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Beware of lawyers bearing gifts: A critical evaluation of the Proposals on Fundamental Rights in the Draft Constitutional Treaty.

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This article offers a critical assessment of the fundamental rights provisions of the draft Treaty establishing a Constitution for Europe, and in particular the proposals for Union accession to the ECHR, incorporation of the Charter, and retention of general principles as a source of fundamental rights in Union law. It is the contention of this article that the proposals on accession and incorporation merit support but that retention of the general principles and proposed modifications to the Charter fail to promote the constitutional objectives set by the 2001 Laecken Declaration.

1. Introduction

The two principal proposed reforms to fundamental rights protection in the draft Constitution establishing a Constitution for Europe as presented to the President of the European Council in Rome on July 18, 2003 (the draft Constitution)¹ are the obligation in

* The author gratefully acknowledges comments on an earlier version of this article from Professor Javaid Rehman. The views expressed in this article are solely the author's. The author can be contacted at stephen.carruthers@dit.ie

¹ CONV 850/03. The July 18 text is available on the Convention website at <http://european-convention.eu.int>. Documents available on this website are not further referenced. Reference to specific Articles in Part I, II, III or IV of the draft Constitution omits reference to the draft Constitution. The July 18 version has been the subject of technical amendments by the Working Party of IGC Legal Experts which

Article I-7(1) for the Union to recognize the rights, freedoms and principles set out in the Charter as incorporated in Part II of the draft Constitution and the obligation in Article I-7(2) for the Union to accede to the ECHR.² These reforms, inserted in the draft Constitution by the Convention on the Future of Europe (the Convention) on the basis of the report of Working Group II (WG II),³ reflect the balance of political and academic opinion in favor of both initiatives.⁴ The Intergovernmental Conference opened at Rome on October 4, 2003 (the “IGC”) has accepted these reforms in principle but proposed amendments both of a substantive and technical nature.⁵

resulted in a revised version published on November 25, 2003 as CIG 50/03, which is the text referred to in this article unless otherwise specified. Subsequent revisions by the IGC Legal Working Party are listed, as of April 30, 2004, in CIG 74/04, at para. 10. IGC documents are available at:

http://ue.eu.int/cms3_applications/Applications/igc/doc_register.asp?content=PRESID&lang=EN&cmsid=577 (the IGC website).

² This article refers to Union accession to the ECHR. The question of the ECHR Protocols to which the Union would accede is for resolution during the accession negotiations.

³ See the final Report of WG II on “Incorporation of the Charter/Accession to the ECHR” (the Report): 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.

⁴ 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. Ewing and A. Tomkins (eds.), *Sceptical Essays on Human Rights* (2001) 33-37. See also J.H.H. Weiler, ‘Editorial: Does the European Union Truly Need a Charter of Rights?’ (2000) 6 *ELJ* 95-97.

⁵ The Italian Presidency proposals are in CIG 60/03 of December 9, 2003; CIG 60/03 ADD1 of December 9, 2003; and CIG 60/03 ADD 2 of December 11, 2003; available on the IGC website. The first proposed amendment on fundamental rights related to the Explanations to the Charter of October 11, 2000 (the Charter Explanations) (CHARTE 4473/00 CONVENT 49 - available on the Convention website); the

Following the failure of the IGC to reach agreement at the European Council meeting of December 12-13, 2003, the Irish Presidency submitted a report to the European Council meeting of March 25-26, 2004 which was broadly positive on the perspectives for adoption of the draft Constitution.⁶ Further proposals were submitted in April 2004,⁷ including a new Protocol relating to Article I-7(2) on the accession of the Union to the ECHR (the ECHR Protocol). Draft texts subject to a broad consensus were circulated in May which included proposed amendments relating to Union accession to the ECHR, the ECHR Protocol and a new draft Declaration relating to Article I-7(2).⁸ Issues requiring further discussion, in preparation for the European Council meeting in Brussels on June 17-18, 2004, were circulated separately, including proposals on the status of the Charter Explanations.⁹

A central issue in any reform process lies in identifying and assessing the validity of the objectives to be achieved by a proposed constitutional provision.¹⁰ This article undertakes

second amended Article I-7(2) by requiring the Union to accede to the ECHR rather than, as in the draft Constitution of July 2003, 'to seek accession'; and the third replaced the requirement for unanimity in the Council of Ministers in negotiating the Union's accession to the ECHR under Article III-227(9) of the draft Constitution by a qualified majority throughout the accession procedure.

