

Editorial



The Refugee Crisis: The End of Schengen?

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The European Union is in the grasp of a refugee crisis that manifested itself more and more in the last years but these days really rocks its values, its institutions and its policies. One may simply refer to the violent actions of the police against refugees at the iron curtain that Hungary has built, to the collapse of the control system at the external borders of Greece and Italy and the ensuing chaos at the borders of, in particular, Slovenia, Austria, and Germany, and to the political conflicts at the national, as well as the local level in Germany, The Netherlands, France and other Member States about the reception of refugees. Against this background, it is no wonder that in the public discussion about this crisis the question quite often pops up whether it will not lead to the end of Schengen or, in a more affirmative manner, whether Schengen should not be abolished. These questions in one way or another embody the idea that Schengen is the main institutional cause of this crisis and that the disappearance or abolishment of Schengen is the answer to it.

At a cursory glance these questions are not that unreasonable because the related control system at the external borders of the European Union did not function properly indeed in the last years and, in this way, provoked the re-introduction of traditional control measures at the common borders of a number of Member States. On closer investigation however, one has to come to the conclusion that the reform of Schengen and a decisive enforcement of a renewed system, but more and better embedded in the foreign policy of the

European Union, is the only way to overcome this crisis and similar crises in the future.

The root causes of the refugee crisis in the first order mainly relate to systemic poverty and corruption, failed states, dictatorship and terrorism, war and civil war, in other parts of Europe, Africa, the Middle East and Asia, and not to forget the organized crime networks operating from all corners of these (sub)continents straight into the heart of the European Union. In the second order one has nevertheless to ask the question to what extent these causes also are rooted in the foreign and the security policy as well as the economic and agricultural policy of (Member states of) the European Union itself. Like other powerful states and federations in the West, the East and the South of the globe, this Union is not only part of the solution but also part of the problem. The leadership of the European Union should acknowledge this uneasy role in world politics more clearly than, e.g., has been done in the rather one-sided European Security Strategy 2003 that has guided its policies up to 2010.¹

This shared responsibility is of course no reason at all to question fundamentally the peace, democracy, rule of law and prosperity the European Union generally has created in Western, Northern, Southern and Central Europe. Exactly these achievements are, after all, the reasons why that many refugees from all over the world risk their life to cross the external borders of the European Union and the common borders of a number of its Member States. The real challenge is to share these all in all scarce public goods on earth with more people inside and outside of the external borders of this Union. If this challenge cannot be taken up in a satisfactory manner the international fight about the availability and distribution of these precious goods will become still more a vicious struggle.

The founding fathers of the European Union were of the opinion that the abolishment of control at the common borders of its Members States was a necessary condition for the free movement of persons, goods, services and capital in the powerful and prosperous internal market they wanted to create on its territory. At the same time, they understood that this unprecedented and far-reaching measure for a number of reasons — not least the containment of

1 C. Fijnaut, 'The Lack of Coherence between Internal and External Security Policies of the European Union', in M. den Boer and J. de Wilde (eds), *The Viability of Human Security* (Amsterdam: Amsterdam University Press, 2008), pp. 97–108; S. Keukeleire and J. MacNaughtan, *The Foreign Policy of the European Union* (Basingstoke: Palgrave, 2008), pp. 59–60. See in this context the book of the Director-General of External and Politico-military Affairs for the Council of the European Union, R. Cooper, *The Breaking of Nations; Order and Chaos in the Twenty-First Century* (Lodon: Atlantic Books, 2003).

organized crime and terrorism, the protection of national security and the maintenance of public order — had to be compensated, or even substituted, not only by a coherent system of specific measures in relation to police and judicial cooperation across the common borders but also by an effective system of control at the external borders of the Union. The short term and long term measures with regard to the transfer of checks on persons and goods to the external borders that were outlined in the Schengen Agreement 1985 — an audacious initiative of Germany, France and the Benelux Countries — clearly testify of their conviction that internal freedom of movement and external border control are structurally interdependent.² The related ideas in the White Paper 1985 of the Commission on the completion of the internal market equally reflect this crucial point of departure.³

They were of course also aware of the fact that it would be difficult to establish, to maintain and to adapt such a system because the Union they had in mind would not dispose of the powers and agencies to do this on its own. This Union would to a large extent be dependent upon the willingness and the capacity of its Member States to implement and to enforce the arrangements and rules they themselves would develop in the framework of Schengen and subsequently in the framework of both the Dublin Convention 1990 and notably the Third Pillar (Justice and Home Affairs; article K.1, (1)–(3), Title VI) of the Treaty on European Union 1992 with regard to, amongst others, the responsibility for the handling of applications for asylum, the movement of third state nationals, the policy on immigration and, not least, the containment of serious (organized) cross-border crime. The fact that it took five years to transform the Schengen Agreement 1985 into the Schengen Implementation Convention 1990 and still another five years before this Convention could enter into force (1995), was — just like the fact that the Dublin Convention only entered into force from 1 September 1997 — a clear sign that even at the negotiating tables it was an uphill battle to agree upon an effective and fair system of control at the external borders of the European Union and upon an equally workable system of cross-border cooperation at the common borders of its Member States. The worrying report that the Commission published in January 1989 on the deficient state of affairs in relation to the abolishment of the checks on persons at the common borders of

2 F. Pastore, 'Visas, Borders, Immigration: Formation, Structure, and Current Evolution of the EU Entry Control System', in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice* (Oxford: Oxford University Press, 2004), pp. 94–98.

