The state at its borders: Germany and the Schengen negotiations

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Abstract

The objective of this thesis is to explore Germany's border policies in the face of a European-level intergovernmental regime for border-related policies: The Schengen Agreements (1985-1995)[1]. The results are twofold: The border retains an essential role for state authorities for security provision since European solutions were only sought to nationally understood security threats. Yet a new principle of internal and external borders emerged in which competence for border policies was moved to the European level and in which the interests of other states have to be taken into account as if they were the state's own.

The thesis analyses the rationale of Germany for advocating such a transfer of hitherto essentially national competence to an intergovernmental mechanism. The motive is identified in a combination of national (internal) security interests and current interpretations of historical experiences. A socialisation of Western Germany into European institutions led it to seek a European-level solution.

In this context, the changes of the political landscape in 1989 had profound implications for the debate about borders. A changed security situation led to a focus on soft security matters which were connected to deep-seated uncertainties of the possible threats emanating from an unstable Eastern Europe. Germany's relationship with its eastern neighbours had to be clarified (which included the recognition of the Oder-Neisse border), and it had to assure the Schengen partners of its ability to guard the eastern Schengen border.

The thesis concludes that Germany was one of the driving forces in the Schengen negotiations. From the start, Germany advocated a set of compensatory measures which were to counteract the identified loss of the security function of the border against international crime and illegal immigration. In parallel, it also implemented significant additional changes on the national level. The resulting Schengen system established a link between freedom and security which was retained in subsequent EU arrangements.

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[1] Beginning of negotiations to beginning of implementation

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List of Abbreviations

BGS	Bundesgrenzschutz, Federal Border Guards
BMI	Bundesministerium des Innern, Federal Ministry of the Interior
CEE	Central and Eastern Europe
CELAD	Comité Européen de Lutte Anti-Drogues, a group of drug coordinators
CIREA	Centre for Information, Discussion, and Exchange on Asylum
CIREFI	Centre for Information, Discussion, and Exchange on Immigration
COMEX	Executive Committee
CDU	Christlich demokratische Union, Christian Democrat Party
CSU	Christlich Soziale Union, Christian Social Party
GDP	gross domestic product
GDR	German Democratic Republic
EBC	External Border Convention
EC	European Community
EU	European Union
Europol	European Police Office
F	France
FDP	Freie Demokratische Partei, German Liberal Party
FRG	Federal Republic of Germany
GG	Grundgesetz; Germany's basic law
IMK	Innenministerkonferenz, regular meeting of all Länder Ministers of the Interior and the federal Minister
INPOL	Informationssystem der Polizei, central police information system in Germany
JHA	Justice and Home Affairs
MAG	Mutual Assistance Group (customs)
NATO	North Atlantic Treaty Organisation
NGO	non-governmental organisation
SIC	Schengen Implementing Convention

SIRENE	Supplementary Information Request at the National Entry, SIS sub-system
SIS	Schengen Information System
SPD	Sozialdemokratische Partei Deutschlands, Social Democrat Party
TREVI	'Terrorisme, Radicalisme, Extremisme et Violence Internationale'
UK	United Kingdom
VAT	Value added tax
WG	working group
WW I	First World War
WW II	Second World War
ZEVIS	Zentrales Verkehrsinformationssystem, central information system on traffic

Chapter 1

State borders, Schengen and Germany

1. Introduction

The Schengen Agreements of 1985 and 1990[2] and their integration into the European Treaties by the Treaty of Amsterdam in 1997 represented a fundamental change with regard to border policies in Europe. Negotiated and implemented in a period of major transitions in Europe, they were decisive steps in European integration. When the process of abolishing border controls started in 1984/85 as a result of a general intention to reinforce European integration and of a strike of lorry drivers, the consequences of such an enterprise had not been thought through and were considered unproblematic. The years of negotiations which followed made apparent the complexity of the issue:

While the modalities of border controls and law enforcement cooperation had hitherto been an exclusive competence of state governments, these agreements introduced substantial European-level solutions to perceived security problems. Not only were actual controls at the borders to be conducted according to a common standard; via common databases on people and goods sought, authorities of one state could require those of another state to act on their behalf. Furthermore, a principle was introduced in which one state of the Schengen partnership had to observe the interests of other states as if they were its own.

For scholars of International Relations, it is therefore an important question why states were willing to give up these traditional competences anchored in national sovereignty. Whilst it is not enough to cite security interests for such a development, it is interesting to ask what kind of security was to be provided through this arrangement, which threats were identified as primary and in which processes with what actors. It is also important to retrace the processes through which this European solution, that was advocated by national governments, became accepted as the adequate solution in the national arena.

One of the central questions of this thesis is which role Germany played in the Schengen negotiations and how it influenced the agenda as well as the solutions found. Germany's historical experiences led it to consider its geographic position as a direct neighbour of two Eastern European states as problematic with regard to immigration and international crime.

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[2] The 1985 treaty is commonly called the 'Schengen Agreement', while the 1990 text is referred to as the 'Schengen Convention'. If both Schengen treaties are referred to, this thesis will use the expression 'Schengen Agreements'.

Its European anchoring led it to seek a common European solution to this problem. During the negotiations, Germany's experiences in terms of practice and techniques of control as well as its central role in the European integration process assured the country a key position.

The aim of this thesis is therefore to retrace the national German debate regarding changes of border controls between 1985 and 1995. At the same time, the interplay between the European and national level is to be investigated – showing German influences on the outcome of negotiations, but also the influence of European processes on German arrangements of border controls.

The timeframe of investigation concentrates on the years between 1985 to 1995. This space encompasses the time between the signing of the first Schengen Agreement and the entering into force of both Agreements (in 1995). During these ten years, the fundamental decisions on the direction and inner logic of the treaties were taken. Although important developments also took place after 1995, they did not run counter to the fundamental directions negotiated before. Developments after the implementation show that the initial rationale was expanded and also found entry into the legal arrangements of the EU through integration of Schengen into the European treaties.

Border, frontiers, boundaries[3] – these terms are very much part of everyday language as well as of the daily experience of citizens: passport controls, cross-border shopping, the presence of asylum seekers, the changes of currency, language or dialects at the border... - all this illustrates the variety of effects of borders on daily lives of citizens and foreigners. It is also apparent that borders differ in their character for individuals. For many people, borders imply difference: different language, food, mentality – 'others' live on the other side. This is not only true for state borders, but also for regional borders within states. Yet borders can also represent contact points in areas where the possibility of economic or cultural exchange over the border is more central than political and societal antagonism.

Growing up in Western Europe after the end of the Second World War sheltered many people from the experience of one of the harshest effects of frontiers: being denied visas or

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[3] The usage of these terms differs widely as Chapter 2 (part 2.1) shows in more detail. This thesis uses the terms in the following sense: Border and frontier are both used for political borders. Frontier is used more to designate international state borders and the external borders of the EU. Border refers to political and administrative limits on all levels. Boundary is employed as the term with the widest connotations, referring to a political border on any level, but also to an abstract 'limit'.

entry to places or being prevented to exit from their own state – an experience very common in many other parts of the world. Yet people were not unfamiliar with strict border controls between states and the possibility of a subjection to the search of car or body at checkpoints. West European countries conducted border controls on goods for purposes of taxation, enforcement of quality or security standards and of laws of import, and they enacted controls of persons for purposes of public security, criminal investigation and immigration control. Especially the entry to East European states carried with it an exercise of the full control of state authorities.

Germans had an ambiguous experience of consequences of borders: one aspect was that crossing the border to go to Berlin or into Eastern Europe entailed detailed controls, rejection of certain goods in the luggage and even denial of entry. The inner-German border made contacts with the 17 million Germans on the other side (to whom many West Germans were related) very limited. Awareness of borders was high – the vast majority of citizens lived within 150 km of a land border, and many lived close to the German-German border.

The inner-German border was one of the most fortified in the world. Personal accounts of people living in Berlin – a divided city surrounded by borders – often referred to the feeling of being shut in. Whereas the Western side of the inner-German border remained relatively unfortified, the eastern side was heavily guarded along the whole length of the border. The following gives an impression of the array of subsequent rows of barriers on the eastern side of the border.

Figure 1: The border between the GDR and FRG[4]

Barricading belt of the Soviet Zone
(firing field of the Soviet Zonal border guards)

Surveillance
by patrols of the People's Police

Barricading line
cordoning off the hinterland

Third line fence

Observation post

Dug-out

Barrage trenches (60 to 80 cm deep)

Second control strip (6 metre strip)
harrowed

Second line fence
(double fence)

Mines

Minen

Clear-felled area

First control strip (10 metre strip)
(in some parts not recognizable)

Chevaux de frise

HALT!
Hier
Zonengrenze

First line fence (frequently dilapidated)

Demarcation line of the Soviet Zone of Occupation
(alignment of boundary stones)

Forbidden zone (up to 5 km deep)

Protective strip (up to 500 metres deep)

15—30 m

20—200 m

Achtung
Lebensgefahr

Caution!
Danger to life!
Operational sphere
of Soviet Zonal mines
Federal Border Guard

Federal Republic of Germany

Caution!
100 Metres
Zonal border
Federal Border Guard

Achtung!
100 m
Zonengrenze
Bundesgrenzschutz

Stop!
Here
Zonal border
Federal Border Guard

The image gives an idea of the impression the presence of such a border must have left on the consciousness of Germans. There were changes to the border regime, but those did little to alleviate the impression of overpowering control.[5] Testimonies to the important role of the border in daily lives are numerous anthologies and other collections documenting 'life with the border' which were published before and after the fall of the wall.[6] Thus, growing up in Germany meant that the eastern border attained an immense psychological importance. The disappearance of this border was charged with new hopes, but also new fears which became part of the German response to Schengen.

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[4] Source: Bundesministerium für Innerdeutsche Beziehungen, *In the Heart of Germany, in the Twentieth Century* (Karlsruhe: Badenia Verlag, 1965).

[5] By the 1980s, the mines had been removed. The metal fence had been fortified, the observation posts multiplied, dogs were constantly on patrol and the third line fence had become equipped with electronic and acustic signals. Border guards had the duty to shoot if a person trying to exit without permit did not stop on demand.

[6] Cf. for example Ernst-Michael Brandt and Roger Melis, *Die unsichtbare Grenze oder Leben in zwei Welten* (Hamburg: Luchterhand, 1991), Ralph Giordano, *"Hier war ja Schluss..."* (Hamburg: Rasch und Röhring, 1996), Karl Ruppert, *Beispiele für Verflechtungen und Zusammenarbeit an der Grenze* (Hannover: Vincentz, 1984), Dietmar Schultke, *"Keiner kommt durch"* (Berlin: Aufbau-Taschenbuch-Verlag, 1999), Ludwig Schumann, *Grenze* (Magdeburg: Blaue Äpfel, 1999), Klaus Herwig Stoll, *Dienst an der Grenze* (Fulda: Parzeller, 2000).

The other aspect of West German post-war experience with borders was ease of travel within Europe, and increasingly within the whole Western world. Indeed, West Germans liked to think of themselves as 'world champions of travel'. The following chart shows that in comparison to their fellow Europeans, Germans were especially eager to spend time and money on journeys beyond their borders. The numbers from 1980 and 1993 demonstrate that Germans continuously spent more on travels abroad than citizens of most other countries.[7]

Country	Rank in 1993	Spending in million $ in 1993	Spending in million $ in 1980	Rank in 1980
United States	1	40,564	10,385	2
Germany	2	37,514	20,599	1
Great Britain and Northern Ireland	4	17,431	6,893	3
Italy	5	13,053	1,907	12
France	6	12,805	6,027	4
Netherlands	8	8,974	4,664	5
Austria	9	8,180	2,847	10
Belgium	11	6,363	3,272	8
Switzerland	12	5,803	2,357	11
Spain	14	4,706	1,229	21
Sweden	15	4,464	1,235	20
Australia	17	4,100	1,749	15
Norway	18	3,565	1,310	19
Denmark	19	3,214	1,560	17
Portugal	27	1,846	290	37
Finland	29	1,617	544	28
Ireland	32	1,256	742	26
Greece	34	1,003	190	41

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[7] Source: Statistisches Bundesamt, *Tourismus in Zahlen 1995* (Stuttgart: Metzler-Poeschel, 1996). See also more extensive chart in the appendix. Figures about Germany include the Eastern part from July 1990 onwards.

It is difficult to say where this desire to cross borders and go abroad sprang and springs from: one might certainly cite the difficult and sometimes tense situation concerning the inner-German border which made Germans enjoy the opportunity to cross other borders in the West easily. One might also refer to the German historical experience which led to a great willingness to view the country's political and citizens' individual future in a European context. The negative memory of the wars as well as Germans' longstanding historical links all over Europe may have led to an awareness of German connectedness to other European states and to a desire to forge friendly ties with former enemies. The rise of economic productivity and wealth from the 1950s onwards certainly also played a role in Germans' willingness to spend money on holidays abroad and demonstrate one's ability to afford such luxury, which had previously been reserved for the upper social classes. Thus, the negotiations for abolition of border controls may be said to have corresponded with an existing desire in Germany to facilitate journeys abroad.

The Schengen negotiations which had progressed to a final stage by 1989 were confronted with critical uncertainties by the changes in Germany and the centre of Europe. Before 1989, the division of Europe had precluded many issues from the political agenda which had to be accepted as a given. The international security situation allowed only small space for manoeuvering, mostly negotiations to change 'low politics' circumstances of life for citizens. Problems such as the final recognition of the eastern German border or even the unification of Europe had been postponed indefinitely. Through the changes, the security situation changed fundamentally, replacing a clearly identifiable enemy with so-called 'soft security' threats such as immigration, terrorism and organised crime: 'The danger to the stability of our system is no longer perceived as a homogeneous external 'enemy' which was identified with the communist system, but with terrorism, drugs and illegal immigration.'[8]

In Germany, unification brought with it a whole set of questions relating to German identity, Germanness and also the relationship with eastern neighbours. This included a re-inforced debate regarding former German land in Poland and the discussion of ethnic Germans' access to Germany. The public debate also highlighted the historical uncertainty of Germany regarding its identity, shape and location of borders. Thus, the role and management of borders became a vital issue: firstly, while the border had cut off relations

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[8] Monica den Boer, "The Quest for European Policing: Rhetoric and Justification in a Disorderly Debate," in *Policing across National Boundaries*, ed. Malcolm Anderson and Monica den Boer (1994), 182.

between the (West) German state and its former lands and area of influence in the East, the dismantling of the tightly controlled border between East and West put renewed questions of the relationship between Germany, its Eastern neighbours and people of German descent. Secondly, while the relations between the two German states had hitherto been subject to only painfully negotiated small changes, the reality after the Cold War demanded active management of border controls in order to encounter problems of uncontrolled migration and international crime.

Germany's European neighbours also viewed the unification with concern. The questions regarding Germany's role in Europe and its relationship with the East also had repercussions for the debate on border controls. One of the concerns was whether Germany would be willing and able to control its Eastern border. Other fears related to German instability and possible claims to lands in the East.

Thus, the political changes of 1985 – 1991 brought with them enormous implications for the discussion of borders and border controls. European integration led to the creation of a common market and envisaged the lifting of border controls. German unification did away with the border between the former two German states which had been the most fiercely guarded border in Europe. Germany saw itself under the obligation internally and from its Western partners to guarantee the control of a new Eastern border of the European Union. Finally, the fall of the Soviet Union and the re-establishement of the sovereignty of Central European states brought with it the freedom of travel for both sides and the interests of developing reinforced economic relations with these states. The changes in the East had contradictory implications: the developments opened up a 'new world' – politically, culturally and economically – to West European states, especially Germany. At the same time, the open borders towards the East became associated with unforeseen consequences for Europe such as the influx of immigration and crime.

Although 1989 changed the whole context of the Schengen negotiations, there were also considerable elements of continuity. It will be shown that a major part of the compensatory measures had been agreed before that time – partly thanks to German insistence. The changes meant that these now became important to Germany's neighbours to safeguard their security interests. While anxieties by Germany's neighbours led to a delay of

implementation, the debate in Germany regarding the security function of the external border did not change course, it only intensified.[9]

Western Europeans had been privileged in seeing a new development through travel unions which abolished border controls between countries. The earliest two such arrangements were the Nordic Passport Union starting in 1954 and the UK-Ireland Common Travel Area.[10] The start on the continent was the Benelux travel union in 1960 as a part of the Benelux Economic Union. Between other countries, such as Germany and France, smaller border points could in practice be crossed without much control (especially at night), but the legal obligation for full border controls remained. The crossing points at major roads for transnational traffic were still controlled closely by the beginning of the 1980s. Progress in European integration led to disaffection with remaining border controls and subsequent delays. Industrial action and perceived economic advantages led the German and French government to conclude a bilateral treaty envisaging the abolition of border controls in 1984. On the invitation of the Benelux Union, this was extended to become a community of five states which envisaged the abolition of border controls at the common borders.

The initial rationale was both economic and political: European integration led to the enactment of an internal market allowing goods and capital to flow freely in the area of the Community. Border checks on goods were to be abolished in order to facilitate trade across the whole of the West European territory. What was missing was agreement on the freedom of movement for persons, which proved more difficult to introduce due to the reticence of some member states, most importantly the UK. The intergovernmental Schengen Agreements of 1985 and 1990 were a solution found to compensate for supposed risks attached to full freedom of movement within the EU. They provided for compensatory measures such as increased police cooperation and reinforced controls at the external borders in order to make up for the loss of internal border controls. It took until 1995 for the implementation of the agreements to create a true European space of freedom of movement. This initial community of Belgium, the Netherlands, Luxembourg, France and Germany with the intention to compensate for the negative consequences of the realisation of the Single Market, widened its scope to eventually include all EU countries

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[9] Organised crime had been an occupation for the German police during the whole decade. With the opening of the iron curtain, fears regarding an influx of criminals intensified.

[10] The UK-Ireland Common Travel Area was in fact not a 'new' development, but was a result of the evolution of Ireland into an autonomous state which took place in the context of the British 'common travel area' for its Empire and Commonwealth.

except the United Kingdom, Ireland.[11] With the integration of the accords into the community *acquis* through the Treaty of Amsterdam (1997/1999), the agreements have become part of the integral logic of the EU and of the acquis all new applicants of the Union will have to implement.

Although borders, migration and internal security have been very high on the agenda in some of the member states of the European Union, have scholars in political science and international relations taken up the issue in greater numbers only recently. There are interesting studies, especially in the field of internal security and migration, but the majority of scholarship has neglected this 'second building site of Europe.'[12] Within this field, a specific interest in borders themselves is rare. Most studies are directed at policy areas such as police cooperation or the fight against organised crime which have become part of the tasks of the EU since 1992.

Also on a theoretical level, there has been comparatively little interest in consequences of border policies for the state, its sovereign authority and intergovernmental cooperation in an area of hitherto central national authority. A number of questions has remained largely unexplored. One set of questions refers to the role of borders for the modern state: what do states expect of their borders at the end of the 1990s, which functions are borders supposed to fulfil? Are there differences in such concepts between states? What influences the attitudes of states towards their borders after the end of the Cold War? Another field of interest could be the relationship between the intended role of the border and practice: How are border controls actually conducted? Do they fulfil the function assigned through politics and administration? Is the physical border of any relevance at all in Europe anymore? Relatively little research has been carried out regarding internal national policies of border controls: Which actors within states advocate the control of borders, which would like to reduce such checks? What is their relative importance and influence in the national policy making field?

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[11] Spain and Portugal joined in June 1991; Austria signed in April 1995 and began implementation in December 1997; Greece signed in November 1992 and started partial implementation at the end of 1997, Italy signed in November 1990 and fully participated only from October 1997 onwards; Denmark, Finland and Sweden joined in December 1996; a cooperation agreement between the Schengen states and Iceland and Norway (members of the Nordic Passport Union) was signed at the same time.

[12] Didier Bigo, ed., *L'Europe des Polices et de la Sécurité Intérieure* (Paris: Editions Complexe, 1992).

2. States, borders and border controls

Policies dealing with migration or foreigners are not only questions of domestic politics. Rather, this topic touches upon questions of encountering 'the other', whether within or across one's own borders. The increased and lasting presence of foreigners in European societies re-poses difficult theoretical questions of identity definition and the constitution of a polity. Where is the difference between 'us' and 'them', and how is this line drawn? How is the relationship across this line between 'us' and 'them' managed?

Political identities in European states have developed at a time of relatively little trans-border exchange in terms of migration or trade. In the past decades, European countries experienced the opening of borders between Western European states. Exchange and intra-Community movement grew over time. With the end of the Cold War, also the strict border controls with East European states were eased. Travel to and from Eastern Europe became easier and an exchange of goods took place. Soon, however, the experience of negative consequences of relatively uncontrolled borders – illegal migration and crime – were noticed. Policies had to be devised which would ensure both the freedom of movement as well as deflect as much as possible the negative effects of borders. On the level of societal questions, these developments challenged certainty about national identity in a number of European countries. Questions of the legitimacy of the presence of foreigners were discussed (asylum seekers, work migrants), but also the access to citizenship. What makes a person 'French', 'German' or 'British', were questions which had to be answered anew in European states.[13]

On the level of governance, deepening European integration and the consequences of the end of the Cold War brought to the surface deep-lying questions of control and ability to provide security and freedom. One of the questions became where this control ought to be exercised and who should be controlled. On a theoretical level, the past decades therefore raised questions of the importance of borders for the modern state. Which role does territoriality, do border controls have for the state and its governance?

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[13] Cf. Koslowski's account of the critical role of migration in the development of political institutions and the problems it raises today for territorially organised institutions. Rey Koslowski, *Migrants and Citizens. Demographic Change in the European State System* (Ithaca and London: Cornell University Press, 2000).

The development of the modern state involved territorial differentiation into like units (formally inscribed by the Treaty of Westphalia). Concomitantly, the modern states gradually evolved systems of control over individuals from those of hierarchical systems of fiefdom to those of state monopoly of power.[14]

Modern states are therefore territorial in the sense that their mode of governance refers to territory. The functioning of the modern state relies on a certain controllability of internal events which is guaranteed by borders and their control. Weber has captured this when he described the modern state: 'Staat ist diejenige menschliche Gemeinschaft, welche innerhalb eines bestimmten Gebietes – dies: das „Gebiet" gehört zum Merkmal – das Monopol legitimer physischer Gewaltsamkeit für sich (mit Erfolg) beansprucht.'[15]

Citizenship, national identity and borders have become interlinked aspects of the modern state. The term citizenship denotes a legal relationship between a person and a state from which result rights for the individuals and duties towards the state. Part of the rights of citizens is to be protected from 'outsiders', thus implying a clearly definable distinction between citizens and aliens. National service in the army in the event of conflict with other states became a constituting feature of the modern state. Citizens of the 'traditional' modern state defined themselves as living within states. Indeed, Koslowski points to the fact that national identity and citizenship developed in a context of emigration in Western Europe when the overwhelming majority of inhabitants did correspond with citizens.[16] Growing integration in Europe and of the international system means, however, that a rising number of citizens spends time outside their state, whether for reasons of travel, work or flight from their country.

Two principles govern the acquisition of citizenship: *ius sanguinis* ('the right of the blood') or the principle of descent, and *ius soli* ('the right of the soil') or the territorially based principle. Many states apply a mixture of the principles, often under the pressure of changed circumstances of migration. Globally speaking, none of the principles dominates: the Americas apply predominantly the territorially based principle, Asia and Central and

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[14] Cf. for example Schulze's history of state and nation in Europe: Hagen Schulze, *Staat und Nation in der Europäischen Geschichte*, Limitierte Sonderauflage ed. (München: Beck Verlag, 1999).

[15] Max Weber, "Politik als Beruf," in *Gesammelte Politische Schriften*, ed. Johannes Winckelmann (Tübingen: J.C.B. Mohr, 1980).

Translation: The state is this human community which (successfully) claims the monopoly of the legitimate use of physical force within a given territory – this: "territory" is an indispensable part of the definition.

[16] Cf. Koslowski, *Migrants and Citizens. Demographic Change in the European State System*.

Eastern Europe use the principle of descent but refer to the *ius soli* to avoid statelessness. Parts of Africa and Europe still apply primarily the principle of descent. In Europe, most states practice a mixture where the principle of descent is complemented with territorially based rights to citizenship for second and third generation migrants. Germany, Austria and the Scandinavian countries used primarily the principle of descent. Germany changed its law of citizenship in 2000 to include a degree of territorially based conditions for citizenship for immigrants.[17]

In the modern system of governance, borders are indispensable for the maintenance of domestic order and the enforcement of legal provisions and taxation. Similarly, the welfare state depends on a certain congruence between citizenship and those entitled to benefits. The terms and conditions under which non-citizens can gain access to the welfare system are a matter of fierce debate (see for example the debate regarding social security for guest workers in Germany). Thus, the change of the law of citizenship in Germany can be interpreted as an attempt to bring into more congruence the holders of democratic rights and the permanent domestic residents.[18]

That modern states display territorial behaviour has to be seen as historically contingent, however. Koslowski has shown, for example, how migration poses a challenge to territoriality as practiced in the modern state.[19] The geographer Sack has identified classification by area, communication and control over territory as general characteristics of territoriality.[20] As socially constituted behaviour, territoriality depends on the reproduction of territory-oriented behaviour. The mode of governance of modern states, which relies on borders in the sense outlined above, is only one particular practice reproducing territoriality.

The governments of modern states see themselves increasingly confronted with phenomena (such as migration or transnational networks of criminals) which fundamentally challenge the system based on territory. This thesis looks at the reaction of states in the face of such a challenge. Europe is a particularly interesting example in that it

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[17] Bayerisches Staatsministerium des Innern, *Abstammungs- und Territorialitätsprinzip* (1999 [cited July 2002]); available from http://www2.stmi.bayern.de/infothek/staatsangehörigkeit/sld003.htm. These are only rough categories and more differentiation would be useful. However, they suffice to indicate the distribution and mixture of principles between countries.

[18] Cf. Bundesministerium des Innern, "Das Bundesministerium des Innern. Informationen zu Aufgaben und Bilanz, Organisation und Geschichte," (Berlin: 2000/2001), 39.

[19] Cf. Koslowski, *Migrants and Citizens. Demographic Change in the European State System.*

[20] Cf. Robert David Sack, *Human Territoriality. Its Theory and History* (Cambridge: Cambridge University Press, 1986).

epitomises the development: the modern territorial nation state evolved in Europe under conditions of emigration and sparse population, while it is now faced with the question of how to deal with increased migration and international crime, and the rising presence of foreigners. At the same time, Europe is undergoing a change as a polity evolving towards an 'ever closer union' amongst its peoples – a development which has itself brought to the surface questions of sovereignty, citizenship and entitlement.

3. European integration and borders

Studying border policies allows the observation of the integration of a new policy area into the EU. Until the Treaty of European Union in 1992, cooperation on matters of Justice and Home affairs, to which the Schengen Agreements were closely connected by virtue of their subject matter and participants, had remained outside the then EC. Given the close connection between developments in European integration and those in coordinated internal policies, provisions were sought to introduce negotiations regarding such issues into the framework of the Treaties. The new Title VI of the Maastricht Treaty represented a compromise of all the diverging views of Member States, allowing for intergovernmental cooperation in a separate pillar of the European Union.

Despite the fact that Justice and Home Affairs have long remained within the realm of intergovernmental cooperation, researching borders in the European Union touches upon the core questions of integration. The issue highlights a number of theoretical questions relating to the evolution and deepening of integration, to the tensions between national and European level and to the possible evolution of a European polity.

Citizenship, national identity and territoriality are interlinked aspects of the modern state. Efficient government relies on clarity of territory and the relevant population. Over time, national control over borders has been developed into a system in which states depend on borders to maintain their authority, their security and their ability to tax. The control of the national borders is part of the competences of the national government, even in states which have a federal system such as Germany. The national control systems, e.g. personified in the national border guard or the customs services, have become intricately linked with internal and external sovereignty.

This does not imply, however, that borders represent also a sharp division in the economic or social sphere. Anderson observes that the 'international boundary no longer constitutes a sharp break in the cultural landscape. This is a reflection of the economic and social realities of contemporary Europe.'[21] At times, the existence of clearly marked and controlled borders – in the interest of efficient governance – can therefore conflict with

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[21] Malcolm Anderson, "The Political Problems of Frontier Regions," *West European Politics* 5, no. 4 (1982): 14.

cross-border ties in the social and economic realm. The evolution of border policies in the European context testifies to tensions between national and Community interests.

While states were intent upon preserving national control and sovereignty, the integration 'project' aimed at promoting transnational contacts and links. The internal logic of integration therefore also aimed at 'an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured"[22] – as already indicated in the Treaty of Rome. This provision was interpreted by most Member States to imply the abolition of all control impeding free movement, but not the abolishing of the legal border itself. While the Member States of the European Community/Union were convinced of the benefits of further integration to every member, such plans held the threat of a loss over what had hitherto constituted a core area of national sovereignty. Propositions of the European Parliament or European Commission for the realisation of an area free of internal borders were therefore viewed with varying degrees of hesitation. As a result, the Schengen cooperation of initially five states took place outside the framework of the European Community and only amongst those states willing and able to abolish border controls.

The willingness of member states to participate in the overall European integration process and transfer sovereignty in the course of its development has been judged differently by researchers. The integration of matters of internal policy such as border controls or police cooperation poses renewed questions of the limits and locus of sovereignty of 'Europeanised' states. Alan Milward, for example, has emphasised the central role of national governments in the history of European integration, arguing that the state is still the master of its own fate.[23] Stanley Hoffmann has argued in a similar direction, pointing out early on the survival of the state despite the transfer of real powers to the EC. For him, the Community helps to preserve states rather than forcing them to disintegrate.[24] Andrew Moravcsik instead has very much acknowledged the economic and political imperatives which lead to compromises of governments otherwise bent on as much autonomy as possible.[25]

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[22] European Communities, "Treaty Establishing the European Community," (Luxembourg: 1997 (1957)), Art. 7a.

[23] Alan S. Milward, Frances M.B. Lynch, and et al., *The Frontier of National Sovereignty. History and Theory 1945-1992* (London/New York: Routledge, 1993).

[24] Cf. Stanley Hoffmann, "Reflections on the Nation-State in Western Europe Today," *Journal of Common Market Studies* 21, no. 1&2 (1982).

[25] Cf. Andrew Moravcsik, "Negotiating the Single Act," in *The New European Community*, ed. Robert Keohane and Stanley Hoffmann (1991).

This thesis will explore to what extent this argument is also true for the Schengen cooperation in which partial decision-making power regarding hitherto core national competences was transferred to intergovernmental coordination, but where ultimate responsibility for implementation of border controls and security provision remained with the states. Indeed, political debate and recruitment, accountability, citizens' identity and areas of high politics remained mainly under state control.[26] It will be shown that the states negotiating the Schengen Agreements were convinced that European-level solutions had to be sought to nationally perceived problems in order to preserve national authority and security.

Integrationalists point to the spill-over effects and dynamics of integration as reasons for inclusion and deeper integration of issue areas into the EU/EC. The explicit connectedness of Schengen to integration objectives such as free movement makes this seem a plausible thesis. However, an open question remains to what extent the inclusion of issues of Justice and Home Affairs leads also to an eventual deepening of integration. Integrationalists see indicators for a changing basis of a European polity for example in the rising number of citizens in the European community spending a part of their lives abroad, the numbers of exchange students abroad and the rising numbers of intra-EU travel. However, it is unclear whether the identification of citizens with a political unit really springs from such experiences and to what extent functional integration really spreads to areas of 'high politics'. During the 1980s and 1990s, citizens still seemed to expect security provision from their national governments – while acknowledging that some solutions may have to lie in European cooperation or integration.

There are thus a number of possible theoretical interpretations of the development of border policies in Europe. Whatever the stance of the researcher, it can be observed that the Treaties of Rome and all subsequent treaties led to the integration of national and supranational authority, the weight of 'Brussels' generally growing in the overall development despite swings back and forth of the pendulum between national and European solutions.[27] The practical implications of the treaties - mainly the gradual achievement of a common market and the four freedoms of goods, capital, services and persons – have led to effective changes both in the objective powers of governments to

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[26] Cf. William Wallace, "Europe after the Cold War: International Society or Interstate Order?," (1998).
[27] Cf. Helen Wallace and William Wallace, eds., *Policy-Making in the European Union* (Oxford: Oxford University Press, 1996).

influence policies affecting the state as well as in the subjective experience of citizens as to the autonomy of national decision-making. Why states were willing to give their consent to such changes remains an object of debate. This thesis hopes to contribute insights to this debate by showing that the German government saw a European agreement on internal and external borders as the only viable solution to security problems, while at the same time being desirable from the point of view of economic and political integration.

This thesis shows that the negotiating states attached different values to the retention of national sovereignty. For example, the willingness to transfer sovereignty in the issue of cross-border pursuit and observation depended on particular national traditions regarding sovereignty. Similarly, the extent of compensatory measures demanded at the negotiations varied according to national experiences. In addition to such questions of sovereignty, trust in the neighbours' ability and willingness to guard the external border became indispensable under the Schengen system.

In the early 1980s, cooperation in matters relating to internal security and border control on a European level was still a relative novelty. International cooperation in a number of issue areas (terrorism, drugs) predated the Schengen negotiations, but for the majority of participants in the negotiations, experiences in European-level coordination and cooperation were limited. Especially the experts for border controls or visas had hitherto been largely concentrated on the national context. Those participants originating from ministries experienced in European negotiations (e.g. ministries responsible for trade or transport) had relatively little knowledge of this field. The result was that the first task during negotiations was to avoid misunderstandings and clarify the various national positions, their differences and congruence. Participants recall the importance of processes of 'getting to know each other' in order to assess the interests of the partner states.[28] This meant the learning about individual legal provisions and their implications in other European states (i.e. the difference between the legal status various countries' visas conferred), but also of the various national arrangements with regard to internal security and border control.

The research on border policies in Europe also allows the study of how the topic evolved in the process of negotiations. While in the past, external security crystallised at the borders, modern European states have increasingly seen borders as essential for

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[28] A number of interviewees have been assured that they would not be quoted directly in the text.

safeguarding internal security. In the course of the Schengen negotiations, concerns regarding a possible security gap became prevalent so that discussions concentrated increasingly on compensatory measures. While the first Schengen Agreement was a result of economic and political interests of deepening integration, the Schengen Convention clearly represents the security dimension. The debate about border policies thus increasingly became one of border controls, their abolition and compensating measures. It was the act of control itself with which states had traditionally ensured security, thus reciprocating by practice territorially based sovereignty. The Schengen Agreements implied, however, that trust in the ability of other states to guard their borders had to replace the old practice – implying a new principle of coordinated sovereignty.

4. Case study Germany

In the process of European integration, Germany holds a central position – it might even be stated that European integration was 'about' Germany. Thus, any steps in the integration process must also involve Germany. On the other hand, Germany has itself been very eager to push ahead with European integration, before and after unification.[29] The country has also been centrally active in the Schengen process itself. The bilateral treaty with France envisaging a removal of border controls was the starting point of Schengen. Experts in a number of German ministries, most notably in the Chancellery and the Ministry of the Interior, dedicated themselves to the topic from early on. Germany also was one of the actors which clearly supported and shaped the Schengen philosophy of 'freedom and security' through compensatory measures. Many of its proposals regarding compensatory measures and their implementation found entry into the final agreements.[30]

Germany is also an interesting case due to its geographic position. It is placed to have both internal and external borders of the Schengen area. Consequently, it had to concern itself with arrangements for both border types and could establish a conceptual link between the two. Thus, the consequences of the abolition of internal border controls were felt strongly and the arrangement of reinforced external border controls seemed a useful solution – whose implementation was in the power of Germany itself.

Connected to this was the fact that Germany was most strongly affected (in terms of borders) by the end of the Cold War. The fall of the inner-German border held an immense psychological importance for Germans. On the one hand, it had been the border which divided the once united Germany on a very practical level. Many families had relatives in the other part of Germany. Much of the collective German historical sites had been cut off from West Germany (such as Weimar or Erfurt). The border also was considered the result and consequence of a war which had been caused by Germany. On the other hand, the border divided West Germany from the East. It had been the symbol for the Cold War and the division of Europe – and the world. The presence of Allied troops in West Germany and of Soviet troops in East Germany reinforced this impression. Thus, the border also had become a symbol of the vulnerability of Germany in the case of

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[29] Banchoff posits the membership and participation in European integration as an integral part of Germany's identity. Thomas Banchoff, "German Identity and European Integration," *European Journal of International Relations* 5, no. 3 (1999).

[30] for example the Schengen Information System and the Common Handbook on Border Controls.

a military confrontation between the superpowers. At the same time, the border had represented protection of Germany from Eastern invasion. Thus, the fall of the wall opened up questions on the individual, the collective, the psychological, the political and the strategic level.

When the Schengen negotiations were begun in 1985, no one foresaw an end of bipolarity in the near future. The fall of the wall led to a number of new hopes and fears both of Germany but also of its neighbours. Hopes were connected to opportunities of European integration and growing influence in the East. Fears referred to the unknown future of the Central and Eastern European area. Many of these fears were also relevant for the Schengen negotiations so that the case study of Germany seemed particularly insightful. German unification led to an entirely new border situation, not only geographically but also in the *de facto* responsibility for controls at that border. While before the eastern border had been guarded through the intensive measures of the German Democratic Republic and Czechoslovakia, now the united Germany took on securing the border to Poland and the Czech Republic.

German proximity to Central and Eastern Europe also allows us to study the interpretation of a threat from Eastern Europe. Historical experiences and deep-seated fears played a role here just as much as unexpectedly fast growing rates of international crime and fears of large waves of immigration.

This German case study also permits to study the peculiarity of the German position within the Schengen founding members: it had ill defined boundaries. Historically, the influence of Germany had extended far to the East and a concept of nationality which was connected to culture and language never led to a clearly fixed image of the country. In two major wars in the 20th century, as well as in the inter-war period, German expansionist policies as well as the lack of clarity of its borders in general were an active source of tension. From a formal point of view, the eastern border of a united Germany remained an open question up to 1990.

Germany also had a peculiar definition of citizenship amongst the Schengen founding members. France had fixed borders as part of its national myth, defining citizenship on the basis of birth on the national territory. Germany's more fluid borders and interrupted history as a state had led to a different link between nation and state. The acquisition of German citizenship on the basis of descent was concomitant to the lack of a fixed national

territory. A concept of an ethnic nation prevailed as opposed to the republican nation ideal in France, for example.

How Germany approached security solutions to perceived threats was strongly influenced by past experiences and existing norms in the country. Germany did not perceive itself as a country of immigration – while administrative practice and social reality were different. This mismatch led to an insecurity as to the reality of future immigration, of the numbers to expect and ways to deal with them. At the same time, the rates of asylum seekers in Germany grew consistently during the 1980s and early 1990s. Changing the law of asylum touched the heart of the self-perception of society. The liberal law of asylum was a heritage of the atrocities committed in the name of Germany in the two world wars. Changing it was therefore only possible under the pressure of perceived unfeasibly large numbers of immigrants and abuse of the system.[31] The link of the topic of immigration to border controls is therefore heavily influenced by socially-charged issues in Germany – a link which can be found in most European countries. German debates are therefore also indicative of larger debates regarding entitlements of political or economic refugees, the capacity of states and societies to take in immigrants and the means to prevent unwelcome immigration. Despite differences in relating to foreigners, there was a common thread in Western European countries linking reinforced border controls to immigration.

The problem of choosing a single case study is obvious: the comparability of the results with other European member states remains open. While borders are by nature a topic of international relations, this thesis had to take into account specific national historical experiences and their interpretation. The experiences and interpretations differ for each country. On the other hand, phenomena like international crime and immigration and a perceived threat to societies are a common experience of all EU countries. Furthermore, the solution found in the Schengen Agreements demonstrates that a common rationale has evolved with includes a considerable common interpretation of the dangers and of how to deal with them.

The documents used for this case study are reports and protocols of the proceedings in the Schengen Executive Committee, the Central Group and working groups in which Germany participated and outlined its position. Furthermore, some reports of the Federal

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[31] This problem was also linked to the influx of considerable numbers of ethnic Germans, so-called 'Aussiedler' who could come to Germany without any need for recognition as refugees. This re-opened a debate of the questions of who is a German and who should be allowed to live in Germany.

Ministry of Interior to the Bundestag Committee on Internal Affairs regarding the progress of Schengen negotiations could be used. Additionally, some reports of hearings of experts by this Committee were available, as well as a protocol from a journey of delegates to the Schengen partner states. This was complemented by a number of interviews with long-standing members of the Committee of Internal Affairs of the Bundestag, current officials at the Federal Ministry of Interior charged with Schengen and German participants at the Schengen negotiations. A list of interviewees can be found in the appendix.

Difficulties arose with the availability of documents due to the majority of documents being classified as 'confidential'. Sometimes these became available through chance, with the help of other researchers, or were available abroad. The confidentiality of the papers confirmed the impression of secrecy linked to the security field in general. Since Schengen was perceived by the Federal Ministries as primarily a security-relevant issue, the confidentiality of documents was a logical consequence. As a result, not all interview partners were willing to be cited by name, although the Ministry of the Interior and its civil servants were helpful and informative in personal contact.

An enquiry to the *Bundesarchiv*, where the papers of the Federal Chancellery are stored, was unsuccessful. These papers would have given important additional insights, because the Chancellery held the overall control of negotiations for Germany until 1995. These papers are only open to researchers after a 30-year lapse or if an official institution applies for their use or if the research is in the interest of public administration. A letter from the Archive pointed out that an official application to use the documents was likely to be unsuccessful and – in the event of it being granted – would only allow insight into few pre-selected papers.[32]

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[32] Quote from the replying letter: "Wie Sie den amtl. Merkblättern über die Benutzungsmodalitäten beim Bundesarchiv, dem Auszug aus der GGO und dem Bundesarchivgesetz entnehmen können, unterliegen amtliche Aktien der 30-jährigen Sperrfrist für Benutzungen. Ausnahmen von dieser Regelung können auf Antrag genehmigt werden von der für die Aktenführung zuständigen Dienststelle, sofern es sich um eine amtliche Benutzung handelt oder die Benutzung in amtlichem Interesse erfolgt. Leider vermag ich beides bei Ihrer Antragstellung nicht zu erkennen. Sollten Sie dennoch auf einer Antragstellung bestehen, muss ich Sie anhand der bisherigen Erfahrungen leider auf die geringen Aussichten auf einen positiven Bescheid aufmerksam machen. In jedem Fall wird sich eine Genehmigung zur vorzeitigen Akteneinsicht auf wenige ausgesuchte Akten beschränken." Letter from Bundesarchiv of 4.7.2001.

5. Existing research

International Relations (IR) as a discipline has paid little direct attention to borders. Unlike the state, strategy or power, the discipline has tended to take the importance of borders as a given. As a result, it has studied the issues of border control and border crossing relatively little. This is all the more astonishing if we consider that the subject even of 'classic' international relations is the state within its boundaries and its relationship with others across such boundaries. Ruggie has voiced his bewilderment: 'It is truly astonishing that the concept of territoriality has been so little studied by students of international politics; its neglect is akin to never looking at the ground that one is walking on.'[33]

Nevertheless, IR has implicitly considered boundaries as important: Broadly speaking, the Realist tradition, beginning with Hobbes, views the border between the domestic and the international as the dividing line between order and anarchy.[34] Equally, the tradition of international law draws a dividing line between an internal realm of the sovereign ruler and an external realm of equal monarchs. For Bodin, for example, sovereignty symbolised the ruler's unrestrained power over people in a defined territory. He therefore started from the premise that law had to be bounded by the territory of the state.[35] In a reaction, one important project of the idealist tradition in International Relations has been to bridge the domestic/international divide.

What could be regarded as one of the first direct considerations relating to borders in the subject of IR, is the debate of the territorial state, sovereignty, and its future with the onset of the nuclear age in the 1950s.[36] However, this debate included very little consideration of borders themselves and their control. The last two decades have seen a growing number of studies of border-related issues in International Relations. These come often from scholars who challenge the traditional approaches and scope of IR, including new objects of study

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[33] John Gerard Ruggie, *Constructing the World Polity. Essays on international Institutionalization* (London: Routledge, 1998), 197. chapter seven on 'Territoriality at millennium's end'.

[34] See the tradition starting with Thomas Hobbes, *Leviathan*, ed. Michael Oakeshott (Oxford: Basil Blackwell, 1946).

[35] Jean Bodin, *Six Books of the Commonwealth*, ed. M.J. Tooley (New York: 1955), Jean Bodin, *Six Livres de la République* (1576).

[36] Cf. John H. Herz, "Rise and Demise of the Territorial State," *World Politics* 9, no. 4 (1957), John H. Herz, "The Territorial State Revisited: Reflections on the Future of the Nation-State," in *International Politics and Foreign Policy*, ed. James A. Rosenau (New York: The Free Press, 1969).

and new approaches.[37] Kratochwil, for example, has discussed the concept of territorial
sovereignty as an organising principle of international politics by studying the functions of
boundaries in territorial and non-territorial societies.[38]

Theories of integration have also tended to concentrate part of their attention on the role
of borders. Karl Deutsch, for example, included an analysis of boundaries and the
concomitant decline of communications in his thoughts about integration of political
communities.[39] Also European studies have united IR scholars with experts from other
disciplines in the study of border-related issues. Often, the consideration of particular issue
areas such as asylum, migration, cross-border cooperation and border control have led to
in-depth studies of the role and effects of borders.[40] This thesis therefore profited from
research carried out within the realm of European integration studies, often with an
emphasis on security aspects or the development of a particular policy field.

As a background to this thesis, reference was also made to a number of other disciplines
whose concerns are relevant to border research. Borders are multi-dimensional phenomena
which can be studied from the perspective of a number of disciplines. Although a
considerable body of literature on borders has emerged from various fields, no agreed
definition of borders has emerged on which scholars could agree. A statement by the

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[37] Cf. For example Bertrand Badie, *La fin des territoires. Essai sur le désordre international et sur l'utilité sociale du
respect* (Paris: Fayard, 1995), Bertrand Badie and Marie-Claude Smouts, eds., *L'international sans territoire*,
vol. 21/22, *Cultures & Conflits* (Paris: L'Harmattan, 1996), Beate Kohler-Koch, "Regieren in
entgrenzten Räumen," *Politische Vierteljahresschrift* Sonderheft 29 (1998), John Gerard Ruggie,
"Territoriality and Beyond: Problematizing Modernity in International Relations," *International
Organization* 46, no. 1 (1993), Cynthia Weber and Thomas J. Biersteker, *State Sovereignty as a Social
Construct* (Cambridge: Cambridge University Press, 1996), Michael Zürn, *Regieren jenseits des
Nationalstaates*, ed. Ulrich Beck, *Edition Zweite Moderne* (Frankfurt a. Main: Suhrkamp, 1998).

[38] Friedrich Kratochwil, "Of Systems, Boundaries, and Territoriality: An Inquiry into the Formation of
the State System," *World Politics* 39, no. 1 (1986).

[39] Karl W. Deutsch, *Political Community and the North Atlantic Area* (Princeton, NJ: Princeton University
Press, 1957).

[40] Cf. for example Alberto Achermann et al., *Schengen und die Folgen. Der Abbau der Grenzkontrollen in
Europa* (Bern: Stämpfli + Cie AG, C.H. Beck, Manz, 1995), Malcolm Anderson and Monica den Boer,
eds., *Policing across National Boundaries* (New York/London: Pinter Publishers, 1994), Malcolm
Anderson et al., eds., *Policing the European Union* (Oxford: Clarendon Press, 1995), Malcolm Anderson
and Eberhard Bort, eds., *The Frontiers of Europe* (London: Pinter, 1998), Bigo, ed., *L'Europe des Polices et
de la Sécurité Intérieure*, Eberhard Bort, ed., *Borders and Borderlands in Europe* (Edinburgh: International
Social Sciences Institute, 1998), Ayse Ceyhan and Anastassia Tsoukala, eds., *Frontières - Identités. Les
enjeux autour de l'immigration et de l'asile* (Paris: L'Harmattan, 1997), Monica den Boer, *Schengen's Final
Days? The Incorporation of Schengen into the New TEU, External Borders and Information Systems* (Maastricht:
European Institute of Public Administration, 1998), Soledad Garcia, ed., *European Identity and the
Search for Legitimacy* (London and New York: Pinter, 1993), Ole Waever et al., *Identity, Migration and the
New Security Agenda in Europe* (London: Pinter, 1993).

geographer Prestcott bears witness to this situation. 'Attempts to produce a set of reliable theories about international boundaries have failed.'[41]

Historians' work into the evolution of the state in Europe was important, as well as the extensive work on nationalism in Europe.[42] Historical research also inspired an appreciation of the historical contingency of the shape, the course and the role of borders. This has informed the methodology of this thesis, placing an emphasis on the historical genesis of borders for an understanding of the positions of contemporary actors.

Empirical research has traditionally been a core emphasis of border research. The collection of data on borders included research on the exact position of borders, the length of borders, the people living on or near the borders, the age of borders, the control of borders or the traffic across borders. These data are of central importance to state governments, but have also been important bases for researchers' interpretation of the role and importance of borders or of particular kinds of borders.[43] In parallel, the search for appropriate frameworks for the conception of research projects has recently moved more to the centre of attention.

Political science has dealt surprisingly little with the boundaries of the state so far. This is astonishing since the state as the traditional object of study in political science has implicitly always been seen as limited. Prestcott's work of 1978 and 1987 were early pieces treating borders in the context of political science.[44] Most influential was his attempt to give clear definitions to the terms border, boundary and frontier. Malcolm Anderson's work on *Frontiers* has to count as one of the first incisive works into the role of boundaries from a direct political science perspective. He covers theoretical as well as practical issues in the relationship between borders and states, presents a history of the concept of borders, a

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[41] J.R.V. Prescott, *Political Frontiers and Boundaries* (London: Allen & Unwin, 1987), 8.

[42] Malcolm Anderson, *Frontiers. Territory and State Formation in the Modern World* (Cambridge: Blackwell, 1996), John Breuilly, "Sovereignty, Citizenship and Nationality: Reflections on the Case of Germany," in *The Frontiers of Europe*, ed. Malcolm Anderson and Eberhard Bort (London: Pinter, 1998), Kenneth Dyson, *The State Tradition in Western Europe* (Oxford: Martin Robertson, 1980), Schulze, *Staat und Nation in der Europäischen Geschichte*, Anthony D. Smith, *Nationalism in the Twentieth Century* (Oxford: 1979), Heinrich August Winkler, *Der lange Weg nach Westen. Deutsche Geschichte vom "Dritten Reich" bis zur Wiedervereinigung*, 2 vols., vol. 2 (München: C.H. Beck, 2000), Heinrich August Winkler, *Der lange Weg nach Westen. Deutsche Geschichte vom Ende des Alten Reiches bis zum Untergang der Weimarer Republik*, 2 vols., vol. 1 (München: C.H. Beck, 2000).

[43] Cf. for example Michel Foucher, *Fronts et Frontières* (Paris: Fayard, 1991).

[44] J.R.V. Prescott, *Boundaries and Frontiers* (London: Croom Helm, 1978), Prescott, *Political Frontiers and Boundaries*. - although the author is a geographer; his attention centres around political borders, border disputes and border evolution.

discussion of mainstream political science theories and borders, and analyses the change in the role of borders in the current political world.

Sociology has contributed to research by a number of studies. System theory has produced important insights into the necessity of boundaries for social systems. Most prominent here is the work of theorists such as Talcott Parsons, Niklas Luhmann and Raimondo Strassoldo.[45] Their work on boundaries and systems, and more specifically on political borders, has contributed to the understanding of the functioning of borders and their role for the differentiation and maintenance of systems.

Classic sociology, from Emile Durkheim back through Max Weber even to Karl Marx, all share an – implicitly or explicitly – territorial definition of society.[46] Ulrich Beck speaks of the container-theory of modern sociology, Agnew and Corbridge of the territorial trap due to the equalisation of society and nation-state.[47] This means that in parallel to political science, the territorial base of sociology was not problematised for a long time. A growing literature within sociology is concerned with social phenomena which take place across national borders and boundaries; they have looked at transnational social movements, changing horizons of experiences of people, transnational experience of threat, a possible emergence of a transnational society and at the effects of such developments on governance.[48] The impact of this body of work on the understanding of borders is profound, albeit indirect. At the least, the insights from studies on transnational social developments allow to infer that the meaning and impact of borders for individuals and society are undergoing significant change.

Geography has been a major field of research into borders and has undergone a marked evolution of approach. Geopolitics has a long tradition and developed important concepts

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[45] Cf. Niklas Luhmann, "Territorial Borders as System Boundaries," in *Cooperation and Conflict in Border Areas*, ed. Raimondo Strassoldo and Giovanni Delli Zotti (Milano: Franco Angeli Editore, 1982), Talcott Parsons, "Evolutionary Universals in Society," *American Sociological Review* 29 (1964), Raimondo Strassoldo and R Gubert, "The Boundary: An Overview of Its Current Theoretical Status," in *Confini E Regioni. Il Potenziale Di Sviluppo E Di Pace Delle Periferie*, ed. Raimondo Strassoldo (Trieste: 1973).

[46] Smith, *Nationalism in the Twentieth Century*, 191. cited after Ulrich Beck, *Was ist Globalisierung, Edition Zweite Moderne* (Frankfurt am Main: Suhrkamp, 1997), 52.

[47] Cf. Beck, *Was ist Globalisierung*, 49.

[48] Cf. Ulrich Beck, *Die Erfindung des Politischen. Zu einer Theorie Reflexiver Modernisierung* (Frankfurt am Main: Suhrkamp, 1993), Ulrich Beck, *Risikogesellschaft. Auf dem Weg in eine andere Moderne* (Frankfurt am Main: Suhrkamp, 1986), Manuel Castells, *The Network Society*, vol. 1 (Oxford: Blackwell, 1996), Stefan Immerfall, ed., *Territoriality in the Globalizing Society. One Place or None?* (Berlin: Springer, 1998), Ernst Ulrich von Weizsäcker, ed., *Grenzenlos? Jedes System braucht Grenzen - aber wie durchlässig müssen diese sein?* (Berlin: Birkhäuser Verlag, 1997), Zürn, *Regieren jenseits des Nationalstaates*.

relating to the state, its environment and positioning in a wider system. The concepts of 'heartlands' and peripheral regions (or marches) have to be mentioned here in particular. Sir Halford Mackinder developed a theory of heartland and rimlands, where access to the strategic position and resources of Euro-Asian land were the secret to becoming the dominating world power.[49]

Political geography's early researchers, the most well known representative of which is probably Friedrich Ratzel,[50] have started with enquiries into the state and its necessary connection to the territory it occupies. A major interest was to identify the relationship between geographical facts and the development of societies and states. Ratzel saw the border as a peripheral organ of the state, thus inherently connected to the organism of the state.[51] A pupil of Ratzel's, Karl Haushofer, threw the discipline of geopolitics into lasting disrepute when he developed the concept of 'Lebensraum', a social Darwinist idea which was used by the Nazis to justify their racism and expansionism. Later scientists in the area of geopolitics are still having to deal with the heritage or reproach of nationalist assumptions despite the fact that Ratzel's determinism has been largely abandoned. Later literature on the geography of borders engaged in questions of classification, definition and recording of border types.[52] Case studies were a prime emphasis of focus.[53]

New and critical geopolitics has started to conceptualise the territoriality of states and the 'geographic processes of socialization (which) have taught us to acknowledge the state system within which we live – a spatial system which is characterized by more or less exclusive boundaries.'[54] Richard Sack's profound study of territoriality is part of this development, but also works which started to 'challenge the idea of a fixed, territorially

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[49] Halford Mackinder, "The Geographical Pivot of History," *Geographical Journal* XXIII, no. April (1904).. In a similar tradition is Alfred Mahan's study which concluded that control of the seas and particular passageways were central factors to become a great power. Alfred Thayer Mahan, *The Influence of Seapower Upon History, 1660 - 1783* (Boston: Little, Brown, 1897). For a contribution on events after the end of the Cold War, deliberating a return of geopolitics see Michel Foucher, "La fin de la géopolitique? Réflexions géographiques sur la grammaire des puissances," *Politique Etrangère* 62, no. 1 (1997).

[50] Cf. Friedrich Ratzel, *Allgemeine Eigenschaften der Geographischen Grenzen und über die Politische Grenze.* (Sonderdruck aus den Berichten der Königlich Sächsischen Gesellschaft der Wissenschaften. Philologisch-Historische Klasse 44, 1892), Friedrich Ratzel, *Politische Geographie* (München: R. Oldenbourg, 1897).

[51] Cf. Friedrich Ratzel, *Politische Geographie*, 3 ed. (München und Berlin: Oldenbourg, 1923), 86.

[52] E.g. R. Hartshorne, "Suggestions on the Terminology of Political Boundaries," *Annals of the Association of American Geographers* 26, no. 1 (1936), S.B. Jones, *Boundary-Making: A Handbook for Statesmen, Treaty Editors and Boundary Commissioners.* (New York: Johnson Reprint Co., 1945/1971).

[53] for a description of the tradition of border research in political geography see David Newman and Anssi Paasi, "Fences and Neighbours in the Postmodern World: Boundary Narratives in Political Geography," *Progress in Human Geography* 22, no. 2 (1998).

[54] Ibid.: 187.

bounded world,[55] incorporating questions of inclusion and exclusion or geographic representation in politics and education.[56] Recently, also under the impact of the political and territorial changes of the 1990s, critical geography has moved to view borders as constructs of a discursive, political and social nature, has demanded that the spatial dimension be reinserted and the multidimensional character of boundaries be incorporated into research.[57]

Anthropologists have not only conducted a number of interesting case studies,[58] but their work has also contributed important insights to border research from the methodological point of view through the use of extensive field work. Studies such as the one of Sahlins or the collected book by Wilson and Donnan have been influential for an understanding of identity formation at and across the border.[59]

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[55] Ibid.: 191.

[56] Cf. e.g. Gerard ÓTuathail, *Critical Geopolitics: The Politics of Writing Global Space* (London: Routledge, 1996), Anssi Paasi, *Territories, Boundaries and Consciousness* (Chichester: John Wiley & Sons, 1996).

[57] Cf. Newman and Paasi, "Fences and Neighbours in the Postmodern World: Boundary Narratives in Political Geography," 200f. David Newman, "Into the Millennium: The Study of international Boundaries in an Era of Global and Technological Change," *Boundary and Security Bulletin* 7, no. 4 (1999/2000): 70.

[58] Frederik Barth, ed., *Ethnic Groups and Boundaries. The Social Organisation of Culture Difference* (Bergen: Universitetsforlaget, 1969), Daphne Berdahl, *Where the World Ended. Re-Unification and Identity in the German Borderland* (Berkeley: University of California Press, 1999).; John Bornemann, "Grenzregime (Border Regime): The Wall and Its Aftermath," in *Border Identities. Nation and State at International Frontiers*, ed. Thomas M. Wilson and Hastings Donnan (Cambridge: Cambridge University Press, 1998).

[59] Peter Sahlins, *Boundaries: The Making of France and Spain in the Pyrenees* (Berkeley: University of California Press, 1989), Thomas M. Wilson and Hastings Donnan, eds., *Border Identities. Nation and State at International Frontiers* (Cambridge: Cambridge University Press, 1998).

6. Positioning of thesis

This thesis aims to contribute to research in International Relations by investigating the role of borders for the modern state in the European Union. In a theoretical way, the functions of borders for the modern state will be explored. It will be shown that borders still retain a central security, economic and legal function for the state. Borders as signals of sovereignty have become less important with the vanishing of the visibility of internal border controls. However, the legal arrangements of agreements regarding borders prove that sovereignty concerns have not been lifted in negotiations. In a practical perspective, the thesis will retrace the evolution of the German position on border policies which is also present in the European agreements. With the help of document analysis, personal interviews and reference to media reports, it will be shown how a security-led perspective came to dominate the German position. This fits in with existing research on the European level on policy-making regarding border controls and internal security.[60]

It will furthermore be shown that despite an abolition of internal border controls, state governments are very active in ensuring the fulfilment of the security role of borders. The necessity of strict controls at the external borders as well as compensatory measures are represented as important in the national interest. The European and state border arrangements will therefore be identified as the reactions of active states in the face of transnational phenomena such as immigration or crime which are seen as a threat to the state's existence.

This thesis also hopes to provide insights into the interplay of the state and European level in negotiating border policy. It will be outlined how European and German politics developed in parallel and in reference to each other. Contacts between national security

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[60] Cf. for example Malcolm Anderson, "Les frontières: un débat contemporain," in *Contrôles: Frontières-Identités. Les enjeux autour de l'immigration et de l'asile*, ed. Ayse Ceyhan and Anastassia Tsoukala, *Cultures & Conflits* (Paris: L'Harmattan, 1997), Anderson and Boer, eds., *Policing across National Boundaries*, Anderson et al., eds., *Policing the European Union*, Didier Bigo, "Frontiers and Security in the European Union: The Illusion of Migration Control," in *The Frontiers of Europe*, ed. Malcolm Anderson and Eberhard Bort (London and Washington: Pinter, 1998), Didier Bigo, *Polices en Réseaux* (Paris: Presses de Sciences Po, 1996), Bigo, ed., *L'Europe des Polices et de la Sécurité Intérieure*, Bort, ed., *Borders and Borderlands in Europe*, Monica den Boer, "Justice and Home Affairs: Cooperation without Integration," in *Policy-Making in the European Union*, ed. Helen Wallace and William Wallace (Oxford: Oxford University Press, 1996), den Boer, "The Quest for European Policing: Rhetoric and Justification in a Disorderly Debate.", Monica den Boer, "Schengen, Intergovernmental Scenario for European Police Cooperation, a System of European Police Cooperation," (Edinburgh: University of Edinburgh, 1992).

experts as early as the 1970s had led to the emergence of a common discourse on threats. Although this network differed in personnel from the one in the Schengen Agreements, this European-level discourse found counterparts in both the national and European debates regarding border controls. It will be shown to what extent German experiences and perspectives found entry into the Schengen Agreements, while at the same time European agreements changed the practice within Germany. The thesis will also show that the structure of the policy field – with negotiations on a European level conducted by the national government and security experts – and of the national debate led to a situation where alternative voices were unable to influence the outcome of policy-making.

The analyses will show that the Schengen Agreements – which were conceived originally as a means of deepening integration – gradually became a field of policy-making where national concerns about sovereignty and security became prevalent. The rhetoric argued for European-level solutions but with the intention of protecting national security.

The thesis aims at contributing to knowledge about the role of Germany in European politics in the Schengen negotiations. The country was one of the initiators of the Schengen process in 1985; Germany pushed for maximum security in compensatory measures and for widening the agenda of compensatory measures; as a country with the longest border with East European countries (after 1989), the arrangements for controls at the external land borders it advocated will be influential for future enlargement and controls in the East.

Also Germany's relation to France is explored: both countries were central figures in the Schengen process. Despite inherent tensions between the two countries on the issues of territory, sovereignty and border control, the two countries started the process of opening borders in 1985 which led to the Schengen Agreements, but took different roles during the negotiations for implementation. On the one hand, it has been observed that France provided the overall political leadership to bring forward the project and Germany contributed mainly technical knowledge. On the other hand, France often proved much more hesitant to adopt far-reaching proposals for compensatory measures. In crucial areas such as cross-border cooperation or the development of the SIS, the German government led and France proved a laggard.[61] The reasons for this can be found in national structures:

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[61] Parts of the negotiations can be usefully described by referring to Héritier's concept of leaders and laggards. But it has to be borne in mind that French consent and also leadership were indispensable for the overall outcome. Cf. Adrienne Héritier, ""Leaders" and "Laggards" in European Policy-

The nationally-organized police and administrative system in France was very perceptive to possible threats to sovereignty by the Schengen agreements. In the German federal system, cooperation between regionally organized law enforcement authorities on all levels was considered routine-procedure. The difference of systems was considered a problem for cooperation, especially from the French perspective, where competences and structures in Germany were perceived as complicated.[62]

Making: Clean-Air Policy Changes in Britain and Germany," in *Convergence or Diversity? The Pressure of Internationalization on Economic Governance Institutions and Policy Outcomes*, ed. Frans van Waarden and B. Unger (Avebury: Aldershot, 1994).

[62] Cf. Didier Bigo and Franziska Hagedorn, "National Report: France," in *Controlling Organised Crime: Organisational Changes in the Law Enforcement and Prosecution Services of the EU Member States*, ed. Monica den Boer and Patrick Doelle (Maastricht: European Institute of Public Administration, 2000).

7. Thesis structure

A theoretical conceptualisation of the role of borders will be attempted in chapter two. It will first delimit and define the term borders. In a next step, borders will be presented as intrinsic to the idea of the modern state; in this section, a special emphasis is laid on the centrality of security in the role of the border.

Chapter three is dedicated to retracing the evolution of European policies on border controls, outlining the gradual emergence of a security-led rationale. After presenting the origins and rationales of cooperation on border control policies, the chapter portrays the circles of experts and politicians with influence on policy-making in a chronological order. The structure of the Schengen negotiations is presented. This is followed by an analysis of the evolution of the Schengen Agreements and their contents. In a short appendix, other conventions with relevance to border controls will be set in relation to the Schengen Agreements.

Chapter four presents a historical perspective on the German relationship with borders. After a presentation of the topography of current German borders, the discontinuity in German history and identity is retraced. Special attention is paid to German relations with the East.

Chapter five outlines the debate in Germany regarding changes of border controls. First, the relevant actors regarding border policies in Germany are presented. In a next step, the chapter sketches out the international and national context to the debate regarding border controls. The events of 1989 to 1992, European integration dynamics, and social phenomena like the rise of immigration, are presented as relevant. The arguments for the necessity of abolition of internal border controls and the introduction of compensatory measures including external border controls are shown to be two-fold: on the one hand, they concentrate on the role of the border as barriers and protection while at the same time suggesting that border controls already were inefficient before their abolition internally.

Chapter six retraces the evolution of policies regarding border controls on a national level. It outlines changes in the border guard service during the relevant period of time, shows a change in the technique of controls as well as the relationship between law enforcement

services. An overall augmentation of control ability will be noticed both internally and at the external borders.

Chapter seven links the two levels of analysis by looking at the role Germany has played during negotiations on the European-level. An enquiry into the institutional involvement of Germany shows the centrality of the German role. Its delegations could rely on relative stability, especially with regard to top-level civil servants as delegation leaders. Germany's central position providing technical competence and advocating and building up compensatory measures will be emphasised.

The conclusion of the thesis will emphasise that borders remain central in spite of or even with the help of a common European border regime. Security-provision remains an important task of the (post)national state and is conducted in the name of and for the state, but through European arrangements. The prevalence of security over other policy concerns is also unlikely to change even with Communitarization as provided for in the Amsterdam Treaty.

Germany is found to have had a decisive role in the process of negotiating Schengen. Together with France, it took the lead in negotiations and provided the technical competence for the realisation of compensatory measures. Germany's role is seen as influenced both by current interpretations of historical experiences and learnings (fears of threats emanating from the East, the untouchability of borders) and an inability to judge the actual threat (through political uncertainties abroad and a policy which denied the discrepancy between immigration rhetoric and practice).

An emergence of two types of borders is presented as one of the consequences of Schengen. A concentration on security focussed only on the external borders, neglecting possible economic consequences, political messages and symbolism conveyed through the strict controls at external borders. Internal borders became political symbols for European integration and free movement. The external borders retained both the role of a border line for checks and a border zone for intensive controls. The internal borders became border zones to be controlled.

Chapter 2

Borders and the modern state

When the first Schengen Agreement was concluded, the implications of suppression of border controls for states and governance had not been thought through. It was the result of a general intention to deepen European integration and of a strike action in Italy and France which affected most European states. It is the aim of this chapter to clarify how fundamental borders and their control are to the modern system of governance and thus to show how essential a challenge the abolition of border controls was to modern states.

The chapter demonstrates 'the ways in which regulation of movement contributes to constituting the very "state-ness" of states.'[63] Indeed, borders and delimited territory cannot be considered separately from the states they enclose. They serve as the basis for an inside/outside divide with relevance for all areas of governance: citizenship and identity, economic and fiscal governance and the state monopoly of force. Entitlement to health and child care, unemployment benefits and education are all connected to this divide. The underlying assumption in the modern state system is shown to be one of congruence between citizens and resident population – a presupposition which is challenged under conditions of migration and easy travel. The changes of 1989 re-posed the questions regarding the role of borders with new urgency in the face of possible migration and crime. Similarly, assumptions about the stability of the system and the provision of security were challenged.

In addition to identifying the fundamental role of borders for modern governance, the chapter also alludes to a conceptual difference between France and Germany with regard to statehood. France has a more monolithic concept of sovereignty which made it difficult to envisage a sharing of sovereignty. Germany, instead, had a tradition of shared sovereignty through its federal structure and the cooperation between the Länder.

The chapter also points to an underlying tension between European integration and the necessity for state governments to retain efficient governance. The existence of a border allows the enforcement of state rules such as taxation and the establishment of internal order. The border also serves an important role as a marker and a symbol of national identity. The dynamic of the economic and political process of integration stood to some extent in opposition to such deeply set interests of governance, although it had not been the intention of national or European elites to challenge the state in such a way.

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[63] John Torpey, *The Invention of the Passport* (Cambridge: Cambridge University Press, 2000), 6.

The chapter starts by pointing out the difficulty to define borders by showing the dimensions of borders and the variety of usage of the term. It continues by illustrating the link between the state and borders by showing how interlinked borders and state are both in their genesis and in international law. It goes on to point to specific areas where the existence of borders makes possible state governance. The chapter continues with outlining the relationship between borders and security, one of the central tasks of governance.

The chapter thus concludes that borders and the modern state are mutually constitutive. Taking away borders threatens the idea of the modern state and the principle according to which it provides security for its citizens.

1. Boundaries and political borders

Drawing and maintaining boundaries[64] is an invariant in human activity. Boundaries surround human beings, indeed all living beings, at all times. Biologically speaking, boundary-drawing behaviour can be observed in most species. Human activity and development is defined by mechanisms of boundary-drawing. Humankind is divided into societies and societies are divided into smaller kin-groups. Developmental psychology of a child identifies the ability to recognise the self as different from the carer as a decisive step in the development of a child. Human consciousness of the self and its connectedness to others is therefore closely related to this mechanism of drawing a boundary.

Boundaries allow people to define, to think and to communicate. They structure reality by ordering information, thus making possible knowledge and understanding. To think and to speak implies a system of boundaries - which allows to distinguish one thing from another. Such distinctions allow to group 'things' and label them. A chair can only be named and communicated to be a chair because it is grouped with other objects with similar features and therefore distinguished from objects such as 'table'. Only its appropriate usage across a social group makes it possible to sustain the meaning of such a term.

Borders, therefore, allow classification and categorisation. By the same mechanism, boundaries negate and exclude by being the foundation of difference. This means that the ability to group things in a socially accepted way also entails social power. Thus, governance (by governments, courts, police etc.) also refers to the ability to define by grouping things, thus drawing boundaries, and thereby defining the reference objects for policies.[65]

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[64] Part 2 of this chapter deals with the distinctions between the terms of boundaries, borders or frontiers. 'Boundary' is used with the widest meaning, whereas 'border' and 'frontier' refer to political borders.

[65] Pointing to the transcendental nature and fundamental function of borders in society, Raffestin and Benveniste draw attention to the deeply rooted sacredness of boundaries in society. Émile Benveniste, *Le Vocabulaire des Institutions Indo-Européennes*, vol. 1 (Paris: Editions de Minuit, 1969), Claude Raffestin, "La frontière comme représentation: discontinuité géographique et discontinuité idéologique," *Relations internationales* 63, no. automne (1990). The drawing of physical boundaries was connected to the highest power in the community, thus a representation of a spiritual ability to draw boundaries. The researchers use the etymologic connection between the Latin *regere fines* and *rex* to show this: *regere fines* was a religious act and means literally 'to draw the boundary in a straight line'. It was the action of the high priest for the construction of a temple or a city and consisted in determining the sacred space. Thus, he separated the inside from the outside, the sacred from the profane. This trace was made by the personage invested with the highest powers, the *rex*. Thus according to Benveniste, "dans rex il faut voir moins le souverain que celui qui trace la ligne". (transl:

Boundaries have the function of introducing predictability and regularity into social life. By structuring reality, they are a mechanism reducing complexity and eliminating options. The rules they apply for defining in and out therefore are crucial for the functioning of a community. On the other hand, borders also seem to be a prerequisite for internal complexity: system theorists have shown that boundaries enable systems to differentiate internally, in separation from the environment.[66]

Raffestin has identified four basic so-called 'megafunctions' for boundaries: translation, regulation, differentiation and relation:[67] The boundary is first of all a translation of a differentiation into a tangible phenomenon. It is also information, a sign and a signal. It regulates - by demarcation - areas of relationships in which certain political, social or cultural rules prevail. It differentiates by being the foundation of a difference whose disappearance would lead to a crisis. The boundary also has the function of relating by juxtaposing two areas, by defining two entities which can face each other, discover and confront each other.[68]

Political borders are a subcategory of boundaries. As such, they share a number of characteristics: similarly to boundaries, political, territorial borders serve to reduce complexity. They provide heightened predictability through the possibility to control entry and exit of people and of goods, and through the possibility of exercising power within these boundaries.[69]

Raffestin has pointed out that the social and historical embeddedness of political borders makes them highly complex systems, more so than many other boundaries[70]: the particular role of borders for a political system is dependent on historical context. The rules of the

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One should see the king less as the sovereign but as the one who traces the line.) Cf. Benveniste, *Le Vocabulaire des Institutions Indo-Européennes.*; Raffestin, "La frontière comme représentation: discontinuité géographique et discontinuité idéologique," 296.

[66] Cf. Luhmann, "Territorial Borders as System Boundaries.", Strassoldo and Gubert, "The Boundary: An Overview of Its Current Theoretical Status."

[67] Raffestin, "La frontière comme représentation: discontinuité géographique et discontinuité idéologique.": 'Un système de limites assume quatre mégafonctions : traduction, régulations, différenciation et relation.' (p.300)

[68] Cf. Ibid.: 301.

[69] Early industrialisation and the setting up of customs borders in order to help young industries to develop may be seen as a example of this.

[70] "Le processus d'émergence, d'évolution et de stabilisation de la frontière est semblable à celui de n'importe qu'elle autre limite; il est simplement plus complexe, à certains égards, apparemment plus socialisé et surtout plus enfoncé dans l'historicité". Raffestin, "La frontière comme représentation: discontinuité géographique et discontinuité idéologique," 198.

game differ according to time and circumstances. Thus, when it is rightly said that the Treaty of Westphalia set out the basic structure of the territorially oriented international system today, this only refers to the specific rules of the game which have been the currency of the system since. For example, the Middle Ages in Europe were a time of a completely different territorial and legal organisation of rule in which territorial contiguity was of less importance than fiefdom.

Another special characteristic of political borders is their distinctly territorial relevance.[71] Despite all the abstraction inherent in borders, there is always a territorial element in delimiting a community's borders. In that respect, political borders are witness to the fact that human life is connected to a physical existence. This thesis concentrates on borders of modern states, but conceptualises these as related to the fundamental behaviour of boundary-drawing in human existence.

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[71] This does not mean that borders are necessarily fixed. For example the non-enter zone of a ship is a mobile territorial border.

2. Problems and varieties of definition of the term 'border'

Anderson emphasises that '[w]hat frontiers represent is constantly reconstituted by those human beings who are regulated, influenced and limited by them.'[72] This constant change over time is also mirrored in the variety and changes of usage of terms designating borders.

2.1. European languages and terms designating 'border'

The evolution of the fundamental role borders have for the modern state is shown by how terms naming borders in European languages have evolved together with the state. The languages retain differences between the various communities' experiences but also demonstrate common features.

The term 'border' itself does not point to a specific shape, whether border line, border zone, border region, whether fragmented or continuous. A border's function is to define a political community as distinct from another, and historically, several shapes have fulfilled that function. Thus, the following account of differences in meaning of the terms designating 'border' also mirror historical change. Early modern states had loose control over their 'marches' and it was one of the features of the modern state to extend control across the territory and up to the borders. The denser population was one important factor pushing this change: empty spaces or those which were not used for extraction of resources did not need exact lines. The ground was surveyed, exact maps were drawn and border guards were established. Thus, in the course of the 19th century, state attitudes to borders or frontiers changed as states' abilities to extend full authority over peripheral regions increased. Today, borders retain a dual meaning of line and zone.

The evolution of the French terms illustrate this duality of line and zone: French has the words *frontière*, *limite*, *front*, and *marche* (archaic). *Frontière*, derived from Latin *frons*, developed from original architectural and military meanings into one referring to the military border area where the enemy was faced. *Limite* was the general word designating the end of the kingdom up until the 16th century. It developed into a legal and abstract term, mainly referring to questions of the line of demarcation. According to Febvre, the rise of a much more clearly defined view of sovereignty in the 15th and 16th century – culminating in the

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[72] Anderson, *Frontiers. Territory and State Formation in the Modern World*, 1-3.

Treaty of Westphalia – led to a merging of the terms *frontière* and *limite*. [73] By the end of the 17th century, *frontière* referred generally to the end of a kingdom or province. Today, only *frontière* is consistently used designate a political state boundary.

English differentiates between border, boundary, frontier, limit and march. According to the definitions of the Oxford English Dictionary,[74] border, derived from French, is the word with the widest general meaning, comprising the meanings of boundary and frontier. Its original geographic meaning has been transferred to a more general figurative meaning. It can designate a line or a zone. Boundary refers to the end of something, geographically or figuratively. Frontier has departed from its early general military meaning to designate the area or line as that part of the country where it borders on another. Additionally, the word has assumed a very specific meaning in the US context of settling the continent by settlers of European origin. Both 'frontier' and 'border' can refer to a zone as well as a line. Limit only refers to a border line today, but also retains a figurative sense. March refers mainly to an area of land which lies on the border and is becoming historicised. Much of this differentiation of meaning in English may be attributed to historical developments and

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[73] Cf. Lucien Febvre, *Pour une Histoire à part entière* (Paris: S.E.V.P.E.N., 1962).

[74] Border (earliest use in ME, adopted from old French):
1. A side edge, brink or margin; a limit or boundary; the part lying along the boundary or outline
2. A frontier; pl. the marches, the border districts ME; the frontier line (first mentioned in 1535)
3. A strip of ground forming a fringe to a garden
4. A defined edging, of distinct material, colour, shape, pattern etc.
5. fig. A limit, boundary, verge 1728

Boundary (1626):
That which serves to indicate the limits of anything; the limit itself

Frontier (ME, adoption from old French):
1. † The front side; the fore-part - 1551
2. † The front line of foremost part of an army. Hence, 'attack, resistance'. –1523
3. The part of a country which fronts, faces, or borders on another country; the marches; U.S. 'That part of a country which forms the border of its settled or inhabited regions'
4. † A fortress on the frontier; a frontier town –1769; a barrier against attack –1690

Limit, ME
1. A boundary, frontier; a landmark. Now only: A bounding line or terminal point
2. One of the fixed points or values between which the possible or permissible range of anything is confined; a bound beyond which something ceases to be possible or allowable, ME.
3. *math.* (...)

March, ME (adopted from French)
1. Boundary, frontier, border
   a. The border of a country (...); often collect. pl., esp. with ref. to the borderland of England and Wales. Now hist.
   b. The boundary of an estate
2. Country, territory. Obsolete

experiences which privileged a particular usage of a term – hence also the difference between US, British and Australian English.[75]

The German language has evolved in a way as to collect the various meanings under one term, emphasising their common nature.[76] The Slavic route 'granica' referred originally to a march which divided two areas. For the English-speaking reader of this thesis, it may thus be important to note that the word 'Grenze' in German refers to the entity of the border as well as to an abstract function and also to a general social phenomenon of distinguishing social units. 'Grenze' can refer both to a border zone as well as a line. It designates equally the state border as well as the one between two 'Länder'.

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[75] American English associates with frontier the specific historical experience of the advancing line of the settled continent and therefore uses border for the international line between states. Cf. Anderson, *Frontiers. Territory and State Formation in the Modern World.*, p.9. The British refer to 'the Borders' to describe those regions of southern Scotland and northern England which were contested over centuries. Western Herefordshire and Herefordshire is also referred to as 'the Welsh Borders'. In both regions, this implied a region where different groups (and jurisdictions) overlapped.

[76] One example to illustrate a similar constellation is the German term 'Schrank' which does not have an English correspondent but has to be translated according to context with 'wardrobe', 'cupboard', 'bookcase', 'cabinet' or 'locker'; conversely, the English word 'box' is split up into a number of German words which together comprise the English meaning of 'box': 'Schachtel', 'Karton', 'Sammelbüchse', 'Loge', 'Zeugenstand', 'Zelle'.

