

LA CONVENTION EUROPÉENNE

LE SECRETARIAT

Bruxelles, le 18 octobre 2002

Groupe de travail II

Document de travail 26 REV 1

Les membres du groupe de travail II trouveront ci-joint des commentaires au projet de rapport final du groupe (WD 025)

Mr. A. KELEMEN, Alternate Member

The European Convention
Working Group on “Incorporation of the Charter/Accession to the ECHR”

Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental
Rights and accession of the Community/ Union to the ECHR

Subject: Incorporation of the Charter

1. Techniques of incorporation

Although the working group has limited its approach to the examination of the technical aspects of incorporation, the choice between different forms of incorporation representing different degrees of acknowledgement of its legal value involves the substantial question of the legal status of the Charter in the future.

Only some of the methods of incorporation ensure that the Charter acquire the status of a legally binding text. A binding force has beneficial effects as regards justiciability, and would ensure consistency between the different human rights standards across the three pillars of the Union. Therefore, I consider, that the options ensuring a binding force are preferable.

Furthermore, a treaty of a constitutional character containing a list of fundamental rights would constitute a move for the Community towards conceiving itself as a constitutional unit thus, the incorporation may convey a stronger political message. The coherent list of fundamental rights having legally binding force would raise people’s awareness of their rights.

2. The question of “replication” in the Charter

The necessary elimination of the replications created by the incorporation of the Charter raises the question of whether the articles of the Charter or those of the current Treaty should be deleted. As far as I see, both general provisions of fundamental rights having broader scope and those relating to specific chapters and sectors are to be maintained given the complementary character of more detailed provisions.

3. Treaty provisions concerning the Court of Justice

a) Amendment of Article 46(d)

Article 46(d) of the TEU conflicting with Article 51(1) of the Charter codifying the well established case law of the Court of Justice is to be deleted in order to ensure legal certainty.

b) Competences of the Court in the field of justice and home affairs

The Treaty of Amsterdam has significantly extended the role of the Court of Justice in the 3rd Pillar. Nevertheless, the jurisdictional competence remained restricted and the preliminary ruling procedure has been modified to the detriment of the citizens. Given that the prevalence of the fundamental rights in the field of the 3rd Pillar is particularly important and the availability of the Court of Justice is essential in guaranteeing the respect those rights, we agree with further extension of the competence of the Court and the proposed modification in the wording of the provision limiting the use of the preliminary ruling procedure.

c) The question of liberalizing the conditions for direct action before the Court

Ensuring binding force to the Charter brings about the need to ensure that individuals have direct access to the European Court in order to challenge Community acts violating their fundamental rights. The introduction of the direct recourse procedure is essential in assuring full protection and transparency among others.

Subject: Accession of the Community/Union to the ECHR

The accession of the Community/Union to the ECHR would put in place an effective external control mechanism of the legislative and enforcement activity of the Community institutions providing for a possibility of direct access of individuals to an independent court ensuring full protection of human rights. Therefore, I am in favour of an eventual accession.

Despite the fact that the consultation mechanism proposed in the working paper could be useful in order to eliminate the problems arising from the possible lack of coherence in the interpretation of human rights of the two courts, I am not convinced by the necessity of its introduction. The purpose of the establishment of the consultation mechanism in the European legal order has been related to the specific character of the Community judicial system; hence this mechanism is not essential in the ECJ – European Court relation.

The main concerns of the opponents of accession to the ECHR relate to the autonomy of Community law and the subordination of the Luxemburg Court. In my opinion, the autonomy of the Community law is not affected by the accession, given that the Strasbourg Court has no competence in the interpretation of Community law nor in the annulment of Community legal acts. According to my views, the subsidiary competence of the Strasbourg Court is manifested by the fact, that the Court respects a certain degree of discretionary power of the national authorities.

Subject: Rights of minorities with special regard to those of national minorities

Being aware of the fact, that the completion of the protected fundamental rights of the Charter will be effectuated by a political decision to be made eventually by the plenary session of the Convention, the contradiction between the practice of the EU enforcing the protection of minority rights in the accession candidate countries by the Copenhagen-criteria, Europe Agreements and the recommendations made in the framework of the Accession Partnership and the lack of legal basis in this field for the adoption of the same kind of measures in the Community necessitates urgent action. Furthermore, I would like to draw the attention to the fact, that the Europe Agreements remaining in force after the first round of enlargement will maintain this controversial “double standard” situation despite the fact that the Charter provides for the non-discrimination of persons on the grounds of their membership in a national minority.

Comments on the draft final report of working group II (doc. no. 25)

Dear Mr Vitorino,

I wish to thank you for the excellent draft final report which describes, in a very balanced manner, the gist of our discussions and the support expressed by members of the group both for an incorporation of the Charter of fundamental rights and for the accession of the European Union to the European Convention of Human Rights.

I only have a few comments to make. They are as follows:

1. There is a marked difference in how the draft report refers to the topic of incorporation and to the topic of accession. In order to avoid this difference I propose to add a sentence in A.I.1 on page 3 at the end of paragraph 2 (following the words: "... ensuring legal certainty"):

"Furthermore, the aforementioned common understanding is to be seen in conjunction with the corresponding unity on the issue of accession by the European Union to the European Convention on Human Rights, cf. point B I, 3rd paragraph below".

2. It has been my impression that working groups should refrain from submitting detailed drafting proposals. This is why I would suggest a slight change of the text now in A.II.1, the second paragraph of page 5 where we should delete any reference to "drafting adjustments" and instead let the two first sentences read:

"Accordingly and appropriate as explained below and as set out in the Annex to this report".

3. Under A, II, 3 I wish to propose, in the third paragraph on page 7, ("dédoublements") the following wording (bold): "Furthermore, the Group is of the view that, as regards these rights, a certain "replication" ("dédoublements") between the Charter and other parts of Treaty law **might** be inevitable for legal reasons **and should be minimised.**"

4. In Chapter B,I, second paragraph on page 12 the report rightly mentions that the Group has discussed the necessary constitutional authorisation enabling the Union to accede to the ECHR. The same paragraph ends with a sentence stating that questions which are "not of a constitutional nature are not for the Convention". In my opinion, the Convention is competent to discuss a great variety of issues and not at all limited to constitutional matters, as is clear from debates in and recommendations of other working groups.

I therefore propose to delete the last sentence of paragraph 2 as inaccurate and to replace it with the following text:

"However, nothing prevents the Heads of State and Government to commit themselves politically to an accession by the European Union to the European Convention of Human

Rights, for instance in the Final Act of the Intergovernmental Conference which is to be convened following the Convention."

5. Still on Chapter B, I, paragraph 4 (pages 12-13) there is an enumeration of reasons in favour of accession. Much more could be said in this context but if no other change is made I would at least ask that what is now the **third indent ("greater Europe" argument) be placed first.**

6. There is another difference of expression pertaining to what the group sees fit to recommend regarding on the one hand the incorporation (A.I.2 paragraph 1 on pages 3-4, options "a and b") and on the other the accession (B.I. paragraph 7 on page 14). In the first context, the Group straightforwardly recommends the Plenary to consider two options whereas in the latter the Group's recommendation is not only conditioned by a later Plenary decision but also less well presented.

This is why I first propose to **delete the words** "if the Plenary agrees politically on the idea of accession" since the group must have the full right to make proposals regardless of subsequent decisions of the Plenary and also since all who have spoken in our group have been in favour of an accession.

I then propose that the presentation follows the one in A.I.2 on pages 3-4 so that the first sentence of the paragraph will appear as follows:

"In the light of the above, the Group therefore recommends -----:

- that a legal basis should be inserted at an appropriate place in the Constitutional Treaty which would authorise the Union to accede to the ECHR."

7. Regarding B.II.1 on page 15 I propose to delete the last four words of the first paragraph ""in cases of doubt") which seem ambiguous in the context.

8. Regarding B.III on page 16 I am very much attached to your writing concerning "alternative mechanisms" especially since concerted legal opinions have ruled them out.

Finally, I assume that the last part of the report concerning Access to the ECJ should be labeled "C".

