European Union

In a watershed year for European institutions, 2004 marked the expansion of the European Union (E.U.) from fifteen to twenty-five member states and initial agreement on a new Constitutional Treaty. A series of train bombings in Madrid on March 11, 2004, marked a more sinister milestone: the worst terrorist attack in modern European history, leaving 191 civilians dead and hundreds wounded. Such defining events leave Europeans with the challenge of protecting rights in a newly enlarged union and meeting the threat of terrorism while protecting Europe's long human rights tradition.

European governments and institutions did not rise to these challenges, instead continuing to scale back rights protections—in particular, for asylum seekers and migrants. They also missed the opportunity to distinguish European practice from the abusive actions of other countries by employing counterterrorism strategies that also violate fundamental rights, including the prohibitions against torture and indefinite detention.

Asylum Seekers and Migrants

Migration into the E.U. poses clear challenges for European governments, and few would question the legitimacy or urgency of policies to address these concerns. But the exclusive focus on combating illegal immigration in Europe reflects a disturbing and prevailing attitude that migrants have no rights. Consequently, regional and national policies and practices have focused on keeping migrants and asylum seekers out of Europe. The tragedies of September 11 and March 11 are used to justify such exclusionary practices. The labeling of migrants and asylum seekers as terrorists or national security threats has resulted in the "securitization of migration," often to the serious detriment of migrants' rights.

Regional Developments

Five years after the 1999 Tampere European Council, during which member states decided to establish the E.U. as an "area of freedom, security and justice," the conclusion of the first phase of harmonizing regional asylum and immigration law in May 2004 reflected the further erosion of the right to seek asylum and of migrants' rights more broadly. In December 2003, the European Parliament (E.P.) requested that the European Court of Justice (ECJ) review the legality of the Family Reunification Directive, adopted in September 2003. Human rights and children's rights organizations shared the E.P.'s serious concern that the directive failed to guarantee the protection of family life enshrined in the European Convention on Human Rights, the E.U. Charter of Fundamental Rights, and the U.N. Convention on the Rights of the Child.

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In March 2004, in an unprecedented move, Human Rights Watch together with other human rights groups called for the withdrawal of the proposed Asylum Procedures Directive, eventually adopted by the European Council in April 2004, because it clearly eroded the individual right to seek asylum. The directive failed to guarantee the right of asylum seekers to remain in a country of asylum pending an appeal and provided for a "safe country of origin" regime. The "safe country of origin" regime would result in a common list of safe countries of origin whose nationals would be tracked into an accelerated asylum procedure, often so brief as to deny asylum seekers full and fair hearings on their claims. The most alarming feature of the directive was provision for the use of the "safe third country" and "super safe third country" concepts, the result of which would prohibit access to asylum procedures for persons who traveled through a third country deemed "safe." A "safe third country" would be one that has ratified the 1951 Refugee Convention and the European Convention on Human Rights, and has a functioning asylum system.

One positive development came in the form of the Qualification Directive, adopted in April 2004. The directive duplicates the definition of what constitutes a "refugee" provided in the Refugee Convention and includes an express obligation on E.U. member states to grant asylum to individuals falling within that definition. The directive also recognizes that non-state actors are often agents of persecution, and acknowledges child-specific and gender-specific forms of persecution. Those persons not recognized as refugees will be eligible for "subsidiary protection," but human rights and refugee organizations have raised concern that persons granted other forms of protection will not be eligible for the same social benefits as recognized refugees.

Implications of Enlargement

The ten new member states admitted to the E.U. in May 2004—Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia—were confronted instantly with the challenge of becoming countries of final destination for asylum seekers, without having the means and the experience to deal with increased numbers of refugees. Long considered refugee-producing and transit countries (for asylum seekers making their way to the E.U.), the new member states' asylum systems and immigration procedures are woefully under-developed and under-resourced to meet this challenge. Early reports indicate that few of the new member states have systems that can offer full and fair asylum determination procedures; detention regimes that comport with international standards; and policies in place to ensure that no person is sent back to a place where her or his life or freedom is threatened.

