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reform worldwide

Comments on the Draft EU Human Rights Strategy: “A New Direction for the EU on Human Rights and Democracy”

Introduction

Penal Reform International (PRI) is an international non-governmental organisation working on penal and criminal justice reform worldwide, with observer status to the Economic and Social Council of the United Nations (UN-ECOSOC), the Council of Europe (CoE), the African Commission on Human and Peoples’ Rights (ACHPR) and the Inter-Parliamentary Union (IPU). Advocating criminal justice reform and implementing regional programmes in the Middle East and North Africa, Central and Eastern Europe, Central Asia and the South Caucasus, the organisation has gathered relevant observations in assessing the impact of EU policies within its area of work.

The EU, through its foreign policy instruments, its enlargement process and as an actor at regional and international inter-governmental organisations plays a significant role in shaping the human rights discourse and in promoting and supporting the implementation of human rights standards within its foreign relations.

However, given the seismic changes in the world since the current EU human rights strategy has been adopted in 2001, the review of the current EU strategy on human rights has long been awaited for, and provides for a rare opportunity to demonstrate leadership in enhancing human rights implementation through foreign relations.

PRI therefore appreciates the opportunity to contribute to the review of the EU Human Rights Strategy and would like to submit the following comments on the draft “New Direction for the EU on Human Rights and Democracy”.

Weight of criminal justice issues

More than 10.2 million people are incarcerated globally, pending trial or following conviction. The figures of persons detained worldwide exceed this number by far, as these statistics reflect imprisonment in relation to criminal proceedings only.

In many countries, people are remanded in custody for offences such as touting for business on buses and parking wheelbarrows in prohibited areas, contributing not only to disproportionate deprivation of liberty¹, but also to overcrowding of prisons² and problematic prison conditions linked thereto.

¹ For example, in Tanzania, prison sentences of up to six months can be handed down for abusive language, operating small business without valid business license or possession of illicit liquor.

What is more, a large percentage of the prison population are awaiting trial, while presumed - and often found - to be innocent. An estimated three million people are held in pre-trial detention on any given day. For example, an overall 36.3 % of the prison population in Africa, totalling 857,994 inmates, are held in pre-trial detention, reaching 80-90 % in some countries.³ Many will spend months and even years in detention—without being tried or found guilty.⁴ The length of pre-trial detention varies largely, with an average of 5.5 months in 19 of the then 25 member states of the European Union⁵ (2003), as compared to an average of 3.7 years in Nigeria.⁶

Moreover, the dynamic implication is such that a multiple of individuals are marked by the experience of imprisonment at some point in their life, as in the course of a year approximately 10 million people pass through pre-trial detention.

Besides the (justified or unjustified) interference with the right to liberty, imprisonment is linked to a wide variety of human rights issues such as torture and ill-treatment, in the context of the coercion of confessions and witness statements as well as regarding conditions of detention; impunity of perpetrators for these abuses; corruption, and infringements of the right to fair trial. Furthermore, pre-trial detention has got a considerable socioeconomic impact:

"Excessive and arbitrary pretrial detention is an overlooked form of human rights abuse that affects millions of persons each year, causing and deepening poverty, stunting economic development, spreading disease, and undermining the rule of law. Pretrial detainees may lose their jobs and homes; contract and spread disease; be asked to pay bribes to secure release or better conditions of detention; and suffer physical and psychological damage that last long after their detention ends. (...)

*The impact of indiscriminate and excessive use of pretrial detention is felt most sharply in the countries that are the focus of the Millennium Development Goals (MDGs). Key goals on child health, gender equality, and universal education are directly inhibited by the significant expense incurred and opportunity lost when someone is detained and damaged through pretrial detention."*⁷

Given this context, PRI believes that (criminal) justice issues, penal reform, detention and imprisonment are not given the appropriate weight in the EU's draft human rights strategy, and in the EU's Common Foreign and Security Policy as a whole.