3 Commissie, *De Volttooiing van de Interne Markt (Completing the Internal Market)*, COM(85) 310, Brussel, 14 June 1985.

the Union and their transfer to the external borders left in any case no room for any doubt in this regard.⁴

It is remarkable that this report also did not address in a clear manner the question whether the fragile intergovernmental system of control at the external borders that the Member States wanted to introduce, would be able to deal with the pressures that large numbers of migrants, refugees, aliens, criminals etc. could exert on this system. This question was not at all an unrealistic one, however. In the Netherlands e.g., a senior member of the Royal Marechaussee wrote in 1993 that the idealist architects of the border control system had not learned the lessons of the past in this field and that after the fall of the Berlin Wall and the collapse of the Soviet Union the system could barely cope with the huge streams of migrants from Central and Eastern Europe.⁵ Very knowledgeable members of the Second Chamber, like M. van Traa, repeatedly asked the responsible minister whether the system of control at the external borders, in particular in the southern Member States, was on paper as well as in practice sufficiently solid to meet with all the obligations and expectations enshrined in the Schengen Implementation Convention.

The minister time and again answered van Traa that one might not suppose that a Member State was not able to organize an effective system of control and to solve the practical problems that still existed, such as the rumours that many people from North Africa in the night landed on the shores of Italy and Spain would be investigated by the Schengen Working Group Police and Security. The reassuring report of this Working Group suffocated such critical voices, however. It stated that the control on the external borders of the European Union was guaranteed but that some improvements were still necessary indeed, in particular with regards to borders that did not consist of natural obstacles like mountains and rivers. Generally speaking, the precondition of a workable external border control system for the entering into force of the Schengen Implementation Convention was fulfilled, however.⁶

In conjunction with this conclusion, it may be called to mind that the European Parliament also did not pay attention to the serious risks which were linked to the fragility of the system that was put into place. The rapporteurs of the most important reports that were published on the Schengen system in 1991–1992, K. Malangré and L. van Ouirve, acknowledged in general the “positive

4 Commissie, *Rapport betreffende de Opheffing van de Personencontroles aan de Binnengrenzen van de Gemeenschap (On the Abolition of Controls of Persons at the Intra-Community Borders)*, COM (88) 640, Brussel, 16 January 1989.

5 C. Nijsingh, ‘Grenzeloos Optimisme’, 40 *Ons Wapen* (1993) 5–10.

6 Tweede Kamer, 1992–1993, 19326, no. 48, pp. 3–5; no. 62, p. 4.

significance” of the Schengen Implementation Convention but denounced in a high tone that the European Commission and the European Parliament had not been involved right from the start in the discussion on the very important issues that were addressed in this Convention. Apart from this constitutional issue, they highlighted in particular the democratic shortcomings of the Schengen Implementation Convention as such, the poor legal quality of its arrangements and rules, the lack of control on cross-border operations by the police forces, the absence of legal aid for suspects in cross-border investigations, etc.⁷ Rather astonishing — definitely in retrospect — is their opinion that checks at the external borders of the Schengen states were in conflict with European integration because “this would create two categories of citizen in the future, which would indeed fly in the face of the concept of European integration”. They clearly did not want to accept the role of Schengen as a forerunner for further integration of all the Member States of this Union and, in addition, completely overlooked the fact that also in the supranational framework of the First Pillar (the European Community) it would be difficult to develop a system that would meet all the standards and expectations they missed in the Convention.⁸

This became quite clear in the second half of the nineties when the European Council and the Council (Justice and Home Affairs) accepted the viewpoint of the European Commission and the European Parliament that it was necessary to “Communitize” to a certain extent migration law, in particular asylum and visa law, as well as the related external border control system, and, in addition to this, to integrate the Schengen *acquis* into the legal framework of the Union. The Treaty of Amsterdam 1997, that entered into force on 1 May 1999, subsequently moved these policy fields from the Third Pillar to the First Pillar, where they were enshrined in the new Title IIIa of the Treaty establishing the European Community: *Visas, asylum, immigration and other policies related to free movement of persons*. This transfer of powers did not straightaway conjure up the coherent, effective and fair policies the rapporteurs of the European Parliament dreamed of, however. The main reason for this was that substantial parts of the

7 European Parliament, 1990–1991, *Verslag over het Vrije Verkeer van Personen en Veiligheid in de Europese Gemeenschap (Rapport de la Commission Juridique et Des Droits des Citoyens sur la Liberté de Circulation et la Sécurité dans la Communauté Européenne)* (rapporteur: K. Malangré), A3-0199/91, PE 143.354/def., Brussels, 3 July 1991; 1992–1993, *Second Report on the Entry into Force of the Schengen Agreements* (rapporteur: L. van Outrive), A3-0336/92, PE 202.504/fin., Brussels, 5 November 1992.

