The Changing Landscape of European Liberty and Security

The CHALLENGE Project:

Final Policy Recommendations on the Changing Landscape of European Liberty and Security

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Abstract

This paper presents the final policy recommendations coming out of the CHALLENGE project on the Changing Landscape of European Liberty and Security. It aims to provide a synthesis of the main policy-relevant inputs that have been presented during the five-year research project and at the same time, refining them in light of the Stockholm programme to be adopted at the conclusion of the Swedish Presidency of the EU in December. The paper first offers a synthesised overview of the most relevant policy contributions achieved by the CHALLENGE project and then moves into an overview of the specific recommendations organised by policy theme. A final section reviews those recommendations that can be considered to be more 'general' or 'horizontal' in character and that are particularly targeted towards the development of new strategies for the implementation of innovative evaluation mechanisms.

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Introduction

The CHALLENGE project (Changing Landscape of European Liberty and Security) has led to the emergence of a substantial number of findings and recommendations of special significance for current and future policy-making strategies addressing the changing articulations between liberty and security in Europe. During its five years of operation (2004–09), the project has provided a unique venue for interdisciplinary study and pluralistic reflection about the multifaceted implications surrounding the transformative (internal and external) dynamics affecting the intersection between liberty and security 'inside and outside' Europe.

The CHALLENGE network has played an active role in the assessment of illiberal practices of liberal regimes and the mutations experienced by traditional understandings of authority in contemporary politics. The project's contribution toward a better understanding of the profound transformations and underlying principles experienced by security, liberty and sovereignty in Europe, and their effects for the shape and goals of current European Union (EU) policies, has been considerable both in academic and policy circles. The justification of (in)security policies, laws and exceptions on grounds of emergency, necessity and prevention, and the impact of these measures and practices on civil liberties and fundamental human rights have been at the heart of our research objectives.

The EU's Area of Freedom, Security and Justice (AFSJ), which has been developed since 1999 and has been politically framed into multiannual programmes adopted by the Council, represents the main focus of study. These programmes have provided the priorities and principles guiding EU policies in these contested domains. CHALLENGE has run in parallel with the 2004 Hague Programme (the second multi-annual programme on an AFSJ),[1] whose mandate expires at the end of this year. The input that the project has put forward to ongoing policy processes started right from its early phases by offering a response to the adoption of the

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[1] European Council, The Hague Programme: Strengthening Freedom, Security and Justice in the European Union, 2005/C53/01, OJ C53/1, 3.3.2005.

Hague Programme at the end of 2004,[2] and it has continued doing so until its very final stages. Since its origin, CHALLENGE has engaged in an (academic) evidence-based and policy-oriented debate about the effects of internal and external security discourses, norms and practices on the liberty and security of the individual. This engagement has resulted in a large number of policy briefs and policy recommendations which have been included in several of its academic contributions, and which have been discussed with relevant international, European and national policy-makers, practitioners, civil society representatives as well as other experts, academics and other relevant research networks.

The Swedish Presidency of the EU has been now entrusted to adopt the successor of the Hague Programme – the so-called 'Stockholm Programme' – before the end of 2009. The Stockholm Programme, which will encompass the guiding principles and policy agenda in what concerns EU policies on freedom, security and justice for the next five years, will be officially agreed at the European Council meetings of 10 and 11 December 2009. The ending of the CHALLENGE project has been therefore particularly timely as it has coincided with the formulation, redefinition and adoption of the new EU policy agenda on an AFSJ for the period 2010–14.

The processes towards Stockholm have already received several official and non-official contributions, among which the following might be highlighted: 1) the European Pact on Immigration and Asylum of October 2008;[3] 2) the Future Group Report "Freedom, Security, Privacy: European Home Affairs in an Open World" of June 2008;[4] 3) the contributions received by the European Commission's open consultation procedure (September-November 2008) entitled "Freedom, Security and Justice: What will be the future?", on priorities for the next five years (2010-2014)';[5] 4) the European Commission's perspective towards the Stockholm process published in June of this year in its Communication "An area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment";[6] and 5) the Opinions of the Committee of the Regions (CoR) and the European Economic and Social Committee (EESC), which are under preparation at the present time.

CHALLENGE has not only participated in the above-mentioned Commission consultation of November 2008,[7] but it has also offered a wide range of recommendations and policy-relevant books and working papers founded on independent and interdisciplinary academic research (see Annex 1 of this paper for an overview), some of which have already specifically targeted the Stockholm Programme. The Justice and Home Affairs Section of the Centre for European Policy Studies (CEPS), which has coordinated the project along with Sciences Po (CNRS), has

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[2] CHALLENGE Paper (2004), "Response to the Hague Programme: Protecting the Rule of Law and Fundamental Rights in the Next Five Years of an EU Area of Freedom, Security and Justice" (retrievable from www.libertysecurity.org).

[3] European Council, 2887th meeting of the Justice and Home Affairs Council, 11653/08, Presse (205), Brussels, 24 and 25 July 2008; see also European Council, European Pact on Immigration and Asylum, 13440/08, Brussels, 24.9.2008.

[4] Report of the High-Level Advisory Group on the Future of European Home Affairs Policy (The Future Group), "Freedom, Security, Privacy: European Home Affairs in an Open World", June 2008. European Council, High-Level Advisory Group on the Future of European Justice Policy – Proposed Solutions for the Future EU Justice Programme, 11549/08, Brussels, 7.7.2008.

