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## Protecting Human Rights in the European Union: An Argument for Treaty Reform

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# Protecting Human Rights in the European Union: An Argument for Treaty Reform

Tara C. Stever

## **Abstract**

This Note argues that the European Community ("EC") should amend the European Community Treaty to provide authority for EC accession to the European Court of Human Rights ("ECHR") because the belief in and protection of human rights must be at the core of a thriving constitutional legal system. As the EC continues to grow geographically, its legal competences must also grow to deal with the challenges of building a singular, unified Europe from traditionally autonomous European states and EC institutions. Part I of this Note explains the institutions of the EC, examines the principles and objectives of the ECHR and its present application in the EC, and discusses current human rights protection in the EC. Part II considers the objectives of a unified Europe, the conflicting opinions regarding EC accession to the ECHR, and the present lack of codification of human rights legislation in the EC. Part III argues that the necessity of enumerated, uniformly enforceable human rights protections at the EC level overrides claims that the EC should not extend its competences to include accession to the ECHR. This Note concludes that the EC should amend the European Community Treaty to include a provision for accession to the ECHR.

# PROTECTING HUMAN RIGHTS IN THE EUROPEAN UNION: AN ARGUMENT FOR TREATY REFORM

Tara C. Stever\*

Law is to do what blood and iron have for centuries failed to do. For only unity based on a freely-taken decision can be expected to last; unity founded on the fundamental values such as freedom and equality, and protected and translated into reality by law.<sup>1</sup>

## INTRODUCTION

As the European Community looks to the future and anticipates continued growth in membership,<sup>2</sup> the lack of clear

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\* J.D. Candidate, 1998, Fordham University School of Law. I would like to thank my family for their unconditional support and encouragement in all my endeavors.

1. Commission of the European Communities, *The ABC of Community Law* 28 (1986); WILLIAM NICOLL & TREVOR C. SALMON, *UNDERSTANDING THE EUROPEAN COMMUNITIES* 48 n.9 (1990).

2. See MARTIN WESTLAKE, *THE COUNCIL OF THE EUROPEAN UNION* 390 (1995) (stating that there is anticipated future growth in European Community). Austria, Finland, and Sweden acceded to the European Union in 1995, increasing the Member States of the European Union to 15. Austria, Finland, Greece, Luxembourg, Spain, Belgium, France, Ireland, Netherlands, Sweden, Denmark, Germany, Italy, Portugal, and the United Kingdom are members of the European Union. *Id.* Many other countries have applied for membership, including Turkey, Cyprus, Malta, Poland, Romania, Slovakia, Hungary, Latvia, Estonia, Bulgaria, Lithuania, the Czech Republic, and Slovenia. *Id.* The European Community has negotiated association and co-operation agreements with many of the Central and Eastern European countries. *Id.* The June 1993 Copenhagen European Council agreed that the associated countries of Central and Eastern Europe could become members of the European Union. *Id.* The European Council agreed that accession negotiations with Malta and Cyprus should begin six months after the end of the 1996 Intergovernmental Conference. *Id.* The December 1994 Essen European Council agreed to a detailed strategy to prepare for the future accession of the Central and Eastern European countries. *Id.* The Cannes European Council in June 1995, invited the eleven European countries, the Central and Eastern European countries, the three Baltic states, Malta, and Cyprus, all of which intended to join the Union at a future date, to meet with the current fifteen Member States. *Id.* Presently, the European Union has Europe Agreements with the following countries: Hungary (1993); Poland (1993); Czech Republic (1994); Slovakia (1994); Romania (1994); and Bulgaria (1994). See Letter from the Press and Public Affairs Committee of the Delegation of the European Commission (Oct. 1996) [hereinafter Delegation Letter] (on file with *Fordham International Law Journal*) (listing nations with which Community has signed agreements). The European Union has Free Trade Agreements with: Estonia (1994); Latvia (1994); and Lithuania (1994). Delegation Letter. In 1996, the European Union signed a Co-operation Agreement with Slovenia, and a Trade and Co-operation Agreement with Albania. *Id.*

human rights legislation that is binding on the European Community as a whole raises concerns about continued European unity,<sup>3</sup> national sovereignty,<sup>4</sup> and jurisdiction.<sup>5</sup> The ever-growing scope of EC institutions<sup>6</sup> has caused a need for reforms and amendments to the foundation treaties<sup>7</sup> that form the present framework of the European Community<sup>8</sup> to accommodate its

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3. See Mary F. Dominick, *Toward a Community Bill of Rights: The European Community Charter of Fundamental Social Rights*, 14 FORDHAM INT'L L.J. 639, 668 (1991) ("Civil and political as well as economic and social rights are implicated by the ever-expanding jurisdiction of the Community.").

4. *Id.*

5. *Id.*

6. See *id.* at 668 (discussing implications of growing European Community on human rights).

To assume benevolently that the Community's conduct will always be such that it will not violate the rights of citizens who empower it is to ignore the constitutional wisdom of its constituent parts . . . . As a federated Europe comes closer to reality, it is essential that its institutional framework contain explicit, invocable, and directly effective fundamental protections for those whom the governments are designed to serve.

*Id.*

7. Manfred Zuleeg, *A Community of Law: Legal Cohesion in the European Union*, 20 FORDHAM INT'L L.J. 623, 623 (1997). The term "Foundation Treaties" was borrowed from Manfred Zuleeg, Professor of Public Law at the Johann Wolfgang Goethe-University, former Judge at the European Court of Justice, and Visiting Professor at the University of California, Berkeley. *Id.*

8. See GEORGE BERMAN ET. AL., EUROPEAN COMMUNITY LAW SELECTED DOCUMENTS 117 (1993) [hereinafter SELECTED DOCUMENTS] (stating that foundation treaties form framework of European Community). The Treaty on European Union ("TEU") changed the name of the European Economic Community to the European Community, reflecting the TEU's emphasis on the need for political and social cohesion among the states of Europe. *Id.* Treaty on European Union, Feb. 7, 1992, O.J. C 224/1 (1992), [1992] 1 C.M.L.R. 719, 31 I.L.M. 247 [hereinafter TEU] (amending Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11, 1973 Br. Brit. T.S. No. 1 (Cmd. 5179-II) [hereinafter EEC Treaty], as amended by Single European Act, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 [hereinafter SEA], in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987). The TEU established a single Union comprised of three European communities already in existence. *Id.* art. A, ¶ 3, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727. The TEU represents the latest stage in the process of creating an "ever closer union among the peoples of Europe." *Id.* The TEU modifies and adds to the treaties establishing the three European communities, but it does not replace them. *Id.*; see WESTLAKE, *supra* note 2, at 8 & table II.2 (explaining pillar structure of gradual extension of European Community into new policy areas). "The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy." P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 4 (6th ed. 1995); TEU, *supra*, art. F(1), O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728. The Communities, which continue to fulfill their respective responsibilities, form the first of the three pillars upon which the European Union is based. DERRICK WYATT & ALAN DASHWOOD, EUROPEAN COMMUNITY LAW 665 (3d ed. 1993). The European Community, as a subset of the European Union,

unanticipated size.<sup>9</sup> To achieve the goals underlying European unification,<sup>10</sup> the European Community should demonstrate its

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remains the entity responsible for most European Union activity and, therefore, most references should be to the European Community rather than the European Union. GEORGE A. BERMAN ET AL., *CASES AND MATERIALS ON EUROPEAN COMMUNITY LAW* 18 (1993). The only areas technically beyond the reach of the European Community are the second and third pillars identified by the TEU, Provisions on a Common Foreign and Security Policy ("C.F.S.P.") and Provisions on Co-operation in the Fields of Justice and Home Affairs. TEU, *supra*, tits. V, VI, O.J. C 224/1, at 94-97 (1992), [1992] 1 C.M.L.R. at 729-35. The reference to "pillars" as an illustration on the structure of the European Union is derived from the image of a Greek temple. WYATT & DASHWOOD, *supra*, at 655. The term "European Union" refers to the political relationship between the three pillars. *Id.* Member States were not ready to include the second and third pillars within the European Community, therefore, the structure of the three pillars was created. *Id.* That structure is held together by a single institutional framework, which functions to ensure the consistency and the continuity of the activities carried out in order to attain EU objectives while at the same time respecting and building upon the *acquis communautaire*. TEU, *supra*, art. C, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727. The term *acquis communautaire* refers to the body of rules governing the Communities in any field of activity. MATHIJSEN, *supra*, at 6 n.7; see DAVID O'KEEFE, *Current Issues in European Integration*, 7 *PAGE INT'L L. REV.* 1, 11 (1992) (defining *acquis communautaire* as "the entire body of Community law, as contained in the Treaties, Acts of Accession, legislation and the case-law of the European Court of Justice (with exceptions justified in the case of the protection of fundamental interests) as the common legal basis" of Community law).

9. See WESTLAKE, *supra* note 2 at 390 (setting forth original Member States and those states that have applied for membership or have entered into agreements with the growing Community). Presently, the Member States of the European Union are Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Portugal, the Netherlands, Spain, Sweden, and the United Kingdom. *Id.* at 366-67, table XVI.4.1. Middle and Eastern European nations that have applied for membership have different political and social histories than those nations that the founders of the Community originally considered. *Id.*; see DR. KLAUS-DIETER BORCHARDT, *EUROPEAN INTEGRATION, THE ORIGINS AND GROWTH OF THE EUROPEAN UNION* 10 (1995) (describing founding of European Community). The founders of the European Union at the signing of the first Treaty, setting up the European Coal and Steel Community on April 18, 1951 in Paris, were Paul van Zeeland of Belgium, Joseph Bech of Luxembourg, Joseph Maurice of Belgium, Count Carlo Sforza of Italy, Robert Schuman of France, Konrad Adenauer of Germany, Dirk Stikker of the Netherlands, and Johannes van den Brink of the Netherlands. *Id.*; see Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 [hereinafter ECSC Treaty], as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES (EC Off'l Pub. Off. 1987).

10. BORCHARDT, *supra* note 9, at 5-6. The European movement toward integration arose from three main considerations: Europe's realization of its own weakness, the conviction of the motto "Never Again!," that summed up the possibility of renewed military conflict arising from internal state conflicts, and the earnest desire to create a better, freer, and more just world in which international relations would be conducted in a more orderly way. *Id.* The Preamble of the EC Treaty states that Member States are:

Determined to lay the foundations of an even closer Union among the peoples of Europe,

respect for human rights by committing to uphold the principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>11</sup> ("ECHR") and ensuring that penalties for violations of its principles are uniformly applied at the state and EC level.<sup>12</sup>

Although nations that already have accession agreements with the European Community meet its requirements for accession, the European Community is expected to continue to grow.<sup>13</sup> An international organization that regulates and enforces respect for human rights is necessary, as violations of such

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Resolved to ensure the economic and social progress of their countries by common action to eliminate the barriers which divide Europe,  
 Affirming as the essential objective of their efforts the constant improvement of the living and working conditions of their peoples,  
 Recognizing that the removal of existing obstacles calls for concerted action in order to guarantee steady expansion, balanced trade and fair competition,  
 Anxious to strengthen the unity of their economies and to ensure their harmonious development by reducing the differences existing between the various regions and the backwardness of the less favored regions,  
 Desiring to contribute, by means of a common commercial policy, to the progressive abolition of restrictions on international trade,  
 Intending to confirm the solidarity which binds Europe and the overseas countries and desiring to ensure the development of their prosperity, in accordance with the principles of the Charter of the United Nations,  
 Resolved by thus pooling their resources to preserve and strengthen peace and liberty, and calling upon the other peoples of Europe who share their ideal to join in their efforts,

Have decided to create a European Economic Community . . . .

EC Treaty, *supra* note 8, pmb., [1992] 1 C.M.L.R. at 587-88.

11. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR]. The ECHR is an international human rights organization that contains definitions, mutual obligations, and a control machinery to ensure that penalties for violations of its principles guarding human rights are uniformly applied by its contracting parties. See FREDE CASTBERG, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 5-7, 111-17 (1974) (describing human rights and freedoms that ECHR guards). The terms "human rights" and "fundamental freedoms" are also commonly referred to in the United States as civil rights. *Id.* (defining concept of civil rights in terms of ECHR); compare ECHR, 213 U.N.T.S. 221 [1950] (outlining rights of contracting parties' citizens) with U.S. CONST. AMENDS. 1-28 (guaranteeing certain rights in United States).

12. See PAUL LEWIS, *U.N. and U.S. Pressed on Rights Stance*, N.Y. TIMES INT'L, Feb. 2, 1997, at 8 (stating human rights groups are increasing pressure on U.S. leaders to make protection of people's human rights around world higher priority, and referencing letter by director of Human Rights Watch, supported by Amnesty International and Lawyers Committee for Human Rights, suggesting ways United Nations could do more to defend human rights).

13. See WESTLAKE, *supra* note 2 at 390 (listing anticipated dates of accession of new Member States to European Community).

rights impede EC respect for human rights and fundamental freedoms, a requirement of membership.<sup>14</sup> Many EC Member States have noted the importance of this task<sup>15</sup> and individually belong to the ECHR.<sup>16</sup> The European Community, however, it is not officially a signatory member.<sup>17</sup>

In April 1994, the Council of the European Union<sup>18</sup> ("Council") requested that the European Court of Justice ("ECJ") rule on whether Article 228<sup>19</sup> of the EC Treaty allows the

14. O'Keeffe, *supra* note 8, at 32. "[M]embership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union." *Id.*

15. See Dominick, *supra* note 3, at 644 ("Demands for an unambiguous enumeration of guaranteed rights that could be invoked against Community institutions subsequently grew, especially in the European Parliament."); see also *id.* at n.19 (citing Resolution of April 27, 1979, O.J. C 127/69 (1979) (Scelba Report); Resolution of Oct. 29, 1982, O.J. C 304/253 (Gonnella Report); Resolution embodying the opinion of the European Parliament on the memorandum from the Commission of European Communities on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms, O.J. C 304/253 (1982)). Groups within the European Parliament, mainly the Institutional Affairs Committee and the Committee on Legal Affairs and Civil Rights, have continually questioned the sufficiency of Community human rights. See Dominick, *supra*, note 3, at 644 (relying on O.J. Annex Nr. 2-337, Debats du Parlement European, Compte rendu des seances du 11 au mars 1986, at 99-103, 105-11 (reproducing statements of 1986 President, EC Council of Ministers, Van den Broek (Neth.), participating)).

16. GERHARD WEGEN & CHRISTOPHER KUNER, *Germany: Federal Constitutional Court Decision Concerning the Maastricht Treaty*, 33 I.L.M. 943, 948 (1993). The number of applications to the Commission on Human Rights has increased from 404 in 1981 to 2037 in 1993. *Id.* The number is expected to continue to increase in light of the fact that the ECHR is now better known and new states have and will probably continue to join the ECHR. *Id.* It is estimated that by the year 2000, as more States join the Council of Europe, between 35 and 40 states will be parties to the ECHR. *Id.*

17. BERMAN ET AL., *supra* note 8, at 146; HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: METHODS OF PROTECTION 17 (Antonio Cassese et al. eds., 1991) [hereinafter COMMUNITY METHODS] (stating that Community is not Signatory Party to ECHR, and therefore, ECHR has rejected applications against Community bodies).

18. See TEU, *supra* note 8, tits. V, VI, O.J. C 224/1, at 94-97 (1992), [1992] 1 C.M.L.R. at 729-38 (adopting name Council of the European Union). The Presidency of the Council rotates twice a year. See WESTLAKE, *supra* note 2, at 45-47, 50-51 (stating that occupation of Presidency allows Member States opportunity to focus on particular policy priorities, for example, Spain's Presidency during second half of 1995 prioritized Euro-Mediterranean Conference to improve Community relations with North African countries facing Spain across Mediterranean).

19. EC Treaty, *supra* note 8, art. 228, [1992] 1 C.M.L.R. at 714. Article 228 provides:

1. Where this Treaty provides for the conclusion of agreements between the Community and one or more States or international organizations, such

European Community to accede<sup>20</sup> to the ECHR.<sup>21</sup> EC Member States submitted *amicus curiae* briefs to the ECJ addressing the

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agreements shall be negotiated by the Commission. Subject to the powers vested in the Commission in this field, such agreements shall be concluded by the Council, after consulting the European Parliament where required by this Treaty. The Council, the Commission or a Member State may obtain beforehand the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of this Treaty. Where the opinion of the Court of Justice is adverse, the agreement may enter into force only in accordance with Article 236.

2. Agreements concluded under these conditions shall be binding on the institutions of the Community and on Member States.

*Id.* The TEU added Article 228 (a) to the EC Treaty, which provides:

Where it is provided, in a common position or in a joint action adopted according to the provisions of the Treaty on European Union relating to the common foreign and security policy, for an action by the Community to interrupt or to reduce, in part or completely, economic relations with one or more third countries, the Council shall take the necessary urgent measures. The Council shall act by a qualified majority on a proposal from the Commission.

EC Treaty, *supra* note 8, art. 228(a), [1992] 1 C.M.L.R. at 715.

20. See *Re the Accession of the Community to the European Human Rights Convention*, Case 2/94, [1996] 2 C.M.L.R. 265 (Mar. 28, 1996) [hereinafter *Opinion 2/94*]. Paragraph 4 of section I of the *Opinion 2/94* states:

With regard to the scope of accession, the Council states that each Community will have to adhere to the Convention within the framework of its powers and within the limits of the scope of its law . . . Such accession should not have any effect on the reservations entered by the Member States, parties to the Convention, which will continue to apply in the areas falling within national jurisdiction. The Community would agree to submit to the machinery for individual petitions and inter-State applications; actions between the Community and its Member States would, however, have to be excluded in recognition of the monopoly conferred in such matters by Article 219 of the EC Treaty on the Court of Justice.

*Id.* at 269, § I, ¶ 4.

21. See *Court Opinion on Accession to Human Rights Convention*, REUTER EUR. COMMUNITY REP., Mar. 28, 1996 (BC cycle) (summarizing *Opinion 2/94* of the ECJ, which held that without treaty amendment, European Community cannot accede to European Convention on Human Rights); *Opinion 2/94*, [1996] 2 C.M.L.R. at 289, ¶ 3 (stating that under Article 3b of EC Treaty, Community may only act within limits of powers conferred upon it by EC Treaty and of objectives assigned by it). Article 235, which permits the European Community to act without explicit power in order to attain the objectives of the European Community, cannot be interpreted to confer the power to accede on the European Community. EC Treaty, *supra* note 8, art. 235, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 716. Article 235 provides:

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

*Id.*

issue of EC accession to the ECHR,<sup>22</sup> and their respective arguments demonstrated the division over the issue of accession.<sup>23</sup> In its March 1996 opinion, the ECJ held that the European Community could not accede to the ECHR<sup>24</sup> because there is no EC Treaty provision that confers power on the European Community to enact rules or to conclude international conventions in the area of human rights.<sup>25</sup> Additionally, the ECJ held that Article 235<sup>26</sup> of the EC Treaty, which empowers the European Community to act in the absence of a specific provision when necessary to achieve the purposes of the EC Treaty, does not confer

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22. *Opinion 2/94* [1996] 2 C.M.L.R. at 271-72, § II, ¶¶ 1-4. Austria, Belgium, Denmark, Finland, France, Germany, Greece, the Netherlands, Portugal, Spain, and the United Kingdom submitted written observations. Additionally, the European Commission and the European Parliament submitted written observations. *Id.* On November 7, 1995, the ECJ entertained oral observations of Denmark, Greece, Spain, France, Ireland, Italy, the Netherlands, Portugal, Finland, Sweden, the United Kingdom, the Council of the European Union, the European Commission, and the European Parliament. *Id.*

23. *Id.* 281-87, at § VI. The Commission, the Parliament, and the Austrian, Belgian, Danish, Finnish, German, Greek, Italian, and Swedish Governments support accession by the European Community to the ECHR. *Id.* at 281-84, § VI, ¶ 1. France, Portugal, Spain, Ireland, and the United Kingdom argued against accession, claiming that it is incompatible with the EC Treaty and questioned the autonomy of the Community legal order and the ECJ's monopoly of jurisdiction. *Id.* at 284-86, § VI, ¶ 2. The Netherlands' Government, in its submission to the ECJ, notes the problems accession presents, without taking a definite position. *Id.* at 286,87, § VI, ¶ 3.

24. *Id.* at 269, § I, ¶ 4. *Opinion 2/94* states:

With regard to the scope of accession, the Council states that each Community will have to adhere to the Convention within the framework of its powers and within the limits of the scope of its law. Accession should cover the Convention and the Protocols which have come into force and been ratified by all the Member States of the Community. Such accession should not have any effect on the reservations entered by the Member States, parties to the Convention, which will continue to apply in the areas falling within national jurisdiction. The Community would agree to submit to the machinery for individual petitions and inter-State applications; actions between the Community and its Member States would, however, have to be excluded in recognition of the monopoly conferred in such matters by Article 219 of the EC Treaty on the Court of Justice.

*Id.*

25. *Id.* at 290, ¶ 27. "No Treaty Provision confers on the Community institutions any general power to enact rules on human rights or to conclude international conventions in this field." *Id.* But see *Opinion 2/91* of Mar. 19, 1993, [1993] ECR I-1061, I-1076-77, § II, ¶ 7, 8 (holding that European Community is empowered to enter into international commitments necessary for attainment of that objective even in absence of express provision to that effect, and EC Treaty may be read to imply such powers from its direct provisions).

26. EC Treaty, *supra* note 8, art. 235, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 716.

sufficient authority to allow for EC accession to the ECHR.<sup>27</sup> The ECJ determined that a modification of the EC institutional system to allow for EC accession to the ECHR would be of constitutional significance<sup>28</sup> and is beyond the scope of EC Treaty Article 235.<sup>29</sup> Such accession, therefore, could only occur by amending the treaties establishing the European Community.<sup>30</sup>

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27. *Opinion 2/94* [1996] 2 C.M.L.R. at 290, ¶¶ 28-30. *Opinion 2/94* states: In the absence of express or implied powers for this purpose, it is necessary to consider whether Article 235 of the Treaty may constitute a legal basis for accession. Article 235 is designed to fill the gap where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty. That provision, being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by the provisions of the Treaty as a whole and, in particular, by those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose.

*Id.* at 291, ¶¶ 35-36. The ECJ continued, stating:

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 be brought about only by way of a Treaty amendment. . . . [A]s Community law now stands, the Community has no competence to accede to the Convention.

*Id.* at ¶¶ 35-36.

28. See JAMES D. DINNAGE & JOHN F. MURPHY, *THE CONSTITUTIONAL LAW OF THE EUROPEAN UNION* xvii (1996) (stating that legal entity of European Union possesses constitution).

29. See *Opinion 2/94*, (1996) 2 C.M.L.R. at 291, at ¶ 36 (concluding that European Community has no competence to accede to ECHR under present EC law).

30. See *id.* at 291, ¶ 35 (suggesting that, as European Community cannot accede to ECHR under present treaty, EC Treaty must be amended); see also EC Treaty, *supra* note 8, art. 238, [1992] 1 C.M.L.R. at 717 (stating that international agreements may call for amendment of EC Treaty). Article 238 provides:

The Community may conclude with one or more States or international organizations agreements establishing an association involving reciprocal rights and obligations, common action and special procedures.

