



INTERNATIONAL COMMISSION OF JURISTS

Commission internationale de juristes - Comisión Internacional de Juristas

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Submission by the International Commission of Jurists to the Commission communication on the establishment of a EU Human Rights Agency

The following comments are provided pursuant to the public consultation procedure opened by the EU Commission on the basis of its Communication on "The Fundamental Rights Agency" (Com(2004) 693 final). These comments seek to provide guidance for a future draft Council Regulations based on a more detailed concept paper.

1. General considerations

The International Commission of Jurists (ICJ) welcomes the decision of the European Council to establish a human rights agency. This decision provides the opportunity to address and rectify lacunae in the human rights protection framework by and within the European Union.

The ICJ is convinced that the added value purported in the Commission communication would not be achieved with a minimalist approach, such as the mere expansion of rights to be covered by the existing European Monitoring Center Against Racism and Xenophobia (EUMC). A EU human rights agency should be measured not only against its possible efficiency but above all against its potential impact on EU policies and the human rights protection within the European Union and its member states. Therefore, the new mandate should not diminish protection against racism and xenophobia, which are serious human rights violations in Europe, but must be embedded in a solid new structure.

The criteria for an effective institution will be its independence and impartiality, its broad human rights mandate and sufficient competencies and resources to monitor and advise on human rights relevant policies. To maximize its role the agency is itself responsible to set clear priorities and maintain close coordination with existing international and national mechanism. Close contact and dialogue with civil society will also be an important element for a future human rights agency.

The benchmarks for an effective institution are contained in the UN Paris Principles¹, which should guide by analogy the elaboration of a detailed proposal. The establishment of the new agency should go hand in hand with other long needed initiatives, such as the accession to the European Convention on Human Rights.

2. The human rights agency as a cornerstone of its human rights protection framework

The ICJ welcomes the opportunity to participate in the public consultation on the nature and scope of such future agency initiated by the European Commission with its communication dated

¹ See UN Doc A/Res/48/134, Principles Relating to the Status of National Institutions.

October 25, 2004. A transparent and genuine discussion with civil society input in itself may contribute to a more genuine human rights culture within the European Union. The participation in the consultation procedure should only be the beginning of this process.

The European Union has long moved from a purely economic organization towards a Union based on the principles of pluralist democracy, the rule of law and human rights. This has been recognized not the least in the incorporation of the European Charter of Fundamental Rights in the new EU Constitution and in articles 6, 7 of the Treaty of the European Union (TEU) which establishes democracy, the rule of law and human rights as an EU wide *ordre public*.

The increasing competencies of the European Union have implications on the effective human rights protection at the EU level and in its member states. This is particularly noticeable with respect to new initiatives in the area of Justice and Home Affairs. The range of measures, actions and decisions taken in the fight against terrorism at the EU level is another very recent phenomenon illustrating that the EU operates in highly human rights sensitive areas, be it under the first or third pillar of the Treaty of the European Union.

There is an emerging understanding that reactive and judicial protection must be complemented by other more pro-active and preventive mechanism for the protection of human rights. This need is also evident with regard to the European Union. The existing protection mechanism of member states are at times insufficient to address the human rights concerns connected to EU initiatives. Judicial protection through the European Court of Justice is limited in a number of human rights relevant areas under the third pillar and the locus standing of individuals to challenge EU decisions is generally narrow, and also *ex post facto* and *inter partes*. Moreover, the non-availability of the remedy to the European Court of Human Rights against EU measures and decisions further limits judicial human rights protection.

The crisis surrounding Austria in 2000 led to the recommendation of the “Wise Men” to establish a EU Human Rights mechanism to monitor and evaluate the commitments and performance of individual member states.² The fact that the EU treaty now firmly recognizes that all member states must be based on pluralist democracy, the rule of law and human rights, illustrates that the human rights situation of the European Union and the member states cannot be completely de-linked. But also in other areas that affect EU relations with third states, such as accession and association agreements or human rights dialogues a more objective, independent and transparent human rights input is long needed. More broadly, there is a need to give sufficient weight to human rights in the common foreign policy in the European Union on the basis of independent, transparent, impartial and objective criteria.

This very cursory overview illustrates a need for a more coherent framework to address question of human rights implementation and policies within the European Union. A EU human rights agency should be a cornerstone in this debate, but will need to be complemented by other measures, such as the accession to the European Convention on Human Rights (ECHR) and the jurisdiction of the European Court of Human Rights.

