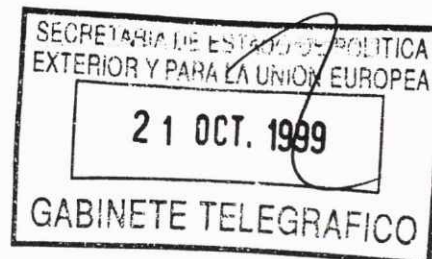




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MINISTERIO DE ASUNTOS EXTERIORES

REPRESENTACION PERMANENTE DE
ESPAÑA EN CONSEJO DE EUROPA
ESTRASBURGO



FAX

FAX REMITENTE:		REP. CONSEJO EUROPA ESTRASBURGO	
NUMERO: 431		Autor: AA/cl	Fecha: 21/10/99
Unidad:		Asunto: Carta derechos fundamentales Unión Europea.	
DESTINATARIO : SEPEUE - SGPEUE - EUROPA - ODH INFO: EMBAJADA UE			

TEXTO

Como continuación a mi telecopia nº 403 y a su telecopia de 20 de Octubre, adjunto remito a V.E. documento de trabajo interno elaborado por la Dirección de Derechos Humanos sobre la posición del Consejo de Europa en relación a la Carta de Derechos Fundamentales de la Unión Europea.

Este documento fue distribuido ayer en almuerzo informal organizado por la Consejera de la Embajada de Finlandia, y a la que asistieron Consejeros de diversas Representaciones, no exclusivamente de la Unión Europea, que se ocupan habitualmente de Derechos Humanos. También asistió un Jurista de la Dirección de Derechos Humanos.

Como V.E. podrá observar, en el apartado 3 del documento anejo se hace referencia a jurisprudencia reciente del TEDH, y muy concretamente al caso Matthews contra el Reino Unido, relevante para el debate sobre las relaciones entre la Unión Europea y el Convenio Europeo de Derechos Humanos.

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- ☐ SECRET. ESTADO
 - ☒ GABINETE DE
 - ☒ SECRET. GENERAL
 - ☒ DG A GEN. TECNICO
 - ☒ SG A GENERALES
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 - ☐ SG A ADUANEROS
 - ☒ SG MERCADO INTERIOR
 - ☐ SG A AGRICOLAS
 - ☐ SG A INDUSTRIALES
 - ☒ SG A SOCIALES
 - ☒ SG A JURIDICOS
 - ☐ ABORACIA ESTADO
 - ☐ PARLAMENTO EUROPEO
 - ☐ PRENSA
 - ☐ ADMINISTRACION
 - ☐ INFORMATICA
 - ☐ INTERVENCION
 - ☒ h. Diet Tómes
 - ☒ h. Fuentes

Estrasburgo, 21 de octubre de 1999
EL EMBAJADOR REPRESENTANTE PERMANENTE,

Guillermo Kirkpatrick

IMPORTANTE ESTE FAX CONSTA DE PAGINAS INCLUIDA LA PORTADA

[eucharte.draft2/JS]

24.9.99

FOOD FOR THOUGHT PAPER ON THE COUNCIL OF EUROPE POSITION REGARDING THE DRAFTING OF A CHARTER OF FUNDAMENTAL RIGHTS OF THE EUROPEAN UNION

Internal document prepared by the Directorate of Human Rights

INTRODUCTION

1. This paper was prepared in response to a request made by the Secretary General (Mr Schumann's memorandum to Mr Imbert of 2 August 1999) for "an updated position paper from our side which clearly underlines our policy over the last twenty years, i.e. Community accession to the European Convention on Human Rights". The request was made against the background of the current preparations in the European Union for the elaboration of a Charter of fundamental rights of the European Union. It was felt that such a paper could assist national delegations, members of the Assembly and the Secretary General in their endeavours to argue in favour of the maintenance and the strengthening of the larger European system for the defence of human rights. Particular reference was made to the forthcoming Quadripartite meeting on 6 October 1999.
2. When preparing this paper, it became clear that in the current circumstances a mere recapitulation of the main arguments in favour of Community accession to the ECHR would serve little purpose. Now that the European Council has decided (in June 1999) that a Charter of fundamental rights should be drawn up, a whole range of legal and political questions arise in connection with both the content and the future status of such a Charter which have a considerable impact on the debate on Community accession to the ECHR and the way such accession can usefully be argued. For these reasons, the Directorate of Human Rights considered that it was not advisable, at this stage, to prepare the requested position paper in the sense of a document merely setting out the arguments in favour of Community accession to the ECHR: such a isolated approach would be an oversimplification and disregard totally the change of political and legal circumstances brought about by the Council decision concerning the EU Charter. The aim of the present paper is rather to serve as a basis for internal discussion within the Secretariat, containing elements which should allow it to arrive at a clear position on the question of the combined approach to be taken in regard to the initiative for a EU Charter of fundamental rights and the question of Community accession to the ECHR.¹

¹ This approach has the advantage that it may already provide certain elements which could be taken up by Council of Europe representatives participating as observers in the future drafting work of the Body responsible for elaborating a draft Charter of fundamental rights during the discussions on various key questions relating to content and status of the charter.

3. To this end, the paper sets out with a brief recapitulation of the main legal and political issues concerning the question of human rights protection within the legal order of the European Community (Section 1 below), followed by a summary overview in Section 2 of the way these issues have been approached over the last 20 years, both by the institutions of the Community (Commission, Council, Parliament and Court of Justice) and by the organs of the Council of Europe (Committee of Ministers and Parliamentary Assembly). Section 3 describes some relevant recent developments in the case-law of the European Court of Human Rights. Finally, Section 4 sets out and analyses some hypotheses concerning possible approaches which could be followed vis-à-vis the question of a Charter of Fundamental Rights of the European Union. In discussing the potential implications of such an EU Charter on the human rights standards of the Council of Europe, this paper focuses essentially on the possible impact on the European Convention on Human Rights (ECHR) and contains only occasional references to the European Social Charter. However, it is clear that the importance of the latter human rights instrument and indeed the importance of also including economic and social rights in a EU Charter would certainly justify a full and in-depth analysis. The Directorate of Human Rights is ready to undertake such an analysis from the perspective of the European Social Charter.

