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Table of contents

Foreword

In its meeting on 3-4 June 1999 the Cologne European Council decided to draft a Charter of Fundamental Rights for the European Union following an initiative of the German EU presidency in 1999. The conclusions of the Cologne Council stated that the EU had reached a stage in its development at which it was desirable to formulate the rights that applied in the Union in a Charter, the primary aim being to make them more visible to the Union's citizens. The Council also stated that the new Charter should in no way detract from the fundamental rights that already applied within the Union, as set forth e.g. in the European Convention on Human Rights.

The Tampere European Council, meeting on 15 and 16 October 1999, reached agreement on the composition, working methods and practical arrangements of the Forum responsible for drafting a Charter of Fundamental Rights. This Forum (known since February 2000 as the Convention) consists of Members of the European Parliament, the legislative bodies of Member States, authorised government representatives and representatives of the European Commission. It has undertaken to complete an interim report before the European Council in June 2000 and to submit a draft Charter to the Council in Paris/Nice on 7-8 December 2000.

On 14 January 2000 the Minister of Foreign Affairs asked the Advisory Council on International Affairs (AIV) to prepare an advisory report on the proposed Charter. In its request for advice, which was formulated at the request of the General Committee on European Affairs of the Lower House of Parliament, the Minister emphasised that the AIV was not being asked to supply a blueprint for a Charter. What he wanted was an answer to questions concerning the legal status of such a Charter, its relationship to existing conventions and other agreements under international law, the consequences for members of the public and possible appeal proceedings that should be attached to it. These are the so-called 'horizontal' questions (see Annexe I for the text of the request for advice). In the light of the rapid developments surrounding the Charter, the Government found itself obliged to adopt a position while the advisory report was still under preparation. The AIV briefly considered responding to this position, but decided against it, as the advisory report and the Government position paper would be appearing at roughly the same time.

In preparing this advisory report, the AIV studied many reports and documents written about the proposed Charter, and had several discussions with experts responsible for drafting it (a list of persons consulted appears in Annexe II). The AIV is grateful to all persons and bodies consulted for their assistance, and wishes to express its special appreciation for the support it received from J.H.M. van Bonzel and I. Henneken of the Permanent Mission of the Netherlands in Brussels for arranging the programme for the visit to the Convention meeting in Brussels on 27 April 2000. While the advisory report was being prepared, good ties were maintained at secretarial level with the Ad Hoc group on the EU Charter of the International Economic and Social Affairs Committee of the Dutch Socio-Economic Council (SER).

The advisory report was prepared in a special AIV Committee on the Charter of Fundamental Rights (CHV), comprising the following persons: Professor F.H.J.J. Andriessen* (CEI), Dr A. Bloed* (CVV), T. Etty (CMR), Professor C. Flinterman (CMR), Professor W.J.M. van Genugten (Chairman/CMR), C. Hak (CMR), F. Kuitenbrouwer

(CMR), H.C. Posthumus Meyjes (CEI), Professor N.J. Schrijver* (COS) and M.G. Wezenbeek-Geuke (CEI). The members whose names are marked with an asterisk took part primarily by correspondence.

The preparation of the advisory report benefited from the special advice and support of A.R. Westerink (European Integration Department, Ministry of Foreign Affairs). The CHV's secretariat was in the hands of T.D.J. Oostenbrink (secretary of the CMR) and trainees A. Schueler and E. van Zimmeren.

The advisory report was discussed during the plenary session of the Human Rights Committee on 18 May 2000 and subsequently adopted by the AIV on 29 May 2000.

I Long-term perspective

Since the Maastricht Treaty (1992), the European Union (EU) has had three 'pillars'.[1] The first and most comprehensive pillar, which has existed for many decades, is the European Community (EC). In the EC, the protection of human rights has acquired form and content largely in the case law of the European Court of Justice (ECJ). This case law is largely based on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) of 1950, to which all Member States are party, and on the common constitutional traditions of the Member States.[2] Sometimes, however, the Court will allow an appeal to other human rights conventions, such as the International Covenant on Civil and Political Rights (ICCPR, 1966).[3] The EC Treaty itself, though several times revised, contains few provisions in the realm of human rights.

The Treaties on European Union (Maastricht, 7 February 1992 and Amsterdam, 2 October 1997) build on the established case law of the ECJ. Article F, paragraph 2 of the Maastricht Treaty (Article 6, paragraph 2 of the Treaty of Amsterdam) provides that the European Union shall respect human rights as guaranteed by the ECHR, including the acquis, and as they result from the constitutional traditions common to the Member States. Furthermore, the Treaty of Amsterdam contains the additional provision, in Article 6, paragraph 1, that the EU is founded on the principles of freedom, democracy, respect for human rights and fundamental freedoms and the rule of law, principles which the Member States have in common. Article 7 has a sanction/suspension clause. Article 46 provides for the exercise of judicial control over respect for human rights.

As already noted in the request for advice, the former Advisory Committee on Human Rights and Foreign Policy (ACM), in its 1996 advisory report on the European Union and Human Rights[4], elaborated three suggestions relating to the protection of human rights within the framework of the Union, viz.:
- the accession of the EC or possibly the EU to the ECHR;
- the EU's adoption of its own 'Bill of Rights';
- a gradual increase in the number of specific human rights provisions in de EU Treaties.

