Judicial Reference to the EU Fundamental Rights Charter

First experiences and possible prospects [*]

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INTRODUCTION

If anything would appear to be indivisible, interrelated and interdependent at this moment within the ambit of the European Union, it would be the issues preoccupying the debate about the future of Europe. A European Convention was initiated by the Laeken Declaration of 15 December 2001[1] to consider key questions about the future development of the EU and to identify possible solutions. One of the issues to be dealt with is the role of human rights within the EU. This might seem surprising in light of the very recent adoption of a Charter of Fundamental Rights[2] by the predecessor of today's Convention.

One of the important characteristics of this text solemnly proclaimed on 7 December 2000 is the historically unique visualisation of a relationship of indivisibility, interrelatedness and interdependence of a much more fundamental nature, that of universal human rights.[3] The mentioning of civil, cultural, economic, political and social human rights on the basis of parity not only reflects a progressive understanding of human rights theory but also gives the Charter a 'specific European flavour'.[4] This could be understood as a long-awaited coming to grips with the potential implications of an ever-closer Union for European citizens. And yet, as if shocked by this insight – like a 50-year old man gazing in a mirror and somehow expecting to meet a reflection of years long past – political leaders were not willing to give this exemplary sign legal

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[1] The Future of the European Union – Laeken Declaration, available at: http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm

[2] OJ 2000 C 364, p.1 of 18 December 2000.

[3] Vienna Declaration (1993), par. 5. "All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis." (Quoted by ALSTON&STEINER (2000, 237)).

[4] VON BOGDANY (2000, 1314, footnote 37). BENOÎT-ROHMER (2001, 1485).

force. This is why one of the tasks of the European Convention is to "give thought to whether the Charter of Fundamental Rights should be included in the basic treaty.[5]"

Since its proclamation the EU Charter has been used and referred to in a variety of ways by the three signing political institutions of the EU.[6] Also the Advocates-General and the Courts in Luxembourg have referred to the Charter despite the fact that it was explicitly adopted as legally non-binding. It is on this last seemingly contradictory development, taking place in the shadow of the current European Convention, that I wish to concentrate. The aim of this paper is to analyse the way in which the Luxembourg magistrates refer to the Charter. To facilitate the analysis, I will begin with some reflections about the legal nature of the Charter. After that I will look at the twenty-four cases in which the Charter has been mentioned thus far and attempt to systematically analyse these references. In a later chapter I will reflect upon the possible future impact of the EU Charter, assessing whether exclusive reference to it by the Courts would be possible and desirable. I will conclude by returning the Charter and its current and possible future use into the context of the broader debate about the future of Europe.

I. THE LEGAL NATURE OF THE EU CHARTER

The Cologne European Council of June 1999 mandated the drafting of a Fundamental Rights Charter. This was to be "a task of revelation rather than creation, of compilation rather than innovation.[7]" The Charter Drafting Convention took the line to produce a text with a content that would allow incorporation in the Treaties, an approach that came to be known as the 'as if' doctrine.[8] Just after the completion of the text that would later be adopted in Nice, the Commission assessed the Charter as having a "great potential value added" that would be "the basis for [its] future success, *irrespective* of its ultimate legal nature.[9]" In light of the explicit adoption as legally non-binding one

[5] See *supra* footnote 1.
[6] See for an overview DUTHEIL DE LA ROCHÈRE (2001, 3-4).
[7] In the words of the Commission: COM (2000) 559, *Commission Communication on the Charter of Fundamental Rights of the European Union*, par. 7. DE BÚRCA (2001-II, 4) states that a 'creative distillation' was envisaged.
[8] See COM (2000) 559, par. 33 and COM (2000) 644**,** *Communication from the Commission on the legal nature of the Charter of Fundamental Rights of the European Union*, par. 33.
[9] COM (2000) 644, par. 2 and 3. Emphasis added.

could wonder how the legal nature of the Charter and the potential added value could be seen.

For a lawyer the starting point of such a reflection should be the text of the Charter. The preamble first provides an understanding of the aim of the Charter: the strengthening of the protection of fundamental rights in order to enable the Union to contribute to the preservation and development of the universal values of human dignity, freedom, equality and solidarity within its fields of competence.[10] The modest method chosen is also to be found in the preamble: the Charter sets out to make these rights more visible by re-affirming them.[11] This leaves one with the query of how to understand a non-binding re-affirmation of existing norms compiled on the presumption of being capable of having legal force.

A first view is that the Charter as agreed in Nice but not incorporated into the Treaties would exist as a mere a declaratory document.[12] Some scholars have argued the opposite: "The legal effect of [the] solemn proclamation is probably *similar* to that of insertion [..] in the EU Treaty. It is indeed obvious that the Charter may be regarded as an emanation of the constitutional traditions common to the EU Member States [it thus being] part of the *acquis communautaire* even if it is not part of the EU Treaty.[13]"

McGlynn, examining how a re-affirmation of existing rights could lead to a controversy about their justiciability, suggests that the legal status was debated "because the Charter does create *new rights* and it is the impact of such provisions which led to deep divisions among Member States.[14]" The UK government's representative to the Convention drafting the Charter has directly opposed this view. He argues that although the Charter "covers [..] with light touch areas where law and thought have developed [such as bioethics, prohibition of human trafficking and environmental issues] these are

[10] Loc.cit. *supra* footnote 2, preamble, par. 2, 3 and 4.
[11] Ibid., preamble, par. 4 and 5.
[12] See the written question P-3997/00 by Charles Tannock, MEP, to the Commission (13 December 2000). He quotes the British Minister for Europe, Mr. Vaz, who stated that a non-incorporated Charter would have "the same legal status as the Beano (a well-known children's comic)."
[13] LENAERTS&DE SMIJTER (2001-I, 90, footnote 1). Emphasis added.
[14] McGLYNN (2001, 583). Emphasis added.

not *new* rights [as] they are all to be found in the common constitutional traditions [and international agreements].[15]"

McGlynn, however, foresees yet another development in that "even those rights which have long been part of Community law are now likely to carry a new significance and moral authority.[16]" Opinions about whether the Courts should intervene in that regard diverge widely. Goldsmith insists that the Courts should approach the Charter "not as a text intended to be legally binding but as a broad political declaration of rights and freedoms and widely drawn principles.[17]" The Commission has predicted an opposite stance of the EU judiciary, suggesting that the Charter will become "mandatory through the Court's interpretation of it as belonging to the general principles of law.[18]" De Witte has taken the same position. After pointing out that the lack of direct admittance of any human rights source into the Community legal order has given the Courts considerable leeway in steering their fundamental rights doctrine through specific cases, he predicts that "this hermeneutic space will [..] be filled by the Charter.[19]"

This short overview indicates the variety of views expressed about the legal nature and the Courts' possible approach to the same legally non-binding text. As McCrudden remarks: "one of the few unambiguous statements that can be made about the legal status of the existing Charter is that its current legal status is unclear.[20]" It should be pointed out, however, that it is not unusual for human rights texts, adopted as legally non-binding, to attain legal status afterwards through the way they are used. This is precisely what occurred with the Universal Declaration of Human Rights of 1948. It is widely recognised that it has since gained legal status in general international law, and is now often referred to as a common standard of interpretation. Such examples suggest that one should not focus too much on the legal status intended at the time of adoption,

[15] GOLDSMITH (2001, 1209). Emphasis in the original.
[16] McGLYNN (2001, 583). The writer seems to point here at a new significance and moral authority of the rights individually. For an argument on how the rights in the Charter *taken together* as a whole could lead to a new significance by an interpretation based on the indivisibility, interdependence and interrelatedness of human rights, see *infra* chapter IV.
[17] GOLDSMITH (2001, 1215).
[18] COM (2000) 644, par. 10.
[19] DE WITTE (2001, 84).
[20] McCRUDDEN (2001, 12).

but on the respective use of a once non-binding text.[21] It is with this in mind that I now set out to discuss the value of the predictions made about the attitude of the EU judiciary towards the EU Charter.

II. REFERENCES MADE TO THE EU CHARTER BY LUXEMBOURG MAGISTRATES[22]

The Advocates-General and the European Courts have explicitly referred to the Charter in twenty-four cases[23] since its adoption.[24] In this chapter I will present only a systematic overview of these references. In the following chapter I will attempt to analyse several striking features of these references. By way of introduction, it will probably be surprising for many to learn that the first two references made to the EU Charter were external to the EU machinery. In September 2000, three months prior to the Charter's solemn proclamation, it had already been referred to in three places in the Wise Men's Opinion on Austria.[25] On 30 November, one week before the Charter's proclamation, the Spanish Constitutional Court in plenary session invoked art. 8 EU Charter as authority for the Community status of the right to protection of personal data.[26]

Turning to the EU judiciary[27], to date the Charter was mentioned nineteen times by Advocates-General and an additional five times by the Court of First Instance. Importantly, it has not yet been referred to by the European Court of Justice, which has thereby rejected an invitation to pronounce itself on nine consecutive occasions.

