the law in an August 1993 judgment, including the new procedures for investigating marriages thought to reflect expediency rather than genuine bonds. The most noteworthy judicial finding, ultimately yielding a constitutional amendment mirroring changes approved in Germany at the end of 1992, was that lawmakers had erred in directing the government to refuse an asylum claim already rejected in another state — a guideline drawn directly from the Schengen implementing convention, and embraced in the Dublin regulation. Pasqua turned to the Conseil d'Etat, France's highest administrative court, which found that an amendment of the 1958 constitution was necessary to remove France's obligation to examine an asylum claim already considered by another European state. So, too, was such a change necessary, then, for France's implementation of Schengen and Dublin, just as a revision was required, in the eyes of German lawmakers, to West Germany's postwar Basic Law. An amendment was adopted by French lawmakers in November 1993, specifying that France could, but was not obligated to, review an asylum claim already examined by another European nation.³⁵

The draconian character of the Pasqua law became a target of fierce irony in the European press. *Globe Hebdo*, a left-wing French weekly, depicted Pasqua as a North African on its cover in the summer of 1993. The caricature illustrated how easily a 'real Frenchman can be transformed into a foreigner and thus into a potential victim of discrimination', as the newspaper noted, in an observation amplified by the German press, which reproduced the depiction in its own pages. The cartoon satirised the fierce, anti-immigrant attitudes of public officials, which drew attention in France and beyond.³⁶

³⁵ See Soltesz, 'Implications', pp.303-5.

³⁶ Reproduced in *Der Spiegel*, 7 Juni 1993.

International officials also condemned the Pasqua laws. In a report to the United Nations Human Rights Commission in early 1996, as the claims of the sans-papier burst forth on the streets of Paris, a special investigator, Maurice Glélé-Ahanhanzo, identified a ‘wave of xenophobia currently sweeping over France’ feeding on ‘declarations made for electioneering purposes by politicians’ — declarations that make ‘foreigners the scapegoats, particularly if they are Black, Arab or Muslim’ — and threatening France’s ‘image’ as the ‘original homeland of human rights and the rights of the citizen’. He placed blame on the measures named for the former interior minister, finding that, ‘Xenophobia in France is today sustained by the Pasqua Acts’. He advised that the legislation be revised to respect both ‘the French ideal of human rights’ as well as ‘international conventions on the rights of the individual’. In particular, he decried the denial of the right of asylum and the forced repatriation of “‘illegal” entrants’, policies that ‘constitute nothing less than an act of self-repudiation’. The United Nations investigator implored: ‘What has become of human dignity?’³⁷

The same question was asked by the immigrants who would come to rally behind the label ‘sans-papiers’, driven from their jobs by the new law. They wandered the streets of Paris, looking for refuge from random checks, in a situation that *Le Monde* described as a ‘national psychodrama’.³⁸ Meanwhile, ministers in parliament gave notice that more checks were being lifted at the land borders, in compliance with Schengen, on the one year anniversary of its full entry into force. The treaty continued to elicit fierce opposition from right-wing lawmakers, who considered it a ‘renunciation of sovereignty’, prompting the government’s muscular

³⁷ Maurice Glélé-Ahanhanzo, *Implementation of the Programme of Action for the Second Decade to Combat Racism and Racial Discrimination*, Commission on Human Rights, E/CN.4/1996/72 (15 February 1996), <http://hrlibrary.umn.edu/commission/country51/78add1.htm>. See also Isabelle Vichniac, ‘Un rapport des Nations unies critique les ‘lois-cadenas’ sur l’immigration’, *Le Monde*, 16 avril 1996.

³⁸ Bernard, ‘Des Africains qui occupaient un gymnase sont menaces d’expulsion’, *Le Monde*, 26 mars 1996.

response to the undocumented.³⁹ The word ‘regularisation’, the press noted, was ‘taboo’ for any government projecting resolve on the immigration issue. But judges continued to release many of the detained, faulting the authorities for improper identity checks and arrest procedures.⁴⁰

The unprecedented action taken by immigrants in the spring of 1996 was an attempt to chart their way out of the shadows. Plans were born in the housing projects of eastern Paris. Michel Rocard, a Socialist politician who had been the nation’s prime minister under François Mitterrand, acted as a general spokesman for the humanitarian associations — Droits Devant, SOS-Racisme, Doctors of the World — which condemned the government’s harsh response to the outbreak of immigrant resistance, and helped organise mass demonstrations. The country’s interior minister, Jean-Louis Debré, defended the arrests and expulsion orders, saying that flouting the country’s immigration laws would contradict the ‘principles of the Republic and of democracy’. Rocard, on the other hand, said he was ‘ashamed’ of his country, arguing that the episode made stark the need to ‘revisit the Pasqua laws’, as he told protesters numbering more than a thousand following deportations in March.⁴¹ But Rocard was an imperfect spokesman for government opposition. His notorious statement, as prime minister in 1990, that, ‘France can no longer take in all of the world’s destitute’, had been a cudgel for Pasqua as he pushed his restrictive measure in 1993, wrapping immigration control in the language of republicanism and liberal ideas of self-government. The sans-papiers sought a decisive break from the centrist consensus, which had solidified in the 1970s and 1980s, that France needed to slow immigration in order to integrate those already within its borders. They took aim at the Pasqua

³⁹ Henri de Bresson, ‘La bonne volonté européenne du gouvernement s’arrête à la frontière belge’, *Le Monde*, 27 mars 1996.

⁴⁰ Philippe Bernard, ‘La loi sera appliquée “avec humanité” aux Africains sans papiers’, *Le Monde*, 11 avril 1996.

⁴¹ Bernard, ‘Des Africains qui occupaient’.

laws, and, by extension, at Schengen, which together exemplified the compromise between liberty and exclusion.⁴²

The influence of the Pasqua laws on the actions of the sans-papiers reveals the essential connection between their protest and the guarantee of free movement under Schengen, which protected European nationals while providing for tighter controls on non-nationals. The sans-papiers called attention to contradictions at the heart of transnational movement, which was exercised across the borders of Europe while states forged afresh exclusive national dominion over foreigners within the territory of Citizens' Europe.

The act of occupation at Saint-Ambroise gave rise to a burgeoning grassroots campaign that built dramatically over the course of five months, reaching a climax with the expulsion of the immigrants in August from Saint-Bernard. The activity was recorded in the popular press, narrated on the front pages of newspapers as ideologically disparate as *L'Humanité* and *Le Figaro*. At first, the headlines in *L'Humanité* were frank: 'Expulsion confirmed for 39 Africans'.⁴³ By July, the newspaper was enlisting more dramatic language, declaring Saint-Bernard the 'final refuge' of the immigrants.⁴⁴ *Le Figaro* focused on political combat. 'But the interior minister seems inflexible', a report in August noted, concluding with a lengthy quote from Debré.⁴⁵ The

⁴² Quoted in Scullion, 'Vicious Circles', p.36. See also Siméant, *Cause des Sans-papiers*; Vincent Decroly, 'Le Devoir d'Asile', in *A la Lumière des Sans-papiers*, ed. Antoine Pickels (Brussels, 2001), p.235.

⁴³ 'Saint-Ambroise: Expulsion Confirmée pour 39 Africain's', *L'Humanité*, 26 mars 1996.

⁴⁴ 'Saint-Bernard, dernier refuge des sans-papiers', *L'Humanité*, 1 juillet 1996.

⁴⁵ A.H., 'Sans-papiers: Le Front Commun de la Gauche', *Le Figaro*, 21 août 1996.

controversy reached publishing houses and found expression in artefacts of mass culture, such as a video journal called '*La Ballade des sans-papiers*', or 'The Ballad of the Sans-papiers'.⁴⁶

Saint-Ambroise was a crucible for the discovery of collective agency, as the irregulars came to see their fight in the tradition of the struggle for workplace justice. The undocumented workers joined the power of individual testimony to the force of mass politics. 'We have been here for years', one said in the video journal. Previously, they had sought to resolve their status on their own, going individually to the prefecture and receiving no suitable response. 'So we said, "We have to get together."' Organising intensified in the tenements of eastern Paris, where ethnic groupings blended, and they set their sights on Saint-Ambroise because it was nearby. Their protest intensified following their first expulsion, as they regrouped in the Japy gymnasium, a sports hall down the boulevard from the church. Following their expulsion from the gymnasium, 130 immigrants found safe haven in the bookshop of the Revolutionary Communist League. From there, they went to the headquarters of the postal and telecommunications union, and then the legal nonprofit *Droits Devant*.⁴⁷ The alliance of the irregulars with organised labour presaged the more explicit effort, in the following decade, to model their actions on union activity.⁴⁸

Many sans-papiers paid a steep price for their protest. On 27 March, five days after the expulsion from the church, 52 Malians were deported to Bamako, mainly single men. The authorities promised to examine the situations of families more closely. A military plane was required to transport them because six trade unions at Air France said they would not

⁴⁶ 'La Ballade des sans-papiers', in *Sans-papiers: Chroniques d'un Mouvement*, IM'média/Reflex (Paris, 1997) (hereafter *Chroniques*).

⁴⁷ *Chroniques*, p.16.

⁴⁸ See Marcus Kahmann, 'When the Strike Encounters the Sans Papiers Movement: The Discovery of a Workers' Repertoire of Actions for Irregular Migrant Protest in France', *Transfer: European Review of Labour and Research*, 21, no.4 (November 2015), pp.413-28.

participate in the deportation of the immigrants.⁴⁹ In the press, the removals were seen as a sign of the resolve of the undocumented, who had ‘deliberately put themselves in danger’.⁵⁰

It was the threat of expulsion that propelled the immigrants to declare their lack of papers — to make this absence the basis of their self-conception and their political strategy. Following their second expulsion, from the Japy gymnasium, they decided to call themselves ‘*sans-papiers*’. The allusion to the revolutionary traditions of the French republic set the immigrants in opposition to a new *ancien régime*. They were intent not only on obtaining papers, but, like the *sans-culottes*, on securing a ‘new space of liberty’, as Ababacar Diop, the immigrant spokesperson, who had come from Senegal, explained.⁵¹ A more confrontational approach was favoured by Cissé, the other spokesperson. Also from Senegal, she had arrived in France in 1993, five years after Diop. A student of German philosophy, she stated the movement’s aims unequivocally — they sought the regularisation of their situations and the revocation of the Pasqua laws and the associated Debré law. ‘It’s because of these laws that we’re here today’, she said. These were the rules that had denied them papers, making them ‘*sans*’.⁵²

As the plight of the *sans-papiers* reached the front pages of the popular press, the immigrants attracted allies not only in the world of politics and humanitarianism, but also in the arts and the academy. At the end of March, they found refuge in La Cartoucherie, a theatre located in an old munitions factory on the eastern edge of Paris. They were taken in by Ariane Mnouchkine, a stage director who had founded an avant-garde ensemble at the theatre in 1964. Molière’s *Tartuffe* was running when the *sans-papiers* took refuge at the theatre. Every audience for the comedy was also an audience for the immigrant protest. It was Mnouchkine, along with

⁴⁹ Behrman, *Law and Asylum*, p.206.

⁵⁰ ‘Les “clandestins” et l’Etat’, *Le Monde*, 3 avril 1996; *Chroniques*, p.17.

⁵¹ Ababacar Diop, *Dans la Peau d’un Sans-papier* (Paris, 1997), pp.108, 95, 102.

⁵² *Chroniques*, p.17.

the French oncologist and health official Léon Schwarzenberg, who first proposed the idea of mediation between the sans-papiers and the government. She was also among a group of cultural figures — which included philosophers and public intellectuals such as Pierre Bourdieu and Étienne Balibar — who issued on 25 March an ‘appeal in solidarity with foreigners’. The sans-papiers credited the declaration with bringing the immigrant cause to popular attention, inspiring 2,500 people to march in a demonstration at La Place Denfert-Rochereau, a public square in Montparnasse.⁵³

A mediator came forward in the figure of Stéphane Hessel. Born German, he was naturalised as a French citizen in 1939. Hessel was a former member of the French Resistance and a survivor of Nazi concentration camps. After the war, he worked as a diplomat, including at the UN, where he was an observer to the drafting of the Universal Declaration.⁵⁴ He led a team of mediators that included the philosophers Paul Ricoeur and Edgar Morin; the journalist Noël Copin; the priest father André Costes; and Antoine Sanguinetti, a former admiral in the French Navy.⁵⁵ Hessel pledged to examine the circumstances of each immigrant and endeavour to find a legal resolution. Meanwhile, the sans-papiers had moved from the theatre to an unused warehouse belonging to the French National Railway Company, or SNCF. Their stay was authorised by rail workers forming part of the French Democratic Confederation of Labour, one of the country’s main confederations of trade unions. As Hessel undertook to resolve the standoff, the lack of a clear response from the government prompted 55 of the irregulars to launch a fresh hunger strike. The tactic was opposed by the mediators, as well as by humanitarian organisations, whose leaders argued that no one should die for the cause of

⁵³ Diop, *Peau*, p.108; Madjiguène Cissé, *Parole de Sans-papiers* (Paris, 1999), p.58.

