



More Justice and Freedom to Balance Security: Amnesty International's Recommendations to the EU

27 September 2004

Amnesty International
EU Office
Rue d'Arlon 39-41
B-1000 Brussels

Tel. +32 2 502 14 99
Fax +32 2 502 56 86
e-mail amnesty@aieu.be

INDEX

I. INTRODUCTION

II. SUMMARY OF RECOMMENDATIONS

Asylum and immigration
Access to justice and the protection of fundamental rights
Police cooperation

III. ASYLUM AND IMMIGRATION

1. Ensuring full compliance with international law principles during the transposition phase
2. Implementing the provisions of the Nice Treaty regarding qualified majority voting and co-decision procedure
3. Ensuring access to asylum procedures
4. Enhancing refugee protection through a fair and efficient asylum procedure
5. Promoting an equivalent level of protection for Convention refugees and persons under subsidiary protection
6. Enhancing practical cooperation in an enlarged EU
7. Combating root causes
8. Access to protection and durable solutions
9. Enhancing protection of migrants
10. EU return policy

IV. ACCESS TO JUSTICE AND THE PROTECTION OF FUNDAMENTAL RIGHTS

1. Domestic human rights observance: Human Rights Agency and Article 7 TEU
2. Accession to ECHR and inclusion of the Charter in the Constitution
3. Racism and xenophobia
4. Counter-terrorism
5. Victims of trafficking
6. Strengthening mutual trust through improved protection of human rights and access to justice
7. Age of criminal responsibility and treatment of children in the criminal justice system
8. Detention
9. Access to justice
10. Admissibility of evidence
11. Practical implications

V. POLICE COOPERATION

1. Human rights in police policy at the national level
2. EU code of ethics for policing
3. Lack of strategic approach and direction

.....

I. Introduction

The European Union is now embarking on the next crucial phase of the development of the EU Area of Freedom, Security and Justice (AFSJ). During the past five years, Amnesty International has closely monitored and commented on developments in the first phase of this important new area of EU policy launched by the European Council at Tampere in October 1999. In this document, Amnesty International sets out its proposals and recommendations in response to the multi-annual programming for the AFSJ presented by the Commission¹ and by the Dutch Presidency².

Every state has the right and the duty to control its borders and to protect its people from terrorist acts that are, in themselves, affronts to the right to life and human dignity. With counter-terrorism and the fight against “illegal immigration” in overdrive on the EU’s Justice and Home Affairs agenda, however, there are grounds to be increasingly concerned about a one-sided emphasis on “security” at the expense of the elements of “justice” and “freedom”. Looking at the future, Amnesty International believes it will be essential for the EU to reaffirm more than just on paper the fundamental orientation toward human rights in both its immigration and security policies, and to guard against short-term measures that may have the effect of putting that orientation at risk in the long term.

Amnesty International’s critical assessment of “Tampere”³ reflects five clear contradictions in the way the AFSJ vision is being translated into practice. **Amnesty International submits these five policy contradictions as the essential elements which need to be addressed in the next five-year AFSJ cycle:**

Human rights in the EU - in principle but what about the practice?

The EU is founded upon the principles of human rights, democracy and respect for the rule of law, but when it comes to guaranteeing these principles in practice, the EU has been far from coherent. Now that the rather sudden decision has been taken to establish an EU Human Rights Agency, it is time for the Council to give the internal human rights agenda the consideration, time and financial backing that it requires to ensure that the principles are translated into reality. Having taken the decision to establish an EU Human Rights Agency, the Council must also increase its own capacity to seriously address these questions, and set up a dedicated Council working group.

Enhancing checks and balances: moving beyond the rhetoric

While the EU has stated a commitment to enhancing judicial and democratic controls over the decision making process, inter-governmental initiatives appear to be of increasing importance. It is time for the EU Member States to practice what they preach in terms of transparency and judicial and democratic controls of the decision making process.

Restrictive asylum and immigration policies clash with human rights obligations

While the future constitutional treaty aims to further develop common standards and move towards a single asylum procedure, there are ever increasing restrictive measures effectively designed to prevent people from entering EU territory and hamper access to asylum procedures. Recent discussions have raised the necessity to combat “illegal immigration” through partnership with countries of origin and transit, including suggestions to establish “reception centers” in countries located at the external periphery of the EU. Third countries are

¹ Communication from the Commission to the Council and the European Parliament: Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations, Brussels, 2.6.2004. COM(2004)4002 final.

² Preparation of the political orientations for the multiannual programme building the area of freedom, security and justice, Brussels 9 July 2004, Doc 11122/04, JAI 258.

³ The European Union – Now more free, secure and just? Brussels 2 June 2004.

being pressed to cooperate in fighting illegal immigration in ways that risk clashing with refugee protection obligations as well as with major orientations of the EU's external relations policy.

It is time for the EU to bridge the gap between the rhetoric on asylum and its pronouncements on promoting human rights in its external relations. Amnesty International acknowledges that transit migration through neighbouring third countries is a complex issue that requires a multi-level agenda of actions. Long-term solutions can only be found in a balanced migration policy and the need to further engage in preventive actions against root causes. In the Mediterranean context, protection of refugees should also be guaranteed in the immediate term through rescue-at-sea schemes. Any cooperation by the EU or any of its Member States with neighbouring third countries to control migration to Europe must be based on full respect for human rights, including the principle of non-refoulement and access to adequate asylum procedures. Those reaching EU territory must be given unconditional access to asylum procedures by the respective EU Member States.

Implementing a balanced approach to migration

Despite repeated political commitments to promote an approach balancing the sound management of legal migration with a renewed commitment to combat illegal immigration, the development of operational cooperation shows an overriding orientation towards defensive measures against irregular migrants who are in a particularly vulnerable situation. It is time for the EU Member States to address immigration in a properly comprehensive manner that takes into account root causes and enhances the fight against labour exploitation. Legal protection of migrants needs to be enhanced and economic actors that are profiting from irregular migrants should be targeted.

Mutual recognition without genuine mutual trust

The European Arrest Warrant was the first important example of legislation based on the principle of mutual recognition and a key part of the EU's response to the threat of terrorism and other forms of serious and organized crime. The principle of mutual recognition is founded on mutual trust between Member States as to the standards and protections inherent in their justice systems. However, the trust that exists at a political level belies the significant differences between the application of human rights in Member States and the resultant mutual suspicion among EU citizens, including the lawyers and judges that will put the principle of mutual recognition into effect. It is time for the EU to address this gap by ensuring genuine and high levels of procedural rights across the EU and by guaranteeing access to justice through practical measures and adequate funding. Only in this way will the EU be able to effectively combat terrorism and other serious forms of criminality while upholding the principles of human rights and respect for the rule of law.

Conclusion

Amnesty International believes it is now time for the EU to refocus its justice and home affairs policies. The 25 Member States of the European Union have an opportunity, at this crucial junction in world affairs, to set a new standard, to adopt a different tone and approach which reflects more of a balance towards the protection of human rights. There needs to be less rhetoric designed for domestic political reasons, and more discussion on setting an example by protecting the hard-won rights as well as the security of all in Europe.

II. SUMMARY OF RECOMMENDATIONS

Asylum and immigration

Post Tampere transitional measures: enhancing checks and balances

Ensuring full compliance with international law principles during the transposition phase

Amnesty International calls on Member States to go beyond the lowest common denominator and to ensure that national legislation is in full compliance with international law standards, in particular the 1951 Geneva Convention and the European Convention on Human Rights.

