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The Monitoring of Fundamental Rights in the Union as a contribution to the European legal space (II): The role of national actors – Ombudspersons and national human rights institutions.

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The Monitoring of Fundamental Rights in the Union as a Contribution to the European Legal Space (II): The Role of National Actors – National Human Rights Institutions and Ombudsmen

By Rick Lawson and Olivier de Schutter*

1. Introduction

In a famous quote Lord Denning compared the significance of EC law for the British legal order to an “incoming tide”: at first it may not be noticed but in the end it cannot be resisted. A reassuring aspect of this metaphor (at least for those who were attached to British sovereignty) is that high tide is usually followed by low tide. The good old days in which Britain *ruled* the waves may have been gone – but perhaps that maritime tradition subconsciously perspired in Lord Denning’s words: one should patiently endure the flood and wait for the ebb.

Similar nautical principles seem to apply to human rights and the rule of law. After the Second World War their high tide set in: principles were agreed upon, international supervisory organs were established, their case-law radically expanded the scope of human rights and emphasised *l’effet utile*: the need for practical and effective enjoyment of rights. And perhaps a low tide set in on the morning of 11 September 2001. The struggle against terrorism puts the right to privacy, the presumption of innocence and even the right to physical integrity under pressure. But whatever the long-term impact of ‘9-11’, it is clear that human rights do not have a fixed meaning: they constantly evolve in response to developments in society. But who directs this evolution? Who is responsible for determining the scope of human rights and for striking the ‘right’ balance between individual freedom and common good? In other words: who rules the rule of law?

For a long time these questions were not raised because the answer seemed so obvious. As the international legislator was largely absent (a few basic texts were adopted, but there was no continuous process of international law-making in the field of human rights), it was only logical to assume that the development of international human rights standards was a matter for the courts and tribunals. In deciding individual cases, they would gradually clarify the standards, the domestic legal orders would be adjusted where necessary, and that’s that. But this model is based on a number of assumptions which are not necessarily true: that all relevant issues are presented to the courts, that they are well-placed to decide the questions of principle that are submitted to them, that their decisions are meaningful, and so. Gradually it became clear that courts are necessary, but not in themselves sufficient, for the effective promotion and protection of human rights.

This may explain two developments that took place in the last two decades. On the one hand, new methods of international supervision were developed. To borrow two examples from the European context: the Committee for the Prevention of Torture (CPT), which should not remedy but prevent ill-treatment of detainees, and the Council of Europe’s Commissioner for Human Rights, who has a broad and flexible mandate in promoting human rights. What these initiatives have in common is that the new institutions are not passive (in the sense of being dependent on complaints) – on the contrary, their role is essentially pro-active. Another common feature is that they seek a dialogue with national authorities, which may (or may not) be more productive than the confrontation that is inherent in international litigation before a human rights court.

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On the other hand there was international recognition of the important role that national human rights institutions (NHRIs) can play. If a handful of NHRIs existed in 1990, today more than 60 have been formally recognised and another 40 bodies akin to NHRIs exist as well.

One could have wondered why there was a need for such institutions as long as the national legislator and judiciary take human rights seriously. Indeed, the whole international machinery of protection of human rights had always been conceived as subsidiary to the national systems safeguarding human rights. Every human rights treaty leaves to its Contracting Parties the task of securing the rights and liberties it enshrines. Yet even in a perfect democracy where the authorities are fully committed to human rights and the rule of law, there is scope for input by independent expertise and civil society; there is need for a national focal point to translate international standards into national law and practice; there is use for a systematic review of domestic human policies which is *not* complaint driven. This was acknowledged by the UN Member States in 1993, when they underlined at the World Conference on Human Rights ‘the important and constructive role’ played by NHRIs, ‘in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights’. In the same year the UN General Assembly approved the *Paris Principles on national institutions for the promotion and protection of human rights*. Other recommendations followed.

By now all EU Member States have established institutions for the promotion and protection of human rights. However, as will be seen below, the mandate, composition and functions of these bodies vary considerably from one State to another. There are full-fledged human rights commissions, specialised tribunals and equal treatment commissions. Some NHRIs receive individual complaints (and believe that without them, they would risk to be out of touch with reality); others are not competent to do so, or do not wish to spend scarce resources on the processing of cases, or prefer to avoid the tension with the administration that is inherent in dealing with individual complaints.

This is where the ombudsman becomes relevant. He too has an important role to play in the protection and promotion of human rights. On the one hand ombudsmen resemble courts as they handle individual complaints, but on the other hand they differ in that they are often empowered to carry out systematic investigations of their own motion. In addition their mandate and constitutional/political position allow them to maintain a degree of flexibility that courts lack.

In this connection it is interesting to note that the Council of Europe Commissioner for Human Rights has sought to establish close links both with NHRIs and with the national ombudsmen of the Member States. Every year the Commissioner organises round tables, one year bringing together NHRIs, the other year ombudsmen. As Commissioner Gil-Robles stated on the occasion of his departure, in April 2006,

I am convinced that national and regional Ombudsmen, National Human Rights Commissions and other specialised bodies such as Ombudsmen and Commissions for children and equality, have an extremely important place in the European human rights architecture.¹

Indeed it seems worthwhile, therefore, to take a closer look at the place of NHRIs and ombudsmen “in the European human rights architecture”. How do they contribute to respect for human rights at the national level, and – a very pertinent question for our REFGOV project – what is their significance for the promotion and protection of fundamental rights in the European Legal Space? The latter issue might be divided in two sub-questions: (a) to what extent are NHRIs and national ombudsmen actually confronted with the European Legal Space? and (b) which lessons could the EU draw from the experience of NHRIs and national ombudsmen?

The paper is structured as follows. Paragraph 2 will explore in more detail the starting point of this paper: the growing awareness that international complaints procedures, as

¹ *Final Report of Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights (October 1999 – March 2006)*, Strasbourg, 29 March 2006 (doc. CommDH(2006)17), para II.2.d.

established under the European Convention of Human Rights and the various UN treaties, suffer from some systemic weaknesses. This awareness resulted in attempts to improve existing procedures, but also in a search for alternative strategies to boost the promotion and protection of human rights.

Paragraph 3 addresses the role of the national institutions for the promotion and the protection of human rights in the EU Member States. Likewise paragraph 4 will focus on the role of the ombudsman. The latter section is based on a questionnaire sent in 2005 to all 'ombuds-institutions' in the EU Member States. Reports from 21 countries were received, and it turned out that virtually all ombudsmen pay considerable attention to the protection of human rights. It should perhaps be emphasised that no attempt will be made to measure or to quantify the actual impact or effectiveness of NHRIs and ombudsmen: to do so would require the collection of elaborate comparative data, as well as the identification of useful indicators.²

In paragraph 5 the position of national ombudsmen is reviewed from the perspective of EU law. It is argued that, as a matter of EU law, they are bound to apply fundamental rights, as general principles of EU law. One could go even further down the road and argue that ombudsmen should apply their rights *ex officio* and set aside domestic rules whenever these are incompatible with these rights. It remains to be seen if similar arguments could be made vis-à-vis NHRIs.

Finally paragraph 6 describes the position of ombudsmen in the current discussions concerning the Fundamental Rights Agency (FRA). Some conclusions can be found in paragraph 7.

2. The problem with courts

Traditionally international human rights lawyers concentrated on the international bill of rights and the way it was applied by the various supervisory bodies (the Human Rights Committee, European Court of Human Rights and so on). This focus is understandable: after all it was – and it still is today – through the international case-law that the substance of human rights takes shape.

However, there are three weaknesses inherent in international human rights litigation. We are not referring here to resentments against particular judgments and views, which indeed do occur every now and then. Political objections may amount, in extreme cases, to a refusal to comply with international decisions, and that is a serious matter that might undermine the authority and credibility of the court concerned. But that is rather a matter for politicians and diplomats (and, under the ECHR, the Committee of Ministers) to solve; it is not a problem that is inherent to the way in which international human rights courts function.

The first issue we have in mind, is a truism: international supervisory bodies are by definition dependent on the complaints that they receive. These complaints may relate to very serious issues or to mundane situations; there may actually be very few of them or there may be tens of thousands; they may be well-argued, or completely fail to pinpoint the crucial human rights issues; they may be part of a wide-spread and structural problem, or be the result of an isolated incident. There is very little that the international institutions can do about this. Of course they may decide to invest as little energy in frivolous complaints as possible – but the question is whether the remaining cases allow these bodies to identify the most serious problems in society, and to develop principles which may contribute to solving these problems. This point becomes very clear in areas where international human rights protection is most needed: for instance in Chechnya or Transnistria. Victims may be too frightened to seek a remedy; qualified legal assistance may not be available; there may be no independent and impartial courts; if a complaint reaches Strasbourg or Geneva it may be almost impossible to establish the facts and to determine who is responsible for what. Or, to take an example from a completely different context: in a recent interview a former judge in the European Court

² On the latter issue, see International Council on Human Rights Policy, *Assessing the Effectiveness of National Human Rights Institutions* (Geneva 2005), available at www.ichrp.org.

of Human Rights expressed her surprise that during her term of office no complaints had been brought about the health care system in her country.³ The shortage of capacity in hospitals sometimes results in life-threatening situations, and one could argue that this raises serious issues under the right to life. Yet, apparently nobody had thought of the possibility to challenge the situation in Strasbourg.

If this is a problem of *input*, there is also a problem of *output*. International supervisory bodies are inclined to do what judges have always done: to confine their attention to the case at hand and to avoid general statements which, when taken out of context, might lead to unforeseen and even undesirable results. In cases involving socio-economic policies, national security issues or moral controversies, the courts tend to leave a wide margin of appreciation to the national authorities, which results essentially in a low level of protection for the individual. It is understandable that courts want to avoid the reproach of a *gouvernement des juges*, but the other side of the coin is that it is often difficult to draw lessons from a particular decision. The *Procola* case, for instance, made clear that the accumulation of functions of the Luxembourg *Conseil d'Etat* was incompatible with the ECHR, but the judgment was extremely vague. This vagueness led to protracted discussions in the Netherlands on the constitutional position of the Dutch *Conseil d'Etat*. On more than one occasion the Strasbourg Court was criticised for being so Delphic. Ironically this becomes a problem only once an international institution has been genuinely accepted by the participating States: they no longer question its legitimacy but seek clarity and guidance so as to prevent future violations being found.

There is another output problem, one that concerns the individual applicant. International courts are not very well placed to ensure *restitutio in integrum* once a violation has been found. A violation of the right to a fair trial may be found, but that doesn't tell us whether the applicant was guilty or not; nor does it guarantee him a release from prison. More often than not an applicant who wins his case, after years of litigation, is told that "the finding of a violation constitutes just satisfaction for any moral damage suffered". In addition individuals in identical situations remain unaffected by the finding of a violation in one case. Just as courts have to wait and see what kind of cases are thrown in their lap (the input problem), they can only throw the applicants off their lap after examination of their complaint. Although the practice differs somewhat from one international supervisory body to another, the courts and committees tend to have limited instruments at their disposal to follow-up on what happens to the applicant who has won his case.

