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Amnesty International's contribution to the European Commission's Green Paper "Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention"

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Introduction

Amnesty International welcomes the opportunity to contribute to the Commission's consultation on strengthening mutual trust in the application of EU criminal justice in the field of detention.

International Human Rights Law principles and practices are abundantly developed in all areas covered by the Commission's Green Paper. By making this submission, we wish to stress their binding nature and how they could be incorporated in EU action and legislation in the field of detention. We also wish to make some suggestions on how the EU could develop an effective and efficient collaboration with its member states and the Council of Europe based on human rights standards.

As documented by Amnesty International's May 2011 Annual Report, *The state of the world's human rights,* prison conditions generally remain as an issue in many EU countries see for examples the entries for Greece and Ireland[1]. Also, situations of ill-treatment and deaths in custody are not a rare occurrence: Amnesty International has received reports of at least 11 deaths in custody over the last five years , and data from 2010 and 2011 show that at in least 15 member states there is evidence of torture in detention, deliberate ill-treatment and poor prison conditions resulting in ill treatment[2].

Question 3

How do you think that detention conditions may have an effect on the proper operation of the EAW? And what about the operation of the Transfer of Prisoners Framework Decision?

Involuntary transfer of prisoners may give rise to an absolute prohibition against the state carrying out the transfer depending on the situation that the individual can expect to face in detention in the receiving state. The application of this international law obligation has obvious consequences for the potential operation of the EAW and TPFD. It should be explicitly recognised that detention conditions in a receiving state are not only capable of creating a *discretion* for the institutions of the sending state to refuse transfer under the EAW or Transfer of Prisoners Framework Decision; detention conditions may give rise to an *absolute international legal obligation* on the institutions of the sending state to refrain from authorizing or carrying out any such transfer.[3]

The European Court of Human Rights has repeatedly emphasised that transfers of any nature are

[1] See *Amnesty International Annual Report 2011* pages 154 and 180.

[2] See *Amnesty International Annual Report 2010 and 2011*.

[3] See European Court of Human Rights [Grand Chamber] *M.S.S. v Belgium and Greece* (app no 30696/09), 21 January 2011.

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absolutely prohibited in all cases where the person in question would face a real risk of being subjected to torture or other inhuman or degrading treatment or punishment in the receiving country or a third country to which he or she would be transferred.[4] This is applicable regardless of what the person is accused of.[5] The Court has also repeatedly reaffirmed that a real "risk of a flagrant denial of justice" in the receiving state would also give rise to an obligation not to proceed with the transfer.[6] An individualised procedure must be available in each case to assess the risk to the person involved, based on the evidence (which will usually involve both evidence about the general situation in the receiving country, and any evidence personal to the individual).

Prohibitions on transfers may therefore arise not only from particular forms of treatment during detention that would *in themselves* violate the prohibition of torture and other ill-treatment, but also detention conditions that are recognised to *increase the risk* of such torture or other ill-treatment, or that would create a risk of flagrant violations of the right to fair trial. Practices recognised to increase the risk of abuse include failing to acknowledge the detention and/or imposing restrictions on detainee contact with the outside world by denying access to independent lawyers, family members, and doctors (i.e. forms of incommunicado detention).[7] Failures to ensure prompt and effective access to independent legal counsel, including during the period between arrest and trial, has also been recognised to carry risks of "irretrievably prejudice" to the right of everyone charged with a criminal offence to be effectively defended by a lawyer as "one of the fundamental features of fair trial", particularly if there is reason to believe that incriminating statements made during police interrogation without access to a lawyer may be used for a conviction.[8]

In this regard, it is worth noting that the UN Committee against Torture (CAT) and others have regularly expressed concerns about the implications of incommunicado detention regimes for states' obligations to prohibit and prevent torture and other ill-treatment and calls on states to abolish incommunicado detention.[9] The Committee has also held a risk of incommunicado detention in a receiving country to

[4] See among many others [GC] *M.S.S. v Belgium and Greece* (app no 30696/09), 21 January 2011, para 365; *Soering v the United Kingdom* [Plenary] (Series A no 161), 7 July 1989, paras 90-91; [GC] *Saadi v Italy* (app no 37201/06), 28 February 2008, paras 124-127.

[5] [GC] *Saadi v Italy* (app no 37201/06), 28 February 2008, paras 137-149.