⁵⁴ ‘Mort de Stéphane Hessel à l’âge de 95 ans’, *Le Monde*, 27 februar 2013.

⁵⁵ Diop, *Peau*, p.109.

papers.⁵⁶ The strike was only called off once the interior ministry agreed that certain criteria would be taken into account in the examination of the dossiers of the sans-papiers. Special categories included parents of French children, gravely sick people, rejected asylum seekers, and immigrants who were deeply integrated in French society.⁵⁷

Summons after summons brought the sans-papiers to the prefecture, but no solution came. Women in the group came forward, organising a ‘women’s march’ to highlight their suffering. In a communiqué to the press on 9 May 1996, they announced themselves as ‘the female sans-papiers of Saint-Ambroise’ and said they had been ‘fighting for two months to obtain our papers and thus to live legally on French soil’. They not only demanded legal status and a right to work but also proclaimed universal principles of mobility and sanctuary. They claimed the ‘right of free movement for all’ and ‘refugee status for all’. The government, they lamented, was unresponsive, steadfast in its ‘racist and sexist’ policies.⁵⁸

The waiting was in vain. Toward the end of June, the government awarded papers to just 48 of the 400 immigrants that demanded them. Particularly galling was the decision to authorise some who remained beyond French borders but claimed status as the parents of French children, while neglecting those languishing in France without work or legal protections. ‘It hurts my heart’, one woman said.⁵⁹

On 28 June, after a weekly protest at Place de la République, a public square named for the French republic and featuring a statue of Marianne, the personification of France, the sans-papiers arrived at the Saint-Bernard church. There, ten immigrants began a new hunger strike. Meanwhile, demonstrations were staged across Paris, including at the base of the Eiffel Tower.

⁵⁶ Ibid., 131.

⁵⁷ *Chroniques*, pp.17, 18.

⁵⁸ Ibid.,p.18; Diop, *Peau*, p.134.

⁵⁹ *Chroniques*, pp.18, 19.

The sans-papiers asked for a new round of negotiations with the government and a moratorium on expulsions. Among those who refused to eat was Camara Hamady, a Mauritanian who had been in France since 1990. ‘We claim our rights, that’s all’, the immigrant said.⁶⁰

As their protest intensified, the sans-papiers drew support from religious and secular leaders throughout France. Church leaders delivered jeremiads against the state. Henri Coindé, who opened the Saint-Bernard church to the immigrants, became known as the ‘priest of the sans-papiers’. At Sunday Mass, he told congregants that those who ‘restored to the law those who have been outlawed’ were the inheritors of God’s promise to Abraham.⁶¹ The sans-papiers also earned praise from the nation’s top labour leaders, including Louis Viannet, secretary general of the General Confederation of Labor, or CGT. He denounced the Pasqua laws as ‘villainous’.⁶² Unions no longer viewed immigrants as ‘the first wrongdoers’ in ‘the crisis that French society is going through’, Diop would note, but rather as its ‘first victims’. Rather than fearing competition from the immigrants, organised labour offered them ‘solidarity’.⁶³ The immigrant cause was also taken up by prominent figures in the arts and civic life. Among them was Jean-Luc Godard, who was among the fifty-nine filmmakers who organised a call for civil disobedience. The sans-papiers earned a visit from Danielle Mitterrand, the widow of the late Socialist president and Schengen founder.⁶⁴

But Debré, the interior minister, was unbowed, promising, ‘We will apply the law’. In fact, he had an additional legal tool. Toward the end of August, he went to the Conseil d’Etat

⁶⁰ Ibid., p.19.

⁶¹ Ibid., pp.19, 20.

⁶² Ismaël Halissat, ‘Henri Coindé, le “curé des sans-papiers”, est mort’, *Libération*, 21 février 2018.

⁶³ Diop, *Peau*, pp.73-77, 96, 108, 118. On unions and the sans-papiers, see Alain Morice, ‘Sans-papiers: Une Difficile Reconnaissance’, *Plein Droit*, no.89 (June 2011), pp.5-8.

⁶⁴ Winders, *Paris Africain*, p.97; ‘Danielle Mitterrand soutient les sans-papiers’, *Les Echos*, 25 juin 1996; ‘François Mitterrand’s Widow Says, “I Will Vote No”’, *Spiegel*, 23 Mai 2005.

for a decision on whether regularisation was required.⁶⁵ The court determined that none of the cases compelled regularisation, based on the rules outlined in the Pasqua laws, while also finding that nothing prevented the government from choosing to regularise the migrants.⁶⁶ Claiming the backing of the administrative court, Juppé vowed not to negotiate, and instead to end the sit-in.⁶⁷ On 22 August, the prime minister appeared on television, pledging that the interior ministry would examine each case individually, applying humanitarian principles carefully but refusing to allow anyone to flout the law. Never, he claimed, would a gravely ill person be sent away. Never would a mother be separated from her children. To prevent these dilemmas from arising in the first place, the prime minister said, the government would redouble efforts to stop improper entry at the border. But first, he promised, he would end the spectacle at Saint-Bernard.⁶⁸

Many stayed up through the night, as the sans-papier were expecting the authorities. Shortly after 7:30 a.m. on 23 August, more than a thousand police officers moved past protesters gathered at metal barricades chanting, 'French, immigrants, solidarity!' The authorities used red wire cutters to breach fencing and broke down the front door of the church with axes. Inside, Father Coindé led Mass, speaking of 'the bread of tomorrow', which would feed 'every mouth' — 'sacred' because it was the 'product of the longest, the most difficult human struggle'. He read from Martin Luther King Jr.'s 'I Have a Dream' speech. He was interrupted by the officers, who separated whites and blacks and prepared everyone for removal. Some cried. A little girl choked on tear gas — dispersed, the authorities would later say, by protesters. A man in his forties stood before a row of officers and proclaimed, 'My

⁶⁵ Dominique Simonnot, 'Le Conseil d'Etat est saisi du dossier des sans-papiers', *Libération*, 22 août 1996; François Bonnet, 'Plusieurs dispositions des lois Pasqua apparaissent désormais inapplicables', *Le Monde*, 23 août 1996.

⁶⁶ François Bonnet, 'Le Conseil d'Etat rappelle que l'administration peut régulariser les sans-papiers', *Le Monde*, 24 août 1996.

⁶⁷ David Dufresne, 'Une centaine d'Africains pourraient être régularisés', *Libération*, 23 août 1996.

⁶⁸ *Chroniques*, p.22.

father went to war for France; today, I am ashamed for her'. To the right of the altar, the ten immigrants who were still refusing food emerged from blue sleeping bags. 'Do not touch the hunger strikers, not them!' activists shouted. In front of them sat Roger-Gérard Schwartzberg, a professor and politician with the Radical Party of the Left, and Alain Krivine, a member of the Revolutionary Communist League and a leader of the May 1968 revolt in Paris. As police started removing the men, the anger of some of the immigrant women boiled over. 'To throw tear gas in a church where there are children, is that right?' one woman wailed. Debré, in a public address, stated, 'The moment had come to apply the law'.⁶⁹



Figure 3. 'With humanity and heart'. The front page of the weekend edition of *Libération* on 24 and 25 August 1996 showed the raid on the Saint-Bernard church. The centre-left newspaper, founded by Jean-Paul Sartre, juxtaposed imagery of the show of force with the interior minister's promise of 'humanity and heart'. *Libération*, 24 et 25 août 1996.

⁶⁹ Ibid., p.22; Aude Dassonville and Erich Inciyan, '7h30, les cloches de Saint-Bernard sonnent à la volée', *Le Monde*, 24 août 1996; Cécile Prieur, 'Un charter à destination du Mali serait prévu pour samedi matin', *Le Monde*, 24 août 1996.

The contest was far from over. That night, 15,000 people marched in Paris — a show of disapproval mirrored in about 40 cities across the country. A national coordinating committee, formed in July, called for the continuation of the struggle, whose stakes were underscored in October, when one of the hunger strikers, Amara Fofana, died of liver cancer. A candlelight vigil in the Place de la République featured signs that read, ‘Juppé surrender your papers to us’.⁷⁰ Church occupations resumed in the new year, in Paris and beyond. On 18 March, 1,500 people observed the anniversary of the inaugural action at Saint-Ambroise.

Not confined to the level of the street, the contest over papers remained a focal point of popular debate, as well as cultural and academic analysis. The Marxist philosopher Étienne Balibar delivered remarks in March 1997 at an event hosted by the French Filmmakers’ Union in Paris. His speech was titled, ‘What we owe to the “Sans-papiers,”’ and it enumerated the contributions of the irregulars to French society. They had enhanced public discourse by refusing to be defined as illegals, instead claiming ownership over their self-identity and their place in democratic life, Balibar said. So, too, he argued, they had laid bare the operation of state violence through the ‘production of illegality’. By shedding light on the ‘main mechanisms of extending *institutional racism*’, the sans-papiers had proven themselves to be victims of a ‘kind of European apartheid that combines emergency legislation and the spread of discriminatory ideologies’, Balibar asserted, a remarkable accusation, levelled three years after the end of formal apartheid in South Africa, a policy of racial stratification that borrowed from colonial practices maintained by France and other European powers.⁷¹ But the sans-papiers also pointed to a more equitable way of organising political life, Balibar argued. He observed that the immigrants

⁷⁰ *Chroniques*, p.22; Winders, *Paris Africains*, p.105; David Dufresne and Dominique Simonnot, ‘Manif contre les expulsions de sans-papiers’, *Libération*, 28 août 1996.

⁷¹ It was not a comparison that gained currency, though insisted upon by Balibar. See Etienne Balibar, ‘Le droit de cité ou l’apartheid?’ in *Sans-papiers: l’archaïsme fatal*, ed. Étienne Balibar, Monique Chemillier-Gendreau, Jacqueline Costa-Lascoux, and Emmanuel Terray (Paris, 1999), pp.89-110.

had ‘recreated citizenship among us’, exalting them for enacting the most fundamental civic act — the demand for rights.⁷²

A change in government leadership did not transform the situation of the sans-papiers, illustrating the durability of the exclusionary agenda since the 1974 reversal on labour migration. The main parties feared giving ground to the Front National, which has successfully politicised the immigration issue.⁷³ In the summer of 1997, legislative elections empowered the Socialists, who swiftly dropped their support for the activists. Lionel Jospin reversed himself once in the premiership, saying he was against full repeal of the Pasqua and Debré measures and sounding notes of scepticism about immigration that resonated with critiques of globalisation and multiculturalism that had gained currency by the century’s end.⁷⁴ Jospin asked Patrick Weil, a scholar of immigration and citizenship at the Sorbonne, to draw up a report on the matter. The academic’s conclusions stressed the need to control immigration while maintaining a welcoming posture. The government took a piecemeal approach, including restoring citizenship to children born in France to foreign parents. Debré’s successor, Jean-Pierre Chevènement, approved roughly every other request for regularisation, eventually approving about 80,000 applications.⁷⁵ The arbitrary approach, which divided families, angered the sans-papiers.⁷⁶ Neither side was satisfied by a legislative package approved in May 1998, known as the Chevènement law. It aimed to enable family reunification while making it more difficult for unmarried people to stay in France.⁷⁷

⁷² Étienne Balibar, ‘What we owe to the ‘Sans-papiers’, <http://eipcp.net/transversal/0313/balibar/en>.

⁷³ On partial easing of restrictions under Mitterrand, see Chin, *Crisis of Multiculturalism*, p.120. See also Hargreaves, *Multi-Ethnic France*, p.177.

⁷⁴ Gatrell, *Unsettling of Europe*, p.331.

⁷⁵ *Ibid.*, p.331.

⁷⁶ Winders, *Paris Africains*, pp.113-16; Svenja Gertheiss, ‘Migration under Control: Sovereignty, Freedom of Movement, and the Stability of Order’, in *Resistance and Change in World Politics: International Dissidence*, ed. Svenja Gertheiss, Stefanie Herr, Klaus Dieter Wolf, and Carmen Wunderlich (Cham, 2017), pp.243-80.

⁷⁷ Patrick Weil, *Qu’est ce qu’un Français? Histoire de la nationalité française depuis la Révolution* (Paris, 2002), pp.165-181.

The nature of the public debate was shifting, becoming more permissive of anti-immigrant views. The mainstream lurched to the right, at the very moment that the sans-papiers succeeded in galvanising a portion of the population behind their vision of open borders and a universal right to move. A poll released in July 1998 by the CSA Institute showed that 15 percent of French people saw themselves as ‘racist’, while 40 percent described themselves as ‘a little’ racist — believing there to be too many blacks and Arabs in the country and claiming to no longer recognise France. The press pointed to the ‘singular’ role of the Front National in spreading ‘racist and xenophobic ideas’ among the electorate.⁷⁸ By 1999, on the third anniversary of the expulsion from Saint-Bernard, the epithet ‘forgotten’ was added to the label ‘sans-papiers’. Those who gained regularisation took menial jobs to obtain the pay stubs required to legitimate their stay. Others faded into the shadows of French society. Chevènement, like his conservative predecessors, assailed local authorities for failing to apprehend and expel those who lacked papers. The right returned to power in 2002, and the stage was set for Nicolas Sarkozy to remake immigration policy, including by stepping up policing in parts of the country dense with foreigners.⁷⁹

The sans-papiers did not obtain the concessions that they sought. But their struggle for papers spread beyond France, spurring transnational protest against border controls and the politics of xenophobia. Demonstrations in Germany and Italy, said Cissé, the spokesperson for

⁷⁸ Roland Cayrol, ‘La société française reste taraudée par le racism’, *Le Monde*, 2 juillet 1998.

