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A Human Rights Framework for the Protection of Security:

Submission by Amnesty International to the
Group of Specialists on Human Rights and the Fight against Terrorism,
established by the Steering Committee on Human Rights
of the Council of Europe's Committee of Ministers

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“... measures for combatting terrorism must remain consistent with the requirements of democracy, the rule of law and human rights.”
Committee of Ministers of the Council of Europe, Communiqué on international action against terrorism, 8 November 2001

1. Introduction

Since the attacks in the USA on 11 September, many states have legislated or planned legislation in order to enhance the protection of people within their territories and in other states from similar criminal acts.

Amnesty International notes that some governments and commentators suggest that there is an irreconcilable conflict between states' duty to protect public security and their duty to respect human rights and - accordingly - that since the attacks of 11 September human rights must be circumscribed in order to enhance security.

The dichotomy between security and human rights is a false one. International human rights standards oblige states to take steps to give effect to the rights enshrined in the treaties, including protection of the public from violations by both state and non-state actors. The rights enshrined in the treaties, such as the right to life; the right to a fair trial and the prohibition of torture, are another way of describing the idea of security that people expect their governments to ensure. They are also not discrete rights, to be pursued without regard to other rights. In the key human rights treaties, such as the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights), they are part of an integrated package of rights states are obliged to respect.

The challenge to states, therefore, is not security versus human rights but rather ensuring respect for and protection of the full range of rights, bearing in mind that while treaties, such as the European Convention on Human Rights, provide that while some rights may be limited or restricted in narrowly prescribed circumstances, other rights are absolute, even in times of public emergency.¹

Amnesty International's concern is that as a consequence of the level of anxiety about security aroused by the attacks of 11 September, various measures adopted and proposed by states may violate or unduly infringe upon a number of rights.

This document describes some of the main features of recent anti-terrorism legislation and legislative proposals that have given rise to human rights concerns, in particular

¹ see, Article 15 of the European Convention on Human Rights; Article 4 of the International Covenant on Civil and Political Rights and Human Rights Committee General Comment 29, States of Emergency (Article 4), UN Doc: CCPR/C/21/REv. 1/Add.11 (31 August 2001).

- the concept of “terrorism”, which often has been vaguely and broadly defined, has been increasingly used in criminal and other areas of law;
- the establishment of indefinite administrative detention as an alternative to prosecution of some people suspected of involvement in politically motivated crime;
- new procedures have been introduced to facilitate extradition;
- the criteria and procedure to determine applications for refugee status have been amended.

This document focuses on these aspects. There are also other elements of recent legislation and proposals that give rise to concerns. For example, many states are granting new and increased powers of authorities to intercept and examine private communications, to search people, their homes, property and possessions, in some instances abandoning the requirement that there be reasonable suspicion for such invasions of privacy and without requiring prior judicial authorization. Alarmingly, attorney-client communications in some states may now be subject to such surveillance. States are also increasingly banning organisations. Reports issued by Amnesty International and other human rights organizations and bodies set out these concerns.²

Among the rights at risk as a consequence of measures that states justify in the so-called “war on terrorism” are rights to

- freedom of expression
- freedom of association
- liberty
- privacy
- confidential communications between lawyer and client
- fair trial, including rights of people who are detained
- not be tortured or subjected to other forms of cruel, inhuman or degrading treatment or punishment and

² See, e.g. Amnesty International’s document: *United Kingdom: The Regulations of Investigatory Powers Bill* (AI Index: EUR/45/49/00). Amnesty International’s reports are available on the organization’s web-site: www.amnesty.org.

- to seek and enjoy asylum.

The risk to human rights in current circumstances is exacerbated by the absence of international and regional mechanisms with specific responsibility to monitor and investigate legislation and practices that are commonly described by states as intended to deal with emergency situations, some of which explicitly or implicitly involve derogations of human rights guarantees. Amnesty International is particularly concerned that, in some states, the mechanisms with prime responsibility for monitoring executive action - the courts - have had their jurisdictions ousted through limits on the scope to seek judicial review and even such basic human rights protection as *habeas corpus*.

It is important to note that the concerns are not exaggerated or fanciful. There have been similar “anti-terrorist” laws around the world for decades and they have demonstrably violated and facilitated the violation of human rights.

