OMCT Europe
Organisation Mondiale Contre la Torture
World Organisation Against Torture
Organisación Mundial Contra la tortura

Convention on the Future of Europe

Second OMCT Contribution[1]

The Protection of HR within the EU

Following the Convention plenary session of October 28th and 29th 2002, OMCT welcomes the wide consensus shown in favour of a **single legal personality** of the Union. As President Giscard D'Estaing has pointed out[2], this should lead to the approval of a future Constitutional Treaty consisting of a **single text,** comprehensive of both the TUE and of the TCE. On the one hand, this solution will have the double advantage of enhancing both the visibility and the comprehension of the Treaty. On the other hand, it would provide the Union with the necessary judicial statute to adhere the international and regional treaties on human rights, such as the European Convention on Human Rights (ECHR), the International Covenants on Civil and Political rights and on Economic, Social and Cultural rights, the Convention against Torture, etc.

As far as the work of the Group II "Integration of the Charter/access to the European Convention on Human Rights"[3] is concerned, OMCT first very much appreciates the political will shown in favour of the **accession of the EU to the ECHR**[4]. Secondly, we welcome the proposal of incorporating the Charter of fundamental rights in the future Constitutional Treaty, which would turn the Charter into a **legally binding text having a constitutional value**.

Nevertheless, OMCT maintains that **some proposals** aiming at amending the so-called "*horizontal articles*" could **endanger the acquis of the Charter** and that it is still necessary to **improve the effectiveness of the Charter**, by guaranteeing an easier access to judicial remedies to the European citizens.

Finally, OMCT denounces the abandon of any initiative concerning the insertion of the **Social Charter** in the Constitutional treaty.

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[1] The first contribution of OMCT is available on the web page of the Convention, *OMCT Contribution: "For an Efficient and Coherent European Human Rights Policy"* , Brussels, 04-06-2002.

[2] Cf. *Summary report of the plenary session -Brussels, 28 and 29 October 2002*, **CONV 378/02**, Brussels, 31-10-2002.

[3] Cf. *Final Report of the Working group II*, **CONV 354/02**, Brussels, 22-10-2002.

[4] Cf. *Ibidem*.

Mechanisms and consequences of the accession of the EU to the ECHR

☞ OMCT welcomes the wide consensus within the Convention in favour of an imminent access of the EU to the ECHR and wishes to highlight the following:

1. First, the technical issues concerning the **relation between the EU and the Council of Europe** should not be considered as an obstacle to the accession. Indeed, the Council of Europe has already envisaged the possibility of amending some clauses of the text of the ECHR in order to overcome the present incompatibilities[5].
2. Secondly, OMCT calls for the adoption of the following proposals in order to overcome once for all the absence of competencies of the Union to access the ECHR[6]:
   - **The attribution of the legal personality to the Union**
   - A **modification of the art. 303 of the TCE**, establishing that «*The Community shall establish all appropriate forms of cooperation with the Council of Europe*», as it follows: «***The Community is competent to access the European Convention on Human Rights, signed in Rome, the 4 November 1950***»[7]

Furthermore, as OMCT has already pointed out in its previous contribution, the accession of the Union to the ECHR should definitely not be considered as an alternative to the effectiveness of the Charter. On the contrary, both the integration of the charter in the Constitutional treaty and the accession of the EU to the ECHR should be considered as being complementary[8]. Namely, only the combination of these two provisions would have the effect of filling the "lawless zone" created in Europe, due to the current lack of control of the communitarian acts concerning fundamental rights. To this extent, OMCT would like to focus the attention of the members of the Convention on the risks of restricting the content and the effectiveness of the Charter contained in some of the amendments proposed by the Working group II.

The amendments and the method of the insertion of the Charter of fundamental rights

1. The amendments

OMCT maintains that the new "**drafting adjustments"** proposed by the Working group II and in particular the new wording of the **horizontal clauses** -art.51 and 52-, 1) are to be considered as substantial modifications restraining the content of the Charter, and 2) they engender confusion in interpreting the Charter.

First of all, we would like to stress that according to the Laeken Declaration mandate, **the Convention has no competence to change the content of the Charter**[9]. In its previous contribution OMCT, alongside some other NGOs, has been very much in favour of a revision of the Charter before its integration in order to improve the

[5] Cf. Council of Europe, *Study carried out within the Council of Europe of technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights*, **WD 08.**

[6] Cf. CJEC, Opinion 2/94, 1996.

[7] Cf. Document by Mr. I. Svensson and Mrs. L. Hjelm-Wallén, *Proposals for Accession of the EU to the European Convention of Human Rights*, **WD 15**, Brussels, 12-09-2002, p.3.

[8] Cf. *Summary report…op. cit.*

[9] Cf. *Ibidem*; cf. also AFEM, « *Fifth position of AFEM presented to the European Convention* », Brussels.

protection of the weakest social groups, such as children, women or immigrants[10]. This initiative has finally been rejected precisely because it exceeded the mandate of the Convention and because such a revision would have taken too long.

