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REFLECTIONS ON THE SCHENGEN BORDERS CODE AND THE RE-ESTABLISHMENT OF CHECKS AT INTERNAL BORDERS*

Abstract

The Schengen Borders Code, i.e. the management of the protection of external borders and the abolishment of internal borders, was introduced in 2006. In its first version it hardly men-tioned human rights. After the dramas particularly in the Mediterranean the code was subject to several revisions each time strengthening the protection of human rights including the non-refoulement principle and the obligation to save lives according to maritime conventions. Finally, in 2014, new criteria for the temporary re-introduction of internal border controls were set forth. Yet, the current mass migration, this time on surface, raises disturbing questions.

Key words: Schengen acquis, Schengen borders code, human rights, non-refoulement principle, maritime conventions obligations, application for international protection, law and reality, democratic options v. rule of (international) law, ethical dilemmata.

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1. INTRODUCTION

The reinforcement of checks at external borders to compensate for the – initially gradual – abolishment of checks at internal borders has already been regulated in art. 3 of the Schengen Implementation Agreement of 19 June 1990.[1] In 2005 the regulation establishing the European Agency for the Management of Operational Cooperation at the External Bordersof the Member States of the European Union (called FRONTEX)[2] has come into force. Only the following year the regulation on establishing a Community Code for the rules governing the movement of persons across borders has been enacted.[3]Possible problems linked to the protection of external borders, which now have become a reality in huge dimensions, were not foreseeable for the regulations' "architects" at the time of the drafts. Only as consequences of the so called "Arabic spring", the disastrous developments including tyrannies, (civil) wars, and droughts in parts of Africa as well as the armed conflicts in the Near and Middle East have these problems become apparent. Migration on sea and on surface has grown to previously unimaginable proportions. Thousands of people trying to flee dire conditions or persecution have drowned in the Atlantic between the north-western coast of Africa and the Canary Islands and in the Mediterranean between north-African countries and primarily Italy and Malta. Whether the EU and its member states and third countries bound by treaties or agreements with them beara co-responsibility for these tragedies, based on the then legal situation, is a difficult and embarrassing question.

1 OJ L 239 of 22 September 2000, 13 et seq.

2 Council Regulation (EC) No 2007/2004 of 26 October 2004 establishing a European Agency for the Management of Operational Cooperation at the External
Borders of the Member States of the European Union, OJ L 349 of 25 November 2004, 1 et seq.

3Regulation (EC) No 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a Community Code on the rules governing the movement of persons across borders (Schengen Borders Code), OJ L 105 of 13 April 2006, 1 et seq.

2. THE LEGAL DEVELOPMENT OF THE BORDERS CODE DURING LAST TEN YEARS

The Initially One-sided Understanding of the Borders Protection Legislation

The legal development of the EU, since the Treaty of Amsterdam[4] conceived as an area of freedom, security and justice,[5] was initially remarkably one-sided,focusing merelyon the protection of external borders. The FRONTEX regulation[6]afore mentioned did not include any specific provisions referring to the protection of fundamental rights or the Geneva Convention on Refugees (GCR).[7] It only stated[8] that the regulation was in line with the fundamental rights of the EU mentioned in art. 6 of the (former) Treaty of the EU and which follow from the Charter of Fundamental Rights of the EU (CFR).[9] This reference at least acknowledged that the activities to protect the external borders were not carried out in an area void of any legal regulation – but it was not sufficient. It is to be noted that the FRONTEX regulation on the operational cooperation came into force before the substantive provision ruling on the crossing of EU external borders.[10]

Despite the fact that all EU member states (EU-MS) are also parties of the European Convention on Human Rights and Fundamental Freedoms (ECHR)[11] – generally including the 4th Protocol[12] which prohibits in its art. 4 the collective expulsion of aliens –, of the GCR,[13] and of the UN Convention against Torture[14] these tragedies happened primarily – though not only – in the Mediterranean which is why the FRONTEX agency was heavily criticised.

