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# Human Rights in the EU: the Charter of Fundamental Rights

This paper looks at the development of a human rights doctrine in the EU and at the draft EU Charter of Fundamental Rights. It considers some of the issues surrounding the Charter, other proposals for human rights protection in the EU, such as EU accession to the European Convention on Human Rights, and contributions to the work of the 'Convention' that is preparing the draft Charter.

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## Summary of main points

The EU is firmly committed to respect for human rights and is a defender of human rights in its internal and external affairs, yet it has no comprehensive or coherent human rights policy in either case. The idea of an EU catalogue of rights was considered at the 1996 Intergovernmental Conference (IGC), but neither the institutions nor the Member States submitted proposals and the idea fell from the agenda. However, the *Treaty of Amsterdam*, did reinforce the existing EU commitment to the ECHR. The idea to create a European Union *Charter of Fundamental Rights* was put forward by the German EU Presidency in early 1999. It was taken a step further by the Tampere European Council in October 1999. An Annex to the Conclusions of the Tampere summit set out the composition, method of work and practical arrangements for the body that would elaborate the draft Charter (See **Appendix 2**). The Helsinki European Council in December 1999 agreed measures to set up a preparatory group, or ‘Convention’, to draw up a draft Charter. Draft texts have already been considered by the Convention.

The creation of a human rights charter presents a number of problems, including:

- the need for such a charter, given existing human rights guarantees under international conventions;
- the rights to be protected;
- the form and legal status of the instrument, its relation to the EC Treaties and to the Council of Europe’s *European Convention on Human Rights*.
- the risk of creating different systems of protection within the EU and the wider Europe, with possible damage to legal certainty;
- mechanisms for monitoring compliance and dealing with breaches.

The timetable for the introduction of the Charter is still uncertain, but the draft Charter is to be submitted to the European Council in Nice in December 2000 at the end of the French EU Presidency.

### Terminology

Treaty articles are described as ‘ex-’ when they refer to pre-*Treaty of Amsterdam* articles and ‘new’ when they refer to the re-numbered articles under the *Treaty of Amsterdam*, which amended the numbering in both the *Treaty Establishing the European Communities* (TEC) and the *Treaty on European Union* (TEU). The *European Convention on Human Rights* is referred to as the ECHR, to avoid confusion with the Charter drafting body, the ‘Convention’.



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# I Human Rights in the European Community

## A. The Treaties

Human rights were not mentioned specifically in the *Treaty of Rome* of 1957, although the Treaty affirms the Member States' willingness to "preserve and strengthen peace and liberty" (Preamble), to improve living and working conditions and to abolish discrimination on the grounds of nationality among citizens of the Member States (ex-Article 7). It also created freedom of movement and establishment for EEC citizens (ex-Articles 48-58), equal treatment for men and women in the workplace (ex-Article 119)<sup>1</sup> and equal treatment for immigrant workers (e.g. ex-Article 51). As one author has commented, in view of the ongoing process of EU integration and of the Court's own view that the Treaty of Rome formed the Community's basic constitutional charter<sup>2</sup>, "it is quite logical ... that the Community legal order should guarantee an adequate protection of fundamental rights which are at the core of Europe's democratic society".<sup>3</sup>

Political initiatives by the EU institutions over the last few decades to introduce human rights protection into the EC/EU have centred on two methods: accession to the *European Convention on Human Rights* or the adoption of a separate EC bill of rights. While keeping alive the debate on human rights in the EC/EU, they have foundered largely through lack of an adequate legal basis for accession to the ECHR on the one hand, but also due to a lack of consensus among the Member States on the principle or the form of EU human rights guarantees on the other.

The European Parliament adopted a Resolution in 1973 "concerning the protection of the fundamental rights of Member States' citizens when Community law is drafted"<sup>4</sup> and another in 1977 "on the granting of special rights to the citizens of the European Community".<sup>5</sup> The EP issued a declaration of political principle on the definition of fundamental rights on 10 February 1977, which was subsequently adopted by the Council and Commission. In a 1979 Resolution the EP urged EC accession to the European Convention and envisaged the drafting of a European Charter of Civil Rights. Further Resolutions in 1983 and 1984 emphasised the need to incorporate fundamental human rights in the EC in a constitutional manner and in 1989 the EP proposed the adoption of a declaration of fundamental rights as part of a 'Constitution' for the EU<sup>6</sup>.

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<sup>1</sup> And later Directive 75/117/EEC (OJL 45, 1975, p.19) on equal pay for equal work.

<sup>2</sup> See Case 294/83, *Les Verts v. Parliament* [1986] ECR 1339, p.1365, para.23; and ECJ Opinion, 14 December 1991 on the *European Economic Area Treaty*.

<sup>3</sup> Alain Van Hamme, "Human Rights and the Treaty of Rome", *Human Rights, A European Perspective*, edited by Liz Heffernan, 1994.

<sup>4</sup> OJC 26, 4 April 1973.

<sup>5</sup> OJC 299, 16 November 1977.

<sup>6</sup> See: OJC 120, 16 May 1989, p.51; OJC 324, 24 December 1990, p.219; OJC 61, 28 February 1994, p.155.

At the Copenhagen European Council in 1978 the Heads of State and Government issued the “Declaration on Democracy” which confirmed their will:

... to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights.<sup>7</sup>

Treaties and amending instruments since the Treaty of Rome have made explicit references to the basis of democratic principles for all Community action. The preamble to the *Single European Act* (SEA) of 1986 expressed the determination of the European Community Member States:

to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the member states, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice.

Four new rights were added by the *Treaty on European Union* (TEU) of 1993: the right of EU citizens to vote and to stand as a candidate in municipal and European elections in the Member State of residence; the right to petition the European Parliament and to apply to the European Ombudsman; and the right to protection in third countries by the diplomatic and consular authorities of any Member State. Article F of the TEU also stated that the Union:

... shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

During the last Intergovernmental Conference in 1996 the House of Commons Foreign Affairs Committee noted simply in its Third Report on the IGC: “It transpires from the initial discussion that to draw up a list, whether exhaustive or not, of rights specific to the Union would involve a fair number of difficulties”.<sup>8</sup> The matter was not considered further, either by the Committee or by the IGC, the difficulties apparently being insuperable and the political will insufficient to pursue solutions. However, the *Treaty of Amsterdam*, which came into force on 1 May 1999, did strengthen EU human rights provisions. New Article 6.1 (TEU) states that the Union is founded on principles that include respect for human rights, and to enforce these rights Article 7 (TEU) and Article 309(2) (TEC) authorises the Council to take measures against Member States which have infringed the principles laid down in Article 6. New Article 13 authorises the Council to act against “discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. The Court’s jurisdiction now also applies to the protection of fundamental rights in the areas of visas,

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<sup>7</sup> Summit Conclusions, 7-8 April 1978.

<sup>8</sup> HC 306, FAC, Third Report, *The Intergovernmental Conference*, 1995-96, p.xlv.

asylum and immigration, which have been transferred from the ‘third pillar’<sup>9</sup> to the ‘Community pillar’.<sup>10</sup>

The intervening years have given rise to a new impetus to solve the difficulties and recent European Councils have put forward concrete proposals for EU human rights protection which are discussed below.

## B. ECJ Case Law

The ECJ implied in a ruling in 1969 that human rights considerations were inherent in EC law when it stated that an Article in Decision 69/71 “contained nothing capable of prejudicing the fundamental human rights enshrined in the general principles of Community law and protected by the Court”.<sup>11</sup> One author has suggested that the ECJ has been motivated to create a doctrine of fundamental rights in order to protect its sometimes fragile supremacy over the national law of the Member States. Bruno de Witte adds, however, that the Court’s activism was also simply a response to the Community’s “growing capacity to affect fundamental rights to an extent unforeseen at the time the European Communities were created”.<sup>12</sup>

In the *Internationale Handelsgesellschaft* ruling in 1970 the ECJ decided that fundamental rights formed part of the general principles of Community law that it was obliged to uphold, and that it should be guided by the constitutional traditions of the Member States in safeguarding those rights.<sup>13</sup> The *Nold* ruling reinforced this and also referred specifically to international treaties (though not to the European Convention specifically) which Member States had ratified as guidelines to be followed within the framework of Community law. No measure could have the force of law unless it was compatible with the fundamental rights recognised and protected by the Member States’ constitutions.<sup>14</sup> In the *Rutili* case in 1975 the Court referred explicitly to the ECHR.<sup>15</sup> In the *Wachauf* case in 1997 the ECJ ruled that its review powers extended to the acts of Member States, to the extent that they fell within areas of Community law.<sup>16</sup>

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<sup>9</sup> The TEU established the ‘three-pillared’ structure of the Union: the first, over-arching Community pillar, the second pillar, the Common Foreign and Security Policy, and the third pillar, Cooperation in Justice and Home Affairs.

<sup>10</sup> Article 35 (TEU), and New Title IV, Article 61-69 (TEC)

<sup>11</sup> Case 29/69, *Stauder v. Ulm* [1969] ECR 419, p.425.

<sup>12</sup> Bruno de Witte, “The Role of the ECJ in Human Rights”, *The EU and Human Rights*, edited by Philip Alston, 1999, p.866.

<sup>13</sup> *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>14</sup> Case 4/73, *Nold v. Commission* [1974] ECR 491.

<sup>15</sup> Case 36/75, *Rutili* [1975] ECR 1219.

