

# The EU's Triple Problem Revealed by the Refugee/Mass Influx Crisis

Guest Lecture at the University of Belgrade, 30 May 2016  
by Dr Markus H.F. Mohler,  
fmr. Lecturer on Public, esp. Safety/Security and Police Law  
at the Universities of Basel and St. Gallen / Switzerland

## Contents:

- I Introduction
- II Three Problem Complexes
- III The Individual Problems
- IV Further Aspects
- V Final Remarks

## I Introduction

“Let’s be honest, the Dublin Procedure in its current form is obsolete in practice”, said German Chancellor ANGELA MERKEL on 7 October 2015 to the EU Parliament,<sup>1</sup> and shortly afterwards the President of the EU Commission, JEAN-CLAUDE JUNKER, added at the same institution: “The Schengen System is partly comatose”.<sup>2</sup> Lacking solidarity among EU member states (MS) as a matter of fact is openly and officially deplored by the JEAN ASSELBORN, the Foreign and Migration Minister of Luxemburg and Chairman of the Council during the second part of 2015.<sup>3</sup>

Yet, these stark statements describe symptoms and their obvious and dramatic consequences, rather than the actual reasons for the shortcomings.

The EU is based on a legal or “constitutional” concept of its own without any predecessors, models or other experiences. From a constitutional law perspective the EU is a legal construction *sui generis*,<sup>4</sup> or – as it has been nicknamed – an «unidentified political object» (WEILER)<sup>5</sup> or rather a *constitutionally unidentified political reality* – since it *is* real.<sup>6</sup> The initial concept of the Rome Treaties was not as far reaching as it is now conceived according to art. 1 (2) of the (Lisbon) TEU<sup>7</sup>: “This Treaty marks

<sup>1</sup> Reuters online, 7/10/2015 (<http://www.reuters.com/article/us-europe-migrants-merkel-idUSKCN0S11W120151007>).

<sup>2</sup> 25/11/2015 (<https://euobserver.com/migration/131265>).

<sup>3</sup> Neue Zürcher Zeitung, 28/12/2015, 7.

<sup>4</sup> Similar: CHRISTA TOBLER/JACQUES BEGLINGER, *Essential EU Law in Text*, 2014, 38.

<sup>5</sup> J.H.H. WEILER, *The EU Constitutional Treaty and its distinction between legislative and non-legislative acts – Oranges into apples?*, in: Jean Monnet Working Paper 01/06, New York University 2006, 45.

<sup>6</sup> The German Constitutional Court (89, 155, Judgment of 12 October 1993, ergo before the Lisbon Treaties) called the European Union a «Staatenverbund» (n. 90 et seq.). «Staatenverbund» is a term not known so far in constitutional science as a state type (see HERDEGEN, *Europarecht*, 16<sup>th</sup> ed., München 2014, § 5, n. 15 et seq., 22, and § 6, n. 1); cf. STEPHAN BREITENMOSER/ROBERT WEYENETH, *Europarecht*, 2<sup>nd</sup> ed., Zürich/St. Gallen 2014, no. 309. Its identity as a (politically) legal object becomes evident as subject of the international law when the Union is dealing with third countries such as Switzerland or states on the accession path such as Serbia; see art. 47 of the Treaty of the European Union (TEU): “The Union shall have legal personality” (OJ C 115 of 9 May 2008, 13).

<sup>7</sup> Treaty of the European Union, of 13 December 2007 (OJ C 83 of 30/3/2010, 13 et seq.; consolidated version).

a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.” Notice the wording: “union among the peoples” and not union among the member states (as the term “*Staatenverbund*” would suggest). And decisions shall be taken as closely as possible to the people and not to the national authorities or the national legislative procedures, i.e. more or less directly – “Brussels to people”. Aiming at such a political mechanism and following it at least partly equals navigating in uncharted waters full of unrecognised dangers. Great numbers of legislative (or non-legislative<sup>8</sup>) acts are issued without any direct influences of the people as it is stated. A contradiction in itself. It amounts to what GOETHE described in his ballad on the Sorcerer’s Apprentice: “The ghosts I’ve called won’t let me go.”

