

Briefing Note for the European Parliament

Sub Committee: Human Rights

The Policy of the EU in the Field of Border Control and the Fight against Organised Crime:

How does it impact on the promotion of human rights and fundamental freedoms in third countries?

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How does the intersection of the EU policy and law in the field of border control and organised crime engage with human rights compliance in third countries? The starting place for any analysis of this area must be with the human rights obligations engaged and from that perspective the consequences of EU external policies.

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Executive Summary

The EU has embarked on an ambitious project of cooperation with third countries regarding policies of justice and home affairs. The European Commission has produced a Communication on the subject, the Council has published a Strategy and the two institutions together with some Member States have produced policy documents for the furtherance of the project with third countries specifically with Afghanistan, the Western Balkans, the Russian Federation and the USA. This briefing paper outlines the key elements in the documents which engage border control and the fight against organised crime. It then examines those elements in light of the relevant human rights obligations of the Member States under the European Convention on Human Rights in particular. It concludes that, so far, the centrality of human rights in the activities of the EU in border control and the fight against organised crime with third countries has not been made out. Even the references to human rights in the documents are limited, in some cases non-existent. The implementation of human rights standards in the action plans is seriously underdeveloped and requires urgent action if the Member States are to fulfil their obligations in international human rights law.

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Introduction

The area of freedom, security and justice (AFSJ), created by the Amsterdam Treaty to complement the internal market, is now well into its second five year work programme. The first programme, The Tampere Milestones, put into place by the Council meeting in that city in 1999, set out a five year plan for the creation of the area which encompasses activities as diverse as protection of refugees, the abolition of intra Member State border controls, judicial cooperation in criminal matters and police cooperation. The second five year plan, contained in the Hague Programme of November 2004, builds on the first with the general intention of deepening the AFSJ through the adoption of a package of measures in the relevant field.

The AFSJ is the subject of substantial change by the proposed EU Constitution as the collapsing of the Pillars and the creation of a single legal framework for the EU would bring all the fields under one principal legal structure (from which exceptions are provided but remain that – exceptions). Until the Constitution or some other mechanism for collapsing the Pillars of the EU comes into effect the legal framework of AFSJ remains problematic as regards transparency, democratic legitimacy and justiciability by the European Court of Justice. These issues have all been well documented elsewhere.¹

While the AFSJ was originally envisaged as an internal project – part of the completion of the internal market – it has fairly quickly attained an external dimension. This is formally acknowledged in the proposed EU Constitution. It is also set out in the Hague Programme. On 12 October 2005 the Commission issued a Communication entitled A Strategy on the External Dimension of the Area of Freedom, Security and Justice (COM (2005) 491 final) in which it states “The projection of the values underpinning the area of freedom, security and justice is essential in order to safeguard the internal security of the EU. Menaces such as terrorism, organised crime and drug trafficking also originate outside the EU. It is thus crucial that the EU develop a strategy to engage with third countries worldwide”. Un-stated in this encapsulation of the external dimension but of high concern to a number of international organisations as well as non-governmental organisations is the protection of refugees. While the Commission highlights ‘menaces’, one of the core issues of the AFSJ is the protection of refugees and persons in need of international protection. Those in need of international protection must not be perceived as a menace to the AFSJ and more vitally must not be the object of externalisation projects which shift responsibility for individuals onto third countries rather than the EU. The European Parliament’s Sub Committee on Human Rights has already received an excellent briefing note on this issue from Claire Rodier DGEExPo/B/PolDep/ETUDE/2006_11. The analysis provided in that briefing note is fully subscribed to here and we will not repeat the contents of that note but build on it.

