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# **MAINTAINING SECURITY WITHIN BORDERS: TOWARDS A PERMANENT STATE OF EMERGENCY IN THE EU?**

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**F**reedom, wherever it existed as a tangible reality, has always been spatially limited. This is especially clear for the greatest and most elementary of all negative liberties, the freedom of movement; the borders of national territory or the walls of the city-state comprehended and protected a space in which man could move freely. Treaties of international guarantees provide an extension of this territorially bound freedom for citizens outside their own country, but even under these modern conditions the elementary coincidence of freedom and a limited space remains manifest. What is true for freedom of movement is to a large extent, valid for freedom in general. Freedom in a positive sense is possible only among equals, and equality itself is by no means a universally valid principle but, again, applicable only with limitations and even within spatial limits.

Hannah Arendt (1963), *On Revolution*.

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## **ABSTRACT**

This report carries out an assessment of the European measures and practices implemented within the scope of the Schengen borders regime after the terrorist attacks of 11 September 2001 in the United States. In particular we look at:

- the re-introduction of border checks on the basis of Art. 2.2 of the Schengen Convention, along with the plan to put protestors under surveillance and deny entry to suspected troublemakers; and
- the policies on intrusive surveillance through the use of biometric technologies and databases, as well as the controversial EU/US bilateral relations on the transfer of Passenger Name Record information (PNR).

We also evaluate to what extent security has taken precedence in the European agenda and how it undermines, among others, the fundamental right of free movement of persons within the EU (which is enshrined in the EC Treaty), and leads to a quasi-permanent 'state of exception' or 'emergency' within the European borders. The human rights considerations as well as the main human targets of these security policies also need special scrutiny.

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## 1. Application by the member states of Art. 2.2 of the Schengen Convention: Overusing an exceptional clause?

The current *illusory* change in security concepts as well as in the classical distinction between internal and external security, owing to the often politically claimed globalisation of its nature, has led towards justifications across Europe for a significant increase in state (mal)practices on intrusive surveillance, policing and restrictive measures towards people in general. This change may have resulted, in some instances, in the erosion of civil liberties, human rights and the rule of law. Therefore the practices implementing the Schengen borders regime merit special attention.

The Schengen agreement of 1985<sup>1</sup> and the Convention of 1990<sup>2</sup> that implemented it were intended to establish, through an intergovernmental approach,<sup>3</sup> the application of ‘the principle of the free movement of persons’ within the European borders.<sup>4</sup>

The Single European Act, which came into effect on 1 July 1987 by introducing Art. 14 into the EC Treaties (formerly Art. 8a), stipulated that the European Community should adopt measures aimed at achieving ‘a market without frontiers’, i.e. an internal market. Article 14 point 2 states :

The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaty.

Thus, an internal market should consist of an area without qualitative or quantitative *barriers* in which the free movement of persons, among the other three freedoms of movement, should be ensured and fully respected under certain circumstances.<sup>5</sup>

It is also important to recall that it was not until 1 May 1999, when the Amsterdam Treaty came into effect, that Schengen became part of the EU machinery,<sup>6</sup> and the section dealing with the Schengen

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<sup>1</sup> The original Schengen Agreement was signed on 14 June 1985 by Germany, France and the Benelux countries ; in the meantime, the Commission presented a White Paper to the European Council on completing the internal market, COM(1985) 310 final, Brussels, 14 June 1985.

<sup>2</sup> Nevertheless the Convention, composed of 142 articles and seven titles, was not applied by any of the member states until, after numerous delays, 1995, even though it entered into force in 1993.

<sup>3</sup> See Bigo, D. (1996), who explains the main reasons why the intergovernmental method was chosen.

<sup>4</sup> See Handol, J. (1995); see also Van Houtum, H. (2000).

<sup>5</sup> The first concept used by the original treaty was the one of the common market ; see also Art. 3 of the EC Treaty, which provides: “For the purposes set out in Art. 2, the activities of the Community shall include...(c) an internal market characterized by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital”. See also Graig, P. and G. de B urce (1998).

<sup>6</sup> Schengen entered into force on 26 March 1995 and until 1 May 1999, it remained within intergovernmental competence, with only a limited number of the EU member states participating fully.

borders *acquis* was incorporated within the first pillar.<sup>7</sup> A Protocol annexed to the Amsterdam Treaty finally integrated the Schengen *acquis* into the framework of the EU – including the decisions and declarations adopted by the Executive Committee established by the 1990 Convention.

Looking at the implementation by member states of some of the measures adopted under the Schengen regime,<sup>8</sup> however, a different path has been taken from the one carefully settled in the EU Treaty structure,<sup>9</sup> due to the predominance of the security rationale over the one of freedom.<sup>10</sup> We can see how, in some instances member states have unilaterally reintroduced border controls and checks on individuals, justified on grounds of ‘special security concerns’ or a ‘state of emergency’. Thus not only has one of the main goals of the internal market been undermined – the freedom of movement of persons – but also other fundamental rights and freedoms provided at the European as well as at international level. Additionally, the categories of people affected by these restrictive policies introduced on behalf of ‘our security’ cover not only those who qualify as third-country nationals (TCNs) or ‘others’,<sup>11</sup> but also EU citizens in general.

