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Beware of Lawyers Bearing Ggifts: a Critical Evaluation of the Report of WG II to the European Convention on Incorporation of the EU Charter of Fundamental Rights and accession to the European Convention of Human Rights.

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Beware of lawyers bearing gifts: A critical evaluation of the Report of WG II to the European Convention on incorporation of the EU Charter of Fundamental Rights and accession to the European Convention of Human Rights.

Introduction

This article undertakes a critical analysis of the fundamental rights provisions of the draft Treaty establishing a Constitution for Europe as presented to the President of the European Council in Rome on 18 July 2003 (the "draft Constitution"),[1] and in particular the Articles in Parts I and II of the draft Constitution incorporating proposals made in the final Report of Working Group II ("WG II") on "Incorporation of the Charter/Accession to the ECHR" (the "Report").[2] A central issue in any reform process, in particular when it involves establishing a constitutional bill of rights, is identifying the objectives to be achieved by a particular constitutional provision: "When a legal norm is expressed as an article in an institutional framework, it is articulated in a particular manner for a particular purpose".[3] It is the contention of this article that a number of the recommendations of WG II failed to meet this standard and this failure was endorsed by the *in extenso* acceptance of the Report by the Convention on the Future of Europe (the "Convention").

A plethora of reform proposals have contributed to the proposed modifications to the existing system of protection of fundamental rights in the draft Constitution.[4] The two

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[1] CONV 850/03. Available on the Convention website at http//:european-convention.eu.int. All documents referred to in this article available on this website are not further referenced. References to specific Articles in Part I, II or III of the draft Constitution omit reference to the draft Constitution.

[2] CONV 354/02: WG II 16, Brussels, October 22, 2002.Available on the Convention website. For a detailed study on the Report see the Sixth Report of the Select Committee of the House of Lords, *The Future Status of The EU Charter of Fundamental Rights.* Session 2002-2003. HL Paper 48. HMSO.

[3] Teraya Koji, 'Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) 12 *EJIL* 917.

[4] See, for example, the proposals for reform of P.Alston and J.H.H.Weiler, 'An 'Ever Closer Union' in Need of a Human Rights Policy: The European Union and Human Rights', in P. Alston, M. Bustelo and J. Heenan (eds.), *The EU and Human Rights* (OUP, 1999) 3. The critical role of the European Parliament in providing impetus for change is analysed in the same volume by R. Rack and S. Lausegger, 'The Role of the European Parliament: Past and Future', 801.

principal recommendations of WG II adopted by the Convention, the creation of a constitutional mandate for the Union to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (the "ECHR")[5] and incorporation of the Charter of fundamental rights of the European Union (the "Charter") in the draft Constitution as a legally binding text,[6] reflect the balance of political and academic opinion in favor of both initiatives.[7]

However, WG II in general did not provide policy justification for the recommendations in the Report, justifying its technical and legal approach[8] on the grounds of its limited terms of reference.[9] This approach was, however, pursued selectively insofar as several recommendations in the Report were influenced by political pressure from the Member States and resulted in changes of substance, in particular as regards the Charter,[10] while in other cases it was used to avoid addressing potentially beneficial reforms to fundamental rights protection in the Union. The suspicion that, notwithstanding WG II's statement that the political decision on incorporation of the Charter and accession to the ECHR should be reserved to the Convention Plenary,[11] the Report represented a 'done deal' was reinforced by the uncritical adoption by the Convention of the Report. The President of the Convention's exhortation to the Member States not to amend the basis of the draft Constitution at the Intergovernmental Conference opened at Rome on October 4, 2003 (the "IGC"),[12] further lessened the likelihood of a substantial revision of the Report's recommendations as incorporated in the draft Constitution by the IGC.

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[5] In this article reference is made to accession to the ECHR. The question of which ECHR Protocols the Union would accede to is, as WG II points out at page 14 of the Report, for the Council to resolve at the time of accession.

[6] On the legal effects of incorporation, see section 7 below.

[7] Support is, however, not universal: 'The Charter simply adds an unnecessary further tier which lacks the subtlety and flexibility of the current system of negotiation.': R. Bellamy, 'Constitutive Citizenship versus Constitutional Rights: Republican Reflections on the EU Charter and the Human Rights Act', in T. Campbell, K.D.Ewing and A.Tomkins (eds.), *Sceptical Essays on Human Rights* (OUP, 2001) 33. See also J.H.H.Weiler, 'Editorial: Does the European Union Truly Need a Charter of Rights?' (2000) 6 *ELJ* 95-97.

[8] For a valuable synthesis of the arguments against a technocratic view of the lawyer's role see: J.H.H.Weiler and A.L.Paulus, 'The Structure of Change in International Law or Is there a Hierarchy of Norms in International Law?'(1997) 8 *EJIL* 545.

[9] The mandate of WG II is set out in CONV 72/02. Available on the Convention website.

[10] The British Government made this explicit: 'We and some other Member States worked hard in the Convention on the Future of Europe to help get more clarity and legal certainty into the Charter. The changes we helped pushed through have put the whole package in much better legal shape'. *A Constitutional Treaty for the EU, The British Approach to the European Intergovernmental Conference 2003,* Cm5934 (September 2003), at para.101.

[11] The Report, at 2 and 11.

[12] The Rome Declaration of V.Giscard D'Estaing, President of the Convention, of July 18, 2003 to the Italian Presidency. Available on the Convention website.

It is the aim of this article to evaluate the proposals of WG II incorporated into the draft Constitution by situating them in the context of issues of principle relating to the sources, scope and enforceability of fundamental rights in the Union. While this analysis lends strong support to incorporation of the Charter and accession by the Union to the ECHR, it concludes that a number of other provisions in the draft Constitution, and in particular the retention of general principles of law as a source of fundamental rights in the Union's legal system and the amendments to the Charter to allay concerns of certain Member States over extensions to the Union's competence in the field of fundamental rights, are not justified and merit further critical examination and debate during the IGC process.

1. Sources of fundamental rights in Union law: undue complexity?

The sources of fundamental rights norms in Union law are exceptionally fluid as a result of the case by case development of protection by the European Court of Justice (Court of Justice): "The Court has consistently held that fundamental rights form an integral part of the general principles of law whose observance the Court ensures…….. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the European Convention for the Protection of Human Rights and Fundamental Freedoms …has particular significance".[13] The Court then specified that Article 6(2) TEU, which was introduced by the Maastricht Treaty and unmodified by either the Amsterdam or Nice Treaties, embodies that case-law.[14] The Charter rights and principles, although not formally incorporated into the Union's legal order, have become a further source of fundamental rights standards.[15]

While WG II did not make a recommendation on the issue of retaining Article 6(2) TEU, the Convention incorporated in Article I-7(3) a clause with substantially similar wording whereby fundamental rights as guaranteed by the ECHR and 'as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law'.[16] The formulation in both Article 6(2) TEU and Article I-7(3) is narrower than the existing case law of the Court of Justice on the sources for general principles of Union law and raises the issue of whether the Court of Justice would interpret Article I-7(3) as restricting the sources of general principles of law to those

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[13] Case C-7/98, *Krombach v. Bamberski* [2000] ECR 1-1935, at para. 25.

[14] *Ibid,* at para. 27.

[15] See J.Morijn, 'Judicial References to the EU Fundamental Rights Charter' at http://europe.eu.int/futurum/documents/other/oth000602_en.pdf. Accessed November 2003.

[16]The reference in Article I-7(3) to Union law as opposed to Community law in Article 6(2) TEU does not constitute a substantive change. As S. Peers has argued the reference to Community law in Article 6(2) TEU is 'vestigal' and should be read as referring to Union law: 'Human Rights and the Third Pillar', in P. Alston, M. Bustelo and J. Heenan (eds.), *op. cit.*, at 171.

specifically referenced. It has been argued, on the basis of Advocate-General Jacob's reference to the First Protocol to the ECHR in *Bosphorous,*[17] that Article 6(2) TEU should not be interpreted in this restrictive sense;[18] however, such an argument would be less persuasive in the context of a constitutional text. The existing principle established by the Court of Justice that international human rights treaties other than the ECHR may be used as an interpretative tool in determining the general principles of fundamental rights law applied by the Court of Justice would, however, remain applicable.[19]

The current proposals set out in the draft Constitution would further complicate the overlapping steams of fundamental rights norms flowing into the Union's legal order. In general, the establishment of a hierarchy of norms in the field of fundamental rights has been opposed on the basis that prioritizing certain rights at the expense of others would threaten the indivisibility of human rights.[20] But if an approach based on differential standards of human rights protection is to be rejected,[21] the question of the ordering of fundamental rights norms originating from these various sources requires resolution. A constitutional ordering of these potentially competing norms would enhance the democratic legitimacy of any such resolution.

The draft Constitution does establish, albeit in disparate provisions, an ordering of fundamental rights within the Union's legal system according to their source. As regards rights derived from international law, Article I-3(4) commits the Union to "strict observance and development of international law, including respect for the principles of the United Nations Charter". This provision reflects the existing case law of the Court of Justice to the effect that public international law forms part of the Union's public legal order and that the Union is obliged to respect international law in the exercise of its powers.[22] Article II-53, which is on the same terms as Article 53 of the Charter, provides specific constitutional authority for the primacy of international law over Charter rights and principles in the event the latter provide a lesser standard of protection: "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized, in their respective fields of application, by Union

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[17] Case C-84/95, *Bosphorous v. Minister for Transport* [1996] ECR I-3953.

[18] S.Peers, *op. cit.*, at 174.

[19] See S.Piers, *op. cit.,* at 171, n.27.

