European Parliament
Hearing on Human Rights in the European Union

Counter-Terrorism Measures and the Prohibition against Torture and Ill-treatment

Submission by Human Rights Watch
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Introduction

In a statement released in June 2002 to commemorate the United Nations International Day in Support of Victims of Torture, the European Union reaffirmed its longstanding commitment to the prevention and eradication of torture and other cruel, inhuman or degrading treatment in all parts of the world.[1] Yet, the actions of some E.U. member states—particularly in the context of the global "war on terror"—fail to match that rhetorical commitment. Indeed, post-September 11, some member states implemented laws and policies that could facilitate acts of torture. Moreover, the *absolute* nature of the prohibition against torture has been questioned, raising serious concerns that some states are unwilling to accommodate even the most fundamental of human rights in the implementation of counter-terrorism measures.

Despite numerous official statements regarding the need for a "balance" between legitimate security concerns and the protection of individual civil liberties, few countries in the E.U. seem to accord human rights considerations appropriate weight in the new anti-terror context. The balance has tipped decidedly in favor of security, and the European human rights regime has come under intense pressure to accept the erosion of individual rights under any pretext associated with the global anti-terrorism project. In this environment, even those abuses that are absolutely prohibited under international and regional law—including the prohibitions against torture and *nonrefoulement*—have become vulnerable to reconsideration. In this context, Human Rights Watch expresses its deepest concern about the erosion of the anti-torture regime in the European Union and the encouragement such erosion will undoubtedly give to countries outside the union with historically weak protections against human rights abuses.

Human Rights Watch is concerned about four areas in which safeguards against torture appear to be vulnerable in the European Union: the promulgation and implementation of anti-terrorism laws that can facilitate acts of torture and cruel, inhuman or degrading treatment (CID); conditions of detention for suspected terrorists that can amount to torture/CID; the repatriation/*refoulement* of terrorist suspects to countries where they could be subject to torture; and the use of E.U. member states' territory for interrogations that could subject detainees to torture/CID.

[1] European Union Press Release, "Declaration of the European Union on the Occasion of the International Day in Support of Victims of Torture," 25 June 2002 at http://www.irct.org/Press_releases_2002/25.htm (accessed 15 April 2003).

Anti-Terrorism Laws

In the aftermath of September 11, many countries implemented new counter-terrorism laws and policies. Other countries used existing anti-terror laws—normally trained on indigenous terrorist groups—to target alleged international terrorist suspects. In the Council of Europe (COE) region, states took advantage of the legal "margin of appreciation" granted under the European Convention on Human Rights (ECHR) to member states to determine what constitutes a national security threat and which measures should be implemented to meet the threat.[2] Recourse to the "margin of appreciation" sometimes seemed stretched beyond its traditional scope, at the expense of individual liberties.

Developments in the United Kingdom provide perhaps the most cogent example of the degradation of a rights tradition in favor of overreaching measures justified as necessary to neutralize the global terrorist threat. In December 2001, the Anti-Terrorism, Crime and Security Act (ATCSA) went into force. The ATCSA provides for the indefinite detention without charge or trial of non-U.K. nationals who are suspected of terrorism-related activity and cannot be returned to their country of origin or to another country. The Secretary of State for Home Affairs must certify a detainee as a suspected terrorist or a national security risk. The evidence used to make such a determination is secret and the suspect is prohibited from gaining access to it. A detainee can lodge an appeal with the Special Immigration Appeals Commission (SIAC), but only on a point of law. Although a detainee can be represented by a court-appointed "special advocate," he or she has no right to legal counsel. A detainee's advocate cannot reveal to the detainee or discuss the evidence upon which the original certification was issued, undermining a detainee's ability to mount an adequate defense. Certification can be withdrawn by the Home Secretary or by the SIAC, although the U.K. courts have ruled that the executive should be given wide discretion in certifications based on national security interests. An October 2002 Court of Appeal ruling held that the indefinite detention of aliens on grounds of national security is a power expressly reserved to the state in time of war or similar public emergency.

In response to the charge that it was reinstituting the practice of internment, used in Northern Ireland, the U.K. government derogated from Article 5 of the ECHR, the provision establishing procedural guarantees that ensure the right to a fair trial.[3] The derogation was predicated on the argument that the global threat of terrorism amounted to

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[2] European Court of Human Rights, *Brannigan and McBride v. United Kingdom*, Judgment of 26 May 1993, series A, no. 258-B.

