

The Law of the EUROPEAN UNION

Teaching Material



PRINCIPLES OF CONSTITUTIONAL LAW:
THE PROTECTION OF HUMAN RIGHTS

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1. THE DEVELOPMENT OF THE HUMAN RIGHTS PROTECTION IN THE COMMUNITY SYSTEM

1.1. Case 1/58: Stork



NOTE AND QUESTIONS

1. Before turning to the cases, please note that the Treaty of Rome contains no bill of rights and no explicit provision for judicial review based on fundamental human rights. What could be the reasons for this?

2. In the Stork decision the Court refuses to engage in such judicial review. Ten years later the Court changes its case law and engages in such review. What, in your opinion, prompts such change?

While reading the principal cases below, keep in mind the following recital from **Stork & Co. v High Authority of the European Coal and Steel Community**, Case 1/58, [1959] ECR 17:

4. (a) Under Article 8 of the treaty the High Authority is only required to apply Community law. It is not competent to apply the national law of the Member States. Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law. Consequently, the High Authority is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law [...].

1.2. Case 44/79: Hauer



NOTE AND QUESTIONS

The Hauer case is the principal reading of the part on development of human rights protection.

1. Focus in particular on Recitals 14 and 15 in which the Court sets out its methodology. Note the tensions and "contradictions" within and between these two recitals. What are the nascent problems encapsulated by these "contradictions"? Does the Court give them an adequate reply?
2. Does the Court actually do in the remainder of the decision what it says it does in Recitals 14 & 15?

Liselotte Hauer v. Land Rheinland-Pfalz

Case 44/79

13 December 1979

Court of Justice

[1979] ECR 3727

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

Mrs. Hauer, the owner of a plot of land in Bad Durkheim, Germany, requested permission in June of 1975 to plant new vines on her land for wine growing. The Land Rheinland-Pfalz, basing its decision on German law, denied her permission. Mrs. Hauer objected, but the Land Rheinland-Pfalz overruled her objection reiterating its position on German law and adding that Council Regulation (EEC) 1162/76 of 17 May 1976, which was passed in the meantime, temporarily prohibited any new planting of vines. Mrs. Hauer then appealed to the Verwaltungsgericht Neustadt an der Weinstraße.

During the course of the appeal, the Land Rheinland-Pfalz withdrew its objection based on German law, but maintained that the Regulation prohibiting new planting still applied. Mrs. Hauer first argued for a favorable interpretation of the Regulation and, then, argued that the Regulation was incompatible with

certain provisions of the Grundgesetz [Basic Law] of the Federal Republic of Germany and, therefore, could not be applied in Germany.

The Verwaltungsgericht pursuant to Article 177 of the EEC Treaty stayed the proceedings and requested a preliminary ruling from the Court of Justice. The Court interpreted the regulation as prohibiting new planting on Mrs. Hauer's land and then went on to consider whether the Regulation, as just interpreted, was consistent with the protection of fundamental rights in the Community legal order.]

Judgment:

[...]

The protection of fundamental rights in the Community legal order

- 13 In its order making the reference, the Verwaltungsgericht states that if Regulation No 1162/76 must be interpreted as meaning that it lays down a prohibition of general application, so as to include even land appropriate for wine growing, that provision might have to be considered inapplicable in the Federal Republic of Germany owing to doubts existing with regard to its compatibility with the fundamental rights guaranteed by Article 14 and 12 of the Grundgesetz concerning, respectively, the right to property and the right freely to pursue trade and professional activities.
- 14 As the Court declared in its judgment of 17 December 1970, Internationale Handelsgesellschaft, [1970] ECR 1125, the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself. The introduction of special criteria for assessment stemming from the legislation or constitutional law of a particular Member State would, by damaging the substantive unity and efficacy of Community law, lead inevitably to the destruction of the unity of the Common Market and the jeopardizing of the cohesion of the Community.
- 15 The Court also emphasized in the judgment cited, and later in the judgement of 14 May 1974, Nold [1974] ECR 491, that fundamental rights form an integral part of the general principles of the law, the observance of which it ensures; that in safeguarding those rights, the Court is bound to draw inspiration from constitutional traditions common to the Member States, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States are unacceptable in the Community; 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. That conception was later recognized by the joint declaration of the European Parliament, the Council and the Commission of 5 April 1977, which, after recalling the case-law of the Court, refers on the one hand to rights guaranteed by the constitutions of the Member States and on the other hand to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (Official Journal C 103, 1977, p.1).
- 16 In these circumstances, the doubts evinced by the Verwaltungsgericht as to the compatibility of the provisions of Regulation No 1162/76 with the rules concerning the protection of fundamental rights must be understood as questioning the validity of the regulation in the light of Community law. In this regard, it is necessary to distinguish between, on the one hand, a possible infringement of the right to property and, on the other hand, a possible limitation upon the freedom to pursue a trade or profession.

The question of the right to property

- 17 The right to property is guaranteed in the Community legal order in accordance with the ideas common to the constitutions of the Member States, which are also reflected in the first Protocol to the European Convention for the Protection of Human Rights.
- 18 Article 1 of that Protocol provides as follows:
- "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law.
- The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."
- 19 Having declared that persons are entitled to the peaceful enjoyment of their property, that provision envisages two ways in which the rights of a property owner may be impaired, according as the impairment is intended to deprive the owner of his right or to restrict the exercise thereof. In this case it is incontestable that the prohibition on new planting cannot be considered to be an act depriving the owner of his property, since he remains free to dispose of it or to put it to other uses which are not prohibited. On the other hand, there is no doubt that that prohibition restricts the use of property. In this regard, the second paragraph of Article 1 of the Protocol provides an important indication in so far as it recognizes the right of a State "to enforce such laws as it deems necessary to control the use of property in accordance with the general interest". Thus the Protocol accepts in principle the legality of restrictions upon the use of property, whilst at the same time limiting those restrictions to the extent to which they are deemed "necessary" by a State for the protection of the "general interest". However, that provision does not, enable a sufficiently precise answer to be given to the question submitted by the Verwaltungsgericht.
- 20 Therefore, in order to be able to answer that question, it is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States. One of the first points to emerge in this regard is that those rules and practices permit the legislature to control the use of private property in accordance with the general interest. Thus some constitutions refer to the obligations arising out of the ownership of property (German Grundgesetz, Article 14 (2), first sentence), to its social function (Italian constitution, Article 42 (2)), to the subordination of its use to the requirements of the common good (German Grundgesetz, Article 14 (2), second sentence, and the Irish constitution, Article 43.2.2°), or of social justice (Irish constitution, Article 43.2.1°). In all the Member States, numerous legislative measures have given concrete expression to that social function of the right to property. Thus in all Member States there is legislation on agriculture and forestry, the water supply, the protection of the environment and town and country planning, which imposes restrictions, sometimes appreciable, on the use of real property.
- 21 More particularly, all the wine-producing countries of the Community have restrictive legislation, albeit of differing severity, concerning the planting of vines, the selection of varieties and the methods of cultivation. In none of the countries concerned are those provisions considered to be incompatible in principle with the regard due to the right to property.
- 22 Thus it may be stated, taking into account the constitutional percepts common to the Member States and consistent legislative practices, in widely varying spheres, that the fact that Regulation No 1162/76 imposed restrictions on the new planting of vines cannot be challenged in principle. It is a type of restriction which is known and accepted as lawful, in identical or similar forms, in the constitutional structure of all Member States.

- 23 However, that finding does not deal completely with the problem raised by the Verwaltungsgericht. Even if it is not possible to dispute in principle the Community's ability to restrict the exercise of the right to property in the context of a common organization of the market and for the purposes of a structural policy, it is still necessary to examine whether the restrictions introduced by the provisions in dispute in fact correspond to objectives of general interest pursued by the Community or whether, with regard to the aim pursued, they constitute a disproportionate and intolerable interference with the rights of the owner, impinging upon the very substance of the right to property. Such in fact is the plea submitted by the plaintiff in the main action, who considers that only the pursuit of a qualitative policy would permit the legislature to restrict the use of wine-growing property, with the result that she possesses an unassailable right from the moment that it is recognized that her land is suitable for wine growing. It is therefore necessary to identify the aim pursued by the disputed regulation and to determine whether there exists a reasonable relationship between the measures provided for by the regulation and the aim pursued by the Community in this case.
- 24 The provisions of Regulation No 1162/76 must be considered in the context of the common organization of the market in wine which is closely linked to the structural policy envisaged by the Community in the area in question. The aims of that policy are stated in Regulation (EEC) No 816\70 of 28 April 1970 laying down additional provisions for the common organization of the market in wine (Official Journal, English Special Edition 1970 (1), p.234), which provides the basis for the disputed regulation, and in Regulation No 337/79 of 5 February 1979 on the common organization of the market in wine (Official Journal L 54, p.1), which codifies all the provisions governing the common organization of the market. Title III of that regulation, laying down "rules concerning production and for controlling planting", now forms the legal framework in that sphere. Another factor which makes it possible to perceive the Community policy pursued in that field is the Council Resolution of 21 April 1975 concerning new guidelines to balance the market in table wines (Official Journal C 90, p.1).
- 25 Taken as a whole, those measures show that the policy initiated and partially implemented by the Community consists of a common organization of the market in conjunction with a structural improvement in the wine-producing sector. Within the framework of the guidelines laid down by Article 39 of the EEC Treaty that action seeks to achieve a double objective, namely, on the one hand, to establish a lasting balance on the wine market at a price level which is profitable for producers and fair to consumers and, secondly, to obtain an improvement in the quality of wines marketed. In order to attain that double objective of quantitative balance and qualitative improvement, the Community rules relating to the market in the wine provide for an extensive range of measures which apply both at the production stage and at the marketing stage for wine.
- 26 In this regard, it is necessary to refer in particular to the provisions of Article 17 of Regulation No 816\70, re-enacted in an extended form by Article 31 of Regulation No 337/79, which provide for the establishment by the Member States of forecasts of planting and production, co-ordinated within the framework of a compulsory Community plan. For the purpose of implementing that plan measures may be adopted concerning the planting, re-planting, grubbing-up or cessation of cultivation of vineyards.
- 27 It is in this context that Regulation No 1162/76 was adopted. It is apparent from the preamble to that regulation and from the economic circumstances in which it was adopted, a feature of which was the formation as from the 1974 harvest of permanent production surpluses, that regulation fulfils a double function: on the one hand, it must enable an immediate brake to be put on the continued increase in the surpluses; on the other hand, it must win for the Community institutions the time necessary for the implementation of a structural policy designed to encourage high-quality production, whilst respecting the individual characteristics and needs of the different wine-producing regions of the Community, through the selection of land for grape growing and the selection of grape varieties, and through the regulation of production methods.

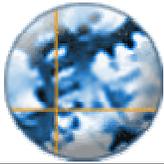
- 28 It was in order to fulfill that twofold purpose that the Council introduced by Regulation No 1162/76 a general prohibition on new plantings, without making any distinction, apart from certain narrowly defined exceptions, according to the quality of the land. It should be noted that, as regards its sweeping scope, the measure introduced by the Council is of a temporary nature. It is designed to deal immediately with a conjunctural situation characterized by surpluses, whilst at the same time preparing permanent structural measures.
- 29 Seen in this light, the measure criticized does not entail any undue limitation upon the exercise of the right to property. Indeed, the cultivation of new vineyards in a situation of continuous over-production would not have any effect, from the economic point of view, apart from increasing the volume of the surpluses; further, such an extension at that stage would entail the risk of making more difficult the implementation of a structural policy at the Community level in the event of such a policy resting on the application of criteria more stringent than the current provisions of national legislation concerning the selection of land accepted for wine-growing.
- 30 Therefore it is necessary to conclude that the restriction imposed upon the use of property by the prohibition on the new planting introduced for a limited period by Regulation No 1162/76 is justified by the objectives of general interest pursued by the Community and does not infringe the substance of the right to property in the form in which it is recognized and protected in the Community legal order.

The question of the freedom to pursue trade or professional activities

- 31 The applicant in the main action also submits that the prohibition on new plantings imposed by the Regulation No 1162/76 infringes her fundamental rights in so far as its effect is to restrict her freedom to pursue her occupation as a wine-grower.
- 32 As the Court has already stated in its judgment of 14 May 1974, Nold, referred to above, although it is true that guarantees are given by the constitutional law of several Member States in respect of the freedom to pursue trade or professional activities, the right thereby guaranteed, far from constituting an unfettered prerogative, must likewise be viewed in the light of the social function of the activities protected thereunder. In this case, it must be observed that the disputed Community measure does not in any way affect access to the occupation of wine-growing, or the freedom to pursue that occupation on land at present devoted to wine-growing. To the extent to which the prohibition on new plantings affects the free pursuit of the occupation of wine-growing, that limitation is no more than the consequence of the restriction upon the exercise of the right to property, so that the two restrictions merge. Thus the restriction upon the free pursuit of the occupation of wine growing, assuming that it exists, is justified by the same reasons which justify the restriction placed upon the use of property.
- 33 Thus it is apparent from the forgoing that consideration of regulation No 1162/76, in the light of the doubts expressed by the Verwaltungsgericht, has disclosed no factor of such a kind as to affect the validity of that regulation on account of its being contrary to the requirements flowing from the protection of fundamental rights in the Community.

[...]

1.3. Case 36/75: Rutili



NOTE AND QUESTIONS

The following are recitals from **Rutili v. Minister of the Interior, Case 36/75, [1976] 1 C.M.L.R. 140**, should be kept in mind while reading the judgment of the Court in Cinéthèque:

[...]

- 26 By virtue of the reservation contained in Article 48 (3), member-States continue to be, in principle, free to determine the requirements of public policy in the light of their national needs.
- 27 Nevertheless, the concept of public policy must, in the Community context and where, in particular, it is used as a justification for derogating from the fundamental principles of equality of treatment and freedom of movement for workers, be interpreted strictly, so that its scope cannot be determined unilaterally by each member-State without being subject to control by the institutions of the Community.

[...]

1.4. Joined Cases 60 and 61/84: Cinéthèque



NOTE AND QUESTIONS

In the Cinéthèque decision the Court is called upon to review Member State action.

1. What set of issues does this raise?
2. Is the decision of the Court satisfactory? Why so?

1.4.1. Opinion of AG Slynn

Cinéthèque S.A. v Fédération National des Cinémas Français

Joined Cases 60 and 61/84

20 March 1985

AG Opinion

[1985] ECR 2605

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

These two cases challenged Section 89 of French Act 82-652 of July 29, 1982 on audiovisual communication which prohibited the sale or rental of video cassettes or video discs of a movie while the movie was still being shown in the theaters unless a minimum period of time (between 6 and 18 months, to be established by decree) from the date of issuance of the performance certificate had elapsed. The Tribunal de Grande Instance de Paris requested a preliminary ruling pursuant to Article 177 the EEC Treaty.

The decree was primarily challenged as being contrary to Articles 30 and 34 of the EEC Treaty on the free movement of goods, and to Article 59 of the EEC Treaty on freedom to provide services. After holding that the French legislation was compatible with the Articles 30, 34 and 59 of the EEC Treaty, the Court considered the plaintiff's argument that the French legislation was contrary to the principle of the freedom of expression.

Opinion:

[...]

It was argued by the applicants at the hearing that the Act was contrary to the principle of the freedom of expression. Reliance was placed on Article 10 of the European Convention on Human Rights which guarantees the freedom of expression subject to exceptions set out in paragraph 2 of the Article.

[...]

The French Government, however, replies that it is not for the Court to consider whether measures taken by the member-States are compatible with the Convention and that on the basis of the Report of the European Commission of Human Rights in Case 5178/81 *De Geïllustreerde Pers v. The Netherlands* [footnote omitted] which was endorsed by the Committee of Ministers by Resolution of 17 February 1977, there is here no breach of the Convention.

The Commission on the basis of the Court's judgment in Case 36/75 *Rutili v. Minister for the Interior* [footnote omitted] contends that exceptions to the fundamental principles set out in the Treaty are to be construed in the light of the Convention and that on the basis of the *De Geïllustreerde Pers* case the French Act was compatible with the Convention since it amounted to a 'protection of the rights of others' because it aimed at ensuring the viable future for the film industry.

It is clear from Case 4/73 *Nold v. E.C. Commission* [footnote omitted] and Case 44/79 *Hauer v. Rheinland-Pfalz* [footnote omitted] that the Convention provides guidelines for the Court in laying down those fundamental rules of law which are part of Community law, though the Convention does not bind, and is not part of the law of, the Community as such (Case 48/75 *Royer* [footnote omitted] and Case 118/75 *Watson and Belman*, [footnote omitted]) where the Court did not accept arguments that the Convention was an integral part of Community law).

In my opinion it is right, as the Commission contends, that the exceptions in Article 36 and the scope of 'mandatory requirements' taking a measure outside Article 30 should be construed in the light of the Convention (*Rutili*, *Warner A.G. in Case 34/79 R. v. Henn & Darby* [footnote omitted]).

That freedom of speech, or expression, is part of Community law in those areas where it is relevant to the activities of the Community, may for present purposes be accepted. I am not satisfied on the arguments adduced that to regulate the sequence which particular methods of exhibiting filmed material are shown, as is done in this case, is in itself a breach of Article 10 of the Convention in the light of the exceptions therein set out. I am not, however, satisfied on the arguments adduced in this case that Article 10 of the Convention is violated by the mere fact that the sequence in which particular methods of exhibiting the same filmed material are shown is regulated by the State, or that a rule of Community law, based on or ensuring compliance with the Convention, exists which prohibits such regulation. It is for the national court to decide whether the national measure in this particular case violates the Convention.

I am not satisfied either that it has been shown in this case that, independently of the Convention, there exists any rule of Community law governing freedom of expression which would be violated by the present law which regulates the sequence and timing of the exploitation of various forms of the same material.

[...]

1.4.2. Judgement of the Court of Justice

Cinéthèque S.A. v Fédération National des Cinémas Français

Joined Cases 60 and 61/84

11 July 1985

Court of Justice

[1985] ECR 2605

<http://www.curia.eu.int/en/content/juris/index.htm>

[...]

19 At the Court's request, the Commission produced information concerning the position in the other member-States. [...]

20 It must be stated first that, in the light of that information, the national legislation at issue in the main proceedings of these cases forms part of a body of provisions applied in the majority of member-States, whether in the form of contractual, administrative or legislative provisions and of variable scope, but the purpose of which, in all cases, is to delay the distribution of films by means of video cassettes during the first months following their release in the cinema in order to protect their exploitation in the cinema, which protection is considered necessary in the interests of the profitability of cinematographic production, as against exploitation through video cassettes. It must also be observed that, in principle, the Treaty leaves it to member-States to determine the need for such a system, the form of such a system and any temporal restrictions which ought to be laid down.

[...]

25 The plaintiffs and the interveners in the main action also raised the question whether section 89 of the French Audiovisual Communications Act 1982 was in breach of the principles of freedom of expression recognized by Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and was therefore incompatible with Community law.

26 Although it is true that it is the duty of this Court to ensure the observance of fundamental rights in the field of Community law, it has no power to examine the compatibility with the European Convention of national legislation which concerns, as in this case, an area which falls within the jurisdiction of the national legislator.

[...]

1.5. Case C-260/89: ERT-AE v DEP



NOTE AND QUESTIONS

In the case ERT (Radiophonia Tileorassi AE) the Court changed course. Where are we heading now?

Elliniki Radiophonia Tileorassi - Anonimi Etairia (ERT-AE)

v

Dimotiki Etairia Pliroforissis (DEP) and Sotirios Kouvelas

Case C-260/89

18 June 1991

Court of Justice

[1991] ECR I-2925

<http://www.curia.eu.int/en/content/juris/index.htm>

- 1 By judgment of 11 April 1989, which was received at the Court on 16 August 1989, the Monomeles Protodikeio Thessaloniki [Thessaloniki Regional Court], in proceedings for interim measures, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty, several questions on the interpretation of the EEC Treaty, in particular Articles 2, 3(f), 9, 30, 36, 85 and 86, and also of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms for November 1950 in order to determine the compatibility with those provisions of a national system of exclusive television rights.
- 2 Those questions were raised in proceedings between Elliniki Radiophonia Tileorassi Anonimi Etairia (hereinafter referred to as "ERT"), a Greek radio and television undertaking, to which the Greek State had granted exclusive rights for carrying out its activities, and Dimotiki Etairia Pliroforissis (hereinafter referred to as "DEP"), a municipal information company at Thessaloniki, and S. Kouvelas, Mayor of Thessaloniki. Notwithstanding the exclusive rights enjoyed by ERT, DEP and the Mayor, in 1989, set up a television station which in that same year began to broadcast television programmes.
- 3 ERT was established by Law No 1730/1987 (Official Journal of the Hellenic Republic No 145 A of 18 August 1987, p. 144). According to Article 2(1) of that Law, ERT's object is, without a view to profit, to organize, exploit and develop radio and television and to contribute to the information, culture and entertainment of the Hellenic people. Article 2(2) provides that the State grants to

ERT an exclusive franchise, in respect of radio and television, for any activity which contributes to the performance of its task. The franchise includes in particular the broadcasting by radio or television of sounds and images of every kind from Hellenic territory for general reception or by special closed or cable circuit, or any other form of circuit, and the setting up of radio and stations. Under Article 2(3) ERT may produce and exploit by any means radio and television broadcasts. Article 16(1) of the same Law prohibits any person from undertaking, without authorization by ERT, activities for which ERT has an exclusive right.

- 4 Since it took the view that the activities of DEP and the Mayor of Thessaloniki fell within its exclusive rights, ERT brought summary proceedings before the Thessaloniki Regional Court in order to obtain, on the basis of Article 16 of Law No 1730/1987, an injunction prohibiting any kind of broadcasting and an order for the seizure and sequestration of the technical equipment. Before that court, DEP and Mr Kouvelas relied mainly on the provisions of Community law and the European Convention on Human Rights.
- 5 Since it took the view that the case raised important questions of Community law, the national court stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

"(1) Does a law which allows a single television broadcaster to have a television monopoly for the entire territory of a Member State and to make television broadcasts of any kind is consistent with the provisions of the EEC Treaty and of secondary law.

(2) If so, whether and to what extent the fundamental principle of free movement of goods laid down in Article 9 of the EEC Treaty is infringed in view of the fact that the enjoyment by a single broadcaster of an exclusive television franchise entails a prohibition for all other Community citizens on the export, leasing or distribution, by whatever means, to the Member State in question of materials, sound recordings, films, television documentaries or other products which may be used to make television broadcasts, except in order to serve the purposes of the broadcaster who has the exclusive television franchise, when, of course, that broadcaster also has the discretionary power to select and favour national materials and products in preference to those of other Member States of the Community.

(3) Whether and to what extent the grant of a television franchise to a single broadcaster constitutes a measure having equivalent effect to a quantitative restriction on imports, expressly prohibited under Article 30 of the EEC Treaty.

(4) If it is accepted that it is lawful to grant by law to a single broadcaster the exclusive right, for the entire national territory of a Member State, to make television broadcasts of any kind, on the ground that the grant falls within the provisions of Article 36 of the EEC Treaty as it has been interpreted by the European Court, and given that that grant satisfies a mandatory requirement and serves a purpose in the public interest - the organization of television as a service in the public interest - whether and to what extent that intended purpose is exceeded, that is to say whether that purpose, the protection of the public interest, is attained in the least onerous manner, in other words in the manner which offends least against the principle of the free movement of goods.

(5) Whether and to what extent the exclusive rights granted by a Member State to an undertaking (a broadcaster) in respect of television broadcasts, and the exercise of those rights, are compatible with the rules on competition in Article 85 in conjunction with Article 3(f) of the EEC Treaty when the performance by the undertaking of certain activities, in particular the exclusive (a) transmission of advertisements, (b) distribution of films, documentaries and other television material produced within the Community, (c) selection, in its own discretion, distribution and transmission of television broadcasts, films, documentaries and other material, prevents, restricts

or distorts competition to the detriment of Community consumers in the sector in which it operates and throughout the national territory of the Member State, even though it is entitled by law to carry out those activities.

(6) Where the Member State uses the undertaking entrusted with the operation of the television service - even with regard to its commercial activities, particularly advertising - as an undertaking entrusted with the operation of services of general economic interest, whether and to what extent the rules on competition contained in Article 85 in conjunction with Article 3(f) are incompatible with the performance of the task assigned to the undertaking.

(7) Whether such an undertaking which has been granted under the law of the Member State a monopoly on television broadcasting of any kind throughout the national territory of that State may be considered to occupy a dominant position in a substantial part of the Common Market, and,

(8) If so, whether and to what extent the imposition (owing to the absence of any other competition in the market) of monopoly prices for television advertisements and of such preferential treatment, at its discretion, to the detriment of Community consumers, and the performance by that undertaking of the activities mentioned above in question (5), pursued in the absence of competition in the field in which it operates, constitute an abuse of a dominant position.

(9) Whether and to what extent the grant by law to a single broadcaster of a television monopoly for the entire national territory of a Member State, with the right to make television broadcasts of any kind, is compatible today with the social objective of the EEC Treaty (preamble and Article 2), the constant improvement of the living conditions of the peoples of Europe and the rapid raising of their standard of living, and with the provisions of Article 10 of the European Convention for the Protection of Human Rights of 4 November 1950.

(10) Whether the freedom of expression secured by Article 10 of the European Convention for the Protection of Human Rights of 4 November 1950 and the abovementioned social objective of the EEC Treaty, set out in its preamble and in Article 2, impose per se obligations on the Member States, independently of the written provisions of Community law in force, and if so what those obligations are."

6 Reference is made to the report for the hearing for a fuller account of the legal background and facts of the main proceedings, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 It emerges, in substance, from the judgment making the reference that by its first question the national court is seeking to ascertain whether a television monopoly held by a single company to which a Member State has granted exclusive rights for that purpose is permissible under Community law. The second, third and fourth questions relate to the point whether the rules on the free movement of goods, in particular Article 9 and Article 30 and 36 of the Treaty, preclude such a monopoly. Since these questions concern a monopoly in services, they are to be regarded as referring not only to the rules of the Treaty in relation to the free movement of goods but also to those relating to the freedom to provide services, in particular Article 59 of the Treaty.

8 The fifth, sixth, seventh and eighth questions relate to the interpretation of the rules on competition applicable to undertakings. In that respect the national court seeks to ascertain in the first place whether Article 3(f) and Article 85 of the Treaty preclude the grant by the State of exclusive rights in the field of television. Secondly, the national court inquires whether an undertaking which has an exclusive right in relation to television throughout the territory of a

Member State holds, as a result, a dominant position in a substantial part of the market within the meaning of Article 86 of the Treaty and whether certain conduct constitutes an abuse of that dominant position. Thirdly, the national court asks whether the application of the rules on competition precludes the performance of the particular task entrusted to such an undertaking.

- 9 The ninth and tenth questions are concerned with an examination of the monopoly situation in the field of television in the light of Article 2 of the Treaty and Article 10 of the European Convention on Human Rights.

The television monopoly

10 In Case C-155/73 Sacchi [1974] ECR 409, paragraph 14, the Court held that nothing in the Treaty prevents Member States, for considerations of a non-economic nature relating to the public interest, from removing radio and television broadcasts from the field of competition by conferring on one or more establishments an exclusive right to carry them out.

11 Nevertheless, it follows from Article 90(1) and (2) of the Treaty that the manner in which the monopoly is organized or exercised may infringe the rules of the Treaty, in particular those relating to the free movement of goods, the freedom to provide services and the rules on competition.

12 The reply to the national court must therefore be that Community law does not prevent the granting of a television monopoly for considerations of a non-economic nature relating to the public interest. However, the manner in which such a monopoly is organized and exercised must not infringe the provisions of the Treaty on the free movement of goods and services or the rules on competition.

Free movement of goods

13 It should be observed in limine that it follows from the Sacchi judgment that television broadcasting falls within the rules of the Treaty relating to services and that since a television monopoly is a monopoly in the provision of services, it is not as such contrary to the principle of the free movement of goods.

14 However it follows from the same judgment that trade in material, sound recordings, films, and other products used for television broadcasting is subject to the rules on the free movement of goods.

15 In that respect, the grant to a single undertaking of exclusive rights in relation to television broadcasting and the grant for that purpose of an exclusive right to import, hire or distribute material and products necessary for that broadcasting does not as such constitute a measure having an effect equivalent to a quantitative restriction within the meaning of Article 30 of the Treaty.

16 It would be different if the grant of those rights resulted, directly or indirectly, in discrimination between domestic products and imported products to the detriment of the latter. It is for the national court, which alone has jurisdiction to determine the facts, to consider whether that is so in the present case.

17 As regards Article 9 of the Treaty it is sufficient to observe that that article contains a prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect. Since the documents before the Court contain nothing to show that the legislation in question involves the levying of a charge on import or export, Article 9 does not

appear to be relevant for the purpose of appraising the monopoly in question from the point of view of the rules on the free movement of goods.

- 18 It is therefore necessary to reply that the articles of the EEC Treaty on the free movement of goods do not prevent the granting to a single undertaking of exclusive rights relating to television broadcasting and the granting for that purpose of exclusive authority to import, hire or distribute materials and products necessary for that broadcasting, provided that no discrimination is thereby created between domestic products and imported products to the detriment of the latter.

Freedom to provide services

- 19 Article 59 of the Treaty provides that restrictions on freedom to provide services within the Community are to be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended. The requirements of that provision entail, in particular, the removal of any discrimination against a person providing services who is established in a Member State other than that in which the services are to be provided.
- 20 As has been indicated in paragraph 12 of this judgment, although the existence of a monopoly in the provision of services is not as such incompatible with Community law, the possibility cannot be excluded that the monopoly may be organized in such a way as to infringe the rules relating to the freedom to provide services. Such a case arises, in particular, where the monopoly leads to discrimination between national television broadcasts and those originating in other Member States, to the detriment of the latter.
- 21 As regards the monopoly in question in the main proceedings, it is apparent from Article 2(2) of Law No 1730/1987 and the case-law of the Hellenic Council of State that ERT's exclusive franchise comprises both the right to broadcast its own programmes (hereinafter referred to as "broadcasts") and the right to receive and retransmit programmes from other Member States (hereinafter referred to as "retransmissions").
- 22 As the Commission has observed, the concentration of the monopolies to broadcast and retransmit in the hands of a single undertaking gives that undertaking the possibility both to broadcast its own programmes and to restrict the retransmissions of programmes from other Member States. That possibility, in the absence of any guarantee concerning the retransmission of programmes from other Member States, may lead the undertaking to favour its own programmes to the detriment of foreign programmes. Under such a system equality of opportunity as between broadcasts of its own programmes and the retransmission of programmes from other Member States is therefore liable to be seriously compromised.
- 23 The question whether the aggregation of the exclusive right to broadcast and the right to retransmit actually leads to discrimination to the detriment of programmes from other Member States is a matter of fact which only the national court has jurisdiction to determine.
- 24 It should next be pointed out that the rules relating to the freedom to provide services preclude national rules which have such discriminatory effects unless those rules fall within the derogating provision contained in Article 56 of the Treaty to which Article 66 refers. It follows from Article 56, which must be interpreted strictly, that discriminatory rules may be justified on grounds of public policy, public security or public health.
- 25 It is apparent from the observations submitted to the Court that the sole objective of the rules in question was to avoid disturbances due to the restricted number of channels available. Such an objective cannot however constitute justification for those rules for the purposes of Article 56 of

the Treaty, where the undertaking in question uses only a limited number of the available channels.

- 26 Accordingly the reply to the national court must be that Article 59 of the Treaty prohibits national rules which create a monopoly comprising exclusive rights to transmit the broadcasts of the holder of the monopoly and to retransmit broadcasts from other Member States, where such a monopoly gives rise to discriminatory effects to the detriment of broadcasts from other Member States, unless those rules are justified on one of the grounds indicated in Article 56 of the Treaty, to which Article 66 thereof refers.

The rules on competition

- 27 As a preliminary point, it should be observed that Article 3(f) of the Treaty states only one objective for the Community which is given specific expression in several provisions of the Treaty relating to the rules on competition, including in particular Articles 85, 86 and 90.
- 28 The independent conduct of an undertaking must be considered with regard to the provisions of the Treaty applicable to undertakings, such as, in particular, Articles 85, 86 and 90(2).
- 29 As regards Article 85, it is sufficient to observe that it applies, according to its own terms, to agreements "between undertakings". There is nothing in the judgment making the reference to suggest the existence of any agreement between undertakings. There is therefore no need to interpret that provision.
- 30 Article 86 declares that any abuse of a dominant position within the common market or in any substantial part of it is prohibited as incompatible with the common market in so far as it may affect trade between Member States.
- 31 In that respect it should be borne in mind that an undertaking which has a statutory monopoly may be regarded as having a dominant position within the meaning of Article 86 of the Treaty (see the judgment in Case C-311/84 CBEM, COT IPB [1985] ECR 3261, paragraph 16) and that the territory of a Member State over which the monopoly extends may constitute a substantial part of the common market (see the judgment in Case C-322/81 Michelin v Commission [1983] ECR 3461, paragraph 28).
- 32 Although Article 86 of the Treaty does not prohibit monopolies as such, it nevertheless prohibits their abuse. For that purpose Article 86 lists a number of abusive practices by way of example.
- 33 In that regard it should be observed that, according to Article 90(2) of the Treaty, undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition so long as it is not shown that the application of those rules is incompatible with the performance of their particular task (see in particular, the judgment in Sacchi, cited above, paragraph 15).
- 34 Accordingly it is for the national court to determine whether the practices of such an undertaking are compatible with Article 86 and to verify whether those practices, if they are contrary to that provision, may be justified by the needs of the particular task with which the undertaking may have been entrusted.
- 35 As regards State measures, and more specifically the grant of exclusive rights, it should be pointed out that while Articles 85 and 86 are directed exclusively to undertakings, the Treaty none the less requires the Member States not to adopt or maintain in force any measure which could

deprive those provisions of their effectiveness (see the judgment in Case C-13/77 INNO v ATAB [1977] ECR 2115, paragraphs 31 and 32).

36 Article 90(1) thus provides that, in the case of undertakings to which Member States grant special or exclusive rights, Member States are neither to enact nor to maintain in force any measure contrary to the rules contained in the Treaty.

37 In that respect it should be observed that Article 90(1) of the Treaty prohibits the granting of an exclusive right to retransmit television broadcasts to an undertaking which has an exclusive right to transmit broadcasts, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 of the Treaty by virtue of a discriminatory broadcasting policy which favours its own programmes.

38 The reply to the national court must therefore be that Article 90(1) of the Treaty prohibits the granting of an exclusive right to transmit and an exclusive right to retransmit television broadcasts to a single undertaking, where those rights are liable to create a situation in which that undertaking is led to infringe Article 86 by virtue of a discriminatory broadcasting policy which favours its own programmes, unless the application of Article 86 obstructs the performance of the particular tasks entrusted to it.

Article 2 of the Treaty

39 As the Court has consistently held (see, in particular, the judgment in Case C-339/89 Alsthom Atlantique v Compagnie de Construction Mécanique [1991] ECR I-107), Article 2 of the Treaty, referred to in the ninth and tenth preliminary questions, describes the task of the European Economic Community. The aims stated in that provision are concerned with the existence and functioning of the Community and are to be achieved through the establishment of a common market and the progressive approximation of the economic policies of Member States.

40 The reply to the national court must therefore be that no criteria for deciding whether a national television monopoly is in conformity with Community law can be derived from Article 2.

Article 10 of the European Convention on Human Rights

41 With regard to Article 10 of the European Convention on Human Rights, referred to in the ninth and tenth questions, it must first be pointed out that, as the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures. For that purpose the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories (see, in particular, the judgment in Case C-4/73 Nold v Commission [1974] ECR 491, paragraph 13). The European Convention on Human Rights has special significance in that respect (see in particular Case C-222/84 Johnston v Chief Constable of the Royal Ulster Constabulary [1986] ECR 1651, paragraph 18). It follows that, as the Court held in its judgment in Case C-5/88 Wachauf v Federal Republic of Germany [1989] ECR 2609, paragraph 19, the Community cannot accept measures which are incompatible with observance of the human rights thus recognized and guaranteed.

42 As the Court has held (see the judgment in Joined Cases C-60 and C-61/84 Cinéthèque v Fédération Nationale des Cinémas Français [1985] ECR 2605, paragraph 25, and the judgment in Case C-12/86 Demirel v Stadt Schwabebisch Gmund [1987] ECR 3719, paragraph 28), it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law. On the other hand, where such rules do fall within the scope of Community law, and reference is made to the Court for a preliminary

ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights.

- 43 In particular, where a Member State relies on the combined provisions of Articles 56 and 66 in order to justify rules which are likely to obstruct the exercise of the freedom to provide services, such justification, provided for by Community law, must be interpreted in the light of the general principles of law and in particular of fundamental rights. Thus the national rules in question can fall under the exceptions provided for by the combined provisions of Articles 56 and 66 only if they are compatible with the fundamental rights the observance of which is ensured by the Court.
- 44 It follows that in such a case it is for the national court, and if necessary, the Court of Justice to appraise the application of those provisions having regard to all the rules of Community law, including freedom of expression, as embodied in Article 10 of the European Convention on Human Rights, as a general principle of law the observance of which is ensured by the Court.
- 45 The reply to the national court must therefore be that the limitations imposed on the power of the Member States to apply the provisions referred to in Articles 66 and 56 of the Treaty on grounds of public policy, public security and public health must be appraised in the light of the general principle of freedom of expression embodied in Article 10 of the European Convention on Human Rights.

[...]

2. HUMAN RIGHTS POST-MAASTRICHT

2.1 Relevant Treaty Provisions

Treaty on European Union

Preamble of the TEU, 3rd recital

CONFIRMING their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law,

[...]

Article 6 (ex Article F) TEU

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

2. 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 the Member States, as general principles of Community law.

[...]

Article 7 TEU

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the Commission, the Council, acting by a majority of four fifths of its members after obtaining the assent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of principles mentioned in Article 6(1), and address appropriate recommendations to that State. Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may call on independent persons to submit within a reasonable time limit a report on the situation in the Member State in question.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member

State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. For the purposes of this Article, the Council shall act without taking into account the vote of the representative of the government of the Member State in question. Abstentions by members present in person or represented shall not prevent the adoption of decisions referred to in paragraph 2. A qualified majority shall be defined as the same proportion of the weighted votes of the members of the Council concerned as laid down in Article 205(2) of the Treaty establishing the European Community.

This paragraph shall also apply in the event of voting rights being suspended pursuant to paragraph 3.

6. For the purposes of paragraphs 1 and 2, the European Parliament shall act by a two-thirds majority of the votes cast, representing a majority of its Members.

Treaty Establishing the European Community

Article 13 TEC

1. Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

2. By way of derogation from paragraph 1, when the Council adopts Community incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1, it shall act in accordance with the procedure referred to in Article 251.

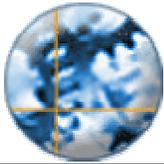
Article 177 (ex Article 130u) TEC

1. Community policy in the sphere of development cooperation, which shall be complementary to the policies pursued by the Member States, shall foster:

[...]

2. Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms.

2.2 Opinion 2/94: Accession by the Community to the ECHR



NOTE AND QUESTIONS

In Opinion 2/94 the Court says the Community does not have a general power to enact rules on human rights. What about the Court itself? What do you think are the Court's motifs for this decision?

Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms

Opinion 2/94

28 March 1996

Court of Justice

ECR [1996] Page I-01759

The Court of Justice has received a request for an Opinion, lodged at the Registry of the Court on 26 April 1994, from the Council of the European Union pursuant to Article 228(6) of the EC Treaty, which provides:

'The Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article N of the Treaty on European Union.'

Summary

I The request for an Opinion

1. The Council [...] requests the Opinion of the Court on the following question:

'Would the accession of the European Community to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (hereinafter The Convention.) be compatible with the Treaty establishing the European Community?'

2. According to the Council, no decision on the principle of opening negotiations can be taken until the Court has considered whether the envisaged accession is compatible with the Treaty.

In its oral observations, the Council, whilst recognizing that the text of the envisaged agreement does not yet exist, submits that the request is admissible. The Council has not committed a misuse of procedure but is confronted by fundamental issues concerning legal and institutional order. Furthermore, the convention to which the Community would accede is known and the legal issues to which accession gives rise are sufficiently clear for the Court to be able to give an Opinion.

3. The Council, setting out the aim and objectives of the agreement envisaged, states its position on the scope of accession, Community participation in control bodies and the modifications which would have to be made to the Convention and the Protocols.
4. With regard to the scope of accession, the Council states that each Member State will have to adhere to the Convention within the framework of its powers and within the limits of the scope of its law. Accession should cover the Convention and the Protocols which have come into force and been ratified by all the Member States of the Community. Such accession should not have any effect on the reservations entered by the Member States, parties to the Convention, which will continue to apply in the areas falling within national jurisdiction. The Community would agree to submit to the machinery for individual petitions and inter-State applications; actions between the Community and its Member States would, however, have to be excluded in recognition of the monopoly conferred in such matters by Article 219 of the EC Treaty on the Court of Justice.
5. With regard to Community participation in control bodies, in particular the future single Court of Human Rights, there are various possible solutions: no Community judge, appointment of a permanent judge with the same status as the other judges, or the appointment of a judge with special status, entitled to vote only in cases concerning Community law. That judge would not be a member of the Court of Justice at the same time. The procedure for appointing the judge would be governed by the Convention on the understanding that the appointment of candidates proposed by the Community would be an internal Community matter. Community participation in the Committee of Ministers would not be envisaged; the Committee would moreover no longer have any function in the future judicial framework.
6. It would be necessary to amend the Convention and the Protocols which are currently open to accession only by Member States of the Council of Europe. The Community does not propose to join the Council of Europe. It would similarly be necessary to modify the technical provisions providing for the Member States of the Council of Europe to intervene in the control machinery of the Convention. In the event of accession, the Community would be bound only within the limits of its powers. There would have to be machinery enabling the Community and the Member States to determine the division of competence before the Convention authorities.
7. In reviewing the conformity of accession with the Treaty, the Council considers the Community's competence to conclude the agreement envisaged and the compatibility of the system of courts under the Convention with Articles 164 and 219 of the Treaty.
8. The Council recognizes that the Treaty confers no specific powers on the Community in the field of human rights. Such rights are protected by way of general principles of Community law. The need for such protection, reaffirmed by the case-law, is now enshrined in Article F of the Treaty on European Union. The Council considers that the protection of human rights flows from a horizontal principle forming an integral part of the Community's objectives. In the absence of a specific article, Article 235 of the EC Treaty would serve as the basis of accession, provided that the conditions of that article's application are fulfilled.

9. The Council also raises the question whether accession of the Community to the Convention, in particular to the system of courts, calls in question the exclusive jurisdiction conferred on the Court of Justice by Articles 164 and 219 of the Treaty and the autonomy of the Community legal order.
10. The Council emphasizes that judgments of the European Court of Human Rights have no direct effect: that court cannot repeal or amend a provision of national law but can only impose on a contracting party an obligation to bring about a certain result. The Court of Justice would, however, have to apply judgments of the Court of Human Rights in its own decisions. The requirement that in order for individual petitions to be admissible domestic remedies must first have been exhausted would mean that the Community's internal courts, in particular the Court of Justice, would rule on the compatibility of a Community act with the Convention. In Opinion 1/91 [1991] ECR I-6079, the Court accepted the Community's submission to judicial machinery created by an international agreement provided that the court simply interpreted and applied the agreement and did not challenge the autonomy of the Community legal order. The Council raises the question whether that statement applies only where the judgments of that court concern solely the international agreement or also where those judgments may cover the compatibility of Community law with the agreement.

[...]

III — History of respect for human rights by the Community

1. Neither the EC Treaty nor the ECSC or EAEC Treaties makes any specific reference to fundamental rights other than by resolving 'to preserve and strengthen peace and liberty' in the last recital in the preamble.
2. The Court of Justice has upheld the protection of fundamental rights by way of general principles of Community law, referring to common constitutional traditions and to international instruments, in particular the Convention.
3. Drawing on that case-law, the Single European Act refers in its preamble to respect for the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention and in the European Social Charter.
4. Article F(2) of the Treaty on European Union states that the Union 'shall respect fundamental rights, as guaranteed by the European Convention ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law'. The fifth indent of Article J.1(2) of that Treaty refers to respect for human rights and fundamental freedoms. Article K.2(1) of the Treaty contains an express reference to compliance with the Convention in cooperation in the fields of justice and home affairs.
5. Reference to respect for fundamental rights has also been made in political declarations by the Member States and Community institutions. These include the Joint Declaration by the European Parliament, the Council and the Commission on fundamental rights of 5 April 1977 (Treaty Series 1995, p. 877); the Joint Declaration by the European Parliament, the Council, the representatives of the Member States, meeting within the Council, and the Commission against racism and xenophobia of 11 June 1986 (Treaty Series 1995, p. 889); the Resolution of the Council and the representatives of the governments of the Member States, meeting within the Council, of 29 May 1990 on the fight against racism and xenophobia (OJ 1990 C 157, p. 1), the Resolution of the Council and of the Member States, meeting in the Council, on human rights, democracy and development of 28 November 1991 (Bulletin of the European Communities, No 11/1991, p. 130, point 2.3.1) and the Conclusions on the implementation of that resolution adopted by the Council and the Member States on 18 November 1992. Declarations by various European Councils may also be mentioned, such as the Declaration by the Heads of State or Government of the Member

States of the EC on the European identity of 14 December 1973 (Bulletin of the European Communities, No 12/1973, point 2501), the Declaration by the European Council on democracy of 8 April 1978, the Declaration by the European Council on the international role of the Community of 2 and 3 December 1988 (Bulletin of the European Communities, No 12/1988, point 1.1.10), the Declaration by the European Council on human rights of 29 June 1991 (Bulletin of the European Communities, No 6/1991, Annex V) and the Statement by the European Union on human rights of 11 December 1993 on the occasion of the 45th anniversary of the Universal Declaration of Human Rights (Bulletin of the European Communities, No 12/1993, point 1.4.12).

