

Contribution to the preparation of the Communication of the European Commission on a renewed Internal Security Strategy for the period 2015–2020

By the European Union Agency for Fundamental Rights (FRA)

In the following paper, the European Union Agency for Fundamental Rights (FRA) presents its contribution to the preparation of the Communication of the European Commission on a renewed Internal Security Strategy for the period 2015–2020. The contribution responds to the five specific questions contained in the request by the Directorate-General Home Affairs of the European Commission of 8 September 2014.

The responses are structured to reflect the logical sequence of the questions, focusing first on the (1) identification of specific future challenges to European Union (EU) security, followed by (2) proposed actions to be taken in response to these challenges and possible FRA contribution, and (3) the role of research in that regard. In line with the FRA mandate, all these responses take into account the need to ensure that EU security policy is designed with fundamental rights compliance in mind. In the next section (4), specific fundamental rights considerations related to EU security policies are elaborated upon, looking at some of the actions that are being considered or already implemented to address security risks at the EU level. Finally (5), the contribution briefly looks at the fundamental rights dimension of EU foreign policy in the field of security. Some of the issues therefore appear repeatedly under various questions in order to be examined from different angles.

- 1. “Which specific challenges need to be tackled by EU action in the coming five years regarding international crime, radicalisation and terrorism, cybercrime and cyberattacks, natural and man-made disasters? What role should the border security have in addressing those challenges?”**

At the outset of the discussions on a renewed Internal Security Strategy, the European Union faces a difficult challenge. On the one hand, it needs to address a wide array of security risks ranging from terrorist threats to cybercrime. These threats have not diminished since the adoption of the Internal Security Strategy in 2010, which underlines the need to seek new, effective and innovative solutions.

On the other hand, policymakers at both the EU and Member State level are becoming increasingly aware of the necessity to design responses to these threats in a manner that is not only effective but which also respects fundamental rights. Events such as the tragedies in the Mediterranean that repeatedly lead to fatalities surpassing even those caused by the most catastrophic terrorist attacks

the EU has experienced, foster a public call for national and EU security policies – in fields covering border control, human trafficking and smuggling – that do not dismiss the rights of individuals.

Furthermore, internal security policies that are disproportionate to the purpose they pursue or that do not contain sufficient fundamental safeguards face the risk of failure, resulting in wasted resources, delayed action and damage to legitimacy and trust. This has been demonstrated by prominent examples such as the ruling of the Court of Justice of the European Union (CJEU) on the Data Retention Directive¹ or its judgment in *Kadi*.² Ensuring fundamental rights compatibility of security measures by design therefore needs to be the key component of the renewed Internal Security Strategy if it is to provide legitimate and sustainable solutions.

This conjunction can be best demonstrated in relation to the threat of **radicalisation** which, besides representing a core consideration of wider integration efforts, is currently discussed in relation to the ‘foreign fighters’; EU residents participating in armed conflicts outside the EU. FRA research has shown close links between the feeling of discrimination, lack of trust towards authorities and radicalisation. A comparative study FRA published in 2010, which focused on the experiences of Muslim and non-Muslim youth in France, Spain and the United Kingdom, revealed higher support for violence, both in its individual form and in the use of war and/or terrorism, among young people who feel socially marginalised due to perceived discrimination.³ Young Muslims reported having experienced discrimination and social marginalisation more often than non-Muslim youth, citing cultural background and religion as the most common underlying reasons. The European Union Minorities and Discrimination Survey (EU-MIDIS), published by FRA in 2009, offered further data to place these findings in a wider context:⁴

The EU-MIDIS figures show that although a significant percentage of Muslims have been victims of racially motivated crime, the vast majority do not report such hate crime to the police, often referring to their lack of confidence that the police would be able to do anything about it. At the same time, 40 % of Muslim respondents who had been previously stopped by the police believed that this was specifically due to their immigrant or minority status.

Source: FRA (2009), *EU-MIDIS Data in Focus Report 2: Muslims*, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-2-muslims>.

These facts and figures show that the much discussed threat of radicalisation amongst the EU’s Muslim community, particularly its young people, is a complex issue that cannot be solved by security measures alone. Although the overwhelming majority of Muslims in the EU do not support violence, they still feel targeted by security measures and insufficiently protected by the authorities should they become victims of crime themselves. This situation has a real potential to deepen feelings of social

¹ CJEU, Joined cases C-293/12 and C-594/12, *Digital Rights Ireland and Seitlinger and Others*, 8 April 2014.

² CJEU, Joined cases C-402/05 and C-415/05, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities*, 3 September 2008.

³ FRA (2010), *Experience of discrimination, social marginalisation and violence: A comparative study of Muslim and non-Muslim youth in three EU Member States*, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2012/experience-discrimination-social-marginalisation-and-violence-comparative-study>.

⁴ Comparable figures in relation to other minorities are available in FRA (2012), *EU-MIDIS Data in Focus Report 6: Minorities as Victims of Crime*, Luxembourg, Publications Office, <http://fra.europa.eu/en/publication/2012/eu-midis-data-focus-report-6-minorities-victims-crime>.

FRA findings in relation to police stops are available in FRA (2010), *EU-MIDIS Data in Focus Report 4: Police Stops and Minorities*, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2010/eu-midis-data-focus-report-4-police-stops-and-minorities>.

marginalisation and to incite radicalisation. Losing trust of an entire community because of measures that should be aimed at specific individuals also threatens to undermine the willingness of Muslim communities to cooperate with the authorities, which could have continued grave effects for the future.

