Vanderbilt Journal of Transnational Law

Volume 16
Issue 4 *Fall 1983*

Article 3

1983

An Analysis of the Proposition of Accession of the European Communities to the European Convention on Human Rights

Yves Quintin

AN ANALYSIS OF THE PROPOSITION OF ACCESSION OF THE EUROPEAN COMMUNITIES TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS*

*Yves Quintin***

TABLE OF CONTENTS

* The author wishes to thank Professor Stein and Rolf Welberts for their assistance in the preparation of this Article. The author, however, remains solely responsible for the opinions stated herein.

** Foreign Lawyer, Squire, Sanders & Dempsey, Cleveland, Ohio. LL.M. 1981, University of Michigan; Diplome d'Etudes Approfondies 1980, University of Paris-Dauphine; Maitrise en Droit 1980, University of Paris-V; MBA 1979, École Superieure de Commerce de Paris.

I. INTRODUCTION

Many individuals perceive the European Communities as an international organization having little impact on their daily lives. The lack of practical realizations, such as the long awaited European passport, has reinforced this perception in the minds of citizens, even the citizens of Member States. On a legal plane, however, the fundamental rights of individuals have been more and more affected by the pervasive influence and action of the European Community (EC) and its nature as a "new international legal order." Because the EC's legal norms have direct internal implications, unlike international organizations such as the United Nations, the EC's influence extends beyond that of an international legal order. Individuals in the Member States are granted new rights and obey new duties under the EC. To the extent that all Member States adhere to the "Rule of Law," however, these new rights and duties must be enacted within certain limits to protect the fundamental rights of individuals against arbitrary or capricious rules and decisions. The EC does not have a traditional constitution, and treaties in the European Community contain only a few provisions dealing with fundamental rights.[1] This unsatisfying situation, nonetheless, has not resulted in the infringement of rights because of the EC Administration's spirit of legality and the Court of Justice of Luxembourg's imaginative and progressive decisions. In addition, the EC's possession of limited prerogatives has contributed to relatively few infringements of fundamental rights.

The institutions of the EC increasingly are concerned that the inadequacy of fundamental rights protections may be an obstacle to the integration of the Communities and may undermine their international standing. The European Parliament, the Council, and the Commission issued a joint declaration in 1977 stressing their commitment to the protection of Human Rights "[a]s de-

1. *See, e.g.*, Treaty Establishing the European Economic Community, Mar. 25, 1957, arts. 7, 48, 52, 57, 117, 119, 298 U.N.T.S. 11 [hereinafter cited as EEC Treaty]; *see also The Protection of Fundamental Rights as Community Law Is Created and Developed*, 9 BULL. EUR. COMM. (Supp. 5/76), Point 7, at 8 (1976) ("the EEC treaty aim[s] to guarantee and improve the position of the individual in the Community") [hereinafter cited as *Protection of Fundamental Rights*].

rived in particular from the constitutions of the Member States and the European Convention for the protection of Human Rights and Fundamental Freedoms."[2] In 1979, the European Parliament adopted a resolution that urged the accession of the EC to the European Convention on Human Rights (ECHR).[3] This resolution endorsed an earlier memorandum issued by the Commission that advocated the accession of the EC to the ECHR.[4] In 1976, the Commission investigated the situation of fundamental rights in the Community legal order and presented a report to the European Parliament and the Council which stated that the "standard of protection of fundamental rights, as it can be taken from the more recent decisions of the Court of Justice, is satisfactory."[5] Although the Court's subsequent rulings indicated a commitment to a greater protection of fundamental rights,[6] the Commission felt it necessary to reverse its 1976 position and promote adherence to the ECHR.[7]

The Commission's modification of its opinion undoubtedly is based on a reevaluation of the function of human rights protections in integrating the Communities.[8] The accession to the Convention also may prove to be a means of dispelling threats to the legal cohesion of the Communities[9] and a political and symbolic step toward the European Union.[10]

These advantages of integration should not hide the numerous problems triggered by the accession.[11] The process of accession raises several international legal questions concerning the negotiation and ratification of the ECHR and the participation of the

---

2. European Parliment, *Council and Commission: Joint Declaration*, 20 O.J. EUR. COMM. (No. C 103) 1, 1 (1977). The Joint Declaration referred to the Court's decision in Nold v. Commission, 1974 C.J. Comm. E. Rec. 491, 507.

3. Resolution on the Accession of the Communities to the European Convention on Human Rights, 22 O.J. EUR. COMM. (No. C 127) 69, 70 (1979).

4. *Commission Memorandum: Accession of the Communities to the European Convention on Human Rights*, 12 BULL. EUR. COMM. (Supp. 2/79) (1979) [hereinafter cited as *Accession of the Communities*].

5. *Protection of Fundamental Rights*, *supra* note 1, Point 39, at 16-17.

6. *See Nold*, 1974 C.J. Comm. E. Rec. at 507; *see also* Hauer v. Land Rheinland-Pfalz, 1979 C.J. Comm. E. Rec. 3727; Rutili v. French Minister of the Interior, 1975 C.J. Comm. E. Rec. 1219.

7. *See supra* note 4.

8. *See infra* pt. II and accompanying text.

9. *See infra* pt. II A and accompanying text.

10. *See infra* pt. II B and accompanying text.

11. *See infra* pt. III and accompanying text.

EC in the organs of Strasbourg.[12] The most difficult problems, however, are the internal complications produced by the coexistence of two identical instruments—the ECHR as signed by each Member State and the ECHR as signed by the EC—in the legal orders of the Member States.[13]

II. Human Rights and the Integration of the Communities

A. Human Rights as an Obstacle to the Integration of the EC

Human rights in the EC legal order, until recently, have been a crack in the European edifice. The drafters of the EEC Treaties, the modern founding fathers, probably thought that the economic objectives of the Treaties made the protection of fundamental rights unnecessary.[14] This view, however, ignores the fact that every legal norm must be enacted within certain limits. Moreover, the economic objectives of the Treaties make compliance with fundamental rights even more important because fundamental rights increasingly tend to be social and economic rights.

