ARTICLES

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UNTANGLING THE LEGAL INFRASTRUCTURE OF SCHENGEN

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ABSTRACT: Human mobility has always been a pre-condition for human development, yet few issues today remain subject to such elaborate legal restrictions. The Schengen acquis is exemplary of this as a composite network of legalities that extend over a broad range of human activities. This *Article* pioneers legal infrastructures as an analytical tool to bring into focus law's fundamental role in shaping human (im)mobility. Section II sets the theoretical frame by conceptualizing Schengen as a legal infrastructure through a brief tour through the scholarly field of infrastructural studies. Section III then traces the emergence of the Schengen legal infrastructure through historical iterations of physicality, accretion, and entanglement. Section IV further shows how Schengen has transformed to actively mediate human mobility and normative frameworks also outside the European space. Part IV concludes briefly on the implications of our analysis for understanding Schengen as a cornerstone of European mobility law.

KEYWORDS: Schengen – EU law – mobility law – legal infrastructures – externalization – migration law.

I. INTRODUCTION

Schengen is a behemoth. Variously described as an *acquis*, "legal regime" or "legal system",[1] Schengen is formally a shorthand for a bundled set of legal agreements, but it is also so much

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[1] See *e.g.* S Peers, 'Caveat Emptor? Integrating the Schengen *Acquis* into the European Union Legal Order' (1999) CYELS 87.

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more than this. Schengen is a geography; the "Schengen zone" defines a specific regional legal space, and by extension, also a culture of free movement and all of its benefits among EU countries.[2] As such, Schengen is also a political arrangement, membership of which designates being part of a club, both for governments and their citizenry.[3] Schengen is thus a space for inclusion or exclusion, and cultural identity, with some migrants expressing their intended destination not as Europe *per se*, but specifically reaching "the Schengen area".[4]

Schengen can also be thought of in more material terms, that is, as sets of objects or physical assemblages.[5] From the ubiquitous star-circled border signs manifesting the EU legal space, to the digitally connected border structures encountered at airports gates, Frontex vessels patrolling the Mediterranean, or the 11 km fence, motion sensors and thermic cameras separating Morocco from the Spanish enclave, Melilla.[6] For many non-EU nationals, the Schengen visa is thus a highly coveted object, uniquely granting temporary access across 27 countries. For much of its existence, the Schengen Information System (SIS) was defined by its more than 100.000 access terminals, allowing national border officials to enter and check millions of records ranging from terrorist suspects to stolen vehicles and identity documents.[7] As a result, today Schengen is also a vast repository of digital information as contained in SIS and the Visa Information System, and in turn, connecting to related databases such as the European Asylum Dactyloscopy Database (EURODAC) biometric database for asylum-seekers and the prospected European Travel Information and Authorisation System (ETIAS), which (re-)produce (un-)worthy identities within its prism.[8]

Schengen then seems to perform a role that surpasses its stated objective to facilitate intra-EU mobility. This is partially a result of the sheer realm of human activity governed by Schengen law, which extends to issues as diverse as transport, tourism, sea and air borders, cross border-policing, judicial co-operation, and the management of personal data. By requiring various "non-Schengen" states to enforce or even comply with certain elements of its *acquis*, the Schengen legal regime similarly projects its normative content well beyond the Schengen zone.[9] Yet, this is also a function of Schengen being more than the sum total

[2] European Commission, *Schengen Area* (21 March 2024) home-affairs.ec.europa.eu.

[3] See *e.g.* TA Börzel and T Risse, 'From the Euro to the Schengen Crises: European Integration Theories, Politicization, and Identity Politics' (2018) Journal of European Public Policy 83.

[4] See J Schapendonk, 'Mobilities and Sediments: Spatial Dynamics in the Context of Contemporary Sub-Saharan African Migration to Europe' (2012) African Dispora 117, 118.

[5] See especially J Hohman and R Joyce (eds), *International Law's Objects* (OUP 2018).

[6] See also recently, N Keady-Tabbal and I Mann, 'Weaponizing Rescue: Law and the Materiality of Migration Management in the Aegean' (2023) LJIL 61.

[7] T Gammeltoft-Hansen, 'Filtering Out the Risky Migrant: Migration Control, Risk Theory and the EU' (AMID Working Paper 52-2006).

[8] See further D Van Den Meerssche, 'Virtual Borders: International Law and the Elusive Inequalities of Algorithmic Association' (2022) EJIL 171.

[9] For an early first step in this direction, albeit through a different theoretical framework, see also R Byrne, G Noll and J Vedsted-Hansen, 'Understanding Refugee Law in an Enlarged European Union' (2004) EJIL 355.

of its individual parts – it is an entity, which when taken as a whole is not just a system of law, but also an arrangement that works to connect people and things and literally move them across vast geographies. This very fact also makes Schengen one of the most contested aspects of the EU legal order, as the precipice for conflict between an idea of free movement and the simultaneous establishment of draconian border controls.

Schengen's reach over such a diverse realm of life and objects means that it is easy to miss these deeper connections between law and it's materialities in lieu of more traditional analytical framings. Approaching Schengen from a purely EU law perspective, we risk missing law's causes and effects, and the ways in which laws interact, across human society. Yet, if we look at Schengen only as conduit for social forces or as a pattern of social consequences, we might miss the fundamentally constitutive power of law in shaping European mobility.

In this *Article*, we seek to explore an idea of Schengen as what we call a *legal infrastructure* as a means to move past existing analytical divides in the literature. Drawing from the "infrastructural turn"[10] in the social sciences, we suggest that Schengen exhibits a range of infrastructural affordances. Firstly, in terms of actively mediating the entities to which it connects; for example, physical border structures, digital infrastructures and human activity. Secondly, as a normative construct, by bringing into relation a range of specialised legal regimes both internally, as a matter of EU law, and externally, in relation to agreements with third countries and international law more generally.[11] Bringing these two perspectives together, we argue that Schengen must be understood *relationally*, on the one hand as a set of socio-material dynamics underpinning and recursively shaped by licit and illicit patterns of human (im)mobility, and on the other as a normative assemblage enabling legal practices and meaning to shift and evolve across formal regime boundaries.

This is both an empirical and a theoretical agenda. We seek to elaborate our understanding through a number of examples which exemplify the empirical purchase of thinking about Schengen infrastructurally. We firstly provide evidence of the historical rise of Schengen as a normative legal infrastructure, providing the scaffolding for a patchwork, but networked, set of legal provisions that drew in different regimes and legal practices of European states. We then show how Schengen has come to exercise an external normative force insofar as its legal rationalities and infrastructural power have come to be exported to and impact other regions and legal regimes. These examples feed-back to further explore an understanding of legal infrastructures; taking Schengen as a paradigmatic case for rethinking the relationship between law and mobility.

The analysis proceeds as follows: Part I stakes out the discursive space for thinking of Schengen infrastructurally by drawing insights from infrastructural studies as means to

[10] On the rising field of infrastructural studies and its potential application to the field of law see especially B Kingsbury and N Maisley, 'Infrastructures and Laws: Publics and Publicness' (2021) Annual Review of Law and Social Science 353.

[11] As of yet, few studies have specifically conceptualised law as a distinct type of infrastructure, but see *e.g.* L Pellandini-Simányi and Z Vargha, 'Legal Infrastructures: How Laws Matter in the Organization of New Markets' (2021) Organization Studies 867.

move past some traditional stalemates between formalist and empirical approaches to law. Section II unpacks the rise of Schengen as a legal infrastructure through an analysis of its historical iterations and current implications for mobility in the European legal space. Section III explores the particular normative properties of legal infrastructures, tracing Schengen's relationship to other legal regimes and legal practices beyond EU boundaries. Section III concludes by taking stock of the power of legal infrastructures in making global mobility.