6. In a report of 4 February 1976, sent to the European Parliament and the Council, entitled 'Protection of fundamental rights in the creation and development of Community law' (Bulletin of the European Communities, Supplement 5/76), the Commission ruled out the necessity of accession by the Community as such to the Convention.
7. Formal accession was first proposed by the Commission to the Council by the Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 April 1979 (Bulletin of the European Communities, Supplement 2/79).
8. That proposal was renewed by the Commission's Communication on Community accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 19 November 1990.
9. On 26 October 1993, the Commission published a working document entitled 'Accession of the Community to the European Convention on Human Rights and the Community legal order', in which it considered in particular the questions as to the legal basis of accession and the monopoly of jurisdiction of the Court of Justice.
10. The European Parliament has on several occasions made statements in favour of accession, most recently by a resolution of 18 January 1994 on Community accession to the European Convention on Human Rights, adopted on the basis of a report of the Committee on Legal Affairs and Citizens' Rights (OJ 1994 C 44, p. 32).

IV — Admissibility of the request for an Opinion

1. Ireland and the United Kingdom argue that the request for an Opinion is not admissible. The Danish, Finnish and Swedish Governments also raise the question whether the request is premature.

In its oral observations, Ireland points out that there is no specific proposal for an agreement on accession on which the Court could give its opinion. The technical problems are numerous and a variety of solutions is conceivable. No option has yet been taken for determination by the parties who have to negotiate.

According to the United Kingdom, no agreement is 'envisaged' within the meaning of Article 228(6) of the Treaty. The Court may be seised only after the draft agreement has been substantially negotiated. In Opinion 1/78 [1979] ECR 2871, the request was admittedly held to be admissible notwithstanding the fact that the negotiations were still to take place. However, at the time the request was made the agreement existed in draft; negotiations took place during the proceedings and the Court was informed of the most recent state of the texts before delivering its Opinion. In these proceedings, in contrast, there is no draft agreement and no negotiations are envisaged before the Opinion is delivered. The request for Opinion 1/78 was relevant since the legal basis of the agreement was at issue. In this case, there is consensus as to the only possible legal basis, namely Article 235 of the Treaty.

As well as the fundamental problems outlined by the Council, the United Kingdom refers to other difficulties. It raises the question of the scope of accession given the reservations made by the Member States, the power of the latter to derogate at any time from certain provisions of the Convention and the risk of a discrepancy between the obligations of the Member States and those of the Community, the problem of the Community's participation in the organs of the Convention, in particular in the future single court, the division of competence between the Community and the Member States, the difficulty of the Community's acceding to the Convention without first acceding to the Council of Europe, and the future of the ECSC and EAEC Treaties. Given the number and gravity of these problems, the United Kingdom submits that the Court could not at the present stage give an Opinion of value.

Article 235 of the Treaty, the only possible legal basis, requires a unanimous decision of the Council. The fact that there is no such unanimity emphasizes the hypothetical and unrealistic nature of the request for an Opinion. In the context of references for a preliminary ruling, the Court has always refused to rule on general or hypothetical questions.

The Danish Government notes that there is no negotiated draft agreement. Still less has any agreement been reached within the Council as to the opening of negotiations.

The Finnish Government points out that, according to Article 107(2) of the Rules of Procedure and the case-law of the Court, an Opinion may deal with the compatibility of the envisaged agreement with the Treaty and with the question of the powers of the Community. In the present case, the admissibility of the request for an Opinion depends on whether the agreement envisaged can be extracted from the documents annexed to the request or referred to therein with sufficient precision to enable the Court to deliver an Opinion. If so, the fact that the request may be premature would not prevent the Court from ruling generally and as a matter of principle.

In its oral observations the Swedish Government also points out that there is as yet no draft text in existence or even a Council decision to open negotiations. Even if the Court were to admit this request for an Opinion, once the legal and technical questions had been tackled during the negotiations, a subsequent request might be unavoidable.

2. The Commission, the Parliament, and the Belgian, French, German, Italian and Portuguese Governments submit that the request for an Opinion is admissible since it concerns an agreement envisaged within the meaning of Article 228(6) of the Treaty.

The Commission refers to the change in the wording of Article 228. The former text of the second subparagraph of Article 228(1) of the EEC Treaty, under which the Opinion of the Court of Justice could be obtained beforehand as to whether the agreement envisaged was compatible, followed on from the first subparagraph referring to the conclusion of agreements between the Community and third countries or an international organization. The new text of Article 228(6) of the EC Treaty refers only to an agreement envisaged with no mention of an Opinion before the conclusion of the agreement in question. In Opinion 1/78, the Court gave a broad interpretation to the concept of agreement envisaged; that case may be regarded as reinforced in the light of the new wording. As in the request for Opinion 1/78, the question before the Court relates to powers and there is no risk that the matter will come before it again during any negotiations.

The Parliament emphasizes that the purpose of Article 228 is, as is clear from Opinion 1/75 [1975] ECR 1355, to forestall disputes relating to the compatibility with the Treaty of international agreements. This case concerns the compatibility of the legal system established by the Convention with the Community legal order. The specific legal question is whether the Court's being subject to a judicial body outside the Community legal system is compatible with the Court's monopoly of jurisdiction. The Court accepted, in Opinion 1/78, cited above, that it is in the interests

of all the States concerned, including non-member countries, for a question of powers to be settled as soon as negotiations are commenced.

The Belgian Government also refers to the precedent of Opinion 1/78 and the new wording of Article 228(6) of the Treaty. It stresses three points. The Member States have accepted that the compatibility of accession with Community law must be established before negotiations are opened. The Court has already acknowledged, in Opinion 1/78, cited above, and Opinion 1/92 [1992] ECR I-2821, that a request for an Opinion must be admitted provided that the subject-matter of the agreement envisaged is known and that the originator of the request has an interest in the outcome, even if the content of the agreement envisaged has not yet been defined in all detail. To require that the institution which makes the request for an Opinion entertains no doubt as to the compatibility of the agreement envisaged with Community law at the time the Court is seised would undermine the effectiveness of Article 228(6) of the Treaty.

In its oral observations the German Government submits that the request is admissible since, when it was made, discussions on accession had reached a stage where an Opinion appeared necessary and justified. The Convention which is to be acceded to as well as the adaptations which such accession requires are known. In accordance with what the Court held in Opinion 1/78, it is in the interests of all the Member States that the question of the power of the Community to accede to the Convention be settled before negotiations begin.

The French Government, in its oral observations, accepts that the Court does not have before it a draft agreement, that there are many uncertainties surrounding the negotiations and that for the moment there is no consensus within the Council on the expediency of accession. However, the Court should admit the request for an Opinion since the legal questions concerning the compatibility of accession with the Treaty are clear and their relevance cannot be disputed.

The Italian Government, in its observations, refers to Article 107(2) of the Rules of Procedure from which it is clear that a request for an Opinion may concern the compatibility with the provisions of the Treaty of the envisaged agreement or the power of the Community to enter into that agreement. If, as in the present case, the request concerned the Community's powers, the existence of a draft agreement already sufficiently defined would not be required. Even if the request also concerns the compatibility of accession with the substantive rules of the Treaty, the Court could not decline to give an Opinion since the Convention to be acceded to exists and its general aspects are known.

The Portuguese Government, in its oral observations, also points out that the result of the negotiations to be carried out and the terms of the Convention to which the Community proposes acceding are known.

V — The legal basis of the envisaged accession

1. The Austrian Government, after referring to the case-law relating to the external competence of the Community, submits that the exercise of all the Community's powers involves respect for fundamental rights. The guarantee of the rights protected by the Convention is based on the powers on the basis of which the Community institutions act in each field concerned. Such internal horizontal application of the rights guaranteed by the Convention is at the same time the basis of the Community's external competence to accede to the Convention.
2. The Commission, the Parliament and the Belgian, Danish, Finnish, German, Greek, Italian and Swedish Governments, together with the Austrian Government as a subsidiary argument, submit that, in the absence of specific provisions, Article 235 of the Treaty is the legal basis for accession. The conditions for the application of Article 235, namely the necessity for action by the Community, the attainment of one of the objectives of the Community and the link with the operation of the common market, are fulfilled.

The Commission refers to its working document of 26 October 1993, cited above in which it described respect for human rights as a transverse objective for forming an integral part of the Community's objectives.

It is clear from the judgment in Case 43/75 Defrenne [1976] ECR 455 that the objectives, within the meaning of Article 235 of the Treaty, may be made clear in the preamble of the Treaty. The preamble to the Single European Act makes reference to respect for human rights and to the Convention.

The Parliament also considers that the protection of human rights is encompassed within the Community's objectives. The embodiment in the Treaty of citizenship of the Union is a new legal factor supporting that argument. By virtue of the combined provisions of the third indent of Article B of the Treaty on European Union and Article 8 of the EC Treaty, it is for the Community to ensure that the fundamental rights of a citizen of the Union are protected to the same extent as his rights as a national citizen with regard to State acts. The Parliament emphasizes the need for the Community, including the Court of Justice, to be subject to the same international judicial control as Member States and their courts of final appeal. According to the Parliament, the choice of Article 235 of the Treaty should be supplemented by reference to the second subparagraph of Article 228(3) of the Treaty, requiring, for the conclusion of certain international agreements, the assent of the Parliament. The need for such assent may be explained by reference to the ratio legis of that provision, which is to ensure that the Parliament is not required by an international agreement, in its role as co-legislator and by virtue of the Community's international obligations, to amend an act adopted following the codecision procedure.

The Austrian, Belgian, Finnish, German, Greek, Italian and Swedish Governments emphasize that the protection of human rights is a general horizontal principle which applies to the Community in the exercise of all its activities and that such protection is essential for the proper functioning of the common market.

According to those governments, the Court has realized that protection by way of general principles of Community law, drawing on common constitutional traditions and international instruments, in particular the Convention. The preamble to the Single European Act, the preamble to the Treaty on European Union and Article F(2), J.1 and K.2 of that Treaty enshrine respect for human rights and, in that context, the role of the Convention.

The Greek Government also refers to Article 130u(2) of the EC Treaty, which mentions the objective of respecting human rights in cooperation and development.

The Austrian Government submits that, to determine the objectives of the Community, reference should also be made to the preamble to the Treaty which refers to the preservation of peace and liberty; that objective encompasses the rights guaranteed by the Convention.

The Finnish Government considers that, at the present stage of the Community's development, the protection of human rights is a proper objective of the Community.

According to all those governments, accession to the Convention and external judicial control are necessary to protect individuals against disregard of the Convention by the Community institutions.

The Belgian Government stresses the need to avoid divergent interpretations in Community case-law and that of the organs of the Convention. It notes that the system of remedies in Community law, which excludes actions for annulment by an individual in respect of an act which is not of direct and individual concern to him, affords less protection than that of the Convention.

The Italian Government, in its oral observations, points out that all the Member States, acting within their powers, have voluntarily submitted to the international control machinery for the protection of human rights. The transfer of State powers to the Community requires that the Community be subject to the same international control in order to restore the balance originally desired by the Member States.

The Austrian Government refers to the need for a uniform interpretation of the Convention, to the continuing increase in the integration envisaged by the Treaty on European Union, an area in which the protection of human rights is particularly important, and the law governing Community officials.

The Finnish Government submits that accession is necessary from the point of view of strengthening the social aspect of the Treaty. The new bases of competence laid down in the Single European Act and the embodiment in the Treaty of the principle of subsidiarity have however restricted the scope of Article 235 of the Treaty. Whether that provision applies would depend on the structure and content of the accession agreement.

3. The French, Portuguese and Spanish Governments and Ireland and the United Kingdom assert that neither the EC Treaty nor the Treaty on European Union contains any provision allocating specific powers to the Community in the field of human rights capable of being the legal basis of the envisaged accession. Article F(2) of the Treaty on European Union simply gives constitutional status to the existing case-law in the field of the protection of human rights and moreover envisages such protection only by way of general principles of Community law.

The French and Portuguese Governments add that Article J.1(2) of the Treaty on European Union, concerned with the common foreign and security policy, and Article K.2(1), concerned with justice and home affairs, which are moreover non within the jurisdiction of the Court of Justice, are in the nature of a programme and do not confer specific powers on the Community. The French Government also rules out Article 130u of the EC Treaty.

The Spanish, French and Portuguese Governments and Ireland and the United Kingdom also argue against any application of Article 235 of the Treaty. Respect for human rights is not among the objectives of the Community as set out in Articles 2 and 3 of the Treaty. The United Kingdom adds that reference to Article F(2) of the Treaty on European Union cannot justify recourse to Article 235.

Those governments deny that a legal vacuum or deficit in the protection of human rights requires the envisaged accession. The Court of Justice has substantially incorporated the Convention into the Community legal order and fully integrated it into the corpus of Community law. The French Government lists the fundamental rights enshrined by the Convention, protection of which has been upheld by the Court of Justice.

The Portuguese Government adds that the risk of divergent interpretations of the Convention by the Court of Justice and the European Court of Human Rights is theoretical and may be explained by the Community's specific objectives of economic and political integration. This government raises the possibility of the Court of Justice making a reference for a preliminary ruling to the European Court of Human Rights on the interpretation of the Convention.

According to the governments, Community law comprises a complete system of remedies for individuals. Accession is not necessary in the context of the operation of the common market.

4. The Danish Government sets out arguments for and against accession. It refers to the lacuna in the protection of human rights in the law governing Community officials while recognizing that that lacuna is not fundamental but procedural in nature. Respecting the Convention by a sort of self-limitation which the Court has developed differs from respecting it by virtue of an international

obligation, even if the difference is theoretical. The advantage of accession would be essentially political, in that it would underline the importance attached to respect for human rights. Accession would also enable the Community to undertake its own defence if Community law were challenged before the organs provided for by the Convention. The Government notes that in general disputes concern a combination of Community and national rules, in which case the national rules are in principle disputed; in that situation, the institutions, in particular the Commission, could assist the national government before the organs of the Convention.

Opposed to that political advantage are, says the Danish Government, practical and legal problems. Currently, accession is only possible for States; the position of the other Contracting Parties is not clear; accession by the Community would give rise to problems with regard to the derogations granted to the Member States and the reservations made by them; accession would probably not extend to the whole of the Convention; it would be necessary to establish machinery for determining the entity responsible for infringement of the Convention, given that *ex hypothesi* the disputed act would be national; the question would also arise as to representation of the Community in the Convention's control bodies, in particular in the future single Court. In the light of the gravity of those problems, the Danish Government proposes that an agreement be concluded between the Community and the Contracting Parties to the Convention enabling the Court of Justice to refer questions concerning human rights to the European Court of Human Rights for a preliminary ruling and authorizing the European Court of Human Rights to seek a preliminary ruling on Community law from the Court of Justice.

VI — Compatibility of accession with Articles 164 and 219 of the Treaty

1. The Commissions, the Parliament, and the Austrian, Belgian, Danish, German, Finnish, Greek, Italian and Swedish Governments submit that the envisaged accession, in particular the submission of the Community to the legal system of the Convention, is not contrary to Articles 164 and 219 of the Treaty.

The Commission notes that, unlike in the case of the Agreement on the European Economic Area, the objectives of the Convention and the Treaty concur in the area of human rights. The Convention lays down classic international-law control machinery and the judgments of the European Court of Human Rights have no direct effect in the internal legal order. Admittedly, the Convention has the specific feature that individuals may petition. That however is simply one aspect of control, alongside the applications which may be made by the Contracting Parties; it would moreover be contradictory to accept that control machinery and to refuse individual petitions. The European Court of Human Rights would not rule on the question of the division of competence between the Community and the Member States, which is regulated solely by the Community legal order. Thus there should be no possibility of any action; between the Community and the Member States.

Neither can it be asserted that the control machinery of the Convention, in that it extends to all Community powers, calls in question the autonomy of the Community legal order. The Convention imposes only minimum standards. The control machinery has no direct effect in the Community legal order. Since it has not been considered contrary to the constitutional principles of the Member States, that machinery could hardly be considered to be incompatible with the principles of Community law.

The Parliament refers to Opinion 1/91, cited above, in which the Court recognized that the Community had power to submit to decisions of an international court. The submission of the Community to a court competent in human rights matters is consistent with the development of the Community order which is no longer directed at the economic operator but at the citizen of the Union. External control in the field of human rights does not affect the autonomy of the Community legal order any more than it prejudices that of the Member States. The Parliament refers to its resolution of 18 January 1994, cited above, in which it noted the importance of being able to bring a direct action before an international court in examining the compatibility of a Community act with

human rights and stressed that the envisaged accession is not such as to call in question the Court's competence in questions of Community law.

The Belgian Government considers that the Court is required to decide whether the fundamental rights integrated in the Community legal order. Where they are drawn from the Convention, become Community law or retain their specific character. Whether or not the envisaged accession affects the autonomy of Community law will depend on the answer.

The Government notes first that the rights and freedoms of the Convention have their own status among the general principles of Community law. The Convention simply establishes a minimum threshold of protection and does not affect the development of that protection from other sources recognized by the Court, namely the Community legal order properly so called and the common constitutional traditions. When it refers to the Convention, the Court takes into consideration the interpretation given by the organs of the Convention, thus underlining the specific place of rights guaranteed by the Convention in the Community legal order. To that extent, the autonomy of the Community legal order, within the meaning of Opinions 1/91 and 2/92, cited above, is from now on simply relative.

The Belgian Government next argues that the agreement envisaged preserves the autonomy of the Community legal order. In accordance with the possibility provided in Article 62 of the Convention, any action between the Community and its Member States would be excluded, which would respect Article 219 of the Treaty. In order to avoid any external influence on the division of competence between the Community and the Member States, the latter could, in the event of an individual petition, adopt a position on the issue of who was liable for the alleged infringement: the machinery to be established would be based on Annex IX to the United Nations Convention on the Law of the Sea of 10 December 1982.

The Belgian Government emphasizes, thirdly, that absolute autonomy of the Community legal order in the field of the rights and liberties guaranteed by the Convention is not desirable. The risk that the organs of the Convention will consider themselves competent to rule on the compatibility with the Convention, if not of Community acts, at least of national implementing acts, cannot be ruled out if the protection of human rights in the Community legal order is less than that of the Convention.

Even if the Court of Justice were to conclude that the criteria laid down in Opinions 1/91 and 1/92 relating to the autonomy of the Community legal order were applicable, the envisaged accession could proceed.

The Belgian Government notes the lack of any personal and functional link between the Court of Justice and the organs of the Convention. The European Court of Human Rights may simply require the relevant party to comply with its judgments without being able to annul or invalidate the national measure in dispute. With regard to the effect of the judgments of that Court, the Government distinguishes two cases. If the provision of the Convention is sufficiently precise and complete, it will be respected simply by recognizing that it is directly applicable. If the infringed provision is not directly applicable, it will be for the State to take the appropriate measures to remedy the infringement. In neither case would the autonomy of the Community legal order be called in question.

According to the Austrian, Danish, Finnish, German, Greek and Italian Governments, the Court accepted in Opinion 1/91, cited above, that the Community may submit to a court set up by an international agreement for the interpretation and application of that agreement provided that the autonomy of the Community legal order is not affected. The Court stressed in particular the need to respect the independence of the Community judicature and the monopoly of the Court of Justice in the interpretation of Community law.

The Danish Government emphasizes that in the Agreement on the European Economic Area the difficulty lay in the fact that that law was the same as Community law. In this case, the Community institutions, including the Court of Justice, would be taking into consideration the case-law of the organs of the Convention solely in respect of human rights. Without wishing definitively to settle the question, the Government stresses that the case-law of the Convention already influences that of the Court of Justice, which argues in favour of accession being compatible with the Treaty.

The German Government also asserts that the question of the division of competence between the Community and the Member States remains within the jurisdiction of the Court of Justice, since the European Court of Human Rights does not rule on the internal law of the Contracting Parties. The Court of Justice safeguards fundamental rights by reference both to the constitutional tradition of the Member States and to the Convention, and achieves greater protection than the Convention. It cannot therefore be argued that the autonomy of Community law is called in question because identical provisions are interpreted differently by virtue of their different objectives. The sole obligation which the Convention would impose on the Community, namely a minimum level of respect, is within the limits laid down in Opinion 1/91, cited above. The German Government also refers to the fact that there is no personal link between the two courts.

The Greek Government considers that any involvement of the European Court of Human Rights in the Community legal order would be limited to interpreting the rights guaranteed by the Convention. Respect for the autonomy of the community legal order would not prohibit any external involvement, but would require the fundamental principles and the institutional balances of Community law to be protected. The participation of a judge from the Community who would not at the same time be a member of the Court of Justice should ensure that the European Court of Human Rights takes into consideration the specific features of community law.

The Italian Government, in its oral observations, points out that the accession agreement will have to respect the criteria laid down by the Court in Opinions 1/91 and 1/92 as regards respect for the Community legal order. The Italian Government particularly emphasizes in this regard that judgments of the European Court of Human Rights do not have direct effect in the internal legal systems and cannot have the effect of declaring internal acts unlawful.

The Austrian Government emphasizes the difference from the Agreement on the European Economic Area. Accession would not create a normative package essentially comprising rules already part of the Community legal order and to be integrated into that order. The European Court of Human Rights would not have jurisdiction to rule on questions of Community law which would for this purpose be treated in the same way as the law of the States party to the Convention.

The Swedish Government considers that accession could be incompatible with Articles 164 and 219 of the Treaty only in the event of a risk of a failure to observe the binding character of judgments of the Court and therefore an undermining of the autonomy of the Community legal order. In order to avoid that risk, the Swedish Government suggests that it would be possible to exclude, by special agreement, disputes between Member States or between Member States and the Community from the settlement machinery of the Convention. It also puts forward the idea of references being made by the European Court of Human Rights to the Court of Justice on questions of Community law.

The Finnish Government does not rule out the possibility that the envisaged accession and the subordination of the Community institutions to the jurisdiction of the European Court of Human Rights may have effects on the interpretation by the Court of Justice of provisions of Community law to the extent that such provisions affect human rights. If the principles set out by the Court of Justice in Opinion 1/91 were applied, it would none the less be necessary to recognize that human rights, protected by way of general principles of Community law, were not within the economic and commercial framework of that law and accession would not prejudice its autonomy.

2. The French, Portuguese and Spanish Governments and Ireland and the United Kingdom argue that accession by the Community to the Convention is incompatible with the Treaty, in particular Articles 164 and 219. Referring to Opinions 1/91 and 1/92, the governments emphasize that the envisaged accession calls into question the autonomy of the Community legal order and the Court of Justice's monopoly of jurisdiction.

The Spanish Government cites Articles 24 and 25 of the Convention establishing inter-State and individual petitions, Article 45 conferring jurisdiction on the European Court of Human Rights over the interpretation and application of the Convention, Articles 32 and 46 conferring a binding character on the decisions of the organs of the Convention, Article 52 on the final nature of judgments of the European Court of Human Rights, Article 53 obliging the Contracting Parties to abide by judgments and Article 54 investing the Committee of Ministers with a duty to supervise execution of judgments. Article 62 of the Convention, submitting all disputes between Contracting Parties concerning the interpretation or application of the Convention to the means of settlement laid down therein, is incompatible with Article 219 of the Treaty; it would be necessary to provide for a reservation or special agreement to exclude disputes between the Member States inter se or with the Community. In contrast to the criteria laid down in Opinions 1/91 and 1/92, the organs of control of the Convention would not simply interpret it but would examine the legality of Community law in the light of the Convention, which would have an impact on the case-law of the Court of Justice.

The French Government asserts that the Community legal order has available an autonomous and specific judicial organization. No right of action in respect of an issue of human rights has been or could currently be instituted beyond the respect for the law conferred as a general principle on the Court.

It also considers the problem of the prior exhaustion of domestic remedies. In the Community system, actions open to individuals are limited and the Court of Justice is in the majority of cases seised by way of reference for a preliminary ruling. The question must arise whether the organs of the Convention would be moved to require the Community to widen access to the preliminary-reference procedure or whether, conversely, they might not refuse to take account of that procedure in assessing the requirement that domestic remedies be exhausted. It would accordingly be easier to amend the second paragraph of Article 173 of the Treaty so as to enable individuals to challenge Community acts affecting their fundamental rights.

The French Government also emphasizes the risk of proceedings involving Community law being submitted to Convention organs consisting of nationals of States which are members of the Council of Europe but not of the Community. It similarly notes the difficulties of participation by Community judges in the control bodies of the Convention. In those circumstances, accession could occur only after amendment of the Treaty, including the Protocol on the Statute of the Court of Justice of the EC.

Ireland, in its oral observations, points out that accession by the Community to the Convention puts in question the exclusive jurisdiction of the Court, under Articles 164 and 219 of the Treaty, to settle any dispute relating to application and interpretation of the Treaty.

The Portuguese Government also stresses that the control bodies of the Convention are competent to apply and interpret provisions with a horizontal effect: that competence would inevitably interfere with the application and interpretation of Community law. Admittedly, Article 62 of the Convention would enable the inter-State action provided for in Article 24 of the Convention to be excluded in order to respect Article 219 of the Treaty. The ratio legis of that article cannot however be limited to proceedings between Member States but means that no method of judicial resolution of disputes other than that applied by the Court of Justice may interfere with the interpretation and application of the Treaty. The European Convention on Human Rights would be moved to interpret Community law and take decisions on the competence of the Community. It would be difficult to devise practicable machinery enabling the Community and the Member States to resolve questions of

competence. To determine whether domestic remedies had been exhausted, the European Court of Human Rights could even rule on the jurisdiction of the Court of Justice; thus it would have to decide whether an individual could have brought an action for annulment against a Community act which directly and individually concerned him.

The Spanish Government and the United Kingdom also note the legal effects of decisions of the European Court of Human Rights and the future single court. They stress in particular that that Court is competent to grant just satisfaction to the injured party which may take the form of monetary compensation. In the event of accession, the Court of Justice would surrender, within the scope of application of the Convention, its ultimate authority as the interpreter of Community law. In contrast to the criteria laid down in Opinion 1/91, the European Court of Human Rights does not limit itself to the interpretation and application of an international agreement. It would be involved in the interpretation and application of Community law and would have to rule on the competence of the Community and the Member States.

3. The Netherlands Government simply notes the problems which must be considered before taking a decision on whether accession is appropriate, without taking a definite position. It refers in particular to the question whether relations between the Court of Justice and the organs of the Convention are compatible with Article 164 of the Treaty, the question of the respective obligations under the Community Treaties and the Convention of the Member States, parties to the Convention and members of the Community, and the problem of determining the responsibility of the Community and the Member States with regard to observance of the Convention.

Opinion of the Court:

Admissibility of the request for an Opinion

- 1 Ireland and the United Kingdom, as well as the Danish and Swedish Governments, submit that the request for an Opinion is inadmissible or is, at any rate, premature. They argue that there is no agreement framed in sufficiently precise terms to enable the Court to examine the compatibility of accession with the Treaty. In the opinion of those Governments an agreement cannot be said to be envisaged at a stage where the Council has as yet not even adopted a decision in principle to open negotiations on the agreement.
- 2 Article 228(6) of the Treaty provides that the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of the Treaty.
- 3 As the Court has stated, most recently in paragraph 16 of Opinion 3/94 of 13 December 1995 (not yet published in the ECR), the purpose of that provision is to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community.
- 4 The Court also stated in that Opinion (at paragraph 17) that a possible decision of the Court to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty could not fail to provoke, not only in a Community context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries.
- 5 In order to avoid such complications, the Treaty has established the special procedure of a prior reference to the Court of Justice for the purpose of ascertaining, before the conclusion of the agreement, whether the latter is compatible with the Treaty.
- 6 That procedure is a special procedure of collaboration between the Court of Justice on the one hand and the other Community institutions and the Member States on the other whereby, at a stage prior to conclusion of an agreement which is capable of giving rise to a dispute concerning the legality of a Community act which concludes, implements or applies it, the Court is called upon to ensure, in accordance with Article 164 of the Treaty, that in the interpretation and application of the

Treaty the law is observed.

- 7 As regards the existence of a draft agreement, there can be no doubt that in this particular case, no negotiations had been commenced nor had the precise terms of the agreement for accession of the Community to the Convention been determined when the request for an Opinion was lodged. Nor will they be so when the Opinion is delivered.
- 8 In order to assess the extent to which the lack of firm information regarding the terms of the agreement affects the admissibility of the request, the purposes of the request must be distinguished.
- 9 As is clear from the observations submitted by the Governments of the Member States and by the Community institutions, accession by the Community to the Convention presents two main problems: (i) the competence of the Community to conclude such an agreement and (ii) its compatibility with the provisions of the Treaty, in particular those relating to the jurisdiction of the Court.
- 10 As regards the question of competence, in paragraph 35 of Opinion 1/78 of 4 October 1979 ([1979] ECR 2871) the Court held that, where a question of competence has to be decided, it is in the interests of the Community institutions and of the States concerned, including non-member countries, to have that question clarified from the outset of negotiations and even before the main points of the agreement are negotiated.
- 11 The only condition which the Court referred to in that Opinion is that the purpose of the envisaged agreement be known before negotiations are commenced.
- 12 There can be no doubt that, as far as this request for an Opinion is concerned, the purpose of the envisaged agreement is known. Irrespective of the mechanism by which the Community might accede to the Convention, the general purpose and subject-matter of the Convention and the institutional significance of such accession for the Community are perfectly well known.
- 13 The admissibility of the request for an Opinion cannot be challenged on the ground that the Council has not yet adopted a decision to open negotiations and that no agreement is therefore envisaged within the meaning of Article 228(6) of the Treaty.
- 14 While it is true that no such decision has yet been taken, accession by the Community to the Convention has been the subject of various Commission studies and proposals and was on the Council's agenda at the time when the request for an Opinion was lodged. The fact that the Council has set the Article 228(6) procedure in motion presupposes that it envisaged the possibility of negotiating and concluding such an agreement. The request for an Opinion thus appears to be prompted by the Council's legitimate concern to know the exact extent of its powers before taking any decision on the opening of negotiations.
- 15 Furthermore, in so far as the request for an Opinion concerns the question of Community competence, its import is sufficiently clear and a formal Council decision to open negotiations was not indispensable in order further to define its purpose.
- 16 Finally, if the Article 228(6) procedure is to be effective it must be possible for the question of competence to be referred to the Court not only as soon as negotiations are commenced (Opinion 1/78, paragraph 35) but also before negotiations have formally begun.
- 17 In those circumstances, the question of Community competence to proceed to accession having been raised as a preliminary issue within the Council, it is in the interests of the Community, the Member States and other States party to the Convention to have that question settled before negotiations begin.
- 18 It follows that the request for an Opinion is admissible in so far as it concerns the competence of the Community to conclude an agreement of the kind envisaged.
- 19 However, the same is not true as regards the question of the compatibility of the agreement with the Treaty
- 20 In order fully to answer the question whether accession by the Community to the Convention would

be compatible with the rules of the Treaty, in particular with Articles 164 and 219 relating to the jurisdiction of the Court, the Court must have sufficient information regarding the arrangements by which the Community envisages submitting to the present and future judicial control machinery established by the Convention.

- 21 As it is, the Court has been given no detailed information as to the solutions that are envisaged to give effect in practice to such submission of the Community to the jurisdiction of an international court.
- 22 It follows that the Court is not in a position to give its opinion on the compatibility of Community accession to the Convention with the rules of the Treaty.

Competence of the Community to accede to the Convention

- 23 It follows from Article 3b of the Treaty, which states that the Community is to act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein, that it has only those powers which have been conferred upon it.
- 24 That principle of conferred powers must be respected in both the internal action and the international action of the Community.
- 25 The Community acts ordinarily on the basis of specific powers which, as the Court has held, are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them.
- 26 Thus, in the field of international relations, at issue in this request for an Opinion, it is settled case-law that the competence of the Community to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions. The Court has held, in particular, that, whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect (see Opinion 2/91 of 19 March 1993 [1993] ECR I-1061, paragraph 7).
- 27 No Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field.
- 28 In the absence of express or implied powers for this purpose, it is necessary to consider whether Article 235 of the Treaty may constitute a legal basis for accession.
- 29 Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.
- 30 That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.
- 31 It is in the light of those considerations that the question whether accession by the Community to the Convention may be based on Article 235 must be examined.
- 32 It should first be noted that the importance of respect for human rights has been emphasized in various declarations of the Member States and of the Community institutions (cited in point III.5 of the first part of this Opinion). Reference is also made to respect for human rights in the preamble to the Single European Act and in the preamble to, and in Article F(2), the fifth indent of Article J.1(2) and Article K.2(1) of, the Treaty on European Union. Article F provides that the Union is to respect fundamental rights, as guaranteed, in particular, by the Convention. Article 130u(2) of the EU Treaty provides that Community policy in the area of development cooperation is to contribute to

the objective of respecting human rights and fundamental freedoms.

- 33 Furthermore, it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the Convention has special significance (see, in particular, the judgment in Case C-260/89 ERT [1991] ECR I-2925, paragraph 41).
- 34 Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.
- 35 Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.
- 36 It must therefore be held that, as Community law now stands, the Community has no competence to accede to the Convention.

[...]

2.3 Case C-368/95: *Familiapress*

Vereinigte Familiapress Zeitungsverlags- Und Vertriebs GmbH v Heinrich Bauer Verlag

Case C-368/95

26 June 1997

Court of Justice

ECR [1997] I-03689

<http://www.curia.eu.int/en/content/juris/index.htm>

Please see Unit IX.

2.4 Case C-106/96: *United Kingdom v Commission (Social exclusion program)*

**United Kingdom of Great Britain and Northern Ireland
v
Commission of the European Communities**

Case C-106/96

12 May 1998

Court of Justice

ECR [1998] I-02729

<http://www.curia.eu.int/en/content/juris/index.htm>

Please see Unit VI.

2.5 Advocate General Toth: The European Union and Human Rights: the Way Forward

Opinion 2/94 of the Court of Justice on the accession by the Community to the European Convention on Human Rights¹ has again focused attention on the relationship between the European Union and the European Convention. The Court has held that as Community law now stands, the Community has no competence to accede to the Convention. It is not the purpose of this article to analyse the Court's Opinion, nor to trace the development of the protection of human rights in the European Community.² Rather, the aim is to examine the options that are open to the Community/Union following the Court's Opinion, and to suggest a solution which might finally resolve a seemingly intractable problem.

It appears that there are three main options available to the Community in the human rights field. The advantages and disadvantages of each are considered in turn below.

1. Option I: Continuation of the status quo

In the aftermath of Opinion 2/94, the favourite option seems to be the continuation of the status quo. This means leaving it to the Court of Justice to continue protecting human rights by way of case law as general principles of Community law. On the face of it, this solution has a number of attractions. First and foremost, it is the most convenient of all options in that it requires no immediate action. No difficult political decisions need to be taken, nor complex legal issues resolved. Secondly, it preserves the unity of human rights protection in the whole of Europe. There is one single system of substantive human rights, that created by the Convention, which is applied by the Member States of the European Community, the Community itself, and non-Member States, more or less in the same way. Thirdly, this is a very flexible solution for the Court of Justice, enabling the Court to enjoy the best of both worlds. It can rely on a set of rules without formally being bound by them. It can interpret and apply these "general principles" in the best interests of the Community. It can (within limits) tailor and adapt them to the needs and objectives of a constantly changing organization.

However, behind the appearance of it being the best of all possible worlds, this option has a number of inherent weaknesses and disadvantages, some of which have been apparent for some time, while others have come to light in the Court's Opinion. They may be summarized as follows.

First, it is by no means clear what the legal basis for the Court's case law is and, therefore, for the protection of human rights in the Community. The EC Treaty itself contains no provisions on human rights. The European Convention cannot form the necessary legal basis either since it is not binding on the Community. The Court has never said that it is: the Court only uses the Convention to draw "inspirations", "guidelines" or "general principles" from it. The Court's own justification is that "fundamental rights form an integral part of the general principles of law whose observance the Court must ensure". However, the force of this thesis, which has been generally accepted without questioning, has been considerably undermined by the Court's Opinion, in particular by paragraphs 23, 27 and 30. According to these, the Community "has only those powers which have been conferred upon it" (Para. 23). However,

¹ [1996] ECR I-1759.

² As to this, see the entry on Human rights in Toth, *The Oxford Encyclopaedia of European Community Law*, Vol. I Institutional Law (1990), p. 284 and Craig and de Burca, *EC Law. Text, Cases and Materials* (1995), chapt. 7, as well as the copious literature cited in both works. For an analysis of Opinion 2/94, see the annotation by Gaja in 33 CML Rev. (1996), 973. Throughout this article, the expression "human rights" refers to the rights and freedoms protected by the European Convention on Human Rights. These are usually described collectively as "civil and political rights" and are distinguished from "economic, social and cultural rights" which are covered by other instruments, such as e.g. the European Social Charter. The latter rights are not discussed in this article.

"no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field" (Para. 27). Moreover, such power cannot even be derived from Article 235 since this would mean "widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community" (Para. 30). Since the latter provisions are those which determine the Community's objectives, it follows that to enact rules on human rights would go beyond the objectives of the Community.

The problem is that it is at least arguable that all these considerations apply with equal force to the Court of Justice itself which, according to Article 4 of the EC Treaty, is one of the institutions and which must, therefore, likewise act "within the limits of the powers conferred upon it by this Treaty". Article 164, which requires the Court to ensure that "in the interpretation and application of this Treaty the law is observed", and on which the Court often relies in human rights cases as a legal basis or justification, only defines the Court's task but does not confer powers upon it. Therefore, everything that the Court says in its Opinion about the institutions' lack of power to act in the human rights field seems to apply, in principle, also to the Court itself. To some extent, the Court has cut the ground from under its own feet: how can the Court do by way of general principles that which the other institutions cannot do by legislation, i.e. incorporate rules on human rights into the corpus of Community law? (Surely, the Court must first incorporate such rules before it can review the acts of the institutions for compliance with them). To develop and apply general principles of law in areas which are covered by the Treaty is one thing, but to develop and apply them in an area (human rights) which is now stated to be outside the scope not only of specific Treaty provisions but also of the general Treaty framework and objectives is for the Court to arrogate to itself a power which does not seem to have been conferred upon it by the Treaty. The explanation that this is simply a question of Treaty interpretation which falls within the jurisdiction of the Court, given by the Court in justification of its establishing the general principle of State liability for damage caused to individuals by breaches of Community law, simply does not hold good here. Clearly, the Court cannot interpret into the Treaty that which it itself has declared not to be in it. Still less can the political institutions "endorse" or "approve" the Court's human rights jurisprudence since no Treaty provision confers any power on them in this field (Para. 27). Even if they could, their declarations would, by definition, lack any legal effect.

It is true that Article F(2) TEU could provide a legal basis for the protection of fundamental rights in the European Union as a whole, including the second and third pillars. However, Article F(2), together with other provisions referring to human rights in the context of the second and third pillars (Articles J.1(2) and K.2(1), respectively), is expressly excluded from the Court's jurisdiction (Article L). There is already case law showing that the Court will not entertain a preliminary reference or an action based on Articles A-F TEU.³ Thus, the present situation leads to totally inconsistent results: an individual can bring alleged human rights violations before the Court on the basis of vague and unwritten "general principles of law", but cannot do so by relying on the written provisions of a Treaty which is supposed to be the Union's "Constitution"! This shows that the above provisions are nothing but embellishments on the Treaty, with no real legal effect. It is, on the whole, unacceptable that there are no written, binding and enforceable rules on human rights in the Treaty on European Union other than these vague references to another international instrument which is not part of Community law. It may be said that at the end of the 20th century the citizen has every right to expect more of a Community or Union based on the rule of law than mere "inspirations" and "guidelines"; that he is entitled to see his fundamental rights set out in black and white in terms that he may enforce in a court of law.

Secondly, by its very nature, the Court's case law suffers from the inherent weaknesses of any uncodified legal system: it develops in a piece-meal and haphazard manner, with the Court having no control over the types of cases that come before it. Thus, important issues may remain unclarified for long periods of time. The Court's decisions can only operate *ex post facto*, after a violation has been committed, and this does nothing to ensure legal certainty, one of the fundamental principles of the Community legal system.⁴

³ See Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame*, [1996] ECR I-1029, Para. 25.

⁴ Case C-167/94, *Grau Gomis*, [1995] ECR I-1023, Para. 6, where the Court held that it had no jurisdiction to interpret Art. B in the context of a preliminary ruling. The same applies to Art. F(2), both in preliminary rulings and in direct actions.

Thirdly, the protection of individuals against human rights violations committed by the Community institutions is, at present, incomplete and inadequate. They cannot bring direct complaint against the Community before the European Commission and Court of Human Rights (ECHR), because the Community is not a Contracting Party to the Convention.⁵ The purpose of accession would have been precisely to ensure that the Community, which now exercises legislative powers in many areas transferred to it from the Member States, is under the same international control as the Member States themselves. Thus, individuals must rely on the system of remedies available before the Court of Justice. However, in direct actions they are not sufficiently protected by the Court of Justice either, because their right of action against Community acts, and in particular regulations, (even those infringing human rights (is severely restricted under Article 173 EC by the requirement of having to prove "direct and individual concern". They may, however, enjoy indirect protection through the preliminary ruling procedure where a Community act has been implemented at the national level.

Fourthly, the supranational protection of individuals against human rights violations committed by the Member States is even less satisfactory and, under the present system, raises several problems. It is true that the Court of Justice has recognized that it has some control over the observance of human rights by the Member States. Thus, the Court has stated that:

"... where [national] rules ... fall within the scope of Community law, and reference is made to the Court for a preliminary ruling, it must provide all the criteria of interpretation needed by the national court to determine whether those rules are compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the European Convention on Human Rights".⁶

The first problem here is that in order to be able to provide "all the criteria of interpretation", the Court must first interpret fundamental rights which "derive in particular from the European Convention on Human Rights", that is, it must interpret the Convention itself. However, according to the Court's established case law, in preliminary ruling procedures brought under Article 177 the Court can only interpret the EC Treaty and the acts of the institutions, but has no jurisdiction to interpret international agreements concluded by the Member States outside the framework of Community law.⁷ It is, therefore, not clear on what legal basis the Court can interpret the European Convention in preliminary ruling proceedings in order to assist national courts in determining the compatibility of national rules with the Convention.

The second problem is that, by contrast, the Court has repeatedly held that

"... it has no power to examine the compatibility with the European Convention on Human Rights of national rules which do not fall within the scope of Community law".⁸

The result of this is that, in practice, individuals are still subject to two different systems of protection at the supranational level: in matters falling within the scope of Community law they are able to use the remedies available before the Court of Justice, but in other matters they must seek protection of their fundamental rights from the Strasbourg organs. This situation is very confusing and unsatisfactory; the more so as in many instances it is by no means certain whether a matter falls within or outside the scope of Community law. The problem is exacerbated by the fact that with the progress of integration (not to mention the possible application of the principle of subsidiarity) the precise scope of Community law is subject to constant change and reinterpretation. Thus, in situations where they have been unable to obtain redress in the national courts, individuals may not be in a position to know before which higher forum the remedy lies, and this is clearly contrary to the principle of legal certainty.

⁵ See the Commission's Memorandum on the accession of the European Communities to the European Convention on Human Rights, dated 4 April 1979, Bull. EC, Suppl.2/79, p.7

⁶ See Conf(d)ration Fran(aise D(mocratique du Travail v. The European Community, European Commission of Human Rights, [1979] 2 CMLR 229 at 233(234).

⁷ Case C-260/89, ERT [1991] ECR I-2925, para. 42.

⁸ Case 130/73, Vandeweghe, [1973] ECR 1329, para. 2; Case 44/84, Hurd, [1986] ECR 29, para. 20.

The greatest weakness of the status quo is that Community law can only protect individuals vis-à-vis the Member States if they rely on human rights in the exercise of a right granted by the EC Treaty. It cannot protect against human rights violations per se. Since most Community rights can only be exercised by EC nationals, particularly in areas in which human rights violations by Member States are most likely to occur, such as the free movement of workers, the right of establishment and the freedom to provide services, human rights protection is practically (or to a great extent restricted to EC nationals and the members of their families). Thus, ultimately, the individual is only protected under Community law as a "Market citizen", not as a human being. The exclusion of non-EC nationals from human rights' protection is clearly illustrated by the Demirel case,⁹ in which the Turkish wife of a Turkish worker lawfully living and working in Germany could not rely on Article 8 of the European Convention to avoid expulsion from Germany (and thus separation from her husband) because there was no provision of Community law permitting the family reunification of Turkish workers. Thus, her case fell outside the scope of Community law.

In the Konstantinidis case,¹⁰ Advocate General Jacobs expressed the opinion that a Community national who goes to another Member State as a worker or self-employed person under Articles 48, 52 or 59 of the Treaty is

"entitled to assume that, wherever he goes to earn his living in the European Community, he will be treated in accordance with a common code of fundamental values ... as laid down in the European Convention on Human Rights."

Such a person, he said, is entitled to say "civis europeus sum" and to invoke that status under Community law in order to oppose any violation of his fundamental rights. Even according to this view, which so far goes the furthest in extending the protection of human rights under Community law (but which has not yet been accepted by the Court), the "common code of fundamental values" would apply to an individual only in his capacity as "civis europeus" exercising a Community right, i.e. as a Market citizen, not as a human being. This is the principal limitation of the present system. To obtain full protection as a human being, the individual must look elsewhere, to another system, which operates outside the framework of Community law.

Fifthly, even EC nationals are not fully protected by Community law against human rights violations by Member States. This is for two reasons. First, the Treaty prohibits discrimination only on grounds of nationality and sex. It does not prohibit discrimination on other grounds, such as race, religion, language, ethnic origin etc. Secondly, the Treaty (and Community law in general) can only be invoked by an individual who is in one of the situations envisaged by the Treaty. It is established case law that the Treaty cannot be relied on in "purely internal situations", i.e. those which exist within a single Member State. Thus, Treaty rights cannot be claimed by an individual who is a national of a Member State but has always lived and worked in that Member State and has never exercised the right to freedom of movement. If a Member State violates one of the fundamental rights of that individual, Community law is powerless to protect him; his only remedy lies before the European Commission and Court of Human Rights. Suppose that a Member State oppresses its ethnic minority and discriminates against the members of that minority by denying them access to certain jobs, trades, professions or educational establishments, or makes such access excessively difficult, or restricts the use of their language. In this case, Community law is of no assistance, first, because discrimination is not on grounds of nationality, residence or sex, and secondly, because this situation does not involve any cross-border movement and, therefore, lies entirely outside the scope of Community law.

Sixthly, although there exists one single system of substantive fundamental rights in Europe, there are two distinct systems of remedies in operation, each headed by a judicial body which is the supreme authority in its own field and which is totally independent of the other. The co-existence of two Supreme Courts, the ECJ and the ECHR, each having independent power to interpret and apply the same text, the

⁹ ERT case, supra note 7. See also Joined Cases 60 and 61/84, Cin(th)(que), [1985] ECR 2605, para. 26 and Case 12/86, Demirel, [1987] ECR 3719, para. 28.

