

**Human Rights Watch
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**Treating “Illegals” Legally:
Commentary regarding the European Commission Green Paper
on a Community Return Policy on Illegal Residents**

Introduction

In April 2002, the European Commission published a Green Paper on a Community Return Policy on Illegal Residents, aimed at stimulating policy debate and the eventual development of new European Union (E.U.) policies establishing guidelines for member states' efforts to return undocumented migrants and rejected asylum seekers to their countries of origin.¹ Against a backdrop of growing anti-immigrant sentiment within European electorates, the Danish government, which holds the E.U. Presidency from July through December 2002, has identified the development of a Community-wide immigration policy as a top priority.²

This briefing paper constitutes Human Rights Watch's commentary on the Commission Green Paper. Drawing on research on the current treatment of migrants in several E.U. member states, the commentary identifies some of the key human rights standards that should be at the core of any Community return policy. The Green Paper currently either references many of these standards incompletely or omits them altogether.

Human Rights Watch's research and analysis of a number of recent E.U. immigration policy proposals has revealed a significant gap between member states'

¹ COM(2002) 175 FINAL, April 10, 2002.

² See the “Justice, Home Affairs, and Civil Protection” section of the Danish Presidency web site at <http://www.eu2002.dk/Issues/default.asp?MenuElementID=8009>, accessed on July 29, 2002.

international human rights commitments and respect for those commitments in the burgeoning Community-wide immigration law and policy regime following the 1999 Tampere European Council.³ This gap is equally evident in the Green Paper's failure to reference many of the international standards that govern the treatment of adult migrants and aliens present in the E.U. With the exception of its reference to the 1951 Convention on the Status of Refugees, its 1967 Protocol, and the Convention on the Rights of the Child, and its selective reference to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) and the European Union Charter of Fundamental Rights (Charter), the near-complete omission of other relevant international standards suggests a reluctance to afford migrants the full range of rights guarantees to which they are entitled under international law.⁴

The Green Paper repeatedly states that minimum standards "could be created" in a number of areas affecting aliens in detention and in the process of return. But the fact is that such standards already exist. Thus, while it is indeed a worthy and necessary project for the Commission to engage in discussions about policy development in the substantive area of returns, it must be noted that there are already standards and basic principles for the protection of migrants' human rights, and most E.U. member states have voluntarily obliged themselves to observe them.

³ See the Human Rights Watch campaign page, "Defending the Rights of Migrants and Asylum Seekers in Western Europe," at <http://www.hrw.org/campaigns/migrants/>, accessed on July 29, 2002.

⁴ The Green Paper references articles 3, 5, 6, 8, and 13 of the ECHR and articles 3, 4, 7, 8, 19, 24, and 47 of the Charter. What it neglects to reference, however, includes an increasing body of authoritative interpretation regarding international standards applicable specifically to aliens. For example, in 1986, the United Nations Human Rights Committee, tasked with overseeing states parties compliance with the International Covenant on Civil and Political Rights (ICCPR), to which all E.U. member states are parties, issued General Comment No. 15 on the Position of Aliens under the Covenant. With the exception of Article 25 covering certain forms of political participation, the committee stated that the "general rule" is that each of the rights of the Covenant "must be guaranteed without discrimination between citizens and aliens." The comment goes on to enumerate the rights that devolve upon aliens, regardless of their legal status:

Aliens thus have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfill a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subjected to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.

Human Rights Watch's research indicates that many, if not most, member states frequently violate the rights of migrants and rejected asylum seekers in the course of detention and return. Moreover, many E.U. member states contract with international organizations and private corporations to effect various aspects of the return process. These entities have no express human rights or international protection mandate, raising additional concerns about potential migrant rights violations in the course of returns.

The E.U. should develop a returns policy consistent with member states' currently existing human rights commitments. Any such policy should include guidelines for its member states to ensure that private companies or other organizations with whom they contract abide by relevant international human rights standards.

The following is a discussion of some of the core rights that should be addressed in a returns policy to provide *minimum* protection for migrants and rejected asylum seekers in detention and in the process of deportation or return.

