



ARTICLES

THE CHARTER OF FUNDAMENTAL RIGHTS IN THE CONTEXT OF INTERNATIONAL INSTRUMENTS FOR THE PROTECTION OF HUMAN RIGHTS

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ABSTRACT: This article examines how international instruments for the protection of human rights may affect the interpretation of the Charter of Fundamental Rights of the European Union (Charter). In doing so, it first reflects on the role of the European Convention on Human Rights (ECHR) in the interpretation of the Charter. The paper then considers the role of other international instruments, as they may be relevant in the interpretation of the Charter. The need to consider these instruments appears particularly clear when the explanations relating to the Charter refer to them in a manner suggesting that the instrument and the Charter protect corresponding rights. When an instrument is relevant, there is the need to take into account the interpretation given by the relevant treaty body established for reviewing the application of the specific instrument, such as the European Court of Human Rights with regard to the ECHR, or the Human Rights Committee with regard to the UN Covenant on Civil and Political Rights. Finally, the paper recalls that the Charter may not be invoked in order to restrict the protection of rights protected by international instruments, thus barring the possible attribution of negative effects to the Charter under EU law.

KEYWORDS: Charter of Fundamental Rights of the European Union – European Convention on Human Rights – human rights treaties – EU law – European Court of Human Rights – Court of Justice of the European Union.

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I. INTRODUCTION

The Charter of Fundamental Rights of the European Union (Charter) binds the Union and its Member States under EU law, but extends its reach beyond their circle. Since the Charter contains a catalogue of rights which adequately appears to reflect the needs of contemporary society, it influences the interpretation of less recent international instruments for the protection of human rights. In particular, certain decisions of the European Court of Human Rights have found in the Charter some useful elements for giving an interpretation of the European Convention on Human Rights (ECHR) as a “living instrument” and for expanding the protection of human rights. This is partly due to the fact that the acceptance by twenty-eight States of the standards relating to human rights established by the Charter is indicative of the perception that these States, which constitute the majority of the States parties to the ECHR, have of the current needs of protection. For instance, in *Schalk and Kopf v. Austria* the European Court (First Section) stated:

“Regard being had to Article 9 of the Charter, [...] the Court would no longer consider that the right to marry enshrined in Article 12 [of the ECHR] must in all circumstances be limited to marriage between two persons of the opposite sex”.¹

However, the present paper does not intend to examine the influence of the Charter on the interpretation of international instruments for the protection of human rights, but only to look at the reverse relation: at how these instruments may affect the interpretation of the Charter.

The influence that international instruments have on the protection of human rights within the Union dates back to the first decisions in which the CJEU introduced that protection in European Community law. Already in the *Nold* case in 1974, the Court noted that it was “bound to draw inspiration from constitutional traditions common to the Member States” and that:

“Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law”.²

On the basis of that approach, many decisions of the CJEU gave weight to international instruments for the protection of human rights. Most of these decisions referred to the ECHR. However, there were a few decisions that also considered other

¹ European Court of Human Rights, judgment of 24 June 2010, no. 30141/04, *Schalke and Kopf v. Austria*, para. 61. For a further example, see European Court of Human Rights, judgment of 6 July 2010, no. 41615/07, *Neulinger and Shuruk v. Switzerland* [GC], para. 135, which gave weight to Art. 24 of the Charter for asserting that “in all decisions concerning children, their best interests must be paramount”.

² Court of Justice, judgment of 14 May 1974, case C-4/73, *Nold KG v. Commission*, para. 13.

instruments. For instance, the *Defrenne III* judgment referred to the European Social Charter and to the ILO Convention No. 111 on discrimination,³ while the judgments in *Orkem*⁴ and in *Dzodzi*⁵ both considered, albeit to little avail, Art. 14 of the UN Covenant on Civil and Political Rights.

Art. F, para. 2, TEU, as adopted in 1992 in Maastricht, expressed for the first time in the Treaties the requirement that fundamental rights be respected under the law of the European Community. According to that paragraph:

“The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to Member States, as general principles of Community law”.

