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Human Rights

Reflections Concerning Accession of the European Communities to the European Convention on Human Rights

Hans Christian Krüger*

I. The Historical Context

When the European Council, meeting in Cologne in June 1999, decided to draft a Charter of Fundamental Rights, it was, in fact, the third attempt to prepare such a text. The major previous attempts were made in 1979, when the European Commission proposed the accession of the European Communities to the European Convention on Human Rights, and in 1989, when the European Parliament formulated a comprehensive catalogue of fundamental rights. Both of these earlier attempts failed.

This time, however, the efforts were successful and a European Union Fundamental Rights Charter was created. It was a wise decision

Deputy Secretary General of the Council of Europe. A version of this paper was presented at the International Law Conference entitled Human Rights: Dynamic Dimensions, held in London on April 27, 2002, and sponsored by the Center for International and Comparative Law of The Dickinson School of Law of The Pennsylvania State University in collaboration with the Institute of Advanced Legal Studies of the University of London.

to involve observers from the Court of Justice of the European Communities and the European Court of Human Rights in the preparation of the Charter, as it ensured the constructive collaboration of both Courts.

The Council of Europe agreed that it was a justified goal of the European Union to prepare a legal text; one which gave European citizens enhanced human rights protections, and that would encompass the legal acts promulgated by the organs of the European Communities. The acts of the European Union increasingly affected the everyday life of the citizens of Europe, not only in the economic context, but also in the civic, social, and political contexts. Preparing a charter of fundamental rights that would protect citizens against violations of their fundamental rights by the organs of the European Union was also considered, from the point of view of the evolution of the Union, to be a legitimate part of the political integration process in which the Union is presently involved. It was also felt in Strasbourg that it was in the interest of all those concerned to ensure that the Charter would adequately take into account the European Convention of Human Rights of 1950, which now binds some 41 European States assembled in the Council of Europe.

II. The Contents of the Charter

Throughout the drafting of the Charter, reference was made to the need, on the one hand, to achieve harmony with the European Convention on Human Rights ("Convention") and, on the other hand, to formulate the rights concerned in a manner more understandable and accessible to the ordinary citizen, and not simply a duplicate of the Convention's language. The rights enumerated in the Convention were agreed upon over 50 years ago. But other legal texts, for instance the German Basic Law, are of similar vintage. I personally disagree with those who consider the formulation of the rights enshrined in the Convention as outdated, old fashioned, incomprehensible, and in need of clarification in the new text. By deliberately adopting an open-ended approach to interpreting the text, the European Court of Human Rights has managed to keep its standards in line with constantly changing social, economic, and cultural conditions, and, also, ethical perceptions in the contracting States. Thus, the Court has repeatedly used individual judgments to clarify the scope and significance of the rights provided by the Convention. In the case of *Ireland v. United Kingdom*, for instance, the Court stated that its "judgments in fact serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby

contributing to the observance by the States of the engagements undertaken by them as Contracting States.”¹

One of the purposes of the general provisions of the Charter was to guarantee that the human rights enshrined in the Convention would not be weakened. Article 52, paragraph 3, of the Charter states that the meaning and the scope of rights contained in the Charter, which correspond to rights guaranteed by the Human Rights Convention, shall be the same as those laid down by the said Convention. Initially, the drafters intended to include the additional words “as interpreted by the European Court of Human Rights.” Although that phrase does not appear in the final draft, the Preamble includes a reference to case law of both the Human Rights Court and the Court of Justice.