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[21] DE WITTE (2001, 84) indicates that the same goes for the Community legal order itself. "There are numerous examples from the case-law of the ECJ in which some interpretative authority was accorded to formally non-binding instruments of EC law."

[22] It should be pointed out that the exclusive focus on the *actual use* of the Charter – which I will operate in this paper – might not give a complete picture. A full understanding of the impact of the EU Charter since its proclamation through the judiciary could only by gathered by also looking at the human rights cases, either at the European level or at the national level within the scope of Union law, *without* reference to the EU Charter. This is because it could also be very illuminating to get a sense of why and when the EU Charter is *not* invoked in cases falling within its scope of application.

[23] As of 21 May 2002. It should be noted that this number has been derived from the combined use of the English, French and German database on the website of the Court of Justice, at: http://www.curia.eu.int/

[24] See the annex at p. 33 for a chronological/analytical overview.

[25] MENÉNDEZ (2001, 12 and footnote 50-51). The full text of the report is available at: http://www.virtual-institute.de/de/Bericht-EU/report.pdf

[26] MENÉNDEZ (2002-I, 5 and footnote 28).

[27] For other analyses of the EU judicial reference to the Charter, see; DUTHEIL DE LA ROCHÈRE (2001, 4-9) and MENÉNDEZ (2002-II, 10-13).

Beginning with the way in which Advocates-General have approached the Charter, it is striking to note that most references have been very short. In my current discussion I will divide the short references into two categories according to whether the legal status of the Charter – the obvious first hurdle to overcome if one would consider giving the Charter some sort of effect – was explicitly mentioned.

In the first category of short references a specific article of the Charter is usually mentioned, as mere evidence of some sort or as a substantive point of reference, but at the same time *explicit stress* is put on the legally non-binding nature of the Charter. This type of reference can be found, chronologically, in the Opinions in *Z. v. Parliament*[28], *Baumbast and R.*[29], *Mulligan and Others*[30], *Überseering*[31], *Commission v. Italy*[32] and *Unión de Pequenõs Agricultores.*[33] A somewhat odd Opinion in this list is *D. v. Council*[34], in which AG Mischo explicitly refers to the 'non-binding' explanatory notes of the Praesidium[35] creating a somewhat puzzling impression by not attributing the same characterisation to the Charter as such.[36]

This provides a bridge to the second category of short references by Advocates-General, in which the Charter is mentioned *without* any explicit statements or emphasis regarding its legal status. Legally, this omission would seem to deserve a more contextual reading in order to understand its significance. I will start with highlighting the 'no-means-none' cases. This is the case in four Opinions of AG Stix-Hackl[37] in which references to the Charter, always in footnotes, are merely descriptive and seem to be included only for the sake of completeness. Therefore, a legal non-status appears to be implied in these

[28] *Z v. Parliament,* C-270/99 P (22/03/01), [2001] ECR p. I-09197, par. 40.
[29] *Baumbast and R.,* C-413/99 (05/07/01), not yet reported, par. 59 and 110 and footnote 58.
[30] *Mulligan and Others,* C-313/99 (12/07/01), not yet reported, par. 28.
[31] *Überseering,* C-208/00 (04/12/01), not yet reported, par. 59.
[32] *Commission v. Italy,* C-224/00 (06/12/01), not yet reported, par. 58.
[33] *Unión de Pequenõs Agricultores,* C-50/00 P (21/03/02), not yet reported, par. 39.
[34] *D. v. Council,* C-122/99 P (22/02/01), [2001] ECR p. I-04319, par. 97.
[35] CHARTE 4473/00 CONVENT 49, of 11 October 2000, *Text of the explanations relating to the complete text of the Charter,* available at: http://ue.eu.int/df/default.asp?lang=en
[36] In a later Opinion, however, *Booker Aquaculture,* C-20/00 (20/09/01), not yet reported, AG Mischo explicitly refers to the Charter as legally non-binding (par. 126). See *infra* for a more detailed discussion of this Opinion.
[37] *Nilsson,* C-131/00 (12/07/01), not yet reported, footnotes 9 and 18; *Carpenter,* C-60/00 (13/07/01), not yet reported, footnote 29; *MRAX,* C-459/99 (13/09/01), not yet reported, footnote 26 and *Käserei Champignon Hofmeister,* C-210/00 (27/11/01), not yet reported, footnote 30.

Opinions.[38] This exact approach is repeated in the Opinions of AG Léger in *Wouters*[39] and AG Geelhoed in *D'Hoop.*[40]

There are three remaining Opinions with short Charter-references in which omitting an explicit mention of its non-status could be understood as having specific implications. Quite strikingly AG Alber in *TNT Traco SpA*[41], the first mentioning of the Charter by the EU judiciary, uses art. 36 EU Charter on the same footing as art. 16 EC to stress the *scope* of an exception in art. 86(2) EC.[42] Such use would certainly seem to imply more than a mere description.

AG Jacobs' references to the Charter are somewhat subject to change. As noted earlier this AG started of by explicitly mentioning the famous legally non-binding character in *Z. v. Parliament*[43] and repeated that in *Unión de Pequenõs Agricultores.*[44] However, the perception of AG Jacobs might be evolving. Whereas the lack of an explicit statement about the Charter's non-status in the Opinion in *Netherlands v. Parliament/Council*[45] could have been understood in light of a desire not to detract attention from the fundamental nature of the argument presented[46], the recent omission of 'non-legally binding' in *Gemo*[47] seems to point in another direction. Quoting article 36 EU Charter in parallel to and on the same footing with article 16 EC, the reference is used to ensure

[38] For two reasons: first, in *MRAX,* loc.cit. *supra* footnote 37 AG Stix-Hackl states in another place regarding a 1993 Resolution of the Council on family reunification "that it is not necessary to consider [it], because of its lack of legal force." (par. 28). In a later Opinion, *Commission v. Italy,* loc.cit. *supra* footnote 32, the same AG explicitly reminds the reader of the legally non-binding status of the Charter.
[39] *Wouters,* C-309/99 (10/07/01), not yet reported, footnotes 176 and 181. Also here the non-mentioning of the Charter's legal status can be understood as an implied non-status, since the same AG – on the same day – published his Opinion on *Hautala v. Council,* C-353/99 P (10/07/01), not yet reported, in which the Charter is dealt with in a detailed way, as well as its formal non-status. (par. 80). See *infra* for a more detailed discussion.
[40] *D'Hoop,* C-224/98 (21/02/02), not yet reported, footnote 18. Although no explicit statement is made about the legal status of the Charter it can be understood to imply a will of the AG to see it as legally non-binding, in light of the 2 previous Opinions, *Baumbast and R.,* loc.cit. *supra* footnote 29 and *Mulligan and Others*, loc.cit. *supra* footnote 30, in which the same AG explicitly stated just that.
[41] *TNT Traco SpA* , C-340/99 (01/02/01), [2001] ECR p. I-04109, par. 94.
[42] Ibid., par. 94. reads "[..] Le nouvel article 16 CE *ainsi que* (the sources are given equal weight, *jm*) l'article 36 de la Charte [...] soulignent *la portée* de cette exception, expression d'une valeur fondamentale inhérente au droit communautaire."
[43] Loc.cit. *supra* footnote 28.
[44] Loc.cit. *supra* footnote 33.
[45] *Netherlands v. Parliament/Council,* C-377/98 (14/06/01), [2001] ECR p. I-07079, par. 197 and 210.
[46] Most probably it was decided not to refer to the non-status so as not to weaken the point to be made about the specific human right concerned, human dignity, which is – in the words of AG Jacobs – "perhaps the most fundamental right of all." (par. 197)
[47] *Gemo,* C-126/01 (30/04/02), not yet reported, par. 124.

that appropriate weight be given to the importance now attached to services of general interest, a far more substantive use.

The eight remaining references, of which three are Opinions of Advocates-General and five are judgments of the Court of First Instance, deserve a closer look. The three Opinions refer to the Charter in a more elaborate way. They make for interesting reading as all three AGs attempt to find a way to reconcile the tension between the content of the document and the status of their compilation. On 8 February 2001 AG Tizzano delivered an Opinion on *BECTU.*[48] His remarks are worth quoting at some length:

> 26. Even more significant [..] is the fact that that right is now solemnly upheld in the Charter [..]after approval by the Heads of State and Government of the Member States, often on the basis of an express and specific mandate from the national parliaments. [..]
> 27. Admittedly, the Charter [..]has not been recognised as having genuine legislative scope in the strict sense. In other words, formally, it is not in itself binding. However, without wishing to participate here in the wide-ranging debate now going on as to the effects which, in other forms and by other means, the Charter may nevertheless produce, the fact remains that it includes statements which appear in large measure to reaffirm rights which are enshrined in other instruments. [..]
> 28. I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved - Member States, institutions, natural and legal persons - in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right.