Processing Migrants and Asylum Seekers Outside the E.U.

Instead of responding adequately to criticism regarding the absence of human rights safeguards in the harmonization process or the need for such safeguards to be in place in the new member states, key E.U. countries resurrected the previously discredited idea of processing claims for asylum outside the E.U. In August 2004, Rocco Buttiglione, then European Commissioner-designate of the Directorate-General for Justice, Freedom and Security voiced enthusiastic support for a German proposal to establish detention

centers in North Africa to process asylum applications for protection in the newly-expanded European Union. While Buttiglione's nomination was ultimately defeated, proposals to process asylum seekers and migrants in select off-shore locations have gained momentum.

That momentum is somewhat counterintuitive given the negative reaction of Germany and key E.U. institutions to a similar proposal from the United Kingdom in early 2003. In March 2004, the European Parliament Committee on Citizens' Freedoms and Rights expressed concern that off-shore centers could violate an individual's right to seek asylum and could shift responsibility for migrants and asylum seekers to developing countries with scarce resources and poor human rights records. The committee stated that processing centers could undermine the 1951 Refugee Convention, the European Convention on Human Rights, and the key idea of responsibility-sharing.

The off-shore processing idea is not dead, however. It became apparent in 2004 that in the face of opposition to the earlier U.K. proposals, the E.U. had decided to take a more gradual approach aimed at the development of off-shore centers. In the meantime, the E.U. embarked on a project of *rapprochement* with potential host countries, including Libya. As a result, bilateral agreements were concluded in August 2004. They focused on combating illegal migration from Libya to Italy and into the E.U., and the E.U. agreed to lift an eight-year long arms embargo on Libya in October 2004.

In October, Italy expelled several hundred persons to Libya without a proper assessment of their asylum claims or any access to fair asylum procedures. These persons are believed to have been sent to detention camps in Libya. Libya has not ratified the 1951 Refugee Convention, signed a cooperation agreement for a formal relationship with the United Nations High Commissioner for Refugees (UNHCR), or developed an asylum system in compliance with international standards. In addition to Libya's appalling human rights record with respect to its own citizens, reports regarding its treatment of migrants and asylum seekers raises special concern about placing processing centers there.

The German Ministry of Interior was also actively involved in supporting the revival of the idea of developing extraterritorial processing centers though its concrete proposals were not made available to the public. Although France, Spain, and Sweden rejected such proposals and called for "absolute caution" and "respect for human rights of refugees," in October 2004 the E.U. Informal Justice and Home Affairs Council considered five pilot projects proposed by the Commission to improve immigration and asylum regimes in Libya, Tunisia, Algeria, Morocco, and Mauritania.

Role of the International Organization for Migration

The operations of the International Organization for Migration (IOM), an independent intergovernmental organization with no formal human rights or refugee protection mandate, came under increasing scrutiny in 2003-2004. The organization's mandate states that it provides assistance to governments and migrants for only voluntary migrant returns, but Human Rights Watch's research

revealed that some IOM field operations have placed migrants at risk of return to places where they face persecution. Human Rights Watch is also concerned about the role of the IOM as convener of the 5+5 Dialogue of the Western Mediterranean Forum and the Forum's emphasis on combating illegal migration. In September 2004, the IOM sent a special technical team to Libya to consult with the government about the management of illegal migration. The timing of the visit, coming on the heels of proposals to establish off-shore detention centers for the processing of asylum seekers in North African countries, gives rise to concerns that IOM will be involved in advising Libya and the E.U. about the establishment and management of such centers in the future.