2.2. Usage of terms by researchers

Not only language communities, but also researchers of political borders have used the terms 'border', 'boundary' and 'frontier' with considerable variation. This can be attributed to a difference of perspective of the various disciplines. Cohen has also pointed to the fact that while some social scientists have tried to do justice to the (often imprecise) use of the terms in everyday language, others have oriented themselves more towards traditional usage within their subject.[77] Prestcott asked for precise definitions to be used within one subject area: 'There is no excuse for geographers using the terms "frontier" and "boundary" as synonymous'.[78]

Malcolm Anderson has analysed the current use of terms for political border: 'Frontier' is the word with the widest meaning, signifying both a line and a border zone or region. It originates from military language. Today it is used to refer to a precise legal/administrative line or to a region where two entities meet. It can also be used to refer to a changing zone of settlement or civilisational advancement (as used by Turner in 1898 in his *The Frontier in American History*).[79] 'Border' can also be used for a zone, mostly conceived as narrow, or a line of demarcation. 'Boundary' is always used for a line of demarcation or delimitation and thus the narrowest of the terms. Anderson therefore uses the term frontier consistently in order to describe the dividing line or zone between two states. 'Frontier' is normally used to refer to the international border; 'boundary' is used to refer to the borders of political and administrative authorities below the state level.[80]

J.R.V. Prestcott makes a distinction between boundaries and frontiers according to criteria of their shape (zone or line) linked to their historical evolution. For him both '[p]olitical frontiers and boundaries separate areas subject to different political control or sovereignty. Frontiers are *zones* of varying widths which were common features of the political landscape centuries ago. By the beginning of the 20th century most remaining frontiers had disappeared and had been replaced by boundaries which are *lines*.'[81] Borders are for him 'the adjacent areas which fringe the boundary.'[82] His usage of the terms links two aspects of

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[77] Anthony P. Cohen, "Boundaries and Boundary-Consciousness: Politicizing Cultural Identity," in *The Frontiers of Europe*, ed. Malcolm Anderson and Eberhard Bort (London/Washington: Pinter, 1998), 25.

[78] Prescott, *Political Frontiers and Boundaries*, 36.

[79] Frederick Jackson Turner, *The Frontier in American History* (Madison: State Historical Society of Wisconsin, 1894).

[80] Cf. Anderson, *Frontiers. Territory and State Formation in the Modern World*, 9f.

[81] Prescott, *Political Frontiers and Boundaries*, 1.

[82] Ibid, 12.

borders, namely their physical nature and their historical development. Frontiers thus seem a feature of the past whereas boundary lines are a characteristic of the present. Variations in the use of English may partly account for that (he is Australian). Anderson has remarked that Prestcott's suggested usage does 'not correspond to the ordinary language in the United Kingdom.'[83] For the purposes of this thesis, it does not seem opportune to de-link the two terms of border line and zone, however. As it is suggested above, border lines and zones are by no means mutually exclusive, but that they are both a feature of the modern border.

Contrarily to Malcolm Anderson, anthropologists have tended to give boundary the widest meaning: the term has been used to designate the greatest diversity of things. 'Border' was used 'situationally specific' and 'frontier' was reserved for geopolitical and legal senses only.[84] For Cohen, the important distinction which anthropologists make is the one between material and ideal: 'Generally in anthropology the distinction can be accomplished simply by regarding frontiers and borders as matters of fact; whereas boundaries are the subjects of claims based on a perception by at least one of the parties of certain features which distinguish it from others. ... [B]oundary suggests contestability, and is predicated on consciousness of a diacritical property.'[85]

The usage of terms in EC/EU circles also is not consistent. Tindemans urged for the 'gradual disappearance of frontier controls... between member states'.[86] The Schengen Convention of 1990, however, defines internal and external borders, by referring to those between Member States and those with third countries. The same document talks about the objective of completing an area without internal frontiers. European Union Council Documents use the terms external borders and frontiers interchangeably, even within the same Presidency.[87] The Select Committee on European Communities Committee of the House of Lords has tried to avoid ambiguities by distinguishing clearly between external frontiers of the Schengen area and internal borders between Schengen states.[88]

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[83] Anderson, *Frontiers. Territory and State Formation in the Modern World*, 10.
[84] Cf. Cohen, "Boundaries and Boundary-Consciousness: Politicizing Cultural Identity," 26.
[85] Ibid.
[86] Leo Tindemans, "The Tindemans Report," *Bulletin of the European Community. Supplement* 1/76 (1975).
[87] Council of the European Union (German Presidency), "Note. Commission Initiative for a Decision Establishing a Convention on Controls on Persons Crossing External Frontiers," (Brussels: 1994), Council of the European Union (German Presidency), "Note. Joint Action for a Further Improvement in Security at External Borders," (Brussels: 1994).
[88] Select Committee on European Communities Committee, "Schengen and the United Kingdom's Border Controls," (London: House of Lords, 1999).

Since there is no agreement on one particular usage in social sciences, this thesis has chosen to use the various words in the following sense: border and frontier will both be used to refer political borders. The two terms differ in connotations, but both can refer to a state 'boundary' as both a line and a zone. 'Frontier' will be used to refer to international state borders, linear or zonal. 'Border' is used with reference to administrative and political borders on all levels. Boundary will be understood as the most versatile term: while it can be understood as a political border (on any level), emphasis will be made on the term's ability to designate an abstract 'limit', thus referring to the 'idea' of differentiation behind a border.

The above discussion of linguistic variety around borders and boundaries points to an underlying variation in the perspectives on borders regarding their functions, role and shape. Indeed, a definition of borders on which all researchers could agree has yet to be found. Consequently, it does not seem useful to present a makeshift definition here. Instead, the following account of the dimensions of borders is intended to provide a closer description of the phenomenon.

2.3. Dimensions of borders

This section aims to highlight the inherent variety of the term border by pointing to the dimensions of natural and artificial borders, lines and zones, points of contact and of isolation as well as phenomenon with internal and external effects. These dimensions are an important background to the Schengen negotiations which had to do justice to this richness of functions in its provisions.

Borders are multi-faceted phenomena with both practical and abstract dimensions. A first important distinction is made by Malcolm Anderson: they are both institutions and processes. As institutions, they are based on political decisions and regulated by legal texts and administrative provisions. Indeed, the 'frontier is the basic political institution: no rule-bound economic, social or political life in complex societies could be organized without them.'[89] Borders are institutions of the state and for the state, they are administered by it, are the foundation for its development into the modern state and contribute to the identity of state and society. As processes, frontiers are characterised by four dimensions: they are instruments of state policy, they depend on the *de facto* control governments can exercise over them, they are markers of identity, and 'frontier' is a term of discourse with changing meaning over time and depending on context.

A further distinction can be made between natural and artificial borders, thus the question whether borders are imposed by nature or formed through human action. Natural borders are a concept which have had currency in Europe since the end of the sixteenth century.[90] The idea of natural borders is derived from the view that geographic elements such as mountains, rivers or the sea are natural barriers for the contact between communities. Underlying the discourse of natural borders was often an expansionist project as Franco-German history shows. For example military writers of the 18th and 19th century regarding the border between Germany and France use this concept for justification.[91]

The historian Lucien Febvre has criticised this concept: 'Faut-il s'arrêter à montrer que, du reste, ces frontières fluviales ou côtières n'ont rien de "naturel", ou, de façon plus générale,

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[89] Anderson, *Frontiers. Territory and State Formation in the Modern World*, 1.

[90] Malcolm Anderson mentions that André Thevet used the idea in order to overcome medieval divisions on French territory. He derived his image from Caesar's and the geographer Strabo's descriptions of Gaul. Cf. Ibid, 21.

[91] Cf. Carl Baur, *Welches ist die Ächte und natürliche Grenze zwischen Deutschland und Frankreich? Eine Militärische Betrachtung* (S.I.: 1813), N.N., *Militärische und Politische Bemerkungen über die Rhein-Grenze* (S.I.: 1798).

que la notion de frontières naturelles ne répond à rien pour le géograph, qu'il n'y a rien de de "donné tout fait" à l'homme par la nature, rien d'imposé à la politique par la géographie?'[92] Although the geographer Friedrich Ratzel is sometimes associated with the idea of natural borders, he denies that there is anything like an absolute border,[93] thus a geographical area which, by its nature, is destined to become a border. When Ratzel talks about natural borders he refers to the political use of an existing natural differentiation, thus displaying all the 'artifice' of human will and power.[94]

International law uses the concept of natural borders in order to introduce a reliable means of measurement over time, although even here, the use is arbitrary.[95] Caflisch asserts that the certitude of natural borders 'leaves something to be desired' and that also the often-stated advantage of natural borders – their permanence – has to be doubted. This is because also natural phenomena, such as the position of rivers, tend to change constantly. He also states that in times when borders were mostly zones, they had more of the character of natural borders than the modern border lines do.[96]

Despite the fact that natural borders in the absolute sense do not exist, one must not neglect the powerful myth of natural borders. Febvre has studied the evolution of such myths in France.[97] He attributes the success of these myths to the complex reality at a time when people had no clear idea where the actual border lay. The border in the system of fiefdoms was multiple, unclear and difficult to mark whereas the myth was clear and simple: 'Sie waren klar und eindeutig – zu einer Zeit, da die wirkliche Grenze, die der Lehnsfolgen, unscharf und schwer erkennbar war. Das ist es, was ihre Popularität ausmacht, und nicht Angriffslust, Beutegier und Herrschaftsdrang der damaligen

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[92] Febvre, *Pour une Histoire à part entière*, 21.. Section on word and meaning of border. Translation: "Does one have to continually emphasise that these river or coastal borders have nothing 'natural', or more generally, that the idea of natural borders does not mean anything to a geographer, that there is nothing 'ready made' by nature for human beings, nothing which geography would have forced onto politics."

[93] Cf. Ratzel, *Politische Geographie*, 387.

[94] Ibid, 404f.

[95] For example, it is unclear which limit is to be defined 'the natural border' (of the land-sea boundary): the end of the land, the end of the 12 mile maritime zone, the end of the zone of economic exploitation or the end of the continental shelf? So-called natural borders cannot answer these legal questions.

[96] Lucius Caflisch, "Essai d'une Typologie des frontières," *Relations internationales* 63, no. automne (1990): 280.

[97] Tracing the evolution of such myths, Febvre finds that most countries which have such a myth are in fact referring to Roman borders. Furthermore, he shows that the myth of natural borders itself has not been stable in France. The 15th and 16th century claimed the four streams Rhône, Saône, Maas and Schelde as natural borders (supposedly emerged from the Treaty of Verdun of 843) whereas the 17th, 18th and 19th century referred to the Rhine and the Alps as the natural borders. Cf. essay on word and meaning of border Febvre, *Pour une Histoire à part entière*.

Franzosen."[98] According to Febvre, the myths of natural borders only became dangerous when the rise of the nation-state brought antagonisms between peoples, necessitated exact demarcation, and every piece of land received a value it had not had before.

Although a number of today's political borders coincide with natural differentiations in the landscape – i.e. the part of the Franco-German river along the Rhine, the French-Spanish border in the Pyrenees or the border between Hungary and Slovakia on the Danube – they are essentially the outcome of negotiations and treaties. They have been settled in the aftermath of war, through international agreements, or forced upon losers of wars.[99] Geographic barriers may then serve as markers and symbols of differentiation, but by no means impose themselves cogently on societies.

Another dimension of borders is their physical extension. As has been pointed out above, borders can be both lines and zones, and have varied historically. There has been a debate as to why border zones or marches precede the border line. Early political geography took an evolutionary view with reference to social Darwinism: Friedrich Ratzel's writings state that undefined border zones are the sign of less mature societies, whereas border lines are the attribute of developed societies. Jacques de la Ferrière echoed this view on the level of the state system when he observed that the border line was the sign of a finished, accomplished world (monde fini) whereas the border zones such as the *limes* belonged to an incomplete world. The latter originated from a society in expansion whose territory was not yet formed.[100]

Such deterministic explanations have to be rejected and others have to be sought on deeper structural levels: Lucien Febvre employed the above-mentioned insight that a new understanding of sovereignty in Western Europe has to be linked to the establishments of border lines: in the middle ages, the state was the agglomeration of manorial systems in which a distinction between public and private affairs did not exist. The development leading up the Treaty of Westphalia in 1648 saw the evolution of a much more clearly defined, exclusive principle of sovereignty which necessitated clear boundaries. The rise of

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[98] Ibid, 22. Translation : They (the myths) were clear and unambiguous – at a time when the real border, the one of fiefdom, was unclear and difficult to discern. That was the reason for their popularity, and not aggressiveness, eagerness for the spoils or will to power of the French.

[99] Michel Foucher shows that 24.3% of current European borders have been drawn between 1910 and 1924 and another 29.9% between 1945 and 1949. Many of these have emerged as consequences of international agreements. Michel Foucher, "Les frontières dans la Nouvelle Europe," *Politique Étrangère*, no. 3 (1990): 577.

[100] Jacques de la Ferrière, "La frontière dans la théorie et la stratégie militaires," *Relations Internationales* 63, no. automne (1990): 250., Ratzel, *Politische Geographie*, 388.

nationalism with its attachment to national soil then reinforced this development.[101] This link between borders and state sovereignty was exemplified also in the negotiations for European border policies when concerns regarding a loss of sovereignty led some governments (e.g. France) to refuse certain far-reaching agreements.

The national attachment of populations in border zones has been subject to a number of studies with varying results: Peter Sahlins concluded from his work that border zones or frontiers are defined by an especially strong attachment of the population to national culture.[102] His description of the importance of the respective French and Spanish national culture in a Basque valley in the Pyrenees illustrates that. While in some instances differentiation against each other takes place in border zones, this attachment to a particular national culture might also be attributed to deliberate government action: the attempts of the French state to instil a sense of French citizenship into the diverse populations along the borders are a good example. Eugen Weber has illustrated that such an attachment is the result of a deliberate policy which suppressed regional languages and imposed national French culture with the help of military service, migration, schooling, religion and 'national' customs.[103] What is more, in many instances, such policies did not completely succeed so that the attachment of the populations in border zones can be multiple. An imprecise fit between borders and nations is a ubiquitous feature in Europe.

It can be summarized therefore, that the border line always exists together with a border zone and that, as anthropologists have been able to establish, these 'frontiers, which are territorial in nature, are political and social features of the borders of all modern nation-states.'[104]

Borders represent the dimensions of contact as well as those of isolation. They are instruments of the state, aiming at asserting its control over exit and entry. For this purpose, a legal division is made between those who are inside and subjected to state authority, and all others. However, the ability of a state to completely enclose itself is limited. Even under circumstances of strict controls, there remains an element of openness and contact at every border. History has shown how extremely difficult and costly

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[101] Cf. Febvre, *Pour une Histoire à part entière*.
[102] Cf. Sahlins, *Boundaries: The Making of France and Spain in the Pyrenees*.
[103] Cf. the classic study by Eugen Weber Eugen Weber, *Peasants into Frenchmen: The Modernization of Rural France, 1870-1914* (London: Chatto & Windus, 1977).
[104] Wilson and Donnan, eds., *Border Identities. Nation and State at International Frontiers*, 9.

(financially and politically) it is to close a border tightly.[105] The growth of international trade and economic interdependence has made isolation even more costly for states. The inner-German border never was a complete obstacle to the movement of goods and people. 'As a result of the complicated social and political construction of this border, in the long run it was surprisingly permeable in both directions – and in several ways.'[106] Not only could asylum seekers pass through the border, East German citizen could emigrate once the financial arrangements between the governments were made and also, economic goods could pass fairly easily.[107]

A border's emergence can be internally or externally driven. Internally defined borders point to the fact that groups characterise themselves by reference to their own characteristics and customs. Externally driven boundary-making means that borders emerge with reference to others or through international negotiations. Such a perspective on European borders has for example been suggested by the anthropologist Frederik Barth[108], and seems implicit in many accounts of boundary formation in Europe.[109] There are a number of examples where people defined themselves in opposition to one group in particular with whom they could not communicate and extended this concept to all foreigners. For example, the Slavic root 'néme', means mute, dumb, unintelligible – and German.[110]

Similarly, the external and internal effects of borders have been analysed. Tomke Lask has identified a difference between German and French by an etymological examination of the terms 'Grenze' and 'frontière'. The original concepts of the words pointed in different directions. The French sense was inward looking, a border to defend the territory, the

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[105] see for example the experience of th GDR

[106] Albrecht Funk, "Control Myths: The Eastern Border of the Federal Republic of Germany before and after 1989," (1994), 4. Unpublished paper, see published version in French Albrecht Funk, "Les Mythes du contrôle: la frontière orientale de la République Fédérale d'Allemagne au tournant des années 1990," in *Contrôles: Frontières - Identités. Les enjeux autour de l'immigration et de l'asile. Cultures & Conflits*, ed. Ayse Ceyhan and Anastassia Tsoukala (Paris: Editions L'Harmattan, 1997).

[107] Cf. Alphones Losser, "La frontière interallemande: exemple type d'une frontière "passoire" dans le domaine économique," *Relations Internationales* 64, no. hiver (1990).

[108] Cf. John Armstrong, *Nations before Nationalism* (Chapel Hill, NC: University of North Carolina Press, 1982).

[109] Cf. Breuilly, "Sovereignty, Citizenship and Nationality: Reflections on the Case of Germany.", Hagen Schulze, *Gibt es überhaupt eine deutsche Geschichte?* (Stuttgart: Reclam, 1998).

[110] Muteness is to be interpreted here in the sense of those with whom one cannot communicate. In Czech, 'nêmecky' means German and 'nêmy' mute, in Polish 'niemicki' and 'niemy' respectively. Even in Hungarian, which is from a completely different language group, but part of the eastern neighbours of Germany, a similar fusion of meanings can be found: 'német' means German and 'néma' means mute.

German border was outward-looking.[111] The origin of the French word stems from the military and refers to the zone of battle where armies 'faced' each other, often a line of defence. The German word is derived from Slavic origin and has the meaning of a border zone with an imaginary line which serves to separate two territories. 'À la différence du mot français "frontière", "Grenze" se réfère originellement à l'espace *à cheval sur la ligne séparatrice*'.[112] The German language thus gives the border the connotation of horizon, which can move with the standpoint of the speaker. Lask also finds that the modern meanings of the French and German words converge towards a representation of a more and more virtual line.

The above sections have shown that the characteristics of borders as a concept cannot be described unambiguously. The border has to be conceptualised as both process and institution, as artificial, but often relying on 'natural' givens, as line and zone, as a point of both separation and exchange and with effects both internally and externally. The next section moves from the dimensions of political borders to the intricate link between modern state governance and borders.

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[111] Cf. Tomke Lask, "Grenze/frontière: le Sens de la frontière," *Quaderni*, no. 27 (1995).
[112] Ibid.: 70. Translation : Different from the French word 'frontiere', 'Grenze' refers originally to the space *on both sides of a separating line.*"

3. Borders as intrinsic to the idea of the modern state

It has been remarked that drawing boundaries is directly related to the modern way of governing: Don Michael, a social psychologist, states that in 'the West, the mythology, certainly since the Renaissance, has included beliefs that take as natural and right: individualism, science, rationality, efficiency, free speech, democracy, progress, competition, a "Christian" god, moral superiority, technological know-how, male dominance.'[113] Part of this mythology of individuation is also the idea of states being bounded in order to be governable. Furthermore, the mentioned modes and expectancies are themselves 'reified and operationalized, expressed and maintained, by boundaries – physical, ideological, factual, procedural, organizational, relational.'[114] Thus, ideas of political borders are at the heart of a mythology of statehood.

The state needs borders in order to be governed. Put differently, a prerequisite for a functioning modern state as a 'bordered power-container'[115] is that it can represent itself as territorial and as extending its power up to the border. This is what the centrality of the symbolism of borders consists in. It will be shown that international law makes a tight link between territory and the state. Furthermore, the specific roles borders have taken on for governance will be outlined: they are decisive for the conceptual divide between citizens and aliens and also for the ensuing entitlements or refusal thereof. They allow governments to maintain a monopoly over economic control as well as internal order through political control and enforceability of law. Finally, they have become the basis on which the state provides security to its citizens.

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[113] Donald N. Michael, "Governing by Learning: Boundaries, Myths and Metaphors," *Futures* 25, no. 1 (1993): 82.
[114] Ibid.
[115] Anthony Giddens, *The Nation-State and Violence* (Cambridge: Polity Press, 1985), 120.

3.1. Ethnic and civic nations and borders

Before going into the specific role of borders, a few remarks about the relationship between different kinds of nationalism and the views on delimited territory and borders are made. This is not the space to present an elaborate discussion of nationalism. Others have done so with great scholarly depth and knowledge.[116] Different kinds of relationships between nation and state are only be presented insofar as they can contribute to an understanding of borders.

The nation and territory are closely linked in European historical experience and interpretation. Generally speaking, nationalism has been a central political doctrine in western Europe since the end of the eighteenth or the beginning of the nineteenth century. The fusion between nation, state and territory became what has been called a mythomoteur of European nationalism, a myth which was central in defining identity in European polities.[117] The originally French principle of the nation-state which spread to Western Europe in the 19th century incorporated the idea that the state is primarily legitimated through the nation that organises itself within it – contrarily to earlier principles of legitimacy of territorial politics and the ruler.

Although a number of theories of nations can be differentiated,[118] Malcolm Anderson points to common threads: firstly, that the nation is seen as the basis of legitimacy and secondly, that it is assumed that the nation is bounded.[119] He cites Benedict Anderson: 'The nation is imagined as limited because even the largest of them, encompassing perhaps a billion living beings, has finite, if elastic, boundaries, beyond which lie other nations.'[120]

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[116] see for example Benedict Anderson, *Imagined Communities. Reflections on the Origin and Spread of Nationalism* (London and New York: Verso, 1991), Armstrong, *Nations before Nationalism*, John Breuilly, *Nationalism and the State* (Manchester: Manchester University Press, 1993), Ernest Gellner, "Nationalism and the Two Forms of Cohesion in Complex Societies," in *Culture, Identity, and Politics* (Cambridge: Cambridge University Press, 1987), Montserrat Guibernau, *Nationalisms. The Nation-State and Nationalism in the 20th Century* (Cambridge: Polity Press, 1996), John Hutchinson and Anthony D. Smith, eds., *Nationalism* (Oxford: Oxford University Press, 1994), Smith, *Nationalism in the Twentieth Century*.

[117] Anderson, *Frontiers. Territory and State Formation in the Modern World*, 25, Armstrong, *Nations before Nationalism*, 9.

[118] For example Anderson distinguishes: the nation as a contractual or quasi-voluntary association, the nation as a natural unit whose membership is destiny, the nation as a metaphysical ideal and the nation as the political project of an elite minority. Cf. Anderson, *Frontiers. Territory and State Formation in the Modern World*, 41f.

[119] Cf. Ibid, 42.

[120] Anderson, *Imagined Communities. Reflections on the Origin and Spread of Nationalism*, 7.

The concept of a nation in itself is depends on boundaries, but not necessarily geographic ones. Nations are large social groups with a feeling of solidarity and reference to common values, a common past and a common culture. Two broad concepts of the emergence and evolution of the nation can be distinguished: one of the ethnic or cultural nation (Kulturnation)[121] and one of the political or civic nation (Staatsnation). Both concepts refer to a bounded, sovereign nation state as their ideal. The former has been used mainly to describe the development and situation in Central and Eastern Europe where the nation defined itself first via a common language and culture. The latter refers to a situation where a nation emerges in an existent state without reference to ethnic differences (Western Europe, main examples: France and Britain).

The distinction between ethnic and civic nationalism also has effects on the relationship between the nation-state and its borders. The civic nation emerges from an already existing state or governing authority. The example of France shows that the state acquired territorial clarity long before the Revolution, and that even myths of natural borders of France existed since the second half of the sixteenth century.[122] Such territorial clarity came into existence through political developments of the land of the French kings and through administrative, military and political necessities. Thus, the emerging nation had an existing 'mythical' space within which in could be imagined. Its identity was primarily wedded to the constitutional values of the state and nation, so that the existing or idealised borders of the state could become the point of identification for the nation. Once in existence, such borders could lead to a reinforcement of the territorial imagination of the nation through their tangibility and their function of representation and symbolic significance.

The ethnic-based nation works according to different principles: the nation exists where members feel bound to the linguistic or cultural foundations of the nation and participate in it. The historian H. A. Winkler on German nationalism and its lack of linkage with an existing state: 'Für den deutschen Begriff von "Nation" war dabei die Gemeinsamkeit der Sprache ("Gezunge") der bestimmende Gesichtspunkt: ein Rückgriff, der nahe lag, wenn man bedenkt, daß die "deutsche Nation" keine irgendwie geartete Verwaltungseinheit bildete. In Frankreich und England dagegen, ging die Nationsbildung von der Monarchie aus, was dem Begriff „Nation" einen in Deutschland nicht möglichen Bezug auf den Staat

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[121] The term *Kulturnation* refers only to the cultural aspect of nations whereas ethnic nation also refers to the tribal and kinship aspects. In practice, many nations which have defined themselves as *Kulturnation* have also included the ethnic traits. Cf. for example the German principle of descendence for conferring citizenship.

[122] Cf. Febvre, *Pour une Histoire à part entière.*

gab.'[123] The ethnic nation is therefore not primarily a political project. Only when it merged with the political ideals of the nation-state, territorial clarity became a necessity.

The 'Kulturnation' is threatened when the concept of a coherent ethnic and linguistic community begins to disintegrate. To the contrary, the 'Staatsnation' is endangered when the physical border which divides citizens from aliens weakens or when the internal authority is fundamentally challenged. This has obviously consequences for a number of policy areas, not least of all those of immigration. For the ethnic nation, it is vital to retain a coherent community in terms of linguistic and ethnic culture, whereas the civic nation needs to integrate aliens into the political and cultural community.

The complex of nation-state-territory[124] has undergone significant changes. On the one hand, the territorial principle seems still very attractive. The right to national self-determination has been enshrined into the United Nations Charter and has become an accepted principle of the world order after WWII. After the Cold War, a large number of states (re-)gained political and territorial sovereignty. On the other hand, the principle of the exclusive exercise of state power over its own territory has seen changes through the European integration project. Integration and projects of cross-border cooperation and indeed cooperation in Schengen have undermined the principle of exclusive state control over territory.[125]

The idea of the nation has changed over time, too: all European states today would claim to have both elements of a *Staatsnation* and a *Kulturnation* – to a varying degree. On the whole, the idea of civic nationalism seems to be on the rise in Western Europe: historical developments and their interpretation, mainly the experience of fascism in Europe with its perversion of nationalism, has discredited ethnic nationalism to some extent. Furthermore, many European states are beginning to recognise (with varying speed) that they are or are becoming multi-national states and societies. To the extent that this recognition challenges

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[123] Winkler, *Der lange Weg nach Westen. Deutsche Geschichte vom Ende des Alten Reiches bis zum Untergang der Weimarer Republik*, 11f. Translation: For the German concept of 'nation', the decisive aspect was the common language: an obvious reference if one considers that the 'German nation' did not form any kind of administrative unit. In France and England, on the contrary, the nation-building originated from the monarchy, which gave the concept of 'nation' a relation to the state which was impossible in Germany.

[124] Cf. Anderson, *Frontiers. Territory and State Formation in the Modern World.*

[125] It is true that unbundled territoriality has always existed, indeed was a prerequisite for the functioning of the territorial state system. The extent to which central functions of the state are affected by current European developments is of a different dimension, however.

the self-understanding of cohesion of a nation, multiculturalism could be seen to undermine the traditional complex of nation-state-territory.

3.2. Borders, territoriality and international law in the modern state system

This section elaborates the various uses the border has traditionally had for the modern state in Europe. The remainder of this thesis will show that many of these were challenged through the Schengen negotiations on border controls and compensatory measures.

Territory/borders and the modern state are mutually constitutive in their genesis. They cannot be decoupled in the understanding of international law and most importantly, the state relies on territoriality for governance: the perception of unity and assertion of sovereignty which territory allows, as well as the possibility of control with which it provides the state, are indispensable to the modern state.

Torpey has summarised the constitutive nature of limiting movement for state authority:

> States have sought to monopolize the capacity to authorize the movement of persons – and unambiguously to establish their identities in order to enforce this authority – for a great variety of reason which reflect the ambiguous nature of modern states, which are at once sheltering and dominating. These reasons include such objectives as the extraction of military service, taxes, and labor; the facilitation of law enforcement; the control of "brain drain"... ; the restriction of access to areas deemed "off-limits" by the state, whether for "security" reasons or to protect people from unexpected or unacknowledged harms; the exclusion, surveillance, and containment of "undesirable elements," whether these are of an ethnic, national, racial, economic, religious, ideological, or medical character; and the supervision of the growth, spatial distribution, and social composition of populations within their territories."[126]

3.2.1. Territorial control in the evolution of the modern state

Historically speaking, the ability of the state to exercise control over its territory changed enormously. Early modern states had loose control over their peripheral regions. The development of the modern state was concomitant with the extension of state control over the whole of the territory up to the borders. What had earlier been termed 'marches' became clearly documented border lines. States' attitudes changed so that now the exact definition as well as control of borders with border guards and posts became an objective.

The history of cartography illustrates this. For example, attempts in Prussia at more precise 'land measuring' began in the early 18th century. In the 1770s, the eastern parts of the Prussian monarchy were measures in fairly accurate maps (1:50 000). The major attempt at

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[126] Torpey, *The Invention of the Passport*, 7.

documenting territory happened in the 19th century in several phases with the help of the military.[127] The first atlas (for administrative and statistical purposes) appeared in 1827/28. Also in Bavaria, cartography was intensified in the early 19th century through the order of Kurfürst May IV. Joseph with the aim of using the maps for tax purposes.[128] It was also in the 19th century that 'instructions' were given to produce uniform bases for measurements in all parts of Prussia. This also facilitated a common set of maps for Prussia, Saxony, Bavaria and Württemberg, decided upon in 1878.

Most state theories of the emerging nation-state of the 17th and 18th century implied a contract, thus a two-way relationship between territory and state. The state relied on clear territory to provide order, law and security to its citizens. Domestic order presupposed enforceability of law, thus clear boundaries. In order to govern effectively, knowledge about the population – for example in the form of economic data – was necessary. Government obtained information about the population and enforced law on a territorial basis in order to provide the (territorially limited) population with security and prosperity.

Liberal contract theory today takes up this reciprocal view. State authority is mainly derived from a bond between the community and government. For government to fulfil its tasks, the population needs to be bounded, so that control can be exercised over entry, resources and all threats to the social order. Thus, the role of government is to preserve the boundaries of the community by territorial behaviour. Michael Walzer argues for example that states have a right to exclude people from immigration since the community could not function without a control on immigration.[129] Rawls also assumes a closed society for the purposes of his theory of justice.[130] Nozick's theory, too, has been interpreted to mean that (collective and individual) property rights can be an argument for the control of entry to territory.[131] Yet other interpretations, not necessarily liberal, base their defence for the

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[127] Gerd Krüger and Jörg Schnadt, *Königreich Preußen. Berlin-Brandenburg im Kartenbild* (2002 [cited July 2002]); available from http://geog.fu-berlin.de/de/Karto/2bik/Kap4/kap4_1-03.php3, Wolfgang Scharfe, *Von der Gemarkungskarte zur Landesaufnahme. Berlin-Brandenburg im Kartenbild* (2002 [cited July 2002]); available from http://geog.fu-berlin.de/de/Karto/2bik/2bik_r.php3. Interestingly, Scharfe reports that the Prussian King Frederick II refused in 1749/50 to have measurements improved because this could be of advantage to Prussia's enemies.

[128] *175 Jahre Sternwarte Bogenhausen* (2002 [cited July 2002]); available from http://www.usm.uni-muenchen.de/hist.html.

[129] Walzer in P.G. Brown and H. Shue, eds., *Boundaries*, vol. 16 (Ottawa: Rowman & Littlefield, 1981). (acc. to Anderson)

[130] Cf. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

[131] Cf. R. Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974).

control of territory on the distinct bases of communities, i.e. ethnic, civic, cultural, imagined.[132]

For control to be politically feasible, it needs to exclude other sources of authority apart from the state. Territorial exclusivity is therefore constitutive of the order of the state, a structuring principle of political communities. Bertrand Badie puts forward a reason for the ideal of territorial exclusivity: exclusive juridical competence is only possible if other sources of authority internally and externally are excluded. Territoriality, in this perspective, is therefore conceptually prior to community:

> Si...le territoire est un instrument de contrôle des individus et des groupes, ce contrôle ne sera politiquement pertinent que s'il dispose de l'exclusivité, c'est-à-dire s'il tarit les autres sources de production de l'autorité... Le principe de territorialité présuppose que le territoire soit reconnu comme constitutif d'ordre, comme principe structurant des communautés politiques, sans qu'il ne dérive préalablement de quelque solidarité sociale qui lui serait antérieure, distincte ou qui le transcenderait.[133]

Territorial control is exercised through mechanisms of control on the whole of the territory. This can reach from the statistics and forms in which the state obtains knowledge about the citizens up to the presence of police and technological surveillance mechanisms. These can only be meaningfully obtained on a limited territory, often precisely even at the borders.

Torpey has made a significant contribution to exploring the importance of territorial control to the development of the modern state with his study on the emergence of the passport. He argues 'that the emergence of passport and related controls on movement is an essential aspect of the "state-ness" of states.'[134] By showing that the authority to regulate movement has 'been intrinsic to the very construction of states since the rise of absolutism

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[132] This is not to ignore the enormous differences and oppositions between various authors such as Benedict Anderson, John Rawls, Will Kymlicka and ethnic based foundationalist argumentations. Also, the longstanding debate about justice of limiting immigration and controlling territory should not be ignored. See e.g. Peter C. Meilaender, "Liberalism and Open Borders: The Argument of Joseph Carens," *International Migration Review* 33, no. 4 (1999)., Nozick, *Anarchy, State and Utopia*, Rawls, *A Theory of Justice*.] etc.
The main point here is, however, to distinguish between the two fundamentally different views on the relationship between territory and community. In the first, it is the interests of the community which generate the need to control territory, in the second, it is the territorial behaviour of existing government which fashions the community.

[133] Badie, *La fin des territoires. Essai sur le désordre international et sur l'utilité sociale du respect*, 47. Translation : If territory is an instrument of control of individuals and of groups, this control is politically pertinent only if it disposes of exclusivity, that is if it silences the other sources of production of authority (...). The principle of territoriality presupposes that the territory be recognized as constitutive of order, as structuring principle of political communities, and not derived from some kind of social solidarity which precedes it, is distinguished from it or transcends it.

[134] Torpey, *The Invention of the Passport*, 3.

in early modern Europe', he draws attention to the control 'techniques of identification that have played a crucial role in the development of modern, territorial states resting on distinctions between citizens/nationals and aliens.'[135]

Denis Retaillé has reflected on the relationship between community, identity and territory and has emphasised their conceptual interlinkedness. Positing territory as a socially constructed phenomenon, he views the action of constructing it as a discourse 'stupéfiant' in which a partial identity is widened to encompass an imagined space. Once delimited, this space becomes the criterion for identity.[136] The argument advanced here is that there is a mutually constitutive element between the territory and the community enclosed. By a process of generalisation and unification, the local is widened to encompass the whole.

3.2.2. International law, sovereignty and borders

International law ties together borders and the state through concepts of sovereignty and stability of the state system. Post-Westphalian international law is founded on a horizontal international structure, with legal equality and territorial exclusivity of all units. Territorial borders can reduce complexity internationally in order to define which law applies to whom. In principle, this division of the international system means the thorough application of one principle, territoriality, to all spheres of life of people located within.

Sovereignty is linked conceptually to the idea of one government possessing the monopoly of force in order to enforce law and produce a domestic order. International law as well as Realist theories of international relations have proposed a close relationship between the territoriality and sovereignty. For Maurice Flory, one is not conceivable without the other in international law: 'En droit international, on ne peut en effet concevoir l'un sans l'autre car un État suppose un territoire et parce qu'en dehors des territoires antarctiques, il n'existe pas de territoire sans État.'[137]

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[135] Ibid, 5.

[136] "(L)e contenu sert d'abord à désigner le contenant, puis le contenant détermine le contenu. L'identité partielle est étendue à un espace imaginé ; une fois délimité, l'espace imaginé devient le critère d'identité." Denis Retaillé, "L'impératif territorial," in *L 'international sans territoire*, ed. Bertrand Badie and Marie-Claude Smouts, *Culture & Conflits* (Paris: l'Harmattan, 1996), 25.

[137] Maurice Flory, "Le Couple État-territoire en droit international contemporain," in *L 'international sans territoire*, ed. Bertrand Badie and Marie-Claude Smouts (Paris: l'Harmattan, 1996), 252. In international law, one cannot conceive one without the other since a state presupposes a territory and because there is no territory without state outside the Antarctic.

This is echoed in the conception of a German lawyer on the importance of borders for the state. For Rupprecht, the border receives its meaning as a result of the state authority which it circumscribes.[138] This concept of the function of the border resulting from its centrality for state authority played a crucial part in the national and European debates regarding border controls.

Lucius Caflisch has emphasised that borders are the markers and precondition of external sovereignty. The function of borders is to divide public power between public entities, whether local or state. He furthermore states that territorial sovereignty legally requires the continued and effective exercise of state power.[139]

For the modern state, it is the essence of statehood to dispose exclusively of this space of sovereignty: '[Le territoire] est l'espace de souveraineté dont dispose à titre exclusif tout État.'[140] Flory adds that in political science, an 'International sans territoire' (title of the collection by Bertrand Badie and Marie-Claude Smouts to which his essay is a contribution) is imaginable, but that international law cannot decouple the two and asserts their 'pérennité juridique.'[141]

Since territory and state have become inseparable units in international law, borders serve as the indicators of the limits of the sovereign legal entity. 'De la confrontation entre égales souverainetés résulte la nécessité d'une délimitation qui fait apparaître la frontière destinée à empêcher tout empiétement sur une autre souveraineté.'[142]

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[138] Die Funktion einer Grenze zwischen Staaten ergibt sich aus der an ihr jeweils endenden staatlichen Macht bzw. aus ihrer geographischen Umschreibung einer bestimmten Staatsgewalt Reinhard Rupprecht and Markus Hellenthal, *Innere Sicherheit im Europäischen Binnenmarkt* (Gütersloh: Verlag Bertelsmann Stiftung, 1992), 40. Rupprecht works for of the German Federal Ministry of the Interior. Translation: The function of a border between states results from the state power ending there, or rather from its geographical circumscription of a specific authority of the state.

[139] "Il ne suffit pas d'acquérir la souveraineté territoriale. Encore faut-il, on l'a souligné, la valider et la conserver à travers l'exercice effectif et continu de la puissance publique." Translation: "It is not enough to attain territorial sovereignty. It has been emphasised that it has to be validated and preserved through the effective and continuing exercise of public power." Caflisch, "Essai d'une Typologie des frontières," 267., with reference to Max Huber, "Ile de Palmas," *Recueil des sentences arbitrales* 2 (1928).

[140] Flory, "Le Couple État-territoire en droit international contemporain," 252. Translation: (The territory) is the space of sovereignty of which each state disposes exclusively.

[141] It should be noted here that legal scholars are beginning to see a weakening of the link of international law and the territorial state. Economic globalisation and international citizenship rights embedded in interstate law allow to trace the beginnings of a new kind of global jurisprudence, says Richard Falk, a leading legal scholar. Cf. Richard A. Falk, *Law in an Emerging Global Village: A Post-Westphalian Perspective* (New York: Transnational Publishers, 1998).

[142] Flory, "Le Couple État-territoire en droit international contemporain," 252. Translation : The confrontation of sovereign equals necessitates a delimitation which makes the border seem destined to prevent all infringement of another sovereignty.

Also the Realist tradition of international relations has such a view of sovereignty linked to exclusivity of territory: in the essay *Rise and Demise of the Territorial State*, John Herz defined the characteristics of the modern nation-state before the nuclear age to consist in the '"impermeability', or 'impenetrability', or simply the 'territoriality' of the modern state. The fact that it was surrounded by a hard shell rendered it to some extent secure from foreign penetration, and thus made it an ultimate unit of protection for those within its boundaries."[143] This shows obviously an idealised view of the modern state where 'power indicated the strategic aspect, independence the political aspect, sovereignty the legal aspect of this selfsame impermeability."[144] Herz found that the nuclear age had ended such a unity of power, independence and sovereignty, but retains this congruence as an ideal. Later, Herz has pointed out, however, that he sees the emergence of what he called new territoriality in an environment of nuclear penetrability and technological relationships of a shrinking world. He finds that the 'territorial urge and the urge to maintain (or establish, or regain) one's "sovereignty" and "independence" – all of these do not seem to have diminished in importance in these decades of the nuclear age."[145] Thus he sees the territorial imperative still at work, partly due to the centrality of sovereignty to the state.

This idealised version of sovereignty and territory has to be opposed with the fact that such exclusivity of sovereignty has never existed. Retaillé speaks of the fiction of total sovereignty which relies on the concepts of exclusivity and exhaustivity.[146] Indeed, extraterritoriality was always needed to make the system work. Only by establishing 'alien' enclaves within states could the vital diplomatic communication be ensured that was needed. Ruggie adds '[w]hat we might describe as an "unbundling" of territoriality, then, of which extraterritoriality was the first and most enduring instantiation, over time has become a generic contrivance to attenuate the paradox of absolute individuation."[147] What remains, however, is that the fiction of territorial exclusivity is closely related to the (constitutive) fiction of total sovereignty of the modern state.

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[143] Herz, "Rise and Demise of the Territorial State," 474. Obviously, territoriality has here a very specific meaning here, namely only and markedly that accorded to the specifically modern state. Since this is threatened in the age of nuclear weapons, Herz speaks of the "passing of the age of territoriality" (p.475)

[144] Ibid.: 475.

[145] Herz, "The Territorial State Revisited: Reflections on the Future of the Nation-State," 78.

[146] Retaillé, "L'impératif territorial," 29. "Les trois principes de l'État moderne fondé sur le territoire, l'unité, le primat du politique, manifestent la découverte de l'impératif territorial en deux attributs superposés: l'exclusivité et l'exhaustivité que l'on retrouve dans la fiction de la souveraineté totale."

[147] Ruggie, *Constructing the World Polity. Essays on international Institutionalization*, 190.

A principle of territorial stability – and concomitant non-changeability of borders by force – allows predictability and a higher degree of security in the international system. The strategy of international law for the stabilisation of borders has generated a number of specific principles[148]: firstly, the doctrine of *rebus sic stantibus* allows a revision of a treaty when fundamental elements leading to the treaty no longer exist, but excludes specifically any revision of a treaty which establishes a border.[149] Secondly, the 1978 Vienna Convention on the succession of states stipulates that any successor state is not bound by any treaty of its predecessor (*tabula rasa*), except those establishing an international border.[150] Thirdly, the principle of *uti possidetis*, used heavily in the process of decolonisation, means that new states have to maintain as international borders the administrative lines of the old empire. Fourthly, the principle of intangibility of borders (same principle under different name), has been established at first summit of the OAU, Cairo 1964; it means that the colonial borders between countries which are heirs of different colonial powers have to be maintained. Lastly, two principles have been established to guarantee territorial stability even in a situation of war. The first one says that any change of territorial control *durante bello* has no effect on the legal right to the territory and the position of the border. The second one, *ius liminii*, states that the owner of a territory before hostilities will be retroactively restored to all rights to his territory after the end of war, even if the territory was occupied or annexed.

An international system of territorial stability allows domestic governments to maintain their role as the source of authority within.[151] The Schengen solution undermined territorial exclusivity to some extent and thus challenged principles of international law.

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[148] Cf. Georges Abi-Saab, "La pérennité des frontières en droit international," *Relations internationales* 64, no. hiver (1990).

[149] Vienna Convention on the law of treaties, 1969, art. 62, quoted after Ibid.

[150] Vienna Convention on the Succession of States, 1978, art. 11, quoted after Ibid.

[151] The division of world society into entitled and non-entitled is often viewed as greatly injust and a result of the practices of highly developed states to exclude. In practice, the principles of modern governance, which rely on borders, clash with liberal principles of global human entitlement. Political reasons for entitlement (feasibility of governance) clash with wider moral deliberations regarding universal human rights. Re-thinking this situation in favour of a more just situation is certainly important with a view to upholding liberal values of entitlement. For these discussions, however, it should be borne in mind how fundamental this rethinking would be. Taking away the negative effects of borders also entails curtailing the state's ability to govern effectively according to established principles of inclusion and exclusion, control and order.

3.3. The importance of borders for the functioning of the modern state

Having shown the constitutive function of borders/territory and the state in international law, the following section moves on to show the central role of borders for governance. The inside-outside division is important in every dimension of governance; borders function as the basis of reinforcing this division through symbolic and practical characteristics: 'Geographic boundaries are not only tangible; they possess other important attributes: they often acquire intense symbolic significance, and the direct impact of political action is frequently earliest and strongest in a geographic context.'[152]

3.3.1. Symbolic and practical functions

Practical and symbolic functions of the border are closely linked. Practical measures at the borders serve a symbolic purpose of deterrence and of representation of the ability of the state to act. Visibility of border controls is an important component of the symbolic role of the border. Indeed, the growth of visibility of border controls in the last century has contributed largely to a consciousness of the border in the whole of the population.[153] If a border is open in the sense of few controls on the movement of people and goods, but retains its legal relevance, its impact may be felt less immediately by the population but its existence is nevertheless still acknowledged.

The importance of the non-material elements of borders has to be emphasised: 'Myth, symbol, communication, and a cluster of associated attitudinal factors are usually more persistent than purely material factors.'[154] On the basis of national myths, '[n]arrowed in-group loyalties' can emerge. 'Nations... provide their citizens with more vibrant public identities than transnational and global organizations will ever be able to do.'[155]

Borders serve as signals. As such, they indicate to insiders and outsiders the limit of a state. They do that often with the help of border markers. These can consist in control instruments, a line on the street, markings of open territory with artificial and natural objects. State symbols such as the flag or the image of the head of state are displayed at the

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[152] Armstrong, *Nations before Nationalism*, 9.
[153] Cf. also Torpey's study on passport controls Torpey, *The Invention of the Passport*.
[154] Armstrong, *Nations before Nationalism*, 9.
[155] William McNeill, "The Care and Repair of Public Myth," *Foreign Affairs* 61, no. 1 (1982): 12. McNeill does not advocate the nation-state as a necessary or ideal site, however. He states that the existence of a world society and a world full of conflict necessitates a balance between broadly inclusive public identities and narrow group loyalties.

border. Amongst these, border controls by specific border control personnel have an especially important function which includes both the 'actual' control and further meaning. Border control guards wear uniforms which mark them as representatives of the state and emphasise the official function of their task. They represent the ability of the state to act and control movement across the border. A physical barrier at border control signals the limit of the exercise of national power. The border control agents also have a power of symbolising the state through the potential of the impact of their actions. These state officials represent state power in that they are entitled to exercise the full extent of the law. Their decisions can lawfully lead to indictment, expulsion or other repressive measures. The knowledge about such repressive power of the control forces, which is concentrated at the border, makes such controls a representation of the state and state power. Thus, visibility and experience of border controls reinforces the awareness of the existence and dividing function of the border in the population.

These mechanisms of symbolisation mean that most citizens have contact with the border even if they do not live close by it. The media, but also the enormous increase of individual travel in Europe and the 'myth' of the border in the form of general knowledge about the 'use' of the border, all led to a production of the 'reality of the border' even for those living away from the border. The symbolisation connected to the border re-occurs in different circumstances of civic life. This means that citizens have become aware of the existence and importance of the border for the state also in their everyday lives.

3.3.2. The economic function

On the one hand, the border serves as a contact point with the international system for trade. Export and import always are done via an international border. Both are vital for the modern state's economy. Maintaining a high degree of permeability for this purpose is in the interest of any state involved in the international trade system.

On the other hand, the state may wish to have a tight control over borders for economic reasons: the border offers an opportunity for the state to protect national production of goods and the labour market if so wished. Goods can be checked for their compliance with national safety or quality standards at the border. Plant and animal health are crucial to societal health, and diseases can represent considerable damage to the national economy.[156]

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[156] Cf. the outbreak of food and mouth disease in Europe in the year 2000.

Controlling at the border is the most efficient way of controlling the moving of goods. When already on the territory, control becomes practically much more difficult due to the dispersion of goods which might be impossible to expel. Also diseases might already have been transmitted.

Furthermore, the border also allows the state to have a certain extent of control of the tax base. Torpey points to the inherent link between restricted movement and economic (taxation) objectives: 'Such devices as identity papers, censuses, and travel certificates thus were not merely on a par with conscription and taxation as elements of state-building, but were in fact essential to their successful realization.'[157]

This fiscal function of the border is becoming increasingly problematic due to changes in the structure of international financial markets and of the international political economy.[158] Indeed, it has been one of the greatest challenges in European integration to work through the contradiction of maintaining fiscal barriers and promoting integrated trade. The Schengen project itself is an attempt to mediate between interests of national control and freedom of movement.

The modern welfare state depends on being able to have such an amount of control as to predict the economic necessities and provide the financial means to counter needs. The recent decades have however seen an increasing inability of states to avoid the erosion of their tax base. The opportunities to circumvent the knowledge of state and border authorities and to bring money outside the country have risen considerably with global financial and European economic integration. Similarly, smuggling and fraud are an increasing problem with regard to trade and the maintenance of standards in European member states.

Looking at the economic function of the border reveals a paradox of the border: it allows state control, but also prevents unhindered trade. Generally speaking, economic integration facilitates legal transactions across borders and is therefore welcomed by states in Europe, but integration also makes more it difficult to retain control over economic activities across and within its borders. For example, the fact that numbers in cross-border traffic rose

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[157] Torpey, *The Invention of the Passport*, 15.
[158] Cf. Richard O'Brien, *Global Financial Integration: The End of Geography* (London: Pinter, The Royal Institute of International Affairs, 1992).

considerably in the 1980s, brought with it the difficulty of keeping control levels at the borders at high levels.[159] In addition, such integration has the unintended consequence of also making illegal interactions, i.e. moving of goods, capital and persons across borders easier. Thus, there is an underlying tension between integration and the modern state in the economic domain.

3.3.3. The identity function

The border has a vital function for the construction of identity. Boundaries – the result of social processes – allow to structure reality into meaningful units. Drawing boundaries includes giving different meaning to the units separated. For each individual unit, the boundary represents the division between inside and outside.

Societies can be conceived as both large collectivities of individuals and as possessing their own social structures. Additionally, societies are characterised by a common orientation, common institutions, practices and norms.[160] Boundaries of societies are thus the basis of such a common meaning, a common interpretation of life, an identity. A mechanism of defining inside and outside offers members of a community the possibility to develop a sense of belonging. The boundary is the line at which the we-you oppositions can crystallise.

Any *perceived* difference can be constructed into the origin of a border. Cohen emphasises the symbolic role of borders in constructing difference: 'Since boundaries are inherently oppositional, almost any matter of perceived difference between a community and the outside world can be rendered symbolically as a resource of its boundary. ... The boundaries consist essentially in the contrivance of distinctive meanings within the community's social discourse. People construct their community symbolically, making it a resource and a repository of meaning.'[161]

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[159] see tables on cross border traffic in the appendix. In contrast, numbers of officers of the Bundesgrenzschutz remained relatively stable during that time.

[160] The properties of society have long been a subject of debate between sociologists. This general definition is by no means an attempt to give any definite explanation, but rather tries to include the elements which inform the understanding of society in the rest of the thesis. It follows Giddens, and includes both Weberian and Durkheimian perspectives on society.

[161] Anthony P. Cohen, ed., *Symbolising Boundaries. Identity and Diversity in British Cultures* (Manchester: Manchester University Press, 1996), 17.

Whether conceived more in ethnic or political terms, national identity is associated with an affiliation to a territory, solidarity between a present community with a continuity over time and 'a feeling of being one of the units of which the global society consists.'[162] Armstrong shows how identity can thus become linked with territory: 'Over long periods of time, the legitimising power of individual mythic structures tends to be enhanced by fusion with other myths in a *mythomoteur* defining identity in relation to a specific polity.'[163] The importance of consciousness and an awareness of the border which thus becomes a part of people's identity is also emphasised by Cohen: '[The] boundary is essentially a matter of consciousness and of experience, rather than of fact and law. As an item of consciousness, it is inherent in people's identity and is a predicate of their culture.'[164]

Peter Sahlins' research also emphasises the importance of borders for state formation and the development of national identity. In a study of the events in the Spanish-French border region over centuries, he shows that national identity was not a sentiment that could be imposed by a central authority. Instead, 'the adoption of national identities was part of a contextual and oppositional process of self-differentiation. Peasants became either French or Spanish because they were not the other, but not because they were no longer Catalans, Cerdans or peasants. ... And in constructing the national boundary of France and Spain, they had created for themselves new identities as French people and Spaniards.' A set of local conflicts had led to a growing 'importance of differences perceived among villagers in proximity to each other.'[165]

A border can become a monument to the lack of national unity for a state (such as divided Germany) or a state-less nation (such as the Kurdish nation). Identity questions can therefore become the prime motive for political attempts to change borders.[166] Also subnational identity is displayed at the borders. In Germany, for example Bavaria or Saxony in Germany have a strong regional identity which also gives them political weight. At the

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[162] Waever et al., *Identity, Migration and the New Security Agenda in Europe*, 21. See also chapter 2 on the relationship between nation, state and borders.
[163] Armstrong, *Nations before Nationalism*, 10.
[164] Cohen, "Boundaries and Boundary-Consciousness: Politicizing Cultural Identity."
[165] Peter Sahlins, "State Formation and National Identity in the Catalan Borderlands During the Eighteenth and Nineteenth Centuries," in *Border Identities. Nation and State at international Frontiers*, ed. Thomas M. Wilson and Hastings Donnan (Cambridge: Cambridge University Press, 1998), 55.
[166] In reverse to the examples just mentioned, a border can also be introduced to do justice to national boundaries: In the case of the Czech and Slovak Republics, the borders were introduced to adapt the political organisation to national ideals.

Land borders, the visitor encounters signs announcing the entry into the territory of the 'Freistaat' Bayern. [167]

Thus, national borders are both an expression and a marker of identity, but also a symbol of the (national) identity. This special historical importance and meaning of political borders may be explained with the characteristic of clarity of the territorial boundary. The border is an easily accessible practical and symbolic indicator of difference.

The abolition of border controls – as symbolisation of the identity marker and representation of state authority – therefore can represent a fundamental change. However, as will be shown below, the discourse on the European and national level concentrated on the loss of security through the abolition of border controls and compensatory measures. The identity discourse did not play a large role in the Schengen negotiations: the abolition of border controls was officially framed as a technical issue so that identity issues were not pushed by the authorities. Additionally, the legal and administrative nature of the border was retained so that identitiy questions did not become immediate.

3.3.4. The governance function

Governance in the modern state is bound up with the ability to enforce order domestically and to distinguish between citizens and aliens with all rights and duties which this differentiation entails.

The legal role of the border is therefore relevant not only externally in the international system, but also extends to the inside of the individual state. By giving the state the possibility to enforce restrictions of entry, the border clearly delimits the space and the population to which national law is applicable. All common and penal law is applicable to the whole of the territory of a state and to everyone sojourning there. The population of a state has particular rights and also duties which can be realised or enforced on the territory. Torpey points to the connectedness of territorial control, citizenship and modern state-building: 'Documentary controls on movement were decisively bound up with the rights and duties that would eventually come to be associated with membership – citizenship – in the nation-state.'[168]

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[167] Most Länder are artificial constructs and thus do have much less of a historical sense of identity. However, a gradual sense of belonging together also emerges on the Länder level.
[168] Torpey, The Invention of the Passport, 19.

As has been pointed out above, enforceability of domestic law gives territory a central place in the modern state. Legitimate use of power by the state authorities relies on a bounded territory: the evolution of the modern state coincided with the development of a central administrative power of government which could exercise internal power.[169] For Anthony Giddens, the nation-state is, therefore, a 'bordered power-container': 'All traditional states have laid claim to the formalized monopoly over the means of violence within their territories. But it is only within nation-states that this claim characteristically becomes more or less successful.'[170] He also mentions that processes of internal pacification, thus the exercise of public power and surveillance, are integral parts of this evolution.

This way of governing requires a finite territory which provides specific features:
- Clarity as to where and to whom state power applies;
- Inescapability to the extent that distance within the territory should not make a fundamental difference to the application of state power;
- The borders of the territory as a possible crystallisation point of state power.

Governance in modern states also implies predictable control over the economy, more particularly state revenues. Borders are crucial in this respect as has been highlighted above. Foucault has remarked on the modern art of government as economic, therefore requiring knowledge:

> To govern a state will therefore mean to apply economy, to set up an economy at the level of the entire state, which means exercising towards its inhabitants, and the wealth and behaviour of each and all, a form of surveillance and control as attentive as that of the head of a family over his household and his goods.[171]

Control over the borders allows the state to some degree to have relevant knowledge about a number of factors crucial for governance: the knowledge of which and how many people are present on the territory, the collection of relevant economic data, the statistical recording and analysis of data etc. Currently, the control of entry of people and the control of exit of financial means are central to this controlling function of the border. Thus, the border is a vital element in the state's ability to control and also to protect people from what are deemed unwanted influences.

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[169] Cf. Weber, "Politik als Beruf."
[170] Giddens, *The Nation-State and Violence*, 120.
[171] Michel Foucault, "Governmentality," in *The Foucault Effect*, ed. Graham Burchell, Colin Gordon, and Peter Miller (Hemel Hempstead: Harvester Wheatsheaf, 1991), 92.

In a practical sense, borders have the function of allowing the state institutions to build up forces at strategic points in order to exercise control. The police forces would not be able to exercise such effective control without borders. If a person subjectable to state sanctions could move around freely, law enforcement would hardly be effective. Strategically speaking, the borders are the most effective way of controlling. At the same time, borders represent the limits to the authority of the state. In congruence with the enclosed Westphalian model of sovereignty, police and other law enforcement services have to limit their activities to the national territory. Formal integration as envisioned in the Schengen Agreement therefore also threatened governance fundamentally.

3.3.5. The differentiation function

As has been shown in the sections on the economic, identity and governance role of the border, the functioning of the modern state is predicated on being able to draw a line between inside and outside. This mechanism is most clearly at work in the function of borders in defining citizens and aliens. It is on the basis of borders that belonging to a certain state is defined. Thus, the link between citizenship and rights relies on the assumption that the population in a state is congruent with citizens, and that very few citizens live abroad for longer periods of time.

The border is most central in the principle of citizenship of *ius soli* where the right of citizenship is conferred according to the place of birth. It is much less true for the *ius sanguinis* where citizenship is accorded due to descent. However, even here a reference to a space of origin is retained which is circumscribed by borders.[172] Most European states today have a mixed system of both rights for according citizenship, meaning that the territorial principle playes a large role for nationalisation.

The differentiation between citizen and alien has consequences for political, social and civil rights. Nationals and foreigners are constructed as opposed groups where the former live in a complex net of rights and duties in a state, whereas the latter have rights only on the basis of international norms and agreements or specifically granted by national laws.

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[172] See for example the debate in Germany regarding the 'Aussiedler' and their reference to descent from Germans who had originally come from the German territory.

Borders define thus the basis of the polis: modern democracy is ultimately a territorial democracy where the right to vote is predicated on territorial qualifications.[173]

The consequences extend much beyond voting rights, however. The inside/outside division implies the applicability of law. Thus, there are certain duties which only apply to nationals: compulsory military service or replacement measures for example. The other side of the coin are rights – such as the one to a passport – which are usually only given to nationals of a country. Similarly, access to many aspects of the welfare system of the modern state was foreseen only for citizens: 'European welfare states... are premised on the notion of a closed membership in which citizens are entitled to universal health care, extensive child care benefits, liberal unemployment benefits, and state-financed higher education.'[174]

The granting of rights to non-nationals conflicts with the basic set-up of the system. For example, the extension of voting rights to citizens living aborad and to non-citizens on the territory has led to an attenuation of the territorial principle. Koslowski has pointed to the predicament of European states in a world where the proportion of non-citizens with entitlements has risen. 'Effective and legitimate democratic welfare states that are based on closed membership may have been possible in the demographic context of increasing population growth within the established membership, but increasing proportions of resident aliens characteristic of postwar European demography have made sustaining welfare states increasingly expensive.'[175]

Koslowski shows that the distinction between social, political and civil rights as components of citizenship allows to differentiate between treatment of foreigners according to *ius soli* or *ius sanguinis* depending on the issue involved. The liberal principles in the constitutions and institutions of modern states ensure that inclusion of foreigners takes place beyond the limits set by citizenship and state borders.[176] However, Koslowski states that the 'issue of political rights incumbent in formal state membership... ultimately takes

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[173] Even in cases where citizenship is conferred according to the ius sanguinis, e.g. formerly in Germany, the original right to vote is derived from belonging to a certain national territory.

[174] Koslowski, *Migrants and Citizens. Demographic Change in the European State System*, 91., with reference to Gary P. Freeman, "Migration and the Political Economy of the Welfare State," in *From Foreign Workers to Settlers? Transnational Migration and the Emergence of New Minorities*, ed. Martin O. Heisler and Barbara Schmitter Heisler (Beverly Hills: Sage, 1985).

[175] Koslowski, *Migrants and Citizens. Demographic Change in the European State System*, 91.

[176] The according of far-reaching social rights to 'Gastarbeiter' by the German Constitutional Court was a decisive step for inclusion of this group of foreigners in Germany.

precedence."[177] He argues that the liberal rights of the modern institutions date from a time of population growth in which the membership of the state also coincided largely with the people entitled. Today's environment of migration and shrinking populations calls into question the feasibility of this construction.

Thus, the system dividing citizens from aliens with consequences in many areas of governance is still in place in principle. Primarily political rights are granted according to this principle. It is challenged, however, in the context of migration and the granting of rights to non-nationals. Also the project of European integration, giving rights to nationals of other European states and facilitating movement and sojourn outside the home country stands in tension to this principle of differentiating between citizens and foreigners.

3.3.6. The security function

The relationship between borders and security is an illustration of the centrality of borders for governance. Indeed, the state has relied on borders for the provision of external security since its beginning and the provision of domestic security has increasingly become linked to clear state borders. The fact that the border in the modern state system is linear and can be easily identified renders it most useful for fending off enemies or apprehending criminals. In and out can be clearly defined, which is a prerequisite for providing security. The border is also central for enforcing internal security. It is vital for defining citizens who are entitled to state protection and the state's laws can be enforced up to the border. Thus, the border has a central importance for both internal and external security.

Often, the security function of the border is mixed with nationalist assumptions that 'our' rule of law is superior to that of others, the 'own' police more efficient and the national judicial system fairer. It is therefore often taken for granted that taking away the border and border controls would weaken the internal security of the state. Such assumptions have been particularly strong in France and Britain. Conversely, in states where these assumptions have not held (e.g. Belgium or Italy), concern regarding an erosion of the internal border has been weaker.

It should be added that there is no necessary logical link between security provision and the state. The link has been established through historical developments and may therefore be

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[177] Koslowski, *Migrants and Citizens. Demographic Change in the European State System*, 92.

historically contingent. Indeed, '... one has to admit 'the extent to which the meaning of security is tied to historically specific forms of political community.'[178] This connection has also become important in the national and European discourses on border controls and the security arrangements made in the Schengen Agreements.

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[178] Waever et al., *Identity, Migration and the New Security Agenda in Europe.* citing R.B.J. Walker, "Security, Sovereignty and the Challenge of World Politics," *Alternatives* XV, no. 1 (1990).

3.4. Borders and security

Security has been conceptualised in many fundamentally different ways in the history of IR. Any definition of security embraces a particular view of the character of international relations. What is common to most interpretations is that security provision, thus the protection of citizens and state from threats, is seen as a traditional task of the state. Once something has been identified as a security issue, the dealing with this issue takes precedence. Differences arise from debates about what poses a threat, who defines threats and what therefore security consists in.

This thesis foregrounds a conception of security as specific social intersubjective relations. Ole Waever: '... we can identify a specific field of social interaction, with a specific set of actions and codes, known by a set of agents as the security field.'[179] Security is no objective state and its mechanisms and logic are the result of social interactions.[180] This is not unconnected to traditional concepts of security: central elements are 'the specific quality characterizing security problems: urgency; state power claiming the legitimate use of extraordinary means; a threat seen as potentially undercutting sovereignty, thereby preventing the political "we" from dealing with any other questions.'[181]

The definition of threats – the turning of an issue into a security concern – depends on specific actors, but also on existing established social understandings of what constitutes a threat. Certain social actors, such as politicians and parts of the media, have the ability to 'securitise' issues more easily than others. The ability to securitise also depends on the nature of the threat: while securitisation usually involves the identification of an issue as a threat and an explanation why this is a threat and to whom, established actors and established 'threats' have less of a need to provide this explanation. This has to do with the social authority of these actors: established and accepted experts for an issue in the public

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[179] Ole Waever, "Securitization and Desecuritization," in *On Security*, ed. Ronnie D. Lipschutz (New York: Columbia University Press, 1995), 51.

[180] Cf. Alexander Wendt, "Anarchy Is What States Make of It: The Social Construction of Power Politics," *International Organization* 46, no. 2 (1992). It ought to be added that already a number of 'classics' of the social sciences and international relations in particular were concerned with the social constructedness of phenomena. Max Weber's approach may be cited here, and also 'classical realists' such as Carr or Morgenthau. Although this approach is not fundamentally new, the specific use of this perspective to deepen the understanding of the nature of international security relations within the discipline has taken off since the mid-1980s and has produced important literature. Alexander Wendt has marked a new departure with his essay on anarchy in the state system which concentrated on the interaction of states in the production of international norms and rules. The Copenhagen School to which is made allusion here, is part of this development and has presented theories of security and social constructivism of various degrees of radicalism.

[181] Waever, "Securitization and Desecuritization," 51.

arena are credited with an ability to establish whether something is a threat. With respect to the border and security, the professionals of border security, the Ministry of Interior and the media play a special role in defining what issues related to border control can become a threat.

Thus, this approach gives the state and the state elites a central role in the definition of security: 'In naming a certain development a security problem, the "state" can claim a special right, one that will, in the final instance, always be defined by the state and its elites.'[182]

3.4.1. External security

The centrality of the role of the border for security has been emphasised by scholars whose main concern was the purely military role of the border: de la Ferrière speaks of the necessity of establishing a permanent linear border only in the case when two antagonists are in competition for the same space.[183] From that essentially Realist viewpoint, the border is in itself a monument to antagonism. For de la Ferrière, the rationale of the border lies in the security it offers to the enclosed collectivity: 'En définitive la raison d'être d'une frontière réside dans la sécurité offerte à la collectivité qu'elle englobe.'[184] He goes on to emphasise that not only arms, but a combination of the military and political-economic role of the border assure this security.

One might not want to follow de la Ferrière in his argument that all relations between neighbouring states are necessarily antagonistic. With regard to his view to boundaries which have been established by force, one has to concede that he shows forcefully how international society has interpreted borders for a long time as a differentiation and protection from an enemy.

Indeed, the territorial state has traditionally been seen as the basic political unit by Realists because it offered security to society and the individual. John Herz was originally an exponent of the classic position which he describes thus: the 'chief thesis was to the effect that for centuries the characteristics of the basic political unit, the nation-state, had been its "territoriality", that is, its being identified with an area which, surrounded by a "wall of

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[182] Ibid, 54.
[183] Cf. Ferrière, "La frontière dans la théorie et la stratégie militaires."
[184] Ibid.: 248.

defensibility", was relatively impermeable to outside penetration and thus capable of satisfying one fundamental urge of humans – protection."[185] Later, Herz had to conclude that even though the territorial protective shell was waning, the state was still retained. Herz ascribes this to the continuing power of sovereignty, nationalism and independence.

The lasting importance of territoriality and the markers of the end of territorial sovereignty, the borders, may also be interpreted differently: of central importance are perceptions of security provided with the help of the border, rather than the objective ability of the state to provide protection (at least over the short to medium term until the effects of such an inability become visible). The importance of the border in symbolising territorial sovereignty (statehood) and societal cohesion must not be underestimated. In other words, although the border provides less security in practical terms in the nuclear age, the remaining actual security function together with the symbolic value of the border are strong enough to ensure the cohesion of the state.[186]

Borders' military importance has decreased at least in Western Europe where integration has made armed conflict seem unlikely. Nevertheless, the border and territory seem to have acquired a deep-lying attachment of people who continue to associate borders with security even in the face of increased threats such as nuclear arsenal which make borders irrelevant.

3.4.2. Internal security

The central task of the border for internal security is the following: modern governance uses the border as a 'line of defence' against threats of the territory and its population. The visible limit of the state is not only a symbol of state authority, but also allows a representation of state authority. By placing agents there with the task to deter certain pre-defined categories of people, the state aims at fulfilling its security function. That the border is a terrain of special manifestation of the state power monopoly is also demonstrated through the fact that in a liberal state, the border zone is one of the few places where people can be stopped and searched without a direct indication of an offence.

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[185] Herz, "The Territorial State Revisited: Reflections on the Future of the Nation-State," 76f.
[186] States have always tried to give the impression of being able to provide such security. In the nuclear age, arrangements were made for relative stability and security; therefore, the ability to provide security has been transferred from the territorial defence capabilities to the abilities of government to negotiate such an arrangement. Thus, the state remained the centre of provision of security and also identity. Territoriality was no longer directly related to the provision of security, but that image remained.

The border therefore has an important representative and symbolic value also internally. Borders mark the limits of state authority, but also often have an importance for societal security. They mark the end of an area in which a particular set of norms and rules has validity and can be enforced. Internally, they limit an area of rights and duties as well as an area of legitimate exercise of state power to enforce these rights and duties. However, the border line is also where the jurisdiction of the state's law enforcement agencies stops, so that it becomes an incentive for criminals to escape across the border.

Experts of internal security describe the border as the geographic circumscription of state power.[187] The pacification of the state territory within its borders and the defence against dangers for the area and the people who live within it are essential to the existence of the state.[188]

For security professionals, the importance of border controls therefore lies in their ability to deter criminals. According to Rupprecht, the risk of detection grows with the intensity of controls at the border. At the same time, the border becomes a line at which the state aims to stop the influx of elements which are considered threatening to social and cultural cohesion: borders are instruments for limiting immigration and the influx of organised crime and terrorism – and also the escape of the state's own criminals and terrorists.

This link between internal security and the border is not automatic, however. Compensatory measures, which became a major issue in the Schengen negotiations, such as the shifting of controls to the interior of the country are theoretically possible without endangering the concept of internal security. Criminals could be detected also in the country, illegal immigrants expelled and public order in general maintained. In practice, however, this is politically unfeasible because it would entail a significantly higher frequency of control of the population. The right of the state to interfere in the private sphere of citizens without a legal reason has to be limited in order to be acceptable. There is a trade-off between internal freedom from control and effective border control. The advantage of the border to allow relatively thorough controls is due to its linear character in the modern state. The amount of personnel needed to replace controls at the linear border completely with internal controls (without any other compensatory measures) would be enormous.

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[187] Cf. Rupprecht and Hellenthal, *Innere Sicherheit im Europäischen Binnenmarkt*, 131.

[188] 'Die Befriedung des Staatsgebietes innerhalb seiner Grenzen und die Abwehr von Gefahren die auf diese Gebiet und die darauf lebenden Menschen einwirken, sind essentialia der staatlichen Existenz.' Ibid, 132.

The argument becomes skewed, however, if border *controls* are emphasised as the only means for achieving security and governability, not due to their practical use but due to some inherent feature. In that case the existence and consciousness of borders is seen as decisive for statehood. Therefore compensatory measures could not attain the same constitutive objective – unless the whole of the Schengen area is to be seen as one territory to be governed. Strictly speaking, the arguments pointing to the indispensable constitutive nature of borders for national security and governance cannot be reconciled logically with advocating compensatory measures.

It should also be mentioned that internal security is to some degree a function of subjective feelings of security which are influenced by 'myths' and traditions. The media, but also popular culture can be influential in shaping such 'myths'. The frequent depiction of the 'villain' in the literatures of modernizing states as foreign and of the heroes as national helped to spread the (only partially correct) image that threats to internal security come from abroad, and that the authorities protect citizens from them.

In summary, the border is central to security both internally and externally. It serves as a crystallisation point of fears regarding security but also as the point where the state aims to provide a significant fight of the threat.

4. Conclusions on the abolition of border controls

This chapter has shown that borders are intrinsic to the idea of the modern state. The citizen-alien divide is inherently connected to this idea of state and national identity. Borders serve as the signals for this system distinguishing between citizen and aliens. The system of states is predicated on their existence and the ability to control the entry of aliens.

The border thus serves as a societal and individual point of identification and of differentiation. It allows the state to exercise control, obtain knowledge about the population and enforce law. Furthermore, borders have a central role in the idea that and how the state provides security for its citizens. The provision of internal and external security depends on the existence of a border.

Such a centrality of borders has implications within the state. Social and political behaviour which is predicated on the existence of borders reifies the existence and necessity of such borders. Thus, the control situation at the border not only allows the state to fulfil its postulated role with regard to security and prosperity, but also re-instates the necessity of the border for security in the minds of citizens and security forces.

Taking away borders therefore threatens the idea of governance of the modern state. Generally speaking, the increased predictability which borders can provide is lost. The close link between borders and the functioning of states within the state system implies that the whole system of governance would be undermined if borders were no longer to exist.

This leads to the question what it means to take away border controls but not borders? On a practical level, taking away only the control of borders implies less ability of the state to control the movement of goods and persons onto, from and on its territory. For example, the entry of foreigners who eventually would be entitled to social, civil and also political rights would be much more difficult to control. The capturing of data would be rendered more difficult or become impossible. The border is often the most economical point to raise certain information with regard to numbers and intentions of people entering the territory. Its abolition would render more difficult the enforcement of national laws and security standards. Compensatory measures can aim at making up for this increased difficulty to control to some extent.

Military security enforcement at the border has lost most of its importance in Western Europe after the end of the Cold War. As outlined above, already the advent of aircrafts at the beginning of the century and long-distance weapons in the nuclear age diminished the relative importance of ground troops opposing each other at the borders. European integration in the post-War era made military conflicts in Western Europe appear impossible. The disappearance of an overarching bipolarity replaced the opposition of two large political and ideological groupings with attention to inner-state conflicts and state-building in Eastern Europe. The debate of losing border controls therefore raised much less military security concerns at the borders of Western Europe but rather fears for societal cohesion and domestic order.

On an abstract and societal level, losing border controls means a loss of the dividing line at which societal identity crystallizes. The act of control at the border assures nationals of the ability and willingness of the state to enforce rules and ensure societal security. The visibility of such an act and the consequences of non-compliance are a powerful representation of state power. An abolition of border controls means that an institution is lost which visualises and symbolises the ability of the state to act: to ensure security for its citizens and to exercise control.

It has to be remarked, however, that it is impossible to take away borders completely as an act of political will. Borders are deeply embedded in the social structure and reproduced not only through state action but also by the daily actions of citizens, thus cannot be taken away in their totality. Eliminating the border posts leaves untouched the legal or administrative function of the border. In fact, numerous administrative borders have remained within the modern state with a lot of importance for citizens' daily life – Germany and its Länder being a prime example. However, the high symbolic meaning attributed to the state border by the public and the overpowering importance attributed to the border by officials and lawyers, give the state border a special role.

The effects of abolishing border controls but retaining the legal and societal role of the border are difficult to assess theoretically. While this chapter has shown that the state is based on the existence of borders for practical and symbolic reasons, the concrete effects of measures aiming at abolishing border controls have to be studied in individual cases. It will be shown that a growing concentration on the loss of the security function of the border led to a policy of compensatory measures.

The Schengen negotiations between Member States did not aim at a European state which would dissolve the international legal and administrative role of the borders. States were not willing to give up national governance. Instead, the negotiations were initiated to further international trade and cross-border relations as foreseen in the founding treaties of the European communities. However, the unintended result of the Agreements was to also impinge on originally national rights of sovereigny and governance. Thus, there emerged a tension between a movement towards closer European integration and the remaining ability of states to retain efficient governance. While the first would have allowed gradual abolition of borders between member states, the latter demanded that borders retain their various functions for governance.

Neither national elites nor European-level officials had given much thought to the consequences of an abolition of border controls for national governance before 1985. The evolution of the European border policies outlined in the following chapter shows the gradual introduction of national concerns for governance and security: the plans for taking away border controls were made in the interest of an economic and political Europe. The compensations suggested and the solutions found, depended on the various actors' perceptions of the consequences they foresaw for national governance capacity.

Chapter 3

Evolution of the Schengen negotiations

This chapter retraces the evolution of policies on border controls on a European level. A number of issues will be emphasised: firstly, it will be shown that the origins of Schengen lay both in an economic integration logic and in political visions of a integrated Europe. It has to be noted that in the initial agreements leading up to the first Schengen Agreement, such abolition of internal border controls was not considered a difficult issue and the implications had not been thought through.[189] The negotiations for the Schengen Implementing Convention had to work through the problems which had by then been identified. The solutions found aimed at compensating for the perceived loss of the security and ordering function of the border described in the previous chapter.

It will secondly be shown that a discourse on the threat of migration and crime came to dominate the justification for a reinforcement of the external borders while a discourse on European integration argued for the abolishing of internal border controls. In this context, it will be mentioned that a rise of numbers of migrants and crime did in fact take place, but that a concentration on security aspects and deterrence at the borders limited the policy options and focused on the solutions foreseen in the Schengen Agreements. The chapter thus shows how the security dimension gradually dominated the agenda of negotiations – a perspective which had a 'tradition' in earlier European cooperation such as TREVI.

The chapter also points to the fact that the changes of 1989 constituted a significant uncertainty for the negotiations of the SIC in their last phase. Few weeks before the intended signing of the SIC, the fall of the wall had implications also for the European border policies. The outcome of the peaceful revolution in East Germany and Eastern Europe was not clear yet. However, questions of security immediately became of concern. The first Schengen Agreement and the negotiations up to the autumn of 1989 did not have to address Germany's contested and ambiguous Eastern border. Many of the implications of this development for Germany and its European neighbours will be spelt out in detail in chapters four and five, while this chapter shows the implications of 1989 for the Schengen negotiations themselves. It meant a delay of signing as well as lengthy negotiations concerning implementation and safeguards for ensuring the lasting security of the border arrangements.

The chapter begins with an outline of the gradual European cooperation in Justice and Home Affairs as a background to the evolution of Schengen. In a next step, the early

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[189] Cf. criticism for 'having made the third step before the first', Dieter Wenz, "Den dritten Schritt zuerst gemacht. Schwierigkeiten der Ordnungshüter," *Frankfurter Allgemeine Zeitung*, 16 October 1992.

circles of cooperation which had an influence on the Schengen negotiations are examined. The chapter then identifies the origins of the European agreements on border controls in pre-existing political commitments and treaties (Benelux Treaty and the Franco-German Agreement of 1984, European Treaties) as well as in underlying political rationales which referred to (societal) security through control. Following this, the evolution of negotiations and the content of the agreement will be detailed. The chapter will conclude by showing how the 'Schengen rationale' was paralleled in other political processes at the time.

1. Cooperation on Justice and Home Affairs in the European Community

Cooperation in Justice and Home Affairs (JHA) in the EC framework has to be considered an important context for the Schengen negotiations. While in the beginning, there was a rather loosely-defined relationship between the Schengen negotiations and broader negotiations in the EC framework, Schengen gradually became more dominant. In the Schengen framework, reference was made to EC-level conclusions and opinions. Conversely, the laboratory character of Schengen for the wider European Community was often emphasised and care was taken to ensure the compatibility of the arrangements with Community law.[190] As shall be seen below, the rationale for Schengen emerged from similar sources as those for cooperation in the area of 'Justice and Home Affairs'.

Indeed, negotiations with relevance to border policies took place in a number of circles in parallel. The Schengen negotiations between governments aimed at international agreements outside the European treaties while negotiations in the EC/EU context (primarily also conducted in an intergovernmental framework) tried to resolve the matters directly following from the treaties.

Membership in these two arenas differed, with Schengen having only five participants in the beginning against the nine and from 1986 twelve Member States of the European Community. This meant that within the EC framework, agreement had to be reached between all members whereas the negotiations outside the treaties included only those willing and able to cooperate.

These two areas of interaction also tied in with existing or newly founded coordinating groups of specialised politicians or professionals (e.g. the TREVI meetings, or meetings of customs officers MAG). Often, the topics dealt with were similar in these circles so that some institutional competition between the groups can be identified.

