

Border security between freedom of movement and illegal migration - The “Schengen-Cooperation” according to the Lisbon Treaty¹

The lifting of the iron curtain, which had divided the European Continent for more than half a century, gave us the chance to reunite Europe in freedom, security and justice, and to enlarge the European Union.²

It was a long way from the Treaties of Rome in 1957, with a European Community of only 6 Member States, to the recent “Lisbon Treaty”³, with a European Union of 27 Member States. The Lisbon Treaty was a further step in deepening the European Union. And this will not be the end of this process of integration of States and Nations, which is without example in human history.

The Lisbon Treaty has migration policy defined as a competence of the European Union shared with the Member States. The policy of the European Union in this area is based on three pillars:

- The promotion of legal migration,
- The fight against illegal migration and
- The link between migration and development.

The Union pursues these objectives on the firm basis of full respect of human rights.

We should not forget that the European Union and its Member States more than 50 years ago was a pioneer of for instance the social security of migrant workers:

In 1958, the European Council issued two regulations on social security of migrant workers which were subsequently superseded by regulations⁴. Nationals from Iceland, Liechtenstein and Norway are also covered via the European Economic Area (EEA) Agreement.

What does the “Schengen Border Regime” mean? It simply means to abolish internal border controls and to intensify border checks at the external borders of the Schengen area.

Since a couple of years you can travel by car from Helsinki to Lisbon without any passport controls and you can leave Frankfurt Airport to Athens by plane without border controls and just an identity check by the airline. Border controls by State authorities just take place if you leave or enter the “Schengen Area”.

¹ Artikel in “Voices of Mexico”, Heft 93, 2012.

² The precondition for this historical operation was to make the European Union fit for opening its doors for 12 new Member States. “Fit” in this context means,

- To facilitate and accelerate the decision-making-process in the Community and in the Union,
- To make clear, which competences have to be located on European level and which competences have to be dealt with by the Member States and
- To improve the democratic legitimacy of the various bodies of the Community and of the Union.

³ Which came into force December 2009.

⁴ Regulation 1408/71, supplemented by implementing Regulation 574/72.

At the beginning of European Integration after the Second World War in the 50th it seemed to be absolutely impossible

- To open borders between France and Germany and Poland and Germany,
- To allow German policemen to follow criminals across the borders to the Netherlands, to Belgium or to Denmark,
- To issue common visa for a couple of European Countries,
- To follow the same principles concerning asylum,
- To install a European Police Agency (Europol) to fight international organized crime and terrorism, an Agency for judicial cooperation (Eurojust) and “Frontex”, a nucleus of a joint European border police.

It was an idea of two Statesmen, the President of the French Republic, *François Mitterrand*, and the Chancellor of the Federal Republic of Germany, *Helmut Kohl*, to bring their nations and their people together by opening the borders between their States. This led to the “Schengen Agreement”, which was signed by the Heads of States and Governments of France, Belgium, the Netherlands, Luxembourg and Germany in the small town of Schengen in Luxembourg, near the Belgian and German border in June 1985.

In June 1990 the “Convention Implementing the Schengen Agreement” was signed by the Heads of States and Governments. Its key points were:

- Harmonizing provisions relating to entry into the “Schengen Area” and short stays in the “Schengen Area” by non-EU citizens, which means to implement a uniform Schengen Visa,
- Asylum matters,
- Matters to combat cross-border drugs- and weapons-related crime,
- Police cooperation and
- Cooperation among Schengen States on judicial matters.

The “Convention Implementing the Schengen Agreement” entered into force in September 1993 and took practical effect in March 1995. With the entry into force of the “Schengen Protocol to the Treaty of Amsterdam” in May 1999 the Schengen Cooperation, based on an international agreement, was incorporated into the Acquis of the European Union.

So the idea of two Statesmen, initiated by an international intergovernmental agreement, was sealed by the Member States accepting this idea as a fundamental principal of the European Union:

Freedom of movement for all citizens of the Union within the borders of the Union, and protection of all citizens against threats by international organized crime from outside the Union.⁵

⁵ The idea of *Mitterrand* and *Kohl* was so attractive, that since 1995 there have been several expansions of the so called “Schengen Area”: Austria acceded in 1997. The Nordic Countries Denmark, Sweden and Finland joined in 2000 and Norway as well as Iceland was invited as associated members. In December 2007 the European Council decided to include the new EU Member States of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia. Since this year even a third non-EU-country, namely Switzerland, is associated with the Schengen-Area.

The so called “Schengen Acquis”, which means the sum of all legislation concerning the Schengen Cooperation, since 1999 is an integral part of the Acquis of the European Union.

In 2006 the most important former intergovernmental Schengen rules became a new legal basis. So the Schengen Agreement of 1985 was transformed into the “Schengen Borders Code” of 15. 3. 1989.⁶

One can imagine that it was not easy to follow the idea of opening the internal borders in Europe after the iron curtain had lifted, because we had to face the danger that thousands of illegal migrants and criminals from the East of Europe would misuse this new regime.