Yours sincerely,

Ingvar

GROUPE DE TRAVAIL II / DOCUMENT DE TRAVAIL 25 du 14 octobre 2002

INCORPORATION DE LA CHARTE DES DROITS FONDAMENTAUX - ACCESSION DE L'UE A LA CEDH

Impression générale: Il faut reconnaître que le projet de rapport constitue un effort important pour rendre fidèlement les détails et l'accord obtenu. Cependant, il ne cesse de mettre en avant une prudence extrême, voire une grande méfiance à l'encontre de la Charte des Droits fondamentaux, comme si celle-ci était une machine de guerre diabolique pour élargir subrepticement les compétences de l'Union au détriment des compétences des Etats membres. Or, il faut rappeler que la Charte a fait l'objet d'un large consensus lors de la 1ère Convention et qu'elle a fait l'objet d'une déclaration solennelle du Conseil européen de Nice. Surtout, elle a rencontré un accueil très favorable dans un grand nombre d'Etats membres et surtout auprès des opinions publiques et de la société civile. Tout en reconnaissant les limites de ce document, il faut convenir que c'est le premier document lisible et visible où les citoyens européens trouvent rassemblés leurs droits.

Etant donné la prudence et la méfiance dont question plus haut, le noyau central du rapport donne l'impression de se concentrer sur une limitation encore plus prononcée que dans le documents original des droits y contenus.

A. On the Charter

I. Recommendations as to the form of possible incorporation of the Charter

1. General recommendation

Le rapport parle (p. 3 version anglaise) du "common understanding" sur certains aspects légaux et techniques de la Charte.

Ces aspects concernent sans doute les points suivants:

- les articles horizontaux
- l'importance du préambule
- le statut des commentaires des articles établis par la présidence de la 1ère Convention

Or, si nous étions d'accord sur le rôle important du préambule et sur le statut des commentaires, nous ne l'étions pas sur la nécessité d'ajouter des articles horizontaux.

2. Recommendations as to the concrete form of incorporation

La majorité s'est prononcée pour l'incorporation du texte complet de la Charte dans un traité constitutionnel pour des raisons de lisibilité de ce traité.

II. Conclusions and recommendations on certain legal and technical aspects...

1. Le groupe de travail n'a pas reconnu la nécessité d'adaptations aux articles horizontaux. Les propositions de nouvelles formulations aux articles horizontaux n'ajoutent rien quant à la sécurité juridique et donnent au contraire l'impression de vouloir à tout prix limiter voire annuler la portée de la Charte des droits fondamentaux.

2. C'est pourquoi je ne peux donner mon accord à l'alinéa 2 de ce paragraphe 2 où il est dit: "...the Group recommends the drafting adjustments to Art. 52.1 and 2."

Il ne me semble pas nécessaire d'ajouter dans 52.6 une référence à la subsidiarité, déjà indiquée dans le Préambule.

III. Recommendations concerning further questions arising in the context of possible incorporation

1. Preamble of the Charter

Je suis sceptique quant à la formulation : "the Charter Preamble...enriched by further elements as appropriate" au cas où le préambule deviendrait celui du traité constitutionnel. Pour ma part, je suis d'avis qu'il convient d'intégrer toute la Charte et éviter d'y toucher.

2. /

3. The importance of the "Explanations"

On propose d'ajouter les commentaires de ce rapport sur les adaptations des articles horizontaux aux commentaires de la Charte.

Or, ceux-ci étaient les commentaires du Présidium et étaient purement explicatifs. Je ne pense pas qu'on puisse imposer maintenant, par le biais de ce rapport, des interprétations à ces explications

C. Access to the Court of Justice

Quant à la nécessité d'étendre la protection juridique, il convient d'ajouter, outre les règlements européens directement exécutoires, les mesures prises dans le cadre du 3e pilier et des agences comme Europol qui touchent aux droits et libertés des individus et ne rentrent pas nécessairement dans le champ d'action des tribunaux nationaux.

Voilà quelques rapides remarques lors d'une première lecture. Je regrette que le délai qui nous est donné pour examiner le rapport du président soit extrêmement court.

Ben Fayot

15/10/2002

Mr. R. van der LINDEN, Member of the Convention

Re: Comment on the Draft Final report WD 25

Dear Mr Vitorino,

It is with great satisfaction that I have read the draft final report. I want to compliment you on the way you succeeded in this difficult task.

However, I want to put forward one point of great importance.

In your report you have left the decision on the incorporation in the (Constitutional) Treaty or in a Protocol attached to it, to the Convention Plenary.

Yet I want to stress the importance of a clear choice of this Working Group as regards the modalities of the incorporation of the Charter.

The EU grows from a economic and political Union to a Union of values. The heart and soul of this Union of values is the Charter. It is, in your words, the ‘building block’.

But how can we stress the importance of a Union of values, without taking on board the Charter in the Treaty itself?

I am convinced that the Charter belongs in the (Constitutional) Treaty itself, even regarding the equally legally binding nature of a Protocol. In my impression this opinion was shared by all members of the group.

For this reason I strongly plead for an explicit choice in this final report in favour of the full incorporation of the Charter in the Treaty itself.

With Kind Regards,

René VAN DER LINDEN

Member of the Convention

Nuth (NL), 16 October 2002 Rlinden2@wish.net

From: Baroness Scotland of Asthal
To: Secretariat

Subject : Draft final report – UK’s proposed amendments

1.	2. CURRENT TEXT (<i>Bold italics show proposed deletions</i>)	3. UK’S PROPOSAL (Bold type shows proposed adjustments)
p. 3 A, I, 1., 1 st paragraph	“... to prepare such a decision...”	“... to prepare for such a decision...”
p. 3 A, I, 1., 2 nd paragraph	“... on <i>all</i> key issues (...) an incorporation of the Charter <i>in a form which would make the Charter legally binding and give it constitutional status.</i> ”	“... on key issues (...) an incorporation of the Charter.”
p. 3 A, I, 1., 2 nd paragraph	“... <i>the necessary</i> groundwork ...”	“... sufficient groundwork...”
p. 3 A, I, 1., 2 nd paragraph	“... on certain legal and technical aspects of the Charter which are of great significance for <i>a smooth incorporation</i> ensuring legal certainty.”	“... on clarifying certain legal and technical aspects of the Charter which are of great significance for ensuring greater legal certainty.”
p. 4, A, I, 2., b.	“... insertion of an appropriate reference to the Charter in <i>one article of</i> the Constitutional Treaty; such a reference could be combined with annexing the Charter to the Constitutional Treaty, either as a specific part of the Constitutional Treaty containing only the Charter or as a separate legal text (<i>e.g., in form of a Protocol.</i>)”	“... insertion of an appropriate reference to the Charter in the Constitutional Treaty; such a reference could be combined with annexing or attaching the Charter to the Constitutional Treaty, either as a specific part of the Constitutional Treaty containing only the Charter or as a separate legal text.”
p. 4 A, I, 2., 2 nd paragraph.	“... a <i>large</i> majority of the Group would prefer the first option. The second option is favoured by certain other members, some of them emphasising the need to <i>annex</i> the Charter <i>to</i> the Treaty, as a specific part of that Treaty or as a protocol. The Group as a whole underlines that both basic options <i>can</i> serve to make the Charter a <i>legally binding</i> text of constitutional status.”	“... a majority of the Group would prefer the first option. The second option is favoured by certain other members, some of them emphasising the need to associate the Charter with the Treaty, as a specific part of that Treaty or as some form of attachment or protocol. The Group as a whole underlines that both basic