To a large extent, this text followed the approach taken by the CJEU in its previous jurisprudence, stretching over about twenty years. However, Art. F, para. 2, TEU also contained some novelties. One of them was the omission of any reference to international instruments other than the ECHR. However, this was not understood by the CJEU as an indication that those instruments should no longer be considered when drawing general principles. In *Grant* the CJEU referred to the UN Covenant on Civil and Political Rights and stated:

“The Covenant is one of the international instruments relating to the protection of human rights of which the Court takes account in applying the fundamental principles of Community law [...]”.⁶

The CJEU thus maintained its traditional approach that also gives weight to international instruments other than the ECHR. Moreover, the quoted passage was not an isolated assertion. The jurisprudence of the CJEU contains further examples of references to international instruments other than the ECHR. For instance, both judgments in *Parliament v. Council*⁷ and in *Dynamic Medien*⁸ referred to the UN Covenant on Civil and Political Rights and to the Convention on the Rights of the Child. Another example is given by the judgment in *International Transport Workers’ Federation*, which considered the European Social Charter and the ILO Convention No. 87 concerning Freedom of Association and Protection of the Right to Organise.⁹

³ Court of Justice, judgment of 15 June 1978, case C-149/77, *Defrenne v. Sabena*, para. 28.

⁴ Court of Justice, judgment of 18 October 1989, case C-374/87, *Orkem v. Commission*, para. 31.

⁵ Court of Justice, judgment of 18 October 1990, case C-297/88, *Dzodzi v. Belgian State*, para. 68.

⁶ Court of Justice, judgment of 17 February 1998, case C-249/96, *Grant v. South-West Trains*, para. 44.

⁷ Court of Justice, judgment of 27 June 2006, case C-540/03, *Parliament v. Council* [GC], paras 37-38.

⁸ Court of Justice, judgment of 14 February 2008, case C-244/06, *Dynamic Medien*, paras 39-40.

⁹ Court of Justice, judgment of 11 December 2007, case C-438/05, *The International Transport Workers’ Federation and the Finnish Seamen’s Union* [GC], para. 43.

Another novelty was that Art. F, para. 2, TEU mentioned the ECHR, in the context of the protection of human rights under EU law, not only as an element for drawing general principles. The same paragraph also stated that “[t]he Union shall respect fundamental rights, as guaranteed by the European Convention”. This provision seemed to point to the ECHR as a binding standard.¹⁰

Art. F, para. 2, TEU became Art. 6, para. 2, at Amsterdam in 1997 and Art. 6, para. 3, at Lisbon in 2007. The wording of the paragraph was slightly changed. The current text reads as follows:

“Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law”.

Also this text does not mention international instruments other than the ECHR. However, there is no reason why those instruments should not continue to be relevant, alongside the ECHR, when drawing general principles.

With regard to the ECHR, Art. 6, para. 2, further envisages that “[t]he Union shall accede to the European Convention”. Accession of the EU to the ECHR has implications that go beyond considering the ECHR as a binding standard within EU law. Such a standard could well exist independently from accession. However, given that Art. 6 TEU no longer states that fundamental rights have to be respected as guaranteed by the ECHR, it may be open to question whether the current text of the TEU already provides a binding standard with regard to the ECHR. The CJEU held that this could occur only as a result of the accession of the EU to the ECHR, for instance in *Åkerberg Fransson*¹¹ and in *Ordre des barreaux francophones et germanophone*.¹²

With the Treaty of Lisbon, the ECHR acquired another significant role, that of influencing the interpretation of the now binding Charter of Fundamental Rights. This will be examined in the following section.