These agreements shall be concluded by the Council, acting unanimously and after receiving the majority of its component members.

Where such agreements call for amendments to this Treaty, these amendments shall first be adopted in accordance with the procedure laid down in Article 236.

*Id.* Article N of the TEU, which replaced Article 236, states:

1. The government of any Member State or the Commission may submit to the Council proposals for the amendment of the Treaties on which the Union is founded.

This Note argues that the European Community should amend the EC Treaty to provide authority for EC accession to the ECHR because the belief in and protection of human rights must be at the core of a thriving constitutional legal system.<sup>31</sup> As the European Community continues to grow geographically, its legal competences must also grow to deal with the challenges of building a singular, unified Europe from traditionally autonomous European states and EC institutions.<sup>32</sup> Part I of this Note explains the institutions of the European Community, examines the principles and objectives of the ECHR and its present application in the European Community, and discusses current human rights protection in the European Community. Part II considers the objectives of a unified Europe, the conflicting opinions regarding EC accession to the ECHR, and the present lack of codification of human rights legislation in the European Community. Part III argues that the necessity of enumerated, uniformly enforceable human rights protections at the EC level overrides claims that the European Community should not extend its competences to include accession to the ECHR. This Note concludes that the European Community should amend the EC Treaty to include a provision for accession to the ECHR.

### I. A UNIFIED EUROPE

After World War II, several European nations, desiring economic and political unity, formed what eventually became the

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If the Council, after consulting the European Parliament and, where appropriate, the Commission, delivers an opinion in favor of calling a conference of representatives of the governments of the Member States, the conference shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to those Treaties. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

2. A conference of representatives of the governments of the Member States shall be convened in 1996 to examine those provisions of this Treaty for which revision is provided, in accordance with objectives set out in Articles A and B. TEU, *supra* note 8, art. N, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739.

31. See CASTBERG, *supra* note 11, at 4 (stating that belief in existence of human rights is true greatness of Western culture and civilization).

32. See COMMUNITY METHODS, *supra* note 17, at 2-3 (discussing growth of EC competences).

European Community.<sup>33</sup> The European Community does not belong to the ECHR,<sup>34</sup> which seeks to prevent and resolve conflicts between European States regarding human rights violations<sup>35</sup> such as the recent violations in Turkey<sup>36</sup> and Belarus.<sup>37</sup> Limited human rights protection at the EC level derives from the EC Treaty and the common constitutional traditions of EC Member States.<sup>38</sup>

#### A. *The Forming of the European Union*

The concept of European unification was sparked during the reconstruction period in Europe after World War II, following a history of instability.<sup>39</sup> The Member States established a series of treaties that governed the newly-emerging structure in Europe.<sup>40</sup> These treaties, however, have evolved and been absorbed by the EC Treaty and the TEU.<sup>41</sup> Interplay between EC institutions form the governing framework of the European Community.<sup>42</sup> The ECJ interprets the laws set down by these institutions and applies them to the Member States, indicating the superiority of EC laws over Member States' national laws.<sup>43</sup> The growth in the number of EC Member States and states vying for EC membership, presents challenges to the governing frame-

33. See BERMANN ET AL., *supra* note 8, at 3-5 (describing postwar movement towards creation of European Community).

34. See COMMUNITY METHODS, *supra* note 17, at 17 (stating that European Community is not contracting party to ECHR).

35. See BORCHARDT, *supra* note 9, at 7 (stating goals underlying ECHR formation).

36. LEWIS, *supra* note 12, at 8. In its report to the Human Rights Commission, Amnesty International requested that the Commission single out five countries for public censure in 1997, including Turkey, for its "persistent, severe and systematic violations of human rights." *Id.*

37. See Helen Womack, *Belarus Poll Paves Way to Dictatorship*, THE INDEPENDENT, Nov. 25, 1996, at 11 (noting human rights violations in Belarus).

38. See BERMANN ET AL., *supra* note 8, at 6 (suggesting postwar reconstruction provided initiative to create European unity).

39. See Emile Noel, *The Institutions of the European Community*, 15 SUFFOLK TRANSNAT'L L.J. 514, 515 (1992) (discussing formation of European communities).

40. See BERMANN ET AL., *supra* note 8, at 5-10 (discussing original three treaties governing European Communities, ECSC, EEC, and Euratom).

41. TEU, *supra* note 8, art. A, ¶ 2, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 726. Article A states that the TEU "marks a new stage in the process of creating an ever closer union among the peoples of Europe." *Id.*

42. WEGEN & KUNER, *supra* note 16, at 247.

43. See BERMANN ET AL., *supra* note 8, at 192 (discussing Member States obligation to implement EC laws).

work of the European Community.<sup>44</sup>

### 1. History of European Community's Founding

Throughout history, contradictory, competitive, and pluralist attitudes have made Europe fragile.<sup>45</sup> After centuries of wars and expansionist philosophies,<sup>46</sup> it became clear that a structure, other than that of singular and powerful nation states, was needed to provide stability in Europe.<sup>47</sup> This was not a new concept.<sup>48</sup> Originally, the desire for peace was the greatest factor propelling Europe towards unity.<sup>49</sup>

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44. See COMMUNITY METHODS, *supra* note 17, at 7 (discussing new human rights concerns facing and challenging European Community as it moves toward year 2000, including biotechnology and environmental issues, human rights issues arising from EU growth, and historical human rights violations, such as gender discrimination).

45. NICOLL & SALMON, *supra* note 1, at 1.

46. *Id.* at 1-2.

47. *Id.* at 3-4. "This was the advocacy of Richard Coudenhove-Kalergi, a Hungarian nobleman who founded in 1923 the Pan-European movement . . . and won the support of several leading and active politicians, especially in France." *Id.* at 4.

48. *Id.* at 1-2; H.A.L. FISHER, A HISTORY OF EUROPE 579 (1938). In the Sixteenth Century, Henry IV of France formulated the idea of a Great Republic of Europe, bringing together the religions, principalities, and kingdoms of Europe to co-exist in peace. NICOLL & SALMON, *supra* note 1, at 2. In 1693, William Penn published an essay advocating the institution of a European estates general or a European Parliament which would mediate disputes among the sovereigns and anticipate resulting future peace in Europe. *Id.* William Penn was an English author, who was forced by his unpopularity within his family and the law of England to travel throughout Europe and witness the devastation of its wars. *Id.* The German philosopher Immanuel Kant published his version of a federation of free states in his 1795 treatise "Towards Perpetual Peace." *Id.* The notion of people participating in government, represented by a European Parliament that is independent of the national states and empowered to settle disagreements among the states, dates back to Saint-Simon's reflections on the U.S. Revolution and constitution-building, and his subsequent publication "On the Reorganization of European Society," in 1814. *Id.* at 3.

49. BORCHARDT, *supra* note 9, at 12. Borchardt states:

[T]here [have] been schemes for a peaceful, voluntary association of States on terms of equality, especially after the harrowing experience of the First World War. In 1923, for example, the Austrian founder-leader of the Pan-European Movement, Count Coudenhove Dalergi, had called for the creation of a United States of Europe, citing such examples as the successful assertion of Swiss unity in 1848, the forging of the German Empire in 1871 and, before all else, the independence of the United States of America in 1776. And on 5 September 1929, in a now famous speech to the League of Nations Assembly in Geneva, the French Foreign Minister Aristide Briand, with the backing of his German counterpart, Gustav Stresemann, proposed the creation of a European union within the framework of the League of Nations. In that case, though, the immediate aim went no further than securing closer cooperation between the States of Europe, leaving their national sovereignty intact.

In 1948, after the Second World War, the leaders of European nations formed a Council of Europe,<sup>50</sup> aimed at achieving closer unity among European nations.<sup>51</sup> In response to an offer of U.S. aid by U.S. Secretary of State George Marshall<sup>52</sup> in 1947, the rebuilding of Europe began.<sup>53</sup> This period of reconstruction in Europe sparked the beginning of European unification.<sup>54</sup> Na-

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*Id.*; NICOLL & SALMON, *supra* note 1, at 1-8. Even during the height of British imperialism, Lord Salisbury wrote:

The federated action of Europe, if we can maintain it, is our sole hope of escaping from the constant terror and calamity of war, the constant pressure of the burdens of an armed peace, which weigh down the spirits and dampen the prospect of every Nation in this part of the world. The Federation of Europe is the only hope we have.

*Id.*; HAROLD MACMILLAN, *TIDES OF FORTUNE 1945-1955* 151 (1969).

50. See BORCHARDT, *supra* note 9, at 6-7 (describing Council of Europe as different from EU Council in that it is not organizational institution of the EU framework, but rather, has separate and distinct membership). On May 5, 1949, leaders of European nations met at the Hauge and founded the Council of Europe in order to foster political cooperation between its Member States and serve as an instrument of intergovernmental cooperation, separate from the European Communities, that pursues closer links between the countries of Europe and promotes their economic and social progress. *Id.* The Council of Europe oversees a wide range of economic, cultural, social, and legal conventions, the most significant and best known of them being the ECHR, adopted on November 4, 1950. *Id.*

51. NICOLL & SALMON, *supra* note 1, at 7.

52. See ROBERT PAYNE, *The Marshall Story: A Biography of General George C. Marshall*, 300-01 (1952) (describing Marshall's influence on U.S. and international affairs). In 1947, he declared "an idea which translates the problem from one of individual countries to one of a continent . . ." *Id.* at 300. Payne further states:

The virtue of the Marshall Plan was that it was concerned with large wholes . . . Marshall specifically asked the nations of Europe to declare their needs *jointly*—"The program should be a joint one agreed to by a number, if not all European nations." He also said that 'the initiative should come from Europe,' though in fact the initiative had come from the small policy-planning group around the President [of the United States]. Early in July the representatives of sixteen nations assembled in Paris . . . to work out the details of European needs, the American Government demanding the utmost speed.

*Id.* at 300-01.

53. NICOLL & SALMON, *supra* note 1, at 8 & n.22; see PAUL A. SAMUELSON, *ECONOMICS* 672 (1955) (explaining U.S. contribution to European unification). Further consideration of this proposal led to the Schuman plan, which essentially launched the establishment of the first of the European Communities. NICOLL & SALMON, *supra* note 1, at 8 & n.23.

54. See BORCHARDT, *supra* note 9, at 6. Borchardt states:

Viewed as a whole, the postwar steps towards European unification offer a confusing picture that is calculated to baffle anyone but the expert. A host of different organizations, largely unconnected, have come into existence side by side: the Organization for Economic Cooperation and Development (OECD), the Western European Union (WEU), the North Atlantic Treaty Organization (NATO), the Council of Europe, and the European Union, which

tions entered into agreements that were no longer based on the fear of war, but rather, on the desire for economic and political unity<sup>55</sup> and stability.<sup>56</sup> European nations created three separate Communities to establish a common market, advance economic policies, promote economic growth and stability, and raise the standard of living.<sup>57</sup>

## 2. Treaties

The progression towards a unified Europe formally began in 1951 with the signing of the European Coal and Steel Community Treaty<sup>58</sup> ("ECSC Treaty") for the purpose of promoting free trade and regulating production in the coal and steel industries.<sup>59</sup> This was followed by the establishment of the European

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is itself built on the foundations of the European Coal and Steel Community, the European Atomic Energy Community and European (Economic) Community.

*Id.*

55. See *European Year Against Racism and Xenophobia*, Jan. 16, 1996, Europe Information Service, European Social Policy, § 59. (noting continuous importance of eliminating divisive factors from Europe). 1997 has been termed the "European Year Against Racism and Xenophobia" to demonstrate Europe's continual struggle to combat ethnocentrism in its quickly growing and ever-diversifying population. *Id.*

56. NICOLL & SALMON, *supra* note 1, at 15.

57. See EC Treaty, *supra* note 8, arts. 2-3, [1992] 1 C.M.L.R. at 588-89 (listing goals of European unification).

58. See ECSC Treaty, *supra* note 9, 261 U.N.T.S. 140. Signatory nations were France, Germany, Italy, Belgium, the Netherlands, and Luxembourg. JOHN SPANIER, *AMERICAN FOREIGN POLICY SINCE WORLD WAR II* 35-47 (1980) (describing motivations behind establishment of ECSC). BORCHARDT, *supra* note 9, at 10. The signatories of the European Coal and Steel Community on April 18, 1951 in Paris, were Paul van Zeeland of Belgium, Joseph Bech of Luxembourg, Joseph Meurice of Belgium, Count Carlo Sforza of Italy, Robert Schuman of France, Konrad Adenauer of Germany, Dirk Stikker of the Netherlands, and Johannes van den Brink of the Netherlands. *Id.* In the pre-industrial era, coal was essential to a modernized nation. WESTLAKE, *supra* note 2, at 1-4. Nations of Europe, therefore, needed to protect this energy source, and the coalfields were a potential source of economic tension and even war. *Id.* Much of the desired coal was located on the political faultline between France and Germany. *Id.* This area was devastated by the

Second World War, and, as reconstruction and the Cold War began, the possibility of economic rivalries seemed inevitable. *Id.* The conclusion reached was that France and Germany should relinquish all of their national sovereignty over coal and steel production and pool it in an independent, supranational organization. *Id.* This ideology eventually led to the creation of the European Coal and Steel Community. *Id.*

59. See ECSC Treaty, *supra* note 9, art. 2, 261 U.N.T.S. at 145 (maintaining productivity throughout creation of common market is main purpose of integration); *id.* art. 4(a), 261 U.N.T.S. at 147 (eliminating restrictions and taxes on movement of coal and steel among Member States).

Economic Community<sup>60</sup> ("EEC") in 1958 and the European Atomic Energy Community<sup>61</sup> ("Euratom"), also in 1958.<sup>62</sup> In 1985, the Single European Act<sup>63</sup> ("SEA") was signed with the intent to complete the creation of the internal market by January 1, 1993.<sup>64</sup> The Treaty on European Union<sup>65</sup> ("TEU"), signed on February 7, 1992, combined the ECSC, EEC, and EAEC, and established a European Community.<sup>66</sup> The EC Treaty encompasses all of these treaties and is the governing treaty of the European Community.<sup>67</sup>

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60. EEC Treaty, *supra* note 8, 298 U.N.T.S. 11. "[T]he principal function of the EEC was to establish a common market and the progressive approximation of the economic policies of the member nations through harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the states belonging to it." ANTHONY J. DAVIS, *Canada's Constitutional Crisis After Meech Lake: Setting a New Course for European Union?* 18 SYRACUSE INT'L L. & COM. 223, 251 (1992) (citation omitted).

61. Treaty Establishing the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 140 [hereinafter Euratom Treaty], *as amended in TREATIES ESTABLISHING THE EUROPEAN COMMUNITIES* (EC Off'l Pub. Off. 1987).

62. Noel, *supra* note 39, at 515. A single European Community formed by merging the three original Communities was proposed but never achieved during the 1985 negotiations of the Single European Act. *Id.*; *see also* SEA, *supra* note 8, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741 (extending Community's field of competence and bringing about significant changes in relations between institutions and their operating rules). The SEA entered into force on July 1, 1987, and gave legal status to Community political cooperation, which has been operational on the basis of intergovernmental agreements since 1970. Noel, *supra* note 39, at 516.

63. SEA, *supra* note 8, O.J. L 169/1 (1987), [1987] 2 C.M.L.R. 741.

64. COMMUNITY METHODS, *supra* note 17, at 1.

65. TEU, *supra* note 8, art. C, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727-28. The TEU is the "single institutional framework which . . . ensure[s] the consistency and the continuity of the activities carried out in order to attain [EU] objectives while respecting and building upon the *acquis communautaire*." *Id.*; *see* WESTLAKE, *supra* note 2, at 7, table II.1 (mapping basic policy processes outlined in previous treaties, now merged into TEU).

66. *See* TEU, *supra* note 8, art. A, ¶ 3, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727 (stating that TEU modifies and adds to treaties establishing three European communities).

67. *Id.* art. C, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727-28. Article C states:

The Union shall be served by a single institutional framework which shall ensure the consistency and the continuity of the activities carried out in order to attain its objectives while respecting and building upon the *acquis communautaire*.

The Union shall in particular ensure the consistency of its external activities as a whole in the context of its external relations, security, economic and development policies. The Council and the Commission shall be responsible for ensuring such consistency. They shall ensure the implementation of these policies, each in accordance with its respective powers.

### a. Treaty on European Union

The TEU demonstrates EC devotion to the ultimate goal of an ever closer European Community and stresses the need for social and political unity.<sup>68</sup> The TEU formally replaced the term European Economic Community with the term European Community<sup>69</sup> and developed the pillar model of European Union composition,<sup>70</sup> reflecting a newly-placed EC emphasis on the social sphere in addition to the economic and political spheres addressed in the previous treaties.<sup>71</sup> The TEU represents the latest development in EC law<sup>72</sup> and its amendments supersede all previous EC law.<sup>73</sup>

Recognizing the European Community's ever-changing nature, the TEU provides a forum for discussing amendments of the TEU by way of an Intergovernmental Conference<sup>74</sup> ("IGC"),

*Id.*

68. *Id.* art. A, ¶ 2, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 726; *see supra* note 41 (citing text of Article A).

69. TEU, *supra* note 8, art. G, O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 729.

70. *See* WESTLAKE, *supra* note 2, at 8, table II.2 (explaining three pillars on which European Union is based). The three pillars on which the European Union is built are the European Community method; Intergovernmental affairs, including Common Foreign and Security Policy; and Intergovernmental affairs, including co-operation in the fields of justice and home affairs. *Id.* The pillar theory developed from the need for the expansion of the European Community method into new areas, such as foreign policy. *Id.* The European Community method consists largely of the legislative process in the European Union. *Id.* The Council acts on the basis of Commission proposals, and the Commission can withdraw such proposal at any time. *Id.* For many acts, the Council is obligated to consult the Parliament, and all of the acts are subject to the jurisdiction of the ECJ. *Id.* at 6.

71. TEU, *supra* note 8, art. B, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 727.

72. Nicholas Stewart, *The Relationship Between the European Court of Justice and the Courts of the Member States of the European Communities*, 5 AUT INT'L L. PRACTICUM 41 (1992) (stating that Community law refers to the laws relating to the EC Treaty, which has merged prior EC law). Community law also derives from the constitutional traditions of Member States. *Id.* at 42 (describing source of Community law).

73. TEU, *supra* note 8, art. A, ¶ 2, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 726; *see supra* note 41 (citing text of Article A).

74. *See* TEU, *supra* note 8, art. N, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739 (requiring conference of representatives of governments of Member States in 1996 to examine, in accordance of objectives set out in Articles A and B, provisions of TEU for which revision is provided). "The convening of the Intergovernmental Conference . . . provides a golden opportunity to (a) broaden the Community's powers and (b) inspire decisionmaking." 24 E.C. BULL., no. 2, *Intergovernmental Conferences: Contributions by the Commission*, at 75; WESTLAKE, *supra* note 2, at 55-56 (explaining procedures, responsibilities and participants of Intergovernmental Conference); June 1996 European Council Presidency Conclusions, Doc. 96/3 (on file with the *Fordham International Law Journal*) at 6-7 (listing aims of Intergovernmental Conference, to be completed by

a negotiation between Member State governments that exists outside the framework of the European Community's procedures and institutions<sup>75</sup> and consists of representatives from Member State governments.<sup>76</sup> The TEU also formally introduces the principle of subsidiarity into the governing framework of the European Community.<sup>77</sup> Finally, the TEU stresses the importance of EC citizenship and provides the European Community with deadlines regarding the progression toward accession.<sup>78</sup>

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mid-1997). The 1996 Intergovernmental Conference was scheduled to address the institutional consequences of Union enlargement. J.E.S. FAWCETT, *APPLICATION OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 392 (1969); see *Opinion 2/94*, [1996] 2 C.M.L.R. at 279, § V, ¶ 2 (discussing European Community enlargement and human rights issues).

The Italian Government, in its oral observations, points out that all the Member States, acting within their powers, have voluntarily submitted to the international control machinery for the protection of human rights. The transfer of State powers to the Community requires that the Community be subject to the same international control in order to restore the balance originally desired by the Member States.

*Id.*; DU JUR HJALTE RASMUSSEN, *Toward a Normative Theory of Interpretation of Community Law*, 1992 U. CHI. LEG. FORUM 135, 150 (suggesting that Community competences should change with times).

75. Delegation of the European Commission, Intergovernmental Conferences: An Overview (on file with *THE INTERNATIONAL LAW JOURNAL*).

76. TEU, *supra* note 8, art. N, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739.

77. EC Treaty, *supra* note 8, art. 3(b), [1992] 1 C.M.L.R. at 590. Article 3(b) states: The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein.

In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently be achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.

Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.

*Id.*; NICOLL & SALMON, *supra* note 1, at 3.

This principle teaches that government can be organized in layers - from the local community up to world level - each layer possessing the competence which it can discharge better than those above or below it. Seen from the viewpoint of a unitary state this is decentralization. Seen from the smallest unit it is federation, and one in which there need be no contradiction between the loyalties paid to each layer - a Yorkshireman can comfortably be a Northerner, an Englishman, a Briton, a European and a citizen of the world.

*Id.*; see George A. Bermann, *Taking Subsidiarity Seriously: Federalism in The European Community and the United States*, 94 COLUM. L. REV. 331 (1994) (discussing whether subsidiarity issues will present obstacles to effective EC action).

78. See EC Treaty, *supra* note 8, art. 8, [1992] 1 C.M.L.R. at 595 (setting forth requirements of EU citizenship).

### b. EC Treaty

The EC Treaty encompasses all EC laws, including those set out in the ECSC, EEC, and Euratom Treaties. The EC Treaty also incorporates the changes made by subsequent treaties, the most recent of which is the TEU.<sup>79</sup> The main purposes of the EC Treaty are the establishment of a common market,<sup>80</sup> the promotion of economic activities,<sup>81</sup> the expansion of the European Community,<sup>82</sup> the promotion of stability,<sup>83</sup> and an increase in emphasis on the European people.<sup>84</sup>

### 3. Institutional Framework

The main institutions of the European Community are the European Commission<sup>85</sup> ("Commission"), the European Parliament<sup>86</sup> ("Parliament"), the European Council,<sup>87</sup> and the ECJ.

79. TEU, *supra* note 8, art. A, ¶ 2, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 726; *see supra* note 41 (citing text of Article A).

80. EC Treaty, *supra* note 8, art. 2, [1992] 1 C.M.L.R. at 588. Article 2 states: The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life, and economic and social cohesion and solidarity among Member States.

*Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* art. 155, [1992] 1 C.M.L.R. at 682; *see* WESTLAKE, *supra* note 2, at 339, table XIV.2.1. (enumerating Commission powers and duties, including advisory, management, regulatory, and safeguarding measures).

86. *See* WESTLAKE, *supra* note 2, at 342-43 (discussing powers of Council and Parliament).

87. *Id.* at 18. No records are kept of the European Council's proceedings, although, Article D of the TEU mandates that the European Council submit a report to the European President after each of its meetings and a yearly written report on the EU progress. TEU, *supra* note 8, art. D, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 728. Article D states:

The European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof.