8 Their comments reflected for the rest to a large extent the criticism of many legal experts in academia. See e.g., J. Bolten, ‘From Schengen to Dublin; the New Frontiers of Refugee Law’, 66 *Nederlands Juristenblad* (1991) 165–178; R. Bieber, ‘Die Abkommen von Schengen über den Abbau der Grenzkontrollen’, 47 *Neue Juristische Wochenschrift* (1994) 294–296.

measures in these sensitive political fields were governed by the co-decision procedure (Council and Parliament) and the unanimity principle (among the Member States).⁹ Even the specific action plans that were concluded in 1998 (the Vienna Action Plan) and 1999 (the Tampere Programme) in order to transform the provisions of the Amsterdam Treaty with regard to the realization of the area of freedom, security and justice into practical policies and measures, could not really speed up and improve the policy making process.¹⁰

A telling example in the context of this editorial concerns one of the so-called Tampere milestones, i.e., that the freedom — based on human rights, democratic institutions and the rule of law — the citizens of the Union enjoy, should not be regarded as their exclusive preserve:

“Its very existence acts as a draw to many others world-wide who cannot enjoy the freedom Union citizens take for granted. It would be in contradiction with Europe’s traditions to deny such freedom to those whose circumstances lead them justifiably to seek access to our territory. This in turn requires the Union to develop common policies on asylum and immigration, while taking into account the need for a consistent control of external borders to stop illegal immigration and to combat those who organise it and commit related international crimes.”

In the complicated reality of European Union politics it was clearly not that easy to translate the strong commitments to “a common European asylum system” and “a fair treatment of third country nationals” into coherent policies, however. It turned out to be very difficult and consequently very time consuming to come to an agreement on the numerous building blocks of these policies. According to K. Hailbronner, S. Peers and others, by the end of 2004 only a few — but nevertheless up to this moment quite relevant — legal instruments in the field of asylum, migration and external border control had been adopted:

- in 2000 the Council Decision on the establishment of a European Refugee Fund and the Council Regulation concerning the establishment of EURODAC for the comparison of fingerprints in relation to the effective application of the Dublin Convention;

9 K. Hailbronner, ‘Asylum Law in the Context of a European Migration Policy’, in N. Walker, ed., *op. cit.*, pp. 43–52.

10 The Vienna Action Plan has been published in the *Official Journal*, C19/1-15, 23.1.1999. The Tampere Programme can be accessed via the website of the European Union (<http://ue.eu.int/newsroom>).

- in 2001 the Council Directive on minimum standards for giving temporary protection in the event of a mass influx of displaced persons as well as the Council Regulation which conferred upon the Council the power to amend the Common Manual for border control authorities;
- in 2003 the Council Regulation setting out rules on the responsibility for asylum applications and the Council Directive laying down minimum standards for the reception of asylum seekers;
- in 2004 the Council Regulation on a network of immigration liaison officers and the Directive on the transmission of passenger information by carriers.¹¹

The further development of “the management of migration flows” — the third component of the “common EU asylum and migration policy”, the European Council envisaged in Tampere – equally proved to be a very tough question. It took several years before the main components of this important policy issue in one way or another got some shape, at least in legal terms. The plan to introduce severe sanctions against the criminal networks who engage in trafficking in human beings and economic exploitation of migrants, only in 2002 was transposed in the Council Framework Decision on combating trafficking in human beings and the Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, and got in 2004 completed by the Council Directive on the issuing of residence permits to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, and are willing to cooperate with the competent authorities in the fight against human trafficking and illegal immigration.¹² The call for closer cooperation and mutual technical assistance between Member States’ border control services, such as exchange programmes and technology transfers, especially on the 40 000 kilometres of maritime borders, merely at the end of 2004 resulted in the establishment of Frontex.¹³ The task of this Agency for the Management of Operational Cooperation at the External Borders was,

11 K. Hailbronner, *loc.cit.*, pp. 50–52; S. Peers, *EU Justice and Home Affairs Law* (Oxford: Oxford University Press, 2011), pp. 144–145, 298–303, 503–506.

12 M. Ventrella, *The Control of People Smuggling and Trafficking in the EU; Experiences from the UK and Italy* (Farnham: Ashgate, 2010) pp. 43–46, 147–151. For the text of these successive Framework Decisions and Directive, see the *Official Journal*, L203/1-4, 1 August 2002, L328/1-3, 5 December 2002, and L261/19-23, 6 August 2004.

13 S. Peers, *op. cit.*, pp. 216–217; R. Möllers, *Wirksamkeit und Effektivität der Europäischen Agentur FRONTEX; eine politikwissenschaftliche Analyse der Entwicklung eines integrierten Grenzschutzsystems an den Auszengrenzen der EU* (Frankfurt: Verlag für Polizeiwissenschaft, 2010), pp. 36–56.

right from its outset in 2005, rather daunting. In 2006 it was estimated that more than 30 000 African migrants landed by boat in the Canary Islands, six times more than in 2005, while thousands were believed to have been lost at sea. The contemporary refugee crisis has a much longer history than many people remember these days.¹⁴

Against this background it is not that astonishing that the assessment of the Tampere Programme by the Commission in 2004 was not such a laudatory one. Moreover, the Commission did not hide away its hope that the Constitutional Treaty that was in the making, would finally create the institutional framework within which it would be possible to take more decisive action in these and other policy fields.¹⁵ With regard to the development of an integrated border management, the Commission stated that in the new constitutional context “the smooth operation of the External Borders Agency must be ensured” and should be strengthened and supplemented with the long-term objective of establishing a European Corps of Border Guards. In conjunction with this statement, the Commission not only underlined the necessity to mobilize, on the basis of the principle of solidarity and burden-sharing, substantial funds for the implementation of the external border control system, but also stressed that the credibility of a positive and open common approach to immigration would very much depend on the ability of the European Union:

“to control illegal immigration. A stronger fight against trafficking in human beings, and the development of an effective policy on returns and readmission, will be facilitated by the future Constitutional Treaty.”

