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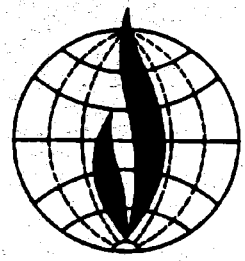

Position Paper

International Commission of Jurists

The Accession of the European Communities to the European Convention On Human Rights

1993

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1 Background

The position of human rights and fundamental freedoms in the legal order of the European Communities has been the subject of debate among legal scholars and politicians for at least 25 years. The Treaties establishing the Communities do not contain any reference to civil and political rights.[1] This omission may be explained by both the predominantly economic character which the drafters envisaged for the Communities and by the limited competence of the institutions. Gradually, however, the Communities' powers and fields of activity have expanded. The fact that the Communities lack a fully-fledged constitution, including human rights provision, has increasingly given rise to questions of legitimacy and to problems of judicial protection in individual cases. It has been the European Communities' own Court of Justice which, in response to specific complaints that acts of the EC institutions infringed upon human rights, has had to define its own human rights standards. Through its case-law, the Court has succeeded in solving the immediate problems confronting it. But the question remains as to what the constitutional position of human rights in the EC legal order should be.

One solution could be the adoption of a specific Community Charter of Human Rights.[2] Another – a complementary approach – would be to make use of existing international instruments for the protection of human rights. As far back as 1979, the Commission of the European Communities proposed that the EC accede to the European Convention on Human Rights (ECHR), a proposal which was repeated in a Notice of November 1990.

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1) Article F of the Treaty on European Union (which, of course, is not yet in force) is novel in this respect. One could however question the effectiveness of this provision; see § 4 *infra*.

2) See, e.g., the Declaration adopted by the European Parliament, *Official Journal* C 120/51 (16 May 1989).

C number 656

2 Overview of the European Convention on Human Rights, the Council of Europe and the European Communities

Due to the complexity of the different institutional systems existing within the Council of Europe and the European Communities and the possibility of confusion between them it may be useful here to highlight some of the relevant distinctive features of each system.

The Council of Europe, which was established in 1950, in the aftermath of the Second World War, has grown in the past forty years from a membership of ten to almost thirty European States. Dedicated to the principles of respect for the Rule of Law and the enjoyment of human rights and fundamental freedoms, the most significant achievement of the Council of Europe has been the implementation of human rights standards through the European Convention on Human Rights. The novelty of the Convention derives less from the minimum standards of protection it establishes than from the institutional machinery it sets up to ensure protection of such rights. In particular, the Convention allows any person, non-governmental organization or group of individuals who consider themselves to be victim of a violation of a right protected by the Convention to lodge a petition against a Member State. Such a petition would then be considered by the European Commission of Human Rights (a body composed of eminent jurists) and, if adjudged admissible, be referred to the European Court of Human Rights in Strasbourg for final judgment.

The European Communities are founded upon three treaties: the Treaty of Paris, establishing the European Steel and Coal Community, the Treaty of Rome, establishing the European Economic Community, and the Treaty founding the European Atomic Energy Community. Currently composed of twelve Member States, the Community has as its tasks the establishment of a common market, the progressive harmonization of the economic policies of Member States, the promotion of harmonious development of economic activities, and the raising of standards of living in the Member States.

Since the Community is a Treaty – based organization there must be competence under the Treaties for any action taken by it. The ultimate interpretative body and guardian of the Treaties is the European Court of Justice based in Luxembourg. Although all members of the Communities are also members of the Council of Europe the two systems remain quite distinct.

3 Objective of this Paper

With this position paper, the International Commission of Jurists (ICJ) hopes to make a contribution to the current debate on accession of the Communities to the ECHR. Therefore, the scope of this paper will be limited to the protection of civil and political rights, as opposed to economic and social rights. The latter category of rights has, to a certain extent, been recognized in the Treaties and the – legally non-binding – Community Charter on Social Rights of Workers (1989). Whilst recognizing the need for enhancement of the protection of social and economic rights, the ICJ considers that the present debate should focus on the utility of accession to the ECHR as an essential part of a programme aimed at a comprehensive system for the promotion and protection of human rights in the EC legal order. The premise, for the ICJ, will be that the principle of a Community governed by the Rule of Law must be reinforced as the application of Community law expands.[3]

Although some complex legal issues would need to be resolved before the Communities could accede to the Convention, the ICJ believes that, with political will, these difficulties could be overcome. For this reason, this paper does not enter into a detailed discussion of each and every technical issue relating to accession.