The following can only point out the major stepping stones in the development of a Community policy during the relevant years. For in-depth scholarship on the development

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[190] Nevertheless, integration into the Treaties according to the Protocol attached to the Treaty of Amsterdam proved not unproblematic. Especially the process of 'ventilation', the dividing of the Schengen acquis between the pillars remained contentious.

of the field of Justice and Home Affairs, a number of studies can be referred to.[191] Intergovernmental cooperation on JHA matters in the EC may be said to have started in 1967 with the signing of the Naples Convention (which made provisions for cooperation between customs authorities). In December 1975, a European Council in Rome stipulated regular meetings of ministers of the interior and justice. This was realised with TREVI meetings which became a regular meeting circle for experts as well as high-level officials of relevant issues over the years. As a result, a considerable acquis was produced by 1993.[192]

The Single European Act raised the immediacy of the issue of an internal market without borders. One result were regular meetings every six months of Ministers of the Interior from 1986 onwards. Another consequence was the setting up of an *Ad hoc* Group on Immigration in London on 20 October 1986. It was to study the consequences and conditions of free movement and also to coordinate asylum and refugee policies between EU member states.[193]

The Rhodes European Council in 1988 created a Coordination Group on Free Movement which was charged with coordinating work done by various groups on terrorism, customs, policing immigration and asylum as well as legal cooperation. Its members were high-level officials from the EC Ministries of the Interior. The Palma Document which the Group produced in June 1989 was intended as a work programme towards 'an area without internal frontiers', recommending essential and desirable measures for the completion of the internal market.[194]

Cooperation in the EC structures also led to the set-up of a number of groups, such as the CELAD (Comité Européen de Lutte Anti-Drogues as a group of drug coordinators) in 1989, the CIREA (Centre for Information, Research and Exchange on Asylum, staffed by

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[191] Roland Bieber and Jörg Monar, eds., *Justice and Home Affairs in the European Union - the Development of the Third Pillar* (Brussels: European Interuniversity Press, 1995), Tony Bunyan, ed., *Key Texts on Justice and Home Affairs* (London: Statewatch, 1997), Heiner Busch, *Grenzenlose Polizei? Neue Grenzen und polizeiliche Zusammenarbeit in Europa* (Münster: Westfälisches Dampfboot, 1995), den Boer, "Justice and Home Affairs: Cooperation without Integration.", Monica den Boer and William Wallace, "Justice and Home Affairs. Integration through Incrementalism?," in *Policy-Making in the European Union*, ed. Helen Wallace and William Wallace (Oxford: Oxford University Press, 2000), Jörg Monar and R. Morgan, eds., *The Third Pillar of the European Union* (Brussels: 1995).

[192] Cf. a document from the K.4 Committee detailing the acquis. Reproduced in Bunyan, ed., *Key Texts on Justice and Home Affairs*. This acquis contained such varied components as the Naples Convention, Dublin Convention, or the Agreement setting up the Europol Drugs Unit.

[193] This group is not to be confused with the group of the same name set up by the European Commission in 1989 to whom the Dublin Convention owes a lot.

[194] Group of Coordinators, "Report of the Group of Coordinators to the European Council," (Madrid: 1989).

the General Secretariat of the Council) and the CIREFI (Centre for Information, Research and Exchange and Immigration, also staffed by the Council Secretariat and charged with monitoring the immigration policies of the EC states) in 1992. Also the initial ideas for Europol (1995) and its precursor the European Drugs Unit (1991) were negotiated in the TREVI/EC circle.

The Maastricht Treaty represented a major institutional change for cooperation. The creation of a pillar for Justice and Home Affairs, although a heterogeneous construction between issues regarded more or less intergovernmental, meant an institutionalisation of the earlier cooperation structures. A Council of Justice and Home Affairs Ministers was introduced as well as a Coordinating Committee (K.4) together with three steering groups covering immigration and asylum; security, police and customs; and judicial cooperation. TREVI was thus integrated into Title VI of the Treaty on European Union.

The next major change in JHA was the incorporation of Schengen into the treaties with the Treaty of Amsterdam and the communitisation of issues regarding migration, asylum, visas and border controls.

Having outlined the major institutional steps in EC/EU cooperation on Justice and Home Affairs, the following will concentrate specifically on the origins of cooperation on border controls in Europe.

2. Early circles of security experts

Long before concrete treaties on the abolition of border controls were in place, a policy-network between national agencies for internal security developed. They were mainly concerned with the issues of transborder crime and terrorism.[195] These policy networks later became important to the evolution and content of border agreements for a number of reasons: they had already established a community of experts in the field of internal security with similar interests - these links sometimes became more influential than those with other national ministries.[196] The usefulness of such networks was proved to the participants through these early exchanges of information; they then aimed at creating more lasting structures for collaboration.

Most importantly, the discussions and papers presented in these circles led to a common language and definition of the problem. Since experts from fields such as social policy, health or development were hardly involved in these groups, a group-specific interpretation emerged. These experts in the provision of internal security came to a common interpretation of the 'threat' posed and the solutions which ought to be offered.

This discourse became influential in later discussions of border controls and issues related. Even if the persons involved in later negotiations were not identical, the rationale of thinking had already become common and accepted knowledge amongst officials dealing with European-level issues. For this reason, the development of these groups and their output is presented in detail below.

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[195] for a detailed analysis for reasons of police cooperation in Europe, see Bigo, *Polices en Réseaux*, 58-98.
[196] Cf. Ibid.

2.1. From Interpol to European groups

The first attempt to create a network of national criminal police services can be traced back to Interpol which was founded in September 1923 in Vienna. Problematic in terms of democratic control, the organisation derived its legitimacy from its efficiency in providing a centre of contact and information for police officers. After its work had been compromised by the Nazi regime after 1938, the organisation was re-founded in 1946 under French leadership: the seat was to be in France and the Secretary General French. National differences in approach, a lack of financial means and 'rivalry' with other organisations and European circles in the 1970s and 1980s prevented it from becoming an effective European centre for the fight against terrorism and drugs.[197]

Contacts between law enforcement services grew also through exchanges or meetings in informal groups from the 1970s onwards. Bigo speaks of a 'very large number of informal groups' which were created.[198] He mentions that the German and French officials were the most active in these circles, followed by the British while the Southern states were much less represented. These groups were a means of developing not only networks of knowledge, but also of common trust. With more formalisation these groups became influential in outlining the dangers to which states saw themselves exposed, in politicising them, and in proposing useful countermeasures.

The first of such 'clubs' emerged in 1971, the Club of Berne and the Pompidou Group. The former comprised the members of the then European Community and Switzerland, and united high-level officials of national intelligence services. It was the first to install reflection groups on a common threat to Europeans and the methods to encounter it. Rather than criminalizing terrorism (which was the emphasis of Interpol), the Club of Berne saw terrorism as a corollary of the Cold War, and thus politicised the issue and possible solutions. It inspired the systematic policy of visas for non-European countries as well as the notion of the non-desirable foreigner. Both became important in the Schengen framework.[199] The Pompidou Group, founded at the initiative of Georges Pompidou concentrated on the fight against drugs. It united officials from a wide range of Ministries (Health, Social Affairs, Justice, Interior) and therefore could serve less as a centre of exchange and 'synchronisation' of interests of police officers. It became a group of

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[197] for details, see Ibid, 62-74.
[198] Ibid, 83.
[199] Cf. Ibid, 85f.

exchange of information, initiated scientific studies and spread information on the varying national systems of drug policy. Other groups, focussing more on repressive measures against drugs, developed in parallel. They remained secret; the German Bundeskriminalamt played an active and influential role within them.[200]

Other groups of importance were the Quantico Group (created in 1979 on US initiative as a meeting place for civil servants from Germany, France, UK, Australia, US, Canada), the Vienna Club (1979, founded on the initiative of Interior Ministers of Germany, Italy, Austria, Switzerland and France to combat terrorism, but also clandestine immigration from the East) and the Police Working Group on Terrorism (created in 1983 as a forum for West European police and security chiefs).

Cooperation among national customs officers started soon after the Treaties of Rome. Initially, it has to be seen as completely separate from police cooperation. No organisation comparable to that of Interpol existed and there were apparently few meeting groups.[201] One group, which was to play a role also for the Schengen negotiations, was set up in 1967 in the framework of the Naples Convention: the Mutual Assistance Group (MAG). As Bigo mentions, it played an important role in mobilising the customs officers against the suppression of internal borders and in developing a discourse of the rise of transnational crime.[202] Its subgroup MAG 92, founded in 1989, analysed the effects of the abolition of border controls and developed an External Frontier Strategy. It comprised the Directors-General of Customs and worked with the Group of Coordinators and Trevi 1992 (see below).[203] The inclusion of customs officers in the Schengen negotiations also shows how central the question of economic control and the transport of goods were to the project.

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[200] For a detailed research on informal groups on drugs, refer to Ibid, 92ff.
[201] Cf. Ibid.
[202] Ibid, 96.
[203] Cf. Tony Bunyan, ed., *Statewatching the New Europe* (Nottingham: Russel Press, 1993), 178,97.

2.2. TREVI

A group with lasting influence was founded by a meeting of European Ministers of Interior in Rome in December 1975 which stipulated regular meetings of Ministers to exchange information for anti-terrorist purposes: TREVI.[204] Bigo has analysed archival documents and concludes that too large a circle of participants inhibited it from being an efficient group initially.[205] By 1986, however, the existing structure of TREVI acquired momentum and became an important forum of innovations in the area of police cooperation, anti-terrorism and fight of international crime. The journal of the German Ministry of the Interior says in 1987, that TREVI has developed into a central instrument of cooperation in the area of internal security, especially the fight against terrorism.[206]

Meetings took place on three levels: ministerial meetings, conferences of high-level officials and work groups with professionals and experts. This organisation on the top level as well as the professional level facilitated the spreading of a common knowledge and viewpoint on the issues concerned. Bigo mentions that the high-level officials played a key role in this; they saw in this exchange on the European level an emerging common discourse which would support their position in national politics.[207]

The actual work was conducted in several working groups: the first, dealing mainly with measures and information against terrorism and for security, was set up in 1977. The second working group was dedicated to police tactics, organisation and equipment since the beginning. In 1985, cooperation for the preservation of public order (e.g. hooliganism) was included in its tasks. Working Group III was founded in 1985 to combat organised crime: it prepared the way for the European Drugs Unit. WG IV and V on nuclear safety and measures in emergencies never met.[208]

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[204] The origins of the name (and of the project) has engendered a long debate. Initially not intended as an central forum, the origin of the name was not documented and later reconstructions were difficult. Answers vary according to states: Italy likes to refer to the Fontana di Trevi in Rome where the initial meeting took place, Germans refer to a pre-project called 'Terrorisme Radicalisme Extrémisme et Violence Internationale' they introduced there (a name which has stuck), the Dutch refer to the first chairman A. R. Fonteijn; cf. Bigo, *Polices en Réseaux*, den Boer, "Justice and Home Affairs: Cooperation without Integration."

[205] Bigo, *Polices en Réseaux*, 86f.

[206] "EG verstärkt den Kampf gegen Internationalen Terrorismus und Rauschgifthandel," *Innenpolitik*, no. V (1988): 3.

[207] Cf. Bigo, *Polices en Réseaux*, 88. "Les hauts fonctionnaires jouent là un rôle clé, car ils voient dans l'échange d'informations entre leurs unités une ressource propre à l'Europe qui joue en leur faveur dans les jeux politiques nationaux : ils ont donc intérêt à promouvoir l'européanisation."

[208] Cf. den Boer, "Justice and Home Affairs: Cooperation without Integration," 394.

TREVI work became important for the issue of border controls directly from the year 1988 onwards. During that year, the forum 'TREVI 1992' was set up to reflect on the consequences of the abolition of internal border controls intended by the Single European Act for 1992.[209] The main work coming out of this group was the Programme of Action, agreed by TREVI Ministers in June 1990.[210] 'TREVI 1992' group reported to the Group of Coordinators.

The Group of Coordinators was also set up in 1988, at the European Council in Rhodes, in order to keep an overview and coordinate the numerous groups and consultations on terrorism, police, immigration and judicial cooperation. It was composed of high-level civil servants from 12 Interior Ministries and it prepared an important contribution to the debate about border controls, the 'Palma Document', which was adopted in June 1989 at the European Council in Madrid. The Palma Document was the first Europe-level document to present in detail the logic of compensatory measures for the lifting of internal border controls. It also mentioned two facets of the task, one set of actions directed at the inside 'ad intra', the other directed at the outside 'ad extra' – thus referring to a division between EC-internal and external measures which were heavily used in the 1990 Schengen Convention.[211]

Another important contribution of the Group of Coordinators were the 1992 recommendations for the structures of the title on Justice and Home Affairs in the Maastricht Treaty, marking the shift from the *ad hoc* mechanisms created since the foundation of TREVI to a new Directorate General in the General Secretariat, a Council of Ministers of Justice and Home Affairs and the specialised K.4 Committee.

Due to its intergovernmental status, TREVI was not controlled by any of the EC institutions. It has often been criticised for this by the European Parliament and also by civil rights advocates.[212] The group has also been criticised by practitioners for being too far

[209] The forerunner of Trevi 1992 was the Ad hoc group on free movement and the effects of 1992, created 1988 in Athens. In 1989, the group name changed into Trevi 1992. It was disbanded in 1992.

[210] Trevi 1992, "Programme of Action Relating to the Reinforcement of Police Cooperation and of the Endeavors to Combat Terrorism or Other Forms of Organised Crime," ed. Trevi (1990). The Programme represents a 'synthesis of the arrangements (...) between police and security services' in relation to 'terrorism, drug trafficking or any forms of crime including organised illegal immigration'. Cited after Bunyan, ed., *Statewatching the New Europe*, 21.

[211] Group of Coordinators, "Report of the Group of Coordinators to the European Council."

[212] J. Benyon et al., eds., *Police Cooperation in Europe. An Investigation* (Leicester: University of Leicester Press, 1992), L. Van Outrive, "Police Cooperation," (Brussels: European Parliament Committee on

removed from practice and representing a political forum of senior bureaucrats and politicians. At the same time, it has been pointed out that the practical impact of TREVI is difficult to assess due to the secrecy of its negotiations.[213]

As mentioned above, these groups were important for setting the tone for the discussion of the abolition of border controls in Europe. By nature of the tasks and interests of the officials involved, they put an emphasis on the prevention of terrorism, drugs and all other transnational crime. Their general rationale was to encounter these phenomena by the international cooperation they had developed, on both formal and informal level. One important outcome was to define a common way of think and a vocabulary for these threats.

Civil Liberties and Internal Affairs, 1992). quoted after den Boer, "Justice and Home Affairs: Cooperation without Integration."

[213] Cf. den Boer, "Justice and Home Affairs: Cooperation without Integration," 396.

3. Origins of European cooperation on border control policies

Cooperation on border policies was motivated by a number of reasons. The first one was the insight that political and economic deepening of European integration and the abolition of border controls were interdependent. The programme for the completion of the Single Market by 1992[214] identified impediments to the free flow of goods, persons, services and capital: physical, fiscal and technical barriers such as different industrial standards, bureaucracy and national practices. Consequently, all barriers to free movement would have to be taken down in order to attain further integration. Cooperation in the abolition of border controls became thus an indispensable element for deepening of European integration. A different reason for cooperation was that states realised that the lifting of border controls would rid them of important control mechanisms for which compensation could only be found in common solutions: thus, the envisaged abolition of border controls in the interest of the completion of the Single Market touched upon interests of governance which were to be worked through by agreements dealing with the consequences of the loss of border controls.

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[214] Cf. Paolo Cecchini, *The European Challenge 1992: The Benefits of a Single Market* (Aldershot: Wildwood House, 1988), European Commission, "Completing the Internal Market: White Paper from the Commission to the European Council," (Brussels: 1985).

3.1. Political origins

3.1.1. European Single Market and Citizen's Europe

Influential for the policies with regard to abolition of border controls were the dynamics of European integration, namely the requirements for the completion of the Single Market and a Europe close to the citizens. The plans of lifting of border controls served as an impetus and as a background to the negotiations between Schengen states. However, the intention to abolish border controls goes back much further than the 1980s. Indeed, already the Treaty of Rome founding the European Community foresaw the creation of one 'internal market characterised by the abolition of obstacles to the free movement of goods, persons, services and capital'[215] and promised that '[e]very citizen of the Union shall have the right to move and reside freely within the territory of the Member States.'[216] Another article gave the right of free movement to all workers of Member States.[217] Putting these principles into practice proved more difficult than the formulation of objectives. Despite some progress through the customs union (1968/70) and measures taken to reduce the formalities at the border for the transport of goods, the free movement of persons was not realised by the beginning of the 1980s due to remaining hesitations of national governments. Customs and control points had been retained at the borders because they were the most efficient place for exercising controls regarding taxes (VAT), trade, health and statistics.

The delay in abolishing European barriers was met with frustration by some politicians. Especially those who saw European integration as a means to enhance economic prosperity and reach reconciliation and lasting peace in Europe pleaded for further measures. Germany was particularly interested in advancing these developments. Helmut Kohl's vision of a 'Europeanised Germany' sprang from the conviction that only an embedding of Germany into European institutions and processes could prevent a restarting of nationalist inimical processes in Europe. He therefore emphasised in his annual governmental declaration (Regierungserklärung) in 1982 that citizens had to be given an understanding of European politics as politics for peace in freedom by concrete steps such as the abolition of border controls.[218]

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[215] European Communities, "Treaty Establishing the European Community," Art. 3 (ex Art. 3).
[216] Ibid, Art. 18 (ex Art. 8a).
[217] Ibid, Art. 39 (ex Art. 48).
[218] Deutscher Bundestag, "121. Sitzung, Regierungserklärung Dr. Helmut Kohl," (Bonn: 13 October 1982). Translation of part of the inaugural speech: European politics have been and are always

The European Parliament was the institution which kept most firmly in mind the perspective of abolishing border controls. Already Leo Tindemans' report in 1975 outlined a vision for a Citizens' Europe closer to the people. This included 'the gradual disappearance of frontier controls on persons moving between member countries, as a corollary of passport union.'[219] A report of the European Parliament of 1983 mentions a number of questions of Members addressed to the Council and the Commission regarding border controls and remaining tensions between the freedoms envisaged in the Treaty and the reality.[220]

The reasons for the lagging behind of political developments in that area are difficult to pin down on any single cause. One reason was certainly that Member State governments did not feel compelled to take down border controls. With the memory of the war still fresh in people's minds, national governments wished to retain this visible sign of state authority and ability to protect. Eurosclerosis or a general slow-down in European integration made advances in areas close to the heart of national governance unlikely. The border question embodied the ongoing tension between European cooperation and national control.

Thus, it was not until 1985 that developments for the completion of the Internal Market and therefore the abolition of border controls went under way: the reports of the Dooge Committee and of the Adonnino Committee in March and June 1985 on 'A people's Europe' were crucial in giving new impetus to the European agenda. They included proposals regarding European citizenship, common European symbols and also the easing of border controls in the interest of the Single Market.[221] The European Council of March that year decided upon the creation of a Single Market by 1992 and asked the Commission to draw up a programme and timetable. The Commission White Book by Lord Cockfield was published in June and identified barriers to trade (physical, fiscal and technical) and

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primarily politics for peace in a context of freedom. We have to remind our citizens of this through very concrete steps, through the abolition of border controls, through an intensification of cultural relations and through an improvement and reinforcement of youth exchange.

[219] Tindemans, "The Tindemans Report," 383.; interestingly, Tindemans places this issue under the heading of: External signs of our solidarity.

[220] Rudolf Schieler, "Bericht im Namen des Politischen Ausschusses über die Mitteilung der Kommission an den Rat über den Entwurf einer Entschließung des Rates über die Erleichterung der Bedingungen, unter denen die Kontrolle der Bürger der Mitgliedsstaaten an den Binnengrenzen erfolgt und über die Paßunion und die Abschaffung der Personenkontrollen an den Binnengrenzen der EG.," ed. Europäisches Parlament (Brüssel: 1983)., cited after Busch, *Grenzenlose Polizei? Neue Grenzen und polizeiliche Zusammenarbeit in Europa*, 19.

[221] Ad hoc Committee on Institutional Affairs (Dooge Committee), "Report to the European Council," *Bulletin of the European Communities*, no. 3 (1985).; Committee for a People's Europe (Adonnino Committee), "A People's Europe," *Bulletin of the European Communities*, no. 7 (supplement) (1985).

proposed a number of measures to be implemented for the creation of the Single Market.[222] The Cecchini Report of 1988 took up this rationale and identified the cost of 'non-Europe' and the concrete obstacles for the free flow of goods, persons, services and capital within the Community.[223] The 1986 Single European Act was a direct result of the White Paper and the Adonnino Report and gave a deadline for the completion of the Single Market for 31 December 1992. This date therefore also set the horizon for the lifting of border controls and was therefore influential for the work of the Schengen negotiators.

3.1.2. Benelux Agreement and French-German Agreement

Since the European-level avenue to the abolition of border controls seemed blocked during the 1970s, a different starting point for lower barriers was sought. The direct origins of the Schengen project can be seen in the Benelux Accords of April 1960/62[224], the French-German Saarbrücken Accord of July 1984 and the preparations for the Single European Act in Fontainebleau in 1984.[225] The Benelux Convention of 11 April 1960 was the first European agreement on the transfer of border controls to the external borders of the sovereign territory of the states concerned. It foresaw common external borders and the suppression of controls at the internal borders. With only 14 articles, it is also much shorter than both Schengen Agreements. It goes further than the Schengen Agreements in some respects (e.g. providing for a common visa for Benelux independent of length) and less far in others (it contains much less compensatory measures).[226]

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[222] European Commission, "Completing the Internal Market: White Paper from the Commission to the European Council."

[223] Cecchini, *The European Challenge 1992: The Benefits of a Single Market.*; see also Ernst & Whinney (Management Consultants), "The 'Cost of Non-Europe'," ed. Office for Official Publications of the European Communities (Luxembourg: 1988).

[224] Secrétariat Géneral de l'Union Douanière Néerlando-Belgo-Luxembourgeoise, "Convention Benelux concernant le transfert du contrôle des personnes," *Bulletin Benelux*, no. 2 (1960).

[225] Fijnaut adds to the roots of Schengen the French-German Agreement on police cooperation in the Saar region of 1977. He says that "the German Government at the time was of the opinion not only that the scope of this Agreement with France should be enlarged to the whole territory of both countries, but also that similar agreements had to be concluded with other western European countries such as the Benelux countries." C.J.C.F. Fijnaut, "The 'Communitization' of Police Cooperation in Western Europe," in *Free Movement of Persons in Europe*, ed. Henry G. Schermers, et al. (Dordrecht/Boston/London: Martinus Nijhoff Publishers, 1993), 86.

[226] The 1960 Convention provided for the shifting of controls to the external borders of the Benelux, while the 1962 Agreement introduced some compensatory police measures such as hot pursuit. According to Bigo, however, these compensatory measures remained marginal and were only used 4 times in 15 years. Bigo, *Polices en Réseaux*, 80FN.
The German-Austrian Agreement of August 1984 contained similar provisions as the French-German one.

The road to the Schengen Agreements depended on economic necessities as well as organisational interests. Bigo – relying on interviews and documents from the Schengen Secretariat – indicates that the French-German Agreement and the Schengen Accords were kindled by two main facts: the interests of the Benelux Secretariat of finding a new, lasting purpose for its personnel and the strike of customs officers in February 1984: a strike of Italian customs officers blocked all non-Italian lorries at the border; this led to a ten-day blockade by French lorry drivers on French frontiers as a 'revenge' – with repercussions all over Europe, especially in Germany, the Netherlands, Belgium and Luxembourg.

Protests pushed the French government to admit that customs controls on the lorry drivers' papers were no longer fitted to the density of traffic.[227] Thus, the agreement was partly a response to demands from industry and traders. At the German-French summit in Rambouillet on 28/29 May, the French President and German Chancellor agreed to do away with formalities for EC travellers between the two countries with the objective of a total suppression of border controls. Helmut Kohl remarked later on the positive results of that meeting: 'Wenn ich vom Abbau von Barrieren spreche, denke ich natürlich nicht nur an die wirtschaftlichen Barrieren, sondern auch an die tatsächlichen Grenzbarrieren. Glücklicherweise sind wir ja bei unserer letzten deutsch-französischen Konsultation auf diesem Weg ein wesentliches Stück vorangekommen.'[228]

The head of the Bundeskanzleramt, Waldemar Schreckenberger, and the general secretary in the Elysée, Jean-Louis Bianco were charged with negotiations. The Accord of Saarbrücken was concluded soon afterwards on 13 July 1984 by Schreckenberger and Roland Dumas, then France's Minister for European Affairs.[229] Immediate measures included a control procedure without waiting (with a green badge for cars with EC citizens) and spot checks. Further consultations until the fall were to plan measures for cooperation of police and customs of both countries and for harmonizing visa regulations. It was planned that all controls could be lifted by the end of 1986.[230]

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[227] Ibid, 114f.
[228] Deutscher Bundestag, "73. Sitzung am 6. Juni 1984," (Bonn: 1984). Translation: "If I speak of the reduction of barriers, I naturally do not only think of the economic barriers, but also of the actual border barriers. Fortunately, we have advanced decisively in this direction at our last German-French consultations."
[229] Cf. Lothar Warscheid, "Barockes Menuett nach Europäischen Noten," *Saarbrücker Zeitung*, 14/15 July 1984.; Presse- und Informationsamt der Bundesregierung, "Deutsch-französische Vereinbarung über den Abbau von Grenzkontrollen," *Bulletin*, no. 86 (1984): 764.
[230] Cf. "Neues deutsch-französisches Grenzabkommen," *Neue Züricher Zeitung*, 15 July 1984, Presse- und Informationsamt der Bundesregierung, "Deutsch-französische Vereinbarung über den Abbau von Grenzkontrollen."; "Freie Fahrt an der Französischen Grenze," *Süddeutsche Zeitung*, 13 July 1984.

The Secretariat of the Benelux Union saw a chance in this development of creating a region of free movement together with the two – economically important – neighbours. It therefore offered its organisation as an institutional backbone to the enterprise.[231] Bigo mentions (following from interviews) that the Secretariat had its own organisational interests, hoping to find a new goal and to avoid laying off a part of its personnel.[232] Through the incorporation of the Schengen Secretariat, the experience from the Benelux Travel Union with regard to a free travel area was transferred to the Schengen negotiations. This development was decisive for the Schengen negotiations: It transformed the enterprise into a real European project and provided a model for the Schengen accords.

The logic of these agreements – the transfer of controls to the external borders in compensation for abolition of internal border controls (Benelux Convention) and the close cooperation of police and customs on both sides of the border as well as visa harmonisation (French-German Agreement) – found entry in the Schengen Agreements.

Thus, the abolition of border controls and the adaptation of concomitant policies was considered unproblematic. The realisation of full free movement was to happen within weeks. This shows that the effects of abolishing border controls on a number of policy areas had not been through through.

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[231] Bigo, *Polices en Réseaux*, 115.
[232] Ibid, 114.

3.2. Rationales for common policies on border controls

The rationales concerning border policies all pointed to the necessity of common policies. While one set concentrated more on the existing inefficiency of border controls and the positive effects of abolishing controls at internal borders, the other perspective put emphasis on the security aspect, compensatory measures and the necessity to secure the external borders. An emphasis on the former view can be seen in the discourse regarding the completion of the Internal Market and rise of traffic. The latter view was most prominent with regard to illegal immigration. However, arguments often mixed these two perspectives, especially with regard to illegal immigration and to a lesser degree also with regard to organised crime.

3.2.1. The deepening of integration and the internal market

Monica den Boer and William Wallace have identified a number of arguments which were important during the founding phase of a common European policy regarding borders.[233] One was the importance for politicians of European integration as such. Referring to the EEC Treaty and the objective of laying the foundations of 'an ever closer union among the peoples of Europe' (preamble), giving 'the right to move and reside freely within the territory of the Member States' to every citizen (Art 8a), a discourse existed which saw border controls as great barriers to bringing closer together the peoples of Europe. Helmut Kohl's speech when taking up office in 1982 was a witness to this importance attributed to further integration.[234] Also the Adonnino Report or the 1985 Commission White Paper demonstrate that the abolition of border control figured high on the European integration agenda in the 1980s.

A second important issue which was used in advocating the abolition of border controls was the completion of an internal market. Here, the abolition of barriers to the free flow of goods was just as important as the movement of persons. As spelt out above, plans for the Single European Act of 1986 were a great impetus to the development of comprehensive common border policies. As mentioned above, the Adonnino committee had recommended an easing of frontier controls in the name of a people's Europe in 1985. Also the Tindemans report of 1975 and various statements of the European Parliament had gone in the same direction. The Cecchini report for example outlined in 1988 the

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[233] Cf. den Boer and Wallace, "Justice and Home Affairs. Integration through Incrementalism?," 497.
[234] Deutscher Bundestag, "121. Sitzung, Regierungserklärung Dr. Helmut Kohl."

obstacles to free movement of goods, persons, services and capital. The report also calculated that such barriers were a cost factor to the Community of around 5 % of GDP.[235] Also scientists pointed to obstacles to the completion of the Internal Market. A Chatham House Paper of 1988 by Pelkmans, Winters and Wallace presented some of the barriers to trade in the EC and estimated their costs. The scientists also presented their analysis on policy options to eliminate such barriers and the implications for the European Community points.[236] TREVI ministers emphasised that cooperation in the area of internal security was not least due to the impending completion of the internal market.[237]

A further rationale referred to the intensification of cross-border movement in Europe. As Europe's prosperity grew, communication facilities improved, more and more people wanted to travel for business or pleasure purposes. Some politicians were concerned that borders represented barriers for integration by travel and exchange. A question put to the government by the German SPD Parliamentary group in 1984 refers expressly to the problems of barriers for travellers and the desiable intensification of youth exchange and tourism. The government emphasises in its answer that it considers the lifting of barriers for travellers as crucially important.[238]

Growing transborder traffic was an important background to the debate regarding border controls. The statistics for Germany show a significant rise of cross-border traffic and overall border crossings from the second half of the 1980s onwards, while numbers had remained fairly stable before.[239] Interestingly, the year reports of the Bundesgrenzschutz as well as media statements of Ministry officials hardly ever mention increasing trans-border traffic as a problem for security. It has to be assumed, however, that rise of traffic was of particular concern to the countries which were transit or destination countries for the transport of goods and persons. In Germany, for example, the rise in budget and personnel of the BGS in the second half of the 1990s was certainly partly due to this rise of traffic.[240]

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[235] Cecchini, *The European Challenge 1992: The Benefits of a Single Market.*
[236] Jacques Pelkmans and L. Alan Winters, *Europe's Domestic Market* (London: RIIA/Routledge, 1988).
[237] "Für den EG-Bereich ergibt sich die Notwendigkeit einer engen Kooperation nicht zuletzt aus der Tatsache, daß bis 1992 der europäische Binnenmarkt verwirklicht sein soll." "EG verstärkt den Kampf gegen Internationalen Terrorismus und Rauschgifthandel," 2.
[238] Bundesregierung, "Antwort der Bundesregierung auf eine kleine Anfrage der SPD Fraktion," ed. Deutscher Bundestag (Bonn: 1984).
[239] See tables on cross border traffic in the appendix.
[240] Numbers of customs officers are likely to have risen as well. Numbers could not be obtained, however. The appendix provides a table on the rise of budget and personnel of the BGS.

In summary, the discourse referring to the completion of the Internal Market and concomitant phenomena such as rise of traffic emphasised the need of common policies in order to reach a common objective. The Internal Market and the lifting of border controls was seen as advantageous to all members so that solutions had to be found to encounter any adverse effects.

3.2.2. Illegal immigration

Two further rationales mentioned by den Boer and Wallace became central only after the mid-1980s and especially after the end of bipolarity in 1989. They were discussed also before that, but their impact on European-level discussion grew significantly after 1989. One of these is the attraction of a prosperous, democratic and secure Europe to migrants. Numbers of migrants to Western Europe show that there was a marked rise of migrants to OECD countries which concerned Germany in particular.[241] Migration to Western Europe was an important topic of public debate. Growing numbers of asylum seekers[242] and migrants were interpreted as a threat. As will be shown below in the chapter on the German debate (chapter five), the main fear was a threat to social cohesion by migrants. Additionally, also the financial aspect is likely to have been of concern. Deterring immigrants with the help of stepped-up border controls as well as providing for asylum seekers during the application process is costly.
Thus, governments feared migration's concomitant financial burden as well as a stress on social cohesion.

The end of the Cold War and the lifting of the Iron Curtain brought with it freedom of movement for citizens of Central and Eastern Europe, but also increased fears of uncontrolled immigration to Western Europe. The border of Western Europe with the countries in the East received attention under a new light. It became now the line immigrants had to cross in order to get to the affluent and established Western societies. The 1991 Berlin conference about illegal immigration – bringing together Western European and Central and Eastern European states – emphasised the importance of this topic. It was the first international attempt to include the CEE states into a solution to safeguard Western Europe from uncontrolled migration.

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[241] see table and figure in the appendix.
[242] see tables in the appendix.

Also the media all over Europe began to dedicate increased attention to the topic of immigration and illegality. Large numbers of articles in newspapers and magazines are a witness to this.[243]

In summary, the threat of illegal immigration was seen to concern all Western European states (albeit to varying degrees) and common solutions and policies were sought in a number of EC and extra-EC groups and initiatives. Germany's debate regarding these issues will be spelt out below in chapter five.

3.2.3. Cross-border crime

Another important argument for common border policies in Western Europe was the 'development of illegal cross-border activities alongside legal economic integration.'[244] Organised crime in general was often used to justify a new policy regarding borders, from the mid-1980s onwards, but especially after the changes of 1989. Ease of communication, use of refined technology, elevated levels of cross-border traffic were all factors seen to support (organised) crime. The spread of the Italian Mafia was perceived as a concrete danger. After 1989, a new threat in the shape of Russian organised crime became a concern for politicians.[245] The end of the Cold War was thus seen as a watershed which entailed new threats and groups of criminals.

Cooperation among police services was advocated as the best solution by security professionals and politicians. A statement from a French official is indicative: 'After the end of the Cold War, a new type of threat is emerging, particularly the organised crime which is developing in Central and Eastern Europe. Given the means of communication today, there is a need to find common answers to these problems together with a number of countries.'[246] For security politicians, the necessity for cooperation extended not only to organised crime, but also to the above-mentioned threat of illegal immigration:

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[243] for a useful account see Ulrich Herbert, *Geschichte der Ausländerpolitik in Deutschland* (München: Beck, 2001).

[244] den Boer and Wallace, "Justice and Home Affairs. Integration through Incrementalism?."

[245] Cf. for example German publications on the threat to Europe and Germany by organised crime: Bundeskriminalamt, ed., *Organisierte Kriminalität in einem Europa durchlässiger Grenzen* (Wiesbaden: Bundeskriminalamt, 1991), Zwischenbericht der gemeinsamen Arbeitsgruppe Justiz/Polizei Bundeskriminalamt, "Strafverfolgung bei Organisierter Kriminalität," (Wiesbaden: 1990), Dagobert Lindlau, *Der Mob. Recherchen zum Organisierten Verbrechen* (Hamburg: Hoffmann und Campe, 1987), Werner Raith, *Mafia - Ziel Deutschland* (Köln: Kösler, 1989), E. Rebscher and W. Vahlenkamp, *Organisierte Kriminalität in der Bundesrepublik Deutschland* (Wiesbaden: 1988).

[246] Bigo and Hagedorn, "National Report: France."

'International operierende Kriminalität und illegale Einwanderung fordern eine Verstärkung der internationalen Zusammenarbeit.'[247]

One prime concern in the area of organised crime was drug trafficking across borders. It was argued that criminals were taking advantage of different legal systems on two sides of a border and that therefore common policies had to be enacted within the European area.[248] This discourse of the advantages of a common European area without border controls for security against organised crime and drugs trafficking is best summed up by Wolfgang Schäuble in a speech in the Hague in November 1989:

> Die Erfahrung zeigt, daß Grenzkontrollen gegenüber der gegenwärtigen Bedrohung durch organisierte Kriminalität und Terrorismus nur eingeschränkt wirksam sind. Trotz der Grenzkontrollen ist Europa für international operierende, organisierte Straftäter bereits heute zu einer kriminalgeographischen Einheit zusammengewachsen. Das ist besonders offenkundig bei der Rauschgiftkriminalität. Für die internationalen Rauschgiftkartelle ist Europa längst ein einheitlicher Absatzmarkt geworden.[249]

The deepening of the internal market and the threat of illegal immigration and organised crime were therefore all arguments which were used to demonstrate the necessity of common border policies and closer cooperation. By pointing to the threat represented by certain phenomena and inefficiencies of controls at the internal borders, the debate emphasised the advantages of common action and policies.

3.2.4. Security-led discourse and compensatory measures

This discourse on the necessity of common border controls produced a rationale which set its emphasis on the security aspect of borders and compensatory measures.

It emphasised that the opening of borders necessitated new forms of cooperation between European law enforcement services. This was due to the loss of the crucial function of the border in the fight against crime. An article in the journal *Innenpolitik* is indicative: it

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[247] "Beratung des Schengener Abkommens im Deutschen Bundestag," *Innere Sicherheit*, no. 2 (1992): 1. Translation: Internationally operating crime and illegal immigration necessitate new international cooperation.

[248] Cf. for example Edmund Stoiber, "Bekämpfung der Organisierten Kriminalität," *Politische Studien* 43, no. 326 (1992).

[249] Wolfgang Schäuble, "Europa ohne Grenzen - eine sichere Gemeinschaft," *Innere Sicherheit*, no. 5 (1989): 11. Translation: Experience shows that border controls have only limited effects with regard to the present threat by organised crime and terrorism. Despite border controls, Europe has grown into a criminal-geographic unit for internationally operating, organised criminals. This is especially obvious in the area of drugs crime. For the international drugs cartels, Europe has long become a unitary market.

recognises border controls as crucial elements in the fight against drug trafficking, the so-called 'Ameisenverkehr' (ant traffic) of consumers. It also mentions the importance of border controls for search for terrorists and for the prevention of illegal entry.[250] Similarly, an officer of the BGS writes:

> Die Grenzen als äußerer Schutzring unserer Staaten sind von alters her ein strategisches Bekämpfungsmittel von hoher Effizienz gegen illegale Migration und damit zusammenhängende grenzüberschreitende Kriminalität. Die Filterwirkung der Grenze spielt daher im nationalen und internationalen Sicherheitsverbund eine wichtige Rolle.[251]

The consequence of this was clear: the removal of internal border controls would not mean the abolition of all controls. New forms of controls, police cooperation and immigration policies were to replace this.

This link between border controls and security was made already by the first Schengen Agreement. All documents dealing with freedom of movement or the removal of border controls after 1985 mentioned compensatory measures. The initial actors in the Schengen process even stated that the opening of borders would bring with it a rise of all forms of crime and fraud.[252]

It is interesting to observe that despite the fact that initial views of the negotiators on the level of the working groups (officials and experts from the ministries) converged on the common belief that border controls were necessary for the fight of crime and that their abolition would necessitate new policies, it took five years from 1985 to 1990 to come to an agreement on the shape of these compensatory measures. And it took another five years, until 1995, for the actual implementation of the agreements. This might be explained by the fact mentioned above that hesitations regarding sovereignty remained, especially due to the fact that these agreements 'Europeanised' issues which were at the heart of the self-understanding of the modern state: crime and immigration control.

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[250] "Öffnung der Grenzen erfordert neue Formen der Kriminalitätsbekämpfung," *Innenpolitik*, no. IX (1987): 6.

[251] Ludwig Rippert, "Sicherung der Außengrenzen der Bundesrepublik Deutschland," in *Schengen's Final Days? The Incorporation of Schengen into the New TEU, External Borders and Information Systems*, ed. Monica Den Boer (Maastricht: European Institute of Public Administration, 1998), 94. Translation : The borders as the outer protection ring of our states are of old a strategic means of high efficiency to fight against illegal immigration and connected trans-border crime. The filter function of the border therefore plays an important role in the national and international security cooperation.

[252] Bigo, *Polices en Réseaux*.

Bigo has characterised the Schengen negotiations as a trading place between governments which linked issues which were initially separate, such as drugs, immigration, asylum and borders. This was possible, according to him, by making the negotiations an exchange of menaces and fears.[253] By viewing all these issues primarily[254] under the angle of security and by intimately linking them to border controls, the Schengen negotiators were actually constantly conjuring up an image of insecurity and of what would happen if the proposed counter-measures were not enacted. The fears connected to the individual issues of organised crime or drug dealing were thus transferred to the whole issue of border controls as such. This process worked especially well because the actors were experts for the provision of security and therefore also the legitimate and accepted actors for the definition of threats to society and the state.

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[253] Cf. Ibid, 122.

[254] These issues could also be viewed from the perspective of health, of freedom, of choice and creativity. These elements were, however, never brought into the picture and into the negotiations. The point here is that the issues concerned certainly had a security aspect to them. This is due to the fact that borders are at the heart of the self-understanding of state elites of the divide between domestic order and international anarchy.

4. Structure of the Schengen negotiations

The circle of countries involved in the Schengen negotiations consisted initially of five countries and widened only gradually: the initial members France, Belgium, the Netherlands, Luxembourg and Germany were joined by Italy in November 1990, Portugal and Spain in June 1991, by Greece in November 1992, Austria in April 1995 and Sweden, Finland and Denmark in December 1996 (at the same time Norway and Iceland received observer status).[255] This means that the negotiations of Schengen I and Schengen II were to a large measure shaped by the original member states. The shape of the *acquis* was by no means determined by 1990, but the fundamental decisions had already been taken. Within the five founding countries, France and Germany were dominating, especially with regard to security interests. As Bigo remarks, most countries seem to have had differing policies over time, depending on the domestic political arena.[256] The exception seems to have been Germany which has presented the most homogeneous long-term strategy.[257]

The negotiations took place on a number of levels: on the level of State Secretaries and Ministers; on the level of senior officials in the Central Negotiation Group and on the level of specialist officials in the Working Groups. The system underwent changes over the time of negotiations, adapting to new tasks and areas, but the basic structure remained the same. The following formal sequence can be identified for the negotiations: if the Executive Committee decided on tackling a certain area, the actual negotiations were transferred to the working groups. These reported to the Central Group which was responsible for tying together the negotiations, for general decisions and contentious questions. If a political decision became necessary, they referred decisions to the regular meetings of Ministers.

The following outlines the various groups and institutions of the Schengen system, indicating the tasks and responsibilities of the various groups.[258]

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[255] Dates given are the dates of signature

[256] Bigo, *Polices en Réseaux*, 120FN. He mentions that in France, Charles Pasqua and Robert Pandraud were central in formulating a discourse on the security deficit and the necessity of an intergovernmental agreement between 1986 and 1988; that the team of Joxe was leaning much more towards communitarisation; that later ministers placed less importance on the issue and that by the return to office of Pasqua, the implementation was still pending.

[257] Cf. Ibid, 121.

[258] Cf. the figure in the appendix giving an overview over the negotiation structures.

4.1. Executive Committee

The highest level meetings in the Schengen framework were those of the Ministers and State Secretaries, afterwards renamed the Executive Committee. They met around twice a year to review the reports and proposals from the Central Group and Working Groups and to take the fundamental decisions for the development of Schengen.

On the basis of the Schengen Convention, the group was effectively transformed into the Executive Committee in October 1993. The legal basis of the Executive Committee (COMEX) lay in the Schengen Convention (Title VII) which charged it with supervising the application of the Convention.[259] The Executive Committee's members were Ministers and State Secretaries of the Member States. Each signatory state had one seat in the Committee. Additionally, observers from the European Commission and applying states (e.g. Austria) as well as representatives with official observer status (Iceland, Norway) were present. It met about five times a year.[260]

Schengen is directed by a presidency rotating every six month. The presiding state holds the presidency in meetings both of the Executive Committee as well as in those of the Central Group. The rank and the ministry of origin of the national representatives differed according to arrangements within states. The protocols of meetings show that the majority of representatives originated from the Ministries of Foreign or European Affairs (Luxembourg, Netherlands, France, Italy, Greece, Spain, Portugal, Greece).[261] Some complemented these representatives with those from other Ministries: the Netherlands, for example, also sent a representative from the Ministry of Justice (89 – 93), Portugal sent additionally delegates from the Ministry of the Interior from 1994 onwards. Belgium changed the Ministries over time: it sent initially a State Secretary for European Affairs (until 1991), then a Minister for Foreign Trade and European Affairs. Germany was first represented by the Chancellery, and from 1996 onwards by the Ministry of the Interior. Austria only sent representatives from the Ministry of the Interior. As a consequence, there was a difference of emphasis from European or integration policy to matters of legal

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[259] The following describes the working structure of COMEX. It can be assumed, however, that the earlier Ministerial meetings followed a similar pattern since COMEX only formalized the existing structures.

[260] Cf. Wouter van de Rijt, "Le fonctionnement des institutions Schengen. "Pragmatisme, Toujours"," in *Schengen's Final Days?*, ed. Monica den Boer (Maastricht: European Institute of Public Administration, 1998).

[261] This information has been inferred from the protocols and relies on the accurate indication of Ministries of origin therein.

cooperation to those of economic interests. Also van de Rijt draws attention to the basic difference between members from Ministries of Foreign Affairs and those from the Ministry of the Interior. He observers that the latter have – as a consequence of their function – more of a police 'fibre' than the diplomats.[262]

The national representatives were mainly State Secretaries from the various Ministries. Some countries, however, sent Ministers as representatives at the negotiations. For example: Minister Urbain, Minister for Foreign Trade and European Affairs (93-95) and Minister Vande Lanotte (1995 onwards) for Belgium, or Ministers Cresson, Guigou, Lamassoure and Barnier for France (1989 – 1995).

The formal end of the Executive Committee came with the entry into force of the Amsterdam Treaty in May 1999. Schengen was then brought under the structures of Justice and Home Affairs.[263] This meant also that the tasks of the Executive Committee were transferred to the JHA Council.

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[262] Cf. van de Rijt, "Le fonctionnement des institutions Schengen. "Pragmatisme, Toujours"."
[263] For a good analysis of the changes to Schengen by the Amsterdam Treaty, see Tony Bunyan, "Post-Amsterdam JHA Working Structure & JHA Conventions," *Statewatch European Monitor* 1, no. 2 (1999).

4.2. Central Negotiation Group

The Central Group served as a coordinating body for the negotiations. It prepared the meetings of the Executive Committee and directed the work of the various working groups and sub-groups.

Most national representatives in the Central Group and heads of the national delegations were top-level bureaucrats. According to Bigo, the participants in the Central Group were primarily professional diplomats whose main concern was to ensure that the results of the negotiations fit the general national European policies and the relationship of Schengen Members with their neighbours in the South.

Meetings took place in about a monthly rhythm.[264] This was necessary in order to review the work of the specialist groups and to structure preparations for the next meeting of Ministers and State Secretaries. In rare cases, competences were delegated from the COMEX to the Central Group, for example in the area of visas with regard to the Common Consulate Instruction.[265]

The national delegations in the Central Group consisted of around 5-10 members. This number was augmented to 10 – 14 members when a country held the presidency. The members of the Central Group national teams were sometimes, but not necessarily, also members of the specialist Working Groups.

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[264] Cf. van de Rijt, "Le fonctionnement des institutions Schengen. "Pragmatisme, Toujours"."
[265] Cf. Ibid.

4.3. Working Groups

Most of the detailed work of the Schengen negotiations took place in the working groups. Their work concentrated on the varied specialised aspects of free movement and compensatory measures. They were formed according to the necessities of the negotiation process; therefore their number and function of changed over time according to exigencies.

The groups met frequently in order to cope with the task of forming agreements out of the diverging national regulations and interests. Bigo states that the meetings of the Working Groups took place regularly and frequently between 1985 and 1990: around 50 times a year, thus one meeting per week.[266]

Four main working groups[267] existed during the early negotiations of the SIC: police and security (WG I), movement of people (WG II), transport (WG III), and customs/movement of goods (WG IV). Additionally, an ad hoc group on SIS emerged in the early nineties.[268] Group I, II and IV had a number of subgroups which prepared work on particular aspects of the topic for meetings of the group. These were: drugs, weapons and ammunition, information and security: immigration, police and surveillance of borders, ad hoc group of lawyers and translators (group I); law of foreigners, visa, asylum, border controls (group II), health, phytosanitary problems, dangerous substances and COCOM (group IV).

 The sub-groups were staffed with security and law enforcement specialists, originating from the relevant services and ministries. Different from early groups of cooperation in home affairs was that border police services were involved. Apparently the services themselves pronounced an interest and could not be kept out given their central role with regard to land and sea borders.[269]

It is difficult to obtain clarity on the actual shape of the working groups. One problem is the secretive nature of the negotiations which made obtaining information difficult. Bigo points out that the organisational structure he arrived at through interviews with participants does not correspond to that given by the 'commission de contrôle' of the

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[266] Bigo, *Polices en Réseaux*, p. 123.
[267] For a full figure of the negotiation structure, please refer to the appendix.
[268] Cf. the protocols available and for example den Boer, "Justice and Home Affairs: Cooperation without Integration."
[269] Bigo, *Polices en Réseaux*, 125FN.

French Senate.[270] He poses the question whether officials gave the correct information to the Parliamentary Committee on Border Control or whether the structures were so obscure as to make it impossible even for participants to keep an overview. Paralleling this discrepancy, the documents available for research in the framework of this thesis[271] did not mention the subgroups on information and security as well as the one on police and border surveillance, but included one on telecoms.

Another difficulty is the fact that the structure of the working groups changed over time, so that it is problematic to pinpoint any definite shape at a given point in time. Especially after 1990, a number of changes seem to have been made to the negotiating groups. This coincided with the progress of the negotiations so that new necessities arose.

For example the subgroups to Group I changed in the following way: the groups on weapons and ammunition as well as the one on telecoms were retained, but a new group emerged which united legal experts. The subgroup on drugs was turned into a working group of its own by a decision of the Ministers and State Secretaries in June 1992.[272] A sub-group on borders was installed around 1994. Also the subgroups of WG II underwent a change. By 1992, the ones on asylum and visa had been retained, but one on readmission and one called Vision (Visa Inquiry Open-border Network) had been added. The changes in the working groups indicate the areas which still were under debate by the early 1990s and received special attention (these areas were weapons and ammunition, drugs, asylum and visa as well as readmissions). Working group III seems to have been transformed from 'transport' to one of 'judicial cooperation' around 1993, and working group IV 'changed from customs/movement of goods' to one on 'external relations' in 1994.

Apart from the Working Groups, the documents available also refer to a committee called 'Regulation of border problems' which united experts from working group I and II and reported to the Central Negotiation Group. This committee created the ad-hoc technical working group 'Common Handbook' and 'visa experts'.[273] The committee became influential for the Schengen acquis in developing the Common Handbook for border controls as well as other regulations with regard to implementation in the area of Schengen

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[270] The report does not mention the groups Information & Security and Drugs, but adds the one on Telecoms.
[271] See list of documents in the bibliography. The information on working groups was pieced together from the entirety of the documents available. An incomplete organizational chart can be found in: SCH/Com-ex (94) 21.
[272] SCH/M (92) PV 1
[273] SCH/Front (91) 5; SCH/M (91) 3

visas. The classmarks of protocols suggest that this committee was the precurser for the subgroup 'border' of Working Group I. Additionally, documents are available of a committee on border controls which reported to the Central Group (starting in 1993). This group was different from the subgroup 'borders' of working group one. Its task were visits to the borders of Member States to check on practices of border controls

To sum up, while it is difficult to determine the exact number of groups and committees from the available documents, it is clear that working groups and their subgroups dealt with the technical questions of the abolition of border controls and compensatory measures. They changed over time according to perceived necessities during the negotiations.

4.4. The General Secretariat

The General Secretariat has for a long time been an unofficial coordinating institution for the Schengen process, mentioned in neither of the Schengen Conventions. It emerged from the Benelux Secretariat and was only mentioned in the Treaty of Amsterdam, one of whose protocols integrated the Schengen Secretariat into the Council Secretariat. The importance of the experience incorporated through the Benelux Secretariat must not be underestimated. The Secretariat has been and is a central administrative, linguistic and logistical service to the Schengen partners. Since it had no legal personality of its own, it acted by delegation of powers of the Schengen Ministers.[274]

The Secretariat certainly had an important coordinating role, not least due to the fact that its employees provided knowledge and continuity due to their long-term presence (e.g. J. Verraes or W. van de Rijt). Coordination was also provided through liaison officers in the General Secretariat which were long-serving national officials. For example, the Dutch R.J. Smit, the German K.P. Nanz, the French A. Bianchi were present first in their national delegations before transferring to the General Secretariat in 1991/92.

The outcome of the Schengen negotiations structure was influenced in varying degrees by different groups of actors: on the one hand, Bigo emphasises that the pyramid image of the organisation is deceptive if it suggests that the top level could veto the decisions of the Working Groups. Instead, he writes, that each subgroup managed to have its bureaucratic interests passed in the Convention.[275] The working group members being experts of security provision and of the 'technical' questions connected to such work, the senior national bureaucrats and diplomats in the negotiations in the Central Group and the Executive Committee were willing to accept the threat analyses of the experts and the solutions offered. It has to be emphasised that this analysis of loss of security and subsequent threat of international crime and immigration only imposed itself so powerfully in the negotiations because its main elements had been established already by the beginning of the 1980s in the groups of security experts in Europe outlined above.

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[274] Cf. van de Rijt, "Le fonctionnement des institutions Schengen. "Pragmatisme, Toujours"."
[275] 'chaque sous-groupe a réussi à faire passer ses intérêts bureaucratiques dans la convention'. Bigo, *Polices en Réseaux*, 126.

On the other hand, the decision making process was taken out of the hands of the practitioners as it went up the hierarchy.[276] The role of the negotiators in the Central Group and Executive Committee was different from the one of national representatives in the working groups. According to Bigo, the members of the Central Group – mostly high-level diplomats and civil servants - introduced most hesitations regarding sovereignty and expected guarantees.[277] Given the fact that politicians had initially thought that negotiations would only take a few months, the length of the negotiations alone shows that security professionals were able to impose their concerns.

Summing up the organisation of negotiations of Schengen, it can be said that the Ministries of Foreign or European Affairs were central (the exception was Germany where the Chancellery was involved) for the most fundamental decisions. The Central Group was composed of high-level officials from a number of national ministries, amongst them Ministries of Interior, Ministries of Foreign Affairs and of Justice. In the Working Groups, professionals and specialised civil servants from the relevant ministries were present. The hierarchical decision-making process ensured that decisions with fundamental political implications were taken at the top while expert input in terms of knowledge of practitioners was fed in through the working groups.

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[276] Cf. Ibid.
[277] Ibid.

5. Evolution and Content Analysis of Agreements

The Schengen *acquis* consists of two Treaties, which are different in legal quality, content, length, and – it may be argued – also in objectives. While the first Schengen Agreement was conceived as an administrative agreement which required no parliamentary ratification,[278] the second Implementing Convention had to be ratified in all member states. While Schengen I concentrated on provisions for the abolition of border controls, Schengen II elaborated in detail compensatory measures with respect to the security of the new Schengen area.

5.1. Phases of Negotiation

The duration of negotiations for the Schengen Agreements can be assessed in different ways. Talks for the actual two Agreements lasted from late 1984 until June 1990. However, intensive discussions in the various committees continued in order to make implementation acceptable to all Member States by mid-1995. After 1995, negotiations continued in order adapt the treaties to changing political and security circumstances, refining provisions for the application of the Agreements.[279] This thesis concentrates on the evolution of the actual Schengen Agreements with regard to the role of borders for the state. By 1995, the fundamental decisions in this respect had already been taken. The following will therefore concentrate on the period between 1984 and 1995.

Negotiations for Schengen I were completed comparatively quickly (ca. December 1984 to June 1985) and conducted mainly by the Ministers of Transport and Foreign Affairs. According to Bigo, the discussions concentrated on questions of practicalities of free circulation of goods and persons so that an accord could be reached without much difficulty.[280] Based on the model of the 1958/60 Benelux Treaty, the agreement emphasised the creation of a space of free movement.

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[278] The Agreement has also been called a 'gentlemen's agreement', cf. J.A.M.E. Verraes, "Schengen, an Agreement to Cooperate" (paper presented at the Institute for the Study of Public Order, Leicester University, 1993).

[279] One of the most notable changes after 1995 for the Schengen framework was the integration into the European Treaties, a decision which necessitated intensive negotiations and discussions between Schengen partners and with EU institutions.

[280] Bigo, *Polices en Réseaux*.

Negotiations for Schengen II were much more protracted and under the augurs of reinforcement of security and controls. The discussions can be roughly divided into a number of stages: in the first phase, the Schengen partners were focussed on defining the issues at stake. The legal areas and shape of compensatory measures had to be determined. Observers of the negotiations emphasise that the first necessity of the negotiations was to get to know each other and national differences in existing regulations such as visas. They also mention that given the relatively small circle of participating countries, personalities and personal relations played an important role in the early negotiations. The first phase was also the period in which the negotiators aimed to become familiar with particular national concerns and interests. The relevant officials from the Benelux states were familiar with their partners and their legal provisions so that the approximation had to take place between France, the Benelux and Germany.

The second phase (1986 – 1989) of the negotiations concentrated on the actual compensatory measures, particularly standards of border controls, in the working groups. Furthermore, decisions were made on the shape of the Agreement, on contents and division into chapters. According to Didier Bigo, the mid-1980s were a crucial time in the development of the SIC but were kept very secretive: 'Les années 1985-1988 sont celles de la maturation du projet mais ce sont aussi les années où les négociateurs de Schengen sont tellement discrets sur leurs activités que certains membres de leurs propres ministères ne sont pas tenus au courant des discussions.'[281]

It was initially planned to conclude preparatory work for one or several international treaties in 1988 so that ratification by 1990 could be ensured. The German head of the Chancellery was positive that texts for signature would be ready by the end of 1988.[282]

In a meeting on 3 June 1987, a meeting of State Secretaries and Ministers decided that an additional international treaty would be concluded on the transfer of border controls to the external borders and on the creation of compensatory measures.[283] At the end of 1987, treaty texts already existed for the areas of fight against crime and common minimal

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[281] Ibid, 121. Translation : The years 1985 – 1988 are those of the maturation of the project, but they are also the years when the negotiators of Schengen are so secret about their activities that certain members of their own ministries are not kept informed about the course of discussions.

[282] Prof. Dr. Waldemar Schreckenberger, "An den Vorsitzenden des Innenausschusses - Unterrichtung des Innenausschusses von der Umsetzung des Schengener Abkommens," ed. Bundeskanzleramt (1988). Statement of the head of the Bundeskanzleramt in a letter to the Committee on Internal Affairs of the Bundestag.

[283] Innenausschuß des Deutschen Bundestages, "Kurzprotokoll, 23. Sitzung des Innenausschusses," ed. Deutscher Bundestag (Bonn: 1988).

prosecution standards for drugs, weapons law, border controls and border checks, visa policy, formalities in asylum law – although some details remained to be settled.[284]

With regard to border controls, principles regarding systematic and intensive controls and checks at the borders were decided upon in December 1987. State Secretary Neusel stated that the sub-group on border controls had basically finished its formulation of elements for the treaty. He also mentioned that proposals regarding carriers' liability and measures against people smugglers were already decided upon.[285]

A meeting of State Secretaries and Ministers on 14 June 1988 in Remich, prepared by a Central Group meeting in May considered an early draft of an Agreement on Free Movement. This comprised sections on border controls, drugs, weapons and ammunition and exchange of information.[286] Important reserves remained regarding the nature of the external border controls. The Minister and State Secretaries emphasised that the abolition of border controls had to go hand in hand with the highest level of security in the countries concerned, ensured especially by reinforced controls at the external borders. Problematic were especially the controls of nationals of EC Member States who were not part of Schengen.

One of the crucial issues was to ensure the compatibility of Schengen with EC law. With regard to external border controls, the heads of the Central Group worked to ensure together with representatives of the Commission that citizens of EC states who were not Schengen members would not be treated as third-country nationals.

Despite the fact that an international treaty had been decided upon in principle, by no means all issues were already settled by 1988. Remaining hesitations existed with regard to a number of issues: the Netherlands differed from the other members in view of minimal standards for prosecution with regard to drugs offences. Details regarding the control of small arms needed to be fixed. A number of details with regard to legal aid needed settling. The other remaining topics were hot pursuit, transborder observation, exchange of liaison officers, measures to prevent dangers emanating from another member state and details regarding content and data protection in the SIS.[287]

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[284] Schreckenberger, "An den Vorsitzenden des Innenausschusses - Unterrichtung des Innenausschusses von der Umsetzung des Schengener Abkommens."
[285] Innenausschuß des Deutschen Bundestages, "Kurzprotokoll, 23. Sitzung des Innenausschusses."
[286] Cf. SCH/M (88) PV 1.
[287] Innenausschuß des Deutschen Bundestages, "Kurzprotokoll, 23. Sitzung des Innenausschusses."

By June 1989, most of the remaining problems had been resolved and the signing was set for 15 December 1989. Indeed, compromises had been reached in the areas of checks of persons at the border, visas, asylum, external border controls, drugs and weapons law. Ministerialdirigent Dr. Glatzel of the Chancellery mentions, however, that a compromise on questions of tax harmonisation and the protection of financial secrets could not be reached and the question remained open.[288]

A third phase in the negotiations can be identified with the rupture of the changes in Eastern Europe. A few weeks before the planned completion of negotiations, the context of the negotiations was transformed. The fall of the wall meant that Schengen negotiators had to take into account the new political and security situation in the East. The most important elements during this time of the Schengen negotiations were provisions to ensure the security of the Eastern Schengen frontier and the development of the Schengen Information System.

In September 1989, Hungary opened its frontiers for refugees from the GDR. A process of peaceful protests and revolutions in Central European states took place, the most emblematic event of which was the breech of the Berlin Wall in the night of 9 November. The changes of autumn 1989 led the German government to call off the signing of the SIC on 14 December, one day before the planned signing. The government of West Germany insisted that citizens of the GDR enjoy free movement also with a passport of the GDR. The other Schengen partners were hesitant, especially France. The lack of clarity regarding the legal status of GDR citizens was planned to be resolved through an addition to the existing SIC.[289] Negotiations stopped until the end of April 1990, by which time it had become likely that German unification would take place.[290]

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[288] SPD Arbeitsgruppe Schengener Übereinkommen, "Sitzung vom 18.1.1990," ed. Fraktion der SPD im Deutschen Bundestag (Bonn: 1990). The document comes from the first meeting of the SPD Working Group on the Schengen Agreement. It was founded with a view to the changes envisaged to the ratification of the Schengen Agreement. The Working Group comprised members of a number of Committees.

[289] Ibid.
Dr. Glatzel emphasises the importance of solving this issues in consultations with France.

[290] The detailed account of Zelikow and Rice as well as memoirs of politicians show that decisive steps had been taken in the time ahead. France hoped to bind Germany closer into a European network by way of EMU and further political integration. Chancellor Kohl and his advisors began to respond positively to this from the end of February onwards. Kohl signaled to Jacques Delors that Germany was willing to engage more in the process of European integration. Horst Teltschik spoke confidentially with Jacques Attali. A French-German initiative for political integration was the result. Cf. Jacques Attali, *Verbatim. Chronique des années 1988 - 1991*, 3 vols., vol. 3 (Paris: 1995), Horst Teltschik, *329 Tage: Innenansichten der Einigung* (Berlin: Siedler, 1991), Philip Zelikow and Condoleezza

By mid-1990, arrangements had been made to ensure freedom of movement also for East Germans. A note in the protocol to the SIC by the Federal Republic of Germany regarding the inclusion of all of Germany into the treaty was added. The Convention was signed on 19 June 1990 by the five original members.

A fourth phase for negotiations can be discerned between 1990 and 1995 during which the implementation of the Agreements was prepared and further members were admitted. A major concern for government representatives was to ensure that implementation would reach the agreed levels of controls at the external borders and the standards of compensatory measures deemed necessary. For example, the development and functionality of the SIS remained problematic until late in the negotiations. Also the common handbook for officials conducting the controls at the borders was written and refined during that time in order to instruct the border guards with which methods to ensure the level of security agreed. Relations to EU institutions were also a matter of discussion, particularly the relationship between the SIS and a planned European Information System (which was to complement the planned External Borders Convention).[291]

The decision of December 1994 to implement the SIC from 26 March 1995 onwards did not end negotiations. However, the fundamental decisions had been taken by this time and the character of the Schengen system was defined. The following section will present in detail the genesis and provisions of the two Agreements which resulted from the negotiations.

Rice, *Sternstunde der Diplomatie. Die deutsche Einheit und das Ende der Spaltung Europas (Germany Unified and Europe Transformed)*, trans. Klaus-Dieter Schmidt (Berlin: Propyläen, 1997).

[291] Cf. the reproduction of a Note of 1992 by the Portuguese Presidency on the 'instrument' to be used to effect the planned EIS in Bunyan, ed., *Key Texts on Justice and Home Affairs*.

5.2. Schengen I

The Schengen Agreement of 14 June 1985 is officially called 'Agreement between the governments of the states of the Benelux Economic Union, the Federal Republic of Germany and the French Republic regarding the gradual abolition of controls at the common borders'. As outlined above, the Benelux Travel Union and French-German Agreement of July 1984 can be considered the starting point of Schengen. The offer of the Benelux Union to use its General Secretariat as an institutional centre widened the circle of participating countries to five.

5.2.1. Genesis

As the events leading up to the conclusion of the first Schengen Agreement outlined above illustrate, officials were primarily interested in practical solutions to the demands of a growing and more complex trade between countries; they did not intend a fundamental change to state relations or a challenge to state sovereignty. Events such as the strike of lorry drivers put pressure on Transport Ministers and also on leading politicians to admit the necessity of changes to the policies of controls at the borders.

Bigo points out that geographic contiguity (and therefore possibly economic interests) was more important for the conclusion of that agreement than a convergence of political visions regarding Europe.[292] He is certainly right in pointing out economic motives as important forces. At the same time, politicians such as the German chancellor were also intent on deepening integration via bi- and multilateral agreements allowing free movement to citizens – also in the absence of an EC-level agreement. While European Community declarations and committees were contemplating measures for the realisation of the freedom of movement, 'classic' international treaties went ahead with measures gradually lifting border controls.

5.2.2. Content

Despite the fact that the agreement was a multilateral agreement outside the framework of the EC, it is clearly closely connected. The preamble refers to the objective of 'an ever

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[292] Bigo, *Polices en Réseaux*, 115.

closer union between the peoples of the Member States of the European Community' and to the will to abolish controls on persons, goods and services of the European Community.

The Agreement is relatively short (compared to the Implementing Convention) with 33 articles. It is divided into short term and long-term measures, of which the former were envisaged to be completed by 1 January 1986 and the latter by 1 January 1990. Similarly to measures provided for in the 1984 Franco-German Agreement, the short-term measures foresaw a simplified control method whereby cars crossed the border with reduced speed without being stopped. Spot checks with the aim of more thorough controls of documents on goods were allowed. These were to happen next to the road so that traffic could cross the border unhindered (Art. 2 and 12). A green badge in the windscreen was to indicate cars with only EC passengers (Art. 3). Common control stations were to be established by 1 January 1986 (Art. 5). Special arrangements were made for the inhabitants of communities adjacent to the border so that they can cross the border at any time (Art. 6). Visa policies were envisaged to be approximated (Art. 4) to protect the whole area against illegal immigration. Member States agreed to fight illegal trade with drugs and to coordinate their policies in this regard (Art. 8). Controls of the driver's log and transport documents at the border were to be abolished (apart from spot checks, Art. 5 and 11).

Long-term measures aimed at complete abolition of controls at the common borders and their transfer to the external borders. Members aimed at a harmonisation of differing laws which were seen as the basis of border controls. At the same time, additional measures for the protection of internal security and against illegal immigration were to be taken (Art. 17). Agreements on police cooperation were foreseen as well as measures against crime, such as the introduction of hot pursuit (Art. 18). Visa policy also was to be harmonised (Art. 19). Tax exemption limits were to be raised (Art. 21), indirect taxes harmonised (Art. 26) and the transport of and checks on goods to be facilitated.

A clear emphasis was set on the realisation of free circulation and movement. Practical solutions to the problem of obstacles to trade and transport were important, dominating over security concerns. Measures to complement the eventual abolition of border controls were included, but only in a very general way and not spelt out in detail. References to police cooperation (such as cooperation between authorities, hot pursuit) with the aim to fight drug and arms trafficking, illegal immigration, tax evasion and smuggling were made only in 4 articles out of 33 (Art. 8,9, 18 and 19). The fight against illegal immigration was mentioned in four articles (7, 9, 17 and 20). Interestingly, the expression 'compensatory

measures' cannot be found in the first Schengen Agreement. The term used are 'complementary measures to safeguard internal security and prevent illegal immigration' (Art. 17). This emphasis is changed conspicuously with the Schengen Implementing Convention which focussed on the formulation of compensatory measures which would allow the realisation of the area free of border controls agreed in 1985. While complementary measures mean additional measures to safeguard security, compensatory measures pointed clearly to the fact of loss of security safeguards which had to be made up for.

5.3. Schengen II

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 regarding the gradual abolition of checks at their common borders of 19 June 1990' (SIC) is much more than pure implementation of the 1985 agreement. As will be described below, it extends to new areas with a different emphasis. It is the much more complex document and has to be considered more important both in its content as well as in its consequences.

5.3.1. Genesis

Negotiations for the SIC were started because security experts and national governments felt that a direct implementation of Schengen I without measures to compensate for the loss of internal border controls was impossible. The Schengen Agreement made reference to some complementary measures for the protection of internal security. The ensuing negotiations aimed to define and harmonise these standards.

The context of Schengen II was different from the one of the 1985 agreement. The time of negotiations was much longer and the European and world political context changed enormously during the time of negotiation. Despite the fact that the influence of these developments must not be underestimated, it is also clear that the fundamental decisions and agreements of Schengen II regarding border controls were made before the end of 1989.

As mentioned above, developments in the framework of European integration provided an important background to the Schengen negotiations. The reports of the Adonnino Committee for a 'People's Europe', the Commission White Paper by Lord Cockfield on the 'Completion of the Internal Market', the signing of the Single European Act have all been cited as important. The progress on the EC level also put pressure on the Schengen negotiations to finish in time in order to serve as a model and testing ground for EC-wide measures.

The larger European social context of the negotiations must not be forgotten. Terrorism occupied the agenda of European governments since the early 1970s.[293] The security services in several countries perceived a Europeanisation of terrorist threats and made this public. Bigo holds that the spectres invoked were exaggerated, mainly due to the interests of law enforcement agencies to create links to exchange information.[294] However, while the interests of the secret services and polices are not to be denied, it is likely that the growing pressure on these organisations led them to seek the help of other national terrorist organisations.[295] Bigo mentions that in his interviews, the mid-decade was often identified as a turning point in terms of regrouping of European terrorism.[296] While the extent of this regrouping is still disputed, it can be safely stated that the terrorist attacks of 1985 and 1986 did create much public attention and fears.[297] Due to the discourse of threat as well as continuing terrorist attacks in the 1980s and early 1990s, terrorism as a danger was still present in the consciousness of European societies.

At the same time, national debates about immigration were beginning to build up political momentum. As mentioned before, migration into OECD countries as well as stocks of foreign populations[298] showed a steady rise from the mid-1980s onwards. Also traditional emigration countries like Italy began to gain inhabitants.[299] The numbers of asylum seekers in OECD countries also began to rise in the mid-1980s, with Germany particularly concerned.[300] The rise of the number of foreigners led to debates about integration and the right of asylum/immigration. Although these reached their height only after the signing of the SIC, the rising numbers of immigrants were already part of the social context for

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[293] The Baader-Meinhof gang of West Germany (founded in 1968), Italy's Red Brigades (active in the late 1970s and early 1980s) and France's Direct Action (founded in 1979) were among the most prominent terrorist groups in Europe.

[294] Bigo, ed., L'Europe des Polices et de la Sécurité Intérieure, 19ff.

[295] One clear indication of cooperation is the common communiqué of RAF and Action Directe called 'Für die Einheit der Revolutionäre Westeuropas' (transl: For the unity of the revolutionaries of Western Europe) of 15 January 1985.

[296] Bigo, ed., L'Europe des Polices et de la Sécurité Intérieure.

[297] Events during those years were: The assassination of General René Audran in France by the Action Directe (25 January 1985), the shooting of Dr. Ernst Zimmermann in Germany, head of the arms company MTU (1 February 1985), an arson attack on the US airbase in Frankfurt and the killing of a GI (8 August 1985), the killing of the Siemens board member Karl-Heinz Beckurts and his driver (9 July 1986), the killing of the high-level official Gerold von Braunmühl (10 October 1986) and the assassination of the head of Renault, Georges Besse, in Paris (17 November 1986). In September 1988, an attempt on the life of Permanent Secretary Hans Tietmeyer failed, in November 1989, the head of the Deutsche Bank Alfred Herrhausen was killed by the RAF and in 1991, the head of the 'Treuhand' Carsten Rohwedder was assassinated. Additionally, the nightclub La Belle in Berlin, where US soldiers frequented, was bombed in 1986. The suspects were Libyans, but also the East German secret service was believed to be involved.

[298] see table on stocks of foreign population in the appendix.

[299] Cf. the table on migration to OECD countries in the appendix.

[300] See tables on asylum seekers in Germany in the appendix.

negotiations. After the unexpected changes of 1989/90, the fear of uncontrolled immigration became even more relevant to the negotiations for implementation.

5.3.2. Content

The text of the SIC is substantially longer than the first Schengen Agreement. It has 142 articles divided into the following titles or chapters:

Title I is concerned with definitions. It is unique in its nature and important for both application of the Convention and its interpretation in that it defines the terms of internal and external frontiers and thus fills them with legal content. Internal borders are therefore: the common land borders of the parties to the treaty as well as their airports for internal flights and their sea ports for ferries between member states. External borders are all other borders of the parties to the treaty.

Other matters defined refer to foreigners, permissions of stay, asylum application and seekers, border crossing and border control. The necessity of definition of these concepts in the framework of this treaty exemplifies the novelty and problematic of issues concerning sovereignty and the application of state authority under the circumstances of this new treaty.

Title II is concerned with the abolition of controls at the internal borders with regard to persons. It allows for the crossing of internal borders at all places. Art. 2. par. 2 gives permission to a state to re-establish border controls for a limited time if public order or national security necessitate it. External borders may only be crossed at border checkpoints and during the opening times. This section also gives rules for the checks on passengers on flights, changing from an external to an internal flight in the Schengen area. It furthermore outlines the conditions for entry of third party nationals and the control at external borders. The title is also concerned with all aspects of visas, refugees and asylum.[301]

These provisions were later complemented with concrete instructions to the officers at the border in the so-called Common Handbook.

Title III is concerned with police and security. It gives details regarding police cooperation promising cooperation between especially authorised central authorities or direct contact

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[301] Chapter 7 on the responsibility for treating an application for asylum has been superseded by the Dublin Convention since 26 April 1994.

between services in cases of urgency. Further bilateral agreements are allowed. Police observation is dealt with in Art. 40. It lists in detail the conditions for taking up and ending observation, the circumstances of observation, the officials allowed to observe, the crimes which make observation admissible. The same detailed prescriptions are to be found in the section on hot pursuit. In addition, bilateral agreements are to spell out the modalities of hot pursuit between two countries.

This title is also concerned with conditions and modalities of legal assistance in criminal matters. It furthermore deals with a prohibition of double sentence, extradition, the transfer of the execution of sentences, drugs (fight against trafficking, controls) and arms and ammunition (classification of prohibited, permissible and obliged to register).

Title IV is dedicated to the Schengen Information System. It details the running and use of the system, which data are to be entered and who is to get access. Another section (fairly long with 16 articles) deals with data protection and security. This is followed by rules regarding the sharing of costs of the system.

Title V is concerned with the transport of goods. The goal is to avoid all controls at internal borders and do checks on technical safety, animal and plant protection and hygiene in the country. The parties are to reinforce cooperation with regard to security of the transport of dangerous goods through the harmonisation of a number of regulations.

This is followed by a separate title dedicated to data protection. Additionally, this title provides for national data protection regulations before data can be loaded into the SIS.

Title VII is dedicated to membership and function of the Executive Committee. Title VIII deals with legal aspects of applicability of the Convention. It also presents the necessity of ratification of the Convention.

5.4. Comparison between Schengen I and II

A comparison between the Schengen agreements I and II quickly reveals that the two documents are of a very different nature. Generally speaking, a shift can be observed in objective from an emphasis on freedom of movement to an emphasis on measures for security to counteract the abolition of controls at the internal borders.

Monica den Boer has written on the different nature of the two agreements. She argues that the first agreement referred more to the short term and the freedom of goods and services while the second agreement aimed at the long term and was directed at compensatory measures for the freedom of persons.[302] Van Outrive is quoted in a similar direction when he says that Schengen I was an agreement on the freedom of movement while Schengen II was about the control of that freedom.[303]

The expression of 'compensatory measures' itself is not mentioned in the Convention. However, its extensive regulations regarding police cooperation, hot pursuit, cross-border observation, legal aid, extradition, fight against drug trafficking, arms and ammunition and the SIS are an illustration of such measures. During the time of negotiations, the concept of compensatory measures became the publicly acknowledged philosophy of Schengen.[304] German officials were prominent in pressing for and formulating them. The German representative Schreckenberger wrote for example in 1988 that preparatory work for 'compensatory measures' had to be finished by the end of the year for border controls to be lifted in 1990.[305] The term became pervasive in the time after 1985 and is mentioned in nearly every text dealing with the ongoing Schengen negotiations.

The Schengen Implementing Agreement touches upon areas that were not present in the 1985 document. The SIS was not foreseen in the Schengen Agreement at all. Other issue areas saw an extension of compensatory measures: while an approximation of laws in the area of drugs and weapons and ammunition was aimed for in 1985, the detailed provisions in the SIC make these essentially new areas.

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[302] den Boer, "Schengen, Intergovernmental Scenario for European Police Cooperation, a System of European Police Cooperation." quoted after Bigo, *Polices en Réseaux*, 120FN.

[303] Lode Van Outrive, "The Entry into Force of the Schengen Agreements," (Brussels: European Parliament Committee on Civil Liberties and Internal Affairs, 1992). quoted after Bigo, *Polices en Réseaux*, 120FN.

[304] The Benelux Agreement contained few compensatory measures. Addtionnal ones on hotpursuit were agreed in 1962, but rarely used according to Bigo Bigo, *Polices en Réseaux*, 80FN.

[305] Schreckenberger, "An den Vorsitzenden des Innenausschusses - Unterrichtung des Innenausschusses von der Umsetzung des Schengener Abkommens."

The changed emphasis can also be seen in the detail with which compensatory measures are treated. Hot pursuit and observation, legal aid are mentioned once in the first Schengen Agreement as possible options for a common fight against crime, but are by no means spelt out. Contrarily, the major part of Schengen II is dedicated to spelling out modalities of police and judicial cooperation in order to counteract an identified security deficit. Only 37 articles (Title I and II) of 142 deal with border crossing, border control and the control of immigration and asylum as such. All the others are concerned with compensatory measures of some kind.

The SIC also shows continuing resistance from some states regarding questions of sovereignty. The result was that a number of issues were only decided upon with general rules whereas the concrete application was up to national measures or bilateral treaties. The General Secretary of the Benelux Union is quoted as saying that each country has its own way of doing things. The Benelux Union had already a visa union and was not ready to take over the stricter French visa provisions.[306] In this issue, a final solution was found, even if only for short-term visas of three months. Long-term visas remained the competency of individual countries.

The issue of hot pursuit is illustrative of a sovereignty problem which could not be regulated. The provisions of the treaty only provide general outlines. The actual scope of action was to be agreed in bilateral agreements. (Art. 10). This has led to major practical discrepancies. France, which had great reservations in this respect does not allow officers of other countries to apprehend a criminal. Other countries have limited the area of pursuit, while yet others have limited the time allowed. Only Germany allowed full pursuit to all foreign officers with the right to apprehend a suspect.

A major new principle introduced by the Schengen Agreements has to be noted: the Agreements are framed in a way that each country's interests have to be ensured by the others as if they were their own. Indeed a French Senator has remarked that the Schengen Agreements give other countries the key to one's territory which is a matter of trust, but

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[306] Cf. Innenausschuß des Deutschen Bundestages, "Bericht über die Reise einer Delegation des Innenausschusses vom 4. Juli bis 8. Juli 1988 in die Länder Frankreich, Luxemburg, Belgien, Niederlande zum Thema: Übereinkommen von Schengen," ed. Deutscher Bundestag (Bonn: 1988).

also entails obligations for all partner states.[307] This statement illustrates a shift of perceptions regarding sovereignty whereby France has to rely on its partners to ensure its security. Standardised controls at the external borders demand that each party trust the other parties to take into account its vital interests. The option of re-establishing border controls for a limited period of time[308] is only a measure of exception and cannot counteract the new principle.