The Commission is urged to take proactive steps, including legal action where necessary, against Member States which fail to fulfil their obligations correctly to transpose and implement EU instruments.

Implementing the provisions of the Nice Treaty regarding qualified majority voting and co-decision procedure

Amnesty International calls on Member States to implement the relevant provisions of the Nice Treaty as soon as the last building block of the Tampere agenda is formally adopted.

EU Member States should stick to their initial commitments, recently renewed under the provisions of the new constitutional treaty, and to abandon any intergovernmental initiative that could be detrimental to collective efforts at EU level.

Towards a single asylum procedure and status, valid throughout the EU

Ensuring access to asylum procedures

Amnesty International calls on Member States to ensure that migration partnerships with third countries are in full compliance with human rights standards and will not hamper the right to spontaneously claim asylum on EU territory.

Enhancing refugee protection through a fair and efficient single asylum procedure

Member States should amend the directive on asylum procedures to ensure that basic procedural guarantees (including the right to have access to a legal adviser and an interpreter, and the right to a suspensive appeal) without exception are fully available in fast track, admissibility and border procedures.

Promoting an equivalent level of protection for Convention refugees and persons under subsidiary protection

In order to improve the integration of refugees in their host countries, Amnesty International urges Member States to amend the qualification directive and ensure that the rights attached to subsidiary forms of protection rights are made equal to the ones offered under the Geneva Convention.

Enhancing practical co-operation in an enlarged EU

Member States should explore responsibility-sharing and solidarity mechanisms in cases where the Dublin II system disproportionately burdens Member States located at the external borders of the EU.

Amnesty International recommends the establishment of a public database available to lawyers and legal advisers of asylum seekers in order to inform them of the existing legal framework in all EU countries.

In addition, a Common European Asylum System should be based on common European reports on countries of origin, or at least be facilitated by the establishment of a European documentation centre dealing with information on refugee producing countries and countries of transit.

Asylum - migration nexus

Combating root causes

Amnesty International reiterates its call for:

- the development of effective monitoring mechanisms;
- a human rights impact assessment, based on relevant human rights standards, of every decision taken to combat illegal immigration and of their cumulative effect, in order to help prevent negative effects on the EU's key human rights obligations.

Access to protection and durable solutions

Amnesty International calls on Member States to ensure that:

- Resettlement and protected entry procedures (PEPs) function without prejudice - both legally and politically - to the right to seek asylum spontaneously.
- The selection criteria are in full compliance with the EU-wide resettlement scheme with the criteria defined in the UNHCR's Resettlement Handbook and provide for the unity of families.
- The feasibility of emergency procedures (PEPs) is explored so that persons facing immediate danger of persecution, such as human rights defenders fleeing their countries, can quickly apply for and be granted asylum *sur place* or humanitarian visas in order to gain access to a fair asylum procedure in the EU.
- There is an independent appeal mechanism in order to ensure accountability on the part of States as well as clarity for refugees and asylum-seekers applying for protection through resettlement avenues.
- In order to enhance legal security, there is a clear link between resettlement schemes and the future EU instrument on long-term residence status for refugees and persons in need of international protection.

Enhancing the protection of migrants

Amnesty International calls on Member States to strengthen legal protection for migrants, expose exploitation and ensure accountability for economic actors, and confront discrimination and racism against migrants. To that end, they should respect, promote and fulfil the rights of migrants as enshrined in the 1990 United Nations Convention on the Right of Migrants Workers and their Family Members.

Amnesty International also calls on Member States to open legal channels of migration and develop a coherent approach to regularisation programs.

EU return policy

In order to ensure full observance of the non-refoulement principle and other relevant international standards, any future legislative initiative should specify:

- the substantive grounds on which individuals can be expelled,
- the procedural safeguards for the individual regarding expulsion and in particular including those developed by the Council of Europe and the European Court of Human Rights,
- the physical conditions of the expulsion.

Amnesty International also calls for a systematic respect of interim measures issued by the ECHR to suspend deportation while the examination of a claim is still pending and for independent investigation in cases where the person removed from EU territory was exposed to persecution.

Access to justice and the protection of fundamental rights

Domestic human rights observance: Human Rights Agency and Article 7 TEU

In addition to the development of a human rights agency, Amnesty International urges the Council to consider the Commission Communication on Article 7 TEU and to respond with a practical outline of how the EU can fulfil its requirements with regard to monitoring and detecting existing or potential breaches of human rights in Member States with a view to correction or prevention.

Accession to ECHR and inclusion of the Charter in the Constitution

Care must be taken to ensure that competing human rights jurisdictions are not formed between the European Court of Justice and the European Court of Human Rights. To this end, thorough consultation must be carried out to ensure a coherent and practical approach to the protection of human rights in Europe. That consultation should begin as soon as possible.

Racism and xenophobia

Amnesty International calls for the Council to continue efforts to combat racism and xenophobia through the agreement of criminal law legislation to ensure that racist and xenophobic behaviour is not tolerated in any country in the EU.

Counter-terrorism

The Council should ensure that the protection of human rights is fully taken into consideration and applied in the counter-terrorism efforts, both in EU level legislation and, more generally on the territory of the EU.

Victims of trafficking

The EU should address the issue of trafficking in human beings, in particular women and girls, from a victims' rights protection perspective.

Strengthening mutual trust through improved protection of human rights and access to justice

The multiannual programme should ensure that the mutual trust required for mutual recognition is founded firmly on the reality of an AFSJ that provides a high level of protection for individual rights across the EU.

Age of criminal responsibility and treatment of children in the criminal justice system

The EU should consider whether, within the context of the AFSJ, there is a general European consensus on the age of criminal responsibility which should result in approximation of laws to raise that age in those Member States which fall below the generally applicable standards.

Detention

Minimum standards should be drawn up relating to the length and conditions of pre-trial detention in the EU, as an important step in improving protection of human rights and in enhancing the mutual trust needed for mutual recognition.

Access to justice

Amnesty International recommends that, amongst others, the following key issues related to procedural rights should be addressed at EU level to improve the protection of human rights within the EU, create a basis for a genuine area of freedom, security and justice and enhance mutual trust between Member States:

- access to a doctor
- electronic records of questioning in police stations
- right against self-incrimination
- *ne bis in idem*
- legal aid
- length of criminal proceedings in accordance with Article 6 ECHR.

Admissibility of evidence

Amnesty International urges the EU to set minimum standards for the admissibility of evidence to prohibit the use of evidence obtained through ill-treatment or torture (except where it is used as proof against the alleged perpetrators of such ill-treatment or torture).

Practical implications

For the EU to demonstrate a genuine commitment to the protection of human rights and access to justice it must give thorough consideration to the possibility of joint resourcing in these fields to ensure that the principles are translated into practice.

Police Cooperation

Human rights in police policy at the national level

Amnesty International urges the Council to develop further initiatives and projects to improve human rights protection and promotion by national police organizations in all Member States. This should result in binding and where appropriate, legally enforceable professional standards.

EU code of ethics for policing

Amnesty International calls on the EU to address issues specifically relating to cross-border cooperation, and recommends that an EU Code of Police Ethics be made legally binding.