[5] http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0001_en.htm

[6] Commission Communication, An area of Freedom, Security and Justice serving the citizen: Wider freedom in a safer environment COM(2009) 262, 10 June 2009, Brussels.

[7] D. Bigo, E. Brouwer, S. Carrera and E. Guild (2008), *Freedom, Security and Justice in the EU: Recommendations for the Future*, Contribution by the Justice and Home Affairs Section of CEPS to the Open Consultation Procedure by DG JFS of the European Commission.

played a key role as the network platform, at times bridging the academic results coming out of the project with current policy processes, structures and networks. This has been combined with the activities by other key CHALLENGE partners, which have implemented targeted strategies to disseminate and channel the project's results and policy recommendations in their respective national arenas along with relevant domestic actors.

This paper presents the final set of policy recommendations coming out of the CHALLENGE project. It aims at providing a synthesis of the main policy-relevant inputs that have been presented during these five years of research while at the same time fine-tuning them especially in light of the Stockholm processes. The paper also incorporates some of the suggestions coming out of an expert seminar that took place at CEPS on 28 April 2009, and where the interim set of policy recommendations were openly discussed among CHALLENGE researchers, civil servants from various EU Member States and EU officials. Section 1 of the paper offers a synthesised overview of the most relevant policy contributions achieved by the CHALLENGE project. Section 2 moves into an overview of the specific recommendations organised by policy theme. Section 3 offers those recommendations that can be considered to be more 'general' or 'horizontal' in character and that are particularly targeted towards the development of new strategies for the implementation of innovative evaluation mechanisms focusing on the multifaceted implications of the internal and external facets of the EU's AFSJ.

1.   CHALLENGE to the EU's AFSJ

If we were to choose those project contributions with the greatest relevance to past, current and future policy processes at EU level affecting relations between liberty and security, the following six could be highlighted: 1) the 'balance' metaphor; 2) restructuring the Directorate General for Justice, Freedom and Security (DG JFS) of the European Commission; 3) integrating liberty; 4) Europeanisation vs. intergovernmentalism; 5) human rights cannot be taken for granted and 6) the policy gap.

First, **the 'balance' metaphor between liberty and security**. Perhaps one of the most important elements coming out of the CHALLENGE project has been its critique of the claim that 'security is the first freedom' and that a 'balance' needs to be established at times of managing 'the global scale of contemporary dangers and risks'. The framing of the relationship between liberty and security in Europe in terms of a balanced approach first entered the EU's discourse following the 11 September 2001 attacks and was injected into the semantics used by the 2004 Hague Programme. CHALLENGE has argued that the balance metaphor considers liberty and security as analogous 'values' which can be compared (and evaluated) with and weighed against each other. Our research has shown that such a 'balancing picture' has actually favoured the development of a conception of security equal to coercion, surveillance, control and a whole series of practices of violence and exclusion.[8] A concept of security has also favoured claims about collective security, 'global threats' and 'worst case scenario' situations, which have too often led to measures and practices outside of democratic accountability and judicial oversight (rule of law) and constituting a challenge to fundamental human rights. The liberty and security of the individual have become therefore at stake in such a changing context. Security only comes from the respect and protection of human rights and fundamental freedoms

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[8] D. Bigo, S. Carrera, E. Guild and R.B.J. Walker (2008), "The Changing Landscape of European Liberty and Security: The Mid-Term Report of the CHALLENGE Project", *International Social Science Journal*, UNESCO, pp. 283-308.

through the rule of law, and liberty should be placed as the starting principle on which the EU's AFSJ should be rooted and developed.[9]

Second, **restructuring the Directorate General for Justice, Freedom and Security of the European Commission**. Under the current institutional architecture of the European Commission, all the policy measures falling within the scope of the AFSJ are addressed within the DG JFS. CHALLENGE found that this is actually a rather uncommon structural setting that does not correspond to current member state traditions. Indeed when looking at the situation across the EU Member States, national competences over these areas are overwhelmingly divided between two different ministries: one dealing with 'Justice' and one with 'Home Affairs'. The project proposed the need to contemplate a new 'division of powers' inside DG JFS.[10] Mirroring more closely national traditions at EU level would not only significantly facilitate Europeanisation in a field where institutional competences are central, but it would also further ensure the protection of the rule of law and fundamental rights inside the EU legal system. Such a restructuring would also contribute towards ensuring more transparency in policy supervision around these policy domains. CHALLENGE proposed to divide DG JFS into three DGs – a Justice DG dealing with policing and judicial cooperation; a DG responsible for borders, immigration and asylum and a DG responsible for fundamental rights charged with ensuring that the democratic concerns expressed by the European Parliament and other key EU bodies are properly followed up. Key to this third DG would be the allocation of substantial resources, commensurate with those of the other two, and weight to enable it to carry out its work effectively. It appears that Guy Verhofstadt, leader of the European Parliament's Liberal group, has proposed to the President of the European Commission, José Manuel Barroso, the creation of a new portfolio for fundamental rights and non-discrimination in the next Commission.[11] Now is the time to develop new institutional strategies for structuring key aspects of freedom, security and justice inside the next Commission.