¹⁰ Supra note 9.

Convention, carries with it the possibility of conflicting interpretations, which is the surest way to undermine legal certainty and confidence in the system. Conflicting interpretations are likely to occur because both Courts follow the same "teleological" method. The ECHR interprets the Convention according to the Convention's objectives, while the ECJ interprets it according to the Community's objectives.¹¹ However, the two sets of objectives do not necessarily coincide. The Convention's aim is to protect the individual as a human being, while the Community's aim is to further economic and social integration. In many areas, such as competition law, State aids, etc., the EC Treaty deals with undertakings as economic entities, whose basic rights may need different types of protection from those afforded to individuals.

This explains certain divergences in the Convention's interpretation that have already come to light. Thus, when in the *Hoechst* case¹² the ECJ held that Article 8(1) of the European Convention, which protects the right to respect for private and family life, home and correspondence, applies only to the private dwellings of natural persons but not to the business premises of undertakings, its reasons were that "the protective scope of that article is concerned with the development of man's personal freedom and may not therefore be extended to business premises". By contrast, in the *Niemietz* case¹³ the ECHR's opinion was that to interpret the words "private life" and "home" as including certain professional or business activities or premises "would be consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities". In *Orkem*,¹⁴ while recognizing that Article 6 of the European Convention, which guarantees the right to a fair trial, may be relied on by an undertaking subject to an investigation relating to competition law, the ECJ denied that that Article includes the right not to give evidence against oneself. In contrast, in the *Funke* case¹⁵ the ECHR upheld the right of anyone charged with a criminal offense, within the meaning of Article 6, "to remain silent and not to contribute to incriminating himself". These discrepancies are due to the fact that the ECJ has interpreted and applied the provisions of the Convention with regard to undertakings, in the context of competition proceedings, and having special regard to the objectives and rules of EC competition law,¹⁶ while the ECHR has interpreted and applied the same provisions with respect to private individuals, in the context of criminal proceedings, and in accordance with the objectives of the Convention itself. Such differences are virtually unavoidable in the present system where the ECJ is not only not bound by the rulings of the ECHR but, in the absence of an appropriate mechanism, is unable to seek any preliminary advice or opinion before interpreting a provision which the ECHR has not interpreted previously, as in the two cases cited above.

Weighing up all the advantages and disadvantages considered, the conclusion seems inescapable that the continuation of the status quo is not a viable option in the long run. Protecting human rights by way of general principles of law was undoubtedly one of the most original, "inspired" solutions ever to be produced by the Court of Justice which, at the time, served well the purpose of filling a glaring gap in the Treaty. But that gap must now be filled by more concrete, more tangible material. So what are the alternatives?

2. Option II: A Community catalogue of fundamental rights

This option would involve the drawing up of a separate catalogue of fundamental rights specially designed for the requirements of the Community. This could be done either in conjunction with, or as an alternative to, accession to the European Convention.¹⁷ In many ways, this would probably be the worst

¹¹ Case C-168/91, [1993] ECR I-1191 at I-1211-1212, para. 46.

¹² In Opinion 1/91 concerning the EEA Agreement, [1991] ECR I-6079, para. 14, the ECJ recognized that identically worded provisions could be interpreted differently in the context of two different legal systems according to their different objectives.

¹³ Joined Cases 46/87 and 227/88, *Hoechst v. Commission*, [1989] ECR 2859, paras. 17(18).

¹⁴ *Niemietz v. Germany*, Series A, No 251 -B, 16 EHRR 97, para 31.

¹⁵ Case 374/87, *Orkem v. Commission*, [1989] ECR 3283, para 30.

¹⁶ *Funke v. France*, Series A, No 256 -A, 16 EHRR 297, para 44.

¹⁷ For another instance where the ECJ applied Art. 8 of the Convention so as not to undermine the aims and objectives of EC competition law, see Case 136/79, *National Panasonic v. Commission*, [1980] ECR 2033, paras. 19 -20.

possible scenario. It would mean establishing a dual system of human rights protection in Europe, one for the Community and one for other States; a splitting up of the present single set of rights, which would undermine the authority of the Convention. The drawing up of such a list would present almost insurmountable difficulties.¹⁸ It would have to be decided whether the catalogue should be exhaustive or selective (and, in the latter case, what rights it should include) and whether it should cover civil and political rights already protected by the Convention (in which case, it would lead to unnecessary duplication¹⁹) or only purely economic and social rights. No solution would be satisfactory as no list, however drafted, would resolve the problems indicated under Options 1 and 3. It would possibly create new ones. Moreover, in the light of Opinion 2/94, it seems certain that the Community has no competence to enact such a catalogue by way of legislation without Treaty amendment (para. 27).

3. Option III: Accession to the European Convention

The Opinion of the Court that the Community has no competence to accede to the European Convention does not, of course, close the door to accession. All that it means is that the EC Treaty must first be amended before accession can take place. This could be achieved, for example, by the insertion of a new sentence in Article 230, which at present reads:

"The Community shall establish all appropriate forms of co-operation with the Council of Europe".

The new sentence could add:

"It shall have competence to accede to the European Convention on Human Rights".

Although according to Article N(1) TEU such an amendment could only be adopted unanimously, this would have been the case also under Article 235 EC which was originally suggested as a legal basis for accession. The only substantial difference is that under Article N(1), any Treaty amendment must be ratified by the Member States.

Accession to the Convention would have obvious advantages.²⁰ It would show a firm commitment to the protection of human rights on the part of the Community by accepting a legally binding international treaty. The Community would be placed under the same control as its Member States. There would be a written catalogue, already interpreted in many important details by a voluminous case law, which would enhance legal certainty. There would be a clear legal basis for the Court's decisions, instead of the present rather vague notions of "inspirations" and "guidelines". The Convention would be finally, albeit indirectly, incorporated in the Community legal order.

¹⁸ See the Commission's Memorandum of 4 April 1979, *supra* note 5, pp. 8, 12. For a third possibility, see the model of "concentric circles" proposed by Lenaerts in "Fundamental rights to be included in a Community catalogue", 16 *EL Rev.* (1991), 367. According to this proposal, the fundamental rights contained in the European Convention would be included in the Community Constitution but would remain subject to the control machinery of the Convention when Member States act outside the scope of Community law. This would lead to enormously complicated enforcement procedures, see *ibid.* at 377 -381.

¹⁹ These are discussed in detail in a study entitled "The problems of drawing up a catalogue of fundamental rights for the European Communities", prepared by Rudolf Bernhardt; *Bull. EC, Suppl. 5/76, Annex*. The difficulties are also discussed in the following documents: House of Lords, Select Committee on the European Communities, Session 1979 -80, 71st Report, "Human Rights" (1980, HL 362), pp. vii-xxxii; *id.* Session 1992 -93, 3rd Report, "Human Rights Re-examined" (1992, HL Paper 10), pp. 42 -43. Both documents come out against drawing up a separate catalogue of fundamental rights for the Community. See also the Presidency's progress report on the Intergovernmental Conference submitted to the Florence European Council of 21-22 June 1996, *Bull. EU 6 -1996*, p. 43, point 1.69.

²⁰ See e.g. Title VIII of the "Draft Constitution of the European Union" prepared by the European Parliament, Annex to Res. of 10 Feb. 1994, O.J. 1994 C 61/155. Title VIII contains a catalogue of human rights guaranteed by the Union, some of which have been taken over, verbatim or in essence, from the European Convention. The observance of these rights is binding on the Union twice, since under Art. 7 the Union is also required to respect fundamental rights "as guaranteed by the European Convention". This creates the following problem: in the case of rights which appear both in the Draft Constitution and in the European Convention, who has the final authority to interpret them for the Union: the ECJ or the ECHR?

As against this, there are also a number of disadvantages and unclarified questions, which may be summarized as follows.

First and foremost, accession to the Convention would mean subjecting the ECJ to the control machinery established by the Convention, and in particular, to the jurisdiction of the ECHR. This might be incompatible with Articles 164 and 219 of the EC Treaty. Article 164 entrusts to the ECJ alone the task of ensuring that "in the interpretation and application of this Treaty the law is observed". It makes the Court the final interpreter of Community law and the supreme guardian of legality in the Community. This idea is reinforced by Article 219 which prevents Member States from submitting a dispute concerning the interpretation or application of the Treaty to any method of settlement other than those provided for in the Treaty itself.

It is true that in Opinion 1/91²¹ the ECJ accepted that an international agreement which submits the Community, including the Court itself, to the binding decisions of another Court created by that agreement is compatible with Community law. But the Court added that this is the case only if that other Court simply interprets and applies the agreement and does not threaten the autonomy of the Community legal order by interpreting Community law also. However, in the event of accession to the Convention, it seems virtually inevitable that the ECHR would get involved in the interpretation of Community law, if only to establish whether a Community rule or practice is compatible with the Convention (this would, after all, be its main judicial function). In this situation, the ECHR would interpret Community law so as to achieve the objectives of the Convention which, as pointed out above, are not necessarily identical with those of the Community. This would re-create the present problem in reverse (as seen, at present the ECJ interprets the Convention according to Community objectives). Suppose that the Hoechst, Orkem and National Panasonic cases²² came before the ECHR following the judgments of the ECJ. This would inevitably have required the ECHR to interpret complex EC competition rules to see if the Commission's acts were compatible with the Convention. There can be no doubt that in so doing that Court would have given priority to the objectives of the Convention over those of EC competition law. This would necessarily mean interference with the powers of the ECJ as the supreme judicial body within the Community.

Opinion 2/94 shows that there is a general disagreement amongst the Member States and Community institutions as to the compatibility of accession to the Convention with the rules of the Treaty. In the absence of sufficient information regarding the arrangements whereby the Community envisages submitting to the jurisdiction of the ECHR, the Court has not been able to give an opinion on this question (Paras. 20-22). Thus, even if the issue of competence is resolved, accession may still not be possible on grounds of incompatibility with the Treaty.

Secondly, accession would raise a number of (as yet unsolved) institutional and technical problems, such as the participation by the Community in the control bodies of the Convention, in particular in the future single Court of Human Rights) after the entry into force of Protocol No. 11); the right of Member States, non-Member States and the nationals of the latter to bring a complaint against the Community, etc.²³ Although not insuperable, these difficulties cannot be overlooked in assessing the overall advantages/disadvantages of accession.

Thirdly, because of the requirement of the exhaustion of domestic remedies, in cases where the complaint is directed against the Community, individuals would be obliged to bring a direct action before the Court of First Instance, followed by an appeal to the Court of Justice, before they could submit an application to the ECHR. Where a complaint is against a Member State, or the validity of a Community act is in question in national proceedings, the exhaustion of domestic remedies would involve a preliminary reference to the ECJ under Article 177 (see further below). Thus, an extra instance would be added to the proceedings and, given the length of proceedings before the CFI and ECJ, this would result in extremely

²¹ See, generally, Part Two of the Commission's Memorandum of 4 April 1979, *supra* note 5.

²² *Supra* note 12, paras. 39-46.

²³ *Supra* notes 13, 15 and 17, respectively. The examples could be multiplied since human rights issues have arisen in a number of competition cases.

long litigations. As a consequence, accession to the Convention would have the adverse effect of depriving the individual of efficient legal protection.

Fourthly, the effect of accession on the status of the Convention within the legal orders of the Community and of the Member States needs clarification. The Commission²⁴ and some commentators²⁵ have expressed the opinion that accession would have implications solely within the field of application of Community law. They maintain that the Convention would impose additional obligations on the Community institutions only, but that its status and effects within the national legal systems would not change. Outside the scope of Community law, they argue, the protection of human rights would remain entrusted to the Member States, as at present, without any Community involvement. Thus, according to this opinion, accession would not entail any extension of Community powers vis-à-vis the Member States in the human rights field.

It is, however, difficult to see how this view can be reconciled with the text of the Treaty and the case law of the ECJ. Article 228(7) of the EC Treaty provides that:

"Agreements concluded under the conditions set out in this Article shall be binding on the institutions of the Community and on Member States".²⁶

Referring to this provision, in the Kupferberg case²⁷ the ECJ has stated:

"Consequently, it is incumbent upon the Community institutions, as well as upon the Member States, to ensure compliance with the obligations arising from such agreements.

The measures needed to implement the provisions of an agreement concluded by the Community are to be adopted, according to the state of Community law for the time being in the areas affected by the provisions of the agreement, either by the Community institutions or by the Member States

In ensuring respect for commitments arising from an agreement concluded by the Community institutions the Member States fulfil an obligation not only in relation to the non-member country concerned but also and above all in relation to the Community which has assumed responsibility for the due performance of the agreement. That is why the provisions of such an agreement ... form an integral part of the Community legal system.²⁸

It follows from the Community nature of such provisions that their effect in the Community may not be allowed to vary according to whether their application is in practice the responsibility of the Community institutions or of the Member States and, in the latter case, according to the effects in the internal legal order of each Member State which the law of that State assigns to international agreements concluded by it. Therefore it is for the Court, within the framework of its jurisdiction in interpreting the provisions of agreements, to ensure their uniform application throughout the Community".

In the Demirel case,²⁹ the Court has confirmed that:

"A provision in an agreement concluded by the Community with non-member countries must be regarded as being directly applicable [in the internal legal order of the Member States] when,

²⁴ These problems are discussed in Parts I and V of Opinion 2/94, supra note 1, and in Part Three of the Commission's Memorandum of 4 April 1979, supra note 5. The problems are also discussed in the two documents prepared by the House of Lords, supra note 19. Both documents advise against accession to the Convention, see pp. xxxii and 42-43, respectively. See also the Editorial "Fundamental rights and common European values" 33 CML Rev. (1996), 215.

²⁵ See the Commission's Memorandum of 4 April 1979, supra note 5, pp. 8-9 and 19-20.

²⁶ See the annotation by Gaja, supra note 2, p 985 and the comments by Schermers in "The Human Rights Opinion of the ECJ and Its Constitutional Implications", University of Cambridge, Centre for European Legal Studies, Occasional Paper No. 1 (1996), p. 15.

²⁷ Emphasis added.

²⁸ Case 104/81, [1982] ECR 3641, paras. 11-14. Emphasis added.

²⁹ In this respect, see also Case 181/73, Haegeman, [1974] ECR 449, para. 5 and Case 12/86, Demirel, supra note 9 para. 11.

regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure."

Finally, in Opinion 1/91,³⁰ the Court has made it clear once again that:

"... international agreements concluded by means of the procedure set out in Article 228 of the Treaty are binding on the institutions of the Community and its Member States ... [A]s the Court of Justice has consistently held, the provisions of such agreements and the measures adopted by institutions set up by such agreements become an integral part of the Community legal order when they enter into force.

In this connection, it must be pointed out that the agreement is an act of one of the institutions of the Community within the meaning of indent (b) of the first paragraph of Article 177 of the EC Treaty and that therefore the Court has jurisdiction to give preliminary rulings on its interpretation.³¹ It also has jurisdiction to rule on the agreement in the event that Member States of the Community fail to fulfil their obligations under the agreement.

Where, however, an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice. Those decisions will also be binding in the event that the Court of Justice is called upon to rule, by way of preliminary ruling or in a direct action, on the interpretation of the international agreement, in so far as that agreement is an integral part of the Community legal order."

It would seem to follow from Article 228(7) EC and the above-cited case law that accession to the European Convention would have far-reaching consequences, both internally, i.e. within the Community legal system, and externally, i.e. in the relationship between the Community/Member States and the other Contracting Parties.³² These may be summarized as follows:

3.1. Internal consequences

First, the Convention would be binding not only on the Community institutions but also on the Member States. The latter would therefore be bound both in their capacity as Contracting Parties and as a matter of Community law. Their obligation to comply with the Convention would arise not only in relation to the other Contracting Parties but also in relation to the Community. In view of the clear provisions of Article 228(7) EC, the legal effects of accession could not be limited to the Community institutions by means of special arrangements entered into with the other Contracting Parties (as is apparently envisaged), except if Article 228(7) itself is first amended.

Secondly, the Convention as a whole would become an integral part of the Community legal system, including those of its provisions which at present fall outside the scope of the Community's activities and competence, e.g. Articles 2 -5 and 6(2) and (3).³³ This view is expressly confirmed by Opinion 2/94, in which the Court has stated that:

³⁰ Supra note 9, para. 14. See also, to the same effect, inter alia, the Kupferberg case, supra note 28, paras. 22-26; Case 17/81, Pabst & Richarz, [1982] ECR 1331, para. 27, etc.

³¹ Supra note 12, paras. 37-39. Emphasis added.

³² On this point, see also the Haegeman case, supra note 29, paras. 4-6 and the Demirel case, supra note 9, para. 7.

³³ On the legal effects of international agreements concluded by the Community with third States, see further the entries on Community treaties, Direct effect and Mixed agreement in Toth, op. cit., supra note 2, pp. 103 (at 108), 166 (at 173) and 370 (at 372), respectively.

"Accession to the Convention would ... entail a substantial change in the present Community system for the protection of human rights in that it would entail ... integration of all the provisions of the Convention into the Community legal order".³⁴

The Community institutions would be responsible for the implementation of the Convention in areas falling within their competence, and the Member States in areas falling within theirs.

Thirdly, the Court of Justice would have jurisdiction to rule on the compliance with the Convention by the Member States; for that purpose it would have power to examine the compatibility with the Convention of national legislative and administrative measures or practices irrespective of whether they fall within or outside the scope of Community law. This seems to follow from Opinion 1/91, cited above (see the sentence in italics). Since the Convention as a whole would become an integral part of the Community legal system, it could be argued that any area of national law (e.g. criminal law) which is covered by the Convention would necessarily come within the supervisory jurisdiction of the Court of Justice, even if the Member States retain their competence to implement and apply the Convention in that area.

Fourthly, for the same reasons, the Court of Justice would have jurisdiction to give preliminary rulings under Article 177 EC on the interpretation of any provision of the Convention irrespective of whether the matter raising the question of interpretation falls within Community or Member State competence.³⁵ Likewise, the Court would have the power to interpret and apply the Convention in direct actions, whether brought against the Community institutions or the Member States. In all of these cases, any ruling given by the ECJ could be reversed (overruled) by the ECHR. It follows from points 3 and 4 that accession to the Convention would not only subject the ECJ to the jurisdiction of the ECHR but that situations could arise in which there would be an overlap between the jurisdiction of the two Courts (concurrent jurisdictions).

Fifthly, the Convention would produce direct effect within the legal systems of the Member States since it is arguable that all of its substantive provisions are capable of satisfying the conditions laid down by the Court in Demirel and other cases.³⁶ Such direct effect would moreover arise even in Member States, such as the United Kingdom, in which the Convention has not been incorporated in domestic law and in which international agreements cannot, as a general rule, produce direct effect. This is because the legal effect of the Convention could not vary from Member State to Member State. As an integral part of Community law, it would have to be applied in a uniform manner throughout the Community, irrespective of its present status in the various national legal systems.

3.2. External consequences

Although it does not appear from the pleadings before the Court of Justice in Opinion 2/94 or from the Opinion that accession to the Convention is envisaged by means of a "mixed agreement" (presumably because the Member States are already Contracting Parties), in many respects the Convention would be in the same position as a mixed agreement from the Community's point of view. One important consequence of this would be that both the Community and the Member States would be bound only within the limits of their respective powers vis-à-vis the other Contracting Parties and the Convention authorities. The Community would be responsible for any infringement falling within its competence, while the Member States would likewise be responsible in respect of infringement falling within their own competence. This would require the precise determination of the division of competence between the Community and the Member States and the advance notification thereof to the other Contracting Parties

³⁴ Article 2: right to life; Article 3: prohibition of torture and inhuman or degrading treatment or punishment; Article 4: prohibition of slavery, servitude, forced or compulsory labour; Article 5: right to liberty and security of person; Article 6(2) and (3): right to a fair trial in criminal proceedings.

³⁵ Supra note 1, para. 34. Emphasis added.

³⁶ This view is supported by the Demirel case, supra note 9, paras. 6-12, where the Court upheld its jurisdiction to interpret the Association Agreement between the EEC and Turkey and the Additional Protocol thereto in spite of objections by certain Member States that the matter raising the question of interpretation (freedom of movement for Turkish workers) fell within the competence of the Member States and not within Community competence.

and the Convention organs. This is, however, a difficult task given the partial overlap and the constantly shifting boundaries between Community and Member State powers in many areas of Community law.

If the above analysis is correct, the result of accession would be the full integration of the Convention in the Community legal order and, through it, in the legal orders of the Member States. This would enable the Court of Justice to ensure virtually the same level of protection, both against the institutions and against the Member States, as the ECHR. Nevertheless, the Court of Justice would be subject to the jurisdiction of another Court, and the question arises whether this would still be necessary given the many disadvantages to which it would give rise. Besides, as seen earlier, such subordination is almost certainly incompatible with the EC Treaty.

On the other hand, it must be remembered that the Court's case law on which the analysis is based concerns association agreements and the EEA Agreement. It may well be that the Court would be unwilling to extend that case law to the European Convention, which raises different problems on account of its nature and subject-matter. The Court might be reluctant to go so far as to ensure the full integration of the Convention into the Community legal order. In that case, accession would only resolve one-half of the existing problems. It would only improve the protection of individuals against human rights violations committed by the Community institutions. But it would not change the present unsatisfactory situation as regards infringements by Member States. Outside the scope of Community law, Member States would remain subject to control by the Convention organs only, so that the dual system of protection would continue with all its disadvantages.

All in all, it appears that in spite of all its obvious advantages, accession to the Convention would not provide a perfectly satisfactory solution. On one interpretation, it would go too far in integrating the Convention into Community law. On another interpretation, it would not go far enough. In any case, it seems almost certain that, even if the question of competence were to be resolved through Treaty amendment, accession would in the end be ruled out by the Court for reasons of incompatibility with the Treaty.

Having come to the conclusion that none of the options examined is without some serious defect or disadvantage, in the concluding part an attempt will be made to propose a solution which may be better suited to the needs of the Community/Union in the long run.

4. The solution proposed

It is submitted that any lasting solution in the human rights field in Europe must satisfy the following five requirements:

1. There must be a single system of substantive rules for the protection of human rights in all of Europe.
2. The rules must protect the individual as a human being without regard to nationality or any other consideration.
3. At least in the great majority of European States and within the European Union, the system must be under the control of one single Court as the final arbiter as to its interpretation and application.
4. The system must form part of the constitutional structure of the European Union, i.e. it must be in writing, have constitutional status and be binding on the institutions and the Member States alike.
5. There must be a simple, efficient and effective enforcement procedure which is readily available to the individual.

In order to meet all these requirements, the following three closely interrelated steps are proposed to be taken when the envisaged enlargement of the Union has been completed:

1. the incorporation of all the substantive provisions (Articles 1 -18) of the European Convention into the Treaty on European Union as a separate Title together with the annexation of the substantive Protocols to the Treaty as Protocols, and the insertion of a new clause into Article B of the TEU and Article 2 of the EC Treaty, stating that the objectives of the Union and the Community shall include "the protection of human rights and fundamental freedoms as provided in [this new] Title" (with the simultaneous repeal of Article F(2) TEU);
2. the extension of the jurisdiction of the Court of Justice under the EC Treaty to this new Title and related Protocols;
3. the withdrawal by all the Member States of the Union from the European Convention in accordance with Article 65 thereof.

Each of these steps is further considered below.

1. The incorporation of the Convention into the TEU (and indirectly into the EC Treaty) forms the central part of the whole proposal, from which the second and the third steps necessarily follow. The main reason for proposing this step is that incorporation would provide a far more effective integration of the Convention into the Community legal system than accession, while at the same time meeting the first, second and fourth requirements above. As seen in Section 3, the precise legal effects of accession cannot be predicted with absolute certainty as they depend on whether the Court of Justice would be willing to extend its existing case law to the Convention. If the Court were unwilling to do so, accession (assuming that it could ever take place) would bring about only partial integration of the Convention, leaving many of the present problems unsolved. A second important consideration is that, unlike accession, incorporation would not lead to the jurisdictional subordination of the Court of Justice to the ECHR (see point 3 below), and could therefore be more easily achieved.

In contrast to accession, incorporation would create a clear-cut and predictable situation. The Convention would be fully and directly integrated into the Community legal order. There would be a single, uniform system of human rights for the whole of Europe; a set of clearly defined and familiar rules, backed up by a large body of case law developed by the ECHR. These rules would have constitutional status in the Union; there would be no longer need to rely on the concept of "general principles of law", nor on the artificial device of treating the Convention as an "act of an institution", which would be the case in the event of accession. The European Union would finally catch up with the modern democracies of the world, which all have provisions on the protection of fundamental rights written in their Constitutions. The rules would have the same status and binding force for the Community institutions as for the Member States, although the Member States would only be bound subject to any reservations which they have made to the Convention. However, this would not cause a great deal of difficulty since reservations normally have only a limited scope under Article 64 of the Convention which does not permit "reservations of a general character".

Each Member State would moreover only be bound by the Protocol(s) which it has ratified and would be free to accept additional obligations under further Protocols. This would in no way run counter to the principles of Community law since the Treaty already permits any Member State to maintain or introduce "more stringent protective measures" than those required by Community law in respect of working conditions,³⁷ consumer protection³⁸ and the environment.³⁹ There seems to be no reason why individual Member States should not likewise be allowed to undertake additional obligations, over and above those laid down in the Treaty, when it is a question of protecting fundamental rights.

The incorporation of the Convention would ensure that fundamental rights are protected without regard to nationality since, under its Article 1, the Community and the Member States would be obliged to secure to "everyone within their jurisdiction" the rights and freedoms in question. The individual would be protected as a human being, not merely as a Market citizen. By virtue of direct effect (see point 2 below), the

³⁷ Cited supra at notes 9 and 30. On the question of the direct effect of the Convention, see further Section 4 below.

³⁸ Art. 118A(3) EC.

³⁹ Art. 129A(3) EC.

protection in the domestic courts would become uniform throughout the whole Community, unlike the present position. At present, the level of protection varies from State to State, depending on the status of the Convention in the national legal systems. In future, that status would be the same in every Member State. Since the Convention would form part of the Treaty, any human rights violation covered by it would come within the (enlarged) scope of application of Community law and would therefore ultimately be subject to control by the European Court of Justice. The artificial distinction between national rules falling within the scope of Community law and those falling outside it would become irrelevant. While the Member States would retain the power to take legislative and administrative measures in areas like criminal law, arrest and detention, treatment of prisoners, etc., the compatibility of any such measure with human rights (as defined by the Convention) would be subject to review by the Court of Justice as a matter of Community law. The Court already has such powers in other areas of Community law; it can review criminal law measures for their conformity with the rules concerning the free movement of goods, persons, services and capital.

Finally, the incorporation of the Convention would in no way exclude the possibility of inserting additional (new) rights into the Treaty, as and when so required by the natural development of Community law. This is a matter for the Member States to decide in accordance with the Treaty amendment procedure.

2. Conferring full jurisdiction upon the Court of Justice over the interpretation and application of the Convention would be a necessary consequence of its incorporation into the Treaties. Otherwise, the Convention would remain unenforceable in Community law and its incorporation would achieve nothing. This step would meet the third and fifth requirements above. It would ensure the full integration of the Convention into the Community system of remedies. The provisions of the Convention would be interpreted and enforced in the same manner as those of the EC Treaty. This would have a number of important consequences.

In the first place, it is to be expected that in due course the Court would confirm, either on an Article-by-Article basis or by way of a general interpretation, that all the substantive provisions of the Convention (Articles 2-14) are capable of producing direct effect in the national legal systems. They impose clear, precise and unconditional obligations and are drafted in peremptory terms ("No one shall be ..."; "Everyone has the right..."), reminiscent of the standstill provisions of the EC Treaty which have all been found to be directly effective.⁴⁰ The very purpose of the Convention is to create individual rights enforceable before courts of law (including the ECHR itself); and in many Member States the Convention does indeed have direct effect. In Member States where it does not, such as the United Kingdom, the great advantage of its incorporation into the Treaties would be that no further legislation would be needed to ensure its direct effect. This would be achieved automatically through Community law, thus making endless debates over the need for a "Bill of Rights" irrelevant. The fact that some provisions of the Convention allow exceptions on grounds of public safety, national security, protection of health or morals, public order, etc.⁴¹ could not prevent them from having direct effect since provisions of the EC Treaty containing similar derogations on similar grounds have all been found to be directly effective.⁴² What is more, the Court of Justice could, by a bold interpretation, conceivably rule that certain provisions of the Convention even have horizontal direct effect and are thus capable of being invoked by one individual against another, like Articles 85-86 and 119 EC. A particularly suitable candidate would be Article 8 which, were it to have horizontal direct effect, could give an enormous boost to the protection of privacy against unjustified intrusion by other individuals (e.g. the media). This would considerably extend the scope of the Convention. At present, the Convention can only be invoked by individuals against violations committed by States.⁴³

Secondly, the provisions of the Convention would enjoy supremacy over national law in the same way as the provisions of Community law. In accordance with the rulings of the Court of Justice, national courts

⁴⁰ Art. 130T EC.

Arts. 12, 31, 32(1), 37(2), 53, 95(1) and (2) EC.

⁴¹ Arts. 12, 31, 32(1), 37(2), 53, 95(1) and (2) EC.

⁴² Arts. 8-11.

⁴³ See e.g. Arts. 30-34 in conjunction with Art. 36; Art. 48; Arts. 52 and 59 in conjunction with Art. 56 EC.

would be obliged to apply the Convention in its entirety, as part of Community law, and to protect the rights which it confers on individuals. The courts would be required to set aside any provision of national law which may conflict with the Convention, whether prior or subsequent to the latter.⁴⁴

It is easy to see that the combined application of the principles of direct effect and supremacy would enormously enhance the effectiveness and efficiency of the enforcement of the Convention's provisions. The long, complicated, time-consuming and expensive Convention machinery would be replaced by much faster and simpler proceedings before the domestic courts. Individuals would be able to invoke the Convention at the earliest possible opportunity in both civil and criminal cases, instead of having to go all the way to Strasbourg. There would be no longer need to exhaust all domestic remedies and to comply with a multitude of admissibility requirements. This would result in a truly decentralized system of protection, in which the national courts would be playing the leading role. This would be perfectly in line with the philosophy of the ECHR itself that it is in the first place for the national authorities and courts to safeguard human rights, with the international judge having only a secondary and supervisory role.⁴⁵ Such a system would also be in accordance with the spirit of subsidiarity.

The national courts would, of course, not be left entirely on their own. They could, and in certain circumstances would be obliged to, refer any question of interpretation of any provision of the Convention to the European Court under Article 177. It would be mainly through the mechanism of the preliminary ruling procedure that the uniform interpretation and application of the Convention would be ensured in the whole Union. There is no reason to believe that this mechanism would be less suitable to enforce human rights provisions than it is to enforce other provisions of the EC Treaty. The protection of individuals against violations by Member States would be guaranteed to the same extent as it is guaranteed in other areas of Community law.

This guarantee would be reinforced by the supervision which the Commission would exercise under Article 169 EC. While the Commission would be required to monitor compliance with human rights on its own initiative, it could be alerted to any undetected infringement by individual complaints. Likewise, Member States would be able to bring inter-State applications under Article 170 EC.

The protection of individuals against infringement by the Community institutions would be ensured primarily under Article 173 EC. As pointed out earlier, it is true that Article 173 cannot at present offer full protection because of the very strict admissibility requirements. It is, however, widely recognized that the locus standi under Article 173 needs broadening, even apart from any human rights considerations.⁴⁶ It is submitted that such broadening could be achieved not necessarily only by formal Treaty amendment. The Court of Justice could simply adopt a more liberal interpretation of the requirement of "direct and individual concern". These concepts are not defined by the Treaty but their restrictive scope is the result of the Court's case law.⁴⁷ Being entirely the Court's own doing, the present situation could be corrected by a bold reinterpretation of the locus standi requirements so as to allow an individual to challenge any act of an institution capable of producing legal effects, irrespective of its nature and designation, which directly affects a specific right or legal interest of that individual. The Court could then develop a legal presumption according to which an act of an institution which prima facie is likely to infringe a fundamental right protected by the Convention automatically satisfies the conditions for admissibility since it directly affects an individual right. Thus, for a challenge to be admissible an individual would only have to make out a prima facie case of human rights violation which, if proven in substance, would lead to the annulment of the act in question on the ground of "infringement of the Treaty". Such a relaxation would be completely in accordance with the principle laid down by the Court itself in the Plaumann case that

⁴⁴ Art. 25 of the Convention.

⁴⁵ Case 106/77, Simmenthal, [1978] ECR 629, para. 21.

⁴⁶ See, in particular, Handyside v. The United Kingdom, Series A, No. 24, 1 EHRR 737, paras. 48-50.

⁴⁷ See The Role and Future of the European Court of Justice. A Report by Members of the EC Section of the Advisory Board of the British Institute of International and Comparative Law chaired by The Rt. Hon. the Lord Slynn of Hadley (1996), pp. 93-94.

"provisions of the Treaty regarding the right of interested parties to bring an action must not be interpreted restrictively".⁴⁸

In addition to direct actions under Article 173, individuals could, of course, use the preliminary ruling procedure under Article 177 indirectly to question the validity of any Community measure which infringes fundamental human rights.

3. Withdrawal from the Convention by all the Member States of the European Union would be a necessary and logical consequence of the first and second steps. If the Convention is incorporated into the TEU and is, in its entirety, brought within the jurisdiction of the Court of Justice, what would be the point of the Member States remaining subject to the Convention's control machinery? Not only would this be unnecessary (since the Convention would become fully enforceable under Community law), but the simultaneous application of the two enforcement procedures could lead to conflicting decisions since they would operate independently of one another. Thus, the present situation, discussed in Section I, would, if anything, become even worse since the Court of Justice would be able, independently of the ECHR, to exercise jurisdiction over the whole range of the Convention's provisions and in respect of any type of infringement, which it cannot do at present.

Therefore, withdrawal from the Convention would be necessary to meet the third requirement mentioned above: to bring the protection of human rights in the European Union and its Member States within a single system of enforcement under the final authority of a single Court. This would eliminate, at least within the Union and its Member States, the possibility of divergent interpretation and application of the Convention and would thus obviate the need for acceding to it. Nevertheless, the question arises whether such a step might not at the same time lead to the breaking up of the present European system of protecting human rights, thereby increasing the possibility of divergence between the jurisprudence of the ECJ and the ECHR in the wider European context.

To deal firstly with the first aspect of the question, it must be remembered that withdrawal would only take place following the next enlargement (or series of enlargements), as a result of which it is expected that more than two-thirds of the present Contracting Parties to the Convention would become members of the Union, totalling some 27 States.⁴⁹ The present dual system of protection (by the ECHR and ECJ) came about as a result of purely historical factors (there is no inherent reason why it should continue indefinitely. It has been justified (and even necessary) for so long as the Union represented a minority of the countries of Europe. But the transfer of the control machinery from the Convention organs to the Union's institutions would be justified by the enlarged size, weight and importance of the European Union on the European scene. Representing an increasingly large (one might say, overwhelming majority of European States at least in terms of size and population), the Union must have its own autonomous system of human rights protection. Thus, as integration progresses ever further, embracing more and more Convention States, the Union would gradually replace the Convention organs as the guardian of human rights in Europe.

During the whole process, however, all the States of Europe (members and non-members of the Union) as well as the Union itself would be bound by the same set of substantive human rights provisions, as laid down in the Convention. The unity of the system would therefore be preserved (even enhanced by its becoming formally binding on the Union), only the method of enforcement would differ. For a diminishing number of non-member States, the Convention organs, possibly a single ECHR, would continue to act as enforcer of the Convention.

As regards the possibility of divergence between the jurisprudence of the two Courts, such a risk could be reduced to an absolute minimum by enabling the ECJ to rely on the past and future case law of the ECHR. This could be achieved by the simple device of inserting an Article in the new Title incorporating the Convention, drafted along the following lines:

⁴⁸ Starting with Case 25/62, *Plaumann v. Commission*, [1963] ECR 95 at 107.

⁴⁹ *Ibid.*

"Without prejudice to the objectives and principles of the Union and the Community as laid down in Titles [...] of this Treaty, in interpreting and applying these provisions [on human rights] the Court of Justice and the Court of First Instance may have regard to any relevant decision of the ECHR".

Such a provision would ensure that the ECJ and CFI follow the body of case law created by the ECHR without being strictly bound by it. They would be able to depart from it in exceptional cases where the different objectives of the Union and the Community so require. However, since the objectives of the Union and the Community would now include the protection of human rights, the Courts would be obliged to interpret and apply the provisions of the Convention (as well as of Community law as a whole) by taking into account that objective as well, to the same extent as any other Treaty objective. And if a conflict should arise between the different objectives, the Courts would have to resolve it by reconciling (balancing) those objectives in accordance with the principles developed by the ECJ for that purpose.

The extremely valuable case law of the ECHR (past and future) would thus be "taken over" or "inherited" by the Union together with the Convention itself. It would be gradually integrated into the Community's legal order through the judgments of the ECJ adopting/confirming it in individual cases, thus acquiring the same authority as the Court's own decisions both in Community law and in the laws of the Member States. This would certainly represent a great improvement on the present position, where the Court is not formally authorized/encouraged to have regard to the ECHR's jurisprudence. As a result, the Convention would be interpreted and applied very much in the same way in the whole of Europe, both within and outside the Union.

The full transfer of human rights protection from the system of the Convention to the Community legal system might encounter three main objections. First, that it would increase the workload of the Commission and of the Community Courts to an unmanageable extent. Secondly, that it would result in inadequate protection of individuals. Thirdly, that it would bring about an unacceptable extension of Community jurisdiction at the expense of the Member States. Each point is considered in turn.

There is no doubt that the workload of the Community institutions would increase. The Commission would effectively take over the role of the European Commission of Human Rights. It would probably need a new Directorate-General on Human Rights. There are, however, essential differences. The Commission, while required to monitor the situation in the Member States, would retain its full discretion as to whether and when to institute Article 169 proceedings. There would be no automatic right for individuals to bring formal complaints within the meaning of Article 25 of the Convention (as opposed to informal complaints which the Commission is not obliged to investigate). Consequently, the Commission would not be overwhelmed with applications in the same way as is the Human Rights Commission.

As regards the Court of First Instance, it is already possible to invoke the Convention before it (through the concept of general principles of law) in direct actions brought against the institutions. The number of cases in which this has happened so far is not unmanageable, and it is very unlikely that this number would increase significantly. It is more probable that the Convention would be relied on more frequently as an additional argument in cases brought on some other grounds.

By contrast, there is no doubt that the ECJ would play a pivotal role in the enforcement of the Convention through preliminary rulings. While the number of references would initially tend to increase, this increase would gradually slow down as the Court incorporates the copious case law of the ECHR into Community law and, through it, into national law. Because of this existing case law, it is unlikely that a large number of new cases would require preliminary rulings on entirely novel points of law. Consequently, only very rarely would the full Court have to be involved in human rights cases. Moreover, the Court would not be required to investigate complex issues of fact. It would be dealing with issues of law only, thus playing the part of a fully fledged Constitutional Court in the human rights field. In any event, incorporation of the Convention would not be likely to increase the Court's workload considerably more than accession to the Convention since in the latter case, too, the Court would be able and even required (in the context of the exhaustion of domestic remedies) to interpret the provisions of the Convention under Article 177 (see *supra*, Section 3). Finally, since enlargement of the Union would result in a Court with 27 or more judges,

the Court would be able to deal with its increased workload in a large number of Chambers of various composition.

A second objection may be based on the argument that withdrawal from the Convention system would diminish the protection of the individual. It would make it impossible for private persons to have an international Court review the acts and decisions of national and Community authorities and courts. This argument is, however, not convincing. The aim of the Convention is certainly to create a higher, European standard for the protection of human rights under the supervision and control of an external Court. There is, however, no reason to believe that the supranational control machinery of the European Union is not at least as competent and effective as that of the Convention.⁵⁰ As the European Court has stated,

"... the European ... Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty The Treaty established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions".⁵¹

If the Treaty incorporated the European Convention, the Court of Justice would be able to ensure compliance with the Convention at least to the same extent as the ECHR. It could provide that European (supra-national) supervision, both over the Community institutions and over the Member States, which the ECHR was set up to perform. The acts of the institutions would in fact be reviewed twice for their compatibility with the Convention: first by the Court of First Instance and then, on appeal, by the Court of Justice. In connection with such review, the Court has stated time and again that it will not uphold Community measures which are incompatible with fundamental rights.⁵² The Court also has the power to review national legislation, administrative action and even court decisions for their compatibility with the Treaty (and thus with the Convention), at the initiative of both the Commission and the Member States.⁵³ In this respect, it has even more extensive powers than the ECHR in that, unlike the latter, it can impose a lump sum or penalty payment on a Member State which fails to comply with its judgment.⁵⁴

Although the Court of Justice has no jurisdiction directly to review the compatibility of national legislation, administrative action or court decisions with the Treaty (Convention) at the request of private individuals through the preliminary ruling procedure, it can, and in such procedures always does, "provide all the criteria of interpretation needed by the national court to determine whether [national] rules are compatible with ... fundamental rights".⁵⁵ And if, in the light of the ruling of the Court, which is binding, the national court should establish that national rules and practices are incompatible with fundamental rights guaranteed by the Convention, the national court has the duty to set aside those rules or to declare those practices illegal in order to ensure the full protection of the individual. Indeed, incompatible national legislation is not only automatically inapplicable but cannot even be validly adopted by the legislature.⁵⁶ The judgments of the ECHR certainly have no such far-reaching effects. Moreover, Member States are obliged, as a matter of Community law, to make good any loss and damage caused to individuals by an infringement of a right directly conferred on the latter by Community law.⁵⁷ This would undoubtedly include infringement of fundamental rights if the Convention were part of the Treaty. Thus, the Member States would be obliged to afford "just satisfaction" to the injured party, just as they may be required to do under the Convention.⁵⁸ Finally, while under the Convention an individual can only bring a complaint if he is the

⁵⁰ According to information available at the time of writing, there are 33 Contracting States and 6 Signatory States to the Convention, see "Human Rights Information Sheet No. 38" (January-June 1996), Council of Europe, p. 13.

⁵¹ See, to the same effect, Lenaerts, *op. cit. supra* note 18, p. 375.

⁵² Case 294/83, *Les Verts v. Parliament*, [1986] ECR 1339, para. 23. Emphasis added.

⁵³ See e.g. Case 4/73, *Nold v. Commission*, [1974] ECR 491, para. 13.

⁵⁴ Arts. 169 and 170 EC, respectively.

⁵⁵ Art. 171(2) EC.

⁵⁶ ERT case, *supra* note 7.

⁵⁷ *Simmenthal* case, *supra* note 45, paras. 17, 21.

⁵⁸ Joined Cases C-6/90 and C-9/90, *Francovich*, [1991] ECR I-5357, para. 37, as interpreted in the *Brasserie du Picheur* and *Factortame* cases, *supra* note 3, para. 22, and in subsequent cases.

"victim of a violation",⁵⁹ that is, normally after the harm has been done, under the system of the EC Treaty a private person could plead the Convention at the earliest possible opportunity, thus preventing a violation from being committed.

All in all, it seems that the legal system of the Community does have a supervision and enforcement machinery which matches, and in many respects even surpasses, that of the Convention. There is, therefore, no reason why the supervision ultimately exercised by the ECJ over the institutions and the Member States should be subject to further review by another Court which is of equal, but not of higher, status and calibre. Both Courts consist of equally highly qualified judges; they use similar methods of Treaty interpretation; they exercise supranational jurisdiction; and their decisions enjoy the same high respect and authority. In short, the ECHR could be replaced by the ECJ in an enlarged Union without any concern that the protection of fundamental rights would thereby diminish in any way. On the contrary, that protection would become more effective and more easily available to the individual.

The third, and probably the strongest, objection could be (at least on the part of certain Member States) that the full incorporation of the Convention in the Community legal order would represent an unacceptable intrusion by the Community/Union into the "reserved domain" of the Member States. Such an objection is, of course, based on the illusory concept of national sovereignty. It is illusory because once a State has adhered to the European Convention it has automatically given up a great deal of sovereignty in the field of human rights. All the Contracting Parties have not only accepted that there are certain fundamental rights pertaining to the individual which are beyond the reach of the State authorities (except on certain limited grounds), but have also entrusted the "collective enforcement" of those rights to common institutions which operate on a higher, European level. From then on, there is no longer any "reserved domain" in this field. States are answerable before international law for their behaviour at the instance of private individuals; the decisions of those international bodies are binding on them without the possibility of an appeal; they may have to adjust/amend their internal laws even in the most sensitive and jealously guarded areas.

The transfer of the protection of human rights from the Convention's system to the Community's would involve only a quantitative, but not a qualitative, change. The methods of protection would alter, but the substantive rights themselves would remain the same. No Member State would be expected to undertake new obligations; each would be bound only by rules which it has already voluntarily accepted. Although, as seen above, the enforcement machinery would become more effective for the individual, it would not necessarily become more onerous for the Member States. The judgments of the ECJ, like those of the ECHR, have no direct effects in the sense that neither Court can repeal or amend provisions of national law. They can only impose an obligation on the State to bring about a certain result.⁶⁰ The power of the ECJ in preliminary ruling procedures is even more restricted: it can only interpret, but not apply, Community law. It cannot directly review the acts and decisions of national authorities and courts. It is perfectly arguable that the preliminary ruling procedure, which would be the main avenue for enforcing human rights against the Member States, would involve less intrusion into national sovereignty than the Convention procedure. Human rights issues would be litigated before and decided by a State's own domestic courts. This would save the State embarrassing exposures and defeats in international law. The judicial sovereignty of the Member States would be preserved, while human rights would be enforced in a coherent and uniform manner in the whole Union. No doubt, the provisions of the Convention would penetrate more deeply into the national legal systems through the concepts of direct effect and supremacy. This would provide an additional guarantee for their observance. But it would be totally hypocritical for a Member State, which has voluntarily agreed to protect human rights, to object to a system of enforcement which makes that protection more effective.

To conclude with, there is one final argument in support of the incorporation of the Convention in the Community legal system. This concerns the accession of the Central and East European States to the

⁵⁹ Art. 50 of the Convention.

⁶⁰ Art. 25 of the Convention.

