



Towards a comprehensive European human rights system

**The speech that Amnesty International would have made at the inauguration
of the EU Fundamental Rights Agency**

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The inauguration of the EU's new Fundamental Rights Agency on 1 March 2007 in Vienna will be hailed by EU leaders as an occasion to celebrate the Union's commitment to its values. The sobering reality is that the agency is based on a fragmented and minimalist conception of "fundamental rights" that bars it from addressing the most pressing human rights challenges in the EU today.

Amnesty International has advocated consistently that the agency should have a mandate that would justify the title. The tortuous negotiation process has produced a mismatch: limited to the EU itself and to the Member States applying Community law, the agency will be dealing mainly with the complex of racism and discrimination and is effectively cut off from virtually all other serious human rights questions.

The lack of public debate around the agency and the very low profile adopted by the Council on the Commission's proposal has been deplorable. This defensive and minimalist approach was inappropriate for a proposal that concerns the fundamental question of how the EU upholds and promotes its common human rights values. A new dynamic will have to be created around the agency to make up for a negotiation phase that almost discredited the whole venture.

Of course racism and discrimination constitute an important human rights domain, one that cuts across and exacerbates many other forms of abuse. The prospect of the agency building on and broadening the work of its predecessor, the EU Monitoring Centre on Racism and Xenophobia, is very welcome. There can be no question that every effort must be made to make the most of the new entity within its designated remit, and Amnesty International will join other civil society organizations to contribute to that effort. However, that will not be enough.

The whole FRA process begs the question of what the EU's human rights policy really is. The resistance from the Member States to have their own human rights performance opened to scrutiny at EU level remains the dominant feature internally, and it is beginning to affect the credibility of the external policy. The European Parliament's recent report on CIA renditions in Europe showed how serious the domestic deficiencies can be especially in the context of the fight against terrorism. Therefore the inauguration of the FRA should not only be cause for celebration. It should also be a moment to acknowledge that it is time to start addressing the hard issues of fundamental rights within the EU.

Amnesty International's fundamental critique of the FRA process is that from the moment the European Council decided in December 2003 to set up a human rights agency, the obvious questions have been conspicuously avoided: "what is the problem that we are trying to address, and what is the purpose of this agency?". There has been no attempt to develop a vision of EU human rights policy that would answer those questions, no analysis that sought to reconcile the limited formal competences of the EU in this area with the evident need to establish a measure of political if not formal accountability at EU level regarding the structural problems in the Member States' human rights performance. Such accountability is indispensable for the EU's human rights policy worldwide to be coherent and credible.

Instead, the debate on the agency's scope and mandate has been driven by the overriding concern not to offend anyone, least of all the Member States, but also the Council of Europe where the new EU venture was eyed with deep suspicion. The result reflects that defensive approach. The final deal struck by the Council in December 2006 leaves the agency out on a limb as an isolated enclave in the patchwork of the EU's internal human rights policy, along with Article 7 TEU that no-one dares to touch, a Charter of Fundamental Rights of uncertain status, a Group of Commissioners on Fundamental Rights working in obscurity, and a Council without a proper structure for domestic human rights issues.

The rationale of depicting the FRA as a useful step in the "incremental process" of building the EU's own human rights system has a certain validity. By subjecting the EU itself to scrutiny, a gap in that system is filled - although real EU accountability in respect of human rights will not come from an agency that can be ignored at will. Such accountability can only be achieved by accession of the EU to the European Convention on Human Rights. However, after the collapse of the constitutional process no other steps have been taken to pave the way for EU accession to the ECHR.

The role of the agency in relation to the human rights prerogative of the Council of Europe was the subject of acrimonious exchange, and the Juncker report *Council of Europe – European Union: a sole ambition for the European continent* in April 2006 made pertinent suggestions. However, we have not seen any serious

effort between the EU and the Council of Europe to pursue the obvious need to make a more structural connection between the standardsetting, judicial and monitoring functions of the Council of Europe and the legislative, political and enforcement capabilities of the EU. Real complementarity means moving beyond demarcation, it requires a conscious search for synergy. The FRA will only be credible as a real enhancement of the protection of human rights in Europe if it is complemented by a serious effort to develop a vision on how to forge a comprehensive "European human rights system".

The agency's limitations made concrete

Racism and discrimination aside, the FRA will be excluded from addressing virtually all serious human rights issues in Europe, as the following overview shows.

1. Counter-terrorism

- The so-called "extraordinary renditions" constitute one of the most striking examples of crucial human rights issues excluded from the remit of the agency. The scandal of rendition and European complicity is so densely packed with human rights questions that one would consider it to be a mandatory target for any "fundamental rights" body. After the investigations by the Council of Europe and the European Parliament, much work remains to be done to review existing legislation and to implement recommendations directed to the Council, the Commission and the Member States.
- National anti-terror laws in a number of Member States erode the human rights standards that the international community has struggled long and hard to achieve. It has even become possible to challenge the absolute prohibition of torture as well as the use of evidence extracted under torture. State authorities have been granted unprecedented powers to restrict liberty, movement and activities of people purportedly suspected of involvement in terrorism, and people have been deported with "diplomatic assurances" to countries where they risk torture. Although these laws and practices go well beyond permissible limitations on basic rights and freedoms, and thus put basic European values as well as international standards into question, the agency will not be able to address them.

