



Council of Europe Responses to the Threat Posed by Terrorism

Since the attacks on 11 September 2001, dealing with the threat of terrorism has become a top political priority. Local, national, and international actors have all been challenged to identify and minimise the danger that terrorist actors pose to their populations and institutions.

The Council of Europe has a history in developing measures to tackle the terrorist threats faced by its member states.

Introduction

The European Convention on the Suppression of Terrorism, signed in 1977, was the first time the Council of Europe dealt directly with the issue of terrorism. Here, conditions for extradition as a means of ensuring that perpetrators are brought to justice were refined and made relevant to the threat posed by potential terrorists. One key element, having a bearing both on the legal status of any perpetrators and on the laws surrounding extradition orders, distinguishes certain crimes often associated with terrorism from political crimes.¹

Article 1

For the purpose of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:

- a. an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at the Hague on 16 December 1970;
- b. an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
- c. a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
- d. an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
- e. an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
- f. an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence.

¹ **Communication from the Council of Europe:** Council of Europe, *European Convention on the Suppression of Terrorism*, ETS No. 90 (Strasbourg, January 1977), p. 1. Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/090.htm>

Guidelines on human rights and the fight against terrorism

On 11 July 2002, the Committee of Ministers of the Council of Europe adopted a set of guidelines to help states find appropriate responses in their struggle against terrorism. These guidelines were the first international legal text on human rights and dealing with the terrorist threat.²

Here, the Committee of Ministers of the Council of Europe reaffirm their condemnation of all terrorist acts as criminal and unjustifiable, stating that terrorism ‘seriously jeopardises human rights, threatens democracy, and aims notably to destabilise legitimately constituted governments and to undermine pluralistic civil society’.³

The Guidelines also make three clear assertions throughout: that all measures taken must be lawful, that upholding human rights is necessary in the search for effective counter-terrorist responses, and that all forms of torture must be prohibited. Below are selected sections of the Guidelines.

I. States’ obligation to protect everyone against terrorism

States are under obligation to take the measures needed to protect the fundamental rights of everyone within their jurisdiction against terrorist acts, especially the right to life. This positive obligation fully justifies States’ fight against terrorism in accordance with the present guidelines.

II. Prohibition of arbitrariness

All measures taken by States to fight terrorism must respect human rights and the principle of the rule of law, while excluding any form of arbitrariness, as well as any discriminatory or racist treatment, and must be subject to appropriate supervision.

III. Lawfulness of anti-terrorist measures

1. All measures taken by states to combat terrorism must be lawful.
2. When a measure restricts human rights, restrictions must be defined as precisely as possible and be necessary and proportionate to the aimed pursued.

IV. Absolute prohibition of torture

The use of torture or inhuman or degrading treatment or punishment is absolutely prohibited, in all circumstances, and in particular during the arrest, questioning and detention of a person suspected of or convicted of terrorist activities, irrespective of the nature of the acts that the person is suspected of or for which he/she was convicted.

The emphasis on respect for the rule of law and the human rights of all individuals involved represents a firm stance. The implementation of the ‘War on Terror’ by a number of governments calls their compliance with this into question. Some examples of European states’ non-compliance with the Guidelines are presented in the Council of Europe Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners (see page 5).

² Directorate General of Human Rights at the Council of Europe, *Guidelines on human rights and the fight against terrorism adopted by the Committee of Ministers on 11 July 2002 at the 804th meeting of the Ministers’ Deputies* (Strasbourg: Council of Europe Publishing, 2002). See also *Conseil de l’Europe* [on-line]. Accessed 28 August 2007, available at http://www.coe.int/t/f/droits_de_l'homme/Guidelines.asp

³ *ibid.* p. 7.

However, the Guidelines do make room for the possibility of States to derogate certain rights under extreme circumstances in their ‘fight against terrorism’.