The Constitutional Treaty did not enter into force, as we know, because of the negative outcome of the referendum about this Treaty in the Netherlands and France. The corresponding — oh irony — Hague Programme and its accompanying Action Plan for the years 2005–2009 expressed to a large extent the same objectives as the Commission fostered, however.¹⁶ The starting point of this programme was the advancement of a comprehensive approach “involving all stages of migration, with respect to the root causes of migration, entry and admission policies and integration and return policies, is needed”. This meant in particular:

14 S. Keukeleire and J. MacNaughtan, *op. cit.*, p. 231.

15 Commission, *Communication (...) Area of Freedom, Security and Justice: Assessment of the Tampere Programme and Future Orientations*, COM (2004) 401, Brussels, 2 June 2004, pp. 9–10.

16 *Official Journal*, C53/1–14, 3 March 2005, and C198/1–22, 12 August 2005.

- the pursuit of close working relations between the relevant policy makers;
- the collection of up-to-date information and data on all relevant migratory developments;
- the development of a common policy based on solidarity and fair sharing of responsibility, including its financial implications;
- the promotion of close practical cooperation between Member States, in particular by establishing appropriate structures in relation to the national asylum services;
- the establishment of a common asylum procedure and a uniform status for those who are granted asylum or subsidiary protection;
- the renewal of the European Refugee Fund for the period 2005–2010;
- the integration of third-country nationals and their descendants in the wider society;
- the establishment of an effective removal and repatriation policy with regard to migrants who do not or no longer have the right to stay legally in the European Union;
- the development of partnerships with third countries, countries of origin and countries of transit.

In conjunction with this last point the European Council clearly recognized:

“that insufficiently managed migration flows can result in humanitarian disasters. It wishes to express its utmost concern about the human tragedies that take place in the Mediterranean as a result of attempts to enter the EU illegally.”

In this way it underpinned the urgent plea to integrate migration into the existing and future relations with third countries, to develop Regional Protection Programmes in partnership with these countries and in close consultation and cooperation with UNHCR, to intensify cooperation and capacity building with countries and regions of transit “both on the southern and the eastern borders of the European Union”, and to enable in this way these countries and regions “better to manage migration and to provide adequate protection for refugees”.

As a complement to this foreign policy programme, the European Council stressed the importance of swift abolition of internal border controls as well as the gradual establishment of the integrated management system for the external borders and welcomed, in particular, the founding of Frontex. It underlined at the same time, however, that the control and surveillance of external borders would remain within the sphere of national border authorities, and that it was necessary to support the Member States “with long or difficult

stretches of external borders” and Member States who are confronted “with special and unforeseen circumstances due to exceptional migratory pressures on these borders”. This support could consist of teams of national experts that would provide rapid technical and operational assistance as well as budgets out of the Community Border Management Fund.¹⁷ In addition the European Council encouraged the production of “joint analyses of migratory routes and smuggling and trafficking practices and of criminal networks active in this area” by Frontex in close cooperation with Europol and Eurojust.

All in all, the Hague Programme was a rather coherent and balanced policy plan with regard to migration, asylum and border control. The big question was whether the (European) Council and the Member States, the Commission and the Parliament were capable of executing this equally soft-worded programme in an effective, transparent and timely manner, notably in the face of the impressive migration flows, the many asylum seekers and the accompanying humanitarian disasters. For all sorts of reasons, well-informed commentators gave these actors the benefit of the doubt.¹⁸ The evaluation of this programme by the Commission in June 2009 demonstrated that effective progress had been made with regard to some of the main points but that there was still a lot to do.¹⁹

The realization, for example, of the Common European Asylum System had entered its second phase of policy development but:

“Operational experience has consistently pointed to the need for practical cooperation, and in the proposed establishment of the Asylum Support Office the EU sought a coherent and efficient means of responding to these challenges.”

In a number of third-party countries, Regional Protection Programmes were established to increase their protection capacities but close reading of the evaluation shows that these programmes were only pilots up to that moment. The Commission nevertheless concluded that migration was better integrated into its development agenda and the European Union’s other external policies:

¹⁷ See with regard to these RABITS, R. Möllers, *op. cit.*, pp. 42–45.

¹⁸ See the comments of E. Guild (‘Danger-Borders under Construction: Assessing the First Five Years of Border Policy in an Area of Freedom, Security and Justice’) and J. Monar (‘The External Shield of the Area of Freedom, Security and Justice: Progress and Deficits of the integrated Management of External EU Borders’), in J. de Zwaan and F. Goudappel (eds), *Freedom, Security and Justice in the European Union; Implementation of the Hague Programme* (The Hague: T.M.C. Asser Press, 2006), pp. 45–90.

¹⁹ Commission, *Justice, Freedom and Security in Europe since 2005: an Evaluation of the Hague Programme and Action Plan*, COM (2009) 263, 10 June 2009.

“This reflected a major change from a primarily security-centred approach to one guided by a deeper understanding of all aspects relevant to migration. Channels were opened for new partnerships and constructive dialogue with regions neighbouring the European Union and with Africa, Asia and Latin America. These discussions were backed up with action on the ground, aiming at making migration and mobility positive forces for development, at better managing legal migration and at preventing and reducing illegal migration.”