The ACM concluded that a 'step-by-step', 'one right at a time' approach was the most realistic in the short term. In the longer term, however, efforts should be made to achieve the accession of the EC or EU to the ECHR or the drafting of the EU's own Bill of Rights.

1 These pillars are the European Community (EC), the Common Foreign and Security Policy (CFSP) and cooperation in the area of Justice and Home Affairs (JHA).

2 See e.g. ECJ Stauder judgment (29/69) of 12 November 1969; ECJ 2nd Nold judgment (4/73) of 14 May 1974; ECJ Hoechst judgment (46/87) of 26 March 1987 and ECJ Orkem judgment (374/87) of 18 October 1989.

3 The ECJ Orkem judgment (374/87) of 18 October 1989 refers explicitly to the ICCPR.

4 See Advisory Committee on Human Rights and Foreign Policy, 'The European Union and Human Rights', advisory report no. 21, The Hague, 1996.

Now it has been decided to draft an EU Charter and the situation described above has completely changed, the AIV has deliberated at length, as the ACM did before, on the human rights protection that should ultimately be realised within the Union. The AIV sees 'Operation Drafting a Charter' as an intermediate stage, whose direction can best be determined once it is clear what the long-term perspective is. This is even more to the point if it emerges in the course of 2000 that no satisfactory consensus can be achieved on the text of a Charter.

Before answering the Minister's questions at length, the AIV wishes to set out the points of departure adopted in this advisory report. The AIV envisages a Europe characterised by:

1. the realisation of civil and political rights within the meaning of the ECHR, but also the ICCPR, and of economic, social and cultural rights within the meaning of the European Social Charter (Revised) (ESC, 1961; ESC (Revised), 1996), the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966) and the 'human rights conventions' of the ILO[5];
2. the explicit commitment of administrators and officials, both at national level and in Brussels, to respect for fundamental human rights;
3. the visibility and clarity of the rights referred to in point 1 to the citizens of the Union and third-country nationals[6], as well as members of the legal profession;
4. a system of controllability and legal protection, that provides inter alia for the possibility of taking legal action against EU institutions whose actions violate fundamental human rights.

Taking these basic principles as its points of departure, the AIV would stress that where it comes to the protection of civil and political rights, the accession of the EU to the ECHR is by far the most preferable option. The AIV is unconvinced by the argument, frequently voiced, that it is already too late for such accession. The following comments may serve to explain this position.

As already noted, the European Court of Justice (ECJ) has incorporated the rights enshrined in the ECHR into the general principles of Community law, which law has been ratified by all Member States of the EC/EU through the inclusion of relevant articles in the EU Treaties (see above). It is therefore still a logical sequel for the EU itself to accede to the ECHR. In this way the ECHR would acquire significance for all three pillars of the EU, which the AIV believes to be the most desirable outcome. It would also prevent the ECJ interpreting fundamental rights in a manner that would either provide less protection than Strasbourg case law or diverge from it significantly in some other way. At the same time it would mean that the ECHR would become the common human rights basis for the whole of Europe, including EU institutions, thus warding off the threat of a divided Europe. Furthermore, such accession would make it possible for the actions of EU institutions in specific situations to be examined by the Strasbourg Court in response to complaints about human rights violations.

The AIV is well aware that accession to the ECHR – and the same would apply *mutatis mutandis* to acceptance of the obligations following from the ESC (Revised), in relation to which it should be borne in mind that not all the obligations following from it could

5 Viz. ILO conventions nos. 87 and 98; 29 and 105; 100 and 111; 138 and 182.

6 The phrase derives from the Treaty of Amsterdam.

be declared equally applicable to the EU – would not be easy to achieve. Differences of opinion exist between the Member States; nor do all parties agree, whether in political or in legal circles, on the possible legal obstacles. It will be recalled that as long ago as 1979 the European Commission proposed that the EC should accede to the ECHR, with a view to reinforcing human rights protection within the Community. This proposal elicited the ECJ's advisory ruling of 28 March 1996, which stated that the Community did not possess the competence to accede to the ECHR. According to the ECJ, such accession could not take place without an amendment to the EC Treaty. Moreover, the question of whether the ECHR itself and its Protocols would have to be amended in this case would also have to be looked at. The question to be answered is whether new reasons may now be advanced for urging reconsideration of the ECJ's advice.