⁷⁹ ‘Chroniques’, pp.130, 131; ‘Faible mobilisation pour les sans-papiers’, *Le Monde*, 24 août 1999; Gatrell, *Unsettling of Europe*, p.331.

the French movement, were signs of an 'awareness that had transcended the borders of France'.⁸⁰

The sans-papiers explained the transnational resonance of their movement by pointing to the harmonisation of migration policy ushered in by the Schengen Agreement. Non-Europeans faced the same reception in neighbouring nations as they did in France. 'By common agreement, the various states of the European Community have modified the legislation relating to foreigners in their countries, thus making entry and residence conditions more difficult', Cissé wrote. The response became common, too, as movements driven by the 'claims by foreigners' developed 'based on the momentum of our fight'. The sans-papiers developed contacts with human rights activists, anti-racism organisations, and feminist groups across Europe. Some of their own initiatives 'took on a European dimension', Cissé noted, whether in advocating for the 'liberation of our comrades' or in marking the anniversaries of demonstrations in the 'presence of foreign delegations'. Among the earliest signs of cross-border linkages were protests outside of French consulates in solidarity with the sans-papiers.⁸¹

France was thus not the sole theatre for the claims of the sans-papiers. Their declarations were translated into English, Spanish, Italian, and German. In December 1997, a group of German feminists travelled to Paris to gather footage for a film on the sans-papier fight called, *Wir sind schon da (We Are Already There)*. Invitations to travel and explain their movement poured in from across Western and Southern Europe: Germany, Austria, Britain, Spain, Italy, Switzerland, Portugal, the Netherlands, Belgium, Luxembourg. Transnational links were made fully manifest in September 1998, when a collection of irregulars living in France

⁸⁰ Cissé, *Parole*, p.130.

⁸¹ *Ibid.*, p.185, 186.

travelled to the *Pont d'Europe* (Europe Bridge) to greet a caravan of immigrants travelling through Germany.⁸²

The struggle that seized Paris did not simply evoke solidarity in other countries; it spurred new movements campaigning for the rights of non-citizens. The campaigning reached as far as Japan, where there had previously been no precedent for mobilisation on behalf of irregulars.⁸³ On the other side of the globe, immigrant activism intensified as well, a response to a turn against undocumented people in the southwestern United States, resembling the unrest in Europe.⁸⁴

From the movement's epicentre in France, a transnational network took shape. Connections were clearest in states that belonged to Schengen, or were in the process of joining the multinational pact, but nations that opted out of the agreement felt the movement's reverberations, too. In Spain, activists targeted a law on foreigners, *Ley de Extranjería*, in force since 1985 — the year of Schengen's adoption. Inspired by the French example, irregulars began to demand papers for all. One of the first associations sprang up in Barcelona, called '*l'Assemblea papers per tothom*', or 'the Assembly of papers for everyone'. A group in the capital formed in October 1997, under the title, '*Papelas para todos y para todas*', or 'Papers for all', counting among its allies 49 social organisations. In June 1998, 52 sans-papiers occupied a church in Málaga, seeking papers and the rights that came with Spanish citizenship.⁸⁵ Protest intensified in Britain, meanwhile, over new limits placed on the rights of asylum seekers. Religious, anti-racist, and human rights organisations mobilised, demonstrating in front of the

⁸² Ibid., p.186.

⁸³ Hélène le Bail, 'Les sans-papiers au Japon: renforcement des contrôles et émergence d'une mobilisation en faveur des régularisations', *Ebisu - Études Japonaises*, 46, no.1(2011), pp.13-37. See also Madjiguène Cissé, 'The Sans-Papiers: a woman draws the first lessons', in *We Are Everywhere: The Irresistible Rise of Global Anticapitalism*, ed. Notes from Nowhere, (London, 2003), p.41, <http://artactivism.members.gn.apc.org/allpdfs/038-The%20Sans%20Papiers.pdf>.

⁸⁴ Rodney Benson, *Shaping Immigration News: A French-American Comparison* (New York, 2013), p.242.

⁸⁵ Cissé, *Parole*, pp.192-3.

British parliament.⁸⁶ The inspiration they lent to movements in other countries deepened the cause of the French sans-papiers. ‘The undocumented people of France started the fight against fortress Europe’, Cissé said. ‘Movements in other European countries’, she observed, illustrate that others ‘face the problems that we ourselves have been confronted with’. Having convinced others to take up arms, she added, ‘we cannot disappoint them’.⁸⁷

The most notable influence was in Germany, where an activist network sprang up to declare, ‘*Kein Mensch Ist Illegal*’, or ‘No One Is Illegal’. The loose association drew its name from the declaration of Elie Wiesel: ‘You who are so-called illegal aliens must know that no human being is illegal. That is a contradiction in terms’.⁸⁸ The group took shape at a temporary ‘media laboratory’ set up at the Documenta X Contemporary Art Exhibition in 1997 in Kassel. The setting was shot through with political meaning. The intention of Documenta, from its founding at a federal horticulture show in 1955, was to display — or document, giving the exhibition its name — the modern art inaccessible to Germans under the Nazis, who had considered such work degenerate.⁸⁹ The curator of the quinquennial exhibition, Catherine David, wrote in an introduction to the show of the dilemmas of artistic practice in ‘the age of globalisation and of the sometimes violent social, economic, and cultural transformations it entails’. The world in which Documenta arose, she added, was the ‘now-vanished era of postwar Europe, shaped by the Cold War’.⁹⁰

Activists joined artists in Kassel in grappling with what would replace this vanished world. The exhibition played host to provocative political manoeuvres, including the display of

⁸⁶ Ibid., pp.193-4.

⁸⁷ Ibid., p.184.

⁸⁸ Quoted in Marie Friedmann Marquardt, Susanna J. Snyder, and Manuel A. Vasquez, ‘Challenging Laws: Faith-Based Engagement with Unauthorized Immigration’, in *Constructing Immigrant ‘Illegality’: Critiques, Experiences, and Responses*, ed. Cecilia Menjivar and Daniel Kanstroom, (Cambridge, U.K., 2014), p.277.

⁸⁹ John Zarobell, *Art and the Global Economy* (Oakland, Calif., 2017), p.108; Adrian Searle, ‘Documenta 13: Mysteries in the mountain of mud’, *Guardian*, 11 June 2012.

⁹⁰ Catherine David, ‘Vorwort’, *documenta X* (1997), <https://msu.edu/course/ha/491/catherinedavid.pdf>.

a sign that read, 'Kill Helmut Kohl', prompting arrests by the police.⁹¹ The media laboratory where 'Kein Mensch' germinated — organised by artists, physicians, lawyers, journalists, some of whom had become allied through the anti-nuclear movement — brought together humanitarian and anti-racist groups, as well as a delegation from the sans-papier movement.⁹² Part of the motivation for the laboratory was the expulsion from the Saint-Bernard church in August 1996. 'All of us felt that the struggle of the sans-papiers represents a completely new quality', one of the organising artists, Florian Schneider, said. 'Our first aim was to establish a connection to Paris'. With the link established, the inchoate network put out an appeal for volunteers to help bring migrants into Germany or convey them to their next destination, as well as to house them and find them work and medical care.⁹³

The influence of the sans-papier movement on activities in Germany flowed through a novel channel: the Internet. The leaders of the activism that emerged from the Kassel exhibition kept abreast of developments in France through a digital mailing list that linked like-minded actors across borders.⁹⁴ Internal to France, mobile phones became a vital new technology, critical in particular to the coordination of the sans-papiers as they anticipated expulsion from the Saint-Bernard church.⁹⁵ Across borders, activists enlisted new webmail services, which were only just beginning to become available. Cyberspace was an unfamiliar terrain of political mobilisation, as Schneider observed, noting, 'it's quite strange to get in contact with people you have never seen before'. The Web, he said, made it possible to 'realise

⁹¹ 'Mein Filz, mein Fett, mein Hase – 48 Stunden überleben für Deutschland', *Schlingensiefel*, <http://www.schlingensiefel.com/projekt.php?id=t011>.

⁹² Gertheiss, 'Migration under Control', p.254.

⁹³ Florian Schneider Interview, Kassel, 4 July 1997, <http://www.bok.net/pajol/international/kassel/florian.en.html>.

⁹⁴ See 'Herr im Haus', *Spiegel*, 19 August 1996.

⁹⁵ Diop, *Peau*, p.161.

the complexity and diversity of the movement'.⁹⁶ It enabled globalisation from below. The conflict over European border controls bore witness to the Internet-enabled internationalisation of radical dissent, a decade and a half before the Arab Spring blossomed on social media.⁹⁷ In the campaign against border controls that seized Europe in the twilight of the twentieth century, the brokers of a new digital politics were not diplomats but everyday asylum seekers and activists.⁹⁸



Figures 4, 5, 6, and 7, clockwise from top left: The exterior of the workspace in Kassel where 'Kein mensch ist illegal' took shape; a wall on the interior of the workspace; the network's logo; and the impromptu workspace in Kassel. Ralf Homman, https://wiki.ralfhomann.info/appeal_no_one_is_illegal.

⁹⁶ Schneider interview. On Internet-enabled activism, see Jennifer Earl and Katrina Kimport, *Digitally Enabled Social Change: Activism in the Internet Age* (Cambridge, Mass., 2011); Fidèle A. Vlavo, *Performing Digital Activism: New Aesthetics and Discourses of Resistance* (New York, 2018).

⁹⁷ On the Internet and globalisation from below, see Zeynep Tufekci, *Twitter and Tear Gas: The Power and Fragility of Networked Protest* (New Haven, 2017).

⁹⁸ On cross-border 'proletarian internationalism' at a different moment, see Peter Linebaugh, 'All the Atlantic Mountains Shook', *Labour/Le Travailleur*, 10 (Autumn 1982), p.88.

In its transit across the Franco-German border, the movement for immigrant rights changed shape, even as the example of the sans-papiers remained foundational. Unlike the movement in France, which issued from the claims of immigrants even as they garnered support from artists and academics, *‘Kein Mensch Ist Illegal’* was pioneered by allies rather than the claimants themselves, a key difference.⁹⁹ It shunned electoral politics and dialogue with national leaders, focusing instead on consciousness-raising and direct action. The campaign drew from its origins as a creative endeavour. At the Documenta X exhibition, the group set up a passport exchange office where visitors could relinquish their passports to those who needed identity papers more desperately. When a police officer inquired, ‘Is this art or not?’ the organisers hedged. Still, their actions were not entirely symbolic. In 2001, hackers working with the network temporarily crashed Lufthansa’s website, in a strike against a company that it viewed as an accomplice to government wrongdoing.¹⁰⁰

‘Kein Mensch Ist Illegal’ became a pillar of the ‘No Border Network’, a loosely organised, pan-European association of groups mobilising for a universal right to move. Its members drew inspiration from across the globe. Among their models was Justice for Janitors, a bottom-up campaign for higher wages and workplace rights that began in Los Angeles in 1990 and grew to include thousands of largely immigrant and often undocumented workers in cities across the United States. ‘No Border’ activists studied reports from that struggle as they conceptualised their own.¹⁰¹ The network first materialised, under the title ‘Admission Free’, at the 1997 European Council meeting in Amsterdam — the summit that brought Schengen into

⁹⁹ Nicolas Boilloux, ‘Le cri des sans-papiers de Saint-Bernard’, *Autres Temps: Cahiers d’éthique sociale et politique*, no.52 (1996), pp.89-91.

¹⁰⁰ Schneider interview; Gertheiss, ‘Migration under Control’, p.254; Florian Schneider and Hagen Kopp, ‘A Brief History of the Noborder Network’, Tactical Media Files, 31 March 2010, <http://www.tacticalmediafiles.net/articles/3332/A-Brief-History-of-the-Noborder-Network>.

¹⁰¹ Schneider and Kopp, ‘Brief History’.

European law. On the sidelines of the meeting, a small group of activists and organisers from anti-racism groups gathered, raising alarm that the protected zone was becoming more perilous for non-citizens. Their efforts gained momentum in 1999, the year that the Amsterdam Treaty, incorporating Schengen into EU law, entered into force. The activist network capitalised on major protests against the EU summit in Tampere, Finland, where leaders agreed on a common approach to rooting out asylum tourism and on the terms of a common European arrest warrant, among other questions of criminal justice that had come to the fore in the Schengen laboratory.¹⁰² Coordination of the protests took place at Helsinki's contemporary art museum, recalling the origins of *'Kein Mensch Ist Illegal'* at the Documenta X exhibition in Kassel.¹⁰³

Actions were staged under the aegis of the transnational network, targeting prominent locations in Europe. The most notable demonstration took place in 2002 in Strasbourg, the site of the Schengen Information System. The activists, gathered at a camp in the French city that hugs the German border, declared: 'The Schengen Information System serves as an electronic, supranational instrument of exclusion and deportation first and foremost against migrants but also against all people.... We oppose a more and more 'harmonised' migration policy...' The demonstration drew 3,000 people to the headquarters of Schengen's apparatus for data sharing and crime control. French activists enlisted the Internet — the potent new tool of immigration tracking — to warn protesters arriving from abroad about the tactics of French law enforcement, from releasing tear gas to firing Flash-Balls, hand-held weapons used in riots as alternatives to firearms.¹⁰⁴

¹⁰² Martin Bright, 'Europewide arrest power planned', *Guardian*, 10 October 1999; 'EU-Gipfel ringt um Asylfrage', *Spiegel*, 15 Oktober 1999.