II. Thinking infrastructurally about Schengen

As one of the pioneers of infrastructure theory in law, Benedict Kingsbury argues that "[t]hinking infrastructurally typically entails understanding infrastructure not simply as a thing, but as a set of relations, processes and imaginations".[12] Thinking infrastructurally about Schengen thus requires consideration its specific aspects and affordances, but also its epistemology – in other words, how do we know what makes Schengen "real", and how does Schengen make the world in its identity?[13] This requires taking a step back from common suppositions on what makes Schengen "law" within the scope of legal cognition.

In legal terms, Schengen is generally thought of as a "legal regime" or, following incorporation, as a sub-system or constitutive part of EU law. Schengen is formally a set of rules – treaties, regulations, delegated and implementing acts – dealing with the EU's internal and external borders. For social scientists it has also been taken as a scheme of norms that makes freedom of movement "real" in a juridical form, i.e., it is also a collocation of human interchange on social issues. However, both approaches in isolation risk missing Schengen's broader impact *as law on the material world*; on human mobility and European societies.[14] While doctrinal approaches tend to ignore law's structural effect on the world, externalist perspectives on Schengen tend to see law as an entirely dependent variable to politics and/or other social forces. This poses difficulties for how we approach Schengen law as a research object, as the principal theories that seek to explain the rise of Schengen are only able to capture part of its complexity.

[12] B Kingsbury, 'Infrastructure and InfraReg: On Rousing the International Law "Wizards of Is"' (2019) Cambridge International Law Journal 171, 186.

[13] See similarly, J d'Aspremont, 'A Worldly Law in a Legal World' in A Bianchi and M Hirsch (eds), *International Law's Invisible Frames: Social Cognition and Knowledge Production in International Legal Processes* (OUP 2021) 110; this argument is not without pre-cursors. See especially S Salomon and J Rijpma, 'A Europe Without Internal Frontiers: Challenging the Reintroduction of Border Controls in the Schengen Area in the Light of Union Citizenship' (2021) German Law Journal 281, proposing that Schengen's intentionality (in a phenomenological sense) constitutes human cognition (and thus border posts are not merely material objects, they also have specific meaning.)

[14] This is arguably a legacy of the "positivist" approach which has long dominated refugee and migration studies, see H Lambert, 'International Refugee Law: Dominant and Emerging Approaches' in D Armstrong (ed.), *Routledge Handbook of International Law* (Routledge 2009) 344 and echoes the calls of critical scholars that deem refugee law scholarship artificially divorced from its context, BS Chimni, 'The Geopolitics of Refugee Studies: A View from the South' (1998) Journal of Refugee Studies 350.

Rational choice approaches, for instance, have explained the rise of Schengen with reference to structural factors, arguing that European policymakers worked to address common internal (i.e., market orientated) and external (i.e., geopolitical) problems, by seeking to accelerate the drive towards integration outside of the regular European Economic Council (EEC) framework.[15] Constructivist scholarship, in contrast, has emphasized that Schengen has developed through processes of norm alignment with constitutional values,[16] in a way that diametrically underplays the role of broader structures in stimulating legal developments. A third position, drawing on sociological theory, proposes that Schengen is the product of a struggle between rising "security entrepreneurs" to define the parameters of an emerging "security field".[17] Such works, however, tend to neglect the role of pre-existing legal structures as a central organizational aspect for how Schengen emerged and came to develop. Each position holds that Schengen embodies a certain politics, yet they struggle to capture what makes law autonomous from market competition, socio-political structures or political ideologies.[18]

One response to this problem has emerged from legal scholars arguing for a new "material turn" in legal scholarship.[19] For Hohmann and others this approach differs from "old materialism" focused on exposing the vicissitudes of capitalist societies and clarifying the difference between appearance and reality. The "new materialism(s)" starts from the premise that law has its own mode of existence that is carried through material objects, and that law is a part of things and of us.[20] As Latour notes illustratively: "[l]aw is not made 'of law' any more than a gas pipe is made of gas or science of science. On the contrary, it is by means of steel, pipes, regulators, meters, inspectors and control rooms that gas ends up flowing uninterruptedly across Europe; and yet it is well and truly gas that circulates, and not the land, nor steel".[21]

We can also think about the Schengen *acquis* in these terms. Its law is not "made" by legislators or judges, any more than it represents the confluence of (im)mobility and normativity. Put differently, the Schengen *acquis* is responsive to movements of people and

[15] R Zaiotti, *Cultures of Border Control: Schengen and the Evolution of European Frontiers* (University of Chicago Press 2011).

[16] A Wiener, 'Forging Flexibility - the British "No" to Schengen' (1999) European Journal of Migration Law 441; see also T Christiansen and KE Jørgensen, 'Transnational Governance "Above" and "Below" the State: The Changing Nature of Borders in the New Europe' (2000) Regional & Federal Studies 62.

[17] D Bigo, 'The European Internal Security Field: Stakes and Rivalries in a Newly Developing Area of Police Intervention' in M Anderson and M den Boer (eds), *Policing across National Boundaries* (Pinter 1994) 161.

[18] See I Venzke, 'The Path not Taken: On Legal Change and its Context' in N Krisch and E Yildiz (eds) *The Many Paths of Change in International Law* (OUP 2023) 309, 326 rightly noting that this "relative autonomy" is "no mere dogma" but has been recognized in different forms by theorists such as Marx, Weber, Luhmann and Bourdieu.

[19] J Hohmann, 'Diffuse Subjects and Dispersed Power: New Materialist Insights and Cautionary Lessons for International Law' (2021) LJIL 585.

[20] D Matthews and S Veitch, 'The Limits of Critique and the Forces of Law' (2016) Law and Critique 349, 351.

[21] *Ibid*. and B Latour, *The Making of Law: an Ethnography of the Conseil d'Etat* (Polity Press 2009) 264.

things, but also works recursively to shape those activities. Schengen is manifested not just in legal forms like the texts of treaties, but also in tangible objects such as visas, electronic border gates and passport systems.[22]

Thinking of law in material terms can help us to understand the force of law, without collapsing into formalism's empty circles of reasoning, or explaining away law as a veil for social machineries.[23] From a new materialist perspective, law and society are indissoluble; they are mutually constitutive aspects of social reality. Law nevertheless maintains a distinctive quality through its ability to link people and objects; through its unique "mode of enunciation and veridiction".[24] Law, in other words, makes things hold a legal affect within a necessary and certain hermeneutic prism, and these in turn help to constitute our way of seeing the world. Nevertheless, it has rightly been noted that the issue of "how to avoid reifying law [whilst] recognizing [its] distinctness in the world" remains somewhat unresolved in this literature.[25]

The metaphor of law as an infrastructure arises at this conjunction: taking law seriously as a form of socio-materiality, on the one hand enacted through social action, but on the other significantly reshaping the world around us. Infrastructures in common parlance refer to physical or organizational aspects of the world that societies require in order to function. In these simple terms, it is not too difficult to see how Schengen's physical manifestations may work as a form of infrastructure. The Schengen visa, for instance, serves to enable tourism and business travel, whilst simultaneously excluding travel opportunities for would-be asylum-seekers and irregular migrants. More recently, a growing transdisciplinary body of scholarship has sought to elucidate the material and social elements of physical infrastructures and critically unpack their effect on society.[26] In our example, visas also connect non-EU immigration with EU's internal services economy, and these forms of infrastructure equally embody a significant ideological component.