4 OJ C 340 of 10 November 21997, 1 et seq.

5 Cf. e.g. Breitenmoser/Weyeneth, no. 40.

6 Cf. fn. 2.

7 Convention Relating to the Status of Refugees of 28 July 1995, UNTS vol. 189.

8 Consideration 22.

9 OJ C 83 of 30 March 2010, 389 et seq.

10 It is interesting to note that this regulation (fn. 3) aims at terrestrial borders including sea ports despite mentioning in art. 2(2) sea borders as "external borders"; see annex VI, no 3 of this regulation.

11 Council of Europe, CETS no, 005.

12 Council of Europe, CETS no. 046.

13 Cf. fn. 7.

14 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984, UNTS vol. 1465, 85.

The Changes of the FRONTEX Regulation The First Change of 2007

The first change was included in the regulation for the creation of rapid border intervention teams.[15] In addition to referring to the Charter of Fundamental Rights of the EU (consideration 17) consideration 18 states that the regulation "should be applied with full respect for obligations arising under the international law of the sea,in particular as regards search and rescue". Art. 2, entitled "scope", stipulates that the regulation "shall apply without prejudice to the rights of refugees and persons requesting international protection, in particularas regards *non-refoulement*".

The Changing Regulation of 2011

The widely publicised dramas particularly in the Mediterranean and most probably the harsh resolution of the Parliamentary Assembly of the Council of Europe[16] led to a further rethinking with regard to the pertinent legislation. In Regulation no. 1168/2011[17] the considerations 29 and 30 introduced the so far missing references to international human rights and maritime conventions.

A new para.2 of art. 1(2) requires the FRONTEX Agency – hence not only the EU-MS – to fulfil "its tasks in full compliance with the relevant Union law, including the Charter of Fundamental Rights of the European Union …; the relevant international law, including the Convention Relating to the Status of Refugees done at Geneva on 28 July 1951 …; obligations related to access to international protection, in particular the principle of *non-refoulement*; and fundamental rights, …".

15 Regulation (EC) No. 863/2007 of the European Parliament of the Council of 11 July 2007 establishing a mechanism for the creation of Rapid Border Intervention Teams and amending Council Regulation (EC) No 2007/2004 as regards that mechanism and regulating the tasks and powers of guest officers, OJ L 199 of 31 July 2007, 30 et seq.

16 Resolution 1821 of 21 June 2011 (http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta11/ERES1821.htm).

17 Regulation (EC) No 1168/2011 of the European parliament and the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 304 of 22 November 2011, 1 et seq.

Furthermore, a new para. 1a in art. 2 focuses in detail on the *non-refoulement* principle and the protection of particularly vulnerable people.[18] This means that the responsible officials of the agency or an EU-MS must not disembark or otherwise hand over someone to the authorities of a country where there is a danger of treatment violating art. 3 ECHR or from where the person could be expulsed to return to a country with similar dangers. In addition the agency is required to draw up and further develop a fundamental rights strategy comprising a mechanism to monitor the respect for fundamental rights in all activities (art. 26a).

Court Judgements

In April 2010 the Council issued a decision as guideline for the surveillance of the sea external borders in the context of the operational cooperation coordinated by the FRONTEX Agency.[19]This decision was annulled by the Court of the European Union since it contains binding essential elements leading to possible infringements of fundamental rights which cannot be regulated as an additional measure but require political decisions if powers such as stopping, searching, seizure, or arrest are to conferred on executive personnel.[20]

Only five months later the European Court of Human Rights convicted Italy for a violation of art. 3 ECHR and art. 4 of the 4th Protocol to the ECHR.[21] The case was based on the returning to Libya of migrants who were stopped on high sea in the Mediterranean. The Court held that since the ship flew the flag ofan EU-MS the applicability of the ECHR was extended in so far that the crew was bound to respect it when acting. This means that the applicability of the ECHR is (also)

18 Art. 2 para. 1a reads: "In accordance with Union and international law, no person shall be disembarked in, or otherwise handed over to the authorities of, a country in contravention of the principle of *non-refoulement*, or from which there is a risk of expulsion or return to another country in contravention of that principle. The special needs of children, victims of trafficking, persons in need of medical assistance, persons in need of international protection and other vulnerable persons shall be addressed in accordance with Union and international law."