⁶ CIG 70/04 of 24 March, 2004. Available on the IGC website.

⁷ CIG 73/04 of 29 April, 2004. Available on the IGC website.

⁸ CIG 76/04 of 13 May, 2004. Available on the IGC website. The draft Declaration reads: 'The Conference agrees that the Union's accession to the European Convention on Human Rights should be arranged in such a way as to preserve the specific features of Community law. A system should be introduced for liaison between the Court of Justice and the European Court of Human Rights in order to avoid, as far as possible, any discrepancies in case law.'

⁹ CIG 75/04 of 13 May, 2004. Available on the IGC website.

¹⁰ "When a legal norm is expressed as an article in an institutional framework, it is articulated in a particular manner for a particular purpose.": Teraya Koji, 'Emerging Hierarchy in International Human

an assessment of how far the fundamental rights reforms in the draft Constitution advance the objectives of promotion of the rule of law, transparency, a balanced relationship between the Union and national legal orders,¹¹ and effective judicial redress.¹² While this assessment lends strong support to incorporation of the Charter of fundamental rights of the European Union declared at Nice on December 7, 2000 (the Charter)¹³ and accession by the Union to the ECHR, it also concludes that a number of other provisions in the draft Constitution, and in particular the retention in Article I-7(3) of general principles of law as a source of fundamental rights in the Union's legal system and the proposed amendments to the Charter are unjustified.

2. Fundamental Rights under the draft Constitution and the Rule of Law

Rights and Beyond: From the Perspective of Non-derogable Rights' (2001) 12 *EJIL* 917-941, at 922 (n.17).

¹¹ See Alan Dashwood, 'The Relationship Between the Member States and the European Union/European Community' (2004) 41 *CML Rev.* 355-381.

¹² Many of these objectives were affirmed in the Laeken Declaration of the European Council on the Future of the European Union of December 2001: available at:

http://europa.eu.int/comm/laeken_council/index_en.htm. See also Koen Laenarts and Marlies Desomer,

'Bricks for a Constitutional Treaty of the European Union: values, objectives and means' (2002) 27 *EL*

Rev. 377-407; and Andrew Williams, 'EU human rights policy and the Convention on the Future of

Europe: a failure of design?' (2003) 28 *EL Rev.* 794-813.

¹³ [2000] OJ C364/1.

‘The dominant way of safeguarding fundamental rights is the rule of law’.¹⁴ 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 European Court of Justice (the Court of Justice)¹⁵ as sources for the general principles of Union law.¹⁶ The EU and EC Treaties both affirm the importance of respecting the rule of law.¹⁷ Recital two of the Charter refers to the rule of law and the substantive Articles of the Charter enshrine basic rights constitutive of both the formal and substantive elements of the rule of law.¹⁸

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, including the rights of persons belonging to minorities.

¹⁴ Armin von Bogdandy, ‘The European Union as a Human Rights Organization? Human Rights and the Core of the European Union’ (2000) 37 *CML Rev.* 1307-1338, at 1311-1312. For a survey of legal scholarship see: David Dyzenhaus, ‘Recrafting the Rule of Law’, in David Dyzenhaus (ed.) *Recrafting the Rule of Law: The Limits of Legal Order* (1999) 1-12.

¹⁵ Includes reference, as appropriate, to the Court of First Instance.

¹⁶ 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.

¹⁷ Third preamble of the TEU and Articles 6(1) TEU and 7 TEU. Article 177(2) TEC refers to ‘developing and consolidating democracy and the rule of law’ as an objective of Community policy in the sphere of development cooperation. 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, ‘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.

¹⁸ See P. Craig, ‘Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework’ (1997) *Public Law* 467-487.

These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and the principle of non-discrimination between men and women prevail.”¹⁹ 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 developing a special relationship with neighboring states.

However, the relationship between respect for human rights and the rule of law has been problematic in 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 a constitutional bill of rights.²⁰ As such the principles originally depended for their legitimacy on the integrity of the judicial process rather than democratic validation.²¹ Secondly, the Charter recognizes, rather than creates, the enumerated rights, freedoms and principles and is not as yet integrated into the Union’s legal order.²² Thirdly, Title IV TEC and Title VI TEU, which contain provisions establishing a “common area of freedom, security and justice”, provide more limited access to democratic control and judicial review than other areas of Union law.²³

¹⁹ Text based on CGI 76/04, *op. cit.*

²⁰ See 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.), *The EU and Human Rights* (1999), 859-897.

