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COMMISSION OF THE EUROPEAN COMMUNITIES

COM(79) 210 final

Brussels, 2nd May 1979

MEMORANDUM ON THE ACCESSION OF THE EUROPEAN COMMUNITIES TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS

COM(79) 210 final

M E M O R A N D U M

on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms

INTRODUCTION.

The European Community has an increasing number of direct legal relations with individuals. Its activities no longer only concern a certain number of economic categories - such as farmers or professional importers and exporters - but also, each individual citizen. It is, therefore, not surprising to see today a demand expressed for the powers which belong to the Community to be counterbalanced by their formal subjection to clear and welldefined fundamental rights.

The Commission believes that the best way of replying to the need to reinforce the protection of fundamental rights at Community level, at the present stage, consists in the Community formally adhering to the European Convention for the protection of human rights and fundamental freedoms of 4th November 1950 (hereafter referred to as "the European Convention on Human Rights" or "ECHR"). The Commission in proposing this, does not disregard the fact that, in the longer term, the Community should endeavour to complete the Treaties by a catalogue of fundamental rights specially adapted to the exercise of its powers. It does not, however, appear possible to achieve this objective in the short term because of the differences of opinion which exist between the Member States on the definition of economic and social rights. In order to reinforce the legal protection of the citizens of the Community immediately and in the most efficient manner possible, one should rely, in the first place, on the fundamental rights inscribed

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in the ECHR. In other words, the Community should adhere as soon as possible to this convention and to the protection mechanisms which it contains. The elaboration of a catalogue for the Community itself would in no way be held up. Accession to the ECHR would constitute on the contrary, a first step in the direction of that objective.

The present memorandum gives, first of all, an outline of how the question of fundamental rights has been treated until now at Community level (I). It describes how the ECHR functions (II) and the position of Community acts in relation to the ECHR in the existing legal context (III). Chapters IV and V contain the arguments which can be advanced "for" or "against" accession, while Chapters VI to XI deal with different problems of legal technique.

The memorandum reaches the conclusion that the accession of the European Community to the ECHR seems desirable for a whole series of reasons. None of the difficulties which have appeared in this context seem insurmountable. Given the dimension of the action to be undertaken and its complexity, the Commission considers it necessary, before setting in motion the appropriate institutional mechanisms, to encourage as profound a discussion as possible with all interested bodies on the basis of this memorandum.

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I. HISTORY

1. For more than two centuries the history of Europe has been characterized by constant efforts to improve the protection of fundamental rights. Founded on the human and civil rights declarations of the eighteenth century, all European constitutions today contain an established body of inviolable fundamental rights and freedoms. This is particularly true of the Member States of the European Communities. In contrast to the constitutions of some East European countries, the constitutional orders of all Member States not only recognize essentially the same body of fundamental freedoms, but also provide for the judicial enforcement of such rights in the event of violations. All Member States, aware of their common heritage of ideas and political traditions, have, moreover, become parties to international conventions on human rights; in particular, they have without exception become parties to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950.

The question of the protection of human rights has become increasingly topical in the last few years. High level national and European Courts have delivered important judgments on the safeguarding of these rights. In France, the Cour de Cassation recently recognized, in a fundamental judgment, the validity in national law of the European Convention on Human Rights.[1] In the United Kingdom, a Bill of Rights

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(1) Cour de Cassation, Judgement of 5 December 1978 in criminal proceedings against Chérif BAROUM.

is envisaged and in Belgium and the Netherlands also consideration is being given to improving the protection of fundamental rights against violations by the legislature. At the Helsinki Conference, the protection of human rights was the most important demand made by the Western States; the final act of that conference has awakened expectations in the Eastern bloc countries with regard to the granting of greater freedom.

2. As far as the European Communities in particular are concerned, their Member States already declared when concluding the Treaty establishing the European Economic Community that the ultimate aim of the pooling of their economic resources was to preserve peace and liberty. The guarantee of a body of fundamental rights and the existence of a democratic pluralist regime are among the essential features of the declaration of the Nine on "European Identity" adopted in Copenhagen in 1973 and according to which "they are determined to defend the principles of representative democracy, the rule of law, social justice-the ultimate goal of economic progress - and respect for human rights. All of these constitute fundamental elements of European Identity". Both elements also played a central role in determining the attitude of the Community towards European countries wishing to become members. The Heads of State and of Government solemnly declared at the European Council meeting of 8 April 1978 "that respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Communities".[1]

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(1) Cf. Bulletin of the European Communities N°3/78, page 5.

3. The Treaties of Paris and Rome are designed primarily as instruments of economic integration, and probably for this reason, but perhaps also on account of the restricted powers accorded to the Community institutions, do not include for the Community its own catalogue of fundamental rights. Nevertheless, the Court of Justice had to deal at a relatively early stage with complaints in which it was maintained that a particular Community act violated a fundamental right guaranteed by the constitution of a Member State. In its desire for uniform application of Community law, the Court of Justice contented itself in the initial stages of its case law by declaring in regard to such complaints that it was not one of its tasks to ensure that national rules of a Member State were observed, even where such rules were of a constitutional nature.[1] Only from the end of the sixties could an evolution be discerned in the decisions of the Court. In two judgements of principle, in 1969 and 1970, it ruled that respect for fundamental rights formed an integral part of the general principles of law, the observance of which the Court had to ensure. The protection of these rights, while inspired by the constitutional traditions common to the Member States, had nevertheless to be ensured within the framework of the Community's structure and objectives.[2]

In subsequent decisions the Court of Justice has specified the criteria according to which it intends to ensure the protection of fundamental rights at Community level, declaring that "it could not accept measures incompatible with fundamental rights recognized and protected by the constitutions" of Member States.

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(1) Judgments of 4 February 1959 in case 1/58 Stork v High Authority /1958/59/ ECR 43 and 17 May 1960 in cases 36-38 and 40/59 Ruhrkohlenverkaufsgesellschaften v High Authority /1960/ ECR 857.