Thirdly, and finally, the international complaints procedures have a problem of what may be called '*throughput*': the way in which complaints are progressed. It is inherent in international human rights litigation that individual rights must be balanced against the general interest. Whether one likes it or not, judgments issued in individual cases establish precedents, albeit to a greater or lesser extent, and often a decision in one case will be relied upon in later cases. Here a problem of information manifests itself. A proper balancing of interests can only take place if the judge is fully aware of the reasons underlying the adoption of impugned legislation, the interests of third parties and so on. One might of course expect the defending State to advance this information. In practice, however, it is unlikely that the courts and tribunals are always fully informed – for instance because a government fails to make a convincing case (especially if legislation was adopted by a previous government) or to give an adequate account of the interests of third parties. In addition judgments may affect other States which were not involved in the proceedings at all. The possibilities to collect evidence or to engage in comparative legal research *ex officio* are extremely limited: it does not take a lot of exaggeration to state that there is not a single international supervisory body that has an adequate research department. Even the Strasbourg Court, which beyond any doubt is the most sophisticated international human rights court, depends on the submissions of parties and interveners if wants to identify the existence of common standards throughout Europe. To some extent NGOs could make up for this problem by

³ R.A. Lawson, "Terugblik op Straatsburg – Interview met mr W. Thomassen", in *55 jaar EVRM* (2006), p. 22.

supplying the court with information. But there are only few NGOs that tend to intervene in human rights cases and it might be hard to reconcile with the independence and impartiality of the courts if they were to intensify their links with civil society in the member States.

In sum then, it is submitted that international human rights courts do not necessarily get the 'right' cases, do not necessarily have all relevant information at their disposal when deliberating, and do not always deliver decisions which allow the States concerned to draw the relevant lessons. These 'inherent systemic flaws' are further aggravated by a problem that is not inherent to international human rights litigation, but nevertheless very real: the enormous case-load. The problems of the European Court of Human Rights are perhaps best-known since they received ample political and scholarly attention, but the UN bodies face similar problems. As a result of the workload, it is unavoidable that important cases (important because of the individual interests at stake, or because of the precedential value) have to wait for years before they are dealt with; that there is less time available for background research; that there is less time available for the drafting of balanced judgments that may provide guidance to the entire legal community.

For sure all this is not meant as criticism on the European Court of Human Rights or any other international supervisory body: year after year a remarkable effort is made to deliver large numbers of high-quality decisions under very difficult circumstances. The above analysis merely purports to explain why there is a need for additional forces at the front, and what the gaps are that these forces should seek to fill. Ideally, institutions such as NHRIs and ombudsmen should systematically monitor their societies and liaise with civil society in order to identify problems which may not be brought before the courts; they should seek to remedy problems, especially if they are of a structural nature; they should review existing government policies – and be involved in *ex ante* impact assessment – from a human rights point of view; they should serve as 'bridgeheads' for the international supervisory bodies by disseminating and analysing their decisions (not just decisions that involve their own country but any decision that addresses issues that are potentially relevant to their country) and by ensuring that decisions are well-implemented; they should collect data and make these available to international supervisory bodies; they should liaise with one another and exchange information. In these ways, fruitful complementarity to the international supervisory bodies may be achieved.

3. National institutions for the promotion and protection of human rights

3.1 The general framework

In the Vienna Declaration and Programme of Action of 25 June 1993, the World Conference on Human Rights reaffirmed 'the important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights'. It also encouraged 'the establishment and strengthening of national institutions, having regard to the 'Principles relating to the status of national institutions' and recognizing that it is the right of each State to choose the framework which is best suited to its particular needs at the national level'.⁴

Indeed a number of the EU Member States have established NHRIs, as encouraged by this passage of the Vienna Declaration and Programme of Action. These institutions have been established in accordance with a set of guidelines based primarily on the *Paris Principles on national institutions for the promotion and protection of human rights*, which were approved by the United Nations General Assembly in 1993.⁵ Other texts however

⁴ Vienna Declaration and Programme of Action of 25 June 1993, UN doc. A/CONF.157/23, at para. 36.

⁵ UN doc. A/RES/48/134, adopted by the 85th plenary meeting of the UN General Assembly, 'National institutions for the promotion and protection of human rights'. These principles were initially approved by

should be mentioned, in particular *Recommendation No R(97)14 on the establishment of independent national institutions for the promotion and protection of human rights*, adopted on 30 September 1997 by of the Committee of Ministers of the Council of Europe; General Comment No. 10 of the Committee on Economic, Social and Cultural Rights of 14 December 1998: *The role of national human rights institutions in the protection of economic, social and cultural rights*⁶; and the *Copenhagen Declaration*, adopted on 13 April 2002 by the Sixth International Conference for National Institutions for the Promotion and Protection of Human Rights, held in Copenhagen and Lund.⁷ These documents have been complemented by compendiums of best practices for the establishment of such institutions.⁸

The 1993 Paris Principles may be read as defining the following criteria for national institutions for the promotion and protection of human rights:

1. Mandate

A mandate 'clearly set forth in a constitutional or legislative text, specifying its composition and its sphere of competence' (competences and responsibilities, para. 2)

A mandate including the submission to the Government, Parliament and any other competent body, 'on an advisory basis either at the request of the authorities concerned or through the exercise of its power to hear a matter without higher referral, opinions, recommendations, proposals and reports on any matters concerning the promotion and protection of human rights', including on legislative or administrative provisions in force or proposed, and any situation of violation of human rights which the institution decides to take up (competences and responsibilities, para. 3, a)⁹

The national institution should have the possibility to 'freely consider any questions falling within its competence, whether they are submitted by the Government or taken up by it without referral to a higher authority, on the proposal of its members or of any petitioner', and to 'hear any person and obtain any information and any documents necessary for assessing situations falling within its competence' (methods of operation)

2. Composition and membership

A composition of the national institution 'in accordance with a procedure which affords all necessary guarantees to ensure the pluralist representation of the social forces (of civilian society) involved in the promotion and protection of human rights', particularly by effective cooperation to be established with, or through the presence of, representatives of non-governmental organizations, trends in philosophical or religious thought, experts, parliament; if delegates from the Executive are included, they should participate in the deliberations only in an advisory capacity (composition and guarantees of independence and pluralism, para. 1).

'In order to ensure a stable mandate for the members of the national institution, without which there can be no real independence, their appointment shall be effected by an official act which shall establish the specific duration of the mandate. This mandate may be renewable, provided that the pluralism of the institution's membership is ensured' (composition and guarantees of independence and pluralism, para. 3).

3. Infrastructure

the Commission on Human Rights in resolution 1992/54 of 3 March 1992. They are further explained in *National human rights institutions: a handbook on the establishment and strengthening of national institutions for the promotion and protection of human rights* (New York/Geneva, 1995), see: <http://www.ohchr.org/english/about/publications/training.htm>.

⁶ UN Doc E/C.12/1998/25.

⁷ Available at: <http://www.nhri.net/SixthConference.htm>

⁸ See, apart from the United Nations *Handbook* referred to above: Council of Europe, *Non-judicial means for the protection of human rights at the national level* (Strasbourg, 1998); Commonwealth Secretariat, *National Human Rights Institutions - Best Practice* (London, 2001). See also B. Lindsnaes a.o. (eds.) *National Human Rights Institutions – Articles and Working Papers* (Danish Centre for Human Rights, 2000).

⁹ The Paris Principles specify that a national institution 'may be authorized to hear and consider complaints and petitions concerning individual situations'; additional principles relate to that function. However, this is not necessarily to be part of the mandate of a national institution.

'The national institution shall have an infrastructure which is suited to the smooth conduct of its activities, in particular adequate funding. The purpose of this funding should be to enable it to have its own staff and premises, in order to be independent of the Government and not be subject to financial control which might affect its independence' (composition and guarantees of independence and pluralism, para. 2).

3.2 *Cooperation between the national institutions for the promotion and protection of human rights at European level*

The European Coordinating Group of NHRIs

On the European continent, NHRIs have been cooperating and exchanging experiences through different means. A European Coordinating Group was established, as a network of NHRIs holding biannual meetings in order to 'offer a space for exchange and cooperation among its members [and to] promote respect for and protection of human rights across the continent and in international forums'.¹⁰ It is currently chaired by the French National Consultative Commission for Human Rights. It held its Fifth Meeting in Berlin on 26 and 27 November 2004.

The role of the Council of Europe and its Commissioner for Human Rights

This cooperation between European NHRIs has been encouraged by the Council of Europe. Recommendation No R(97)14, cited above, encourages the Council of Europe Member States to 'consider, taking account of the specific requirements of each member State, the possibility of establishing effective national human rights institutions, in particular human rights commissions which are pluralist in their membership, ombudsmen or comparable institutions'. It also invites the governments to 'promote co-operation, in particular through exchange of information and experience, between national human rights institutions and between them and the Council of Europe'.

By Resolution 97(11) which it adopted at the same meeting,¹¹ the Committee of Ministers of the Council of Europe decided 'to institute, in the framework of the Council of Europe, regular meetings with national human rights institutions of member states to exchange views and experience on the promotion and protection of human rights in their areas of competence'. The Resolution also invites the Secretary General of the Council of Europe to 'ensure that national human rights institutions are informed of relevant activities concerning the promotion and protection of human rights in the framework of the Council of Europe'. Indeed, one of the main functions of national institutions for the promotion and protection of human rights – as it also appears clearly from the Paris Principles adopted in 1993 by the United Nations General Assembly¹² – is to contribute to the implementation by the State concerned of international human rights law: thus, the Council of Europe naturally has considered that the NHRIs of its Member States should constitute the channel not only of international human rights law, but also of the standards of the Council of Europe.

After the Commissioner for Human Rights of the Council of Europe was established in 1999 – one of the missions of whom it is to 'facilitate the activities of national ombudsmen or

¹⁰ For a description of the activities of the European Coordinating Group of national institutions for the promotion and protection of human rights, see the communication submitted to the United Nations Commission on Human Rights, UN doc. E/CN.4/2005/NI/2 (30 March 2005).

¹¹ Resolution 97(11) on co-operation between national human rights institutions of the Member States and between them and the Council of Europe, adopted by the Committee of Ministers on 30 September 1997, at the 602nd meeting of the Ministers' Deputies.

¹² Under the Paris Principles, NHRIs should in particular 'promote and ensure the harmonization of national legislation regulations and practices with the international human rights instruments to which the State is a party, and their effective implementation'; and 'encourage ratification of the above-mentioned instruments or accession to those instruments, and to ensure their implementation'.

similar institutions in the field of human rights'¹³ –, an agreement between the Commissioner's Office and the Presidency of the European Co-ordinating Committee of NHRIs led to the establishment of a Liaison Office ensuring that the co-operation between the Office of the Commissioner for Human Rights and the European NHRIs continue on a regular basis. Biannual meetings have been held between the Office of the Commissioner for Human Rights and European NHRIs. The most recent of these biannual events, called *European Roundtables of National Human Rights Institutions*, was held in Berlin on 25-26 November 2004. The participants there

'called on the Council of Europe Commissioner for Human Rights to pursue his efforts to assist member States in setting up truly independent NHRIs pursuant to the Paris Principles and to intensify his good co-operation with them, especially by convening round table meetings at yearly (and not bi-annual) intervals and by facilitating engagement among NHRIs and Council of Europe fora in their field of competence, as is foreseen in the agreement on the establishment of the Liaison Office between the Commissioner's Office and the Presidency of the European Co-ordinating Committee'.¹⁴

3.3 *The national institutions for the promotion and protection of human rights in the EU Member States*

The EU Network of Independent Experts on Fundamental Rights prepared a comparative table of NHRIs within the EU Member States in March 2004.¹⁵ The *International Coordination Committee of national institutions for the promotion and protection of human rights*, which was established in 1993 and consists of representatives of national institutions, also constitutes a useful source of information on NHRIs. The main observations which this calls for are the following.

The situation in the Member States with regards to the establishment of NHRIs remains varied. The Vienna World Conference on Human Rights recognized that 'it is the right of each State to choose the framework which is best suited to its particular needs at the national level'. However, the variations between the Member States of the EU concern not only the precise modalities of implementing the Paris Principles according to different national contexts; they concern the establishment of NHRIs itself.

