

The Human Rights Dimension of E.U. Immigration Policy: Lessons from Member States

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Patching Up Tampere”

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Introduction

Many thanks to the Academy of European Law for inviting Human Rights Watch to be part of this very timely discussion regarding the state of play of post-Tampere immigration and asylum policy in the European Union. For those of you new to Human Rights Watch's work, it is an international non-governmental organization that monitors human rights violations in over seventy countries worldwide. The flagship office is in New York, with regional offices in other capitals, including London, Brussels, Moscow, and Washington.

Human Rights Watch's Europe and Central Asia division is currently at the mid-way point in a multi-year research and advocacy project focusing on the human rights of migrants in Western Europe. The project involves conducting research in a number of West European countries, with an eye toward influencing both national and European Union (E.U.) immigration and asylum law and policy. To date, we have published reports and policy papers on Greece, Spain, and the United Kingdom; and commentaries on the impact of September 11 on migrants and asylum seekers in the E.U. Although there is a growing nexus between immigration and asylum policy, and a welcomed trend toward discussing these substantive areas in combination, our recent research has tended to concentrate on migrants' rights. Thus, the examples we bring to the table for discussion today focus primarily on immigration policy initiatives.

For our purposes then, the central question of this seminar, “Can migration really be regulated?” is narrowed to: “How can the E.U. ensure that policies aimed at efficient immigration management comport with member states' obligations under regional and international human rights standards?” This is a question that unfortunately has not been adequately addressed in efforts to open space for a dialogue about the benefits of labor migration on the one hand, and the law enforcement effort to combat illegal immigration, on the other.

The development of E.U. immigration policy is a balancing act between the sovereign right of states to control immigration and ensure national security and their obligation to protect the

fundamental human rights of all migrants. Many of these core rights—basic rights to fair and non-arbitrary procedures and decision making, and to be protected from inhumane conditions of detention, for example—apply to all migrants, regardless of their legal status in E.U. member states. Thus, the Tampere imperative of creating an area of “freedom, security, and justice” applies not only to E.U. member state nationals, but, particularly in the area of justice, to third country nationals present in or, in some cases, trying to gain access to member states. Regrettably, the E.U. discussion documents, proposals, framework decisions, and council directives developed post-Tampere have uniformly failed to acknowledge in full that migrants, undocumented migrants in particular, do indeed have human rights. In fact, we would argue that the E.U. approach to immigration since Tampere has focused almost exclusively on combating illegal immigration and reflects a prevailing official attitude that undocumented migrants live a “rightless existence.”¹

In order to more clearly illustrate this prevailing attitude, I’d like to discuss a selection of examples that reflect how E.U. level policy, either in development, near to adoption or already part of the “acquis communautaire” fails to address adequately certain key migration dynamics—including avenues of entry to member state territory, such as trafficking; the use of immigration detention; and the problems associated with return and repatriation—that lead to human rights violations, in particular against undocumented migrants. As our research has revealed, the failure at both the national and regional levels to acknowledge undocumented migrants as anything more than “illegal” results in routine violations of their human rights, including arbitrary detention; gravely substandard conditions of detention; procedural violations in criminal and administrative law, and in asylum systems; racial and ethnic discrimination; police abuse; arbitrary and collective expulsions; violations of children’s and women’s rights; and horrendous abuses of migrants and asylum seekers at the hands of human traffickers, sometimes in complicity with law enforcement officials in E.U. member or accession states.

The examples below reflect how evolving E.U. immigration policy fails those migrants and asylum seekers in detention, those subject to serious abuses as victims of trafficking, and those subject to deportation or expulsion proceedings. The examples reflect Human Rights Watch’s research findings in two particular member states, Greece and Spain, but point to challenges that most if not all E.U. member states face and that have yet to be addressed at the E.U. level.

