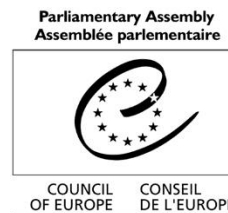


# Parliamentary Assembly Assemblée parlementaire



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## Follow-up to the Third Summit: the Council of Europe and the Fundamental Rights Agency of the European Union

Report  
Committee on Legal Affairs and Human Rights  
Rapporteur: Mr Erik Jurgens, Netherlands, Socialist Group

### *Summary*

The Committee, recalling Assembly Resolution 1427 (2005), reaffirms that “creation of a fundamental rights agency within the European Union could make a helpful contribution, provided that a useful role and field of action is defined for it and that the agency therefore genuinely “fills a gap” and presents irrefutable added value and complementarity in terms of promoting respect for human rights.”

In fact, by far the most serious gap surrounds the institutions of the European Union itself: the only public authorities operating in Council of Europe member States that are outside the jurisdiction of the European Court of Human Rights.

First and foremost, the Agency should concentrate on filling this lacuna. Were it also to duplicate activities already undertaken by the Council of Europe, this could have serious adverse effects for the overall system. There could also be disadvantageous consequences from the perspective of European integration.

Furthermore, creation of a new, separate human rights body whose activities duplicated those of the Council of Europe would be entirely inconsistent with the decisions taken at the Warsaw Summit and contrary to the conclusions of the report of Prime Minister Juncker.

The Committee therefore recommends that all European Union member States' national parliaments that have not already done so give serious and detailed consideration to the proposed Agency. Drawing on its own existing positions and on the objections raised thus far within national parliaments, the Assembly also makes a series of recommendations to the institutions and member states of the European Union. Finally, the Assembly recommends to the Committee of Ministers that it give further serious and detailed consideration to the issue with a view to reaching a common position.

## A. Draft recommendation

1. The Parliamentary Assembly, recalling its Resolution 1427 (2005), reaffirms that “creation of a fundamental rights agency within the European Union (EU) could make a helpful contribution, provided that a useful role and field of action is defined for it and that the agency therefore genuinely “fills a gap” and presents irrefutable added value and complementarity in terms of promoting respect for human rights.”

2. To determine whether there is such a gap, it is necessary first to consider the existing human rights protection system which is built upon and around the Council of Europe. Over its 56-year history, the Council of Europe – which now counts amongst its membership all but one of the countries of Europe – has developed a complete range of instruments and mechanisms for promoting and protecting human rights.

3. Since all European Union member States are also members of the Council of Europe, their actions in implementing European Union law are subject to the standards and supervisory mechanisms of the Council of Europe. In fact, by far the most serious lacuna surrounds the institutions of the European Union itself: the only public authorities operating in Council of Europe member States that are outside the jurisdiction of the European Court of Human Rights, although the European Court of Justice, in its decisions, does in fact follow the case-law of the European Court of Human Rights.

4. The Assembly’s concern in this matter is motivated by a desire to ensure that the inhabitants of Europe as a whole benefit from the most effective and efficient overall human rights protection system. First and foremost, the Agency should concentrate on filling the principal lacuna. Were it, in addition, to duplicate activities already undertaken by the Council of Europe (or by national human rights commissions), this could have serious adverse effects for the overall system. Duplication would risk inconsistency and create the possibility of “forum shopping,” with the countries that were subject to the different mechanisms giving preference to whichever took the more favourable position.

5. There could also be disadvantageous consequences from the perspective of European integration. The fact of having two parallel institutions engaged in similar activities within the same geographical region, one having a more limited membership than the other, would create new dividing lines in Europe by reference to states’ institutional situation in bodies devoted to human rights, one of the very principles intended to unite Europe. The apparent incoherency of creating a new European Union body to duplicate work already satisfactorily undertaken elsewhere would cause confusion amongst a European public already uncertain about the process of European integration. Duplication would also waste public money at a time of general budgetary stringency, thus further alienating citizens from European institutions, including the mechanisms of human rights protection.

6. At the Warsaw Summit in May 2005, the Heads of State and Government of the Council of Europe member States – including those of all European Union member States – reaffirmed the central role of the Council of Europe in protecting and promoting human rights and resolved to enhance its role as an effective mechanism of pan-European cooperation in this field, including by ensuring that the European Union and its member states make better use of available Council of Europe instruments and institutions. The Warsaw Summit also requested Prime Minister Jean-Claude Juncker of Luxembourg to prepare a report on relations between the Council of Europe and the European Union. The Assembly considers that creation of a new, separate human rights body whose activities duplicated those of the Council of Europe would be entirely inconsistent with the decisions taken at the Warsaw Summit and contrary to the conclusions of the Juncker report.

7. At the beginning of the consultation procedure, the European Commission produced a consultation document containing *inter alia* the following points:

7.1. the Agency will be required to monitor fundamental rights by area [thematically] and not prepare reports by country;

7.2. confining the Agency’s activities to the scope of EC/EU law would help avoid duplication of the activities of other bodies;

7.3. a mandate for the Agency to act in relation to Article 7 of the Treaty on European Union, to determine serious and persistent breaches by member States of the founding principles of the European Union, would be difficult to reconcile with an effective agency and could lead to overlap with the work of the Council of Europe, creating a very real risk of duplication and contradiction;

7.4. confining the Agency's activities to European Union territory would clearly underline the political will to emphasise the importance of fundamental rights to and within the Union, effectively placing responsibility on the institutions; this message would be diluted if the agency's remit included third countries.

8. The Assembly deeply regrets the fact that subsequent developments appear to have lost sight of these points and firmly believes that they remain the most appropriate basis for an effective Agency, analogous to a national human rights institution, with the potential to bring genuine added value to the overall European human rights protection system.