To sum up: according to the Convention, common European rules apply to the controls at the external borders, and checks on entry and exit at the internal borders are only permitted in special circumstances in the interest of public order and internal security. While the Schengen Agreement places an emphasis on the development of a European space of free movement, the Schengen Convention details the compensatory measures emphasising security and control which become the *conditio sine qua non* for the abolition of border controls. Given that Schengen represented a threat to professionals for ensuring national security, compensatory measures became an appropriate way to ensure institutional continuity as well as the level of security. Thus, the SIC establishes a clear link between freedom and security on a European level.

The old image of the border as embodying the authority of the state, barrier to invasion, instrument of defence becomes obsolete through the application of the SIC.[309] The Schengen Convention divides the existing state borders into internal and external borders of Schengen countries; it spells out a common body of rules for external border controls; the Schengen regime also provides for control teams composed of other member states regarding the quality of border controls. All this combines to detract from the sovereignty of the state to define the modalities and level of the control of its borders – an act which has hitherto been regarded as representing and refying the authority of the state. Despite the fact that the legal and administrative national function of the border has been retained, the dematerialisation of the border brings with it the loss of the borders as a marker of state authority. Its function becomes more abstract and symbolic and therefore changes its role for the state. It has become the object of an intergovernmental agreement, later even integrated into the European treaties, and therefore moved from the realm of national

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[307] Paul Masson and Xavier de Villepin, "Rapport de la Commission de contrôle du Sénat sur la mise en place et le fonctionnement de la convention d'application de l'accord de Schengen du 14 Juin 1985," (Paris: Sénat, 1991).

[308] Art. 2 par. 2

[309] Cf. for a similar argument Bigo, *Polices en Réseaux*, 130.

control to one of mixed authority. Mutual dependence and trust with regard to borders and security of national territory have also become necessary with the new regime.

Freedom and security have become interlinked concept in which the freedom of EC citizens can only be realised in a framework of security. This security is to be provided in a common area and with common standards for external border controls.

6. The Schengen rationale in other circles

The discourse of security and freedom was also taken up in other circles in Europe. While the connection between Schengen negotiations and broader ones in the EU were initially rather loosely-defined, the Schengen approach gradually came to dominate.

Meetings between the relevant ministers often dealt with similar issues to those in the Schengen framework. An example is the meeting of Ministers responsible for migration, which prepared the Convention on the Crossing of External Borders and the Dublin Convention. The following outlines two examples of political processes which mirror the Schengen rationale.

6.1. Budapest Process

One 'export' to the Schengen discourse where Germany played a major part was the so-called Budapest process. 'Gelegentlich entwickelte sich eine im Anschluß an eine deutsche Initiative entschlossene Errungenschaft zu einem Wegbereiter weit über Schengen hinaus. Zu denken ist unter anderem an die Kampagnen gegen das Schleuserunwesen, die auf weitere internationale Foren, etwa den Budapester Prozeß, übergriffen.' [310]

The expression 'Budapest process' refers to a series of meetings of states from East and West, beginning in January 1991 in Vienna. At that conference a first international platform for the fight against migration between East and West was created. The meeting on 30/31 October 1991 in Berlin was a follow-up with 27 states from Central, Eastern and Western Europe. The invitation was an initiative of the then German Minister of Interior Wolfgang Schäuble. Minister Schäuble was of the opinion that the border was no intelligent means of investigation. He said in a speech in November 1989 in The Hague that he did not think border barriers a good means of control. [311] Instead, he advocated the cooperation of national police forces and the development of new forms of cooperation. The initiative of a meeting with Eastern neighbours in order to define a common strategy therefore fit

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[310] Horst Eisel, "Interview with Horst Eisel," (2001). Translation: At times, an achievement which had been decided upon on a German initiative developed into a forerunner way beyond Schengen. This refers, for example, to the campaigns against human smuggling which spread also to other international forums such as the Budapest Process.

[311] Schäuble, "Europa ohne Grenzen - eine sichere Gemeinschaft."

Wolfgang Schäuble's conviction that the fight against immigration had to be conducted on more levels than just strict border controls.[312]

Central in the discussions were short-term measures of police and foreigner law to deal with migration. The final communiqué signalled a common strategy of East and West in the area of fight against human smuggling for the first time. A report of the German Ministry of Interior mentions that the participating states followed the German suggestion of a three-step-system: the creation of a harmonised visa policy, the implementation of carriers' liability and cross-border pursuit were to fight human smuggling close to the 'source'. Activities at the borders were to be reinforced with the help of intensive checks at and along the border. Finally, re- and deportations were to be conducted if illegal immigrants had reached the West European countries via one of the partner states. A working group was to suggest concrete measures to realise the agreement.[313]

This meeting illustrates the idea of 'safe third countries' which was developed and practiced by Germany concomitantly with the Schengen Agreements. The idea was that illegal migrants coming from a safe third country neighbouring Germany were to be readmitted to that country. Legally, this was possible only if those countries were classified as free of persecution, thus safe, for the groups of people concerned. Mickel has called the results of the Berlin Conference 'Schengen-Ost', because both the measures concluded as well as the underlying rationale fit with the Schengen provisions.[314] Indeed, the three steps suggested by Germany for the conference can all also be found in the Schengen philosophy.

The follow-up conference in Budapest in February 1993 extended this logic and recommended border surveillance measures against illegal immigrants, concrete regulations in order to expel them and criminalised the smuggling of humans.

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[312] This contrasts with the opinion of Rupprecht mentioned above who saw border controls as central to the internal security of the state.

[313] "Illegale Einwanderung - Europäer einigen sich auf gemeinsames Vorgehen gegen Schleuser-Banden," *Innenpolitik*, no. VI (1991).

[314] Wolfgang Mickel, ed., *Handlexikon der Europäischen Union*, 2 ed. (Köln: Omnia Verlag, 1998).

6.2. External Borders Convention and Dublin Asylum Convention

The External Borders Convention (EBC) and the Dublin Asylum Convention (Dublin I) similarly contain clear elements from the Schengen rationale, or rather contain elements which are also present in the Schengen agreements. The External Borders Convention and the Dublin Convention are agreements between all Member States of the European Community.

The Conventions were negotiated by the Ministers responsible for questions of immigration policies of the EC member states. Negotiations for both started in the late 1980s. Thus, it is plausible that they took up elements of agreements found in the Schengen framework. The Dublin Convention was signed in 1990, but only implemented in 1997. The External borders convention was never signed. Both conventions refer to the obligation under Art. 8a of the Treaty of Rome for the creation of an area without internal borders (similarly to the Schengen Agreement).Their contents are the following:

The External Borders Convention allows for sanctions if borders are crossed other than at authorised crossing points; it stipulates a common list of countries requiring visas; it applies the principle of carrier's liability; it defines a list of inadmissible third country nationals and plans an electronic system for controls. The Dublin Convention details rules according to which the state responsible for treating asylum applications can be determined. In principle, these rules give responsibility to the state into which the applicant enters first. There are a number of exceptions (family reunion or extended stay in other Member States etc.), but the principle remains.

Despite the fact, that members of the Schengen negotiations process were not identical with EC member states, the institutional and sometimes personal link has to be accepted as given. EC ministers negotiating the two conventions were the ministers responsible for migration, thus mostly from the Ministries of Interior. Often, there was a congruence if not of persons, the of departments which dealt with the questions in the Conventions and Schengen. In Germany, for example, the Permanent Secretary (BMI) who gave reports on Schengen to the Committee on Internal Affairs of the Bundestag on a regular basis, Hans Neusel, was also the German member of the Group of Coordinators. This Group was charged with coordinating the work on necessary compensatory measures in various

groups. Its work was crucial for the shape of compensatory measures in the EBC.[315] The similarity of Schengen and the preparations to the EBC is shown also in a report of Permanent Secretary Neusel when he states that a declaration by TREVI Ministers of 15.12.1989 covers thematically all areas that are also covered by the Schengen Implementing Convention.[316]

With regard to the EBC, the link with Schengen becomes clear even in the terminology: the discussions refer to compensatory measures, a common list of inadmissible persons, external and internal borders, and a common electronic information system.[317] The negotiations also show similar hesitations and problems with regard to sovereignty and the assurance of security.

One major difference between the EBC and the Schengen Process is that no concrete date for an abolition of border controls was envisaged although 1992 was a goal. This was due to the fact that some Member States (e.g. the United Kingdom) expressed their doubt whether the realisation of the Internal Market at the end of 1992 also included the obligation of the opening of the border to third country nationals. This problem and remaining differences between the UK and Spain regarding Gibraltar led to a sidelining of the Convention. The German government insisted on an abolition of all border controls between EC states (if compensatory measures were put in place).[318] It also advocated a speeding up of discussion in 1990, in order to be able to meet the envisaged date of 1992. With broad membership of Schengen and the integration into the treaties, the convention has become practically obsolete. It is an example, however, of an application of the same approach as Schengen.

The Dublin Convention which was more successful and entered into force in September 1997, is a similar example of the philosophy of 'security for freedom within.' Its provisions parallel those originally written for the Schengen Implementing Convention. Even more, it fit the Schengen framework so closely that it supplanted the regulations of the SIC when it entered into force.

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[315] Staatssekretär Neusel, "Unterrichtung des BT-Innenausschusses über den Stand der Beratungen der Einwanderungs- und Trevi-Minister der EG," ed. Bundesministerium des Innern (Bonn: 1990).

[316] Ibid.: "... deckt thematisch alle Felder ab, die auch Gegenstand des Zusatzvertrages zum Schengener Übereinkommen sind."

[317] Apparently, a European Information System was initially planned to fulfil this role. Cf . a confidential note cited in Bunyan, ed., *Key Texts on Justice and Home Affairs*.

[318] Neusel, "Unterrichtung des BT-Innenausschusses über den Stand der Beratungen der Einwanderungs- und Trevi-Minister der EG."

These Agreements and Conventions were cited in order to show that the philosophy of Schengen did not remain contained to the Agreement itself. For one thing, this is due to the fact, that circles preceding Schengen and these Conventions had already elaborated a common understanding of dangers and possible solutions. At the same time, these circles had established a network of experts who were then also charged with developing measures ensuring security after the abolition of border controls.

It is the dual philosophy of freedom and security of Schengen, however, which proved the most practicable policy acceptable for the public. The fact that Schengen negotiations involved many deliberations of experts who brought their knowledge to the table led to a result which was acceptable to other circles comprised with similar experts. The knowledge or 'savoir' developed in Schengen fit best the political, strategic, European and public exigencies of the time. It is therefore not surprising that it found entry also in other – parallel – deliberations.

7. Conclusions

The aim of this chapter was to retrace the evolution of European border control policies, rationales of security and freedom as well as the ability to govern. It was shown that a European regime of border controls emerged – despite the fact that borders are intrinsically linked to the governance of the modern state. The tension between national sovereignty and the deepening of European integration and the internal market led to compromises: the compensatory measures introduced were an attempt to find a common denominator in making up for the loss of security through internal border controls. The emerging common border regime led to a situation where authority over controls at national borders is effectively shared and exclusive national control over entry on the national territory is ended. At the same time, the rationales aiming at security provision and economic prosperity and freedom led to a philosophy which combined freedom and security and saw both as mutually constitutive.

The remaining part of the thesis will aim to explore Germany's negotiating behaviour in more detail and retrace the rationale for its position.

Chapter 4

Germany's historical relationship with its borders

This chapter presents the history of German borders and the relationship of the state to its borders. The peculiarity of the German position with regard to an uneasy territorial identity and thus also its definition of citizenship will be emphasised. It will also be shown that German perceptions and historical experiences of the Eastern border and the Eastern neighbours were very different from the relationship with the West. The country's important historical economic and political position in central Europe will be discussed and it will be shown that many of the political decisions in Germany's history were connected to changes to its – internal and external – borders. The discourse on migration and crime coming from the East can only be adequately understood in the light of Germany's close historical links to and experiences in Eastern Europe.

Equally, the difficult, ambiguous situation for Germany in the phase of change after 1989 can be highlighted through this historical account. On the one had, exchange and openness towards the East had long been a political objective and reminded of old ties to the East. On the other hand, open borders towards the East were feared to have unforeseen consequences for Europe in terms of unmanageable amounts of migrants and inflow of crime.

This chapter therefore represents the historical context for negotiations on border controls. German historical experiences influenced not only the perspective and position of the German delegation. German history in this respect also created fears and expectations on the side of Germany's neighbours.

Avant propos: the German language and borders

Before giving an account of the historical development of Germany's borders and of the problematic nature of German identity in relationship to its borders, some particularities of the German language concerning borders have to be noted. Language can help to illustrate the 'mental map' of a particular group and partly conserves past experiences.

First of all, German is one of the few European languages which has only one word for 'boundary', 'border', 'frontier' and limit. 'Grenze' is a derivative from West Slavic 'greniz(e)' or 'granica', which is a rather rare root in German words.[319] Interestingly, the term is derived from a stem which means to 'protect' and 'to keep'.[320] The word was first used in German in 1262 and entered the general language around 1280 through the Latin of the knights of the orders and coexisted for a long time with other words referring to the marches of the German-inhabited area such as 'Marken'. The modern word 'Grenze' was spread only by Luther who used it in his translation of the bible in the 16th century.[321] Thus, the term entered the language region from the east. This illustrates the exchange with that region and the influence it had. At the same time, it was this area where the definition of the limits of German areas lacked clarity at the time.

The term 'Grenze' in German designates state borders, as well as sub-state borders or a border region. In order to be more precise when speaking about a specific type of border, the speaker will add to the word 'Grenze' another noun, thus the words 'Grenzregion', 'Grenzraum' or 'Grenzlinie'.[322] The word 'Grenze' itself contains all of these meanings. What is more, the word 'Grenze' also conjures up the much more general meaning of an encounter of two entities and the limit of something. An encyclopedia defines it as the dividing line between two areas – in the figurative sense also between social givens.[323] Another encyclopedia defines the border as the limit of a thing beyond which it ends.[324] It could thus refer to practically anything: the line between languages, (*Sprachgrenze* or

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[319] *Brockhaus Enzyklopädie*, 19 ed. (Mannheim: F.A. Brockhaus, 1989).

[320] Alexander Demandt, "Zur Geschichte der Grenzen Deutschlands," in *Grenz-Fälle*, ed. Martin Sabrow (Leipzig: Akademische Verlagsanstalt, 2000).

[321] Cf. Ulrich von Alemann, "Grenzen schaffen Frieden," *Die Zeit*, 4 February 1999.

[322] border region, border area, border line.

[323] *Brockhaus Enzyklopädie*, 17 ed. (Wiesbaden: F.A. Brockhaus, 1969).: „Trennungslinie zwischen verschiedenen Gebieten (natürlicher oder rechtlicher Art); im übertragenen Sinn auch zwischen gesellschaftlichen Gegebenheiten."

[324] *Meyers Lexikon*, 7 ed. (Leipzig: Bibliographisches Institut, 1926).: „Das Ende einer Sache, jenseits dessen sie aufhört".

Dialektgrenze), between cultures (*Kulturgrenze*) or between mentalities (*Mentalitätsgrenze*) – and many more such encounters. The word indicates that something is different on one side of the 'Grenze' from the other side.

Often, the word is used to refer to what is inside, rather than what is outside, thus indicating a limit: the word 'Schmerzgrenze' for example means the limit of the pain one is able to bear (threshold of pain). 'Die Grenzen des Machbaren' (the limits of the feasible) is a common expression in the German language.[325] In most of these cases, English or French would use a variety of expressions, not necessarily only the word border or boundary. Thus, the German word *Grenze* unites within it the meanings of a range of words in other European languages and it is up to the context to give further definition to the word. Speaking about the border in Germany necessarily has different connotations from the English or French or any other major European language. The word always refers to some kind of difference and it is up to the context to determine the specific meaning.

The language used in connection with border controls is also interesting. Indeed, border control is not easy to translate. *Grenzkontrolle* in German is most often associated with the action of checking at the border itself. If border control is supposed to refer to the surveillance of the area of the border, then *Grenzüberwachung* or *Grenzsicherung* would be the more appropriate expression in German. In fact, *Grenzsicherung* is probably the word most often used by politicians and professionals. The word 'sicher' in this context is extremely interesting. Again, the German word unites a number of English meanings. *Sicherung* as in *Grenzsicherung* means protection or making safe. *Sicherheit*, a closely related word, means safety if used in the sense of safety procedures for example (*Sicherheitsvorschriften*). It also means security, for example, when one refers to classical protection from threat, as in *militärische Sicherheit*. This means that the word *Grenzsicherung* refers to first of all the technical fact of making the border safe (from whatever the threat defined may be), but also conjures up the fact of people therefore being secure.

The language of the illegal crossing of the border in German is also indicative. The word which is officially used is *Grenzverletzung*, literally meaning hurting of the border. Such an expression attributes personal character to the border itself, as something which can be hurt. The connotation is that it is not the border which is hurt, but the sovereignty of the state, the state itself. This example refers to the relationship between the state and its

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[325] 'Die Grenzen des Wachstums' was the translation of the 'Limits of Growth' report of the Club of Rome.

borders spelt out in chapter two. Although the relationship may well have changed from the time when this linguistic term was coined, the language nevertheless conserves this idea of the border protecting the state. Using it conjures up the meaning of 'damage' done to the state or community.

1. Topography of German borders

The identity of Germans has been and is closely connected to being in the centre of Europe. As is spelt out below, much of German history is connected to changes of the position of borders.[326] The fact of having borders with many neighbouring countries has influenced the perceptions of political and strategic necessities in the past, but also in the present. The formation of the German state over the centuries has happened with reference to and in close relationship with its neighbours, mostly in an act of differentiation. Germany has traditionally had - for better or for worse - to live with its position in the centre of Europe, with what is called 'Mittellage'. Today, the country has land borders with 9 states, these being Austria, Switzerland, France, Luxembourg, Belgium, the Netherlands, Denmark, Poland and the Czech Republic. The country also borders the Baltic Sea in the north-east and the North sea in the north-west.

The majority of Germany's borders today are land borders with a length of 3758 km (Austria: 816 km, Czech Republic 811 km, Poland 442 km, Denmark 67 km, the Netherlands 567 km, Luxembourg 135 km, Belgium 156, France 448 km and Switzerland 316 km). The former inner-German border amounted to 1393 km.[327] The country's coasts have a length of 907 km.

The borders vary in their geographical nature. Not only are there land and sea borders, but also borders which are clearly marked by natural phenomena such as rivers and others which are topographically less clearly defined. Although the concept of natural borders is rejected here in the tradition of Lucien Febvre[328] and others, it should be noted that many borders of Germany today coincide with markers, whether these be interpreted as linking or dividing.

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[326] This is not unusual, of course, since until very recently the main object and result of disputes and war was control of territory. The peculiarity in the German case is that the position of borders and the gain or loss of territory has played a central part in national debates and the formation of a self-image of the nation. As will be spelt out below, the development of German identity and the German question is tied to a lack of a specific territorial image and often to specific territorial problems.

[327] Statistisches Bundesamt, *Statistisches Jahrbuch 2000* (2000 [cited 2002]); available from www.statistik-bund.de. The BGS uses slightly different figures: Austria: 795 km, Czech Republic 810 km, Poland 454 km, Denmark 69 km, the Netherlands 572 km, Luxembourg 134 km, Belgium 157, France 453 km and Switzerland 411 km. The difference has been explained to the author by a BGS officer as due to different measures of sea and river lines. Cf. Grenzschutzdirektion Bundesgrenzschutz, *Bundesgrenzschutz - Federal Border Police*, 2 ed. (Koblenz: 2001).

[328] Cf. Febvre, *Pour une Histoire à part entière*. Rivers, mountains or even the sea can have the quality of linking as well as dividing two communities. Switzerland, for example, is a nation set completely within the mountains, a fact which has not hindered it historically to develop a national bond.

A number of Germany's borders are 'water-based': Lake Constance and the Rhine on the border with Switzerland, the Rhine, the Saar, Mosel, Sauer and Our on the border with France, the North Sea and the Baltic Sea as sea borders. The eastern border is now fixed along the rivers of Oder and Neisse. Purely land borders are the south-eastern borders of Germany – they are set within a mountainous area.

As outlined above, the Schengen Implementing Convention of 1990, divides a country's borders conceptually and practically into external and internal frontiers of the EU. The external borders include the land borders with non-Schengen states, the coasts, the islands and international airports. According to this division, Germany has 3.983 km of external borders of which 1.744 km are land borders and 2.239 km are coastal and sea borders.[329] 1.253 km is the length of the border between Germany and Poland and the Czech Republic, which presents itself as the one of the most problematic external frontiers to border control services since the end of the Cold War.

German territory has not always been this clearly delimited. Indeed, the historical genesis of today's shape of Germany has been very changeable. Not only have the borders of the German speaking area changed relatively much over its history, but also the German nation was difficult to link to a fixed territory. Indeed, the German concept of nationhood, based on culture and later also genetics, can also be attributed to the unstable relationship of the country with its borders. The following section will thus outline the historical development of Germany's borders.

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[329] Rippert, "Sicherung der Außengrenzen der Bundesrepublik Deutschland." Counted according to Schengen criteria, the coastal lines have a length of 1098 km (North Sea) and 1052 km (Baltic Sea). Bundesgrenzschutz, *Bundesgrenzschutz - Federal Border Police.*

2. Uneasiness of German historic and territorial identity

Popular images of a country are hard to pin down; they show themselves for example in the 'mental maps' of the population, in maps used in school books and atlases, metaphors used in popular culture and political discourse. Such images of a country are important not only for the subjective identification of citizens but also reflect the meaning of borders and territory for both the nation-building process and governance. Anderson has referred to this process and the fact that the nation-state is connected to a precise sense of territorial identity and control: '[T]he state-nation-territory bonding exemplified by revolutionary France became the *mythomoteur* of nineteenth- and twentieth-century nationalism in Europe.'[330] What is referred to here are processes of social spatialization, thus 'the ongoing social construction of the spatial at the level of the social imaginary ... and in the form of interventions in the landscape.'[331]

It may be stated in a rather general sense that the collective image of Germany does not refer to a specific shape or image of the country. This is different from France, for example, where there is a widespread conception of the country as the 'hexagon', implying that this is the natural and lasting shape of the country.[332] Germany, has had a much contested idea of its 'natural' shape. Indeed, it may be said that the idea of borders in Germany is much rather a derivative of an abstract concept of the state itself, of the political, social, institutional and constitutional ensemble that forms the state. This is due to a number of factors which include the historical fragmentation of the empire until 1870/71, the frequent changing of borders and an ongoing uneasiness with defining 'Germanness' – from the days of the 1848 Parliamentary Assembly in Frankfurt, through the 'Groß-' or 'Kleindeutsche Lösung'[333] up to today's debate about changes of the law of naturalisation or the law of immigration in Germany recently. The following section will link such historical developments to border changes.

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[330] Anderson, *Frontiers. Territory and State Formation in the Modern World*, 25.

[331] Paasi, *Territories, Boundaries and Consciousness*, 7.

[332] This is, of course, a historical and empirical error. There are no natural borders as such. However, the early territorial clarity of France and the spread of the idea of natural borders from the 16th century onwards helped to sustain the idea. Cf. Anderson, *Frontiers. Territory and State Formation in the Modern World*, 21f.

[333] Literally the small or large German solution, thus the question whether to include the whole or parts of Austria in a German state.

One remnant of historical developments are images remaining in the German language, such as the one of 'Germany in the borders of 1937' – a legitimate objective for the German Christian Democrats for a long time.[334] An objective, which they gave up only gradually and which was put forward as one of their main concerns in opposing the 'Ostpolitik' of the Brandt government at the beginning of the 1970s.[335]

This chapter will show that Germany today has ended a history of territorial instability and has reached the end of a German 'Sonderweg'. The example of the image of 'Germany in the borders of 1937' shows that the public discourse does retain images although they do not coincide with today's reality. Other representations for the historical image of Germany often retain the empire nature of historical Germany: 'Germany in 1914' (in the most popular German school atlas, next to the map of Germany in 1937)[336], 'Roman-German Empire 10th century', 'Holy Roman Empire of German Nation at 1648' and 'German Empire 1871 – 1918' (in a book by the press office of the German government).[337]

Apart from emphasising the historical volatility of German territory, these various representations also give the impression to the reader, that in comparison to France or Great Britain, no fixed image of Germany has developed.

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[334] Cf. for example: Bernt Conrad, "Unbehagen über Rühe und Vogel. Warnung vor "Auflockerung" von Rechtspositionen in der Diskussion um Oder-Neiße-Linie," *Die Welt*, 25 February 1985, "Strauß: Deutschland besteht fort in den Grenzen von 1937," *Süddeutsche Zeitung*, 5 June 1985, "Strauß: Ostverträge sind keine Grenzanerkennungsverträge," *Süddeutsche Zeitung*, 13 November 1985.

[335] Cf. for example Schulze, *Gibt es überhaupt eine deutsche Geschichte?*, p. 13. One should remind oneself of the political weight of the refugee organisations from the former German land in the East. The Conservative parties found in them an important constituency and could obviously not afford to neglect their concerns.

[336] Ferdinand Mayer, "Diercke Weltatlas," (Braunschweig: Westermann, 1974 (1883)).

[337] Presse- und Informationsamt der Bundesregierung, *Tatsachen über Deutschland* (Frankfurt a.M.: Societäts-Verlag, 1999).

2.1. Lack of continuity

The fluidity of Germany's historical borders can easily be demonstrated by a *tour d'horizon* of its current frontiers. Indeed, most of German history since the 19th century was influenced by hopes to change the location of borders in order to bring the ideas of nation and state into congruence (a Germany in the shape of the Medieval Reich, the revision of the borders of the Versailles Treaty, the restitution of the borders of 1937). However, when can we start speaking of 'German' borders or German history?[338] This question does not so much refer to legal or even institutional continuity of the current state, but rather to the cultural and sociological processes which underlie the current self-image of Germany's past. There are always several German pasts which are referred to in major debates in Germany, changing according to current political interests and deeper convictions. The debates of what is German history is not new, as Hagen Schulze's writings on German history demonstrate.[339]

This difficulty to speak of German borders is therefore connected to the inability of the Germans to define the historical identity of the German nation. Schulze sums up the German difference the following way: 'Was ist anders mit den Deutschen?... Ihnen fehlt es, zeitlich gesehen, an Kontinuität, räumlich betrachtet an einer Mitte wie an festen Grenzen.'[340] He refers to the universal nature of the Holy Roman Empire on the one hand and to the emerging of more than 300 territorial entities in middle Europe on the other hand, both of which prevented a unified German state to emerge. This principle of territorial fragmentation, supported through the guarantee of sovereign rights for the state-like entities in the Treaty of Westphalia, remained in place until the foundation of the German Reich in 1871. German-ness was not a political concept, but rather a purely cultural one. From the mid-18th century onwards, 'German' culture and language became the means of the newly rising German 'Bildungsbürgertum', the bourgeoisie, to define itself against the dominant French culture at court. The old German Reich may have included a number of non-German peoples, and the German nation as a cultural term only started to be used in the second half of the 18th century. The emphasis in the German concept of the

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[338] For the following account of the German debate about its history, I have drawn largely on Hagen Schulze's excellent volumes. Schulze, *Gibt es überhaupt eine deutsche Geschichte?* and Schulze, *Staat und Nation in der Europäischen Geschichte.* Winkler, *Der lange Weg nach Westen. Deutsche Geschichte vom "Dritten Reich" bis zur Wiedervereinigung,* Winkler, *Der lange Weg nach Westen. Deutsche Geschichte vom Ende des Alten Reiches bis zum Untergang der Weimarer Republik.*

[339] Schulze, *Gibt es überhaupt eine deutsche Geschichte?*

[340] Ibid, 20. Translation: What is different with the Germans? (...) They lack, temporally speaking, continuity, spatially speaking, a middle and fixed borders.

nation at the time was therefore on culture, not on a political project. The impact of the French revolution was thus felt mainly in its aspect emphasising the inclusion of the people whereas the democratic aspects of sovereignty of the people and self-determination had less influence. Nationalism in Germany turned into a political project rather late. Breuilly even asserts that for the 'majority nationalist ideology meant little until well after the formation of the nation-state.'[341] Thus, the borders of Germany were only connected to a vague cultural notion of a German nation.

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[341] Breuilly, "Sovereignty, Citizenship and Nationality: Reflections on the Case of Germany," 37.

2.2. Building a nation: myths of unity and wars of unification

At the beginning of the 19th century, views on the German nation comprised three perspectives: the nation as a cultural community (in the tradition of the enlightenment), as an ethnic community of destiny (under the influence of the Romantic movement) and as a political community.[342] German nationalism received an impetus in the early 19th century: the end of the Empire in 1806 and the resistance against Napoleonic occupation gave the inhabitants of middle European states (Prussia, Bavaria, Sachsen, Württemberg, Sachsen-Coburg-Gotha) a sense of belonging together – in opposition to France. Indeed, the self-definition through identifying enemies became a constant of German identity – as in most other modernising nation states.[343] Even the name of the *Einigungskriege*, the wars of unification, against Denmark, Austria and France (1864, 1866 and 1870/71), bear witness to the fact that unity was created through external enemies. Indeed, Weiler shows that these wars were the decisive event binding together German citizens in a notion of common citizenship.[344] France became the '*Erbfeind*', the hereditary enemy in the imagination of Germany. As is often the case, wars or military threats 'give state frontiers a symbolic as well as a practical significance.'[345] 'The Franco-Prussian war as arguably the first popular national war fought in Europe imparted a national meaning to the frontiers produced by German victory which had been missing before but it is typical of nationally informed histories that these differences were then essentialized and projected back into the past.'[346] What is more, France had the most developed perspective on a distinction between foreigners and citizens and 'linked this to a sharp demarcation of the national frontier.'[347]

Since there was not much in the present of the 19th century to support this new German identity, a German past was 'constructed' through myths and stories. This finds a parallel

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[342] Hermann Kinder and Werner Hilgemann, eds., *dtv-Atlas zur Weltgeschichte*, vol. 2 (München: Deutscher Taschenbuch Verlag, 1989).

[343] Schulze, *Gibt es überhaupt eine deutsche Geschichte?*, 28.

[344] J.H.H. Weiler, "Legitimacy and Democracy of Union Governance," in *The Politics of European Treaty Reform. The 1996 Intergovernmental Conference and Beyond*, ed. Geoffrey Edwards and Alfred Pijpers (London and Washington: Pinter, 1997).

[345] Breuilly, "Sovereignty, Citizenship and Nationality: Reflections on the Case of Germany," 47. Breuilly notes in this context that the Southern and South-Eastern border bore no symbolic significance even after 1871. At the same time, he emphasizes the continuing importance of sub-state borders.

[346] Ibid, 49. Breuilly mentions that only France represented a threat to the security of German states: "it was regarded as the most important threat to international and social stability (followed closely by fears of Polish rising in the Prussian, Russian and Austrian areas of occupation)." (p. 46).

[347] Ibid, 46. Breuilly mentions also that the introduction of *ius sanguinis* in Germany in 1913 was a result of the French-German conflict (over Alsace) in the 1870s and 1880s.

also in other states, including Great Britain.[348] The Romantic movement, the collection of German fairy tales, Romantic literature set in a mythic German past all contributed to this effort. German philosophers like Hegel were popular, who had declared the idea of a people (Volk) to be pre-existing and perennial, finding its manifestation in the language of the people. The people became a romanticised, even holy entity. Already in 1717, the philosopher Leibniz had published a pamphlet against the influence of French language in Germany, denouncing the fact that francophile leaders ruled over German provinces and that Germany was under the French yoke.[349] Humboldt emphasised the link between language and national character in 1806, calling the language the 'soul of the nation', without which one could never understand national characteristics. He privileged language over descent as a means for defining a national character.[350] Sometimes, the meaning of the German nation was reduced to a notion of descent from the Ancient Germanic peoples, and the virtues which writers like Tacitus and contemporaries had attributed to the Germanic tribes. The work of the philosopher Fichte was used to support this argument. He stated that German – contrary to other Germanic languages – had developed continuously from its origins. He drew the conclusion that only the Germans really had a people, and that only the Germans had the capacity for real and reasoned love to their nation.[351] This link between a German culture, language and even descent, and the German nation became a lasting feature in discussions of German-ness and in the political debates around the foundation of a German national state.

The foundation of a German nation-state became an objective of the liberal forces at the beginning of the 19th century. This was mainly a vision influenced by Prussian, Protestant ideas making reference to a strong German Empire of the Middle Ages. The German Federation (Deutscher Bund) from 1815-1848 referred back to the territorial borders of the Holy Roman Empire. It consisted of 39 members and constitutionally and culturally different entities: the Austrian empire (without Hungary), 5 kingdoms (Prussia – except East and West Prussia, Sachsen, Bavaria, Württemberg, Hannover), 1 electorate (Hessen), 7 great duchies (Baden, Hessen-Darmstadt, Luxemburg, Mecklenburg-Schwerin, Mecklenburg-Strelitz, Oldenburg, Sachsen-Weimar), 10 duchies, 11 principalities and 4

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[348] Cf. the work of Hobsbawm and Ranger on the construction of traditions in Britain over the last two centuries. Eric Hobsbawm and Terence Ranger, eds., *The Invention of Tradition* (Cambridge: Cambridge University Press, 1992).

[349] Cf. Gottfried Wilhelm Leibniz, ed., *Unvorgreiffliche Gedanken, Betreffend die Ausübung und Verbesserung der Teutschen Sprache (1717), Barock* (München: 1963).

[350] Cf. A. Flitner and G. Giel, eds., *Wilhelm von Humboldt, Werke* (Darmstadt: 1961), 58f.

[351] Herbert Fichte, ed., *Johann Gottlieb Fichte. Gesammelte Werke* (Berlin: 1971), 276ff.

Free Cities (Lübeck, Hamburg, Bremen, Frankfurt). The kings of Great Britain (Hannover), Denmark (Holstein) and the Netherlands (Luxembourg) were members.

Under Prussian leadership, economic unification antedated political union. The many internal customs duties that the Holy Roman Empire had known were gradually eliminated. After preliminary steps in the shape of the Prussian Customs Law (1818) and regional customs unions (1828), the German Customs Union was established in 1834 (since 1868 with a customs parliament). This union was to become a decisive stepping stone for the German Empire of 1871.

A first attempt at unification under national auspices happened in 1848 in Frankfurt after the March revolution. The enterprise exemplified the difficulty of identifying a German nation and the question of whether Germans could found a nation-state at all or whether a multinational state would be more appropriate.[352] The goal of the 'Parliament of professors' was to found a monarchic, democratic and liberal German state. A major debate was the problem of whether to include Austria-Hungary in a German state (larger German solution (*Großdeutsche Lösung*) as a federation with two variations: all of Austria-Hungary or only German-Austria) or whether to leave Austria outside of the union (lesser Germna solution (*Kleindeutsche Lösung*) excluding Austria). The solution found was a proposition of a smaller within a wider federation (only German Austria); this was rejected by Austria which was not ready to dissolve its empire. As a consequence the small national solution was accepted by Parliament. This enterprise ended, however, when the Prussian king rejected the offered imperial crown and imposed instead a new constitution in Prussia. These events were the final blow to that part of the liberal movement which had favoured a federal, multinational solution for a German state. Hopes of national unification remained in the liberal bourgeoisie, however. Politically, Prussia was no longer willing to submit to any Austrian domination and insisted on a federation in which only Germanophone Austrians could participate and which would have given Prussia the lead.

The wars of unification under the leadership of Prussia against Denmark (1864, about Schleswig and Holstein), Austria (1866 about Schleswig and Holstein) and France (1870/1) thus took place under the auspices of the ideal of a small-German state for all Germans.

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[352] German nationalists in the debate denied the Czechs, Slovenes and Danes the right to national self-determination in case a German nation-state was to be founded. These claims had to subordinate themselves to the historically superior German claims, it was argued. Cf. Winkler, *Der lange Weg nach Westen. Deutsche Geschichte vom Ende des Alten Reiches bis zum Untergang der Weimarer Republik*, 118.

The war against Austria ended all hopes of including parts of Austria in a German federation. The Peace Treaty of 23 August 1866 gave Austria's consent to a new formation of the German federation without Austria. Bismarck used French territorial claims in order to ensure that the Southern German states joined his side. The shape the German Empire took eventually in 1871 (including Prussia and excluding Austria with the Bavarian border as the external border in the south) was just as much legitimated by an interpretation of the past, thus by myths created of what was the German nation, as it was by political events.

This image of national unity remained an important part of German thinking, despite the fact that the German Empire was politically, socially, economically and culturally of a plural nature. The 'Kaiser', although Prussian, was fashioned into a symbol for the unity of the German people. The Weimar Republic saw embittered social conflicts, yet the ideal goal of a nation-state remained.

Hitler's rise to power was built on these myths and transformed them into the superiority of the German *Volk*. The supposed 'entitlements' of the *Deutsche Volk* featured large in the speeches and writings justifying the policy (and also the crimes) of the Third Reich. The end of the Second World War left German historians and people with a feeling of discontinuity of German past and present, or rather a feeling of discontinuities in German history. The 'German catastrophe' meant that the dreams of German nationhood had led the way to crimes unimaginable, committed in the name of the German people. After the first efforts of reconstruction and the immediate material needs were fulfilled, a general interest in the past was generated by a need of orientation and identity. The two German states were seen as a result of the catastrophic politics conducted in the name of and for the people, but unification of these two German states was judged to be a legitimate political objective, enshrined in the *Grundgesetz* of the Federal Republic. The German question therefore remained open until the unification. One sign of this is the fact that the myth of restoring the 1937 frontiers was maintained throughout the Bonn Republic. German identity had become thus linked to the German state(s) that it was felt that a unification would lead to the fulfilment of the long-term objective of a German nation in a German state.

Since unification in 1990, historians see the current Federal Republic as the only thinkable state for the German nation which has no legitimate rival in the imagination of the majority

of Germans.[353] The remaining problematic borders with Poland were recognised in the process leading to unification and political remarks about a Germany in the borders of 1937 have subsided.

This short outline has shown the discontinuities of German history and the continuity of a German ideal of some kind of German nation. It explains the uneasiness of Germans when thinking about their past and identity and therefore also about Germany's borders. A lack of clarity of the German borders in history is a logical concomitant of such uncertainty.

It is against this background of a disputed national past that the following quick representation of the history of current German borders needs to be understood. The recent nature of many of them is grounded in the historical development of the successive German states and the difficulty of identifying a German history as the one of one state and its borders.

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[353] Cf. Schulze, *Gibt es überhaupt eine deutsche Geschichte*, Winkler, *Der lange Weg nach Westen. Deutsche Geschichte vom Ende des Alten Reiches bis zum Untergang der Weimarer Republik*. Timothy Garton Ash agrees in his book on the transformations in Middle and Eastern Europe after 1989. Timothy Garton Ash, *History of the Present. Essays, Sektches and Despatches from Europe in the 1990s* (London: Allen Lane - The Penguin Press, 1999).

2.3. A short history of German borders

The following traces back the origin of today's borders of Germany. A number of Germany's current borders were fixed in their position only after the Second World War. Many of these actually date back to much older times, however.

The inner German border, fixed after World War II through agreement between the Allied forces who were to govern the zones into which Germany had been split, was an anomaly. The growing tensions and enmity between East and West and the foundation of two different German states led to a gradual 'solidification' of the border, culminating in the building of an actual wall in 1961. Although also an outcome of World War II (similar to Germany's other eastern frontiers), this border continued to be perceived by the government as most 'unnatural' in the West because it divided the same nation.[354] The journal of the Federal Ministry of the Interior of 1986, for example, speaks of the dismantling of automated killing installations of the GDR in 1984, but says that the unnatural German border has not become more permeable through this.[355] Interesting is the use of the word 'unnatural' in this context. The lack of natural borders has already been outlined above. The term indicates here that the German government regarded it as natural that all German citizens should be within one state and not be kept from one another by a border. This is interesting since Germans had lived abroad in Eastern Europe for centuries before as the next section will show.

Germany's oldest borders go back to the 15th century. With very few exceptions,[356] what is today the border between Germany and Switzerland was fixed in 1474 in a Treaty between the Swiss Confederation and Austrian rulers, at that time in possession of the area between Constance and Basel.[357] It has not been changed by any of the major European Treaties that accounted for many other changes: e.g. the Treaty of Westphalia or the Congress of Vienna.

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[354] On the other hand, in view of the war experiences, many in France or Britain were willing to accept the situation since it meant a weakened Germany.

[355] "Die unnatürliche deutsch-deutsche Grenze ist dadurch jedoch nicht durchlässiger geworder!" (sentence bold in the original) "Der Bundesgrenzschutz erfüllt als Polizei des Bundes verläßlich seine Aufgaben," *Innenpolitik*, no. III (1986).

[356] Minor changes were: The city of Schaffhausen extended its territory gradually until the 17th century; the Fricktal changed hands from Austria to France and then Switzerland in 1801/2.

[357] Cf. Marc Lengereau, *Les Frontières Allemandes*, vol. 3, *Bilans et Enjeux* (Bern Frankfurt/M.: Peter Lang, 1990), 19.

Today's border with Austria is also an old one. Bavaria's borders to the south and east go back to the late Middle Ages, experiencing only further definition and clarity. Until 1806, or even 1871, this border cannot be termed an external border of Germany, since Bavaria was part of the larger German Empire or German Federation. In a longer perspective, however, this is an old political border which has changed function from an internal border in an Empire to an external border of a modern state.[358]

Germany's eastern border was much more changeable and sensitive to the development of German national identity. For a long time, borders were not sharply defined and fixed in treaties. Especially in the area directly east of Germany, the definition of spheres of influence for trade, settlement and rule was a disputed issue. There was a relatively small population in that area, little geographic barriers and changing power constellations.[359] Religious conversion, settlement and conquest were the means for the advancing of German language and culture in the East.[360] Conquest, mission of the Slavs and colonisation 'Germanised' the Eastern territories from the Middle Ages onwards. Of importance was here the Deutsche Orden (Teutonic Order of Knights), founded in the late 12th century, whose centre was moved to Marienburg in West Prussia in the early 14th century. Gradually, the order reached possession of Danzig, Estonia, Gotland and the Neumark, increasing also its influence in trade and production in the Baltic Sea region. In the 15th and 16th century, Poland came to dominate the area of influence, but the order had already established a lasting influence for German culture and trade.

Very influential was also the Hanse, a term originally used for a community of tradesmen abroad – later also for an alliance between major cities from the Netherlands in the West to Eastern Livland. The emphasis of this alliance moved gradually east in the course of German Eastern settlement. Politically and economically influential, the demise of the Hanse only came at the end of the 15th century.

The border with today's Czech Republic illustrates the long and complicated history of Germany's eastern border: the areas of Bohemia and Silesia are examples of former inter-imperial borders of Germany which no longer exist: the Silesian wars of 1740-1742 and 1744-45 in which Prussia fought against Austria brought Silesia into the possession of

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[358] The history of Salzburg shows, however, that even here the border was changeable. For a long time, the city was a full member of the Holy Roman Empire, then belonged to Bavaria until 1815.
[359] Cf. Demandt, "Zur Geschichte der Grenzen Deutschlands."
[360] For the German relationship with the East, see section below.

Prussia, confirmed in the Peace of Dresden (1745), the Peace of Aachen (1748) and the Peace of Hubertusburg (1763). At the end of WWI, the Versailles Treaty fixed the German-Czech border in reference to the old imperial line, whose northern part had been fixed around the 17th century as the line between reformation and counter-reformation.[361] Poland demanded the area of Upper Silesia, but a referendum in March 1921 resulted in a positive vote for Germany by 59.6%. The League of Nations then adopted a compromise solution which meant that large numbers of German speakers remained in Poland and vice versa.

During the Third Reich, the fact that German speakers had long been settlers in the area (by 1938, they were a large minority of 28% in Czechoslovakia, the second biggest national group after the Czechs with 46%) became Hitler's pretext for annexing Bohemia and Moravia in 1938. The end of WW II led to a further change of the location of the border. The area east of the river Neisse became Polish so that the eastern section of the old German-Czech (or German-Austrian) border became the new Polish-Czech border. In the west of Czechoslovakia, the old border was reinstated, the north-western part bordering on the GDR, the south-western part on the FRG. The change of the border also led to the expulsion of around 3 million Germans from the Polish and Czech territories. The resulting refugee organisations in West Germany have played an important part in post-war German policy.

Today's German-Polish border is yet another illustration of Germany's problematic history and its relationship to borders. It is also, however, a symbol of the changed use of and relationship to borders in the decades after WW II. Poland's vicinity to the German Empire was a source of longstanding conflicts over border areas. It reached its first peak of political power in the 15th century after a victory over the Teutonic Order of Knights. The divisions of Poland (1772-1795) under the leadership of its neighbours Prussia, Russia and Austria lead to a *de facto* dissolution of the state. The renewed Polish state, proclaimed in the middle of WWI, was set up with contested territorial borders. It had a difficult starting position so that disputes about territory and the preservation of agreed borders became a major preoccupation.[362] In the time between the wars, Germany and Poland clashed

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[361] Foucher, *Fronts et Frontières*, 485.
[362] After WWI, a number of territories were given to Germany after referenda. Upper Silesia was divided and only the smaller part of it (but economically more important) was integrated into Poland. The area around Teschen and the border in the Tatra region were disputed with Czechoslovakia and fixed by ambassadorial conferences. A war broke out between Poland and the Soviet Union about the location of the Polish Eastern border (1920/21) which was fixed to Polish advantage in the Peace of

politically repeatedly over the location of the German eastern border (fixed in the Versailles Treaty) which the Weimar Republic refused to recognise. A 'customs war' about Upper Silesian coal also took place. A German-Polish non-aggression treaty in January 1934 reassured Poland. However, by 1938, the Third Reich started to insist on a reintegration of the free city of Danzig into German territory and extraterritorial transport routes through Polish territory. The one-sided termination of the non-aggression treaty by Germany exposed the illusion of territorial certainty and was soon followed by the German aggression against Poland on 1 September 1939, the start of WW II.

Despite the fact that the German territory was fixed by the Allies during the peace conferences (to the border on the rivers of Oder and Neiße), the German Democratic Republic and Poland never signed an official peace settlement. For the Basic Law of the Federal Republic of Germany of 1949, the restoration of German territory to the shape of 1937 remained a political objective. It was refugees from the former German areas of Pomerania and Upper Silesia who opposed recognition of the Oder-Neisse line, holding that these areas belonged to Germany historically. The former residents of Bohemia and Silesia also insisted on intransigence with the argument that no former German areas should be permanently given up.[363] The West German government gave a territorial guarantee to the Polish government in 1970. The Brandt government was of the opinion that the West German government could not sign a binding treaty for a unified Germany and thus could not go further than such a guarantee. Tensions remained between the interests of refugee organisations and political intentions of the government.[364] During the negotiations leading to German unification, recognition became a crucial stepping stone as will be explained in the following chapter.

The western border of Germany has also had a varied history which illustrates the evolution of the relationship between France and Germany. The Treaty of Westphalia transferred the rights regarding Alsace from the Hapsburgs to the French king. The

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Riga in March 1921. In summary, Poland risked conflict with all its neighbouring states with regard to the fixing of its borders. This weighed on relations also in the time after the war.

[363] They were leading a longstanding battle for the recognition of their property rights in Bohemia.

[364] The refugee organisations had continuously expressed their demands for Germany to be restored to the borders of 1937. Amongst other, this sparked off a debate regarding the portrayal of Germany in school atlases in the early 1980s. Cf. Dieter Baur, "Pochen auf Grenzen von 1937," *Süddeutsche Zeitung*, 6 April 1981, "Grenzstreit in Schulbüchern beigelegt," *Süddeutsche Zeitung*, 14 February 1981, ""Soviel wie möglich retten". Spiegel-Interview mit Vertriebenenminister von Hassel," *Der Spiegel* 1968, Rudolf von Thadden, "Warum fällt den Sudetendeutschen der Ausgleich mit Tschechien so schwer?," *Die Zeit*, 20 December 1996, Heinrich Windelen, "Information oder Propaganda?," *Deutschland-Union-Dienst* 30, no. 59 (1976)., "Frage der Ost-Grenze ist noch offen," *Die Welt*, 25 October 1983.

Treaties of Nijmegen (1672-1678/79) gave the French a patchy influence throughout the area. In 1679, the French king took possession of major parts of Alsace, justifying the action with 'historic rights'. The next major European conference which occupied itself with this territorial question was the Vienna Congress which decided to leave all territory acquired during the 17th and 18th century under French rule. Nevertheless, a sizeable German–speaking community remained in the area until the present day. This was the excuse for Chancellor Bismarck for appropriating Alsace-Lorraine after the war of 1870/71 in the Treaty of Frankfurt. However, this territorial change must not strictly be interpreted as an expression of ethnic politics and an attempt to bring all German speakers into the new German Reich. It was rather a strategic decision which was presented with a publicly welcome excuse in the shape of German culture. Indeed, the appropriated area not only included all German speaking parts, but also primarily French speakers, for example the cities of Metz and Château-Salins.[365]

In 1919, Germany had to return Alsace-Lorraine to France without any conditions, re-establishing the *status quo* of 1870. In the interwar period, Alsace-Lorraine was the object of demagogic assaults, claiming the 'return' to the Reich for all Germans. During WWII, the re-annexation of Alsace and the re-establishment of the border of 1871 was therefore an important objective (July 1940).[366] After the end of the War, the old border was reinstalled, but France also held the protectorate over the Saarland. Only in 1954 was the Saar area returned to autonomy and reintegrated into West Germany by 1959.

The German borders with Luxembourg and the Netherlands date largely from the 18th and 19th century. The border with the Netherlands can essentially be traced back to the Treaty of Westphalia which enshrined the independence of the United Provinces.[367] In 1815, the final act of the Vienna Congress founded the kingdom of the Netherlands (comprising today's Luxembourg and Belgium) and the border was thus fixed.[368] The border agreed then did not respect ethnic cleavages so that a sizeable minority of French speakers remained in the Prussian Rhineland and vice versa. Both minorities were confronted with politics of turning them into Germans or French respectively.

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[365] Cf. Lengereau, *Les Frontières Allemandes*, 19.

[366] The annexation was extended to Lorraine in November 1940. The people of Alsace and Lorraine never received German citizenship, but had the obligation to serve in the Wehrmacht.

[367] Originally, the Low Countries were part of the 'Reich'. It was in 1648 that the United Provinces formally left the Holy Roman Empire.

[368] Belgium became independent in 1830 and a treaty called des 24 articles of November 1831 fixed the borders of Belgium and gave it a neutral status.

After WW I, statutes of the League of Nations established in parts a new line of the border with Belgium: after a plebiscite, Eupen and Malmédy became Belgian. In effect, the border was pushed about 30 km to the east, leading to a situation where there were no more French speakers in German territory, but a number of German speakers remained in Belgium. The border was fixed in a protocol in Aachen in November 1922. During WW II, the territories of Eupen and Malmedy as well as the whole of Luxembourg were annexed to the Reich. The peace conferences at the end of the war fixed the border again in the old position. German speakers remained in Belgium, but arrangements were made for the accommodation of linguistic minorities.

The German-Danish border has been mentioned before as it was subject to a dispute as late as the 1860s when Prussia fought Denmark over the fixing of the border. Minorities on both sides had led to claims to the area. The Vienna Congress had attributed the duchies of Schleswig, Holstein and Lauenburg to Denmark, with the latter two being members of the Deutsche Bund. After 1865/66, the duchies of Schleswig and Holstein became part of the Prussian state and later the German Empire. After WW I, the destiny of Northern Schleswig was put to a plebiscite. The result split the region into two and led to the integration of the larger northern section into Denmark and of the southern section into Germany. WW II and the peace conferences did not change the German-Danish border. Subsequent arrangements were made to accommodate the remaining minorities on both sides. Even today, the Danish speaking community in Schleswig-Holstein enjoys special cultural and political rights and vice versa.

This short history of the German borders shows that the definition of German borders was problematic. The frontiers with France and Denmark were much disputed. The reasons for this lay in political-military interests, often covered in nationalist arguments. But the border which remained most problematic was the eastern border. Not only was the border here most changeable, it also was a witness to the problematic relationship of Germany with its eastern neighbours which will be explored next.

3. Germany and the East

Germany's relationship with its eastern neighbours has historically been problematic. This relationship was different from the one to France on the Western border where there had been close interaction since Germanic times. In a process of conquests, assimilations and oppositions, the French and German nations emerged in mutual differentiation. Demandt emphasises that even the Roman-Germanic language border has remained comparatively constant despite changes of the state borders.[369]

The following will show that the difficult relationship with the East was due to an uncertainty as to the differentiation against Germany's eastern neighbours. One the one hand, Germans have had longstanding relations with the East, often assimilated into these societies and held a fascination for Slavic culture. Only since Frederick the Great did relations between Poles and Germans become problematic. On the other hand, Poland, Czech or Russia – all Slavic countries – have held a symbolic place in German images of enmity. For example Neumann has shown how Russia has been constructed as Europe's Other over the last 500 years.[370] It is these tensions which created uncertainty and as a backlash also the myth of superiority of the Germans with regard to the Slavs.

One word of caution: the historical relationship between Germany and such a vast region is a multifaceted and complex phenomenon. The experience and interpretation of harmonious or inimical relationships depended on many factors, not least amongst them social class and position. This complexity cannot be rendered adequately here. The following account is merely presented to show the ambiguous relationship of Germany to its eastern neighbours – a relationship which became of renewed relevance after the fall of the Iron Curtain in the Schengen negotiations.

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[369] Demandt, "Zur Geschichte der Grenzen Deutschlands."
[370] Cf. Iver B. Neumann, "Russia as Europe's Other," *Journal of Area Studies*, no. 12 (1998).

3.1. Migration, exchange and the East as a German area of influence

Over the centuries, Central and Eastern Europe became an important area of influence for German culture, language and economic interests through migration and exchange.

Germans settled in the East since the Middle Ages.[371] Around 1100, German speakers started to settle east of the river Elbe and along the Baltic Sea. In the mid-12th century, so-called Saxons from Rhine and Mosel settled in Siebenbürgen, in the then Hungarian kingdom. In the 18th century, settlers from Southern and central Germany also moved east in larger numbers on the invitation of the Emperor (since 1716/18).[372] On the invitation of Catherine the Great around 30 000 German settlers moved into the area of the lower Volga river in 1763 to make use of the rich land. The political background was the intention to secure the area against the Tartars. By 1914 around 700 000 Volga Germans lived between Urals and the Ukraine. During the World Wars, the Volga Germans suffered progroms and deportation, more than halving their number. After WW II, many emigrated back to Germany despite the fact that they were rehabilitated within the USSR in 1964.

During the early Middle Ages, the border area between the Frankish empire and the eastern areas was 'marked by wide stretches of empty land. ... The frontier itself was not static ... [and] continued instead as a smudged line along the course of the Elbe, Saale and Enns.'[373] The reasons for the eastward movement have been sought in demographic pressures and a crusading ideology. Rady emphasises also that the 'new and vigorous eastward policy pursued by the German princes owed much ... to the new dynasties which took power on the frontier during the course of the early 12th century.'[374] These were the Welf branch of the Bavarian dukes, the Ascanian family and the counts of Schauenburg.

The mostly peaceful German settlement was in some parts of (later) Poland preceded by violent conquest. Contemporary sources are witness to mistrust between the settlers and

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[371] There were earlier contacts, of course: There was Germanic settlement on the southern shores of the Baltic and throughout the area of modern Poland until around 700. Slavs then moved westward and sttled up to the Elbe which led to the expedition of Charles the Great against the Slavs east of the Elbe at the end of the 8th century. This should not be regarded as the beginning of settlement of the Slavic area by Germans. Clearly defined bodies of Slavs and Germans did not exist yet at that time. Only the foundation of the Moravian, Polish and Abodrite dukedoms began to change this. Cf. Martyn Rady, "The German Settlement in Central and Eastern Europe During the High Middle Ages," in *The German Lands and Eastern Europe*, ed. Roger Bartlett and Karen Schönwälder (Houndmills, Basingstoke: Macmillan Press, 1999), 16.

[372] Banater Schwaben and Sathmarer Schwaben.

[373] Rady, "The German Settlement in Central and Eastern Europe During the High Middle Ages," 18f.

[374] Ibid, 22.

the Slavic population.[375] In other areas, the native princes invited the settlers in. The know-how of Germans in agriculture promised benefits to the economy. The settlers were granted special economic and cultural rights, allowing limited self-government. These innovations were soon adopted by the Slavic populations so that distinctions gradually eroded.[376] German settlement also led to the growth of urban communities. These were linked to a trading network in the West. Also new churches and monasteries changed the appearance of the landscapes.

Within two centuries, the German speakers came to dominate the lands between the Elbe and the Oder, parts of Pomerania and Prussia on the Baltic coast and there were also 'a thin stratum of German-speakers with heavier concentrations in the towns' in Courland and Livonia.[377]

Researchers emphasise that relations between Germans and Slavs were experienced as mostly harmonious and and that it is a nationalist misreading of the past which led historians to interpret relations differently.[378] Contact between the population groups was close and frequent and Germans often assimilated to the local populations. Karin Friedrich emphasises for the early modern period, for example, that 'for over 300 years the Polish-Lithuanian state was an example for the successful cohabitation of several groups of linguistic, ethnic and religious origin, who carved for themselves a common political identity under the aegis of "Sarmatian" nationhood.'[379] Similarly, Norman Davies emphasises that only one of ten recorded centuries can be said to have been dominated by entrenched mutual conflict.[380]

With regard to identity, studies of the Polish area suggest that the early settlers had a fluid identity and that a change occurred in the early modern period in which German speakers mainly assimilated to their Polish environment. Differentiations have to be made:

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[375] Cf. Ibid, 13.
[376] Thus, 'German law' villages were not necessarily German villages.
[377] Rady, "The German Settlement in Central and Eastern Europe During the High Middle Ages," 11.
[378] Norman Davies, "One Thousand Years of Polish-German Camaraderie," in *The German Lands and Eastern Europe*, ed. Roger Bartlett and Karen Schönwälder (Houndmills, Basingstoke: Macmillan Press, 1999), Karin Friedrich, "*Cives Patriae*: 'German' Burghers in the Polish-Lithuanian Commonwealth," in *The German Lands and Eastern Europe*, ed. Roger Bartlett and Karen Schönwälder (Houndmills, Basingstoke: Macmillan Press, 1999), Rady, "The German Settlement in Central and Eastern Europe During the High Middle Ages."
[379] Friedrich, "*Cives Patriae*: 'German' Burghers in the Polish-Lithuanian Commonwealth."
[380] Cf. Davies, "One Thousand Years of Polish-German Camaraderie."

German burghers who migrated over several centuries - mainly for trade and crafts - to other Polish royal towns were under pressure to choose between a German ("alien") and a Polish identity and, in a majority of cases, assimilated to their Polish environment. The traditions of Royal Prussia, however, provided its burghers with a strong political and national Prussian identity and distinguished them as Prussians from their German counterparts in the Polish and Lithuanian provinces. Nevertheless, what the burgher élites in all parts of the Commonwealth had in common was the civic consciousness of being citizens of a common fatherland, the Polish-Lithuanian republic. The attempt of the nobility to deny burghers a political consciousness equal, but not identical, to the noble nation of the Commonwealth had failed long before the Constitution of 1791 recognized the burghers as a political estate.[381]

Relations became more problematic with Prussian leaders who thought that Prussia could only prosper if Poland had no important role. This had lasting consequences and will be explored in the following section.

Migration also took place in the opposite direction so that many inhabitants of current Germany are descendants from eastern emigrants. At the end of the 19th century, German agriculture and industry were in need of foreign (often seasonal) workers and many migrants had come from the East. No reliable numbers are known, but an act of 1885 (in response to political nationalism) banning workers from the East and expelling those present in Germany resulted in the expulsion of 30 000 people. In 1890, the ban was lifted since landowners depended on the season workers from the East. A further indication of the numbers involved is given by Murphy who states that around half a million Poles and Mazures (from Eastern Prussia) had migrated to the Ruhr Area before 1914.[382] They settled in the Rhineland for work in the heavy industries; other destinations were industries in northern Germany and rural Prussia for agricultural work.

After the Second World War, the migrants from Eastern Europe came for different reasons: they were former citizens of the Reich or ethnic Germans who were forced to leave. Official estimates of the German government state that in 1950, around 12 million citizens of East and West Germany were expellees. In the 1950s and 60s, smaller numbers of political refugees came to Germany from Hungary, Czechoslovakia and other CEE countries. In the 1980s, immigration of ethnic Germans from Eastern Europe grew

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[381] Friedrich, "*Cives Patriae*: 'German' Burghers in the Polish-Lithuanian Commonwealth."

[382] R.C. Murphy, *Guestworkers in the German Reich: A Polish Community in Wilhelmian Germany* (Boulder, CO: 1983). cited after Karen Schönwälder, "Invited but Unwanted? Migrants from the East in Germany, 1890 - 1990," in *The German Lands and Eastern Europe*, ed. Roger Bartlett and Karen Schönwälder (Houndmills, Basingstoke: Macmillan Press, 1999).

markedly.[383] Integration of post-war refugees represented a challenge to German society. Although most accounts present this process as a success story, research has recently questioned this and shown that there was also considerable opposition to 'Polacken', mostly in the rural areas.[384]

This account shows that the exchange between Germany and Eastern Europe was no one-way street. Germans migrated East in large numbers over the centuries, taking with them German culture, language and skills. They assimilated there into local societies although keeping a heritage of German culture. Eastern European immigrants to Western Europe started to come towards the end of the 19th century. Despite the fact that they were subjected to tight controls and obligations of seasonal work, many eventually remained and settled in Germany.[385] Today, regions such as the Ruhrgebiet show this heritage through the many Polish names remaining there.

Migration is only one facet of the links between Central and Eastern Europe and the West. For centuries, Russia was linked to western Europe through dynastic ties and through importing western culture. On the imperial level, for example Tsar Peter III was born as Count of Holstein-Gottorf and Catherine the Great was a Prussian princess.

Also trade and economic influence created lasting ties between Germany and its eastern neighbours. The aforementioned Teutonic Order, founded in 1190, was important in establishing German influence in the areas neighbouring Germany. The Hanse, a term for an alliance of trading cities from the Entherlands in the West to Eastern Livland, also was influential in promoting German dominance in trade. The organisation was politically and economically powerful and secured its members trading privileges. It remained influential until the 16th century.

This German influence in trade translated into a tradition of industrial and technical relations with Central and Eastern Europe.[386] As a result, the German government and

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[383] See table on ethnic Germans coming to Germany in the appendix.
[384] Cf. Schönwälder, "Invited but Unwanted? Migrants from the East in Germany, 1890 - 1990."
[385] They also settled in mining areas of France and Belgium.
[386] Otto Wolf von Amerongen, *Der Weg nach Osten. Vierzig Jahre Brückenbau für die deutsche Wirtschaft* (München: Droemer Knaur, 1992). „Wir haben eine Tradition in den industriellen und technischen Beziehungen mit Mittelost- und Osteuropa. Vor dem Ersten Weltkrieg und auch bis zum Zweiten Weltkrieg war Deutsch die Hauptfremdsprache der russischen Ingenieure." p. 314.

business were the most engaged in Central and Eastern Europe in the year immediately following the fall of the wall. [387]

Exchange occurred between Germany and Eastern Europe in both directions, but the more lasting cultural and structural impact was certainly made through German settlers in the East. The areas east of Germany became the traditional German sphere of influence. German was spoken in all adjacent regions. German culture dominated especially in the cities and East European intellectual life up to the 19th and early 20th centuries. At the same time, however, German relations with the East became increasingly problematic from the 18th century onwards. Political rivalry and economic nationalism led to difficult relations in which Germany denied Poles the right to national self-determination. At the same time, a feeling of superiority with regard to 'Slavs' emerged.[388]

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[387] By 1992: 105 billion DM of loans and transfer fees, over 50% of all western aid. Ibid, 313.

[388] One might also argue that this feeling is due to a much longer development, starting with the Roman feeling of superiority towards tribes outside the Empire and continuing with the threat of 'barbarians' to the East Roman Empire.

3.2. The problematic relationship with the East

Despite the fact that relations with Central and Eastern Europe were harmonious for most of the early German settlers, later political and economic relations between Poland, Russia and western Europe were much less so. Thus, a distinction ought to be made between the individual experiences of settlers and powerful political myths influencing public opinion.

Slavs in general were portrayed as threatening to western civilization.[389] Yet another distinction has to be made in the relations to Poland or Czech and Russia. While the former were increasingly portrayed as inferior and denied self-determination, Russia – albeit represented as uncivilized and barbaric – remained a power factor to be reckoned with.

Relations started to become especially difficult in the 18th century. While Russians had been viewed as barbarians by western Europe even in the 16th and 17th century,[390] strategic issues and Russia's position in the European power constellation became more important in the 18th century with Russia's predominance at the Baltic Sea. Tsar Peter I opened a 'window on the West' and western European opinions held it to be a 'newcomer among the great nations (which) stood supreme between Europe and Asia, and looks to dictate to both."[391] Many Germans sought their fortune in the service of the Tsar. Russia and its Tsar were seen as barbarians, but willing and able to learn from Europe. At the same time, it was seen as a valuable ally against the Turks. Also during the 19th century, the 'theme of the barbarian at the gate' was reinforced.[392] Not only Germany, but also the French and English took this perspective: Neumann quotes de Bonald as referring to the 'nomadic character' of the Russians or l'abbé de Pradt viewing Russia as 'built up despotically and asiatically'.[393] The 20th century continued this theme: Adenauer wrote just after the war that 'Asien steht an der Elbe'.[394] Russia was now often viewed as authoritarian or totalitarian, replacing the old stereotype of barbarian and uncivilised. In parallel, however, there was always also a fascination with Russia's difference which was understood as an opportunity for the future. Neumann mentions here the conservatives of 19th century Europe who

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[389] Indeed, German literature stands in a tradition of a 'West' and 'East' differetiation, whose roots can be found in the Middle Ages.

[390] Neumann, "Russia as Europe's Other."

[391] Ibid.

[392] Ibid.

[393] Ibid., p. 40, 42. Especially the time before the Napoleanic excursion saw an orchestration of publications highlighting the strategic danger in a powerful Russia.

[394] Hans Peter Mensing, ed., *Konrad Adenauer. Briefe, 1945-47* (Berlin: Siedler, 1983).; 'Asia is standing on the river Elbe'

hoped that Russia retained ideas of the *ancien régime* and could help Europe to find back to its own proper self. Russia was seen as a nation of 'primitive health' and advanced spirituality which might 'furnish (Europe's) spiritual renewal.'[395]

The relationship to Poland was different and engendered a lasting negative stereotype of the Slavs. Frederick the Great 'undoubtedly changed the tone for the worse.'[396] In his calculations, Prussia could only thrive if Poland was destroyed. He apparently commented his role in the dissolution of the Polish Commonwealth with the words '*Vita mea, mors tua.*[397] From then onwards, the constituting German Polish nations met each other with growing enmity: 'In the hands of Prussian leaders, German identity was nurtured with a sense of superiority over Germany's eastern neighbours.'[398] The official 'myth' regarding Poles and Slavs in general stereotyped them as 'lazy, incompetent and incorrigibly rebellious savage(s).'[399] Anarchy and inefficiency marked the ideas of historians as well as the public with regard to Poland. 'Polnische Wirtschaft' became a common expression for 'shambles'.

One important example of this are the debates in the Paulskirche in 1848. During the debates of what areas were part of the German state to be constituted, there was no space for the interests of neighbouring nations. Von Gagern, a leading liberal, explained the mission of the Germans to rule the people in the East who had no claim to sovereignty. Strategically, the eastern neighbours were to be kept in check with Austria's help: 'Es gelte durch den Fortbestand Österreichs, sei es Slawen-, sei es Magyaren- Reiche an der Ostgrenze Deutschlands zu hindern.'[400] Indeed, the inclusion of all of Austria in the new empire was to ensure the success of a 'holy war of the culture of the west against the barbarians in the east.'[401] Thus, the Polish nation was denied a right to its own state.

German superiority with respect to Slavs became deeply engrained as these examples show. During the Third Reich, these stereotypes bore their fruit. Although the excesses of the

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[395] Fridtjof Nansen in 1923, quoted in Neumann, "Russia as Europe's Other," 36.
[396] Davies, "One Thousand Years of Polish-German Camaraderie," 261.
[397] Ibid.
[398] Ibid.
[399] Ibid, 262.
[400] Winkler, *Der lange Weg nach Westen. Deutsche Geschichte vom Ende des Alten Reiches bis zum Untergang der Weimarer Republik*, 119. „daß wir diejenigen Völker, die längs der Donau zur Selbständigkeit weder Beruf noch Anspruch haben, wie Trabanten in unser Planetensystem einfassen."
[401] Ibid. „dieser heilige Krieg der Kultur des Westens gegen die Barbarei des Ostens", p. 122. In this quotation, Poland and Hungary are included on the 'Western' side, thus expressing the fears projected into Russia.

Nazi era can hardly be judged typical, they are a good example of what dimensions the German perspective on Slavs could take and what consequences it could engender. Slavs were eliminated from humankind, they were 'Untermenschen' in the racial discourse of the Nazis so that all policies regarding their native lands was permitted. The East was turned into the supposedly vital 'Lebensraum' for the Germans. The 'drive to the East' (Drang nach Osten) was taken as a sign of the vitality of the German people. To some extent, the rights of the Germans to the eastern lands were presented as if they were 'empty lands'. The gravest crimes of the Holocaust were committed in the East as if this were area to dispose of.

The end of the war led to yet another discontinuity in German historical identity. The relationship with the East and most particularly the racist stereotyping of the Nazis was not problematised. In the Democratic Republic, there were deliberate attempts to educate people as philo-Slavic. Poles were represented positively in poems and prose, and the plural nature and common experiences in the border provinces was emphasised (see e.g. Johannes Bobrowski).[402] The asymmetrical relationship with Russia refashioned the relationship under new ideological auspices. It is to be assumed, however, that underneath the surface, the old stereotypes remained – also due to the fact that the old clichés had never been critically worked through.

In the Federal Republic, the relationship with the East was shaped under the impression of political opposition and pragmatic solutions. The political and educational emphasis turned west. Knowledge about the East and its historical relationship with Germany was not of primary concern. History lessons in schools hardly dealt with Eastern Europe. Scholars and political experts for Eastern Europe remained, but their work was overshadowed by the overpowering ideological rift.

To sum up, the German relationship to the East was characterized by ambiguity and complexity. Migration and trade led to numerous linkages and exchange. Growing political rivalry led Prussian leaders to paint Slavs and Poles in particular as barbarians and nomads, inferior to the west. The East was seen as a source of instability and chaos. On the other hand, the East – especially Russia – was also mystified as having strong spirituality, and there was an undercurrent viewing Russia as a 'land of the future'. After the war, large

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[402] Thomas C. Fox, "Imagining Eastern Europe in East German Literature," in *Germany and Eastern Europe. Cultural Identities and Cultural Differences*, ed. Keith Bullivant, Geoffrey Giles, and Walter Pape (Amsterdam, Atlanta: Rodopi, 1999).

numbers of refugees and migrants led to a picture (in Germany) in which the East was seen as an area of potential emigration.

4. Conclusions

This chapter has described the problematic territorial identity of Germany. The history of the country was characterised by an uneasiness with regard to identity definition: 'Diese Unsicherheit in der Bestimmung der deutschen Identität kontrastiert scharf zum historischen Selbstverständnis von Deutschlands westlichen Nachbarn.'[403] Germany or rather the successive German states have had many shapes during their history, even if only counting from the 19th century onwards (the German Empire, Germany after 1919, Germany after 1937, Germany after 1945, Germany after 1989). Going further back, the shape of the Holy Roman Empire and all individual German principalities have to be considered. This accounts for the fact that there are many diverse historical image of Germany in collective consciousness.

Germany's borders were changeable, most prominently in the East. Looking back on the different historical development of the eastern and western frontier, it becomes clear that the former commanded much more sensitivity. After WW I, the question of the eastern border problem remained unresolved[404] and was the object of challenges in the 1930s, whereas the Western border was essentially settled after WW I although Alsace remained a point of dispute. Therefore, talk about 'Germany in the borders of 1937' met with high sensitivity with Germany's eastern neighbours from after WW II until the 1980s. At the same time, the eastern border of Germany is much more connected with the above mentioned search for a definition of German-ness. Myths abounded about 'the East' which was wild, uncivilised and threatening. German culture and 'soul' was repeatedly defined in opposition to Slavic culture and civilisation. Indeed, German claims to supremacy were based on an argument of cultural and political superiority to the East.

The eastern border was perceived as protection as well as a moveable object if political and military means allowed. Only after WW II did a major change come about. A thorough re-orientation of the political elites led to the incorporation of principles of territorial stability and inviolability of borders into the political culture of Germany. At the same time, the claims of refugees from the eastern territories were a constant element of Germany politics. The agreement of the political elites was that if a revision of the eastern border had to be reached, this was to be with the means of a treaty of both German states. The eastern

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[403] Schulze, *Gibt es überhaupt eine deutsche Geschichte?* , 18.
[404] The solutions found led to sizeable German minorities in Poland and Czechoslovakia.

border was politically recognised and fixed by international law in the process of unification. It remains a border with Slavic countries whose political culture and mentality are much less known to the majority of contemporary West Germans, especially elites, than the West.

Despite the lack of a fixed image of Germany, the stability of borders has become part of German consciousness today: the recognition of the Oder-Neisse showed that such an act stirred only the emotions of a relatively limited group of former refugees. The recognition of the current borders as final is generally accepted. Unification was seen as the end of the German question but also the end of territorial instability.

A heritage of German history certainly remains, however. German elites take into account the hesitations of neighbours and partners regarding German involvement in territorial questions. Any political arrangements which could remind people of the German rule over neighbouring countries are approached with great caution. This obviously played a role for the Schengen negotiations when dealing with questions of police presence abroad or preservation of sovereignty based on territorial integrity.

This short history of Germany as a nation and state as well as of its borders was intended as a background to the discussion of the role of borders and border controls at the end of the 20th century. It was my intention to show

1. that Germans have long lacked a collective mental map of the country (which the French have for example), and that German borders in the East commanded great sensitivity,
2. that the stability of borders after WW II has been generally recognised,
3. that German-ness originally referred to a cultural essence rather than a political project; the process of the emergence of a German nation-state – and its borders – was therefore connected to the cultural idea of German-ness,
4. that the changes of 1989 not only involved territorial changes for Germany, but also stirred concerns of Germany's neighbours with regard to its future role in Eastern Europe as well as the security of its eastern border. France, Great Britain and Poland all had major reservations with regard to German unification.

Chapter 5

The German debate on border controls

This chapter shows the interaction of two main strands in the German debate of border controls: one was the issue of Germany's eastern border and the country's relationship to Eastern Europe and the other was the gradual dominance of security concerns in border policies. The former was partly resolved in the process of unification. The latter issue was crucial in the Schengen negotiations and received new dynamics through the changes of 1989.

The previous chapter outlined Germany's historical relationship with its borders. It showed a historical uneasiness to fix an image of Germany. This chapter demonstrates how these issues became important again in the national debate regarding borders around 1989.

This debate was set in a context which contained a number of challenges. Firstly, the German debate before 1989 had left open the legal questions regarding the Eastern border. Secondly, the prospect of unification raised old concerns of Germany's neighbours regarding German dominance in Europe and its turn eastwards. Unification pushed for a closure of the open question of the Oder-Neisse border – both due to Germany's international partners as well as due to German legal self-understanding. The disintegration of the Soviet Union with the ensuing political uncertainty raised fears regarding possible floods of migration and crime. The border debate was also partly conditioned by Germany's commitment to the European integration process. It was active in promoting policies furthering market integration and abolishing internal border controls.

German policies regarding borders from the late 1980s to the mid-1990s were faced with the challenge of managing a balance between rising numbers of asylum seekers, immigrants, organised crime, and great fears on the side of the population about unmanageable 'floods' of migrants.

The arguments for reinforcing external border controls and abolishing internal border controls were dominated by security concerns, thus threats to social cohesion in the form of migration and crime. The border was presented as an important barrier and filter, and thus indispensable for security provision at the external borders. At the same time, the abolishing of internal border controls was justified through the inefficiency of internal border controls and the superiority of European cooperation.

Thus, while 1989 opened up a set of questions regarding Germany's borders, the debate regarding the role of the border for security did not change fundamentally. The importance

of the border in this respect had been emphasised by security professionals since the beginning of the negotiations. The opening up of Eastern Europe foregrounded potentials threats, however, and thus intensified the debate.

1. Actors in German border policies

The following sets out the major players in the policy field of internal security in Germany. While there are indeed many actors involved, two institutions have proved crucial for devising border policies, also in the context of the Schengen negotiations: the Federal Ministry of the Interior and the BGS. They therefore receive more detailed attention in the subsequent sections.

1.1. The structure of the policy field regarding border controls

Generally speaking, a policy network consts of various political and social institutions, groups and individuals. Majone defines a policy community as 'composed of specialists who share an active interest in a certain policy or set of related policies: academics, professionals, analysts, policy planners, media and interest-group experts. The members of a policy community represent different interests, hold different values, and may be engaged in different research programs, but they all contribute to policy developments by generating and debating new ideas and proposals.[405] Den Boer has identified the members of the community of European police cooperation to represent a variety of professions (police, politics, academia, civil service). As characteristics of the field, she mentions fluctuating membership and participation but also a relatively high institutionalisation of the members of the policy community, to the extent that the actors have created their own rules and procedures.[406]

Although the German policy community resembled the above description of the European one in terms of institutionalisation and the development of particular procedures, it differed significantly in terms of participants: The decisive community was largely limited to civil servants in the federal ministries, security professionals from the law enforcement services and elected politicians who either specialised in internal security or were concerned with European integration. Expertise and reference to data played a large role in the political debate – which gave the professional security services and the bureaucrats in the Ministry of the Interior important influence. Academics and interest-group representatives were nearly invisible in the debate. Only the organisations of expellees from areas now part

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[405] Cf. Giandomenico Majone, *Evidence, Argument and Persuasion in the Policy Process* (New Haven: Yale University Press, 1989), 161.
[406] Cf. den Boer, "The Quest for European Policing: Rhetoric and Justification in a Disorderly Debate."

of Poland, the Czech Republic, Hungary and Russia were very vocal in the debate on the recognition of the eastern border of Germany. The media, quality newspapers as well as broadsheets and television, also played a role in the debate regarding unwanted foreigners and asylum seekers in Germany.[407] They mostly highlighted and reinforced a discourse of asylum abuse which was present in parts of the population and was voiced by a number of politicians. With regard to the Schengen negotiations, media interest was low. Extended coverage only took place during the phases of intended and actual abolition of border controls. At those points in time, both the advantages for citizens as well as the warnings of security professionals were reported.

The debate regarding border controls was framed nearly exclusively in terms of internal security. The second part of the chapter will show that it was the arguments of the security experts, the bureaucracy and politics that structured the debate so that the influence of other actors remained low. A number of organisations such as NGOs, lawyers' associations or courts could have made relevant contributions to the debate, framing it in terms of their perspectives, i.e. civil rights (whether based on citizenship or universal), constitutional values other than security (liberty to exercise individual rights) or the loss of sovereignty in an area which is at the heart of governance. This was not the case, however. They were not able to portray the issues of immigration and asylum in a way that they would be perceived as potential assets. Instead, the threat posed by 'imported' crime and culture was prominent in the discussion. In this respect, the institutionalised interests of security experts and bureaucracy acted as gate-keepers to the NGOs who were not able to set the agenda. NGOs addressing the issue from a perspective of rights were not able to counteract the force of the security logic. Thus, the central actors in the national debate were the civil servant security professionals on the one hand and political elites responsible for overall government in the Chancellery.

For security professionals, the European level held a particular importance. In the national bureaucratic negotiations, more weight could be given to an argument by security professionals if they felt that a European coalition of experts existed, such as in the topic of internal crime and terrorism. The circles of security experts which had been formed from the 1970s onwards were supportive in this sense.

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[407] On this debate, see Heribert Prantl, *Deutschland - Leicht Entflammbar* (München: Carl Hanser Verlag, 1994).

The German position in the Schengen Agreements is a result of a specific combination of institutional interests, larger political objectives and publicly acceptable demands. It represents the consensus on the necessity of measures in a specific political sector in a particular historical and political context. Nevertheless, border control policy had to be compatible with overall European policy.