The request issued to the ECJ to advise on the accession of the EC to the ECHR was to a large extent inspired, at the time, by the political opposition of some EU Member States to an extensive interpretation of Article 235 (old) of the EC Treaty ('If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures'). Since the entry into force of the Treaty of Amsterdam, with the new Title IV included in the first pillar, the protection of human rights has moved closer towards definition as one of the Union's core objectives. The provisions to this end formulated in Article 6, paragraph 1 transform the comment that systems of government should be based on democratic principles into an absolute condition.[7] This is clear, for instance, from the fact that Article O (old) of the EU Treaty (now Article 49) has been amended such that any European state which respects the said principles may apply to become a member of the Union. Furthermore, Article 6, paragraph 4 of the EU Treaty states that the Union 'shall provide itself with the means necessary' to pursue the principles of the rule of law on which the Union is based. Basically, Article 6, paragraph 1 encapsulates the obligation that any state wishing to accede to the EU must be party to the ECHR. As far as fundamental rights are concerned, the Treaty of Amsterdam clearly states that the Union possesses certain qualities of constitutional law. The principles concerned are no longer the exclusive prerogative of Member States, but now also affect the Union as a whole.[8] Furthermore, the Strasbourg Court has made it clear in a number of recent judgments that it too wishes to step up the pressure to make Union institutions accountable for the implementation of decisions – as far as the consequences of the application of Community law within the national legal orders of Member States are concerned, in any case.[9] In addition, we may cite the decision-making during the Tampere summit of 15 and 16 October 1999. The Presidency's conclusions dwelt at length in the chapter 'Towards a Union

7 This is a quotation from Professor R. Barents in 'Het Verdrag van Amsterdam', Kluwer, Deventer, 1997, pp. 24-27.

8 Ibid.

9 See e.g. European Court of Human Rights, 19 February 1999, Matthews – United Kingdom, in R.A. Lawson & H. Schermers, Leading cases of the Court of Human Rights (2nd ed., Ars Aqui, 1999, p. 671), and European Court of Human Rights, 17 March 2000, T.I. – United Kingdom, (Nederlands Juristenblad, no. 19, 12 May 2000, pp. 981-982).

of freedom, security and justice', on the common values that are of essential importance to the EU, and the procedure for drafting a Charter on fundamental rights was further elaborated.[10]

As matters now stand, the EU does not possess the competence to conclude international human rights conventions or to accede to any such conventions. This is often explained by stating that the EU lacks the legal personality that would be necessary for such actions. In the AIV's view, however, there is nothing to stop the Member States deciding, for instance within the framework of the current IGC negotiations, to have the EC/EU accede to the ECHR. All that is needed is the will to do it, and for this will to be expressed: if all fifteen EU Member States decide that such accession is desirable and affirm their support for it, the process can be set in motion.[11] There is no need to create a separate, absolute legal personality for the Union, by analogy with Article 281 of the EC Treaty, which affirms that the Community possesses legal personality. The general debate on legal personality should be separated from the actual willingness to effect accession to the ECHR. According to the AIV, this willingness is in itself the decisive factor. All this applies to the Union side of the equation. On the ECHR side, separate problems present themselves, such as the necessary amendment of the Statute of the Council of Europe and of the ECHR itself. These too can be resolved, however, provided there is the political will to do so. It should be borne in mind, however, that the Council of Europe consists of another 26 Member States besides the fifteen partners in the Union, each with its own views on these matters.

Another possibility, where accession to the ECHR is concerned, is the application of the doctrine of 'implied powers'. This doctrine deals in general terms with the question of whether an organisation in which competence has been vested internally within a particular area may also take on external responsibilities that are necessary for the adequate fulfilment of that competence. Although the doctrine of 'implied powers' is also acknowledged within the framework of the Union – see e.g. the 1956 Fédéchar ruling – it plays a minor role in the EU, because many of the Union's powers have been explicitly regulated by the Member States, for the sake of caution. One exception, however, is the power to conclude external conventions. In this area the doctrine is invoked with some regularity, one example being the Community's accession to the WTO Treaty. The AIV would recommend that, now that the Union's powers in the realm of human rights and related matters are to be gradually expanded (cf. Title IV of the Treaty of Amsterdam), the government investigate whether the situation has changed sufficiently, or will have changed sufficiently after the adoption of the Charter, for the doctrine of implied powers to be deemed applicable.

Taking all these considerations and trends into account, the AIV recommends that the government explore the climate of opinion among the present Member States in the near future, or that it endeavour to procure a fresh ruling from the ECJ on the question

10 On this subject, see e.g. the letter from the Minister of Foreign Affairs to the Speaker of the Lower House, of 26 October 1999, concerning a Forum to prepare an EU Charter of Fundamental Rights (DIE/676/99).

11 By way of comparison: the legal personality of the United Nations under international law is also not explicitly regulated; see however the Reparations for Injuries in the Service of the United Nations, Advisory Opinion of the ICJ, 11 April 1949, p. 174 ff.

of accession, in the light of the latest developments and on the basis of specific questions.[12]

The AIV has also reflected on what action should be taken if neither of the above recommendations is followed. In this event, a number of possible approaches still remain, as described above. The least dramatic approach would be to try to bring about a political declaration. Such a declaration, however, runs a great risk of becoming 'all things to all Member States', given the way the Convention is working. After all, the compilers would be at liberty to add new rights (for more on this point see below) without states being bound by the declaration and without citizens acquiring any added legal protection. The AIV would view this latter situation as undesirable. It would arouse false expectations among the general public. It is clear from the developments thus far within the Convention, however, and from the talks that the CHV has conducted in this context, that the Convention appears to be aiming for a formulation of the Charter that would make it legally binding, either now or in the long term. This can be achieved in various ways. One option would be to integrate the Charter into the EU Treaty or a Protocol to the Treaty, according to the preference of the European Council. In this regard the AIV has a mild preference for the former option, as it would emphasise the fundamental importance of the EU Treaty to the further integration of Europe. The AIV favours the adoption of a binding Charter as the best alternative to the EU's accession to the ECHR, and will therefore now turn to a detailed discussion of this option.