Union, which States lack any experience and tradition in the human rights field. It is generally accepted that

"... the accession of any new State should be conditional on it being established that that State complies with the principles ... of freedom, democracy, respect for human rights and the rule of law The rights attached to membership of the Union should be linked to States' compliance with these principles."⁶¹

There can be no doubt that the admission of the Central and East European States must be accompanied with written, legally binding and judicially enforceable guarantees that they will observe human rights and fundamental freedoms, including the protection of ethnic and other (religious, linguistic, etc.) minorities. While such guarantees could be written in the Treaties or Acts of Accession, this would have the great disadvantage of creating generally framed unilateral obligations for the new Member States only, the precise contents of which (i.e. the particular rights and freedoms to be protected) would be left undefined. It would be far more convincing and effective if these new States were to join a Union which, instead of relying on vague general principles and (for it) non-binding international agreements, had an up-to-date Constitution incorporating a set of precisely defined fundamental rights which are binding on, and are directly enforceable in, all the Member States in a uniform manner! The fact that the new Member States will have adhered to the Human Rights Convention prior to accession cannot in itself provide the necessary guarantees from the Union's point of view. Their obligation to respect human rights, which will be not only a precondition for accession but an ongoing condition for enjoying the rights and benefits of membership of the Union, must exist towards the Union, not towards the other Contracting Parties to the Convention. However, if the status quo continues the Court of Justice will not be in a position, on the basis of the Convention alone, to ensure compliance with that obligation in respect of a whole range of vitally important human rights issues (e.g. oppression of ethnic and other minorities) simply because they fall outside the scope of Community/Union competence! Thus, potentially serious human rights violations by the new Member States may escape Community control altogether.⁶²

5. Conclusions

The merger of the two supranational legal orders co-existing in Europe (those of the European Union and of the Convention on Human Rights) is prompted by a number of considerations. First amongst these is the very practical argument that there does not seem to exist any credible alternative. The indefinite maintenance of the status quo is not viable as it produces less and less satisfactory results as more and more complex human rights issues arise. The drawing up of a Community catalogue of fundamental rights would go against the paramount objective of having a common code for all of Europe. Besides, it would not resolve the problems associated with the other options. Accession to the Convention, quite apart from a host of institutional, jurisdictional and technical complications, is almost certainly incompatible with the Treaty. A second main argument is that with an enlarged European Union in existence, comprising the great majority of the Contracting Parties to the Convention (and of the countries of Europe) there is simply no need to have two parallel and partly overlapping systems of human rights protection. That protection should be transferred to the European Union and placed under the authority of the Court of Justice, with the ECHR continuing to act for the non-Member States so long as they choose to remain outside the Union. There is neither theoretical nor practical justification for submitting the Court of Justice to the jurisdiction of another Court which may be regarded as its equal, but not as its superior, and which will be representing a smaller and smaller number of non-Union States.

The incorporation of the European Convention, together with the existing and future case law of the ECHR, into the Community legal system would have several major advantages. It would ensure that the European Union itself, its Member States as well as non-member countries are governed by a single set

⁶¹ Art. 171(1) EC.

⁶² Presidency's progress report on the IGC to the Florence European Council, *supra* note 19, p. 43, point I.65.

of substantive human rights provisions, thus creating a "European human rights area". In the European Union, these provisions would acquire constitutional status, thereby filling a significant gap in the Community legal system, while at the same time elevating the Court of Justice to the rank of a genuine Constitutional Court. It would become the ultimate guardian of fundamental rights in the Union and its Member States.

The bringing of the Convention within the supranational control machinery of the European Union would put an end to the present dual system of enforcement. The acts of both the institutions and the Member States would be subject to review by a single Court, the ECJ, irrespective of the area in which a human rights violation occurs. The artificial distinction between matters falling within and those falling outside Community competence would become irrelevant as henceforth all matters covered by the Convention would come within the Court's jurisdiction.

The benefits for the individual would be equally important. He would be protected simply as a human being, irrespective of nationality or any other consideration. The degree and method of protection would be the same in the whole Union since the provisions of the Convention would enjoy the same direct effect and supremacy in all Member States. The enforcement procedure would become simpler, faster, cheaper and therefore more effective.

The solution envisaged would be a major step forward in the integration process. It would bring the European Union a great deal closer to reaching full political maturity.

3. HUMAN RIGHTS POST-AMSTERDAM

3.1 Relevant Treaty provisions

Article 2 (ex Article B) TEU

(post-Amsterdam version)

The Union shall set itself the following objectives:

- to strengthen the protection of the rights and interests of the nationals of its Member States through the introduction of a citizenship of the Union;
- to maintain and develop the Union as an area of freedom, security and justice, in which the free movement of persons is assured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime;

Article 6 (ex Article F) TEU

(post-Amsterdam version)

1. The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

[...]

Article 7 (ex Article F.1) TEU

(introduced by the Amsterdam Treaty)

1. The Council, meeting in the composition of the Heads of State or Government and acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the assent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article 6(1), after inviting the government of the Member State in question to submit its observations.

2. Where such a determination has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of this Treaty to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

[...]

Article 13 TEC

(introduced by the Amsterdam Treaty)

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

3.2 Case C-60/00: Carpenter



NOTE AND QUESTIONS

This is a very significant judgment in many respects and some may read it as a development in the Court's approach to fundamental rights.

Mary Carpenter v Secretary of State for the Home Department

Case C-60/00

11 July 2002

Court of Justice

ECR [2002] I-06279

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

Mary Carpenter, a Philippine national, was given leave in 1994 to enter the UK as a visitor for six months. She overstayed that leave without seeking an extension and, in May 1996, married Peter Carpenter, a national of the UK.

Mr Carpenter runs a business selling advertising space in medical and scientific periodicals and offering various administrative and publishing services to the editors of those journals. The business is established in the United Kingdom, as are some of its customers, but a significant proportion of the business is conducted with advertisers established in other Member States. Mr Carpenter travels to those Member States for the purposes of his business. In July 1996 Mrs Carpenter applied to the Secretary of State for leave to remain as the spouse of a United Kingdom national. The Secretary of State refused the application, and decided to make a deportation order against her because she had overstayed her original leave to enter. Mrs Carpenter is challenged that decision. The Immigration Appeal Tribunal, which was hearing the case, stayed proceedings and referred to the ECJ the question whether Community law can confer on the spouse, who is a national of a non-member country, of a national of a Member State of the European Union a right of residence in the United Kingdom, Mr Carpenter's Member State of origin.

Two questions were referred to the Court:

1. Does Community law apply to that situation, or, in other words, is there a connecting factor?

It is established that Mr Carpenter's business consists of providing services, for remuneration, to advertisers established, in particular, in other Member States. Those services involve travelling on business to those other Member States and cross-border services provided from the United Kingdom. Mr Carpenter is therefore availing himself of his right freely to provide services. However, the Community Directive on the abolition of restrictions on movement and residence within the Community for nationals of Member States with regard to the provision of services provides, in that context, for entry and residence, within the territory of another Member State, but does not govern the right of residence of members of the family of a provider of services in his Member State of origin.

2. Can a right of residence be derived from Community law in favour of the spouse?

Judgement:

[...]

28 It is to be noted, at the outset, that the provisions of the Treaty relating to the freedom to provide services, and the rules adopted for their implementation, are not applicable to situations which do not present any link to any of the situations envisaged by Community law (see, to that effect, among others, Case C-97/98 Jägerskiöld [1999] ECR I-7319, paragraphs 42 to 45).

29 As is apparent from paragraph 14 of this judgment, a significant proportion of Mr Carpenter's business consists of providing services, for remuneration, to advertisers established in other Member States. Such services come within the meaning of 'services' in Article 49 EC both in so far as the provider travels for that purpose to the Member State of the recipient and in so far as he provides cross-border services without leaving the Member State in which he is established (see, in respect of 'cold-calling', Case C-384/93 Alpine Investments [1995] ECR I-1141, paragraphs 15 and 20 to 22).

30 Mr Carpenter is therefore availing himself of the right freely to provide services guaranteed by Article 49 EC. Moreover, as the Court has frequently held, that right may be relied on by a provider as against the State in which he is established if the services are provided for persons established in another Member State (see, among others, Alpine Investments, cited above, paragraph 30).

31 With regard to the right of establishment and the freedom to provide services, the Directive aims to abolish restrictions on the movement and residence of nationals of Member States within the Community.

32 It follows both from the objective of the Directive and the wording of Article 1(1)(a) and (b) thereof, that it applies to cases where nationals of Member States leave their Member State of origin and move to another Member State in order to establish themselves there, or to provide services in that State, or to receive services there.

33 That interpretation is borne out, in particular, by Article 2(1) of the Directive, whereby 'Member States shall grant the persons referred to in Article 1 the right to leave their territory'; Article 3(1), whereby 'Member States shall grant to the persons referred to in Article 1 the right to enter their territory merely on production of a valid identity card or passport'; Article 4(1), whereby '[e]ach Member State shall grant the right of permanent residence to nationals of other Member States who establish themselves within its territory'; and Article 4(2) of the Directive, whereby, '[t]he right of residence for persons providing and receiving services shall be of equal duration with the period during which the services are provided'.

34 It is true that Article 1(1)(c) of the Directive extends to the spouses of the Member States' nationals referred to in subparagraphs (a) and (b) of that article the right to enter and reside in another

Member State, irrespective of their nationality. But, in so far as the Directive aims to facilitate the exercise by Member States' nationals of freedom of establishment and freedom to provide services, the rights were accorded to their spouses so that they can accompany them when they exercise, in the circumstances provided for by the Directive, the rights which they derive from the Treaty by moving to or residing in a Member State other than their Member State of origin.

35 Therefore, it follows from both its objectives and its content that the Directive governs the conditions under which a national of a Member State, and the other persons covered by Article 1(1)(c) and (d), may leave that national's Member State of origin and enter and reside in another Member State, for one of the purposes set out in Article 1(1)(a) and (b), for a period specified in Article 4(1) or (2).

36 Since the Directive does not govern the right of residence of members of the family of a provider of services in his Member State of origin, the answer to the question referred to the Court therefore depends on whether, in circumstances such as those in the main proceedings, a right of residence in favour of the spouse may be inferred from the principles or other rules of Community law.

37 As has been held in paragraphs 29 and 30 of this judgment, Mr Carpenter is exercising the right freely to provide services guaranteed by Article 49 EC. The services provided by Mr Carpenter make up a significant proportion of his business, which is carried on both within his Member State of origin for the benefit of persons established in other Member States, and within those States.

38 In that context it should be remembered that the Community legislature has recognised the importance of ensuring the protection of the family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the Treaty, as is particularly apparent from the provisions of the Council regulations and directives on the freedom of movement of employed and self-employed workers within the Community (see, for example, Article 10 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475); Articles 1 and 4 of Council Directive 68/360/EEC of 15 October 1968 on the abolition of restrictions on movement and residence within the Community for workers of Member States and their families (OJ, English Special Edition 1968 (II), p. 485), and Articles 1(1)(c) and 4 of the Directive).

39 It is clear that the separation of Mr and Mrs Carpenter would be detrimental to their family life and, therefore, to the conditions under which Mr Carpenter exercises a fundamental freedom. That freedom could not be fully effective if Mr Carpenter were to be deterred from exercising it by obstacles raised in his country of origin to the entry and residence of his spouse (see, to that effect, Singh, cited above, paragraph 23).

40 A Member State may invoke reasons of public interest to justify a national measure which is likely to obstruct the exercise of the freedom to provide services only if that measure is compatible with the fundamental rights whose observance the Court ensures (see, to that effect, Case C-260/89 ERT [1991] ECR I-2925, paragraph 43, and Case C-368/95 Familiapress [1997] ECR I-3689, paragraph 24).

41 The decision to deport Mrs Carpenter constitutes an interference with the exercise by Mr Carpenter of his right to respect for his family life within the meaning of Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950 (hereinafter 'the Convention'), which is among the fundamental rights which, according to the Court's settled case-law, restated by the Preamble to the Single European Act and by Article 6(2) EU, are protected in Community law.

42 Even though no right of an alien to enter or to reside in a particular country is as such guaranteed by the Convention, the removal of a person from a country where close members of his family are living may amount to an infringement of the right to respect for family life as guaranteed by Article 8(1) of the Convention. Such an interference will infringe the Convention if it does not meet the requirements of

paragraph 2 of that article, that is unless it is 'in accordance with the law', motivated by one or more of the legitimate aims under that paragraph and 'necessary in a democratic society', that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, in particular, *Boultif v Switzerland*, no. 54273/00, §§ 39, 41 and 46, ECHR 2001-IX).

43 A decision to deport Mrs Carpenter, taken in circumstances such as those in the main proceedings, does not strike a fair balance between the competing interests, that is, on the one hand, the right of Mr Carpenter to respect for his family life, and, on the other hand, the maintenance of public order and public safety.

44 Although, in the main proceedings, Mr Carpenter's spouse has infringed the immigration laws of the United Kingdom by not leaving the country prior to the expiry of her leave to remain as a visitor, her conduct, since her arrival in the United Kingdom in September 1994, has not been the subject of any other complaint that could give cause to fear that she might in the future constitute a danger to public order or public safety. Moreover, it is clear that Mr and Mrs Carpenter's marriage, which was celebrated in the United Kingdom in 1996, is genuine and that Mrs Carpenter continues to lead a true family life there, in particular by looking after her husband's children from a previous marriage.

45 In those circumstances, the decision to deport Mrs Carpenter constitutes an infringement which is not proportionate to the objective pursued.

46 In view of all the foregoing, the answer to the question referred to the Court is that Article 49 EC, read in the light of the fundamental right to respect for family life, is to be interpreted as precluding, in circumstances such as those in the main proceedings, a refusal, by the Member State of origin of a provider of services established in that Member State who provides services to recipients established in other Member States, of the right to reside in its territory to that provider's spouse, who is a national of a third country.

[...]

3.3 Council Regulations on Human Rights

3.3.1 Council Regulation (EC) No 975/1999

Council Regulation (EC) No 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 130w thereof,

Having regard to the proposal from the Commission¹,

Acting in accordance with the procedure laid down in Article 189c of the Treaty²,

(1) Whereas procedures should be laid down for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms;

(2) Whereas the Council has adopted simultaneously with this Regulation, Council Regulation (EC) No 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries³;

(3) Whereas Community policy in the sphere of development cooperation contributes to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms;

(4) Whereas Article F.2 of the Treaty on European Union stipulates that the Union respects 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 the Member States, as general principles of Community law;

(5) Whereas Community action to promote human rights and democratic principles is guided by belief in the universality and indivisibility of human rights, principles that underpin the international system for the protection of human rights;

(6) Whereas Community action to promote human rights and democratic principles is rooted in the general principles established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;

¹ (1) OJ C 282, 18.9.1997, p. 14.

² Opinion of the European Parliament of 19 November 1997 (OJ C 371, 8.12.1997, p. 74), Council Common Position of 25 January 1999 (OJ C 58, 1.3.1999, p. 17) and Decision of the European Parliament of 14 April 1999 (not yet published in the Official Journal).

³ See page 8 of this Official Journal.

(7) Whereas the Community recognises the interdependence of all human rights and whereas progress in economic and social development and in the achievement of civil and political rights should be mutually supportive;

(8) Whereas human rights within the meaning of this Regulation should be considered to encompass respect for international humanitarian law, also taking into account the 1949 Geneva Conventions and the 1977 Additional Protocol thereto, the 1951 Geneva Convention relating to the Status of Refugees, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and other acts of international treaty or customary law;

(9) Whereas the resolution on human rights, democracy and development adopted by the Council and the Member States, meeting within the Council, on 28 November 1991 sets out guidelines, procedures and practical measures aimed at promoting civil and political freedoms alongside economic and social rights, by means of a representative political system based on respect for human rights;

(10) Whereas Community action to promote human rights and democratic principles is the product of a positive and constructive approach in which human rights and democratic principles are seen as a matter of common interest for the Community and its partners, and as a subject for dialogue that can produce measures to promote respect for these rights and principles;

(11) Whereas this positive approach should be reflected in the implementation of measures in support of democratisation, the strengthening of the rule of law and the development of a pluralist and democratic civil society and in confidence-building measures aimed at preventing conflicts, supporting peace initiatives and addressing the issue of impunity;

(12) Whereas the financial instruments used to support positive action in individual countries should be used in a manner consistent with geographical programmes and integrated with other development instruments to maximise their impact and effectiveness;

(13) Whereas it is also necessary to ensure that these operations are consistent with the European Union's foreign policy as a whole, including the common foreign and security policy;

(14) Whereas these operations should in particular focus on those discriminated against or suffering from poverty or disadvantage, children, women, refugees, migrants, minorities, displaced persons, indigenous peoples, prisoners and victims of torture;

(15) Whereas Community support for democratisation and observance of the principles of the rule of law within a political system respecting the individual's fundamental freedoms helps fulfil the objectives laid down in the agreements concluded by the Community with its partners, in which respect for human rights and democratic principles is an essential element of relations between the parties;

(16) Whereas the quality, impact and continuity of operations should in particular be safeguarded by providing for multiannual programmes to promote human rights and democratic principles in partnership with the authorities of the country concerned, taking account of its specific needs;

(17) Whereas efficient and consistent action requires the specific characteristics of action on human rights and democratic principles to be taken into consideration and to be reflected in the establishment of flexible, transparent and rapid decision-making procedures for the financing of operations and projects in this field;

(18) Whereas the Community needs to be able to respond rapidly to emergencies or situations of particular importance in order to enhance the credibility and effectiveness of its commitment to the promotion of human rights and democratic principles in countries where such situations arise;

(19) Whereas the procedures for the award of assistance and the evaluation of projects in particular should take account of the special nature of the recipients of Community support in this field, namely the non-profit nature of their activities, the risks run by members who are in many cases volunteers, the sometimes hostile environment in which they operate and the limited room for manoeuvre afforded by their own resources;

(20) Whereas the development of civil society must involve the emergence and organisation of new players and whereas in this context the Community may be required in beneficiary third countries to provide financial support to partners who have no previous experience in this area;

(21) Whereas decisions to fund projects to promote human rights and democratic principles must be taken impartially, without racial, religious, cultural, social or ethnic discrimination between bodies receiving Community support and persons or groups targeted by the projects supported, and must not be guided by political considerations;

(22) Whereas procedures should be established for the implementation and administration of aid for the promotion of human rights and democratic principles financed from the Community's general budget;

(23) Whereas a financial reference amount, within the meaning of point 2 of the Declaration by the European Parliament, the Council and the Commission of 6 March 1995(4), is included in this Regulation for the entire duration of the programme, without thereby affecting the powers of the budgetary authority as they are defined by the Treaty,

HAS ADOPTED THIS REGULATION:

CHAPTER I

Objectives

Article 1

The purpose of this Regulation is to lay down the procedures for the implementation of Community operations which, within the framework of Community development cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms.

The operations referred to in this Regulation shall be implemented in the territory of developing countries or shall be directly related to situations arising in developing countries.

Article 2

Within the limits of Article 1, and consistent with the European Union's foreign policy as a whole, the European Community shall provide technical and financial aid for operations aimed at:

1. promoting and defending the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and other international instruments concerning the development and consolidation of democracy and the rule of law, in particular:

- (a) the promotion and protection of civil and political rights;
- (b) the promotion and protection of economic, social and cultural rights;
- (c) the promotion and protection of the human rights of those discriminated against, or suffering from poverty or disadvantage, which will contribute to reduction of poverty and social exclusion;
- (d) support for minorities, ethnic groups and indigenous peoples;
- (e) supporting local, national, regional or international institutions, including NGOs, involved in the protection, promotion or defence of human rights;
- (f) support for rehabilitation centres for torture victims and for organisations offering concrete help to victims of human rights abuses or help to improve conditions in places where people are deprived of their liberty in order to prevent torture or ill-treatment;
- (g) support for education, training and consciousness-raising in the area of human rights;
- (h) supporting action to monitor human rights, including the training of observers;
- (i) the promotion of equality of opportunity and non-discriminatory practices, including measures to combat racism and xenophobia;
- (j) promoting and protecting the fundamental freedoms mentioned in the International Covenant on Civil and Political Rights, in particular the freedom of opinion, expression and conscience, and the right to use one's own language;

2. supporting the processes of democratisation, in particular:

- (a) promoting and strengthening the rule of law, in particular upholding the independence of the judiciary and strengthening it, and support for a humane prison system; support for constitutional and legislative reform; support for initiatives to abolish the death penalty;
- (b) promoting the separation of powers, particularly the independence of the judiciary and the legislature from the executive, and support for institutional reforms;
- (c) promotion of pluralism both at political level and at the level of civil society by strengthening the institutions needed to maintain the pluralist nature of that society, including non-governmental organisations (NGOs), and by promoting independent and responsible media and supporting a free press and respect for the rights of freedom of association and assembly;
- (d) promoting good governance, particularly by supporting administrative accountability and the prevention and combating of corruption;
- (e) promoting the participation of the people in the decision-making process at national, regional and local level, in particular by promoting the equal participation of men and women in civil society, in economic life and in politics;
- (f) support for electoral processes, in particular by supporting independent electoral commissions, granting material, technical and legal assistance in preparing for elections, including electoral censuses, taking measures to promote the participation of specific groups, particularly women, in the electoral process, and by training observers;
- (g) supporting national efforts to separate civilian and military functions, training civilian and military personnel and raising their awareness of human rights;

3. support for measures to promote respect for human rights and democratisation by preventing conflict and dealing with its consequences, in close collaboration with the relevant competent bodies, in particular:

- (a) supporting capacity-building, including the establishment of local early warning systems;
- (b) supporting measures aimed at balancing opportunities and at bridging existing dividing lines among different identity groups;
- (c) supporting measures facilitating the peaceful conciliation of group interests, including support for confidence-building measures relating to human rights and democratisation, in order to prevent conflict and to restore civil peace;
- (d) promoting international humanitarian law and its observance by all parties to a conflict;
- (e) supporting international, regional or local organisations, including the NGOs, involved in preventing, resolving and dealing with the consequences of conflict, including support for

establishing ad hoc international criminal tribunals and setting up a permanent international criminal court, and support and assistance for the victims of human rights violations.

Article 3

Community support for these aims may include the financing of:

1. campaigns to increase awareness, inform and train the agencies involved and the general public;
2. the measures needed for the identification and preparation of projects, namely:
 - (a) identification and feasibility studies;
 - (b) the exchange of technical know-how and experience between European organisations and bodies in third countries;
 - (c) the costs arising from tendering procedures, in particular the evaluation of tenders and the preparation of project documents;
 - (d) the financing of general studies concerning the Community's action within the scope of this Regulation;
3. the implementation of projects:
 - (a) technical assistance and expatriate and local staff to help implement the projects;
 - (b) purchasing and/or delivering any product or equipment strictly necessary for the implementation of operations, including, in exceptional circumstances, and when duly justified, the purchasing or leasing of premises;
 - (c) where appropriate, actions for the purpose of highlighting the Community character of the operations;
4. measures to monitor, audit and evaluate Community operations;
5. activities to explain the objectives and results of these measures to the general public in the countries concerned and administrative and technical assistance for the mutual benefit of the Commission and the beneficiary.

CHAPTER II

Procedures for the implementation of aid

Article 4

1. The partners eligible for financing under this Regulation are regional and international organisations, non-governmental organisations, national, regional and local authorities and official agencies, community-based organisations and public or private-sector institutes and operators.
2. Operations financed by the Community under this Regulation shall be implemented by the Commission either at the request of a partner referred to in paragraph 1 or on its own initiative.

Article 5

To be eligible for Community aid, the partners referred to in Article 4(1) must have their main headquarters in a third country eligible for Community aid under this Regulation or in a Member State of the Community. Such headquarters must be the effective decision-making centre for all operations financed under this Regulation. Exceptionally, the headquarters may be in another third country.

Article 6

Without prejudice to the institutional and political environment in which the partners referred to in Article 4(1) operate, the following factors shall in particular be considered when determining a body's suitability for Community funding:

- (a) its commitment to defending, respecting and promoting human rights and democratic principles in a non-discriminatory manner;
- (b) its experience in the field of promoting human rights and democratic principles;
- (c) its administrative and financial management capacities;
- (d) its technical and logistical capacity in relation to the planned operation;
- (e) the results, where relevant, of any previous operations carried out, in particular those financed by the Community;
- (e) its capacity to build up a working relationship with other elements of civil society in the third country concerned and to direct assistance to local organisations accountable to civil society.

Article 7

1. Aid shall not be allocated to the partners referred to in Article 4(1) unless they undertake to comply with the allocation and implementation conditions which are laid down by the Commission and to which they shall be contractually bound.
2. Activities aided by the Community shall be implemented in accordance with the objectives laid down in the Commission financing decision.
3. Community financing under this Regulation shall take the form of grants.
4. Where operations financed under this Regulation are the subject of financing agreements between the Community and the recipient countries, such agreements shall stipulate that taxes, charges and customs duties are not to be borne by the Community.

Article 8

1. Participation in invitations to tender and the award of contracts shall be open on equal terms to natural or legal persons from the recipient country and the Member States. It may be extended to other countries in exceptional and duly justified cases.
2. Supplies shall originate in the Member States or the recipient country. They may originate in other countries in exceptional and duly justified cases.

Article 9

1. In the interests of consistency and complementarity and in order to maximise the overall effectiveness of operations, the Commission, in close cooperation with the Member States, may take any coordination measures necessary.
2. In any case, for the purposes of paragraph 1, the Commission shall encourage:
 - (a) the introduction of a system for the exchange and systematic analysis of information on operations financed or considered for financing by the Community and the Member States;
 - (b) the coordination of the implementation of operations on the spot by means of regular meetings for the exchange of information between the representatives of the Commission and the Member States in the recipient country;
 - (c) the promotion of a coherent approach in relation to humanitarian assistance and, whenever possible, the integration of the protection of human rights within humanitarian assistance.

CHAPTER III Procedures for the implementation of operations

Article 10

The financial reference amount for the implementation of this Regulation during the period 1999 to 2004 shall be EUR 260 million.

The annual appropriations shall be authorised by the budgetary authority within the limits of the financial perspective.

Article 11

The Commission shall plan, appraise, decide upon and administer, monitor and evaluate operations under this Regulation in accordance with the budgetary and other procedures in force. It shall lay down the conditions for allocating, mobilising and implementing aid under this Regulation.

Article 12

1. The following shall be adopted by the Commission according to the procedure laid down in Article 13(2):
 - decisions on operations for which financing under this Regulation exceeds EUR 1 million and any modification to such operations leading to an increase of more than 20 % in the sum initially agreed,

- programmes intended to provide a coherent framework for action in a given country or region or in a specific field where the scale and complexity of the needs identified are such that they seem likely to continue.
2. The Commission shall notify the committee referred to in Article 13 of financing decisions that it intends to take concerning projects and programmes costing less than EUR 1 million. Notice shall be given at least a week before the decision is taken.

Article 13

1. The Commission shall be assisted by a Human Rights and Democracy Committee, hereinafter referred to as "the committee", composed of representatives of the Member States, and chaired by the representative of the Commission.
2. Where reference is made to this Article the representative of the Commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall without delay submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

If, on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

Article 14

1. The Commission may finance emergency measures up to a maximum of EUR 2 million. Emergency measures shall be deemed necessary in cases of urgent and unforeseeable need arising from the sudden suspension of the democratic process or the emergence of a state of crisis or exceptional and imminent danger affecting all or part of the population of a country and posing a grave threat to the fundamental rights and freedoms of the individual.
2. Where operations fulfil these conditions, the Commission shall act after consulting the Member States by the most efficient means. Five working days shall be allowed to the Member States in which to put forward any objections. If there are any objections, the committee, referred to in Article 13, shall examine the question at its next meeting.
3. The Commission shall inform the committee referred to in Article 13, at its next meeting, of all emergency measures financed under these provisions.

Article 15

The committee may examine any general or specific issues concerning Community aid in the field and should also play a useful role as a means for improving the coherence of the human rights and democratisation actions of the European Union towards third countries. Once a year it will examine the planning for the following financial year or discuss general guidelines for operations under this Regulation to be undertaken in the year ahead.

Article 16

1. The Commission shall regularly evaluate operations financed by the Community under this Regulation in order to establish whether they have achieved their objectives and to produce guidelines for improving the effectiveness of subsequent operations. The Commission shall submit to the committee a summary of the evaluation exercises carried out that it might, if necessary, examine. The evaluation reports shall be available to the Member States on request.
2. At the request of the Member States, the Commission may, with them, also evaluate the results of the Community's operations and programmes under this Regulation.

Article 17

All contracts or financing agreements concluded under this Regulation shall provide in particular that the Commission and the Court of Auditors may conduct checks on the spot and at the headquarters of the partners referred to in Article 4(1) in accordance with the usual procedures established by the Commission under the rules in force, and in particular those of the Financial Regulation applicable to the general budget of the European Communities.

Article 18

1. Within a month of its decision, the Commission shall notify the Member States of operations and projects approved, indicating the sums, the nature of the operation, the recipient country and the partners involved.
2. At the close of each financial year, the Commission shall submit an annual report to the European Parliament and to the Council with a summary of the operations financed in the course of that year.

The summary shall contain information concerning the partners with which the operations referred to in Article 1 have been implemented.

The report shall also include a review of any external evaluation exercises which may have been conducted and may, if appropriate, propose specific operations.

Article 19

Three years after this Regulation enters into force, the Commission shall submit to the European Parliament and to the Council an overall assessment of the operations financed by the Community under this Regulation, which may be accompanied by appropriate proposals concerning the future of this Regulation.

Article 20

This Regulation shall enter into force on the third day following that of its publication in the Official Journal of the European Communities.

It shall apply until 31 December 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 29 April 1999.

3.3.2 Council Regulation (EC) No 976/1999

COUNCIL REGULATION (EC) No 976/1999 of 29 April 1999 laying down the requirements for the implementation of Community operations, other than those of development cooperation, which, within the framework of Community cooperation policy, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular, Article 235 thereof,

Having regard to the proposal from the Commission¹,

Having regard to the opinion of the European Parliament²,

(1) Whereas procedures should be laid down for the implementation of Community operations, other than those of development cooperation which, within the framework of Community cooperation policy in third countries, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries;

(2) Whereas the Council has adopted simultaneously with this Regulation, Council Regulation (EC) No 975/1999 of 29 April 1999 laying down the requirements for the implementation of development cooperation operations which contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms³;

(3) Whereas, within the framework of existing programmes relating to cooperation with third countries, including TACIS, PHARE, MEDA and the Regulation on reconstruction in Bosnia and Herzegovina, as well as future such cooperation implemented on the basis of Article 235 of the EC Treaty, action is necessary to contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms in third countries;

(4) Whereas Article F.2 of the Treaty on European Union stipulates that the Union respects 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 the Member States, as general principles of law;

(5) Whereas Community action to promote human rights and democratic principles is guided by belief in the universality and indivisibility of human rights, principles that underpin the international system for the protection of human rights;

(6) Whereas Community action to promote human rights and democratic principles is rooted in the general principles established by the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights;

¹ OJ C 282, 18.9.1997, p. 14.

² Opinion delivered on 14 April 1999 (not yet published in the Official Journal).

³ See page 1 of this Official Journal.

(7) Whereas the Community recognises the interdependence of all human rights, and that progress in economic and social development and in the achievement of civil and political rights are mutually supportive;

(8) Whereas human rights within the meaning of this Regulation should be considered to encompass respect for international humanitarian law, also taking into account the 1949 Geneva Conventions and the 1977 Additional Protocol thereto, the 1951 Geneva Convention relating to the Status of Refugees, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and other acts of international treaty or customary law;

(9) Whereas the resolution on human rights, democracy and development adopted by the Council and the Member States meeting within the Council on 28 November 1991 sets out guidelines, procedures and practical measures aimed at promoting civil and political freedoms alongside economic and social rights, by means of a representative political system based on respect for human rights;

(10) Whereas Community action to promote human rights and democratic principles is the product of a positive and constructive approach in which human rights and democratic principles are seen as a matter of common interest for the Community and its partners, and as a subject for dialogue that can produce measures to promote respect for these rights and principles;

(11) Whereas this positive approach should be reflected by the implementation of measures in support of democratisation, the strengthening of the rule of law and the development of a pluralist and democratic civil society and by confidence-building measures aimed at preventing conflicts, supporting peace initiatives and addressing the issue of impunity;

(12) Whereas the financial instruments used to support positive action in individual countries should be used in a manner consistent with geographical programmes and integrated with other development instruments to maximise their impact and effectiveness;

(13) Whereas it is also necessary to ensure that these operations are coherent with the European Union's foreign policy as a whole, including the common foreign and security policy;

(14) Whereas these operations should focus on those discriminated against or suffering from poverty or disadvantage, children, women, refugees, migrants, minorities, displaced persons, indigenous peoples, prisoners and victims of torture;

(15) Whereas Community support for democratisation and observance of the principles of the rule of law within a political system respecting the individual's fundamental freedoms helps fulfil the objectives laid down in the agreements concluded by the Community with its partners, in which respect for human rights and democratic principles is an essential element of relations between the parties;

(16) Whereas the quality, impact and continuity of operations should in particular be safeguarded by providing for multiannual programmes to promote human rights and democratic principles in partnership with the authorities of the country concerned, taking account of its specific needs;

(17) Whereas efficient and consistent action requires the specific characteristics of action on human rights and democratic principles to be reflected in the establishment of flexible, transparent and rapid decision-making procedures for the financing of operations and projects in this field;

(18) Whereas the Community needs to be able to respond rapidly to emergencies or situations of particular importance in order to enhance the credibility and effectiveness of its commitment to the promotion of human rights and democratic principles in countries where such situations arise;

(19) Whereas the procedures for the award of assistance and the evaluation of projects, in particular, should take account of the special nature of the recipients of Community support in this field, namely the non-profit nature of their activities, the risks run by members who are in many cases volunteers, the sometimes hostile environment in which they operate and the limited room for manoeuvre afforded by their own resources;

(20) Whereas the development of civil society must involve the emergence and organisation of new players and whereas in this context the Community may be required in beneficiary third countries to provide financial support to partners who have no previous experience in this area;

(21) Whereas decisions to fund projects to promote human rights and democratic principles must be taken impartially, without racial, religious, cultural, social or ethnic discrimination between bodies receiving Community support and persons or groups targeted by the projects supported, and must not be guided by political considerations;

(22) Whereas procedures should be established for the implementation and administration of aid for the promotion of human rights and democratic principles financed from the general budget of the European Communities;

(23) Whereas implementation of these operations is likely to help achieve the Community's objectives; whereas the Treaty does not provide, for the adoption of this Regulation, powers other than those set out in Article 235;

(24) Whereas a financial reference amount, within the meaning of point 2 of the Declaration by the European Parliament, the Council and the Commission of 6 March 1995⁴, is included in this Regulation for the entire duration of the programme, without thereby affecting the powers of the budgetary authority as they are defined by the Treaty,

HAS ADOPTED THIS REGULATION:

CHAPTER 1

Objectives

Article 1

The purpose of this Regulation is to lay down the procedures for the implementation of Community operations, other than those of development cooperation which, within the framework of Community cooperation policy in third countries, contribute to the general objective of developing and consolidating democracy and the rule of law and to that of respecting human rights and fundamental freedoms.

The operations referred to in this Regulation shall be implemented in the territory of third countries or shall be directly related to situations arising in third countries.

⁴ OJ C 102, 4.4.1996, p. 4.

Article 2

The procedures laid down in this Regulation apply to operations in the fields covered by Articles 3 and 4 implemented within the framework of existing programmes relating to the cooperation with third countries, including TACIS⁵, PHARE⁶, MEDA⁷ and the Regulations relating to Bosnia and Herzegovina⁸, as well as to any future operations of Community cooperation relating to third countries in these fields, other than those of development cooperation, implemented on the basis of Article 235 of the Treaty establishing the European Community.

Article 3

Within the limits of Articles 1 and 2, and consistent with the European Union's foreign policy as a whole, the European Community shall provide technical and financial aid for operations aimed at:

1. promoting and defending the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and the other international instruments concerning the development and consolidation of democracy and the rule of law, in particular:
 - (a) the promotion and protection of civil and political rights;
 - (b) the promotion and protection of economic, social and cultural rights;
 - (c) the promotion and protection of the human rights of those discriminated against, or suffering from poverty or disadvantage, which will contribute to reduction of poverty and social exclusion;
 - (d) support for minorities, ethnic groups and indigenous peoples;
 - (e) supporting local, national, regional or international institutions, including NGOs, involved in the protection, promotion or defence of human rights;
 - (f) support for rehabilitation centres for torture victims and for organisations offering concrete help to victims of human rights abuses or help to improve conditions in places where people are deprived of their liberty in order to prevent torture or ill-treatment;
 - (g) support for education, training and consciousness-raising in the area of human rights;
 - (h) supporting action to monitor human rights, including the training of observers;
 - (i) the promotion of equality of opportunity and non-discriminatory practices, including measures to combat racism and xenophobia;
 - (j) promoting and protecting the fundamental freedoms mentioned in the International Covenant on Civil and Political Rights, in particular the freedom of opinion, expression and conscience, and the right to use one's own language;
2. supporting the processes of democratisation, in particular:
 - (a) promoting and strengthening the rule of law, in particular upholding the independence of the judiciary and strengthening it, and support for a humane prison system; support for constitutional and legislative reform; support for initiatives to abolish the death penalty;
 - (b) promoting the separation of powers, particularly the independence of the judiciary and the legislature from the executive, and support for institutional reforms;
 - (c) promotion of pluralism both at political level and at the level of civil society by strengthening the institutions needed to maintain the pluralist nature of that society, including non-governmental

⁵ Council Regulation (EEC) No 2157/91 (OJ L 201, 24.7.1991, p. 2). Regulation as last amended by Regulation (EC) No 1279/96 (OJ L 165, 4.7.1996, p. 1).

⁶ Council Regulation (EEC) No 3906/89 (OJ L 375, 23.12.1989, p. 11). Regulation as last amended by Regulation (EC) No 753/96 (OJ L 103, 26.4.1996, p. 5).

⁷ Council Regulation (EEC) No 1763/92 (OJ L 181, 1.7.1992, p. 5). Regulation as last amended by Regulation (EC) No 1488/96 (OJ L 189, 30.7.1996, p. 1).

⁸ Council Regulation (EC) No 753/96 (OJ L 103, 26.4.1996, p. 5).

- organisations (NGOs), and by promoting independent and responsible media and supporting a free press and respect for the rights of freedom of association and assembly;
- (d) promoting good governance, particularly by supporting administrative accountability and the prevention and combating of corruption;
 - (e) promoting the participation of the people in the decision-making process at national, regional and local level, in particular by promoting the equal participation of men and women in civil society, in economic life and in politics;
 - (f) support for electoral processes, in particular by supporting independent electoral commissions, granting material, technical and legal assistance in preparing for elections, including electoral censuses, taking measures to promote the participation of specific groups, particularly women, in the electoral process and by training observers;
 - (g) supporting national efforts to separate civilian and military functions, training civilian and military personnel and raising their awareness of human rights;
3. support for measures to promote the respect for human rights and democratisation by preventing conflict and dealing with its consequences in close collaboration with the relevant competent bodies, in particular:
- (a) supporting capacity-building, including the establishment of local early warning systems;
 - (b) supporting measures aimed at balancing opportunities and at bridging existing dividing lines among different identity groups;
 - (c) supporting measures facilitating the peaceful conciliation of group interests, including support for confidence-building measures relating to human rights and democratisation, in order to prevent conflict and to restore civil peace;
 - (d) promoting international humanitarian law and its observance by all parties to a conflict;
 - (e) supporting international, regional or local organisations, including the NGOs, involved in preventing, resolving and dealing with the consequences of conflict, including support for establishing ad hoc international criminal tribunals and setting up a permanent international criminal court, and support and assistance for the victims of human rights violations.

Article 4

Community support for these aims may include the financing of:

- 1. campaigns to increase awareness, inform and train the agencies involved and the general public;
- 2. the measures needed for the identification and preparation of projects, namely:
 - (a) identification and feasibility studies;
 - (b) the exchange of technical know-how and experience between European organisations and bodies in third countries;
 - (c) the costs arising from tendering procedures, in particular the evaluation of tenders and the preparation of project documents;
 - (d) the financing of general studies concerning the Community's action within the scope of this Regulation;
- 3. the implementation of projects:
 - (a) technical assistance and expatriate and local staff to help implement the projects;
 - (b) purchasing and/or delivering any product or equipment strictly necessary for the implementation of operations, including, in exceptional circumstances, and when duly justified, the purchasing or leasing of premises;

- (c) where appropriate, actions for the purpose of highlighting the Community character of the operations;
- 4. measures to monitor, audit and evaluate Community operations.
- 5. activities to explain the objectives and results of these measures to the general public in the countries concerned and administrative and technical assistance for the mutual benefit of the Commission and the beneficiary.

CHAPTER II

Procedures for the implementation of aid

Article 5

- 1. The partners eligible for financing under this Regulation are regional and international organisations, non-governmental organisations, national, regional and local authorities and official agencies, Community-based organisations and public or private-sector institutes and operators.
- 2. Operations financed by the Community under this Regulation shall be implemented by the Commission either at the request of a partner referred to in paragraph 1 or on its own initiative.

Article 6

To be eligible for Community aid, the partners referred to in Article 5(1) must have their main headquarters in a third country eligible for Community aid under this Regulation or in a Member State of the Community. Such headquarters must be the effective decision-making centre for all operations financed under this Regulation. Exceptionally, the headquarters may be in another third country.

Article 7

Without prejudice to the institutional and political environment in which the partners referred to in Article 5(1) operate, the following factors shall in particular be considered when determining a body's suitability for Community funding:

- (a) its commitment to defending, respecting and promoting human rights and democratic principles in a non-discriminatory manner;
- (b) its experience in the field of promoting human rights and democratic principles;
- (c) its administrative and financial management capacities;
- (d) its technical and logistical capacity in relation to the planned operation;
- (e) the results, where relevant, of any previous operations carried out, in particular those financed by the Community;
- (f) its capacity to build up a working relationship with other elements of civil society in the third country concerned and to direct assistance to local organisations accountable to civil society.

Article 8

1. Aid shall not be allocated to the partners referred to in Article 5(1) unless they undertake to comply with the allocation and implementation conditions laid down by the Commission, to which they shall be contractually bound.
2. Activities aided by the Community shall be implemented in accordance with the objectives laid down in the Commission financing decision.
3. Community financing under this Regulation shall take the form of grants.
4. Where operations financed under this Regulation are the subject of financing agreements between the Community and the recipient countries, such agreements shall stipulate that taxes, charges and customs duties are not to be borne by the Community.

Article 9

1. Participation in invitations to tender and the award of contracts shall be open on equal terms to natural or legal persons from the recipient country and the Member States. It may be extended to other countries in exceptional and duly justified cases.
2. Supplies shall originate in the Member States or the recipient country. They may originate in other countries in exceptional and duly justified cases.

Article 10

1. In the interests of consistency and complementarity and in order to maximise the overall effectiveness of operations, the Commission, in close cooperation with the Member States, may take any coordination measures necessary.
2. In any case, for the purposes of paragraph 1, the Commission shall encourage:
 - (a) the introduction of a system for the exchange and systematic analysis of information on operations financed or considered for financing by the Community and the Member States;
 - (b) the coordination of the implementation of operations on the spot by means of regular meetings for the exchange of information between the representatives of the Commission and the Member States in the recipient country;
 - (c) the promotion of a coherent approach in relation to humanitarian assistance and, whenever possible, the integration of the protection of human rights within humanitarian assistance.

CHAPTER III
Procedures for the implementation of operations

Article 11

The financial reference amount for the implementation of this Regulation during the period 1999 to 2004 shall be EUR 150 million.

The annual appropriations shall be authorised by the budgetary authority within the limits of the financial perspective.

Article 12

The Commission shall appraise, decide upon and administer, monitor and evaluate operations under this Regulation in accordance with the budgetary and other procedures in force. It shall lay down the conditions for allocating, mobilising and implementing aid under this Regulation.

Article 13

1. The following shall be adopted by the Commission according to the procedure laid down in Article 14(2):
 - decisions on operations for which financing under this Regulation exceeds EUR 1 million and any modification to such operations leading to an increase of more than 20 % in the sum initially agreed,
 - programmes intended to provide a coherent framework for action in a given country or region or in a specific field where the scale and complexity of the needs identified are such that they seem likely to continue.
2. The Commission shall notify the committee referred to in Article 14 of financing decisions that it intends to take concerning projects and programmes costing less than EUR 1 million. Notice shall be given at least a week before the decision is taken.

Article 14

1. The Commission shall be assisted by the "Human Rights and Democracy Committee", hereinafter referred to as "the Committee", set up by Article 13 of the Regulation (EC) No 975/1999.
2. Where reference is made to this Article the representative of the commission shall submit to the committee a draft of the measures to be taken. The committee shall deliver its opinion on the draft within a time limit which the chairman may lay down according to the urgency of the matter. The opinion shall be delivered by the majority laid down in Article 148(2) of the Treaty in the case of decisions which the Council is required to adopt on a proposal from the Commission. The votes of the representatives of the Member States within the committee shall be weighted in the manner set out in that Article. The chairman shall not vote.

The Commission shall adopt the measures envisaged if they are in accordance with the opinion of the committee.

If the measures envisaged are not in accordance with the opinion of the committee, or if no opinion is delivered, the Commission shall without delay submit to the Council a proposal relating to the measures to be taken. The Council shall act by a qualified majority.

If, on the expiry of a period of three months from the date of referral to the Council, the Council has not acted, the proposed measures shall be adopted by the Commission.

Article 15

1. The Commission may finance emergency measures up to a maximum of EUR 2 million. Emergency measures shall be deemed necessary in cases of urgent and unforeseeable need arising from the sudden suspension of the democratic process or the emergence of a state of crisis or exceptional and imminent danger affecting all or part of the population of a country and posing a grave threat to the fundamental rights and freedoms of the individual.
2. Where operations fulfil these conditions, the Commission shall act after consulting the Member States by the most efficient means. Five working days shall be allowed to the Member States in which to put forward any objections. If there are any objections, the committee, referred to in Article 14, shall examine the question at its next meeting.
3. The Commission shall inform the committee referred to in Article 14, at its next meeting, of all emergency measures financed under these provisions.

Article 16

The committee may examine any general or specific issues concerning Community aid in the field and should also play a useful role as a means for improving the coherence of the human rights and democratisation actions of the European Union towards third countries. Once a year it will examine the planning for the following financial year or discuss general guidelines presented by the representative of the Commission for operations under this Regulation to be undertaken in the year ahead.