<sup>16</sup> Case 5/88, *Wachauf* [1989] ECR 2609, para.2639.

The liability of Member States to apply fundamental rights was made clear in the *ERT* case<sup>17</sup>, in which the ECJ ruled that States were obliged by EC law to respect fundamental rights when they implement it or when they rely on derogations from fundamental Treaty rules.

Although human rights may be an indirect source of Community law, the protection of fundamental rights under ECJ case law is limited. Rights must be protected within the EC system<sup>18</sup>, and protected areas must be within the jurisdiction of the ECJ. Furthermore, although the ECJ has made references to the ECHR in numerous judgments over the last two decades, the case law of the European Commission or Court of Human Rights was not referred to until a judgment in 1996.<sup>19</sup> Neither, according to studies of ECJ case law, is there evidence of references to national constitutional court judgments, in spite of the ECJ's doctrine of respect for the common constitutional provisions of the Member States. The ECJ cannot be bound either by the ECHR or by the constitutional provisions of the Member States but it is bound, by virtue of Article 220<sup>20</sup>, to give effect to fundamental rights (In the ECJ's own words it is not bound by these principles or provisions, but 'guided' and 'inspired' by them. Constitutional fundamental rights provisions vary in any case from state to state). In determining what are fundamental rights in the EC system, the Court has regard to a number of sources which include the ECHR. While for some commentators this indicates incoherence, for others it is evidence of the Court's self-restraint in not overstepping the limits of its institutional role.

While it is clear that the EU is committed to respecting fundamental rights, the individual Member States are only required to comply with the minimum standards laid down when they are implementing Community law.<sup>21</sup> The standards for human rights protection provided by EC law apply only to EC legislation and to national measures that implement it, or which come within the EC legal framework in some other way. In practice, many Member States apply higher standards of protection than those required by EC law, often in order to comply with the stricter requirements of national constitutions.<sup>22</sup> Francis Jacobs and Robin White comment that although progress has been made in this area, "the context in which human rights questions have arisen in Community law has been rather meagre, and no measure has been struck down for failure to respect such rights".<sup>23</sup> However, as a consequence of ECJ rulings upholding human rights in the Community, when the Institutions

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<sup>17</sup> C-260/89, *Ellinki Radiophonia Tileorassi* [1991] I ECR 2925.

<sup>18</sup> C-11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125.

<sup>19</sup> See Case C-13/94, *P v. S and Cornwall County Council* [1996] ECR I-2943, at 2164, and three others in 1996, 1997 and 1998.

<sup>20</sup> "The Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed" (ex-Article 164).

<sup>21</sup> cf. *Kremzow v Austrian Republic*, judgment of 29 May 1997, ECR I-2629 at 15 et seq, 19.

<sup>22</sup> The German and Italian Constitutional Courts drew attention to the lack of adequate human rights guarantees at Community level in rulings in 1986 and 1965.

<sup>23</sup> *The European Convention on Human Rights*, 1996, p.412.

adopt legislation they must also comply with international provisions, particularly the standards of the ECHR.<sup>24</sup>

To summarise, the once clear distinction between the remit of the ECJ and that of the Court of Human Rights has disappeared and the expansion of the EU's activities and competences, particularly in the third pillar areas, has given the ECJ a human rights dimension in areas also covered by the ECHR.<sup>25</sup> Although the ECHR is not formally binding on the EU Institutions as it is on Member States, its provisions are given effect as 'general principles' of EC law. As Bernard Robertson has pointed out, the ECJ has "to find a background of generally accepted principles of law against which to interpret the Community laws. Increasingly it has turned to the [European] Convention as evidence of these generally accepted principles, so in a way the Convention is becoming part of EC law".<sup>26</sup> Rulings of the ECJ have contributed to the jurisprudence of the ECHR as well as to the development of human rights protection in the EC legal order. For example, an ECJ judgment in 1994 was described as "a major contribution to the jurisprudence on Article 8 of the Convention [ECHR]".<sup>27</sup> The Court overruled a 1992 judgment of the Court of First Instance concerning the right of an individual not to undergo an AIDS test for pre-recruitment purposes and the right to keep secret one's state of health.<sup>28</sup> In the 1994 judgment the Court concluded that the rights of Mr X had been breached: where a person makes clear that he/she is not prepared to undergo a particular medical test, carrying out the test constitutes a breach of their human rights. The ECJ also insisted that this right had to be respected in its entirety: the Commission could not carry out an unwanted AIDS test, or any other test that might indicate the existence of an illness that the individual had refused to disclose.

## II The Issues

### A. Does the EU need a bill of rights?

Given the number of existing national, European and other international human rights instruments ratified by the EU Member States, another human rights instrument could present a situation of "rights saturation rather than rights deprivation".<sup>29</sup> More specifically, since all Member States have ratified the ECHR (indeed, ratification is a condition of EU membership), nearly all have incorporated it into their domestic law, and the ECJ has generally upheld ECHR rights, it has been argued that there is no pressing need for the

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<sup>24</sup> For example, paragraph 2 of EP and Council Directive 97/66/EC on telecommunications and Council Regulation 1035/97 of 2 June 1997 establishing a European Monitoring Centre on Racism and Xenophobia.

<sup>25</sup> For detailed analysis of third pillar rights see Steve Peers, "Human Rights and the Third Pillar", *The EU and Human Rights*, edited by Philip Alston, 1999.

<sup>26</sup> "Which European Court?", *Justice of the Peace*, 24 March 1990.

<sup>27</sup> Dean Spielmann, "Comparing ECJ and ECHR Case Law", *The EU and Human Rights*, P. Alston, 1999.

<sup>28</sup> Case C-404/92, *X v. EC Commission* [1994] ECR I4737.

<sup>29</sup> J.H.H. Weiler, "European Citizenship and Human Rights", from *Reforming the Treaty on European Union - the Legal Debate*, edited by Winter et al, 1996, pp79-81.

adoption of another human rights instrument. De Witte sees no need for a binding Community human rights instrument, commenting that “there is no glaring human rights deficit in the legal orders of the Member States, which the ECJ should set out to remedy”.<sup>30</sup>

On the other hand, the prospect of EU enlargement to include a number of countries from Central and Eastern Europe with a shorter experience of democracy, might necessitate a strengthening of human rights guarantees in the EC legal order which the Treaty of Amsterdam does not currently provide. In addition, the transfer of ‘third pillar’ matters with potential human rights implications (e.g. visas, immigration, border controls) into the Community part of the Treaty strengthens the arguments for better EU protection. The ECHR is limited in the rights it protects and the Charter could remedy this.

The inclusion of a catalogue of rights in the Treaty would give it one of the major elements of a constitution. While it is doubtful that the majority of EU citizens would perceive convincing or concrete evidence of human rights protection from existing Treaty provisions, secondary laws and ECJ case law based on the ‘general principles’ doctrine, a list of rights in the Treaty would make human rights protection in the EC legal order more visible to individuals, thereby strengthening its legitimacy. This awareness could also lead to an increase in litigation at the Court, which might or might not be regarded as a benefit.

## **B. Which Rights and Whose Rights?**

It is expected that the rights to be protected will be based on existing international treaty rights and on the ECHR in particular. The EU Charter could present an opportunity to modernise and extend the ECHR by bringing together universal rights, such as the right to life, and rights specific to the EU, such as the right to stand for and vote in European elections. The rights protected by the ECHR are:

- Right to life, liberty and security of person
- Right to a fair trial in civil and criminal matters
- Respect for private and family life, home and correspondence
- Freedom of thought, conscience and religion
- Freedom of expression
- Freedom of peaceful assembly and association
- Right to have a sentence reviewed by a higher tribunal
- Right to marry and found a family
- Equality of rights and responsibilities of spouses in marriage
- Right to peaceful enjoyment of possessions
- Right to education
- Certain rights concerning elections
- Liberty of movement and freedom to choose where to live

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<sup>30</sup> Bruno de Witte, “The Role of the ECJ in Human Rights”, *The EU and Human Rights*, 1999, p.873.

- Right to leave a country including one's own

The ECHR also guarantees a prohibition from:

- Torture and inhuman or degrading punishment
- The death penalty
- Slavery, servitude and forced labour
- Criminal laws that are retroactive
- Discrimination in the enjoyment of rights and freedoms guaranteed by the Convention
- Expulsion of a state's own nationals or denying them entry, the collective expulsion of aliens

The social and economic rights guaranteed by the *European Social Charter*<sup>31</sup> could also be incorporated. These concern largely the rights, conditions and remuneration of workers, and include the right to facilities for vocational training, social security, social and economic protection and housing, with special provisions for the protection of women and children. The list might include economic and social rights on the one hand and civil and political rights on the other, with different enforcement mechanisms, depending on their applicability.

