HUMAN RIGHTS DISSOLVING AT THE BORDERS? COUNTER-TERRORISM AND EU CRIMINAL LAW

Human rights are often portrayed as a potential barrier to effective protection from "terrorist" acts rather than a pre-requisite for genuine security. The central argument of Amnesty International's analysis is that it is in the breach, not in the respect of human rights, that security is put at risk.

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TABLE OF CONTENTS

1. Counter-terrorism and criminal law in the EU

1.1 Introduction

Human rights are often portrayed as a potential barrier to effective protection from "terrorist" acts rather than a pre-requisite for genuine security. Some argue that the threat of "terrorism" can justify limiting or suspending human rights. Even the prohibition of torture, a fundamental human rights principle and a rule of customary international law which binds every state and every individual, has been called into question.

The central argument of this report is that it is in the breach, not in the respect of human rights, that security is put at risk. Amnesty International's analysis seeks to propose ways in which the European Union could act to ensure that its approach to terrorism not only acknowledges but actively incorporates the need to protect human rights and the rule of law in this sensitive area.

Unfortunately, amid the flurry of recent counter-terrorism initiatives both in the EU and beyond, the concept of human rights and the rule of law as the basis for genuine security has been lost all but in the rhetoric. In its policies and legislation on counter-terrorism, the EU has failed so far to properly address the serious issue of the protection of fundamental rights. While one element of the creation of the EU's Area of Freedom, Security and Justice[1] is the promotion and protection of fundamental rights, this aspect has not been manifest in concrete proposals on counter-terrorism.

The language adopted in the area of judicial and police cooperation within the EU to combat serious and organised crime including terrorism, speaks of mutual trust and shared values. But in practice, the fight against terrorism often is being used as justification for compromising those values or turning a blind eye to the questionable practices and legislative frameworks on counter-terrorism in some EU Member States.

As far as cooperation with third countries in the fight against terrorism is concerned, the EU and its Member States too often are prepared to remain silent on the issue of rights protection. While there is a general assumption that the human rights of terrorist suspects will be protected within the European Union, little attention is given to credible concerns that serious human rights abuses may occur when those suspects are transported to some countries outside the borders of the Area of Freedom, Security and Justice.

In this analysis, Amnesty International calls on the EU to take active steps to ensure that the shared values of the protection of human rights and the respect for the rule of law upon which the Area of Freedom, Security and Justice is built are ensured throughout that space and are not allowed to dissolve at the borders of the EU.

For more than 40 years, Amnesty International has monitored the use of legislation designed to provide for the "security of the state" in all regions of the world including Europe. This is part of the organisation's overall work in researching and publicising the effects on individuals when internationally agreed human rights rules and standards are broken, and holding states accountable to those standards.

Often "suppression of terrorism" has been used as an excuse for laws and practices designed simply to stifle dissent and opposition. In many cases this has amounted to a "war" against political opposition of whatever kind, with the use of a repressive catalogue of violations of human rights including the right to life, the right not to be tortured, the right not to be detained arbitrarily and the right to a fair trial. Those affected frequently include the wider

[1] The Treaty of Amsterdam on the European Union which came into force on 1 May 1999 states that the EU "must be maintained and developed as an Area of Freedom, Security and Justice"; this objective has been elaborated in the 1999 Tampere and 2004 Hague multi-annual programmes.

population who are innocent of any illegal activity.

EU countries are not exempt from such examples of this broad use of security laws leading to violations of human rights. In regard to a number of individual EU Member States, anti-terrorism measures have been introduced ostensibly to deal with emergency situations. Some explicitly or implicitly involve derogating from human rights guarantees by limiting or suspending them. Amnesty International has raised particular concerns with regard to several Member States where the courts have had their jurisdiction curtailed through limitations on judicial review and even suspension of basic human rights safeguards such as *habeas corpus*[2]. The EU however has remained resolutely silent on such questionable practices in its own Member States.

Amnesty International recognises the right and indeed the duty of states under international human rights law to protect their populations from violent criminal acts. However, such measures must be implemented within a framework of human rights protection. The Universal Declaration of Human Rights was initiated by states in response to the widespread and serious abuses that some governments perpetrated on their own citizens and those of occupied or enemy countries during the Second World War. Human rights standards thus constitute a consensus by states of the minimum standards necessary to protect the safety and integrity of individuals from abuse of power.

These human rights standards are binding obligations that apply to all persons under a state's jurisdiction. They cannot be avoided simply by placing a person deliberately outside the jurisdiction. It is particularly important that the administration of justice is fair. Without the safeguards of the rule of law, including mechanisms to ensure accountability, action taken against criminal suspects may lead to serious violations of human rights, such as unfair trials, secret detention, detention without charge or trial, torture, "disappearance", and extra-judicial execution.

The EU is committed to the construction of an Area of Freedom, Security and Justice based on a high level of mutual trust between the justice systems of Member States. In this context, it is for the EU to justify such trust and to facilitate cooperation between Member States by ensuring that adequate human rights safeguards are in place throughout the EU.

This analysis will highlight areas which pose problems in the context of judicial cooperation in the fight against terrorism in the EU, and make recommendations of steps that could be taken within the unique context of the EU to improve the protection of human rights. While indispensable for providing a genuine Area of Freedom, Security and Justice for all, these steps will ensure that the fight against terrorism is effective by minimising the risk of abuses of human rights and miscarriages of justice which tend to increase a sense of alienation in sectors of society particularly affected and to discredit the EU in its relations with third countries on this issue.

1.2 The EU and its Member States

The European Union has not been slow in responding to the threat of international terrorism even though its structure and the powers conferred on the EU by Member States create a unique and complex framework for measures in this field. The EU anti-terrorism roadmap[3], produced within weeks of 11 September 2001, covered a broad range of areas that could have an impact on the fight against terrorism and the root causes of terrorism, from criminal law initiatives to the safety of air transport to relations with third countries and aid.

The areas covered by the fight against terrorism span the three "pillars" of the EU – that is:

- the first (or Community) pillar which includes issues such as the free movement of persons, asylum and immigration and

[2] A legal procedure that allows anyone deprived of their liberty by arrest or detention (or anyone on their behalf) to take proceedings before a court, in order that the court may decide without delay on the lawfulness of their detention and order their release if the detention is not lawful.

[3] Council document 12800/01 of 16 October 2001.

judicial cooperation in civil and commercial matters;
- the second pillar (which is intergovernmental) covering the Common Foreign and Security Policy (CFSP); and
- the third pillar (also intergovernmental) covering criminal law issues of justice and home affairs, in particular police and judicial cooperation in criminal matters.

The powers of the EU to act and the ways in which measures are taken vary considerably depending on which of the three pillars the subject matter is governed by. This analysis will concentrate primarily on EU measures taken under the third pillar in the field of judicial cooperation in criminal matters. It will also look at the interaction between extradition and asylum procedures.

Many measures taken under the first and second pillars may have significant implications for the enjoyment of human rights (notably the right to privacy, the right to freedom of expression or association, the right to an effective remedy and the right to freedom from discrimination) or may imply an impact outside the borders of the EU. In the field of the CFSP, one of the distinguishing features of the EU approach to counter-terrorism is its failure to provide a strong critical voice in regard to abuses of human rights in the global fight against terrorism, in particular where such abuses are being perpetrated by EU allies such as the United States of America in relation to the treatment of detainees in Guantánamo Bay or allegations of torture.

The scope of all these issues is too broad to be dealt with in a single report. Rather, the present document aims to examine those areas of competence and action where the EU bears direct responsibility for ensuring adequate protection of human rights in the context of countering terrorism. The measures taken in the intergovernmental field of judicial cooperation in criminal matters provide a focus for assessing the EU's performance in protecting human rights within its borders. This applies both to EU-level activity and to the collective responsibility for the actions of Member States in relation to human rights such as the right to freedom from torture or other cruel, inhuman or degrading treatment, the right to liberty and the right to a fair trial that have formed the core of Amnesty International's work over the past 40 years.

Article 6 of the Treaty on European Union (TEU) provides that:

"1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

Article 7 TEU provides a mechanism whereby the EU can suspend certain membership rights relating to a Member State where the existence of a serious and persistent breach of the principles of Article 6 TEU or a risk of a serious breach of those principles is found in a particular Member State.

These articles constitute the legal and political basis of the collective responsibility of the EU for the protection of human rights and fundamental freedoms throughout its territory. The EU is thus obliged to ensure that its own measures are in accordance with fundamental rights and also to identify and act upon a serious and persistent breach of fundamental rights or a clear risk of such breach in its Member States.

Amnesty International has noted worrying trends in the EU in relation to the fight against terrorism. Disturbing legislative developments in Member States have led to *incommunicado* detention in Spain[4]; the UK has derogated from Article 5 of the European Convention on Human Rights and Fundamental Freedoms (ECHR) and Article 9 of the International Covenant on Civil and Political Rights (ICCPR) to allow for indefinite detention without trial and the use in court of secret intelligence

[4] "Spain in Amnesty International Annual Report", AI Index POL 10/01/2004; also see Articles 509, 520(a) and 527 of the Spanish Code of Criminal Procedure; Article 509 of the Code was amended by Organic Law 15/2003 of 25 November 2003 to extend the maximum length of *incommunicado* detention.

evidence, potentially extracted through torture or other cruel, inhuman or degrading treatment. The Secretary-General of the Council of Europe[5] condemned UK anti-terrorist legislation (Anti-Terrorism, Crime and Security Act of 2001) following a judgement from the House of Lords that the legislation was incompatible with human rights[6].

Amnesty International is aware of cases where Member States, the UK and Sweden, may have been complicit in the "extraordinary rendition" of suspects without due process to countries where they are at a grave risk of torture and a flagrant breach of their fair trial rights. Removals of people suspected of terrorism show a worrying tendency to reduce or ignore the rights of suspects, justified by the interests of swift procedures. Thus, serious risk is created of breaching human rights standards, including the absolute prohibition of torture and other ill-treatment, and the equally absolute principle of *non-refoulement*. Special procedures limiting basic rights such as the right to a lawyer that apply in some countries in "terrorist" cases are particularly worrying in the light of the often broad definitions of "terrorist offences" to which they apply. There is no effective remedy to contest inclusion on terrorist lists.

Furthermore, racism and discrimination are a significant problem in Europe and Amnesty International is concerned that the fight against terrorism is fuelling discrimination by states and non-state actors against certain groups in society. Statements such as that by the UK's Minister for Counter Terrorism, Hazel Blears, that Muslims must face the reality that the police would target them because of the threat from an extreme form of Islam[7] are very worrying and encourage discriminatory policing which exacerbates feelings of alienation in the Muslim population. This trend to equate terrorism with Islam risks undermining the EU's commitment to fight racism and xenophobia.

Despite these problems which appear across the EU, the EU itself has paid no more than lip service to the question of protecting human rights in the context of the fight against terrorism. In the rush to take action in the political climate following 11 September 2001, the key EU level measures aimed at combating terrorism in the criminal law sphere were drafted with little consideration being given to procedural safeguards or to legal certainty. The negotiations on certain procedural rights for suspects in criminal proceedings throughout the European Union[8] have included debates about excluding terrorist suspects completely from the application of procedural rights[9] to reflect current national practices in some Member States, a suggestion which not only runs contrary to the principle of the universality of human rights but potentially also undermines the possibility of effective prosecutions and cooperation between Member States to combat terrorism.

1.3 The broader international framework of counter-terrorism

> *"While we recognise that the threat of terrorism requires specific measures, we call on all Governments to refrain from any excessive steps which would violate fundamental freedoms and undermine legitimate dissent. In pursuing the objective of eradicating terrorism, it is essential that States strictly adhere to their international obligations to uphold human rights and fundamental freedoms"* – Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary-General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE's Office for Democratic Institutions and Human Rights on 29 November 2001[10].

The risk to human rights in the current circumstances is heightened because there has been no strong international mechanism specifically responsible for monitoring

[5] The Secretary General of the Council of Europe Terry Davis stressed that "[t]he anti-terrorism legislation in the United Kingdom must be changed as a matter of urgency. We will not win the fight against terrorism if we undermine the foundations of our democratic societies." The Council of Europe Secretary General's press release 653a(2004) of 22 December 2004.

[6] A (FC) and others v Secretary of State for the Home Department and X (FC) and another (FC) v Secretary of State for the Home Department, House of Lords opinion of 16 December 2004, [2004] UKHL 56.

[7] The Times, 2 March 2005.

[8] COM (2004) 328 final.

[9] Council document 14198/04 of 11 November 2004.

[10] Press release (www.osce.org/news/show_news.php?id=2183).

emergency legislation and practices from a human rights perspective.

The overarching international framework in response to international terrorism is that of the United Nations. Resolution 1373 of the UN Security Council, adopted on 28 September 2001 creates obligations on states to take a variety of measures aimed at cooperation on preventing terrorist acts and prosecuting the supporters of those acts. It also set up the Counter-Terrorism Committee (CTC) to monitor the implementation of the resolution and states are obliged to report regularly on the steps that they have taken. The Secretary-General of the UN has stated that:

"… [There] is no trade-off between effective action against terrorism and the protection of human rights … [While] we certainly need vigilance to prevent acts of terrorism, and firmness in condemning and punishing them, it will be self-defeating if we sacrifice other key priorities – such as human rights – in the process"[11].

However, while the UN High Commissioner for Human Rights has also insisted on the need to respect human rights while combating terrorism[12], any analysis of the protection of human rights was absent from states' reporting to the CTC which has tended towards a view that while the respect for human rights is something to be borne in mind, in practice it is not at the core of work on counter-terrorism. Reality has belied this approach. Over the past year, Amnesty International has continued to note a negative impact on human rights from legislation and measures introduced by governments to counter terrorism in a range of countries.

Under the banner of fighting the "war on terror", the US government has blatantly disregarded human rights and fundamental freedoms. Images of torture and ill-treatment of detainees in US custody in Iraq and other locations dramatically illustrated how human rights can be sacrificed in the name of security. Hundreds of foreign nationals remain in prolonged indefinite detention without charge or trial in Guantánamo Bay, in blatant contravention of international and US constitutional standards. Hundreds of people suspected of connections with the Taleban or al Qa'ida remain in long-term arbitrary detention in Pakistan as well as in US-controlled centres in Afghanistan. China has conveniently used the "war on terror" to justify its repression policies in the predominantly Muslim Xinjiang Uighur Autonomous Region to stifle Uighur identity. Until 2005, 11 men remained in high security detention in the UK under the Anti-Terrorism, Crime and Security Act 2001. In Morocco, Saudi Arabia, Tunisia, Yemen and other countries, scores of people have been arrested and arbitrarily detained in connection with suspected terrorist acts or links to opposition armed groups. In Kenya, counter-terrorism measures have resulted in detention without trial and unfair trials[13].

It was only after several years of strenuous campaigning by human rights organisations that human rights began to be factored into the UN's handling of counter-terrorism, with the appointment in 2004 of a human rights expert in the CTC as well as the appointment by the Commission on Human Rights of an independent expert[14]. Mandated for one year, the expert reported to the Commission's 2005 session concluding that there is a pressing need for monitoring under a single mandate that has a comprehensive overview of the relationship between human rights and counter-terrorism measures[15]. This proposal was endorsed by both the UN Secretary-General and the High Commissioner for Human Rights, and resulted in the appointment by the Commission this year of a Special Rapporteur on the protection of human rights and fundamental freedoms while countering terrorism. The new mandate will monitor counter-terrorism laws and practices for their compatibility with human rights and provide technical assistance to states.

[11] Statement made by UN Secretary-General Kofi Annan to the Security Council on 18 January 2002, UN Document S/PV.4453, p. 3.

[12] e.g. *Digest of Jurisprudence of the UN and Regional Organisations on the Protection of Human Rights while Countering Terrorism,* 28 July 2003 (www.unhchr.ch/html/menu6/2/digest.doc).

[13] *2005 UN Commission on Human Rights: The UN's chief guardian of human rights?* AI Index IOR 41/008/2005.

[14] Commission on Human Rights Resolution 2004/87 "Protection of human rights and fundamental freedoms while countering terrorism", 58th meeting, 21 April 2004.

[15] UN document E/CN.4/2005/103.

