

Amnesty International's recommendations to JHA Council 5-6 June 2003

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Amnesty International notes that the Justice and Home Affairs Council meeting this week is expected to conclude its work on the EU-USA agreements on extradition and mutual legal assistance, giving the green light to the signing of these agreements at the EU-US summit on 25 June 2003. The EU decided after the events of 11 September 2001 to enter into closer cooperation in criminal matters with the United States, and the process that led first to agreement on the mandate for negotiation by the JHA Council in April 2002, and now to conclusion of the negotiations with the US, has been the subject of scrutiny by Amnesty International in order to ascertain whether the agreements contained adequate human rights safeguards.

The lack of transparency has made it difficult to scrutinize this process. The negotiating mandate was not fully made public, and the texts of the agreements were declassified only one month ago, on 2 May 2003. In statements released on the eve of the JHA councils of April 2002 and February 2003, Amnesty International called on the EU to ensure that any cooperation with the US in criminal matters included express safeguards prohibiting EU Member States from surrendering individuals where they are at risk of suffering serious human rights violations such as the death penalty, unfair trial, and torture or ill-treatment. The present document focuses mainly on the extradition agreement.

Now that it is possible to make a proper assessment, we must conclude that the agreements as they stand are still flawed on human rights protection, in that they fail to incorporate sufficient standards to ensure protection of the rights of persons who are subject to a request for extradition or prosecuted in connection with a case in which an EU Member State has provided mutual assistance. And although it should be acknowledged that the provision on the death penalty offers added value by complementing existing bilateral agreements with a general framework, the overall assessment must remain critical. This is all the more problematic as these agreements with the US can be expected to serve as a model for future similar agreements with other countries.

Insofar as there is no further room for discussion and adjustment before the agreements are submitted for signature, it is all the more important to identify and seek substantive clarification on the main shortcomings, and to inform constitutional ratification procedures that are to be completed by Member States before the agreements can enter into force.

Political context

Ever since the "war against terrorism" began to dominate the international agenda, the EU has found itself under pressure to 'balance' security with human rights. Its relationship with the US has undergone profound change during the same period and this has, if anything, added to the challenge the EU faces to uphold its obligations under international human rights law.

Concerns about the application of the death penalty in relation to extradition to the US were evident and of a nature that the EU had to take a stance, but even that stance has been less than unequivocal. Concerns about the US Government's stated intention to conduct trials by military commissions, and the denial of justice to the detainees held at Guantanamo Bay, raised the more thorny question of how the EU would apply its view on international human rights standards regarding fair trial. It is precisely this context which makes it all the more important to assess the agreements against international human rights obligations.

Legal and democratic context

The agreements are the first of a new generation of treaties, negotiated by the European Union as such on the basis of Article 38 of the Treaty on European Union (TEU) that makes it possible, in conjunction with Article 24 TEU, to conclude international agreements in the sphere of police and judicial cooperation in criminal matters. They complement bilateral agreements, which in the case of extradition, exist with all Member States. Article 3 of the

agreements require that they be applied in place of, in addition to, or in the absence of provisions of bilateral agreements between the US and the Member States as regards specific issues listed in that article, with the exception of the clause on the death penalty in the extradition agreement, the use of which is optional.

The Union does not yet have express legal personality, and the power conferred in Articles 24 and 38 TEU on the Council to conclude treaties in the second and third pillars (foreign policy, and policing and criminal law) does not state whether the treaties in question are concluded on behalf of the EU or of its Member States acting collectively. However, the practice to date (all in the area of CFSP) is that the Union is the contracting party. Given that no such treaties have yet been concluded in the sphere of police and judicial cooperation in criminal matters, there is no certainty that they are to be regarded as so-called 'mixed agreements' where Member States also become contracting parties. In fact, Article 24 TEU states that an agreement shall not be binding if a Member State declares that "it has to comply with the requirements of its own constitutional procedure", and that other Member States may agree that "the agreement shall apply provisionally to them".

The Greek Minister of Justice on behalf of the Presidency has indicated to the European Parliament on 14 May 2003 that the agreements would only enter into force once specific constitutional procedures to ratify them have been completed by Member States which require them. The European Parliament through its Citizens' Rights Committee had signalled concern that it would not be involved on a matter affecting fundamental rights of citizens, even though under Article 24 TEU such agreements are concluded by the Council acting alone. On 3 June 2003 the European Parliament in plenary session recommended to the Council that it be consulted before any final agreement. At the same time it expressed the view that the signing of these agreements should be made "conditional upon the finding of a fair solution to the problem of the situation of the persons, especially the Europeans, held at the base in Guantanamo Bay".

Amnesty International believes that given the nature of the agreements and their potential impact on protection of fundamental rights, their entry into force should be contingent on proper parliamentary scrutiny in all Member States.