Lack of strategic approach and direction

Amnesty International calls upon the Council to develop concrete measures to address the problem of lack of oversight as there is no area of policing which should be immune from independent external scrutiny.

III. Asylum and immigration

Overview

The entry into force of the Amsterdam Treaty on 1 May 1999 and the development of a common European asylum policy was seen as a decisive element in reducing national disparities and constructing a fair and non-discriminatory system where refugees would benefit from an equivalent level of protection. Unfortunately, Amnesty International's overall assessment of the first phase of harmonization, which ended in May 2004, is rather negative. The commitment of EU Member States to international human rights standards as laid out at Tampere has been corroded by a steady deterioration in refugee rights and a tightening of controls.

While this first phase is now over, Amnesty International is concerned that the discussions on the new programme to be adopted for the next five year period are taking place within a difficult political climate. The latest statistical overviews published by the UNHCR show a continuous decrease of asylum applications in most EU Member States. Although the overall number of arrivals remains quite low compared to previous years, Member States located at ports of entry to the European Union are currently confronted with difficulties in managing migration and refugee flows. These difficulties have rekindled discussions about the need to explore the possibilities of opening offshore processing centres outside the European Union and developing legal channels of migration.

Given the potentially far-reaching implications of the current discussions on the protection of persons in need of international protection, Amnesty International takes the opportunity to submit concrete recommendations aimed at:

- Improving the decision-making process,
- Ensuring access to a fair and efficient asylum system, and
- Promoting an adequate protection of migrants.

Post-Tampere transitional measures: enhancing checks and balances

1. Ensuring full compliance with international law principles during the transposition phase

EU Member States have now formally adopted or agreed the building blocks that were required by the Amsterdam Treaty to achieve a first phase of establishment of a common European asylum and immigration system (CEAS). These instruments set out minimum standards and leave a wide margin of discretion.

Amnesty International calls on Member States to go beyond the lowest common denominator and to ensure that national legislation is in full compliance with international law standards, in particular the 1951 Geneva Convention and the European Convention on Human Rights.

The Commission is responsible for monitoring and reporting on progress in transposing the relevant legal texts into Member States' national law and their implementation. The European Commission now has the responsibility to check whether the transposition instruments are in full compliance with EU legislative instruments. In Amnesty International's view, such a monitoring exercise should also take into consideration international law standards in accordance with Article 6 of the Amsterdam Treaty.

Amnesty International believes that the monitoring exercise is of critical importance given that a number of EU Member States (such as Austria, Germany, Finland, France, Lithuania, United Kingdom) have recently reformed their national procedures. These reforms have led to the introduction of restrictive measures that were severely criticised by intergovernmental bodies

such as the UNHCR, the Commissioner for Human rights of the Council of Europe, and representatives of civil society.

Amnesty International urges the Commission to take proactive steps, including legal action where necessary, against Member States which fail to fulfil their obligations correctly to transpose and implement EU instruments.

2. Implementing the provisions of the Nice Treaty regarding qualified majority voting and co-decision procedure

While the entry into force of Amsterdam treaty has provided for the long-awaited communitarization of asylum issues, the first phase of harmonisation which ended in May 2004 has been characterised by lack of ambition and political will on the part of the Member States. The difficult political climate was further exacerbated by the requirement of unanimity voting in the Council regarding most JHA areas, including immigration and asylum. As a result, the CEAS was often hostage to domestic political agendas. Furthermore, the fact that the European Parliament has brought actions before the European Court of Justice in three matters relating to the adoption of immigration measures is a reflection of the lack of proper democratic safeguards and the need to move ahead in the decision making process⁴. Despite the obvious disadvantages of the current decision making process, recent discussions have highlighted the political resistance of certain Member States to switch to the co-decision procedure, where the democratic control of the European Parliament would be enhanced and where decisions would be adopted under the qualified majority vote.

Amnesty International calls on Member States to implement the relevant provisions of the Nice Treaty as soon as the last building block of the Tampere agenda is formally adopted.

However, a high level of ambition in the second phase of the harmonization process will not be achieved merely through procedural reforms. Protracted negotiations have also led to palpable fatigue, severely eroding Member States' political commitment towards the harmonization process. Recent months have been characterized by a renewed interest in intergovernmental cooperation on the part of the most influential Member States, in particular within the framework of G5 summits (France, Germany, Italy, Spain and the United Kingdom), increasing the difficulty of achieving ambitious results at EU level. Amnesty International is concerned that Member States may depart from their initial commitments under the Amsterdam Treaty, given that the intergovernmental method has been characterized by a lack of transparency and an overall restrictive approach.

Amnesty International calls on all EU Member States to stick to their initial commitments, recently renewed under the provisions of the new constitutional treaty, and to abandon any intergovernmental initiative that could be detrimental to collective efforts at EU level.

Towards a single asylum procedure and status, valid throughout the EU

3. Ensuring access to asylum procedures

Amnesty International notes that Italy and Germany have launched discussions regarding the possibility of developing extraterritorial processing centres following the stand-off in June and July this year between the Italian authorities and the German ship, the Cap Anamur which had rescued refugees off the Italian coast. Amnesty International acknowledges that transit migration through neighbouring third countries is a complex issue that requires a multilevel agenda of actions. Long-term solutions can only be

⁴ ILPA, An Area of Freedom, Security and Justice Five Years On : Immigration and Asylum for the Next Five Years, June 2004.

found in a balanced migration policy and the need to further engage in preventive actions against root causes. In the immediate term, there is an urgent need to put an end to human tragedies by implementing rescue-at-sea schemes and develop new avenues for entering the EU territory. Further proposals to develop orderly and managed entry procedures are discussed below.

Without prejudicing formal proposals that have yet to come forward, Amnesty International wishes to highlight the critical importance of people being able to spontaneously access EU territory and thus, refugee status determination procedures.

At the time of the Thessaloniki European Council in June 2003, Amnesty International expressly stated that potential transfer of responsibility to countries where responsibility, enforceability and accountability for refugee protection may be diminished, weak and unclear, would be contrary to Member States' obligation under international law⁵. In addition, if implemented, such a policy might conflict with the European Union's commitment to enhance coherence in external action including human rights protection as an objective for the relations of the EU with the rest of the world. In April 2004, the UK House of Lords published a critical report upholding a number of Amnesty International's concerns⁶.

While current legislation includes safeguards to ensure access to asylum procedures, Amnesty International fears that these provisions will remain a "dead letter" because the drastic measures envisaged by some EU Member States to fight illegal immigration may, if adopted, hamper effective access to protection. Finally, Amnesty International is greatly concerned by the recent initiative of certain Member States to develop partnerships with third countries, such as Libya, that have poor human rights records. After a mission held in February 2004, following 15 years of absence from the country, Amnesty International was able to document concrete evidence of refoulement of Eritreans from Libya⁷. We deplore that, despite political commitments to oppose serious human rights abuse, EU governments seem to suffer from collective amnesia when migration issues are at stake and are ready to open negotiations even while there is no collective framework to initiate a proper political dialogue⁸.

Any cooperation by the EU or any of its Member States with neighbouring third countries to control travel to Europe by asylum seekers and immigrants must be based on full respect of human rights, including the principle of non-refoulement and access to adequate asylum determination procedures. Such cooperation must be predicated on effective assistance and monitoring by the EU and the UNHCR. Those reaching EU territory must be given unconditional access to asylum determination procedures by the respective EU Member States.