The Council of Europe, an organisation of which all EU Member States are also members adopted *Guidelines on Human Rights and the Fight against Terrorism*[16] on 11 July 2002 and *Guidelines on the Protection of Victims of Terrorism*[17] on 2 March 2003. Although most welcome, it became clear during the drafting process of these standards that while states for the most part were willing to codify their existing obligations in these two sets of guidelines, they did not use the opportunity presented to set down standards which would result in a strengthening or creation of additional safeguards. The Council of Europe's Convention on the prevention of terrorism, adopted on 3 May 2005[18], however, shows a worrying trend towards the extension of the notion of terrorist activity to areas which may be open to abuse by Member States curtailing the right to freedom of expression[19].

The OSCE's Office for Democratic Institutions and Human Rights appointed a Counter-terrorism and human rights coordinator in an attempt to ensure that the protection of human rights is not lost in the implementation of UN measures in the OSCE region.

Overall, there are signs of an increasing recognition of the crucial role of the protection of human rights as an intrinsic part of the fight against terrorism which goes beyond the rhetoric of "no security without human rights". Amnesty International is encouraged by the inclusion in the recommendations in the Madrid Agenda arising from the Madrid Summit on Democracy and Terrorism (Madrid 8-11 March 2005) of a section on confronting terrorism:

"Democratic principles and values are essential tools in the fight against terrorism. Any successful strategy for dealing with terrorism requires terrorists to be isolated. Consequently, the preference must be to treat terrorism as criminal acts to be handled through existing systems of law enforcement and with full respect for human rights and the rule of law. We recommend:
taking effective measures to make impunity impossible either for acts of terrorism or for the abuse of human rights in counter-terrorism measures.
the incorporation of human rights laws in all anti-terrorism programmes and policies of national governments as well as international bodies. (….)"[20].

While international efforts to combat terrorism have focused on the need to enhance cooperation between states, little, if any, attention has been given to the effective inclusion of human rights protection as a crucial element in that cooperation. International human rights obligations do not stop at borders and a failure to respect human rights in one state undermines its effectiveness in the international effort to cooperate to combat terrorism. The trend towards unorthodox methods of cooperation that blur the lines between human rights and humanitarian law or bypass legal methods altogether risks turning borders into a "no man's land" in terms of human rights protection and making a mockery of international frameworks to ensure human rights and the rule of law. As yet, international organisations have failed to take concrete steps to ensure that international human rights standards and obligations do not dissolve at borders. The EU is in a unique position to begin to close the gap between human rights theory and counter-terrorism practice.

[16] www.coe.int/T/E/Human_rights/h(2002)4eng.pdf

[17] www.coe.int/T/E/Human_rights/guidelinesvictimsterrorism.asp

[18] http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=196&CM=8&DF=18/05/05&CL=ENG

[19] The Convention requires *inter alia* states parties to criminalise direct and indirect public provocation of terrorism, recruitment and training for terrorism, and to either try or extradite persons accused of such crimes. The Parliamentary Assembly and the Commissioner for Human Rights of the Council of Europe as well as NGOs raised concerns that such a formulation could lead to an erosion of the right to freedom of expression and freedom of association. See *Amnesty International's representations on the draft Council of Europe Convention on the Prevention of Terrorism*, AI Index IOR 061/005/2005.

[20] http://www.clubmadrid.org/cmadrid/index.php?id=543

2. The EU as a separate legal framework

In a global environment where there is an increasing tendency to categorise certain acts as "terrorist" and to base levels of cooperation between states and types of legislation on this categorisation it is important to know precisely what is meant by "terrorism". The consequences of an offence being categorised as "terrorist" can be very serious in terms of limitations on certain rights. For example, in some Member States, the classification of proceedings as relating to "terrorism" can result in curtailment of the right of access to a lawyer, inclusion on public lists identified as a terrorist, invasion of privacy, the use of secret evidence and incommunicado detention. When states cooperate with each other on counter-terrorism, the difference in treatment and procedures in "terrorist" cases as well as very different approaches to the classification of groups as "terrorist" makes it crucial for states to understand what each one means by the term[21].

While the existence of legislation and special procedures relating to "terrorism" demand a clear definition of terrorism to ensure legal certainty and the effectiveness of a counter-terrorism strategy, what is not clear is the added value or justification of treating "terrorism" as an issue which is separate from the underlying criminal acts to be prosecuted such as murder or kidnapping which can be found in the regular criminal justice systems of Member States. While the general threat of terrorism is put forward as a justification for the limitation of fair trial rights and intrusions into private life, among other things, there has been no serious discussion as to whether these limitations are in fact necessary in relation to terrorism as opposed to other forms of serious violent and/or organised crime.

[21] Amnesty International has generally sought to avoid using the term "terrorism" or "terrorist" without quotation marks, as there is no agreed legal definition of what constitutes terrorism. The term has strong political and emotional connotations and to maintain its impartiality, Amnesty International prefers, wherever possible, to factually describe the act and formulate its position on it. For the purposes of this report quotation marks have been used only for grammatical reasons.

The right to a fair trial, for example, is a fundamental concept of justice and the rule of law, its function being to protect against miscarriages of justice which are prejudicial both to the individuals concerned and to society as a whole. It is hard to see what benefit there can be in increasing the risk of miscarriages of justice in highly sensitive terrorism cases by limiting the right to a fair trial. A miscarriage of justice not only gives impunity to the real perpetrators of acts of terrorism but also undermines the public faith in the state's ability to guarantee freedom, justice and security. It may also alienate minorities who are perceived as a higher "risk factor" for generating terrorist activity and who are therefore more likely to suffer from potential abuses of human rights connected to the fight against terrorism.

2.1 The definition of terrorism

The international community has found it very hard in the past to come up with a consensus on what exactly is meant by "terrorism" due to ideological clashes between states. Amnesty International raised the definition issue in its comments on the draft Council of Europe Convention on the prevention of terrorism[22]. As adopted on 3 May 2005[23], the Convention requires states parties to criminalise provocation of and recruitment and training for terrorism. It does however not include a precise definition of terrorism for the purpose of the treaty, thus effectively creating subsidiary offences while the primary offence of terrorism remains undefined.

While existing UN conventions refer to terrorism, they prohibit certain crimes without defining terrorism as such. The UN High Level Panel on Threats, Challenges and Change in December 2004 suggested the following definition of terrorism be adopted:

[22] *Council of Europe: Amnesty International's Preliminary Observations on the December 2004 Draft European Convention on the Prevention of Terrorism*, AI Index IOR 061/002/2005.

[23] Supra nr 18.

"any action constitutes terrorism if it is intended to cause death or serious bodily harm to civilians or non-combatants with the purpose of intimidating a population or compelling a government or an international organisation to do or abstain from doing any act"[24].

The EU Council Framework Decision on combating terrorism[25], however, which was agreed in record time in December 2001 is broader than this, including in the acts covered *"causing extensive destruction to a government or public facility, including an information system, a fixed platform located on a continental shelf, a public place or private property likely to endanger human life or result in major economic loss"*[26]; and a threat to commit any of the acts listed in the Framework Decision[27], thus extending the notion of terrorism beyond actual violent acts designed to cause death or serious bodily harm or attempts at such acts.

The Framework Decision on combating terrorism was one of the key elements of the EU's response to 11 September 2001 along with the European Arrest Warrant (discussed below). At the time of negotiation it was felt that a common definition of terrorism was necessary to ensure effective cooperation between Member States to combat terrorism as some Member States did not have "terrorism offences" as such in their legislation and this undermined the possibilities for extradition or other forms of judicial cooperation which required double criminality (that is that the offence concerned is an offence both in the requesting and requested country). The development in parallel of the European Arrest Warrant and subsequent mutual recognition instruments[28], however, has seen the abolition of the principle of double criminality in relation to terrorism in the EU so it may be asked what practical added value the Framework Decision on combating terrorism now has on EU level cooperation in counter-terrorism.

During the negotiations of the Framework Decision on combating terrorism, a number of Member States, as well as NGOs including Amnesty International[29], raised concerns that the definition contained in the Commission proposal was not sufficiently precise as to guarantee legal certainty and that the breadth of the proposed definition could threaten the right to freedom of association and legitimate protest. Requiring criminalisation of "terrorist" acts, it allowed for prosecution for offences such as "unlawful seizure of or damage to state or government facilities, means of public transport, infrastructure facilities, places of public use, and property"[30], and "promoting of, supporting of or participating in a terrorist organisation"[31]. Without clearly defining the terms this could lead to criminalisation of activities which are unrelated in any way to acts of violence.

In response to some Member States' concerns that the still relatively broad definition finally adopted would threaten the right to legitimate protest, a declaration[32] attached to the Framework Decision provides that the Framework Decision "should not be understood to criminalise on terrorist grounds persons who exercise their legitimate right to manifest their opinions, even if they commit criminal offences while exercising this right"[33]. This declaration though, remains ambiguous, has no legal status or effect and does not cure the vagueness of the definition itself.

In addition, there are provisions relating to human rights in recital 10 of the Preamble and Article 1 (2) of the Framework Decision that stipulate that the measures provided for in the Framework Decision "shall not have the effect of altering the obligation to respect fundamental rights or freedoms", such as the right to strike, freedom of assembly, of association or of expression. However, the vagueness of these provisions and non-binding

[24] *A More Secure World – Our Shared Responsibility*, report of the High-Level Panel on Threats, Challenges and Change, UN document A/59/565, para 164 (d).
[25] OJ L 164 22.06.2002 p. 3.
[26] Ibid, Article 1(1)(d).
[27] Ibid, Article 1(1)(i).
[28] For example Council draft Framework Decision on the application of the principle of mutual recognition of confiscation orders, Council document 14622/04 of 17 December 2004.
[29] Comments by Amnesty International on a proposal by the Commission for a Council Framework Decision on combating terrorism, 19 October 2001.
[30] COM(2001)521 final, Article 3.1(f).
[31] Ibid, Article 3.1(m).
[32] Council document 14845/01of 6 December 2001.
[33] Idem.

effect of the Preamble mean that they do not resolve the underlying problem of lack of legal certainty.

Framework Decisions are binding on Member States as to their effect but leave the form of implementation up to each individual Member State. They can only set minimum standards regarding substantive criminal law, so Member States are free to diverge from those standards. In the case of the Framework Decision on combating terrorism, some Member States already had their own national legislation that went further than the Framework Decision and therefore implementation required little change to the law. Some of those Member States that did not previously have a definition of terrorism in their national law, however, have transposed the Framework Decision almost exactly into their national legislation thus failing to remedy the problem of the vague definition[34].

The Framework Decision contains nine specific acts mostly concerning attacks on persons or weapons-related acts although some are less clearly related to violence[35]. The act committed must fall under one of three categories of objectives in order to qualify as a "terrorist act". Those objectives are:

- to seriously intimidate a population, or
- unduly compel a government or international organisation to perform or abstain from performing any act, or
- seriously destabilise or destroy the fundamental structures of a country or an international organisation[36].

The definition contained in the Framework Decision on combating terrorism is important in that it establishes the parameters for other counter-terrorism initiatives at EU level such as the establishment of lists of organisations and individuals involved in terrorism (see below). While this definition, vague as it is, exists at EU level, the development of the European Arrest Warrant (EAW) has further exacerbated the lack of legal certainty in the definition of "terrorism" in practice. As the EAW removes the requirement for double criminality in relation to "terrorism" and membership of a proscribed organisation, the definitions which apply in the application of the EAW are those which apply in national law, not commonly agreed definitions[37]. National definitions are thus extended across the EU without a clear picture of what those definitions might be.

The Framework Decision on combating terrorism establishes a basic set of acts and objectives, but Member States are not prevented from going further than these acts and objectives in their national legislation. If a Member State qualifies a particular organisation as a "terrorist" organisation whether or not it participates in the acts contained in the EU definition, then membership of such an organisation could, under the law of that Member State, be considered a terrorist offence for which it could issue an EAW. The requested state would be obliged to surrender the person even if the activities of the organisation in question are not considered to be terrorist in nature or illegal in that state, as it is in fact not able to question the nature of the offence or to refuse to surrender on that basis[38].

The vagueness of the definition contained in the Framework Decision on combating terrorism is primarily of concern in that it provides a basis for further measures such as the establishment of terrorist lists. In practical terms it must be for Member States to ensure that their implementation of the Framework Decision is sufficiently clear to cure the lack of legal certainty in the Framework Decision itself. The EU cannot legitimately base mutual recognition instruments for judicial cooperation

[34] See EU Network of Independent Experts on Fundamental Rights, *Thematic Observation 1: Balance between freedom and security within the EU* at p. 12-16. Also, see Commission report on implementation of the Framework Decision on combating terrorism, COM(2004)409, and Commission Staff Working Paper, annexed to it, SEC(2004)688.

[35] Framework Decision on combating terrorism, Article 1(1)(d), supra nr 25.

[36] Ibid, Article 1(1).

[37] Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedure between Member States (OJ L 190, 18.7.2002, p 1), Article 2(2).

[38] See examples of refused surrender from France where the court used grounds of territoriality to refuse surrender of French nationals requested by Spain in relation to non-violent activities in support of groups which are illegal in Spain but not in France – Case of *Amaya Recarte*, judgement of the Cour de Cassation, 08/07/2004, Case number 04-83662 and judgement of the Cour d'Appel de Paris of 26/01/2005 case of *Jean-Francois Lefort*, head of Askatasuna in France, which follows this jurisprudence.

on mutual trust where it is unclear whether national definitions of terrorism which, due to the erosion of the principle of double criminality, now may be applied across the whole EU territory, are in compliance with international human rights obligations.

If it is to provide the basis for judicial action, prosecutions and international cooperation, a definition of terrorism must be sufficiently clear as to provide legal certainty. Article 7.1 of the ECHR on "no punishment without law" states that:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

The European Court of Human Rights clarified this provision in the Kokkinakis case:

"52. […T]he Convention […] embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (nullum crimen, nulla poena sine lege) and the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable"[39].

Amnesty International is concerned that the EU definition of terrorism as set out in the Framework Decision on combating terrorism does not comply with this requirement. What is more, the abolition in mutual recognition instruments such as the EAW of double criminality in relation to terrorism, without a clear picture of the kind of acts classified as terrorist offence in the laws of Member States, undermines the principle of legal certainty in the Area of Freedom, Security and Justice.

Amnesty International calls on Member States to review their national legislation to ensure that transposition of the EU Framework Decision on combating terrorism corrects this problem. The Commission should compile a report of Member States' definitions of terrorism with a view to ensuring that they are sufficiently clear and precise as to provide legal certainty and to exclude the possibility of counter-terrorism legislation being used to quash legitimate protest and dissent which is necessary in a society based on democracy, human rights and the rule of law such as the EU purports to be.

2.2 Who is a terrorist?

The difficulties encountered in identifying what terrorism is become more acute when people or organisations are identified as "terrorist". In a climate where identification as a "terrorist" has such serious implications for the enjoyment of rights (in particular on the right to freedom of assembly and association, freedom of expression, the right to respect for private and family life, the right to basic public services and on the right to liberty and the right to a fair trial) it is crucial that such identification must be based on clear evidence that is capable of being challenged. The ECHR in Article 13 sets out the right to an effective remedy:

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity".

Similar provision is found in Article 47 of the EU Charter of Fundamental Rights. In the EU it is not clear at all what remedy a person or organisation has to challenge their publication in the Official Journal of the European Communities as a "terrorist" and to receive reparation for the damages that they may suffer as a consequence of that inclusion, whether at national or at EU level.

[39] ECHR, judgement *Kokkinakis v Greece* of 25 May 1993, Series A 260-A, para 52.

In implementing UN Security Council resolution 1373 the EU introduced a series of legislative measures which created EU terrorist blacklists building on the UN lists. The EU lists are comprised of "persons who commit, or attempt to commit, terrorist acts or who participate in, or facilitate, the commission of terrorist acts" and "groups and entities owned or controlled directly or indirectly by such persons; and persons, groups and entities acting on behalf of, or under the direction of, such persons, groups and entities"[40].

The definition of terrorism in these instruments is the same as that in the EU Framework Decision on combating terrorism[41], although it goes beyond that definition in that it is not limited to acts by or against EU citizens/residents or on EU territory. The legal effect of these EU lists is unclear which leads to an absence of legal certainty as to their impact on the rights of persons and organisations included on the lists. There was practically no democratic scrutiny related to the establishment of these lists and there is no judicial supervision regarding inclusion on them, which further undermines their legitimacy, and indeed their practical usefulness in their stated aim of combating terrorism.

