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Promoting EU Fundamental Rights Policy

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Two questions have been marked out for the debate on the EU fundamental rights policy today:

1. How to strike the right balance between security requirements and protection of fundamental rights?
2. What should be the role for the EU Fundamental Rights Agency in this context?

Security and human rights

The first question has dominated the human rights debate in the months and years following 11 September 2001. What is the strength of the European human rights framework and policy in the face of major threats to our collective security? There is plenty of rhetoric about the need to strike the right balance between security and human rights, but in reality there is very little to show in the way of real determination and effort to give substance to that assurance. At the UN there has been a chronic disconnect between the security and human rights domains that is only now being slowly repaired. At the EU there has been a marked failure to seriously address the human rights impact of its anti-terrorist measures.

Amnesty International has noted disturbing trends in Europe in relation to the fight against terrorism. Most visibly, emergency legislation in Member States has led to incommunicado detention in Spain, and indefinite detention without trial and the use in court of secret intelligence evidence, potentially extracted through torture, in the UK. There have been cases where Member States have been complicit in the 'rendition' of suspects without due process to countries where they are at a grave risk of torture and a flagrant breach of their fair trial rights. Deportation and extradition of people suspected of terrorism show a worrying tendency to reduce safeguards in the interests of swift procedures, creating a risk of breaching the principle of *non-refoulement*. Special procedures limiting basic rights such as the right to a lawyer that apply in some countries in 'terrorist' cases are particularly worrying in the light of the often broad definitions of 'terrorist offences' to which they apply. There is no effective remedy to contest inclusion on terrorist lists. The trend to equate terrorism with Islam undermines the EU's commitment to fight racism and xenophobia.

Despite these problems which appear across Europe, the EU itself has paid no more than lip service to the question of protecting human rights in the context of the fight against terrorism. In the rush to adopt something in the political climate following September 11 2001, the key EU-level measures to combat terrorism in the criminal law sphere were drafted with little consideration being given to procedural safeguards or to legal certainty. The negotiations on procedural rights for suspects and defendants in criminal proceedings, which are still ongoing, have led to discussion about excluding terrorist suspects completely from the application of procedural rights to reflect current national practices in some Member States. It is a suggestion which runs contrary to the principle of the universality of human rights.

In fact, the whole security issue thus raises a basic question: what *is* the fundamental rights policy that we are to promote here?

The Fundamental Rights Agency

Then there is the Fundamental Rights Agency. The Council's decision in 2003 to set up a human rights agency was utterly unclear, and this lack of clarity of purpose has bedevilled the debate until

today. The predominant approach from institutions, Member States and most other stakeholders has been to argue what the agency should *not* do:

- it should not do what others are doing and claim as their turf;
- it should not do what Member States find undesirable or embarrassing;
- it should not do anything that might raise questions about the competence of the EU.

In other words, when trying to determine what the FRA *should* do, the key question is, again: what *is* the EU fundamental rights policy?

A policy gap

It is obvious that there is a policy gap, and that we need a concerted effort to fill that gap. Am I being fair here? We are often accused as NGOs of being overly critical, and while things may not be perfect in Europe, surely it is the region where rights protection is most advanced and best assured. And indeed, look at where we are now:

- there is a Charter of Fundamental Rights, now included in the constitution;
- there is a Commission communication on the application of Article 7 TEU;
- there is a Council decision to set up a human rights agency;
- there is a Group of Commissioners on fundamental rights and anti-discrimination;
- there is a decision to set up an EU gender institute;
- there is a stated commitment to ensure a proper balance between security and human rights;
- there is the overarching goal of strengthening the EU as an area of freedom, security and justice.