The House of Commons representative on the drafting body, Win Griffiths, raised the question of content in an adjournment debate:

Some of the rights are fundamental and we can all agree on them. However, should we include a right to a healthy environment, or is that just a worthy political objective? Might consumer rights be included? Are the rights to safety and health, to fair remuneration, to paid holidays, to a pension and to training at work and to social security fundamental, or are they matters that Governments and political parties have as worthy objectives, which should not be included in such a declaration?<sup>32</sup>

Some rights would not be confined to the nationals of EU Member States, but would apply to all EU residents. The extent to which they applied to third country nationals would depend on their scope and universality, which raises political and economic issues linked to implementation and enforcement. Henry Schermers has argued forcefully against an EU bill of rights, not least because of the division it would create in human rights provisions for the citizens of EU and non-EU Member States:

For the Union, human rights protection might be further improved. For Europe as a whole, however, there would also be a considerable loss. Europe would be split with regard to human rights, most certainly to the detriment of non-members of the Union. The system of the Council of Europe would suffer enormously if the Members of the European Union were to go their own way in protecting human rights. A

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<sup>31</sup> European Treaty Series 35, 18 October 1961, ETS 163, 3 May 1996 (revised treaty) and Additional Protocol ETS 158, 9 November 1995.

<sup>32</sup> HC Deb, 16 February 2000, c228WH.

disadvantage would also be that the Union would not be subjected to ‘outside’ judicial review in the field of human rights.<sup>33</sup>

### C. EC/EU Accession to the ECHR

The European Commission issued a Memorandum in April 1979 on “the Communities becoming a signatory of the European Convention on Human Rights” as an initial step towards consolidating human rights protection in the Community.<sup>34</sup> The House of Lords Select Committee on the European Communities reported on the Memorandum and took the view that the “immediate practical gains of accession are likely to be limited, the benefits being largely indirect and to some extent symbolic”.<sup>35</sup> The report concluded that there were more pressing demands on the EC’s resources. The Commission renewed the proposal in a Communication of November 1990,<sup>36</sup> which pointed to a “conspicuous gap in the Community legal system” that could be filled by Community accession to the ECHR. The Commission argued that Community accession would promote the uniform protection of human rights in the Member States and also present the Community legal order as a comprehensive legal order with constitutional guarantees equivalent to those in the Member States. It would be a complementary rather than an alternative measure for review and enforcement.

The ECJ has ruled on whether the Community (but not the Union) has the power to accede to the ECHR. The Court looked at the competence of the Community to conclude an agreement to accede and at the compatibility of such an agreement with the EC Treaty, with particular regard to the jurisdiction of the Court. In its Opinion in 1996 the ECJ found that the Community was not so empowered; that Article 308 (ex-Article 235)<sup>37</sup> was not a sufficient basis for granting the EC authority to ratify the ECHR. The Opinion stated that: “No treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field”.<sup>38</sup> Accession to the ECHR would:

... entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.<sup>39</sup>

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<sup>33</sup> H. Schermers, “The New European Court of Human Rights”, *Common Market Law Review*, Vol 35, No.1, February 1998.

<sup>34</sup> *Bulletin of the European Communities*, supplement. 2/79.

<sup>35</sup> Lords 71<sup>st</sup> Report, 1979-80, “Human Rights”, p xvi, para 32.

<sup>36</sup> CONS DOC 10555/90, 4 December 1990

<sup>37</sup> “If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”

<sup>38</sup> *Opinion 2/94*, [1996] ECR I-1759, 28 March 1996, para. 27.

<sup>39</sup> *Opinion 2/94*, para.27.

The ECJ had already accepted in an Opinion on the *Agreement Establishing the European Economic Area* that the Community was competent to submit itself to the jurisdiction of a court established by an international agreement in order to rule on the interpretation and application of its provisions.<sup>40</sup> However, the ECJ needed more information on “the arrangements by which the Community envisages submitting to the present and future judicial control machinery established by the Convention” in order to decide on the question of compatibility with the Treaty<sup>41</sup>. The Opinion also acknowledged, however, that “respect for human rights is a condition of the lawfulness of Community acts,”<sup>42</sup> a view affirmed in ECJ case-law for some decades, even before respect for human rights was explicitly mentioned in the Treaties.<sup>43</sup> Commenting on the Court’s ruling, J.H.H.Weiler and Sybilla C.Fries suspected:

... that it was the ‘institutional implications’ that caused most trouble and that principal among these was the institutional implication which would submit the Court of Justice, like its constitutional brethren in the Member States, to scrutiny by the Strasbourg Court.<sup>44</sup>

For some critics the Amsterdam human rights provisions do not offer adequate or accessible means of protection. Anthony Arnall commented on new Article 7 (TEU) which allows for Council action against a Member State in “serious and persistent breach” of human rights:

... the heaviness of the procedure prescribed by these provisions and the potentially damaging consequences of invoking them make them weapons of last resort. They will do little to reinforce the protection afforded to individuals in concrete cases. That is one of the reasons why an amendment to the Treaties to permit the accession of the Community of the Union to the European Convention continues to be advocated.<sup>45</sup>

In the event of accession, the European Court of Human Rights would carry out judicial control of respect for fundamental rights by the EU institutions, taking precedence over the ECJ on human rights issues. Accession would also mean that Article 59 of the ECHR (signature and ratification) would have to be amended to allow for the accession of the EU, which is not a member of the Council of Europe.<sup>46</sup>

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<sup>40</sup> *Opinion 1/91*, [1991] ECRI-6079, para 40.

<sup>41</sup> *Opinion 2/94*, para 20.

<sup>42</sup> *Opinion 2/94*, para 34.

<sup>43</sup> E.g. Joined cases 60 and 61/84, *Cinéthèque SA v. Fédération Nationale de Cinémas Français* [1985] ECR 2605, para 26.

<sup>44</sup> “A Human Rights Policy for the European Community and Union: The Question of Competences”, from *The EU and Human Rights*, edited by Philip Alston, 1999.

<sup>45</sup> Anthony Arnall, *The European Union and its Court of Justice*, 1999, p. 219.

<sup>46</sup> Also, under Article 4 of the COE Statute, COE membership is open only to European states.

## D. Binding Charter or Political Declaration?

The German Presidency of the EU in the first half of 1999 made the creation of an EU charter of rights one of its aims and priorities. The Presidency programme, entitled *Europe's Path into the 21<sup>st</sup> Century*, stated:

European decisions must be meaningful to Europe's citizens. European policies, like the policies of the Union's Member States, should demonstrably respect the rights of the people. Germany therefore strongly supports the idea of a Charter of Human Rights which would have pride of place among Europe's treaties. The European Parliament, the national parliaments and as many social groups as possible should participate in the debate and the drafting of such a charter.<sup>47</sup>

In the section on "Objectives and priorities of the German Presidency of the EU", the document confirmed that the German Presidency would initiate "a procedure for the drawing up and adoption of a Charter of Basic Rights to preface the European Treaties".

The German Foreign Affairs Minister, Joschka Fischer, told the EP on 12 January 1999:

In order to increase the citizen's rights, Germany is proposing the long-term development of a European Charter of Basic Rights. ... For us, it is a question of consolidating the legitimacy and identity of the EU. The European Parliament which has already provided the groundwork with its 1994 draft should be involved in the drawing up of a Charter of Basic Rights, as well as national parliaments and as many social groups as possible.<sup>48</sup>

The Cologne European Council on 3-4 June 1999 proposed a political declaration or proclamation of existing rights enjoyed by EU citizens under the Treaties, rather than a legal charter, concluding:

44. ... at the present stage of development of the European Union, the fundamental rights applicable at Union level should be consolidated in a Charter and thereby made more evident.

Annex IV stated:

Protection of fundamental rights is a founding principle of the Union and an indispensable prerequisite for her legitimacy. The obligation of the Union to respect fundamental rights has been confirmed and defined by the jurisprudence of the European Court of Justice. There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens.

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<sup>47</sup> *Europe's Path into the 21<sup>st</sup> Century*, Part 1, "Creating a people's Europe - making it part of their daily lives", <http://www.bundesregierung.de/>

<sup>48</sup> EP *Minutes*, 12 January 2000.

The European Council believes that this Charter should contain the fundamental rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from the constitutional traditions common to the Member States, as general principles of Community law. The Charter should also include the fundamental rights that pertain only to the Union's citizens. In drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely establish objectives for action by the Union.<sup>49</sup>

The Conclusions leave open the question of whether the Charter will be a proclamation or a legally binding text.

The European Council will propose to the European Parliament and the Commission that, together with the Council, they should solemnly proclaim on the basis of the draft document a European Charter of Fundamental Rights. It will then have to be considered whether and, if so, how the Charter should be integrated into the treaties.<sup>50</sup>

Some commentators have argued that legally binding rights would form a firmer basis for the whole EC legal order and consideration of them could become a policy objective of the EC law-making bodies, just as consideration for the environment and sustainable development are now taken into account in all EC policies and activities.<sup>51</sup> This would oblige the Commission in its legislative capacity to subject all draft proposals to a human rights 'test'. In the long term the involvement of all the law-making institutions in this area might alleviate the potential extra burden on the ECJ.

The ECJ would be able to rely on legally binding rights in its interpretation of Community law, although there would be some objection to the ECJ acquiring jurisdiction in this area. Vincent Power regards even the ECJ's present involvement in human rights issues as a way of extending its competence:

It [the ECJ] is now using human rights not only to defend the supremacy of Community law but also to extend the jurisdiction of the ECJ. In finding that Community law was superior to national law, the ECJ had to fill the gap of national protection of human rights by finding some means of Community-based protection.<sup>52</sup>

ECJ jurisdiction would probably need to be accompanied by structural and procedural reforms within the ECJ and Court of First Instance (CFI) in order to cope with the expected increase in workload. At present, changes to the ECJ's Rules of Procedure can only be

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<sup>49</sup> European Council Conclusions, Cologne, 3-4 June 1999.