9. The European Union Constitutional Treaty is often mentioned in justification for establishing the Agency, even by reference to the fact that its ratification process has been blocked. The Assembly notes that this Treaty, agreed upon as a package of measures, would also have given far greater powers to national parliaments with respect to the EU legislative process, in particular in relation to application of the principle of subsidiarity. Unfortunately, however, the role of national parliaments in the discussions surrounding the Agency has not been properly acknowledged, despite several – including in the Czech Republic, France, Germany, the Netherlands, the United Kingdom and, jointly, in Estonia, Latvia, Lithuania and Poland – having expressed serious reservations.

10. The Assembly recommends that all European Union member States' national parliaments that have not already done so give serious and detailed consideration to the proposed Agency, with a view to adopting a position based on the present recommendation. Assembly delegations from the relevant parliaments should take the lead in initiating the necessary procedures.

11. Given the double mandate of its members as democratic representatives at both national and European levels, the Assembly draws on its own existing positions and on the objections raised thus far within national parliaments to make the following recommendations to the institutions and member States of the European Union:

11.1. the Agency should be explicitly limited, in its mandate, to human rights issues that arise within the European Union's internal legal order;

11.2. the Agency should be explicitly required, in its mandate, to refer in its work to the principal human rights instruments of the Council of Europe, namely the European Convention on Human Rights, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the European Social Charter and the Framework Convention for the Protection of National Minorities;

11.3. the Agency should have no mandate to undertake activities concerning non-EU member States. Should such a mandate nevertheless be considered absolutely necessary, it should be strictly confined to candidate countries and limited to issues arising from the accession process;

11.4. the Agency should be explicitly excluded, in its mandate, from engaging in activities that involve assessing the general human rights situation in specific countries, in particular those that are members of the Council of Europe;

11.5. establishment of the Agency should not be accompanied by creation of a new Forum for human rights;

11.6. the Agency should be explicitly required, in its mandate, to ensure that it avoids duplication of the activities of the Council of Europe;

11.7. the Council of Europe should be represented on the management structures of the Agency at a level and with voting rights at least equal to those that it currently enjoys on the management structures of the EU Monitoring Centre on Racism and Xenophobia;

11.8. the legal basis of the Agency must be beyond reproach. In the interests of transparency, the critical opinion of the legal services of the Council of the European Union, as referred to by the French National Assembly and the Czech Senate, should be published;

11.9. further serious and detailed consideration should be given to application of the principle of subsidiarity. This should involve detailed comparison of the various activities proposed for the Agency with the relevant acts of member States at both national level and in other international fora, including in particular the Council of Europe;

11.10. further serious and detailed consideration should also be given to application of the principle of proportionality, taking into account the exact extent to which the relevant treaty contains objectives of relevance to the activities proposed for the Agency;

11.11. given the importance to the legal environment in which the Agency would operate of the EU Charter for Fundamental Rights having binding effect and the European Union acceding to the ECHR – both foreseen in the European Union Constitutional Treaty – consideration should be given to postponing creation of the Agency until the fate of these provisions has been resolved;

11.12. the political will impelling the proposals for the Agency should be employed to give new impetus towards European Union accession to the European Convention on Human Rights, which would be the most important step in ensuring that the European Union acts with full respect for human rights;

11.13. final decisions relating to the Agency should be deferred until national parliaments in all European Union member States have had the opportunity of adopting final positions on matters relating to it. The present report and recommendation complement but cannot completely substitute for the full range and detail of positions that might be taken in national parliaments:

12. Bearing in mind the more general work currently being undertaken concerning relations between the Council of Europe and the European Union, the Assembly strongly believes that the issue of the Agency should not be addressed outside this context. The Assembly therefore makes the following recommendations to the Committee of Ministers and to the institutions and member States of the European Union:

12.1. work on a co-operation agreement between the Agency and the Council of Europe should be deferred until the precise mandate of the Agency has been determined;

12.2. final decisions on the creation and mandate of the Agency should be deferred until the overarching new framework for enhanced co-operation between the Council of Europe and the European Union (at present being discussed as a “memorandum of understanding”) has been defined and agreed upon.

13. Finally, the Assembly recommends to the Committee of Ministers that, since this issue is of profound significance to the overall European human rights protection system and thus to the Council of Europe in particular, it give further serious and detailed consideration to the issue, with a view to reaching a common position based on the present recommendation.

**B. Explanatory memorandum**

by Mr Jurgens, Rapporteur

**I. The Assembly's perspective**

1. In Resolution 1427 (2005), the Parliamentary Assembly concluded that "creation of a fundamental rights agency within the EU could make a helpful contribution, provided that a useful role and field of action is defined for it and that the agency therefore genuinely "fills a gap" and presents irrefutable added value and complementarity in terms of promoting respect for human rights." For the Rapporteur, this remains the starting point of his analysis.

2. From the outset, therefore, he would like to emphasise that he is concerned only to ensure that nothing is done to undermine Europe's existing human rights protection system, within which the Council of Europe plays the central role. If there are activities that the Council of Europe does not and cannot undertake, the Assembly should be glad to see such genuine lacunae being filled. On the other hand, duplication of existing Council of Europe activities would only be harmful. It would risk creating double standards and inconsistency between separate monitoring procedures and allow for forum-shopping, with the subjects of monitoring tending to privilege the institution they considered (for whatever reason) preferable. It would create new dividing lines in Europe, between EU members and non-members, defined by reference to the very principles of democracy, human rights and the rule of law that should be uniting us. It would give an impression of incoherency in the process of European integration, at a time of existing public uncertainty. Through inefficient use of public money, it would alienate Europe's citizens from the institutions of European integration, including the mechanisms of human rights protection.