The European Council shall bring together the Heads of State or Government of the member-States and the President of the Commission. They shall be assisted by the Ministers for Foreign Affairs of the member-States and by a Member of the Commission. The European Council shall meet at least twice a year,

The interrelation of these institutions comprises the framework of the European Community.<sup>88</sup> Interplay among them and with the various Member State institutions is unavoidable, causing questions of jurisdiction to arise.<sup>89</sup>

#### a. The Council of the European Union and the European Commission

The Council and Commission issue general regulations, directives, decisions, recommendations, and opinions.<sup>90</sup> Regulations are binding on all Member States.<sup>91</sup> Directives are binding on Member States only as to the results achieved<sup>92</sup> and decisions are binding on the government, enterprise, or individual addressed.<sup>93</sup> Recommendations and opinions are not binding.<sup>94</sup>

##### 1. The Council

The Council is the European Union's legislative body and has accrued considerable executive powers.<sup>95</sup> The Council's primary function is to ensure the coordination of Member States' economic policies.<sup>96</sup> The Council consists of one representative

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under the chairmanship of the Head of State or Government of the member-State which holds the Presidency of the Council.

The European Council shall submit to the European Parliament a report after each of its meetings and a early written report on the progress achieved by the Union.

*Id.*

88. WEGEN & KUNER, *supra* note 16, at 247.

89. TEU, *supra* note 8, O.J. C 224/1, at 5 (1992), [1992] 1 C.M.L.R. at 719; WEGEN & KUNER, *supra* note 16, at 247.

90. EC Treaty, *supra* note 8, art. 189, [1992] 1 C.M.L.R. at 693; *see also id.* art. 145 (outlining responsibilities of Council); *id.* arts. 155-63, [1992] 1 C.M.L.R. at 679-80, [1992] 1 C.M.L.R. at 682-84 (outlining responsibilities of Commission).

91. *Id.* art. 189, [1992] 1 C.M.L.R. at 693. Article 189, in pertinent part, states that a "regulation shall have general application. It shall be binding in its entirety and directly applicable in all member-States." *Id.*

92. *Id.* art. 189, in pertinent part, states, "[a] directive shall be binding, as to the result to be achieved, upon each member-State to which it is addressed, but shall leave to the national authorities the choice of form and methods." *Id.*

93. *Id.* Regarding decisions, Article 189 states, "[a] decision shall be binding in its entirety upon those to whom it is addressed." *Id.*

94. *Id.* Regarding recommendations, Article 189 states, "[r]ecommendations and opinions shall have no binding force." *Id.* at 694; *see* Noel, *supra* note 39, at 519 (describing application of recommendations and opinions).

95. *See* WESTLAKE, *supra* note 2, at 340 (describing functions of Council of European Union).

96. *See* EC Treaty, *supra* note 8, art. 145, [1992] 1 C.M.L.R. at 679-80 (setting forth responsibilities of Council). Article 145 states:

from each Member State who is authorized to commit his or her respective government to agreed-upon measures.<sup>97</sup> The president of the Council holds a two-year position, allowing the Member State from which the president comes to focus the Council's attention on particular policy priorities.<sup>98</sup>

## 2. The European Commission

The Commission<sup>99</sup> acts as the executive branch of the European Community, initiating policy and defending EC interest in the Council.<sup>100</sup> The Commission is independent from individual national governments and the Council.<sup>101</sup> It consists of seventeen members, with no more than two members coming from any Member State, chosen on the basis of competence and com-

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To ensure that the objectives set out in this Treaty are attained, the Council shall, in accordance with the provisions of this Treaty:

- ensure coordination of the general economic policies of the member-States;
- have power to take decisions;
- confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the Opinion of the European Parliament.

*Id.*

97. WESTLAKE, *supra* note 2, at 45-47, 50-51.

98. *See id.* at 46 (stating that Presidency is important to Member States because it gives a Member State possibility of ensuring that its particular policy priorities are brought to fore).

99. *See* EC Treaty, *supra* note 8, arts. 155-63, [1992] 1 C.M.L.R. at 682-84 (setting forth powers of Commission). Article 155 instills in the Commission powers traditionally associated with an executive branch of government, and states:

In order to ensure the proper functioning and development of the common market, the Commission shall:

- ensure that the provisions of this Treaty and the measures taken by the institutions pursuant thereto are applied;
- formulate recommendations or deliver opinions on matters dealt with in this Treaty, if it expressly so provides or if the Commission considers it necessary;
- have its own power of decision and participate in the shaping of measures taken by the Council and by the European Parliament in the manner provided for in this Treaty;
- exercise the powers conferred on it by the Council for the implementation of the rules laid down by the latter.

*Id.*, art 155, [1992] 1 C.M.L.R. at 682; *see* BERMANN ET AL., *supra* note 8, at 57-63 (discussing Commission's composition and duties).

100. Noel, *supra* note 39, at 524.

101. WESTLAKE, *supra* note 2, at 339.

plete independence.<sup>102</sup> The governments of Member States consult with the European Parliament and nominate the Commission President.<sup>103</sup>

The Commission proposes EC legislation that, if passed by the Council, the Commission then implements.<sup>104</sup> It also ensures that the provisions of the EC Treaty and measures taken by EC institutions in their implementation of EC Treaty provisions are consistent with the proper functioning and development of the common market.<sup>105</sup> When the Commission determines that a violation of EC law has occurred, the Commission investigates and rules on the issue.<sup>106</sup> If the questioned activity is not rectified by the Commission's specified deadline, the Commission may refer the matter to the ECJ.<sup>107</sup> The Commission's actions are subject to review by the ECJ.<sup>108</sup>

#### b. Parliament

Parliament has come to play an increasingly important role in EC decision-making procedure.<sup>109</sup> Parliament oversees the Commission and guarantees that the Commission will represent

102. EC Treaty, *supra* note 8, art. 157, [1992] 1 C.M.L.R. at 682.

103. *Id.*, art. 158, [1992] 1 C.M.L.R. at 683. After consulting with the nominee for President, the governments of the Member States nominate the other Members of the Commission. WESTLAKE, *supra* note 2, at 339. The President and the other Members of the Commission are subject as a body to a vote of approval by the European Parliament. *Id.* After approval by Parliament, the governments of the Member States appoint the Commission President and new Members by common accord.

104. *Id.*, art. 155, [1992] 1 C.M.L.R. at 682; see A.G. TOTH, *THE OXFORD ENCYCLOPAEDIA OF EUROPEAN COMMUNITY LAW* 70 (1990) (describing legislative process of European Community).

105. EC Treaty, *supra* note 8, art. 155, [1992] 1 C.M.L.R. at 682; see *supra* note 89 (citing text of Article 155).

106. See WESTLAKE, *supra* note 2, at 357, table XVI.2.1 (giving general overview of decision-making process in European Union and explaining interaction among Commission, Council, Council of Ministers, European Council, and Parliament).

107. *Id.*

108. EC Treaty, *supra* note 8, art. 173, [1992] 1 C.M.L.R. at 687. In pertinent part, Article 173 states:

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-a-vis* third parties.

*Id.*

109. BORCHARDT, *supra* note 9, at 25. The extension of Parliament's duties is "in response to the concern to rectify the democratic deficit with which existing forms of international governmental co-operation have often been reproached." WESTLAKE,

faithfully EC interests.<sup>110</sup> Members of Parliament are elected for EC-level political groups by universal suffrage.<sup>111</sup> The 1987 SEA<sup>112</sup> granted Parliament the power of assent regarding the conclusion of association agreements<sup>113</sup> and the accession of new Member States.<sup>114</sup> The TEU expanded the Parliament's power<sup>115</sup> and provided that the President of the Council should

*supra* note 2, at 243; see BERMANN ET AL., *supra* note 8, at 63-68 (discussing composition and duties of Parliament).

110. See EC Treaty, *supra* note 8, arts. 137-44, [1992] 1 C.M.L.R. at 676-79 (defining powers of Parliament); see also TEU, *supra* note 8, art. 138a, O.J. C 224/1, at 56 (1992), [1992] 1 C.M.L.R. at 676-77 (stating that Parliament expresses political will of citizens and noting that political parties at Community level are important factor for integration).

111. EC Treaty, *supra* note 8, art. 138, [1992] 1 C.M.L.R. at 676. Article 138 states, "[t]he representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by universal suffrage." *Id.*

112. SEA, *supra* note 8, art. 7, O.J. L 169/1, at 5-6 (1987), [1987] 2 C.M.L.R. at 745 (replacing Article 149 of EEC Treaty). Article 7 states, in pertinent part:

The European Parliament may within the period of three months referred to in point (b), by an absolute majority of its component members, propose amendments to the Council's composition. The European Parliament may also, by the same majority, reject the Council's composition. The result of the proceedings shall be transmitted to the Council and the Commission.

If the European Parliament has rejected the Council's composition, unanimity shall be required for the Council to act on a second reading.

*Id.*; see arts. 6-12, 17-18, O.J. L 169/1, at 5-8 (1987), [1987] 2 C.M.L.R. at 744-47, 748-49 (requiring cooperation of action of Council with European Parliament).

113. See WESTLAKE, *supra* note 2, at 390 (discussing association agreements and listing states that have entered into association and other agreements with European Community).

114. *Id.* at 342-43; TEU, *supra* note 8, art. O, O.J. C 224/1, at 99 (1992), [1992] 1 C.M.L.R. at 739. Article O provides:

Any European State may apply to become a Member of the Union. It shall address its application to the Council, which shall act unanimously after consulting the Commission and after receiving the assent of the European Parliament, which shall act by an absolute majority of its component members.

The conditions of admission and the adjustments to the Treaties on which the Union is founded which such admission entails shall be the subject of an agreement between the Member States and the applicant State. This agreement shall be submitted for ratification by all the contracting States in accordance with their respective constitutional requirements.

*Id.*; see Davis, *supra* note 60, at 256 (discussing Treaty of Accession and Act, which concerned conditions of accession that were concluded in Madrid on June 12, 1985, and were effective January 1, 1986).

115. See TEU, *supra* note 8, art. 137, O.J. C 224/1, at 55 (1992), [1992] 1 C.M.L.R. at 676. Article 137 states that the "European Parliament, which shall consist of representatives of the peoples of the States brought together in the Community, shall exercise the powers conferred upon it by this Treaty," omitting the language of confine-

consult the Parliament regarding common foreign and security policy, amounting to a power to authorize ratification of new Member States.<sup>116</sup>

### c. European Council

The European Council<sup>117</sup> is a provider of political impetus and synthesis,<sup>118</sup> and ensures the general economic policies of Member States.<sup>119</sup> The EC Treaty confers the power to implement the Council's rules on the Commission.<sup>120</sup> The European Council is comprised of the Member States' Heads of State and the President of the Commission,<sup>121</sup> assisted by the Member States' Ministers for Foreign Affairs and another Member of the Commission.<sup>122</sup> Functions of the European Council include defining the guidelines for integration, coordinating, monitoring, and enlarging the scope of European cooperation, issuing declarations on foreign relations, *de facto* decision-making, and policy monitoring.<sup>123</sup> The European Council also provides EU general, political, and economic guidelines, enhances mutual understanding, and introduces more predictability into intergovernmental relations.<sup>124</sup> The European Council provides a forum for informal exchanges, and the records of its activities remain

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ment found in Article 137 of the original EC Treaty to advisory and supervisory powers.  
*Id.*

116. WESTLAKE, *supra* note 2, at 343.

Parliament has come a long way from its initial position regarding international agreements, where it was merely consulted on a limited category of such agreements and received no information on their negotiation. Its powers, under the assent procedure, are comparable to the right to authorize ratification that most national parliaments enjoy, and its access to information on the conduct of negotiations is actually better than many national parliaments.

*Id.* (quoting CORBET ET AL., *THE EUROPEAN PARLIAMENT* 217 (3d ed. 1995)).

117. See EC Treaty, *supra* note 8, arts. 145-54, [1992] 1 C.M.L.R. at 679-82 (describing functions and composition of Council).

118. BERMAN ET AL., *supra* note 8, at 13 (stating European Council has become forum for discussing sensitive political matters).

119. WESTLAKE, *supra* note 2, at 18; BERMAN ET AL., *supra* note 8, at 55-57 (discussing duties of European Council).

120. EC Treaty, *supra* note 8, art. 145, [1992] 1 C.M.L.R. at 679.

121. See WESTLAKE, *supra* note 2, at 339 (defining duties of President of Commission).

122. *Id.* at 18.

123. *Id.* at 26-31; BERMAN ET AL., *supra* note 8, at 55-57 (discussing functions of European Council).

124. WESTLAKE, *supra* note 2, at 26-31.

unpublished.<sup>125</sup>

#### d. The ECJ

The ECJ is the judicial branch of the European Union.<sup>126</sup> Although it has no general, inherent jurisdiction,<sup>127</sup> the ECJ has jurisdiction to give preliminary rulings on the interpretation of the EC Treaty and to decide the validity and interpretation of secondary EC law.<sup>128</sup> The ECJ requires that EU Member State

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125. *London Declaration of the European Council* 30, EC BULL. no. 6 at 29-30 (1977).

126. EC Treaty, *supra* note 8, arts. 164-88, [1992] 1 C.M.L.R. at 684-93. The ECJ consists of thirteen Judges who are chosen from people who are independent and qualified, for terms of six years. *Id.* art. 167, [1992] C.M.L.R. at 684. Every three years there is a partial replacement of the Judges. *Id.* The judges deciding Opinion 2/94 were: Presiding, Rodriguez Iglesias, P.; Kakouris, Edward, Puissochet and Hirsch PPC; Mancini, Shockweiler (Rapporteur), Moitinho de Almeida, Kapteyn, Gulmann, Murray, Jann, Ragnemalm, Sevan and Wathelet JJ. *Opinion 2/94*, [1996] 2 C.M.L.R. 265. The judges are also assisted by Advocates-General. E.C. Treaty, *supra* note 8, art. 166, [1992] 1 C.M.L.R. at 685. "It shall be the duty of the Advocate-General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the Court of Justice, in order to assist the Court in the performance of the task assigned to it in Article 164." *Id.*; see Noel, *supra* note 39, at 518. The EC also has a Court of Auditors, whose twelve members are appointed by unanimous decision of the Council after consultation with the Parliament. *Id.* The Court of Auditors audits the accounts of the Community, examines revenue and expenditures, and checks the financial management of the European Union. *Id.* The Court of Auditors then reports back to the various institutions of the European Community. In 1989, the Court of First Instance was established, in response to the full docket of the ECJ. BERMANN ET AL., *supra* note 8, at 72-73 (discussing duties of Court of First Instance). The Court of First Instance has jurisdiction over certain types of cases, including non-contractual liability of the European Community, staff cases, coal and steel cases, competition cases, and related damages cases. *Id.*

127. See Stewart, *supra* note 72, at 42 (discussing ECJ jurisdiction).

128. EC Treaty, *supra* note 8, art. 177, [1992] 1 C.M.L.R. at 689; see Carl Otto Lenz & Gerhard Grill, *The Preliminary Ruling Procedure and the United Kingdom* 19 FORDHAM INT'L L.J. 844, 845-848 (analyzing preliminary ruling procedure under Article 177); see also EC Treaty, *supra* note 8, arts. 164-88, [1992] 1 C.M.L.R. at 684-93 (setting forth powers and composition of ECJ). EC Treaty Article 177 states:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a member-state, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court of tribunal

activities, their interpretation and application of EC Treaty provisions,<sup>129</sup> and statutes established by acts of the Council, comport with provisions of EC law.<sup>130</sup> When EC law confers rights on its Member States, such rights become part of EC and Member States' legal heritage and culture.<sup>131</sup>

The ECJ may review acts of the Council, Parliament, and the Commission, and declare them illegal on grounds of lack of competence, infringement of an essential procedural requirement, infringement of the TEU or any rule of law relating to its application, or misuse of powers.<sup>132</sup> The ECJ also addresses cases in which a Member State has brought an action against

or a member-state, against whose decisions there is not judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

*Id.* art. 177, [1992] 1 C.M.L.R. at 689.

129. BERMAN ET AL., *supra* note 8, at 180. In order to become an element of a Member States' legal order, Community law that is considered directly applicable does not need to be incorporated into domestic legislation. *Id.*

A provision of Community law will be considered directly applicable within the domestic legal order if it becomes an element of that order without need of any formal "incorporation" into Member State law . . . . The term directly applicable, as used in this sense, has an obvious affinity with the more conventional international law term "self-executing."

*Id.* A Community law has direct effect if it creates rights for not only Member States, but also for private parties. *Id.* at 181.

130. EC Treaty, *supra* note 8, art. 169, [1992] 1 C.M.L.R. at 686.

131. Zuleeg, *supra* note 7, at 665; Case 26/62, *Van Gend en Loos*, [1963] E.C.R. 1, 12.

132. TEU, *supra* note 8, art. 173, O.J. C 224/1, at 62 (1992), [1992] 1 C.M.L.R. at 687-88. Article 173 states:

The Court of Justice shall review the legality of acts adopted jointly by the European Parliament and the Council, of acts of the Council, of the Commission and of the ECB, other than recommendations and opinions, and of acts of the European Parliament intended to produce legal effects *vis-a-vis* third parties.

It shall for this purpose have jurisdiction in actions brought by a Member State, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers. The Court shall have jurisdiction under the same conditions in actions brought by the European Parliament and by the ECB for the purpose of protecting their prerogatives.

Any natural or legal person may, under the same conditions, institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another person, is of direct and individual concern to the former.

The proceedings provided for in that Article shall be instituted within two months of the publication of the measure, or of its notification to the plaintiff,

another Member State for infringement of EC Treaty obligations.<sup>133</sup> Additionally, the ECJ may hear actions brought by Member States or other EC institutions against the Commission or Council for failure to act, when such action is necessary under the EC Treaty.<sup>134</sup> Judgments of the ECJ are binding on all parties.<sup>135</sup>

#### e. The ECJ's Relationship with Member States

Legal scholars have noted the importance of the relationship between the courts of the Member States and the ECJ,<sup>136</sup> because Member States implement much of EC law.<sup>137</sup> When a new Member State accedes to the European Community, it integrates EC law into its national legal system, and is bound, by default, to apply EC law.<sup>138</sup> Although EC law is supreme over national law,<sup>139</sup> the European Community is a system of limited

or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be.

*Id.*

133. EC Treaty, *supra* note 8, art. 170, [1992] 1 C.M.L.R. at 686.

134. *Id.* art. 175, [1992] 1 C.M.L.R. at 688.

135. *Id.* arts. 165-87, [1992] 1 C.M.L.R. at 684-91. In particular, Article 187 states, "[t]he judgments of the Court of Justice shall be enforceable under the conditions laid down in Article 192." *Id.* art. 187, [1992] 1 C.M.L.R. at 691; *see id.* art. 164, [1992] 1 C.M.L.R. at 684 (stating European Court of Justice ("ECJ") is highest authority on interpretation of Community Law).

136. *See* BERMANN ET AL., *supra* note 8, at 166-97 (examining relationship between Member States and European Community).

137. *See id.* at 166 (stating that Member States implement EC law); JURGEN SCHWARZE, *THE ROLE OF THE EUROPEAN COURT OF JUSTICE IN THE INTERPRETATION OF UNIFORM LAW AMONG THE MEMBER STATES OF THE EUROPEAN COMMUNITIES* (1988) (discussing issues of ECJ jurisdiction, interpretation, and sovereignty); J.H.H. Weiler & Ulrich R. Haltern, *The Autonomy of the Community Legal Order: Through the Looking Glass*, 37 HARV. INT'L L.J. 411, 412 (1996) (stating that decisive question is evolving relationship between Community law and Member State law); J.H.H. Weiler et al., *European Democracy and Its Critique*, W. WUR. POLITICS, July 1995, at 4.

138. Stewart, *supra* note 72, at 41 (relying on ECJ case *Costar v. ENEL*, [1964] E.C.R. 585).

139. *See* EC Treaty, *supra* note 8, art. 171, [1992] 1 C.M.L.R. at 687 (requiring that Member States obey rulings of ECJ). Article 171 states:

1. If the Court of Justice finds that a Member State has failed to fulfil an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice.
2. If the Commission considers that the Member State concerned has not taken such measures it shall, after giving that State the opportunity to submit its observations, issue a reasoned opinion specifying the points on which the Member State concerned has not complied with the judgment of the Court of Justice.

competences.<sup>140</sup> Member States approved the transfer of competences to a central institution.<sup>141</sup> An array of specific and detailed competences, however, limit this transfer of competences.<sup>142</sup>

The ECJ generally decides the validity and the interpretation of EC laws.<sup>143</sup> Other duties, such as the institution and application of such laws, are left to the Member States' courts.<sup>144</sup>

If the Member State concerned fails to take the necessary measures to comply with the Court's judgment within the time-limit laid down by the Commission, the latter may bring the case before the Court of Justice. In so doing it shall specify the amount of the lump sum or penalty payment to be paid by the Member State concerned which it considers appropriate in the circumstances. If the Court of Justice finds that the Member State concerned has not complied with its judgment it may impose a lump sum or penalty payment on it. This procedure shall be without prejudice to Article 170.

*Id.* "National law may not permit what is prohibited by EU law. To this degree, EU law is supreme." Paul H. Vishny et al., *European Union Law: An Introduction*, in AMERICAN LAW INSTITUTE—AMERICAN BAR ASSOCIATION CONTINUING LEGAL EDUCATION 1, 12 (1996).

140. See Opinion of Advocate General Lagrange, *Alegra v. Common Assembly of the European Coal and Steel Community*, Joined Cases 7/56 & 3-7/57, [1957] E.C.R. 39, at 82.

The Treaty is based upon delegation, with the consent of the Member States, of sovereignty to supranational institutions for a strictly defined purpose . . . The legal principle underlying the Treaty is a principle of limited authority. The Community is a legal person governed by public law, and as such, it shall enjoy the legal capacity it requires to perform its functions and attain its objectives, but only that capacity . . . .

*Id.*

141. Dr. Ranier Arnold, *The Treaty on European Union and German Constitutional Law: The German Constitutional Court's Decision of Oct. 12, 1993, on the Treaty of Maastricht*, 9 TUL. EUR. & CIV. L.F. 91, 120 (1994).

142. Rasmussen, *supra* note 74, at 150.

The list of enumerated competences under the EEC Treaty begins with Article 169, authorizing the ECJ to hear cases brought by the Commission against Member States in breach of their Community obligations. Article 170 grants the ECJ the power to hear complaints by one Member State against another. Article 173 allows the ECJ to hear actions for annulment of legal acts issued by the Council or the Commission. The first paragraph of Article 173 gives standing to the Council, the Commission, and the Member States and establishes jurisdiction over actions brought by these parties.

*Id.* (citations omitted).

143. See EC Treaty, *supra* note 8, arts. 169-70, [1992] 1 C.M.L.R. at 686-87 (explaining ECJ jurisdiction over Member States or Commission in case of Member State's non-compliance with EC Treaty measures).