Third, **integrating and unifying liberty**. The project has argued that as long as internal and external security agencies and (in)security professionals have experienced increasing convergence (refer to the CHALLENGE work on mapping the field of EU Internal Security Agencies),[12] 'liberty' should also follow a similar convergence pattern. In particular, the project advises that those agents, actors and networks holding competences in safeguarding rule of law and liberty in Europe, such as the European Union Fundamental Rights Agency (FRA), the European Data Protection Supervisor (EDPS), the European Ombudsman, Article 29 Data Protection Working Party, etc., as well as their respective networks of national officials and practitioners should strengthen their cooperation and 'knowledge sharing'. This would be the only way to challenge the current axiom driving the EU's AFSJ according to which security is unified and liberty is (or needs to be) fragmented. The integration of liberty should be also accompanied by the necessary financial resources and political support by EU institutions as well as the Member States. Further, the project has proposed **the expansion of the FRA's**

[9] E. Guild, S. Carrera and T. Balzacq (2008), *The Changing Dynamics of Security in an Enlarged European Union*, CHALLENGE Research Paper No. 12, Centre for European Policy Studies, Brussels, October.

[10] D. Bigo, S. Carrera and E. Guild (2008), *What Future for the Area of Freedom, Security and Justice? Recommendations on EU Immigration and Borders Policies in a Globalising World*, CEPS Policy Brief No. 156, March. H. Lieber (2008), *Checks and Balances: Dividing the Directorate General for Justice, Freedom and Security in to two – an Interior and a Justice branch*, CEPS Policy Brief No. 158, Centre for European Policy Studies, Brussels, April.

[11] Euractiv, Verhofstadt lists conditions for Barroso II, 15 July 2009, retrievable from www.euractiv.com

[12] D. Bigo, L. Bonelli, D. Chi and C. Olsson (2007), *Mapping the Field of the EU Internal Security Agencies*, Paris: L'Harmattan/Centre d'Etudes sur les Conflits.

mandate, evaluation competences and monitoring remit on the fundamental rights and rule of law across the EU-27. These competences should include policy domains dealing with police and judicial cooperation in criminal matters (the current EU third pillar), wider rule of law questions related to corruption and organised crime within law enforcement authorities as well as the human rights/fundamental freedoms aspects of EU cooperation with third countries in the field of security (the external dimension of the AFSJ). The role of civil society and independent networks of academics should be also further strengthened in the research work conducted by the agency.

Fourth, **Europeanisation vs. intergovernmentalism**. The political desire to enhance EU cooperation around AFSJ policies has left the door open to flexible and differentiated integration processes of 'various speeds' (variable geometry), with small groups of member states moving ahead through enhanced, privileged or discrete degrees of transnational cooperation. CHALLENGE has addressed the tensions between these intergovernmental logics and the Community method of cooperation. By falling outside the scope of the Treaties, these initiatives do not benefit from rule of law and accountability mechanisms and structures characterising the EU legal system. This has been well illustrated by the Treaty of Prüm,[13] a part of which was later 'Europeanised' into a Council Decision.[14] Prüm constitutes yet another example of the practices of resistance exercised by some Member State authorities against the EU's AFSJ and the processes of Europeanisation around liberty and security. A similar critique has been put forward in relation to the European Pact on Immigration and Asylum of October 2008, which has also been driven by the principles of nationalism and intergovernmentalism.[15] CHALLENGE research has shown that these practices fundamentally weaken the EU and undermine European initiatives, as well as the legitimacy of the political foundations of the European integration projects. Moreover, the project has also advocated **the disappearance of the First-Third Pillar division** currently characterising Justice and Home Affairs policies. The end of the pillars divide would facilitate (subject to some exceptions) an increased democratic accountability (European Parliament and national parliaments), judicial control (extended competence of the European Court of Justice) and more efficient decision-making processes (co-decision procedure now called ordinary legislative procedure).[16] This element has actually

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[13] Convention between the Kingdom of Belgium, the Federal Republic of Germany, the Kingdom of Spain, the French Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands and the Republic of Austria on the stepping up of cross-border cooperation particularly in combating terrorism, cross-border crime and illegal migration, Prüm (Germany), 27 May 2005, Council Secretariat, 10900/05, (Brussels, 7 July 2005).

[14] European Council, Decision 2008/616/JHA of 23 June 2008 on the implementation of Decision 2008/615/JHA on the stepping up of cross-border cooperation, particularly in combating terrorism and cross-border crime, OJ L 210/12, 6.8.2008. See E. Guild (2007), *Merging security from the two-level game: Inserting the Treaty of Prüm into EU law?*, CEPS Policy Brief No. 124, Centre for European Policy Studies, Brussels, March and T. Balzacq, D. Bigo, S. Carrera and E. Guild (2006), *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats,* CEPS Working Document No. 234, Centre for European Policy Studies, Brussels, January.

[15] S. Carrera and E. Guild (2008), *The French Presidency's European Pact on Immigration and Asylum: Intergovernmentalism vs. Europeanism? Security vs. Rights?*, CEPS Policy Brief No. 170, Centre for European Policy Studies, Brussels, September.

