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REPORT

from	Chairman of Working group II "Incorporation of the Charter/ accession to the ECHR"
to	Members of the Convention
Subject :	**Final report of Working Group II**

Introduction

On the basis of its mandate (doc. CONV 72/02), the Group has, in the course of its seven meetings and having held hearings with several legal experts[1], examined two main complementary issues:

- the modalities and consequences of possible incorporation of the EU Charter of Fundamental Rights (hereinafter: "the Charter") into the Treaties (Chapter A);
- the modalities and consequences of possible accession of the Community / the Union to the European Convention on Human Rights (hereinafter: "the ECHR") (Chapter B).

In addition, the Group has discussed the specific issue of access by individuals to the Court of Justice, which, as mentioned in the Group's mandate, arises independently of the questions of incorporation of the Charter and of accession to the ECHR but has a wider link to fundamental rights (Chapter C).

[1] Mr. Johann Schoo, Director, Legal Service of the Parliament, Mr. Jean-Claude Piris, Jurisconsult, Director-General of the Legal Service of the Council, and Mr. Michel Petite, Director-General of the Legal Service of the Commission, heard on 23 July (see WD N° 13 and CONV 223/02); Mr. Marc Fischbach, Judge, European Court of Human Rights, and Mr. Vassilios Skouris, Judge, European Court of Justice, heard on 17 September (see WD N° 19 and CONV 295/02). Mr. Söderman, European Ombudsman and observer in the Convention, attended the Group's meeting on 4th October and presented his contribution CONV 221/02 CONTRIB 76.

Thanks to the strong sense of commitment, the willingness to engage in detailed technical discussion, and the remarkable spirit of compromise of its members, the Group has succeeded in producing a highly consensual report on both main issues; both parts of this report have to be seen as complementary and belonging to the same context.

A. On the Charter

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

1. General recommendation

At the outset, the Group stresses that, in accordance with its mandate, the political decision about possible incorporation of the Charter into the Treaty Framework will be reserved for the Convention Plenary. The mandate of the Group has been to prepare for such a decision through examination of a series of specific questions relating to modalities and consequences of such incorporation.

Without prejudice to that political decision, and on the basis of the common understanding reached by the Group on all key issues related to the Charter as set out below, all members of the Group either support strongly an incorporation of the Charter *in a form which would make the Charter legally binding and give it constitutional status* or would not rule out giving favourable consideration to such incorporation. Different forms exist, in the Group's view, to achieve that result, as set out below; but in any event, a "building block" as central as fundamental rights should find its place in the Union's constitutional framework. The Group is confident that, with its report, the necessary groundwork allowing the Plenary to take its political decision on incorporation has now been done; notably, this general recommendation of the Group has been facilitated by a common understanding, reached within the Group as set out below, on clarifications of certain legal and technical aspects of the Charter which are advisable in case of a legally binding Charter and of great significance for smooth incorporation ensuring legal certainty.

2. Recommendations as to the concrete form of incorporation

The Group is fully aware that the choice to make as to the concrete form of incorporation does not depend exclusively on considerations linked to the Charter or to fundamental rights in general, but also on the overall picture of the Treaty architecture which will emerge in future discussions of the Convention Plenary. For this reason, it would not be appropriate for this Group to restrict the Convention's further overall work by proposing only one technique for incorporation of the Charter. Rather, out of the various possibilities submitted to the Group at the outset of its work[1], the Group recommends the Plenary to consider the following basic options:

a. insertion of the text of the Charter articles at the beginning of the Constitutional Treaty, in a Title or Chapter of that Treaty; or
b. insertion of an appropriate reference to the Charter in one article of 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 (e.g., in form of a Protocol).
c. According to one member of the Group, an "indirect reference"[2] to the Charter could be used in order to make the Charter legally binding without giving it constitutional status.

Having considered the questions coming under the Group's mandate, a large majority of the Group would prefer the first option in the interest of a greater legibility of the Constitutional Treaty. The second option is favoured by certain other members, some of them emphasising the need to annex the Charter to the Treaty, as a specific part of that Treaty or as a Protocol. The Group as a whole underlines that both these basic options could serve to make the Charter a legally binding text of constitutional status.

[1] See documents CONV 72/02 and 116/02, pp. 7-8.
[2] See document CONV 116/02, p. 7.