Lack of a comprehensive strategy on justice issues

While stressing the importance of the rule of law to date EU foreign policy with regard to justice issues has an almost exclusive scope of police cooperation and

² For example, in Cambodia the rights group Licadho reported that prison occupancy was close to 180 percent, making it among the 25 most overcrowded prison systems in the world. The overcrowding is attributed in part to the practice of detaining those who are unable to pay criminal fines, and the use of prison sentences that are not commensurate with the crimes committed. (ICPS News Digest 5th Edition, September/October 2011, <http://www.prisonstudies.org/news/all/146-prison-news-digest-issue-five.html>)

³ Joint NGO Statement at the 50th Session of the African Commission on Human and Peoples' Rights in Banjul, 25 October 2011; referring to International Centre for Prison Studies; World Prison Brief; http://www.soros.org/initiatives/justice/articles_publications/publications/achpr-pretrial-20111025/pretrial-detention-statement-10252011.pdf; <http://www.prisonstudies.org/info/worldbrief/>

⁴ Open Society Justice Initiative, The Socioeconomic Impact of Pretrial Detention, October 2011, p. 12.

⁵ Accompanying document to the Proposal for a Council Framework Decision on the European supervision order in pre-trial procedures between Member States of the European Union, SEC(2006)1079 (Brussels: European Commission, August 29, 2006), 10–11.

⁶ Anthony Nwapa, Building and Sustaining Change: Pretrial Detention Reform in Nigeria, in Justice Initiatives: Pretrial Detention (New York: Open Society Institute, 2008), 86.

⁷ Open Society Justice Initiative, The Socioeconomic Impact of Pretrial Detention, October 2011.

prosecution relating to the fight against drugs and organised crime with a link to the EU.

References to the “independence of the judiciary”⁸, “access to justice and redress”⁹ or to the “functioning of the judiciary”¹⁰ remain rare and general. More concrete issues relating to the judiciary, to imprisonment and detention are occasionally listed in Action Plans with third countries; however, they appear to lack a solid footing in an overall strategy and concrete objectives driven through foreign policy.

This lack of a comprehensive strategy in order to strengthen the judiciary in third countries unfortunately is perpetuated in the “A New Direction for the EU on Human Rights and Democracy”. The development of a policy is envisioned only for the area of transitional justice, hence not encompassing (criminal) justice issues in third countries beyond dealing with abuses in previous armed conflicts.

PRI believes that a more comprehensive and strategic approach is required in order for the EU to contribute to the strengthening of the judiciary and the rule of law in third countries, encompassing concrete structural, institutional and legislative objectives drawing on international human rights law. Given the severity of its implications, criminal justice ought to take a prominent place in such a strategy, focusing on the rights of the accused.

PRI therefore recommends that the EU expand the section on justice issues, on detention and imprisonment and consider the drafting of a policy document or guideline in order to outline the EU’s concrete objectives, benchmarks and possible measures in order to strengthen the judiciary in third countries, and to enhance the criminal justice system more specifically.

Such a strategy would have to go beyond police cooperation, border management and prosecution of certain offences, setting agreed overall objectives to be achieved through foreign policy. A map of policies of such nature to potentially be addressed in the area of criminal justice, detention and imprisonment would comprise, in particular:

1) Enhancing the capacity of police authorities and the prosecution to prevent and solve crimes, including the provision of adequate forensic methodology and technology in order to solve criminal cases (other than by coercion of confessions and witness statements); training of police officers and prosecutors; ensuring accountability.

2) Improving the framework relevant to ensure the independence of courts and judges, e. g. regulations regarding the appointment of judges as well as their terms of office and their guaranteed tenure; disciplinary procedures (potentially interfering with their independence) and availability of independent review of disciplinary decisions; assignment of judges to cases; exclusive authority to decide on cases of judicial nature; revision only by courts; capacity and resources allocated to the court system; professional secrecy; freedom to form and join associations of judges; training of judges.¹¹

⁸ Page 2, in the context of supporting democracy refers to an “independent judiciary” and the right to fair trial, however does not flesh out in more detail how this could be achieved.

⁹ The chapter “Lines for action” on page 6 highlights the objective of ensuring that “victims have access to justice and redress and that those responsible are held to account”, however lines for action are limited to the promotion of the universal nature of human rights.

¹⁰ Page 16 refers to the “functioning of the judiciary” in the context of “Freedom, security and justice”, and lists as examples “police cooperation, the fight against drugs and organised crime, the functioning of the judiciary, border management, asylum and migration”, thereby emphasising issues under the “security” heading and remaining very general with regard to justice issues.

¹¹ As for international benchmarks see, amongst others, UN Basic Principles on the Independence of the Judiciary.

