



Public Consultation: Consultation on the renewal of the EU Internal Security Strategy

Contribution of the International Commission of Jurists

October 2014

1. Introduction

The International Commission of Jurists is pleased to present its contribution to the European Commission in the framework of the public consultation on the renewal of the EU Internal Security Strategy ("ISS") and to join the discussion during the development of this strategy in 2015.

Composed of 60 eminent judges and lawyers from all regions of the world, the International Commission of Jurists ("ICJ") promotes and protects human rights through the Rule of Law, by using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

The European Union's ISS ("Towards a European Security Model") was adopted in 2010 by the European Council, following the entry into force of the Lisbon Treaty and the Stockholm Programme in the Area of Freedom, Security and Justice. The Council highlighted several security threats and requested the Commission to put forth a communication for concrete action.¹ This communication identified five strategic objectives: (1) disruption of international criminal networks; (2) prevention of terrorism and addressing radicalization and recruitment; (3) raising the levels of security for citizens and businesses in cyberspace; (4) strengthening security through border management; and (5) increasing Europe's resilience to crises and disasters.²

Adopting a new strategy provides the opportunity to critically assess the priorities identified by the EU, but also to re-evaluate the foundation and strategic objectives of the first ISS and to learn lessons from its successes and failures. This contribution provides recommendations on two questions posed by the consultation, relating to (1) actions at EU level in the next five

¹ *Internal Security Strategy for the European Union: Towards a European Security Model*, Council Doc 5842/2/2010, March 2010.

² *Communication from the Commission to the European Parliament and the Council, The EU Internal Security Strategy in Action: Five steps towards a more secure Europe*, COM(2010) 673 final, 22 November 2010 (hereafter "Commission Communication on the EU Internal Security Strategy 2010"). Following the adoption of the Strategy, three implementation reports were issued, respectively in 2011, 2013, and 2014, highlighting the EU's achievements and remaining challenges, see, Communication from the Commission to the European Parliament and the Council, *First Annual Report on the Implementation of the EU Internal Security Strategy*, COM (2011) 790, 25 November 2011; Communication from the Commission to the European Parliament and the Council, *Second Report on the Implementation of the EU Internal Security Strategy*, COM (2013) 179, 10 April 2013; Communication from the Commission to the European Parliament and the Council, *The Final Implementation Report of the EU Internal Security Strategy 2010 – 2014*, COM (2014) 365, 20 June 2014.

years, and (2) what is needed to safeguard European citizens when developing future EU security actions. The starting point for this paper is the need to give continued and increased priority to protection of human rights³ and the rule of law, which must be central to the activities and policies of the strategy as well as security objectives themselves.

Following the entry into force of the Lisbon Treaty, the Charter on Fundamental Rights ("EU Charter") became legally binding on the EU institutions and on Member States.⁴ The ICJ considers that more can still be done to develop an EU legal system that fully secures human rights protection. The ICJ also underscores the need for EU institutions to operate in accordance with the principle of transparency in the process of EU accession to the European Convention on Human Rights (ECHR). It is therefore laudable that in the new Commission, human rights, particularly fundamental rights under the EU Charter, and the rule of law will be central to the Commission's work. This objective should be facilitated in particular by the work of the new Commission's First Vice-President (Frans Timmermans), who will have a role as "watchdog" over the application of the EU Charter in all EU legislation and activities. The ICJ also welcomes the newly adopted Rule of Law Framework,⁵ which should enable the EU to respond more quickly when there are signs of significant rule of law deficits in a Member State. These steps towards stronger implementation of the EU's founding principles can and should be complemented by an internal security strategy that promotes and ensures fundamental rights and rule of law.

In this submission, the ICJ therefore makes the following recommendations.