The provision used by the member states has particularly been Art. 2.2 of the Schengen Convention, which has Arts. 62.1 and 64 of the EC Treaty<sup>12</sup> as its legal basis and provides the following:

1. Internal borders may be crossed at any point without any checks on persons being carried out.
2. Nevertheless, where public policy or national security so require, a Contracting Party may, after consulting the other Contracting Parties, decide that for a limited period national border checks appropriate to the situation shall be carried out at internal borders. 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.

Therefore this article states in its first paragraph that no checks on persons shall be carried out when crossing internal borders, but allows in its second paragraph for the unilateral introduction of border controls at internal borders “where public policy or national security so require” after consulting the other Schengen contracting parties. The consultation requirement does not have to be followed in those instances when the state deems it necessary to act immediately: the state may reinstate checks

<sup>7</sup> Police and judicial cooperation in criminal matters, however, were integrated into the third pillar; see Art. 2 of the Protocol integrating the Schengen *acquis* into the framework of the European Union.

<sup>8</sup> Since 1990, all the EU member states have acceded to the Schengen regime, except for the UK and Ireland, which together with Denmark, concluded special protocols that permit them to remain outside the Schengen agreement in relation to the special provisions. That notwithstanding, the UK and Ireland are allowed to choose whether they wish to participate in some of the provisions adopted under the regime, following Arts. 3 and 4 of the Protocol on the Position of the United Kingdom and Ireland. In addition, the European Commission has started negotiations with Switzerland regarding their potential future association with the Schengen regime (see [http://europa.eu.int/comm/external\\_relations/switzerland/intro/](http://europa.eu.int/comm/external_relations/switzerland/intro/)).

<sup>9</sup> Art. 2 of the TEU states: “The Union shall set itself the following objectives: to maintain and develop the union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime”.

<sup>10</sup> It is also interesting to note that the French controls at its borders with the Benelux countries have not yet been totally abolished.

<sup>11</sup> Following the opinion of some academics, these ‘other’ persons would be those who fall into the category of foreigners and would also fulfill certain physical as well as behavioral characteristics that are different from the ‘occidental-normal’ ones.

<sup>12</sup> Looking at the Council Decision that determines the legal basis for each of the provisions or decisions that constitute the Schengen *acquis* and statements (1999/436/EC, 20 May 1999), the EU legal basis for Art. 2.2 of the Schengen Convention is Art. 62.1, with respect to the provisions of Art. 64 of the EC Treaty; Art. 62.1 stipulates the absence of any controls for crossing internal borders, with respect to Art. 64, which states that this “should not affect the exercise by the Member States of their responsibilities for the maintenance of law and order”.

when an ‘extreme urgency’ exists.<sup>13</sup> Even though this provision must be used exclusively under the exceptional circumstances of an emergency and for a limited period of time, looking at the states’ practices, however, their use of the provision has not been so exceptional, but rather a common practice.

Critical questions have been raised concerning the continued non-communitarisation of Art. 2.2, which falls completely outside the EU institutional framework.<sup>14</sup> The fact that this provision is still of a purely intergovernmental nature explains the lack of judicial and parliamentary accountability for the use of this clause so far. In most of the cases, public information is lacking on when and how the states’ authorities have implemented it. In fact, looking at the public server of the EU Council, available information about every single application of the exceptional clause seems to be less than exhaustive.<sup>15</sup> Another problem is the lack of checks and balances for the proportionality of the temporarily resettled border controls, and how to protect the respect of human rights, civil liberties and the rule of law. The full application of the right of free movement of persons provided by Art. 18 of the TEC<sup>16</sup> and Art. 45<sup>17</sup> of the European Charter of Fundamental Rights, as well as the respect of Art. 15 of the European Convention of Human Rights (ECHR) need to be guaranteed and considered as a high policy priority.<sup>18</sup>

In addition, it is significant to see how “these checks are applied flexibly as the situation requires”.<sup>19</sup> The law enforcement authorities at the national level have wide discretion to determine the existence of a threat to public policy and national security, and the security standards to follow in the particular event. Table 1 shows the use that some of the contracting states have made of Art. 2.2, as well as the concrete events and period of time in which it has been implemented.

A good example of the often-unilateral use of Art. 2.2 was that by Italy on the occasion of the G8 meeting in Genoa between 20 and 22 July 2001.<sup>20</sup> As the Interior Minister Claudio Scajola said before the Chamber of Deputies, due to the use of this article and the exercise of border controls, 2,093 persons were refused entry into the country.<sup>21</sup>

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<sup>13</sup> See the decision of the Schengen Executive Committee of 20 December 1995 on the procedure for applying Art. 2.2 of the Schengen Convention implementing the Schengen Agreement (SCH/Comex (95) 20 rev. 2), OJ L239, 22 September 2000, p. 16. It states: “A State which deems it necessary to reinstate checks immediately so as to maintain public order or national security must send notification to the other States containing the elements listed under point 1, i.e. grounds, extent and probable duration of the measure”.

<sup>14</sup> The Commission has referred to a legislative proposal harmonising the procedure to use Art. 2.2 several times, however, a more formal or serious proposal is lacking so far.