When EC law is directly applicable in cases before the national courts, challenging individuals often argue that the EC rules do not respect the basic human rights embodied in their national constitution. The Court of Justice rejected this argument of unconstitutionality, stressing that the Court was "[N]ot in charge of assuring the respect of the internal legal norms, even constitutional, of the Member States."[15] The national courts, however, could not evade this argument.

The German and Italian constitutional courts have endangered the supremacy of EC law in cases that have questioned the EC's lack of fundamental protections. The German Court held that EC law could be reviewed on the basis of the fundamental rights provisions of the *Grundgesetz*, thus impairing the absolute supremacy of EC norms.[16] After the memorandum of the Com-

---

12. *See infra* pt. III B and accompanying text.

13. *See infra* pt. III A and accompanying text.

14. J. Boulouis & R. Chevalier, Grands Arrêts de la Cour de Justice des Communautés Européennes 101 (2d ed. 1978).

15. *Id.* (citing Mining Companies of the Ruhr Basin v. The High Authority of the ECSC, 1960 E. Comm. Ct. J. Rep. 423; Fredrich Stork & Co. v. High Authority of the ECSC, 1959 E. Comm. Ct. J. Rep. 17).

16. Decision of May 29, 1974, Bundesverfassungsgericht, W. Ger., 37 Bundesverfassungsgericht [BVerfG] 271.

mission supporting adherence to the ECHR was issued, however, the German Court held in a July 1979 decision that it accepted a limitation on its review of primary EC law under the German constitution.[17]

The German Court's decision apparently did not exclude the secondary EC law from review.[18] The Italian Court envisaged the possibility of reviewing EC norms that violate the fundamental principles of the Italian Constitution or the inalienable rights of man.[19]

The Court of Justice, confronted with these challenges by the national courts, developed a body of case law in which the concern for fundamental rights led to a higher level of protection for individuals. Because the Court's case law in this field has been studied often, a detailed description here is unnecessary.[20] The recent *Hauer* case[21] best summarizes the Court's position. In *Hauer*, an EC act was challenged as a violation of the German *Grundgesetz*. In deciding whether the plaintiff's fundamental rights had been infringed, the Court considered both the common constitutional principles of the Member States and the ECHR, which binds all Member States. The *Hauer* decision is tantamount to holding that the Communities are bound by the ECHR.[22]

This progressive and imaginative body of case law, however, is not an adequate answer to the national constitutional challenges. The German Constitutional Court is reluctant to yield completely to the absolute supremacy of EC law because the protection reached by combining the ECHR and common constitutional principles is a minimum standard. This resulting level of protec-

---

17. Decision of July 25, 1979, Bundesverfassungsgericht, W. Ger., 52 BVerfG 187. *See* Glaesner, *Einige Überlegungen zum Beitritt der EG zur Europäischen Konvention für Menschenrechte*, 1980-2 EUROPARECHT 121-22.

18. Glaesner, *supra* note 17, at 121-22.

19. Judgment of Dec. 27, 1973, Corte Cost., Italy, 1973 Giurisprudenza Constituzionale 2406.

20. *See generally* Edeson & Wooldridge, *European Community Law and Fundamental Human Rights*, 1976-1 L.I.E.I. 1 (discussing the case law of the Court of Justice and the decisions of the German and Italian Constitutional Courts).

21. *Hauer*, 1979 C.J. Comm. E. Rec. at 3727.

22. Some authors have argued for a long time that the EC is bound by the the decisions of the ECHR. *See, e.g.*, Waelbroeck, *La Convention Européenne des Droits de l'Homme lie-t-elle les Communautés Européennes?*, in DROIT COMMUNAUTAIRE ET DROIT NATIONAL (1975).

tion reflects, as to each fundamental right, the standard of protection provided by the least protective Member State. Because "common constitutional principles" are common only if accepted by all Member States, it logically follows that a principle adopted by all but one Member State cannot serve as a guideline or "inspiration" for the Court.

The *CFDT* case[23] exhibits the weakness of the EC's position regarding fundamental rights. In *CFDT* a French trade union, Confédération Française Démocratique du Travail, challenged a decision by the Council of the EC before the European Commission of Human Rights in Strasbourg on the grounds that the EC failed to respect certain provisions of the ECHR. Although the Commission determined that it lacked jurisdiction over the EC, it left open the issue of whether an act accomplished by an organ of the EC triggers the collective responsibility of the nine Member States under the ECHR.[24] The *CFDT* case points out the incomplete protection of individuals' rights and the dependence of the EC at an international level. The Commission in Strasbourg could not enforce the responsibility of the EC, but only the collective responsibility of its constituents. The situation represented by the *CFDT* case is frustrating because it is tantamount to a denial of the international personality of the EC.

B. The Political Advantages of the Protection of Human Rights Within the Community Legal Order

Human rights protections, if properly used, can provide an excellent means to enhance the status of the EC and promote the unification process of the EC legal order. The adoption of the ECHR by the EC could serve as an indirect method of achieving the European Union. In his report on the European Union, L. Tindemans proposed "[t]he protection of the rights of Europeans, where this can no longer be guaranteed solely by individual states."[25] He added that:

> The gradual increase in the powers of the European Institution

---

23. Confédération Française Démocratique du Travail v. The European Communities, 1978 Y.B. EUR. CONV. ON HUMAN RIGHTS 530 (Eur. Comm'n on Human Rights).

24. *Id.*, Point 5, at 538.

25. *European Union: Report by L. Tindemans to the European Council*, 9 BULL. EUR. COMM. (Supp. 1/76) 26 (1976) [hereinafter cited as *European Union*].