National Developments

Asylum policy and practice in the Netherlands and an aggressive program for the return of failed asylum seekers raised considerable alarm in 2003-2004. Concerns include the use of an accelerated (forty-eight hour) asylum determination procedure (AC procedure); the inappropriate treatment of migrant and asylum-seeking children; restrictions on asylum seekers' rights to basic material support, such as food and housing; and proposals for returning large numbers of failed asylum seekers, some in violation of international standards. The AC procedure is regularly used to process and reject some 60 percent of asylum applications. The brevity of the procedure affords applicants little opportunity to adequately document their need for protection or to receive meaningful legal advice, and the right to appeal is severely curtailed. To date, there has been no measurable change in the AC procedure to ensure that asylum seekers receive a full and fair hearing.

In light of such restrictive asylum policies, a key concern over the last year has been the increasing rate of migrant returns to states where failed asylum seekers would face persecution or a real risk of torture or ill-treatment. In early 2004, for example, the Dutch government revealed proposals to deny failed asylum seekers community-based social assistance and to place them in special centers prior to their "voluntary" return—or in detention centers pending their forcible deportation. Thousands of failed asylum seekers would be threatened with return over the next few years, including persons from countries where ongoing conflicts will threaten their safety, such as Chechens, Afghans, Liberians, some Somalis, and persons from Northern Iraq.

Human Rights Watch publicly challenged the Dutch returns plan in February 2004, arguing that it represented a further degradation of the Netherlands' commitment to the right to seek asylum and the principle of *nonrefoulement*, and signaled a continuing and disturbing trend on the part of Dutch authorities to depart from international standards in their treatment of asylum seekers and migrants.

Counterterrorism Measures

The climate of fear generated by the September 11 attacks in the U.S. and further exacerbated by the March 2004 Madrid bombings resulted in regional and national counterterrorism laws and policies permitting the indefinite detention of foreign terrorism suspects; extended periods of incommunicado

detention; and the erosion of the absolute ban on torture, including the use of evidence extracted by torture and growing reliance upon so-called "diplomatic assurances" to return alleged terrorist suspects to places where they face a real risk of torture or ill-treatment.

Indefinite Detention

In the aftermath of September 11, the U.K. passed the Anti-Terrorism, Crime and Security Act (ATCSA), which provided for the indefinite detention of foreign terrorist suspects. In order to establish such a detention regime, the U.K. had to suspend ("derogate" from) some of its human rights obligations under the European Convention on Human Rigghts and the International Covenant on Civil and Political Rights (ICCPR) by formally declaring "a public emergency threatening the life of the nation." The U.K. is the only Council of Europe and U.N. member state to declare such an emergency and to determine that the global threat from terrorism required it to abandon one of its core human rights obligations—the prohibition against indefinite detention without charge or trial.

Under the ATCSA, the Home Secretary can certify a foreign national as a "suspected international terrorist" if he has a "reasonable belief " that the person is a threat to national security and a "suspicion" that the person is an international terrorist or had links with an international terrorist group. Certification is based on secret evidence. Detainees can challenge their detention in the Special Immigration Appeals Commission (SIAC), a tribunal with limited procedural guarantees and a low standard of proof. Detainees are assigned a security-cleared barrister known as a "special advocate." Classified evidence is heard during "closed" sessions attended by the special advocate. Detainees and their lawyers of choice are excluded from those sessions, and contact between the special advocates and detainees is limited.

Seventeen men in total have been detained under the ATCSA regime. To date, eleven men remain detained indefinitely without charge or trial. The treatment of detainees under the ATCSA in high security U.K. prisons also raises concerns that they have been subject to cruel, inhuman, or degrading treatment. Detainees have complained of long periods of isolation; lack of access to health care, religious observance, and educational services; lack of exercise; obstacles to visits from friends and family; and psychological trauma associated with not knowing when they will be released.

The indefinite detention regime has been criticized and challenged in U.K. courts. Two U.K. parliamentary committees—the Privy Council Review Committee (known as the "Newton Committee") and the Joint Human Rights Committee—have called for the urgent repeal of the measures that allow for indefinite detention. In October 2002, upon a challenge that the indefinite detention regime discriminates against foreign nationals, the British Court of Appeal ruled that indefinite detention was compatible with U.K. and international law. In October 2004, a specially convened nine-judge panel in the House of Lords heard an appeal on the lawfulness of the derogation and the compatibility of the legislation with other human rights obligations from which Britain has not derogated. That decision is pending.