The Right to Life

The Green Paper does not include direct reference to any regional or international obligation to protect the right to life.⁵ Migrant deaths in the process of forced deportation, allegedly at the hands of law enforcement and immigration officials, occurred during the 1990s in Austria, Belgium, France, Germany, Italy, Switzerland, and the United Kingdom.⁶ Although some countries discontinued the use of specific forms of restraint during forced deportations, or conducted reviews of procedures for forced deportations in the immediate aftermath of a migrant's death, until recently there was little attempt to hold law enforcement or immigration officials accountable for these deaths.⁷ Human Rights Watch continues to receive reports that migrants and asylum seekers in Western Europe are subjected to cruel and dangerous methods of restraint and various forms of physical abuse during forcible deportation.⁸

⁵ ECHR article 2, Charter article 2, ICCPR article 6.

⁶ Parliamentary Assembly of Europe, "Expulsion Procedures in Conformity with Human Rights and Enforced with Respect for Safety and Dignity," Document 9196, September 10, 2001, at <http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2Fdocuments%2Fworkingdocs%2Fdoc01%2Fedoc9196.htm>, accessed on July 19, 2002. See also Campaign against Racism and Fascism (CARF), "Institutionalised Racism and Human Rights Abuses: A Special Investigation into 45 Deaths in Europe in 1998," Issue No. 48, February/March 1999 and Amnesty International, "Western Europe: Deaths in Deportation," March 2000 Newsletter, AI-Index: NWS 21/002/2000, March 1, 2000, at <http://web.amnesty.org/ai.nsf/Index/NWS210022000?OpenDocument&of=COUNTRIES%5CLAOS>, accessed on July 19, 2002.

⁷ Belgium, for example, discontinued the use of the "cushion technique" by which deportees' faces were forced into a cushion to muffle their screams and protests. Switzerland discontinued the use of adhesive tape to cover deportees' mouths. Reviews of procedures for forced deportations were conducted in Belgium and France. In March 2002, Belgium initiated the prosecution of five police officers in connection with the death of Nigerian asylum seeker Semira Adamu in 1998. Three officers are charged with assault, battery, and involuntary manslaughter for forcing Adamu's head into an airline pillow just before the plane departed Belgium and two officers have been charged with criminal negligence for failing to intervene and halt the physical coercion. Adamu, aged twenty-three, died of a brain hemorrhage. See Human Rights Watch World Report 1999, "Asylum Policy in Western Europe," at <http://www.hrw.org/worldreport99/europe/asylum.html>, accessed on July 19, 2002, and Associated Press, "Police Officers Sent to Trial in Death of Nigerian Asylum Seeker," March 26, 2002.

⁸ See World Organization against Torture (OMCT), Urgent Intervention Case GRC 010702, July 1, 2002, detailing the torture and ill-treatment, including by electric shock, of a Nigerian national in the immediate aftermath of a failed forcible deportation from Greece. Alitalia airline refused to seat the deportee because his feet and hands were bound and the Greek police had taped his mouth closed.

The Green Paper makes reference to the treatment of those being deported in the “Removal” section of the paper, stating that “basic requirements for the physical state and mental capacity of the persons could be set in order to react properly to an illness claimed by the returnee immediately before departure or the psychological health of the returnee.” It also states that “enforcement standards could be envisaged, viz., security standards for the removal itself, on the use of restraints and on the competencies of escorts.”

This tentative approach to the most basic of rights guarantees – the right to life – should be replaced with a firm commitment, supported by clear and unambiguous guidelines for forced repatriation, narrowly defining the exceptional circumstances that would warrant the use of coercive physical measures in the deportation process. Moreover, any returns policy should include a dimension of accountability for law enforcement and immigration officials who violate any safeguards aimed at preserving returnees’ rights to life and to be free from torture and inhuman or degrading treatment. References to ECHR article 3 prohibiting torture or inhuman or degrading treatment or punishment—which do appear in several places in the Green Paper, usually with regard to the prohibition against *refoulement*—must also take into account article 3’s application to *all* immigration functions, including the prohibition against ill-treatment in detention and in the process of forced deportations.