Human Rights and Immigration Detention

¹ See Jesuit Refugee Service (JRS), *Irregular Immigration in Europe: New Empirical Studies*, Brussels, February 27, 2001. Despite the international and regional human rights commitments of West European governments, the JRS studies conclude that undocumented migrants “lead a ‘rightless existence’ without the basic protection of criminal or civil law and with no legal avenues by which to assert an entitlement to just or humane treatment,” *Ibid.*, Conclusions, p. 1.

In the November 2001 Communication from the Commission to the Council and the European Parliament on a Common Policy on Illegal Immigration,² the section on compliance with international obligations and human rights focuses exclusively on “the obligation to protect those genuinely in need of international protection” and references members states’ obligation to observe the principle of *nonrefoulement* according to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and the 1951 Convention relating to the Status of Refugees (Refugee Convention). This narrow approach to the human rights dimension of migration appears to suggest that “genuine” asylum seekers and refugees enjoy certain fundamental rights, but that other migrants do not. Further on, the communication states that “whatever measures are designed to fight illegal immigration, the specific needs of potentially vulnerable groups like minors and women need to be respected.” The use of the word “needs,” as opposed to “rights,” opens the way for an interpretation of “the fair treatment of migrants” whereby a person’s status as an undocumented migrant could trump her status as a person entitled to a set of basic human rights, regardless of legal status.

The communication goes on to address the issue of a community return policy based on “common principles, common standards and common measures.” It states that based on the principles of voluntary as opposed to forced return and the international obligation of states to readmit their own nationals, “common standards on expulsion, detention, and deportation *could* be developed (emphasis added).”³ This tentative approach to common standards in these areas of immigration management and an emphasis on “administrative cooperation”⁴ raise serious concerns. Indeed, many relevant standards governing these activities exist in regional and international human rights law and need only to be re-articulated and implemented at the E.U. level. Given the rise of the immigration detention regime in Western Europe and the often appalling abuses suffered by migrants and asylum seekers in detention, it would seem that implementation of common standards for immigration detention should be of critical concern. Moreover, the rising number of reports of deaths in the process of deportation and the phenomenon of collective expulsions begs for a more concerted effort at the E.U. level to identify and implement common standards and practices for detention, expulsion, and deportation as a matter of urgency.

Human Rights Watch’s research has revealed that migrants in Greece and Spain are held in administrative detention in substandard conditions and without the ability to exercise their procedural rights. Their treatment can amount to arbitrary detention, prohibited by international law. Other non-governmental and intergovernmental bodies have identified similar rights violations in other E.U. member states as well.

² COM(2001), 672 Final, November 11, 2001.

³ Ibid., para. 4.8.

⁴ Ibid.

In Greece, we found migrants in a squalid, severely over-crowded, roach-infested police detention facility that failed to provide proper access to counsel. Detainees were not permitted access to exercise, fresh air, adequate amounts of food and basic health care in conditions that may have amounted to cruel, inhuman and degrading treatment.⁵ Many of the detainees were in detention for lengthy periods of time—one man for over a year—because their home countries could not or would not provide the approval and requisite documents for them to return. Their detention—without charge, with virtually no avenue for appeal to an independent authority, and without an active deportation process that promised some certainty of return—violated Article 5 of the European Convention on Human Rights, Article 9 of the International Covenant on Civil and Political Rights—to which all E.U. members states are parties—and the customary law prohibition against arbitrary detention.⁶

In Spain, our research revealed similar conditions in old airport facilities in the Canary Islands.⁷ Migrants detained there are held in two overcrowded old airport facilities on Fuerteventura and Lanzarote. At times, more than 500 migrants have been kept in a space that the Spanish Red Cross has determined to be designed to accommodate fifty people. Detainees are cut off from the outside world. There are no telephones. Visits are not permitted. Detainees can never leave the premises; they cannot exercise, and have no exposure to fresh air or sunlight. The state of medical care and sanitary conditions in the facilities also raised serious concern, particularly when the volunteer doctors at the facilities suspended their services in protest over the conditions. Furthermore, detainees receive virtually no information about their rights, are rarely provided with interpretation or translation—even when asked to sign documents authorizing their deportation—and have inadequate access to meaningful legal representation and individualized judicial oversight of their cases. Asylum seekers face additional obstacles, finding it difficult, at times impossible, to apply for asylum prior to, during, and after detention. In both Greece and Spain, the Ombudsmen have publicly criticized the detention conditions of undocumented migrants.