1. PROTECTION OF HUMAN RIGHTS WITHIN THE COMMUNITY: OUTLINE OF THE MAIN ISSUES

A. The legal issue

4. As the Commission stated in its communication on Community accession to the ECHR of 19 November 1990 (see Appendix 1 to this paper):

"There is a conspicuous gap in the community legal system. All legal acts of the Community Member States are subject to review by the Commission of Human Rights and the Court of Human Rights (...). The Community, however, while proclaiming its commitment to respecting democratic values and human rights, is not subject to this control mechanism and the acts promulgated by its institutions enjoy a sort of "immunity" from the Convention. (...) The idea of accession is a response to a long-felt need to ensure full respect for human rights in the interpretation and application of Community law."

5. The 3 Treaties contained no specific human rights provisions (let alone a comprehensive bill of rights), apart from a few substantive provisions such as, e.g., Article 7 (now: Article 12) EEC (general prohibition of discrimination based on nationality) and Article 119 (now: Article 141) EEC (principle of equal pay without any discrimination based on sex). The case-law of the Court of Justice has gradually recognised (in the context of rulings on claims that certain Community law provisions were invalid on account of their being contrary to national constitutional human rights guarantees) that fundamental rights recognised and guaranteed by the constitutions of member States were an integral part of the general principles of law, the observance of which the Court of Justice ensures, so that measures which are incompatible with the fundamental rights recognised by the constitutions of those States are unacceptable in the Community. Similarly, the ECJ has recognised that international human rights treaties, signed by member States or drawn up with their collaboration, can supply guidelines which should be followed within the framework of Community Law (eg: Hauer case [1979] ECR 3, 727). In this context, the Court of Justice has also recognised that the ECHR has a "special significance" (see case C-260/89 ERT [1991] ECR I-2925, para. 41).

6. It has often been suggested that this development in the case-law was, in part at least, a reaction to rulings by the highest domestic courts in some Member States (especially the Constitutional Courts of Germany and Italy) which reserved the right to deny applicability of Community law to the extent that it was incompatible with (constitutional) guarantees of fundamental rights.

7. However, the fact remains that, according to the case-law of the Court of Justice, fundamental rights are to be respected "as general principles of Community law". This state of affairs, in which ~~the~~ neither the Maastricht Treaty on European Union nor the Amsterdam Treaty has brought any real change, has been described by a former President of the Court of Justice as a "solution de dépannage" (Robert Lecourt, *Cour européenne des droits de l'Homme et Cour de justice des Communautés européennes*, Wiarda Festschrift, p. 336): there is no written catalogue of fundamental rights and freedoms which is binding upon the Community; this case-law-based approach raises questions about its democratic legitimacy and poses problems from the point of view of legal certainty (which rights will be "identified" in the case-law? what restrictions are permissible?). In addition, many commentators have pointed at the risk of divergent approaches and interpretations in the field of human rights between the Court of Justice and the Strasbourg Court (and several cases may serve to illustrate that this risk is not purely theoretical), because the Luxembourg Court has never stated that it should be bound by the interpretation given to certain rights by the Strasbourg Court.²

8. It has also been said that the expansion of the activities and competencies of the Community/European Union has made it increasingly difficult to separate human rights issues from Community activities.³ Reference can be made, for example, to the human rights clauses in agreements with third countries and to the increased role of human rights issues in the CFSP, to the development of Community activities in the field of the Single Market and the development of co-operation in the fields of justice and home affairs (including such matters as immigration and asylum, judicial co-operation in criminal matters, etc.).

B. The wider political context: issues related to European identity

9. On 20 November 1973, increasing co-operation in the area of foreign policy between the (then) nine Member states made the need felt for a definition and expression of the values that united them in the form of a Declaration on European Identity (Bulletin of the EC No. 12/73, p. 126). In this text, the Ministers of Foreign Affairs affirmed "qu'ils entendent sauvegarder les principes de la démocratie représentative, du règne de la loi, de la justice sociale.. et du respect des droits de l'homme, qui constituent des éléments fondamentaux de l'identité européenne". It has been noted that the need to reaffirm or proclaim officially these elements of European identity has come to the fore on the occasion of enlargement of the European Community.

10. The importance for the Community of expressing and demonstrating its commitment to human rights is amply illustrated by numerous subsequent political declarations by the Member States and Community institutions (an overview is given in para. III. 5 of Opinion 2/94 of the

² See, most recently, R.A. Lawson, *Het EVRM en de Europese Gemeenschappen* (The European Convention on Human Rights and the European Communities), Leiden 1999, pp. 14-19 (with further references).

³ For example in the Commission communication of 19 November 1990, Section 3 (see Appendix 1 to this paper).

Court of Justice on Community accession to the ECHR, reproduced as Appendix 2 to this paper). Some quotations may serve to illustrate the underlying reasons for this.

11. As the Commission noted in its communication of 1990 in the context of its proposal that the Community accede to the ECHR: "...it is important for the Community as such to demonstrate in a solemn and tangible way for the citizens of Europe its attachment to the principles contained in the Convention."