[16] S. Carrera and T. Balzacq (eds) (2006), *Security versus Freedom: A Challenge for Europe's Future?*, Hampshire: Ashgate Publishing.

become one of the most innovative features of the new institutional framing that would be conferred on the AFSJ after the entry into force of the Treaty of Lisbon.[17]

Fifth, **fundamental human rights**. While fundamental rights constitute one of the general principles upon which the EU has been constructed and developed, they are often taken for granted. CHALLENGE research has demonstrated that this is especially the case in relation to flows of people, border practices and inclusion/security of third country nationals as well as the human implications of (in)security technologies (e.g. the Commission's 2008 border package)[18] and the exchange of information within and outside Europe (e.g. the Passenger Name Record).[19] In addition to the one of 'integrating liberty', CHALLENGE has proposed several strategies to strengthen 'the freedom dimension' at EU level. It has for instance sustained the need for the Union to adopt the Charter of Fundamental Rights and Freedoms as a legally binding instrument, which has been also included in the Treaty of Lisbon. Its incorporation in the EU's legal framework would be vital in order to give legal weight to those rights that are at the core of the EU and in whose name the AFSJ acts are being carried out.[20] Further, while it needs to be acknowledged that the European system for protecting fundamental rights is already well developed at EU level, a key issue of concern remains the ways in which individuals can actually have access to those recognised fundamental rights across the various Member States arenas. Also, the project has called for new strategies to be implemented in relation to strengthening (or developing new) (ex post) evaluation mechanisms on rule of law and good administration in the AFSJ. (See section 3 below.)

Sixth, **addressing 'the gap' between social sciences research and EU policy-making**: One of the main findings emerging from our work has been the need to develop a more coherent strategy towards 'evidence-based policy-making' in the EU's AFSJ. European policy-making processes need to benefit more from (and make better use of) the knowledge and results coming out of social-sciences research projects. We perceive a profound 'knowledge deficit' in EU policy-making. There is a 'policy gap' consisting of a lack of proper linking between 'the state of art' coming of projects such as CHALLENGE[21] and policy/legislative initiatives put forward by the European Commission services themselves (most particularly DG JFS, but also those related services in DG Employment, Social Affairs and Equal Opportunities, DG External Relations, DG Education and Culture, etc.).

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[17] S. Carrera and F. Geyer (2008), "The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice", in E. Guild and F. Geyer (eds), *Security versus Justice? Police and Judicial Cooperation in the European Union*, Hampshire: Ashgate, pp. 289-307.

[18] European Commission, Communication on preparing the next steps in border management in the European Union, COM(2008) 69 final, Brussels, 13.2.2008(g).

[19] See European Commission, Proposal for a Council Framework Decision on the use of passenger name record (PNR) data for law enforcement purposes, COM(2007) 654, Brussels, 6.11.2007(a); see also E. Brouwer (2009), *The EU PNR System and Human Rights: Transferring passenger data or passenger freedom?*, CEPS Working Document No. 320, Centre for European Policy Studies, Brussels, August.

Towards a European PNR System? Questions on the added value and the protection of fundamental rights, Briefing Paper for the European Parliament, PE 410.649, Directorate-General Internal Policies for the Union, January.

[20] E. Guild and S. Carrera (2006), *The Hague Programme & the EU's agenda on freedom, security and justice: delivering results for Europe's citizens?*, CEPS Commentary, 10 July. See also S. Carrera et al. (2006), *Priorities for the Finnish Presidency, July-December 2006*, CEPS Working Document No. 248, 12 July.

[21] Information about other projects funded by DG Research on related topics addressed in CHALLENGE can be found at: http://ec.europa.eu/research/social-sciences/policy_en.html

While some 'knowledge' and recommendations might indeed challenge some of the underlying questions framing the policy priorities at stake, they actually constitute a sound manifestation of the weaknesses affecting current EU policies and structures, which call for innovative, ambitious and politically courageous strategies. Policy must not be guided by sensitivity to immediate dangers or opportunistic politics. Evidence from independent research should therefore constitute the premise for future policy-making on the AFSJ. This is a precondition for Europe to be able to address some of the most important challenges that it is facing in a changing world, which is increasingly complex and where traditional assumptions about the relationship between liberty and security and the role of Europe in the world, are no longer valid and call for innovative approaches.

All too often we have seen how the EU's security agenda is framed in a way that directly marginalises social sciences in favour of the interests of security and private industries' technologies. The latter pay little attention to the human impact of these technological policies on liberty, nor to their added value, proportionality and effectiveness. **Strengthening the social sciences approach to the liberty/security dilemmas affecting Europe** is particularly relevant for Europe to meet individuals' expectation and to ensure that its policies duly acknowledge and address social interests (realities, needs and impacts), rather than those of private and technological parties which tend to frame social realities into a technological fix leading to more insecurity in relation to the principles of rule of law and fundamental rights of the individual.

Following the discussion of the major findings and contributions put forward by CHALLENGE, the remainder of this paper sketches and synthesises the specific and general policy recommendations put forward by the project between 2004 and 2009. Some of them have been updated, complemented and fine-tuned in light of relevant policy developments during the final phase of the project and the prospective adoption of the next multi-annual programme on an AFSJ by the Swedish Presidency at the end of 2009[22] – the Stockholm Programme, and its implementation by the European Commission under the auspices of the upcoming Spanish Presidency as from the first half of 2010.

2. CHALLENGE Recommendations by Policy Theme

2.1 Borders

1.   The European Commission should create a new function of an **EU border monitor,** which would have the following competences: to ensure that EU border controls, wherever they take place, are consistent with EU law and the Charter of Fundamental Rights; and to monitor the conditions under which expulsions of irregular immigrants take place under the framework provided by the so-called Returns Directive on common standards and procedures in member states for returning illegally staying TCNs (third-country nationals).[23]

2.   FRONTEX's activities must be more thoroughly subject to the **principles of transparency and accountability**. Before advancing the integrated border management strategy, an in-depth (independent) assessment of the ways in which EU border control takes place in the territory of third countries under the coordination of FRONTEX should be carried out. It should also examine the effects of this 'preventive' EU border-management practice over

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[22] Work Programme of the Swedish Presidency of the EU, 1 July – 31 December 2009, 23 June 2009 (retrievable from http://www.se2009.eu/en).