As the rapid development of information and communication technologies continues and allows for the transfer of both private and business activities and interaction online, **cyberspace** is likely to play an ever increasing role as a means of and platform for criminal activity. This has been taken into account by recent action at the EU level, including the European Commission's Joint Communication on Cyber Security Strategy of the European Union: an Open, Safe and Secure Cyberspace⁵ and the adoption of the Directive on Attacks against Information Systems.⁶

Its anonymous nature, accessibility and outreach also make cyberspace the chief platform for radicalisation, including incitement to terrorism. A growing body of FRA research covering various topics and groups in society confirms the importance of cyberspace as a forum for cyberharassment and hate crime.

For example, 10 % of respondents interviewed for the FRA survey on discrimination and hate crimes against Jews have experienced offensive or threatening antisemitic comments made about them on the internet, and nearly three quarters (73 %) believe that online antisemitism increased over the past five years. Data from the FRA survey on gender-based violence against women – based on 42,000 interviews – also show that one in 10 (11 %) women in the EU has been a victim of cyberharassment at least once since the age of 15.

Source: FRA (2014), *Fundamental rights: Challenges and achievements in 2013*, Annual report, Luxembourg, Publications Office, p. 93, <http://fra.europa.eu/en/publication/2014/fundamental-rights-challenges-and-achievements-2013>.

International crime continues to present a serious threat to EU security and individuals alike. It has particularly grave effects when it targets vulnerable groups, as is often the case with respect to trafficking and smuggling in human beings. These activities share a common trait in that it is very difficult to detect and punish the perpetrators.

Trafficking in human beings remains one of the most flagrant violations of fundamental rights. In comparison with various estimates about the scale of human trafficking, and despite numerous legal and policy instruments adopted at international as well as EU level in the last two decades, reporting by victims (as well as witnesses) is relatively rare. Reasons include the victims' fear and anxiety together with uncertainty about their own status and rights.⁷ Furthermore, the identification of

⁵ European Commission (2013), *Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Cybersecurity Strategy of the European Union: An Open, Safe and Secure Cyberspace*, JOIN(2013) 1 final, Brussels, 7 February 2013, available at: <http://ec.europa.eu/digital-agenda/en/news/eu-cybersecurity-plan-protect-open-internet-and-online-freedom-and-opportunity-cyber-security>.

⁶ Directive 2013/40/EU of the European Parliament and the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, OJ L 2013, p. 8-14.

⁷ More specific FRA findings on the situation of irregular migrants are available for instance in: FRA (2011), *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2012/migrants-irregular-situation-employed-domestic-work-fundamental-rights-challenges>.

potential victims of human trafficking at the border is difficult and does not seem to be a priority within the overall work of border management. As FRA research carried out at land border crossing points shows, existing tools developed at the EU level to help border guards in recognising signs of human trafficking remain little known among front-line border guards, who see identification of victims of human trafficking as a peripheral task.⁸

Severe forms of **labour exploitation** of irregular migrants, including slavery, bonded labour and the employment of migrant workers under particularly exploitative conditions, often also contain a strong cross-border element - even when not amounting to trafficking in human beings. At present, the FRA is finalising a research project concerning the labour exploitation of migrant workers. This research shows that cases of severe forms of labour exploitation of migrants are widespread – in particular in certain economic areas – and remain mostly undetected. Migrants in an irregular situation are primarily dealt with in the framework of countering irregular migration, typically leading to the initiation of return procedures for exploited migrants rather than to the punishment of their employers, detection of possible links to international criminal networks and the compensation of the workers. Under this approach, the motivation of migrants to report exploitative working conditions and cooperate with the authorities is minimal.

Similarly to trafficking in human beings, smuggling of migrants concerns both internal security and the fundamental rights of persons subject to smuggling. In the absence of legal ways to enter Europe, resorting to smuggling networks represents the only realistic option for many persons in need of protection to reach safety. Therefore, even if contact with a smuggler is initiated by migrants voluntarily, this is often due to an absence of alternative options. This fact is systematically exploited by smuggler networks and facilitates their operations, which needs to be taken into account when the EU designs its response. Hazardous travel conditions and the abuse of the migrants' situation by the smugglers during the process puts their lives at risk.

In a recent example, smugglers have allegedly killed around 500 migrants, including many families and unaccompanied children, sinking their boat off the coast of Malta when they refused to be moved to an unseaworthy boat. A recent IOM report has highlighted that from January to September 2014, 3,072 migrants died in the Mediterranean and that this corresponds to 75 % of fatalities at borders worldwide during that period.

Source: International Organisation for Migration (2014), *Fatal Journeys: Tracking Lives Lost during Migration*, page 11.

As shown by the discussions on rescue at sea in the Mediterranean, **border security** is not just about having effective measures in place to decide who is a legitimate traveller and can be allowed access to the EU, and who is not. It is also about addressing an alarming and unresolved chink in the EU's protection of core rights of individuals. This emerges also from Article 1 of the Eurosur Regulation, which clarifies that one of the purposes of establishing a European framework for sharing information on the situation at the external borders is to contribute to the saving of lives and the protection of migrants. One of the questions of the challenges for the future security strategy is how to ensure that in practice Eurosur contributes to achieving such an objective.

⁸ FRA (2014), forthcoming, *Fundamental rights at airports: border checks at five international airports in the European Union* and *Fundamental rights at land borders: findings from selected European Union border crossing points*. See also FRA, *Fundamental Rights at Europe's Southern Sea Borders*, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2013/fundamental-rights-europes-southern-sea-borders>.