1.	2. CURRENT TEXT (<i>Bold italics show proposed deletions</i>)	3. UK'S PROPOSAL (Bold type shows proposed adjustments)
		options could serve to make the Charter a text of constitutional status.”
p. 4, A, II	“... a smooth incorporation of the Charter, <i>as a legally binding document</i> , into the new Treaty architecture...”	“... a smooth incorporation of the Charter into the new Treaty architecture...”
p. 4, A, II, 1., 1 st paragraph	“The <u>whole</u> Charter (...) should <i>therefore</i> be respected by this Convention <i>and not be re-opened by it.</i> ”	“The <u>whole</u> Charter (...) should in general be respected by this Convention.”
p. 5, A, II, 1., 2 nd paragraph	“ <i>Accordingly</i> , the Group has not considered any changes...”	“The Group has not considered any changes...”
p. 5, A, II, 1., 2 nd paragraph	“... render <i>absolutely</i> clear and legally watertight...”	“... render clearer and more legally watertight...”
p. 5, A, II, 2., 1 st paragraph	“... incorporation of the Charter <i>will</i> in no way modify the allocation of competences...”	“... incorporation of the Charter must in no way modify the allocation of competences...”
p. 6, A, II, 3., 2 nd paragraph	“... ensuring complete compatibility <i>and coordination</i> between the statements of the rights in the Charter and their more detailed regulation as currently found in the EC Treaty.”	“... ensuring complete compatibility between the statements of the rights in the Charter and their more detailed regulation as currently found in the EC Treaty and secondary legislation. ”
p. 6, A, II, 3., 2 nd paragraph	“... reflecting that principle of compatibility <i>and coordination</i> ...”	“... reflecting that principle of compatibility...”
p. 7, A, II, 3., 3 rd paragraph	“...a certain "replication" ("dédouplements") between the Charter and other parts of Treaty law will be inevitable for legal reasons and will not be harmful.”	“...a certain "replication" ("dédouplements") between the Charter and other parts of Treaty law will be inevitable for legal reasons and will not be harmful provided it is made clear, as is proposed, that the Charter articles are not intended to disrupt the Treaty provisions. ”
p. 7, A, II, 3., 4 th	“... as advocated by a <i>large</i> majority of the	“... as advocated by a majority of the Group...”

1.	2. CURRENT TEXT (<i>Bold italics show proposed deletions</i>)	3. UK'S PROPOSAL (Bold type shows proposed adjustments)
paragraph	Group..."	
p. 7, A, II, 4.	"... this article does not prevent more extensive protection (i) in Union legislation and (ii) in those articles of the Charter which, although based on the ECHR, go beyond the ECHR because Union law <i>acquis</i> had already reached a higher level of protection (e.g., Article 47 on effective judicial protection, or Article 50 on the right not to be punished twice for the same offence)."	"... this article does not prevent more extensive protection already achieved or which may subsequently be provided for (i) in Union legislation and (ii) in those articles of the Charter which, although based on the ECHR, go beyond the ECHR because Union law <i>acquis</i> had already reached a higher level of protection (e.g., Article 47 on effective judicial protection, or Article 50 on the right not to be punished twice for the same offence). Thus, the guaranteed rights in the Charter reflect higher levels of protection in <u>existing</u> Union law. "
p. 7, A, II, 5.	"... the Charter has <i>deep</i> roots in the Member States' common constitutional traditions..."	"... the Charter has firm roots in the Member States' common constitutional traditions..."
p. 7-8, A, II, 5.	"...represents an important source for <i>the</i> rights recognised by the Charter. In order to <i>highlight</i> these roots and in the interest of a smooth incorporation of the Charter <i>as a legally binding document</i> ..."	"... represents an important source for some rights recognised by the Charter. In order to emphasise the importance of these roots and in the interest of a smooth incorporation of the Charter..."
p. 8, A, II, 5.	"Under that rule, <i>rather than following a rigid approach of "a lowest common denominator"</i> , the Charter rights concerned should be interpreted in a way offering a high standard of protection <i>which is adequate for the law of the Union and</i> in harmony with the common constitutional traditions."	"Under that rule, account must be taken of the constitutional traditions that actually exist in the individual Member States. A rigid "lowest common denominator" approach need not be applied; instead the Charter rights concerned should be interpreted in a way which offers a high standard of protection in harmony with the common constitutional traditions."

1.	2. CURRENT TEXT (<i>Bold italics show proposed deletions</i>)	3. UK'S PROPOSAL (Bold type shows proposed adjustments)
p. 8, A, II, 6., 1 st paragraph	“In order to <i>reconfirm</i> that distinction while increasing legal certainty in the perspective of a <i>legally binding</i> Charter <i>with constitutional status</i> , the Group proposes an additional general provision (see Article 51 § 5 in the <u>Annex</u>) encapsulating <i>in a clear legal definition</i> the understanding of the concept of "principles"..."	“In order to confirm that distinction while increasing legal certainty in the perspective of an incorporated Charter, the Group proposes an additional general provision (see Article 51 § 5 in the <u>Annex</u>) encapsulating the understanding of the concept of "principles"..."
p. 8, A, II, 6., 1 st paragraph	“... they may call for implementation through legislative or executive acts; <i>accordingly, they</i> become significant for the Courts when such acts are <i>interpreted or reviewed</i> .”	“... they may call for implementation through legislative or executive acts. Such principles become significant for the Courts only when such legislative or executive acts are adopted by the Union .”
p. 8, A, II, 6., 2 nd paragraph	“... to express the character ("right" or "principle") of individual Charter articles as best as possible in the wording of the respective articles <i>and to leave it, on this basis and</i> taking into account the <i>valuable</i> guidance provided by the "Praesidium's Explanations", for future jurisprudence to rule on the exact attribution of articles to the two categories.”	“... to express the character ("right" or "principle") of individual Charter articles as best as possible in the wording of the respective articles taking into account the crucial guidance provided by the "Praesidium's Explanations", supplemented by explanations from the current Working Group , for future jurisprudence to rule on the exact attribution of articles to the two categories. See also section III.3 below. ”
p. 9, A, III, 1.	“... <i>should in the Group's view</i> be used as the Preamble to the Constitutional Treaty.”	“... could be used as the Preamble to the Constitutional Treaty.”
p. 9, A, III, 1.	“If in turn the Charter is incorporated as a specific part of the Constitutional Treaty or as a separate <i>binding legal</i> text (<i>e.g. in the form of</i>	“If in turn the Charter is incorporated as a specific part of the Constitutional Treaty or as a separate text within the Union's constitutional architecture...”

1.	2. CURRENT TEXT (<i>Bold italics show proposed deletions</i>)	3. UK'S PROPOSAL (Bold type shows proposed adjustments)
	<i>a Protocol</i>) within the Union's constitutional architecture...”	
p. 9, A, III, 1.	“... <i>the</i> elements of general importance...”	“... elements of general importance...”
p. 10, A, III, 2., 1 st paragraph	“... Union law is open for future evolutions...”	“... Union law is open for future evolution...”
p. 10, A, III, 3.	“ <i>It recognises that these Explanations are presently not sufficiently accessible for legal practitioners. The Group recommends therefore that, upon possible incorporation of the Charter, attention be drawn in an appropriate manner to these Explanations which, as they themselves state, have no legal value but are intended to clarify the provisions of the Charter. In particular, it would be important to publicise them more widely.</i> To the extent that the Convention takes on board the drafting adjustments proposed by this Group, the corresponding explanations given in this report should be <i>added to</i> the original Explanations.”	“To the extent that the Convention takes on board the drafting adjustments proposed by this Group, the corresponding explanations given in this report should be integrated with the original Explanations. This technical work should be done prior to possible incorporation of the Charter and associated with the Charter in an appropriate manner. ”
p. 11, B, I, 3 rd paragraph	“... on the basis of the <i>arguments and conclusions set out</i> below...”	“... on the basis of the safeguards proposed below...”
p. 11, B, I, 4 th paragraph	“Accession to the ECHR would give citizens <i>the same degree</i> of protection...”	“Accession to the ECHR would give citizens similar protection...”
p. 12, B, I, 6 th paragraph	“... the Union's accession to the ECHR <i>should</i> not be regarded as <i>alternatives</i> ...”	“... the Union's accession to the ECHR need not be regarded as <i>alternatives</i> ...”