<sup>15</sup> See <http://register.consilium.eu.int/utfregister/frames/introfsEN.htm>.

<sup>16</sup> Art. 18.1 of the EC Treaty, states: “Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect”.

<sup>17</sup> Art. 45 of the European Charter of Fundamental Rights and Freedoms states: “Every citizen of the Union has the right to move and reside freely within the territory of the Member States”.

<sup>18</sup> Art. 15 of the ECHR, entitled “Derogation in time of emergency”, stipulates: “In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law”. See Ergec, R. (1987); see also Steiner, H. J. and P. Alston (2000).

<sup>19</sup> See the application by Spain of Art. 2.2 of the Convention implementing the Schengen Agreement, Council of the European Union, 15901/02, Brussels, 20 December 2002; see also Art. 2.2 of the Schengen Convention, which states that “checks appropriate to the situation shall be carried out”.

<sup>20</sup> See the application by Italy of Art. 2.2 of the Convention implementing the Schengen Agreement, Council of the European Union, 10830/01, Brussels, 11 November 2001.

<sup>21</sup> See <http://www.statewatch.org/news/2001/jul/genoa6.htm>; see also the report on the International Inquiry Committee for the protection of basic human rights in the face of globalization, 6 April 2002 (retrieved from <http://www.statewatch.org/news/2002/jul/08agenoa1.htm>).

Table 1. Use of Art. 2.2 per country and event

COUNTRY	EVENT	PERIOD OF TIME
Belgium	Immigrant regularisation programme	10–31 January 2000
Luxembourg	Belgian restoration of border checks	Not specified
Germany	Visit of the Iranian President Mohammad Khatami	7–12 July 2000
France	European Council meeting in Biarritz, France, 12–14 October 2000	10–14 October 2000
Spain	European Council meeting held in Biarritz, France, 12–14 October 2000	11–14 October 2000
Luxembourg	Visit of Prime Minister Jose Maria Aznar from Spain, 28–29 November 2000	25–29 November 2000
France	Nice European Council, 7–8 December 2000	2–10 December 2000
Belgium	Risk of sudden, temporary increase in asylum-seekers owing to new asylum restrictions from 10 January 2001	26 December 2000 to 10 January 2001
Austria	European Economic Summit, Salzburg, 1–3 July 2001	25 June to 3 July 2001
Sweden	European Summit Gothenburg, 15–16 June 2001	15–16 June 2001
Italy	G8 meeting, Genoa, 20–22 July 2001	14–21 July 2001
Norway	Nobel prize ceremony, including Palestinian leader Yassar Arafat and Prime Minister Ariel Sharon, Oslo	5–12 December 2001
Spain	Events scheduled by the Spanish presidency	30 January to 4 February 2002
Iceland	Checks among passengers on two planes from Copenhagen for members of a suspected organised crime group	1 February 2002
Austria	Visit of the Iranian President Mohammad Khatami, 11–13 March 2002	11–13 March 2002
Spain	Barcelona European Council meeting	9–18 March 2002
Spain	Informal meeting of EU defence ministers, Zaragoza	21–23 March 2002

Iceland	NATO meeting in Reykjavic, 14–5 May 2002	7–16 May 2002
Spain	EU Summit in Seville, 21–22 June 2002	14–22 June 2002
Norway	World Bank Conference, Oslo, 24–26 June 2002	15–27 June 2002
Austria	European Economic Summit, 15-17 September 2002	9–17 September 2002
France	Batasuna meeting/rally, Bayonne (Pyrenees)	19 October 2002
Italy	European Social Forum, Florence	1–10 November 2002
Denmark	Copenhagen European Council, 12–13 December 2002	6–12 December 2002
Sweden	Copenhagen European Council, 12–13 December 2002	6–14 December 2002
Spain	Movement of eminent persons during the Christmas holidays to the area of the Arán Valley (Lleida)	20 December 2002 to 7 January 2003

Source: Statewatch European Monitor (Vol. 3, No. 4, February 2003).

Indeed, according to NGOs and human rights organisations reporting directly from Genoa,<sup>22</sup> a high number of persons were not checked at the border points on a *case-by-case* basis, as required by the Schengen *acquis*, but instead were blocked as a group at the Italian frontiers. Additionally, the security framework and police force action used during the event have been identified as failing to meet the principle of proportionality and represented a good example of what a ‘police state’ may look like.<sup>23</sup>

Spain is another case that shows the wide discretion often left in the hands of the states’ institutions. Looking back, the Spanish national authorities have used the exceptional clause more than any other Schengen state so far. Measures on border controls were (re)introduced not only during the Spanish presidency of the EU (at the Council meetings in Seville and Barcelona), but also in situations when the grounds for emergency were not clear in order to apply the ‘exceptional’ article. This was also the case in the movement of eminent persons to the Arán Valley during the Christmas holidays.<sup>24</sup>

One of the main negative aspects of the application of Art. 2.2 is that once the border controls have been re-established all those entering the country will be exhaustively checked. This may lead to a total block of the border due to the usually large-scale influx of travellers and the necessity to check a majority or all of them. Therefore, the restrictive measures will affect not only those who qualify as ‘suspects’, but also any person trying to cross the frontier of that state for whatever reason.<sup>25</sup> Article 1 states: “Any Member State which applies Art. 2.2 of the Schengen Convention shall take every step to limit, as far as possible, the inconvenience caused by checks on travellers”, but in our opinion, whether the instruments adopted to achieve this goal will be effective in practice remains highly uncertain.