> which will make itself felt while the Union is being built up will make it imperative to ensure that rights and fundamental freedoms, including economic and social rights, are both recognized and protected. In this the Union will find confirmation of its political objectives.[26]

Thus, the protection of human rights is necessary to the overall political design for Europe. By acceding to the ECHR, the EC would follow the pattern found in most Western states—enacting legislation or constitutional provisions to embody fundamental rights at the state's creation or after a major event.[27]

In these Western countries, however, the state preexisted the legislative embodiment of fundamental rights. But can this historical order be reversed considering that the embodiment of the ECHR in European law would be a decisive step toward establishing a European State? The Commission in its 1976 report concluded that the "express embodiment of fundamental rights in a future European Constitution remains desirable, if not essential."[28] The ECHR, therefore, could provide a preconstitutional basis thereby making the move toward a supranational or federal state in Europe less complicated.

The political and symbolic step toward a European Union is not the sole reason for the Commission's reevaluation of its position during the years between 1976 and 1979. In 1976 the Commission adopted the view that "in the light of the present structure of the Community, the most complete protection of fundamental rights is ensured by the Court of Justice which guarantees a *maximum level of protection.*"[29] The Commission's statement appears to be based on an ambiguous analysis of two points. The first point relates to the Commission's view of the level of fundamental rights protection in the EC:

---

26. *Id.*

27. For example, in the United Kingdom, the Magna Carta was enacted after the rebellion of the barons and the Bill of Rights (1688) was adopted after the bourgeois revolution. In the United States, the Bill of Rights was passed after independence was secured from Great Britain. In France, the *Declaration des Droits de l'Homme* was signed in 1789. In Germany (B.R.D.), the *Grundgesetz* comprising basic rights was enacted after the tragic period of Nazism and World War II. More recently, Canada, after Quebec's failure to achieve independence (*souveraineté-association*), adopted a Bill of Rights during the same period that it was repatriating the Constitution.

28. *Accession of the Communities, supra* note 4, Point 39, at 17.

29. *Id.* (emphasis added).

> In interpreting the decisions of the Court of Justice, the Commission proceeds from the basis that the substantive content of the fundamental rights recognized under Community law must be defined in accordance with the *national standard that affords the maximum of protection* whilst taking into account the general interest, in order to achieve an *optimum standard* of protection of fundamental rights in the Community.[30]

The Commission examined the *Nold* case[31] and concluded that by recognizing the constitutional traditions common to the Member States, the Court seemed "to have moved toward a sort of optimum standard of fundamental rights."[32] The Commission's evaluation is ambiguous because the Court, in fact, laid down a minimum standard by first considering the "common constitutional traditions,"[33] and then by considering the ECHR in the *Hauer* case.[34] These legal norms were the *lowest common denominator* because of their common nature; Member States, however, are not prevented from adopting a higher standard of protection. The optimum standard of protection as embraced by the most progressive Member State, however, may not be compatible with the legal and social order of a less advanced Member State.[35]

---

30. *Id.*, Point 31, at 15 (emphasis added).
31. 1974 C.J. Comm. E. Rec. at 491.
32. *Accession of the Communities*, *supra* note 4, Point 9(iii), at 9.
33. *Nold*, 1974 C.J. Comm. E. Rec. at 507.
34. *Hauer*, 1979 C.J. Comm. E. Rec. at 3727.
35. Some authors argue in favor of a maximum theory. *See, e.g.*, 1 A. TOTH, LEGAL PROTECTION OF INDIVIDUALS IN THE EUROPEAN COMMUNITIES 109 (1978). Toth states:

> In order that a basic right be protected at Community level, it cannot be required that it be protected by the Constitutions of all the Member States. On the contrary, Community law calls for the application of a 'maximum theory' which is capable of affording the maximum possible protection. Accordingly, *any* basic right that is enshrined in the Constitution of *any* Member State must be safeguarded by the Communities.

Id. (emphasis added). Unfortunately, Mr. Toth undermines his argument because he also states:

> Generally speaking, for a legal principle to be recognized as part of Community law it is not necessary to be unanimously accepted in the legal systems of all Member States, not even in the majority of them, nor to represent at least the "lowest common denominator" or the "lowest limit" of the national solutions. . . . It is nevertheless clear that there is no general common principle where the national laws vary to such an extent that it is impossible to extract from them a truly common meaning of the legal concept. *Nor where a principle in one Member State is not at least gener-*

The Commission also overlooked the advantages to be gained from the inclusion of a catalogue of fundamental rights in EC law. A catalogue, such as the ECHR, would address the German Constitutional Court's criticism[36] in its 1974 decision and, therefore, would strengthen the supremacy of EC law. Because of the difficulties arising from the accession of the EC to the ECHR[37] and the amount of time that such a process would require, the strengthening of the supremacy of EC law is a fundamental and essential impetus to the proposition of accession.

The Commission itself recognized the importance of strengthening EC law supremacy in its memorandum:

> 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 Constitution, and possibly declaring them inapplicable in the light of those Constitutions, thus violating the principle of the uniformity of Community law.[38]

Because the ECHR does not take into account social and economic rights, the German Court or the Italian Court can continue to question the sufficiency of human rights protection in the EC and thereby continue to endanger the supremacy of EC law.[39] The coexistence of two similar legal instruments in the national legal orders of the Member States will cause the EC supremacy issue to be one of the most acute problems arising out of the EC's accession to the ECHR.

---

ally known in the others.

Id. at 86-87 (emphasis added). This last sentence contradicts the affirmation that *any* basic right enshrined in any constitution has to be accepted at the Community level; a basic right enshrined in only one constitution could not be accepted following the approach of Mr. Toth. This illustrates the point that the "optimum standard" theory as expressed by the Commission is not easily acceptable even if it would be desirable. *See supra* text accompanying note 32.

36. Decision of May 29, 1974, Bundesverfassungsgericht, W. Ger., 37 BVerfG 271.

37. *See supra* pt. II A.

38. *Accession of the Communities*, *supra* note 4, Point 16, at 12.

39. *See* Glaesner, *supra* note 17, at 122.