12. Or, to quote from an opinion adopted in 1993 by the European Parliament's Committee on Civil Liberties and Internal Affairs (also on the question of Community accession to the ECHR): such accession "would also make it abundantly clear that fear of a future with an omnipotent "Brussels" legislative body which needs show no real interest in effective protection of fundamental freedoms is unfounded. EC citizens must also have at their disposal a system to protect their fundamental rights if they feel they are the victim of actions on the part of the Community (...) it is important - in terms of the need to generate sufficient support for further European unification - to give ordinary citizens the feeling that even within the EC they have adequate protection of their fundamental rights." This opinion also refers to the fact that accession would "enhance the image of a free and democratic Europe" and "indicate to non-EC countries that the EC takes seriously the protection of human rights within the Community itself - no luxury at a time when the EC is increasingly using respect for human rights as a criterion of its external policy (...) in addition, the Community plays a key role in encouraging the transition towards democracy and respect for human rights in Central and Eastern Europe. The credibility of the Community in the eyes of third countries would, at the very least, be considerably enhanced if we were to provide formal guarantees of maximum protection of human rights within the Community and if we were prepared to arrange for an independent body to subject respect for human rights to a critical review."⁴

2. APPROACHES TO THESE ISSUES OVER THE LAST 20 YEARS

13. What follows is a summary chronological overview of the main positions expressed and other politically relevant developments during the last 20 years on the approach to be taken vis-à-vis the question of the protection of human rights within the European Community (Union).

14. Commission memorandum adopted on 4 April 1979 (supplement No. 2/79 to the Bulletin of the European Communities). In this discussion document, the Commission reached the conclusion that Community accession to the ECHR was desirable for a whole series of reasons. The memorandum describes the various arguments in favour and against such a step, and states: "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 of a heritage of fundamental and human rights considered inalienable by those European States organised 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" (pp. 8-9). The Commission stressed that this step does not form an obstacle to the preparation of a special Community catalogue, nor does it

⁴ Opinion on the Bontempi report, annexed to document A3-0421/93, p. 32 (draftsman: Mr Verhagen).

in any way prevent the Court of Justice to develop a more extensive protection of human rights (reference is made to Article 60 ECHR - current Article 53 - and the minimum character of the ECHR guarantees). The Commission Memorandum also discusses the legal and technical questions which arise in the context of Community accession to the ECHR (eg: the issue of the "representation" of the Community in the ECHR organs) but concludes that there are no obstacles that cannot be overcome.

15. The memorandum was sent to the Council, the European Parliament and to the Economic and Social Committee. The *European Parliament*, in a Resolution on Accession of the Community to the ECHR adopted on 27 April 1979, expressed itself in favour of accession. The Parliament expressed a further favourable opinion in 1982 and confirmed this opinion in 1989 and 1990. The *Economic and Social Committee* endorsed the Commission Memorandum in 1980.

16. The *Committee of Ministers of the Council of Europe*, at the 64th Session of the Ministers of Foreign Affairs (10 May 1979), "s'est félicité du fait que la Communauté étudie la possibilité d'adhérer à la Convention européenne des droits de l'homme". For its part, the *Parliamentary Assembly* adopted a resolution in 1981 in which "elle formule le souhait que les Communautés européennes présentent, dans un avenir très proche, une demande officielle d'adhésion à la Convention européenne des droits de l'homme" (Resolution 745 (1981); see also the relevant report in doc. 4649).

17. The *Council* discussed the Commission's proposal at a meeting on 21 and 22 April 1986. According to the Commission (Commission communication of 19 November 1990, para. 1) the Presidency agreed at the end of the exchange of views to reflect on what action should be taken on this dossier in the light of the various arguments put forward.

18. In the *Commission communication to the Council of 19 November 1990* (see Appendix 1), the Commission concluded that the time had come to make a formal request to the Council for approval of the Community's accession to the ECHR as well as for authorisation to start negotiations on the details of this accession, the aim being to make the necessary adjustments to the ECHR to make possible this accession.

19. In November 1990, on the occasion of the Informal Ministerial Conference on Human Rights held in Rome, the *Presidency of the Committee of Ministers of the Council of Europe* noted with interest the Commission's request to the Council for approval of a formal accession request.

20. The *European Parliament*, in its resolution on respect for human rights in the Community of 26 April 1993, again called for accession by the Community to the ECHR. It took the view that 'the abolition of internal frontiers under the Single European Act and the provisions for intergovernmental co-operation in the areas of justice and home affairs' in the Maastricht Treaty, together with the reference in Article K.2 to the obligation to respect the ECHR in this domain, reinforced "the need for clear and readily available judicial processes against breaches of human rights" pursuant to the Convention.

21. On 18 January 1994, the *European Parliament* adopted a resolution on Community accession to the European Convention on Human Rights (rapporteur Mr Bontempi. doc.

A3-0421/93) in which it agreed that the Commission should receive authorisation to negotiate with the Council of Europe on accession arrangements.

22. Following the Intergovernmental Conference leading up to the conclusion of the Maastricht Treaty, Article F of the Treaty on European Union states that "the Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law". After the adoption of the Maastricht Treaty on European Union, discussions on accession continued in the Council. In April 1994, these discussions resulted in the Council's decision to request an opinion from the Court of Justice on the question of whether accession of the European Community to the ECHR would be compatible with the EC Treaty (Article 228, paragraph 6 of the EC Treaty).

23. The request for an opinion was lodged with the Court on 26 April 1994 and the *Court of Justice* delivered its opinion (opinion 2/94) on 28 March 1996 (see Appendix 2). The Court distinguished two main problems presented by the question of Community accession to the Convention: (i) the competence of the Community to conclude such an agreement and (ii) its compatibility with the provisions of the Treaty, in particular those relating to the jurisdiction of the Court of Justice. As concerns (i), the Court rejected submissions by Ireland, the United Kingdom, Denmark and Sweden to the effect that the request for an opinion was inadmissible or was, at any rate, premature. It held that "Respect for human rights is [...] a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order. Such a modification of the system for the protection of human rights in the Community, with equally fundamental institutional implications for the Community and for the Member States, would be of constitutional significance and would therefore be such as to go beyond the scope of Article 235. It could only be brought about by way of Treaty amendment" (recitals 34 and 35). The Court therefore held that, as Community law now stood, the Community had no competence to accede to the ECHR.