In December 2001, the United Nations Human Rights Committee, which monitors states parties' compliance with the International Covenant on Civil and Political Rights (ICCPR), issued its

⁵ Human Rights Watch Memorandum, *Urgent Concerns: Conditions of Detention For Foreigners In Greece*, December 2000, at <http://www.hrw.org/background/eca/greece-detention-bck.htm>

⁶ A new immigration law came into force in Greece in June 2001, six months after our research there was completed. Under the new law, a migrant has “the right to raise objections against the decision of detention before the chair of the administrative court of first instance who judges on its legality with the respective application of the procedure provided for in article 243 of Law 2717/1999” [Article 44(2)]. The administrative court is under the jurisdiction of the Ministry of Justice. There is no stated time limit within which any challenge to detention must be lodged nor does it state whether or not a challenge to detention will effect a suspension of the deportation order. Moreover, the law is extremely vague, and it remains unclear whether this provision applies to migrants with administrative detention orders—that is, the majority of immigration detainees in Greece—or only to migrants issued a judicial deportation order.

⁷ Human Rights Watch, *Spain: The Other face of the Canary Islands: Rights Violations Against Migrants and Asylum Seekers*, February 2002, at <http://hrw.org/reports/2002/spain>

concluding observations on the report of the United Kingdom.⁸ The committee expressed concern that “asylum seekers have been detained in various facilities on grounds other than those legitimate under the Covenant, including reasons of administrative convenience.”⁹ Moreover, the committee noted that some rejected asylum seekers are held in detention “for an extended period when deportation might be impossible for legal or other considerations.”¹⁰ As noted above, the prolonged detention of migrants and asylum seekers who cannot be returned to their countries of origin can frequently amount to arbitrary detention.

Human Rights Watch, in a commentary regarding proposals in a recent U.K. white paper on immigration and asylum policy,¹¹ expressed concern that the current detention regime in the U.K.—which the white paper proposes to continue—would violate the U.K.’s obligations under the ICCPR, as described in the authoritative conclusions of the U.N. Human Rights Committee noted above. Moreover, continuing the U.K.’s policy of detaining asylum seekers solely for administrative reasons may amount to a violation of the 1951 Refugee Convention.¹² It is also contrary to the United Nations High Commissioner for Refugees’ Detention Guidelines¹³ and conclusions reached by the United Nations Working Group on Arbitrary Detention after a 1997 visit to the U.K. The Working Group recommended that the U.K. “should ensure that detention of asylum seekers is resorted to only for reasons recognized as legitimate under international standards and only when other measures will not suffice.”¹⁴

⁸ U.N. Human Rights Committee, “Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland,” CCPR/CO/73/UK, December 6, 2001.

⁹ *Ibid.*, para. 16.

¹⁰ *Ibid.*

¹¹ Human Rights Watch Briefing Paper, *Commentary on the United Kingdom Home Office White Paper: Secure Borders, Safe Haven: Integration with Diversity in Modern Europe*, March 2002, at <http://hrw.org/backgrounder/eca/uk-briefing.htm>

¹² Article 31(1) of the Refugee Convention states that governments “shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened . . . enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.” The convention goes on to state that “[c]ontracting States shall not apply to the movements of such refugees restrictions other than those which are necessary...” (Article 31(2)).

¹³ United Nations High Commissioner for Refugees, Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Geneva, February 1999. The guidelines state that asylum seekers, in general, should not be detained. They do enumerate instances where an asylum seeker may be detained, including for the purpose of determining the elements on which the claim for refugee status or asylum is based. However, the guidelines state that this exception cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time.