Althusser famously invoked the notion of an infrastructure to theorize capitalism as an object of ethnography.[27] Infrastructural studies has since blossomed beyond the

[22] F Infantino, *Outsourcing Border Control: Politics and Practice of Contracted Visa Policy in Morocco* (Palgrave Pivot 2017); T Gammeltoft-Hansen, 'The Rise of the Private Border Guard: Accountability and Responsibility in the Migration Control Industry' in T Gammeltoft-Hansen and N Nyberg Sørensen (eds), *The Migration Industry and the Commercialization of International Migration* (Routledge 2013) 128, 146 ff.

[23] See also, describing the stalemate between law and international relations scholarship on these points, T Aalberts and I Venzke, 'Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice' in J d'Aspremont, T Gazzini, A Nollkaemper and W Werner (eds), *International Law as a Profession* (CUP 2017) 287.

[24] D Matthews and S Veitch, 'The Limits of Critique and the Forces of Law' cit.

[25] J Hohman and R Joyce, *International Law's Objects* cit.

[26] For an introduction, see especially recent edited collections N Anand, H Appel and A Gupta (eds), *The Promise of Infrastructure* (Duke University Press 2018); P Harvey, C Jensen and A Morita (eds), *Infrastructures and Social Complexity* (Routledge 2019).

[27] L Althusser, *Ideology and Ideological State Apparatuses)* (1970).

Marxist tradition. The first line of analysis arose from social histories of how physical infrastructures, such as electrical power grids, literally draw people in and, in turn, organize social relations.[28] Infrastructural studies have since been extended to consider a diverse array of human activity as governed by infrastructural logics, from socio-technical systems, to labour and power relations, as well as information and communication and knowledge ecosystems.[29] Scholars have since proposed that infrastructures are a key technology of modern governance that privileges the circulation of people and things in a way that tends to depoliticize formal power relations.[30] In response, "infrapolitics" has been proposed as a collective term for the kind of acts that take place offstage or appear unobtrusive, as a means to discern the political struggles and resistance by those who are subjected to or marginalized by infrastructures.[31]

The concept of infrastructure employed in these works provides some impetus for thinking about Schengen in infrastructural terms. Schengen is a normative complex constructed to facilitate and constrain physical mobility by connecting things such as identity documents and border checks whilst removing their use at other points inside the EU.[32] Schengen has a necessary human-material dimension, as opposed to something merely natural.[33] Schengen is spatial; not only in terms of its defined jurisdiction *ratione loci*, but also in the way it compresses and configures different types of mobility as intra- and extra-EU and classifies individuals and their actions within this specific legal identity.[34] On this basis, Schengen serves to distribute people, power and capital through the interlocking arrangement of the internal market, freedom of movement and external borders. Common with the notion of infrastructure as employed in infrastructural studies, Schengen is a technological platform that for most EU citizens tends to recede into the

[28] TP Hughes, *Networks of Power: Electrification in Western Society, 1880-1930* (John Hopkins University Press 1993).

[29] See *e.g.* SC Pandey and A Dutta, 'Role of Knowledge Infrastructure Capabilities in Knowledge Management' (2013) Journal of Knowledge Management 435.

[30] See *e.g.* P Joyce, *The Rule of Freedom: Liberalism and the Modern City* (Verso Books 2003).

[31] The term itself was coined by James C Scott, who did not write on infrastructures. Yet, the term has since become central in infrastructure studies. JC Scott, *Domination and the Arts of Resistance: Hidden Transcripts* (Yale University Press 1992); G Marche, 'Why Infrapolitics Matters' (2012) Revue française d'études américaines 3; K Easterling, *Extrastatecraft: The Power of Infrastructure Space* (Verso Books 2014); NB Thylstrup, *The Politics of Mass Digitization* (MIT Press 2019).

[32] See recently on the border infrastructures of the EU space, H Dijstelbloem, *Borders as Infrastructure: The Technopolitics of Border Control* (MIT Press 2021).

[33] B Kingsbury and N Maisley, 'Infrastructures and Laws: Publics and Publicness' cit.

[34] See similarly, on its information infrastructure, M Velicogna, 'The Making of Pan-European Infrastructure: From the Schengen Information System to the European Arrest Warrant' in F Contini and G Lanzara (eds.), *The Circulation of Agency in E-Justice: Interoperability and Infrastructures for European Transborder Judicial Proceedings* (Springer 2014) 185.

background, its presence only being felt at its margins or when it malfunctions, as for example, when internal border checks are reintroduced.[35]

Scholarship specifically linking infrastructural studies to migration and human mobility offers further analytical traction here.[36] Lindquist and Xiang, for example, have explored how migration infrastructures link commercial, regulatory, technological, humanitarian and social rationalities to produce (im)mobility across the globe.[37] In a parallel, path-breaking study in law, Thomas Spijkerboer demonstrates how a global mobility infrastructure, composed of physical materials, services and laws, enables some people to move internationally at low cost and with speed, whilst slowing down or pushing those excluded into irregularity, such that international law is not only produced by, but also reproduces, forms of stratification.[38] Turning to our own example, we argue that Schengen is not just law and material aspects; it is also a contingent, yet socially productive post-national normative configuration that accelerates or deaccelerates the movement of persons, goods and services at certain points.[39]

Within much of extant the literature that comprises infrastructural studies, however, law is often taken to play at best a marginal role. Vice versa, within the legal discipline, an infrastructural turn has yet to find proper foothold.[40] As Kingsbury and Maisley note, "more systematic investigations of how infrastructure and law come together…are only recently expanding".[41] Legal scholars in this vein further differ in terms of how they conceive of the relationship between law and infrastructures. Some scholars argue that "law [is] part of the infrastructure, not something that exists independently of it"[42] or approach the relationship more metaphorically arguing that "infrastructures act like laws" in that they "create both opportunities and limits".[43] Others again, have proposed that law operates as a significant

[35] This is characteristic of mobility infrastructures, M Sheller and J Urry, 'The New Mobilities Paradigm' (2006) Environment and Planning A: Economy and Space 207.

[36] N Kleist and J Bjarnesen, 'Migration Infrastructures in West Africa and Beyond' (MIASA Working Papers 3-2019); W Lin, J Lindquist, B Xiang and B Yeoh, 'Migration Infrastructures and the Production of Migrant Mobilities' (2017) Mobilities 167.

[37] B Xiang and J Lindquist, 'Migration Infrastructure' (2014) International Migration Review 122.

[38] T Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' (2018) European Journal of Migration and Law 452.

[39] M Sheller and J Urry, 'The New Mobilities Paradigm' cit.

[40] Much of the existing literature concerns the juridical affect and in particular public-private arrangements created by public infrastructural projects. See *e.g.* M Valverde, F Johns and J Raso, 'Governing Infrastructure in the Age of the "Art of the Deal': Logics of Governance and Scales of Visibility' (2018) PoLAR Political and Legal Anthropology Review 118.

[41] B Kingsbury and N Maisley, 'Infrastructures and Laws: Publics and Publicness' cit.

[42] G Gordon, 'Engaging an Infrastructure of Time Production with International Law' (2021) London Review of International Law 319, see similarly T Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control,' cit.

[43] PN Edwards, 'Infrastructure and Modernity: Force, Time, and Social Organization in the History of Sociotechnical Systems' in TJ Misa, P Brey and A Feenberg (eds), *Modernity and Technology* (MIT Press 2002) 185, 191.

"non-human organizer" *vis-a-vis* other infrastructures, such as financial markets.[44] Yet, despite these notable inroads, conceiving of *law as infrastructure* still remains significantly underexplored.