Amnesty International calls on Member States to ensure that migration partnerships with third countries will be in full compliance with human rights standards and will not hamper the right to spontaneously claim asylum on EU territory.

4. Enhancing refugee protection through a fair and efficient single asylum procedure

Amnesty International would generally favour a single asylum procedure in which the need for protection pursuant to the Geneva Convention and complementary forms of protection are comprehensively examined. Indeed, the circumstances that force people to flee their country are complex and, often, of a composite nature. The identification of a person's protection needs cannot, therefore, be made in a compartmentalised fashion. Furthermore, separate procedures often do not include identical procedural safeguards and such discrimination cannot be justified given that both groups of asylum seekers have comparable protection needs.

⁵ Amnesty International, UK/EU/UNHCR Unlawful and Unworkable: extraterritorial processing of claims, June 2003, AI Index: IOR/61/004/2003.

⁶ House of Lords, EU Committee, 11th Report of Session 2003-2004, Handling EU asylum claims : new approaches examined, Report with evidence, 30 April 2004.

⁷ Amnesty International, Libya : time to make human rights a reality, April 2004, AI Index MDE 19/002/2004.

⁸ Amnesty International, Urgent Action : Over 200 Eritrean nationals detained in Lybia. Over 110 Eritrean nationals forcibly returned from Lybia, AI Index MDE 19/012/204, 28 July 2004. Amnesty International, Urgent Action, AI MDE/19/014/2004, Update 6 September 2004.

Amnesty International's support for a single procedure is based on the fact that such a system better ensures the legal security of asylum seekers since the claim is processed in one procedure and the person does not need to be aware of specific conditions of the different forms of protection. In addition, a "one-stop shop" procedure is often time-effective and offers the advantage of quickly resolving the situation of those seeking asylum. Experience shows that an early identification of persons in need of international protection is also a key element in the integration process of refugees.

Amnesty International's support for a single procedure is however conditional on the actual procedural safeguards contained in the procedure. During the negotiations and upon its adoption, Amnesty International, in line with UNHCR and many NGOs across Europe, has severely criticised the content of the directive on asylum procedures that, in a number of respects, may be in direct violation of international protection standards⁹. In June 2004, a detailed assessment of the directive was shared with EU institutions and Member States. The main concerns raised in this document relate to the wide discretion left to Member States regarding procedural safeguards to be applied in fast track procedures, the notion of safe countries (regarding countries of origin and transit States), and the lack of compliance with international standards regarding the right to an effective remedy¹⁰.

On the basis of this assessment, Amnesty International urges Member States to amend the directive on asylum procedures in order to ensure that basic procedural guarantees (including the right to have access to a legal adviser and an interpreter, and the right to a suspensive appeal) without exception are fully available in fast track, admissibility and border procedures.

The rulings of the European Court of Human Rights ought to be fully reflected in EU legislative instruments. In particular, EU instruments should fully comply with the Court's interpretation of responsibility sharing agreements and the right to an effective remedy. Regarding the first point, Amnesty International has warned repeatedly that the implementation of the safe third country principle should not lead to situations of « refugees in orbit ». Regarding the right to an effective remedy, asylum seekers should have a right to appeal against negative decisions before an independent and impartial judicial body, which has full jurisdiction over the claim.

Given the absolute nature of the non-refoulement principle, Amnesty International recalls that the right to an effective remedy should include the suspensive effect against the implementation of deportation orders while the examination of the claim by the judicial authority is still pending. These safeguards are complementary to the ones that should be included in the future EU instrument defining minimum standards on return.

5. Promoting an equivalent level of protection for Convention refugees and persons under subsidiary protection

While the qualification directive contains positive elements regarding the grounds for offering protection, Amnesty International deplores that the final text of the directive further enhances the discrimination existing between Convention refugees and persons eligible for subsidiary forms of protection. As a result of the political pressure put forward by one Member State, the final version of the directive endorses the concept of "second class refugees". During the negotiations, Amnesty International had warned Member States of the harmful consequences of such discrimination for the integration of persons eligible for subsidiary forms of protection. Indeed, the need for subsidiary protection often turns out to be just as long lasting as that for protection under the 1951 Convention. The practice shows that subsidiary protection status is often renewed for many years and that leaving a large population of refugees in a precarious situation creates significant social problems without having any positive impact on the labour market.

⁹ Amnesty International, ECRE, Human Rights watch, press release, 28 April 2004.

¹⁰ Amnesty International's comments on the follow-up to the study on the single asylum procedure : « One-stop shop » against the background of the common European asylum system and the goal of the common asylum procedure, March 2004.

The feasibility and desirability of a single status needs also to be explored in view of the future legislative developments regarding long-term residence status and the transfer of protection status in the EU¹¹.

Amnesty International also believes that offering a single status with equivalent rights and entitlements to both Convention refugees and persons eligible to subsidiary protection would be an efficient way to avoid eroding the legal primacy of the Geneva Convention.

Amnesty International urges Member States to amend the qualification directive and ensure that the rights attached to subsidiary forms of protection rights should be equal to the ones offered under the Geneva Convention.

6. Enhancing practical cooperation in an enlarged EU

The debate about the need for a second stage of harmonisation should also take into account the impact of enlargement. The Dublin II mechanism determining which Member State is responsible for dealing with an asylum application potentially has far-reaching implications for the asylum systems of the ten new EU member states. Given the predominant responsibility of countries located at the external borders of the EU territory, this regulation is likely to create a very heavy burden on the new Member States. In this respect, Amnesty International is concerned by recent legislative developments in new EU Member States, such as the Czech Republic, Latvia and Lithuania. They have passed amendments or are considering amending their legislation in order to considerably restrict access to the regular asylum procedure for aliens entering the territory illegally and which may undermine procedural safeguards.

Amnesty International calls on Member States to explore responsibility-sharing and solidarity mechanisms in cases where the Dublin II system disproportionately burdens Member States located at the external borders of the EU.

While the implementation of the Dublin II mechanism is based on the principle of an equivalent level of protection, Amnesty International believes that the conditions for ensuring mutual trust are not yet satisfied in practice. Practical measures should be adopted to substantially improve the knowledge and mutual understanding of the asylum systems amongst the 25 Member States. In this context, the Commission's proposals to enhance cooperation amongst practitioners deserves support.

Amnesty International recommends the establishment of a public database available to lawyers and legal advisers of asylum seekers in order to inform them of the existing legal framework in all EU countries.

A common independent information base is a key element in achieving an equivalent level of protection throughout the EU. Such a system would work on the basis of a wide variety of sources including reports from inter-governmental organizations such as the UNHCR, and non-governmental organizations.

Amnesty International recommends that a Common European Asylum System should be based on common European reports on countries of origin, or at least be facilitated by the establishment of a European documentation centre dealing with information on refugee producing countries and countries of transit.

Asylum - migration nexus

7. Combating root causes

¹¹ Danish Refugee Council, Migration Policy Institute, Institute for Migration and Ethnic Studies, Study on the transfer of protection status in the EU, against the background of the common European asylum system and the goal of a uniform status, valid throughout the Union, for those granted asylum, 25 June 2004.

