

Human Rights Implications of European Union Internal Security Proposals and Measures in the Aftermath of the 11 September Attacks in the United States

Context Post-September 11: General Concerns

Human Rights Watch understands the interest in developing European Union-wide internal security measures in the aftermath of the 11 September attacks in the United States. However, a number of recent E.U. proposals to combat terrorism and other proposed internal security measures contain elements that raise serious human rights concerns. Accordingly, we urge the E.U. to proceed with caution to ensure that any security measures taken provide adequate safeguards to guarantee the protection of individual civil liberties. Moreover, we recommend that any new E.U. legislation contain a specific provision guaranteeing that it is in full conformity with international human rights law, international humanitarian law, and international refugee protection standards.

The European Commission's proposed new security measures to combat terrorism and to establish a European arrest warrant have been introduced and are being deliberated at an unprecedented pace. The commission documents as well as the 20 September conclusions adopted by the Justice and Home Affairs Council and the conclusions and plan of action adopted at the extraordinary session of the European Council on 21 September contain provisions that implicate member states' obligations under international and European human rights law. The declaration issued by E.U. member states at the extraordinary European Council meeting at Ghent on 19 October notes that numerous operations detailed in the 21 September action plan had already been initiated and urged the council to move forward with additional measures "which must be put into effect as soon as possible." Human Rights Watch is concerned that in the rush to agree these proposals, critical public debate and input from civil society are being sacrificed. This undermines ongoing efforts to create transparent and participatory processes meant to give nationals of member states a stake in the E.U. The lack of critical consideration of the impact of these proposals on citizens, refugees, and migrants in the E.U. could result in laws and policies that erode essential liberties and freedoms.

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HRW Press Release, October 15, 2001

The conclusions adopted by the Justice and Home Affairs Council on 20 September included an invitation to the commission "to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments" (Conclusion 29). Human Rights Watch fears that this proposal may result in the exclusion or expulsion of refugees and migrants from member states without adequate safeguards. Government statements in the aftermath of 11 September equating the fight against illegal immigration with the war on terrorism raise concern that proposed anti-terrorism measures coupled with changes in immigration and asylum policy and practices are keyed toward excluding refugees and migrants from Western Europe, possibly undermining the right to seek asylum and the fundamental human rights of migrants, refugees, and asylum seekers. Thus, the E.U. must clarify for member states their obligations to comply with such established principles of customary international law as nonrefoulement and the prohibition against arbitrary detention.

While it is crucial for the E.U. to reaffirm its commitment to individual human rights and refugee protection in the face of terrorist acts and other security threats, the E.U. can also play a role in answering the call for accountability for international crimes, such as crimes against humanity, that permit the prosecution of a suspect in any country under the doctrine of universal jurisdiction. E.U. member states must comply with the principle of nonrefoulement and remain firm in their rejection of extraditing any person to a jurisdiction where the death penalty might be imposed. However, complying with these obligations and commitments should not amount to impunity for persons who have committed international crimes and are apprehended in member states. If the evidence against a suspect meets internationally recognized standards and no other relevant jurisdiction can offer a suspect a fair trial by an independent and impartial tribunal, E.U. member states should examine their responsibility to bring international criminals to

trial in the member state in which the suspect is found under the doctrine of universal jurisdiction.

E.U. Proposals: Specific Concerns

Definition of Terrorism

The European Commission Proposal for a Council Framework Decision to Combat Terrorism of 19 September 2001 provides a broad definition of terrorism that could be used against legitimate dissent. To be qualified as a "terrorist offence," the proposal requires the intentional commission of an act against one or more countries, their institutions or people by an individual or group with "the aim of intimidating them and seriously altering or destroying the political, economic, or social structures of these countries." The explanatory memorandum accompanying the proposal contains a list of terrorist offences that includes "unlawful seizure of or damage to" public transport, government facilities, places of public use, and public and private property, including "acts of urban violence."

The proposal's definition as it stands would cover numerous activities that appear to require a public order - not an anti-terrorist - response. Human Rights Watch is concerned that public demonstrations and protests could be subject to the provisions of the proposal, thus quelling legitimate peaceful dissent. Moreover, the commission proposal makes "promoting of, supporting of or participating in a terrorist group" a criminal offense with a penalty of up to seven years imprisonment. Human Rights Watch is deeply concerned that broad, undefined terms such as "promoting" will result in findings of "guilt by association" for persons sharing the same political ideology, nationality, or ethnicity as persons who commit acts of terrorism.