II. Conclusions and recommendations on certain legal and technical aspects of the Charter of importance for the smooth incorporation of the Charter into the new Treaty architecture

An important part of the Group's work has been to examine a number of legal and technical aspects of the Charter which, as has become clear during the Group's discussions, are important in the perspective of a smooth incorporation of the Charter, as a legally binding document, into the new Treaty architecture. The Group has found a common understanding on these questions and on ensuing recommendations which are proposed with large majority support, two of its members having reservations, as set out hereafter.

1. Respecting the content of the Charter

The basic starting point underlying the Group's conclusions on the Charter is that the content of the Charter represented a consensus reached by the previous Convention, a body which had special expertise in fundamental rights and served as model for the present Convention, and endorsed by the Nice European Council. The whole Charter - including its statements of rights and principles, its preamble and, as a crucial element, its "general provisions" - should be respected by this Convention and not be re-opened by it.

Accordingly, the Group has not considered any changes to the rights and principles contained in the Charter. The Group recognises however that certain technical *drafting adjustments* in the Charter's "general provisions" are nonetheless possible and appropriate as explained below; the Group therefore proposes to the Plenary the drafting adjustments set out in the Annex to this report[1]. It is important to note that these adjustments proposed by the Group do not reflect modifications of *substance*. On the contrary, they would serve to *confirm*, and render absolutely clear and legally watertight, certain key elements of the overall consensus on the Charter on which the previous Convention had already agreed. They are prompted by the new perspective of a Constitutional Treaty which has arisen in the present Convention, but also by the concern of legal certainty in the field of fundamental rights, to which the Charter is designed to contribute. Thus, all drafting adjustments proposed herein fully respect the basic premise of the Group's work, i.e. to leave intact

[1] In addition to the adjustments indicated in the Annex, it should be kept in mind that, depending on the future Treaty architecture, purely drafting adjustments may become necessary to the various references, made throughout the Charter, to "the Treaties", "the Community Treaties", "the Treaty on the European Union", "Community law", etc., see doc. CONV 116/02, p. 7.

the substance agreed by consensus within the previous Convention, and the Group urges the Plenary equally to respect this premise when considering the proposed drafting adjustments.

2. Incorporation of the Charter will not modify the allocation of competences between the Union and the Member States

The Group is able to confirm that incorporation of the Charter will in no way modify the allocation of competences between the Union and the Member States. This point, on which there was consensus already in the previous Convention, is currently reflected in Article 51 § 2 of the Charter. The fact that certain Charter rights concern areas in which the Union has little or no competence to act is not in contradiction to it, given that, although the Union's *competences* are limited, it must *respect* all fundamental rights wherever it acts and therefore avoid indirect interference also with such fundamental rights on which it would not have the competence to legislate.

However, in order to render this point clear beyond any doubt, even in the perspective of a Charter forming part of a constitutional treaty, the Group recommends the drafting adjustments to Article 51 § 1 and 2 set out in the Annex. Moreover, the Group considers it useful to confirm expressly, in Article 51 § 2, in light of established case law, that the protection of fundamental rights by Union law cannot have the effect of extending the scope of the Treaty provisions beyond the competences of the Union.[1]

Furthermore, the Group recalls in this context that the Charter was drafted with due regard to the principle of subsidiarity, as is clear from its Preamble, its Article 51 § 1 and from those Charter Articles which make references to national laws and practices; it seems appropriate to the Group to include a clause in the general provisions of the Charter (see Article 52 § 6 in the Annex) recalling these references. Likewise, it is in line with the principle of subsidiarity that the scope of application of the Charter is limited, in accordance with its Article 51 § 1, to the institutions and bodies of the Union, and to Member States *only* when they are implementing Union law.[2]

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[1] See Judgment of the Court of Justice C-249/96 Grant, 1998 ECR I-621, at par. 45.

[2] It should be noted that, upon possible incorporation of the Charter into the Treaty, the current wording of Article 46 (d) TEU would have to be brought in line with existing case law and Article 51 of the Charter on the (limited) application of fundamental rights to acts of Member States.

3. Full compatibility between the fundamental rights of the EC Treaty and the Charter articles which restate them

As regards the specific case of those fundamental rights which are already expressly enshrined in the EC Treaty and merely "restated" in the Charter (notably rights derived from Union citizenship)[1], there was already consensus in the previous Convention on the principle that the legal situation as defined by the EC Treaty should remain unaffected by the Charter; this is presently expressed in the "referral clause" of Article 52 § 2 of the Charter[2].