III. The Legal Status of the Charter

The central question of the Charter’s legal status and its possible incorporation in the European Union or European Community Treaties was not addressed by the Brussels Convention elaborating the Charter. The issue persisted as a subject of controversy among the European Union member States to the very end. The European Parliament and the Commission came out in favor of a legally binding Charter, to be incorporated into the treaties. Although initially proclaimed as a non-binding text at the Nice Summit, the Charter is likely to influence legal practice. This view was also expressed by the European Union Commission.² The European Parliament, the Council, and the Commission have committed themselves to respecting the Charter. The legal service of the Commission has already started to examine the compatibility of new EU legislation with the Charter. The Charter is also mentioned in the preambles of recently adopted EU legal acts, particularly in the fields of asylum and judicial cooperation in criminal matters (i.e., the European arrest warrant). There is nothing to prevent the European Court of Justice and the Court of First Instance from referring to the fundamental rights it enshrines when determining general principles of Community law in accordance with Article 6 paragraph 2 of the European Union Treaty. The first signs of this are already evident in the conclusions of the Advocates General.³

Indeed, the possibility of incorporating the Charter into the

1. *Ireland v United Kingdom*, 25 Eur. Ct. H.R. (ser. A) at 154 (1978).

2. Communication on the Legal Nature of the Charter of Fundamental Rights of the European Union, COM(00)644 final.

3. Conclusions of Advocate General Tizzano, Case C-173/99, *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)*, ¶¶ 26-28 (Feb. 8, 2001); conclusions of Advocate General Alber, Case C-340/99, *TNT Traco SpA*, ¶ 94 (Feb. 2, 2001).

European Community or European Union Treaties will be discussed by the next Intergovernmental Conference, which must complete its work by 2004, at the latest. Beforehand, the Convention, chaired by Mr. Giscard d'Estaing, will consider these matters under a mandate received from the European Council on December 15, 2001, at Laeken. Indeed, the Laeken Declaration states expressly that "[t]hought would also have to be given to whether the Charter of Fundamental Rights should be included in the basic treaty and to whether the European Community should accede to the European Convention on Human Rights." This throws the problem of the relationship between the European Convention on Human Rights and the Charter of Fundamental Rights into sharp relief. The issue was repeatedly mentioned in the drafting Convention but could not be resolved due to the absence of a clear mandate.

IV. The Relationship Between the Charter and the Convention

Throughout the elaboration of the Charter, the observers of the Council of Europe were anxious about the creation of an alternative European system for the protection of human rights, one which would operate independently from that created by the European Convention on Human Rights. The fear that new dividing lines would be set up in Europe in the field of human rights, which demanded a united front, was always present. During the past ten years, the Council of Europe has experienced a significant enlargement in its membership. The Council almost doubled, from 23 member States in 1989, to 41 member States in 1999. There are now 43 members with the accession, a year ago, of Armenia and Azerbaijan. Furthermore, the 11th Protocol to the European Convention on Human Rights established the single permanent Court. The Protocol substantially changed and improved the mechanism of human rights protection under the Convention. Therefore, it remains important to avoid the creation of an alternative European system for the protection of human rights and fundamental freedoms that might compete with the Convention. This point was made during the elaboration of the Charter, and it bore some fruit.

V. Accession to the European Convention on Human Rights

The best means of achieving the necessary coherence between the European Convention on Human Rights and Community law is for the European Communities or the European Union to accede to the former. This has repeatedly been advocated by not only the Council of Europe's Secretary General⁴ and Parliamentary Assembly,⁵ but also by the

4. See Walter Schwimmer, Secretary General of the Council of Europe, *Einheit* –

European Commission⁶ and the European Parliament. In a resolution adopted on March 16, 2000, the European Parliament once again called on the Intergovernmental Conference "to enable the Union to become a party to the European Convention on Human Rights so as to establish close co-operation with the Council of Europe, whilst ensuring that appropriate action is taken to avoid possible conflicts or overlapping between the Court of Justice of the European Communities and the European Court of Human Rights."⁷

Accession and the European Union Charter should be seen not as in the alternative, but, rather, complementary. At the drafting Convention's very first sitting on December 17, 1999, European Union Commissioner António Vitorino said that the adoption of a Charter of Fundamental Rights would neither prevent accession to the European Convention on Human Rights nor make it unnecessary.⁸ In view of the progress of integration within the European Union, it seems appropriate for the European Union to have a written bill of rights, not unlike most of its member States. Article 53 of the European Convention on Human Rights makes it clear that the Convention does not aim to restrict or prejudice in any way more extensive national or international guarantees of fundamental rights.⁹ For reasons of legal clarity and legal certainty, accession to the European Convention on Human Rights would be a logical and sensible addition to the Charter.