Prohibition against Discrimination

There is a notable absence in the Green Paper of any mention of the growing E.U. anti-discrimination regime to immigration management or to the rights of migrants present in member states. In fact, despite a range of possible protections against discriminatory treatment in European and international law, member states and the E.U. have routinely made exceptions to the anti-discrimination principle with respect to immigration functions. Thus, there is a significant gap between E.U. member states’ international legal commitments—enshrined, for example, in the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)—and the application of the nondiscrimination principle with respect to third country nationals at Community and member state level. Moreover, some existing regional anti-discrimination standards that should apply automatically are routinely ignored in the implementation of immigration control measures.

The ECHR’s general anti-discrimination provision at article 14—prohibiting discrimination based on sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status—applies to all the rights enshrined in the Convention, many of which apply to aliens.⁹ Yet, article 14 is not referenced in the Green Paper. Also neglected is Protocol 12 to the ECHR, which extends article 14 to “any right set forth by law” and by *any public authority* on the same grounds as those listed in article 14. Protocol 12 has been signed by a majority of E.U. member states, indicating their commitment not to undermine the purpose or effect of the Protocol.

⁹ See Helene Lambert, *The Position of Aliens in Relation to the European Convention on Human Rights*, Human Rights Files No. 8 (revised), Council of Europe 2001. The author argues that under ECHR article 1, every person within the jurisdiction of a member state benefits from the rights and freedoms enumerated in the Convention and therefore alienage constitutes no ground for discrimination under the ECHR. *Ibid.*, p. 50.

Though other provisions of the E.U. Charter of Fundamental Rights are frequently referenced in the Green Paper, article 21 of the Charter is not. Article 21 prohibits discrimination based on a range of markers, including sex; race; color; ethnic or social origin; language; religion or belief; political or any other opinion; membership of a national minority; and, without prejudice to the provisions of the Treaty establishing the European Community and Treaty on European Union, discrimination based on national origin.

Disappointingly, some relevant E.U. and member state anti-discrimination laws and policies have been given limited applicability to immigration controls or have even provided immigration authorities with special powers to discriminate against certain groups. The E.U. Race Equality Directive adopted in June 2000, for example, covers discrimination based on racial or ethnic origin, but not nationality or a third-country national's legal status in an E.U. member state. Moreover the Directive explicitly limits the prohibition against racial or ethnic discrimination in the immigration field, noting that the prohibition is not intended to contravene laws and conditions on the entry, residence, and employment of third-country nationals in E.U. member states.¹⁰ As an even more troubling example, a ministerial authorization that entered into force in April 2000 as part of the U.K.'s Race Relations (Amendment) Act, moreover, expressly authorizes immigration officials to discriminate against certain nationals and ethnic groups—including Afghans, Albanians, Kurds, Roma, Somalis, Tamils—in the exercise of their functions.¹¹ This controversial authorization, entitled "Discrimination on Ground of Ethnic or National Origin," allows British officials to subject the enlisted categories of people, "by reason of th[eir] ethnic or national origin" to, *inter alia*, "a more rigorous examination than other persons in the same circumstances" upon arrival in the U.K., detain them "pending examination," and "impose a condition or restriction on the[ir] leave to enter the United Kingdom."

¹⁰ Council Directive 2000/43/EC of June 29, 2000 "implementing the principle of equal treatment between persons irrespective of racial or ethnic origin." Article 3 (2) provides that the Directive "is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned." The Preamble provides further that the prohibition against discrimination based on race or ethnic origin "should also apply to nationals of third countries, but does not cover differences of treatment based on nationality and is without prejudice to provisions governing the entry and residence of third-country nationals and their access to employment and to occupation." Preamble, paragraph 13. The directive, now part of the "acquis communautaire"—the body of law governing membership in the E.U.—requires all member states to conform their legislation to implement the directive's anti-discrimination principles by July 19, 2003. The directive prohibits direct and indirect discrimination in both the public and private sectors based on race or ethnic origin and applies to access to employment; vocational training and working conditions; membership in trade unions; social advantages; social security and health care; education; and to the provision of goods and services available to the public, including housing. For a detailed discussion on the Race Equality Directive's applicability to immigration control, see Cholewinski, Ryszard, "Borders and Discrimination in the European Union," Immigration Law Practitioners' Association and Migration Policy Group, 2002. Cholewinski notes that the Directive's "direct impact on the treatment of third-country nationals in the field of immigration control is likely to be nominal, largely as a result of the measure's limited material scope. [...] Member States recognize that they are making explicit distinctions on the basis of nationality and arguably also that they are acutely aware that immigration control activities are particularly susceptible to discrimination on the grounds of race, ethnic or national origin or religion."