On 1 December 2005 the Justice and Home Affairs Council endorsed a Strategy for the External Dimension of JHA: Global Freedom, Security and Justice (Doc No 15446/05). No mention is made of the Commission’s Communication on the same subject. This Strategy commences very similarly to the Commission’s stating “in order to meet the expectations of its citizens the European Union must respond to the security threats of terrorism, organised crime, corruption and drugs and to the challenge of managing migration flows.” It states that

¹ The journal Statewatch and the observatory attached to it provide an excellent source of background information on the AFSJ from a critical perspective. The European Commission funded Framework 7 Project CHALLENGE has an excellent website – www.libertysecurity.org which contains excellent critical analyses of the AFSJ.

the EU should make JHA (an alternative and competing formulation of AFSJ) “a central priority in its external relations and ensure a co-ordinated and coherent approach”.

The appearance of two EU policy documents covering the same territory, along broadly similar lines, published in quick succession one to the other, one produced by the Commission and the other by the Council, might seem rather quixotic to the outsider. However, the sequence of events usually reveals a competence battle between EU institutions – usually the Commission and the Member States united in the Council regarding the field of activity. We shall assume the same is the case here, in no small part the result of the failure to come into force of the proposed EU Constitution. Under the EU doctrine internal and external competence (see the *ERTA* judgment of the European Court of Justice²) if an internal competence has been fully exercised by the EU institutions, exclusive external competence follows and the Member States, including in the form of the Council, are excluded from taking initiatives internally or externally. If an internal competence has been only partially exercised then there is joint competence and if there is no exclusive internal competence to the EU there is no exclusive external one either. As the areas covered by the Communication and the Strategy cover a mixed field – caught between the EC Pillar of the Union (such as immigration), the so-called First Pillar, and the more intergovernmental Third Pillar (such as police cooperation), external competences are mixed as well.

In order to understand how EU policy in border control and the fight against organised crime impacts on human rights in third countries the first step will be to outline the policy – its objectives, framing of the issues and policy instruments. This is somewhat complicated by the need then to summarise briefly the two policies – that in the Commission’s Communication and that in the Council’s Strategy. Then we will examine what steps have been taken in implementation of the policy/policies. Thereafter we will examine each of the key human rights, as contained in the European Convention on Human Rights (also to be found in the UN International Covenant on Civil and Political Rights) and incorporated into the EU Charter of Fundamental Rights, which are engaged by the policies and indicate how the policies impact on each human right. This will be followed, in each section, by recommendations regarding the protection of each human right which is engaged by the policy field. The human rights which we consider of specific importance for this study are (here we use the European Convention on Human Rights as the starting point):

1. Article 3 – the absolute prohibition on torture, inhuman and degrading treatment: issues here include in migration/asylum refoulement of persons in need of international protection; extradition to countries where there are substantial suspicions that the individual may suffer torture or inhuman and degrading treatment; ‘rendition’ or other kidnapping with state collusion which results in an individual being removed to a country where there is a substantial risk he or she will be subjected to torture, inhuman or degrading treatment;
2. Article 5 – the limitations on detention – the limitation of the use of detention to that which is consistent with the rule of law and includes fair trial protections irrespective of whether the individual is an alien or citizen;
3. Article 6 – fair trial – how do the policies on borders and organised crime ensure that the individual’s right to fair trial is respected, including rules on and use of evidence (for instance in conjunction with the Article 3 prohibition on torture); witness protection across borders; legal certainty regarding criminal proceedings;

² 22/70.

4. Article 8 – the right to private and family life – there are two aspects, on the one hand in the immigration context, the right to family life including third country national family members; on the other, the right to privacy expressed in the rules of data protection.

Once we have indicated what the policy/policies are and the state of their development, we will turn to the human rights engaged and discuss, with specific reference to the above rights, how their delivery may be enhanced in third countries through the policy/policies adopted by the EU institutions.

The Objectives, Issues and Policy Instruments

The Commission's Communication

According to the Commission's Communication the objectives of the strategy on the external dimension are related to international stability and security both outside and inside the EU. This is comprised of five parts:

1. The promotion of free movement within the EU and in general more open borders which add a new dimension to international cooperation;
2. Efficient border management to fight threats such as terrorism and organised crime;
3. Independent and efficient judiciaries to uphold rule of law and to ensure the protection of human rights (here it is unfortunate that the upholding of human rights standards seems to rest with the judiciary rather than first and foremost with the state administrations);
4. Fully functioning asylum systems to protect refugees;
5. Efficient and effective police forces which can cooperate with their counterparts – we would note that from a human rights perspective, successful cooperation among police forces depends on all of them upholding the highest standards of human rights protection for all individuals with whom they come into contact. Where this fails, further cooperation is likely to be blocked first from the police, secondly by prosecutors and magistrates and finally by the courts.