That is the glass half full. Clearly, human rights in the EU is finally and firmly on the political agenda, and I do not in any way wish to belittle the efforts – not least by the European Parliament – that have gone into achieving all of this, nor the potential that such initiatives offer. However, there is also a more critical view to be taken:

- the purpose of the fundamental rights agency is unclear;
- the establishment of the Group of Commissioners on fundamental rights was prompted by a particular set of circumstances rather than principled vision;
- however, it is as yet unclear what agenda the Group is to develop or pursue;
- there is no idea of how to link the Fundamental Rights Agency to the Gender Institute, nor how to address problems not only of inequality but also of violence against women as fundamental rights issues;
- there has been no Council response to the Commission communication on Article 7;
- which reflects the Council's patent determination to keep anything that might look at their own rights compliance off the agenda;
- indeed, any suggestion that serious rights problems in a Member State ought to be of concern to the EU, that there ought to be a measure of EU-level accountability, is met with deafening silence;
- which in turn contrasts sharply with the scrutiny of accession countries on human rights issues;
- enlargement has brought more sharply into focus how far the EU and Member States have yet to go to really tackle persistent racism and discrimination;
- there is still no vision behind the "no security without human rights" mantra;
- the notion that fundamental rights are essential for the mutual trust that is to underpin the area of freedom, security and justice is slow to sink in;
- in the light of these critical factors it is all the more remarkable that a Council response to the call for a Council Working Group on fundamental rights within the EU is so slow in coming.

That is the glass half empty – which bears out the assertion that there appears to be no such thing as an "EU fundamental rights policy".

Re-orientation of the European fundamental rights order

The respect for human rights in the Union has been largely declaratory in the past – now it must become effective. Amnesty International has long been calling for the establishment of effective monitoring and correction mechanisms, and we welcome in principle the creation of an EU

Fundamental Rights Agency. However, we are concerned that there is a strong push towards a minimalist conception of the agency in order to ensure that something may be put in place quickly that fits existing structures and that does not offend political sensitivities. The future agency is being discussed in the context of the current ad hoc approach to fundamental rights policy in the EU, when instead, a rethink is required of the way in which the EU deals with the promotion and protection of fundamental rights within its own borders. We need a re-orientation of the European fundamental rights order.

The essence of the new order should lie in improving individual protection throughout the EU. To achieve this, the individual must be placed at the centre of all European initiatives, and the respect for individual rights and freedoms should be the cornerstone of the law-making process in the EU. This calls for raising the corrective capacity of both the national and collective systems enabling it to respond to abuse with structural improvement. This in turn should serve to ensure that human rights protection in law and practice is the effective backbone of the mutual trust and recognition on which the EU aims to build its area of freedom, security and justice.

The EU Treaty provides both a legal basis and a practical tool for addressing serious human rights violations and the risk of such violations in Europe. The mechanism available under Article 7 TEU, but never used so far, should be actively explored for applying preventive and corrective measures in cases of serious and persistent breaches occurring in the EU. Thus, Article 7, rather than remaining a nuclear option for extreme circumstances, has the potential to become a key to building effective human rights protection within the EU.

On the institutional side, Amnesty International has persistently argued the need for the Council to build capacity to address issues relating to human rights within the EU, through the creation of a Council Working Group for human rights in the EU to deal with these questions in a coherent and consistent manner. The Commission can also play a key role in advancing a more comprehensive approach to the EU fundamental rights policy. With the establishment of the Group of Commissioners on fundamental rights, President Barroso has marked fundamental rights as a priority for his Commission, which holds the promise of a more active role of the Commission in bringing about the re-orientation that is needed. In addition, the Commission's role as the guardian of the treaties should be taken further to develop a structured impact assessment procedure to evaluate the human rights dimension of all legislative initiatives.

Concluding, Amnesty International calls on the European Parliament to view the creation of the European Fundamental Rights Agency in the context of developing a comprehensive and coherent strategy for human rights protection. If the agency is to add to the protection and promotion of fundamental rights in Europe, it should not be a mere extension of the EU institutions, adding a new layer to an already complex network of agencies and bodies. Instead, there is a strong need for an independent and competent agency that is empowered to identify the weaknesses in the existing system of human rights protection in the EU and to make recommendations as to how the respect for human rights could be improved.

The objective should be the development of a genuine area of freedom, security and justice, in which full respect for fundamental rights exists *in practice* across the Member States of the European Union.