2. “Taking into account the developments in the next five years, which are the actions to be launched at the EU level? How do you see the role of your organisation in supporting those actions?”

In order to address the challenges identified in the response to Question 1, a comprehensive response both at EU and Member State level is needed that will deal with both root causes and effects.

In the area of radicalisation which has the potential to lead to terrorism, there is a strong need for the EU to encourage and support Member States in **introducing or reinforcing existing cooperation with relevant communities**. The feeling of systematic discrimination and social marginalisation that leads to lack of trust in the authorities needs to be addressed both in order to identify specific risks and as part of the overall effort to prevent an escalation of the problem in terms of further radicalisation. Rebuilding trust and ensuring a working relationship between the community and law enforcement is of crucial importance. In 2013, FRA published a fundamental rights-based police training manual that provides guidance on how law enforcement can carry out its duties in a fundamental rights-consistent manner (see textbox). FRA is ready to continue its work in this field to support law enforcement action that respects fundamental rights while remaining effective. In addition, in 2010 FRA published a guide for identifying legitimate and illegitimate uses of profiling, which was accompanied by evidence concerning practice on the ground comparing the experiences of profiling among ethnic minority and immigrant respondents alongside their majority population ‘neighbours’ in ten EU Member States.⁹

The FRA manual for fundamental rights-based police training shows that relatively minor steps can have a major effect on the perception of law enforcement policies and increase their acceptance at individual and community level. It covers a wide range of areas and includes a compilation of fundamental rights-compliant practices ranging from anti-terrorism to intercultural communication and hate crime.

Source: FRA (2013), *Fundamental rights-based police training – A manual for police trainers*, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2013/fundamental-rights-based-police-training-manual-police-trainers>.

Other mechanisms that are already available can be used to foster cooperation with communities and empower them to counter radicalism, particularly if they create the feeling of ‘ownership’ of these initiatives. This includes the Radicalisation Awareness Network (RAN) set up by the European Commission in 2011 as a platform for sharing best practices. In order to ensure long-term effects of RAN, however, due attention needs to be paid to combating the root causes of radicalisation, including discrimination and marginalisation. Appropriate awareness raising tools, effective communication responses and counter-narrative material designed with appropriate cultural and religious sensitivity should play a major role in the future. The May 2014 report of the EU Counter-Terrorism Coordinator contains other useful proposals including offering alternative ways of engagement (such as in the relief effort) with particular groups of young people who might otherwise consider participating in armed conflicts.

⁹ FRA (2010), *Towards more effective policing, understanding and preventing discriminatory ethnic profiling: A guide*, available at: <http://fra.europa.eu/en/publication/2012/towards-more-effective-policing-understanding-and-preventing-discriminatory-ethnic>.

Addressing feelings of discrimination and experiences of hate crime victimisation, both by the Muslim community and more generally, will be necessary to eliminate grounds for radicalisation. As has been underlined in the final report of the Europol Working Group on Illegal Migration conducted within the European Police Chief Convention 2014, “cases of xenophobic violence, xenophobic attitudes and hate crimes immediately reflect on policing, creating a dangerous short-circuit among different communities. Law enforcement structures are very often called upon to address these issues, which require a professional approach as well as deep understanding and trust towards representatives of different communities.”¹⁰ The EU and its Member States, particularly law enforcement authorities, should be exemplary in this regard when developing security measures in a manner that avoids legitimising xenophobic reactions towards specific groups within European society. Measures (or means for their implementation) need to be avoided that focus exclusively on persons of a specific ethnic or religious background, such as discriminatory ethnic profiling (see also response to Question 4), without wider reference to other grounds of intelligence gathering on potential security threats.

FRA will continue its work on these issues in order to identify trends and provide evidence-based advice on how to counter these phenomena. In 2015, FRA will start to implement the second round of the European Union Minorities and Discrimination Survey (EU-MIDIS) which will offer a robust set of data to be compared with the results of the first round published in 2009.

The call for increased attention to the threat posed by hate crime can be reiterated in relation to security in cyberspace where it primarily concerns online hate speech. EU action would be beneficial in relation to cyber hate, and **Member States that have not done so should be encouraged to become party to the Additional Protocol to the Council of Europe Convention on Cybercrime**, thus enhancing cross-border police and judicial cooperation. Another possible area for EU initiative could be in **approximation of legislation on negationism and reviving of totalitarian ideologies**, as these phenomena contain a strong cross-border element that hinders their combating by individual Member States. Fundamental rights safeguards, particularly in relation to the freedom of expression, would need to be an integral part of these measures, taking into account the relation between human dignity and the freedom of expression under Article 17 of the European Convention on Human Rights and related jurisprudence of the European Court of Human Rights (ECtHR).¹¹

The private information and communications sector needs to become more involved in protection of the security and rights of citizens on the internet, within the framework of corporate social responsibility, including by **ensuring sufficient protection against personal data breaches**. Their cooperation with law enforcement authorities in countering other security threats, such as hate speech or incitement to or financing of terrorism, would again need to be tested against possible fundamental rights risks (see the response to Question 4 for details).

In the area of border security, adoption of regulation (EU) 656/2014 establishing rules for Frontex-coordinated maritime operations is an important step forward. However, the **guidance provided should not be limited to Frontex-coordinated operations but also be extended to operations carried out by the Member States**. Respect for the principle of *non-refoulement* in the context of maritime border surveillance operations also needs to be reflected in operational plans and other documents for **joint operations or patrols with third countries**.

¹⁰ Europol (2014), *Final report of the Working Group on Illegal / Irregular migration*, The Hague, 2014, p. 10.