**II. The Council of Europe – Europe's human rights defender**

3. In order to assess whether any such genuine lacunae do in fact exist, it is necessary first to reflect on Europe's existing human rights protection system, within which the Council of Europe plays the central role.

4. At the heart of the Council of Europe's statutory mandate lies promotion and protection of human rights, democracy and the rule of law in Europe. It has discharged this mandate since 1949 and now has 46 member States: all the countries of Europe, with the sole exception of Belarus. All member States of the European Union, along with all potential member states, therefore, are already members of the Council of Europe and part of its human rights protection system. The actions of EU member States when implementing EU law are thus subject to those states' obligations to the Council of Europe and are therefore covered by the Council of Europe's supervisory mechanisms.

5. The Council of Europe brings together permanent representatives of the governments of all member States in its Committee of Ministers. National parliaments are represented in the Parliamentary Assembly (PACE), and local and regional authorities in the Congress of Local and Regional Authorities of Europe. There is also a Conference of International NGOs, through which almost 400 European civil society associations (including pan-European umbrella organisations representing numerous national bodies) participate in the work of the Council of Europe.

6. Issues involving or relating to human rights dominate the agendas of all of these institutions, which each have specialist sub-units dealing with various aspects of human rights protection and promotion. The Committee of Ministers, which, amongst other things, undertakes thematic human rights monitoring, is assisted by the Steering Committee on Human Rights (known by its French acronym, CDDH) and its various sub-committees. The Assembly undertakes country-specific monitoring to ensure that new member States honour their obligations and commitments to the Council of Europe and produces numerous reports on both thematic and country-specific human rights issues. Both the Committee of Ministers and the Assembly issue regular resolutions and recommendations aimed at enhancing respect for human rights.

7. During its history, the Council of Europe has developed a full range of specialised treaty-based human rights protection mechanisms, including both normative legal instruments and independent supervisory bodies. Amongst the most significant are the ECHR and the European Court of Human Rights; the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; the European Social Charter and the European Committee of Social Rights; and the Framework Convention for the Protection of National Minorities and its Advisory Committee.

8. In addition to these treaty-based mechanisms, the independent Council of Europe Commissioner for Human Rights was created in 1999 to promote education in, awareness of and respect for human rights, as embodied in the human rights instruments of the Council of Europe; and the European Commission against Racism and Intolerance (ECRI) was created in 1993 to combat racism, xenophobia, anti-semitism and intolerance, from the perspective of the protection of human rights. On questions relating to the interpretation and application of international law (including international human rights and humanitarian law) and constitutional law, the Council of Europe, its member States and third parties are able to call on the high expertise of the European Commission for Democracy through Law (the "Venice Commission").

9. The Council of Europe's work on human rights is complemented and reinforced by its equally wide-ranging and detailed activities to promote respect for democracy and the rule of law in Europe, since these three fundamental principles are interdependent. By contrast, the Council of Europe remains undistracted by competing institutional missions in fields such as trade, economic and monetary policy or defence that could generate tension or compromise over policies relating to the promotion and protection of human rights.

10. At the Warsaw Summit, held in May 2005, the heads of state and government of Council of Europe member States underlined that the core objectives of the organisation were to preserve and promote human rights, democracy and the rule of law. They resolved to enhance the role of the Council of Europe as an effective mechanism of pan-European cooperation in all relevant fields, including by ensuring that the European Union and its member states make better use of available Council of Europe instruments and institutions. Underlying these decisions was a renewed determination to build a Europe without dividing lines based on the common values of democracy, human rights and the rule of law, as embodied in the organisation's Statute. Certainly, there was no indication of any need or intent to create a separate human rights body with more limited membership to supplement, duplicate or relocate activities of the Council of Europe; indeed, this would have been entirely inconsistent with the decisions that were taken. The Warsaw Summit also requested Prime Minister Jean-Claude Juncker of Luxembourg to prepare a report on relations between the Council of Europe and the European Union.

### **III. History of the proposal to create an EU fundamental rights agency**

11. Although a similar idea had first been floated at the 1999 European Council in Cologne, the decision to create an EU fundamental rights agency was taken in December 2003, when the European Council, "stressing the importance of human rights data collection and analysis with a view to defining Union policy in this field, agreed to build upon the existing European Monitoring Centre on Racism and Xenophobia and to extend its mandate to become a Human Rights Agency to that effect."<sup>1</sup>

12. On 25 October 2004, the Commission issued a consultation document,<sup>2</sup> which contained the following notable points:

- i. The Agency will be required to monitor fundamental rights by area and not to prepare reports by country.
- ii. Confining the Agency's remit strictly to the scope of EC/EU law would avoid duplicating the work of other bodies active at international and national level.
- iii. If the Agency were given a remit covering Article 7 of the Treaty on European Union (TEU),<sup>3</sup> this would be difficult to reconcile with the aim of an effective agency and could lead to overlaps with work carried out by the Council of Europe and national human rights bodies, with a very real risk of duplication and contradiction.
- iv. Confining the Agency's scope to the territory of the Union would clearly underline the will to emphasise the importance of fundamental rights in the EU and would be an effective means of placing responsibility on its institutions. This message might be diluted if the Agency's remit were to be extended to third countries.

13. The Rapporteur would draw attention to how closely these points reflect the Assembly's own conception of a useful Agency. Had subsequent developments adhered to this model, there would have

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<sup>1</sup> The European Monitoring Centre on Racism and Xenophobia (EUMC) was created in 1997, as part of the European Year on Racism.

<sup>2</sup> COM(2004) 693 final.

<sup>3</sup> Determination of a serious and persistent breach by a member State of the founding principles of liberty, democracy, respect for human rights and fundamental freedoms and the rule of law.

been little to which the Assembly could, or would, have objected. Certainly, they stand in stark contrast to the Commission's later proposals (see paragraph 18 below).