(2) Judgments of 12 November 1969 in case 29/69, Stauder v City of Ulm /1969/ ECR 49 and 17 November 1970 in case 11/70 Internationale Handelgessellschaft /1970/ ECR 1125.

The Court of Justice also stated 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".[1]

This case law of the Court, through which a whole series of fundamental rights and general principles of law have been subsequently recognized as essential elements of the Community legal order,[2] has been highly praised throughout the Community. The political institutions of the Community supported it in their Joint Declaration on fundamental rights of 5 April 1977 [3] and have repeatedly stressed the prime importance they attach to the method adopted by the Court for developing a means of protection of fundamental rights which is specifically adapted to the requirements of the Community.

Nonetheless, however satisfactory and worthy of approval the method developed by the Court may be, it cannot rectify at least one of the shortcomings affecting the legal order of the Communities through the lack of a written catalogue of fundamental rights : the impossibility of knowing in advance which are the liberties which may not be infringed by the Community Institutions under any circumstances. The European citizen has a legitimate interest in having his rights vis-à-vis the Communities laid down in advance. He must be able to assess the prospects of any possible legal dispute from the outset and therefore have at his disposal clearly defined criteria. The fact that judgments which operate only ex post facto cannot fully satisfy this requirement of legal certainty is inevitable in the nature of things and - as is emphasized here once again - in no way implies criticism of the Court's approach.

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(1) Judgment of 14 May 1974, Case 4/73, Nold v Commission /1974/ ECR 491; and of 28 October 1975, Case 36/75, Rutili v French Minister of the Interior /1975/ ECR 1219.

(2) For details see the Commission's report of 4 February 1976 on the protection of fundamental rights in the European Community, supplement 5/76 to the Bulletin of the European Communities, p. 9.

(3) OJ N° C 103 of 27 April 1977, p.1.

The decision by the German Federal Constitutional Court, in its judgement of 29 May 1974,[1] that, so long as there existed no Community catalogue of fundamental rights corresponding to the German Constitution, it was entitled to decide upon the validity of legal acts of the Community - even where these had previously been declared lawful by the Court of Justice - in the light of the fundamental rights laid down in the German Constitution is certainly incompatible with the principle of exclusive power of review by the Court of Justice and of the unity of Community law, but also demonstrates that at least some of the highest courts in the Member States consider it necessary to bind the Community to a written text.

The Italian Constitutional Court did not go quite so far in its Judgement N° 183/1973 [2] but did nonetheless suggest a similar concern.

The European Parliament and a majority of writers on the subject have, like the Commission, criticized the decision of the German Federal Constitutional Court. Nevertheless, there has recently been increasing support for the idea of a written catalogue of fundamental rights for the Community.

The advantages of such a catalogue are not contested by the Commission, but it is clear that the process of drawing it up will be a long and exacting task. If it were undertaken too hastily, there is the fear that it would bring to light differences between the Member States particularly with regard to economic and social rights, and that agreement would be possible only on the basis of the lowest common denominator.[3] This would represent a retrograde step compared

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(1) BVerfGE 37, 271.

(2) Judgment of 27 December 1973 - Case 183/73 Fortini and associates, Giurisprudenza Costituzionale, 1973, 2406 = Foro Italiano, 1974, I, 315, Giurisprudenza Italiana, 1974, I,1,865.

(3) It should be pointed out in this connection that the first attempts to incorporate economic and social rights in the European Convention on Human Rights were not a striking success.

with the level guaranteed by the Court of Justice of the European Communities.

3. As a way out of these difficulties, the suggestion of accession to the ECHR has been put forward from various sides, and in particular on the occasion of a symposium organized by the European Parliament in October 1978 in Florence (cf. also the draft Resolution Doc 509/78 submitted by the socialist and liberal groups).

In its Report of 4 February 1976 to the European Parliament, the Commission declared that in its view the Community was already obliged to observe the human rights embodied in the ECHR on the basis of the decisions of the Court, but it did not consider it necessary for the Community formally to accede to this Convention.[1] Closer consideration has recently revealed more clearly to the Commission the disadvantages which arise from the lack of a written catalogue both for the image of the Community in general and for the protection of the rights of the European citizen. As a result, the Commission has reconsidered its position. It has considered the legal and technical problems which would be posed by the accession of the Community to the ECHR and it has come to the conclusion that there are no obstacles to such a step that cannot be overcome.

After a thorough examination of all the arguments, the Commission now recommends the formal accession of the European Communities to the ECHR. The decisive factor in its view is that the ECHR and the protection of fundamental rights ensured by the Court of Justice of the European Communities essentially have the same aim, namely the protection

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(1) Cf. Supplement 5/76 to the Bulletin of the European Communities, p. 15.

of a heritage of fundamental and human rights considered inalienable by those European States organized on a democratic basis. The protection of this Western European heritage should ultimately be uniform and accordingly assigned, as regards the Community also, to those bodies set up specifically for this purpose.

The Commission is aware that the accession of the European Communities to the ECHR will give rise to not inconsiderable difficulties on account of the Communities' particular structure. Before it submits appropriate proposals to the Council, therefore, it has considered it expedient to launch a discussion on the results of its examination by means of this Memorandum in accordance with the announcement made by its President to the European Parliament on 16 November 1978.

4. It should be clearly stated from the outset that accession of the European Communities to the ECHR does not form an obstacle to the preparation of a special Community catalogue, nor does it prevent in any way the Court of Justice of the European Communities from further developing its exemplary case law on the protection of fundamental rights, which has always been welcomed by the Commission. As Article 60 thereof clearly shows, the ECHR is only a minimum code and thus in no way prevents its contracting parties from developing a more extensive protection of fundamental rights. The Court of Justice will therefore remain free not only to apply the method which it has developed for the Community with a view to defining economic and social fundamental rights, which are barely touched upon in the ECHR, but also where specific needs dictate, to go beyond the rights contained in the ECHR.