Border issues and controls do not generally constitute an element of the public debate. Only when major changes are proposed or events catch the eye of the public, do they become important issues. Also during the Schengen process, public attention with regard to border issues themselves was small. Often, the issues to be decided had a rather technical appearance and therefore received little media attention.[408] Only major events in the policy field attracted the attention of the media and thus also the public. Peaks of public attention were therefore the July 1984 French-German Agreement as the first of its kind; the German-Austrian Agreement in August 1984; the first Schengen Agreement in June 1985; the signing of the Schengen Implementing Convention in 1990; the envisaged implementation date for the internal market at the end of 1992; the enactment of the SIC in 1995. In between these periods, public attention was relatively low. Some attention was dedicated to the repeated postponement of implementation. Even today, the Schengen Agreement is relatively little known in the public.[409]

Although public debate was not focused on the details of the European agreements on border policies, keeping the borders tightly controlled and limiting immigration were recurrent themes in the tabloid and serious press. Significant rises in the numbers of asylum seekers and ethnic Germans in Germany were counted in the late 1980s and early 1990s. Attacks on asylum seekers' homes and 'different looking' foreigners became more frequent.[410] The issue received large media attention, focussing on retracing the numbers of asylum seekers in recent years and the abuse of the liberal asylum law in Germany.

Actors arguing for a change of the current system became influential in the time of attacks on foreigners. The originally conservative argument that the practice of asylum had to be

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[408] Bigo makes a similar argument as to why the issues received little public attention. He emphasises that while the issues had a technical appearance, the decision to be made were political. Bigo, ed., *L'Europe des Polices et de la Sécurité Intérieure*, 29.

[409] In a quiz show on German tv in 2001 – thus six years after the start of implementation - , the candidate was not even able to identify the name of the agreement which abolished border controls. The choice was between Luxembourg Treaty, Maastricht Treaty, Schengen Treaty or Nice Treaty.

[410] Cf.Beauftragte der Bundesregierung für Ausländerfragen, *Daten und Fakten zur Ausländersituation* (Berlin: 2000).; see the table on attacks on foreigners in Germany in the appendix.

changed to a situation where there would be fewer numbers and less abuse convinced a wider public, impressed by the crimes committed against foreigners. The 'asylum compromise' of 1992, a change of the constitution which limited the right to asylum received wide coverage. This legal change also introduced a central role for border control in asylum policy. Thus, the – rather fundamental - changes in border policies were often started by concern about other political issues.

It is indicative that no public opinion poll institute conducted a survey regarding fears or expectations of the Schengen process of opening internal borders. However, internal security surveys existed and they contained illegal immigration and foreigner crime as objects of enquiry.[411] These showed high concerns for personal security and a limiting of the numbers of asylum seekers. It can be stated, therefore, that negotiations of the Schengen Agreements happened without much direct public attention or scrutiny while issues such as migration and asylum were high on the agenda. Thus opinion-building and decision-making was often limited to the political elites.

1.2. Federal Ministry of the Interior

The German constitution grants all legal competence to the Länder unless it has been explicitly transferred to the federal level. Art. 73 Nr 5 of the German Basic Law gives the federal government exclusive competency over the controls of people and goods at the border. Only this explicit mandate gives the federal government the permission to use a federal force – police matters are otherwise the competency of the Bundesländer. In Bavaria, a special administrative arrangement of 1975 gives the competence to guard the borders to the Bavarian Border Police, the *Bayerische Grenzpolizei*.[412]

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[411] See for example the ipos-surveys commissioned by the Ministry of Interior: "Große Zufriedenheit mit dem Politischen System und der Demokratie," *Innenpolitik*, no. VII (1988), "Politik in den Augen der Bürger," *Innenpolitik*, no. V (1991), "Zufriedenheit der Bürger mit der Demokratie erreicht Höchstwert," *Innenpolitik*, no. V (1990).

[412] This is a recognition of the special position of Bavaria already in the German Empire. Bavaria is legally equal to all other Länder, but does retain a special status in some respects. For example, the Bavarian constitution still confers a Bavarian citizenship – which is legally void due to the overarching German citizenship, but holds symbolic power.
The Bavarian Border Police was founded after the war under the Allied Forces. In 1953, a non-published administrative agreement was concluded between the federal government and the Bavarian government, giving the competence to control passports to the Bavarian Border Police. The 1975 Agreement clarified the legal situation and accorded all tasks of border control to the Bavarian Police. The general interpretation of the legal situation states that the Länder may fulfill these tasks as long as the federal level does not legislate to do otherwise. In 1992, a modification of the agreement made the BGS responsible for the guarding of the open border line with the Czech Republic and of the new Munich airport. Cf. "Verwaltungsabkommen zwischen dem Bundesminister des Innern und der Bayerischen Staatsregierung über die Wahrnehmung von Aufgaben des grenzpolizeilichen Einzeldienstes in Bayern," 3 July 1975.

The Bundesministerium des Innern (BMI) in Germany is the central institution charged with the provision of security internally. This comprises protection from crime, protection of constitution and state, security in information technology and also border controls. The Federal Minister of the Interior is charged with supervising the work of the federal border guards, the *Bundesgrenzschutz*. Amongst its other tasks are: responsibility for employees in the public sector – most BGS employees are civil servants -, political education of citizens, promotion of sports, aid in emergency situations and policies on asylum seekers and foreigners in general. This bundling of tasks indicates not only a conceptual link between internal security and border controls in Germany, but also an institutional one.

The Ministry is hierarchically ordered. The organisation is headed by the Minister and the Permanent Secretaries (two are Members of Parliament, two are civil servants).[413] The day-to-day running of the Ministry as well as the supervision of policy proposals are the responsibility of the Permanent Secretaries. As so-called political civil servants, they comply with the general policy of the Minister. The Permanent Secretaries head the organisational units of the Ministry: around 10 units (*Abteilungen*), around 1-3 sub-units (*Unterabteilungen*) and a number of departments (*Referate*). With regard to border controls, the BGS unit, but also the police unit, constitutional law unit and internal security unit are of special importance.[414] These were also involved in the Schengen negotiations (the German involvement in the negotiations is outlined in chapter seven).

The Minister is part of the cabinet, and appointed and dismissed by the chancellor. In the German political system, the competence of the Minister is set within a field of tension: the chancellor has the *Richtlinienkompetenz*, the competence for the general guidelines of policy and takes responsibility for overall decisions (*Kanzlerprinzip*). Within that, each Minister leads his or her Ministry independently and under his own responsibility (*Ressortprinzip*). This means that no Minister can design a policy against the express wishes of the chancellor. On the other hand, a minister has the right to make basic decisions independently and on his own responsibility. It is within this tension of competence that policy-making takes place. Given the growing links between the national and the European level with regard to border policies, it can be validly supposed that the fundamentals of

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[413] For a table showing the Ministers and permanent secretaries from 1983 onwards, please refer to the appendix.

[414] The organisational structure of the Ministry can be found in the appendix.

interior policy with implications for a European border policy complied with the intentions of the chancellor.

With regard to border controls, this policy area remained in the hands of the Ministry until European integration interests pushed them onto the European-level agenda. It was then that the Chancellery took over until the fundamentals had been agreed. The BMI remained closely involved in the process because its expertise was important for the progress of negotiations and for safeguarding Germany's interests.

Summing up, in the German debate regarding borders, the Ministry of the Interior was regarded as competent in regard to border controls whereas the chancellery dealt with general policies regarding foreigners and migration and defined Germany's overall interests on a European level. With regard to border policies, the BGS has a special role in the German political system which will be outlined in the following section.

1.3. Bundesgrenzschutz (Federal Border Guard)

The following outlines tasks and history of the Federal Border Guard in Germany who were an important actor in the national border control debate and centrally involved in the Schengen negotiations. The nature and tasks of the BGS have changed considerably over time. At its foundation it served as a para-military force with the tasks of border control and the countering of any anti-democratic movements – at a time when the young, semi-sovereign West Germany was not permitted to have an army. By the end of the 1990s, it had changed to a police service with an emphasis on the actual control of borders and protection of rail and air traffic.

1.3.1. History of the Bundesgrenzschutz

The development of the Bundesgrenzschutz has to be seen within its historical context.[415] First of all, a 'federal police' is an exception to the German constitutional system which places emphasis on the primary legal competences of the Länder – thus making police an exclusive Land competence. This was owed to the historical constitution of Germany out of many autonomous entities as well as the disastrous experience of centralization during the Third Reich. Nevertheless, Germany needed a federal force with powers to guard its borders, but also able to fulfil tasks of public order maintenance and territorial defence. It thus differs from the French 'gendarmerie' which fits with a generally centralized administrative and police system.

Secondly, the distinctive features of the BGS owe to its origins in a divided Germany which was not permitted to maintain an army. Thus, it was founded in 1951 as a paramilitary service. Its task as defined in the first law on the Bundesgrenzschutz was the protection of the borders against dangerous disruptions of the public order in an area of up to 30km from the border. It was intended to be used against (Communist) infiltrators and partisans. In 1953, the the Bundestag raised the initial numbers of personnel from 10,000 to 20,000 after plans of the government for a genuine federal police had been opposed from Bavaria.

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[415] For the summary of the BGS history, I have referred to Martin Winter, "Kleine Geschichte des Bundesgrenzschutz," *Bürgerrechte & Polizei* 47, no. 1 (1994)., Bundesgrenzschutz, *Geschichte* (2000 [cited 2001]); available from http://www.bundesgrenzschutz.de/allgem/chronik/chronik.htm, Wolf-Dieter Narr, "BGS - Die Bundespolizei," *Bürgerrechte & Polizei* 47, no. 1 (1994).

In 1956, the 'reserve function' of the BGS for an army became apparent when a changed law on the Bundesgenzschutz gave civil servants of the BGS the opportunity to change over to the newly formed Bundeswehr. 57% of BGS officers made use of this option. Now that it had lost its substitute role for a military, a debate on the use and the future of the BGS began. The official explanation given for its continuing existence was given as follows: in the case of crisis, the BGS could act as a buffer by its nature of being a police force; police would lead less easily to military escalation on the demarcation line; a national police service would be needed in the case of an internal uprising. They thus retained a para-military function to the extent that they were tasked with territorial defence. This was reinforced in 1965 when they were given the status of combatants, making them part of the fighting troops in the case of war. At the same time, they also had a more police-oriented role in their function of public order maintenance.

A change towards more police tasks occurred with the new law on the BGS (2. Bundesgrenzschutzgesetz) in 1973. The protection of the borders remained a central task and was complemented with other tasks: support of the police of the Länder in special situations; the limitation of the area of service to up to 30 km in the border region was lifted. Since the 1970s, this special police of the federal level has acted as a reserve for the Länder and they have been present at major demonstrations. In 1976, a law on the structure of personnel of the Bundesgrenzschutz completed a process of assimilating the structures from military to the ones of police. Education and rank of the BGS were assimilated to those of the police of the Länder.

As a result of the planned abolition of EC internal border controls, a planning group (Planungsgruppe BGS 2000) was set up in 1987. Its proposals included compensatory measures for the loss of tasks at the borders.[416] German unification and the disappearance of the German Democratic Republic rid the BGS of one of its important tasks and original focal points as envisaged at its foundation. The BGS of the former GDR (founded in 1989, 2,300 personnel) was added to the BGS. A new 'Grenzschutzpräsidium' East was founded with a final number of personnel planned to be 8,300. However, the use of the new personnel was at first not possible since all new state employees had to be checked for relations with the Staatssicherheitsdienst of the GDR. There was therefore a shortage of personnel in the East which had to be compensated with Western personnel.

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[416] Cf. "Kaum eine Lebensstellung - Der Bundesgrenzschutz auf der Suche nach seinen Aufgaben im Jahr 2000," *Frankfurter Allgemeine Zeitung*, 12 November 1988.

In 1992, a new law gave the BGS the new tasks of rail and air traffic protection, thus emphasising even more police tasks. This necessitated a new organisational structure. The services for border controls and the police standby component were integrated into one service divided along regional lines. With the entry into force of the Schengen Agreement between Belgium, Germany, France, Luxembourg, the Netherlands, Spain and Portugal in 1995, the controls at the internal borders were suppressed.

As far as the BGS' tasks go, it evolved from a force against Communist rebels to a reserve police of the federal level. Guarding of the borders has always been their explicit task, with a special reference to the inner German border. The internal German border, or any borders, however, although important symbolically for their tasks, was not a concentration point of their forces.

The BGS developed from a service military in nature to one structured like police in the course of its history. It can no longer be compared to the Gendarmerie in France or Spain since it has lost its military character, both in organisation and in its task. The only remaining such task is the use of the BGS in the case of emergency or defence. However, there are still policemen of the Länder police who remark on the *esprit de corps* of the service, reminding of military. Diederichs quotes an officer of one of the Länder police: 'Den BGS einsetzen heißt Aufgabenerfüllung um jeden Preis.' He adds that the units of the BGS are little mobile and that they are more focussed on executing orders than problem solving and adjusting to the situation.[417]

1.3.2. Tasks and organisation

The Basic Law and federal laws charge the BGS with important tasks in the area of border security and public order maintenance. The duties of the BGS today are specified in the law on the Bundesgrenzschutz which has been last revised in 1994.[418] Several additional laws such as the Alien Act, Asylum Procedure Act and the Air Traffic Law also have regulations which describe the tasks of the BGS. These include:[419]

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[417] Otto Diederichs, "In welcher Verfassung ist der BGS?," *Bürgerrechte & Polizei* 47, no. 1 (1994): 34f. Translation: Using the BGS means fulfilment of tasks at any price.
[418] "Bundesgrenzschutzgesetz," *Bundesgesetzblatt* 19 October (1994).
[419] by the year 2000. Bundesgrenzschutz, *Bundesgrenzschutz - Federal Border Police.*

- border-police protection of the Federal territory
- railway-police duties
- protection against attacks on the security of air traffic
- protection of constitutional institutions of the Federal Government and the Federal Ministries
- duties on the North Sea and the Baltic Sea
- police duties in states of emergency and in the case of defence
- involvement in police duties abroad under the responsibility of an international organisation
- support of the police service at the German Parliament
- support of the Ministry of Foreign Affairs to protect German diplomatic and consular missions abroad
- support of the Federal Office of Criminal Investigation in protection and escort services
- support of the Federal Office for the Protection of the Constitution in the field of radio communication
- support of the police forces of the Federal Länder, particularly with large-scale operations
- assistance in cases of catastrophes or particular accidents including airborne rescue services

Organisationally, the BGS is located within the Ministry of Interior. The BGS unit in the Ministry consists of two subdivisions, one dealing with general, administrative economic and personnel matters, the other with actual interventions, that is principles of interventions and leadership, rail and air traffic protection and international cooperation. Here, the main policies regarding the BGS, its tasks, organisation and future planning are designed. Responsibility for the Schengen negotiations in the Ministry lay within the BGS unit, with the Schengen representative and the Department for International and Police Cooperation.

The organisational location of the BGS within the BMI has advantages for both the ministerial bureaucracy and the service itself. High-level civil servants in the BGS division often have practical experience in the service, having headed a regional office or even made a whole career of policing. The BGS conducts its work 'on the ground' and is therefore the prime institution collecting information on the process of border controls, their efficiency

and needs. At the same time, the dangers and needs perceived can be communicated through the hierarchy. The analyses of the high-level bureaucrats will then be the basis for further planning. Thus, the BGS unit provides a link between ministerial bureaucracy and actual practice of border controls. At the same time, the information given to the Ministry is heavily influenced by the perceptions of the BGS, read and analysed also by BGS professionals; it therefore tends to emphasise the security-aspect of borders.

The work of the BGS is traditionally divided into two branches or types of work: one is the 'Einzeldienst' which conducts the actual controls of traffic and persons at the border. The 'Verbandspolizei' are stand-by federal police responsible for tasks such as protection of federal institutions, interventions abroad, and support of the Länder police during demonstrations or other major events.

Not much is publicly available about the actual conduct of controls at the border. In the interest of secrecy and security, reports and press releases of the BMI remain tight-lipped with regard to this topic. Also exact numbers of BGS employees at the German borders, particularly the inner-German border, before unification were rarely published. The following information was available: a 1986 report of the Ministry of the Interior mentions the number of 2,000 officers at the official crossing points of the inner-German border.[420] A 1991 report of the BGS states that of 18,500 members, only 2,100 were employed at the borders.[421] The year reports specify that by 1998, around 20,000 security forces worked at the external borders (12,000 BGS officers, another 2,500 from Bavarian border police and water police of Bremen and Hamburg, and 5,500 from the customs service). 12,100 officers were stationed at land borders, 5,100 on airports and 2,800 at sea borders. 9,300 worked at the borders with Poland and the Czech Republic (6,200 BGS plus 3,100 others).[422] At the Western frontiers, there were significantly less officers. After Schengen implementation, there remained only the number of around 250. However, the BGS officially announced a plan in 1997 to increase the number of personnel to around 1,000.[423]

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[420] "Der Bundesgrenzschutz erfüllt als Polizei des Bundes verläßlich seine Aufgaben," 13. In comparison: A 1988 report states that the BGS estimates that the CSSR and the GDR had 37,000 officers at their borders with West Germany. "Eine Schneise in der Landschaft," *Innenpolitik*, no. VI (1988): 9.

[421] Bericht der vom Bundesministerium des Innern eingesetzten Arbeitsgruppe zur Neuorganisation des Bundesgrenzschutz, 1991, p.1, quoted after Funk, "Les Mythes du contrôle: la frontière orientale de la République Fédérale d'Allemagne au tournant des années 1990," 80.

[422] Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1998," ed. Bundesgrenzschutz (Bonn: 1999).

[423] Cf. Zeitschrift des BGS , 11-12/1997, p.8 cited after Heiner Busch, "Schengen und die Folgen," *Bürgerrechte & Polizei* 59, no. 1 (1998).

Thus, the reorganisation of the BGS mentioned in the above section on its history led to a significant increase of officers at the borders and to an emphasis of work at the eastern border.

2. The changing context to the debate on border controls

The next section will give an account of the more immediate background to the discussion of the role of borders at the end of the 1980s and the beginning of the 1990s. The following will divide the context for a German debate regarding border controls between an international and a domestic context. This division is often arbitrary, most visibly with German unification. Nevertheless, an attempt is made to differentiate between purely domestic issues and those of concern to Germany's neighbours.

2.1. The border debate before 1989

After the war, West German governments tended to view the situation of the German borders as an external given. Politics were concentrated on managing the German political position within the given situation. Nevertheless, debates about borders repeatedly came up. Problematic were mainly the Eastern borders of Germany. The borders with the Western neighbours were charged with less difficulties. Border controls took place, but were considered not different from those between other European partners. The progress of European integration was linked to a closer relationship between states and constant exchange between governments so that borders gradually lost their military role and took on mainly administrative tasks. Nevertheless, borders were still regarded as possible lines of defence against threats from outside: an example is the order from the Bundesinnenminister Zimmermann in 1987 enabling the BGS to conduct AIDS-testing at the borders in order to reject infected people at the border.[424]

The inner German border was regarded as an anomaly. Fixed after World War II by the Allied forces, it engendered an ambiguous attitude. On the one hand, it had to be accepted as the outcome of the war, on the other hand, the division of the German people was considered 'unnatural'.[425] Reference was made to the border between the 'zones' (*Zonengrenze*) rather than a state border. This continued also after the building of the wall

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[424] Cf. "Innenminister irritiert Frau Süssmuth. Aids-Kontrollermächtigung für Grenzschutz befremdet Gesundheitsministerium," *Süddeutsche Zeitung*, 12 May 1987, ""Pro Asyl" gegen Aids-Kontrolle durch Bundesgrenzschutz," *Süddeutsche Zeitung*, 12 May 1987, Martin E. Süskind, "Ein Erlaß, der nichts als Schaden stiftet," *Süddeutsche Zeitung*, 14 May 1987.

[425] "Die unnatürliche deutsch-deutsche Grenze ist dadurch jedoch nicht durchlässiger geworder!" (sentence bold in the original) "Der Bundesgrenzschutz erfüllt als Polizei des Bundes verläßlich seine Aufgaben."

when the areas of West Germany on the border were called 'zone border areas' (*Zonenrandgebiete*).

Public expectations of unification in the FRG were low. In the after-war period, the indefinite postponing of unification was considered the price for the West orientation of the Federal Republic. The political developments in the following decades confirmed this view. Even in the mid-1980s, when the GDR was in fact already showing signs of destabilisation, the general expectation of politicians and citizens alike was still that unification would not come for 10-20 years.[426]

A number of contradictory legal theories attempted to explain the situation and the consequences for the validity of borders. Most prominent in West Germany was the 'identity theory' which postulated the identity of each of the German states with the German state of 1919 - 1845, thus they had 'replaced' it. From this theory, the claim was derived that West Germany could act independently in legal matters (*Alleinvertretungsanspruch*). The West German jurisdiction, however, long tended to support the 'roof theory' according to which both German states were sections of the legally continuing German Reich, thus arguing that non alone could make treaties on issues pertaining to the Reich.

This debate became most relevant in the discussion about the relationship to the former German areas east of the Oder-Neisse line. While the refugees from these areas were very vocal and attempted to 'save as much as possible'[427] (von Hassel), the Brandt government towards the end of the 1960s was ready to negotiate an agreement with Poland in order to settle the border question.[428] This was part of the new Ostpolitik with the aim of easing the tension between East and West. The outcome of these negotiations was the Warsaw Treaty of 7 December 1970 which guaranteed the Oder-Neisse line as the Western border of Poland.

This did not end the debate, however, since the above-mentioned legal disagreements came to bear. Many – amongst them lawyers and members of parliament - argued that West

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[426] The Bavarian government facilitated a federal billion credit line in order to help avoid bankruptcy of the GDR in 1983.

[427] Cf. ""Soviel wie möglich retten". Spiegel-Interview mit Vertriebenenminister von Hassel.", Windelen, "Information oder Propaganda?."

[428] "Bonn zu Gesprächen mit Polen bereit," *Süddeutsche Zeitung*, 20 May 1969, "Gomulka schlägt Grenzvertrag vor," *Süddeutsche Zeitung*, 19 May 1969, Winkler, *Der lange Weg nach Westen. Deutsche Geschichte vom "Dritten Reich" bis zur Wiedervereinigung*, 285-88.

Germany alone was not entitled to act and that only a unified Germany would be able to conclude a treaty valid under international law.[429] An exchange of notes between the Allies and the German government also stated that the FRG could only act for itself. Formally, the recognition of the German-Polish border was thus postponed until a peace treaty was concluded between both German states and Poland. Also the constitutional court, the Bundesverfassungsgericht, concluded in 1975 that the Warsaw Treaty had not legally transferred any territory. Others, however, emphasised that the Warsaw Treaty was a valid international treaty and that therefore the Western border of Poland was the Oder-Neisse line.[430] The remaining uncertainty of the issue was demonstrated also by repeated doubts expressed by Polish politicians regarding the intentions of the German government in the border question.[431]

An interesting illustration of the problem was the attempt of the government in 1979 to introduce a revised law on VAT which contained a new definition of the domestic area comprising only West Germany and West Berlin. Up to that time, the definition of the domestic area had referred to the borders of 1937. This proposed change was rejected by most of the conservative-led Länder, mostly Bavaria, in the second chamber.[432]

The sensitivity of the issue can also be shown through a debate in 1981 about the location of the German Eastern border in school atlases.[433] The compromise found was that the current German borders as well as those of 1937 were to be shown. The 1937 line was to bear a legend referring to the 1975 Bundesverfassungsgericht rulings on the Treaties with the Soviet Union and Poland as well as the continuing responsibilities of the Four Powers for Germany as a whole.[434] This debate regarding the location of the Eastern German border continued well into the 1980s, as is shown by remarks of Franz Josef Strauss emphasing that in his opinion, the 'Ostverträge' were no treaties recognising borders, or by

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[429] "Verfassungsexperte: Grenzfrage im Osten völkerrechtlich offen," *Süddeutsche Zeitung*, 25 October 1983, Windelen, "Information oder Propaganda?."

[430] Conrad, "Unbehagen über Rühe und Vogel. Warnung vor "Auflockerung" von Rechtspositionen in der Diskussion um Oder-Neiße-Linie.", "Die deutschen Grenzen aus der Sicht eines Professors für Völkerrecht," *Die Welt*, 12 February 1979.

[431] see for example "Zweifel an den Bonner Absichten," *Süddeutsche Zeitung*, 14 October 1985.

[432] "Bundesrat lehnt Umsatzsteuernovelle ab," *Süddeutsche Zeitung*, 7 July 1979.

[433] "Von der Schwierigkeit, die deutsche Grenze zu markieren," *Die Welt*, 10 February 1979.

[434] Cf. Baur, "Pochen auf Grenzen von 1937.", ""Der Vorgang fing schon an zu stinken". Bremens Bildungssenator Horst von Hassel (SPD) über den Streit um die Ostgrenzen in den Schulatlanten," *Der Spiegel*, 6 April 1981, "Der Warschauer Vertrag gilt," *Süddeutsche Zeitung*, 7 April 1981, "Grenzstreit in Schulbüchern beigelegt.", "Pochen auf Grenzen von 1937," *Süddeutsche Zeitung*, 6 April 1981.

the debate engendered by remarks of Theo Waigel emphasising that the German Empire in the borders of 1937 legally continued to exist.[435]

2.2. International context

The immediate international context for the Schengen negotiations and changes in border policies was mainly influenced through European integration, the destruction of the Soviet Union and transformation in Eastern Europe. Another important external element for German border policies were concerns of neighbouring countries resulting from German unification.

2.2.1. The effects of 1989/1992

The changes of the political landscape in Europe between 1989 and 1992 had crucial implications for the international debate regarding Germany's borders. This section outlines the fears of Germany's allies and neighbours which were opened up through unification – not least of all Germany's future behaviour towards the east. It then details how the closure on the German debate regarding its eastern border interacted with unification.

Given that Germany's history was linked to changeable borders in the past, unification opened up old questions for Germany's partners: on the one hand, there were questions regarding territorial claims in Eastern Europe, even a possible replay of history, and on the other hand, security problems in the Schengen framework were raised. The months between autumn of 1989 and October 1990 were characterised by excitement, but also by general insecurities and fears of Germany's allies and neighbours.

The growing destabilization of the GDR and the process towards German unification alerted Germany's neighbours and created a number of concerns. These concerns were on the one hand inspired by the current political and security situation and on the other hand by the historical experience of Germany's expansionist and aggressive policies. They centered around a number of issues: disturbances to the global security arrangements, Germany's intention to shift borders or reclaim territory, Germany's predominance in

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[435] Doris Köpf, "Theo Waigel: Ich nehme nichts zurück," *Express*, 9 July 1989, "Strauß: Deutschland besteht fort in den Grenzen von 1937.", "Strauß: Ostverträge sind keine Grenzanerkennungsverträge."

Central and Eastern Europe and the security of the eastern border. Especially the French and British leaders used historical comparisons in order to explain their doubts and fears.

France feared a too powerful Germany imposing itself on its neighbours, threatening the overall security arrangements in Europe. According to one of Mitterand's closest advisors, Jacques Attali, the French President drew a parallel to 1913 fearing that Germany was setting the triple alliance of France, Great Britain and Russia against itself.[436] He also suspected that the situation after the fall of the wall might lead to a re-awakening of nationalism (in Central and Eastern Europe) and that West Germany might eventually want to 'take more' than just the GDR.[437] Apparently, a German government speaker asked in Paris at the end of 1989 at a dinner who would deny that Silesia was German territory – a remark which led to talks over months in France.[438] There were concerns regarding the predominance of Germany in Central and Eastern Europe. Zelikow and Rice quote an official from the Quai d'Orsay saying that one had to take care that Germany would not again become a hegemonial power.[439] According to accounts of the process towards unification, Mitterand gradually gave in, realizing that unification could not be avoided. French hopes were then linked to binding Germany closer into a network of European and Western commitments.[440]

The security of Germany's (new) eastern border was equally of concern. Formerly, the eastern border of West Germany had been one of the most guarded in the world – controlled mostly by the eastern neighbours. After the changes, the border with Poland and Czechoslovakia would have to be secured by the government of a unified Germany. Fears of migrations from Eastern Europe – particularly after the collapse of the Soviet Union – grew more and more important. The disintegration of Yugoslavia and the concomitant waves of migrants was a further shock to European politicians, creating fears of large numbers of immigrants. A report of the French Senate gives voice to the worries which

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[436] Attali, *Verbatim. Chronique des années 1988 - 1991*, 363-65.

[437] "La situation actuelle est peut-être plus dangereuse que la précédente. Elle peut mener au réveil des nationalités. La RFA, à très long terme, ne voudra-t-elle pas prendre plus que la RDA ?" Ibid, 341.

[438] „Wer will bestreiten, daß Schlesien deutsches Territorium ist?" Zelikow and Rice, *Sternstunde der Diplomatie. Die deutsche Einheit und das Ende der Spaltung Europas (Germany Unified and Europe Transformed)*, 291.

[439] Ibid.

[440] Attali gives a detailed account of Mitterand's changing position.

concerned France, but also other Schengen partners: 'Les frontiers de la France sont maintenant la ligne Oder-Neisse et le détroit de Gibraltar'.[441]

Great Britain was even more opposed to German unification. Margaret Thatcher saw the divided Germany as a result of the war which ought not to be changed. A major concern was a Germany which could dominate Europe. The Prime Minister feared a repetition of Munich 1938 and that the Germans would get in peace what Hitler did not manage in war.[442] Attali recounts an incident in which she pointed out Silesia, Pomerania and Eastern Prussia on a map, predicting that Germany would take all that – plus Czechoslovakia.[443] Only when Great Britain realised that German unification could not be prevented (around March 1990), did it engage in the process and concentrated on binding Germany into NATO.

The United States played a very active role in the negotiations, forging the 2 + 4 process. Although Foreign Secretary James Baker referred to the 'legitimate concerns of Germany's neighbours'[444], the US were less concerned about possible territorial claims or expansionist policies of Germany. The primary aim was to keep the unified Germany in NATO.

The Soviet Union under Gorbachev remained long opposed to unification of a Germany that was to be a NATO member. The Soviet influence in East Germany had been a crucial element in post-war foreign policy. Observers of the process assume that the reason pushing the Soviet Union to eventually give in had to do with the crisis of the Soviet Union, its disintegrating empire and the hopes for economic cooperation – aid – with the West. Mitterrand's furious response when he heard of Gorbachev agreeing to German unification emphasises the suspected economic incentives for the Soviet leaders' position: 'Qu'est-ce qui prend à Gorbatchev? Il me dit qu'il sera ferme, et il cède sur tout! Que lui a donné Kohl en échange? Combien de milliards de Deutsche Mark?'[445]

A pre-condition to the allies' giving in to German unification was the assurance of the German government not to extend Nato structures to ex-GDR territory, to offer a

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[441] Masson and Villepin, "Rapport de la Commission de contrôle du Sénat sur la mise en place et le fonctionnement de la convention d'application de l'accord de Schengen du 14 Juin 1985." Translation : The borders of France are now the Oder-Neisse line and the Straits of Gibraltar.
[442] Margaret Thatcher, *Downing Street No. 10* (Düsseldorf, Wien, New York, Moskau: 1993).
[443] Attali, *Verbatim. Chronique des années 1988 - 1991*, 369.
[444] Presse- und Informationsamt der Bundesregierung, *Tatsachen über Deutschland*, 176.
[445] Attali, *Verbatim. Chronique des années 1988 - 1991*, 416. Translation: What's got into Gorbachev? He tells me he will be firm, and then he gives in on all points! What has Kohl given him in exchange? How many billion Deutsch Marks?

reduction of German forces and last but not least not to link German unification with the changing of Germany's borders.

The problematic of the recognition of the Oder-Neisse border has been already laid out above. Recognition only came about under the pressure of the Allies. Ambiguity and hesitation on the side of the German government was due to the fact that Chancellor Kohl did not see Germany in a legal position to negotiate for a unified Germany, but also due to internal political hesitations regarding the interests of refugees.[446] Indeed, Helmut Kohl refused recognition in a treaty for a long time. In November 1989, he emphasised that he could not speak in the name of Germany as a whole. Later, this legal argument was supplemented by the argument that raising the question of the Oder-Neisse border would reinforce the German extreme right.[447]

The difficulty of the question of recognition can also be inferred from the fact that there was a lively debate in Germany between government and opposition and within government which lasted from the autumn of 1989 until the decisive steps for recognition were taken.[448] As pointed out above, the debate regarding the Oder-Neisse border predated the changes of 1989. Already in summer 1989, a heated discussion had been sparked of by remarks of Minister Theo Waigel that also the areas east of the Oder-Neisse were part of the German question.[449] The refugee organisations attacked President Weizsäcker for admitting that Poles had lived in the former German land for decades now and that the German border would not be changed.[450] The governments who had opposed German unification, fearing a repetition of history and German hegemony in Eastern Europe saw themselves confirmed in the German hesitation to recognise the eastern border. While European states and the US were afraid that raising the border question would open Pandora's box, they insisted that Germany be very clear about its borders before

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[446] "Haltung Kohls zur Grenzfrage "zweideutig"," *Frankfurter Allgemeine Zeitung*, 14 December 1989.

[447] Cf. for example Kohl in a conversation with Mitterrand: Attali, *Verbatim. Chronique des années 1988-1991*, 424.

[448] Cf. for example "Bisher Weitestgehende Garantie für Oder-Neiße-Grenze," *Süddeutsche Zeitung*, 9 November 1989, "Haltung Kohls zur Grenzfrage "zweideutig".", Eghard Mörbitz, "Die Machtfrage," *Frankfurter Rundschau*, 7 March 1990, Lothar Rühl, "Revision der Grenze zu Polen mit Europäischem Frieden unvereinbar," *Die Welt*, 26 February 1990, Horst Schreitter-Schwarzenfeld, "Taktieren mit der Grenze," *Frankfurter Rundschau*, 8 January 1990.

[449] Cf. for example "'Grenzstreit' Gewinnt Zunehmend an Schärfe," *Die Welt*, 19 July 1989, Köpf, "Theo Waigel: Ich nehme nichts zurück."

[450] Cf. Klaus J. Schwehn, "Vertriebene Werfen von Weizsäcker in Grenzfrage Selbstherrlichkeit vor," *Die Welt*, 27 December 1989 1989.

unification.[451] The international pressures for recognition during the unification negotiations were so strong that the government decided to move on the issue.[452]

On 8 March 1990, the West German Parliament decided that after the elections in the GDR, a common declaration of Eastern and Western governments regarding the Polish border would be made. A treaty with Poland was to be made after unification. The same decision also implied that unification would take place according to art. 23 GG. Chief US diplomats interpret this already as the *de facto* recognition of the border because this process meant that all international treaties of West Germany would remain valid, thus also the 1970 guarantee.[453] The Kohl government finally recognised the Oder-Neiße as the German eastern frontier on 14 November 1990 in a state treaty with Poland, after pressure from the former allies in the 2+4 talks.[454]

2.2.2. European integration

The developments in JHA as the immediate context for European border policies have been outlined in chapter three. In a more general way, the European integration process constituted an important background to the negotiations of border controls. Germany's post-war political development was closely connected to European integration so that any discussion of unification and German borders necessarily also had a European component.

European integration can be said to have been about Germany from the start. The Cold War shut West-Germany off from the East and integrated it into the West. The country's anchoring in the Western international institutions was seen as one of the prerequisites for eventual full sovereignty. Furthermore, it has been shown that Germany's identity has become closely linked to a European identity, which is demonstrated by the fact that European integration remained a priority for German politicians even after unification.[455] Germany has been one of the motors of European integration in all of its components. This includes the development of the common market from which the German industry profited significantly. The four freedoms which were outlined already in the Treaties of

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[451] Attali, *Verbatim. Chronique des années 1988 - 1991*, 377.

[452] Cf. Timothy Garton Ash, *Im Namen Europas*, trans. Yvonne Badal (München: Carl Hanser Verlag, 1993), Zelikow and Rice, *Sternstunde der Diplomatie. Die deutsche Einheit und das Ende der Spaltung Europas (Germany Unified and Europe Transformed)*. "Amerikanische Kritik an Kohl - Unbehagen über die Behandlung der Grenzfrage," *Neue Zürcher Zeitung*, 2 March 1990.

[453] Zelikow and Rice, *Sternstunde der Diplomatie. Die deutsche Einheit und das Ende der Spaltung Europas (Germany Unified and Europe Transformed)*, 312.

[454] Breuilly, "Sovereignty, Citizenship and Nationality: Reflections on the Case of Germany," 58f.

[455] Cf. Banchoff, "German Identity and European Integration."

Rome and then to be realised in the Single European Act in 1986 were therefore also in the interest of Germany and supported vocally in the EC negotiations which aimed at cutting down all barriers. Volumes have been written about the reasons for such a European orientation and its durability. Two aspects merit special mentioning in this context: firstly, German politicians of all parties felt that a reassurance of their Western partners of the reliability of Germany could be achieved only through a long-standing engagement in Western Europe. Secondly, Germany's initiatives in the West European project were used by German politicians, most notably Helmut Kohl, to counterbalance other tendencies in German foreign policy (cf. the Europol initiative at a time when German attention was perceived to be directed inwards or more towards the East.)

European integration received new dynamism around 1985 after the politics of small steps of the late 1970s and early 1980s. Important advancements were: the Fontainebleau European Council in June 1984 which agreed to set up two committees for reform; the reports of the Adonnino and Dooge Committees (1985)[456] aiming at a more efficient Europe, closer to its citizens; the Commission White Book for the completion of the single market; Jacques Delors' Presidency of the European Commission which was marked by new initiatives in the integration process; the joining of Spain and Portugal in 1986 and the signing of the Single European Act. Thus, the debate regarding border policies in Europe coincided with a reinforced integration process to which German was committed. It was therefore politically difficult in Germany to reject any project which was seen as a corollary of European integration. This concerned also the Schengen process.

When negotiations about the Schengen agreements were first started, Germany still had a border with the GDR and Czechoslovakia which was most strictly supervised by those countries. It was thus the country representing the separation of Europe.

The Agreement of 1990 occurred in a completely changed context. The prospect of unification meant an external border with Poland and the Czech Republic and a longer one on the Baltic Sea. The end of the Soviet Union also meant the end of a superpower conflict, which had had its most likely 'venue' and most visible symbol on German ground. With regard to borders another thing had changed: after the end of the Cold War, Germany and its Western European partners could no longer rely on the neighbouring countries to guard the borders, but have to ensure the control of the eastern frontier. At

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[456] Ad hoc Committee on Institutional Affairs (Dooge Committee), "Report to the European Council.", Committee for a People's Europe (Adonnino Committee), "A People's Europe."

the same time, the binding of Germany into European institutions had become even more important for Germany's neighbours, so that Germany was careful not to give the impression of obstructing European agreements.

2.2.3. Demise of the Soviet Union and transformation in Eastern Europe

While German unification was the first 'shock' to the mental maps of Germans and all other Europeans, the demise of the Soviet Union and the dissolution of its empire represented a second one.[457] This process equally had consequences on the debate about border controls in Germany. The re-establishment of the full sovereignty of central European states adjacent to Germany meant a decisive change.

As outlined above, Germany has historically had longstanding, ambiguous relations with these areas. The East was on the one hand perceived as an area of opportunity, but on the other hand the relationship with the Slavs was complicated since Frederick the Great. The policies of the Nazis had made reconciliation an even more distant possibility.

This led to two divergent argumentations which were present in the political scene, with no one being attributable to a specific party:
- One official argumentation was that business and politics expected to develop links with this emerging area and profit from a growing market while at the same time supporting the democratic and stable development of the region.
- The other argument was careful to take into account the concerns of both Western and Eastern neighbours that Germany aimed at regaining its old 'sphere of influence' by expanding economically there.

In Germany, there was concern that these countries often had to establish completely new legal, political and economic structures in order to cope with the – often brutally quickly – imposed changes to a market economy. There was great interest in Western European states to ensure that these structures guaranteed not only economic access for themselves but provided a stable political system. Security concerns of this kind were manifest in many speeches given at the time. The reform of administration in these countries was therefore encouraged not only by Germany, but also the whole of the EU.

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[457] The break-up of Yugoslavia might also be viewed as such a shock to the system. Both with regard to the fact that a war took place on the EU's 'doorstep' and that large numbers of refugees had to be accommodated in EU countries (the majority of which in Germany).

It has to be added that these central European countries were comparatively unknown to West German institutions and politicians. Post-war relations had been maintained, but compared to relations with Western partners, bureaucratic and economic exchanges had been limited and often blocked. Expertise of culture, of habits of people and administration, of structures and responsibilities was scarce in the former West Germany. East German experience existed, but was not always helpful since the basic structures in these countries had changed and the higher civil servants from East Germany were compromised. Attempts were made to quickly set up contacts with the newly independent states, which was most successful with the nearest neighbours, the Visegrad countries. Nevertheless, the transformation process was difficult to judge in terms of its stability and progress.

Germany was keen to develop economic ties with these countries. Investment by German companies was encouraged and supported by the German government. Economic interests in developing the markets in Eastern Europe also demanded that controls at the borders be limited in order to reduce the long waiting times at the borders. At the same time, these countries' governments were anxious not to be shut out of Europe with new visa requirements. This was in conflict with Western concerns about security and stability of these countries and led to lengthy negotiations regarding visa requirements.

In terms of practical changes, the fully established rights of travel allowed a great number of citizens from Eastern Europe to come to Germany and vice versa. The motives of these journeys ranged from interest in the unknown West to the hope to find work, even if underpaid, in the rich zone in the West. Soon, however, visa restrictions were imposed on Poland and other countries. Only after the negotiation of Agreements which provided for Poland and other European states to take back undesired immigrants[458], were the restrictions lifted. Germany was one of the advocates for lifting visa restrictions for Poland and Hungary, partly for economic reasons, partly for reasons which were connected to the role that these countries had played in the revolution of 1989/90.

To sum up, the political changes of 1985-1991 had significant implications for the discussion of borders and border controls in Germany. During that time, European economic integration pushed for an abolition of border controls. In 1989/1990, one of the

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[458] Agreement Schengen States – Poland: March 1991
Agreement with Romania in September 1992; with Bulgaria in September 1994; with Macedonia and Croatia in April 1994 and with the Czech Republic in November 1994.

most fiercely controlled borders in the world disappeared, charging Germany with the obligation to guarantee the security of the new external border of the Union. Finally, the end of the Soviet Union and the re-establishment of the sovereignty of central European states had contradictory implications: the developments opened up a 'new world' – politically, culturally and economically – to West European states, especially Germany. At the same time, the open borders towards the East became associated with unforeseen consequences for Europe: it was seen as an opening for immigration and crime coming across the borders.

2.3. Domestic context

The domestic context in Germany also changed significantly between 1985 and 1995 – with consequences for the debate on the role of borders.

2.3.1. Consequences of unification

German unification was politically the fulfilment of a long-pronounced intention – but completely unexpected. The constitutional set-up of West Germany was such that the divided German state had been regarded as a temporary solution. Unification remained a goal for political elites, although no one believed that unification would come so quickly. When Chancellor Willy Brandt enacted the new *Ostpolitik*, he was accused by his political opponents for stabilising the GDR. Brandt himself retained unification as a goal but admitted that he had given up speaking about it.[459] This was a widespread feeling amongst German political elites. It is demonstrated by the fact that even in 1988 Helmut Kohl doubted whether he would live to see German unification.[460]

The unification of Germany was seen by German politicians as ending the 'German question'. Helmut Kohl stated repeatedly that the unified Germany would take the same political position as the former West Germany and confirm the borders.[461] Germany's borders after 1990 were recognised to be final. The former objectives of 'Germany in the borders of 1937' were no longer important in the political 'mainstream' of the conservative parties. Nevertheless, Chancellor Kohl had strong domestic political concerns with regard to refugee organisations and the extreme right. He feared that bringing up the recognition of the Oder-Neisse border would be an incentive to revisionist demands or give support to the extreme right voicing demands for territories beyond the border. For this reason, he tried to delay recognition for an extended period. However, when the Oder-Neisse border

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[459] Interview with Willy Brandt, U.S. News and World Report, 29 December 1969, cited after Ash, *Im Namen Europas*, 201.

[460] Zelikow and Rice, *Sternstunde der Diplomatie. Die deutsche Einheit und das Ende der Spaltung Europas (Germany Unified and Europe Transformed)*, 103.

[461] For example, Helmut Kohl in conversation with Mitterrand: "Une Allemagne unifiée aura la même position que la RFA sur le nucléaire et sur les frontiers; l'Allemagne unifiée confirmera les frontiers." Attali, *Verbatim. Chronique des années 1988 - 1991*.

A remaining question was the timing of the recognition of borders, whether it should be linked with unification and in which legal form (unilateral declaration or treaty) this should be done. Kohl's hesitation on recognising the Oder-Neisse line raised suspicions.

was finally recognised the influence of refugee organisations was shown to be of little significance.[462]

The integration of the new Länder into the old Federal Republic brought with it a number of economic and social tensions. Economic and monetary unification took place on 1 July 1990, thus predating the decision of the GDR 'Volkskammer' for accession in August. It had become clear that independent economic existence of the GDR was unfeasible. The change from a planned economy to a functioning system of social market economy was a hitherto unprecedented process. The old export markets of the GDR were disintegrating and the preconditions for a new economic order had to be established. The reconstruction included privatising state enterprises and property, installing a new communication and transport infrastructure, improving the quality and efficiency of production, restructuring agricultural businesses and ensuring the development of a new landscape of science, research and development tuned to business interests. Also a new administrative and legal system had to be established. The re-building of the Eastern Länder was largely modelled on West Germany. Hopes of civil rights campaigners at the 'Round Tables' during the revolution for an alternative construction were disappointed.

Until 1997, the state invested or 'transferred' around 1000 billion DM from West to East.[463] In order to finance the enormous sums needed for the re-building of the Eastern Länder, a solidarity tax (5,5% - 6,5% of income tax) was levied. Despite all these efforts and an effective rise in economic activity and investment in the East, the discrepancies between East and West remained. Wages in the East remained lower (ca. 77% of Western wages in 1997) and also productivity lagged behind.

The economic union and re-building effort coincided with the onset of a recession in 1992/93. The economy grew slowly in the early 1990s and even shrunk in 1993 by 1,1% of GDP.[464] Unemployment rose steadily in both East and West until 1997, but the East was hit much more. In 1997, the overall unemployment rate for Germany was 11,4% with the

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[462] There were, of course, remaining problems with the 'Sudeten Germans' who keep claiming rights in the Czech Republic. They even influenced the bilateral German-Czech treaty negotiations via their influence in the CSU. Problems remained also with regard to German minorities in Rumania and Poland. Concerns regarding unification remained in the population. However, it would be very difficult to link the success of the German extreme right during elections in the early 1990s to particular concerns regarding recognition of borders.
[463] Presse- und Informationsamt der Bundesregierung, *Tatsachen über Deutschland*.
[464] See table on GDP in Germany in the appendix.

situation particularly grave in the East. Whereas 16,7% were unemployed in the Eastern Länder, the rate was relatively lower in the West with 9,8%.

The economic problems did not correspond to the expectations of citizens. Although few people had actually believed that 'unification will not cost citizens anything' (Chancellor Kohl), the actual difficulties came as a surprise. Social tensions between East and West emerged. The citizens of the new Länder were generally disappointed with the slowness of equalisation of living standards; unemployment became a grave problem and young people began to move West. There was a growing feeling that the East was being 'bought out' by Westerners in the process of privatisation. Some Westerners felt that the solidarity tax was alimenting Eastern lack of innovation. Stereotypes of lazy Easterners and 'Besserwessis' became common.[465]

The building up of administrative structures in the East also proved a challenge. On the one hand, the former Eastern employees had to be trained in the Western administrative and legal system. On the other hand, state employees of the former GDR were discredited. All future civil servants had to be checked for connections to the secret service, a process which took time. Western civil servants proved reluctant to move East so that a number had to be transferred by order to fill the gap or encouraged with financial or career building incentives.

This was also true for the Bundesgrenzschutz (BGS), the service responsible for controlling the border. Until 1989, European integration meant essentially Western integration. After the transformations, many policy areas which had hitherto been approached with a purely Western perspective had to be reassessed. The former inner German border had been heavily guarded while the border with Poland had been subject to relatively little controls. Thus, there was a lack of personnel in the East with experience of surveilling the eastern frontier. Even less was there personnel who had been trained to implement Schengen standards in the East. The BGS West therefore had to supplement the new BGS East, a process which met with considerable disenchantment from Westerners.[466]

After the changes of 1989, German attitudes towards the East remained ambiguous: on the one hand, German elites were still trying to re-orientate themselves and took care not to

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[465] 'Besserwessis' is a pun referring both to Westerners thinking that they were 'better' as well always knowing everything better.

[466] Cf. for example "Unruhe wegen neuer Kollegen," *Frankfurter Allgemeine Zeitung*, 3 December 1990.

alienate European partners through a marked turn eastwards. On the other hand, Germany itself saw itself as a bridge to the East. Especially the representatives of ethnic Germans emphasised this.[467] German politicians referred to Germany's historical role in Eastern Europe as well as the commitments resulting from unification when commenting on German engagement in Eastern Europe. This was echoed also be German business representatives: 'Aber wir können mit aller – auch aus finanziellen Gründen – international gebotenen Bescheidenheit als wichtiger Impulsgeber für die Revitalisierung der osteuropäischen Wirtschaft dienen und insofern unsere historische Rolle wiederaufnehmen.'[468] Sometimes, the activities were played down as 'merely' Germany's geographical function.[469]

The economic interests of Germany in Eastern Europe must not be underestimated. Also political influence was sought through economic support – the ability to influence the process of democratization and thus stabilization in the eastern neighbours was deemed important. It would be incorrect, however, to interpret this engagement as an attempt of Germany to reach a renewed hegemonial position in Eastern Europe.

Unification meant that Germany emerged as a state in the centre of Europe with a big economy and the largest population in Europe. The end of the German question led to a territorially stable state. German unification brought with it the practical changes of the disappearance of the most fiercely guarded border in Europe, of new, sensitive, external borders to guard, of the need of qualified personnel in the East. It also brought with it social and economic tensions. The next section will outline the rise of immigration, another factor which was interpreted to contribute to social tensions.

2.3.2. Rise of immigration

The border question was intricately linked with rising numbers of migrants in Germany. The specificity of the German system meant that migration into Germany was only

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[467] Cf. "Wir sind ein Brückenvolk. Rußlanddeutschen-Sprechen Wormsbecher und Staatssekretär Waffenschmidt über die Deutschen in der GUS," *Der Spiegel*, 10 May 1993.

[468] Amerongen, *Der Weg nach Osten. Vierzig Jahre Brückenbau für die deutsche Wirtschaft.* Wolff von Amerongen was a leading German entrepreneur, member of the East Committee of German Industry, President of the German Association of Industry and Commerce and represented the German government inofficially in Eastern Europe. Translation: But we can, with all internationally imperative modesty – also for financial reasons – serve as an important impulse for the revitalisation of the East European economy and in that take up again our historical role.

[469] A good example is also here Wolf von Amerongen, the former chief economic negotiator for Germany with Eastern Europe. Ibid.

possible as a recognised refugee who was granted asylum, or as a so-called ethnic German. An exception was the migrant worker (*Gastarbeiter*) initiative of the 1960s and 1970s, which invited foreign workers for a temporary, but in principle unlimited period to stay in Germany. This led to a substantial group of immigrants in Germany, the largest of which was Turkish one, followed by (former) Yugoslavs and Italians.[470] Acceptance of migration to Germany was reserved and when a recession hit Germany in the early 1980s, a general feeling of crises prevailed that transformed into fears and aggressions against foreigners. One reproach was that foreigners (especially the Turks) were taking away employment and that most asylum seekers were abusing the system.[471]

Asylum seekers came to Germany in growing numbers[472] during the 1980s. Politicians accused them of using the German asylum law for economic reasons as an entry ticket to the supposed 'social paradise' Germany.[473] Rising numbers of asylum seekers led to an increased discourse regarding the 'flood' of immigrants and the abuse of asylum law. Gradually, asylum policy came to symbolise for many Germans their disenchantment with immigration as such.[474] The eventual result of this development was the change of the German law of asylum in 1992. At the same time, ethnic Germans began to migrate back to Germany in greater numbers. Encouraged by the German government, people of German descent living in the former Soviet Union, Romania and other areas, came to Germany. Numbers began to decline only in the mid-1990s when the German government tightened the administrative guidelines according to which the right to a German passport was granted.

Taken together the numbers of asylum seekers and ethnic German immigrants, 2,2 million people from former Communist states migrated to Germany between 1988 and 1992.[475]

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[470] According to official figures, Turks represented 28,8% of all foreigners in Germany in 1998, people from the Republic of Yugoslavia 9,8%, Italians 8,4% and Greeks 5,0%. See for example Beauftragte der Bundesregierung für Ausländerfragen, *Bericht über die Lage der Ausländer in der Bundesrepublik Deutschland* (Bonn: 2000).

[471] Cf. Winkler, *Der lange Weg nach Westen. Deutsche Geschichte vom "Dritten Reich" bis zur Wiedervereinigung*, 371.

[472] see below. A table and figure in the appendix are also provided.

[473] German Minister of the Interior Zimmermann, cited in Herbert, *Geschichte der Ausländerpolitik in Deutschland*, 267.

[474] „'Asylpolitik' wurde vielmehr für viele Deutsche zum Symbol für den bis dahin vielfach noch zurückgehaltenen Verdruß über die Zuwanderung überhaupt, über die vermeintliche Privilegierung anderer und die sozialen Schieflagen im Gefolge der Wirtschaftskrise der frühen 80er Jahre generell." Ibid, 269f.

[475] Ibid.

The following chart compares numbers of asylum seekers and ethnic German immigrants and shows that ethnic Germans represented the majority of newcomers in most years:[476]

Year	All	Asylum seekers	'Aussiedler'
1986	142,438	99,650	42,788
1987	135,902	57,379	78,523
1988	305,749	103,076	202,673
1989	498,373	121,318	377,055
1990	590,136	193,063	397,073
1991	478,107	256,112	221,995
1992	668,756	438,191	230,565
1993	541,487	322,599	218,888
1994	349,801	127,210	222,591
1995	345,835	127,937	217,898

The issue of immigration of ethnic Germans and the difference made between ethnic Germans and other immigrants indicates the problematic of German citizenship and territorial boundaries of 'Germanness': the ethnic Germans comprised two categories of people: Germans of former German Eastern territories who were denied exit during the refugee waves after the end of WW II and people of German descent who had kept some link with German culture. In many cases (until the tightening of preconditions for immigration), these potential immigrants did often not speak German fluently.

In the 1970s, the German government had made great (financial) efforts to enable the immigration of ethnic Germans.[477] Before 1987, migrants had mainly come from Poland, thus former German territories. After that, the numbers of ethnic German migrants to Germany from Eastern Europe began to rise. In the late 1980s, the number of emigrants from the Soviet Union and Rumania grew significantly in comparison with Polish

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[476] Source: Bundesministerium des Innern, "Das Bundesministerium des Innern. Informationen zu Aufgaben und Bilanz, Organisation und Geschichte.", Herbert, *Geschichte der Ausländerpolitik in Deutschland*, Dietrich Thränhardt, "Germany's Immigration Policies and Politics," in *Mechanisms of Immigration Control. A Comparative Analysis of European Regulation Policies*, ed. Grete Brochmann and Tomas Hammar (Oxford: Berg, 1999). See also the charts in the appendix for German asylum seekers up to 2001 and those comparing numbers of asylum seekers in European countries.

[477] For example a substantial loan was given to Poland (2.3 billion DM) which was conditioned on exit permits; also sums between 20.000 – 100.000 DM were paid to 'buy free' people from Rumania.

emigrants. Between 1986 and 1988, the number of ethnic German immigrants quintupled.[478]

The acceptance of such ethnic Germans touched upon the roots of 'Germanness' with political elites and the public. Leading politicians kept up the post-war definition that ethnic Germans were those people of German descent who had declared themselves for Germanness (*Deutschtum*) in their home country. For example the Parliamentary State Secretary Spranger emphasized that ethnic Germans were Germans with equal rights and that it was a national and moral duty to help them.[479] However, it seems that this view had not been retained by the German population. Indeed, at least parts of the population regarded these immigrants – often alien to contemporary German language and culture – as foreigners who were accorded unfair privileges.[480]

Experts showed that the German population tended to have a confused concept of the term foreigner, which included everyone not obviously German in language and culture, thus also ethnic Germans.[481] Commentators argued that the political campaign of the conservative parties against asylum seekers over years, using continuously terms like 'breaking of a dam', 'glut of foreigners', 'floods of refugees' had brought the public discussion to a head. The result was the votes for right-wing parties in 1989 and resentments also against the ethnic Germans, originally priviledged by the conservative parties.[482]

To some extent, the German development with regard to immigration is paralleled by most other industrialised states. For reasons spelt out above, most governments saw the regulation of immigration as 'an essential element of their sovereignty.'[483] Rogers shows that 'the trend in host countries has been towards increased controls,'[484] including introduction of quotas, safe third country rules, voluntary repatriation and efforts to keep migrations 'at home'. The difference of the German position has to be seen in fundamentally different concepts of national identity from countries such as Great Britain, France or the US. German identity after the war did not include integration and

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[478] For a detailed analysis see e.g. Herbert, *Geschichte der Ausländerpolitik in Deutschland*.
[479] Deutscher Bundestag, "102. Sitzung," (Bonn: 26 October 1988).
[480] See for example Herbert's analysis who also gives examples from the German press reports of the time: Herbert, *Geschichte der Ausländerpolitik in Deutschland*.
[481] Mannheimer Forschungsgruppe Wahlen in: "Im Jahr 2000 ein türkischer Kanzler," *Der Spiegel*, 13 February 1989.
[482] Heribert Prantl, "Die Saat geht auf: Ausländerhaß," *Süddeutsche Zeitung*, 8 February 1989.
[483] R. Rogers, "The Politics of Migration in the Contemporary World," *International Migration* 30 (1992).
[484] Ibid.

assimilation of foreigners. Indeed, one lasting concept in German policies regarding foreigners was the concept of 'locals' versus 'foreigners'.[485]

Thus, the goals of immigration policy did not correspond to reality in Germany. The history of work migration into Germany started during the last century, continued with migrant workers in the first decade of this century and was then resumed after the war with the 'Gastarbeiter'.[486] The issue of the 'Gastarbeiter' shows the discrepancy between public discourse, perceptions and political reality. When the migrant workers were first invited to come to Germany in the early 1960s, they were to stay for an agreed, limited period of time. The reality was, however, that the Gastarbeiter who had made a home in Germany and become part of German society (whether integrated or not), did not go back and could not be sent back. As Max Frisch commented: Germany recruited guest workers and got human beings.

In reality, Germany has been a country of both immigration and emigration. Flows in and also out of Germany were a constant. However, a percentage of foreigners remained in Germany permanently. Münz and Ulrich show that the positive migration balance between 1954 and 1999 was around 9 million (of which 6,7 million foreigners and 2,3 million Germans).[487]

As migration expert, Prof. Klaus Bade, asserts: Germany had become a country of immigration by the early 1980s at the latest.[488] Bade states that immigration into Germany was administratively practised but never became a socio-political or conceptual topic. The security needs of the population and the interest in votes of politicians led to an open political disinterest in the topic ('demonstrativem politischen Desinteresse').[489] Bade even cites the thesis that the immigration situation in Germany in the 1980s was only manageable because its existence was denied politically in the formula of 'Deutschland ist kein Einwanderungsland'.

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[485] Cf. Klaus J. Bade, "Immigration and Social Peace in United Germany," *Daedalus* 123, no. 1 (1994).

[486] Also the integration of large numbers of German refugees from the East could be included into this category. They all had to be integrated into German society and required enormous efforts of population and administration. Since they were 'Germans', came as refugees and had no choice but to stay, however, they are not considered work migrants officially.

[487] Rainer Münz and Ralf E. Ulrich, "Migration und zukünftige Bevölkerungsentwicklung in Deutschland," in *Migrationsreport 2000*, ed. Klaus J. Bade and Rainer Münz (Frankfurt a.M.: Campus, 2000), 25.

[488] Klaus J. Bade, "Zuwanderung und ihre Folgen" (paper presented at the Konferenz: Strategien zur Integration von Zuwanderern im internationalen Vergleich, Stuttgarter Schloß, 23 - 25 June 1999 1999).

[489] Ibid.

To sum up, a rise in numbers of asylum seekers and ethnic German immigrants was part of the background against which the debate regarding border policies in Germany took place. The deep-seated distinction between Germans and 'others', symbolised through the German law of citizenship, made it possible for political elites to uphold a doctrine of no-immigration while the political reality was much different.[490]

2.3.3. Rise of transnational crime

The rise of international crime was a source of disquiet to many people and served both as a background to and argument in the debate regarding border controls.

The fight against crime in general was high on the agenda for German citizens as surveys around the turn of the decade indicate.[491] The surveys give no indication of a particular concern with regard to crime committed by foreigners. However, high percentages of foreigner offenders (ca. 30%) compared to their percentage of the population (around 8 %) were certainly a point of concern for the law enforcement services and also the population in general.

In parallel, international crime was found increasingly to target Germany. Since there was no criminal offence as such termed 'organised crime', the definition of this social-psychological, political as well as criminal phenomenon proved difficult. In Germany, a definition of organised crime for the purposes of law enforcement was only found in 1990. It included the elements of more than two people associating in order to commit crimes

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[490] In the meantime, the debate in Germany has changed considerably. Not only has a new citizenship law altered the old principle of *ius sanguinis* to one where immigrants can attain German citizenship after a certain period of residence. Several commissions (inner-party, cross-party) - amongst them the most prominent 'Süssmuth Commission' - have been called together to discuss the future of immigration in Germany. Some of these commissions have clearly emphasised that Germany is a country of immigration and furthermore, that it needs immigration for economic and demographic reasons and that immigration ought to be viewed as a positive value, both culturally as well as economically. The work of these commissions has also ended with a 'myth' that immigration – once publicly admitted – would be uncontrollable. The proposals for a new law of immigration (Zuwanderungsgesetz) accepts the necessity of (managed) migration for Germany. At the same time, the law mixes conceptually the categories of asylum seekers and other migrants (while retaining the legal difference).

[491] Cf. "Große Zufriedenheit mit dem Politischen System und der Demokratie.", "Politik in den Augen der Bürger.", "Zufriedenheit der Bürger mit der Demokratie erreicht Höchstwert."

using business structures and violent means or influence of politics, media, judiciary, administration or business.[492]

According the experts on organised crime, Germany was seen as unattractive for organised crime until the early 1980s due to the efficiency of its police and justice system as well as general awareness of politics and business against illegal deals.[493] During the 1980s, Germany apparently became a target of organised international crime – little observed by the public and also the law enforcement services. Reports show that Germany first became an area of rest, but then also turned into an area of operation.[494]

It was mainly the law enforcement services who came to emphasise the existence of organised crime in Germany during the 1980s. Raith says that there existed a hard controversy with regard to the existence of crime between German politicians, the public and police.[495] Studies with regard to organised crime only began to emerge after the mid-1980s, most notably at the end of the decade.[496] One important stepping stone was a study conducted by the Federal Criminal Police Office, begun in 1985, published in 1988.[497] It was found that although there was no unifying model for organised crime in Germany, there were networks of criminals working in urban centres as well as organisations aiming at Germany from abroad. They were working in the areas of drug dealing, economic crime or blackmailing protection money. The study also predicted a steady rise of organised crime

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[492] Individual Länder or experts had suggested definitions before. The discussion of police experts began in the 1970s.
The working definition in Germany was coined by a common working group of police/judiciary and adopted by the conference of interior ministers in 1990:
"Organisierte Kriminalität ist die von Gewinn- oder Machtstreben bestimmte planmäßige Begehung von Straftaten, die einzeln oder in ihrer Gesamtheit von erheblicher Bedeutung sind, wenn mehr als zwei Beteiligte auf längere oder unbestimmte Dauer arbeitsteilig a) unter Verwendung gewerblicher oder geschäftsähnlicher Strukturen, b) unter Anwendung von Gewalt oder anderer zur Einschüchterung geeigneter Mittel, c) unter Einflussnahme auf Politik, Medien, Öffentliche Verwaltung, Justiz oder Wirtschaft zusammenwirken." Bundeskriminalamt, "Strafverfolgung bei Organisierter Kriminalität," 3.

[493] „Bis Anfang der achtziger Jahre galt die Bundesrepublik unter Mafia-Bossen, aber auch bei den Oberhäuptern fernöstlicher Unterweltgruppen als wahrer Horror: Die Polizei hatte den Ruf großer Effizienz und moderner Ausstattung ..., die Gerichte schienen unbeugsam, die Geamten weithin unbestechlich, das Unternehmertum aufmerksam gegeüber unsauberen Kunden." Werner Raith, *Organisierte Kriminalität* (Hamburg: Rowohlt, 1995), 28.

[494] Cf. Konrad Freiberg and Berndt Georg Thamm, *Das Mafia-Syndrom* (Hilden/Rhld.: Verlag Deutsche Polizeiliteratur, 1992).

[495] Raith, *Mafia - Ziel Deutschland*, 41.

[496] Bundeskriminalamt, ed., *Organisierte Kriminalität in einem Europa durchlässiger Grenzen*, Bundeskriminalamt, "Strafverfolgung bei Organisierter Kriminalität.", U. Dörmann et al., *Organisierte Kriminalität - wie groß ist die Gefahr?* (Wiesbaden: 1990), Butz Peters, *Die Absahner - Organisierte Kriminalität in der Bundesrepublik* (Rowohlt: Reinbek b. Hamburg, 1990), Raith, *Mafia - Ziel Deutschland*, Rebscher and Vahlenkamp, *Organisierte Kriminalität in der Bundesrepublik Deutschland*, U. Sieber and M. Bögel, *Logistik der Organisierten Kriminalität* (Wiesbaden: 1993), E. Weschke and K. Heine-Heiß, *Organisierte Kriminalität als Netzstrukturkriminalität* (Berlin: 1990).

[497] Rebscher and Vahlenkamp, *Organisierte Kriminalität in der Bundesrepublik Deutschland*.

in the near future.[498] This report was followed by media attention to the attempts of police to fight organised crime.[499]

At the beginning of the 1990s, law enforcement services began to realise that 'organised crime is a fact' (President Zachert of the BKA in 1990),[500] but also that there was no complete picture indicating the quantitative extent of organised crime. This was partly due to the structure of organisations of organised crime, but also due to lack of studies. Only from 1991 onwards did the Bundeskriminalamt start to construct so-called analyses of the situation (*Lagebilder*) aiming to give an overview of the situation and structure of organised crime. The first report of 1991 is not public. It is important in the context of the Schengen process because it refers back to data up to 1987. According to Freiberg and Thamm, the report states that nearly half of all proceedings against the bandwidth of organised crime during that time had an international dimension and that about half of all suspects were non-German citizens.[501]

Especially the Italian mafia was represented as a threat, gradually building up networks in Germany and infiltrating the restaurant business. In 1987, Dagobert Lindlau published a bestseller about the activities of 'the mob' in Germany, warning of organised crime and the Italian Mafia in Germany.[502] The book has been repeatedly criticized as superficial and sensational, but is said to have had the effect of pointing Helmut Kohl's attention on the problematic.[503] Together with the 1988 BKA report, these publications apparently prompted Chancellor Kohl to his European FBI initiative in 1988.[504] One of the problems was that once Lindlau's mistakes had been exposed, the impression of a 'scam' with regard to the Mafia-scare remained, lessening the attention of political elite to the topic in general, says Werner Raith.[505]

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[498] Ibid.

[499] Cf. for example the report on a journey of the head of the Land criminal office to the FBI: "Mafia und Cosa Nostra - eine Dienstreise wert," *Süddeutsche Zeitung*, 7 October 1988.

[500] Bundeskriminalamt, "Strafverfolgung bei Organisierter Kriminalität."

[501] Freiberg and Thamm, *Das Mafia-Syndrom*.

[502] Lindlau, *Der Mob. Recherchen zum Organisierten Verbrechen*. The book was also followed by a series of articles in the Spiegel magazine. "Die Macht der Syndikate," *Der Spiegel*, 29 February 1988, "Milliardenbranche Stehlen & Hehlen," *Der Spiegel*, 14 March 1988, "Rauschgifthandel," *Der Spiegel*, 21 March 1988, "Schutzgelderpressung," *Der Spiegel*, 7 March 1988.

[503] Werner Raith: „Das Buch", sagte mir der Leiter einer Fortbildungsveranstaltung für Fahnder in der Abteilung Organisierte Kriminalität in Essen Anfang 1989, „hatte allerdings einen Effekt. Bundeskanzler Kohl hat es in die Hand genommen und seine Leute angewiesen, doch ml nachzusehen, ob das alles tatsächlich so schlimm ist, wie Lindlau schreibt." Die Folge war eine Flut von Hearings in den Landtagen. Raith, *Mafia - Ziel Deutschland*, 37.

[504] Cf. den Boer and Wallace, "Justice and Home Affairs. Integration through Incrementalism?."

[505] Raith, *Mafia - Ziel Deutschland*, 38.

After 1989, the risk analysis underwent an important transformation towards Eastern European threats. In the situation reports of organized crime of the BKA of the beginning of the 1990s, the largest groups of non-German suspected criminals were: Turks (around 15 %), Italians (5 - 6%), ex-Yugoslavs (ca. 6%)[506] and Poles (between 3 and 5 %).[507] It was predicted that East European organized crime would increasingly target the West European market.[508]

One instance which caught the eye of the German public in particular was the theft of cars which were then transferred into the East.[509] Already in 1989, the year report of the BGS mentions the occurrence of such thefts, pointing out that this category of crime was taking on characteristics of organised crime. According to the BGS, in 1989, high-quality cars were mainly smuggled to the Near East and the US, while diesel cars had Eastern European countries as their destination.[510] Subsequent reports show a gradual shift of the destination countries to Eastern Europe for all kinds of cars although also the Near East remained a market. The economic damage was considerable: for 1992, the BGS fixes the damage by car crime at over 1 billion DM. Around 60.000 cars disappeared permanently in that year.[511] Compared to that the numbers of cars retrieved at the border appear small:[512] In 1991, 353 cars were retrieved, in 1992 725; the number of retrieved cars rose to 1334 in 1995, but remains small compared to the dimension of disappeared cars.[513] The highest rates of retrievals were at the eastern border control stations in Frankfurt/Oder. In 1993, 71% of all rediscovered cars were taken in there.[514]

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[506] These were Macedonians, Montenegrans and Serbs. In 1992, Bosnians, Croates and Slowenes represented another 2,6 % of suspects.

[507] Bundeskriminalamt, "Lagebild der Organisierten Kriminalität in der Bundesrepublik Deutschland 1992," (Wiesbaden: 1992), Bundeskriminalamt, "Lagebild der Organisierten Kriminalität in der Bundesrepublik Deutschland 1993," (Wiesbaden: 1993).

[508] „Durch den politischen und wirtschaftlichen Zusammenbruch der osteuropäischen Staaten hat sich der Druck der Organisierten Kriminalität aus diesen Ländern auf den westeuropäischen Wirtschaftsraum verstärkt. Diese Entwicklung wird sich in den nächsten Jahren mit steigender Tendenz fortsetzen." Bundeskriminalamt, "Lagebild der Organisierten Kriminalität in der Bundesrepublik Deutschland 1993."

[509] Observers think that this had a huge psychological impact since this was a crime which could hit everyone and hurt many Germans at a particularly vulnerable point: their car.

[510] Bundesministerium des Innern, "Tätigkeitsbericht des Bundesgrenzschutzes (BGS) 1989," ed. Bundesgrenzschutz (Bonn: 1990).

[511] Bundesministerium des Innern, "Tätigkeitsbericht des Bundesgrenzschutzes (BGS) 1992," ed. Bundesgrenzschutz (Bonn: 1993).

[512] Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1995," ed. Bundesgrenzschutz (Bonn: 1996).

[513] See the appendix for a table of the retrieved cars.

[514] Bundesministerium des Innern, "Tätigkeitsbericht des Bundesgrenzschutzes (BGS) 1993," ed. Bundesgrenzschutz (Bonn: 1994).

It was thus during the 1980s that the perception of danger of international crime rose in Germany. While during the mid-1980s, the international dimension of crime was beginning to be perceived as a possibility, it was only towards the end of the decade and the beginning of the 1990s, that transnational crime became a manifest problem. The changes in Eastern Europe and the opening of Western Europe towards the East as well as progress in international communication and transport were identified to be connected to the increase in numbers of crimes.

3. Arguments for changes of border policies

This section presents the central arguments used by domestic actors to justify the changes in the border control regime in Germany and explores the rationale behind these arguments. Contrary to the actual development in terms of migration and organised crime spelt out above, this section explores the perceived threats and arguments in the debate regarding border controls.

Both the arguments used for justifying changes and the measures suggested retained a strong connection to the border itself. The justifications referred to the filter and security function of the border which would be endangered either through the uncontrollable rise of external phenomena (crime and immigration) or through the abolition of border controls themselves. Thus, the phenomena which the debate highlighted as reasons for changes of border control policies were both (at least partly) outside the control of German politics (international crime and migration) and also a result of a development which Germany itself had promoted (European integration).

What is common to all arguments is that they identify a possible threat to German society. The compensatory measures suggested were a political reaction to counteract that threat. They were constructed to ensure that the security function of the border be re-enacted on a different level. Some of these were directly border-related, others transferred the control and security function of the border to other areas (spatial control, police cooperation).

Three lines of arguments will be presented which advocated the changes to border policies which appeared in the Schengen agreements and other European agreements on border controls. One was the loss of the security function of the border at internal borders, another was the border as a barrier, a third one was the inefficiency of border controls. The first argumentation was mainly advocated by security forces and saw compensatory measures as important but not able to completely replace the loss of the security function. The second and third argument was found to be presented by politicians and tended to point to the superiority of compensatory measures.

The following presentation of the arguments in the German debate reflects the relative weight of the arguments themselves. The part on the security function of the border and fears of uncontrolled immigration and crime is rather long and it also took up the largest

part of the inner-German debate. The issues of the border as a barrier to state authorities was mainly advocated by police forces and sometimes the Ministry of the Interior and took up less space. The least publicised argument was that of the existing inefficiency of border controls and the subsequent possibility to suppress them.

3.1. The security function of the border

3.1.1. The border as a filter and the threat of a security deficit

One important line of arguments for reinforcing external border controls and implementing complementary measures was the loss of the security function at internal borders of the Schengen area. The central security aspects concerned were the fight against crime and immigration. According to security experts, the so-called filter-function of borders was lost through the abolition of internal border controls. Compensatory measures in the shape of high standard external border controls, police cooperation, a common information system and a common visa regime were therefore deemed necessary.

The security function of the border held a prominent place in the argumentation of security experts of the police, but also a of number of politicians in the area of internal security.[515] The state secretary of the Chancellery and Schengen representative Waldemar Schreckenberger:' [Es gibt] Befürchtungen, daß mit dem Wegfall der Grenzkontrollen, die bisher auch eine wichtige Sicherheitsfunktion haben, die Sicherheit gefährdet, zumindest aber eingeschränkt würde.'[516]

The police also tended to emphasise the security function of borders. Bernd Walter, a director in the BGS identified the importance of borders as filters and funnel. He conceded that border controls were no insurmountable barrier to criminals, but that their strategic value was crucial: 'Grenzkontrollen sind zwar im Regelfall kein lückenloses und unüberwindbares Hindernis für Straftäter, bilden jedoch strategische Linien mit Filter- und Trichterwirkung, die bei Schwerpunkt- und Alarmfahndungen schnell und verzugslos aktiviert werden können.'[517] Similarly, the President of the Bavarian Landeskriminalamt confirmed the importance of the border due to the positive results of the border police, which made 60% of its drug finds at the border. 'Auch heute ist der Sicherheitswert der Grenzkontrollen nicht als gering einzuschätzen. 60 % der polizeilichen Fahndungserfolge werden an den Grenzen der Bundesrepublik Deutschland erzielt. Über 60 % der

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[515] See for example "Ein Sicherheitsfilter," *Der Spiegel*, no. 12 (1989), "Wichtiger Sicherheitsfilter soll bleiben - Gegen "freie Fahrt für Rechtsbrecher"," *Sueddeutsche Zeitung*, 21 April 1989.

[516] Prof. Dr. Waldemar Schreckenberger, "Europäischer Binnenmarkt und Innere Sicherheit," *Europa als Auftrag*, no. 5 (1989): 1. Translation: There are fears that security is threatened or at least restricted by the loss of border controls which have had an important security function so far.

[517] Bernd Walter, "Interpretationen und Tatsachen. Staatsgrenze - Kontur oder Limes," *Kriminalistik*, no. 1 (1994): 51. Translation: Border controls may not be a complete and insurmountable obstacle for criminals, but they represent strategic lines with the effect of filter and funnel which can be activated quickly and without delay for investigations with a special emphasis or urgency.

Rauschgift-Sicherstellungen finden an den Grenzen der Bundesrepublik statt ..., so dass die *Filterfunktion der Grenzen nach wie vor zu bejahen* ist.'[518]

Horst Eisel, formerly at the BMI, emphasises a second aspect of the security function of the borders: the mere presence of border guards acts as a preventive measure. 'Die Grenzsicherung entfaltet schon durch ihre Präsenz präventive Schutzeffekte.'[519]

Given this importance of border controls, it was argued that the impending abolition of all internal border controls would led to a security deficit. Compensatory measures were needed in order to preserve security at least partly. This was emphasised in nearly every contribution to the debate by the Bundesgrenzschutz, the Federal Ministry of Interior and politicians.[520] Here an example by the President of the BKA: 'Der bevorstehende Abbau der Grenzkontrollen an den Binnengrenzen der Schengener Vertragsstaaten zum 1.1.1993 und die Einführung des EG-Binnenmarktes machen *Ausgleichsmaßnahmen* erforderlich, um die entstehenden Sicherheitsdefizite möglichst gering zu halten.'[521]

Edmund Stoiber, Minister of the Interior in Bavaria at the time, made a similar connection between abolition of border controls and compensatory measures: "Die *Innenminister der Länder* haben daher festgestellt, daß der Wegfall der Grenzkontrollen erst dann vertretbar ist, wenn alle im Schengener Durchführungsübereinkommen festgelegten Ausgleichsmaßnahmen realisiert sind."[522]

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[518] Hermann Ziegenaus, "Sicherheitsdefizite der Grenzöffnung - Kompensationsmöglichkeiten," *Politische Studien* 43, no. 326 (1992): 39. (Emphasis in the original)

[519] Eisel, "Interview with Horst Eisel." Translation: Border security provides preventive security effects already by its presence.

[520] for example: "Europa ohne Grenzen - eine sichere Gemeinschaft," *Innenpolitik*, no. I (1990), Hans Neusel, "Bericht des Bundesministeriums des Innern über Ausgleichsmaßnahmen zum Schengener Abkommen," ed. Bundesministerium des Innern (Bonn: 1989), "Öffnung der Grenzen erfordert neue Formen der Kriminalitätsbekämpfung.", "Schärfere Kontrollen an deutschen Ostgrenzen," *Süddeutsche Zeitung*, 28 June 1993, Schreckenberger, "Europäischer Binnenmarkt und Innere Sicherheit.", Ständige Konferenz der Innenminister und -senatoren der Länder, "Beschlußniederschrift über die Sitzung der Ständigen Konferenz der Innenminister und -Senatoren der Länder am 14. April 1989 in Köln," (Bonn: 1989).

[521] Hans Ludwig Zachert, "Der neue kriminalgeographische Raum in Folge der Öffnung des Binnenmarktes," *Politische Studien* 43, no. 326 (1992): 32. (Emphasis in the original). Translation: The impending loss of border controls at the internal borders of the Schengen treaty states on 1.1.1993 necessitates the introduction of compensatory measures in order to keep the security deficits as small as possible.

[522] Stoiber, "Bekämpfung der Organisierten Kriminalität," 19. (Emphasis in the original). Translation: The Ministers of the Interior of the Länder have determined that the abolition of border controls is only justifiable when all compensatory measures of the Schengen Implementation Convention have been realised.

The link between the importance of border controls and heightened security has been subjected to criticism. Monica den Boer points out that one argument against this logic might be that international crime has spread in the past despite the existence of borders.[523] This argument may be encountered by the fact that the mere numbers presently involved make the border a necessary element in the fight against organised crime. If, however, border controls were not successful in stopping the spread of international crime when there was a relatively small number and when the number of travellers on the whole was less, how could border controls fulfil this function now?

According to the negotiating security experts, the high standard of controls at the external borders and the other additional compensatory measures ought to be able to be replace the filter function of the internal borders. However, the additional compensatory measures taken by individual countries such as Germany, France or the Netherlands ('Schleierfahndung,'[524] national police cooperations) point to the fact that individual countries were not convinced that the external borders alone could ensure the security function.

The emphasis on the filter function of the border also gives no indication as to which kinds of criminals are detected at the border.[525] If it is mainly the 'small fish' that are caught in the net at the border, then the border cannot be termed to be an effective instrument in the fight against organised international crime, as most experts do. The security function of the border which does remain in this case is a relative success in the fight against smaller crime. This, too, would contribute to a feeling of security of the population. The connection between the filter function and the fight against international organised crime, however, is not cogently shown by the security experts.