[23] European Council, Directive 2008/115/EC of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals, OJ L 348/98, 24.12.2008(e).

human rights obligations with which EU institutions and Community bodies, as well as member state national authorities, must comply within and outside the EU's common territory.

3.   The enhanced use of new technologies in the changing landscape of European security policies must be duly tested against its **ethical and human implications**. The role of social sciences research is key towards that objective. **No more large-scale IT systems** should be agreed or established in the EU before the SIS II and VIS are operational. These two systems will equally require an in-depth (independent) assessment as regards not only their 'efficiency' but also concerning their legal and ethical implications. The questions of adequacy and proportionality of the flow of information equally need to be addressed to avoid the idea that maximum technology is by definition the solution for better security.

4.   The management of the EU's external border must be solidly founded on law and the rule of law. **The Schengen Borders Code** is the EU's basic law on who can cross the external border and how the internal border is managed. The guarantees contained therein should be properly implemented in all the EU member states and by all the relevant EU agencies, wherever operating. Expensive projects of uncertain results involving massive data collection and retention, biometrics, etc. (the 2008 Commission Border Package) should only be contemplated if there is clear evidence that they are central to implementing EU law.

5.   **The exchange of information** has to be specified and channelled carefully **through trusted agencies**, and not broadly disseminated among very different kinds of networks. The claim that any form of mobility is a security deficit leading to an increased danger for the EU collective identity and safety is not substantiated. A stronger, supranational control over member states' diverging practices of designating 'competent authorities' should be exerted. Also, it is fundamental that information does not escape the protection of EU law through an open-ended network of exchange of information with third country governments, in the name of efficiency regarding collecting information, especially when its communication extends beyond the sphere of liberal regimes. Limits concerning the sharing of information, the connection between levels of information, the quality of agencies exchanging data and the implications of third-country participation have to be openly discussed and addressed.

6.   **EU policy should not be driven by forms of suspicion generated by specific technologies linked to new private-public partnerships** in military and policing intelligence spheres. Arguments for greater European rather than American control over security and surveillance industries must not become a justification for the erosion of ethical commitments or the development of practices on the margin of the law infringing fundamental rights of citizens and foreigners. The use of specific technologies and the need for collaboration must be proportionate with the scale of the actual danger, based on accumulated knowledge. It must not be usurped by 'worst case scenarios' that have no limit other than the political imagination of experts who can presume to be acting beyond the limits of political responsibility.

7.   The functioning of external EU border crossing points is insufficient with respect to the quality of services provided to travellers. In addition to the need to ameliorate infrastructure and services at border crossing points, a priority should be **to foster respectful and non-discriminatory behaviour of border guards and custom officers towards travellers** regardless of their citizenship, ethnicity and purpose of their travel.[24]

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[24] M. Kindler and E. Majetko (2008), *Gateways to Europe: Checkpoints in the EU External Land Border: Monitoring Report*, Stefan Batory Foundation, Warsaw, April.

2.2 Asylum

8.   The common European asylum system (CEAS) must be modified so that **the country in which an asylum-seeker makes his or her protection claim is the one responsible** for determining the substance of that claim. The system of sending asylum-seekers from one state to another so their applications can be determined elsewhere in the EU is counterproductive, expensive and inhumane for the individual. This is best exemplified by the current recognition rates, according to which the CEAS as it now stands produces more divergence among member states than four years ago.

9.   Asylum-seekers should be given **the right to work and study** at the very latest after six months of presence in the territory of a member state. Exclusion from the mechanisms of social participation for a period that is any longer is not consistent with the right to dignity contained in the Charter of Fundamental Rights.

10.   Directive 2005/85 on asylum procedures[25] contains an acceptable general asylum procedure for the EU. Yet all the exceptional categories, such as 'safe third country', 'European safe third country' and 'safe country of origin', have the effect of diminishing or excluding the general procedure for specific classes of asylum-seekers. All asylum-seekers should be entitled to a fair and effective procedure. The exceptional categories should all be removed from the Directive.

2.3 Immigration

11.   **A Europe of fundamental human rights needs to be implicated with a common immigration policy driven by a 'rights-based approach'.** The creation of an exhaustive and consolidated framework of protection that is respectful of the fundamental human rights of third country nationals should be a priority. The normative patchwork of rights and administrative procedures currently provided for TCNs under EU immigration law is too diversified, weak and incoherent. More effective mechanisms need to be envisaged in order to ensure the correct application and accessibility of existing EU rights and freedoms of third-country nationals.

12.   **The right to family reunification is the right of families to live together and for children to be with both of their parents. As such, it forms the basis of society** and is a principle set out in the Universal Declaration of Human Rights, the European Convention of Human Rights and the Charter of Fundamental Rights. The vague and unsatisfactory notion of 'reception capacities' must not be used to interfere with the right to family reunification in Europe as provided in these legal instruments as well as in Council Directive 2003/86. The Commission should bring to the attention of member states the need to stop using mandatory integration conditions/programmes within the EU and abroad, based on the transposition of EU immigration law, as this not only goes against the objectives of EU directives, but it also contravenes the principles of non-discrimination and proportionality (suitability, necessity and proportionality *stricto sensu*).