On 27 December 2001 a number of measures were adopted by the Council within the context of the fight against terrorism: Council Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism[42], Council Decision 2001/927/EC establishing the list provided for in Article 2(3) of Council Regulation (EC) No 2580/2001[43], Council Common Position 2001/930/CFSP on combating terrorism[44], Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism[45]. Once again, the haste and timing of the adoption of these instruments along with the choice of instrument meant that there was little opportunity for scrutiny or debate on the content or potential impact of the measures. The European Parliament at point 2 of its resolution on this legislation[46]:

"Regrets that the measures adopted by the Council on 27 December 2001 by 'written procedure' constitute a legally complex construction, which appears designed to circumvent the democratic scrutiny of the European Parliament".

Of particular concern is the list contained in Council Common Position 2001/931/CFSP on the application of specific measures to combat terrorism[47] which creates obligations on states in relation to those on the list, for example for the freezing of assets or for police and judicial cooperation with other Member States. It is a piece of legislation whose legal complexity within the framework of the EU makes it difficult to contest through judicial channels. The Common Position is drawn up under the EU's Common Foreign and Security Policy (CFSP, the second pillar of the EU), and as well as provisions on the freezing of assets which fall under Community law (first pillar) it has an effect relating to judicial and police cooperation between Member States (justice and home affairs, the third pillar). The second and third pillars of the EU are primarily intergovernmental in character. Decisions taken by Member States under the CFSP are not subject to judicial review within the EU[48]. Under the third pillar (JHA), issues may only be referred to the European Court of Justice (ECJ) as a request for a preliminary ruling from Member States which have accorded the ECJ competence in this field[49]. The European

[40] Common Position 2001/931/CFSP of 27 December 2001 (OJ L 344, 28.12.01, p 9), Common Position last amended by Common Position 2004/500/CFSP of 17 May 2004 (OJ L 196, 3.6.2004, p 12), Article 2.
[41] Framework Decision on combating terrorism, supra nr 25.
[42] OJ L 344, 28.12.2001, p.70.
[43] Ibid. p.83. The Decision was last amended by Council Decision 2005/221/CFSP of 14 March 2005 implementing Article 2(3) of Regulation (EC) No 2580/2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism and repealing Decision 2004/306/EC.
[44] Supra, nr 42, p.90.
[45] Supra, nr 42, p.93.
[46] P5_TA(2002)0055 – European Parliament resolution on the Council's decision of 27 December 2001 on measures to combat terrorism.
[47] Supra nr 40.
[48] Article 46 TEU does not allow the ECJ to review the lawfulness of decisions taken in the field of CFSP.
[49] Article 35 TEU. A number of Member States have not given their national courts jurisdiction to send references to the ECJ on policing and criminal law issues.

Parliament again in its resolution on this legislation[50]:

"Deplores the choice of a legal basis which falls under the third pillar for the definition of the list of terrorist organisations, thereby excluding all consultation and effective scrutiny both by the national parliaments and by the European Parliament, and also evading the jurisdiction of the Court of Justice".

Inclusion on the list requires unanimity of Member States but once on the list, a decision to remove a group or person from the list also requires all Member States to agree to removal. The evidence provided to justify inclusion, or the details of which Member State put forward a particular organisation or person, or what was discussed, are not made public. Any approach to seek removal from the list through national channels is therefore made practically impossible.

The categories of persons or organisations contained in the list annexed to Common Position 2001/931/CFSP (and its later updates) can be divided roughly into two different types – organisations and persons related to terrorism internal to the EU and those related to "international terrorism" external to the EU. The effect of the legislation on the two groups is quite different in terms of the potential practical and legal impact on the enjoyment of fundamental rights.

2.2.1 GROUPS AND INDIVIDUALS EXTERNAL TO THE EU

In addition to an obligation to enhance police and judicial cooperation in relation to many of the groups and individuals included on the list, provisions relating to asset freezing apply to many as well and the consequent financial implications for them mean that there is a Community (first pillar) effect which gives the ECJ a degree of competence on related issues. As in relation to the UN lists, Amnesty International is concerned that the manner in which numerous individuals have been placed on such lists with extremely short notice and without the possibility of review or appeal raises indeed, as the UN High Level Panel suggests in the case of "terrorist lists", "serious accountability issues and possibly violate fundamental human rights norms and conventions" (recommendations 40 and 52).

One case currently before the ECJ is that of the Philippine national José-Maria Sison[51] who was included in the list adopted under the terms of Regulation 2580/2001 in decision 2002/848/EC of October 28, 2002. Mr Sison contests his inclusion in the list and any link to terrorism. The impact of inclusion on the list was that Mr Sison, resident in The Netherlands, among other things had his social benefits terminated and his bank account frozen. A request from his lawyers to the General Secretariat of the Council of the EU for information on the justification of his inclusion on the list was refused and this decision was upheld by the Court of First Instance (CFI) that rejected the application for access to documents on 26 April 2005[52].

The inability to gain access to documents relating to the decision to include a person on the list has the effect of undermining the practical possibility of challenging that inclusion. It is impossible to contest inclusion if the reasons for it remain unknown. Amnesty International is very concerned that the complexity of EU law may create a smokescreen to prevent the effective protection of human rights.

2.2.2 GROUPS AND INDIVIDUALS INTERNAL TO THE EU

Some of the individuals and groups included in the annexe to Common Position 2001/931/CFSP are identified by an asterisk as only being affected by enhanced judicial and police cooperation measures and not by other provisions in the Common Position (Article 4 of the Common Position). It is those affected only by Article 4 who are, paradoxically, in the most complex legal position and the individuals affected are, in fact, all citizens of the European Union and seem to sit strangely in an instrument relating to common foreign and security policy.

[50] European Parliament resolution on terrorism, supra nr 46.

[51] Case T-47/03.

[52] The CFI allowed to invoke the exception relating to the public interest contained in Article 4(1)(a) of the Regulation No 1049/2001.

The European Court of Human Rights refused admissibility for a complaint from two Basque Groups, Segi and Gestoras Pro Amnistía included on the EU list in a decision of 23 May of 2002[53]. The Court side-stepped the issue of whether national or EU remedies had been exhausted, thus in effect failing to identify whether or not such remedies existed in the first place and refused admissibility on the basis that the organisations concerned could not establish their status as victims without demonstrating that they had actually been affected by the alleged violation of their rights as a result of their inclusion on the EU list. The Court took the view that their rights and freedoms would not be affected until they were actually arrested and brought before a national court at which point they would be able to raise the question of their inclusion on the EU list. It could be argued that this is a very narrow view of the effect of the ECHR and of the status of a victim, and a rather broad view of the possibility to effectively challenge EU law through domestic criminal justice systems.

An order of the Court of First Instance of the European Communities of 7 June 2004[54], rejecting the admissibility of a claim by Segi, clarifies the unsatisfactory legal status of these lists by ruling that the Court has no competence in this area. The order states that it is probable that the applicants will have no effective remedy either before national or community jurisdictions to contest the inclusion of Segi on the list of persons, groups or entities involved in terrorism. This situation is exacerbated by the use of a Common Position as a basis for the list rather than, for example, a Decision which would have potentially given the Court competence. It goes on to state that the absence of an effective remedy will not, in itself, provide a basis for community competence within the EU judicial system based on the principle of the competence of attribution resulting from Article 5 TEU[55].

The order also addresses the legal weight of the Council Declaration annexed to the Common Position 2001/931/CFSP that in the event of any error as to the persons, groups or entities included in the list the injured party would have the right to judicial reparation. In finding that the declaration does not provide for either the means of recourse to justice or the conditions for starting such a procedure, the court found that, in any event, the declaration could not envisage a procedure before the community jurisdictions as it would run counter to the competence given to the community courts by the Treaty on European Union[56]. The case is now pending for appeal before the ECJ[57].

[53] Decision on admissibility of request no 6422/02 *Segi and others* and request no 9916/02 *Gestoras Pro Amnistía and others against Germany, Austria, Belgium, Denmark, Spain, Finland, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, the UK and Sweden*, of 23 May 2002.

[54] Order of the Court of First Instance (second chamber) 7 June 2004, Case T-338/02, *Segi, Araitz Zubimendi Izaga, Aritza Galarraga against Council of the European Union, supported by the Kingdom of Spain and the United Kingdom*.

[55] Ibid. at para 38. *"S'agissant de l'absence de recours effectif invoquée par les requérants, force est de constater que ces derniers ne disposent probablement d'aucun recours juridictionnel effectif, que ce soit devant les juridictions communautaires ou devant les juridictions nationales à l'encontre de l'inscription de Segi sur la liste des personnes, groupes ou entités impliqués dans des actes de terrorisme. En effet, contrairement à ce que soutient le Conseil, rien ne servirait aux requérants de mettre en cause la responsabilité individuelle de chaque Etat membre pour les actes nationaux pris en exécution de la position commune 2001/931, alors qu'ils cherchent à obtenir réparation éventuelle du préjudice prétendument causé par l'inscription de Segi dans l'annexe de cette position commune. Quant à la mise en cause de la responsabilité individuelle de chaque Etat membre devant les juridictions nationales pour sa participation à l'adoption des positions communes en cause, une telle action paraît peu effective. En outre, toute mise en cause de la légalité de l'inscription de Segi dans cette annexe, notamment en vertu d'un renvoi préjudiciel en validité, est rendue impossible par le choix d'une position commune et non, par exemple, par celui d'une décision au titre de l'article 34 UE. Toutefois, l'absence de recours juridictionnel ne saurait fonder par elle-même un titre de compétence communautaire propre dans un système juridique fondé sur le principe des compétences d'attribution, tel qu'il résulte de l'article 5 UE (voir, en ce sens, arrêt de la Cour du 25 juillet 2002, Unión de Pequeños Agricultores/Conseil, C50/00 P, Rec. p. I6677, points 44 et 45)."*

[56] Ibid. at para 39. *"Les requérants invoquent encore la déclaration du Conseil relative au droit à réparation, aux termes de laquelle « toute erreur quant aux personnes, groupes et entités visés donne le droit à la partie lésée de demander réparation en justice ». Selon une jurisprudence constante, les déclarations figurant dans un procès-verbal ont une valeur limitée, en ce sens qu'elles ne peuvent être prises en considération pour l'interprétation d'une disposition de droit communautaire lorsque le contenu de cette déclaration ne trouve aucune expression dans les textes de la disposition en cause et n'a, dès lors, pas de portée juridique (arrêts de la Cour du 26 février 1991, Antonissen, C292/89, Rec. p. I745, point 18, et du 29 mai 1997, VAG Sverige, C329/95, Rec. p. I2675, point 23). Force est de constater que la déclaration en cause ne*

Amnesty International is concerned that the way in which the EU has addressed the issue of blacklisting has led to a situation where those included on EU terrorist lists are deprived of an effective remedy to challenge their inclusion. The very choice of instrument to give effect to UN Security Council Resolution 1373 creates a virtually impenetrable level of secrecy around inclusion on the lists by excessively limiting parliamentary scrutiny of the measures and by effectively removing the possibility of judicial scrutiny of individual decisions. The Council declaration to the effect that any party included in error on the lists should have the right to seek reparation pays lip service to the principle of an effective remedy without providing one in fact or in law. Amnesty International believes that a conscious effort should be made to counter the impression of Member States collectively or individually hiding behind the complexity of the EU legal framework to avoid their obligations to respect human rights.

Cases involving judicial cooperation between Member States relating to groups included on the list also show a lack of coherence which gives rise to a suspicion that Member States are not, in fact, entirely in agreement as to the inclusion of groups on the lists or as to the desirability of cooperating to combat such groups' activities. In the case of Amaya Recarte[58] the French Cour de Cassation upheld the decision of the Cour d'Appel de Pau and refused to surrender a spokesperson for Segi to Spain on the basis that part of the alleged offence (related to organising demonstrations for Segi) had been carried out in France[59].

While the French authorities based the decision for refusal to surrender to Spain on grounds of jurisdiction, Segi is not an illegal organisation in France and no moves have been made to prosecute the alleged offences in France – where they do not amount to offences. It would seem therefore that, while France must have agreed to the inclusion of Segi on the list (as such a decision requires unanimity), in practice France does not consider their activities to amount to terrorist offences that require prosecution. This discrepancy calls into question not only the consistency of states' practices but also the legitimacy of the lists themselves[60].

Amnesty International calls on the EU to review the legislation concerning terrorist blacklisting to ensure that there are clear procedures for judicial review of the inclusion of individuals or groups on the lists, as well as for reparation for damages in case of wrongful inclusion impacting on the rights of those concerned.

précise ni les voies de recours ni, a fortiori, les conditions d'ouverture de celles-ci. En toute hypothèse, elle ne peut viser un recours devant les juridictions communautaires, car elle contredirait alors le système juridictionnel organisé par le traité UE. Dès lors, en l'absence de toute compétence dévolue au Tribunal par ledit traité, une telle déclaration ne saurait le conduire à examiner le présent recours."

[57] Other related cases currently pending before the Court of First Instance are: Aden (T-306/01); Kadi (T-315/01); Othman (R-308/01); OMPI (T-228/02); PKK and FNL (T-229/02); Ayadi (T-253/02); Al-Aqsa (T-327/03); Hassan (T-49/04); Aydar and others (T-253/04); Selmani (T-299/04).

[58] Supra nr 38.

[59] Idem.

[60] Amnesty International has raised concerns about the practices relating to proscription of organisations in some Member States which, through cooperation across borders, become potential concerns at EU level in the absence of any credible collective accountability mechanism within the EU. With regard to the UK, the powers to proscribe organisations in the UK not only make it a criminal offence to belong to "terrorist organisation" but they also criminalise anyone speaking at a meeting where a member of a proscribed organisation is also speaking even if the speech opposes the activities of such organisation. The "meeting" could consist of three people "whether or not the public are admitted". The penalty for the latter offence could be imprisonment for up to ten years. These powers may infringe on the rights to freedom of association and expression. With regard to Spain, Amnesty International raised concerns about the drafting of the "Ley orgánica de partidos politicos" which posed a risk to the rights to freedom of thought, expression, assembly and association due to the broad scope of activities which could be considered as grounds for proscription.
The differences in Member States' approaches to proscription of organisations can be seen through the French courts' reluctance to surrender French nationals to Spain where they were accused of activities relating to organisations that are proscribed in Spain but not in France.

3. Prosecuting terrorists across borders: extradition and surrender between EU Member States

In the international approach to combating terrorism, it has become increasingly clear that while prosecutions and investigations may cross borders, adequate protection of human rights does not go with them. The crossing of borders in terms of preventing, investigating and prosecuting terrorism-related offences can be divided into two parts in relation to the EU: cooperation between Member States and cooperation with third countries. Two major planks of the EU roadmap to combat terrorism post 11 September 2001 were developed at EU level: the European Arrest Warrant adopted in 2001 and the EU-US agreements on extradition and mutual legal assistance concluded in 2003. Aside from these two EU-level developments, there has been a worrying trend in the methods for removing terrorist suspects from EU jurisdictions through deportation, "rendition" and even abduction.

The two categories raise quite different issues for EU policy and the protection and promotion of human rights. On the one hand, cooperation between Member States can only be facilitated by ensuring that there is a level playing field of rights protection, in particular in relation to fair trial and other procedural rights, across the territory of the EU. It is only on this basis that the principle of mutual trust can develop, enhancing cooperation based on a well-founded belief that miscarriages of justice are unlikely within the European judicial space.

On the other hand, cooperation with third countries must not result in an erosion of the level of rights protection found within the EU. How can one feel a sense of "a high level of security" where people may be taken off the street and flown out of the jurisdiction of EU Member States without even a nod to due process? The idea of an Area of Freedom, Security and Justice seems particularly thin when the EU is not prepared to use its external borders as a means of ensuring that the rights and principles enshrined in its Treaty are applied to all within its territory, including those who may be facing extradition, expulsion or other forms of removal from that territory.

3.1 Extradition between EU Member States

Extradition between EU Member States prior to the coming into force of the European Arrest Warrant (EAW) on 1 January 2004 was governed by traditional rules on extradition, principally through the Council of Europe's 1957 European Convention on Extradition. In practice, final decisions on extradition were made by the executive rather than by a judicial authority. Where the ultimate decision was taken on a political level, the desire for reciprocity meant that it was rare that a Member State would give much weight to arguments that an extradition to another EU Member State would result in a breach of human rights. Blockages to extradition were primarily on the question of differences in substantive criminal law or on the fact that most EU Member States did not extradite their own nationals, rather than on concrete human rights issues. Occasionally, however, judicial review of cases highlighted difficulties relating to the protection of human rights.