It should also be pointed out that accession to the ECHR does not imply any extension of the powers of the Community with regard to the protection of fundamental rights, and that it is in no way the intention of this Memorandum to advocate the extension of the powers of the Community vis-à-vis the Member States to cover fundamental rights which are not within the scope of the Community.

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II. The European Convention on Human Rights and its mode of operation.

Drawn up within the Council of Europe, the European Convention on Human Rights was signed on 4 November 1950 and came into force on 3 September 1953. Five protocols were adopted later.

The ECHR has been signed by all members of the Council of Europe, that is to say all nine Member States of the Community, plus Austria, Cyprus, Greece, Iceland, Malta, Norway, Portugal, Sweden, Switzerland and Turkey and recently Spain and Liechtenstein also. With the exception of Spain and Liechtenstein, all these States have also ratified the convention.[1]

The European Convention on Human Rights represents a collective guarantee at a European level of a number of principles set out in the Universal Declaration of Human Rights, supported by international judicial machinery making decisions which must be respected by contracting States. This collective and international guarantee is not a substitute for national guarantees of fundamental rights, but is supplementary to them. Proceedings under the Convention involve three bodies : the European Commission of Human Rights, the European Court of Human Rights and the Committee of Ministers of the Council of Europe.

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(1) It should be noted however that France has not signed the additional Protocol N° 2 and that Italy and the United Kingdom have not yet ratified Protocol N° 4.

a) The European Commission of Human Rights has mainly a mission of inquiry and conciliation. If no friendly settlement has been reached on the basis of respect for Human Rights, the Commission formulates a legal opinion. The Commission consists of a number of members equal to the number of contracting parties. These members are elected by the Committee of Ministers by absolute majority from a list of names drawn up by the Bureau of the Consultative Assembly of the Council of Europe; the election is based on proposals made by each group of representatives in the Consultative Assembly. The members, who are elected for a period of six years, sit in the Commission in their individual capacity, which ensures genuine independence. The Commission may deal both with applications submitted by a contracting party (Article 24) and with complaints made by a person, non-governmental organization or group of individuals (Article 25); the latter provision applies, however, only insofar as the State complained of has expressly recognized the right of individuals to submit applications.[1]

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(1) France, Cyprus, Greece, Malta and Turkey have not so far permitted individual applications.

The Commission decides first on the admissibility of applications. If an application is declared admissible and no friendly settlement can be achieved between the parties, the Commission draws up a report which includes in particular its opinion as to whether there is a breach of the ECHR. The case may then be referred to the Court within three months, although only the State making the application or the State complained of, the State of whom the person concerned is a national or the Commission of Human Rights itself are empowered to do this. If the case is not referred to the Court, the Committee of Ministers has to take a decision.

b) The European Court of Human Rights is competent to take a judicial decision which is binding on the parties to the action on whether in a given case the Convention has or has not been violated by a contracting State. The Court consists of a number of independent judges equal to that of the Members of the Council of Europe. They are elected by the Consultative Assembly from a list of candidates submitted by the Member States; each Member State may nominate three candidates, of whom two at least must be its own nationals. The judges are elected for a period of nine years.

The Court is competent only if its jurisdiction has been recognized by the contracting parties concerned (Article 46).[1] The Commission or one of the contracting parties may refer a case to the Court, but not an individual applicant (Articles 44 and 48). It decides on the case in question by means of a judgment which is final and may award compensation to the injured party.

c) If the case has not been referred to the Court within three months of the submission of the Commission's Report, the Committee of Ministers decides by a two-thirds majority whether there has been a violation of the ECHR; at the same time it prescribes a period during which the State concerned must take the necessary measures. If that State does not take satisfactory measures, the Committee of Ministers has to decide "what effect shall be given" to its original decision.

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(1) With the exception of Malta and Turkey all members of the Council of Europe have accepted the compulsory jurisdiction of the Court. Spain and Liechtenstein have not yet adopted a position on this point.

The ECHR contains no provisions on how this should be done; it mentions as a form of sanction only publication of the Commission's report (Article 32(3)). Many observers consider these quasi-juricial powers to be extremely unsatisfactory on account of the political nature of the Committee of Ministers.

III. The relationship of the Community to the Convention on Human Rights on the basis of the present legal position.

1. Since 1974, all the Member States of the Community have been contracting parties to the ECHR, which has led the Court of Justice of the European Communities to derive guidelines for the constitutional traditions common to the Member States from the fundamental rights embodied in the ECHR; in other words to use the ECHR indirectly as an indicator of the standard existing at Community level in the field of fundamental rights. Although the Court has hitherto avoided speaking of the Community being directly bound by the catalogue in the ECHR, there are good reasons for considering this already to be the case. On the one hand the ECHR represents a minimum standard of the "general principles of law" protected by the Court of Justice. On the other, it is arguable that the Community, insofar as powers have been assigned to it by the Member States, is already bound, on the basis of the principle of substitution, by the substantive provisions of the Convention on Human Rights by reason of the original obligation of the Member States.

2. Since the Community is not a contracting party to the ECHR, it seems impossible for it to be made the direct object of an application by a State or individual. Nevertheless the possibility that certain legal acts of the Community could be made the subject of proceedings before the Commission of Human Rights or the Court of Human Rights cannot be dismissed a priori. Applicants might be above all non-member countries, which have no access to the Court of Justice of the European Communities and natural or legal persons, who have lost their case in proceedings before the

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latter. This last possibility materialised recently; an employees' association sought to incriminate all the Member States together concerning a decision of the Council refusing it the right to be represented in the Consultative Committee set up by the ECSC Treaty. Admittedly this application was dismissed by the Commission of Human Rights on 10 July 1978 as inadmissible, but only on grounds relating to the particular circumstances of that case. At this stage the possibility cannot be excluded that the European Commission for Human Rights or the Court in Strasbourg will one day take a different view of the question of the collective responsibility of the Member States, having regard in particular to the consequences which the transfer of powers of the Member States to the Community implies.

