AMNESTY INTERNATIONAL EU Office

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Amnesty International's Response to the Green Paper from the European Commission on obtaining evidence in criminal matters from one Member State to another and securing its admissibility

The following comments are a non-exhaustive first general response from Amnesty International to the Green Paper on evidence submitted by the Commission in November 2009.

The Green Paper on evidence issued by the European Commission explores the possibility of extending the principle of mutual recognition beyond the scope of the Framework Decision on the European Evidence Warrant (EEW) to allow for the transfer of a wider range of evidence from one Member State (MS) to another at the same time as its admissibility is secured. Compared with the scope of application of the Framework decision on the EEW, the new proposed instrument would also cover evidence that – although directly available – does not already exist, such as statements from witnesses, and evidence that – although already existing – is not directly available without further investigation or examination, such as DNA samples or fingerprints.

While Amnesty International (Amnesty) does not in principle oppose new mutual recognition instruments, we are very concerned that the proposal fails to address issues of human rights raised by evidence gathering and admissibility. This is particularly worrying in a context where very little common standards are in place regarding evidence at European Union (EU) level and where safeguards are still lacking with regards the criminal procedure more generally. It would therefore seem more appropriate to delay and revise the proposal to ensure that all the relevant procedural rights can be secured in practice. This involves strengthening the general procedural criminal law framework on fair trial rights and building in more human rights provisions in the existing mutual recognition instruments.

In this respect, Amnesty wishes to recall that measures on the rights of suspects and defendants in criminal proceedings – which are *also* prioritised in the new Stockholm Programme – are yet to be adopted. We also recall that further work on evidence was initially foreseen as a follow-up to the debate on the presumption of innocence, which was actually dropped after the Green Paper consultation in 2006.

While the proposal of the Green Paper on evidence aims to improve expedience and efficiency of the criminal procedure, Amnesty International considers that this should never be at the detriment of protecting human rights. Compliance by EU MS with their obligations to protect fair trial rights is an essential component of mutual trust and is necessary to ensure high and equivalent standards of protection in a common EU area of freedom, security and justice.

The latest developments in the field of counter-terrorism, including in cross border situations and international cooperation, have shown disturbing trends which involve unlawful detention, torture or other ill-treatment of persons and disappearances. The question of the validity and accessibility of the evidence used to justify such illegal practices has proven particularly critical in this context.

Amnesty would like to reiterate its call to the Commission to address the issue of the use of evidence extracted through torture or other ill-treatment to ensure full respect by EU MS of their obligations under international and European human rights law.

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Questions posed by the Green Paper

Questions on obtaining evidence

Question 1.
Would you in principle welcome a replacement of the existing legal regime on obtaining evidence in criminal matters by a single instrument based on the principle of mutual recognition covering all types of evidence, including evidence that does not already exist or is not directly available without further investigation or examination? Why?

Amnesty welcomes any measures taken by the EU which aim to ensure the implementation of existing obligations of EU MS under international human rights treaties and the highest possible safeguards for the protection of human rights, including the rights to a fair trial.

While Amnesty does not oppose in principle EU initiatives to replace the legal assistance scheme with mutual recognition instruments in the field of judicial cooperation in criminal matters, we are however concerned that this may lead to systematic standardised systems of cooperation that risk ignoring the necessary checks and safeguards that need to be secured throughout the whole criminal justice process, including with regards to the obtaining of evidence.

The lack of mention of the inclusion of mechanisms aimed to ensure protection of human rights in the course of obtaining and sharing evidence within the Green Paper is of great concern. This is so, as the failure to ensure respect and protection of human rights in the gathering, sharing and use of evidence opens the door for abuse in these processes and further protection gaps on the criminal justice process as a whole. It is for example striking that transfer of witness statements are being envisaged although there are still no EU minimum standards concerning the right to interpretation and translation in criminal proceedings.