¹¹ Race Relations (Amendment) Act 2000. The authorization to discriminate can be found at <http://www.ind.homeoffice.gov.uk/>, accessed on July 19, 2002.

Even where their laws are neutral on their face, some E.U. member states appear to target migrants of specific nationalities for disparate treatment in the processes leading to deportation. Our research in Spain, for example, revealed that the arbitrary application of Spain's Foreigners' Law disadvantaged certain migrant groups—Algerians in particular.¹² Algerians were more likely than other similarly situated migrants to be given expulsion orders, thus prohibiting them from seeking regularization in Spain at a later date. The lack of transparency and clear guidelines surrounding the proper application of the law and the apparent arbitrary treatment of Algerians left the Spanish government open to the charge of discriminatory treatment of this particular group in deportation and expulsion proceedings. Our research in Greece also revealed that the Greek government was vulnerable to similar charges of discriminatory treatment with respect to routine group and summary expulsions of Albanian migrants.¹³

Human Rights Watch is concerned that the exceptions to the anti-discrimination principle in the immigration field claimed at E.U. level and by some member states have not been adequately justified according to European law or under international standards. The E.U.'s and various member states' efforts to exempt some immigration control activities from prohibited discriminatory practices indicates a fear that they could be vulnerable to charges that they do discriminate against third country nationals based on race or ethnicity. As well, some member states' disparate treatment of specific migrant groups in the processes leading to deportation raises serious concern. Such apparent discrimination is unlawful under international standards. The development of a returns policy truly based on respect for human rights and human dignity must include a requirement to observe the very cornerstone of human rights law—the prohibition against discrimination.

Detention

Regarding detention, as with other issues it addresses, the Green Paper fails to frame the issue of human rights and return in terms of regional and international standards already in effect. The Green Paper notes that minimum standards for the issuance of detention orders could be set at the E.U. level as well as minimum rules on the conditions of detention “to ensure a humane treatment in all detention facilities in the Member States.” No mention is made of relevant existing standards. For instance, the paper suggests that any returnees who are detained in ordinary prisons, “might be separated from convicts in order to avoid any criminalization,” ignoring existing international standards governing detention conditions that *require* that immigration detainees be held in facilities separate from convicted felons.¹⁴ What is needed at E.U. level is coordinated implementation of such existing standards in the context of the developing E.U. immigration regime.

Human Rights Watch's research in E.U. member states has highlighted the plight of migrants and asylum seekers detained in appalling conditions with inadequate procedural guarantees. In Spain, migrants detained in old airport facilities in the Canary Islands are housed in gravely substandard facilities in overcrowded conditions with little or no access to regular

¹² Human Rights Watch, *Spain: Discretion without Bounds: The Arbitrary Application of Spanish Immigration Law*, Vol. 14, No. 6 (D), July 2002, at <http://www.hrw.org/reports/2002/spain2/>, accessed on July 19, 2002.

¹³ Human Rights Watch, Submission to the Committee on the Elimination of All Forms of Racial Discrimination (CERD) regarding the Fifteenth Periodic Report of the Government of Greece, CERD/C/363/Add.4, 30 May 2000, on file with Human Rights Watch. See also section below regarding collective expulsions.

¹⁴ See, ICCPR, article 10 (2)(a).

health care, fresh air, or exercise.¹⁵ They have inadequate access to counsel and opportunities to appeal the legality of their detention. They are routinely deprived of all communication with the outside world, including family members. Many are denied the right to seek asylum. Aspects of their plight are mirrored in Greece, where we documented grossly substandard conditions of detention for undocumented migrants in police detention facilities in Athens. In both Greece and Spain, the national ombudsmen have publicly criticized these substandard conditions. Reports by intergovernmental bodies and nongovernmental organizations concerning immigration detention facilities in France, the U.K., and elsewhere within the E.U. indicate that such inhumane conditions are widespread in the Union.¹⁶

