

December 2004

## **Amnesty International contribution to the Commission Consultation on the Establishment of an EU Fundamental Rights Agency**

As part of the consultation regarding the establishment of an EU fundamental rights agency, Amnesty International takes this opportunity in response to the Commission Communication<sup>1</sup> on the Fundamental Rights Agency (the Communication) to address the key questions surrounding the purpose of the future agency.

### **Summary**

Amnesty International makes the following recommendations to ensure that the agency will be an effective mechanism for the protection and promotion of human rights in the EU:

- The agency must have a broad mandate to cover all of the rights contained in the EU Charter of Fundamental Rights and Freedoms, while selecting priorities for annual or multiannual programmes from within that scope.
- The geographical scope of the agency should be limited to the EU.
- The scope should not be restricted solely to the EU institutions and implementation of EU law or to acting as an early warning mechanism for Article 7 TEU but should aim to fill gaps identified in the monitoring of human rights in the EU.
- Tasks should include data collection, monitoring, analysis and policy recommendations.
- There must be a clear methodology.
- There must be complementarity with other international organizations such as the Council of Europe, UN and OSCE.
- The independence of the agency must be guaranteed both through its composition and through protecting its budget from undue political influence.
- It must report annually to the European Parliament and address recommendations on policy to the Commission and to the Council, the latter through a Council structure dedicated to issues of fundamental rights within the EU.
- The agency must have sufficient resources to carry out its mandate effectively.

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<sup>1</sup> Communication from the Commission: The Fundamental Rights Agency: Public Consultation Document, SEC(2004)1281, Brussels, 25.10.2004, COM(2004)693 final.

## What are the problems that the agency needs to address?

Amnesty International has long been advocating that the EU should take seriously its obligations in terms of the collective responsibility for the promotion and protection of human rights across the territory of the EU. The EU Charter of Fundamental Rights, while not (yet) binding, firmly places human rights in general at the heart of EU policy *in principle*. What is now required is to ensure that those rights are applied *in practice*. Through the Constitution giving the Charter treaty status, it is clear that the Charter's importance in EU policy is increasing. However, while the inclusion of the Charter in the Constitution for the EU is a demonstration that the EU is beginning to take the issue of human rights within its borders seriously, the EU is lacking an adequate mechanism for monitoring the application of those rights in practice and for making an evaluation as to relevant policies and actions which could enhance the protection of those rights.

The Commission Communication of October 2003 on Article 7 TEU 'Respect for and promotion of the values on which the Union is based'<sup>2</sup> was a first step towards an acknowledgement that monitoring of the situation of human rights is the joint responsibility of the EU according to the treaties. The notion of EU level accountability which is implicit in this Communication, however, has yet to be adequately recognised by the Council. As the EU continues to expand its areas of competence and its impact on the daily life of those within its borders, the requirement for monitoring of the state of human rights respect within the EU becomes increasingly pressing if it is to guarantee the high standards proclaimed in the treaties.

The distinction which appears in the Communication between confining the areas that the agency can cover to Community law and extending it to cover the scope of Article 7 TEU is not considered sufficiently clearly. If the agency is to fulfil a monitoring function and an evaluation and advising function, it needs a broad mandate from which it will need to establish priorities. The use of Article 7 TEU is a last resort where a serious and persistent breach or a clear risk of serious breach of human rights occurs in a Member State. The agency should not be restricted to being a mere early warning system for such breaches but rather should be a tool for the EU to improve its policies and actions in relation to the protection and promotion of human rights to ensure that the Union is in fact based on the values described in Article 6 TEU. While the agency may give opinions in cases where a potential Article 7 TEU situation arises, this should not be its sole *raison d'être*.

The Communication puts forward one possibility of the agency's role being 'to help ensure compliance with fundamental rights of both Community law and policies and implementation of the latter by Member States'. This kind of role appears not suitable for an agency. Compliance with fundamental rights of proposals and legislation coming from the Commission and monitoring of the implementation of that legislation in Member States is a job which the Commission should be doing systematically at present. EU agencies are not to take on the work with which the EU institutions are tasked<sup>3</sup>. The question of compliance of Community law and policies with human rights should be addressed through an internal appraisal mechanism in the Commission, perhaps through the elaboration of a human rights impact assessment, but should not be a direct task of the agency.

The agency could however give added value in the sphere of Union law by identifying areas where EU policy could be developed to improve the protection of human rights or to identify trends in policy which may have an adverse impact on human rights. It could also be useful in bridging gaps in relation to human rights assessment between the Commission and the

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<sup>2</sup> COM (2003) 606 final

<sup>3</sup> Communication from the Commission – The operating framework for the European Regulatory Agencies, COM(2002) 718 final

Council where human rights concerns arise in relation to Council redrafting of proposed legislation or where a Member State puts forward a legislative proposal.