Reconfirming that point, the Group has reached consensus on the need to have, as concerns these rights, a legally "watertight" referral clause, such as presently included in Article 52 § 2 of the Charter, ensuring complete compatibility between the statements of the rights in the Charter and their more detailed regulation as currently found in the EC Treaty. The Group stresses that this clause of Article 52 § 2 will, if the Charter is to become a part of the constitutional treaty, logically need a slight drafting adjustment, so as to make it clear that the referral is made to *other parts* of Treaty law where the conditions and limits of the exercise of these rights are defined. The precise formulation of such a drafting adjustment, reflecting that principle of compatibility, cannot be undertaken at this stage as it will depend on the exact overall Treaty architecture.

Furthermore, the Group is of the view that, as regards these rights, "replication" ("dédoublements") between the Charter and other parts of Treaty law might, to a limited extent, be inevitable for legal reasons and will not be harmful, given that, as is proposed, a referral clause will ensure compatibility.

The Group signals that if, as advocated by a large majority of the Group, incorporation is achieved by the insertion of the Charter text in the first part of the Constitutional Treaty, it would then become necessary to combine, in an appropriate manner, in that Treaty the Charter articles on citizens' rights and the provisions on citizenship of the EC Treaty having constitutional importance; this should be considered as a technical operation raising no political problems.

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1 A list of those rights is to be found in WD N° 9 of the Chairman, page 3, Fn. 2.

2 See also the "Explanations" (Document CHARTE 4473/00 CONVENT 49 of 11 October 2000; see in detail below, section A III 3) under Article 52 § 2: "The Charter does not alter the system of rights conferred by the Treaties".

4. Correspondence between Charter rights and rights guaranteed by the ECHR

The Group underlines and reconfirms the central importance of Article 52 § 3 of the Charter, on those Charter rights which correspond to rights guaranteed by the ECHR; it recalls that this clause was a crucial element of the overall consensus in the previous Convention.[1] On the basis of the "Explanations" on the Charter[2], the Group confirms its common understanding on the meaning of this provision: the rights in the Charter which correspond to ECHR rights have the same scope and meaning as laid down in the ECHR; this includes notably the detailed provisions in the ECHR which permit limitations of these rights. The second sentence of Article 52 § 3 of the Charter serves to clarify that this article does not prevent more extensive protection already achieved or which may subsequently be provided for (i) in Union legislation and (ii) in some articles of the Charter which, although based on the ECHR, go beyond the ECHR because Union law acquis had already 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 existing Union law.

5. An interpretation in harmony with common constitutional traditions

The Group stresses that the Charter has firm roots in the Member States' common constitutional traditions, which were brought together impressively in the previous Convention's work. The extensive case law on fundamental rights derived from the common constitutional traditions established by the Court of Justice and confirmed by Article 6 § 2 TEU, represents an important source for a number of rights recognised by the Charter. In order to emphasise the importance of these roots and in the interest of smooth incorporation of the Charter as a legally binding document, the large majority of the Group proposes to include a rule of interpretation in the general provisions (see Article 52 § 4 in the Annex); two of its members have reservations against this proposal. The rule is based on the wording of the current Article 6 § 2 TEU and takes due account of the approach to common constitutional traditions followed by the Court of Justice as explained by Judge Skouris at the hearing of 17 September. Under that rule, rather than following a rigid approach of "a lowest common denominator", the Charter rights concerned should be interpreted in a way offering a high standard of protection which is adequate for the law of the Union and in harmony with the common

[1] Cf. on Article 52 § 3 of the Charter also the concurrent statements made by Judge Fischbach of the European Court of Human Rights and Judge Skouris of the European Court of Justice at the hearing on 17 September, doc. CONV 295/02.

[2] On the "Explanations", see in detail below, section A III 3.

constitutional traditions.

6. The distinction between "rights" and "principles" in the Charter

The Group stresses the importance of the distinction between "rights" and "principles", which was an important element – already expressed in the Preamble and in Article 51 § 1 of the Charter - of the consensus reached by the previous Convention. In order to confirm that distinction while increasing legal certainty in the perspective of a legally binding Charter with constitutional status, the large majority of the Group proposes an additional general provision (see Article 51 § 5 in the Annex) encapsulating the understanding of the concept of "principles" which marked the work of the previous Convention and has been recalled in the discussions of the Working Group by members of that Convention; two of its members have reservations against this proposal. According to that understanding, principles are different from subjective rights. They shall be "observed" (Article 51 §1) and may call for implementation through legislative or executive acts; accordingly, they become significant for the Courts when such acts are interpreted or reviewed. This is consistent both with case law of the Court of Justice[1] and with the approach of the Member States' constitutional systems to "principles" particularly in the field of social law.