¹⁰³ Schneider and Kopp, 'Brief History'.

¹⁰⁴ Quoted in Gertheiss, 'Migration under Control', p.255. Pam Alldred, 'No Borders, No Nations, No Deportations', *Feminist Review*, no.73(2003), p.154.

The sans-papiers were shrewd theorists of their own predicament as rightless persons. The movement's two primary spokespersons, Ababacar Diop and Madjiguène Cissé, narrated their efforts in accounts fusing personal biography, eyewitness testimony, and philosophical investigation. Diop's account, *Dans la Peau d'Un Sans-papiers (In the Skin of a Sans-papier)* was published in 1997, while Cissé's *Parole de Sans-papier (Word of a Sans-papier)* came out two years later.¹⁰⁵ They overlap in significant ways, though they also notably diverge. Diop's narrative is more personal, charting his travails in France, including his failure to gain asylum. Cissé's is more political, indicting European border policy as shaped by the rules of the Schengen system.



Figure 8. Madjiguène Cissé and Ababacar Diop in the Church of Saint-Bernard, August 21, 1996. Par Pierre Lepidi and Amadou Ndiaye, 'Les sans-papiers de Saint-Bernard, vingt ans après', *Le Monde*, 22 août 2016, https://www.lemonde.fr/societe/article/2016/08/22/les-sans-papiers-de-saint-bernard-vingt-ans-apres_4986040_3224.html.

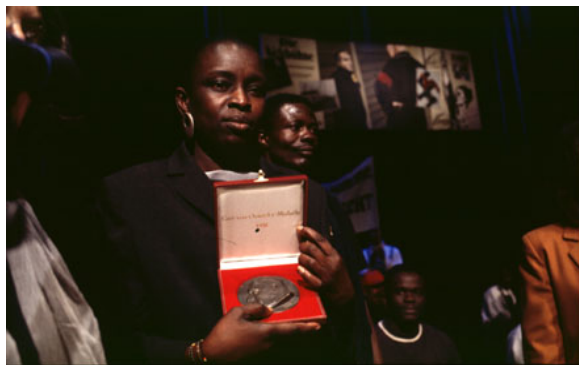


Figure 9. Madjiguène Cissé receiving the Carl-von-Ossietzky Medal. 'Papers for all Sans-Papiers in Europe', Sara Callaway and Benoit Martin, Dec. 1998, Bok.net, <https://www.bok.net/pajol/sans-pap/blackwomen/blackwomen3.en.html>

¹⁰⁵ Diop, *Peau*; Cissé, *Parole*.

Diop was raised among fisherman on the Atlantic coast, in the old capital of the French colonies of Senegal and Mauritania, Saint-Louis.¹⁰⁶ Swept up in political activism that placed him in the government's crosshairs, he left in 1988. To enter France, he had to obtain a visa under rules that were being tightened in the Schengen laboratory. At first, he did not think to apply for asylum. 'In Senegal, we did not worry about that', he wrote. Those who aspired to leave, he noted, still viewed France as an 'open country', one with a debt to its former colonies.¹⁰⁷

It was only when his visa was about to expire that he filed an asylum claim in France, in the autumn of 1988, gathering press clippings about the political unrest in Senegal to prove his 'reasons to fear' return to his home country. He detailed his story in a letter, telling of his involvement in a separatist movement in the Casamance region, and placed it in the mail. 'I was alone', he wrote. He was summoned for an interview with three officials, which lasted for half an hour. Filing his claim gave him access to a work authorisation, which he used to find a job with an industrial cleaning company. This was the beginning of what Diop called his 'period of papers'.¹⁰⁸

When his asylum claim was rejected in the spring of 1990, however, he learned what it was like to be without papers, 'sans'. He received notice that he had been turned down by the French asylum office at the same time that he learned that he had passed a course in computer technology, granting him professional credentials. The two results, for Diop, laid bare the untenable position of the immigrant: 'To have the right to work but not to be here; to be able to enter the labour market, but not to have the possibility of going out into the open: it could be a definition of what the authorities call "clandestine," and what we call "sans-papiers."' ¹⁰⁹ He

¹⁰⁶ Diop, *Peau*, pp.11-21, 31-32, 36.

¹⁰⁷ *Ibid.*, pp.37-39.

¹⁰⁸ *Ibid.*, pp.44, 46.

¹⁰⁹ *Ibid.*, pp.53, 54.

filed an appeal but was unable to move freely while he waited for it to be adjudicated, fearing that he would be seized and expelled from the country. He could not return to Senegal for his own wedding in 1991, so he was married to his wife, Astou, from afar. Meanwhile, he falsified papers and continued to work as a cleaner, in an industry where employers were less scrupulous.¹¹⁰ His wife joined him in France the following year. Bowing to the corrupt practices of the French consulate in Dakar, she paid 150,000 francs to obtain a tourism visa. Their daughter was born in June 1994.¹¹¹

Volatility marked Diop's situation. In October 1994, the Conseil d'Etat nullified the decision in his asylum case, and he was able to regain regular status, along with another short-stay visa. But in June 1995, his papers were withdrawn again. The refugee appeals board, revisiting his case following the judgment from the Conseil d'Etat, again denied him sanctuary. When he sought answers, he was informed not only of his own insecurity but of his child's: 'Your child is not French. We cannot do anything for you'. He provided paperwork showing a promise to hire, but the officials dismissed him. He learned that he once could have obtained a residence permit based solely on the number of years he had resided on French soil — seven at that point. But tightened rules under the Pasqua laws had withdrawn that privilege, he was told.¹¹²

'We were nothing', Diop wrote of his situation, which compelled him to 'exit the shadows'. At 11 p.m. on a March night in 1996, Diop switched on the television to France 2 and saw images of the occupation at the Saint-Ambroise church. He joined the demonstration.¹¹³ Inside the church, solidarity emerged from a shared African identity, as well as

¹¹⁰ Ibid., p.57, 63.

¹¹¹ Ibid., pp.61, 62, 65, 68.

¹¹² Ibid., pp.67-70.

¹¹³ Ibid., pp.69-72.

a common claim on the French state. The immigrants signed their first communiqué to the press ‘the African collective of Saint-Ambroise’. Soon, their tactics came to centre on French history and nationhood. Under the guidance of Diop, who became a spokesperson for the immigrant activists, they decided that 35 immigrants would begin a hunger strike, in reference to the 35 articles of the 1945 Ordinance on the entry and residence of foreigners in France.¹¹⁴

In Diop’s telling, the sans-papiers were campaigning for a vision of the French nation in which they could belong, one that took greater account of the country’s colonial history than did the narrow conception of citizenship propounded by the state. Theirs was a definition truer to ‘international conventions that France has ratified’, as well as to France’s own traditions and high ideals, Diop maintained.¹¹⁵ The failed asylum seeker did not dismiss these ideals — the France of Voltaire, of the sans-culottes, of the Declaration of the Rights of Man and of the Citizen, of Victor Hugo, of tolerance, of freedom — but argued that they could only be realised in accordance with the aims of the sans-papiers. To show their fidelity to French traditions, the immigrants made a pilgrimage to the Tata of Chasselay, near Lyon, to lay wreaths at the graves of African soldiers who lost their lives fighting against the Nazis. The ultimate aim of the sans-papiers was to restore ‘historical truth’, Diop argued, to account for their own belonging in France.¹¹⁶

¹¹⁴ Emmanuel Terray, ‘Quelques Réflexions à Propos de la Lutte des Sans-papiers’, *Journal des Anthropologues*, no.66-67(1996), p.249.

¹¹⁵ Diop, *Peau*, p.126.

¹¹⁶ *Ibid.*, p.183.



Figure 10. A visit to the Tata of Chasselay. ‘Lyon: Le “tata” sénégalais, cimetière militaire des tirailleurs, a été tagué’, *20 Minutes*, <https://www.20minutes.fr/lyon/1747591-20151209-lyon-tata-senegalais-cimetiere-militaire-tirailleurs-tague>.

Opposite Diop’s expansive understanding of the French nation was the view ratified by the Pasqua laws in accordance with the Schengen guidelines. This was the vision enforced by authorities at the Saint-Bernard church, where Diop was separated from his wife and child and placed in a police van.¹¹⁷ At the station, he was handed a bag for his belongings marked with a red label of the travel company *Nouvelles Frontières*, or ‘New Frontiers’. The title of the brand made him reflect on the new frontiers of Europe, which had tightened for non-Europeans in preparation for the removal of internal borders. ‘The story of the *sans-papiers* of Saint-Bernard reveals the unbearable nature of the situations generated by the legislation on foreigners’, Diop wrote. That legislation was rationalised as a response to Schengen, which fulfilled aspirations for free movement — but only for Europeans. Diop also yearned for free movement: ‘I want to go where I please’.¹¹⁸

He closed his first-person account with a demand for free movement, arguing that the most effective way to improve the lives of the *sans-papiers* was to ‘allow everyone to move freely’.¹¹⁹ Diop was released after about 18 hours in police custody. The immigrants regrouped

¹¹⁷ *Ibid.*, pp.172, 173.

¹¹⁸ *Ibid.*, pp.175, 178-9, 182, 183.

¹¹⁹ *Ibid.*, pp.184-5.

at the theatre space where they had taken refuge earlier that year. Many would receive deportation orders in the ensuing days. Dramatising his quest for free movement, Diop set off walking across France in the summer of 1997. In the press, it was labelled his ‘tour de France’.¹²⁰ Upon his return, he gained papers in a wave of regularisations.¹²¹

An appeal for free movement opened Cissé’s account, *Parole de Sans-papiers*, just as it opened the ‘story of the human species’, as she argued. ‘At all times, in all latitudes, human populations have defied the worst conditions, crossed deserts, seas, mountains’, she wrote, finding that free movement had been critical in all eras, in times of both war and peace.¹²² Hers is an account of one such war, which she joined after coming to Paris in search of better schooling for her daughter. Arriving in 1993 on a tourism visa, she was planning to leave within months when she heard, in March 1996, reports of a ‘mutiny directly affecting me’. She joined her ‘compatriots’, as she recalled, describing them as ‘refugees’ in the Saint-Ambroise church.¹²³ It was not a war for resources. It was not a war for territory, per se. But it was a war over the right to move across territory. ‘Because there are human rights, rights that come from being human’, argued Cissé, who was born in a suburb of Dakar and finished her university degree, through the *Deutscher Akademischer Austauschdienst* (the German Academic Exchange), in Saarbrücken, the site where France and Germany agreed to remove border checkpoints in 1984, laying the groundwork for Schengen.¹²⁴ ‘When these rights are threatened, there is a legitimate reason to fight’. She affirmed: ‘Every human being has the right, in the continuity of one’s ancestors, to travel, to migrate, in short to circulate, to receive and to be received’. What the

¹²⁰ Karim Talbi, ‘La longue marche d’Ababacar Diop’, *Libération*, 11 août 1997.

¹²¹ Béatrice Bantman, ‘Ababacar Diop: L’ancien porte-parole des sans-papiers de Saint-Bernard s’est range’, *Libération*, 28 juillet 1999.

¹²² Cissé, *Parole*, p.7.

¹²³ Ibid., p.37. See also Rolenn de Soyer, ‘Portrait’, *La Croix*, 25 juillet 2000.

¹²⁴ Cissé, *Parole*, pp.28-31.

sans-papiers were asking for was not new. Nor did it come from France. It came from their forebears, by dint of their very personhood.¹²⁵

The confrontation inside Saint-Bernard marked an eruption of colonial conflict in the heart of the metropole. In Cissé's account, the reason was that political and social hierarchies — and, above all, spatial divisions — once enforced in foreign lands had been replicated within Europe. She traced the strife to 1974, when France ended its policy of welcoming economic immigrants. The reversal marked the beginning of a quest by the French state to block immigration, especially from its former colonies — 'close, control, manage, repress: this evocative vocabulary may not be best adapted to the "country of human rights."' By her lights, most dangerous was the second instalment of the Pasqua legislation, in 1993, when foreigners were declared enemies of 'public order', as she wrote, in line with the interior minister's goal of 'zero immigration'. Cissé was hardly alone as a critic of the Pasqua regime. What was distinct about her analysis was her observation that the pursuit of 'zero immigration' rested on lists of countries posing an immigration threat to Europe. She named twelve in particular — 'Afghanistan, Armenia, Azerbaijan, the Democratic People's Republic of Korea, Georgia, Iraq, Iran, Jordan, Lebanon, Libya, Yemen, and the Palestinians' — each of which appeared on the lists circulated during Schengen negotiations. The nationals of these countries, Cissé wrote, 'are required to declare to police headquarters their intention to leave French territory and to produce an exit visa'. As stipulated in Schengen, stemming the tide of immigration involved controlling the movements of those already within European borders.¹²⁶

Indeed, Schengen was at the heart of the border regime that, in Cissé's view, had replicated colonial hierarchies inside Europe. The Schengen space, which had grown to include

¹²⁵ Ibid., p.9.