3.1.2. Immigration and international crime – fears of uncontrollability

Rather than any military threat, as had still been the case during the Cold War, an uncontrollable influx of international criminals and immigrants represented another main threat. This was partly due to the experience of high numbers of asylum seekers and ethnic Germans coming to Germany during the late 1980s and early 1990s. The presence of 'too

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[523] den Boer, "The Quest for European Policing: Rhetoric and Justification in a Disorderly Debate."
[524] 'Schleierfahndung' is a word describing a method of control and is best translated with 'dragnet controls'. The first part of the word means veil, the second investigation.
[525] Cf. den Boer, "The Quest for European Policing: Rhetoric and Justification in a Disorderly Debate."

many' foreigners was feared and resented by some social groups while at the same time, the official German-foreigner distinction clung to *ius sanguinis*.[526]

The argument used in Germany paralleled the one also used by Germany's Schengen partners: a loss of internal border controls would make the movement of criminals, terrorists and their goods uncontrollable and lead to a loss of the filter function of those individual state borders which were also internal borders of the Union. Strict controls at the external borders to be done by the partner states were to ensure that all elements endangering internal security in the Schengen area were apprehended either when entering or leaving.

Thus, the identification of international crime (including terrorism) and immigration as a threat to German society predated the political changes of 1989. The recipes found in compensatory measures were by no means only conditioned by the changes in Central and Eastern Europe. In 1987, the Minister of the Interior Zimmermann emphasised that neither terrorism nor other kinds of crime could at the moment be fought without using borders for investigation.[527] In 1988, for example, - coinciding with the first studies on organised crime in Germany - the Minister urged to find appropriate measures for the fight against international organised crime before it became firmly established in Germany. These criminals would be the first to make use of a Europe without borders. The Bundesgrenzschutz was to play a crucial role in containing them.[528] The President of the Bundeskriminalamt, Hans Ludwig Zachert, emphasised that even before the abolition of

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[526] Another topic of foreigner policy which led to nervous reactions was the discussion in 1985/6 whether the 1963 association agreement with Turkey gave Turkish citizens a right to free movement and to work in the EC-countries. The prospect that a stream of Turks would come to Germany caused concern in ministries and the public. Cf. Herbert, *Geschichte der Ausländerpolitik in Deutschland.* Even the liberal newspaper *Die Zeit* argued that the instinct of man caused him to stay with 'his own' and if foreigners came, they at least ought to accept the language, culture and values that they found in the country. *Zeit*-editor Theo Sommer spoke of a dam which had hitherto kept Anatolia's poor away and which would now break. Theo Sommer, "Vertragsbruch oder Dammbruch," *Die Zeit*, 19 July 1985.

[527] „... wie Minister Zimmermann betonte ... könnten derzeit weder Terrorismus noch andere Kriminalitätsformen ohne Grenzfahndung effektiv bekämpft werden." "Mehr Einsätze als je zuvor," *Innenpolitik*, no. II/III/IV (1987): 9.

[528] Es kommt "nach den Worten Zimmermanns darauf an, ein geeignetes Bekämpfungsinstrumentarium zu entwickeln und umzusetzen, 'bevor sich die organisierte Kriminalität bei uns einnistet', denn diese Form des Verbrechens werde am schnellsten alle Vorteile eines grenzfreien Europas zu nutzen wissen". Friedrich Zimmermann, "Grundsatzrede zur Inneren Sicherheit - Bekämpfung der Organisierten Kriminalität wird verstärkt," *Innenpolitik*, no. VI (1988).; see also Zimmermann's statements at the annual presentation of the BGS report "Der Bundesgrenzschutz - ein wichtiger und verläßlicher Partner im Sicherheitsverbund," *Innere Sicherheit*, no. 1 (1988).

border controls, international criminal organisations for smuggling and drug dealing had rooted themselves in Europe.[529]

After 1989/90, the same logic was applied, in Germany as much as in other Schengen states. The necessity of compensatory measures and strictness of external border controls was emphasised even more. Both international crime and immigration remained of concern and were closely associated with uncontrollability. These changes in Eastern Europe had the effect of alerting German society to a possible threat, making Schengen and national compensatory measures acceptable, and involving German authorities much more closely in the security provision, namely at what was seen to be a problematic eastern border.

Immigration remained a major concern in Germany although the emphasis changed. The political changes in Eastern Europe were identified as origins of new threats to Germany and Western Europe.[530] The predicted enormous numbers of immigration as well as international crime were linked to the closeness to Eastern Europe, the political instability of the region and economic disparity between East and West. The attraction of Germany due to its successful economic and legal system, political stability, geographic position and social welfare were taken as a given.[531]

The reasons for the threat emanating from the East were identified in detail by one of the leading experts of the BGS, Markus Hellenthal in the dissolution of police structures and the partial loss of the state monopoly on violence in Eastern Europe. He furthermore pointed to the difficult economic situation in Eastern Europe and the economic disparity to Western Europe as an incentive for crimes directed against Western Europe:

> Die Bedrohung der Inneren Sicherheit Deutschlands und Europas insgesamt hat durch die politischen Veränderungen in den mittel- und osteuropäischen Staaten, die Ablösung der früher dort vorhandenen auch polizeilichen Strukturen (so verabscheuungswürdig diese auch waren), der (sic!) wirtschaftlich größtenteils äußerst schwierige Situation und die sich daraus verschärfenden Disparitäten zu den westeuropäischen Staaten sowie der immer unbeschränkteren Freizügigkeit innerhalb ganz Europas eine neue Dimension erreicht. ... Das besonders Bedrohliche daran ist die zunehmende Organisiertheit des Verbrechens und die in Osteuropa zum Teil bestehende Gefahr einer jedenfalls partiellen Außerkraftsetzung des staatlichen Macht- und Gewaltmonopols.[532]

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[529] Cf. Zachert, "Der neue kriminalgeographische Raum in Folge der Öffnung des Binnenmarktes."
[530] see for example Stoiber, "Bekämpfung der Organisierten Kriminalität."
[531] Cf. Ibid.
[532] Markus Hellenthal, "Die aktuelle Entwicklung der illegalen Zuwanderung nach Deutschland insbesondere mit Blick auf die Schleuserkriminalität und andere Felder der grenzbezogenen Organisierten Kriminalität und die Gegenmaßnahmen des Bundesgrenzschutz in seiner neuen Organisationsstruktur," *Die Polizei* 85, no. 1 (1994). Translation: The threat to the internal security of

Germany's geographic position was perceived as particularly problematic in this respect. Its direct neighbourhood to the transition countries or rather countries whose democratic stability and development was perceived as unclear in the early 1990s was interpreted to mean a special exposure to crime emanating from the East. One common statement was that Germany had moved from a situation at the fringe of Europe to the centre of Europe. 'Durch die politische Entwicklung in Europa hat sich die Situation Deutschlands von einer Randlage in eine Mittelpunktlage verwandelt'.[533]

Also public awareness changed after 1989. The rise of numbers of asylum applicants and ethnic Germans coincided with great preoccupation of the population. Political statements with regard to immigration and social policy predicted enormous numbers of immigrants to Western Europe and Germany. The threat of millions of Russians and other Central and Eastern Europeans moving to Germany also went through the media at the end of 1990, creating fears and a lively debate.[534] The articles referred to the image of refugee 'treks', and the movement of masses of people which could not be checked. This was repeated at the height of the 'asylum-campaign' in 1991/1992 when articles problematised the topic of migrants and mentioned the danger of uncontrollable masses of people emigrating from the Soviet Union: 'Was wird, wenn Gorbatschow die Grenzen öffnet und 8 bis 10 Millionen Russen kommen?'[535]

A director of the Bundesgrenzschutz in the Grenzschutzpräsidium East joined the experts who predicted uncontrollable immigration from the East: 'Die Migrationsbewegung aus Osteuropa – ausgelöst durch den Sog der europäischen Wohlstandsstaaten – kann alsbald Dimensionen annehmen, die weder mit grenz- noch mit allgemeinpolizeilichen Mitteln zu

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Germany and Europe as a whole has reached a new dimension through the political changes in central and East European states, the replacement of the former police structures (as despicable as they may have been), the economically mostly extremely difficult situation and the worsening disparities to west European states as well as through the ever more unrestricted freedom of movement in Europe internally. (...) The especially threatening aspect is the growing degree of organization of crime and the danger of at least a partial repeal of the state monopoly of power and violence in parts of Eastern Europe.

[533] Stoiber, "Bekämpfung der Organisierten Kriminalität."; Zachert, "Der neue kriminalgeographische Raum in Folge der Öffnung des Binnenmarktes." Translation: Through the political development in Europe, the situation of Germany has changed from a margin position to a centre position.

[534] "'Igor Ante Portas'. Die Bundesrepublik braucht eine rationale Einwanderungspolitik," *Die Zeit*, 14 December 1990, "Massen-Treck verhindern," *Abendzeitung*, 14 December 1990, "Sowjetdiplomaten warnen den Westen vor Millionen Zuwanderern," *Frankfurter Rundschau*, 6 December 1990. This continued into the late 1990s: Peter Schmitt, "Noch zwei Millionen 'Rußlanddeutsche'," *Süddeutsche Zeitung*, 9 January 1999.

[535] "Die Asylanten-Katastrophe. Morgen auch bei uns?," *Bild-Zeitung*, 14 August 1991. Translation: What will happen if Gorbachev opens the borders and 8 to 10 million Russians come (to us)?

steuern sind.' He goes on to cite an expert: 'Experten rechnen für die EG-Länder in den nächsten Jahren mit einem Wanderungsschub gewaltigen Ausmaßes.' [536]

Illegal immigration – which is by definition uncontrolled – was therefore one of the major points of concern both in the year reports of the BGS, as well as in the commenting articles. The numbers given by the BGS refer to those persons who were caught when crossing the border illegally. From these numbers, the BGS infers an enormous number of immigrants who succeeded in entering the country illegally for purposes of asylum applications. Markus Hellenthal cites the estimate of more than 300,000 illegal immigrants in 1994. [537]

A link was made between illegal immigration and asylum seekers. Since Germany's legal arrangements do officially not allow any immigration, [538] the great number of asylum seekers in Germany at the beginning of the 1990s was portrayed as an abuse of the liberal system by people who were in fact economic migrants and not politically persecuted individuals. The low numbers of recognition of asylum applications were taken as an indication that many of these people did not have a right to apply to the German system. [539] Immigration of economic migrants with the purpose of applying for asylum was therefore considered illegal.

The fears in parts of the German population regarding migration to Germany found their sad climax in the attacks against asylum seekers' homes and assassinations of foreigners. The table in the appendix shows that the years 1992/1993 saw a marked rise of attacks against foreigners.

After the change of the law of asylum, illegal immigration for the purposes of asylum became an offence against foreigner's law. The concept of 'safe third countries' stipulated that an asylum applicant should have applied in the first safe state he went to. Germany

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[536] Walter, "Interpretationen und Tatsachen. Staatsgrenze - Kontur oder Limes." Translation: The migration movement from Eastern Europe can – caused by the maelstrom of the European welfare states – soon take dimensions which cannot be controlled by means of border or general police. Experts predict for the EC states a migration thrust of massive extent.

[537] Hellenthal, "Die aktuelle Entwicklung der illegalen Zuwanderung nach Deutschland insbesondere mit Blick auf die Schleuserkriminalität und andere Felder der grenzbezogenen Organisierten Kriminalität und die Gegenmaßnahmen des Bundesgrenzschutz in seiner neuen Organisationsstruktur."

[538] For the 'unofficial' immigration see below in the assessment of the arguments.

[539] See the numbers of recognition of asylum seeker in Germany in the appendix.

being surrounded by states considered safe (also in the East), there was no reason to cross the border. Applications could therefore be rejected for being 'manifestly unfounded'.

Generally speaking, the eastern frontier was represented as much more problematic than European internal frontiers. Both the border with Poland and with the Czech Republic were entry points for illegal immigrants.[540] Here, the borders with Poland lost in their problematic in the time of reference, mainly due to good cooperation with Polish border police. A 1993 cooperation agreement with regard to the effects of migration movements seemed to be successful.[541] The border with the Czech Republic remained a focal point of illegal entry.[542]

The reports do mention, however, illegal entry at internal borders of the EU as well.[543] In the year reports of the BGS, this receives attention only since around 1994. The numbers of the mid-1990s were very small, however. For 1994, for example, illegal entries over the Schengen border amounted to 161 – as against around 31.000 at the external borders. During the early 1990s, the emphasis of attention was clearly on the eastern border.[544]

Fears of large numbers of foreigners which could not be integrated were also conjured up by exaggerated figures. Even if they were later contradicted, the effect of an impression of large numbers of people waiting to immigrate remained. Prof. Klaus Bade draws attention to the exaggerated reports on future immigration in a situation of little political direction at the beginning of the 1990s:

> The pressure of immigration from the outside grew into a "new mass-migration", an "invasion of the poor," and "onslaught on Europe," and was frightfully exaggerated in sensational reports by the media and in widely distributed horror publications. The fear of foreigners grew accordingly, in an immigration situation without guidelines.[545]

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[540] The year report of the BGS of 1991 states that 88% of all illegal entries happen via the Polish and Czech borders. Since July 1991, a reinforced control pattern is enacted due to the migratory 'pressure'. Cf. Bundesministerium des Innern, "Tätigkeitsbericht des Bundesgrenzschutzes (BGS) 1991," ed. Bundesgrenzschutz (Bonn: 1992).

[541] Pressemitteilung zur Jahresstatistik des BGS 1998.

[542] Pressemitteilung - Grenzpolizeiliche Feststellungen 1999.

[543] Towards the end of the 1990s, the Austrian-German border is portrayed as the second concentration point of illegal entry after the German-Czech border. The explanation given in the press release is the Kosovo crisis which has prompted people to attempt to enter Germany via Italy and Austria.

[544] According to a source in the Federal Ministry of Defence, the illegal entries over the internal borders surpassed in some months those of the external borders for the first time.

[545] Bade, "Immigration and Social Peace in United Germany." Bade cites three examples: Manfred Ritter, *Sturm auf Europa: Asylanten und Armutsflüchtlinge. Droht eine neue Völkerwanderung?* (Munich: von Hase & Koehler, 1990).; Jan Werner, *Die Invasion der Armen: Asylanten und illegale Einwanderer* (Munich: von Hase & Koehler, 1992).; cf. Beate Winkler, *Zukunftsangst Einwanderung* (Munich: C.H.Beck, 1992).

This attitude of painting a threat in potential immigration has thus to be seen in connection to the German debate of asylum and foreigner policies at the beginning of the 1990s. The conservative parties aimed to reform the right of asylum. A political campaign by the Christian union parties took place between 1990 and 1993 which aimed at a change of asylum law. The central argument of the campaign (supported by the Bild-Zeitung and the Welt am Sonntag) was that the majority of asylum seekers were defrauders attracted by the rich social system.[546] The result was a subsequent tightening of immigration possibilities for ethnic Germans (conduct of the recognition process abroad, stricter examination of entitlement) and the introduction of a new migration compromise in December 1992 (safe third country regulation for asylum seekers, war refugees were granted temporary rights to stay, not asylum, introduction of quotas for ethnic German immigrants).

However, the painting of foreigners as possible abusers of the German system backfired. It found a resonance with socially disprivileged groups. The presence of growing numbers of ethnic German immigrants and asylum seekers, mainly from Eastern Europe, put a strain on the social system, but also on people's willingness to accept such large numbers of foreigners. The strongest hostility was to be found in the social groups which rivalled directly with the immigrants on the labour and housing market.[547] An incident in August 1991 when a ship with thousands of Albanian refugees arrived in the Italian city of Bari caused reactions near to panic in Germany. The Bild-Zeitung predicted similar situations in Germany if politicians did not act.[548]

The problematic definition of 'Germanness' and the difference between public discourse and the perspectives of the population also contributed to disenchantment. The debate stirred up anti-foreigner sentiments which even led to brutal attacks. Parties at the extreme right on the political spectrum capitalised on this development and phrased sayings such as 'Das Boot ist voll' (The boat is full) in order to indicate that they would refuse to tolerate any more immigration to Germany. Their remarkable election results around 10% in 1991 showed the state of uncertainty of voters.

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[546] The debate suggested that a clear distinction could be made between 'real' asylum seekers and fraud which in reality was difficult. The argument about 'swindlers' in the face of low rates of recognition (see appendix) had become possible only because legal changes and decisions had at times even excluded the threat of torture as a reason for asylum. For a detailed account of the debate: Herbert, *Geschichte der Ausländerpolitik in Deutschland*.

[547] Cf. Ibid, 277.

[548] "Die Asylanten-Katastrophe. Morgen auch bei uns?."

The general German dictum 'Deutschland ist kein Einwanderungsland' which predates the changes of 1989,[549] was also used as an argument of an immigration policy of strict controls at the borders and the turning back of non-legitimate immigrants.

Actual numbers did not correspond to these predictions. While experts still predicted an uncontrollable wave of immigrants in 1994, the numbers of refugees to Germany had stabilised and were even beginning to sink.[550]

The media participated in this discourse by reporting widely on abuses of the German system of asylum, on the huge numbers of asylum seekers and the privileges they obtained and the low recognition rate of applications. Broadsheets, TV and the serious mass media were part of this discourse, albeit with different emphasis. Often, the reports simply consisted in enriching the figures from the year report of the BGS slightly, or repeating the security arguments used by the BGS or politicians of internal security.[551] The factual reports tended to emphasise the problems in guarding the eastern borders.[552] However, there also was a critical discussion of the border regime. For example, the Süddeutsche Zeitung often had commentaries which aimed at taking policies at the eastern border out of the purely security-oriented discourse and put them into a more general political context.[553]

Also the fight against cross-border crime remained an important justification for changes in border control practices, albeit now with a shift of emphasis in the threat from international crime in general to a threat from the Eastern neighbourhood of Germany. Fijnaut has pointed to the fact that Germany was particularly concerned by international crime: 'One should not lose sight of Germany's central geographical position on the European continent; this position means that Germany – much more than any other State in western Europe – takes part in the problems of (international) crime and crime-fighting

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[549] "Minister Zimmermann: "Die Bundesrepublik Deutschland ist kein Einwanderungsland","
Innenpolitik, no. IX (1986).
[550] See tables and figures on asylum seekers in Germany in the appendix.
[551] "Grenzschutz hindert 30 000 Ausländer an illegaler Einreise," *Frankfurter Allgemeine Zeitung*, 30 August 1995.; "Ostgrenzen besser sichern," *Süddeutsche Zeitung*, 6 October 1993.; "Bonn will Ostgrenzen besser sichern," *Süddeutsche Zeitung*, 9 June 1993.; Ralf Hübner, "Das Tor nach Osten steht sperrangelweit offen," *Neue Zeit*, 25 August 1992.
[552] "Nur langsame Annäherung entlang der Neisse," *Neue Züricher Zeitung*, 7 September 1993, "Polen befürchtet steigende Belastung," *Süddeutsche Zeitung*, 2 July 1993, "Schärfere Kontrollen an deutschen Ostgrenzen."; Michael Ludwig, "Schlepper schleusen Rumänen, Zigeuner, Bulgaren," *Süddeutsche Zeitung*, 26 August 1992.
[553] "Die Aufrüstung des Ostwalls," *Süddeutsche Zeitung*, 3 November 1993.; Heribert Prantl, "SZ-Interview mit Burkhard Hirsch zur Grenzsicherung. Warnung vor einem Bruch des Völkerrechts," *Süddeutsche Zeitung*, 9/10 January 1993.; Heribert Prantl, "Asylkompromiß auf der Rutschbahn," *Süddeutsche Zeitung*, 9 January 1993.

of many Western, Eastern, Nordic and Southern European States.'[554] In public statements of the Bundesgrenzschutz as well as of the responsible politicians, the rise of cross-border crime is mentioned as an important reason for the necessary compensatory measures.[555] Similarly to the argumentation with regard to immigration presented above, Eastern European countries were mentioned as a source as well as transit area for crime. Additionally, it was presented as an area of refuge for criminals.[556]

According to Hellenthal's analysis, Western Europe and Germany were identified as new areas of action offering new criminal possibilities, while the East acted as an area of repose for criminals. 'Der Umbruch in den mittel- und osteuropäischen Staaten ebenso wie die Freizügigkeit zwischen den Mitgliedsstaaten der Europäischen Gemeinschaft haben international operierenden Tätergruppen neue und lukrative Aktionsräume und – möglichkeiten eröffnet.'[557] The feared consequence was that Germany would also become a 'turntable' of drugs and organised crime. Germany was perceived as a country of transit for criminals as well as an object for the attack of criminals.

German security experts made a strong link between economic disparity and rising crime rates in Central and Eastern Europe. This was considered the main source of the threat to internal security by Hellenthal of the BGS, head of the Grenzschutzdirektion Koblenz, and can also be identified as the main reason for the increased need for border protection in Walter's article.[558]

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[554] Fijnaut, "The 'Communitization' of Police Cooperation in Western Europe," 81.

[555] For example: "Zum Stand der Verhandlungen im Zusammenhang mit dem Schengener Abkommen," *Innere Sicherheit*, no. 3 (1988).; Rudolf Seiters, "Rede des Bundesinnenministers im Deutschen Bundestag anläßlich der ersten Lesung des 'Gesetzes zum Schengener Übereinkommen vom 19. Juni 1990 Betreffend den Schrittweisen Abbau der Kontrollen an den Gemeinsamen Grenzen'," *Innere Sicherheit*, no. 2 (1992).; "Öffnung der Grenzen erfordert neue Formen der Kriminalitätsbekämpfung."; Wolfgang Schäuble, "Leitlinien Künftiger Innenpolitik," *Innenpolitik*, no. 1 (1991).; "Europa ohne Grenzen - eine sichere Gemeinschaft."; "EG verstärkt den Kampf gegen Internationalen Terrorismus und Rauschgifthandel."

[556] Hellenthal, "Die aktuelle Entwicklung der illegalen Zuwanderung nach Deutschland insbesondere mit Blick auf die Schleuserkriminalität und andere Felder der grenzbezogenen Organisierten Kriminalität und die Gegenmaßnahmen des Bundesgrenzschutz in seiner neuen Organisationsstruktur."

[557] Cf. Ibid., translation: The transformation in the Central and East European states as well as the freedom of movement between the Member States of the European Community have opened up new and lucrative areas and opportunities of action to internationally operating groups of criminals. Similar views are voiced by the Minster of Interior Rudolf Seiters Rudolf Seiters, "Das Schengener Abkommen und die Innenpolitik im Zeichen von Binnengrenzkontrollabbau und Europäischer Einigung," *Politische Studien* 43, no. 326 (1992).

[558] Cf. Hellenthal, "Die aktuelle Entwicklung der illegalen Zuwanderung nach Deutschland insbesondere mit Blick auf die Schleuserkriminalität und andere Felder der grenzbezogenen Organisierten Kriminalität und die Gegenmaßnahmen des Bundesgrenzschutz in seiner neuen Organisationsstruktur.", Walter, "Interpretationen und Tatsachen. Staatsgrenze - Kontur oder

The BGS tended to state that it was at the limit of its capacities and that therefore an augmentation of personnel and technological level was necessary. Indeed, the year reports show a constant rise of budget and personnel from 1985 to 1999. The budget more than doubled while the number of personnel rose by roughly a third.[559] Despite these changes, the situation at the eastern border in 1994 was presented as still problematic, challenging the capacity of the BGS to the limit. 'Die nach wie vor problematische Lage an den deutschen Ostgrenzen stellt alle zur Grenzüberwachung und zur Kontrolle des grenzüberschreitenden Verkehrs eingesetzten Kräfte immer wieder vor große Herausforderungen und verlangt den Einsatz aller verfügbaren Kräfte.'[560]

Border-related crime received special attention as a specific category of crime which constituted a threat to internal security in the analysis of experts. Offences against property (Eigentumsdelikte) were mentioned primarily in the reports and here especially the theft of cars (which had received considerable attention in the public over the years).[561] The inhabitants near the eastern borders felt intimidated through a heightened number of break-ins and petty theft. Drug delinquency was mentioned as a problem, with steadily rising numbers of confiscated material. However, in this case, the eastern border was hardly mentioned. Instead, the German-Dutch and the German-Danish border were shown to be the main problem.[562]

Crime and immigration were often not presented as separate categories, but as intricately linked. Walter for example says that movements of migration are a security problem *sui generis*, although they have to be seen also in connection with transborder crime.[563] A link between crime and immigration is also derived from the national crime statistic. Here it is emphasised how immigration can lead to a heightened threat to internal security. Reinhard Rupprecht, head of the department of Internal Security at the BMI: 'An der Polizeilichen

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Limes.". It has to be pointed out that economic refugees neither have a legal right to stay in Germany nor does the majority of Germany recognise economic refugees as 'real' refugees.

[559] See appropriate table in the appendix.

[560] Hellenthal, "Die aktuelle Entwicklung der illegalen Zuwanderung nach Deutschland insbesondere mit Blick auf die Schleuserkriminalität und andere Felder der grenzbezogenen Organisierten Kriminalität und die Gegenmaßnahmen des Bundesgrenzschutz in seiner neuen Organisationsstruktur," 4. Translation: The still problematic situation at the German eastern borders poses great challenges to all forces employed for border surveillance and for controls of transborder traffic, and therefore demands the deployment of all available forces.

[561] Cf. Ibid.

[562] Ibid.: 3f. It is mentioned that in 1992, 540 cases of arrests, out of a total of 911, were made at the Dutch-German border.

[563] Walter, "Interpretationen und Tatsachen. Staatsgrenze - Kontur oder Limes," 48.

Kriminalstatistik (PKS) läßt sich ablesen, daß Immigration zu einer verstärkten Kriminalitätsbelastung führt.[564] He finds that even when all the necessary differentiations for a higher percentage of foreigners in the crime statistic are made[565], the foreign population in Germany and especially the asylum applicants have a significantly higher crime rate than Germans (about 3 times as high as their percentage in the population).

Hellenthal makes reference to the link between illegal immigration, asylum and the import of crime to Germany:

> [Dabei] spielt die illegale Einreise und die Schleuserkriminalität eine besondere Rolle. Zum einen stellen beide an sich bereits strafbares Handeln dar, zum anderen sichern sie die Verbreitung illegaler Aktivitäten in ganz Europa und damit den Aufbau krimineller Strukturen auch in den westeuropäischen Staaten. Der überaus signifikante Anstieg des Anteils ausländischer Tatverdächtiger insgesamt – bereinigt um alle ausländertypischen Straftaten im Zusammenhang mit dem Ausländergesetz oder Asylverfahrensgesetz – und noch mal deutlicher, der von Asylbewerbern, gibt einen klaren Hinweis auf diese Entwicklung.[566]

To sum up, the prevalent argument with regard to border policies was that the border had an important security and filter function. The loss of border controls internally would also lead to an increase of insecurity. In some speeches, no differentiation was made between the fact that only internal border controls were to be abolished – thus creating the impression that the abolition of border controls would lead to an easy entry for criminals and immigrants.

The threats which were primarily of relevance were immigration and international crime. Although the threat of these phenomena had already been discovered in the mid 1980s, it was only after the changes of 1989 that they became prevalent. The East appeared as an

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[564] Reinhard Rupprecht, "Zuwanderung und Innere Sicherheit," in *Migration und Flucht*, ed. Steffen Angenendt (München: R. Oldenbourg Verlag, 1997). Translation: The police criminal statistic shows that immigration leads to a stronger burden of crime.

[565] These differentiations are for him: crime which can only be committed by foreigners such as offences against the foreigners' law (Ausländergesetz AuslG) and the asylum law (Asylverfahrensgesetz AsylVfG), age groups (foreigners have an unproportionately high percentage of minor offenders), citizenship (Turks and Yugoslavs have the highest percentage – due to their larger section in the population) and crime categories (drug dealing, gambling and pick pocketing have over 2/3 foreign offenders).

[566] Hellenthal, "Die aktuelle Entwicklung der illegalen Zuwanderung nach Deutschland insbesondere mit Blick auf die Schleuserkriminalität und andere Felder der grenzbezogenen Organisierten Kriminalität und die Gegenmaßnahmen des Bundesgrenzschutz in seiner neuen Organisationsstruktur." Translation: The illegal entry and smuggling crimes play a special role. On the one hand, they both represent punishable action by themselves, on the other hand, they ensure the spreading of illegal activities in all of Europe and thus the building up of criminal structures also in West European states. The significant rise of the percentage of foreign suspects as a whole – cleared up by all foreigner-typical crimes in connection with foreigner law or asylum process law – and even more clearly the percentage of asylum applicants give a clear indication of this development.

unpredictable area of uncertainty and insecurity at the beginning of the 1990s. Fears of being unable to contain such developments were (mostly unintendedly) nurtured by the discourse of political and law enforcement elites. In this perspective, stricter controls at the borders were presented as a means to stem against possible 'floods' of immigrants.

Another reason for the necessity of strictly enforcing the external border controls can be inferred from a statement of Horst Eisel, part of the negotiating team of the Ministry of Interior: while prior to 1989, the hesitations with regard to Schengen were mainly directly towards the South, the fall of the Iron Curtain made the eastern border also problematic or 'neuralgic'. Germany had the perception – justly as can be inferred from statements of French politicians for example – that the Western partners were following with great attention German measures to guard the eastern border.[567]

> Zum Zeitpunkt des Abschlusses des ersten Schengener Übereinkommens im Jahre 1985 verhinderte noch die nahezu undurchdringliche innerdeutsche Grenze weitgehend das Eindringen von Gefahren aus östlicher Richtung, womit nicht zum Ausdruck kommen soll, daß die deutsche Politik dem „Eisernen Vorhang" aus solchen Erwägungen einen positiven Aspekt beimaß. Demgegenüber hatten Länder wie Frankreich, Italien und Spanien unter anderem schwierige Seegrenzen zu schützen, so daß die zuständigen deutschen Behörden eher mit Sorge dorthin blickten, wenn sie an die Absicherung ihrer Westgrenzen dachten.
> Nach der Wiedervereinigung änderte sich die Konstellation insofern, als Deutschland nunmehr Verantwortung für die neuralgischen Grenzen zu Polen und Tschechien trug und die anderen Partner jetzt mit besonderer Aufmerksamkeit darauf achteten, daß die deutsche Seite die Schengener Ostflanke zuverlässig abschirmt.[568]

Given the importance of the security function of the border, compensatory measures were suggested. Advocates of the crucial importance of the centrality of the filter function of the border emphasised, however, that these measures could never really compensate for the security deficits created by the abolition of border controls. 'Mit dem Schengener

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[567] Bigo mentions Pierre Mazeaud from the RPR as saying that immigrants might profit from the admitted lack in strictness of control at the Bavarian-Austrian border: "Profitant, dit-il, des derogations admises au contrôle des frontiers externs de Schengen dans le cas de l'accord germano-autrichien, les émigrés est-européens auront toutes facilités our passer en Allemagne et de là n'importe où." Similarly, his party colleague, Paul Masson points to the Oder-Neisse border still badly controlled by the new authorities. Bigo, ed., *L'Europe des Polices et de la Sécurité Intérieure*, 83.

[568] Eisel, "Interview with Horst Eisel." Translation: At the time of the conclusion of the first Schengen Agreement in
1985, the nearly impenetrable inner German border prevented the intrusion of dangers from the eastern direction – which is not to say that German politics regarded the 'Iron Curtain' under a positive aspect due to such deliberations. In contrast to this, countries such as France, Italy and Spain had to protect difficult sea borders so that the responsible German authorities tended to look there with concern if they thought of the security of their western border.
After unification, the constellation changed insofar as Germany now had the responsibility for the 'neuralgic' borders to Poland and Czech and the other partners now took special care that the German side secured the Schengen eastern flank reliably.

Durchführungsübereinkommen ... wurde eine Vielzahl von Ausgleichsmaßnahmen konzipiert, die in dieser Art wohl einmalig auf der Welt sind, gleichwohl aber entstehende Sicherheitsdefizite nicht kompensieren können."[569]

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[569] Ziegenaus, "Sicherheitsdefizite der Grenzöffnung - Kompensationsmöglichkeiten," 39. Translation: With the Schengen Implementing Convention, a multiplicity of compensatory measures was conceived which are probably singular in the world, but yet can not compensate the security deficits produced.

3.2. The border as barrier

A parallel argument to the one on the security function of borders was that the border constituted a barrier in a number of ways which was an obstacle to the interests of European states, more particularly to the European market and to state authorities pursuing criminals. While the argument regarding the internal market necessitated an abolition of border controls, the argument regarding police authority demanded as a consequence that efficient compensatory measures be installed and strict external controls be conducted.

The deepening European integration and the internal market as a rationale for common policies on border controls has already been outlined in chapter three. This was also an important argument for German politicians. For chancellor Kohl, deepened European integration was central for a peaceful and free Germany in Europe. Freedom of movement across borders and cultural exchange were central for him to realize this goal: 'Europapolitik war und ist immer zuerst eine Politik für den Frieden in Freiheit. Das müssen wir wieder mehr als bisher ins Bewußtsein unserer Bürger bringen durch ganz konkrete Schritte, durch mehr Abbau der Grenzkontrollen, durch eine Intensivierung der Kulturbeziehungen und durch eine Verbesserung und Verstärkung des Jugendaustausches'.[570]

In a similar vein, the answer of the government to a written question of the SPD parliamentary fraction states: 'Die Abschaffung der Binnengrenzkontrollen ist nach Auffassung der Bundesregierung ein wichtiges Ziel der europäischen Integration.'[571]

Chancellor Helmut Kohl was especially concerned that numerous barriers impeded the completion of the internal market and a deepening of European integration.

> Die Vollendung eines Binnenmarkte in der EG steht immer noch aus. ... Wir müssen sie (die Wachstumsreserven) mobilisieren und die vielfältigen wirtschaftlichen Grenzbarrieren, die sichtbaren und die versteckten, abbauen. Nur dann behalten wir auf Dauer die Chance, gestützt auf die Größe des eigenen Marktes im Wettbewerb mit den anderen großen Industrienationen erfolgreich bestehen zu können. Wenn ich

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[570] Deutscher Bundestag, "121. Sitzung, Regierungserklärung Dr. Helmut Kohl." Translation: Europapolitics has been and is always first and foremost politics for peace in freedom. We have to make citizens aware of this again more than up to now through very concrete steps, through more abolition of border controls, through an intensification of cultural relations and through an improvement and reinforcement of youth exchange.

[571] Bundesregierung, "Antwort der Bundesregierung auf eine kleine Anfrage der SPD Fraktion."

vom Abbau von Barrieren spreche, denke ich natürlich nicht nur an die wirtschaftlichen Barrieren, sondern auch an die tatsächlichen Grenzbarrieren.[572]

At the same time, law enforcement agencies were particularly concerned about the border acting as a barrier to state authority and the ability to pursue criminals while Europe was already one criminal geographic area.[573] Edmund Stoiber exposed drastically the paradox he observed if border controls at internal borders were to be lifted while police still need to stop at the border: 'Kein überzeugter Europäer kann schließlich eine Freifahrt für Rauschgifthändler, Waffenschieber und andere Schwerverbrecher wollen, während es für die Polizei heißt: Stopp an den Grenzen.'[574] He was supported in this by Ziegenaus, the President of the Bavarian 'Landeskriminalamt'. He said that the police must not be stopped at the borders while criminals could pass without obstacles and controls.[575] He is echoed by a high-level police officer: 'Nun fallen die Schlagbäume, wettert der Kriminaldirektor Mellenthin, aber nur für die Spitzbuben; für uns, da bleiben sie.'[576]

The President of the BKA also joined in this argument by saying that the emerging free movement in Western Europe and the growing together of Europe had also benefited the offenders: 'Von der wachsenden Freizügigkeit in Westeuropa, der Grenzöffnung im Osten und den immer stärkeren wirtschaftlichen und politische Verflechtungen, vom Zusammenwachsen Europas also, haben auch die Straftäter profitiert.'[577]

It was emphasised that organised crime already worked in networks across Europe and that the opening of borders facilitated international activities of criminals.[578] The prediction was therefore, that with the fall of internal border controls, the ability of police to investigate would be diminished even more if no measures were agreed to enhance police cooperation.

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[572] Deutscher Bundestag, "73. Sitzung am 6. Juni 1984." Translation: The completion of the internal market is still to come. (...) We have to mobilise (the growth reserves) and have to remove the manifold economic barriers at the borders, the visible and the hidden. Only then do we have a chance in the long-term to hold our own in the competition with other leading industrial nations by relying on the size of our domestic market. If I speak of the removal of barriers then I am thinking not only of economic barriers, but also of real borders.

[573] Cf. Zachert, "Der neue kriminalgeographische Raum in Folge der Öffnung des Binnenmarktes."

[574] Stoiber, "Bekämpfung der Organisierten Kriminalität," 19. Translation: No convinced European can want a free passing for drug dealers, arms traffickers and other criminals, while the police is confronted with a stop sign at the borders.

[575] Ziegenaus, "Sicherheitsdefizite der Grenzöffnung - Kompensationsmöglichkeiten."

[576] Dieter Wenz, "Schengen und die Grenzen in Europa," *Frankfurter Allgemeine Zeitung*, 8 December 1990. Translation: 'Now the border barriers go away, rails criminal director Mellenthin, but only for the villains; for us, they remain.'

[577] Zachert, "Der neue kriminalgeographische Raum in Folge der Öffnung des Binnenmarktes," 26. Translation: Also the criminals have profited from the growing freedom of movement in western Europe, the opening of borders in the East and the ever stronger economic and political ties.

[578] Cf. Stoiber, "Bekämpfung der Organisierten Kriminalität."

Compensatory measures were the means advocated to make up for the fact that national police would have to stop at the borders while persons could leave the territory. These included the possibility of physical presence of police in a neighbouring country (cross-border observation and hot pursuit), a facilitation of exchange of information between local police offices of two countries, the Schengen Information System on criminals and their goods (in order to apprehend them at the borders) and a simplification of extradition procedures. The principle advanced was that if the border was regularly an obstacle for police, measures had to be taken which allowed the means of police investigation to cross borders (information on criminals, assistance in legal procedures) and allow policemen to cross the border in specific cases in person. At the same time, these kinds of measures would not be an obstacle to internal trade.

3.3. The border as an inefficient instrument

A third line of argument pointed to the fact that border controls were not efficient in deterring criminals and that their abolition did therefore not necessarily represent a security threat in itself. This argument was often mixed with the previous one, which pointed to the fact that borders were obstacles to law enforcement services while networks of criminals operated across European borders.

For example the President of the BKA affirmed in 1991 that state borders had long been no considerable obstacle for criminal organisations: 'Insbesondere für kriminelle Organisationen stellen die Staatsgrenzen schon lange kein nennenswertes Hindernis mehr dar.'[579]

Wolfgang Schäuble inferred that the border barrier was not a very intelligent means of investigation of police. 'Der Schlagbaum ist kein besonders intelligentes Fahndungsinstrument'.[580] To some extent, Schäuble therefore contradicted in this statement the argument of the filter function of the border.

If borders were no real obstacle to criminals or often not efficient, then cooperation with neighbouring national police forces promised more efficient results. Rudolf Seiters summed up this argument when he said that border controls could not provide everything and that reinforced cooperation was in the long run more effective than the filter function of the border alone. 'Grenzkontrollen sind nicht alles; verstärkte Zusammenarbeit ist auf die Dauer effektiver als allein die Filterfunktionen der Grenzen.'[581]

To some extent, this argument supported the idea of compensatory measures most fully, since only they would be able to encounter the European structures of criminals. The argument remains open to challenges if contrasted with the arguments of security advocates of the border. Also the politics of the Schengen Agreement lifting internal border controls and reinforcing them externally is not quite congruent with the argument. If borders had themselves shown to be inefficient, why would border controls be retained at the external borders. A logical extension of this argument is therefore that where

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[579] Zachert, "Der neue kriminalgeographische Raum in Folge der Öffnung des Binnenmarktes."
[580] Schäuble, "Europa ohne Grenzen - eine sichere Gemeinschaft."
[581] Seiters, "Das Schengener Abkommen und die Innenpolitik im Zeichen von Binnengrenzkontrollabbau und Europäischer Einigung," 11.

compensatory measures are not possible, border controls are still important for control of criminals and immigration. Furthermore, efficient compensatory measures are only possible with countries with whom close cooperation in a number of fields can be established and to whom a degree of trust is extended.

3.4. The positions of the various institutions

The debate regarding the Schengen border control regime was on the whole congruent with the solutions found. The actors whose arguments were presented above were also influential during the phase of negotiations. Furthermore, the key arguments had been presented repeatedly in articles and the media so that they had become commonly accepted.

Nevertheless, a differentiation between the position of various actors – no doubt influenced by their institutional interests – can be observed. Each social group tended to emphasise a different part of the final compromise found.

As outlined above, representatives of the Bundesgrenzschutz tended to advocate stricter border controls and closer cooperation with their European colleagues in the interest of more efficiency at the borders in deterring criminals and immigrants. At the same time, the Bundesgrenzschutz also stressed the fact that efficient fulfilment of its task would necessitate a higher budget and personnel. All of these factors can also be found in the Schengen arrangements.

The representatives of the national police forces tended to stress compensatory measures rather than the security function of the border. Individual statements often demanded more extensive measures than agreed in the Schengen treaties (e.g. extensive harmonisation of legal arrangements). Further national security measures in Germany took up these concerns.

The Federal Ministry of the Interior tended to hold positions which united the various lines of argument, albeit with different emphasis. Wolfgang Schäuble was of the opinion that although the border was not a very efficient means for police investigations (and thus could be abolished internally), the border ought to be strictly supervised externally, accompanied by compensatory measures. Rudolf Seiters, instead, tended to emphasise the European dimension of the problematic and thus also of its solution. He repeatedly appealed to European solidarity in dealing with immigration. Minister Seiters stated that the problems did not stop at the border and that politics had to answer with strategies which were not founded on national 'solo efforts'. 'Die Überlegung, daß man nationalistisch abgekapselt die heutigen Probleme lösen kann, ist eine Vorstellung vergangener Zeiten.'[582] Wolfgang

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[582] Ibid.. The thought that today's problems could be solved nationally is an idea of the past.

Schäuble also said in 1991 that none of the European states could deal with the problem of 'poverty movement' by itself.[583] Although Minister Kanther was little optimistic with regard to a common European refugee policy, his project of a European zone of security also was a result of the idea of necessary collaboration.[584] He added that the Schengen states were aware that in the face of illegal immigration they could defend themselves only together.[585]

The Chancellery made hardly any statement with regard to the issue of border controls. Chancellor Kohl's statements wishing to advance European integration and the internal market also by lifting of border barriers have been cited above. Not many other statements of members of the chancellery could be found. From the way the Chancellery led the German delegation and negotiated for the German position (see chapter seven), it can be inferred however, that the principle lines of argument were shared with the other actors.

Summing up the various lines of argument employed for the Schengen measures of abolition of internal border controls, reinforcing of external border controls and establishment of a catalogue of compensatory measures, it can be shown that they were sometimes contradictory. While one discourse highlighted the role of borders for security purposes, another diminished the importance of borders and emphasised the role of cooperation between national polices instead. The solutions proposed were compatible, however, if considered under the interests of security of state and society. The Schengen arrangements can therefore be called the smallest common denominator of the parties involved.

The Schengen arrangements therefore accommodated all cited positions which dominated the debate in Germany. This is an indication as to why Germany was a key supporter of the final compensatory measures reached. Individual German groups would have preferred stronger measures in the interests of security which were eventually realised through national measures.

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[583] "Schäuble will Asylrecht harmonisieren," *Frankfurter Allgemeine Zeitung*, 3 January 1991.
[584] Martina Fietz, "Kanther will europäische Sicherheitszone," *Die Welt*, 2 July 1998.
[585] Martina Fietz, "Stärkere Kontrolle der Grenzen," *Die Welt*, 17 September 1998.

4. Conclusions

Policies in Germany in the late 1980s and early 1990s were faced with the challenge to strike a balance between necessary adjustments to new threats, new patterns of migration, and fears about 'floods' of immigrants coming to Germany.

Several parallel arguments were used in order to justify the reinforcement of external border controls and compensatory measures in exchange for the abolition of internal border controls: one was the loss of border controls as national security filters of criminals and immigrants, which necessitated stricter external border controls; another was the necessary abolition of barriers to the European market and to state authority and prosecution of criminals. A third line of argument was the existing inefficiency of border controls.

In conclusion, the argument emphasising the security and filter aspect of the border advocated compensatory measures as a 'second-best' option if border controls had to be lifted. Cooperation between law enforcement services could not fully replace the function of the border. This argument saw the border as the most efficient means in the fight against both international crime as well as illegal migration. The arguments with regard to the border as a barrier or the inefficiency of border controls presented compensatory measures as superior.

Security experts in the Federal Ministry for the Interior, in the BGS and police, supported through statements of politicians, mostly the federal Minister of Interior or his Länder colleagues, were central in the debate regarding border control policies. These groups were also the ones who were most influential for defining the German position in the Schengen negotiations.

The discourse of security experts did not admit any contradiction between the arguments. While in one sense, the border was considered so vital for the fight against crime that any removal of internal border controls had to be counteracted by strengthening of external border controls, in another sense, the border was seen as a not very useful means for police work in the current crime situation.

All arguments for the strengthening of the border regime went together with the construction of a threat against societal security. This threat lay in the rise of international crime which was a potential direct threat to internal security and order; in the potential rise of immigration which could constitute a threat to the cultural and social cohesion of Germany through an influx of a number of foreigners which could not be assimilated; in the association of immigration with crime which could lead to the import of international criminal organisations and threats to internal security; in the direct neighbourhood of Germany to an instable and unpredictable East.

The discourse also emphasised Germany's special geographic situation. The SPD Minister of the Interior in Brandenburg, Alwin Ziel, called the eastern German border the German 'Wohlstandsgrenze'.(the border of affluence)[586] The proximity to the East was presented as a disadvantage in that it was the source and transit area of crime and immigration. There was no direct reference to old fears of the East in the official public discourse. However, allusions to past events like the 'migration of the peoples' of the 4th century or the use of metaphors which remind of the 'hordes' who lived in the East and threatened Europe do hold strong connotations without having to be spelt out.

By emphasising the security aspect of border-related issues, the proponents of strict external border controls and the most efficient compensatory measures played something of a 'trump card'. By emphasising that their objective was to retain societal security, they surpassed any alternative voices pointing out the limitation of civil rights or parliamentary control of the process.[587] The inability of alternative voices to influence the argument had a number of reasons: there really was a marked rise in numbers, the security experts were the people commanding the highest authority for identifying threats to internal security; they were supported in this through a similar discourse of security experts in other European countries;[588] the inner logic of security which came to bear gave priority to security experts to define the solutions to the threat identified.

This trump card effect of securitisation led to a politically powerful and successful argument, but also to an argument which has gaps and silences. The trust the other states' police forces needed to make this system work was hardly ever mentioned in the national German discourse. The border as inevitably connecting the Schengen area to its

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[586] Alvin Ziel, "Polizeiliche Zusammenarbeit mit Osteuropa," *Die Polizei* 84, no. 6 (1993): 129.
[587] Such as the German Greens.
[588] Cf. den Boer, "The Quest for European Policing: Rhetoric and Justification in a Disorderly Debate."

environment was also largely ignored. Migration and crime as a consequence of the integratedness of a system were not recognised, but treated as a phenomenon which could be fought at the border if it so wished.

The debate made it impossible to address the deeper structures of immigration and crime. The sources of immigration were mentioned as economic and political instability. The problem was framed in a way, however, where the solution lay in the reinforcing of controls at the borders. The illegality of immigration, the connection with crime and the abuse of the asylum system were emphasised with the effect of an impression that these 'undeserving' immigrants simply needed to be pushed back behind the borders.

Thus, the ultimate perspective of the discourse presented was national, emphasising largely national fears regarding immigration and crime, while European-level solutions were advocated in order to reach national societal security objectives.

Chapter 6

National changes of border-related policies

The last chapter outlined the German debate on border controls and how the security issue came to dominate the debate regarding borders in Germany. The increasing general awareness of potential threats from Eastern Europe entailed an increasing need of the security forces to demonstrate their ability to encounter such threats. At the same time, the developments on the European level put pressure on Germany to fulfil its promise to secure the Eastern borders. It is against this background that this chapter shows the changes which took place within Germany with the intention to provide additional security and adapt to European internal security demands.

National substitutes for border controls after the Schengen Agreements carry a special problem. The Schengen Agreements themselves do not allow such substitutes for border controls because the intention is that internal borders can be crossed *without any checks on persons being carried out* (Art.2 (1) SIC). Allowed are, however, measures for the enforcement of national law on the *entirety of the sovereign territory* (Art. 2 (3) SIC).

On the national level, substitutes for border controls directly behind the border were neither politically nor legally acceptable. The staff council of civil servants of the Bundesgrenzschutz, for example, voiced grave reserves with regard to controls at the interior of the country: 'Bei einer Öffnung der Grenzen stehen vermehrte Kontrollen im Landesinneren der Bundesrepublik Deutschland – primär aus rechtsstaatlichen Erwägungen – nicht zur Debatte'.[589] Thus, the measures taken nationally had to be shaped so that they did not constitute a replacement of actual border controls: this meant that national measures should not constitute systematic controls in the border region independently of suspicion.[590]

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[589] Bundesgrenzschutz-Hauptpersonalrat, "Ergebnisprotokoll der Sitzung des AK GSE vom 14.02.1989," (Bonn: 1989). Translation: After an opening of the borders, increased controls at the interior of the Federal Republic of Germany are not up for debate – mainly for reasons of the rule of law. (Rechtsstaatlichkeit refers to the legality of a measure with a view to constitutional rights)

[590] The difference between border checks and substitute measures is not always clear. A distinction becomes possible through the definition of border checks in the SIC: 'Border check shall mean a check carried out at a border in response exclusively to an intention to cross that border, regardless of any other consideration.' (Art. 1). In this definition, border checks are those checks which are conducted independently of other reasons due to the displayed intention of crossing the border. This means that checks of vehicles or persons which are conducted due to a concrete suspicion of officers, in a border area in which usually no systematic checks are carried out, do not qualify as border controls. An impression of a border control may nonetheless remain with citizens if patrols are reinforced in border areas or on main roads leading to the border.
The issue of checks and controls also shows a semantic problem: While the English differentiates between systematic controls and intermittent (random or selective) checks, French and German only uses the word 'contrôle' or 'Kontrolle'. Cf. Select Committee on European Communities Committee, "Schengen and the United Kingdom's Border Controls."

The following will show which changes took place in Germany in the context of the European-level Schengen arrangements. Most of these measures have not clearly been identified as reactions to Schengen. Some responded to concrete demands of Schengen provisions or Schengen partners. Others may be interpreted to result rather from an intention to assure partners of German ability to control, yet others were an attempt to reassure the German public of the ability of the government to retain a high level of internal security in the face of open internal borders (see here for example Bavaria's efforts before the joining of Austria) and uncertainty following the 'asylum crisis' of 1992/93.

This chapter thus also presents the German reaction to European agreements which it had negotiated. As the next chapter will outline, German officials had been very active in assuring the security of the new border arrangements in Europe. Even before 1989, national compensatory measures were advocated. However, after 1989, the activities were intensified and a number of changes in the Bundesgrenzschutz and the working methods of law enforcement services can be found.

The following will first present changes within the BGS, showing how reorganisations, a rise of budget and personnel, and increased technological means were to increase the efficiency of BGS work. The chapter continues with the changes within other law enforcement services and legal/administrative changes in the country, followed by agreements made with other states to increase border control efficiency.

1. Changes within the Bundesgrenzschutz

The following will give an account of the changes which occurred in the Bundesgrenzschutz at the end of the 1980s and during the 1990s. A history of the border guards was given in chapter five to provide a context for the presentation of relevant national actors of internal security. Changes with regard to border controls happened in the Bundesgrenzschutz, its organisation, tasks and equipment as well as the cooperation with other services. These changes were an outcome of the debate about borders as it has been retraced in the preceding chapter. As has been pointed out, the BGS was itself an active player in this debate, advocating the need for heightened security measures. At the same time, the changes also provided further input into the debate, either as justifications for the supporters of stricter controls or as an object of criticism for opponents.

1.1. Reorganisation of the BGS in 1992 and 1998

During the 1980s, the emphasis of BGS work was on the tasks of policing, supporting Länder police in special situations such as major demonstrations. The year report of 1989 illustrates that the BGS was organised in such as way as to provide the national logistical and personnel support to such missions: the units supporting Länder police were divided between 5 Grenzschutzkommandos (South, Centre, West, North and Coast) so that they could be deployed in the various Bundesländer. The rest of personnel was organised in units for the border controls in the 'Einzeldienst' – which comprised actual border checks and mobile control teams.[591]

In 1992, the emphasis of BGS work changed due to the reorganisation of the service in reaction to the envisaged Schengen implementation, to German unification and changes in states east of Germany. On 1 April 1992, the tasks of rail police and air security were transferred by law to the BGS. The duty of rail police consists in averting dangers to public security, to rail equipment or to the running of the trains in the area of the rails of the federal government. The task to ensure air security is aimed at averting dangers for the safety of civil aviation (except those resulting from aviation itself), especially dangers of high-jacking and sabotage. This includes the control of passengers and their luggage for weapons, bombs and other dangerous objects; protection of the passenger control posts

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[591] Bundesministerium des Innern, "Tätigkeitsbericht des Bundesgrenzschutzes (BGS) 1989."

with weapons to ensure that no unauthorised persons enter the areas beyond; protection of planes and aviation equipment and buildings; averting situations of concrete danger by special groups on alert.

With the 1992 reorganisation, a process was begun which shifted the focus of BGS work to the work at the borders, to rail and air security and away from the police as reinforcement from Länder police. This included mainly shifting personnel towards the east of Germany, but also putting an emphasis on new locations, concentrating on the main railway stations and airports.

In 1994, the law of the BGS was changed so that the guards were allowed to conduct police controls of identity up to 30 km from the border, enter houses of suspects of smuggling or illegal entry and use methods of 'undercover' investigation.

In 1998, a further re-organisation continued reform efforts in order to 'take into account the new framework conditions and the changed crime situation'[592], enabling the BGS to change its organisational structure in order to shift its focus even more to the Einzeldienst.[593] This change has to be seen in conjuncture with the implementation of Schengen and the intensified fight against organised crime and illegal immigration. The year report of the BGS also shows that the measures now enacted had partly been envisaged since 1994. The focal points of the re-organisation as mentioned in the year report 1998 were the following:

- Shifting of the focus of the work of the BGS to the external borders and to the rail police while reinforcing the number of personnel. The result of this shift was that while in April 1992 only 10% of the BGS officers worked in the 'Einzeldienst', in 1999 80 % of its work was done there.
- Creation of 98 Inspektionen which integrate all work of 'Einzeldienst' (border control, air and rail security)
- Reduction and reorganisation of the those units which have tasks in special situations requiring police intervention.

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[592] Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1998." Vorbemerkung. This formulation makes reference to the implementation of the Schengen Agreement and migration and organised crime in Eastern Europe.
[593] Gesetz über den Bundesgrenzschutz zur Stärkung der inneren Sicherheit vor dem Hintergrund der neuen Rahmenbedingungen und der veränderten Kriminalitätslage vom 1.11.1994; Erstes Änderungsgesetz vom 25. August 1998

- Possibility of controls independently of suspicion (but according to the situation) in airports and railway infrastructure

The shifting of personnel towards the Eastern border after 1989/90 with the two major reforms was not met with pure welcome. It involved the moving of families not only to another part of the country, but to an area where quality of living was – at least initially – markedly lower. General prejudices of Westerners against the East might also have played a role. The BGS itself said in its year report of 1998 that agreements had been made between the BMI and the main personnel representation of the BGS (Hauptpersonalrat) for the changes initiated in 1998 (around 9.500 employees were concerned).[594] As far as possible all personnel shifts were to happen on the basis of voluntarism and in a socially acceptable way. Flanking measures such as easier promotion were introduced to encourage mobility. The report speaks of the successful conclusion of the personnel reorganisation in the first quarter of 1999.

Reports of the reorganisation of 1992 give a slightly different picture from official statements and point to difficulties. The police trade union (Gewerkschaft der Polizei), which is the strongest representation of BGS personnel, spoke of a lot of work in connection with the reorganisation following 1992, to try and make the structural changes more acceptable to employees. The plans of the BMI had included a principle of voluntarism as far as possible: offers of free posts primarily to the locations where personnel had to be reduced, chances of speedy promotion etc.[595] In practice, however, Diederichs reports of the prevalence of the old 'Prussian spirit', meaning that higher ranks had much more chances of having their wishes fulfilled than the ordinary officers.[596]

The numbers involved were played down. Schäuble indicated that of 'originally' 960 BGS officers at the border, 296 were to be retained at the internal borders. He claimed that only 361 employees were concerned by the abolition of internal border controls, because normal fluctuation and placements in other units had already decreased the number of personnel at those borders.

The reorganisations of 1992 were met by concern not only in the service but also amongst party politicians. A letter to the Minister Wolfgang Schäuble by the Member of Parliament

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[594] Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1998."
[595] Deutsche Polizei 3/92 cited after Diederichs, "In welcher Verfassung ist der BGS?."
[596] Cf. Ibid.

Willfried Penner of 17 July 1990, envisaging problems in the planned reorganisation, shows this.[597] The answer by the Minister is indicative of the deliberations behind the changes: the BGS was to be retained and the continuing importance of the BGS was emphasised specifically. Schäuble stated that the BGS would continue to conduct controls at EC-external borders with an emphasis on international airports, to protect constitutional and federal institutions and to protect German representations abroad. Furthermore, the BGS was seen as indispensable for support of Länder police in difficult situations and for the protection of the freedom in Germany. A 'broader perspective for the future' was to be given to the BGS by rail and airport security.'

Summing up the reorganisations of 1992 and 1998, a major shift occurred from federal 'police tasks' to control at the border, railways and airports. At the same time, personnel was shifted from western stations to the eastern border. The military organisational structures were replaced with regional offices uniting all control tasks of the BGS in one region.

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[597] Wolfgang Schäuble, "Brief an MdB Willfried Penner," ed. Bundesministerium des Innern (Bonn: 1990).

1.2. Rise of budget and personnel of the BGS

Despite the fact that the Schengen Agreements led to an abolition of border controls at the internal borders, the personnel and budget of the BGS continued to rise. This was due to the fact that the service managed to portray credibly the list of 'indispensible security tasks'[598] it fulfilled, not least at the new eastern border. At the same time, the loss of such an institution was often portrayed as a loss in itself. The newspapers reported uncertainty as to the future tasks of the BGS, but combined this with the emphasis of the necessity and efficiency of the BGS at the eastern border.[599]

In 1989, the year before unification, the total personnel of the BGS amounted to 24,982 (this includes police officers, officers-in-training, administration personnel and others).[600] After merging with the BGS East (which had around 2,300 officers) and an increase in personnel, the total number had augmented to 34,733 (of which 24,463 were officers) by 1992. This rise of personnel was employed to guard the eastern border.

An employment offensive was conducted between 1991-1996. By the end of 1997, 40,346 people worked for the BGS, 30,008 of these were fully trained officers. 'Amateur officers' called 'Grenzpolizeilichen Unterstützungskräfte', which were introduced in 1993 to support the work of the officers, amounted to 1,205 in 1997.[601] There were further 2,232 officers in training, adding to the number of personnel. (In 1998, the first reduction in personnel for over a decade can be noticed when the number fell to 39,631. Indeed, the BGS year report 1998 states that new personnel would only be taken on to maintain the amount of 30,000 officers planned.) A steady fall of administrative personnel can be constated due to budget-

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[598] "Grenzschützer lassen sich umschulen," *Süddeutsche Zeitung*, 2 November 1990.

[599] Cf. for example "BGS-Beamte bereits an Ost-Grenzen im Einsatz - Schäuble: Seitdem funktioniert es besser," *Die Welt*, 29 September 1990, "Bundesgrenzschutz soll verstärkt werden," *Frankfurter Allgemeine Zeitung*, 1 November 1990, "Grenzschützer lassen sich umschulen.", Johannes Leithäuser, "Die Fahnder aus dem Westen," *Frankfurter Allgemeine Zeitung*, 2 August 1990, Walter Reischl, "Bundesgrenzschutz heute: 30 000 Mann und kein Befehl?," *Passauer Neue Presse*, 2 November 1990, Hans Schiemann, "Händeschütteln auf der Letzten Streife," *Rheinischer Merkur*, 6 July 1990, "Wenn immer mehr Grenzen wegfallen - Bundesgrenzschutz und Zoll vor neuen Aufgaben," *Franfurter Allgemeine Zeitung*, 7 February 1990.

[600] For statistics see appendix.

[601] These members of the BGS are recruited from local inhabitants, in a mixture between support for the officers and employment measure for the local communities. They are supposed to support the BGS officers to control the border against illegal immigrants and in the fight against human smuggling, car smuggling and transborder petty crime. They are also supposed to have an effect of deterrence on refugees and smugglers. These groups have been subject to sharp criticism, questioning their motives and legal status. Cf. for example Marina Mai, "Die Hilfssheriffs," *Die Woche*, 3 April 1998.

prescribed reductions of administrative personnel since 1993 and the total stop of employment in administration since 1995.[602]

In terms of budget, the BGS' financial means saw a steady rise.[603] In 1989, the total budget amounted to 1,294 million DM. In 1992, it grew to 1,899 million DM. In 1993, the amount jumped over 2 billion DM and by 1998, 2.9 billion DM were paid to the BGS (two and a half times the amount of nine years earlier). In 2000, the budget was over 3.2 billion DM.[604] Given that 75% of the budget of the BGS are personnel costs (in 1998 year report), the rise coincides with the aforementioned rise of personnel.

One result of the Schengen Agreements and the assessment of the internal security situation after 1989 by German security experts was therefore a rise in personnel and budget. Despite the fact that the controls at the internal borders were suppressed, and a majority of personnel was shifted from other tasks to border controls, the necessity of more personnel had been advocated.

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[602] Figures from Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1998.", Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1999," ed. Bundesgrenzschutz (Berlin: 2000), Petra Pau and Katina Schubert, "Bundesgrenzschutz. Eine Omnipräsente und Omnipotente Bundespolizei?," *Bürgerrechte & Polizei* 62, no. 1 (1999), Winter, "Kleine Geschichte des Bundesgrenzschutz."

[603] See table on BGS personnel and budget in the appendix.

[604] Figures from Pau and Schubert, "Bundesgrenzschutz. Eine Omnipräsente und Omnipotente Bundespolizei?.", Winter, "Kleine Geschichte des Bundesgrenzschutz."

1.3. Reinforcement of technological equipment

The BGS and the Länder police have also reinforced their technological equipment for control in the first half of the 1990s. Heiner Busch speaks of a shift from border control to border surveillance at the German eastern border which went hand in hand with new technology, meaning that the means of control changed from systematic checks at defined points to a technological surveillance of as many areas as possible.[605]

Generally speaking, the BGS aims at adapting its equipment to the 'latest technical developments'.[606] Since the 1992 reorganisation of the BGS following the changes of German unification and the signing of the Schengen Convention, the year reports of the BGS speak regularly of new vehicles purchased in order to fulfil the new tasks of the BGS. In 1992, the equipment of the BGS with automobiles and with arms was readjusted to 'new requirements' and the reorganised BGS.[607] The year report of 1992 states that the amount spent for equipment of offices and for reneweing of technological equipment was around 100 million DM.[608] Similarly, special transport vehicles such as helicopters, speedboats and four-wheel drives were purchased.[609] For example it was mentioned for the year 1997 that 220 million DM were to be spent on the modernisation of the helicopter fleet and the purchase of 400 vehicles.[610]

The technology used for surveillance was originally developed for military purposes. One device reinforces the remaining light for use at night (light amplifiers and night vision scopes) and another translates the warmth of human bodies into images on a screen (heat sensors). Both these technologies are useful for the detection of persons seeking illegal entry over the border. While the first can detect groups or individuals wandering in the border region at night, the latter are able to detect people in complete darkness or hidden in cars. The BGS personnel was trained by the Bundeswehr to use these technologies. The first vehicles with heat sensors were developed at the beginning of the 1990s and introduced in 1994, in time before the implementation of the Schengen Agreement in

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[605] Heiner Busch, "Hart an der Grenze," *Bürgerrechte & Polizei* 60, no. 2 (1998).
[606] Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1996/97," ed. Bundesgrenzschutz (Bonn: 1998).
[607] Bundesministerium des Innern, "Tätigkeitsbericht des Bundesgrenzschutzes (BGS) 1992."
[608] Ibid.
[609] Pau and Schubert, "Bundesgrenzschutz. Eine Omnipräsente und Omnipotente Bundespolizei?."
[610] Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1996/97."

1995.[611] These appliances cost around 300.000 DM per piece.[612] By 1998, 104 heat sensors were in use at the BGS, in VW-busses or in helicopters. Light amplifiers and night vision scopes were also in use by 1993 at the latest, with new models bought in subsequent years. A mobile video surveillance equipment was purchased in 1997.

The transport of goods is checked, in order to control smuggling , but also to make sure that no human beings are being transported in the lorries. CO_2 measuring appliances are used for this purpose – they are first mentioned in the 1996/97 year report of the BGS.

The control of passports and other documents is achieved with the help of appliances which magnify the documents as well as by the use of different light sources, like UV light. From the year reports of the BGS, it can not be inferred when this technology was introduced, but the state of technology makes it likely that this was in the early 1990s at the earliest: the regional centres for checking documents use videospectral analysis. The introduction of digital photo and video technology is mentioned for 1998.[613] The central office for checking documents is the document laboratory (Urkundenlabor) in the Grenzschutzdirektion. It provides the units with information on real and false documents and also plans to set up a database on forged documents together with the BKA.

Also the use of information technology was begun in 1992. In subsequent years, the equipment with INPOL system terminals, IT work stations, wireless data terminals, vans, helicopters and boats was improved and constantly modernised. In 1995, the equipment of the border control posts with information technology was completed. Centrally stored information can be retrieved by terminals at the border posts.

By 1994, technology enabled border control guards to retrieve information from all central police databases:[614] the databases which can be consulted are the INPOL (the police information system which contains data on persons and cases which are sought), the Ausländerzentralregister (the central database on foreigners held at the BKA), the Zentrale Verkehrsinformationssystem (the central traffic information system ZEVIS) and the

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[611] Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1994," ed. Bundesgrenzschutz (Bonn: 1995).
[612] for details on technologies used, refer to Busch, "Hart an der Grenze.", Pau and Schubert, "Bundesgrenzschutz. Eine Omnipräsente und Omnipotente Bundespolizei?."; they also report that the technology only works well in good weather; in rain or fog, the visibility is greatly reduced. The year reports of the Bundesgrenzschutz contain information on the type and number of equipment purchased, but do not comment their use or purpose.
[613] Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1998."
[614] Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1994."

Schengen Information System (SIS).[615] Mobile terminals which can check data independent of a fixed terminal have been in use in trains since the 1980s. The Bavarian police doing controls inland has used mobile data transfer technology for checks in traffic since 1994.

Systems of digital recording of finger prints have become common. In Germany, all asylum seekers are fingerprinted and photographed since 1992 and the AFIS[616] has been set up. In this system, the data of asylum seekers, of suspects, convicted and imprisoned people are all in the same database.

These new technologies allow the BGS to conduct checks on persons entering or leaving the Schengen territory to an extent hitherto unknown. They can be checked for existing warrants, whether they are registered as asylum seekers somewhere in Germany. Their car licence can be checked for any offences, and any van can be subjected to CO_2 measurements in order to check for hidden immigrants. The possibility to access different databases together has been criticised for endangering civil rights of citizens. The problematic of the SIS has also been presented by civil rights advocates. It has often been criticised that the reason for entering persons was not clear and that the data not suppressed in time.[617]

Modern technology introduced new possibilities and methods of border controls, and thus changed the practice at the border itself. It is difficult to assess whether the new technology has facilitated the work at the border. While machines allow the checking of forged passports or the surveilling of a border area, much important work still has to be done 'in person' such as patrols of the border area or detecting new forging techniques. Nevertheless, technological equipment was given great emphasis and is constantly being updated, since the BGS saw their work as an ongoing race between smugglers and police.[618]

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[615] Busch states that nearly 60% of the data in INPOL and 85% of the data in SIS concern non-EU nationals who are to be deported or denied entry.

[616] Automatisiertes Fingerabdruckidentifizierungssystem, automated fingerprint information system.

[617] For criticism of the SIS refer for example to publications of Statewatch and Bürgerrechte & Polizei.

[618] See e.g. Jürgen Wahl, "Menschenschmuggel im Zittauer Sack. Die Kontrolle an den Außengrenzen der EU," *Rheinischer Merkur*, 30 June 1995.

1.4. Cooperation between services

Since 1973, the BGS has a legal obligation to serve as a reinforcement of the Länder police if so requested. The BGS also supports the Länder in delegating the special services (anti-terrorist unit GSG 9, flying services, central office for communication etc.), its helicopters, water-cannons and special automobiles. A substantial amount of its time was spent on such work in the past: for example in 1989, around 13,400 BGS officers worked at 16 different occasions for Länder police.[619] By 1995, the number of officers in support of Länder police was markedly reduced, although the BGS supported the Länder police in 29 cases: 5,800 officers were in action and 165,000 hours of work were invested.[620] Most of these interventions were at the occasions of major demonstrations.

A number of cooperations between services on the federal level and between federal and Länder level have been initiated in order to improve the fight against border-related crime and offences. Especially after the unification and the signing of the SIC and before implementation, the security rationale became prevalent also for measures raising national law enforcement capacity. On 1 April 1992, a regulation went into force which unified the various existing regulations for the cooperation between customs and BGS and applied these also to the German-Polish and German Czech border.[621] The intention was to create a unitary framework for the cooperation of the services which are subordinate to different ministries (customs: Ministry of Finance and BGS: Ministry of the Interior). The regulation provided for a unification of personnel at the border points and for coordinated work along the border. The reason given for this cooperation was the rise of illegal immigration and smuggling of goods.[622] The BGS and the customs service also collaborated in order to evaluate the various sections of the border according to categories of danger in the framework of a criminal-geographic regional analysis. The goal was to optimise the control and surveillance.[623]

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[619] Bundesministerium des Innern, "Tätigkeitsbericht des Bundesgrenzschutzes (BGS) 1989."
[620] Cf. Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1998."
[621] Dienstanweisung für die Zusammenarbeit von Bundesgrenzschutz und Bundeszollverwaltung bei der Überwachung der Grenzen zu Polen und der CSFR, cited after Hellenthal, "Die aktuelle Entwicklung der illegalen Zuwanderung nach Deutschland insbesondere mit Blick auf die Schleuserkriminalität und andere Felder der grenzbezogenen Organisierten Kriminalität und die Gegenmaßnahmen des Bundesgrenzschutz in seiner neuen Organisationsstruktur," 5.
[622] Ibid.
[623] Ibid, Fredi Hitz, "Grenzlagebild - Lageentwicklung und Zusammenarbeit der Sicherheitsbehörden," *Die Polizei* 84, no. 6 (1993), Eduard Lintner, "Grenzüberschreitende Kooperation der Sicherheitsbehörden," *Die Polizei* 84, no. 6 (1993).

After shifting the emphasis of its own service gradually to border controls, the BGS started a number of cooperations with Länder police. These cooperations allowed the two services to gain insights for each other's work and to provide mutual support during operations. A first regional security partnership between the police of Sachsen and the BGS of that area was enacted in 1992. The police was to support the BGS in the border region in measures of fighting crime (mainly observation) and to reinforce investigations in the area where three states meet (Dreiländereck). The objective of these partnerships was described as follows in the 1998 year report of the BGS: the aim was to promote the cooperation between the security authorities, to reinforce the visible presence of police, to fight transborder crime, especially smuggling and illegal immigration, and to include citizens more in the fight against crime.

The cooperation between Länder police and BGS was intensified through the so-called 'Sicherheitskooperationsvereinbarungen' (security cooperation agreements) with Baden-Württemberg (18 July 1997), Mecklenburg-Vorpommern (1 July 1998), Sachsen (3 March1999), Niedersachsen (26 April1999), Schleswig-Holstein (20 May 1999), Brandenburg (7 June 1999), Berlin (30 June 1999) and Hamburg (5 May 1999). Furthermore, security partnerships were agreed for the cities of Berlin (22 April 1998), Stuttgart (3 March 1998) and Bremen (5 May 1998) as well as Frankfurt a.M., Offenbach, Hanau and the Rhein-Neckar region (early 1999). For the cities of Munich (4 June 1998) and Hanover (18 August 1998), regional cooperation for interventions was agreed.

The cooperation with Länder police meant that the BGS retained visibility in the Länder also after its shifting primarily to border controls. The BGS was also present at the interior of the territory due to the tasks of rail police at railway stations and in trains. Such a presence could give citizens the impression that security issues originally associated with the border had moved away from the border and were relevant for internal security everywhere in the country.

2. Reinforced controls within the German territory

Having outlined the changes which occurred specifically within the BGS in order to adapt it to the new tasks at the eastern border and the consequences of the abolition of internal border controls, the next section surveys the means and principles of law enforcement agencies in general. The BGS is a central institution for law enforcement at the borders, but the Länder police have also been given an increasing role in ensuring internal security after the end of internal border controls.

The reinforced checks have introduced new principles of control, most notably the possibility of control independent of suspicion. Bavaria was the first Land which allowed its police so-called 'anlaß- und verdachtsunabhängige Kontrollen' (controls independent of concrete occasion and suspicion) (Bayerisches PAG, §13 Abs.1 Nr.5) outside the immediate border zone in 1994.[624] The origins of the so-called 'Schleierfahndung'[625] can be traced back to a working group of police practicioners in the Bavarian Landeskriminalamt[626] which had already suggested in 1988 means of counteracting the reduction of border controls in Bavaria by compensatory measures.[627] The following measures were suggested:[628]

- investigations independent of concrete occasion, conducted by mobile patrols
- constant control of 'criminographic areas'
- undercover control of moving traffic on motorways and through-roads with international traffic
- use of mobile control troops for the fight against certain types of crime (illegal entry, car theft, drugs control)

Art. 31 Abs. 1 Nr. 5 of the changed police law in Bavaria of 1 January 1995 took most of these possibilities into account. This was justified with the impending accession of Austria to the EU and Schengen. Controls independent of suspicion were allowed on through-roads (Autobahn, European roads and other roads with significance for transborder traffic) and within 30 km of the border. Similar provisions were made by Baden-Württemberg,

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[624] Eberhard Roese, "Interview with Eberhard Roese," (2001).
[625] The term 'Schleierfahndung' describes the particular method of control and is difficult to translate and will therefore be used in German. The closest English translation is dragnet controls.
[626] Land Office of Criminal Investigation.
[627] Roese, "Interview with Eberhard Roese."
[628] Eberhard Roese, ""Schleierfahndung" in München. Art. 13 Abs. 1 Nr. 5 Bayer. Polizeiaufgabengesetz," ed. Polizeipräsidium München and Abteilung Einsatz (München: 2000).

Mecklenburg-Vorpommern, Niedersachsen, Sachsen and Thüringen (which has neither an internal nor external Schengen border!).

From 1998 onwards, the BGS, too, was to conduct controls independent of suspicion, but depending on the general situation (lageabhängig). This was to be allowed in the 30-km area, but also in airports and railway stations. This meant that every person could be stopped and searched in all trains and railway stations independently of suspicion.

Connected to this new principle of control of was a general zonal approach to control. Markus Hellenthal, Referatsleiter of the BGS, wrote in 1997, that the strategy of the BGS left the actual border line and directs its attention to the border area.[629] Minister Kanther also emphasised the need to control the region near the border rather than the border line: 'Durch den Wegfall der Personenkontrollen an den Schengener Binnengrenzen kommt der verstärkten polizeilichen Überwachung der grenznahen Region und der Verkehrsknotenpunkte maßgebliche Bedeutung zu. Nur durch einen gemeinsamen „Sicherheitsschleier" von Bundesgrenzschutz und Landespolizeien könne verhindert werden, dass Kriminelle ungestört von einem Staat in den anderen reisen können.'[630] Through the security cooperations between Länder and BGS, the BGS could profit from the larger competences of the Länder police as well as surveilling its own 30 km zone. This also fit the picture of a spatial approach to control.

The basis of such a zonal approach to border control was traffic control. Bavaria equipped all the police units responsible for motorways with teams for control and investigation. Their task was to search for individuals, to fight smuggling and support other divisions in the fight against organised crime and drug-related crime.[631] They disposed of laptops where they have access to all important data via police radio.

These special units were reinforced after the inclusion of the Bavarian border police into the Land police due to the abolition of border controls with Austria: two thirds of the former officers of the border police were used in the border region, in the 'allgemeinpolizeilichen Betreuung' (general police services) of the Land police, in the LKA

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[629] Albrecht Maurer, "Schleierfahndung im Hinterland," *Bürgerrechte & Polizei* 59, no. 1 (1998).
[630] Press release of the BMI, 17.7.1996. Translation: Due to the lifting of controls on persons at the Schengen internal borders, the increased police surveillance of the border region and the traffic centers has gained crucial importance. Only a common 'security veil/network' by federal border police and Länder police could prevent that criminals travel unimpeded from one state to another.
[631] Maurer, "Schleierfahndung im Hinterland."

and the control of dangerous and heavy traffic. A significant part of the officers was employed in 'Schleierfahndung' and was attributed to 5 new police inspections.[632]

This kind of control has been the subject of intense debate. Critics have observed that it was not the original objective to multiply the points of controls and to 'transform the old borders into the network maps of the European railways' as one journalist put it.[633] The former president of the police in Düsseldorf, Prof. Hans Lisken, said in an interview that such controls of everyone were against constitutional rights.[634] A head of the Baden-Württemberg police academy, Thomas Feltes, has also argued that 'Schleierfahndung' was 'at least against the spirit of the Schengen Convention,'[635] which stipulated that crossing of borders between Member States be possible without regular controls. This was contradicted by Munich's police vice president Roese who said that the legal preconditions for the application of the law (on controls independent of suspicion) were concrete enough (prevention of illegal crossing of the border, prevention of illegal stay in Germany, fight against organised crime); he added that these preconditions were subjectable to legal control. He also said that imprecise terminology in the law was necessary in order to take into account the mobility and changeability of international crime.[636] The Ministry of Interior argued thus: a differentiation had to be made between control of transborder circulation (which the SIC forbids at the internal borders) and the police surveillance of the border (which has to be understood as a general task of danger prevention not directed at a particular person).[637]

The controls of the BGS in the border area are *de jure* only observing units. The police of the Land, however, can exercise its control possibilities up to the border which seems within the legal ambit of the Schengen Convention. However, in cases where the division between the BGS and Länder police is attenuated, as for example in cooperation agreements, the argumentation becomes legally problematic.

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[632] Ludwig Fisch, "Polizei auf dem Land bekommt Verstärkung," *Süddeutsche Zeitung*, 10 March 1998.
[633] Heribert Prantl, "Das Land der tausend Grenzen," *Süddeutsche Zeitung*, 15 June 1998.
[634] Süddeutsche Zeitung, 31.1.1998
[635] cited after Maurer, "Schleierfahndung im Hinterland," 2.
[636] Roese, "Interview with Eberhard Roese."
[637] Ibid.

3. Cooperation agreements with other countries

3.1. Cooperation with law enforcement services

Already in the 1950s, Germany entered into cooperation agreements with neighbours in order to be able to ensure the enforcement of controls at its borders. As concerns its Schengen neighbours, Germany already had cooperation agreements before the Schengen Agreement were concluded:[638] with France[639], with Belgium[640] and with the Netherlands[641]. These agreements aimed mainly at regulating the relationships between border control units working in immediate proximity and provided for rudimentary cooperation. In the framework of the Schengen agreements, other cooperation seemed necessary. Police cooperation with France was agreed in October 1992 with common commissariats, a coordination centre, coordinated interventions, exchange officers and a rise in financial means for communication devices.[642] Luxembourg and Germany concluded a similar agreement in October 1995, which contained also provisions and details for modalities of cross-border observation and pursuit.[643] Additionally, agreements were made with the other Schengen neighbours according to Art. 39 (4) of the SIC (cooperation in border areas) with similar provisions.

Germany also concluded cooperation agreements with its eastern neighbours. In the years 1991 and 1992, bilateral agreements in the area of the fight against organised crime, drug-related crime and illegal immigration were made between Germany and Poland, Hungary, the then Czechoslovakia and Bulgaria. These states were to receive 31 million DM up to 1994 with the purpose of purchasing of equipment and improving police education.[644]

With Poland, additional police cooperation was agreed. A state treaty between Germany and Poland for the cooperation of police authorities and border authorities was signed in

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[638] All figures taken from the report of the Schengen working group on police and security SCH/I (95) 46 rev.2.

