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SELECT COMMITTEE ON
THE EUROPEAN UNION

THE FUTURE STATUS OF THE EU
CHARTER OF FUNDAMENTAL RIGHTS

WITH EVIDENCE

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CONTENTS

	<i>Paragraph</i>	<i>Page</i>
ABSTRACT:		7
PART 1: INTRODUCTION	1	8
Introduction	1	8
The options: the Charter and/or the ECHR.....	4	8
The options	5	8
The inquiry	18	10
PART 2: BACKGROUND	19	11
The political mandate	19	11
The Convention on the Future of Europe	21	11
The Working Group on the Charter.....	22	11
Call for evidence.....	23	12
Fundamental rights as general principles of Community law	24	12
The Charter	26	13
Current status of the Charter.....	30	13
A Constitution for the European Union.....	35	15
Mode of incorporation	38	15
PART 3: INCORPORATING A BILL OF RIGHTS INTO THE EU CONSTITUTION	43	17
Introduction	43	17
Incorporating the Charter—the case/arguments in favour.....	46	17
(a) Greater transparency, legal certainty	46	17
(b) Enforceable rights.....	48	18
(c) A tailor-made Bill of Rights	50	18
(d) The credibility of the European Union	51	18
(e) Simpler and more speedy exercise than accession to the ECHR	52	18
Incorporating the Charter—the arguments against.....	53	18
(a) Balance of responsibilities between European institutions and national governments—extending Union competence	54	19
(b) Implications for acts and policies of Member States - impinging upon Member States freedom of action	59	19
(c) Not in a fit state to be incorporated.....	63	20
(d) Lack of homogeneity—rights, principles, aspirations	67	21
Incorporating the ECHR into the Treaties in preference to the Charter	71	21
Incorporating the ECHR—the arguments for.....	73	22
(i) Already well-established common ground.....	73	22
(ii) Known enforceable rights.....	74	22
Incorporating the ECHR—arguments against	75	22
(i) Limited scope of ECHR	75	22
(ii) The Union should have its own Bill of Rights	76	22
(iii) Dynamic but not tailor made	77	22
(iv) Would not necessarily avoid confusion and divergence of approach.....	78	22
Conclusions on incorporation of the Charter	79	23
The horizontal clauses	88	24
The Commentary	93	26
Charter should not extend EU competence	95	26
Limited application to acts of Member States	97	26
Incorporation—warts and all	100	27
PART 4: ACCESSION TO THE ECHR.....	102	28
Introduction	102	28
Views of witnesses	105	28
The benefits of accession.....	108	28
(i) Incorporation of the Charter in no way diminishes the importance of accession to the ECHR.....	108	28
(ii) Subjecting the Union, its institutions and bodies to a specialist external arbiter.....	109	29
(iii) Unifying effect of common external control	110	29
(iv) Removing conflicts and inconsistencies	111	29
(v) Enforcing ECHR obligations	112	29
(vi) Removing an apparent double standard.....	113	29
Potential problems and difficulties ahead.....	114	30
(a) EU or EC accession/the legal personality question.....	115	30

(b) Member States' reservations	120	30
(c) The autonomy of the Community legal order	124	31
(d) The relationship of the Strasbourg and Luxembourg courts.....	127	32
The domestic remedies rule	131	32
Problem that both courts are overburdened with a backlog of cases.....	132	33
Re-appraising the case for accession	134	33
A combination of the Charter and accession to the ECHR.....	136	33
PART 5: REVIEW OF ECJ JURISDICTION AND OF REMEDIES.....	139	35
Introduction	139	35
(i) The jurisdiction of the Court of Justice	143	35
Common Foreign and Security Policy.....	145	36
Justice and Home Affairs/Third Pillar.....	147	36
The bodies	149	36
(ii) Remedies for/enforcement by the individual aggrieved—the standing rule	151	37
PART 6: CONCLUSIONS.....	157	39
General	157	39
Specific/detailed	164	39
Recommendation	167	40
Box 1: Extract from our Report EU Charter of Fundamental Rights		8
Box 2: The horizontal clauses with the amendments (shown in bold print) proposed by the Convention Working Group		25
Appendix 1: Membership of the Sub-Committee		41
Appendix 2: List of Witnesses		42
Appendix 3: ECHR Member State Reservations		43
ORAL EVIDENCE		
<i>Professor Anthony Arnull, Birmingham University</i> Oral evidence, 9 October 2002.....		1
<i>Mr Timothy Kirkhope MEP</i> Oral evidence, 16 October 2002.....		14
<i>Mr Andrew Duff MEP</i> Oral evidence, 16 October 2002.....		20
<i>Advocate General Francis Jacobs, Court of Justice, Luxembourg</i> Written evidence		26
Oral evidence, 28 October 2002.....		30
<i>Judge Marc Fischbach and Mr Johan Callewaert, European Court of Human Rights, Strasbourg,</i> Oral evidence, 20 November 2002.....		40
<i>The Rt Hon Baroness Scotland of Asthal QC, Parliamentary Secretary, and Mr Mark de Pulford, Lord Chancellor's Department</i> Oral evidence, 25 November 2002.....		46

WRITTEN EVIDENCE

Advice on Individual Rights in Europe (AIRE) Centre	69
The Bar European Group (BEG)	56
Professor Paul Beaumont, University of Aberdeen, School of Law	60
The British Institute of Human Rights	82
The Confederation of British Industry (CBI)	61
The Faculty of Advocates	66
Fair Trials Abroad	66
Professor Giorgio Gaja, Department of Public Law, University of Florence	68
Immigration Law Practitioners' Association (ILPA)	69
International Centre for Trade Union Rights (ICTUR)	75
JUSTICE	77
The Law Society of England and Wales	80
Professor Dr R A Lawson, Europa Institute, Leiden University	93
Liberty (National Council for Civil Liberties)	82
Professor Dr H G Schermers FBA, Europa Institute, Leiden University	93
Professor S Simitis, Johann Wolfgang-Goethe University, Frankfurt am Main	96
Statewatch	97
Swedish Ministry of Justice	107
Professor A G Toth	108

NOTE: Pages of the Report and Appendices are numbered in bold type; pages of evidence are numbered in ordinary type. References in the text of the Report are as follows:

(Q) refers to a question in oral evidence

(p) refers to a page of the Report or Appendices, or to a page of written evidence

SIXTH REPORT

3 FEBRUARY 2003

By the Select Committee appointed to consider European Union documents and other matters relating to the European Union.

ORDERED TO REPORT

THE FUTURE STATUS OF THE EU CHARTER OF FUNDAMENTAL RIGHTS

ABSTRACT

The EU Charter of Fundamental Rights was “proclaimed” at the Nice European Council in December 2000.

The Convention on the Future of Europe is preparing a draft Constitution for the European Union, in which the Charter might serve as a Bill of Rights.

The Convention is also considering whether the Union should be able to accede to the European Convention on Human Rights (ECHR).

The Committee has been keeping the work of the Convention under review.

This Report examines

- € The pros and cons of the Charter or the ECHR serving as a Bill of Rights for the Union;
- € The arguments for and against EU accession to the ECHR;
- € The remedies available to the individual and the role of the Community Courts.

PART 1: INTRODUCTION

Introduction

1. The EU Charter of Fundamental Rights ('the Charter') was "proclaimed" at the Nice European Council in December 2000. But the Council postponed taking any decision to incorporate the Charter into the Treaties—that issue is being given detailed consideration by the Convention on the Future of Europe ('the Convention'), set up to prepare the way for the 2004 InterGovernmental Conference ('the IGC'). The Convention established a Working Group to consider the issue. The Working Group has now reported back to the Convention.¹

2. Preparation of the Charter was not a purely clerical exercise. Nor was it an academic exercise in jurisprudence. It raised complex legal, political and constitutional issues going to the heart of the debate about the nature and future of Europe.

3. In 2000, at the time of the negotiation and preparation of the Charter, this Committee, under the chairmanship of Lord Hope of Craighead, conducted an inquiry into and reported on the Charter.² The Committee approached the Charter, in draft as it then was, from an essentially practical standpoint. All international human rights instruments are aimed at conferring rights on individuals and the Committee took the view that the measure of the success of a Charter intended to guarantee fundamental rights and freedoms would be what in practical terms it actually achieved for the citizen. The Charter presented a major opportunity for protection to be given to individual citizens of the Union in relation to the activities of the various institutions of the Union.³

Extract from our Report *EU Charter of Fundamental Rights*

Conclusion

154. The potential significance of the Charter, both politically and legally, is very great. Work on it is proceeding rapidly, in order to enable a first reading by Ministers at Feira in June and adoption by the end of the year. The creation of any Charter of fundamental rights has implications for the future of the Union. Its content will send signals to the peoples of Europe and to the international community. At the practical level of safeguarding the interests of the individual there is a need for a Community statement of fundamental rights, and the Charter could fill that need. The extent of its usefulness will depend, however, on the status it is to have and the purpose it is intended to serve. A declaration by the European Council of rights already existing and protected in EC law might provide a list of rights that would be clear and accessible to the public and reinforce the protection of ECHR rights as an integral part of Community law. But a political act of that kind would close none of the gaps that currently exist in Community law in the protection of fundamental rights within the EU. While skilful drafting might side-step questions of potential conflict with the ECHR and European Court of Human Rights, a non-binding Charter would not prevent alternative rights or interpretations of ECHR rights being adopted by the Community courts. Accession to the ECHR remains the crucial step required if the gap is to be closed. Accession of the EU to the ECHR, enabling the Strasbourg Court to act as an external final authority in the field of human rights, would go a long way in guaranteeing a firm and consistent foundation for fundamental rights in the Union. It would secure the ECHR as the common code for Europe. The question of accession by the Union to the ECHR should be on the agenda for the IGC.

The options: the Charter and/or the ECHR

4. The attention being paid to the Charter by the Convention persuaded the Committee to revisit the Charter, its contents and its status. We decided to examine, in particular, the position the Charter might occupy in any new constitution for the Union and its relationship with the European Convention on Human Rights ('the ECHR'). In doing so we have tried to adopt the same practical approach as that adopted by our predecessors.

The options

5. There is an important debate being conducted not only within but also outside the Convention as to whether there should be a constitution for the European Union and, if so, what its terms should be.

¹ Final report of Working Group II. Doc. CONV 354/02. 22 October 2002.

² *EU Charter of Fundamental Rights*, 8th Report 1999-2000, HL Paper 67.

³ *Ibid*, para 121.

It is not our intention in this Report to engage in this debate. It is apparent, however, that there is a political impetus moving the Convention towards a recommendation for a new constitution. The premise on which this Report is based, therefore, is that a new constitution for the European Union will emerge from the deliberations of the Convention. We think it safe to assume, also, that if there is to be a new constitution for the Union a Bill of Rights in some form will be a part of that new constitution. The Charter, either as it stands or in some revised form, might constitute the requisite Bill of Rights. But, of course, each Member State is a signatory to the ECHR. Since, however, the Union, unlike its constituent Member States, is not a signatory to the ECHR, the ECHR Articles do not apply to actions or omissions of the Union or of its various institutions. Citizens of the Union have at present no direct ECHR protection against an oppressive but lawful exercise by a Union institution of powers conferred on it under European law.

6. In these circumstances a number of different options appear to be available to be taken in order to produce a Bill of Rights as part of a new European constitution.

7. The Charter, as it stands, might be made a part of the new constitution. Two particular problems (although some might not regard them as problems) are associated with this option. First, the Charter, as it at present stands, is expressed to cover a number of matters that are outside the competence of the European Union or any of its institutions. It is not intended, by the side-wind of incorporation of a Bill of Rights into a new European constitution, to increase the competences of the Union or of its institutions. Nor is the principle of subsidiarity to be undermined or eroded by such a side-wind. The so-called "horizontal" clauses (which will be examined in more detail later in this Report) are intended to ensure that the impact of the Charter is confined to regulating the manner in which the European Union and its institutions exercise their powers under their Treaty competences.

8. The second problem associated with this first option is that many of the Articles of the Charter are of an aspirational character, intended to inform the approach of Member States to problems associated with the subject matter of the Articles in question. The terms of these Articles lack the precision and definition that would be expected of Articles in a Bill of Rights intended to be enforceable in a court of law by individual citizens.

9. Nonetheless, the Charter has come to be seen by many as already constituting an EU Bill of Rights notwithstanding its present lack of legal force. The text is up-to-date and drafted specifically for the Union. It goes beyond the ECHR in content and reflects fundamental freedoms and economic and social rights derived from other international instruments as well as the common constitutional traditions of the Member States.

10. A second option would be to revise the Charter so as, first, to exclude provisions which relate to matters not within the competences of the Union or its institutions and, second, to revise and re-draft what remains, substituting where necessary a more precise statement of enforceable rights for the aspirational character of the present contents. The revised Charter could then be incorporated into the new constitution.

11. It seems to be generally accepted that, excepting the horizontal clauses, there is no practical possibility of changes being made to the text of the Charter. It may be right that this is the present political reality but it is regrettable. The text of the Charter has been criticised, even by some of its most ardent supporters. Revision is desirable. And, post-incorporation, any amendment of what would have become part of the Union's constitution would be very cumbersome and much more difficult to achieve. This state of affairs underlines the importance of the horizontal clauses and the proposal that the Charter should be supported by an explanatory commentary.

12. A third option would be to step back from the Charter, leaving it with its present status unchanged, and to look elsewhere for the new constitution's Bill of Rights. The search might need to go no further than the ECHR. If the Union were to accede to the ECHR and become bound, under European law, to comply with the ECHR Articles, just as Member States under their respective domestic laws are so bound, the ECHR would become for the Union a Bill of Rights. But the ECHR does not cover certain civil and political, and social and economic rights which many consider valuable.

13. It was the main conclusion of the Committee's earlier Report that the best way forward to secure effective protection of citizens against the misuse or abuse of power by EU institutions lay in accession by the Union to the ECHR.

14. Another ECHR option, as an alternative to the EU acceding to the ECHR, would be for the text of the ECHR to be incorporated into the new EU constitution. This would raise the same competences difficulties that incorporation of the Charter would raise. The same, or similar, horizontal clauses would be needed.