[6] See among others *Soering* [Plenary] (Series A no 161), 7 July 1989, para 113; [GC] *Mamatkulov and Askarov* (app nos 46827/99; 46951/99), 4 February 2005, paras 90-91; [GC] *Saadi v Italy* (app no 37201/06), 28 February 2008, paras 150-160. In other contexts, the term "flagrant denial of justice" has been used in reference to denial of one or more of the "essential elements" of article 6 of the European Convention, rendering the proceedings manifestly contrary to the provisions of Article 6 or the principles embodied therein: see, e.g. *Sejdovic v Italy* [GC] (app no 56581/00) 1 March 2006, para 84, ECHR 2006-II [referring to refusal to reopen *in absentia* proceedings without any indication that the accused had waived his or her right to be present during the trial).

[7] E.g. *Aksoy v Turkey* (app no 21987/93) Reports 1996-VI, 18 December 1996, para 83; [GC] *Salduz v Turkey* (app no 36391/02), 27 November 2008, para 54; Human Rights Committee, General Comment No 20: Article 7 (Prohibition of torture, or other cruel, inhuman or degrading treatment or punishment), UN Doc A/47/40 pp 193-195 (10 March 1992) para 11; Committee Against Torture, General Comment No 2: Implementation of article 2 by States Parties, UN Doc CAT/C/CG/2/CRP1/Rev4 (23 November 2007) para 13; UN General Assembly Res 60/148 (16 December 2005) Article 11.

[8] [GC] *Salduz v Turkey* (app no 36391/02), 27 November 2008, paras 50-55.

[9] UN Committee against Torture, Concluding Observations on Spain, UN Doc CAT/C/ESP/CO/5 (9 December 2009) para 12; Concluding Observations on El Salvador, UN Doc CAT/C/SLV/CO/2 (9 December 2009) paras 19 and 20; Concluding Observations on Yemen, UN Doc CAT/C/YEM/CO/2/Rev1 (25 May 2010) para 12. See also Special Rapporteur on Torture and other Cruel Inhuman or Degrading Treatment or Punishment, UN Doc E/CN4/2003/68 para 26 (17 December 2002) para 26(g) [General Recommendations of the Special Rapporteur]; and see UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Report on Mission to Spain, UN Doc A/HRC/10/3/Add2 (16 December 2008) para 32: "The Special Rapporteur calls for the complete eradication of the institution of incommunicado detention and urges Spain to thoroughly consider any initiatives in this direction. The use of this exceptional regime not only entails a risk of prohibited treatment but also makes Spain vulnerable to allegations of torture and as a result weakens the legitimacy of its counter-terrorism measures." See also Amnesty International, *Spain: Out of the Shadows – Time to End Incommunicado Detention,* AI Index EUR 41/001/2009 (15 September 2009); Amnesty International, *Spain: Follow-Up Information to the*

preclude transfers of detainees to the country in some circumstances[10] and the ECtHR has, as part of its reasoning in a case where it found that certain extraditions to Uzbekistan would violate article 3 of the ECHR, noted that the fact the individuals would be likely to be placed in incommunicado detention upon return meant "no relative or independent observer will be granted access to them, thus intensifying the risk of ill-treatment".[11]Relevant in this regard, Amnesty has called for the Spanish Parliament to abrogate the existing legislation permitting incommunicado detention and to ensure the effective protection of the rights of all persons deprived of their liberty, in accordance with international human rights standards". In its 2010 Report, Amnesty International stated that "No other European Union country maintains a detention regime with such severe restrictions on the rights of detainees. The continuing allegations of torture and other ill-treatment made by detainees who have been held incommunicado demonstrate the grave consequences detention in this regime may have"[12].

To ensure that treatment and conditions in detention do not operate as an inhibition to legitimate transfers of individuals between states, EU member states must: ensure that torture and other cruel, inhuman or degrading treatment or punishment is effectively prevented and prohibited; that all allegations are independently, impartiality and thoroughly investigated; that those found responsible are subject to consequences including being brought to justice where conduct amounts to crimes under international or national law; and that victims receive appropriate redress. Measures such as incommunicado detention, associated with increased risk of such abuse, should be abolished; national law and practice should fully guarantee rights of arrested persons and other pre-trial detainees to eliminate real risks of flagrant denials of justice. To ensure confidence, States must fulfil their obligations to ensure that whenever credible allegations are made or there is otherwise reason to believe that its authorities have participated in, facilitated, or acquiesced in unlawful detention practices on the state's territory, a thorough, impartial and independent investigation meeting international standards and with access to all relevant evidence is conducted and, if the evidence supports it, results in effective procedures for accountability (including where relevant criminal accountability), access of victims and the public to the truth, and redress.[13]

Question 7

Would there be merit in having European Union minimum rules for maximum pre-trial detention periods and the regular review of such detention in order to strengthen mutual trust?
If so, how could this be better achieved? What other measures would reduce pre-trial detention?