Two extradition cases between EU Member States just prior to the coming into force of the EAW, however, do show that a failure to respect human rights can undermine efficient cooperation against terrorism even within the EU. The first case of Rachid Ramda[61] in connection with the 1995 Paris metro bombing involved a judicial review by the UK High Court of the Home Secretary's decision to extradite the suspect; this resulted in a delay of the determination of the case which has now been ongoing for nine years. The second of Irastorza Dorronsoro[62] concerning an ETA

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

suspect was a decision by the French Court of Appeal in Pau to discharge the requested person. Both therefore reflect judicial rather than political decisions. The facts of these cases turned on the admissibility of evidence allegedly extracted from a third party through torture or other ill-treatment which could result in a flagrant denial of the right to a fair trial of the extraditee under Article 6 ECHR if he 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 underlying these cases remains unchanged in the EAW scheme which, without legislation to address the underlying issue of a lack of mutual trust in procedural guarantees, is likely to face similar difficulties in such cases.

These cases demonstrate two barriers to mutual trust between EU Member States:

1. the admissibility of evidence extracted through torture or ill-treatment;
2. allegations of torture or ill treatment by law enforcement officers.

In order to ensure that EU Member States can cooperate effectively with each other to combat terrorism while respecting the rights and principles enshrined in Article 6 TEU and upon which the Area of Freedom, Security and Justice is built, they will need to address these issues at an EU level through establishing EU standards in relation to procedural rights from the start of criminal proceedings and by addressing the question of the admissibility of evidence in accordance with the jurisprudence of the ECHR.

3.2 The European Arrest Warrant

The Framework Decision on the European Arrest Warrant and Surrender Procedures between Member States[63] (EAW) is not of itself a threat to the protection of human rights. Rather, in an Area of Freedom, Security and Justice bound by the principles of the rule of law and respect for human rights, the EAW system should allow judges to guarantee international human rights obligations and refuse to surrender a person where there is a danger that the requesting Member State will not be able to guarantee the requested person's human rights.

The EAW had been in preparation for some time when the events of 11 September 2001 propelled it to becoming the flagship measure of the EU's counter-terrorism response, its adoption completed in a matter of months. The main changes in extradition or surrender procedures brought in by the EAW are:

the abolition of double criminality;

- the removal of the political element in decisions on extradition by putting the decision in the hands of judicial authorities;
- the abolition of the "own national" rule whereby many Member States refused to extradite their own nationals;
- the abolition of the political offence exception;
- the optional abolition of the specialty rule, whereby a surrendered person can only be prosecuted for the offence(s) for which they were surrendered;
- the imposition of strict time limits.

The simplification of the rules on surrender brought in by the EAW do not, however, have the effect of limiting Member States' obligations under international human rights law and, in particular, the ECHR.

Article 1(3) of the EAW makes this clear when it states that:

This Framework Decision shall not have the effect of modifying the obligation to respect fundamental rights and the fundamental legal principles as enshrined in Article 6 of the Treaty on European Union.

The obligation not to extradite a person to a state where there is a serious risk of a breach of that person's rights is contained in a number of international instruments. The EU Charter of Fundamental Rights states that "no one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment" (Article 19.2). The European Court of Human Rights has established that, where extradition to a state would pose a serious risk of that person's

[63] OJ L 190, 18.7.2002, p 1.

human rights being violated, in particular the right to freedom from torture or other cruel, inhuman or degrading treatment contrary to Article 3 ECHR, or a flagrant denial of the right to a fair trial contrary to Article 6 ECHR, the extraditing state may be responsible under the ECHR for human rights violations which the individual suffered following extradition[64]. The Council of Europe's Guidelines on Human Rights and the Fight Against Terrorism adopted in 2002 reflect this jurisprudence. The UN Human Rights Committee, in relation to the International Covenant on Civil and Political Rights (ICCPR) has also noted that *"if a State party extradites a person within its jurisdiction in such circumstances, and if, as a result, there is a real risk that his or her rights under the Covenant will be violated in another jurisdiction, the State party may be in violation of the Covenant"*[65].

Paragraphs 12 and 13 of the preamble to the EAW state that:

(12) This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union, in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that the person's position may be prejudiced for any of these reasons.

This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media.

(13) No person should be removed, expelled or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

It is crucial to the working of the EAW and to the credibility of the Area of Freedom, Security and Justice, that these obligations must be respected in practice and not simply in principle. In order to make sure that human rights are respected in the application of EU legislation based on mutual recognition by judicial authorities it is imperative that judicial authorities across the EU are aware of their international human rights obligations in this regard. The advent of the EAW and the fact that requests need no longer be dealt with centrally may well mean that many judges who have never previously had cause to come into contact with EU law or with the law relating to international cooperation in criminal matters will find themselves having to grapple with complex issues that have significant implications for a person's human rights. If mutual recognition based on mutual trust is to work it will require not only the training of judges and exchange visits so that judges can become acquainted with each other's justice systems, but also training in human rights law in general and, in particular, the human rights obligations that apply in such cases.

Although the main challenges to the EAW so far have been with regard to the extradition of nationals of Member States[66], the reluctance in practice to surrender nationals may be a reflection of other issues, in particular the suspicion that the laws and/or procedures that would be applied in the requesting state would not come up to the standards applied in the requested state. Human rights are universal and each state is duty bound to respect and protect the rights of these persons in its territory and subject to its jurisdiction. Thus, the nationality of a person is not relevant to the obligation not to extradite where there would be a risk of a breach of human rights on surrender. Cases involving own nationals, however, tend to give rise to greater public

[64] *Soering v UK*, Series A, No 161 (1989).
[65] *Chitat Ng v Canada*, Communication No. 469/1991, UN Document CCPR/C/49/D/469/1991, at para 14.2.

[66] Supra nr 38. The Polish Constitutional Court ruled on 27 April 2005 that the extradition of nationals under the EAW is unconstitutional but allowed that the Constitution could be changed so that Polish law would be in conformity with the EU law. See also pending decision of the German Federal Constitutional Court 2 BvR 2236/04 Bundesverfasssungsgericht.

interest and debate which can provoke greater reflection on the issues at hand and bring to light a more general mistrust of other judicial systems.

Amnesty International urges the European Commission to carefully monitor the implementation in practice of the European Arrest Warrant, taking note of cases that raise questions of potential breaches of human rights or due process and addressing the issues that they highlight through recommendations or legislation to rectify the situation at EU level by raising standards across the territory of the EU. Amnesty International further recommends strongly that the EU focus on human rights training for judges as a core element of training through the European Judicial Training Network and exchange programs.

3.3 Procedural rights for suspects and defendants

At the time of agreement on the EAW in December 2001, the Commission promised that concerns about differing standards in the protection of fair trial rights in criminal proceedings would be met with a proposal on EU minimum standards in procedural rights for suspects and defendants. Amnesty International was active in the consultation leading up to the publication of a Green Paper followed by a proposed Framework Decision on certain procedural rights for suspects and defendants in criminal proceedings[67] (the proposal) in April 2004.

Amnesty International welcomed the proposal as the first step towards addressing the rights of defendants within the context of the Area of Freedom, Security and Justice[68]. However, it considers the scope and level of the standards of procedural rights contained in the proposal disappointing and is concerned that negotiations within the Council Working Group on Substantive Criminal Law (DROIPEN) may lead to a further dilution of those standards. If legislation in this field is to have added value to already existing obligations under the ECHR and the EU Charter of Fundamental Rights, it must be binding on Member States, capable of enforcement and sufficiently precise so as to ensure homogeneity of application across the EU. Care must also be taken that minimum standards agreed at EU level are not lower than those set by existing international standards, and that such minimum standards are interpreted in the light of the evolving jurisprudence of the European Court of Human Rights. This will ensure that EU minimum standards do not quickly become obsolete or undermine the level of rights protection afforded by the ECHR.

In September 2004[69] Amnesty International raised concern over the wording of paragraph 8 of the proposal's preamble which indicated an intention to limit some of the application of the fundamental rights included in the draft Framework Decision in relation to persons suspected of or charged with certain types of crime, and, in particular, terrorism-related offences. This concern was heightened when discussions in the Council DROIPEN[70] raised the prospect of excluding terrorist offences from the scope of the Framework Decision altogether by including a provision in the text of the Framework Decision itself to that effect rather than in the preamble. Amnesty International was therefore pleased to note that a majority of delegations and the Commission expressed the view that a suggestion to exclude "from the scope of the Framework Decision the investigations on terrorist offences prior to the point where the suspect is charged with an offence" would be incompatible with Article 6 of the ECHR[71].

In the context of future discussions on this point, Amnesty International underlines the importance of ensuring that terrorist and organised crime offences are included in the scope of the proposed Framework Decision. The proposal was initially promised as a necessary complement to the European Arrest Warrant, itself an instrument put forward as a

[67] Supra, nr 8.
[68] July 2004 (general comments) and September 2004 (specific provisions).
[69] Idem.
[70] Council document 14198/04 of 11 November 2004, p. 2.
[71] Council document 15327/04 of 10 December 2004, para 4.

key element in the fight against terrorism, and it would appear not only incoherent and inconsistent within that context, but indeed objectionable to exclude from its remit the very type of offences that it was expected to tackle.

Proceedings against terrorist suspects are often precisely those that are most susceptible to violations of human rights or to allegations of such violations. Miscarriages of justice arising from violations of human rights in terrorism cases not only create the potential that the real perpetrators of terrorist acts remain at liberty to commit other acts of terrorism, but they also have a significant impact on public confidence in the rule of law. In turn this can lead to a sense of alienation within certain sectors of society that feel as though they are being unfairly targeted in the fight against terrorism.

National legislation and practice in this field vary significantly between Member States. The breach or risk of breach of human rights in proceedings against terrorist suspects in Member States is a very real phenomenon that can lead and has led [72] to a breakdown in cooperation which is symptomatic of the absence of mutual trust. Cases where judicial cooperation has broken down as a result of (a risk) of violation of human rights have highlighted problems both in the investigatory stage and in the trial stage of proceedings against terrorist suspects[73]. An absence of trust seems also to be reflected in judicial authorities' reluctance to surrender (or to prosecute upon refusal of surrender) their own nationals requested for terrorism-related offences by other Member States[74]. Mutual trust can only be built upon genuine and enforceable common standards of protection of and respect for human rights in the fight against terrorism.

The proposed Framework Decision has been drawn up in the context of judicial cooperation within the EU and the legal base for this proposal is cited as Article 31(1) of the Treaty on European Union which allows the EU to develop common action so as to ensure compatibility in rules where necessary to improve cooperation[75]. In particular, the proposed Framework Decision aims to establish common standards which will facilitate the development of the principle of mutual recognition by ensuring that the notion of a level playing field for the protection of fair trial rights within the Area of Freedom, Security and Justice is a reality. The key to the legal basis for legislation in this area lies in its ability to adequately address problems identified in judicial cooperation and, in particular, to enhance the mutual trust between Member States which is required for the principle of mutual recognition.

In order to meet that requirement, legislation must make a concrete and discernible improvement to the protection of the rights of suspects and defendants in criminal proceedings across the EU. Judicial cooperation in criminal matters between EU Member States is commonly used to combat serious forms of criminality such as terrorism, trafficking in human beings and other forms of serious and organised crime. To remove this type of crime from the scope of the proposed Framework Decision would not only diminish the credibility of the EU's commitment to the protection of human rights in the fight against terrorism, but would undermine the very object of the proposal itself and so put its legal base into question.

The Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight against Terrorism states that "All measures by States to fight terrorism must respect human rights and the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate judicial supervision"[76]. Any restrictions on the right of defence or on communication while in detention must be necessary, strictly proportionate to their aim and must not undermine the substance of procedural rights[77]. Removing terrorism-related offences from the scope of the proposed Framework Decision could result in arbitrariness in

[72] Cases of *Ramda* (supra nr 61) and *Irrastorza* (supra, nr 62).
[73] Supra, nr 38 and 66.
[74] Idem.
[75] Supra, nr 8, explanatory memorandum at p.6, para 20.
[76] Article II, Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism.
[77] Ibid, Articles IX and XI.

measures taken to fight terrorism within the EU.

The limitation of fundamental rights such as the right of access to a lawyer, in particular in terrorist cases, is not a theoretical problem in the EU. Amnesty International is concerned about the law and practice in a number of EU Member States, particularly through the application of specific legislation aimed at combating terrorism.

3.3.1 FRANCE

Under law no. 2004-204 of 9 March 2004, a 96-hour special custody regime was extended to a wider range of offences. Moreover, under this law, persons suspected of terrorism or drug trafficking can be held incommunicado for the first 48 hours without access to a lawyer. The Council of Europe's Committee for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (CPT) had on previous occasions, including during their visit to France in 2003[78], expressed its concern to the French authorities about the – then applicable - law which denied access to a lawyer for the first 36 hours in police custody. The CPT stated that all detainees should have access to a lawyer from the outset of custody, as well as the right to the presence of a lawyer during police questioning, which is not currently permitted[79].

3.3.2 SPAIN

Concern has also been raised about the lack of prompt access to a judge or lawyer and the *incommunicado* detention of persons suspected of terrorism-related offences in Spain. Among other things, such suspects can be held in police custody for five days before being brought before a judge. Furthermore, the judge can extend the period of *incommunicado* detention for up to 13 days.

During *incommunicado* detention a suspect is denied access to a lawyer of their choice. In addition, although the suspect is provided with an appointed legal aid lawyer, the role of the lawyer is so restricted as to deny the suspect's right to legal assistance. The suspect is denied that right at the outset of detention, and the lawyer is only present when the suspect gives an official police statement, which may be several days after detention. Furthermore, throughout this time, before and after statements are given, as well as during hearings before judges, the legal aid lawyer may not communicate in private with the detainee. Moreover, the judges can impose secrecy (*secreto de sumario*) on the investigation and on judicial proceedings, either in whole or in part. Under *secreto de sumario*, suspects and their lawyers are denied access to critical information regarding the charges or the evidence, and this denial could be maintained until the investigation phase of the legal process is almost concluded[80]. Thus the suspect is denied any effective legal assistance throughout this period of detention.

In February 2004 the UN Special Rapporteur on Torture issued a report on a visit to Spain in October 2003[81]. The aim of the visit was to study the various safeguards for the protection of detainees in the context of anti-terrorism measures. The Rapporteur noted that "the degree of silence that surrounds the subject and the denial by the authorities without investigating the allegations of torture has made it particularly difficult to provide the necessary monitoring of protection and guarantees"[82]. He concluded that "in the light of the internal consistency of the information received and the precision of factual details … these allegations of torture cannot be considered to be fabrications". Although not a regular practice, "their occurrence is more than sporadic and incidental"[83].

Many of the UN Special Rapporteur's findings were in accordance with those of Amnesty International, as well as with those of the UN CAT and the Council of Europe's CPT[84]. He

[78] CPT / Inf (2004) 6. Report to the Government of the French Republic on the visit to France carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

[79] See also Amnesty International, *France: the search for justice*, April 2005, AI Index EUR 21/001/2005.

[80] Human Rights Watch report *Setting an Example? Counter-Terrorism Measures in Spain*, January 2005.

[81] E/CN.4/2004/56/Add.2 of 6 February 2004.

[82] Ibid, para 29.

[83] Ibid, para 58.

[84] The CPT, in particular, concluded in a 2003 report following its visit to Spain in 2001 that the existing legal framework failed to provide an effective set of safeguards against ill-treatment for detainees, as recommended by the Committee during its previous visit. The Committee

recommended that the Spanish government draw up a comprehensive plan to prevent and suppress torture and that the *incommunicado* regime be abrogated. However, the Spanish government made a number of objections to the report and maintained that "every single accusation of torture or ill-treatment is investigated" and that "the assertions made by the Rapporteur concerning the passivity and permissiveness of the legal and administrative authorities are completely unacceptable". It refused to introduce safeguards into the incommunicado regime, as advocated by a number of international bodies, on the grounds that they were not necessary, but there are signs that this may be reconsidered.