Provisions governing the humane treatment of detainees are enshrined in the ICCPR, the U.N. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the European Convention on the Prevention of Torture, and the ECHR. Further authority regarding what constitutes humane detention conditions is found in the European Prison Rules and the U.N. Standard Minimum Rules for the Treatment of Prisoners. Moreover, the U.N. Working Group on Arbitrary Detentions has developed a list of procedural rights specifically for immigration detainees, aimed at protecting them from arbitrary detention.¹⁷

We understand that the Green Paper is an initial attempt to generate discussion about Community standards with respect to the return of undocumented migrants. Its tentative approach to the need for common standards to govern pre-return detention, however, raises some concern, particularly in light of the numbers and vulnerability of the populations currently in immigration detention across the E.U. Human Rights Watch hopes that in the consultation and policy-making period following the issuance of the Green Paper, the E.U. will adopt policies that adequately reflect the current significant use of immigration detention in member states. Indeed, we urge the E.U. to draw on existing international and regional law to adopt common standards governing the procedures and conditions of detention for all immigration detainees.

Procedural Guarantees in Deportation

The Green Paper notes generally that the procedural guarantees in article 5 of the ECHR are applicable to migrants. On the particular issue of collective expulsions, however, the paper mentions only the E.U. Charter of Fundamental Rights article 19, although ECHR article 5 has been interpreted to prohibit collective expulsions also. Moreover, ECHR Protocol Four, Article

¹⁵ See Human Rights Watch, *Spain: The Other Face of the Canary Islands: Rights Violations against Migrants and Asylum Seekers*, Vol. 14, No. 1(D), February 2002, at <http://hrw.org/reports/2002/spain/>, accessed on July 19, 2002 and Human Rights Watch Memorandum, "Greece: Urgent Concerns: Conditions Of Detention For Foreigners In Greece," December 2000, at <http://www.hrw.org/backgrounder/eca/greece-detention-bck.htm>, accessed on July 19, 2002.

¹⁶ Rapport au Gouvernement de la République française relatif à la visite en France effectuée par le Comité européen pour la prévention de la torture et des peines ou traitements inhumains ou dégradants (CPT), du 14 au 26 mai 2000, CPT/Inf (2001) 10, at <http://www.cpt.coe.int/fr/rapports/inf2001-10fr.htm>, accessed on July 19, 2002. The CPT visited France again in June 2002 to examine the treatment of aliens refused entry into France and those requesting asylum while held at Charles de Gaulle Airport in Paris. The delegation also visited holding facilities used by the French Customs Service at the airport. Regarding immigration detention in the United Kingdom, see British Refugee Council, *The Detention of Asylum Seekers in the U.K.*, September 2001.

¹⁷ United Nations Commission on Human Rights, Report of the Working Group on Arbitrary Detention, E/CN.4/2000/4, December 28, 1999, Annex II, Deliberation No.5 (Situation Regarding Immigrants and Asylum Seekers), page 26.

4—not referenced at all in the Green Paper—specifically prohibits the collective expulsion of aliens and has the force of binding treaty law that the Charter does not yet enjoy.¹⁸ Every E.U. member state, with the exception of Greece, has signed Protocol Four—with the vast majority of member states having ratified it. None of the international standards prohibiting collective expulsions—in particular, ICCPR Article 13—are referenced in the Green Paper.

In some E.U. member states, the lack of adequate procedural safeguards that ensure full and fair individual determinations of the legality of deportation or expulsion raises serious concern. For example, some migrants in Spain are subject to a rapid deportation procedure called *devolución*, which is often applied to groups of people—without adequate procedural safeguards such as individual deportation determinations, access to information regarding legal rights, or the effective opportunity to appeal a deportation decision. Likewise, in Greece, in the immediate aftermath of the September 11 attacks in the United States, certain migrant groups arriving by boat were given fifteen-day expulsion notices, without the right of appeal or the ability to apply for asylum. As noted above, our research in Greece also indicated that police sweeps of Albanian migrants often resulted in groups of boys and men being placed immediately on waiting buses and transported to the Greek-Albanian border for expulsion with no process at all.¹⁹

Procedural safeguards in the process of deportation should be an essential element of an E.U.-level returns policy. The full articulation of such safeguards—as enshrined in the ICCPR and the ECHR, and interpreted by various intergovernmental bodies—would ensure that returns from the E.U. to other countries are conducted within the rule of law and in full conformity with E.U. member states’ regional and international obligations.

