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**The Eminent Jurists Panel  
on Terrorism, Counter-Terrorism and Human  
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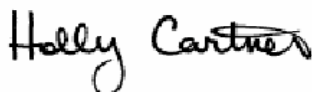
**June 25, 2007**

**Dear Eminent Jurists Panel Members:**

**Please find attached the written submission of Human Rights Watch to the Eminent Jurists Panel for its forthcoming European Union Sub-regional hearing. The submission focuses on counterterrorism legislation and policies in France and Spain, and on the use of diplomatic assurances against torture in the region. As you know, our concerns on the UK were communicated to the Panel during its hearing in London.**

**We are delighted to have the opportunity to develop our concerns in oral testimony at the sub-regional hearing in Brussels July 2-4, 2007. Judith Sunderland, one of our researchers on the EU region, will represent Human Rights Watch. Should you have questions about the submission, please do not hesitate to contact Judith directly at [sunderj@hrw.org](mailto:sunderj@hrw.org) or +39-02-6990-1902.**

**Sincerely,**



**Holly Cartner  
Executive Director  
Europe and Central Asia Division**

**Human Rights Watch Submission  
Eminent Jurists Panel on Terrorism, Counter-Terrorism and  
Human Rights  
European Union Sub-regional hearing, Brussels, July 2007**

**This submission summarizes some of Human Rights Watch’s key concerns on the human rights implications of counter-terrorism measures in the European Union region. Since Human Rights Watch gave evidence to the Eminent Jurists Panel hearing in the United Kingdom, our concerns in relation to that country are not included. We focus on counterterrorism legislation and policies in France and Spain, and the use of diplomatic assurances against torture and ill-treatment in the EU region.**

**France: Insufficient safeguards in national security removals**

**Over the past five years, France has forcibly removed dozens of foreign residents accused of links to terrorism and extremism. Available government figures indicate that 71 individuals described as “Islamic fundamentalists” were forcibly removed from France between September 2001 and September 2006. Fifteen of these were described as imams. Though not a new policy, national security removals now form an integral part of France’s national strategy to counter violent radicalization and recruitment to terrorism.**

**The procedures for national security removals do not contain sufficient guarantees to prevent violations of fundamental human rights. Appeals against such removals, including against the country of return on the grounds of risk of torture or prohibited ill-treatment, are non-suspensive. Asylum claims have suspensive effect**

**only at first instance in cases involving national security, so an initial negative decision by the national refugee office paves the way for immediate removal even if the individual has appealed the decision to the independent refugee appeals board.**

**France was condemned in May 2007 by the UN Committee Against Torture for the second time in four years for violating its absolute obligation not to return anyone to a country where she or he faces torture or ill-treatment. The May decision concerned Adel Tebourski, a French-Tunisian national whose acquired French citizenship was stripped in order to expel him to Tunisia in August 2006.**

**Administrative expulsions ordered by the Interior Ministry are based on intelligence reports, so-called white notes (*notes blanches*), that do not disclose either the sources or the methods used to obtain the information. Cases examined by Human Rights Watch involved individuals accused of speech that, while offensive, did not involve obvious incitement to violence that would justify such a draconian interference with the fundamental right of freedom of expression as expulsion. France modified its Immigration Code in 2004 to allow for expulsions for “incitement to discrimination, hatred or violence against a specific person or group of persons.”**

**Annex 1: Human Rights Watch report, In the Name of Prevention: Insufficient Safeguards in National Security Removals, June 2007.  
<http://hrw.org/reports/2007/france0607/>**

### **Spain: Incommunicado detention**

**Special criminal procedures in terrorism cases in Spain raise serious concerns about the right to freedom from torture and prohibited ill-treatment, as well as the right to an effective defense. Under Spain’s Code of Criminal Procedure, terrorism suspects may be held**

**incommunicado for a total of thirteen days: five days in police custody, a further five days upon remand into pre-trial detention, and an additional three days (either consecutive or imposed at a later date) when considered necessary. During incommunicado detention, detainees are held in isolation and do not have the right to counsel at the outset of detention or to a lawyer of their own choosing. They are assigned a legal aid attorney, who must be present at all interrogations and statements before a judge, but with whom they may not consult in private, either before or after these proceedings. The legal aid attorney is unable to address the detainee directly, either to ask questions or provide legal advice. Under these restrictions, the role of the defense attorney is reduced to that of a silent witness.**

**Although incommunicado detainees are technically under judicial supervision, in practice the competent judge does not see the detainee until he or she has spent three or even five days in police custody. Detainees are examined regularly by court-appointed forensic doctors, an important safeguard against torture, but not all reports of ill-treatment are duly investigated. Incommunicado detainees do not have the right to an examination by a doctor of their own choosing.**

**While there is no prohibition under international law of incommunicado detention per se, there is significant consensus among UN human rights bodies that it facilitates torture and ill-treatment and should be prohibited. Both the UN Committee Against Torture and the UN Special Rapporteur on Torture have expressed serious concerns about incommunicado detention in Spain.**

**The right of terrorism suspects to an effective defense, already undermined by the limitations on access to counsel during the incommunicado period, is further impaired by the use of secret legal proceedings. Judges may—and often do—impose secrecy on the**

**investigation and judicial proceedings, either in whole or in part. This means defense attorneys do not have access to critical information regarding their clients or the evidence against them, including the full grounds for remand into pre-trial detention. This restricted access may be kept in place until the investigative phase of the legal process is almost concluded.**