19 Council Decision of 26 April 2010 supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (2010/252/EU), OJ L 111 of 4 May 2010, 20 et seq.

20 European Court of Justice (ECJ), C-355/10 (EU:C:2012:516), §§ 77 et seq.

21ECtHR, *Hirsi Jamaa et al./Italy*, Judgement of 23 February 2013, No. 27765/09.

extended based on the flag principle.[22] By this judgement the Court confirmed its practice with regard to the responsibility of ECHR-parties for implementing the guarantees of the ECHR outside its own territory: The ECHR parties and their organs under extraordinary circumstances are obliged to respect the human rights if they have authority and control over a person or a group of persons, a ruling similar to but not following thesame reasoning of the obligation to protect according to the *Soering* practice[23]. With these judgements the two Courts, the ECtHR and the ECJ, in combination with an earlier judgement of the ECJ,[24]have shown the limits to the Schengen Borders Code and its application under certain conditions or, rather, the applicability of the ECHR beyond the territory (land, sea, or air) of EU-MS and ECHR bound countries.

The Regulation (EU) No 656/2014 Establishing Rules for the Surveillance of External Sea Borders

Contrary to an earlieroccasionally held opinion that the human rights and the GCR were not in their entirety applicable on high sea and in sovereign territory of a third country[25] the regulation 656/2014[26] stipulates now that the applicability of the ECHR is extended on the high sea. Furthermore, the former practice of concluding agreementson returning people to countries who do not guarantee treatment that conforms human rightswas stopped.[27]

22Likewise decided the ECtHR in *Medvedyev/France*, Judgement of 29 March 2010, No 3394/03, §§ 62 et seq.

23 ECtHR, *Soering/United Kingdom*, Judgement of 7 July 1989, No 14038/88; cf. GRABENWARTER/PABEL, § 17 no. 17 (obligation to protect against acts of non-ECHR-parties).

24See below, 3.1.3. with fn. 47.

25Buckel, 224; Seehase, 270

26 Regulation (EU) No 656/2014 of the European Parliament and of the Council of 15 May 2014 establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 189 of 27 June 2014, 93 et seq.

27 Consideration 13 obliges the EU-MS to check, based on EU and international law, whetherthere are in the asylum procedures systemic shortcomings or violations of the *non-refoulement* principle in countries with which they have concluded agreements on returning people. Cf. Buckel, 188 et seq.; Deimel, 133, 135 et seq.; Seehase, 269.

Considerations 8 and 9 enumerate several international conventions which ought to be respected by the EU-MS and the Agency while protecting external borders.[28]

The general provisions stipulate prominently at the beginning of the edict that during a sea operation "the safety of the persons intercepted or rescued, the safety of the participating units or that of third parties" has to be ensured (art. 3) and that the fundamental rights, including the *non-refoulement* principle, must be observed (art. 4). The situation in third countries is to be assessed "based on information derived from a broad range of sources, which may include other Member States, Union bodies, offices and agencies, and relevant international organisations" (art. 4[2], para. 2). In addition, the participating units of EU-MS "shall…. use all means to identify the intercepted or rescued persons, assess their personal circumstances, inform them of their destination in a way that those persons understand or may reasonably be presumed to understand and give them an opportunity to express any reasons for believing that disembarkation in the proposed place would be in violation of the principle of *non-refoulement*"before the intercepted or rescued persons are disembarked in, forced to enter, conducted to or otherwise handed over to the authorities of a third country" (art. 4[3]). These provisions "shall apply to all measures taken by Member States or the Agency in accordance with this Regulation" (art. 4[7]).

Consideration 10 declares EU-MS and the Agency to be "bound by the provisions of the asylum *acquis*, and in particular of Directive 2013/32/EU … with regard to applications for international protection made in the territory, including at the border, in the territorial waters or in the transit zones of Member States".

28 Consideration 8 lists the following conventions: UN Convention on the Law of the Sea, the International Convention for the Safety of Life at Sea, the International Convention on Maritime Search and Rescue, the UN Convention against Transnational Organized Crime and its Protocol against the Smuggling of Migrants by Land, Sea and Air, the UN Convention relating to the Status of Refugees, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the UN Convention on the Rights of the Child and other relevant international instruments.