On 10 July 2001 it was AG Léger, in his Opinion in *Council v. Hautala*[49], who went into some more depth. Before the part relevant to this discussion, he mentions article 42 Charter regarding access to documents as evidence of the *continuing process of acknowledgement* of this right in general[50] and as a definer of the status and content of this right[51] so as to establish its place in the ranking of norms within the Community legal order. He then continues, interestingly:

> 80. Naturally, the clearly-expressed wish of the authors of the Charter not to endow it with binding legal force should not be overlooked. However, aside from any consideration regarding its legislative scope, the nature of the rights set down in the Charter of Fundamental Rights precludes it from being regarded as a mere list of purely

[48] *BECTU,* C-173/99 (08/02/01), [2001] ECR p. I-04881.
[49] Loc.cit. *supra* footnote 39.
[50] Ibid., par. 51.
[51] Ibid., par. 73.

> moral principles without any consequences. It should be noted that those values have in common the fact of being unanimously shared by the Member States, which have chosen to make them more visible by placing them in a charter in order to increase their protection. The Charter has undeniably placed the rights which form its subject-matter at the highest level of values common to the Member States.
> 81. [..] where rights, freedoms and principles are described, as in the Charter, as needing to occupy the highest level of reference values within all the Member States, it would be inexplicable not to take from it the elements which make it possible to distinguish fundamental rights from other rights.
> 82. The sources of those rights, listed in the preamble to the Charter, are for the most part endowed with binding force within the Member States and the European Union. It is natural for the rules of positive Community law to benefit, for the purposes of their interpretation, from the position of the values with which they correspond in the hierarchy of common values.
> 83. As the solemnity of its form and the procedure which led to its adoption would give one to assume, the Charter was intended to constitute a privileged instrument for identifying fundamental rights.[..]

Finally, on 20 September 2001, AG Mischo also made a more deliberate reference to the Charter in *Booker Aquaculture.*[52] After having brought up art. 17 EU Charter as additional evidence supporting his argument[53], he states:

> 126. I know that the Charter is not legally binding, but it is worthwhile referring to it given that it constitutes the expression, at the highest level, of a democratically established political consensus on what must today be considered as the catalogue of fundamental rights guaranteed by the Community legal order.

I intend to let these quotations speak for themselves for now but will come back to some of these thoughts in the next chapter.

In comparison to these references the five made by the Court of First Instance seem to be, at first glance, more modest. But the power is in the not-stated. As early as 20 February 2001 it was forced to pronounce itself about the Charter in *Mannesmannröhren-Werke AG*[54], since the applicant brought it up as constituting a new point of law.[55] The Court dealt with it on purely procedural grounds, but clearly left the door open for future applications.[56]

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[52] Loc.cit *supra* footnote 36.
[53] Ibid., par. 125.
[54] *Mannesmannröhren-Werke AG,* T-112/98 (20/02/01), [2001] ECR p. II-00729.
[55] Ibid., par. 15.
[56] Ibid., par. 76. "As regards the potential impact of the Charter [..] it must be borne in mind that that Charter was proclaimed on 7 December 2000. It can therefore be of no consequence for the purposes of review of the contested measure, which was adopted prior to that." AG Stix-Hackl copied this insight in the Opinion in *Käserei Champignon Hofmeister,* loc.cit. *supra* footnote 37, footnote 30.

On 11 January 2002, almost a year later, the Court of First Instance silently but very importantly moved to integrate the Charter as an aid for interpretation in *Territorio Histórico de Álava*[57] at the specific request of the applicant.[58] As had been predicted by some[59], the Charter was simply added to the list of sources upon which the Courts had until then based their fundamental rights case-law. More particularly, the Charter appeared on equal footing with the other sources mentioned in art. 6(2) EU and without mention of its formal non-binding status.[60] Two weeks later, in *max.mobil Telekommunikation Service*[61], the Court of First Instance seems to have gone one step further by using the Charter as a building block for the framework within which the admissibility and substance of the claim were to be considered. Again its formally non-binding status not being mentioned, the Charter is used in two different places regarding two different rights.[62] It is used on equal footing with the sources "common constitutional traditions" and the ECHR as a re-confirmation of an already protected right. This approach has been repeated by the President of the Court of First Instance in his recent Order in *Technische Glaswerke Ilmenau GmbH*.[63]

In the groundbreaking case *Jégo-Quéré et Cie v. Commission*[64], about the concept of individual concern under Article 230(4) EC, the Court of First Instance seems to have gone yet another step further. Although the Charter is formally mentioned[65] in parallel with other sources of human rights, its *de facto* influence appears to have been more important than in the other cases discussed. Its legally non-binding nature again unmentioned, the Charter is now, for the first time, referred to in a separate paragraph, strongly suggesting that it is being used as a separate building block for the reasoning.[66] Thus, although not explicitly delineated, in this case the Charter seems to have been taken *de facto* beyond its re-confirming status.

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[57] *Territorio Histórico de Álava,* T-77/01 (11/01/02), not yet reported.
[58] Ibid., par. 19.
[59] McGLYNN (2001, 584).
[60] Loc.cit. *supra* footnote 57, Par. 35.
[61] *max.mobil Telekommunikation Service,* T-54/99 (30/01/02), not yet reported.
[62] Arts. 41(1) and 47 EU Charter in par. 48 and 57 respectively.
[63] *Technische Glaswerke Ilmenau GmbH,* T-198/01 R (04/04/02), not yet reported, par. 85 and 115.
[64] *Jégo-Quéré et Cie v. Commission*, T-177/01 (03/05/02), not yet reported.
[65] Ibid., par. 42 and 47.
[66] "Le droit à un recours effectif pour toute personne dont les droits et libertés garantis par le droit de l'Union ont été violés a, *en outre*, été réaffirmé par l'article 47 de la Charte [..]" (par. 42). My emphasis. The two other sources, the common constitutional traditions and the ECHR, are mentioned in the previous paragraph 41. "La Cour fonde sur les traditions constitutionelles communes aux États membres et sur les articles 6 et 13 de la CEDH la droit à un recours effectif devant une juridiction compétente."

In the case, the Court of First Instance seems to draw a distinction between a system of remedies being *complete* – as pronounced by the ECJ in *Les Verts*[67]– and *effective.*[68] On this basis it argues that the remedies available under articles 234 EC, 235 EC and 288(2) EC can no longer be considered as placing the courts in a position fully to control the legality of Community acts and to guarantee the right to an effective remedy for EU citizens.[69] It then reformulates the concept of individual concern. A person is to be regarded as individually concerned by a community measure of general application that concerns him directly, if the measure in question affects his legal position in a manner which is both *definite and immediate*, by restricting his rights or by imposing obligations upon him.[70]

It is interesting to contrast this reasoning of the Court of First Instance, in which article 47 EU Charter plays an important role, with the Praesidium's Explanatory Notes accompanying this article. "The inclusion in the Charter of [the precedent of *Johnston*[71] of guaranteeing the right to an effective remedy before a court] is *not* intended to change the appeal system laid down by the Treaties, *and particularly the rules relating to admissibility.*[72]" It is clear that the Court of First Instance reached the completely opposite conclusion. On the other hand, these legal explanations have no legal value and are "simply intended to clarify the provisions of the Charter.[73]" In any event, it seems to be almost certain that an appeal to this case will be brought before the European Court of Justice.

Thereby the Charter seems to have entered the case law of the Court of First Instance as an unmentioned source of "confirmation" of the two sources of inspiration mentioned in art. 6(2) EU. Although the nature of a source of confirmation seems to be different from, since inherently dependent on, a source of inspiration, the fact that the Charter is

[67] *Les Verts v. Parlement,*C-294/83 [1983] ECR p. 1339
[68] Loc.cit. *supra* footnote 64, par. 41 and 43.
[69] Loc.cit. *supra* footnote 64, par. 46 and 47. For our purpose it is important to note that, in par. 47, the ECHR articles 6 and 13 and the EU Charter article 47 are here again mentioned side by side in one paragraph to provide the evidence that the current jurisprudence can *no longer* be supported. As the ECHR was already in existence before the EU Charter's adoption in December 2000 and could already be referred to by the European Courts before that time, this suggests that it has actually been the EU Charter that has made the defining difference for this decision.
[70] Loc.cit. *supra* footnote 64, par. 51. Emphasis added.
[71] *Johnston,*C-224/84, [1986] ECR p. 1651
[72] Loc.cit. *supra* footnote 35, p. 41. Emphasis added.
[73] Idem., p. 1. See also AG Mischo's remark in *D. v. Council* (loc.cit. *supra* footnote 34), as discussed *supra,* that the Explanatory Notes are non-binding.

used on equal footing in the language is significant. Moreover one could now wonder whether the Charter has developed into a potential point of reference for the progressive reading in of (constitutional) change, which would take it even beyond the value of a mere source of confirmation. However, with all this activity of the Court of First Instance it must be recalled that the politically more important Court of Justice has not yet taken the opportunity to pronounce itself on the Charter. Many more opportunities will come, with currently ten opinions containing references to the Charter waiting to influence the thoughts of the judges, who now know the firm position taken by the Court of First Instance.