¹²⁶ Ibid., p.23. See 'Un entretien avec Charles Pasqua', *Le Monde*.

Spain and Portugal and was poised to incorporate Italy as well, was the territory around which a new security apparatus had taken shape, infringing on ‘personal liberty’. Foreigners feared the possibility that their passports could be confiscated; their travel documents seized; and, within a perimeter of 20 kilometres of the Schengen area, their vehicles searched. These provisions were introduced, she wrote, in the name of a ‘Europe of police, a fortress erected before a new *Desert of the Tartars*’, invoking the film based on the Italian novel *The Tartar Steppe* — named one of the best 100 books of the century by *Le Monde* in 1999 — in which a young officer guards a fortress, waiting for a dramatic confrontation that will finally give the citadel purpose.¹²⁷ Cissé attacked Schengen as a laboratory not of freedom, but of control over the lives of non-Europeans. It was among the Schengen states that a new policy was tested in 1998, allowing immigrants to choose voluntary return to their home countries over forced removal, and compensating them financially for that choice.¹²⁸ The policy, which she labelled a ‘demagogic *trompe-l’oeil*’, was a ‘test’, destined to reach across Europe, she reasoned, because it was first instituted in the Schengen area.¹²⁹

Cissé argued that Schengen exemplified the perverse logic of European integration, which required regressive social policy to enable economic expansion. The immigrant spokesperson narrated a story of Europe’s origins contrary to the one articulated by Mitterrand at Fontainebleau, as well as by delegates at Schengen. ‘Originating in the European Coal and Steel Community, preoccupied by the market and by economic dividends, Europe was born at a far remove from any social concerns’, she asserted. ‘It is now difficult to manage the social consequences of its economic and political ambitions’. She identified a pattern: ‘The most

¹²⁷ Ibid., pp.149-50. See ‘Le Monde’s 100 Books of the Century,’ TheGreatestBooks.org, <https://thegreatestbooks.org/lists/108>.

¹²⁸ On the 1998 French policy, see Karin Sohler, ‘France’, in *REGINE - Regularisations in Europe*, ed. Martin Baldwin-Edwards and Albert Kraler (Amsterdam, 2009), p.255.

¹²⁹ Cissé, *Parole*, p.164.

important stages of European construction have been accompanied by texts directly or indirectly marked by a desire to manage migratory flows'. There was no better example than Schengen, as the guarantee of free movement gave rise to 'a whole series of treaties and conventions on the management of migratory flows, the movement of foreigners, and the right of asylum'. These policies spread across borders, in parallel with the people whom they were meant to control.¹³⁰

Most perilous for foreigners in the Schengen area, Cissé argued, was the creation of the Schengen Information System. The 'huge computer file', as she described it, was the cornerstone of new policing measures to restrict the rights of foreigners within the Schengen territory. She claimed that it turned the xenophobic posture of one state into the policy of the entire Schengen bloc: 'the "undesirable" foreigners in a country are registered in this file, thus becoming undesirable in all Schengen countries. A visa or residence permit refused to them, they may be expelled, even if they have a right to stay'. It was the data that held sway, trumping all other considerations. Articulating Schengen's dual purpose, Cissé noted how the accord 'creates an area of free movement of goods and people, but at the same time strengthens cooperation among the states in terms of access to the common territory'.¹³¹ For Cissé, the compensatory measures that made Schengen possible negated its professed aims.

Her conclusion was that Schengen was undemocratic — a finding in notable contrast to that of Hreblay, the police official and Schengen negotiator who saw in the removal of obstacles to free movement signs of democracy's international ascent. The difference was that Cissé viewed foreigners as members of the European community, whose exclusion thus violated principles of popular sovereignty. 'The Schengen Agreement, coupled with the Treaty of

¹³⁰ Ibid., p.195.

¹³¹ Ibid., p.196.

Amsterdam, associates European construction with phobia of the foreigner', Cissé wrote. Such an association, she argued, 'is anachronistic vis-à-vis the will of democratic construction'. She identified Schengen, paired with the treaty that made it European law, as the edifice of 'Fortress Europe'.¹³² She called for these aspects of Schengen — its protective walls — to be stripped away, lest the entire accord require repeal. For she warned: 'A space created in such a way will bear totalitarian scars'.¹³³

The response of the *sans-papiers*, in Cissé's telling, was democratic 'rebellion'. She credited Schengen with helping to propel the protest of the *sans-papiers* across borders. Foreigners in other European nations, she wrote, 'experience similar problems', sparking 'great interest' in the unrest in France. 'As internal borders fall, controls are drastically reinforced at the external borders for non-EU nationals', she explained, articulating the logic of the Schengen accord. The aim of the treaty-making, she argued, was to advance 'free circulation for the nationals of the member countries of the European space' and simultaneously 'to protect this same space from the invasion of those beyond the Community, often in disregard of the most basic rights of the human being'.¹³⁴ While affirming the right of European nationals to move freely, she claimed, Schengen endangered even more fundamental rights — guarantees that transcended circumstances of citizenship and nation. These were the rights for which the *sans-papiers* were fighting, seeking to recast the narrow guarantee of free movement as a universal protection.

Their quest, far from striving to attain a certain idea of France, was to fashion a better image of Africa. 'We have always fought', Cissé wrote, 'for public opinion to take into account

¹³² See Carr, *Fortress Europe*.

¹³³ Cissé, *Parole*, p.235.

¹³⁴ *Ibid.*, p.185.

another image of Africa'.¹³⁵ A student of German literature, who admired the writings of Malcolm X and Angela Davis, Cissé insisted on the sovereignty of the sans-papiers over their own mobilisation. She understood 'the role of intellectuals in a struggle like ours'. But the roots of the movement lay 'in working-class neighbourhoods', she argued, and their efforts served those 'confronted each day by the difficulties of living'.¹³⁶ The immigrants made their own decisions, as a 'family'. Their method of political organising reflected the central place of family bonds in their struggle. 'In the course of the ordeals suffered, a real familiarity was formed', Cissé wrote. 'The group had become a family'. She stressed the role of women in particular, among whom 'contact is faster and easier'. Cissé aimed to set an example, 'to call other women to solidarity'. The family ethos was not simply a source of amity among the immigrants. It helped frame the 'general assembly' devised by the sans-papiers to come to collective decisions. Enlisting an African idea about the enlarged family, they met regularly for 'family reunions'. The meetings were independent of outside allies; only the sans-papiers were allowed, frustrating humanitarian groups. 'It's the families that decide', the sans-papiers would reply.¹³⁷

Following the evacuation of the Saint-Bernard church, Cissé was brought before a criminal tribunal, told that she had trespassed on French territory by overstaying her visa. She was handed a two-month suspended sentence, which hung over her head, she wrote, 'like the sword of Damocles'. The Paris Court of Appeal upheld her conviction, adding an order excluding her from France for three years. The Court of Cassation refused to reconsider the ruling.¹³⁸ The claims of the sans-papier found no vindication in French courts.

¹³⁵ Ibid., pp.77-8.

¹³⁶ Ibid., pp.56-7.

¹³⁷ Ibid., pp.39, 40, 54-54, 66-67.

¹³⁸ Ibid., pp.123, 125-6, 129.

Cissé brought a case to the European Court of Human Rights, but a judgment in the dispute, *Cissé v. France*, did not come down before she complied with her deportation order and left France in 2000. Back in Dakar, she turned her attention to devising a ‘city of women’, part of a development project to improve gender equality.¹³⁹

When the European Court of Human Rights decided *Cissé v. France*, in 2002, the tribunal ruled against the claimant. It found that there had been no breach of Cissé’s human rights. And it affirmed the legal grounds for her removal, her unfree movement.

Cissé had turned to the European Court of Justice in November 1998. A month later, she would win the prestigious Carl von Ossietzky Medal, awarded by the Norwegian chapter of P.E.N. for extraordinary contributions to human rights and civil liberties and named for the German pacifist who exposed details of Germany’s secret rearmament in the interwar period.¹⁴⁰ Cissé broadened her claim as she brought her case to Strasbourg, arguing that the raid on the church had denied her freedoms protected by international covenants. She rooted her claim in Article 11 of the European Convention on Human Rights, which provides that, ‘Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests’.¹⁴¹ Her associative rights, Cissé reasoned, gave her the freedom to occupy the Saint-Bernard church, joining like-minded immigrants to claim a physical space in a nation that classified them as outlaws.

¹³⁹ ‘Madjiguène Cissé quitte la France’, *Libération*, 26 juillet 2000; Jean-Luc Martin-Lagardette, ‘Madjiguène Cissé: l’ex-sans-papier aide les femmes à créer des richesses’, *Ouvertures*, 4 janvier 2010, <https://www.ouvertures.net/madjiguene-cisse-lex-sans-papier-aide-les-femmes-a-creer-des-richesses-iii/>

¹⁴⁰ Sara Callaway and Benoit Martin, ‘Papers for all Sans-Papiers in Europe’, December 1998, <https://www.bok.net/pajol/sanspap/blackwomen/blackwomen3.en.html>.

¹⁴¹ ECHR, art.11.

In response, the French state maintained that it was justified in raiding the church and that the police action did not infringe on anyone's freedom of assembly. The state pointed to the health and safety of those inside the church as grounds for the intervention, which it said was necessary to preserve public order. The state acted out of concern, it claimed, for worship activities, as well as the ability to move peacefully outside the church. As the court summarised the state's position, 'the installations that had been set up outside the church obstructed the free flow of traffic and the occupation of the church attracted a number of onlookers giving rise to fears that the situation would get out of hand'. Free movement, the state suggested, was at stake. The French government further claimed that the immigrant's illegal status made her ineligible for the right to free association.¹⁴²

The judges in Strasbourg reasoned that the police intervention had served a legitimate aim — 'the prevention of disorder'. In its review of the facts, the court noted how the 'group of aliens', mostly of African origin, had begun a public campaign to call attention to their irregular status. The court quoted from an evacuation order, signed by the Paris police commissioner on 22 August 1996, which warned of 'public order disturbances'. The judges described how the authorities conducted the raid — how they set up a checkpoint to verify which immigrants had papers 'authorising them to stay and circulate in the territory'. Race dictated whether a church dweller was checked. 'Whites were immediately released while the police assembled all the dark-skinned occupants', as the opinion stated, and the suspect persons were sent 'to an aliens' detention centre'. Many were later released because of irregularities in police checks. But not Cissé.¹⁴³

¹⁴² *Cissé v. France*, pp.10-12.

¹⁴³ *Cissé v. France*, pp.11, 2, 3.

The court applied a balancing test, weighing individual freedoms against the police power of the state. The judges agreed with Cissé that her associative rights had been violated. The question, then, was whether the interference was justified. In principle, it fell to the police — under France’s ‘Code of the Territorial Authorities’ — to supervise religious ceremonies. That the assembly was undertaken by those who had broken French law enhanced the authority of the state, the judges reasoned. Health concerns were also relevant. ‘The interference therefore pursued a legitimate aim’, they found. The opinion did allow that the judges ‘regretted the sudden and indiscriminate manner in which the police intervened’. But the methods, the court concluded, were not ‘disproportionate’. Moreover, ‘the symbolic and testimonial value of the applicant’s and other immigrants’ presence had been tolerated sufficiently long enough’, the judges reasoned. They had made their point. The time had come for the state to act. The human rights tribunal dismissed Cissé’s claim.¹⁴⁴

A similar balancing test was applied by the European Court of Human rights in a line of cases also involving mobility and the police power of the state — but with the opposite result. The contrast illuminates the place, within existing charters, where the excluded could prosecute their case for free movement and related liberties. Like Cissé, the claimants did not base their argument on the ‘right to liberty of movement and freedom to choose his residence’, a guarantee added to the European Convention in a 1963 protocol. This was a right limited to those ‘lawfully within the territory of a State’, and it protected movement only within ‘the territory of a State’, rather than among states or across continents.¹⁴⁵ Notably, too, the claimants did not appeal to the European Court of Justice, the forum for Gravier’s assertion of the right to cross borders for vocational training. Community law did not protect non-European

¹⁴⁴ *Cissé v. France*.