13.   Integration measures/conditions must not be used as an immigration control mechanism preventing family reunification nor be designed to restrict the legal channels that enable families to live together. **Integration should favour the social and economic inclusion** of newly arrived family members **after** the family has been reunited in the EU. The 'exchange of information' between the member states on national integration policies and programmes in the scope of the EU framework on integration should not leave the door open to transfer to the

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[25] European Council, Directive 2005/85 of 1 December on minimum standards on procedures in Member States for granting and withdrawing refugee status, OJ L 326/13, 13.12.2005(b).

European level restrictive national immigration policies limiting access to rights and security of residence, and thus leading to the social exclusion of TCNs.

14. Social cohesion in the Member States depends on an understanding of **integration as a right for the migrant to equality** rather than the obligation to abandon her/his identity. Mandatory, civic integration programmes on 'national and European values' pose serious conflicts with fundamental rights and non-discrimination. Imposing values (national identity and patriotism) in the context of immigration law on TCNs leads to illiberal practices.[26] Imposing acculturation on immigrants as a condition for enabling them to have access to EU rights and freedoms gives rise to various contradictions with fundamental rights and non-discrimination. Fundamental rights are there to set the limits on official criteria calling for nationalisation of the immigrant into a conception of national identity that goes beyond any acceptable remit of the rule of law in the EU.

15. The EU should facilitate **the inclusion of Islam** within the public spheres of European countries by changing the portrayal of Islam in political discourses, ending its ghetto-isation and disentangling the discourse on Islam from international politics.[27] The EU could for instance play a crucial role in producing helpful materials and overall guidance and in the development of new policies, especially in the educational and cultural domains. It could also develop initiatives where Muslims are engaged in mainstream social issues and not only involved in Islamic issues. Encouraging cross-cultural civil society organisations will aid this process. The scapegoating of a religious community on dubious security grounds can only lead to political and social exclusion, the fracturing of social cohesion and social conflict. The EU must always guarantee the respect of Article 9 of the European Convention for the Protection of Human Rights and Article 10 of the Charter of Fundamental Rights. **Freedom of thought, conscience and religion** needs to be duly protected and promoted at EU level.

16. **Mobility partnerships with third countries should comply with a *common immigration policy fostering a coherent, rights-based and fair treatment approach***. The wide diversification in terms of member states' participation (differentiation) and the proposed actions and projects included in the remit of these partnerships make it difficult to guarantee the consistency, coherency and commonality of an EU migration policy. Furthermore, these instruments must not end up bringing back the illusion of the 1970s that migration is a temporary phenomenon that can be 'managed' *selectively* by the state. The temporary nature of migration policies (circular migration) might conflict with guaranteeing, and further ensuring, the security of (permanent) residence and the social inclusion of TCNs within the Union.

17. **The external relations consequences** of the message that is being sent by Europe abroad by giving an overriding priority to policies on return, readmission and border controls should be evaluated. This securitarian approach engenders multiple negative effects in terms of the EU's own credibility on human rights and the principle of solidarity in the world.

18. The justification for **the differential treatment between the North/Eastern and the South European Borders as regards the flow of persons** should be re-examined and re-conceptualised. The non-facilitation of entry and the characterisation of those willing to do so from the South as 'illegal' is counterproductive to fostering freedom, security and justice for all. The EU needs to develop common immigration rules that liberalise the admission of immigrants for employment and self-employment purposes. Regulatory mechanisms to liberalise the

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[26] E. Guild, K. Groenendijk and S. Carrera (2009), *Illiberal Liberal States: Immigration, Citizenship and Integration in the EU*, Hampshire: Ashgate Publishing, forthcoming.

[27] J. Cesari (2009), *The Securitisation of Islam in Europe*, CHALLENGE Research Paper No. 15, Centre for European Policy Studies, Brussels, April.

movement of persons from the Southern border are urgently needed in order to diminish the phenomenon of irregular immigration.

19.   **The EU should change the current discursive framing of the phenomenon of irregular immigration which links it with illegality and insecurity**. The European Commission and Council's insistence on using the term 'illegal', and phrases such as 'combating illegal immigration', to refer to people and public policies responding to the phenomenon of irregular immigration is objectionable and discouraged in international fora. People are not illegal; their presence on a territory may not be authorised or their administrative status as an immigrant may lack proper documentation, but that does not put them in a category where their very existence constitutes 'illegality'. **The rights, inclusion and protection of undocumented migrants** should also be at the heart of the EU's attention and social protection strategies, particularly when taking into consideration their high degree of vulnerability and insecurity.

2.4 Data protection

20.   Privacy rules must be built into the programmes that run EU databases and systems of information (**data protection by design**). Technology needs to be used in the service of liberty. These programmes should: 1) include automatic deletion of data at the end of the permitted period; 2) prevent the copying of data for any purpose other than the original purpose or for data security reasons; 3) prevent all unauthorised access to the system and any duplication of images on computer screens; and 4) prohibit all searches of databases except by order of a judge. These prohibitions should be built into the programme that runs the database.

21.   Databases should not be set up without **prior impact assessment studies** performed by objective and independent organisations. Any EU strategy on data exchange needs to start with the **evaluation and inventory of current policies**, tools and institutional structures involved in data exchange in the field of security at the EU level. Any new databases should only be set up, and subsequently used, for specific and lawful purposes – preventing vague, open definitions and aimless data collection.