The Directive 2010/32 EU

This directive 2010/32/EU[29] establishes the common procedures for granting and withdrawing international protection,[30] i.e. the receipt of applications for international protection made in the territoryincluding at the border, in the territorial waters or in the transit zones of the Member States in. Art. 8 on information and counselling in detention facilities and at the border crossing pointsregulates in detail how to proceed:

" 1. Where there are indications that third-country nationals or stateless persons held in detention facilities or present at border crossing points, including transit zones, at external borders, may wish to make an application for international protection, Member States shall provide them with information on the possibility to do so. In those detention facilities and crossing points, Member States shall make arrangements for interpretation to the extent necessary to facilitate access to the asylum procedure."

"Member States shall ensure that organisations and persons providing advice and counselling to applicants have effective access to applicants present at border crossing points, including transit zones, at external borders. Member States may provide for rules covering the presence of such organisations and persons in those crossing points and in particular that access is subject to an agreement with the competent authorities of the Member States. Limits on such access may be imposed only where, by virtue of national law, they are objectively necessary for the security, public order or administrative management of the crossing points concerned, provided that access is not thereby severely restricted or rendered impossible."

The applicants "shall be informedin a language which they understand or are reasonably supposed to understand ofthe procedure to be followed and of their rights and obligations during the procedure and the possible consequences of not complying with their obligations and not cooperating with the authorities" (art.

29 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), OJ L 180 of 29 June 2013, 60 et seq.

30 According to Directive2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted(recast), OJ L 337 of 20 December 2011, 9 et seq.

12[1a]), receive services of an interpreter for submitting their case to the competent authorities (art. 12[1b], 15[3c]) and "be given the opportunity of a personal interview on his or her application for international protection with a person competent under national law to conduct such an interview" (art. 14[1]). The applicants shall, on request, be "provided with legal and procedural information free of charge, including, at least, information on the procedure in the light of the applicant's particular circumstances (art. 19 et seq.) and have the right to an effective remedy before a court or tribunal, against negative decision of the first instance (art. 46).

Intermediate Conclusion

The regulation 656/2014 obliges all services and their members of EU-MS and of the Agency to guarantee the safety on sea according to the pertinent international law and to the fundamental rights, including the *non-refoulement* principle (in all possible variations), to identify the intercepted people as far as possible and provide them with the opportunity to give the reasons why they should not be returned to a third country. However, they are not competent to receive a formal application for international protection. Yet, the units areobliged, if the intercepted people raise reasons for not being returned, to respect directive 2013/32/EU which means that they have to guide the intercepted people to the territory of the respective EU-MS.

It is apparent that the interconnected provisions were conceived to handle perhaps a few dozens of people at a given time. Any logistical problems have obviously not been considered.

3. REFLECTION ON THIS LEGISLATION AND ITS APPLICATION

The Squaring of the Circle Legal Situation

After the highest Courts have set substantive limits on the Schengen Borders Code the political authorities now try to do the splits between stopping people from illicit border crossing at external sea borders on the one hand and the maritime rescue obligations as well as the *non-refoulement* principle on the other hand.The very detailed provisions about procedures and processes (art. 4[5] para. 2, and art. 5-10 of regulation [EU] 656/2014) on the surveillance of external sea borders are part of the attempts to solve the squaring of the circle. Yet, it is apparent that

the different aims of the provisions are very disparatewith regard to our hierarchy of values: The illicit border crossing which is to be prevented as main aim is in general a misdemeanour – even not legitimising the simplified exchange of information and intelligence according to the respective Schengen framework decision[31] –whereas the possible and (as the recent history has proved) real "collateral damages" of such efforts represent the highest values: the right to life and the prevention of torture. As third element the international law obligations according to the UN Convention against Transnational Organized Crime[32] and particularly its second Protocol against the Smuggling of Migrants by Land, Sea and Air have to be fulfilled.[33] Thus, the priorities have been turned upside down: the protection of human rights including the maritime rescue and the *non-refoulement* principle are *conditio sine qua non* for all endeavours to protect the external borders, particularly on sea. Furthermore, the circumvention of the *non-refoulement* principle by agreements with countries not guaranteeing the observation of this principle is banned; to assess the situation in third countries the EU-MS have to consult with the European Asylum Support Office (EASO),[34] the UNHCR and other international organisations.