In addition, with the proposed clause the Group reconfirms the line followed by the previous Convention to express the character ("right" or "principle") of individual Charter articles as clearly as possible in the wording of the respective articles taking into account the important guidance provided by the "Praesidium's Explanations", supplemented by explanations from the current Working Group (see section III.3. below), permitting future jurisprudence to rule on the exact attribution of articles to the two categories.

[1] Cf. notably recent case law on the "precautionary principle" in Article 174 § 2 TEC: judgment of the CFI of 11 September 2002, T-13/99, Pfizer vs. Council, with numerous references to earlier case law; and a series of judgments on Article 33 (ex-39) on the principles of agricultural law, e.g. judgment of the Court of Justice C-265/85, Van den Berg, 1987 ECR 1155: scrutiny of the principle of market stabilisation and of reasonable expectations, further references see Comm. Megret, tome 3, pp. 80 et seq.

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

1. Preamble of the Charter

The Group considers the Charter Preamble as a crucial element of the overall consensus on the Charter reached by the previous Convention. The Group therefore recommends that this element should in any event be preserved in the future Constitutional Treaty framework. The Group also recalls that the Charter Preamble comprises language on the fundamental nature of the Union going well beyond the area of fundamental rights. As is the case with the Charter as a whole, the concrete form of an "incorporation of the Charter Preamble" into the Treaty framework, as recommended by the Group, will equally depend on the overall Treaty structure to be defined by the Plenary. Thus, if the Charter articles were to be inserted directly in the Constitutional Treaty, the Charter Preamble should be used as the Preamble to the Constitutional Treaty. If in turn the Charter is incorporated as a specific part of the Constitutional Treaty or as a separate binding legal text (e.g., in the form of a Protocol) within the Union's constitutional architecture, the Charter Preamble could remain attached to the text of the Charter without any changes; that would of course not preclude the Convention from using, for the drafting of the new Treaty preamble, the elements of general importance to be found in the Charter preamble.

2. Continued reference to external sources (such as currently found in Article 6 § 2 TEU)

The Group discussed whether or not, in case of incorporation of the Charter, the Constitutional Treaty should also contain a reference to the two external sources of inspiration for fundamental rights, as is currently found in Article 6 § 2 TEU, i.e. the ECHR and the constitutional traditions common to the Member States. Valid arguments have been advanced both for and against this.

Some members have taken the view that maintaining such a reference would be redundant and create legal confusion, given that the Charter already includes rights derived from the ECHR and the common constitutional traditions and makes references to these sources. Others have argued that 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 ECHR and Member States' human rights law.

In any event, the Group recognises that this question is closely related to the choice of the form of incorporation which the Convention will have to make. The Group therefore refrains from making a firm recommendation on this issue; instead, it limits itself to stating that such a reference, if appropriately drafted[1], is not excluded by the prospect of a legally binding Charter, and signals the issue to the Plenary for consideration.

3. The importance of the "Explanations"

The Group stresses the importance of the "Explanations ", drawn up at the instigation of the Praesidium of the previous Convention[2], as one important tool of interpretation ensuring a correct understanding of the Charter[3]. It recognises that these Explanations are presently not sufficiently accessible for legal practitioners. 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 fully integrated with the original Explanations. Upon possible incorporation of the Charter, attention should then be drawn in an appropriate manner to the Explanations which, though they state that they have no legal value, are intended to clarify the provisions of the Charter. In particular, it would be important to publicise them more widely.

4. Procedure for future amendment of the Charter

As a consequence of possible incorporation of the Charter into the Constitutional Treaty framework, the question will arise according to which procedure the Charter can be amended in the future. However, the Group has considered that this question goes beyond its mandate since it will have to be examined by the Plenary as part of the general question of amendment procedure(s) for the various building blocks of the future Treaty framework.

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1 See doc. CONV 116/02, page 9.

2 Document CHARTE 4473/00 CONVENT 49 of 11 October 2000.

3 The Group furthermore notes in this context that the previous Convention worked in public - as the present Convention does - and that its meeting records and working documents are publicly accessible (see http://ue.eu.int/df).