Amnesty International acknowledges the efforts made by the European Commission aimed at targeting external policy to the goal of preventing the causes of migration. However, given Member States' restrictive policies, Amnesty International wishes to raise its concerns regarding the development of a "negative migration conditionality" and the use of financial and technical incentives to enhance cooperation with countries of origin and transit. The difficulties encountered by the European Commission in promoting this policy and convincing third countries to sign readmission agreements illustrates the pressing need for the establishment of a structured dialogue with third countries. COREPER and the High Level Working Group on Asylum and Migration could be used as frameworks to initiate such a dialogue at an early stage of the discussions. The policy of engagement with countries of origin and transit should approach political, development or economic co-operation from a human rights perspective to prevent the causes of people fleeing their countries.

Amnesty International is concerned that so far this dialogue has not been more than an extension of the Member States' restrictive asylum and immigration policies, with insufficient attention paid to the question of good governance and respect for fundamental rights by third States. Readmission agreements do not include sufficient safeguards and a mere general reference to Member States' international obligations is not enough to effectively prevent *refoulement*.

In the light of the above, Amnesty International reiterates its call for:

- **the development of effective monitoring mechanisms;**
- **a human rights impact assessment, based on relevant human rights standards, of every decision taken to combat illegal immigration and of their cumulative effect, in order to help prevent negative effects on the EU's key human rights obligations.**

8. Access to protection and durable solutions

Amnesty International supports the proposals made by the European Commission to enhance protection of refugees in their region of origin. While such a policy can only be successful through a multi-level action agenda, including trade and development policies, Amnesty International believes that there is an urgent need to focus on capacity building in the region in order to develop an effective level of protection for refugees. In recent documents, the European Commission has advocated a careful examination of the conditions that need to be fulfilled in third countries in order to have in place the capacity required to provide "effective protection". Amnesty International encourages EU institutions and Member States to develop common benchmarks in order to be able to assess the concrete needs of receiving countries. Although there is no formal definition of such a concept, Amnesty International believes that the conclusions from the roundtable in Lisbon in December 2002 co-hosted by the UNHCR, are useful benchmarks¹². While the UNHCR should be a leading actor in the development of capacity-building in the region, concrete results can only be achieved by substantially increasing the financial contribution provided to the UNHCR by the European Union and its Member States.

Amnesty International also supports the Commission's recent proposal to develop access to durable solutions for persons in need of international protection. The possible creation of an EU-wide resettlement scheme, offering expanded resettlement opportunities within Europe, would constitute a welcome development for the EU and a significant contribution to promoting durable solutions available to refugees. However, Amnesty International only supports the use of protected entry procedures and resettlement schemes as long as they are complementary tools to the existing asylum procedures and not a substitute for spontaneous claims for asylum on EU territory.

Amnesty International also shares the Commission's views that these mechanisms need to be part of a broader-based and more comprehensive approach to strengthening international

¹² Lisbon expert round-table, 9-10 December 2002: The Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum Seekers, organized by UNHCR and the Migration Policy Institute, hosted by the Luso-American Foundation for Development.

protection and that they cannot be expected to have a substantial impact on their own. It should be borne in mind that less than 1% of the world's refugee population is granted resettlement as a durable solution, with even less than that accessing protection through protected entry procedures. Enhancing access to international protection would therefore require significant commitments from EU Member States both in terms of numerical targets (i.e. persons actually resettled within the EU) and in terms of financial support to the UNHCR and other relevant actors involved. In June 2004, Amnesty International submitted concrete suggestions regarding the safeguards that should be included in the EU scheme¹³.

On the basis of this assessment, Amnesty International calls on Member States to ensure that:

- **Resettlement and protected entry procedures (PEPs) must function without prejudice - both legally and politically - to the right to seek asylum spontaneously.**
- **The selection criteria should be in full compliance with the EU-wide resettlement scheme with the criteria defined in the UNHCR's Resettlement Handbook and should provide for the unity of families.**
- **The EU should further explore the feasibility of emergency procedures (PEPs) so that persons facing immediate danger of persecution, such as human rights defenders fleeing their countries, can quickly apply for and be granted asylum *sur place* or humanitarian visas in order to gain access to a fair asylum procedure in the EU.**
- **There should be an independent appeal mechanism in order to ensure accountability on the part of states as well as clarity for refugees and asylum-seekers applying for protection through resettlement avenues.**
- **In order to enhance legal security, there should be a clear link between resettlement schemes and the future EU instrument on long-term residence status for refugees and persons in need of international protection.**

9. Enhancing the protection of migrants

Amnesty International acknowledges that the fight against "illegal immigration" is a necessary component of a proper immigration policy and understands the desire of governments to promote new and more effective ways of dealing with spontaneous arrivals of third country nationals in irregular situations. However, we are very concerned that recent measures adopted at national and European level are primarily targeting individuals, and do not include significant sanctions against the those who are exploiting irregular migrants. The increasing number of human tragedies highlights the need for a concerted approach towards labour exploitation.

Throughout its research, Amnesty International has demonstrated that, as a consequence of migratory movements, many individuals are exposed to human rights abuses¹⁴. Such abuses could be the result of restrictive migration control measures, the denial of fundamental rights in the host country as a result, for example, of exploitative labour practices, or human rights abuses committed in the course of removing a migrant from the territory of the host State. Regarding this last point, Amnesty International has raised particular concerns regarding the human rights violations occurring as a result of the forcible expulsion of child migrants from Spain¹⁵.

¹³ Amnesty International's comments on the Communication from the Commission : « Improving access to durable solutions : managed entry in the EU of persons in need of international protection and the enhancement of the protection capacity of the regions of origin », COM (2004) 210 final.

¹⁴ Amnesty International's concerns relevant to the 92nd International Labour Conference, 1-17 June 2004, AI Index IOR 42/008/20004.

¹⁵ Amnesty International, Spain: Unaccompanied foreign minors without papers are at risk, November 2003. Amnesty International, Spain: "Street children" have rights too, AI Index EUR 41/003/2001.

During the various stages of their journey, discrimination, racism, xenophobia, arbitrary detention and exploitation are today amongst the most common human rights concerns affecting migrants.

Amnesty International calls on Member States to strengthen legal protection for migrants, expose exploitation and ensure accountability for economic actors, and confront discrimination and racism against migrants. To that end, they should respect, promote and fulfil the rights of migrants as enshrined in the 1990 United Nations Convention on the Right of Migrants Workers and their Family Members.

Regularisation programs recently announced by some EU Member States, such as Spain, also show the need for legal channels of immigration for both qualified and unqualified migrants.

Amnesty International also calls on Member States to open legal channels of migration and develop a coherent approach to regularisation programs.

10. EU Return Policy

Amnesty International notes the determination of the past and present EU Presidencies to develop a common return policy. On the basis of the mandates given by successive European Council meetings, the European Commission has gradually elaborated tools for an integrated management of external borders and the fight against “illegal immigration”, in particular through financial instruments and the establishment of a European agency for the management of operational cooperation at the external borders.

While a return policy is a necessary component of a proper asylum and immigration policy, Amnesty International is concerned that protection issues are not given adequate attention as persons in need of international protection are amongst irregular arrivals. A consistent monitoring of Member States over the years has revealed regular breaches of the principle of non-refoulement in particular with the development of fast-track procedures to process asylum claims lodged at the borders, which do not involve the right to a suspensive appeal.