Article 17

1. The Commission shall regularly evaluate operations financed by the Community under this Regulation in order to establish whether they have achieved their objectives and to produce guidelines for improving the effectiveness of subsequent operations. The Commission shall submit to the committee a summary of the evaluation exercises carried out that it might, if necessary, examine. The evaluation reports shall be available to the Member States on request.
2. At the request of the Member States, the Commission may, with them, also evaluate the results of the Community's operations and programmes under this Regulation.

Article 18

All contracts or financing agreements concluded under this Regulation shall provide in particular that the Commission and the Court of Auditors may conduct checks on the spot and at the headquarters of the partners referred to in Article 5(1) according to the usual procedures established by the Commission under the rules in force, and in particular those of the Financial Regulation applicable to the general budget of the European Communities.

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1. Within a month of its decision, the Commission shall notify the Member States of operations and projects approved, indicating the sums, the nature of the operation, the recipient country and the partners involved.
2. At the close of each financial year, the Commission shall submit an annual report to the European Parliament and to the Council with a summary of the operations financed in the course of that year.

The summary shall contain information concerning the agencies with which the operations referred to in Article 1 have been implemented.

The report shall also include a review of any external evaluation exercises which may have been conducted and may, if appropriate, propose specific operations.

Article 20

Three years after this Regulation enters into force, the Commission shall submit to the European Parliament and to the Council an overall assessment of the operations financed by the Community under this Regulation, which may be accompanied by appropriate proposals concerning the future of this Regulation.

Article 21

This Regulation shall enter into force on the third day following that of its publication in the Official Journal of the European Communities.

It shall apply until 31 December 2004.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Luxembourg, 29 April 1999

3.4 Allan Rosas: Human Rights and the External Relations of the European Community: A Conceptual Perspective

1. Introduction

There is an abundance of writings on the status and role of human rights in European Community (EC) law and the policies of the European Union (EU).¹ Especially the case-law of the European Court of Justice (ECJ) since 1969² and the relation between human rights as general principles of Community law and the European Convention on Human Rights (ECHR), including the possible adherence by the EC to the ECHR,³ have been widely discussed.

Less attention has been paid to the concept of human rights in the external policies of the EC and the EU. What are the sources of law forming the basis of such an external human rights policy, given that the EC is not a Contracting Party to any human rights convention in the true sense of the word? And how does this external policy relate to the main categories of human rights (civil rights, political rights, social rights, minority rights, and so on) and to their broader conceptual framework, notably democracy and the rule of law?

This paper is an endeavour to elucidate such basic conceptual issues. We have deliberately chosen to focus on the external human rights policy of the European Community, as the emphasis is on acts of Community law (notably the Treaties, Community agreements and autonomous regulations) and related pronouncements by the Commission and other Community institutions. It is more difficult to articulate and analyse the basic concepts of a human rights policy of the European Union to the extent that this falls outside the Community framework. This would lead us to the legal marshland of Common Foreign and Security Policy (CFSP, or the 'Second Pillar'), with its complex mix of common and national policies.⁴

2. Sources of Law

2.1. General

According to the ECJ's case-law referred to above, the principal source of law for human rights in the Community legal order is the general principles of Community law. In Opinion 2/94 on accession by the Community to the ECHR, the Court summarised the situation as follows:

It is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the

¹ Suffice it to mention here A. Cassese, A. Clapham and J. Weiler (eds.), *European Union: The Human Rights Challenge*. Vol. I - III (1991); N. Neuwahl and A. Rosas (eds), *The European Union and Human Rights* (1995); L. Woods, 'The European Union and Human Rights', in R. Hanski and M. Suksi (eds), *An Introduction to the International Protection of Human Rights: A Textbook* (1997) 283-300, with references.

² Case 29/69 *Stauder v City of Ulm* [1969] ECR 419.

³ In *Opinion 2/94* [1996] ECR I-1759 (para. 36), the ECJ concluded that 'as Community law now stands, the Community has no competence to accede' to the ECHR.

⁴ For an analysis of this aspect of the question, see M. Fouwels, 'The European Union's Common Foreign and Security Policy and Human Rights', 15 *Netherlands Quarterly of Human Rights* (1997) 291-324.

protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the [ECHR] has special significance.⁵

The Court's jurisprudence has been a source of inspiration for Treaty provisions as well. Apart from the Preambles to the Single European Act (SEA)⁶ and the Treaty on European Union (TEU),⁷ this is true, in particular, for Article F(2) of the TEU, according to which

[t]he Union shall respect fundamental rights, as guaranteed by the [ECHR] and as they result from the constitutional traditions common to the Member States, as general principles of Community law.

The legal implications of this provision for Community law are uncertain, given that it appears in Title I of the TEU ('Common Provisions'), which falls outside the jurisdiction of the ECJ, and that it refers to the Union, not to the Communities.⁸ However, this state of affairs will change with the entry into force of the Treaty of Amsterdam, which submits Article F (2) to the jurisdiction of the ECJ, subject to certain conditions.⁹

In addition, the Amsterdam Treaty has introduced a new Article F (1), according to which the Union 'is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States', an Article F.1 on the possibility to suspend membership rights in the event of a serious and persistent breach of Article F (1), and an addition to Article O, which limits the right to apply for EU membership to European States which respect the principles set out in Article F (1). It will be noted that the new Article F.1 reaffirms a general competence of the Commission to monitor the human rights situation in the Member States, as it provides for the right of the Commission (alternatively, one third of the Member States) to propose that the Council determine the existence of a serious and persistent breach by a Member State of principles mentioned in Article F (1). Finally, the Amsterdam Treaty brings to the 'First Pillar' a clause on combating discrimination in general (Article 6a), a provision on measures concerning asylum, refugees and immigration (Article 73k) and certain competences in the field of employment, working conditions and social protection (Article 117).

With respect to external policies, it is often assumed that the Treaty's emphasis is on the CFSP, one of the objectives of which, according to Article J.1 of the TEU, is 'to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms'.¹⁰ However, the relevance of human rights for the external policies of the EC under the 'First Pillar' is explicitly recognised in Article 130u of the EC Treaty (ECT), which provides that 'Community policy' in the area of development co-operation 'shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms'.

While the drafters of Article F (2), given its reference to 'general principles of Community law', seem to have had mainly the internal dimension in mind, this provision, which covers the whole range of Union

⁵ *Supra* note 3 (para. 33).

⁶ According to the third preambular paragraph of the SEA, the Member States are 'determined to work together to promote democracy on the basis of the fundamental rights recognised in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice'.

⁷ According to the third preambular paragraph of the TEU, the Member States confirm 'their attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law'.

⁸ See, e.g., N. Neuwahl, 'The Treaty on European Union: A Step Forward in the Protection of Human Rights?', in Neuwahl and Rosas, *supra* note 1, 1-22 at 13-22.

⁹ According to the new Article L (d), the jurisdiction of the Court will cover 'Article F (2) with regard to action of the institutions, insofar as the Court has jurisdiction under the Treaties establishing the European Communities and under this Treaty'.

¹⁰ See also the fifth preambular paragraph of the SEA, which, in the context of an exhortation incumbent upon 'Europe' to speak with one voice, refers to the need 'in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached'.

competences and activities, including the 'First Pillar', may be of relevance for the question of external policies as well.¹¹

Be that as it may, Article 235 of the ECT (which provides for a general competence to take action, if this is 'necessary to attain one of the objectives of the Community' and if other provisions of the Treaty have not provided, expressly or implicitly, the necessary powers) seems to offer a basis for Community external policies in the field of human rights. It was on this legal basis that the Commission founded its view that the Community had competence to adhere to the ECHR. While the ECJ denied such a competence, it seems to have done so on the basis of the ECHR's specific features.

True, the Court also stated that 'no Treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field'.¹² But in the absence of any such express or implied powers, the Court went on to consider whether Article 235 could nevertheless constitute a legal basis for accession. The negative answer underlined the institutional implications of adherence to the ECHR¹³ and thus does not seem to constitute a refusal to acknowledge any EC human rights competence under Article 235.¹⁴

In light of the above, it is submitted that the combined effect of the human rights declarations made by the Community institutions, the Preamble of the SEA, the Preamble and provisions of the TEU, including Article F (2), and the case-law of the ECJ on human rights as part of the general principles of Community law, is to make human rights a 'transverse' objective of the Community. This view may be corroborated by the very wording of Article 130u of the ECT, which qualifies this area as a 'general objective'. In any event, taking into account the increased emphasis on human rights in the Treaty of Amsterdam, including the submission of Article F (2) to the jurisdiction of the ECJ, it seems more and more difficult to argue that human rights are not an objective of the EC.

Additional evidence for this argument may be found in the principle of coherence ('consistency') in the external activities of the Union, as enshrined in the fundamental Article C of the TEU. This provision is based on a holistic approach, since it refers to the need for consistency of 'external activities as a whole in the context of external relations, security, economic and development policies', and contains an obligation for both the Council and the Commission to ensure such consistency. Coherence would not be served by a strict - and, from a practical point of view, somewhat artificial - delimitation of matters according to 'pillars'.

Seen in this perspective, it would be strange indeed if the EU's external human rights policy would be restricted to the CFSP (where neither treaties in the name of the EU/EC can be concluded nor regulations or directives adopted) and to promoting the development and consolidation of human rights in development co-operation. The Community ('First') Pillar is by now far from being limited to economic issues and the four freedoms but covers a wide range of issues of more general political, social and cultural interest. Moreover, as affirmed by Article M of the TEU and the case-law of the ECJ,¹⁵ the fact that an issue such as human rights can be discussed in the context of the CFSP does not remove it from the ambit of Community competence.

¹¹ In *Opinion 2/94* (*supra* note 3), the ECJ listed as relevant sources for an EC human rights agenda the various declarations of the Member States and the Community institutions, the preamble to the SEA, the preamble to, and Articles F (2), J.1 and K.2. of the TEU, and Article 130u of the ECT (para. 32), without making a distinction between external and internal competences.

¹² *Supra* note 3 (para. 27).

¹³ The Court underlined that accession 'would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order' (para. 34) and went on to say that such a modification, 'with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235' (para. 35).

¹⁴ See, e.g., J. Kokott and F. Hoffmeister, Note on *Opinion 2/94* in 90 *AJIL* (1996) 664-669; R. Gosalbo Bono, 'Reflexiones en torno al futuro de la protección de los derechos humanos en el marco del derecho comunitario y del derecho de la Unión: insuficiencias y soluciones', *Revista de derecho comunitario europeo* (1997) 29-68 at 57.

¹⁵ See, e.g., Case C-124/95 *Centro-Com* [1997] ECR I-81, where the Court reaffirmed that political motives behind a trade embargo are not a sufficient reason to remove them from the ambit of Article 113 of the EC Treaty. See also cases 70/94 *Werner* [1995] ECR I-3189 and C-83/94 *Leifer* [1995] ECR I-3231.

At any rate, the existence of a Community external human rights policy is confirmed by practice, notably of the 1990s. This takes many forms but can principally be associated with the so-called human rights clause in agreements concluded between the EC and third countries, issues related to the link between human rights and unilateral trade preferences, EC programmes on technical (financial) assistance for democracy- and human rights-building activities as well as related Commission activities of information-gathering and -sharing. Mention should also be made of the political conditions relating to democracy, human rights and the rule of law which have been recently discussed by the Commission in its Opinions on ten Central and Eastern European candidate countries in the context of enlargement. It is to these more specific contexts that we shall now turn.

2.2. The Human Rights Clause

Since the early 1990s, the EC has included more or less systematically a so-called human rights clause in its bilateral trade and co-operation agreements with third countries, including association agreements such as the Europe agreements, Mediterranean agreements and the Lomé Convention.¹⁶ A Council decision of May 1995 spells out the basic modalities of this clause, with the aim of ensuring consistency in the text used and its application.¹⁷ That model consists of a provision stipulating that respect for fundamental human rights and democratic principles as laid down in the Universal Declaration of Human Rights of 1948 (or, in a European context, also the Helsinki Final Act and the Paris Charter for a New Europe) inspire the internal and external policies of the parties and constitute an 'essential element' of the agreement. A final provision dealing with non-execution of the agreement requires each party to consult the other before taking measures, save in cases of special urgency. An interpretative declaration clarifies that cases of special urgency include breaches of an 'essential element' of the agreement.

Since the Council decision of May 1995, the human rights clause has been included in all subsequently negotiated bilateral agreements of a general nature (excluding sectoral agreements on textiles, agricultural products, and so on). At the time of writing, this amounts to more than 20 agreements which have already been signed. These agreements come in addition to the more than 30 agreements negotiated before May 1995 which have a human rights clause which does not necessarily follow the model launched in 1995.¹⁸ An agreement with Vietnam signed on 17 July 1995,¹⁹ while including the basic human rights clause, lacks the accompanying suspension clause, but this can be explained by the fact that the agreement was largely negotiated before May 1995. On the other hand, when Australia in 1996 refused to accept incorporation of the human rights clause as proposed by the EC in a trade and co-operation agreement, no binding agreement could be concluded and a political declaration was adopted instead.²⁰

An important reason for including this standard clause in agreements with third countries is to spell out the right of the Community to suspend or terminate an agreement for reasons connected with non-respect of human rights by the third country concerned. Suspension or termination can thus take place, in a manner consistent with the rules of customary international law codified in the Vienna Conventions on the Law of Treaties of 1969 and 1986 (to which the EC is not formally a Contracting Party), without, however, the need to follow all the procedural requirements (and in particular, the notification requirements) laid

¹⁶ See, e.g., the Communication from the Commission on the inclusion of respect for democratic principles and human rights in agreements between the Community and third countries, COM(95) 216 final of 23 May 1995; D. Napoli, 'The European Union's Foreign Policy and Human Rights', in Neuwahl and Rosas, *supra* note. 1, 297-312 at 306-308.

¹⁷ Article 5 of the Lomé IV Convention, as revised by an Agreement signed in Mauritius on 4 November 1995, is somewhat more elaborate than the standard clause used in bilateral contexts (see also Article 366a on suspension).

¹⁸ For a list of the countries concerned (34 or so) and a short analysis of the various types of clauses found in the agreements, see COM(95) 216 final, *supra* note 16, at Annex 3.

¹⁹ OJ L 136 of 7.6.1996, 28.

²⁰ Joint Declaration on EU-Australia Relations, signed in Luxembourg on 26.6.1997, Bull. EU 6-1997, point 1.4.103 (summary).

down in the Conventions. Before the human rights clause, the EC had to rely on general international law to suspend an agreement, as happened with regard to Ex-Yugoslavia in 1991.²¹

The human rights clause does not transform the basic nature of agreements which are otherwise concerned with matters not directly related to the promotion of human rights. It simply constitutes a mutual reaffirmation of commonly shared values and principles, a precondition for economic and other cooperation under the agreements, and expressly allows for and regulates suspension of an agreement in case of non-compliance with these values. This approach seems to have been confirmed by the ECJ in *Portugal v. Council* (1996), where the Court observed that an important function of the human rights clause could be to secure the right to suspend or terminate an agreement if the third State had not respected human rights.²²

The clause thus does not seek to establish new standards in the international protection of human rights. It merely reaffirms existing commitments which, as general international law, already bind all States as well as the EC in its capacity as a subject of international law.²³ The clause accordingly does not imply the enactment of rules on human rights or the conclusion of specific human rights conventions in the sense in which these expressions were used by the ECJ in *Opinion 2/94*.²⁴ Therefore, the human rights clause, with its emphasis on the right of suspension, is a question of treaty law, which does not depend on which view is taken on the potential of Article 235 (or Article 130u) to serve as an enabling clause for human rights standard-setting.

The basic term of reference for the human rights clause is the Universal Declaration of Human Rights, proclaimed by the UN General Assembly in 1948.²⁵ This Declaration, being a resolution of the General Assembly, is not as such a legally binding instrument. But with the major world conferences of the 1990s, including the World Conference on Human Rights of 1993,²⁶ it has become increasingly accepted that the Universal Declaration is not only of exceptional historical and political importance, but also reflects, at least at the level of general principles, existing general international law, whether seen as customary international law or as general principles of law recognised by civilised nations.²⁷ The Declaration can also be seen as a specification of the human rights provisions of the UN Charter.²⁸

²¹ The trade concessions of the 1983 Co-operation Agreement were suspended by Council Regulation (EEC) No 3300/91 of 11 November 1991 (OJ L 315 of 15.11.91, 1) and the whole Agreement by a Council decision, taken together with the Representatives of the Member States, meeting within the Council (the Agreement was mixed), OJ L 315 of 15.11.91, 47. According to P.J. Kuyper, 'Trade Sanctions, Security and Human Rights and Commercial Policy', in M. Maresceau (ed.), *The European Community's Commercial Policy after 1992: The Legal Dimension* (1993) 401-438 at 431, suspension was based on a combination of the *clausula rebus sic stantibus* and the principle of supervening impossibility of performance. In his Conclusions of 4 December 1997 relating to Case C-162/96 *Racke v. Hauptzollamt Mainz*, Advocate General Jacobs accepted *rebus sic stantibus* as a ground for suspension of the 1983 Agreement.

²² Case C-268/94 *Portugal v Council* [1996] ECR I-6177 (para. 27). A proposal for EC internal procedures for suspension of the Lomé Convention is contained in COM(96) 69 final of 21 February 1996. While this proposal has been blocked for quite some time in the Council, as it provides for majority voting when the Council is to decide on suspension, it has gained new momentum in November-December 1997. Article 228, paragraph 2, of the ECT, as amended by the Treaty of Amsterdam, will contain a general clause on the suspension of EC agreements.

²³ The relevance for the EC of general (customary) international law is acknowledged in Case C-286/90 *Poulsen and Diva Navigation* [1992] ECR 6019 (e.g. para. 9); Case C-432/92 *Anastasiou E.A.* [1994] ECR I-3087 (e.g. para. 40); Case T-115/94 *Opel Austria v Council* [1997] ECR II-39. In *Opel Austria*, the Court of First Instance observed that 'it is generally recognised that the First Vienna Convention [on the Law of Treaties] codifies certain universally binding rules of customary international law and that hence the Community is bound by the rules codified by the Convention' (para. 77). See also the conclusions by Advocate General Jacobs of 4 December 1997 in Case C-162/96, *supra* note 21. On the implications for Member States, see V. Lowe, 'Can the European Community Bind the Member States on Questions of Customary International Law?', in M. Koskeniemi (ed.), *International Law Aspects of the European Union* (1997) 149-168.

²⁴ *Supra* note 3.

²⁵ Article 5 of the revised Lomé Convention IV does not mention the Universal Declaration, but the Declaration, together with the two International Covenants of 1966, is referred to in the Preamble.

²⁶ The Vienna Declaration and Programme of Action, adopted by consensus by the World Conference on Human Rights on 25 June 1993.

²⁷ See generally, e.g., T. Meron, *Human Rights and Humanitarian Law as Customary Law* (1989); A. Eide et al. (eds), *The Universal Declaration of Human Rights: A Commentary* (1992); K. Drzewicki, 'The United Nations Charter and the Universal Declaration of Human Rights', in Hanski and Suksi, *supra* note 1, 65-76 at 74-76. See also O. Schachter, 'International Human Rights', in *Hague Academy of International Law, Recueil des Cours* (1982), Vol. V, 334-336, who considers that some, but not all, rights enshrined in the Universal Declaration could be considered as having obtained the status of customary international law; N. Rodley, 'Human Rights and Humanitarian Intervention: The Case Law of the World Court', 38 *ICLQ* (1989) 326.

²⁸ In the *Tehran Hostage* Case, the International Court of Justice noted that a certain conduct relating to the deprivation of liberty 'is in itself manifestly incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the

The EC's treaty practice since the early 1990s, accepted by an increasing number of third countries via bilateral agreements, contributes to the reaffirmation of the status of the Universal Declaration as an expression of general international law. Moreover, in a Declaration adopted by the Luxembourg Summit of 12/13 December 1997, the European Council reaffirmed the EU's solemn commitment to the respect and defence of the rights enshrined in the Universal Declaration.²⁹

It should be emphasised that these conclusions do not necessarily imply that each and every word of the Universal Declaration has become universally binding. In fact, the standard EC human rights clause refers to 'democratic principles and basic human rights, as proclaimed in the Universal Declaration of Human Rights', rather than to the provisions of the Declaration as such. What can be safely said is that recent international developments, including EC treaty practice, create a presumption (which may be rebutted on a particular point of detail) that the Declaration expresses customary international law, or at least general principles of law recognised by civilised nations.³⁰

As will be developed below (2.3., 3.2.), the human rights policy of the EC includes a social and workers' rights dimension. It should be noted that in this context, too, the European Commission has assumed that there are some basic standards which are universally applicable, whether or not a given State (or the EC itself) has adhered to a particular human rights, including International Labour Organisation (ILO), convention.

For instance, in its 1996 Communication to the Council on 'The Trading System and Internationally Recognised Labour Standards',³¹ the Commission recognised that, while a wide range of human rights and labour standards had been adopted over time in the UN, the ILO and other international organisations, the international debate on trade and fundamental workers' rights had recently focused on a minimum core of rights which could be generally recognised as universally applicable. In the Commission's view, these core labour standards include the prohibition of slavery and forced labour, freedom of association and the right to collective bargaining, the elimination of discrimination in employment and the suppression of the exploitation of child labour. The basic approach seems to be one of human rights, and the Communication cites a number of international instruments, including not only ILO Conventions, but also the Universal Declaration and specific UN human rights conventions, as indicators of universally applicable standards rather than as instances of treaty law.³²

2.3. Unilateral Trade Preferences

Apart from international agreements, and general international law as a basis for these agreements, human rights may be linked to autonomous acts of secondary Community legislation. In the first place, the Community's unilateral scheme of generalised tariff preferences (the 'GSP'), laid down in Regulations No 3281/94 and No 1256/96 in respect of certain industrial and agricultural products originating in

Universal Declaration of Human Rights', ICJ Reports (1980) 3 at 42. At the World Conference on Human Rights, States reaffirmed in the Preamble of the Vienna Declaration 'their commitment to the purposes and principles contained in the Charter of the United Nations and the Universal Declaration of Human Rights'. In the substantive parts, the World Conference declared, *inter alia*, that 'the universal nature of these rights and freedoms is beyond question', that the protection and promotion of human rights 'is the first responsibility of Governments' and that the promotion and protection of all human rights 'is a legitimate concern of the international community'.

²⁹ See Annex 3 to the Presidency Conclusions of 13 December 1997 of the Luxembourg European Council, SI (97) 1000, para. 1.

³⁰ The role of human rights as general principles of law is (rightly, it is believed) emphasised by B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles', 12 *Australian Year Book of International Law* (1992) 82-108 at 102-108. Some parts of the Universal Declaration may even reflect peremptory international law (*ius cogens*), see generally L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988) 425-520.

³¹ COM(96) 402 final of 24 July 1996.

³² Cf. the much older Communication on 'La coopération au développement et le respect de certaines normes internationales en matière de conditions de travail', COM(78) 492 final of 8 November 1978, which (in relation to the Lomé Convention system) is closer to a specific labour standard approach (although the Communication does cite the International Covenant on Economic, Social and Cultural Rights of 1966).

developing countries, probably contains the Community's most extensive set of actions related to third countries' respect for (or neglect of) fundamental labour standards to date.³³

On the one hand, by virtue of Article 9 of the said Regulations, benefits granted to a particular country under the GSP may be temporarily withdrawn, in whole or in part, if the country is found to practice any form of forced labour, as this term is defined in the Geneva Conventions of 1926 and 1956³⁴ and ILO Conventions N° 29 and 105.³⁵ Thus, formal adherence to these conventions is not a necessary prerequisite for withdrawal of tariff concessions in case of non-compliance. The approach is again one of universally applicable standards, which are articulated in more specific conventions.

While the procedure leading to such withdrawal is very time-consuming, recent experience has shown that it can nevertheless be brought to bear on countries significantly and consistently violating the most fundamental labour standards. Indeed, on 24 March 1997, based on a complaint by two Trade Union Confederations, the Council temporarily withdrew access to the tariff preferences under both the industrial and the agricultural GSP-schemes for the Union of Myanmar (Burma) because of its use of forced labour.³⁶ This was based on an investigation opened on 20 January 1996 by the Commission, which heard experts and consulted the GSP Committee according to the procedures laid down in the above Regulations.

On the other hand, Article 7 of the said Regulations provides for a system of additional preferences, the so-called 'special incentive arrangements', to be granted (in principle as from 1 January 1998) to countries honouring the standards laid down in ILO Conventions N° 87 and 98 concerning freedom of association and protection of the right to organise and to bargain collectively and Convention N° 138 concerning the minimum age for admission to employment.

At Community level, the GSP is the first instrument to contain a social incentive clause. However, its implementation still requires the completion of a two-step procedure: The first step was already taken, the Commission having sent, on 2 June 1997, a report to the Council on the results of studies carried out in international fora such as the ILO, the WTO and the OECD on the relationship between trade and labour rights.³⁷ The second has been initiated with the Commission's adoption of a proposal for a Council Regulation concerning the implementation of Articles 7 and 8 of the two Regulations (labour standards- and environment-related incentive arrangements).³⁸ At the time of this writing, the proposal is still pending before the Council, but it may be assumed that, during the early months of 1998, the Community's first set of 'special incentive arrangements' for labour standards will be put in place.

The second example of autonomous trade preferences linked to compliance with pre-existing human rights standards concerns certain countries of south-east Europe (most of which have emerged from the former Yugoslavia). The matter is best known under the heading of "Conditionality".

In fact, in November 1991, given the progressive dissolution of the Socialist Federal Republic of Yugoslavia (SFRY), the Community and its Member States first suspended,³⁹ then denounced⁴⁰ the Co-

³³ Council Regulation No 3281/94 of 19 December 1994 applying a four-year scheme of generalised tariff preferences (1995 to 1998) in respect of certain industrial products originating in developing countries, OJ L 348, 31.12.1994, 1, as last amended by Council Regulation No 2623/97 of 19 December 1997, OJ L 354, 30.12.1997, 9; Council Regulation No 1256/96 of 20 June 1996 applying multiannual schemes of generalised tariff preferences from 1 July 1996 to 30 June 1999 in respect of certain agricultural products originating in developing countries, OJ L 160, 29.6.1997, 1, as last amended by Council Regulation No 2623/97 of 19 December 1997, OJ L 354, 30.12.1997, 9.

³⁴ Slavery Convention, signed at Geneva on 25 September 1926, and Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted on 7 September 1956.

³⁵ Forced Labour Convention No. 29 of 1930 and Abolition of Forced Labour Convention No. 105 of 1957.

³⁶ Council Regulation No 552/97 of 24 March 1997 temporarily withdrawing access to generalised tariff preferences from the Union of Myanmar, OJ L 85, 27.3.1997, 8.

³⁷ COM(97)260 final of 2 June 1997.

³⁸ COM(97)534 final of 30 October 1997, OJ C 360, 26.11.1997, 9.

³⁹ *Supra* note 21.

⁴⁰ Council Decision No 91/602/EEC of 25 November 1991 denouncing the Co-operation Agreement between the European Economic Community and the SFRY, OJ L 325, 27.11.1991, 23. As noted *supra* note 21, a preliminary reference procedure concerning the above-mentioned acts is currently pending before the ECJ; Case C-162/96 *Racke*.

operation Agreement in force between the Community and the SFRY.⁴¹ However, within weeks, the tariff preferences originally granted by this Agreement were reintroduced by the Community with respect to those Republics which actively contributed to the peace process, by means of autonomous Regulations.⁴² Already at this time, the measures were explicitly qualified as “positive incentive measures”.⁴³ They have been successively renewed, with varying geographical coverage, until the present day.

For instance, at the end of 1996 the Council adopted Regulation No 70/97.⁴⁴ Its application was limited to one year (until 31 December 1997), since the benefits contained therein are supposed to be ‘renewed on the basis of conditions established by the Council in relation to the development of relations’ between the Community and each of the countries concerned. The one year-period was thus decided ‘in order to permit a regular review of compliance, without prejudice to the possibility of modifying the geographical coverage of this Regulation’.⁴⁵

Meanwhile, the Community defined a coherent strategy for its future relations with those countries of south-east Europe with which Association Agreements had not yet been concluded (Bosnia-Herzegovina, Croatia, the Federal Republic of Yugoslavia [FRY], the former Yugoslav Republic of Macedonia [FYROM] and Albania). Indeed, on 29 April 1997, the Council adopted Conclusions on the future strategy of ‘Conditionality’.⁴⁶

As results from the Introduction to these Conclusions, bilateral relations with the countries concerned will be developed, among others, ‘within a framework which promotes democracy, the rule of law [and] higher standards of human and minority rights’. Since the strategy is conceived as an incentive, and not an obstacle, for the countries concerned to fulfil the general and country-specific criteria laid down therein, the Community will follow a graduated approach in monitoring and evaluating the progress made in meeting these criteria. In this context, the Community’s granting of (autonomous) trade preferences, the extension of financial assistance and economic co-operation (including assistance under the Phare Regulation)⁴⁷ and the establishment of contractual relations with the countries concerned are subject to different degrees of Conditionality.

Here again, while an Annex to the Conclusions lays down certain elements for the examination of compliance with democratic principles, human rights, the rule of law and respect for and protection of minorities, the Conclusions as a whole do not establish new rules. The substance of the respective countries’ commitments stems mainly from the Dayton Peace Agreements, including the General Framework Agreement for Peace (and its provisions on co-operation with the International Tribunal), the Federation/Croatia and the Republica Srpska/FRY agreements, or the Basic Agreement on Eastern Slavonia.

On 29 December 1997, the Council decided to extend the application of the trade preferences of Regulation 70/97 for 1998.⁴⁸ This extension applies to imports from Bosnia-Herzegovina and Croatia and to imports of wine from FYROM and Slovenia, FYROM being now covered, for its remaining products, by a new Co-operation Agreement which entered into force on 1 January 1998.⁴⁹ FRY (Serbia and

⁴¹ Co-operation Agreement between the European Economic Community and the SFRY, signed 2 April 1980; concluded by Council Regulation No 314/83 of 24 January 1983, OJ L 41, 14.2.1983, 1.

⁴² The first such Regulation was Council Regulation No 3567/91 of 2 December 1991 concerning the arrangements applicable to imports of products originating in the Republics of Bosnia-Herzegovina, Croatia, Macedonia and Slovenia, OJ L 342, 12.12.1991, 1.

⁴³ Cf. the second preambular paragraph of this Regulation.

⁴⁴ Council Regulation No 70/97 of 20 December 1996 concerning the arrangements applicable to imports into the Community of products originating in the Republics of Bosnia-Herzegovina, Croatia and the former Yugoslav Republic of Macedonia and to imports of wine originating in the Republic of Slovenia, OJ L 16, 18.1.1997, 1, as amended by Council Regulation No 825/97 of 29 April 1997, OJ L 119, 8.5.1997, 4 (extension of the benefits of this Regulation to the Federal Republic of Yugoslavia [FRY]).

⁴⁵ See the last preambular paragraph of Regulation 70/97; the extension of this Regulation to the FRY (*supra* note 44) for part of 1997 constitutes the first example of such an interim modification of the Regulation’s geographical coverage.

⁴⁶ Council Conclusions on the principle of Conditionality governing the development of the European Union’s relations with certain countries of south-east Europe, adopted on 29 April 1997, Bull. EU 4-1997, points 1.4.67 (commentary) and 2.2.1 (full text).

⁴⁷ See sub-chapter 2.4. below.

⁴⁸ Council Regulation No 2636/97 of 29 December 1997, OJ L 356, 31.12.1997, 16.

⁴⁹ OJ L 348 of 18.12.1997, 1.

Montenegro) has again been excluded from the preferential regime (at least temporarily), most probably because of its lack of fulfilment of the political Conditionality criteria.⁵⁰

2.4. Technical (Financial) Assistance

Assistance related to human rights and institution or democracy-building has also regularly been provided by the Community as part of its technical (financial) assistance, which again is regulated in autonomous Community acts (regulations). This is true in particular as regards the Community's instruments for assistance to the Central and Eastern European countries (CEEC), the New Independent States (NIS) and Mongolia as well as the Mediterranean countries. However, such activities also form an important part of the Community's 'horizontal' instruments governing development co-operation with lesser developed countries.⁵¹

While the possible scope of projects relating to human rights or democracy building was not yet fully spelled out in the 1989 Phare Regulation, the main instrument for technical (financial) assistance to the CEEC,⁵² projects concerning human rights and institution building, as well as efforts towards the harmonisation of legislation (aligning these countries' legal orders on prevailing European standards) are regularly included in Phare programmes. The objective is even clearer as regards the NIS and Mongolia, since Annex II of the 1996 Tacis Regulation lists the 'restructuring of public administration', 'legal assistance, including approximation of legislation' and in particular the 'strengthening of the civic society' among the indicative areas for assistance to these countries.⁵³

A similar approach has been retained for the 1996 MEDA Regulation.⁵⁴ In fact, Article 2 of this Regulation mentions the 'reinforcement of political stability and of democracy' among the three main sectors of the Euro-Mediterranean partnership, thus including it in the Regulation's primary objectives. In addition, the 'strengthening of democracy and respect for human rights' and the promotion of 'good governance' (in all its various forms) are listed in Annex II of the Regulation as specific areas of MEDA co-operation.

The Tacis and MEDA Regulations contain an additional feature, however, insofar as they incorporate provisions which bear a certain resemblance to the 'human rights clauses' included in all recent EC agreements (see above, 2.2.). According to Article 3 of the MEDA Regulation, which probably constitutes the most recent example of a general human rights clause in a Community (internal) Regulation,

[t]his Regulation is based on respect for democratic principles and the rule of law and also for human rights and fundamental freedoms, which constitute an essential element thereof, the violation of which element will justify the adoption of appropriate measures. (emphasis added)

While at the time of adoption of the MEDA Regulation, unanimity could not be found for a provision regulating the procedures to be followed in case of suspension (unanimity v. qualified majority), this lacuna is now on the verge of being rectified. Indeed, at the end of 1997, the Commission proposed a

⁵⁰ This motivation was fully spelled out in the penultimate preambular paragraph of the Commission's proposal, cf. COM(97) 637 final of 28 November 1997. However, as part of the political compromise achieved (with difficulty) in Council, this language has not been included in the Regulation's final version.

⁵¹ See, for example, Council Regulation No 443/92 of 25 February 1992 on financial and technical assistance to, and economic co-operation with, the developing countries in Asia and Latin America [ALA], OJ L 52, 27.2.1992, 1; according to Article 1 of this Regulation, in the context of financial and technical development assistance to and economic co-operation with these countries, the Community shall attach the utmost importance, *inter alia*, to '[t]he promotion of human rights, support for the process of democratisation [and] good governance'.

⁵² Council Regulation No 3906/89 of 18 December 1989 concerning economic assistance to the Republic of Hungary and the Republic of Poland ['Phare'], OJ L 375 of 23.12.1989, 11, as last amended by Regulation No 753/96 of 22 April 1996, OJ L 103, 26.4.1996, 5.

⁵³ Council Regulation No 1279/96 of 25 June 1996 concerning the provision of assistance to economic reform and recovery in the New Independent States and Mongolia ['Tacis'], OJ L 165, 4.7.1996, 1 at 6.

⁵⁴ Council Regulation No 1488/96 of 23 July 1996 on financial and technical measures to accompany the reform of economic and social structures in the framework of the Euro-Mediterranean partnership (MEDA), OJ L 189, 30.7.1996, 1, as corrected in OJ L 255, 9.10.1996, 24.

modification of Article 16 of the MEDA Regulation so as to provide for the possibility to suspend co-operation by qualified majority.⁵⁵

The same idea is expressed, albeit in somewhat different form, in Article 3.11 of the Tacis Regulation. According to this provision,

[w]hen an essential element for the continuation of co-operation through assistance is missing, in particular in cases of violation of democratic principles and human rights, the Council may, on a proposal from the Commission, acting by a qualified majority, decide upon appropriate measures concerning assistance to a partner State.

A very similar formula has been included in Article 5 of the Commission's recent proposal for a Council Regulation on assistance to the applicant countries in Central and Eastern Europe in the framework of the pre-accession strategy.⁵⁶ Indeed, according to this Article,

[w]here a factor that is essential for continuing to grant pre-accession assistance is absent, and where the principles of democracy, the rule of law, respect for human rights or the protection of minorities are violated, the Council, acting by qualified majority on a proposal from the Commission, may take appropriate steps with regard to any pre-accession assistance granted to an applicant country.

While not technically an amendment to the Phare Regulation, this new proposal would de facto introduce a 'human rights clause' into Phare assistance to the applicant countries, since Phare is the main instrument for Community assistance to these countries in the context of the so-called "Accession Partnerships" decided by the Luxembourg European Council of 12/13 December 1997.⁵⁷

All these clauses can be used to suspend, or even terminate, co-operation with a partner State in case of substantial human rights violations or significant undemocratic developments. However, experience shows that the cited clauses, given their broad wording, may also be used as a basis for certain positive measures aimed at promoting (or even restoring) human rights and democracy in an internal state of crisis in one of the partner countries, without it being necessary to apply all the normal procedures provided for in the respective Regulations.

The Commission has long considered that such clauses, given their reference to 'appropriate' measures or steps (and not simply to suspension or termination), should in fact have a positive dimension, at least in certain (possibly exceptional) situations. This view was recently confirmed by the Council.

Indeed, in the aftermath of the 1996 constitutional crisis in Belarus, all bilateral Tacis-assistance was de facto suspended, since it proved impossible for the Commission to negotiate an Indicative Programme and an Action Programme, both prerequisites for effective programming under the Tacis Regulation. However, in three successive political statements (Conclusions and Declarations), the Council, while condemning the situation and thus (politically) confirming the de facto suspension of all technical assistance, nevertheless left some opening for future Community assistance to Belarus, if this were directly geared towards promoting human rights, freedom of the media and, more generally, the democratisation process.⁵⁸

⁵⁵ Proposal for a Council Regulation amending Regulation 1488/96 (MEDA) as regards the procedure for adopting the appropriate measures where an essential element for the continuation of support measures for a Mediterranean Partner is lacking; COM(97) 516 final of 10 November 1997, OJ C 386, 20.12.1997, 9.

⁵⁶ COM(97) 634 final of 10 December 1997.

⁵⁷ See the Presidency Conclusions of 13 December 1997 of the Luxembourg European Council, SI (97) 1000, paragraphs 14-16.

⁵⁸ Council Conclusions of 24 February 1997; Council Declaration of 29 April 1997, Bull. EU 4-1997, point 1.4.6; Council Conclusions of 15 September 1997; all cited in the Commission's proposal (see below).

The Commission reacted to this signal and adopted, on 19 September 1997, a proposal for a Council Decision on a Tacis Civil Society Development Programme for Belarus.⁵⁹ This Decision was adopted by the Council on 18 December 1997.⁶⁰ It constitutes the first positive measure to be founded on the 'human rights clause' of the Tacis Regulation, and probably the first measure ever to be formally decided by the Council under a 'human rights clause' with the objective of helping restore human rights and democracy in a country in serious constitutional crisis.

Finally, Community human rights assistance extends beyond the scope of technical (financial) co-operation in the sense in which this was just described. Indeed, Chapter 7-7 of the Community budget contains a whole series of budget lines aimed more directly at the promotion of human rights on a global scale, thus laying the ground for a 'European Initiative for democracy and the protection of human rights'. Measures envisaged under this heading range from the (classical) support to democracy, human rights and institution building in developing and other countries (including the CEEC, the NIS and Mongolia and the countries of the former Yugoslavia), to assistance in the establishment of free and independent media, support for the international criminal tribunals with a view to fostering the creation of a permanent international criminal court, to concrete assistance to victims of torture and other human rights violations.

As results from the broad field of actions envisaged in this Budget Chapter, the Community is now called upon to move from a sectoral (and largely geographically predetermined) human rights approach to a global and encompassing appreciation of human rights in its international relations. This is also the objective of the Commission's recent proposal for a Council Regulation, which is meant to constitute the 'legal base' for all financing activities in the field of human rights and democracy.⁶¹ The proposal, based on Article 130w (development co-operation), has been discussed at Council level during autumn 1997. As matters currently stand, the Council might well decide to split the Commission proposal into two legal acts, one applying to developing countries and based on Article 130w, the other applying to other countries and based on Article 235. If adopted in this form, the Regulations would enable the Commission, assisted by the same Committee(s) of Member State representatives, to implement projects in all areas currently covered by Chapter 7-7 of the Budget. The Regulations could thus contribute significantly to a more coherent human rights approach of the Community. Moreover, they (or rather, one of the two Regulations) would reaffirm the use of Article 235 as a basis for external EC human rights activities.

3. Categories of Human Rights

3.1. General Context

In line with a general tendency in international law and diplomacy, the EC (and EU) approach to human rights is more often than not based on the broader triad of democracy, human rights and the rule of law.⁶² Sometimes, as with Article F of the TEU⁶³ and the standard human rights clause discussed above (2.2.), express reference is made to human rights and democratic principles only, it apparently being assumed that the rule of law is covered by the concept of human rights. In most of the other human rights provisions of the TEU (the Preamble, Article 130u ECT, Article J.1) reference is made to democracy, human rights and the rule of law. Inspired by the Preamble, the new Article F (1) of the Treaty of

⁵⁹ COM(97) 441 final of 19 September 1997, as amended by COM(97) 602 final of 12 November 1997, OJ C 384, 18.12.1997, 10.

⁶⁰ Council Decision (98/1, EC/EAEC) of 18 December 1997, O.J. L 1, 3.1.1998, 6.

⁶¹ Proposal for a Council Regulation concerning the development and the consolidation of democracy and the state of law as well as respect for human rights and fundamental freedoms, COM(97) 357 final of 24 July 1997.

⁶² The relation between the three concepts could be described as being one between 'Siamese triplets'. Cf. A. Rosas, 'Democracy and Human Rights', in A. Rosas and J. Helgesen (eds), *Human Rights in a Changing East-West Perspective* (1990), 17-57 at 17, where democracy and human rights are characterised as 'Siamese twins', which seem 'not only to presuppose each other but also to be genuinely intertwined'.

⁶³ Article F (2) discussed above merely refers to 'fundamental rights', whereas 'principles of democracy' are mentioned in Article F (1) as the foundation of the systems of government of the Member States.

Amsterdam provides that the Union is founded on the principles of 'liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law'.

In its Opinions on ten Central and Eastern European candidate countries published in July 1997,⁶⁴ the Commission, in accordance with the 'political criteria' formulated by the European Council in Copenhagen, included a chapter on 1) democracy and the rule of law and 2) human rights and the protection of minorities. The first sub-chapter discusses the political and constitutional system and the judiciary. The second sub-chapter includes sub-headings on civil and political rights, economic, social and cultural rights, and minority rights. The Opinions avoid any sharp distinctions between these different categories, but rather seem to view them as interrelated and mutually reinforcing. This, of course, is in line with a current tendency in international human rights discourse, including the 1993 Vienna Declaration and Programme of Action.⁶⁵ The same approach can be seen in the above-mentioned Commission proposal for a human rights financing regulation, since this refers not only to the universality but also to the indivisibility of human rights.⁶⁶

3.2. Economic and Social Rights

As demonstrated by the specific reference to 'liberty', 'democracy' and the 'rule of law' in the new Article F (1) of the Amsterdam Treaty, there can be no doubt that civil and political rights are covered by the EC concept of human rights. What may be more open to question, is the status and role of economic, social and cultural rights. While in internal Community law, and notably in the ECJ's case-law, there is a certain emphasis on the European Convention on Human Rights, which deals with economic and social rights only marginally,⁶⁷ the *acquis* may well include other human rights conventions, including those dealing with economic and social rights.⁶⁸

On the level of the founding Treaties, the Preamble to the Single European Act makes reference not only to the European Convention on Human Rights, but also to the European Social Charter. In addition, the Preamble to the Treaty of Amsterdam as well as the new version of Article 117 ECT (adopted in Amsterdam) refer to 'fundamental social rights' such as those defined in the European Social Charter and in the 1989 Community Charter on the Fundamental Social Rights of Workers. The ECJ, for its part, has sometimes referred to 'the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories',⁶⁹ which in principle may include both categories of human rights conventions.

Even more to the point, the Community Courts have repeatedly drawn inspiration from international social rights standards when interpreting certain EC Treaty provisions with a view to develop a set of EC based social rights. As early as 1978, having declared that the elimination of discrimination based on sex (Article 119 of the EC Treaty) formed part of the fundamental human rights, respect for which the Court must ensure, the Court went on to note:

⁶⁴ COM(97) 2000 final of 15 July 1997, Vols. I and II ("Agenda 2000"); COM(97) 2001-2010 final of 15 July 1997 (Commission Opinions on the individual candidate countries).

⁶⁵ According to paragraph I:5 of the Vienna Declaration and Programme of Action, 'all human rights are universal, indivisible and interdependent and interrelated'. See also A. Eide, C. Krause and A. Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (1995), *passim*.

⁶⁶ *Supra* note 61, third preambular paragraph.

⁶⁷ But the ECHR is not a treaty by definition limited to civil and political rights, see, e.g., M. Pellonpää, Economic, Social and Cultural Rights, in R.St.J. Macdonald, F. Matscher and H. Petzold (eds), *The European System for the Protection of Human Rights* (1993) 855-874.

⁶⁸ See, e.g., S. O'Leary, 'The Social Dimension of Community Citizenship', in: A. Rosas and E. Antola (eds), *A Citizens' Europe: In Search of a New Order* (1995) 156-181 at 177-178; E. Szyszczak, Social Rights as General Principles of Community Law, in: Neuwahl and Rosas, *supra* note 1, 207-220 at 208-213; L. Betten and D. Mac Devitt (eds), *The Protection of Fundamental Social Rights in the European Union* (1996).

⁶⁹ This is stated, e.g., in Case 4/73 *Nold* [1974] ECR 491 (para. 13), and in *Opinion 2/94*, *supra* note 3 (para. 33).