¹⁴⁵ Protocol No. 4, 1963, art.2.

nationals. They did not invoke the Schengen convention, which affirmed the right of asylum but did not create new protections for residence in a foreign country. Nor did they appeal to the Geneva convention, which guaranteed asylum to victims of political persecution but, as states ensured, did not cover economic indigence or other hardship, aspects of immigration whose discounting was lamented by failed asylum seekers, including Ababacar Diop, the sans-papier spokesperson.¹⁴⁶

Where, then, and on what grounds, did claims against unfree movement succeed? They gained purchase in Strasbourg, but only on the basis of family ties, not associative freedoms or the freedom of circulation. Article 8, Section 1 of the European Convention provided that, ‘everyone has the right to respect for his private and family life’. The Convention protected that right against state interference, except in cases of ‘national security, public safety or the economic well-being of the country’, or to prevent ‘disorder or crime’ — all issues brought to the fore by the removal of internal borders under the Schengen accord.¹⁴⁷

Family proved the only reliable bulwark against unfree movement, as illustrated in a set of cases that remain at the margins of scholarship on European law. Less than a year before the occupation of the Saint-Ambroise church in the spring of 1996, the tribunal issued a judgment in a case, *Nasri v. France*, blocking the ordered expulsion of an Algerian national living with his parents in Nanterre. The decision, which came down in June 1995, cited the minutiae of the Pasqua legislation — the same set of provisions that motivated the occupation of the church. The judges noted that the first Pasqua law, approved in September 1986, removed the word ‘serious’ from the provision of national law authorising the interior minister to order a deportation ‘if the aliens’ presence on French territory constitutes a serious threat to public

¹⁴⁶ Diop, *Peau*, p.38

¹⁴⁷ ECHR, art.8.

order'. The stipulation was reinstated in 1990, and thus applied to the dispute over whether Mohamed Nasri could be separated from his parents.¹⁴⁸

That qualification mattered as the judges weighed Nasri's right to family life against the state's interest in banishing him, just as they would weigh Cissé's right to free association against the state's authority to remove her. Deaf and mute, Nasri arrived with his family in France in 1965. Expelled from school and unable to sustain work as a house painter, he racked up criminal convictions — for theft, attempted theft, theft with violence, receipt of stolen goods, assault of a public official, and gang rape. A psychiatric examination found that the convict was not 'mentally ill' but 'very easily influenced' on account of his handicap. Pasqua ordered his deportation in August 1987 on the grounds that he was a threat to public order. But the move was invalidated by the Versailles Administrative Court, which found that Nasri was being deported under the more severe standard adopted in September 1986, which did not apply at the time of his convictions. Following a series of appeals in France, the European Commission of Human Rights stayed the execution of the deportation order, sending the case to the European Court of Human Rights.¹⁴⁹

The judges in Strasbourg found in the non-national's favour, ruling that he could remain in France because deporting him — forcing him to move away from his family — would violate his rights under Article 8. Crucially, they found that there was no compelling reason — 'in accordance with the law' and 'necessary in a democratic society', as Article 8 states — that overrode the Algerian's right to remain with his family.¹⁵⁰ The court's finding was not that France lacked the authority to order deportations. Indeed, this power was core to state

¹⁴⁸ *Nasri v. France*, 18/1994/465/546, Council of Europe: European Court of Human Rights, 21 June 1995, para.13, <https://www.refworld.org/cases,ECHR,3ae6b6ffc.html>.

¹⁴⁹ *Nasri v. France*, paras.6-20.

¹⁵⁰ *Nasri v. France*, para.33.

sovereignty. ‘The Court reiterates that it is for the Contracting States to maintain public order ... to control the entry and residence of aliens and notably to order the expulsion of aliens convicted of criminal offences’, the decision stated, using language that echoed the assurance of the European Court of Justice in *Gravier* that states enjoyed the authority to make their own education policy. But in exercising its authority ‘in a democratic society’, the Court added, there were constraints. The state’s actions must be ‘justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued’, the judges reasoned. Nasri’s handicap, they found, mitigated his criminal liability and, more importantly, underscored the significance of family. The interference with his family life was not proportional to the benefit to public safety.¹⁵¹

In rendering their decision, the judges gave credence to the idea that family bonds could limit a state’s authority over its borders and entitle a non-national to a form of protected movement otherwise denied to him by multinational treaties, such as Schengen. They stressed that Nasri had lived with his parents for his entire life. Six of his siblings had acquired French nationality. Of his meagre schooling, most of it was in French. His family life was rooted in France, and it was the sole sphere in which he was ‘capable of achieving a minimum psychological and social equilibrium’. His individual fulfilment, the opinion concluded, was possible ‘only within his family, the majority of whose members are French nationals’. Family, the court’s judgement suggested, was unique because it was intertwined with nationality, the status that conditioned access to the protections of Schengen and other multinational treaties. A similar link to nationality did not exist with the freedom of assembly, certainly not with the right to work.¹⁵²

¹⁵¹ Ibid., paras.41, 42.

¹⁵² Ibid., para.46.

The 1995 decision in *Nasri v. France* built on precedent developed by the human rights court as judges found that family bonds could trump a nation's credible assertion that it was acting to protect national security. The opinions came down during the period when France and its neighbours were tightening their immigration rules in response to the removal of internal borders. In 1988, the international tribunal barred Dutch authorities from deporting a Moroccan national, Abdellah Berrehab, finding that his ties to his daughter were no less worthy of protection because he no longer lived with her, following his divorce from his Dutch wife.¹⁵³ The court extended its reasoning to apply to children as well as adults, convicts as well as those with clean criminal records — and people enmeshed in a range of family bonds. In 1991, the court decided that Abderrahman Moustaqim, a Moroccan national who had come to Belgium as a child, could not be deported even though he was classified as a 'real danger to society', appearing before the juvenile court nearly 150 times.¹⁵⁴ A year later, European judges arrived at the same conclusion about a foreign national who had committed a series of offenses as an adult.¹⁵⁵

The court's position as the guardian of human rights turned the international tribunal into an authoritative arbiter of the meaning of family, as well as an exponent of diverse conceptions of family life. A similar effect — broadening the meaning of economic activity, rather than family bonds — occurred in *Gravier*. In both instances, the courts expanded domains of individual freedom, located in the family and the market, that curtailed state authority to exclude foreigners.

¹⁵³ *Berrehab v. The Netherlands*, 3/1987/126/177, European Court of Human Rights, 28 May 1988, <https://www.refworld.org/cases,ECHR,3ae6b6f424.html>.

¹⁵⁴ *Moustaqim v. Belgium*, European Court of Human Rights, 18 February 1991, para.13, <https://www.refworld.org/cases,ECHR,3ae6b7018.html>.

¹⁵⁵ *Beldjoudi v. France*, App. No.12083/86, European Court of Human Rights, 26 March 1992.

The protection of family, as a limitation on the power of the state to control its population and police its borders, was not absolute. In 1996, the Court circumscribed the reach of the right to family life in a case not involving forced movement out of a European state, but rather a request for admission into a state. In *Gul v. Switzerland*, the Court considered the case of a Turkish national denied asylum in Switzerland but later granted a right of residence on humanitarian grounds, after his Turkish wife fell ill in Switzerland. The Swiss Aliens Police denied his request to bring his two sons to Switzerland on the grounds that he did not have sufficient means to provide for them. Gul's family situation was 'very difficult from the human point of view', the court acknowledged. Yet the Swiss state had not violated his human rights by refusing to admit his children.¹⁵⁶

Applying its balancing test, the European Court of Human Rights affirmed that non-nationals were entitled to protection in states where the transnational guarantee of free movement depended on European nationality. It was an affirmation set forth in Cissé's case as well, although the international court ruled against the spokesperson for the sans-papiers.

In *Cissé v. France*, the European Court of Human Rights expressly declared that foreigners deemed illegal — excluded persons, the 'sans' — were protected by the European Convention. It rejected France's argument that Cissé's illegal status placed her beyond the pale of enforceable rights. Though finding that security concerns justified France's eviction of people without papers from the Saint-Bernard church, the judges wrote: "The Court does not share the Government's view that the fact that the applicant was an illegal immigrant sufficed to justify a breach of her right to freedom of assembly..."¹⁵⁷ That judgment spoke to the question at the centre of the long debate over Schengen's implementing convention: whether freedom of

¹⁵⁶ *Gul v. Switzerland*, European Court of Human Rights, 19 February 1996, paras.14, 42, 43, <https://www.refworld.org/cases,ECHR,3ae6b6b20.html>.

¹⁵⁷ *Cissé v. France*, p.12.

movement and associated liberties could be limited in practice to European nationals within a new transnational space extending across Europe's borders.

At the heart of Cissé's critique of Schengen lay a capacious theory of free movement that defined border crossing as a human right that transcended nationality. No court — neither in Paris nor in Strasbourg — guaranteed her the right to move freely. As a *sans-papier*, an 'undesirable', she would ultimately be expelled from France, and her freedom of association under the European Convention, when she protested the deportation of the undocumented at Saint-Bernard, was limited by the alleged threat her presence posed to national security. Ruling for France, the European tribunal acknowledged the right of the illegal immigrant to have rights while upholding the power of state to subject her to involuntary movement.

The Paris uprising of the *sans-papiers* gave impetus to a transnational social movement of undocumented persons but did not alter the law. The claims brought to the courts by Cissé transformed neither criminal justice in France nor Europe's legal doctrine of human rights. Yet the protest driven by the *sans-papiers* across the frontiers of Europe recast understandings of the principle of free movement and protection of human rights as well as of claims to citizenship. The conflict at the Saint-Bernard church marked a turning-point — a rupture counting as an *'événement'*, to borrow the language of the philosopher Paul Ricoeur, a representative of the *sans-papiers* in mediations with the French government — an event of

history, brought about by human actors, recorded at the time and yet producing an ‘epistemic gap’ requiring further explication to draw out unstated meaning.¹⁵⁸

In finding meaning in the cause of the sans-papiers, French philosophers contemplated the boundaries of free movement, but also matters of asylum, human dignity, and national identity. They entered into an inquiry whose terms had been defined by Arendt’s study of the perplexities of human rights — of the right to have rights by virtue simply of being human.¹⁵⁹ Their inquiry owed as well to the thought of the sans-papiers, echoing the ideas of Diop and Cissé, vindicating rights claims discountenanced by European lawmakers.

‘But what are the “sans-papiers” lacking?’ asked Jacques Derrida, in a statement delivered at a mass demonstration in Paris, in December 1996. He confessed to finding ‘sans-papier’, as an expression, ‘terrifying’. It was frightful because it signified the process by which a piece of paper had become identified with a right — not just any right, but ‘the right to a right’, as the Algerian-born French philosopher argued, echoing Arendt. ‘One assumes’, he said, ‘that the “sans-papiers” is in the end “*sans droit*”, “without right” and virtually outside the law’. But the absence went deeper: ‘he is naked and exposed, without right, without recourse, deficient in the essential’. What the sans-papier essentially lacked, Derrida claimed, was ‘*dignity*’. But it was France, he said, that stood in violation of human dignity.¹⁶⁰

The need, then, was to invert the logic of illegality and absence. And here he spoke of particular laws, of Pasqua and Debré, and of Schengen’s rules. ‘When one hears it said that the “sans-papiers” are *lacking* something, one must begin by speaking of the dereliction of the

¹⁵⁸ Paul Ricoeur, ‘Le retour de l’Événement’, *Mélanges de l’Ecole française de Rome. Italie et Méditerranée*, 104, no.1 (1992), p.29.

¹⁵⁹ On the sans-papier struggle as intellectually generative, see Isabelle Sommier, ‘Le Renouveau de la Critique Sociale Depuis les Années 1990: Entre Mythe et Réalité’, *Modern and Contemporary France*, 20, no.2 (May 2012), pp.153-68.

¹⁶⁰ Jacques Derrida, ‘Derelictions of the Right to Justice (But What Are the ‘Sans-papiers’ Lacking?)’, in *Negotiations: Interventions and Interviews, 1971-2001*, ed. Elizabeth Rottenberg (Stanford, 2002), p.135.

French state ... of justice in the name of a right that, under the name of the “Pasqua law”, which, improved, polished, and more offensive still, is getting worse and turning into the “Debré law”, Derrida said. He assailed the ‘bargain’ embodied in these laws, which responded to the opening of borders across Europe, ensuring that the state was capable of surveilling, excluding, and deporting — ‘discriminating, filtering out, hunting down, expelling more effectively than ever’. The philosopher argued that this power, enhanced by techniques of information sharing, had turned the borders of Europe ‘into new iron curtains’. Borders, Derrida said, ‘are no longer places of passage; they are places of interdiction’/ In the ‘singular human tragedy’ of the sans-papiers, Derrida saw ‘the *globalization* of the market under the domination of neo-liberalism’, as exemplified by ‘the Schengen accords’, whose provisions on free human movement were ‘still not being applied in France’. Because the contradiction between human movement and the transit of capital and commodities was rooted in international treaty-making, the resistance against treating non-Europeans as sans-papiers ‘must be global, European, national, and local at the same time’. The law must be defied across the borders of nations, he argued, to safeguard ‘the *rights of man*’.¹⁶¹

Later, at the moment when Cissé’s appeal failed in the European Court of Human Rights, a theorist at the Sorbonne, Daniel Mouchard, wrote of the legal campaign mounted by the sans-papiers through an enactment of illegality. Their appeal was sharpened, Mouchard argued, by their subordination to the state, which they exploited by intentionally exposing themselves to violence inflicted by state institutions.¹⁶² Independence would come only with the attainment of free movement, he argued, which would involve ‘abolishing all control based on nationality’. That guarantee would make migrants bearers of rights enforceable against the state.