3. The danger that Community acts will be made subject to control by the Strasbourg authorities without the Community having appropriate means to defend itself is evident particularly in those cases in which the Member States incorporate into national law obligations under Community Law without having any discretionary powers of their own. A human rights complaint would be directed in such cases against a specific Member State; and as such would therefore be perfectly admissible. The object of the complaint would then be, however, disregarding the possibility of any additional provisions not specifically required under Community law, the Community rule behind the national act. The situation with such implementing acts is particularly unsatisfactory inasmuch as the Member State would certainly be unable to rely on the defence that it was merely fulfilling an obligation under Community law, while the Community, the party ultimately responsible, would, for its part, have no opportunity to reply to the complaints against it.

4. Thus, the Community runs the risk under the present legal position that its legal acts could be controlled by the Strasbourg authorities as to their compatibility with the ECHR, without having appropriate means to defend the Community position, while the Member States could possibly be prevented from applying those acts.

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IV. The arguments in favour of accession.

The arguments in favour of the Community becoming a party to the ECHR may be summarized as follows :

1. Improving the image of Europe as an area of freedom and democracy.

a) Accession to the ECHR would make a substantial contribution to the strengthening of democratic beliefs and freedon both within and beyond the free world. Even more than the Joint Declaration by the three political institutions of 5 April 1977 [1] on the protection of fundamental rights, it would make clear to the whole world that the Community does not merely make political declarations of intent but is determined to improve in real terms the protection of human rights by binding itself to a written catalogue of fundamental freedoms.

b) The accession of the Community to the ECHR is completely in line with the declaration made by the European Council on democracy on 8 April 1978; in this declaration is was solemnly stated "that respect for and maintenance of representative democracy and human rights in each Member State are essential elements of membership of the European Communities". If respect for human rights is for a State an essential condition of membership of the Community, then it is only logical to bind the Communities themselves to respect such rights.

The accession of the Community to the ECHR would give increased significanceto the Copenhagen declaration and would allow the Community to ensure the respect of the legal,political and moral values to which it is attached.

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(1) O J C 103 of 27 April 1977, p. 1.

2. Strengthening the protection of fundamental rights in the Community.

a) Accession of the Community to the ECHR would clarify the position of its legal acts in relation to the ECHR and give them a satisfactory status; for it is more logical to enable a complaint for violation of fundamental rights to be made directly against such acts under the conditions laid down in the ECHR rather than merely by means of an attack upon the relevant implementing measures taken by the Member States; this would then make possible genuine adversary proceedings in which the Community itself could participate. The accession of the Community to the ECHR would moreover restore the legal position in which the nationals of Member States found themselves before the transfer of certain powers to the Community.

b) Accession would at least partly satisfy the demand, voiced for some time, that a written catalogue of fundamental rights, binding on the Community, should be established. It is true that the rights contained in the Convention and in the additional Protocols do not cover all the fundamental rights which might possibly be pertinent to the activities of the Community. The majority of these rights are nevertheless important for the Community also. These rights will be guaranteed by a written legal act providing clear criteria known beforehand by individuals and the Institutions.

3. Strengthening of institutions.

a) Accession of the Community to an international mechanism of legal control would underline its own personality.

b) Accession to the Convention would enable the Community, when confronted with criticism concerning the gaps which exist as regards fundamental rights, to point not only to the very progressive case law of the Court of Justice, but also to its formal commitments within the ECHR. The Community would show its willingness to meet all objections calling into question the compatibility of its acts with fundamental rights.

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c) Finally, accession would reduce the risk of national courts using the absence of a written catalogue of fundamental rights formally binding upon the Community as justification for reviewing acts of the Council or the Commission by reference to their national constitutions, and possibly declaring them inapplicable in the light of those constitutions, thus violating the principle of the uniformity of Community law.

V. Arguments against accession.

1. The Community requires its own catalogue.

It has been contended that the fundamental rights contained in the ECHR are not relevant for the Community and that, accordingly, the idea of accession can serve only as an alibi for failure to tackle the real problem : the preparation and adoption of a catalogue specially adapted to the requirements of the Community.

As will be shown below in point 2, the catalogue in the ECHR is by no means irrelevant to the Community's needs but at the same time it cannot be said to be adapted to the requirements of the Community on all points. On this matter, however, it has already been pointed out in the introduction that the chances of agreeing, within a reasonable period of time, on a catalogue specifically designed for the Community, in particular as regards economic and social rights, remain slight. The Community should therefore adhere to the Convention with the intention of working actively to enlarge and reinforce the human rights enshrined therein.

As has already been pointed out above, the accession of the Community to the ECHR in no way precludes the eventual preparation of a specific Community catalogue going beyond what is required by the Convention.

2. The ECHR does not meet the requirements of the Community.

It is correct that the ECHR is concerned more with the traditional freedoms than with the economic and social rights which are more relevant to the Community. Nevertheless, the traditional freedoms are also important for the Community and, furthermore, the Convention and its additional protocols do contain a number of economic and social rights. In terms of potential significance, the most important probably are the right to respect for private and family life, home and correspondence (Article 8). These rights could be of significance not only in connection with rules on competition and prices, but also in relation to provisions which restrict unreasonably the right of migrant workers and members of their family to live together. As regards freedom of religion and association, there are already pertinent examples in the case law of the Court [(1)] and not much imagination is needed to see that problems could also arise with regard to the general fredom to hold opinions and to receive and impart information and ideas (Article 10). Article 10 could play a role in connection with both competition law and rules on the movement of goods; moreover, it has a not inconsiderable bearing on the relationship of the Community and its employees.