² See <http://www.virtual-institute.de/en/Bericht-EU/report.pdf>

3. A strong and independent human rights agency as an expression of an effective institution

The Commission communication expresses concern with regard to the relationship between mandate and functions of the agency and its efficiency.³ It is obvious that any institution must be capable of fulfilling the tasks and expectations entrusted to it. In this regard the ICJ believes that it is of paramount importance that the European Union and its member states have the political will not only to establish a human rights agency but also to provide it with sufficient resources.⁴ Moreover, efficiency is also to be achieved by the agency itself by setting clear priorities and defining its working methods within the exercise of its independent mandate.

The truism entrenched in the Commission communication that a narrow mandate and competencies constitute efficiency must be avoided. While an agency with a narrow mandate and purview may be efficient on delivering on a limited task, it will on the other hand not be able to make a significant contribution to the promotion and protection of human rights. In turn, only a strong and independent institution will be “money for value” and will provide the added value the Commission communication calls for.

The ICJ welcomes that the Commission recognizes the UN Paris Principles on Independent Human Rights Institutions as a term of reference. These universal principles and the experiences of many EU member states, including in its new Central and Eastern European member states, should indeed guide the establishment of the new agency. It should be recalled that these principles are indeed minimum standards, which the EU itself expects from third states in its assistance projects. Falling short of its own standards to third countries would be unacceptable and would reduce EU legitimacy. Deviations from these benchmarks - if acceptable at all - must not be opportunistic, but be justified on the basis of clear and imperative grounds inherent in the specific nature of the community legal order.

4. The institution must be independent and impartial, competent and should be pluralistic

Independence is the key criteria for any human rights institution with a credible monitoring and advisory mandate. The experiences with the range of existing EU agencies and the EUMC should be thoroughly and critically evaluated in order to identify how to improve the independent structure and functioning of the new human rights agency.

It is in particular important that the members and staff of the agency are fully independent from political and financial pressure both from EU institutions and EU member states. Independence is usually defined through the institutions legal and operational autonomy, a stable mandate (including appointment and dismissal procedures), and its financial independence.⁵ The pluralistic nature prescribed in the Paris Principles is an additional element fostering an independent culture and perspective within the agency, which should guide a Human rights Agency.

³ See also Question 1 attached to the Commission Communication.

⁴ In this regard the ICJ is concerned with references in the Commission communication on the “lightweight structure in terms of staff and budget’...” of the new agency and the consistent concern raised about lacking efficiency resulting from an appropriate mandate.

⁵ See also National Human Rights Institutions, A handbook on the establishment and strengthening of national human rights institutions for the promotion and protection of human rights, United Nations 1985, at 10 et seq.

Legal and operational autonomy

The proposal to establish an independent agency with its own legal personality through a Council Regulation is in line with the Paris Principles. It would, however, be advisable in the medium term to consider the integration of a EU human rights agency into the constitutional framework of the European Union. The experience with human rights institutions suggests that constitutional status best ensures independence, limits conflicts over competencies with other bodies and recognizes the fundamental importance of the institution, despite its largely informal nature with advisory and recommendatory powers.

Financial independence

Financial independence of the human rights agency must be preserved, for example by the provision of a separate budget line for the agency. The present practise of the EUMC may provide guidance, in that the Director of the Agency is entrusted with the drafting of the annual budget, which would then be submitted for approval first to the Management board and then to the EU institutions. It is important to ensure that the EU institutions are limited to a role of evaluation and control of the fiscal affairs of the institution. It should not extend to defining priorities for the institution, which should remain within the purview of its own operational autonomy.

Appointment and dismissal procedures

The independence of the members and staff of the EU agency is of paramount importance. Ensuring independence requires clear provisions regarding the method and criteria of appointment, durations and possible reasons and procedures for dismissal. If the structure of the EUMC is to be maintained with a Management and Executive Board and a Director of the Agency, these criteria come into play at different levels and are largely dependent on the conceptual relationship between the Boards and the Director of the agency.

