

EXECUTIVE SUMMARY

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. Some argue that the threat of “terrorism” can justify limiting or suspending human rights, with even the prohibition of torture being called into question.

The European Union has always been clear in asserting that there can be no security without human rights. However, in practice the EU and its Member States are too often prepared to remain silent on breaches of rights protection within or outside the EU. There is a general assumption that the human rights of terrorist suspects will be protected within the EU’s own Area of Freedom, Security and Justice, while little attention is given to credible concerns that serious human rights abuses may occur when those suspects are transported to countries outside its borders.

Amnesty International’s analysis sets 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 European Union’s anti-terrorism roadmap produced within weeks of 11 September 2001 covered a broad range of areas that could have an impact on the fight against terrorism, from criminal law initiatives to the safety of air transport, to relations with third countries and aid.

This document examines 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. It proposes ways in which the EU can ensure that its approach to fighting terrorism actively incorporates the need to protect human rights and the rule of law thus rendering its counter-terrorism effort more effective.

Amnesty International concludes that the EU has failed so far to properly address the serious issue of protection of fundamental rights in its collective policies and legislation on counter-terrorism. In surveying the multitude of counter-terrorist initiatives at EU level in the criminal law sphere since 11 September 2001, it is clear that the lack of concrete safeguards is not only leading to breaches of human rights, but has created legal confusion and uncertainty.

Effective cross-border cooperation to fight terrorism is based on the principle of mutual recognition, whereby an order from a judicial authority in one Member State is to be recognised as valid in another.

This in turn depends on EU Member States trusting each other's legal systems and sharing the same values. The reality is that questionable practices and legislative frameworks on counter-terrorism in some EU Member States are compromising those shared values and thus hampering the mutual trust on which cooperation depends.

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, but also have a significant impact on public confidence in the rule of law. This can in turn 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.

It is not just at the EU's internal borders that Amnesty International believes human rights are being left behind. In relation to cooperation with third countries to extradite or expel terrorist suspects, too little attention is being paid to credible concerns that serious human rights abuses may occur when they are transferred to third countries, making the EU complicit in such abuses. The worrying trend in the methods of removing terrorist suspects from EU jurisdictions through deportation, "rendition" and even abduction underlines that concern.

Main Points

1. Definition of terrorism

During the negotiations on the 2001 Framework Decision on combating terrorism, a number of EU Member States as well as NGOs including Amnesty International raised concerns that the definition contained in the Commission proposal was not sufficiently precise to guarantee legal certainty and that the breadth of the proposed definition could threaten the right to freedom of association and legitimate protest. In response, a declaration was attached to the Framework Decision and assurances included in its preamble attempting to rectify this problem. Amnesty International regards these as ambiguous, and points out that they do not cure the vagueness of the definition of "terrorism" itself. This is of particular concern in that it provides a basis for further measures such as the establishment of terrorist lists.

Amnesty International calls on the EU to ensure that definitions of terrorism are sufficiently clear and precise as to provide legal certainty.

2. Terrorist blacklists

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 serious implications for the enjoyment of fundamental rights, it is crucial that such identification must be based on clear evidence that is capable of being challenged. However, there has been practically no democratic scrutiny related to the establishment of these terrorist blacklists and there is no judicial supervision regarding inclusion on them, while individuals placed on them are effectively deprived of an effective remedy to challenge their inclusion.

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.

3. European Arrest Warrant

Two cases in which extradition was refused between EU Member States just prior to the coming into force of the EAW in 2004 show that a failure to respect human rights can undermine effective

cooperation against terrorism even within the EU by causing obstacles to extradition. 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. Without mutual trust in procedural guarantees, the EAW is likely to face similar difficulties.

Amnesty International calls on 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.

4. Protecting the rights of suspects and defendants in criminal proceedings

The EU has proposed minimum standards in its draft Framework Decision on certain procedural rights for suspects and defendants. Amnesty International considers the scope and level of the proposed minimum standards as disappointing and is concerned that negotiations may lead to further dilution of these standards. This applies in particular to the possibility that terrorist and organized crime offences may be excluded from 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 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.

Amnesty International will urge the Commission to withdraw the proposed Framework Decision on procedural rights if terrorist offences are to be excluded from its remit.

5. Admissibility of evidence obtained by torture

Amnesty International is profoundly concerned about the ruling from the Court of Appeal of England and Wales in August 2004 that "evidence" obtained through torture by foreign agents could be admissible.

Amnesty International urges the European Commission to address the issue of evidence extracted through torture and other ill-treatment in its forthcoming green papers on evidence.

6. Extradition to third countries

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. Amnesty International considers that the agreement leaves an unacceptable margin of discretion with regard to the death penalty and fair trial. While the EU-US extradition agreement is the first of its kind, further agreements with third countries may be negotiated in future particularly in the context of the fight against terrorism. For example, following the recent EU-Russia Summit, cooperation in the area of counter-terrorism is to be stepped up between the EU and the Russian Federation.

Amnesty International recommends that all future agreements with third countries set clear parameters for the respect of human rights that meet the standards that the EU applies within its own Area of Freedom Security and Justice.

7. Extradition and asylum

Asylum and extradition intersect when an asylum seeker or a recognized refugee is required by a third country for criminal proceedings. The final draft directive on asylum procedures leaves open the possibility for Member States to carry out an extradition request while an asylum application is still pending. Given its potentially far-reaching consequences for the principle of *non-refoulement*, i.e. not

sending a person back to a country where they may face serious human rights violations, extradition orders should not be carried out while an asylum claim is still being examined.

The refugee qualification directive makes it easier for Member States to revoke or end refugee status when "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". This provision is all the more worrying in that its implementation may lead to softening the absolute prohibition of *non-refoulement*. Amnesty International believes that revoking refugee status is not an appropriate way of dealing with possible terrorist suspects. If there are reasons to suspect that an asylum-seeker or a refugee has committed crimes that fall within the scope of the exclusion clauses of the Refugee Convention, states should prosecute or surrender them to another state in accordance with international human rights law.

Amnesty International calls on the EU to ensure that Member States respect the absolute principle of non-refoulement in all circumstances.

8. "Rendition" and abduction

Outside the traditional framework of extradition, there is an increasingly worrying trend within the context of the "war on terror" to use avenues to transfer suspects across borders that bypass the requirements of due process and lead to serious breaches of human rights. Such practices include "extraordinary rendition", expulsion with diplomatic assurances and illegal abduction. Since 11 September 2001 reports of "extraordinary renditions" whereby people are transferred involuntarily across borders with no due process and often in a clandestine manner, have become commonplace around the world.

In most of the reported cases, with the exception of cases in Sweden cited in this report, 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 they have been carried out through EU air space. Media and other reports state that Frankfurt, Mallorca and Shannon airports are known stop-off points for unmarked CIA jets carrying irregular renditions. Member States that allow their territory to be used for stop-overs are colluding in serious breaches of human rights.

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 people in circumstances where there is a serious threat that their human rights will be further breached en route or at their destination.

9. Diplomatic assurances

The practice in extradition and expulsion cases of relying on diplomatic assurances in the face of a risk of torture or other ill-treatment has led to serious abuses. Caution by courts in EU Member States has in some cases been set aside by the executive branch of government, with grave consequences for the persons concerned.

Amnesty International calls on EU Member States to ensure that when transferring individuals to third countries they are not put at risk of torture or other ill-treatment on the basis of diplomatic assurances by the receiving countries.