III. ANALYSIS OF THE REFERENCES MADE TO THE CHARTER: SOME POSSIBLE IMPLICATIONS

After having given an overview of references to the EU Charter made by the EU judiciary, I will now discuss some selected topics in somewhat greater depth. I propose first to examine more systematically how the Advocates-General have referred to the Charter. More specifically I will look at what type of Charter articles has been referred to thus far and at the distinction proposed by some between the legislative scope of the Charter and the nature of the rights protected. Following this I will give some thought as to what such use could imply for the indivisibility of human rights. A third focus will be the current position of the European Court of Justice. Finally I will examine the implications this carries for EU citizens.

By way of preliminary remarks on the use of the Charter I would like to make two, more abstract observations. We have just seen in the four recent judgements of the Court of First Instance, that a powerful argument can be hidden in the not-stated. Yet the constant repetition of a negation, 'non-binding'[74], could have more to it than legal rigidity. Classical Greek poets, such as Homer, often choose one particular word to characterise main personalities throughout a wide variety of different contexts. Such an appellation, an *epitheton ornans*, apart from being of practical use[75], made the poem

[74] See *supra* Chapter II. Note that AG Geelhoed in *Baumbast and R.,* loc.cit *supra* footnote 29**,** stressed three times the non-binding status of the Charter.
[75] Eg. for completing strophes to keep the rhythm intact so as to also make it easier for travelling artists to remember the complete, often very long, piece.

more lyrical. Great poets, however, could be distinguished by their skill to also use the *epitheton ornans* in other ways. Their use of an ever-returning word could make the listeners understand that in the context in which it was used it could not have but another, more substantial meaning. In that sense the repetition of 'non-binding' could also be seen as an attempt to legitimise the content of the Charter irrespective of its intended status.

Some Advocates-General have also used the democratic nature of the drafting process in an attempt to strengthen their argument that attention should be paid to it. AG Tizzano in *BECTU* stressed the "approval of the Heads of State and Government, often on the basis of an express and specific mandate from national parliaments.[76]" AG Léger in *Council v. Hautala*[77] and AG Ruiz-Jarabo Colomer in *Überseering*[78] observed that "the values listed in the Charter have in common the fact of being unanimously shared by Member States." And AG Mischo in *Booker Aquaculture* considered the Charter "worthwhile referring to given the fact that it constitutes the expression, at the highest possible level, of a democratically established political consensus on what today must be considered as the catalogue of fundamental rights guaranteed by the Community legal order.[79]" At first sight these arguments might seem to be an obvious strengthening for the case of giving more force to the content of the Charter. However, it should be kept in mind that the very legitimisation of the process could also be seen as quite irrespective of the content of the Charter.[80] Reference to the process would only seem worthwhile because of the resulting content, not so much because of the process in and of itself. In short, it remains important to distinguish between cause and effect. There is not a necessary beneficial link between the process and the content.

Turning now to a more legal analysis of the use of the Charter, I want first to look roughly at what type of rights have been referred to until now. As mentioned earlier, one of the revolutionary features of the Charter is its embodiment of the indivisible, interrelated and interdependent nature of human rights. The fleshing out of this potential

[76] Loc.cit. *supra* footnote 48, par. 26.
[77] Loc.cit. *supra* footnote 39, par. 80.
[78] Loc.cit. *supra* footnote 31, par. 59.
[79] Loc.cit. *supra* footnote 36, Par. 126.
[80] See, in this sense, DE BÚRCA (2001-I, 132): "Whatever the ultimate proposals of the body [responsible for the drafting], the nature of the process specified made it clear that they would have to be taken seriously."

in practise, however, would also appear to require a court to treat the rights listed in such a way by giving them equal weight and attention.

In analysing this[81] I propose to start from the somewhat simplified position that most "controversial" and "new" rights have been laid down in chapters III and IV of the EU Charter respectively, titled Equality and Solidarity. It emerges that rights in both chapters II and VI, about Freedoms and Justice, have been referred to eight times to date, followed by six additional references to rights contained in chapter V about Citizens' Rights. There have been three references to chapter IV's solidarity-rights. Finally, a chapter I dignity-right has been referred to once and there have not yet been any references to one of the equality-rights in chapter III. This means that only three out of twenty-four references have been related to "controversial" or "new" rights.

So, with the notable exceptions related to articles 31(2)[82] and 36 EU Charter[83], the EU judiciary has been shown to focus on and flesh out the reaffirmed rights that had already been developed in the Community context hitherto. However, we are still very close to the date of the Charter's adoption and the EU judiciary is obviously dependent upon the cases brought before it for considering specific rights. Therefore it might be difficult to draw definite conclusions from the tendency described, although it may at least suggest a general strategy of the EU judiciary to 'begin uncontroversially' in approaching the Charter.

Another interesting point to focus on is the distinction explicitly proposed by AGs Tizzano and Léger.[84] It is the distinction between legislative scope on the one hand and the nature and scope of fundamental rights on the other. AG Tizzano starts by noting in *BECTU* that "the Charter has not been recognised as having genuine legislative scope in the strict sense, [..] that it is not in itself binding.[85]" After having stated, however, that the rights in the Charter are a reaffirmation of rights from other sources he continues that "in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored [..] since [it is] its clear purpose of

[81] This section essentially consists of an analysis of the annex to this paper, see *infra* p. 33.
[82] In *BECTU*, loc.cit. *supra* footnote 48
[83] In *TNT Traco SpA*, loc.cit. *supra* footnote 41, and in *Gemo*, loc.cit. *supra* footnote 47.
[84] And practised implicitly by AG Alber in *TNT Traco SpA*, loc.cit. *supra* footnote 41; see *supra* Chapter II.
[85] Loc.cit. *supra* footnote 48, Par. 27.

serving as a substantive point of reference for all those involved. [Therefore] the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid [holidays] constitutes a fundamental right.[86]"

AG Léger's reasoning in *Council v. Hautala* proceeds along very much the same lines. The Charter is first used as evidence of the confirmation and the definition of status and content of the principle of access to documents.[87] After mentioning the clearly-expressed will not to make the Charter binding, he argues that "[a]side from any consideration regarding its legislative scope, the nature of the rights set down in the Charter [..] precludes it from being regarded as a mere list of purely moral principles without any consequences. [These values are shared by the Member States], which have chosen to make them more visible by placing them in a Charter in order to increase their protection.[88]" On this basis he makes the argument that the Charter should be used as a tool to distinguish between rights and fundamental rights, as it "was intended to constitute a privileged instrument for identifying fundamental rights.[89]"

Critical for this reasoning, in my understanding, is the statement in both Opinions that the purpose of the Charter is to be a substantive point of reference for all, a privileged instrument for the identification of fundamental rights. In this we can recall the visibility-aspect with which the Charter was drawn up. This outweighs – for the AGs – the way in which the purpose of a document is normally expressed by its drafters, i.e. by its legislative scope in the strict sense. It even places the provisions in the top of the hierarchy of sources, as is expressed by AG Tizzano's words 'most reliable' and AG Léger's 'privileged'. As a result it seems that we are dealing with a container without explicit legal force, but with legally binding content. It would obviously be revolutionary if the Courts were to pronounce themselves in equally explicit terms about the Charter thus circumventing the express will of the Member States.

But let us look again, thereby moving to the next point of the analysis, at the implications of the words of AG Tizzano and Léger in light of the principle of indivisibility of human rights as protected by the EU. Would their powerful pro-Charter

[86] Loc.cit. *supra* footnote 48, par. 28.
[87] Loc.cit. *supra* footnote 39, par. 73.
[88] Ibid., par. 80.
[89] Ibid., par. 81 and 83.

reasoning also imply that the complete content of the Charter, article by article, deserves equal attention of the Courts[90] and will be given equal legal force? Would every right listed benefit from the observation that the Charter is to be seen as a substantive point of reference for all, a privileged instrument for identifying fundamental rights?