¹⁴ Working Group on Arbitrary Detention, “Report of the visit of the Working Group to the United Kingdom on the Issue of Immigrants and Asylum Seekers,” E/CN.4/1999/63/Add.3, para. 26. In late 1999, the Working Group also issued a set of general guidelines on the detention of asylum seekers and immigrants to be used to determine whether or not a detention is arbitrary. See 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) at:

With such grievous abuses and policies documented by groups like Human Rights Watch, openly opposed by humanitarian organizations, and condemned by the offices of national ombudsmen, it would seem that E.U. member states would take a greater interest in identifying and implementing the relevant common E.U. standards for the treatment of immigration detainees. However, there has been little effort to do so in recent E.U. initiatives. E.U. documents that do refer to the rights of migrants in detention do so in a tentative and non-committal fashion.

For example, an April 2002 Green Paper on a Community Return Policy on Illegal Residents,¹⁵ does note that minimum standards for the issuance of detention orders “could” be set at E.U. level as well as minimum rules on the condition of detention “to ensure a humane treatment in all detention facilities in the Member States.”¹⁶ It goes on to say that any returnees who are detained in ordinary prisons, “might be separated from convicts in order to avoid any criminalization,” ignoring regional and international standards that require such separation.”¹⁷ We understand that the Green Paper is an initial attempt to generate discussion about setting 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 vulnerable populations currently in immigration detention across the E.U. Human Rights Watch would hope 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 would urge the E.U. to adopt common standards that reflect minimum procedural safeguards and minimum standards for humane detention conditions for all immigration detainees that comply with already existing international and regional standards.

Human Rights and Trafficking in Human Beings

The same resistance to acknowledging that migrants can be victims of human rights abuses continues to plague the debate on how to effectively combat trafficking in human beings at the E.U. level. Governments have focused on law enforcement issues such as investigating and freezing the funds of organized criminal trafficking networks and creating standard penalties for trafficking and associated crimes. They have been much slower to recognize that trafficking

<http://www.unhchr.ch/Huridocda/Huridoca.nsf/0811fcbd0b9f6bd58025667300306dea/39bc3afe4eb9c8b480256890003e77c2?OpenDocument#annexII>, (accessed March 12, 2002).

¹⁵ COM(2002) 175 Final, April 10, 2002.

¹⁶ *Ibid.*, para. 3.1.3.

¹⁷ United Nations Standard Minimum Rules for the Treatment of Prisoners (Standard Minimum Rules) and the European Prison Rules serve as authoritative guides for states on how to comply with their international and regional obligations to protect the human rights of persons held in all forms of detention. Both require that non-criminal detainees be held in separate facilities away from convicted felons.

victims have suffered a grievous human rights abuse—giving rise to certain obligations on the part of government to remedy the violation.

In February 2001, Human Rights Watch criticized the December 2000 Commission Proposal for a Council Framework Decision on Combating Trafficking¹⁸ for its failure to provide adequate victim and witness protection mechanisms.¹⁹ We noted that E.U. member states had recently completed negotiations on the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime,²⁰ which many E.U. member states had signed. Article 2 of the Protocol called on states parties “to protect and assist” the victims of trafficking, “with full respect for their human rights.” Article 6 of the Protocol provided for assistance and protection of trafficking victims, including confidential legal proceedings to protect privacy; assistance in accessing information about criminal and administrative proceedings; and making victims’ and witnesses’ concerns known in the course of any criminal proceedings against traffickers. It also called on states to consider protection measures to provide for the physical, psychological, and social recovery of trafficking victims, including the provision of housing, counseling—particularly regarding legal rights—in a language understood by the victim; medical, psychological and material assistance; employment, educational and training opportunities; measures to ensure the safety of trafficking victims; and the possibility of obtaining compensation for damage suffered. Moreover, Article 7 encouraged all states parties to consider adopting measures that permit victims of trafficking to remain in their territory, temporarily or permanently, in appropriate cases. Human Rights Watch urged the E.U. to ensure that such protections were included in its Framework Decision.