B. On accession to the European Convention on Human Rights

I. General conclusions and recommendations

Just as in the case of the Charter, the Group stresses at the outset that, in accordance with the Group's mandate, the political decision about the perspective of possible accession to the ECHR by the Union (i.e. by the new single legal personality as emerging from the work of Working Group III) will be reserved to the Convention Plenary. The mandate of the Group has been to prepare such a decision through examination of a number of specific questions relating to modalities and consequences of possible accession.

The Group furthermore stresses that the Convention is to decide only on whether to introduce into the new Treaty a constitutional authorisation *enabling* the Union to accede to the ECHR. In contrast, it would later be for the institutions of the Union, notably for the Council deciding by unanimity, to open negotiations for an accession treaty and set the concrete framework of those negotiations; during such negotiations, a range of technical questions regarding the concrete modalities of accession, of which the Group has taken due note[1], will have to be dealt with. Likewise, the decision on the appropriate timing for possible accession by the Union to the ECHR and to its various additional protocols should be left for the Council. All these questions are not of a constitutional nature and therefore not for the Convention.

Without prejudice to the political decision by the Plenary, and on the basis of the arguments and conclusions including on certain safeguards as set out below, all members of the Group either strongly support or are ready to give favourable consideration to the creation of a constitutional authorisation enabling the Union to accede to the ECHR.

The main political and legal arguments speaking in favour of accession by the Union to the ECHR, which have been recognised by the Group, are the following:

- As the Union reaffirms its own values through its Charter, its accession to the ECHR would give a strong political signal of the coherence between the Union and the "greater Europe", reflected in the Council of Europe and its pan-European human rights system.

[1] See notably WD N° 8, containing a study carried out within the Council of Europe on technical and legal questions of possible accession to the ECHR.

- Accession to the ECHR would give citizens an analogous protection vis-à-vis acts of the Union as they presently enjoy vis-à-vis all the Member States. This appears to be a question of credibility, given that Member States have transferred substantial competences to the Union and that adherence to the ECHR has been made a condition for membership of new States in the Union.
- Accession would be the ideal tool to ensure a harmonious development of the case law of the two European Courts in human rights matters; for some, this argument has even greater force in view of a possible incorporation of the Charter into the Treaties. In this connection, mention should also be made of the problems resulting from the present non-participation of the Union in the Strasbourg judicial system in cases where the Strasbourg Court is led to rule indirectly on Union law without the Union being able to defend itself before that Court or to have a judge in the Court who would ensure the necessary expertise on Union law.

The Group has looked in depth into the possible impact of accession to the ECHR on the principle of autonomy of Community (or Union) law including the position and authority of the European Court of Justice. It has emerged from the Group's discussion and expert hearings[1] that the principle of autonomy does not place any legal obstacle to accession by the Union to the ECHR. After accession, the Court of Justice would remain the sole supreme arbiter of questions of Union law and of the validity of Union acts; the European Court on Human Rights could not be regarded as a superior Court but rather as a specialised court exercising external control over the international law obligations of the Union resulting from accession to the ECHR. The position of the Court of Justice would be analogous to that of national constitutional or supreme courts in relation to the Strasbourg Court at present.

The Group stresses that the incorporation of the Charter into the Treaties and the Union's accession to the ECHR should not be regarded as *alternatives*, but rather as complementary steps ensuring full respect of fundamental rights by the Union: just as the existence of the Charter does not in any way diminish the benefits of extending the control of the Strasbourg Court to cover Union acts, so accession to the ECHR does not reduce the significance of the Union's own catalogue of fundamental rights. The two steps would lead to a situation analogous to that in the laws of the Member States whose Constitutions protect fundamental rights but who at the same time have

[1] Cf. the concurring statements by Judges Skouris (WD N° 19) and Fischbach (CONV 295/02) as well as by Messrs. Schoo and Petite (WD N° 13).

subscribed to the additional external human rights check of the Strasbourg system.

In the light of the above, the Group therefore recommends (subject to the above-mentioned political decision and the safeguards set out below) 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. The drafting of such a legal basis could be kept fairly simple[1]. Given the constitutional significance of possible accession, it should however also be specified that the signature and conclusion of the accession treaty require a decision by the Council by unanimity and the assent of the European Parliament; otherwise, the normal procedures for international agreements would apply.