The five key issues, according to the Commission, are slightly different:

1. Human rights: ensure that human rights are placed at the heart of law enforcement policies;
2. Strengthening institutions and good governance: this includes the fight against corruption, transparency, accountability and sound management;
3. Migration, asylum and border management: improving third countries' capacity for migration management and refugee protection; border management capacity and preventing illegal immigration;
4. Fight against terrorism: institution building and implementation of international instruments, work with third countries on terrorist recruitment and financing, support of the UN and building relationship with the USA;
5. Organised crime, including trafficking in persons, drugs and human organs, counterfeiting, economic and financial crime and cybercrime.

The issues are to be addressed on the basis of geographic prioritisation starting with the candidate countries, moving to the formally designated Neighbours³ and Russia. The approach is to be characterised by differentiation – states will be treated differently - flexibility, cross pillar coordination, partnership, relevant external action, added value and benchmarking.

The Policy Instruments are to include bilateral agreements between the EU and third countries; enlargement and pre-accession discussions; European Neighbourhood Policy (ENP) Action Plans; regional cooperation; individual arrangements; operational cooperation; institution building and twinning; development policy; external aid programmes; international organisations and monitoring.

The Council's Strategy

The Communication was rapidly followed by a Council Strategy Paper adopted by the Justice and Home Affairs Council in December 2005.⁴ The formal title of the document is A Strategy for the External Dimension of JHA: Global Freedom, Security and Justice. The Council indicates that in its view “the development of the area of freedom, security and justice can only be successful if it is underpinned by a partnership with third countries on these issues which includes strengthening the rule of law and promoting the respect for human rights and international obligations.” The issues which the Council considers key are:

1. Terrorism: international cooperation to fight terrorism is an element of the Union's external relations to be pursued *inter alia* by prevention of radicalisation, exchange of information to identify terrorists, disrupt their activities and bring them to justice;
2. Organised and serious crime: this including trafficking in women and drugs; the EU needs to stop criminals, disrupt their organisations and finances, and provide access to justice for their victims; remove obstacles to judicial co-operation in criminal and civil matters across the EU's external borders;
3. Increased global migration: specifically illegal immigration is identified as a problem, followed by trafficking and the protection of the human rights of migrants;
4. Strengthening border controls to combat illegal immigration and settle more readmission agreements, durable solutions for refugees in regions of origin and transit and the policy coherence of migration and development;
5. Weak governance: building up law enforcement institutions and courts systems identified as weak to tackle better organised crime and corruption.

The principles to be followed in dealing with the issues are: partnership with third countries; use of significant relationships; a differentiated and flexible approach to individual countries; use of broad policy instruments including CFSP, EDSP and JHA; the involvement of Member States; monitoring and evaluation.

The policy instruments (called delivery mechanisms) include: enlargement discussions; ENP; the strategic relationship with the US and cooperation with Russia. The specific steps which the Strategy outlines are: building on political engagement with countries seeking closer links; regional groupings; engagement with international organisations; technical capacity building; allocation of responsibilities to the EU institutions such as Europol, Eurojust and Frontex as well as Member State liaison officer networks; ensuring adequate funding.

³ See the EU Neighbourhood Policy -

⁴ Council Doc 15446/05.

