

Convention on the Future of Europe

OMCT Contribution

“For an Efficient and Coherent European Human Rights Policy”

Since the beginning, human rights have constituted the cornerstone of European construction and an indispensable dimension to maintain peace and stability in Europe. And yet we cannot but assess that there has been a growing dichotomy between declarations and practices of the EU in this regard, and that such a dichotomy has caused this human rights dimension to get marginalized vis-à-vis political, economic and security-related considerations.

Given the EU's prevailing role in its people's daily life and its growing weight on the international level, it is fundamental it completely reintegrate the human rights dimension. This means, on the internal level, not only an effective integration of human rights norms but also setting up an external system to control activities and measures adopted by the EU. This also means that a real coherence between internal and external policies must be achieved, the latter having human rights protection as main focus and reference.

If one should hail the importance given to human rights promotion and defence in the European construction on the European as well as on the global level, numerous improvements remain to be achieved to reduce the excessive and growing gap existing between declarations and practice. The European human rights policy, to remain credible, has to become more coherent and efficient.

The Convention on the Future of the EU represents a unique opportunity to concretise more than fifty years of commitment for peace, stability and the protection of the fundamental rights of all. The OMCT praises the opportunity that is offered to civil society to contribute in that debate, and requests the present Convention to do everything in its power so that :

- The European Union adhere to the **European Convention on Human Rights**, as soon as possible and with no reservations ;
- The European Union adhere to the **Revised European Social Charter**, as well as to all existing international human rights mechanisms, as soon as possible and with no reservations ;

- The **Charter of Fundamental Human Rights of the European Union** be amended before being **integrated**, so that matters relating to non-discrimination, promotion and protection of children and family as well as migrant workers rights be fully taken into consideration ;
- A particular attention be given to **the rights of women, children, migrant and all vulnerable groups** ;
- Concrete monitoring mechanisms be set up **to make human rights clauses operational** , which would allow to assess the implementation of such clauses and/or to take effective measures so as to put an end and to prevent serious human rights violations ;
- Human rights become the cornerstone of EU's external policy, with a particular attention to be paid to the implementation of underogatable human rights such as the right to life and to protection against torture.

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The European Union and Fundamental Rights

Fundamental Rights in the European Union

As far as the implementation of fundamental rights in the EU is concerned, the OMCT feels particularly worried about some developments such as growing xenophobia and discrimination of a racial kind in particular, which not only prove to be individual attitudes but also happen in the frame of the judiciary and penitentiary system. We are also concerned with infringements on the right to asylum, and more particularly about developments in the European and Member Countries' asylum policy, in the same way as we are about infringements on the rights of migrant workers, and more especially in terms of family regrouping or protection against expulsion. At last, the fact that life precariousness and extreme poverty are on the rise is also a matter of extreme concern.

Given the absolute necessity to integrate a human rights dimension in the European Union's institutions and policies, the OMCT calls on Member States to access to the European Convention on Human Rights (ECHR) and to act towards improving the Charter of Fundamental Rights of the European Union before its integration into the European Treaties and/or into the future European Constitution, these two channels being deeply complementary¹.

- **Accession to the European Convention on Human Rights (ECHR)**

While governments and Member States have declared that *"the only border that the European Union draws is that of democracy and human rights"*², the EU's accession to the ECHR is a matter of credibility³ of the Union's commitment to human rights, and indeed not only on a symbolic level, i.e. to strengthen the sense of being part of a political construction based on common values, but also on a practical level.

Via the 2nd and 3rd pillars indeed, the community's legislation is meant to develop on issues relating to the very heart of civil, political, economic and social liberties of every person living on the European territory (European arrest warrant, Eurocorps, justice and police co-operation, asylum and immigration policy, fight against terrorism,...). And yet in the current situation this legislation is not submitted to any external control that may be called so, in the field of human rights, the Court of Justice of Luxembourg having no competencies in this regard.

Accession to the ECHR thus so far remains the only possible ultimate credible recourse on the European level to ensure an external control mechanism everyone may have access to, a concrete effective protection of fundamental rights and the rehabilitation of victims within the Union.