<sup>22</sup> See, among others, *Italy, G8 Genoa policing operation of July 2001, A summary of concerns*, Amnesty International, London, 1 November 2001 (retrieved from <http://www.amnesty.org>).

<sup>23</sup> See “Italy’s strategy of tension”, *The Guardian*, 27 July 2001; see also the statements by two of the British people arrested in <http://www.statewatch.org/news/2001/aug/02genoa.htm>.

<sup>24</sup> See the application by Spain of Art. 2.2 of the Convention implementing the Schengen agreement, Council of the European Union, 15901/02, Brussels, 20 December 2002.

<sup>25</sup> In this last case, the freedom to provide services – as provided by Arts. 49-55 of the EC Treaty and the Council Directive 73/148 of 21 May 1973 on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to the establishment and the provision of services, OJ(1973) L172/14 – would be gravely undermined.

Protests and demonstrations on relevant occasions such as European Council meetings and other comparable events have become one of the main targeted activities when Art. 2.2 has been more frequently applied by the member states. The huge demonstrations that occurred during the EU-US summit in Gothenburg represented the starting point for the development of an EU policy dealing with these matters.<sup>26</sup> Consequently, the Justice and Home Affairs (JHA) Council meeting of July 2001 dealt for the first time with the operational measures necessary to reduce the risk of serious disturbances of law and order, including the need to develop the collection, analysis and exchange of data between the competent national authorities.<sup>27</sup> Recently, an action plan has been presented by the Italian presidency of the EU to put protestors or ‘suspected troublemakers’ or both under surveillance.<sup>28</sup>

The main idea of the draft Council Resolution on security at European Council meetings and other comparable events<sup>29</sup> is the denial of entry to those falling within the previously mentioned categories to the territory of the state. Thus, it is equally a denial of their ability to exercise their free movement rights, where a protest is planned, by determining that they will constitute potential disturbances of public law and order.

Looking at the provisions of the draft Council Resolution,<sup>30</sup> this proposal is intended to lead to the creation of a system of national databases of persons who have been identified as potential ‘troublemakers’ or ‘suspects’. These databases will enable the transfer of data between the different national authorities. In our view, it is striking to see how the inclusion of a suspect in such a database and the exchange of all data concerning a particular person may be based exclusively on suspicions that if this person crosses the border, he or she may be a serious threat to the internal security of the state. No clear legal standards are provided for carrying out the surveillance of these targeted groups.

Therefore, it is highly probable that the respect of the rights to peaceful assembly and demonstration and freedom of expression, provided by Arts. 10<sup>31</sup> and 11 of the ECHR,<sup>32</sup> as well as the right of data protection of the ‘not-welcomed’ may be jeopardised by the application and functioning of the proposed European system. Furthermore, Art. 2 of the draft Resolution stipulates:

Any Member State which applies Art. 2.2 of the Schengen Convention when a European Council meeting or other comparable international event is being held within its territory will therefore have to give precedence to targeted close checks on individuals believed to be intending to enter the country with the aim of disrupting public order and security at the event.

We share the view that the expression “individuals believed to be intending” shows the lack of real or feasible conviction that the national law enforcement authorities may succeed in determining whether or not the person concerned truly represents a threat to public order and national security to the state holding the high-level event.

<sup>26</sup> See <http://news.bbc.co.uk/1/hi/world/europe/1384339.stm>; see also <http://europa.eu.int/scadplus/leg/en/lvb/133085.htm> for all the legislative developments concerning the prevention and control of hooliganism.

<sup>27</sup> See the Conclusions adopted by the Council and the representatives of the Governments of the Member States on 13 July 2001 on security at meetings of the European Council and other comparable events, Council of the European Union, 10916/01 JAI 82, Brussels, 16 July 2001.

<sup>28</sup> See <http://www.ueitalia2003.it/EN/Notizie/affariGeneraliRelazioniEsterne/>.

<sup>29</sup> See the Draft Council Resolution on security at European Council meetings and other comparable events, Council of the European Union, 10965/03, Brussels, 30 June 2003.

<sup>30</sup> The proposal by the Italian presidency has received criticism from, for instance, the Dutch government (see <http://www.statewatch.org/news/2003/aug/20neths.htm>).

<sup>31</sup> Art. 10 of the ECHR, entitled “Freedom of expression”, provides: “Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

<sup>32</sup> Art. 11 of the ECHR on the freedom of assembly and association stipulates: “Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests”.

The creation of a system to transfer personal data between the member states is covered by Art. 3 of the draft Council Resolution.<sup>33</sup> This system would be an extension of the existing Schengen Information System (SIS). It would incorporate to the latter a European database on ‘suspected protestors’. It is also interesting to highlight that Art. 4 of the proposal states that the “information supplied may, where national legislation allows, include names of individuals convicted of offences involving disruption of public order at demonstration or other events”. The real scope and limits of the behaviours and activities that may fall within the expression “or other events”, as well as the control and limits over the use of the special information provided remains rather far from the concept of European accountability.