¹¹ For instance ECtHR, *Vejdeland and Others v. Sweden*, No. 1813/07, 9 February 2012, para. 55.

With respect to combating trafficking in human beings, EU action that is currently outlined in the EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016 needs to be continued and, where possible, enhanced in order to motivate Member States to further action. To this end, the EU should continue taking human trafficking and its victims into account in all relevant future legislation and policy, and provide further guidance and support to Member States, including in the area of comprehensive and coherent implementation of the Trafficking Directive.¹² The EU should also **further promote awareness of the issue among the general public, targeting potential witnesses, to ensure that combating trafficking in human beings becomes part of public discourse**, whilst also seeking ways to inform potential victims of their rights and the availability of assistance.

FRA and other EU agencies continue to cooperate in a joint effort to support the implementation of the Trafficking Directive. Some of the outcomes of the agencies’ work, such as the Frontex “Handbook on Risk Profiles on trafficking in human beings”, already significantly support the capacity of border staff in this area overall. In the future, however, **particular attention will need to be paid to counter trafficking in children**. This is already reflected in projects developed by Frontex on the identification of child victims of trafficking.

Child victims of trafficking are also a central focus of the FRA Handbook on Guardianship for Children deprived of Parental Care that has been developed in cooperation with the European Commission and the EU Anti-Trafficking Coordinator’s Office, which aims to facilitate the reinforcement of Member States’ guardianship systems in this regard.

Source: FRA (2014), *Guardianship for children deprived of parental care*, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2014/guardianship-children-deprived-parental-care-handbook-reinforce-guardianship>.

As far as labour exploitation of migrants is concerned, attention needs to be paid also to cases that are not, or cannot be proven to be, linked to trafficking in human beings. In this field, **appropriate implementation of the Employers’ Sanctions Directive**¹³ by Member States should be ensured, including the obligation of Article 13 (4) to grant permits of limited duration to the victims to remain in the territory. In this sense, Member States should be particularly encouraged to create a functioning framework that would guarantee the rights of victims to effective investigations and prosecution of perpetrators and to receive back payments and compensation. An **effective EU response to smuggling of migrants must look beyond criminalising the migrants themselves**, but rather should focus on facilitating the detection and punishment of perpetrators by creating conditions and incentives that would enable and motivate migrants to cooperate with the authorities, as underlined in a FRA paper on criminalisation of migrants in an irregular situation (see textbox).

In its paper on criminalisation of migrants in an irregular situation, FRA suggests promoting access to justice for migrants who are victims of exploitation and abuse by issuing a residence permit which is not dependent on the perpetrator (for example, as a sponsor of the migrant’s stay in a Member State). EU Member States should favourably consider granting such permits beyond what is already provided

¹² Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ 2011 L 101, p. 1-11.

¹³ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ 2009 L 168, p. 24-32.

for in various EU legal instruments, and as provided for in the Council of Europe Convention on preventing and combating violence against women and domestic violence ('Istanbul Convention'),¹⁴ building on existing promising practices existing in some Member States.

Source: FRA (2014), *Criminalisation of migrants in an irregular situation and of persons engaging with them*, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them>.

In order to ensure that the instruments in place to combat irregular migration and its effects are appropriately designed to target the perpetrators – organisers of smuggler networks and persons involved in related exploitative criminal activities – the review of the EU *acquis* announced as an action point in the paper of the Task Force Mediterranean is much needed.¹⁵ The current wording of the Facilitation Directive¹⁶ which does not prohibit Member States to also penalise actions committed with a humanitarian aim – including humanitarian assistance at entry (rescue at sea and assisting refugees to seek safety) as well as the provision of non-profit humanitarian assistance (e.g. food, shelter, medical care, legal advice) to migrants in an irregular situation – needs to be examined. In the meantime, practical guidance to support Member States to implement the directive in a fundamental rights compliant manner should be considered. This would allow to concentrate the resources of border and law enforcement authorities on organised crime as the actual security threat linked to smuggling.

FRA is ready to work alongside EU institutions and Member States to provide advice and expertise on how fundamental rights safeguards can be better integrated in the EU's internal security policies. FRA is currently able to contribute to these issues either on its own initiative or, in the areas of judicial and police cooperation, upon request. The ability to work also in the fields of judicial and police cooperation on its own motion would enable FRA to develop continual expertise and data, making its contributions more timely and effective. As a result, FRA could offer more support to the design of effective, yet fundamental rights compliant, security policies.

¹⁴ Adopted 11 May 2000, entered into force 1 August 2014, on 1 October 2014 it was ratified by eight and signed by an additional 14 EU Member States.

¹⁵ European Commission (2013), *Communication from the Commission to the European Parliament and the Council on the work of the Task Force Mediterranean*, COM(2013) 869final, Brussels, 4 December 2013, available at: http://ec.europa.eu/dgs/home-affairs/what-is-new/news/news/docs/20131204_communication_on_the_work_of_the_task_force_mediterranean_en.pdf.

¹⁶ Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (Facilitation Directive), OJ 2002 L 328, p. 17–18.

3. "Which specific research, technology and innovation initiatives are needed to strengthen the EU's capabilities to address security challenges?"