Following in the footsteps of this nascent scholarship, the following sections further develop an understanding of legal infrastructure using Schengen as a paradigmatic example. We argue that law itself may constitute a distinct form of infrastructure that while intimately connected to other, *e.g.* material assemblages simultaneously law exhibit a number of unique infrastructural traits enabling the diffusion of legal meaning and rationalities. Schengen not only endows materials with a legal aspect, such as an EU passport or a Schengen visa, but also normatively organizes the distribution of mobility rights across different legal issues and regimes; from free movement and migration control in the EU sphere, to effects on third countries. The Schengen legal infrastructure is thus both a product of (human) mobility, but also *generative* of mobility insofar as it gives "significance and direction through the infrastructuring process",[45] and actively mediates the things to which it connects, such as spaces, objects, and practices.[46]

The following sections unpack this argument by firstly outlining the evolution of Schengen's infrastructural dynamic into EU law, before turning to consider the role of Schengen in relation to other mobility regimes as a matter of regional and international law.

III. Schengen as legal infrastructure

In this section, we outline the rise of Schengen as an example of legal infrastructure, comprised of both social-material assemblages and interlocking legal networks. The trajectory that we mark follows a pattern of physicality, accretion, and entanglement: Schengen firstly enabled a particular construction of (im)mobility, as characterised by the trade-off between internal free movement and external border control. Over time, however, Schengen gradually accumulated further competences for seamless flow, simultaneously broadening and deepening its legal and material extensions.

It is perhaps first necessary then to start with the common narrative - that Schengen was born from the work of a small number of states that wanted to overcome the stalling of EU integration. These states "were hoping that [it] would turn into…an "engine" which would push the complex issue of border politics, i.e. the realisation of the four freedoms of movement of goods, services, capital and persons according to the Treaty of Rome".[47]

[44] L Pellandini-Simányi and Z Vargha, 'Legal Infrastructures: How Laws Matter in the Organization of New Markets' cit. 867.

[45] B Xiang and J Lindquist, 'Migration Infrastructure' cit.

[46] See similarly A Philippopoulos-Mihalopoulos, *Spatial justice: Body, Lawscape, Atmosphere* (Routledge 2015).

[46] A Wiener, 'Forging Flexibility - the British "No" to Schengen' cit.

[47] A Wiener, 'Forging Flexibility - the British "No" to Schengen' cit.

However, as states began removing internal border controls, a growing concern rose in regards to the collective's external borders and the need to police irregular migrants and asylum-seekers, who upon entry would otherwise be free to move among the member states as well.[48] Pushing back on the common narrative thus suggests that Schengen from the outset entailed both a market and security logic, and these required complex social control technologies, rather than Schengen simply being an order for liberalization of human movement in the EU order. Schengen was intended to structure "built networks that facilitate the flow of goods, people, or ideas and allow for their exchange over space", thus enabling a physical infrastructure to operate through law.[49]

In this light, Schengen represents a pivotal moment in the extension of global mobility pathways through law. Of course, it was not without precursors. Some degree of freedom of movement was for long the norm within Europe, and the pan-European institutionalization of regular border controls, passport requirements and visa checks only emerged after the First World War.[50] In the post-WW2 period, a number of sub-regional mobility pathways emerged, such as the Nordic Passport Union,[51] and the EEC treaties granted freedom of movement rights for occupational sectors between signatory states.[52] Schengen can thus be taken as facilitating a particular vision and history of intra-regional mobility at a time when Europe experienced rapidly rising labour migration and intra-EU tourism as a result of cheaper and faster transport connections.[53] However, Schengen served to not only reproduce but also produce new patterns of mobility by establishing an *espace juridique* and set of legal technologies that worked to "enhance the mobility of some peoples and places and heighten the immobility of others, especially as they try to cross borders".[54]

Following this notion, Schengen can also be conceived as a technique of governance that was the product of socio-technical capacity; that is, the increasing bureaucratic and technological capacity of the state that had arisen through welfare societies.[55] Schengen provided a normative "scaffolding" through a complex regulatory structure that for the

[48] M van der Woude, 'The Crimmigrant "Other" at Europe's Intra-Schengen Borders' in M Jesse (ed.), *European Societies, Migration, and the Law: The 'Others' amongst 'Us'* (CUP 2020) 62.

[49] B Larkin, 'The Politics and Poetics of Infrastructure' (2013) Annual Review of Anthropology 327, 328.

[50] M Czaika, H de Haas and M Villares-Varela 'The Global Evolution of Travel Visa Regimes' (2018) Population and Development Review 589; J Torpey, *The Invention of the Passport: Surveillance, Citizenship and the State* (CUP 2010).

[51] See M Tervonen, 'The Nordic Passport Union and its Discontents: Unintended Consequences of Free Movement' in J Strang (ed.) *Nordic Cooperation: A European Region in Transition* (Routledge 2015) 131.

[52] E Recchi, *Mobile Europe: The Theory and Practice of Free Movement in the EU* (Springer 2015) 2.

[53] See also LP Moch, *Moving Europeans: Migration in Western Europe since 1650* (2nd edn Indiana University Press 1992) proposing that these different forms of migration have always co-existed in Europe.

[54] M Sheller and J Urry, 'The New Mobilities Paradigm' cit.

[55] See especially J Torpey, 'Coming and Going: On the State Monopolization of the Legitimate Means of Movement' (1998) Sociological Theory 239.

most part, remained invisible.[56] Indeed, the rules spawned on the basis of the early Schengen cooperation became a "byword for obsessive secrecy" as a "black market for European integration".[57] By the end of the 1990s, "much of the material, the institutional and the substantive aspects of Schengen have indeed remained barely known to even participating policy-makers, let alone the public".[58] Schengen became not only a set of treaties, but also a particular type of bureaucratic governance. This cast as veil over Schengen's emerging public power as a significant legal-political entity in its own right; a pattern of accumulation often neglected in legal and political science accounts of its history.[59]

Over time, the Schengen legal infrastructure has expanded dramatically because its ability to control things required it to extend its "disciplinary architecture" over the things of mobility.[60] This would extend from a centrifugal code to regulations for internal and external borders, including special rules for local traffic, returns, visas and passport security. The Schengen *acquis* also provided for the establishment of vast and gradually integrated digital infrastructures for policing and migration control, including Schengen Information System (SIS), the Visa Information System (VIS) and the European Border Surveillance System (EUROSUR). It has further spawned a host of different agreements with third countries, covering visa facilitation, readmissions and migration control. It also prompted institutional developments, such as the establishment of Frontex, and its gradual transformation into a fully-fledged European Border and Coast Guard Agency. This gradual extension of "infrastructural power" plays into longstanding debates on EU's supranational aspirations; also reflected in general theory on the centrality of infrastructures for state-building through the establishment of divisions of labour, systems of communication and transport, and a population cognisant of the idea of the legal system.[61]

However, infrastructural tension and frictions also emerged from the need to eventually integrate the Schengen *acquis* as a matter of EU law. While the initial setup had provided flexibility in terms of developing and expanding the Schengen legal infrastructure, it also meant that an increasing cross-over grew between Schengen and EU Justice and Home Affairs rules and cooperation.[62] The solution became a wholesale import of Schengen via a Protocol to the *Treaty of Amsterdam* taking effect in 1999. From the outset, however, this left the Council with a legal puzzle, namely, to allocate and reconnect the

[56] See especially GC Bowker and SL Star, *Sorting Things Out: Classification and Its Consequences* (MIT Press 1999).

[57] S Peers, 'Caveat Emptor? Integrating the Schengen *Acquis* into the European Union Legal Order' cit.

[58] A Wiener, 'Forging Flexibility - the British "No" to Schengen' cit.

[59] On infrastructures accumulating power as a pattern of accretion see *e.g.* SL Star 'The Ethnography of Infrastructure' (1999) American Behavioral Scientist 377.