Finally, the legal tool that has been used to deal with the policy issue is a draft Council Resolution. This sort of legal act is not subject to any kind of parliamentary or judicial control whatsoever. Also, a resolution falls within the category of the so-called ‘soft law’, which refers to the non-binding character of certain EU decisions, and thus the member states will be completely free to apply or not apply its provisions in their internal systems.

Closely related and complementary to the draft Council Resolution on security is the *Security Handbook for the use of police authorities and services at international events such as meetings of the European Council*.<sup>34</sup> Its main purpose is presented in the introductory chapter of the document, which states that its intention is as follows:

to serve as a practical instrument or check-list providing guidelines and inspiration for law enforcement authorities in Europe undertaking the responsibility for security at international events such as meetings of the European Council or providing assistance for the host authorities.

Point IV.2 of the document provides that the member states shall use Art. 2.2 of the Schengen Convention as “the available and appropriate” legal base to justify the border checks and the potential intensification of police control aimed at preventing the ‘not-welcomed’ from going to the part of the territory where the event is going to take place.

The handbook gives a predominant role to the General Secretariat of the Council (GSC) by stating the set of responsibilities that it has in the procedure, such as giving advice about the security measure to be implemented before the event takes place, as well as maintaining liaison with the event security officer of the organising state. In our view, however, the text leaves the national security authorities of the hosting state too much room for discretion regarding the decisions about the security framework to adopt and the grounds for determining a potential threat to the maintenance of public law and order.

This may be shown in the so-called ‘permanent risk analysis’ that has to be carried out by each permanent national contact following the steps set out in Annex A of the handbook, entitled “Risk analysis on potential demonstrators and other groupings”. The risk analysis, which has to be developed by the state in order to gather information on suspected troublemakers, is again too wide in character, and based on unilateral and purely subjective considerations.

## **2. Towards a coherent EU policy ensuring the right of data protection?**

This section builds on the previous one by briefly analysing other Schengen-related policies,<sup>35</sup> including those that fall within the package of measures called for by modern political voices that see an urgent need for more security guarantees surrounding our borders.<sup>36</sup>

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<sup>33</sup> See paragraph 3 of the draft Resolution, which states: “In order to make it easier for the host country to carry out targeted close checks on travelers, Member States shall supply that country with any information of relevance in identifying individuals with a record of having caused disturbances in similar circumstances”.

<sup>34</sup> See the *Security Handbook for the use of police authorities and services at international events such as meetings of the European Council*, Council of the European Union, 12637/3/02 ENFOPOL 123 REV 2 + COR 1, Brussels, 12 November 2002; see also the Decision of the Executive Committee of 16 December 1998 on the Handbook on cross-border police cooperation (SCH/Comex (98) 52).

<sup>35</sup> See Apap (2002), pp. 72-82.

The future developments of a Visa Information System (VIS) and the second generation of the Schengen Information System (SIS II),<sup>37</sup> as well as the use of biometrics and new technologies of surveillance, are at present a hot topic for discussion at the European level. Different opinions arise about the coherency of these policies with European and international human rights standards in general, and the respect of data protection rights for EU and non-EU citizens in particular.<sup>38</sup> Indeed, the development of these controversial policies will be relevant not only to those falling within the category of ‘the others’, foreigners or TCNs, but also to every single individual fulfilling the necessary conditions – being physiological or behavioural or both - to be qualified as an ‘unwanted’, ‘not-welcomed’ or ‘suspicious’ person. The question of whether these instruments (which are justified on grounds of the now familiar American/European campaign on the war against terror and the fight against illegal immigration) may lead to practices that are not reconciled with respect for human rights remains open.

As a point of departure, it is interesting to assess the Commission’s recent Communication on the development of a common policy on illegal immigration, smuggling and trafficking of human beings, external borders and the return of illegal residents, COM(2003) 323 final<sup>39</sup> In this key legislative proposal, the European Commission, after having carried out the feasibility study on the necessary investment costs,<sup>40</sup> reconfirmed the high priority already given at the European Councils of Laeken<sup>41</sup> and Seville<sup>42</sup> to the development of, among others, the following policy guidelines and objectives :

1. the Visa Information System (VIS), as a future tool that would become a pivotal part of the plan to combat illegal immigration and the trafficking/smuggling of human beings,<sup>43</sup> and complement the SIS II; and
2. biometric identifiers technology for the overall efficiency and accuracy of the projected system.

The communication also underlined the progressive, global importance given to “the verification and identification of travellers and the vulnerability of current travel documents”, in order to prevent a potential threat to aviation. It also stressed the necessity of amending the existing EC regulations that

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<sup>36</sup> See *A secure Europe in a better world*, the paper presented by Javier Solana, EU High Representative for the Common Foreign and Security Policy at the European Council in Thessaloniki, 20 June 2003; the paper explains in a rather unfortunate way that Europe faces three threats: international terrorism (Europe is both a target and a base for terrorists), the proliferation of weapons of mass destruction and organised crime.

<sup>37</sup> With regard to the Schengen Information System, see Guild, E. (2001).