Death penalty

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 current and new EU Member States as regards the death penalty in peacetime by virtue of their ratification of the Sixth Protocol to the European Convention on Human Rights. Furthermore, the Charter of Fundamental Rights is unequivocal in its prohibition of extradition when there is the risk of facing the death penalty, and although not yet legally binding, it is rapidly acquiring authority. Similarly, the application of the death penalty for acts committed in wartime is prohibited by the Thirteenth Protocol to the European Convention on Human Rights (which enters into force on 1 July 2003, and has been signed by all Member States but not yet ratified by all).

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 of the European Convention on Human Rights and with the EU Charter of Fundamental Rights which prohibit extradition where there is a risk of the death penalty. If adopted it must 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 in 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 not calling for a death sentence might preclude prosecution per se in certain cases and so create de facto discrimination among US citizens. Nevertheless, Amnesty International believes this option to be at odds with the Charter 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

ECHR, *Soering vs. United Kingdom*, 7 July 1989, req. no. 161/217.. The option also steps down 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 fulfills 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 may be considered theoretical that the United States would breach its own undertakings, but the US capital justice system is known to be flawed, including on the issue of compliance with international obligations. The proposed military commissions, which would have the power to hand down death sentences, have added a new ingredient to this concern. It is conceivable, for example, that a non-US defendant accused of a "terrorist" offence, initially placed in the normal criminal justice system, could subsequently be transferred to trial by military commission, as was reportedly considered in the case of French national Zacarias Moussaoui.

Fair trial

The extradition agreement contains no express clause permitting refusal to extradite on grounds that a person has been convicted following or risks being subjected to proceedings which fail to meet international standards of fair trial. There is a preambular reminder that the right to a fair trial is provided for in the parties' respective legal systems, but it is not matched by an express provision in the articles of the agreement that a Member State may refuse to extradite if there is a risk that a person has been or will be subject to an unfair trial. Rather, the reference in the preamble indicates a basis of "mutual trust" underlying the agreement.

Trust in the US guaranteeing fair trial cannot be unqualified. As Amnesty International has pointed out repeatedly, in the search for justice for the atrocities of 11 September, the US continues to violate its obligations under international human rights and humanitarian law standards, including its duties to uphold standards of fair trial and to protect against arbitrary detention. Amnesty International has repeatedly criticized 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" into which it has been keeping hundreds of detainees in Guantanamo Bay.

Amnesty International considers the absence of a substantive reference to fair trial guarantees in the extradition agreement a serious omission.

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 are not precluded by the EU-US treaty.

Another scenario is provided for in Article 16a(2) which calls for special consultations "*where the constitutional principles of the requested State may pose an impediment to fulfillment of its obligation to extradite*" and where there is no provision for resolving the issue in the EU-US agreement or a bilateral agreement. This provision expressly recognizes that States might have constitutional principles that prevent them from carrying out obligations to extradite under this agreement or bilateral agreements. A similar provision is included in the agreement on mutual legal assistance, with Article 13 permitting refusal of assistance "*pursuant to (...) its applicable legal principles, including where execution of the request would prejudice its sovereignty, security, ordre public or other essential interests*".

By its express wording, the provision in Article 16a(2) only provides for an obligation to consult, not an obligation to reach a result permitting extradition, so it does not have the effect of overriding the relevant constitutional principles or of obliging States to amend such principles. At the same time, it does not suggest any limit upon the scope of the relevant constitutional obligations which could be invoked, so it must be assumed that the refusal to extradite on fair trial grounds is among those principles which could apply. The draft agreement is silent as to whether other international obligations, in particular stemming from international human rights law, could justify a refusal to extradite. However, in the absence of any limit on the scope of Article 16a(2), there is nothing to preclude a requested State from considering that international human rights obligations form part of its constitutional principles.

It is important to note the ambiguity which is implied in these provisions, by 'hiding' the need to protect fundamental rights in "constitutional principles" or "other essential interests". It would have been more forthright and responsive

to legitimate concerns if human rights obligations had been mentioned explicitly as being anchored in constitutional principles of Member States and the EU (Article 6 TEU) as well as in international human rights law. It may be assumed that for the US it would have been too explicit to make the agreement subject to international human rights standards.

The problems of US compliance with international obligations regarding fair trial are central to the whole issue, and are in themselves sufficient reason for concern with regard to the extradition treaty. From the EU's point of view, as this is the first agreement of its kind, the overriding aim should be 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.

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Amnesty International recommends that an interpretative framework be drawn up to inform decisions regarding the EU-US agreements and any future such agreements with a view to prohibiting EU Member States from surrendering individuals to countries where they will be at risk of suffering serious human rights violations including unfair trial, death penalty and torture.