[20] See G. Schwarzenberger, 'International jus cogens?,' (1965) 43 *Texas Law Review* 455; P. Weil, 'Towards Relative Normativity in International law?' (1983) 77 *AJIL* 413; and T. Meron, 'On a Hierarchy of International Human Rights' (1986) 80 AJIL 1. However, recent academic opinion has been more favourable to an ordering of fundamental rights, arguing for example that non-derogable rights can form the basis of understanding hierarchy in international law: see T. Koji, *op. cit.*; and J.Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16 *OJLS* 85; but see the critique of Tasioulas' position by J. Beckett, 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' (2001) 12 *EJIL* 627.

[21] See section 3 below.

[22] R.Higgins, 'The ICJ, the ECJ and the Integrity of International Law' (2003) 52 *ICLQ* 1.

law and international law and by international agreements to which the Union or all the Member States are party, including the ECHR, and by the Member States' constitutions".

The principle established by Article II-53 is subject, insofar as concerns Charter rights corresponding to ECHR rights, to Article II-52(3) which provides that the meaning and scope of those rights shall be the same as those laid down by the ECHR but without preventing "Union law providing more extensive protection". A difficult, but probably academic,[23] question would arise if a ruling of the Court of Human Rights were to conflict with international law. If the relevant provision of the ECHR corresponded to a Charter right then Article I-3(4) and Article II-52(3) could conflict, although the Court of Justice would no doubt strive to interpret the international law norm as providing more extensive protection so as to avoid such a conflict. If the ECHR provision did not correspond to a Charter right and formed part of Union law either through accession by the Union to the ECHR or as a general principle of Union law under Article I-7(3), then the international law norm should prevail in case of conflict by reason of Article I-3(4).[24]

Finally there is the issue of ordering the sources of general principles of law specified in Article I-7(3).[25] Clearly no such general principle would be admitted by the Court of Justice insofar as it conflicted with international law and that is confirmed by Article I-3(4). Further, as regards general principles resulting from the constitutional traditions common to the Member States, no such tradition should be admitted as a general principle insofar as it conflicts with the ECHR or the Charter since the recognition of any such conflicting principle in the case of the Charter would be a violation of Article I-7(1) and in the case of the ECHR would be incompatible both with the mandate for the Union to accede to the ECHR under Article I-7(2) and the ECHR as a source of fundamental rights under the general principles case law. Accession by the Union to the ECHR would, of course, in addition make the adoption of such a tradition in conflict with the ECHR a breach of the Union's obligations under international law. The implausibility of these scenarios provides support for the argument that retention of general principles as a source of law under Article I-7(3) is unnecessary and confusing.[26]

2. A 'Lawyer's Paradise'? : Union Fundamental Rights and the Rule of Law

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[23] 'Its [the Court of Human Rights] starting point is that human rights law, including the Convention on Human Rights, is *part* of international law.' R.Higgins, *ibid*, at 10.

[24] 'One may therefore conclude – tentatively – that an international agreement entered into by the Community will be of no effect within the Community legal system if it is outside the capacity of the Community or if it conflicts with one of the constituent Treaties or (possibly) with a general principle of law': T.C.Hartley, *op. cit.,* at 185-186.

[25] On the hierarchical relationship between general principles and the Community Treaties see T. Kyriakou, 'The impact of the EU Charter of Fundamental Rights on the EU system of protection of rights: much ado about nothing?' (2001) 5 Web JCLI: http://webjcli.ncl.ac.uk/2001/issue5/kyriakou5.html. Accessed November 2003.

[26] See section 2 below.

'The dominant way of safeguarding fundamental rights is the rule of law'.[27] The rule of law is an integral part of fundamental rights protection and recognition of the rule of law is embedded in the principal international conventions for the protection of fundamental rights recognized by the Court of Justice as sources for the general principles of Union law.[28] In *Golder* the Court of Human Rights emphasized the importance of references to the rule of law in the Statute of the Council of Europe and the ECHR as an interpretative aid to the substantive rights conferred by the ECHR:

> "It may also be accepted, as the Government have submitted, that the Preamble does not include the rule of law in the object and purpose of the Convention, but points to it as being one of the features of the common spiritual heritage of the member States of the Council of Europe. The Court however considers, like the Commission, that it would be a mistake to see in this reference a merely "more or less rhetorical reference", devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration" was their profound belief in the rule of law".[29]

The Treaty on European Union ("TEU") and the Treaty Establishing the European Community ("TEC") likewise affirm the importance of respecting the rule of law.[30] Recital two of the Preamble to the Charter also refers to the rule of law and the substantive Articles of the Charter enshrine a number of the basic rights constituting both the formal and substantive elements of the rule of law. The draft Constitution consolidates these provisions in Article I-2: "The Union is founded on the values of respect for human dignity, liberty, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society of pluralism, tolerance, justice, solidarity and non-discrimination". Article I-58, incorporating provisions relating to suspension of membership rights, retains the reference to "a clear risk of a serious breach by a Member State of the values mentioned in Article I-2" as the trigger for sanctions. Article I-56 refers to the values of the Union as the basis for

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[27] Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) 37 *CMLRev.* 1307, at 1311-1312. For a useful survey of legal scholarship relating to the rule of law see: David Dyzenhaus, 'Recrafting the Rule of Law', in David Dyzenhaus (ed.) *Recrafting the Rule of Law: The Limits of Legal Order* (Hart Publishing, 1999) 1.

[28] See, for example, Articles 6 and 7 of the Universal Declaration of Human Rights and Article 16 of the International Covenant on Civil and Political Rights (the 'ICCPR').

[29] *Golder v United Kingdom* (1975) 1 EHRR 524, at para. 34.

[30] Third preamble of the TEU and Articles 6(1) TEU and 7 TEU. Article 177 TEC refers to 'developing and consolidating' the rule of law in Community development co-operation policies and Article 220 TEC provides: 'The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed'. For an analysis of the role played by Article 220 TEC in the relationship between the rule of law and fundamental rights developed by the Court of Justice as general principles see: T.Kyriakou, *op. cit.*

developing a special relationship with neighboring states. The incorporation of the Charter by Article I–7(1) and the mandate for the Union under Article I-7(2) to seek accession to the ECHR would strengthen the link between protection of fundamental rights and the rule of law in the Union's new constitution.

Notwithstanding the clear connection established by international human rights treaties between respect for human rights and the rule of law, the relationship between the two principles has been problematic in the context of Union law. Firstly, protection of fundamental rights was developed by the Court of Justice on the basis of general principles of law rather than on the basis of a constitutional bill of rights.[31] As such the principles originally depended for their legitimacy on the integrity of the judicial process rather than democratic validation. Secondly, the Charter sets itself out as recognizing rather than creating the 'rights, freedoms and principles' set out in the Charter and is not as yet integrated into the Union's legal order.[32] Nevertheless, Advocates-General and the Court of First Instance have referred to the Charter as an authoritative statement of human rights standards applicable in Union law[33] which raises the issue of whether such judicial activism is consistent with the principles of the rule of law.[34] Thirdly, Title IV of the TEC and Title VI of the TEU, which contain provisions establishing a "common area of freedom, security and justice", provide more limited access to democratic control and judicial review of Community measures than in other areas of Community law.[35]

The tension between the role of the judiciary and the legislature in the field of fundamental rights reflects the more general problem of democratic legitimacy in the Union. In a political structure where human rights are constitutionalised, encroachment of judicial powers is restricted but in the case of the Union the lack of an original constitutional basis for human rights protection allowed scope for judicial expansionism both as regards the delimitation of powers between the community institutions and between the Community and the Member States raising issues of compatibility with the rule of law both as a substantive and procedural doctrine.[36] Two views on the application

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[31] See for a summary of the development of the Court of Justice's role: Bruno De Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in P. Alston, M. Bustelo and J. Heenan (eds), *op. cit.*, 859.

[32] For an appraisal of the normative status of the Charter see: C.Engel, 'The European Charter of Human Rights: A Changed Political Opportunity Structure and its Normative Consequences' (2001) 7 *ELJ* 151.

[33] See J.Morijn, *op. cit.*

[34] See for a summary of the position of 'democratic positivists' who contest the role of the judiciary in developing rules of law and 'liberal anti-positivists' who support such a role: D. Dzyenhaus, *op. cit.*, at 2-3.

[35] See for a comprehensive review of this area: S. Peers: 'Human Rights and the Third Pillar', in P. Alston, M. Bustelo and J. Heenan (eds.), *op. cit.*, 167; and S. Peers, *EU Justice and Home Affairs* (Pearson, 2000).

[36] See P.Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' (1997) *Public Law* 467. For a discussion of the arguments about 'majoritarian democracy' as the preferred system of protecting the rule of law see: J. Goldsworthy, 'Legislative Sovereignty and the Rule of Law' in T. Campbell, K.D. Ewing, and A. Tomkins (eds), *op. cit.*, 61.

of the rule of law to the European Union have been identified:[37] "pro-ECJ scholars" who concluded that "the traditional characteristics of the rule of law are preserved at the E.U. level: along the lines of the traditional *Rechsstaat*, independence from other institutional actors and consistency of adjudication obtains throughout the system" and "juro-sceptics" who argue "that a rule of law other than one confined exclusively to economic integration is unlikely to emerge in the near future" on the basis that the Court of Justice "lacks the necessary autonomy to keep the other political institutions from enacting arbitrary and inconsistent policies".[38]

The provisions of the draft Constitution incorporated on the basis of the recommendations made by WG II significantly alter the terms of debate over the relationship between fundamental rights protection and the rule of law in the Union. Incorporation of the Charter and Union accession to the ECHR would provide the Union with a clearly defined constitutional basis for the protection of fundamental rights. In particular, accession to the ECHR would weaken the argument that the rule of law does not apply fully to the Union on the basis of a lack of autonomy on the part of the Court of Justice.[39] However, Article I-7(3) and Articles II-52(4) and 52(5) would undermine these benefits from a rule of law perspective.