The procedural guarantees provided for in Article 6 could be relavant to the procedures by which the Community imposes sanctions. Moreover, just as it has already been faced with the "ne bis indem" [(2)] problem, the Community could equally one day find itself confronted with the "nulla poena sine lege" rule embodied in Article 7 of the ECHR.

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(1) cf judgment of 27 October 1976, Case 130/75 - Prais v Council [1976] ECR 1589 and judgment of 28 October 1975, Case 36/75 - Rutuli v French Minister for the Interior - [1975] ECR 1219.

(2) Judgment of 14 February 1972, Case 7/72 - Boehringer v Commission [1972] ECR 1281.

The right to form any type of peaceful association or trade union (Article 11) is without doubt an economic fundamental right of considerable significance. The first Additional Protocol concerns the protection of property and the right to education; the latter has become of concern to the Community in Cases 9/74 [1] and 68/74 [2] in connection with the equal treatment of the children of migrant workers. Finally, there are embodied in the fourth Additional Protocol rights concerning the free movement of persons which are of particular significance for the activities of the Community.

The often heard claim that the ECHR is only of marginal interest for the activities of the Community therefore appears, all things considered, to be incorrect. Moreover, in the future, it cannot be excluded that initiatives may be taken to strengthen the position of the European citizen in the field of economic and social rights.

3. <u>The Community is incapable of fulfilling the obligations arising from ECHR.</u>

It has also been maintained that, from the point of view both of the substance of the rights it contains and of the procedures it provides for, the ECHR is clearly intended for participation by sovereign States and that certain of the obligations which it imposes could not be fulfilled by the Community in its present form.

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(1) Judgment of 3 July 1974, Case 9/74 Casagrande v Landeshauptstadt München [1974] ECR 773.

(2) Judgment of 29 January 1975, Case 68/74 Alaimo v Préfet du Rhône [1975] ECR 109.

a) It is true that both in the way that it is drafted and in its origins, the ECHR is intended for participation only by sovereign States. Provisions such as Articles 10, 11, 17, 28, 30, 31 or 64, which use the term "State" (which, however, is used in the Convention merely as a synonym for the term "High Contracting Party") cannot be applied directly to international organizations. From a legal and political point of view, however, the Commission considers that this is no more of an obstacle than the terms "national security" of "economic well-being of the country", which are used in Articles 8 to 11 as a criterion for the limitation of certain freedoms by the legislature. The need to restrict fundamental rights on grounds of a superior common interest applies in principle to the Community just as it does to the contracting States. Therefore it should be sufficient to lay down in an accession protocol (still to be negotiated) that the Convention, when it uses terms relating specifically to States, also applies mutatis mutandis to the European Communities.

b) One must take into account the objection that the Community is not a sovereign State and for this reason could not fully exercise the procedural rights embodied in the ECHR. In view of the necessarily limited powers of the Community in comparison with those of States, it must indeed be asked whether it is right for the Community to seek full and equal membership in all respects. In the Commission's view, accession must serve to extend the range of legal remedies available in the event of violations of fundamental rights by the Community. In other words, any person who, under the ECHR, has a right to bring proceedings before one of the organs of the Convention should also be entitled, under the conditions laid down in the Convention, to have legal acts of the Community examined as to their compatibility with the fundamental rights embodied therein.

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As regards the active right to refer cases in accordance with Articles 24 and 48 b,c,d, of the ECHR, however, one must ask whether the Community should acquire these rights. One should at least admit that the Community should be able to exercise such rights in those cases concerning violations of fundamental rights by a State which is not a member of the Community and where the violation has a specific connection with the powers transferred to the Community. Where it is a question of violations of fundamental rights by its Member States which are specifically related to Community law, the Community in any event possesses adequate means of action, under the Treaties' infringement procedures.

Another question is whether the Community should also refrain from participating in the work of the organs of the Convention where the matter in question is of a non-Community nature : this question will be considered below in chapter VI. 1.

c) It has also been claimed that the Community in its present constitutional form could not execute various obligations arising from the ECHR, for example, the effective remedy requirements of Article 13 and the holding of elections at reasonable intervals with a view to the choice of the legislature (Article 3 of the First Additional Protocol).

ca) It is true that the Treaties provide for no direct remedies against legal acts which are addressed to an unspecified number of persons. Nevertheless, Article 13 of the ECHR has never previously been interpreted as meaning that in the event of a violation of one of the rights embodied in the ECHR judicial remedy must exist against every act, including legislative acts. The wording of Article 13 requires an effective remedy before a national authority. As the Court of Human Rights decided in the Golder [1] and Klass [2] cases, among others, it need not necessarily be a judicial authority.

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(1) Judgment of 21 February 1975, Yearbook of the European Convention on Human Rights 1975, pp. 291 and seq.

(2) Judgment of 6 September 1978.

The possibility of an effective remedy is sufficient, particularly, in the form of appeal to a supervisory authority or the possibility of presenting counter arguments, but nevertheless one must rely on the totality of the remedies available.

If in this connection one takes into consideration the indirect remedies available to any citizen affected by a legislative act of the Community, such as the examination of such acts by means of proceedings under Article 177 and 184 of the EEC Treaty and by way of the claim for compensation under Article 178 and the second paragraph of Article 215 of the EEC Treaty, no obstacles to accession should arise from Article 13 of the ECHR. It should moreover be pointed out that the legal orders of a considerable number of States which have signed the ECHR do not provide for direct remedies against legislative acts. Nevertheless, none of those States has considered it necessary to enter a reservation in relation to Article 13.

cb) As regards Article 3 of the First Additional Protocol, according to which the contracting parties are obliged "to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature", one may question whether this provision is satisfied by the Community. In this respect, it must be pointed out that the text of Article 3 does not require the election of the legislative body by direct universal suffrage. Moreover, apart from the special nature of the legislative process in the Community, there is no doubt that the choice of the Members of the Council of the Communities reflects the results of free elections ensuring the free expression of the opinions of the citizens of the Member States. In any case, if there are doubts, it would be possible to enter a reservation in this respect, on signing the accession protocol or at the moment of depositing the instrument of ratification, to the effect that the accession of the Community to the ECHR does not affect its present institutional structure. Such reservations are possible under Article 64 of the ECHR and have been made with regard to various provisions of the convention by almost all signatory States.