12 See e.g. Professor E.M.H. Hirsch Ballin: 'Commentaar bij Advies 2/94 van het Hof van Justitie van 28 maart 1996 inzake de toetreding van de Gemeenschap tot het EVRM', in SEW, Tijdschrift voor Europees en economisch recht, vol. 45, no. 1, January 1997, pp. 21-23.

II Essential criteria

Given the long-term perspective already outlined by the AIV, and taking into account that no objective goal appears to have been defined as to what the Charter must achieve, the AIV believes that the following factors should be taken into account in shaping the Charter.

Interrelationship and indivisibility of classical and social human rights
The AIV is aware that the Convention is giving serious consideration to the possibility of including only civil and political rights, with a view to arriving ultimately at a binding Charter. This approach is based on the argument that economic, social and cultural rights, given that these are in the nature of 'normative instructions', cannot be included in a binding text. The AIV believes that to act on this basis is to adopt an approach that is wrong in principle.

The EU too has constantly emphasised the interrelationship and indivisibility of civil and political rights on the one hand, and economic, social and cultural rights on the other, in its human rights policy. This point of departure, that finds its origins partly in President Roosevelt's Four Freedoms Speech of 1941, was confirmed during the Second World Conference on Human Rights in 1993, with the full support of the Member States of the EU. It should be added that terms such as interrelationship and indivisibility (or 'interdependence' or another equivalent) have since become common currency internationally. To separate the two kinds of rights again would send the wrong message to large parts of the world community of states and the non-governmental world. Mary Robinson, UN High Commissioner for Human Rights, also recently defined the interrelationship and indivisibility of human rights as an important point requiring action.[13] Moreover, it is clear from developments on the international legal front that the classic distinction between legally enforceable and legally non-enforceable does not correspond to the distinction between civil and political rights on the one hand and economic, social and cultural rights on the other. To uphold an absolute distinction of this kind is no longer tenable.[14]

The Convention should therefore assert that in Europe too, human rights constitute an indivisible package of rights, consisting of specific claims in each of the two areas. The AIV would therefore strongly urge that the proposed Charter make no distinction between the way classical and social human rights are presented. The mere fact of grouping the two kinds of rights together does not automatically imply, however, that all rights have the same legal force. But that they are all binding – about that there should be no doubt. Even those rights, for instance, that are now enshrined in the ESC (Revised) are binding on states that have ratified it. The significance of these rights in legal proceedings instituted by individual members of the public, however, may differ.[15] In some cases, legis-

13 See also e.g.: Advisory Council on International Affairs, 'The functioning of the United Nations Commission on Human Rights', report no. 11, The Hague, 1999, section IIb.

14 Reference may also be made to the collective complaints procedure that has since entered into force – and that is used – under the ESC (Revised).

15 It is indeed a situation that may also differ from one country to the next; cf. developments in national legal practices in South Africa and India.

lation and the decisions of government and public authorities may be subject to direct scrutiny for compatibility with these rights, and perhaps declared non-binding. In other cases these rights can help in the interpretation of vaguely formulated national norms. In the Netherlands, for instance, courts are under an obligation to interpret and apply domestic legislation in the light of international obligations. This applies not only in the realm of civil and political rights, but also to economic, social and cultural rights such as equal treatment for women and men, the protection of children from economic and social exploitation, parents' right to choose their children's schools freely, and the right to form trade unions.

This said, some economic, social and cultural rights lend themselves less than others to judicial scrutiny or enforcement through the courts. People complaining of an infringement of these rights, or an aspect of such, would have to resort primarily to other mechanisms, such as appeals to governments and political parties and public campaigns. The AIV is aware that many Member States are not yet willing to go any further down the path of invoking economic, social and cultural rights before courts of law than can be done at present. Though this is regrettable, the AIV does not consider the Convention to be the appropriate forum for promoting further developments in that area. Any radical proposal would deal a sure deathblow to the entire Charter operation. The point is that the adoption of the Charter should send out a clear message to the citizens of the Union that they possess a number of human rights, by which the Union too is bound, but that these rights may not all have equal status in a court of law.

New rights

This brings the AIV to the issue of whether it would be wise to include a number of new rights in the Charter, as some members (of the Convention) and several non-governmental organisations have suggested. Possible examples include the right to a clean environment and the right to good governance. Understandable though such impulses may be, trying to impart the desired added value to the Charter in that way would be fraught with danger. Instead the AIV believes, as it indicates in its basic points of departure, that it would be better to achieve this added value by strengthening the legal accountability of the Union's institutions in respect of fundamental rights that are already recognised within Europe (see the section below on expanding existing legal remedies). In the light of this key objective, it could be hazardous to add new rights to the Charter, for the simple reason that some states could view them as a reason for rejecting the Charter, either when the Convention is finalising its draft or in the subsequent stage of formal adoption by the IGC and European Council. It could be a case of 'biting off more than one can chew' and spell death for the whole project. The AIV therefore advocates that any new rights be dealt with in separate treaty negotiations, possibly – though not necessarily – culminating in a separate Protocol to the ECHR, the ESC (Revised) or the Treaty on European Union.