As an organisation that monitors respect for human rights around the world, Amnesty International is also mindful that the conduct of European countries is often highly influential in shaping opinion elsewhere. Just a week ago, the Kenyan journalist M Gaitho noted that “once the nations we hold as the beacons of freedom and democracy are spooked enough to curtail civil rights and introduce draconian security measures, and their subjects are quite happy to acquiesce, something has gone terribly wrong with civilisation as we know it.”³

Amnesty International welcomes the establishment of the *Group of Specialists on Human Rights and the Fight against Terrorism* by the Council of Europe’s Committee of Ministers Steering Committee for Human Rights and thanks the Group for opportunity to make this submission. It urges the Group of Specialists to incorporate the recommendations contained in this document into the draft guidelines it will submit to the Committee of Ministers of the Council of Europe, in order to ensure that the measures taken by member states of the Council of Europe to enhance security are consistent with their obligations to protect and respect the human rights of all people in their territories and subject to their jurisdiction.

2. Definitions of “terrorism”

The conduct that is proscribed under various laws and proposed laws concerned with terrorism is defined vaguely and/or broadly. For example:

- the European Commission *Proposal for a Council Framework Decision on combatting terrorism* mandates states to take steps to criminalize “supporting” a

³*Daily News*, 20 November 2001.

terrorist group. [Article 3.1.(m)] The document provided no guidance as to what “supporting” means;

- a Decree-Law adopted by the Italian government on 18 October 2001 prohibits the establishment and promotion of associations to undertake acts of violence against people or things with the aim or purpose of international terrorism - terrorism is not defined, nor is it defined in existing law relating to domestic terrorism;
- the UK Anti-terrorism, Crime and Security bill currently before Parliament will permit the indefinite detention without charge or trial of a non-national who “has links with a person who is a member of or belongs to an international terrorist group.” [Clause 21(2)(c)]. The bill does not define “links”;
- the draft UN Convention on Terrorism would permit states to prosecute legal entities, such as trade unions, political parties and other non-governmental organizations, based solely on the commission of a “terrorist” offence by one of its officers.[Article 9] This could result in collective criminal punishment of an organization - and, possibly, its members - for the criminal act of one individual.

The objectionable consequences of provisions such as those cited are apparent:

- the imprecision makes it difficult for people to know if their behaviour is lawful or not and to adjust what they do accordingly;
- activities that are unrelated in any way to violence may be criminalized - for example, occupying a public building or a space such as a highway;⁴
- rights such as freedom of association and of expression may be infringed.

3. Indefinite detention

In their responses to violent acts of armed opposition groups and internal and international armed conflict over many decades, a number of states have detained people considered to be a threat to national security without prosecuting them.

⁴Article 3.1(f) of the Commission of the European Communities *Proposal for a Council Framework Decision on combating terrorism* requires states to punish as a terrorist offence “unlawful seizure of or damage to state or government facilities, means of public transport, infrastructure facilities, places of public use, and property.”

Following the events of 11 September, the US Congress legislated to permit indefinite administrative detention of “suspected terrorists”; a bill to permit such detention is being considered by the UK parliament. In both countries, non-nationals who cannot be deported will be detained.

The US and the proposed UK systems of detention are, in effect, informal or shadow criminal justice systems. People may be certified by government officials as threats to national security [tantamount to being convicted by the executive] and may be detained for years, as if they had been sentenced. The key difference between the detention systems and criminal justice systems is the absence of the safeguards and guarantees that are integral to the latter.

The certification that a person is a “suspected terrorist” is made initially by an executive official in a secret process. An accused person is unaware of the process is even occurring and cannot defend himself or herself. The evidence is likely to include material inadmissible in a criminal prosecution and the decision made on a lower standard of proof. Although an appeal to a judicial body is permitted, the process may still involve secret evidence and anonymous witnesses, thereby denying people facing extremely serious allegations and consequences the right to defend themselves effectively.

Governments’ justification for such detention schemes is that the normal safeguards are too stringent to permit successful prosecutions leading to imprisonment for criminal offences. As the UK Home Secretary has stated, the authorities cannot secure the imprisonment of suspected terrorists by prosecuting them for crimes because of “the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required.”⁵

It is imperative to recall that the rules of evidence and standard of proof in the criminal justice system have been prescribed in order to reduce the risk of innocent individuals being convicted and punished. It is unacceptable that governments should seek to circumvent the safeguards of the criminal justice system in such a manner. Amnesty International believes that it is a violation of fundamental human rights for states to detain people who the authorities believe are a threat to national security but who they do not intend to prosecute and who cannot be deported.

The proposed UK administrative detention provisions do not expressly provide other essential safeguards of criminal justice systems,⁶ such as:

⁵In his notification of the derogation to the Secretary General of the Council of Europe, 11 November 2001.