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cc) Finally, reference should be made to the problems which, in this context, might arise for the Community from Article 14 of the ECHR. Under this provision, the enjoyment of the rights and fredoms set forth in the Convention must be "secured without discrimination", in particular descrimination on grounds of national origin. In order to avoid possible objections against the preferential treatment which is accorded to nationals of the Member States and which is inherent to the nature of the Community, a clarification would probably be necessary in respect of Article 14 of the ECHR.

4. Impairment of the jurisdictional system of the Community.

It is sometimes argued that it would be unacceptable for the decisions of the Court of Justice of the Communities to be subject to review by some other international body. Moreover, legal procedures, which are already lengthy as a result of the combination of national and Community remedies, would be made subject to further delay.

a) On closer examination, there is nothing unusual in the idea that the decisions of an "international court" should be subject to review by other international bodies. The Community is after all the smaller entity in relation to the Council of Europe. Its legal system may in this respect be considered an internal legal system. It is therefore only logical that decisions of the Court of Justice of the European Communities should be treated in the framework of the ECHR as decisions of a national court.

b) The fact that access to additional remedies lengthens the proceedings is only natural and should be accepted as a lesser evil in view of the resulting improvement in the protection of fundamental rights. There is no reason to fear a delay in the execution of Community decisions, since neither the lodging of applications with the Commission of Human Rights nor the bringing of cases before the Court of Human Rights has suspensory effect.

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5. Individual right of petition and reservations

It has been contended that accession to the ECHR would lead to a real improvement of the legal protection of the citizen only if the Community was also to allow individual right of petition against all its legal acts; it is at present not certain, that such a decision will be taken. The Community ought, moreover, to state whether it intends to take refuge behind the reservations its Member States have made regarding this or that provision and if need be add new ones, or whether it is prepared to accept the Convention as it stands.

a) If accession is to bring about a substantial improvement in the protection of fundamental rights, it would be desirable, if not entirely indispensable, for the Community to recognize not only the competence of the Court of Human Rights but also to allow the individual right of petition provided for in Article 25 of the ECHR. Without the possibility of the individual right of petition accession to the ECHR would primarily benefit those States which are not members of the Community. Applications introduced by a Member State against the Community under Article 24 of the ECHR are hardly conceivable. One should, moreover, exclude them as Articles 87 ECSC, 219 CEE, and 193 EAEC forbid the Member States to settle disputes concerning the application and interpretation of Community law in a different manner from that laid down in the Treaties.

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Accession to the Human Rights Convention should signify, as far as possible, that the individual right of petition in Article 25 ECHR be allowed. The Commission recommends this approach for both political and legal reasons. It is of the opinion, however, that for a transitional period accession might be envisaged without this possibility should the agreement of all Member States to the allowing of individual petitions not be immediately forthcoming. Even if the Community could not immediately accept the individual right of petition, accession would remain an important step forward from the political point of view, especially if it were declared on that occasion that the Community plans to recognize the individual right of petition eventually. For the citizen seeking justice, there would be an advantage in this at least in that the ECHR would then no longer have to be regarded only as an indicator as to the general legal principles of the Member States, but as a legal instrument formally binding on the Community (cf. Article 228(2) of the EEC Treaty). This would doubtless encourage the courts of Member States to refer to the Court of Justice of the European Communities more frequently than before questions concerning the compatibility of certain Community acts with the ECHR.

It should also be pointed out that the negotiations over accession and the subsequent ratification procedures will, in any case, take a considerable amount of time. The possibility cannot be ruled out that during this period the Member States might reach agreement on the question of the right of individual petition.

b) Because of the various reservations which the Member States have made regarding individual provisions upon signature or when depositing the instrument of ratification, the obligations imposed on them by the ECHR are not uniform. This might result in certain Member States not needing to comply with the ECHR when fulfilling an obligation under Community law, while others do. Depending on the type and extent of the Community's reservations, the situation might even arise where the citizen concerned cannot plead the incompatibility with the Convention of a national implementing measure, but can successfully attack the Community act underlying the measure.

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In the Commission's opinion, such divergences ought not to encourage the Community to enter reservations which go beyond the extent which is absolutely necessary having regard to its internal structure. If the Community confines itself to making the few reservations justified by its specific nature, there would be no fear of a conflict between the reservations made by the Member States and the position of the former. In the example given, the reservation expressed by the Member State would, on the one hand, be fully respected, while on the other hand the citizen would be given an opportunity to attack the Community act directly on the grounds that it conflicts with his fundamental rights. The Commission therefore advocates that the Community's reservations in the event of accession be limited to matters specific to the Community.

VI. Participation by the Community in the organs of the ECHR.

The preceeding condiderations have shown that adoption of the fundamental rights contained in the Convention - apart from certain clarifying statements as regards Article 14 and Article 3 of the first Additional Protocol - pose no problems for the Community. Difficulties do arise, however, over the question how the Community would actually participate in the work of the organs of the ECHR. Even these difficulties nevertheless appear upon closer inspection to be surmountable.

1. Partidpation in the work of the Commission of Human Rights and the Court of Human Rights

Unlike the Committee of Ministers, members of the Commission and the Court do not represent the contracting parties and are not instructed by their Governments; the members of the Commission and the judges act only in their individual capacity.