Visibility and clarity

As already noted, one of the objectives of the Charter project is to enhance the visibility of rights. In this regard, a distinction is often made between lawyers and ordinary citizens: the former are supposedly fully abreast of existing rights, while the latter have no clear picture of them. However, this distinction is flawed in several respects. The AIV would mention just two. First, 'even' lawyers often lack detailed knowledge of the human rights situation within the Union – that is, of the Treaty component supplemented by a series of judgments handed down by the Luxembourg Court. A degree of specialisation is needed that is certainly not possessed by the entire legal profession.

Only recently, complaints emanated from 'Luxembourg' (the ECJ) that many European lawyers were unfamiliar with European law, and the same complaint would be applicable here.

As far as ordinary citizens are concerned, not all people are ignorant of their rights, although it would certainly be wrong to generalise from the proverbial exceptions such as specialised non-governmental organisations (including, in the Netherlands, the Dutch section of the International Commission of Jurists). Both Strasbourg and Brussels are in many respects remote, and this affects issues of fundamental rights. There is much room for improvement, on the part of both national authorities and the institutions themselves. A well-formulated Charter could help a great deal, by improving visibility and clarity. In this connection it is important to give a wide interpretation to the concept of 'citizens': at issue are not only ordinary members of the public and non-governmental organisations, but also companies and other private actors such as the media, which operate within and from Europe.

EU citizens and third-country nationals

An important point in the debate, and a separate area of concern for the AIV, concerns the fundamental rights of third-country nationals, people from countries outside the EU. The AIV would begin by commenting in general that human rights apply to everyone within the territory of the EU, including third-country nationals. The nature of human rights is such that they are not dependent on being a national of an EU Member State, but apply to everyone. This is true not only of internationally recognised human rights such as the right to freedom of expression and the right of association and peaceful assembly, but also to the right to health care and to education.

In practice, however, the legal status of third-country nationals within the EU is highly complex. This is mainly because their rights derive from different legal sources. Aside from rights based on the EC Treaty (as revised several times), they also have rights based on guidelines on discrimination, equal treatment, part-time work, family reunification and anti-racism measures. In other cases, rights accorded third-country nationals are largely determined by their nationality and/or country of residence. Rights that third-country nationals enjoy on the basis of their nationality may even derive, for instance, from Association Agreements, which are limited in scope to the nationals of Contracting States. The same applies, in another context, to the distinction between EU citizens and third-country nationals on the basis of the Schengen Agreements, where the Member State of residence is the decisive factor.[16]

When the rights of third-country nationals are compared with those of the nationals of a Member State, several differences emerge. The main differences relate not so much to civil rights but to political, social and economic rights, though in political rights too, the division between EU citizens and third-country nationals is growing less strict. This applies, for instance, to the right of petition and the right to submit a complaint to the European Ombudsman.[17] Although states are allowed under the terms of Article 16 of the ECHR to impose restrictions on the activities of aliens, this provision has seen little

16 See esp. the doctoral dissertation by Helen Staples, 'The Legal Status of Third Country Nationals Resident in the European Union', Utrecht, 13 October 1999, pp. 422-429.

17 See the memorandum by the National Ombudsman, 'Memorandum ten behoeve van de Europese Ombudsman', 12 April 2000.

application.[18] The general point of departure should be that third-country nationals enjoy the same rights as EU citizens, unless there are objective and reasonable grounds for departing from this general rule, as is done in practice regarding the right to vote and to be elected.[19] The same applies to the right to diplomatic and consular protection and eligibility for positions in EU institutions.

As the protection of human rights of all those who find themselves within the EU should be of paramount importance, the narrower problem of European citizenship should also be approached in that light. Article 8 (old) of the EC Treaty provides that every person holding the nationality of a Member State is a citizen of the Union, and that the citizens of the Union enjoy the rights conferred by the EC Treaty and are subject to the duties it imposes. Some of these rights are enshrined in Articles 8a-d (old), while others occur in various places in the EC Treaty. Even so, it is clear that European citizenship, which is supplementary to citizenship of a Member State (and hence does not replace it), is as yet of very limited scope. Thus in a number of cases regulations that apply in one country (e.g. relating to discrimination on the grounds of race or the legal status of partnerships) do not apply elsewhere. Furthermore, in some cases the ways and means of using existing rights effectively are inadequate – the right to publication of all European decision-making and access to documents being a case in point.[20] The AIV considers that the government, proceeding on the assumption of the basic equality of EU citizens and third-country nationals who have resided in the Union for more than five years, should flesh out the concept of EU citizenship unless there are 'objective and reasonable grounds' for making a distinction.

Tensions between the ECJ and the European Court of Human Rights
In the discussions on the Charter, the question frequently arises of the tensions that the new Charter might generate between the Strasbourg and Luxembourg Courts.

The Strasbourg Court currently dispenses justice in cases brought before it by citizens of any of the 41 States that are party to the ECHR, while the Luxembourg Court will in future be competent to rule, extrapolating from existing procedures, in cases in which one of the EU's institutions has violated a human right as formulated in the Charter. This raises a number of questions.