In conjunction with this conclusion the Commission stated that illegal migration was not increasing in the EU as a whole, but:

“Mediterranean Member States are shouldering an increasing share of the burden. Particularly worrying is the number of people arriving after dangerous sea crossings.”

The border management had indeed improved. From 2005 to 2008 Frontex conducted 50 joint operations and 23 pilot projects involving several Member States. The Schengen Borders Code, which was published in 2006, had become effective in all Member States “setting down standards and procedures they have to follow in controlling the movement of persons across internal and external European Union borders”. In 2006, 500 000 illegal immigrants were apprehended in the European Union of whom 40% were subsequently returned. Moreover, proposals had been made for the establishment of an entry–exit system through automatic alerts where someone overstays his/her visa and for the establishment of a system for the surveillance of the European Union’s southern and eastern external borders (known as EUROSUR).

All in all, in 2009 migration, asylum and border control policy was still very much a work in progress. The question whether it would be sufficiently robust to deal with a major crisis at the southern and eastern external borders was not posed in the evaluation, however. Effective testing the existing policies and practices on worst-case-scenarios or at least hard-case-scenarios was again not an explicit component of the assessment effort. In this respect also the evaluation of the Hague Programme sketched a rather misleading and reassuring picture of the situation at that moment.

The entry into force of the Lisbon Treaty in December 2009, the political priorities in the accompanying Stockholm Programme 2009 and some new policy documents concerning migration and asylum created — according to the Justice and Home Affairs Council in the press report on its meeting from 25–26 February 2010 — the momentum for the further development of the area of freedom,

security and justice, particularly with regard to the protection of the external borders and combating illegal immigration.²⁰ This press report that listed the relevant measures to achieve these aims, acknowledged also the real incentive to come into action: the humanitarian crisis in the Mediterranean area:

“Stressing the need to share and assess analysis of the continuing illegal arrivals of migrants at the southern maritime borders, as well at the eastern land borders, as shown in particular by recent events in the Mediterranean area, and of the smuggling of migrants and trafficking of human beings, which often have tragic consequences.”

The paragraph “Access to Europe in a globalized world” in the Stockholm Programme indeed contained quite a number of issues regarding the integrated management of the external borders.²¹ Most of them elaborated on the points that had been stated in the (evaluation of) the Hague Programme, e.g., the establishment of the EUROSUR-system, the practical cooperation between border guard authorities and other law enforcement authorities working inside the territory, and the introduction of an electronic system for recording entry to and exit from Member States. Some proposals were new or at least added new elements to the existing ones. A good example is the invitation to Frontex “to consider, within its mandate, establishing regional and/or specialized offices to take account of the diversity of situations, particularly the land border to the East and the sea border to the South”. Another example related to the pressure of the Council on the Commission and the Member States “to ensure that the Schengen Information System II and the Visa Information System would become fully operational in keeping with the timetables to be established for that purpose.”

Honesty compels one to admit that the Stockholm Programme not only contained this quite defensive paragraph but also a more comprehensive paragraph on “A Europe of responsibility, solidarity and partnership in migration

20 Council, *Council Conclusions on 29 Measures for Reinforcing the Protection of the External Borders and Combating Illegal Immigration*, Brussels, 25–26 February 2010 (press.office@consilium.europa.eu).

21 For the text of the Stockholm Programme see the *Official Journal*, C115/1-38, 4 May 2010. The text of the Lisbon Treaty is published in the *Official Journal*, C306/1-271, 17 January 2007. See also S. Wolff and R. Zapata-Barrero, ‘Border Management: Impacting on the Construction of the EU as a Polity?’, in S. Wolff, F. Goudappel and J. de Zwaan (eds), *Freedom, Security and Justice after Lisbon and Stockholm* (The Hague: T.M.C. Asser Press, 2011), pp. 117–134.

and asylum matters”, based on the fundamental commitments set out in the so-called European Pact on Immigration and Asylum:

- to organize legal migration and to take account of the priorities, needs and reception capacity determined by each Member State, and to encourage integration;
- to control illegal immigration by ensuring that illegal immigrants return to their countries of origin or to a country of transit;
- to make border controls more effective;
- to construct a Europe of asylum;
- to create a comprehensive partnership with the countries of origin and of transit in order to encourage the synergy between migration and development.

On the basis of these principles, several sets of measures were presented in order to realize the goals enshrined in these proposals: a dynamic and comprehensive migration policy and a common area of protection and solidarity — also between the Member States — in the field of asylum.²² As far as immigration is concerned, the programme made a distinction between the advancement of legal immigration and the integration of legally residing third-country nationals on the one hand, and the effective enforcement of policies to combat illegal immigration on the other hand. It is nearly self-evident that the last-named policies particularly related to:

“the fight against trafficking in human beings and smuggling of persons, integrated border management and cooperation with countries of origin and transit, supported by police and judicial cooperation, in particular, must remain a key priority for this purpose. Our aim must be to prevent the human tragedies which result from the activities of traffickers.”

The other side of these policies consisted of a large number of measures to achieve “a comprehensive approach on return and re-admission”, based on the idea that “all states are required to readmit their own nationals who are illegally staying on the territory of another state.”