III. Problems Triggered by the Accession to the ECHR

The accession to the ECHR triggers two kinds of problems: internal problems such as the supremacy of EC law and international problems such as the enhancement of the EC's international status through its adherence to the ECHR. The international problems raise questions concerning the adherence itself and participation in the organs of Strasbourg.

A. The Possible Conflicts Between the Community Convention and the Member States Conventions

1. *The View of the Commission*

The Commission takes the view in its memorandum that the formal incorporation of the ECHR into EC law would not change the effect of EC law within the national legal orders of the Member States. The Commission argues that:

> 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 the Member States while exercising their own powers would not be affected by accession despite the primacy of Community law over national law.*[40]

2. *Appraisal of the Position of the Commission*

The Commission optimistically attempts to reassure the Member States that accession would not alter the status of the ECHR in municipal law. As discussed earlier,[41] one of the primary aims of accession is to promote the supremacy of EC law. Because the principle of supremacy would also apply to the ECHR, conflicts could arise between the ECHR as signed by each Member State (national ECHR or NECHR) and the ECHR as signed by the EC (Community ECHR or CECHR).

---

40. *Accession of the Communities*, *supra* note 4, Point 41, at 20 (emphasis added).

41. *See supra* text accompanying notes 37 & 38.

a. The domestic rank of the CECHR

The first problem of accession is the rank of the CECHR within the hierarchy of norms of the Member States. The supremacy of EC law is now a well-settled principle.[42] Both primary (treaty law) and secondary (derived law such as regulations or directives) EC law supersede any conflicting national norm, even a statute enacted by a parliament. In addition, international agreements to which the EC is a contracting party are inserted into the EC legal order and become EC law.[43] The rank of these international agreements in the EC legal system is inferior to that of the EEC Treaty[44] but superior to that of derived EC law.[45] The CECHR, therefore, would be part of the EC legal order and would enter the national legal orders.[46] Consequently, two Conventions would coexist in the legal order of a Member State.

b. Sources of conflict

This coexistence may result in conflicts between the two ECHR. One type of conflict, described as a material conflict, could occur if the material provisions of the two ECHR are dissimilar. Another source of conflict is the direct effect of EC law in Member States within which the NECHR presently does not have direct effect.

(i) *Material conflicts.*—Material conflicts may arise when the provisions of the CECHR are broader or narrower than those of the NECHR.[47] As an example, assume that the CECHR is more protective than the NECHR and that an EC directive is implemented in a Member State through a "national norm" challenged by an individual. Depending upon the willingness of the lower

---

42. *See* Amministrazione delle Finanze dello Stato v. Simmenthal S.P.A., 1978 C.J. Comm. E. Rec. 629 (the most important recent case on this topic).

43. *See* 1 ENCYCLOPÉDIE DALLOZ DE DROIT INTERNATIONAL, *Communautes Européennes (Droit)*, Points 120-21, at 404.

44. *Id.*, Points 123-25, at 404. The international agreements must respect the constitutional order of the EC. *See* Opinion 1/76, 1977 C.J. Comm. Eur. Rec. 741; *see also* Louis, *Mise en oeuvre des obligations internationales de la Communauté dans les ordres juridiques de la Communauté et de ses États Membres*, 1977 REVUE BELGE DE DROIT INTERNATIONAL 138.

45. 1 ENCYCLOPÉDIE DALLOZ DE DROIT INTERNATIONAL, *Communautés Européennes (Droit)*, Points 126-27, at 404-05.

46. *See* Louis, *supra* note 44.

47. *See infra* Annex 1.

courts, a national court will eventually refer the question of whether the directive is valid or constitutes a violation of fundamental rights to the European Court of Justice of the EC.[48] The Court will then apply the CECHR as the standard of review for the directive. If the Court finds a violation of the CECHR, the legal basis of the national norm will be void, and, consequently, this norm also will be void. If the Court finds no violation of the CECHR, the directive will be valid. Failure to find a violation, however, does not prevent the national norm itself from constituting a violation of the CECHR; the national act could both conform to the NECHR and simultaneously violate the CECHR, to the extent that the CECHR is more protective than the NECHR. The Member State, therefore, is bound by the CECHR on two alternative grounds when implementing an EC norm, such as a directive.

A Member State that implements a directive may be acting as an EC organ and not as a sovereign State. Commenting on the implementation of directives by Member States and the nature of their competence in this process, Professors Boulouis and Chevalier state that:

> Il n'en reste pas moins que cette compétence est, en tout état de cause, une *compétence liée* aussi bien dans son exercice que dans sa finalité, ce qui se concilié assez mal avec les caractères ordinairement réconnus a la souveraineté.[49]

Acting as a Community organ, the Member State will be bound by the CECHR. If a Member State contends that it is not acting as an EC organ when implementing a directive,[50] it nevertheless will be bound by the CECHR under Article 228-2 of the EEC. This provision states that "[A]greements concluded under the[se] conditions . . . shall be binding on the institutions of the Community *and on Member States*."[51] Without discussing the scope of CECHR application within the internal legal orders of the

---

48. EEC Treaty, *supra* note 1, art. 177.

49. J. BOULOUIS & R.M. CHEVALIER, *supra* note 14, at 49-51. The English translation of this quote is: "It remains that this competence is, in any case, bound, both in its exercise and its purpose, a situation hardly compatible with the usual attributes of sovereignty."

50. It is indeed likely that a Member State can be sued by the Commission under Article 169 of the EEC Treaty if it does not carry out the directive.

51. EEC Treaty, art. 228-2.

Member States,[52] it is certain that, at the very least, the CECHR will apply to national acts implementing EC norms. If the CECHR did not apply, Article 228-2 would have no force and the Member States would be able to disregard the binding effect of the international agreement.[53]

Thus, the CECHR is binding upon the Member State when it implements a directive. The national judge should review the national norm and evaluate the action of his government or parliament on the basis of the CECHR. The judge, therefore, will be required to set aside his state's NECHR which, by not recognizing a violation of a fundamental right, stands in conflict with the

---

52. *See infra* notes 58-61 and accompanying text.