## II Three Problem Complexes

Three fundamental problem complexes now clearly revealed by the severe refugee crisis and mass influx phenomenon can be identified:

- The EU’s basic constitutional structure – with its competing allocation of powers or the “liquefaction” of sovereignty
- The dysfunctional political mechanism
- The relativity of the rule of law – including the respect for, and protection of, human rights.

These three complexes of problems are, of course, interrelated and influence each other permanently. The result is not just the sum of them but an increased problematic of its own. It impacts directly on the citizens and *all* people living in the EU member states. It leads increasingly to disregard of, or outright resistance against, legislative acts if situations are felt to get out of hand.

What we see now are two opposing tendencies: the so-called post-national paradigm, based on humanitarian or libertarian<sup>9</sup> convictions. This considers any controlled borders – and particularly the “fortress Europe”<sup>10</sup> – for a 19<sup>th</sup> or 20<sup>th</sup> century relict or a denial real freedom (of movement). On the other hand there is the conservative paradigm which defends local or regional values, existing public order, and traditions that preserve their – often precarious – assets.<sup>11</sup> In between is “Brussels” confused by permanently rotating (national) compasses. It compensates the loss of a clear objective and a widely accepted legislation mechanism by adding more of complex secondary law. These regulations and directives get more and more complicated and are not suitable anymore for a proper application in reality.<sup>12</sup>

<sup>8</sup> Cf. WEILER (FN 5).

<sup>9</sup> See e.g. MARCO MONA, «Es gibt zu viele Juristen, die keine Ahnung haben von der Welt», *Neue Zürcher Zeitung*, 21/5/2016, 51.

<sup>10</sup> Cf. Vgl. SONJA BUCKEL, „Welcome to Europe“, *Die Grenzen des europäischen Migrationsrechts*, Bielefeld 2013, *passim*.

<sup>11</sup> Cf. UDO DI FABIO, *Wem die Stunde schlägt*, *Neue Zürcher Zeitung*, 17/5/2016, 10.

<sup>12</sup> See the list of secondary law regulations covering immigration, asylum and subsidiary protection in: MARKUS H.F. MOHLER, *Die EU hat mit dem Kernbereich von «Schengen» und mit «Dublin» den Stresstest bisher nicht bestanden*, in: *Sicherheit&Recht*, 1/2016, 3 et seq., 8 et seq.

### III The Individual Problem Complexes

#### 1 The Basic Constitutional Structure

##### a Definition of Problems

There are various opinions with regard to the constitutional set up of the EU<sup>13</sup> but all agree that the EU is – despite its many institutional elements of a state – *not* a federal state. It has been called a “Staatenverbund”. This means some sort of a combination – or rather “union” – of states more closely linked to one another than in a loose federation.<sup>14</sup> The EU is certainly «more» than an *intergovernmental organisation*<sup>15,16</sup> but far from a *federal state*<sup>17</sup> as well. The EU is arguably closest to what is termed a confederation. But just a definition by the German Constitutional Court demonstrates the confusion about the various terms and their contents: “The concept of the “*Verbund*” (literally translated: combine) means a close and long term combination of sovereign states which on a contractual basis exercises power, which’s fundamental order, however, is solely subject of the member states’ decisions and their peoples – i.e. the citizens – of the member states remain the responsible bodies of the democratic legitimation”.<sup>18</sup> Now this definition is – *mutatis mutandis* – applicable for the Swiss Confederation, no doubt a federal state – as opposed to the EU.<sup>19</sup>

For many people, particularly politicians, this legal structure does not appear as a system of shared and complementary sovereignty but as “liquefaction” (HABERMAS<sup>20</sup>) of the own state’s sovereignty.

##### b Competing Allocations of Power: Union Law vs. Individual States’ Sovereignty

The former three pillar structure according to the Maastricht Treaty<sup>21</sup> was clearer with regard to the different competences. The second pillar (foreign and security policy) and the third (justice and home affairs) belonged clearly to the individual member states’ primary competences. The first

<sup>13</sup> Cf. e.g. CHRISTIAN CALLIES, *Die neue Europäische Union nach dem Vertrag von Lissabon*, Tübingen 2010, 43 m.w.H.; KLAUS HÄTSCH, *Perspektiven der europäischen Integration*, in: Olaf Leisse (Hrsg.), *Die Europäische Union nach dem Vertrag von Lissabon*, Wiesbaden 2010, 69 ff., 73; MATTHIAS HERDEGEN (FN 6), § 5, n. 15 ff., 22 m.w.H.; J.H.H. WEILER (FN 5).