Furthermore, a single instrument covering all different types of evidence, including the evidence that is not directly available or that does not already exist, without tailoring the conditions of transfer of the evidence to the specificities of the different types of evidence, increases the risk of weakening the specific checks and safeguards that are necessary in some cases to guarantee the presumption of innocence and the fairness of criminal proceedings. It is for instance remarkable that the proposal encompasses bodily material although there is no common approach of EU MS on how/when to use this material.

The mere reference to the fact that a MS can reject as inadmissible evidence collected in another EU MS if it was obtained in a way that is contrary with its 'fundamental principles' is in Amnesty's view not sufficient to ensure full protection of human rights throughout the process.

Amnesty has welcomed the statement of the new Commissioner-designate for Justice, Fundamental Rights and Citizenship before the European Parliament (12 January 2010) in which she declared that she would be in charge of the human rights impact assessment of all EU policies. This assessment will imply an analysis of the compatibility of each proposal from the Commission with the EU Charter of Fundamental Rights. Mrs Reding also insisted on the future EU accession to the European Convention on Human Rights (ECHR) and the need to ensure the compatibility of all EU measures with ECHR. Furthermore, the Stockholm programme insists on the need to evaluate EU criminal policy developments in close collaboration with the Council of Europe. Amnesty calls for a thorough analysis of this proposal and of the existing instruments in this perspective including consultation with the Council of Europe at the earliest stage.

Question 2.
In your opinion, would it be necessary to include specific rules for some types of evidence in the instrument? If so, which? Why?

Question 3.
In your opinion, would it be inappropriate to apply the characteristics of mutual recognition instruments to all types of evidence, including evidence that does not already exist or is not directly available without further investigation or examination? If so, which types of evidence would deserve a specific treatment? Why?

Amnesty believes that special attention must be given to human rights protection issues arising from the use of specific types of evidence. The challenges raised by the different types of evidence in this regard, suggest that it may be too early to envisage a *single* mutual recognition instrument at this stage of development of EU criminal law.

Examples of challenges raised by specific types of evidence (to be covered by a new mutual recognition instrument on evidence) from a human rights/fair trial rights perspective:

Statements from witnesses (evidence that does not exist but is directly available)

All people charged with a criminal offence have the right to call witnesses on their behalf and to examine or have examined witnesses against them, as provided for in Articles 14 (3) (e) of the International Covenant on Civil and Political Rights (ICCPR) and 6 (3) ECHR. This is a fundamental element of the principle of equality of arms and of the rights of defence. Any rules governing the transfer of evidence in the form of witness statements across the EU MS should therefore ensure that this right is fully protected.

Respect for this right implies the right of the accused to adequate time and facilities to prepare the examination of prosecution witnesses. It means that all the evidence must be produced in the presence of the accused at a public hearing, so that the evidence itself and the reliability and credibility of the witness can be challenged. This also entails special attention to the use of testimony from an anonymous witness, which may render the trial, as a whole, unfair.

The right of the accused to examine or have examined witnesses against them may be limited on the basis of the accused conduct, if the witness becomes unavailable, or when the witness reasonably fears reprisal. The rights of the victims and other witnesses to be protected from reprisals and from unnecessary anguish have to be balanced against the right of the accused to a fair trial. The rules governing the transfer of evidence should provide for adequate protection of victims and witnesses and provide for specific measures to assist victims and witnesses throughout the proceedings.

An automatic standardised transfer of witness statements without review (whether protection measures may be required and are available and adequate) could expose the witnesses and the victims to reprisals. Similarly, admissibility of the evidence without further fair trial guarantees for the accused could undermine the principle of equality of arms of the defence.