53. O. Jacot-Guillarmod considers that:

> Dans l'exécution interne des accords internationaux conclus par la Communauté, les États Membres apparaissent . . . moins comme sujets de Droit International Public que comme *organes des Communautés*. Ils sont donc vises, pour reprendre dans ce contexte particulier le langage de l'arret Defrenne, dans l'exercice de toutes celles parmi leurs fonctions qui peuvent concourir a l'exécution de cette obligation, autrement dit aussi bien dans leurs fonctions législative et exécutive que judiciaire.

O. JACOT-GUILLARMOD, DROIT COMMUNAUTAIRE ET DROIT INTERNATIONAL PUBLIC 97 (1979) ("In the internal execution of the international agreements concluded by the Community, the Member States appear less as subjects of public international law than they appear *organs of the Community*. They are thus affected, using in this particular context the language of the *Defrenne* judgment, in the exercise of all of their functions that may contribute to the execution of this obligation, be it their legislative, executive, or judicial function.") Therefore, a Member State, when implementing a Community norm, cannot disregard the international agreements entered into by the EC: it would have to respect the ECHR.

Paul Reuter, in his commentary on Article 228 of the EEC, writes that:

> In its memorandum on the Accession of the Communities to the European Convention on Human Rights . . . the commission stated that in its view that action would have an effect only on Community law; it would not affect the operation of the European Convention on Human Rights within the internal (non-Community) law of the Member States. The language of the Memorandum suggests that this view is based on the Commission's assumption that international agreements entered into by the Community do not bind the Member States internationally as to matters which are not within Community jurisdiction. Nevertheless, Ruling 1/78 of November 14, 1978, 228.02. [b][1] indicates that the Member States have an obligation, within the sphere of their jurisdiction, to cooperate with the Community in the implementation of the Community's international obligations.

6 H. SMIT & P. HERZOG, THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY: A COMMENTARY, art. 228, at 6-242 (1981) (Columbia Law School Project on European Legal Institutions).

CECHR. Rejecting the state's NECHR will ensure the supremacy of the EC norm over the conflicting national norm. The question that arises from such action is whether a national judge has the power to set aside a treaty.[54]

As another example of a material conflict, assume that the NECHR provides more protection than the CECHR and that a national norm, based on an EC directive, is challenged by an individual. In this case, a national court will refer the question of the directive's validity to the Court of Luxembourg. If the Court finds a violation of the CECHR, the directive will be void and, consequently, the national norm also will be void. If the Court finds no violation of the CECHR, the legal basis of the national norm will be valid. Following the same reasoning discussed earlier, the standard of review for the national act will be the CECHR. The national act, therefore, may violate the NECHR and conform to the CECHR which, by hypothesis, is less protective. Individuals in this situation could be deprived of some protection on the grounds of EC law supremacy. Although this latter conflict can be solved, the problem presented by the first hypothetical is more difficult and troublesome to resolve.

(ii) *The direct effect of the CECHR.*—Another source of conflict derives from the NECHR's current status in the legal orders of the Member States. In most Member States, the NECHR may be invoked by the citizens before the national courts, but, in some others, such as the United Kingdom, Ireland, and Denmark, citizens do not possess this right. Even if the NECHR and the CECHR materially conflict, in those countries in which citizens lack the power to invoke the NECHR, an individual could invoke the CECHR before a court by relying on the direct effect of EC law. Although all the international agreements of the EC do not have direct effect and therefore can not be invoked automatically by individuals before the national courts, the Court in the *International Fruit*[55] case established the criteria for recognizing international agreements which create rights for individuals. In deciding whether an international agreement should be recognized, the Court referred to the spirit, the terms, and "économie générale" of the GATT.[56] Although the Court did not consider the GATT

54. *See infra* notes 62-70 and accompanying text.

55. International Fruit Co., N.V. v. Produktshap voor Groenten en Fruit, 1972 C.J. Comm. E. Rec. 1219.

56. *Id.* at 1227.

to be directly applicable in *International Fruit*, the Court did recognize in a later case the direct effect of an external agreement of the EC, the Yaounde Convention.[57]

Under the direct effect principle, the CECHR may be invoked by individuals in the Member States. As a result, the CECHR, which was created to provide protections, rights, and remedies to individuals in the international legal order, would be applicable in the Member State in which the NECHR is not presently invokable. A British, Irish, or Danish citizen could challenge a national act implementing an EC norm on the ground that it infringes the CECHR. This result is paradoxical because a citizen could invoke the CECHR but not the NECHR, even when his country is a contracting party to the Convention. In addition, the possibility of these challenges to national acts raises a question concerning the scope of the CECHR's applicability in the legal orders of the Member States.

c. Resolution of the conflict

This section examines the methods of solving the conflicts outlined above. Solving these conflicts raises other questions that have been addressed superficially in the preceding section:

1) To what extent is it possible to restrict the application of the CECHR in the domestic orders of the Member States to national acts implementing EC law?
2) Acknowledging the supremacy of the CECHR to the NECHR, should the national courts be allowed to set aside the NECHR if a material conflict exists?

(i) *Scope of applicability of the CECHR.*—At issue is whether the CECHR should be a standard of review for national acts implementing only EC law or for all national acts. The use of the CECHR as a standard for reviewing national acts would cause the NECHR to be superseded. This position does not reflect the Commission's view that "[a]dditional obligations would arise only with regard to the freedom of action of the Community institutions and their legislative and administrative functions."[58] This statement appears, however, to negate the supremacy of EC law.

---

57. Bresciani v. Amministrazione Italiana Delle Finanze, 1976 C.J. Comm. E. Rec. 129.

58. *Accession of the Communities*, *supra* note 4, at 26.

The principle of supremacy as expressed in *Costa*[59] and *Internationale Handelsgesellschaft*[60] directs that any EC norm supersedes any national norm, regardless of their respective rankings within the hierarchy of norms.