14. In Resolution 1427 (2005), adopted in March 2005 whilst the consultation procedure was still under way, the Assembly made the following constructive proposals:

- i. Before establishing the Agency, the EU should reflect carefully on the purpose and context of its internal human rights policy, ensuring that full account was being taken of the activities of the Council of Europe in the light of the decisions of the (then imminent) Warsaw Summit.
- ii. The Agency's mandate must be clearly defined so as to ensure that its work represented genuine added value, avoiding any duplication of Council of Europe activities.
- iii. The scope of the Agency's work should be confined to EC/EU law, ensuring that such law complies with fundamental rights and that member states respect fundamental rights when implementing it.
- iv. The Agency should work on a thematic, not a country-by-country basis, focusing on themes of especial relevance to EC/EU policies.
- v. The Agency's reference texts should include the principal human rights instruments of the Council of Europe by which EU member States are already bound, alongside the non-binding EU Charter of Fundamental Rights.
- vi. The Agency's reports should be addressed to the relevant EU institutions only, since member States are already subject to the activities of both national human rights institutions and the Council of Europe, including in relation to action taken at national level in pursuit of EC/EU law.
- vii. The purpose of the Agency, which must be independent, should be to collect, record and analyse information on human rights to be used by the EU institutions for mainstreaming and promoting human rights in decision making, including the drafting of legislation.
- viii. The Agency's founding regulation must contain provisions establishing a rule of non-duplication and a duty of cooperation and coordination with the Council of Europe.
- ix. There must be mandatory provision for full Council of Europe participation in the Agency's management structures.
- x. There should be a detailed agreement between the Agency and the Council of Europe establishing concrete mechanisms for close cooperation.

15. In its Reply to this Recommendation, the Committee of Ministers "agrees with the Assembly that the agency's mandate should focus on human rights issues within the framework of the European Union, address its advice to the EU institutions and ensure that unnecessary duplication with the Council of Europe is avoided. It hopes that these points will be fully reflected in the future Community regulation."<sup>4</sup>

16. Subsequently, the European Parliament adopted a resolution on "promotion and protection of fundamental rights: the role of national and European institutions, including the Fundamental Rights Agency" in April 2005.<sup>5</sup> This made *inter alia* the following proposals:

- i. The Agency's three main functions should include monitoring the observance of fundamental rights.
- ii. The Agency should provide all the information required to develop the EU's monitoring role with respect to fundamental rights.
- iii. The Agency should have the power to follow the development of implementation of the EU Charter of Fundamental Rights within the EU and accession countries.
- iv. The Agency should also be able to cover third countries when involved in human rights issues affecting the EU, for instance suspected violations of the "democracy clause" in agreements with the EU.

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<sup>4</sup> PACE Doc 10729.

<sup>5</sup> P6\_TA(2005)0208.

v. Protection of ethnic and national minorities should be one of the Agency's specific tasks.

17. The language used to express these proposals implies that the Agency be mandated to conduct monitoring of respect for human rights standards in specific countries, including Council of Europe member States, whether members of the EU or not. Assuming this language accurately reflects the intentions of the European Parliament, such an Agency would predictably – even deliberately – duplicate activities of the Council of Europe.

18. On 30 June 2005, the Commission issued its proposals for a Council Regulation establishing a European Union Agency for Fundamental Rights and a Council Decision empowering the Agency to pursue its activities in areas referred to in Title VI of the Treaty on European Union.<sup>6</sup> Unfortunately, not only were many of the Assembly's most important concerns not satisfied by these proposals, new issues of concern arose, in particular:

i. The Agency would not be explicitly required to refer in its work to the main Council of Europe human rights instruments (Article 3(2)), despite all EU member States being bound by them<sup>7</sup> and the European Court of Justice having ruled that the ECHR forms part of the general principles of Community law. The mandate should also explicitly mention these Council of Europe instruments.

ii. The Agency's mandate would include third countries with which the EU has, is negotiating or is planning to negotiate agreements containing human rights clauses, in particular countries covered by the Neighbourhood Policy (Article 3(4)). This would duplicate activities of the Council of Europe in non-EU member States. Such duplication would risk double standards and create a second tier of countries by reference to their institutional situation in bodies devoted to human rights promotion and protection, thus drawing new dividing lines in Europe. The only conceivable role for the Agency in third countries that could bring added value would relate to the activities of candidate countries in fulfilling the accession criteria, as suggested by Sub-committee E of the UK House of Lords EU Committee.<sup>8</sup> (See also Article 27.)

iii. The Agency would be mandated to assess the human rights situation in specific states and address conclusions and opinions to them (Article 4(1)(d)). Again, this would duplicate Council of Europe activities, risking inconsistency and wasting resources. It would be preferable for the Agency to give advice only to the EU institutions, within the EU legal framework.

iv. The Agency would include a Fundamental Rights Forum through which outside actors would make suggestions for the Agency's annual work programme and make proposals on the basis of the annual report (see Article 14). Given that the annual report would be very wide-ranging (see Article 4(1)(f)), this could duplicate the activities of the Council of Europe, notably the Commissioner for Human Rights, in engaging with civil society associations active in the field of human rights in relation to our pan-European standards and supervisory mechanisms.

v. There should be an unambiguous and explicit requirement that the Agency avoid duplication of the activities of the Council of Europe and ensure that its own activities bring genuine added value to the overall European human rights protection system (see Article 9, in particular; also Articles 4(1)(i) and (j), 5(1)(e) and 6(2)).

vi. The Council of Europe would be less effectively represented on the Agency's management structures than it is at present on those of the EUMC. In particular, it would have no place on the Executive Board and its voting rights on the Management Board would be limited, even with respect to the substance of the Agency's work (see Articles 11 and 12).