1. The future ISS must be centred on human rights and the rule of law. In the context of a wider EU fundamental rights strategy, it must include protection of fundamental rights and the rule of law as a security objective, and must strive to ensure compliance with fundamental rights and principles of rule of law in all security related laws, policies and practices.
2. The future ISS should clarify its objectives on "border management", ensuring that issues of migration, including asylum, are not represented mainly as security issues, but as matters primarily concerned with the protection of human rights. The EU must ensure better protection of human rights in "border management", and this should be reflected in the ISS.
3. Data protection of all individuals subject to EU jurisdiction and/or affected by EU policies must be prioritized under the ISS, since large-scale violation of privacy rights poses a serious threat to the protection of rights of privacy and data protection, and therefore to security, within the EU.
4. The ISS should critically evaluate its counter-terrorism strategies and the counter-terrorism activities of the Member States, ensuring that fundamental rights and the rule of law are protected, in particular in regard to securing accountability and reparation for complicity in rendition and secret detention practices.
5. The ISS should also include a security objective relating to justice and the rule of law, as a basis for further EU legislative protection for fair trial rights.
6. The proposed European Public Prosecutor's Office (EPPO) can play a potentially significant role in fighting corruption. It will remain important to clarify the specific aim of the EPPO to ensure safeguards for human rights and the rule of law, including by providing appropriate guarantees for respect of fundamental rights.

³ In this paper, we use the term "human rights" when referring to rights protected under international human rights law. The term "fundamental rights" is used to denote rights under the EU Charter of Fundamental Rights.

⁴ European Union, *Consolidated version of the Treaty on European Union*, 13 December 2007, 2008/C 115/01, Article 6; European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Article 51.

⁵ Communication from the Commission to the European Parliament and the Council, *A new EU Framework to strengthen the Rule of Law*, COM(2014) 158 final/2, 19 March 2014.

2. Human Rights and Rule of Law as foundations for the EU's security strategy

The ICJ considers it essential that protection of fundamental rights and the rule of law in Europe be central to the framing of the future ISS. Prioritisation of fundamental rights protection under the future ISS should be undertaken in the context of a wider EU fundamental rights strategy, which aims at the effective protection of the human rights of all those present in EU Member States.

It is important to stress that there is no dichotomy between protecting human rights and ensuring security. Rather, security is in itself one of the objectives of human rights, since, under international human rights law, States have a positive obligation to protect people under their jurisdiction. Indeed, one of the primary aims of the international human rights law framework, developed after World War II, was ensuring security.⁶

On a practical level, security measures that are compliant with human rights and the rule of law reinforce the credibility and legitimacy of the response to terrorism, or other security threats.⁷ Conversely, violations of human rights or rule of law principles in security measures may actively threaten security, creating disaffection and encouraging resort to terrorist or other criminal acts. Fundamental rights and rule of law should therefore be the starting point, as well as a key objective, of any security strategy.

The UN Security Council, in its resolution 2178(2014) adopted unanimously on 24 September 2014, underscored that "respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort and note[d] the importance of respect for the rule of law so as to effectively prevent and combat terrorism, and ... that failure to comply with these and other international obligations, including under the Charter of the United Nations, is one of the factors contributing to increased radicalization and fosters a sense of impunity."⁸

Globally, in the last fifteen years, security and counter-terrorism measures have too often disregarded human rights principles, and have sometimes led to gross violations of human rights. The 2009 Report of the ICJ's Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, an initiative of the ICJ established to assess the impact of counter-terrorism measures on the protection of human rights and the rule of law worldwide, found that, since September 2001, "some States have allowed themselves to be rushed into hasty responses, introducing an array of measures which are undermining cherished values as well as the international legal framework carefully evolved over at least the last half-century"⁹.

Although EU Member States have often been important defenders of the protection of the rule of law in times of crisis, including terrorist threats, the years following the attack in the US on 11 September 2001 saw some European States compromise the protection of human rights in the name of security and counter-terrorism. Such measures included the adoption and implementation of over-broad counter-terrorism laws, administrative measures, such as preventive detention,¹⁰ as well as complicity in the USA-led renditions and secret detentions programme. The latter were marked by gross human rights violations amounting to crimes under international law, such as torture and ill-treatment, enforced disappearance and

⁶ International Commission of Jurists (ICJ), *Assessing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, February 2009, p. 16. In the counterterrorism context the ICJ underscored this principle in its 2004 Berlin Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism, <http://www.refworld.org/docid/41dec1f94.html> which affirms that: "safeguarding persons from terrorist and acts and respecting human rights both form part of a seamless web of protection incumbent upon the State."

⁷ International Commission of Jurists (ICJ), *Assessing Damage, Urging Action*, *op cit*, p. 21.

⁸ UN Security Council Resolution 2178(2014), Recital 7.