Article I-7(3), a modified version of Article 6(2) TEU, substitutes for the obligation for the Union to "*respect*" as general principles of "*Community*" law fundamental rights as guaranteed by the ECHR and as they result from the constitutional traditions common to the Member States, the stipulation that such rights shall "*constitute*" general principles "of the *Union's* law". The retention of the reference to the common constitutional traditions and the ECHR as sources of general principles of law in Article I-7(3) seems designed to retain a dynamic element to the protection of fundamental rights in Union law.[40] However, the Court of Justice's references to such common constitutional traditions have been perfunctory: "One could even say that the Court of Justice is not genuinely interested in finding out whether there is a 'common tradition' among the Member States concerning the legal regime of a particular rule. References to specific national legal systems are perfunctory and haphazard. A national constitutional judgment has never been cited".[41] Accession of the new Member States will further complicate

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[37] J. P. McCormick, 'Supranational Challenges to the Rule of Law: The Case of the European Union' in David Dyzenhaus (ed.), *op. cit.*, 267.

[38] *Ibid*, at 280-281.

[39] WG II in its Report concentrated on a different aspect of autonomy, namely whether accession of the Union to the ECHR would impact adversely 'on the principle of autonomy of Community (or Union) law including the position and authority of the European Court of Justice' (p.12). As discussed in section 6 below their views on this issue seem misguided.

[40] While Working Party II made no recommendation on retention, those members in favour argued that such a reference 'could serve to complete the protection offered by the Charter and clarify that Union law is open for future evolutions in ECHR and Member States' human rights law': the Report, at 9.

[41] Bruno de Witte, *op. cit.*, at 878.

reliance on such traditions. Furthermore, the reference to the ECHR is otiose since, even if accession negotiations to the ECHR were to fail, the Charter already substantially recognises the rights and freedoms guaranteed by the ECHR.[42] WG II emphasized that Article 52(3) of the Charter, incorporated unamended as Article II-52(3), means that if Charter rights correspond to ECHR rights they shall have the same scope and meaning as laid down in the ECHR but that, according to the second sentence of Article 52(3), this does not prevent Union law providing more extensive protection than the ECHR if Union legislation subsequently so provides or provisions of the Charter, although based on the ECHR, provided more extensive protection.[43] In the light of the minimum standard of protection guaranteed by Article II-52(3), even if the Union does not accede to the ECHR, it is difficult to see how retaining ECHR rights as a source of general principles of Union law could materially add to the same, or enhanced, rights set out in the Charter.

One argument in favour of retaining Article I-7(3) is that the general principles derived from the ECHR could be used by the Court of Justice to recognize rights not protected under the Charter but protected under the ECHR on the basis of Article II-53. Such a lacuna might develop as a result of divergent case law between the Court of Justice and the Court of Human Rights.[44] However, this is rather an argument in favour of the Union's accession to the ECHR if the Charter is incorporated. Incorporation of the Charter will increase the risk of such divergence since "experience tends to show that it is difficult to avoid contradictions where two differently worded texts on the same subject-matter are interpreted by two different courts" and the "provisions of Article 52 and 53 of the EU Charter will probably not be sufficient to avoid the risk of contradictions, certainly not where the application and interpretation of the Charter and the ECHR by national courts is concerned".[45] Another argument for retaining I-7(3), that "the scope of application *ratione materiae* of the Charter is more limited than the protection offered by the present system of guaranteeing respect of fundamental rights in the EU flowing from Article 6(2) *juncto* Article 46(d) EU",[46] would lose much of its persuasiveness following incorporation of the Charter into the Union's Constitution. If the Charter is incorporated, the inclusion of Article I-7(3) should therefore be rejected as undermining certainty in

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[42] 'It means that, by and large, the substantive provisions of the European Convention have been incorporated [in the Charter], although not exactly in the same wording': L. Betten, *Human Rights,* (2001) 50 *ICLQ* 690, at 692.

[43] The Report, at 7. WG II refers to Articles 47 and 50 of the Charter as examples of provisions providing more extensive protection.

[44] It seems unlikely that the Court of Justice would interpret the Charter so as to give rise to such conflicts, although the timing of judgments on similar issues might give rise to inadvertent conflicts.

[45] *Study of Technical and Legal Issues of a Possible EC/EU Accession to the ECHR* dated September 28, 2002 by the Steering Committee for Human Rights (CDDH) of the Council of Europe (the CDDH Report), reproduced in WD No 8 of WG II, at 26-27. Available on the Convention website.

[46] K.Lenaerts and E.E. de Smijter, 'A "Bill of Rights" for the European Union' (2001) 38 *CMLR* 273, at 281.

identification of the Union's fundamental rights.[47] Accession by the Union to international treaties protecting fundamental rights in addition to the ECHR would provide a preferable method of improving the protection available under the Charter and the ECHR to the retention of general principles under Article I-7(3).[48]

Secondly, Article II-52(4) provides: 'Insofar as this Charter recognizes fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions'. WG II, with two members dissenting, justified Article II-52(4) on the basis it served to emphasize the "firm roots" of the Charter in the common constitutional traditions of the Member States and "in the interest of smooth incorporation of the Charter as a legally binding document".[49] This argument suggests the purpose of inserting Article II-52(4) was political expediency rather than an objective analysis of its merits. Apart from the difficulty of identifying such traditions, such a rule of interpretation if applied literally risks freezing the interpretation of the Charter articles concerned to reflect the constitutional traditions of the current Member States.

WG II then sets out how it considers Article II-52(4) should be applied: "the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common constitutional traditions". This contradictory terminology apparently reflects academic arguments in favour of the application of differential standards of human rights,[50] although the Report claims to reject the argument that the Court of Justice should adopt a "lowest common denominator" approach to Charter rights derived from the common constitutional traditions.[51] However, the reference to an interpretation "in harmony with those traditions" is so vague that it is hard to see how the Court of Justice could give it any substantive effect. In practice, the Court of Justice is more likely discreetly to ignore the provision as political rhetoric. A further objection to Article II-52(4) is that since the Charter does not, with good cause, explicitly identify the rights derived from the common constitutional traditions nor which traditions form the source of such rights, one is

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[47] The WG II discussion paper dated June 18, 2002 sets out admirably the objections to retaining an equivalent to Article 6(2) TEU (CONV 116/02), at 10; available on the Convention website. See also C.Engel's recommendation to eliminate Article 6(2) TEU if the Charter were incorporated 'lest the Community create a 'lawyers paradise' on fundamental rights', *op. cit.*, at 167.

[48] For a discussion of options for enhancing protection of human rights under Community law see: G.Gaja, 'New Instruments and Institutions for Enhancing the Protection of Human Rights in Europe?' in P.Alston, M.Bustelo and J.Heenan (eds.), *op. cit.*, at 796-800. It has been argued the Community could, without a Treaty amendment, currently accede to the European Social Charter, the Convention of the Council of Europe on Data Protection and the Vienna Convention on Human Rights and Application of Biology and Medicine: P.Alston and J.H.H.Weiler, *op. cit.*, at 31. See further J.H.H.Weiler and S.C. Fries, 'EC & EU Competences in Human Rights', in P. Alston, M. Bustelo and J. Heenan (eds.), *op. cit.*, 147.

[49] The Report, at 7.

[50] See section 3 below.

[51] The Report, at 7.

obliged to refer to the "Explanations" to the Charter (the Explanations),[52] which requirement weakens the authority of the Charter and risks solidifying the rights protected by it. As has been aptly stated: "Good constitutions are short and enigmatic".[53]

WG II also proposed, with two members having reservations, a new provision which has been inserted as Article II-52(5): "The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by the institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognizable only in the interpretation of such acts and in the ruling on their legality". According to WG II Article II-52(5) would be "consistent both with the case-law of the Court of Justice and with the approach of the Member States' constitutional systems to 'principles' particularly in the field of social law".[54] It provided reassurance that "future jurisprudence" will be able to rule on the 'exact attribution of articles to the two categories" (right or principle) by referring to the wording of the respective articles of the Charter "taking into account the important guidance provided by the Explanations, supplemented by explanations from the current Working Group".[55]

Several criticisms may be made of Article II-52(5). Firstly, it constitutes an attribution of legislative competence, although it fails to define the modalities of its exercise, which is out of place in a constitutional rights instrument such as the Charter and conflicts with Article II-51(2), which is an amended version of Article 51(2) of the Charter,[56] since it establishes a new legislative power for the Union. Secondly, by restricting judicial cognizance of Charter principles to implementing legislation it deprives the principles of legal effect in the absence of such legislation. Since many of the principles are of a general nature and relate to areas where community action is likely to be dilatory, this would risk relegating the principles to the fate of many Christmas poinsettias: left to wither after due credit has been taken for their initial bloom. Thirdly, it creates a rigid distinction between the legal effect of those provisions of the Charter recognizing rights and those containing principles, whereas Article 51(1) of the Charter simply provides the Member Sates shall "respect the rights, observe the principles and promote the application thereof in accordance with their respective powers". Article II-52(5) therefore constitutes a substantive change to the structure of the Charter the recommendation of which fell outside the scope of WG II's competence and does not correspond to the 'technical *drafting adjustments'* which it was at pains to stress was the limit of its remit.[57]

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[52] Contained in document CHARTE 4473/00 CONVENT 49 of October 11, 2000. Available on the Convention website.