II. THE ROLE OF THE ECHR IN THE INTERPRETATION OF THE CHARTER

The role of the ECHR in the interpretation of the Charter is the object of Art. 52, para. 3, of the latter instrument. This is one of its “horizontal provisions”. It reads as follows:

¹⁰ I had expressed this view in *The Protection of Human Rights under the Maastricht Treaty*, in D. CURTIN, T. HEUKELS (eds), *Institutional Dynamics of European Integration. Essays in Honour of Henry G. Schermers*, Dordrecht and Boston: Martinus Nijhoff Publishers, 1994, p. 549 *et seq.* For a similar view, see F.G. JACOBS, *European Community Law and the European Convention on Human Rights*, *ivi*, p. 563.

¹¹ Court of Justice, judgment of 26 February 2014, case C-617/10, *Åkerberg Fransson* [GC], para. 44.

¹² Court of Justice, judgment of 28 July 2016, case C-543/14, *Ordre des barreaux francophones et germanophone and Others*, para. 23.

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

The third sentence of Art. 6, para. 1, TEU, requires an interpreter of the Charter to have “due regard to the explanations referred to in the Charter, that set out the sources of those provisions”.¹³ As is indicated in the explanation on Art. 52 of the Charter, the quoted para. 3 “is intended to ensure the necessary consistency between the Charter and the ECHR by establishing the rule that, in so far as the rights in the present Charter also correspond to rights guaranteed by the ECHR, the meaning and scope of those rights, including authorised limitations, are the same as those laid down by the ECHR”.

The explanation also notes that “[t]he reference to the ECHR covers both the Convention and the Protocols to it”. Since the additional Protocols are only invoked for the interpretation of the Charter and not for their application, it does not appear necessary that the Protocols to the Convention should have entered into force for all the Member States. This is confirmed by the references in the explanations on Arts 19 and 50 of the Charter to rights granted in Protocols 4 and 7, both of which certain Member States have not yet accepted.

When considering Art. 52 of the Charter, the explanations list various “Articles of the Charter where both the meaning and the scope are the same as the corresponding Articles of the ECHR” and other “Articles where the meaning is the same as the corresponding Articles of the ECHR, but where the scope is wider”. The list of rights is meant to cover those existing “at the present stage, without precluding developments in the law, legislation and the Treaties”. These developments include the possible widening of the protection guaranteed by the ECHR, either by the adoption of new Protocols or by an evolving case-law of the European Court of Human Rights.

Moreover, the explanations on several articles of the Charter state that these texts “correspond” to provisions in the ECHR¹⁴ or that the rights they protect “have the same meaning and scope” as the rights under the ECHR.¹⁵ In other cases, the explanations use language to a similar effect.¹⁶ Whatever the terminology chosen, there is according to these explanations a substantial overlap between the provisions of the ECHR and those of the Charter.

¹³ Similarly, the preamble of the Charter states that “the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention”.

¹⁴ See, for instance, the explanations concerning Arts 2, 5, 10 and 11.

¹⁵ See, for example, the explanation with regard to Art. 6.

¹⁶ One may refer to the explanation concerning Art. 4: “The right in Article 4 is the right guaranteed by Article 3 of the ECHR”, or to that about Art. 9: “This Article is based on Article 12 of the ECHR”.

In so far as a provision of the ECHR corresponds to an article of the Charter, there does not seem to be a role for the ECHR in the shaping of general principles that apply independently from the Charter. The Charter has become after Lisbon the main source of protection of human rights under EU law, and there is no point in referring to general principles based on the ECHR for adding what would be an overlapping protection with the same content. The apparently restrictive wording of Art. 51, which makes the Charter applicable to “Member States only when they are implementing Union law”, may have seemed to restrict the scope of the Charter more than that of general principles. However, this does not appear to have found confirmation in the case-law of the CJEU.¹⁷

III. THE ROLE OF INTERNATIONAL INSTRUMENTS OTHER THAN THE EUROPEAN CONVENTION

With regard to international instruments for the protection of human rights other than the European Convention, the Charter does not include any provision indicating that these instruments may also be relevant in the interpretation of the Charter. However, the instruments in question, when they bind all the Member States or a substantial number of them, are part of the normative context surrounding the Charter and therefore are relevant for the interpretation of the latter. The provisions of the Charter cannot be interpreted in total isolation from the meaning given to rights guaranteed by these international instruments. This is also in view of the fact that these instruments had an influence on the drafting of the Charter which is only partly reflected in the explanations.¹⁸