¹ It seems obvious to us that the Charter and the ECHR are meant to be complementary, which is illustrated for example by the article 53 of the Charter that stipulates that *"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 particular by] the European Convention for the Protection of Human Rights and Fundamental Freedoms."*

² Annexes to the conclusions of the Presidency – Laeken, December 14 and 15, 2001, SN 300/1/01 REV 1, p.20

³ A rejection attitude would be difficult to accept now that it is stated in the article 7 of the EUT that the Council may sanction a member state that does not respect human rights, and while the UE requires countries willing to join to respect these rights.

Such an option obviously raises legal questions such as the EU's competence or legal personality. Without underestimating the importance of such problems, it seems that they could be overcome if there is enough political will to seek their resolution (see Annex 1).

- **The Charter of Fundamental Rights of the European Union**

The OMCT praises the progress represented by the elaboration of a Charter of Fundamental Rights in itself, but it believes that the latter is still not entirely satisfactory (see Annex 2) and would therefore require to be improved before being endowed with any binding character.

To begin with, the Charter lacks an explicit and all-encompassing⁴ clause asserting that all rights deriving from the Charter of Fundamental Rights have to be taken into account in the design and implementation of all Union's policies. An overall reference would constitute an important symbolic political commitment. Moreover, some articles contain an ambiguous formulation spelling a setback in terms of positive obligations of the states⁵. A systematic formulation stipulating that *"every person has a right to..."* would be not only clearer but would most importantly eliminate the risk of minimum interpretations. At last, in the field of concrete rights, some articles are less assertive compared to what has already been achieved elsewhere, especially with regard to issues such as the protection of migrant workers, family and children, the guarantee of non-discrimination, the right to housing, etc.

Secondly, the Charter is in no way to be considered as an alternative to the accession to the ECHR⁶ (see Annex 2). Indeed the Charter, as it stands now, does not contain any safeguard mechanism, any external monitoring system. And even in the case the Court of Justice of the European Communities competence would be extended, the conditions to access to it, which are very strict for individuals⁷, make it in no way a recourse equivalent to the Strasbourg Court.

So as to ensure an effective guarantee of fundamental rights within the EU, the OMCT wishes:

- A quick accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms with no reservations ;
- A previous improvement of the Charter of Fundamental Rights of the European Union before conferring it a legal binding character ;
- An effective guarantee of human rights protection norms for every person living on the EU territory, with no form of discrimination whatsoever ;
- A common asylum policy that would strictly abide by both the spirit and the letter of international treaties dealing with this matter.

⁴ This reference exists for some articles in particular only.

⁵ E.g., the art. 25 stipulates that *"The Union recognises and respects the rights of the elderly to lead a life of dignity and independence..."*

⁶ Moreover, the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly, in a report dealing with the draft Charter of Fundamental Rights of the European Union (CHARTER 4499/00, CONTRIB 349, p.11, pt. 26) rightly stipulates that *"many national Constitutions recognise human rights and fundamental freedoms, but their existence in the Constitution did not make the accession of concerned Member States to the ECHR meaningless."*

⁷ Even with the extension of accessing conditions for individuals that was brought about by the decision of the Court of First Instance in the case T-1777/01

The European Union and human rights in the world

While the European Union has committed itself to placing human rights at the centre of its foreign policy, we cannot but assess that declarations and commitments are often not followed by acts in the practice. In this regard, the risk may be that the fragmentation and the lack of coherence in the current foreign policy in terms of human rights promotion and protection could lead in the end to marginalizing human rights vis-à-vis security-related, economic or political priorities.

While various human rights related initiatives juxtapose themselves and fragmentize the EU's approach in this area, issues regarding the promotion and protection of human rights in Third Countries are often sacrificed in decision-making processes.