24. However, as regards question (ii), the Court held that in order fully to answer the question of compatibility, especially with Articles 164 and 219 relating to the jurisdiction of the Court of Justice, the Court must have sufficient information regarding the arrangements by which the Community envisages submitting to the present and future control machinery established by the ECHR. As the Court had not been given detailed information in this respect, it held that it was not in a position to give an opinion on the compatibility of Community accession to the ECHR with the rules of the EC Treaty.

25. In 1995, coinciding with the preparations for the European Union's Intergovernmental Conference (IGC) which led to the conclusion of the Treaty of Amsterdam (signed on 2 October 1997; entry into force on 1 May 1999), relevant opinions were expressed by the Committee of Ministers and the Parliamentary Assembly of the Council of Europe and the President of the European Court of Human Rights.

The Committee of Ministers decided to put a number of considerations to the Reflection Group responsible for preparing the 1996 IGC; these considerations were "intended to

promote greater cohesion of the European institutional system in the long term.⁵ Under the heading "Safeguarding human rights in Europe", the Committee of Ministers took the following positions:

"Human rights protection lies at the heart of the Council of Europe's action. Exceptionally, its approach in this field is aimed at integration, since the central instrument, the European Convention on Human Rights has the originality of giving competence to a supranational body - the Court - to take decisions directly binding on member States, which are required to accede to the Convention without delay. The Preamble to the Single European Act and Articles F2 and K2 of the Treaty on the European Union refer to the Convention. The Convention must remain an essential reference point, in terms both of rights guaranteed and its judicial mechanisms, for the protection of human rights in Europe as a whole. It is in this context that consideration of the possibility of the Community's acceding to the Convention and its protocols might be placed. The Parliamentary Assembly is in favour of such an option, and the President of the European Court of Human Rights, Mr Rolv Ryssdal, also supported the idea at the end of a paper (...), which he delivered at a recent round table (...)." The document also states that the European Social Charter, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and the Framework Convention for the Protection of National Minorities constitute basic texts of reference for the protection of human rights in Europe.

Parliamentary Assembly Recommendation 1279 (1995) on the 1996 Intergovernmental Conference of the European Union inter alia recommends that the Committee of Ministers draw the attention of its governments (in particular those of the EU member States) to the already supranational character of the ECHR, set up a working party to determine the manner of the European Community's accession to the ECHR and its practical implications for the Council of Europe, and invite the European Community to accede to the revised European Social Charter and other treaties.⁶

The then President of the European Court of Human Rights, Mr Rolv Ryssdal, concluded an address delivered at a Round Table on the developing role of the European Court of Justice (Brussels, 12 May 1995) by stating that Community accession to the ECHR "would appear a logical step forward. It would strengthen both the Community and the Convention and (...) post cold-war Europe needs a strong Community and a strong Convention. It needs a strong Court of Justice and a strong European Court of Human Rights".

⁵ See document CM (95) 128 revised of 19 October 1995, entitled: "Place and Role of the Council of Europe in European Construction, with the Prospect of the European Union's 1996 Intergovernmental Conference - considerations which the Ministers' Deputies wish to bring to the attention of the Reflection Group".

⁶ In Resolution 1068 (1995), the Parliamentary Assembly pointed out that "accession [to the ECHR] would strengthen the safeguard of human rights in Europe, ensure effective protection of the rights of Community citizens and establish coherence in the system for safeguarding fundamental rights, while avoiding any risk of parallel interpretation of the Convention's provisions by the European Court of Human Rights and the Court of Justice of the European Communities." The Assembly therefore expressed "the hope that the Community will soon take the necessary steps to submit its formal application for accession to the European Convention on Human Rights".

The question of Community accession to the ECHR was not seriously discussed subsequently to the Opinion of the Court of Justice in the framework of the Intergovernmental Conference which led to the conclusion of the *Treaty of Amsterdam*⁷. The IGC did not result in a Treaty amendment establishing competence for the Community to accede to the ECHR (although it did result in the introduction of certain new provisions according to which the Union is founded, inter alia, on the principle of respect for human rights and fundamental freedoms - new Article 6).

26. In its Recommendation 1365 (1998) the *Parliamentary Assembly of the Council of Europe* welcomed the strengthening of human rights protection within the Union. It also considered that accession of the European Community to the ECHR would further strengthen this protection and eliminate the current risk of divergent case-law between the European Court of Justice and the European Court of Human Rights. It recommended that the Committee of Ministers "promote actively the accession of the European Community (Union) to all Council of Europe conventions which foresee this possibility as well as to the European Convention on Human Rights, the European Social Charter and the European Cultural Convention" and "re-examine the question of accession by the European Community (Union) to the Council of Europe".

27. In its reply to this Recommendation dated 1-2 July 1998, the *Committee of Ministers* noted that a number of Council of Europe conventions and agreements provide for accession by the European Community and that it was for the Community to decide when it wishes to take advantage of the possibility of accession. It also noted that several options had been put forward concerning Community (or Union) accession to the ECHR at the time of the Intergovernmental Conference of the European Union which preceded the adoption of the Amsterdam Treaty, none of which had been pursued further. The Committee of Ministers also referred to the above-mentioned opinion of the Court of Justice.