144. *Id.*; *id.* art. 171, [1992] 1 C.M.L.R. at 689. Article 171 of the TEU states that Member States shall be required to take the necessary measures to comply with the obligations provided for by the TEU and with the judgments of the ECJ. *Id.*; see *id.* art. 169, [1992] 1 C.M.L.R. at 686 (stating ECJ has interpreted TEU Article 169 to state that

In this way, Member State courts may impact EC law.<sup>145</sup> A measure can be challenged based on differing interpretations of EC law, on *ultra vires* grounds, or as beyond the powers that the EC Treaty confers upon the European Community.<sup>146</sup>

The decision of the German Federal Constitutional Court<sup>147</sup> in *Solange I*<sup>148</sup> demonstrated that when the legality of a Community measure is challenged,<sup>149</sup> the question of which institution ultimately decides the issue carries important jurisdictional and political implications.<sup>150</sup> This decision also displays the tension between the court systems of the Member States and that of the European Community.<sup>151</sup> In *Solange I*, the German Federal Constitutional Court challenged the TEU, holding that in the case of such a dispute, it has the final word rather than the ECJ,<sup>152</sup> and

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Commission can bring action against Member State for failure to enforce or legislate law of European Community). Article 169 states:

If the Commission considers that a Member State has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

*Id.*

145. See Zuleeg, *supra* note 7, at 626-32 (describing interaction of ECJ and Member States' courts).

146. See Weiler & Haltern, *supra* note 137, at 413 (describing how to bring challenges to Community law).

147. Zuleeg, *supra* note 7, at 627-28. "The German Constitutional Court is composed of two Senates, which are chambers of eight judges deciding independently from each other." *Id.* at 628 n.20.

148. Judgment of May 29, 1974, Case 2 BvL 52/71, 37 BVerfGE 271, [1974] 2 C.M.L.R. 540 [hereinafter *Solange I*].

149. Weiler & Haltern, *supra* note 137, at 413.

150. See *id.* (stating that jurisdictional limits in Community Treaties are notoriously difficult to identify with precision, therefore, question of who gets to decide is of great political importance for relationship between the Community and Member States). The answer to this jurisdictional question raises an issue of Community law in an international or constitutional light. See *id.* at 411-13 (critiquing theory expressed in Theodor Schilling, *The Autonomy of the Community Legal Order — An Analysis of Possible Foundations*, 37 HARV. INT'L L.J. 389 (1996)). The TEU faced hurdles on the path to ratification. See BORCHARDT, *supra* note 9, at 14. Denmark ratified the TEU narrowly in a second referendum in May 1993. *Id.* In France, public opinion was also divided regarding ratification, and the United Kingdom withheld ratification until August 2, 1993. *Id.* A legal challenge to ratification was brought in the German Constitutional Court, claiming that the TEU would alter Germany's constitutional structure. *Id.*

151. See Weiler & Haltern, *supra* note 137, at 448 n.12 ("This is the consequence of the German system of centralized judicial review, with the Bundesverfassungsgericht at its core.").

152. *Id.*; see Zuleeg, *supra* note 7, at 627-28 (explaining struggle between ECJ and

that the German Constitutional Court, rather than the ECJ, controls any power exerted on German land.<sup>153</sup> The *Solange I* holding suggests a situation in which Member State courts do not agree on an interpretation of EC law and apply varying forms of a directive,<sup>154</sup> thus jeopardizing the legal consistency which the European Community requires.<sup>155</sup>

#### 4. The Challenge of European Community Enlargement

One of the greatest challenges facing the European Community is that of enlargement through the accession of new Member States.<sup>156</sup> This is especially true considering Parliament's leap forward towards European unity during the 1980s,<sup>157</sup> and the decision to include nations of Central and Eastern Europe in the European Community.<sup>158</sup> European Community expansion implicates civil and political rights, in addition to

German Constitutional Court, and tracing its decisions in area of fundamental rights from *Solange I* to *Solange II*. A recent decision of the ECJ, however, held that it is its job to review EC and Member State actions, and determine whether they are in accord with the Treaty. *Id.* at 630, n.30 (citing *Port v. Bundesanstalt für Landwirtschaft und Brahrung*, Case C 68/95 (Eur. Ct. J. Nov. 26, 1996) (not yet reported)).

153. Zuleeg, *supra* note 7, at 4.

154. See Stewart, *supra* note 72, at 48-49 (discussing *Regina v. Secretary for Transport, ex parte Factome*, in which allegation was discrimination based on nationality in violation of free movement of persons and services in Community).

155. *Id.* at 49. Movement towards greater harmonization of laws and procedures would lead to greater consistency and efficiency of the Community as a whole. *Id.*

156. See O'Keefe, *supra* note 8, at 33-34 (discussing formal agreement process undertaken prior to membership of states applying for EC membership). "The difficulties which will be caused by enlarging the Community/Union were brought into stark relief in 1994, after the negotiations for accession to the Union of Austria, Finland, Norway and Sweden had been concluded." *Id.* at 35. A Europe Agreement, which aims to contribute to the development of the associated countries with a view to their possible accession, was drafted with the Czech and Slovak Republics on June 23, 1993. 26 EC BULL., no. 6, point 1.3.17-18 (1993). A Europe Agreement with Romania was adopted on December 21, 1992. 25 EC BULL., no. 12, point 1.4.14 (1993). A Europe Agreement was executed with Bulgaria on December 22, 1992. 25 EC BULL., no. 12, point 1.4.11-12 (1992). The Community has also entered into 10 year agreements with the Baltic states of Estonia, Latvia, and Lithuania, by which it intends to develop trade and commercial links with these potential Member States. *Id.*; see WESTLAKE, *supra* note 2, at 390 (listing nations that have applied for membership in EU or have entered into agreements with EU).

157. See BORCHARDT, *supra* note 9, at 12 (discussing European Parliament's support of European unity during 1980s); see COMMUNITY METHODS, *supra* note 17, at 24-36 (analyzing increased strains on human rights due to integration process).

158. See O'Keefe, *supra* note 8, at 31 (discussing effects of admission of new states to European Community); see *supra* note 319 (discussing issues presented by European growth).

economic and social rights.<sup>159</sup> As a result, legislation has increased as a fully integrated Europe moves closer to reality, and most infringements involve differences in interpretation between the Commission and Member States, rather than deliberate attempts to evade the EC Treaty rules.<sup>160</sup>

Despite obstacles, the European Community has decided on expansion.<sup>161</sup> The decision to broaden and deepen<sup>162</sup> the European Community involves the removal of institutional barriers<sup>163</sup> and, therefore, the corresponding need for international cooperation to diminish newly created opportunities for violating criminal and civil human rights has arisen.<sup>164</sup> The broadening and widening of Europe raises not only national sovereignty issues, but also is accompanied by individuals' apprehensions about personal autonomy.<sup>165</sup> Greater freedom of movement between countries may cause social resentment, nationality discrimination, racism, and xenophobia.<sup>166</sup> This is largely because

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159. Dominick, *supra* note 3, at 668; see DAVIS, *supra* note 60, at 295 (stating that European Union has encompassed more than just economic regulation).

The founders realized political constraints existed which would not allow complete integration to be achieved by one agreement at one point in time. Therefore, it has developed slowly, integrating the diverse Member States first economically and now politically. This framework under which the Member States have been brought together represents what has been called a constitutional order.

*Id.* (citation omitted); Noel, *supra* note 39, at 525-26 (noting increase in EC legislation due to different interpretations of Community law).

160. Noel, *supra* note 39, at 525-26.

161. O'Keefe, *supra* note 8, at 34. The consideration of new Member States in the European Union has led to major upheavals in the EU framework and its institutions' responsibilities. *Id.*; see *id.* at 35-36 (discussing difficulty in adjusting Council membership and weighted voting in light of increased Community membership).

162. *Id.* at 34. "The debate on 'broadening and deepening' the Community turns on two issues: expanding the membership of the Community and increasing the Community's competences." *Id.* In its opinions on the application for accession of Cyprus and Malta, the European Commission similarly recognized that the continued growth of the European Community will have important institutional consequences, such as the need to allocate representation to accommodate EC participation. BORCHARDT, *supra* note 9, at 66.

163. *Id.*

164. Francis R. Monaco, *Europol: The Culmination of the European Union's International Police Cooperation Efforts*, 19 *FORDHAM INT'L L.J.* 247, 247-48 (1995).

165. See COMMUNITY METHODS, *supra* note 17, at 2 (discussing EC growth issues).

166. *Id.* at 3. "The European Council in Rome also saw it as a task of the future political union to fight against racism and xenophobia." TONY VENABLES, *CURRENT EC LEGAL DEVELOPMENTS - AMENDMENT OF THE TREATIES* 28 (1992) (citing Conclusion by Presidency, SN424/2/90, at 3).

of EC movement toward the abolition of frontiers and the promotion of a single European Union citizenship.<sup>167</sup> European Union citizenship is based on the premise that every person who holds the nationality of a Member State shall be considered a citizen of the European Union, and that other Member States must respect such status.<sup>168</sup> Additionally, the successful achievement of EU citizenship is dependent upon Member States' mutual recognition and acceptance of each others' provisions and criteria for the acquisition of state nationality.<sup>169</sup> Paradoxically, there is no EC definition of nationality to facilitate acceptance and agreement among Member States, but, rather, each Member State determines the way in which national citizenship is gained and lost.<sup>170</sup>

European growth raises at least two issues regarding the expansion of the European Community, namely, the changes inherently necessary in its make-up<sup>171</sup> and the need for increased competence of EC institutions to accommodate more Member States.<sup>172</sup> The question of how the EC institutional make-up will have to change has not been unanswered.<sup>173</sup> The necessary allocations of duties and representation among EC institutions will be made as new nations are admitted to the European Community.<sup>174</sup>

#### B. *The European Convention for the Protection of Human Rights and Fundamental Freedoms*

The ECHR was established on September 3, 1953, and is composed of the Commission of Human Rights, the CHR, and the Committee of Ministers of the Council of Europe ("Community of Ministers").<sup>175</sup> The ECHR provides rights and proce-

167. COMMUNITY METHODS, *supra* note 17, at 8.

168. VENABLES, *supra* note 166, at 29 (citing Article 8(1) of EC Treaty).

169. *Id.*

170. DOMINIK LASOK & PETER A. STONE, CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY 32 (1987).

171. See *Opinion 2/94*, [1996] 2 C.M.L.R. at 269-70, § I, ¶¶ 2-6 (suggesting that continued growth of European Community and accession to ECHR would have important institutional consequences).

172. O'Keeffe, *supra* note 8, at 34.

173. *Id.*

174. *Opinion 2/94*, [1996] 2 C.M.L.R. at 269-70, § I, ¶ 6. Accession to the ECHR itself would raise institutional questions. *Id.*

175. CASTBERG, *supra* note 11, at 14, 16.

dures for the protection of human rights to anyone within the jurisdiction of its contracting parties.<sup>176</sup> The European Community, however, while not a contracting party, refers to ECHR provisions in its treaties.

### 1. Founding of the ECHR

The Council of Europe created the ECHR to promote greater cooperation and understanding of common human rights between European states, in an attempt to avoid a repetition of the international tensions that led to World War II.<sup>177</sup> In its Message to Europeans, the Council of Europe pledged a Charter of Human Rights, guaranteeing liberty of thought, assembly, and expression, the right to form a political opposition, a Court of Justice with adequate authority to enforce the Charter, and an expectation of human values and human liberty in Europe.<sup>178</sup> On July 12, 1949, the Committee of Ministers of the Council of Europe received a draft of the ECHR.<sup>179</sup> The draft

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176. ECHR, *supra* note 11, art. 45, 213 U.N.T.S. at 246. Article 45 states, "[t]he jurisdiction of the court shall extend to all cases concerning the interpretation and application of the present Convention which the High Contracting Parties or the Commission shall refer to it in accordance with Article 48." *Id.*

177. IAIN CAMERON & MAJA KIRILOVA ERIKSSON, AN INTRODUCTION TO THE EUROPEAN CONVENTION ON HUMAN RIGHTS 22 (1993). The devastation of World War II was also a driving force in European integration. See BORCHARDT, *supra* note 9, at 5.

Only after Europe had yet again been devastated by war was the disastrous futility of constant national rivalry truly appreciated. Europe's total collapse and the political and economic disintegration of outdated national structures set the stage for a completely fresh start and called for a far more radical approach to the reordering of Europe.

*Id.* The concerns left over after World War II left its mark on the treaties establishing the European Communities, namely, to preserve and strengthen peace, to achieve economic integration, to work towards political union, and to strengthen and promote social cohesion within the Union. *Id.* at 23; Minutes of the Congress of Europe, convened by the International Committee of Movements for European Unity from May 8-10, 1948 (on file with *Fordham International Law Journal*) (stating that forces underlying formation of European Community and ECHR are similar).

178. COUNCIL OF EUROPE, EXPLANATORY REPORT AND PROTOCOL NO. 11 TO THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, RESTRUCTURING THE CONTROL MACHINERY ESTABLISHED THEREBY, 33 I.L.M. 943, 945-46 (American Soc'y of Int'l Law ed., 1994) [hereinafter COUNCIL OF EUROPE REPORT].

179. See *id.*, at 946; CASTBERG, *supra* note 11, at 16. It is noteworthy that the Committee of Ministers also has duties conferred upon it by the Council of Europe. *Id.* at 17. These duties "are completely independent of its function under the Convention on Human Rights." *Id.* The provisions of the ECHR do not affect the powers of the Committee of Ministers under the Statute of the Council of Europe. *Id.*; ECHR, *supra* note 11, art. 32, 213 U.N.T.S. 221 (stating, in part, ECHR duties of Council of Ministers).

set forth a minimum standard of human rights that the contracting parties must protect, and established a system for legal remedy and for their enforcement, empowering the institutions that the ECHR established to condemn infringements of human rights.<sup>180</sup> At that time, there was no significant division among the nations of Europe regarding the necessity for such a convention, and the ultimate result of the July 12 draft was the tripartite<sup>181</sup> structure that forms and supports the ECHR, established on September 3, 1953.<sup>182</sup>

## 2. ECHR Protections

The ECHR does not require that individual states incorporate its provisions into national law.<sup>183</sup> It does mandate, however, that each contracting party ensure compliance with its provisions.<sup>184</sup> Many of the ECHR's contracting parties have not expressly incorporated the ECHR into national legislation, but they recognize the right of an individual to petition the Commission of Human Rights and are subject to its jurisdiction.<sup>185</sup> A contracting party must accept an individual's right to petition and directly invoke provisions of the ECHR.<sup>186</sup> Among the rights the ECHR guarantees are civil and political rights, such as the rights to life, liberty, and security.<sup>187</sup> It also protects citizens against inhuman or degrading treatment, slavery, forced labor, and servitude, and guarantees citizens a fair trial, freedom of speech, and freedom of assembly.<sup>188</sup> The purpose of the ECHR is to provide signatory parties and individual citizens with a supra-national legal order, against which national legislation and its compatibility with ECHR principles are tested.<sup>189</sup>

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180. BORCHARDT, *supra* note 9, at 7.

181. COUNCIL OF EUROPE REPORT, *supra* note 178, at 946.

182. ECHR, *supra* note 11, 213 U.N.T.S. 221.

183. FAWCETT, *supra* note 74, at 4.

184. *Id.*

185. *Id.*

186. *Id.* at 6.

187. PETER WESSMAN, *THE PROTECTION OF HUMAN RIGHTS IN EUROPEAN COMMUNITY LAW* 2-3 (1992).

188. *Id.* at 3; *see* FAWCETT, *supra* note 74 (outlining protections provided by ECHR).

189. WESSMAN, *supra* note 187, at 2.

### 3. ECHR Bodies

The tripartite structure of the ECHR consists of the Commission of Human Rights, the CHR, and the Committee of Ministers.<sup>190</sup> The Commission on Human Rights considers the admissibility of petitions, establishes facts, promotes friendly settlements, and, if necessary, delivers opinions regarding whether violations of human rights have occurred.<sup>191</sup> The CHR gives a final and binding judgment on cases that the Commission of Human Rights or a contracting party referred to it.<sup>192</sup> The Committee of Ministers renders a final and binding decision on cases that cannot be referred or are not referred to the CHR.<sup>193</sup>

#### a. The Commission of Human Rights

The Commission of Human Rights is a body of inquiry with advisory and mediary functions.<sup>194</sup> Its task is to protect the common interest of all members of the Council of Europe<sup>195</sup> in the enforcement of ECHR provisions.<sup>196</sup> It assists parties in reaching friendly settlements, draws up reports describing agreements reached or not reached, and issues opinions on whether the parties violated the agreements.<sup>197</sup> Application to the Commission

190. CASTBERG, *supra* note 11, at 14, 16.

191. FAWCETT, *supra* note 74, at 258-59. The duty of the Commission on Human Rights has been compared to the Judicial Committee of the Privy Council in the United Kingdom. *Id.* at 263. The Judicial Committee has the task of maintaining standards of justice in the courts within its jurisdiction, not of a revising court of criminal appeal. *Id.* The reports of the Commission on Human Rights to the Committee of Ministers is an opinion and not binding law that the Council is bound to accept. *Id.* at 264.

192. ECHR, *supra* note 11, art. 52, 213 U.N.T.S. at 248. Article 52 states that "[t]he judgment of the court shall be final." *Id.*

193. See CASTBERG, *supra* note 11, at 16 (defining Committee of Ministers).

194. *Id.* at 20-23 (describing functions and procedures of Commission on Human Rights).

195. See FAWCETT, *supra* note 74, at 271 (noting that some scholars have considered ECHR to be organ of Council of Europe). The Committee of Ministers of the Council of Europe elect the members of the ECHR, and the Council of Europe and its secretariat bear the expenses of the ECHR. *Id.* (referencing Report of Committee of Experts, Mar. 16, 1950) (stating "it does seem in fact advisable to attach the Commission from an administrative point of view, to the Council of Europe," and demonstrating early connection between Convention and European Community).

196. ECHR, *supra* note 11, art. 19, 213 U.N.T.S. at 234. Article 19 provides, "[t]o ensure the observance of the engagements undertaken by the High Contracting Parties in the present Convention, there shall be set up: (1) A European Commission of Human Rights hereinafter referred to as the 'Commission'; (2) A European Court of Human Rights, hereinafter referred to as 'the Court.'" *Id.*

197. *Id.* art. 31, 213 U.N.T.S. at 240. Article 31 states:

of Human Rights does not have any effect on a Member State's ability to take alternative action through its own judicial or legislative system.<sup>198</sup>

The Commission of Human Rights is not a supreme body that examines alleged errors of law or fact committed by the domestic courts of the contracting parties acting wholly within their own jurisdiction.<sup>199</sup> It instead ensures observance of the contracting parties' obligations and ensures compliance with the ECHR.<sup>200</sup> The Commission of Human Rights receives applications from contracting parties<sup>201</sup> or individuals<sup>202</sup> and examines

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1. If a solution is not reached, the Commission shall draw up a Report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The opinions of all the members of the Commission on this point may be stated in the Report.
  2. The Report shall be transmitted to the Committee of Ministers. It shall also be transmitted to the States concerned, who shall not be at liberty to publish it.
  3. In transmitting the Report to the Committee of Ministers the Commission may make such proposals as it thinks fit.

*Id.*

198. 297/57: 2 Yearbook 212; 1420/62: 6 Yearbook 590, 626.

199. ECHR, *supra* note 11, art. 19, 213 U.N.T.S. at 234; *see supra* note 196 (quoting ECHR Article 19).

200. ECHR, *supra* note 11, art. 19, 213 U.N.T.S. at 234.

201. *Id.* art. 24, 213 U.N.T.S. at 236. Article 24 states, "[a]ny High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party." *Id.*

202. *Id.* art. 25, 213 U.N.T.S. at 236-38. Article 25 states:

(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High contracting Parties of the rights set forth in this Convention, provided that the High contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

(2) Such declarations may be made for a specific period.

(3) The declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High contracting Parties and publish them.

(4) The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

*Id.*

the parties and the merits of applications.<sup>203</sup> The Commission of Human Rights acts on such applications as provided in Article 57 of the ECHR<sup>204</sup> and cannot itself initiate proceedings or inquire into the conditions of the application of the ECHR in a contracting state.<sup>205</sup> Before the Commission of Human Rights can even consider an application, it must demonstrate jurisdiction by determining that the complaining party has exhausted all local remedies.<sup>206</sup> The relation of the Commission on Human Rights to national courts depends on whether the procedure for application to the Commission of Human Rights can exclude the invocation of provisions of the ECHR before national courts, and how far the Commission of Human Rights can scrutinize and control the decisions of national courts.<sup>207</sup>

#### b. The Court of Human Rights

The Council of Europe determines the composition of the CHR.<sup>208</sup> Its powers are limited to determining whether the contracting parties have committed a substantive or procedural abuse of ECHR provisions.<sup>209</sup> CHR jurisdiction reaches all cases

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203. *Id.* art. 24-25, 213 U.N.T.S. at 236-38; *see supra* note 201 (quoting text of Article 24).

204. *See* ECHR, *supra* note 11, art. 57, 213 U.N.T.S. at 250 (as amended by Protocols Nos. 3, 5, and 8, which entered into force on Sept. 21, 1970, Dec. 20, 1971, and January 1, 1990 respectively). Article 57 provides, "[o]n receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention." *Id.*

205. *See*, FAWCETT, *supra* note 74, at 267.

206. ECHR, *supra* note 11, art. 26, 213 U.N.T.S. at 238. Article 26 states that "[t]he Commission may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of six months from the date on which the final decision was taken." *Id.*

207. *See* FAWCETT, *supra* note 74, at 267.

208. ECHR, *supra* note 11, art. 39, 213 U.N.T.S. at 242-44. Article 39 states:

(1) The members of the court shall be elected by the Consultative Assembly by a majority of the votes cast from a list of persons nominated by the Members of the Council of Europe; each Member shall nominate three candidates, of whom two at least shall be its nationals.

(2) As far as applicable, the same procedure shall be followed to complete the Court in the event of the admission of new Members of the council of Europe, and in filling casual vacancies.

(3) The candidates shall be of high moral character and must either possess the qualifications required for appointment to high judicial office or be jurists of recognized competence.

*Id.*

209. *Id.* art. 54, 213 U.N.T.S. at 248. Article 54 states, "[t]he judgment of the court

that involve the ECHR's application and interpretation by the contracting parties.<sup>210</sup>

### 1. CHR Composition

The judges of the CHR are elected from a list of persons nominated by the Members of the Council of Europe<sup>211</sup> for a term of nine years.<sup>212</sup> The CHR elects a president and vice-president for terms of three years each.<sup>213</sup> The number of judges sitting on the CHR corresponds with the number of contracting parties in the Council of Europe.<sup>214</sup> The Committee of Ministers supervises the execution of CHR judgments.<sup>215</sup>

### 2. Powers of the CHR

The CHR can determine only whether the domestic courts of contracting parties have committed an abuse or procedural irregularity, and only the contracting parties and the Commission on Human Rights may bring a case before the CHR.<sup>216</sup>

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shall be transmitted to the Committee of Ministers which shall supervise its execution." *Id.*

210. *Id.* art. 45, 213 U.N.T.S. at 246; see *supra* note 176 (citing text of Article 45).