[53] C.Engel, *op. cit.*, at 151.

[54] The Report, at 8.

[55] The Report, at 8.

[56] See further section 3 below.

[57] The Report, at 4-5.

Finally, WG II emphasized the importance of the Explanations as an important tool in ensuring a "correct understanding of the Charter" and proposed the explanations contained in their report should be "fully integrated with the original Explanations".[58] This suggestion was in part adopted by the Convention through an addition to the Preamble to the Charter set out in Part Two of the draft Constitution: "In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared at the instigation of the Praesidium of the Convention which drafted the Charter". However, the Explanations were formulated on the basis they should have "no legal value"[59] and a change to their status would undermine the transparency and accessibility of fundamental rights in the new constitution and jeopardize a dynamic interpretation of the Charter rights and principles by the Court of Justice.[60] The analysis of Article 53 of the Charter in the Explanations demonstrates the danger of according them legal status (emphasis added): 'This provision is intended to **maintain** the level of protection **currently** afforded within their respective scope by Union law, national law and international law.'[61] Such an interpretation would unnecessarily exclude from the scope of Article II-53 future conventions protecting fundamental rights to which the Union acceded.

3. Incorporation of the Charter and the relationship between National and Union Law

Human rights norms can have either an integrating or destabilizing effect on the relationship between the Union's legal order and the national legal orders of the Member States.[62] The initial impetus for the development by the Court of Justice of human rights norms within the community legal system was provided by the decisions of the constitutional courts of Germany and Italy challenging the legitimacy of the principle of supremacy of community law developed by the Court of Justice in the absence of such norms.[63] In this context the development of human rights norms had an integrating function. However, the extension by the Court of Justice of the application of these norms to actions by the Member States both in implementing Community law (*Wachauf*[64]) and

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[58] *Ibid*, at 10. The British Government endorsed this proposal, *op. cit.*, at para.102.

[59] See the Explanations, *op. cit.*, at 1.

[60] On the requirement for transparency and clarity in the Union's instruments and procedures, see the Final Report of Working Group IX, CONV 424/02, Brussels November 29, 2002. Available on the Convention website.

[61] The Explanations, *op. cit.,* at 50.

[62] See on the integrating effect of the Charter: C.Engel, *op. cit.*, at 154.

[63] See Bruno de Witte, *op. cit.*

[64] Case 5/88, *Wachauf v. Germany* [1989] ECR 2609.

in derogating from the application of Community law (*ERT*[65]) created the potential for conflicts between the requirements of national constitutionally protected rights and those developed by the Court of Justice.[66] This has led some commentators to argue that different standards should be applied by the Court of Justice to the protection of human rights for Community measures from those measures adopted by the Member States in derogation of their Community obligations in order to protect the Member State's margin of appreciation in such situations.[67]

The proclamation of the Charter outside the legislative framework of the Treaties reflected the tensions between conflicting national and Union perceptions as to the role of human rights norms in the Union legal order. Concerns over incorporation of the Charter relate both to extension of Union competence through the back-door of human rights protection and also the relationship between the Charter provisions and national human rights standards.[68] The 'horizontal' provisions of the Charter, and in particular Articles 51(1) and (2) and Article 53, were designed to limit the potential for such conflicts.[69] WG II recommended drafting amendments to Articles 51(1) and (2) and additional 'horizontal' provisions in Articles II-52(4), (5) and (6) and these were adopted *verbatim* in the draft Constitution.[70] Despite the Working Group's claim that these are "technical *drafting adjustments*",[71] an analysis of the changes shows they are potentially substantive in nature[72] and reflect the overriding concern of WG II to ensure that "incorporation of

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[65] Case C-260/89, *ERT v DEP* [1991] ECR 1-2925.

[66] An example of such conflict occurred in *Case C-285/98, Kreil v. Bundesrepublik Deutschland* [2000] ECR 1-0069. For analysis of the case see J. Schwarze, *op. cit.*, at 28-29. *SPUC v. Grogan* is an example of a case where the Court of Justice avoided having to resolve such a conflict: Case C-159/90 [1991] ECR 4685.

[67] J.H.H.Weiler, 'Fundamental Rights and Fundamental Boundaries: On Standards and Values in the Protection of Human Rights' in N.A. Neuwahl and A. Osas (eds.) *The European Union and Human Rights* (Kluwer, 1995) 51. But see also L.Besselink: 'Entrapped by the Maximum Standard: On Fundamental Rights, Pluralism and Subsidiarity in the European Union' (1998) 35 *CMLRev.* 629. See also Armin de Bogdandy's arguments in favor of differential human rights standard to be applied by the Union in the field of foreign relations, national measures implementing Union law, and acts of the Union's institutions, *op. cit.*, at 1318-1319.

[68] See generally P.Eeckhout, 'The EU Charter of Fundamental Rights and the Federal Question' (2002) 39 *CMLRev.* 945; and J.Bering, 'Does the EU Charter of Fundamental Rights Threaten the Supremacy of Community Law?'; LLM dissertation, Liisberg, NYU School of Law at: http://jeanmonnetprogram.org/papers/01/010401.html; accessed November 2003.

[69] On Article 51 see the detailed analysis by P. Eeckhout, *op. cit.*

[70] The proposed 'drafting adjustments' are set out in the Annex to the Report.

[71] The Report, at 4.

[72] See section 2 above for an analysis of Articles II-52(4) and (5).

the Charter will in no way modify the allocation of competences between the Union and the Member States".[73]

Article 51(1) of the Charter is modified in Article II-51(1) by the addition of "**agencies"** to "institutions" and "bodies" of the Union as addressees of the provisions of the Charter[74] and the insertion at the end of the second sentence of the phrase "**and respecting the limits of the powers of the Union as conferred on it by the other Parts of the Constitution**". Article 51(2) is amended in Article II-51(2) as highlighted to read: "This Charter does not **extend the scope of application of Union law beyond the powers of the Union or** establish any new power or task for the **Union**, or modify powers and tasks defined **in the other Parts of the Constitution"**. The reasons which led WG II to recommend these modifications emphasizing the jurisdictional boundaries of the Charter are difficult to discern from the Report,[75] or indeed why the Convention should have adopted the proposals *verbatim.* The Report acknowledges that the existing text of Article 51(2) of the Charter addresses the issue of allocation of competences between the Union and the Member States.[76] The underlying rationale, as part of the strategy of making incorporation more palatable to wavering Member States,[77] seems to have been to reinforce a restrictive interpretation of the scope of the Charter as constituting a record of existing human rights protection under Union law rather than an interpretation of the Charter as a dynamic contribution to "strengthening EU fundamental rights protection".[78]

However, the first sentence from Article 51(1) of the Charter is retained unamended in Article II-51(1), whereby the Charter provisions are addressed to the Member States "only when they are implementing Union law". WG II specifically endorsed this provision by reference to the principle of subsidiarity,[79] although this utilitarian test as set out in Article I-9(3) hardly seems relevant to the issue of the scope of the Court of Justice's judicial review powers over violations of Charter rights. The Charter will therefore not apply to the exercise of derogations by the Member States from their

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[73] The Report, at 5.

[74] This amendment was not proposed by WG II.

[75] The Report does refer in support of the amendment to Article 51(2) of the Charter to the established case law of the Court of Justice and in particular Case C-249/96, *Grant v. South West Trains Ltd* [1998] ECR I-621. However, it seems unnecessary for the Charter to be amended to confirm case law of the Court of Justice.

[76] The Report, at 5.

[77] The reference with approval to the amended text of Article 51(2) by the British Government indicates the political pressure exerted on WG II in this area, *op.cit.,* at para. 102.

[78] P.Eeckhout, *op.cit.,* at 981.

[79] The Report, at 5.

obligations under Union law,[80] unless the Court of Justice were to adopt a strained interpretation of Article II-51(1) to bring it into line with its general principles case law.[81] An alternative route for the Court of Justice would be to bypass the limitation under Article II-51(1) by continuing to apply the wider criteria developed in its general principles case law on the basis of Article I-7(3). Such an approach, however, would create an unfortunate dichotomy between the scope of protection for Charter rights and Article I-7(3) protected rights.

Following the recommendation of WG II, a new Article II-52(6) provides: "Full account shall be taken of national laws and practices as specified in this Charter". The Report justifies this new provision by reference to the principle of subsidiarity referred to in the Preamble and Article 51(1) of the Charter and 'from those Charter Articles which make references to national laws and practices'.[82] Again it is difficult to attribute any specific meaning to this provision. Firstly, the principle of subsidiarity was relevant to determining the original scope of the Charter, as made clear in Article 51(1) of the Charter, but not to the interpretation of the Charter provisions, whether or not referring to national laws and practices. Secondly, on each occasion the Charter refers to national laws and practices it is clear from the relevant Article that the exercise of the right shall be determined in accordance with such national laws and practices and therefore Article II-52(6) adds nothing to the Charter's existing text; as indeed Article II-52(6) recognises by providing that full account shall be taken of national laws and practices "as specified in the Charter".

In conclusion, the Report contributed little of substance to the debate over the boundaries between Union protection of fundamental rights and national constitutional protection. The proposals made, and adopted *verbatim* by the Convention, were of a conservative nature designed to assuage the concerns of Member States opposed to incorporation of the Charter. It is, however, doubtful if the changes to Articles 51(1) and (2) of the Charter and the new provisions incorporated in Article II-52(4), (5), and (6) will in fact be interpreted by the Court of Justice as altering the existing allocation of competences under the Charter.

