



Comments on European Commission 2010 Report on the Application of the EU Charter of Fundamental Rights, COM (2011) 160 final, 30 March 2011

On 31 March 2011, the Commission launched its first *Annual Report on the Application of the EU Charter of Fundamental Rights* (the Report).¹ This new initiative was announced by Commissioner Viviane Reding at the outset of her mandate. It complements the *Commission's Strategy on the effective implementation of the Charter*, published in October 2010 (the Strategy).²

Amnesty International (AI) has consistently urged the Commission to reflect on the EU's internal human rights policy. So we welcome the Strategy and the Report as important milestones towards this objective. The *Council Conclusions on the role of the Council of the EU in ensuring the effective implementation of the Charter* adopted by the Council in February 2011 already represent a success in involving the other EU institutions in this process.³

The Report is accompanied by a Commission Staff Working Document with more detailed information and explanation.⁴ Following the structure of the Charter, it provides through a right-by-right approach, a useful compilation of EU initiatives and measures which have been adopted or are underway. Our comments below focus on the report's political value and follow the structure of the report.⁵

We welcome the report's objective to monitor progress in the implementation of the Charter and its influence on EU policies. However, the report lacks courage and vision. It falls short of expectations by not acknowledging the failure of EU action and by failing to propose new avenues for a more proactive EU role in making the Charter a reality.

We are particularly concerned that the report focuses on restricting as much as possible the scope of the Charter as well as the Commission's legal and political responsibility in its implementation. The report's first chapter (*Clarifying when the Charter applies and when it does not*) is particularly revealing about the Commission's priorities.

¹ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2010 Report on the Application of the EU Charter of Fundamental Rights, COM (2011) 160 final, 30 March 2011

² Communication from the Commission, Strategy for the effective implementation of the Charter of Fundamental Rights by the European Union, COM (2010) 573 final, 19 October 2010. See separate comments from AI

³ Council Conclusions on the role of the Council of the European Union in ensuring the effective implementation of the Charter of Fundamental Rights of the European Union, 6387/11, 25 February 2011. See separate comments from AI

⁴ Commission's Staff Working Document, Accompanying document to the report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, 2010 Report on the application of the EU Charter of Fundamental Rights, SEC (2011) 396 final, 30 March 2011

⁵ The comments do not refer to the working document nor the last Chapter ("Most important developments in 2010"). Specific examples of EU action/inaction are nevertheless addressed in reference to the 'policy' chapters

“Clarifying when the charter applies and when it does not”

Amnesty International welcomes the Commission’s commitment to make the Charter the compass for EU law-making. This will ensure that human rights concerns are raised at all stages of the legislative process, boosting the EU institutions’ legitimacy in protecting human rights. However, we note that this issue was already addressed in the October Strategy. The Report rather focuses on clarifying the Charter’s scope. We are concerned that this confirms the narrow interpretation already endorsed by the Strategy and omits to confront the reality of human rights violations in the member states.

By insisting on the Charter’s limited scope (stressing that not all situations where fundamental rights are at stake in the EU fall under EU competence and hence the Charter’s scope) the Commission appears anxious to dispel any ‘misconceptions’ generated by the initial publicity on the Charter’s new enhanced status under the Lisbon Treaty.

1. The report insists that the absence of EU competence does not entail any lack of protection for fundamental rights at EU level since the main responsibility for fundamental rights protection remains with national constitutional systems. Although it is important to recall member states’ responsibility, this should not prevent the Commission from exploring all avenues for the EU to play a central role in enhancing fundamental rights protection in Europe.

Moreover, this approach is based on the assumption that there are no gaps in fundamental rights protection at national level. It fails to address the role of the EU when member states fail to offer sufficient guarantees of respect for human rights because human rights standards are not in place are unsatisfactory or national authorities fail to enforce them, leaving existing gaps in human rights protection in the EU untouched. As highlighted in some examples below, we believe the EU could make better use of the Charter combined with the legal and policy instruments it has developed on both the internal and external affairs’ fronts to make a positive difference for human rights’ protection in Europe.

Instead of describing the *status quo*, the Commission’s annual report on the implementation of the Charter should be an opportunity for a more critical and forward-looking assessment of EU action in the field of human rights.

- a. The EU could do more to oppose discrimination against Roma people. For example, it could build on the provisions of the Race Directive which forbid ethnic discrimination in the field of housing and education to tackle head-on forced evictions and segregation in schools. It could respond more vigorously to racist violence and crime against Roma people using the Framework Decision on combating racism and xenophobia. Instead, the EU has confined its role to promoting social inclusion policies at national level. While we welcome the Commission’s strong stance against the measures France took against the Roma in the summer 2010, we regret that it focused on France’s incorrect implementation of the Free Movement Directive, side-tracking anti-discrimination law and the Charter. The seeming lack of follow-up on the discrimination concerns casts another shadow over its commitment to fight discrimination.
- b. The EU could and should have taken a more principled position on the Hungarian media law that was adopted in April 2011. We regret that the Commission failed to confront freedom of expression abuses in monitoring the new Hungarian media law, giving priority to technical issues over human rights concerns despite advice from an impressive range of eminent human rights bodies.⁶
- c. On the migration front, the EU still lacks comprehensive human rights based policy as illustrated by its defensive EU-centered response to the uprisings in North Africa and the war in Libya. The historic events unfolding in the Mediterranean region should trigger an in-depth review of EU migration policies that ensure human rights are central to existing and future agreements between the EU or individual member states and North African