<sup>14</sup> See FN 6.

<sup>15</sup> Yet, HERDEGEN (FN 6), § 5, n. 1, calls it an *international organisation* as subject of international law rights and obligations (however, the EU is – so far – not a UN member and therefore not *directly* bound to the UN Charter as opposed to its individual MS, HERDEGEN [FN 6] § 5, n.4).

<sup>16</sup> The European Council (not to be confused with the Council of Europe: <http://www.coe.int/en/>) is – as one of his two characteristic and functions – the intergovernmental part of the EU construction (HERDEGEN [FN 6], § 7, n.4; TORSTEN OPPELLAND, *Institutionelle Neuordnung und Demokratisierung*, in: Olaf Leisse (ed.) (FN 13), 79 et seq., 86.

<sup>17</sup> See CHRISTIAN CALLIES (FN 13), 43 (with further references).

<sup>18</sup> Translation by the author of this paper.

<sup>19</sup> Art. 3 of the Swiss Federal Constitution reads: “Cantons. The Cantons are sovereign except to the extent that their sovereignty is limited by the Federal Constitution. They shall exercise all rights that are not vested in the Confederation.”

<sup>20</sup> JÜRGEN HABERMAS, *Faktizität und Geltung*, Frankfurt 1998, 626; HABERMAS, *Die postnationale Konstellation*, Frankfurt 1998, 133 ff. See e.g. the arguments around „Brexit“ or in Switzerland.

<sup>21</sup> Of 7 February 1992 (OJ C 191 of 29 July 1992, 1 et seq.).

pillar which contained the former European Economic Community (EEC) fell under the EU authority with regard to legislation. According to the TEU and TFEU (Lisbon)<sup>22</sup> the general devolution is more complicated. A closer look shows the complicated set-up of regulations: Only maintaining public order and internal security is reserved for the MSs' sole competence (art. 72 TFEU), yet with exceptions in regard of penal provisions. In any other field the allocation of the competences to legislate is regulated by different procedures:<sup>23</sup>

- the *ordinary legislation* procedure (e.g. art. 75[1] TFEU) ➤ *majority rule* (eliminating the formerly possible “veto” by a MS);
- the *special legislation* procedure (e.g. art. 81[3]; civil matters, measures concerning family law with cross-border implications], 87[3]; to establish operational measures], 89 [regulating police operation on the territory of another MS] TFEU) ➤ *unanimity rule*;
- “emergency break procedure” (in relation to the ordinary procedure) in regard to penal (procedure) legislation (art. 82[3], 83[3] TFEU); and
- Action for annulment of a legislative act to the ECJ (art. 263[2] TFEU).

Furthermore and most important, the right to grant asylum remains according to *international law principles* in the competence of each country whether part of the EU or not.<sup>24</sup> But every country's *formal* competence in regard to granting asylum or subsidiary and temporary protection, however, is limited by three restrictions of the *substantive* international law:

- The *non-refoulement obligation* by *refugee law* comprising
  - ✓ The protection of the *individually* persecuted persons by the Geneva Convention on the Refugee Status,<sup>25</sup>
- The *human rights non-refoulement obligation* comprising
  - ✓ The protection of all people against torture, other cruel or inhuman or degrading treatment or punishment<sup>26</sup>;
  - ✓ the particular protection of children<sup>27</sup>; and
  - ✓ the protection against enforced disappearance;<sup>28</sup>
- the *humanitarian law protection* of people (not falling under the first two categories) fleeing violence of international or non-international armed conflicts.<sup>29</sup>

The apparent contradiction in regard of the competences is formally “resolved” by the definition of the competences of the EU: The EU shall “develop a policy with a view to: (a) ensuring the

<sup>22</sup> TEU: FN 7; TFEU: Treaty on the Functioning of the European Union (same date and OJ like TEU).

<sup>23</sup> BREITENMOSER/WEYENETH (FN 6), no 1042 et seq.

<sup>24</sup> Cf. MOHLER (FN 12), 4 et seq. (with further references).