The press report on the Council meeting of 25–26 February 2010 did not of course cover all aspects of the migration and asylum policy of the European Union. It detailed for the most part the measures in the Stockholm Programme

22 S. Wolff and F. Trauner, ‘A European Migration Policy Fit for Future Challenges’, and C. Kaunert and S. Lónard, ‘The EU Asylum Policy: Towards a Common Area of Protection and Solidarity’, in S. Wolff et al., *op. cit.*, pp. 63–78, 79–96.

concerning the protection of the external borders, the fight against human trafficking and illegal immigration, and the return and readmission of illegally staying third-country nationals. This threefold set of rather urgent measures was to a large extent repeated in the overarching Internal Security Strategy (in Action) that was published in November 2010.²³

A remarkable new point in this strategy concerns, however, the announcement of a “pilot project at its southern or south-western border” that on the one hand would consist of the two centres that had already been established in this region in order to fight human trafficking, human smuggling and drugs smuggling, and on the other hand the Commission, Frontex and Europol: “This pilot project will explore synergies on risk analysis and surveillance data in common areas of interest concerning different type of threats, such as drugs and people smuggling.”²⁴ Particularly interesting about this pilot project is that it alludes to a new stage in the development of Europol: no longer only a clearing house and expert centre in The Hague to support national police forces but also a service that on the ground takes part in policing the external borders of the European Union.²⁵

The leadership of the European Union made in the years 2011–2014 an important effort to translate policies into programmes, to convert programmes into measures, and to put measures into action. The formal introduction of EUROSUR and the regulation with regard to the coordinating role Frontex has to play in the protection of the maritime external borders, the new regulation concerning the responsibility of states for handling requests for international protection, as well as the establishment of a new mechanism to monitor and evaluate the application of the Schengen *acquis* by the Member States, clearly demonstrate this effort.²⁶ Against the background of the increasing number of refugees and the related humanitarian disasters in the wake of the military intervention in Libya and the civil war in Syria this rather fast bureaucratic pace was quite understandable: after years of policy making and piecemeal engineering the

23 P. Craig, *Lisbon Treaty; Law, Politics and Treaty Reform* (Oxford: Oxford University Press, 2010) pp.374–378.

24 See R. Möllers, *op. cit.*, pp. 36–39; S. Peers, *op. cit.*, pp. 216–220. In 2008 Frontex and Europol concluded a strategic co-operation agreement (see the website of Europol), on 29 July 2013 Eurojust and Frontex signed a draft memorandum of understanding (Council, 12823/13, Eurojust 65, 29 July 2013). On 26 June 2015 the Europol Deputy Director W. van Gemert visited the Regional Task Force in Catania (press report Europol d.d. 26 June 2015).

25 Commission, *The EU Internal Security Strategy in Action: Five Steps Towards a More Secure Europe*, COM (2010) 673, 22 November 2010.

26 See the *Official Journal* L180/31–54, 29.6.2013; L295/11–26, 6.11.2013; L295/27–37, 6 November 2013, and L189/93–107, 27 June 2014. As far as the coordinating role of Frontex is concerned, see its first annual report about this role: Council, 11162/15, Front 152, 24 June 2015).

European Union was running out of time to prepare itself for dealing in an effective manner with “exceptional circumstances putting the overall functioning of Schengen cooperation at risk”, i.e., worst case scenario’s at its external and inevitably its internal borders. According to the cautious estimates of Frontex, e.g., the number of illegal entries at the official border crossing points went up from 107 365 in 2013 to 283 532 in 2014, many of them Syrians.²⁷ The European Council as well as the Commission was well aware of this very serious risk. At the request of the European Council from 23–24 June 2011 the Commission published in September 2011 a quite alarming communication on *Schengen governance, strengthening the area without internal border control*.²⁸

In this communication the Commission first of all reminded the readers that Schengen is not just about borders and border controls:

“The Schengen area is based on a body of rules (the Schengen *acquis*) which encompasses not only the abolition of border control at internal borders and common rules on the control of external borders but also a common visa policy, police and judicial cooperation, common rules on the return of irregular migrants and the establishment of common databases such as the Schengen Information System.”

The first main point in the communication addresses the revision of the Schengen evaluation mechanism, including e.g., unannounced visits, in order to verify whether the Member States apply the Schengen *acquis*.

The second main point relates to the very controversial issue of re-introduction of internal border controls in case of exceptional circumstances.²⁹ The starting-point in this context is that such measure can only be taken in case of a serious threat to public policy or to internal security. A most relevant example of such a threat is according to the Commission the “persistent failure of a Member State to adequately protect part of the EU’s external border, or a sudden and unexpected inflow of third-country nationals at a part of that border.” The decision to re-introduce internal border controls for renewable periods up to 30 days (with a maximum duration of six months) should be taken by the Commission as an implementing act involving the Member States accordingly. In urgent situations, however, Member States could still take unilateral action

27 Frontex, *Annual Risk Analysis 2015* (Warsaw: Frontex, 2015), pp. 17–25.

28 Commission, *Schengen Governance; Strengthening the Area Without Internal Border Control*, COM(2011) 561, 16 June 2011.