1.	2. CURRENT TEXT (<i>Bold italics show proposed deletions</i>)	3. UK'S PROPOSAL (Bold type shows proposed adjustments)
p. 13, B, I, 7 th paragraph	"... authorise the Union to accede to the ECHR..."	"... authorise the Union, subject to the safeguards set out below , to accede to the ECHR..."
p. 13, B, I, 7 th paragraph	"The drafting of such a legal basis could be kept <i>very</i> simple..."	"The drafting of such a legal basis could be kept fairly simple..."
p. 13, B, II, 1., 2 nd paragraph	"... accession by the Union to the ECHR - like incorporation of the Charter – <i>will</i> in no way modify the allocation of competences..."	"... accession by the Union to the ECHR - like incorporation of the Charter – must in no way modify the allocation of competences..."
p. 13, B, II, 1., 1 st paragraph	"... a provision in the accession treaty and / or in an accompanying declaration made by the Union."	"... a provision in the accession treaty and / or in an accompanying declaration made by the Union and/or as a general reservation ."
Footnote 1, p. 13	"The legal base could for example state that the Union shall be authorised to accede to the ECHR."	"The legal base could for example state that the Union shall be authorised to accede to the ECHR subject to competence and without prejudice to the national positions of individual Member States in relation to the ECHR ."
p. 14, B, II, 2.	"... accession by the Union to the ECHR <i>does</i> not affect the positions..."	"... accession by the Union to the ECHR must not affect the positions..."
p. 14-15, B, II, 2. (2 nd bullet)	"... <i>would</i> in any event remain unaffected by accession..."	"... should in any event remain unaffected by accession..."
p. 15, B, III	"... <i>are</i> not <i>recommended</i> by the Group."	"... were not explored further by the Group."
p. 15, B (meaning C?), 2 nd paragraph	"... the Union's present system of remedies available <i>for the defence of their Charter rights</i> ."	"... the Union's present system of remedies available."
p. 17 (title)	ANNEX	ANNEX ADD EXPLANATIONS

Mr. M. LOBO ANTUNES, Alternate Member

Comments 1. Given the technical nature - that the report itself acknowledges - of the various subjects discussed at the WG with which other members of the Convention may not be very familiar with, I believe it could be useful to begin the report with a kind of "executive summary" listing the Group's recommendations to the plenary. This would make the report more "attractive" and easy reading for those wishing a quick access to those conclusions.

2. To redraft last sentence of page 2 and first page 3 (1.General recommendations) as follows: "(quote)At the outset, the Group stresses that, in accordance with its mandate, the final political decision TO RECOMMEND the possible incorporation....etc. (continues unchanged)"(unquote) .

3. To redraft second sentence page 11 (1. general conclusions and recommendations) as follows: (quote)".....Group's mandate, the final political decision TO RECOMMEND the possible accession by..etc. (continues unchanged)"(unquote) .

These drafting proposals are, in my view, more on line with the mandate enshrined in the Laeken Declaration (see point on Final Document) .

Best regards,
Manuel Lobo Antunes
member of the WGII

Ms. N. KUTSKOVA, Alternate Member

As it will be impossible for me to be present during the next meeting of Working Group II on 21 October 2002, I would like to express my support for the last version of the draft final report (working document 25). I think it reflects in a correct and balanced way the opinions expressed during the work of the group. As a representative of a candidate country, I would especially like to stress the importance of the strengthening of the horizontal clauses (general provisions) which is foreseen in the annex to the report.

Sincerely yours,

Nelly Kutzkova

Alternate to the Representative of the Bulgarian Government

En relación con el proyecto de informe final del grupo de trabajo II, remitido por el Secretariado, documento de trabajo 25, SN 3794/02 (apartado B II. 2), el miembro de la Convención adscrito al grupo citado D. Gabriel Cisneros formula la siguiente aportación fundada en un estudio realizado por la profesora Dña Belén Becerril, miembro del Instituto de Estudios Europeos, perteneciente a la Universidad San Pablo-CEU, sobre el estado actual del Convenio Europeo de Derechos Humanos en los Estados de la Unión Europea.

La Carta de Derechos Fundamentales de la Unión Europea ha colmado un gran vacío en una Comunidad que durante años había carecido de un catálogo escrito de derechos fundamentales. Sin embargo, la Carta no ha dado por zanjado otro debate que se plantea desde los años setenta en la arena comunitaria: la posible adhesión de la Comunidad o de la Unión al Convenio Europeo para la protección de los Derechos Humanos y de las Libertades Fundamentales (en adelante, CEDH).

Los argumentos a favor y en contra de una eventual adhesión son de todos conocidos. Los partidarios alegan que la adhesión aumentaría la protección de los derechos fundamentales en la Unión, extendiendo a las instituciones europeas el mecanismo de control judicial externo al que están sometidos los Estados miembros, y articulando armoniosamente los dos sistemas europeos de protección de derechos fundamentales. Los detractores, por su parte, alegan que la adhesión sería incompatible con el principio de autonomía del Derecho comunitario y significaría la ruptura de la supremacía jurisdiccional del Tribunal de Justicia. A esto hay que añadir las reticencias que despierta el hecho de que, tras una eventual adhesión, la Unión quedaría sometida al control de jueces de terceros Estados, más lejanos a la especificidad de la integración europea, y en ocasiones, con menor tradición democrática y menor experiencia en el control de la observancia de los derechos humanos.

A estos argumentos podríamos sumar uno más que hasta ahora no ha recibido apenas atención y que no obstante podría suponer un obstáculo adicional para que la adhesión pudiese producirse, o al menos, para que ésta pudiese desplegar los efectos esperados.

Los quince Estados miembros de la Unión Europea y los diez Estados candidatos que ultiman en estos meses sus negociaciones de adhesión (Chipre, República Checa, Eslovaquia, Eslovenia, Estonia, Hungría, Letonia, Lituania, Malta, y Polonia) han firmado y han ratificado el CEDH. Sin embargo, una lectura detenida del Convenio y de los trece protocolos que lo han

completado y modificado a lo largo de los años, pone de manifiesto que la situación de estos veinticinco Estados respecto al Convenio es muy diversa.

Esta diversidad se deriva principalmente de que, como Tratado internacional, el Convenio admite reservas y declaraciones (algunas de las cuales se refieren a su aplicación territorial) por parte de los Estados firmantes. Los trece protocolos admiten a su vez reservas y declaraciones, y además, éstos no han sido, en su totalidad, firmados y ratificados por los veinticinco Estados. El resultado es que la situación de cada uno de éstos Estados respecto al Convenio es diferente.

Durante muchos años esta diversidad alcanzaba tanto al sistema de protección de los derechos fundamentales como al catálogo de derechos protegidos. Sin embargo, el protocolo XI, abierto a la firma el 11 de mayo de 1997 y en vigor desde el 1 de noviembre de 1998, realizó una profunda reforma del sistema procedimental, simplificándolo y terminando con la notable heterogeneidad existente hasta entonces. El protocolo XI instauró un nuevo Tribunal permanente que conoce de todas las demandas, ya sean introducidas por los Estados o por los particulares¹. No obstante, la diversidad sigue siendo muy notable en lo que respecta a la parte sustantiva, es decir, al catálogo de derechos y libertades protegidos (derechos y libertades de los artículos 2 a 14 del CEDH, completado por los Protocolos 1, 4, 6, 7, 12 y 13).

Derechos y libertades de los artículos 2 a 14 del CEDH:

El Convenio recoge en su artículo 1 la obligación de respetar los derechos humanos. Las Altas Partes contratantes reconocen a toda persona dependiente de su jurisdicción los derechos y libertades que están definidos en el Título I del Convenio:

Art. 2: Derecho a la vida.

Art. 3: Prohibición de la tortura.

Art. 4: Prohibición de esclavitud y del trabajo forzado.

¹ Hasta entonces, el sistema de protección variaba considerablemente según cada Estado hubiese o no aceptado expresamente (a través de una Declaración al artículo 46) la competencia del Tribunal, según hubiese o no reconocido (a través de una Declaración al artículo 25) la posibilidad de que los particulares que se considerasen víctimas de una violación pudiesen interponer una denuncia, y según hubiese o no firmado y ratificado el protocolo IX, reconociendo a los particulares la posibilidad de pedir la elevación de un asunto al Tribunal (garantizando así al particular el derecho a una decisión emitida por un órgano judicial, apartado de las razones políticas a las que era más permeable el Comité).

Art.5: Derecho a la libertad y a la seguridad.

Art.6: Derecho a un proceso equitativo.

Art.7: No hay pena sin ley.

Art.8: Derecho al respeto de la vida privada y familiar.

Art.9: Libertad de pensamiento, de conciencia y de religión.

Art.10: Libertad de expresión.

Art.11: Derecho de reunión y de asociación.

Art.12: Derecho a contraer matrimonio.

Art.13: Derecho a un recurso efectivo.

Art.14: Prohibición de discriminación.