XV. Possible derogations

1. When the fight against terrorism takes place in a situation of war or public emergency which threatens the life of the nation, a State may adopt measures temporarily derogating from certain obligations ensuing from the international instruments of protection of human rights, to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law. The State must notify the competent authorities of the adoption of such measures in accordance with the relevant international instruments.

The phrasing and lack of clear definitions within the possible derogations is a cause for concern. The ‘life of the nation’ is expressly protected but it is unclear what this term refers to. Why the reference is to ‘life of the nation’ rather than the life of people, for example, requires further explanation.

By not defining precisely what constitutes being ‘strictly required by the exigencies of the situation’, the Guidelines leave much room for ambiguity in member states’ responses. This could undermine the Guidelines’ own position that human rights must be respected strictly. The limits and conditions fixed by international law are mentioned but no references are given, nor are the relevant international laws outlined. Who the competent authorities are is also left in doubt.

If it is deemed that measures can be adopted which derogate from human rights obligations the conditions must be made absolutely clear. This is a shortcoming of the Guidelines.

The language used by the Council of Europe is a further cause for concern. Throughout the Guidelines states are continually said to be ‘fighting terrorism’. At the Worldwide Security Conference, organised by the Club de Madrid and the EastWest Institute, the dangers of referring to counter-terrorist strategies as a fight were discussed. Effects including the galvanising of terrorist operators (who are now at war) and the fostering of an over-anxious desire to seek explicitly military responses are dangerous and can be highly counterproductive.

Protocol amending the European Convention on the Suppression of Terrorism

Following the adoption of the Guidelines, the Council of Europe agreed to update the Convention signed in 1977 with the Protocol amending the European Convention on the Suppression of Terrorism.⁴ This Protocol, drafted in May 2003, wished ‘to strengthen the fight against terrorism while respecting human rights’.

This Protocol differs from the original Convention in three main ways:

Firstly, the list of offences not regarded as ‘political crimes’ by the Convention has changed to incorporate all relevant UN anti-terrorist Conventions and Protocols. The list of offences

⁴ **Communication from the Council of Europe:** Council of Europe, *Protocol amending the European Convention on the Suppression of Terrorism*, ETS No. 190 (Strasbourg, May 2003), p.1. Available at <http://conventions.coe.int/Treaty/en/Treaties/Html/190.htm>

not regarded as 'political crimes' has been extended considerably. Secondly, a simplified amendment procedure has been introduced. Thirdly, the Convention has been opened to accession by the observers to the Council of Europe. Other states may also join the Convention if invited by the Committee of Ministers.

The discrimination clause, a necessary addition when the list of offences not regarded as political crimes is added to, is expanded in the Protocol. It includes a clause which authorises states to refuse the extradition of any individual who may face a death sentence, be subjected to torture, or be sentenced to life imprisonment without parole.

Again, the language used by the Council of Europe continually refers to a fight against terrorism.

Council of Europe Convention on the Prevention of Terrorism

In May 2005, the Council of Europe adopted a new Convention on the Prevention of Terrorism.⁵ The purpose was stated in Article 2.

Article 2 - Purpose

The purpose of the present Convention is to enhance the efforts of Parties in preventing terrorism and its negative effects on the full enjoyment of human rights, in particular the right to life, both by measures taken at national level and through international co-operation, with due regard to the existing applicable multilateral or bilateral treaties or agreements between the Parties.

This Convention sets out two ways to 'enhance the efforts' of member states:

It established as criminal offences certain acts that may lead to an increased likelihood of terrorist incidents, namely public provocation, recruitment and training. Secondly, it reinforces cooperation on prevention. This refers both to internal (national prevention policies), and to international cooperation. Existing extradition procedures are modified and mutual assistance arrangements are strengthened.