A comprehensive approach to security, as this paper underlines – bringing together traditional security measures with a fundamental rights-perspective – is crucial for an overall security strategy to be effective and sustainable. Research, by way of data collection and analysis, must fully inform policy making and action from this integrated perspective. This includes objective and independent data collection on communities that are perceived as posing threats to internal security. In this regard, the earlier (in response to the first question) mentioned European Union Minorities and Discrimination Survey (EU-MIDIS),¹⁷ conducted by FRA in 2007–2008 and a repetition planned for a more developed version in 2015 (pre-testing conducted in 2014), serves as a good example. **Also 'hard-to-reach' groups such as irregular migrants must be accessed with such research, in order to get a comprehensive picture of the situation on the ground.**¹⁸ Such studies can provide insights into the causes and effects of exclusion and insufficient integration, as well as on required measures to provide for a society that is inclusive and open – where fundamental rights are upheld. This in turn will contribute to policy-makers taking better informed decisions. **Regularly conducted research can also function as an early warning mechanism in detecting certain trends**, and here indicators are useful to focus attention on key aspects.¹⁹ FRA is ready to continue its work in this field and provide research that will support the design of fundamental rights-compliant security policies.

Solid research must also be accompanied by close consultation with key actors in the Member States

- National Human Rights Institutions, equality bodies, and other such entities with statutory independence and with a fundamental rights remit. Civil society organisations must also be able to feed into the security debate in order to shape appropriate responses to security threats. FRA posited in its latest Annual Report on the fundamental rights situation in Europe, that the EU also needs an **internal strategic framework for fundamental rights,**²⁰ **to match the existing external framework.**²¹ Such a strategic framework would include a fundamental rights policy cycle in which consultation would be built in – allowing for a more coordinated debate on the compatibility of proposed measures with fundamental rights, alongside the provision of viable alternatives, while also helping to avoid complications both within the legislative process and in its subsequent implementation. Such an approach would have a wide reach, but would be specifically important to the field of security.

¹⁷ For an overview of FRA publications on the basis of the EU-MIDIS survey, see <http://fra.europa.eu/en/project/2011/eu-midis-european-union-minorities-and-discrimination-survey?tab=publications>.

¹⁸ See, for instance, FRA's efforts in this regard: FRA (2014), Criminalisation of migrants in an irregular situation and of persons engaging with them, Luxembourg, Publications Office of the European Union, available at: <http://fra.europa.eu/en/publication/2014/criminalisation-migrants-irregular-situation-and-persons-engaging-them>; FRA (2011), Fundamental rights of migrants in an irregular situation in the European Union, Luxembourg, Publications Office, available at: <http://fra.europa.eu/en/publication/2012/fundamental-rights-migrants-irregular-situation-european-union>.

¹⁹ See, for instance, FRA (2014), Fundamental rights: challenges and achievements in 2013 – Annual report 2013, Luxembourg, Publications Office of the European Union (see tool 19 in particular), available at: <http://fra.europa.eu/en/publication/2014/fundamental-rights-challenges-and-achievements-2013>.

²⁰ FRA (2014), Fundamental rights: challenges and achievements in 2013 – Annual report 2013, Luxembourg, Publications Office of the European Union (see tools 6 and 12 in particular), available at: <http://fra.europa.eu/en/publication/2014/fundamental-rights-challenges-and-achievements-2013>.

²¹ Council of the European Union, EU Strategic Framework and Action Plan on Human Rights and Democracy, 25 June 2012, available at: www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/131181.pdf.

4. “What is needed to safeguard rights of European citizens when developing future EU security actions?”

Fundamental rights of people in the EU – not only citizens – need to be at the heart of all EU policies. In the case of security policy, this is a necessity for a number of reasons. First and foremost, security measures can have, in comparison with other policy areas, the most prominent and potentially damaging effects on a wide array of fundamental rights, including the right to human dignity, the right to life and physical integrity, and the right to liberty. Lack of sufficient fundamental rights safeguards can also prevent the enjoyment of the right to effective remedy of the damage caused by fundamental rights violations in the first place.

As outlined above, full integration of the fundamental rights viewpoint into the design of security measures is also the only reliable mechanism to guarantee the sustainability of future EU security action – this applies not only to citizens but to people in the EU regardless of their nationality or residence status. Illegitimate measures do not engender trust needed for their effectiveness and can be revoked by courts, as has been pointed out above.

Security measures, nevertheless, often result in a certain limitation of fundamental rights. The EU Charter of Fundamental Rights recognizes this fact by introducing the **principle of proportionality** in Article 52 that allows such limitations “only if they are necessary and genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.”

Due to the scope of FRA’s work, the response to this question addresses both the fundamental rights dimension of some of the security actions mentioned in the responses to previous questions, as well as certain other security measures or policies where the need to ensure that respect for fundamental rights is particularly prominent.

In the area of terrorism and radicalisation, the issue of foreign fighters needs to be addressed in a comprehensive framework dealing with the phenomenon of radicalisation, including root causes of discrimination, social marginalisation and hate crime. Security measures that have been proposed or already implemented by some Member States – such as the confiscation of passports or other travel restrictions, revoking of citizenship, and surveillance – need to be tested against the principle of proportionality and existing jurisprudence from both the CJEU and the ECtHR. Jurisprudence in case of travel restrictions imposed upon own citizens, for example, makes it clear that such preventive measures must be proportionate and subject to strict limitations and judicial review.²² The issue is further complicated by the lack of tangible information as regards the real extent and severity of the risk and the plethora of motivations that might lead young people to visit conflict areas (not necessarily with the intention of directly participating in the conflict or even providing support).