<sup>50</sup> *Ibid.*

<sup>51</sup> Treaty of Amsterdam, Article 6 (TEC).

<sup>52</sup> Vincent Power, "Human Rights and the EEC", *Human Rights: A European Perspective*, edited by Liz Heffernan, 1994.

amended by unanimity in the Council of Ministers under Article 245 of the Treaty, but this might be amended by the current Intergovernmental Conference to Council approval by a qualified majority vote (QMV). Other reforms might be needed, such as the creation of a specific type of complaint, i.e. a human rights complaint, and the granting of the right of individuals to take a human rights complaint to the ECJ (as under the ECHR).

The Finnish EU Presidency in the second half of 1999 adopted a decision on the Charter in accordance with the Cologne Conclusions. The Finnish Prime Minister, Paavo Lipponen, indicated that the Charter should be a political declaration rather than a binding treaty, although it might result in certain EC Treaty changes that would clarify its status.<sup>53</sup> This view is not supported by all parties concerned. COSAC, the Conference of European Affairs Committees, considered the proposed Charter in October 1999, concluding that if it were adopted as a declaration with no legal force it would be meaningless, while if incorporated into the Treaties, it would cause confusion and possibly conflict.

Giorgio Gaja has argued against a binding catalogue of rights, largely on the grounds that the authority of the COE system would be undermined, but also because to be effective, a separate EU human rights court would probably be needed:

A catalogue included in the TEU or in the EC Treaty would probably be intended to apply to all Community and national measures, and thus be juxtaposed to national rules on the protection of human rights. The system for the protection of human rights existing within the Council of Europe, or even its further development, would apparently not be affected by a European Union catalogue, but – apart from the risk of conflicts – the effectiveness of the Council of Europe system would most likely be undermined, to the detriment of the protection of the same rights in the States that are not members of the European Union. Another disadvantage would be the fact of giving the decisive role in the interpretation of the catalogue to a non-specialized court, that would moreover become overburdened, unless one accepted the idea of creating a new human rights court within the European Union – a solution that would be politically difficult and would complicate the position of national courts when confronted with an issue of the validity of Community acts.<sup>54</sup>

It has been suggested that the Charter might be introduced in two phases, beginning as a non-legally binding document but incorporated at a later stage. This would allow more time to monitor the extent to which the rights are protected; how, where and by whom they are invoked; and to prepare any necessary monitoring and complaints mechanisms.

Most Member States, including the British Government, appear to support the idea of a non-binding but politically important proclamation of rights, as was made clear at the June 1999 European Council. The Austrian delegation favours drawing up a Charter first and deciding

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<sup>53</sup> *Agence Europe*, 18/19 October 1999.

<sup>54</sup> Giorgio Gaja, "New Instruments and Institutions?" *The EU and Human Rights*, Alston, 1999, p.798.

later whether or not to make it legally binding, although this has not received overwhelming support. The main issues appear to be effectiveness and enforcement.

## E. Different Interpretations

Different interpretations from the two European Courts on similar or identical issues could give rise to confusion and legal uncertainty. Recent ECHR case law has already demonstrated the potential for conflict between the COE and EC Courts. In *Matthews v UK*<sup>55</sup> the Council Decision requiring the UK to exclude Gibraltar citizens from voting rights in the EP elections was found to contravene Article 3, Protocol 1 of the ECHR on the right to vote in elections for the legislature.

The Council of Europe's Parliamentary Assembly believes that the authority of the European Court of Human Rights could be undermined by conflicting interpretations of similar issues. Jacobs and White cite the example of *Hoechst*<sup>56</sup>, in which the ECJ and the Court of Human Rights had different opinions on the right to inviolability of the home when used for business purposes and professional premises.

On the other hand, while divergent opinion cannot be ruled out, would it necessarily be a bad thing? The potential for different interpretations already exists within the Court of Human Rights system of chambers under the arrangements put in place by Protocol 11 in 1998. This situation is resolved under Article 30 of the ECHR by the relinquishment of jurisdiction to a Grand Chamber. Different international courts have in the past taken different approaches to similar issues. For example, the case law of the International Court of Justice (ICJ) in the Hague has sometimes differed from that of the European Court of Human Rights. In the case of *Loizidou v. Turkey*<sup>57</sup> the ICJ and the European Court of Human Rights held different views on Turkey's restrictive acceptance of the jurisdiction of the Court in each case (i.e. in accepting it only in relation to events in the part of Cyprus controlled by Turkey). Spielmann suggests that a "dissenting or merely separate voice from Luxembourg [ECJ] could indeed be a valuable input,"<sup>58</sup> pointing out that in systems where the ECHR is part of the domestic law "divergent interpretation of domestic courts is possible and even frequent, and sometimes local courts go far beyond the minimum standards set by the European Court of Human Rights".<sup>59</sup> Exactly how such conflicts of law would be resolved at European level is not clear.

Some critics suggest that the ECJ's relative lack of experience in human rights issues would be a disadvantage, while others have said that there is no convincing argument why the ECJ would not be as capable of interpreting human rights cases as the COE body. It has even been suggested that the ECJ might be better in this role than the COE, given that it is more

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<sup>55</sup> Application No. 24833/94, judgment of 18 February 1999.

<sup>56</sup> Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR 2859.

<sup>57</sup> ECHR 9 1995, Series A, Vol.310.

<sup>58</sup> Dean Spielmann, "Comparing ECJ and ECHR Case Law", *The EU and Human Right*, Alston, 1999, p.779.

familiar with the legal traditions of the 15 Member States than the COE, which has to deal with the legal systems of a much more divergent membership of forty-one, including both East and West European states.<sup>60</sup> However, there is no reason to suppose that judges nominated by the Member States with regard to their competence in EC law also have a high level of competence in the field of human rights. The European Court of Human Rights, by contrast, is composed of judges with expertise in this area.

One practical problem for the ECJ would be the potential extra caseload, bearing in mind the number of complaints taken to the European Court of Human Rights.<sup>61</sup> There would probably have to be an admissibility procedure - carried out by the ECJ itself or by another body - to select complaints to be dealt with by the ECJ from others that would not merit consideration.

### **III The EU Draft Charter: Contributions to the Debate**

Various EP Committees, as well as the Committee of the Regions, the Economic and Social Committee, and some non-EU organisations, have already contributed to the debate on the Charter. The Council of Europe's Parliamentary Assembly put forward proposals on the content of the Charter at its plenary on 25 January 2000. The contributions already reveal radical differences in approach towards the content and legal status of the Charter.

#### **A. EP Constitutional Affairs Committee**

The Constitutional Affairs Committee, which has taken the lead among the EP Committees, published a working document on 7 December 1999 prepared by rapporteurs Andrew Duff and Johannes Voggenhuber.<sup>62</sup> Key points arising from the document and the Committee's discussion were that:

- The Charter should have 'mandatory' legal effect and not be just a 'solemn proclamation';
- It should apply to all the EU's areas of activity, including the second and third pillars; and at the level of EU institutions, national, regional and local government levels too;
- The body should be chaired by a parliamentarian;
- Applicant countries should be involved in the work of the preparatory body;
- Procedural matters should be decided by consensus among the Council, Commission, EP and national parliaments; voting on content should be on basis of one member, one vote;
- The Charter should be closely linked to the IGC, which should allow ECJ to develop jurisprudence in the field, on the basis of individual petition;

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<sup>59</sup> Dean Spielmann, "Comparing ECJ and ECHR Case Law", *The EU and Human Right*, Alston, 1999, p.779.

<sup>60</sup> This argument loses some weight in view of enlargement of the Union to include countries from Central and Eastern Europe.

<sup>61</sup> Applications averaged 10-12,000, with over 4,500 cases registered until 1997. With the implementation of Protocol 11, the number is expected to fall to around 3,000 per year (H.Schermers, *Common Market Law Review*, Vol.35, No.1, February 1998)

<sup>62</sup> DT\385929EN.doc, PE 232.397, 7 December 1999.

- The Charter should be closely linked to the ECHR and other relevant international conventions (United Nations, Council of Europe, International Labour Organisation and the Organisation for Security and Cooperation in Europe);
- It should be possible to amend the Charter to respond to changing political fashion and the division of powers between the EU and Member States;
- It should include rights common to all Member States, economic and social rights, rights derived from EU citizenship, ‘modern rights’ (eg arising from information or genetic technology) and specific group rights (eg. Women, children).

The Committee has taken opinions from other EP Committees<sup>63</sup> and adopted its final report after a lengthy debate on over 200 amendments on 29 February 2000.<sup>64</sup> The main conclusions of the report are:

- The Charter must be legally binding and incorporated into the Treaty;
- The Charter should be on the IGC agenda;
- Member States should be bound by the Charter in the implementation of EC law;
- The EU should accede to the ECHR;
- The Charter should be justiciable before the ECJ, with individual access.<sup>65</sup>

## **B. Council of Europe**

On 25 January 2000 the Council of Europe’s Parliamentary Assembly approved a report on the Charter by the Swedish Socialist, Göran Magnusson, of the Committee on Legal Affairs and Human Rights. The report records legitimate concerns about the new Charter, noting in particular that the ECHR already provides human rights protection and a long-established complaints mechanism for all EU countries. It also expresses concern about possible inconsistencies arising from the co-existence of two parallel systems of human rights protection. The report draws attention to the achievements of the ECHR which could be undermined by the “risks of having two sets of fundamental rights”.<sup>66</sup> It does not object to the adoption of a Charter of Rights in addition to EC/EU accession to the ECHR.<sup>67</sup> It also suggests that the Charter should contain all the rights guaranteed by the ECHR, and others “now accepted as fundamental rights”, including the rights contained in the European Social

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<sup>63</sup> Foreign Affairs, Human Rights, Common Security and Defence Policy, Legal Affairs and the Internal Market, Women’s Rights and Equal Opportunities, Petitions and the Committee on Employment and Social Affairs.