3.3.3 UNITED KINGDOM

Under Part 4 of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA), which expired in March 2005[85], the Secretary of State was able to certify non-UK nationals as "suspected international terrorists" and detain them indefinitely without charge or trial. The Special Immigration Appeals Commission (SIAC) was a judicial procedure which reviewed the executive decision. Under this procedure, the SIAC heard secret evidence put forward by the intelligence services in secret hearings. The detainee would be allocated a Special Advocate, who was a security cleared lawyer, and who would have access to the secret evidence and the secret hearings. However, the Special Advocate was not allowed to communicate with the detainee about the secret evidence, nor receive instructions from the detainee. Thus the detainee was denied the right to a defence. The Chairman of the parliamentary Constitutional Affairs Committee stated in April 2005: "The Special Advocate system lacks the most basic features that make for a fair trial"[86].

held on numerous occasions that the suggestion that torture and ill-treatment had been eradicated in Spain, was premature.

[85] It was not renewed in March 2005, after the Law Lords had ruled in December 2004 that Part 4 of the Act violated the detainees' human rights because the provisions for detention were disproportionate and discriminatory.

[86] http://www.parliament.uk/parliamentary_committees/conaffcom/cac020405pn16.cfm

Amnesty International urges Member States and the Commission to ensure that terrorist offences and other forms of serious and organised crime are kept fully within the scope of the proposed Framework Decision on certain procedural rights for suspects and defendants in criminal proceedings in the EU. Any decisions to limit rights in particular cases should be the subject of judicial scrutiny to ensure that they are not applied arbitrarily and that they are proportionate and clear in their aim in order to ensure legal certainty. If the standards of procedural rights set out in the ECHR and the jurisprudence of the European Court of Human Rights cannot be met in the negotiations on the proposed Framework Decision, Amnesty International would urge the Commission to withdraw the proposed Framework Decision in its entirety rather than to establish standards that are below the existing human rights obligations of Member States.

3.4 Admissibility of evidence

The subject of the admissibility of evidence in criminal proceedings has not yet been addressed by the European Commission although Amnesty International understands that a green paper on the presumption of innocence is expected from the Commission before the end of 2005 and another green paper on the gathering and admissibility of evidence has been scheduled for June 2006. The problem that had been identified in both the UK case of ex p. Ramda[87] and in the French case of Irastorza Dorronsoro[88] was the risk that evidence that had allegedly been extracted through torture or other ill-treatment would be admissible as evidence in criminal proceedings. The ex p. *Ramda* judgement based its arguments on the ECHR and the fact that if evidence extracted by torture or ill-treatment was admissible in the determination of the charge against Ramda he would not

[87] Case of *Ramda*, supra, nr 61.

[88] Case of *Irrastorza*, supra nr 62.

have a fair trial in accordance with Article 6 ECHR. The Irastorza Dorronsoro decision was based on Article 15 of the UN Convention against Torture[89] which states that:

"Each state party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made".

The French court took the view that such evidence was the only evidence upon which the request for extradition had been made and therefore refused extradition.

Following the attacks of 11 September 2001, the UN CAT issued a statement condemning the atrocities in the strongest terms, and reminded State parties of the non-derogable nature of the obligations undertaken by them in ratifying the Convention:

"The obligations contained in Articles 2 (whereby "no exceptional circumstances whatsoever may be invoked as a justification of torture"), 15 (prohibiting confessions extorted by torture being admitted in evidence, except against the torturer), and 16 (prohibiting cruel, inhuman or degrading treatment or punishment) are three such provisions and must be observed in all circumstances"[90].

The application of Article 15 of the Convention against Torture is not limited to statements made by the person who was alleged to have been tortured, or to cases in which the state conducting the proceedings has itself procured or connived in the obtaining of the statement by torture. Indeed, the CAT has specifically stated that:

"Statements obtained directly or indirectly under torture should not be admissible as evidence in the courts".

In *PE v France*[91], the CAT clarified that Article 15 applies in circumstances where one state seeks to adduce evidence allegedly obtained by torture in another state.

The CAT held that *"the generality of the provisions of article 15 of the Convention derive[d] from the absolute nature of the prohibition of torture and impl[ied], consequently, an obligation for each State party to ascertain whether or not statements constituting part of the evidence of a procedure for which it is competent have been made as result of torture"*[92]. With this, the CAT underscored the requested State parties' positive obligation to make enquiries as to the validity of the allegations of torture used to extract incriminating evidence in the requesting State.

The UN Special Rapporteurs on Torture have consistently followed the line of the CAT in their reports.

Amnesty International raised a number of serious concerns about the application of Part 4 of the UK ATCSA. Under that Act the Home Secretary had the power to certify a non-UK national as a "suspected international terrorist". The effect of such certification was the detention without charge or trial of the person certified. The certification was reviewable by the SIAC. In July 2003, in the course of part of an appeal against such certifications before the SIAC, which took place in public, counsel for an internee cross-examined an MI5 (security services) witness known as Witness A. During his cross-examination, Witness A made statements to the effect that it was possible that evidence extracted under torture could be assessed as reliable by MI5, and that, therefore, it could be relied upon by the Home Secretary in the context of the SIAC proceedings.

On 29 October 2003, the SIAC ruled that "evidence" extracted under torture of a third party was not only admissible in judicial proceedings but may also be relied on by the SIAC in reaching judgement. On appeal to this ruling, the Court of Appeal of England and Wales on 11 August 2004 disturbingly "clarified" its view that "evidence" obtained by torture of a third party (i.e. not the ATCSA internee) would only be deemed non-admissible if it had been directly procured by UK agents or if UK agents had connived in its procurement. Otherwise, "evidence" obtained

[89] Which has been ratified by all EU Member States.
[90] CAT annual report, UN Document A/57/44 (2001), para. 17.
[91] CAT Communication No 193/2001: France. CAT/C/29/D/193/2001, 19 December 2002.
[92] Ibid, para 6.3.

through torture would be admissible and could be relied upon. The appeal of this judgement to the UK's highest court, the Appellate Committee of the House of Lords (the Law Lords) remains pending[93].

Upon its examination of the UK's report of its implementation of the Convention against Torture, the CAT expressed concern that UK domestic legislation had been "interpreted to exclude the use of evidence extracted by torture only where the State party's officials were complicit". With respect to this, the CAT recommended that the UK authorities should not "rely on or present in any proceeding evidence where there is knowledge or belief that it has been obtained by torture". It also recommended that the UK authorities should "provide for a means whereby an individual can challenge the legality of any evidence in any proceeding plausibly suspected of having been obtained by torture"[94].

Amnesty International is profoundly concerned that the Court of Appeal's judgement does nothing to prevent torture by agents of other states. Reliance by the authorities on "evidence" thus obtained and its admission by the courts, in effect gives a green light to torturers and undermines the absolute prohibition of torture and other ill-treatment.[95]

Such a development can have no place in a genuine Area of Freedom, Security and Justice and Amnesty International urges the EU, through the Commission and potentially through the Council using the procedures under Article 7 TEU, to ensure that Member States comply fully with the international prohibition of torture and other ill-treatment. In order to render this prohibition effective, there must be a total ban on the introduction of "evidence" obtained through torture or other ill-treatment in any proceedings, including judicial ones, except against a person accused of torture. Such a ban must apply irrespective of the location in which the torture or other ill-treatment treatment took place and regardless of who was responsible for such acts.

Amnesty International urges the Commission to address the issue of the admissibility of evidence extracted through torture or other ill-treatment in the forthcoming green papers on evidence to ensure that the EU applies clear standards in conformity with the UN Convention against Torture and the ECHR.

[93] Hearings in the case are scheduled to take place in October 2005; Amnesty International and 13 other NGOs have been granted leave to make oral and written submissions to the Court.
[94] CAT/C/CR/33/3, 10 December 2004, para 4(a)(i).
[95] See *UK: Briefing for the Committee against Torture*, November 2004, AI Index: EUR 45/29/2004.

4. Prosecuting terrorists across borders: extradition and expulsion to third countries

Extradition to countries outside the EU is generally governed by bilateral treaties with individual Member States or, within the Council of Europe, by the European Convention on Extradition 1957. The EU concluded an agreement with the USA in 2003 on extradition[96] and another on mutual legal assistance[97] which provide a framework within which Member States must apply rules on extradition in their bilateral relations with the USA[98]. At the time of the agreement Amnesty International raised concerns[99] relating to the unsatisfactory nature of the provision on the death penalty and to the absence of a substantive reference to the guarantee of fair trial rights.

Some recent cases have highlighted the problem of multiple requests for extradition not made in good faith to different EU Member States successively where extradition has already been refused in another Member State and even asylum granted on the facts of the case. Amnesty International believes that this development should be addressed at EU level as an issue which touches on the credibility of the Area of Freedom, Security and Justice. It reflects that, while prosecutorial measures are recognised across borders, the protection of human rights is not.

Despite the existence of clear international standards, the relationship between asylum and extradition has recently become increasingly complex given the lack of adequate safeguards in some national legislations to protect asylum seekers against extradition measures while their cases are still pending. The aftermath of 11 September 2001 has also had a great influence on Member States' practice regarding revocation of refugee status and extradition or expulsion of terrorist suspects. While sending governments may have sought diplomatic assurances, the practice shows that countries offering such assurances may be those where human rights violations often occur.

Outside of the traditional framework of extradition, there is an increasingly worrying trend within the context of the "war on terror" to use avenues to surrender suspects across borders, practices which bypass the requirements of due process and lead to serious breaches of human rights[100]. Such practices include "extraordinary rendition", expulsion with diplomatic assurances and illegal abduction. Amnesty International is extremely concerned that some EU Member States have been complicit in such practices or have not behaved with due diligence to protect those under their jurisdiction from the human rights abuses that can arise out of such practices. If the EU is serious about creating an Area of Freedom, Security and Justice, it must ensure that such practices are not tolerated within its borders by drawing up a framework of standards to be applied to the surrender of persons outside the EU in whatever form that takes.

4.1 Extradition agreements with third countries

4.1.1 EU-US AGREEMENT

In 2003 the EU concluded an extradition agreement with the US – the first agreement of its kind on judicial cooperation in criminal matters with a third country. The negotiations leading up to the agreement were widely criticised for their lack of transparency and the absence of any democratic scrutiny on the process. There was concern that the EU could

[96] OJ L 181, 19.7.2003, p 27.
[97] Ibid, p 34.
[98] Individual Member States may go further in enhancing cooperation in their bilateral treaties.
[99] *"EU-US extradition agreement still flawed on human rights - Recommendations to the JHA Council of 5-6 June 2003"*, AI Index EUR 01/005/2003, 4 June 2003

[100] Shortly after 11 September 2001, Statewatch News published a list of actions to combat terrorism proposed by President Bush to Romano Prodi, then President of the European Commission. Among these was the proposal to "[e]xplore alternatives to extradition including expulsion and deportation where legally available and more efficient."

bind its Member States in an agreement which could have a significant impact on the respect for human rights within the EU without full consultation and democratic accountability. At the time of the agreement Amnesty International raised a number of concerns about its provisions[101].

Article 13 of the extradition agreement contains express provision on the death penalty, entitling any Member State to require as a condition for extradition that the death penalty shall not be imposed, or if imposed shall not be carried out, if that Member State does not impose the death penalty for the offence in question.

However, it provides only that Member States *may* set a condition that the death penalty not be imposed or carried out, or that they *may* refuse extradition if the US does not accept the relevant conditions. Unlike comparable clauses in several bilateral agreements, there is no obligation imposed on EU Member States by the EU-US agreement to set such a condition or to refuse extradition in such a case. Amnesty International considers that such an obligation arises for all EU Member States as regards the death penalty in peacetime by virtue of their ratification of Protocol 6 to the ECHR. Furthermore, the Charter of Fundamental Rights is unequivocal in its prohibition of extradition when there is the risk of facing the death penalty. Similarly, the application of the death penalty in all circumstances is prohibited by Protocol 13 to the ECHR.

Amnesty International considers that Article 13 of the extradition agreement leaves an unacceptable margin of discretion with regard to conditioning and refusing extradition in the face of the death penalty. It is not consistent with Protocols 6 and 13 to the ECHR and with the EU Charter of Fundamental Rights which prohibit extradition where there is a risk of the death penalty. It must, however, be interpreted in a manner which is consistent with the EU's stance on the death penalty and with Member States' obligations under international law.

Another problem regarding Article 13 is the provision that the death penalty may in fact be imposed as long as it is not carried out. It is understood that for the US an absolute prohibition to extradite in case of death penalty was not acceptable because it considered that such a limitation might preclude prosecution in certain cases per se and so create de facto discrimination among US citizens. Nevertheless, Amnesty International believes that this is at odds with the Charter of Fundamental Rights which in Article 2 states that *"no one shall be condemned to the death penalty, or executed"*, and in Article 19.2 stipulates that *"no one may be removed, expelled or extradited to a state where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment"*. Even if an extradited person is not executed, a death sentence and subsequent confinement in death row can be regarded as cruel and inhuman treatment notwithstanding the absence of the prospect of actual execution[102]. The final choice of wording also dilutes the commitment from the JHA Council Conclusions of 26 April 2002 stating that *"the Union will make any agreement on extradition conditional on the provision of guarantees on the non-imposition of capital punishment sentences"*.

Finally, the death penalty provision hinges on the requesting state not only accepting the conditions, but also complying with them. There is no mechanism to ensure that the United States will fulfil its obligations pursuant to the agreement if it accepts the relevant conditions. There is no joint court or other dispute settlement organ which has the power to issue binding decisions concerning the application of the agreement to individual cases. The only "sanction" possible is the prospect of terminating the agreement with six months' notice.

It cannot be considered purely theoretical that the United States would breach its own undertakings; the US capital justice system is known to be flawed, including on the issue of compliance with international obligations. The military commissions established in the context

[101] Amnesty International *"EU-US extradition agreement"* document, supra nr 99.

[102] See ECHR, *Soering v UK*, supra, nr 64.

of the camps at Guantánamo Bay, which have the power to hand down death sentences, add to this concern. It is conceivable, for example, that the case of a non-US citizen accused of a terrorist offence, initially to be tried in the regular criminal justice system, could subsequently be transferred for trial by military commission, as was reportedly considered in the case of French national Zacarias Moussaoui.

Another central issue is that of US compliance with international obligations regarding fair trial, in itself sufficient reason for concern with regard to the extradition agreement. From the EU's point of view, as this was the first agreement of its kind, the overriding aim should have been to set a clear standard to ensure that rights protection obligations stemming from its own constitutional principles and from international human rights commitments are properly guaranteed.

An implicit possibility to refuse extradition on fair trial grounds is set out in Article 16a (1), which permits refusal to extradite on any ground set out in a bilateral extradition treaty which is not covered by the EU-US agreement. It follows that the application of any bilateral agreements permitting refusals to extradite on fair trial grounds is not precluded by the EU-US treaty.

Trust in the US guaranteeing fair trial cannot be unqualified. As Amnesty International has pointed out repeatedly, the US, in pursuing the "war on terror", continues to violate its obligations under international human rights and humanitarian law, including its duties to uphold standards of fair trial and to protect against arbitrary detention. Amnesty International has repeatedly raised concerns about the possibility of trials by executive military commissions with the power to hand down death sentences and no right of appeal, and called on the US government to end the legal "black hole" in which it has been keeping hundreds of detainees in Guantánamo Bay.

4.1.2 FUTURE AGREEMENTS

The EU-US agreements on extradition and mutual legal assistance were the first of their kind negotiated by the EU and it may be that further agreements with third countries may be negotiated in the future, particularly within the context of the fight against terrorism. For example, cooperation in the area of counter-terrorism is to be stepped up between the EU and the Russian Federation.

The Road Map for the Common Space of Freedom, Security and Justice agreed at the 10 May 2005 EU-Russia Summit foresees intensified cooperation in the area of counter-terrorism, including full cooperation to *"(…) find, deny safe haven and bring to justice, on the basis of the principle to extradite or prosecute any person who supports, facilitates, participates, or attempts to participate in the financing, planning, preparation or commission of terrorist acts or provides safe havens".* This aspect will also be taken into account in development of asylum cooperation with the Russian Federation. The Road Map stresses that cooperation will be *"in accordance with international law, in particular international human rights, refugee and international humanitarian law"*[103].