Moreover, the same concepts are recognised by [the European Social Charter] and by Convention N° 111 of the [ILO] concerning discrimination in respect of employment and occupation.⁷⁰

The European Social Charter was also referred to in the context of the Court's interpretation of the concept of vocational training under Article 128 of the EC Treaty.⁷¹ Finally, in a case where the applicant had specifically invoked certain ILO Conventions and the European Social Charter, the Court of First Instance reaffirmed that a female worker's dismissal on account of pregnancy constituted a direct sex discrimination under Community law, since '[t]he same conclusion is to be drawn from the international instruments in which the Member States have co-operated or to which they have acceded'.⁷²

As to the external aspect, in its 1995 Communication on the external dimensions of human rights policy, the Commission stressed, inter alia, the principle of indivisibility, which precludes discrimination between civil and political rights, and economic, social and cultural rights.⁷³ In fact, the Universal Declaration itself, which forms the basic frame of reference for the EC human rights clause (cf. Sub-chapter 2.2 supra), includes a number of rights belonging to the sphere of economic, social and cultural rights. These include the right to social security and other economic, social and cultural rights indispensable for the dignity and the free development of the personality of each human being (Article 22), the right to work (Article 23), the right to rest and leisure (Article 24), the right to an adequate standard of living (Article 25), the right to education (Article 26) and the right to participate in cultural life (Article 27). The European Council, for its part, recently reaffirmed its support for an 'integrated approach' to human rights (including social and economic development) in all pertinent activities of the UN and other International Organisations.⁷⁴

It is against this background that the question of whether or not to include a separate 'social clause' in the Community's agreements with third countries should be viewed. In fact, it appears that such rights are already covered by the unlimited reference to 'respect for human rights and democratic principles' contained in the standard human rights clause. There may be a certain risk that, if separate 'social rights' were defined and covered by a specific 'social clause', this might give the erroneous impression that these rights are not universal human rights, which might diminish, rather than increase, their significance. The Commission has so far refrained from proposing separate social rights clauses for EC agreements to be concluded with third countries.⁷⁵ Article 5 of the Lomé Convention IV, for its part, expressly covers both civil and political rights and economic, social and cultural rights, which according to the Convention are 'indivisible and inter-related' (para. 2).

Also in the context of the international debate on the relation between trade and worker's rights, the Commission, for instance in its 1996 Communication referred to above,⁷⁶ approached this issue in the broader framework of human rights and cited not only ILO Conventions but also the Universal Declaration and UN human rights conventions in support of its view that a core of fundamental workers' rights exist which are universally applicable. In fact, the core rights invoked (freedom from forced labour, freedom of association, etc.) illustrate the difficulties in making a sharp distinction between civil and political rights, on the one hand, and economic, social and cultural rights on the other.

In the context of enlargement, too, the Commission has included economic and social rights in its discussion of the fulfilment of the so-called 'Copenhagen criteria' by the ten candidate countries. The

⁷⁰ Case 149/77 *Defrenne v. Sabena* (No 3) [1978] ECR 1365 (para. 20).

⁷¹ Case 24/86 *Blaizot* [1988] ECR 379 (para. 20).

⁷² Case T-45/90 *Alicia Speybrouck v. European Parliament* [1992] ECR II-33 (para. 49).

⁷³ COM (95) 567 final of 22 November 1995, 10.

⁷⁴ *Supra* note 29 (para. 7).

⁷⁵ However, human resources development and social co-operation have been included among the objectives of development co-operation (Articles 3, paragraph 4, respectively) of the recent Co-operation Agreements with Laos (OJ L 334, 5.12.1997, 14) and Cambodia (COM(97) 78 final of 3 March 1997, OJ C 107, 5.4.1997, 6, not yet adopted), while a separate Article 12 on social co-operation 'giv[ing] particular priority to respect for basic social rights' has been inserted in the Co-operation Agreement with Yemen (COM(97) 435 final of 8 September 1997, OJ C 317, 18.10.1997, 5, not yet adopted). The recent Agreement with FYROM, on its part (*supra* note 49), even includes social rights among its main objectives (Article 1, paragraph 5). According to this Article, the Parties 'acknowledge the importance of social development which should go hand in hand with any economic development' and undertake to 'give particular priority to the respect for basic social rights' (emphasis added).

⁷⁶ *Supra* note 31.

Opinions consider whether these countries have adhered to the European Social Charter or not (other conventions considered include the European Convention on Human Rights, the European Torture Convention and the main UN instruments). There is also a brief discussion on the state of certain selected economic and social rights, such as trade union rights, but this discussion is generally much shorter than the part of the Opinions dealing with civil and political rights. This may be indicative of the fact that economic, social and cultural rights, while being seen (also) as part of the human rights agenda, have not yet been conceived as enjoying quite the same status qua human rights as civil and political rights.

Finally, it will be recalled that the 1997 Commission proposal for a human rights financing regulation⁷⁷ is based on the principle of indivisibility of human rights. That economic and social rights are included in the concept of human rights is spelled out in a preambular paragraph.

3.3. Minority Rights

While the Commission Opinions on the ten candidate countries make rather short shrift of economic and social rights, the same is not true of what in the Opinions is called 'minority rights and the protection of minorities'. Especially for countries with large minority populations, such as Estonia and Latvia, there is a fairly detailed discussion of existing problems and the need to integrate the minority population into the society.

This emphasis on minority rights is not anchored in any long-standing EC law tradition. The concept of minority rights has not had a specific place in Community law, which may relate to the fact that some Member States have emphasised the unity of the State and the Nation rather than special minority arrangements.⁷⁸ At the same time, the case-law of the Court of Justice,⁷⁹ in referring to 'international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories' does not exclude that some minority rights could be included in the *acquis*. But this is uncertain ground, given the reservation formulated by one Member State to Article 27 (persons belonging to ethnic, linguistic or religious minorities) of the International Covenant on Civil and Political Rights.⁸⁰

Nor does the Treaty of Amsterdam introduce the concept of minority rights into the founding Treaties. However, this Treaty may be said to take some steps in this direction. For instance, the principle of non-discrimination, traditionally limited to discrimination on the basis of nationality (Article 6 of the EC Treaty), has merited a new Article 6a, according to which the Council may take appropriate action to combat discrimination based, *inter alia*, on 'racial or ethnic origin'.⁸¹ Moreover, a new version of Article 128 (4) requests the Community to take cultural aspects into account in its action under other provisions of the Treaty, 'in particular in order to respect and to promote the diversity of its cultures'.

With respect to the external dimension, express references to minority rights include the 1997 Council Conclusions on the future strategy of 'Conditionality' with respect to ex-Yugoslavia.⁸² In a broader EU framework (including the policies of Member States), minority rights and the protection of minorities have received much attention during the 1990s, with the instruments adopted in the framework of the Organisation of Security and Co-operation in Europe (OSCE), the Council of Europe Framework

⁷⁷ *Supra* note 61.

⁷⁸ See M.A. Martín Estébanez, 'The Protection of National or Ethnic, Religious and Linguistic Minorities', in Neuwahl and Rosas, *supra* note 1, 133-163 at 133-134.

⁷⁹ *Supra* note 69.

⁸⁰ The French reservation, the text of which can be found e.g. in *Human Rights: Status of International Instruments* (1987) 35, states that "article 27 is not applicable as far as the Republic is concerned". It should be noted that Greece only ratified the Covenant in 1997, without, however, making any reservation in this respect.

⁸¹ Already on 2 June 1997, the Council adopted Regulation No. 1035/97 establishing a European Monitoring Centre on Racism and Xenophobia, OJ L 151, 10.6.1997, 1. The Regulation is based on Articles 213 and 235 of the EC Treaty.

⁸² *Supra* note 46.

Convention for the Protection of National Minorities of 1994 and, at the universal level, the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992.⁸³

This more recent emphasis on minority rights and the status of minorities has, especially at the European level, been seen as part of a policy to promote stability and sustainable development in 'new' democracies and countries in transition. The Commission's 1997 Opinions on the ten candidate countries of Central and Eastern Europe⁸⁴ should be seen against this background. The Opinions are based on a broad conception of what constitutes a minority, including that part of the permanent population which has not been granted citizenship by countries such as Estonia and Latvia.⁸⁵ With respect to these countries, the Opinions discuss the criteria for acquiring citizenship and the rights of the minority populations with respect to freedom of movement, political participation and access to public posts, access to courts, freedom of information and the educational system.

The status of minority rights as part of the enlargement process would be confirmed, in line with the Copenhagen criteria, by the adoption of a new Regulation relating to the pre-accession strategy. In fact, the Commission proposal of December 1997 refers to the need to respect the principles of 'democracy, the rule of law, respect for human rights or the protection of minorities'.⁸⁶ The separate mentioning of minorities is supposedly meant to highlight minority protection rather than to suggest any dividing line between it and 'human rights'.

Finally, it should be noted that the 1997 Commission proposal for a human rights financing regulation contains a preambular paragraph confirming that EC human rights programmes should favour special groups, including 'minorities' as well as 'indigenous peoples'.⁸⁷ Community assistance could thus promote minority rights in all third countries, not just the Central and Eastern European States which are candidates for enlargement.

4. Summary and Conclusions

Especially since the early 1990s, human rights have found a place in EC external policies, including commercial policies. In fact, a considerable part of EU external human rights activities and policies has been situated in the 'First Pillar', that is, Community legal acts, rather than CFSP action. This is after all not surprising, given that international agreements and secondary legislation can only be adopted in the framework of the Communities.

Nevertheless, the scope and intensity of Community action in this field has continued to be surrounded by controversy. This can be seen from the statements made by some Member States before the ECJ in its consideration of Opinion 2/94 (on adherence to the ECHR), the 1997 discussions on competence and legal base for the adoption of the proposed Council Regulation(s) on human rights financing programmes and the absence from the Treaty of Amsterdam of a clause expressly enabling the EC to adhere to international human rights conventions, including the ECHR.

But the proposed Regulation(s) on human rights financing programmes (one of which might eventually be based on Article 235), and the provisions relating to human rights which did find their way into the

⁸³ On these developments see, e.g., A. Phillips and A. Rosas (eds), *Universal Minority Rights* (1995) passim (Part II containing the relevant texts). The OSCE documents and the 1992 UN Declaration have been adopted by consensus and thus accepted by all EU Member States.

⁸⁴ *Supra* note 64.

⁸⁵ For a similar approach, see the General Comment on Article 27 of the International Covenant on Civil and Political Rights approved by the Human Rights Committee in 1994, Report of the Human Rights Committee, Vol. I, GAOR, Forty-ninth Session, Supplement No. 40 (A/49/40) 107-110. Compare the declaration made by Estonia to the Council of Europe Framework Convention for the Protection of National Minorities (ratification of 6 January 1997), which attempts to exclude non-citizens from the protection of the Convention.

⁸⁶ *Supra* note 56.

⁸⁷ *Supra* note 61.

Amsterdam Treaty, are indicative of a trend towards a full-fledged human rights competence of the Community, including in the external field. The human rights clauses of the EC bilateral agreements and the autonomous legislation on trade preferences and technical assistance and development programmes are of course also significant in this regard. Moreover, it should be recalled that since the adoption of a model human rights clause in May 1995, all subsequently negotiated EC 'framework' trade and co-operation agreements have been bestowed with such a clause.

At the time of this writing, there is also an increased tendency to accept (qualified) majority voting for the suspension of Community legal acts in case of human rights violations committed by a third country (modification of the MEDA Regulation, new Regulation supplementing the Phare Regulation, consideration of procedures for suspending the Lomé Convention). This may imply that the possibility of suspension will not remain a dead letter. In fact, the recent suspension of GSP trade preferences with respect to Myanmar and the exclusion of the FRY from the Community's autonomous import regime for certain countries of south-east Europe in 1998 show that suspension is not just a theoretical possibility. In the same vein, the recent use of the Tacis 'human rights clause' with respect to Belarus, while of course not technically a case of 'suspension', nevertheless shows that such clauses can be used to adopt, by qualified majority, positive measures aimed at restoring human rights in certain partner countries. Human rights conditionality has thus entered both trade and technical assistance policies.

EC external human rights policies are underpinned by two fundamental principles: universality and indivisibility. As part of the emphasis on universality, the Universal Declaration of Human Rights stands out as the normative basis of all activities. EC external human rights policies are based on the presumption that the Universal Declaration expresses general principles which have become binding on all subjects of international law, including the Community itself.

The principle of indivisibility stresses that human rights are interdependent and interrelated and that the distinction between different categories of human rights, while sometimes useful as a presentational and educational tool, should not lead to any watertight compartments between, for instance, civil and political rights on the one hand and economic, social and cultural rights on the other. Community legal acts and Commission documents generally seem to be based on the principle of indivisibility and an 'integrated' approach. Only the coming years will tell what specific weight economic and social rights, and minority rights, will be given in the development of EC and EU external human rights policies.

While the EC, as a subject of international law, is already bound by, and influences the development of, general international law in the field of human rights, the Community remains formally outside the written conventions, including the ECHR. This is regrettable, as it means that the EC is not directly responsible for the execution of these conventions. While EC accountability could already in the present situation be advanced on the basis of voluntary co-operation with the treaty-bodies established under the various conventions, EC adherence to such human rights conventions as the ECHR, the European Social Charter and the 1966 Covenants is a challenge which has not yet been met with an adequate response.

Another challenge, certainly not limited to the field of human rights, is posed by the distinction between 'First Pillar' (EC) and 'Second Pillar' (Non-EC, EU) matters. While the present article has not addressed 'Second Pillar' issues, a long-term strategy for an EC/EU human rights policy must take as one of its starting points the principle of coherence ('consistency'), as this is proclaimed by Article C of the TEU for the EU's 'external activities as a whole'.

3.5 JHH Weiler & Sybilla Fries: An EU Human Rights Agenda for the New Millennium – The Competences of the Community and Union

**THIRD WORKING DRAFT – NOT FOR CIRCULATION OUTSIDE THE PROJECT ON AN EU HUMAN RIGHTS AGENDA FOR THE NEW MILLENNIUM.
(STRICTLY NOT FOR CITATION)**

I. Prologue – Don't Do What I Do, Do What I Tell You to Do

The question of Community Competences in the field of human rights has taken a new turn with the publication of the Proposal for a Council Regulation (EC) on the development and consolidation of democracy and the rule of law and respect for human rights and fundamental freedoms (OJ No C 282/97, p. 14) COM(97) 357 final - 97/0191(SYN) (Submitted by the Commission on 24 July 1997) and the widely circulated Opinion of the Legal Service of the Council on this proposal.

Until now, the debate about competences mostly turned on the reach of the judicial writ of the European Court of Justice especially to certain classes of Member State Acts. With the publication of the Commission Proposal – what could be considered as a bold move towards a comprehensive Human Rights Policy of the Community, the discussion shifts from Court to Political Institutions.

On its face this seems to be a simple morality tale: The Commission, champion of human rights proposes and the Council (Legal Service) seeks to place niggardly restrictions and constraints.

The burden of the Council position turns on the following legal propositions:

The Council first repeats the Court's affirmation in Opinion 2/92 that

No treaty provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field

Following what it believes is the burden of Opinion 2/92 the Council comes to the conclusion that Article 235 could not be used either.

As regards the use of Article 130w which refers to the objectives set out in Article 130u, the Council, purporting to follow the decision of the Court in Portugal v Council¹⁶¹ argues that Article 130u cannot be a legal basis for measures whose main object and purpose is democratization and human rights rather than Cooperation Development.¹⁶²

¹⁶¹ Case C-268/94, Portuguese Republic v. Council of the European Union, [1996] ECR I-6207.

¹⁶² We accept that this is a plausible reading of Portugal v Council by the Legal Service. What may be questioned is the decision of the Court to read Article 130u(2) as necessarily an ancillary provision to a more generic Cooperation Development policy and not allow an autonomous Community measure or Community Agreement (ex Article 130y) to be directed entirely at democracy, rule of law and human rights. Why, one may ask, would the provisions of 130u(1) alone appropriately describe a cooperation development measure but Article 130u(2) not? 130u(1) provides: Community policy in the sphere of development cooperation... shall foster: the sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them; the smooth

The Council (Legal Service) then concludes that 130w and 235 may only be used to support Human Rights and Democratization measures which are part of, and ancillary to, general Cooperation Development Instruments. It also would allow, following existing practice¹⁶³ the usage of Article 235 as a basis for human rights and democratization measures in instruments of cooperation in relation to countries which are not, strictly speaking, developing countries – citing such famous programmes as Phare, Tacis and Meda, provided that, where necessary, the enabling regulations are suitably amended.

Even so, not all measures, envisaged by the Commission Proposal would be allowed.

Under Article J.1.1 and J.3 TEU many of the actions envisaged in the Commission Proposal could take place though these do not require a Commission Proposal.¹⁶⁴ This, of course, would split the operation and transfer some of the power away from the Commission Services promoting the Proposed Regulation.

Finally, the Council is emphatic that

in any case, no measure in this area could be directed towards actions promoting the observance of human rights and democratic principles by and in the Member States.

We believe that as this legal tale unfolds, there are no clear saints and villains. All Institutions seem to playing a corporatist game intent on promoting and preserving their own prerogatives under the guise of concern for human rights. They all seem to be giving a new meaning to the term “Chtzpah” by preaching to others what they do not practice themselves – following faithfully the Officers’ maxim: Don’t do what I do, do what I tell you to do. In this they seem to be taking their cue from the Community as a whole, which is extremely apt at preaching democracy to others when it, itself, continues to suffer from a serious democratic deficiencies and to insist that all new comers adhere to the ECHR when it, itself, refuses to do the same.

The Court has – laudably – found no difficulty over the years to assert a comprehensive basis for a judicial protection of human rights covering the entire field of Community law, including, where appropriate Member State acts. However the proposed accession to the ECHR would, in the Court’s eyes, in a passage noted for its opaqueness and cryptic nature entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.

Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.

Of course, given the political reality and voting requirements of Treaty Amendment, this decision meant the end to accession. We can only guess why accession to the Convention would be of a constitutional significance greater than, say, membership in the new WTO or of adherence by Member States most of which did not require a Constitutional Amendment to join the ECHR. There is no answer, as regards the integration of all the provisions of the Convention, which

and gradual integration of the developing countries into the world economy; the campaign against poverty in the developing countries. 130u(2) provides: Community policy in this area shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms. Why 130u(1) should be privileged over 130u(2) is not altogether clear.

¹⁶³ See the excellent Rosas & Brandtner, Human Rights and the External Relations of the European Community, 1998 EJIL (forthcoming) for chapter and verse.

¹⁶⁴ J.1.1. includes as an objective of PESC -- to develop and consolidate democracy and the rule of law, and respect for human rights and fundamental freedoms.

provisions give trouble to the Court, why the possibility of a Mixed Agreement was not contemplated, and how this could be a concern without seeing the negotiated entry instruments: After all, clearly some provisions of the ECHR would have to be modified to allow EC membership. The suspicion is, therefore, despite strenuous denials by certain Members of the Court, that it was the “institutional implications” that caused most trouble and that principal among these was the institutional implication which would submit the Court of Justice, like its constitutional brethren in the Member States, to scrutiny by the Strasbourg Court.

Nonetheless, we will argue that, contrary to the Council Legal Service, it is possible to read Opinion 2/94 as permitting a Community human rights policy, provided that certain conditions are maintained.

The Council (Legal Service) position is also interesting. Having just approved a Common Position on Tobacco Advertising – a measure masquerading as harmonizing obstacles to free movement in the internal market, but in fact conceived and conspicuously explained in its earlier life as having a principal public health objective (and thus requiring as its principal legal basis Article 129 which inconveniently precludes legislation) it is curious to see the sensibility to an objective analysis of object and purpose of legislation as a condition for establishing legal basis.

Nonetheless, we do not disagree with the Council analysis of the limits of Article 130u (we just marvel at the, well, elasticity, with which it uses the underlying methodology) but we do, strongly, disagree, as we shall argue that there is no legal basis for a Community Human Rights policy which would affect human rights within and by the Member States. We shall argue that so long as such a policy is in the field of Community law, what is sauce for the Judicial goose, is also sauce for the legislative gander.

Finally the Commission. It is not our purpose or task in this paper to analyze or critique the Commission proposal. And giving money to worthy NGOs (“partners”) is always a good thing – thought the proposal would allow handouts to all manner of public bodies, including governments as well as “private sector operators.” The Commission Proposal in many respects is, however, a disappointing and ugly document which, at its worst, mocks the very values which it purports to promote.

The document borrows the canonical language of of developing and consolidating democracy and the rule of law, and to that of respecting human rights and fundamental freedoms

In the legal order, a respect for jurisdictional limits of the Community is an important dimension of the Rule of Law and of Democracy. A Community and Union which transgress such limits not only breach an important constitutional principle but also contribute to a continuous aggregation of power in the centre compromising an important aspect of democracy.

It is difficult to read the Proposal as drafted with its loose language such as Article 2(d) which would apparently allow unrestricted support to operations supporting local, national, regional or international institutions involved in the protection or promotion of human rights as if the Commission really believes that the Community and Union truly have no limits on such activities or that, because of the important aims, others will be shamed into not contesting the proposals. The words “rule of law” appear again and again, but nowhere will you find material restrictions limiting such support to those fields where the Community may appropriately act. Respect for constitutional divisions of power in the federal structures that have been set up in many of the countries to which this instrument is aimed would be part of the Rule of Law that one tried to instill and encourage. What an exquisite irony that it is done by an instrument which shows no sensitivity to that very issue.

The same is true with another word which appears, again and again, in the Commission proposal: Democracy. But are the democratic controls which the Commission proposes for itself in this field adequate?

An Advisory Committee of Member State nominated mandarins? An annual Report to the European Parliament with a summary of activities but no continuous Parliamentary oversight? The notoriously non-transparent and undifferentiated (all-or-nothing) controls through the budgetary procedure? The conspicuous absence of transparency as regards financial order of magnitude envisaged.

There are two other elements which cannot but strike the reader of this proposal: The almost exclusive reliance on financial handouts to others as the method of vindicating the objectives of the proposal and, more egregiously, the total absence of any notion that the Community and Union themselves (and their Institutions) might have room for improving the situation of human rights within.

Some of the NGOs – especially those operating in third countries – can sigh with relief, since the legal opinion of the Council provides the way through skillful amendment and word smithery here and there to make the necessary pay-outs. But one cannot but lament this document as a poor substitute for a full fledged human rights policy which the Commission could have and should have presented. Maybe the invitation of Amsterdam Article 6a will provide such an incentive. If necessary we may propose the contours of such a policy at a later date.

What we propose to do now it to explore the possible legal basis for a comprehensive human rights policy of the Community on the basis of the current Treaty and jurisprudence.

II. Towards a General Principle of Human Rights Competences

What, then, are the competences of the Community in the field of human rights? It is, of course, possible to try and formulate an overarching statement of positive Community law defining such competences. Such an exercise could, we believe, be of some utility in establishing some general principles and ways of thinking about the issue. But it is not enough. The Proverbial “No Vehicles in the Park” gives us a general orientation as to what may and may not be allowed in the Park, but will not answer specifically the question whether skateboards or perambulators are allowed in.

Thus, one would have to apply, in due course, these principles to any comprehensive human rights policy which may be proposed. In an eventual annex we will scrutinize the current Commission Proposal in the light of the legal situation as we find it, which differs from that of the Council.

For decades the European Court of Justice has held, in slightly differing formulae that “... respect for human rights is a condition of the lawfulness of Community acts.”¹⁶⁵ The source and material definition of such rights has likewise become canonical: Community human rights are rooted in, and derive from, “... the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories.”¹⁶⁶ These fundamental rights form “... an integral part of the general principles of [Community] law” and their autonomy from their national source has been regularly underscored: “the question of a possible infringement of

¹⁶⁵ Recently Opinion 2/94 Recital 34

¹⁶⁶ Opinion 2/94 Recital 33.

fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself.”¹⁶⁷

Somewhat less noticed in this field is a classical move which is one the hermeneutic hall marks of the Court: The move from norms to institutional duty, from substance to procedure, from ius to remedium. We are mostly familiar with this move in the constitutional area which defines the relationship between the Community legal order and that of the Member States. Norm oriented doctrines such as direct effect or supremacy are regularly, and without fuss, turned into institutional duties on Member State courts. The high tide of this move in that area is the Francovich¹⁶⁸ jurisprudence. Another remarkable example of the Court’s Norm-Duty jurisprudence is its decision which found France in violation of its obligations under the Treaty for failure to prevent the obstruction to free movement of goods by private individuals.¹⁶⁹

In Commission v France the Court, inter alia, held:

The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as a positive act.

Article 30 therefore requires the Member States not merely themselves to abstain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory.

[...]

It should be added, by virtue of the combined provisions of Articles 38 to 46 and Article 7(7) of the EC Treaty, the foregoing considerations apply also to Council regulations on the common organization of the markets...¹⁷⁰

We are, of course, aware of the difference between the fundamental freedom when it concerns Free Movement and the fundamental freedom of human rights. The former is an object of the Treaty in the sense of Article 3 the latter, in say, F.2 is a duty of the Union as a whole which, under Amsterdam, will become justiciable. But even if we take a minimalist view, the transverse notion of human rights means that in any measure adopted by the Community following its Article 3 type objectives, respect for human rights is mandated. And in this respect, at least, abstaining from taking action is, as the Court reasons in Commission v France, just as likely to cause an obstruction to fundamental human rights as would a positive violative act.

Thus, in T.Port v. Bundesanstalt für Landwirtschaft und Ernährung¹⁷¹ the Court addressed various aspects of the duty of the Community legislator to act in the context of a transition from a national regime to a Community Common Organization which require certain transitional measures and where the possibility of an Article 175 action exists.

The Court’s words are suggestive:

¹⁶⁷ Case 44/79 Hauer 1979 ECR 3727, Recitals 14 and 15.

¹⁶⁸ Joined Cases 6 and 9/90 Francovich 1991 ECR I-5357

¹⁶⁹ Case C-265/95 Commission/France, Judgment of 9 December 1997.

¹⁷⁰ Case 265/95 Recitals 31, 32, 36

¹⁷¹ Case 68/95 1966 ECR 6065.

Those transitional measures must address difficulties encountered after establishment of the common organization of the market... (Recital 36)

[...]

When assessing whether transitional measures are necessary, the Commission has broad discretion [...]. As the Court held in its order in Case 280/93 R Germany v Council [...] the Commission, or the Council [...] are, however, obliged to take action if the difficulties associated with the transition from national arrangements to the common organization of the market so require. (Recital 38)

It is for the Court of Justice to review the lawfulness of the Community Institutions' action or failure to act. (Recital 39)

The Community Institutions are required to act in particular when the transition to the common organization of the market infringes certain traders' fundamental rights protected by Community law, such as the right to property and the right to pursue a professional or trade activity. (Recital 40, emphasis added).

It would seem that the Court is moving beyond the prohibition on measures which, in and on itself, violate human rights, and is setting up a positive duty to take measures to ensure that certain rights should not be compromised.

We would submit that such legislative competence is inherent in each and every field of legislative competence of the Community.

Put differently, in the first instance, from the negative prohibition on obstacles to free movement, was derived a positive institutional duty (the contours and reach of which should not be exaggerated) effectively to ensure such freedom and from the second instance of the Common Organization was established a duty to act so as to ensure that human rights are respected even when, arguably, the Community measure itself does not create a violation.

The Court has made a similar move in the area of human rights: In *Cinéthèque* (and elsewhere) it expressed the normative statement about human rights (respect for human rights as a condition for lawfulness) as an institutional, nay, Institutional duty: "...[I]t is the duty of this Court to ensure the observance of fundamental rights in the field of Community law..."¹⁷² In *ERT* it imposed, somewhat controversially, a similar duty on Member State courts as regards a certain class of Member State acts.

Cinéthèque is important because it belongs to the pre SEA, TEU era, namely to an era in which fundamental human rights were not explicitly mentioned or even alluded to in the Treaties – the Constitutional Charter of the Community. This absence did not prevent the Court from articulating the norm – human rights as part of Community General Principles of law nor of a redefinition¹⁷³ of its Institutional role, right and duty, to ensure that human rights are not violated. This duty which the Court imposed on itself did not relate to an explicit objective laid down in the treaty, but was, it is presumed, considered as necessary to enable the Community to carry out its functions. Respect for and protection of human rights were, thus, conceived as an integral, inherent, transverse principle forming part of all objectives, functions and powers of the Community.

¹⁷² Joined Cases 60 and 61/84 *Cinéthèque*, 1985 ECR 2605, Recital 26.

¹⁷³ cf. Case 1/58 *Stork*: "Similarly, under Article 31 the Court is only required to ensure that in the interpretation and application of the Treaty, and of rules laid down for implementation thereof, the law is observed. It is not normally required to rule on provisions of national law. Consequently, the High Authority is not empowered to examine a ground of complaint which maintains that, when it adopted its decision, it infringed principles of German constitutional law. . . ."

Otherwise, whence the jurisdiction of the Court to ensure, in the entire field of Community law, the observance of fundamental rights?

In articulating a general principle of Community competences in the field of human rights it would seem to us as following from the Court's overall jurisprudence to suggest that it is not only the Court, as one of the Institutions of the Community that has a duty to ensure the observance of fundamental rights in the field of Community law, but that such a duty rests, inherently, on all Institutions of the Community exercising their competences within the field of Community law. Why would such a duty fall on the Court, in some instances on Member State courts, in some instances on the executive or legislative agencies of the Member States but not on the political Institutions of the Community – primarily Commission, Council and Parliament?

Of course the political Institutions enjoy wide discretion in exercising their powers to attain the functions of the Community. Thus, their duty to ensure the observance of human rights within the field of Community law could not, under normal circumstances, be the subject of, say, a 175 action.¹⁷⁴ But equally, should Commission, Council and Parliament decide to discharge their inherent duty to ensure the observance of fundamental rights in the field of Community law by legislating aiming to do just that, and provided such legislation did not stray from the field of Community law, it is hard to see on what ground their overall competences could be challenged. Would the Commission and Council not, for example, have the competences simply to codify what the Court has done in its jurisprudence so that its jurisprudence can have a greater impact on all public authorities?¹⁷⁵

We now have to address as a matter of principle two issues: What would or could be the content of legislative and administrative action by the political Institutions in this field; and what could be the legal basis of such action.

To the first question we shall give a brief answer and deal with it more extensively in the second part of this paper. If we are to take seriously the notion of ensuring respect for human rights, long gone are the days whereby the mere provision of formal judicial remedies would be considered a sufficient and effective guarantee. The great movement in the 70s and 80s of Access-to-Justice has taught us that formal rights are often just that. That making rights effective often requires positive action, such as the provision of legal services, the dissemination of information, the education of people about their rights, the provision of new forms of legal actions such as class action and a whole variety of procedural, financial and institutional measures. Justice without "Access" is justice denied. To take human rights seriously would require broad action by the political Institutions.

What would be the specific legal basis on which such action may be contemplated?

Especially since the entry into force of the SEA, the question of legal basis for Community legislation has become critical given the different political consequences of differing legal bases in terms of voting procedures and involvement of the European Parliament. What legal basis, then, could and should be used by the political Institutions when exercising their duty to ensure the observance of fundamental rights in the field of Community law?

There seem to be three categories of a legal basis.

The first would be the legal basis governing action in a specific field. The Community 'legislative branch' (Commission, Council, Parliament) could (and arguably should) attach to any legislation it passes "human rights" concerning, say, transparency, information to interested parties, right to appeal, legal aid and the like. There are few areas of Community activity which cannot, negatively

¹⁷⁴ cf. Case 22/70 ERTA and Case 8/73 Massey-Ferguson 1973 ECR 897

¹⁷⁵ But Cf. *Vedder in Europarecht 1996, p. 309ff*

and positively, affect the fundamental rights of individuals and groups. It cannot be stated often enough: The simple fact that individuals have, under certain circumstances, the right to challenge Community acts before the Court or through Article 177b is not in many circumstances in and of itself sufficient to ensure the observance of fundamental human rights.

In some fields, the Community legislation coincides with a classic fundamental right – such as Article 119 ECT. Even here one notes the interplay between norm and affirmative duty.¹⁷⁶

In other fields concern for fundamental rights are specifically mentioned – such as Cooperation and Development Article 130u ECT, and, under Amsterdam, Article 6(a).¹⁷⁷ This is significant since the duty and right of non discrimination and equality is at the core of all other human rights and can provide a broad platform for a human right policy.

The second legal basis would be a more broader use of Article 100a. Member State measures designed to protect fundamental human rights could constitute an obstacle to one of the fundamental freedoms. Subject, perhaps, to the principle of subsidiarity,¹⁷⁸ there could be a Community harmonization measure designed to protect fundamental human rights in the field of application of Community law, just as there is a Community harmonization measure designed to protect the physical life or safety of individuals in this field of free movement.

It may, however be considered necessary, so as to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty, to have a measure which is not directly connected to any specific policy or is not a legitimate harmonization measure. Imagine the aforementioned notion of codifying the Court's jurisprudence in the interest of transparency and efficiency. Imagine the setting up of information bureaus to advise Community citizens of their rights, including their human rights, under the Treaty. Imagine the creation of a mechanism to monitor and report on the status within the field of Community law of those very human rights the observance of which it is the duty of the Court, and other Institutions, to ensure such as the annual report on human rights in the European Union Presented by the Internal Affairs and Civil Liberties Committee of the EP.

Surely ensuring such observance would be enhanced by, and in some cases would depend on, such monitoring. And surely some institutional arrangement would be necessary for such monitoring to be effective. But what would be the legal basis? And if, more audaciously, the Commission wished to bring under one chapeau all threads of the Community's human rights activities within the field of Community law? What if the Community wanted to have a general policy and institutional set up designed, in an integral and coordinated way, to ensure the protection of human rights within the field of Community law?

As the Court in Opinion 2/94 reminds us in Recital 27

No Treaty provision confers on the Community institutions any general power to enact rules on human rights [...].

We have already argued that where there is a specific legislative competence, one can imply a competence to enact provisions designed to ensure that in the specific field human rights are respected. But what if there is not even an implied power?

¹⁷⁶ 119(1) Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

¹⁷⁷ Article 6a. Without prejudice to the other provisions of the Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission ... may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

¹⁷⁸ The Commission view is that Article 100a is an exclusive competence and, thus, may be understood as not subject to subsidiarity: see: Commission Document SEK (92) 1990. We can only accept this view if it means that after 100a legislation, the field is pre-empted. Surely, before exercising its 100a jurisdiction, the subsidiarity considerations should apply.

Again the Court in Opinion 2/94 Recital 28 provides guidance:

In the absence of express or implied powers for this purpose, it is necessary to consider whether Article 235 of the Treaty may constitute a legal basis

In Recital 29 of Opinion 2/94 the Court defines the function of Article 235 as follows:

Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty.

The Court added in Recital 30:

That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.

In the Opinion the Court had to decided about accession to the ECHR. It reached a negative conclusion. But its reasoning should be read strictly.

In Recitals 34 and 35 the Court came to the following conclusions:

Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.

Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could be brought about only by way of Treaty amendment.

What, then, does a strict reading yield? We think it is more than permissible to conclude that the Court would have allowed, and in the light of its earlier jurisprudence on Article 235¹⁷⁹ would have had to allow, reliance on 235 in the field of human rights, if the measure in question:

- did not entail a substantial change in the present Community system for the protection of human rights
- did not entail the entry of the Community into a distinct international institutional system
- did not modify the material content of human rights within the Community legal order¹⁸⁰
- did not have fundamental institutional implications (especially to the hallowed position of the Court)

¹⁷⁹ See e.g. *Erasmus Case 242/87 1989 ECR 1425*.

¹⁸⁰ This is our current formula to attend to the Court's (misconceived) concern about integration of all the provisions of the Convention into the Community legal order.

and more generally

would not and could not be considered of “constitutional significance.”

Put differently, a Community Human Rights Policy which respected the current Institutional balance, which avoided formal accession to the ECHR, which left intact the definition of the material contents of rights and their Community autonomy and which, critically, scrupulously remained within the field of Community law, would not and could not be considered of “constitutional significance” in the sense used by the Court in Opinion 2/94 and, thus, could be based, where necessary (i.e. where other provisions did not exist¹⁸¹) on Article 235 ECT.

How then should one define the field of Community law for the purposes of human right jurisdiction?

One possible definition would equate human rights legislative competence to judicial supervisory competence. With one possible exception, in all those areas and within the domain in which the Court regards itself entitled to pronounce on the lawfulness of measures – Community and Member State – the political Institutions may exercise their legislative and administrative competences.

The equation between the Court and the Legislator can go only so far. The Court’s human rights primary jurisdiction address Community acts which, additionally, may be subject to competences jurisdiction. A Community act may not violate human rights and may additionally, not transgress the legislative limits of the Community. Nonetheless, the inseparability of human rights concern from all aspects of public policy must mean that “the field of Community law” must include a large area of Community regulatory competence.

It seems to us thus, uncontrovertible that the political Institutions may adopt measures of human rights in all those fields which are controlled materially by Community law, either under exclusive or concurrent jurisdiction and in which the object of the human rights legislation would be either Community Institutions or complementary to Community laws and policies. If Community law controls, say, the conditions of access of migrant workers to the labour market in the Community, then in those fields human rights enhancement action would be permitted.

This does not mean, to continue with this example, that all those life situations where one can find migrant workers would or could be subject to Community human rights legislation. What of the example of an intra Community migrant worker condemned to have his arm chopped off as punishment for stealing a loaf of bread?¹⁸² Would such a Member State act be justiciable before the Court? The Court’s answer seems to have been no. It would not, any more than would an alleged violation by other aspects of the penal code, the law of contracts or delicts or property in any of the Member States in which a migrant happened to live or work. Provided the migrant was not discriminated against, provided the occurrence did not happen in an area governed already by Community law – such as conditions of permanence – the jurisdiction of the Court would be barred, and by extension, any would be human rights jurisdiction by the political Institutions. To hold otherwise, i.e. to hold that the Community had jurisdiction in any situation involving a migrant worker would give the Community practically limitless jurisdiction.¹⁸³

¹⁸¹ See, e.g., *GTP Case 45/86 ECR 1987 1493*

¹⁸² cf. A.G. Jacobs in *Case C-168/91 Konstandinidis* in [1993] 3 CMLR 401, generally Darcy Binder “The European Court of Justice and the Protection of Fundamental Rights in the European Community: New Developments and Future Possibilities in Expanding Fundamental Rights Review to Member State Action” 4/95 Harvard Jean Monnet Working Paper Series, www.law.harvard.edu/Programs/JeanMonnet/

¹⁸³ See *Case 299/95 Kremzow* 1997 ECR 2629, especially AG La Pergola, Recital 7 and Judgment Recitals 15-18.

The Court has extended the exercise of its human rights jurisdiction to Member State measures in two types of situation: a. The Agency situation -- when the Member State is acting for and/or on behalf of the Community and implementing a Community policy (Klensch¹⁸⁴ and Wachauf¹⁸⁵); and b. When the State relies on a derogation to fundamental market freedoms (ERT¹⁸⁶) and most recently developed in Bauer.¹⁸⁷

The rationale for agency review is simple and, in our eyes, compelling. All of us often fall into the trap of thinking of the Community as an entity wholly distinct from the Member States. But of course, like some well known theological concepts, the Community is, in some senses, its Member States, in other senses separate from them. This, as two thousand years of Christian theology attest, can at times be hard to grasp. But in one area of Community life it is easy. In the EC system of governance, to an extent far greater than any federal state, the Member States often act as, indeed are, the executive branch of the Community. When, to give an example, a British customs official collects a Community imposed tariff from an importer of non-Community goods, he or she are organically part of the British customs service, but functionally they are wearing a Community hat. If the Court's human rights jurisdiction covers, as it clearly does, not merely the formal legislative Community normative source, but its *mise-en-œuvre*, is it not really self evident, as Advocate General Jacobs puts it in Wachauf, even on a narrow construction of the Court's human rights jurisdiction, that it should review these "Member State" measures for violation of human rights. In this case the very nomenclature which distinguished Member State and Community acts fails to capture the reality of Community governance and the Community legal order. Not to review these acts would be legally inconsistent with the constant human rights jurisprudence and, from the human rights policy perspective, arbitrary: If the Commission is responsible for the *mise-en-œuvre* review will take place but if it is a Member State, it will not?

It would appear to us that also the political Institutions should have human rights competence in this area even if it means that it would be directly imposing human rights obligations in and by the Member States. On what grounds could one fault the Community legislator if in its enabling legislation under the Klensch or Wachauf situations it explicitly, rather than implicitly, instructed the Member States in question on their human rights obligations in administering Milk Quotas?

More problematic is the ERT line of jurisprudence. This would be the exception to our principle of equation between Court jurisdiction and Institutional competence.

Let us first review the jurisprudence of the Court and draw the judicial jurisdictional line and rationale. The development in ERT, foreshadowed by the Opinion of the Advocate General in Grogan¹⁸⁸ is more delicate.

The Treaty interdicts Member State measures which interfere with the fundamental free movement provisions of the Treaty. This interdiction applies to any Member State measure, regardless of its source. The mere fact that the interference may emanate from a constitutional norm is, in and of itself, irrelevant. Likewise, the fact that the constitutional measures may be an expression of a deeply held national societal more or value is, in and of itself, irrelevant. If, say, a Member State, even under widespread popular conviction and support, were to adopt a constitutional amendment which, 'in the interest of preserving national identity and the inalienable fundamental rights of our citizens' prohibited an undertaking from employing foreigners, including Community nationals, ahead of Member State citizens or to purchase foreign goods ahead of national products, such a constitutional provision would be in violation of Community law.

¹⁸⁴ Joined Cases 201 and 202/85 Klensch 1986 ECR 3477

¹⁸⁵ Case 5/88 Wachauf 1989 ECR 2609

¹⁸⁶ Case C-260/89 ERT, 1991 ECR I-29225

¹⁸⁷ Case 368/95 ECR 1997 3689

¹⁸⁸ Case C-151/90 SPUC/Grogan 1991 ECR I-4685

Community law itself defines two situations which may exculpate such a national measure from the Treaty interdiction. First, the national measure itself must be considered as constituting an illegal interference with the market freedom. The Treaty is very vague on this and the Court has developed a rich case law in this regard. Not every measure which on its face seems to interfere will necessarily be construed as a violation of one of the market freedoms. Second, even a national measure which on its face constitutes a violation of the interdiction may, under Community law, be exculpated if it can be shown to fall under derogation clauses to be found in the Treaty. Article 36, for example, speaks of measures "justified" on grounds of public morality, health etc.

The crucial point is that defining what constitutes a violation of the basic market freedoms is, substantively and jurisdictionally, a matter of Community law and for the Court to decide, as is the exculpatory regime. Substantively the Court will interpret the language of the Treaty -- often opaque: What, for example, does (or should) "justified" mean? or "public order" etc. Jurisdictionally, the Court (in tandem with national jurisdictions) will supervise that the Member States are in fact fulfilling their obligations under the Treaty.

One way of explaining the "extension" of human rights jurisdiction to Member State measures in the ERT situation is simple enough. Once a Member State measure is found to be in violation of the market freedoms, but for the derogation it would be illegal. The scope of the derogation and the conditions for its employment are all "creatures" of Community law, Treaty and judge made. Now, it could be argued in opposition, and we would not consider this a specious argument, that one should look at the derogations as defining the limit of Community law reach. We are not persuaded. Even from a formalist perspective, the very structure of, say, Article 30 - 36 indicates the acceptance of the Member States that the legality or otherwise of a measure constituting a prima facie violation of the prohibition on measures having effect to quantitative restrictions becomes a matter for Community law. From a policy perspective it could hardly be otherwise. Imagine the state of the common market if each Member State could determine by reference to its own laws and values -- without any reference to Community law -- what was or was not covered by the prohibition and its derogation. Surely how wide or narrow the derogation is, should be controlled by Community law. The concomitant consequence of this is that once it is found that a Member State measure contravenes the market freedom interdictions such as Article 30, even if it is exculpated by a derogation clause in the Treaty, the Community's legislative competence is triggered and it may become susceptible to harmonization.

Let us illustrate this by taking the most telling instance: The Rule of Reason doctrine developed principally in *Cassis de Dijon*¹⁸⁹ of which *Cinéthèque* is an example. Here the Court has carved out new circumstances, not explicitly mentioned in the Treaty derogation clause, which would allow the Member States to adopt measures which otherwise would be a violation of Article 30. I do not recall any protest by Member States complaining about the Court's rather audacious construction of Articles 30-36 in this regard. But, obviously the Member States are not given a free hand. The Court will have to be persuaded that the Member State measures seeking to benefit from the Rule of Reason are, for example, as a matter of Community law, in the general interest and of sufficient importance to override the interest in the free movement of goods, that they are proportionate to the objective pursued, that they are adopted in good faith and are not a disguised restriction to trade. So, the ability of the Member States to move within the derogations to the free movement provisions are subject to a series of limitations, some explicitly to be found in the Treaty, others the result of judicial construction of the Treaty.

In construing the various Community law limitations on the Member States' ability to derogate from the Treaty and in administering these limitations in cases that come before it, should the Court insist on all these other limitations and yet adopt a "hands off" attitude towards violation of human rights. Is it so revolutionary to insist that when the Member States avail themselves of a

¹⁸⁹ Case 120/78 *Cassis de Dijon* 1979 ECR 649

Community law created derogation they respect too the fundamental human rights, deriving from the constitutional traditions of the Member States, even if the European Community construction of this or that right differs from its construction in this or that Member State? After all, but-for the judicially constructed Rule of Reason in *Cassis*, France would not be able to justify at all its video cassette policy designed to protect French cinematographic culture. To respect the Community notion of human rights in this scenario appears to us wholly consistent with the earlier case law and the policy behind it.

It could be argued that in supervising the derogation the Court should not enter into the policy merits of the Member State measure other than to check that it is proportionate and not a disguised restriction to trade. Human Rights review, on this reading, is an interference with the merits. Again, we are not persuaded. First it must be understood that the doctrine of proportionality also involves a Community imposed value choice by the Court on a Member State. Each time the Court says, for example, that a label informing the consumer will serve a policy adequately compared to an outright prohibition, it is clear that at least some consumers will, despite the label, be misled. There are ample studies to demonstrate the limited effectiveness of labels. Thus, in the most banal proportionality test "lurks" a judicial decision by the ECJ as to the level of risk society may be permitted to take with its consumers.

Second, even if Human rights review may be more intrusive than proportionately in some cases, it need not always interfere with the actual merits of the policy pursued and could still leave considerable latitude to the State to pursue their own devices. Provided they do not violate human rights, the Court will not interfere with the content of the policy. Admittedly this may sometimes thwart their wills, but that, after all, would also be the case under the European Convention on Human Rights. That on some occasions it might give teeth to the European Convention in those countries which have after decades not yet incorporated it into national law must, we assume be welcomed by those who profess to take rights seriously.