Concerns regarding the broad definition of terrorism, the motivation for acts of political violence, and the possibility of guilt by association under the commission proposal were expressed in a letter from Human Rights Watch to E.U. officials on 27 September 2001. In mid-October, Human Rights Watch met with E.U. officials to advocate for a more precise definition. One official informed Human Rights Watch that the definition of terrorism in the original commission proposal had been vigorously debated at the Justice and Home Affairs Council meeting on 16 October as some member states believed it to be too broad and thus open to abuse. Human Rights Watch encourages all member states to ensure that the definition of terrorism at the E.U. level is precisely worded to ensure that it cannot be used either as a deterrent to suppress legitimate dissent and/or protest or to unduly infringe on the rights to freedom of expression, assembly, and association.

European Arrest Warrant

The European Commission Proposal for Council Framework Decision on the European Arrest Warrant of 19 September 2001 is meant to replace the current system of extradition between E.U. member states. The state-to-state nature of extradition is thus replaced by the principle of mutual recognition of court orders and/or judgments giving rise to court-to-court relations between judicial authorities of member states. The proposal provides that the arrest warrant will be issued based on an order or decision from a court empaneled in the issuing state and that the warrant will be honored by the so-called surrendering state. Human Rights Watch is concerned that the European arrest warrant proposal may not be in complete conformity with internationally recognized fair trial standards that afford persons in the criminal justice system of any state basic protections against arbitrary action or abuse by that state.

The new warrant system is predicated on the notion that there is uniform adherence throughout the E.U. to the fair trial standards enshrined in the European Convention on Human Rights. However, even a cursory survey of European Court of Human Rights cases from the last decade indicates that fair trial standards have been frequently violated in a number of E.U. member states and in most of the forty-three Council of Europe member states governed by the ECHR, including many E.U. accession countries. Human Rights Watch is deeply concerned that adequate safeguards be included in the arrest warrant proposal to ensure that fair trial standards will be observed in any procedure in the issuing and surrendering states. This is particularly important with respect to some of the accession states that will undoubtedly join the E.U. before they can claim to be in conformity with internationally recognized fair trial standards.

The warrant proposal should also contain an explicit reference that prohibits the return of any

person to a country where he or she has not or will not receive a fair trial in conformity with international standards or who would be subject to serious human rights violations, including torture or the application of the death penalty.

Refugees and Migrants: Protection Obligations, Human Rights, and Security Concerns

The Conclusions adopted by the extraordinary meeting of the Justice and Home Affairs Council of 20 September 2001 included an invitation to the commission "to examine urgently the relationship between safeguarding internal security and complying with international protection obligations and instruments" (Conclusion 29). This conclusion suggests that E.U. authorities will be exploring ways in which member states can expel or exclude from their territory a refugee or migrant suspected of past criminal activity or who poses a threat to the national security of a country. Human Rights Watch urges member states to consider fully their obligations under the 1951 Convention Relating to the Status of Refugees (Refugee Convention), the European Convention on Human Rights (ECHR), the 1966 International Covenant on Civil and Political Rights (ICCPR), the 1984 United Nations Convention against Torture (CAT), and under customary international law in their deliberations regarding the exclusion or expulsion of persons suspected of terrorist activity from the territories of members states.

The guiding principle underpinning international refugee protection standards is the prohibition against refoulement, enshrined in Article 33 of the 1951 Refugee Convention which states that no convention party "shall expel, or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion." The principle of nonrefoulement applies both to direct refoulement to a particular country and to indirect measures that may effectively return a refugee to a country where his life of freedom would be threatened.

The Refugee Convention does contain provisions permitting the exclusion of a person from refugee status-and thus from the protection of the principle of nonrefoulement-if there are "serious reasons" to consider that he has committed a) a crime against peace, a war crime or a crime against humanity; b) a past serious non-political crime outside the country of refuge; or c) acts contrary to the purposes and principles of the United Nations [Article 1(f)(a-c)]. These exclusionary clauses are of an exceptional nature, however, and should be applied strictly and in full accordance with their terms. Article 1(f) indicates a high evidentiary standard ("serious reasons") and the requirement that the crimes were committed by the individual being considered for exclusion (not simply by an organization with which the individual might be associated). Moreover, standard procedural guarantees under international criminal law should apply to exclusion proceedings, including the right of the individual to defend against the charge that he or she committed criminal acts of the grave nature contemplated by the exclusionary clauses and safeguards against discriminatory exclusions based solely on nationality, ethnicity or religion.