Amnesty International is concerned that preliminary discussions regarding common minimum standards have revealed a great reluctance to develop ambitious standards at EU level, despite existing obligations under international human rights instruments. It is also concerned that Member States, such as Belgium or Estonia, have not modified their legislation despite condemnation by the European Court of Human Rights and/or observations issued by competent UN bodies¹⁶. In light of the case of Semira Adamu¹⁷, who was suffocated to death pending her deportation, Amnesty International believes that the use of physical constraints during expulsions should be very strictly codified.

In order to ensure full observance of the non-refoulement principle and other relevant international standards, any future legislative initiative should specify¹⁸:

- **the substantive grounds on which individuals can be expelled,**
- **the procedural safeguards for the individual regarding expulsion and in particular including those developed by the Council of Europe and the European Court of Human Rights,**
- **the physical conditions of the expulsion.**

In order to avoid irreparable breaches of the principle of non-refoulement, the future EU instrument should explore legal ways of ensuring systematic respect for the interim measures

¹⁶ ECHR, *Conka vs. Belgium*, judgement of 5 February 2002. UN Human Rights Committee, Concluding Observations on Estonia, 15/04/2003, CCPR/CO/77/EST. Conclusions and recommendations of the Committee against Torture, Belgium, 14/05/2003 (UN Doc. CAT/C/CR/30/6).

¹⁷ Amnesty International, Briefing to the UN Committee Against Torture, May 2003, AI Index EUR 14/001/2003.

¹⁸ ILPA, *An Area of Freedom, Security and Justice Five Years On : Immigration and Asylum for the Next Five Years*, June 2004.

issued by the European Court of Human Right to suspend deportation while the examination of a case is still pending.

The EU instrument should also examine the feasibility of carrying out independent investigation in the case where such a deportation is carried out, and where the expulsion has resulted in an actual breach of the principle of non-refoulement. Given the extra-territorial effect of Article 3 ECHR, Member States should be held accountable for breaches of the non-refoulement principle occurring outside the EU territory.

Amnesty International also calls for a systematic respect of interim measures issued by the ECHR to suspend deportation while the examination of a claim is still pending and for independent investigation in cases where the person removed from EU territory was exposed to persecution.

IV. Access to justice & the protection of fundamental rights

Overview

Amnesty International is encouraged by the fact that the Presidency document preparing the political orientations for the multiannual programme includes adequate access to justice and the protection of rights as the first key area to be addressed in this next stage of development of the AFSJ. The protection of fundamental rights and the strengthening of mutual trust by assuring for all European citizens a high-quality system of justice based on common values is also a core part of the Commission Communication on this subject.

Amnesty International's assessment of the Tampere agenda highlighted the disappointments at its outcome. It now seeks to put forward the possibilities in the fields of access to justice and protection of rights it believes are necessary to make the EU more free, more secure and more just in the follow up to Tampere.

1. Domestic human rights observance: human rights agency and Article 7 TEU

From a practical perspective, perhaps the most pressing issue to address is the establishment of a Council working group for human rights within the EU. The steadily increasing workload related to fundamental rights, whether in relation to the establishment of a human rights agency, the assessment of Article 7 TEU or in the narrower context of judicial cooperation makes the currently fragmented situation untenable. The overarching emphasis on security and counter-terrorism makes it all the more urgent to establish a proper forum to address these concerns also from a fundamental rights perspective. Having taken the decision to establish a human rights agency, the Council must increase its own capacity to seriously address questions of fundamental rights within the EU.

The decision to establish a human rights agency out of the EU Monitoring Centre on Racism and Xenophobia in Vienna was taken in somewhat confused and hasty circumstances. The forthcoming Communication from the Commission, however, should allow the time for careful consideration of how to form a human rights agency that will have a practical impact on the protection of fundamental rights within the EU. In order for a human rights agency to fulfil this task, it must be given a sufficiently clear mandate to allow for monitoring of the human rights situation in Member States, issuing recommendations for improvements where appropriate and the development of EU policy to further the protection of human rights.

In addition to the development of a human rights agency, Amnesty International urges the Council to consider the Commission Communication on Article 7 TEU¹⁹ and to respond with a practical outline of how the EU can fulfil its requirements with regard to monitoring and detecting existing or potential breaches of human rights in Member States with a view to correction or prevention.

2. Accession to ECHR and inclusion of the Charter in the Constitution

The new Constitutional text states that the EU will accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and incorporates the EU Charter of Fundamental Rights. Accession to the ECHR may have a number of practical and legal implications for the EU institutions that should not be underestimated. Care must be taken to ensure that competing human rights jurisdictions are not formed between the European Court of Justice and the European Court of Human Rights.

¹⁹ COM(2003) 606

To this end, thorough consultation must be carried out to ensure a coherent and practical approach to the protection of human rights in Europe. Amnesty International urges the EU to begin that consultation as soon as possible.

3. Racism and xenophobia

The importance of preventing and combating racism and xenophobia within the AFSJ as set down in Article 29 TEU cannot be underestimated and the multiannual programme should reflect this. Amnesty International urges the Council to keep this issue high on the agenda in order to ensure that it is not sidelined as a result of the expansion of the European Monitoring Centre on Racism and Xenophobia into a fully-fledged human rights agency.

Particular attention should be given to ensuring that access to justice is not affected by discrimination arising from racism and xenophobia and the issue of the marginalisation of communities such as the Roma in relation to the justice system should be made a priority.

Amnesty International urges the Council to continue efforts to combat racism and xenophobia through the agreement of criminal law legislation to ensure that racist and xenophobic behaviour is not tolerated in any country in the EU.

4. Counter-terrorism

Certain aspects of the current situation relating to counter-terrorism in the EU require attention. Firstly, the lack of judicial accountability and the absence of an effective remedy to inclusion of EU nationals on the EU terrorism lists²⁰ is something that must be addressed to ensure that the complex institutional structure of the EU does not create the situation of a legal black hole.

Secondly, the approach of certain Member States to the fight against terrorism undermines the EU's avowed commitment to protect human rights. In particular, Part IV of the Anti-Terrorism Crime and Security Act 2001 in the UK²¹ which required a derogation from Article 5 of the ECHR in order to detain foreign terrorist suspects indefinitely without trial is a matter which deserves the scrutiny of Member States who share a degree of collective responsibility for the respect of human rights set down in Article 6 TEU as the foundation of the Union.

Amnesty International urges the Council to ensure that the protection of human rights is fully taken into consideration and applied in the counter-terrorism efforts, both in EU level legislation and, more generally, on the territory of the EU.

5. Victims of trafficking

The phenomenon of trafficking in human beings poses a grave threat to human rights and victims of trafficking are extremely vulnerable. Developments so far in this area have been characterised by a law-enforcement perspective which addresses victims in the context of their cooperation with law-enforcement authorities²². Amnesty International believes that legislation relating to the protection of victims of trafficking is a key to preventing re-trafficking of victims and to the greater protection of human rights within the AFSJ.

Amnesty International urges the EU to address the issue of trafficking in human beings, in particular women and girls, from a victims' rights protection perspective.

²⁰ See for example Council Common Position 2004/500/CFSP of 17 May 2004 published in OJ L 196/12 on 3.6.2004 in conjunction with the Ordonnance du Tribunal (deuxieme chambre) of 7 June 2004 in the Case T-338/02, Segi.