In 1993 for instance in Germany lived more than 800.000 people who had to leave the country, because they had entered Germany illegally, most of them without passport, without visa, being not an asylum seeker or a refugee.

We knew from our experience that illegal migration is closely connected with international, cross border crime:

- Falsification of documents,
- Men smuggling,
- Drug trafficking and
- Smuggling of weapons.

And we were aware that the opening of the borders inside the Schengen Area must not give way for more illegal migration, because it is obvious that illegal migration is not the proper way to gain freedom from social misfortune. It makes migrants victims, vulnerable for exploitation from the first day of their dreadful journey to, may be, the end of their lives – a life which is endangered by crime, determined by illegal work and deprived from social security.

Therefore the opening of borders *inside* the Schengen Area was only possible by intensifying border checks at its *external* borders.

It was not easy to convince for instance the Governments in Austria, Italy, Spain, Portugal and Greece to build up a well trained and properly equipped border police, to join the Schengen Information System and to sign readmission agreements with countries of origin of illegal migration, before opening the internal border with those Member States of the EU.

“Schengen” has become one of the best success stories in European integration, because we did not make the mistake to leave the path of this very clear philosophy. The idea of “more freedom of movement and more security via cooperation at the external borders” works.

⁶ Regulation (EC) 562/2006 of the European Parliament and of the Council establishing a Community Code on the rules governing the movement of persons across borders, Official Journal of the European Union of 13. 4. 2006, L 105/1.

It has shown that it is able to tackle even big problems like the increasing illegal migration at the Greek and at the Italian borders, if its rules are respected and not misinterpreted or even misused. It is, for example, not in line with the idea of Schengen, to grant Schengen Visa to migrants from third countries, which are not tourists or business man on their short visit to one of the Schengen States, but people, who definitely want to stay in the Schengen area, to find better living conditions than in their countries of origin, like Tunisia.

To prevent this misuse of a brilliant idea, we have to think about, how tackle those problems in proper way, which might overcharge Member States concerned: It seems that the Schengen rules need to be adapted to this problem with a quite new dimension.

- Art. 2 I of the Schengen Agreement of 1985 stated, that for a limited period national border checks appropriate to the situation shall be carried out at internal borders, where public policy or national security so require.⁷
- According to Art. 23 Nr. 1 of the Schengen Borders Code, a Member State may *exceptionally* reintroduce border control at its internal borders *for a limited period of no more than 30 days where there is a serious threat* to public policy or internal security.⁸

Under those even more restrictive rules of the Schengen Borders Code it seems not to be possible, to solve this problem on a solid legal basis. We need to think about an amendment to Art. 23 of the Schengen Borders Code, which addresses explicitly the problem of massive influx of migrants of even refugees in a certain region of the Schengen area or a single Member State.

But there are even bigger threats:

Let us not forget that since the Olympic Games in Munich 1972, since 9/11 in the US and especially in our days on airports, in railway and subway stations in Europe and in the US we have to face and to tackle the problem that terrorists cross the borders and are determined to commit their awful crimes in their country of destination.

From the point of view of the National State authorities it has to be taken into account every day that persons, they check, can be tourists, workers on lawful basis, asylum seekers, refugees, illegal migrants, criminals or terrorists. And it is one of the most difficult tasks in national, supra-national and international policy, to find the best way to treat each person in a decent way in accordance with the respective laws and fundamental rights – failures in this very difficult effort,

⁷ Contracting Party may, after consulting the other Contracting Parties, decide that if public policy or national security requires immediate action, the Contracting Party concerned shall take the necessary measures and at the earliest opportunity shall inform the other Contracting Parties thereof.

⁸ "...or for the foreseeable duration of the serious threat if its duration exceeds the period of 30 days, in accordance with the procedure laid down in Article 24 or, in urgent cases, with that laid down in Article 25. The scope and duration of the temporary reintroduction of border control at internal borders shall not exceed what is strictly necessary to respond to the serious threat."

included. This is the daily dilemma of the balance of freedom and security, even if legal migrants are concerned.

The measures necessary are not yet complete and need to be updated according to the permanent change of threats:

- We have to continue our work on an integrated border police of the Schengen Member States and hopefully in the end of the European Union.
- The “Schengen-Information-System”, which provides the policemen at the external borders with the necessary information, has reached the very limit of its capacity and needs to be enlarged.
- And we have to pay attention to other areas, which have nothing to do with Schengen: It makes no sense to intensify border controls for passengers more and more and to realize that in so called “Combi”-airplanes or even in quite normal planes the strictly checked passengers sit above decks loaded with nearly unchecked cargo.

The concept of an area of freedom, security and justice already features in the previous Treaties. However, the Lisbon Treaty gives the Union better means of reaching solutions consonant with the scale of the challenges facing the Union.