The Framework Decision, however, provided virtually no protections for trafficking victims, focusing instead on definitions and on penalties for traffickers. A December 2001 version of the Framework Decision revealed that although the proposal recognized that “[t]rafficking in human beings constitutes serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt bondage and coercion,”²¹ there was no concomitant provision for adequate protection and assistance to victims. Article 7 is titled “Protection and Assistance to Victims,” but provides no concrete protection measures at all, instead focusing on the special vulnerability of child trafficking victims. Throughout the course of debating and amending the Framework Decision, non-governmental organizations were assured that, although the

¹⁸ COM(2000) 854 Final, December 21, 2000.

¹⁹ Human Rights Watch Briefing Paper, *Recommendations regarding the Proposal for a Council Framework Decision on Combating Trafficking in Human Beings*, February 2001, at <http://hrw.org/backgrounder/wrd/trafficking-framework.htm>

²⁰ A/55/383, adopted by the General Assembly on November 2, 2000 (Trafficking Protocol).

²¹ 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, preamble, para. 3.

Framework Decision itself did not include protection measures, victim and witness protection would be addressed in a separate document.

To our dismay, in February 2002, the Commission issued a 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.”²² The explanatory memorandum accompanying the document is exceptionally frank in its admission that only certain trafficking victims—those considered “useful” for the purpose of investigating, arresting, and prosecuting traffickers—will be informed about and be able to apply for the short-term permit. Moreover, the proposal states that although its provisions “may appear to serve to protect victims. . .[t]his is not, however, the case:”

the proposed Directive introduces a residence permit and is not concerned with protection of either witnesses or victims. This is neither its aim nor its legal basis. Victim and witness protection are matters of ordinary European law.²³

The proposal then refers to the March 2001 Framework Decision on the status of victims in criminal proceedings²⁴ and a November 1995 Council resolution on the protection of witnesses in the framework of the fight against international organised crime²⁵ as adequately covering the victim and witness protection needs of trafficking victims. Neither of these documents was written and adopted with the very special needs of trafficking victims in mind, despite the fact that they are subject to a range of grievous violations particular to their suffering under conditions of forced labor or servitude at the hands of exploitative “employers” and often under the surveillance of brutal transnational trafficking networks. Moreover, as with the E.U. directive, neither of these documents applies to victims who do not cooperate with the authorities in the context of a criminal proceeding. Thus, those trafficking victims who cannot or will not cooperate with authorities could be subject to arrest, detention and deportation—despite their status as victims of a human rights violation. This approach ironically punishes the trafficking victim, categorizing her or him solely as an undocumented migrant subject to expulsion, without any recognition that he or she is a victim of serious rights abuse. No other victims of human rights violations are required to cooperate with authorities in criminal investigations or proceedings in order to enjoy the protection of the state, including potential mechanisms for rehabilitation and in some cases, compensation for abuses.

The flaw in the E.U. approach—as aptly identified by Helga Konrad, Chair of the Task Force against Human Trafficking of the South-East European Stability Pact—is its orientation toward the problem of trafficking solely as an element of efforts to combat illegal immigration. This

²² COM(2002) 71 Final, 2002/0043 (CNS), February 11, 2002.

²³ Ibid., para. 2.3.

²⁴ OJ L 82, 22 March 2001.

²⁵ OJ C 327, 7 December 1995.

approach gives rise to two categories of victims: those who cooperate with the authorities and those who do not or cannot—without any attention to the needs for protection common to all of these victims, regardless of the level of their cooperation with the fight against illegal immigration.²⁶

To illustrate the problems with this approach in practice, Articles 9 and 10 of the proposed Directive detail the procedure for issuing the short-term permit. The authorities are responsible for determining who is a victim for the purpose of possibly issuing the permit, based on the victim's usefulness, whether they have shown a clear intent to cooperate, and evidence that the victim has severed all links with the traffickers. After such a determination is made, the victim is informed of the possibility of receiving a permit based on her/his cooperation with authorities. A thirty-day "reflection period" ensues during which the victim would have access to housing, health care, and psychological support. During this period, the authorities may not expel a victim, but may issue an expulsion order, which is not immediately enforceable. At the end of the thirty days, the victim must decide whether to cooperate. If s/he does not, an expulsion order may be immediately executed. If s/he decides to cooperate, any pending expulsion order would be lifted upon the issuance of the short-term residence permit.