The arguments used in the past to support accession have gained added weight through the extension of the European Union's powers by the Treaties of Amsterdam and Nice. Accession would improve the protection of citizens' fundamental rights and lead to a coherent system

auch in Menschenrechten (Kein Europa nach zweierlei Mass und Geschwindigkeit, FRANKFURTER ALLGEMEINE ZEITUNG, Mar. 14, 2000.

5. See Recommendation 1479 (2000) of Sept. 29, 2000, Doc. 8819, Report of the Committee on Legal Affairs and Human Rights (rapporteur Mr Magnusson); Recommendation 1439 (2000) of Jan. 25, 2000, Doc. 8611, Report of the Committee on Legal Affairs and Human Rights (rapporteur Mr Magnusson). See also Resolution 1068 (1995) of Sept. 27, 1995, Report on the Accession of the European Community to the European Convention on Human Rights, Doc. 7383.

6. See Communication on the accession of the Community to the ECHR and the Community legal order, Commission, SEC(90)2087 final (Oct. 19, 1990); see also Memorandum on the Accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Commission on Apr. 4, 1979, *Bulletin of the EC*, supp. 2/79.

7. European Parliament Resolution A5-0064/2000 on the drafting of a European Union Charter of Fundamental Rights (Plenary Session, Mar. 16, 2000).

8. Record of the first meeting of the Body to draw up a draft Charter of Fundamental Rights for the European Union, CHARTE 4105/BODY 1, p. 18.

9. "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party."

for human rights protection in Europe. Achieving this coherence is not simply a legal, but also a highly political matter. Just over 10 years after the fall of the Berlin Wall, it makes no sense to create a new division in Europe and to undermine the effectiveness of the most successful system ever devised for the protection of human rights. As far back as 1979, the European Commission declared that “the European Convention on Human Rights and the protection of fundamental rights ensured by the Court of Justice of the European Communities essentially have the same aim, namely the protection of a heritage of fundamental 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.”¹⁰

The credibility of the European Union’s human rights policy is at stake, too. There is a growing contradiction between the human rights commitments demanded from non-European Union States, for instance in connection with development aid and association agreements, and the lack of any external scrutiny whatsoever of the Union’s own actions. Does it really make sense to make ratification of the European Convention on Human Rights a condition for European Union membership, when the European Union itself, and its legislation, are wholly exempt from supervision by the Convention bodies?¹¹

Since the European Communities are not Parties to the European Convention on Human Rights, Europeans have, at present, no possibility of bringing complaints against the European Union institutions directly before the European Court of Human Rights. Following the adoption of a European Union Charter of Fundamental Rights, it seems increasingly anachronistic that the European Union should be the only “legal space” left in Europe which is not subject to external scrutiny by the Strasbourg Court.¹² While all national laws, regulations, court judgments, and other measures fall within that court’s jurisdiction, European Union legal acts do not.

10. See Memorandum on the Accession of the European Communities, *supra* note 6, ¶ 7.

11. See P. Alston and J.H.H. Weiler, *The European Union and Human Rights: Final Project Report on an Agenda for the Year 2000*, in LEADING BY EXAMPLE: A HUMAN RIGHTS AGENDA FOR THE EUROPEAN UNION FOR THE YEAR 2000 55 (1998).

12. J.-P. Jacqué, *L’adhésion de la Communauté Européenne à la Convention européenne des droits de l’homme: Aspects juridiques et techniques*, in *Grundrechtsschutz im europäischen Raum. Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention* 317 (Iliopoulos-Strangas ed.) (1993). “[E]lle [la Communauté] demeure, dans le cadre d’une Europe démocratique, un îlot dans lequel la question du respect des droits de l’homme est soustraite à tout contrôle externe mis en œuvre à l’initiative de l’individu.”