Existing data or bodily material (evidence that exists but is not directly available)

The latest report the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (A/HRC/13/37, 28 December 2009) raises concern about the erosion of the right to privacy in the context of measures taken in the fight against terrorism through the use of surveillance powers and new technologies, which are used

without adequate legal safeguards. The report shows that these measures have also had a negative impact on the enjoyment/respect of due process rights. For example, the Special Rapporteur stated that "centralised collection of biometrics" for example, creates a risk of causing miscarriages of justice. He used as an example the Brandon Mayfield Case (January 2006). Following the Madrid bombings of 11 March 2004, the Spanish police lifted a fingerprint from an unexploded bomb. Experts from the FBI declared that a lawyer's fingerprint (that was on a US fingerprint system because the lawyer was a former US soldier) was a match to the crime–scene sample. The lawyer was then detained for two weeks even though the fingerprint was not his. A failure to sufficiently consider the match of fingerprints has therefore led to a miscarriage of justice. Automatic transfer of such 'evidence' without further examination (including the right to challenge the evidence and the opinion) would facilitate repetition of similar errors.

The report also notes that states have expended their powers to stop and search individuals, giving rise to concerns regarding racial profiling and discrimination in Europe. On 12 January 2010, the European Court of Human Rights (ECtHR) condemned the UK stop and search procedures without reasonable procedure under the Terrorism Act 2000. The ECtHR ruled that the UK had violated the right to respect for private and family life under Article 8 of the ECHR of two protesters who were stopped near a protest in 2003. The ECtHR also sated it was "struck by the statistical and other evidence" showing that theses powers disproportionately affected black and Asian people. Automatic transfer of such 'evidence' across MS without further checks risk perpetuating discriminatory practices and undermining privacy rights across the EU.

The issue of evidence extracted through torture

Amnesty considers it essential to adopt EU instruments on procedural rights before envisaging any new EU prosecution mechanisms. This is particularly important when the statements of suspects are being requested for evidence. These must have been obtained in circumstances fully respecting the requirements of Articles 5 and 6 ECHR. Similar attention is also required with regards to statements of witnesses and victims. It is notably widely accepted that access to counsel during questioning and at the time of arrest is a significant protection against torture and other cruel, inhuman or degrading treatment or punishment.

The issue of evidence unlawfully obtained in or by a third country is particularly critical and should be addressed as such when considering both availability and admissibility of evidence across the EU.

Amnesty has consistently called on the EU to address the issue of evidence extracted through torture or other ill-treatment to ensure full respect by EU MS of their obligations under Article 3 ECHR, Article 7 ICCPR and Article 15 of the Convention Against Torture (CAT), which prohibit the use of information adduced as a result of torture or other ill-treatment in proceedings except as evidence in proceedings against the persons alleged to be responsible for such treatment. While this issue is included in the EU Guidelines on Torture, it is not addressed by any EU internal instrument.

Any statement made as a result of torture or other cruel inhuman treatment or punishment is inadmissible as evidence. These standards apply not only to statements made by the accused but also to statements made by any witness (Articles 15 CAT, 12 of the Declaration against Torture and 69 (7) of the Rome Statute of the International Criminal Court (ICC)). The body of Principles for the protection of All Persons under Any Form of Detention or Imprisonment further prohibits taking advantage of the situation of detainees to compel them to testify or confess, or using violence, threats or methods of interrogation which impair their capacity of decision or their

judgments (Principle 21). Principle 27 states that non-compliance with these principles in obtaining evidence must be taken into account in determining the admissibility of the evidence.

Amnesty believes that whenever there is an allegation that a statement was elicited as a result of torture, cruel, inhuman treatment or duress, a separate hearing should be held before such evidence is admitted in the trial. At the hearing, evidence should be taken on whether the statement in question was made voluntarily. If it was determined that the statement was not made voluntarily, then it must be excluded from evidence in all proceedings except proceedings brought against those accused of coercing the statements. When the prosecutors come into possession of evidence against suspects that they know or believe on reasonable grounds was obtained through recourse to unlawful methods which constitute grave violations of the suspects' human rights, they must take all necessary steps to ensure that those responsible for using such methods are brought to justice.