<sup>38</sup> See [http://europa.eu.int/comm/internal\\_market/privacy/index\\_en.htm](http://europa.eu.int/comm/internal_market/privacy/index_en.htm).

<sup>39</sup> Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki, Brussels, 3 June 2003, COM(2003) 323 final.

<sup>40</sup> Around €140 million have been deemed necessary.

<sup>41</sup> Point 42 of the Laeken Presidency Conclusions, 14–15 December 2001 states: “Better management of the Union's external border controls will help in the fight against terrorism, illegal immigration networks and the traffic in human beings. The European Council asks the Council and the Commission to work out arrangements for cooperation between services responsible for external border control and to examine the conditions in which a mechanism or common services to control external borders could be created. It asks the Council and the Member States to take steps to set up a common visa identification system and to examine the possibility of setting up common consular offices.”

<sup>42</sup> Point 30 of the Seville Presidency Conclusions, 21 and 22 June 2002 provides for the “introduction, as soon as possible, of a common identification system for visa data, in the light of a feasibility study to be submitted in March 2003 and on the basis of guidelines from the Council”.

<sup>43</sup> See the Proposal for a comprehensive plan to combat illegal immigration and trafficking of human beings in the European Union, 2002/C 142/02, 14 June 2002, pp. 26 and 27; see also the Communication from the Commission to the Council and the European Parliament, Towards integrated management of the external borders of the Member States of the European Union, COM(2002) 233 final, Brussels, 7 May 2002, in which the proposal towards the creation of a European Corps of Border Guards was also presented; on that subject, see also the UK Parliament House of Lords Select Committee Session 2002–2003, *Proposals for a European Border Guard* 29<sup>th</sup> Report, 1 July 2003.

deal with the uniform format for visas and residence permits for TCNs in order “to establish a reliable link between the document issued and its holder”.<sup>44</sup> Therefore, following these policy guidelines, the Thessaloniki European Council Conclusions called for the establishment of “a coherent approach on biometric identifiers or biometric data, which would result in harmonised solutions for documents for third country nationals, EU citizens’ passports and information systems (VIS and SIS II)”.<sup>45</sup>

The European Council thus formally invited the Commission to prepare the legislative proposals necessary to comply with the agreed political agenda, influenced to a great extent by transatlantic politics and pressures. Consequently, two proposals have been recently presented by the European Commission<sup>46</sup> that intend to amend:

- the Council Regulation laying down a uniform format for residence permits of third-country nationals, (EC) No. 1030/2002, of 13 June 2002; and
- the Council Regulation laying down a uniform format for visas, (EC) No. 1683/95, of 29 May 1995.

The two Commission proposals will result in the harmonisation of documents granted to TCNs within the EU, by stipulating a common set of legal bases and leaving to the competent national authorities the responsibility for the practical implementation of the system. The main objective of these amendments is once again justified on behalf of the necessity to guarantee a very high level of security in the aftermath of the tragic events of 11 September 2001.<sup>47</sup> The member states will be required to introduce biometric information in visas as well as residence permits given to the target group, i.e. TCNs.

Even though the concept of biometric data may be rather broad and flexible for any sort of technological preferences, these data can be defined as information on the behavioural and physiological characteristics of an individual (retina scans, facial recognition and digital fingerprints, among others) that will facilitate his or her automatic identification.<sup>48</sup>

In addition, as the Council also stressed in Thessaloniki, the use of biometric identifiers will play a decisive role in the future development of the VIS<sup>49</sup> as well as the upcoming second generation of the SIS (SIS II),<sup>50</sup> which will lead to the establishment of a European database on inadmissible foreigners. Furthermore, it is striking to see how, following some studies carried out by NGOs,<sup>51</sup> the human targets of these policy initiatives and databases will not only be ‘foreigners’, but a broader category of

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<sup>44</sup> See page 5 of the Commission Communication, COM(2003) 323 final, within the second heading on *Policy Developments*.

<sup>45</sup> See page 3 of the Presidency Conclusions, Thessaloniki European Council, 19 -20 June 2003.

<sup>46</sup> See the Proposal for a Council Regulation amending Regulation, (EC) 1030/2002, Laying down a uniform format for residence permits for third-country nationals, COM(2003) 0558 final–CNS 2003/0218, and also the Proposal for a Council Regulation amending Regulation, (EC) 1683/95, Laying down a uniform format for visas, COM(2003) 0558 final–CNS 2003/0217, 24 September 2003.

<sup>47</sup> See the Explanatory Memorandum of both proposals, where it is first stated that, “In the aftermath of the tragic events of September 11, 2001 the Commission was asked by Member States to take immediate action in order to improve document security. Clearly, it was important to be able to detect persons who tried to use forged official documents in order to gain entry to European Union territory. Prevention of the use of bogus or false identities could best be achieved by enabling more reliable checking of whether the person who presented a document was identical to the person to whom the document has been issued.”

<sup>48</sup> Spain was one of the first EU countries that used biometrics identifiers (fingerprints) in the issue of national identity cards and other identity documents.

<sup>49</sup> The VIS is thought to have been structured in two parts, a central visa information system (C-VIS), and a national visa information system in each of the member states (N-VIS).