[60] K McGee, *Bruno Latour: The Normativity of Networks* (Routledge 2014) 168.

[61] M Mann, 'The autonomous power of the state: Its origins, mechanisms and results' (1984) European Journal of Sociology 185; M Boer and L Corrado, 'For the Record or Off the Record: Comments about the Incorporation of Schengen into the EU' (1999) European Journal of Migration and Law 397.

[62] S Peers, *EU Justice and Home Affairs Law* (OUP 2006) 45.

Schengen *acquis* across the different titles and pillars of EU law.[63] The problem of determining a legal basis for the various elements of not just the *Schengen Implementing Agreement* (SIA), but also the various decisions and declarations adopted by the Schengen Executive Committee and other bodies soon became apparent. For instance, rules related to border controls, visas and free movement necessitated a series of statements and declarations by member states concerned about their allocation to the First Pillar.[64] On a number of issues, most notably the Schengen Information System, no agreement emerged, leaving them to be provisionally allocated under the Third Pillar.[65] In this way, the incorporation process highlights how legal infrastructures emerge and unfold through patterns of "deep connectivity", as new–or in this case, merged–laws need to connect at multiple points in order to fit a pre-existing legal structure.[66] Infrastructural studies theorists have described this process as a "doubly relational" pattern of connections, arising from infrastructures' "simultaneous internal multiplicity and their connective capacities outwards".[67]

Another important dimension of incorporation became the way that Schengen continues to serve as a normative interface towards non-EU countries (Iceland, Norway, Switzerland) and opt-out member states (Denmark, Ireland, the United Kingdom). The experience of the United Kingdom is instructive here. Its objection to a borderless regime invoked a clear socio-technical logic that sought to countercheck European ideas; 'as an island, the United Kingdom has a comparative advantage in the field of border politics' through control of airports, seaports, and the Channel tunnel.[68] As the United Kingdom opted out of certain aspects, a conflict which came to a head in a series of cases where the United Kingdom argued it was free to adopt certain measures with respect to visas. This argument failed, with the Court of Justice of the European Union (CJEU) holding that Schengen could not operate without its conformity on such matters.[69]

Schengen thus literally "drew people in"[70] as its infrastructural logic even sometimes prevailed over ideas of national sovereignty. A similar dynamic can be observed in regard

[63] *Ibid.*

[64] M Boer and L Corrado, 'For the Record or Off the Record: Comments about the Incorporation of Schengen into the EU' cit. 397.

[65] This follows from the Schengen Protocol, which establishes the Third Pillar as a "default position"; S Peers, 'Caveat Emptor? Integrating the Schengen Acquis into the European Union Legal Order' cit.

[66] L Pellandini-Simányi and Z Vargha, 'Legal Infrastructures: How Laws Matter in the Organization of New Markets' cit.

[67] P Harvey, C Jensen and A Morita, 'Introduction: Infrastructural complications' in P Harvey, C Jensen and A Morita (eds), *Infrastructures and Social Complexity* cit. 8.

[68] A Wiener, 'Forging Flexibility - the British "No" to Schengen' cit.

[69] See case C-77/05 *United Kingdom v Council* ECLI:EU:C:2007:803; case C-137/05 *United Kingdom v Council* ECLI:EU:C:2007:805; and case C-482/08 *United Kingdom v Council* ECLI:EU:C:2010:631.

[70] B Larkin, 'The Politics and Poetics of Infrastructure' cit. 330.

to the Nordic countries, where Schengen, and related rules such as Dublin, were extended to non-EU member states, such as Norway and Iceland, due to the pre-existing Nordic free movement arrangement.[71] During its initial phase, this similarly led to a projection of substantive EU asylum law towards *e.g.* Norway.[72] Carefully safeguarding its opt-out, Denmark in contrast never pursued a similar process of informally aligning its domestic aliens law with EU's asylum directives. Yet, based on its Schengen Protocol, Denmark is nonetheless expected to implement all new EU measures building upon the Schengen *acquis* on an intergovernmental basis, or risk exclusion from cooperation in this area altogether.[73] The definition of when new EU legislation constitutes a development of the Schengen *acquis*, moreover, rests with the Commission Legal Service. Even where new legal developments are deemed to only be *in part* a development of Schengen, Denmark will, in practice, implement the entire instrument, as happened with the EU Returns Directive, an area otherwise covered by the opt-out.

The Schengen infrastructure is further unintelligible without reference to other parts of EU law, notably the Dublin system. Schengen and Dublin both represent socio-technical "innovations"[74] in terms of centralizing control of internal movement and responsibility for processing asylum applications within the Schengen area.[75] Their interdependence became particularly evident following the geographical expansion of the EU in the 2000s.[76] In practice, this meant some states became "countries of immigration policy before they were ever countries of immigration".[77] Acceptance to the Schengen club was dependent on the Dublin system and implementing the emerging Common European Asylum System, and the shift of asylum responsibilities to the South and East disproportionately favoured the original circle of member states.

In this way, the Schengen legal infrastructure also began to experience horizontal conflicts with cognate protections under human rights law. This was evident in a number of cases where the European Court of Human Rights considered the interaction of Dublin and Schengen with the European Convention.[78] In *M.S.S v. Belgium and Greece*, the Court held that Dublin transfers were subject to a member state ensuring that the return state

[71] T Gammeltoft-Hansen and S Ford, 'Danish Immigration Law' in P Nielsen and J Olsen (eds), *Public Law: Insights into Danish Constitutional and Administrative Law* (Hans Reitzel Forlag 2022) 167.

[72] I Staffans, 'Vigdis Vevstad: Utvikling av et felles europeisk asylsystem: Jus og politikk' (2008) Nordic Journal of Human Rights 354.

[73] R Adler-Nissen and T Gammeltoft-Hansen, 'Straitjacket or Sovereignty Shield? The Danish Opt-out on Justice and Home Affairs and Prospects after the Treaty of Lisbon' (2010) Danish Foreign Policy Yearbook 137.

[74] H Dijstelbloem, *Borders as Infrastructure: The Technopolitics of Border Control* cit.

[75] K Hailbronner and C Thierry, 'Schengen II and Dublin: Responsibility for Asylum Applications in Europe' (1997) CMLRev 957.

[76] M de Somer, 'Dublin and Schengen: a Tale of Two Cities' (European Policy Centre Discussion Paper 2018).

[77] A Geddes and P Scholten, *The Politics of Migration & Immigration in Europe* (SAGE 2016) 196.

[78] But see also HP Olsen and A Frese, "Spelling it Out' - Convergence and Divergence in the Judicial Dialogue between CJEU and ECtHR' (2019) NordicJIL 429.

was safe for the asylum seeker.[79] This points to an important aspect of legal infrastructure as dependant on certain material arrangements, which, if they falter, can also result in a similar normative malfunction.[80] Greece, for some time, had been hosting large numbers of transitory migrants and refugees, despite the country and EU institutions failing to provide sufficient means to allow Dublin and Schengen to work properly.[81] A similar dynamic can be seen in *N.D. and N.T. v Spain* where the EU's external borders had come under significant pressure from large-scale physical crossings.[82] Of course, it is open to question if these infrastructural malfunctions rather arose from Schengen's separation of free movement of EU citizens and irregular migrants/asylum-seekers. Yet, this also shows how by this stage Schengen and Dublin had become inextricably linked and bound up in the same logics.