First, the question may be asked of how great the risk is of the Luxembourg Court adopting a different, substantially divergent interpretation of a particular human right compared to Strasbourg. A clause will probably be included in the Charter to the effect that the Luxembourg Court should consider itself bound by the Strasbourg acquis, but this ignores the fact that as an independent tribunal, the Luxembourg Court is within its rights to ignore such a provision. More generally, it may be assumed that the Luxembourg Court will have little inclination to accept as a foregone conclusion the interpretation of rights as agreed in Strasbourg. Furthermore, law is not a static

18 See European Court of Human Rights, 27 April 1995, Piermont-France (Series A, vol. 314), section 64.

19 See also European Court of Human Rights, 16 September 1996, Gaygusuz-Austria (Reports 1996, p. 1129), section 42.

20 Although Art. 255 of the EU Treaty provides for the right to inspect documents of the European Parliament, the Commission and the Council, the number of grounds on which this inspection may be refused are so numerous that the right has little substance.

phenomenon, and substantially different ideas may arise concerning the development of new law. The crucial point is whether or not this would have an adverse effect. Would it in general be a problem if the two courts were to arrive at different interpretations of certain provisions? From the present vantage-point the AIV sees a certain risk, but feels, especially in view of the independence of the judges in the two Courts, that it can and should be accepted. However, mindful of this risk, the AIV would add the express proviso that within at most ten years of adopting a Charter, a serious review should determine whether significant differences of interpretation have indeed arisen. If such be the case, the EU and the Council of Europe would be obliged to make further conventional agreements or to decide after all to accede to the ECHR and to accept the corresponding obligations deriving from the ESC (Revised).

In the short term, one option already suggested would be to create the possibility of appealing to Strasbourg from judgments handed down by Luxembourg, provided these lie within the scope of the ECHR. The AIV believes that despite the benefits to be gained, in maximising the scope for action for citizens whose rights have been undermined – and in strengthening legal certainty – this is undesirable from the vantage-point of process economy. After first exhausting domestic remedies the petitioner could take his or her case to two international courts, which, partly in light of both Courts' present workload, would appear to be 'too much of a good thing'. In this connection the AIV would point to the parallel that exists in that millions of European citizens may choose, in the event of a violation of their rights, to take their cases to both Strasbourg and the UN Human Rights Committee in Geneva. Although this possibility exists on paper, many countries have restricted it by entering reservations to either the ECHR or the ICCPR at the time of accession or ratification.

A different point is the division of labour between the two Courts. The misapprehension appears to be abroad that citizens will be entirely free in future to decide whether to take their cases to Strasbourg or Luxembourg, depending on where they believe their best chances lie. The AIV believes this would be undesirable. To prevent it, it should be emphasised that the Strasbourg Court should in essence carry on doing what it is doing now, whereas bringing a case before 'Luxembourg' will be possible only in relation to violations resulting from the actions of the EU's institutions. Examples would include the EU's promulgation of a Regulation undermining the right of ownership, or a decision made without respecting the elementary right to have both sides of a case heard. Only in such cases would the Luxembourg Court be the proper tribunal to apply to, though where a case lends itself in terms of substance to being heard by either Court, the choice would be up to the petitioner. This is in accordance with international legal practice.

Expansion of existing legal remedies

As noted in Chapter I of this report, the AIV believes that one of the most important principles in the Charter operation should be that it should clarify and strengthen the existing system of controllability and legal protection. Citizens are entitled not to be on the receiving end of empty promises on the part of their governments. In this context it is important to acknowledge that as things now stand, it is difficult for individual members of the public to gain access to the Court in Luxembourg. The classical criteria of an action taken by one of the EU's institutions being of 'direct and individual concern'[21] in practice throws up a considerable obstacle and seriously impedes the controllability

21 Art. 230 of the EC Treaty provides for a similar qualified right of appeal for natural and legal persons.

of decision-making.[22] The AIV therefore believes that citizens should be given wider – and more realistic – opportunities to complain about violations of their rights by one of the EU's institutions. It is counter-productive to place too many obstacles in their path. In this connection the AIV advises taking existing procedures as the point of departure and adjusting them. Where admissibility is concerned, the criteria of the ECHR could be used, as recently reaffirmed (in the context of the 11th Protocol, which embodied fundamental revisions of the Strasbourg system) and honed by the Strasbourg monitoring bodies. These requirements of admissibility, varying from the time limit for submitting a complaint to the requirement that a petitioner must claim to be the victim of a violation himself, have by now proven their worth. It is also clear that they do indeed function as obstacles, but not as insuperable ones.

As far as defining who is entitled to submit a complaint is concerned, the ECHR again provides useful criteria. It refers to 'any person, non-governmental organisation or group of individuals claiming to be the victim of a violation'. It would be appropriate for the Charter to include such a formula, again under the caveat that any change to the admissibility criteria or the use of two different systems is more likely to raise new questions than to help produce a clear and coherent whole. In the discussions on the Charter it has been acknowledged that it would be wrong for the Charter to send a message that there is a Strasbourg 'speed' and a higher or different 'speed', applicable to EU Member States. Adding new rights to the Charter (see above) and introducing a complaints system that differed from Strasbourg in terms of admissibility criteria would also send out the wrong message in that respect.