The next problem which must be addressed is whether an EC norm, such as the CECHR, should be applied when the interests of the EC are not at stake. The application of the CECHR in the absence of EC interests appears unnecessary because the competencies of the EC are enumerated;[61] consequently, the CECHR would be protecting the fundamental rights pertaining to these enumerated competencies. The CECHR's scope of applicability, therefore, need not extend to "normal" national acts. Adopting this view, however, threatens the principle of supremacy itself. Limiting the CECHR's scope runs contrary to the provision of Article 228-2 of the EEC, which does not expressly limit the extent to which a Member State is bound by international agreements entered into by the EEC. Article 228-2 also does not restrict this binding effect of international agreements to Member State "Community activities" such as implementing EC norms.

Two views of the CECHR's scope of applicability can be defended: (1) the CECHR is relevant only when EC law is involved; and (2) the scope of the CECHR is broader, and it would be paradoxical to grant individuals some rights under the CECHR and to refuse those same rights under the NECHR. The Member States, however, would be unlikely to accept the second view.

(ii) *Role and power of the national judge.*—Irrespective of the CECHR's scope, the proper attitude of a national court faced with a national act that implements a Community law which contravenes the CECHR, but not the NECHR, must be determined. Given a situation in which fundamental rights requirements differ, the material provisions of the two conventions would be in conflict. This conflict should be solved by applying the *Simmenthal* case,[62] in which the Court held that "every national

59. Costa v. Enel, 1964 C.J. Comm. E. Rec. 585.

60. Internationale Handelsgesellschaft v. Einfuhr-und Vorrats-stelle fur Getreide und Futtermittel, 1970 C.J. Comm. E. Rec. 1125.

61. Although the EC has limited competencies more strictly, it does not prevent them from enjoying implied powers as shown in the *ERTA* case.

62. Amministrazione delle Finanze dello Stato v. Simmenthal S.P.A., 1978 C.J. Comm. E. Rec. 629.

court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly *set aside any provision of national law* which may conflict with it, whether prior or subsequent to the Community rule."[63]

The *Simmenthal* holding apparently dictates that the national court should set aside the NECHR. The decision to reject the NECHR, however, raises important questions: (1) What is the status of the NECHR, which is a treaty, in the national legal orders of the Member States? (2) Is the NECHR a provision of national law as understood by the Court, and if not, may the national courts set aside a treaty?

The answer to these questions depends on the differing constitutional systems of the ten Member States. For example, the validity of rejecting the NECHR will depend on the rank of treaties relative to statutes in the hierarchy of norms. In addition, the Court's position in *Simmenthal* on which norms may be set aside is unclear: "[A] national court which is called upon . . . to apply provisions of Community law is under a duty to give full effect to those provisions if necessary refusing of its own motion to apply any conflicting provision of national *legislation*, even if adopted subsequently . . . ."[64] The Court's ruling may be interpreted to compel national courts to set aside any legal norm (law), or alternatively, only norms at the statute level (legislation). The French and German versions of the decision do not clarify the Court's decision. In the French version, the Court states that the judge should "laisser inapplique . . . toute disposition contraire de la *loi* nationale,"[65] and "laisser inapplique . . . toute disposition contraire de la *legislation* nationale."[66]

The French term *loi* refers to statutes enacted by the Parliament. The meaning of "legislation," however, can refer to general legal norms including treaties. The German version, both in the course of the decision and in the ruling, provides that the judge should set aside "[J]ede möglicherweise entgegenstehende Bestimmung des nationalen *Rechts*."[67] The German term *Recht* refers to any legal norm. Thus, the examination of the decision's

63. *Id.*, Point 21, at 644.
64. *Id.* at 645.
65. *Id.* at 644.
66. *Id.* at 645 (emphasis added).
67. *Id.* at 644-45 (emphasis added).

different versions leaves the scope of the Court's decision unclear.

Even if *Simmenthal* mandates the rejection of any legal norm, a national court may lack the power to reject treaties. For example, a French court would not be allowed to set aside a treaty which, by its nature, is within the province of the executive branch. A French court, in fact, must refer to the Ministry of Foreign Affairs when the interpretation of a treaty[68] is at stake. This procedure shows that the executive branch retains wide powers over the treaties in force. In addition, the setting aside of a treaty by a court would encroach on the function of the executive branch to repeal treaties.

If the Court's decision endorses the setting aside of national norms only at the statute level, the Member States would be divided between those countries that treat the NECHR as a statute and those that rank the NECHR above statutes in the hierarchy of norms. In some Member States,[69] therefore, a judge may set aside the NECHR, but in other Member States[70] the judge would lack this power.[71] In the United Kingdom, Ireland, and Denmark, the judge would not have to set aside the NECHR, even if it materially conflicted with national norms, because the NECHR cannot be invoked by individuals in these countries.

The different rankings of the NECHR, together with the setting aside of statutory norms, would cause a double standard to exist for the Member States. Some countries would be required to set aside their NECHR in favor of the CECHR, but other countries would not have this requirement. The application of this double standard to EC law would contradict another major principle of the EC legal order, uniformity.

If a national act implementing EC law contravenes the NECHR but not the CECHR, a compromise may be reached even though the CECHR theoretically binds the judge. The NECHR would be more protective than the CECHR in this case. One can admit, however, that the national court's setting aside of the NECHR

---

68. This applies except for Community treaties.

69. These countries include Germany, Italy, and Luxembourg (probably).

70. Among the second group are Belgium (probably), Greece (probably), France, and The Netherlands.

71. *See* Golsong, *Effet direct et range de la Convention Européenne des Droits de l'Homme en droit interne*, 1978 LES RECOURS DES INDIVIDUS DEVANT LES INSTANCES NATIONALES EN CAS DE VIOLATION DU DROIT EUROPÉEN 59; *see also* Drzemczewski, *The Domestic Status of the European Convention on Human Rights: New Dimensions*, 1977-1 L.I.E.I. 1.

would be useless because the purpose of the accession is to increase, not decrease, the protection granted to the citizens of the EC. In addition, the supremacy of the CECHR is not violated by enforcing a higher standard because the CECHR remains respected. The two instruments are not in conflict but, in fact, are complementary.

d. Counter proposition

A possible solution to the conflict arising when the CECHR is more protective than the NECHR is to require EC adherence to the Convention on the basis of a minimum standard: the EC would be bound only by the provisions of the Convention, including the protocols, which bind the ten Member States. The conflict described above,[72] therefore, would be avoided. The Commission, however, has rejected this possibility in its memorandum.[73] The "minimum standard adhesion" also would fail to answer the reproaches of the German constitutional court[74] because the EC standard of protection would remain below that of a Member State with a standard above the least protection granted by any other Member State.