There have been two major objections to accession. These objections relate to the autonomy of the European Union's legal system and the problem of subordination of the European Court of Justice to the European Court of Human Rights. The following remarks are an attempt to answer these objections.

Any scheme for integration of the European Union into the European Convention on Human Rights system must allow for the autonomy of the Community legal system and the special status of the European Court of Justice. Under Article 220 of the European Community Treaty (ex Article 164), the Court of Justice of the European Communities is the ultimate authority on the interpretation of all Community law. But is it appropriate to talk of autonomy when the protection of fundamental and human rights is the issue? These rights are not merely another area into which Community competence will extend. The idea of human rights is based on universal values and, in Europe, that idea has found expression in the European Convention on Human Rights and in the establishment of the European Court of Human Rights as an independent international supervisory body. When it comes to the protection of fundamental and human rights, the European Convention on Human Rights and Community law is based on the same values and principles. In other words, accession in no way means that the European Union must be incorporated into a legal order foreign to its nature. Instead, it would simply be recognizing the international monitoring system, which applies to all its member States. All of these member States have accepted supervision by the European Court of Human Rights, and the European Union itself should now do the same. No one can claim, for instance, that the German Constitutional Court or the Finnish Supreme Court neglect fundamental rights in their rulings. Like the Court of Justice of the European Communities, they have an excellent reputation. Nevertheless, the existence of a European monitoring system, operating outside the national systems whose legal measures it examines, gives the public a guarantee that their rights will be protected—and dispensing with the monitoring system is unthinkable.

In the debate on European Union accession to the European Convention on Human Rights, it has been suggested that establishing a sequence of courts from the Court of Justice of the European Communities to the European Court of Human Rights would leave the Court of Justice subordinate to a Council of Europe body. This overlooks the fact that the European Court of Human Rights would by no means review all the European Court of Justice's judgments.¹³ The

13. See S. Alber and U. Widmaier, *Die EU Charta der Grundrechte und ihre Auswirkungen auf die Rechtsprechung*, EUGRZ 2000 497 at 506.

jurisdiction of the Court of Human Rights would be limited to cases raising issues involving the protection of fundamental and human rights under the European Convention on Human Rights. These constitute a small percentage of the cases brought before the Court of Justice. Moreover, the subsidiarity principle, which governs the Strasbourg system's relationship with national authorities—and which the Strasbourg Court has repeatedly emphasized—would also apply. Even after accession, the European Union institutions, including the Court of Justice and the Court of First Instance, would primarily be responsible for ensuring that the rights enshrined in the Convention were respected. Supervision by the European Court of Human Rights is subsidiary in character; a fact reflected, in particular, in the recognition of national margins of appreciation. The issue here is not subordination or primacy of courts but, rather, the submission of final decisions on alleged violations of fundamental rights to a uniform, specialized, pan-European body, with power merely to verify whether Community law and Community measures are compatible with fundamental rights. The Strasbourg Court is in no sense a higher court than the Supreme Courts or the Constitutional Courts of other countries. It is simply a “more specialized” court, responsible under the European Convention on Human Rights for “[ensuring] the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto.”¹⁴

If the European Union acceded to the European Convention on Human Rights, the tasks of the Luxembourg and Strasbourg Courts would be complementary. The Court of Justice of the European Communities would continue to review the final decisions on all questions of Community law. If the Strasbourg Court found incompatibilities between the Convention and European Community or European Union law, the relevant European Union institutions would then be responsible for taking the action needed to bring the corresponding regulations, or their application in specific cases, into line with the Convention's requirements. Like other Parties, the European Union institutions would, under Article 46, paragraph 1, of the European Convention on Human Rights, have a measure of discretion in executing the Strasbourg Court's judgments. In other words, external scrutiny in the field of fundamental and human rights in no way conflicts with the Court of Justice's role as the court of last instance for the interpretation of Community law.