¹⁶¹ Derrida, ‘Derelictions’, pp.138, 134, 140, 141, 142, 143.

¹⁶² Daniel Mouchard, ‘Les Mobilisations des “Sans” dans la France Contemporaine: L’Émergence d’un ‘Radicalisme Autolimité’, *Revue Française de Science Politique*, 52, no.4 (2002), pp.435, 436.

No less, it would sustain economic autonomy, averting exploitation in a single national labour market. Mouchard's argument thus linked the dual justifications for free movement articulated by Schengen's framers — political, as a model of 'Citizen's Europe', and economic, as preparation for a single marketplace. To Mouchard, the revolt of the *sans-papiers* was an *événement* announcing the claims of the undocumented to the rights afforded by both political belonging and market exchange.¹⁶³

The question of what the *sans-papiers* were owed was one Étienne Balibar returned to repeatedly. When first posing the question, in 1997, he had been troubled about violence, the betrayal of democracy, and the limits of citizenship. In a 2013 addendum, the philosopher theorised anew about the Saint-Bernard occupation, describing a need to respect historical specificity while drawing lessons that might serve the ongoing movement. The aspiration was for a 'new right for the circulation of people', he wrote, 'of their residence, their labor and their social welfare, established above and beyond national borders'. Turning the language of Schengen's authors to subversive ends, he argued that a new right of free movement would advance democracy by fulfilling 'legitimate demands for liberty and security'. The pursuit of that right, although unrecognised by states, would shape 'political language and practice, today dangerously aligned with exclusive corporate and national interests'.¹⁶⁴ In a 2015 interview, Balibar again recalled the 'emblematic moment' of 1996, how Saint Bernard exposed economic exploitation and political violence reminiscent of colonial subjugation. Memory of the uprising compelled consideration of Schengen's legacy, he argued. 'We're invited to keep quiet about this, but we can't ignore the moral question at issue', he said. 'Europe — Schengen-area

¹⁶³ Mouchard, 'Mobilisations des "Sans"', p.441.

¹⁶⁴ Balibar, 'What we owe to the "Sans-papiers"'.

Europe, with France in the lead — is deploying a repressive arsenal to block the influx of migrants...¹⁶⁵

What the sans-papiers provoked, therefore, was profound doubt about the moral legitimacy of the Schengen project and a reimagining of free movement as a universal human right to traverse national borders. The lack of papers deprived migrants of a place in Citizens' Europe — and of a forum for their claims within a transnational territory in which the nation remained the guarantor of rights as well as the protector of security, although using instruments, such as the Schengen Information System, that reached across national borders. Boundaries hardened for Europe's most vulnerable denizens. 'The Republic wanted to show its strength', as Cissé said of the sans-papiers' eviction from the sanctuary of churches.¹⁶⁶ Yet the migrants won recognition of their rights claims outside of legislatures and courts, by virtue of their insurgency in 1996. Protestors circulated across Paris, chanting, 'We are all "sans-papiers"'.¹⁶⁷

¹⁶⁵ Miri Davidson, 'Two Roads for Europe: An Interview with Étienne Balibar', 10 August 2015, Verso, <https://www.versobooks.com/blogs/2169-two-roads-for-europe-an-interview-with-etienne-balibar>.

¹⁶⁶ Pierre Lepidi and Amadou Ndiaye, 'Les sans-papiers de Saint-Bernard, vingt ans après', *Le Monde*, 22 août 2016.

¹⁶⁷ Bernard 'ménacé'.

EPILOGUE

On 13 June 2010, the Musée européen Schengen opened its doors for the first time to celebrate the twenty-fifth anniversary of the signing of the Schengen Agreement. The museum stands on the banks of the Moselle River; it is a plain building of grey concrete, glass, and wood, unadorned except for three stars carved into the front wall. The stars symbolise France, Germany, and the Benelux Union — the founding states of the Schengen area.

Inside the museum are artefacts: the agreement signed in 1985, passports, photographs, and maps. The permanent exhibition documents the history of the Schengen accord, and of the Moselle Valley, and of the rise and fall of borders. It also documents the use of the Schengen Information System for security and the visa procedures for non-Europeans. Maps indicate how Schengen expanded across the European continent, encompassing 25 nations by 2010, extending from Portugal, Spain, and Greece to the Scandinavian countries and east to Poland, Slovakia, Hungary, and the Baltic states. The museum describes its aim as exhibiting the everyday meaning of free movement and the values of European integration — how the ‘free movement of people within the Schengen Area and the new external borders have changed the lives of Europeans’, and how the removal of internal frontiers ‘put into practice one of the four foundational European freedoms set down in the 1957 Treaty of Rome’.¹

Outside the museum are sections of the Berlin Wall, concrete symbols of the destruction of borders. Nearby, a monument to the Schengen accord rises from the riverbank — three steel steles, each with a star cut into it. Again, the stars honor the tripoint agreement of France, Germany, and the Benelux union to create a territory of free movement.²

¹ ‘European Museum Schengen’, <http://www.eu2015lu.eu/en/la-presidence/luxembourg-et-ue/musee-schengen/index>.

² ‘Monument Schengen Agreement’, Luxembourg Government, <https://www.visitluxembourg.com/en/place/misc/monument-schengen-agreement>.

Dignitaries from across Europe attended the inaugural opening of the Schengen museum: the royalty of Luxembourg, officers of the European Parliament and the European Commission, and representatives of member states of the European Union. Also there were Schengen founders, who had signed the accord in 1985: Catherine Lalumière, for France, and Robert Goebbels, for Luxembourg. Celebratory addresses acclaimed the meaning of Schengen in the development of both the European Union and the internal market. It was 'synonymous with freedom', the mayor of Schengen, Roger Weber, said. It expressed 'a European identity', said Jerzy Buzek, of Poland, the European Parliament's president.³

It was a particular point of celebration that the museum offered the public a history of a transnational project, with Schengen as a cornerstone of Citizens' Europe and the construction of free movement within its borders. As Luxembourg's foreign minister, Jean Asselborn, said, 'It is the first museum of its kind having as an object one of the great achievements of the European construction that traces the path from a Europe of borders to citizens' Europe'. Such was the narrative of historical change to be represented in the Schengen museum: the removal of borders, the demolition of walls, the downfall of the Iron Curtain. The museum, Asselborn explained, would show what was 'progressively left behind: closure and withdrawal, confrontation and war ... and a continent cut in half'. But it would also address boundaries against foreigners, 'our external borders, our security'. The mission was to exhibit a European common space, 'of belonging to a territory, a culture'.⁴

The dedication of a museum to Schengen was certainly the most visible commemoration of the accord, but other consequential anniversaries of European integration also became occasions for examining the work of Schengen as the continent's laboratory of free

³ 'Europe a fêté le 25e anniversaire de la signature des Accords de Schengen', Europa Forum, <http://www.europaforum.public.lu/fr/actualites/2010/06/schengen-1306/index.html>.

⁴ Ibid.

movement. Such inquiry involved retrospective reflections — about Schengen’s abolition of borders put in place by sovereign nations, about Schengen’s part in the imagined community of Citizens’ Europe. And it involved contemplating the future, as well as surveying the past. Appraisals of free movement began almost as soon as the accord entered into force in 1995.

One of the most authoritative inquiries was a *Report of the High Level Panel on the free movement of persons*, presented to the European Commission in 1997. The year 1997 marked the fortieth anniversary of the signing of the Treaty of Rome, and also witnessed the signing of the Treaty of Amsterdam, which incorporated Schengen into EU law. The panel, set up by the Commission, was chaired by Simone Veil, a Holocaust survivor who became a president of the European Parliament.⁵ She knew well the experience of unfree movement across Europe’s borders, deported from France to Auschwitz, in Poland, and then to Bergen-Belsen, in Germany, never forgetting, she later said, ‘the sky clouded by the smoke of the crematoria’.⁶

The report on free movement produced by Veil’s panel studied Europe’s transformation since the signing of the Rome Treaty in 1957. It traced the arc of the guarantee of free movement to the peoples of Europe, citing Schengen as a model for the entire European Union. By 1997, eight countries had acceded to the accord: Italy in 1990, Spain and Portugal in 1991, Greece in 1992, Austria in 1995, and Denmark, Finland, and Sweden in 1996. The panel took as its remit border crossing not by all persons traversing Europe but only by Community nationals, declaring free movement an axis of common citizenship: ‘The free movement of persons is of major importance in bringing the peoples of the Union closer together and in making them increasingly aware of their European citizenship’.⁷

⁵ Commission of the European Communities, *Report of the High Level Panel on the Free Movement of Persons*, chaired by Mrs. Simone Veil, presented to the European Commission on 18 March 1997 (Brussels, 1997).

⁶ ‘Simone Veil ou la mémoire de la Shoà’, *L’Obs*, 30 juin 2017.

⁷ High Level Panel Report, pp.3, 5, 6.

The Veil report charted a shift in the principle of free movement and in the very purpose of European integration — a transcendence of the market. It celebrated the guarantee of free movement to European nationals as persons rather than economic actors alone, tracing the shift from ‘human resources as a factor of production’ to the ‘free movement of citizens’. On the disuse of the category of ‘workers’, established by Schengen and enshrined at the European Union’s founding in the Maastricht Treaty, the report explained: “The fully integrated single market has given way to a Union which recognizes for the people of the Member States “the respect of their history, their culture and their traditions.”⁸ In the report’s preface, Veil wrote of Europe as a humanistic achievement: “The Union is not simply a market but also a body of men and women united by values and a common destiny”.⁹

Progress toward realising the free movement of persons as a universal principle of Europeanism lay in extending the expanse of the Schengen area across the entire European Community, according to Veil’s report. Associating border crossing with a ‘sense of belonging to a common area’, the report hailed Schengen as a ‘major landmark’, declaring, ‘The Schengen agreement constitutes progress in terms of abolishing border controls between the Member States which apply it. It therefore ought to be extended as far as possible’. As long as the accord covered only part of the continent, the consequence would be ‘fragmentation of the area of free movement between Schengen and non-Schengen countries’, the report warned. It noted that barriers persisted, including identity checks at certain common borders, urging strict enforcement of the rights of European nationals. But, above all, it called for Schengen’s expansion: ‘It is desirable ... that the principle whereby people may move freely without being checked at internal borders should be extended to all EU Member States’.¹⁰

⁸ Ibid., pp.15, 5.

⁹ Ibid., pp.15, 5m 6.

¹⁰ Ibid., pp.21, 28, 22, 4, 75.

The High Level Panel's findings on free movement — particularly, the significance ascribed to transcending the market as the basis of common life — were endorsed by a Committee on Civil Liberties of the European Commission and in turn by the Commission itself. 'This area without frontiers must not be confined to economic aspects', the committee stated.¹¹ And a Commission paper on the Veil report for the European Parliament declared free movement 'an integral part of the legal heritage' of all Community citizens, advocating a common guarantee of that entitlement, 'irrespective of whether they pursue an economic activity'.¹² That promise would be fulfilled by extending Schengen's scope.

Thus Schengen formed a touchstone in official representations of the past and future of the free movement of persons as a defining principle of the European project. As the Veil report undertook to establish, Schengen embodied the amplitude of that principle, for within its common space, devoid of internal borders, free movement was no longer a byproduct of economic life, nor limited to vendors of labour, but afforded to all Europeans as members of a transnational community that was 'not simply a market'.¹³

A decade later, the half-century anniversary of the Treaty of Rome evoked another set of reflections on European integration. Summits, seminars, exhibitions held across the continent and worldwide surveyed a path of development from a 'common market to people's Europe'.¹⁴ One was a symposium organised by the Financial Economics Association, based in France, which published the papers in the *Revue d'économie financière*. The contributors were European statespersons, international bankers, scholars, and directors of Europhile

¹¹ Report on the report of the High-Level Panel on the free movement of persons chaired by Mrs Simone Veil, Committee on Civil Liberties and Internal Affairs Rapporteur: Mrs Anne-Marie Schaffner (1998), pp.7, 8, 11.

¹² Commission of the European Communities, Commission Communication to the European Parliament and the Council on the Follow-up to the Recommendations of the High-Level Panel on the Free Movement of Persons, 1 July 1998, Brussels, 01.07.1998, COM(1998)403 final, p.2.

¹³ High Level Panel Report, p.6.

¹⁴ See *Europa*, 2007, https://europa.eu/50/index_en.htm.

foundations. The papers examined themes ranging from postnational identity to monetary theory, in meditations about ‘what has been built ... and what now should be undertaken or avoided’.¹⁵

Among the authors was a signer of the Schengen accord in 1985, the leader of France’s delegation, Catherine Lalumière. Since then, she had travelled an illustrious political itinerary, becoming Secretary General to the Council of Europe, a member of the European Parliament, and vice-president of the European Parliament. In 2007, she was president of la Maison de l’Europe de Paris, an association promoting European citizenship. When presiding at the Council of Europe’s colloquy on ‘Human Rights without Frontiers’, in 1989, Lalumière had criticised the Schengen Implementing Convention’s exclusion of non-Europeans from the guarantees of free movement as a human rights violation, imploring that a ‘lesson from history’ be learned’.¹⁶ Again, in meditating on the Rome Treaty’s legacies, she addressed the lessons of history, offering a bleak appraisal of the relationship between the market and a people’s Europe.