Todos los Estados miembros de la Unión, así como los diez Estados candidatos cuya situación examinamos, han firmado y ratificado el Convenio, por lo cual, los veinticinco reconocen estos derechos y libertades a toda persona dependiente de su jurisdicción. No obstante, las reservas y declaraciones emitidas a estos artículos son muy numerosas, como puede examinarse en el primer cuadro matricial que hemos recogido a continuación. Una mención especial merecen los artículos 5 y 6, pues a ellos se refieren la mayor parte de las reservas y declaraciones emitidas por los Estados.

Además, el catálogo de derechos recogido en el Convenio ha sido ampliado por sucesivos protocolos adicionales¹.

Derechos y libertades del Protocolo 1º:

El Protocolo 1º, abierto a la firma el 20 de marzo de 1952, y en vigor desde el 18 de mayo de 1954 recoge los siguientes derechos y libertades:

Art.1: Protección de la propiedad.

Art.2: Derecho de instrucción.

Art.3: Derecho a elecciones libres.

¹ Incluimos referencias a los protocolos en su versión actual, es decir con las modificaciones introducidas por el Protocolo 11.

Los veinticinco Estados han firmado y ratificado este protocolo, aunque han emitido numerosas reservas y declaraciones a los artículos 1 y 2, tal y como puede examinarse en el segundo cuadro matricial.

Derechos y libertades del Protocolo 4º:

El Protocolo 4º, abierto a la firma el 16 de septiembre de 1963, y en vigor desde el 2 de mayo de 1968, recoge los siguientes derechos y libertades:

Art.1: Prohibición de la privación de libertad por incumplimiento de obligaciones contractuales.

Art.2: Libre circulación.

Art.3: Prohibición de expulsión de nacionales.

Art.4: Prohibición de expulsión colectiva de extranjeros.

Este Protocolo no ha sido firmado por Grecia, y no ha sido ratificado por España ni por el Reino Unido. Además, se han emitido diversas reservas y declaraciones al mismo, tal y como puede examinarse en el tercer cuadro matricial.

Derechos y libertades del Protocolo 6º:

El Protocolo 6º, abierto a la firma el 28 de abril de 1983 y en vigor desde el 1 de marzo de 1985, dispone:

Art.1: Abolición de la pena de muerte.

Conviene no obstante notar que el artículo 2 dispone que “Un Estado podrá prever en su legislación la pena de muerte para aquellos actos cometidos en tiempo de guerra o de peligro inminente de guerra; dicha pena solamente se aplicará en los casos previstos por dicha legislación y con arreglo a lo dispuesto en la misma. Dicho Estado comunicará al Secretario General del Consejo de Europa las correspondientes disposiciones de la legislación en cuestión”.

Este Protocolo ha sido firmado y ratificado por los veinticinco Estados. No se han emitido reservas al mismo, pues tal cosa queda prohibida por su artículo 4. Sí se han emitido declaraciones, tal y como puede examinarse en el cuarto cuadro matricial.

Derechos y libertades del Protocolo 7º:

El Protocolo 7º, abierto a la firma el 22 de noviembre de 1984, y en vigor el 1 de noviembre de 1988, recoge los siguientes derechos y libertades:

Art.1: Prohibición de expulsión arbitraria de extranjeros

Art.2: Derecho a un recurso contra una condena penal

Art.3: Derecho a indemnización por anulación de condena

Art.4: Principio *non bis in ídem*

Art.5: Igualdad jurídica de los esposos

Este Protocolo no sido firmado por Bélgica, Malta y el Reino Unido, y no ha sido ratificado por Alemania, España, Países Bajos, Polonia y Portugal. Así pues, sólo está en vigor en 17 de los 25 Estados cuya situación examinamos. Además, se han emitido diversas reservas y declaraciones al mismo, tal y como puede examinarse en el quinto cuadro matricial.

Derechos y libertades del Protocolo 12º:

El Protocolo 12 fue abierto a la firma el 4 de noviembre de 2000, pero aún no ha entrado en vigor. Dispone:

Art.1: Prohibición general de discriminación.

Este Protocolo no ha sido firmado por Dinamarca, España, Francia, Lituania, Malta, Polonia, Reino Unido y Suecia. Tan sólo ha sido ratificado por uno de los veinticinco Estados, Chipre, tal y como puede examinarse en el sexto cuadro matricial.

Derechos y libertades del Protocolo 13º:El Protocolo 13 fue abierto a la firma el 3 de mayo de 2002, pero aún no ha entrado en vigor. Dispone:

Art.1: Abolición de la pena de muerte.

Este Protocolo ha sido firmado por los veinticinco Estados y ha sido ratificado por dos de ellos, Irlanda y Malta, tal y como puede examinarse en el séptimo cuadro matricial.

CUADRO 1°

LA SITUACIÓN DE LOS QUINCE ESTADOS MIEMBROS DE LA UNION EUROPEA Y DIEZ

CANDIDATOS A LA ADHESIÓN RESPECTO AL

CONVENIO EUROPEO DE DERECHOS HUMANOS:

Estados	Fecha de firma:	Fecha de ratificación:	Fecha de entrada en vigor:	Reservas a los artículos:	Declaraciones a los artículos ¹ :
Alemania	4.11.50	5.12.52	3.9.53	3.1.	
Austria	13.12.57	3.9.58	3.9.58	5, 6	
Bélgica	4.11.50	14.6.55	14.6.55		
Chipre	16.12.61	6.10.62	6.10.62		
Rep. Checa	21.2.91	18.3.92	1.1.93	5, 6	
Dinamarca	4.11.50	13.4.53	3.9.53		
España	24.11.77	4.10.79	4.10.79	3.2. 5, 6, 11	10, 15
Eslovaquia	21.2.91	18.3.92	1.1.93	5, 6	
Eslovenia	14.5.93	28.6.94	28.6.94		
Estonia	14.5.93	16.4.96	16.4.96	6	
Finlandia	5.5.89	10.5.90	10.5.90	6	
Francia	4.11.50	3.5.74	3.5.74	5, 6, 15	56
Grecia	28.11.50	28.11.74	28.11.74		
Hungría	6.11.90	5.11.92	5.11.92		
Irlanda	4.11.50	25.2.53	3.9.53	6	
Italia	4.11.50	26.10.55	26.10.55		
Letonia	10.2.95	27.6.97	27.6.97		
Lituania	14.5.93	20.6.95	20.6.95	5	
Luxemburgo	4.11.50	3.9.53	3.9.53		
Malta	12.12.66	23.1.67	23.1.67	10	6
Países Bajos	4.11.50	31.8.54	31.8.54		56
Polonia	26.11.91	19.1.93	19.1.93		
Portugal	22.9.76	9.11.78	9.11.78	5, 7	

¹ Declaración, Declaración sobre aplicación territorial o Comunicación. Solo constan referencias de las reservas o declaraciones que están en vigor en la actualidad. Asimismo, se han suprimido referencias a declaraciones que si bien no han sido formalmente retiradas han quedado sin efecto, como las declaraciones de Alemania sobre la aplicación territorial al *Land* de Berlín.

Estados	Fecha de firma:	Fecha de ratificación:	Fecha de entrada en vigor:	Reservas a los artículos:	Declaraciones a los artículos¹:
Reino Unido	4.11.50	8.3.51	3.9.53		56, 15
Suecia	28.11.50	4.2.52	3.9.53		

CUADRO 2°
LA SITUACIÓN DE LOS QUINCE ESTADOS MIEMBROS DE LA UNION EUROPEA Y DIEZ
CANDIDATOS A LA ADHESIÓN RESPECTO AL
PROTOCOLO 1 :

Estados	Fecha de firma:	Fecha de ratificación:	Fecha de entrada en vigor:	Reservas a los artículos:	Declaraciones a los artículos ¹ :
Alemania	20.3.52	13.2.57	13.2.57	3.3.	2
Austria	13.12.57	3.9.58	3.9.58	1	
Bélgica	20.3.52	14.6.55	14.6.55		
Chipre	16.12.61	6.10.62	6.10.62		
Rep. Checa	21.2.91	18.3.92	1.1.93		
Dinamarca	20.3.52	13.4.53	18.5.54		
España	23.2.78	27.11.90	27.11.90	3.4. 1	
Eslovaquia	21.2.91	18.3.92	1.1.93		
Eslovenia	14.5.93	28.6.94	28.6.94		
Estonia	14.5.93	16.4.96	16.4.96	1	1
Finlandia	5.5.89	10.5.90	10.5.90		
Francia	20.3.52	3.5.74	3.5.74		4
Grecia	20.3.52	28.11.74	28.11.74		
Hungría	6.11.90	5.11.92	5.11.92		
Irlanda	20.3.52	25.2.53	18.5.54		2
Italia	20.3.52	26.10.55	26.10.55		
Letonia	21.3.97	27.6.97	27.6.97	1	
Lituania	14.5.93	24.5.96	24.5.96		
Luxemburgo	20.3.52	3.9.53	18.5.54	1	
Malta	12.12.66	23.1.67	23.1.67		2
Países Bajos	20.3.52	31.8.54	31.8.54		2, 4
Polonia	14.9.92	10.10.94	10.10.94		
Portugal	22.9.76	9.11.78	9.11.78		
Reino Unido	20.3.52	3.11.52	18.5.54	2, 4	D ²
Suecia	20.3.52	22.6.53	18.5.54	2	

¹ Declaración o Declaración sobre aplicación territorial.