<sup>64</sup> Adopted by 18 to 4 with 2 abstentions.

<sup>65</sup> From *European Parliament News Report*, 1 March 2000.

<sup>66</sup> *Ibid*, p.2.

<sup>67</sup> Reference to an EU report, prepared in February 1999 by an expert group chaired by Professor Simitis, which recommended that Articles 2 to 13 of the ECHR be incorporated into Community law, together with the rights secured in the protocols to the Convention.

Charter.<sup>68</sup> The Rapporteur's Explanatory Memorandum also notes support for the idea that the Charter should not be integrated into the EC Treaties "as it would doubtless result in different interpretations of the Convention's provisions by the European Court on Human Rights on the one hand and the Court of Justice of the European Communities on the other". The Report concludes by calling on the EU Member State parliaments "to renew their efforts in favour of the accession of the Union to the Council of Europe's European Convention on Human Rights ... and in the meantime to do their utmost to prevent the granting of treaty value to any European Union Charter of Fundamental Rights".<sup>69</sup>

## **IV Drafting the Charter**

### **A. Meeting in December 1999**

The drafting body met for the first time on 17 December 1999. The nominations for representatives from the EU Institutions and the Member States for the drafting body and Alternates are listed in Appendix 1. It was already clear that there was a wide range of opinion among contributors on the status, form and content of the Charter:

Roman Herzog (chairman):

We are not talking about a European constitution here, and the issue is not whether in setting itself fundamental rights the European Union stands to gain in terms of statehood, which, incidentally, I don't believe it would. We are not talking about the emergence of a federal state, supervision by the Constitutional Court, or anything like that. Those are all issues which will have to be clarified and decided on in their own time.

...

We are going to draft a text that will not be immediately binding as European law or Community law. Despite this, we should constantly keep the objective in mind that the Charter which we are drafting must one day, in the not too distant future, become legally binding.<sup>70</sup>

Inigo Mendez de Vigo (leader of the EP representation):

... for us a mere declaration is not enough ... The Charter of Fundamental Rights must be binding and must be incorporated into the Treaty. To the extent that the Treaties constitute the Constitutional Charter of the European Union, as reaffirmed by the case-law of the Court of Justice, the Charter of Fundamental Rights should be a part of it.

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<sup>68</sup> Signed in 1961 and revised in 1996.

<sup>69</sup> Doc. 8611, p.3.

<sup>70</sup> <http://db.consilium.eu.int/df/default.asp?lang=en>.

**António Vitorino (Commission):**

... the final decision on whether the Charter must be integrated into the Treaties and how this should be done is a matter for the Heads of States or Government alone. This body must, therefore, come up with a text which the Commission believes should meet the necessary format and content requirements for integration into the Treaties. For the Commission, the aim should be to provide the Union with a Charter of Fundamental Rights founded on judiciary control.

...

In the Commission's opinion the adoption of a Charter of Fundamental Rights will not block, or render redundant, accession to the Convention, nor will that accession block, or render redundant, the adoption of a Charter of Fundamental Rights by the Union. We clearly cannot prevent this issue surfacing during our discussions, but I feel no conclusive answer has to be found for it in this body – providing we agree with the Commission's analysis regarding the compatibility of possible accession to the Convention and adoption of a fundamental rights catalogue specific to the Union.

**Vassilios Skouris (ECJ):**

... in the event of an institutional act of the Communities infringing fundamental rights, it is already within the jurisdiction of the Court to verify observance of fundamental rights. It verifies not only acts of the legislative and executive powers of the Communities but also regulations of the Member States where the latter act within the scope of Community law. Thus, once the Charter of Fundamental Rights has been drawn up the Court of Justice of the European Communities will not be taking on a new role in monitoring observance of these rights, as it has always affirmed that fundamental rights are an integral part of the law which the Court is there to enforce.

**Judges Marc Fischbach and Hans Christian Krüger (European Court of Human Rights):**

As far as civil and political rights are concerned, the Charter should build on the European Convention on Human Rights. The rights and freedoms contained in the Convention and its additional protocols are worded in such a way that they could be incorporated lock, stock and barrel into Community law. They constitute a body of rules which have been tested, developed and applied by the European Court and Commission over a period of more than forty years and to which the Court of Justice of the European Communities refers with increasing frequency.

As to whether the charter should include social and economic rights, we would first of all point out that, as the European Court of Human Rights itself has stated, there can be "no watertight division" between the various categories of rights. It is therefore desirable, in the interests of human rights protection, that the Charter be more than a catalogue of traditional civil and political rights. Progress within the European Union in this area would be a driving force for improvement of the European protection of human rights in general.

The drafting of a charter of fundamental rights for the European Union provides a unique opportunity to construct a coherent system of human rights protection in Europe. Rather than search for new procedures, it would be preferable to devise an efficient system on the basis of the existing elements that have already proved their worth. Experience shows that a proliferation of codes with competing enforcement mechanisms tends to impair the effectiveness of all existing procedures. Furthermore, if the Charter were to be intended to set up an alternative European system for protecting fundamental rights, that might create a new divide in Europe – between the Member States of the European Union and the other European countries. Moreover, such an approach would lend weight to the idea that the substance of fundamental rights can be adjusted according to, for example, the economic situation of the countries expected to uphold them.

Accession to the European Convention on Human Rights remains a very effective manner of ensuring the necessary consistency between the convention and Community law. It would strengthen the protection of Europe's citizens.

Accession would obviate the risk of divergent interpretations being adopted in Strasbourg and Luxembourg. Of course, this is not the only way to integrate Community law and the Convention so as to form a coherent and efficient system. We could undoubtedly think of other options that would merit detailed consideration.

## **B. Meetings in 2000**

At its meeting on 17 January the committee of office holders from the constituent groups agreed under the chairmanship of Roman Herzog that the body would be called the 'Convention'. The proceedings would be open and transparent, as established at Tampere ("Hearings held by the Convention and documents submitted at those hearings will be public"). There would be no working groups or sub-committees and all discussions would take place in plenary session.

On 1-2 February 2000 the Convention heard submissions from the European Ombudsman, the Committee of the Regions and the Economic and Social Committee. The EP rapporteurs, MEPs Duff and Voggenhuber, submitted a proposal for rules of procedure to be adopted by the body. They acknowledged the difficulty of reaching consensus in some areas and proposed that decisions relating to procedure be made by unanimity, while decisions on substantive issues should be taken by a two-thirds qualified majority. On the basis of a paper drafted by the President, Roman Herzog<sup>71</sup>, the Convention discussed 'horizontal' issues: the Charter's relationship with other bodies, laws and texts, its legal status with regard to the EC Treaties and the nature of the protection guaranteed. The proposal made the following recommendations:

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<sup>71</sup> For full text see <http://db.consilium.eu.int/df/default.asp?lang=eng>.

- The legal status of Charter (solemn declaration or legally binding text) should be a political decision;
- Charter should apply to EU institutions, but cannot impose obligations on non-EU Member States;
- Charter should establish a bill of rights, not confer new powers on EU to legislate in this area;
- Charter should apply to all three Union ‘pillars’;
- Charter should apply to all EU nationals, with proviso to cover all EU citizens;
- Charter will not affect issue of EC acceding to ECHR;
- Charter should contain declaration that it does not affect protection under ECHR, national constitutions and other international agreements;
- There is a distinction between legally enforceable rights and ‘political principles’ for EU action (e.g. the right to employment).

At an informal plenary meeting on 23-24 February members debated the President’s draft articles on human dignity and the right to life. At another informal plenary on 2-3 March, discussion continued of draft articles tabled by Mr Herzog (see **Appendix 3**). The Convention is to meet again on 20-21 March, 5-6 June, 11-12 September and 30-31 October 2000, with a final meeting in November to draft the Charter formally for presentation to the European Council in Nice in December.

### C. Draft Texts

In January the Portuguese Presidency published a draft charter of rights based on the Community Treaties, international human rights conventions and the ECHR. It distinguishes between civil and political rights on the one hand, and economic and social rights on the other. Some texts would have a binding nature and others would not. In February the Convention President proposed two sets of Articles with commentaries, which are currently under discussion by the Convention<sup>72</sup>. Lord Goldsmith QC, the British Government’s representative on the Convention, has proposed a two-part text, details of which are set out **Appendix 5**. Lord Goldsmith has proposed that the Charter should be prepared in two parts:

- Part ‘A’ would be a “succinct and user-friendly statement of rights and responsibilities” that apply within the EU;
- Part ‘B’ would offer an explanation of the nature and scope of these rights, indicating legal source and explaining how they would be justiciable, whether at the European Court of Human Rights, the ECJ or national courts.<sup>73</sup>

He added in his Convention contribution:

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<sup>72</sup> These and other texts can be accessed at <http://db.consilium.eu.int/df/default.asp?lang=en>.