At the same time it is of great importance to include a provision in the Charter forbidding the invocation of the Charter to give a restrictive interpretation or application to existing national and international provisions and obligations in the area of human rights. A provision of this kind could be formulated by analogy with Article 53 of the ECHR and Article 5, paragraph 2 of the ICCPR.[23]

Concluding remarks

Should it turn out, after careful examination of the text of a Charter as agreed by the Convention for compatibility with the acquis of Strasbourg and Luxembourg[24], that the efforts to arrive at a well-formulated and legally binding Charter have not produced the desired outcome, there is still the option of a 'political' declaration, which could be made legally binding in due course. In that case the 'step-by-step', 'one right at a time' approach described above would be applicable, as the IGC could emphasise. If the most significant steps forward, such as accession to the ECHR and *mutatis mutandis* to the ESC (Revised), or the drafting of a legally binding Charter, prove impossible or unfeasible, this should not be seized upon as an excuse to do nothing. In the past a

22 See e.g. ECJ Plaumann judgment (25/62) of 15 July 1963; ECJ Toepfer judgment (joined cases 106 and 107/63) of 1 July 1965; ECJ Eridania judgment (joined cases 10 and 18/68) of 10 December 1969; ECJ International Fruit Company I judgment (joined cases 41-44/70) of 13 May 1971; and ECJ Kwekerij Gebroeders Van der Kooy BV et al. judgment (joined cases 67, 68 and 70/85) of 2 February 1988.

23 See e.g. the opinion of L.F.M. Besselink in Nederlands Juristenblad, vol. 17, 28 April 2000, pp. 887-888.

24 In this report the AIV proceeds on the assumption that the Convention will succeed in presenting a text of the Charter during the Lisbon summit in June 2000. In the ensuing months, but before the Nice summit, the text could undergo the examination referred to here.

piecemeal approach has often produced positive results, even generating a certain dynamism in the integration process. On balance, human rights already enjoy a considerable degree of protection in the EU, although this protection is not always sufficiently clear. Carrying on along this path would be the last option in attempting to strengthen the legal protection of the citizens of the EU.

A final word. The AIV wishes to emphasise the close relationship that must exist between the standards that are imposed internally and those that are urged upon other countries in the framework of external policy. Although this report primarily focuses on internal policy, it is of great importance to recognise that internal and external human rights policy cannot be viewed in isolation from each other. The EU cannot urge norms upon others in the context of external policy unless it has already achieved them itself.

III Recommendations

On the basis of the above considerations, the AIV makes the following recommendations to the Government of the Netherlands:

1. The AIV emphasises that the EU's accession to the ECHR is by far the most preferable option. The government should therefore give serious consideration to investigating whether such accession may not be feasible in the changed political circumstances. The same applies *mutatis mutandis* to accession to the ESC (Revised) and the ILO 'human rights' conventions.

2. If accession appears not to be feasible in the short term, efforts should be made to achieve a legally binding Charter of Fundamental Rights, incorporating economic, social and cultural rights as well as civil and political rights. The inclusion of these two types of rights in the same text does not automatically mean that they would all have the same legal force in all cases. Their significance in legal proceedings instituted by members of the public may differ.

3. The Government should try to make the rights included in a Charter both visible and clear, both for members of the public and even (!) for members of the legal profession.

4. The added value of the Charter should lie in the increased legal protection it affords citizens in the area of human rights, including access to the courts, in the application of European legislation. Its added value should not lie in the inclusion of new rights.

5. The AIV notes that great differences remain between the fundamental rights enjoyed by EU citizens and by third-country nationals. The AIV urges the government to introduce distinctions only in cases in which it is reasonable and objectively justified, and in other cases to proceed on the basis that EU citizens and third-country nationals who have been resident for five years or longer within the territory of the EU possess equal rights.

6. The AIV recognises the risk that the Courts in Strasbourg and Luxembourg may in some cases arrive at different interpretations of human rights norms. It considers that in the present circumstances this is an acceptable and inevitable risk, and recommends that in the event of significant differences, further conventional agreements be made within the framework of the EU and the Council of Europe, or alternatively that the decision be made for the EU to accede to the ECHR. In this connection, the AIV proposes that within ten years at most, a review be conducted to examine to what extent significant differences have arisen. In the AIV's view, it would be undesirable to create a possibility of appeal in Strasbourg against judgments handed down by the Court in Luxembourg.

7. In order to make it easier for members of the public to submit complaints about human rights violations by EU institutions and to prevent the growth of two divergent systems of admissibility, the admissibility requirements set forth and standardised in the context of the ECHR should be used as the basis. The question of who is entitled to submit a complaint should likewise be decided by refer-

ence to the ECHR criteria. Steps must be taken to ensure that existing national and international provisions of fundamental rights cannot be interpreted restrictively.

8. As soon as an initial draft of the Charter is finalised, a meticulous examination of the text should follow to check compatibility with the acquis of Strasbourg and Luxembourg.