While the Convention on the Future of Europe intends to mainly focus on issues regarding EU's internal organisation, today such a debate cannot be dissociated from EU's external policy related issues, in particular as far as issues in relation to human rights are concerned. The coherence of EU's approach in this regard is at stake. The OMCT wishes to underscore that an Union aiming at conducting a common foreign policy and recognising that respect for human rights constitutes an essential element of peace and security has a duty to integrate human rights on the various levels of its foreign policy by making it de facto one of its fundamental elements.

In this regard, the OMCT expects the Convention to take the necessary measures in order to guarantee:

- The concrete implementation of "human rights" clauses in association agreements passed between the EU and Third Countries;
- That an equal importance be given to human rights as compared to other EU's priorities, in particular by fully considering them as a point on the agenda of the General Affairs Councils;
- That post-September 11 policies to fight against terrorism be not used as a pretext to violate international human rights protection norms and in particular underogatable rights such as the right to life and to protection against torture⁸;
- The effective and systematic implementation of recommendations and procedures mentioned in the *EU guidelines on human rights dialogues*⁹;
- The effective and systematic implementation of recommendations and procedures mentioned in the *Guidelines for the EU's policy towards Third Countries on torture and other cruel, inhumane, or degrading treatments or punishments*¹⁰, regarding in particular:

⁸ There are numerous examples of anti-terrorist legislation adopted after September 11 seriously infringing on civil and political rights, in particular towards human rights defenders. The European decision-cadre in this regard itself is not exempt from ambiguity, regarding in particular the definition of terrorism, which could lead to abuses.

⁹ Adopted by the Council of the EU on December 3, 2001, # 14469/01, CFSP492

¹⁰ Adopted by the Council of the EU on April 9, 2001

- (a) The evaluation and follow-up of cases of torture in Third Countries;
 - (b) The encouragement of Third Countries to put an end to such practices, if necessary by taking measures of sanction in the frame of economic agreements;
 - (c) The intensification of the fight against impunity and the strengthening of support to the victims of torture and other inhuman or degrading treatments.
- That the assessment of the impact of European Union's economic policy measures on human rights, and in particular on economic, social and cultural rights, be systematised and formalised;
 - That political and economic pressure be carried out by the EU so that non-state actors (such as international financial institutions and transnational corporations) take human rights into account and respect them in their economic policies, especially economic, social and cultural rights.

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Annex 1 : Accession to the European Convention on Human Rights (ECHR)

- **About the competence of the UE in the field of Human Rights**

The ruling 2/94 of the Court notes a problem of competence given the current stand of jurisprudence. The Community does not possess any attribution competencies and the Court rules, indeed, that *"no provision of the Treaty confers on the Community institutions in a general way the power to enact rules concerning human rights or to conclude international agreements in this field"*. Another possibility was to recourse to the old article 235 of the Treaty (that has become the article 308). This article allows the implicit extension of the Community's competencies by allowing the latter to recourse to competencies that are necessary for the achievement of objectives prescribed to it by Community law. In this case, the Community is vested with a competence allowing it to take international commitments that are necessary to achieve this objective, and this even in the absence of an express provision in this regard. But the Court here rules out the possibility for this article to apply as *"accession by the Community to the ECHR would, however, entail a substantial change in the present Community system ... in that it would entail the entry of the Community into a distinct international institutional system"* which would go beyond the limits of the said article. And the Court concludes that this accession *"could be brought only by way of Treaty amendment"*.

And yet since this ruling the European Union was instituted. Does the latter possess competencies in the field of human rights? The article 6 UET stipulates that the Union has to abide by fundamental rights as guaranteed by the ECHR and that it also should provide itself with the means necessary to achieve its objectives. The article 7 of the European Union Treaty states that the Council should be able to sanction a Member State that would not respect human rights by suspending the rights deriving from the application of the Treaty, including the right to vote within the Council.

From these 2 articles, it seems hard not to recognise the competence of the Union in the field of human rights.