²¹ See *inter alia* Amnesty International 'UNITED KINGDOM – Justice perverted under the Anti-terrorism, Crime and Security Act 2001' published on 11 December 2003.

²² Directive on residence permits for victims of trafficking or facilitation of irregular migration (adopted 29 April 2004, not yet published).

6. Strengthening mutual trust through improved protection of human rights and access to justice

The development of mutual recognition as the basis for judicial cooperation within the AFSJ requires a foundation of mutual trust in Member States' justice systems that can only genuinely be found if the standards of the protection of rights and access to justice in different Member States are, in fact, comparable. There are a number of areas where mutual trust could be strengthened by improvements in the standards applied in Member States. Informed knowledge of each other's systems and the realities of those systems would also help to develop mutual trust and should result in an overall improvement in the protection of rights in Member States' criminal justice systems through the exchange of best practice.

One method of ensuring that the standards of protection of rights are comparable across the EU would be to develop a system of peer review. This could be complemented by the possibility of technical assistance where a Member State is found to fall below the standards expected in the EU on certain issues. For example, the application of fair trial rights in Member States could be assessed by a group of practitioners (judges, prosecutors or lawyers) from different Member States who could identify elements of best practice that could provide an example for improvement across the EU. They might also identify practices that fall below accepted standards of protection of fair trial rights as applied in the EU in general so that such a problem might be rectified.

The multiannual programme should ensure that the mutual trust required for mutual recognition is founded firmly on the reality of an AFSJ that provides a high level of protection for individual rights across the EU.

7. Age of criminal responsibility and treatment of children in the criminal justice system

The age of criminal responsibility varies widely between Member States²³. The European Court of Human Rights in the case of *T and V v United Kingdom*²⁴ failed to find a violation of Article 3 ECHR in the attribution of criminal responsibility to a child of 10 in England and Wales on the basis that there was no European consensus on the age of criminal responsibility. There was, however, a strong dissenting judgment from five judges who stated that there was "a general standard amongst Member States of the Council of Europe under which there is a system of relative criminal responsibility beginning at the age of 13 or 14 – with special court procedures for juveniles – and providing for full criminal responsibility at the age of 18 or above."²⁵

Amnesty International urges the EU to consider whether, within the context of the AFSJ, there is a general European consensus on the age of criminal responsibility which should result in approximation of laws to raise that age in those Member States which fall below the generally applicable standards.

The treatment of children in the criminal justice system is one of the topics touched on in the Commission proposal for a framework decision on certain procedural rights in criminal proceedings.²⁶ Amnesty International believes that EU minimum standards should be drawn up regarding the treatment of persons under 18 in the criminal justice systems of Member States.

8. Detention

The judicial supervision of detention including the right to be brought before a judge or judicial authority promptly in accordance with Article 5(3) ECHR and the right to have the lawfulness of the detention decided speedily by a court in accordance with Article 5(4) ECHR provides a key protection of basic human rights. The application of these rights is currently extremely variable across the EU Member States and, indeed, within some Member States where certain types of offence, such as terrorism offences, entail a reduction in judicial supervision. Recent jurisprudence from the European Court of Human

²³ from 8 years in Scotland to 15 years in Portugal.

²⁴ (2000) 30 EHRR 121

²⁵ *ibid*

²⁶ 28/04/2004. COM(2004) 328 final

Rights finding breaches of Articles 5.3 and 5.4 on the part of EU Member States²⁷ shows that this is a problem that needs to be addressed.

The conditions and length of pre-trial detention in some Member States may well undermine mutual trust in their criminal justice systems and lead to difficulties in the operation of surrender under the European Arrest Warrant. All Member States are signatories to the ECHR and their obligations under the ECHR prevent them from surrendering a person to another state where that surrender would result in a serious breach of that persons fundamental rights.²⁸ The Reports of the Council of Europe Commissioner for Human Rights²⁹ and judgments of the European Court of Human Rights³⁰ demonstrate that the conditions and length of pre-trial detention in some Member States might amount to such a serious breach. The fact of increased cross-border cooperation and the possibility for more surrenders of people across borders may lead to extended pre-trial detention far from a person's family with serious consequences for the enjoyment of the right to private and family life contained in Article 8 ECHR.

Amnesty International urges the EU to draw up minimum standards relating to the length and conditions of pre-trial detention in the EU, as an important step in improving protection of human rights and in enhancing the mutual trust needed for mutual recognition.

9. Access to justice

The Commission's proposal for a framework decision on certain procedural rights in criminal proceedings addresses some key issues in relation to access to justice such as:

- access to legal advice both before the trial and at trial
- access to free interpretation and translation
- ensuring that persons who are not capable of understanding or following the proceedings receive appropriate attention
- the right to communicate, *inter alia*, with consular authorities in the case of foreign suspects
- notifying suspected persons of their rights.

A number of other procedural rights have not yet been addressed or are not adequately addressed in the proposal. The establishment of high standards of procedural rights in the context of the EU is necessary both in order for the EU to put into practice the values that it espouses through Article 6 TEU, and to ensure that there is a sufficient level of mutual trust between Member States to enable effective judicial cooperation to combat crime.

Amnesty International recommends that, amongst others, the following key issues related to procedural rights should be addressed at EU level to improve the protection of human rights within the EU, create a basis for a genuine area of freedom, security and justice and enhance mutual trust between Member States:

- **access to a doctor**
- **electronic records of questioning in police stations**
- **right against self-incrimination**
- ***ne bis in idem***
- **legal aid**
- **length of criminal proceedings in accordance with Article 6 ECHR.**

10. Admissibility of evidence

Differences in the admissibility of evidence in different Member States raise a number of questions about the standards of protection of rights across the EU as well as the effectiveness of prosecutions of serious

²⁷ Case of *G.K. v Poland*, Judgment of 20 January 2004; Case of *Wesolowski v Poland*, Judgment of 22 June 2004; Case of *Tám v Slovakia*, Judgment of 22 June 2004; Case of *Pavletic v Slovakia*, Judgment of 22nd June 2004; Case of *Hill v UK*, Judgment of 27 April 2004.

²⁸ See Case of *Soering v UK*, judgment of 7 July 1989.

²⁹ See e.g. CommDH(2004)5, Report on the visit to Estonia, 27-30 October 2003

³⁰ e.g. Case of *Cevizovic v Germany*, judgment of 29 July 2004 (breach of Art. 5.3).

forms of crime such as trafficking in human beings and terrorism which themselves result in grave abuses of individual rights.

Amnesty International believes that a key part of the new multiannual programme for the AFSJ must be legislation preventing the admissibility of evidence extracted through torture or other ill-treatment in criminal proceedings (except where such evidence is used in the context of a prosecution of the alleged ill treatment or torture). In a number of extradition proceedings prior to the advent of the European arrest warrant system, judicial decisions prevented or delayed extradition between EU Member States³¹, in particular in terrorism-related cases on the basis of allegations of ill-treatment at the hands of the police. The facts of these cases turned on the admissibility of evidence allegedly extracted from a third party through ill-treatment or torture which would result in a flagrant denial of the right to a fair trial of the extraditee under Article 6 ECHR if he/she were to be returned and/or would be contrary to a state's obligations under the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

The principle behind these cases remains unchanged in the European arrest warrant scheme which, without legislation to correct the problem, is likely to face similar difficulties in such cases. Clear legislation excluding evidence extracted through torture or other ill-treatment would result in raising the standards of rights protection across the EU. The use of such evidence indicates a tacit acceptance of the use of torture and other ill treatment which has no place in an EU founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.