22.   Data collection systems **must not reveal sensitive data** about ethnic origin, religion or other aspects prohibited in EU non-discrimination law; disguised criteria indicating ethnic or religious distinctions, such as the birthplace of parents or the individual, or former nationality, should be forbidden. Individuals must be adequately protected against the consequences of data inaccuracies or of lax data exchange and should be **properly informed of their rights**.[28]

23.   CHALLENGE welcomes the more comprehensive definition of **'document'** proposed by the European Ombudsman and the European Parliament. It recommends that clarity be given to the issue of transparency and openness over the copying (in full or part) of a 'document', and the consequential implications of that for *ownership and use* of the data contained in the new 'document'. The European Parliament and the European Ombudsman should insist on: 1) the **withdrawal** of a) systems where there are insufficiently robust security architectures to protect the citizen against malevolent access to and use of their data and b) methods that are open and vulnerable to easy abuse (by virtue of, for example, a smartcard and PIN access system); 2) **data subject control** of their data even if this reduces the prospect of interoperability; 3) respect

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[28] A 2008 Eurobarometer survey showed that, while the majority of EU citizens (64%) are concerned about data protection issues, only about a quarter of them (27%) are aware of the rights they enjoy in case of misuse of their personal data, and not even one-third (29%) know that sensitive data like information about racial or ethnic origins receive special legal protection. See Gallup Organisation (2008), "Data Protection in the European Union. Citizens'perceptions. Analytical Report", Eurobarometer, p. 5.

for **the principles of data minimisation, purpose limitation, and require privacy and security risk assessments** of any function-creep functionality built into systems; and 4) **the data subject being present** to give explicit consent to permit officials and their agents (whether private, public of in mixed public private partnerships) access to and exchange of documents relating to them.

2.5 Criminal Justice

24. No **further legislation** should be adopted in the field of criminal justice unless it provides for standards for the **rights of defence and of fair trial** that are at least as high as those offered within the context of the Council of Europe. The current EU proposal on the rights of criminal suspects that the Council is considering does not meet the minimum requirements of the European Convention on Human Rights. In terms of the necessity for new measures, the European evidence warrant is shunned by national policing and judicial authorities, which seem to be favouring the traditional, enhanced mutual-assistance mechanisms.

25. There is a need to address **horizontal, institutional and procedural issues characterising the justice and good administration systems throughout all EU Member States**. Matters such as 'the quality of justice' have huge repercussions over the principle of mutual recognition of criminal decisions and more generally over the levels of trust and confidence between EU Member States. They additionally create tensions as to the ways in which the EU is guaranteeing the liberty and security of the individual affected by these supranational processes of policy-making. **A permanent EU assessment board** should be established in order to carry out a constant monitoring of the quality of Member States' criminal justice systems and verify whether they fulfil international and European standards on the rule of law.

3. Recommendations on Evaluation, Accountability and Scrutiny Mechanisms

26. The EU should **develop an evaluation mechanism at the EU level on the internal and external facets of the AFSJ**. In 2006, the European Commission proposed a 'strategic evaluation mechanism' for EU policies on FSJ, which met considerable resistance from the Member States and was therefore abandoned.[29] This initiative should be revisited and improved in terms of scope, methodology and the actors involved. The latter would need to take into account the new configurations provided by the Lisbon Treaty and especially Art. 70 of the Treaty on the Function of the European Union.[30]

The evaluation mechanism for the AFSJ should avoid duplication of existing (dispersed) EU evaluation systems as well as those for instance of the Council of Europe. It would be essential that such a scrutiny system would actively involve not only member states, but also and most importantly, the relevant services at the European Parliament, the Committee of the Regions and the European Economic and Social Committee. In light of the principles of subsidiarity and

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[29] European Commission, Communication on the evaluation of EU policies on freedom, security and justice, COM(2006) 332, Brussels, 28.6.2006.

[30] This article states that "the Council may, on a proposal from the Commission, adopt measures laying down the arrangements whereby Member States, in collaboration with the Commission, conduct *objective and impartial evaluation of the implementation of the Union policies referred to in this Title by Member States' authorities*, in particular in order *to facilitate full application of the principle of mutual recognition*. The European Parliament and national Parliaments shall be informed of the content and results of the evaluation" (emphasis added).

proportionality, it is also recommended that this be accompanied by formalised roles for specialised committees among national parliaments (e.g. the House of Lords EU Select Committee of the UK Parliament) as well as regional and local authorities with special attention given to European networks of cities.

The **local dimension of the AFSJ** could play a decisive role when monitoring implementation *and* results in the scope of the AFSJ, as well as when examining the added value, social impacts and practical effectiveness of common EU policies. Any new EU evaluation/peer review mechanism would need to ensure a **close and formalised partnership with EU agencies/bodies** dealing with FSJ-related aspects, especially with the FRA, the EDPS and Article 39 Working Group, in the phases preceding the formal adoption of proposals and where their concerns/views would become part of and substantiate EU decision-making processes. Moreover, **transparent, formalised and open consultation mechanisms** with other key stakeholders (such as practitioners at national and local levels, including judges and prosecutors) and civil society organisations should be further improved and promoted in AFSJ policies in order to take their views and practical concerns on board as well as in the follow-up phases of EU policies.

27. **It is urgent to expand and promote the use of existing monitoring tools on fundamental rights and the rule of law**. A **'fundamental rights culture'** needs to be **at the heart of the future AFSJ** and the European Commission's activities. The impact of any AFSJ policy measure on the liberty and security of individuals should be carefully (and independently) assessed and resolutely taken into account by the relevant Commission services before presenting more 'results' and when assessing Member State actions.