<sup>73</sup> From Lord Goldsmith’s contribution and intervention, <http://db.consilium.eu.int/df/default.asp?lang=en>

The two parts would be clearly linked through mutual cross-references though the first could perhaps be made available separately for promotional purposes, but keeping the signpost to Part B. This approach would allow visibility and accessibility through Part A while retaining legal certainty through Part B. Part B would also contain any applicable national derogation.<sup>74</sup>

The Goldsmith draft is based on a framework of the four headings identified at Cologne (civil and political rights, EU citizens' rights, economic and social rights; and rights emanating from the constitutional traditions common to all Member States). At the Convention meeting on 23-24 February Lord Goldsmith clarified his texts, emphasising that in Part B consistency with the wording of the ECHR would be crucial in order to avoid legal problems. Other representatives pointed out that the Convention aimed to do more than simply copy out the ECHR. His proposed text is outlined in **Appendix 4**. Discussion of the proposed wording has revealed inherent differences among the national legal systems and in national policies and provisions in areas such as education, family life and religious freedom.

## V Summary of Views

### A. British Government and Parliament

The Government has supported human rights guarantees in the EU. In June 1999 the Prime Minister stated that the Government welcomed the German initiative which “should make the fundamental rights which already exist and are applicable at Union level more visible to the Union’s citizens”.<sup>75</sup> Mr Blair later said that the Charter would be a “document which sets out in a more accessible form the many rights which citizens already enjoy at European level”<sup>76</sup> and “should make it easier for EU citizens to know the civil and political rights they already enjoy under the Treaties, including those covered by Article 6.2 of the Treaty on European Union”.<sup>77</sup> He has also suggested that the Charter “should take the form of a political statement, rather than a legal text to be incorporated into the Treaties”.<sup>78</sup>

The Prime Minister has outlined some of the issues that the drafting body will have to tackle, such as the categories of rights it will aim to protect. On the status of the proposed Charter *vis-à-vis* the Treaties, Mr Blair said “There is no agreement that the Charter ... should be incorporated into the EU/EC Treaties”. Asked which body would be the final arbiter on questions of interpretation of the Charter, he replied:

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<sup>74</sup> From Lord Goldsmith’s contribution and intervention, <http://db.consilium.eu.int/df/default.asp?lang=en>.

<sup>75</sup> HC Deb, 28 June 1999, c20W.

<sup>76</sup> HC Deb, 5 July 1999, c363W.

<sup>77</sup> HC Deb, 4 November 1999, c486-7W.

<sup>78</sup> HC Deb, 30 November 1999, c81W.

The Government want a non-justiciable Charter which makes existing rights more visible. Where those rights are justiciable elsewhere, the relevant source instruments (for example, the European Convention on Human Rights or the EU/EC Treaties) will continue to be interpreted in the usual way by the appropriate institutions (for example, the European Court of Human Rights or the European Court of Justice).<sup>79</sup>

In the Government's view the Charter should make existing rights clearer and more accessible to help "deepen and strengthen the culture of rights and responsibilities at all levels across the EU"<sup>80</sup>, identifying and complementing existing legal instruments on fundamental rights.

Win Griffiths put forward his views on the Charter in his adjournment debate on 16 February 2000:<sup>81</sup>

First, the charter could emphasise communal values within the European Union. Secondly, it could raise awareness of existing fundamental civil, political and other rights that support human dignity, and oppose all types of discrimination and xenophobia. Thirdly, it could bring out the essential interface between rights and responsibilities both for individuals and Governments. Fourthly, it could declare boldly to European citizens their right to participate in the democratic process, to live, study and work, to provide and receive services and to set up businesses anywhere in the European Union.<sup>82</sup>

Kevin McNamara (Labour) was concerned about the possible creation of a two-tier system of human rights protection with two rival jurisdictions, suggesting that there would be "one court for the rich countries – the established countries – and another for lesser breeds without the law".<sup>83</sup> Terry Davis (Labour) was concerned about the waste and "unnecessary expenditure" that duplication would bring.<sup>84</sup> Opposition Members pointed to the issues of duplication, justiciability and the undermining of the Strasbourg court. Christopher Gill (Conservative) suggested that a "great deal of important work is likely to be thrown down the drain if the European Union produces a set of justiciable principles".<sup>85</sup> Richard Spring (Conservative) did not want Britain to become subject to a "whole new set of wide-ranging rights".<sup>86</sup> Mark Oaten (Liberal Democrat) put forward the Party's belief in the "logic in moving towards a structure that incorporates the charter" but also its concern that a two-tier system should be avoided.<sup>87</sup> In his reply the Minister for Europe, Keith Vaz, reminded the

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<sup>79</sup> HC Deb, 24 January 2000, c3W.

<sup>80</sup> HC Deb, 1 February 2000, c.541W

<sup>81</sup> HC Deb, 16 February 2000, cc225-244WH.

<sup>82</sup> *Ibid*, c226WH.

<sup>83</sup> HC Deb, 16 February 2000, c233WH.

<sup>84</sup> c235WH.

<sup>85</sup> c232WH.

<sup>86</sup> HC Deb, 16 February 2000, c239WH.

<sup>87</sup> *Ibid* c237WH.

House that the final decisions on the form, content and legal status of the Charter lay with the European Council (therefore making them subject to unanimous approval by the fifteen Member States) and that the House would have “ample opportunity” to question the Government and to debate the issues.<sup>88</sup> He concluded that the Charter would help to explain “in simple and user-friendly language exactly how people benefit from membership of the European Union”.<sup>89</sup> He also promoted the Charter as a way of ‘exporting’ to the applicant countries “the rights, responsibilities and values that we hold so dear in the European Union”.<sup>90</sup>

## **B. The EU Institutions and Other Member States**

In the EP delegation to the Convention the majority would like a charter that will take the form of a legally binding Treaty protocol covering all aspects of EU activity, including the Common Foreign and Security Policy (CFSP), Justice and Home Affairs (JHA) and institutions such as Europol.<sup>91</sup> Some MEPs want to create “an all-embracing and justiciable treaty-incorporated charter that will take the Union into new waters”.<sup>92</sup> The European Ombudsman, the Economic and Social Committee and the Committee of the Regions would like the Charter to be legally binding, with the latter calling for recognition of the principles of diversity, protection of minorities, local and regional autonomy. The European Council, the Commission and most Convention representatives from national parliaments do not want a justiciable, incorporated charter.<sup>93</sup> The Commission and the Portuguese Presidency want the final proposals to be included in the present IGC negotiations.

The German SPD government firmly supports a legally binding catalogue of rights in the EC/EU Treaty. In a report in the *Frankfurter Allgemeine Zeitung*<sup>94</sup> the German Justice Minister, Herta Däubler-Gmelin, supported many of the EP’s recommendations for a comprehensive catalogue of rights, formulated so as to apply both to EU citizens and also to all EU residents. She drew comparisons with the German constitution, the Basic Law, its complaints mechanism and the need for compatibility between the EU and the German texts. She also argued for a maximum level of human rights protection rather than minimal guarantees.

The Irish government, like the German government, is concerned about compatibility with the national constitution, but the former “is very much of the minimalist school, hoping that

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<sup>88</sup> HC Deb, 16 February 2000, c243WH.

<sup>89</sup> c244WH.

<sup>90</sup> *Ibid.*

<sup>91</sup> c227WH.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*

<sup>94</sup> *Frankfurter Allgemeine Zeitung*, 10 January 2000.

the convention will limit itself to an unenforceable political declaration and will not require any Irish constitutional amendment.”<sup>95</sup>

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<sup>95</sup> *Irish Times*, 22 February 2000.

## Appendix 1 Members of the Convention

### European Parliament

Inigo MÉNDEZ DE VIGO (president of delegation)	Alternates
Charlotte CEDERSCHIÖLD	Teresa ALMEIDA GARRETT
Thierry CORNILLET	Rocco BUTTIGLIONE
Ingo FRIEDRICH	Konstantinos HATZIDAKIS
Timothy KIRKHOPE	Marie-Thérèse HERMANGE
Johanna MAIJ-WEGGEN	Peter Michael MOMBAUR
David MARTIN	Reinhard RACK
Pervenche BÉRÉS	Ieke van den BURG
Hans-Peter MARTIN	Catherine LALUMIERE
Martin SCHULZ	Ulpu IIVARI
Elena PACIOTTI	Phillip WHITEHEAD
Andrew DUFF	Jean-Maurice DEHOUSSE
Johannes VOGGENHUBER	Graham WATSON
Sylvia-Yvonne KAUFMANN	Kathalijne BUITENWEG
Georges BERTHU	Pernille FRAHM
Jens-Peter BONDE	Mauro NOBILIA

### Court of Justice, Council of Europe, Commission

Court of Justice	KRUGER (Secretary General)
SKOURIS (Judge)	FISCHBACH (Judge)
ALBER (Advocate General)	Commission
Council of Europe	António VITORINO (Commissioner)

### Member States

(A=Alternate)

#### FINLAND (Presidency)

Paavo NIKULA (Justice Minister) Chancelier de la Justice)  
Gunnar JANSSON  
Tuija BRAX

#### DENMARK

Erling OLSEN  
Tyge LEHMANN (A)  
Jacob BUKSTI  
Ulla TØRNAES  
Knud Erik HANSEN (A)  
Pia CHRISTMAS-MØLLER (A)