15. The final option would be to combine one or other of the ECHR options with the Charter option. The majority of those giving evidence to us, while recognising that accession to the ECHR would be legally and politically complex, supported both accession by the Union to the ECHR and also incorporation of the Charter into a new Union constitution.

16. We have endeavoured in this Report to examine the pros and cons of these various options; incorporation of the Charter or of the ECHR; EU accession to the ECHR; or a combination. The choice to be made between these options must take account of their respective pros and cons but will, of course, be heavily influenced by the political dimension and dynamic of the current debate.

17. It is important to recognise also that, independent of which option is to be preferred, the issue of judicial remedies must be addressed. Rights amount to nothing if they cannot be effectively enforced. We doubt whether a citizen will be much impressed if access to a remedy is not available to him when he believes that his rights under the new constitution have been infringed. Neither the Convention, nor the Working Group, has yet done any serious work on this issue. This neglect is unsatisfactory. Work needs to be set in hand immediately, with the UK Government taking a leading role in persuading the Convention and the Community Courts to examine and put forward proposals aimed at ensuring that an individual can pursue an effective remedy in his national courts and, where necessary, directly in the Community Courts, for breach of his rights under the new constitution.

The inquiry

18. The inquiry was carried out by Sub-Committee E (Law and Institutions) under the chairmanship of Lord Scott of Foscote. The membership of the Sub-Committee is listed in Appendix 1. The witnesses are listed in Appendix 2. The evidence, written and oral, is printed with the Report. We would like to thank all those who assisted in the inquiry.

PART 2: BACKGROUND

The political mandate

19. It is becoming the practice for one InterGovernmental Conference (IGC) to leave a mandate for the next. As the Amsterdam IGC (1997) provided a mandate for the Nice IGC (2000), so Nice has provided a mandate for the next IGC, planned for 2004. As a minimum the next IGC has to deal with four things:

- (a) clarification of the field of competence shared between the EU and the Member States;
- (b) the status of the EU Charter of Fundamental Rights;
- (c) simplification of the Treaties;
- (d) the role of national parliaments in the institutional structure of the Union.

The conference at Nice also called for a deeper and wider debate about the future development of the Union, a debate in which the peoples of Europe and the candidate countries would participate. To meet some of the criticisms of the Amsterdam and Nice IGCs it was agreed that the consultative procedure should be wide and involve members of civil society. Successive Presidencies have taken this exercise forward. Drawing inspiration from the methodology employed in drafting the Charter of Fundamental Rights, the Council of Ministers agreed in October 2001 that a Convention should be convened with the main aim of elaborating options open to the IGC.

20. At the Laeken European Council (December 2001) Heads of State and Government agreed the terms of a Declaration on the future of the Union. Under the Heading *Towards a Constitution for European citizens* the following paragraph appears:

“Thought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights”.⁴

Those questions have been taken up by the Convention.

The Convention on the Future of Europe

21. Comprising 105 members in total, the Convention on the Future of Europe (the Convention) includes representatives from the Member States’ and candidate countries’ governments, national parliamentarians, 16 European parliamentarians, and representatives of the Commission. The European Ombudsman and representatives of the Economic and Social Committee, the Committee of the Regions and the European Social Partners attend as observers. Each member has an alternate. The Convention is chaired by former French President, Valéry Giscard d’Estaing.⁵ It is supported by a 12 member Praesidium (steering group)⁶ and a Secretariat.⁷ The Convention began its work in February 2002 and was due to report in the Spring of 2003. The timetable seems likely to be extended a few months and the Convention is not now expected to finish its work until June 2003.

The Working Group on the Charter

22. In June 2002 Working Groups⁸ were set up by the Convention to deal with a variety of subjects including subsidiarity, the role of national parliaments, the legal personality of the Union and the Charter of Fundamental Rights. The Charter Working Group was chaired by Commissioner Vitorino. It was mandated to answer the following questions:

⁴ *Laeken Declaration on the Future of the European Union*, SN 300/1/01 REV 1, p 24.

⁵ There are also two vice-Chairmen, Jean-Luc Dehaene, the former Belgian premier, and Giuliano Amato, the former Italian Prime Minister.

⁶ The Praesidium is composed of the Chairman, the two vice-Chairmen, two representatives each from the Commission, the European Parliament and national parliaments and representatives from the EU Presidency troika. A representative of the candidate countries attends as invitee.

⁷ The Secretariat is headed by Sir John Kerr, a former UK ambassador to the EU and head of the Foreign Office.

⁸ Some eleven Working Groups have been established: Working Group I: Subsidiarity; II: Charter/ECHR; III: Legal personality; IV: National parliaments; V: Complementary Competences; VI: Economic Governance; VII: External Action; VIII: Defence; IX: Simplification; X: Freedom, Security and Justice; XI: Social Europe.

If it is decided to incorporate the Charter of Fundamental Rights in the Treaty; how should this be done and what would be the consequences? What would be the implications of accession by the Community/Union to the European Convention on Human Rights?⁹

The Group held seven meetings, and received both written and oral evidence. Its conclusions are contained in its Final Report of 22 October 2002.¹⁰ We deal with those conclusions later in this Report.

Call for evidence

23. The pattern of our inquiry has been greatly influenced by the debate in the Convention and the timetable and conclusions of the Working Group. Our own call for evidence reflected the two principal strands of the Convention's debate on the Charter. We invited views on two main questions: *Should the Charter be incorporated into the Treaties?* and *What should be the Charter's relationship with the ECHR?*

Fundamental rights as general principles of Community law

24. All Member States of the Community are Contracting Parties to the ECHR as well as to other international instruments under which fundamental rights are protected.¹¹ When questions of fundamental rights have arisen, incidentally, in matters involving the Community, the European Court of Justice (ECJ or the "Luxembourg Court") has since 1969¹² applied such rights as an integral part of the "general principles of Community law". Respect for human rights has thus been generally secured without the actual incorporation of the Charter or accession to the ECHR. Successive Treaty amendments have captured the essence of the ECJ jurisprudence without attempting to codify or catalogue the nature and extent of fundamental rights.

25. It is significant that the Amsterdam Treaty entrenched the concept of fundamental rights as one of the basic building blocks of the Union. Article 6(1) of the Treaty on European Union (TEU) declares that the Union "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States". Article 6(2) requires the Union to respect fundamental rights, as guaranteed by the ECHR and as the result of the constitutional traditions common to the Member States, "as general principles of Community law". Article 7 provides for the suspension of rights derived from the Treaty, including voting rights, if a Member State were in "serious and persistent breach" of the principles in Article 6(1). The Amsterdam Treaty also brought Union activity within the jurisdiction of the ECJ¹³ as regards that need to respect human rights. But there remain significant limitations on the Court's jurisdiction with regard to police and judicial co-operation in criminal matters¹⁴ and the Court has no jurisdiction in relation to the Common Foreign and Security Policy.¹⁵

⁹ Mandate of the Working Group on the Charter. 31 May 2002. Doc. CONV 72/02.

¹⁰ Final Report of Working Group II. Doc. CONV 354/02.

¹¹ These include the following European (a) and International (b) instruments:

(a) European Social Charter (1961); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (1987); European Convention on the Exercise of Children's Rights (1996); Convention for the Protection of Human Rights and dignity of the human being with regard to the application of biology and medicine: Convention on Human Rights and Biomedicine (1997).

(b) Slavery Convention (1926); International Labour Organisation Convention No 29 on Forced or Compulsory Labour (1930); International Labour Organisation Convention No 87 Concerning Freedom of Association and Protection of the Right to Organise (1948); Universal Declaration of Human Rights (1948); Geneva Convention Relative to the Protection of Civilian Persons in time of War (1949); Geneva Convention Relative to the Treatment of Prisoners of War (1949); United Nations Convention Relating to the Status of Refugees (1951); Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery (1956); International Labour Organisation Convention on Discrimination (Employment and Occupation) (1958); Covenant Against Discrimination in Education (Unesco 1960); International Covenant on Economic, Social and Cultural Rights (CESCR) (1966); International Covenant on Civil and Political Rights (CCPR) (1966); International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1966); Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979); United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984); United Nations Declaration Against Torture (1984); United Nations Convention on the Rights of the Child (CRC) (1989).

¹² Case 29/69, *Stauder v City of Ulm*. [1969] ECR 419.

¹³ Article 46(d) TEU.

¹⁴ Title VI TEU.

¹⁵ Title V TEU.

The Charter

26. The European Council meeting in Cologne that decided in June 1999 that a European Union Charter of Fundamental Rights should be established did so in order to make the “overriding importance and relevance [of these fundamental rights] more visible to the Union’s citizens”. The Charter was the product of a Convention, made up of representatives of Member States, the European Parliament, national Parliaments and the Commission. It started work in December 1999 and adopted a draft text on 2 October 2000. The text was unanimously approved at the Biarritz European Council (13 to 14 October 2000). The Presidents of the European Parliament, the Council and the Commission signed and “solemnly proclaimed” the Charter on behalf of their respective institutions on 7 December 2002 in Nice.

27. The Charter’s first fifty Articles encompass a wide range of civil, political, economic and social rights. Most are applicable to all persons in the EU but some are limited to EU citizens. The Charter substantially reproduces the rights contained in the ECHR and, in accordance with the political mandate given at the 1999 Cologne European Council, goes beyond these by including certain economic and social rights. These are drawn from the Council of Europe’s Social Charter, the Community Charter of Fundamental Social Rights of Workers and other international conventions to which the European Union or its Member States are parties. Other Charter rights are derived from the common constitutional traditions of Member States and some are of an aspirational character (QQ 220, 224).

28. These rights are set out in six sections:

- Dignity
- Freedoms
- Equality
- Solidarity
- Citizens’ rights
- Justice

29. A final section (General Provisions) deals with the scope of the Charter and its provisions and with their relationship to the Community Treaties and other instruments, including the ECHR. These are the so-called “horizontal clauses”. As will be seen, they have an important role to play as regards the future status and role of the Charter.

Current status of the Charter

30. Baroness Scotland of Asthal,¹⁶ told the Committee: “the Charter is a political document. Unless and until the IGC changes that position in 2004 it will remain a political document”¹⁷ (Q 218). But the Charter, though formally only “declared” and not a legally binding instrument, is not without political, constitutional and legal force. Its contents have had an immediate impact on Community legislation and on the Community Courts. Liberty said: “despite its non-binding character, the Charter ... already has had a significant impact on the protection of human rights within the EU and beyond” (p 83).

31. As regards Community legislation, the Commission decided in March 2001¹⁸ that every proposed legislative or regulatory measure of the European Union should, before its adoption, be checked for compatibility with the Charter provisions. Compliance with the Charter would, said the Commission, be the “touchstone”. And it is now common to see explicit reference to the Charter in the recitals to legislative instruments.¹⁹

32. The Community Courts have also made reference to the Charter. At least seven Advocates General at the Court of Justice have referred to the Charter in order to identify fundamental rights to be respected within the Community.²⁰ For example, in his opinion in the *Hautala* case Advocate

¹⁶ Parliamentary Secretary, Lord Chancellor’s Department.

¹⁷ The Minister used similar words to describe the Charter during the debate of the Convention on the Future of Europe. HL Deb. 7 January 2003, col. 900.

¹⁸ Communication SEC (2001) 380/3.

¹⁹ eg the Council’s Decision of 28 February, 2002 setting up Eurojust.

²⁰ Case C-491/01 *R v Secretary of State for Health ex parte: British American Tobacco (Investments) Ltd and Imperial Tobacco Ltd* (10 September 2002); Case C-112/00 *Eugen Schmidberger Internationale Transporte Planzüge v Austria* (11 July 2002); Case C-466/00 *Kaba v Secretary of State for the Home Department* (11 July 2002); Case C-126/01 *Ministre de l’économie, des finances et de l’industrie v GEMO SA* (30 April 2002); Case C-340/99 *TNT v Poste Italiane* [2001] ECR I-4109; Case C-313/99 *Mulligan v Attorney General* (12 July 2001); Case C-413/99 *Baumbast v Secretary of State for the*

General Léger described the Charter as “a source of guidance as to the true nature of the Community rules of positive law”.²¹ On at least three occasions the Court of First Instance has expressly taken account of rights set out in the Charter.²² The Court of Justice itself has yet to refer expressly to the Charter, though there is evidence to suggest that it is influenced by the statement of rights in the Charter. Professor Arnall summarised the position: “the Charter constitutes an authoritative source of guidance as to the scope of the general principle of protection for fundamental rights which the Community courts uphold. The consequence of that is that it may affect both the interpretation of Community acts and indeed the Treaty itself and also perhaps even the validity of Community acts” (Q 2).

33. There have been a number of cases in which English judges have cited or relied on provisions contained in the Charter. In *R v City of Wakefield Metropolitan Council and the Home Secretary, Ex parte Robertson*²³ a successful challenge was made to the legality of the practice of selling copies of the electoral register to commercial interests without seeking the consent of electors whose names appeared on the register. Mr Justice Maurice Kay decided the case on the basis of Article 8 of the ECHR, but cited Charter Article 8 which confers the right to protection of personal data. The Judge added that he did not treat the Charter provision as “a source of law in the strict sense”. In a later case, *R v Secretary of State for the Home Department, ex parte Howard League for Penal Reform*,²⁴ Mr Justice Munby repeated this formula but appears to have derived real assistance from a provision contained in the Charter. Mr Justice Munby cited Article 3 of the ECHR, two Articles from the United Nations Convention on the Rights of the Child and Articles 24.1 and 24.2 of the Charter. He said:

“The European Convention is, of course, now part of our domestic law by reason of the Human Rights Act 1998. Neither the UN Convention nor the European Charter is at present legally binding in our domestic law and they are therefore not sources of law in the strict sense. But both can, in my judgment, properly be consulted insofar as they proclaim, reaffirm or elucidate the content of those human rights that are generally recognised throughout the European family of nations, in particular the nature and scope of those fundamental rights that are guaranteed by the European Convention.”