Amnesty International is concerned that the lack of transparency which characterised the negotiation process with the US making external scrutiny extremely difficult, should not be repeated in future agreements of this kind which may have substantial implications for the human rights of individuals concerned and for the protection of human rights generally.

Amnesty International urges the EU, in its negotiations on any future agreements with third countries on matters of judicial cooperation and of cooperation in the fight against terrorism more broadly, to set clear parameters for the respect of human rights in this context that meet the standards that the EU applies within the Area of Freedom, Security and Justice, in particular the ECHR and its protocols, the abolition of the death penalty and the full respect of the rights not to be subjected to torture or other ill-treatment and to a fair trial.

[103] *Road Map for the Common Space of Freedom, Security and Justice*, 15th EU-Russia Summit, Moscow 10 May 2005, 8799/05 ADD 1 (Presse 110), pp. 23-24.

4.2 Multiple requests

An individual must be able to move around the EU secure in the knowledge that a decision to refuse extradition to a third country on the grounds of lack of evidence or of the risk of human rights abuse will be recognised throughout the Area of Freedom, Security and Justice. While the EU is developing the principle of mutual recognition (whereby an order from a judicial authority in one Member State is to be recognised as valid in another Member State based on mutual trust in the quality of justice in the EU) of judicial orders relating to prosecutions and investigations, it seems inconsistent that the same principle should not apply to judicial findings relating to the protection of fundamental rights in the context of criminal law and extradition proceedings.

The case of Akhmed Zakayev demonstrates how the problem of multiple extradition requests to different EU Member States undermines the principle of legal certainty and the right to freedom of movement of persons within the EU. Akhmed Zakayev, an envoy of the late Chechen President Aslan Maskhadov, was first arrested on 30 October 2002 in Copenhagen where he was attending the World Chechen Congress. Amnesty International welcomed the decision by Denmark's Justice Ministry to refuse, due to lack of evidence, to extradite Mr Zakayev as requested by the Russian Federation[104]. Mr Zakayev was subsequently arrested on his arrival in the UK from Copenhagen on 5 December 2002 on another extradition request from the Russian Federation, but later released on bail.

Amnesty International urged the UK authorities not to extradite Mr Zakayev to the Russian Federation on the grounds that, if extradited, he risked being subjected to torture or ill-treatment or an unfair trial. The UK judge decided that the extradition request should be declined on the grounds that Akhmed Zakayev's ethnicity and political beliefs made it likely that he would be subjected to torture if returned to the Russian Federation. During the extradition hearings in the UK, experts and witnesses gave evidence of widespread torture of persons held in pre-trial detention centres and prisons. One witness, Duk-Vakha Doshuyev, alleged for example that he had been tortured into providing accounts to support the Russian Federation's extradition request. In November 2003 Mr Zakayev was granted refugee status in the UK.

Another example of competing requests and interests blurring the lines of due process (although not strictly involving two EU Member States) was the case of Mullah Krekar, an Iraqi Kurd, which involved a complex array of competing extradition requests from Jordan and Iraq and deportation proceedings between The Netherlands and Norway. While an extradition request from Jordan to The Netherlands was never formally refused on human rights grounds by the Dutch Court as Mr Krekar was deported to Norway before the extradition proceedings were completed in January 2003, The Netherlands has a policy of not extraditing to Jordan due to fears of human rights abuses. In Norway Mullah Krekar was the subject of another request for extradition from Jordan and a further request from Iraq. On 15 June 2004 it was announced in Norway that all charges were to be dropped against Mullah Krekar for lack of evidence and fears that witness testimony in Iraq was coerced[105].

Amnesty International considers that within the context of the Area of Freedom, Security and Justice, where an extradition request is refused on the grounds of having not been made in good faith, of lack of evidence, or of a risk of a breach of fundamental rights, that decision ought to be recognised across the EU on the basis of mutual recognition. Shopping by third countries in the EU should not be tolerated as it undermines the credibility of a Union based on common values and threatens the principle of freedom of movement by eroding legal certainty.

There may be a justification for renewed requests to different EU Member States where refusal to extradite was based on grounds which may be substantially different between

[104] Amnesty International, *Russian Federation: Denmark releases Chechen envoy*, AI Index EUR 46/065/2002, 3 December 2002.

[105] Unless, in the case of lack of evidence, credible new evidence is provided before extradition proceedings are initiated.

Member States (such as, for example, the requirement for double criminality which might be met in one Member State and not in another, genuine and credible new evidence, or the application of the "own national" rule where some Member States may not extradite their own nationals to third countries). However, in cases where the refusal is based on the international obligations of Member States to protect those within their jurisdiction from breaches of human rights which are common to all Member States and form part of the basic principles upon which the EU is founded, refusal from one Member State should mean automatic refusal to extradite from any Member State.

Amnesty International urges the EU to develop minimum standards for the protection of human rights in the context of extradition to third countries and to establish a system of mutual recognition of decisions to the effect of refusing extradition on grounds of potential breach of human rights obligations, so as to ensure that different responses to multiple requests made across the EU do not undermine legal certainty and the principle of freedom of movement.

4.3 Competing proceedings: extradition and asylum

4.3.1 INTERNATIONAL LAW PRINCIPLES

Asylum and extradition intersect when an asylum seeker or a recognised refugee is requested by a third country for criminal proceedings. Refugee status does not have to prevent extradition *per se*, as long as adequate legal safeguards protecting individuals from persecution and torture are in place.

According to Article 33.2 of the 1951 Geneva Convention, the only exception to the principle of *non-refoulement* applies where there are *"reasonable grounds for regarding [him or her] as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country"*. As an exception to the general principle of *non-refoulement*, paragraph 2 of Article 33 has to be interpreted restrictively. The threshold for application of this exception is high – the requested refugee must be a threat to the foundations of the public order or the very existence of the state he is in. The danger to the community must be very serious, threatening the safety of the population of the country[106]. The decision to extradite the person must be taken by a competent authority and conform to the principle of proportionality whereby the danger entailed to the refugee by expulsion or return is weighed against the threat to public security that would arise if he were permitted to stay.

However, the exceptions listed under Article 33.2 may be seen as redundant given the jurisprudence of the European Court of Human Rights, which has considerably broadened the scope of the principle of *non-refoulement* through a wide interpretation of Article 3 ECHR. This article states that under no circumstances can a person be sent back to a country where s/he risks facing torture or cruel, inhuman or degrading treatment or punishment. The European Court has consistently ruled that Article 3 ECHR applies regardless of the legal status of the person under the Geneva Convention[107]. The Court also put an end to controversies regarding the possibility to apply Article 3 ECHR both to administrative measures and judicial measures, by stating explicitly that the principle of *non-refoulement* applies to anyone subjected to a deportation order[108], to an extradition order[109] or to any measure of expulsion[110].

The European Court of Human Rights has consistently acknowledged that contracting states are afforded some discretion as to the manner in which they conform to their obligations under Article 3 ECHR. However, it has expressly held that there can be no exception on the grounds of public order or

[106] See Sibylle Kapferer, *The Interface between Extradition and Asylum*, UNHCR Department of International Protection, November 2003, paras 233-236.
[107] See ECHR, *X, Cabales and Balkandali v United Kingdom*, 11 May 1982.
[108] See ECHR, *Cruz Varas v Sweden*, 20 March 1991.
[109] See ECHR, *Soering v UK*, supra nr 64.
[110] See ECHR, *Vilvarajah and others v United Kingdom*, 30 October 1991.

national security. In the case of *Chahal v the UK*, the European Court of Human Rights ruled that the return to India of a Sikh activist would violate the UK's obligations under Article 3, despite diplomatic assurances proffered by the Indian government that Chahal would not suffer mistreatment at the hands of the Indian authorities. The Court stated that in *non-refoulement* cases *"the issues concerning national security are immaterial" […] "given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to [the prohibition of torture]"*[111].

The same interpretation has been endorsed by UN treaty monitoring bodies, such as the UN CAT, and the absolute prohibition of *refoulement* is now considered to be part of customary international law. In the case of *Paez v Sweden*[112], the CAT held that "the nature of the activities in which the person concerned engaged cannot be a material consideration when making a determination under Article 3 of the Convention [, that prohibits *refoulement* of individuals in another State]"[113]. Therefore, it excluded the possibility of balancing the decision to expel an individual against his possible membership in a terrorist organisation, if expulsion was likely to result in torture, cruel, inhuman or degrading treatment or punishment.

4.3.2 THE INTERACTION BETWEEN ASYLUM AND EXTRADITION PROCEDURES IN PRACTICE

While the legal safeguards have been clearly established, the interaction between asylum and extradition procedures is fragile in practice given that the assessment of the safety of the country requesting the extradition remains highly political. Governments in Europe and North America are increasingly sending alleged terrorist suspects and others to abusive states based on so-called "diplomatic assurances" of humane treatment that in fact expose these individuals to serious risk of torture or other ill-treatment upon return. Countries offering such assurances have included those where torture and other ill-treatment are often practised, as well as those where members of particular groups are routinely singled out for the worst forms of abuse. In the face of the absolute prohibition of *refoulement*, sending governments have justified such transfers by referring to diplomatic assurances they sought from the receiving country that the suspects would not be tortured or ill-treated upon return[114]. Research carried out by Human Rights Watch shows that an assessment of the appropriateness of the use of diplomatic assurances varies greatly according to states' diplomatic agendas[115].

Furthermore, an assessment of states' practices reveals the lack of a uniform approach regarding the relationship between status determination usually done through an administrative procedure and extradition procedures, which are judicial in nature. This question is not settled by existing EU standards, despite discussions within the different working groups of the EU Council involved in the negotiations of the draft directive on minimum standards on procedures in EU Member States for granting and withdrawing refugee status[116]. Given Member States' reluctance to limit their competence regarding the issue of extradition within the framework of this directive, the final text leaves open the possibility for EU Member States to carry out an extradition request while an asylum application is still pending.

While it still remains to be approved by the European Parliament before it can enter into force, Amnesty International fears that the ambiguous provisions of this directive, once adopted, may downgrade refugee protection in this regard. Although it does include general reference to the principle of *non-refoulement*, under its Article 6.2, Member States can make an exception to the applicant's right to remain

[111] See ECHR, *Chahal v UK*, 19 November 1996.
[112] CAT/C/18/D/39/1996, 28 April 1997.
[113] Ibid, paras 14.4 and 14.15.

[114] *Call for action against the use of diplomatic assurances in transfers to risk of torture and ill-treatment,* joint statement by Amnesty International, Association for the Prevention of Torture, Human Rights Watch, International Commission of Jurists, International Federation of Action by Christians for the Abolition of Torture, International Federation for Human Rights, International Helsinki Federation for Human Rights, World Organisation Against Torture,, AI Index ACT 40/002/2005, 12 May 2005.
[115] Human Rights Watch report, *Still at Risk: Diplomatic Assurances No Safeguard Against Torture*, April 2005 vol.17, n°4.
[116] Council document 14203/04, ASILE 64, November 2004.

on their territory while the asylum application is still pending *"where they will surrender or extradite, as appropriate, a person either to another Member State pursuant to obligations pursuant with a European Arrest Warrant or otherwise, or to a third country, or to international criminal courts or tribunals"*. Further, under its Article 23 (m), Member States will be entitled to consider an asylum claim as manifestly unfounded and process it under a fast track procedure when the applicant is considered to be a threat to public order or to national security. In such a case, the applicant may be expelled or extradited before the end of the asylum procedure given that the appeal has no suspensive effect[117].

The case of Akhmed A.[118] demonstrates the gaps in effective protection of asylum seekers from *refoulement* in extradition cases as well as the shortcomings of the Austrian legislation. Akhmed A. is a Russian citizen who was extradited to Russia while his application for asylum was pending before the Austrian Appeals Board[119]. He applied for asylum in Austria in early 2001, claiming that he would face persecution if sent back to Russia due to his ethnic origin and religion (Kumücke) and his work for the Dagestan militia near the Chechen border.

After his initial claim for asylum was rejected, Akhmed A. lodged an appeal with the Independent Federal Asylum Review Board. Although his appeal was pending before the Board, he was detained pursuant to the extradition request by the Public Prosecutor of the Russian Federation. Despite the acknowledgement of the regional court that Akhmed A. could face torture or ill-treatment upon his return to Russia, it went on to authorise extradition following diplomatic assurances on the part of Russia guaranteeing compliance with Articles 3 and 6 ECHR. The Austrian Minister of Justice, competent to overrule the finding of the Court, confirmed the extradition decision and affirmed that "all the rights required to present a defence will be available to Mr. A., and he will not be subject to torture, cruel, inhuman or degrading treatment or punishment"[120]. It must be noted that the assessment of the extradition request was made without looking into the grounds for extradition presented by Russia given that the court is not even authorised to verify the validity of charges of the applying state. Only the offence as well as date and location of the alleged crime must be indicated. Preliminary proceedings in this regard could only be carried out by the asylum authorities, but this is made impossible in that the extradition takes place before completion of the pending asylum procedure.

Although according to the Austrian Asylum Act, expulsion and deportation are prohibited during an ongoing asylum procedure, the Ministry of Justice held that as the prohibition did not explicitly mention "extradition", it was possible to meet the Russian extradition request. Amnesty International believes that such a restrictive interpretation is not in conformity with the above-mentioned case law of the ECHR, nor with the spirit of the Geneva Convention. According to the UN High Commissioner for Refugees, a refugee claim must be determined in a final decision before execution of any extradition order[121]. Whereas procedures of determination of refugee status and extradition request may run in parallel, the actual execution of the extradition request cannot be made before refugee status has been recognised or otherwise. This is required to ensure that should well-founded fear or persecution exist, it is established before the person concerned is deported[122].

Akhmed A. is currently in detention in Dagestan and there have been claims of torture and ill-treatment. Amnesty International has expressed concerns regarding inadequate monitoring the situation of Akhmed A. following his return[123].

[117] Ibid, Article 38.

[118] In order to maintain some measure of confidentiality, Amnesty International uses his first name only as an identifier.

[119] Amnesty International, *Europe and Central Asia summary of Concerns in the Region*, January-June 2004, 1 September 2004.

[120] Human Rights Watch, *Diplomatic Assurances* report, supra 115, p. 77.

[121] UNHCR, *Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, HCR/GIP/03/05, 4 September 2003.

[122] Ibid, p 78.

[123] Amnesty International, *Europe and Central Asia summary*, supra nr 119.

Despite a positive outcome, the case of Mohamed Bilasi–Ashri offers another illustration of the deficiencies of the Austrian legislation[124]. In November 2001, the Court of Appeal in Vienna ordered the extradition to Egypt of Mohamed Bilasi-Ashri, who had been sentenced in absentia in Egypt to fifteen years of hard labour for alleged involvement in an Islamic extremist group. The court considered Mr Bilasi-Ashri's claim that he would be at risk of torture or ill-treatment and would not be given a fair trial upon return, but concluded that "Egypt was not a country where serious large scale violations of human rights could be considered an institutionalised everyday practice …[t]hus there was no general obstacle to extradition". The Court of Appeal dismissed evidence that members of Islamist groups in Egypt are frequently subjected to torture and ill-treatment, including electric shocks, beatings, burning and various forms of psychological abuse. The court also determined that Mr Bilasi-Ashri's pending asylum application did not preclude his extradition. However, the Court of Appeal conditioned his extradition upon receiving diplomatic assurances from the Egyptian authorities that Mr Bilasi-Ashri's conviction *in absentia* would be declared null and void, that he would be retried before an ordinary criminal court and would not be persecuted or suffer restrictions upon his personal freedom.

Austrian authorities requested permission from the Egyptian government to visit Mr Bilasi-Ashri after his return to Egypt. In March 2002, the UN High Commissioner for Refugees requested that Austria grant Mr Bilasi-Ashri refugee status on the basis that he had a well-founded fear of persecution if returned. In March and April 2002, the European Court of Human Rights requested that Austria not return Mr Bilasi-Ashri until the Court reviewed his case. The Egyptian authorities subsequently rejected the conditions laid out in the extradition order and Mr Bilasi-Ashri was released from detention in Austria in August 2002[125].

Aside from individual cases, Amnesty International is concerned that national differences in the approach to the relationship between asylum and extradition procedures can result in an erosion of the right to asylum. Asylum seekers subject to extradition proceedings must be provided with an effective opportunity to have their claim examined or to challenge the legality of their transfer to a country where they might face serious human rights violations.