19. The Rapporteur is of the firm position that these issues cannot be taken in isolation as bargaining points. The Assembly should only be prepared to accept an Agency whose mandate is satisfactory on all of these issues. In particular, improved representation for the Council of Europe on the Agency's management structures, by itself, will not be enough to ensure the avoidance of duplication of Council of Europe activities if serious deficiencies remain elsewhere in the mandate.

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<sup>6</sup> Document COM(2005) 280 final.

<sup>7</sup> The only exceptions concern the Framework Convention for the Protection of National Minorities, which, amongst EU member States, has not yet been ratified by Belgium, France, Greece or Luxembourg.

<sup>8</sup> See "Human rights protection in Europe: the Fundamental Rights Agency," 4/4/06.



20. Although the EU's final decision will be taken using the consultation procedure (in which the final decision lies exclusively with the EU Council), this will involve the "trialogue" mechanism, whereby the European Parliament's input is given especial consideration. The European Parliament has a total of five rapporteurs responding to the Commission's proposals: Mrs Kinga Gál (Hungary, EPP/ED) and Mrs Magda Kósáné Kovács (Hungary, SOC), who are reporting on the proposal for a regulation and on the proposal for a decision, respectively, on behalf of the Committee on Civil Liberties, Justice and Home Affairs (LIBE); Mr Cem Özdemir (Germany, Greens/ EFA) who is preparing an opinion on behalf of the Committee on Foreign Affairs (AFET); Mr Ignasi Guardans Cambó (Spain, SOC), who is preparing an opinion for the Committee on Constitutional Affairs (AFCO); and Ms Emine Bozkurt (Netherlands, SOC), who is preparing an opinion on behalf of the Committee on Women's Rights and Gender Equality (FEMM).

21. All five rapporteurs have now produced first drafts, proposing a total of 131 amendments to the Commission's proposals (124 of them to the proposal for a regulation).<sup>9</sup> Three additional documents containing some 200 amendments have also been tabled.<sup>10</sup> If a compromise can be reached on all these proposals, the LIBE committee hopes to have a first reading on 4 April. Without going into detail on what remain, for the time being, only draft amendments, the Rapporteur would express his alarm at the extremely ambitious nature of some of these, which suggest either ignorance of or wilful blindness to the concerns – even the very existence – of the Council of Europe.

22. According to the Rapporteur's information, the triologue would then resume on 25 April, with a high-level tripartite meeting involving Commission Vice-President Franco Frattini and Hans Winkler of the Austrian Foreign Ministry on behalf of the EU Presidency. Assuming this goes well, the LIBE committee hopes to adopt its report on 4 May. The Austrian Presidency, for whom creation of the Agency (which would be based in Vienna) is a priority, hopes that the EU Council will take its final decision before the end of June. The Council's Working Group on Fundamental Rights and Citizenship is already working on the issue and is considering further amendments of its own.

23. Alongside these procedures, the Assembly, along with other Council of Europe institutions, notably the Secretary General, has remained very active in seeking to ensure that the eventual Agency does not undermine the overall European system of human rights protection. In addition to adoption of Resolution 1427, the President of the Assembly has sent comments and drafting suggestions on the Commission's proposal to the President and other members of the European Parliament, including three of the rapporteurs. The Chairperson of the Assembly's Committee on Legal Affairs and Human Rights attended an exchange of views with the LIBE committee in Brussels on 22 February, and Mrs Gál and Mr Özdemir attended an exchange of views with the Assembly's Committee on Legal Affairs and Human Rights in Paris on 13 March. The minutes of this latter discussion were subsequently declassified and sent for information to the EP President, rapporteurs and relevant committees. The Secretary General of the Council of Europe has also sent drafting suggestions, consistent with those produced by the President of the Assembly, to Vice-President Frattini. There have also been numerous bilateral meetings, including at the very highest levels.

24. On 10 April 2006, Prime Minister Juncker published his report on relations between the Council of Europe and the European Union. In this report, he made the following recommendations concerning the Agency, with which the Rapporteur fully agrees:

- i. The Council of Europe must remain the benchmark for human rights in Europe. The EU must, therefore, draw more systematically on its expertise; this applies equally to EU member States, candidate countries and non-member States that are members of the Council of Europe, in respect of the EU's bilateral relations, neighbourhood policy, association agreements and the stabilisation and association process.
- ii. The Council of Europe must remain responsible for monitoring its member States and ensuring that they respect human rights. It should make regular evaluations in each of its member States, on a country-by-country basis. The reference value of its thematic reports must be strengthened.
- iii. The Agency must be strictly complementary to the Council of Europe. It is essential, therefore, that its mandate be limited to human rights issues that arise in connection with the implementation of Community law, i.e. strictly within the EU's internal legal system.

<sup>9</sup> See documents LIBE\_PR(2006)369836, LIBE\_PR(2006)369852, AFET\_PA(2006)364872, AFCO\_PA(2006)369971 and FEMM\_PA(2006)367833.

<sup>10</sup> See documents LIBE\_AM(2006)370083, AFET\_AM(2006)369899 and FEMM\_AM(2006)370179.

- iv. The Agency's mandate should explicitly mention the ECHR and other key Council of Europe instruments as reference texts.
- v. The Council of Europe should be represented on the Agency's management bodies.

25. The role of national parliaments in these proceedings has unfortunately been very limited. Whilst various countries contributed to the Commission's consultation procedure – several of them raising concerns similar to those of the Assembly – these contributions do not seem to have weighed heavily on the EU institutions. The failure of the Constitutional Treaty is often cited by supporters of the Agency as a reason why it is all the more necessary to proceed with the establishment of a strong and extensive Agency. Had the Constitutional Treaty come into force, however, national parliaments would have the right to a far greater say in the EU's legislative processes. Were this the case, the Rapporteur is convinced that the concerns expressed both during the Commission's consultation procedure and by national parliamentarians subsequently would have led to proposals for a far more realistic and acceptable Agency. (See further below at paragraph 48.)