The Commission could take a stronger political stance and exercise in full its right to further develop and actively apply existing monitoring mechanisms on Member States' compliance with common EU principles, such as Article 7 TEU. This provision makes available preventive measures and potential sanctions/penalties against a member state – including the suspension of its voting right in the Council – upon determination of the "existence of a serious and persistent breach" of the principles on which the Union is based, e.g. fundamental rights and the rule of law within or outside the scope of EU law.[31] The EU's procedure envisaged in Article 7 to make sure that systematic and serious violations of human rights and fundamental freedoms do not take place in the EU has never been used, despite the fact that violations have been ascertained for instance by the Council of Europe.

The democratic accountability (European Parliament and relevant national parliament) of any eventual political decision taken by the Council in this context should be duly ensured by all means. At times examining the existence of a clear "threat or a risk of serious breach" by a Member State of the principles mentioned in Article 6.1, the Commission should establish institutionalised cooperation and a long-standing formalised partnership especially with the FRA, the Council of Europe and the UN Commission on Human Rights. This could be accompanied by the setting-up of **a permanent European network of (interdisciplinary) academics**, which in close cooperation with key civil society organisations would provide independent expertise specifically focused on the fundamental rights and rule of law aspects related to the AFSJ.

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[31] European Commission, Communication on Article 7 of the Treaty on European Union: Respect for and promotion of the values on which the Union is based, COM(2003) 606 final, Brussels, 15.10.2003. Refer also to the European Commission, Communication on the practical operation of the methodology for a systematic and rigorous monitoring of compliance with the Charter of Fundamental Rights, COM(2009) 205 final, Brussels, 29.4.2009.

Annex 1
A Selection of CHALLENGE Policy-Relevant Contributions
2004-2009

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Balzacq, T. and S. Carrera (2005), *The EU's Fight against International Terrorism – Security Problems, Insecure Solutions*, CEPS Policy Brief No. 80, Centre for European Policy Studies, Brussels, July.

Balzacq, T., D. Bigo, S. Carrera and E. Guild (2006), *Security and the Two-Level Game: The Treaty of Prüm, the EU and the Management of Threats,* CEPS Working Document No. 234, Centre for European Policy Studies, Brussels, January.

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Priorities for the Finish Presidency of the EU July–December 2006, CEPS Working Document No. 248, Centre for European Policy Studies, Brussels, July.

Carrera, S. and F. Geyer (2007), *The Reform Treaty and Justice and Home Affairs: Implications for the Common Area of Freedom, Security and Justice*, CEPS Policy Brief No. 141, Centre for European Policy Studies, Brussels.

Carrera, S. and T. Balzacq (eds) (2006), *Security versus Freedom: A Challenge for Europe's Future?*, Hampshire: Ashgate Publishing.

Carrera, S., E. Guild and F. Geyer (2008), *The Commission's New Border Package: Does it take us one step closer to a 'cyber-fortress Europe'?*, CEPS Policy Brief No. 154, Centre for European Policy Studies, Brussels, March.

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About CHALLENGE

T he familiar world of secure communities living within well-defined territories and enjoying all the celebrated liberties of civil societies is now seriously in conflict with a profound restructuring of political identities and transnational practices of securitisation. CHALLENGE (Changing Landscape of European Liberty and Security) is a European Commission-funded project that seeks to facilitate a more responsive and responsible assessment of the rules and practices of security. It examines the implications of these practices for civil liberties, human rights and social cohesion in an enlarged EU. The project analyses the illiberal practices of liberal regimes and challenges their justification on the grounds of emergency and necessity.

The objectives of the CHALLENGE project are to:

- understand the convergence of internal and external security and evaluate the changing character of the relationship between liberty and security in Europe;

- analyse the role of different institutions in charge of security and their current transformations;

- facilitate and enhance a new interdisciplinary network of scholars who have been influential in the re-conceptualising and analysis of many of the theoretical, political, sociological, legal and policy implications of new forms of violence and political identity; and

- bring together a new interdisciplinary network of scholars in an integrated project, focusing on the state of exception as enacted through illiberal practices and forms of resistance to it.

The CHALLENGE network is composed of 21 universities and research institutes selected from across the EU. Their collective efforts are organised under four work headings:

- *Conceptual* – investigating the ways in which the contemporary re-articulation and disaggregation of borders imply a dispersal of practices of exceptionalism; analysing the changing relationship between new forms of war and defence, new procedures for policing and governance, and new threats to civil liberties and social cohesion.

- *Empirical* – mapping the convergence of internal and external security and transnational relations in these areas with regard to national life; assessing new vulnerabilities (e.g. the 'others' targeted and critical infrastructures) and lack of social cohesion (e.g. the perception of other religious groups).

- *Governance/polity/legality* – examining the dangers to liberty in conditions of violence, when the state no longer has the last word on the monopoly of the legitimate use of force.

- *Policy* – studying the implications of the dispersal of exceptionalism for the changing relationship among government departments concerned with security, justice and home affairs, along with the securing of state borders and the policing of foreign interventions.

The CHALLENGE Observatory

The purpose of the CHALLENGE Observatory is to track changes in the concept of security and monitor the tension between danger and freedom. Its authoritative website maps the different missions and activities of the main institutions charged with the role of protection. By following developments in the relations between these institutions, it explores the convergence of internal and external security as well as policing and military functions. The resulting database is fully accessible to all actors involved in the area of freedom, security and justice. For further information or an update on the network's activities, please visit the CHALLENGE website (www.libertysecurity.org).