4. The control of derogations from fundamental rights in the Union's legal order

[80] The Report, at p.5 (n.2), states: 'It should be noted that, upon possible incorporation of the Charter into the Treaty, the current wording of Article 46 (d) TEU would have to be brought in line with existing case law and Article 51 of the Charter on the (limited) application of fundamental rights to acts of Member States'. This avoids the issue of the conflict between the existing case law on the scope of the Member States obligations to comply with the Union's fundamental rights norms when derogating from Union law, discussed further at section 4 below, and Article 51(1).

[81] For the reported view of the Bar European Group and Professor Arnull that such an interpretation is unlikely, see the House of Lords Select Committee Sixth Report, *op. cit.,* at para. 60.

[82] The Report, at 5.

The history of Nazi Germany, Vichy France and apartheid South Africa[83] exemplify the dangers of a failure of judicial integrity in countering attempts to circumvent constitutional protection of fundamental rights by the expedient of derogations[84] based on concepts such as 'public emergency', 'terrorism' or 'state security'. The responses of governments to the events of September 11, 2001 have highlighted the contemporary need for vigilance in times of public emergency.[85] Although the Union currently lacks some of the key characteristics of a sovereign state, notably an autonomous military capability, police force, or security service,[86] and has not developed a coherent legal framework for regulating the use of derogations from fundamental rights protection in emergency situations, as its powers are extended into areas prone to generate conflicts with fundamental rights, in particular relating to the "area of freedom, security and justice" established by Title VI of the TEU and Title IV of the TEC,[87] the development of such a framework is pressing. In this section, the sources and control of the use of derogations under Union law will be examined in the context of the proposals in the draft Constitution.

The principal international human rights treaties provide for derogations[88] but only from non-core rights, which vary from treaty to treaty. However, even in respect of derogable rights international treaties have been interpreted to restrict the freedom of states in the

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[83] See M. Stolleis, *The Law under the Swastika: Studies on Legal History in Nazi Germany*, trans. by Thomas Dunlap (University of Chicago Press, 1998); R. H. Weisberg, *Vichy Law and the Holocaust in France* (New York University Press, 1996); R.Abel, *Politics by other Means: Law in the Struggle Against Apartheid, 1980-1994* (Routledge, 1995); and the contributions in *Recrafting the Rule of Law: The Limits of Legal Order* D.Dyzenhaus (ed.), *op. cit*.

[84] Derogations, depending on the context, refer here both to formal derogation from fundamental rights obligations, as for example under Article 15 of the ECHR, and to restrictions and limitations on fundamental rights resulting from legislative provision or judicial interpretation.

[85] See A.Cassese, 'Terrorism is Also Disrupting Some Crucial Categories of International Law' (2001) 12 *EJIL* 1993; E.Katselli and S.Shah, 'September 11 and the UK Response' (2003) 52 *ICLQ* 245; S.Peers, 'EU Responses to Terrorism' (2003) 52 *ICLQ* 227; and C.Warbrick, 'The Principles of the European Convention of Human Rights and the Responses of States to Terrorism' (2002) 3 *EHRLR* 287.

[86] But see the proposals for enabling an expansion of the role of Europol and Eurojust in the final report of Working Group X "Freedom, Security and Justice" (CONV 426/02); available on the Convention website.
[87]For the proposed extension of Union competence in this area, see the Final Report of Working Group X, *op. cit* Following the events of September 11, 2001, the Union adopted, *inter alia,* a Council Framework Decision on combating terrorism of 13 June 2002 (OJ 2002 L 164/3) and a Council Framework Decision of 13 June 2002 on the European Arrest Warrant (OJ 2002 L 190/1). On the Framework Decision on terrorism, see S.Peers, *op. cit.,* and on the European arrest warrant, see 'Memo on the European Arrest warrant as part of a move towards an area of freedom, security and justice in the EU', a JUSTICE briefing, January 2002 at: http:///www.justice.org.uk/ourwork/eu/index.html. Accessed November 2003.

[88] For example, Articles 4(1) and (2) of the ICCPR; Articles 27(1) and (2) of the American Convention of Human Rights (ACHR); and Articles 15(1) and (2) of the ECHR. See generally,J. Fitzpatrick: 'Protection against Abuse of the concept of "Emergency"' in L. Henkin and J.Lawrence (eds.) *Human Rights: An Agenda for the Next Century* ' (Hargrove, 1993).

exercise of such derogations.[89] As regards derogations from fundamental rights under Union law, three situations will need to be distinguished if the proposals in the draft Constitution on fundamental rights are adopted: firstly, derogations which form part of the Union's general principles of law as they apply either to the institutions of the Union or to the Member States implementing or derogating from their obligations under Union law; secondly, derogations from Charter rights which may be broadly sub-divided into rights which result from the constitutional traditions common to the Member States, rights which correspond to ECHR rights, and rights which are based on the EC Treaty or the EU Treaty;[90] and thirdly, the specific case of the terms on which the Union could avail of the derogations provisions under Article 15 of the ECHR.

In respect of the first instance, the Court of Justice has established that fundamental rights derived from the common constitutional traditions apply to the acts of the institutions and the Member States but that the rights are subject to limitations: "Within the Community legal order it likewise seems legitimate that these rights should, if necessary, be subject to certain limits justified by the overall objectives pursued by the Community, on condition that the substance of these rights is left untouched".[91] In respect of fundamental rights derived from the ECHR, and capable of being subject to restriction, the Court of Justice has applied a similar test.[92] As regards the scope of its jurisdiction to review derogations by a Member State from its obligations under the Treaties, the Court of Justice initially held that it had no power to control the conformity of national law with general principles of Union law, including fundamental rights, which falls outside the scope of Union law.[93] In subsequent case law, however, the Court of Justice has narrowed the scope of those judgments by holding that when a Member State seeks to justify a restriction on a fundamental freedom under the Treaties by relying on a derogation provision of the Treaties, that justification would be reviewed for its compatibility with the general principles of Union law, including fundamental rights.[94]

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[89] For example see *Advisory Opinion OC-8/87, Inter-American Court of Human Rights* (1987) 11 EHRR 33 on the suspension of the writ of habeas corpus in times of emergency. It has been argued that one conclusion to be drawn from this Opinion is that 'no European state should be permitted to derogate from its duties under Article 5(4) of the European Convention, even though this is not expressly excluded by Article 15(2)': M. Janis, R. Kay and A. Bradley, *European Human Rights Law*, 2nd Edition (OUP, 2000) at 401. In respect of derogations under Article 15(2) of the ECHR, see *Brannigan and McBride v. United Kingdom* [1993] 17 EHRR 539.

[90] The Preamble to the Charter refers to a wider range of non-exhaustive sources for Charter rights: the constitutional traditions and international obligations common to the Member States, the TEU, the Community Treaties, the ECHR, the Social Charters adopted by the Community and by the Council of Europe, and the case law of the Court of Justice and Court of Human Rights.

[91] Case 4/73, *Nold v. Commission* [1974] ECR 491, at para.14.

[92] Case C-112/00, *Schmidberger v Austria* [2003], at paras. 79 and 80.

[93] Cases 60 and 61/84, *Cinéthèque v. Fédération Nationale des Cinémas Français* [1985] ECR 2605; and Case 12/86, *Demirel v. Stadt Schäbish Gmünd* [1987] ECR 3719.

[94] Case C-260/89 *ERT* [1991] ECR I-2925 and Case C-368/95, *Vereinigte Familapress Zeitungsverlags- und Vertreibs GmbH v. Heinrich Bauer Verlag* [1997] ECR I-3689. In such cases, the Court of Justice also

Insofar as the second category is concerned, the general provision controlling the exercise of derogations is Article 52(1) of the Charter, reproduced in Article II-52(1): "Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others". This provision is based on the Court of Justice's case law on the permitted scope of derogations.[95] Charter rights corresponding to ECHR rights have, however, also to be read subject to the first sentence of Article 52(3) of the Charter, reproduced in Article II-52(3), which provides that the "meaning and scope of those rights shall be the same as those laid down" by the ECHR. WG II interprets this provision to mean it "includes notably the detailed provisions in the ECHR which permit limitations of these rights".[96] WG II does not, however, clarify whether the second sentence of Article 52(3),[97] which provides the provision shall 'not prevent Union law providing more extensive protection' than the ECHR and is retained in draft Article II-52(3), would mean the limitation provisions in the ECHR could also be more strictly construed by the Court of Justice. Such an interpretation would be welcome as permitting a higher standard of protection to be developed by the Court of Justice. As regards rights in the Charter that correspond to the non-derogable rights set out in the ECHR,[98] it seems reasonable to argue by analogy that they should be construed as not being capable of restriction under Article II-52(1) on the basis such restriction would breach the minimum equivalent standard of Article II-52(3).

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subjects the application of a derogation to the principle of proportionality and a narrow construction of the grounds for exercising such derogations: Case C-7/98, *Krombach v. Bamberski*, [2000] ECR I –1935.

[95] See the Explanations, *op. cit.,* at 48.

[96] The Report, at 7. The Explanations, *op. cit.,* also follow this interpretation, although adding: '..without thereby adversely affecting the autonomy of Community law and that of the Court of Justice ..', at 48. See further on the 'autonomy' issue section 6 below.

[97] The Report provides this provision serves to clarify Article 52(3) 'does not prevent more extensive protection already achieved or which may subsequently be provided for (i) in Union legislation and (ii) in some articles of the Charter which, although based on the ECHR, go beyond the ECHR because Union law acquis had already achieved a higher level of protection (e.g., Article 47 on effective judicial protection, or Article 50 on the right not to be punished twice for the same offence)'.