⁶ Council of Europe Commissioner for Human Rights, OSCE Representative on Freedom of the Media, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression - See AI letter to Commissioner Neelie Kroes, 30 March 2011 (AI Ref. B1059)

countries. A thorough review should also include discussions on opening channels for legal migration and ensuring mobility for people in the region by allowing them readily to obtain visas.⁷

- d. The EU could be more active in preserving the absolute ban on torture in Europe. It could for instance take a firm stand against member states' reliance on 'diplomatic assurances' to return people suspected of terrorism to their countries of origin despite the risk of torture and other ill-treatment, building on the principle of *non-refoulement* enshrined in the Charter (Article 19), the EU's enhanced competence in justice and home affairs, and its own Guidelines on Torture which clearly state that: "work towards the prevention and the eradication of all forms of torture and ill-treatment *within the EU* and worldwide is a strongly held policy view of all the EU member states. Promotion and protection of this right is a *priority* of the EU's human rights policy" [our italics].⁸

2. AI has consistently denounced the EU's failure to tackle human rights issues and challenges which fall outside its strict area of competence (the 'grey zone'). This goes against the letter and spirit of the Treaties, which empower the EU to intervene where there is a "clear risk" or the "existence of a serious and persistent breach" of EU common values by member states (Article 7 TEU).

In fact, the report ignores Article 7 TEU. We believe that the Commission should consider this treaty mechanism in any reflection on EU human rights' policy.

- a. The lack of EU political will to address the European complicity in the US-led rendition and secret detention programmes which resulted in unlawful detention and torture by member states is a flagrant example. We believe the Commission could at least have launched a discussion on this issue by mentioning the letters it has sent to Lithuania, Poland and Romania inquiring about investigations into secret CIA sites on EU territory.
- b. The EU's reluctance to intervene in the controversy surrounding the Hungarian constitution is another example which challenges Article 7 TEU.⁹

3. The report fails to look at the Charter in the wider context of the international human rights framework. The approach fails to examine how interaction between the EU and national, regional and international human rights protection mechanisms (Council of Europe, UN, OSCE) can have an impact on human rights protection in Europe and enhance the accountability of all those responsible. The paragraph on the EU's forthcoming accession to the ECHR and the reference to EU accession to the UN Convention on the Rights of Persons with Disabilities could have provided an opportunity to explore these issues further.¹⁰

In fact, by referring to other institutions including the ECHR, the Commission gives the impression that it is seeking to shift its responsibilities on enforcing fundamental rights in the EU rather than to work together to elaborate common strategies.

4. The report also fails to reflect on cooperation between the Commission and the other institutions and agencies. It refers to the Court of Justice of the EU without examining its role in shaping national and EU interpretation of the Charter. It only alludes to the role of the Council, Parliament or the EU Fundamental Right Agency (FRA). Considering the changes introduced by the Lisbon Treaty and the FRA's increasing importance, this is particularly disappointing.

⁷ See AI letter to EU Hungarian Presidency, 6 April 2011 (AI Ref. B1063)

⁸ Council of the European Union, Guidelines, Human Rights and International Humanitarian Law, Chapter 2: Torture and other cruel, inhuman or degrading treatment or punishment (2001) (updated in 2008)

⁹ See AI letter to Commissioner Viviane Reding , 20 April 2011 (AI Ref. B1073)

¹⁰ The link between the EU's new Directive on trafficking and the Council of Europe Convention against trafficking in human beings, as well as the consequences of the Court of Justice of the European Union's judgment in the Kadi case are other missed opportunities (Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities)

5. The lack of reference to civil society's role, including human rights NGOs and academics, is another matter of concern. Their input is crucial to ensuring high-quality and impartial fundamental rights assessments of EU action.

“Making the Charter more effective for people”

Amnesty International welcomes the Commission's commitment to improving communication with and providing assistance to the public on human rights enforcement mechanisms to ensure “a genuine possibility of redress” over human rights violations. However, we believe that ensuring better information cannot be the EU's only response as suggested by this whole chapter which says little on specific EU action or proposals to ensure that rights enshrined in the Charter are respected in the EU.

Despite its title, the first paragraph (*Tacking action at EU and at national level*) contains no indication of any specific action undertaken or envisaged by the Commission to improve human rights performance at EU or national level. In practice, the Commission's approach to cases of human rights violations in member states has casted doubts on this commitment's real value (see the examples of France and Hungary above). The Commission has been reluctant to engage in infringement proceedings against member states or to otherwise pursue non-compliance with the Charter. We are particularly concerned about the lack of thorough and public follow-up of cases which have been under the spotlight.

Furthermore, the report only focuses on ex post-facto intervention. It fails to analyse the role of the EU in preventing human rights violations within its borders.

We are also concerned that by stating that: “*The public authorities of the member states [...] are only bound to comply with the Charter when implementing EU law*” (page 4, par2.1), the Commission is conveying a very restrictive interpretation of Article 51 TEU, suggesting that the Charter has no role to play in shaping domestic law and policies.

CONCLUSION

The report concludes that clarifying when the Charter does and does not apply is essential to ensuring that citizens fully benefit from the Charter. Although we agree about the importance of giving the public clear practical information on existing human rights protection mechanisms at EU and national level, the report seems to suggest that improving transparency would be a panacea. This approach is worrying as it betrays the Commission's intention to reduce the failure of EU human rights protection systems of to the simple lack of information among the public.

AI welcomes the suggestion of using the report as the basis for an annual exchange of views with the European Parliament and the Council on the Charter's application, and hence for fostering dialogue between institutions on internal human rights policy. We look forward to further discussions.

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