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Critique of the European Commission's paper on asylum, protection and internal security

displays flagrant disregard for basic human rights obligations
suggests solutions that are not coherent
would apply to situations wholly unrelated to terrorism

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Summary

The Commission paper on the relationship between internal security and international protection (COM (2001) 743, 5 Dec. 2001) is deeply flawed. It displays flagrant disregard for basic human rights obligations relating to torture, the death penalty and private and family life found in the European Convention on Human Rights, the EU Charter of Fundamental Rights and international human rights instruments. Moreover, it suggests solutions that are not coherent in relation to EU asylum rules or proposals, conflict with agreed EU measures regarding terrorism and arrest warrants, or would apply to situations wholly unrelated to terrorism. Finally, the practical implications of certain proposals have not been seriously considered.

The issues

1) Asylum Procedures

The Commission paper begins by arguing that all persons should in principle have access to the asylum procedure, regardless of allegations concerning terrorism. This is without prejudice to the prospect that applicants for asylum may be found to be ineligible for refugee status on the grounds listed in Article 1.F of the Geneva Convention.

The Commission's support for admission of all applicants into the asylum determination system is welcome, as in most cases an alleged terrorist will dispute such accusations and it would violate the Geneva Convention and the European Convention on Human Rights to remove that person without any consideration of the truth of such allegations. However, the Commission then goes on to suggest detailed solutions for certain issues. Here there are two serious problems with the Commission's analysis.

1a) Asylum Procedures and Extradition

The first problem concerns the relationship between asylum applications and an extradition request from a state other than the country of origin. The Commission puts forward two options here. In the first option, an asylum application would be 'frozen' while a person would be extradited to another state to face certain charges. The application could then be resumed if the person in question was not found guilty of the allegations. Under the second option, the asylum application would be dismissed as 'inadmissible' in such situations, but an applicant could then apply for asylum in the Member State to which he or she was extradited.

It is obvious that the Commission has not thought through the practical implications of either option. First of all, the Commission has not suggested rules regarding the need to ensure that the applicant is not 'refouled' (i.e., sent to an unsafe country) following completion of the trial in the country requesting extradition (assuming the trial country is itself safe). Failure to guarantee

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this would violate the 'non-refoulement rule' of the Geneva Convention on Refugees, as well as Article 3 of the European Convention on Human Rights, which guarantees the right to be free from torture or other inhuman or degrading treatment. Also, the Commission has not considered that the European Convention on Human Rights, in certain cases, prevents removal to face an unfair trial.

Secondly, the Commission has not mentioned the practical difficulties of resuming the process of considering the asylum application (in the first option) or changing the Member State responsible for considering the application (in the second option). The first option would require a commitment from the Member State where the asylum application is first lodged to readmit the applicant to resume the claim. It would also potentially require rules on transit through Member States and non-Member States alike. Furthermore, it might entail changes to the Dublin Convention (or the proposed Regulation which will replace it), as otherwise the responsibility for considering the application might result in another Member State being responsible, if the applicant spends a long enough time away from the Member State in which he or she applied and then does not return directly to that Member State. But the Commission expressly states that it does not contemplate an amendment to the Dublin rules.

As for the second option, the Commission simply appears to assume that in all such cases the applicant would be extradited to another Member State. But what if the applicant is extradited to a non-Member State? Will that third state be responsible for considering the application? If so, on what basis can it be guaranteed that this non-Member State will consider the application? What if this non-Member State does not apply the Geneva Convention on refugees at all, or not in the same way, or is not a party to the ECHR? Or alternatively, if the intention is that the applicant return to a Member State to apply again, how will entry in order to make such an application (or the possibility of applying through an embassy) be guaranteed? What about transit issues? Where an applicant in this scenario is extradited to another Member State, the Dublin Convention (or replacement Regulation) would likely have to be changed to accommodate the result the Commission recommends; but again the Commission does not suggest such amendments.

Under either scenario, the Commission does not address the prospect that even where an applicant is acquitted of all charges (or convicted only of offences that fall under the threshold of Article 1.F of the Geneva Convention), a state might still argue that Article 1.F applies to that person, as Article 1.F can be applied, in the Commission's view, even without a criminal conviction. There is thus a risk that Article 1.F will be applied on an automatic basis even after an acquittal (or conviction on minor charges).

1b) Asylum Procedures

The Commission suggests that where Article 1.F of the Geneva Convention allegedly applies, proceedings could be accelerated and remedies to prevent expulsion could be removed. Both suggestions raise huge risks that the rights under the Geneva Convention and the ECHR will not properly be protected. Of course, there will be some cases where the application of Article 1.F is obvious, but in other cases the evidence will be unclear and contested. It is thus essential that applicants have full procedural rights and that the dismissal of an asylum application at the first instance does not result in a suspension of the right to remain in the country during an appeal. The 'right' to an appeal which the Commission mentions would be essentially useless if it cannot be exercised in-country. This drastic reduction in procedural rights would arguably contradict the right to an effective remedy in Article 13 of the ECHR and Article 47 of the EU Charter of Fundamental Rights.