3) Strengthening of the role of lawyers; e. g. regulations relating to licences to practise law; disciplinary regulations and proceedings (potentially interfering with the role of lawyers); independent professional bar associations; guarantees to ensure freedom from intimidation, hindrance or improper interference; access to files and documents; confidential communication and consultation with clients; codes of professional conduct for lawyers.¹²

4) Ensuring procedural rights of persons detained and their adequate protection in constitutional laws and codes of criminal procedure, such as prompt information of charges; prompt access to a lawyer of own choosing; access to legal aid; habeas corpus; presumption of innocence/ burden of proof; adequate time and facilities for preparation of the defence; "equality of arms" of prosecution and defence; access to interpretation; right to an effective remedy.

5) Addressing the over-use of imprisonment, amongst others resulting in overcrowding and exacerbating conditions of detention which amount to torture and ill-treatment; in particular a) assessment of offences enshrined in criminal codes, in order to capture the over-use of prison sentences; b) no punishment without law; c) ne bis in idem (no retrospective prosecution); d) reduction of extensive pre-trial detention (e.g. by promoting alternatives to pre-trial detention where sensible and by reducing the length of pre-trial detention); e) promotion of sentencing guidelines in order to improve consistency and non-discrimination; f) abolition of imprisonment for debt (Art. 1 OP1 to ICCPR)¹³.

5) Promoting measures of rehabilitation and reintegration in order to reduce reoffending, including a rehabilitative rather than punitive approach to criminal justice.

7) Conditions of detention with benchmarks such as the European Prison Rules, standards developed by the European Committee on the Prevention of Torture (CPT), the European Convention on Human Rights (ECHR), the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules); independent monitoring mechanisms at national level; and access of international mechanisms such as Special Rapporteurs, the Human Rights Committee or the Committee against Torture (i.e. standing invitations).

Fighting Impunity (p. 9)

With good reason, the draft EU strategy stresses the importance of the European Union's engagement in preventing crimes against humanity, war crimes and genocide, as well as countering impunity for the perpetrators of such crimes, and refers to the commitment of the EU in its support of the International Criminal Court.

However, while the fight against impunity at the international level is a crucial resort, PRI would like to stress that international justice has been established in order to substitute, where necessary, the lack of accountability at the national level.

PRI therefore recommends that the EU human rights strategy include a component of strengthening the justice systems at the national level in order to achieve accountability for these international crimes, rather than to limit its activities to the support of the International Criminal Court.

¹² As for international benchmarks see, amongst others, UN Basic Principles on the Role of Lawyers.

¹³ Article 1 of the Optional Protocol 1 to the International Covenant on Civil and Political Rights: No one shall be deprived of their liberty merely on the ground of inability to fulfill a contractual obligation.

Trade policy (p. 13)

PRI appreciates that the draft strategy mentions licensing/ export control mechanisms as a tool of human rights policies alongside the tool of incentives to promote human rights.

However, PRI believes that this policy should also include a commitment to the rigorous implementation, and the strengthening of Council Regulation (EC) No. 1236/2005 which bans the export of equipment which 'have no practical use other than for the purpose of capital punishment or for the purpose of torture and other cruel, inhuman or degrading treatment or punishment, irrespective of the origin of such equipment'.¹⁴

European Neighbourhood Policy (p. 15)

PRI would like to note that this chapter lacks strategic direction, but largely resorts to general aspirations such as "progress in human rights, democracy and the rule of law". In order to provide guidance, vague concepts such as "mutual accountability" or "more for more" policy should be avoided, and a clear strategy be outlined in order to achieve these aspirations.

As outlined above, references to the strengthening of the rule of law and reforms of the judiciary would hugely benefit from specific objectives, benchmarks, tools and activities in order to achieve progress, including in third countries that are partners in the Neighbourhood Policy.

While a tailored approach to each country is certainly beneficial and preferable, to date EU policies, including the ENP, lack clarity in terms of what exactly they seek to achieve in the area of human rights and justice. Objectives in the area of "Justice and Home Affairs" remain limited to police cooperation, migration control and the fight against organised crime and terrorism, while references to human rights, the rule of law and strengthening of the judiciary continue to be rare and vague.

PRI recommends replacing the current chapter on the European Neighbourhood Policy with a more specific strategy, including concrete objectives pursued within this framework regarding human rights and justice.