To date 13 of the 25 Member States have established a NHRI. These States are Cyprus, the Czech Republic, Denmark, France, Germany, Greece, Ireland, Latvia, Luxembourg, Poland, Portugal, Sweden and Spain. All of these institutions with the exceptions of three (Cyprus, the Czech Republic and Latvia) have been granted 'A' status by the International Co-ordinating Committee of National Institutions for the Promotion and Protection of Human Rights, which implies that they are considered to conform fully with the Paris Principles.¹⁶ These institutions are: for Cyprus, the *National Organisation for the Protection of Human Rights* (1998); for the Czech Republic, the *Ombudsman Office* (1999); for Denmark, the *Danish Institute for the Protection of Human Rights* (2002); for France, the *Commission nationale consultative des droits de l'homme* (1984); for Germany, the *German Institute for Human Rights* (2001); for Greece, the *Greek National Commission for Human Rights* (1998); for Ireland, the *Irish Human Rights Commission* (2001); for Latvia, the

¹³ Article 3, d), of the terms of reference of the mandate of the Council of Europe Commissioner for Human Rights, as adopted by Resolution (99)50 on the Council of Europe Commissioner for Human Rights, adopted by the Committee of Ministers on 7 May 1999, at its 104th Session, Budapest. The Commissioner for Human Rights also is to 'provide advice and information on the protection of human rights and prevention of human rights violations. When dealing with the public, the Commissioner shall, wherever possible, make use of and co-operate with human rights structures in the member States. Where such structures do not exist, the Commissioner will encourage their establishment'.

¹⁴ See Council of Europe doc. CommDH/NHRI(2004)2.

¹⁵ Opinion n° 1-2004. The documents of the Network may be consulted on: http://www.europa.eu.int/comm/justice_home/cfr_cdf/index_en.htm

¹⁶ <http://www.nhri.net/ICCMembers.htm>

National Human Rights Office (1995); for Luxembourg, the *Consultative Commission on Human Rights* (2000); for Poland, the *Commissioner for Civil Rights Protection* (1999); for Portugal, the *Provedar de Justiça* (1999); for Spain, the Ombudsman (*Defensor del Pueblo*) (2000); for Sweden, the *Ombudsman against Ethnic Discrimination* (1999).

However, it is sometimes difficult to assess precisely whether the institution which is set up fully complies with the Paris Principles. For instance, although it has been granted 'A' status, the Swedish Ombudsman against Ethnic Discrimination has a mandate limited to combating ethnic discrimination,¹⁷ which constitutes a more limited mandate than that recommended under the Paris Principles. As to the National Organisation for the Protection of Human Rights established in Cyprus, although it complies essentially with the Paris Principles, its funding remains problematic.¹⁸ Certain institutions fulfil in the Member States functions which resemble those of a NHRI, although they may not present all the characteristics of such institutions. The most significant examples, explained in Appendix II, are those of Austria (Austrian Human Rights Advisory Board, *Menschenrechtsbeirat*), of Estonia (Legal Chancellor), of Finland (Advisory Board on International Human Rights), and of Slovakia (Slovak Centre for Human Rights).

As will be described in more detail in the next section, ombudsman institutions have been created in a number of Member States following *Recommendation No. R(85)13 on the Institution of the Ombudsman*. Indeed this Recommendation, which was adopted in 1985, encourages the Member States of the Council of Europe to

consider empowering the Ombudsman, where this is not already the case, to give particular consideration, within his general competence, to the human rights matters under his scrutiny and, if not incompatible with national legislation, to initiate investigations and to give opinions when questions of human rights are involved.

This to a certain extent aligns the mandate of the ombudsman with those normally entrusted to NHRIs. In Slovenia for instance, the Ombudsman is entrusted by the Constitution with the protection of human rights and basic freedoms in matters involving state bodies, local government bodies and statutory authorities.¹⁹ The Ombudsman may, in particular, submit initiatives for amendments of statutes and other legal acts to the National Assembly and the Government²⁰; he may discuss broader questions important for the protection of human rights and basic freedoms as well as for the legal protection of citizens in the Republic of Slovenia.²¹

A number of EU Member States have no NHRI, nor any equivalent institution such as an Ombudsman institution whose mandate extends to human rights matters and to proactive action, through the issuance of opinions or recommendations. These States are Belgium – despite a statement in favour of the establishment of a NHRI in a governmental declaration of July 2003 –, Finland,²² Hungary,²³ Italy, Lithuania, Malta, and the Netherlands. In the latter country an initiative to establish a NHRI is underway.

¹⁷ There are other Ombudspersons in Sweden, which in total has six official such institutions: the Office of the Parliamentary Ombudsman (JO), Consumer Ombudsman (KO), Office of the Equal Opportunities Ombudsman (JämO), Ombudsman against Ethnic Discrimination (DO), Children's Ombudsman (BO), Office of the disability Ombudsman and Ombudsman against Sexual Orientation Discrimination (HomO). These ombudsmen however deal with the complaints they receive; their functions may not be assimilated to those normally performed by NHRIs.

¹⁸ The conditions under which this institution currently is working does not adequately ensure that it can remain independent. The organisation employs only one person, whose salary is arranged directly from the Government through the amount provided for the Law Commissioner Office.

¹⁹ Art. 159.1 of the Constitution, Official Gazette RS, Nos. 33/91, 42/97, 66/00 and 24/03.

²⁰ Art. 45.1 of the Constitutional Court Act, Official Gazette RS, No. 15/94.

²¹ Art. 9.2 of the Ombudsman Act, Official Gazette RS, Nos. 71/93, 15/94 and 56/02.

²² See however the description above.

²³ However, as a result of the amendment of the Constitution in 1989 and the 1993 Act on the Parliamentary Commissioners, four commissioners exist: the Parliamentary Commissioner for Human Rights, the Deputy Ombudsman, the Parliamentary Commissioner for Data Protection and Freedom of

The situation of the United Kingdom is somewhat specific insofar as there exists hitherto a NHRI for one part of the country (Northern Ireland Human Rights Commission) while there are three other national institutions which focus only on discrimination (Commission for Racial Equality, Disability Rights Commission, and Equal Opportunities Commission). However, the situation in the United Kingdom is evolving, as the government has agreed to the proposal of the Parliament's Joint Committee on Human Rights that a Commission for Equalities and Human Rights should be established, to take over the work of the three equality bodies, while also focusing on the three other equality strands (age, religion and belief and sexual orientation) and taking responsibility for the promotional agenda which underpins the Human Rights Act. The Government published a White Paper concerning the proposed Commission for Equality and Human Rights (CEHR) on 12 May 2004, describing the role, functions and powers of the new proposed new Commission.²⁴ Following a consultation period, the Government published a response on 18 November 2004, including certain changes to its initial proposal. The Government intends to appoint the Chair and Commissioners by 2006 so that the body will be up and running in 2007. A process of phased entry is anticipated for the existing Commissions, with all of them being incorporated by 2008/09.

Variations exist, too, within the 13 Member States in which a national institution essentially compliant with the Paris Principles exists.²⁵ Of particular interest are the composition of these institutions, their independence, and the powers which they are recognized. Appendix I to this note summarizes these different dimensions in the form of a table.

How to respond to the many differences between NHRIs? The prevailing view is that one should not try to impose a uniform model, although differences ought to relate rather to the shape of the institution than to the hard core of the Paris Principles. Or, as the International Council on Human Rights Policy phrased it: "There is no single model of national human rights institution for the world. There are, however, principles of independence, integrity and good performance which must be kept in view".²⁶ In addition, co-ordination may be needed. Commissioner Gil-Robles recently underlined the need to ensure complementarity if different institutions co-exist:

There is a wide variety of institutions to be found in Council of Europe member States and it seems to me that there need be no fixed model for each State to adopt. The national context and institutional framework varies from country and it is appropriate that national institutions should reflect this diversity. Indeed, the distinction between national Ombudsmen and National Human Rights Institutions is often hard to draw. This is not, in itself, problematic, but care must be taken to ensure that their respective competences are well articulated when both exist in the same country. Further reflection in this area may well prove necessary in the future as both kinds of institution continue to develop at a rapid rate. For my part, I am certain that the two types of institution can happily co-exist and that both should be encouraged.²⁷

This brings us to the role of ombudsman institutions. To what extent do they engage in the promotion and protection of human rights?

Information, the Parliamentary Commissioner for Ethnic Minorities. These Parliamentary Commissioners were elected by the required two-thirds majority of the Hungarian Parliament on 30 June 1995.

²⁴ *Fairness for All: A New Commission for Equality and Human Rights* (Cm 6185).

²⁵ This comprises the 13 NHRIs having been accredited with 'A' status by the ICC, despite the reservations made above.

²⁶ International Council on Human Rights Policy, *Performance and Legitimacy: National Human Rights Institutions* (Geneva 2004), p. xiv, available at www.ichrp.org.

²⁷ Final Report of Mr Alvaro Gil-Robles, Council of Europe Commissioner for Human Rights (October 1999 – March 2006), Strasbourg, 29 March 2006 (doc. CommDH(2006)17), para III.4.

4. The Ombudsman and Human Rights

4.1 General remarks

The importance of national ombudsmen for the protection of human rights and the promotion of the rule of law has been widely acknowledged, both in academic writing, in statements by ombudsmen themselves and in statements by international bodies such as the Council of Europe Parliamentary Assembly.²⁸ But how relevant are fundamental rights for the actual practice of the ombudsmen? With that question in mind, a number of questions concerning human rights was therefore included in a questionnaire that was sent to all ombudsman institutions in the EU and EEA Member States in 2005.²⁹ Reports from 21 countries were received.³⁰

Before we engage in an analysis of the ombudsmen's role in protecting human rights, two preliminary points must be made. The first one is brief and concerns the co-operation between ombudsmen. Like the NHRIs, they have biannual meetings too: those convened by the Commissioner for Human Rights of the Council of Europe, and – as far as the ombudsmen of the EU Member States are concerned – those within the framework of the Network of European Ombudsman. During the most recent meeting of the latter Network, in 2005, the present European Ombudsman Mr Diamandouros announced his intention to strengthen the structure.³¹

The second preliminary remark also relates to a feature that ombudsmen hold in common with the NHRIs: diversity. And, as is the case with NHRIs, this diversity is perceived as an asset, not a problem. As Mr Diamandouros observed on the same occasion

Naturally there is great variety in how our different offices are organised, in how they work and in such matters as, for example, the division of labour between ombudsmen and the courts. This diversity results from one of the keys to the success of the ombudsman institution - its flexibility - which enables it and us to adapt prudently to different constitutional, legal, cultural and political environments.

The facts illustrate how different the ombudsman offices are. For instance, the size of their staff varies from 8 (in the case of Luxembourg) to 240 (Poland). There is no strong correlation with the size of the country: the German *Petitionsausschuss* has only 80 staff members. Of four countries that have a population of about 10 million, Belgium has 41 staff members, the Czech Republic 86, Greece 176 and Portugal 116.

Likewise, the size of the staff does not seem to be tied to the number of complaints received: the Austrian *Volksanwaltschaft* has a staff of 57 to handle 15,787 complaints (in 2003), whereas their 55 Finnish colleagues dealt with 2,504 complaints. Based on the figures of 2003, the average staff member of a national ombudsman office may expect to receive 106 complaints per year. But in practice the case load differs greatly, from roughly 40 cases per staff member per year (e.g. Estonia, Finland, Lithuania, Portugal) to well over 200 in the case of Austria, Germany and Poland. The brave staff of the *Médiateur de la Vallée d'Aoste* had to deal with 3,000 complaints – which meant 500 cases per staff member!

²⁸ See PACE Recommendation 1615 (2003), *The institution of ombudsman*.