[639] Agreement of 18 April 1958 on the neighbouring border control stations and Agreement of 3 February 1977 on police cooperation in the border area.

[640] Agreement of 30 September 1959 on the relations between the police autorities at the common border.

[641] The document of the working group does not indicate a date, but refers to several agreements predating the Schengen Implementing Convention.

[642] Agreement of 12 October 1992 on police cooperation between the Länder and Departments at the border.

[643] Agreement of 24 October 1995 on bilateral police cooperation.

[644] Ziel, "Polizeiliche Zusammenarbeit mit Osteuropa."

1995. Further agreements on the formation of common groups of investigation, and common units were planned.[645]

Despite these formal agreements, it was the informal contacts which proved most successful. Dietrich cites two BKA officers that the informal cooperation is satisfactory and even closer than the one with most Western European states.[646]

Furthermore, the conferences of Berlin (1991), Budapest (1993) and Prague (1997) brought together the authorities responsible for internal security of EC states, Switzerland, Austria as well as states of Eastern and South-Eastern Europe. The conferences, at the initiative of the German Minster of Interior in 1991, Dr. Wolfgang Schäuble, aimed at a common strategy for all European states, given that all states were concerned by the phenomena of migration and trans-border crime. Part of this strategy was future cooperation of law enforcement services and regular meetings of heads of police.

3.2. Readmission agreements

Readmission agreements provide for co-operation on the return of illegal immigrants to their country of origin, thus allowing a 'refoulement' of refugees and asylum seekers. Individual states are usually partners in such treaties. The Schengen Agreements made possible the conclusion of Schengen Readmission Agreements between all Schengen partners and individual countries.

Germany had a number of readmission agreements with West European partners before Schengen: with the Benelux countries (1966), Denmark (1954), France (1960), Sweden (1954) and Norway (1955). These were all states with whom such deportation agreements were relatively unproblematic since fairly similar economic conditions and no large numbers of migrants were involved. In the face of a sharp rise of asylum seekers and immigration of ethnic Germans towards the end of the 1980s, Germany concluded a number of agreements with the aim of fixing the duty of neighbouring countries to take back people with provenance from the East who had no legal right to enter Germany.[647]

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[645] Cf. Helmut Dietrich, "Deutsch-Polnische Polizeikooperation," *Bürgerrechte & Polizei/CILIP* 59, no. 1 (1998).
[646] Ibid.
[647] All following dates are taken from Council of the European Union, "Inventory of Readmission Agreements," ed. General Secretariat (Brussels: 1994).

The first of such agreements was concluded between Poland and all of the Schengen states in March 1991; visa obligations were lifted after this agreement.[648] An additional bilateral agreement between Germany and Poland for taking back refugees was signed in May 1993 and enacted in June of the same year. In exchange, Germany agreed to pay 120 million DM to Poland for the accommodation of refugees and for the reinforcement of controls at the Polish eastern border. Similar bilateral agreements were made with the Czech Republic (1994), Romania (1992) and Bulgaria (1994 and 1996). Agreements with Slovakia, Hungary, Slovenia and Turkey were also negotiated.

The countries east of Germany have started to imitate this policy and made readmission agreements amongst themselves. Poland for example has concluded readmission agreements with the Schengen members as well as Bulgaria, Croatia, the Czech Republic, Hungary, Moldova, Romania, Slovakia, Slovenia, and Ukraine.

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[648] Since 1997, the European Commission has been authorised to negotiate further readmission agreements with other states of origin of refugees such as Russia, Morocco, Pakistan, Sri Lanka, Hong Kong and Macao. Also readmission clauses have been included in agreements with Algeria, Armenia, Azerbaijan, Croatia, Egypt, Georgia, Lebanon, FYROM and Uzbekistan.

4. Safe third countries and the change of the law of asylum

The first change for asylum seekers hoping to come to Germany was the introduction of visas for all countries of provenance of asylum seekers in the 1980s. Since this did not have much effect on the number of asylum seekers, the law of asylum was changed in 1993 after much debate. In a looser sense, this may also be considered as part of Germany's national compensatory measures for the elimination of border controls. The change of the Basic Law required an alliance across parties which was achieved in the end with a coalition of the conservative parties CDU/CSU, the Social Democrats and the Liberals. The new provisions allowed for illegal immigrants to be pushed back - if found in the border area - to the country they came from. This was made possible by designating the country of provenance as a safe third country.

The geographic position in the midst of Europe was traditionally considered a disadvantage. Chapter five showed that Germany's position in the centre of Europe was presented as problematic with regard to migration and international crime. Prantl writes that the conservative parties attempted to turn this position into an advantage in asylum policies:

> Deutschland habe lange genug unter seiner geographischen Lage im Herzen Europas gelitten, meinte man in der CDU/CSU. Jetzt solle man sich in der Flüchtlingsfrage diese Lage doch einmal zunutze machen – und die Staaten, die Deutschland wie ein Ring umgeben, zur Auffangzone für Flüchtlinge machen. Diese Idee ist der Kern des Asylkompromisses vom Dezember 1992.[649]

According to this analysis, Germany tried to turn 'finally' an old disadvantage on its head. The geographical position in the middle of the continent was to serve as a strategic advantage.

Germany had been trying to create a list of safe third countries since 1991 in the framework of the EC/EU (Ad hoc Group of Immigration).[650] The reasoning was the following: if the objective of a person was to seek protection from political prosecution,

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[649] Prantl, *Deutschland - Leicht Entflammbar*, 96. Translation: The CDU/CSU were of the opinion that Germany had suffered long enough from its geographical position in the heart of Europe. Now this position could be used to one's own advantage - and turn the countries which surround Germany like a ring into a gathering place for refugees. This idea is the centre of the asylum compromise of 1992.

[650] Heiner Busch, "Vom Einheitlichen Binnenmarkt zum Gemeinsamen Abschieberaum," *Bürgerrechte & Polizei /CILIP* 45, no. 2 (1993): 19.

then he or she would apply for asylum in the first safe state he arrived in. If, instead, a person continued towards another state, he or she was 'obviously' trying to abuse the right of asylum and their application of asylum may be rejected on the grounds that it was 'manifestly unfounded'[651]. Thus, people coming from a safe third country could be pushed back without the police having to wait for the outcome of a legal process.

The existence of safe third countries, comprising all countries around Germany, facilitated reducing the number of asylum seekers and immigration in Germany. At the same time, however, it put pressure on the borders since increasing numbers of people tried to enter and stay in the country illegally, knowing that there were no other options to enter: since Germany did not have a legal way to immigrate, they would be pushed back at the borders or have their asylum application rejected.

The change also augmented the task of the BGS. According to the readmission agreements, illegal immigrants caught in the border zone could only be pushed back if their entry via an external border could be proven or was apparent. Thus, the BGS had an important task in ensuring the asylum compromise: 'Seit dem 1. Juli 1993 hat der BGS eine zusätzliche fundamentale Funktion in der praktischen Umsetzung der Neuregelung des Asylrechts: Die Anwendung der Drittstaatenregelung als einem Eckpfeiler des Asylrechts und die daraus folgende Rückführung von unberechtigten Asylbewerbern setzen voraus, daß die Zuwanderung aus einem bestimmten Drittstaat nachgewiesen werden kann. Dies kann in der Regel nur bei Aufgriffen im Grenzgebiet gelingen.'[652] The important role of the BGS in the new legal arrangements and its new tasks as deportation agents were also noted in the newspapers.[653]

All of the aforementioned measures were taken to make the control at the borders themselves tighter or to reinforce controls in a spatial view of borders. The widening of controls to the whole border zone, or as in the case of Bavaria, to practically the whole territory was a witness to this practice. High-tech control equipment and an increased budget and personnel allowed the services to do this job. Agreements with neighbouring

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[651] 'offensichtlich unbegründet' is one of the legal categories for rejection of an asylum application.
[652] Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1994," 8. Translation: Since 1 July 1993, the BGS has an additional fundamental function in the practical transposition of the new asylum regulation: The application of the third state rule as a pillarstone of the new law of asylum and the resulting returning of unfounded asylum applicants presuppose that immigration from a particular third state can be proven. As a rule, this can only succeed if migrants are apprehended in the border region.
[653] Cf for example "Neue Dienststellen Beim Grenzschutz," *Frankfurter Allgemeine Zeitung*, 6 April 1993, Wolfgang Sardison, "Grenzschützer als Abschieber," *Süddeutsche Zeitung*, 15 April 1993.

countries were made so that border controls could be more effective. Readmission agreements – and the new law of asylum – served the purpose to deport speedily the unwanted migrants.

5. Conclusion

This chapter has retraced the changes in national border policies in Germany in the timeframe that was also relevant for the Schengen Agreements. It has been shown that the BGS adapted its structure, equipment and personnel to the new geopolitical situation with a reorganisation in 1992 and 1998 and a new law in 1994. New principles of control were introduced, using technology and a spatial approach to controls. Cooperation agreements with Länder police and the customs service were initiated to step up a coordinated fight against international crime and illegal immigration. The new law of asylum and the regulation regarding safe third countries as well as the re-admission agreements with neighbouring states gave the BGS a crucial role in apprehending illegal immigrants close to the border.

These developments show that reinforcement of controls did not only take place as a direct consequence of legal Schengen provisions, but that Germany reinforced controls on the national level without legal obligations to do so. Thus, the Schengen rationale of a common safe internal space was reinscribed on the national level.

Chapter 7

The German role on the European level

Chapters five and six presented the changes relating to border controls on the national German level, showing how national security agencies both contributed and reacted to a changing discourse regarding the use and necessity of border controls. The aim of this chapter is to analyse the involvement of German representatives at the European level. It will explain that Germany's concerns were central in shaping the final nature of the Agreement. Germany's contribution in the negotiations themselves consisted above all in providing technical and practical knowledge and experience. A 'division of work' between the two leaders France and Germany can be identified, in which France took more of the political leadership and authority while Germany provided the technical competence and experience. However, there was also disagreement between the two largest Schengen states with regard to SIS and cross-border hot pursuit. While Germany pushed these issues ahead, France was rather hesitant. These disagreements can be best understood in light of the different concepts of sovereignty in the two countries which has been outlined in chaper two.

Germany's participation in European policies aiming at dismantling of border controls is set on a number of foundations. Germany's historical experience, as outlined in chapter four, led its leaders to view the abolition of border controls in a European context as much desirable. Indeed, the Western and European identification of Germany was strong enough for it to be ready to give up sovereign rights in exchange for a deepening of the integration. Germany's political and economic weight within the European Community led it to believe that also its influence in the area of internal affairs would be large enough to shape the results to a degree of security that was deemed indispensable by German officials. Conversely, the German experts for internal security were convinced that security could only be reached through Europe-wide measures.

The heritage of the historical role also was a reason for a certain reticence during the negotiations on the German side. Germany's European partners would have regarded demands giving far-reaching rights to German police in other states or allowing strongly repressive measures as inappropriate or even threatening.

Germany's central role in the process of European integration placed it in a position where lack of participation in such a major enterprise would have meant a crucial setback. The events of 1989 retained and even emphasised this constitutive role for Germany in the European Community, but changed its negotiating position. The interests of Germany's partners after the end of bipolarity were to ensure Germany's anchoring in the European

process even more and not to have Germany 'drift' eastwards. The government had to respect this in its policy choices and representations so as not to raise any further fears of its partners. Before unification, Germany did not have highly problematic borders in the Schengen perspective, since the 'Iron curtain border' was fiercely guarded. After 1990, Germany possessed a long eastern frontier which it had to control, bordering on an area which was feared to be politically instable.

The following will first outline which German institutions were involved in the negotiations. It will be shown that the lead of the negotiations in the Chancellery was advantageous to maintain a coherent position. The Ministry of the Interior and its BGS department were also centrally involved. A further section will show that the higher officials from the Chancellery and the Ministries attended the Central Negotiation Group while the professionals and experts were present in the working groups. This finding confirms the general description of other researchers of the structure of the Schengen negotiations (cf. Chapter three). The next section outlines Germany's longstanding concern with compensatory measures and its influence on the Schengen negotiations in this respect. It will be shown that it provided a lot of technical expertise and thus pushed for a number of individual measures such as hot pursuit, the Schengen Information System or the actual conduct of controls at the borders. The last part of the chapter outlines the French-German relationship in these negotiations.

1. Institutional involvement of Germany

1.1. 'Federführung' in the Chancellery

Germany's involvement in European circles began early on. It was a member of all circles on the EC level which dealt with questions of police cooperation, terrorism and drug controls. Germany sent representatives to meetings of all levels of TREVI. This meant that the Minister himself was involved in the regular meetings with European colleagues. At the same time, his senior civil servants were participating in conferences where information on policies were exchanged. Lastly, national experts (lower level bureaucrats and practitioners) met regularly for the exchange of information in working parties. It is known that in Germany, Hans Neusel as state secretary from the BMI was closely involved with TREVI. It is much more difficult to find out who from the lower level civil servants were present.[654] Also not much information was available about personal links between engagement in Schengen and that in other circles. Given that cooperation in the area of immigration and crime limited the circle of participants to members of the appropriate ministries (Ministry of Justice and Interior and of Foreign and European Affairs) and given the limited number of personnel, it is to be assumed that some overlay in terms of personnel must have existed. And furthermore, that at least people from the same departments were involved in circles as diverse as TREVI, Vienna Club and Schengen.

Although the Schengen Agreements were primarily about the abolition of border controls, the German Ministry of the Interior was initially not the prime actor involved in the negotiations. The initiative for the abolition of border controls came from the Bundeskanzleramt, the Federal Chancellery. The Schengen negotiations were 'Chefsache' as one interlocutor put it.[655] It is well known, that Chancellor Kohl had a special personal interest in realising the abolition of border controls. Reportedly, he himself tried to destroy a border barrier as a young man.[656] His common initiative with President Mitterrand in May 1984 for the abolition of border controls between France and Germany became the immediate starting point for a long European development. As has been noted above, however, the politicians had not envisaged such lengthy negotiations. The abolition of border controls was to be a matter of weeks.

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[654] Interview partners were hesitant to name participants or had entered the Ministry later.
[655] A matter for the leader.
[656] At the beginning of the 1950s, a number of young people tore down border barriers which were regarded as symbols of divisions between countries.

The Chancellery was in overall charge of negotiations for the abolition of border controls, 'federführend' until 1995. The concept of 'Federführung' means that one federal institution has the initiative in a certain subject matter. It coordinates all actions, calls together meetings, receives and distributes information and therefore sets the agenda and the pace of proceedings in the subject matter. In international negotiations it also heads the national delegation. The 'Federführung' in the Chancellery shows the importance accorded to the process by the top level of government. The positioning of the topic at the Chancellery also ensured that negotiations were integrated with other policy goals such as policies towards its neighbours, German policy of European integration and also relations between East and West Germany. Placing the negotiations in the hands of the BMI would have meant a primary emphasis on questions of security and border controls and their technical feasibility. One objective of putting the lead in the Chancellery was that no one of the other involved institutions could advocate its own interests one-sidedly. As Horst Eisel, the Schengen representative at the BMI at the time, puts it: 'Die Federführung (für Schengen) lag im Kanzleramt. Und dies aus gutem Grunde. Bei einem so komplexen Thema, bei dem Materien aus verschiedenen Ressorts involviert sind, ging es darum, Einseitigkeiten durch Ressortbegehrlichkeiten zu vermeiden.'[657]

The 'Federführung' in the Chancellery was also necessary due to the federal structure of Germany and the Länder's insistence in making their voices heard in the process. The lead with the central institution of government made coordination of diverging interests easier. Despite the fact that some differing interests may have remained, the overall long-term strategy of Germany was perceived as consistent by observers.[658] This was certainly also due to the stability of the German government (1982-1998). While most other Schengen members experienced one or several turns of interior policy, Germany was able to present an overall consistent picture – given the dramatic change of external political circumstances after 1989.[659]

Placing the lead of the negotiations with the BMI would also have been a great innovation since it had hitherto been rather nationally oriented. Internal security was not a central

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[657] Eisel, "Interview with Horst Eisel." Translation: The 'Federführung' for Schengen lay in the Chancellery. And this for a good reason. It was important to avoid biases due to covetousness of departments in such a complex matter which involved issues of various departments.

[658] Cf. Bigo, *Polices en Réseaux*, 121.

[659] Although unification and large numbers of asylum seekers led to fundamental changes of the constitution, the general line of policy of the CDU-FDP government did not change. Stability of government also meant a stability of the composition of high-level civil servants which were central in these negotiations.

European topic in the mid-1980s. It may have been dealt with amongst European circles of security officials, but the numbers of officials involved were small. EC structures before 1985 had not included any topics relating to internal security. Therefore, employees of Ministries of the Interior had relatively little experience with the negotiation structures on the European level.

1.2. The German delegation

The German delegation to the Schengen negotiations united members from a number of Federal Ministries, including the Ministry of the Interior, the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Technology, the Ministry of Traffic, the Ministry of Finance and the Chancellery. The negotiations were headed by the so-called 'Schengen Koordinator' in the Federal Chancellery who represented Germany in the Executive Committee from 1985 – 1995, the highest level of decision-making in the Schengen negotiation process. After 1995, the lead passed to the Ministry of the Interior. From 1985 up to the present, these were:

- Prof. Dr. Waldemar Schreckenberger (1985 – 1988), Permanent Secretary, head of the Federal Chancellery (*Leiter des Kanzleramtes*)

- Dr. Lutz Stavenhagen (1989-1991), Minister of State in the Chancellery

- Bernd Schmidbauer (1992 – 1995), Minister of State in the Chancellery

- Prof. Dr. Kurt Schelter (1995 – 1998), Permanent Secretary in the Ministry of the Interior

- Claus Henning Schapper (since 1998), Permanent Secretary in the Ministry of the Interior[660]

1.2.1. Departments involved

The team from the Chancellery was mainly recruited from the Department of Internal Affairs, Social Policy and Environment. The protocols available show that Horst Glatzel represented Germany in the Central negotiation group from 1989 to 1994.[661] Witnesses of the negotiations estimate that he was centrally important to the progress of negotiations. It was voiced that without him, Schengen would not be what it was today. He was assisted by a team from the same department.[662] As far as can be inferred from the protocols, chancellery members were present mainly in the Central Negotiation Group.

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[660] Together with the Minister, Permanent Secretaries and Ministers of State belong to the political leadership of the Ministry. They are hierarchically directly subordinate to the Minister. The German ministerial bureaucracy knows two types of Permanent Secretaries, one being civil servant, the other being a member of the German Parliament. The parliamentary Permanent Secretary is called Staatsminister in the Federal Chancellery.

[661] His predecessor was Dr.Dr. König from the Chancellery. However, no protocols could be obtained on the earliest part of negotiations.

[662] The following results from an analyses of protocols available. Unfortunately, reliable protocols could only be obtained for the time from 1989 onwards. There may also have been additional members. Only the more senior members of the delegation could be identified by their function. Given the limited availability of protocols and closure of Schengen documents in the German federal archive,

A team from the Federal Ministry of the Interior was also involved from the beginning. Its involvement secured technical experience and knowledge for the negotiation team. The exact size of the team during various stages of the negotiations cannot be determined. Documents allow, however, to identify central figures and the length of their presence at the negotiations.

The most senior people involved were the state secretaries of the Ministry. For the time of enquiry, they were Hans Neusel (1985 – 1992) and Kurt Schelter (1993 – 1998).[663] From the Ministry's departments and units, the police unit was centrally involved from the beginning. During the 1980s, this unit comprised both ordinary police matters as well as the Bundesgrenzschutz. It thus contributed to the negotiations knowledge about border control practices and options as well as knowledge about police investigation practices and about information technologies such as the INPOL. One of the members of the department, Reinhard Rupprecht, was present at the negotiations already for the first Schengen Agreement. As head of special police matters at the BMI, he attended the negotiations until 1991, when he took over the Berlin representation of the Ministry.[664] Horst Eisel from the department concerned with border control[665] was a long-term member of the negotiation team (until 1997). He was also mentioned to be one of the 'fathers of Schengen' by an interlocutor of the BMI.[666] Other departments present at the negotiations were for example the unit of police information systems and the unit of the Bundeskriminalamt at the BMI. Another BMI department involved was the one for matters of foreigners and asylum.[667] Similarly, the department for constitutional matters, state law and administration was involved. For example, Klaus-Peter Nanz, one of the interviewees for this thesis, participated in the negotiations from the early stages until 1994. He was

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there is no means to countercheck the data. Efforts were made, however, to have interviewees confirm the validity of data where possible.

[663] Evidence they gave to the Committee of Internal Affairs at the Bundestag is an indication of their involvement. E.g. Neusel, "Bericht des Bundesministeriums des Innern über Ausgleichsmaßnahmen zum Schengener Abkommen.", Neusel, "Unterrichtung des BT-Innenausschusses über den Stand der Beratungen der Einwanderungs- und Trevi-Minister der EG."

[664] In 1992, he became head of the department 'Internal Security' at the Ministry. Since 1991, his name no longer appears in protocols, but his continuing interest in matters concerning European-level solutions for internal security is demonstrated by his book of 1992 and also later work: Rupprecht, "Zuwanderung und Innere Sicherheit.", Rupprecht and Hellenthal, *Innere Sicherheit im Europäischen Binnenmarkt*.

[665] Abt. P I 4, after reorganisation in 1993 P III 1 (General police intervention, border police; a unit for international and Schengen police matters). In 1996, the Schengen coordination was transferred to this area which became an subunit within the police unit. Eisel also held the post of border representative of the government.

[666] Interview with Dr. Mizia.

[667] Abt. V II, from 1992 onwards Abt. A

seconded to the General Secretariat in 1992 with the task to represent the interests of the BMI. Other departments of the BMI present at the negotiations included visa matters, border control, police and security matters.

The Ministry of Foreign Affairs also sent regular members of the delegation. Here, primarily the department for legal matters was concerned. They came from the unit of state and administrative law, and the unit of foreigners' and asylum law. The Ministry of Finances was present through representatives from the unit III for customs, consumer taxes and movement of goods. The Ministry of Justice was equally involved through members of the unit of public law and of the unit for international penal law. Occasionally, also members from the Ministry of Traffic were present.

Additionally to representatives from federal Ministries, members from a number of other institutions completed the German team of negotiators. The Bundeskriminalamt sent members into various working groups; so did the Bundesgrenzschutz. The representatives of the Bundeskriminalamt were present mainly in the SIS steering group and the SIRENE group, the sub-groups on visas and on drugs . The BGS employees worked mainly in the sub-group on borders. Also representatives from Länder Ministries of the Interior were present in working group negotiations.

1.2.2. Attendance in Schengen groups

During the Schengen negotiations, officials from a variety of hierarchical levels were needed to discuss the multiplicity of issues. The German members of the Executive Committee came from the Bundeskanzleramt from 1985 – 1995, and from the Federal Ministry of Interior after the national coordination was handed over.

The leadership of the German delegation in the Central Negotiation Group remained fairly permanent with the Chancellery. Dr. Dr. König headed the delegation in the beginning, replaced by Dr. Glatzel in the late 1980s, who remained in office until 1994. Occasionally, the German leader of the delegation replaced the state secretary at meetings of the Executive Committee.

The size of the national delegations in the Central Group varied between around 4 and 10 members, increasing to 8 to 14 members when one delegation held the presidency. The

German delegates in the Central Group came from all of the aforementioned Ministries, varying with the matters under discussion.

A survey of the protocols shows that some German negotiators worked exclusively in the Central Negotiation Group. Many attended additionally meetings of working groups[668], while yet others were present only in the working groups or their sub-groups. The representatives of the various Ministries attended working groups according to their specialisation.

For example, German members of working group I (police and security) originated primarily from the Ministry of the Interior, but later also members of the BGS and the BKA were present. Also other working groups illustrate the presence of specialists: for example, the BMI member from the unit of police information systems participated in the SIS working group. Similarly, the working group which occupied itself with judicial cooperation (WG III) had as German members mainly representatives of the Ministry of Justice, and the German delegates of working group IV - responsible for customs matters – were principally from the Ministry of Finance, division of customs. As has already been indicated above, members of the BKA contributed to the working groups on the SIS, drugs and visas, thus their areas of expertise.

In summary, the German representatives in the Schengen negotiations originated mainly from federal Ministries, primarily the Chancellery, the Ministry of the Interior, the Ministry of Foreign Affairs and the Ministry of Justice. 'Federführung' for the German delegation came from the Chancellery until 1995 when it changed over to the BMI. The heading of the German delegation in the Central Negotiation group paralleled this development. On the whole, the leadership of the German delegation proved relatively stable, with little change of personnel. [669] The working group participants changed more frequently according to the topics under discussion.

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[668] For an overview of the organisation of negotiations into working groups, see chapter three.
[669] This was different in some other delegations: The head of the French delegation in the Central Group changed from Ambassador Cazimajou to B. Hagelsteen to J. Y. Audoin and P.H. Maccioni between 1989 and 1997.

2. Germany's position in the negotiations: technical expertise and promotion of compensatory measures

The positions and interests of German bureaucrats and politicians in European circles are somewhat difficult to trace. One reason is that documents on the German preparations of negotiations themselves are hard to obtain. In Germany, many are classified as secret or are simply not in the public domain. Protocols of the Central Negotiation Group or the Working Groups were available for this thesis, but can only give limited information about German interests. To some extent, this is a reflection of the structure of policy-making on the European level. TREVI and Schengen were both intergovernmental processes whose work was difficult to control.[670] Although national parliaments were regularly informed, they were dependent on the information and perspectives provided by the participants.[671] Transparency to the public in general, including the availability of documents, was not a characteristic of the negotiations regarding border controls.

The information had to be pieced together from the sources available and observations of witnesses of the process. This chapter was able to refer to a number of protocols of the meetings of the various negotiation groups, to reports made by the German government to the Committee of Internal Affairs in the Bundestag and to reports made by the Committee itself. Published speeches and reports by the relevant ministries and politicians have also been used. Furthermore, a series of interviews has been conducted with officials from the Ministry of Interior, Members of Parliament involved in the Schengen process and non-German observers of the process from the Schengen Secretariat.[672] Additionally, the existing work of other scholars could be referred to for particular aspects.[673] The variety of

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[670] The secretive nature of Schengen has repeatedly been denounced by researchers and civil rights associations. Cf. e.g. Bigo, *Polices en Réseaux*, Bunyan, ed., *Statewatching the New Europe*, den Boer, "Justice and Home Affairs: Cooperation without Integration."
The Schengen Secretariat, now moved into the General Secretariat, maintains an archive with all relevant documents to which researchers can get access upon request. This facilitates access to a number of documents regarding the negotiations themselves.

[671] The Dutch parliament criticised its government in 1989 for planning to sign an agreement whose text was not known to the parliament."Gefährdetes Abkommen über den Abbau innereuropäischer Grenzkontrollen," *Neue Züricher Zeitung*, 14 December 1989.

[672] Not many persons who were involved in the initial negotiations are still in office. Often, they have gone into retirement or left Parliament. The people from the Chancellery and the Ministry of Interior who were decision-makers at the negotiations were mostly senior level bureaucrats who have left office by now.

[673] Cyrille Fijnaut, for example, has retraced the German positions nationally and on the European level with regard to police cooperation up to 1993. Fijnaut, "The 'Communitization' of Police Cooperation in Western Europe."

sources ensured that organisational interest representations of one particular actor did not overly skew results.

This chapter will show that Germany was a central player during the negotiations for the Schengen Agreement. Not only through its weight within the European Community, but also by virtue of its experiences and expertise of its experts and bureaucrats and by the relatively coherent strategy within negotiations was Germany able to influence the process and outcome of negotiations. Horst Eisel from the German Ministry of Interior, who was present at the negotiations from the start, emphasises the centrality of Germany in the Schengen process and the motivation of realising free movement for its engagement: 'Deutschland vertritt die Schengener Binnen-Politik aus Überzeugung und war seit Anfang an einer der Schrittmacher. Die Bundesregierung hat Freizügigkeit nicht nur vertraglich zugesagt, sondern maßgeblich dazu beigetragen, daß sie praktisch zur Geltung kam.'[674]

A central issue in the German position throughout the entire negotiations was the inclusion and actual content of compensatory measures. This was an attitude mainly advanced by bureaucrats and security professionals, and was due to the perspective that border controls were intimately linked with internal security. As has been shown in the chapter on the German debate regarding border controls, compensatory measures became the means of choice to make up for the loss of internal controls. An abolition of border controls therefore necessitated other measures to ensure security from dangers in the transnational sphere.[675]

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[674] Eisel, "Interview with Horst Eisel." Translation: Germany represents the Schengen internal policy out of conviction and was a pacemaker right from the beginning. The federal government has not only agreed freedom of movement in a treaty, but has decisively contributed to the fact that it was transposed into practice.

[675] This argumentation is explored further in the Chapter on the debate about changes in border policies.

2.1. The early 'history' of compensatory measures

The importance of measures compensating for the abolition of border controls in European agreements can be traced back to the European Council in Fontainebleau in 1984 when the intention to abolish border controls before mid-1985 in Europe was published.[676] Says Fijnaut: 'Notably for the Germans such a decision could not be implemented unless simultaneous measures were taken to counteract what they considered to be the more or less negative effects of such a policy, including the negative effect on internal safety and crime-fighting in the countries concerned.'[677] Indeed, by mid-1985, none of the envisaged 'all police and customs formalities' had fallen in the EC. The measures needed in order to enact such an abolition proved to be much more important, complex and controversial than foreseen by the heads of state.

The Franco-German Agreement of 1984 itself only mentioned compensatory in a general way, stipulating more cooperation between national police and customs authorities, envisaging shifting all controls to external borders as well as approximating of national law (the whole document comprises only 2 pages).[678] Political discourses concentrated on the freedom of movement for goods and persons that was being created. That the issue of compensatory measures was regarded as relatively unproblematic by politicians is shown by the fact that Kohl and Mitterand intended to have results within a few weeks. The Frankfurter Rundschau reported at the time that according to President Mitterand the two states ought to pass the implementation laws within a very short period of time. As a timeframe, he envisaged 'the next few weeks'. Chancellor Kohl said that abolitions of border controls were to happen soon.[679] However, the abolition of border controls was far away and compensatory measures played a large role in making abolition acceptable. The implementation of the Saarbrücken Agreement of 13 July 1984 only reduced border checks

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[676] "The European Council welcomes the basic agreement which has been reached regarding the introduction of the European passport and asks the Council to take the necessary decisions so that this passport is available to the citizens of the Member States on 1 January 1985 at the latest. It asks the Council and the Member States to examine very quickly the measures which allow to abolish within the shortest period of time, at any rate *before the end of the first half of 1985*, ... all police and customs formalities at the inner community borders." (emphasis added) Presidency of the European Council, "Conclusions of the Presidency of the European Council on the 28th Meeting of the European Council in Fontainebleau on 25 and 26 June 1984," *Europa-Archiv*, no. 15 (1984): 442.

[677] Fijnaut, "The 'Communitization' of Police Cooperation in Western Europe," 87.

[678] "Abkommen zwischen der Regierung der Bundesrepublik Deutschland und der Französischen Republik über den Schrittweisen Abbau der Kontrollen an den Grenzen Frankreichs und der Bundesrepublik Deutschland," *Bulletin der Europäischen Gemeinschaften* 17, no. 7/8 (1984).

[679] "Bald ohne Grenzkontrollen. Paris und Bonn über Abschaffung einig/Feier in Verdun," *Frankfurter Rundschau*, 30 May 1984., cited after Busch, *Grenzenlose Polizei? Neue Grenzen und polizeiliche Zusammenarbeit in Europa*.

to occasional spot checks and introduced common check points. An abolition of border controls was envisaged for later. Events were taken up by the Schengen negotiations and it took until 1995 that border checks were completely abolished.

An early use of the concept of compensatory measures can be found in 1984 when a German newspaper report already referred to the idea of compensatory measures: after a visit to France, Belgium and the Netherlands, members of parliament of the CDU/CSU reported that they had been in agreement with their interlocutors in these countries that the abolition of controls had to be accompanied by corresponding security measures.[680]

Reports of security experts in the Franco-German working group and the Bavarian police (regarding the Austrian-German Agreement along similar lines) in the mid-1980s displayed a concentration on security aspects: the practice of the control procedure without creating too many obstacles to traffic, the development of apprehensions at the border and the implementation of agreed compensatory measures.[681] Thus, with regard to a Franco-German Agreement, German police and law enforcement experts focused much more on security than politicians had done.

Similarly, the Conference of German Länder Ministers of Interior (IMK) created a working group already on 13 June 1984 (thus before the Saarbrücken Agreement) to consider compensatory measures for the removal of checks on persons at the internal borders of the EC.[682] The first report of this group – noted by the Conference of Ministers on 19 October 1984 – emphasised the importance of border controls for internal security in Germany. As a first step, spot checks were accepted immediately without a loss of security. However, a second step of abandoning border controls completely would necessitate the prior 'complete implementation of the measures suggested for the fight against crime'.[683] Compensatory measures were presented without which the abolition of border controls ought not to take place. The list included[684]:

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[680] "Grenzkontrollen werden weiter abgebaut," *Süddeutsche Zeitung*, 29 November 1984.
[681] Cf. Busch, *Grenzenlose Polizei? Neue Grenzen und polizeiliche Zusammenarbeit in Europa*, 24.
[682] Arbeitsgruppe 'zur Prüfung von Ausgleichsmaßnahmen für den Abbau von Personenkontrollen an den Binnengrenzen der EG'. Decision of the IMK of 13.6.1984, quoted after Ibid, 25.
[683] Arbeitsgruppe der Ständigen Konferenz der Innenminister und -senatoren der Länder, "Erster Bericht der IMK-Arbeitsgruppe zur Prüfung von Ausgleichsmaßnahmen für den Abbau von Personenkontrollen an den Binnengrenzen der EG, dem Innenausschuß des Bundestages übermittelt vom BMI am 27.11.1984," ed. Innenministerkonferenz (Bonn: 1984)., quoted after Busch, *Grenzenlose Polizei? Neue Grenzen und polizeiliche Zusammenarbeit in Europa*, 25. Original text: "vollständige Durchführung der zur Kriminalitätsbekämpfung vorgeschlagenen Maßnahmen.
[684] Quoted after Busch, *Grenzenlose Polizei? Neue Grenzen und polizeiliche Zusammenarbeit in Europa*.

- cooperation in electronic investigations
- exchange of information between security agencies
- simplification of cooperation between authorities and for purposes of extradition
- hot pursuit
- approximation of laws regarding drugs, weapons and compulsory registration.

A statement of Permanent Secretary Spranger in 1987 referring to this concept shows that the link between compensatory measures and border controls was applied to the then ongoing European negotiations: 'Spranger erinnerte daran, daß der Bundesinnenminister eine klare Konzeption zum Abbau der Grenzkontrollen habe, die mit der Innenministerkonferenz abgestimmt sei. Danach sollen bei einem Abbau der Grenzkontrollen entsprechende Ausgleichsmaßnahmen in Kraft gesetzt werden.'[685]

Thus, the Conference of Ministers of Interior of the Länder and the Federal Ministry of Interior began to develop the rationale of security through compensatory measures from 1984 onwards at the latest. This rationale also found entry not only into the bilateral Agreements (see delay in putting Saarbrücken Agreement fully into practice) but also into the multilateral European-level negotiations.

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[685] "Öffnung der Grenzen erfordert neue Formen der Kriminalitätsbekämpfung." Translation: Spranger recalled that the Federal Minister of the Interior had a clear concept for the abolition of border controls which was in coordination with the Conference of Interior Ministers. In accordance with this concept, compensatory measures were to be enacted if border controls were abolished.

2.2. Introduction of German experiences into the Schengen Agreement I

The rationale of compensatory measures to ensure security was also introduced by German representatives in the Schengen Agreements. As outlined above, the Schengen I document is divided into long-term and short-term measures thus introducing the two steps suggested by the working group of the Länder. It is interesting to observe that these measures include all of the above-mentioned aspects listed in the report by the working group of the IMK. The Schengen Agreement states a date by which both the abolition of border controls and the compensatory measures ought to be in place (1 January 1990). An express temporal link between compensatory measures and abolition of border controls is made in Art. 17 where it says 'To that end they shall endeavour first to harmonise, where necessary, the laws, regulations and administrative provisions concerning the prohibitions and restrictions on which the checks are based and to take complementary measures to safeguard internal security and prevent illegal immigration by nationals of States that are not members of the European Communities.' Also this echoes the suggestion made by the German working group for compensatory measures.

Didier Bigo has found out that representatives of the German Ministry of Interior at the time, amongst them Reinhard Rupprecht, were very influential for including the idea that the end of border controls was a risk for security and that compensatory measures needed to be found.[686] It may be supposed that other countries had similar concerns, but it is indicative of the 'division of roles' that it was a German representative who was deemed responsible for the inclusion of the issue. Busch states that Rupprecht was one of the most important representatives of the thesis of the 'loss of security', thus the thesis that an abolition of border controls endangered security severely.[687] Rupprecht himself has pointed repeatedly to the importance of state borders for police investigations and defence against threats.[688] He emphasised the filter function of borders and that border controls were to deflect damage from the community whose territory is circumscribed by the border to be controlled.[689]

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[686] Bigo, *Polices en Réseaux.*

[687] Busch, *Grenzenlose Polizei? Neue Grenzen und polizeiliche Zusammenarbeit in Europa,* 37.

[688] Reinhard Rupprecht, "Wettlauf der Schnecken. Probleme und Konsequenzen des Abbaus von Grenzkontrollen," *Kriminalistik,* no. 5 (1989).; see also Rupprecht, "Zuwanderung und Innere Sicherheit.", Rupprecht and Hellenthal, *Innere Sicherheit im Europäischen Binnenmarkt.*

[689] The relevant sections in Rupprecht's and Hellenthal's draft of a European Community of Internal Security (EGIS - Europäische Gemeinschaft der Inneren Sicherheit) are indicative in this respect: Rupprecht and Hellenthal, *Innere Sicherheit im Europäischen Binnenmarkt,* 129-37. See especially section IV: Die Bedeutung der Grenzkontrollen für die Innere Sicherheit.

By viewing the border as the spatial fixation of state sovereignty, Rupprecht follows a tradition of scientists and practitioners of the state.[690] He interprets a legal-administrative tradition which asserted that effective governance is only possible in a bordered area. He equates the boundedness of territory with controls at its borders. Rupprecht therefore necessarily saw a danger in the abolition of border controls because such controls had hitherto been central for governance and public security. He narrowed the legal tradition of giving borders a central role for governance to one emphasising the internal security function of border *controls*. He was echoed in this by many German experts for internal security, but has spelt out this theory most precisely.

It is to be supposed that the German input was crucial in providing for compensatory measures already in Schengen I. Given that institutions within Germany had already got experience in planning such agreements (Saarbrücken) and had already elaborated the necessity and a list of compensatory agreements regarded as useful, it can be assumed that this experience and rationale led Germany to press for the inclusion of these measures into agreements on border controls: Schengen I lists in Articles 18-20 the compensatory measures on which talks were to be started soon:

- police cooperation for preventive combating crime and for investigation
- improvement in international legal aid and extradition
- measures for common combat against crime: hot pursuit by police, use of given communication possibilities and internal legal aid
- approximation of laws in the areas of weapons, drugs and foreigner registration
- harmonisation of visa and immigration conditions

Talks regarding the details of border controls were taken up soon afterwards. The fact that the measures had not been agreed in detail had obviously sped up the negotiations for Schengen I. At the same time, however, it led to a situation where the necessary content of these measures also had to be defined afterwards. The 'junctim' between compensatory measures and abolition of border controls which had been included in the agreement made such a settlement necessary. Apparently the security officials were unhappy with the clear formulation of objectives regarding the lifting of border controls and the lack of clarified compensatory measures. A member of the German delegation states that this situation was suspicious:

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[690] Ibid.; here he makes reference to the German lawyer Ernst Sauer: Ernst Sauer, *Grundlagen des Völkerrechts* (1948).. See also chapter two on the role of the border for the state.

Im Vergleich zu dieser klaren Zielbestimmung sind die Regelungen über Ausgleichmaßnahmen im Sicherheitsbereich verschwommen. Da ist von der Einleitung von Gesprächen, von der Suche nach Mitteln zur gemeinsamen Verbrechensbekämpfung u.a. durch Prüfung der etwaigen Einführung eines Rechtes der polizeilichen Nacheile. Solche ausweichende Sprache macht mißtrauisch und hat die Verantwortlichen für die Innere Sicherheit besonders dazu veranlaßt, ihre Erwartungen und Forderungen eindeutig zu definieren und intensive Bemühungen zu deren Durchsetzung zu unternehmen.[691]

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[691] Eisel, "Interview with Horst Eisel." Translation: In comparison with this clear definition of objective, the regulations about compensatory measures are vague. The beginning of talks is mentioned, the search for means of a common fight against crime amongst other by examining the possible introduction of a right to hot pursuit. Such evasive language makes suspicious and has caused the responsible people for internal security to define their expectations and demands clearly and to undertake intensive attempts to push them through.

2.3. The elaboration of compensatory measures

The importance of compensatory measures within the national circles charged with negotiations remained high between 1985 and 1990/1995. Negotiations of Schengen II by the German government were conducted on the basis of two decisions which both emphasised the importance of compensatory measures.

One was a decision of the German Bundestag introduced by the Committee on Internal Affairs in 1985 which emphasised compensatory measures:

> Die Bundesregierung wird gebeten, mit ihren Partnerstaaten zum Ausgleich der verringerten Grenzkontrollen bilateral oder auf Gemeinschaftsebene geeignete Maßnahmen zu vereinbaren, damit der erleichterte Grenzübertritt nicht zu Sicherheitsdefiziten und der illegalen Einreise von Nicht-EG-Staatsangehörigen in die Mitgliedsstaaten führt. Diese Ausgleichsmaßnahmen werden für unverzichtbar gehalten.[692]

The second one was a decision of the Innenministerkonferenz of 18 April 1986 which listed compensatory measures which it considered important before realising the abolition of border controls.[693] The IMK represents the opinion of the Länder Ministers in the federal system of Germany in the area of internal policy. Its opinion has therefore to be taken very seriously by the government.

A concept of the Federal Minister of Interior for a policy on security and foreigners was based on this IMK-Decision; this document was also concerned with compensatory measures (in the context of policies on foreigners). A report of a session of the committee on internal affairs of the German Bundestag of 13 April 1988 states: 'Herr Parl. Staatssekretär Spranger hat Ihnen am 2. Dezember 1987 das Konzept des Bundesministers des Innern für den Sicherheits- und Ausländerbereich vorgetragen, wie sich ein aus dem Abbau der Binnengrenzkontrollen ergebendes Sicherheitsdefizit vermindern und eine

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[692] Innenausschuß des Deutschen Bundestages, "Beschlußempfehlung und Bericht des Innenausschusses," ed. Deutscher Bundestag (Bonn: 1985), 2. Translation: The government is asked to agree with its partner states, bilaterally or on the Community level, apt measures in compensation for the reduced border controls so that the eased crossing of the border does not lead to security deficits and to illegal entry of non-EU citizens into Member States. These compensatory measures are taken to be indispensable.

[693] Ständige Konferenz der Innenminister und -senatoren der Länder, "Beschlußniederschrift über die Sitzung der Ständigen Konferenz der Innenminister und -Senatoren der Länder am 18. April 1986 in Bonn," (Bonn: 1986). The compensatory measures mentioned are: international police cooperation (exchange of information, common information system, cross-border pursuit), facilitation of international legal aid including extradition, taking into account the interests of other EC states, approximation of material law (drugs, weapons and explosives, compulsory registration), foreigners' law (uniform travel documents, uniform visa regime, exchange of information on unwanted third country nationals, carrier liability, harmonisation of asylum law).

abgestimmte Ausländerpolitik verwirklichen lassen.'[694] Thus, within Germany, there was a lot of activity in circles charged with or with influence on negotiation policies in order to define compensatory measures.

Reports to the Committee on Internal Affairs of the German Bundestag show that officials of the Ministry of Interior insisted consistently on the realisation of compensatory measures before any abolition of border controls.[695] Similarly, this emphasis on compensatory measures can also be detected in the publications of the Ministry of Interior of the late 1980s and early 1990s.[696] It has to be assumed, however, that the objective of these publications was less to influence the negotiations, but rather to communicate the existing security provisions and plans to the public and personnel.

While compensatory measures were foreseen already early in the Schengen process, no express temporal link as to their completeness was made initially. As time progressed, German authorities tended to emphasise that these measures all had to be enacted completely before border controls could be lifted. This development is reflected by two statements of the Innenministerkonferenz, a central group in internal policy making (consisting of all Länder Ministers of the Interior. In 1986, the Länder Ministers only encouraged their federal colleague that all negotiations with regard to abolition of border controls also include negotiations about compensatory measures.[697] In 1989, they emphasised that compensatory measures must be enacted before abolition of border controls due to the danger of security deficits: 'Die Innenministerkonferenz ... ist insbesondere der Auffassung, daß ein Abbau der Grenzkontrollen an den Binnengrenzen der Schengener Vertragsstaaten ohne die erforderlichen Ausgleichsmaßnahmen zu

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[694] Innenausschuß des Deutschen Bundestages, "Kurzprotokoll, 23. Sitzung des Innenausschusses." Translation: The parliamentary state secretary Spranger has presented to you on 2 December 1987 the concept of the Minister of the Interior for the area of security and foreigners, how to reduce a security deficit which might result from abolition of internal border controls and how to realise a concerted foreigners' policy.

[695] Innenausschuß des Deutschen Bundestages, "Kurzprotokoll, 45. Sitzung des Innenausschusses," ed. Deutscher Bundestag (Bonn: 1989).; Innenausschuß des Deutschen Bundestages, "Bericht über die Reise einer Delegation des Innenausschusses vom 4. Juli bis 8. Juli 1988 in die Länder Frankreich, Luxemburg, Belgien, Niederlande zum Thema: Übereinkommen von Schengen."; Innenausschuß des Deutschen Bundestages, "Kurzprotokoll, 23. Sitzung des Innenausschusses."; Schreckenberger, "An den Vorsitzenden des Innenausschusses - Unterrichtung des Innenausschusses von der Umsetzung des Schengener Abkommens."; Ständige Konferenz der Innenminister und -senatoren der Länder, "Beschlußniederschrift über die Sitzung der Ständigen Konferenz der Innenminister und -Senatoren der Länder am 14. April 1989 in Köln."

[696] Cf. The journal 'Innenpolitik' over the years.

[697] Cf. Ständige Konferenz der Innenminister und -senatoren der Länder, "Beschlußniederschrift über die Sitzung der Ständigen Konferenz der Innenminister und -Senatoren der Länder am 18. April 1986 in Bonn."

schwerwiegenden Sicherheitsdefiziten führen würde und daß deshalb möglichst vor, spätestens im umsetzungsmäßigen Zusammenhang mit dem Grenzkontrollabbau Einigkeit über die notwendigen Ausgleichsmaßnahmen erzielt und die Voraussetzungen für ihre Umsetzung geschaffen werden müssen."[698]

Thus, it can be assumed that the role of German officials was not only to insist on compensatory measures (most states have done that), but also to create a 'junctim' between compensatory measures and implementation, to suggest a concrete list of measures which was incorporated into the Agreements and to insist on a certain standard of measures before abolition of controls was to be introduced.

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[698] Ständige Konferenz der Innenminister und -senatoren der Länder, "Beschlußniederschrift über die Sitzung der Ständigen Konferenz der Innenminister und -Senatoren der Länder am 14. April 1989 in Köln." Translation: The conference of ministers of the interior is of the opinion that an abolition of border controls at the internal borders of the Schengen treaty states without that the necessary compensatory measures would lead to grave security deficits, and that therefore there has to be unanimity regarding the necessary compensatory measures and the preconditions for their implementation have to be met before or at the latest contemporaneously with the abolition of border controls.

2.4. Widening of the agenda

The fact that compensatory measures were demanded in the first Schengen Agreement, but not spelt out in detail left much open to later negotiations. It appears that Germany was active in including a number of new topics in the compensatory measures. Indeed, it seems that the openness with which this issue was settled in the first Schengen treaty was used by German officials to widen the agenda.

According to Permanent Secretary Neusel, it was decided only in 1987 that the transfer of border controls to the external borders and the creation of compensatory measures would be settled in a state treaty.[699] Apparently, it had become clear by that time that the extent of the regulations would necessitate such a state treaty (in contrast to the 'gentlemen's agreement that was Schengen I). This widening of the agenda was not welcomed by all.

The inclusion of more and more issues was not favoured by all members, for example the Benelux countries. A protocol of a meeting of the Executive Committee cites a quotation of the French head of the Central Group saying that he feared that harmonisation had become an objective in itself:

> Unter Berücksichtigung der Tätigkeiten der Arbeitsgruppen und der Untergruppen hat die Zentrale Verhandlungsgruppe den Eindruck gewonnen, dass das Ziel des Schengener Übereinkommens, nämlich die Erleichterung der Grenzkontrollen, manchmal aus den Augen verloren wird. Wie es in dem Übereinkommen ausdrücklich vorgesehen worden ist, setzt – soweit erforderlich – die Pflicht zur Erreichung dieses angestrebten Ziels die Harmonisierung bestimmter gesetzlicher und administrativer Bestimmungen voraus. Die Harmonisierung darf aber nicht als Ziel an sich betrachtet werden. Sie muss auf eine notwendige und ausreichende Harmonisierung beschränkt werden, um unter vertretbaren Bedingungen den Folgen der Erleichterung oder der Abschaffung der Grenzkontrollen begegnen zu können.[700]

Similar opinions were voiced by Permanent Secretary Robert Goebbels of the Foreign Ministry of Luxemburg who headed the negotiations for his country. In a report of a visit of a delegation of the German Bundestag, he is quoted as saying: 'Er habe den Eindruck

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[699] Innenausschuß des Deutschen Bundestages, "Kurzprotokoll, 23. Sitzung des Innenausschusses."
[700] SCH/M (88) PV 1. Translation: Taking into account the activities of the working groups and the subgroups, the Central Negotiation Group has got the impression that the objective of the Schengen Agreement, i.e. the easing of border controls, is sometimes lost out of sight. As is explicitly provided for in the Agreement, the duty to reach this objective presupposes – as far as necessary – the harmonisation of certain legal and administrative regulations. The harmonisation must not be regarded as a goal in itself, however. It must be reduced to the necessary and sufficient harmonisation in order to be able to confront under justifiable conditions the consequences of the easing or abolition of border controls.

gewonnen, daß in den einzelnen Arbeitsgruppen Perfektionismus betrieben werde. Darüber werden eigentliche Ziel – Wegfall der Grenzkontrollen – vergessen.'[701] He furthermore blamed the German delegation in the negotiations for the inclusion of unnecessary and unfeasible measures as well as measures beyond the framework of the Schengen Agreement: 'Seitens der Bundesrepublik z.B. würden Kontrollen an den Außengrenzen verlangt, die nicht zu machen und nicht nötig seien. ... Er habe auch den Eindruck, daß man häufig bereits Dinge mitregeln wolle, die über das Ziel und den Rahmen des Schengener Abkommens hinausgingen.'[702]

A similar statement is noted from the General Secretary of the Benelux Union, E.D.I. Kruijtbosch who emphasised during the discussion that perfectionism should not be an objective of the negotiations and that the real objective of Schengen must not get out of focus: 'E.D.I. Kruijtbosch ... wies im Gespräch vor allem darauf hin, daß bei den Beratungen in den 4 Arbeitskreisen kein Perfektionismus angestrebt werden könne. Man wolle nur das machen, was auch zu machen sei, und nicht um jeden Preis harmonisieren. Ziel sei die Abschaffung der Grenzkontrollen.'[703]

It is therefore to be assumed that the widening of the agenda of compensatory measures was in some cases initiated by the German delegation and in others supported. The perception that perfectionism went hand in hand with an inclusion of more topics into the agenda fits with the philosophy advanced by German professionals that compensatory measures have to make up for the loss of security through the abolition of border controls.

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[701] Innenausschuß des Deutschen Bundestages, "Bericht über die Reise einer Delegation des Innenausschusses vom 4. Juli bis 8. Juli 1988 in die Länder Frankreich, Luxemburg, Belgien, Niederlande zum Thema: Übereinkommen von Schengen," 5. Translation: He had got the impression that perfectionism was pursued in the individual working groups. The real objective – the abolition of border controls – was being forgotten by this.

[702] Ibid. Translation: By the Federal Republic, for example, controls would be demanded at the external borders which could not be done and were unnecessary. (...) He had the impression that one attempted to already regulate things which went beyond the goal and framework of the Schengen Agreement.

[703] Ibid, 20. Translation: E.D.I. Kuijtbosch mentioned during our talk that no perfectionism must be aimed at in the negotiations of the four working groups. One could only agree what was doable and not harmonise at any price. Goal was the abolition of border controls.

2.5. German influence on a list of measures

With regard to individual measures, Germany has played a prominent role in a number of areas. Horst Eisel has identified the following points of influence:

Deutsche Handschrift tragen – außer SIS – zum Beispiel die Vorschriften und Entscheidungen über
- die Personenkontrollen an Übergängen und die Überwachungsmaßnahmen an den grünen und blauen Außengrenzen, niedergelegt vor allem in Art. 6 des Durchführungsübereinkommens und im Gemeinsamen Handbuch;
- die Inanspruchnahme der Beförderungsunternehmen zur Prüfung der für den Bestimmungsstaat erforderlichen Dokumente bei Vermeidung von Sanktionen (Art. 26 SDÜ);
- die Pönalisierung von Schleuserhandlungen (Art. 27 SDÜ);
- die Verknüpfung der einzelnen, nacheinander gestaffelten Sicherheitsstationen zu einem konsistenten Schutznetz gegen illegale Zuwanderung und grenzüberschreitende Kriminalität, beginnend bei der Erhebungen anläßlich der Visumerteilung über die Kontrollen der Beförderer, die Außengrenzabsicherung bis hin zu den Aktivitäten im Landesinneren;
- das Programm zum Rückbau der Abfertigungsanlagen und -einrichtungen an den Übergängen entlang der Binnengrenzen;
- Teilbereiche des Visum-Regimes;
- Das Reglement zur Festlegung der Zuständigkeit für die Behandlung von Asylbegehren, später abgelöst durch das Dubliner Übereinkommen;
- Die Einführung des Inkraftsetzungsmechanismus (Art. 1 der Schlussakte zum SDÜ) in Ergänzung zum Institut des Inkrafttretens mit dem Ziel, die tatsächlich Verwirklichung der von den Beitrittsstaaten übernommenen vertraglichen Verpflichtungen zu gewährleisten.[704]

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[704] Eisel, "Interview with Horst Eisel."
Translation: Apart from SIS, for example the following rules and decisions bear German handwriting
- checks of persons at the crossing points and the surveillance measures at the green and blue external borders, as noted primarily in art. 6 of the Implementing Agreement and in the Common Handbook
- the charging of transport enterprises with examining the documents necessary for entering the country of destination, at the expense of avoiding sanctions
- penalising of smuggling (art. 27 SIC)
- the linking of individual, security measures to a consistent network of protection against illegal immigration and transborder crime, starting with the investigations with regard to issuing visas, over controls of the transport enterprises and the protection of external borders up to activities at the interior of the country
- the program for the de-construction of clearance installations and institutions parts of the visa-regime
- the system of rules to identify the responsibility for the examining of asylum applications, later supplanted by the Dublin Convention
- the introduction of the mechanism of putting into force (art. 1 of the final act of the SIC), complementary to the legal institute of coming into force, with the objective to guarantee the realisation of the commitments assumed by the accession states.

Thus, Germany was active in nearly all areas of compensatory measures. As an illustration of the way Germany was able to input its experiences, the next few sections show German influence on border controls, the SIS and cross-border police investigations in particular.

2.5.1. Border checks and controls

It seems to be evident that Germany was very concerned with and influential in the area of checks on persons at the borders and the actual controls of the border. A direct consequence of the general concerns with compensatory measures was to insist on strict standards of controls at the external borders. Indeed, the regulations regarding principles of systematic and intensive checks and controls at the external borders were amongst the first to be accepted by the Executive Committee. The Dutch delegation presented a draft in 1988. State Secretary Neusel mentioned in the same year that a treaty text covering these issues was nearly completely finished.[705] The protocol of the meeting of State Secretaries and the Minister of June 1988 shows, however, that important reservations remained with regard to security of the external borders.[706]

The regulations for implementing the agreed controls (Durchführungsbestimmungen) were crucially influenced by the German side. It was a German, Horst Eisel, who wrote the draft for the Common Handbook which serves as an instruction manual for officers at the border to guarantee a common high standard of controls.[707] Obviously, many Schengen partners asked for changes and additions, but the original draft and the shape of the handbook were due to German initiative.

Germany was apparently also concerned with the standard of controls and sought to introduce this into the agreement. Luxemburg's State Secretary Goebbels stated in 1988 that Germany was especially eager in asking for high standards of controls (which he thought unnecessary and unfeasible). It seems that views regarding the usefulness of border controls varied. While Germany saw the external borders as ideal instruments for the fight

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[705] Cf. StS Neusel in Innenausschuß des Deutschen Bundestages, "Kurzprotokoll, 23. Sitzung des Innenausschusses."
[706] SCH/M (88) PV 1.
[707] Eisel, "Interview with Horst Eisel."

against crime due to their filter function, Luxemburg's negotiator stated that terrorists and important drug dealers were seldom caught at the border.[708]

It has to be emphasised that this insistence on strict external border controls became virulent for Germany itself only after the political changes of 1989/90. Before that, Germany's borders with Western partners were either internal borders (France, Luxembourg, Belgium, Netherlands) or covered by special treaties (Denmark, Austria).[709] The inner German border was not problematic from the point of view of border controls. Transit between West Berlin and West Germany which was the main control task, only flowed through 4 crossing points: Hof, Bebra, Helstedt and Lauenburg. Asylum seekers were not a major problem at the border. In Berlin Schönefeld, which was the only important point of entry for asylum seekers, they often contacted the BGS themselves. The presence of the BGS at the inner German border was therefore not justified by the necessity of border security but by a combination of factors: West Germany wanted a presence at the internal border in order to be able to react to inexpected political events. At the same time, the BGS at the border was a remnant of the early BGS task to guard against possible (Communist) uprisings.

Before 1989/90, German concerns were therefore directed much more against the difficult sea borders of southern states such as France, and Italy and Spain (when their joining became clear). The standards which Germany had insisted on were to ensure the safety of those borders. However, these suddenly also became relevant at the German eastern border after 1990.

> Horst Eisel: 'Zum Zeitpunkt des Abschlusses des ersten Schengener Übereinkommens im Jahre 1985 verhinderte noch die nahezu undurchdringliche innerdeutsche Grenze weitgehend das Eindringen von Gefahren aus östlicher Richtung, womit nicht zum Ausdruck kommen soll, daß die deutsche Politik dem 'Eisernen Vorhang' aus solchen Erwägungen einen positiven Aspekt beimaß. Demgegenüber hatten Länder wie Frankreich, Italien und Spanien unter anderem schwierige Seegrenzen zu schützen, so daß die zuständigen deutschen Behörden eher mit Sorge dorthin blickten, wenn sie an die Absicherung ihrer Westgrenzen dachten. Nach der Wiedervereinigung änderte sich die Konstellation insofern, als Deutschland nunmehr Verantwortung für die neuralgischen Grenzen zu Polen und Tschechien

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[708] Cf. Innenausschuß des Deutschen Bundestages, "Bericht über die Reise einer Delegation des Innenausschusses vom 4. Juli bis 8. Juli 1988 in die Länder Frankreich, Luxemburg, Belgien, Niederlande zum Thema: Übereinkommen von Schengen."

[709] The situation with Austria was not unproblematic, however, since it opened the Southern German border (an external one) to crossing with spot checks only.

trug und die anderen Partner jetzt mit besonderer Aufmerksamkeit darauf achteten, daß die deutsche Seite die Schengener Ostflanke zuverlässig abschirmt."[710]

Indeed, the situation created through the changes of 1989 also had large implications for the negotiations of Schengen. The German government cancelled the signing of the Schengen Agreement on the day of 14 December 1989 due to a number of insecurities which had arisen from the October events.[711] The legal position of East German citizens with regard to the western neighbours had not been completely resolved and the German government insisted that East Germans be treated like West Germans. This left open the question of efficient controls of third-country nationals entering via the eastern border of the GDR. Politicians asked for further negotiations so that East Germans would not become 'Second Class Germans' with respect to rights of free movement.[712] This unclear situation for GDR citizens was especially bemoaned by the FDP partner of the German government coalition. Additionally, they also had reservations with regard to the data protection provisions.[713]

The insecurities, uncertainties and even fears the prospect of German unification raised with Germany's neighbours have been mentioned in chapter four. Furthermore, the German government had to examine first if it was in a position to secure the new eastern border. Thus, the signing the Schengen Convention in December 1989 was judged to be inopportune by the German government. Additionally, there were a number of other issues which remained unresolved, such as disagreement about tax questions with Luxembourg. Dinan states that the calling off must have relieved the Schengen partners: 'It appeared that

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[710] Eisel, "Interview with Horst Eisel." Translation: At the time of the conclusion of the first Schengen Agreement in 1985, the nearly impenetrable inner-German border still prevented largely the penetration of dangers from the eastern direction, which is not meant to say that German politics judged positively the 'Iron Curtain' due to such deliberations. In contrast, countries like France, Italy or Spain had to secure amongst other difficult sea borders, so that the responsible German authorities looked there with apprehension when thinking of the security of their western borders. After re-unification, the constellation changed so that Germany now bore the responsibility for the neuralgic borders with Poland and the Czech Republic and the partners now took special care that the German side would shield the eastern flank reliably.

[711] Negotiations had gone on until late that night although the decision was taken in a German cabinet meeting in the evening. It is not clear when the negotiators knew of the decision to cancel. The protracted negotiations were due to disagreements between the Netherlands and Luxembourg regarding fiscal matters. Cf. "Abbau der Grenzkontrollen gefährdet. Bonner EG-Partner befürchten ungehinderten Zustrom von Menschen aus dem Osten," *Süddeutsche Zeitung*, 13 December 1989. One could assume that the German delegation hoped that the signing would be called off anyway due to these disagreements and therefore delayed announcing the cancelling. Although there is no proof of this thesis, it is supported by the fact that on the day before the called-off signature, only the partner states had been held responsible for delays. Cf. "Kabinett verzichtet auf Paraphierung," *Frankfurter Allgemeine Zeitung*, 14 December 1989.

[712] See for example the conservative Schlee: Harald Günter, "Vor Schengen zieht Schlee eine Maginot-Linie," *Die Welt*, 5 January 1990.

[713] Cf. "Kabinett verzichtet auf Paraphierung."

the German government stated in public only what the other four signatories had privately though; no country was quite ready to do away with border controls."[714]

Within the German government, there was considerable unrest after the signing had to be called off. The Permanent Minister of the Interior Stavenhagen blamed the FDP and its sudden change of mind. He claimed that the FDP had repeatedly changed its reason for not giving in three times (from the lack of information for Parliament during the negotiations to the involvement of Parliament in international negotiations in general to the problem of GDR citizens).[715] It seems therefore, that there was considerable disagreement in the government regarding the cancelling of the signing. Nevertheless, the hesitations of the FDP were important enough to set itself in opposition to the Chancellor and the Minister of the Interior. In the final result, the government accepted that too many questions remained unresolved and called off the signing.

Thus, while the security of border controls themselves was called into question after the changes of 1989, it was not this single issue which led to the cancellation. Additionally, the lack of information for parliaments, the uncertain legal situation of GDR citizens and disagreement between the Netherlands and Luxembourg on fiscal matters played a role.

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[714] Desmond Dinan, ed., *Encyclopedia of the European Union* (Boulder, Col: Lynne Rienner, 2000).
[715] ""Schengener Abkommen ohne Not aufs Spiel gesetzt"," *Badische Neueste Nachrichten*, 18 December 1989.

2.5.2. Schengen Information System

Another compensatory measure which was crucially influenced by Germany was the SIS. The Schengen Information System represents a completely new instrument in international police cooperation. It is a common system by a number of states into which all partners can feed information regarding items and persons sought, and from which all states can call up information.

Germany had had electronic systems for investigation since the 1970s. This became a useful source of experience. Not only the suggestion of such a system, but also its conception and technique were heavily influenced by German ideas and experiences. Horst Eisel:

> Das Schengener Informationssystem ist maßgeblich von deutschen Experten mitentwickelt worden. Sie waren bei der Ausarbeitung des konzeptionellen Gerüstes, der Realisierung bis zur Betriebsbereitschaft und der ständigen Perfektionierung und Erweiterung tonangebend. Dabei kamen ihnen die jahrelangen Erfahrungen mit elektronischen Personen- und Fahndungssystemen in Deutschland – namentlich INPOL – sehr zu gute.[716]

Already in 1972, the first electronic police information system was introduced - INPOL. The system is 'star-shaped', thus run commonly by Länder and federal level with the BKA as a central office. Data regarding persons who are to be arrested or whose whereabouts are to be found is included, as well as data regarding objects which have a connection to a crime.[717]

This principle was advocated also for the SIS. The experts from the Bundeskriminalamt, experienced in the use of INPOL, were also crucial in designing the SIS. Horst Eisel: 'Das BKA hat sich große Verdienste um SIS erworben.'[718] The SIS also is shaped like a star system with a central unit in Strasbourg (C.SIS) and national units (N.SIS). There is a difference between the functions of the central units, however. While the BKA also has an analytic and investigative function in INPOL, the C.SIS is only a 'computing' unit which provides all national system with the same set of data. Also the data categories in the SIS

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[716] Eisel, "Interview with Horst Eisel." Translation: The Schengen Information System has been developed decisively with the help of German experts. They set the tone at the elaboration of the conceptual framework, at the realisation until the system was operational and at the constant perfectioning and enlargement. The years of experience with electronic investigation systems for persons and goods – notably INPOL – was very useful in this respect.

[717] Cf. Gernot Achsnich et al., *Innere Sicherheit im vereinten Deutschland* (Erfurt: Heron, 1997), 35f.

[718] Eisel, "Interview with Horst Eisel." Translation: The BKA has earned great merits with regard to the SIS.

are also similar to the ones of the national INPOL system. They refer to objects (weapons, documents, registered money, vehicles – also for the purpose of 'hidden registration') and persons (reason of inclusion into database, measure requested and additional information). Flowtext is not permitted, all data to be entered has to fit the given category. This parallels the German INPOL system, where objects are entered only alphanumerically, and data regarding persons has to be fitted into fixed categories.

An official of the Schengen General Secretariat has remarked on the importance of the SIS: 'The importance of SIRENE is not so much the technology but the organization and its underlying rationale, that is to relay information necessary to safevouch public order and security.'[719] (SIRENE is an complementary system to the SIS, the Supplementary Information Request at the National Entry. It is part and parcel of the SIS and provides additional information if requested).

SIS was considered the 'heart' of compensatory measures, but was also one of the items which took longest to become ready for operation. Indeed, implementation of Schengen was delayed due to the fact that the SIS could not run due to 'technical problems'. Oberservers credited the French, on whose territory the central unit was placed, with this delay. The German Member of the European Parliament Detlev Samland thought it was 'obstructionist policies' which had prevented computer progress. He accused Charles Pasqua, who was very critical of the cooperation, of delaying progress.[720]

Also after implementation, Germany remained one of the most active partners in the SIS. It provided most data (in the beginning this was a logical result of existing experiences and data in INPOL) both in the category of persons and of objects. By November 2000, the SIS contained 9.6 million data sets Europe-wide. 1.2 million of these were for investigation of persons and 8.4 million for objects. Germany provided the largest national section with 2.6 million entries (that is 40.1% of data regarding persons and 23.4% of data regarding objects). For comparison: Benelux provided around 2% of all data, Spain 2.5 % and

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[719] Verraes, "Schengen, an Agreement to Cooperate".

[720] „Der SPD-Politiker Samland meint, daß es wohl „französische Obstruktionspolitik" gewesen sei, die Computerfortschritte beim SIS verhindert habe. Bis Dezember hatte Paris den Vorsitz in der Schengen Kommission inne, und da habe Pasqua offenbar dafür gesorgt, daß man es beim SIS etwas langsam angehen lasse." Karl-Otto Sattler, "Die Grenzen feiern klammheimlich Auferstehung," *Frankfurter Rundschau*, 13 May 1994.

Portugal only 0.6 %. Italy, however, was also a major contributor with 30.3 % of data regarding persons and 24.5 % of all data regarding objects.[721]

2.5.3. Hot pursuit and cross-border observation

Another measure which German officials put a lot of emphasis on was the introduction of the possibility of cross-border observation and hot pursuit, that is the possibility for police officers to follow a suspect across the border into the neighbouring country. The German position in this case was to create the possibility of unlimited (temporal and spatial) pursuit in the neighbouring countries. The objective of German officials was an agreement which would have made cross-border observation and pursuit subject to similar conditions everywhere. This was not acceptable to some Schengen partners, such as Denmark and France. According to observers, Germany was supported by others, however, such as Spain and Italy. Hesitations with regard to national sovereignty led Germany's partner states to reject such a regulation. The negative experiences of Germany's neighbours in the past may also have had a part in this.

In the Schengen convention, hot pursuit was allowed in principle without limit to time and space, but subject to additional bilateral agreements or declarations.[722] The result is that the rights of police differ between all countries. France allows hot pursuit unlimitedly, but does not give permission to foreign officers to apprehend a suspect until French police arrive. Denmark has limited the area for hot pursuit and added regulations regarding the use of weapons. Belgium has introduced a time limit. The Netherlands allow pursuit in an area of 15 km, but only in public space. Germany is the only country in which no limit was introduced. This is often given by security experts as an example to what extent Germany was ready to give up sovereignty rights in exchange for security measures. At the same time, Dr. Mizia from the BMI has also mentioned the factor that smaller states always worry not to be dominated by the bigger ones. Given Germany's history with its neighbouring countries, he says, it is understandable that they were more hesitant.[723]

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[721] Bayern mit 280.000 Fahndungsausschreibungen im Schengener Informationssystem vertreten, Bayerisches Staatsministerium des Innern.

[722] Roese, "Interview with Eberhard Roese.". According to Roese, a general limitation of pursuit to 15 km was discussed at a certain point in the negotiations. The German delegation was able to prevent this.

[723] personal opinion of the interviewee.

Similar divergence can be observed on the topic of cross-border observation. While Germany aimed at a regulation which would have allowed both observation of the environment of the suspect and 'preventive' observations, the result of the SIC was different: cross-border observation is only possible after an application for administrative help (Rechtshilfeersuchen) (Art. 40 (2)), only directed at the suspect himself and only if one of the crimes of a given catalogue is concerned. (Art. 40 (7))

These limitations were not satisfying for German officials. Additionally, the refusal of Schengen partners to create extensive provisions for the cooperation on the level of police practice led to dissatisfaction. Other states often insisted on keeping involved the judicial bureaucracy which was seen as time-consuming by Germany.

> Nicht durchsetzen konnte sich die deutsche Seite etwa mit ihrer Forderung zur Reform der Rechtshilfe, insbesondere in Gestalt der sogenannten polizeilichen Rechtshilfe. Sie betrifft die direkte Zusammenarbeit der Polizeibehörden ohne die oft zeitraubende Beteiligung der Justiz bei der Erledigung eiliger Ersuchen um Durchführung von Aufklärungsmaßnahmen im Rahmen der Strafverfolgung. Mehrere Schengen-Staaten konnten sich den Überlegungen Deutschlands nicht anschließen, weil sie von den ehernen justiziellen Befugnissen nicht abrücken wollen.[724]

Given the dissatisfaction with results of Schengen II in this respect, Germany has tried to introduce changes to the Agreement also afterwards. One example is the German-Swiss Agreement of 1999 which included a number of measures that were not possible in Schengen II.[725] It is hoped in circles of German security experts that this agreement can serve as a model for further changes to the Schengen *acquis*.

> Nicht selten muß man Umwege gehen, um zum Ziel zu gelangen. Im April 1999 hat die Bundesrepublik mit dem Nicht-EU-Staat Schweiz einen Polizeivertrag abgeschlossen, der zukunftsweisend ist und vieles enthält, was im Schengener Rahmen noch nicht durchsetzbar war. Österreich hat gegenüber der Eidgenossenschaft nachgezogen und will mit Deutschland eine Übereinkunft ähnlichen Inhalts treffen. Unsere Rechnung scheint aufzugehen. Wenn das deutsch-

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[724] Eisel, "Interview with Horst Eisel." Translation: The German side was not successful with its claims for a reform of judicial aid, especially in the for of so-called police judicial aid. It concerns the direct cooperation of police authorities without the often time-consuming participation of the judiciary in the execution of urgent calls for investigations in the framework of criminal prosecution. Several Schengen states could not join the German deliberations because they did not want to dissociate themselves from iron judicial rights.

[725] Bundesregierung, "Entwurf eines Gesetzes zu den Verträgen vom 27. April 1999 und 8. Juli 1999 zwischen der Bundesrepublik Deutschland und der Schweizerischen Eidgenossenschaft über grenzüberschreitende polizeiliche Zusammenarbeit, Auslieferung, Rechtshilfe sowie zu dem Abkommen vom 8. Juli 1999 zwischen der Bundesrepublik Deutschland und der Schweizerischen Eidgenossenschaft über Durchgangsrechte," ed. Deutscher Bundestag (Berlin: 2001).

schweizerische Vorbild erst einmal im EU-Raum Fuß gefaßt hat, könnte es auch innerhalb der Union zum Selbstläufer werden.[726]

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[726] Eisel, "Interview with Horst Eisel." Translation: Not rarely, one has to take detours in order to reach a goal. In April 1999, the Federal Republic has concluded a police treaty with the non-EU-state Switzerland which is forward-looking and contains much which has not yet been successful in the Schengen framework. Austria has followed with regard to confederation and wants to conclude with Germany an agreement of a similar nature. Our calculation seems to work out. Once the German-Swiss example has taken root in the EU area, it could perpetuate itself within the Union.

2.6. Germany as a 'neutral' negotiator for security and freedom

German self-perceptions insisted that Germany acted much less on the motive of national interests than others. This is mostly based on the argument that Germany was willing to give up more sovereignty rights with regard to hot pursuit than other states. Germany's role as an honest broker is therefore based on the perception that it had no particularistic interests to defend: 'Deutschland hatte nach meinen Beobachtungen keine Sonderinteressen zu 'retten' und war dadurch in der günstigen Situation, seine ganze Aufmerksamkeit auf die bestmögliche Umsetzung des Schengener Anliegens zu konzentrieren, das Europa der Bürger zu schaffen.'[727]

It is certainly true that Germany had less concerns on giving up sovereignty than France and other partners did. However, Germany, too, had special interests which it brought into the process. Like all negotiators it brought the lessons from its historical experiences to the table as well as a legal and administrative tradition of interpreting the role of the state. Interestingly, Germany's interests concentrated on areas which were of concern to all participating countries to a greater or lesser degree: the possible loss of security. The rationale it brought to the negotiations was not in opposition to the objectives of other states, although the practical measures suggested might sometimes have gone too far and been difficult to reconcile with the sovereignty interests of other states. France and Germany shared the general political objectives and also security concerns, but took different views on the place of national sovereignty in the solutions.

It also has to be mentioned that the situation changed with German unification and the dissolution of the Soviet Union. Germany now had the task and the vital interest in protecting its eastern frontier, contrary to the situation before 1989 where the guarding of the border was in practice done through the arrangements of the Communist regimes. Especially after 1992, the security concerns can be seen to rise. While compensatory measures had been advocated from the start by German security experts, now the wider political landscape became aware of possible dangers. Thus, after 1989/92, the German insistence on compensatory measures also concerned its own external borders.

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[727] Ibid. Translation: According to my observations, Germany had no special interests to 'safeguard' and was thus in the favourable position to be able to concentrate on the best possible translation of the Schengen matters of concerns in order to create the Europe of citizens.

In summary to the German position on compensatory measures, it can be observed that German bureaucrats, thus experts in the provision of security, advocated strict and comprehensive compensatory measures, while politicians were initially for a quick abolition of border controls. But the 'necessity' and feasibility of compensation and the security logic of bureaucrats were gradually accepted by politicians as well, especially after 1992. In an interview, Horst Eisel cautiously admits the central role of Ministries of Interior on the federal and Länder level for advocating security standards:

> Sicherheitspolitische Forderungen wurden sehr wohl von politischer Seite erhoben, wenn auch nicht gerade gebieterisch aus Kreisen, die sich primär dem Ziel der Freizügigkeit verpflichtet sahen. Der Bundesminister des Innern hat aber stets im Benehmen mit den Innenministern der Länder darauf gedrungen, daß der Schutz der Bürger gleichen Rang besitzt wie ihre ungehinderte Reisemöglichkeit im Schengener Raum.[728]

In the Schengen rationale, compensatory measures were the only efficient means of arriving at a similar standard of security despite the abolition of border controls which had hitherto been considered essential to the provision of internal security. It was agreed that no national measures would be necessary once a high standard of controls at external borders was reached.

After the implementation, an argument was made that national measures were needed nonetheless in order to ensure internal security in the face of international crime and migration which were crossing internal borders. Implicitly, it was therefore argued that external border control measures and compensatory measures did not provide the standard of internal security expected by German officials.

> Grenzpolizeiliche Präsenz an den Binnengrenzen und in deren rückwärtigen Räumen war wohl im Schengener Szenario nicht vorgesehen, weil man davon ausging, daß vor allem durch den gründlichen Außengrenzschutz der Wegfall der Kontrollen an den gemeinsamen Grenzen ausreichend kompensiert würde. Diese Annahme hat sich nicht bestätigt. Die weiterhin über die inneren Grenzen stattfindenden Wanderungs-

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[728] Ibid. Translation: Security demands were made from teh political side, even if not very peremptorily from circles whose first responsibility was the goal of freedom of movement. The Federal Minister of the Interior in agreement with the Ministers of the Länder has always asked that the protection of citizens has the same importance as their unhindered travel opportunity in the Schengen area.

It is important to note here that organisational interests and loyalty would make it impossible for an official to admit any specific roles assumed by the institutions in this regard. At the same time, however, it is to be supposed that attitudes were mixed and security interests also voiced from within the Bundeskanzleramt (and vice versa). Given the above rationales, however, it seems correct to attribute more concern for freedom of movement in the BK than in the BMI. At the same time, it is the institutional task of the Ministry of Interior to work for what it perceives to be an optimum of possible internal security for citizens.

und Kriminalitätsbewegungen haben die verantwortlichen Behörden veranlaßt, Gegenmaßnahmen in nationaler Zuständigkeit zu ergreifen.[729]

Thus, the Schengen rationale was paralleled by measures on the national level which were spelt out in chapter six. These illustrate the idea that internal security is compromised through the abolition of controls at the internal borders and that additional measures have to be taken. It can be deducted therefore that despite a multiplicity of voices and opinions within Germany, a general line of policy was coherently followed on both the European and national level. A security-led perspective dominated, but a discourse with regard to the realisation of freedom of movement was retained. This was possible due to a 'division of work' between politicians and bureaucrats. The former accepted the security necessities advocated by security experts, but continued to emphasise a rhetoric and objective of freedom.

Germany therefore also had its agenda at the negotiations which it aimed to defend. It managed to have a number of its proposals passed, not least due to the fact that the other Schengen partners were also concerned with security (albeit in different degrees).

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[729] Ibid. Translation: The presence of border police at the internal borders and the rear areas was not envisaged in the Schengen scenario, because it was assumed that the abolition of controls would be sufficiently compensated by thorough external border security. This assumption has not been confirmed. The continuing migration and movements of criminals across the internal borders have prompted the responsible authorities to take counter measures in national competency.

3. French-German relations in the negotiations

France and Germany were the two most important players in the Schengen negotiations. Not only did they have the most economic and political weight of the Schengen founding states, but also the French-German agreement proved the immediate precurser of Schengen.[730] A common basic interest in terms of trade and European integration pushed the two partners to persevere in putting together a comprehensive agreement on border controls. Regular exchange and informal meetings between the countries' representatives ensured that solutions could be found which safeguarded national interests. Furthermore, the close relationship between President Mitterand and Chancellor Kohl, and their commitment to the Schengen process meant that political solutions could be sought to problematic issues.

The two countries had differences in the starting positions, however. As has been shown above, the French Republic was most openly pushed to seek open borders due to the lorry strike of 1984. While Germany had similar concerns (also proved in the agreement with Austria), its politicians emphasised the ultimate political goal of European integration much more.