<sup>25</sup> Convention relating to the Status of Refugees of 28 July 1951 (UNTS, vol. 189, p. 137) with Protocol relating to the Status of Refugees (UNTS, vol. 606, p. 267).

<sup>26</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 10 December 1984 (UNTS 1465).

<sup>27</sup> Convention on the Rights of the Child of 20 November 1989 (UNTS 1665).

<sup>28</sup> International convention for Protection against enforced Disappearance of 20 December 2006 (UNTS 2716).

<sup>29</sup> Cf e.g. the Recommendation of the Council of Ministers or the European Council Rec(2001) 18 of 2001 (<https://wcd.coe.int/ViewDoc.jsp?id=241721&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>) and <https://wcd.coe.int/ViewDoc.jsp?id=347555&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>).

absence of any controls on persons, whatever their nationality, when crossing internal borders;” (art. 77[1]) and “...a *common policy* on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*” (art. 78[1] TFEU). Yet, the individual states are sovereign to decide. In reality the “split” competences have not been working under the stress of the current mass influx of refugees and other migrants. To the contrary, it has been facilitating open conflicts between “Brussels” and individual member states.<sup>30</sup>

## 2 The Dysfunctional Political Mechanism

The apparent failing of EU authorities as well as many of the MS to cope with the mass influx of refugees and migrants according to the fundamental legal principles (ECHR<sup>31</sup> and EU CFR<sup>32</sup>) and a great number of detailed regulations revealed a *structural crisis*: The relevant legal obligations have often and in various countries not been followed either by the sheer impossibility or by simply not accepting the pertinent legal provisions.

Quite a few elements may have contributed to this deplorable situation:

- The proposals for legislative acts and these themselves are known by a small elite (“élu[e]s) only, i.e. the ministers, the parliamentarian and members of expert groups. Even among those quite a few appear to have limited knowledge especially of interconnected meanings and consequences of legal provisions. No wonder: Articles even of directives may stretch over more than a full page and are hard to understand. Great numbers, even the local national/local politicians, know little if anything of the pertinent legislation – a fact which may also depend of the quality (and freedom) of the media in a country.<sup>33</sup>
- The legislative acts are in their majority hugely complicated and complex. Even those who are able and willing for careful deliberations (possibly a rather small minority) may have

---

<sup>30</sup> MOHLER (FN 12), 22.

<sup>31</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (Council of Europe, CETS 005).

<sup>32</sup> Charter of Fundamental Rights of the EU (2010/C 83/02, OJ C 83 of 30/3/2010, 389 et seq.).

<sup>33</sup> MOHLER (FN 12), 25.

great difficulties to understand the legal texts.<sup>34,35</sup> This can be shown by the high number of preliminary rulings by the ECJ (415 in 2015<sup>36</sup>) asked for by the highest national courts (art. 267 TFEU).

<sup>34</sup> Directives are to be translated and integrated into the national legislation by each country (art. 288[3] TFEU). As an example for the complexity: Art. 46 of 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 29/6/2016, 60 et seq.) reads as follows (801 words!):

“*Article 46*

The right to an effective remedy

1. Member States shall ensure that applicants have the right to an effective remedy before a court or tribunal, against the following:

(a) a decision taken on their application for international protection, including a decision:

(i) considering an application to be unfounded in relation to refugee status and/or subsidiary protection status;

(ii) considering an application to be inadmissible pursuant to Article 33(2);

(iii) taken at the border or in the transit zones of a Member State as described in Article 43(1);

(iv) not to conduct an examination pursuant to Article 39;

(b) a refusal to reopen the examination of an application after its discontinuation pursuant to Articles 27 and 28;

(c) a decision to withdraw international protection pursuant to Article 45.

2. Member States shall ensure that persons recognised by the determining authority as eligible for subsidiary protection have the right to an effective remedy pursuant to paragraph 1 against a decision considering an application unfounded in relation to refugee status.

Without prejudice to paragraph 1(c), where the subsidiary protection status granted by a Member State offers the same rights and benefits as those offered by the refugee status under Union and national law, that Member State may consider an appeal against a decision considering an application unfounded in relation to refugee status inadmissible on the grounds of insufficient interest on the part of the applicant in maintaining the proceedings.