The Lisbon Treaty confirms the commitment of the European Union to the development of a common immigration policy. This will ensure a consistent approach on immigration, taking into account the economic and demographic evolution of our continent, and giving due attention to social integration.

The Lisbon Treaty also confirms the development of a common European asylum system with the establishment of a uniform status and common procedures for all persons in need of international protection.

People will live in a safer Europe as the Union can take decisions easier and faster in the field of security. Europe will be more effective in combating terrorism, dealing with criminal gangs, crime prevention, and illegal migration and trafficking in human beings.

The Treaty of Lisbon underlines the Schengen-Acquis and shapes the future development of this idea⁹. The Treaty replaces Articles 62 to 64 of the former Treaty of the European Union by a new Chapter 2 “POLICIES ON BORDER CHECKS, ASYLUM AND IMMIGRATION”.

⁹ According to Article 61 the Union shall constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. 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. The Union shall endeavor to ensure a high level of security through measures to prevent and combat crime, racism and xenophobia, and through measures for coordination and cooperation between police and judicial authorities and other competent authorities, as well as through the mutual recognition of judgments in criminal matters and, if necessary, through the approximation of criminal laws. The European Council shall define the strategic guidelines for legislative and operational planning within the area of freedom, security and justice. It shall be open to Member States to organize between themselves such forms of cooperation and coordination as they deem appropriate between the competent departments of their administrations (Article 61 F).

According to new Article 62 the Union shall develop a policy with a view to ensuring the absence of any controls on persons, whatever their nationality, when crossing internal borders, carrying out checks on persons and efficient monitoring of the crossing of external borders and the gradual introduction of an integrated management system for external borders.

The European Parliament and the Council shall adopt measures concerning the common policy on visas and other short-stay residence permits, the checks to which persons crossing external borders are subject, the conditions under which nationals of third countries shall have the freedom to travel within the Union for a short period, any measure necessary for the gradual establishment of an integrated management system for external borders and the absence of any controls on persons, whatever their nationality, when crossing internal borders.¹⁰

The Union shall develop 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 *nonrefoulement*. This policy must be in accordance with the Geneva Convention of 1951 and the Protocol of 1967 relating to the status of refugees, and other relevant treaties.¹¹

According to Article 63a the Union shall develop a common immigration policy aimed at ensuring the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings.

The Union may conclude agreements with third countries for the readmission to their countries of origin or provenance of third-country nationals who do not or who no longer fulfill the conditions for entry, presence or residence in the territory of one of the Member States.

Especially the so called Return Directive, which entered into force in December 2008 and has to be implemented into national law by the Member States until December 2010, has been qualified by numerous Latin American countries as an “unfriendly act”. They assume that the Directive criminalizes illegal immigration, will impose new sanctions, make migrants criminals and will have the consequence that all immigrants will be removed immediately.

¹⁰ Those Articles shall not affect the competence of the Member States concerning the geographical demarcation of their borders, in accordance with international law.

¹¹ The European Parliament and the Council shall adopt measures for a common European asylum system comprising:

- A uniform status of asylum for nationals of third countries, valid throughout the Union,
- A uniform status of subsidiary protection for nationals of third countries who, without obtaining European asylum, are in need of international protection, a common system of temporary protection for displaced persons in the event of a massive inflow,
- Common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status, criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection, standards concerning the conditions for the reception of applicants for asylum or subsidiary protection and partnership and cooperation with third countries for the purpose of managing inflows of people applying for asylum or subsidiary or temporary protection.

This is not true, because the Directive does not impose any penal punishment. There is no legislation of the Union regarding criminalization of third-country nationals illegally entering or staying in the European Union. It remains within the competence of the Member States to decide on the application of such matters.

By the way: Up until 2008 it was considered a crime in Mexico to be an illegal migrant which could carry a penalty of up to ten years in prison.

The only sanction imposed by the Return Directive is the prohibition of re-entry into the European Union for a certain period. Illegal immigrants are already now subject to the possibility of being expelled. The difference, once the Directive comes into force in all Member States, is that illegal migrants will enjoy a full range of rights, for instance the right to get a written decision and information about the possible remedies, linguistic assistance, legal aid, emergency health care, education of minors etc.

“Schengen” is not a “model” for other regions of our planet. But it is an example, how problems between States can be solved, even between Mexico, the United States and Canada. Against this background it is not impossible, to open one day the internal borders between those three countries.

“Schengen” is not Tijuana, and it is not San Diego. Mexico has to face two quite different problems concerning migration:

- Mexico is a country of destination and a country of transit as far as migrants from the South are concerned.
- But Mexico as well is a country of origin of migration – legal and illegal migration, looking to your neighbor in the North.

And this means an enormous responsibility and challenge for the Mexican Government: To manage the migration from the South and the emigration of fellow citizens to the North.

“Schengen” stands for an idea:

- To trust each other,
- To help each other against threats,
- To be watchful to live together in freedom, security and justice and
- To respect human rights without any condition.

And this idea is not limited to the European continent.