- **About the legal personality of the EU**

Some still consider that the Union is not yet vested with any legal personality¹¹, which should prohibit it from accessing to the Convention. The solution here would consist in modifying the European Union Treaty to confer explicitly the legal personality to the EU. This would consist concretely in inserting an article that would read the following: *"The European Union possesses a legal personality"*. It is worth noting that the European Parliament has been pleading since its October 2, 1997 resolution¹² in favour of a modification of the EU Treaty so as to endow the Union with legal personality.

¹¹ According to the prevailing doctrine, an international organisation like the European Union possesses a legal personality in international public law only if it is conferred to it by its founders who themselves are subjects of international public law. While each of the three Communities enjoy such a personality thanks to their respective constitutive treaties, the European Union Treaty does not say a word about it.

¹² Point 16 of the resolution A4-0278/1997

- **About the European Convention on Human Rights**

At last, the European Convention for the Protection of Human Rights and Fundamental Freedoms stipulates in its article 59 that the Convention is open to the signature of members of the Council of Europe. It should be noted from the current status of the Council of Europe¹³ that only states (in this case European) may become members of the said Council. It seems therefore that the ECHR is not open to the signature of non-state entities such as the European Union. But it would also be enough here to bring a few slight amendments to the ECHR so that the European Union, once endowed with a legal personality, may ratify it¹⁴. Moreover, the Council of Europe has long announced its will to achieve a solution allowing the European Union to fully adhere to the ECHR¹⁵.

We shall not deny that practical problems would appear following the accession, such as the issue of relations between the Court of Justice of Luxembourg and the European Court of Human Rights of Strasbourg in compliance with the art. 220 and 292 ECT, that of the representation and participation of the Union within the Strasbourg European Court of Human Rights and in the Committee of Ministers of the Council of Europe in charge of executing the rulings of this Court. **Nevertheless none of these issues represent, *per se*, a real legal problem and all of them can be resolved thanks to a genuine political will.**

- **About the necessity of external control**

"There is no legitimate reason why acts accomplished in the name of the European Union should be exempt from this fundamental external control mechanism (European Court of Human Rights), which would basically mean that people whose rights and fundamental freedoms are infringed upon by Community law would be deprived of any protection from the ECHR¹⁶. There is today a "lawless zone", in Europe, as far as human rights are concerned. On the one hand indeed the entire Community law, under the angle of human rights, is exempt from any genuine control mechanism. While the Community legislation is likely to develop in extremely sensitive areas such as those contained in the 2nd and 3rd pillars, such an assessment is extremely preoccupying and concrete.

Indeed, while most of the consequences deriving from the implementation of the Union's policies are likely to be monitored by the Court of Human Rights, no existing system obliges the author of the said provisions to assume his political obligations with regard to fundamental rights. The Court of Strasbourg¹⁷ has effectively considered that the fact that an internal right provision was *"inspired almost word for word [by a] Community directive"* did not mean that this provision was exempt from any control with regard to the ECHR. The incoherence revealed by such a fact is obvious and unarguable. For indeed whereas one may sanction the application of a European directive, one may not do so with what may be the cause of this human rights violation, i.e. the directive itself. And by conducting the analysis further, one may say that this Member State, by complying with the ECHR, would place itself off the limits of the European legislation!

¹³ Statutes of the Council of Europe, art. 4

¹⁴ The first modification to undertake is to open the ECHR to ratification by the European Union in the same way as what was done in favour of the European Community with regard to the Convention on Human Rights and Biomedicine of the Council of Europe, art. 33§1

¹⁵ e.g. See : Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly, in a report dealing with the draft Charter of Fundamental Rights of the European Union, CHARTER 4499/00, CONTRIB 349, p.11, pt. 25

¹⁶ Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly, in a report dealing with the draft Charter of Fundamental Rights of the European Union, CHARTER 4499/00, CONTRIB 349, p.11, pt. 25

¹⁷ *Ruling Cantoni v. France* of November 15, 1996

Annex 2 : Analysis of the Charter

◆ The content of the Charter

We are going to roughly review the content of the Charter but without pretending to carry out an exhaustive analysis. In order to get a better idea of the value of this Charter, we are going to confront it to two of the most important international instruments available in Europe in this area, i.e. the European Convention on Human Rights (ECHR) and the Revised European Social Charter (ESC).