3. In order to comply with paragraph 1, Member States shall ensure that an effective remedy provides for a full and *ex nunc* examination of both facts and points of law, including, where applicable, an examination of the international protection needs pursuant to Directive 2011/95/EU, at least in appeals procedures before a court or tribunal of first instance.

4. Member States shall provide for reasonable time limits and other necessary rules for the applicant to exercise his or her right to an effective remedy pursuant to paragraph 1. The time limits shall not render such exercise impossible or excessively difficult.

Member States may also provide for an *ex officio* review of decisions taken pursuant to Article 43.

5. Without prejudice to paragraph 6, Member States shall allow applicants to remain in the territory until the time limit within which to exercise their right to an effective remedy has expired and, when such a right has been exercised within the time limit, pending the outcome of the remedy.

6. In the case of a decision:

(a) considering an application to be manifestly unfounded in accordance with Article 32(2) or unfounded after examination in accordance with Article 31(8), except for cases where these decisions are based on the circumstances referred to in Article 31(8)(h);

b) considering an application to be inadmissible pursuant to Article 33(2)(a), (b) or (d);

(c) rejecting the reopening of the applicant's case after it has been discontinued according to Article 28; or

(d) not to examine or not to examine fully the application pursuant to Article 39,

a court or tribunal shall have the power to rule whether or not the applicant may remain on the territory of the Member State, either upon the applicant's request or acting *ex officio*, if such a decision results in ending the applicant's right to remain in the Member State and where in such cases the right to remain in the Member State pending the outcome of the remedy is not provided for in national law.

7. Paragraph 6 shall only apply to procedures referred to in Article 43 provided that:

(a) the applicant has the necessary interpretation, legal assistance and at least one week to prepare the request and submit to the court or tribunal the arguments in favour of granting him or her the right to remain on the territory pending the outcome of the remedy; and

(b) in the framework of the examination of the request referred to in paragraph 6, the court or tribunal examines the negative decision of the determining authority in terms of fact and law.

If the conditions referred to in points (a) and (b) are not met, paragraph 5 shall apply.

8. Member States shall allow the applicant to remain in the territory pending the outcome of the procedure to rule whether or not the applicant may remain on the territory, laid down in paragraphs 6 and 7.

9. Paragraphs 5, 6 and 7 shall be without prejudice to Article 26 of Regulation (EU) No 604/2013.

- The accessibility of the pertinent EU legislation is limited. It requires a lot of knowledge and skills to find them within a reasonable period of time. This is caused by (a) the more or less permanent partial revisions or amendments of legal texts without providing a consolidated version in most instances and (b) the technically rather demanding procedure via internet.<sup>37</sup>
- The parliamentary representation within the EU has to cope with the quadrupling of the problems inherent in any parliamentary representation:<sup>38</sup>
  - To bridge the gap between the musts according to international law and the rule of law principles on one side and the will (*volonté*) of the people in the various countries oscillating between rational and emotional motifs. National governments (members of them are also members of the respective EU council) cannot completely disregard opposing manifestations in their home countries even when they are overwhelmingly emotionally motivated – as long as there are no legal ways of opposition such as a referendum.<sup>39</sup>
  - To try to harmonise the various opinions in the member countries on “what is right” based on different (national) histories and experiences, different traditions, conventions, economic conditions and fears.
  - To bridge the much greater distance between the people and the “Brussels” compared with the one to national authorities (which may even be great);
  - Finally, to deal with the different political structures: The vast majority of MS follow (more or less) a bi-partisan system (government/majority in national parliament vs. opposition). The EU Parliament (as well as the Council of Ministers), however, is composed of a multitude of parties with their representatives. This requires the will to compromise and concordance, an ability which is not so widespread everywhere. And a compromise reached in Brussels may find strong opposition in the home country.

Therefore, it may be asked whether the EU legislation is based on a *rational* general consent (*volonté générale*<sup>40</sup>) of the people, indispensable for a democratic system (art. 1 and 2 TEU), and therefore accepted. It appears e.g. that at least the findings of the Resolution of the European Parliament on drawing up of a common European policy on refugees of 1986<sup>41</sup> is not based on the necessary

---

10. Member States may lay down time limits for the court or tribunal pursuant to paragraph 1 to examine the decision of the determining authority.