#### AUSTRIA

Franz VRANITZKY  
Heinrich NEISSER  
Harald OFNER

#### BELGIUM

Jean-Luc DEHAENE  
Roger LALLEMAND  
Karel de GUCHT

**FRANCE**

BRAIBANT

François LONCLE

Nicole AMELINE (A)

Hubert HAENEL

Marie-Madeleine DIEULANGARD (A)

**PORTUGAL**

Pedro BACELAR DE VASCONCELLOS

José BARROS MOURA

MARAI Eduardo AVEZEDO

**GREECE**

George PAPANIMITRIOU

Georgios ROMEOS

Michael LIAPIS

**IRELAND**

Michael O'KENNEDY

Desmond O'MALLEY

Bernard DURKAN

**ITALY**

Giovanni Marai FLICK

Andrea MANZELLA

Piero MELOGRANI

Furio BOSELLO (A)

Maria Pia VALETTO BITELLI (A)

**NETHERLANDS**

Frits KORTHALS ALTES

Michiel PATIJN

Ernst HIRSCH BALLIN

Erik JURGENS (A)

Gerritjan van OVEN (A)

**GERMANY**

Roman HERZOG

Jürgen MEYER

Jürgen GNAUCK

Peter ALTMAIER (A)

Wolf WEBER (A)

**SPAIN**

RODRIGUEZ-BEREIJO

Gabriel CISNEROS

Jordi SOLÈ TURA

**UNITED KINGDOM**

Lord GOLDSMITH QC

Wyn GRIFFITHS

Lord BOWNESS

**SWEDEN**

Daniel TARSCHYA

Göran MAGNUSSON

Lars F. TOBISSON

**LUXEMBOURG**

Paul-Henri MEYERS

Ben FAYOT

Simone BEISSEL

**OTHERS**

Economic and Social Committee-Alan HICK

Committee of the Regions-Béatrice TAULÈGNE

The Ombudsman-Jacob SÖDERMAN

## **Appendix 2      Annex to Tampere Conclusions**

### **The composition, method of work and practical arrangements for the drafting body**

#### **A    COMPOSITION OF THE BODY**

##### **(i) Members**

###### **(a) Heads of State or Government of Member States**

Fifteen representatives of the Heads of State or Government of Member States.

###### **(b) Commission**

One representative of the President of the European Commission.

###### **(c) European Parliament**

Sixteen members of the European Parliament to be designated by itself.

###### **(d) National Parliaments**

Thirty members of national Parliaments (two from each national Parliament) to be designated by national Parliaments themselves.

Members of the Body may be replaced by alternates in the event of being unable to attend meetings of the Body.

##### **(ii) Chairperson and Vice-Chairpersons of the Body**

The Chairperson of the Body shall be elected by the Body. A member of the European Parliament, a member of a national Parliament, and the representative of the President of the European Council if not elected to the Chair, shall act as Vice-Chairpersons of the Body.

The member of the European Parliament acting as Vice-Chairperson shall be elected by the members of the European Parliament serving on the Body. The member of a national Parliament acting as Vice-Chairperson shall be elected by the members of national Parliaments serving on the Body.

##### **(iii) Observers**

Two representatives of the Court of Justice of the European Communities to be designated by the Court.

Two representatives of the Council of Europe, including one from the European Court of Human Rights.

##### **(iv) Bodies of the European Union to be invited to give their views**

The Economic and Social Committee

The Committee of the Regions

The Ombudsman

##### **(v) Exchange of views with the applicant States**

An appropriate exchange of views should be held by the Body or by the Chairperson with the applicant States.

##### **(vi) Other bodies, social groups or experts to be invited to give their views**

Other bodies, social groups and experts may be invited by the Body to give their views.

##### **(vii) Secretariat**

The General Secretariat of the Council shall provide the Body with secretariat services. To ensure proper coordination, close contacts will be established with the General Secretariat of the European Parliament, with the Commission and, to the extent necessary, with the secretariats of the national Parliaments.

## **B WORKING METHODS OF THE BODY**

### **(i) Preparation**

The Chairperson of the Body shall, in close concertation with the Vice-Chairpersons, propose a work plan for the Body and perform other appropriate preparatory work.

### **(ii) Transparency of the proceedings**

In principle, hearings held by the Body and documents submitted at such hearings should be public.

### **(iii) Working groups**

The Body may establish *ad hoc* working groups, which shall be open to all members of the Body.

### **(iv) Drafting**

On the basis of the work plan agreed by the Body, a Drafting Committee composed of the Chairperson, the Vice-Chairpersons and the representative of the Commission and assisted by the General Secretariat of the Council, shall elaborate a preliminary Draft Charter, taking account of drafting proposals submitted by any member of the Body.

Each of the three Vice-Chairpersons shall regularly consult with the respective component part of the Body from which he or she emanates.

### **(v) Elaboration of the Draft Charter by the Body**

When the Chairperson, in close concertation with the Vice-Chairpersons, deems that the text of the draft Charter elaborated by the Body can eventually be subscribed to by all the parties, it shall be forwarded to the European Council through the normal preparatory procedure.

## **C PRACTICAL ARRANGEMENTS**

The Body shall hold its meetings in Brussels, alternately in the Council and the European Parliament buildings.

A complete language regime shall be applicable for sessions of the Body.

## **Appendix 3 President's Draft Charter of Fundamental Rights of the European Union<sup>96</sup>**

### **1. Dignity of the human person**

1. Human dignity shall be inviolable.
2. No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
3. No one shall be required to perform forced or compulsory labour.

### **Article 2. Right to life**

1. Everyone shall have the right to life.
2. Everyone shall have the right to the respect of his physical, psychological and genetic integrity.
4. The death penalty shall be abolished.

#### **Alternative wording for paragraph 2:**

2. Everyone shall have the right to the respect of his physical, psychological and genetic integrity. In the field of medicine and biology, the following principles must be respected:
  - An intervention in the health field may only be carried out after the person concerned has given free and informed consent to it.
  - Any form of discrimination against a person on grounds of his or her genetic heritage is prohibited.
  - Predictive genetic tests may only be carried out for medical purposes or for medical research, subject to appropriate genetic counselling. An intervention to modify the human genome may only be undertaken for preventive, diagnostic or therapeutic purposes and only if its aim is not to introduce modifications in the genome of any descendants.
  - Medical research must respect the dignity of the human person and the principle of free and informed consent.
  - The human body and its parts shall not, as such, give rise to financial gain.
  - The removal of organs from a living donor for transplantation purposes may be carried out solely with the free and informed consent of the donor and for therapeutic benefit where there is no other alternative therapeutic method.
  - The cloning of human beings is forbidden.

### **Article 3. Liberty and security**

1. Everyone has the right to liberty and security of person.
2. No one shall be arrested or detained save in the cases prescribed by law.
3. Everyone arrested or detained on reasonable suspicion of having committed an offence shall be brought before a judge and shall be entitled to trial within a reasonable time or be released pending trial.
4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the above provisions shall have an enforceable right to compensation.

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<sup>96</sup> Note from the President, 15 February 2000, CHARTE 4123/1/00,REV 1

**Article 4. Right to an effective remedy**

Everyone whose rights and freedoms are violated shall have the right to bring an action before a court or tribunal specified by law.

**Article 5. Right to a fair trial**

1. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
2. Access to justice shall be effective. Legal aid shall be provided to those who lack sufficient resources [insofar as such aid is indispensable to ensure the effectiveness of access to justice].
3. Everyone charged with an offence has the following minimum rights:
  - (a) to be presumed innocent until proved guilty according to law;
  - (b) to be informed promptly, in a language which he understands and in detail, of the accusation against him, and to have adequate time and facilities for the preparation of his defence;
  - (c) to defend himself in person or through legal assistance of his own choosing or to be given it free, and to have the free assistance of an interpreter if he cannot speak the language of the proceedings;
  - (d) to have access to the dossier; to examine or have examined under the same conditions witnesses on his behalf and witnesses against him.

**Article 6. No punishment without law**

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence in law at the time when it was committed. No heavier penalty than the one applicable at the time of committing the offence shall be imposed. If, subsequent to the commission of the offence, the law provides for a lighter penalty, that penalty shall be applicable.

**Article 7. Non bis in idem**

No one shall be tried or convicted for offences for which they have already been finally acquitted or convicted.

**Article 8. Respect for private and family life**

1. Everyone shall have the right to respect and protection for their identity.
2. Respect for privacy and family life, reputation, the home and the confidentiality of correspondence, irrespective of the medium, shall be guaranteed.

**Article 9. Family life**

1. Everyone shall have the right to found a family.
2. The Union shall ensure the legal, economic and social protection of the family.
3. The Union shall ensure the protection of children.

**II. HORIZONTAL ARTICLES**

These articles are not submitted for discussion. They are intended merely to provide an illustration of a possible way of solving certain horizontal problems which are closely linked to matters to be examined when drafting provisions on specific rights.

**Preamble or Article 1**

The following provisions are applicable to the Institutions and bodies of the European Union within the framework of the powers and tasks assigned to them by the Treaties. They are binding on the Member States only where the latter transpose or apply the law of the Union. The Charter does not introduce new tasks or powers, nor does it extend existing tasks or powers.

**Article X**

1. Certain rights shall be reserved for citizens of the European Union. [It may be decided to extend the enjoyment of such rights wholly or partly to other persons.]