These cases also illustrate how legal infrastructures can become subject to exogenous shocks that change the terms of their operation. Such shocks can occur through political events, but also through the sheer force of socio-natural phenomena such as a global pandemic. Historically, political conflicts between France and Italy resulted in both states refusing to lift their internal borders until as late as 1998.[83] Recent years, however, have seen successive political challenges to the Schengen legal infrastructure. The 2015 European asylum crisis led several member states to unilaterally reintroduce internal border controls. States argued that controls were necessary because of "secondary movements", highlighting Schengen's dependence on the always politically frail Dublin system for registering and allocating responsibility for asylum-seekers. Law actively mediated this crisis, but in turn, the crisis re-constituted the legal terrain of Schengen. Legal infrastructures – once entrenched, can prove extraordinarily resilient to political crisis,[84] a fact often recognized by legal scholars of Schengen.[85] However, as successive crises have marred Schengen in recent years, the legal infrastructure is hardly left unaffected; as evidenced by the wealth of legal commentary suggesting how also the exception of

[79] ECtHR *M.S.S. v. Belgium and Greece* App n. 30696/09 [21 January 2011].

[80] On the broader socio-legal entanglement between human rights and refugee norms see T Gammeltoft-Hansen and MR Madsen, 'Regime Entanglement and Interstitial Legal Fields: The case of Denmark and the migration-human rights nexus' (2021) Nordiques 1.

[81] See also M Lovec, 'Politics of the Schengen/Dublin System: The Case of the European Migrant and Refugee Crisis' in C Günay and N Witjes (eds), *Border Politics: Defining Spaces of Governance and Forms of Transgressions* (Springer 2017) 127, finding the infrastructural malfunction a failure of law rather than politics.

[82] See also M Ticktin, 'Building Borders and "No Borders": Infrastructural Politics as Imagination' (2023) AJIL 11.

[83] M de Somer, 'Schengen: Quo Vadis?' (2020) European Journal of Migration Law 178.

[84] L Pellandini-Simányi and Z Vargha, 'Legal Infrastructures: How Laws Matter in the Organization of New Markets' cit.

[85] The ability of Schengen to withstand crises has been recognized by doctrinalists see *e.g.* S Mantu, 'Schengen, Free Movement and Crises: Links, Effects and Challenges' European Journal of Migration Law 377.

internal border controls has increasingly become the norm,[86] or at least expanded the space for exceptional measures, culminating in the near complete suspension of the European travel regime during the COVID pandemic.[87]

In brief, the above analysis has sought to demonstrate how Schengen has evolved from its relatively humble origins as a facilitator for inter-EU mobility, to becoming entangled in the socio-material aspects of the EU legal order its technologies and practices. This shift firstly arose from rising bureaucratic capacity but then took on a dynamic of its own as its capillaries extended to express something that almost approached a state power. It experienced significant vertical (inter-EU) and horizontal (extra-EU) tensions as it expanded its capacities, but has proven extraordinarily resilient to crises, largely due to its effective integration in what is arguably the most prominent realization of the idea of an EU: free movement between countries. In this way, the Schengen itself has come to exercise a degree of social force in the way that it circulates persons, objects and ideas, removing obstacles and barriers for some but creating new types of 'disconnection, social exclusion, and inaudibility' for others.[88] Section IV further explores these dynamics as the Schengen infrastructure is extended beyond the EU.

IV. Infrastructural connections beyond the EU

In the previous Section, we sought to illustrate the rise of Schengen as a legal infrastructure enabling free movement within the EU regional space. However, Schengen has also come to serve as a normative interface between the EU and legal relations at the international and bilateral levels. We now seek to elaborate on how Schengen mediates things outside of the EU legal space through three examples: African mobility regimes, readmission agreements, and the law of the sea. Each example shows how the Schengen legal infrastructure acts as a bridge for legal rationalities to travel across regime boundaries.

It is first necessary, however, to briefly reconsider the role of legal infrastructures in merging a legal network with the political, that follows from our previous discussion. The Schengen legal infrastructure is not a passive site but engaged in a specific mode of governing, and therefore, a specific kind of politics. Schengen itself represents a kind of "geopolitics" insofar as it enables the interaction of "spatially dispersed communities of practice" through a socio-technical logic; it connects people, ideas and power structures through technologies of governing.[89] At the same time, however, it is important to note

[86] E Guild, 'Schengen Borders and Multiple National States of Emergency: From Refugees to Terrorism to COVID-19' (2021) European Journal of Migration Law 385 noting that internal border controls have been constant proposing that invoking internal border controls have been a 'constant feature' of the Schengen.

[87] See ET Achiume, T Gammeltoft-Hansen and T Spijkerboer, 'COVID-19, Global Mobility and International Law' (2020) AJIL 312.

[88] M Sheller and J Urry, 'The New Mobilities Paradigm' cit.

[89] *Ibid*.; A Folkers, 'Existential Provisions: The Technopolitics of Public Infrastructure' (2017) Environment and Planning D: Society and Space 855.

that the politics of infrastructures is not necessarily always "in the service of pre-existing hegemonic power" because their core operation enables only certain sets of moves to "route, block, challenge, or rework power in particular ways".[90]

As a *legal* infrastructure, Schengen takes on specific characteristics as a "thing" of law – that is, it is expressed in material (textual) forms that impose normative constraints on arguing. In other words, "law's matters are not necessarily physical elements but rather issues or problematizations", and these objects are deeply embedded in socio-political contexts.[91] Infrastructures cannot determine a specific course of action, but they can modify the range of possibilities by altering "the built environment".[92] Seen in these terms, a legal infrastructure restricts the range of possible interpretations and the political room for manoeuvre.[93] However, as an assemblage necessarily wedded to a power structure, it can never be neutral. A legal infrastructure entails certain distributions of agency[94]–and thereby, power–both in relations to its own jurisdiction and horizontally, *vis-à-vis* other normative structures. In other words, legal infrastructures are vacuous as well as productive; they not only exercise, channel, and circulate political agency, but also reconstitute it.

This power can firstly be seen in the relationship between Schengen and other legal regimes. Schengen's infrastructural history is equally tied to the rise of *non-entrée* policies[95] and the so-called "deterrence paradigm" in global refugee policy.[96] The rise of Schengen coincided with the rise of new mobility technologies, enabling much easier travel from the Global South to the North, leading to new patterns of refugee flows, dubbed by some as the "jet-age asylum-seeker".[97] In response, mobility became contingent on a variety of socio-technical measures to contain irregular migration and separate the wanted from the unwanted travellers.[98] Some of these legal technologies, such as visa rules and carrier sanctions (enabling the enrolment of private airlines to perform migration control) were included in the Schengen framework from early on.[99] Schengen

[90] M de Goede, C Westermeier, 'Infrastructural Geopolitics' (2022) International Studies Quarterly 1.

[91] HY Kang and S Kendall, 'Legal Materiality' in S Stern, M Del Mar and B Meyler (eds), *The Oxford Handbook of Law and the Humanities* (OUP 2019) 1.

[92] A Folkers, 'Existential Provisions: The Technopolitics of Public Infrastructure' cit.

[93] L Pellandini-Simányi and Z Vargha, 'Legal Infrastructures: How Laws Matter in the Organization of New Markets' cit.

[94] M Velicogna, 'The Making of Pan-European Infrastructure: From the Schengen Information System to the European Arrest Warrant' cit.

[95] JC Hathaway, 'The Emerging politics of Non-Entrée' (1992) Refugees 40.

[96] T Gammeltoft-Hansen and NF Tan, 'The End of the Deterrence Paradigm? Future Directions for Global Refugee Policy' (2017) Journal on Migration and Human Security 28.

[97] DA Martin, 'The New Asylum Seekers' in D Martin (ed.), *The New Asylum Seekers: Refugee Law in the 1980's* (Brill – Nijhoff 1988) 1.