211. ECHR, *supra* note 11, art. 39, 213 U.N.T.S. at 242-44; see *supra* note ??? (citing text of Article 39).

212. ECHR, *supra* note 11, art. 40, 213 U.N.T.S. at 244. Article 40 states:

(1) The members of the Court shall be elected for a period of nine years. They may be re-elected. However, of the members elected at the first election the terms of four members shall expire at the end of six years.

(2) The members whose terms are to expire at the end of the initial periods of three and six years shall be chosen by lot by the Secretary-General immediately after the first election has been completed.

(3) A member of the Court elected to replace a member whose term of office has not expired shall hold office for the remainder of his predecessor's term.

(4) The members of the Court shall hold office until replaced. After having been replaced, they shall continue to deal with such cases as they already have under consideration.

*Id.*

213. *Id.* art. 41, 213 U.N.T.S. at 244. Article 41 states, "[t]he Court shall elect its President and Vice-President for a period of three years. They may be re-elected." *Id.*

214. *Id.* art. 38, 213 U.N.T.S. at 242. Article 38 states, "[t]he European court of Human Rights shall consist of a number of judges equal to that of the Members of the Council of Europe. No two judges may be nationals of the same State." *Id.*

215. *Id.* art. 54, 213 U.N.T.S. at 248.

216. ECHR, *supra* note 11, art. 44, 213 U.N.T.S. at 246. Article 44 states, "[o]nly the High Contracting Parties and the Commission shall have the right to bring a case before the Court." *Id.* An individual cannot bring a case before the CHR, nor can an individual be a respondent there. FAWCETT, *supra* note 74, at 330. The method for dealing with such a situation is the Report of the Commission and observations made to

Before a petition applying for judgment by the CHR is admissible, all internal remedies, including bringing an action in the EC internal courts, and particularly the ECJ, must first have been exhausted.<sup>217</sup> Additionally, the CHR has the power to decide an issue only if the contracting parties cannot reach a friendly settlement within three months.<sup>218</sup> The CHR is unable to repeal or amend a provision of national law.<sup>219</sup>

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the CHR, orally or in writing, by delegates of the Commission on Human Rights. *Id.* Article 48 of the ECHR states:

The following may bring a case before the Court, provided that the High Contracting Party concerned, if there is only one, or the High Contracting Parties concerned, if there is more than one, are subject to the compulsory jurisdiction of the Court or, failing that, with the consent of the High Contracting Party concerned, if there is only one, or of the High Contracting Party concerned if there is more than one:

- (a) the Commission;
- (b) a High Contracting Party whose national is alleged to be a victim
- (c) a High Contracting Party which referred the case to the Commission;
- (d) a High Contracting Party against which the complaint has been lodged.

ECHR, *supra* note 11, art. 48, 213 U.N.T.S. 221.

217. *Opinion 2/94*, [1996] 2 C.M.L.R. at 270-71, § I, ¶ 10; see ECHR, *supra* note 11, art. 26, 213 U.N.T.S. at 236-38; *supra* note 206 (limiting circumstances under which ECHR may review petition).

218. ECHR, *supra* note 11, art. 47, 213 U.N.T.S. at 246. Article 47 states, "[t]he Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32." *Id.* Article 32 states:

- (1) If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds of the members entitled to sit on the committee whether there has been a violation of the Convention.
- (2) In the affirmative case the Committee of Ministers shall prescribe a period during which the High Contracting Party concerned must take the measures required by the decision of the Committee of Ministers.
- (3) If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the committee of Ministers shall decide by the majority provided for in paragraph (1) above what effect shall be given to its original decision and shall publish the Report.
- (4) The High Contracting Parties undertake to regard as binding on them any decision which the committee of Ministers may take in application of the preceding paragraphs.

*Id.* art. 32, 213 U.N.T.S. at 240-42.

219. See UN: *Massive Refugee Flows to Rwanda Would Not End Region's Human Rights Problems Norway Tells Third Committee*, Nov. 26, 1996, available in Westlaw, 1996 WL 13552936, [hereinafter *Refugee*]. "Human rights and fundamental freedoms [are] inalienable for rich and poor alike, and they [are] the only sure foundation for stability and long-term economic development." *Id.*

### 3. Jurisdiction

The CHR has jurisdiction over all cases that concern the interpretation and application of the ECHR by the high contracting parties.<sup>220</sup> The CHR determines whether it has jurisdiction.<sup>221</sup> In a case in which provisions of the ECHR completely or partially differ from the constitutional law of the high contracting parties, the ECHR provisions suggest that it overrides national legislation.<sup>222</sup> The assumption is that internal law of a contracting party will conform to the requirements of the ECHR.<sup>223</sup> The CHR may hear cases brought to it by individuals, victim applicants,<sup>224</sup> contracting parties,<sup>225</sup> or the Commission.<sup>226</sup> The judgment of the CHR is final,<sup>227</sup> excluding the possibility of interpretative or revisionary proceedings conducted at

220. ECHR, *supra* note 11, art. 45, 213 U.N.T.S. at 246; *see supra* note 176 and accompanying text (citing text of article 45).

221. ECHR, *supra* note 11, art. 49, 213 U.N.T.S. at 248, art. 49. Article 49 states, "[i]n the event of dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court." *Id.*

222. *Id.* art. 50, 213 U.N.T.S. at 248. Article 50 states, "if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party." *Id.*

223. CASTBERG, *supra* note 11, at 14.

224. ECHR, *supra* note 11, art. 25, 213 U.N.T.S. 236-38. Article 25 states:

(1) The Commission may receive petitions addressed to the Secretary-General of the Council of Europe from any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention, provided that the High Contracting Party against which the complaint has been lodged has declared that it recognizes the competence of the Commission to receive such petitions. Those of the High contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.

(2) Such declarations may be made for a specific period.

(3) The declarations shall be deposited with the Secretary-General of the council of Europe who shall transmit copies thereof to the High Contracting Parties and publish them.

(4) The Commission shall only exercise the powers provided for in this Article when at least six High Contracting Parties are bound by declarations made in accordance with the preceding paragraphs.

*Id.*

225. *Id.* art. 24, 213 U.N.T.S. at 236. Article 24 states, "[a]ny High Contracting Party may refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party." *Id.*

226. *Id.*

227. *Id.* art. 52, 213 U.N.T.S. at 248; *see supra* note 192 (quoting text of ECHR Article 52).

the request of a high contracting party or the Commission on Human Rights.<sup>228</sup>

c. Committee of Ministers of the Council of Europe

The Ministers of Foreign Affairs of each of the contracting parties make up the Committee of Ministers.<sup>229</sup> The Committee of Ministers receives a report from the Commission on Human Rights regarding potential violations.<sup>230</sup> If an alleged violation is not referred to the CHR within three months, the Committee of Ministers decides whether there has been a violation of the ECHR.<sup>231</sup> If a binding decision is reached,<sup>232</sup> the Committee of Ministers will designate a time period during which the contracting party must attempt to correct the violation by taking measures set out by the decision of the Committee of Ministers.<sup>233</sup> If the contracting party does not satisfactorily take such measures, the Committee of Ministers will decide by two-thirds majority what effect will be given to its original decision.<sup>234</sup> If the case is not brought before the ECJ, the Committee of Ministers must also publish the Commission of Human Rights' Report.<sup>235</sup>

228. FAWCETT, *supra* note 74, at 336.

229. CASTBERG, *supra* note 11, at 16. These duties "are completely independent of its function under the Convention on Human Rights." *Id.* at 17. The provisions of the ECHR do not affect the powers of the Committee of Ministers under the Statute of the Council of Europe. *Id.*

230. ECHR, *supra* note 11, art. 31, 213 U.N.T.S. at 240. Article 31 states:

(1) If a solution is not reached, the Commission shall draw up a report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The opinions of all the members of the Commission on this point may be stated in the Report.

(2) The Report shall be transmitted to the Committee of Ministers. It shall also be transmitted to the States concerned, who shall not be at liberty to publish it.

(3) In transmitting the Report to the Committee of Ministers the commission may make such proposals as it thinks fit.

*Id.*

231. *Id.* art. 32, 213 U.N.T.S. at 240-42; *see supra* note 218 (quoting Article 32).

232. CASTBERG, *supra* note 11, at 16. "A majority of two-thirds of the members entitled to sit on the Committee is required for a decision by the Committee of Ministers to be binding." *Id.*

233. ECHR, *supra* note 11, art. 32(2), 213 U.N.T.S. 221 at 242.

234. *Id.* art. 32(1), 213 U.N.T.S. at 240; *see supra* note 218 (quoting Article 32).

235. ECHR, *supra* note 11, 213 U.N.T.S. at 242, art. 32(3); CASTBERG, *supra* note 11, at 234.

### 3. Relationship Between the European Community and the ECHR

The present lack of enumerated human rights laws in the European Community forces those Member States that have chosen not to incorporate the ECHR into their national laws to adhere to ECHR principles when applying any national law that has its basis in EC law or that is affected by EC law.<sup>236</sup> As EC law now affects a large area of national law, this amounts to the incorporation of the ECHR through the "back door."<sup>237</sup> In other words, although the Member States' Constitutional Courts cannot review EC acts, as this would constitute a lack of fidelity to EC law,<sup>238</sup> the nature of and questionable direct applicability of<sup>239</sup> EC measures arguably requires Member States to do just this.<sup>240</sup> For example, if an ECHR signatory party, that is also a Member State, fails to apply EC law, which relies on ECHR principles, an individual may request a national court to make a referral to the ECJ.<sup>241</sup> The ECJ interprets EC law as coexisting with ECHR law and, thus, would be enforcing ECHR regulations despite that the European Community never has explored and ratified fully this intention.<sup>242</sup>

#### C. Human Rights Protection in the European Community

The Community does not have a formal, written Bill of Rights,<sup>243</sup> nor it is a contracting party to the ECHR.<sup>244</sup> The ECJ

236. See Dominick, *supra* note 3, at 643 and n.14 (noting significance of 1974 decision *Solange I*, of German Constitutional Court, which held that "so long as" there existed neither a viable legislative power sufficient to balance the other Community organs nor written catalogue of fundamental rights, German Basic Law would be considered superior to Community law."); see also *Frontiti v. Ministero delle Finanze*, Case 183/73, Giust. civ. 1974-III, [1974] 2 C.M.L.R. 372, 410 (holding that, absent constitutional requirement to adhere to ECHR, national law of Italian Corte Costituzionale prevails).

237. See Dominick, *supra* note 3, at 643; Rasmussen, *supra* note 74, at 143 (describing horizontal effect of directives by "back door").

238. Zuleeg, *supra* note 7, at 635.

239. BERMANN ET AL., *supra* note 8.

240. See EC Treaty, *supra* note 8, art. 189, [1992] 1 C.M.L.R. at 693-94; *supra* note 91 (explaining application of EC laws).

241. EC Treaty, *supra* note 8, art. 177, [1992] 1 C.M.L.R. at 689; *supra* note 128 (quoting text of Article 177).

242. *Solange I*, [1974] 2 C.M.L.R. at 540.

243. BERMANN ET AL., *supra* note 8, at 3.

244. COMMUNITY METHODS, *supra* note 17, at 12.

has noted<sup>245</sup> that the protection of human rights in the European Community mainly derives from different sources of law.<sup>246</sup> This includes EC Treaty protections, natural law, Member States' common constitutional laws,<sup>247</sup> and international treaties and conventions, such as the ECHR.<sup>248</sup> The ECHR, however, is not officially incorporated into the EC legal system.<sup>249</sup>

### 1. EC Treaty Protection

EC membership requires that a candidate country achieve stability of democratic institutions, guarantee the existence of a functioning market economy, and guarantee the protection of respect for minorities.<sup>250</sup> As the European Community is not a Member of the ECHR, this third requirement does not expressly include acceptance of the ECHR, which would impose minimum standards of human rights and fundamental freedoms on Member States.<sup>251</sup> General principles of EC law,<sup>252</sup> therefore, provide

245. BERMAN ET AL., *supra* note 8, at 3.

246. See VENABLES, *supra* note 166, at 27-36 (referencing confusing structure of human rights protection in Community and noting parts of EC Treaty in which such provisions are found). The need for specific Community powers in the field of human rights, reaffirmed by case-law, is enshrined in Article F of the TEU. *Opinion 2/94*, [1996] 2 C.M.L.R. at 170, § I, ¶ 8.

247. *Stauder v. City of Ulm*, Case 29/69, [1969] E.C.R. 419, 424-25.

248. SEA, *supra* note 8, pmb., O.J. L. 169/1, at 2 (1987), [1987] 2 C.M.L.R. at 741. The SEA Preamble states that the Community is "determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice . . ." *Id.*; BERMAN ET AL., *supra* note 8, at 145-49 (discussing origins of fundamental rights protection in European Community).

249. COMMUNITY METHODS, *supra* note 17, at 12.

250. SEA, *supra* note 8, pmb., O.J. L. 159, at 2, [1987] 2 C.M.L.R. at 741; *see supra* notes 248 (citing text of preamble); BERMAN ET AL., *supra* note 8, at 145-46 (discussing origins of fundamental rights protection in European Community).

251. See CASTBERG, *supra* note 11, at 5 (stating "the direct purpose of the Convention is to safeguard certain 'minimum rights.' On the other [hand], the view has been expressed . . . that the list of human rights to be protected by the Convention is not complete . . ."). The concept of *Rechtsgemeinschaft*, meaning a community of law, is required as a condition of joining the Union. Zuleeg, *supra* note 7, at 633-34. "In the German version, the rule of law is called *Rechtsstaatlichkeit*, a notion derived from the *Rechtsstaat*, the state of law. The Court of Justice transformed this notion into *Rechtsgemeinschaft* (community of law) enabling it to apply its meaning to the European Community." *Id.* (citing AECH, *Les Verts v. European Parliament*, Case No. 294/83, [1986] E.C.R. 1339, 1365; repeated by ECJ, *Opinion 1/91*, [1991] E.C.R. I-6079, I-6102). This includes, however, accepting fundamental law, not accepting the ECHR and its principles. *Id.*

252. See WESSMAN, *supra* note 187, at 14-15 (explaining definition of general princi-

the foundation of human rights protection in the European Community.<sup>253</sup>

The treaties establishing and regulating the European Union do not make any exact references to specific fundamental rights.<sup>254</sup> The clearest EC statement regarding fundamental human rights is found in Article F(2) of the TEU<sup>255</sup> which states that the European Union shall respect the fundamental rights guaranteed by the ECHR, those guaranteed by the Member States' common constitutional traditions, and those guaranteed by general principles of EC law.<sup>256</sup> Such reference, however, does not provide that European citizens shall have the right to invoke such rights against a state or institution for their viola-

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ples of Community law, including its three categories, compelling legal principles, regulatory rules common to laws of Member States, and general rules that are native to Community legal order). General principles of law is a doctrine developed by the ECJ, which has:

[U]tilized general principles of law to cloak the nakedness of judicial law-making: the idea is that if a ruling can be shown to be derived from a principle of sufficient generality as to command common assent, a firm legal foundation for the judgment will be provided. For this reason, the European Court has developed a doctrine that rules of Community law may be derived, not only from treaties and legislation, but also from the general principles of law.

*Id.* (citing T.C. HARTLEY, *THE FOUNDATIONS OF EUROPEAN COMMUNITY LAW* 129 (2d ed. 1988)).

253. EC Treaty, *supra* note 8, art. 164, [1992] 1 C.M.L.R. at 684. Article 164 states, "[t]he Court of Justice shall ensure that in the interpretation and application of this Treaty the law is observed." *Id.*

254. *Opinion 2/94*, [1996] 2 C.M.L.R. at 272, § III, ¶ 1; see WESSMAN, *supra* note 187, at 5.

It is generally accepted that the EEC Treaty does not contain any specific provisions dealing with the protection of human rights. However, it could be argued that at least two important provisions of the Treaty contribute to this protection. These are the freedom of movement . . . of workers, and the freedom from discrimination based on nationality and sex.

*Id.*

255. TEU, *supra* note 8, art. F, O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728. Article F of the TEU provides:

1. The Union shall respect the national identities of its Member States, whose systems of government are founded on the principles of democracy.
2. The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.
3. The Union shall provide itself with the means necessary to attain its objectives and carry through its policies.

*Id.*

256. *Id.*

tion,<sup>257</sup> nor does it provide for penalties for the violation of such rights. At present, the requirement of a general respect for fundamental rights and freedoms, as stated in Article F(2), does not impose any minimum standards on the European Community or its institutions, other than confirming the Member States' attachment to respecting human rights and fundamental freedoms.<sup>258</sup>

The EC Treaty, in its preamble, resolves to preserve and strengthen peace and liberty in the European Community.<sup>259</sup> This loose collection of laws<sup>260</sup> has become the basis of the EC civil and human rights law.<sup>261</sup> Additionally, because the EC treaties primarily address economic issues, fundamental rights protections covered tend to have more of an economic than a personal nature.<sup>262</sup> Paradoxically, although the European Commu-

257. VENABLES, *supra* note 166, at 29.

258. *Id.*

259. *Opinion 2/94*, [1996] 2 C.M.L.R. at 272, at § III, ¶ 1.

260. See SEA, *supra* note 8, pmb., O.J. L 169/1, at 2 (1987), [1987] 2 C.M.L.R. at 741 (referring to fundamental rights recognized in laws of Member States, ECHR, and European Social Charter, and stressing importance of fundamental rights in connection with democratic principles); TEU, *supra* note 8, art. F.2, O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728 (stating that European Union "shall respect fundamental rights, as guaranteed by the European Convention . . . and as they result from the constitutional traditions common to the Member States, as general principles of Community law"); *id.* art. J.1(2), O.J. C 224/1 at 94 (referencing respect to human rights and fundamental freedoms); *id.* art. K.2(1), O.J. C 224/1 at 97 (referencing compliance with ECHR with respect to justice and home affairs); EC Treaty, *supra* note 8, art. 130u(2), [1992] 1 C.M.L.R. at 672 (providing that Community policy in area of development cooperation is to contribute to objective of respecting human rights and fundamental freedoms); see also *Opinion 2/94*, [1996] 2 C.M.L.R. at 272, at § III, ¶¶ 2, 3 (stating "[t]he Court of Justice has upheld the protection of fundamental rights by way of general principles of Community law, referring to common constitutional traditions and to international instruments, in particular the Convention."); *Id.* at 273, § III, ¶ 5 (providing references to respect for fundamental rights and freedoms made in political declarations by Member States and Community institutions).

261. See EC Treaty, *supra* note 8, art. 3(c), [1992] 1 C.M.L.R. at 588 (stating abolition, as between Member States, of obstacles to freedom of movement for persons, services, and capital); *id.* art. 48, [1992] 1 C.M.L.R. at 612 (stating freedom of movement for workers shall be secured, along with abolition of discrimination based on nationality between workers of Member States with regards to employment, remuneration, and other conditions of employment, excluding application of Article 48 to employment in public service); *id.* art. 52, [1992] 1 C.M.L.R. at 613-14 (stating abolition of restrictions on freedom of establishment of nationals of Member State, applying particularly to self-employed persons); *id.* art. 53, [1992] 1 C.M.L.R. at 614 (restricting Member States to limit right of establishment); *id.* art. 59, [1992] 1 C.M.L.R. at 616-17 (providing for progressive abolition of restrictions of freedom to provide services within Community); see also *Opinion 2/94* [1996] 2 C.M.L.R. at 272-74, § III, ¶¶ 1-10 (noting separate locations from which Community human rights law is derived).

262. DINNAGE & MURPHY, *supra* note 28, at 335.

nity has rights to place restrictions on its Member States and demand that they work with the European Community to create a Europe without internal frontiers, it has no responsibilities to ensure that this is accomplished in accordance with the protection of human rights.<sup>263</sup> This task is left to national and international control organizations.<sup>264</sup>

Since the 1970s, the EC institutions have increasingly focused on the importance of protecting the human rights and fundamental freedoms of the people of the European Community.<sup>265</sup> The EC institutions issued a Joint Declaration<sup>266</sup> noting EC commitment to the protection of fundamental rights, as derived from the ECHR and the constitutions of the Member States.<sup>267</sup> The Joint Declaration, however, is not judicially binding.<sup>268</sup> The ECHR's principles, therefore, do not bind the European Community.<sup>269</sup>

The most widely recognized and utilized remedy<sup>270</sup> for protection of human rights against EC acts is found in Article 177 of the EC Treaty, the preliminary rulings procedure.<sup>271</sup> Also providing protection against human rights violations is Article 173,<sup>272</sup> which gives individuals the right to bring an action

263. COMMUNITY METHODS, *supra* note 17, at 8.

264. *Id.*

265. See *Intergovernmental Conferences: Contributions by the Commission*, 24 EC BULL. no. 2, at 75 (1991) (discussing Member States' emphasis on international scope of human rights).

The 12 Member States have gradually come to accept the need for a higher profile on the international scene to enable them to give a collective response to a clear demand for Europe, to work together to defend their interests, and to contribute to the creation of a fairer, more efficient world order which respects the values they share, in particular human rights.

*Id.*

266. The Joint Declaration by the European Parliament, the Council and the Commission, Apr. 5, 1979, O.J. C 103/1 (1979); see WESSMAN, *supra* note 187, at 6 (explaining history and purpose of Joint Declaration); *id.* at 62 (reproducing text of Joint Declaration).

267. SEA, *supra* note 8, pmb., O.J. L 169/1, at 1 (1987), [1987] 2 C.M.L.R. at 741; see *supra* note 248 (stating content of preamble); BERMANN, ET AL., *supra* note 8, at 145-46 (discussing origins of fundamental rights protection in European Community).

268. *Id.* at 146.

269. *Id.*

270. WESSMAN, *supra* note 187, at 24.

271. See EC Treaty, *supra* note 8, art. 177, [1992] 1 C.M.L.R. at 689; see *supra* note 128 (quoting text of Article 177).

272. See EC Treaty, *supra* note 8, art. 173, [1992] 1 C.M.L.R. at 687-88; see *supra* note 132 (citing Article 173).

before the ECJ for review of EC decisions, and Articles 178 and 215,<sup>273</sup> which concern the liability of the European Community to pay damages for the unlawful measures of its institutions. The determination of whether a measure of EC institutions or Member States is unlawful, however, is subject only to the vague definition of general principles of EC law.<sup>274</sup>

## 2. Member State Protection

The nature of EC law, which takes different forms and has different effects on the Member State legal systems, complicates the practical application in the Member States of EC Treaty references to human rights.<sup>275</sup> Much of EC law, for example, is in the form of directives.<sup>276</sup> A national court or administrative agency must interpret and implement directives by national leg-

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273. See EC Treaty, *supra* note 8, art. 215, [1992] 1 C.M.L.R. at 710. Article 215 states:

The contractual liability of the Community shall be governed by the law applicable to the contract in question.

In the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member-States, make good any damage caused by its institutions or by its servants in the performance of their duties.

The preceding paragraph shall apply under the same conditions to damage caused by the ECB or by its servants in the performance of their duties.

The personal liability of its servants towards the Community shall be governed by the provisions laid down in their Staff Regulations or in the Conditions of Employment applicable to them.