[98] These are, pursuant to Article 15 ECHR, the right to life (Article 2), the prohibition of torture or inhuman or degrading treatment or punishment (Article 3), the prohibition of slavery or servitude (Article 4(1)) and the principle of non-retroactivity of criminal laws (Article 7): see J.Fitzpatrick in L.Henkin and J.L.Hargrove, *op. cit.,* at 209. The corresponding Charter rights are set out in Articles 2, 4, 5 and 49: see the Explanations, *op. cit.*

As regards Charter rights derived from the EC Treaty or the EU Treaty,[99] Article 52(2) has been retained substantially unamended as Article II-52(2): "Rights recognized by this Charter for which provision is made in other Parts of the Constitution shall be exercised under the conditions and within the limits defined by these relevant Parts". WG II recommended retention of Article 52(2), subject to the necessary technical drafting amendments to reflect the Charter's incorporation,[100] to ensure "complete compatibility between the statements of the rights in the Charter and their more detailed regulation as currently found in the EC Treaty".[101] In contrast to Article II-52(3), therefore, Charter rights which correspond to an EC or EU Treaty right pursuant to Article 52(2) may be subject to the same restrictions and "do not enjoy broader protection than the original rights".[102]

Thirdly, until the Union accedes to the ECHR it obviously cannot avail of the specific derogation provisions in Article 15 ECHR.[103] The accession treaty of the Union to the ECHR will clearly have to address the terms on which the Union can avail of Article 15. Although the CDDH Report proposed that terms referring specifically to states in the ECHR should apply *mutatis mutandis* to the Union, without redefining each such term so as 'to tailor them to the EC/EU, which would be a highly complicated exercise',[104] it is doubtful that that such a broad-brush approach could be applied to the criteria established by the Court of Human Rights to control the exercise of derogations under Article 15.[105] Rather than relying on the Court of Human Rights to develop a new version of the

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[99] "These relate to rights to freedom of movement, almost all the rights in the "citizenship" chapter of the Charter (right to vote, access to documents, right of petition, etc.) and the clauses relating to non-discrimination on grounds of nationality and equality between the sexes": Working Document 9 of WG II of July 18, 2002, at 3. Available on the Convention website.

[100] Working Document 9, *ibid.,* at 5, and WG II, in the Report at 6, considered the issue of amending the Charter chapter on Citizens' rights in the event of incorporation to align them with the corresponding articles in the new Constitution. However, this was not considered necessary since the Charter was incorporated in a separate part of the draft Constitution and only minor amendments were made in Article II-41 and II-42.

[101] The Report, at 6.

[102] K.Lenaerts and E. de Smijter, *op. cit.,* at 283. The authors conduct a penetrating analysis of the scope of application of Article 52(2) of the Charter, and in particular to those Charter rights which are derived from sources additional to the EC and EU Treaties, *ibid* at 282-290.

[103] A difficult question will be whether the Charter rights derived from the ECHR or the ECHR rights forming part of the Union's general principles would also be covered by a derogation obtained by the Union under Article 15 ECHR.

[104] The CDDH Report, *op. cit.,* at 15.

[105] 'An exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed': *Lawless v Ireland (No 3)* (1961) 1 EHRR 15, at para.28. The size of the territory of the enlarged Union would in itself make such a test impractical.

Lawless formula to apply to the Union, it would be preferable for the accession treaty to establish separate derogation criteria appropriate for the Union.

In conclusion, incorporation of the Charter and accession by the Union to the ECHR would provide substantial benefits in clarifying and strengthening the law applicable to derogations from fundamental rights in Union law. Article II-52(1) will codify and entrench[106] the case law of the Court of Justice on controlling restrictions on fundamental rights in respect of Charter rights and accession to the ECHR will provide a well established control mechanism by the Court of Human Rights of derogations by the Union from its ECHR obligations. However, as this brief analysis of the conditions for the control of the exercise of derogations in Union law has demonstrated, the complexity and duplication of sources for fundamental rights protection under the proposals in the draft Constitution strongly militates in favour of simplification by removing reference to general principles of law as a source of fundamental rights under Article I-7(3).

5. Enforceability of fundamental rights under the Union's Constitution

The relationship of fundamental rights to the legal order has long been debated and in particular whether a necessary connection to effective enforcement mechanisms must exist for fundamental rights to progress beyond, in Bentham's phrase, "nonsense on stilts".[107] In the Union's political process, however, fundamental rights discourse fulfills a number of functions, some of which are not dependent on legal enforcement mechanisms.[108] For example, the role played by the European Parliament in promoting a coherent fundamental rights policy in the Union also served as a means of expanding "its powers and responsibilities to topics which did not actually fall within its normal remit".[109] However, it is generally agreed that increased rights of access to judicial enforcement mechanisms is a key element in promoting the effective protection of fundamental rights.[110]

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[106] On entrenchment, see section 7 below.

[107] For Bentham's downbeat assessment of fundamental rights as set out in the French Declaration of the Rights of Man see the version of his 'Anarchical Fallacies' reprinted in J.Waldron (ed.) *Nonsense upon Stilts: Bentham, Burke and Marx on the Rights of Man* (Methuen, 1987).

[108] F.I Michelman provides in the Massachusett Constitution an example of 'obligations *of law,* which nevertheless defy judicial enforcement: 'The Constitution, social rights, and liberal political justification', (2003) 1 I.CON, 13.

[109] R.Rack and S.Lausegger, 'The Role of the European Parliament : Past and Future', in P.Alston, M.Bustelo and J.Heenan (eds.), *op. cit*.

[110]See in this sense the paper prepared for WG II by F.G.Jacobs on 'Necessary changes to the system of judicial remedies', Working Document 20, at 2. Available on the Convention website. It has been argued that the Union should also improve other non-judicial mechanisms for securing protection of fundamental rights, see P. Alston and J.H.H.Weiler, *op. cit.*, at 19-20. However, see Armin Von Bogdandy's critique of aspects of Alston and Weiler's thesis, *op. cit.*

In addition to accession by the Union to the ECHR and incorporation of the Charter, the principal reform proposals made in the context of the Union to achieve this objective have included: the relaxation of the standing requirements under Article 230(4) TEC; the creation of an individual human rights complaint procedure; and access to the Court of Justice for public interest institutions.[111] WG II considered and rejected the idea of creating a special procedure for the protection of fundamental rights before the Court of Justice;[112] it decided not to make any recommendations to the Convention on the reform of Article 230(4) TEC;[113] and it did not consider the issue of *locus standi* for public interest institutions. Part III of the draft Constitution only addresses the first issue in Article III-270(4), which is a substantial reworking of Article 230(4) to take account of the change in the denomination of the Union's legal instruments.[114] Article III-270(4) constitutes a partial loosening of the "direct and individual concern" test as regards a "regulatory act" but not an "act"[115] by providing that any natural or legal person may challenge a regulatory act which is "of direct concern to him or her and does not entail implementing measures".

WG II did, however, briefly refer to the "possibility of a provision in the Treaty on the obligation of Member States, as spelt out in the recent case law, to provided for effective remedies for rights derived from Union law".[116] This proposal was taken up in Article I-28, paragraph 2: "The Member States shall provide rights of appeal sufficient to ensure effective legal protection in the field of Union law". This is no doubt intended to buttress the obligation of sincere co-operation incumbent on the Member States under Article 10 TEC and restated in Articles I-5(2) and I-10(2) of the draft Constitution and codifies the existing case law of the Court of Justice.[117] As regards the widely acknowledged *lacunae*

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[111] As listed and discussed by Bruno de Witte, *op. cit.,* at 887-897. See also the discussion papers prepared for WG II: CONV 116/02 of June 18, 2002; and Working Document 20 of September 27, 2002. Both available on the Convention website.

[112] The Report, at 15.

[113] *Ibid,* at p.16. WG II referred in n.3 on p.16 to the various contributions made to it on this issue which are discussed in greater detail in Working Document 21 of 1 October 2002 from Mr. A.Vitorino: *'The question of effective judicial remedies and access of individuals to the European Court of Justice'*. Available on the Convention website.

[114] Final Report of Working Group IX on Simplification, o*p. cit.*

[115] The distinction between an 'act' and a 'regulatory act' is dependent on an interpretation of the new classes of Union instruments set out in Chapter 1 of Title V of Part I of the Constitution (Articles I-32 to I-37). However, the terminology adopted in those articles does not match Article III-270(4) and needs clarification.

[116] The Report, at 16, referring to paras. 41 and 42 of *UPA v. Council* (Case C-50/00P). This reference was prompted by a proposal by Mr. Soderman, the European Ombudsman: see doc. CONV. 221/02 and Working Document 21, *op. cit.*, at 7.

[117] See references in Working Document 21, *op. cit.*, at 7, n.16.

in judicial protection in respect of Third Pillar measures,[118] WG II took the view the issue was outside its remit.[119] Working Group X on 'Freedom, Security and Justice' concluded that "the general system of jurisdiction of the Court of Justice should be extended to the area of freedom, security and justice, including action by Union bodies in this field".[120] The Convention followed this recommendation since Article III-270(1) provides jurisdiction for the Court of Justice to review "the legality of European laws and framework laws, of acts of the Council of Ministers, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects vis-à-vis third parties" which includes the acts which may be adopted under Chapter IV of Part III of the draft Constitution relating to the "Area of Freedom, Security and Justice".