²¹ Article 6(2) TEU, introduced at Maastricht as Article F(2), provided partial validation.

²² 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* 151-170.

²³ See S. Peers: ‘Human Rights and the Third Pillar’, in Alston, Bustelo and Heenan (eds.), *op. cit.*, 167-186; and S. Peers, *EU Justice and Home Affairs* (2000). For the jurisdiction of the Court of Justice over the Third Pillar, see Bruno de Witte, *op. cit.*, at 885-886.

The draft Constitution would significantly improve the relationship between fundamental rights protection and the rule of law. Union accession to the ECHR and incorporation of the Charter would provide a clearly defined constitutional basis for the protection of fundamental rights. 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.²⁴ Incorporation of the Charter would alter its normative status by allowing direct judicial reference to the Charter rather than through the indirect route of the general principles case law.²⁵ Finally, Article III-270(1) provides jurisdiction for the Court of Justice to review acts which may be adopted under Chapter IV of Part III establishing the area of freedom, security and justice.²⁶

3. Sources of fundamental rights under the draft Constitution: ‘a lawyers paradise’?

‘If we are to have greater transparency, simplification is essential.’²⁷ This section argues that this goal would be undermined by the retention of general principles as a source of fundamental rights in the Union’s legal order and by the proposed amendments to the

²⁴ This argument is summarised in J. P. McCormick, ‘Supranational Challenges to the Rule of Law: The Case of the European Union’ in Dyzenhaus (ed.), *op. cit.*, 267-282, at 277-279. The Report concentrated on the opposite 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.’ *op. cit.*, at 12.

²⁵ See Jaqueline Dutheil de la Rochère, ‘The EU and the Individual: Fundamental Rights in the Draft Constitutional Treaty’, (2004) *CML Rev.* 345-354, at 351.

²⁶ But for retained restrictions on the Court of Justice’s jurisdiction over areas currently subject to Title VI TEU, see Dougan, *op. cit.*, at 792.

²⁷ Laeken Declaration, *op. cit.*

Charter in Part II of the draft Constitution. Article I-7(3), which closely follows Article 6(2) TEU, provides 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.²⁸ The retention of the reference to the common constitutional traditions and the ECHR as sources of general principles of law is designed to retain a dynamic element to the protection of fundamental rights in Union law.²⁹ However, the Court of Justice's references to such common constitutional traditions have been limited: "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".³⁰ The accession of the ten new Member States on May 1, 2004 further complicates reliance on such traditions.

Furthermore, the reference to the ECHR is otiose since the Charter already substantially recognizes the rights and freedoms guaranteed by the ECHR.³¹ Article II-52(3) provides that if Charter rights correspond to ECHR rights they shall have the same scope and meaning as laid down in the ECHR but that this does not prevent Union law providing

²⁸ The formulation in both Article 6(2) TEU and Article I-7(3) is narrower than the case law of the Court of Justice, which refers to 'guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories' (Case C-7/98, *Krombach v. Bamberski* [2000] ECR I-1935, at para. 25).

²⁹ The Report, *op. cit.*, 9.

³⁰ Bruno de Witte, *op. cit.*, 878. See also Koen Laenarts, 'Interlocking Legal Orders in the European Union and Comparative Law', (2003) 52 *ICLQ* 873-906.

³¹ '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* 690-701, at 692.

more extensive protection.³² Even if the Union does not accede to the ECHR, retaining ECHR rights as a source of general principles of Union law would not materially add to the same, or enhanced, rights set out in the Charter. Retention of the general principles in Article I-7(3) would, however, undermine certainty in identification of the Union's fundamental rights.³³

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'. Article II-52(4) was justified as serving 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".³⁴ This suggests Article II-52(4) was proposed for political expediency rather than on merit. Apart from the difficulty of identifying the common traditions,³⁵ the rule of interpretation risks freezing the relevant Charter articles to reflect the constitutional traditions of fifteen member states.³⁶ A further objection to Article II-52(4) is that since the Charter does not identify the rights derived from the common constitutional traditions nor which traditions form the source of such rights, one must refer to the Charter Explanations, which weakens the Charter's authority and risks

³² The Report refers to Articles 47 and 50 of the Charter as examples of provisions providing more extensive protection, at 7.