In order to take the process forward, the Council called for Action Oriented Papers (AOPs) to be produced covering priority countries, regions and themes and an 18 month report. AOPs were ordered on the following topics: counter terrorism and North Africa; organised crime, illegal immigration and counter terrorism in the Western Balkans and relevant ENP countries; drug production and trafficking in Afghanistan; migration issues with countries of origin and transit in Africa; and implementing with Russia the Common Space of freedom, security and justice. Each AOP is to have three sections (1) an analysis of the issue and the EU's objectives; (2) a summary of current action; (3) identification of what needs to be done. It is the Presidency's responsibility to produce the AOPs working together with the Council Secretariat and the Commission and supported by interested groups of Member States.

Implementing the Policy/Policies

We have had sight of two AOPs produced in May 2006 – these are in respect of drugs and Afghanistan⁵ and organised crime, corruption, illegal immigration and counterterrorism in the Western Balkans and relevant ENP countries⁶ which is being followed up by a second report on the relevant ENPs.⁷ One further document is of interest to us here, the Communiqué of the meeting between the Ministers of the Interior from the EU Multi-Presidency, Russian Federation and the United States of America of 4 May 2006.⁸

The AOP Afghanistan

The AOP on Afghanistan including transit routes confirms that the framework is based on “an integrated and balanced approach to countering the drugs problem and conformity with international law, human rights and fundamental freedoms.” The Council considers the key priorities are: (a) strengthening legal rural livelihoods in Afghanistan; enhanced border controls and intelligence gathering and sharing; enhanced EU profile in major policy making bodies. The overview of the situation is grim with increased opium yields and the likelihood of greater imports of heroin to the EU. Among other things, the AOP recommends in respect of Afghanistan and the trafficking routes:

1. Additional support for criminal justice reform including prison refurbishment and construction and the establishment of criminal courts and correctional facilities. Legal training and mentoring is also considered crucial.
2. Counter narcotics police support including capacity building and border control;
3. Integrated programmes to assist farmers to diversify crops;
4. Anti corruption mechanisms and state capacity building support;
5. Further assistance to Iran in its anti drugs policy including strengthening capacity on border management;
6. More border control capacity for Pakistan as well as assistance in judicial co-operation including training and judges' protection;
7. Greater information sharing with Turkish law enforcement authorities;
8. Implementation of international money laundering rules in the UAE;
9. An expanded EU engagement in the management of strategic borders between Central Asia and Afghanistan.

⁵ Council Doc 9370/06.

⁶ Council Doc 9272/06.

⁷ Council Doc 9360/06.

⁸ Council Doc 9122/06.

The recommendations in this AOP do not always include an indication of which body, agency or part of the EU or its Member States should be responsible for follow-up.

The AOP Western Balkans and ENP countries

As regards the AOP on cooperation, organised crime, corruption, illegal immigration and counter terrorism in the Western Balkans and relevant ENP countries, the Council notes that as immediate neighbours these countries have a privileged position with the EU. A security partnership based on trust, common interests and the values of freedom, democracy and justice is an important element of the relationship. The current situation is characterised as including organised crime originating from or linked with the Western Balkans which affects the EU; corruption makes it difficult to address; there is substantial heroin importing via the Western Balkans as well as illegal migration and human trafficking linked with international organised crime groups. There is a potential link between organised crime and terrorist activities. Arms trafficking is also an issue. The AOP recommends among other things:

1. Improving law enforcement cooperation to tackle organised and economic crime including cooperation among prosecutors and the judiciary (Europol and Eurojust are engaged);
2. Improving sharing of criminal information and intelligence – the EU should deploy Intelligence Development Officers and Europol and other EU bodies exchange criminal information and/or intelligence (Europol and IDOs);
3. Operational cooperation on human, drugs and small arms smuggling: including protection programmes for human smuggling witnesses and victims; analysis of criminal networks and ESDP police missions to assist in the fight against trafficking in humans, drugs and small arms (OCTA, COSPOL and the European Police Chiefs Task Force);
4. Fighting corruption: more prevention, investigation and prosecution of large scale corruption cases and the encouragement of individuals and groups outside the public sector in the prevention of and fight against corruption (Member States and the Commission);
5. Fighting illegal immigration: the implementation of effective integrated border management systems; coordination among border police, immigration and customs experts and more law enforcement action against forging of travel documents and counterfeiting of visas with the engagement of Europol and Frontex;
6. Terrorism: an assessment of radicalisation and more dialogue – SitCen and Europol are to be engaged in this;
7. Donor coordination: training of law enforcement, prosecutors and the judiciary.