Amnesty International would welcome any measures that contribute to ensuring better respect for the rights protected by Articles 5(3) and 5(4), European Convention on Human Rights (ECHR) (and, by implication, Article 6, Charter of Fundamental Rights of the European Union) and Articles 9(4) and 9(4) the International Covenant on Civil and Political Rights (ICCPR), and ensuring that the procedures

Concluding Observations of the Committee Against Torture, AI Index EUR 41/003/2010 (12 November 2010); Amnesty International, *Spain: Civil Guards convicted of torture*, AI Index EUR 41/002/2011 (10 January 2011).

[10] E.g. Josu Arkauz Arana v France, UN Doc CAT/C/23/D/63/1997 (5 June 2000), paras 11.3-12.

[11] Ismoilov and Others v Russia, App No 2947/06 (24 April 2008), para 123. See also Gaforov v. Russia, App No 25404/09 (21 October 2010), para 131. And see Report to the Italian Government on the visit to Italy carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 27 to 31 July 2009, CPT/Inf (2010)14, 28 April 2010, paras 43 and 47.

[12] See page 17 of Amnesty International 2010 Report "Spain: Out of the shadows – time to end incommunicado detention"; See also Amnesty International Press Release 21 October 2011: Spain: end to ETA violence presents an opportunity for Human Rights reforms http://www.amnesty.org/en/news-and-updates/spain-end-eta-violence-presents-opportunity-human-rights-reforms-2011-10-21

[13] See *Amnesty International, Europe: Open secret: Mounting evidence of Europe's complicity in rendition and secret detention,* AI Index 01/023/2010 (15 November 2010).

contemplated by those provision meet or exceed the standards contemplated by those provisions for judicial independent, effective and fair review, and accessibility.

Having EU minimum rules for maximum pre-trial detention periods and requiring regular review of such detention could help improve states' respect for these rights in practice,[14] but only if such rules were explicitly placed in the context of the relevant aspects of already-existing obligations of states under the, ECHR, ICCPR and other human rights instruments, including as described in part 4 of the Green Paper. Among the relevant aspects are the following:

- The onus to justify before a competent court any deprivation of liberty pending a trial must always be on the state authorities. State authorities must present sufficient specific evidence in the particular case to establish a risk of flight, risk to the safety of others, or risk of interference with investigations, which cannot be addressed through any lesser measure. Even where such risks may exist, the imposition of pre-trial detention and its duration must not be disproportionate to the underlying offences of which the individual is accused.
- Given the presumption of innocence and the principles stated above, even if a maximum pre-trial detention period is established in EU or national law it must be expressly recognised that periods of pre-trial detention shorter than the maximum period can still violate the right to trial within a reasonable time or release, depending on the facts of each individual case.
- No requirement for automatic periodic review of detention can be invoked as a reason to deny any person deprived of their liberty an opportunity to challenge the lawfulness of his or her detention on his or her own motion as contemplated by article 5(4) ECHR / 9(4) ICCPR.
- The requirements that any person accused of a criminal offence be promptly brought before a judicial authority, and that any challenge to the lawfulness of detention be promptly adjudicated, are also key in this area.[15]
- Any EU standards should explicitly reinforce the requirements under the ECHR and ICCPR as to: the independence and impartiality of judicial institutions determining the lawfulness of detention;[16] the characteristics and powers necessary to constitute a competent and effective court (for art 5(4)/9(4)) or judicial authority (for art 5(3)/9(3)) for these purposes;[17] and the procedural rights and safeguards necessary for such proceedings to be fair and effective, including access to an independent legal counsel of choice for these purposes,[18] and the right to communicate with that lawyer in complete confidentiality,[19] as well as the right of the

[14] The UN Committee on the Rights of the Child has for its part stated in relation to children that "the duration of pretrial detention should be limited by law and be subject to regular review": Committee on the Rights of the Child, General Comment no 10, UN Doc CRC/C/GC/10 (25 April 2007) para 80.

[15] ECtHR, *Çetinkaya and Çağlayan v Turkey* (app nos 3921/02, 35003/02 and 17261/03), 23 January 2007, para 43; [Plenary], *Brogan and Others v UK* Series A No 145-B, 29 November 1988, para 62; *Aşan and Others v Turkey* (app no 56003/00), 31 July 2007, paras 107-108; *Kandzhov v Bulgaria* (app no 68294/01), 6 November 2008, para 66.