A comprehensive set of thematic guidance (p. 18)

While on a variety of human rights issues EU policies have been developed in more detail, the area of (criminal) justice, strengthening of justice systems and the independence of the judiciary respectively lack specific guidance as for objectives, actions and benchmarks to be applied by EU institutions and EU member states as a baseline in multilateral and unilateral foreign policy, including as a framework for summits, human rights dialogues and consultations.

This appears to be problematic since the lack of a consistent strategy in the area of justice imperatively limits, to a large extent, what the European Union can achieve to this end. As a consequence clarity as to the content of a "robust and proactive" policy on justice issues is lacking, despite the considerable emphasis the draft EU human rights strategy allocates to the element of the "rule of law".

PRI therefore believes that the EU should consider the drafting of a Guideline or Toolkit on criminal justice issues, which could be used as a framework of objectives and practical tools within the EU's foreign policy, following the model of EU

¹⁴ Council Regulation (EC) No 1236/2005, articles 3 and 4.

Guidelines on other issues such as torture, human rights defenders or the death penalty.

With regard to the "Guidelines on violence against women and girls and combating all forms of discrimination against them", PRI would like to draw attention to the relatively new set of standards adopted by the UN General Assembly on 21 December 2010 on the treatment of female prisoners, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules).¹⁵

This set of guidelines has been adopted to address discrimination against women and girls in the criminal justice system which has tended to leave their specific needs unacknowledged and unaddressed. Amongst others, the small number of women prisoners usually means fewer prisons for women and girls; female prisoners being housed in annexes to male prisons, often inadequately separated from the male population; an increased risk of overcrowding; and greater distances from their homes and families, resulting in disadvantages in receiving visits and access to rehabilitation programmes, and in increased isolation. Typical female offenders in many countries will be young, come from socially disadvantaged communities and groups, and have low levels of education and dependent children. This may be reflected in particular vulnerability to being deprived of their liberty, for reasons including lack of information on rights and options, an inability to pay fines for petty offences or to meet financial and other bail or sentencing obligations.

Section 3.1.1. on the promotion of gender equality and combating of discrimination against women, including the "focus on legislation and public policies which discriminate against women and girls", provides room for EU institutions to take up this issue. However, while intended as a tool addressing the discrimination against women, the EU Guidelines do not yet take into consideration the discrimination against women and girls in the justice system, nor do they list the standard of the Bangkok Rules in the section on the "international legal framework and obligations of States".

PRI recommends that third countries be encouraged to implement this new set of standards aimed at addressing the discrimination of women offenders. The organisation also suggests that EU institutions be made aware of the Bangkok Rules and invited to monitor their implementation in third countries. Furthermore, PRI recommends that, within any forthcoming review of the "Guidelines on violence against women and girls and combating all forms of discrimination against them", explicit mention of the Bangkok Rules and guidance as for practical action by EU institutions be included.

Practical assistance in other countries (p. 19)

Torture and ill-treatment is still routinely used in criminal investigations throughout the world. Police officers frequently coerce confessions or witness statements, and prosecutors and judges rely on such evidence in criminal proceedings.

Underlying causes of law enforcement resorting to such abuses include the lack of adequate forensic methodology, equipment and training in order to conduct factual examination of evidence. Investigators' lack of access to such tools increases the risk that they resort to the coercion of confessions and witness statements in order to "solve" crimes. Moreover, appraisal processes for law enforcement officials in many countries focus on the quantity of solved crimes, constituting an additional incentive

¹⁵ UN General Assembly Resolution A/RES/65/229

for officers to use unlawful methods of investigation in order to increase the number of – supposedly - “solved cases”.

PRI believes that technical assistance to third countries in order to enhance forensic methodology, equipment and training has considerable potential to reduce the practice of torture and ill-treatment. Another underlying cause could be addressed by sharing good practice with regard to criteria of appraisals for law enforcement officials and by encouraging countries to replace solely quantitative criteria of assessing the performance of police officers.

PRI recommends that the EU human rights strategy explicitly mention, alongside the European Instrument for Democracy and Human Rights (EIDHR), measures such as technical assistance provided to third countries and sharing of good practice, which would help address underlying causes of, for example, police officers resorting to torture and ill-treatment.

PRI, November 2011
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Penal Reform International (PRI) is an international non-governmental organisation working on penal and criminal justice reform worldwide. PRI has regional programmes in the Middle East and North Africa, Central and Eastern Europe, Central Asia and the South Caucasus. To receive our **monthly newsletter**, please sign up at <http://www.penalreform.org/keep-informed>.