#### **IV. The Assembly's outstanding concerns**

26. In addition to the issues mentioned at paragraph 14 above, the Rapporteur considers that further, detailed consideration should be given to the issues of the Agency's legal basis, subsidiarity and proportionality (intended to ensure complementarity and efficiency), the fate of the EU Constitutional Treaty (including the issues of EU accession to the ECHR and the legal status of the EU Charter of Fundamental Rights), the role of national parliaments and the eventual agreement between the Agency and the Council of Europe, along with the more general issue of relations between the Council of Europe and the European Union as a whole.

27. The Commission proposes that the appropriate legal basis for the Agency is to be found in Article 308 TEC, which allows for decisions intended to further the objectives of the Community. Amongst the objectives set out in Article 2 TEC, however, the only one of potential relevance to a human rights body is "equality between men and women."<sup>11</sup> This would seem to imply that the EU has no competence to establish an Agency along the lines proposed by the European Commission.

28. During the consultation procedure, the French Assemblée nationale noted the doubts expressed by the legal services of the EU Council as to use of Article 308 as the legal basis for the Agency. Similarly, the Czech Senate has reserved its final position on the validity of Article 308, awaiting publication of the report of the EU Council's legal services. Sub-committee E of the UK House of Lords EU Committee has noted that "[q]uestions remain as to the adequacy of Article 308" and, without reaching any conclusions on the matter, recommended that the UK government report to parliament on the issue once the Agency's final mandate has been determined.

29. As reflected by the Statute of the Council of Europe, the principles of human rights and the rule of law (along with that of democracy) are interdependent and indivisible. The Rapporteur considers that it would absolutely inappropriate for a human rights protection body to be established by a decision that was wholly or partially *ultra vires*. He considers that this matter should be given further careful consideration; in the interests of transparency, this should be accompanied by publication of the legal opinion referred to by the French and Czech parliaments.

30. The EU defines the principle of subsidiarity as being "intended to determine whether the Union can intervene or should let the Member States take action. In accordance with this principle, the Union can intervene in areas which do not fall within its exclusive competence only insofar as the objectives of the intended action cannot be sufficiently achieved by Member States but can rather, by reasons of the scale or effects of the proposed action, be better achieved at Union level."<sup>12</sup>

31. What is clearly missing from the EU definition of subsidiarity – and is of particular relevance to the issue of the Agency – is the relationship between EU action and the activities of other international organisations, notably those with an essentially inter-governmental structure such as the Council of Europe. The Dutch Senate's Joint Committee Application Subsidiarity has addressed this issue in its opinion concerning parliamentary procedure for European draft legislative acts. According to this view, in

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<sup>11</sup> This might be said to beg the question, what is the legal basis for the EUMC? The answer, however, is beyond the scope of this report.

<sup>12</sup> See [http://europa.eu.int/scadplus/constitution/subsidiarity\\_en.htm](http://europa.eu.int/scadplus/constitution/subsidiarity_en.htm).

determining whether an act at community level has clear advantages, it should be compared also to the acts of EU Member States acting in other international fora.

32. Protocol (No. 30) on the application of the principles of subsidiarity and proportionality, annexed in 1997 to the Treaty establishing the European Community (TEC), states that “[i]n exercising the powers conferred on it, each institution shall ensure that the principle of subsidiarity is complied with... For any proposed Community legislation, the reasons on which it is based shall be stated with a view to justifying its compliance with the principles of subsidiarity and proportionality; the reasons for concluding that a Community objective can be better achieved by the Community must be substantiated by qualitative or, wherever possible, quantitative indicators... For Community action to be justified, both aspects of the subsidiarity principle shall be met...”

33. In the Explanatory Memorandum to its proposal, the European Commission states that “the subsidiarity principle applies” and gives reasons. These reasons, however, relate only to a very general definition of the Agency’s activities: for instance, there is no mention of the possibility of country-specific monitoring or of the Agency’s role in non-EU member States that are members of the Council of Europe. Furthermore, they do not address the question of whether member States, acting in other international fora, can satisfactorily achieve some, or all, of the objectives proposed for the Agency.

34. Rule 34 of the European Parliament’s Rules of Procedure requires it to pay particular attention to whether a legislative act is in conformity with the principle of subsidiarity.<sup>13</sup> None of the draft reports or opinions by the five rapporteurs, however, makes any mention of subsidiarity.

35. The German Bundesrat has concluded that the proposed Agency should be rejected on account of its scope, by reference to the principle of subsidiarity.<sup>14</sup> The French Senat – considering that the existence of a deficiency in the protection and promotion of human rights that cannot be rectified by one of the numerous existing structures has not been established – has concluded that the utility of such an Agency had yet to be demonstrated and that its creation did not correspond to a priority of the EU.<sup>15</sup> The French Assemblée nationale came to the same conclusions, regretting that no prior evaluation of the necessity of creating such an Agency had been undertaken.<sup>16</sup>

36. In the Rapporteur’s opinion, there has not yet been sufficient consideration given to whether or not the European Commission’s proposals satisfy the test of subsidiarity. From the published documents, it appears that no meaningful consideration was given to the issue prior to publication of the Commission’s proposals.<sup>17</sup> The Commission did not prompt contributors to the consultation procedure to address it, nor was it meaningfully considered in either the independent preparatory study for the impact assessment report or the impact assessment report itself, prepared by the European Commission.