There is also a provision on the protection and compensation of victims of terrorism within the 2005 Convention. The Council of Europe states that a 'consultation process is planned to ensure effective implementation and follow up'.⁶

The alleged use of European countries by the CIA for the transportation and illegal detention of prisoners

Since the start of the 'War on Terror', declared following the attacks on 11 September 2001, critics have accused the United States (US) government, in particular the Central Intelligence Agency (CIA), of rendering individuals suspected of involvement in terrorist activities to third countries where they may face torture. Both the Council of Europe and the European Parliament have produced reports where transportation and illegal detention is

⁵ Communication from the Council of Europe: Council of Europe, *Council of Europe Convention on the Prevention of Terrorism*, ETS No. 196 (Warsaw, May 2005). Available at <http://conventions.coe.int/Treaty/EN/Treaties/Html/196.htm>

⁶ Communication from the Council of Europe: Council of Europe, *Council of Europe Convention on the Prevention of Terrorism: Summary of the treaty* [on-line], accessed 5 September 2007, available at <http://conventions.coe.int/Treaty/EN/Summaries/Html/196.htm>

investigated. This section will first look at the Council of Europe's activities before focussing on the European Parliament's report.

On 7 June 2006, a report from the Committee on Legal Affairs and Human Rights of the Council of Europe was made public. The report on 'Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states' was written by Dick Marty, a Swiss member of the Parliamentary Assembly of the Council of Europe.⁷ In the report, Marty states that some European countries are being used in this process of detaining suspects without any judicial oversight and without allowing access to legal counsel, as well as the extradition to countries where torture or 'enhanced interrogation techniques' are employed. One of Marty's conclusions was that a hundred people had been kidnapped by the CIA in Europe, qualifying them as 'ghost detainees', before being rendered to a third country such as Egypt, Jordan, Syria, Morocco or Uzbekistan where torture may take place.

Following this report, the Parliamentary Assembly of the Council of Europe published a draft Recommendation and Resolution document, also in June 2006. Here, the Parliamentary Assembly of the Council of Europe (PACE) demands that 'human rights clauses' be included in agreements regarding US military bases with the US, as well as calling for clear regulations governing how foreign intelligence services can operate within Council of Europe member states. It calls for the immediate dismantling by the US of its system of secret detention centres, some of which are located in Europe.

Earlier, in April 2006, Mr. Gies de Vries (the EU's antiterrorism coordinator) stated that no evidence existed which proves that extraordinary rendition had been taking place in Europe. However, in addition to Mr. Marty's report, this denial was categorically rejected by a European Parliament report on the subject in February 2007.⁸

The European Parliament's report, entitled 'Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners', was adopted by a large majority in the Parliament. It names fourteen countries as having tolerated illegal actions of the CIA including secret flights over their territories. The named countries were: Austria, Belgium, Cyprus, Denmark, Germany, Greece, Ireland, Italy, Poland, Portugal, Romania, Spain, Sweden, and the United Kingdom. Below is an extract from the report.

The European Parliament,

36. Recalls that the programme of extraordinary rendition is an extra-judicial practice which contravenes established international human rights standards and whereby an individual suspected of involvement in terrorism is illegally abducted, arrested and/or transferred into the custody of US officials and/or transported to another country for interrogation which, in the majority of cases, involves *incommunicado* detention and torture;

⁷ Communication from the Council of Europe: Parliamentary Assembly of the Council of Europe, *Alleged secret detentions and unlawful inter-state transfers involving Council of Europe member states*, AS/Jur (2006) 16 Part II (Strasbourg, June 2006). Available at http://assembly.coe.int/CommitteeDocs/2006/20060606_Ejdoc162006PartII-FINAL.pdf

⁸ It should be remembered that the Council of Europe is a separate organisation to the European Union. The Council of Europe was founded in 1949 and has forty-seven member states. The European Union was founded in 1957, when six European countries joined the European Economic Community (EEC), and now has twenty-seven Member States. The European Parliament is an institution of the European Union, hence a separate report to that of the Council of Europe.