³³ A WG II discussion paper, dated June 18, 2002, sets out the objections to retaining an equivalent to Article 6(2) TEU: CONV 116/02, at 10; available on the Convention website. See also 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.

³⁴ The Report, *op. cit.*, at 7.

³⁵ See Leonard Besselink, 'The Member States, the National Constitutions and the Scope of the Charter', (2001) 8 *Maastricht Journal of European and Comparative Law*, 69-80.

³⁶ Although the ten new Member States had observer status at the Convention which elaborated the Charter.

solidifying the rights protected by it. As has been aptly stated: “Good constitutions are short and enigmatic”.³⁷

Article II-52(5) provides: “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”. Several criticisms may be made of Article II-52(5).³⁸ Firstly, it constitutes an attribution of legislative competence, although without defining the modalities of exercise, which conflicts with Article II-51(2).³⁹ Secondly, by restricting judicial cognizance of Charter principles to implementing legislation, it deprives the principles of legal effect in the absence of such legislation. Thirdly, it creates an unnecessarily rigid distinction between the legal effect of those provisions of the Charter recognizing rights and those containing principles.⁴⁰

Article II-52(6) provides: “Full account shall be taken of national laws and practices as specified in this Charter”. This provision is redundant since on each occasion the Charter refers to national laws and practices it is clear that the exercise of the right shall be determined in accordance with such national laws and practices.

Finally, Part Two of the draft Constitution supplements the fifth recital to the Charter: “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

³⁷ Engel, *op. cit.*, at 151.

³⁸ See also the criticisms in Dutheil de la Rochère, *op. cit.*, at 352.

³⁹ See further section 4 below.

⁴⁰ The potential problems of this distinction is demonstrated by the request of certain IGC delegations for insertion in the Charter Explanations that Article II-21, relating to non-discrimination, contains both rights and principles: CGI 75/04, *op. cit.*

the Convention which drafted the Charter”.⁴¹ The Charter Explanations were formulated, however, on the basis they should have “no legal value”⁴² and a change to their status would undermine the transparency of the Charter rights and principles and jeopardize their development. In conclusion, the proposed amendments add little of substantive value but detract from the Charter’s clarity and legal certainty.⁴³

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

The proclamation of the Charter outside the 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

⁴¹ An IGC amendment has been proposed to include reference to amendments to the Charter Explanations made under the responsibility of the Praesidium of the Convention and to reproduce the Charter Explanations in a Declaration to the Final Act of the IGC. The IGC Legal Working Group also recommended the Charter Explanations be published in the ‘C’ Series of the OJ: CIG 50/03, *op. cit.* A ‘small number’ of IGC delegations have sought the reference to the Charter Explanations be included in the body of Part II: CGI 75/04, *op. cit.*

⁴² See the Charter Explanations, *op. cit.*, at 1.

⁴³ The British Government presented the opposite view: ‘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*, Cmnd. 5934 (September 2003), at para.101.

standards.⁴⁴ 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. Articles II-51(1) and II-51(2) amend the corresponding Charter articles and, on the recommendation of WG II, additional ‘horizontal’ provisions have been inserted in Articles II-52(4), (5) and (6).⁴⁵ These changes are the result of the overriding concern to ensure that “incorporation of the Charter will in no way modify the allocation of competences between the Union and the Member States”.⁴⁶

Article II-51(1) amends Article 51(1) of the Charter by adding “**agencies**” to “institutions” and “bodies” of the Union as addressees of the provisions of the Charter⁴⁷ and by inserting” **and respecting the limits of the powers of the Union as conferred on it by the other Parts of the Constitution**” at the end of the second sentence. Article II-51(2) amends Article 51(2) of the Charter as follows: “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 underlying rationale for these amendments, as part of the strategy of facilitating incorporation,⁴⁸ is to reinforce a restrictive interpretation of the

⁴⁴ See P. Eeckhout, ‘The EU Charter of Fundamental Rights and the Federal Question’ (2002) 39 *CML Rev.* 945-996.