For a start, this would seem contrary to some predictions. Eeckhout, for example, states regarding "more novel" provisions in the Charter, meaning not a clear confirmation or codification of rights already clearly protected by the Courts, that "one is likely to see variation in the extent to which the Courts apply the Charter, depending on the *type of provision* parties seek to rely on." In his view that will be a "delicate exercise" for the Courts.[91] Also Weber, after an analysis of the nature and justiciability of solidarity-rights, goes in this direction by remarking "that the interpretative function of Community organs and the ECJ [..] will be rather difficult and may considerably weaken the *coherent legal nature of the whole document* as a justiciable catalogue of rights for the citizen.[92]"

But are there any signs in the Opinions just discussed that the type of provision in the Charter matters? Was the protection of the coherent legal nature of the entire document implicit in their argument? Here we must admit that neither Opinions are put in such absolute terms that they do not allow some spaces to accommodate flexibility. Although AG Léger in *Council v. Hautala* begins by referring to the rights in a generic way (the nature of the 'rights' set down in the Charter precludes it from being regarded as a mere list of purely moral principles[93]), he soon admits that their sources are *for the most part* endowed with binding force.[94] The same applies to AG Tizzano's words in *BECTU*, when he stresses the Charter's "clear purpose of serving, *where its provisions so allow,* as a substantive point of reference.[95]"

An obvious counter-argument on the basis of *BECTU* would be that such linguistic nuances need not *per se* lead to a division in types of provisions, since that particular case dealt with a right that would normally be put in the weaker group: a social right. It

[90] An analysis *supra* has shown that this is not yet the case.
[91] EECKHOUT (2000, 105). Emphasis added.
[92] WEBER (2000, 112). Emphasis added.
[93] Loc.cit. *supra* footnote 39, par. 80.
[94] Ibid., par. 82.
[95] Loc.cit. *supra* footnote 48, par. 28.

has even been noted in an early analysis of the practice of the Advocates-General that one of the striking features of their reference has been that it was done irrespective of their original source or whether or not they were a clear reaffirmation of existing rights.[96] Also the four recent cases of the Court of First Instance showed no sign of weakening this view. Therefore, from the information we have at our disposal, we might have reason to be optimistic.

At the same time however, we must remain realistic. Based on an understanding of the current setting of the EU we probably should not expect the EU Charter to change dramatically the way the Courts approach fundamental rights, particularly in their indivisible relation to each other. This means that although the Charter brought together for the first time all human rights, it might well be that this merger will for a long time remain but an indivisibility on paper, thereby embodying a *de facto* divide in impact and protection at EU level. Such is the clear implication of De Witte's following remark:

> The Charter may, here as in other areas, have the effect of redirecting the course of the general principles case-law and making the ECJ more attuned to the need to offer protection to social rights. But judicial creativity is rendered more difficult here than in other areas because social rights typically require positive action for 'the progressive achievement of their full realisation'. [The ECJ checking the Community legislator in the fulfilment of these duties] would be a major innovation, because, so far, the 'positive dimension' is almost entirely absent from the ECJ's fundamental rights case-law. Introducing this 'positive dimension' [..] by invoking a non-binding Charter, would be a major exercise of judicial activism which one cannot expect from the Court, given the political and institutional context in which it currently operates.[97]"

This might be an appropriate bridge to the next part of the analysis, relating to the position of the European Court of Justice. As we mentioned before, the ECJ has not yet made any reference to the Charter although it has been explicitly invited on a number of occasions. What could be the reasons for that? I will mention three.

A first explanation is powerful in its simplicity: the ECJ simply did not need to invoke the Charter in order to reach its conclusion. It is possible that the ECJ has not wished to go further than needed in order to answer the questions that have arisen thus

[96] DUTHEIL DE LA ROCHÈRE (2001, 7). A look at the annex to this paper (*infra* p. 33) reveals that references to 'controversial' rights, mainly listed in chapter III (Equality) and IV (Solidarity) of the EU Charter, have been the first two and recently in *Gemo* (loc.cit. *supra* footnote 47). The number of cases in between, however, would at this stage seem to take away at least some of the force of the argument of Professor Dutheil de la Rochère.
[97] DE WITTE (2001, 86-87).

far[98], thereby strategically buying some time to see how the Charter is being used by its Advocates-General, the Court of First Instance and other EU institutions.

A second explanation for not referring to the text could be that there is a difference of opinion amongst the judges on how to do so.[99] The ECJ has been very cautious from the beginning[100], since it is aware that the Charter may raise many thorny questions over which disagreement is not unlikely. For example, it could well be that the Charter is found to be a problematic legal text to apply, that it is not perceived as the 'textual guidance' that Eeckhout expected it to become.[101] I will come back to this idea in the next chapter.

A third explanation for a possible delay in reference is of a more fundamental nature, as it relates to the position of the ECJ in the institutional setting. Engel has indicated that the Charter, if made justiciable – either by the Masters of the Treaty or by judicial application –, could also have deeper consequences for the position of the Courts in the institutional setting. At first sight, they would be strengthened by the extension of their competences. Their mandate would be broadened to include an explicit and well-delimited list of human rights specifically compiled for the European Union context, rather than the current unwritten set laid down in article 6(2) EU which refers only to *sources* from which to draw inspiration. The Preamble-adagium 'strengthening of protection through more visibility' could encourage the EU judicial branch, which has been surprisingly introverted in the field of human rights protection in absolute terms[102], to become more active in this area.

This enhanced human rights competence as a legal institution, however, could also be perceived by the ECJ to go hand in hand with a loss in *another* area. Engel has pointed out that "the Court of Justice [in protecting fundamental rights] has acted as a motor for integration, [..] understanding itself less as an organ of the judiciary but rather

[98] WHITE (2001, 330).
[99] WHITE (2001, 330).
[100] According to one author the ECJ observers to the drafting Convention "refrained from taking active part out of fear that they might prejudice later interpretation and application of the Charter." LIISBERG (2001, 1181).
[101] EECKHOUT (2000, 104).
[102] DE WITTE (1999, 869).

as a *political body*.[103]" A switch to referring to fundamental rights as a *judicial body* bound by a constant text would therefore take away some of its flexibility in the fulfilment of other functions it has been used to addressing with its fundamental rights case-law, "such as the promotion of European integration and, more specifically, the safeguarding of the supremacy of EC law before domestic courts.[104]" A reference to the Charter would imply the acknowledgement by the Court that with the adoption of the Charter the initiative of human rights definition in the EU has been taken over by the highest and most legitimate political body, the Masters of the Treaties. This would mean that the ECJ could only practise political power in legal form as to fundamental rights and that it would have to think of new or adapted ways to continue fulfilling its other functions. Therefore a justiciable Charter would limit, or at least change, the ways in which the court could act as a political body.[105]

I would like to end this chapter with two brief remarks that may be obvious for (EU) experts, but maybe less for (EU) citizens. If one looks at the EU judiciary's practise of referring to the Charter, it is to be noted that reference has until now been made only in combination with other sources.[106] Very much the same goes for citizens. Direct and exclusive reference to the Charter is unlikely to be successful in the current setting.[107] But, as Menéndez notes, "as the number of references grows, the legal representatives of the parties before the Court of Justice would find it increasingly necessary to refer to the text of the Charter in their own arguments.[108]" That is the doubly indirect way, through their lawyers and necessarily in combination with reference to the original sources of which the Charter is a composition, EU citizens should now start exercising their newly visible rights. Whether or not legal certainty will thereby increase, as the Commission predicted,[109] remains to be seen, as it depends very much on how the reference to the Charter by the Courts will develop.

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[103] ENGEL (2001, 156). Emphasis added.
[104] DE WITTE (1999, 869).
[105] ENGEL (2001, 169).
[106] Later I will assess the possibility for the Courts of exclusive reference to the EU Charter. See *infra* chapter IV.
[107] See BETTEN (2001, 161) and LENAERTS&FOUBERT (2001, 271) who point out that "rights in the Charter cannot as such serve as basis for claims by EU citizens against the Community or Member States. They should [..]be seen as 'touchstone' against which Community and Member State action can be tested."
[108] MENÉNDEZ (2002-I, 5). See also EECKHOUT (2000, 104).
[109] COM (2000) 559, par. 10.

IV. WOULD EXCLUSIVE REFERENCE TO THE EU CHARTER BY THE COURTS BE POSSIBLE AND DESIRABLE IN THE FUTURE?

McCrudden has strikingly reminded us that "the question of what we should do with the Charter depends significantly on what we think the Charter *is* currently [and] what we think it *is for* [..].[110]" The previous two chapters have hopefully provided an understanding of what the Charter currently *is* to the EU judiciary. In this chapter I will look at the Charter as a human rights text and operate from the presumption that it should exist *for* the enhancement of human rights protection within the Union legal order. In this context I intend to highlight only one issue relating to the possible future impact of the Charter that, to my knowledge, has not yet been specifically addressed by legal scholarship: the possibility and desirability of exclusive reference to the EU Charter by the Courts.[111] After that I will return the Charter back to the context of EU human rights protection in general.