It is worth noting that in this AOP, the recommendations are almost always accompanied by any indication of which body, agency or part of the EU should be following up which recommendation.

EU Multi-Presidency, Russian Federation and USA Meeting

The Communiqué of the meeting between the EU Multi-Presidency, Russian Federation and the USA on cooperation in the field of justice and home affairs of 4 May 2006⁹ states that the meeting provided a “first opportunity for a discussion of issues of common concern in relation to internal and homeland security”. The EU outlined its strategy which includes strengthening rule of law and the promotion of the respect for human rights and international obligations. The Russian Federation indicated a readiness to cooperate on internal security issues preferring operational cooperation. The USA noted its extensive cooperative relationship with the EU on Justice and Home Affairs issues and “its history of enforcement cooperation with the Russian Federation.” The principles agreed are set out as follows:

1. Willingness to work together on common threats and problems;
2. Efforts to make justice and home affairs a priority in external relations;
3. Emphasis on action oriented solutions in terrorism, transnational organised crime, corruption and illegal migration;
4. A differentiated and flexible approach;
5. Promotion of the principles and norms of international law;
6. Recognition of the rule of law and democratic rights in the service of security;
7. Mobilisation of operational resources re internal and homeland security.

The specific areas identified for cooperation are three: (1) combating terrorism including radicalisation and recruitment; (2) fighting organised crime and corruption including money laundering and trafficking in human beings; (3) countering illegal immigration, security of identity documents and border controls. A further meeting is to be held under the German Presidency in the first half of 2007. In the meantime, experts have been invited “to explore the added value accomplished through such a tripartite cooperation and to come forward with relevant recommendations.”

The position of human rights in the documents is somewhat varied. While the Commission’s Communication places it as the first of the key issues, the Council’s Strategy states that success of JHA strategies with third countries need to include the rule of law and promote the respect for human rights. The AOPs also treat human rights differently. While the Afghanistan AOP mentions human rights as part of the framework there is no further specific recommendation about it nor are human rights explicitly incorporated into the recommendations. In the Western Balkans AOP, there is no reference at all to human rights. The only expression used which might be interpreted as including human rights is “a security partnership based on trust, common interests and the values of freedom, democracy and justice”. It is indeed worrying that in a region such as the Western Balkans where respect for fundamental human rights as contained in the ECHR is giving rise to an increasing number of very serious cases before the European Court of Human Rights, the Council has adopted an AOP on justice and home affairs issues which does not even make reference to the term.

In the Communiqué with the Russian Federation and the USA, the framework is stated as including the strengthening of the rule of law and promoting the respect for human rights. In light of the condemnation in 2005 of the Russian Federation by the European Court of Human Rights for very serious human rights violations in Chechnya and the extremely serious matter of extraordinary rendition whereby at the behest of US state officials individuals have been moved through EU states devoid of any legal procedures to countries where there is a serious

⁹ Council Doc 9122/06.

risk that they may suffer torture, reference to human rights and rule of law are most welcome. Unfortunately human rights do not appear again as an area for cooperation.

One final reflection in this section relates to the sustained interest of the EU institutions and the Member States in the external aspect of AFSJ and JHA as a field for substantial endeavour. As the rocky debut of the European Arrest Warrant and the Evidence Warrant indicates, there is much still to be done within the EU to improve the legitimacy and confidence of the public in the human rights compliance of the AFSJ and JHA both domestically within the Member States and at the EU level.¹⁰ The continuing stream of cases coming before the European Court of Human Rights against EU Member States in the fields covered by the AFSJ and JHA indicate that much still needs to be done as regards placing human rights at the heart of EU and Member States' policies in the field and ensuring their implementation and application. Yet, rather than focussing EU efforts towards these obvious problems and issues (which are clearly within the control of the Member States and the EU), there is a substantial new policy initiative by the JHA ministries in the Council and DG JLS of the Commission to externalise activities and to push the question of AFSJ and JHA outside the borders of the EU. One wonders to what extent the struggles over competence in the field between the EU institutions and the JHA ministries of the Member States have resulted in this rather odd approach. It might be compared to turning a glove inside out – the internal policies of the Member States and EU are reversed to become external policies beyond the borders of the EU and thus are move outside the field of competition over responsibilities and competences which is troubling so many JHA ministries at the national level.