The new initiative to draw up a Charter of fundamental rights of the European Union

28. Under the German Presidency of the European Council in the first half of 1999, an initiative was launched towards the elaboration of a Charter of fundamental rights of the European Union. This resulted in a *Council decision adopted in Cologne (3-4 June 1999)* referring to a need, at the present stage of the Union's development, to establish a Charter of fundamental rights in order to make their overriding importance and relevance more visible to the Union's citizens. According to the terms of the decision, "The European Council believes that this Charter should contain the fundamental rights and freedoms as well as basic procedural rights guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and derived from the constitutional traditions common to the Member States, as general principles of Community law. The Charter should also include the fundamental rights that pertain only to the Union's citizens. In drawing up such a Charter account should furthermore be taken of economic and social rights as contained in the European

⁷ The Community's accession was not an option in the IGC (or the resulting Amsterdam Treaty) because of lack of unanimous support from member States of the European Union; see the Committee of Ministers' reply to the above-mentioned Parliamentary Assembly Recommendation 1279 (1995), adopted at the Deputies' 601st meeting (17 September 1997).

Social Charter and the Community Charter of the Fundamental Social Rights of Workers (Article 136 TEC), insofar as they do not merely establish objectives for action by the Union."

29. A draft for such a Charter should be drawn up by a body with a fairly broad composition, which should present a draft document in advance of the European Council in December 2000. The European Council will propose to the European Parliament and the Commission that, together with the Council, they should "solemnly proclaim on the basis of the draft document a European Charter of Fundamental Rights. It will then have to be considered whether, and, if so, how the Charter should be integrated into the treaties."

30. At the *Quadripartite meeting between the European Union and the Council of Europe* on 10 February 1999, the German Presidency initiative was discussed (see doc. SG/Inf(99)4). The *Secretary General* recalled previous discussions on accession by the community to the ECHR, which had been advocated by the Parliamentary Assembly, the European Parliament, the European Commission and a majority of European Union member States. The Convention had proved its worth and was immediately available; the drawing up of a new instrument might result in problems of compatibility and a risk of different standards. This was borne out by the discussion concerning the CIS instrument. The *European Commission representative* recalled that the Commission had always been in favour of Community accession to the Convention, but that the opinion of the Court of Justice had shown that there were a number of obstacles to this. The question of the EU getting its own Charter of human rights had now been raised once more. The ECHR remained, however, a unique instrument with its own implementation mechanisms. The EU Presidency and future Presidencies should take account of the ECHR and the need to avoid duplication and erosion of the unique character of the ECHR. The *President of the Council* stressed that the discussion of the EU Charter as part of the EU treaties was only at its beginning. This was an excellent opportunity for starting a discussion with the Council of Europe and he assured that its views would be taken into consideration.

3. SOME RELEVANT RECENT DEVELOPMENTS IN THE STRASBOURG CASE-LAW

31. On 18 February 1999, the *European Court of Human Rights* delivered judgment in three cases which suggest a certain departure from earlier case-law of the Commission.⁸ The first case concerned the fact that Gibraltar had been excluded from participating in the European Parliament elections and the question of whether this was in conformity with Article 3 of Protocol No. 1 to the ECHR (*Matthews v. UK*). The UK Government argued that it could not be held responsible, since this exclusion was based on measures taken in the framework of the European Community. The Court reached a different conclusion and found a violation of Article 3 of Protocol No. 1. It accepted that Community acts could not be challenged as such in Strasbourg since the Community was not a Party to the ECHR. The ECHR does not exclude the transfer of competences to international organisations, provided that the rights of the ECHR continue to be "secured": "Member States' responsibility therefore continues even after such an transfer." Interestingly, the Court considered that the *European Parliament*, in view of its legislative powers and its role of exercising democratic supervision of the activities of the

⁸ See, in particular, *M. & Co. v. Germany*, Adm. dec. of 9 February 1990 (appl. No. 13258/87), Decisions and Reports Vol. 64, p. 138.

Community, should be considered as part of the "legislature" of Gibraltar for the purposes of Article 3 of Protocol No. 1. It found a violation of this provision because the applicant was completely denied any opportunity to express her opinion in the choice of members of the European Parliament.

32. In the second case (*Waite and Kennedy v. Germany*)⁹ which concerned the question of Germany's responsibility for accepting immunity from jurisdiction of the European Space Agency, the Court held as follows: "The Court is of the opinion that where States establish international organisations in order to pursue or strengthen their co-operation in certain fields or activities, and where they attribute to these organisations certain competences and accord them immunities, there may be implications as to the protection of fundamental human rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. It should be recalled that the Convention is intended to guarantee not theoretical or illusory rights, but rights that are practical and effective [...]. For the Court a material factor for determining whether granting the ESA immunity from German jurisdiction is permissible is whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention." (§§ 67-68 of the judgment)

33. The possible impact of this development in the case-law on the subject-matter of this paper is discussed in paragraphs 46-47 below.

4. OUTLINE OF CERTAIN HYPOTHESES/POSSIBLE APPROACHES

34. Before examining a number of hypotheses/possible approaches, it is important to define the exact nature of the legitimate Council of Europe interest in this matter.

35. It is proposed¹⁰ to define the legitimate interest of the Council of Europe in the matter of human rights protection within the European Community as follows: its wish to avoid a situation where there would be two "competing" European Bills of Rights, which would risk diminishing the authority of the ECHR and creating divergent minimum European human rights standards, which would lead to confusion and (legal) uncertainty and which would obviously not be in the interest of the populations of the member States of the Council of Europe. Politically, such parallel operation of two competing bills of rights could in effect mean the drawing of new "dividing lines" in Europe, since individuals in some parts of the wider Europe would enjoy certain fundamental rights which would be different from those enjoyed by people in other European countries. This would be difficult to accept also from the perspective of the principle of universality of human rights and weaken the credibility of Europe's reliance on this principle in relation to other regions of the world (both in bilateral and in multilateral relations).

36. Against this background, a number of possible hypotheses can be identified. These are set out and commented upon below. From the comments it will be clear that not all of these are

⁹ The third case (*Beer and Regan v. Germany*) is very similar - also from the point of view of the Court's reasoning - and will not be dealt with separately.

¹⁰ This is a tentative proposal which can no doubt be improved on the basis of wider in-house discussions.

viable.