[98] TA Aleinikoff, 'State-Centered Refugee Law: From Resettlement to Containment' (1992) MichJIntlL 120.

[99] T Rodenhauser, 'Another Brick in the Wall: Carrier Sanctions and the Privatization of Immigration Control' (2014) IJRL 223.

similarly worked to curtail historical mobility channels, as citizens of many former colonies could no longer enjoy visa free travel.[100] However, Schengen law has also enabled the physical extension of migration control beyond the EU's borders, most evidently through the significant expansions of Frontex's mandate enabling *e.g.* joint operations in third countries.[101]

The EU has further worked to extend elements of Schengen's legal infrastructure to other regions. Since the early 2000s, the EU has offered "Mobility Partnerships" to states in Eastern Europe and Africa. While formally non-binding, these sub-regional engagements have been a key site for circulating elements of the EU mobility *acquis*, including readmission agreements, visa facilitation and the streamlining of domestic immigration codes towards EU law.[102] As part of the EU's efforts to conclude common readmission agreements, target countries have also been offered visa exemptions for its own citizens, as well as assistance concluding similar readmission agreements with third states, thereby further expanding Schengen's particular model of facilitation and control.[103] The "hard borders" of Schengen have equally been argued to create a normative mimicry effect, as neighbouring third states adopt similarly restrictive border and asylum legislation from fear of becoming a "closed sack" for refugee and migratory journeys towards the EU.[104] More generally, the dual-sided nature of the Schengen regime provides for a "carrot and stick" approach, which has proved particularly useful in extending EU's normative reach to third countries.

As Schengen, on the one hand, restricted mobility from third countries to the EU, the offer of visa free travel became a particularly valuable asset through which to negotiate third country agreements on migration management. For instance, co-operation with Morocco in these dialogues has led the country to introduce more restrictive border controls, including through the provision of funding for coast guards.[105] A similar dynamic

[100] *E.g.* ECtHR *N.D. and N.T. v. Spain* App n. 8675/15 and 8697/15 [13 February 2020]; M Czaika, H de Haas and M Villares-Varela 'The Global Evolution of Travel Visa Regimes' cit.

[101] F Coman-Kund, 'The Territorial Expansion of Frontex Operations to Third Countries: On the Recently Concluded Status Agreements in the Western Balkans and Beyond…' (06 February 2020) Verfassungsblog verfassungsblog.de.

[102] N Reslow, 'The Role of Third Countries in EU Migration Policy: The Mobility Partnerships' (2012) European Journal of Migration and Law 393; M Brouillette, 'From Discourse to Practice: The Circulation of Norms, Ideas and Practices of Migration Management through the Implementation of Mobility Partnerships in Moldova and Georgia' (2018) Comparative Migration Studies 6.

[103] I Kruse and F Trauner, 'EC Visa Facilitation and Readmission Agreements: A New Standard EU Foreign Policy Tool?' (2008) European Journal of Migration and Law 411; S Wolff, 'The Politics of Negotiating EU Readmission Agreements: Insights from Morocco and Turkey' (2014) European Journal of Migration and Law 69.

[104] R Byrne, G Noll and J Vedsted-Hansen, 'Understanding Refugee Law in an Enlarged European Union' (2004) EJIL 355; T Gammeltoft-Hansens, 'Outsourcing Migration Management: EU, Power, and the External Dimension of Asylum and Immigration Policy' (DIIS Working Paper 1-2006).

[105] L Laube, 'The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy' (2019) Comparative Migration Studies 1.

can be seen in the "EU-Turkey" deal, whereby Turkey agreed to prevent migrants from travelling to the Greek islands and re-admitting them, in exchange for visa-free travel. The agreement further called on Turkey to harmonize its visa policy with the Schengen *acquis*, including lifting visas for all EU citizens and introducing such visa requirements for EU "blacklist" countries. In this way, Schengen was "communitized",[106] in the words of a more constructivist logic, as a source of external EU influence on domestic policymaking, but also significantly expanded its normative reach beyond EU's formal borders.[107] These dynamics thus demonstrate a process of sub-regional diffusion of norms, in addition to a material infrastructural defence, that worked to preserve the viability of EU free movement. In this context, however, the Schengen infrastructure is always relational and interfaces with other normative frameworks operating in adjacent spheres, such as those for the provision of development assistance and trade partnerships.[108]

The Schengen legal infrastructure similarly interacts with and reshapes regional mobility frameworks in other parts of the world.[109] One of the most pronounced examples can be seen in West Africa where the Economic Community of West African States (ECOWAS) provides some degree of free movement between signatory states. African borders are historically porous, with the contemporary dividing lines a largely a historical contingency and legacy of colonialism.[110] The ECOWAS and its Protocol (1979) were conceived to overcome this heritage by building an infrastructure that "converted borders…into 'bridges'" through regional free trade and movement.[111] Critics point out that regional free movement in West Africa faces infrastructural challenges associated with non-implementation of the Protocol and weak institutionalization through the relatively toothless ECOWAS court.[112] Yet, regional free movement has also been "actively undermined"[113] by pressure from the EU, which has entered into strategic partnerships with

[106] See especially, recognizing the role of French and German hegemony in this process, C Aygül, 'Visa Regimes as Power: The Cases of the EU and Turkey' (2013) Alternatives: Global, Local, Political 321.

[107] L Laube, 'The Relational Dimension of Externalizing Border Control: Selective Visa Policies in Migration and Border Diplomacy' cit.; as similarly seen in the West Balkans, see above and also F Trauner and E Manigrassi, 'When Visa-free Travel Becomes Difficult to Achieve and Easy to Lose: The EU Visa Free Dialogues after the EU's Experience with the Western Balkans' (2014) European Journal of Migration and Law 125.

[108] See similarly T Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' cit.

[109] M Czaika, H de Haas and M Villares-Varela 'The Global Evolution of Travel Visa Regimes' cit.

[110] See, for example, MW Mutua, 'Why Redraw the Map of Africa: A Moral and Legal Inquiry,' (1995) MichJIntlL 1113.

[111] On ECOWAS as a mobility infrastructure see N Kleist and J Bjarnesen, 'Migration Infrastructures in West Africa and Beyond' cit.

[112] SK Okunadeaand and O Ogunnub, 'A "Schengen" Agreement in Africa? African Agency and the ECOWAS Protocol on Free Movement' (2021) Journal of Borderland Studies 119; see also AR Weinrich, 'Regional Citizenship Regimes from within: Unpacking Divergent Perceptions of the ECOWAS Citizenship Regime' (2023) JMAS 117.

[113] C Castillejo, 'The Influence of EU Migration Policy on Regional Free Movement in the IGAD and ECOWAS Regions' (Deutsches Institut für Entwicklungspolitik Discussion Paper 11-2019).

ECOWAS' states to police internal borders in the hope that it will hinder migration out of the region.[114] This encouragement to set up a "border management infrastructure" may be seen as part of EU's wider externalization logic, projecting the control side of Schengen towards other regional legal infrastructures. Yet, in this case, it is asymmetric and hegemonic, actively undermining aspirations to maintain regional free movement in other parts of the world.[115] The price for maintaining a high velocity of human mobility in Europe, in other words, is a simultaneous slowing down of mobility flows, not just at EU's external borders, but also *within* other regional mobility systems.[116]

Schengen's relationship with the law of the sea is another case in point. The rise of irregular boat migration means that the law of the sea has become heavily contested in recent decades.[117] Rules on search and rescue are routinely invoked by European states as legal basis for maritime interdiction policies on the high seas and third country waters, or to shift disembarkation responsibilities for rescued migrants.[118] Reference to the law of the sea has further been used by governments in attempts to disavow obligations as a matter of international human rights law.[119] In this way, as Mann and Keady-Tabbal have argued, "infrastructures of protection come to function as technologies of violence" through the entanglement of different legal regimes.[120] The interaction of different legal regimes in this area has led to significant disruptions of the maritime infrastructure that the law of the sea is intended to facilitate, as commercial and private vessels are repeatedly denied disembarkation of rescued migrants due to political stalemates and differing legal interpretations across the Mediterranean countries.[121]

[114] The EU has also chosen not to extend its five-year (2013-2018) migration project to "Support to Free Movement of Persons and Migration in West Africa", K Arhin-Sam, A Bisong, L Jegen, H Mounkaila and F Zanker, 'The (In)formality of Mobility in the ECOWAS Region: The Paradoxes of Free Movement' (2022) South African Journal of International Affairs 187.