Having set out the process which has been put into motion and the activities which have taken place so far, we will now turn to the question of human rights. In the next section we will analyse the human rights issues engaged in the process, the concerns and opportunities which the process presents and make recommendations.

The Human Rights Issues and Recommendations

In this section we will consider the human rights which are most clearly engaged by the policies which are being pursued above. We will examine each human right in turn and make reference to its application, in particular, to the AOPs. Where appropriate we will recommend action to promote human rights protection.

Article 3 ECHR; Article 7 ICCPR;¹¹ Article 3 UN Convention against Torture (UNCAT)

This international human rights obligation requires states to ensure that no one is subject to torture or to cruel inhuman or degrading treatment. It is absolute. The definition of torture is contained in Article 1 UNCAT and means “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purpose as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.” The prohibition includes an absolute ban on the return of a person to a country where there is a substantial risk that he or

¹⁰ *Constitutional Challenges to the European Arrest Warrant* Elspeth Guild (ed), Wolf, Nijmegen, 2006.

¹¹ International Covenant on Civil and Political Rights

she would suffer the prohibited treatment irrespective of national security considerations of the state where the individual is present. Further, in the EU the prohibition includes return to a state which applies the death penalty and also applies to situations where the torture or other treatment is carried out by non state actors.

Three aspects of the Communication, Strategy, AOPs and Communiqué raise issues of compliance with Article 3:

1. Asylum: persons who are at risk of treatment contrary to Article 3 are entitled to protection in the Member States but to enjoy that protection they must be able to access the territory. The third key policy of the Communication, the fourth key of the Council's Strategy, the Afghanistan AOP recommendations numbered herein 2, 5, 6 and 9, Western Balkans AOP recommendation numbered herein 5, Communiqué point 3 all engage the duty of the EU to protect the individual in need of international protection as all of them recommend the hardening of border controls. Hard border controls make it more difficult for those in need of protection to arrive at the border and to seek protection. They tend to block the individual at risk of torture in the state where he or she is at risk rather than permitting him or her to flee and seek protection elsewhere.

There is no mention in the documents of this fundamentally important human rights obligation and the duty of the EU to ensure that it is not obstructed.

2. Extradition: the use of criminal law to move an individual from one jurisdiction to another must never result in his or her exposure to torture or inhuman or degrading treatment. Communication key issues 4 and 5, Strategy key 2 and 5, AOP Afghanistan recommendations 1 and 4, AOP Western Balkans recommendations 1, 4, and 7 are affected by this duty. Greater police and judicial cooperation among states can only take place where there is a high level of confidence that the individual will not be subject to treatment contrary to Article 3.
3. Extraordinary Rendition: this is a term which has been coined to describe state kidnapping of individuals and their transportation by state officials from one state to another for uncertain or publicly unknown purposes. This practice has been the subject of much concern by the European Parliament as it has been practiced by the USA with the complicity of various EU Member States, candidate states, states in the Western Balkans and Afghanistan. In light of the risk of treatment contrary to Article 3, any policy intended to promote human rights in JHA and AFSJ must address this issue.

Article 5 ECHR; Article 9 ICCPR

This is the right to liberty and security of the person. It requires that no one is deprived of his or her liberty except in the circumstances enumerated and in accordance with a procedure prescribed by law. The procedure must include access to a competent court, the prompt information of the individual of the reason for arrest and charge and the right to challenge detention.