37. Against this background and given the serious concerns that have been raised elsewhere, it seems extraordinarily fortuitous that the preferred option identified by the independent consultants was subsequently and coincidentally found to satisfy the test of subsidiarity. Furthermore, should any of the more radical amendments being proposed by the European Parliament be adopted and subsequently find favour with the EU Council, the need for a more thorough investigation of this issue will become all the more acute.

38. The principle of proportionality, which requires that action taken by the Union, in terms of its form and content, does not exceed what is required to achieve the objectives set out in the relevant treaty, is also binding on EU institutions. As noted in paragraph 27 above, the objectives of the relevant treaty appear to have little relevance to the activities proposed for the Agency.

39. If most of the activities being proposed for the Agency do not correspond to activities set out in the relevant treaty, then it would seem to be impossible to conclude that the proposals satisfy the test of proportionality. Nevertheless, the accompanying Explanatory Memorandum concludes that the test is indeed satisfied, for two reasons. First, by building on the EUMC, the proposals will exploit existing expertise and

<sup>13</sup> Rule 34 refers also to the principle of proportionality (see paragraph 38ff below).

<sup>14</sup> Resolution 518/05.

<sup>15</sup> Contribution de la Délégation pour l’Union européenne du Sénat français.

<sup>16</sup> See Communication de M. Christian Philip, Délégation pour l’Union européenne.

<sup>17</sup> In the public hearing organised by the European Commission in Brussels on 25/1/05, Mr Francisco Fonseca Morillo, Director of Justice, Fundamental Rights and Citizenship stated that “due to subsidiarity, the Agency cannot replace national/transnational networks;” and in the European Commission’s “Public consultation analysis report,” it is stated that “[t]he EU’s subsidiarity requirement and the need for local input should guarantee the Agency’s legitimacy and efficiency.”

experience “and thus achieve the objectives in the most proportionate way.” To the Rapporteur, this conclusion refers more to the practical ease with which the Agency could be established and does not seem to be relevant to assessing application of the principle of proportionality. Second, the policy option identified by the independent consultants would give “good value for money.” Again, this does not seem to be relevant to whether the *scope* of the Agency is proportionate to the objectives of the relevant treaty, referring instead to financial concerns.

40. None of the five EP rapporteurs has addressed the principle of proportionality, despite the EP’s Rules of Procedure requiring particular attention to be paid to it.

41. Indeed, given the extremely limited reference to human rights objectives in the Treaty establishing the European Community, the increasingly ambitious scope of the various proposals and amendments for the Agency’s mandate would appear to be going further and further beyond what is required to achieve these objectives. The Rapporteur considers that further consideration should be given to whether the European Commission’s proposals genuinely satisfy the test of proportionality, as properly defined.

42. In July 2003, the Convention on the Future of Europe completed work on the draft Treaty establishing a Constitution for Europe, which was signed by the EU member and candidate countries in October 2004. In May and June 2005, however, the people of France and the Netherlands voted against ratification. All of the most significant decisions concerning creation of the Agency were taken during the optimistic period between completion of the draft Treaty and the negative French and Dutch referenda.

43. On the one hand, Mrs Gál, principal rapporteur for the EP LIBE committee, considers that “[i]n view of the actually suspended constitution-making process of the EU, ... it is the right moment for Europe to flag the protection and promotion of fundamental rights.” Whilst the Rapporteur would not disagree that the EU should make every effort to ensure that it respects human rights, Mrs Gál’s observation does not necessarily lead to the conclusion that this is the right moment to establish the proposed Agency.

44. On the other hand, blockage of the EU Constitutional Treaty means that the anticipated legal environment within which the Agency would have begun operating does not yet exist. Had the Treaty come into force, the EU’s Charter of Fundamental Rights, intended to be one of the Agency’s reference texts, would have become legally binding on the EU institutions and on member States when implementing EU law. Without legal force, the EU Charter must remain uncertain as a source of obligations and standards against which EU institutions and member States’ actions can be assessed.

45. The Treaty would also have permitted the EU to accomplish its long-stated goal of acceding to the ECHR, thus ensuring that all sources of political, legal and administrative authority over European citizens were bound by the same basic human rights standards and supervisory mechanisms. Without the Court having subsidiary jurisdiction over the human rights compliance of EU acts, the Agency will lack an ultimate reference point for ensuring that its own activities in the context of the EU are consistent with the wider European human rights protection system.

46. The UK parliament’s Joint Committee on Human Rights, in its contribution to the consultation procedure – made before the negative French and Dutch referenda – in principle welcomed the proposal to establish an agency. Nevertheless, it pointed out that “we are in a period in which it is not clear whether the significance of fundamental rights within the EU legal order will be radically changed by the coming into force of the new constitutional treaty.” Against this background, the Joint Committee concluded that “there is a case for the establishment of an agency, and consideration of its precise functions and powers, to be postponed until these matters have been clarified or decided.”

47. The Rapporteur finds the argument of the UK Joint Committee to be highly persuasive and recommends that further consideration be given to whether creation of the Agency should be postponed until the fate of the EU Constitutional Treaty (and its provisions on the EU Charter of Fundamental Rights and EU accession to the ECHR in particular) is finally determined.

48. As mentioned above, blockage of the EU Constitutional Treaty means that national parliaments have not yet acquired the formal role in scrutinising draft legislation that was proposed by the Convention on the Future of Europe and subsequently agreed to by the member States of the EU. It has already been noted that several national parliaments have already expressed reservations of varying gravity, even at the stage of the consultation procedure (when the proposals were less objectionable). These include the Dutch Senate, the German Bundesrat, the French Senat and Assemblée nationale, the Czech Senate, the Estonian, Latvian and Lithuanian parliaments and the Polish Sejm, and the UK Joint Committee on Human Rights. Sub-committee E of the UK House of Lords EU Committee has only very recently completed a report

on the Agency, and the German Bundestag is still in the process of giving proper consideration to the matter, having instituted a blocking procedure in the meantime.