Amnesty International is also concerned that countries rely on diplomatic assurances as a device to circumvent their obligation to prohibit and prevent torture or other ill-treatment including the *non-refoulement* obligation. As in the process of extradition the validity of charges of the applying state cannot be verified pursuant to applicable legal rules, the danger remains that states might fabricate offences in order to persecute rather than prosecute asylum seekers they have traced. To establish whether extradition is lawful, the question of refugee status of persons subject to such proceedings has to be resolved by the competent asylum authorities. This is made impossible in practice when extradition or expulsion takes place before a final decision on an asylum claim has been made.

4.3.3 POTENTIAL BREACH OF THE *NON-REFOULEMENT* PRINCIPLE

Amnesty International is concerned that the transposition of the Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection, adopted in April 2004[126], may further complicate the relationship between extradition and refugee status determination procedures.

Indeed, the negotiations on the qualification directive took place in the aftermath of 11 September 2001, and revealed a clear willingness on the part of certain Member States to broaden the scope of the exclusion clauses of the Geneva Convention. The directive enhances the possibility for Member States to revoke or end refugee status when

[124] Amnesty International, *Austria: Risk of forcible return/torture, Muahmmad Abd al-Rahman Bilasi-Ashri, (m) aged 35, married with five children*, AI Index EUR 13/001/2002, 4 January 2002.

[125] Reprinted in Human Rights Watch, *Diplomatic Assurances* report, supra, nr 115.

[126] Council Directive 2004/83/EC of 29 April 2004, OJ L 304, 30.9.2004, p 12.

"there are reasonable grounds for regarding him or her as a danger to the security of the Member State in which he or she is present"[127]. This provision is all the more worrying in that the directive seeks to soften the absolute prohibition of *non-refoulement*. Provided that the *refoulement* complies with Member States' international obligations, the directive allows Member States to return a refugee, whether formally recognised or not, when there are reasonable grounds for considering him or her as a danger to the security of the Member State in which he or she is present; or for considering that he or she, having been convicted by final judgement of a particularly serious crime, constitutes a danger to the community of that Member State[128].

Amnesty International has expressed strong concerns regarding the erroneous linkage between the revocation procedure and references to grounds held in Article 33.2 of the Geneva Convention. The provisions of the qualification directive are at variance with the Geneva Convention and its Article 1F, which provides an exhaustive list of exclusion grounds[129]. It is important to recall that the granting of refugee status is declaratory, i.e. it is not the actual eligibility decision that makes someone a refugee but the actual facts which have forced the refugee to leave his country of origin or of former residence. The eligibility procedure only acknowledges a quality that did pre-exist. As a consequence, the process for revoking refugee status is only available in very limited circumstances[130].

The provisions of the qualification directive go far beyond these conditions and are confusing provisions that serve different purposes. Indeed, Article 33(2) deprives a refugee of the benefit of the *non-refoulement* provision, but it does not exclude or deprive a refugee from refugee status. On the other hand, it must be recalled that a person who has committed an offence or who is suspected to threaten the public order or the national security of one Member State may still have a well-founded fear of persecution and therefore be a genuine refugee according to Article 1A of the Geneva Convention. Amnesty International considers the linking of the conditions for revocation to grounds of Article 33.2 as rather alarming with potentially serious consequences for the individuals concerned, as it might result in *refoulement*.

In addition, Amnesty International believes that in the absence of common definitions under EC law of "danger to national security" or "particularly serious crime", such provisions open the door to extensive and inappropriate interpretation. The above-mentioned cases clearly show that the use of diplomatic assurances is a highly politicised exercise that has led to state obligations regarding the principle of *non-refoulement* being circumvented.

Although the qualification directive has not yet been transposed by EU Member States, the potential danger of the revocation clause can be illustrated by recent evolution in German practice, and particularly through the case of Metin Kaplan, a Turkish national and radical Muslim cleric, who was extradited to Turkey in October 2004 after more than 20 years of asylum in Germany[131]. He was found guilty of inciting hate in Germany and is wanted in Turkey for high treason and involvement in a plot to blow up a strategic target in Istanbul in 1998. The initial decision by the German court not to extradite Mr Kaplan on the grounds that he would face torture and unfair trial in Turkey has been criticised by the leader of the Christian Social Democrats in Germany as "one of the biggest disgraces for the security authorities in past years"[132]. The higher court later ordered deportation of Mr Kaplan, claiming that the written agreement issued by

[127] Ibid, Article 14.4 (a) relating to refugee status. Under article 17.1 (d), similar provisions apply to revocation of subsidiary forms of protection.

[128] Council Directive 2004/83/EC, supra, nr 127, Article 21.2 (a) and (b).

[129] UNHCR Guidelines, supra nr 122.

[130] According to paragraph 117 UNHCR handbook on procedures and criteria to be applied for granting refugee status, revocation can only occur under the following circumstances:

(i) where evidence can be adduced that the declaration was inaccurately or improperly made;
(ii) where the Article 1C cessation clauses apply;
(iii) where it subsequently appears that one of the exclusion clauses would have applied to him had all the relevant facts been known at the time the decision was made.

[131] Human Rights Watch, *Diplomatic Assurances* report, supra nr 115.

[132] Deutche Welle online, 30.05.2004.

the Turkish authorities would prevent him from being subjected to torture.

Following the attacks on 11 March 2004 in Madrid the anti-terror measures within the German Immigration Act were again expanded, resulting in the introduction of a number of clauses facilitating deportation. The new Immigration Act entered into force in January 2005. A deportation order can now be issued on the basis of an "evidence-based threat prognosis", i.e. if there are fact-based reasons to suspect that the person might be a threat to national security. Proof that someone committed a crime is not needed, the suspicion based on facts suffices for deportation. In cases where deportation would result in suspects facing torture of the death penalty in their home country, they would be allowed to stay in Germany under tight restrictions, limiting freedom of movement and the right to communication. Breach of these restrictions would be heavily penalised. The new Act gives discretionary power to the authorities to expel so-called "intellectual incendiaries", or leaders publicly inciting hate, violence and terrorist acts[133].

Amnesty International calls on the EU to ensure that Member States respect the absolute nature of the *non-refoulement* principle in all circumstances. Extradition orders shall not be carried out while an asylum claim is still being examined by competent refugee status determination authorities. Where there are serious reasons for considering that an asylum-seeker or a refugee has committed crimes that fall within the scope of the exclusion clauses of the Refugee Convention, states shall, when excluding such individuals from refugee protection, undertake to prosecute them or to surrender them to another state for prosecution in accordance with international human rights law and standards.

[133] McHardy N.G., The New German Immigration Act, available at http://www.aila.org/fileViewer.aspx?docID=16464.

4.4 "Rendition" and abduction

Since 11 September 2001 reports of "extraordinary renditions" whereby people are transferred involuntarily across borders without due process and often in a clandestine manner, have become commonplace[134]. Such renditions have reportedly taken various forms: through the transportation of people to camps such as that in Guantánamo Bay, or through individual cases. One such case was that of Maher Arar, a dual Canadian-Syrian national, who was detained by US immigration authorities while in transit from Tunisia to Canada, then flown to Jordan and eventually delivered across the border to Syria, where he was held in custody for 10 months. On release he alleged that he was tortured during his detention there.

The cases of Muhammad Muhammad Suleiman Ibrahim El-Zari and Ahmad Hussein Mustafa Kamil Agiza in Sweden[135] also demonstrate elements of rendition in that they were not given the opportunity to contest their expulsion and it seems, from documents released through a Swedish Parliamentary Inquiry[136] that their expulsion was facilitated by the assistance of US security services who flew them to Egypt.

Article 13 of the ICCPR states that:

An alien lawfully in the territory of a state party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be

[134] Amnesty International *USA: Guantánamo and beyond: The continuing pursuit of unchecked executive power*, May 2005, AI Index: AMR 51/063/2005. See also BBC file on four, Extraordinary Rendition broadcast 8 February 2005, available at http://news.bbc.co.uk/nol/shared/bsp/hi/pdfs/15_02_05_renditions.pdf; and Human Rights Watch, *Diplomatic Assurances* report, supra nr 115.

[135] Discussed below.

[136] Report of the Swedish Parliamentary Ombudsman of 22 March *Chefsjustitieombudsmannen Mats Melin, Avvisning till Egypten – en granskning av Säkerhetspolisens verkställighet av ett regeringsbeslut om avvisning av två egyptiska medborgare [Expulsion to Egypt: A review of the execution by the Security Police of a government decision to expel two Egyptian citizens]*, reprinted in Human Rights Watch, *Diplomatic Assurances* report, supra, nr 116, p. 93.

represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Cases of irregular rendition, disguised extradition and abduction are clearly in breach of this right.

In most of the reported cases, with the exception of the Swedish cases cited above, the "irregular renditions" have been carried out by the US, not directly by EU Member States. There are, however, disturbing allegations that EU Member States have allowed their territory to be used as landing points for planes used in the renditions and that these renditions have been carried out through EU air space. An article in Le Monde Diplomatique in April 2005 by Stephen Grey[137] states that:

[In documents released as part of a Swedish Parliamentary Inquiry] *"the head of the deportation operation with the Swedish security agency, Arne Andersson, said they had problems obtaining a plane that night and turned to the CIA: 'In the end we accepted an offer from our American friends … in getting access to a plane that had direct over-flight permits over all of Europe and could do the deportation in a very quick way'."*

The article also cites both Frankfurt and Mallorca airports as known stop-off points for unmarked CIA jets carrying out irregular renditions. Amnesty International has also received reports of a US-leased jet, which appeared to have been used for such purposes, being sighted at Shannon airport, Ireland, on several occasions.

On 18 January 2005 Amnesty International requested the Dutch immigration authorities to intervene in the expulsion of Abd al-Rahman al-Musa, a Syrian national who was deported from the US via The Netherlands to Syria. Because of his affiliation with the outlawed Muslim Brotherhood, Amnesty international feared that Mr al Musa would be arrested upon arrival and could face torture in detention. The Dutch border police however ignored the request as a result of which Mr al-Musa had no opportunity to claim asylum. Upon arrival in Syria, Mr al-Musa was indeed arrested and held *incommunicado* for weeks. In April 2005 he was transferred to an unknown location. As a result of the incident, the Dutch section of Amnesty International filed a complaint against the border police and raised the issue in parliament[138].

Two judicial inquiries underway in EU Member States indicate that, aside from the problem of "extraordinary renditions", straight abductions by agents of a third state may also be a threat within the EU.

There is a judicial inquiry under way in Germany into the case of Khaled al-Masri, a German citizen from Ulm who alleged that he was kidnapped in Skopje, Macedonia, on 31 December 2003 before being flown to Afghanistan and then detained in a US prison facility there. He has claimed that he was subjected to repeated beatings before being released four months later and left on a roadside in Albania. According to Stephen Grey's article in Le Monde Diplomatique[139], the flight logs of the plane that transported him from Skopje to Afghanistan showed that it stopped over at Mallorca airport.

The case of Abu Omar who disappeared from the street in Milan during a 10 minute walk from his local mosque has also given rise to a judicial investigation in Italy. As reported by Stephen Grey, "an eyewitness said he was stopped on the street by three white men, with a van drawn up on the pavement. He had been under surveillance by Italian authorities but they denied any role in his disappearance. The claim is that he was seized by US agents, taken to the US Aviano air base and flown to Egypt"[140].

If these accounts and claims are true they raise serious concerns about the ability of the EU to provide a genuine Area of Freedom, Security and Justice within the context of the global fight against terrorism.

EU Member States' activities outside the territory of the EU in this context also raise serious questions. Amnesty International is

[137] Le Monde Diplomatique*, The Security and Intelligence Dossier – The United States Trade in Torture*, by Stephen Grey, April 2005.

[138] Amnesty International, *Syria: Further information on: Fear of Torture*/incommunicado *detention: Abd al Rahman al-Musa*, 17 May 2005, AI Index MDE 24/026/2005.

[139] Supra nr 137.

[140] Idem.

particularly concerned about the role that UK authorities, including MI5 in particular, may have played in the unlawful rendering to US custody of a number of individuals, such as Martin Mubanga of dual UK-Zambian nationality and Wahab al Rawi and Jamil al-Banaa, UK residents arrested in the Gambia who were eventually transferred to Guantánamo Bay. Amnesty International is also concerned that UK intelligence officers have taken advantage of the legal limbo in which individuals, including UK citizens and residents, have been held in Guantánamo Bay to interrogate them in the absence of any safeguards including legal counsel, thereby circumventing both domestic and international human rights law[141].

Amnesty International is very concerned that EU airspace and Member States' airports are being used to facilitate this kind of rendition which in many cases involves transferring persons to countries where they are likely to be tortured. Member States who let their territory be used for a stop-over and allow flights to leave in such circumstances are colluding in serious breaches of human rights. Such collusion could amount to a serious and persistent breach of the fundamental principles of the EU justifying action to be taken under Article 7 TEU. The Area of Freedom, Security and Justice is not credible if its air space and airports may be used to perpetuate serious breaches of human rights either in their own territory or elsewhere in the world.

Amnesty International calls on the EU to establish rules prohibiting the authorisation of the use of airspace or airports on EU Member State territory for the transfer of persons in circumstances where they have not had the benefit of due process and where there is a serious threat that their human rights will be further breached *en route* and at their destination. Amnesty International also urges the EU to monitor authorisations for the transfer of persons across EU territory to ensure that such abuses are not allowed to continue with impunity.

[141] Amnesty International *UK: Briefing for the Committee against Torture*, November 2004, AI Index: EUR 45/29/2004.

4.5 Deportation with diplomatic assurances

The question of the validity of diplomatic assurances in deportation and extradition cases when there is a risk of torture or other ill-treatment is one that has been of concern to Amnesty International in a number of cases. The European Court of Human Rights in the case of *Chahal v United Kingdom*[142] addressed the question of states' parties acceptance of diplomatic assurances as a guarantee that there would not be violations of their obligations under Article 3 ECHR. It ruled in the case of a Sikh activist who was to be returned to India by the UK that, despite diplomatic assurances in good faith from the Indian government, the UK would be in violation of its obligations under Article 3 if it were to return him, as the Indian government would not be practically capable of ensuring that Chahal's human rights would not be breached by members of the security forces.

The practice of relying on diplomatic assurances in the face of a risk of torture or other ill-treatment has also been the focus of reports by other human rights groups such as Human Rights Watch[143] and Redress[144]. Diplomatic assurances have been criticised by courts in EU Member States, most notably in the case of Metin Kaplan where a German Court held that diplomatic assurances from the Turkish Government that Kaplan would not be subjected to human rights violations in his treatment and prosecution on return, did not provide sufficient protection from such violations[145]. In that case, however, the German government claimed that the court decision did "not stand in the way of expulsion, especially since the declarations of the Turkish government adequately guarantee that, after his expulsion to Turkey, Kaplan will not be subjected to treatment that violates the

[142] ECHR, *Chahal v UK*, supra nr 111.

[143] Human Rights Watch, *Diplomatic Assurances* report, supra nr 115.

[144] *Terrorism, Counter-Terrorism and Torture – International Law in the Fight Against Terrorism*, July 2004.

[145] Oberlandesgericht Düsseldorf, case of *Metin Kaplan*, 4Ausl (a) 308/02-147.203-204.3III, May 27 2003. Also Human Rights Watch, *Diplomatic Assurances* report, supra nr 115.

rule of law"[146]. This approach to court decisions on a state's obligations under international human rights law is extremely worrying in a Union based on shared principles of respect for human rights and the rule of law.

In 2001, Amnesty International opposed and condemned the forcible deportation of Muhammad Muhammad Suleiman Ibrahim El-Zari and Ahmed Hussein Mustafa Kamil Agiza from Sweden to Egypt, arguing that they were at grave risk of torture and unfair trial in Egypt. Although recognising that both men had a well-founded fear of persecution, the Swedish government refused them protection on the basis of secret evidence provided by the Swedish security police which linked them to "terrorist" organisations, but which was not disclosed in full to the men and their legal counsel. Sweden proceeded to their deportation on the basis of written guarantees from the Egyptian authorities that they would not be ill-treated. However, following their forcible return in December 2001, the two men were held *incommunicado* for over a month, unable to contact their lawyers and relatives. On 23 January 2002 the two men were visited by the Swedish ambassador to Egypt. The family of Ahmed Hussein Mustafa Kamil Agiza was also able to see him and reported that he had been subjected to torture.