[3] In considering the periodic report of the United Kingdom in December 2001, the United Nations Human Rights Committee noted with concern legislative measures being considered by the government that could have "far-reaching effects" and require derogations from its human rights obligations. During questioning by the Committee, the United Kingdom reportedly invoked Article 103 of the U.N. Charter to argue that its obligations to the Counter Terrorism Committee under Security Council Resolution 1373 took precedence over its obligations to the Human Rights Committee. Article 103 states that "[i]n the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

a public emergency that "threatened the life of the nation," although the Home Secretary publicly stated in October 2001 that there were no specific terrorist threats aimed at the U.K.

In February 2002, the European Committee for the Prevention of Torture (ECPT) made an *ad hoc* visit to the U.K. to monitor detentions under the ATCSA. The committee expressed concern about lack of access to counsel; the use of secret evidence; lack of exercise and out-of-cell time; delayed access to healthcare, in particular to psychological support and psychiatric treatment; translation and interpretation problems; and lack of adequate contact with the outside world.

In the wake of September 11, Spain did not implement new legislation, but trained its existing strict counter-terrorism regime on suspected international terrorists. Spain's anti-terror laws permit the use of incommunicado detention, secret legal proceedings, and pre-trial detention without charge for up to four years. The proceedings governing the detentions of suspected al-Qaeda operatives apprehended in Spain in November 2001, July 2002, and January 2003, among others, have been declared secret (*causa secreta*). The investigating magistrate of the Audiencia Nacional, a special court that oversees terrorist cases, can request *causa secreta* for thirty days, consecutively renewable for the duration of the four-year pre-trial detention period. Secret proceedings bar the defense access to the prosecutor's evidence, except for information contained in the initial detention order. Without access to this evidence, detainees are severely hampered in mounting an adequate defense.

In November 2002, the United Nations Committee against Torture (CAT) expressed serious concern about incommunicado detention under Spain's criminal laws. A suspect can be held incommunicado for up to five days, without access to an attorney, family notification, services such as access to health care, or contact with the outside world. The CAT concluded that incommunicado detention under these circumstances could facilitate acts of torture and ill treatment. In Spain, most suspected terrorist detainees are held incommunicado for at least the first forty-eight hours in custody. In a report published in March 2003, the European Committee for the Prevention of Torture (ECPT) expressed similar concerns about detentions of ETA members and Basque nationalists under Spain's anti-terror regime.

Mistreatment in Detention

The U.K. authorities have apprehended dozens of persons under the ATCSA since December 2001. The treatment of detainees under anti-terrorism legislation in high security U.K. prisons has raised concern that they are subject to cruel, inhuman or degrading treatment. Detainees in U.K. prisons have complained of long periods of isolation; lack of access to health care, exercise of religion, and educational services; lack of exercise; obstacles to visits from friends and family; and psychological trauma associated with the uncertainty of when they will be released.[4]

[4] See Amnesty International, *Rights Denied: The U.K.'s Response to 11 September 2001*, AI Index: EUR 45/016/2002, 5 September 2002.

The international campaign against terrorism coincided with a heightened Spanish government crackdown on Basque separatists and supporters of the pro-independence movement. Since September 11, over fifty suspected ETA members have been detained and held under Spain's anti-terror laws. Human rights organizations have documented instances of alleged torture and ill treatment of ETA members and pro-independence supporters detained by Spanish authorities. In February 2003, *Euskaldunon Egunkaria*—the sole remaining newspaper written entirely in the Basque language—was closed down, and ten people associated with the paper were arrested and held incommunicado. The paper's chief editor, detained for five days incommunicado, accused the Spanish Civil Guard of ill treatment in detention, including severe physical abuse and sleep deprivation.

Refoulement

In the aftermath of September 11, Spanish Foreign Minister Josep Pique told *El Pais* that "[t]he reinforcement of the fight against illegal immigration is also the reinforcement of the fight against terrorism." Such political rhetoric has been accompanied throughout Western Europe by increasingly restrictive immigration and asylum policies and practices that undermine the right to seek asylum and threaten the absolute nature of the principle of *nonrefoulement*.