²⁹ The questionnaire was sent in preparation of the Fifth Seminar of the National Ombudsmen of EU Member States (The Hague, 12-13 September 2005), where the first author served as General Rapporteur. Ombudsmen from the EEA Member States were also invited.

³⁰ In alphabetical order: Austria, Belgium, Cyprus, Czech Republic, Denmark, Estonia, Finland, Germany, Greece, Hungary, Italy (Region autonome Vallée d'Aoste), Lithuania, Luxembourg, the Netherlands, Norway, Poland, Portugal, Slovak Republic, Spain, Sweden, the UK.

³¹ Keynote Speech by the European Ombudsman, Professor P. Nikiforos Diamandouros, at the Fifth Seminar of the National Ombudsmen of the EU Member States., The Hague, 12 September 2005 (at www.euro-ombudsman.eu.int).

Of course not every complaint will receive the same amount of attention; in many cases it may be clear from the outset that the ombudsman lacks competence or that the complaint is manifestly ill-founded. But also if we were to limit our comparison to in-depth inquiries, there is no clear relationship between the size of the staff and the number of inquiries carried out.

A last statistical note relates to the number of complaints per country. As was to be expected, the absolute numbers vary enormously – from 1,203 (Luxembourg) to 55,286 (Poland) in 2003. But also if we take into account the size of the population, the differences are considerable. In Luxembourg, one out of every 416 inhabitants lodged a complaint in 2003; in Belgium one of every 1,809 inhabitants, in Germany only one per 5,310 inhabitants. The average pattern is that every year one out of every 2,995 inhabitants will lodge a complaint. Since not all complaints result in an inquiry, the average ombudsman will conduct one inquiry per 6,335 inhabitants (in Cyprus: one inquiry per 504 inhabitants, in the Czech Republic: one per 17,960).

4.2 *Human rights – but a domestic orientation*

Not surprisingly virtually all ombudsmen indicated that they pay considerable attention to the protection of human rights – even if in some cases their mandate was originally limited to the more classical function of controlling compliance with the principles of good administration.³² In this connection it may be observed that these principles are increasingly ‘aligned’ with human rights standards. In 2005, for instance, the Dutch Ombudsman issued a compact set of standards of proper conduct of public authorities. This *behoorlijkheidswijzer* contains 23 rules of good governance that the public administration should take into account. Interestingly the first six rules all relate to fundamental rights: (1) the prohibition of discrimination, (2) secrecy of communications, (3) right to respect for the home, (4) privacy, (5) prohibition of arbitrary deprivation of liberty, and (6) other human rights.

But the question is: which human rights standards does one apply? Hence the ombudsmen were asked how often they referred to three distinct sources of fundamental rights: national constitutions, the European Convention of Human Rights (ECHR) and EU law. The responses indicated a very interesting pattern. Generally speaking, references to national constitutions are “very frequent” or “frequent”; references to the ECHR occur “frequently” or “occasionally”; references to fundamental rights as guaranteed by EU law only “occasionally” or “rarely”. It is clear that the ombudsmen tend to have a domestic orientation in this respect; EU law as a source of fundamental rights protection is almost absent. We will return to this issue in para. 5 below.

One question focussed on the Charter of Fundamental Rights. This question – which we can say with the benefit of hindsight was drafted in an overly optimistic mood – recalled that “when” the Treaty establishing a Constitution for Europe enters into force, “the Charter will become binding”. The ombudsmen were asked if this would make a difference for their own practice. The response was very mixed. A small majority of ombudsmen (11) thought that it would be “more useful” to apply to the ombudsman, one held the opposite view (“less useful”) and to seven ombudsmen it made no difference.

It is difficult to describe in a few words how ombudsmen contribute in actual fact to the promotion and protection of human rights. For one, the annual reports of the EU Network of Independent Experts on Fundamental Rights reflect the involvement of ombudsmen in human rights matters. The Dutch Ombudsman, for instance, often investigates cases where physical force was applied by law enforcement officials; in another context he has repeatedly criticised the malfunctioning of the immigration authorities. The questionnaire gave a similar

³² This is the case, for instance, of the *Seimas* (Parliamentary) Ombudsmen’s Office established in 1994 in Lithuania. There are five *Seimas* (Parliamentary) Ombudsmen: two are entrusted with the investigation of the activities of State institutions; three investigate the activities of local government officers. They receive complaints relating to abuse of office by state and local authorities.

impression, as may be illustrated by the ombudsmen's practice in the area of discrimination. Although a number of ombudsmen do not deal with discrimination cases because specialised bodies exist, many ombudsmen reported that they often deal with several categories of discrimination. The Estonian Chancellor of Justice is "frequently" confronted with cases involving discrimination on disability; the Dutch Ombudsman "frequently" handles racial discrimination cases. The Luxembourg *Médiateur* mentioned an interesting case of a Belgian homosexual couple who had married in Belgium; one of them had been working in Luxembourg for ten years, but his husband did not get a residence permit because Luxembourg does not recognise same-sex marriages. The Hungarian Parliamentary Commissioner noted that so far no *EU related* discrimination cases have been received, although this institution does deal with cases involving discrimination on, for instance, disability or nationality. Of course Hungary only joined the EU recently. The Cypriot Commissioner for Administration mentioned cases involving alleged discrimination on the grounds of sex or sexual orientation.

4.3 *Ex officio investigations*

It was asserted in the introduction to this paper that ombudsmen differ from courts in that they are often empowered to carry out investigations of their own motion. Indeed, the questionnaire showed that practically all³³ ombudsmen do have the power to start investigations *proprio motu*, that is investigations in individual cases or situations where no formal complaint had been brought, or investigations specifically intended to examine the possible existence of structural problems. This is, at least potentially, a powerful tool to protect and promote human rights.

Indeed many ombudsmen indicated that they have carried out relevant own-initiative inquiries. The Cypriot Commissioner for Administration, the Parliamentary Ombudsman of Finland, the Netherlands Ombudsman and the *Médiateur de la Vallée d'Aoste* had all carried out investigations into the treatment of aliens. In addition the Cypriot Commissioner had investigated the position of mentally ill prisoners and the living conditions of Roma. The Dutch Ombudsman had also reviewed, in 1998, the unlawfulness of public order measures relating to EU nationals during the European Council of Amsterdam. The Polish Commissioner for Civil Rights had dealt, *inter alia*, with the rights of disabled people.

As to policy areas that might usefully be the subject of *future* investigations, social security and medical assistance were mentioned repeatedly (Czech Republic, Estonia, Portugal), as well immigration issues (Finland, the Netherlands, Portugal, Sweden). Denmark mentioned *inter alia* personal data processing, social assistance to nationals abroad or foreigners residing in Denmark, and access to environmental information. The Parliamentary Ombudsman of Finland is currently investigating domestic violence and deportation of illegal immigrants. The Greek ombudsman: children's rights, human rights and environmental issues. The Norwegian Ombudsman is "particularly aware" of discrimination and restrictions relating to the free movement (persons, goods, services, capital), in the form of rules of taxation, customs and excise, as well as conditions to acquire land and property. The Polish Commissioner for Civil Rights is of the opinion that an investigation might be useful in the areas of discrimination and consumer protection.

4.4 *Approach to human rights matters*

Some cases cited by ombudsmen suggest that they may sometimes obtain better results, from the perspective of the individual, than courts. An interesting illustration was given by the Luxembourg *Médiateur*, Mr M. Fischbach (coincidentally a former judge of the European Court of Human Rights). According to EU rules, Mr Fischbach explained, persons originating from

³³ The Luxembourg *Médiateur* is an exception: he is not authorised to inquire on his own initiative.

countries outside the EU who are married to migrating EU citizens working and living in Luxembourg, may also work there without having to request a work license. But a person with the same background who is married to Luxembourg nationals must obtain a work licence. This, in the opinion of Mr Fischbach, is discrimination. He contacted the Luxembourg Ministry of Foreign Affairs and Immigration, which promised to change the law and not to enforce it until then.

One would comment that this is an excellent result, which the individual concerned would probably not have been able to achieve before a court of law, since reverse discrimination is permitted under (and indeed is often inherent in) EC law. In another case the domestic authorities refused a residence permit to the Ukrainian spouse of a French worker residing in Luxembourg. The refusal was motivated by the fact that the couple was engaged in a divorce procedure; the authorities apparently suspected that this was a sham marriage. At the request of the *Médiateur*, however, a residence permit was eventually granted.

Beyond the level of anecdotes it would be worthwhile to explore more in-depth if ombudsmen take up human rights issues systematically. The follow-up studies in the second phase of REFGOV project might be a good opportunity to do so.

4.5 *A perceived lack of information about EU law*

To apply EU law presupposes familiarity with it. Although the national ombudsmen of the EU Member States indicated to have no difficulty in accessing information about EU law (through publications and websites), they perceive a lack of information both on the part of the authorities and on the part of the general public. In addition some ombudsmen pointed out that there are inherent problems which also affect their own work: the interpretation of EU law is difficult due to the imprecise wording of its provisions; it is hard to have reliable knowledge of the ECJ case law; access to the background of EU legislation is also a problem.

This suggests that there is a need to improve the knowledge of EU law at the various levels (the general public, the administration, in-house expertise of the ombudsman's office). It may seem inevitable that more resources are made available for training programmes. But other options are conceivable: ombudsmen could be empowered to ask preliminary questions to the ECJ or to other institutions of the EU; the institutions might be more active in imparting information; at the national level, independent expertise centres might be established which can be contacted whenever a question arises. Another (complementary) way to improve the supply of information would be that ombudsmen share amongst themselves their experiences with the application of EU law. Of course periodic meetings provide an occasion to exchange information and to identify best practices. But a more permanent information structure might be desirable, for instance in the shape of a joint database.

5. *On the significance of human rights for Ombudsmen as a matter of EU law*

As was seen above virtually all ombudsmen state that they pay considerable attention to the protection of human rights, but at the same time EU law is not perceived by the national ombudsmen as a significant source of fundamental rights. It is submitted that as a result a huge potential remains unused; one could even argue that ombudsmen are *obliged* to protect human rights on the basis of EU law. To a certain extent the same argument could be made vis-à-vis NHRIs.

5.1 *The evolving position of human rights in the EU legal order*

The evolving position of human rights in the EU legal order has been well documented, so a few words will suffice here. While the founding treaties of the European Communities, in the 1950s, did not contain express provisions for the protection of human rights, the ECJ held as early as 1969 that fundamental rights were part of the unwritten general principles of Community law. In protecting these rights, the ECJ took its inspiration from the constitutional traditions of the Member States and international human rights instruments.³⁴ The European Convention of Human Rights (ECHR) quickly acquired special significance in this respect, and the ECJ has by now referred extensively to the jurisprudence of the European Court of Human Rights.³⁵ This practice was reaffirmed in the preamble to the Single European Act, then incorporated in the Treaty of Maastricht (Article F(2) TEU), repeated in the Treaty of Amsterdam (Article 6(2) TEU) and, most recently, included in Article I-9 (3) of the Constitutional Treaty.

Meanwhile the Charter of Fundamental Rights of the EU was adopted, as a political document, in Nice in December 2000.³⁶ As is well-known, the Charter contains a wide variety of rights: civil and political rights, economic, cultural and social rights. A number of provisions are of special relevance to ombudsmen, such as the right to good administration and access to documents. The Charter's text reveals a certain amount of ambiguity: some provisions are expressly directed to the EU; others are not addressed to any authority in particular but relate to policy areas where the Union has little or no competence. Be that as it may, the Charter combines classic and innovative provisions, from the prohibition of slavery to the right to good administration – in short, it is an attempt to formulate the 'state of the art' in human rights that has added value when compared to existing human rights treaties and domestic constitutions.