In order to ensure the independent operation of the Agency, operational autonomy should lay with the Director(s) of the Institution. The Director(s) should be appointed/elected within a transparent process with a fixed tenure and clear provisions limiting grounds and procedures for possible dismissal. In addition to questions of procedure, it would be advisable to stipulate that the Director(s) would need to have a high-level human rights expertise. The Management Board should equally represent this high-level human rights expertise including specific knowledge of human rights in the member states. It may provide the main policy guidance and ensure the accountability of the agency, but do not control the day to day operation of the agency, such as through editorial control over any reports, recommendations or statement by the Director.

The members of the Boards should be equally independent and impartial both from their governments as well as from EU Institutions, especially if their role extends beyond advisory functions. In this regard, the direct representation of EU institutions as suggested by the Commission may jeopardise independence if it would allow direct influence into the decision making process of the agency.

Pluralistic composition

The Paris Principles call for a pluralistic composition of an independent human rights institution. The importance of these criteria is to ensure that a human rights institution reflects various social groups to define appropriate advice and policy recommendations. The diversity of backgrounds also helps to foster a culture of independence.

Pluralism could be either achieved by a divers management board, which implies not only representation by member states, but also of different forces from societies, including minorities,

different backgrounds and thematic human rights expertise.⁶ Pluralism may also be enhanced by the inclusion of other members such as national human rights institutions or civil society representatives as part of a Management or Advisory Board. Another option is the establishment of a multi-member institution (a number of Co-Directors or a Director and a specified numbers of deputies), which would allow for the inclusion of more divers profiles. In addition, it is the staffing policy of the agency, which needs to reflect pluralism.

5. The Agency should have a strong monitoring and advisory function

The functions of the human rights agency should allow the agency to provide high-level advise on human rights policies to EU institution. This should include a pro-active role of the agency on the basis of an independent collection of information and data, which means not only statistical data, but also other forms of investigation and research.

The agencies' added value should stem from its capacity to provide reports, opinions and recommendations to improve the human rights performance by and within the European Union. For an effective agency it will be essential that it can - like any other national institution - provide these also on its own initiative. In a similar vein, the new agency should - like any national institution - have the right to provide advise on draft regulations, directives, framework decisions and others if the agency determines that they raise human rights concerns. This would not conflict with the role of the EU Commission. The situation is similar to that of domestic systems, where existing control mechanism by Parliament, Ministries or even quasi-judicial control do not preempt competencies of national institutions to raise concerns with regard to existing or new legislation. It should always be borne in mind that the advise of the agency would be advisory in nature.

A key function of the agency should be a clear monitoring mandate that allows the agency to respond to rule of law and human rights problems where they occur. Limiting the mandate – as suggested by the Commission – to reports by themes is a limitation unknown to any national human rights institutions in the EU. Both a proper monitoring and advisory function requires the ability to obtain reliable data and information. The agency will need to be able to collect information both actively and passively. Confining a human rights agency to a “passive collection” of data and information does neither seem workable nor acceptable for any independent human rights institution.

The capacity and right to access and verify information is the heart of the notion of a human rights agency. It is strongly suggested for the Council Regulation itself to ensure that the agency has the right to hear any person and obtain any information and /or documents required for assessing the situation. The Commission should consider to what extend this would require the adjustment of additional legal acts and regulations. Moreover, the Director of the Agency should be able to address EU institutions in important human rights issues (Parliament, Council and Commission) in addition to the presentation of an annual report.

Human Rights Institutions usually carry a promotional and educational mandate. To the extent that the promotional and educational function would be included in the Council Regulation, it should be fairly limited to prevent the agency from becoming “a technical assistance provider” rather than an advisory and monitoring body. Promotional and educational activities beyond the wide

⁶ See UN Paris Principles on “composition and guarantees of independence and pluralism”.

dissemination of the reports of the agency should be conducted in close cooperation with national human rights institutions and other European networks.

Human Rights institutions under the UN Paris Principles may also have a quasi-judicial mandate. For many institutions this is an effective tool to obtain friendly settlements of disputes without the need to go to court and it helps institutions to have a very realistic picture of the human rights problems. It seems that this task would be best located at the domestic level and it does, moreover, carry the obvious risk of over-burdening the agency. However, on the national level, institutions have made positive experiences with the use of special remedies, such as constitutional complaints, or where national law allows, with the use of public interest litigation. Another effective means for an agency is the ability in cases of strategic importance to submit *amicus curiae* briefs. The inclusion of these powers or those to directly address cases or questions to the European Court of Justice could clearly enhance a EU human rights agency.