This notably includes taking all means necessary to ensure that no claim of confidentiality on grounds of national security, state security, diplomatic relations, or witness protection, is or may be asserted as justification for failure to disclose information or evidence of serious human rights violations, in any investigation or inquiry, prosecution, hearing of a human rights complaint. All claims for secrecy of possibly relevant information or evidence on grounds of national security, state security, diplomatic relations, or witness protection, should be subject to substantive scrutiny and determination by an impartial authority independent of the executive, which should have the power to order disclosure if it finds the information or evidence to concern a serious human rights violation. (See Amnesty International, Six detailed steps for Europe to end rendition and secret detention, June 2008).

Example – Italy: The Abu Omar rendition case. The Italian Constitutional Court ruled on 11 March 2009 that some evidence could not be disclosed because it dealt with issues of Italian national security. The excluded evidence included SISMI documents and testimonies that contained information about the relationship between SISMI and the CIA. Moreover, key witnesses could no longer appear in court to give testimony as that evidence also dealt with SISMI's relationship with the CIA. Amnesty International believes that governments must not invoke state secrecy in a manner that would deprive a victim of human rights violations of an effective remedy or prevent authorities or courts from bringing perpetrators of human rights violations to justice. (Amnesty International media briefing, 4 November 2009)

Particular attention must also be paid to the need for MS to ensure the accountability of domestic and foreign intelligence agencies by: prohibiting the practice of mutual assistance (including providing information to foreign governments, posing questions to detainees held abroad, participating in interrogations) in circumstances where there is a substantial risk that such co-operation would contribute to unlawful detention, torture or other ill-treatment, enforced disappearance, unfair trial or the imposition of the death penalty; prohibiting in practice the use, in judicial or other proceedings, of information or evidence obtained by torture or other ill-treatment or other serious violations of human rights; providing protection against reprisals, discipline, or prosecution, for individuals who in good faith disclose information about serious human rights violations, which would otherwise be suppressed from independent and publicly accountable scrutiny and review. (See Amnesty International, Six detailed steps for Europe to end rendition and secret detention, June 2008).

Example – UK government must launch investigation into its role in overseas torture. As evidence mounts that UK authorities exploited the torture of terrorism suspects by foreign intelligence agencies, Amnesty International has reiterated its demand that the British government conduct a full public inquiry to identify and hold to account those responsible. (Amnesty international Press Release, 10 July 2009)

In its recommendations to the Spanish Presidency (January 2010), Amnesty has highlighted the case of British resident Binyam Mohamed, whose interrogation by UK agents in Pakistan was the prelude to rendition, torture and secret detention in Morocco and Afghanistan, followed by years in Guantanamo Bay.

Amnesty urges the EU to call on the UK government to investigate the alleged complicity of UK intelligence agents and to make sure that all relevant sources of information on this case are made available to any inquiry.

Question 4.
In your opinion, would it be useful to supplement the instrument with non-legislative measures? If so, which? Why?

Amnesty believes that additional non-legislative measures may be useful to provide for best practices examples with regard to human rights protection. They should in no case be used to suggest exceptions lowering the general standards or as a substitute for introducing binding obligations on EU MS.

Question 5.
In your opinion, are there any other issues which should be addressed? If so, which? Why?

As stressed above, Amnesty believes that the issue of transfer of evidence cannot be addressed in a vacuum and needs to be envisaged in the wider work on fair trail rights. Cross reference to the Roadmap on procedural safeguards endorsed by the Stockholm Programme, as well as parallel work on the instruments foreseen in the Roadmap is essential to ensure consistency and compatibility overall with international human rights standards.

Questions on the admissibility of evidence

Any common standards on the transfer of evidence with a view of securing its admissibility should include mechanisms for effectively reviewing that a request complies with MS' human rights obligations as provided for in international and European human rights law. They should also include the opportunity to challenge the admissibility and the substance of the evidence obtained from another state during the course of the criminal proceedings. There must be explicit grounds of refusal based on respect for human rights.

Please see some comments above in relation to the issue of evidence extracted through torture.