It has already been pointed out[112] that direct and exclusive reference to the EU Charter by individuals in a EU human rights case is unlikely to be successful. But what about the reverse scenario: if the question of the status, interpretation and effects of the Charter was to be left entirely to the EU judiciary[113], could the Courts opt to base their reasoning exclusively upon the Charter?[114] From an EU perspective, keeping in mind the simplicity-, and visibility-grounds on the basis of which the Charter was drafted, exclusive reference might be of great value in making the method in which human rights cases are decided more understandable and predictable for citizens.[115] I would also suggest, from a human rights perspective, that it could possibly enhance the fleshing out of the potential of this historically unique embodiment of the indivisibility

[110] McCRUDDEN (2001, 11). Emphasis added.
[111] Obviously much thought has been given already to the future of the Charter in general. See in particular McCRUDDEN (2001) and DE BÚRCA (2001-II). DUTHEIL DE LA ROCHÈRE (2001, 13-20) gives an overview of options - varying from keeping the situation as it is to integrating the Charter into the Treaties in some sort of way - and the consequences of each.
[112] See *supra,* Chapter III.
[113] DE BÚRCA (2001-II, 5) explains that "[t]his could be an attractive option in terms of simplicity and in terms of the integrity of the Charter (in the sense that it would not need to be amended nor made strictly compatible with overlapping provisions of other EU Treaties and instruments)."
[114] BETTEN (2001, 159) points out that art. 51(2) EU Charter precludes that the *legislator* can use the Charter as a direct, and thus also as an exclusive source of reference. See also DE BÚRCA (2001-II, 11-12).
[115] A potential risk of such a practice, "a more inward looking jurisprudence and [a] chilling [of] the constitutional dialogue" is pointed out by WEILER (2000, 96) with regard to the Charter in general.

of human rights.[116] Their visualised interrelatedness and implied interdependence[117] could give way to a dynamic interpretation using one single text to stress that both classical freedoms and economic, social and cultural rights are to be understood as being firmly anchored in human dignity. This is indeed how – again in the words of McGlynn's – "even those rights which have long been part of Community law [could] now [be] likely to carry a new significance and moral authority.[118]" No international court until now has had jurisdiction over such a human rights text that could then be so systematically and coherently interpreted according to its own logic.[119]

It should immediately be made clear that this potentially raises numerous problems in the specific context of the EU.

First, for the ECJ to refer exclusively to the EU Charter would seem to imply the need for powerful arguments, such as the democratic legitimacy flowing from the drafting *process*, the stressing of the *content* of the Charter as merely reaffirming fundamental rights and the *aim* of enhancing human rights protection in the EU – constitutional language indeed – to circumvent its legally non-binding character. On top of that it would need to make an explicit statement that the EU Charter, according to paragraph 5 of its Preamble, reaffirms rights from the sources mentioned in art. 6(2) EU, over which it has jurisdiction according to art. 46(d) EU. Therefore – the Court could then argue – the existence of the comprehensive "catch-all" Charter should be seen as eliminating the need to refer explicitly to these original sources.

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[116] BENOÎT-ROHMER (2001, 1485).

[117] To be sure: "The interdependence principle reflects the fact that the two sets of rights [both 'traditional' civil and political rights and economic, social and cultural rights] can neither logically nor practically be separated in watertight compartments. Civil and political rights may constitute the condition for and thus be implicit in economic and social rights." (ALSTON&STEINER (2000, 247)).

[118] McGLYNN (2001, 583).

[119] BENOÎT-ROHMER (2001, 1492). Obviously such extended jurisdiction would not eliminate the need to continue co-ordinating the development of human rights law with national constitutional courts and other international courts. The point to be made here is that the *nature of the co-ordination* would change. In relation to national constitutional courts of EU Members it would entail the move to a clearer *shared jurisdiction over the full set of human rights* within the context of the EU. In relation to other international courts, in particular the ECtHR, it would give the EU courts a clearer *general human rights jurisdiction* in a specific (EU) context, whereas the ECtHR would keep its *specific jurisdiction* (civil and political rights) in a general (European) context. Now the co-ordination with specialised courts, such as the ECtHR, would seem to have to focus on a dialogue about the *actual content* of the rights protected. In contrast, the co-ordination under the full jurisdiction shared with the national constitutional courts of the EU members would seem to have to focus on both the *content* of the rights protected and the development of the more *systemic features of human rights protection*, such as the bringing into practise of the indivisibility, interrelatedness and interdependence of human rights.

Second, a dynamic interpretation based upon all the substantive rights present in the Charter could be seen as creating tension with sensitive horizontal issues, such as the principles of subsidiarity and specific competence attribution as mentioned in art. 51(1) and 51(2) Charter[120], the scope-provisions of art. 52(2) and 52(3) Charter[121] and the 'level of protection' provision of art. 53 Charter.[122] Imagine, for example – in light of article 52(2) and 52(3) EU Charter – an EU judge having to determine the relative meaning of a right in the Charter as a whole and in light of "changes in society, social progress and scientific and technological developments[123]", while not jeopardising the necessary consistency between the Charter and the 50-year-old ECHR from which many rights have been copied in different terms, and which should not be understood as having given these rights a different meaning. Similarly – in light of art. 53 EU Charter – picture an EU judge having to keep the ECHR, a document containing but civil and political rights, as a convincing minimum-level of protection, while at the same time having to keep in mind and express the value *inter se* of the reaffirmed and sometimes redefined rights (their indivisibility, interrelatedness and interdependence) in light of the progressive preamble-mission just mentioned.[124] In both cases an EU judge applying a dynamic interpretation would seem to have to overcome too many, sometimes contradictory considerations.

Third, the fact that the Charter has been argued to "contain but a sample of the total range of fundamental rights the European Court of Justice guarantees respect for,"[125] thereby implying that the reaffirmation was incomplete, leads to other concerns. To begin with, it could put the Court in a difficult position when called upon to protect a right not listed in the Charter but mentioned in a source external to the EU and potentially entering through art. 6(2) EU.[126] This could be called the problem of the

[120] DE BÚRCA (2001-II, 12).
[121] LENAERTS&DE SMIJTER (2001-II, 282).
[122] DUTHEIL DE LA ROCHÈRE (2001, 17).
[123] See par. 4 Preamble, loc.cit. *supra* footnote 10.
[124] See for a similar thought as to article 51(2) Charter, DE BÚRCA (2001-II, 12). "[I]t seems difficult to imagine that the policy competencies of the Community and Union will not in various ways be affected by the further constitutional and legal strengthening of the Charter. In what sense can Article 51(1) of the Charter impose an obligation on the Member States and the European Union to "promote the application" of the rights contained within it, when many of the rights (especially the social rights) declared and contained within it are at best weakly recognised as interests or entitlements at present, (or even, as in the case of the right to strike, explicitly excluded from EC powers of action) without implying that the powers of the Union – indeed arguably the *obligations* of the Union – have altered?"
[125] LENAERTS&DE SMIJTER (2001-II, 281).
[126] See BETTEN (2001, 160)

'external higher standard'. But also it could put the Court in a difficult situation when called upon to interpret a Charter-right that clearly reverses its earlier case-law.[127] Similar situations could rise with possible fundamental rights not mentioned in the Charter but contained in the EC Treaty or belonging to the common constitutional traditions of the Member States. This could be called the problem of the 'internal higher standard'.

And lastly, it would seem to presuppose a situation in which the EU would no longer have the possibility to accede to the ECHR and the ESC for reasons of potentially diverging case-law.

All of these problems are extremely delicate indeed. For the sake of arguing for the Charter as a human rights text potentially enhancing EU human rights protection and the possible implication for dynamic interpretation of the visualised indivisibility, interrelatedness and interdependence, I will leave them aside for the moment and return to them later on.

Returning to the issue of possible exclusive reference to the EU Charter, I propose to deal with it in light of the tension in the task of the drafters between visibility and legal certainty.[128] On the one hand, rights were to be reaffirmed 'as if' they could be incorporated in the Treaties, which would suggest a need for language fine-tuned enough to serve as law.[129] On the other, simple language was felt to be needed for close-to-the-citizens and visibility reasons.[130] To this end a choice was made to redraft several

[127] See, for an example, DE BÚRCA (2001-I, 137) about the situation of Member States derogating from fundamental market freedoms. Although, *prima facie*, this might seem to be a rather futile point, extending EU human rights protection to Member States implementing and derogating from Union law is extremely important not only for principle reasons but also in absolute terms. Since a well-known characterisation of the EU is *'une administration qui fait faire'*, possible human rights implications of EU policies logically very often only surface once on national level, in the process of their implementation or because of their interplay with other national rules. This has been the rationale behind the ECJ's extension of EU human rights protection to both the implementation,- and the derogation situation. In this light, given the huge impact the EU already has in the current stage of integration, the remark by MENÉNDEZ (2002-II, 15) "that Member States as a *general rule* keep on being bound by their national constitutional law, complemented by the Strasbourg system, the *exception* to this rule being Member States 'implementing Union law' " might well have to be reversed.