One conclusion from this analysis is that the standard of review in this situation should not be the normal Community standard but the standard that would be applied by the ECHR.¹⁹⁰ Unlike the *Wachauf* situation where the Member State is merely the agent of the Community and the Member State measure is in truth a Community measure, here we are dealing with a Member State measure in application of a Member State policy. The interest of the Court and the Community should be to prevent a violation of core human rights but to allow beyond that maximum leeway to national policy.

For the same reason we do not believe that the Community would have legislative competences in this area other than in a situation, discussed above, where the Member State human rights measure itself constituted an obstacle to free movement and could, thus, be subject to an Article 100a harmonization measure.

¹⁹⁰ President Due and Judge Gulman introduce a note of caution to this debate which we fully share: "Not surprisingly, when laying down the necessary criteria for the definition of the area of application of Community fundamental right in the national legal orders, there is one essential requirement which the Court will have to fulfill, i.e. the need to give a convincing explanation, based on the specific requirements of the Community legal order, why it is necessary, for national authorities to respect the same fundamental rights as those respected by the Community institutions. In cases concerning the relationship between Community law and national law and, in particular, where delicate problems of fundamental rights are at stake, the authority of the Court depends on its ability to convince" Due and Gulman, *Community Fundamental Rights as part of National Law*, Scritti in Onore di F.G. Mancini (1998) p. 405ff. at 422. We cannot judge if the rationale we have provided is convincing. But we respectfully disagree with the learned judges on one point: In ERT type review, we do not believe that the ECJ should hold the Member States to the same rights as Community Institutions but only to the ECHR standard which may differ. In Case 368/95 *Bauer*, the Court affirmed its doctrine of ERT explicitly as regards mandatory requirements. Significantly, it then made exclusive reference to the ECHR (Article 10) and not to Community standards as such. Also significant was its reference to a judgment of the European Court of Human Rights – as if shoring up the legitimacy of its jurisprudence by reminding the national courts and national authorities that it is holding them only to a standard that they have already accepted. Recitals 24-26 of judgment.

III. Tentative Conclusions

How then do these considerations affect a “would be” Community Human Rights Policy?

1. Though the Council Legal seems to have drawn the correct implications from *Portugal v Council*, one may question, as we have, the reasoning of the Court. If an Agreement ex Article 130y or a programme ex Article 130w would be legitimate instruments of Cooperation Development if fostering – exclusively – the objectives referred to in Article 130u(1) there is no clear reason to exclude Agreements or Programmes which would, exclusively, contribute to the objectives mentioned in Article 130u(2).

2. Even absent such an interpretation the Community may adopt a general human rights policy the purpose of which would be to ensure that in the field of Community law, the fundamental human rights recognized by the Court are effectively ensured. Given the transverse nature of human rights, such a policy may have as its legal basis the entire gamut legislative competence with, where appropriate, Article 235. Such a programme should be scrupulous in restricting its operation, including contributions to “operators” and “partners” to those whose activities fall within the field of Community law.

3.6 Case C-122/00: Schmidberger



NOTE AND QUESTIONS

Schmidberger and Omega (see 3.7) are important decision where the Court has to deal with a clash between the free movement of goods and services and human rights.

Can human rights - or morality and human dignity, as was the case in Omega - represent an exception to the free movement of goods and services?

Eugen Schmidberger, Internationale Transporte und Planzüge

Case C-112/00

12 June 2003

Court of Justice

ECR [2003] I-000

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

Transitforum Austria Tirol, an association for the protection of the environment, organised a demonstration from 12 to 13 June 1998 on the Brenner motorway to bring to the attention of the public the problems caused by the increase in traffic on that route and to call upon the Austrian authorities to take corrective measures. On 15 May 1998, it duly informed the competent administrative authorities (the Bezirkshauptmannschaft in Innsbruck) and the media of the demonstration, which passed on the information to Austrian, German and Italian road-users. That demonstration, which the Austrian authorities found to be lawful as a matter of national law, took place peacefully on the appointed date and caused the complete closure of the Brenner motorway to road traffic for 30 hours.

Schmidberger, a company specialising in transport between Italy and Germany, brought an action before the Austrian courts seeking compensation from Austria, which it considered to be liable for a restriction of the free movement of goods contrary to Community law. It claimed damages of ATS 140 000 (EUR 10 174.20) because five of its heavy-goods vehicles were immobilised for four consecutive days (the day before the demonstration was a bank holiday and the two following days fell at the weekend, during which lorries may not, in principle, operate).

The Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court), Innsbruck stresses that the requirements of Community law must be taken into account. More particularly, in its view, it is necessary to determine whether the principle of the free movement of goods requires Member States to ensure free access to major trunk routes and whether that obligation prevails over fundamental rights, including the freedoms of expression and assembly in issue in this case. It is on this point, in particular, that it seeks the guidance of the Court of Justice.

Judgement:

[...]

- 46 It should be noted at the outset that the questions referred by the national court raise two distinct, albeit related, issues.
- 47 First, the Court is asked to rule on whether the fact that the Brenner motorway was closed to all traffic for almost 30 hours without interruption, in circumstances such as those at issue in the main proceedings, amounts to a restriction of the free movement of goods and must therefore be regarded as a breach of Community law. Second, the questions relate more specifically to the circumstances in which the liability of a Member State may be established in respect of damage caused to individuals as a result of an infringement of Community law.
- 48 On the latter question, the national court asks in particular for clarification of whether, and if so to what extent, in circumstances such as those of the case before it, the breach of Community law - if made out - is sufficiently manifest and serious to give rise to liability on the part of the Member State concerned. It also asks the Court about the nature and evidence of the damage to be compensated.
- 49 Given that, logically, this second series of questions need be examined only if the first issue, as defined in the first sentence of paragraph 47 of the present judgment, is answered in the affirmative, the Court must first give a ruling on the various points raised by that issue, which is essentially the subject of the first and fourth questions.
- 50 In the light of the evidence in the file of the main case sent by the referring court and the written and oral observations presented to the Court, those questions must be understood as seeking to determine whether the fact that the authorities of a Member State did not ban a demonstration with primarily environmental aims which resulted in the complete closure of a major transit route, such as the Brenner motorway, for almost 30 hours without interruption amounts to an unjustified restriction of the free movement of goods which is a fundamental principle laid down by Articles 30 and 34 of the Treaty, read together, if necessary, with Article 5 thereof.

Whether there is a restriction of the free movement of goods

- 51 It should be stated at the outset that the free movement of goods is one of the fundamental principles of the Community.
- 52 Thus, Article 3 of the EC Treaty (now, after amendment, Article 3 EC), inserted in the first part thereof, entitled 'Principles', provides in subparagraph (c) that for the purposes set out in Article 2 of the Treaty the activities of the Community are to include an internal market

characterised by the abolition, as between Member States, of obstacles to inter alia the free movement of goods.

- 53 The second paragraph of Article 7a of the EC Treaty (now, after amendment, Article 14 EC) provides that the internal market is to comprise an area without internal frontiers in which the free movement of goods is ensured in accordance with the provisions of the Treaty.
- 54 That fundamental principle is implemented primarily by Articles 30 and 34 of the Treaty.
- 55 In particular, Article 30 provides that quantitative restrictions on imports and all measures having equivalent effect are prohibited between Member States. Similarly, Article 34 prohibits, between Member States, quantitative restrictions on exports and all measures having equivalent effect.
- 56 It is settled case-law since the judgment in Case 8/74 Dassonville [1974] ECR 837, paragraph 5) that those provisions, taken in their context, must be understood as being intended to eliminate all barriers, whether direct or indirect, actual or potential, to trade flows in intra-Community trade (see, to that effect, Case C-265/95 Commission v France [1997] ECR I-6959, paragraph 29).
- 57 In this way the Court held in particular that, as an indispensable instrument for the realisation of a market without internal frontiers, Article 30 does not prohibit only measures emanating from the State which, in themselves, create restrictions on trade between Member States. It also applies where a Member State abstains from adopting the measures required in order to deal with obstacles to the free movement of goods which are not caused by the State (Commission v France, cited above, paragraph 30).
- 58 The fact that a Member State abstains from taking action or, as the case may be, fails to adopt adequate measures to prevent obstacles to the free movement of goods that are created, in particular, by actions by private individuals on its territory aimed at products originating in other Member States is just as likely to obstruct intra-Community trade as is a positive act (Commission v France, cited above, paragraph 31).
- 59 Consequently, Articles 30 and 34 of the Treaty require the Member States not merely themselves to refrain from adopting measures or engaging in conduct liable to constitute an obstacle to trade but also, when read with Article 5 of the Treaty, to take all necessary and appropriate measures to ensure that that fundamental freedom is respected on their territory (Commission v France, cited above, paragraph 32). Article 5 of the Treaty requires the Member States to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty and to refrain from any measures which could jeopardise the attainment of the objectives of that Treaty.
- 60 Having regard to the fundamental role assigned to the free movement of goods in the Community system, in particular for the proper functioning of the internal market, that obligation upon each Member State to ensure the free movement of products in its territory by taking the measures necessary and appropriate for the purposes of preventing any restriction due to the acts of individuals applies without the need to distinguish between cases where such acts affect the flow of imports or exports and those affecting merely the transit of goods.
- 61 Paragraph 53 of the judgment in Commission v France, cited above, shows that the case giving rise to that judgment concerned not only imports but also the transit through France of products from other Member States.

- 62 It follows that, in a situation such as that at issue in the main proceedings, where the competent national authorities are faced with restrictions on the effective exercise of a fundamental freedom enshrined in the Treaty, such as the free movement of goods, which result from actions taken by individuals, they are required to take adequate steps to ensure that freedom in the Member State concerned even if, as in the main proceedings, those goods merely pass through Austria en route for Italy or Germany.
- 63 It should be added that that obligation of the Member States is all the more important where the case concerns a major transit route such as the Brenner motorway, which is one of the main land links for trade between northern Europe and the north of Italy.
- 64 In the light of the foregoing, the fact that the competent authorities of a Member State did not ban a demonstration which resulted in the complete closure of a major transit route such as the Brenner motorway for almost 30 hours on end is capable of restricting intra-Community trade in goods and must, therefore, be regarded as constituting a measure of equivalent effect to a quantitative restriction which is, in principle, incompatible with the Community law obligations arising from Articles 30 and 34 of the Treaty, read together with Article 5 thereof, unless that failure to ban can be objectively justified.

Whether the restriction may be justified

- 65 In the context of its fourth question, the referring court asks essentially whether the purpose of the demonstration on 12 and 13 June 1998 - during which the demonstrators sought to draw attention to the threat to the environment and public health posed by the constant increase in the movement of heavy goods vehicles on the Brenner motorway and to persuade the competent authorities to reinforce measures to reduce that traffic and the pollution resulting therefrom in the highly sensitive region of the Alps - is such as to frustrate Community law obligations relating to the free movement of goods.
- 66 However, even if the protection of the environment and public health, especially in that region, may, under certain conditions, constitute a legitimate objective in the public interest capable of justifying a restriction of the fundamental freedoms guaranteed by the Treaty, including the free movement of goods, it should be noted, as the Advocate General pointed out at paragraph 54 of his Opinion, that the specific aims of the demonstration are not in themselves material in legal proceedings such as those instituted by Schmidberger, which seek to establish the liability of a Member State in respect of an alleged breach of Community law, since that liability is to be inferred from the fact that the national authorities did not prevent an obstacle to traffic from being placed on the Brenner motorway.
- 67 Indeed, for the purposes of determining the conditions in which a Member State may be liable and, in particular, with regard to the question whether it infringed Community law, account must be taken only of the action or omission imputable to that Member State.
- 68 In the present case, account should thus be taken solely of the objective pursued by the national authorities in their implicit decision to authorise or not to ban the demonstration in question.
- 69 It is apparent from the file in the main case that the Austrian authorities were inspired by considerations linked to respect of the fundamental rights of the demonstrators to freedom of expression and freedom of assembly, which are enshrined in and guaranteed by the ECHR and the Austrian Constitution.

- 70 In its order for reference, the national court also raises the question whether the principle of the free movement of goods guaranteed by the Treaty prevails over those fundamental rights.
- 71 According to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The ECHR has special significance in that respect (see, inter alia, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37, and Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25).
- 72 The principles established by that case-law were reaffirmed in the preamble to the Single European Act and subsequently in Article F.2 of the Treaty on European Union (Bosman, cited above, paragraph 79). That provision states that '[t]he 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 the Member States, as general principles of Community law.'
- 73 It follows that measures which are incompatible with observance of the human rights thus recognised are not acceptable in the Community (see, inter alia, ERT, cited above, paragraph 41, and Case C-299/95 Kremzow [1997] ECR I-2629, paragraph 14).
- 74 Thus, since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the free movement of goods.
- 75 It is settled case-law that where, as in the main proceedings, a national situation falls within the scope of Community law and a reference for a preliminary ruling is made to the Court, it must provide the national courts with all the criteria of interpretation needed to determine whether that situation is compatible with the fundamental rights the observance of which the Court ensures and which derive in particular from the ECHR (see to that effect, inter alia, Case 12/86 Demirel [1987] ECR 3719, paragraph 28).
- 76 In the present case, the national authorities relied on the need to respect fundamental rights guaranteed by both the ECHR and the Constitution of the Member State concerned in deciding to allow a restriction to be imposed on one of the fundamental freedoms enshrined in the Treaty.
- 77 The case thus raises the question of the need to reconcile the requirements of the protection of fundamental rights in the Community with those arising from a fundamental freedom enshrined in the Treaty and, more particularly, the question of the respective scope of freedom of expression and freedom of assembly, guaranteed by Articles 10 and 11 of the ECHR, and of the free movement of goods, where the former are relied upon as justification for a restriction of the latter.
- 78 First, whilst the free movement of goods constitutes one of the fundamental principles in the scheme of the Treaty, it may, in certain circumstances, be subject to restrictions for the reasons laid down in Article 36 of that Treaty or for overriding requirements relating to the public interest, in accordance with the Court's consistent case-law since the judgment in Case 120/78 Rewe-Zentral ('Cassis de Dijon') [1979] ECR 649.

- 79 Second, whilst the fundamental rights at issue in the main proceedings are expressly recognised by the ECHR and constitute the fundamental pillars of a democratic society, it nevertheless follows from the express wording of paragraph 2 of Articles 10 and 11 of the Convention that freedom of expression and freedom of assembly are also subject to certain limitations justified by objectives in the public interest, in so far as those derogations are in accordance with the law, motivated by one or more of the legitimate aims under those provisions and necessary in a democratic society, that is to say justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued (see, to that effect, Case C-368/95 *Familiapress* [1997] ECR I-3689, paragraph 26, Case C-60/00 *Carpenter* [2002] ECR I-6279, paragraph 42, and *Eur. Court HR, Steel and Others v. The United Kingdom* judgment of 23 September 1998, Reports of Judgments and Decisions 1998-VII, § 101).
- 80 Thus, unlike other fundamental rights enshrined in that Convention, such as the right to life or the prohibition of torture and inhuman or degrading treatment or punishment, which admit of no restriction, neither the freedom of expression nor the freedom of assembly guaranteed by the ECHR appears to be absolute but must be viewed in relation to its social purpose. Consequently, the exercise of those rights may be restricted, provided that the restrictions in fact correspond to objectives of general interest and do not, taking account of the aim of the restrictions, constitute disproportionate and unacceptable interference, impairing the very substance of the rights guaranteed (see, to that effect, Case C-62/90 *Commission v Germany* [1992] ECR I-2575, paragraph 23, and Case C-404/92 *P X v Commission* [1994] ECR I-4737, paragraph 18).
- 81 In those circumstances, the interests involved must be weighed having regard to all the circumstances of the case in order to determine whether a fair balance was struck between those interests.
- 82 The competent authorities enjoy a wide margin of discretion in that regard. Nevertheless, it is necessary to determine whether the restrictions placed upon intra-Community trade are proportionate in the light of the legitimate objective pursued, namely, in the present case, the protection of fundamental rights.
- 83 As regards the main case, it should be emphasised at the outset that the circumstances characterising it are clearly distinguishable from the situation in the case giving rise to the judgment in *Commission v France*, cited above, referred to by *Schmidberger* as a relevant precedent in the course of its legal action against Austria.
- 84 By comparison with the points of fact referred to by the Court at paragraphs 38 to 53 of the judgment in *Commission v France*, cited above, it should be noted, first, that the demonstration at issue in the main proceedings took place following a request for authorisation presented on the basis of national law and after the competent authorities had decided not to ban it.
- 85 Second, because of the presence of demonstrators on the Brenner motorway, traffic by road was obstructed on a single route, on a single occasion and during a period of almost 30 hours. Furthermore, the obstacle to the free movement of goods resulting from that demonstration was limited by comparison with both the geographic scale and the intrinsic seriousness of the disruption caused in the case giving rise to the judgment in *Commission v France*, cited above.
- 86 Third, it is not in dispute that by that demonstration, citizens were exercising their fundamental rights by manifesting in public an opinion which they considered to be of importance to society; it is also not in dispute that the purpose of that public demonstration

was not to restrict trade in goods of a particular type or from a particular source. By contrast, in *Commission v France*, cited above, the objective pursued by the demonstrators was clearly to prevent the movement of particular products originating in Member States other than the French Republic, by not only obstructing the transport of the goods in question, but also destroying those goods in transit to or through France, and even when they had already been put on display in shops in the Member State concerned.

- 87 Fourth, in the present case various administrative and supporting measures were taken by the competent authorities in order to limit as far as possible the disruption to road traffic. Thus, in particular, those authorities, including the police, the organisers of the demonstration and various motoring organisations cooperated in order to ensure that the demonstration passed off smoothly. Well before the date on which it was due to take place, an extensive publicity campaign had been launched by the media and the motoring organisations, both in Austria and in neighbouring countries, and various alternative routes had been designated, with the result that the economic operators concerned were duly informed of the traffic restrictions applying on the date and at the site of the proposed demonstration and were in a position timeously to take all steps necessary to obviate those restrictions. Furthermore, security arrangements had been made for the site of the demonstration.
- 88 Moreover, it is not in dispute that the isolated incident in question did not give rise to a general climate of insecurity such as to have a dissuasive effect on intra-Community trade flows as a whole, in contrast to the serious and repeated disruptions to public order at issue in the case giving rise to the judgment in *Commission v France*, cited above.
- 89 Finally, concerning the other possibilities envisaged by Schmidberger with regard to the demonstration in question, taking account of the Member States' wide margin of discretion, in circumstances such as those of the present case the competent national authorities were entitled to consider that an outright ban on the demonstration would have constituted unacceptable interference with the fundamental rights of the demonstrators to gather and express peacefully their opinion in public.
- 90 The imposition of stricter conditions concerning both the site - for example by the side of the Brenner motorway - and the duration - limited to a few hours only - of the demonstration in question could have been perceived as an excessive restriction, depriving the action of a substantial part of its scope. Whilst the competent national authorities must endeavour to limit as far as possible the inevitable effects upon free movement of a demonstration on the public highway, they must balance that interest with that of the demonstrators, who seek to draw the aims of their action to the attention of the public.
- 91 An action of that type usually entails inconvenience for non-participants, in particular as regards free movement, but the inconvenience may in principle be tolerated provided that the objective pursued is essentially the public and lawful demonstration of an opinion.
- 92 In that regard, the Republic of Austria submits, without being contradicted on that point, that in any event, all the alternative solutions which could be countenanced would have risked reactions which would have been difficult to control and would have been liable to cause much more serious disruption to intra-Community trade and public order, such as unauthorised demonstrations, confrontation between supporters and opponents of the group organising the demonstration or acts of violence on the part of the demonstrators who considered that the exercise of their fundamental rights had been infringed.
- 93 Consequently, the national authorities were reasonably entitled, having regard to the wide discretion which must be accorded to them in the matter, to consider that the legitimate aim

of that demonstration could not be achieved in the present case by measures less restrictive of intra-Community trade.

- 94 In the light of those considerations, the answer to the first and fourth questions must be that the fact that the authorities of a Member State did not ban a demonstration in circumstances such as those of the main case is not incompatible with Articles 30 and 34 of the Treaty, read together with Article 5 thereof.

The conditions for liability of the Member State

- 95 It follows from the answer given to the first and fourth questions that, having regard to all the circumstances of a case such as that before the referring court, the competent national authorities cannot be said to have committed a breach of Community law such as to give rise to liability on the part of the Member State concerned.
- 96 In those circumstances, there is no need to rule on the other questions referred concerning some of the conditions necessary for a Member State to incur liability for damage caused to individuals by that Member State's infringement of Community law.

[...]

3.7 Case C-36/02: Omega



NOTE AND QUESTIONS

The decision in Omega suggests that moral standards and the law have moved on since the 1986 decision in Case 121/85: Conogate where the Court held that Britain could not stop the import of inflatable dolls on the grounds of public morality. It is possible that the Court's decision in Omega could re-ignite debates that most would consider closed; such as abortion. (In Case 159/90: Grogan the Court held that abortion was a service within the meaning of Community law, with the consequence that Ireland, where abortion was illegal could not stop its nationals travelling to another EU country where it was lawful.)

Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn

Case C-36/02

14 October 2004

Court of Justice

ECR [2004] I-000

<http://www.curia.eu.int/en/content/juris/index.htm>

Summary of the facts and procedure:

Omega is a German company which operated an installation known as a "laserdrome" in Bonn. In its laserdrome, Omega used a form of the game developed and marketed by a company established in the United Kingdom and concluded a franchising agreement with that company.

In 1994, the Bonn police authority prohibited Omega from allowing or tolerating in its laserdrome games which involved firing on human targets. That prohibition was based in particular on the existence of a danger to public policy, the acts of simulated homicide and ensuing trivialisation of violence being contrary to fundamental values prevalent in public opinion.

The Bundesverwaltungsgericht (Federal Administrative Court), hearing an action by Omega against that prohibition at final instance, stayed the proceedings and referred a question to the Court of Justice as to whether it was compatible with fundamental freedoms guaranteed by the EC Treaty, such as the freedom to provide services and the free movement of goods, for national

law to ban the use of a laserdrome where acts of homicide were simulated on the ground that it was contrary to certain values (notably human dignity) enshrined in the German constitution. The essential question was whether the restriction of fundamental freedoms in question had to be based on a conception of law common to all the Member States.

Judgement:

[...]

10. The Bundesverwaltungsgericht takes the view that, under national law, Omega's appeal must be dismissed. It is, however, uncertain whether that result is compatible with Community law, particularly Articles 49 to 55 EC on the freedom to provide services and Articles 28 to 30 EC on the free movement of goods.
11. According to the Bundesverwaltungsgericht, the Oberverwaltungsgericht was right to hold that the commercial exploitation of a killing game' in Omega's laserdrome' constituted an affront to human dignity, a concept established in the first sentence of Paragraph 1(1) of the German Basic (Constitutional) Law.
12. The referring court states that human dignity is a constitutional principle which may be infringed either by the degrading treatment of an adversary, which is not the case here, or by the awakening or strengthening in the player of an attitude denying the fundamental right of each person to be acknowledged and respected, such as the representation, as in this case, of fictitious acts of violence for the purposes of a game. It states that a cardinal constitutional principle such as human dignity cannot be waived in the context of an entertainment, and that, in national law, the fundamental rights invoked by Omega cannot alter that assessment.
13. Concerning the application of Community law, the referring court considers that the contested order infringes the freedom to provide services under Article 49 EC. Omega concluded a franchising agreement with a British company, which is being prevented from providing services to its German customer, whereas it supplies comparable services in the Member State where it is established. There might also be an infringement of the free movement of goods under Article 28 EC, in so far as Omega wishes to acquire in the United Kingdom goods to equip its laserdrome', particularly laser targeting devices.
14. The national court considers that the case in the main proceedings gives an opportunity to spell out in greater detail the conditions which Community law places on the restriction of a certain category of supplies of services or the importation of certain goods. It point out that, under the case-law of the Court of Justice, obstacles to freedom to provide services arising from national measures which are applicable without distinction are permissible only if those measures are justified by overriding reasons relating to the public interest, are such as to guarantee the achievement of the intended aim and do not go beyond what is necessary in order to achieve it. It is immaterial, for the purposes of assessing the need for and the proportionality of those measures, that another Member State may have taken different protection measures (Case C-124/97 Läära and Others [1999] ECR I-6067, paragraphs 31, 35 and 36; Case C-67/98 Zenatti [1999] ECR I-7289, paragraphs 29, 33 and 34).
15. The national court queries, however, whether, in the light of the judgment in Case C-275/92 Schindler [1994] ECR I-1039, a common legal conception in all Member States is a precondition for one of those States being enabled to restrict at its discretion a certain category of provisions of goods or services protected by the EC Treaty. Should Schindler have to be interpreted in that way, it could be difficult to confirm the contested order if it

were not possible to deduce a common legal conception as regards the assessment in Member States of games for entertainment with simulated killing actions.

16. It states that the judgments in *Läärä* and *Zenatti*, delivered after *Schindler*, could give the impression that the Court of Justice no longer adheres strictly to the need for a common conception of law in order to restrict the freedom to provide services. If that were the case, it argues, Community law would no longer prevent the order in question from being confirmed. By reason of the fundamental importance of the principle of human dignity, in Community law as well as German law, there would be no need to enquire further as to the proportionality of the national measure restricting the freedom to provide services.
17. In those circumstances, the *Bundesverwaltungsgericht* decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

Is it compatible with the provisions on freedom to provide services and the free movement of goods contained in the Treaty establishing the European Community for a particular commercial activity - in this case the operation of a so-called laserdrome involving simulated killing action - to be prohibited under national law because it offends against the values enshrined in the constitution?'

Admissibility of the question referred

18. The Bonn police authority questions the admissibility of the question referred and, more particularly, the applicability of the rules of Community law on fundamental freedoms in this dispute. In its view, the prohibition order of 14 September 1994 has not affected any operation of a cross-border nature and cannot therefore have restricted the fundamental freedoms guaranteed by the Treaty. It argues that, at the date on which the order was adopted, the installation which Pulsar had offered to supply to Omega had not yet been delivered and no franchising agreement required Omega to adopt the variant of the game concerned by the order.
19. It should, however, be recalled that, according to settled case-law, it is solely for the national courts before which actions are brought, and which must bear the responsibility for the subsequent judicial decision, to determine in the light of the special features of each case both the need for a preliminary ruling in order to enable them to deliver judgment and the relevance of the questions which they submit to the Court. Consequently, where the questions referred involve the interpretation of Community law, the Court is, in principle, obliged to give a ruling (see, *inter alia*, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 38; Case C-390/99 *Canal Satélite Digital* [2002] ECR I-607, paragraph 18; Case C-373/00 *Adolf Truley* [2003] ECR I-1931, paragraph 21; Case C-18/01 *Korhonen and Others* [2003] ECR I-5321, paragraph 19; Case C-476/01 *Kapper* [2004] ECR I-0000, paragraph 24).
20. Moreover, it also follows from that case-law that the Court can refuse to rule on a question referred for a preliminary ruling by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see *PreussenElektra*, paragraph 39; *Canal Satélite Digital*, paragraph 19; *Adolf Truley*, paragraph 22; *Kapper*, paragraph 25).
21. That is not the case here. Even if the documents before the Court show that, at the time the order was adopted on 14 September 1994, Omega had not yet formally concluded supply or franchising agreements with the company established in the United Kingdom, it is

sufficient to note that, having regard to its forward-looking nature and the content of the prohibition which it lays down, that order is capable of restricting the future development of contractual relations between the two parties. Therefore, the question put by the referring court, which concerns the interpretation of the Treaty provisions guaranteeing the freedom to provide services and the free movement of goods, is not obviously without relation to the actual facts of the main action or its purpose.

22. The question referred by the Bundesverwaltungsgericht must therefore be declared admissible.

The question referred

23. By its question, the referring court asks, first, whether the prohibition of an economic activity for reasons arising from the protection of fundamental values laid down by the national constitution, such as, in this case, human dignity, is compatible with Community law, and, second, whether the ability which Member States have, for such reasons, to restrict fundamental freedoms guaranteed by the Treaty, namely the freedom to provide services and the free movement of goods, is subject, as the judgment in *Schindler* might suggest, to the condition that that restriction be based on a legal conception that is common to all Member States.
24. As a preliminary issue, it needs to be determined to what extent the restriction which the referring court has found to exist is capable of affecting the freedom to provide services and the free movement of goods, which are governed by different Treaty provisions.
25. In that respect, this Court finds that the contested order, by prohibiting Omega from operating its 'laserdrome' in accordance with the form of the game developed by Pulsar and lawfully marketed by it in the United Kingdom, particularly under the franchising system, affects the freedom to provide services which Article 49 EC guarantees both to providers and to the persons receiving those services established in another Member State. Moreover, in so far as use of the form of the game developed by Pulsar involves the use of specific equipment, which is also lawfully marketed in the United Kingdom, the prohibition imposed on Omega is likely to deter it from acquiring the equipment in question, thereby infringing the free movement of goods ensured by Article 28 EC.
26. However, where a national measure affects both the freedom to provide services and the free movement of goods, the Court will, in principle, examine it in relation to just one of those two fundamental freedoms if it is clear that, in the circumstances of the case, one of those freedoms is entirely secondary in relation to the other and may be attached to it (see, to that effect, *Schindler*, paragraph 22; *Canal Satélite Digital*, paragraph 31; *Case C-71/02 Karner* [2004] ECR I-0000, paragraph 46).
27. In the circumstances of this case, the aspect of the freedom to provide services prevails over that of the free movement of goods. The Bonn police authority and the Commission of the European Communities have rightly pointed out that the contested order restricts the importation of goods only as regards equipment specifically designed for the prohibited variant of the laser game and that that is an unavoidable consequence of the restriction imposed with regard to supplies of services by Pulsar. Therefore, as the Advocate General has concluded in paragraph 32 of her Opinion, there is no need to make an independent examination of the compatibility of that order with the Treaty provisions governing the free movement of goods.
28. Concerning justification for the restriction of the freedom to provide services imposed by the order of 14 September 1994, Article 46 EC, which applies here by virtue of Article 55 EC,

allows restrictions justified for reasons of public policy, public security or public health. In this case, the documents before the Court show that the grounds relied on by the Bonn police authority in adopting the prohibition order expressly mention the fact that the activity concerned constitutes a danger to public policy. Moreover, reference to a danger to public policy also appears in Paragraph 14(1) of the OBG NW, empowering police authorities to take necessary measures to avert that danger.

29. In these proceedings, it is undisputed that the contested order was adopted independently of any consideration linked to the nationality of the providers or recipients of the services placed under a restriction. In any event, since measures for safeguarding public policy fall within a derogation from the freedom to provide services set out in Article 46 EC, it is not necessary to verify whether those measures are applied without distinction both to national providers of services and those established in other Member States.
30. However, the possibility of a Member State relying on a derogation laid down by the Treaty does not prevent judicial review of measures applying that derogation (Case 41/74 Van Duyn [1974] ECR 1337, paragraph 7). In addition, the concept of public policy' in the Community context, particularly as justification for a derogation from the fundamental principle of the freedom to provide services, must be interpreted strictly, so that its scope cannot be determined unilaterally by each Member State without any control by the Community institutions (see, by analogy with the free movement of workers, Van Duyn , paragraph 18; Case 30/77 Bouchereau [1977] ECR 1999, paragraph 33). Thus, public policy may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society (Case C-54/99 Église de Scientologie [2000] ECR I-1335, paragraph 17).
31. The fact remains, however, that the specific circumstances which may justify recourse to the concept of public policy may vary from one country to another and from one era to another. The competent national authorities must therefore be allowed a margin of discretion within the limits imposed by the Treaty (Van Duyn , paragraph 18, and Bouchereau , paragraph 34).
32. In this case, the competent authorities took the view that the activity concerned by the prohibition order was a threat to public policy by reason of the fact that, in accordance with the conception prevailing in public opinion, the commercial exploitation of games involving the simulated killing of human beings infringed a fundamental value enshrined in the national constitution, namely human dignity. According to the Bundesverwaltungsgericht, the national courts which heard the case shared and confirmed the conception of the requirements for protecting human dignity on which the contested order is based, that conception therefore having to be regarded as in accordance with the stipulations of the German Basic Law.
33. It should be recalled in that context that, according to settled case-law, fundamental rights form an integral part of the general principles of law the observance of which the Court ensures, and that, for that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories. The European Convention on Human Rights and Fundamental Freedoms has special significance in that respect (see, inter alia, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41; Case C-274/99 P Connolly v Commission [2001] ECR I-1611, paragraph 37; Case C-94/00 Roquette Frères [2002] ECR I-9011, paragraph 25; Case C-112/00 Schmidberger [2003] ECR I-5659, paragraph 71).
34. As the Advocate General argues in paragraphs 82 to 91 of her Opinion, the Community legal order undeniably strives to ensure respect for human dignity as a general principle of

law. There can therefore be no doubt that the objective of protecting human dignity is compatible with Community law, it being immaterial in that respect that, in Germany, the principle of respect for human dignity has a particular status as an independent fundamental right.

35. Since both the Community and its Member States are required to respect fundamental rights, the protection of those rights is a legitimate interest which, in principle, justifies a restriction of the obligations imposed by Community law, even under a fundamental freedom guaranteed by the Treaty such as the freedom to provide services (see, in relation to the free movement of goods, Schmidberger , paragraph 74).
36. However, measures which restrict the freedom to provide services may be justified on public policy grounds only if they are necessary for the protection of the interests which they are intended to guarantee and only in so far as those objectives cannot be attained by less restrictive measures (see, in relation to the free movement of capital, *Église de Scientologie* , paragraph 18).
37. It is not indispensable in that respect for the restrictive measure issued by the authorities of a Member State to correspond to a conception shared by all Member States as regards the precise way in which the fundamental right or legitimate interest in question is to be protected. Although, in paragraph 60 of *Schindler* , the Court referred to moral, religious or cultural considerations which lead all Member States to make the organisation of lotteries and other games with money subject to restrictions, it was not its intention, by mentioning that common conception, to formulate a general criterion for assessing the proportionality of any national measure which restricts the exercise of an economic activity.
38. On the contrary, as is apparent from well-established case-law subsequent to *Schindler* , the need for, and proportionality of, the provisions adopted are not excluded merely because one Member State has chosen a system of protection different from that adopted by another State (see, to that effect, *Läärä* , paragraph 36; *Zenatti* , paragraph 34; Case C-6/01 *Anomar and Others* [2003] ECR I-0000, paragraph 80).
39. In this case, it should be noted, first, that, according to the referring court, the prohibition on the commercial exploitation of games involving the simulation of acts of violence against persons, in particular the representation of acts of homicide, corresponds to the level of protection of human dignity which the national constitution seeks to guarantee in the territory of the Federal Republic of Germany. It should also be noted that, by prohibiting only the variant of the laser game the object of which is to fire on human targets and thus play at killing' people, the contested order did not go beyond what is necessary in order to attain the objective pursued by the competent national authorities.
40. In those circumstances, the order of 14 September 1994 cannot be regarded as a measure unjustifiably undermining the freedom to provide services.
41. In the light of the above considerations, the answer to the question must be that Community law does not preclude an economic activity consisting of the commercial exploitation of games simulating acts of homicide from being made subject to a national prohibition measure adopted on grounds of protecting public policy by reason of the fact that that activity is an affront to human dignity.

[...]

3.8 EMESA Sugar v Netherlands (Application nr. 62023/00)



NOTE AND QUESTIONS

Emesa Sugar v Netherlands is a decision of the Strasbourg based European Court of Human Rights (ECHR). The ECHR was asked by Emesa Sugar to exercise external control on the respect of fundamental rights in the legal order of the EU.

Emesa Sugar claimed that Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms on the Right to fair trial had been violated by not allowing it to submit written observations to the Advocate General's Opinion in a preliminary reference procedure before the ECJ.

EMESA SUGAR N.V. v. the Netherlands

Decision as to the Admissibility of Application no. 62023/00

13 January 2005

European Court of Human Rights
Third section

THE FACTS

The applicant, Emesa Sugar N.V., is a public limited company, having its registered seat in Oranjestad (Aruba). It is represented before the Court by Mr G. van der Wal and Mr P. Kreijger, who are both lawyers practising in Brussels. The respondent Government are represented by their Agent,

Mr R.A.A. Bocker, of the Ministry of Foreign Affairs. The European Commission is represented by Messrs G. Marenco and C. Ladenburger. and Mrs S. Fries.

The facts of the case, as submitted by the parties, may be summarised as follows.

The applicant company's activities include the operation of a sugar factory on Aruba and the export of sugar to the European Communities (EC). Since Aruba produces no sugar, the sugar is bought from cane sugar refineries in Trinidad and Tobago. After purchase, the sugar is transported to Aruba, where it is cleaned, milled and packed.

The applicant company operates within the legal framework of the European Council Decision 91/482/EEC of 25 July 1991. This Council Decision is based on Part IV of the EC Treaty, relating to the association of overseas countries and territories with the EC. Aruba is one of these "overseas countries and territories" ("OCT"). Part IV to the EC Treaty provides the basis for the abolition of customs duties on goods originating from OCTs on import thereof to the EC. In accordance with Article 187 of the EC Treaty, the details of and the procedure for the association of the OCTs with the EC are set out in an Implementing Convention.

Since 1964, there have been several successive Implementing Conventions. The European Council Decision 91/482/EEC is the sixth Implementing Convention. The original version of the sixth Implementing Convention provided for the possibility of imports of goods originating from the OCT to the EC free of customs duties or charges. Goods were not only considered to be of OCT origin when they were wholly obtained within the OCT concerned, but also if they were obtained from one of the ACP (Africa, Caribbean, Pacific) States or the EC and underwent work or processing in the OCT.

The sixth Implementing Convention was amended at mid-term by the European Council Decision 97/803/EEC of 24 November 1997. This amendment severely impeded the commercial operations of the applicant company, since it limited the levy free imports of sugar of ACP/OCT origin within the EC to 3,000 tonnes per year.

Following the adoption of the European Council Decision 97/803/EEC, the applicant company instituted summary injunction proceedings (kort geding) before the President of the Regional Court (arrondissementsrechtbank) of The Hague seeking an interim order prohibiting:

- the Netherlands State from charging import duties on sugar originating in the OCTs from where the applicant company proposed importation;
- the Central Board for Agricultural Products (Hoofdproductschap voor Akkerbouwproducten) from refusing to grant the applicant company import licences; and
- the Aruba authorities from refusing to grant the applicant company movement certificates EUR-1 for sugar produced by it in Aruba, where those certificates were not withheld under European Council Decision 91/482/EEC, before it was amended by the European Council Decision 97/803/EEC.

On 19 December 1997, the President of the Regional Court of The Hague decided to declare the case inadmissible in respect of the claims of the applicant company against the Netherlands State and the Central Board for Agricultural Products, for lack of competence, as the Industrial Appeals Tribunal {College van Beroep voor het Bedrijfsleven} was the competent judicial body for claims concerning import levies, agricultural levies and/or import licences. As to the applicant company's claim against the authorities of Aruba, the President decided to refer a number of questions to the Court of Justice of the European Communities (ECJ) for a preliminary ruling, within the meaning of (former) Article 177 of the EC Treaty, on the validity of the Council Decision 97/803/EC of 24 November 1994 and, pending the outcome of the proceedings before the ECJ, provisionally granted the interim measure sought by the applicant company against the authorities of Aruba.

A hearing was held before the ECJ on 16 March 1999 and, on 1 June 1999, the Advocate General to the ECJ presented his Opinion. Under Article 18 of the AC Statute of the ECJ and Article 59 of the Rules of Procedure of the ECJ, the submission of the Opinion of the Advocate General brought the oral proceedings before the ECJ to an end.

The applicant company's request of 11 June 1999 to be allowed to respond to the Opinion was rejected by the ECJ in a decision of 4 February 2000. The ECJ held inter alia:

- "2. The EC Statute of the Court of Justice and the Rules of Procedure of the Court make no provision for the parties to submit observations in response to the Advocate General's Opinion.

3. However, Emesa relies on the case-law of the European Court of Human Rights concerning the scope of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the Convention'), and in particular on the judgment of 20 February 1996 in *Vermeulen v Belgium* (Reports of Judgments and Decisions, 1996-1, p. 224).

[...]

8. As the Court has consistently held, fundamental rights form an integral part of the general principles of law, the observance of which it ensures (see, in particular, Opinion 2/94 of 28 March 1996 [1996] ECR I-1759, paragraph 33). For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have cooperated or of which they are signatories. The Convention has special significance in that respect (see, in particular, Case C-260/89 ERT [1991] ECR I-2925, paragraph 41).
9. Moreover, those principles have been incorporated in Article 6(2) of the Treaty on European Union, according to which "The Union shall respect fundamental rights, as guaranteed by the European Convention/or 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 the Member States, as general principles of Community law". According to Article 46(d) of the Treaty on European Union, the Court is to ensure that this provision is applied 'with regard to action of the institutions, in so far as [it] has jurisdiction under the Treaties establishing the European Communities and under [the] Treaty [on European Union]'
10. It is also appropriate to recall the status and role of the Advocate General within the Judicial system established by the EC Treaty and by the EC Statute of the Court of Justice, as set out in detail in the Court's Rules of Procedure. «
11. In accordance with Articles 221 and 222 of the EC Treaty, the Court of Justice consists of Judges and is assisted by Advocates General. Article 223 lays down identical conditions and the same procedure for appointing both judges and Advocates General. In addition, it is clear from Title I of the EC Statute of the Court of Justice, which, in law, is equal in rank to the Treaty itself, that the Advocates General have the same status as the Judges, particularly so far as concerns immunity and the grounds on which they may be deprived of their office, which guarantees their full impartiality and total independence.
12. Moreover, the Advocates General, none of whom is subordinate to any other, are not public prosecutors nor are they subject to any authority, in contrast to the manner in which the administration of justice is organised in certain Member States. They are not entrusted with the defence of any particular interest in the exercise of their duties.
13. The role of the Advocate General must be viewed in that context. In accordance with Article 222 of the EC Treaty, his duty is to make, in open court, acting with complete impartiality and independence, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it, which is to ensure that, in the interpretation and application of the treaty, the law is observed.
14. Under Article 18 of the EC Statute of the Court of Justice and Article 59 of the Rules of Procedure of the Court, the Opinion of the Advocate General brings the oral procedure to an end. It does not form part of the proceedings between the parties, but rather opens the stage of deliberation by the Court. It is not therefore an opinion addressed to the judges or to the parties which stems from an authority outside the Court or which 'derives its authority from that of the Procureur General's department (in the French version, "ministere public")' (judgment in *Vermeulen v Belgium*, cited above, paragraph 31). Rather, it constitutes the individual reasoned opinion, expressed in open court, of a Member of the Court of Justice itself.
15. The Advocate General thus takes part, publicly and individually, in the process by which the Court reaches its judgment, and therefore in carrying out the judicial function entrusted to it. Furthermore, the Opinion is published together with the Court's judgment.

16. Having regard to both the organic and the functional link between the Advocate General and the Court, referred to in paragraphs 10 to 15 of this order, the aforesaid case-law of the European Court of Human Rights does not appear to be transposable to the Opinion of the Court's Advocates General.
17. Moreover, given the special constraints inherent in Community judicial procedure, connected in particular with its language regime, to confer on the parties the right to submit observations in response to the Opinion of the Advocate General, with a corresponding right for the other parties (and, in preliminary ruling proceedings, which constitute the majority of cases brought before the Court, all the Member States, the Commission and the other institutions concerned) to reply to those observations, would cause serious difficulties and considerably extend the length of the procedure.
18. Admittedly, constraints inherent in the manner in which the administration of justice is organised within the Community cannot justify infringing a fundamental right to adversarial procedure. However, no such situation arises in that, with a view to the very purpose of adversarial procedure, which is to prevent the Court from being influenced by arguments which the parties have been unable to discuss, the Court may of its own motion, on a proposal from the Advocate General or at the request of the parties, reopen the oral procedure, in accordance with Article 61 of its Rules of Procedure, if it considers that it lacks sufficient information, or that the case must be dealt with on the basis of an argument which has not been debated between the parties (see, in particular, with regard to the reopening of the oral procedure, the order of 22 January 1992 in Case C-163/90 Legros and Others, not published in the ECR, and the judgment of 16 July 1992 in Case C-163/90 Legros and Others [1992] ECR I-4625; the order of 9 December 1992 in Case C-2/91 Meng, not published in the ECR, and the judgment of 17 November 1993 in Case C-2/91 Meng [1993] ECR I-5751; the order of 13 December 1994 in Case C-312/93 Peterbroeck, not published in the ECR, and the judgment of 14 December 1995 in Case C-312/93 Peterbroeck [1995] ECR I-4599; the order of 23 September 1998 in Case C-262/96 Surul, not published in the ECR, and the judgment of 4 May 1999 in Case C-262/96 Surul [1999] ECR I-2685; and the order of 17 September 1998 in Case C-35/98 Verkooijen, not published in the ECR).
19. In the instant case, however, Emesa's application does not relate to the reopening of the oral procedure, nor does it rely on any specific factor indicating that it would be either useful or necessary to do so.
20. Emesa's application for leave to submit written observations in response to the Advocate General's Opinion must therefore be dismissed."

By judgment of 8 February 2000, the ECJ gave the requested preliminary ruling in which it upheld the validity of the Council Decision 97/803 EC of 24 November 1994.

The summary injunction proceedings before the President of the Regional Court of The Hague were subsequently discontinued.

COMPLAINT

The applicant company, relying on the Court's findings in the cases of Vermeulen v. Belgium (judgment of 20 February 1996, Reports of judgments and decisions 1996-1, p. 234, § 33), Van Orshoven v. Belgium (judgment of 25 June 1996, Reports 1996-III, p. 1051, §§ 40-42), J.J. v. the Netherlands (judgment of 27 March 1998, Reports 1998-11, p. 613, § 43) and K.D.B. v. the Netherlands (judgment of 27 March 1998, Reports 1998- II, p. 631, § 44), complains under Article 6 § 1 of the Convention that it was deprived of a fair hearing in that, in the proceedings before the Court of Justice of the European Communities, on a request for a preliminary ruling from the President of the Hague Regional Court, it was not allowed to respond to the Opinion of the Advocate General to the Court of Justice of the European Communities. It argues that the national judiciary is obliged to respect and follow a preliminary ruling of the ECJ and that non-compliance with this obligation can lead to an action against the EC Member State concerned under Articles 226-228 of the EC Treaty for non-compliance with the obligations under the EC Treaty.

THE LAW

The applicant company claimed, by not having been allowed to respond to the Opinion of the Advocate General to the ECJ, that in the proceedings at issue it had been deprived of its right to a fair hearing as guaranteed by Article 6 § 1 of the Convention.