[16] Eg ECtHR [GC], *D.N. v Switzerland* (app no 27154/95) ECHR 2001-III (29 March 2001) para 42;, *Lawless v Ireland (No 3)* Series A No 3 (1 July 1961) para 14; [Plenary], *Ireland v UK* Series A No 25 (18 January 1978) paras 199-200; *Brincat v Italy* Series A No 249-A (26 November 1992) para 21; *Assenov and Others v Bulgaria* (app no 24760/94) Reports 1998-VIII (28 October 1998) paras 144 to 150; *Klamecki v Poland (no 2)* (app no 31583/96), 3 April 2003, para 105; *Niedbała v Poland* (app no 27915/95), 4 July 2000, paras 48-57; *Dacewicz v Poland* (app no 34611/97), 2 July 2002, paras 21 et seq; *Assenov and Others v Bulgaria* (app no 24760/94) Reports 1998-VIII (28 October 1998), para 146; *Moulin v France* (app no 37104/06), 23 November 2010, para 59.

[17] ECtHR, *Çetinkaya and Çağlayan v Turkey* cited above, para 43; [Plenary], *Ireland v UK* cited above, para 199; *Assenov and Others v Bulgaria* cited above para 146.

[18] [18] Eg ECtHR, *Castravet v Moldova* (app no 23393/05), 13 March 2007, paras 47-50; *Singh v the United Kingdom* (app no 23389/94) ECHR1996-I (21 February 1996), para 68; *Soysal v Turkey* (app no 50091/99), 3 May 2007, paras 77-81; *Abdolkhani and Karimnia v Turkey* (app no 30471/08), 22 September 2009, paras 141-142.

[19] ECtHR, *Castravet v Moldova* cited above para 60; *Istratii and Others v Moldova* (app no 8721/05), 27 March 2007, para 100; *Modarca v Moldova* (app no 14437/05), 10 May 2007, para 98; *Musuc v Moldova* (app no 42440/06), 6 November 2007, para

detainee to be present during the proceedings,[20] and other due process elements such as equality of arms.[21]

- Any EU standards should expressly reaffirm that the right of access to a court to challenge the lawfulness of detention and to be ordered released if the detention is unlawful (as per article 5(4) ECHR and 9(4) ICCPR) is non-derogable, including in times of emergency.[22]

As an example of the kinds of requirements that need to be met in order to ensure the lawfulness of detention periods taking place before trial, Amnesty International has highlighted concerns about the French legislation on pre-charge detention (garde à vue). Although the Conseil Constitutionnel on November 18th has issued a reservation on part of the law, it has deemed the text to be in conformity with the French Constitution. Therefore, according to the French law, authorities are still allowed to defer meetings between a lawyer and a client placed in garde à vue. Also, the lawyer still does not have complete access to all documents related to his client's situation. Furthermore, Amnesty International has pointed out that the ECHR does not consider the "procureur" and the "ministère public" to have the qualities of independence and impartiality required as a matter of article 5 of the European Convention for an authority empowered to determine this form of detention[23].

Question 8

Are there any specific alternative measures to detention that could be developed in respect of children

It should be noted that the requirement in Article 37 of the UN Convention on the Rights of the Child (CRC) that deprivation of liberty be a measure of last resort and only for the shortest period of time applies to all cases involving persons under the age of 18 years (CRC article 1), no matter what the offence with which they may be charged. As it is not directly addressed in the Green Paper, it should also be recalled that Article 40 of the CRC makes further provisions specifically in relation to children alleged as, accused of, or recognized as having infringed the penal law, including:

- Promotion of the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

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[20] ECtHR, *Singh v the United Kingdom* (App No 23389/94) ECHR1996-I (21 February 1996) para 67; *Niedbała v Poland* (app no 27915/95), 4 July 2000, paras 58-68; *Włoch v Poland* (app no 27785/95) ECHR-2000-XI (19 October 2000), paras 125-131; *Klamecki v Poland (no 2)* (app no 31583/96), 3 April 2003, paras 128-131; *Ladent v Poland* (app no 11036/03), 18 March 2008, para 75; *Lebedev v Russia* (app no 4493/04), 25 October 2007, para 113.

[21] ECtHR, *Ismoilov and Others v Russia* (app no 2947/06), 24 April 2008, para 145; *Sakık and Others v Turkey* (app nos 23878/94 and others) ECHR 1997-VII (26 November 1997) paras 52-54; *Çetinkaya and Çağlayan v Turkey* (app nos 3921/02, 35003/02 and 17261/03), 23 January 2007, para 43; [GC], *A and Others v the United Kingdom* (app no 3455/05), 19 February 2009, paras 203-224.

[22] Human Rights Committee, General Comment No 29: Article 4 (Derogations during a state of emergency), UN Doc CCPR/C/21/Rev1/Add11 (31 August 2001), para 16; UN Working Group on Arbitrary Detention, Annual Report 2003, UN Doc E/CN4/2004/3 (15 December 2003), para 63.