⁹ ICJ, *Assessing Damage, Urging Action*, *op cit*, p.159

¹⁰ See ICJ, *Assessing Damage, Urging Action*, *op cit*, Chapter 5, Chapter 6.

prolonged arbitrary detention.¹¹ More recently, there has been mounting concern at the adverse human rights impact of mass surveillance in the interests of security, including in the EU.¹²

As the EU prepares its future ISS, in a climate when concern at the threat of terrorism is once more increasing, it should draw on the lessons of the past, strive to ensure that the EU and its Member States respect human rights and the rule of law in all security measures, and promote protection of human rights as the most effective means, in the long-term, of preserving the security of the people of Europe.

Fundamental Rights and Rule of Law in the EU ISS

The 2010 Stockholm Programme on the area of freedom, security and justice states that the EU ISS' aim is "to further improve security in the Union and thus protect the lives and safety of citizens and to tackle organized crime, terrorism and other threats"¹³ and that it shall be based on a number of principles, including "respect for fundamental rights, international protection and the rule of law".¹⁴ In a March 2010 paper specifically on the EU ISS, the Council elaborated on certain principles to guide the strategy, including (1) justice, freedom and security policies that respect fundamental rights, international protection, the rule of law and privacy, (2) protection of all citizens; and (3) transparency and accountability in security policies.¹⁵

However, the implementing Communication of the European Commission which set out concrete strategic objectives for the EU ISS 2010 - 2014 referred to fundamental rights and rule of law only as common values on which the ISS is based, and did not specify how the Commission planned to incorporate these principles in ISS-related activities.¹⁶

The ICJ regrets that the Commission has conducted little evaluation in terms of fundamental rights and rule of law in its analysis of the implementation of the ISS¹⁷ and that it has not provided explanations on the compliance of ISS activities and legislation with the EU Charter and principles of the rule of law, nor as to how human rights are to be protected and fulfilled by the strategy.¹⁸ The ISS' focus on security at the expense of human rights protection has been criticised by the European Parliament, which has stressed the need to ensure "the revision of those policies in order to safeguard human rights and fundamental freedoms".¹⁹

The ICJ therefore welcomes the statement in the Commission's final implementation report of

¹¹ See ECtHR, *Al Nashiri v. Poland* Application no. 28761/11, Judgment of 24 July 2014; *Abu Zubaydah v Poland*, Application no. 7511/13, Judgment of 24 July 2014. See, the last resolution of the European Parliament, *European Parliament resolution of 10 October 2013 on alleged transportation and illegal detention of prisoners in European countries by the CIA*, Doc. No. P7_TA(2013)0418.

¹² See, OHCHR, *The right to privacy in the digital age*, UN Doc. A/HRC/27/37, 30 June 2014; *European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs*, Doc. No. P7_TA(2014)0230; Parliamentary Assembly of the Council of Europe, *Improving user protection and security in cyberspace*, Resolution 1986(2014), adopted on 9 April 2014.

¹³ *The Stockholm Programme an Open and Secure Europe Serving and Protecting Citizens*, 2010/C 115/01, 4 May 2010 (hereafter "Stockholm Programme, 2010/C 115/01"), p. 5.

¹⁴ Stockholm Programme, 2010/C 115/01, Section 4.1 page 17

¹⁵ Council Doc 5842/2/2010, *Internal Security Strategy for the European Union: Towards a European Security Model*, p. 19 – 20

¹⁶ Commission Communication on the EU Internal Security Strategy 2010, p. 2.

¹⁷ See first implementation report p. 3; Second implementation report, p. 2 and 13.

¹⁸ For example, whilst the Commission does refer to their proposed 2012 EU data protection package, as well as "practically oriented efforts further to integrate fundamental rights in the EU security domain" such as opinions and reports of the fundamental rights agency on for instance data protection, radicalization to hate crime and extremism, and the 2013 fundamental rights based police training manual, no real evaluation is made. Also a reference is made to the aim of monitoring Member States in respecting fundamental rights in the context of the adoption of the Schengen evaluation mechanism, as well the fair trial directives that have been adopted, but there is no goal setting or accountability. See, *Communication from the Commission to the European Parliament and the Council, the final implementation of the EU Internal Security Strategy 2010 – 2014*, COM (2014) 365 final, 20 June 2014, p. 10 – 11.