⁴⁵ WG II’s proposed amendments are set out in the Annex to the Report, *op. cit.* See section 3 above for an analysis of Articles II-52(4), (5) and (6). Article II-53 retains Article 53 of the Charter substantially unmodified.

⁴⁶ The Report, *op. cit.*, at 5.

⁴⁷ This amendment was not proposed by WG II.

⁴⁸ The reference with approval to the amended text of Article 51(2) by the British Government indicates the political pressure exerted on WG II; Cmnd. 5934, *op. cit.*, at para. 102. The decision of the British Government to hold a referendum on the new Constitution raises the possibility of further restrictions: see *The Irish Times* of May 18, 2004, for a report of British concerns over the effect of incorporation of the Charter at the Brussels Council meeting on 17 May 2004, at 9.

scope of the Charter as a record of existing human rights protection under Union law rather than as a dynamic contribution to “strengthening EU fundamental rights protection”.⁴⁹

The retention of the first sentence of Article 51(1) of the Charter in Article II-51(1), whereby the Charter provisions are addressed to the Member States “only when they are implementing Union law”, underlines the conservative approach to delimiting the scope of the Charter. The Charter will therefore not apply to the exercise of derogations by the Member States from their obligations under Union law, unless the Court of Justice adopts a strained interpretation of Article II-51(1) to bring it into line with its general principles case-law.⁵⁰ 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.

In conclusion, the proposals in the draft Constitution contribute little of substance to the debate over the boundaries between Union protection of fundamental rights and national constitutional protection. The proposals are of a conservative nature designed to allay 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 in Articles II-52(4), (5), and (6), will be interpreted by the Court of Justice as substantively altering the existing ‘horizontal’ provisions in the Charter.

5. Enforceability of fundamental rights under the draft Constitution

⁴⁹ Eeckhout, *op.cit.*, at 981.

⁵⁰ For the reported view of the Bar European Group and Professor Arnulf that such an interpretation is unlikely, see the House of Lords Report, *op. cit.*, at para. 60.

Improved rights of access to judicial enforcement is a key element in promoting the effective protection of fundamental rights.⁵¹ In addition to accession to the ECHR and incorporation of the Charter, the principal reform proposals to achieve this objective have included the relaxation of *locus standi* 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.⁵²

The draft Constitution only addresses the first issue. Article III-270(4), which is a substantial reworking of Article 230(4) TEC to take account of the change in the denomination of the Union's legal instruments,⁵³ relaxes the "direct and individual concern" test as regards a "regulatory act" but not an "act" 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".⁵⁴ In addition, Article I-28(1) provides: "The Member States shall provide rights of appeal sufficient to ensure effective legal protection in the fields covered by Union law".⁵⁵ This article buttresses the obligation of loyal cooperation in Article I-5(2) and codifies the existing case-law of the Court of Justice.⁵⁶

⁵¹ See the paper prepared for WG II by F.G. Jacobs on 'Necessary changes to the system of judicial remedies', Working Document 20 of September 27, 2002. Available on the Convention website.

⁵² Bruno de Witte, *op. cit.*, at 887-897. See also WG II papers on this issue: CONV 116/02 of June 18, 2002; and Working Document 21 of November 17, 2002; available on the Convention website.

⁵³ See Final Report of Working Group IX on Simplification of November 29, 2002; available on the Convention website. See for detailed analysis, Michael Dougan, 'The Convention's Draft Constitutional Treaty: bringing Europe closer to its lawyers?' (2003) 28 *E.L. Rev.* 763-793, at 781-787.

⁵⁴ See Dougan, *ibid.*, at 790-791.

⁵⁵ Reflecting a proposal by Mr. Soderman, the European Ombudsman: see doc. CONV. 221/02 and Working Document 21, *op. cit.*, at 7. Available on the Convention website.

⁵⁶ See references in Working Document 21, *op. cit.*, at 7 (n.16).

The most significant improvements in access to justice resulting from implementation of Article I-7(1) and (2) would be the right of individual application under Article 34 ECHR⁵⁷ and the right to avail of Charter rights directly before the Union and national courts. In particular, incorporation would result in Charter rights being directly justiciable by Union and national courts applying Union law rather than, as presently, indirectly as a source for general principles of Union law.⁵⁸ 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 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".⁵⁹ The introduction of an independent remedy based on an alleged violation of fundamental rights was canvassed⁶⁰ but rejected. A person seeking a judicial remedy for a breach of a Charter right will therefore have to bring herself within the scope of one of the existing judicial remedies.