[23] See the Décision n° 2011-191/194/195/196/197 QPC 18 November 2011 of the Conseil Constitutionnel http://www.conseil-constitutionnel.fr/conseil-constitutionnel/francais/les-decisions/acces-par-date/decisions-depuis-1959/2011/2011-191/194/195/196/197-qpc/communique-de-presse.103782.html and Amnesty International France Press Release, 21 November 2011: http://www.amnesty.fr/AI-en-action/Violences/Mauvais-traitements/Actualites/L-audition-hors-garde-vue-conforme-la-Constitution-sous-reserve-3991.

- A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

The Committee on the Rights of the Child has described the practice of holding children in pre-trial detention "for months or even years" as "a grave violation of article 37(b)" of the Treaty. In this connection, the Committee stated:

> "An effective package of alternatives must be available … for the States parties to realize their obligation under article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort. The use of these alternatives must be carefully structured to reduce the use of pretrial detention as well, rather than "widening the net" of sanctioned children…[24]"

Elaborating on the package of alternatives, the Committee stated as follows:[25]

> "It is, therefore, necessary - as part of a comprehensive policy for juvenile justice - to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed. These should include care, guidance and supervision, counselling, probation, foster care, educational and training programmes, and other alternatives to institutional care (art. 40 (4))".

Interventions without resorting to judicial proceedings

According to Article 40 (3) of CRC, the States parties shall seek to promote measures for dealing with children alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings, whenever appropriate and desirable.

In the opinion of the Committee, the obligation of States parties to promote measures for dealing with children in conflict with the law without resorting to judicial proceedings applies, but is certainly not limited to children who commit minor offences, such as shoplifting or other property offences with limited damage, and first-time child offenders. Statistics in many States parties indicate that a large part, and often the majority, of offences committed by children fall into these categories. It is in line with the principles set out in Article 40 (1) of CRC to deal with all such cases without resorting to criminal law procedures in court. In addition to avoiding stigmatization, this approach has good results for children and is in the interests of public safety, and has proven to be more cost-effective.

On the basis of the information provided in the reports from some States parties, it is clear that a variety of community-based programmes have been developed, such as community service, supervision and guidance by for example social workers or probation officers, family conferencing and other forms of restorative justice including restitution to and compensation of victims. Other States parties should benefit from these experiences. As far as full respect for human rights and legal safeguards is concerned, the Committee refers to the relevant parts of Article 40 of CRC and emphasises the following:

- Diversion (i.e. measures for dealing with children, alleged as, accused of, or recognized as having infringed the penal law without resorting to judicial proceedings) should be used only when there is compelling evidence that the child committed the alleged offence, that he/she freely and voluntarily

[24] Committee on the Rights of the Child, General Comment no 10, UN Doc CRC/C/GC/10 (25 April 2007) para 80.

[25] Committee on the Rights of the Child, General Comment no 10, UN Doc CRC/C/GC/10 (25 April 2007) paras 23-29.

admits responsibility, and that no intimidation or pressure has been used to get that admission and, finally, that the admission will not be used against him/her in any subsequent legal proceeding;
- The child must freely and voluntarily give consent in writing to the diversion, a consent that should be based on adequate and specific information on the nature, content and duration of the measure, and on the consequences of a failure to cooperate, carry out and complete the measure. With a view to strengthening parental involvement, States parties may also consider requiring the consent of parents, in particular when the child is below the age of 16 years;
- The law has to contain specific provisions indicating in which cases diversion is possible, and the powers of the police, prosecutors and/or other agencies to make decisions in this regard should be regulated and reviewed, in particular to protect the child from discrimination;
- The child must be given the opportunity to seek legal or other appropriate assistance on the appropriateness and desirability of the diversion offered by the competent authorities, and on the possibility of review of the measure;
- The completion of the diversion by the child should result in a definite and final closure of the case. Although confidential records can be kept of diversion for administrative and review purposes, they should not be viewed as "criminal records" and a child who has been previously diverted must not be seen as having a previous conviction. If any registration takes place of this event, access to that information should be given exclusively and for a limited period of time, e.g. for a maximum of one year, to the competent authorities authorized to deal with children in conflict with the law.

Interventions in the context of judicial proceedings

When judicial proceedings are initiated by the competent authority (usually the prosecutor's office), the principles of a fair and just trial must be applied (see section D below). At the same time, the juvenile justice system should provide for ample opportunities to deal with children in conflict with the law by using social and/or educational measures, and to strictly limit the use of deprivation of liberty, and in particular pre-trial detention, as a measure of last resort. In the disposition phase of the proceedings, deprivation of liberty must be used only as a measure of last resort and for the shortest appropriate period of time (art. 37 (b)). This means that States parties should have in place a well-trained probation service to allow for the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day report centres, and the possibility of early release from detention.