Two aspects of the Communication, Strategy, AOPs and Communiqué engage Article 5:

1. In the context of the externalisation of border controls, implicit is the detention of foreigners on the far side of the border. The Briefing Note prepared for the European Parliament by Claire Rodier referred to above covers this aspect most helpfully. The EU must not export the detention of foreigners as a mechanism to prevent the arrival at the EU's borders of persons seeking international protection or seeking to visit the EU. There is no a priori way to determine that a foreigner is regularly or irregularly seeking to enter the EU until he or she arrives at the border. His or her detention in a third state in order to prevent him or her from arriving on the basis of a suspicion that perhaps a Member State's border official might refuse the individual entry is an act contrary to Article 5 and the complicity, should there be any, of the EU or any Member State in any act by a third country of this kind is likely to be contrary to the human right as well.
2. In the context of the criminal justice system, Communication key issue 5 on organised crime, the Strategy keys 2 and 5, AOP Afghanistan recommendation 1, AOP Western Balkans recommendations 1 and 4 engage this human right. At the centre of all cooperation in law enforcement, the centrality of the right of liberty of the person must be ensured. In particular the AOP Afghanistan recommends cooperation on prison refurbishment and correctional facilities. In any cooperation, protection of Article 5 must be central. There is also the serious concern regarding the nexus of Articles 3 and 5 – when an individual is detained he or she is at much greater risk of torture than when at liberty. In light of the public concerns expressed regarding, for instance Bagwan Airport in Afghanistan as a place of detention and torture, EU attention to the human rights obligations here are particularly important.

Article 6 ECHR; Article 9 ICCPR

The right to a fair trial is a central human right recognised in the European Convention on Human Rights and the International Covenant on Civil and Political Rights. Any police or judicial cooperation must incorporate this right which includes the presumption of innocence, a set of minimum rights including timeliness of trial, the right to a defence including regarding evidence and the examination of witnesses. Communication key issues 4 and 5; Strategy key 1 and 2, AOP Afghanistan recommendation 1 and 8, AOP Western Balkans recommendations 1 and 2 and the Communiqué generally engage the issue of fair trial. A trial will not fulfil the conditions of Article 6 if, for instance, evidence tainted by torture is adduced by the state. The exchange of information by police and prosecutors must fulfil the conditions of legality if that information is to be used in criminal trials, suspicion and rumour must be excluded. Witnesses need to be protected in the circumstances of cross border trials but the defence must also have the right to cross examine witnesses. The externalisation of JHA and AFSJ must not result in practices of criminal procedures which fail to comply with Article 6.

Article 8 ECHR;

The right to private and family life is a central human right protected in international instruments. The state is obliged to respect the private and family life of every individual within its jurisdiction subject to the limitations which are enumerated in them. Any interference with the right to private and family life must be contained in the law and comply with the restrictions contained in the human rights instrument. Two aspects of Article 8 are of concern here:

1. The right to private life: this right is the right to privacy which includes the right of the individual to protection of his or her personal data. In European human rights law, personal data remains the property of the individual to whom it applies, not to the agency which collected it. There are five aspects of data which are at stake: collection, storage, manipulation, exchange and deletion. All are governed by Article 8 ECHR and must comply with a proportionality requirement. Thus whenever EU states are engaged in the collection, storage, manipulation or exchange of personal data of the individual this must not take place except where permitted in accordance with the right to protection of the individual's data, the individual's consent or an explanation compatible with Article 8 as to why the individual's consent is not required. Communication key issues 4 and 5, Strategy keys 1 and 2, AOP Afghanistan recommendation 7, AOP Western Balkans recommendations 1, 2, 3 and 4 and Communiqué principle 3 all raise questions about Article 8 and the individual's right to control of his or her data.
2. The right to family life includes the right of families to live together including where the nationalities of members of the family are different. Border and migration policies including those regarding illegal migration must not constitute an obstacle to the legitimate right of the family to live together in order to exercise their human right. Those provisions of the Communication, Strategy, AOPs and Communiqué which engage the issues of migration must be developed in accordance with the right to family life and should foster and promote family unity. They must not be used to separate families and result in children growing up without their parents, couples living apart and the sacrifice of elderly parents and other vulnerable family members.