34. “So although, as Advocate General Jacobs said, there may be some uncertainty about the Charter’s precise status (Q 150) it is clear that the Charter is being used as an authoritative source in identifying fundamental rights at the EU level and in domestic law. Very much as we predicted in our earlier Report²⁵ an instrument prepared by such a body as the Charter Convention and endorsed at the highest political level in the Union cannot be overlooked. Weight will inevitably be attached to it. The Charter has also been referred to by the European Court of Human Rights (the Strasbourg Court).²⁶ Judge Fischbach referred to it as “a source of inspiration in the interpretation of the Convention” (Q 195). The Charter is therefore not without present legal significance. Experience to date before the Community Courts shows that the Charter may help to identify those fundamental rights which form part of the general principles of law governing Union activity. But although the Charter may help to clarify the obligations of the institutions of the EU, it does not directly confer enforceable benefits on individuals. Whether “integrating” the Charter into the Treaties and thus giving it greater legal force would bring such benefits, or whether accession to the ECHR might in practice be more effective in doing so is a question that has been at the forefront in our inquiry. Whichever or whatever, rights which are not accompanied by practical and effective remedies for breach are emptied of substance. In Part 5 of this Report we return to this important issue.

Home Department (5 July 2001); Case C-377/98 *Netherlands v Parliament and Council* (14 June 2001); Case C-270/99P *Z v Parliament* (22 March 2001); Case C-50/00P *Unión de Pequeños Agricultores v Council* (21 March 2001); Case C-353/99P *Council v Hautala* (10 July 2001), Case C-309/99 *Wouters v Nederlandse Orde Advocaten* (10 July 2001); Joint Cases C-122 and 125/99 *D v Council* [2001] ECR I-4319; Joint Cases C-20/00 and 64/00 *Booker Aquaculture v The Scottish Ministers* (20 September 2001); C-459/99 *MRAX v Belgium* (13 September 2001); Case C-173/99 *R v Secretary of State for Trade and Industry ex parte BECTU* [2001] ECR I-4881.

²¹ Case C-353/99P *Council v Hautala* (10 July 2001).

²² Case T-54/99 *Max-Mobil*, judgment of 30 January 2002; Case T-198/01R *Technische Glaswerke*, order of 4 April 2002, and Case T-177/01 *Jégo-Quéré*, judgment of 3 May 2002. Statewatch, however, noted that the Court treats the Charter as an ancillary source of the general principles of Community law, not a primary source. The Charter is used only to confirm or reaffirm the existence of, and not as a source of, a general principle (para 4).

²³ [2001] EWHC (Admin) 915.

²⁴ [2002] EWHC (Admin) 2497.

²⁵ *EU Charter of Fundamental Rights*, 8th Report, 1999–2000, HL Paper 67, at para 125.

²⁶ *Goodwin v United Kingdom* (2002) 35 EHRR No 18, at p. 447.

A Constitution for the European Union

35. Discussion of the future of the Charter is now firmly linked to the proposals for a constitution for the EU and the simplification of the Treaties. The Government has changed its position on the idea of a Constitution for the European Union, and appears to have dropped its original opposition.²⁷ It remains to be seen what form of constitution will be put before the IGC in 2004.

36. There is some time to go before the IGC but already various draft Treaties have been put forward, including a personal contribution from Mr Andrew Duff MEP.²⁸ Giscard D'Estaing, in his role as Chairman of the Convention, has himself tabled a Preliminary draft Constitutional Treaty.²⁹ It is very much a skeleton text and contains an Article (6) entitled Charter of Fundamental Rights but does no more than set out a number of approaches that might be considered.³⁰ The Commission has recently published its own version.³¹

37. The UK Government has presented a Draft Constitutional Treaty prepared by Professor Alan Dashwood, University of Cambridge.³² But this document does not necessarily set out the UK's position and the Government has formally distanced itself from it. Mr Peter Hain MP told the European Scrutiny Committee in the House of Commons that the Dashwood Treaty had been proffered to counter the more super-state model produced by the European University Institute at Florence.³³ What, however, is noteworthy in the present context is the minimalist approach the Dashwood text takes in relation to the Charter. Article 2(2) of the Dashwood Treaty provides: "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950, as identified in the Charter of Fundamental Rights of the European Union, and as they result from the constitutional traditions common to the Member States, as general principles of Union law".

Mode of incorporation

38. In addition to the substantive questions about the future status of the Charter and the Union's accession to the ECHR, the Convention Working Group was invited to consider how the Charter might be integrated into the Treaties. They were presented with six options:³⁴

"(a) The Charter could be 'attached' to the Treaties in the form of a 'Solemn Declaration'.

(b) The EU Treaty or a new basic Treaty could refer to the Charter according to the model of Article 6(2) of the existing EU Treaty. It would therefore be merely an *indirect* reference to the Charter as a source of inspiration for the case-law definition of fundamental rights.

(c) The EU Treaty or a new basic Treaty could make *direct* reference to the Charter.

(d) A direct or indirect reference to the Charter could be made in the preamble to a new basic Treaty.

(e) The Charter could become a new Protocol annexed to the Treaties or a new basic Treaty.

(f) The full body of the 54 articles of the Charter could be inserted into the title or chapter of the EU Treaty, or into a new basic Treaty, of which it would, for example, form the first title or chapter."

39. As Professor Giorgio Gaja, Department of Public Law at the University of Florence, pointed out, the legal and practical effects would vary depending on the way the Charter was integrated into the Treaties (p 68). In the Bar European Group's (BEG) view, incorporation needed to be in a manner that would satisfy three objectives. First, the Charter must apply to all European Union activity, rather than solely to activity under the EC Treaty. Second, the Charter must be capable of enforcement by the Community Courts. Finally, the ECJ must have jurisdiction to interpret the Charter, where relevant, on a reference for a preliminary ruling from a national court (p 57).

²⁷ Jack Straw, *A constitution for Europe*. The Economist, 12 October 2002.

²⁸ Doc. CONV 234/02.

²⁹ Doc. CONV 369/02.

³⁰ Article 6 states: "The wording of this article will depend on the proceedings of the Working Group on the Charter. It could be modelled on Article 6 of the Treaty on European Union. It could – either refer to the Charter; - or state the principle that the Charter is an integral part of the Constitution, with the articles of the Charter being set out in another part of the Treaty or an annexed protocol; - or incorporate all the articles of the Charter".

³¹ Contribution to a preliminary draft Constitution of the European Union ("Penelope") Brussels 5 December 2002.

³² Doc. CONV 345/02.

³³ House of Commons European Scrutiny Committee. Minutes of Evidence. Wednesday, 20 November 2002, at Q 39.

³⁴ Doc. CONV 116/02: *Modalities and consequences of incorporation into the Treaties of the Charter of Fundamental Rights and accession of the Community/Union to the ECHR*, at p. 7.

40. It was generally perceived that options (a), (b), (c) and (d) would add nothing to the Charter's existing status. Professor Toth, Professor of European Law at the University of Strathclyde, believed there was "no substitute for proper incorporation. The Charter must not only become, but must also be seen to have become, an integral part of the Union's constitutional structure. This can only be achieved if the basic rights and freedoms of the citizen are enshrined in a constitutional text" (p 109). The view of most witnesses was that the Charter should go into the EU Treaty or a new basic Treaty or into a Protocol to the EU Treaty or new basic Treaty.

41. The Convention Working Group submitted two options as to the manner in which the Charter could be made binding and given constitutional status: first, insertion of the Articles of the Charter in the Constitutional Treaty; or, second, insertion of an appropriate reference to the Charter in an article of such Treaty, combined with annexure or attachment of the Charter, either as a specific part of the Treaty or as a Protocol. Commissioner Vitorino has said that the large majority of the Working Group favoured the first option.³⁵

42. **In this Report we make no recommendation as to the form of any incorporation of the Charter into the Treaties or any new constitutional Treaty.** As Advocate General Jacobs said, the form of incorporation will depend very much on the form and the structure of the new Treaty and on the legal effect decided to be given to the Charter (Q 161). The only point that we would add is that the form of incorporation may well have implications for future amendments to the Charter. As Professor Arnall observed, amendments are going to be very difficult if the Charter is incorporated in treaty form, whether in the main text or in a protocol. He noted that there was currently discussion about a treaty amendment procedure that would vary according to the section of the Treaty to which the proposed amendment related; but he observed that it would be difficult to justify a simpler procedure (*ie* one not requiring unanimity and subsequent ratification in accordance with national constitutional requirements) for amendment of the Bill of Rights section of the Treaty than amendment of other sections (Q 37).

³⁵ The European Convention. Summary report of the plenary session. Brussels, 28 and 29 October 2002. Doc. CONV 378/02.

PART 3: INCORPORATING A BILL OF RIGHTS INTO THE EU CONSTITUTION

Introduction

43. Discussion about incorporating a Bill of Rights into the EU Constitution highlights two anomalies: first, the absence from the Treaties of a list of fundamental rights; second, the fact that neither the Union nor the Community is party to the ECHR.³⁶ Incorporation of the Charter into a new Constitution would remedy the first of these anomalies. The proclamation of the Charter in December 2000 provided Member States with an opportunity to increase the protection of individuals in relation to the activities of the Union. This opportunity has not yet been taken although in practical terms the Charter has not been devoid of legal effect. As described above, it has been pleaded in aid before the Community Courts, the Strasbourg Court and in national courts. But on the key issue of whether it has conferred rights on the individual which he or she can enforce by obtaining a remedy for abuse of power by the EU institutions, the Charter, being in the Minister's words merely a "political document", is of very limited value.

44. The groundswell of movement towards the adoption of some sort of constitution for the European Union is probably becoming irresistible. Modern constitutions are expected to contain Bills of Rights. Many see the Charter as fulfilling that role in a European Constitution. The Committee on the Affairs of the European Union of the Deutscher Bundestag has described the Charter as "one of the most modern fundamental rights catalogues in the world and an important element for a future constitution of the European Union".³⁷ And the majority of our witnesses took the view that the Charter should be an essential part of any form of constitutional Treaty for the Union. Omission would, in BEG's view, be "both anomalous and unsatisfactory given the broad and potentially increasing range of powers enjoyed by the EU institutions" (p 57). JUSTICE said that "a binding catalogue of fundamental human rights guarantees is an essential part of the constitutional structure of the Union. The EU Charter of Rights, which includes comprehensive and carefully drafted protection for both civil and political and economic and social rights, would, if made binding, fully ensure such accountability" (p 77).

45. **That any EU Constitution should include a Bill of Rights, specifying rights of the citizen and limiting the powers of the EU institutions seems beyond argument.** But whether the Charter is the answer is at least debatable. Another way in which the position of the individual could in practical terms be improved would be by EC/EU accession to the ECHR. This is not necessarily an alternative requiring a choice to be made. But in considering what the future role of the Charter should be the options need to be examined. In this part of the Report we consider, with the benefit of the written and oral evidence that we have received, the arguments for and against incorporation of that Charter into the Treaties or into a new constitutional Treaty for the Union as well as the case for EC/EU accession to the ECHR. In doing so we make both general and, sometimes, detailed recommendations. These are brought together and listed in Part 6 of this Report.

*Incorporating the Charter—the case/arguments in favour**(a) Greater transparency, legal certainty*

46. A number of witnesses supported incorporation of the Charter into the Treaties because so doing would remove the uncertainty surrounding the present status of the Charter and bring greater transparency and legal certainty. JUSTICE pointed out that although declaratory instruments have an important role to play in building human rights awareness and protection internationally they do not constitute a sufficient constitutional protection against bodies exercising State power (p 78). Liberty said that "it would be a clear advantage of incorporation that the rights available to citizens of the European Union (and those within its jurisdiction) would be (a) more visible and visibly part of their legal heritage and (b) directly enforceable and perceived as such" (p 88).

47. There is general agreement that in its areas of competence the Union must respect fundamental rights as "general principles of Community law"³⁸ and the Charter would add detailed content to that obligation. It would make clear, and thus reinforce, the need for the Union institutions to meet the requirements not only of the ECHR but also of other international human rights instruments (such as the International Covenant on Civil and Political Rights) by which the Member States are bound.

³⁶ *EU Charter of Fundamental Rights*, 8th Report 1999–2000, HL Paper 67, at para 119.

³⁷ *The Committee on the Affairs of the European Union 1998–2002*, at p 15, Deutscher Bundestag October 2002.

³⁸ Article 6(2) TEU.

(b) Enforceable rights

48. Most witnesses assumed, or at least expected, that upon the incorporation of the Charter into a new constitution the rights would become enforceable by the individual. BEG said: “incorporation would send a clear signal to EU citizens that the rights contained in the Charter were real, enforceable rights ... Any impression that the Charter constitutes a catalogue of political aspirations that the Union has pledged to uphold but cannot be held to would be dispelled” (p 57).

49. However, the Government has dissented from the view that incorporation of the Charter would create new rights or give remedies which were not presently available. Baroness Scotland said: “The reality is that the whole point of the horizontal provisions was to say that there would be no new jurisdiction, no new competence and no new encroachment into a different field. There should not be, simply by virtue of incorporation of the Charter, a significant increase in the call on the use of remedies in relation to the Charter, it should not change things. That is certain”. In the light of that statement she was asked in the next question: “Are you not going to be giving individuals a whole raft of new rights?” to which her response was “No” (QQ 254-5).

(c) A tailor-made Bill of Rights

50. The majority of witnesses took the view that the Charter should be an essential part of any form of Constitutional Treaty for the Union. The Charter goes, intentionally, beyond the ECHR and is specially tailored to the circumstances of the Union”. The Charter includes, for example, rights which are peculiar to the Union (for example the fundamental economic freedoms—the rights of movement of persons, goods, services, capital—and the specific citizenship rights accorded by the EC Treaty) as well as economic and social rights. Some saw these rights as a part of an indivisible body of fundamental rights. Advocate General Jacobs said: “In a modern bill of rights appropriate for the European Union it is appropriate to have some account given of economic and social rights as well as civil and political rights, it would be difficult to omit that side of the rights altogether” (Q 154). It should be recalled that when giving its initial instructions on the preparation of the Charter the European Council specifically required the draftsmen to take account of economic and social rights³⁹.