⁶For additional details of Amnesty International’s concerns about the proposed UK legislation, see Amnesty International’s document, *UNITED KINGDOM: Creating a shadow criminal*

- the right of a detained person to be informed immediately, in a language they understand, of the reasons for their detention;
- the right of access to and assistance of a lawyer without delay;
- the right to inform family of detention and place of confinement and the right to visits from their family;
- the right of foreign nationals to communicate with consular representatives or the appropriate international organization;
- the right to be promptly brought before a judge.⁷

4. Extradition

Some so-called terrorist crimes have international aspects - they are committed by people who flee abroad and/or perpetrators are assisted by people who do not live in the country where the attacks take place. It is understandable, therefore, that a significant aspect of the response to politically motivated violence prior to and since 11 September has been to facilitate the extradition of suspected perpetrators.

Amnesty International acknowledges that extradition is a key element of the international law enforcement co-operation that provides a safeguard against impunity. The organisation is concerned that, in their efforts to facilitate and expedite extradition procedures, states will weaken or fail to put in place human rights guarantees for accused people.

For example, in September the EU Commission proposed a Council Framework Decision on the European arrest warrant and the surrender procedures between the Member States.⁸

justice system in the name of "fighting international terrorism", (AI Doc: EUR 45/019/2001), available electronically on the organization's web-site: www.amnesty.org.

⁷ Principle 11(1) of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment guarantees this right to all people detained. In addition, Amnesty International believes that Article 5(3) of the European Convention on Human Rights is applicable to such indefinite detention on the certification of the executive. The organization considers that the nature of such certification and the potential severity of the consequences - including indefinite detention - are tantamount to criminal charges, conviction and punishment under international human rights law, without the required guarantees of a fair trial set out in the Convention, including in Articles 5 and 6 and Article 2 of Protocol 7.

⁸COM (2001) 522 final.

Significantly, the proposal failed to incorporate the guarantees provided in the Charter of Fundamental Rights of the EU, which 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] This is in line with international extradition law standards which provide that an extradition request should, in all cases, be refused if the person whose extradition is requested would be subjected to torture or cruel, inhuman or degrading treatment or punishment.⁹ Further, the European Convention on the Suppression of Terrorism provides that states are not obliged to extradite if an extradition request “has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that person’s position may be prejudiced for any of these reasons.” [Article 5] The Explanatory Report on this Convention suggests that a person’s position would be prejudiced if, for example, they would be “deprived of the rights of defence as they are guaranteed by the European Convention on Human Rights.”¹⁰

Amnesty International considers that an individual should not be surrendered to a country where he or she would be at risk of being brought to justice in a trial which does not respect internationally recognised rights of fair trial for whatever reason, not simply because of prejudice towards the individual.

5. Protection for refugees

The 1951 Convention relating to the Status of Refugees [UN Refugee Convention] specifies certain grounds for exclusion from refugee status for those whom there are serious reasons for considering they have committed crimes against peace, war crimes or crimes against humanity. [Article 1(F)] In the asylum procedure, decisions to exclude someone from refugee status should be made within the context of a full and fair process of determination of an individual’s asylum claim, in line with relevant international standards such as those set out in UNHCR’s *The exclusion clauses: guidelines on their application*.¹¹

Following the attacks of 11 September, there have been several proposals that states should legislate to exclude asylum-seekers suspected of involvement in “terrorism” and this assessment should occur prior to considering their application overall. For example:

⁹UN Model Treaty on Extradition, GA res. 45/116 of 14 December 1990, Article (3)f.

¹⁰Council of Europe, *European Convention on the Suppression of Terrorism - Explanatory Report*, par 50.

¹¹UNHCR, 1996.

- the draft UN Convention on Terrorism would require states to institute such procedures [Article 7]
- the UK Anti-terrorism, Crime and Security Bill [Clauses 33 and 34] proposes to deny people who are certified by the Home Secretary to be suspected national security risks to have their applications for asylum considered on their merits in a full and fair procedure.

The effect of the proposals would be to exclude people from refugee protection who have committed acts that do not amount to crimes or acts that currently preclude the granting of refugee status under the UN Refugee Convention. Proposed definitions of terrorism would apply, for example, to all acts of armed political groups even when they do not violate international humanitarian law. Under the proposals, states would be obliged to deny refugee status to people who currently might qualify, and perhaps even to extradite or prosecute them.

No person should be prevented from lodging an application for asylum. Amnesty International believes that a determination to exclude an individual from refugee status should only be made **after** full consideration of the claim in a fair procedure. In view of the serious consequences of an incorrect decision for the individual concerned, the procedure should comply with all procedural safeguards provided in human rights and refugee law, notably to be informed that exclusion is under consideration, to be informed of the evidence and to appeal against a decision to exclude. It is generally recognized that a decision on exclusion in a fair asylum procedure should be taken **after** the determination of whether an individual has a well-founded fear of persecution, a process referred to as “inclusion before exclusion.”¹²

While a decision to exclude a person removes them from the protection of the UN Refugee Convention, it does not follow that a state can remove the individual from the territory as a consequence. The jurisprudence of the European Court of Human Rights provides that, where people risk torture or other forms of cruel, inhuman or degrading treatment or punishment, the prohibition of *refoulement* is absolute. As well, as noted above, the Charter of Fundamental Rights of the EU provides 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] *Refoulement* should also be prohibited if there is a risk that a person would face an unfair trial.