Nevertheless, the **new proposals** of the Working group II **do imply a substantial modification of the Charter**, exceeding thereby the competencies of the Convention. Moreover, these modifications not only do not foresee any improvements, but on the contrary they **do restrict the content of the Charter**, via the drafting adjustments of the horizontal articles[11]:

▪ Article 51(1) (Field of implementation)

This article already foresees that «The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of **subsidiarity**». It does not seem necessary to us to further reiterate «[…] *and respecting the limits of the powers of the Union as conferred on it by other parts of [this Treaty/ the Constitutional Treaty]*". At the same time, the proposal of article 51(2) has the only function of repeating that «*This Charter does not extend the scope of application of Union law beyond the powers of the Union*».

☞ **It therefore seems to us that these new specifications are neither useful, nor necessary**. Their only impact is to make the text too cumbersome and to engender difficulties interpreting the text.

▪ Article 52(4), (5) et (6) (Content of the guaranteed rights)

The new paragraphs are meant to provide some interpretation criteria:

- Article 52(4): "*Insofar as this Charter recognises fundamental rights as they result from the constitutional traditions common to the member states, those rights shall be interpreted in harmony with those traditions».* In fact, this article suggests that in case of uncertainty, the judicial authority is expected to comply with a sort of minimal common denominator of the common constitutional traditions, which would impede any evolving interpretation of the Charter.
This new paragraph represents a step backwards in the acquis of the Charter; in fact, fundamental rights are already part of the low general principles ensured by the Court, as it has been pointed out by the judge Skouris[12]. Besides, the **Court of Luxembourg has until now always shown to freely appreciate the common constitutional traditions** of the Member states, which has allowed for « un niveau de protection élevé en matière de droits fondamentaux»[13]. If the freedom of interpretation of the Court concerning the common constitutional traditions would be limited, there would be a serious risk of a lower degree of protection of the fundamental rights.

☞ **In the light of these observations, OMCT calls the Convention to delete this paragraph.**

- Article 52(5): this article is meant to explain the different judicial impact of **rights** and **principles**: «[...] ***principles may be implemented by legislative and executive acts taken by institutions and bodies of the Union*** […]», while Member states should have a general **obligation of respecting rights**, according to art. 51(1). This distinction is based on the fact that principles would not be provided with a direct applicability, since they require legislative or executive acts in order to be implemented, while rights would be directly applicable.

First of all, as Mrs Paciotti has argued, this analysis does not seem to be judicially correct. In fact, "les droits fondamentaux classiques peuvent eux-mêmes requérir des lois et mesures pour être protégés, alors que les

[10] Cf. OMCTeurope, *OMCT Contribution: "For an Efficient and Coherent European Human Rights Policy"* , Brussels, 04-06-2002.
[11] Cf. Observations of Mrs Paciotti, Mr. Rack et Mr. Fayot at WG 25 of the Charter Group, **WD 26 REV 1**
[12] Cf. *Audition of the judge Skouris*, **WD 19**, Brussels, 20-09-2002.
[13] "A high level of protection of fundamental rights", cf. *Ibidem.*

principes peuvent constituer des obligations juridiques immédiatement efficaces qui limitent les pouvoir législatifs et exécutifs"[14]. Moreover, the new clause 52.5 is in contradiction with art. 51.1 foreseeing that «*the institutions and bodies of the Union […]* ***respect*** *the rights,* ***observe*** *the principles […]*»[15].

☞ **For these reasons, OMCT urges the Convention to abolish the new article 52(5)**, since not only it establishes an incorrect distinction between rights and principles, but also as a consequence restricts the field of implementation of the Charter (contrary to the mandate of the Convention, as it has been already stressed).

- Article 52(6) foresees that «*full account shall be taken of* ***national laws and practices*** *as specified in this Charter*». Again, this new clause has the effect of limiting the room of interpretation of the judge, which is contrary to the spirit of the charter.

☞ **Therefore OMCT asks the Convention to abolish the new article 52(6)**

▪ Finally, the proposal of the Convention of adopting an "**Explanatory Protocol**" for the interpretation of the horizontal articles shows that the drafting adjustments have the only effect of triggering confusion vis-à-vis the different judicial actors. In addition, these comments would only have an explanatory nature without implying legally binding consequences as to the interpretation of the Charter[16]. Such a Protocol would therefore only make the interpretation of the Charter even more difficult for the different judicial actors.