The need to consider these instruments in the interpretation is particularly clear when the explanation on a provision of the Charter refers to them in a manner that suggests that the international instruments protect rights corresponding to those guaranteed by the Charter. When the explanations state that a certain provision in the Charter “is based” or “draws” on a certain international instrument, they implicitly consider that the right conferred by the Charter corresponds to that guaranteed by the instrument. This points to an interpretation which reflects that of the provision of the relevant international instrument. Such a conclusion is not prevented by the absence in the Charter of a provision parallel to Art. 52, para. 3, which requires to align the meaning and scope of rights protected by the Charter with the corresponding rights under the ECHR.

A list of the articles of the Charter which, according to the explanations, reflect provisions of international instruments other than the ECHR would be rather long. Leaving aside the ECHR, the largest number of references to international instruments in the

¹⁷ See in particular the judgment in *Åkerberg Fransson* [GC], cit., paras 45-47. For a review of the case-law on this issue, see M. DOUGAN, *Judicial Review of Member State Action under the General Principles and the Charter: Defining the ‘Scope of Union law’*, in *Common Market Law Review*, 2015, p. 1201 *et seq.*

¹⁸ See A. ROSAS, *The Charter and Universal Human Rights Instruments*, in S. PEERS *et al.* (eds), *The EU Charter of Fundamental Rights. A Commentary*, Oxford: Oxford University Press, 2014, p. 1699.

explanations concerns the European Social Charter, which is also recalled in a paragraph of the Preamble to the Charter that reaffirms the rights as they result, *inter alia*, from “the Social Charters adopted by the Union and by the Council of Europe”, the latter being the European Social Charter adopted in 1961 and then revised in 1996. References to the European Social Charter or to the revised Social Charter may be found in the explanations concerning 14 articles of the Charter of Fundamental Rights. They relate to the right to education (Art. 14), the freedom to choose an occupation and right to engage in work (Art. 15), equality between women and men (Art. 23), the rights of the elderly (Art. 25), integration of persons with disabilities (Art. 26), workers’ right to information and consultation within the undertaking (Art. 27), right of collective bargaining and action (Art. 28), right of access to placement services (Art. 29), protection in the event of unjustified dismissal (Art. 30), fair and just working conditions (Art. 31), prohibition of child labour and protection of young people at work (Art. 32), family and professional life (Art. 33), social security and social assistance (Art. 34) and health care (Art. 35).

References in the explanations to other international instruments are limited. What may seem surprising in particular is the fact that there are only two references to the United Nations Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights. With regard to the latter Covenant, the explanation on Art. 19 of the Charter, concerning protection in the event of removal, expulsion or extradition, only says “see also Article 13 of the Covenant on Civil and Political Rights”, while the explanation on Art. 49 states that the provision adds to “the traditional rule of the non-retroactivity of laws and criminal sanctions”, “the rule of the retroactivity of a more lenient penal law, which exists in a number of Member States and which features in Article 15 of the Covenant on Civil and Political Rights”. The lack of references to the Covenants may partly be explained by the difference in meaning that may exist between certain provisions of the Covenants and those of the ECHR and the European Social Charter and by the opportunity to point in the explanations to a single meaning. It would however have been preferable not to isolate the interpretation of the Charter from that of the principal instruments for the protection of human rights at the universal level, which are moreover binding on all the Member States of the Union.

In the explanations relating to the Charter, only a handful of further references to international instruments can be found. Two references are made to the European Convention on Human Rights and Biomedicine (Arts 3 and 21), one each to the Statute of the International Criminal Court (Art. 3), the European Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Art. 8), the Convention on the Rights of the Child (Art. 24) and the Geneva Convention on Refugees (Art. 18). The latter Convention, which guarantees the right to asylum, is also mentioned in the text of the article of the Charter.