Following the Charter's proclamation, the Commission announced that it would take the Charter into account when drafting legislation.³⁷ Yet in the Luxembourg case-law the Charter's role is less than prominent. Presumably because of its soft law nature, the ECJ has so far refrained from applying it, although the Court of First Instance and a number of Advocates General had no difficulty in doing so.³⁸ At any rate most of the rights contained in the Charter have already been accepted in the Luxembourg case-law, albeit sometimes in a piecemeal fashion. As to the status of the Charter as a whole, it could be argued that it is somewhat strengthened by its inclusion in a treaty text (the TCE) that was meant to become legally binding.

5.2 The obligation for Member States to respect human rights as a requirement of EU law

In the development described so far, the Union's role was essentially passive in the sense that the institutions accepted that they were bound by fundamental rights standards. In the late 1980s, however, the ECJ decided that the general principles of Community law, including fundamental rights, do not only bind the institutions, but also the Member States where they apply Community law.³⁹ It later added that the same applies if Member States restrict the common market freedoms (free movement of workers, of services, of goods, of

³⁴ See *Stauder*, Case 29/69 [1969] ECR 419, *Internationale Handelsgesellschaft*, Case 11/70 [1970] ECR 1125 and *Nold*, Case 4/73 [1974] 291.

³⁵ For example, *Grant*, Case C-249/96 [1998] ECR I-621; *Baustahlgewebe*, Case C-185/95 [1998] ECR I-8417; *Connolly*, Case C-274/99 [2001] ECR I-1611, and *Karner*, Case C-71/02, judgment of 25 March 2004 (n.y.r.).

³⁶ *OJ* 2000, C 364.

³⁷ See SEC (2001) 380/3: "any proposal for legislation and any draft instrument to be adopted by the Commission will therefore, as part of the normal decision-making procedures, first be scrutinised for compatibility with the Charter".

³⁸ Contrast, for instance, the Opinion of AG Léger with the Court's ruling in *Hautala*, Case C-353/99 P [2001] ECR I-9567 and I-9594.

³⁹ *Wachauf*, Case C-5/88 [1989] ECR p. 2609.

capital): any such restriction should be in conformity with human rights.⁴⁰ The present state of the case-law can be summarised as follows:

“... according to the Court's case-law, where national legislation falls *within the field of application of Community law* the Court, in a reference for a preliminary ruling, must give the national court all the guidance as to interpretation necessary to enable it to assess the compatibility of that legislation with the fundamental rights whose observance the Court ensures”.⁴¹

The result is a constant flow of cases, usually through the preliminary rulings procedure, where it was alleged that national authorities violate human rights: *Demirel* on the German decision to expel the spouse of a Turkish worker, *Cinétèque* on the French restrictions of the sale of videotapes of films, *Grogan* on the Irish prohibition of information about abortion facilities abroad, *Konstantinidis* on the way in which German authorities transcribed a Greek name, *Kremzow* on the consequences for a criminal conviction of the finding that the trial had been unfair – and more recently cases such as *Carpenter* and *Baumbast* on the free movement of persons and their family members, *Österreichischer Rundfunk* and *Lindqvist* on the right to privacy, *Booker Aquaculture* on the absence of financial compensation following the destruction of fish infected by a contagious disease, *Karner* on compatibility with the freedom of expression of Austrian restrictions on advertisement, and *Silvio Berlusconi* on the principle of the retroactive application of the more lenient penalty.⁴² The cases are mentioned here to illustrate the enormous range of ‘domestic’ human rights issues that is being brought before the ECJ these days. In this connection it is worthwhile noting a recent trend in the Luxembourg case-law, whereby the ECJ seeks to reinforce the jurisprudence of the European Court of Human Rights by enabling (or even forcing) the Member States to take that jurisprudence into account.⁴³

The judicial interest in domestic compliance with human rights was gradually joined by political interest and legislative activities. In the early 1990s the European Parliament started to discuss human rights in the Union and adopted annual resolutions on this issue. Measures to fight discrimination and racism were adopted. Harmonisation occurred in areas where the internal market suffered from diverging national standards, for instance in the field of data protection.⁴⁴ The development of the ‘Area of Freedom, Security and Justice’ has led to wide-ranging discussions on issues as diverse as asylum, migration and border policies, the protection of national security, crime prevention, judicial cooperation in criminal matters and the approximation of procedural and substantive criminal law.⁴⁵ The potential impact of all these matters on fundamental rights is clear – and so is the need for mutual confidence in the level of human rights protection in each of the Member States.

Meanwhile the Treaty of Amsterdam introduced Article 7 TEU. This provision allows for measures against Member States if there is a serious and persistent breach of the fundamental values on which the EU is based, notably human rights. The procedure of Article 7 TEU was enhanced by the Treaty of Nice, following the crisis surrounding the participation of the *FPÖ* in the Austrian government. Action may now be taken if there is

⁴⁰ *ERT*, Case C-260/89 [1991] ECR p. I-2925.

⁴¹ *Karner*, mentioned above, § 49, emphasis added.

⁴² *Demirel*, Case 12/86 [1987] ECR, p. 1417; *Cinétèque*, Joined Cases 60-61/84 [1985] ECR p. 2627; *Grogan*, Case 159/90 [1991] ECR p. I-4741; *Konstantinidis*, Case C-168/91 [1993] ECR p. I-1191; *Kremzow*, Case C-299/95 [1997] ECR, p. I-2629; *Carpenter*, Case C-60/00 [2002] ECR, p. I-6279; *Baumbast*, Case C-413/99 [2002] ECR, p. I-7091; *Österreichischer Rundfunk*, Joined Cases C-465/00 a.o. [2003] ECR, p. I-4989; *Lindqvist*, Case C-101/01, judgment of 6 Nov. 2003 (n.y.r.); *Booker Aquaculture* Joined Cases C-20/00 & C-64/00 [2003] ECR, p. I-7411; *Karner* mentioned above; *Silvio Berlusconi a.o.*, Case C-387/02 a.o., judgment of 3 May 2005 (n.y.r.).

⁴³ See esp. *K.B.*, Case C-117/01, judgment of 7 January 2004, para. 33-34, and *Pupino*, Case C-105/03, judgment of 16 June 2005 (n.y.r.) para. 60.

⁴⁴ See for instance Directive 95/46, OJ 1995 L 281, p. 31.

⁴⁵ For the ‘Hague Programme’, see the Presidency Conclusions of the Brussels European Council (4-5 Nov. 2004), doc. 14292/04.

'only' a serious risk that things may go wrong in a Member State. It remains to be seen how this procedure will be applied in practice.⁴⁶

These developments are reflected in Article 51 (1) of the Charter of Fundamental Rights:

"The provisions of the Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard to the principle of subsidiarity and to the Member States only when they are implementing Union law".

The official explanations to the Charter clarify this provisions as follows:

"As regards the Member States, it follows unambiguously from the case-law of the Court of Justice that the requirement to respect fundamental rights defined in a Union context is only binding on the Member States when they act in the scope of Union law (...). Of course this rule, as enshrined in this Charter, applies to the central authorities as well as to regional or local bodies, and to public organisations, when they are implementing Union law".⁴⁷

5.3 *Significance for the national ombudsman institutions*

Where does this leave the national ombudsman institutions? The foregoing was meant to make clear (a) that human rights are part and parcel of EU law; (b) that the Union's understanding of human rights is considerably broader than that of the ECHR and most constitutional traditions of individual countries; (c) that the Member States are bound to respect and promote these rights when acting in the scope of Union law (not just when applying EU law), and (d) that this obligation extends to all public authorities.

This means that an ombudsman, when reviewing the conduct of administrative bodies in any area covered by EU law, is also entitled to review the extent to which these bodies complied with fundamental rights as defined in EU law.⁴⁸ This power exists independently from the specific terms of reference which the ombudsman has under domestic law: it is a power that he derives from the fact that he is competent to review the application of Union law by public authorities. We can even go a bit further: in this case an ombudsman is *obliged* to review if the administrative bodies complied with fundamental rights, since he himself is also acting in an area covered by EU law when examining a complaint about a situation that falls within the scope of EU law.

5.4 *Ex officio application of EU human rights?*

One of the results of the questionnaire was most ombudsmen apply rules of EU law even if the parties did not invoke it. Four ombudsmen, however, do not do so. One possible explanation might be that these ombudsmen are short of staff and therefore do not have the required capacity to explore of their own motion the potential EU dimension of complaints. However, the statistics do not point in that direction: the staff of the four ombudsman offices⁴⁹

⁴⁶ For a first exploration, see the Commission's *Communication on Article 7 TEU – Respect for and promotion of the values on which the Union is based*, COM (2003) 606 final of 15 Oct. 2003. Note that the arrangement of Article 7 TEU returns in Article I-59 TCE.

⁴⁷ See Annex 12 to the TCE, in *OJ* 2004 C 310, p. 454, and, originally, doc. CONV 828/1/03 REV 1 (18 July 2003), *Updated explanations relating to the complete text of the Charter of Fundamental Rights of the EU (as amended by the European Convention and incorporated as Part II of the Treaty on a Constitution for Europe)*, pp. 46-47 (to be found via <http://european-convention.eu.int>).

⁴⁸ The argument developed here was recently adopted by the European Ombudsman, Mr Diamandouros, in "The institution of the ombudsman as an extra-judicial mechanism for resolving disputes in the context of the evolving European legal order" (Speech Athens, 14 April 2006).

⁴⁹ The Finnish Chancellor of Justice, the Hungarian Parliamentary Commissioner and the Slovak and UK ombudsmen.

does not appear to be significantly smaller than the others. It may also be noted that three of the four ombudsmen indicated that they have in-house expertise on EU law at their disposal.

Against this background it is interesting to recall the *Van Schijndel* judgment of the ECJ.⁵⁰ When dealing with the question if *courts or tribunals* should apply rules of EU law of their own motion, the ECJ gave a nuanced answer:

“Where, by virtue of domestic law, courts or tribunals *must* raise of their own motion points of law based on binding domestic rules which have not been raised by the parties, such an obligation also exists where binding Community rules are concerned.

The position is the same if domestic law confers on courts and tribunals *a discretion to apply* of their own motion binding rules of law. Indeed, pursuant to the principle of cooperation laid down in Article 5 of the Treaty, it is for national courts to ensure the legal protection which persons derive from the direct effect of provisions of Community law”.

The situation may however be different, the ECJ continued, in a civil suit where it is for the parties to take the initiative, the court being able to act of its own motion only in exceptional cases where the public interest requires its intervention. The ECJ accepted that this principle reflects conceptions prevailing in most of the Member States as to the relations between the State and the individual; it safeguards the rights of the defence; and it ensures proper conduct of proceedings by, in particular, protecting them from the delays inherent in the examination of new pleas. In those circumstances, the ECJ held,

“Community law does not require national courts to raise of their own motion an issue concerning the breach of provisions of Community law where examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute defined by the parties themselves and relying on facts and circumstances other than those on which the party with an interest in application of those provisions bases his claim”.

It will be interesting to discuss the significance of *Van Schijndel*, if any, for national ombudsmen. For sure the ‘civil suit exception’ does not apply to ombudsmen, who are not usually required by law to take a passive position and confine themselves to the facts and arguments advanced by the parties. So arguably a straight transposition of *Van Schijndel* on ombudsmen would mean that they are obliged to apply EU law of their own motion – which is, between parentheses, a daunting task given the scope of EU law. Consequently they should also apply the fundamental rights that are part of EU law.

The question remains, however, if such a transposition of *Van Schijndel* is justified given the basic differences between courts and ombudsmen. Or, to put it differently: does the very nature of the ombudsman’s activities justify a departure from the general standard that domestic authorities must apply EU human rights, if need be of their own motion?