The Refugee Convention also contemplates the expulsion of a refugee from a country of asylum for national security purposes. Article 32 permits the expulsion of a refugee on grounds of national security or public order pursuant only to a decision reached in accordance with internationally recognized procedural guarantees. However, under no circumstances can a refugee subject to expulsion under Article 32 be sent to a place where his life or freedom would be threatened. The general principle of nonrefoulement therefore qualifies Article 32, so that even where national security concerns dictate expulsion, a refugee may not be returned, directly or indirectly (i.e. sent to another country where his life or freedom would be threatened).

The only instance provided for under the Refugee Convention in which a host country could expel a recognized refugee and return him to a place where his life or freedom would be threatened is under Article 33. Article 33(2) states that protection against refoulement "may not be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." The two qualifications included in this provision, however, require a direct link between the presence of the refugee within a territory and a national security threat to that country. Therefore, a refugee is still protected against refoulement if he does not presently constitute a threat to the security of the country of asylum. Although no procedural guarantees are explicitly articulated in Article 33, Human Rights Watch believes that the procedural guarantees provided for expulsions under

Article 32 should also apply to Article 33 because the potential consequences of Article 33(2) are much more severe than those stemming from Article 32.

E.U. member states must consider their international refugee protection obligations not simply in light of the Refugee Convention, however, but also with respect to their obligations under European and international law. The principle of nonrefoulement is enshrined in Article 3 of the European Convention of Human Rights (ECHR), Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 3 of the U.N. Convention against Torture (CAT), and it has risen to the level of customary international law. The U.N. Human Rights Committee and other authoritative interpreters of these conventions have said that even a person excluded from protection under the Refugee Convention cannot be sent to a place where he will be subjected to various serious abuses, including torture, or inhuman or degrading treatment. Article 3 of the European Convention on Human Rights (ECHR) has been interpreted by the European Court of Human Rights to prohibit signatories from returning any person to a place where he would be "subjected to torture or to inhuman or degrading treatment or punishment." Parties to the ECHR, including all E.U. member states, cannot derogate from Article 3. The prohibition against refoulement enshrined in Article 3 is an absolute requirement for compliance with the convention. The U.N. Convention against Torture expressly prohibits a state party from expelling, returning, or extraditing a person "to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture." In General Comment No. 1 regarding the individual communications procedure under the CAT and states parties obligations under Article 3, the U.N. committee against torture has interpreted the phrase "another State" to refer to either the state to which an individual concerned is being expelled, returned or extradited, as well as any State to which the individual may subsequently be expelled, returned or extradited.

Human Rights Watch urges E.U. members states to ensure that internal security measures introduced in the aftermath of the 11 September attacks do not undermine member states' obligations under international refugee, human rights, and customary law-most importantly the prohibition against refoulement by which all member states are bound.

Arbitrary Detention

Some E.U. member states have proposed that persons suspected of acts of terrorism who cannot be returned to their own country or to a different country due to the Article 3 concerns detailed above, should be indefinitely detained as national security threats and released only when they no longer pose such a risk or at such time when a third country agrees to accept them and protect them from Article 3 violations. Proposals keyed toward indefinite detention would require member states to invoke their ability to derogate from the ECHR under Article 15 and then to officially derogate from Article 5 of the convention, which guarantees the right to liberty and security of person, and enshrines the prohibition against arbitrary detention.

Indefinite prolonged detention without charge or adequate access to judicial review amounts to arbitrary detention, a violation of both conventional and customary international law. Even in states of emergency, Human Rights Watch rejects the use of indefinite detention without charge in the absence of basic procedural guarantees against arbitrary detention (e.g. access to counsel, right to judicial review, etc.). Human Rights Watch is deeply concerned that any exploration of international protection obligations at the E.U. level in light of security concerns take account of the ways in which states might comply with certain rights guarantees such as the prohibition against refoulement, at the expense of others, in this case the prohibition against arbitrary detention.

The Death Penalty

Human Rights Watch views the European Union's progressive opposition to the death penalty and its attempts to persuade third countries to abolish capital punishment as a model of multi-lateral state action on behalf of human rights. In the aftermath of the 11 September attacks, we urge the E.U. to remain staunch in its opposition to the death penalty. We call upon the E.U. to continue to answer any request from a third country for the extradition of a person suspected of involvement in the attacks by seeking conclusive confirmation that the death penalty will not be imposed if the suspect is to be extradited.