In the context of improved access to justice, the two most significant benefits from implementation of the draft Constitution would be the individual right of application under Article 34 of the ECHR and the possibility for individuals to avail of Charter rights directly before the Court of Justice and national courts. Both issues were, however, only briefly discussed by WG II.[121] The effect of incorporation of the Charter on creating justiciable rights for individuals is the more problematic. Incorporation of the Charter would, according to WG II, make 'the Union's present system of remedies available'.[122] This makes the point that incorporation of the Charter would result in Charter rights being directly justiciable by the Court of Justice and national courts applying Union law rather than, as presently, indirectly as a source for general principles of Union law. In addition, the extension of the Court of Justice's jurisdiction under the draft Constitution in the "area of freedom, security and justice" would materially enlarge the scope of the justiciability of Charter rights. However, the retention of a modified version of Article 51(1) of the Charter in Article II-51(1) seems designed to retain the fundamental structure of the Charter as an instrument of judicial review rather than conferring on individuals a remedy for an alleged violation of a Charter right independently of "an accessory instrument which violates a rights included in the Charter".[123] The introduction of an independent remedy based on an alleged violation of fundamental rights was

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[118] For the current jurisdiction of the Court of Justice in respect of the Third Pillar see Bruno de Witte, *op. cit.*, at 885-886. See also N. Neuwahl, 'The place of the citizen in the European construction', in P.Lynch , N.Neuwahl and W.Rees (eds.) *Reforming the European Union: from Maastricht to Amsterdam* (Longman, 2000), at 195-196.

[119] The Report, at 16, n.3.

[120] Final report of Working Group X on 'Freedom, Security and Justice', CONV 426/02 of December 2, 2002, at 25. Available on the Convention website.

[121] For the right of individual application to the ECHR, see Working Document 21, *op. cit.*, at 4. The CDDH considered the technical aspects of an individual application as regards joinder of the Union/Member States as co-defendants in the CDDH Report, *op. cit.*, at 18-19.

[122] The Report, at 15.

[123] L.Betten, *op. cit.*, at 695. I am indebted for this analysis to his perspicacious comments on the Charter as an instrument for constitutional review of Community Acts, *ibid* , at 694-697.

canvassed[124] but rejected by WG II and the Convention. A person seeking to seek a judicial remedy for a breach of a Charter right will therefore have to bring themselves within the scope of one of the existing judicial remedies.[125]

6. Accession to the ECHR: the Union at last?

Convergence between the Community institutions and those of the Council of Europe had already been discussed at the time of the founding of the Communities.[126] Although the original Treaties did not incorporate any reference to the ECHR, or indeed any fundamental rights standards, the Court of Justice in a series of cases beginning with *Rutili*[127] made explicit reference to the ECHR. The Parliament, Council and Commission issued a Joint Declaration of 5 April 1977 concerning the Protection of Fundamental Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms[128] confirming their respect for the fundamental rights protected under the Court of Justice's case law on general principles, including those derived from the ECHR. In 1979 the Commission reversed its earlier opposition to accession by the Communities to the ECHR.[129] Article F(2) TEU, introduced by the Maastricht Treaty and renumbered as Article 6(2) by the Amsterdam Treaty, enshrined the fundamental rights protected by the ECHR as general principles of Community law. In November 1993 the Council submitted the issue of accession by the Community to the ECHR for an opinion under Article 300(6) TEC but the Court of Justice concluded that the Community did not have competence to accede to the EC Treaty and accession would require its amendment under Article 236 TEC (now Article 48 TEU).[130] The intergovernmental conferences leading up to the Amsterdam and Nice Treaties did not, however, amend the Treaties to permit accession. The issue of the accession to the ECHR was raised at the Laeken European Council meeting of December 2001 and submitted for consideration by the European Convention.[131]

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[124] See Working Document 21, *op. cit.*, at 3-4.

[125] Subject to such amendments as may be adopted in the new Constitution.

[126] See T.Freixes and J.C.Remotti, *Le Futur de l'Europe: Constitution et Droits Fondamentaux*, European Institute of Law, at p.3, n.2: http://europa.eu.int/futurum/documents/other/oth001101bis_fr.pdf. Accessed November 2003.

[127] Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219. For further references see: T.C.Hartley, *op. cit.* , at 141, n. 32.

[128] OJ 1977 C 103/1.

[129] *Accession of the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 April 1979, EC Bulletin, Supplement 2/79.

[130] Opinion 2/94, *Accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.

[131] See the Laeken Declaration on the Future of the European Union at http://europa.eu.int/comm/laeken_council/index_en.htm. Accessed November 2003.

The recommendation of WG II to include a constitutional authorisation enabling the Union to accede to the ECHR[132] was in this context hardly controversial.[133] The Convention broadly accepted the recommendation but strengthened its terms from an authorisation to an injunction in Article I-7(2): "The Union shall seek accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Accession to that Convention shall not affect the Union's competences as defined in the Constitution". This obligation is tempered, however, by the provision in Article III-227(7) that accession shall be subject to the consent of the European Parliament and in Article III-227(9) that the Council must act unanimously throughout the accession procedure.[134]

The inclusion of the second sentence in Article I-7(2), specifying that accession to the ECHR shall not affect the Union's competences as defined in the draft Constitution, was the result of a proposal of WG II[135] and was one of three "technical devices" it recommended to ensure the "Union's accession to the ECHR does not modify the allocation of competences" between the Union and the Member States.[136] WG II was concerned to ensure that accession by the Union to the ECHR "would thus not lead to any extension of the Union's competences, let alone to the establishment of a general competence of the Union on fundamental rights".[137] However, WG II never set out how accession to the ECHR could lead to such results and indeed acknowledges that the preparatory work for accession proceeded on the opposite assumption.[138] In any event the definition of the Union's competences as set out in the draft Constitution are so fluid that the statement in Article I-7(2) that accession to the ECHR shall not 'affect' the

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[132] The Report, at 13.

[133] The arguments in favour of accession are listed at pages 11-12 of the Report. The modalities of accession by the Union have been addressed in the CDDH Report, *op. cit.*

[134] WG II had recommended that a requirement for a unanimous decision of the Council and assent of the European Parliament to the terms of accession be included in the constitutional authorization: the Report, at 13. The Commission in its comments on the Draft Constitution has proposed the Council decision on accession be taken by Qualified Majority Voting: Section II.7 of the Commission's Opinion on the draft Constitution of 17 September, 2003: COM(2003)548. Available on the Convention website.

[135] The Report, at 13.

[136] The other two being a statement upon accession 'stressing the Union's limited competence in the area of fundamental rights' and a mechanism allowing the Union and a Member State to appear jointly as 'co-defendants' before the Court of Human Rights to avoid any ruling by the Court of Human Rights on the allocation of competences between the Union and the Member States, *ibid,* 13-14. See on these proposals the CDDH Report, *op. cit.*, at paras. 26 and 57-62 respectively.

[137] The Report, at 13.

[138] As the Report itself acknowledges : at 13, note 2. The CDDH Report, clearly states: 'The "scope" of EC/EU accession would be limited to issues in respect of which the EC/EU has competence', *op. cit.*, at para. 26.

Union's competences seems too broad: accession may well constrain, and thus affect, the Union's competences.

A further issue arising from accession to the ECHR is the extent to which the Court of Justice will be obliged to follow the case law of the Court of Human Rights on the interpretation of the ECHR.[139] Specific references to the jurisprudence of the Court of Human Rights by the Court of Justice had until recently been infrequent[140] and it has been argued that the Court of Justice "is not legally obliged to follow the interpretation of the European Court of Human Rights".[141] The details of the structuring of the relationship between the Court of Justice and the Court of Human Rights will be crucial in determining whether the Court of Human Rights is to be recognized as a superior court to the Court of Justice as regards interpretation of the ECHR following accession.[142] It is submitted that the terms of accession of the Union to the ECHR should make clear that the Court of Justice should be bound to follow a ruling of the Court of Human Rights in order to maximize the benefits of accession by the Union to the ECHR[143] and to avoid possible conflicts between the Union's legal order and the ECHR.[144] Article II-52(3) would in any event oblige the Court of Justice to review the relevant case law of the Court of Human Rights in order to ensure that those Charter rights which correspond to ECHR rights have the same "meaning and scope" as the ECHR rights.

A wider but related issue relates to the principle of the autonomy of the Union's legal order. WG II was of the opinion that this principle would not place any legal obstacle to accession since the "Court of Justice would remain the sole supreme arbiter of questions of Union law and on the validity of Union Acts; the European Court of Human Rights could not be regarded as a superior Court but rather as a specialized court exercising external control over the international law obligations of the Union resulting from accession to the ECHR".[145] This conclusion is, however, debatable. As the CDDH Report makes clear, a procedure before the Court of Justice would not be considered a

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[139] See L.Betten, *op. cit.*, at 697-701.

[140] See B. de Witte, *op. cit.,* at 878. But see recent references in: Case C-249/96, *Grant* v *South-West Trains Ltd.* [1998] I-621, at paras. 33 and 34; Case C-60/00, *Carpenter v Secretary of State for the Home Department* [2002] I-6279, at para. 42; and Case C-112/00, *Schmidberger v Austria* [2003], at para. 79.

[141] D. Spielmann, 'Comparing ECJ and ECHR Case Law', in P.Alston, M. Bustelo and J. Heenan (eds.), *op. cit.*, at 762, note 21.

[142] On the proposed modalities of accession by the Union to the ECHR see the discussion paper of June 18, 2002 forwarded to the Convention Secretariat by WG II (CONV 1116/02). Available on the Convention website. See also the CDDH Report, *op. cit.*

[143] For arguments in favour of the Court of Human Rights as final arbiter on the protection of human rights in the Union see: L.Betten, *op. cit.*, at 698-699 and I.Canor, '*Primus inter pares.* Who is the ultimate guardian of fundamental rights in Europe?' (2000) 25 E.L.Rev. 3.

[144] See the CDDH Report, *op. cit.*, at paras. 78-82.