<sup>50</sup> See the JUSTICE press release of 18 December 2000, “Europe’s largest database breaches human rights standards”, in which the SIS was criticised for not fulfilling the requirements for data protection; see also the Commission Communication to the Council and the European Parliament, Development of the Schengen Information System II, COM(2001) 0720 final.

<sup>51</sup> Apap, J. (2000), *A Report on Free Movement of People in the Schengen Area: Visible and Hidden Barriers*, Euro Citizen Action Service (ECAS), Brussels.

persons. In fact, as the SIS stands now, the following may also qualify to be recorded in the SIS database:

- wanted persons or persons under police surveillance;
- missing persons or persons who should be placed under protection (such as minors); and
- persons whose identity is (or maybe) fraudulently used as an alias by others (such as in reported cases of stolen identity documents).

In our opinion, it is worrying to see the lack of transparency about the real limits and purposes of these new databases, which sometimes include sensitive data about those persons who may also fulfil the requirements to be noted on the SIS. It is also striking to look at the current politically-desired functions<sup>52</sup> of such systems, and the wider competences given to the national security authorities (police, military and border guards) for access to data collected through these new technological instruments, despite not being fully in accordance with Art. 96 of the Schengen Convention.<sup>53</sup>

Democratic controls, along with parliamentary and judicial accountability are preconditions to comply with the rule of law and to ensure the human rights protection. The right to data protection will continue to be difficult to develop because of the abstract position of the SIS between the first and third pillar.

The Commission's Communication COM(2003) 323 final also highlighted the importance of "the verification and identification of travellers and the vulnerability of current travel documents". In that regard, on 13 March 2003 the European Parliament widely adopted a resolution regretting the joint declaration by US and EU officials of 19 February 2003, which allowed European airlines to transfer data to US customs officials on passengers flying to the US.<sup>54</sup> In the opinion of the European Parliament, this would infringe the European Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 95/46/EC, of 24 October 1995.<sup>55</sup> Furthermore, the European Parliament was not informed at all during the whole process of the talks with US officials. Therefore, it called upon the Commission to suspend this joint declaration as soon as possible, and instead implement a coherent EU policy on the use of Passenger Name Record (PNR) data for transport and border purposes, which would fully respect the human rights framework under EU law.

Recently, through a letter to the US Secretary of Homeland Security on 12 June 2003,<sup>56</sup> Mr Frits Bolkestein, Member of the European Commission in charge of the Internal Market and Taxation, expressed the difficulties that European airlines face in order to comply with the US requirements on PNR data, (which are justified on the grounds of preventing any threat to aviation). He also underlined the high degree of uncertainty about whether the US framework meets the European legal requirements for the adequate protection of human rights, particularly Art. 15 of the European

<sup>52</sup> See "Requirements for SIS", Council of the European Union, 5968/02, SIS 6 COMIX 78, Brussels, 5 February 2002; see also the Statewatch online news article "SIS II takes ominous shape" (retrieved from <http://www.statewatch.org/news/2002/apr/01sis.htm>).

<sup>53</sup> Art. 96 of the Schengen Convention states: "Data on aliens for whom an alert has been issued for the purposes of refusing entry shall be entered on the basis of national alert resulting from decisions taken by the competent administrative authorities or courts in accordance with the rules of procedure laid down by national law". The competent administrative authorities are not the security agencies of the member states, but instead the national immigration administrative institutions.

<sup>54</sup> Senior officials of the European Commission and the US Administration met in Brussels on 17–18 February 2003, to find a solution to the problems for airlines flying to or from the US, owing to the new Passenger Name Record (PNR) transmission requirements in the US Aviation and Transportation Security Act of 2001.

<sup>55</sup> *Official Journal* (1995), OJ L281, 23 November, see Chapter IV, which deals with Transfer of Personal Data to Third Countries, and specifically Art. 25; see also the Report from the Commission (2003), First Report on the Implementation of the Data Protection Directive 95/46/EC, COM (2003), 265 final, 15 May.

<sup>56</sup> See the letter from Frits Bolkestein, Member of the European Commission in charge of the Internal Market and Taxation, to US Secretary of Homeland Security Tom Ridge, 12 June 2003; see also the speech by Frits Bolkestein, "EU/US talks on transfers of airline passengers", Brussels, 9 September 2003.

Directive on Data Protection,<sup>57</sup> as well as Art. 8 of the EU Charter of Fundamental Rights.<sup>58</sup> He continued by explaining that,

Data protection authorities here take the view that PNR data is flowing to the US in breach of our Data Protection Directive...[C]ertain categories of data must receive reinforced protection under our law. Some such data may be included in certain PNR's, for example data that may reveal religion or health condition.

Indeed, there are several sensitive concerns in relation to the transfer of the sort of data that the US authorities have requested from the EU.<sup>59</sup> The most relevant of these concerns is the potential abuse, or rather non-proportional use, of 'sensitive' information, justified exclusively on the suspicions that a person fulfils (in our opinion) certain characteristics that are very well-defined and relate to a specific category of persons or 'others' who may represent a threat to aviation and global security in general. Use of information in such a manner goes directly against European data-protection rules.