Moreover, we are deeply concerned that E.U. members, under pressure from third countries, may seek to avoid securing such confirmation simply by using the current exemptions provided

in refugee law to exclude or expel persons based on past criminal activity or national security concerns, thus potentially putting such individuals in danger of transfer to a jurisdiction where the death penalty could be imposed.

Accountability for International Crimes in the European Union

In the aftermath of the September 11 attacks, the E.U. also has the opportunity to confirm its commitment to holding accountable those persons responsible for the most egregious international crimes. Customary and conventional international law hold that certain crimes (crimes against humanity, genocide, torture, and war crimes) are so abhorrent that-in the name of the international community-any state can prosecute these crimes, based on the doctrine of universal jurisdiction, regardless of where they were committed and by whom. While key E.U. member states have been at the forefront of the effort to establish an International Criminal Court (ICC) with jurisdiction over certain international crimes and violations of international humanitarian law, many member states have resisted the call to commit to the principle of universal jurisdiction and to enact enabling legislation to allow their own domestic courts to try perpetrators for international crimes.

All E.U. member states have ratified the U.N. Convention against Torture (CAT) and the Geneva Conventions. Some have enacted legislation to permit domestic prosecution of such crimes based on universal jurisdiction, while others have failed to adopt implementing legislation permitting prosecutions. This piecemeal approach to ending impunity for the most heinous international crimes has given rise to concerns that parts of the E.U. might serve as a "safe haven" for international criminals. In fact, the lack of a uniform approach to accountability for international crimes has, in the past, led to the failure of some E.U. member states to hold accountable war criminals and torturers who have found refuge in their countries.

Human Rights Watch and others consider the 11 September attacks to be crimes against humanity. U.N. High Commissioner for Human Rights Mary Robinson on 20 September stated:

Under existing norms of international criminal law the 11 September attacks in the US can be characterized as a crime against humanity, because of its large scale nature and because it was directed against the civilian population. The international nature of this crime creates a duty on all states to assist in bringing the culprits to justice.

Crimes against humanity are defined as acts-such as murder, torture, rape, or inhumane acts-which form part of a widespread or systematic attack directed against a civilian population. Although most adjudicated cases of crimes against humanity address crimes committed in the context of armed conflict and organized under state authority, the Rome Statute of the International Criminal Court (ICC) and recent jurisprudence from the ad hoc international criminal tribunal Rwanda has held that crimes against humanity can be committed in armed conflict or in peacetime.

As noted above, crimes against humanity give rise to universal jurisdiction, meaning that any state may try suspected perpetrators, regardless of the nationality of the suspect or the location of the crime. Whether a state can take advantage of universal jurisdiction, however, depends on whether its domestic law gives such powers to its national courts. The courts of many E.U. member states lack the requisite powers to prosecute persons responsible for the worst international crimes, including crimes against humanity.

Human Rights Watch believes not only that the E.U. should uphold individual civil liberties and refugee protection in the face of growing concerns over internal security, but that it should explicitly make accountability and the prevention of the most egregious international crimes part of its commitment to create the "area of freedom, security and justice" contemplated by the 1999 Tampere European Council conclusions. In the face of serious and compelling obligations not to return any person to a place where his or her life or physical well-being are threatened-and in light of the E.U.'s consistent opposition to extradite any person to a jurisdiction where the death penalty could be imposed-the E.U. must then take the necessary steps to ensure that no E.U. country becomes a safe haven for those responsible for crimes against humanity and other egregious violations of international criminal and humanitarian law.

To that end, Human Rights Watch recommends that, in addition to ensuring speedy ratification and entry into force of the ICC statute (in line with the newly adopted E.U. common position on

the ICC), E.U. member states commit to the principle of universal jurisdiction and no safe haven for the perpetrators of crimes against humanity, genocide, torture, and war crimes. The E.U. should thus enact legislation giving the courts of all member states jurisdiction over these crimes, wherever committed. The legislation should designate the competent court to hear such cases, define the crimes in conformity with international law and enumerate appropriate penalties. Moreover, the legislation should require member states to cooperate fully with the efforts of other members to bring to justice those responsible for crimes in violation of international law. This can be done as part of the continuing effort to adopt implementing legislation for the ICC treaty.