[128] I borrow this distinction from GOLDSMITH (2001, 1211). See also his similar argument about such a tension caused by disagreement over the *nature* of the different rights. GOLDSMITH (2001, 1204)

[129] See GOLDSMITH (2001, 1215).

[130] See EDITORIAL COMMENTS (2001, 2). "[The authors] used short sentences and kept the style as simple as possible in order to promote both the acceptance of such values by the people of the EU and the latter's identification with those values."

rights as compared to their expression in other human rights texts and to include only one general clawback-clause, art. 52(1) EU Charter, instead of the article-by-article approach as laid down in the ECHR. If one looks at the text as a product of this tension, it may be argued that, on the balance, the visibility-, and simplicity-concerns have outweighed the 'as if' goal.[131]

The combination of simplified language and a general clawback-clause, while allowing for visibility, appears to have caused a problem for our current purposes as well. For in its current form the Charter is now a rather problematic source of exclusive reference.[132] Legal certainty, paradoxically one of the things the Charter initially set out to increase, would not be served by a court applying too vague a text without any guidance for interpretation.[133] Therefore the likeliness of the Courts basing their reasoning solely on the EU Charter seems to be seriously jeopardised.[134]

As a result, in my perception, De Witte's remark that the Charter in its current form "will, most probably, become a favourite 'source of inspiration' for the ECJ in future fundamental rights cases"[135], will probably be – and from a legal point of view understandably so – as good as it gets. From a EU perspective this would seem, *prima facie,* a somewhat disturbing conclusion for a text designed to enhance visibility and to strengthen human rights protection in a system now characterised by its use of

[131] The very fact that a need was felt to publish a document with explanations relating to the complete text of the Charter 'to clarify' for the possibly puzzled expert-reader the result of the close-to-the-citizens visibility-exercise – an *expert-clarification to a layman's clarification*, so to say – could be seen as evidence of this presumption.

[132] See WATHELET (2000, 588): "La limitation des droits par une seule formule générale [..] est certes une solution facile, mais elle donnera lieu [..] à des difficultés d'interpretation." More generally, this could be seen as a result of not having met the standards for drafting set by TULKENS (2000, 331), who explains that "the drafting of a text of law, all the more so of a text of fundamental rights, is the result of a subtle reasoning between precision, concision and extension." (quoted by McCRUDDEN (2001, 7)).

[133] Indeed, this would also seem to conflict with the perception of some that one function of the Charter is to *control* the European Courts in how they develop their fundamental rights jurisprudence. See McCRUDDEN (2001, 13).From this perspective one might add that the recent *Jégo-Quéré et Cie v. Commission* (loc.cit. *supra* footnote 64) has shown quite the contrary, in that in this case the possible guidance for interpretation of the Charter, the explanatory notes,(loc.cit. *supra* footnote 35) have even been explicitly ignored by the Court of First Instance. See the discussion *supra* Chapter II.

[134] See also GOLDSMITH (2001, 1215), although in a different, more general way: "In the end I believe that the Charter lacks the precision of language needed to allow it legal force." WATHELET (2000, 590), discussing the Charter's legal status, suggests in this context a side-effect that the 'as if' doctrine could have had on some negotiators. Instead of resistance at their home-fronts some of them could have been more co-operative in the negotiations about the content of the rights, because of the awareness that the last decision about the legal status would be made by politicians anyway. "[..] Il n'est pas inconcevable que le contenu de la Charte est ce qu'il est, *parce que* les négotiateurs les plus réticents ne devaient pas craindre qu'un effet contraignant fût donné à la Charte." Emphasis added.

[135] DE WITTE (2001, 84).

"disparate, sometimes uncertain, sources of inspiration"[136] causing inherent vagueness. However, it is important to keep in mind that this vagueness holds hidden *higher* standards than the Charter. Therefore we should not get carried away with the attraction of simplicity and visibility in a way that would actually *lower* the current standard of protection in the EU. Applied visibility should not invisibly harm.[137] From a pure human rights perspective, however, the lack of independence could be seen as disappointing. The compulsory 'double reference' would make a forward-looking interpretation, fleshing out the potential of the visualised indivisibility, interrelatedness and interdependence of human rights presumably more difficult, if not altogether impossible.[138] In light of all this one might be forced to wonder whether from a human rights perspective the EU Charter has not simply made the situation even more complicated.[139]

This might be a good point to change our perspective somewhat. Thus far we have addressed numerous issues that are about judicial reference to a formally legally non-

[136] COM (2000) 644, par. 5

[137] BETTEN (2001, 160-161) points out that the lowering of the current standard might have been a deliberate move. In the Charter the "Member States have formally expressed the definition of human rights to which they commit themselves in the EU context; if a right is not included it means that the Member States [have wanted] to exclude that right in Community law." One should however, as is indicated by Betten, approach this problem by making a further distinction. Member States are not entitled to go beneath the 'external higher standards' in the EU context, since they are bound by them by having signed the external treaties in which these standards have been laid down. (See also art. 53 EU Charter). On the contrary, part of the 'internal higher standards' as developed in the European Courts' case-law (and probably also the EC Treaty- and common constitutional traditions-rights, because of the enhanced democratic legitimacy present in the Convention drafting the Charter) *can*, arguably, legitimately be reversed by the Masters of the Treaties as the supreme legislator in the EU. An argument against that position could be that many issues, like Member States derogating from fundamental market freedoms, have already been covered – without much controversy – for 30 years by the Courts' fundamental rights jurisprudence on the basis of art. 220 EC. See LENAERTS&DE SMIJTER (2001-II, 277, footnote 21). However, the argument following from that by LENAERTS (2000, 5) (analysing the modifications of the Treaty of Amsterdam which did not integrate such Member States' actions in the 6(2)/46(d) EU-protection), that "it is difficult to believe [..] that [restriction] of the case-law in this area should have [been] sought" (intentionally) seems to have lost some of its strength now that such Member States' actions, yet again, explicitly lack mentioning. That is also the view of JACOBS (2001, 338-339). It should be noted that the pending case *Booker Aquaculture,* loc.cit. *supra* footnote 36, will be an opportunity for the ECJ to give guidance as to this important issue.

[138] On a deeper level, paradoxically, the *too democratic* drafting process might have caused such a situation. See DE BÚRCA (2001-I, 133, footnote 22). "It is sometimes said that the openness and inclusiveness of a process of drafting (in international human rights law in general) tends to be inversely related to the legal strength of the final document which emerges."

[139] Thereby having disregarded the warning words of GAJA (1999, 782): "An evaluation of the existing systems [for the protection of human rights] appears to be essential before any new initiative is taken in order to establish yet another instrument. A further text should be adopted only if it serves an appreciable purpose that prevails over the disadvantages that would be caused by making the systems for protection human rights even more complicated." ENGEL (2001, 167), cynically, calls this "a 'lawyers paradise' on fundamental rights."

binding human rights text having been squeezed into the Union legal order. The progress we have described and that is to be expected is the result of the pressure caused by its political weight. No doubt the EU Charter will find itself a place amongst the sources of fundamental rights. The only questions are when and how.

For EU human rights protection in general, however, its potential impact should not be overestimated. In fact, it cannot be but limited, since the Charter has not removed some well-known inherent drawbacks to effective human rights protection in the EU.[140] As the proclamation of the Charter has not resulted in dramatic changes in the system of fundamental rights protection to date, it is legitimate to admit that Weiler was correct in observing that "if the purpose of the Charter is to enhance the protection of human rights in the Union, the most troubling aspect of this entire exercise is the fact that it serves as a subterfuge, an alibi, for not doing what is truly needed.[141]"

To re-prioritise but one of the issues, it is my view that the EU's accession to the ECHR and the ESC[142] of the Council of Europe should be facilitated. Human rights monitoring external to the EU, namely, would be beneficial in different respects. From a legal viewpoint "judicial review by courts not directly part of the polity the measures of which come under review[143]" would enhance the legitimacy of the EU human rights protection system. From a political point of view "the existence of a check by 'outsiders' on the human rights performance of EU institutions would be a sign of self-confidence and a useful message to those third countries whose human rights performance is monitored by the EU."[144] But, importantly, the co-ordinated co-operation of courts would also have the potential of being very beneficial legal-politically. International courts should be allowed to operate from "a common sense of

[140] DE WITTE (1999, 883) gives the following overview, of which the first two concerns might have changed somewhat with the references to the Charter as a 'source of confirmation' discussed and with *Jégo-Quéré et Cie v. Commission,* loc.cit. *supra* footnote 64. "The lack of visibility of Community fundamental rights due to their unwritten state of general principles of law; the narrow standing rules for individual complaints under Article 230 EC; the wide discretion left to the national courts as to whether they will raise issues of human rights breaches by Member State authorities; and finally, the classical access to justice problem that litigation is both costly and time-consuming [..]"
[141] WEILER (2000, 96).
[142] DUTHEIL DE LA ROCHÈRE (2000, 679). Only in combination do these two treaties of the Council of Europe cover both civil and political and social, economic and cultural rights.
[143] WEILER (1995, 74).
[144] DE WITTE (1999, 890).

belonging to the judicial branch"[145] rather than from a sense of protection of their position in their respective settings. And even without an explicit mandate, courts themselves should prioritise "mutually reinforcing their ability to uphold the law"[146], taking it as a common mission to counterbalance political forces that tend to keep the judicial branch fragmented.