Article 6 § 1 provides, so far as relevant, as follows:

"In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
..."

A. The submissions of the respondent Government

The Government submitted in the first place that they could not be held responsible for the alleged violation, since it concerned an act by the ECJ, an organ of the European Communities (EC). Relying on the case law of the former European Commission of Human Rights to the effect that an application cannot be made against the European Communities (CFDT v. the European Communities and their Member States, application no. 8030/77, Commission decision of 10 July 1978, Decisions and Reports (DR) 13, p. 231), the Government considered that the application should be rejected for being incompatible *ratione personae*.

In case the Court would find that a respondent State could, in principle, be held responsible for an act of an EC organ, the Government submitted, in the alternative, that the EC's legal order in any event ensures respect for human rights. Consequently, the principle of subsidiarity should exclude a review by the Court of the acts at issue. They referred in this respect to the case of *M. & Co. v. Germany* (application no. 13258/87, Commission decision of 9 February 1990, DR 64, p. 138), in which the Commission of Human Rights accepted that it was permissible for States to transfer powers to international organisations provided that, within the organisation, fundamental rights receive an equivalent protection. The Commission found that the EC, through declarations and the existing case law of the ECJ, secured fundamental rights and provided for control of their observance. The Government pointed out that, since that decision, the human rights safeguards in the Community's legal order have been further strengthened. Since the entry into force of the Maastricht Treaty on 1 November 1993, the EC protection of human rights has a treaty basis. This protection has been confirmed in Article 6 § 2 of the Treaty of Amsterdam of 2 October 1997, which reads:

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

The Government argued that, if an act of a member state in execution of EC law cannot be challenged in proceedings before the Strasbourg court as held in the case of *M. & Co. v. Germany*, this applies even more to acts of EC institutions. They considered that, for this reason, the application was also incompatible *ratione materiae*.

In the further alternative, the Government submitted that the facts complained of fell outside the scope of Article 6 of the Convention. In the first place as, according to the Court's finding in the case of *Apis a.s. v. Slovakia* ((dec.), no. 39754/98, 10 January 2000), summary injunction proceedings aimed at obtaining an interim measure do not amount to a determination of civil rights and obligation or of a criminal charge within the meaning of Article 6 § 1 of the Convention. In the second place, the proceedings at issue in the present case concerned the question whether or not the applicant

company was obliged to pay custom duties, whereas in its judgment of 12 July 2001 in the case of *Ferrazini v. Italy* ([GC], no. 44759/98, § 29, ECHR 2001-VII) and its judgment of 23 July 2002 in the case of *Vastberga Taxi Aktiebolag and Vulic v. Sweden* (no. 36985/97, § 75) the Court held that proceedings on tax disputes fall outside the scope of "civil rights and obligations" under Article 6 § 1 of the Convention. As the proceedings in which the President of the Regional Court sought the ECJ preliminary rules at issue solely concerned the question whether the applicant company was obliged to pay customs duties, the Government were of the opinion that, also on these grounds, the application was incompatible *ratione materiae*.

Other objections to admissibility raised by the Government were that the applicant company had failed to exhaust domestic remedies as the summary injunction proceedings before the President of the Regional Court were apparently discontinued after the ECJ had handed down its preliminary ruling which meant that the applicant company had not even completed the domestic proceedings in first instance, and that Article 6 § 1 of the Convention cannot be regarded as applying to proceedings before the ECJ on a request by a domestic court for a preliminary ruling as in such proceedings the ECJ can only give an authoritative interpretation of EC law without applying this interpretation to the particular facts of the underlying case, which remains the task of the national judge who requested the preliminary ruling. The Government lastly contended that, if the Court were to accept to examine the merits of the case, the refusal of the applicant company's request to respond to the Opinion of the Advocate General to the ECJ did not infringe the fairness of the proceedings taken as a whole.

B. The submissions of the applicant company

Pointing out that its application was not directed against the EC but solely against the Netherlands, the applicant company submitted that an EC Member State cannot be allowed, by delegating powers to EC institutions, to escape the judicial control system of the Convention. Relying on the findings of the European Commission of Human Rights in the case of *Tete v. France* (no. 11123/84, Commission decision of 9 December 1987, Decisions and Reports (DR) 54, p. 52) the applicant company argued that violations that emanate from such a transfer of power remain within the scope of responsibility of the transferring Member State. The applicant company distinguished the case of the *CFDT v. France* (cited above) as the conclusion reached in that case had been based on its particular circumstances and as that case had been directed against all EC Member States which could be interpreted as an indirect application against the Council of the EC whereas in the instant case the individual responsibility of only one Member State, i.e. the Netherlands, was invoked.

The applicant company further argued that the above-cited case of *M. and Co. v. Germany* cannot be considered as a precedent for situations in which States violate the rights and freedoms protected by the Convention, in that the equivalent protection tests constitutes an overall test that merely ascertains whether a particular organisation provides, in general terms, equivalent protection of fundamental rights, but which does not work on a case-to-case approach. Such a general approach would imply that the Court would be unable to examine any act of any international organisation as long as this organisation provided a theoretical equivalent protection of fundamental rights. The fact that the EC theoretically provide for an efficient protection of fundamental rights under the Convention does not mean that these rights are effectively protected. Moreover, the principle introduced in the case of *M. and Co. v. Germany* was an application under the Convention cannot be directed against the EC. This principle cannot, however, be interpreted as excluding applications concerning acts of EC institutions.

As to the question whether the proceedings complained of fall within the scope of Article 6 of the Convention, the applicant company submitted that the ECJ, in giving a binding interpretation on a point of EC law raised by the referring domestic judge, does determine civil rights and obligations within the meaning of Article 6 of the Convention. In its opinion, the rights of subjects falling within the jurisdiction of a High Contracting Party to the Convention were at stake, which automatically implies that civil rights are at stake.

The applicant company further refuted the respondent Government's argument that domestic remedies would not have been exhausted. It submitted that there were no legal remedies available at the domestic or EC level capable of redressing the violation of Article 6 of the Convention complained of, i.e. the impossibility to respond to the Opinion of the Advocate General to the ECJ, as the domestic judge has to accept the binding force of the ECJ preliminary ruling.

C. Third party submissions of the European Commission

The European Commission submitted that the application was not directed against any act of the Netherlands, but exclusively an act of a Community institution namely an Order issued by the ECJ on 4 February 2000. It supported the respondent Government's argument that, on this basis, the application should be rejected as incompatible *ratione personae*.

The European Commission made further submissions on the way in which fundamental rights are observed and applied by the Community institutions and considered in agreement with the respondent Government that, in the alternative, the application could be rejected as incompatible *ratione materiae* since equivalent protection of Convention rights exists within the EC legal order. It also considered that the applicant company had failed to comply with the requirement of exhaustion of domestic remedies under Article 35 § 1 of the Convention, in that the ECJ never decides the case before the national court but instead give a reply to a question about EC law. The preliminary ruling procedure is conceived as a dialogue between judges at the national and the Community level on a question of interpretation of EC law. A preliminary reference to the ECJ must be seen as an integral part of the main proceedings at the national level.

Consequently, any question of compliance with the Convention can be analysed, if at all, only at the end of the national proceedings as a whole and having regard to their final outcome.

The European Commission further agreed with the respondent Government that Article 6 of the Convention was not applicable to the proceedings at issue. In the first place as the main proceedings at the domestic level concerned customs duties, i.e. a classical form of taxation, and - secondly - because the national proceedings were summary injunction proceedings aimed at obtaining interim relief and thus did not entail a final determination of the parties' rights and obligations.

D. The Court's assessment

The Court notes that the Government argued at the outset that they could not be held responsible for the alleged violation given that it concerned an act by the ECJ; consequently, the application should be rejected for being incompatible *ratione personae* with the provisions of the Convention. However, the Court does not find it necessary to deal with this question, since, in the particular circumstances of the present case, it considers it more appropriate to determine first whether the proceedings at issue concerned a "dispute" about "civil rights and obligations" within the meaning of Article 6 § 1 of the Convention.

It reiterates that the concept of "civil rights and obligations" cannot be interpreted solely by reference to the domestic law of the respondent State concerned. The Court has on several occasions affirmed the principle that this concept is "autonomous", within the meaning of Article 6 § 1. Pecuniary interests are certainly at stake in proceedings concerning a dispute about the question whether or not customs duties or charges are due for imported goods, but merely showing that a dispute is "pecuniary" in nature is not in itself sufficient to attract the applicability of Article 6 § 1 under its "civil" head, as rights and obligations existing for an individual are not necessarily civil in nature. As customs duties or

charges for imported goods must be regarded as falling within the realm of taxation and as tax matters still form part of the hard core of public-authority prerogatives, with the public nature of the relationship between the taxpayer and the community remaining predominant, the Court considers that tax disputes, including disputes about the determination of import duties or charges, fall outside the scope of civil rights and obligations, despite the pecuniary effects which they necessarily produce for the taxpayer (see, *mutatis mutandis*, *Ferrazzini v. Italy* [GC], no. 44759/98, §§ 24-31, ECHR 2001- VII, and *Vastberga Taxi Aktiebolag and Vulic v. Sweden* (no. 36985/97, § 75, 23 July 2002).

As the subject matter of the summary injunction proceedings taken by the applicant company before the Regional Court of The Hague solely concerned the question whether or not it was entitled to import in the EU its sugar produce free of customs duties or charges, it follows that these proceedings do not fall under the civil head of Article 6.

As the present case does not have any criminal connotation, it does not fall under the criminal head of Article 6 either. Consequently, the facts of the case fall outside the scope of Article 6 of the Convention.

Having reached this finding, the Court does not find it necessary to determine the other admissibility issues raised.

It follows that the application is incompatible *rationes materiae* with the provisions of the Convention within the meaning of Article 35 § 3 and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court unanimously Declares the application inadmissible.

4. HUMAN RIGHTS AND THE DRAFT EUROPEAN CONSTITUTION

4.1 Relevant provisions

See also Part II of the Constitutional Treaty incorporating the Charter of Fundamental Rights.

Article I-2 The Union's values

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article I-3 The Union's objectives

1. The Union's aim is to promote peace, its values and the well-being of its peoples.
2. The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, and a single market where competition is free and undistorted.
3. The Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of children's rights.

It shall promote economic, social and territorial cohesion, and solidarity among Member States.

The Union shall respect its rich cultural and linguistic diversity, and shall ensure that Europe's cultural heritage is safeguarded and enhanced.

4. In its relations with the wider world, the Union shall uphold and promote its values and interests. It shall contribute to peace, security, the sustainable development of the earth, solidarity and mutual respect among peoples, free and fair trade, eradication of poverty and protection of human rights and in particular children's rights, as well as to strict observance and development of international law, including respect for the principles of the United Nations Charter.
5. These objectives shall be pursued by appropriate means, depending on the extent to which the relevant competences are attributed to the Union in the Constitution.

Article I-4
Fundamental freedoms and non-discrimination

1. The free movement of persons, services, goods and capital, and freedom of establishment shall be guaranteed within and by the Union, in accordance with the Constitution.
2. Within the scope of the Constitution, and without prejudice to any of its specific provisions, any discrimination on grounds of nationality shall be prohibited.

Article I-9
Fundamental rights

1. The Union shall recognise the rights, freedoms and principles set out in the Charter of Fundamental Rights which constitutes Part II.
2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Constitution.
3. 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.

Article I-59
Suspension of Union membership rights

1. On the reasoned initiative of one third of the Member States or the reasoned initiative of the European Parliament or on a proposal from the Commission, the Council may adopt a European decision determining that there is a clear risk of a serious breach by a Member State of the values referred to in Article I-2. The Council shall act by a majority of four fifths of its members after obtaining the consent of the European Parliament.

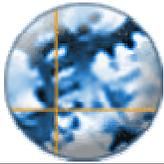
Before making such a determination, the Council shall hear the Member State in question and, acting in accordance with the same procedure, may address recommendations to that State.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, on the initiative of one third of the Member States or on a proposal from the Commission, may adopt a European decision determining the existence of a serious and persistent breach by a Member State of the values mentioned in Article I-2, after inviting the Member State in question to submit its observations. The European Council shall act unanimously after obtaining the consent of the European Parliament.
3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may adopt a European decision suspending certain of the rights deriving from the application of the Constitution to the Member State in question, including the voting rights of the member of the Council representing that State. The Council shall take into account the possible consequences of such a suspension for the rights and obligations of natural and legal persons.

In any case, that State shall continue to be bound by its obligations under the Constitution.

4.2 Charter of Fundamental Rights of the European Union



NOTE AND QUESTIONS

Please find the full text of the Charter of Fundamental Rights of the European Union in your Primary Sources (Treaty Establishing a constitution for Europe, Part II). **It is essential to read this document.**

4.2.1 Background

The Charter of Fundamental Rights of the European Union, as signed and proclaimed by the Presidents of the European Parliament, the Council and the Commission at the European Council meeting in Nice on 7 December 2000, is the end-result of a special procedure, which is without precedent in the history of the European Union and has served as a model to - at least at first sight – an even more far-reaching project: the Convention on the Future of Europe.

The issue of the Charter's legal status has already been raised by the Cologne European Council, which launched the Charter initiative. Although it was drafted as if it were to have full legal effect (see Commission communication on the Legal Nature of the Charter: COM(2000)644) the Nice European Council (see Annex I to the Presidency conclusions) decided to consider the question of the Charter's legal status during the general debate on the future of the European Union and to take the final decision only during the 2004 Intergovernmental Conference.

Regardless of the fact that the Charter's status could be described as pending, it would be wrong and almost unfair to say that it has no effect at all. In its short life, the Charter has already been referred to by most European institutions and even by the Strasbourg based European Court of Human Rights. Increasing numbers of EU citizens are referring to its provisions in the letters, petitions and complaints which are sent to the European Parliament and Commission.

The European Ombudsman was very explicit in his speech of April 8, 2002, to the European Parliament in saying:

“High officials tell me that the Charter is only a political declaration. I understand from such statements that citizens should not expect political promises to be kept. To me this seems like a way to undermine democracy. I would like to stress that European citizens have the right to expect the Charter to be followed by those institutions whose presidents solemnly proclaimed it in Nice in December 2000, that is the Council, the Parliament and the Commission.”

An increasing number of similar statements can be easily found in speeches by Commission officials and even Member state governments' representatives. The Convention Working Group on “Incorporation of the Charter/Accession to the ECHR” answered both questions posted to it in affirmative (see Final Report of 22 October, 2002, CONV 354/02). Nevertheless all eyes still keep on turning to the Courts of the European Communities.

4.2.2 The Charter in the Draft European Constitution

Excerpt from: Draft Constitution: citizens' guide.

The **Charter of Fundamental Rights** has been built-in the draft European Constitution as Part 2.

The text of the **Charter of fundamental rights** had been approved by a previous Convention. The Parliament, the Council and the Commission solemnly proclaimed the Charter on 8 December 2000. However, the Charter was not part of the Union's Treaties and had no binding legal force. The draft Constitution thus achieves a major breakthrough which allows the Union to have its own **catalogue of rights**. The Charter is incorporated into the draft Constitution as Part II; its provisions have binding legal force but this does not mean an extension of the Union's powers.

The institutions, bodies and agencies of the Union must respect the rights written into the Charter. The same obligations are incumbent upon the Member States when they implement the Union's legislation. The Court of Justice will ensure that the Charter is adhered to. The content of the Charter has undergone no changes in relation to the text drafted by the previous Convention and only amendments of form have been made.

The content of the Charter is broader than that of the **European Convention for the protection of human rights and fundamental freedoms** signed in Rome on 4 November 1950 and ratified by all the Member States of the Union. Indeed, whereas the ECHR is limited to civil and political rights, the Charter of Fundamental Rights covers other areas such as the right to proper administration, the social rights of workers, the protection of personal data and bioethics.

Under the terms of the current Treaties, the Union had no competence to adhere to the ECHR, while this competence is explicitly provided for in the draft Constitution, which stipulates that the Union will endeavour to adhere to the ECHR. As for the incorporation of the Charter in the Constitution, adherence to the ECHR does not mean any change to the Union's powers as defined in the Constitution. The full incorporation of the Charter and adherence to the ECHR are complementary rather than alternative steps.

The Charter of Fundamental Rights is an integral part of the European Constitution

Future adherence of the Union to the European Convention on Human Rights

4.2.3 The status of the Charter in AG Opinions

Advocates General within the Court of Justice have, without ignoring the fact that the Charter does not have any autonomous binding effect, referred to it in their opinions and some even clearly emphasised its purpose of serving as a substantive point of reference for all those involved in the Community context.

Virtually all the AGs have referred to the Charter on one or more occasions in their opinions – some almost systematically in all human rights cases assigned to them, where such reference is adequate; others are still more reluctant.

By the end of 2004, the Advocates General had referred to the Charter in 51 cases they handled concerning human rights since the Charter's proclamation in December 2000.

YEAR	2001	2002	2003	2004*
AG opinions	15	11	15	10

(* Based on cases and opinions issued by January 19, 2005. For up-to-date information check the Courts case-law database - http://www.curia.eu.int/en/content/juris/index_form.htm)

Case C-340/99: *TNT Traco - Opinion of AG Alber delivered on 1 February 2001*

This case, involving a dispute between Poste Italiane and a private delivery firm over the Post's right to levy postal dues for services it did not provide, saw the first reference to the Charter by Advocate General Alber.

Case C-173/99: *BECTU - Opinion of AG Tizzano delivered on 8 February 2001*

Regardless of how the Charter had been previously referred to in AG Alber's Opinion in Case C-340/99 it was AG Tizzano in BECTU, who crucially discussed its status and relevance for the first time.

In this case the trade union BECTU objected to the way the British government transposed part of the EU Working Time Directive. The British legislation which implements the European working time directive of 1993, provides that entitlement to leave is conditional upon the person concerned having been continuously employed for 13 weeks by the same employer. The workers represented by BECTU are only employed on short term contracts which are often less than 13 weeks. As a result, they do not become entitled to the right to annual leave under British law. BECTU brought an action against the Secretary of State for Trade and Industry for the annulment of this legislation. The High Court asked the ECJ if the directive allows a Member state to prescribe that a worker's entitlement to paid annual leave does not begin to accrue until the worker has completed a qualifying period with the same employer.

According to the AG, the right to paid annual leave is a fundamental social right based on a series of international documents. The AG continues by claiming:

(Footnotes omitted)

[...]

26. Even more significant, it seems to me, is the fact that that right is now solemnly upheld in the Charter of Fundamental Rights of the European Union, published on 7 December 2000 by the European Parliament, the Council and the Commission 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. Article 31(2) of the Charter declares that: 'Every worker has the right to limitation of maximum working hours, to daily and weekly rest periods and to an annual period of paid leave. And that statement, as expressly declared by the Presidium of the Convention which drew up the Charter, is inspired precisely by Article 2 of the European Social Charter and by paragraph 8 of the Community Charter of Workers' Rights, and also took due account 'of Directive 93/104/EC concerning certain aspects of the organisation of working time.
27. Admittedly, like some of the instruments cited above, the Charter of Fundamental Rights of the European Union 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. In its preamble, it is moreover stated that 'this Charter reaffirms, with due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe and the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights.
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.

[...]

Case C-353/99 P: Council v Heidi Hautala - Opinion of AG Leger delivered on 10 July 2001

Heidi Hautala, a Member of the European Parliament, requested that the Council send her a copy of a report on conventional arms exports. The Council refused to do so, on the ground that it contained sensitive information, disclosure of which could be harmful for the EU's international relations. Under Community law on access to documents, the Council may refuse access to a document in order to protect the public interest with regard to international relations. On 19 July 1999 the Court of First Instance annulled the Council decision and ruled that the Council should consider allowing partial access to documents. The Council lodged an appeal against the judgment of the Court of First Instance.

The AG notes first of all that the strength of the principle of access to documents derives from the fact that it is a fundamental right. He then refers expressly to the Charter of Fundamental Rights, which provides for a right of access to such documents. In his view this establishes the principle of transparency and allows for citizen involvement in the management of public affairs.

The AG addresses the legal validity and role of the Charter:

(Footnotes omitted)

[...]

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 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. It is known that the political and moral values of a society are not all to be found in positive law. However, 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. It is a source of guidance as to the true nature of the Community rules of positive law.

[...]

4.2.4 The status of the Charter in the jurisprudence of the Court of First Instance

YEAR	2001	2002	2003	2004*
CFI judgments	1	3	6	3
CFI orders		2	0	0
Σ CFI	1	5	6	3

(* Based on cases and opinions issued by May 13, 2003. For up-to-date information check the Courts case-law database - <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en>)

The Court of First Instance made its first reference to the Charter of Fundamental Rights in a case involving max.mobil, an Austrian mobile phone operator, and the European Commission. The company complained to the Commission about fees set by the Austrian government for the GSM concession, but its plea was rejected. In determining the legal framework for hearing the case, the court referred to Articles 41(1) and 47 of the Charter, laying down a person's right to have his or her affairs handled impartially, and to secure an effective remedy where rights are violated. The Court in max.mobil illustrates those rights from the Charter as confirming existing "general principles that are observed in a State governed by the rule of law and are common to the constitutional traditions of the Member States".

In Mannesmannröhren-Werke the plaintiff invoked the Charter, but the CFI dismissed its argument: "As regards the potential impact of the Charter, to which the applicant refers (see paragraph 15 above), upon the assessment of this case, it must be borne in mind that that Charter was proclaimed by the European Parliament, the Council and the Commission 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 date."

By now probably the most significant of the cases in which the CFI referred to the Charter is the case of Jégo-Quéré (Case T-177/01). In it the CFI based its new interpretation of the notion of "individual concern" on the Opinion of Advocate General Jacobs in the case of UPA v Council (C-50/00 P) and on the principle of effective judicial protection, while expressly referring to Article 47 of the Charter of Fundamental Rights of the European Union.

References to the Charter of fundamental rights can also be found in two orders issued by the President of the Court of First Instance.

4.2.5 The status of the Charter in the jurisprudence of the European Court of Human Rights

(*as of January 19, 2005 – for most up-to-date information check the ECHR case-law database: <http://hudoc.echr.coe.int>)

Interestingly enough the Charter has already been referred to by an institution outside the EU institutional system - the European Court of Human Rights.

The first reference to the Charter of fundamental rights in the jurisprudence of the European Court of Human Rights can be found in a Separate Opinion of Judge Costa in the case of *Hatton and Others v. the United Kingdom* of 2 October 2001. In this case dealing with noise pollution in the proximity of Heathrow airport judge Costa, while addressing the right to a healthy environment in the light of the case-law of the ECHR, asks himself, if the court (ECHR) went too far in protecting the human right to a sound environment.

“Since the beginning of the 1970s, the world has become increasingly aware of the importance of environmental issues and of their influence on people’s lives. Our Court’s case-law has, moreover, not been alone in developing along those lines. For example, Article 37 of the Charter of Fundamental Rights of the European Union of 18 December 2000 is devoted to the protection of the environment. I would find it regrettable if the constructive efforts made by our Court were to suffer a setback.”

A further reference to the Charter can be found in a joint partly dissenting opinion of judge Sir Nicolas Bratza and judges Fuhrmann and Tulkens the case of *Fretté v. France* of 26 February 2002.

On 11 July 2002, the European Court of Human Rights made two references to Article 9 of the Charter in its rulings against the UK’s ban on marriage for transsexual people (*Case of I. v. UK* (See paragraphs 41 and 80) and *Case of Christine Goodwin v. UK* (See paragraphs 58 and 100)).

On 8 July 2004 the ECHR made a reference to Article 3 of the Charter of Fundamental Rights in its judgement in the *Case of Vo v. France* (See paragraphs 5 and 9).

4.3 Accession to the ECHR

Excerpt from the 6th Report of the Select Committee on the European Union to the House of Lords: "The Future Status of the Charter of Fundamental Rights"

February 3, 2003

[...]

102. The two main proposals on the table are, first, that the Charter should become a Bill of Rights for the European Union and, second, that the European Union should accede to the ECHR. These proposals are not necessarily exclusive of each other, though given the close relationship of their subject they fall to be considered together in any debate on the future of the Union.

103. The Report of the Working Group has produced a clear, but limited, recommendation on the issue of accession to the ECHR. The Working Group construed its terms of reference narrowly and its Report has stressed that it is not for the Convention to decide whether the Union should accede to the ECHR but only to decide whether the Treaties should be amended to provide the power ("a constitutional authorisation") to accede. It would then be for the Council, by unanimity, to agree to accede. Agreement to accede would have to be preceded by agreement on the necessary technical modalities and also on the additional protocols of the ECHR to which the Union should accede.¹ 104. Commissioner Vitorino, who chaired the Working Group, reported to the Convention Plenary that all members of the Group either strongly supported or were ready to give favourable consideration to a Treaty amendment creating a constitutional authorisation enabling the Union to accede to the ECHR. The Group also stressed that incorporation of the Charter and accession to the ECHR were not necessarily alternatives, but could be regarded as complementary steps to be taken in order to achieve full respect of fundamental rights by the Union. Incorporation and accession would lead to a situation analogous to that in Member States, which both protect fundamental rights and at the same time have subscribed to the external control of the Strasbourg Court.²

Views of witnesses

105. The majority of witnesses favoured EU/EC accession to the ECHR. Liberty described accession by the Union to the ECHR as "the most important step that could come out of the work of the Working Group and the Convention, as it would ensure a uniform minimum level of protection across Europe irrespective of the legal actor (*ie* Member State or EU institution) involved" (p 83). Some believed that accession to the ECHR should have priority over incorporating the Charter into the Treaties. The CBI saw EU accession to the ECHR as a better way to improve human rights protection in the Union than changing the status of the Charter. "This would make the EU institutions accountable for considering human rights (or face an adverse judgment of the Strasbourg Court), but avoid the problems of conflicting with the current structure of human rights protection or expanding the judicial competence of the ECJ" (p 62).

106. But not all witnesses thought that accession was an essential step. Professor Toth contended that if the Charter were incorporated into a new Constitution, accession of the EU or the EC to the ECHR would be "neither necessary nor even desirable" (pp 114-115). But most witnesses supported EU/EC accession to the ECHR and saw it going hand in hand with strengthening the Charter and providing a number of clearly identifiable benefits for the Union and its citizens.

¹ Report of Working Group II. Doc. CONV 354/02, at page 13.

² The European Convention. Summary report of the plenary session. Brussels, 28 and 29 October 2002. Doc. CONV 378/02.

107. Baroness Scotland described the Government's position on the question of accession: "we are neither for nor against accession at this moment. We can see the case for it but equally we can see problems that could make accession do more harm than good" (Q 240). The Government "are not convinced that accession is vital" (Q 259). They were, however, actively considering whether there should be accession and, if so, in which form (Q 249).

The benefits of accession

(i) Incorporation of the Charter in no way diminishes the importance of accession to the ECHR 108. Professors Schermers and Lawson, Faculty of Law at the University of Leiden, noted that virtually all continental States have included in their constitutions fundamental rights, which domestic authorities must respect. Statements of fundamental rights in national constitutions may differ from the ECHR. If an individual complains of a violation of his rights under a constitutional provision that does not have an equivalent in the ECHR, then he will have no further remedy if the domestic court rejects his complaint. If, on the other hand, the right alleged to have been violated also forms part of the ECHR, then an appeal to the European Court of Human Rights will be possible after exhaustion of the domestic remedies (p 95).

(ii) Subjecting the Union, its institutions and bodies to a specialist external arbiter

109. JUSTICE urged EU accession to the ECHR in order "to ensure the best possible protection of human rights within the Union". Accession would bring the EU institutions within a well established regional human rights system. By the acceptance of scrutiny by an independent court, the European Court of Human Rights, accession would ensure consistency in providing protection to a high standard of civil and political rights in Europe (p 79). Statewatch said that "it would reassure citizens (and national courts) that the Union is not 'above the law' as far as human rights are concerned, an assurance necessary in particular as the Union's competences expand well beyond economic integration to include security issues where human rights concerns are more frequent" (p 103). Accession would give citizens protection *vis-à-vis* acts of the Union analogous to that which they already enjoy *vis-à-vis* acts of Member States.

(iii) Unifying effect of common external control

110. Accession of the European Union to the ECHR would result in all European legal orders being subject to the same supervision in relation to the protection of fundamental rights. Professors Schermers and Lawson considered that this would be advantageous to the unity of Europe. Any alternative to accession might appear to constitute a refusal of the Union to accept the general supervision which all European States have accepted. (para 6). The Working Group believed that accession would be a strong political signal for coherence between the Union and the "greater Europe".

(iv) Removing conflicts and inconsistencies

111. There have, on occasion, been divergent interpretations of the ECHR by the Strasbourg Court and the Community Courts. Judge Fischbach said: "there is a probability that the Charter will generate a new dynamic and that there will be in the future far more requests for preliminary rulings in Luxembourg So you see the danger, the risk that there may be more and more divergency in the interpretation of the same Human Rights" (Q 199). Accession would remove the risk and strengthen Community law as a result (BEG pp 58-60). Merely incorporating the Charter including its ECHR based rights (read in accordance with Article 52(3)) would not achieve the same result because, Professor Arnulf said, the Community Courts could get it wrong (Q 47). Accession would therefore increase legal certainty and would serve to strengthen the autonomy of both the Luxembourg and Strasbourg Courts.

(v) Enforcing ECHR obligations

112. EU measures are already to some extent subject to 'indirect review' in Strasbourg (Statewatch p 103). Accession would permit the EC/EU to defend itself directly before the Strasbourg Court. Judge Fischbach said that accession would enable the institutions of the Union to participate fully in Strasbourg proceedings in which Union law was at issue (Q 197). Liberty argued that it would be beneficial for the EC/EU to become a Contracting Party if only to enable it to represent the interests of the EC/EU (and its responsible institutions) directly in proceedings before the Strasbourg Court and to implement obligations under the ECHR by means of EC law rather than through the (sometimes inappropriate) medium of the respondent Member State(s) (p 86).

(vi) Removing an apparent double standard

113. Judge Fischbach referred to "a growing contradiction between the obligations which the Union seeks to place on certain third countries in connection with development aid or other association agreements and the absence of the external control and the external review of decisions of the Union itself". Moreover, it was not logical that ratification of the ECHR by candidate countries was a precondition for Union membership but the Union itself was not subject to such review and control (Q 197). JUSTICE said that accession would strengthen the EU's credibility in the human rights field (p 79). Contrariwise, as the Immigration Law Practitioners' Association (ILPA) and the Advice on Individual Rights in Europe (AIRE) Centre noted, accession would not preclude the Union from giving protection via the Charter to a greater range of rights than were protected under the ECHR. Nor would it preclude the Union from protecting traditional civil and political rights at a higher level than the ECHR's minimum level of protection (p 73).

Potential problems and difficulties ahead

114. Even if the case for accession were to be accepted by all Member States there would remain a number of major and difficult legal and political hurdles to overcome.

(a) EU or EC accession/the legal personality question

115. The majority of witnesses supported EU, not simply EC, accession to the ECHR. Statewatch said: "Accession by the full Union is important because the internal security aspects of the Union Third Pillar raise obvious human rights issues and the external security aspects of the Second EU Pillar can fall within the scope of the ECHR in certain cases, for example where an EU force controlled part of the territory and/or administration of an area outside the EU" (p 104).³ We agree. In principle it is desirable that all EU activities, whatever the Pillar, should be subject to the supervision of the ECHR. There should be no distinction between the Community and the Union as regards compliance with fundamental rights. Therefore accession should be by the EU. But this presupposes that the EU could, as a matter of international law, accede if there were a political decision to do so and raises a question as to the legal status of the Union, and in particular whether it has the requisite legal personality to accede to an international treaty.

116. A separate Working Group was set up in the Convention to consider the question of the legal personality of the Union. The present position is that the Treaties expressly provide that the Community has legal personality (Article 281 TEC), as has Euratom (Article 184 EAEC). But there is no such provision in relation to the Union. It has been argued that the Union has, as a matter of international law, legal personality by virtue of certain actions it has power to take. However, the better view would seem to be that the Union does not have legal personality and that amendment of the Treaties would be needed to confer it.

³ Statewatch gave as an example the case of *Bankovic v UK*, before the Strasbourg court. [2002] EHRLR 775.

117. The Convention Working Group on legal personality supports the view that the Union should be explicitly given legal personality.⁴ The Group's principal recommendation is threefold:

- the European Union should explicitly be given legal personality;
- that personality should replace the existing personalities of the Community and of Euratom;
- there should be a single legal personality for the European Union.

118. It would follow that the Union, as a legal person subject to international law, would be able to become a party to treaties and other international agreements (eg the ECHR), to sue and be sued, and to be a member of international organisations. There would also, the Working Group recognised, be possible implications for the "architecture" of the Union. The creation of a single legal personality for the Union would enable the different treaties on which the Union and Communities are now based to be merged into a single Treaty. The Group believed that to preserve in a single Treaty the current "Pillar" structure would be anachronistic. Conferring legal personality on the Union would not *per se* entail any amendment to the division of competences, either between the Union and the Member States or between the Union and the Community. The Working Group was, however, careful not to prejudge the outcome of the current discussions in the Convention, and in particular within the Working Group on External Relations.

119. We support the conclusion of the Working Group that the EU should have legal personality. It should, as we have recommended above, be the Union that accedes to the ECHR. On the question whether the distinction between the Union and the Community should go and the three Pillars be collapsed into one, we note that a merger of the Union and the Community into one single legal entity would not necessarily imply that a single Community method had to be followed in each policy area. Inter-governmentalism, which characterises activity in both Second and Third Pillar areas, could remain notwithstanding fusion of the Treaties and of the Pillars. Whether such an outcome would be any more comprehensible or any easier to explain to an outsider is, however, highly debatable.

(b) Member States' reservations

120. Much technical work has already been done on the question of EU/EC accession to the ECHR. A Steering Committee of the Council of Europe has prepared a detailed report on the legal and technical issues to be resolved before any political decision could be taken.⁵ The ECHR itself would need to be amended and this would require the consent of all Contracting Parties.

121. A particular problem, not addressed in the Council of Europe's report but identified by the Government, is that of individual Member States' reservations from certain of the ECHR articles. Although all Member States are party to the ECHR it is permissible under Article 57 ECHR for contracting parties to make reservations when signing the Convention. Many States have also made declarations. Further, the ECHR allows States, in certain circumstances, to derogate from its provisions (eg Article 15—Derogation in time of emergency). A number of Member States have made reservations and declarations. Baroness Scotland asked: "How do you incorporate those reservations in relation to protocols and other articles of various Member States in such a way that you reflect what they have in fact agreed to? We have not at the moment come up with a way you can do that and therefore we are not for accession, we are not against accession. We simply pose certain questions as to how practically it could be done without doing violence to the Member States' reserved positions in various ways." (Q 223).

122. We do not understand why, if the European Union were to accede to the Convention, the Member States could not themselves agree upon any qualifications or reservations upon accession. Since Union accession would be restricted to matters within Union competence it is not apparent why Union accession should affect Member States' reservations. This was put to the Minister. She replied: "I am not suggesting

⁴ Final report of Working Group III on Legal Personality. Doc. CONV 305/02.

⁵ *Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights*. Report adopted by the Steering Committee for Human Rights (CDDH) at its 53rd meeting (25-28 June 2002). Doc DG-II (2002)006.

that it is impossible. What we say is that it is difficult and those issues would have to be overcome. So far no-one has so far found an efficient and effective way to overcome them. I am not suggesting that they cannot be overcome All I can say is that at the moment we do not see a clear way of how to do it" (Q 226).

123. To assist our own understanding we have prepared a table setting out the reservations and significant declarations and derogations made by Member States. The table is printed in Appendix 3 to this Report. That table indicates that the reservations and the decisions not to ratify certain protocols are attributable to features of national law. These reservations and decisions would stay in place, even if the EU were to accede to the ECHR. If the EU were to consider accession to the ECHR, the Member States would have to agree on the reservations (if any) to be made by the Union. The EU would also have the right under Article 15 ECHR to make specific derogations. These, too, would have to be agreed by Member States. But any such reservations or derogations would apply only in relation to European Union law. There would be no need to include in the new EU reservations any national reservations that had no applicability to EU law. It is clear that further and detailed consideration needs to be given to this issue, not least to determine whether it is simply a political problem or whether there are genuine legal difficulties to overcome. Our present opinion is that the legal difficulties are overstated.

(c) The autonomy of the Community legal order

124. Professor Toth argued forcefully that accession by the EU to the ECHR would endanger the autonomy of the Union's legal order by subjecting the ECJ to the control machinery established by the ECHR and, in particular, to the jurisdiction of the Strasbourg Court. This, he argued, would be incompatible with the role of the ECJ as the final interpreter of EU law and the supreme guardian of legality in the EU (p 114). Moreover, Strasbourg might find itself ruling on the division of competences between the EU and the Member States. This, too, would be incompatible with EU law (p 114).

125. But Professor Toth's view was not shared by other witnesses, including the Government.⁶ Further, the Convention Working Group concluded that accession by the Union to the ECHR posed no threat to the principle of autonomy of Union law or to the authority of the ECJ. As Judge Fischbach explained, the nature and content of the rights established by and protected under the ECHR would not change by the mere fact of being applied within EC law, whether with or without incorporation of the Charter. The Strasbourg Court "by virtue of the subsidiarity principle" was not allowed to interfere in the legal systems of Contracting Parties. Nor would it be allowed to interfere in the Union legal system. Strasbourg review would be restricted to assessing whether an EU measure was consistent with the ECHR. In making that assessment the Strasbourg Court would leave the Union a 'margin of appreciation' allowing special features of Community law to be taken into account. Where the EU measure was contrary to the ECHR, the Court would merely deliver a finding of a breach, but would not itself be able to annul or amend the measure in question or to tell the Union what measure to take to remedy the matter. The Union, like the Member States, would be able to decide, with no encroachment on its powers, how it would go about complying with the Strasbourg Court's judgment (Liberty p 86).

126. We agree with the majority view. The autonomy of the Community legal order would not in our opinion be endangered by EU accession to the ECHR. The Strasbourg Court would have the last word on what ECHR rights mean and require, whether inside the Union or outside it. Strasbourg would be able to examine whether EU law and acts conformed with the ECHR. But the ECJ would remain the final judge on questions of EU law and the validity and lawfulness of Union acts.

(d) The relationship of the Strasbourg and Luxembourg courts

127. In the United Kingdom we have incorporated the ECHR into our domestic law, but that does not mean that the Strasbourg Court is the final court of appeal in these areas. Our courts are required under the Human Rights Act 1998 to take account of its decisions, but they are not obliged to follow them if, for

⁶ Q 242.

whatever reason, it is thought that they ought not to be followed. On the other hand, UK courts, and all other Member States' courts are obliged to follow and apply Luxembourg decisions. So what, if the Union acceded to the ECHR, would be the relationship between the Strasbourg Court and the Luxembourg Court?

128. Most witnesses took the view that the relationship of the Strasbourg Court to the Luxembourg Court would be the same as its relationship to the United Kingdom courts. Advocate General Jacobs said: "it would be the final court under international law whose decisions would be binding in the instant case on the European Union if it was a case involving the European Union, or on the United Kingdom if it was a case in the United Kingdom. However, its decision in terms of its general jurisprudential authority would be the same in Luxembourg as it would be in the United Kingdom. There would therefore be no change, I think, in the position of the Strasbourg Court in relation to United Kingdom courts." (Q 170). Similarly the Luxembourg Court would not be bound by the Strasbourg Court's decisions. Advocate General Jacobs added: "I think in practice the Luxembourg Court would be very concerned to follow the Strasbourg Court's decisions, just as I am sure the United Kingdom courts would be, but they would not be formally binding, they would be formally binding only under international law on the Union or the United Kingdom respectively" (Q 171).

129. Professor Toth believed that the analogy was a false one. "The proper comparison to be drawn is not between the ECJ and the national Constitutional Courts (since they are not on the same level), but between the ECJ and the ECtHR. They are both supranational Courts of equal rank, status and calibre, standing at the apex of their respective supranational legal systems. Both Courts consist of equally highly qualified judges, representing not one national legal system but the legal systems of all the Members States and Contracting Parties. Both Courts use similar methods of Treaty interpretation and their decisions enjoy the same high respect and authority. Just as it would be inconceivable to subject the ECtHR to the jurisdiction of another international court (eg the International Court of Justice), it would be highly undesirable to subordinate the ECJ to an external court which could override/reverse its decisions. This would undoubtedly weaken the ECJ's authority in the eyes of the national courts and thereby undermine the coherence and unity of the whole EU legal order" (p 115).

130. We take the view that the position of the ECJ would be analogous to that of national constitutional or supreme courts in relation to the Strasbourg Court. The ECJ would remain the final court on questions of European Union law; the Strasbourg Court would be the final court on questions of ECHR law. There would not be a conflict between them any more than there is a conflict between the House of Lords and the Strasbourg Court when interpreting the ECHR.

The domestic remedies rule

131. EU accession to the ECHR plus incorporation of the Charter may give rise to practical problems of delay and costs. Under the domestic remedies rule, parties must have exhausted all their domestic remedies before the Strasbourg court will entertain their plea. As Professor Arnall pointed out, the domestic remedies rule would not present a problem in all cases. In direct actions (*ie* where the Community institution was defendant in the Community Courts) the domestic remedies rule would be exhausted relatively speedily because there would be only two levels, CFI and ECJ. In cases brought in the national courts the time taken in exhaustion of domestic remedies would depend on how the rule was to be interpreted. If a national court of first instance made a reference to Luxembourg and the Luxembourg ruling determined the fundamental rights point, that might mean, for Strasbourg purposes, that the domestic remedies could be regarded as having been exhausted at that stage, without the necessity for the case to be taken back to the national courts (QQ 50-2). This is a matter which could usefully be clarified in the instrument of accession.

Problem that both courts are overburdened with a backlog of cases

132. Both the Community Courts and the Strasbourg Court are overburdened and substantial delays now face litigants.⁷ Any development which led to an increase in the volume of litigation would make a bad situation even worse. One remedial possibility that has been suggested would be to allow any ECHR/human rights point arising in litigation on issues of EU law to be taken speedily to Strasbourg by some kind of reference procedure. But as witnesses pointed out, there might be problems in separating out ECHR/human rights points and, in any event, a decision by the ECJ on the EC/EU law points might be sufficient to resolve the case. Professor Arnulf was not convinced of the utility of a reference procedure from Luxembourg to Strasbourg, because of the delay it would cause to the normal reference procedure from Member State to Luxembourg. If delays appeared likely to be excessive the national judge might try to decide all the points himself, possibly undermining the preliminary rulings procedure which was the cornerstone of the internal market (Q 59).

133. It is nonetheless necessary that something be done to prevent an extra load of litigation before either the ECJ or the Strasbourg court from inflicting additional costs and delay on litigants. Both the ECJ and the Strasbourg Court are alert to the problem and Judge Fischbach told us that quite radical solutions were being considered, including the creation of a court of first instance at Strasbourg (Q 201). It seems clear to us neither Luxembourg nor Strasbourg can continue to take on more and more work without substantial increases in resources and changes to their respective procedures.

Re-appraising the case for accession

134. The final sentence of the Conclusion to our earlier Report stated: "The question of accession by the Union to the ECHR should be on the agenda for the IGC". We are therefore pleased to see that the issue has been taken up in the Convention on the Future of Europe, paving the way for the IGC scheduled to begin later this year.

135. Our view remains that accession to the ECHR is the best way to guarantee a firm and consistent foundation for fundamental rights in the Union. The case for Union accession to the ECHR remains a very strong one. As the Government acknowledged, there is already a growing divergence between the human rights jurisprudence of the ECJ and that of the ECHR. With the growth of both Community and Union laws affecting the individual, there is an increased scope for further and greater divergence. To give the ECJ the final say on human rights issues would enhance the risk of conflicts of jurisprudence with the Strasbourg Court. Avoidance of this risk should be a priority.

Further, as we said in our earlier Report, the Strasbourg Court as an external final authority in the field of human rights can bridge the gap which exists in the protection of those rights in the Union.

A combination of the Charter and accession to the ECHR

136. It is significant that most of those who are advocating accession do not see it as an alternative to the inclusion or the incorporation of the Charter. They see it as an addition. The Government's view was that there were "certain inherent conflicts in trying to do both. Both may be possible and we have to be very careful about how we construct such a possibility" (Q 249). But, as Statewatch pointed out, we are not being forced to choose between an enhanced status for the Charter and accession to the ECHR (p 99). Integrating the Charter into the Treaties would not prevent or restrict accession to the ECHR. And although Article 52(2) of the Charter (one of the horizontal clauses) is intended to regulate the relationship

⁷ In the first seven months of 2001, 20,739 applications were received by the Strasbourg Court. The number of applications has also risen steeply in recent years (553% in the period between 1988 to 2000). See *Structures, procedures and means of the European Court of Human Rights*, a report of the Council of Europe Committee on Legal Affairs and Human Rights, 17 September 2001. At the recent Thomas More Lecture at Lincoln's Inn on 17th October 2002, Sir Nicholas Bratza, the UK judge at the Strasbourg Court, said that the current backlog of cases was approximately 30,000.

of the Charter and the ECHR, whether that clause would be sufficient to avoid divergent interpretations in the application of the ECHR has been questioned.⁸

137. Accession by the Union or Community to the ECHR would require not just the unanimous agreement of EU Member States but the agreement of all contracting parties to the ECHR. This might take some years to negotiate and conclude. There are technical problems to overcome and it would be necessary first for all parties to the ECHR to agree the changes and second for those changes to be ratified by the Contracting Parties in accordance with their national constitutional requirements. It is by no means a foregone conclusion that negotiations would succeed, or that ratification would take place, or that the process would be speedy. Negotiations could not begin until the Union/Community had been given the necessary powers to accede and the Council had agreed the mandate to commence the negotiations. But, given the political will, these difficulties would not prevent preliminary work being put in hand earlier.

138. By contrast the Charter could be integrated into the Treaties at the next IGC and could take its place as the EU Bill of Rights at the same time as Member States ratify the new EU Treaty. We agree that for these reasons integration of the Charter should go forward, provided sufficient safeguards for the ECHR and for Member States' competences can be secured via the horizontal clauses, bolstered by the commentary.

[...]

⁸ See the Council of Europe's recent report, *Study of Technical and Legal Issues of a Possible EC/EU Accession to the European Convention on Human Rights*. Report adopted by the Steering Committee for Human Rights (CDDH) at its 53rd meeting (25-28 June 2002). Doc DG-II (2002)006, at para 80.

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