The Implementation

Italy has reacted by running the operation MARE NOSTRUM saving reportedly some 150'000 migrants on boats in the Mediterranean.[35] As of 1 November 2014 this Italian operation was followed by the EU joint operation TRITON[36], formally replacing operations HERMES and AENEAS. However, the necessary solidarity

31 Council Framework Decision 2006/960/JHA of 18 December 2006 on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union, OJ L 386 of 29 December 2006, 89 et seq.

32 UNTOC; UNTS vol. 2225 No. 39574.

33 UNTS vol. 2237 No. 39574.

34 See Regulation (EU) No 439/2010 of the European Parliament and of the Council of 19 May 2010 establishing a European Asylum Support Office, OJ L 132 f 29 May 2010, 11 et seq.

35 ANSA it Sicilia, 20 October 2014 (http://www.ansa.it/sicilia/notizie/2014/10/18/immigrazione-un-anno-di-mare-nostrum_a5698982-e3bc-4108-a8ff-56dc87dd597f.html).

36 Statement by Angelino Alfano, Italian Interior Minister, Blog Sicilia, 22 October 2014 (http://oltrelostretto.blogsicilia.it/immigrazione-dal-primo-novembre-triton-sostituisce-mare-nostrum/274997/).

among the EU-MS for the joint operation was still by far insufficient.[37]The UK, not a Schengen-MS in the strict sense, refused to support search and rescue operations in this context,[38],[39]other countries just abstained.Only in June 2015 the EU Foreign Affairs Council launched the operation EUNAVFOR Med for disrupting the business of migrant smugglers in order to comply with UNTOC and the Protocol against the Smuggling of Migrants.[40] At the beginning of October 2015 the operation SOPHIA was started to intercept, board, search, and seize smugglers' vessels.[41]

ECHR Conform?

The EU is still not party of the ECHR. The ECJ found in his opinion 2/13 of 18 December 2014 that the final draft of the agreement on the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms[42] is not compatible with Article 6(2) TEUor with Protocol (No 8) relating to Article 6(2) of the TEU.[43] However, all EU-MS are also parties and bound to the ECHR. This situation opens a gap of the legal accountability between the EU, or rather the FRONTEX agency, and the executing EU-MS. The

37 Then EU Commissioner for freedom, security and justice, Cecilia Malmström, said on 2 October 2014, solidarity is still largely non-existent, Malta today, 2 October 2014 (http://www.maltatoday.com.mt/news/europe_2014/44487/malmstrm_on_refugees_solidarity_between_eu_states_still_largely_nonexistent#.VlgOq7_ysrZ).

38 BBC new, 28 October 2014 (http://www.bbc.com/news/uk-29799473).

39 For permanently updated details on the development of the situation in the central mediterranean area see the website of em. Prof. Jürg Gabriel: www.blue-borders.ch. According to the UNHCR at least 3419 migrants have lost their lives in 2014 (up to 10 December) while crossing the Mediterranean (http://www.ansamed.info/ansamed/en/news/sections/generalnews/2014/12/10/immigration-3419-dead-in-mediterranean-in-2014-unhcr_2af3e7d3-a4ee-47a1-b464-568a900a472e.html).

40Council of the European Union, press release of 22 June 2015 (http://www.consilium.europa.eu/en/meetings/fac/2015/06/22/).

41BBC news of 7 October 2015 (http://www.bbc.com/news/world-europe-34461503).

42See Final report to the CDDH of 3April 2013 (http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports_en.asp).