¹⁹ *Report on the situation of fundamental rights in the European Union (2012) (2013/2078 (INI) Committee on Civil Liberties, Justice and Home Affairs*, A7-0051/2014, 27 January 2014, para. 26.

the EU ISS 2010 – 2014, that “strengthening the respect of fundamental rights as part of a citizen-centred approach” will be a cross-cutting objective for the future EU ISS of 2015 – 2019.²⁰ The report stresses that fundamental rights reinforce “the EU internal security by safeguarding and increasing trust among citizens and between citizens and governmental institutions”.²¹ Such an approach is in line with the Stockholm Programme, which states that it “is of paramount importance that law enforcement measures, on the one hand, and measures to safeguard individual rights, the rule of law and international protection rules, on the other, go hand in hand in the same direction and are mutually reinforced”.²²

The ICJ recommends that the future EU ISS be clearly articulated as a strategy to protect all those present in the EU. The respect, protection and fulfilment of fundamental rights and of the rule of law is essential to such an objective, not only as a foundational principle, but also as a means of preventing resort to terrorism and crime. It should therefore be made a specific security objective in the EU ISS 2015 – 2020.

It is also welcome that in the final implementation report, the Commission provides some account of fundamental rights measures relevant to the ISS. However, this accounting is expressed only in general terms.²³ There is a need for a more structured, detailed and integrated approach to evaluation of the protection of fundamental rights and the rule of law, under the ISS. This evaluation should take account of the fundamental rights and rule of law implications of each ISS security objective.

The ICJ therefore recommends that reporting under the ISS include structured and comprehensive reporting on how action under each security objective impacts on fundamental rights and the rule of law. In some circumstances this will require follow-up by the EU institutions, to ensure that these principles are protected in practice.

3. “Border Management”: Implications for Migration and Asylum

The Stockholm Programme framed the ISS as covering border management for security purposes, relating to human trafficking and cross-border crime, and did not address the implications for protection of rights of migrants, including asylum seekers. The Council, in its 2010 conceptual document, and the Commission, in its Communication on the strategy, set as a clear aim that external borders must be managed as part of the EU’s security strategy.²⁴ Whilst the ICJ acknowledges the need for border management in order to combat organized crime, including human trafficking, we stress that in practice every aspect of border management may also affect the human rights of people seeking to enter the EU. Many aspects also touch on their protection under international refugee law.

The ICJ is concerned that the Commission, in its final implementation report, appears to frame migration primarily as part of a security agenda and not also as a key area of human rights concern, with the recognition that migration engages the responsibility of the EU and its member states for human rights protection.²⁵ The ICJ shares the opinion of the UN Special

²⁰ *Communication from the Commission to the European Parliament and the Council, the final implementation of the EU Internal Security Strategy 2010 – 2014*, COM (2014) 365 final, 20 June 2014, p. 17.

²¹ *Ibid.*, p. 17.

²² *The Stockholm Programme an Open and Secure Europe Serving and Protecting Citizens*, 2010/C 115/01, section 1.1.

²³ *Ibid.*, p. 10 – 11.

²⁴ Stockholm Programme, 2010/C 115/01, p. 17, 26,27; Commission Communication on the EU Internal Security Strategy 2010, Objective 4.

²⁵ The Commission for instance states that the ISS’s actions on border management were fulfilled by “exploiting the synergies between border management policies on persons and on goods, as well as by addressing migration management and the fight against crime in combination when implementing the integrated border strategy”, referring specifically to EUROSUR, Schengen governance legislation, second generation Schengen Information system, the Visa Information System, the Smart Border

Rapporteur on the Human Rights of Migrants that “within the European Union policy context, irregular migration remains largely viewed as a security concern that must be stopped [and that this] is fundamentally at odds with a human rights approach, concerning the conceptualization of migrants as individuals and equal holders of human rights”.²⁶

It is clear that the EU cannot conduct security activities on external borders in a vacuum, without reference to human rights obligations. Insofar as the future ISS concerns border management, its strategies and activities must therefore be integrated with wider EU strategies to ensure protection of fundamental rights in migration, asylum and border management.

The ICJ therefore recommends that future ISS should take into account that issues of migration, including asylum, should not be considered primarily as issues of security, but also as deeply implicating the protection of human rights.