*Id.*

274. WESSMAN, *supra* note 187, at 24. Other texts that deal with human rights and the European Community include the European Council Declaration of European Identity (1973), the Joint Declaration of Human Rights (1977), the European Council Declaration on Democracy (1978), Parliamentary Resolution on the abolition of the death penalty in the European Community (1981), the Joint Declaration against racism and xenophobia (1986), Foreign Ministers' Statement on human rights (1986), Human Dimension of the CSCE (1989), Parliamentary Resolution on the social dimension of the internal market (1989), Parliamentary Resolution on the ethical and legal problems of genetic engineering (1989), Parliamentary Resolution adopting the Declaration of fundamental rights and freedoms (1989), European Convention on Transfrontier Television (1989), Council Directive on Broadcasting (1989), Community Charter of the Fundamental Social Rights of Workers (1989), Fourth ACP-EEC Convention (1989). ANDREW CLAPHAM, HUMAN RIGHTS AND THE EUROPEAN COMMUNITY: A CRITICAL OVERVIEW, Vol. I, Annex II (1990).

275. Rasmussen, *supra* note 74, at 148-49. "[T]he ECJ emphasized [that] national judges must always consider the characteristic features of Community law and the particular difficulties to which its interpretation gives rise." *Id.*

276. EC Treaty, *supra* note 8, art. 189, [1992] 1 C.M.L.R. at 693; Stewart, *supra* note 72, at 42; see *supra* note 92 (citing text of Article 189).

islation, and apply national law consistent with the most closely related EC directive.<sup>277</sup> As a general rule, however, directives do not have direct horizontal effect.<sup>278</sup> Directives are binding on Member States as to the result, but Member States determine the manner of its attainment.<sup>279</sup> This discretion gives rise to the question of whether Member States that are also ECHR contracting parties must observe the ECHR in their national law provisions that implement its provisions, or merely reach a certain result.<sup>280</sup> Recommendations and opinions, by way of contrast, are not binding.<sup>281</sup> Regulations have the ultimate force of law in Member States and impart obligations and confer rights on Member States.<sup>282</sup> Regulations have direct effect on subjects of the European Community, and require no further implementation.<sup>283</sup>

The ECJ cannot review legislative provisions of Member States for compliance with ECHR provisions, and it lacks the power to review legislation concerning areas that fall within the jurisdiction of national legislation, even if such legislation arguably violates human rights.<sup>284</sup> Member State national courts, therefore, have great leeway in determining the human rights protections of their citizens, because, in order to comply with EC law, such laws must only comply with the vague standard of respect for fundamental rights.

### 3. Case Law on Human Rights in the European Community

The EC institutions addressed the tension between the European Community, the ECHR, and the sovereign states in the area of human rights as far back as the 1960s when the ECJ ruled on the compatibility of EC law with the human rights laws of the

277. Stewart, *supra* note 72, at 42

278. See Rasmussen, *supra* note 74, at 144 (noting distinction between vertical effect of directives that affects legal relationship between citizen and Member States, and horizontal effect that affects relationship between private parties).

279. *Id.*; EC Treaty, *supra* note 8, art. 189, [1992] 1 C.M.L.R. at 693; see *supra* note 92 (citing text of Article 189).

280. See Stewart, *supra* note 72, at 43 (giving example of possibility of different results in Member States' courts).

281. See Noel, *supra* note 39, at 518-19 (describing effect of recommendations and opinions on EC law).

282. See Stewart, *supra* note 72, at 42 (discussing effect of regulations on Member States).

283. *Id.*

284. COMMUNITY METHODS, *supra* note 17, at 15.

German Constitution, the *Grundgesetz*.<sup>285</sup> Initially, the ECJ refused to recognize human rights protections codified in the German Constitution.<sup>286</sup> The German Constitutional Court subsequently held, in *Solange I*, that EC law did not bind the German Constitutional Court in situations in which Community law would violate German human rights laws.<sup>287</sup> In reaction to an unfavorable appraisal of the new Community institutional structure, a democratic deficit in the treaties establishing and regulating the European Community, the absence of a Community catalogue of fundamental rights, and the fear of a possible German revolt,<sup>288</sup> the ECJ, in *Stauder v. City of Ulm*,<sup>289</sup> recognized human rights as a part of EC law.

In *Internationale Handelsgesellschaft*,<sup>290</sup> the ECJ<sup>291</sup> furthered

285. WESSMAN, *supra* note 187, at 25.

286. *Stork v. High Authority*, Case 1/58, [1959] E.C.R. 17; *Geitling v. High Authority*, Case 49/59, [1960] E.C.R. 423.

287. *Solange I*, [1974] 2 C.M.L.R. at 540. Similarly, the Italian Constitutional Court, *Corte Costituzionale*, in its ruling of December 27, 1973, held that if Community law was interpreted as to violate fundamental human rights, the Constitutional Court could consider whether Community law was compatible with such rights. WESSMAN, *supra* note 187, at 37; Frontiti, [1974] 2 C.M.L.R. 372.

288. WESSMAN, *supra* note 187, at 26.

289. *Stauder*, [1969] E.C.R. 419, [1970] C.M.L.R. 112 (regarding compatibility of EC decision that made sale of cheap butter under welfare provisions dependent on revealing beneficiaries names to sellers with general principles of EC law).

290. *Internationale Handelsgesellschaft mbH v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, 1135 [hereinafter *Internationale Handelsgesellschaft*] (holding that fundamental rights are guaranteed by Community's legal system). In that case, a German exporter challenged a Council regulation, under German law, that made the grant of export licenses for certain products conditional on payment of a deposit, which would be forfeited if the payment were not made. *Id.* at 1127. The ECJ held that:

Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and efficacy of community law. The validity of such measures can only be judged in the light of Community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as Community law and without the legal basis of the community itself being called into question. Therefore the validity of a Community measure or its effect within a Member State cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that State or the principles of a national constitutional structure.

However, an examination should be made as to whether or not any analogous guarantee inherent in Community law has been disregarded. In fact, respect for fundamental rights forms an integral part of the general principles

the recognition of fundamental rights in the European Community and addressed the issue of whether the EC Member States, the Council of Ministers, and the Commission must adhere to ECHR principles when legislating and applying Community law.<sup>292</sup> The ECJ held that EC law incorporates the principles of the ECHR and, therefore, the EC institutions are required to follow those principles.<sup>293</sup> In *Nold K.G. v. Commission*,<sup>294</sup> the ECJ again extended the scope of EC protection of human rights in holding that the ECJ must draw its inspiration from common constitutional traditions of Member States and utilize guidelines provided by international treaties to which Member States are signatories.<sup>295</sup>

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of law protected by the court of Justice. The protection of such rights, whilst inspired by the constitutional traditions common to the Member States, must be ensured within the framework of the structure and objectives of the Community. It must therefore be ascertained, in the light of the doubts expressed by the Verwaltungsgericht, whether the system of deposits has infringed rights of a fundamental nature, respect for which must be ensured in the community legal system.

*Id.* at 1134. The validity of *Internationale Handelsgesellschaft* has been subsequently questioned by the ECJ in *Bundesverfassungsgericht*, [1980] 2 C.M.L.R. 531; see WESSMAN, *supra* note 187, at 35 (discussing *Internationale Handelsgesellschaft*); see also Frontiti, [1974] 2 C.M.L.R. 372 (addressing similar issues regarding transfer of Member State power to European Community, and positing that this transfer was not intended to confer on European Community power to violate human rights).

291. CAMERON & ERIKSSON, *supra* note 177, at 109.

292. *Id.*

293. *Internationale Handelsgesellschaft*, [1970] E.C.R. at 1125 (holding that ECHR is incorporated into Community's legal system and, therefore, Member States must follow ECHR principles); see *Society for the Protection of the Unborn Child v. Grogan*, [1991] 3 C.M.L.R. 849, 876-79, (holding that ECHR is part of general principles of EC law and demonstrating intention to include human rights protection of ECHR in EC law).

294. *Nold Kohlen- und Baustoffgrosshandlung v. Commission*, Case 4/73, [1974] E.C.R. 491, [1974] 2 C.M.L.R. at 338 (regarding claim that EC decision violated human rights because it infringed on right to free pursuit of business activity).

295. *Id.* at 507-08. Specifically, the ECJ stated:

As the Court has already stated, fundamental human rights form an integral part of the general principles of law, the observance of which it ensures.

In safeguarding these rights, the court is bound to draw inspiration from constitutional traditions common to the Member States, and it cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions of those States.

Similarly, international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law.

The submissions of the applicant must be examined in the light of these principles.

The ECJ first formally referred to the ECHR in the 1974 case *Rutili v. Minister for the Interior*,<sup>296</sup> concerning the free movement of workers. The ECJ held that the limitations that were placed on the Member States' power to control non-nationals are a reflection of the general principles enshrined in the ECHR.<sup>297</sup> In the subsequent case *Liselotte Hauer v. Land Rheinland-Pfalz*,<sup>298</sup> which once again involved the relationship between EC law and the principles of the German constitution, the ECJ confirmed that EC human rights law is based on a broad outline of general principles of fundamental rights that are considered to be an integral part of the general principles of law.<sup>299</sup> These developments in EC human rights protections have been considered sufficient by the German Constitutional Court which overruled *Solange I* in *Wunsch Handelsgesellschaft*,<sup>300</sup> commonly referred to as *Solange II*, and held that it will no longer exercise its jurisdiction to rule on the sufficiency and applicability of EC law.<sup>301</sup>

Despite the numerous EC references to the ECHR and common constitutional traditions,<sup>302</sup> these rights are neither developed nor used to strike down EC provisions.<sup>303</sup> The *Kent Kirk* case<sup>304</sup> is a rare example of an individual benefiting from ECJ reliance on the principles of the ECHR.<sup>305</sup> In this case, the ECJ upheld the ECHR provision that penal provisions may not have retroactive effect.<sup>306</sup> This holding is arguably one of the clearest

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*Id.*

296. See *Rutili v. Minister for the Interior*, Case 36/75, [1975] E.C.R. 1219 (regarding validity of Member State residence permit that prevented plaintiff from entering four French departments and, therefore, affected his political and trade union activities, even though he was Italian national residing in France).

297. *Id.* at 1232. The Court states, "[t]aken as a whole, these limitations placed on the powers of Member states in respect of control of aliens are a specific manifestation of the more general principle, enshrined in Articles 8, 9, 10, and 11 of the Convention for the Protection of Human Rights and Fundamental Freedoms . . ." *Id.*

298. *Liselotte Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727, [1980] 3 C.M.L.R. 42.

299. WESSMAN, *supra* note 187, at 34-35.

300. Bundesverfassungsgericht, [1987] 3 C.M.L.R. 225.

301. WESSMAN, *supra* note 187, at 36.

302. See *supra* notes 260, 261 (citing references to human rights protection in treaties establishing European Community).

303. COMMUNITY METHODS, *supra* note 17, at 16.

304. *Kent Kirk*, Case 63/83, [1984] E.C.R. 2689-718.

305. COMMUNITY METHODS, *supra* note 17, at 16.

306. *Kent Kirk*, [1984] E.C.R. at 2689-718. "The principle that penal provisions

showings of ECJ support of the ECHR.<sup>307</sup>

#### 4. International Treaties and Conventions

Although EC law supports the protection of human rights<sup>308</sup> and often references the ECHR, this patchwork organization causes problems with the consistent application of EC human rights laws.<sup>309</sup> The ECHR cannot correct this confusion, as the European Community is not a member.<sup>310</sup> As a non-member, the European Community is not bound by the ECHR to any formal human rights legislation, therefore, in a case of EC violation of an ECHR provision, an applicant would have no recourse under the ECHR against the European Community or other Member States that are not contracting parties.<sup>311</sup>

Because there exists no formal human rights legislation that is binding on the European Community as a whole, alleged victims or Member States are presented with the option of reporting to a number of organizations.<sup>312</sup> These include the International Covenant on Economic, Social and Cultural Rights,<sup>313</sup> the International Covenant on Civil and Political Rights,<sup>314</sup> the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>315</sup> the Convention on the Elimination of All

may not have retroactive effect is one which is common to all legal orders of the Member States and is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms as a fundamental right; it takes its place among the general principles of law whose observance is ensured by the Court of Justice." *Id.* at 2689.

307. *COMMUNITY METHODS*, *supra* note 17, at 16-17.

308. *See Opinion 2/94*, [1996] C.M.L.R. at 290, ¶¶ 32,34 ("Respect for human rights is . . . a condition of the lawfulness of Community acts.")

309. Noel, *supra* note 39, at 525-26.

310. *COMMUNITY METHOD*, *supra* note 17, at 17.

311. *See Refugee*, *supra* note 219 (discussing need for EC governing bodies to continue to examine ways to reduce duplication of reporting and reporting burden on Member States).

312. *Id.*

313. LAURIDS MIKAELSEN, *EUROPEAN PROTECTION OF HUMAN RIGHTS* 9 (1980). The General Assembly of the United Nations adopted the International Covenant on Economic, Social and Cultural Rights on December 16, 1966, for the purpose of establishing a Human Rights Committee and requiring acceptance of its rules as a condition on the U.N. Control System. *Id.* The International Covenant on Economic, Social and Cultural Rights entered into force on January 3, 1976, after being ratified by the requisite thirty-five states. *Id.*

314. *Id.* The Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations, entered into force on March 23, 1976. *Id.*

315. *Id.*

Forms of Discrimination against Women,<sup>316</sup> the Convention on the Rights of the Child,<sup>317</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.<sup>318</sup>

#### D. Human Rights Violations

Violations of human rights are not only occurring within the European Community,<sup>319</sup> such as in Northern Ireland.<sup>320</sup> They are also occurring in those states vying for EC membership, such as Turkey,<sup>321</sup> and in states that have entered into free trade agreements with the European Community, such as Estonia<sup>322</sup> and Latvia.<sup>323</sup> Additionally, human rights violations in states bordering EC Member States influence human rights issues in the European Community.<sup>324</sup>

#### 1. Human Rights Violations in the European Community - Northern Ireland

For decades,<sup>325</sup> Northern Ireland has been a state plagued

316. *Id.*

317. *Id.*

318. *Id.*

319. *Britain Calls for Reforms to Court of Human Rights*, LONDON TIMES, Nov. 25, 1996, available in WESTLAW, 1996 WL 6535006. In fact, over the past thirty years, the highest number of human rights claims were brought against Italy, followed by Turkey and Great Britain. *Id.* Of the eighty cases brought against Great Britain, violations of human rights were found in thirty-seven cases. *Id.*; see Nadire Mater, *Turkey: Response to Child Torture Claim Fails to Deter Critics*, Nov. 22, 1996, available on WESTLAW, 1996 WL 13589334 [hereinafter *Child Torture*] (citing cases of abuse and murder of children in Belgium); LAWYERS COMMITTEE FOR HUMAN RIGHTS, AT THE CROSSROADS: HUMAN RIGHTS AND THE NORTHERN IRELAND PEACE PROCESS 1 (1996) [hereinafter *CROSSROADS*] (stating allegation that United Kingdom was in violation of ECHR and International Covenant on Civil and Political Rights ("ICCPR") during period from late 1994 until February 1996).

320. *CROSSROADS*, *supra* note 319, at 1-3 (discussing years of human rights violations in Northern Ireland, and examining the continuation of emergency powers of U.K. authorities).

321. Lewis, *supra* note 12, at 8 (noting human rights violations in Turkey).

322. U.N.: *Draft on achieving goal of gender equality in secretariat staffing one of three texts approved-Pt.2*, Nov. 26 1996, M2 Presswire, available in WESTLAW, 1996 WL 13552942 [hereinafter *U.N. Draft*] (discussing violations in Estonia and Latvia).

323. *Id.*

324. Womack, *supra* note 37, at 11.

325. *CROSSROADS*, *supra* note 319, at 3-4 (stating that use of emergency powers to counter this political instability has been disputed since 1973, and noting that Northern Ireland has been in state of civil discord for past twenty-five years).

by human rights problems,<sup>326</sup> suffering violent and ongoing civil strife.<sup>327</sup> Not only is this occurring at the hands of groups such as the Irish Republican Army<sup>328</sup> that is allegedly responsible for personal, terrorist attacks against Northern Ireland's judges and their families,<sup>329</sup> but also violations exist in domestic legislation that derogates fundamental standards of fairness.<sup>330</sup> Additionally, the Lawyers Committee for Human Rights<sup>331</sup> has stated its concern that Northern Ireland's judicial system insufficiently protects due process and other rights of its citizens<sup>332</sup> because due process protections are among the freedoms most vulnerable to government intrusion.<sup>333</sup> There also exist more publicized forms of violence against human rights in Ireland, even in light of attempted peace discussions,<sup>334</sup> such as bombings in London, Manchester, and Northern Ireland, and the killing of Warrant Officer James Bradwell.<sup>335</sup>

The emergency regime in Northern Ireland also provides a situation in which the violation of such rights is an effective vehicle for state response to crisis.<sup>336</sup> For example, there have been concerns in Northern Ireland regarding an alleged shoot-to-kill policy of law enforcement, and collusion between paramilitary organizations and state security forces.<sup>337</sup> Alleged human rights

326. *Id.*

327. *Id.*

328. *Id.* at 57.

329. *Id.* at 57-58.

330. *Id.* at 66.

331. *Id.* at 145. "Since 1978, the Lawyers Committee for Human Rights has worked to protect and promote fundamental human rights. Its work is impartial, holding each government to the standards affirmed in the International Bill of Human Rights . . ." *Id.*

332. *Id.* at 61.

333. *Id.*

334. *Id.* at 3-4.

On August 31, 1994 the [IRA] declared a complete cessation of military operations. On October 13, 1994 the combined Loyalist Military command responded by declaring its own ceasefire. The Irish National Liberation Army (INLA) declared a "tactical rather than permanent" ceasefire in a statement issued on May 1, 1995 . . . The ceasefire commitment was shattered on February 9, 1996 when a terror bombing occurred in the eastern dock area of London, for which the IRA claimed responsibility.

*Id.*

335. *Id.* at 4.

336. *Id.* at 3-4.

337. *Id.* at 7, 9 and n.6 (citing MARK URBAN, *BIG BOYS RULES: THE SECRET STRUGGLE AGAINST THE IRA*, at xvii (1992); KADAR ASMAL, *SHOOT TO KILL?, INTERNATIONAL*

violations also occur regularly in Castlereagh, the main detention center for emergency arrests in Northern Ireland.<sup>338</sup> According to the U.N. Human Rights Committee, the facility routinely deprives inmates of humane, clean cells, and access to natural daylight and exercise, and it thus urges Caslreagh's closure.<sup>339</sup>

## 2. Human Rights Violations in States Awaiting EC Membership - Turkey

Turkey's application for membership in the European Union<sup>340</sup> exemplifies the potential human rights issues<sup>341</sup> the European Community must address as it continues to grow and looks to admit new members.<sup>342</sup> Turkey has been internally warring since 1984.<sup>343</sup> More than 21,000 people have been killed in the Government's campaign against the Marxist Kurdish Workers Party ("PKK").<sup>344</sup> Both the Kurds and the Turkish Government have committed human rights abuses against the civilian population.<sup>345</sup> Eyewitnesses to these abuses allege that many of the killings, instances of torture, and kidnappings occurred at the hands of Turkish security forces.<sup>346</sup> Much of this torture has been inflicted on children.<sup>347</sup> There are cases where police and

LAWYER'S INQUIRY INTO THE LETHAL USE OF FIREARMS BY THE SECURITY FORCES IN NORTHERN IRELAND 10 (1985)).

338. *Id.* at 9.

339. *Id.* (citing Comments of the U.N. Human Rights Committee CCPR/c/79/Add. 55, July 27, 1995, para. 22).

340. See WESTLAKE, *supra* note 2, at 390-91 (listing Turkey, Cyprus, Malta, Slovakia, Slovenia, the Czech Republic, Estonia, Latvia, Poland, Romania, Hungary, Bulgaria, and Lithuania among states vying for EC membership).

341. See Lewis, *supra* note 12, at 8 (noting Turkey's persistent and severe abuse of human rights).

342. See BORCHARDT, *supra* note 9, at 22 (stating "the collapse of the Soviet bloc has also opened up the prospect of further links and enlargement. Poland, the Slovak Republic, the Czech Republic, Hungary, Bulgaria and Romania are all seeking closer ties and eventual membership.").

343. See Kelly Couturier, *Security Forces Allegedly Involved in Turkish Criminal Gang*, WASH. POST, Nov. 27, 1996, at A24 [hereinafter *Turkish Criminal Gang*].