43ECLI:EU:C:2014:2454 (http://curia.europa.eu/juris/documents.jsf?pro=&lgrec=de&nat=or&oqp=&dates=&lg=&language=de&critereEcli=ECLI%253AEU%253AC%253A2014%253A2454&jur= C%2CT%2CF&cit=none% 252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C% 252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&td=%3BALL&pcs= Oor&avg=&page=1&mat=or&jge=&for= &cid820263)

operational plan drawn up by the FRONTEX agency is binding for the participating units of the EU-MS.[44] In this context it is to be remembered that according to art. 77 (2) TFEU the competence to regulate external border crossings is conferred upon the EU.[45]With regard to the asylum policy two EU legal provisions are relevant: (1) art. 78(1) TFEU stipulates that the asylum policy must ensure compliance with the principle of *non-refoulement*and be in accordance with the GCR "and other relevant treaties" and (2) art. 28 of the Schengen Implementation Agreementwhich reads as follows:

"The Contracting Parties reaffirm their obligations under the Geneva Convention relating to the Status of Refugees of 28 July 1951, as amended by the New York Protocol of 31 January 1967, *with no geographic restriction* on the scope of those instruments, and their commitment to cooperating with the United Nations High-Commissioner for Refugees in the implementation of those instruments."[46]

Art. 51(1) CFR obliges "institutions, bodies, offices and agencies of the Union" to "respect the rights, observe the principles and promote the application thereof…"; in this context the ECJ judged that art. 227 Treaty of the European Community (now art. 52 TEU/art. 355 TFEU) "…does not, however, preclude Community rules from having effects outside the territoryof the Community".[47] In combination with the ECtHR judgement *Hirsi Jamaa/Italy*[48] *this ruling of the ECJ also sets the parameter for the operational planning of the FRONTEX agency respecting the pertinent requirements of Regulation (EU) No. 656/2014.*[49]

The established practice of the ECtHR with regard to the positive obligations in relation to the protection of human rights, particularly the right to life and the prevention of torture, can be summarised as follows:

Three requirements need to be fulfilled:

– a person (as a legal subject) entitled to profit from an obligation of the state (or an organ on its behalf) to protect[50]

44Explicitly stated by the ECJ, *European Parliament/Council of the European Union,* judgement of 5 September 2012 (C-355/10; ECLI:EU:C:2012:516), no 81 et seq.

45See also Regulation (EC) No 562/2006 (fn. 3), art. 1.

46 Emphasis by italics added here.

47 ECJ, *Boukhalfa/Germany*, judgement of 30 April 1966 (C-214-94; ECLI:EU:C:1996:174), no. 14.

48 See fn. 21.

49 See fn. 26; cons. 9, 17; art. 4 in combination with art. 7 and 9(2).

50 Grabenwarter/Pabel, §19, no. 5.

– a situation creating the claim for protection of which the competent authorities know/knew or ought to have known[51]

– the protecting or saving intervention can reasonably be expected.[52]

Thethird requirement is also in line with the UN Convention on the Law of the Sea.[53]

This legal situation does not oblige the EU and its MS to search permanently the entire Mediterranean for shipwrecked people or those otherwise locked in life threatening situations. However, the FRONTEX agency and operational units of the MS must, while keeping the maritime external EU borders under surveillance,deploy all means at their disposition to detect people in distress and if close enough to save them. The incomparably higher value of the right to life as opposed to an illegal border crossing requires sea rescue operations whenever they canreasonably be expected. Reportedly, migrant smugglers coerce migrants by force of arms to board unseaworthy boats even in extremely bad sea and weather conditions; according to the obligation to fight organised crime and particularly smuggling of migrants[54] – it is therefore an even greater andundeniable duty to prevent victims from peril.

Despite enormous efforts to solve the humanitarian problems on the Mediterranean the attempts tosquarethis circle have not been as successful as the EU and the international law require.

In recent months the change of the migration routes, now predominantly on land via the Balkan countries, have also changed the focus of legal perspectives.

51 Cf. ECtHR,*Begheluri/Georgia*, judgement of 7 October 2014, No. 28490/02, §§ 97, 118, w.f.r..; *Keller/Russia*, judgement of 17 February 2014, No. 26824/04, §§ 82, 88; Mohler, no. 1502.

52 Cf. e.g. ECtHR, *Bljakaj et al./Croatia*, judgement of 18 September 2014, No. 74448/12, § 121; *Makaratzis/Greece*, judgement of 20 December 2004, No. 50385/99, Rec. 2004, § 71; Mohler, no. 306 et seq.