6. The agency should be based on a broad human rights mandate

One of the most elementary principles guiding independent human rights institutions is its “broad human rights mandate” which should be clearly set out in the founding act.⁷ The options presented by the Commission communication are in this respect not fully satisfactory, namely the reference to the European Charter on Fundamental Freedoms or the pre-selection of themes or specific rights to be monitored.

National legislation on human rights institutions or human rights Ombudsman-type institutions in Europe provide guidance on possible clauses to be used in the Council Regulation setting up the human rights agency. The terms of reference usually include at a minimum all rights contained in human rights treaties ratified (or applicable) by the country and those reflected in customary international law.

The mandate should therefore not be limited to a range of rights nor to a single document, but to the full scope of rights and documents relevant for human rights protection within the European Union. This would not prevent the agency from using the Charter of Fundamental Rights as its primary term of reference, nor would it question the efficiency of the agency. It will be for the agency itself – in line with its independent status – to determine and define clear, objective and transparent priorities and in this way ensure efficiency. Applying the human rights standards most relevant to an issue also ensured the quality of the advice.

The suggested pre-selection of specific rights or themes by the Council is in itself contrary to the aim of moving from a thematic agency (EUMC) to a full and comprehensive human rights agency. While the themes mentioned in the communication by the Commission are clearly relevant, it would leave out other important areas and it presumes that priorities are static. The topic of counter-terrorism and human rights, in particular at the European Union level, is both an example of a recently emerged topic as well as an example of an important topic not reflected in the present list. Moreover, any pre-selection of themes or rights carries the risk of undermining the principle of the indivisibility of human rights. It is quite likely that the identification of priority rights or

⁷ See Paris Principles Relating to the Status of National Institutions, principle 2: “A national institution shall be given as broad a mandate as possible, which shall be clearly set forth in a constitutional or legislative text specifying its composition and its sphere of competence.”

themes could lead to the exclusion of economic and social and cultural rights contrary to the spirit of the European Charter on Fundamental Freedoms.

The key reference point for the new human rights agency should be the full range of rights contained in the European Charter on Fundamental Freedoms. However, the agency should be able to provide advice on the basis of all relevant human rights norms. An example is the advice on a particular policy, legal regulation, or framework decision, which would need to include not only the European Charter of Fundamental Rights – which will only become a binding part of EU law with the ratification of the new Constitution. Should a comment on a regulation not extend to other binding obligations, such as the European Convention on Human Rights (ECHR) or other obligations that have been recognized as part of the general principles of community law or as part of customary international law by the European Court of Justice? Moreover, the ECHR will be clearly the most relevant legal text in relation to member states.

The inadequacy of the European Charter as sole reference is even more evident if the agency is to provide information on third countries. In this case, it is obvious that the reference must be the applicable universal human rights regime. Finally, it should be considered that policy advice is often based on good practice on the implementation of human rights. Such standards are often contained in other regional and universal documents. If – as the Commission suggests – minimum standards in the administration of justice can be monitored, this should also include references to other documents, such as the European Charter of Judges or relevant UN documents regarding the administration of justice.

In responding to the Commission's preoccupation of not overloading a human rights agency with tasks, it needs to be stressed, that a broad human rights mandate does not mean that the institution will cover all human rights issues at all times. It is within the very principle of the independent nature of the agency to select and prioritize in a transparent fashion its focus areas. This is common practice at the level of national human rights institution, and the same principle should guide the operation of the new EU human rights agency.

7. The remit of the agency with regard to EU member states and regarding third states

Among the key questions raised by the Commission is the remit of the agency, with regard to EU institutions and policies, its member states and third states.

EU institutions

The first priority for the mandate of the EU human rights agency should be its capacity and ability to influence policies and laws within the European Union itself. This is particularly warranted, since the EU institutions and its activities are neither subject to the control of the European Court of Human Rights, nor to the UN human rights treaty bodies. It should be recalled that in order to ensure the efficiency of the agency, it will need full access to information from EU Institutions and ability to address European Institutions before decisions are taken.