Although the ICJ considers that it is not appropriate to address migration and asylum in the framework of a security strategy, we note that the Commission’s paper mentions situations linked to border management. In this connection, the ICJ reiterates its concern at the possible failures of the EU and its Member States to comply with obligations under the international law of the sea on search and rescue and with obligations on the protection of the right to life at sea under human rights law. This arises in particular from the lack of clarity about the connections between Operation Frontex Plus and Italy’s operation Mare Nostrum. While the Italian Minister of the Interior, Angelino Alfano, has repeatedly announced that the Frontex operation will take over from the Mare Nostrum operation, the European Commission and Frontex have been clear that Frontex Plus will not replace Mare Nostrum, and that therefore all ‘humanitarian’ efforts remain the responsibility of Mare Nostrum or in any case not the responsibility of the EU.

While conscious that the EU under its present budget may lack resources to undertake an operation of the magnitude of Mare Nostrum, the ICJ urges the EU and its Member States, including Italy, to undertake all efforts to continue the operation Mare Nostrum or another operation that provides at least equivalent protection.²⁷ The ICJ further urges that all operations, in particular those led by Frontex under the Maritime Surveillance Regulation 2014, comply with international law, including the international law of the sea, international human rights law and refugee law.

The ICJ has previously set out its views on the proposed Regulation establishing rules for the surveillance of the external sea borders in the context of operational cooperation coordinated by Frontex.²⁸ While the Regulation may assist in ensuring the respect of the principle of *non-refoulement* in Frontex sea operations and in giving priority to the duty of the EU and Member States to search and rescue and bring to safety migrants in distress in the high seas, it is only applicable to Frontex operations. The ICJ recommends that such protections be extended to operations by Member States and that there be EU-wide strategic guidelines on search and rescue, for instance a European Strategy on Search and Rescue.

Package, and the reinforcement of Frontex through the adoption of a revised legal basis. See *Communication from the Commission to the European Parliament and the Council, the final implementation of the EU Internal Security Strategy 2010 – 2014*, COM (2014) 365 final, 20 June 2014, p 8 – 9.

²⁶ *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*, Report of the UN Special Rapporteur on the human rights of migrants, Francois Crepeau, UN Doc. A/HRC/23/46, 24 April 2013, para. 31.

²⁷ Inter Press Service, *New Operation Could Hide Major Shift in Europe’s Immigration Control Policy*, 6 September 2014, www.ipsnews.net.

²⁸ International Commission of Jurists, Amnesty International, European Council on Refugees and Exiles, *Joint Submission on EU Draft Regulation on Surveillance of External Sea Borders*, 2 September 2013, available at: <http://www.icj.org/joint-submission-on-eu-draft-regulation-on-surveillance-of-external-sea-borders/>.

The ICJ considers that, in border management, the foremost objective must be ensuring better protection of human rights and access to international protection, and this should be reflected in the ISS. Clear rules on search and rescue duties and on the respect of the principle of *non-refoulement* will ensure the respect of this priority.

4. Data protection and Privacy Rights

As stressed by the European Data Protection Supervisor (EDPS) in June 2014, “during the last five years concerns about privacy and data protection have arguably become more intense than ever before.”²⁹ The EDPS referred to the Commission’s 2012 proposed package of legislative reforms on data protection in the EU, the revelations of secret services’ programmes of mass surveillance of individuals, and most recently the April 2014 judgment of the Court of Justice of the European Union which annulled the Data Retention Directive due to its excessive interference with fundamental rights.³⁰ A number of distinct security-related issues need to be addressed by the EU.

Ensuring Effective Data Protection

It is clear that violations of the rights to privacy and to data protection are significant security threats to any individual both globally³¹ and within the EU. The threat comes not only from the security services of third countries such as the US, but also from within the EU, ostensibly prompted by security objectives, including counter-terrorism, but often used for other purposes. Already in 2010, the European Data Protection Supervisor (EDPS) criticized the then adopted EU ISS for failing to explain how fundamental rights of privacy and data protection would be ensured.³² **The ICJ recommends that a security objective on data protection is adopted in the future ISS. Under this objective, the Commission should take practical steps to ensure that all EU ISS related activities comply with rights to privacy and data protection.**