37. **Hypothesis 1:** the Community would not proceed with the adoption of a Charter of Fundamental Rights of the European Union

comment: this hypothesis seems unrealistic after the June 1999 European Council decision of principle that such a Charter should be drawn up in advance of the European Council in December 2000.

38. **Hypothesis 2:** such a Charter would be solemnly proclaimed in the form of a political declaration, not as a legally binding instrument (eg: as part of the treaties).

comment: the European Council decision explicitly leaves open the question of whether the Charter should be integrated into the treaties. Furthermore, a key reason for drawing up the Charter stated in the Council decision is the fact that "There appears to be a need, at the present stage of the Union's development, to establish a Charter of fundamental rights *in order to make their overriding importance and relevance more visible to the Union's citizens*" (emphasis added). If visibility is the purpose, it could be thought that a legally binding text is not necessary. However, there may be strong pressure from different actors (the European Parliament, one or more Member States, interest groups/NGOs, ...) to bring about a legally binding text (or to transform what might initially be a political declaration into a legally binding text at a later stage).

39. **Hypothesis 3:** such a Charter would contain the ECHR rights in exactly the same wording as the ECHR provisions themselves (the same would apply for the Social Charter if social rights are to be included in the EU Charter); in addition, a clause referring to the ECHR and its case-law would be included in the Charter.

comment: it is to be noted that the Council decision of June 1999 is very unclear and ambiguous on the rights to be included in the Charter. It states that the Charter should contain the fundamental rights and freedoms as well as certain basic procedural rights guaranteed by the ECHR and derived from the constitutional traditions common to the Member States, as general principles of Community law. This suggests that the rights guaranteed by the ECHR will be included in the Charter, but it does not necessarily mean that the formulation of the provisions on these rights will follow the ECHR provisions word for word (the decision that the Charter should contain fundamental rights "as general principles of Community law" seems to suggest that a very precise wording is not envisaged, which would in all likelihood mean a departure from the formulations of the provisions of the ECHR. It is unclear what is meant by the reference to "certain basic procedural rights" guaranteed by the ECHR (does this refer to fundamental rights of a procedural nature such as the rights laid down in Articles 5, 6 and 13 ECHR or does this concern the right of individual petition to the European Court of Human Rights? If the former interpretation is the correct one, does this mean that not all of the ECHR rights are to be taken up in the future Charter?). It should also be noted that the Council decision adds that the Charter should also include the fundamental rights that pertain only to the Union's citizens. Finally, the decision states that in drawing up such a Charter, account should furthermore be taken of economic and social rights as contained in the European Social Charter and the Community Charter of Fundamental Social Rights of Workers, "insofar as they do not merely establish objectives for action by the Union". It is unclear whether this means that it is

envisaged to include economic and social rights in the Charter and, if so, whether the phrase quoted should be taken to mean that only justiciable rights would qualify for such inclusion. If the latter is the case, the question arises as to how this relates to the fact that the Council decision explicitly reserves the decision on the status (legally binding or not) of the EU Charter for a later stage.

40. It seems likely that these important questions will have to be addressed by the Body that will be responsible for drawing up such a Charter. In this respect, it should be pointed out that there is a direct link between the question of the future status of the Charter (ie: political declaration or (also) a legally binding instrument) and the wording of the provisions: a legally binding instrument requires provisions that are much more precise than is required for a political text (for example, while for a political text it could arguably be sufficient to state the "everyone has the right to freedom of expression", a legally binding instrument would need to specify the restrictions that might lawfully be placed upon the exercise of that right).

41. In other words: an approach according to which the Charter's provisions that contain rights which are also guaranteed by the ECHR will follow the latter's precise formulations (the aim being to avoid discrepancies in the relevant minimum standards) seems viable only in one of the following two cases:

a. the Charter will be drafted in the form of a binding legal instrument (which will necessarily mean that its provisions will be detailed and precise);

b. the Charter will be drafted in the form of a political declaration with detailed and precise provisions (which, therefore, could easily be transformed into a binding legal instrument at a later stage).

42. The only case in which there seems to be no strong need, from the point of view of avoiding discrepancies between the Charter and the ECHR, to follow closely the wording of the ECHR provisions is that where the drafters opt for a political declaration with short provisions simply stating the rights without much detail, "as general principles of Community law". However, even in such a scenario, it would seem important to include all of the rights guaranteed by the ECHR and its additional Protocols, since the omission of one or the other right (or its formulation in weaker or more limited terms than those provided in the corresponding ECHR provision) would be likely to lead to a "downgrading" of that right (and to relativise the importance of the right in this way could have adverse repercussions on its status in the ECHR context). Such a situation could be avoided if the Charter would contain Article 1 as well as all the rights of Section I of the ECHR (Articles 2-18) and the additional Protocols to the ECHR. The question arises, however, what the political (and possibly legal) situation is with respect to some member States of the European Union, given that not all of them have ratified all additional Protocols.

43. However, even if the drafters of the Charter follow the wording of the ECHR provisions to the letter, this in itself would not eliminate altogether the risk that the Court of Justice would interpret them differently from the way the European Court of Human Rights interprets the corresponding provisions of the ECHR, since, from a legal point of view, these are two distinct legal instruments. A possibility might be to include in the Charter a provision to the effect that the result of the application and interpretation of its provisions, notably by the Court of Justice,

shall not lead to a reduction of the protection of human rights as afforded by the provisions of the ECHR and its Protocols, as interpreted by the European Court of Human Rights (as the case may be, a similar reference could be made to "case-law" of the European Committee of Social Rights on corresponding provisions of the European Social Charter).¹¹ It might be questioned, however, whether such a clause, if included in a legally binding instrument the observance of which is ultimately ensured by the Court of Justice, would be compatible with the EC treaty rules relating to the jurisdiction of the Court of Justice. It could be argued that, depending on its precise formulation, a clause of this type might create a legal obligation for the Court of Justice to follow (or: respect) the Strasbourg case-law as concerns the interpretation of certain parts of Community law, namely the fundamental rights provisions of the Charter and thus derogate from the rules of the EC treaty concerning the monopoly of jurisdiction of the Court of Justice (see in particular Article 164 and perhaps also Article 219). An amendment of the EC Treaty on this point might therefore be required.