Amnesty International urges the EU to set minimum standards for the admissibility of evidence to prohibit the use of evidence obtained through ill-treatment or torture (except where it is used as proof against the alleged perpetrators of such ill-treatment or torture).

11. Practical implications

The creation of an area of freedom, security and justice has been predominantly in the inter-governmental field. Despite justice and home affairs being the area which produces the largest amount of EU legislation, funding for JHA issues is minimal by comparison with areas of Community competence such as agriculture. If the EU is to establish a genuine area of freedom, security and justice guaranteeing access to justice and protection of human rights, it must address the issue of funding. Many of the proposals that have been put forward in this area have serious financial implications if they are to be put into practice rather than simply serving to outline principles.

In order for the work of an EU human rights agency to be of value it will require sufficient resources to carry out thorough and efficient monitoring in coordination with national agencies and institutions. If the quality and availability of free translation and interpreting for criminal proceedings is to be maintained, those translators and interpreters will need a solid funding base. In order to ensure access to effective legal advice when the interests of justice so require, substantial funding will need to be set aside to guarantee that adequate levels of legal aid are available across the EU to match the advances made in these areas.

Amnesty International urges the EU to demonstrate a genuine commitment to the protection of human rights and access to justice through consideration of the possibility of joint resourcing in these fields to make sure that the principles are translated into practice.

V. Police Cooperation

³¹ See *R v Secretary of State for the Home Department, ex parte Rachid Ramda* [2002] EWHC 1278 admin (UK) and *Irrastorza Dorransoro* (No 238/2003), judgment of 16 May 2003, Cour d'Appel de Pau (France).

European police cooperation relates to a range of initiatives at both the operational level (e.g. information exchange, joint police actions and investigation techniques) and the non-operational level (e.g. training). Because European police cooperation entails cooperation between national law enforcement organizations, it requires a great level of mutual trust between Member State police forces in their levels of professionalism and effectiveness, along with confidence in the integrity of the criminal justice sector in their respective countries. From a human rights point of view therefore, discussing challenges with regard to European police cooperation raises concerns about police performance in Member States across the EU in addition to concerns about the effectiveness of institutions and instruments that direct and regulate European police cooperation, and levels of accountability.

Human rights protection and promotion is sometimes wrongly perceived as contradictory to the objective of improving the capacity to protect societies against ‘...external and internal threats to security and to public and legal order, and to fight organized (cross-border) crime’³². Amnesty International recognizes the right – indeed the duty – of states to protect their citizens. The challenge for the Union is to ensure protection and promotion of the full range of human rights within the AFSJ and to put this explicitly at the core of policy developments in police cooperation.

1. Human rights in police policy at the national level

Despite the fact that European integration in this area is based on a rigorous concept of the protection of fundamental rights, it is not clear if, or to what extent, European police cooperation has so far contributed to improving standards in the level of human rights protection in policing across the EU. The existence and efficiency of accountability mechanisms for police conduct vary widely between Member States. As police and other law enforcement agencies are key to the fulfillment of States’ responsibilities with regard to human rights protection and promotion, it is essential that police organizations across the EU put human rights at the centre of policy-making as well as during planning and operations and while evaluating their performance. International human rights concepts have also much to offer in relation to the protection of police as individuals.

Amnesty International urges the Council to develop further initiatives and projects to improve human rights protection and promotion by national police organizations in all Member States. This should result in binding and were appropriate legally enforceable professional standards.

2. EU code of ethics for policing

The Dutch Presidency has taken the initiative in drafting an EU Code of Ethics for the Police, which is said to build on the non-binding Code of Police Ethics established by the Council of Europe in 2001. A code of ethics for the police could help to secure common police standards. In addition, by laying the foundations for ethical norms, a code enhances the possibility that ethical problems are more readily identified, more fully understood, analyzed more carefully and more readily resolved.³³ In addition to the establishment of shared standards, the Dutch Presidency apparently intends to obtain agreement on the implementation and monitoring of such an EU code. Although Amnesty International supports the establishment of an EU Code of Ethics in principle, there are questions and concerns regarding this particular initiative:

³² Doc 11122/04 JAI 258, Brussels 9 July 2004, p.4

³³ See also The Council of Europe’s European Code of Police Ethics (Recommendation (2001)10, adopted by the Committee of Ministers of the Council of Europe on 19 September 2001, Explanatory Memorandum

- What is the additional value of an EU code to the Council of Europe's code?
- Would the EU code be given statutory status as a means of ensuring (external) legal accountability?
- How will it be ensured that the principles embodied in this code are reflected in national law and practice?³⁴
- Will there be an appropriate independent body overseeing implementation of this code, as recommended by Article 63 of the Council of Europe's Code of Police Ethics?

Amnesty International calls on the EU to address issues specifically relating to cross-border cooperation, and recommends that an EU Code of Police Ethics be made legally binding.

3. Lack of strategic approach and direction

As the Commission states "One of the main problems in police and customs cooperation in the EU has been an apparent lack of strategic approach."³⁵ A related problem in this area is the proliferation of non-binding instruments approved or taken note of by the Council, such as recommendations or conclusions.³⁶

As has been stated by the Council, the Commission and relevant officials within the Member States, the area of freedom, security and justice should be based on the principles of transparency and democratic control. However as there is no strategic approach, it is difficult to have an overview of the full spectrum of European police cooperation, and then to assess to what extent it affects 'national' police practices. The development of established and proposed bodies, instruments and initiatives aiming at improved protection against external threats to security and to public and legal order as well as improving the capacity to fight organized and cross-border crime is taking place at various levels and within a multitude of forums and institutions. As there is no body in particular entrusted with overseeing the full spectrum of police cooperation and its future strategic direction, transparency, openness and subsequent possibilities for strong democratic accountability are hampered. Therefore, Amnesty International supports the European Commission's assessment that: "It is important that the future programme/multi-annual programme is accompanied by a process that evaluates the establishment and implementation of the *acquis* adopted following Tampere, in order to ensure that new proposals complement efficiently the existing instruments."³⁷

Amnesty International calls upon the Council to develop concrete measures to address the problem of lack of oversight as there is no area of policing which should be immune from independent external scrutiny.

* * *

³⁴ As is recommended in Section I(A) of the Guidelines of the Effective Implementation of the UN Code of Conduct for Law Enforcement Officials

³⁵ Doc 9903/04, ENFOPOL 57, ENFOCUSTOMS 36, Brussels June, 2004, p.37

³⁶ The possibility offered by Article 34(2)(c) in Title VI TEU to adopt, by qualified majority, measures necessary to implement Council Decisions that promote cooperation has never been used. The Draft Constitutional Treaty provided for different decision-making procedure for police and customs cooperation. Whilst decisions on operational cooperation and decisions on operation by one Member State in the territory of another would remain subject to unanimity, decisions relating to the framework and mechanisms for cooperation (e.g. Europol) would be taken by qualified majority and co-decision.

³⁷ DOC 10857/04, LIMITE ENFOPOL 83, Brussels, 1 July 2004, p.7)