Amnesty International called for an international, wide-ranging and impartial investigation into all the aspects of the case and into the failures to protect the two men by each of the three countries involved, Egypt, Sweden and the USA[147]. Amnesty International welcomed the decision on 20 May 2005 by the UN CAT in the case of Ahmed Hussein Mustafa Kamil Agiza, which found that the Swedish government had breached Article 3 of the Convention against Torture and its obligation not to expel or to return a person to another state where there are substantial grounds for believing that he or she would be in danger of being subjected to torture. The CAT stated that the natural conclusion that Ahmed Agiza, if expelled to Egypt, would be at a real risk of torture was based on a number of factors, including the fact that "at the outset that it was known, or should have been known, to the State party's authorities at the time of the complainant's removal that Egypt resorted to consistent and widespread use of torture against detainees, and that the risk of such treatment was particularly high in the case of detainees held for political and security reasons" and the fact that Egyptian and US intelligence services had an interest in him[148].

The issue of diplomatic assurances in cases of rendition has also arisen in the context of the UK's attempts to find alternatives to the indefinite detention of foreigners suspected of terrorist activities as highlighted in a recent Human Rights Watch report[149]. The UK Case of *Youssef and Others*[150] demonstrated how a detainee's safety after his extradition to Egypt was not a primary consideration for the UK authorities. The High Court of England and

[146] Joint Statement of German Federal Ministry of Interior and Ministry of Interior of North Rhine Westphalia *Schily and Behrens Regret Decision of OLG Düsseldorf in Kaplan Case*, Berlin, May 27 2003.

[147] AI Index EUR 42/001/2004. Such an inquiry has not been held to date.

[148] "In the Committee's view, the natural conclusion ...that the complainant was at a real risk of torture in Egypt in the event of expulsion, was confirmed when, immediately preceding expulsion, the complainant was subjected on the State party's territory to treatment in breach of, at least, article 16 of the Convention by foreign agents but with the acquiescence of the State party's police. It follows that the State party's expulsion of the complainant was in breach of article 3 of the Convention. The procurement of diplomatic assurances, which, moreover, provided no mechanism for their enforcement, did not suffice to protect against this manifest risk." (para 13.4) In connection with the denial to the complainant of a review procedure of the decision to expel him, the CAT said in para 13.8: "In the present case, however, due to the presence of national security concerns, these tribunals relinquished the complainant's case to the Government, which took the first and at once final decision to expel him. The Committee emphasises that there was no possibility for review of any kind of this decision. The Committee recalls that the Convention's protections are absolute, even in the context of national security concerns, and that such considerations emphasise the importance of appropriate review mechanisms. While national security concerns might justify some adjustments to be made to the particular process of review, the mechanism chosen must continue to satisfy article 3's requirements of effective, independent and impartial review. In the present case, therefore, on the strength of the information before it, the Committee concludes that the absence of any avenue of judicial or independent administrative review of the Government's decision to expel the complainant does not meet the procedural obligation to provide for effective, independent and impartial review required by article 3 of the Convention." UN Document CAT/C/34/D/233/2003 of 20 May 2005.

[149] Human Rights Watch, *Diplomatic Assurances* report, supra nr 116.

[150] *Hani El Sayed Sabaei Youssef and The Home Office*, Case No HQ3X03052, 2004 EWHC 1884 (QB), 30 July, 2004.

Wales held in 2004 that the men had been unlawfully detained after it was established that their return to Egypt would be contrary to the UK's *non-refoulement* obligations. After continuous bargaining with Egypt as to the content of written assurances about the detainees' safety upon their return to Egypt and the latter's refusal to provide any, the men were finally released. In the process, however, the UK showed readiness to accept formal assurances, not guaranteeing de facto safety of the persons concerned. Despite Mr Youssef's sentence *in absentia* to life imprisonment with hard labour by an Egyptian Military Court and the UK Home Secretary's acknowledgement that the men were possibly at risk of having their rights under Article 3 EHCR violated, the Prime Minister saw "no obvious reasons why British officials need[ed] to have access to Egyptian nationals held in prison in Egypt, or why the [group] should have [had] access to a UK-based lawyer"[151]. The UK Government's readiness to accept general and vague promises by Egypt not to torture the men after their return, and on that basis to remove them from the UK, showed obvious disregard for the UK's international human rights obligations[152].

In May 2004, in the case of Nuije Kesbir, a Dutch court gave exclusive authority to the government to decide whether to extradite the requested person to Turkey, despite admitting that her fear of torture and unfair trial in Turkey was not completely unfounded. Following the decision, the Dutch authorities sought and received very general assurances from Turkey stating that *"Ms Kesbir will be brought before the Turkish Court without delay in accordance with relevant laws and have the unimpeded right of access to her lawyers when extradited to Turkey"*[153]. This decision was overturned in January 2005, when the court concluded that diplomatic assurances could not guarantee her, as a PKK (Kurdish Workers Party, now known as Kongra-Gel) official, safety and freedom from torture in Turkey[154]. The Court based its decision in particular on an intervention by the UN Special Rapporteur on Torture and human rights information provided by Amnesty International and Human Rights Watch.

On 12 May 2005 Amnesty International with seven other NGOs issued a public statement calling for action against the use of diplomatic assurances[155]. They argued that diplomatic assurances in relation to torture and other ill-treatment are inherently unreliable and do not provide an effective safeguard against such treatment. They called on the international community to recognise that the use of diplomatic assurances in the face of risk of torture and other ill-treatment violates the absolute prohibition in international law against torture and other ill-treatment, including the *non-refoulement* obligation.

In the ever-changing and increasingly complex and obscure legal framework for the transfer of terrorist suspects across borders, whether by way of formal extradition, expulsion or a form of extraordinary rendition, the EU's commitment and Member States' obligation to protect human rights too easily seems to become lost.

The respect for human rights should not stop at the borders of the EU. The prohibition on torture is absolute and it is not through technical legal arguments and diplomatic sleight of hand that the EU and its Member States can bypass their obligation to protect individuals from torture.

[151] Reprinted in *UK: Egyptian national "unlawfully detained" after intervention by Prime Minister*, Statewatch August-October 2004 (Vol 14 no 5).
[152] *Youssef* case, supra nr 150, p 71.
[153] Letter from Embassy of Turkey to the Dutch Ministry of Foreign affairs, Reference No 2004/Lahey BE/15949, November 18, 2004, Human Rights Watch, *Diplomatic Assurances* report, supra nr 115, para 74.
[154] Human Rights Watch, *Diplomatic Assurances* report, supra nr 115, p 72.
[155] *Call for action against the use of diplomatic assurances in transfers to risk of torture and ill-treatment*, 12 May 2005, supra nr 114.

Amnesty International calls on the EU, as a matter of urgency, to establish a clear and legally binding set of standards for Member States to reflect their international obligations with regard to the protection of human rights when transferring individuals to third countries, and to ensure that individuals are not put at risk of torture or other ill-treatment in third countries on the basis of diplomatic assurances.

5. Conclusion

In the discourse surrounding counter-terrorism and human rights in the EU, a distinction is often made between the requirements of freedom and justice and those of security. This distinction is misplaced: the protection of human rights and respect for the rule of law are fundamental elements of genuine security rather than competing interests. If the EU is to be successful in creating an Area of Freedom, Security and Justice it cannot afford to be complacent but rather must strive to reinforce these elements as part of an effective security strategy.

In this analysis Amnesty International has set out to:

1) Establish the serious deficiencies in the EU's criminal law response to terrorism, in terms of definition problems undermining legal certainty and the secrecy surrounding terrorist blacklists, and in the way that human rights protection obligations are allowed to dissolve at borders.

2) Show that when the mutual trust in the quality of justice across the EU is undermined by Member States' abuse of human rights, it jeopardises effective cooperation to counter terrorism, so that it is in the breach, not in the protection of human rights that security is put at risk.

3) Outline how the EU can redress the human rights deficit in its counter-terrorism strategy by setting its own legal framework to ensure that definitions of terrorism are sufficiently clear and precise as to provide legal certainty and avoid abuse of terrorist blacklisting, and by establishing clear and legally binding standards as to how Member States should comply with their international obligations to protect human rights when prosecuting terrorists across borders either within or outside the EU.

The unique nature of the EU as an international organisation and the advanced levels of cooperation between Member States provide the opportunity to advance the fight against terrorism within a framework that respects and promotes the protection of human rights and the rule of law. This applies not only to the protection of human rights within its borders, but beyond them as well. There can be no double standard as regards protection of rights in the EU's internal and external cooperation.

As far as the protection of rights within the EU is concerned, if the EU is to construct a credible Area of Freedom, Security and Justice, it must not ignore its obligations when transferring people across its borders. At the moment it seems that while cooperation between security services, police and prosecuting authorities knows no borders, the protection of human rights does not have the same freedom of movement.

The rhetoric of fundamental rights too easily is lost in the legal and technical miasma of EU law, subsidiarity and competing jurisdictions. Counter-terrorism measures which impact on the rights of individuals and potentially on legitimate opposition and dissent in society are shrouded in the fog of obscure legislation which leaves those concerned with no effective remedy to the infringement of their rights and leaves Member States unclear as to what the effect of legislation in fact is when it comes to cooperating against terrorism. The complex legal structure of the EU should not be allowed to subvert the protection of rights and the necessary political and judicial accountability. Non-binding declarations regarding the need for a remedy are simply not sufficient.

Between Member States, the principle of mutual recognition risks being undermined by the lack of genuine mutual trust. It is difficult to understand how, in a Union of shared values, one Member State can derogate from Article 5 ECHR from 2001 until March 2005 in relation to terrorist suspects and another has legislation allowing for incommunicado detention of terrorist suspects which has been severely criticised by international human rights bodies, and yet the EU remains silent.

The distinction that is made in some Member States between proceedings involving terrorist offences and regular criminal proceedings or asylum procedures, exacerbates the problem.

Connections that are sometimes made in public discourse between "terrorists" and certain sectors of society due to their ethnicity, nationality or religion can foment feelings of isolation in communities and a sense that we are living in a besieged society. The notion of a "war on terror" is helping to create a legal limbo.

The concept of "terrorism" should not be used as a catch-all to justify any kind of repressive activity or the suppression of human rights protection. It is in no-one's interests, and certainly not in the interests of security, to obtain a wrongful conviction in a terrorist trial, or to actively alienate parts of the community. Nor is it acceptable to cooperate blindly with states that do not respect the rule of law, democracy or the protection of human rights, and so give their methods legitimacy.

A clear indication of where EU policy would be heading in a mistaken direction is the attempt to remove terrorism from the scope of the proposed Framework Decision on procedural rights. This was precisely the instrument that was promised to ensure adequate protection in criminal proceedings within the context of the fight against terrorism. Terrorist cases are often those most susceptible to abuses of fundamental rights due to the political and emotional impact of terrorist offences in Member States. Thus, it is in the most difficult and sensitive cases that clear and binding standards for criminal justice can least be dispensed with if the EU is to live up to its promise to protect the principles of human rights and the rule of law.

6. Summary of recommendations

6.1 Internal

1. Definition of terrorism

Amnesty International is concerned that the requirement of legal certainty is not met by the EU Framework Decision on combating terrorism and calls on Member States to review their national legislation to ensure that transposition corrects this problem. The Commission should compile a report of Member States' definitions of terrorism with a view to ensuring that they are sufficiently clear and precise as to provide legal certainty and to exclude the possibility of counter-terrorism legislation being used to quash legitimate protest and dissent which is necessary in a society based on democracy, human rights and the rule of law such as the EU purports to be.

2. Terrorist blacklisting

Amnesty International calls on the EU to review the legislation concerning terrorist blacklisting to ensure that there are clear procedures for judicial review of the inclusion of individuals or groups on the lists, as well as for reparation for damages in case of wrongful inclusion impacting on the rights of those concerned.

3. European Arrest Warrant

Amnesty International urges the European Commission to carefully monitor the implementation in practice of the European Arrest Warrant, taking note of cases that raise questions of potential breaches of human rights or due process and addressing the issues that they highlight through recommendations or legislation to rectify the situation at EU level by raising standards across the territory of the EU. Amnesty international further recommends strongly that the EU focus on human rights training for judges as a core element of training through the European Judicial Training Network and exchange programs.

4. Procedural rights

Amnesty International urges Member States and the Commission to ensure that terrorist offences and other forms of serious and organised crime are kept fully within the scope of the proposed Framework Decision on certain procedural rights for suspects and defendants in criminal proceedings in the EU. Any decisions to limit rights in particular cases should be the subject of judicial scrutiny to ensure that they are not applied arbitrarily and that they are proportionate and clear in their aim in order to ensure legal certainty. If the standards of procedural rights set out in the ECHR and the jurisprudence of the European Court of Human Rights cannot be met in the negotiations on the proposed Framework Decision, Amnesty International would urge the Commission to withdraw the proposed Framework Decision in its entirety rather than to establish standards that are below the existing human rights obligations of Member States.

5. Admissibility of evidence

Amnesty International urges the Commission to address the issue of the admissibility of evidence extracted through torture or other ill-treatment in the forthcoming green papers on evidence to ensure that the EU applies clear standards in conformity with the UN Convention against Torture and the ECHR.

6.2 External

6. Extradition agreements

Amnesty International urges the EU, in its negotiations on any future agreements with third countries on matters of judicial cooperation and of cooperation in the fight against terrorism more broadly, to set clear parameters for the respect of human rights in this context that meet the standards that the EU applies within the Area of Freedom, Security and Justice, in particular the ECHR and its protocols, the abolition of the death penalty and the full respect of the rights not to be subjected to torture or other ill-treatment and to a fair trial.

7. Multiple extradition requests

Amnesty International urges the EU to develop minimum standards for the protection of

human rights in the context of extradition to third countries and to establish a system of mutual recognition of decisions to the effect of refusing extradition on grounds of potential breach of human rights obligations, so as to ensure that different responses to multiple requests made across the EU do not undermine legal certainty and the principle of freedom of movement.

8. Absolute principle of *non-refoulement*

Amnesty International calls on the EU to ensure that Member States respect the absolute nature of the *non-refoulement* principle in all circumstances. Extradition orders shall not be carried out while an asylum claim is still being examined by competent refugee status determination authorities. Where there are serious reasons for considering that an asylum-seeker or a refugee has committed crimes that fall within the scope of the exclusion clauses of the Refugee Convention, states shall, when excluding such individuals from refugee protection, undertake to prosecute them or to surrender them to another state for prosecution in accordance with international human rights law and standards.

9. Rendition and abduction

Amnesty International calls on the EU to establish rules prohibiting the authorisation of the use of airspace or airports on Member State territory for the transfer of persons in circumstances where they have not had the benefit of due process and where there is a serious threat that their human rights will be further breached *en route* and at their destination. Amnesty International also urges the EU to monitor authorisations for the transfer of persons across EU territory to ensure that such abuses are not allowed to continue with impunity.

10. Diplomatic assurances

Amnesty International calls on the EU, as a matter of urgency, to comply with their international obligations with regard to the protection of human rights when transferring individuals to third countries, by ensuring that individuals are not put at risk of torture or other ill-treatment in third countries on the basis of diplomatic assurances.

GLOSSARY

AFSJ
Area of Freedom, Security and Justice

ATCSA
UK Anti-Terrorism, Crime and Security Act 2001

CAT
Committee against Torture

CAT Convention Against Torture
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984

CFI
European Court of First Instance

CFSP
Common Foreign and Security Policy (second pillar)

CPT
Council of Europe Committee for the Prevention of Torture

CTC
United Nations Counter-Terrorism Committee

DROIPEN
Council Working Group on Substantive Criminal Law

EAW
European Arrest Warrant

ECHR
European Convention on Human Rights and Fundamental Freedoms 1950

ECJ
European Court of Justice

EU
European Union

Geneva Convention
Geneva Convention Relating to the Status of Refugees 1951

ICCPR
International Covenant on Civil and Political Rights 1966

JHA
Justice and Home Affairs (third pillar)

NGO
Non-governmental organisation

OSCE
Organisation for Security and Cooperation in Europe

SIAC
Special Immigration Appeals Commission

TEU
Treaty on the European Union

UN
United Nations

UNHCR
United Nations High Commissioner for Refugees