1. Articles of the Charter whose meaning and scope are the same as in the articles of the ECHR

For details, see note of presidium, Charter 4473/1/00 rev1, convent 49, *"text of explanations relating to the full text of the Charter, as stated in the doc. CHARTE 4487/00 CONVENT 50"*, via the EP's website.

Those are articles¹⁸ dealing with:

- The right to life
- The banning of torture and inhuman or degrading punishments or treatments
- The banning of slavery and forced labour
- The right to freedom and safety
- The respect of private and family life
- The freedom of thought, conscience and religion
- The freedom of expression and information
- The right to property
- Protection in case of separation, expulsion or extradition
- Presumption of innocence and defence's rights
- The principle of legality and proportionality of punishments

2. Articles whose meaning is the same as that of corresponding articles in the ECHR, but whose scope was extended

Those are articles¹⁹ dealing with:

- The right to marriage, the extension bearing on the non-requirement of a sexual differentiation
- The freedom of reunion and association, extended to the European level
- The right to education which encompasses the right to continued vocational training
- The right to an effective recourse and to access to an impartial tribunal insofar as the article does not limit this freedom to civil and criminal matters
- The *non bis in idem* principle that is extended to the European Union
- The fact that EU citizens may not, in the field of application of Community law, be considered as foreigners due to the banning of all discriminations on the basis of nationality, which generates an extension as compared to some articles of the ECHR.

¹⁸ Art. 2, 4, 5§1et2, 6, 7, 10§1, 11, 17, 19§1 and 2, 48 and 49§1 of the Charter of Fundamental Rights.

¹⁹ Art. 9, 12§1, 14§1, 14§3, 47§2et3 and 50 of the Charter of Fundamental Rights.

3. Additions in the Charter of Fundamental Rights

Articles dealing with:

- Human dignity and person's integrity insofar as the Convention on Human Rights and Biomedicine of the Council of Europe was not yet ratified by all Member States
- The protection of data of a personal kind
- The freedom of arts and sciences
- The freedom of circulation within the EU of course
- The freedom of enterprise
- The protection of intellectual freedom as it is namely quoted
- The right to asylum as the article reminds the submission to the Geneva Conventions
- The whole chapter V dealing with European citizenship (right to a fair European administration, to vote and to eligibility, to access to documents, mediators, freedom of movement and stay, diplomatic protection, ...)

4. Gaps in the Charter of Fundamental Rights of the European Union

Basically, there is a lack of an explicit and all-encompassing reference asserting that all rights deriving from the Charter of Fundamental Rights have to be taken into account in the design and implementation of all European Union's policies. This reference only exists for some articles in particular. For example, the art. 35 (protection of health) stipulates that a *"high level of protection of human health is ensured in the design and the implementation of all policies and actions of the Union"*.

☞ **An all-encompassing reference is an obvious necessity and would represent an important symbolic political commitment.**

There is a similar problem with some articles containing an ambiguous formulation as to the mentioned rights. For example, the art. 25 (rights of the elderly) stipulates that *"The Union recognises and respects"* the rights of the elderly to lead a life of dignity and independence and to participate to social and cultural life.

☞ **A systematic formulation stipulating that *"every person has a right to..."* would not only be clearer but would also be more convincing and, most importantly, would not bear the risk of minimum interpretations.**

a) *Concretely, a series of fundamental rights are not taken up in the Charter :*

- In the area of justice for example, the Charter does not guarantee the right to a double degree of jurisdiction in the criminal field, while it is covered by the art. 2 §1 of the Protocol 7 to the ECHR²⁰
- The right to compensation in case of legal error is lacking as well²¹.