Human Rights Watch's research, in Greece and the Balkans in particular, indicates that trafficking victims often will not or cannot cooperate with the authorities for a variety of reasons. Often the victim fears retaliation from the traffickers or corrupt officials in the country of origin. Trafficking victims who have left children at home are particularly vulnerable to these threats. Some trafficking victims may view the incentives to cooperate with the authorities skeptically, understanding that many so-called protection measures are only temporary and do not provide the type of safety and security they will need in the long term.²⁷ Finally, our research has revealed that many migrants are apprehended, detained, and deported as a matter of first course, their status as undocumented migrants trumping their status as victims of trafficking.²⁸

In sum, there remains a serious gap in terms of specific protection measures for all victims in the burgeoning European-wide anti-trafficking regime. The general protections included in existing decisions and resolutions noted above create a legal vacuum in which victims who do not cooperate with authorities in criminal proceedings are left without any protection at all. The absence of such protection for all trafficking victims fails to meet the standards for protection of trafficking victims outlined in the Trafficking Protocol.

²⁶ Migration News Sheet, "European Union: Human Trafficking Must Not be Seen from the Angle of Illegal Immigration," April 2002.

²⁷ The short-term permits proposal suffers this last defect. Not only are the permits reserved only for those victims deemed "useful" to the authorities, there is only a limited guarantee that a permit will be renewed. According to Article 16, the permit "shall not be renewed" if the conditions outlined in the proposal's text, including the victim's "usefulness," "cease to be satisfied."

²⁸ Human Rights Watch Memorandum, *Trafficking of Migrant Women for Forced Prostitution into Greece*, July 2001, at <http://www.hrw.org/backgrounder/eca/greece/index.htm>

Human Rights and the Return of Undocumented Migrants

The E.U.'s record with respect to the protection and promotion of migrants' rights in the post-Tampere period has indeed been spotty. Most proposals avoid mention of human rights all together, except for a boiler plate paragraph declaring that any measures taken should conform with E.U. human rights standards and the European Convention on Human Rights. Many documents go on to propose laws, policies, and amendments in direct contradiction to those standards. Some documents attempt to detail the human rights standards that apply but do so in a selective manner, enumerating selected rights, while ignoring some of those standards that often give migrants maximum protection.

The April 2002 Commission Green Paper on a Community Return Policy on Illegal Residents²⁹ is one recent initiative, mentioned briefly above, that contains a section on the applicability of some human rights standards to migrants, but fails to acknowledge others that are critical to conforming with community and international human rights obligations. In a section titled "Human Rights and Return," the paper lists provisions of the European Convention on Human Rights the Charter on Fundamental Rights (Charter) that apply to a policy on return.³⁰ The only international standards detailed, however, are those applying to children, as enshrined in the 1989 Convention on the Rights of the Child. The complete omission of other relevant international standards and certain provisions of regional law suggests a reluctance to afford migrants the full range of rights guarantees to which they are entitled under law.³¹ I will note just three obvious examples of how such omissions could gravely affect migrants:

²⁹ COM(2002) 175 Final, April 10, 2002.

³⁰ ECHR Articles 3, 5, 6, 8 and 13 are listed, as well as Charter Articles 3, 4, 7, 8, 19, 24 and 47.