4 The Need for Protection of Human Rights in the EC Legal Order

The basic principle of uniformity of EC law throughout the Community requires national rules to yield to Community legislation in the fields of Community competence. If one were to accept the possibility that individuals could invoke national rules to invalidate a Community Regulation, for example, the force of such a measure would be severe-

3) Cf. European Court of Justice (ECJ), case 294/83 *("Les Verts" v European Parliament)*, ECR 1986, p. 1365 and Court of First Instance of the EC, "Reflections on the Future Development of the Community Judicial System", in *European Law Review* vol. 16/3 (1991), p. 175.

ly weakened. It would remain valid for some Member States and be invalid in others. The Court of Justice has held:[4]

> "In fact, the law stemming from the [EEC] Treaty, an independent source of law, cannot by its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question. *Therefore, the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to fundamental rights as formulated by the constitution of that State*".

From the perspective of Community law, this is a perfectly coherent view. But it leads to a situation where the most fundamental values of society could – at least in theory – be set aside by some technical rules of secondary EC legislation; a point which is even more disturbing if one takes into account the absence of explicit human rights guarantees in the Treaties and the weak position of the European Parliament. In response to criticisms from legal scholars and authorities in the Member States the Court ruled[5] that

> "(..) fundamental rights form an integral part of the general principles of law, the observance of which the Court ensures. In safeguarding these rights, the Court is bound to draw inspiration from the constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States. 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".

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4) Case 11/70 *(Internationale Handelsgesellschaft)*, E.C.R. [1970] 1134. Emphasis added.

5) Case 4/73 *(Nold)* ECR [1974] 507. The Court implicitly referred to Art. 164 EEC Treaty: "The Court of Justice shall ensure that in the interpretation and application of the Treaty the law is observed".

National constitutions and the ECHR are not directly binding on the EC, but the Court is bound to take them into account. The Court remains the only authority that is entitled to interpret Community law and decide on its validity. The uniformity of EC legislation remains intact, and at the same time respect for human rights is judicially ensured. Following this judgment, provisions of the ECHR, as well as its Protocols, the International Covenant on Civil and Political Rights, the European Social Charter and ILO Conventions have been invoked and applied in many cases. In a Joint Declaration of 1977, the European Parliament, the Council and the Commission expressed their support for the approach taken by the Court.[6]

However, the present situation leaves room for uncertainty. The words "inspiration" and "guidelines" suggest that the Communities are still allowed to depart from the provisions of the ECHR. Similarly, it remains unclear to what extent the Court will follow the *jurisprudence* of the ECHR organs. It should be stressed that it is precisely the Strasbourg case-law which has given the ECHR its distinctive character and impact. In that respect, the consequences of the position taken explicitly by one of the Advocates General, that the Court is *not* required to follow the interpretation of the Convention organs, cannot be underestimated.[7] Indeed, if the "Luxembourg" (*i.e.* from the EC Court of Justice) interpretation of the ECHR provisions was to diverge from the "Strasbourg" (*i.e.* from the European Court of Human Rights) one, the influence of the ECHR in the EC legal order could be diminished or even undermined. States might be inclined to attach more weight to the "Luxembourg" interpretation than to the authentic interpretation offered by "Strasbourg".

Given the potential for the development of different interpretations of the ECHR by the Strasbourg and Luxembourg Courts there is a danger that a lack of clarity may exist concerning the precise content of individual rights under EC law. In view of the freedom of interpretation that the Court of Justice has reserved for itself, it is questionable whether, in the current situation, the subjects of EC law can be fully aware of the contents of their rights.

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6) *Official Journal*, 1977, C 103/1.