Amnesty International holds that the prime purpose of the fundamental rights agency should be to fill the gap between principle and practice in the way that the EU addresses human rights within its borders.

### **How can it best respond to those problems?**

The Communication raises the question of effectiveness and efficiency of the agency. In Amnesty International's view, the criteria for an effective and efficient agency are that it:

- Addresses real problems
- Offers the prospect of real remedies
- Has genuine, objective priorities
- Is independent
- Has a workable methodology,
- Draws on existing resources, and
- Complements existing international mechanisms.

### **Scope**

The original mandate for the agency should be broad while allowing the agency to select priorities for annual or multiannual programmes and giving it enough flexibility to respond to urgent issues that might arise. Amnesty International would recommend that the scope of the agency should potentially cover all of the rights contained in the Charter while clear priorities should be set within those parameters. Priorities should reflect the gaps in human rights monitoring in Europe that the agency should identify and should be driven by objective realities rather than by EU policies or work programmes. The choice of priorities must be objectively justifiable. The work relating to racism and xenophobia currently carried out by the EUMC should not be marginalised in the expansion into a full fundamental rights agency.

The geographical scope of the agency should be the EU if it is to answer the needs for monitoring of the protection of human rights in the EU and the question of collective responsibility. The range of cultures and the diversity of national systems found within an enlarged EU will provide a large geographical base for monitoring. A fundamental rights agency charged with monitoring the situation in this space alone will, in practice, need to prioritise certain areas of importance in order to provide effective and systematic rather than purely superficial and incidental monitoring and analysis of the situation. If the remit of the human rights agency were to be global, the capacity for working on EU countries would be significantly limited and the agency would be unable to fulfil the required function of monitoring the respect of human rights within the EU to meet the need for the EU to exercise accountability for abuses of human rights within its borders.

The gradual enlargement of the EU has included the monitoring of standards of rule of law and human rights protection in candidate countries. If the EU is to remain credible as a space in which high human rights standards are respected and applied, such monitoring must apply equally to Member States within the EU as to those seeking to join the Union. The EU cannot afford to project the image of a club with high standards for entry where, once inside, anything goes.

## Tasks

### ***Data-collection and Monitoring***

The agency should provide a monitoring function through the collection of reliable and comparable data relating to the enjoyment of fundamental rights in the EU. Data-collection by the agency should be both active and passive – that is that it should rely on existing sources of data such as other international organisations (like the Council of Europe and UN treaty bodies), national human rights institutions, national governments and NGO's, but should seek to fill the gaps left by these other sources with its own active data-collection.

The issue of data-collection in this context raises two particular problems – the existence of comparative data in Member States and the existence of relevant national contact points in Member States. If the agency is to be effective, the framework for data-collection in particular areas may require a degree of harmonisation at EU level, placing an obligation on Member States to collect data on certain areas in a certain way. The problem relating to comparability of data was one that was highlighted in reports on the effectiveness of the EUMC<sup>4</sup> and must be addressed in the establishment of the agency. The external evaluators of the EUMC stated that 'The Community value added lies in providing comparability, so that conclusions can be drawn between the effectiveness of different policies and practices in combating racism.'<sup>5</sup> This will equally apply to the fundamental rights agency. It will also, certainly, require the identification of appropriate contact points in Member States which may require further consideration of the possibility of an EU wide model of national human rights institutions set up in accordance with the Paris Principles and capable of acting as national interlocutors with an EU agency. If the agency is to be effective it must be underpinned by appropriate methodology.

Various bodies such as the Council of Europe and UN treaty bodies regularly report on Member States. Such reports should provide a reliable resource for the agency. The regularity of country reports is, however, limited to some extent due to the wider geographical remit covered by those bodies. The agency should identify the gaps in reporting from other bodies and seek to fill those gaps with its own data collection. Care must be taken to avoid a simple duplication of roles within Europe and the establishment of the agency should involve extensive consultation with such bodies to ensure that the agency's work is complementary and provides added value within the EU.

### ***Evaluation and Recommendations***

The agency must be capable of evaluating the situation with regard to the respect for human rights in the EU and of responding to that evaluation with appropriate policy recommendations for improvements at EU level. Conclusions and recommendations from the agency should highlight areas of policy where the EU needs to act to improve the protection of human rights as well as addressing particular national situations which give rise to concern within an EU context such as, for example, where one particular Member State applies much lower standards in procedural rights in criminal justice to an extent that it would undermine the principle of mutual recognition in the area of freedom, security and justice. They should also highlight best practice in a Member State which could usefully be applied to the Union as a whole. Recommendations should be practical and, while the agency could not be expected to provide technical remedies, the EU must address the question of how remedies to problems which have been identified by the agency will be carried out, for example through technical assistance from a group of experts from Member States.