9. If the efforts to bring about a Charter do not lead to a well-formulated and legally binding result, the strengthening of the protection of human rights within the EU should proceed by way of a 'step-by-step', 'one right at a time' approach.

10. In conclusion, the AIV emphasises once again that the EU cannot urge norms upon others in its external policy that it has not achieved internally.

Annexes

Chairman of the Advisory Council
on International Affairs
Prof. R.F.M. Lubbers
P.O. Box 20061
2500 EB The Hague

The Hague, 14 January 2000

Dear Professor Lubbers,

Mr Michiel Patijn has asked me, on behalf of the General Committee on European Affairs of the Lower House, to request from your Advisory Committee a report on the Charter of Fundamental Rights, or Bill of Rights, for the European Union. Mr Patijn chairs this Committee, and he also represents the Lower House in the Forum* that will be drafting the Charter. Professor Ernst Hirsch Ballin has been appointed to represent the Upper House. The Government is represented by Mr Frederik Korthals Altes.

The decision to draft a Bill of Rights for the European Union was taken by the European Council meeting in Cologne on 3-4 June 1999. A Forum consisting of members of the European Parliament and the parliaments of the member states and authorised representatives of governments and of the European Commission will prepare the Charter. This Forum must submit a draft of the proposed Charter to the Council before the European Council in December 2000. The Forum met on 17 December 1999 for the first time.

The General Committee on European Affairs of the Lower House indicated that it would like the Committee's advisory report to deal with the following points:

- What relationship will the new Bill of Rights have with existing national legislation (in particular the Constitution), European Conventions (in particular the European Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter) and international conventions (Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights)?
- What subjects should this Bill of Rights address that are not already included in existing legislation and regulations?
- How would such a Bill of Rights affect members of the public?
- How should this Bill of Rights be arrived at procedurally?
- What appeal proceedings should be applicable to the Bill of Rights? What legal institutions play a role here? How should the relations between these institutions be regulated?

The General Committee on European Affairs has pointed out that the subject of the Bill of Rights is already included in the Advisory Committee's programme, and has therefore expressed the hope that the report might be made available within three months.

As you are no doubt aware, the Interministerial Committee on European Law issued a report to the State Secretary for Foreign Affairs on 10 September 1999, which dealt

with some of the points raised above. This report is enclosed for your information. Also enclosed is a memorandum on the Charter that I sent to the Speaker of the Lower House on 3 December 1999.

I am familiar with the report 'The European Union and Human Rights', published by the Advisory Committee on Human Rights and Foreign Policy on 25 September 1996. The report now requested could perhaps build on this.

I share the hope expressed by the General Committee on European Affairs that the Advisory Committee's advisory report can be made available within three months, and I am convinced that it will be of great benefit to those representing both Parliament and the Government in helping to formulate their contributions to the Forum.

Yours sincerely,

Signed

Jozias van Aartsen,
Minister of Foreign Affairs

* In February 2000 the name 'Forum' was changed in 'Convention'.

List of persons consulted

P. Altmeyer (member of German Bundestag)

G. Braibant (representative of the French Government in the Convention)

K.M. Buitenweg (Group of Greens, European Parliament)

I. van den Burg (Group of European Social Democrats, European Parliament)

R. van Dam (Group of Democracies and Diversities, European Parliament)

R. Fernhout (National Ombudsman of the Netherlands)

Lord Goldsmith QC (representative of the British Government in the Convention)

R. Herzog (Chair of the Convention)

F. Korthals Altes (Speaker of the Upper House of Parliament)

J.R.H. Maij-Weggen (Group of European People's Party and European Democrats, European Parliament)

M. Patijn (Chair of the General Committee on European Affairs of the Lower House)

Mr Rodriguez Berejo (representative of the Spanish Government in the Convention)

P.B.C.D.F. van Sasse van Ysselt (Chairperson of the Dutch section of the International Commission of Jurists)

Also consulted was Professor E.M.H. Hirsch Ballin (member of the Upper House and Professor of International Law, Tilburg University); and

official advisors:

R.A.A. Böcker (International Law Division, Ministry of Foreign Affairs)

I. van der Steen (European Law Division, Ministry of Foreign Affairs)

List of abbreviations

ACM	Advisory Committee on Human Rights and Foreign Policy
AIV	Advisory Council on International Affairs
CEI	European Integration Committee
CFSP	Common Foreign and Security Policy
Charter	EU Charter of Fundamental Rights
CHV	Committee on the Charter of Fundamental Rights of the AIV
CMR	Human Rights Committee
Commission	European Commission
Convention	Forum responsible for drafting a Charter of Fundamental Rights
COS	Development Cooperation Committee
CVV	Peace and Security Committee
EC	European Community
ECHR	European Court of Human Rights
ECJ	European Court of Justice in Luxembourg
ESC	European Social Charter
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESC	International Covenant on Economic, Social and Cultural Rights
IGC	Intergovernmental conference
ILO	International Labour Organisation
JHA	Justice and Home Affairs
NJCM	Dutch section of the International Commission of Jurists
SER	Socio-Economic Council
UN	United Nations
Union	European Union
WTO	World Trade Organisation

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* Issued jointly by the Advisory Council on International Affairs (AIV) and the Advisory Committee on Issues of Public International Law (CAVV)