5.5 *To apply or not to apply: on the supremacy of EU law*

A last issue to be discussed here is the view that ombudsmen take as regards the relationship between EU law and domestic law. The questionnaire showed that some ombudsmen do not hesitate to set aside domestic law in favour of EU law, but many others do not set aside domestic law at all. It seems worthwhile to take a closer look at this issue, which goes to the very heart of EU law.

Some ombudsmen explained that there simply happened not to be a *need* to set aside rules of domestic law: they tend to be in compliance with EU law. Of course if this is the case, then there are no problems under EU law – quite to the contrary. The position of the Danish Parliamentary Ombudsman, however, is different. In his case it is the relationship to parliament that sets a barrier for his application of EU law: he does not have the competence to make statements concerning the work of the parliament. Accordingly in

⁵⁰ See *Van Schijndel & Van Veen*, Cases C-430 & 431/93 [1995] ECR I-4705.

situations where EU law has been applied by an act of parliament, and questions arise as to whether the application has been correct, the Danish Ombudsman will be in a difficult situation. It is not inconceivable that other ombudsmen face similar difficulties, so it is interesting to see what EU law has to say about this.

Obviously EU law is part of domestic law. Hence it is part of the law that ombudsmen must apply. It is also obvious that the principles of supremacy and direct effect of Community law are just as relevant for them as they are for anyone. Objectively speaking, the legal context in which ombudsmen operate includes rules of Community law which, in the case of conflict with domestic law, take precedence. Likewise, few will have difficulties in accepting that, under the principle of “*interprétation conforme*”, ombudsmen should interpret as far as possible national legislation in the light of the wording and purpose of relevant rules of Community law.

But can we – should we – go a step further and argue that ombudsmen, when otherwise acting within their field of competence, must disregard procedural rules which prevent them from protecting the rights that individuals derive from Community law? Perhaps we can derive an answer from the famous case of *Factortame* in which the ECJ elaborated on the ‘duty of loyal co-operation’ (Article 10 EC) and the obligation to give full effect to the rights enjoyed by individuals under EU law. In this case the House of Lords, believing that the applicants could derive from Community law certain rights which domestic law was deliberately withholding, had put a preliminary question to the ECJ in order to obtain an authoritative ruling on the matter. The problem was that the ECJ was likely to need two years for its reply. What should happen to the applicants in the meantime? To deny them the rights which they could derive from Community law would mean their bankruptcy. To grant them these rights, however, would be to disregard an Act of Parliament without a justification in the shape of an ECJ ruling. Such relief was precluded by the old common-law rule that an interim injunction may not be granted against the Crown. So a *second* preliminary ruling was asked: should domestic courts grant an injunction in order to protect individual rights, even if they do not have the power under constitutional law? The ECJ replied in the affirmative:

“any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Community law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect are incompatible with those requirements, which are the very essence of Community law (...).

It must be added that the full effectiveness of Community law would be just as much impaired if a rule of national law could prevent a court seized of a dispute governed by Community law from granting interim relief in order to ensure the full effectiveness of the judgment to be given on the existence of the rights claimed under Community law. It follows that a court which in those circumstances would grant interim relief, if it were not for a rule of national law, is obliged to set aside that rule”.⁵¹

It is an intriguing question if an analogous line of reasoning applies to ombudsman institutions and similar bodies. Can they – should they – “do everything necessary ... to set aside national legislative provisions which might prevent, even temporarily, Community rules from having full force and effect”? This is essentially the question if, for instance, an ombudsman finds that certain legislative provisions are incompatible with fundamental rights as protected by Community law, but he is prevented from making formal statements to that end because his mandate does not allow him to question the validity of domestic laws.

On the one hand it could be argued that the duty to give full effect to the rights enjoyed by individuals under EU law is owed by ‘the public authorities’ of the Member States and there is no reason to assume that ombudsman institutions do not belong to this category. If a formal statement by an ombudsman would be helpful in upholding rights derived from EU law, then that statement ought to be made. Following this line of reasoning

⁵¹ See *Factortame*, Case C-213/98 [1990] ECR I-2433.

a case could be made that *Factortame* provides a strong basis for an ombudsman institution to tackle procedural barriers that render the application of EU law more difficult. On the other hand, the position of ombudsman institutions can be distinguished from that of the courts in that they are obviously not involved in the judicial settlement of disputes.

Finally a somewhat different argument could be useful in the Danish example where EU law has been applied by an act of parliament, and questions arise as to whether the application has been correct. Arguably, what is expected from the ombudsman is not so much a statement concerning the work of parliament, but rather a statement about the contents of EU law, which forms part of the law of the land and is supreme to any rule of domestic law that happens not to be in conformity with it.

Mutatis mutandis one could build a similar argument relating to NHRIs, depending on the actual mandate of these bodies. For sure this is true if they deal with individual complaints in a way comparable to ombudsman institutions: when reviewing the conduct of administrative bodies in any area covered by EU law, they are entitled to review the extent to which these bodies complied with fundamental rights as defined in EU law. This power exists independently from the specific terms of reference which the NHRI has under domestic law: it is a power that it derives from the fact that it is competent to review the application of Union law by public authorities..

6. NHRIs, National Ombudsmen and the Fundamental Rights Agency

6.1 General background

In June 2005 the European Commission formally proposed to set up a Fundamental Rights Agency in Vienna.⁵² The proposal goes back to the meeting of the European Council in Brussels (December 2003), where the decision was taken to develop the existing European Monitoring Centre on Racism and Xenophobia (EUMC) into an all-round human rights agency that should play a major role in enhancing the coherence and consistency of the EU human rights policy.

According to the Commission's proposals, the Agency is to become a centre of expertise on fundamental rights issues at the EU level. Its objective is to provide the Union and its Member States with assistance and expertise. The Agency will collect and assess data on the practical impact of Union measures on fundamental rights and on good practices in respecting and promoting fundamental rights, express opinions on fundamental rights policy developments and raise public awareness and promote dialogue with civil society, and coordinate and network with various actors in the field of fundamental rights. It is to be underlined, the Commission stated, that the proposed Agency would have no complaint resolution mechanism, nor is it anticipated that it will carry out systematic and permanent monitoring of the Member States for the purposes of Article 7 EU.

In its proposal the Commission stresses that the Agency will complement the existing international, European and national mechanisms for monitoring fundamental rights. It aims to collaborate closely with relevant organisations and bodies:

“In order to cooperate and to avoid any overlapping, the Agency will build close institutional relationship with the Council of Europe and the relevant Community agencies and Union bodies, especially with the European Institute for Gender Equality”.⁵³

6.2 NHRIs and the FRA

⁵² See COM(2005)280 and SEC(2005)849 of 30 June 2005.
⁵³ COM(2005)280, p. 7.

There are two ways to conceive the relationship between the future Agency and the NHRIs of the EU Member States. First, the Agency could be seen as an institution for the promotion and protection of human rights in the legal order of the Union. It could seek inspiration, for the identification of the guarantees of its independence, for the composition of its organs, and for the definition of its powers as well as of its working methods, from the practice of the existing NHRIs in the Member States, remaining of course within the general framework set by the 1993 Paris Principles. In a way this is how the European Ombudsman was established: as an institution that was to a large extent modelled after existing national ombudsmen, with a mandate that is focussed on the promotion of good governance by the EU institutions.

Second, the Agency could be seen as based on the existing network of European NHRIs, and as a forum in which the existing NHRIs (or the equivalent institutions in the Member States which have no NHRI in the sense of the Paris Principles) could exchange their experiences and work together in order to contribute, through reports, recommendations and opinions, to improving the protection of fundamental rights in the Union. A position such as that recently adopted by the *European Group of national institutions for the promotion and protection of human rights* combines both ideas: it feels that

“the Agency must comply with the principles of independence, pluralism and transparency contained in the UN Paris Principles on National Human Rights Institutions’; but it also advocates that the Agency should work in ‘close cooperation with the already existing institutions, particularly NHRIs and other national independent bodies’ and that the structure should comprise ‘representatives of national human rights institutions (NHRIs) and (...) representatives of European institutions’.⁵⁴

Similarly, certain elements in the proposal of the Commission appear to be influenced by the first model: for instance, the fundamental rights forum (Art. 14 of the proposal) which is to be composed in a way roughly similar to a NHRI constituted at the level of the Union; the very idea of the Agency being ‘independent’ (Art. 15(1): ‘The Agency shall fulfil its tasks in complete independence’); the fact that, apart from the two representatives of the Commission, the other members of the management board are ‘independent persons’ appointed by each Member State (25-27, or more if third countries participate), by the European Parliament (1), by the Council of Europe (1); or the cooperation with civil society, non-governmental organisations, social partners, which the Agency is encouraged to undertake (Art. 4(1), i)).

Other elements, however, clearly bring us closer to the second model: in particular, the ‘independent persons’ the Member States should appoint to the management board of the Agency should be persons ‘with high level responsibilities in the management of an independent national human rights institution; or, with thorough expertise in the field of fundamental rights gathered in the context of other independent institutions or bodies’ (Art. 11(1), al. 2), which suggests a vision of the management board as a network of NHRIs and equivalent institutions which may exist in the Member States; the two representatives of the Commission on the management board have a right to vote on the decisions adopted by the board, which is not in conformity with the requirement under the Paris Principles that if the government is represented, its representatives should have only a consultative voice; furthermore, the executive board comprises, not only the chairperson and the vice-chairperson of the management board, but also the two representatives of the Commission, which again would not be compatible with an understanding of the EU Fundamental Rights Agency conceived as a national institution for the promotion and protection of human rights for the legal order of the Union.

While it may be tempting to combine the two ideas (that of the EU Agency as a NHRI for the Union, on the one hand; that of the EU Agency as a network of NHRIs or equivalent institutions existing at the national level, on the other hand), these ideas can be dissociated

⁵⁴ Common position regarding the European Commission’s proposals for a Council regulation establishing a European Union Agency for Fundamental Rights, 17 January 2006.

from one another. We could conceive the EU Fundamental Rights Agency as an independent institution for the promotion and the protection of human rights within the EU legal order, ensuring the 'pluralist representation of the social forces (of civil society) involved in the promotion and protection of human rights' as recommended by the Paris Principles, for instance with a management board composed of persons presented by European-level human rights non-governmental organisations, academic experts, or the social partners represented at European level. We could also imagine the EU Agency as a network of national institutions for the promotion and protection of human rights which exist at national level. The two visions are clearly distinguishable in theory.

What are the merits of each of these respective models? The first option is sometimes considered to be difficult to reconcile with the specificities of EU law and the role of agencies in the EU institutional construction. It is said, in particular, that the fact that the EU has limited competences (it may only exercise the competences which it has been attributed by the Member States) would not be reconcilable with the tasks normally entrusted to a NHRI. Second, it is added, the institutions of the Union should preserve their entire freedom of appreciation about what initiatives to take in the exercise of their competences to develop fundamental rights, and such appreciation – especially where it might involve the very delicate appreciation of the situation of fundamental rights in the Member States – could not be left to an Agency. Third, the agencies as they exist under the framework of European Community law⁵⁵ would not be reconcilable with the kind of organisation required from an independent institution for the promotion and protection of human rights.