37. Deplores the fact that the families of the victims are kept in complete ignorance of the fate of their relatives;
38. Underlines, notwithstanding an intended confusion created by some US representatives in private and public speeches, that extraordinary rendition is a wholly different practice from one that has been used by some European countries only in very exceptional circumstances, namely the detention or reception into custody in third countries of individuals formally accused of very serious crimes, in order to transfer them to European soil in order to face criminal charges before a court with all the guarantees of a judicial system;
39. Condemns extraordinary rendition as an illegal instrument used by the United States in the fight against terrorism; condemns, further, the acceptance and concealing of the practice, on several occasions, by the secret services and governmental authorities of certain European countries;
40. Condemns any participation in the interrogation of individuals who are victims of extraordinary rendition, because it represents a deplorable legitimisation of that type of illegal procedure, even where those participating in the interrogation do not bear direct responsibility for the kidnapping, detention, torture or ill-treatment of the victims;
41. Considers that the practice of extraordinary rendition has been shown to be counterproductive in the fight against terrorism and that extraordinary rendition in fact damages and undermines regular police and judicial procedures against terrorism suspects;
42. Stresses that at least 1 245 flights operated by the CIA flew into European airspace or stopped over at European airports between the end of 2001 and the end of 2005, to which should be added an unspecified number of military flights for the same purpose; recalls that, on one hand, there may have been more CIA flights than those confirmed by the investigations carried out by the Temporary Committee, while, on the other hand, not all those flights have been used for extraordinary rendition;
43. Regrets that European countries have been relinquishing their control over their airspace and airports by turning a blind eye or admitting flights operated by the CIA which, on some occasions, were being used for extraordinary rendition or the illegal transportation of detainees, and recalls their positive obligations arising out of European Court of Human Rights case law, as reiterated by the European Commission for Democracy through Law (Venice Commission);

This report, together with Mr. Marty's report and the Council of Europe Recommendation and Resolution document, seriously implicates European countries in practices which constitute gross abuses of human rights. There have been a number of high-profile cases where abducted individuals are found to be innocent (following extended periods in secret detention centres or prisons in third countries) and left without any apology or compensation.

One case involves a German citizen, Khalid el-Masri, who was abducted on his way to a New Year's holiday in Macedonia. He was imprisoned in a hotel room in Macedonia, flown to an Afghani prison (where he was incarcerated for four months); and stripped naked and beaten on various occasions. He was eventually blindfolded and flown to Albania where he was left to find his way home. The most likely explanation at the moment is that the US confused el-

Masri with another man with a similar name, Khalid al-Masri, who met with members of the 'Hamburg cell' which participated in the 11 September attacks in the US. But whether or not the 'right man' was the subject of such treatment, the treatment itself is not acceptable under any circumstances and contravenes various international standards: in particular the right to liberty and security; the freedom from torture and cruel, inhuman or degrading treatment; and the right to an effective remedy.

In the report, the European Parliament also expresses serious concern over the conditions surrounding the extraordinary rendition of six other men (Bisher Al-Rawi, Jamil El-Banna, Abou Elkassim Britel, Binyam Mohammed, Abu Omar and Maher Ara) and the expulsion of a further two (Ahmed Agiza and Mohammed El Zari).⁹

Concluding remarks

The Council of Europe has taken measures to remind member states and others that human rights must not be neglected, whether or not states take part in the so-called 'War on Terrorism'. It has made clear that this is both the right position to take and the most effective. Technical changes, such as the criminalisation of certain acts and enhancing of cooperation mechanisms in the Council of Europe Convention on the Prevention of Terrorism, have strengthened the opportunity for states to meet the security challenges they face.

Activity within the Council of Europe on the subject has increased sharply since 11 September 2001, as would be expected.

The Convention on the Suppression of Terrorism offers tools to member states to strengthen their counter-terrorism efforts while the Guidelines provide a clear approach for states to take. They must utterly condemn the attacks; respond to them with respect for the rule of law, maintain absolute respect for human rights, and condemn the use of torture in all circumstances.

⁹ Communication from the European Parliament: European Parliament, *Report on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners*, A6-9999/2007 (January 2007), p. 13/77. Available at http://www.europarl.europa.eu/comparl/tempcom/tdip/final_report_en.pdf