The Committee reminds States parties that, pursuant to Article 40 (1) of CRC, reintegration requires that no action may be taken that can hamper the child's full participation in his/her community, such as stigmatization, social isolation, or negative publicity of the child. For a child in conflict with the law to be dealt with in a way that promotes reintegration requires that all actions should support the child becoming a full, constructive member of his/her society.

While the question posed by the Green Paper focuses specifically on alternatives to detention for children, a range of other relevant UN standards could be relevant to considerations within the EU about other aspects of detention of children in the criminal justice system:

- United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"), adopted by General Assembly resolution 40/33 of 29 November 1985, [particularly Rules 11, 13, 17, 18 and 19].
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by General Assembly resolution 45/113 of 14 December 1990.
- United Nations Standard Minimum Rules for Non-custodial Measures ("The Tokyo Rules"), adopted by General Assembly resolution 45/110 of 14 December 1990.
- Guidelines for Action on Children in the Criminal Justice System, recommended by Economic and Social Council resolution 1997/30 of 21 July 1997, [particularly Guideline 15].

A number of the specific elements of the universal instruments cited above have been explicitly recognised to be embodied in the more general provisions of the ECHR (and therefore within the parallel provisions of the Charter of Fundamental Rights of the European Union). In one case, for instance, the Court, referring to sources including the CRC recalled that "the pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults"; finding the authorities "never took the applicant's age into consideration when ordering his detention" and that he was kept together with adults, the Court found the pre-trial detention to have contravened article 5(3) of the European Convention on Human Rights.[26]

Amnesty International's 2010 report on children prosecution under anti-terrorism legislation in Turkey referred to the same principles. We also argued that pre-charge detention of minors should not be a "routine" and that all state officials involved in prosecutions of children (should be provided) with training on the CRC, other relevant international standards and national law standards relating to the protection of children"[27]. We condemned the practice of detaining and interrogating children unofficially at the Anti-Terror Branch of Security Dictatorates.

Question 9

How could monitoring of detention conditions by the Member States be better promoted? How could the EU encourage prison administrations to network and establish best practice?

Amnesty International believes monitoring of detention can be better promoted if all member states were to ratify the Optional Protocol to the UN Convention against Torture (OPCAT), and to ensure the establishment or designation of one or more National Preventive Mechanisms (NPMs) fully meeting all the requirements of the OPCAT.[28] To be effective, it is essential that NPMs and other visiting bodies have the right to carry out not only regular visits notified to the authorities in advance, but also ad-hoc unannounced visits, to any place of detention on the territory or otherwise under the jurisdiction of the member state.[29]

Whether or not an NPM under the OPCAT, or otherwise established in the state, monitoring of detention conditions will be facilitated if member states also provide access to all places of detention for non-governmental organisations concerned with respect for the rights of and well-being of detainees and prisoners, with guarantees similar to those required for NPMs.[30] The establishment of an NPM should not be seen as mutually exclusive with robust access by non-governmental organisations and other civil

[26] *Nart v Turkey* (app no 20817/04), 6 May 2008, para 31.

[27] See *All children have rights. End unfair prosecutions of children under anti-terrorism legislation in Turkey*, Amnesty International Report June 2010, pages 25 and 26.

[28] See OPCAT, Part IV; *Amnesty International's 10 Guiding Principles for the*

Establishment of National Preventive Mechanisms, AI Index IOR 51/009/2007 (12 October 2007); UN Subcommittee on Prevention of Torture, Fourth Annual Report, UN Doc CAT/C/46/2 (3 February 2011) paras 63-102 "Guidelines on National Preventive Mechanisms"; Reports of the UN Special Rapporteur on Torture, UN Doc A/61/259 (14 August 2006) paras 69-75, and UN Doc A/65/273 (10 August 2010), paras 75-86, 92.

[29] UN Subcommittee on Prevention of Torture, Fourth Annual Report, UN Doc CAT/C/46/2 (3 February 2011) para 87; Reports of the UN Special Rapporteur on Torture, UN Doc A/61/259 (14 August 2006) paras 69-75, and UN Doc A/65/273 (10 August 2010), para 92.