53 UNTS No. 31363, art. 98(1).

54 See fn. 32, 33.

4. THE RE-ESTABLISHMENT OF INTERNAL BORDERS

A further Revision of the Schengen Borders Code

Exceeding the original regulation in art. 2(2) of the Schengen Implementation Agreement on a temporary re-establishment of internal border checks the Schengen Borders Code[55] was again changed by Regulation (EU) No 1051/2013[56] introducing and stating three more precise criteria and procedures for the temporary re-introduction of internal border checks: (1) Where "there is a serious threat to public policy or internal security in a Member State, that Member State may exceptionally re-introduce border control at all or specific parts of its internal borders for a limited period of up to 30 days or for the foreseeable duration of the serious threat if its duration exceeds 30 days". It shall only be re-introduced as a last resort (art. 23) and comply with the principle of proportionality in relation to the seriousness of the potential impacts of the losses threatened with and of the impact of the measure on free movement of persons (art. 23a). The periods of 30 days are renewable but the total period shall not exceed 6 months unless there are exceptional circumstances allowing to extend the duration to a maximum of 2 years (art. 23[4]). The acting MS shall notify the other MS, the European Parliament, and the Council before the planned re-introduction,giving and explaining the reasons as well as the technical details (art. 24[1-3]). The commission or any MS may issue an opinion; if concerns about the necessity or proportionality of the planned re-introduction are submitted a consultation procedure shall take place before the planned measures take effect (art. 24[4-6]).

(2) If a serious threat requires immediate action the MS concerned may immediately re-introduce internal border checks for a limited period of 10 days. If the threat persists the border controls may be prolonged for periods of 20 days but not exceeding 2 months. The immediate re-introduction of borders controls requires the notification of the other MS and the Commission and a prolongation is subject to consultation (Art. 24).

(3) In case of "exceptional circumstances where the overall functioning of the area without internal border control is put at risk as a result of persistent serious

55 See fn. 3.

56 Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 201 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances, OJ L 295 of 6 November 2013, 1 et seq.

deficiencies relating to external border control" the Council may, as a last resort, "recommend that one or more Member States decide to reintroduce border control at all or at specific parts of their internal borders" for a period of up to 6 months which may be prolonged not more than 3 times (art. 26). The criteria the Council has to observe before issuing such a recommendation are laid down in art. 26a.

The Recent Reality

"The Schengen system is partly comatose," said EU Commission president Jean-Claude Juncker in his speech to the European Parliament on 25 November 2015.[57] This statement focuses on the core part of "Schengen", the abolition of the internal border controls and – as compensation – the strengthening of the protection of the external borders. The unforeseen and in this extent unforeseeable mass migration has put the system not only under an extreme stress but rendered it dysfunctional at least for the time being. This applies also to the Dublin scheme which was called "obsolete" by German chancellor Angela Merkelwhen sheaddressed the European Parliament. Yet, despite the fact that hundreds of thousands of migrants have entered the Schengen area without having been identified the EU Council has not considered to invoke art. 26 of the Regulation (EU) No 1051/2013. Instead, the proposal of a permanent relocation scheme as an alternative to the current Dublin mechanism was not agreed by all MS, particularly not by those of the Visegrad group.[58] Equally, there was no agreement on the proposal for a common list of safe countries of origin in which Turkey – on a proposition of the Commission – was to be included. In view of the 22% of asylum applications of Turkish nationals receiving apositive decision the doubts proved convincing. Furthermore, the ministers could not agree to start at least the procedure for the establishment of a European Border and Coast Guard System as stipulated in art. 77(2d) TFEU; the reluctance to give up sovereignty was too strong a hindrance.[59]

Meanwhile various Schengen-MS have temporarily reintroduced controls at their internal borders, notifying the Commission.[60] Some of them have transferred arriving migrants directly to the neighbouring country westwards without any reg-

57EU observer (https://euobserver.com/migration/131265).

58 Yves Pascouau, European Policy Centre, 10 October 2015 (www.epc.eu). (Visegrad group: Czech Republic, Hungary, Poland, Slovakia).