Furthermore, the legal and state traditions of the two countries were very different which was to remain apparent throughout the negotiations. One French concern was that the Schengen agreements would entail too much loss of sovereignty. Cross-border observation and pursuit therefore proved difficult elements of the Schengen agreement. Most notably the right of foreign officers to arrest someone in France, thus exercising foreign law on French territory, remained unacceptable. A number of restrictions were imposed so that France and other states would find the new regulation acceptable. Furthermore, the various national services allowed to exercise hot pursuit were listed in the treaty text. Bilateral agreements between the Schengen partners regulate details of the hot pursuit and can allow further measures. This issue remained difficult until relatively shortly before the proposed signatures in December 1989.[731]

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[730] Nevertheless, the role of the Benelux must not be underestimated. Their inclusion into the Schengen founding group meant that one could draw the the Benelux experiences with a travel union. Furthermore, the Benelux were important in helping France and Germany to come to compromises on difficult issues.

[731] Cf. the solution spelt out in the protol SCH/M (89) PV 2.

Germany was much less concerned with sovereignty issues, which is shown by the fact that its declaration in the SIC allows the widest-possible right for hot pursuit and observation by other states. It may be speculated, why this is the case. Interlocutors have mentioned that the necessity of compensatory measures and interests of security weighed more in this respect than considerations of national sovereignty. It has also been voiced that Germany – due to its historical development – was used to a division of sovereignty between various levels. Thus, conceding limited rights to other Member States was considered less of a break with tradition. Since national competency for the actual controls was retained, the agreement was also acceptable to German police. Additionally, the German debate on border-related issues highlighted the urgency of efficient measures against illegal immigration and organised crime so that far-reaching agreements would have been accepted. Lastly, Germany was ready to take into account national sensitivities of its neighbours and therefore to accept a solution which was considered sub-optimal.

It has been mentioned by several of the observers that a division of work took place between France and Germany to the extent that Germany provided expertise while France took over the role of political leadership. This is difficult to trace through the protocols of the meetings of workings groups and State Secretaries and Ministers. It becomes clear from remarks of observers, however, that there was disagreement between France and Germany as to the extent of security versus liberties. As mentioned, the demands by the German delegation to have foreign officers arrest in France and use their weapons were rejected in France. Furthermore, the French negotiators were astonished about the role of representatives of the Bundeskriminalamt who acted as equal to their colleagues from the BMI and often were much more restrictive.[732] The French government used this situation to present the final text, which gave less rights to foreign police than anticipated, to the public as a concession from the 'Germany of police'.[733]

The roles reversed somewhat with the revolutions in Eastern Europe and German unification. As the quotation of Eisel above shows, it was now Germany's partners who started to watch carefully if Germany was able to ensure the security of the eastern border. All the more so, since Germany had before been perceived to demand ever stricter control and compensatory measures. The new situation not only gave Germany a new eastern border, but there was also insecurity as to the ability to control the border. It is a land

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[732] Cf. Jean Quatremer, "Frankreich: Sieg über das 'Deutschland der Polizei'?," in *Europol · Die Bullen Greifen nach den Sternen* (Hamburg: Förderverein Umweltschutz Unterelbe, 1990).
[733] Ibid.

border, for a lengthy part along a river. The West German Bundesgrenzschutz was largely unfamiliar with the topography and the Eastern Bundesgrenzschutz was only being built up. At the same time, an interlocutor mentioned that there were some hesitations of East German officials to cut long-established connections with the former 'Communist brothers'. Economically and politically, this was unwelcome to some GDR or 'new Länder' citizens.

As has been spelt out in chapter five, the German debate regarding border controls itself also demanded stricter measures. The topics of immigration and international crime as objects of fears were present in both Germany's debate as well as the one in France and other European partners. The concern in France was most pronounced, however, especially with regard to migration. The element of mutual trust between the Schengen partners necessary for the system to work and which had been established through the Schengen mechanism was put to a first test. A report in the name of the Committee of Control of the French Senate by Paul Masson and Xavier de Villepin of 1991 is indicative in this respect: the situation in Germany in 1991 was defined as 'particularly preoccupying,'[734] most importantly the situation with regard to asylum seekers and immigration. The authors recall the numbers of asylum seekers of 1991 and mention the Russian Minister of Interior saying that around 3 million Russians might move to Western Europe during the next year.

The report asserts that a European space without controls means to trust the key to one's national territory to one's other partners. It insists therefore that every participating state must scrupulously respect all its obligations under the treaty.[735] This has to be interpreted as a call to Germany, but also to Southern members of Schengen (with whom the system had not been 'activated' yet at the time) to ensure the security of France by securing their external border.

Thus, German unification and changes in Eastern Europe made realise the Schengen member states that they were dependent on each other for ensuring mutual security. To what extent the changes of 1989/90 were considered threatening depended on national positions and fears with regard to immigration and crime. France considered Germany's

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[734] Masson and Villepin, "Rapport de la Commission de contrôle du Sénat sur la mise en place et le fonctionnement de la convention d'application de l'accord de Schengen du 14 Juin 1985," 37.
[735] Ibid. "Réaliser un espace en Europe sans contrôles aux frontières, c'est confier en quelque sorte la clé de notre territoire national à nos partenaires. C'est pourquoi chaque Etat partie, y compris la France, doit respecter pleinement ses obligation dans le cadre de l'Accord de Schengen."

eastern borders its own new border. At the same time, it showed itself particularly concerned with migration from Eastern Europe and asked for re-assurance that this border was secure.

Migration from Southern Europe had of course been a concern from the start and also rendered problematic the negotiations with Italy, Spain and Portugal, later also Greece, aiming to ensure the best possible control of sea borders. However, the fast changes in Eastern Europe which required adaptation by one of the central Schengen players had the impact of novelty and insecurity as to future numbers. It raised remaining fears and hesitations with regard to the Schengen system and trust of other Schengen partners.

4. Conclusions

This chapter has aimed to present Germany's role in the negotiations on the European level. Its national interests were influenced by its historical relationship with borders (cf. chapter four) and the national debate regarding border controls (cf. chapter five). Borders and their control were seen as a protection against unwanted immigration.

In the Schengen negotiations, Germany aimed at finding a European solution to nationally perceived insecurities. At the same time, the political goal of the completion of the internal market played an important role. Together with France, Germany played the role of leaders and both were crucial for the progress of the negotiations.

Germany's advocacy for compensatory measures was echoed by the other Schengen states, but made particularly salient through the participation of German experts from the BMI and BKA which contributed relevant experiences, i.e. with regard to control or data analysis systems. With its emphasis on a comprehensive SIS and on cross-border pursuit possibilities, Germany attempted to project national internal security arrangements of its federal system to the European level. This was met with reticencies by other countries, such as France, whose domestic internal security systems were structured differently.

Germany showed itself much less concerned about issues of sovereignty than its partner states, most markedly France. It pressed for far-reaching solutions in the area of cross-border observation and crime, but had to give in to the reservations of the Schengen partners.

Chapter 8

Conclusions and Consequences

1. Introduction

This thesis has aimed to explore the role of borders for a modern West European state with the example of Germany. Such an investigation seemed especially interesting in the context of the evolution of a European policy on border controls which gave an intergovernmental institution the possibility to prescribe common standards for border controls at the external borders and to found a new principle of a common safe internal area of free movement. The changes touch the very heart of governance, traditional concepts of state sovereignty and security provision. Border controls – and therefore the control over entry and exit of persons and goods – were part of the attributes of the modern territorial state. The thesis has therefore answered the question which processes and perceptions within one of the Member States of the European Union have led the country to push for a common regulation of these issues. It has furthermore been explored which solutions were favoured and for what reasons.

The leading question of whether borders are losing their importance in such an arrangement has to be denied. While border controls at the internal borders are abolished, borders as such retain vital importance for the state in legal and administrative terms as well as for the enforcement of security measures. The research has also shown, however, that a differentiation in the role of borders has taken place which challenges the absoluteness of state borders as symbols of state authority and means of representing and enforcing security.

The findings of this thesis will be summarised in the following sections. The first section will cover Germany's position on border controls, the national discourse and policy intentions. A second section looks at the German role in the Schengen negotiations and shows the interplay between national and European level. A further part presents conclusions on the functions of the border after Schengen. A last section will explore consequences of the particular way the Schengen negotiations were framed and the changed role of borders.

2. The German position on border controls

This thesis has presented Germany's position in the Schengen negotiations. The country's position was decisively influenced by high-level bureaucrats, professionals of the provision of internal security and the *Bundesgrenzschutz*, as well as politicians in the Federal Ministry of the Interior and the Chancellery. Influenced by current interpretations of historical experiences, these elites developed a discourse emphasising the security function of borders which paralleled the one on the European level. This discourse represented a common ground between the institutional interests of internal security, border professionals and politicians aiming to retain the governance ability of the modern state. In negotiations, Germany adopted a role in which it mainly provided the technical competence to reach the objective of internal security. The result was a special emphasis on compensatory measures which also found entry into the final Schengen Agreements.

In the case of Germany, the historical heritage of lack of territorial identity and the self-definition against eastern neighbours has contributed to an underlying feeling of dangers emanating from the East. While true social learning and a common perspective have arguably accompanied post-war changes in Western Europe, the transformations in the East were met with much less political and structural changes in their Western partners. The perspective of a 'common fate' was much less expressed on the Western side.

Chapter four outlined Germany's historical relationship with its borders and emphasised an uneasiness of historic national and territorial identity. A survey of Germany's history showed a lack of continuity with regard to national identity and territorial state formation. Contrary to the evolution of other European states, the German ethnic principle of nationhood was not connected to territorial consolidation and concentration. Universalism and political plurality combined to a political entity which was much more a federation of territorial rulers than a territorial state. Germany became 'the late nation', founding a state only in the late 19th century and a territorial democracy only in 1919. No geographical barriers served to circumscribe a German territory. This meant that no territorial image was fixed to the image of Germany. German-ness was an abstract idea, manifested in language and culture, but not projected onto a limited area. Indeed, German culture was spread much further east than the states inhabited by German speakers. From the Middle Ages onwards, the influence of German language and culture extended eastward into Central and

Eastern Europe. Despite the close involvement in the region, the definition of German-ness happened in opposition to the Slav and the Western neighbours.

This territorial instability was also shown to be mirrored in the history of current German borders. Especially the eastern borders changed location dramatically over the centuries, while the Western borders with France were often objects of conflicts, but actually consolidated over time. The current Eastern borders of Germany were all set after World War II.

Although the German question can be considered as ended with German unification, a heritage of uncertainty with regard to the East has remained. The East was shown as the region against which Germany defined itself, culturally and politically. Eastern Europe was not only associated with a lack of civilisation at times, but also with a lack of political culture and stability. A threat emanating from the East became a deeply-engrained possibility for Germans. Negative associations with the East from Mongols to Russians were present in German language until late in the 20th century – living alongside a fascination with Central and Eastern European history and culture. This ambiguous relationship to the East received new life in the discussions regarding the need of border controls. By pointing to the possible dangers emanating from the East, politicians and security experts could refer to an existing framework of interpretation. Even the term '*Völkerwanderung*' (migration of the peoples)[736] used in the debates was a reference historical migrations between the 3rd and 6th centuries. The residue and current interpretation of German relationships with Western and Eastern neighbours therefore was important for the German position in discussions on border policies.

Current interpretations of past experiences and perspectives were influential for a position in Germany which justified the need for stricter border controls with the danger of uncontrollable waves of immigration. While a very real possibility of further immigration existed, exaggerated numbers played on existing fears. The projected immensity of numbers turned immigration into a security issue, instead of a challenge to social policy. A similar interpretation could be applied to international crime. Here, however, it has to be acknowledged that projections on international crime did exist and were indeed used as a justification for increasing border controls and compensatory measures, but projections in fact underestimated the actual developments. Nevertheless, the debate regarding cross-

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[736] Migration of the peoples

border crime associated the East with an area of instability and turned the issue into a security issue.

Chapter four also showed that Germany never saw itself as a country of immigration. Contrary to that image, Germany was crucially influenced by migration both in and out of the country. Already in the latter third of the 16th century, immigration into Germany began with religious refugees. Huguenots, Dutch, Waldensians and Salzburg people were greeted with economic privileges and cultural autonomy in the 17th century. Industrialisation at the end of the 19th century led to immigration of Eastern workers. This continued also in the first decade of the 20th century. Germany was obviously also a country of emigration – from the Eastern settlements from the 12th century onwards to the mass emigration to America in the 19th century. While the latter has stayed in public consciousness, the fact that Germany also was a country of immigration in the past was ignored.

It has been demonstrated that a traditional division between Germans and 'Fremde' (foreigners) in German identity can partly explain this phenomenon. A fear of foreigners existed due to projections and images of danger connected with 'others'. Klaus Bade analysed that not only the clear distancing ('Abgrenzung'!) of the own from the suspicious foreign was the aim, but also the security of the own identity against a foreign identity whose only function was at times to be the opposite of the own: 'Oft ging und geht es dabei nicht nur um die Abgrenzung des vertrauten Eigenen vom beargwöhnten Fremden, sondern auch um die Sicherung der eigenen durch Abgrenzung von einer fremden Identität, die sich zuweilen in der Funktion erschöpft, das Gegenbild zur eigenen zu sein.'[737] This division between home and others has therefore led to a denial of the reality of immigration into Germany in the past, such as the migration of refugees and 'Gastarbeiter' from the 1970s onwards. This denial led to a discrepancy of public perception and reality. It was argued that a fear of immigration from the East and the necessity of protection from the East was at least partly influenced by the uncertainty which resulted from this discrepancy.

At the same time, the steadily rising numbers of incoming foreigners into Germany in the 1980s and 1990s were a reminder of the fact that Germany had to deal with immigrants but had no immigration policy. All the more so since a substantial part of the immigrants were so-called ethnic Germans (*Aussiedler*), whose claim to a German passport was rooted in the

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[737] Klaus J. Bade, *Homo Migrans. Wanderungen* (Essen: Klartext, 1994).

German law of descent. Their lack of knowledge of current German culture and language made them appear to many as foreigners. Thus, the old distinction between foreigner and 'German' engendered problems also in the present. The lack of clarity and of a capable policy dealing with immigration led to an uncertainty in society and a vague feeling of uncontrollability.

It has also been demonstrated that the changes after 1989 and the opening of Eastern Europe for the West reposed the open questions regarding the German relationship with the East. While there was an economic and political interest in Central and Eastern European states (and also a fascination with Eastern European cultures), the insecurity regarding political stability combined with an uncertainty regarding German identity in differentiation from Central Europe remained. Debates on border controls brought this ambiguity to the forefront, highlighting a division between a growing connection to Eastern Europe and a necessary protection from instability.

The changes of 1989 engendered concerns of Germany's neighbours about the country's future orientation. The British Prime Minister, Margaret Thatcher, feared that Germany would use its larger population and economy to dominate the Western European partners and even to lay claims to earlier possessions in Eastern Europe. France, too, was concerned about Germany turning East. At the same time, there were serious concerns whether Germany would be able to control its eastern external border sufficiently well to shield France and the other Schengen partners from dangers.

The German post-war experience, the integration into Western structures and the development of a democratic and European Germany also influenced the way Germany dealt with security problems. The Western orientation begun by Konrad Adenauer has become a fixed component of German policies. It views itself as a country of the Western world, participating in democratic values, freedom rights and a partner in ensuring security collectively. Furthermore, Germany has come to see itself as a Europeanised Germany, thus a country whose identity is linked to its membership in European institutions and to their common norms. This value orientation also played its part in German perspectives on border policies. Security problems – which linked external and internal security by transgressing the border – were perceived as possible threats to European partners with similar social values as much as to Germany. Solutions were to be found on a common level. This was to some extent reciprocated by the European partners who were willing to use the established mechanisms of intergovernmental cooperation in a new subject area.

Germany's strong European identity also led it to be less weary of sovereignty infringements than other partners. This might partly be explained by the assurance of being a big and central European player as opposed to smaller European states. However, France, too, displayed much more hesitations in this regard. Historical experience certainly played a role in this, since all neighbours of Germany had suffered from German occupation and been oppressed by German authorities in recent memory. Furthermore, the German national debate had come to concentrate on the necessity of efficient compensatory measures. As a result, Germany was willing to agree to the presence of foreign police officers in hot pursuit or cross-border observation without a territorial or temporal limitation. In an imbalanced solution, all other states restricted these rights much more.

During the Schengen negotiations, Germany adopted a security-led perspective, emphasising the need for the highest standard of external border control practices and compensatory measures. Chapter five presented the main actors in the German debate regarding border policies and retraced their concerns. The German government of the time emphasised the need to abolish internal border controls in the interests of European integration. Chancellor Kohl regarded the borders as barriers both to political and to economic integration. This was supplemented by arguments referring to immigration and crime as reasons for reinforced border controls. The latter arguments were put forward mainly by national security professionals and the bureaucracy of the Ministry of the Interior.

The solutions of compensatory measures and external border controls united the interests both of security specialists as well as politicians in general. The need to retain the governance function provided hitherto by the border meant that solutions had to be found that still enabled an enforceable distinction between citizen and foreigner. Most centrally, the security function was crucial in this respect. The enforcement of national law depends on a limited territory and the real probability of consequences in case of deviance. At the same time, security professionals emphasised that borders were useful for law enforcement in a pragmatic sense by serving as a filter. While researchers have doubted the usefulness of the border for this purpose to the extent that police emphasises it, the awareness of population and government of such a role of the border is more central than its actual efficiency. Compensatory measures therefore served to replace this function of the border

for efficiency of law enforcement – although experts remain divided over the question whether such measures can ever replace the identified filter function of the border.

The reasons for the inability of alternative discourses to influence the final shape of the Agreements were considered. The problems treated in the Schengen Agreements were presented as mainly of a technical nature, their political impact being sidelined during the negotiations. The required expert knowledge therefore limited the circle of contributors to those well versed in questions of security provision. At the same time, the structure of the negotiations between the European level of cooperation and national representatives left little room of influence for non-governmental actors. Given that such an intergovernmental agreement on a whole complex of issues of internal security was a novelty, there was no established procedure for input of dissenters such as NGOs, churches, lawyers' associations etc. to the negotiations.

Even the influence of the German Bundestag and the German Länder was only gradually established with the progress of negotiations. The relevant committee of the Bundestag was only informed of the progress of negotiations, but became more closely involved only in 1990 when Parliament had to vote on the second Schengen Convention. Regular hearings with experts from the Ministry of Interior took place, but Parliamentary influence was low. The lack of importance of Parliament is also shown by the fact that a special working group on Schengen was only formed in January 1990.[738]

Another reason for the dominance of a security-led discourse lies in the nature of security itself. Security actors within the state have the professional and institutional task of identifying such threats and offering solutions. This means that some actors have more authority to identify a political or social occurrence as a danger and interpret it as a threat. With regard to border controls in Germany, these security actors include the Ministry of the Interior and the Chancellery, as well as security officials and professionals. These were not only closely involved in the Schengen negotiations, but were also present in the national public debate, explaining the need of compensatory measures. From the institutional perspective of government and security professionals, it was logical to press for compensation for the loss of governance and security functions of the internal borders.

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[738] In principle, the Länder were represented through the Conference of Ministers of the Interior on whose decision the federal government negotiated. In practice, the Länder did not have much influence on the negotiations themselves. They were influential, however, in spelling out the necessity of compensatory measures upon which the mandate to negotiate was based. Only in 1996 were they able to send a representative to the negotiations.

The security debate acted as an argument which 'beat' others such as voices for openness of the European polity and concerns of building a fortress Europe or limiting civil rights. All the more so since the negotiators in Schengen took care to emphasise that the 'freedom' perspective was not neglected. The inclusion of provisions for data protection – one of the main worries of opponents – served as a proof of that during the debate. German representatives were especially active in this regard. One reason was the established institution of data protection officers and laws in Germany, another the existing awareness in the German public for such a problematique.

The structure of the public discourse and the relative influence of the players remained similar. Once established, the dual rationale of security and freedom remained largely unchallenged. Security experts used a convincing argument of threat and offered a solution which was difficult to counter.

The lack of an informed media and public debate can be seen as a weakness of the national political process regarding Schengen. While the media did report on impending changes in 1985, interest remained fairly low during the time of negotiation of the Convention. When the SIC was signed, media interest returned to the issue. Relatively few journalists followed the ongoing discussions, although there were regular comments asking when the Schengen Agreements were finally to be implemented and the borders opened. This development was aided by traditionally secluded policy-making in the area of security. Access to documents and information on the process was scarce. At the same time, it has to be admitted that interest in the 'mechanics' of the debate was low.

3. Germany's role in the negotiations and the interplay between national and European level

Chapter three showed that the origins of the Schengen Agreements were due to a Franco-German initiative: the deepening of European integration in which Germany was crucially involved implied the lifting of all controls to persons as well as goods, services and capital. The French President and German chancellor were both convinced of both the political and economic necessity of the step. Chancellor Kohl emphasised the importance of such a step for European integration expressly; he also consistently mentioned the importance of a European reference for German identity, if future conflicts were to be avoided. It was the participation of the two central states in European integration, France and Germany, which gave momentum to the development. This opened up a new level of policy-making which also would touch upon issues of sovereignty, so that Schengen can rightly be termed a *sui generis* treaty.

Germany's involvement in the Schengen negotiations was outlined in chapter seven. Institutionally, Germany was involved in all important negotiation groups and was able to display consistency over time. The consistency in the German approach was due to the a number of factors: the administrative lead for the project was located centrally in the Chancellery and later in the Ministry of Interior. The location in the administration directly subordinated to the Chancellor during the time when the basic foundations of the treaty were laid, allowed the coordination of the interests of a number of ministries from 1985 to 1995 and ensure the congruity of larger European policy goals with those of the Schengen negotiations. These political intentions centred around measures which would make Europe visible for citizens – freedom of movement was an important option for this policy.

Consistency was also given through the long-standing influence of the Ministry of Interior. While officially only one of the ministries represented in the Schengen negotiations, the rationale of security was advocated from the start and found entry into the central German position. The compensatory measures included in the final agreement already were developed from the mid-1980s onwards in German circles of interior policy. Although the political and economic perspective was prevalent in the beginning and promoted by the Chancellery, the view of possible threats to internal security existed from the start of the negotiations and gained prevalence gradually. After 1989, and especially after 1992, a shift

can be observed in the central objectives from primarily political and economic concerns to security issues in which the Ministry of Interior had the expertise. In 1996, the Ministry also took over the coordination of the German position for further negotiations.

Within the German delegation, consistency was assured by a relative stability of personnel. The government sent high-level bureaucrats and Permanent Secretaries to head the negotiations in the Executive Committee and Central Group, as well as the working groups. The representatives in the Executive Committee only changed if the office holder had been replaced, thus in 1989, 1992 and 1998. The stability of the German government itself proved advantageous for a consistent policy line. From 1982 to 1998, the conservative parties of CDU and CSU were in government in a coalition with the Liberals, the FDP. France, for example, had a different development where the governments and also the interior policy objectives changed several times during the negotiations.

Chapter seven showed the interplay between the dynamics of European integration and the supranational intergovernmental level. European integration had foreseen a right of free movement for persons, goods and services from the Treaties of Rome onwards. Germany was a convinced subscriber to this policy. While the realisation of such freedoms had been politically unfeasible until the beginning of the 1980s, new momentum in European politics embraced the economic as well as political necessity for a common European Market. The German Chancellor was one of the most prominent and active promoters of this policy.

The intergovernmental Schengen negotiations outside the treaties pre-empted events on the EC level. It was the bilateral Franco-German Accord of 1984 which became – together with the Benelux Union – the founding stone of the first Schengen Agreement. Speeches by the German Chancellor show that this step was clearly perceived in reference to European objectives – but taken outside the EC framework. It was later repeatedly emphasised that Schengen, which effectively ran parallel and in temporal rivalry to EC-level negotiations, was to serve as a model for European enterprises.

The interplay between the national and European level was identified also in the security rationale. Firstly, national security was perceived as impossible to be attained by one country on its own due to the international nature of security threats. What was seen as threatened, however, was the security of states and national societies, not European society. While common values of European states were sometimes invoked, the clear emphasis was on a threat to national security interests. Protection from this was only to be attained

through a European security strategy. Thus, any development of a common security strategy happened in the name of Members States and for the sake of these states.

Chapters five, six and seven dealt with the national German and European discourse and practice regarding border policies. The emphasis of security functions of the border can be traced back to common European-level circles as well as to the national level. Germany's involvement in questions of border-related issues reached back before the Schengen negotiations. The country was a member of a number of European and international circles which dealt with the danger to security of transnational crime and terrorism. Earlier circles of security experts (whether Interpol or TREVI, the Pompidou Group or the Vienna Group) emphasised the exchange of information and led to the gradual emergence of a common definition of dangers and their threats, leaving untouched all questions relating to internal security. Chapter five showed that the German debate regarding border controls used arguments similar to the European circles for changes in border policies (which were outlined in chapter three). This discourse emphasised publicly the political goal of European integration and free movement in a framework of security. The dangers identified and thus the protection offered through compensatory measures and external border controls were largely similar on the German and European level. This may first of all be explained simply by the fact that national security experts all over Europe concurred in their views of the role of borders by nature of their tasks. Being charged with ensuring protection of the state and used to the role of borders in this protection, they referred to the same logic of 'security through borders' by transferring it to the European level – regardless of political implications. Second of all, both on the European and the national level, the room for alternative voices was small and did not form a part of the central political discourse.

When political necessities pushed for the deepening of European integration by removing border controls, the common knowledge of European internal security circles came to bear. Although the circles of people meeting in the Schengen negotiations differed from those who had met in TREVI, they partly originated in the same institutions and it can be assumed that they also shared the concerns of their colleagues who had participated in earlier meetings.

The connectedness of the European and the national level can also be seen in the actual changes in border controls. European-level measures were negotiated between all Schengen Members in unanimity and therefore as a compromise. The emphasis of the participating

governments varied between them and over time: from a primary concern about freedom to one about security. The Schengen Agreements can be regarded as the smallest common denominator with regard to security. Some observers have interpreted this to mean that a maximum of security measures were taken. However, chapter seven showed that some states including Germany had originally hoped to include more far-reaching compensatory measures, such as more rights in police cooperation, cross-border observation and pursuit.

It has been shown that at times, national sovereignty concerns were set against European security concerns. Cross-border observation and hot pursuit are a good example. As was mentioned above with reference to the heritage of past experiences, most governments were very hesitant to give up sovereignty rights in this respect.[739] The result was that while the general right to such measures was written into the Schengen Convention, bilateral agreements between member states were to regulate the actual proceedings. This has not only led to a diversity of arrangements but also to restrictive handling of the matter in some states.

Compromises about these matters on the European level led to additional national compensatory measures if states were not assured of the security provided through Schengen. In the case of Germany, national measures included the introduction of new methods of control (Schleierfahndung), cooperation between services, cooperation with eastern neighbours and a new asylum policy (cf. chapter six).

An interesting contradiction emerged: on the one hand, German officials advocated strict compensatory measures and the widening of the agenda of measures in order to ensure maximum security even in the face of an abolition of external border controls. They also presented themselves officially as content with the result reached. Yet many professionals doubted the feasibility of the compromise and interpreted subsequent rises of crime at the borders as an indication that security could not be maintained. The solution was not to plead for additional measures on the European level, but to introduce measures on the national level.[740] One reason was certainly that the nature of the treaties as a compromise made a re-opening of the negotiations on such a basic level impossible.

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[739] Others had more hesitations in fixing these rights in writing. Benelux countries emphasised that according to their experience the practical relevance of these measures was low and that not all had to be fixed in writing.

[740] Obviously, the Schengen acquis was widened even after 1995, with additional measures strengthening security provisions. Cf. General Secretariat of the Council of the European Union, *The Schengen Acquis Integrated into the European Union* (Luxembourg: Office for Official Publications of the European

On the other hand, experience showed that national control over national measures to provide security was effective. At the same time, the enforcement of such measures at the national borders served to underline state authority in a core area of governance.

Influence also occurred from the national German to the European level: German influence on the development of a common rationale and compensatory measures can be discerned all through the process; it was a central member of a security community before 1985; it provided expertise and practical solutions in the negotiation process; it pushed for the inclusion of many subject areas and strict enforcement of agreed measures.

Practical border controls provide an example of German influence on European agreements. Chapter seven has presented the close involvement of Germany in the development of compensatory measures. Germany's role of providing technical competence while France provided the political authority in the process can be seen there. German experiences in the development of a common data system found entry in the development of the SIS; members of the Bundeskriminalamt were crucial in this development. Also experiences in actual patrols and controls of the borders were taken up, for example in the common handbook on border controls whose original version was provided by a German delegate from the Ministry of Interior. Similarly, Germany was influential in introducing the system of mutual control. Generally speaking, Germany aimed at widening the agenda of compensatory measures to include more and more issues. This was opposed by some states such as Luxembourg, but the final large agenda of Schengen (which includes for example exchanges on speeding tickets and hooliganism) shows that Germany was fairly influential.

The European context for the development of future policies on borders in Germany was crucially important. First of all, Germany and the security of its borders were seen in the context of other West European countries which faced the same security problems. A community of European security experts was responsible for such a view. Secondly, the European rationale of integration led to a perceived political necessity to abolish border controls. This in turn exacted reactions from security experts who saw additional security problems if no compensatory measures were taken. Thirdly, national and European

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Communities, 2001).. The basic logic of complementing European measures with national ones remained, however. This way, individual states retained national control over important measures to ensure public security although the borders were subject to a European regime.

measures changing the practice of border controls were complementary, and national measures can be interpreted as additions to European-level measures.

4. Border functions after Schengen

Schengen created a new distinction between two categories of borders. The internal borders became those borders between EC/EU member states who were willing to cooperate in the Schengen framework. This included land borders, but also those airports and ports which were exclusively used for direct transport to another Schengen state. By definition, external borders were consequently all other borders. This definition represented a break from the past where only one legal concept of a state border existed – with the same implications for citizenship, entry of other states' nationals etc. Schengen, instead, created a common safe space in terms of security, but retained the legal and administrative function of the border. It has created a more complicated situation in this respect. The whole of the Schengen territory is considered as one unit with regard to security. Controls at the external borders enclosing this space have to ensure protection against external threats. Also short-term visas are given out according to common principles aiming at a uniform standard of security. However, decisive competences remain with the national state. The national territory is still the basis for defining citizenship and thus the basis for defining legal obligations and rights. The national authorities are also responsible for decisions on longer stays of third-country nationals. Equally, the actual border controls remain the responsibility for national border services. Also the national police is limited to the national borders (except for specifically defined exceptions under Schengen).[741]

The role of borders changed from a situation where a border was in principle expected to serve military, legal, control, economic, identity and security purposes. Through the Schengen Agreements, a differentiated view of borders has emerged: one kind of borders, internal borders of the Schengen area, no longer have a defensive function and also have lost much of their economic and identity functions. They remain intact in legal and administrative terms, but have a less prominent role for control and security. Before the Schengen Agreements, all borders were seen as a potential net through which criminals and terrorists could be caught and which represented state power visibly for all people crossing. The changes reduced the law enforcement and representative functions of internal borders,

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[741] Furthermore, Schengen has created ambiguous spaces where it is unclear when third-country nationals are regarded as being in the Schengen area (e.g. the airport spaces).

but necessitated compensatory measures which were conducted in reference to the border. These compensatory measures included police cooperation, a common visa policy, the Schengen Information System and, most prominently, hot pursuit and cross-border observation. Thus, one step removed, the security function of the border remained central.

While the internal borders themselves were no longer to exercise the border functions of security and national identity, the eastern borders attained new security meaning because they were also 'external' borders of the Schengen Area. External borders of Schengen are a pre-condition for the system of internal borders to exist. They maintain strict controls, thus fulfilling the main security function of borders, replacing the one of internal borders to a large extent.

The fact that the national debate in Germany concentrated on security aspects or the border as a barrier meant that other aspects were neglected. While the function of the (external) border outwards (in terms of deterrence) was considered, signals given to direct neighbours were largely ignored. Also, the effects of the border inwards were not part of the deliberations. The ability of the border to enable structured relationships and the exercise of state power received little attention. Thus, there were not many deliberations what a splitting up of the security functions of the border and the representation of the state would have on citizens. Horst Eisel's statement shows that the attention of politicians was only on particularly negative effects of the border, the border as a barrier and a symbol for national narrowness: 'Man hatte auf diese Weise zweierlei gewonnen: Die Reisenden können freie Fahrt innerhalb der Gemeinschaft genießen und die Grenzen, zuvor als Symbol als nationalstaatlicher Enge empfunden, reduzieren sich visuell auf unsichtbare Linien.'[742]

The emphasis of the kind of security to be provided by borders has changed from an emphasis on military security before the end of the Cold War to a protection against threats posed to society in the form of illegal immigration and international crime. Another change resulting from the security-led debate in Schengen was a growing attention towards the 'practical' security function of borders, providing protection from large-scale social phenomena. The actual act of providing security received much more attention both in

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[742] Eisel, "Interview with Horst Eisel." Translation: One had thus gained two things: Die travellers can enjoy free movement within the community and the borders – formerly perceived as symbols of nation-state narrowness – are visually reduced to invisible lines.

public and in the tactics of the border guard service than the underlying rationale for border controls.

Whether these external borders also have a special role with regard to a European identity is open to speculation. The importance of borders for symbolical representation of the state is less clear. The differentiation of borders between internal and external borders and the different levels of controls and law enforcement at the borders may also lead to a differentiation of perceptions of borders in the public. No studies have been made, although it is conceivable that the division between safe 'Schengenland' and non-safe abroad at the borders will have consequences for the development of a European sense of identity.

5. Consequences of Schengen

The continuing importance of borders for the state can be concluded both from the framing of the national debates and the result of the Schengen negotiations. The emphasis on the relevance of borders for national internal security was clear in the discourse of elites. External border controls were seen as vital for ensuring an acceptable level of security within the Schengen area, and also the importance of internal borders was emphasised: firstly, it was precisely the abolishing of controls at these borders which necessitated the whole range of compensatory measures. Secondly, the states retained the right to re-introduce temporary controls at these borders in the interest of public order or national security. Thirdly, additional security measures in the zone around the internal borders were stepped up, partly due to the concern of the population regarding trans-border crime. Furthermore, the whole public discussion and the actual changes in border controls and national security measures have recalled the importance of borders for citizens. Although no survey institute seems to have conducted research on opinions regarding the importance of borders, the presence of the topic 'borders and national security' brought the centrality of borders into focus.

At the same time, states, not any European-level arrangement, presented themselves as the central actors providing security. This follows the traditional pattern and points to the fact that states are presenting themselves as willing and able to fulfil the classic security function of the state – albeit in a manner of coordinated sovereignty. Internal security – traditionally at the heart of national government – has been presented as feasible only through European cooperation.

Borders and the state thus remain of central importance to security also or even especially after Schengen. This is not least due to the fact that the self-perception of governments includes security as fundamental to governance. As has been shown in chapter two, borders have become central to the provision of such security and the authority to restrict movement is constitutive for the territorial state. The findings show that the territorial state continues to exist as a lock-in, but that governments view the means of achieving security in a perspective beyond the state. These changes can not only be understood as an adaptation to European integration dynamics but also the beginning of a more fundamental change to this historically contingent constellation of state, borders and security.

Nevertheless, the Schengen Agreements did represent a new departure. They provided for a comprehensive, binding intergovernmental Agreement which regulated many issues which were close to the core of governance. The modalities for the provision of security at the borders could no longer be decided upon independently. At the same time, states had to rely on their partners to ensure a high standard of control.

The representation of the 'own' state as the major actor in terms of internal security neglected the fact that the actual decisions with Schengen taken allow considerable influence of partner states on decisions regarding national security. It seems that the structuring of the national debate avoided the clear admittance that sovereignty had been given up.

It is obvious that the actors themselves did not have in mind a major shift of sovereignty when negotiating the new arrangement of border controls. In this respect, one has to distinguish between the intentions of actors and consequences of these actions. A member of the BMI emphasises that the elimination of the border as an integral part of the state was not intended, but only the removal of state control functions which were linked to the border for strategic and tactical reasons.[743]

The effect of new arrangements regarding border controls and compensatory measures on national governance can only be assessed over time. Changes in perceptions and subsequent effects on citizenship and national sovereignty happen but gradually. The inclusion of the Schengen Agreements into the European Treaties and the transfer of issues of migration and asylum to the first pillar suggest a further shift. It might be that citizens will only become aware of this once they feel directly impacted by decisions attributable to the European Community level.

Changes in this respect are occurring slowly, but some indications may be perceived already now. The public appeals for closing the border due to foot-and-mouth disease in the UK and France showed that the public still retained a consciousness of the protecting function of the national border. At the same time, this episode also showed that any such protection was ineffective in the face of true transnational threats such as highly infectious diseases or environmental threats. In the case of violent protesters, the temporary re-installation of

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[743] Ibid.: „Ihre Zielrichtung war nicht die Aufhebung der Grenzen als eines integralen Bestandteiles des Staatsgebildes, sondern die Abschaffung staatlicher Kontrollfunktionen, die aus strategischen oder taktischen Gründen mit der Grenze verknüpft waren."

controls at the German-Austrian border during the economic summit was perceived by the public as a useful measure. Thus, it may be that a differentiation in the perception of the role of borders will occur, in which the border can offer protection (even if only temporal) against threats emanating directly from identifiable persons, while it is useless against other threats.

It remains to be seen whether this difference of perceptions between elites and public of the role of borders, but also the ability of the state to protect, is an indication of a further rift between policy-makers in European and national politics and the expectations of the public. The future of the state and of the European Union depends, however, on a concurring view of the role of the state and its ability to fulfil this role.

An interesting specificity of the Schengen process is the fact that the administration acted pre-emptively here. While usually re-active, it was the impending abolition of internal border controls and the possible threat of large-scale illegal immigration to Western Europe which prompted a process of negotiations of counteracting measures. European circles had identified a threat of international crime, illegal immigration and terrorism at a time at which borders still existed. Yet the lifting of internal border controls was immediately interpreted as augmenting the threat to Western Europe. The link between border controls and international crime and migration had not been conclusively proven yet. It was an established self-reinforcing agreement that border controls had a filter and funnel effect. This discourse neglected any discussion as to the efficiency of such a filter (whether the heads of crime and the root of the problem could be touched).

The debate regarding border controls centred around security-led arguments so that the issue of societal security from crime and immigration became prominent. The national German and European debate show important parallels. This may first of all be due to the force of the argument of security itself which leaves little possibility for alternative voices. Second of all, this congruence of debates may also be ascribed to the influence of security experts both on the European and on the national level. Thirdly, the similar emphasis on compensatory measures can also be accounted for by the influence which the security-conscious Germany had on the course of the negotiations of Schengen.

The conclusion of the Schengen Agreements also had significant impacts on the definition of security in Europe. An explicit link between freedom and security was made that later also found entry in the European concept of an Area of Freedom, Security and Justice.

Freedom firstly referred to freedom of movement as envisaged in the Treaty of Rome. This became one of the rationales for starting negotiations. Gradually, the term freedom was also used to designate the idea of freedom from threat. This is a concept from the national tradition in which freedom is postulated only to exist under circumstances allowing the exercise of freedom rights. Thus, freedom became conditional upon the existence of freedom in the European space. The linked concepts of freedom and security employed here refer primarily to European nationals, thus ensuring security for those inside the European space to enable them to exercise their rights as European and national citizens. The pitching of a safe internal area versus an unsafe external area against which one had to protect created problems, however.

First of all, it was not clear what the 'inside' was. As pointed out, the competencies for security provision remained on the state level and for the state level, i.e. German politicians emphasised that Germany was still safe. At the same time, this security was only to be achieved through coordinated European standards and the definition of a common European space of security. At the same time, it was not clear, what the 'outside' was. The Schengen arrangement seemed to view everyone coming from outside as potentially a threat and therefore subject to intensive controls. This alerted all those member states of the EC/EU who were not (yet) part of Schengen. Arrangements had to be found which satisfied these states that their nationals would not be disadvantaged.

Also in the context of enlargement, the effects of this differentiation were strong. The partners in the EU or/and in the Schengen Agreements were portrayed as states with similar interests and values, both culturally and in terms of security. They were thus all part of the safe inside. This was reinforced by that view that not only did they face the same threats as Germany but they also envisaged the same solutions through Schengen (and earlier European groups). In principle, they had to be trusted to enforce the measures necessary for security. The states east of Germany faced very different challenges and were portrayed as resting area for criminals, victims of large-scale corruption as well as origin of possible migration and crime. The close control of borders was therefore necessary. While this was the general discourse during the Schengen negotiations in the early 1990s, the prospects of enlargement have changed the language here. The future members of the Union have been increasingly portrayed as making good progress, also in the area of Justice and Home Affairs, and as able to apply the Schengen *acquis* in the future. A period of transition for the implementation of free movement is ascribed to economic rather than security reasons. The logic of security has therefore been extended to include the accession

candidates, and the divisive line of the external borders has been pushed further east. The problems which such a new border will pose for the accessing states, especially Poland, were long not much thematised. For example, the Eastern Polish economy depends also on the trade from Byelorussia and Ukraine. Furthermore, not only the signals sent to the accession states were ambiguous, but also the signals to states further east. Conditionality has been imposed with regard to cooperation of Eastern European states in crime and immigration control.

A conclusion is that the interests and concerns of the participating states have shaped the agreements, with a lack of attention to the signals sent to 'outsiders'. East European countries are regarded as the origin of threats to Europe with little prospect of change. The necessary opposition with which the security logic operates has identified them as lasting problems. The negative image of the 'East' is therefore repeated, much in the same way as the 'Southern threat' has emerged. While the structural deficits of such countries in comparison to Western and also Central Europe cannot be denied, it remains an important question whether these exclusionary signals are a useful basis for future relationships with the EU.

What also has been reinforced in the Schengen negotiations is the perception that security is to be attained through controls. While security may also be regarded as the absence of threat, security has been presented in the negotiations as the successful protection against a threat. This implies that a threat had been identified by security experts and a solution offered. This thinking remained, however, within the state-centred logic, only shifting the solution to the European level. The presentation of possible migration as an anonymous phenomenon made regular and thorough controls appear as the best solution. A policy of promoting democratic and economic structures in the countries of origin was also pursued, but it remained unconnected to the Schengen security rationale.

Security through control at the border and internally is a means of governing which does not deal with the sources of the problem. While this may be a temporary solution, it does not seem feasible as a structural element of policy. This, however, is the nature of the content of the Schengen Agreements. The external borders are to represent the 'protecting' limits of Europe safeguarding against permanent external threats. Therefore, the conclusions of the special European Council in Tampere in 1999 are to be welcomed which envisaged a more balanced approach addressing also the roots of migration in countries or origin.

If borders are 'time inscribed into space or, more appropriately, time written in territories'[744], then the role assigned to the Schengen borders point to a time which does not take into account the reality of citizens' perceptions and signals sent to the outside. The present border is a witness to a time in which the state presents answers to challenges by transnational phenomena. This answer consists in an uneasy compromise between re-assertion of current interpretations of past experiences, national security tasks and consequences of European integration. This answer also consists in a new phase in the relationship between the national and the European, where a European space of freedom of movement coincides with reinforced spatial controls.

Each European state has found its own interpretation of this compromise. For Germany, this has meant that its concerns and fears but also its experiences in the provision of security have found entry into the European border arrangements. Where its concerns could not be entirely lifted by the Schengen arrangement, additional national security measures were put in place. It has also meant that Germany was willing to give up sovereignty, and also to endanger civil rights, for the sake of ensuring freedom in a context of security.

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[744] Cf. Michel Foucher, "The Geopolitics of European Frontiers," in *The Frontiers of Europe*, ed. Malcolm Anderson and Eberhard Bort (London and Washington: Pinter, 1998), Foucher, "Les frontières dans la Nouvelle Europe."; this saying is sometimes wrongly attributed to Rupnik, see Knud Erik Jørgensen, "Borders, Nations and States: Frontiers of Sovereignty in the New Europe [Review]," *Regional & Federal Studies* 7, no. 1 (1997).

Appendix

Figures and Tables

Table 1: Federal Ministers of the Interior and their Permanent Secretaries (1983 – present)

Election period	Bundesminister	Parliamentary Permanent Secretaries	Permanent Secretaries
1983- 1987	Friedrich Zimmermann (CSU)	Carl-Dieter Spranger (CSU) Horst Waffenschmidt (CDU)	Siegfried Fröhlich (until 30.6.1985) Hans Neusel (from 1.8.1985) Günter Hartkopf (until 19.4.1983) Franz Kroppenstedt (from 16.5.1983)
1987-1990	Friedrich Zimmermann (CDU) (until 21.4.1989) Wolfgang Schäuble (CDU) (from 21.4.1989)	Horst Waffenschmidt (CDU) Cari-Dieter Spranger (CSU)	Hans Neusel Franz Kroppenstedt
1990-1994	Wolfgang Schäuble (CDU) (until 26. 11. 1991) Rudolf Seiters (CDU) (from 26.11.1991 to 7.7.1993) Manfred Kanther (CDU) (from 7.7.1993)	Horst Waffenschmidt (CDU) Eduard Lintner (CSU)	Hans Neusel (until 30.9.1992) Johannes Vöcking (from 1.10.1992 to 22.6.1993) Kurt Schelter (from 15.9.1993) Franz Kroppenstedt Walter Priesnitz
1994-1998	Manfred Kanther (CDU)	Horst Waffenschmidt (CDU) (until 15.5.1997) Manfred Carstens (CDU) (from 15.5.1997) Eduard Lintner (CSU)	Franz Kroppenstedt (until 30.4.1995) Eckart Werthebach (from 1.6.1995) Kurt Schelter Walter Priesnitz (until 31.3.1996)
1998-2002	Otto Schily (SPD)	Fritz Rudolf Körper (SPD) Dr. Cornelie Sonntag-Wolgast (SPD)	Brigitte Zypries Claus Henning Schapper

Figure 2: Federal Ministry of the Interior in 1989[745]

This overview shows in an exemplary fashion the organisation of the Federal Ministry of the Interior. Organisation changed over time (see chapter five), but the overall structure remained the same.

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                        Federal Minister of the
                              Interior

        2 Permanent                      2 Parliamentary
        Secretaries                         Permanent
                                           Secretaries

Unit Z        Unit G        Unit D      Unit V         Unit IS       Unit P

Central      General       Public      Constitution,  Internal       Police
Division     Principles    Service     State Law and  Security
             of Internal               Administration
             Policies

        Unit O        Unit VtK                Unit SM        Unit KN

        Administrative  Displaced             Sports, Media   Disaster
        Organisation,   Persons,              Policy          Prevention,
        Local           Refugees and                          Civil
        Administration, War-disabled;                         Protection,
        Statistics      Cultural Matters                      Civil Defence
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[745] *Bund Transparent. Parlament, Regierung, Behörden*, 6 ed. (Bad Honnef: Verlag Karl Heinrich Bock, 1989).

Figure 3: Schengen negotiation structure[746]

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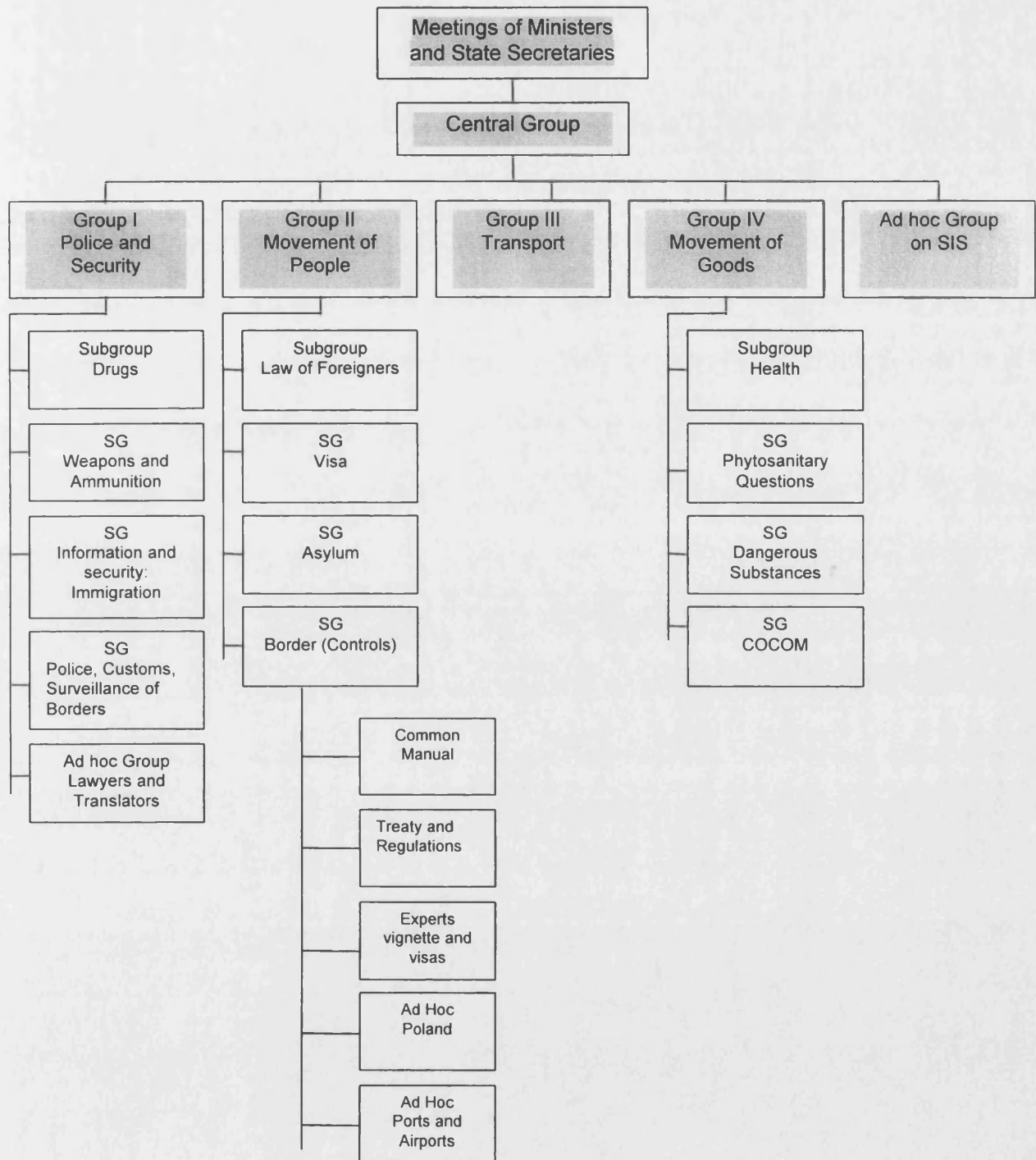
[746] Bigo, *Polices en Réseaux*. Bigo has reconstructed the structure of negotiations from a large number of interviews and document research. The chart represents only an approximation. The section on working groups in chapter 3 outlines the changeable character of the organisation of working groups.

Appendix

Table 2: German Representatives in the Executive Committee

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Prof. Dr. Waldemar Schreckenberger	1985 – 1988	Chef des Bundeskanzleramtes (Head of the Federal Chancellery)
Dr. Lutz Stavenhagen	1988 – 1991	Staatsminister beim Bundeskanzler (Minister of State at the Chancellery)
Bernd Schmidbauer	1992 – 1995	Staatsminister beim Bundeskanzler (Minister of State at the Chancellery)
Prof. Dr. Kurt Schelter	1995 – 1998	Staatssekretär im Bundesministerium des Innern (Permanent Secretary, BMI)
Claus Henning Schapper	since 1998	Staatssekretär im Bundesministerium des Innern (Permanent Secretary, BMI)

Appendix

## Table 3: Asylum applicants to Germany (1971 - 2001)[747]

Numbers of asylum applicants in Germany had a peak in 1992 before the 'asylum compromise' changed the law of asylum. At the same time, the percentages of recognition went steadily down.[748] It has to be noted, however, that even if refugees did not receive individual asylum, a much larger percentage received protection from deportation due to political circumstances in their home country.

Year	1971	1972	1973	1974	1975	1976	1977
Applicants	5,388	5,289	5,595	9,424	9,627	11,123	16,410
Recognition in %	57.0	39.8	33.0	32.4	22.2	18.4	10.0

Year	1978	1979	1980	1981	1982	1983	1984
Applicants	33,136	51,493	107,818	49,391	37,423	19,737	35,278
Recognition in %	10.3	16.5	12.0	7.7	6.8	13.7	26.6

Year	1985	1986	1987	1988	1989	1990	1991
Applicants	73,832	99,650	57,379	103,076	121,318	193,063	256,112
Recognition in %	29.2	15.9	9.4	8.6	5.0	4.4	6.9

Year	1992	1993	1994	1995	1996	1997	1998
Applicants	438,191	322,599	127,210	127,973	116,367	104,353	98,644
Recognition in %	4.3	3.2	7.3	9.0	7.4	4.9	4.0

Year	1999	2000	2001
Applicants	95,113	78,654	88,287
Recognition in %	3.0	3.0	5.3

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[747] Source: Berliner Institut für Vergleichende Sozialforschung, *Bundesrepublik Deutschland, Asylbewerber und -berechtigte (1971 bis 1995)* (1999 [cited September 2001]); available from http://userpage.fu-berlin.de/%7Emigratio/Statistik/brasy002.htm, Bundesamt für die Anerkennung ausländischer Flüchtlinge, *Asyl im Blick* (Nürnberg: BAFI, 2000), Bundesamt für die Anerkennung ausländischer Flüchtlinge, *Entscheidungen und Entscheidungsquoten seit 1985* (2002 [cited May 2002]); available from www.bafl.de/bafl/template/index_statistiken.
[748] The percentages of recognition refer to decisions taken that year, not to numbers of asylum seekers.

Figure 4: Numbers of asylum applicants to Germany (1971 – 2001)
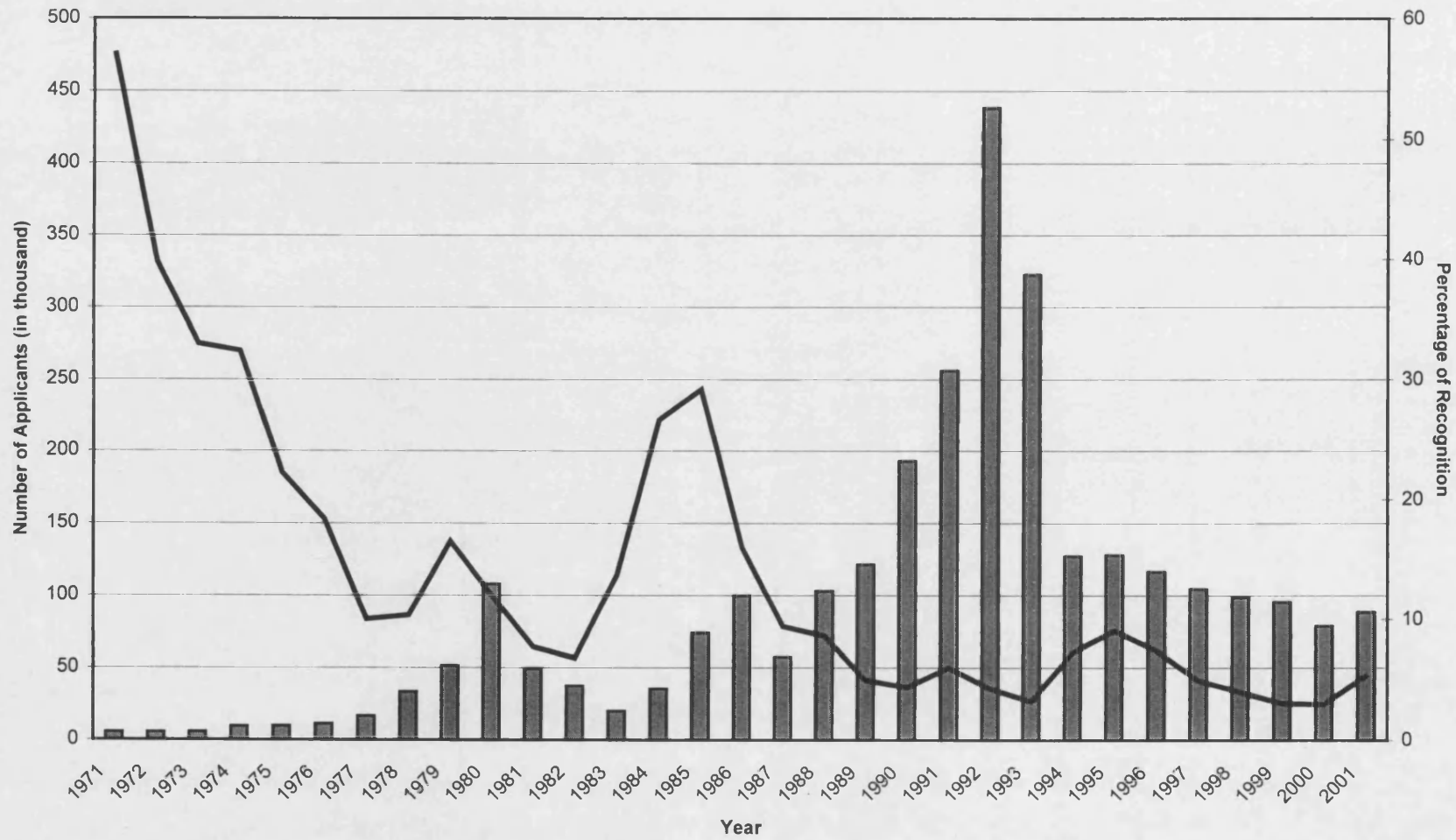
Table 4: Numbers of asylum applicants to selected European countries (1985 – 1995)[749]

These figures show the high number of asylum applicants in Germany in comparison to other European countries. The trend in Germany was reversed in 1993 after the change of policies, but numbers generally remain high in Europe.

(in thousand)

	1985	1986	1987	1988	1989
Germany	73.9	99.7	57.4	103.1	121.3
France	25.8	23.4	24.8	31.6	58.8
UK	5.5	4.8	5.2	5.1	10.0
Austria	6.7	8.7	11.4	15.8	21.9
Sweden	14.5	14.6	18.1	19.6	32.0
Netherlands	5.6	5.9	13.4	7.5	13.9

	1990	1991	1992	1993	1994	1995
Germany	193.0	256.1	438.1	322.6	127.2	127.9
France	56.0	44.8	28.9	26.6	26.0	20.4
UK	30	57.7	32.3	28.0	41.0	55.0
Austria	22.8	27.3	16.2	4.7	5.1	5.9
Sweden	29.4	26.5	84.0	37.6	18.6	9.0
Netherlands	21.2	21.6	20.3	35.4	52.6	29.3

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[749] Source: SOPEMI 1998 cited after Berliner Institut für Vergleichende Sozialforschung, *Asylum Applicants in OECD-Countries* (1999 [cited January 2001]); available from http://userpage.fu-berlin.de/%7Emigratio/Statistik/euall008.htm, Bundesamt für die Anerkennung ausländischer Flüchtlinge, *Asylbewerberzugänge im Europäischen Vergleich* (2001 [cited September 2001]); available from www.bafl.de/bafl/template/index_statistiken.

Figure 5: Numbers of asylum applicants to selected European countries (1985 – 1995)
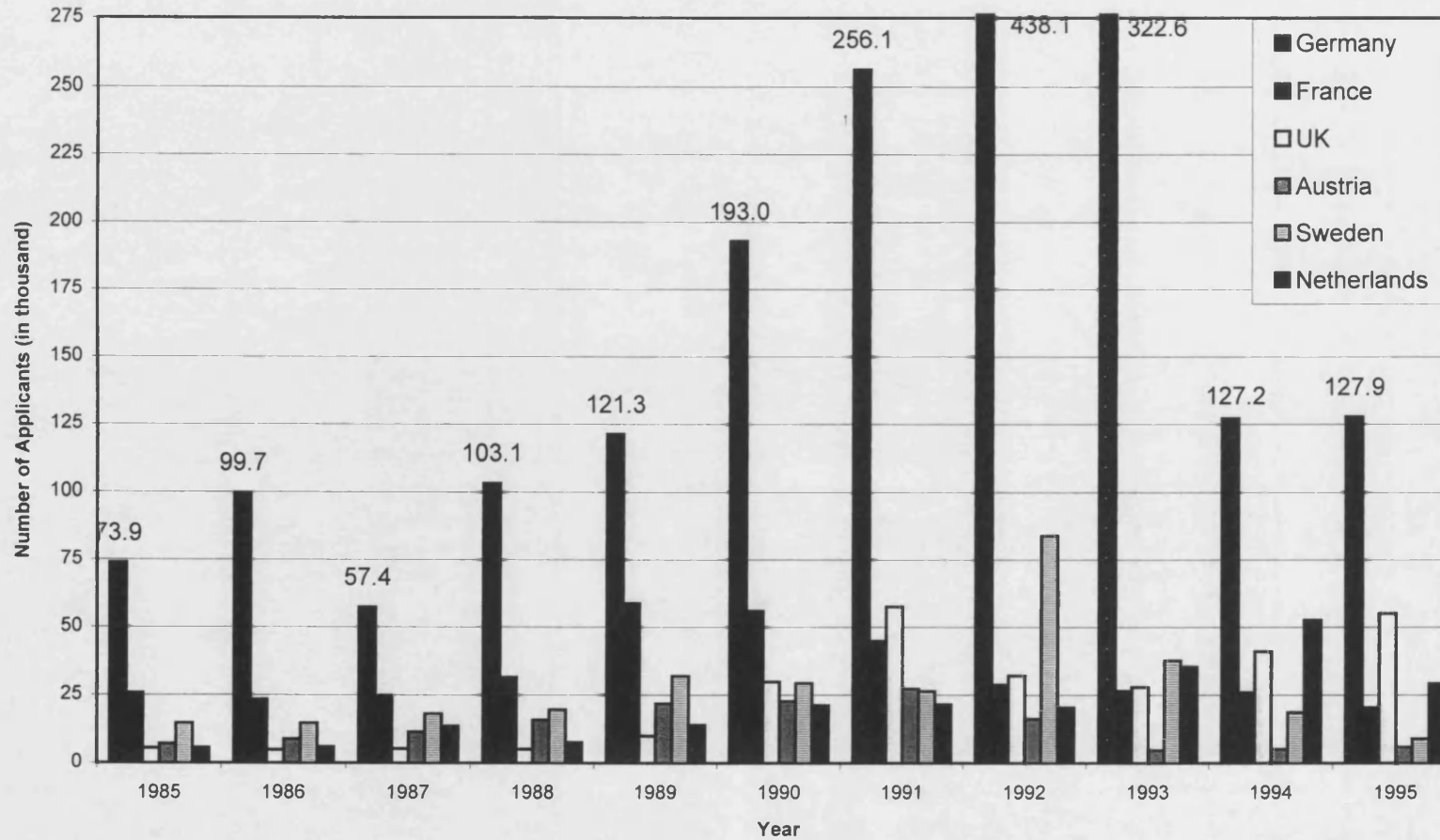
## Table 5: Inflow of asylum seekers and 'Aussiedler' (1985-1995)[750]

This table shows that although numbers of asylum seekers in Germany were high, they were topped by the influx of 'Aussiedler' or ethnic Germans in all years since 1987, except 1991 – 1993.

Year	All	Asylum seekers	'Aussiedler'
1985	112,800	73,832	38,968
1986	142,438	99,650	42,788
1987	135,902	57,379	78,523
1988	305,749	103,076	202,673
1989	498,373	121,318	377,055
1990	590,136	193,063	397,075
1991	478,107	256,112	221,995
1992	668,756	438,191	230,565
1993	541,487	322,599	218,888
1994	349,801	127,210	222,591
1995	345,835	127,937	217,898

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[750] Source: Berliner Institut für Vergleichende Sozialforschung, *Bundesrepublik Deutschland, Asylbewerber und -berechtigte (1971 bis 1995)* ([cited), Bundesministerium des Innern, "Das Bundesministerium des Innern. Informationen zu Aufgaben und Bilanz, Organisation und Geschichte.", Bundesministerium des Innern, "Info-Dienst Deutsche Aussiedler. Zahlen Daten Fakten," ed. Beauftragter der Bundesregierung für Aussiedlerfragen (Berlin: 2001).
Please note: Since numbers of 'Aussiedler' had to be taken from different sources, variations in statistical precision had to be accepted.

Figure 6: Inflow of asylum seekers and 'Aussiedler' to Germany (1985 – 1995)
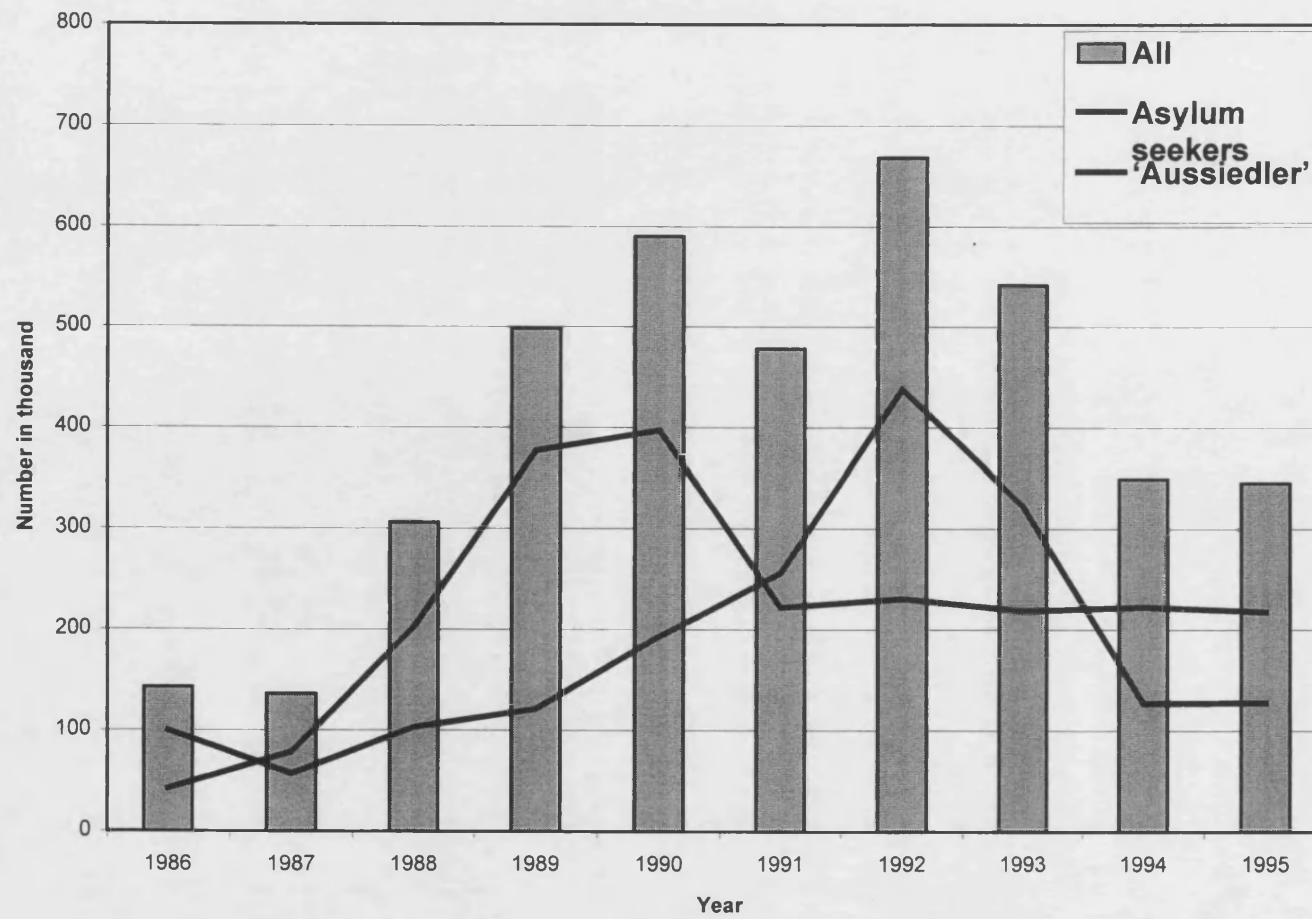
Table 6: Net Migration in selected OECD countries (1987-1995)[751]

The following shows that Germany had a relatively high number of positive net migration, even compared to other European states with a large population. The most striking case in Europe is Italy with a change from emigration to substantial immigration within a short period of time.

(including EU/EEA nationals and third-country nationals)

Year	France	Germany	Italy	Netherlands	UK
1987	44,000	152,486	- 3,880	35355	21,986
1988	57,000	497,867	9,554	27,808	36,072
1989	71,000	746,048	16,324	27,260	81,770
1990	80,000	656,166	24,212	48,730	68,384
1991	90,000	602,563	4,163	49,998	76,416
1992	90,000	776,397	181,913	43,185	44,887
1993	70,000	462,284	181,070	44,418	90,184
1994	50,000	315,568	153,364	20,429	84,249
1995	40,000	398,263	94,012	14,929	116,868

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[751] Source: Center for International and European Law on Immigration and Asylum, *Net Migration Including EU/EEA Nationals and Third-Country Nationals to and from EU Member States (1987 to 1997)* (1999 [cited January 2001]); available from http://migration.uni-konstanz.de/pdf/Net-Migration-including-EU.htm. The different rounding of numbers (France versus the other countries) has to be taken into account. The original source does not give any explanation.

Figure 7: Net migration in selected OECD countries (1987 – 1995)
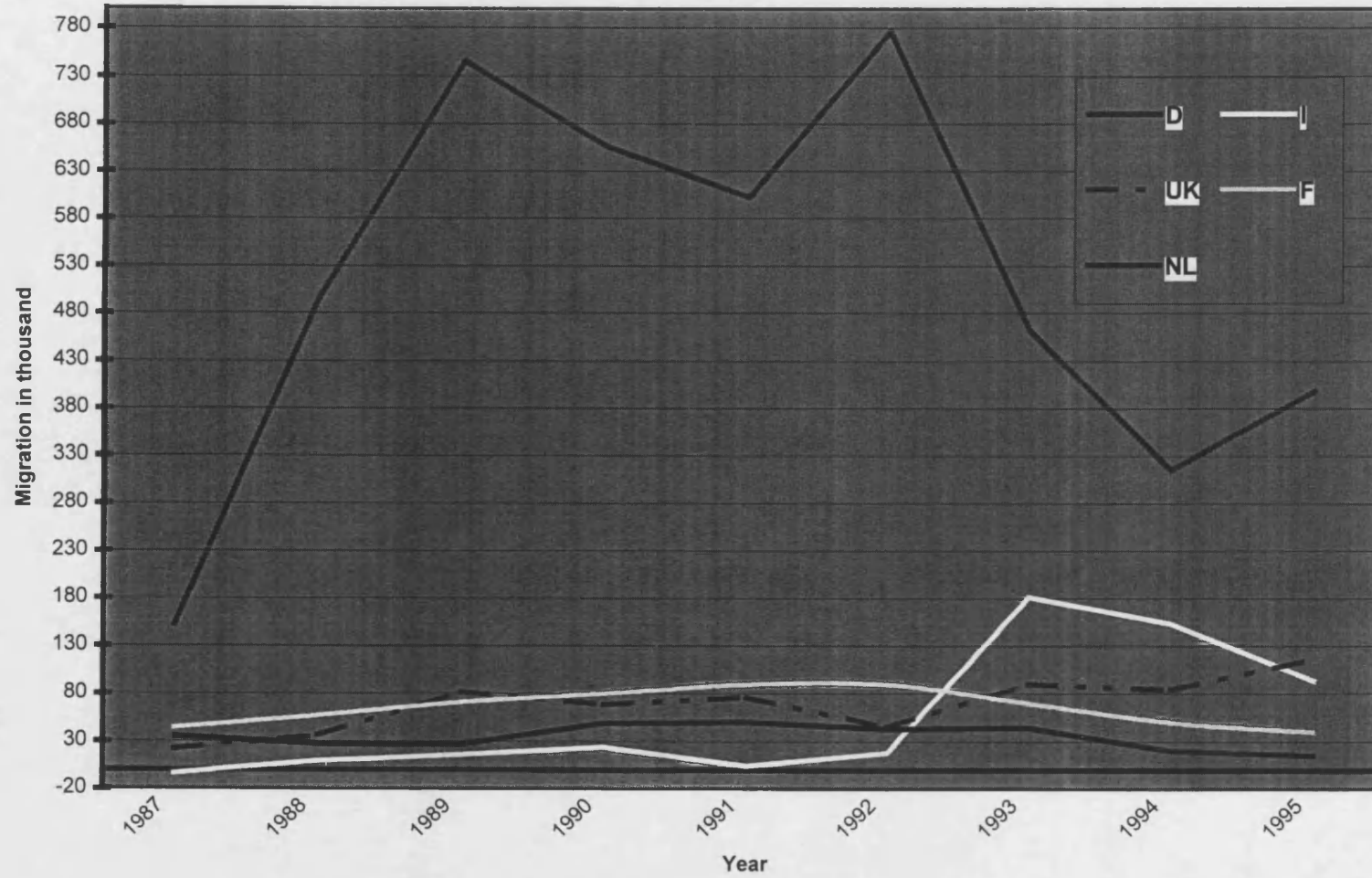
Table 7: Stolen cars retrieved at the German border (1991 – 1995)

Year	1991	1992	1993	1994	1995
Retrieved cars	353	725	1176	1947	1334

Table 8: Attacks against foreigners in Germany (1991 – 1996)[752]

The following shows that attacks on foreigners were a permanent feature in Germany during the 1990s. An especially high number of attacks occurred at the beginning of the 1990s, the reversal of the trend coinciding with the new law of asylum and gradually lower numbers of asylum seekers.

	1991	1992	1993	1994	1995	1996
Murder - concluded - attempted	3	4 28	2 18	8	8	11
Physical injury	236	576	727	494	372	307
Explosives offence		12	3	1		
Arson	335	596	284	80	37	27
Other	1852	5120	5687	2908	2051	1887
Sum	2426	6336	6721	3491	2468	2232

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[752] Beauftragte der Bundesregierung für Ausländerfragen, *Daten und Fakten zur Ausländersituation.*

Table 9: Budget and personnel of BGS (1985-2000)[753]

This table shows the marked rise of both personnel and budget of the BGS. Number of personnel rose steadily during the 1980s and showed a marked rise at the beginning of the 1990s. The budget rose in parallel (although inflation has to be taken into account).

Year	Policemen	all personnel[754]	All personnel with policemen in training	Budget
1985	Ca. 20,000		24,551	1.15 billion
1986	Ca. 20,000		24,446	1.16 billion
1987			24,575	1.23 billion
1988			24,869	1.29 billion
1989	20,538		24,982	1.29 billion
1990	20,700		25,187	1.30 billion
1991	21,800	27,320	31,360	1.66 billion
1992	24,463	29,981	34,733	1.93 billion
1993	26,382	32,062	35,392	2.17 billion
1994	27,514	34,066	39,921	2.43 billion
1995	26,919	34,912	40,440	2.74 billion
1996	28,597	36,924	41,018	2.95 billion
1997	30,008	38,114	40,346	2.86 billion
1998	30,800	38,389	39,631	2.98 billion
1999	30,491	38,128	38,829	3.02 billion
2000 (projected)			39,240	3.29 billion

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[753] Source: Year reports of the BGS (1989 – 2000) and "Der Bundesgrenzschutz erfüllt als Polizei des Bundes verläßlich seine Aufgaben.", "Eine Schneise in der Landschaft.", "Mehr Einsätze als je zuvor."
[754] With administration personnel, employees and workers

Table 10: Border crossings (1986 – 1995)[755]

This table shows the rise in border crossings since the end of the 1980s according to the numbers given by the BGS. It also shows that crossings over the external borders were about 63% of all crossings in 1991.

Year	Border crossings (in million)
1986	913
1988	998
1989	1076
1990	1137
1991	1157
1991	740 (1991 following without EC-internal border)
1992	864
1993	910
1994	920
1995	907

[755] Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1994.", Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1996/97.", Bundesministerium des Innern, "Bundesgrenzschutz - Jahresbericht 1998.", Bundesministerium des Innern, "Tätigkeitsbericht des Bundesgrenzschutzes (BGS) 1989.", Bundesministerium des Innern, "Tätigkeitsbericht des Bundesgrenzschutzes (BGS) 1991.", Bundesministerium des Innern, "Tätigkeitsbericht des Bundesgrenzschutzes (BGS) 1992."

Table 11: Cross-border Traffic (1985 – 1995)[756]

This table shows the number of vehicles crossing the borders.

Year	Vehicle crossings
1985	133,393
1986	144,118
1987	151,991
1988	159,294
1989	168,315
1990	181,319
1991	201,138
1992	219,103
1993	217,147
1994	231,079
1995	234,259

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[756] Bundesverkehrsministerium, ed., *Verkehr in Zahlen* (Hamburg: Deutscher Verkehrs-Verlag, 1997).

Table 12: Spending in international travel[757]

| Country	Rank in 1993	Spending in million $ in 1993	Spending in million $ in 1980	Rank in 1980
United States	1	40,564	10,385	2
Germany	2	37,514	20,599	1
Japan	3	26,860	4,593	6
Great Britain and Northern Ireland	4	17,431	6,893	3
Italy	5	13,053	1,907	12
France	6	12,805	6,027	4
Canada	7	10,629	3,122	9
Netherlands	8	8,974	4,664	5
Austria	9	8,180	2,847	10
Taiwan	10	7,585	818	23
Belgium	11	6,363	3,272	8
Switzerland	12	5,803	2,357	11
Mexico	13	5,562	4,174	7
Spain	14	4,706	1,229	21
Sweden	15	4,464	1,235	20
Republic of Korea	16	4,105	350	34
Australia	17	4,100	1,749	15
Norway	18	3,565	1,310	19
Denmark	19	3,214	1,560	17
Singapor	20	3,022	322	35

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[757] Source: Statistisches Bundesamt, *Tourismus in Zahlen 1995*.

Table 13: German Gross Domestic Product (1983 - 2001)[758]

The table shows the development of the German economy in the timeframe of the thesis. Important is the recession in the German economy in 1992/93 with negative growth.

Year	1983	1984	1985	1986	1987	1988	1989	1990	1991
Change in %	1.8	2.8	2.0	2.3	1.5	3.7	3.6	5.7	5.0

1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
2.2	-1.1	2.3	1.7	0.8	1.4	2.0	1.8	3.0	0.6

Figure 8: German Gross Domestic Product (1983 - 2001)

Year

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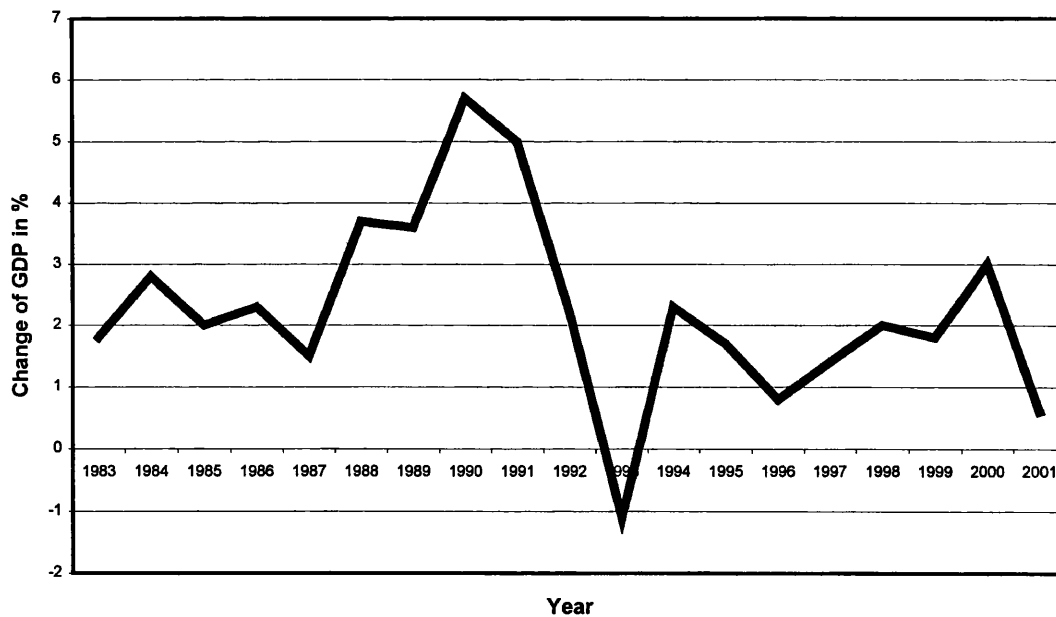
[758] Statistisches Bundesamt, *Volkswirtschaftliche Gesamtrechnungen* (Wiesbaden: 2002). The changes are given in constant prices: 1984 - 1991 in prices of 1991, from 1991 onwards in prices of 1995. Before 1992: former West Germany, after 1992: unified Germany.

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[760] The documents used are only a selection. The choice reflects the limited availability of documents but gives a reliable overview over negotiations.

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