The combined effect of Articles II-51(1) and 51(2) is to further limit the justiciability of Charter rights in areas outside the Union's competences: "Insofar as the Charter contains rights which are not based on the EC or EU Treaty, these rights can offer legal protection

⁵⁷ 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: *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 18-19. Available on the Convention website. See also Para. 1 of the ECHR Protocol, *op. cit.*

⁵⁸ See the Report, *op. cit.*, at 15.

⁵⁹ Betten, *op. cit.*, at 695.

⁶⁰ Working Document 21, *op. cit.*, at 3-4.

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”.⁶¹ There may therefore be an infringement of Charter rights which, independently of the adequacy of Union remedies for breaches of fundamental rights, will not be subject to legal redress since it falls outside the scope of Union law. Instead of making the Charter rights ‘more visible’,⁶² incorporation therefore risks making them more illusory.

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 founding of the Communities.⁶³ 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*⁶⁴ 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 Freedoms⁶⁵ confirming their respect for the fundamental rights protected under the Court of Justice’s

⁶¹ K.Lenaerts and E.E. de Smijter, ‘A “Bill of Rights” for the European Union’ (2001) 38 *CML Rev.* 273-300, at 289.

⁶² Paragraph 5 of the preamble to Part Two of the draft Constitution.

⁶³ See T.Freixes and J.C.Remotti, *Le Futur de l’Europe: Constitution et Droits Fondamentaux*, European Institute of Law, at 3 (n.2): http://europa.eu.int/futurum/documents/other/oth001101bis_fr.pdf. Accessed November 2003.

⁶⁴ Case 36/75 *Rutili v Minister for the Interior* [1975] ECR 1219. For further references, see: T.C. Hartley, *The Foundations of European Community Law* (2003), at 141 (n. 32).

⁶⁵ [1977] OJ C103/1.

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.⁶⁶ 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 a treaty revision under Article 236 TEC (now Article 48 TEU).⁶⁷ The intergovernmental conferences leading up to the Amsterdam and Nice Treaties did not, however, amend the Treaties to permit accession. The issue of accession to the ECHR was submitted by the Laeken European Council meeting of December 2001 for consideration by the European Convention.⁶⁸

A constitutional mandate for the Union to accede to the ECHR was in this context hardly controversial.⁶⁹ Article I-7(2) provides: “The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union’s competencies as defined in the Constitution”.⁷⁰ Article III-227(7) provides that accession shall be subject to the consent of the European Parliament and Article III-227(8) that the Council must act by qualified majority

⁶⁶ *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.

⁶⁷ Opinion 2/94, *Accession by the Community to the Convention for the Protection of Human Rights and Fundamental Freedoms* [1996] ECR I-1759.

⁶⁸ See the Laeken Declaration, *op. cit.*

⁶⁹ The arguments in favour of accession are listed at pages 11-12 of the Report. The modalities of accession by the Union are addressed in the CDDH Report, *op. cit.* See also the discussion paper of June 18, 2002 forwarded to the Convention Secretariat by WG II (CONV 116/02). Available on the Convention website.

⁷⁰ The text is taken from CIG 76/04, *op. cit.*

throughout the accession procedure.⁷¹ Based on concerns expressed by certain member states,⁷² the ECHR Protocol⁷³ and a new Declaration,⁷⁴ also in relation to Article I-7(2),

⁷¹ The text is taken from CIG 76/04, *ibid.* WG II recommended 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. This had been reflected in Article I-7(2) of the July 18 version of the draft Constitution. The Commission 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.

⁷² CIG 73/04, *op. cit.*

⁷³ The ECHR Protocol provides: '1. The agreement relating to the accession of the Union to the European Convention on Human Rights provided for in Article I-7, paragraph 2 of the Constitution shall take into account the following: the specific characteristics of the Union and Union law, in particular with regard to: the specific arrangements for the Union's possible participation in the control bodies of the European Convention on Human Rights, the mechanisms necessary to ensure that proceedings by non-Member States and individual applications are correctly addressed to Member States and/or the Union as appropriate; 2. The agreement referred to in paragraph 1 shall ensure that nothing therein shall affect the situation of Member States in relation to the European Convention on Human Rights, in particular in relation to the Protocols to the Convention, measures taken by Member States derogating from the Convention in accordance with Article 15 thereof and reservations to the Convention made by Member States in accordance with Article 57 thereof. 3. Nothing in the agreement referred to in paragraph 1 shall affect Article III-281, paragraph 2 of the Constitution.': CIG 76/04, *op. cit.* Article III-281(2) corresponds to Article 292 TEC.