2. Police ill-treatment and excessive use of force

- Human rights organisations as well as the Council of Europe's Committee to Prevent Torture regularly document patterns of abuse by law enforcement officials, including torture, ill-treatment and excessive use of force and, at the same time, failure of the judicial system to prosecute and punish such human rights violations. The cases range from excessive use of force in police assignments, to maltreatment in custody and disproportionate use of firearms. A number of Member States lack an adequate definition of torture in their penal codes. But as law enforcement remains a national competence, these issues are excluded from the agency's mandate. The EU guidelines on torture only apply to third countries.
- While the EU has engaged in conducting joint law enforcement activities, police cooperation remains fragmented and without any form of Community supervision, even when clearly of transnational character and entailing the risk of systematic intrusion into the fundamental rights and freedoms of EU citizens and residents. The agency is not going to remedy this lack of effective control as police cooperation constitutes a "third-pillar" matter, outside its remit.

3. Asylum and immigration

- Human rights organisations have documented consistent patterns of human rights violations linked to the interception, detention and expulsion by states of third country nationals, including those seeking international protection. In this area, the agency will be competent to give its opinion on the implementation of Community law by Member States, but its work will remain a patchwork of very limited nature rather than a comprehensive monitoring of human rights compliance. The agency will only be competent to deal with the existing "first pillar" asylum directives. Some of these are at odds with international refugee law, but as the agency's competence is limited to the implementation of EU asylum legislation at national level, monitoring of compliance of Member States' practice and legislation with international standards will not be covered.

- The increasing and disproportionate use of detention of asylum seekers and migrants, even of children, pregnant women and traumatised persons, remains outside the scope of the agency as no EU legislation is in place that would permit monitoring of Member States' actions in this area. As the persons concerned are not even suspected of having committed any offence, but are detained only to enforce expulsion procedures, prolonged periods of detention of asylum seekers and migrants are a serious human rights concern with regard to the right to liberty.
- Although the focus of the EU in the area of asylum has increasingly shifted to what is commonly subsumed under the term "external dimension", this appears to fall outside the remit of the agency. It has no mandate to analyse human rights compliance of interception on the high seas or co-operation agreements with third countries, even though these measures increasingly challenge the right to seek asylum within the EU.

4. Fair trial

- A number of European countries still lack implementation of adequate procedural standards for suspects and defendants in criminal proceedings such as access to a lawyer after arrest, access to interpretation or to legal aid. Such deficiencies are time and again established in reports of the Committee to Prevent Torture and in judgments of the European Court of Human Rights. But recommendations are either ignored due to their non-binding character (CPT) or complaints solved on a case-by-case basis (ECHR) rather than by a systematic review of national legislation, let alone in a harmonised manner at EU level. To date, there is no EU legislation in this area, so no role for the agency.
- The same applies to the use of evidence in criminal proceedings although the acquisition of objects, documents and data may constitute evident human rights concerns. As regulations are either based on national competence, or on the EU competence to enhance judicial cooperation, human rights implications on the use of evidence fall outside the scope of the agency.

5. Violence against women

- Violence in the home against women and girls remains pervasive across the European region, manifesting itself through verbal and psychological abuse, physical and sexual violence, economic control and even killings. Commonly, only a small proportion of women report these abuses, for understandable reasons. The agency is neither mandated to analyse national legislation in order to assess the Member States' compliance with their obligations to protect women, nor is it within its remit to suggest measures at EU level as this issue does not constitute a Community competence.

6. Trafficking in human beings

- Trafficking in human beings remains one of the most pressing and complex abuses, also in Europe. Trafficking constitutes multiple violations of human rights including the right to physical and mental integrity, the right to life and liberty, freedom from slavery, from torture and other inhuman or degrading treatment, right to family life and privacy, as well as the right to the highest attainable standard of health. The number of trafficked people in the Europe region has dramatically increased over the last decade. Many states fail to ensure that the focus of policy and action in this area is on respect for and protection of the rights of trafficked persons. As the EU's competence by and large is based on the third pillar, the agency has no mandate here.

Conclusion

This overview demonstrates the contrast between the limited role of the Fundamental Rights Agency and the serious human rights issues confronting Europe and the EU. While a theoretical framework exists to oversee human rights at EU level, a mechanism of scrutiny and intervention is not yet in place. Given the minimalist approach of the FRA, it will not remedy the crucial lack of scrutiny, accountability and intervention with regard to a range of substantial human rights concerns.

What stands out positively as distinct added value that the agency can bring is a broadened mandate in the area of racism and discrimination. In comparison to the European Monitoring Center, the agency will be able to deal with the complex issue of discrimination in a more comprehensive manner, including gender,

disability, sexual orientation, age, and belief as a basis for discrimination. In the field of asylum, the other main human rights subject where Community law applies, it remains to be seen whether the agency will be able to put human rights in its focus when sorting through the patchwork of EU directives.

Amnesty International will support efforts to help the FRA develop effectively within its designated area of work. At the same time it will continue to call for a comprehensive vision on how to forge a proper "European human rights system". On its 50th anniversary the EU must finally begin to dismantle the taboo on its own human rights performance.