(d) The credibility of the European Union

51. For some there is an overwhelming political case for enhancing the status of the Charter. In the view of Professor Spiros Simitis, Professor at Johann Wolfgang-Goethe University, Frankfurt, a failure to incorporate the Charter into the Treaties would undermine the credibility of the European Union “... to solemnly proclaim the willingness to guarantee fundamental rights by adopting a Charter exclusively devoted to these rights but to refuse to include it in the documents regarded as the constitutive elements of the European Union would inevitably discredit all prior declarations of a special commitment to both a democratic society and to fundamental rights” (p 97). Mr Andrew Duff MEP believed that the political case was irresistible: “I find it an inconceivable proposition that contemporary Europeans should seek to draft a Constitution and exclude an explicit bill of rights ... If we are going to have one then it will have to be the Charter” (Q 104).

(e) Simpler and more speedy exercise than accession to the ECHR

52. Incorporation of the Charter into the Treaties or a new constitutional Treaty would have to be agreed by all Member States and the necessary amendments to the Treaties and/or the new constitutional Treaty ratified by each Member State in accordance with its own constitutional procedures. That, as the recent history of the ratification of the Nice Treaty has shown, may be time-consuming and politically controversial. But EC/EU accession to the ECHR would require much more, including both EC/EU Treaty amendment and ECHR amendment. Taking a body such as the Union into the ECHR regime is unprecedented and would require complex technical treaty amendment prior to unanimous agreement and ratification by all 44 members of the Council of Europe.

Incorporating the Charter—the arguments against

53. There are a number of substantial arguments against incorporating the Charter, at least in its present form, into the Treaties.

³⁹ Particularly those contained in the European Social Charter and the Community Charter of the Fundamental Social Rights of Workers.

(a) Balance of responsibilities between European institutions and national governments—extending Union competence

54. The CBI believe that incorporating the Charter into the Treaty and giving it “full legal status” would create legal uncertainty and risk altering the balance of responsibilities between European institutions and national governments (p 61). The Charter contains a number of Articles (for example, Article 9 (right to marry) and Article 10 (freedom of religion)) dealing with matters where the Community/Union currently has no or only limited competence to act. The question raised is what effect, if any, incorporation of the Charter in the Treaties might have on the respective competences of the Union and the Member States. The debate would become that much more significant if the Charter were to be incorporated as one of the fundamental elements of a new constitutional Treaty. In such a case the provisions of the Charter would, in JUSTICE’s view, have a higher law status than other Treaty Articles: “The terms of the Charter should be seen as basic principles that inform the EU legal order. Its principles should be a tool of interpretation for other Treaty Articles, and should condition the application of these Treaty Articles where there is inconsistency with Charter rights” (p 79). BEG contended that Charter articles should take precedence over other Treaty Articles in the event of conflict: “This would be consistent with the status normally given to constitutional rights provisions” (p 57).

55. While many witnesses were confident that incorporation of the Charter would not affect the balance of competences (and indeed Statewatch thought the Working Group’s preoccupation with the subject ill-informed and unnecessary), others were less certain. That this issue may have serious political and practical implications can be seen most clearly from the difference of views of the CBI and ICTUR (International Centre for Trade Union Rights) on the possible effects of certain of the Charter’s economic and social rights.

56. ICTUR envisaged the Charter having significant effects in relation to collective labour rights. ICTUR noted that the Charter went far beyond existing EC law, which effectively excluded competence over rights of association and strike action.⁴⁰ ICTUR believed that, if incorporated into the Treaties, the Charter (and in particular Articles 12, 27 and 28) might have an influence on the interpretation of the directives on information/ consultation; might protect the right to take industrial action as against Member State’s duty to ensure the functioning of the single market; might reinforce the immunity for collective agreements from competition law; might permit legislation on the freedom of association and strike action notwithstanding Article 137(6) EC; and, might enhance the legitimacy of framework agreements as a source of legislation (p 76). ICTUR argued that it should be made explicit that the Charter could be used in the interpretation of existing competences and that it should also be possible for the Charter to be a source of competence where the Treaties do not make full provision for the rights guaranteed by the Charter (p 77).

57. Not surprisingly, these were the very sorts of arguments and conclusions about which the CBI expressed strong concern. The CBI believed that there was “a significant risk that incorporation of the Charter would transfer power to the EU on a range of issues which, under the principle of subsidiarity, fall to national governments to determine. For example, Member States specifically excluded issues such as the right to strike and unfair dismissal from the European Treaty because the differing systems of industrial relations which exist across Europe mean that it is more appropriate for these issues to be decided at national level. The CBI expressed concern that radical change might be introduced “through the back door—as a side effect of incorporation of the Charter—rather than specific legislative proposals” (p 63). Three Articles were, in the view of the CBI, so wide in scope as to extend EU competences beyond current agreement: Article 21 (prohibition on discrimination); Article 28 (right of collective bargaining and action); and Article 30 (protection in the event of unjustified dismissal).

58. Article 51(2) of the Charter aims to ensure that the Charter does not create any new power for the Community or the Union or modify any existing one. That Article was the subject of much discussion in the Convention Working Group and the text of the Article has been changed to strengthen it. This has been a major concern of the Government (Q 254).⁴¹

(b) Implications for acts and policies of Member States - impinging upon Member States freedom of action

59. A key issue is the extent to which the Charter would be applicable to acts done by the Member States. This issue was addressed at the time of its preparation. Under Article 51(1) of the Charter, its provisions apply to the Member States “only when they are implementing Union law”.

⁴⁰ Article 137(6) TEC.

⁴¹ See para 49 above.

60. A number of witnesses drew attention to the fact that this limitation was not applied by the ECJ in determining the compatibility of Member States' rules with the ECHR. In the *ERT* case, for example, the Court held that Member States were obliged to comply with fundamental rights when acting "within the scope of *Community law*".⁴² Even that formulation, as BEG pointed out, is capable of differing interpretations. BEG believed that the ECJ would adopt the narrower view of the applicability of the rights contained in the Charter to the actions of Member States (p 58). Professor Arnulf agreed: "Article 51.1 ... goes on to say that the Member States are addressed by the Charter only when they are implementing Union law. That is an embodiment of the effect of the existing case law of the Court of Justice. It is rather a truncated form of the case law of the Court of Justice which I think shows that Member States have to comply with the general principle of respect of fundamental rights either when they are giving effect to a Community act or when they are seeking to invoke a derogation for which Community law provides" (Q 9).

61. Perhaps more problematic is the scope of the Charter itself. Concerns have been raised in relation to "rights" enshrined in the Charter, which are not replicated in either the ECHR or the EC Treaty, and especially in relation to the economic and social rights set out in Chapter IV under the heading "Solidarity". The CBI considered the current text of the Charter to be that "of a political aspirational document which is wholly unsuitable to become legally binding" (p 64). Particular examples could be found in Article 14 (right to education), Article 26 (integration of persons with disabilities), Article 27 (workers' right to information and consultation within the undertaking), and Article 31 (fair and just working conditions). The CBI believed that incorporating the Charter would "inappropriately translate a political aspirational document into a directional instrument with legal status" (p 62).

62. Other witnesses were resistant to any notion that social and economic rights should be declaratory only and to attempts to exclude them from, or restrict their scope in, the Charter. Liberty and the British Institute of Human Rights (BIHR) contended that the "suggestions made by the United Kingdom originate not in a justified or justifiable concern over the limits to those rights but from a persistent and, in the view of these organisations, irrational refusal to recognise that economic, social and cultural rights are exactly that, namely "rights", which are within limits enforceable, rather than mere "ambitions" or "principles". This position is clearly out of step with current thinking on human rights" (p 89). In Liberty's view, any fear concerning the result of allowing economic, social and cultural rights to remain in the Charter was "clearly misplaced" (p 90).

(c) Not in a fit state to be incorporated

63. We asked for views on whether, in view of its form and content, the Charter really was suitable to become legally enforceable. Mr Timothy Kirkhope MEP doubted whether the Charter was in a fit state to be incorporated into the Treaties or any Constitution (Q 80). Fair Trials Abroad believed that the Charter "would not bring any added benefits to the citizen in its current state. To leave the application of the Charter, with its inadequate protection, to be determined over time by the Court of Justice would be less than desirable" (p 68). Professor Toth identified the following as giving rise to problems: "the extremely wide range and varied nature of the rights and freedoms in question; the nature of the corresponding obligations that the Charter imposes on the institutions and the Member States; the wording and lack of enforceability (justiciability) of some of its Articles; possible incompatibility with existing Treaty provisions" (p 110).

64. But while some witnesses saw difficulty and disadvantage in the variety of subject matter, form and character of provisions of the Charter, others disagreed and considered these features to be fully justifiable. Mr Duff said that the Charter "is far broader and wider than any single alternative formulation of rights. It flows from the sources which are stipulated quite clearly in the preamble and the general clauses - from a number of sources, including the corpus of law developed over now 50 years of the European Union which enjoys extensive scope ... It is the breadth of the Charter which brings some of the richness of the Charter" (Q 121).

65. Witnesses accepted that the Charter was not perfect and could be improved. But there was considerable doubt whether its renegotiation would result in anything substantially better. Others strongly resisted the very idea of change. To open up the Charter for amendment, Mr Duff said, "would be a mistake. It would first of all suggest that the first drafting was in some way improper ... Or it was incomplete in its work. Secondly, we feel that we require far more experience of the Charter with mandatory force in practice before we should consider any supplemental amendment" (QQ 106-7).

⁴² Case C-260/89, [1991] ECR I-2925, at para 42.

66. The Convention Working Group concluded that the content of the Charter represented a consensus reached by the previous Convention that should be respected and, excepting the so-called horizontal clauses, should not be re-opened. In Statewatch's view, this conclusion was "unfortunate". There were several provisions that could be improved. "In particular, the access to documents clause could be amended to apply to 'access to information' and to apply to documents held by all EU institutions or bodies. Provisions based on the Fourth ECHR Protocol and the International Covenant on Civil and Political Rights (ICCPR) could be added regarding procedural rights for migrants in expulsion cases. The rule relating to non-discrimination on grounds of nationality could be broadened to take greater account of human rights treaties. As for criminal law, it would be useful to have provisions based on the ICCPR (and ECHR Fourth Protocol) rules on compensation for wrongful conviction and the right to a criminal appeal" (p 103).

(d) Lack of homogeneity—rights, principles, aspirations

67. The Charter contains a mix of provisions, not only as regards subject matter but also as regards the nature of the obligations prescribed. A number of witnesses were particularly critical of the more "aspirational" obligations. On the other hand, Mr Duff said: "Certainly the Charter includes a statement of values and principles as well as classical formulation of fundamental rights. In that it is exactly the same as all the other Bills of Rights that you find in any other constitution that I can find. It is not exceptional" (Q 106).

68. While some provisions of the Charter clearly set out rights (for example, Article 8, the right to the protection of personal data) others have a less normative character and cannot necessarily be given effect by the courts. Professor Toth asked: "How can, for example, the Community or Member State Courts enforce the right to work (Article 15(1)) or the right of the elderly to lead a life of dignity and independence (Article 25)?" Other provisions were still less justiciable for the simple reason that they merely declare ideals and principles without conferring any right or freedom at all⁴³ (p 111).

69. Some Articles might be classed as "principles", to be taken into account by the courts when interpreting the scope of rights in a particular area.⁴⁴ Others were seen as mere "aspirations". Article 37 of the Charter provides that a high level of environmental protection must be "integrated into the policies of the Union". Article 38 states that "Union policies shall ensure a high level of consumer protection". In JUSTICE's view these two Articles appeared to set out "programmatic objectives" rather than judicially enforceable rights. Article 12(2) states that "political parties at Union level contribute to expressing the political will of the citizens of the Union". This appears to be a statement of fact rather than a right. Nevertheless, JUSTICE considered that although such provisions were not likely to provide firm guarantees of protection, they could be used as guiding principles of interpretation by the ECJ (p 78).

70. Baroness Scotland emphasised the fact that the provisions of the Charter were derived from different roots: the constitutional bases of Member States, common constitutional traditions, the ECHR and a number of other treaties (Q 222). The challenge was to separate out "fundamental principles which are justiciable in whole from principles which may be justiciable in part and from principles which are purely aspirational in nature". In the Government's view it was important that the horizontal articles should give "clarity as to what the boundaries are in the way in which they will be implemented" (Q 230).

Incorporating the ECHR into the Treaties in preference to the Charter

71. **It is clear from the evidence received that whether the Charter, in its present form, is suited to be the EU's Bill of Rights is open to question.** The Charter was a political compromise. It contains some rights and duties (for example, those modelled on the ECHR) which are capable of being enforced by courts but it also contains others whose enforceability by courts is problematic. We have therefore considered whether, in any EU constitutional instrument, there should be a more precise focus on those aspects of the Charter that would find their place in a national Bill of Rights. For example, Chapter IV of the Charter deals with such matters as unfair dismissal, placement services and collective bargaining, which though important would normally not find their way into a Bill of Rights and would not normally be justiciable. The ECHR itself could be used as a source of the essential core.

72. We deal below with the issue of whether the EC/EU should accede to the ECHR. A separate question is whether the provisions of the ECHR should be incorporated into the Treaties, or a new

⁴³ See eg Articles 12(2), 22 and 36.

⁴⁴ Q 185.

Constitutional Treaty, as the Union's Bill of Rights. We have no doubt that it would be possible to do this but, as in the case of the Charter, there are arguments for and against.

Incorporating the ECHR—the arguments for

(i) Already well-established common ground

73. The Union already has, in a sense, a Bill of Rights. Every Member State is party to the ECHR and any candidate State must be a party to the ECHR before any negotiations to join the Union can begin. The Treaty on European Union (TEU) already requires the Union to respect ECHR rights "as general principles of Community law".⁴⁵ The restatement of ECHR rights as a Bill of Rights for the Union would give clear definition as to the scope of that obligation. Legal certainty would be increased if an interpretative provision such as Article 52(3) of the Charter were also incorporated. The status of ECHR rights incorporated into the Treaties as part of a new constitution would be enhanced even further by EC/EU accession to the ECHR.

(ii) Known enforceable rights

74. The provisions of the ECHR are all justiciable and have been directly applied in most Member States for many years. There is no question but that the rights set out in the ECHR are enforceable. National courts have experience in applying these rights and they are familiar territory for both EU and national administrations.