44. **Hypothesis 4:** such a Charter would be adopted simultaneously with a Council decision to amend the treaties and to open negotiations with the Council of Europe on accession to the ECHR (in case the Charter is integrated into the treaties by amendment of the latter, the hypothesis is that a further amendment would be adopted simultaneously, providing for Community competence to accede to the ECHR).

comment: this hypothesis is based upon the recognition that it is, as such, entirely legitimate for the Union to adopt its catalogue of fundamental rights. Indeed, in the past both the Commission and the European Parliament have taken the view that Community accession to the ECHR and adoption of a catalogue of fundamental rights of the Union are not incompatible: the parallel has been drawn with the existing situation as concerns the co-existence of national constitutional bills of rights of States parties to the ECHR and the latter's catalogue. Given the advanced stage of development of the legal order of the European Community, it appears natural for it to have its own bill of rights, just as individual member States' constitutions recognise such rights. However, this line of reasoning calls for some comments:

- the adoption of a (legally binding) Charter by the European Union differs from the adoption of a national (constitutional) bill of rights by a member State in that such a national bill of rights does not "compete" with the ECHR: member States remain free, under the ECHR, to adopt in their domestic legal systems a higher level of protection of fundamental rights and freedoms than that foreseen in the minimum standards of the ECHR (see Article 53 ECHR). Strictly speaking, the same is true, of course, for the Community legal order (leaving aside the fact that the Community is not a party to the ECHR). However, the adoption of a Union Charter may lead to confusion and (legal) uncertainty in the member States of the Union as to what the applicable European minimum standard is in human rights matters: the ECHR or the Union Charter?¹² It should be added that a (legally binding) Union Charter would not only bind the

¹¹ Clearly, the question of the precise wording of such a clause would have to be examined very carefully; at this point it is merely the general idea of such a clause which is floated. Such a provision would not be unique: see e.g. Article 23 of the Framework Convention for the Protection of National Minorities (concerning the relationship of this Convention with the ECHR).

¹² In this respect, the adoption of a Union Charter might also be detrimental to useful synergies between the Council of Europe and the European Union as concerns the promotion of respect for human rights in States that are candidates for accession to the Union.

institutions of the Union but also bind the individual member States whenever they take measures to implement Community law (see, *mutatis mutandis*, the judgment in the Wachauf case, CJ case 5/88, ECR 1989, p. 2639, para. 19). [It is true that this risk of confusion and uncertainty to some extent already exists on account of the fact the Court of Justice has recognised the importance of fundamental rights as general principles of Community law - but (i) the Court has recognised that the ECHR has "special significance" in this respect and (ii) laying down provisions guaranteeing fundamental rights in a written (and legally binding) EU bill of rights would undoubtedly further increase the risk of confusion and uncertainty.] It is clear that such confusion and uncertainty is neither in the interest of the (candidate) Member States of the Union, nor in that of their populations. In particular, it would not be in the interest of the protection of human rights in Europe.

- the analogy with the position of individual member States does not apply in one vitally important respect: those States have submitted their acts and omissions to the jurisdiction of a supranational human rights court: the European Court of Human Rights. A similar mechanism of "external judicial control" is lacking as far as the legal order of the Community is concerned: the judgments of its "supreme court", the Court of Justice, are not subject to review by the Strasbourg Court in the same way as judgments of the constitutional and supreme courts of the EU member States are. Therefore, even if the Union would have its own "constitutional bill of rights", this would not ensure that its acts and omissions can, ultimately, be tested for compliance with the minimum human rights standards of the ECHR through the control mechanism of the latter.

45. These comments lead to the following conclusions:

- a. the drawing up of a Charter and community accession to the ECHR can be considered to be complementary rather than alternative measures (this has also been the position taken by the Commission and the European Parliament: see, in Appendix 1, the Commission Communication on accession of 19 November 1990, in particular paragraph 8 of Annex II thereto);
- b. the risk of confusion and legal uncertainty about the applicable minimum human rights standards in Europe would be avoided if adoption of the Charter (if it is to be adopted in legally binding form) is accompanied by a decision to make the necessary amendments to the treaties so as to make it possible for the Communities to accede to the ECHR and to formally start negotiations to that effect.¹³ This would ensure not only external judicial control of Community compliance with fundamental human rights and freedoms but also the maintenance of a uniform European minimum standard of human rights protection, whilst allowing the European Union to apply any higher standards of human rights protection which may be laid down in the future Charter.

¹³ It should be noted that the European Parliament's Committee on Institutional Affairs, in its opinion on the Bontempi report (A3-0421/93) on Community accession to the ECHR, also took the view that "In order to emphasise the complementary nature of the two approaches, the three Institutions (Commission, Council and Parliament) should, at the latest at the time of the Union's accession to the ECHR, sign a joint declaration endorsing Parliament's Declaration of 12 April 1989 and advocate the ultimate incorporation of the Declaration into the Treaties." (draftsman: Mr De Gucht; the opinion is appended to the Bontempi report). An amendment to this effect was adopted by the Parliament and included in the resolution (para. 13).

5. SOME FURTHER CONSIDERATIONS

46. The above-mentioned recent developments in the Strasbourg case-law (see paras. 31-32 above) necessitate a further comment because they may have an impact on the question of Community accession to the ECHR and the preparations for a Charter. Already in its memorandum of 1979, the Commission pointed to the following argument in favour of community accession: "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. (...) At this stage the possibility cannot be excluded that the European Commission of 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. 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 be perfectly admissible. The object of the complaint would then be, however, (...) the Community rule behind the national act." The Commission concluded: 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."