11. Member States may also lay down in national legislation the conditions under which it can be assumed that an applicant has implicitly withdrawn or abandoned his or her remedy pursuant to paragraph 1, together with the rules on the procedure to be followed.”

<sup>35</sup> MOHLER (FN 12), 23, 25.

<sup>36</sup> European Court of Justice, Annual Report 2015, 9 ([http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-04/rapport\\_annuel\\_2015\\_activite\\_judiciaire\\_de.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2016-04/rapport_annuel_2015_activite_judiciaire_de.pdf)). Cf. MARKUS H.F. MOHLER, Gedanken zu den Grenzen des Schengener Grenzkodex, in: Breitenmoser/Gless/Lagodny (ed.), Schengen und Dublin in der Praxis – Aktuelle Fragen, Zürich/St. Gallen 2015, 91 et seq., 123.

<sup>37</sup> MOHLER (FN 12), 25; THE SAME, Der neue Besitzstand von Schengen, in: Breitenmoser/Gless/Lagidny (ed.), Schengen in der Praxis, Zürich/St. Gallen 2010, 7 et seq., 21 et seq.

<sup>38</sup> MOHLER (FN 12), 22 et seq. (including the first 3 of the following points).

<sup>39</sup> KARL POPPER diagnosed the ambivalence of human beings between rational and emotional motifs (Die offene Gesellschaft und ihre Feinde, 8<sup>th</sup> ed., Tübingen 2003, 312 et seq., 326 et seq.). For further references see MOHLER (FN 12), 24 et seq.

<sup>40</sup> JEAN-JACQUES ROUSSEAU, Du Contrat Social ou Principes du droit politique, 1762.

<sup>41</sup> OJ C 2 283 of 10/11/1986, 74 et seq.

common consent any more even by those countries which were at that time already EC member states.

### 3 Rule of Law

#### a The Legal Fundament

Art. 2 TEU reads: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.” And art. 67(2) TFEU reads: “It shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals. ...”

Of course, the CFR extended by all the secondary legislative acts referring directly to it is prominent part of this legal fundament.

#### b Deviations

It does not require a great deal of legal knowledge to find out that these provisions have not been followed exactly with regard to manage the mass influx. To the contrary, there was first much confusion about how to handle the masses of arriving people at the external borders and then about the legality of controls at internal borders and how to deal with those who have already entered a specific country by crossing an internal border:

- It did and does not correspond with the pertinent regulations to pull up a fence at the external borders *without* establishing a transition zone where the due procedure can be followed<sup>42</sup> supported by the necessary infrastructure to provide shelter and subsistence;
- Establishing controls at internal borders without following the precise regulations<sup>43</sup> was illegal;
- Most interesting is that the Commission did not apply – as far as identifiable – the directive of 2001 focusing on a mass influx of displaced persons (except for using the financial means of the particular funds).<sup>44</sup> It may be that the EU authorities were afraid of lacking solidarity

<sup>42</sup> Art. 3 of the Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (OJ L 180 of 29/6/2013, 100 et seq.).

<sup>43</sup> Regulation (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 13/4/2006, 1), art. 23-26, changed by Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 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 6/11/2013, 1). See now the EU list of controls at internal borders according to the pertinent provisions: [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/re-introduction-border-control/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/re-introduction-border-control/index_en.htm).

<sup>44</sup> Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member



of MS so that the foreseen measures would not have worked out. This directive would have immediately provided the legal basis for controls at internal borders following the corresponding recommendation by the Commission.<sup>45</sup>

- The single article of Protocol No 24 to the TEU and TFEU<sup>46</sup> reads in its beginning: “Given the level of protection of fundamental rights and freedoms by the Member States of the European Union, Member States shall be regarded as constituting safe countries of origin in respect of each other for all legal and practical purposes in relation to asylum matters.” Based on this legal text the ECJ concluded: “In those circumstances, it must be assumed that the treatment of asylum seekers in all Member States complies with the requirements of the Charter, the Geneva Convention and the ECHR”.<sup>47</sup> Yet, a little further down it admitted: “In those circumstances, the presumption underlying the relevant legislation, ..., that asylum seekers will be treated in a way which complies with fundamental rights, must be regarded as rebuttable”.<sup>48</sup> This judgement rendered the Dublin system a first time as dysfunctional.