Incorporating the ECHR—arguments against

(i) Limited scope of ECHR

75. Other fundamental rights, not to be found in the ECHR, are already recognised at the European Union level. Some of these derive from the fundamental freedoms (of movement of persons, goods, services and capital) set out in the EC Treaty. Others are the economic and social rights that are recognised, and accepted by Member States, in Council of Europe instruments. And there are rights derived from other international human rights instruments, such as the International Covenant on Civil and Political Rights, to which Member States are party. Should the EU and its institutions be obliged to respect the standards set by these instruments as well as those set by the ECHR?

(ii) The Union should have its own Bill of Rights

76. Many Member States have, in addition to their obligations under the ECHR, their own Bills of Rights which in most cases differ to some extent from the ECHR. As Advocate General Jacobs said, "it so happens that the United Kingdom has adopted the text of the Convention in the Human Rights Act, but most of the Member States of the European Union have their own Bills of Rights which are different from the Convention, and in some respects they go further than the Convention. The existence of such a Bill of Rights in the Constitution, which is used for internal purposes of domestic law, is different from the European Convention's functions as an external check, with the respect for Convention rights being subject to review by the European Court of Human Rights in Strasbourg" (Q 163).

(iii) Dynamic but not tailor made

77. Although the language of the ECHR has not been amended, and Protocols have from time to time been added to the Convention, the ECHR has been interpreted in a dynamic manner and has thus been able to adapt to political and social events and developments. It was, nonetheless, to most of our witnesses less attractive than the Charter. Professor Arnulf said: "the Charter has the advantage over the ECHR of being an up to date Bill of Rights which is specially tailored to the circumstances of the Union" (Q 20).

(iv) Would not necessarily avoid confusion and divergence of approach

78. If the ECHR were to be reproduced as a constitutional Bill of Rights in the Treaties this would raise questions about the relationship between the provisions of that Bill of Rights, the ECHR itself and the rights in the Charter. In the absence of EC/EU accession to the ECHR even the addition of an interpretative provision, such as that in Article 52(3) of the Charter, would not prevent divergence.

⁴⁵ Article 6(2) TEU.

Conclusions on incorporation of the Charter

79. **The true measure of the value of an international human rights instrument will be its ability to discourage infringing behaviour and to provide a remedy for the individual in the event of breach. Whether the Charter, as it stands, could do that we doubt. But there might, nevertheless, be some advantages in incorporating the Charter.**

80. First, the Charter contains a comprehensive statement of rights and is tailor-made for the Union. It is, consequently and significantly, more extensive in scope than the ECHR. The Charter includes, for example, economic and social rights. Second, Member States are bound by a number of other international instruments, *eg* the International Covenant on Civil and Political Rights and the European Social Charter. If in the exercise of their powers the EU institutions are expected to meet the standards set by these instruments as well as those set by the Charter and to accord similar protection and safeguards, then any EU Bill of Rights should include not only those core rights contained in the ECHR but also the others.

81. Third, incorporation of the Charter (or the ECHR) into the Treaties would be a simpler and more speedy exercise than accession to the ECHR. As we shall explain in more detail below, the legal and political hurdles would be fewer and lower. Fourth, as Professor Arnulf said, “a constitution for the Union which did not contain a Bill of Rights—and the Charter is probably the best Bill of Rights we have—could be regarded as undermining the statement in an early provision of the Treaty on the European Union that the principle of respect of fundamental rights is one on which the Union is founded” (Q 6).

82. **There are, however, a number of substantial arguments against incorporating the Charter, at least in its present form, into the Treaties.** First and foremost it is doubtful whether the Charter would give citizens any more rights, by which we mean enforceable rights. In a speech to the Convention plenary, Commissioner Vitorino reported that: “all members of the Group either support strongly an incorporation 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”.⁴⁶

83. However, if the Government’s objective, as explained by Baroness Scotland, prevails it is doubtful whether the incorporated Charter would give citizens any greater rights than they have at present. The Government objective goes no further than to make existing rights of citizens under the EU and national laws more visible (Q 259). There would be no new rights and no new remedies. The effectiveness of the Charter rights in curtailing abuse by, for example, the Commission in the enforcement of the Community’s competition rules (an area where the Commission has powers to carry out inspections and impose fines on parties to a cartel) would depend not on anything in the Charter but on “the law” as defined by the ECJ and on existing judicial remedies obtainable either from Community Courts or from national courts.

84. But it is not clear what effect the incorporation of the Charter into the Treaties, or into a new constitution, would be intended to have. It seems to be assumed by some that incorporation would change the status of the Charter and its articles and that new obligations would be imposed thereby on the Union/Community and its institutions, and also on Member States, when implementing Union law. As Mr Duff said: “the advantage of incorporating the Charter would be that judges would have an explicit catalogue which would not be simply as it is a source of reference for them but a more central source of reference, clearer, more straight forward, more explicit” (Q 111).

85. **We have detected a clear divergence of opinion as to the intended effect of incorporation.** The Government’s view, no doubt shared by many, does not accord with that of some other commentators. **It is, in our view, essential, if the incorporation option is chosen that there should be agreement and clarity as to the intended effect of incorporation. In the absence of that agreement and clarity, pronouncements by the Courts, and in particular by the ECJ, may give to the incorporated Articles an effect not intended by some Member States.**

86. The Charter contains rights, principles and aspirations. But it is not always easy to determine which a particular Article is and therefore what its consequences might be. Baroness Scotland said that the Charter “was not drafted with the precision that one would wish to see if it was going to be justiciable in all its parts and was going to be legally enforceable”. The Minister explained how the Working Group had sought to remedy the position. First, a great deal of work has gone into strengthening the horizontal articles in the Charter. Second, the Working Group has recommended that there should be a specific nexus created between the Charter and the commentary, prepared by the praesidium of the earlier Convention (Q 224).

⁴⁶ Summary report of the plenary session—Brussels, 28 and 29 October 2002. Doc. CONV 378/02, at page 7.

87. It is important, if incorporation of the Charter is the chosen option, that the Charter be accompanied by an authoritative commentary/interpretation to which reference can be made. The purpose of such a document would be, first, to identify the source of a "right" and, second, its status (an enforceable right, a principle which might be used to guide the interpretation of EU legislation, or merely a statement of political aspiration). Taken with the proposed amendment of the horizontal clauses, the commentary should make the integration of the Charter into the text of the Treaties much more workable in practice, potentially saving much argument and even litigation. The horizontal clauses and the commentary together should also help to curb any "competence creep" by the Union, though the potential dynamic effect of an incorporated Charter should not be underestimated.

The horizontal clauses

88. Chapter VII of the Charter is entitled General Provision and contains the so-called horizontal clauses. There are four: Article 51, defining the scope of application of the Charter; Article 52, setting the scope of the rights guaranteed by the Charter; Article 53, maintaining the level of protection currently afforded by international, Union, and national laws; and Article 54, prohibiting any abuse of Charter rights.

The horizontal clauses with the amendments (shown in bold print) proposed by the Convention Working Group

Article 51–Scope

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].**

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].**

Article 52–Scope of guaranteed rights

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

2. Rights recognised by this Charter which are based on the Community Treaties or the Treaty on European Union shall be exercised under the conditions and within the limits defined by those Treaties.

3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

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.

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.

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

Article 53–Level of protection

Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union, the Community or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 54–Prohibition of abuse of rights

Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.

89. The Working Group has proposed certain amendments to the horizontal provisions of the Charter in order to meet concerns of legal certainty and help ensure a smooth incorporation of the Charter as a legally binding document. It has proposed that Article 51(2) should be strengthened in order to make clear that incorporation of the Charter would not lead to an extension of the Union's competences; a new Article 52(4) would be inserted to make clear that Charter rights based on the Member States' common constitutional traditions will be interpreted "in harmony" with those traditions; and that a new Article 52(5) would clarify the distinction between "rights" and "principles" in the Charter.

90. The Government is looking at the detail of the proposed horizontals (Q 219). It is clear that they provide the key to a resolution of some of the problems surrounding the Charter: most notably the avoidance of any "competence creep" from the Member States to the Union; the relationship between Charter rights and ECHR rights; the lack of homogeneity in the text of the Charter (the "rights"/"principles" question); and the relationship between the Charter and national constitutions.

91. In our opinion, however, it is, in principle, unsatisfactory that the rights of the individual should, in effect, be curtailed by the horizontal clauses. Such an approach scarcely serves the interests of transparency or makes those rights more visible to the citizen. On the other hand, the horizontal clauses provide significant advantages for legal certainty as regards the definition of competences.

92. It is essential to ensure that the horizontal clauses are as clear and unambiguous as possible. The horizontal clauses have an important role to play in identifying both the content and scope of the Charter. What they say as regards, for example, the relationship between Charter rights and ECHR rights will be crucial in determining the overall acceptability of the Charter. The Government is right to be looking at the detail.

The Commentary

93. An explanatory note or commentary was prepared, though not formally published with the Charter. That note⁴⁷ begins: “These explanations have been prepared at the instigation of the Praesidium. They have no legal value and are simply intended to clarify the provisions of the Charter.” There follows the text of the Charter. After each Article there is a brief note describing the source of the particular rights and, sometimes, the intended effect of the provision. As Baroness Scotland explained, when the Charter was put forward at Nice the commentary was not incorporated with it because some Member States (but not the UK) considered that it was merely a commentary of the praesidium which had no legal force or effect. In the Charter Working Group there has been much discussion as to what needed to be done with the commentary and there was an agreement that it needed to be given a more formal and enhanced status with a more direct link to the Charter. The Working Group recommended that the legal explanations of the Charter provisions supplied by the praesidium to the original Convention should be supplemented and be published (Q 237).

94. We agree that if the Charter is to be incorporated into the Treaty there is a need for an authoritative commentary or “interpretation”. This would be helpful not only in identifying the origin of particular articles but also in determining their legal status. The commentary should be published and be readily available to the citizen and the courts.

Charter should not extend EU competence

95. What is clear is that the Charter was not, and is not, intended to extend the competence of the Union or the Community. That appears from Article 51(2): “This Charter does not establish any new power or task for the Community or the Union, or modify powers and tasks defined by the Treaties”. Further, as Statewatch has pointed out, there is a line of cases in which the ECJ has refused to rule on human rights issues where there was no link with EC Treaty rules or EC legislation.⁴⁸ There was nevertheless much discussion of competence issues in the Convention Working Group, leading to the proposal that Article 51(2) should be strengthened.

96. The position must be as certain and free from argument, legal or political, as possible. We support the stance being taken by the Government in this context as regards both the horizontal clauses and the commentary. The latter currently states: “Paragraph 2 confirms that the Charter may not have the effect of extending the competences and tasks which the Treaties confer on the Community and the Union”. That should be amended to make clear that the Charter is not intended to extend the competences of the Community and the Union and does not in fact do so.

Limited application to acts of Member States

97. An incorporated Charter would only apply to EU activity, and would principally be addressed to the institutions and bodies of the Union. In relation to a matter outside Union competence, and where Member States retain control and responsibility, individuals will not necessarily be without rights. But whether rights and remedies flow from the Charter, the ECHR or another international instrument, or from a national bill of rights will depend on the particular circumstances and the domestic laws of the Member State in question. The overlap of the rights derived from the Charter and those derived from the ECHR may in practice make the division of competences somewhat academic

⁴⁷ Doc CHARTE 4473/00. CONVENT 49. 11 October 2000.

⁴⁸ Cases 12/86 *Demirel* [1986] ECR 3719; C-159/90 *Grogan* [1991] ECR I-4685; C-144/95 *Maurin* [1996] ECR I-2909; C-299/95 *Kremzow* [1997] ECR I-2629; C-291/96 *Grado and Bashir* [1997] ECR I-5531; C-309/96 *Annibaldi* [1997] ECR I-7493.

but nonetheless significant as regards the remedies available to the individual and the court in which they can be secured.

98. We do not believe that the Charter is intended to change the scope of application of Community law (including the protection of fundamental rights as general principles of Community law). The explanatory notes prepared by the Praesidium of the Charter Convention make this clear. The wording of Article 51 (1) of the Charter is based on the ECJ's judgment in *Karlsson*: "the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules".⁴⁹ **The Charter's impact on Member States' freedom of action is therefore circumscribed. It is not intended to fetter the powers of Member States outside the field of Community/Union law to pursue whatever policies they choose. A statement to that effect could usefully be included in the revised explanatory notes.**

99. The greater concern is the broader one, flowing from the wide scope and content of the Charter, as compared, say, to the ECHR. The risk is that the rights, principles and aspirations set out in the Charter will in practice impinge on national policy and practice and limit the freedom of action of Member States even in areas that remain clearly within their competence. It may prove difficult for a Member State to resist pressure to change and to align itself with the Charter where the latter appears to give the citizen/individual greater rights or privileges than the existing domestic regime. Where competences are mixed and even where the Union only has a complementary/supporting competence (eg public health, education), the "higher" Union standard will inevitably exert pressure on national governments. This is likely to be so particularly in the areas of employment and social policy. Some pressure is already present by virtue of the very existence of the Charter. That pressure would inevitably become greater if the Charter were to be incorporated into a constitutional Treaty for Europe. **It is doubtful whether the horizontal clauses or the commentary can provide comfort here, but no doubt the Government will be considering the possibility of further strengthening the horizontal clauses and commentary.**

Incorporation—warts and all

100. The question of the legal status of the Charter was left open at the time of its preparation. But, as Professor Arnall reminded the Committee, the Charter was drafted in a form that could be made legally binding. To have drafted it otherwise would have been to pre-empt the decision by the European Council at Nice as to whether it should be legally binding (Q 29). The text has subsequently come in for some substantial criticism. The general view, however, is that notwithstanding any faults it may have the Charter should not be opened up for renegotiation. But the present position is that serious consideration is being given to incorporating a document which is generally agreed to be in some respects unsatisfactory and at least capable of improvement. Further, even if the Charter is not entrenched, as bill of rights rules sometimes are in constitutional instruments, it will be very difficult to achieve any amendment in the future. The full rigour of the Treaty amendment process would have to be undergone.