6. Monitoring

¹²See the UNHCR Guidelines and *Summary Conclusion - Exclusions from Refugee Status* from the Lisbon Expert Roundtable of the Global Consultations on International Protection of 3-4 May 2001, in document EC/GC/01/2Track/1 of 30 May 2001; available at <http://www.unhcr.ch>

As noted by Ms Françoise Hampson, in a study prepared for the Council of Europe's Committee of Ministers' Steering Committee for Human Rights, a significant weakness in the current system of human rights protection in the context of internal conflicts and situations of internal tension is that there is not an international mechanism to systematically monitor legislation and practice in emergency situations.¹³ There was a Special Rapporteur on States of Emergency and the UN Human Rights Committee has "left open the question as to whether they should engage in systematic monitoring of this type."¹⁴

7. Recommendations

Amnesty International urges the *Group of Specialists on Human Rights and the Fight against Terrorism* to incorporate the following recommendations in the draft guidelines that they advise the Steering Committee for Human Rights to adopt and forward to the Committee of Ministers. These recommendations aim to ensure that the measures taken by states to enhance security respect and protect the human rights of all people in their territories and subject to their jurisdiction.

Definition of "terrorism"

States legislating to proscribe conduct relating to "terrorism" should ensure that the laws

- clearly define the conduct that is proscribed and
- do not unduly or inadvertently restrict rights such as those of freedom of association, expression and peaceful assembly.

Detention

States should not legislate to permit detention unless:

- people are charged with recognizable criminal offences promptly and tried within a reasonable period in proceedings that comply fully with international fair trial standards; or
- action is being taken to deport within a reasonable period to another country where they would not risk being subjected to an unfair trial, the imposition of the death penalty,

¹³"Study on human rights protection during situations of armed conflict, internal disturbances and tensions," Strasbourg 31 October 2001, CDDH 920010 21 rev. provisional.

¹⁴*Ibid* 110.

torture or other cruel, inhuman or degrading treatment or punishment, or serious human rights abuses by non-state actors. There must be a realistic possibility of deportation being effected.

Safeguards

If states do, however, legislate to permit the detention of people suspected to be “terrorists” but whom they do not intend to prosecute and whom they cannot deport or extradite, the systems of detention should be subject to human rights standards including:

- the fact and location of detention must not be secret;
- a detained person must be notified of the reasons for their detention and of their rights, in a language that they understand;
- a detained person must without delay be given access to and assistance of a lawyer, assigned free of charge if necessary;
- a detained person must have the right to confidential communication with their lawyer;
- a detained person must be brought before a judicial authority to determine necessity for and lawfulness of detention;
- a detained person must be entitled to challenge the lawfulness of detention [*habeas corpus*];
- there must be periodic review of the necessity for and lawfulness of continuing the detention by a judicial authority;
- a detained person’s family must be notified and be permitted to have access;
- foreign nationals must be given all reasonable facilities to communicate with and receive visits from representatives of their government or an appropriate international organization;
- a detained person must have the right to be examined by a doctor and, when necessary, to receive medical treatment;
- the conditions of detention must comply with all international standards, for example as set out in the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment and the European Prison Rules;

- a detained person must have an enforceable and effective right to redress and reparation if unlawfully detained;
- people who are detained without charge should not be detained with people convicted of criminal offences.

Fair trial rights

All criminal and administrative proceedings should be conducted in accordance with internationally recognised fair trial rights.

Secret evidence and anonymous witnesses should not be used in

- criminal trials;
- proceedings to determine refugee status;
- proceedings to determine whether a person should be detained on the grounds that they are a threat to national security.

Extradition

Extradition laws should not permit the extradition of a person to a jurisdiction where they would be subjected to an unfair trial, the imposition of the death penalty, or treatment or punishment involving torture or other cruel, inhuman or degrading treatment or punishment and other serious human rights abuses.

Determination of applications for asylum

The determination to exclude an individual from refugee status should only be made **after** full consideration of the claim in a fair procedure.

The procedure for determining asylum applications should comply with all procedural safeguards provided in human rights and refugee law, notably among others, the rights to be informed that exclusion is under consideration, to be informed of the evidence and to appeal against a decision to exclude.

Monitoring

A regional mechanism should be created to monitor emergency legislation and measures, including their implementation in practice, to ensure that they are in conformity with the European Convention on Human Rights.