IV. THE INTERPRETATION GIVEN BY THE RELEVANT TREATY BODY

Interpreting rights under the Charter according to the meaning and scope of the corresponding rights under the ECHR, as required by Art. 52, para. 3, of the Charter, implies giving weight to the case-law of the European Court of Human Rights. There are clear indications pointing in that direction both in the Charter and in the explanations. In its Preamble, the Charter reaffirms “the rights as they result, in particular, from [...] the case-law [...] of the European Court of Human Rights”. The explanation on Art. 52 of the Charter, after referring to the ECHR and the Protocols to it, notes that “[t]he meaning and the scope of the guaranteed rights are determined not only by the text of those instruments, but also by the case-law of the European Court of Human Rights and by the Court of Justice of the European Union”. The explanation on Art. 19, concerning protection in the event of removal, expulsion or extradition, specifies that “[p]aragraph 2 incorporates the relevant case-law from the European Court of Human Rights regarding Article 3 of the ECHR” and refers to two judgments of that Court.

The CJEU has often referred to the case-law of the European Court when examining provisions of the Charter, sometimes even when the Charter does not guarantee rights corresponding to those protected by the ECHR.¹⁹ In other decisions, the CJEU has omitted references to the case-law of the European Court. Sometimes these omissions may be explained by the fact that certain conclusions had already been reached by the CJEU in its earlier jurisprudence and that the same Court may have considered it sufficient to refer to what it had previously stated. This is in line with the reference to the “case-law [...] of the Court of Justice” which is contained in the passage of the explanation on Art. 52 quoted above.

One may also find some decisions of the CJEU which raise doubts about whether the interpretation given to the Charter is consistent with the provisions of the ECHR guaranteeing corresponding rights. For instance, the European Court of Human Rights highlighted in *Tarakhel v. Switzerland* a difference of view with the CJEU with regard to the protection to which a person is entitled against removal to a country where he or she runs a risk of an inhuman or degrading treatment. The CJEU had identified that risk in the existence of “systemic flaws in the asylum procedure and reception conditions for asylum applicants in the Member State responsible, resulting in inhuman or degrading treatment”, while the European Court did not require systemic flaws, but considered the existence of “substantial grounds [...] for believing that the applicants would be at

¹⁹ See M. AFROUKH, *La notion de droits correspondants dans la jurisprudence de la Cour de justice de l'Union européenne*, in *Revue des affaires européennes*, 2011, pp. 768-770.

risk of treatment contrary to Article 3" of the ECHR.²⁰ This difference has since to a large extent been bridged by the CJEU in *Aranyosi*.²¹

Although the interpretation of the ECHR given in decisions of the European Court of Human Rights is not defined as binding, it is implicit in a system which is established for ensuring that a treaty is correctly applied that the decisions of the treaty body are relevant for the interpretation of the instrument. This in particular when the decisions of the treaty body, like those of the European Court, are binding with regard to the specific case submitted to the Court, and therefore any departure from the interpretation accepted by the Court may lead to a judgment affirming the existence of a breach of the ECHR.

While the importance of the jurisprudence of the European Court for the interpretation of the ECHR stands out and is reflected in the explanations on the Charter, the opinions expressed by other treaty bodies with reference to the interpretation of their respective treaty should also be taken into account. Thus, when a right guaranteed under an international instrument other than the ECHR is relevant for determining the scope and meaning of a right under the Charter, the interpreter should consider comments, views or other opinions expressed by the treaty body established for reviewing the application of the instrument in question. The CJEU should thus be less dismissive of the views expressed by the Human Rights Committee with regard to the Covenant on Civil and Political Rights than it had been in its judgment in *Grant*, when it had emphasized that the Committee "is not a judicial institution and [its] findings have no binding force in law".²² This statement is no doubt true, but cannot exclude the relevance of the views expressed by the Committee for the interpretation of the Covenant or by other treaty bodies with regard to the interpretation of their respective treaty. The importance of the "interpretation adopted by this independent body [the Committee] that was established specifically to supervise the application of that treaty" was stressed by the International Court of Justice in its judgment in *Ahmadou Sadio Diallo*.²³