101. Ideally, the Charter should be in an appropriately revised form before it becomes part of any EU constitution. That said, we have to have an eye for the political realities and we note that the majority of witnesses concluded that the present text of the Charter is workable and sufficiently satisfactory for the time being. **To reopen the entire process of negotiating the Charter would probably not lead to any substantial improvement and might be seen as a wrecking tactic. There is, however, general agreement that there may need to be some amendment made to the horizontal clauses. Given the paramount importance of those clauses, that is welcome.**

⁴⁹ Case C-292/97, [2000] ECR I- 2737, at para 37.

PART 4: ACCESSION TO THE ECHR

Introduction

102. The two main proposals on the table are, first, that the Charter should become a Bill of Rights for the European Union and, second, that the European Union should accede to the ECHR. These proposals are not necessarily exclusive of each other, though given the close relationship of their subject they fall to be considered together in any debate on the future of the Union.

103. The Report of the Working Group has produced a clear, but limited, recommendation on the issue of accession to the ECHR. The Working Group construed its terms of reference narrowly and its Report has stressed that it is not for the Convention to decide whether the Union should accede to the ECHR but only to decide whether the Treaties should be amended to provide the power (“a constitutional authorisation”) to accede. It would then be for the Council, by unanimity, to agree to accede. Agreement to accede would have to be preceded by agreement on the necessary technical modalities and also on the additional protocols of the ECHR to which the Union should accede.⁵⁰

104. Commissioner Vitorino, who chaired the Working Group, reported to the Convention Plenary that all members of the Group either strongly supported or were ready to give favourable consideration to a Treaty amendment creating a constitutional authorisation enabling the Union to accede to the ECHR. The Group also stressed that incorporation of the Charter and accession to the ECHR were not necessarily alternatives, but could be regarded as complementary steps to be taken in order to achieve full respect of fundamental rights by the Union. Incorporation and accession would lead to a situation analogous to that in Member States, which both protect fundamental rights and at the same time have subscribed to the external control of the Strasbourg Court.⁵¹

Views of witnesses

105. The majority of witnesses favoured EU/EC accession to the ECHR. Liberty described accession by the Union to the ECHR as “the most important step that could come out of the work of the Working Group and the Convention, as it would ensure a uniform minimum level of protection across Europe irrespective of the legal actor (*ie* Member State or EU institution) involved” (p 83). Some believed that accession to the ECHR should have priority over incorporating the Charter into the Treaties. The CBI saw EU accession to the ECHR as a better way to improve human rights protection in the Union than changing the status of the Charter. “This would make the EU institutions accountable for considering human rights (or face an adverse judgment of the Strasbourg Court), but avoid the problems of conflicting with the current structure of human rights protection or expanding the judicial competence of the ECJ” (p 62).

106. But not all witnesses thought that accession was an essential step. Professor Toth contended that if the Charter were incorporated into a new Constitution, accession of the EU or the EC to the ECHR would be “neither necessary nor even desirable” (pp 114-115). But most witnesses supported EU/EC accession to the ECHR and saw it going hand in hand with strengthening the Charter and providing a number of clearly identifiable benefits for the Union and its citizens.

107. Baroness Scotland described the Government’s position on the question of accession: “we are neither for nor against accession at this moment. We can see the case for it but equally we can see problems that could make accession do more harm than good” (Q 240). The Government “are not convinced that accession is vital” (Q 259). They were, however, actively considering whether there should be accession and, if so, in which form (Q 249).

*The benefits of accession**(i) Incorporation of the Charter in no way diminishes the importance of accession to the ECHR*

108. Professors Schermers and Lawson, Faculty of Law at the University of Leiden, noted that virtually all continental States have included in their constitutions fundamental rights, which domestic authorities must respect. Statements of fundamental rights in national constitutions may differ from the ECHR. If an individual complains of a violation of his rights under a constitutional provision that does not have an equivalent in the ECHR, then he will have no further remedy if the domestic court rejects his complaint. If, on the other hand, the right alleged to have been violated also forms part of

⁵⁰ Report of Working Group II. Doc. CONV 354/02, at page 13.

⁵¹ The European Convention. Summary report of the plenary session. Brussels, 28 and 29 October 2002. Doc. CONV 378/02.

the ECHR, then an appeal to the European Court of Human Rights will be possible after exhaustion of the domestic remedies (p 95).

(ii) Subjecting the Union, its institutions and bodies to a specialist external arbiter

109. JUSTICE urged EU accession to the ECHR in order “to ensure the best possible protection of human rights within the Union”. Accession would bring the EU institutions within a well established regional human rights system. By the acceptance of scrutiny by an independent court, the European Court of Human Rights, accession would ensure consistency in providing protection to a high standard of civil and political rights in Europe (p 79). Statewatch said that “it would reassure citizens (and national courts) that the Union is not ‘above the law’ as far as human rights are concerned, an assurance necessary in particular as the Union’s competences expand well beyond economic integration to include security issues where human rights concerns are more frequent” (p 103). Accession would give citizens protection *vis-à-vis* acts of the Union analogous to that which they already enjoy *vis-à-vis* acts of Member States.

(iii) Unifying effect of common external control

110. Accession of the European Union to the ECHR would result in all European legal orders being subject to the same supervision in relation to the protection of fundamental rights. Professors Schermers and Lawson considered that this would be advantageous to the unity of Europe. Any alternative to accession might appear to constitute a refusal of the Union to accept the general supervision which all European States have accepted. (para 6). The Working Group believed that accession would be a strong political signal for coherence between the Union and the "greater Europe".

(iv) Removing conflicts and inconsistencies

111. There have, on occasion, been divergent interpretations of the ECHR by the Strasbourg Court and the Community Courts. Judge Fischbach said: “there is a probability that the Charter will generate a new dynamic and that there will be in the future far more requests for preliminary rulings in Luxembourg So you see the danger, the risk that there may be more and more divergency in the interpretation of the same Human Rights” (Q 199). Accession would remove the risk and strengthen Community law as a result (BEG pp 58-60). Merely incorporating the Charter including its ECHR based rights (read in accordance with Article 52(3)) would not achieve the same result because, Professor Arnall said, the Community Courts could get it wrong (Q 47). Accession would therefore increase legal certainty and would serve to strengthen the autonomy of both the Luxembourg and Strasbourg Courts.

(v) Enforcing ECHR obligations

112. EU measures are already to some extent subject to ‘indirect review’ in Strasbourg (Statewatch p 103). Accession would permit the EC/EU to defend itself directly before the Strasbourg Court. Judge Fischbach said that accession would enable the institutions of the Union to participate fully in Strasbourg proceedings in which Union law was at issue (Q 197). Liberty argued that it would be beneficial for the EC/EU to become a Contracting Party if only to enable it to represent the interests of the EC/EU (and its responsible institutions) directly in proceedings before the Strasbourg Court and to implement obligations under the ECHR by means of EC law rather than through the (sometimes inappropriate) medium of the respondent Member State(s) (p 86).

(vi) Removing an apparent double standard

113. Judge Fischbach referred to “a growing contradiction between the obligations which the Union seeks to place on certain third countries in connection with development aid or other association agreements and the absence of the external control and the external review of decisions of the Union itself”. Moreover, it was not logical that ratification of the ECHR by candidate countries was a precondition for Union membership but the Union itself was not subject to such review and control (Q 197). JUSTICE said that accession would strengthen the EU's credibility in the human rights field (p 79). Contrariwise, as the Immigration Law Practitioners’ Association (ILPA) and the Advice on Individual Rights in Europe (AIRE) Centre noted, accession would not preclude the Union from giving protection via the Charter to a greater range of rights than were protected under the ECHR. Nor would it preclude the Union from protecting traditional civil and political rights at a higher level than the ECHR’s minimum level of protection (p 73).

Potential problems and difficulties ahead

114. Even if the case for accession were to be accepted by all Member States there would remain a number of major and difficult legal and political hurdles to overcome.

(a) EU or EC accession/the legal personality question

115. The majority of witnesses supported EU, not simply EC, accession to the ECHR. Statewatch said: "Accession by the full Union is important because the internal security aspects of the Union Third Pillar raise obvious human rights issues and the external security aspects of the Second EU Pillar can fall within the scope of the ECHR in certain cases, for example where an EU force controlled part of the territory and/or administration of an area outside the EU" (p 104).⁵² **We agree. In principle it is desirable that all EU activities, whatever the Pillar, should be subject to the supervision of the ECHR. There should be no distinction between the Community and the Union as regards compliance with fundamental rights. Therefore accession should be by the EU. But this presupposes that the EU could, as a matter of international law, accede if there were a political decision to do so and raises a question as to the legal status of the Union, and in particular whether it has the requisite legal personality to accede to an international treaty.**

116. A separate Working Group was set up in the Convention to consider the question of the legal personality of the Union. The present position is that the Treaties expressly provide that the Community has legal personality (Article 281 TEC), as has Euratom (Article 184 EAEC). But there is no such provision in relation to the Union. It has been argued that the Union has, as a matter of international law, legal personality by virtue of certain actions it has power to take. However, the better view would seem to be that the Union does not have legal personality and that amendment of the Treaties would be needed to confer it.

117. The Convention Working Group on legal personality supports the view that the Union should be explicitly given legal personality.⁵³ The Group's principal recommendation is threefold:

- ≠ the European Union should explicitly be given legal personality;
- ≠ that personality should replace the existing personalities of the Community and of Euratom;
- ≠ there should be a single legal personality for the European Union.

118. It would follow that the Union, as a legal person subject to international law, would be able to become a party to treaties and other international agreements (eg the ECHR), to sue and be sued, and to be a member of international organisations. There would also, the Working Group recognised, be possible implications for the "architecture" of the Union. The creation of a single legal personality for the Union would enable the different treaties on which the Union and Communities are now based to be merged into a single Treaty. The Group believed that to preserve in a single Treaty the current "Pillar" structure would be anachronistic. Conferring legal personality on the Union would not *per se* entail any amendment to the division of competences, either between the Union and the Member States or between the Union and the Community. The Working Group was, however, careful not to prejudge the outcome of the current discussions in the Convention, and in particular within the Working Group on External Relations.

119. We support the conclusion of the Working Group that the EU should have legal personality. It should, as we have recommended above, be the Union that accedes to the ECHR. On the question whether the distinction between the Union and the Community should go and the three Pillars be collapsed into one, we note that a merger of the Union and the Community into one single legal entity would not necessarily imply that a single Community method had to be followed in each policy area. Inter-governmentalism, which characterises activity in both Second and Third Pillar areas, could remain notwithstanding fusion of the Treaties and of the Pillars. Whether such an outcome would be any more comprehensible or any easier to explain to an outsider is, however, highly debatable.

(b) Member States' reservations

120. Much technical work has already been done on the question of EU/EC accession to the ECHR. A Steering Committee of the Council of Europe has prepared a detailed report on the legal and

⁵² Statewatch gave as an example the case of *Bankovic v UK*, before the Strasbourg court. [2002] EHRLR 775.

⁵³ Final report of Working Group III on Legal Personality. Doc. CONV 305/02.

technical issues to be resolved before any political decision could be taken.⁵⁴ The ECHR itself would need to be amended and this would require the consent of all Contracting Parties.

121. A particular problem, not addressed in the Council of Europe's report but identified by the Government, is that of individual Member States' reservations from certain of the ECHR articles. Although all Member States are party to the ECHR it is permissible under Article 57 ECHR for contracting parties to make reservations when signing the Convention. Many States have also made declarations. Further, the ECHR allows States, in certain circumstances, to derogate from its provisions (eg Article 15—Derogation in time of emergency). A number of Member States have made reservations and declarations. Baroness Scotland asked: "How do you incorporate those reservations in relation to protocols and other articles of various Member States in such a way that you reflect what they have in fact agreed to? We have not at the moment come up with a way you can do that and therefore we are not for accession, we are not against accession. We simply pose certain questions as to how practically it could be done without doing violence to the Member States' reserved positions in various ways." (Q 223).

122. **We do not understand why, if the European Union were to accede to the Convention, the Member States could not themselves agree upon any qualifications or reservations upon accession.** Since Union accession would be restricted to matters within Union competence it is not apparent why Union accession should affect Member States' reservations. This was put to the Minister. She replied: "I am not suggesting that it is impossible. What we say is that it is difficult and those issues would have to be overcome. So far no-one has so far found an efficient and effective way to overcome them. I am not suggesting that they cannot be overcome All I can say is that at the moment we do not see a clear way of how to do it" (Q 226).

123. To assist our own understanding we have prepared a table setting out the reservations and significant declarations and derogations made by Member States. The table is printed in Appendix 3 to this Report. That table indicates that the reservations and the decisions not to ratify certain protocols are attributable to features of national law. These reservations and decisions would stay in place, even if the EU were to accede to the ECHR. If the EU were to consider accession to the ECHR, the Member States would have to agree on the reservations (if any) to be made by the Union. The EU would also have the right under Article 15 ECHR to make specific derogations. These, too, would have to be agreed by Member States. But any such reservations or derogations would apply only in relation to European Union law. There would be no need to include in the new EU reservations any national reservations that had no applicability to EU law. **It is clear that further and detailed consideration needs to be given to this issue, not least to determine whether it is simply a political problem or whether there are genuine legal difficulties to overcome. Our present opinion is that the legal difficulties are overstated.**

(c) The autonomy of the Community legal order

124. Professor Toth argued forcefully that accession by the EU to the ECHR would endanger the autonomy of the Union's legal order by subjecting the ECJ to the control machinery established by the ECHR and, in particular, to the jurisdiction of the Strasbourg Court. This, he argued, would be incompatible with the role of the ECJ as the final interpreter of EU law and the supreme guardian of legality in the EU (p 114). Moreover, Strasbourg might find itself ruling on the division of competences between the EU and the Member States. This, too, would be incompatible with EU law (p 114).