29 See the press reports about this issue, e.g., M. Wehner, ‘Unionspolitiker wollen Grenzen dicht machen’, *Frankfurter Allgemeine Zeitung*, 3 October 2015, and Ph. Wittrock, ‘Jetzt wird es ungemütlich’, *Spiegel Online*, 2 October 2015.

to reintroduce internal border controls, but only for a limited period (five days). In the annex all the means are listed up that can be used to support a Member State that is confronted with a critical situation: Frontex assistance, EU funding, Asylum Support Teams, cooperation with third countries amongst others. On 22 October 2013 the Parliament and Council came to an agreement on the introduction of a number of common rules regarding the re-establishment of internal border controls in exceptional circumstances (even up to two years in some cases) in the Schengen Border Code of 2006.³⁰

The European Union was in the course of 2014 and 2015 more and more overtaken by the facts: the number of refugees at the southern and eastern borders steadily increased and the number of humanitarian disasters in the seas around Italy and Greece, and later on at the external and internal borders of these and other (Member) States, kept pace with this, in the end massive, inflow. Despite the fact that the European Council, the Parliament, the Council and the Commission since June 2014 feverishly did their utmost to maintain the Schengen system in the South of the European Union, it step by step collapsed. And what this collapse meant and means, has been indicated in the beginning of the editorial: collapse of the control system at the external borders of Greece and Italy, police violence against refugees in Hungary etc. etc. In other words, the dreadful realization of the worst case scenario the European Union had not really prepared itself for in the past years.

This nightmare has of course led to a whole spectrum of short term measures, e.g., the special budgets for Greece and Italy in order to be able to cope in a more sufficient manner with the refugee problems, the (military) operations in the Mediterranean Sea (Operation Triton and EUNAVFOR MED³¹) in order to save the lives of refugees and to destroy the boats of smugglers, the establishment of Migration Management Support Teams and Rapid Border Intervention Teams at the southern borders, the augmentation of the strength of Frontex, Europol and the European Asylum Support Office, the (highly controversial) relocation of thousands and thousands refugees from in particular Greece and Italy to other Member States, a diplomatic offensive in relation to the countries of origin and countries of transit (Turkey, Tunisia, Egypt, Mali, etc.), and the refunding of the food programmes and humanitarian aid in Lebanon, Jordan and Turkey.³²

30 *Official Journal*, L295/1-10, 6 November 2013.

31 The military operation EUNAVFOR MED was launched on the basis of a Council Decision from 22 June 2015 (*Official Journal*, L157/51, 23 June 2015).

32 Commission, *Managing the Refugee Crisis: Immediate Operational, Budgetary and Legal Measures under the European Agenda on Migration*, COM (215)490, 23 June 2015. See also

At the same time this horror scenario — by the way: democratic systems usually “need” a crisis to get sufficient political support for fundamental reforms — has led to the necessary reflection about the long term policy with regard to the reform of Schengen. The abolishment of this system is indeed no option at all. Not only because democratic systems always have – definitely in the global village we live in — to solve in one way or another the problems of immigration and asylum, control at the borders, mutual and international police and judicial cooperation, etc., but also because the abolishment of Schengen — without a better alternative that can be implemented and enforced overnight — would obviously mean the end of the European Union: this quasi-federal system cannot function without a Schengen and would come down. The only real option is a well thought-out reform of Schengen and the vigorous enforcement of the renewed system. The Commission noted a few weeks ago deeply frustrated that the European Union is not starting from scratch:

“We already have legislation, financial resources and arrangements in place that are designed to cope with the current situation. The problem is that in many cases they have not been implemented, are not known or are insufficiently exploited.”³³

I seriously question whether the European Union was — even on paper — that prepared for the ongoing crisis as the Commission suggests here. The public documents do not demonstrate in any case that the existing arrangements ever have been severely tested on hard cases, as concluded earlier in this editorial. More important, however, is now to consider the “robust system that will bear the test of time” the European Council and the Commission outline in a rather confusing number of policy papers, among others: *An open and secure Europe: making it happen* (11 March 2014), *The final implementation report of the EU Internal Security Strategy* (20 June 2014), *The European agenda on security* (28 April 2015), *A European agenda on migration* (13 May 2015) and *Managing the refugee crisis: immediate operational, budgetary and legal measures under*

the press reports concerning the meetings of the European Council on 23 April 2015 and 23 September 2015. As far as the relocation programme is concerned see in particular: Commission, *Proposal for a Council Decision Establishing Provisional Measures in the Area of International Protection for the Benefit of Italy, Greece and Hungary*, COM (2015)451, 9 September 2015.

33 Commission, *Managing the Refugee Crisis: Immediate Operational, Budgetary and Legal Measures under the European Agenda on Migration*, COM (2015) 490, 23 June 2015, p. 2.

the European agenda on migration (23 September 2015).³⁴ How will the robust Schengen system look like in their view?³⁵

First of all, this system has to give room for maximizing the benefits of regular migration as well as to reduce irregular migration and to ensure effective return of illegal immigrants. Very important components of this policy objective are the implementation of the Common Visa Policy, the consolidation of the Common European Asylum System, and a smoothly functioning Schengen Information System II. Equally important, however, are the efforts to prevent that large numbers of people “make hazardous journeys across the Sahara, the Mediterranean and other routes in the hope of reaching Europe”. This means that a number of initiatives have to be stepped up: the increase of Regional Protection Programmes, more commitment to Resettlement Programmes in developing countries, the establishment of Protected Entry Procedures outside of the European Union (without prejudice to the existing right of access to asylum procedures in the Union) and the erection of Hotspots where the European Asylum Support Office, Frontex and Europol will work on the ground with frontline Member States to swiftly identify, register and fingerprint incoming migrants.