In accordance with the EU Charter and international human rights law, all security related activities of the EU and its Member States must refrain from interference with privacy rights, save where such interference is prescribed by law, and is necessary in a democratic society in pursuit of a legitimate aim, and proportionate to that aim.³³ There is also an obligation to take positive measures to prevent and remedy violations of the rights to privacy and data protection, including by third states or private persons. The ICJ agrees with the European Data Protection Supervisor (EDPS) who emphasized that the key milestones for data protection during the Stockholm programme have been the January 2012 Commission proposals for reforming the data protection framework and the March 2014 European Parliament resolution on the reform by the European parliament.³⁴ The EDPS stressed that it is “regrettable that progress has been slower at Council level, and ... continue(d) to urge all parties to move towards agreement as soon as possible”. **The ICJ therefore recommends that, under the future ISS, prompt action be undertaken by all relevant EU Institutions, to ensure the further adoption of legislation to protect the privacy and**

²⁹ European Data Protection Supervisor, *Opinion of the European Data Protection Supervisor on the Future Development of the Area of Freedom, Security and Justice*, 4 June 2014, para. 3.

³⁰ *Ibid.*

³¹ See, UN General Assembly resolution no. 68/167, *The right to privacy in the digital age*, UN Doc. A/RES/68/167, 18 December 2013; and, OHCHR, *The right to privacy in the digital age*, UN Doc. A/HRC/27/37, 30 June 2014.

³² The EDPS also emphasized that from a data protection perspective the EU ISS also holds a nexus with other EU strategies being developed, including the review of the data protection legal framework, discussed above, which has not been completed, calling for a more comprehensive and integrated approach. European Data Protection Supervisor, *EU Internal Security Strategy: "Security and Privacy Concerns should be taken Equally Serious"* says EDPS, Press Release, 20 December 2010.

³³ Article 8.2 ECHR; article 17 ICCPR; articles 7 and 8 EU Charter.

³⁴ European Data Protection Supervisor, *Opinion of the European Data Protection Supervisor on the Future Development of the Area of Freedom, Security and Justice*, 4 June 2014, para. 11.

personal data of everyone in Europe.

Finally, the ICJ notes that in April 2014 the CJEU annulled the EU's data retention directive as non-compliant with articles 7 and 8 on the rights to privacy and private life and to data protection of the EU Charter.³⁵ The ICJ regrets that whilst the Final Implementation Report of the Commission was published last June, the Commission has yet to implement or in any way publicly comment on the judgment. It is unclear whether the EU has continued activities that may have been in violation of the CJEU judgment since April. **The ICJ therefore urges that the Commission implement the CJEU's judgment relating to data protection immediately.**

The EU and NSA Surveillance

The new EU ISS should also address the violations of privacy rights and data protection by security services, whether external or internal to the EU, and should take robust and meaningful steps to ensure the protection of people in Europe against these violations. The revelations of whistle-blower and former United States National Security Administration (NSA) contractor Edward Snowden have lifted the veil of secrecy on a vast programme of surveillance and on the interactions and possible complicities of EU Member States.³⁶

The ICJ considers the NSA surveillance revelations to be a red flag for the credibility and legitimacy of the EU and its Member States in terms of rule of law and human rights protection, in particular for the rights to privacy and to the protection of personal data secured by articles 7 and 8 of the EU Charter, article 17 ICCPR and article 8 ECHR. Without a strong reaction to these revelations from the EU, and a shift in intelligence and security practices, there is a risk that EU institutions will be accused of double standards and will lose their legitimacy on matters of human rights beyond EU borders. In particular there is a risk that any EU criticism of mass surveillance by third country governments will fall on deaf ears without a change of direction on this issue by the EU.

Apart from the laudable action of the European Parliament and of its LIBE Committee to set up an inquiry and issue a resolution on 12 March 2014 condemning these practices,³⁷ neither the European Council, the Council of the European Union nor the European Commission have acted to meaningfully address the adverse impact on human rights of this surveillance programme. **The ICJ recommends that under the future ISS, legislative reforms should be introduced for third party control of fundamental rights compliance of any international security agreement. A mechanism should be set up, for example by giving additional competence to the Fundamental Rights Agency, to independently assess the fundamental rights compliance of any international security cooperation agreement. It is advisable that any of these procedures be public and in collaboration with international experts, for example, the UN Special Rapporteurs and other independent mandates established under the UN Human Rights Council, as well as the Office of the UN High Commissioner for Human Rights. The mechanism could be part of a more general "fundamental rights compliance" mechanism.**

The ICJ also recommends that there be a full review of the Passenger Name Records agreements already signed with the USA, Australia and Canada. The focus should be on ensuring mutual cooperation and trust between Member States on exchange of

³⁵ Court of Justice of the European Union, Judgment in Joined Cases C-293 and C-594/12, 8 April 2014.