Trafficking in Human Beings

The Green Paper references no human rights standards with respect to migrants who are trafficked into the E.U. for the purpose of forced labor. We welcome the paper’s recognition that certain vulnerable persons require special humanitarian protection against expulsion.²⁰ The absence of express acknowledgement of trafficking victims’ rights in this section or in any other section of the Green Paper raises concern, however, that the E.U. will continue to address trafficking in human beings solely as a law enforcement issue and fail to address it also as an egregious human rights violation, giving rise to certain obligations on the part of member states toward trafficking victims.

¹⁸ The most recent and complete articulation of the prohibition against collective expulsions of aliens and the requirement that every deportation involve a full and fair individual assessment of a deportee’s case and an effective opportunity to challenge the deportation can be found in the February 2002 European Court of Human Rights decision in the case of *Conka v. Belgium*, Application No. 51564/99, at <http://hudoc.echr.coe.int/hudoc/ViewRoot.asp?Item=0&Action=Html&X=719215822&Notice=0&Noticemode=&RelatedMode=0>, accessed on July 19, 2002.

¹⁹ Human Rights Watch, Submission to the Committee on the Elimination of All Forms of Racial Discrimination (CERD) regarding the Fifteenth Periodic Report of the Government of Greece, CERD/C/363/Add.4, May 30, 2000, on file with Human Rights Watch. The Greek Minister of Public Order told Human Rights Watch in November 2000 that sweeps have occurred and that Albanians have been collectively expelled from Greece without the benefit of procedural safeguards. The Minister claimed at that time that due to increasing racist and xenophobic violence by Greeks against Albanian migrants, the Greek government had to take matters into its own hands. See *ibid*.

²⁰ Green Paper, section 3.1.2.1, page 13. The paper recognizes, in particular, the special circumstances of long-term residents, family members of E.U. citizens, refugees, and third-country nationals born in a member state who have never lived in their country of nationality. *Ibid*.

Human Rights Watch has urged the E.U. to incorporate victim protection measures into recent immigration policy proposals, including the December 2000 Commission Proposal for a Council Framework Decision on Combating Trafficking in Human Beings (Trafficking Proposal) and the February 2002 Commission Proposal for a Council Directive “on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities” (Short-Term Permits Proposal).²¹ The Trafficking Proposal, now in the final stages of being adopted, provides no concrete victim protection measures and the Short-Term Permits Proposal fails to provide such measures for trafficking victims other than those who cooperate with law enforcement authorities in the investigation and prosecution of traffickers and their accomplices.

In failing to provide protection mechanisms for all trafficking victims, the E.U. falls short of international standards for the protection of victims of human rights violations. Most E.U. member states have signed the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), supplementing the United Nations Convention against Transnational Organized Crime.²² Article 2 of the Protocol calls on states parties “to protect and assist” the victims of trafficking, “with full respect for their human rights.” Article 6 encourages states to implement measures for the physical, psychological, and social recovery of victims. In particular, the Protocol calls on states, “in appropriate cases,” to consider providing victims with housing; counseling and information; medical, psychological and material assistance; and employment, educational, and training opportunities.²³ Significantly, the Protocol calls upon states to permit trafficked persons to remain in country temporarily or permanently in appropriate cases.²⁴

In an April 2002 resolution, the United Nations Commission on Human Rights “[r]eaffirmed that, pursuant to internationally proclaimed human rights principles, victims of grave violations of human rights should receive, in appropriate cases, restitution, compensation, and rehabilitation.”²⁵ The resolution called upon the international community to give “due attention to the right to a remedy and, in particular, in appropriate cases, to receive restitution, compensation, and rehabilitation, for victims of violations of international human rights law.”²⁶ It referenced as a guide to doing so the draft “Basic Principles and Guidelines on the Right to a

²¹ COM(2000) 854 Final, December 21, 2000 (Trafficking Proposal) and COM(2000) 71 Final, 2002/0043 (CNS), February 11, 2002 (Short-Term Permits Proposal) respectively. An amended version of the original Commission Trafficking Proposal was issued in late 2001: Council of the European Union, Proposal for a Council Framework Decision on Combating Trafficking in Human Beings, 14216/01, Limite, DROIPEN 97/MIGR 90, December 3, 2001. Human Rights Watch issued commentaries on both the Trafficking Proposal at <http://hrw.org/backgrounder/wrd/trafficking-framework.htm>, accessed on July 22, 2002, and the Short-Term Permits Proposal at <http://www.hrw.org/campaigns/migrants/#eu> (under “European Union” as PDF document), accessed on July 22, 2002.