2) Protection against Expulsion

The Commission states at p. 14 that a state requesting extradition 'could, for instance' agree not to impose the death penalty. This wording suggests that it is optional for Member States to decide whether or not to expel a person to face the death penalty (potentially). But this interpretation ignores the Member States' legal obligations regarding the death penalty following their ratification of the Sixth Protocol of the ECHR. This is the more striking because the preamble to the Framework Decision on the European arrest warrant, as agreed politically

by the Council in December 2001, expressly states that no person can be extradited to face the death penalty. Also, the Commission does not take account of Article 19 of the EU Charter of Fundamental Rights, 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'.

As far as Article 3 of the ECHR is concerned, the Commission recognises that protection against expulsion to face torture or other inhuman or degrading treatment is absolute, but then suggests that there might be future case law of the European Court of Human Rights which 'balances' state security against this absolute right. The Commission's suggestion here quite simply betrays a profound contempt for one of the most fundamental human rights, as there is no indication of such a possible change in the established case law of the European Court of Human Rights. Again, the preamble to the Framework Decision on the European arrest warrant, as agreed politically by the Council in December 2001, expressly states that no person can be extradited to face torture or other inhuman or degrading treatment; and again, the Commission's view conflicts with Article 19 of the EU Charter of Fundamental Rights, 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'.

3) 'Excludable' persons

The Commission rightly points out that the situation of persons who can legally be excluded from a 'protection' status but who cannot be expelled is not defined in any international rules or many national rules. It would therefore be useful, as the Commission suggests, to adopt Community rules addressing the status of such persons, although the Commission does not give any indication of what the content of such rules would be. However, the Commission wrongly confuses two groups here: the persons who do not qualify for refugee status in the first place, due to Article 1.F of the Geneva Convention, and the persons who do qualify for that status but could potentially still be expelled in accordance with Articles 32 or 33 of that Convention. The latter group are refugees and until and unless their refugee status is withdrawn pursuant to Article 1.C of the Geneva Convention, they do have the status of Geneva Convention refugees.

4) Eurodac

The Commission's discussion of Eurodac in Chapter 4 of its paper is profoundly disturbing. Eurodac provides that fingerprints of asylum-seekers and persons irregularly crossing the border can be taken in order for the limited purposes of comparing fingerprints to ascertain which Member State is responsible for considering an asylum application. The fingerprints in the system cannot be used for general crime-fighting purposes. While of course any purely national fingerprint database is not subject to the limitations placed on Eurodac, the Commission fails to point out that any further use by Member States of the fingerprints of asylum-seekers is governed by the data protection rules of the 1995 EC data protection directive, the 1981 data protection Convention of the Council of Europe, and Article 8 of the ECHR.

5) Reception conditions

The Commission's paper suggests that reception conditions for asylum seekers could be reduced if they 'aided and abetted' or gave financial support to a terrorist group as defined by the EU. This fails to consider that in most cases, such alleged support would be in relation to a group in a third country, run by third-country nationals and allegedly committing 'terrorist' acts against third-country nationals. But the framework decision defining 'terrorism' agreed by the Council in December 2001 only governs acts committed wholly or partly within the EU, by EU nationals or residents or against EU nationals or residents (it is not plausible that asylum-seekers are 'residents' under this definition, since their residence status is only provisional and their rights are very limited: Member States cannot have it both ways). So the Commission's proposal on this issue fails to take account of the jurisdictional limits of the framework decision, and confuses the vital underlying distinction between the unjustifiability of political violence in a

democratic society and violent acts in defence of democracy in a non-democratic state. This distinction is expressly recognised by a Statement exempting 'the conduct of those who have acted in the interest of preserving or restoring...democratic values' from the version of the framework decision on terrorism approved by the Council.

6) Migration

The Commission's proposal finally addresses the issue of long-term residents. This issue is outside the scope of asylum law. Moreover, the Commission's proposals are ill-thought-out. The proposed Directive on long-term resident third-country nationals already provides for potential expulsion of any long-term resident convicted of a sufficiently serious crime, so already provides for sufficient protection in cases of alleged terrorist activity. But the Commission nonetheless proposes to amend its proposed Directive, in each case by making changes that would also apply outside the context of terrorism.

For example, the Commission proposes to delete the rule that a criminal conviction of a long-term resident third-country national would not automatically result in expulsion. Deleting this rule would obviously affect many persons who are not involved with terrorism, even allegedly, but who rather are convicted of possibly quite minor crimes. The rule in question as currently drafted would not in any way prevent the fight against terrorism, as it would simply require the national authorities and the courts to consider, on a case-by-case basis, the seriousness of any criminal conviction against the established rights of a long-term resident before removing them. Applying this balancing test, a terrorist conviction would certainly not stand in the way of expulsion. Moreover, the Commission's amendment would conflict with the established jurisprudence of the European Court of Human Rights on the protection for long-term residents under Article 8 ECHR, and since it would place long-term resident third-country nationals in a different position from EU nationals, would conflict with the principle of treating long-term resident third-country nationals and EU nationals the same 'as far as possible', as agreed by the Tampere European Council.

Background

The Commission's paper (COM(2001) 743 final) was prepared in response to the "Conclusions" of the specially-called meeting of the Justice and Home Affairs Council on 20 September 2001. One of the measures agreed in response to 11 September was to call on the Commission to: "examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments".

On 16 October President Bush wrote to the EU institutions making a series of demands for EU-US cooperation including eight substantive migration/asylum issues. This was followed on 26 October by a special meeting of the EU's high-level Strategic Committee on Immigration, Frontiers and Asylum (SCIFA) with US officials.

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