³⁶ For a full collection of the revelations originated by the documents provided by Edward Snowden, see "The NSA files" on the website of *The Guardian*, at <http://www.theguardian.com/world/the-nsa-files>.

³⁷ European Parliament resolution of 12 March 2014 on the US NSA surveillance programme, surveillance bodies in various Member States and their impact on EU citizens' fundamental rights and on transatlantic cooperation in Justice and Home Affairs ([2013/2188\(INI\)](#)).

criminal records, so that such information can be shared and analysed, rather than jeopardizing the rights of those travelling from the EU to the US, Australia or Canada³⁸ or to any other third country, in particular a country party to the "Five Eyes" group.³⁹

It will also be important for the future ISS that the EU legislates to provide adequate protection for whistleblowers, including EU citizens denouncing "internal" wrongdoings as well as any other "foreign" person denouncing wrongdoings having an effect on EU interests, competences, legislation or the EU Charter rights. This regulation should also encompass obligations to grant international protection of some sort to "foreign" whistleblowers, in line with the Global Principles on National Security and the Right to Information (Tshwane Principles), endorsed by the Parliamentary Assembly of the Council of Europe.⁴⁰

The future ISS should contemplate the establishment of a European intelligence supervisor or task Parliament to supervise intelligence services: the EU should give competence to the LIBE Committee, or to another independent body, to supervise any collaboration and exchange of information at the EU level, both where it involves the EU institutions and where it is among EU Member States. The EU could explore, within this context, the creation of a European network of parliamentary surveillance committees with power to request and share information and the development of substantive standards built on the Tshwane principles.⁴¹

5. Counter terrorism and Human Rights: Renditions and Secret Detention

The involvement of EU Member States in the USA-led system of renditions and secret detentions exposed the weakness of the rule of law in those States in the face of pressures to counter terrorism, and led to multiple and systematic violations of human rights within the EU, and to complicity in crimes under international law. It is therefore of key importance that Member States conduct effective investigations, initiate prosecutions and provide remedies and reparation to victims, and that the Council of the European Union and the European Commission promote accountability in this regard, of which there has so far been very little.⁴² In the context of an ISS security aim to ensure protection of human rights and the rule of law, it should be a priority that measures are taken to enhance security services respect for human rights and rule of law and to ensure that they are held accountable for violations of human rights.

³⁸The EDPS stated in this regard that "agreements must not legitimize massive data transfer in a field – law enforcement – where the impact on individuals is particularly serious and where strict and reliable safeguards and guarantees are thus all the more needed, in particular preventing authorities or third countries, and ensuring enforceable rights, including judicial redress mechanisms for data subjects in the EU. In cases where national security exception is invoked, exceptions should be narrowly defined and with appropriate safeguards and limitations agreed", European Data Protection Supervisor, *Opinion of the European Data Protection Supervisor on the Future Development of the Area of Freedom, Security and Justice*, 4 June 2014, para. 32.

³⁹ The "Five Eyes" countries (USA, UK, Canada, Australia and New Zealand) are part of a unofficial intelligence community under which they share any sort of information as they were one intelligence service. This community is heavily dominated by its US component as demonstrated by the revelations that, despite an existing "no-spy" agreement among these countries, the US has been spying on UK citizens with the permission of the UK secret services. See, The Guardian, "US and UK struck secret deal to allow NSA to 'unmask' Britons' personal data", 20 November 2013, www.theguardian.com.

⁴⁰ See, principles 37-43 of the Tshwane Principles. The Tshwane Principles were endorsed by the Parliamentary Assembly of the Council of Europe in Resolution 1729 (2010), <http://assembly.coe.int/main.asp?link=/documents/adoptedtext/ta10/eres1729.htm>

⁴¹ See Global Principles on National Security and the Right to Information ("The Tshwane Principles"), 12 June 2013, finalized in Tshwane, South Africa.

⁴² See, among other reports, Amnesty International, *Open Secret : Mounting evidence of Europe's complicity in rendition and secret detention*, Doc. No. EU 01/023/2010, 2010. The European Parliament and the Parliamentary Assembly of the Council of Europe have both conducted inquiries on the issue of complicity of European countries with the US-led rendition, secret detention and interrogation programme, and the European Court of Human Rights has already ruled on this matter, including in *El Masri v. former Yugoslav Republic of Macedonia* of 13 December 2012 and *Al Nashiri v. Poland and Husayn (Abu Zubaydah) v. Poland* of 24 July 2014.