Furthermore, the fact that the conflicts in question attract mostly persons of specific ethnic and/or religious backgrounds raises clear discrimination risks. Although monitoring of persons suspected of criminal activity constitutes a legitimate preventive instrument, the same cannot be said about surveillance of a specific group or profiling of potential suspects based solely on ethnicity or religion. These create the risk of unacceptable discriminatory treatment both under the European Convention on Human Rights and the EU Charter of Fundamental Rights, and need to be avoided. From the law enforcement perspective, profiling based on such categories entails additional risks, as it may fail to

²² See, for instance: CJEU, C-430/10, *Hristo Gaydarov v. Director na Glavna direktsia "Ohranitelna politzia" pri Ministerstvo na vatrešnite raboti*, 17 November 2011, or ECtHR, *Ignatov v. Bulgaria*, No. 50/02, 2 July 2009.

detect potential perpetrators who do not correspond with the profile, such as persons who had only recently converted to a given religion.

In this respect, the FRA guide on discriminatory ethnic profiling contains clear guidelines to help law enforcement avoid breaching fundamental rights. Besides defining the attributes of discriminatory ethnic profiling and outlining the problems that it poses to both policing and communities, it provides guidance on combating it in the context of training as well as within the procedures for actual stops.

Source: FRA (2010), *Towards more effective policing, understanding and preventing discriminatory ethnic profiling: A guide*, available at: <http://fra.europa.eu/en/publication/2012/towards-more-effective-policing-understanding-and-preventing-discriminatory-ethnic>.

The much discussed introduction of an EU system using **Passenger Name Record (PNR)** information for law enforcement purposes continues to raise fundamental rights concerns over core issues such as data protection, profiling or overall proportionality.²³ While it is understandable that the issue becomes topical again with the rise of the ‘foreign fighters’ phenomenon and the engagement of Member States in conflicts in the Middle East, it should be borne in mind that the issues in question are very similar to those that led the CJEU to its landmark judgment on the Data Retention Directive. Consequently, these issues would need to be addressed in any potential future attempt to introduce an EU PNR system.

In March 2014, FRA presented a set of fundamental rights safeguards to serve as guidance for EU Member States that might be considering setting up a domestic PNR system. While not responding in full to all issues of fundamental rights compliance, these safeguards – including introducing clear and strict limitations on purpose, protection of personal data safeguards and increased transparency of the system towards passengers – would alleviate some of the system’s weaknesses without compromising its primary security function.

Source: FRA (2014), *Twelve operational fundamental rights considerations for law enforcement when processing Passenger Name Record (PNR) data*, available at: <http://fra.europa.eu/en/news/2014/fra-provides-guidance-member-states-setting-national-pnr-systems>.

Finally, it needs to be emphasised that any measures taken to curb terrorism and strengthen internal security must have a **scope of application that reflects the purpose** for which they have been adopted, and which clearly distinguishes and functionally separates them from standard law enforcement tools. Sufficient safeguards need to be in place to ensure that these measures are not invoked beyond their legitimate scope, including in relation to ordinary crime or even to manifestations of political opinion such as the activities of environmental protection groups or other civil society organisations. This would have irreparable consequences both for the rights of individuals as well as for the future legitimacy and public trust in security policies.

Border management is seen by the current Internal Security Strategy as a key component of ensuring Europe’s security, be it in tackling of criminal forms of facilitation of migration such as smuggling of migrants or in detecting terrorist threats as in the case of PNR. It is however also linked to some of the most prominent risks to fundamental rights that the EU faces today, including the fatalities at the EU’s southern sea borders (estimated to have already surpassed 3,000 this year). In view of the future

²³ See also FRA (2011), *Opinion on the proposal for a Directive on the use of Passenger Name Record (PNR) data for the prevention, detection, investigation and prosecution of terrorist offences and serious crime*, FRA Opinion 01/2011, Vienna, available at: <https://fra.europa.eu/en/opinion/2011/fra-opinion-proposal-passenger-name-record-pnrdirective>.

challenges discussed above, there is an urgent need to fully recognise these risks and to begin to address them by introducing appropriate fundamental rights safeguards.

The EU should begin this **by initiating a process leading to a joint commitment by all Mediterranean coastal and other interested states to address unsafe migration by sea**. This should include the possibility of legal access to the EU through, for instance, humanitarian visas and increased resettlement opportunities, potentially focusing on those who have close family members living in the EU.

Joint operations with third countries must be conditional on full respect for fundamental rights. Tools should be developed to ensure that this happens in practice, and operational plans and other documents guiding joint operations or patrols with third countries must take into account the need to mitigate as much as possible the risk of fundamental rights violations; this should include clear provisions on the use of force, the prohibition of torture, inhuman or degrading treatment or punishment, and respect for the principle of *non-refoulement*.

Although the situation of undocumented persons arriving at EU air and land borders differs from those arriving by sea, some of the fundamental rights risks are identical. FRA research on the treatment of third country-nationals at external borders has identified the **need for increased training on both human dignity and professional conduct as well as on the identification and referral of persons in need of protection**, including victims of trafficking in human beings, the necessity to ensure access to information on border procedures, possible remedies and legal aid, and the need to ensure that conditions in detention facilities comply with fundamental rights. Discriminatory ethnic profiling must be avoided using, for example, the guidance contained in the Frontex Common Core Curriculum.

Efforts to mainstream fundamental rights considerations into Schengen evaluations as the key instrument for monitoring the application of the Schengen *acquis* should continue. The implementation of the revised evaluation and monitoring mechanism to verify the application of the Schengen *acquis* under Regulation (EU) No 1053/2013 provides new opportunities. Schengen evaluations are a useful tool to verify, for instance, whether systematic assessment in order to identify persons in need of protection constitutes an integral part of risk analyses conducted by border guards, and whether there is enough specialised training available to staff. Identification needs to be accompanied by adequate referral mechanisms for persons in need of protection that are in conformity with the EU *acquis*. They should also review whether instructions and training provided to border guards adequately address fundamental rights, in particular on issues such as professional conduct including the use of force, and the principle of *non-refoulement*.