[115] R Idrissa, *Dialogue in Divergence: The Impact of EU Migration Policy on West African Integration: The Cases of Nigeria, Mali, and Niger* (Friedrich-Ebert-Stiftung 2019).

[116] T Spijkerboer, 'The Global Mobility Infrastructure: Reconceptualising the Externalisation of Migration Control' cit.

[117] T Gammeltoft-Hansen, 'The Perfect Storm: Sovereignty Games and the Law and Politics of Boat Migration' in V Moreno-Lax and E Papastavridis (eds), *'Boat Refugees' and Migrants at Sea. A Comprehensive Approach: Integrating Maritime Security with Human Rights* (Brill – Nijhoff 2016) 60.

[118] T Gammeltoft-Hansen, 'The Refugee, the Sovereign, and the Sea: European Union Interdiction Policies' in T Gammeltoft-Hansen and R Adler-Nissen (eds), *Sovereignty Games: Instrumentalizing State Sovereignty in Europe and Beyond* (Palgrave Macmillan 2008) 171.

[119] T Gammeltoft-Hansen, 'International Cooperation on Migration Control: Towards a Research Agenda for Refugee Law' (2018) European Journal of Migration and Law 373. See as example ECtHR *Hirsi Jamaa and Others v Italy* App n. 27765/09 [23 February 2012], an argument that was ultimately rejected by the Court.

[120] RN Keady-Tabbal and I Mann, 'Weaponizing rescue: Law and the Materiality of Migration Management in the Aegean' cit.

[121] T Gammeltoft-Hansen and A Laurence, *Deployment and Distress: Legal Issues Confronting Danish Naval Vessels in Connection with Search and Rescue of Migrant Boats in the Mediterranean* (DJØF 2021).

Yet, the Schengen *acquis* also serves to infuse particular legal interpretations into this space. Amendments to the Search and Rescue and Safety of Life at Sea conventions have sought to establish the principle that the state in whose search and rescue region a person is rescued maintains "primary responsibility" for ensuring disembarkation.[122] The exact interpretation of this formulation, however, is still subject to contestation by some states. The EU Sea Borders Regulation notably emphasises that persons intercepted on the high seas are disembarked "in the third country from which the vessel is assumed to have departed", a practice which more often than not appears to be accepted in joint operations with third countries.[123] Similarly, the EU Sea Borders Regulation does not require that persons be in "grave and imminent" danger, as the threshold is set out in the Search and Rescue Convention.[124] Mere "danger" is sufficient,[125] thereby enabling a broader interpretation of what constitutes "distress". Both points illustrate a core trait - and *sui generis feature* - of legal infrastructures. Rather than simply facilitating "the movement of other matter",[126] legal infrastructures equally enable norms, interpretations and specific legal practices to move across formal regime boundaries. This phenomenon is equally observable in other areas of migration law, for example between international refugee law and international human rights law, and represents an important driver for interpretive change in this area of international law.[127]

V. Conclusion

This *Article* has sought to conceptualize Schengen as a legal infrastructure, consisting of normative as well as material aspects, and operating through juridical-political practices which collectively enable and constrain mobility both within and outside the EU. In our anal-

[122] SAR Convention, Annex, para. 4.8.5 [IMO, Convention on Maritime Search and Rescue (SAR) of 27 April 1979 Annex, para. 4.8.5 www.imo.org]; SOLAS Convention, Chapter V, Regulation 33.1-1 [United Nations, International Convention for the Safety of Life at Sea (SOLAS) of 1 November 1974, No. 18961, Chapter V, Regulation 33.1-1]. The formulation was introduced through amendments to both conventions in 2004, see IMO, Resolution, Amendments to the International Convention for the Safety of Life at Sea of 20 May 2004, MSC.153(78), para. 3.1.9, and confirmed by the IMO, Principles Relating to Administrative Procedures for Disembarking Persons Rescued at Sea of 22 January 2009, para. 2.3., wwwcdn.imo.org.

[123] See further T Gammeltoft-Hansen and A Laurence, *Deployment and Distress: Legal Issues Confronting Danish Naval Vessels in Connection with Search and Rescue of Migrant Boats in the Mediterranean* cit. 68 ff.

[124] Convention on Maritime Search and Rescue (SAR) (1979) cit. Annex 1.3.13.

[125] Article 9. T Gammeltoft-Hansen and A Laurence, *Deployment and Distress: Legal Issues Confronting Danish Naval Vessels in Connection with Search and Rescue of Migrant Boats in the Mediterranean,* cit. 65.

[126] B Larkin, 'The Politics and Poetics of Infrastructure' cit. 329.

[127] T Gammeltoft-Hansen and M Madsen, 'Regime Entanglement in the Emergence of Interstitial Legal Fields: Denmark and the Uneasy Marriage of Human Rights and Migration Law' (2021) Nordiques 1; T Gammeltoft-Hansen, 'Legal Evolution and the 1951 Refugee Convention' (2021) International Migration 257. See more generally, N Stappert, 'Practice Theory and Change in International Law: Theorizing the Development of Legal Meaning through the Interpretive Practices of International Criminal Courts' (2020) International Theory 33 ff.

ysis, we have argued that the Schengen legal infrastructure operates along three dimensions: *Spatially*, Schengen has served to reframe human mobility and territory by bringing events, objects, and practices within its legal hermeneutic, through the establishment of a base legal framework to the gradual accumulation of infrastructural power over all aspects of mobility. *Temporally*, Schengen re-shapes notions of time to accelerate some movements, whilst making others slower or more gradual. This oscillating velocity takes shape through normative practices, which may bring it into conflict with or push particular interpretations in relation to adjacent legal areas. *Normatively*, the Schengen legal infrastructure exercises agency by fusing legal meaning and thereby re-constituting objects and practices, from the semiotics of the life raft to the metaphor of the fortress or mundane objects like border signs. However, this dynamic can never be unidirectional. When materials and practices move across borders, they bring with them juridical imaginations, affects, and practices, as can be seen in the way that Schengen interacts with other regional and international mobility regimes, such as ECOWAS and the law of the sea.

At its core, our analysis argues that Schengen must be understood *relationally*, on the one hand as a set of socio-material dynamics underpinning and recursively shaped by patterns of human mobility, and on the other, as a normative assemblage that enables legal practices and meaning to shift and evolve across formal regime boundaries. At both levels, Schengen implicates certain types of *infrastructural politics*, and when the behemoth becomes the Leviathan, we should closely scrutinize its practices. Untangling the legal infrastructure of Schengen is just one layer of a dense and overlapping normative framework of mobility law, which cuts across fields as diverse as aviation, shipping, trade and human rights law, but whose combined impact have deep felt and discriminatory effects on human existence. Thinking infrastructurally, we argue, may help bring attention to these dynamics across a broader scale and re-think the underlying basis of global mobility law.