V. THE EFFECTS OF INTERNATIONAL INSTRUMENTS ON THE LEVEL OF PROTECTION

After stating that the meaning and scope of the rights contained in the Charter which correspond to rights guaranteed by the ECHR "shall be the same as those laid down by

²⁰ European Court of Human Rights, judgment of 4 November 2014, no. 29217/12, *Tarakhel v. Switzerland* [GC], paras 102-105.

²¹ Court of Justice, judgment of 5 April 2016, joined cases C-404/15 and C-659/15 PPU, *Aranyosi and Căldăraru* [GC], paras 84-94.

²² *Grant v. South-West Trains*, cit., para. 46. The Court had also noted that the Committee "confined itself, as it stated itself without giving specific reasons, to 'noting ... that in its view the reference to 'sex' in Articles 2, paragraph 1, and 26 [of the Covenant] is to be taken as including sexual orientation".

²³ International Court of Justice, *Ahmadou Sadio Diallo* (Guinea v. Democratic Republic of the Congo), judgment of 30 November 2010, para. 66.

the said Convention”, Art. 52, para. 3, of the Charter adds: “This provision shall not prevent Union law providing more extensive protection”. The explanation on this article states that this sentence “is designed to allow the Union to guarantee more extensive protection” and that “[i]n any event, the level of protection afforded by the Charter may never be lower than that guaranteed by the ECHR”. In other words, the ECHR provides a minimum protection that the Charter may supplement.

What the Charter and the explanations state in these quoted passages about the ECHR has to be applied *a fortiori* to the relations between the rights guaranteed by the Charter and the corresponding rights which are granted under an international instrument other than the ECHR. Also when these instruments are relevant for the interpretation of the Charter, the Charter may provide a more extensive protection.

Art. 53 of the Charter considers the reverse case that an international instrument provides a wider protection of certain rights. The provision states:

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

The explanation on this provision adds that it “is intended to maintain the level of protection currently afforded within their respective scope by Union law, national law and international law”. Art. 53 and the related explanation do not make distinctions among the international instruments for the protection of human rights. The explanation specifies that the ECHR is mentioned in the text of the article “owing to its importance”.

The purpose of Art. 53 seems to be that of ruling out the possibility of invoking the Charter in order to restrict the protection of certain rights which may be guaranteed more extensively by another instrument.²⁴ The idea that an instrument designed to protect human rights may have what one could call negative implications for the interpretation of other instruments was expressed by the European Court of Human Rights when it interpreted Art. 11 of the ECHR restrictively on the basis of the provisions of the European Social Charter. The latter had been adopted 11 years later and the Court considered that it could not be less advanced than the ECHR.²⁵ Art. 53 of the Charter bars this type of interpretation with regard to the possible attribution under EU law of negative effects to the Charter.

While, according to the provisions concerning the relations between the Charter and other international instruments examined above, the protection of rights is inspired by

²⁴ See B. DE WITTE, *Article 53 in The EU Charter of Fundamental Rights*, cit., p. 1532.

²⁵ European Court of Human Rights, judgment of 27 October 1975, no. 4464/70, *Syndicat national de la police belge c. Belgique*, para. 38; European Court of Human Rights, judgment of 6 February 1976, no. 5614/72, *Swedish Engine Drivers’ Union v. Sweden*, para. 39.

the principle that the more favourable provision applies, this result cannot always be achieved. A right conferred to one person may conflict with the right accorded to another. Should both rights be guaranteed under the Charter, one would have to find the balance of these rights within the system of the Charter. Should on the contrary the protection of one of the rights find its source in another instrument, the Charter would not necessarily provide a solution about how the various rights are to be combined.