14. Article 19 of the European Convention on Human Rights.

VI. Conclusion

The accession of the Union, or at least the Community/ies, would be a major contribution to the establishment of a coherent human rights protection system in Europe. It would confirm the European Union's standing as a Community based on the rule of law, and legal certainty would benefit if the actions and decisions of the European Union institutions were subjected to the same external scrutiny as those of its member States. The autonomy and authority of the two courts would also be strengthened if each had the final say in its own area of jurisdiction.

In 1994, when the Court of Justice of the European Communities was asked for an opinion on Community accession to the European Convention on Human Rights, none of the practical conditions for accession had been worked out. Therefore, the Court of Justice of the European Communities concluded that it was not in a position to give an opinion on the compatibility of accession with the provisions of the European Community Treaty.¹⁵ It could only consider the question of competence. It is thus extremely useful, in practical terms, to start thinking about the arrangements which should apply in the event of accession. The time factor must not be underestimated. Negotiating a protocol and getting it adopted and ratified by all the Parties to the Convention will take some time. It would therefore be a mistake to wait for the European Union to conclude its opinion-forming process before going into action at the Council of Europe.

The decision on accession is, of course, a matter for the member States of the European Union alone. However, the implications of that decision directly affect the interests of all the Council of Europe Member States, the joint guarantors of the Convention system. This is why the Council must strike while the iron is hot and make active preparations for accession. It is a very encouraging sign that the Committee of Ministers instructed the Steering Committee for Human Rights on March 28, 2001, "to carry out a study of the legal and technical issues that would have to be addressed by the Council of Europe in the event of possible accession by the European Communities/European Union to the European Convention on Human Rights, as well as of the other means to avoid any contradiction between the legal system of the European Communities/Union and the system of the European Convention on Human Rights."¹⁶ An expert working group held its first meeting from January 30 to February 1, 2002. The questions they addressed included:

15. See Opinion 2/94, RE the Accession by the Community to the European Human Rights Convention, 1996 E.C.R. I-1759, [1996] 2 C.M.L.R. 265 (1996).

16. Ad hoc terms of reference adopted at the 747th meeting of Ministers' Deputies.

- points on which an amendment of the ECHR would probably be required (e.g., the closed nature of the ECHR as a Council of Europe Convention (Art. 59), the reference to “State” or “States” in the Convention, and the supervision of judgments through the Committee of Ministers);
- points on which an amendment might not be necessary (e.g., the terminology used in the restriction clauses, financial contributions, *amicus curiae* participation of the EC/EU, and the question of inter-State complaints); and, finally,
- other questions (e.g., status and participation in the Court of the judge elected in respect of the EC/EU and modalities of entry into force).

The Steering Committee for Human Rights hopes to finalize its report in June 2002.

The House of Lords Select Committee on the European Union, reporting on the European Union Charter of Fundamental Rights in May 2000, came to the following conclusions at the end of their important Report:

While skillful drafting might side-step questions of potential conflict with the ECHR and European Court of Human Rights, a non-binding Charter would not prevent alternative rights or interpretations of ECHR rights being adopted by the Community courts. Accession to the ECHR remains the crucial step required if the gap is to be closed. Accession of the EU to the ECHR, enabling the Strasbourg Court to act as an external final authority in the field of human rights, would go a long way in guaranteeing a firm and consistent foundation for fundamental rights in the Union. It would secure the ECHR as the common code for Europe. The question of accession by the Union to the ECHR should be on the agenda of the IGC. [para. 154.]

In its Report, the Select Committee also—and rightly so—said that legal solutions to all problems involved can be found, provided the political will is present.

The Finnish authorities came down squarely on the side of finding this political will when they proposed, not unlike the Select Committee of the House of Lords, “that the issue of the accession by the European Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms be discussed anew in the intergovernmental Conference in 2004.”

I fully endorse the arguments put forward by Finland and would like to encourage the Finnish authorities to persist in their efforts. The proposal for a concrete modification of Article 303 of the Treaty on the

European Community, in order to allow the Community to accede to the ECHR, demonstrates the feasibility of this procedure. All that is now required is the political will to put it into effect.