⁷⁴ 'The Conference agrees that the Union's accession to the European Convention on Human Rights should be arranged in such a way as to preserve the specific features of Community law. A system should be introduced for liaison between the Court of Justice and the European Court of Human Rights in order to avoid, as far as possible, any discrepancies in case law.': CIG 76/04, *op. cit.*

have been tabled. Both proposals reflect member states' concerns that Union accession to the ECHR should not affect the scope and conditions of their ECHR membership.⁷⁵

The provision in Article I-7(2) that accession to the ECHR shall not affect the Union's competences was one of three "technical devices" to ensure the "Union's accession to the ECHR does not modify the allocation of competences" between the Union and the Member States.⁷⁶ However, it is difficult to see how accession could lead to such a result and indeed the preparatory work on accession proceeded on the opposite assumption.⁷⁷ A further issue arising from accession 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.⁷⁸ Specific references to the jurisprudence of the Court of Human Rights by the Court of Justice had until recently been infrequent⁷⁹ and it has been argued that the Court

⁷⁵ For example, the UK currently has a derogation under Article 15 ECHR in respect of the detention without trial provisions of the Anti-Terrorism, Crime and Security Act 2002: reproduced in (2002) 22 *Human Rights Law Journal*, at 465-466.

⁷⁶ 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: The Report, *op. cit.*, 13-14. See on these proposals the CDDH Report, *op. cit.*, at paras. 26 and 57-62 respectively. See also para. 1 of the ECHR Protocol, *op. cit.*

⁷⁷ The CDDH Report 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.

⁷⁸ See Betten, *op. cit.*, at 697-701.

⁷⁹ 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.

of Justice “is not legally obliged to follow the interpretation of the European Court of Human Rights”.⁸⁰

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 ECHR⁸¹ and to avoid possible conflicts between the Union’s legal order and the ECHR.⁸² 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.

7. Conclusion – success at a price

Incorporation of the Charter and Union accession to the ECHR would make an important contribution to the protection of fundamental rights in the Union on a transparent, principled, and securely entrenched constitutional basis.⁸³ Incorporation of the Charter,

⁸⁰ D. Spielmann, ‘Comparing ECJ and ECHR Case Law’, in Alston, Bustelo and Heenan (eds.), *op. cit.*, 757-780, at 762 (n. 21).

⁸¹ For arguments in favour of the Court of Human Rights as final arbiter on the protection of human rights in the Union see: Betten, *op. cit.*, at 698-699 and I. Canor, ‘*Primus inter pares*. Who is the ultimate guardian of fundamental rights in Europe?’ (2000) 25 *EL Rev.* 3-21.

⁸² See the CDDH Report, *op. cit.*, at paras. 78-82. The proposed Declaration relating to Article I-7(2) seeks to minimize such a risk: ‘A system should be introduced for liaison between the Court of Justice and the European Court of Human Rights in order to avoid, as far as possible, any discrepancies in case law.’: CIG 76/04, *op. cit.*

⁸³ 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 amendment to the Constitution requires, firstly, the “common accord” of the conference of the representatives of the governments of the Member States and, secondly,

notwithstanding problems of justiciability, would entrench a binding and comprehensive set of fundamental rights standards. Union accession 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".

However, in order to overcome opposition to either or both these proposals, the draft Constitution is conservative both in its approach to the terms on which the Charter is incorporated and on the legal consequences of Union accession to the ECHR. Furthermore, the proposed retention of general principles as a source of fundamental rights undermines the benefits of a codified system of protection under the Charter and the ECHR. The principles of incorporation of the Charter and Union accession to the ECHR have been accepted by the IGC. However, the additional 'safeguards' built into the draft Constitution against any extension of Union powers through ECHR accession and incorporation of the Charter has meant such acceptance has come at the price of reduced transparency.

the ratification of the amendments by all the Member States "in accordance with their respective constitutional requirements". For proposed amendments to Article IV-7, see CIG 76/04, *op. cit.*