7) AG Darmon in case 374/87 *(Orkem)*, ECR [1989] at 3337-3338. See, for an example, the different opinion on the question whether a legal person is entitled to respect for its 'private life'; compare the *Hoechst* judgment of the Court of Justice (case 46/87 & 227/88), ECR [1989] 1924 and the *Niemietz* judgment of the European Court of Human Rights of 16 December 1992 (case A-251-B).

Further, a discrepancy remains between the situation in the Member States and the situation at Community level. All Member States (with the exception of the UK) have a written constitution with a fixed catalogue of human rights, in conjunction with international agreements providing for additional standards. The national courts, in all Member States, protect human rights in cases of individual complaints, in combination with international bodies providing for additional protection. The Communities lack a written constitution with a fixed catalogue of rights; nor are they subjected to international supervision.

Seen from the angle of the ECHR supervision mechanisms, the Communities form a kind of 'vacuum'. All EC Member States are parties to the Convention, and their acts are subject to review by the Strasbourg organs. However, as the Member States transfer powers to the Communities, an increasing number of issues are excluded from the scrutiny of Strasbourg. Complaints against the EC, or against Member States implementing EC decisions, have so far been declared inadmissible because the Communities are not a party to the ECHR.[8]

5 The Treaty on European Union

The Treaty on Political Union known as the "Maastricht" Treaty represents a major development in the evolution of the European Communities, not only because it establishes the concept of economic and monetary union as an objective of the Communities, but also because it widens the competence of the Community in areas such as the implementation of a common foreign and security policy, European citizenship and co-operation on justice and home affairs.

Given the broad range of issues dealt with by the Treaty on European Union (Maastricht, 1992), it is obvious that the 'vacuum' described above will not disappear. On the contrary, it will increase. The Treaty itself does not offer any specific solution to this question. The relevant section of the Treaty is Article F(2). The provision reads as follows:

8) See *inter alia* European Commission on Human Rights, Appl. no. 8030/77 *(CFDT)* Dec. 10-7-1978, DR 13, p. 231 and Appl. no. 13258/87 *(M. & Co.)* Dec. 9-2-1990.

"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."

It is clear that the uncertainties of the present situation persist. As a matter of fact, this provision is even more restrictive than the case-law of the Court, as it only refers to the ECHR. Apparently, other human rights instruments "on which the Member States have collaborated or of which they are signatories" have been excluded. Even the Single European Act of 1986, in addition to the ECHR, referred to the European Social Charter.

6 Accession to the European Convention on Human Rights

As stated in the introduction, the Commission of the EC has twice proposed that the European Communities as such should accede to the ECHR. This step would have some important advantages. Some of the arguments in favour of accession will be discussed in more detail below.

- ***Accession would underline the ideals of democracy and commitment to human rights***

The first argument is quite obvious. An accession would represent a much stronger expression of the notions embodied in Article F of the Treaty on European Union: it would show that the Communities do indeed take human rights seriously. This would be an important signal for European citizens, the European institutions (as such it could also reassure those who fear that the powers of "Brussels" are increasingly beyond any control) and States wishing to join the Communities. Accession to the ECHR would also show the outside world that the EC indeed takes human rights seriously. It is worth remembering that human rights play an important role in the *external relations* of the EC and in the framework of European Political Co-operation. The Lomé IV Convention, for example, contains an explicit reference to human rights; association agreements nowadays, by defini-

tion, include a human rights clause. The credibility of this policy could be undermined if a visible 'domestic' human rights policy for the EC remains absent.

- ***Human rights compliance by the European Communities as such would be under 'external' review***

The most striking development of the international legal order since the Second World War has been the creation of international (and, on occasion, even *supra* national) bodies to promote and protect human rights. The background for this development is that experience had demonstrated the need for a safety net in the (exceptional) case that the national courts should fail to protect individual rights. Whilst paying full regard to the complete independence and outstanding professional qualities of the judges in the Court of Justice, it should be observed that this basic argument is also valid for the Communities. The Court of Justice forms part of a legal order with a very strong emphasis on economic interests. It may well be inclined to analyze cases from a predominantly economic point of view without paying due regard to human rights issues. The fact that the Court has developed the notion of general principles of EC law does not detract from the importance of having an external check provided by a body specialized in the protection of human rights.