344. *Id.*

345. *Id.*

346. See *id.* (stating that two reports of lawmakers cited eyewitness testimony that points to involvement of armed forces in violent gang activity). The Turkish state has denied allegations of security force excess. *Id.*

347. See *Child Torture*, *supra* note 319. (stating that Istanbul branch of Turkey's Human Rights Association received 36 complaints about human rights violations against children in 1995, and 16 in first six months of 1996).

security forces used beatings and electric shocks, hosed victims with ice cold water, and sexually abused and tortured child detainees for violations as small as petty-theft.<sup>348</sup> Numerous foreign ministers showed support for delaying the EU/Turkey Customs Union Agreement, based on Turkey's poor human rights record.<sup>349</sup> In accord with this position, several parliamentarians were assigned fact-finding missions in Turkey to determine the extent of human rights violations conducted there.<sup>350</sup>

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348. *Id.*

349. *Id.* "Greece will object to plans to bring Turkey closer to the EU at the Dublin summit, Greek foreign minister Theodoros Pangalos warned yesterday, and called for 'international military and economic measures' to 'convince' Turkey 'to behave in a civilized manner.'" *Id.*; see also *Commission Calls Upon Christopher to Reject Turkey's Bid to Hold OSCE Summit*, Nov. 25, 1996, available in WESTLAW, PR Newswire [hereinafter *Christopher*] (relying on information in letter to U.S. Secretary of State). In a letter from the Commission on Security and Cooperation in Europe ("CSCE") to Secretary of State of the United States Warren Christopher, the CSCE requested that the United States deny consensus on Turkey's proposal to serve as host of a summit meeting of the Heads of State or Government of the Organization for Security and Cooperation in Europe due to its dismal human rights record. *Id.* The European Committee for the Prevention of Torture has found the incidence of torture and ill-treatment in Turkey to be "widespread" and "systematic." *Id.* But see *Republic of Belarus: News Update*, Nov. 22, 1996, available in WESTLAW, 1996 WL 13553165 [hereinafter *Belarus*]. "[T]he tolerance shown by some powerful countries towards the behavior of Turkey (invasion, expansionist policies, violation of human rights) has made Turkey even more provocative than before." *Id.*; Boris Bachoriz, *Agence Fr.-Presse*, available in WESTLAW, 1996 WL 12188472 [hereinafter *Bachoriz*]. "It [is] important to get EU-Turkey relations out of the difficult patch, they were currently going through . . . stressing the country's huge strategic importance. Turkey has its faults but we must not forget it is surrounded by some of the most unstable and difficult regions in the world." *Id.*; *Compass Middle East Update*, Nov. 22, 1996, available in WESTLAW, 1996 WL 13944291, Fed. News Serv. MidEast Newswire [hereinafter *Middle East Update*]. "A U.S.-based human rights group . . . condemned the recent wave of suicide bombings by Kurdish separatists in Turkey, saying that feigning civilian status to attack an enemy was 'a serious violation of customary law.'" *Id.*; *Fresno Bee*, Nov. 21, 1996, at A12, available in WESTLAW, 1996 WL 13893795. The Amnesty International report that children are victims of torture in Turkey added to the litany of human-rights complaints lodged by the group against Turkish authorities. *Id.*; *Ankara Dismisses Alleged Catalogue of Rights Abuses*, DEUTSCHE PRESSE-AGENTUR, Nov. 20, 1996, available in WESTLAW [hereinafter *Ankara*]. In a similar report, Amnesty International said that "allegations of sexual torture of juveniles were frequent and in some cases they are corroborated by medical and other evidence, though detention for days or weeks without access to doctor, family or lawyer ensures that such evidence is extremely difficult to obtain." *Id.*

350. White and Case European Union Report, Vol. 6 No. 3, Sept. 30, 1995 (on file with the *Fordham International Law Journal*); see also Okak Isik Yurtcu, *The Guardian Features Page - Letter from Prison*, GUARDIAN, Nov. 25, 1996, at T014 [hereinafter *Letter from Prison*]. "Turkey has held more journalists in prison than any other country over the last three years. Yrutcu's case is typical of the charges used by the government to imprison dozens of journalists" for preparing reports on the Kurdish rebellion, which the

The story of Abdullah Canan demonstrates what happens if one challenges authority.<sup>351</sup> Canan brought suit against certain members of the security force for destroying homes in his village after the owners refused to become guards.<sup>352</sup> He was warned by Major Yurdakul to drop his complaint.<sup>353</sup> He refused and consequently he disappeared.<sup>354</sup> Later his body was found.<sup>355</sup> His son recounts distress at his father's demise, in particular at the signs of torture found on Canan's mutilated body.<sup>356</sup> The security guards had carved off pieces of Canan's face and ears, burned away his fingertips by electric shocks, and placed Canan's identity card in a gash they cut in his neck.<sup>357</sup> Turkish authorities have acknowledged the existence of torture cases, but insist that they are neither officially sanctioned nor systematic and that offenders are caught and prosecuted.<sup>358</sup>

### 3. Human Rights Violations in States that have Entered into Free Trade Agreements with the European Community - Estonia and Latvia

The Estonian Government deprived more than 300,000 permanent residents<sup>359</sup> of their nationality and their national minority status.<sup>360</sup> The Latvian Government similarly deprived more than 700,000 citizens of the same rights.<sup>361</sup> Both governments denied approximately one-third of the potential electorate in their countries the right to vote and to be elected, among other such violations.<sup>362</sup> Concerns have been raised regarding the possibility that the Estonian and Latvian policies were imple-

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Government classifies as propaganda for the PKK or as incitement to racial hatred. *Id.* Yurtcu, in a letter sent from the Sakarya prison, stated that "it is impossible to have other freedoms in a country where there is no freedom of the press." *Id.*

351. *Letter from Prison, supra* note 350, at T014.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

358. *Child Torture, supra* note 319.

359. *See WESTLAKE, supra* note 2, at 390 (stating that Estonia has applied for membership in European Community).

360. *U.N. Draft, supra* note 322.

361. *Id.*; *see WESTLAKE, supra* note 2, at 390 (stating that Latvia has applied for membership in European Community).

362. *U.N. Draft, supra* note 322.

mented to change the ethnic balance of the countries in order to create societies based on monoethnic principles.<sup>363</sup> Both these nations are awaiting entry to the European Community.<sup>364</sup>

#### 4. Human Rights Violations in States Bordering the European Community - Belarus

Although Belarus has not yet applied for EC membership, it lies in a location strategic to the promotion of European unity<sup>365</sup> at the crossroads in Eastern Europe, bordering Poland, Lithuania, Latvia, Ukraine, and Russia.<sup>366</sup> Belarus President Alexander Lukashenko has been accused of staging a *coup d'etat*,<sup>367</sup> creating a dictatorship in the former Soviet republic,<sup>368</sup> and silencing his

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363. *Id.* As a result of the deteriorating social situation in Estonia and Latvia, between the years of 1991 and 1996 more than 100,000 people had to leave Estonia and 75,000 people had to leave Latvia, all against their wishes. *Id.* "Most of those who stayed would not be able to restore their rights and freedoms proclaimed in the Universal Declaration of Human Rights." *Id.* There are reportedly lists of hundreds of people who had been separated from their families and who had received orders against the Russian-speaking population in Estonia and Latvia. *Id.*

364. See WESTLAKE, *supra* note 2 (noting that Latvia and Estonia have applied for EC membership).

365. *Nato, Russia Should Seek Special Partnership, Germany Says*, Deutsche Presse-Agentur, Nov. 23, 1996, available in WESTLAW. The article states:

The image of the common foe is no longer the motive which unites states and nations . . . . Without Poland an integrated Europe would be a Europe without a heart . . . . The political developments in Belarus trigger our justified concern, not only as a neighbour state but also as a member of the European family of democratic states. Belarus is the signatory of international agreements concerning the respect for democratic norms of behaviour. Therefore, [Poland's] appeal seems well-grounded that the present crisis in Belarus be resolved along constitutional lines, with the observance of the right of all institutions of state power, with the citizen and media freedoms fully respected.

*Id.*

366. *The Chernobyl of Law*, WALL STREET J., Nov. 21, 1996, available in WESTLAW. The escalating conflict between Belarusian President Alexander Ludashenko and a united front of Communists and nationalists in the Parliament is particularly significant, as Belarus still has 18 SS-25 nuclear ICBMs. *Id.*

367. Bachoriz, *supra* note 349; see WOMACK, *supra* note 37, at 11 (comparing Belarus President Lukashenko with Adolf Hitler, as dictator who similarly rose to power via ballot box and increased his power at expense of Parliament and extended his own term by two years).

368. Bachoriz, *supra* note 349. The U.N. Committee on Disarmament and International Security adopted a resolution favoring the ban on use, stockpiling, production, and transfer of anti-personnel landmines. See *Disarmament: U.N. To Pursue Outright Ban on Landmines*, INTER PRESS SERV., Nov. 22, 1996, available in WESTLAW, 1996 WL 13589346. According to a report by Boutros Boutros-Gali, former U.N. Secretary-General, these weapons are some of the deadliest of all weapons and they have caused an

opposition.<sup>369</sup> Because of its strategic location, uprisings in Belarus can greatly affect the stability of the European Union.<sup>370</sup>

## II. SHOULD THE EUROPEAN UNION AMEND THE TEU AND ACCEDE TO THE ECHR?

The lack of codified human rights law in the European Community is not a new concern.<sup>371</sup> The Council's 1996 request that the ECJ determine whether the Community could accede to the ECHR<sup>372</sup> was preceded by Parliament's<sup>373</sup> and the Commission's<sup>374</sup> recent push to improve human rights protection in the European Community. The ECJ has upheld the protection of human rights by way of general principles of EC law, the common constitutional traditions of Member States, and international instruments, including the ECHR, however, the EC Treaty contains no catalogue of specific, enumerated rights.<sup>375</sup> The re-

estimated 25,000 casualties each year and have devastated millions of civilians in the ethnic conflicts raging mostly in Europe, Africa, and Asia. *Id.* Ten countries abstained from the adoption, defending their right to use these deadly landmines as weapons of self-defense. *Id.* Two of the ten abstaining countries are Belarus and Turkey, both of which are awaiting EC membership. *Id.*

369. *The Chernobyl of Law*, *supra* note 366.

370. *Authoritarian Belarus Leader Has His Way*, FIN. TIMES, Nov. 25, 1996, available in WESTLAW, 1996 WL 13950739. "The potential for widening conflict in Belarus has heightened anxiety in neighboring Poland and Lithuania, both of which crave stability as they seek EU and NATO membership." *Id.*; see also WESTLAKE, *supra* note 2, at 390 (listing states that have applied for membership in European Community or have entered into agreements with European Community).

371. See BORCHARDT, *supra* note 9, at 12.

372. *Opinion 2/94*, [1996] 2 C.M.L.R. at 269, at § I, ¶ 1 (stating "[t]he Council . . . requests the Opinion of the Court on the following question: 'Would the accession of the European Community to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 . . . be compatible with the Treaty establishing the European Community?'").

373. See Draft Treaty Establishing the European Union, O.J. C 77/33 (1984) (recommending that European Community accede to ECHR and European Social Charter); Dominick, *supra* note 3, at 668 n.8 (suggesting that Parliament has deemed protection of human rights in Community to be inadequate)

374. Dominick, *supra* note 3, at 639:

In October 1989, the . . . Commission . . . took its second major step in ten years toward a Community bill of rights by submitting a draft Community Charter of Fundamental Social Rights to the Council of Ministers of the European Communities . . . . The first step was its 1979 proposal to the Council of Ministers that the European Community . . . should accede to the European Convention on Human Rights and Fundamental Freedoms . . . .

*Id.*

375. *Opinion 2/94*, [1996] 2 C.M.L.R. at 272, at § III, ¶¶ 1-2.

ality of a unified Europe has brought to light the lack of an institutional EC framework of guaranteed, enforceable fundamental rights, and EC division over possible solutions.<sup>376</sup>

#### A. *The European Community Should Accede to the ECHR*

Member States supporting the ECHR seek a binding catalogue of enforceable rights, rather than a mere declaration of general social principles, as exists in EC law.<sup>377</sup> Those nations supporting accession recognize that all countries are members of an international community and, therefore, international obligation is necessary.<sup>378</sup> According to supporters of accession, ECHR principles are consistent with EC law.<sup>379</sup> Additionally, ECHR protections will not challenge the autonomy of the EC legal order.<sup>380</sup> Supporters stress the need for a collective body of law to ensure uniform protection and enforcement of the common interest in promoting and protecting human rights in an expanding European Community.<sup>381</sup>

#### 1. International Obligation is More Effective than Voluntary Support

States arguing for accession to the ECHR<sup>382</sup> emphasize the difference between respecting human rights by self-limitation, and protecting human rights by virtue of an international obligation.<sup>383</sup> Under this view, accession would underline the great importance of respect for human rights at the international level because it would replace the requirement of voluntary cooperation with mandatory adherence.<sup>384</sup> Accession to the ECHR

376. Dominick, *supra* note 3, at 668.

377. *See id.* at 658-59.

378. FAWCETT, *supra* note 74, at 266.

379. *Opinion 2/94*, [1996] 2 C.M.L.R. at 277-79, § V, ¶ 2.

380. *Id.*

381. *Id.*

382. *Id.* The Commission, the Parliament, and the Austrian, Belgian, Danish, German, Finnish, Greek, Italian, and Swedish Governments support accession of the Community to the legal system of the ECHR. *Id.*

383. *Id.*

384. *Id.* at 280, § V, ¶ 4; *see U.N. Draft*, *supra* note 322 (noting that "[i]t [is] vital to strengthen State responsibility in the fulfillment of their international commitments in order to achieve progress in this field [of international humanitarian law]."); William N. Gianaris, *The New World Order and the Need for an International Criminal Court*, 16 *FORDHAM INT'L L.J.* 88, 119 (1992) (stating that institutional framework of human rights protection must be established at EC level); *Amnesty International Urges Greater Protection*

would allow EU institutions, EC Member States, and the ECHR to work together in cases where national rules or EC principles are disputed.<sup>385</sup> Such nations argue that the constitutionalization of fundamental human rights laws by virtue of international obligation is an essential component of a choate federal system.<sup>386</sup> Such a federal system may be threatened by restrictive holdings of the ECJ regarding the compatibility of Community law with human rights law.<sup>387</sup> The ECHR would provide a system of checks and balances that the European Community now lacks.<sup>388</sup>

Additionally, supporters of accession argue that international obligation at the EC level is more effective than voluntary ECJ support of the ECHR because EC violations of human rights may be more difficult to recognize than outward Member State violations, such as imprisonment, slavery, or systematic racial and gender discrimination.<sup>389</sup> Although EC action is not conducted in view of the public and, thus, is not subjected to as much public scrutiny as that of the Member States,<sup>390</sup> the ECJ's decisions can affect EC citizens perhaps even more greatly in that they become a part of the EC and Member States' legal heritage.<sup>391</sup>

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*of Human Rights*, Updated European Report, § 2157 (provided by the European Commission Information Service) (on file with *Fordham International Law Journal*) (stating necessity of system of accountability for EC violation of ECHR).

385. Gianaris, *supra* note 384, at 119.

386. Dominick, *supra* note 3, at 640.

387. WESSMAN, *supra* note 187, at 57-59. See A.H. ROBERTSON & J.G. MERRILLS, *HUMAN RIGHTS IN EUROPE: A STUDY OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (3d ed. 1993) ("In its early case law the Court of Justice refused to consider any rights other than those set out in the Treaty of Rome."); *Stork*, [1959] E.C.R. 17 (strictly interpreting Treaty and finding for defendant).

388. See *COMMUNITY METHODS*, *supra* note 17, at 18 (stating that European Community is not subject to system of checks and balances).

389. *Id.*

The Community does not hang, torture or imprison people, nor does it have a record of genocide, slavery or systematic racial discrimination. However, its action may still have far-reaching effects on the social and economic lives of its citizens, and due to the very nature of its procedures, provisions and decisions are not made in the glare of public attention.

*Id.*

390. *Id.*

391. *Van Gend en Loos*, Case 26/62, [1963] E.C.R. 1, 12. "Independently of the legislation of Member States, Community law . . . not only imposes obligations on individuals but is also intended to confer upon them rights which become part of their legal heritage." *Id.*

## 2. The ECHR is Consistent with EC Law and is Supported by the EC Institutions

The EC order has developed from an economically driven idea to one that emphasizes the citizen of the European Union.<sup>392</sup> Member states suggesting accession to the ECHR state that it is consistent with, and necessary for the continuation of, such development.<sup>393</sup> Indeed, of eight requirements on which the European Union is deemed to depend, European citizenship and a common framework of fundamental human rights and freedoms is one.<sup>394</sup> The ECJ considers the ECHR interpretation of human rights measures, demonstrating the importance of human rights in EC law.<sup>395</sup> There has been increasing support among EC institutions for EC accession to the ECHR.<sup>396</sup> The principles of EC law already accept the principles of rights and freedoms enumerated in the ECHR.<sup>397</sup> Parliament emphasized the need for the ECJ, the European Community, and Member States to be subject to the same international control in the human rights arena.<sup>398</sup> The ECJ has also recognized that the EC

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392. See EC Treaty, *supra* note 8, art. 8, [1992] 1 C.M.L.R. at 595 (setting forth rights and requirements of EU citizenship).

393. *Opinion 2/94*, [1996] 2 C.M.L.R. at 281-84, § VI, ¶ 1.

394. VENABLES, *supra* note 166, at 2. The eight demands that, if completed would achieve European Union are a central bank and economic and monetary union, majority voting in the Council of Ministers on environmental and social policies, a common foreign currency, elements of a European citizenship and a common framework for fundamental human rights and freedoms, the establishment of a Regional Assembly to deal with policies affecting the European Community, democratically elected representatives of the European Community, a Commission president that is more responsive to the people and that would hold office for the same term as Parliament, and the requirement that EC law is a product of a joint agreement of the Council, Member States, and the Parliament. *Id.* at 2-3.

395. *Id.* at 2-3.

396. See European Parliament Proposal of 18 January 1994, O.J. C 44/32 (1994) (supporting accession to ECHR, adopted on basis of report of Committee on Legal Affairs and Citizens' Rights); see also *Opinion 2/94*, [1996] 2 C.M.L.R. at 274, § III, ¶ 10 (stating "[t]he European Parliament has on several occasions made statements in favour of accession . . .").

397. *Opinion 2/94* at § VI, ¶ 1.

When it refers to the [ECHR], the [ECJ] takes into consideration the interpretation given by the organs of the [ECHR], thus underlining the specific place of rights guaranteed by the [ECHR] in the Community legal order. To that extent, the autonomy of the Community legal order . . . is from now on simply relative."

*Id.*

398. See *id.* (noting "[a]ccording to the Parliament, the choice of Article 235 of the Treaty should be supplemented by reference to the second subparagraph of Article

Treaty was not complete, acknowledging that certain general principles of law, including respect of fundamental human rights, are part of the new EC legal order,<sup>399</sup> even though the EC Treaty does not sufficiently address them.<sup>400</sup> Additionally, the Commission urged the Council of Ministers, in a February 1979 Commission Report on Accession to the European Convention,<sup>401</sup> that the European Community formally accede to the ECHR and render the ECHR's catalogue of basic rights legally binding on EC institutions and Member States.<sup>402</sup> In October 1989, the Commission submitted a draft Community Charter of Fundamental Social Rights<sup>403</sup> to the Council of Ministers, dem-

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228(3) of the Treaty, requiring, for the conclusion of certain international agreements, the assent of the Parliament.")

399. See Zuleeg, *supra* note 7, at 623. "The European Community constitutes a new legal order of international law, for the benefit of which the Member States have limited their sovereign rights, albeit within limited fields, and the subjects of which compromise not only Member States but also their nationals." *Id.* (citing *Van Gend en Loos*, [1963] E.C.R. 1); see Stewart, *supra* note 72, at 41 (discussing relationship between Member States and Community in this new world order); J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) (discussing unique quality of Community's new legal order).

400. *Nold*, [1974] E.C.R. 491 (holding that fundamental rights and international law form integral parts of Community law that ECJ would safeguard); *Hauer v. Land Rheinland-Pfalz*, Case 44/79, [1979] E.C.R. 3727 (protecting fundamental rights); *Internationale Handelsgesellschaft*, [1974] 2 C.M.L.R. 540 (discussing term "democratic deficit" and reaffirming *Nold*).

401. Accession of the Communities to the European Convention on Human Rights-Commission Memorandum, 25 EC BULL., no. 2, at 79 (1992) [hereinafter EC BULL. 2/79]. Accession was first formally proposed by the Commission to the Council in the Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms on April 4, 1979. *Opinion 2/94*, [1996] 2 C.M.L.R. at 273, § III, ¶ 7.

402. *Id.*

403. See Dominick, *supra* note 3, at 639-40 and nn.2, 13 (discussing Community Charter of Fundamental Social Rights ("Charter") and its enumerated social and economic rights of workers and citizens). The Charter was adopted by an eleven to one majority over the objection of the United Kingdom. *Id.* "The European Parliament regretted 'that the Charter has not been embodied in Community law by means of binding instruments.'" *Id.* at 642 n.13 (citing Doc. A 3-69/89, ¶ 2, O.J. C 323/44, at 45 (1989)); see also The Community Charter of Fundamental Social Rights (adopted by a 11 to 1 majority of European Council at December 8-9, 1989 meeting in Strasbourg); Agence Europe, Dec. 11-12, 1989, No. 5151, at 3; European File, Community Charter of Fundamental Social Rights of Workers, May 1990, at 2. The United Kingdom was the dissenting vote. Dominick, *supra* note 3, at 639-40. The proposal contained 30 articles enumerating 10 basic rights guaranteed to workers and citizens of the Community. *Id.* They include a right to: freedom of movement, employment and remuneration, improvement of living and working conditions, social protection, freedom of association and collective bargaining, vocational training, equal treatment for men and women,

onstrating the importance of the constitutionalization<sup>404</sup> of fundamental civil rights in a unified international system like that of the European Community. In 1990, the Commission's 1979 proposal to accede to the Convention was renewed,<sup>405</sup> and in 1993, the Commission published a working document entitled "Accession of the Community to the European Convention on Human Rights and the Community Legal Order" which focused on accession and the resulting legal and jurisdictional questions involved.<sup>406</sup>

### 3. Accession Presents No Jurisdictional Problems

According to the Member State supporting accession to the ECHR, the ECHR does not threaten the autonomy of the EC legal order because its control machinery has no direct effect in the EC legal order.<sup>407</sup> Article 62 of the ECHR<sup>408</sup> states its respect for Article 219 of the EC Treaty<sup>409</sup> and would exclude any action between the European Community and Member States.<sup>410</sup> The Swedish Government states that accession would only be incompatible, and might undermine the legal order of the European Community, if the CHR failed to observe the binding character of the ECJ.<sup>411</sup> The ECHR merely imposes minimum standards on contracting parties and does not affect the development of

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workers' right to information, consultation, and participation, health and safety protection at the workplace, and protection of children and adolescents, elderly persons, and disabled persons. *Id.*

404. *Id.* at 639-40.

405. *Opinion 2/94*, [1996] 2 C.M.L.R. at 274, § III, ¶ 8.

406. *Id.* at 274, § III, ¶ 9.

407. *Id.* at 281-84, § VI, ¶ 1. In addition, the Belgian Government suggests that complete autonomy of the European Community on the issue of human rights is not desirable. *Id.* (submission of Belgian Government).

408. ECHR, *supra* note 11, art. 62, 213 U.N.T.S. at 250. Article 62 states:

The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement or other than those provided for in the Convention.

*Id.*

409. EC Treaty, *supra* note 8, art. 219, [1992] 1 C.M.L.R. at 710. Article 219 states, "Member 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." *Id.*

410. *Id.*

411. *Opinion 2/94*, [1996] 2 C.M.L.R. at 281-84, § VI, ¶ 1 (submission of Swedish Government).

human rights protection from other sources<sup>412</sup> recognized by the EC legal order and the common constitutional traditions of the European Community and individual Member States.<sup>413</sup> A state may, through its own legislative channels, for example, institute human rights laws that are more strict or more specific than those of the ECHR.<sup>414</sup> The involvement of the CHR in EC law would be essentially the same as in the case of individual Member States.<sup>415</sup> The CHR would not have jurisdiction to rule on questions of EC law,<sup>416</sup> just as the CHR cannot invalidate or annul a national measure that is in dispute.<sup>417</sup> The lack of a personal link between the ECJ and the CHR,<sup>418</sup> such as one judge sitting on both the ECJ and the CHR at the same time,<sup>419</sup> could ensure EC autonomy.<sup>420</sup>

Additionally, respect for the autonomy of the EC legal order does not preclude external involvement, but requires the supremacy of EC law.<sup>421</sup> The German Government, in its submission to the ECJ, stressed that the sole obligation that the ECHR would impose on the European Community, namely a minimum level of respect for human rights, is within the limits

412. See CASTBERG, *supra* note 11, at 7 (stating that provisions establish minimum standard for Member States, and suggesting that nothing in ECHR precludes Member State from enacting more stringent human rights laws); ECHR, *supra* note 11, art. 26, 213 U.N.T.S. at 238 (stating domestic remedies rule).

413. *Opinion 2/94*, [1996] 2 C.M.L.R. at 281-84, § VI, ¶ 1 (submission of Austrian Government).