Conclusions and Policy Recommendations

The field of border control and the fight against organised crime engages many fundamental human rights to which all EU Member States have subscribed. In the European context, the ultimate interpretation of the Member States' human rights obligations is the responsibility of the European Court of Human Rights which is working at full capacity dealing with petitions by individuals, including those of the EU Member States, which reveal strong indications that fundamental human rights have not been successfully protected including by EU Member States, their police and judiciary.

In the externalisation of border control and the fight against organised crime, the EU must ensure that its policies and actions support the protection of human rights not only within the EU but also in those states where the policies will have effect. Where a member State of the ECHR incites another member State to breach its obligations in human rights, it is certainly arguable that the member State carrying out the incitement is equally in violation of the ECHR as the state taking the action. Further, the duty to protect human rights applies in respect of all state actions, including those by its officers abroad. The acts of consular officials, for instance, have frequently been found in breach of member States' human rights obligations under the ECHR. Where the EU is deploying officials abroad in the pursuit of its external JAH and AFSJ policies, anxious scrutiny must be given to ensuring that their actions promote human rights and do not become the object of judicial proceedings before the European Court of Human Rights in respect of violations of the ECHR abroad.

In order to achieve the two key objectives – to enhance human rights compliance and protection abroad and to ensure EU and Member States officials do not place Member States at risk of violation of their human rights duties in particular under the ECHR three practical steps need to be taken:

First Recommendation: human rights must be mainstreamed into the EU’s policy in border control and the fight against organised crime as regards policies in respect of third countries. This means that in the development, adoption, implementation and application of policies in this field there must be a high level of scrutiny regarding the EU and its Member States human rights obligations which are affected by the policy. In order to achieve this we recommend:

- All policy initiatives or documents should be accompanied by a human rights compliance report;
- Every AOP have a specific section on the human rights including an assessment of the situation in the third country and the implications of all aspects of the policy;
- In every report on discussions with officials of third countries, such as the Communiqué, a specific section explain how the question of human rights and their application in this field were discussed at the meeting/event;
- A periodic report on the human rights implications and actions in the field must be prepared and submitted to this Committee for scrutiny, including a detailed table of the use of funding on human rights in the policy field as recommended below at (3).

Second Recommendation: unless resources are made available to make sure human rights are a central concern in this field, it is likely that if any action is taken it will be to allocate human rights monitoring and reporting to some official who is already responsible for many other aspects of the policies and may have no background in human rights compliance and implementation. In order to achieve the first recommendation in a meaningful manner each team which is working on a policy field in this area or a geographical sphere must be allocated a dedicated human rights specialist duly qualified who has key responsibility for taking the lead on the human rights compliance and monitoring aspects of the policy. In order to ensure the independence of this member of the team he or she must be accountable to an authority outside the sector which has a human rights responsibility – such as this Committee. It is key that this member of the team must not only be a key participant in the development and implementation of the policy but must also have an acknowledged and accepted role as a watchdog responsible to an external authority to report where problems or important decisions and issues arise.

Third Recommendation: in the context of the Member States’ and EU’s legal obligation to ensure human rights compliance, policies in border control and the fight against organised crime in conjunction with third countries must aim to increase and ensure respect for human rights standards in conjunction with those third countries. Resources in the form of a substantial budget line, we would suggest not less than 25% of the overall budget for financing activities in this field, must be allocated to human rights protection and compliance. Without resources to improve human rights standards many third countries may not be in a position to take effective action even when acknowledged and accepted. When new resources are made available for the purpose of human rights protection, third countries are likely to be better able to take effective action. The dedicated human rights expert working in each policy/geographical area within the EU institutions on the policy must be involved in the approval of allocations from this budget line to ensure the effective use of the funds for human rights purposes.

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