The agency should not be tasked with an extensive monitoring of the human rights impact of EU legislation and its implementation which is a task for the Commission as the guardian of the treaties and which should be systematically incorporated into the work of the Commission. There could, however, be scope for the agency to evaluate the impact of

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<sup>4</sup> COM(2003) 483 final

<sup>5</sup> *ibid.* p. 15

general trends of EU legislation on human rights and how the respect for human rights could be improved in certain areas such as the fight against terrorism. While the impact assessment for human rights of proposed legislation from the Commission should be a job for the Commission, where human rights issues arise in relation to legislation agreed in the Council as a result of significant alterations from an original Commission proposal or on the basis of a proposal from a Member State or group of Member States, the agency could give opinions on the human rights impact of the legislation to assist the Council in coming to a final decision on certain points – this could be a useful additional role for the agency.

The conclusions and recommendations of the agency should be published and widely distributed. The data upon which they are based should also be clearly identified and accessible.

### **Co-operation with IGO's, national human rights institutes and civil society**

The agency must work in close co-operation with organisations such as the Council of Europe and other treaty bodies as well as with national human rights institutes and civil society to ensure that its work benefits from and gives added value to the expertise that they have built up over many years of work for the promotion and protection of human rights. A first task in the establishment of the agency should be to identify exactly what monitoring functions are already being done by other organisations and where the gaps in the monitoring of human rights in the EU are so as to ensure that the work of the agency is focused and useful. This mapping exercise should pay particular attention to the work of the Council of Europe including the Commissioner for Human Rights, the Committee for the Prevention of Torture and the European Court of Human Rights. This should grow from the co-operation that has already begun to be established in relation to racism and xenophobia between the EUMC and ECRI and should take into account lessons learned in that experience. Rather than duplicating work done by the Council of Europe in this connection, the work of the agency should build on that work within the different context of the EU.

National bodies for the protection and promotion of fundamental rights and similar national agencies will be a key element in the agency's work. A careful analysis must be made as to which national agencies cover what elements of human rights and in what way to ensure that there is an equal degree of human rights monitoring in the EU. As well as providing data to the agency, these agencies perform an important national monitoring function and it may be that a study of different aspects of these agencies could lead to the development of EU best practice in national agencies which would assist the EU agency in giving added value at EU level as it would be working with a level playing field of high level human rights monitoring in all Member States.

The agency must establish a meaningful dialogue with civil society and should consult widely. It may be that national experts and/or the national agencies which would form the key contact points for the EU agency would be better placed to consult with civil society on a national level feeding into the EU agency while the EU agency could directly consult with international NGO's or groups of NGO's who have a European presence. Consultation with civil society should be both active and passive. Civil society may provide data and reports that would be useful for the agency but the agency should not rely on civil society to remedy problems that arise through lack of resources in the agency itself.

The function of the Network of Independent Experts is an important element in monitoring human rights within the EU but the question arises what added value it could have as a separate entity in the EU system following the establishment of an effective EU fundamental rights agency. If the agency is to be effective it must contain internal expertise and have expert contact points in Member States from whom it can get local information and analysis. The important role of the Network of Independent Experts should, therefore, be incorporated

into the structure of the agency. It is difficult to see the justification for the existence of two parallel mechanisms for human rights monitoring within and for the EU.

### **Independence and efficiency**

The independence of the agency is paramount if it is to be an effective and credible monitor of fundamental rights in the EU. The composition of the agency must include independent scientific experts in an advisory role and an independent management board. Decisions on the priorities of the agency and on the practical operation should be taken in a transparent way. The establishment of the agency should take into account lessons learned from the external evaluation of the EUMC in terms of efficiency and, in particular, should ensure that the objectives of the agency are sufficiently clear and precise as to allow for genuine efficiency and effectiveness.

The agency will need to interact with the EU institutions in a number of ways to ensure transparency and accountability while maintaining its independence. It should report to the European Parliament at least on an annual basis. Its recommendations on policy developments should be directed to the Commission and to the Council. The development of a fundamental rights agency highlights once again the gap that exists in the Council for addressing issues relating to fundamental rights within the EU. Amnesty International recommends that a Council dedicated structure for fundamental rights within the EU, similar to COHOM in external relations, should be created and that this would provide a key interlocutor for the agency.

### **Conclusion**

Amnesty International welcomes the step towards creating a fundamental rights agency for the EU as a way of plugging clearly identified gaps in the protection of fundamental rights in the territory of the EU. The Communication raises a number of questions and there is much work to be done to develop a model for a fundamental rights agency that would be both effective and efficient. It is of concern, however, that the Communication already says that the agency 'is intended to be a lightweight structure in terms of staff and budget'...<sup>6</sup>. If the EU is serious about the protection and promotion of human rights within its territory, it must be prepared to commit sufficient resources to the agency to ensure its effectiveness. Effectiveness must be anchored in the political will to establish accountability at EU level for the respect of fundamental rights in the EU, and based on the combination of focus, efficiency and adequate resources.

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<sup>6</sup> p. 10