☞ **OMCT maintains that all these so-called "*drafting adjustments*" go far beyond a simple technical amendment of the text of the Charter. Consequently, they shall not be integrated in the final text of the Charter, particularly because they endanger the acquis of the Charter and are in contradiction with the spirit of the first Convention. This would imply at the same time the abandon of the "Explanatory Protocol".**

2. Mechanisms of integration and revision of the Charter in the future constitutional treaty

As far as the integration of the Charter in the treaty is concerned, there are two possible options

1. The insertion of the whole text of the Charter in the first part of the constitutional treaty, either in a specific title or in a chapter of the treaty
2. The insertion of a direct reference to the Charter in a single article of the treaty

Traditionally, the European national constitutions consist of two parts: the first part contains a catalogue of fundamental rights, while the second part is dealing with the division of powers. Therefore it would be quite unusual that the constitutional text of the European Union would not be in line with the above-mentioned tradition. At the same time, it seems to us contradictory that human rights, which are considered as "the heart and soul" of the treaty, would not be directly visible and accessible to the European citizens. In addition, one of the priorities of the convention consists of eliminating the gap between the Union and its citizens, precisely by improving both the visibility and the

[14] Cf. "Even the fundamental rights in the classical sense could require legislative and executive acts in order to be implemented, while principles in turn could be directly applicable, limiting thereby the legislative and executive power". Cf. Observations of Mrs Paciotti… *op. cit.*

[15] Cf. *Ibidem.*

[16] Cf. Observations of Mr. Fayot…*op. cit.*

understanding of the main objectives of the complex European architecture. Thereby the EU would become a community of values and not only a common market.

- ☞ **According to these considerations, OMCT is very much in favour of a direct integration of the whole text of the Charter in the future constitutional treaty as well as of the integration of the Preamble of the Charter as the general Preamble of the constitutional treaty, as it has been proposed by the Working group II[17].**

Finally, as far as the possibilities of revisiting the Charter are concerned, the Convention will be competent to fix the final mechanism, whatever the option chosen will be. Nevertheless, OMCT believes that the two following elements should be taken into consideration:

- ☞ **The introduction of a clause establishing a specific mechanism of revision of the Charter, which should guarantee transparency and the involvement of the civil society.**
- ☞ **The inclusion of a non-regression clause[18], aiming at preserving in the future the acquis of the Charter.** Conceived as a "safety valve", this clause will have the function of impeding any revision of the Charter that could somehow restrain both its content and its effectiveness.

In this context, the effectiveness of the Charter could only be achieved by fully guaranteeing judicial remedies to the individuals.

Improving the judicial remedies

Once the constitutional treaty will come into force, all the provisions of the Charter will become substantial rights. According the judge Skouris, in all modern constitutions to each substantial it corresponds a judicial remedy to ensure its enforcement[19].

At present, article 230 establishing a judicial remedy for the individuals before the Court of Luxembourg, does not seem to be an effective judicial remedy. This is due to the particularly restricted admissibility conditions, which have the effect of limiting de facto the access of the citizens to the Court of Justice of the European Communities (CJEC).

- ☞ **For these reasons OMCT calls for a new wording of art. 230, aiming at making more flexible the access conditions to the Court of Luxembourg[20], and proposes therefore:**

1. The introduction of a clause allowing the **individuals to directly attack a communitarian act before the Court[21]**
2. **A modification of art. 230(1)**: at present, this article only mentions the actions led against the **institutions** but not against the different **bodies** of the Union. Consequently, **it is important to include a reference to the different bodies of the Union in order to consider the whole range of acts of the Union**

[17] Cf. *Summary report…op. cit.*

[18] Cf. AFEM Position, *«Fifth position» …op. cit.*

[19] Cf. *Audition of the judge Skouris…op. cit.*

[20] Cf. CJEC, Decision *Union de Pequeños Agricultores*, affaire C-50/00 P, 25-07-2002, in which the Court has not shown to be contrary to a possible modification of art. 230, highlighting that the legislator is finally competent to carry out a reform of the current system.

[21] Cf. *Audition of the judge Skouris…op. cit.*

3. **A modification of art. 230(4)**, foreseeing the conditions of access to the court. OMCT proposes to substitute the present cumulative clause, establishing that all individuals should be involved "*directly* ***and*** *individually*", with an alternative clause in order to extend the access conditions. All individuals should therefore be involved "*directly* ***or*** *individually*" [22]

By making the access mechanism to the Court more flexible, both the **credibility** and the **effectiveness** of the Charter as well as the system of protection of human rights as a whole within the EU would be strengthened.

☞ **At the same time, in order to ensure a full and coherent protection of the fundamental rights, it would be also necessary to extend the control of the Court to all acts adopted in the framework of the third pillar, (Justice and Home Affairs), via an amendment of art. 234.**

As a matter of fact, acts adopted in this field are currently deprived of any judicial control while they could potentially restrict the fundamental freedoms of the individuals[23]. In the aftermath of the 11th of September, it has become particularly important to take all necessary measures in order to avoid any restriction of fundamental freedoms in the name of the fight against terrorism.

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[22] Cf. V. Povilas Andriukaitis, *Comments on horizontal articles of the Charter*, **WD 24**, Bruxelles, 7-10-2002.
[23] Cf. OMCT Contribution, 04.06.02, op. cit.