²⁰ *"Every person declared guilty of a criminal offence by a tribunal has a right to have the ruling of guiltiness or the condemnation examined by a superior jurisdiction ..."*

²¹ Art.3 of Protocol 7 to the ECHR

b) In comparison with the Revised European Social Charter (ESC), numerous gaps are to be noted :

- The right to a minimum income (art. 4 ESC: right to a fair income) ensuring a satisfying standard of living for workers and their family.
- The protection of migrant workers (art. 19 ESC) is not really taken into account. This includes the right to family regrouping, the guarantee of non-expulsion, of adequate and free welfare services, the transfer of funds by a migrant worker to a third country, ...
- The protection against employer's insolvency (art.25 ESC)
- The guarantee of non-discrimination towards workers assuming family responsibilities (art. 27 ESC)
- The specific protection of workers representatives (art. 28 ESC)
- Generally, the protection of the family and of the children and their advancement is much broader in the ESC than in the Charter of Fundamental Rights (art. 16 and 17 ESC).

For example, it is regrettable that the Charter does not make any references, in its article 24, to the UN Charter on Children's Rights. Besides, it does not contain the principle according to which children have to be fully considered as individuals. Another gap is the absence of a guarantee of protection of children against violence, sexual exploitation and other abuses. And finally, there is nothing in the Charter in relation to the specific problematic of the right of separated children within the asylum and immigration policies.

- The right to protection against poverty and social exclusion (art. 30 ESC) is not clearly guaranteed.
- The Charter of Fundamental Rights does not mention the right to housing (art. 31 ESC).

Obviously, additional gaps are worth noting and it would be impossible to go through all of them. Let us mention some more such as environmental rights, the right of NGOs to be consulted on the European level, while such a right is recognised in the additional Protocol to the ESC which contains a collective complaint mechanism²², the rights relating to biomedicine such as those developed in the Convention on Human Rights and Biomedicine²³.

◆ Why the Charter is no alternative to an accession to the ECHR

Some argue that the Charter, as an autonomous legal text, would make the accession of the Union to the ECHR unnecessary. It is very far from the truth, as this accession would establish an external control mechanism on fundamental rights guaranteed on the Union's level²⁴. *"Acceptance of external review of human rights is necessary precondition for any entity aiming for constitutional maturity. It would be a concrete manifestation of commitment to universal human rights. In the long run, this is essential for the Union's credibility in external relations."*²⁵

²² Protocol of November 9, 1995

²³ Convention on Human Rights and Biomedicine of April 4, 1997

²⁴ Besides, the Committee on Legal Affairs and Human Rights of the Council of Europe Parliamentary Assembly, in a report dealing with the draft Charter of Fundamental Rights of the European Union (CHARTER 4499/00, CONTRIB 349, p.11, pt. 26) rightly asserts that many national constitutions recognise human rights and fundamental freedoms, and their existence in the constitution didn't make superfluous the access of the concerned States to the ECHR.

²⁵ P. Lipponen, Prime Minister of Finland, «Fundamental Rights in Future Europe », www.theepc.be/europe

Finally, in the hypothesis that the Charter would be integrated into the Treaty of the Union, some embarrassments would have to be dealt with. Besides the issue of constitutionnalisation of the Charter, the parallel existence of these two texts could entail *"an increased risk of contradictions between the jurisprudence of the European Court of Human Rights and the Court of Justice, given in particular differences in content and formulation between the Charter and the Convention"*²⁶ and inevitable interpretative conflicts. Besides, in case of the integration of the Charter into the EU Treaty, *"for example, the Commission and the council would arguably have an implied obligation to monitor the application of the Charter in EU law, possibly take action for non-implementation and even legislative order for fundamental rights to be protected. This logic naturally goes against article 51 §2 of the draft Charter."*²⁷ (The article 51 §2 of the Charter indeed stipulates that the latter does not create any competence or new task for the Community and the Union and does not modify competencies and tasks defined by treaties). Constitutionnalisation of the Charter in the current situation would also raise a series of somehow important legal and political issues.

²⁶ Speech of Gil Carlos Rodriguez Iglesias, President of the Court of Justice of the European Communities www.echr.coe.int

²⁷ M. Heim, « *The EPC Project on the European Charter of Fundamental Rights - Some Initial Considerations* », www.theepc.be/europe