[145] The Report, at 12.

procedure of "international investigation or settlement" in the sense of Article 35(2)(b) ECHR and "the mere fact that a case has been dealt with by the Luxembourg Court should not prevent the Strasbourg Court from accepting an application as admissible".[146] If the Court of Human Rights found that a judgment of the Court of Justice had failed to protect an ECHR right, the Court of Justice would be obliged to follow the decision of the Court of Human Rights under Article 46(1) ECHR, provided the Union was a party to the proceedings before the Court of Human Rights. Furthermore, proposed changes to the ECHR whereby the Committee of Ministers would be given power to institute infringement proceedings "against a State that would persistently refuse to comply with a judgment of the Court",[147] could apply to a persistent failure by the Court of Justice to adopt its interpretation of the ECHR to that of the Court of Human Rights.

7. Incorporation of the Charter: A Bill of Rights for the Union?

A "bill of rights is a formal commitment to the protection of those rights which are considered, at that moment in history, to be of particular importance. It is, in principle, binding upon the government and can be overridden, if at all, only with significant difficulty. Some form of redress is provided in the event that violations occur".[148] It is the purpose of this section to evaluate whether incorporation of the Charter would provide the Union with a bill of rights according to Philip Alston's definition. The other elements of the Union's protection of fundamental rights set out in Article I-7, accession to the ECHR and retention of fundamental rights as general principles of law, are not included in this analysis since, as has been argued, retention of the general principles would add little of substance to the Charter rights and principles[149] and, until the terms of accession by the Union to the ECHR are negotiated, it is difficult to assess the contribution of Union accession to the ECHR.

It is reasonably clear that the Charter satisfies Philip Alston's first criterion both in the form it was adopted in December 2000 and *a fortiori* if incorporated on the terms set out in the draft Constitution. The fourth paragraph of the Charter's Preamble in both versions clearly affirms its claim to modernity through its mission to "strengthen the protection of fundamental rights in the light of changes in society, social progress and scientific and technological developments by making those rights more visible in a Charter" and the breadth of the rights recognized by the Charter has generally been acknowledged.

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[146] CDDH Report, *op. cit.*, at 16-17.

[147] See the CDDH report to the Council of Europe of 8 April 2003 on guaranteeing the long-term effectiveness of the ECHR: CM(2003)55, proposal C.4. Available at http://www.coe.int/T/F/Droits_de_l'Homme/2003cm55.asp. Accessed November 2003.

[148] P.Alston, 'A Framework for the Comparative Analysis of Bills of Rights' in P.Alston (ed.) *Promoting Human Rights Through Bills of Rights: Comparative Perspectives* (OUP, 1999), at 10.

[149] For a study of the Charter rights in the context of the Court of Justice's existing case law on fundamental rights, see: K.Lenaerts and E.E. de Smijter, *op. cit.*

As regards the binding nature of the Charter on the Union's government, this would be achieved through the combined effect of Article I-7(1) and the reformulated version of Article 51(1) of the Charter set out in Article II-51(1). Article I-7(1) requires the Union to "recognise the rights, freedoms and principles set out in the Charter" and Article II-51(1) requires the "institutions, bodies and agencies of the Union with due regard for the principle of subsdiarity and to the Member States only when they are implementing Union law" to "respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the other Parts of the Constitution".[150] It is difficult to justify the differences in terminology between Article I-7(1) and II-51(1) other than by reference to the perceived political imperative of retaining and strengthening the jurisdictional elements of Article 51(1) of the Charter. Nevertheless, it is clear that that the incorporated Charter would create binding legal obligations on the Union's governing institutions and any failure to fulfill those obligations within the parameters set out in the Constitution would found an action for judicial review of acts adopted in breach of those obligations. Incorporation of the Charter on the terms of the draft Constitution would alter the normative status of the Charter by allowing direct judicial reference to the Charter rather than through the indirect route of the general principles case law.[151]

"So that it appeareth plainly, to my understanding, both from reason, and from Scripture, that the sovereign power, whether placed in one man, as in monarchy, or in one assembly of men, as in popular, and aristocratical commonwealths, is as great, as possibly men can be imagined to make it".[152] While Thomas Hobbes would no doubt have needed some persuading of the merits of entrenching constitutional fundamental rights,[153] incorporation of the Charter on the terms of the draft Constitution will achieve entrenchment according to the definition formulated by Philip Alston. Article IV-7 elaborates on the current procedure for amending the TEU and TEC under Article 48 TEU but retains the core requirements that any amendments to the Constitution require firstly the "common accord" of the conference of the representatives of the governments of the Member States and secondly the ratification of the amendments by each of the Member States "in accordance with their respective constitutional requirements". Both from the perspective of historical precedent and the Union's enlargement, it would be difficult to argue against the proposition that overriding the Charter rights by amendment to the Constitution could only be done "with significant difficulty".

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[150] This contrasts with the more emphatic terminology employed in Article 1 of the ECHR: 'The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention'.

[151] For a less optimistic view on the clarity of the normative status of the Charter under Article I-7(1), see the editorial comments in: (2003) 28 E.L.Rev., at 450.

[152] Thomas Hobbes, *Leviathan,* ed. J.C.A. Gaskin (OUP, 1998), at 138.

[153] For an excellent discussion of the arguments for and against entrenchment of bills of rights see: M. Darrow and P. Alston, 'Bills of Rights in Comparative Perspective', in P. Alston (ed.), *op. cit.*, 465; and N. Walker, 'Human Rights in a Postnational Order: Reconciling Political and Constitutional Pluralism' in T.Campbell, K.D.Ewing and A. Tomkins (eds.), *op. cit.*, 119.

The final characteristic of a bill of rights according to Philip Alston's definition, requiring some form of redress to be provided in the event that violations of rights occur, is the most problematic under the Charter's existing status and would so remain, albeit to a more limited extent, if the Charter were incorporated on the terms of the draft Constitution. In particular, the limitation of the scope of application of Charter rights under Article II-51 would pose real problems of effective judicial redress: "Insofar as the Charter contains rights which are not based on the E.C. Treaty or E.U. Treaty, these rights can offer legal protection only to the extent that they relate to the current exercise of powers by the Community, the Union or the Member States implementing Union law. The statement of rights that cannot be linked to such an exercise of power mainly has a political function".[154] There may therefore be an infringement of Charter rights which, independently of the issue of the adequacy of Union remedies for breaches of fundamental rights, will not be subject to legal redress since it falls outside the competence of Union law. While it could be argued that there is no infringement, since Article II-51 defines Charter rights so as to exclude their application in such a situation, such an argument is unattractive since instead of making the Charter rights 'more visible',[155] incorporation threatens to make them more illusory.

In conclusion, the incorporation of the Charter on the terms of the draft Constitution falls at the last hurdle when measured against the criteria for a bill of rights identified by Philip Alston. While it may justifiably be argued that such a restriction on the scope of the Charter rights is inevitable to maintain the jurisdictional balance between the Union and the Member States and render the Charter politically acceptable,[156] the Charter rights could nevertheless have been redrafted to take account of the Union's competences under the draft Constitution. However, such a task was outside the remit of WG II and never a political option for the Convention.

8. Conclusion – success at a price

In recommending the incorporation of the Charter and authorization for the Union to accede to the ECHR, WG II has made two important contributions to the draft Constitution and, if they are implemented, the protection of fundamental rights in the Union will benefit from a transparent, principled and securely entrenched constitutional basis. The subsequent accession by the Union to the ECHR would provide an autonomous system of control over the protection of fundamental rights and an important additional bulwark against any abuse of the Union's enhanced powers, particularly in the "common area of freedom, security and justice" currently covered by the Third Pillar and Title IV TEC.

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[154] K. Lenaerts and E.E. de Smyter, *op. cit.,* at 289.

[155] Paragraph 5 of the preamble to Part Two of the draft Constitution.

[156] As J. Schwarze points out Article 51(2) was deliberately included in the Charter to 'increase its chance of acceptance, in particular in Germany.', *op. cit.*, at 29.

While both of these proposals were predictable, the potential opposition of some Member States to either or both of these measures meant that WG II was conservative both in its approach to the terms on which the Charter should be incorporated and in its analysis of the effect on the Union's legal order of accession to the ECHR. As a result, several of the subsidiary recommendations in the Report were prompted more by a desire to smooth the passage of the primary recommendations than a principled reflection on the role of fundamental rights protection under the new Constitution. In particular, the retention of general principles as a source of fundamental rights under the new Constitution would undermine from a rule of law perspective the benefits of having a codified system of protection in the Charter and the ECHR. In a similar vein, the drafting amendments to the Charter incorporated in the draft Constitution appear driven by the need to assuage Member State sensibility as to the allocation of competences in the field of fundamental rights protection and detract from the existing text of the Charter.[157]

Political reality suggests that the IGC is unlikely to devote substantial time to the detailed amendments resulting from the proposals of WG II. Incorporation of the Charter and a mandate for the Union to accede to the ECHR no longer seem controversial, at least at the IGC level, and the additional 'safeguards' built into the draft Constitution against an encroachment of Union competence in the protection of fundamental rights are unlikely to be challenged but rather welcomed as a useful armory to deploy in the struggle to secure ratification of the new Constitution. The contentious issues for the future development of fundamental rights protection in the Union are more likely to center on the terms of accession of the Union to the ECHR and alternative mechanisms for updating fundamental rights protection if Council unanimity is required for amendments of the new Constitution. While the 'technical' amendments resulting from the Report may seem of minor significance in comparison, it would be regrettable if the IGC fails to take full advantage of this unique opportunity to establish a unified, coherent and simplified constitutional basis for the protection of fundamental rights in the Union.

[157] The British position is set out in Cmnd 5934, *op. cit.,* at para.102.