49. The Rapporteur believes that, given the potential impact of the proposed Agency on wider European interests – most especially that of citizens, both within and without the EU, in maintaining the most effective human rights protection system – the issue is of sufficient importance for all EU member States' national parliaments to give specific consideration to it. Furthermore, the Rapporteur strongly urges the EU institutions not to proceed to any final decision on the establishment or mandate of the Agency until they have allowed all national parliaments the opportunity of expressing their opinion on the matter and have taken these opinions into account. Since the Agency is being justified by reference to the EU Constitutional Treaty, despite that treaty not yet having come into force, it seems only proper in this instance that other relevant intentions of the Treaty, which was agreed as a package of measures, should also be given effect.

50. The Rapporteur considers that it would be entirely inappropriate to conclude any cooperation agreement between a future Agency and the Council of Europe before the mandate of the Agency has been fully and finally determined. Without such clarification, it is impossible to assess the content of or procedures for possible cooperation. He strongly urges all parties to refrain from concluding any such agreement until the mandate has been finalised.

51. At the Warsaw Summit, the heads of state and government, far from criticising the Council of Europe and calling for it to be replaced or supplemented by new, separate bodies, reaffirmed its central role in promoting and protecting human rights. Against this background, they resolved to create a new framework for enhanced cooperation between the Council of Europe and the EU in areas of common concern, including, in particular, human rights.

52. This framework is currently under discussion in the Committee of Ministers, on the basis of a draft Memorandum of Understanding prepared by the EU. In early April, Prime Minister Juncker of Luxembourg will present his report on relations between the Council of Europe and the EU that was commissioned at the Warsaw Summit. The Assembly will also be contributing to this debate through a recommendation to be adopted during its April part-session.

53. These discussions are intended to create a new overall framework for cooperation between the Council of Europe and the EU, within which specific cooperation concerning the Agency will subsequently take place. The Rapporteur therefore proposes that consideration be given to postponing final decisions, both on the establishment or mandate of the Agency and on cooperation between the Agency and the Council of Europe, until there is agreement on the new overall framework. To clarify its context, the specific agreement concerning the Agency could then be annexed to the overall agreement.

*Reporting committee:* Committee on Legal Affairs and Human Rights

*Reference to committee:* Docs 10555 and 10556, References 3095 and 3096 of 6 June 2005

*Draft recommendation* unanimously adopted by the Committee on 11 April 2006

*Members of the Committee:* Mr Dick **Marty** (Chairperson), Mr Erik **Jurgens**, Mr Eduard Lintner, Mr Adrien **Severin** (Vice-Chairpersons), Mrs Birgitta **Almqvist**, Mr Athanasios **Alevras**, Mr Rafis Aliti, Mr Alexander **Arabadjiev**, Mr Miguel Arias (alternate: Mr Miguel **Barceló Pérez**), Mr Birgir Ármannsson, Mr José Luis Arnaut, Mr Abdülkadir Ateş, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise **Bemelmans-Vidéc**, Mr Giorgi Bokeria, Mrs Olena Bondarenko, Mr Erol Aslan Cebeci, Mrs Pia **Christmas-Møller**, Mr Boriss **Cilevičs**, Mr Domenico Contestabile, Mr András Csáky, Mrs Herta Däubler-Gmelin, Mr Marcello Dell'Utri, Mrs Lydie Err, Mr Jan **Ertsborn**, Mr Václav **Exner**, Mr Valeriy **Fedorov**, Mr György Frunda (alternate: Mr Tamás **Sándor**), Mr Jean-Charles **Gardetto**, Mr József Gedei, Mr Stef Goris (alternate: Mrs Christine **Defraigne**), Mr Valery **Grebennikov**, Mrs Gultakin **Hajiyeva**, Mrs Karin Hakl, Mr Nick Harvey (alternate: Mr Christopher **Chope**), Mr Michel **Hunault**, Mr Rafael Huseynov, Mrs Fatme Ilyaz, Mr Kastriot **Islami**, Mr Sergei **Ivanov**, Mr Tomáš Jirsa, Mr Antti Kaikkonen, Mr Uyriy Karmazin, Mr Karol Karski (alternate: Mrs Ewa **Tomazowska**, Mr Hans Kaufmann, Mr Nikolay Kovalev, Mr Jean-Pierre Kucheida (alternate: Mr Yves **Pozzo di Borgo**), Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine Leutheusser-Schnarrenberger, Mr Tony **Lloyd**, Mr Humfrey **Malins**, Mr Andrea Manzella, Mr Alberto Martins, Mr Tito Masi, Mr Andrew **McIntosh**, Mr Murat Mercan, Mr Philippe Monfils, Mr Philippe **Nachbar**, Mr Tomislav **Nikolić**, Ms Ann **Ormonde**, Mr Rino Piscitello, Mrs Maria Postoico, Mr Christos Pourgourides, Mr Jeffrey Pullicino Orlando, Mr Martin Raguž, Mr François Rochebloine (alternate: Mr Rudy **Salles**), Mr Armen **Rustamyan**, Mr Michael Spindelegger, Mrs Rodica Mihaela **Stănoiu**, Mr Christoph **Strasser**, Mr Petro Symonenko, Mr Vojtech **Tkáč**, Mr Øyvind Vaksdal, Mr Egidijus Vareikis, Mr Miltiadis Varvitsiotis, Mrs Renate **Wohlwend**, Mr Krzysztof Zaremba, Mr Vladimir Zhirinovskiy, Mr Zoran **Žižić**, Mr Miomir Žužul

N.B.: The names of the members who took part in the meeting are printed in **bold**

*Secretariat of the Committee:* Mr Drzemczewski, Mr Schirmer, Mrs Clamer, Ms Heurtin