² D: Declaración que no se refiere a ningún artículo específico.

CUADRO 3°
LA SITUACIÓN DE LOS QUINCE ESTADOS MIEMBROS DE LA UNION EUROPEA Y DIEZ
CANDIDATOS A LA ADHESIÓN RESPECTO AL
PROTOCOLO 4 :

Estados	Fecha de firma:	Fecha de ratificación:	Fecha de entrada en vigor:	Reservas a los artículos:	Declaraciones a los artículos¹ :
Alemania	16.9.63	1.6.68	1.6.68	3.5.	
Austria	16.9.63	18.9.69	18.9.69	3	
Bélgica	16.9.63	21.9.70	21.9.70		
Chipre	6.10.88	3.10.89	3.10.89		4
Rep. Checa	21.2.91	18.3.92	1.1.93		
Dinamarca	16.9.63	30.9.64	2.5.68		
España	23.2.78			3.6.	
Eslovaquia	21.2.91	18.3.92	1.1.93		
Eslovenia	14.5.93	28.6.94	28.6.94		
Estonia	14.5.93	16.4.96	16.4.96		
Finlandia	5.5.89	10.5.90	10.5.90		
Francia	22.10.73	3.5.74	3.5.74		5
Grecia					
Hungría	6.11.90	5.11.92	5.11.92		
Irlanda	16.9.63	29.10.68	29.10.68		3
Italia	16.9.63	27.5.82	27.5.82	3	
Letonia	21.3.97	27.6.97	27.5.82		
Lituania	14.5.93	20.6.95	20.6.95		
Luxemburgo	16.9.63	2.5.68	2.5.68		
Malta	5.6.02	5.6.02	5.6.02		
Países Bajos	15.11.63	23.6.82	23.6.82		3, 5
Polonia	14.9.92	10.10.94	10.10.94		
Portugal	27.4.78	9.11.78	9.11.78		
Reino Unido	16.9.63				
Suecia	16.9.63	13.6.64	2.5.68		

¹ Declaración o Declaración sobre aplicación territorial.

CUADRO 4°
LA SITUACIÓN DE LOS QUINCE ESTADOS MIEMBROS DE LA UNION EUROPEA Y DIEZ
CANDIDATOS A LA ADHESIÓN RESPECTO AL
PROTOCOLO 6 ¹:

Estados	Fecha de firma:	Fecha de ratificación:	Fecha de entrada en vigor:	Declaraciones a los artículos²:
Alemania	28.4.83	5.7.89	1.8.89	D
Austria	28.4.83	5.1.84	1.3.85	
Bélgica	28.4.83	10.12.98	1.1.99	
Chipre	7.5.99	19.1.00	1.2.00	2
Rep. Checa	21.2.91	18.3.92	1.1.93	
Dinamarca	28.4.83	1.12.83	1.3.85	
España	28.4.83	14.1.85	1.3.85	
Eslovaquia	21.2.91	18.3.92	1.1.93	
Eslovenia	14.5.93	28.6.94	1.7.94	
Estonia	14.5.93	17.4.98	1.5.98	
Finlandia	5.5.89	10.5.90	1.6.90	
Francia	28.4.83	17.2.86	1.3.86	
Grecia	2.5.83	8.9.98	1.10.98	
Hungría	6.11.90	5.11.92	1.12.92	
Irlanda	24.6.94	24.6.94	1.7.94	
Italia	21.10.83	29.12.88	1.1.89	
Letonia	26.6.98	7.5.99	1.6.99	
Lituania	18.1.99	8.7.99	1.8.99	
Luxemburgo	28.4.83	19.2.85	1.3.85	
Malta	26.3.91	26.3.91	1.4.91	
Países Bajos	28.4.83	25.4.86	1.5.86	D, 2
Polonia	18.11.99	30.10.00	1.11.00	
Portugal	28.4.83	2.10.86	1.11.86	
Reino Unido	27.1.99	20.5.99	1.6.99	D
Suecia	28.4.83	9.2.84	1.3.85	

¹ *** Conviene notar que este Protocolo, en virtud de su artículo 4, no admite reservas.

² Declaración, Declaración sobre aplicación territorial o Comunicación.

CUADRO 5°

LA SITUACIÓN DE LOS QUINCE ESTADOS MIEMBROS DE LA UNION EUROPEA Y DIEZ

CANDIDATOS A LA ADHESIÓN RESPECTO AL

PROTOCOLO 7:

Estados	Fecha de firma:	Fecha de ratificación:	Fecha de entrada en vigor:	Reservas a los artículos:	Declaraciones a los artículos¹:
Alemania	19.3.85			3.7.	2, 3, 4
Austria	19.3.85	14.5.86	1.11.88		2, 3, 4
Bélgica					
Chipre	2.12.99	15.9.00	1.12.00		
Rep. Checa	21.2.91	18.3.92	1.1.93		
Dinamarca	22.11.84	18.8.88	1.11.88	2	6, 2
España	22.11.84			3.8.	
Eslovaquia	21.2.91	18.3.92	1.1.93		
Eslovenia	14.5.93	28.6.94	1.9.94		
Estonia	14.5.93	16.4.96	1.7.96		
Finlandia	5.5.89	10.5.90	1.8.90		
Francia	22.11.84	17.2.86	1.11.88	2, 3, 4, 5, 6	2
Grecia	22.11.84	29.10.87	1.11.88		
Hungría	6.11.90	5.11.92	1.2.93		
Irlanda	11.12.84	3.8.01	1.11.01		
Italia	22.11.84	7.11.91	1.2.92		2, 3, 4
Letonia	21.3.97	27.6.97	1.9.97		
Lituania	14.5.93	20.6.95	1.9.95		
Luxemburgo	22.11.84	19.4.89	1.7.89	5	
Malta					
Países Bajos	22.11.84				2
Polonia	14.9.92				
Portugal	22.11.84				
Reino Unido					
Suecia	22.11.84	8.11.85	1.11.88		1

¹ Declaración, Declaración sobre aplicación territorial o Comunicación.

CUADRO 6°

LA SITUACIÓN DE LOS QUINCE ESTADOS MIEMBROS DE LA UNION EUROPEA Y DIEZ

CANDIDATOS A LA ADHESIÓN RESPECTO AL

PROTOCOLO 12:

Estados	Fecha de firma:	Fecha de ratificación:	Fecha de entrada en vigor:	Reservas a los artículos:	Declaraciones a los artículos:
Alemania	4.11.00			3.9.	
Austria	4.11.00				
Bélgica	4.11.00				
Chipre	4.11.00	30.4.02			
Rep. Checa	4.11.00				
Dinamarca					
España				3.10.	
Eslovaquia	4.11.00				
Eslovenia	7.3.01				
Estonia	4.11.00				
Finlandia	4.11.00				
Francia					
Grecia	4.11.00				
Hungría	4.11.00				
Irlanda	4.11.00				
Italia	4.11.00				
Letonia	4.11.00				
Lituania					
Luxemburgo	4.11.00				
Malta					
Países Bajos	4.11.00				
Polonia					
Portugal	4.11.00				
Reino Unido					
Suecia					

CUADRO 7°

LA SITUACIÓN DE LOS QUINCE ESTADOS MIEMBROS DE LA UNION EUROPEA Y DIEZ

CANDIDATOS A LA ADHESIÓN RESPECTO AL

PROTOCOLO 13:

Estados	Fecha de firma:	Fecha de ratificación:	Fecha de entrada en vigor:	Reservas a los artículos:	Declaraciones a los artículos:
Alemania	3.5.02			3.11.	
Austria	3.5.02				
Bélgica	3.5.02				
Chipre	3.5.02				
Rep. Checa	3.5.02				
Dinamarca	3.5.02				
España	3.5.02			3.12.	
Eslovaquia	24.7.02				
Eslovenia	3.5.02				
Estonia	3.5.02				
Finlandia	3.5.02				
Francia	3.5.02				
Grecia	3.5.02				
Hungría	3.5.02				
Irlanda	3.5.02	3.5.02			
Italia	3.5.02				
Letonia	3.5.02				
Lituania	3.5.02				
Luxemburgo	3.5.02				
Malta	3.5.02	3.5.02			
Países Bajos	3.5.02				
Polonia	3.5.02				
Portugal	3.5.02				
Reino Unido	3.5.02				
Suecia	3.5.02				

Conclusiones

La situación de los veinticinco Estados respecto al CEDH y sus protocolos varía considerablemente. Por supuesto, en líneas generales la posición es la misma, pues todos han ratificado el Convenio y todos se han sometido al Tribunal, aceptando la obligatoriedad de su jurisdicción y permitiendo a los particulares el acceso al sistema. Sin embargo, un análisis más detallado nos ha permitido ver las diferencias que se encierran tras esa aparente homogeneidad; lo cierto es que el catálogo de derechos y libertades protegidos varía considerablemente en los veinticinco Estados cuya situación hemos examinado.

Esta heterogeneidad puede presentar problemas a la Comunidad o a la Unión de cara a una eventual adhesión ¿Con qué protocolos, qué reservas y qué declaraciones se procedería a tal adhesión?

Mantener todas las reservas y renunciar a la firma de los protocolos no ratificados por todos los Estados miembros supondría adherirse a un denominador común del Convenio, lo cual sería perjudicial para la protección de los derechos fundamentales y además, negaría la autonomía del derecho comunitario.

Sin duda, la solución más acertada sería adherirse a la totalidad del mismo, sin tener en cuenta las múltiples reservas nacionales o incluyendo determinadas reservas propiamente comunitarias. La Comunidad invocaría aquí su propia sensibilidad, como ha venido haciendo en su jurisprudencia defensora de los derechos fundamentales, y recordaría a los Estados que en todo caso, el control se produciría sobre el derecho comunitario, no sobre sus normas de derecho nacional.

Sin embargo, esta solución no dejaría de plantear problemas, más aún con los delicados fenómenos de “incorporación” que pueden producirse en aquellos casos en los que las fronteras son muy difusas, y el Tribunal de Luxemburgo debe ser muy meticuloso para no incorporar la normativa nacional a su control de protección de derechos fundamentales.

En todo caso, por encima de estas consideraciones de carácter jurídico, la notable heterogeneidad que se ha señalado en este estudio pone de manifiesto que el Consejo de Europa, con sus 44 Estados miembros y su enorme diversidad, es un marco muy lejano al que representa la Unión Europea del siglo XXI: una comunidad de valores integrada, homogénea y sólidamente asentada en sus Estados miembros.

También se ha puesto de manifiesto que el CEDH es un Tratado flexible y complejo, carente de la transparencia y la simplicidad que precisa en la actualidad la protección de los derechos

fundamentales en la Unión. En este sentido conviene recordar que el Informe sobre Derechos Fundamentales en la Unión Europea del grupo de expertos presidido por el profesor Spiros Smitis, de febrero de 1999, afirmaba que: “Los derechos fundamentales sólo pueden cumplir su función si los ciudadanos conocen su existencia y son conscientes de la posibilidad de hacerlos aplicar, por lo que resulta esencial expresar y presentar los derechos fundamentales de forma que todos los individuos puedan conocerlos y tener acceso a ellos; dicho de otro modo, los derechos fundamentales deben ser visibles (...) Deben encontrarse los medios para conseguir la máxima visibilidad de los derechos, lo que implica su enumeración expresa, a riesgo de repetirse, en lugar de una simple referencia general a otros convenios en los que figuran”.

Tras largos años de protección jurisprudencial de los derechos fundamentales, el sistema europeo precisa, sobre todo, claridad y transparencia. Los Derechos Fundamentales de la Unión deben ser los de Carta, y su intérprete supremo debe ser el Tribunal de Justicia de Luxemburgo.

Mr. A. ARABADJIEV, Alternate Member

Since I will not be able to attend the meeting of the working group on 21 October 2002 and "any reactions" to the draft are allowed,

I want to state that I find that the draft reflects in a correct and balanced manner the discussions held in the Working Group and the common understanding reached by the Group on most of the key issues included in its mandate.

For this reason I prefer not to suggest any amendments to the proposed text.

On some issues which need, in my view, to be further clarified or strengthened, I will express my opinion during the debate on the report in the Convention Plenary. These include:

- The distinction between "rights" and "principles";
- The "scope" of EU accession to the ECHR(and the specific possible situation of the Strasbourg Court having to rule on the allocation of competences between the Union and the Member States when an application is addressed against both);
- The limits reached (in the ECJ's case-law) as to individual access to that court.

Alexander Arabadjiev

Contribución al Proyecto de Informe Final del Grupo de Trabajo II (Carta)

Quiero mostrar mi acuerdo con el conjunto del Proyecto de Informe. No obstante, formulo las siguientes observaciones:

1. Entiendo que el informe corresponde al consenso posible obtenido en el seno del Grupo, aun cuando no estemos de acuerdo en todos sus extremos.
2. La redacción del Informe ha tenido en cuenta suficientemente las preocupaciones y reservas manifestadas por algunos miembros del Grupo respecto a la Carta.
3. Por mi parte, recuerdo que presenté a la última sesión del Grupo una serie de enmiendas a las llamadas “cláusulas horizontales”. Algunas de dichas enmiendas fueron aceptadas y otras no. Estas últimas las considero retiradas para así facilitar el acuerdo final sobre el texto del Informe.

En todo caso, quiero señalar que mi aceptación de la redacción del conjunto del Proyecto de Informe se produce en el bien entendido de que la Carta de Derechos Fundamentales debe integrarse en la futura Constitución europea con carácter jurídicamente vinculante, como así se señala en el Proyecto final que se nos ha sometido.

English VERSION

Mr. Diego López Garrido, Alternate Member

Contribution to the Draft Final Report issued by Working Group II (Charter)

I agree with the Draft Report as a whole. However, I should also like to make the following remarks:

1. It is my understanding that the Report reflects the consensus that the Group has been able to agree, even though we have been unable to agree on every point of the Report.
2. The Draft Report adequately reflects the concerns and reservations expressed by some Group members regarding the Charter.
3. At the last Group session I put forward a number of proposed amendments to the ‘horizontal clauses’. Some proposals were accepted, while others were rejected. I hereby withdraw the latter proposals in order to facilitate final agreement on the text of the Report

4. t. In any event, I should like to point out that I accept the Draft Report expressly on the understanding that the Fundamental Rights Charter must form a part of the future European Constitution in a legally binding way, as set forth in the final Draft submitted to the Group members.
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Mr. R. Rack, Alternate Member

Dear Commissioner,

I would like to thank you very much for your draft final report of working group II. It reflects to a very great extent the consensus reached in the group and points out all important aspects which arise in respect of the mandate of the group and which were discussed over the past four months.

With respect to some details, however, I could envisage a different or more precise formulation.

Paragraph 2 on page 14 for example seems to suggest that, in case of accession of to the ECHR, the Union's relationship with the Council of Europe is already settled or at least fairly clear. However, especially the representation of the Union in the Committee of Ministers – an organ of the Council of Europe of which the Union will not be a member – does not seem to be an automatic consequence of EU accession to the ECHR. It should be pointed out in the final report of the working group that certain “technical” questions regarding the relationship between the Union and the Council of Europe will have to be settled upon accession. (This entails for example the question of a Union representative in the Committee of Ministers, the participation of the Union in the different monitoring processes of the Council of Europe with regard to the ECHR or the representation in ECHR-related expert committees of the Council of Europe.)