The lack of accountability in EU Member States for cases of complicity in US renditions that could amount to crimes under international law reinforces the proposition that this matter cannot be solved at the national level alone, where too many interests block effective investigations, and that some responsibility should be assumed at the European level by EU institutions initiating their own investigations within their competence and supporting effective national investigations. If this is not done, there is an increased risk that an EU citizen may be criminally charged in the jurisdiction of a non-EU State or the International Criminal Court, in the absence of a national prosecution.

The ICJ commends the work of the EP on rendition and secret detentions and supports the recommendations contained in its resolution of 10 October 2013 on "alleged transportation and illegal detention of prisoners in European countries by the CIA".⁴³

The ICJ recommends that the Commission in the future ISS (1) develops proposals to enhance accountability of EU Member State intelligence services for violations of human rights in counter-terrorism, including by establishing a mechanism for independent EU oversight of cross-border intelligence activities related to counter-terrorism; and (2) develops legislation to ensure access to effective remedies and accountability for gross violations of human rights and crimes under international law, and if restrictions on EU competence impede such measures, support an appropriate treaty amendment to establish competence.

6. Corruption: EPPO Proposal

Article 86 of the Lisbon Treaty provided the legal basis for the creation of a European Public Prosecutor's Office (EPPO), and the Commission put forth a first legislative proposal on the EPPO in July 2013.⁴⁴ The ICJ agrees that the creation of the EPPO will aid in the fight against corruption, which is also a fundamental threat to security, fundamental rights and rule of law. However, it should be stressed that any establishment of the EPPO must respect fundamental rights, including the right to fair trial. **The ICJ considers it essential in the future ISS, any action and policy relating to the EPPO does not set minimum standards that fall below the EU Charter and ECHR, but that the opportunity is taken to strengthen procedural rights protection.**

7. Justice Dimension of Security: Continued Focus on Criminal Procedural Rights

A secure society is also ensured by adequate protection of fair trial and other procedural rights, including the right to liberty, throughout the EU, which in turn fosters mutual recognition and mutual trust and will enable Member States to communicate security concerns to each other safely and appropriately. Cooperation measures already in place, such as the European Arrest Warrant, aim to foster security. As the ICJ's Eminent Jurist Panel stressed in its 2009 report, a well-functioning criminal justice system, which upholds fair trial rights, maintains an independent judiciary, and ensures accountability of other branches of government, will "deter terrorists, disrupt terrorist networks, catch and punish those who commit crimes, and ensure that any innocent suspects mistakenly caught up in the law enforcement process are rapidly released."⁴⁵

⁴³ European Parliament resolution of 11 September 2012 on alleged transportation and illegal detention of prisoners in European countries by the CIA: follow-up of the European Parliament TDIP Committee report ([2012/2033\(INI\)](#)).

⁴⁴ Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office 2013/0255 (APP) COM(2013) 534, 17 July 2014.

⁴⁵ International Commission of Jurists (ICJ), *Addressing Damage, Urging Action. Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, February 2009, p. 21.

The ICJ commends the criminal procedural rights directives that have already been adopted in the context of the Stockholm Programme, as highlighted by the Commission in their final implementation report on the ISS.⁴⁶ The enactment of these directives, as well as the initiation of discussions on the three directives proposed by the Commission in November 2013, is a positive step, but more work needs to be done to advance protection for procedural rights in EU law. Not only do elements of the proposed Directives still lack strength when it comes to fundamental rights protection, but there also remain significant areas where legislation is needed, for example in relation to detention. Greater procedural trial rights protection is needed across the EU, and the ICJ regrets that further legislation in this area, beyond the three current proposed directives, is not at present planned by the European Commission. **The ICJ recommends that in the future ISS the Commission as well as the Council carefully evaluate the successes of the already adopted procedural rights Directives and engage in a constructive dialogue with civil society and legal practitioners on other areas where legislation may be necessary to strengthen protection of criminal procedural rights.**

⁴⁶ *Communication from the Commission to the European Parliament and the Council, the final implementation of the EU Internal Security Strategy 2010 – 2014*, COM (2014) 365 final, 20 June 2014, p. 11