Overall, the existence of migrants in an irregular situation should be acknowledged when EU policies on immigration, return as well as victim protection are developed and implemented. Such **policies should be directed towards removing legal and practical obstacles that may prevent them from enjoying their fundamental rights**. This is closely linked to breaking the circle of exploitation.

Legal labour migration schemes should be developed to fill labour demand needs in Member States. This would contribute to reducing the need for irregular work and thus the risk of exploitation and other fundamental rights abuses triggered by migrants' irregular status. FRA research on migrants in an irregular situation employed in the domestic work sector showed, for example, that lack of legal residence status heightens the risk of abuse and exploitation.

Source: FRA (2011), Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States, Luxembourg, Publications Office, available

at: <http://fra.europa.eu/en/publication/2012/migrants-irregular-situation-employed-domestic-work-fundamental-rights-challenges>.

Border control activities by EU Member States are guided by the concept of Integrated Border Management (IBM). This concept is based on a four-tier access control model which includes also measures in third countries. One of these measures is represented by the posting by Member States of Immigration Liaison Officers (ILOs) in third countries, and possibly in the future also by Frontex.²⁴ As illustrated by the amended ILO Network Regulation,²⁵ this has significant fundamental rights implications. Persons in need of international protection might be prevented from departing and seeking asylum in the EU. It is therefore **important to stress the merely advisory role of ILOs towards airlines** and the fact that airline staff are not required to follow the requests of ILOs to prevent the departure of a person that intends to seek asylum in the state of destination.²⁶ At the same time, **ILOs need to be given training and instructions** on what to do to ensure compliance with the principle of *non-refoulement* during their daily work.

The fundamental rights ramifications related to the use of modern technologies for border management purposes, such as large-scale IT systems that rely on the collection and use of large amounts of personal data must be considered in terms of both opportunities and risks. Opportunities should be optimised and identified risks appropriately addressed. Furthermore, some of the possible tools, such as the use of satellite imagery or unmanned aerial vehicles (drones), are both costly and intrusive, which underlines the need to examine their added value.

For instance, elements of the proposed Smart Borders Package²⁷ entail risks as regards privacy and data protection, which has been also emphasised by the European Data Protection Supervisor, who questioned the necessity and proportionality of the proposed Entry/Exit system.²⁸ The possibility of future law enforcement access to the data collected for border management purposes raises the same questions as the PNR proposal, including the justification of the collection of a full set of fingerprints which may not be necessary for border procedures. Rights of data subjects and oversight represent additional fundamental rights issues. The Registered Traveller Programme²⁹ raises concerns particularly over the voluntary nature of the system (in the absence of suitable alternatives that would not require submitting personal data) and possible discrimination of persons who are not willing or able to use the system. The reliance of the Smart Borders Package on automated border control gates also raises fundamental rights issues regarding the identification of victims of human trafficking, the protection of the rights of the child, the rights of persons with disabilities, and those of elderly persons. The current debate on the implementation of the Smart Borders Package shows that the compliance

²⁴ Regulation (EU) No 1168/2011 of the European Parliament and of the Council of 25 October 2011 amending Council Regulation (EC) No 2007/2004 establishing a European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ 2011 L 304, p 1-17, Article 14.

²⁵ Council Regulation (EC) No 377/2004 of 19 February 2004 on the Creation of an immigration liaison officer network, OJ 2004 L 64, p. 1-4.

²⁶ The International Air Transport Association (IATA), Control Authorities Working Group (CAWG) (2002), A Code of Conduct for Immigration Liaison Officers, Montreal, International Air Transport Association Control Authorities Working Group.

²⁷ This includes an entry/exit system (EES) and a Registered Travellers Programme (RTP)

²⁸ European Data Protection Supervisor (EDPS) (2013), Opinion of the European Data Protection Supervisor on the proposals for a regulation establishing an entry/exit system (EES) and a regulation establishing a registered traveller programme (RTP), 18 July 2013.

²⁹ Proposal for a Regulation of the European Parliament and of the Council establishing a Registered Traveller Programme, COM(2013) 97 final, 28 February 2013.

of the systems with fundamental rights will be largely dependent on details of their practical operation (such as ensuring that it correctly records all exits and therefore does not falsely blacklist persons as 'overstayers'), which demonstrates the limitations of technology as a solution to security issues.

A number of the above mentioned concerns – limitations on purpose, data protection and access or profiling – apply equally to other EU large-scale IT systems storing biometric data. In this regard, it should be recalled that the use of biometrics creates both opportunities and risks for fundamental rights and these must be carefully assessed and weighed against each other using the proportionality principle before proceeding further.

In 2014, FRA launched a project on biometric data in large IT databases in the area of borders, visa and asylum which will contribute to ensuring fundamental rights-compliant operation and use of these systems (publication of the findings is envisaged in 2016).

Fundamental rights concerns related to the collection and processing of large volumes of data are not limited to the area of border and migration management, and are equally present in the field of combating terrorism, dealt with earlier, together with the threat of radicalisation. The CJEU judgment on the Data Retention Directive has clarified the need to carefully assess the proportionality of measures that otherwise satisfy the “objective of general interest, namely the fight against serious crime and, ultimately, public security”. Assessing the proportionality of such large scale data collection is difficult without specific knowledge of the results achieved with its help. It should however be emphasised that the majority of fundamental rights concerns that have been raised in relation to the Data Retention Directive are equally applicable to other security measures based on law enforcement access to databases containing personal or otherwise sensitive data originally not collected for law enforcement purposes, including data held by private subjects such as PNR data or information on financial transactions.