[30] UN Special Rapporteur on Torture, UN Doc E/CN.4/2003/68 (17 December 2002), para 26 [General Recommendations of the Special Rapporteur], para 26(f).

society organisations;[31] indeed, some states have established NPMs that formally incorporate or coordinate their work with non-governmental organisations.[32]

Monitoring of detention conditions could be better promoted if, among other things: national laws were explicitly to require that all persons deprived of liberty are always physically brought before any judge hearing an application in relation to their detention; all practices of incommunicado detention are ended; the rights of all persons deprived of liberty to contact with and visits from family, independent lawyers, and independent medical professionals are fully respected from the very outset of the deprivation of liberty.[33]

In addition to continuing to build the network for contact between NPMs within Europe as mentioned in the Green Paper, monitoring of detention conditions by the members states could be further promoted by concerted efforts to facilitate regular and confidential contact between European NPMs and the European Committee for the Prevention of Torture as well as the UN Subcommittee on Prevention of Torture.

Question 10

How could the work of the Council of Europe and and that of Member States be better promoted as they endeavour to put good detention standards into practice?

In order to better address problems in the field of detentions conditions, it is essential that the EU and the Council of Europe (CoE) coordinate their efforts to ensure their actions are complementary. It would not be useful if the EU intervened where the CoE's achievements have proved effective, unless it can bring an added value without duplicating its actions or complicating its mechanisms. Close collaboration and mutual reliance would guarantee an improved respect of each other's competence and a more efficient approach to solving the issues at stake.
One of the strengths of the CoE is its potential to monitor detention conditions. In the course of its existence, the CoE has created a number of bodies and monitoring mechanisms that are engaged in constant control and surveillance of detention conditions, compiling statistics and evaluating the available data under European human rights standards. A good example of these mechanisms, beyond the obvious Committee for Prevention of Torture and its visits, is the SPACE I (Statistiques Penales Annuelles du Conseil d'Europe) project, that kicked off in 1983 with the goal of presenting comparable data on the population of penal institutions in the CoE member states. The data is gathered periodically through a questionnaire sent to penitentiary administration authorities, enquiring on several categories of indicators (prison population, foreign prisoners, deaths, suicide rates etc…)[34]. Some of the SPACE statistics do not just provide comparable data on the single member states. In fact new items focusing on data related to EU countries have been introduced in the last report[35]. This kind of monitoring allows

[31] UN Subcommittee on Prevention of Torture, Fourth Annual Report, UN Doc CAT/C/46/2 (3 February 2011) para 67.

[32] See for instance the arrangements in Denmark: http://en.ombudsmanden.dk/opcat/ accessed 21 November 2011.

[33] UN Special Rapporteur on Torture, UN Doc E/CN.4/2003/68 (17 December 2002), para 26 [General Recommendations of the Special Rapporteur], para 26(g); UN Doc A/65/273 (10 August 2010), para 75.

[34] For the latest SPACE I annual report (2009) http://www3.unil.ch/wpmu/space/files/2011/02/SPACE-1_2009_English2.pdf;the latest data available was also more succinctly presented at the Council of Europe Conference of Directors of Prison Administration on October 13th and 14th 2011 in Strasbourg.

[35] For example a new item on foreign prisoners who are citizens of Member States of the European Union has been added – page 55, Council of Europe Annual Penal Statistics – SPACE I report – 2009.

for insightful comparisons between EU member states and between EU countries and CoE countries[36].

The CoE's impact is also significant in producing and clarifying detailed standards in the domain of Human Rights. Many of these have a direct or indirect link with detention and custody and most of them, such as European Prison Rules and CPT standards, are not in-and-of-themselves binding legal texts. It is however important to remember that these rules are not simply used as guidelines for the implementation of national policies and legislation by the CoE member states, or for the monitoring of prison services across Europe, but they are often referred to by the ECtHR in its case law, and, as such, can become increasingly authoritative interpretations of states' legal obligations.

The EU, on the other hand, has more means at its disposal to codify rules in a legally-binding way, and to ensure their direct enforcement within its member states. This does not necessarily mean that the EU should proceed to turn every standard set by the CoE and its bodies into a binding internal rule. Transposing CPT standards or the European Prison Rules into EU legislation may be hard to achieve from a political point of view and it carries the risk of weakening the effectiveness of the standards by duplicating them if changes are made during the EU process.

There are in fact several ways in which the EU can promote and enhance CoE's efforts in the field of detention conditions.

1. Incorporating ECtHR case law standards in EU criminal law legislation.

This is essential given that all of the EU member states are parties to the ECHR and as such they are bound by its provisions and their interpretation in the ECtHR case law. Furthermore the Lisbon Treaty paves the way for accession to the Convention by the EU itself. These elements were properly taken into consideration in the Stockholm programme[37] and in the Preamble of the 2009 Council Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings[38]. As a result, a few issues that are strongly linked with detention conditions and implementation of CoE standards on detention have already been addressed in the measures of the Roadmap that are currently under discussion. It is essential that the EU keeps up this progressive approach towards codification of well-established ECtHR standards as the other Measures foreseen in the roadmap will come into discussion.