47. The approach taken by the European Court of Human Rights in the Waite & Kennedy and the Matthews cases suggest that the Court has taken a major step towards recognition of the principle of continued Member State responsibility even after transfer of powers to an international organisation. This recent development makes the risk pointed out by the Commission in its memorandum of 1979 a very real one and provides a very strong argument indeed in favour of Community accession to the ECHR. Such accession would, it can be assumed, generally obviate the need, in terms of effective protection of the rights guaranteed by the ECHR, to develop further this concept of Member State responsibility in the Strasbourg case-law, for it would allow for "direct" review of Community acts by the Strasbourg Court, with full possibilities for the Community to defend its position in the Strasbourg proceedings.

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48. On the basis of the foregoing, the following suggestions can provisionally be made as to the position to be taken by the Council of Europe in regard to the debate on the EU Charter and the question of Community accession to the ECHR:

A. While the elaboration of a EU Charter is a matter for the EU institutions to decide, the Council of Europe nonetheless considers that the drawing up and adoption of such a Charter may pose certain risks for the effectiveness of the protection of human rights in Europe, which should at all times be avoided. The Council of Europe believes that certain precautionary

measures are necessary in order to avoid these risks.

B. The position of the Community/EU differs in some important respects from that of individual member States (see para. 44 above), which creates the risk that such a EU Charter could develop into/be misunderstood as a catalogue of minimum European human rights standards which would compete with and call into question the authority of the ECHR. Such confusion about the applicable minimum European standard will lead to (legal) uncertainty and be detrimental to the overriding interest which the populations of the member States of the Union (and those of candidate member States and other States which are members of the Council of Europe) have in an effective protection of human rights in Europe. Creating a situation where there would be two competing catalogues of minimum human rights standards in Europe would be tantamount to drawing new "dividing lines" in Europe, be damaging to the process of European construction in the wider sense, be contrary to the fundamental principle of universality of human rights and weaken the credibility of Europe's reliance on this principle in foreign relations in the wider world (both bi- and multilaterally).

C. It is therefore vitally important that the relationship between the future EU Charter and the ECHR be defined at an early stage during the preparatory work for the Charter. If the Charter is to be adopted as a joint Political Declaration of the Council, the Parliament and the Commission, that is: if it is not to be given any legal effect (which would be the case if, for example, the Charter were to be integrated into the treaties), the situation of two competing European catalogues of minimum human rights standards would not arise for it would be clear that the ECHR constitutes the legally binding minimum European standard. On the other hand, should the Charter be given legal effect, certain measures should be taken with a view to defining the relationship between the future EU Charter and the ECHR so as to ensure that a uniform European minimum standard is maintained.

D. A first step would be to ensure that Articles 1-18 of the ECHR and the substantive provisions of the Protocols to the ECHR guaranteeing additional rights and freedoms are verbatim included in the future Charter, alongside any additional rights which may be of special relevance in the context of the EU. Omission of certain ECHR rights or inclusion of these rights in a weaker or more limited form than is guaranteed by the ECHR would tend to lower the level of European human rights protection and should therefore be avoided at all cost. However, even then the risk of divergent minimum standards (Strasbourg vs. Luxembourg) is not eliminated (see para. 43 above). To avoid this risk, it would seem necessary to take a second step: to include a provision in the Charter according to which the result of the application and interpretation of its provisions, notably by the Court of Justice, shall not be such as to lead to a reduction of the level of human rights protection as afforded by the provisions of the ECHR and its Protocols, as interpreted by the European Court of Human Rights. Depending on the content of the draft Charter, a similar reference to the European Social Charter might also be required.

E. However, the most effective way of clarifying the relationship between the Charter and the ECHR would be for the Community to accede to the ECHR. Over the last 20 years, this has been advocated and/or supported on several occasions by the European Parliament, the European Commission and a majority of EU Member States, as well as by the Parliamentary Assembly of the Council of Europe, while the Committee of Ministers of the Council of Europe has welcomed the interest of the Community in considering such a step and drawn the attention of the 1996 IGC to this possibility. As has been argued by the European Parliament and the

Commission, accession would be complementary to the drawing up of a EU/Community catalogue of rights, not an alternative to it.

The arguments in favour of accession in terms of the protection of fundamental rights and freedoms within the Community have been set out very clearly and concisely in the Commission communication of 19 November 1990 (see appendix 1 to this paper). There are, however, two additional arguments in favour of accession which have gained a special importance in the current circumstances. The first is the very fact that the European Union is preparing the adoption of the Charter of fundamental rights. Accession to the ECHR simultaneously with the adoption of the Charter would not only show that the Union/Community is willing to subject its acts to external judicial control of compliance with human rights standards; it would also make clear that the position of the EU Charter vis-à-vis the ECHR is similar to that of national constitutional bills of rights: in full conformity with the subsidiary nature of the ECHR system, it will be in the first place for the authorities of the Union/Community to ensure respect for the rights laid down in the ECHR, notably through the application of the provisions of the EU Charter. The role of the ECHR and its control system would then be the same as it is in relation to States Parties: a subsidiary guarantee to ensure that the European minimum human rights standards of the ECHR are observed in relation to all persons within their jurisdiction.

The second additional argument in favour of accession is the development of the Strasbourg case-law: the recent case-law of the European Court of Human Rights (emphasising the continued responsibility of individual member States in relation to powers they have transferred to an international organisation) highlights the need for the Union/Community to become a Party to the ECHR, with full possibilities to defend its position in the course of the Strasbourg proceedings.

49. It should therefore be concluded that the drawing up and adoption of the EU Charter does not obviate the need for Community accession to the ECHR; on the contrary, there are cogent reasons for taking both steps simultaneously.