On page 16 footnote 1, to quote the UPA judgement of the European Court of Justice with regard to the obligation of the Member States to provide for effective remedies for rights derived from Union law seems somewhat misleading. While it is true that the Court confirms this obligation of the Member States in para 41 of the UPA judgement, this statement only appears in the context of the argument that direct action for annulment before the Community Court cannot depend on whether the individual is allowed to bring proceedings before a national court to contest the validity of the Community measure at issue. The main statement of the UPA judgement, however, rather seems to envisage a reform of the current system of judicial review of the legality of Community measures of general application under Article 230 TEC.

In general it seems to me that the opinions expressed by the group during the discussion about a possible amendment of Article 230 § 4 TEC were slightly more positive than one might suggest from reading your report.

As to page 10 paragraph 1, I think that the group's discussion on Article 6 § 2 TEU focused on the question of whether there should be a reference to the common constitutional traditions rather than on the question whether a reference to the ECHR should be kept. In particular I would suggest to delete the words “ECHR and” in the last sentence. The sentence would then read: “... such a reference in the Constitutional Treaty could serve to complete the protection offered by the Charter

and clarify that Union law is open for future evolutions in Member States' human rights law." If the Union accedes to the ECHR and there are any future developments like, for example a new protocol, it would be – as pointed out later in the draft final report – for the Council and the Parliament to decide whether the Union should sign and ratify this protocol. A future protocol which has not been ratified by the Union cannot become binding on it by way of jurisprudence of the European Court of Justice.

As to this suggested texts of Arts 51 and 52 I would like to point out again that I see them as an extremely generous compromise to some of our group, who feel a need for further clarification or further restrictions of the horizontal charter articles; a view I and many colleagues do not really share. Therefore any additional step towards watering down the substance and legal implications of the charta would certainly not be acceptable.

Due to the forthcoming elections in Austria I will not be able to attend the group's final meeting on October 21. I would hope that you will take my above-mentioned concerns into account when drafting the final version of the report.

However, if consensus on these points cannot be reached, I should like to accept the report as it stands.

Yours sincerely,

Reinhard Rack.

Working Group II “Integration of the Charter/Accession to the ECHR”

I generally support the draft final report of the Working Group II. Nevertheless, I would like to make a few comments on certain aspects of the report.

1. I fully agree with the premise that the whole Charter - including its Preamble - should be respected and debates on its content should not be reopened by the Convention. However, in section entitled “Preamble of the Charter” of Part A of the report we read about the splitting of the Charter Preamble from the Charter articles and about “enrichment” of the Charter Preamble “by further elements as appropriate, should it be used as a Preamble to the Constitutional Treaty”.

Firstly, I would hesitate to support the proposal of cutting the text of the Charter in two parts and separating the Preamble from the body of the Charter. The Working Group does not seem to have reached a consensus on this point. I would rather see the whole text of the Charter - including its Preamble - kept intact and incorporated into the Constitutional Treaty as its first and principle Chapter.

Secondly, I would be highly reluctant to support the idea of “enriching” the Charter Preamble. To my mind, in essence it would mean reopening of the debates on the content of the Charter involving lengthy and controversial drafting exercise. Moreover, that the majority of the members of our Working Group seem to strongly oppose such an idea.

2. Under the mandate of our Working Group (CONV 72/02), we were entrusted with examining the question whether to keep a reference - of the kind currently in Article 6 § 2 TEU – to common constitutional traditions of the Member States and the ECHR.

I would like to encourage the Working Group to take a stand on this issue. I do not think that we have to make a “firm” recommendation, but at least to express our view. Moreover that the

tendency to favour EU's accession to the ECHR is quite strong and seems to be the majority opinion among the members of our group. Therefore, I would like to support the opinion of a number of our members that the reference to the two external sources of inspiration for fundamental rights in current Article 6 § 2 TEU after the Charter is incorporated in the Constitutional Treaty, will be redundant, and thus not necessary.

3. Under the mandate of our Working Group (CONV 72/02), we were also asked to express our opinion on the question of appeals to the Court of Justice, namely amendments to Article 230 § 4 TEC with regard to the right of direct access by individuals to the Court of Justice.

The language of the section entitled "Access to the Court of Justice" of the draft final report, to my mind might be strengthened. The statement that "the Group's discussion has shown that a certain lacuna of protection might exist, given the current condition of "individual concern" in Article 230 § 4 TEC and the case law interpreting it" seems to be quite weak and insufficient to express the opinion on the matter as important as ensuring effective judicial protection of fundamental rights.

Again, I would like to urge the Working Group not to refrain from stating its position on the issue. I agree that the "division of work" between the Community and national courts should not be "profoundly altered", but at the same time, a number of the members of our Working Group seem to share the view that there is a need to expand the right of direct access by individuals to the Court of Justice. I fully share this view.

Mr. N. Mac Cormick, Alternate Member

I must thank you and Commissioner Vitorino for the excellent work which has been done in putting together the Draft Report. Being in Texas at the moment, I am behind time for returning comments, but perhaps it will be helpful to know that I am fully happy with the Draft Report as it stands now.

I have to restate my apology for absence from the Group's final meeting, as I am continuing from here to Canada to give some lectures.

Please convey to Commissioner Vitorino my sincere congratulations on the excellent conduct and outcome of the Group's deliberations, and to the other members of the secretariat as well as yourself my thanks for the extremely efficient servicing of the Group's work.

Yours sincerely,

Neil MacCormick

Observations de Mme Paciotti au WD 25 du groupe "Charte"

Au Secrétariat de la Convention

Observations sur le document de travail 25 du Groupe de travail "Charte"

En rapport avec le contenu du projet de rapport final, que je partage en grande partie, je souhaite vous communiquer que je suis en désaccord avec ce qui est écrit au point 6 de la lettre A et confirmer ma divergence par rapport aux clauses horizontales ajoutées à l'article 52 de la Charte, reproduites en annexe au rapport, en particulier en me référant à la clause 52.5.

1. Au point A.6 il est question de la distinction - qui aurait été fondamentale dans la précédente Convention - entre droits et principes et il est prétendu que les principes seraient différents des droits parce qu'ils demanderaient une mise en oeuvre par des actes législatifs ou exécutifs.

L'opposition entre principes et droits ne me paraît pas pouvoir être proposée sous cette forme. En effet, les droits fondamentaux classiques peuvent eux-mêmes requérir des lois et mesures pour être protégés, alors que les principes peuvent constituer des obligations juridiques immédiatement efficaces qui limitent les pouvoirs législatifs et exécutifs.

Je rappelle aussi que la répartition des articles de la Charte, qui ne se fait plus selon la division traditionnelle en droits politiques et civils et droits économiques et sociaux, mais selon les chapitres "Dignité, Liberté, Egalité, Solidarité, Citoyenneté, Justice", a voulu signifier que toutes les dispositions avaient la même valeur et n'étaient pas susceptibles d'une graduation leur donnant une intensité de protection différente (sauf bien sûr les limites de compétence des institutions européennes, répétés à juste raison dans le rapport).

Par ailleurs, les Cours constitutionnelles des Etats membres, ayant des constitutions écrites et rigides, appliquent directement les principes constitutionnels pour en déduire des droit ou pour les interpréter.

2. Quant aux nouvelles clauses horizontales de la Charte proposées dans le document annexé au rapport, je trouve qu'elles ne feraient que créer des incertitudes d'interprétation et qu'elles modifieraient l'équilibre du compromis de la Convention précédente.

En particulier, la nouvelle clause 52.5 selon laquelle "les dispositions de la présente Charte qui contiennent des principes **peuvent** être mis en oeuvre par des actes législatifs et exécutifs pris par les institutions et les organes de l'Union ..." ("the provisions of this Charter which contain principles **may** be implemented by legislative and executive acts taken by institutions and bodies of the Union...") contredit le texte actuel de la clause 51.1 selon lequel "les institutions et organes de l'Union ...**respectent** les droits, **observent** les principes ..." ("the institutions and bodies of the Union **shall** respect the rights, observe the principles...").

Je compte sur le fait que le texte définitif du rapport pourra être modifié.

Madame, Monsieur,

Ne pouvant être parmi vous lundi prochain pour l'adoption du rapport final du groupe de travail II, je tenais à vous faire connaître mon entier accord au texte du projet de rapport.

Bien à vous

Robert Badinter

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