II. Conclusions and recommendations with respect to specific questions linked to possible accession by the Union to the ECHR

1. Accession to the ECHR will not modify the division of competences between the Union and the Member States

The Group agrees on the central importance of the fact that accession by the Union to the ECHR - like incorporation of the Charter - will in no way modify the allocation of competences between the Union and the Member States. According to the Group's common understanding, the legal "scope" of the Union's accession to the ECHR would be limited to issues in respect of which the Union has competence; it would thus not lead to any extension of the Union's competences, let alone to the establishment of a general competence of the Union on fundamental rights[2]. Accordingly, "positive" obligations of the Union to take action to comply with the ECHR would arise only to the extent to which competences of the Union permitting such action exist under the Treaty.

The Group recommends the use of certain technical devices in order to clarify with certainty that the Union's accession to the ECHR does not modify the allocation of competences. Firstly, a provision clarifying this point could be included in the possible legal basis authorising accession. Secondly, upon accession, a statement stressing the Union's limited competences in the area of fundamental rights could be included in a provision in the accession treaty and / or in an accompanying declaration made by the Union. Thirdly, a mechanism allowing the Union and a

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[1] The legal base could for example state that the Union shall be authorised to accede to the ECHR. On a possible additional clause clarifying that the division of competences shall not be modified, see the next section of this report.

[2] Existing preparatory work for accession has also proceeded upon this understanding, see the Council of Europe's study, WD N° 8, at para. 26, an understanding confirmed by Judges Skouris and Fischbach (WD N° 19; CONV 295/02) and by Mr. Petite (WD N° 13) at the respective hearings.

Member State to appear jointly as "co-defendants" before the Strasbourg Court could ensure that that Court would not make any ruling on the allocation of competences between the Union and the Member States[1].

In this context, it is important to bear in mind that accession by the Union to the ECHR would not mean that the Union would become a member of the Council of Europe, nor that it would become a general political player in Strasbourg. Rather, the Union and its law would simply take part (with a "scope" limited to its competences) in the specific system of judicial human rights control established by the ECHR. Basically (and without anticipating the details to be negotiated upon accession), there would be a judge at the Strasbourg Court elected "with respect to" ("à titre de") the Union, who would contribute specific expertise in Union law to the Court. Furthermore, a representative of the Union would take part in the Committee of Ministers' specific task of supervising execution of judgments under Article 46 ECHR (which is important notably to ensure that the Committee is properly informed on questions of Union law such as on the system of competences), but not in the Committee's general functions outside of the ECHR.[2]

2. The Member States' individual positions with respect to the ECHR will be unaffected by the Union's accession

The Group underlines the importance of the principle that accession by the Union to the ECHR does not affect the positions which the Member States have taken individually with respect to the ECHR, as reflected in particular in their individual decisions on the ratification of certain additional protocols, in the reservations they have entered upon ratification of the ECHR or its additional protocols, and in their right to make specific derogations. The Group stresses that this point can be fully taken into account, since:

- As explained above, the Convention now has to discuss the insertion in the Treaty of a legal basis permitting accession by the Union to the ECHR. If such a possible legal basis were inserted, it would then be for the Council to define, by unanimity, to which additional protocols the Union should accede and when, and which reservations the Union should enter in respect of the ECHR *in its own name*.

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1 The mechanism has been explained to the Group by Judge Fischbach, see summary note CONV 295/02, p. 5, and is also explained in detail in the Council of Europe's study, Working Document n° 8, at paras 57 - 62.

2 This statement is without prejudice to presently existing arrangement of participation in the meetings of the Committee of Ministers by the Community without a right to vote, see WD N° 8, at para. 34.

- The *Member States'* individual reservations made in respect of the ECHR and additional protocols, as well as their right to make specific derogations (Article 15 ECHR), would in any event remain unaffected by accession since they concern the respective national law, whereas accession by the Union would have legal effect only insofar as Union law is concerned.

III. Conclusions with respect to alternative mechanisms proposed to accession to the ECHR

In the light of expert testimony[1] given to the group on the legal and practical problems with several mechanisms sometimes suggested as alternatives to accession by the Union to the ECHR, such alternative mechanisms (e.g., a special procedure of "referral" or "consultation" from the Court of Justice to the Strasbourg Court, a special recourse to the Strasbourg Court against the institutions without accession, or a "joint panel/chamber" composed of judges from both European Courts), are not recommended by the Group.