2. Using the CoE monitoring outcome as a tool for ex-post evaluation (possibly review) and as guidelines for implementation and reform of EU policy and legislation.

Given the effectiveness of the CoE's tools, the EU should use the CoE's monitoring of prison conditions as a tool for assessing the impact and the effectiveness of its action, detect possible gaps and use the monitoring outcome as guidelines for implementing its policy in the field of detention. This will ultimately help the EU to review its strategy, whenever needed, and to ensure better compliance with

[36] During the recent CoE Conference of Directors of Prison Administration a comparison between EU member states and CoE countries without EU member states on data related to the number of pre-trial detainees, foreign nationals among all prisoners, juvenile and female detainees was presented – see page 13 of the official presentation published on the CoE website: http://www.coe.int/t/dghl/standardsetting/prisons/Conferences/CDAP%20Marcelo%20F%20Aebi_Natalia%20Delgrande%20Speech.pdf

[37] See paragraphs 3.2.6. on detention and 3.5.2 on criminal law

[38] Recitals: (1) In the European Union, the Convention for the Protection of Human Rights and Fundamental Freedoms (the 'Convention') constitutes the common basis for the protection of the rights of suspected or accused persons in criminal proceedings, which for the purposes of this Resolution includes the pre-trial and trial stages. (2) Furthermore, the Convention, as interpreted by the European Court of Human Rights, is an important foundation for Member States to have trust in each other's criminal justice systems and to strengthen such trust. At the same time, there is room for further action on the part of the European Union to ensure full implementation and respect of Convention standards, and, where appropriate, to ensure consistent application of the applicable standards and to raise existing standards. (13) Any new EU legislative acts in this field should be consistent with the minimum standards set out by the Convention, as interpreted by the European Court of Human Rights (...).

Human Rights standards in the field of detention without unnecessarily duplicating the existing control mechanisms at the regional level.

Amnesty International has previously demonstrated how CPT findings and CoE data should be used by the EU as an ex-post tool in this domain. In its report on the effects of the EU ban on tools of torture in detention, Amnesty International referred extensively to discoveries included in CPT reports to prove that the Council Regulation 1236/2005 did not stop the trade of tools used for torture in detention facilities (both in an internal cross border and an external perspective), either because its formulation allowed for loopholes or because the member states did not enforce it properly[39]. The CPT Visit Report on Hungary issued in 2006, for example, clearly states that Hungary has imported stun belts from non-EU countries, planning to use them in their prisons[40]. Member states are therefore continuing to trade and use these instruments on their prisoners, with a significant negative impact on detention conditions. In this respect, Amnesty International calls for "the competent authority (to) take into account available international court judgements, findings of the competent bodies of the UN, the Council of Europe and the EU, and reports of the Council of Europe's Committee for the Prevention of Torture, and of the UN Special Rapporteur on Torture"[41].

3. The EU and its member states should adopt a consistent position on OPCAT ratification.

The EU has in its external policies repeatedly expressed support and called for ratification of the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, including by issuing statements42 and expressly welcoming the ratification by non-EU countries43. As per the EU Torture Guidelines, the EU has committed to encouraging non-EU countries to accede to OPCAT and other relevant instruments.

However, in its internal policies, the EU has not been seen to be vocal in calling for ratification or accession to this important instrument by all EU member states. To date, 17 EU member states are state parties to the OPCAT. Six EU countries have signed, but not yet ratified OPCAT, and four have not even signed it. Since OPCAT establishes not only a global system for inspection of detention facilities with the goal of preventing torture and ill-treatment, but also requires the establishment or designation, with certain minimum characteristics and powers, of national preventive mechanisms as well, its ratification would ultimately have positive effects on compliance with existing European standards (ex. CPT and European Prison Rules).

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[39] "From words to deeds. Making the EU ban on tools of torture a reality", Amnesty International and Omega Research Foundation Report, 2010.

[40] Visit Report: Hungary (2005) (CPT/Inf (2006) 20), para.127

[41] See page 15, par.2.1 "Member States licensing decisions".

[42]See e.g. Joint Declaration by the African Union and the European Union on the United Nations international day in support of victims of torture 25th June 2010.

[43] See for ex. Declaration by the Presidency on behalf of the European Union on the ratification of the OPCAT by Azerbaijan, February 16th 2009, Statement by EU High Representative Catherine Ashton on the ratification by Tunisia of three key international human rights instruments 2nd July 2011.