The rule of law is attached to three hinges:

- a legislation respecting human rights and fundamental freedoms and following a truly democratic transparent procedure;
- the proper application of the legal provisions again with respect of the fundamental rights in the first place and
- the necessary legal remedies by a court (according to the CFR) or at least an independent authority (according to the ECHR).

Whether these principles have been sufficiently followed may be assessed by all themselves. But the question may be asked whether there is also some sort of “liquefaction” of the law, even of the rule of law, to be diagnosed.

---

States in receiving such persons and bearing the consequences thereof (OJ L 212 of 7/8/2001, 12). Even the most recent Council Implementing Decision of 12 May 2016 allowing specified controls at internal borders relies on the Schengen Border Codex Regulation and not on the Council Directive of 2001 ([http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index\\_en.htm](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/borders-and-visas/schengen/reintroduction-border-control/index_en.htm)).

<sup>45</sup> It is noteworthy that the European Council agreed at an *informal* meeting of 23 September 2015 how to distribute the 160'000 people needing international protection among the member states ([http://ec.europa.eu/news/2015/09/20150923\\_de.htm](http://ec.europa.eu/news/2015/09/20150923_de.htm)). The real figures never reached 20% of the total (see Member States' Support to Emergency Relocation Mechanism as of 19 May 2016, [http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state\\_of\\_play\\_-\\_relocation\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/press-material/docs/state_of_play_-_relocation_en.pdf)).

<sup>46</sup> OJ C 83 of 30/3/2010, 305.

<sup>47</sup> ECJ, Joined Cases C-411/10 and C-493/10, *N.S. and M.E. et al./The United Kingdom*, Judgement of 21/12/2011, § 80.

<sup>48</sup> Loc. cit., 104.

## IV Further Aspects

### 1 Equal Human Rights Standards

In its opinion regarding the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>49</sup> the ECJ stated “that the principle of mutual trust between the Member States is of fundamental importance in EU law, given that it allows an area without internal borders to be created and maintained. That principle requires, particularly with regard to the area of freedom, security and justice, each of those States, save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognised by EU law” and further on that “the Member States may, under EU law, be required to presume that fundamental rights have been observed by the other Member States, so that not only may they not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law, but, save in exceptional cases, they may not check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU”.<sup>50</sup> In the Judgment of the European Court of Human Rights<sup>51</sup> *Tarakhel v. Switzerland* the Court contradicted this presumption by demanding a higher standard for the support of the family in question than any requirement (art. 8 in combination with art 3 ECHR).<sup>52</sup>

### 2 The Consequences for the Intertwined Schengen/Dublin System

The Schengen Border Codex eliminating all internal controls – safe special, short term situations and following a particular procedure – led also to a unionised borderless asylum area. Given that the Human Rights standards are not in all MS as equal as stipulated by the EU legislation the question may be asked whether the factual situation withdraws the very fundament of the Schengen/Dublin system – or whether the conditions for an area without internal borders are still present.<sup>53</sup>

<sup>49</sup> Opinion 2/13 of the Court (Full Court) 18 December 2014 pursuant to Article 218(11) TFEU — Draft international agreement – Compatibility of the draft agreement with the EU and FEU Treaties (ECLI:EU:C:2014:2454).

<sup>50</sup> Loc. cit. § 190 et seq.

<sup>51</sup> Of the Council of Europe, Strasbourg. This judgement may even have been a reason why the ECJ held the agreement on the accession of the EU to the ECHR is not compatible with Article 6(2) TEU or with Protocol (No 8) relating to Article 6(2) of the TEU on the accession of the Union to the ECHR (MARC BOSSUYT, *The European Union Confronted with an Asylum Crisis in the Mediterranean: Reflections on Refugees and Human Rights Issues*, in: *European Journal of Human Rights* 2015/5, 598 et seq. (with further references).