C. Access to the Court of Justice

The Group discussed the Union's current system of remedies available to individuals, notably in the light of the fundamental right to effective judicial protection.

In this context, the Group has examined the idea of establishing a special procedure before the Court of Justice for the protection of fundamental rights. As a majority of members had reservations about this idea, the Group does not recommend it to the Convention. The Group underlines however the great benefit which citizens would gain from a possible incorporation of the Charter into the Constitutional Treaty architecture, thereby making the Union's present system of remedies available.

The Group wishes however to draw the Plenary's attention to a different issue, namely the question whether or not the conditions of direct access by individuals to the Court (Article 230 § 4 TEC) need to be reformed in the interest of ensuring effective judicial protection. On this point, the Group's discussion has shown that a certain lacuna of protection might exist, given the current condition of

[1] See the hearing of Mr. Schoo, Mr. Piris and Mr. Petite of 23 July 2002 (Working Document 13, pp. 14, 32 fn. 2, 50 - 51) as well as the hearing of Judge Fischbach of 17 September 2002, doc. CONV 295/02.

"direct and individual concern" in Article 230 § 4 TEC and the case law interpreting it, in the specific case of "self-executing" Community regulations which impose directly applicable prohibitions on individuals. On the other hand, a widely shared trend emerged in the group's discussion according to which the present overall system of remedies, and the "division of work" between Community and national courts it entails, should not be profoundly altered by a possible reform of Article 230 § 4 TEC. Some members have referred to the possibility of a provision in the Treaty on the obligation of Member States, as spelt out in recent case law[1], to provide for effective remedies for rights derived from Union law.

In any event, while the issue of Article 230 § 4 TEC certainly has a nexus with fundamental rights, it transcends the protection of those rights - as judicial protection must exist for *all* subjective rights -, and it arises quite independently of the concrete questions of the incorporation of the Charter and accession to the ECHR. The Group considers that this issue and its institutional implications must be examined together with other topics such as the limits of Court jurisdiction in Justice and Home affairs[2] or judicial control of subsidiarity. The Group therefore refrains from making concrete recommendations and commends the question of possible reform in Article 230 § 4 TEC, together with the valuable contributions submitted thereon[3], for further examination by the Convention in an appropriate context.

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[1] Judgment of the Court of Justice of 25 July 2002, C-50/00 P, UPA, at paras 41, 42. It should also be recalled that the Court noted in this judgment that, while it is possible to envisage a system of judicial review of the legality of Community measures of general application different from that established by the Treaty, it is for the Member States, if necessary, in accordance with Article 48 TEU, to reform the system currently in force.

[2] In this connection, attention is drawn to expert testimony given to the Group reflecting concerns, from a perspective of protection of fundamental rights, about these limits as presently contained in Article 68 TEC and Article 35 TEU in an area as sensitive to fundamental rights as Justice and Home affairs, and on limits of judicial control over Union bodies such as Europol; see the hearing of Judge Skouris (WD N° 19) and of Mr. Schoo of 23 July 2002 (WD N° 13), as well as WD N° 20 of Mr. Ben Fayot presenting a note by Advocate-General Francis Jacobs.

[3] See, comprehensively on judicial and non judicial remedies, doc. CONV 221/02 CONTRIB 76 of Mr. Söderman; specifically on Art. 230: CONV 45/02 CONTRIB 25 by Mr. Hannes Farnleitner; the Group's WD N° 17 by Mr. Jürgen Meyer; WD N° 20 of Mr. Ben Fayot presenting a note by Advocate-General Francis Jacobs; the hearing of Judge Skouris (WD N° 19); the hearing of Mr. Schoo (WD N° 13); and an overview of the debate and options in WD N° 21 by the Group's Chairman.

ANNEX

Proposals by the Working Group for drafting adjustments in the horizontal articles of the Charter[1]:

Article 51 (1):

"The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers **and respecting the limits of the powers of the Union as conferred on it by other parts of [this Treaty / the Constitutional Treaty]**."

Article 51 (2):

"This Charter does not **extend the scope of application of Union law beyond the powers of the Union or** establish any new power or task for [the Community or] the Union or modify powers and tasks defined **by the other [Chapters / parts] of** [this Treaty / the Constitutional Treaty]."

add to Article 52:

"52(4) Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions."

"52 (5) The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions and bodies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality."

"52 (6) Full account shall be taken of national laws and practices as specified in this Charter."

[1] The wording in brackets depends on the exact final Treaty architecture.