**Article Y. Limitations**

Without prejudice to provisions affording more protection than this Charter, no limitation on respect for the rights and freedoms which it recognises shall be admitted except under a rule of law which is not an implementing rule, does not infringe the essential content of the rights in question and, subject to the principle of proportionality, remains within the limits necessary for the protection of legitimate interests in a democratic society.

**Article Z. Level of protection**

No provision of the this Charter may be interpreted as placing restrictions on the protection afforded, in conformity with Article 6 of the Treaty on European Union, by the European Convention on Human Rights.

**DRAFT CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION, Note from the Praesidium, Proposed Articles (Articles 10 to 19), Brussels, 24 February 2000 (28.02)**

Below are further articles relating to civil and political rights. The only Article on the initial list which has not been included is the one concerning the principle of democracy. The place and the content of that Article merit particular attention. Proposals will be made later, particularly in the light of the principles common to national constitutions. Likewise, the question of freedom of movement will be considered at a later stage.

**Article 10: Freedom of thought, conscience and religion**

Everyone shall have the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

**Article 11: Freedom of expression**

Everyone shall have the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas, regardless of frontiers.

**Article 12: Right to education**

1. Everyone shall have the right to education [and to vocational training] appropriate to their abilities.
2. There shall be free choice of educational [and vocational training] establishment.
3. The right of parents to have their children educated and taught in accordance with their religious and philosophical convictions shall be guaranteed.
4. Art, science, research and teaching shall be free of constraint.

**Article 13: Freedom of assembly and association**

Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions.

**Article 14: Right of access to information**

Every citizen of the Union and anyone residing in the Union shall have a right of access to the documents of the institutions of the European Union. This right shall be exercised under the conditions laid down by Article 255 of the Treaty establishing the European Community.

**Article 15: Data protection**

Every natural person shall have a right to protection for his personal data.

**Article 16: Right to ownership**

Everyone is entitled to the peaceful enjoyment of his possessions. No one may be deprived of his possessions except in the public interest and in the cases and subject to the conditions provided for by law and subject to fair [and prior] compensation.

**Article 17: Right of asylum and expulsion**

1. Persons who are not nationals of the Union shall have a right of asylum in the European Union [in accordance with the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees] [under the conditions laid down in the Treaties].
2. Collective expulsions of aliens shall be prohibited.

**Article 18: Equality**

All persons shall be equal before the law.

**Article 19: Non-discrimination**

1. Any discrimination based on sex, race, colour or ethnic or social origin, language, religion or belief, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
2. The Union shall seek to eliminate inequalities and to promote equality between men and women. [The equality of the sexes shall be ensured in particular by the setting of pay and other working conditions in accordance with the Treaty and with the texts implementing it.]

## Appendix 4 Lord Goldsmith's Draft Text<sup>97</sup>

### II. Article 1 / Purpose and Object

(1) The dignity of the person is inviolable. In order to protect it, the European Union declares its adherence to the fundamental rights set out below.

(2) The following provisions are addressed to the bodies and institutions of the European Union in the exercise of the responsibilities and tasks assigned to them by the Treaties. [\*] They establish neither new tasks or competences for the Union nor do they extend its existing tasks or competences.

(3) The fundamental rights are listed below in Part A. Part B explains the nature, full extent and application of these rights.

#### Notes:

- *'Purpose and Object' is borrowed from the helpful titular formulation in the Convention on Human Rights and Biomedicine and is perhaps a more accurate description than 'Article 1'.*
- *'Inviolability' presents some difficulties in English. Prof. Braibant has suggested an alternative formulation using 'respected' which we should consider.*
- *[\*]I would suggest that we omit the second sentence of your Article 1(2) which contains a proposition which would require a Treaty amendment for its validity. We can discuss these issues at greater length.*

### Article 2

(Right to life)

(1) Everyone's right to life shall be protected by law.

(2) The death penalty is abolished. No one shall be condemned to such penalty or executed.

#### Notes:

- *I still think it is better to aim for a shorter Part A leading to a cleaner, more accessible document, with the detail in Part B.*
- *Headnote for Articles 3 to 5: We could possibly consider the pros and cons of combining these provisions under a single Article entitled 'Respect for the person.'*

### Article 3

(Right to the respect of physical and mental integrity)

Everyone has the right to the respect of his or her physical and mental integrity in the application of biology and medicine.

### Article 4

(Prohibition of torture and inhuman treatment)

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

### Article 5

(Prohibition of forced or compulsory labour)

No one shall be required to perform forced or compulsory labour.

#### Note:

- *Setting out this right in this way increases visibility without losing legal certainty.*

### Article 6

(Liberty and security)

Everyone has the right to liberty and security of person and cannot be deprived of it save in limited specific cases and in accordance with a procedure prescribed by law.

#### Note:

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<sup>97</sup> CHARTE 4146/00, 6 March 2000, supplements and clarifies CHARTE 4122/00, 7 February 2000.

- I regard it as important that the right should not be cut down by using any expression which might be interpreted differently from ECHR Article 5, which limits cases where a person might be deprived of liberty to specific limited circumstances. But the two-part approach allows visibility without losing legal certainty. This approach enables a visible statement of a personal right but tied clearly to the protection of the individual in ECHR Article 5.

## **PART B**

**This Part explains the nature, full extent and application of the fundamental rights referred to in Part A.**

### **General Provisions**

Each reference in this Charter to an Article of the ECHR or its Protocols should be interpreted in accordance with the jurisprudence of the Strasbourg organs.

*Note:*

- *It will be necessary in the draft to capture the developing jurisprudence of the Strasbourg and to tie the application of the Charter rights to individuals to the obligations of Member States. It may be possible to incorporate some or all of such material in Article 1 or draft a general clause thereby avoiding needless*

*repetition. But it is probably better to return to this question at the end of the process. The text I previously proposed included ‘References to ECHR Articles in this Charter are to be understood having regard to the jurisprudence of the Strasbourg organs. They do not confer a guarantee greater than that under the corresponding ECHR Article(s) subject to any reservation or, where applicable, derogation entered in respect of them’. This will have to be for consideration.*

### **III. Article 1 / Purpose and Object**

1(1): The principle of respect for the inviolable dignity of the human person is the foundation for statements of fundamental rights throughout the European Union. Article 1 has effect in accordance with the constitutional traditions of Member States and is respected by the Union bodies and institutions.

*Note:*

- *We cannot supply a Part B text for Article 1(2), because there is as yet no certainty about the legal force the Charter may be given at some later stage.*

### **Article 2**

(Right to life)

The rights in Article 2 are the rights guaranteed by Article 2 of and Articles 1, [2], 3 and 4 of Protocol 6 to the ECHR, read with ECHR Articles 17 and 18<sup>98</sup>. The full ECHR Article 2 is as follows [...]

The full text of relevant provisions of ECHR Protocol 6 is as follows [...]

### **Article 3**

(Right to the respect of physical and mental integrity)

The right set out in this Article comprises the following principles:

- (a) the principle of informed consent should be respected;
- (b) the human body and its parts shall not, as such, give rise to financial gain;
- (c) research on human beings shall only be carried out under appropriate conditions for their protection;
- (d) organ removal from living donors shall only be permitted under specified circumstances and with the consent of the person concerned.

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<sup>98</sup> It will need to be considered later where in the Charter we should set out the text of ancillary provisions of this kind.

The principle in (a) above is covered by the general rule given in Article 5 of the Convention on Human Rights and Biomedicine. It will not be applicable in all circumstances; for example, where a person is not able to give informed consent the relevant rules given in Articles 6, 8, 17 and 20 of the Biomedicine Convention must be applied. Where a person suffers from a serious mental disorder the principles given in articles 7 and 26 of the Biomedicine Convention will be applicable if certain criteria are met. The principle in (b) above is that laid down in Article 21 of the Biomedicine Convention. The appropriate protective conditions referred to in (c) above are set out in Articles 16 and 17 of the Biomedicine Convention. The principle in (d) above is laid down in Article 19 of the Biomedicine Convention, which specifies the permitted circumstances.

References to the Biomedicine Convention articles are to be read subject to the relevant exceptions provided by that Convention and subject to any applicable reservation or derogation.

**Note:**

*I expressed concern about the Praesidium text not reflecting the existing situation, and the need to confine ourselves to existing, justiciable rights. There is another preliminary observation: unlike the ECHR, the Council of Europe's Convention on Human Rights and Biomedicine permits the Community to accede (although I believe it has not yet done so). The Biomedicine Convention is not an existing active instrument and we will have to consider very carefully what should be included, which rights are common to Member States' constitutional traditions, and ensure that we reflect the language and exceptions of the Convention on Human Rights and Biomedicine. I have asked for advice on the detailed position in the UK at the moment. But in order to produce a draft for discussion I have very tentatively suggested the short Part A wording and the Part B note above, and may revert with further wording.*

**Article 4**

(Prohibition of torture and inhuman treatment)

Article 4 recites the text of Article 3 of the ECHR, the rights in which are guaranteed by that provision, read with ECHR Articles 17 and 18.

**Article 5**

(Prohibition of forced or compulsory labour)

The rights in Article 5 are the rights guaranteed by Article 4 of the ECHR, read with ECHR Articles 17 and 18. The full ECHR text of Article 4 is as follows: [...]

**Article 6**

(Liberty and security)

The rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, read with ECHR Articles 17 and 18. The full text of ECHR Article 5 is as follows: [...]