125. But Professor Toth's view was not shared by other witnesses, including the Government.⁵⁵ Further, the Convention Working Group concluded that accession by the Union to the ECHR posed no threat to the principle of autonomy of Union law or to the authority of the ECJ. As Judge Fischbach explained, the nature and content of the rights established by and protected under the ECHR would not change by the mere fact of being applied within EC law, whether with or without incorporation of the Charter. The Strasbourg Court "by virtue of the subsidiarity principle" was not allowed to interfere in the legal systems of Contracting Parties. Nor would it be allowed to interfere in the Union legal system. Strasbourg review would be restricted to assessing whether an EU measure was consistent with the ECHR. In making that assessment the Strasbourg Court would leave the Union a 'margin of appreciation' allowing special features of Community law to be taken into account. Where the EU measure was contrary to the ECHR, the Court would merely deliver a finding of a breach, but would not itself be able to annul or amend the measure in question or to tell the Union what measure to take

⁵⁴ *Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights*. Report adopted by the Steering Committee for Human Rights (CDDH) at its 53rd meeting (25-28 June 2002). Doc DG-II (2002)006.

⁵⁵ Q 242.

to remedy the matter. The Union, like the Member States, would be able to decide, with no encroachment on its powers, how it would go about complying with the Strasbourg Court's judgment (Liberty p 86).

126. We agree with the majority view. The autonomy of the Community legal order would not in our opinion be endangered by EU accession to the ECHR. The Strasbourg Court would have the last word on what ECHR rights mean and require, whether inside the Union or outside it. Strasbourg would be able to examine whether EU law and acts conformed with the ECHR. But the ECJ would remain the final judge on questions of EU law and the validity and lawfulness of Union acts.

(d) The relationship of the Strasbourg and Luxembourg courts

127. In the United Kingdom we have incorporated the ECHR into our domestic law, but that does not mean that the Strasbourg Court is the final court of appeal in these areas. Our courts are required under the Human Rights Act 1998 to take account of its decisions, but they are not obliged to follow them if, for whatever reason, it is thought that they ought not to be followed. On the other hand, UK courts, and all other Member States' courts are obliged to follow and apply Luxembourg decisions. So what, if the Union acceded to the ECHR, would be the relationship between the Strasbourg Court and the Luxembourg Court?

128. Most witnesses took the view that the relationship of the Strasbourg Court to the Luxembourg Court would be the same as its relationship to the United Kingdom courts. Advocate General Jacobs said: "it would be the final court under international law whose decisions would be binding in the instant case on the European Union if it was a case involving the European Union, or on the United Kingdom if it was a case in the United Kingdom. However, its decision in terms of its general jurisprudential authority would be the same in Luxembourg as it would be in the United Kingdom. There would therefore be no change, I think, in the position of the Strasbourg Court in relation to United Kingdom courts." (Q 170). Similarly the Luxembourg Court would not be bound by the Strasbourg Court's decisions. Advocate General Jacobs added: "I think in practice the Luxembourg Court would be very concerned to follow the Strasbourg Court's decisions, just as I am sure the United Kingdom courts would be, but they would not be formally binding, they would be formally binding only under international law on the Union or the United Kingdom respectively" (Q 171).

129. Professor Toth believed that the analogy was a false one. "The proper comparison to be drawn is not between the ECJ and the national Constitutional Courts (since they are not on the same level), but between the ECJ and the ECtHR. They are both supranational Courts of equal rank, status and calibre, standing at the apex of their respective supranational legal systems. Both Courts consist of equally highly qualified judges, representing not one national legal system but the legal systems of all the Members States and Contracting Parties. Both Courts use similar methods of Treaty interpretation and their decisions enjoy the same high respect and authority. Just as it would be inconceivable to subject the ECtHR to the jurisdiction of another international court (*eg* the International Court of Justice), it would be highly undesirable to subordinate the ECJ to an external court which could override/reverse its decisions. This would undoubtedly weaken the ECJ's authority in the eyes of the national courts and thereby undermine the coherence and unity of the whole EU legal order" (p 115).

130. We take the view that the position of the ECJ would be analogous to that of national constitutional or supreme courts in relation to the Strasbourg Court. The ECJ would remain the final court on questions of European Union law; the Strasbourg Court would be the final court on questions of ECHR law. There would not be a conflict between them any more than there is a conflict between the House of Lords and the Strasbourg Court when interpreting the ECHR.

The domestic remedies rule

131. EU accession to the ECHR plus incorporation of the Charter may give rise to practical problems of delay and costs. Under the domestic remedies rule, parties must have exhausted all their domestic remedies before the Strasbourg court will entertain their plea. As Professor Arnall pointed out, the domestic remedies rule would not present a problem in all cases. In direct actions (*ie* where the Community institution was defendant in the Community Courts) the domestic remedies rule would be exhausted relatively speedily because there would be only two levels, CFI and ECJ. In cases brought in the national courts the time taken in exhaustion of domestic remedies would depend on how the rule was to be interpreted. If a national court of first instance made a reference to Luxembourg and the Luxembourg ruling determined the fundamental rights point, that might mean, for Strasbourg purposes, that the domestic remedies could be regarded as having been exhausted at that stage, without the necessity for the case to be taken back to the national courts (QQ 50-2). **This is a matter which could usefully be clarified in the instrument of accession.**

Problem that both courts are overburdened with a backlog of cases

132. Both the Community Courts and the Strasbourg Court are overburdened and substantial delays now face litigants.⁵⁶ Any development which led to an increase in the volume of litigation would make a bad situation even worse. One remedial possibility that has been suggested would be to allow any ECHR/human rights point arising in litigation on issues of EU law to be taken speedily to Strasbourg by some kind of reference procedure. But as witnesses pointed out, there might be problems in separating out ECHR/human rights points and, in any event, a decision by the ECJ on the EC/EU law points might be sufficient to resolve the case. Professor Arnall was not convinced of the utility of a reference procedure from Luxembourg to Strasbourg, because of the delay it would cause to the normal reference procedure from Member State to Luxembourg. If delays appeared likely to be excessive the national judge might try to decide all the points himself, possibly undermining the preliminary rulings procedure which was the cornerstone of the internal market (Q 59).

133. It is nonetheless necessary that something be done to prevent an extra load of litigation before either the ECJ or the Strasbourg court from inflicting additional costs and delay on litigants. Both the ECJ and the Strasbourg Court are alert to the problem and Judge Fischbach told us that quite radical solutions were being considered, including the creation of a court of first instance at Strasbourg (Q 201). It seems clear to us **neither Luxembourg nor Strasbourg can continue to take on more and more work without substantial increases in resources and changes to their respective procedures.**

Re-appraising the case for accession

134. The final sentence of the Conclusion to our earlier Report stated: "The question of accession by the Union to the ECHR should be on the agenda for the IGC". We are therefore pleased to see that the issue has been taken up in the Convention on the Future of Europe, paving the way for the IGC scheduled to begin later this year.

135. Our view remains that **accession to the ECHR is the best way to guarantee a firm and consistent foundation for fundamental rights in the Union.** The case for Union accession to the ECHR remains a very strong one. As the Government acknowledged, there is already a growing divergence between the human rights jurisprudence of the ECJ and that of the ECHR. With the growth of both Community and Union laws affecting the individual, there is an increased scope for further and greater divergence. To give the ECJ the final say on human rights issues would enhance the risk of conflicts of jurisprudence with the Strasbourg Court. Avoidance of this risk should be a priority. Further, as we said in our earlier Report, the Strasbourg Court as an external final authority in the field of human rights can bridge the gap which exists in the protection of those rights in the Union.

A combination of the Charter and accession to the ECHR

136. It is significant that most of those who are advocating accession do not see it as an alternative to the inclusion or the incorporation of the Charter. They see it as an addition. The Government's view was that there were "certain inherent conflicts in trying to do both. Both may be possible and we have to be very careful about how we construct such a possibility" (Q 249). But, as Statewatch pointed out, we are not being forced to choose between an enhanced status for the Charter and accession to the ECHR (p 99). Integrating the Charter into the Treaties would not prevent or restrict accession to the ECHR. And although Article 52(2) of the Charter (one of the horizontal clauses) is intended to regulate the relationship of the Charter and the ECHR, whether that clause would be sufficient to avoid divergent interpretations in the application of the ECHR has been questioned.⁵⁷

137. Accession by the Union or Community to the ECHR would require not just the unanimous agreement of EU Member States but the agreement of all contracting parties to the ECHR. This might take some years to negotiate and conclude. There are technical problems to overcome and it would be necessary first for all parties to the ECHR to agree the changes and second for those changes to be ratified by the Contracting Parties in accordance with their national constitutional requirements. It is by no means a foregone conclusion that negotiations would succeed, or that ratification would take place, or that the process would be speedy. Negotiations could not begin until the Union/Community

⁵⁶ In the first seven months of 2001, 20,739 applications were received by the Strasbourg Court. The number of applications has also risen steeply in recent years (553% in the period between 1988 to 2000). See *Structures, procedures and means of the European Court of Human Rights*, a report of the Council of Europe Committee on Legal Affairs and Human Rights, 17 September 2001. At the recent Thomas More Lecture at Lincoln's Inn on 17th October 2002, Sir Nicholas Bratza, the UK judge at the Strasbourg Court, said that the current backlog of cases was approximately 30,000.

⁵⁷ See the Council of Europe's recent report, *Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights*. Report adopted by the Steering Committee for Human Rights (CDDH) at its 53rd meeting (25-28 June 2002). Doc DG-II (2002)006, at para 80.

had been given the necessary powers to accede and the Council had agreed the mandate to commence the negotiations. But, given the political will, these difficulties would not prevent preliminary work being put in hand earlier.

138. By contrast the Charter could be integrated into the Treaties at the next IGC and could take its place as the EU Bill of Rights at the same time as Member States ratify the new EU Treaty. **We agree that for these reasons integration of the Charter should go forward, provided sufficient safeguards for the ECHR and for Member States' competences can be secured via the horizontal clauses, bolstered by the commentary.**

PART 5: REVIEW OF ECJ JURISDICTION AND OF REMEDIES

Introduction

139. As mentioned above the general assumption of witnesses supporting incorporation of the Charter was that Charter rights would thus become legally enforceable. The citizen would have a remedy if his rights were infringed. While the increased visibility of the Charter rights seems to be the only objective of the Government, the majority of witnesses expect more. As Professor Gaja commented forcibly, “The solemn proclamation in December 2000 of a set of fundamental rights and now the incorporation of the Charter make little sense if no adequate remedy is offered to aggrieved individuals in case of breach. It is regrettable that a more practical approach has not yet been taken, as if the difficult question of providing adequate judicial remedies for the protection of fundamental rights were only a secondary matter” (p 69).

140. The final section of the Report of the Working Group addressed the question of access to the European Court of Justice. The Group rejected the notion of a special procedure for dealing with fundamental rights issues. The Group drew the attention of the Convention to the need to consider possible reform of the conditions under which individuals may bring cases before the Court (Article 230(4) TEC) together with reform of other issues, such as the present limits to the Court’s jurisdiction in Third Pillar matters. The Group commended the topic for further examination by the Convention “in an appropriate context”. Mr Duff said: “There has been a big reflection on the matter but the question of improving citizen’s individual access of course has got much broader ramifications than simply the Charter so they have postponed, as it were, a decision on this for the plenary of the Convention” (Q 135).

141. Most witnesses agreed that the incorporation of the Charter, with or without accession to the ECHR, rendered it necessary to reform the system of remedies available under Community law. The Government, on the other hand, did not see incorporation of the Charter as necessarily giving rise to the need to improve remedies. Since, in the Government’s view, there would be no intention to create any new rights, there would be no need for any new remedies (Q 254).

142. Accession to the ECHR, however, would lead to new remedies. Subject to the exhaustion of remedies rule,⁵⁸ the individual would be able to make an application to the Strasbourg Court complaining of a breach of the ECHR by the EU, acting by one or other of its institutions or bodies. And where an individual complained of a breach of the ECHR by a Member State implementing EU law, accession would, as mentioned above, enable the EU institutions to play a full role in the proceedings before the Strasbourg Court and, if so advised, to defend their actions directly. **If incorporation of the Charter is to confer any real benefit on individuals, the rights that will have been created will need effective remedies in order to give those rights substance and make them meaningful.** The issues are twofold: the jurisdiction of the ECJ; and, second, remedies that are practical and effective.

(i) The jurisdiction of the Court of Justice

143. As Statewatch pointed out, a change in the legal status of the Charter would not *per se* remove the current limitations on the jurisdiction of the Court of Justice (p 98). Nor would accession to the ECHR do so (p 99). Professor Simitis said: “The solution of conflicts resulting out of the application of the Charter can neither be left to the ECHR nor to the courts of the Member States. It must as in the case of Article 220 of the EC Treaty be exclusively reserved to the European Court of Justice. Only then a both consistent and binding interpretation of the Charter guided by the knowledge of the European Union’s goals and tasks can be secured” (p 79). Other witnesses emphasised the need for the Court of Justice to have jurisdiction to apply an incorporated Charter. Advocate General Jacobs said: “it would make little sense to have a Charter of fundamental rights which had legal effect, if there were not supporting remedies available for individuals who claimed that their rights had been violated” (Q 174). As he and other witnesses made clear, some substantial changes would be needed if the Charter were to be given legal force or the EU were to accede to the ECHR.

144. There are two major areas where any substantive, not merely cosmetic, incorporation of the Charter into the Treaties would impinge upon the current limitations of the jurisdiction of the Community Courts. Were the Charter to become legally binding on the institutions and bodies of the Union across the whole area of EU law, the ECJ’s jurisdiction would have to be extended in relation to those areas where it is at present restricted, *ie* Title IV TEC (Justice and Home Affairs) and Title VI TEU (Third Pillar), or where it is excluded (Second Pillar). The starting point, recommended by

⁵⁸ Described at para 131 above.

Advocate General Jacobs, is that no matter should be automatically *a priori* excluded from judicial review (Q 180). That proposal, we believe, would present a major political challenge to the governments of Member States.