Whether it would be possible to find a legally secure and adequate solution to deal with the issue at stake in the still-pending bilateral talks between the EU and the US, is in our view, far from being clear.<sup>60</sup> European authorities should always keep in mind that every single security measure needs to respect and meet the well-known, but often forgotten, human rights standards.

Finally, we can conclude by remembering what the Data Protection Working Party has stated in Art. 29, in relation to the issue of biometric data:<sup>61</sup>

[T]he processing of biometric data may only be considered lawful if all the procedures involved are carried out in respect of the provisions of Directive 95/46/EC.

### 3. Conclusion

The current European political will that is driving towards rapid progress on instruments that implement databases on protestors and foreigners, as well as the development of biometric technologies to ensure a high level of security against terrorism, organised crime and illegal immigration, needs to be carefully assessed from a human rights and civil liberties perspective.

The respect of the fundamental rights and freedoms of every human being, as provided by international as well as European legal frameworks, needs to be taken as a point of departure in every single security initiative adopted and implemented on behalf of our 'security'. Security needs to go hand-to-hand with freedom. The political view advocating the establishment of an international order, based on effective multilateralism has to be assessed from a perspective that maintains the right

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<sup>57</sup> Art. 15 of the Council Directive, entitled "Automated individual decisions", states: "Member States shall grant the right to every person not to be subject to a decision which produces legal effects concerning him or significantly affects him and which is based solely in [the] automated processing of data intended to evaluate certain personal aspects relating to him, such as his performance at work". See also the recent judgment by the European Court of Justice of 20 May 2003, Joint Affairs C-465/00, C-138/01 and C-139/01.

<sup>58</sup> Art. 8 provides for the protection of personal data, stipulating that : 1) everyone has the right to the protection of personal data concerning him or her; 2) such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law ; 3) everyone has the right of access to the data that has been collected concerning him or her and the right to have it rectified; and 4) compliance with these rules shall be subject to control by an independent authority.

<sup>59</sup> See Apap, J., D. Bigo and J. Lodge (2003), *Data Protection in JHA: An Opportunity for Transatlantic Dialogue*, CEPS Commentary, Centre for European Policy Studies (CEPS), Brussels, July (retrieved from <http://www.ceps.be/Commentary/July03/ApapBigoLodge.php>).

<sup>60</sup> On 22 September 2003, Asa Hutchinson, Undersecretary for Border and Transportation Security, US Department of Homeland Security, was in Brussels for the continuation of talks with EU officials on homeland security issues, including the transfer of PNR (retrieved from <http://www.useu.be/Terrorism/USResponse/Sept2303HutchinsonPNR.htm>); see also the draft agreements between the EU and US on extradition and on mutual legal assistance by the Council of the European Union (2003), 8295/03, Brussels, 9 April.

<sup>61</sup> See the *Working Document of biometrics*, Art. 29, Data Protection Working Party (the independent EU Advisory Body on Data Protection and Privacy), adopted 1 August 2003, 12168/02/EN, WP 80.

balance between freedom and security. Both of these are fundamental elements vis-à-vis the Justice and Home Affairs heading and the aim to create an Area of Freedom, Security and Justice in the EU, as highlighted at the Tampere European Council.

The Schengen regime is not transparent enough and there are differences between the actual spirit of the Schengen *acquis* and how it is implemented in different member states. As identified in this report, there are still important gaps in some of its current and projected operational aspects that may be worrying in view of the upcoming EU enlargement.<sup>62</sup> The overuse of the formerly considered ‘exceptional’ or ‘emergency’ clauses by the member states to politically justify and guarantee a high level of security and protection may lead to cases in which some serious, practical human rights considerations arise.<sup>63</sup> A serious lack of democratic accountability – checks and balances – on, for instance, the respect of the principle of proportionality, the principle of transparency as well as the protection of the human rights sphere remains within the regime. This lack of accountability needs to be tackled as soon as possible.

Thus, in our view it is clear that the question as to what extent an increase in a security rationale actually guarantees an increase in internal safety and freedom leads to a negative answer. It seems that the quoted phrase “A world without frontiers in which solidarity with the whole human race dominates all intermediate solidarities remains a Utopian dream” is an unquestionable truth.<sup>64</sup>

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<sup>62</sup> The European Commission has presented two proposals for Council regulations: one of these is on the establishment of a regime of local border traffic at the external borders of the member states and the other is on the establishment of a regime of local border traffic at the temporary land borders between member states, (12161/03, VISA 137, COMIX 518) Brussels, 2 September 2003. See also the Communication on the Wider Europe – Neighborhood: A New Framework for Relations with our Eastern and Southern Neighbors, 11 March 2003, COM (2003) 104 final.

<sup>63</sup> A very good compilation of these sorts of cases was carried out by the Euro Citizen Action Service (ECAS) hotline. The compilation provides a very useful tool to prove how Schengen works in practice and the gaps that still exist in its functioning. Further, some aspects of the regime are characterised by a lack of transparency and accountability. On 26 March 2000, the fifth anniversary after Schengen took effect; a free phone number was advertised throughout Europe after a press conference to enable people (EU and non-EU nationals) to call the organisation to express their concerns.

<sup>64</sup> See Anderson (1996).

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