³¹ 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 in 1986. With the exception of Article 25, 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 fulfil 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

- The Green Paper does not currently include reference to ECHR Article 2 and Charter Article 2, protecting the right to life. Migrant deaths, allegedly at the hands of law enforcement and immigration officials, have grown considerably over the past few years. The March 2002 Belgian court decision to prosecute five police officers in connection with the death of Nigerian asylum seeker Semira Adamu in 1998 is just one case where coercion in the process of deportation led to the death of an asylum seeker while in the custody—and possibly at the hands—of law enforcement officials. In the Adamu case, three officers have been 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 stop the physical coercion. Adamu, aged twenty, died of a brain hemorrhage;³²
- There is a notable absence in the Green Paper of any mention of the possible applicability of the growing anti-discrimination regime in Western Europe to immigration management or to the rights of migrants present in E.U. member states. The ECHR’s general anti-discrimination provision at Article 14—which applies only to the rights enshrined in the Convention—is not listed, nor is Protocol 12 to the ECHR, which extends Article 14 to “any right set forth by law.” The Charter of Fundamental Rights’ 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. Since the full incorporation of the Charter into binding E.U. law is still under debate at the E.U. level, the Green Paper references virtually no binding anti-discrimination standards at either the regional or international level.³³ While some E.U. anti-discrimination legislation has been deemed inapplicable to immigration controls,³⁴ international standards and ECHR Protocol

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.

³² Associated Press, “Police Officers Sent to Trial in Death of Nigerian Asylum Seeker,” March 26, 2002.

³³ The prohibition against discrimination is a norm of customary international law. It is prohibited by, among other instruments to which most E.U. member states are parties, the Universal Declaration on Human Rights; International Covenant on Civil and Political Rights; the International Covenant on Economic, Social, and Cultural Rights; and the Convention on the Elimination of All Forms of Discrimination.

³⁴ The Council of the European Union Directive 2000/43/EC (Race Equality Directive) implements the principle of equal treatment among persons irrespective of racial or ethnic origin. The directive, now part of the “acquis communautaire”—the body of law governing membership in the European Union—requires all member states to conform their legislation to implement the directive’s anti-discrimination principles within three years. The directive prohibits direct and indirect discrimination in both the public and private sectors based on race or ethnic origin and

12 do provide some protection from discrimination for vulnerable migrants. We have seen the importance of such protections in our research in Spain, where our investigation revealed that the arbitrary application of Spain's Foreigner's Law disadvantaged certain migrants groups—Algerians in particular. Algerians were more apt 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 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;³⁵

- 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 Charter Article 19, although Article 5 has been interpreted to prohibit collective expulsions also. Moreover, ECHR Protocol IV, Article 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. In some E.U. member states, collective expulsions occur on a regular basis, often characterized by the failure of authorities to provide adequate procedural guarantees in each individual case. For example, some migrants in Spain subject to a rapid deportation procedure called *devolución* suffered what appear to be collective expulsions because the procedure is applied to groups of people, without adequate procedural safeguards such as individual deportation determinations; access to information regarding legal rights; and the ability 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.

Human Rights Watch will be publishing a much more detailed critique of the Green Paper's human rights aspects in the future. Suffice it to say from the examples above, however, that the paper's attempt to incorporate human rights standards into the immigration policy debate in the areas of deportation and expulsion falls far short of implementing either international or regional standards.

Conclusion

Human Rights Watch has acknowledged the European Union as leader in the promotion and protection of human rights worldwide. We have lauded the E.U. for consistent principled positions on a wide range of issues, including the abolition of the death penalty, equality between

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. The directive specifically includes third country nationals within its scope, notwithstanding a government's right to differential treatment based strictly and solely on legal status.

³⁵ Human Rights watch will release a report on the arbitrary application of Spain's Foreigner's Law in June 2002.

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 welcomed advancement in community law.

These efforts, however, should be coupled with respect for the fundamental rights of all persons in the E.U., including migrants, refugees, and stateless persons. 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 for the protection of all persons in the E.U., without respect to legal status or nationality. It can only be hoped that in its effort to realize Tampere's promise, the E.U. will develop immigration policies that continue the community's long tradition of respecting fundamental rights.

Thank you.
April 25, 2002