The present authors are not convinced that these arguments are totally conclusive. While of course the structure and the working methods of the EU Fundamental Rights Agency should take into account the framework under which it will be placed – in particular as regards the relationship of the Agency to the EU institutions –, there is no insuperable obstacle in considering it in the form of a NHRI for the legal order of the Union. In particular, it is clear that the conclusions and opinions which the Agency should deliver either on its own initiative or upon request of the institutions (Art. 4(1), d)) shall have to take into account the principle of conferral, and could not lead the Agency to recommend the Union institutions to exercise powers they have not been attributed under the treaties. It is also clear that any conclusions or opinions adopted by the Agency will not be binding upon the institutions, who shall be entirely free either to take them into account or to disregard them, in the exercise of their powers: indeed, NHRIs are normally conceived as acting on an advisory basis, i.e., as consultative bodies. Finally there are many similarities between a Fundamental Rights Agency and other agencies set up in order to provide the necessary expertise collected through independent means to the institutions in order to facilitate their work, so that the classical model of Community agencies is in fact transposable to the setting up of an EU Fundamental Rights Agency conceived along the lines of a NHRI for the Union.

The second model would be that of the EU Fundamental Rights Agency conceived as a network of NHRIs or equivalent institutions existing in the EU Member States. This is intellectually seducing. However, there are two main difficulties with this approach. First, there is no uniformity among the Member States: as described in detail above and in the attached table, only 13 out of 25 have NHRIs considered to comply with the Paris Principles, and even among those States, strikingly different types of institutions may be identified; while in a few of the other Member States institutions performing relatively similar functions to NHRIs do exist, seven Member States still have no institution even vaguely similar to a NHRI, and in certain cases – for example in the Netherlands – the government has explicitly rejected the idea of creating such an institution. Second, under this model, each NHRI (or equivalent institution) would be represented within the structure of the Agency, but whereas each NHRI deals with national questions (i.e., with the promotion and protection of human rights at national level), the Agency would require an expertise about specifically European questions (i.e., which concern the development of Union legislation and policies), which are

⁵⁵ See, in particular, European Commission, *Meta-Evaluation on the Community Agency System*, Final Report of the Budget DG – Evaluation Unit, 15 September 2003.

potentially very different and have their own specificities. This second model risks entertaining a confusion as to the actual role of the EU Fundamental Rights Agency: while it would in principle be entrusted with contributing to the promotion and protection of human rights within the legal order of the EU, it might be perceived as a forum where the Member States' performances in the field of human rights are compared with one another, and where national institutions meet in order to share concerns they have about human rights developments at then national level and which answers these concerns call for.

On both these issues, the differences with the 'Article 29 Working Party' should not be underestimated.⁵⁶ This Working Party, which has an advisory status and is to act independently, is composed of a representative of the supervisory authority or authorities designated by each Member State and of a representative of the authority or authorities established for the Community institutions and bodies, and of a representative of the Commission.

However, under this Directive, each Member State has to set up an independent supervisory authority responsible for monitoring the application within its territory of the provisions adopted pursuant to the Directive (see chapter VI). In proposing the EU Fundamental Rights Agency, by contrast, the Commission does not propose to impose on all the Member States to create an independent institution for the promotion and protection of human rights, which would ensure an equivalent uniformity.

Secondly, while the rules on which both the national supervisory authorities and the 'Article 29 Working Party' have been harmonized throughout the Member States – so that the Working Party may ensure that the interpretations converge and that problems of interpretation are clarified in its opinions –, certainly no such harmonization can be said to have taken place in the vast fields which present a relationship to the protection of fundamental rights. Indeed, fundamental rights are not as such a 'field': they are a set of requirements which have to be complied with in all the fields in which the public authorities act, and they cannot be circumscribed to any particular domain of activity.

6.3 Ombudsmen and the FRA

In remarkable contrast with the fairly extensive debate on the relationship between the FRA and NHRIs, the Commission's proposal of June 2005 does not refer to ombudsmen at all.⁵⁷ No formal links or contacts with ombudsman institutions are envisaged.

A similar picture emerges from the *Commission Staff Working Paper* that accompanies the proposal. It contains an overview of "existing mechanisms to monitor and collect information on respect for fundamental rights in the EU", which refers *inter alia* to the courts in the Member States and national human rights institutions.⁵⁸ But not a single reference to ombudsmen is made. The same is true for the contacts that, according to the Working Paper, the future Agency is to establish:

"The creation of the Agency will lead to better coordination of national human rights institutions and engagement with NGOs, when the Agency will work with them for consultation, information gathering purposes".⁵⁹

Although co-operation with ombudsman institutions or similar bodies is not excluded, it is noticeable that at present they are not mentioned in any way.

⁵⁶ Created under Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31).

⁵⁷ With a single exception: the operations of the Agency are subject to supervision by the European Ombudsman. See Art. 18 of the proposed Regulation.

⁵⁸ SEC(2005)849, p. 8.

⁵⁹ *Ibidem*, p. 21.

To the present authors, this is an undesirable development. Courts, ombudsmen and human rights institutes may be seen as forming a 'human rights triangle'. Each of them has an essential role to play in protecting and promoting human rights: in settling disputes, in addressing situations of maladministration and in formulating policy proposals, respectively. Ideally, these institutions complement one another and exchange information about their activities.

The recent paper of the European Data Protection Supervisor on transparency and data protection is an excellent example of this synergy. First the European Ombudsman questioned the fact that access to documents was denied on the ground that these documents contained personal data which should not be revealed in order to protect the privacy of the individuals concerned.⁶⁰ Now the Data Protection Supervisor has picked up the theme and developed an elaborate set of guidelines, which are based, *inter alia*, on the case-law of the ECJ and the European Court of Human Rights.⁶¹

The example shows that human rights institutions, ombudsmen and courts can greatly benefit from each others' work. It would be a pity if a new human rights institution were to be set up in the EU, without any involvement from the ombudsmen.

7. Concluding remarks

7.1 Summing up

Who rules the rule of law? The starting point of this paper is that international human rights courts do not necessarily get the 'right' cases, do not necessarily have all relevant information at their disposal when deliberating, and do not always deliver decisions which allow the authorities to draw the relevant lessons. These 'systemic flaws' are further aggravated by the enormous case-load of these bodies. Some of these flaws might be remedied by NHRIs and ombudsmen. Despite the differences amongst them, they have a promising potential for the protection and promotion of human rights: they are usually empowered to investigate problems of their own motion; they are more flexible than courts in the standards they apply and in the way that they function; they have a political/constitutional position different from that of the courts which allows them to expressly call upon the administration to make improvements where necessary.

In this paper an overview was given of the national institutions for the promotion and protection of human rights (NHRIs) in the EU Member States. Currently only 13 out of 25 Member States have established a NHRI, although more or less similar structures exist in most of the remaining Member States. The differences between the various institutions are considerable, but the prevailing view is that this diversity has to be accepted. There are a number of structures bringing together the European NHRIs: biannual meetings are organised both by the European Coordinating Group and the Commissioner for Human Rights of the Council of Europe.

Next an attempt was made to get an insight in the human rights practice of the ombudsmen in the EU Member States. Some pointers are given by the responses to a questionnaire, although there remains substantial scope for follow-up research. Virtually all ombudsmen state that they pay considerable attention to the protection of human rights, but their frame of reference is generally speaking restricted to domestic standards. EU law is not perceived by the national ombudsmen as a significant source of fundamental rights. It is submitted that as a result a huge potential remains unused. The argument was made that ombudsmen, when reviewing the conduct of administrative bodies in any area covered by

⁶⁰ See complaint 713/98/IJH which led to the adoption of a special report to the EP on 23 Nov. 2000. The situation which the European Ombudsman addressed ultimately led to a case which is now pending before the Court of First Instance (case T-194/04 *Bavarian Lager v. European Commission*).

⁶¹ European Data Protection Supervisor, *Public Access to Documents and Data Protection* (Background Paper Series, vol. 1, July 2005), to be found via <http://www.edps.eu.int>.

EU law, are free, and indeed are obliged, to protect human rights on the basis of EU law. When necessary they should do so of their own motion, and they should disapply any rules of domestic law that are incompatible with these rights. The same applies to NHRIs, especially to the extent that they receive individual complaints. As to the co-operation between ombudsmen, it was noted that they too have biannual meetings: those convened by the Commissioner for Human Rights of the Council of Europe, and – as far as the ombudsmen of the EU Member States are concerned – those within the framework of the Network of European Ombudsman. The present European Ombudsman has announced his intention to strengthen the latter structure.

Finally attention was paid to the relationship between the future Fundamental Rights Agency on the one hand, and the NHRIs and ombudsmen of the EU Member States on the other. It was argued that the Agency could be seen either as a ‘NHRI-like’ institution for the promotion and protection of human rights in the legal order of the Union, or as a forum for the existing NHRIs or equivalent institutions. If the latter option was chosen, one would have to ensure that, in addition to bringing together domestic practices, the Agency has sufficient expertise about *European* questions, which are potentially very different and have their own specificities. It was also observed that the national ombudsmen are surprisingly absent in the proposals concerning a Fundamental Rights Agency. It is submitted that both ombudsmen and the FRA have a lot to win from close co-operation.

7.2 Outlook

As was stated in the introduction, the essential purpose of this paper was to explore the significance of NHRIs and ombudsmen for the promotion and protection of fundamental rights in the European Legal Space.

Without having made an exhaustive overview of all the activities of all NHRIs and ombudsmen in the EU Member States – which would be nigh impossible – it seems safe to assume that they have a primarily national orientation. Of course many NHRIs deal with international legal standards on a day-to-day basis, but this is often primarily from the point of view of the implementation of these standards into the domestic order. As to the ombudsman, they themselves indicated that they are only occasionally confronted with issues of EU law – although it may not be excluded that this happens more often than they realise, as it requires special expertise to recognise the ‘EU dimension’ of a case. So at first sight NHRIs and national ombudsmen appear to be somewhat detached from the European Legal Space – even if they meet periodically at the European level.

But this is likely to change as the Area of Freedom, Security and Justice develops. It seems safe to assume that in the very near future NHRIs and ombudsmen will be more often confronted with cross-border situations. The European Arrest Warrant is just one example of the intensified cooperation between Member States within the ‘Area of Freedom, Security and Justice’. Clearly this is an area where measures may have a profound impact on the basic rights of individuals.⁶² A challenge is presented by the fact that it may be difficult in practice to allocate responsibility for specific acts – for instance if police bodies of two or more countries carry out operational measures together or if national and Union bodies share personal data without proper safeguards. In these circumstances NHRIs and ombudsmen might wish to engage in joint inquiries, and it might be prudent to develop a framework for this at an early stage. The current system of bi-annual meetings will not suffice and more intensive forms of networking and coordination will have to be developed.

⁶² On the EAW see notably the judgment of the *Bundesverfassungsgericht* of 18 July 2005 in the case of *Darkazanli* (2BvR 2236/04). In this case it was held that the German implementing law (*Europäisches Haftbefehlsgesetz*) encroaches upon the freedom from extradition (Article 16.2 *Grundgesetz*) in a disproportionate manner and that it infringes the guarantee of recourse to a court (Article 19.4 *GG*) because there is no possibility of challenging the judicial decision that grants extradition. Judgment to be found via <http://www.bverfg.de/entscheidungen>.

The practical problems that migrating EU citizens encounter call for interventions by NHRIs and ombudsmen too. They can play an essential role in making the free movement of persons a reality. The European Commission recently noted that, despite many initiatives, a genuine 'mobility culture' for workers in Europe does not exist. Although there are currently few reliable statistics on mobility flows in the Union and on the motives underlying them, it would seem that rates of mobility remain extremely low. The Commission observed that many obstacles of a legal or administrative nature, but also of a linguistic or socio-cultural nature, continue to hamper workers' freedom of movement and to discourage them from taking advantage of the opportunities for mobility that arise. Their apprehension is also often linked to a lack of information about existing opportunities or the related support mechanisms in the EU.⁶³ This is clearly an area where NHRIs and ombudsmen, by disseminating information and assisting migrants in their dealings with the administration, can add in a very tangible way to the practical realisation of a European Legal Space.