<sup>52</sup> MARC BOSSUYT, *Tarakhel c. Suisse, La Cour de Strasbourg rend encore plus difficile une Politique commune européenne en matière d’asile*, in: *Schweizerische Zeitschrift für internationales und europäisches Recht* Bd./Jg. 25, I/2015, 3 ff.; MARKUS H.F. MOHLER, *Anmerkungen zum EGMR-Urteil i.S. Tarakhel c. Schweiz. Überstellung einer afghanischen Familie durch die Schweiz nach Italien gemäß Dublin-Verordnung*, in: *Allgemeine Juristische Praxis* 5/2015, 818 ff. Even the ECJ Judgement *N.S. and M.E. et al./The United Kingdom* (FN 47) can be considered as a contradiction in itself in this regard.

<sup>53</sup> MOHLER (FN 12), 21.

Schengen and Dublin can only function if *all* comply with the legislation in force and help each other with the required solidarity.

### 3 Legal Fundament for Other Forms of Cooperation

“Schengen” is today actually much more than its original core part, the *border management*. In addition to its original objectives it has been developed to an indispensable multinational legal system. Beyond EU membership with associated countries – it is the legal basis for transnational police cooperation, the simplified exchange of information,<sup>54</sup> transnational surveillance,<sup>55</sup> transnational hot pursuit,<sup>56</sup> and controlled deliveries,<sup>57</sup> the harmonised legislation on weapons,<sup>58</sup> the visa-regulations and – of greatest importance – the Schengen Information System (SIS).<sup>59</sup> All these forms of transnational police cooperation and mutual judicial assistance as well as extradition rely on the founded presumption that the partner state complies with the standards of the human rights and fundamental freedoms as laid down in the CFR or the ECHR.<sup>60</sup> If this is not the case there will be different huge problems: fighting terrorism and organised crime in the first place.

## V Final Remarks

The EU is one of the reactions to the horrors of the Second World War such as such the Universal Declaration of Human Rights of 10 December 1948<sup>61</sup> or the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>62</sup> As a political concept for the “old continent” it is brilliant, ingenious. But its fundamental legal construction appears as not sufficiently matching its own objectives such as, say, stated in art. 1 and 2 TEU.<sup>63</sup>

<sup>54</sup> 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 29/12/2006, 89 et seq.).

<sup>55</sup> Art. 40 of Convention of 19 June 1990 Implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (CISA; OJ L239 of 22/9/2000, 9 et seq.).  
<sup>56</sup> Art. 41 CISA.

<sup>57</sup> Art. 73 CISA (restricted on narcotics), extended to all offences which are subject to international judicial assistance by the Council Act of 29 May 2000 establishing in accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (OJ L 197 of 12/7/2000, 1 et seq.).

<sup>58</sup> Directive 2008/51/EC of the European Parliament and of the Council of 21 May 2008 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons (OJ L 179 of 8//2008, 5 et seq.).

<sup>59</sup> Council Regulation (EU) No 1272/2012 of 20 December 2012 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) (recast) (OJ L 359 of 29/12/2012, 21 et seq.) and Council Regulation (EU) No 1273/2012 of 20 December 2012 on migration from the Schengen Information System (SIS 1+) to the second generation Schengen Information System (SIS II) (recast) (OJ L 359 of 29/12/2012, 32 et seq.).

<sup>60</sup> Art. 25 para. 2 and 3 of the Swiss Federal constitution read e.g.: “<sup>2</sup> Refugees may not be deported or extradited to a state in which they will be persecuted. <sup>3</sup> No one may be deported to a state in which they face the threat of torture or any other form of cruel or inhumane treatment or punishment.” (this comprises also the elimination of the risk of a deportation to a non-safe country by the partner state.)

<sup>61</sup> A/RES/3/217 A of the UN General Assembly.

<sup>62</sup> FN 31.

<sup>63</sup> “Article 2 The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values

A crisis is always also a chance. The obvious current crisis should be used for an in-depth analysis of systemic shortcomings. This honest analysis should lead to conceive overall accepted measures to preserve the *fundamental European values* developed since the enlightenment as well as the human rights by following procedures which allow to reach ROUSSEAU's *volonté générale* and to respect MONTESQUIEU's *Spirit of the Laws* with the emphasis on the *separation of powers* in each member state.

It is worthwhile. Not to do so may develop into the equivalent of a political black hole – in view of other challenges anything but recommendable.