The role of the private sector in ensuring the fundamental rights compliancy of security measures is relevant also in the wider context, and the EU should take further action in this regard in the framework of its policy on corporate social responsibility. The UN Guiding Principles on Business and Human Rights emphasise that businesses should not only avoid causing or contributing to adverse effects on human rights through their own activities, but also seek to prevent such effects if they are otherwise directly linked to their operations.³⁰ It is important in this regard that the ICT Sector Guide published by the European Commission has subscribed to these principles and includes the responsibilities of companies in the face of potential government requests for cooperation for law enforcement purposes among the duties to protect human rights.³¹ This can apply to law enforcement activities as well as intelligence authorities in their fight against terrorism and cybercrime.³² The same approach should be promoted across the private sector regardless of the field of business or activity.

³⁰ United Nations (2011), *Guiding principles on business and human rights*, available at: <http://business-humanrights.org/en/un-guiding-principles>.

³¹ European Commission (2013), *ICT Sector Guide on implementing the UN Guiding Principles on business and human rights*, Luxembourg, Publications Office, available at: http://ec.europa.eu/enterprise/policies/sustainable-business/files/csr-sme/csr-ict-hr-business_en.pdf.

³² See FRA project on national intelligence authorities and surveillance in the EU: Fundamental rights safeguards and remedies, available at: <http://fra.europa.eu/en/project/2014/national-intelligence-authorities-and-surveillance-eu-fundamental-rights-safeguards-and>.



5. “How can the EU's foreign policy improve the security within the EU?”

As many of the future challenges to EU security identified in this contribution have a strong external element, the measures to address them require cooperation with third countries and international organisations. This in turn leads to the need to extend the fundamental rights safeguards discussed above into this cooperation, taking into account the fact that the EU Charter of Fundamental Rights is equally applicable also in EU foreign policy but also the importance that the EU attaches to human rights and rule of law in its foreign policy in general. If the EU fails to demonstrate in its foreign policy its readiness to protect fundamental rights of its own citizens and residents, it can have adverse effects not only on the actual rights of people residing in the EU and their trust, but also on the legitimacy of the EU’s long-term goal to promote human rights worldwide.

The need to cooperate with third countries and international organisations to achieve an effective yet fundamental rights-compliant security policy is most prominent in the field of border security, particularly at the southern maritime border. International cooperation in the fight against smuggling in human beings is encouraged by international law, such as in Article 7 of the Protocol against Smuggling of Migrants by Land, Sea and Air which supplements the UN Convention against Transnational Organized Crime.³³ It can include a variety of measures, such as the exchange of intelligence with countries of origin or transit, the posting of liaison officers or capacity-building activities in third countries. It can also extend to joint operations. These do not, however, discharge EU Member State officials from their duty to respect fundamental rights.

The EU needs to cooperate closely with both transit countries and the Office of the United Nations High Commissioner for Refugees (UNHCR) and other relevant UN organisations with the aim of strengthening the protection space in those countries; focusing on the establishment of effective asylum and reception systems; enhancing the rule of law; prevention and protection from abuse and exploitation; and access to justice for migrants who are victims of serious crime. EASO can play an active role in this process, with a view to implementing actions aimed at creating a protection space for refugees.

When the EU and its Member States provide assets, equipment and other maritime border management facilities to neighbouring third countries, **priority should be given to assets and equipment that can be used to enhance their search and rescue capacities.** Provision of assistance in the field of border surveillance should be accompanied by training of the authorities of the receiving country to underscore the proper use of donated assets and equipment in accordance with applicable human rights law.

International cooperation is also the cornerstone of combating terrorism. Cooperation with third countries is one of the four priorities defined by the European Council in December 2013 in relation to countering the threat of ‘foreign fighters’ (together with prevention, detection and flagging of the fighters’ travels, and response from the judiciary). Sharing of law enforcement information, particularly personal data, with third countries would need to be subject to strict fundamental rights safeguards including the proportionality test. In this context, the **EU and its Member States should**

³³ Adopted 15 November 2000, entered into force 28 January 2004, on 1 October 2014 27 EU Member States were parties and at least also signed by Ireland; the European Union is a party to the protocol; the convention itself, adopted on the same date, entered into force 29 September 2003, all 28 EU Member States and the EU itself are parties.

pay particular attention to fundamental rights safeguards when engaging in cooperation with countries where access to justice for criminal suspects is not fully guaranteed.

Establishing a new balance between security and privacy, both within the EU and in its partnerships, is essential in order to ensure the legitimacy of EU security policy and foster public trust in its implementation. The same is true for the role of fundamental rights in security. The European Union Agency for Fundamental Rights stands ready to contribute with its resources in this regard. This would be helped by enabling FRA to work on its own initiative across all areas of work of the EU, which would ensure that the Agency could contribute more effectively to ensuring that the EU's external action in the field of security is consistent with the requirements of the EU Charter of Fundamental Rights. The reciprocal relationship between internal and external action stressed in this paper would also be reinforced with strengthened fundamental-rights scrutiny in the internal work of the EU, such as with impact assessments. Also here, FRA is available to step up its contribution. Embedding fundamental rights in security and ensuring strong coherence between internal and external action would strengthen the credibility of the EU's foreign policy and of the EU itself.