Common Foreign and Security Policy

145. The proposal that the Court should have jurisdiction over foreign policy seems, at first sight, a radical one. But as Advocate General Jacobs reminded us, there is no exclusion for matters of foreign policy from the jurisdiction of the Strasbourg Court. He added: “where there is judicial review in Strasbourg there is perhaps a stronger argument for having internal judicial review, partly because of the obligation under the Convention to provide for review and partly because where there has been a domestic decision it may be easier for the Strasbourg Court itself to reach the right result” (Q 184). Advocate General Jacobs did not expect there would be many CFSP measures that would give rise to difficulties: many would not be legally binding measures; some, such as those implementing UN Security Council agreed sanctions, were implemented under the First Pillar (*eg* Article 301 TEC) (Q 180). Nor did he expect the Union to be subject to intensive scrutiny in that area: “The [Strasbourg] Court would obviously allow a certain margin in areas where there were elements of policy involved, as it does already in its exercise of judicial review” (Q 181).

146. No matter within the scope of the Charter and within EU competences should be outwith the jurisdiction of the ECJ. If, as we have recommended above, the Union becomes party to the ECHR, the Strasbourg Court would be entitled to review the legality of Union action against the standard of the ECHR. There would be no exception for foreign policy as such. But although Member States have accepted ECJ jurisdiction over international trade and commercial matters, we very much doubt whether governments will be attracted by the idea of extending the ECJ’s jurisdiction to matters of foreign policy. But in principle the actions of the EU and/or the Member States in giving effect to CFSP should be subject to judicial review/supervision in both the ECJ and the Strasbourg Court.

Justice and Home Affairs/Third Pillar

147. A number of witnesses proposed the alignment of the ECJ’s jurisdiction relating to justice and home affairs with its regular jurisdiction. As Statewatch explained, this would entail permitting:

- ∉ all national courts (instead of final courts only) to send to the ECJ questions relating to immigration and asylum law;
- ∉ all national courts in all Member States to send to the ECJ questions on policing and criminal law (at present the UK, Ireland and Denmark have an opt-out and Spain permits only final courts to refer);
- ∉ individuals and the European Parliament to bring direct challenges before the ECJ;
- ∉ the Commission to sue Member States for faulty or inadequate implementation of Third Pillar ‘decisions’, ‘framework decisions’ and ‘common positions’, and abolishing certain ‘public order’ restrictions on the ECJ’s jurisdiction in these areas.

In Statewatch’s view all of these changes would be desirable (pp 106-107).

148. In our opinion, the ECJ should have jurisdiction (and the full range of remedies should be available) in relation to Title IV of Part III of the EC Treaty (visas, asylum, immigration and other policies related to free movement of persons) and to Title VI of the TEU (police and judicial co-operation in criminal matters). As recent developments, such as the European Arrest Warrant, show, such matters may impinge directly on the interests and rights of the individual. The ECJ should be entitled to measure the legality of Union action, including that of Member States and their authorities when implementing it, against the norms contained in the Charter and the ECHR.

The bodies

149. As Article 51 of the Charter indicates, the Charter is addressed to bodies as well as to institutions. A number of witnesses pointed out the potential significance for the individual. There is a number of bodies exercising powers which may give rise to fundamental rights issues. Statewatch said that “the accession treaty could usefully clarify that the obligations of the ‘European Union’ (along with, where relevant, its Member States) extend to the acts of all institutions and bodies created by the Treaties or by EU legislation or other EU measures, in particular Europol and Eurojust. This will ensure that it is possible to hold such entities to account in the event of human rights concerns about

their behaviour. As creations of the EU legal system, the actions of these entities should engage the responsibility of the EU even where the bodies in question are entirely independent of control of the EU institutions or the Member States. This is *a fortiori* necessary if the EU creates a European Prosecutor” (p 105).

150. The Union’s business is no longer solely economic, as recent and current activities in relation to such matters as fraud, organised crime, drugs, terrorism, human trafficking, immigration and border controls clearly demonstrate. There is a good case for ensuring that remedies extend to the whole field of Union activities, whereas at present they are largely confined to actions within the First Pillar and the major institutions and bodies. Human rights challenges to any measures taken by an institution or body of the Union or by a creation of the Union or its Member States acting as such (eg Europol), should be capable of being made in the Community courts or national courts as the case may be.

(ii) Remedies for/enforcement by the individual aggrieved—the standing rule

151. Article 230 TEC requires a private applicant to satisfy a number of criteria before he can challenge, in the Community courts, an act other than one addressed to him (the standing rule). One such criterion is that of “individual concern”.⁵⁹ This qualification has been interpreted strictly by the Community courts. In *UPA*⁶⁰ Advocate General Jacobs proposed a possible new test of “substantial adverse effect”. Another possibility would be to seek to align the Community rule with the Strasbourg rule and allow a challenge to be made by any victim, whether direct or indirect. Professor Arnall did not find that solution attractive. In his view, the existing rules on standing were too strict, even in non-fundamental rights cases, and might involve an infringement of the Charter and the ECHR. He suggested, further, that it was not desirable to have a separate mechanism for fundamental rights cases. Almost every case would have the potential of being dressed up as involving a fundamental rights issue. Many actions for annulment brought before the Community courts raise fundamental rights issues as well as other issues of Community law. He concluded that it did not make sense to try to separate off fundamental rights cases from the others (QQ 62, 68).

152. There is a concern that if the standing rule were to be relaxed the large number of applications made would further overburden the already stretched Community Courts. The Government has acknowledged that remedies are important but has expressed the view that that importance does not justify a direct recourse to the ECJ being given to everyone who thought that any of his Charter rights had been breached (Q 261). Baroness Scotland thought that national courts would have an important role to play and that the provision of adequate remedies at national level for breaches of the Charter might suffice (Q 262). She thought that giving broader rights to access at a national level might be a possible solution to providing adequate Charter remedies (Q 264).

153. Advocate General Jacobs rejected the “floodgates” argument. He pointed out that it was not proposed to allow challenges to be made by the world at large. The alleged Charter breach would have to be shown to have a direct effect on the rights of the individual. Second, the present time limit of two months for commencing proceedings would remain. Third, there were already powers to deal with vexatious or hopeless, *ie* “manifestly ill-founded”, cases. Further, multiple claims could be consolidated into one action. The Advocate General expected that the number of cases in which the Court would have to examine the complaint in detail would be limited. But if there were a large number of claims in which allegations were made that the rights of the individual were being violated by Union action, then arrangements should be made for the Court of First Instance (CFI) to deal with them. If necessary the resources of the CFI could be increased. This might take the form of an increase in the number of staff (not necessarily the number of judges) (Q 179, 186).

154. The present debate highlights the difficulties which Article 230 can present to the individual. In some cases his national court may be able to provide a remedy. But the case law of the ECJ demonstrates the difficulties of a decentralised system under which national courts have no power to invalidate Community rules.⁶¹ If the standing rule is not relaxed so as to widen access to the Community Courts in the area of human rights there are likely to be some violations of the ECHR for which no effective remedy is available other than such remedy as the Strasbourg Court is able to provide. The narrower the gateway to Luxembourg the more important it is to have access to Strasbourg. That this is so strengthens the arguments for accession.

⁵⁹ Article 230, paragraph four, provides: “Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to the person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of *direct and individual concern* to the former”. Emphasis added.

⁶⁰ Case C-50/00P (21 March 2001).

⁶¹ Case 314/85, *Foto-Frost*, [1987] ECR 4199.

155. But the problem is not restricted to human rights cases. Widening individual access to the Community Courts would help ensure the application of Articles 6 and 13 of the ECHR as well as Article 47 (Right to an effective remedy and to a fair trial) of the Charter. It is not necessarily therefore a question of creating new rights but rather of giving new remedies against the EU institutions if they breach existing rights. The EU/Community system needs to be able to protect the individual citizen against the abuse of power by EU institutions. There must be an effective remedy either in Luxembourg or Strasbourg, or in both.

156. The issue of standing is of general importance and is not restricted to human rights cases. The time is right to re-examine Article 230(4) with a view to enabling individuals, at least in some circumstances, to challenge measures which are not directed specifically at them. The Convention is due to report in June and the initial stages of the Inter-Governmental Conference are expected to commence soon afterwards. The issue therefore is becoming most urgent. We urge the Government to press the Convention to examine the issue of remedies without delay, working in close conjunction with the Community Courts in doing so. It seems to us essential that the creation of a Bill of Rights for the Union, whether by incorporation of the Charter or by accession of the Union to the ECHR, or both, should go hand-in-hand with the development of effective judicial remedies available to individuals in the event of any breach by the EU or any of its institutions.

PART 6: CONCLUSIONS

General

157. Any new constitution for the Union should be accompanied by a bill of rights.

158. The Charter, preferably appropriately revised but if that is impracticable then as it stands, could be incorporated into the new constitution so as to constitute the requisite bill of rights.

159. If this Charter option is adopted great care must be taken via the “horizontal” clauses to ensure that Union and Community competences are not thereby enlarged and that the Charter rights are enforceable only in respect of the acts of the EU or its institutions within their respective competences or the acts of Member States in relation to the implementation of EU law.

160. An alternative course would be for the Union to accede to the ECHR so that the ECHR became the Union’s bill of rights. Here, too, however, the accession should not enlarge Union competences or the competences of Union institutions.

161. The main difficulty with accession by the Union to the ECHR is that the necessary changes in the ECHR Treaty would have to be agreed upon by all its signatories. This unanimity might be very difficult, politically, to achieve. The difficulty would be enhanced by the need to obtain unanimity also on the reservations or derogations to accompany accession.

162. There is no conceptual reason why the Charter option and the accession to the ECHR option should not be combined. The combination, if it could be brought about, would provide maximum protection to individual citizens in respect of any alleged breach of fundamental rights by the EU or its institutions.

163. The extent of the practical benefits to be brought to individual citizens either by incorporation of the Charter, or by accession of the Union to the ECHR, or by both, is likely to be limited and disappointing unless there is at the same time a reform of the remedies obtainable by citizens from the Community courts. Without this reform the new bill of rights may take on the appearance of a false prospectus. A review of the jurisdiction of the ECJ and the rules governing and limiting the ability of individual citizens to obtain remedies from the Community courts should be put in hand immediately, with a view to implementation of any necessary reforms at the same time as the coming into effect of the new bill of rights.

*Specific/detailed*164. (a) *The Charter—horizontal clauses and commentary*

- ∄ The horizontal clauses provide significant advantages for legal certainty as regards the definition of competences. It is essential to ensure that the horizontal clauses are as clear and unambiguous as possible (paras 91, 92). They may need to be strengthened to ensure that the Charter does not extend the competences of the Community and the Union (para 96, 99, 101).
- ∄ If the Charter is to be incorporated into the Treaty there is a need for an authoritative commentary or “interpretation”, which should be published and be readily available to the citizen and the courts (para 94). It should include a statement to the effect that the Charter is not intended to fetter the powers of Member States outside the field of Community/Union law to pursue whatever policies they choose (para 98).

165. (b) *Accession to the ECHR*

- ∄ The EU should have legal personality (para 119).
- ∄ If the Union were to accede to the Convention, the Member States should be able to agree any qualifications or reservations (paras 122, 123).
- ∄ The autonomy of the Community legal order would not be endangered by EU accession to the ECHR. The position of the ECJ would be analogous to that of national constitutional or supreme courts in relation to the Strasbourg Court. But any uncertainty as to the application of the domestic remedies rule should be clarified in the instrument of accession (paras 126, 130 and 131).

166. (c) *Remedies*

- ∄ If incorporation of the Charter is to confer any real benefit on individuals, the rights that will have been created will need effective remedies in order to give those rights substance and make them meaningful (para 142).

- ∄ No matter within the scope of the Charter and within EU competences should be outwith the jurisdiction of the ECJ. The Court should have jurisdiction over Second and Third Pillar matters, and over all EU institutions and bodies (paras 146, 148, 150).
- ∄ The standing rule in Article 230(4) TEC should be re-examined. We urge the Government to press the Convention to do so as a matter of urgency, working in close conjunction with the Community Courts (para 156).
- ∄ The resources of the Community Courts and the Strasbourg Court need strengthening to enable cases to be decided within a reasonable time (para 133).

Recommendation

167. The Committee considers that incorporating the Charter into the Treaties raises important questions to which the attention of the House should be drawn and recommends the Report to the House for debate.

APPENDIX 1

Sub-Committee E (Law and Institutions)

The members of the Sub-Committee which conducted this inquiry were:

Viscount Bledisloe (up to November 2002)
Lord Brennan
Lord Fraser of Carmyllie
Lord Hunt of Wirral (up to November 2002)
Lord Grabiner (from November 2002)
Lord Henley (from November 2002)
Lord Lester of Herne Hill
Lord Mayhew of Twysden
Lord Neill of Bladen (from November 2002)
Lord Plant of Highfield
Lord Richard (up to November 2002)
Lord Scott of Foscote (Chairman)
Baroness Thomas of Walliswood
Lord Thomson of Monifieth

Declared interests:

Lord Lester of Herne Hill Council Member of JUSTICE; Governor of the British Institute of Human Rights; father of Maya Lester who contributed to the evidence given by Liberty to this inquiry.

APPENDIX 2

List of Witnesses

The following witnesses gave evidence. Those marked* gave oral evidence.

Advice on Individual Rights in Europe (AIRE) Centre

* Professor Anthony Arnall, Birmingham University

The Bar European Group (BEG)

Professor Paul Beaumont, University of Aberdeen, School of Law

The British Institute of Human Rights

The Confederation of British Industry (CBI)

* Mr Andrew Duff MEP

The Faculty of Advocates

Fair Trials Abroad

* Judge Marc Fischbach and Mr Johan Callewaert, European Court of Human Rights, Strasbourg,

Professor Giorgio Gaja, Department of Public Law, University of Florence

Immigration Law Practitioners' Association (ILPA)

International Centre for Trade Union Rights (ICTUR)

* Advocate General Francis Jacobs, Court of Justice, Luxembourg

JUSTICE

* Mr Timothy Kirkhope MEP

The Law Society of England and Wales

Professor Dr R A Lawson, Europa Institute, Leiden University

Liberty (National Council for Civil Liberties)

Professor Dr H G Schermers FBA, Europa Institute, Leiden University

* The Rt Hon Baroness Scotland of Asthal QC, Parliamentary Secretary,

and Mr Mark de Pulford, Lord Chancellor's Department

Professor S Simitis, Johann Wolfgang-Goethe University, Frankfurt am Main

Statewatch

Swedish Ministry of Justice

Professor A G Toth