Those States which are parties to the ECHR but not members of the Community therefore have no need to fear that, in cases concerning the Community, those members of the Commission or judges who are nationals of the Member States of the Community will unite in favour of the "Community" argument by forming a blocking minority or even the majority(1). For the same reason, they would not be able to make accusations of "over-representation" if a member of the Commission and a judge were added in the name of the Community as such.

There are therefore two possible solutions which may be envisaged for the Commission and the Court of Human Rights:

a) The first solution would leave untouched the present composition of the Commission and the Court in Strasbourg. It can be argued in favour of this arrangement that the addition of a member of the Commission and a judge in the name of the Community is not indispensable because of the independent status of the members of the Commission and the Court. In cases brought before the Court, the judge sitting "ex-officio" in the name of the Community could, for example, be the national of the Member State currently chairing the Council of the Communities.

One may ask, however, whether such a solution would not be in contradiction with the affirmation of the international personality of the Community. Does not the international legal capacity of the Community, in fact, require that, when the interests and, a fortiori, the responsibilities of the Community are being dealt with in the organs of the ECHR, an additional commissioner and judge be appointed in the name of the Community?

One can observe, in fact, that although the judges of the Court of Human Rights sit in their individual capacity and not as representatives of their States, a national judge, that is to say a judge of the country concerned, must sit as a member of the Chamber.

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(1) The Nine figure today among the nineteen States which have ratified the Convention; on the completion of the present negociations on the enlagement of the Community as well as the ratification procedures to the ECHR in progress, the relation would be twelve to twenty-one.

It would therefore seem unacceptable to opt for a solution whereby the Community as such is not represented within the Commission and the Court. It must be remembered that the members of the organs in Strasbourg are not necessarily familiar with the Community legal system.

b) The only acceptable solution is therefore the second one, whereby a commissioner and a judge, both appointed in the name of the Community, would respectively be part of the Commission and the Court of Human Rights. Their presence would underline the autonomy of the Community. It would be justified on the same grounds as the presence of a national from each country party to the ECHR. It is essential that every legal system be represented within the two organs.

The members of the Commission and the Court of Human Rights act in a purely personal capacity, the participation of the personalities, appointed to the two organs in the name of the Community, in the work of those organs should in principle extend to all cases before them. It would, of course, also be possible to restrict such participation to proceedings relating to complaints directed at the Community. This would be tantamount, however, to creating two categories of members of the Commission and the Court of Human Rights, which would, no doubt, not only pose personal and administrative problems but might also jeopardize the continuity of the case-law. At all events, the participation of the "representatives" of the Community must be ensured in the case of applications directed at measures taken by Member States to implement binding Community rules.

The appointment of these personalities would require a derogation from Articles 20 and 38 of the Convention, which lay down that no two members of the Commission or the Court of Human Rights may be nationals of the same State.

2. The Committee of Ministers

Although its functions are quasi-judicial, the Committee of Ministers is a political body whose members are bound by instructions from their respective Governments. In view of this dependence and the allegiance owed by the Member States to the Community, it is hardly conceivable that the Community and the Member States would hold divergent viewpoints within the Committee of Ministers, not only when the lawfulness of an act of the Council is at issue, but also in respect of all acts of the Community.

For this reason, those contracting parties to the ECHR which are not members of the Community might therefore see the Member States of the Community blocking decisions calling into question Community acts. Since, under Article 32 of the ECHR, the Committee of Ministers adopts decisions by a two-thirds majority, there is already a blocking minority with seven votes on the basis of the present number of States members of the Council of Europe.

These difficulties could be overcome if the Member States of the Community and the Community itself had only one representative on the Committee of the Ministers during proceedings relating to Community matters (e.g. , the current President of the Council), i.e. if the Member States were legally obliged to withdraw from proceedings of this sort. This solution would, however, reduce to an abnormal extent the participation of the Member States. It would also set a dangerous precedent for the exercise of mixed powers within other international organizations.

In these circumstances, it would seem appropriate to exclude totally the Committee of Ministers from proceedings relating to Community matters. This solution may appear radical at first sight, but it would in no way prejudice the objective pursued by means of accession.

It should be remembered, also, that the proceedings before the Council of Ministers, were conceived for the case of a Member State which has not recognised the jurisdiction of the Strasbourg Court. The problem of the representation of the Community within the Committee of Ministers loses all practical importance the moment the Community recognises the compulsory jurisdiction of the Court of Human Rights. Such recognition will, in the view of the Commission, be a matter of course. It would even welcome it if the Commission of Human Rights, in every case where it declares admissible an application against a Community act, always referred the case to the Court on the basis of article 48 a) of the ECHR.

VII. The relationship between the ECHR and the Council of Europe

The ECHR is in the formal sense not a legal act of the Council of Europe. It was, of course, drafted within the Council of Europe, and it is also true that the Convention makes use of some of the organs of the Council. From the legal point of view, however, it is an independent mechanism. It ought therefore to be possible to agree to a derogation from Article 66 of the ECHR, which provides that the Convention is open only to members of the Council of Europe.

There is no need for the Community to become a member of the Council of Europe itself. The cooperation between both organizations is satisfactory and it is becoming increasingly close. The Community has already acceded to several conventions of the Council of Europe with a content relevant to the Community. Experience has shown that the members of the Council of Europe are as a rule prepared to facilitate Community participation in such conventions, even if this calls for certain changes to existing conventions.

VIII. Election procedures

1. Commission of Human Rights

Pursuant to Article 21 of the ECHR, the members of the Commission of Human Rights are elected by the Committee of Ministers by an absolute majority of votes. Unlike the exercise by the Committee of its judicial functions which may pose problems, there are no objections of principle to allowing the Committee of Ministers to elect the "representative" of the Community. (See in this connection VI.1(b) above). To prevent the Member States of the Community from systematically overruling the other contracting parties during such elections (which could happen especially after the forthcoming enlargement of the Community), it would appear advisable to provide for unanimous agreement on the appointment to the Commission of Human Rights of the member in the name of the Community; in fact the elections of members of the Commission of Human Rights already follow that practice.