Incommuncado detention

In Spain, the prolonged detention of foreign terrorist suspects has also given rise to serious concerns about procedural and other violations in the special detention regime. The Spanish Code of Criminal Procedure (*Ley de Enjuiciamiento Criminal*) provides for incommunicado detention for up to thirteen days, limitations on the right to counsel, pre-trial detention for up to four years, and secret legal proceedings (*causa secreta*). The proceedings governing the detentions of suspected al-Qaeda operatives apprehended in Spain since September 11, among others, were declared secret by the Audiencia Nacional, a special court that supervises terrorist cases. The imposition of secrecy can bar defense access to the prosecution evidence—except for information contained in the initial detention order—for the majority of the investigative phase. Human Rights Watch detailed its concerns with the Spanish counter-terrorism regime in a December 2004 report titled, *Setting An Example? – Counterterrorism Measures in Spain*. Many of those concerns have been echoed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), and the U.N. special rapporteur on torture.

Evidence Extracted under Torture

In August 2004, Britain's second highest court ruled that evidence obtained under torture in third countries could be used in special terrorism cases. The Court of Appeal held that the British government can use evidence extracted under torture as long as the U.K. neither "procured the torture nor connived at it." Such evidence can be used to "certify" foreign terrorist suspects and during appeals against indefinite detention in the SIAC. The court's decision undermines the global prohibition against torture. Article 15 of the Convention against Torture explicitly prohibits the consideration of evidence obtained under torture in any legal proceedings. The House of Lords has been asked to review the question of use of evidence obtained under torture on appeal.

Diplomatic Assurances No Safeguard against Torture

European governments also contributed to the erosion of the ban on torture by relying on so-called "diplomatic assurances" to return terrorist suspects and foreigners labeled national security threats to countries where they were at risk of torture or ill-treatment. Diplomatic assurances are formal guarantees from the receiving government that it will protect a person from torture upon return. Under international law, the absolute prohibition against torture includes the obligation not to send a person to a country where he or she is at risk of torture or ill-treatment. Human Rights Watch's research, detailed in an April 2004 report titled, *"Empty Promises:" Diplomatic Assurances No Safeguard Against Torture*, revealed that such assurances provide no guarantee against torture, which is practiced in secret and often denied by governments in states where torture is systematic or used to repress and intimidate particular groups. The report detailed cases where persons returned based on diplomatic assurances were in fact tortured or ill-treated, and highlighted cases in several European countries where the courts intervened and ruled that diplomatic assurances from governments in states where torture is a serious problem were not reliable. Schemes for "post-return monitoring"—that is, an agreement by the two governments involved that the sending government could deploy its diplomats to monitor a person's treatment after return—did not provide an additional safeguard against torture.

Cases in which European governments have relied upon or attempted to employ assurances to effect a return have been documented in Sweden, the U.K., Germany, the Netherlands, Austria, Georgia, and Turkey, among others. In Sweden, the cases of two Egyptian asylum seekers expelled in December 2001 from Stockholm to Cairo based on diplomatic assurances from the Egyptian government were of particular note. The Swedish authorities determined in 2001 that the men, Ahmed Agiza and Mohammad al-Zari, had a well-founded fear of persecution if returned to Egypt. Based on secret evidence never made available to the men or their lawyers, the Swedish government excluded the men from protection under the 1951 Refugee Convention and ordered their expulsions, based on assurances from the Egyptian authorities that the men would not be subject to the death penalty, subject to torture or ill-treatment, and that they would receive fair trials. The men were expelled from Sweden on the same day the decision to deny them protection was made.