59 Pascouau, *ibidem*.

60 www.ec.europa.eu/.../ms_notifications_-_reintroduction_of_border_control_en.pdf., page 1.

istration. But the mass migration towards the EU has not stopped. Stricter control or partial closing of the external Schengen border has only relocated the very same problems to the eastern and southern frontiers of non-Schengen countries.[61]

5. DISTURBING FINAL QUESTIONS

There is the constricting question whether the current and now foreseeable migration problems triggered elsewhere and out of reach for being addressed at their very roots can be solved, under the given international law and national state policies parameter, in a defendable way respecting the European canon of values and the human rights and fundamental freedoms.

Or has the normative power of facts become so strong that this fundament of developed civilized democracies cannot resist against formally democratic or populist demands to stop the immigration of people fleeing from persecution or frombattlefields of armed conflicts? Another conflict between the respect for democracy and respect for the rule of law including fundamental rights?

Or – where is a reasonably and ethically defendable limit of such immigration?

References:

- Stephan Breitenmoser/Robert Weyeneth, *Europarecht*, 2nd ed., Zürich/St. Gallen, 2014.

- Stefanie Deimel, FRONTEX, *Das EU-Aussengrenzmanagement vor dem Hintergrund kontemporärer Migrationsbewegungen*, Frankfort/M, 2012.

- Sonja Buckel, „Welcome to Europe“, *Die Grenzen des europäischen Migrationsrechts*, Bielefeld, 2013.

- ChristophGrabenwarter/Katharina Pabel, *Europäische Menschenrechtskonvention*, 5th ed.,München, 2012.

- Markus H.F. Mohler, *Grundzüge des Polizeirechts in der Schweiz*, Basel, 2012.

- Juliane Seehase, *Die Grenzschutzagentur FRONTEX*, Baden-Baden, 2013.

61 Clashes of angry migrants with Macedonian police at Greek border; BBC on line 29 November 2015 (http://www.bbc.com/news/world-europe-34954127).

Internet:

- http://www.ansa.it/sicilia/notizie/2014/10/18/immigrazione-un-anno-di-mare-nostrum_a5698982-e3bc-4108-a8ff-56dc87dd597f.htm

- http://oltrelostretto.blogsicilia.it/immigrazione-dal-primo-novembre-triton-sostituisce-mare-nostrum/274997

- http://www.maltatoday.com.mt

- http://www.bbc.com/news/uk-29799473

- http://www.ansamed.info/ansamed/en/news/sections/generalnews/2014/12/10/immigration-3419-dead-in-mediterranean-in-2014-unhcr_2af3e7d3-a4ee-47a1-b464-568a900a472e.html

- http://www.consilium.europa.eu/en/meetings/fac/2015/06/22/

- http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Meeting_reports_en.asp

- http://curia.europa.eu/juris/documents

- https://euobserver.com/migration/131265

- www.ec.europa.eu/.../ms_notifications_-_reintroduction_of_border_control_en.pdf

- http://www.bbc.com/news/world-europe-34954127

RAZMIŠLJANJA O ŠENGENSKOM SPORAZUMU I PONOVNOM USPOSTAVLJANJU KONTROLA NA UNUTRAŠNJIM GRANICAMA

Apstrakt

Šengenski sporazum o upravljanju zaštitom spoljnih granica iz 2006. je značio ukidanje granica između zemalja potpisnica sporazuma. U njegovoj prvoj verziji, ljudska prava skoro da i nisu ni spominjana. Nakon drastičnih događaja, posebno na Mediteranu, Šengenski sporazum je bio predmet nekoliko revizija, pri čemu je svaki put pojačana zaštita ljudskih prava, kao i princip o zabrani proterivanja i obaveza spasavanja života prema pomorskim konvencijama. Napokon, 2014. godine, uspostavljen je novi kriterijum za trajno ponovno uspostavljanje granica. Međutim, aktuelne masovne migracije donose sa sobom i uznemirujuća pitanja.

Ključne reči: Šengen, ljudska prava, princip o zabrani proterivanja, obaveze pomorskih konvencija, aplikacije za međunarodnu zaštitu, zakon i realnost, demokratske opcije vs. (međunarodni) zakon, etničke dileme.