As regards the preparation of the list of candidates provided for in Article 21 of the ECHR, it should be considered whether this should be left to the Consultative Assembly of the Council of Europe or whether a formula should be sought which, while maintaining by and large the existing procedures, guarantees an appropriate degree of participation by the European Parliament in the nomination of the "Community candidates".

2. Court of Human Rights

Pursuant to Article 39 of the ECHR, the members of the Court are elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the members of the Council of Europe. This procedure could be followed without any particular difficulty for the appointment of a Community judge. A derogation would nevertheless have to be made from Article 39, so that the Community, as soon as it becomes a Contracting Party to the Convention, could propose its candidates without being a member of the Council of Europe.

Preparation of the list of candidates for the position of Community judge is an internal Community matter. There would therefore be no need to include a special provision in the protocol of accession.

IX. The defence of the Community's viewpoint

This, too, is an internal matter which the Community institutions must settle among themselves. In the Commission's view, the Community institutions should be guided by Article 211 of the EEC Treaty.

X. Special problems

Of the numerous problems to which accession by the Communities to the ECHR gives rise, three deserve special mention : the status of the ECHR within the Community legal order, the effects of accession on the operation of the ECHR within the legal orders of the Member States, and the question of how to proceed in cases in which national courts have failed to fulfil their obligations to make a reference to the Court of Justice of the European Communities.

1. Under Article 228(2) of the EEC Treaty, accession by the Community to the ECHR would mean that the obligations contained in the ECHR would be directly binding on the Community institutions. Only the Court of Justice Justice can in the last analysis rule on the status of the ECHR within the Community's legal order. It is clear from the previous case-law of the Court of Justice [1] that one must start from the principle that the ECHR is higher-ranking within the Community than secondary Community legislation.

2. Since the effects of the ECHR in national law are at present still very varied (they range from the completely insignificant to a position of primacy over national law and even, in the case of Austria to the position of a constitutional norm). One must ask whether the formal incorporation of the ECHR into Community law would involve changes as regards its effect within the national law of the Member States. In the Commission's opinion,

(1) Cf. Judgement of 12 December 1972 in Joined Cases 21 to 24/72, International Fruit Company v. Produktschap voor Groenten /1972/ 1219

this would not be the case. Accession by the Community to the ECHR can have implications only for Community law as such. Additional obligations would arise only with regard to the freedom of action of the Community institutions and their legislative and administrative functions. The position of Member States while exercising their own powers would, therefore not be affected by accession, despite the primacy of Community law over national law.

3. Under Article 26 of the ECHR, the Commission of Human Rights may deal with applications concerning an infringement of the ECHR only after all domestic remedies have been exhausted. Since the means of defence against unlawful Community acts often consist of a combination of national and Community judicial remedies, the question should be cleared up of how to proceed in cases in which national courts of last instance have failed to fulfil their obligation to refer the matter to the Court of Justice under the third paragraph of Article 177 of the EEC Treaty. The party concerned cannot himself compel the court to make such a reference. Consequently, Article 26 of the ECHR could not be used against him personally. The essence and purpose of Article 26 is, however, to prevent a matter from being brought before the Strasbourg authorities which has not yet been exhaustively investigated by the competent national courts. In other words, steps must be taken to ensure that the Court of Justice in Luxembourg is able to perform fully the supervisory functions vested in it by the Treaties.

Since it can hardly be envisaged that the Strasbourg authorities would themselves refer questions to the Court of Justice, it would appear appropriate to introduce a procedure whereby the Community is obliged, in cases where the compatibility of a Community act with the ECHR is in question, to ask the Court of Justice for an opinion before it submits its own conclusions and to transmit this opinion together with its observations to the Strasbourg authorities. This procedure should be employed both in the case

of clear failure by national courts of last instance to comply with the third paragraph of Article 177 of the EEC Treaty and in the case of applications by non-member countries, which, for their part, do not have the opportunity to make a reference to the Court of Justice when they are in doubt as to the conformity of a Community act with fundamental rights.

X.I.-IX. Technical aspects of accession

1. As already indicated in Chapter VII, accession by the Community to the European Convention necessitates derogation from Article 66 of the ECHR. This derogation could be included in the accession protocol, i.e., be agreed at the same time as the other amendments which will be necessary as a result of accession (e.g., to Articles 20, 38 and 39).

2. The legal basis for accession could be provided by Article 235 of the EEC Treaty, Article 203 of the Euratom Treaty and Article 95 of the ECSC Treaty, which enable appropriate provisions to be adopted if an action appears necessary to achieve one of the objectives of the Community. It is the objectives of the Community as a whole that the proposed action is intended to achieve; the activities undertaken by the Community institutions under the Treaties cannot henceforth be brought to a successful conclusion - because of the demands made by public opinion certain supreme courts and leading authorities as well as the constitutional principles of all the Member States of the Community - without effective protection of fundamental rights at Community level. Such action is moreover in line with the last part of the Preamble to the EEC Treaty and with the solemn declarations of 5 April 1977 and 8 April 1978.

3. The negotiations with the contracting States to the European Convention should take place on the basis of directives laid down by the Council of Ministers on a proposal from the Commission. The European Parliament would naturally be consulted after the conclusion of the negotiations. In view of the matters' importance, however, it would be advisable also to consult Parliament at the start of negotiations, since it has shown a particular interest in this question all along.

4. As already indicated, the negotiations concerning accession by the Community to the Convention will certainly take several years. The necessary amendments to the Convention will at all events become effective only after they have been approved by the current Members of the Convention in accordance with their national constitutional rules. This means that accession by the Community to the ECHR will be possible only if all the signatory States, including the Member States of the Community, agree to it.