Seen from the perspective of the Strasbourg organs, accession by the Communities would eliminate the existing vacuum. Both acts of the Communities' institutions and acts of the EC Member States implementing EC law would be brought under the jurisdiction of the Strasbourg organs. As a result, the former position – in which the ECHR organs were competent to monitor human rights compliance in cases in which the authorities of the Member States are involved – would be restored.

- ***The interpretation of the ECHR would, in final instance, be a matter of one body***

The risk of diverging interpretations, as described above, would be largely eliminated. Every individual who felt that his or her rights had been violated would be in a position to submit a complaint to the Strasbourg organs, after of course having exhausted all 'local' remedies provided for in the Community legal system. The lack of legal certainty inherent in the present situation (see § 3) would be cured.

- ***Accession by the Communities would reinforce the strength of the ECHR***

More than ever, the ECHR is a truly *European* Convention. Several Central and Eastern European States – including most recently the Baltic States – have acceded to the Council of Europe and ratified the European Convention. By acceding to the ECHR, the Communities would recognize the importance of this document as the basic European 'code of conduct' in the field of civil and political rights. By the same token, to adopt a separate Community Charter, without adhering to the Convention, risks undermining the European Convention.

The legal order of the Communities is a very strong one. The preliminary rulings procedure of Art. 177 EEC Treaty provides every national court or tribunal with the opportunity of communicating directly with the Court of Justice and obtaining an authoritative interpretation of the law. In the framework of these procedures, the Court on some occasions did not limit its human rights test to acts of the Community institutions, but also monitored the human rights performance of the Member States when acting in the field of Community law.[9] Given the power of the 177 procedure, it might very well be that an alternative way of protecting human rights at the European level is emerging. Individuals might be more interested in obtaining a judgment of the Court of Justice at an early stage of their domestic procedures than to exhaust local remedies and bring a case to Strasbourg. Against this background, it is all the more important that the Luxembourg approach to the ECHR be in conformity with the Strasbourg case law. Far from submitting that this development is a threat to the European Convention, it could be argued that the effectiveness of the ECHR would be enhanced if the Convention were inserted in the Community legal system. The real threat to the European Convention seems to lie in the continuation of the present situation, in which the Court of Justice is completely free to develop its own interpretation.

9) See, *e.g.* case 222/84 *(Johnston)*, ECR [1986] 1682; case 222/86 *(Heylens)*, ECR [1987] 4117; case 5/88 *(Wachauf)*, ECR [1989] 2639; case C-260-89 *(ERT)*, judgment of 18-6-1991 (not yet reported), in para's 43-45.

7 Possible Disadvantages

Numerous counter-arguments have been presented since the Commission of the EC proposed Community accession to the ECHR. These arguments merit serious attention.

- ***The legal procedure for complaints would be very complicated and time-consuming***

It is obvious that the relationship between the two legal orders (and the two courts involved) would raise some complex and delicate problems. However, it should be noted that as far as direct procedures are concerned (mainly Articles 173 and 215 EEC Treaty) there should be no difference from the situation in which national legal remedies are exhausted. The amount of time involved (about 18 months for an action for annulment) is actually much less than the average procedure before national courts. As far as preliminary rulings are concerned, it would seem preferable to limit the possibility of applying to the ECHR organs to situations in which all national remedies have been exhausted. In that respect the present situation would remain unchanged. It would take too much time if an individual could appeal from the preliminary ruling itself.

- ***The representation of the EC in the Strasbourg organs would cause problems***

The Members of the Council of Europe are at present entitled to propose "representatives" from their own country to the European Commission and Court of Human Rights, although once appointed, appointees serve these bodies in an individual capacity. In its proposals for accession, the Commission raised the question of whether the Community would have its own "representative" (meeting, of course, all standards of independence and impartiality) in the ECHR organs. The consequence of having a Community "representative" would be that there would be two members of the Commission and Court of the same nationality. On the other hand, the Community legal order has developed to such an extent, that a representative of this legal order would certainly be able to contribute in a most valuable way to the case law of the Commission and Court of Human Rights. Furthermore, simply to nominate an *ad hoc* member to the Commission or the Court in the cases in which the Community is involved would easily create a

wrong impression to the outside world, *i.e.* that he or she is actually there to defend the Community. Such considerations would appear to argue in favour of a permanent member of the Commission and a permanent Judge in the Court.