B. International Problems

The accession of the EC to the Convention presents two kinds of international problems. The first is related to the EC's position in the organs of Strasbourg and to the powers the treaty of adhesion would provide to the EC in these international bodies. The second type of problem concerns the negotiation and the ratification of the Convention.

1. *The Organs of Strasbourg*

Of the three organs instituted by the Convention, the Commission and the Court are basically judicial and the Committee of Ministers is a political organ.

---

72. *See supra* note 25 and accompanying text.

73. *Accession of the Communities*, *supra* note 4, Point 29, at 16.

74. *See supra* note 17 and accompanying text.

a. The Commission and the Court

The Commission of Human Rights and the Court of Human Rights are bodies in which the members act in their own capacities, without receiving any recommendations from their government.[75] The contracting parties to the Convention which are not members of the EC, therefore, should not fear an attempt by the representatives of the EC countries to use their number to block any action against the Community.

The Commission of the EC wishes to alter the present composition of the Commission of Human Rights and the Court of Human Rights by adding a commissioner and a judge to these bodies for the protection of the EC's international personality.[76] On the other hand, Professor Schermers favors the current composition of the Commission of Human Rights and the Court of Human Rights.[77] He points out that the judges in the Court are equal in number to the members of the Council of Europe but not to the parties to the Convention. No link exists between the number of judges and the number of parties to the Convention. The adding of a judge of the EC, therefore, is unnecessary because the EC legal system would be represented by the ten judges of the Member States. Professor Schermers suggests that a European commissioner should not be appointed to the Commission because the Convention provides that no two members may be nationals of the same Member State. To allow the appointment of an additional commissioner or judge, the Commission of the EC would "require a derogation from articles 20 and 38" of the Convention.[78]

b. The Committee of Ministers

The Commission of the EC advocates a total exclusion of the Committee from EC matters because the other contracting parties may fear that the Member States and the EC representatives could veto decisions questioning EC acts.[79] Although this problem

---

75. *Accession of the Communities*, *supra* note 4, Point 31, at 17.

76. *Id.*, Points 32-33.

77. Schermers, *The Communities under the European Convention on Human Rights*, 1978-1 L.I.E.I. 1, 6.

78. *Accession of the Communities*, *supra* note 4, Point 33, at 18. Articles 20 and 38 of the Convention set forth the requirements for citizenship of judges and commissioners.

79. *Id.*, Point 34, at 18.

could be overcome by having the Member State withdraw from the Committee when EC matters come under scrutiny, the Commission asserts that this solution would reduce abnormally the participation of the Member States and establish a dangerous precedent for the exercise of mixed powers within international organizations.[80] When EC matters are challenged, therefore, the Committee should be excluded and compulsory jurisdiction given to the Court of Human Rights. Professor Schermers favors EC representation in cases concerning its interests, but not in other cases: "[T]he most suitable representation would then be that of the Member State charged with the presidency of the Council [of the EC], the other Member States not participating in the voting."[81] He concludes that a solution to the problem of EC representation is to bring all cases against the EC before the Court of Strasbourg.[82]

The question to resolve, however, is which cases are to be brought against the EC. Assume that to apply an EC directive, a Member State passes an act subsequently challenged by an individual claiming the norm is void because the directive violates the CECHR. The national court will refer the case to the Court of Luxembourg to have the validity of the EC directive scrutinized under the CECHR. If the Court of Justice rules that the directive is valid even though it violates the CECHR as interpreted by the Court of Strasbourg, and if the national court applies that ruling, then both the EC and the Member State will share responsibility for violating the Convention. In this case, because it would be difficult to divide the responsibility between the EC and the Member State, both probably would share responsibility for the violation.[83]

2. *The Procedure of Accession*

The legal basis for the accession of the EC to the ECHR is Article 235 of the EEC treaty.[84] This provision can be used in the

---

80. *Id.*

81. Schermers, *supra* note 77, at 6. This view faces criticism already expressed by the Commission of the EC.

82. *Id.* at 7. He recognizes, however, that some cases would be unsuitable for a Court decision because of their political nature. *Id.*

83. *Id.* at 8.

84. Other legal bases are Article 203 of the EAAC Treaty and Article 95 of the ECSC Treaty. *Accession of the Communities*, *supra* note 4, Point 27, at 15.

field of external relations to expand EC powers for the achievement of an EC objective.[85]

The accession will require a modification of some ECHR provisions and the EEC Treaty. Article 219 of the EEC treaty, which should be amended, provides that "[M]ember States undertake not to submit a dispute concerning the interpretation or application of this treaty to any method of settlement other than those provided for therein."[86] This provision in the EEC treaty would prevent the Member State from suing the EC before the Court of Strasbourg. Such a limitation contradicts the ECHR which allows a contracting party to sue any other contracting party before the organs of Strasbourg.[87] In addition, the limitation contained in Article 219 would make the accession a mere formal act, if the citizens of the EC are denied, at least for a transitional period, the right of petition in Article 25 of the ECHR.[88] Consequently, Article 219 should be amended within the procedure outlined by Article 236 of the EEC treaty.[89]

The accession also will require many of the ECHR provisions to be amended. According to the Commission, the ECHR provisions using the term "state" are not applicable to international organizations. This problem, however, could be solved by "laying down in an accession protocol that the Convention, when it uses terms relating specifically to states, also applies *mutatis mutandis* to the EC."[90] Although this proposition provides a simple and reasonable solution to the problem, it may encounter some opposition from anti-Europeans who view the embodiment of such a statement in an international instrument as tantamount to recognizing the EC as a state.