**Annex 2: Human Rights Watch report, Setting an Example? Counter-terrorism Measures in Spain, January 2005.**

**<http://hrw.org/reports/2005/spain0105/>**

## **Diplomatic Assurances against torture and ill-treatment**

**With respect to counter-terrorism measures region-wide that undermine human rights, Human Rights Watch directs the panel's attention to the growing use in European Union member states of diplomatic assurances against torture and ill-treatment to effect the transfer of national security suspects to countries where they are at real risk of such abuse. This is an issue of serious and immediate concern that Human Rights Watch has raised in a number of other Eminent Jurists Panel hearings, including those convened in the US, Canada, and the United Kingdom. In addition to the UK, EU member states that have used, or attempted to use, diplomatic assurances against torture and ill-treatment to effect such returns include: Austria, The Netherlands, Germany, and Sweden.**

**The conclusions of the May 2007 G-6 Interior Ministers' meeting in Venice underscore Human Rights Watch's concerns about this dubious practice yet again. The conclusions state that the interior ministers of the G-6 (France, Germany, Italy, Poland, Spain and the United Kingdom) believe that "expulsion related to terrorism has proven to be an effective tool for States in order to protect their people from foreign nationals that are believed to pose a threat to national security:"**

**The Ministers discussed the difficulties faced by States in seeking to implement an effective expulsion policy: the need to protect national security and the human rights of those who pose a threat. To that aim, they decided to analyse better the different mechanisms that exist, including a case by case approach, diplomatic contacts or assurances, that could be useful under certain circumstances for promoting, in repatriation States, patterns of conduct compliant with the international obligations as to the safeguard**

**of human rights. They agreed to promote a more in-depth common study about the different systems and best practices. The need for further consideration by the European Union in this field has also been underlined.**

**A number of EU member states have argued that diplomatic assurances mitigate a person's risk of torture and ill-treatment, reducing it to such an extent that the state's obligation of nonrefoulement is met. But the nature of torture itself makes diplomatic assurances from regimes that practice torture inherently unreliable and practically unenforceable.**

**Torture is criminal activity, practiced in secret using techniques that often defy detection – such as mock drowning, sexual assault, and the application of electricity on the victim's body. In some countries, governments employ medical personnel in detention facilities to monitor the abuse to ensure that the torture is not easily detected. Detainees subjected to torture are often afraid to complain to anyone about the abuse for fear of reprisals against them or their family members. Periodic post-return monitoring visits by diplomats or others under such conditions thus cannot adequately protect a suspect from abuse. Moreover, states that employ torture routinely deny that it occurs and refuse to investigate allegations of abuse, making accountability for a breach of any assurances unlikely.**

**Moreover, it is disingenuous for the G-6 to frame the use of diplomatic assurances as a tool that will promote patterns of conduct in compliance with repatriation countries' human rights obligations. Indeed, states that secure diplomatic assurances explicitly acknowledge that a person subject to transfer based on such promises is at risk of torture precisely because the repatriation state has failed to comply with its**

**international obligations. Non-binding, unenforceable, bilateral agreements against torture and ill-treatment are ineffective as a safeguard against abuse for the sole person subject to return. Moreover, they do not require a repatriation state to commit to any system-wide reform required by their obligations under the European Convention on Human Rights, the Convention Against Torture, or the International Convention on Civil and Political Rights. Diplomatic assurances may be an expedient way for governments to remove undesirable aliens. But they should not be confused with concerted advocacy by the global community to eradicate torture with the hard work of wide-ranging systemic reforms that, implemented in full, will protect all persons from torture and thus make the use of diplomatic assurances against torture redundant.**

**If non-nationals on EU territory are suspected of posing a threat to the national security of a member state, but cannot be deported or otherwise transferred due to the risk of torture on return, the evidence against them should be produced in a fully constituted court of law and they should be prosecuted. Many member states have laws and procedures related to sensitive national security-related intelligence that safeguard against its public disclosure, but permit a full confidential review in conformity with a suspect's fair trial rights.**

**Alternatively, in light of the prohibition against indefinite detention, non-nationals currently in detention and suspected of posing such a threat who cannot safely be removed should be released and subject to judicially-supervised surveillance measures commensurate with their human rights. The possibility that non-nationals could be sent back to a risk of torture is a severe penalty that calls for alternative measures – such as prosecution or release and continuing surveillance**

**consistent with human rights norms – to ensure that they are held accountable for any crimes they may have committed and their fundamental rights are protected.**

**In a February 2007 the European Parliament adopted a resolution on a report by its Temporary Committee on the alleged use of European countries by the CIA for the transportation and illegal detention of prisoners. The resolution concluded that the use of diplomatic assurances is incompatible with the absolute prohibition of torture. The July 2006 interim report by the same committee called on member states to reject altogether reliance on diplomatic assurances against torture.**

**Diplomatic assurances against torture and ill-treatment do not protect people from abuse and undermine the global absolute prohibition against transferring a person to risk of torture. Human Rights Watch urges this panel to recommend that the EU reject the use of diplomatic assurances as they are not an effective safeguard against torture and thus cannot be deemed a “best practice” in countering terrorism.**

**Annex 3: Human rights Watch report, Still at Risk: Diplomatic Assurances No Safeguard Against Torture, April 2005, <http://hrw.org/reports/2005/eca0405/eca0405.pdf>**

**Annex 4: “Diplomatic Assurances” against torture, Questions and Answers, <http://www.hrw.org/backgrounder/eca/ecaqna1106/>**

**Annex 5: Human Rights Watch press release, “No Guidelines on Empty ‘No Torture’ Promises,” April 2006, <http://hrw.org/english/docs/2006/04/03/eu13110.htm>**

**Annex 6: Conclusions of the G6 Meetings in Venice, 11-12 May 2007,**  
**Source Italian Interior Ministry, May 12, 2007,**  
<http://www.statewatch.org/news/2007/may/05venice-g7-may-2007.htm>