Member States

Moreover, the agency should have a role with regard to monitoring the situation in EU member states – in close coordination with national human rights institutions and with respect for the principle of subsidiarity. The example of an early warning mechanism under article 7 TEU would be an important element. More broadly, the credibility of the EU in addressing human rights concerns outside its borders will considerably depend on its openness and ability to address human

rights concern within its member states. In practise, it will be inevitable that the new agency looks into the performance and situation in EU member states. For example, it is almost impossible to assess the implications of EU immigration policies without regard to existing immigration measures already taken by EU member states. A clear and strict separation between EU competencies, including the impact of EU regulations or directives on human rights in member states on the one hand and member states own authority on the other hand will be difficult to maintain in practise.

Third countries

The Commission communication raises the question as to whether the remit of the agency should be confined to the EU itself and possibly its member states, or also extends to cover third states.

The starting point should be that the EU would benefit greatly from a more objective, transparent and independent and impartial human rights assessment in its relationship with third countries. The authority to advise on relations with third countries could be limited to the exercise of authority of the EU under the TEU. The jurisdiction is thus not one that is universal but accessory to the specific activities and relationships the EU establishes with third states. From a human rights standpoint it is evident, that the implementation of human rights clauses in EU Association Agreements do require the setting of more objective and transparent benchmarks. A transparent monitoring and assessment is missing. The EU human rights agency should make a useful contribution in this regard. It should be stressed, that this would not mean assuming the political decision making power. Summarily, it seems appropriate to allow the institution to participate and take a lead role in EU human rights dialogues with third states or to provide objective assessments on the human rights in possible accession states. The human rights agency may also be called upon in case that the EU is facing a major rule of law and human rights crisis outside Europe and provide advise or participate upon request a verification mission.

Should the EU opt for a narrow scope as it seems suggested by the Commission communication, there would remain a serious question how to address the existing shortcomings.

8. Relationship with inter-governmental organizations, national institutions and civil society

A EU human rights agency needs to establish strong links and coordination mechanism with other existing human rights mechanism. The aim of a EU human rights office must not be a replacement of existing inter-governmental structures in Europe, such as the Council of Europe or the OSCE Office for Democratic Institutions and Human Rights (ODIHR), but the improvement of human rights protection within and by the European Union. While this may require more thorough and separate analysis, the new agency would as a rule not duplicate such mechanism, but enhance their impact by the inclusion of monitoring reports in its own work. Duplication and confusion could be best avoided by the establishment of a direct coordination mechanism with other institutions or by the inclusion of representative in advisory committees.

In a similar vein, it will be absolutely necessary for the new agency to maintain very close contacts with national human rights institutions and independent specialised equality bodies, which should be – where existing – be a direct contact point for the agency.

A difficult question is raised with regard to the relationship with the existing EU network of independent experts on fundamental freedoms. This expert group has been a useful and genuinely independent expert body. Independent monitoring of EU institutions and human rights within the

EU should be maintained. The role of the agency could be twofold. First, there seems to be a lack of translation of the monitoring reports into concrete policy changes, a role that the new agency may assume. Second, the integration of the monitoring role into the new agency should be considered, which would in turn require that the new agency is as independent as the network of independent experts has proven to be. A possible option for consideration may be the incorporation of the independent experts into the structure of the agency as an advisory structure similar to the Advisory Council of Jurists within the Asian Pacific Framework of National Human Rights Institutions. Moreover, cooperation with other EU human rights bodies, such as the Equality network and Gender Institute has to be ensured.

The relationship with civil society will be one of the key elements for a successful EU human rights agency. The regulation establishing the mandate of the agency should make specific reference to the need to establish a constant dialogue and exchange of information with civil society and human rights NGOs on the international and national level. The agency should then regularize and formalize its relationship with civil society.

Conclusions:

A Human Rights Agency of the European Union would mark an important development within the European Union. It would lead to an increased legitimacy of EU policies within Europe, but also towards third states. In order to achieve this, a strong and truly independent agency is needed that has the necessary monitoring and advisory functions to enhance human rights implementation. Falling below the universal standards contained in the UN Paris Principles will, in turn, undermine not only the credibility of the new institution within Europe, but also signify a double standard between EU policies internally and externally.

The draft regulation should reflect the above recommendations and allow the agency to develop and grow. Domestic examples clearly show that an institution that is not set-up as a full independent human rights agency will later on have grave difficulty to regain lost credibility and reputation.

Finally, the ICJ wishes to recall, that an institution as suggested in this paper, would not replace any existing Executive, Legislative or Judicial responsibility for human rights within the European Union but complement them.