⁶³ See Memorandum 05/229 of 30 June 2005, entitled *2006 – European Year of Workers' Mobility, the importance of the mobility of workers to the implementation of the Lisbon strategy*, to be found via http://europa.eu.int/comm/press_room/index_en.htm.

APPENDIX I

National institutions for the promotion and protection of human rights (NHRIs) existing in the EU Member States

	Composition	1) Independence	Powers
Cyprus: National Organisation for the Protection of Human Rights (1998)	President: independent government officer appointed by the Council of Ministers for a renewable period of five years. Two committees: committee on the implementation of conventions, composed of representatives of ministerial departments; committee on guidance, composed of distinguished persons in the field of human rights proposed by diverse actors, including civil society.	Independence formally guaranteed under Sect. 1 of its Memorandum (representatives of the government in the committee on the implementation of conventions only have consultative voice); however the level and method of funding does not ensure independence	<ul style="list-style-type: none"> Issues recommendations and reports to the authorities Prepares the State reports to human rights treaties bodies May examine human rights violations on its own initiative or on the basis of complaints Recommendations concerning compliance with international instruments in the field of human rights
Czech Republic: Ombudsman Office (1999)	Ombudsman office comprises the Ombudsman, one Deputy Ombudsman, and the staff.	Independence is guaranteed and effective, as the Ombudsman is placed under the responsibility of the Parliament	<ul style="list-style-type: none"> Receives and examines complaints about cases of maladministration May investigate on his own initiative and address recommendations
Denmark: Danish Institute for the Protection of Human Rights (2002)	Director of the Institute, and four departments (research department; international department; information and education department; national department); a Council for Human Rights ensures that the work of the Institute conforms to its mandate	High degree of independence guaranteed under the Act on Establishment of a Danish Centre for International Studies and Human Rights of 6 June 2002	<ul style="list-style-type: none"> Offers advice to the Parliament and Government on human rights matters Human rights training and awareness raising (Since May 2003) may hear complaints relating to alleged instances of discrimination
France: Commission nationale consultative des droits de l'homme (1984)	Composed of representatives of the government (which however have advisory powers only), as well as of	Although its members are appointed by the Prime Ministers, the CNCDH is truly independent because of its pluralist composition and because the representatives of	<ul style="list-style-type: none"> Adopts opinions on parliamentary or governmental bills or proposals, as well as on compliance with human rights in the

	two members of the Parliament (one from the National Assembly and one from the Senate), the members of the Council of State, magistrates, and the Médiateur de la République (ombudsman); as well as a large number of representatives of civil society organisations (NGOs and unions, experts, academics, e.g.)	the executive have no voting powers	practice of the authorities <ul style="list-style-type: none"> • Contributes to the reports presented by France to human rights treaties bodies
Germany: German Institute for Human Rights (2001)	Composed of one executive board; one advisory board composed of representatives of civil society and academia; and an assembly of members. Staff currently of 9 employees.	Independence is guaranteed under the responsibility of the <i>Bundestag</i> , although the funding is received from ministerial departments; the representatives of ministries and of the <i>Bundesrat</i> which are members of the Institute do not have voting rights	<ul style="list-style-type: none"> • Information and documentation on human rights matters • Advises the public authorities on human rights issues • Does not exercise forms of monitoring
Greece: Greek National Commission for Human Rights (1998)	Under Article 2 of Law 2667/1998, the GNCHR is composed of a large number of personalities from civil society organisations (including unions), from the media, from universities, from the Bar; two of the members are eminent personalities appointed by the Prime Minister	The independence of the GNCHR is ensured by the fact that the representatives of the participating institutions elect the president and vice-president of the Commission, and by the fact that the representatives of ministerial departments participate without a right to vote.	<ul style="list-style-type: none"> • Submits recommendations, reports and opinions on the legislative, administrative or other measures which could improve the situation of human rights in Greece • Awareness-raising in the field of human rights • Consultative opinions on the reports Greece is to submit to human rights treaties bodies • Annual report on the situation of human rights in Greece • Contribute by opinions to the implementation of international human rights law in Greece
Ireland: Irish Human Rights Commission (2001)	15 members, including the President	The Irish Human Rights Commission had demonstrated its independence despite initial fears after the government	<ul style="list-style-type: none"> • May examine legislative proposals for their compliance with human rights, if

		refused to appoint the members recommended by an independent selection committee	requested to do so by Government <ul style="list-style-type: none"> • May make recommendations either upon request or on its own motion on how to improve the situation of human rights in Ireland • May conduct enquiries (sect. 9 of the Human Rights Commission Act 2000) • Awareness raising in the field of human rights • May assist individual victims of human rights violations or offer legal representation • May institute legal proceedings in its own name based on the Irish Constitution or an international treaty in force in Ireland
Latvia: National Human Rights Office (1995)	The Director is appointed by the Saeima (Parliament) upon the proposal of the Cabinet of Ministers, and has a status equivalent to that of a Minister, which ensures his or her independence. The deputy director and staff are appointed by the Director.	Independence is effective, although not protected in the <i>Satversme</i> (Constitution) (the Office is a public institution whose independence is functional rather than institutionally guaranteed)	<ul style="list-style-type: none"> • May inquire about complaints for human rights abuses • May react to allegations of human rights abuses • Monitors the situation of human rights in the country • Information and dissemination activities • May examine the compliance of legal acts with human rights and where a conflict is suspected submit an application to the Constitutional Court
Luxembourg: Consultative Commission on Human Rights (2000)	The Commission is composed of 22 members with diverse backgrounds, appointed for terms of three years for their expertise in human rights or issues of general	Full independence	<ul style="list-style-type: none"> • Provides opinions and recommendations of an advisory nature to the government, either upon request of the government or on its own initiative

	interest		
Poland: Commissioner for Civil Rights Protection (1999)	Ombudsman is appointed by the Sejm (lower house of Parliament) for a five-year term of office		<ul style="list-style-type: none"> • May carry out investigations on complaints and deliver opinions on the appropriate solution; may also request that disciplinary proceedings be commenced, or judicial proceedings initiated, with a right to take part in those proceedings and file cassation appeals against any final judgment reached • May propose legislative initiatives • May seek from the Constitutional Tribunal a decision on the compatibility of statutory laws, international treaties and other regulations with the Constitution
Portugal: Provedar de Justiça (1999)	Ombudsman elected by the Parliament for a four year period renewable once, and is supported by a staff (25 Assessors and 5 co-ordinators), including a technical and administrative staff	Independence is guaranteed under the Statute establishing the institution of the Ombudsman; enjoys an immunity both civil and criminal for the recommendations or opinions adopted in the exercise of his functions. Budget of the office is adopted by Parliament, and the Ombudsman is recognized ministerial powers with regard to the authorisation of expenses	<ul style="list-style-type: none"> • May receive complaints relating to actions or omissions of the public authorities, and delivers recommendations to the competent bodies • May make recommendations relating to legislative initiatives which might be adopted in order to improve the protection of human rights • May deliver opinions upon the request of the Parliament • May request from the Constitutional Court a ruling on the constitutionality or legality of any act adopted by the public authorities (Art. 281, para. 1 and 2(d) of the Constitution) • Is recognized

			certain investigative powers in order to fulfil his function effectively
Spain: Ombudsman (<i>Defensor del Pueblo</i>) (2000)	Under the Organic Law 3/1981 of 6 April 1981 (BOE du 7 mai 1981), the Defensor del Pueblo is elected by the Cortes Generales (Senate and Congress) for 5 years, with a 3/5 majority	Independence guaranteed through the modalities of his/her election, requiring the support of a large group of political forces; is also independent in the exercise of the mandate and is recognized a certain immunity	<ul style="list-style-type: none"> • May supervise the administration for cases of maladministration (also with respect to the Autonomous Communities, since cooperation agreements have been passed with the Ombudspersons in the Communities) • May file complaints on behalf of aggrieved citizens or on his/her own motion, including amparo before the Constitutional Tribunal; and may challenge the constitutionality of a legislation adopted by the Cortes • May adopt opinions on his/her own motion • May request information from the Executive; any refusal to provide the information requested may be arbitrated by the Cortes • Where he/she identifies indicia of criminal offences, may submit the information to the prosecutor or to the general council of the judiciary
Sweden: Ombudsman against Ethnic Discrimination (1999).	Appointed by the Parliament for a term of four years	Independence is ensured through the process of appointment (election by Parliament)	Offers advice in individual cases and may seek to reach a friendly settlement with the alleged wrongdoer

Appendix II. Institutions fulfilling functions comparable to those of the NHRIs but not presenting all the characteristics of NHRIs

➤ **Austria**

In Austria, the Austrian Human Rights Advisory Board (*Menschenrechtsbeirat*) was established in 1999 in reaction to a recommendation of the European Committee for the Prevention of Torture (CPT). It consists of an equal number of governmental and non-governmental members and has the function of monitoring the federal law enforcement agencies and advising the Minister of Interior in all human rights aspects. The Advisory Board established six regional Human Rights Commissions with the task of regularly visiting all places of detention under the authority of the Ministry of the Interior and of monitoring the use of force by law enforcement authorities. Although the independence has been guaranteed by a special constitutional provision, the members of both the Advisory Board and its Commissions can be released by the Minister of the Interior and are not fully independent.

➤ **Estonia**

In Estonia, the Legal Chancellor of the Republic of Estonia is an independent official who is appointed to office by the Parliament (Riigikogu) on the proposal of the President of the Republic for a term of seven years; the Office of the Legal Chancellor currently consists of approximately 40 qualified lawyers and other staff. The Legal Chancellor not only acts as an ombudsman on the basis of individual complaints; he also controls the conformity with the constitution of all new laws, foreign treaties, regulations and other legal acts of state and municipal organs, and may recommend that these acts be modified in order to ensure compliance, and if the competent authority does not follow upon this recommendation, he may bring the issue to the Supreme Court.

➤ **Finland**

In Finland, there exists an Advisory Board on International Human Rights matters, nominated by the cabinet and linked to the Ministry of Foreign Affairs. There also exists a Parliamentary Ombudsman, elected by Parliament and independent from Government, which receives complaints under a broad mandate, including constitutional rights, international human rights and good administration. She can order prosecution in most serious cases, although she usually only issues reprimands. A study prepared in 2002 within the Abo Akademi University Institute for Human Rights proposed a network model for the setting up of a national institution where the office of the Parliamentary Ombudsman, the existing Advisory Board on International Human Rights and academic human rights institutes would work closely together in order to cover the functions required by the Paris Principles.⁶⁴ The government however, has not acted upon this recommendation yet.

➤ **Slovakia**

In Slovakia, the Slovak Centre for Human Rights was established in 1993.⁶⁵ Under an agreement concluded on 15 March 1994 between the United Nations and the Government of the Slovak Republic regarding the establishment of the Slovak Centre for Human Rights, the government is bound to provide adequate premises for the Human Rights Centre, to provide adequate funds, and to ensure the legal and operational independence of the Human Rights Centre. The Human Rights Centre has an administrative board composed of nine members, appointed by the President of the Slovak Republic (1), the President of the National Council of the Slovak Republic (1), the Public Defender of Rights (Ombudsman)(1), the Prime

⁶⁴ See <http://www.abo.fi/institut/imr/norfa/miko-pohjolainen-martin.pdf> (Finnish)

⁶⁵ Act of the National Council of the Slovak Republic No. 308/1993 Coll. of 15 December 1993, as amended by the Act No. 136/2003 Coll.

Minister on the motion of NGOs (1), the Minister of Labour, Social Affairs and Family (1), and the Deans of the Law Faculties of the four universities of the country (4). The Human Rights Centre monitors the situation of fundamental rights in the country. It publishes reports and accomplishes research and educational activities.