It was subsequently revealed that the men were handed over to U.S. operatives at Bromma Airport in Stockholm; hooded, shackled, and drugged by these operatives; placed aboard a U.S. government-leased plane; and transported to Cairo. They were held in incommunicado detention for a full five weeks before the Swedish ambassador to Egypt visited them. The men have credibly alleged that they were tortured and ill-treated in those five weeks and that such treatment continued even after the Swedish diplomats began monitoring their treatment. A classified Swedish government monitoring report from January 2002 indicated that the men told the Swedish authorities about this abuse, but the Swedish government took no action and in fact deleted these allegations from its public reporting on the cases.

In October 2003, al-Zari was released without charge and he remains under constant surveillance by Egyptian police. Ahmed Agiza's April 2004 re-trial (he had been tried *in absentia* in Egypt in 1999 and sentenced to 25 years of hard labor) was conducted in a special military court. A Human Rights Watch trial monitor, present throughout the trial, documented numerous serious fair trial violations. In the course of the trial, Agiza told the court that he had been tortured in prison and requested an independent medical examination, which the court denied. The Swedish authorities were denied access to the first two of the four trial hearings, and did not take action on Agiza's claims that he was tortured. Human Rights Watch criticized the Swedish government for violating its absolute obligation not to return a person to a country where they are at risk of torture and publicly called for an international, independent inquiry under the auspices of the United Nations to investigate all three governments' involvement in the men's abuse.

This disquieting trend was further substantiated by recent indications of the growing use of diplomatic assurances in Germany, the Netherlands, and the United Kingdom. Thus, although in May 2003 a German court rejected as insufficient diplomatic assurances offered by the Turkish government in the extradition case of Metin Kaplan, the leader of the banned Islamic fundamentalist group, "Caliphate State," Mr. Kaplan was subsequently deported to Turkey in October 2004. Similarly, in September 2004, the Dutch government decided to extradite Nuriye Kesbir, a high-level member of the Kurdistan

Workers' Party (PKK), following diplomatic assurances from Turkey that she would not be tortured or ill-treated upon return and would receive a fair trial. In a letter to the Dutch Minister of Justice, Human Rights Watch detailed the real risk of torture and ill-treatment Kesbir would face upon return and stated that assurances from Turkey could not be considered reliable given Turkey's failure to implement adequate monitoring mechanisms to ensure that torture did not occur. In October 2004, during the House of Lords appeal on the lawfulness of the indefinite detention regime (see above), the British government indicated that it is actively seeking diplomatic assurances from states where there is a risk of torture to facilitate the removal from the U.K. of men currently subject to indefinite detention.

A number of international and regional actors have also criticized states' growing reliance on diplomatic assurances. In his October 2004 report to the U.N. General Assembly, the U.N. Special Rapporteur on Torture stated that assurances from governments in countries where torture is systematic cannot be relied upon and should not be employed to circumvent the obligation not to return a person to a country where he or she risks torture. Similarly, in his April 2004 report, the Council of Europe Commissioner for Human Rights. Gil Robles expressed concern that the use of diplomatic assurances in the Agiza/al-Zari cases did not provide the two men with an adequate safeguard against torture. The U.N. Human Rights Committee has also expressed concern about the adequacy of such assurances as an effective safeguard. The Agiza case is pending before the U.N. Committee against Torture.

At the regional level, the European Court of Human Rights was presented with the opportunity to reaffirm the absolute nature of the prohibition against returning any person to a country where she or he would be at risk of torture or prohibited ill-treatment in *Mamatkulov and Askarov v. Turkey,* a case for which Human Rights Watch and the AIRE Centre submitted an *amicus curiae* brief. In its brief, Human Rights Watch documented the systematic practice of torture in Uzbekistan, a conclusion echoed by a February 2003 report by the U.N. special rapporteur on torture. Human Rights Watch also questioned the reliability of the diplomatic assurances proffered by the Uzbek authorities as well as the follow-up monitoring of the assurances by the Turkish government, which was limited to one prison visit by Turkish officials (more than two years after the men were returned) and reliance on medical certificates from prison doctors employed by the state and alleged to be implicated in acts of torture. A decision is expected in the *Mamatkulov* case before the end of 2004.