One of the most disturbing developments is the reconsideration of the absolute nature of the prohibition against torture under Article 3 of the European Convention on Human Rights (ECHR). Article 3 prohibits states from expelling, deporting, extraditing, or repatriating any person to a place where s/he could be subject to torture or to inhuman or degrading treatment. This commitment to the principle of *nonrefoulement* under Article 3 is non-derogable, even if a state suspects that a person is a national security threat.

New asylum and immigration laws and practices in several E.U. member states post-September 11 appear to contravene the principle of *nonrefoulement*. In Greece, authorities have denied some migrants the right to seek asylum, despite the fact that many have come from countries where persecution of certain groups is on going, including Turkey and Iran. A May 2002 immigration law in Denmark provides for an accelerated procedure that permits the review of an asylum claim in as little as one day, hardly enough time for the full and fair determination procedure required by UNHCR guidelines.[5] A similar procedure in the Netherlands also gives rise to serious concerns. Such accelerated procedures put asylum seekers at risk of being returned to countries where they could be subject to torture or inhuman or degrading treatment or punishment.[6]

In January 2003, following opposition calls for rejected asylum seekers certified as security threats to be removed from the country, Prime Minister Tony Blair stated publicly that the U.K. government would "consider further measures, including

[5] UNHCR Executive Committee Conclusion No. 30 (XXXIV) - 1983 - The Problem of Manifestly Unfounded or Abusive Applications for Refugee Status or Asylum.

[6] See Human Rights Watch, *Fleeting Refuge: The Triumph of Efficiency over Protection in Dutch Asylum Policy*, April 2003.

fundamentally looking at the obligations we have under the Convention on Human Rights." Prime Minister Blair's remarks raised serious concerns that the U.K. would consider withdrawing from the ECHR in order to return suspected terrorists to their home country despite the possibility that they might be tortured.

Austria went further and ordered the extradition of an asylum seeker to a country where he was vulnerable to torture. In a trial that did not conform with international standards, Muhammad 'Abd al Rahman Bilasi-Ashri had been sentenced *in absentia* in Egypt to fifteen years hard labor for alleged involvement in an Islamic terrorist organization. Despite credible reports that suspected members of Islamic groups were often subject to torture in detention, an Austrian court ordered Bilasi-Ashri's extradition in November 2001. [7] It was only the withdrawal of the extradition request by Egypt in August 2002 that has thus far prevented Bilasi-Ashri from being sent back.

Sweden forcibly returned two persons suspected of affiliations with Islamic groups to Egypt in December 2001. The two men applied for asylum in Sweden, and although it was determined that they had a well-founded fear of persecution, their asylum claims were denied based on secret evidence not available to them. In order to avoid criticism that it was in violation of ECHR Article 3, the Swedish government sought written assurances from the Egyptian authorities that the two men would not be subject to human rights violations upon return. The assurances transmitted by the Egyptian authorities were *pro forma* and have been criticized as "a woefully inadequate means"[8] of protecting the two men from torture and ill treatment in a country where such mistreatment for members of certain groups is systematic. Family members claimed in 2002 that the men were subject to ill-treatment in detention, despite two brief visits by Swedish diplomats to the facilities where the men were held.

Use of E.U. Member State Territory for Abusive Interrogations

The prohibition against torture extends to all the territories of E.U. member states. In December 2002, reports that U.S. forces were using "stress and duress" techniques in their interrogations of al-Qaeda suspects detained on the island of Diego Garcia—part of British-held Indian Ocean Territory—resulted in urgent appeals to the U.K. government to ensure that the detainees' human rights were upheld.[9] The U.K. government could be seen complicit in acts of torture if it permits allies to use abusive interrogation techniques on its soil.

[7] See Amnesty International, Austria: Muhammad 'Abd al-Rahman Bilasi-Ashri, Urgent Action, AI Index: EUR 13/001/2002, 4 January 2002.

[8] International Helsinki Federation for Human Rights, *Anti-Terrorism Measures, Security and Human Rights: Developments in Europe, Central Asia and North America in the Aftermath of September 11*, April 2003, p. 173.

[9] See Human Rights Watch press release, "British Territory must not be used for Torture," 31 December 2002 at http://www.hrw.org/press/2002/12/uk1230.htm (accessed on 18 April 2003).