²² A/55/383, adopted by the General Assembly on November 2, 2000 (Trafficking Protocol).

²³ Article 6. No indication is given in the Protocol as to which cases would qualify as “appropriate” under this article.

²⁴ Article 7: “(1)...each state party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases. (2) In implementing the provision contained in paragraph 1 of this article, each state party shall give appropriate consideration to humanitarian and compassionate factors.”

²⁵ United Nations Commission on Human Rights Resolution (Resolution) 2002/44, April 23, 2002, preamble.

²⁶ Resolution, paragraph 1.

Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law" (Basic Principles).²⁷ The draft Basic Principles, though yet to be adopted, are based on principles and guidelines in conformity with existing international law, "taking into account all relevant international norms arising from treaties, customary international law, and resolutions [of U.N. charter-based bodies]."²⁸

The Basic Principles echo the call for states to provide assistance to and protection of victims and witnesses of human rights and humanitarian law violations²⁹ in the form of access to justice, reparation, restitution, compensation, and rehabilitation.³⁰ Significantly, principle 12(b) urges that states "take measures to minimize the inconvenience to victims, protect their privacy as appropriate and ensure their safety from intimidation and retaliation, as well as that of their families and witnesses, before, during, and after judicial, administrative, or other proceedings that affect the interests of victims."

Certainly the interests of trafficking victims should be taken into account when determining whether or not they should be detained, repatriated or expelled from an E.U. member state. In any further development of a Community return policy, Human Rights Watch urges the European Commission to make express reference to the fact that many undocumented migrants and asylum seekers seeking entry into the E.U. are, in fact, victims of trafficking. As such, they are victims of a serious human rights violation that gives rise to obligations on the part of member states to provide them with the rights and special protections to which they are entitled under international law. Trafficked persons' status as victims of a human rights violation should in all cases be taken into consideration in the course of immigration and asylum proceedings, in particular with respect to the propriety of detention, deportation, and expulsion. An E.U. returns policy should make certain that trafficking victims are included in the categories of persons that may require special protection against expulsion.

Conclusion

The European Union is a leader in the promotion and protection of human rights worldwide, appropriately hailed for its consistent, principled positions on a wide range of issues, including the abolition of the death penalty, equality between women and men, and respect for privacy and family life. The development and implementation of an E.U.-wide anti-discrimination regime has also been a welcome advancement in Community law.

²⁷ United Nations Commission on Human Rights, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, E/CN.4/2000/62 at Annex, January 18, 2000.

²⁸ Ibid., paragraph 7.

²⁹ Draft Basic Principles, principle 5.

³⁰ Ibid. Principle 11 states that remedies include access to justice, reparation for harm suffered, and access to factual information concerning the violations suffered. Principle 22 defines restitution as the restoration of the victim to his or her original situation before the human rights violation(s) occurred, including restoration of liberty; legal rights, social status, family life, and citizenship; return to one's place of residence; and restoration of employment and return of property. Compensation is defined at principle 23 and entails "economically assessable damage" resulting from human rights violations, including physical or mental harm; lost opportunities, including education; material damages and loss of earnings; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services. Principle 24 states that rehabilitation should include medical and psychological care as well as legal and social services.

These efforts, however, should be coupled with respect for the fundamental rights of all persons in the E.U., including undocumented migrants and rejected asylum seekers subject to detention and deportation from the E.U. A human rights regime that protects only nationals of member states and those with proper documents falls far short of observing international and regional standards. At the 1999 Tampere European Council, E.U. member states committed to an area of “freedom, justice, and security.” It can only be hoped that in its effort to realize Tampere’s promise, the E.U. will develop immigration policies—including a return policy—that continue the Community’s long tradition of respecting fundamental rights guaranteed under international law.