It has been asked whether the Charter could form a threat to the supremacy of Community law.[147] The answer was in the negative, one of the remarkable conclusions being that "one of the major purposes of strengthened human rights protection at the Community level is precisely to safeguard the supremacy principle.[148]" In light of the paramount systemic drawbacks that remain unresolved it might be time to re-prioritise the question of human rights protection in the EU. Perhaps the reversal of the question just mentioned would be a good starting-point: does the supremacy of Community law in its current operation threaten the effective protection of indivisible, interrelated and interdependent human rights of European citizens? It is to be hoped that the participants in the current European Convention about the Future of Europe realise that this is at the heart of a Union pretending to place individuals at the heart of its activities.

V. CONCLUSION

In this paper I have attempted to indicate how the Luxembourg Courts have referred to the EU Charter after its proclamation in December 2000. References have been quite numerous. It has emerged that some Advocates-General, although aware of the Charter's controversial legal nature, have been quite progressive in their explicit references, stressing the democratic and substantive (added) value of the text. Others have persistently pointed at the formally legally non-binding status of the Charter. Whether this signifies legal formalism or, like an *epitheton ornans*, intends to implicitly give the Charter more than a non-status by the frequency with which, and the context in which, this characterisation is used, seems to depend on what the reader wishes to read.

[145] WEILER (1995, 71)
[146] Ibid. Although the author uses this reasoning for a description of the relationship between transnational and national courts, this would also seem to hold true for the relationship between transnational courts.
[147] LIISBERG (2001).
[148] LIISBERG (2001, 1193).

The Court of First Instance has, without much hesitation, now included the Charter as a source of "confirmation" next to the usual sources of inspiration. Also it seems to have been strongly inspired by it when it very recently extended *locus standi* under article 230(4) EC in certain situations. It should be kept in mind, however, that until now the European Court of Justice has refrained from following its Advocates-General in their reference to the Charter.

It is known that human rights protection has surfaced as an explicit concern for the Masters of the Treaties in the last decade. This resulted first in the insertion of an article F in the Maastricht-version of the TEU, which evolved subsequently into article 6 EU with the Treaty of Amsterdam and will be changed again if and when the Treaty of Nice comes into force. It is known also that the European Court of Justice in the past has used fundamental rights as an additional instrument to overcome political blockades[149], thereby strengthening its own position at the same time. Until now the EU Charter has not been taken up for such a judicial activist approach. The Masters of the Treaties, namely, have quite clearly adopted it as a declaratory document only, at least for the time being.[150] On top of that, this moment seems to be more fundamentally defining than any other the Court has found itself in, as evidenced by the current European Convention. This may explain the reluctance of the ECJ in referring to the EU Charter to date, and quite possibly for some time to come.

However, given these facts, it could also be regarded as offering new ways for the EU judiciary to influence the human rights debate, whether overtly or more subtly. Pending cases could offer the European Court of Justice the avenue needed to involve itself again in the EU human rights debate by giving the Masters of the Treaties a powerful sign to keep in mind human rights considerations in their ongoing discussion. Recall that it has done so before with its (in)famous Opinion 2/94 on accession to the ECHR[151], given just days before the initiation of the IGC leading up to the Treaty of Amsterdam.[152]

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[149] ENGEL (2001, 154).
[150] WATHELET (2000, 589).
[151] Opinion 2/94, *Accession by the Communities to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, [1996] ECR I-1759.
[152] LENAERTS (2000, 1). The CFI's judgement in *Jégo-Quéré et Cie v. Commission* (loc.cit. *supra* footnote 64) could be understood in the same way. It is not unlikely that, as a component of the EU judicial branch, the CFI wanted to give a sign to the European Convention not to forget about the

But even without such an impetus of the Court, the European Convention should use the constitutional momentum to give human rights considerations fundamental weight in the interrelated, interdependent and indivisible issues it faces. It should do so by removing the systemic drawbacks for effective human rights protection and by adding human rights protection as one of the objectives of the Community in art. 3 EC.[153] If the incorporation of the Charter in the Treaties is considered[154], its limited possible use as a source of exclusive reference should clearly be taken into account. On top of that, however, the EU's accession to the ECHR and the ESC as a cumulative step has also been recommended.

Only if such steps are taken could European citizens see their interrelated, interdependent and indivisible human rights safeguarded through the smoothly working protection system to which they are entitled. Only then could the promise of placing individuals at the heart of the Union's activities be lived up to.

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importance of sweeping and fundamental changes needed as to the Courts' architecture and resources in light of their already impressive caseload and possibly even more important implications of wider jurisdiction resulting from the expanding competences of the EU as a whole.

[153] WEILER (2000, 97).

[154] In the words of the Commission: "There is a very close link between reorganisation of the Treaties and incorporation of the Charter in them", COM (2000), 644, par. 12.

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ANNEX
CHRONOLOGICAL LIST OF OPINIONS AND DECISIONS WITH EU CHARTER-REFERENCE

DATE	CASE	STATUS	NAME	ART.&CHAPTER*
01/02/01	C-340/99	Opinion (Alber)	TNT Traco SpA	36 - IV
(17/05/01		*Judgment ECJ*		*No reference)*
08/02/01	C-173/99	Opinion (Tizzano)	BECTU	31(2) - IV
(26/07/01		*Judgment ECJ*		*No reference)*
20/02/01	T-112/98	Judgment CFI	Mannesmannröhren-Werke AG	General
22/02/01	C-122/99 P C-125/99 P	Opinion (Mischo)	D. v. Council	9 - II
(31/05/01		*Judgment ECJ*		*No reference)*
22/03/01	C-270/99 P	Opinion (Jacobs)	Z. v. Parliament	41(1) - V
(27/11/01		*Judgment ECJ*		*No reference)*
14/06/01	C-377/98	Opinion (Jacobs)	Netherlands v. Parliament/Council	1 - I 3(2) - I
(09/10/01		*Judgment ECJ*		*No reference)*
05/07/01	C-413/99	Opinion (Geelhoed)	Baumbast and R	7 - II 45 - V
10/07/01	C-309/99	Opinion (Léger)	Wouters	47 - VI (footnote)
(19/02/02		*Judgment ECJ*		*No reference)*

* The EU Charter consists of the following 7 chapters; I: Dignity, II: Freedoms, III: Equality, IV: Solidarity, V: Citizens' Rights, VI: Justice and VII: General provisions

DATE	CASE	STATUS	NAME	ART. &CHAPTER
10/07/01 *(06/12/01*	C-353/99 P	Opinion (Léger) *Judgment ECJ*	Council v. Hautala and Others	42 - V *No reference)*
12/07/01	C-313/99	Opinion (Geelhoed)	Mulligan and Others	17 - II
12/07/01 *(13/12/01*	C-131/00	Opinion (Stix-Hackl) *Judgment ECJ*	Nilsson	49(1) - VI (footnote) *No reference)*
13/09/01	C-459/99	Opinion (Stix-Hackl)	MRAX	7 - II (footnote)
13/09/01	C-60/00	Opinion (Stix-Hackl)	Carpenter	7 - II (footnote)
20/09/01	C-20/00 C-64/00	Opinion (Mischo)	Booker Aquaculture	17 - II
27/11/01	C-210/00	Opinion (Stix-Hackl)	Käserei Champignon Hofmeister	16 - II (footnote)
04/12/01	C-208/00	Opinion (Ruiz-Jarabo Colomer)	Überseering	17 - II 47 - VI
06/12/01 *(19/03/02*	C-224/00	Opinion (Stix-Hackl) *Judgment ECJ*	Commission v. Italy	41 - V *No reference)*
11/01/02	T-77/01	Judgment CFI	Territorio Histórico de Álava	47 - VI

DATE	CASE	STATUS	NAME	ART. &CHAPTER
30/01/02	T-54/99	Judgment CFI	max.mobil Telekommunikation Service	41(1) - V 47 - VI
21/02/02	C-224/98	Opinion (Geelhoed)	D'Hoop	general (footnote)
21/03/02	C-50/00 P	Opinion (Jacobs)	Unión de Pequenõs Agricultores	47 - VI
04/04/02	T-198/01 R	Order President CFI	Technische Glaswerke Ilmenau GmbH	41(1) - V 47 - VI
30/04/02	C-126/01	Opinion (Jacobs)	Gemo	36 - IV
03/05/02	T-177/01	Judgment CFI	Jégo-Quéré et Cie v. Commission	47 - VI