Article 66 of the ECHR, which provides that the Convention is open only to members of the Council of Europe, should not prove to be an obstacle to accession. The Commission argues that the ECHR is not a legal act of the Council of Europe, but an independent mechanism.[91] The EC's lack of membership in the Council

---

85. *Id.*, Point 44, at 20.

86. EEC Treaty, *supra* note 1, art. 219.

87. European Convention on Human Rights, Nov. 4, 1950, art. 24, 213 U.N.T.S. 221, 236.

88. *Accession of the Communities*, *supra* note 4, Point 27, at 15.

89. EEC Treaty, *supra* note 1, art. 236.

90. *Accession of the Communities*, *supra* note 4, Point 20, at 13 (italics added).

91. *Id.*, Point 35, at 18.

of Europe would not be a major obstacle because the Convention may be amended by the protocol of accession, one clause of which would be the amendment of ECHR Article 66.[92]

The right to petition in ECHR Article 25, which France and Greece had not accepted at the time of the Commission's memorandum, will be another point of debate. The change of the French administration following the 1981 presidential election resulted in the acceptance of Article 25's right to petition. Greece remains the only state in the EC denying its citizens the right to petition. If Greece's position of "legal solitude" in the EC does not lead the country to accept Article 25, the Commission proposes that the right to petition be set aside for a transitional period.[93]

IV. Conclusion

Considering the numerous problems created by the accession, including the length of time required and the administrative burdens placed on the EC, one may question the value of this project. The creation of a catalogue of rights, however, will require as much time as the accession. As Professor Schermers points out, producing such a catalogue specifically for the EC will further split Western Europe, isolate the other members of the Council of Europe, and limit the effectiveness of the ECHR to the extent that the provisions in the catalogue would offer higher standards of protection.[94] One may argue, however, that the benefit of a more integrated EC outweighs the cost of a less influential ECHR in the field of international protection of human rights. The Member States of the EC will remain bound by the ECHR and, therefore, this instrument will retain its valued status as one of the most advanced conventions in the field.

Even though the ECHR is advantageous because it is currently in existence, the arguments of the Commission in its favor are not compelling. The Commission rejects the idea of drawing up an EC catalogue of human rights in the near future because "the chances of agreeing within a reasonable period of time, on [such] a catalogue . . . remain slight."[95] The Commission does recognize in its conclusion, however, that "the negotiations concerning ac-

92. Schermers, *supra* note 77, at 4.
93. *Accession of the Communities*, *supra* note 4, Point 27, at 16.
94. Schermers, *supra* note 77, at 2.
95. *Accession of the Communities*, *supra* note 4, Point 17, at 12.

cession by the Community to the Convention will certainly take several years."[96] In addition, the ratification by each contracting state to the ECHR is required for EC adherence to the Convention. This ratification requirement implies, paradoxically, that the Commission trusts Malta or Iceland more than the Member States to advance the protection of fundamental rights within the EC.

One of the risks that the Member States incur in choosing either accession or an EC catalogue is the possibility that the new EC instrument will supersede their own norms and, thus, repeat the United States experience in which the Bill of Rights, originally intended to apply only to the federal government, now applies to all state governments.[97] It may be argued, however, that the Court of Justice of Luxembourg is already in the process of solving this problem of fundamental rights. In the *Hauer* case,[98] the Court stated that to answer the question of infringement upon the right of property, "it is necessary to consider also the indications provided by the constitutional rules and practices of the nine Member States."[99] The Court referred only to the German, Italian, and Irish Constitutions when it considered the limitations on the right of property.[100] The Court may have looked to the German and Italian Constitutions to show that the *Hauer* holding did not violate the constitutions of the Member States whose constitutional courts had raised some questions about fundamental rights protection. The Court's reliance on three of the ten Member States' constitutions may prove to be a mechanism for adopting an optimum standard of protection. Using this mechanism to construct an optimum standard, relevant provisions found in only a few constitutions could be selectively chosen, and other constitutions not providing the right in question could be ignored. The Court's approach in finding *common* constitutional principles is sufficiently vague to permit the Court to choose select constitutional principles. When discussing the "practices" of the Member States, the Court speaks of "numerous legislative measures" limiting the right of property, but never identifies these pieces of legislation. The Court stated in the *Nold*

96. *Id.*, Point 46, at 21.
97. U.S. CONST. amend. XIV.
98. 1979 C.J. Comm. E. Rec. at 3727.
99. *Id.*
100. *Id.*

case[101] that it had to "draw inspiration" from the common constitutional traditions of the Member States to identify those "measures which are incompatible with the fundamental *rights recognized* and protected by the Constitutions of such states"[102] and unacceptable to the Court. This is an objective approach: the *rights* must be *recognized* and, therefore, expressly stated by the constitutions. The Court's use of the vague term "drawing inspiration" in *Nold* also allows the selective choosing of constitutional principles. In the *Hauer* case, the Court spoke only of the "ideas" and "precepts" common to the constitutions of the Member States. Nothing is more ethereal or subjective than an idea or a precept as opposed to a "right recognized by a constitution." The Court, rather than adopting common constitutional principles and practices and therefore embracing the lowest level of protection, will be able to adopt a higher standard of protection by stating that a right is a "precept" common to the ten constitutions of the Member States.

This process of protecting fundamental rights through Court decisions is slow and uncertain. The process of accession, however, would require a greater length of time and would give rise to the many conflicts discussed above.[103] Allowing the Court of Justice decisions to implement protections, therefore, could provide a workable solution to the problem of individual fundamental rights and extinguish the need for accession to the ECHR.

101. 1974 C.J. Comm. E. Rec. at 491.
102. *Id.* at 507 (emphasis added).
103. *See supra* note 86-97 and accompanying text.