- ***The accession would block the creation of a Community Catalogue of Human Rights***

It is a fact that the ECHR does not contain all rights relevant to the Community legal order. Obviously, social and economic rights are not included in the ECHR. Accession to the ECHR should, therefore, be seen as a step towards the full protection of all rights within the Community legal order. The ECHR would provide a minimum level for the protection of civil rights; it would be up to the Communities to go on and set its own standard – much as the Member States have done in their Constitutions. Similarly, the Court of Justice would be able to continue to develop its human rights approach, *inter alia* by taking into account the constitutional traditions common to the Member States.

- ***The 'Back Door': Accession would empower the EC to monitor human rights compliance in the Member States***

Some dualist States, in which the Convention has not been incorporated into the domestic legal order, fear strongly that the ECHR could be transplanted into their legal order by means of accession of the Communities: the 'back door argument'. According to this argument, since Community law automatically forms part of the national legal order, the ECHR would 'come with it'.

A first response to this argument could be that accession would only concern those fields in which the Communities are presently competent. The effect of accession would thus be limited to those fields. A second observation would be, as has been stated above, that the Court of Justice already applies the Convention when reviewing the Member States activities in the field of Community law. Accession would not add anything to that. If one wishes to put it that way, the 'back door' is already open.[10] Accession would merely ensure that the Court of Justice, when carrying out its tasks, will not apply the ECHR in a way contrary to the authentic interpretation of the Strasbourg

10) See note 9 *supra* and accompanying text.

organs – an interpretation which is at present already accepted by all Member States as parties to the ECHR.

- ***The Court of Justice would never accept the primacy of the European Court of Human Rights***

The main purpose of acceding to the ECHR would be to submit the Communities to the jurisdiction of the European Court of Human Rights. According to Article 38 ECHR, the Court consists of a number of judges equal to that of the Members of the Council of Europe. In practice, each Member State has its "own" judge in the Court. This would imply that a number of non-EC nationals would be involved in passing a judgment on acts of the EC.

It is difficult to anticipate the position the Court of Justice would be likely to take, since it has not spoken out on the accession issue. It is, however, extremely interesting to note the following part of a recent opinion on the European Economic Area:[11]

> "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 the agreement is an integral part of the Community legal order.
>
> An international agreement providing for such a system is in principle compatible with Community law. The Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created or designed by such an agreement as regards the interpretation and application of its provisions."

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11) Opinion 1/91 of 14 December 1991 (not yet reported in ECR), § 39 and 40.

Although the Court does not specifically refer to the ECHR, it seems to be abundantly clear that the Court would not object to a construction in which the European Court of Human Rights would have jurisdiction over the EC and its institutions.

8 Concluding Remarks

The International Commission of Jurists supports the proposals for Community accession to the European Convention on Human Rights. There are various important arguments for accession:

- accession would underline the ideals of democracy and commitment to human rights.,
- human rights compliance by the European Communities as such would be under 'external' review.,
- the interpretation of the ECHR would in final instance be a matter of one body.,
- accession by the Communities would reinforce the strength of the ECHR.,

Given the expanding powers of the Communities and the increasing influence of Community actions upon the daily lives of people living within Community borders as well as the important impact of Community actions on the international stage, the ICJ considers that the need for the Communities to accede to the European Convention is now compelling.

The ICJ, therefore, urges the Member States of the EC, which are all parties to the European Convention and thereby all agree on its content, to address the accession proposals in a constructive spirit and to open discussions with the Council of Europe in the near future. As stated in the introduction, the principle of a Community governed by the Rule of Law must be reinforced as the application of Community law expands. This aim is too important to be neglected.

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