Secondly, the management of the external borders has to become more integrated via enhancing the role of Frontex, the implementation of EUROSUR and the pursuit of cooperation between military actors and law enforcement. In conjunction with this main point, the policy papers pay particularly a lot of attention to the disruption of cross-border crime networks which are involved in trafficking human beings, small arms and light weaponry, drugs etc. In order to achieve this goal the European Union must as much as possible adapt its response to this threat and coordinate its action within the European Union and beyond. This means that the Member States should focus on these priorities, organize joint operations (Joint Investigation Teams) and implement the Prüm framework that offers automated comparison of DNA profiles, fingerprint data and vehicle registration data, establish — parallel to the existing European Criminal Records Information System — a European Police Record Index System, confiscate at a larger scale the proceeds of crime and prevent that these profits infiltrate in the legal economy, employ the system of liaison officers and

34 See the related COM-documents: COM(2014)154, 11 March 2014; COM(2014)365, 20 June 2014; COM(2015)185, 28 April 2015; COM(2015)240, 13 May 2015; (COM(2015)490, 23 September 2015.

35 Meanwhile the Commission has published quite a number of related plans, e.g., the *EU Action Plan against Migrant Smuggling, 2015–2020*, COM(2015)265, 27 May 2015, and the *EU Action Plan on Return*, COM(2015)453, 9 September 2015.

deploy security experts in Delegations of the European Union in non-Member States etc. The most challenging institutional initiatives are the establishment of the European System of Border Guards and/or a European Coastguard, the realization (finally!?) of the European Public Prosecutor's Office, and the deployment of Joint Mobile Teams by Europol — in cooperation with Frontex and Eurojust — to provide on-the-spot operational and information support to the frontline Member States. These initiatives definitely fit in a strategy to be better prepared for serious crises at the external borders of the European Union. At the same time they could give the feeling that the crisis is used to satisfy the increasing craving of the Brussels institutions for a more operational law enforcement system at the level of the European Union.

The foregoing overview demonstrates that the renewal of Schengen the Brussels policy makers have in mind, is not such a revolutionary one. In the face of the refugee crisis they above all want to improve this system by strengthening a number of its crucial components and integrating them in a more coherent manner. This is a very legitimate but — one has to acknowledge — at the same time also a very difficult manoeuvre. It is not that easy to channel masses of refugees to e.g., the planned Hotspots and to steer in a democratic and effective manner the unruly Member States.³⁶ Nevertheless, one has to fight the criminal networks that in dreadful conditions smuggle that many people from different parts of the globe into the European Union and do not care at all about the many humanitarian disasters.³⁷ It is impossible to apply in an appropriate manner fair immigration and asylum procedures in chaotic circumstances at the external and internal borders of the European Union (135,000 refugees in September in Bavaria³⁸). And one should definitely not underestimate the political and social conflicts in the Member States that will manifest themselves if the quantitative and qualitative gap between immigration of third-country nationals and their societal integration by a lack of housing, work etc. becomes too large.

In addition, one has to conclude that the European Union cannot expect that this reform of Schengen in the foreseeable future will completely prevent

36 As far as the controversial Hotspots are concerned, see P. Valkenet, Italië worstelt met 'hotspots', *Trouw*, 25 September 2015.

37 One of the most shocking examples has been analysed by M. van Reisen, M. Estefanos and C. Rijken, *Human trafficking in the Sinai; refugees between life and death* (Oisterwijk: Wolf Legal Publishers, 2012). Numerous newspapers have published, however, similar stories, e.g., R. Hermann, 'In den Händen der Schlepper', *Frankfurter Allgemeine Zeitung*, 25 September 2015.

38 Report in the *Frankfurter Allgemeine Zeitung*, 24 September 2015.

a refugee crisis similar or dissimilar to the crisis we are confronted with these days. It is a necessary but not a sufficient step, for the simple reason that Schengen is no remedy for the root causes of this crisis. To address these root causes asks for a comprehensive evaluation of the foreign (political, economic and military) policy of the European Union (and its powerful Member States). The European Union accepts within limits this idea. It acknowledges in its security strategy:

“Political change and instability, widening gaps in prosperity and climate change are drivers for both voluntary mobility on a larger scale and forced displacement resulting in pressure on EU’s external borders. The EU has to engage more effectively with neighbouring countries, both East and South, and those further afield to address the root causes of irregular and forced migration.”

The response to this analysis, however, is not to address these causes themselves but:

“To this end, the EU should continue to assist countries of origin and transit to strengthen their capacity to prevent irregular migration and combat migrant smuggling and trafficking in human beings, improve border management, as well as asylum and reception capacities.”

It goes without saying that it is all in all relatively easy for the European Union to strengthen its own Schengen system and to support similar systems in the related countries, but if this security policy is not more and better embedded in a foreign policy that honestly and effectively focuses on the root causes, the area around its external borders will end up in a situation that resembles still much more a battlefield than is now already the case. The policy makers in the European Union are of course aware of this serious risk. In their papers they pinpoint the importance of “national development and poverty reduction plans” and the badly needed support “for human rights, democracy and fundamental values and good governance” in at least the immediate neighbourhood of the European Union. The very sketchy way in which these points are brought up in the policy papers does not testify of sufficiently real engagement, however. For this reason this editorial is a plea for a more balanced and comprehensive security policy in order to contain in a more adequate manner the permanent risk of a refugee crisis at the external and internal borders of the European Union.