Lalumière’s account was a declension narrative — of humanism subordinated by the market. She lamented the debasement of the ethos of European integration, a descent from idealism to materialism, from the values of a pluralist democracy animating reconciliation after the Second World War to the goals of a neoliberal economic project — Europe as ‘triumphant capitalism, an instrument of ‘economic liberalism’, the ‘direct extension of “globalisation.”’ Just after the war, she wrote, European construction was a ‘project based on a humanist philosophy’, aimed at building peace, erecting barriers against totalitarianism, and protecting freedom. But with the Rome Treaty, Europe became a ‘big economic project’, acquiring ‘over time, an image more and more materialistic, finally cold and without human warmth’. Lalumière

¹⁵ Robert Raymond, ‘Avant-Propos, in ‘50 Ans après le Traité de Rome’, special issue, *Revue d’économie financière*, 88,no.50 (April 2007), p.9.

¹⁶ Lalumière, ‘Welcome Speech’, in *Colloquy*, p.6.

did not discount gains accrued from a single market, increased prosperity through industrial and agricultural development, but she argued for viewing economic progress from a humanist social perspective. ‘Insidiously’, she wrote, ‘the initial objective of the European construction became more blurry, more vague, to the point of disappearing’.¹⁷

It was an arc of change that contrasted with triumphalist stories of the ascent of Citizens’ Europe. Notably, Lalumière did not address the value of extending Schengen’s principles to a wider swath of territory, though she was an architect of the accord. Nor did she dwell on the difference between persons and workers as the beneficiaries of free movement. Instead, she wrote of restoring ‘a soul for Europe’. This meant looking not simply inside Europe’s borders, nor securing its perimeter against non-European nationals, but attending to ‘external relations with the rest of the world’ and basing commitments on ‘humanist values’, Lalumière argued. ‘One glimpses all that must be imagined, fathomed, developed in the setting of globalisation, a new reunified Europe, and a society in transformation’.¹⁸ For that, Schengen did not figure as a model.

By the time the Schengen museum opened, a spokesperson for the sans-papiers of Saint-Bernard, the African asylum seeker Ababacar Diop, had returned to Senegal, where he became president of *Jonction*, a human rights organisation focusing on the flow of global information.¹⁹ His journey had been remarkable, his fortunes waxing and waning since the sans-papiers were forcibly expelled from the Paris church where they had found refuge. Asylum had been a flashpoint of conflict in the making of Schengen, in the negotiations on the implementing convention, the debates over ratification, and the harmonising of immigration rules, highlighting concerns about respect for human rights and national sovereignty. Diop’s

¹⁷ Lalumière, ‘Construction Européenne au-delà de l’Economie’, in ‘50 Ans’, pp.196, 197, 195, 198.

¹⁸ Ibid., pp.199, 200, 199.

¹⁹ *Jonction*, <http://jonction.e-monsite.com/pages/presentation.html>.

itinerary — his route from France back to Senegal — indicated how the experience of asylum-seeking in a Schengen country became a laboratory for new modes of transnational human rights organising.

At the time of the half-century celebrations of the Rome Treaty, Diop was in jail in Senegal, charged with a breach of trust in a business deal. A decade earlier, in Paris, he had finally acquired papers, under regularisation measures adopted by France in 1997, though he never was granted refugee status. He continued to speak on behalf of the *sans-papiers*.²⁰ In 1998, he appeared in the European Parliament, where he recounted the history of colonialism and migratory flows. Meanwhile, he worked as a computer scientist. In 2000, he opened a cybercafé in Paris, across the street from the Saint-Bernard church. He called it ‘Vis@Vis’, trademarking the name and forming a partnership with a cybercafé in Dakar: for 5 francs a minute, migrants in France could videoconference with family in Africa. His venture enabled border crossings — via the Internet. Then, due to a trademark dispute, the onetime *sans-papier* became wealthy, winning 8 million francs in a settlement with a French media company. In 2001, Diop returned to Senegal to invest his fortune in his homeland, reaping further wealth from auctioning off shares of Vis@Vis. He started a transport firm and opened cybercafés in Dakar and Saint-Louis, envisioning ‘access at a lower cost for the poorest’.²¹ By 2007, his investments had collapsed and he was jailed in Saint-Louis for several months, for breach of promise to procure documents for travel to Europe.²²

But Diop’s fortunes shifted again, as he became influential in a global network advocating digital human rights. During the Saint-Bernard occupation, he had been a ‘cyber-

²⁰ Nathaniel Herzberg, ‘Ababacar Dip, au nom de tous les sans-papiers’, *Le Monde*, 11 janvier 1997.

²¹ Ndiaye et Lepidi, ‘Les Sans-Papiers de Saint-Bernard, Vingt Ans Après’; Winders, *Paris Africain*, p.132.

²² Marie-Christine Tabet, ‘Ababacar Diop Porte Voix des Sans Papiers de Saint Bernard’, *Le Figaro*, 22 août 2007; Béatrice Bantman, ‘Ababacar Diop: L’ancien porte-parole des sans-papiers de Saint-Bernard s’est range’, *Libération*, 28 juillet 1999.

clandestine’, armed with a mobile phone and laptop.²³ In Senegal, he worked with *Imaginons un Réseau Internet Solidaire*, a human rights group promoting digital solidarity.²⁴ A year after his jail term, a United Nations document listed him as *Jonction’s* president, seeking ‘equitable rights’ for African peoples.²⁵ By 2010, when the Schengen museum opened, he was the director of *Seneclie*, a Senegal government agency that combated digital inequality by giving thousands of Senegalese children access to the Internet.²⁶

As a *sans-papiers* without Schengen’s protections, Diop had been subject to surveillance, his movement tracked as an illegal migrant. As a Senegalese human rights spokesperson, he argued for informational self-determination as a foundation of democratic society. In 2014, working with the Global Surveillance and Safeguards Project, he contributed to a paper on the right to digital privacy presented at the Africa Internet Governance Summit, in Djibouti. The paper warned of states increasing ‘collection of personal data through surveillance’, violating international privacy protections found in the Universal Declaration of Human Rights. It did not name Schengen’s Information System, yet highlighted the wrong of controlling human movement through ‘invasive technologies’, as were used across the Schengen states by the time of the Saint-Bernard occupation.²⁷

Meanwhile, *sans-papiers* in Europe protested the denial of free movement in the Schengen area. Waging transnational dissent, they crossed borders in acts of civil disobedience,

²³ Saranga Karen, ‘Ababacar Diop, le clandestin le plus médiatique de France’, *L’Express*, 16 janvier 1997; John Downing, ed., *Encyclopedia of Social Movement Media* (Thousand Oaks, Calif., 2011), p.525.

²⁴ See ‘Shirin Ebadi as Civil Society Speaker’, IRIS (2005), <http://www.iris.sgdg.org/actions/smsi/hr-wsis/ListOfSupports-141005.html>.

²⁵ Miguel d’Escoto Brockmann to President, UN General Assembly, 21 October 2008, <https://www.un.org/en/ga/president/63/pdf/letters/20081021-finfordev.pdf>.

²⁶ ‘Senegal, Reduction of Digital Divide’, ERNWACA (2010), http://www.ernwaca.org/panaf/spip.php?rubrique2&debut_arts=280; Seneclie Project (2005), <https://www.facebook.com/246689678784048/posts/246735132112836/>.

²⁷ Arthur Gwagwa et al., ‘Protecting the Right to Privacy in the Digital Age’, Privacy International, IDRC, May 2014, pp.2, 7.

erected encampments outside the European Parliament, and demonstrated at migrant holding centres. At the moment of the Africa Internet summit, a March for Freedom was nearing Schengen. It had begun in Strasbourg and would end in Brussels, crossing France, Germany, Luxembourg, and Belgium. It opposed the construction of 'Fortress Europe'. The passage across the Schengen area took about a month, from May to June 2014. 'We we will exercise our basic right of freedom of movement', the migrants declared. 'We are asylum seekers, refugees, undocumented migrants ... who have no full privilege of citizenship'. There were demonstrations at significant sites in the history of European integration, from Saarbrücken to Berlin. But the village of Schengen had singular symbolic meaning. The migrants crossed the Moselle River by boat, 'breaking the border', and enacted a rewriting of the Schengen accord. On the monument honoring the accord, the star-marked steel steles, they hung barbed wire. Pictures of sans-papiers who had died crossing borders formed a makeshift exhibition outside the Schengen museum.²⁸

The rights claims of the sans-papiers, from the theories advanced at Saint-Bernard to the symbolism of the migrants' march, refused the history taught in the Schengen museum — of European integration that transformed a continent ravaged by world war into an expanse of freedom and post-national peace. To speak of free movement as a transnational human right made evident the fixed boundaries secured through the sovereignty of the Schengen states. The ordeal of the sans-papiers in the Schengen area exposed the cruel anomalies of human migration in a world where commodities and capital circulate across borders with far less restraint.

²⁸ 'Let's march for our freedom! May-June 2014' <https://freedomnotfrontex.noblogs.org/post/2014/02/03/lets-march-for-our-freedom-may-june-2014/>; 'Daily Reports', <https://freedomnotfrontex.noblogs.org/daily-reports-journaux/>; Heinz Nigg, 'Sans-papiers on Their March for Freedom 2014: How Refugees and Undocumented Migrants Challenge Fortress Europe', *Interface*, 7, no.1 (May 2015), pp.263-288.

Any history of Schengen's origins is incomplete without taking account of dissident itineraries, the journeys of Ababacar Diop and Madjiguène Cissé; the March for Freedom on behalf of asylum seekers, migrant workers, and refugees without papers. The world Schengen made was hardly one of open borders. Nor did it transcend the logic of the market that propelled European integration. Nor was it meant to be otherwise by its founders.

The narratives told of Schengen in its formative era simplified its history, but in contrasting ways. Schengen appears as a landmark in the path from a Europe of borders to Citizens' Europe, but conversely as the embodiment of fortress Europe. So, too, Schengen appears as a landmark in the path toward a European Union that was not simply a market, but conversely as a zone of triumphant global capitalism where persons are commensurate with goods as subjects of free movement. Precisely because Schengen's origins have not been a centrepiece of scholarship on Europe's postwar history, such opposing creation narratives have gained currency, serving alternatively to vindicate European integration and to condemn the project as a betrayal of human rights. And the stakes of the narratives became all the greater with the onset of Europe's refugee crisis, as a surge of asylum seekers beginning in 2015 tested the values and institutions of the European Union.²⁹ As border camps were planted at Europe's outer frontiers, checkpoints were reinstated at internal borders, presaging the death of Schengen by a thousand cuts.

Always, however, the Schengen accord intended free movement only for certain people — Europeans. It never promised a universal right to cross borders, instead predicating the free movement of European nationals within the common space on the exclusion of foreign

²⁹ Sergio Carrera, et al., 'The EU's Response to the Refugee Crisis: Taking Stock and Setting Policy Priorities', 2015, https://www.ceps.eu/wp-content/uploads/2015/12/EU%20Response%20to%20the%202015%20Refugee%20Crisis_0.pdf; Christelle Palluel, 'Le nouveau régime de la demande d'asile en rétention administrative: des garanties en trompe-l'œil', *Le Revue des Droits de l'Homme*, 10 (2016).

migrants and the fortification of controls at external borders. From its inception, Schengen paired internal freedom with unfreedom enforced by sovereign states. Always, too, the free movement of persons was meant to add value to Europe's single market, supplementing the exchange of commodities with the unhindered flow of human capital, lending legitimacy to economic integration through European cosmopolitanism. From its inception, Schengen paired the market's needs with the principle of free movement and the creation of Citizen's Europe. Such dualisms defy narratives of progress or declension. Accordingly, this thesis offers a different history, tracing the emergence of Schengen's manifold aims and the conflict evoked by their pursuit. At one and the same time, Schengen associated economic life with transnational citizenship and deepened the distinction between foreigners and Europeans.

It was Europe's escalating refugee crisis that split apart the elements of the Schengen accord, setting single market doctrine in conflict with national barriers against foreigners. The problem was the checkpoints restored at common borders to stop the flow of asylum seekers. By 2016, a report commissioned by the European Parliament warned, "The reintroduction of ID-checks at internal Schengen area borders entails a negative impact on the economies of the European Union".³⁰ If free movement had costs, so did its abridgement. That year, the ceiling collapsed in the Schengen museum. But the town's mayor denied any symbolism, saying only, 'It's a sign that we need to do some repairs'.³¹

³⁰ Matthias Luecke and Tim Breemersch, *Schengen Border Controls: Challenges and Policy Options* (2016), European Parliament, p.4 http://www.europarl.europa.eu/RegData/etudes/IDAN/2016/578990/IPOL_IDA%282016%29578990_EN.pdf.

³¹ 'Schengen European Museum ceiling collapse, an EU omen?', *Luxembourg Times*, 12 May 2016.

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