414. CASTBERG, *supra* note 11, at 7.

415. *Opinion 2/94*, [1996] 2 C.M.L.R. at 281-84, at § VI, ¶ 1 (submission of Austrian Government). The Swedish Government considers that accession could only be incompatible if the Court of Human Rights failed to observe the binding character of the ECJ, thus undermining the legal order of the Community. *Id.*

416. *Id.*

417. *Opinion 2/94*, at § VI, ¶ 1 (submission of Belgian Government). The Italian Government, in its oral observations, also pointed out that the "judgments of the European Court of Human Rights do not have direct effect in the internal legal systems and cannot have the effect of declaring internal acts unlawful." *Id.*

418. *Id.* The German Government, in its submission to the Court of Justice, stressed, "[t]he sole obligation which the Convention would impose on the Community, namely a minimum level of respect, is within the limits laid down in Opinion 1/91 . . . . The German Government also refers to the fact that there is no personal link between the two courts." *Id.*

419. *Id.* The German Government "refers to the fact that there is no personal link between the two courts." *Id.*

420. See *id.* (referencing submission of Greek Government).

421. See EC Treaty, *supra* note 8, art. 171, [1992] 1 C.M.L.R. at 687 (requiring that Member States observe rules of ECJ); *supra* note 139 (quoting text of Article 171).

previously laid down.<sup>422</sup> In addition, the movement toward European unity necessarily entails the transfer of some state powers to the European Community.<sup>423</sup> Such a transfer requires that the Community be subject to the same control as the Member States that are contracting parties in order to restore the balance originally desired by EC Member States.<sup>424</sup>

#### 4. Need for Uniformity

As human rights laws and the law governing EC officials are areas of particular importance, the Austrian Government refers to the need for a uniform interpretation<sup>425</sup> of the ECHR by the European Community due to the continuing increase in the integration envisaged by the TEU.<sup>426</sup> Some scholars have suggested that European integration be placed on two tracks, one for those nations that are ready for complete European integration, and one for those that are not.<sup>427</sup> Regarding the concern

422. *Opinion 2/94*, [1996] 2 C.M.L.R. at 281-84, 278-79, § VI, ¶ 1.

423. *Id.* at 278-79, § V, ¶ 2 (observations of Italian Government).

424. *Id.*

425. See Weiler & Haltern, *supra* note 137, at 432 (describing danger of non-uniform laws). The danger of leaving a door open for Member States to have the final say on the competencies of the European Community becomes clear through a hypothetical situation, demonstrating how the results could directly contradict the purposes of the Treaties, including, according to Article 2, harmonious and balanced development, social cohesion, and solidarity among Member States. *Id.* Consider the following example:

State A, in the face of an unfavorable judicial decision, unilaterally abrogates Treaty provision X on the grounds that it is, in its eyes, *ultra vires*. The international law principle of reciprocity would mean that the particular obligation would cease to be operative between State A and States B-Z. This would result in a situation where the provision is applied among B-Z, but not in the relationships of B-Z and A. Imagine that State B abrogates on the same grounds for provision Y, and State C for provision Z, and so on. The result is a pragmatic nightmare and open-textured Treaties.

*Id.*

426. *Opinion 2/94*, [1996] 2 C.M.L.R. at 278-79, § V, ¶ 2; see WESTLAKE, *supra* note 2, at 390 (listing Member States and those that have applied for membership in European Community or have entered into agreements with European Union).

427. See O'Keeffe, *supra* note 8, at 37. This split is referred to as "variable geometry," which refers to the growing concern as to whether it is feasible to expect all, especially new Member States, to move toward European integration at the same speed. *Id.* For example, Germany, which leads the maximalist camp, wants to make the European Union more transparent and capable of absorbing new members. *Id.* German Foreign Minister Klaus Kinkel emphasized that European Integration should move forward, focusing partially on improving basic civil rights at the European Union level and further developing the concept of EU Citizenship in the Treaty of Rome. *Id.* The United Kingdom, in contrast, focuses on containment rather than reform. *Id.* The United King-

as to whether complete uniformity desired of European integration is feasible at all, supporters stress the need to focus on improving basic civil rights at the European Union level and further developing the concept of EU citizenship.<sup>428</sup>

Basic civil rights, such as the right to due process,<sup>429</sup> have developed on a case-by-case basis, which has resulted in gaps in EC human rights protection.<sup>430</sup> Such gaps may lead to a situation in which the European Community and the ECHR have divergent interpretations of the ECHR, and may present a case in which an individual's human rights are violated by EC law, yet the individual has no remedy against the European Community.<sup>431</sup> For example, similar violations of general principles of Community law might lead to different results in different Member States and EC institutions.<sup>432</sup> EC institutions have spoken against this result and have demonstrated increasing support for strengthening human rights laws.<sup>433</sup> This was largely in reaction to the 1974 *Solange I*<sup>434</sup> decision of the German Constitutional Court which held that absent a catalogue of fundamental rights

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dom opposed further increase in EC jurisdiction or any proposals that promote a federalized Europe and supports only the improvement of existing institutions. *Id.* Furthermore, the United Kingdom proposed that Member States not be required to pay damages to the European Union if, after a good faith effort, they fail to implement binding measures. White and Case European Union Report, Vol. 7 No. 2, June 1996, at 3-4.

428. *Id.*

429. U.S. CONST. AMEND. XIV, § 1 (providing that no State shall "deprive any person of life, liberty, or property, without due process of law."); see ANTHONY C. CICIA, Note, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 FORDHAM L. REV. 2241 (1996) (analyzing and criticizing modern due process jurisprudence).

430. Dominick, *supra* note 3, at 656-57.

431. *Opinion 2/94*, [1996] 2 C.M.L.R. at 278-79, § V, ¶ 2 (submission of Belgian Government).

432. See Stewart, *supra* note 72, at 43. "For example, in one Member State, but not in another, the consequences of infringement of employment rights might give rise to criminal liability; or the courts of one Member State may specifically enforce a right based on Community law whereas in another the remedy may lie in damages alone." *Id.*

433. See Dominick, *supra* note 3, at 652 (stating "[e]fforts by both the Commission and the Parliament to move forward [in strengthening human rights in the Community] have been thwarted by various Member States in the Council of Ministers, including France, Denmark, and the United Kingdom.").

434. *Solange I*, [1974] 2 C.M.L.R. 540. This decision came after, and largely in response to, the 1970 *Internationale Handelsgesellschaft* decision of the ECJ. See *Internationale Handelsgesellschaft mbH v. Einfuhr- und Futtermittel*, Case 11/70, [1970] E.C.R. 1125, [1974] 2 C.M.L.R. 540 (holding that Community law is supreme).

or a legislative power sufficient to balance EC institutions, German law was supreme over EC law in the human rights arena.<sup>435</sup> Supporters of accession impliedly rely on the U.S. concept of due process,<sup>436</sup> suggesting that EC civil and human rights constitutional laws should not remain fixed to only those provided for in the EC Treaty.<sup>437</sup>

### B. *The European Union Should Not Accede to the ECHR*

Nations that do not support EC accession to the ECHR rely on EC Treaty restrictions and the principle of subsidiarity which state that EC action is confined to the specific powers enumerated in the EC Treaty, of which accession to an international human rights organization is not one.<sup>438</sup> Another concern regarding EC accession to the ECHR involves institutional con-

435. Dominick, *supra* note 3, at 643. In *Solange I*, the German Constitutional Court held that so long as there neither existed a written catalogue of fundamental rights nor a viable legislative power sufficient to balance the other Community organs, German law would be considered superior to Community law in the area of human rights. *Id.* The ECJ expressly rejected this view in *Internationale Handelsgesellschaft*, [1974] 2 C.M.L.R. 540.

436. See Cicia, *supra* note 429 (discussing due process).

437. *Wolf v. Colorado*, 338 U.S. 25 (1949) (holding that in prosecution in state court for state crime, Fourteenth Amendment does not permit admission of evidence obtained by unreasonable search and seizure). In the plurality opinion, Justice Frankfurter stated:

Due Process conveys neither formal nor fixed nor narrow requirements. It is the compendious expression for all those rights which the courts must enforce because they are basic to our free society. But basic rights do not become petrified as of any one time, even though, as a matter with human experience, some may not too rhetorically be called eternal verities. It is of the very nature of a free society to advance in its standards of what is deemed reasonable and right. Representing as it does a living principle, due process is not confined within a permanent catalogue of what may at a given time be deemed the limits or the essentials of fundamental rights.

To rely on a tidy formula for the easy determination of what is fundamentally right for purposes of legal enforcement may satisfy a longing for certainty but ignores the movements of a free society. It belittles the scale of the conception of due process. The real clue to the problem confronting the judiciary in the application of the Due Process Clause is not to ask where the line is once and for all drawn but to recognize that it is for the Court to draw it by the gradual and empiric process of 'inclusion and exclusion.' . . . This was the Court's insight when first called upon to consider the problem; to this insight the Court has on the whole been faithful as case after case has come before it since *Davidson v. New Orleans* was decided.

*Id.* at 27 (citations omitted).

438. EC Treaty, *supra* note 8, art. 3(b), [1992] 1 C.M.L.R. at 590; see *supra* note 77 (quoting text of Article 3(b) and defining Community competences).

cerns about EC involvement in the ECHR, the potential erosion of ECJ authority, and the threat to the autonomy of the EC legal order presented by accession.<sup>439</sup> According to states that reject the notion that the human rights protection in EC law is insufficient because the European Community is already bound by the ECHR, alternatives other than accession are more appropriate.<sup>440</sup>

### 1. The European Union Is Already Bound to ECHR Principles by Article F2 and Case Law

According to the Member State governments opposing EC accession to the ECHR, present EC law comprises a complete and sufficient system of remedies for the violation of an individual's human rights.<sup>441</sup> These nations argue that the ECJ has substantially incorporated the ECHR into the EC legal order and fully integrated it into the corpus of EC law.<sup>442</sup> Non-supporters of accession generally agree that the objectives of the TEU, including its preamble considerations of liberty, democracy, and respect for human rights, fundamental freedoms, and the rule of law,<sup>443</sup> are sufficiently guaranteed by present human rights law in the European Community.<sup>444</sup> They view accession as a possi-

439. *Opinion 2/94*, [1996] 2 C.M.L.R. at 281-86, § VI, ¶¶ 1-2.

440. *Id.*

441. *Id.* at 284-86, § VI, ¶ 2 (submission of Spanish Government).

442. *Id.* at 279-80, § V, ¶ 3 (submission of Portuguese, Spanish, and French Governments).

443. TEU, *supra* note 8, pmb., O.J. C 224/1, at 2 (1992), [1992] 1 C.M.L.R. at 725-26. In pertinent part, the Preamble confirms the EU Member States "attachment to the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law," and their desire "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions," and their desire "to enhance further the democratic and efficient functioning of the institution so as to enable them better to carry out, within a single institutional framework, the tasks entrusted to them . . . ." *Id.*

444. *Zuleeg, supra* note 7, at 632.

After *Solange II*, the standard of protection of fundamental rights by EC Courts has not been lowered. To the contrary, both the system of fundamental rights and their extent have been completed. The ECJ requires an effective judicial protection of fundamental rights. Co-operation between the ECJ with the national courts is mandated in the framework of preliminary rulings under Article 177 of the EC Treaty.

The system of protection of fundamental rights in the European Community closely resembles the German one, except for a catalogue in the constitution.

*Id.*; see *supra* note 128 (quoting text of EC Treaty Article 177).

ble affront to national sovereignty, to the autonomy of the EC legal order, and to the ECJ's monopoly of jurisdiction.<sup>445</sup> The French Government, for example, in its submissions to the ECJ, lists the fundamental rights enshrined by the ECHR, the protection of which the ECJ upheld.<sup>446</sup>

## 2. Accession to the ECHR Will Erode ECJ Authority and Undermine the Authority of the EC Legal Order

Not only do Member States opposing accession to the ECHR suggest that accession is not necessary in the context of the operation of the common market, but also they maintain that it will allow the ECHR control organs to interpret EC law and possibly trump the ECJ's power.<sup>447</sup> The Portuguese Government suggests that formal EU accession to the ECHR would amount to the ECHR interpreting EC law and making decisions regarding the competence of the European Community.<sup>448</sup> The Spanish Government specified articles of the ECHR that question the autonomy of the EC legal order.<sup>449</sup> Among these are Articles 24 and 25 of the ECHR,<sup>450</sup> establishing inter-State and individual petitions, Articles 32 and 46 of the ECHR,<sup>451</sup> conferring a binding character on the decisions of the ECHR, and Article 62 of the ECHR,<sup>452</sup> submitting all disputes between contracting parties concerning the interpretation or application of

445. *Opinion 2/94*, [1996] 2 C.M.L.R. at 279-80, § V, ¶ 3.

446. *Id.*

447. *Id.* at 284-86, § VI, ¶ 2.

448. *Id.* at 279-80, § V, ¶ 3 (submission of Portuguese Government).

449. *Id.* at 284-86, § VI, ¶ 2 (submission of Spanish Government).

450. ECHR, *supra* note 11, arts. 24, 25, 213 U.N.T.S. at 236-38; *see supra* notes 224, 225 (quoting text of ECHR Articles 24 and 25).

451. ECHR, *supra* note 11, arts. 32, 46, 213 U.N.T.S. at 221, 241-42, 246; *see supra* note 218 (quoting text of ECHR Article 32). Article 46 states:

1. Any of the high Contracting Parties may at any time declare that it recognizes as compulsory *ipso facto* and without special agreement the jurisdiction of the Court in all matters concerning the interpretation and application of the present Convention.

2. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain of the High Contracting parties or for a specified period.

3. These declarations shall be deposited with the Secretary-General of the Council of Europe who shall transmit copies thereof to the High Contracting Parties.

ECHR, *supra* note 11, art. 46, 213 U.N.T.S. at 221.

452. ECHR, *supra* note 11, art. 62, 213 U.N.T.S. at 221, 250; *supra* note 408 (quoting text of ECHR Article 62).

the ECHR to the means of settlement laid down therein.<sup>453</sup> Additionally, to Member States opposing accession, accession would undermine the supremacy of the ECJ and its monopoly of jurisdiction.<sup>454</sup> The Spanish Government also noted ECHR articles that arguably call into question the supremacy of the ECJ, including Article 45 of the ECHR,<sup>455</sup> conferring jurisdiction on the CHR over the interpretation and application of the ECHR, Article 52 of the ECHR,<sup>456</sup> regarding the finality of the decisions of the CHR, Article 53 of the ECHR,<sup>457</sup> obliging the contracting parties to abide by judgments of the CHR, and Article 54 of the ECHR,<sup>458</sup> vesting the Committee of Ministers with a duty to supervise the execution of judgments. The Spanish Government suggests that all of the above-mentioned articles are incompatible with Article 219 of the EC Treaty<sup>459</sup> and the ECJ would examine the legality of EC law in the light of the ECHR, thus impacting on its case-law.<sup>460</sup>

The Portuguese Government refers to the difficulty in devising ECHR control machinery to accommodate EC participation in the ECHR.<sup>461</sup> Accession to the ECHR itself would raise institutional questions regarding the ECHR bodies.<sup>462</sup> The ECHR and its protocols would have to be amended because it is only open to membership by individual states and the Council of Eu-

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453. *Opinion 2/94*, [1996] 2 C.M.L.R. 284-86, § VI, ¶ 2 (submission of Spanish Government).

454. *Id.*

455. ECHR, *supra* note 11, art. 45, 213 U.N.T.S. at 246; *see supra* note 176 (quoting text of ECHR Article 45).

456. ECHR, *supra* note 11, art. 52, 213 U.N.T.S. at 248; *see supra* note 192 (quoting ECHR Article 52).

457. ECHR, *supra* note 11, art. 53, 213 U.N.T.S. at 248.

458. *Id.* art. 54, 213 U.N.T.S. at 248; *see supra* note 209 (quoting ECHR Article 54).

459. EC Treaty, *supra* note 8, art. 219, [1992] 1 C.M.L.R. at 710; *see supra* note (explaining content of Article 219).

460. *Opinion 2/94*, [1996] 2 C.M.L.R. at 284-86, § VI, ¶ 2 (submission of Spanish Government).

461. *Id.* at 279-80, § V, ¶ 3 (submission of Portuguese Government).

462. *Id.* at 270, § I, ¶ 6. Accession to the ECHR itself would raise institutional questions. *Id.* Not only would the ECHR and its Protocols have to be amended, as it is only open to membership by individual states and the Council of Europe, which the European Community does not propose to join as entity, but the control machinery of the Convention, which presently provides only for intervention by the Council of Europe and Member States, must be amended to provide for appropriate Community power. *Id.*

rope.<sup>463</sup> Additionally, the control machinery of the ECHR, which presently provides only for intervention by the Council of Europe and contracting parties, would have to be amended to provide for appropriate EC control in its power structure.<sup>464</sup> Other Member States opposing accession have also noted that the ECHR, at present, is not equipped to deal with the accession of the European Union.<sup>465</sup> It would be necessary to establish machinery for determining the entity responsible for violation of the ECHR's orders and to provide for EC participation in the ECHR's control bodies, particularly the CHR.<sup>466</sup>

Member States not supporting accession also question the ECHR requirement of prior exhaustion of domestic remedies before an alleged violation is considered and argue that this requirement would force the ECJ to widen its access to the preliminary-reference procedure.<sup>467</sup> This procedure, found in Article 177 of the EC Treaty, specifies circumstances over which the ECJ has jurisdiction.<sup>468</sup> It is argued that, in order to fulfill the ECHR requirement of exhaustion of domestic remedies,<sup>469</sup> the ECJ

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463. *See id.* (stating that European Community does not propose to join Council of Europe).

464. *Id.* at 279-80, § V, ¶ 3 (arguing that control organs of ECHR cannot accommodate European Community participation).

465. *Id.*

466. *Id.*

467. *Id.* EC Treaty Article 177 sets forth the preliminary rulings procedure to which the French Government refers and states:

The Court of Justice shall have jurisdiction to give preliminary rulings concerning:

- (a) the interpretation of this Treaty;
- (b) the validity and interpretation of acts of the institutions of the Community;
- (c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Where such a question is raised before any court or tribunal of a Member-State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgement, request the Court of Justice to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a member-state, against whose decisions there is not judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.

EC Treaty, *supra* note 8, art. 177, [1992] 1 C.M.L.R. at 689.

468. *Id.*

469. ECHR, *supra* note 11, art. 26, 213 U.N.T.S. at 238; *see supra* note 206 (quoting text of Article 26). Before a petition is admissible to apply for judgment of the Court of Human Rights, all internal remedies, including the Community's internal courts and

might have to expand such jurisdiction, potentially leading to an overload of cases in the ECJ.<sup>470</sup>

### 3. The Principle of Subsidiarity Suggests that Human Rights Issues are Better Dealt with at a Local Level

Member States opposing accession to the ECHR rely on the principle of subsidiarity which states that EC institutions should not govern actions that are better approached by individual Member States.<sup>471</sup> The principle of subsidiarity has been elevated to the rank of a constitutional principle in the European Community.<sup>472</sup> Under the principle of subsidiarity, the European Community shall act within the limits of the powers conferred upon it by the EC Treaty and of the objectives assigned to it.<sup>473</sup> All actions taken under the EC Treaty are subject to this general principle.<sup>474</sup> In areas that do not fall within exclusive EC competence, the European Community shall take action, in accordance with the principle of subsidiarity, only if the objectives of the proposed action cannot be sufficiently achieved by the Member States and can, therefore, by reason of the scale or effects of the proposed action, be better achieved by the European Community.<sup>475</sup> In other words, EC action shall not go beyond what is necessary to achieve the specified objectives of the EC Treaty.<sup>476</sup> The Finnish Government,<sup>477</sup> although conceding that accession is necessary when considering the need to strengthen the social aspect of the EC Treaty, stated that the principle of subsidiarity and the new bases of competence laid down in the SEA<sup>478</sup> have restricted the scope of Article 235.<sup>479</sup>

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particularly the Court of Justice, must first have been exhausted. ECHR, *supra* note 11, art. 26, 213 U.N.T.S. at 238.

470. *Opinion 2/94*, [1996] 2 C.M.L.R. at 279-80, § V, ¶ 3.

471. *See supra* note 77 (defining concept of subsidiarity).

472. BORCHARDT, *supra* note 9, at 28.

473. O'Keefe, *supra* note 8, at 18.

474. *Id.*

475. *Id.*

476. *Id.*

477. *Opinion 2/94*, [1996] 2 C.M.L.R. at 278-79, § V, ¶ 2.

478. *See SEA*, *supra* note 8, pmbl., O.J. L 169/1, at 4 (1987), [1987] 2 C.M.L.R. at 741 (listing new bases of competence laid down in SEA). In pertinent part, the Preamble states:

[The Community is] [d]etermined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member-States, in the Convention for the Protection of Human

In accordance with this principle, a Member State is and must continue to be the highest authority on national soil.<sup>480</sup>

#### 4. Proposed Alternatives to Acceding to the ECHR

Those nations that reject accession to the ECHR as an option to correct the EC human rights deficiency suggest alternatives other than accession to the ECHR.<sup>481</sup> The French suggest that it would be easier to amend the second paragraph of Article 173 of the EC Treaty which grants the ECJ jurisdiction to hear actions by only Member States, the Council, or the Commission,<sup>482</sup> to also enable individuals to challenge EC acts affecting their fundamental rights, rather than accede to the ECHR.<sup>483</sup> Another proposed alternative to EC accession to the control machinery of the ECHR is the creation of an EC Bill of Rights to enumerate human rights to be protected in the European Community.<sup>484</sup> Additionally, Member States opposing accession suggest that the ECJ refer to the CHR in order to make preliminary rulings on the interpretation of the ECHR with respect to EC law and to rectify potential situations in which the ECJ and the CHR differ on interpretations of treaties regarding human rights,

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Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice, Convinced that the European idea, the results achieved in the fields of economic integration and political co-operation, and the need for new developments correspond to the wishes of the democratic peoples of Europe, for whom the European Parliament, elected by universal suffrage, is an indispensable means of expression, Aware of the responsibility incumbent upon Europe to aim at speaking ever increasingly with one voice and to act with consistency and solidarity in order more effectively to protect its common interests and independence, in particular to display the principles of democracy and compliance with the law and with human rights to which they are attached, so that together they may make their own contribution to the preservation of international peace and security in accordance with the undertaking entered into by them within the framework of the United Nations Charter . . . .

*Id.*

479. See *supra* note 21 and accompanying text (quoting EC Treaty Article 235 in full).

480. Zuleeg, *supra* note 7, at 6.

481. *Opinion 2/94*, [1996] 2 C.M.L.R. at 279-80, § V, ¶ 1.

482. EC Treaty, *supra* note 8, art. 173, [1992] 1 C.M.L.R. at 687-88; see *supra* note 132 (quoting text of EC Treaty Article 173).

483. *Opinion 2/94*, [1996] 2 C.M.L.R. at 279-80, § V, ¶ 3.

484. Dominick, *supra* note 3, at 639, 642-43, 668 n.10 (relying on statement of Parliament, regretting that "the Charter has not been embodied in Community law by means of binding instruments.") (citing Doc. A 3-69/89, ¶ 2, O.J. C 323/44, at 45 (1989)).

rather than allowing the CHR to directly rule on issues concerning EC law.<sup>485</sup>

### III. THE TREATIES MUST BE AMENDED TO ACCOMMODATE EUROPEAN COMMUNITY ACCESSION TO THE ECHR

The European Community should amend the EC Treaty to allow for accession to the ECHR so that the European Community, along with its Member States and institutions, will be held accountable consistently for human rights violations.<sup>486</sup> This solution to the human rights deficiency in the European Community would more immediately provide protection to EU citizens than an EC Bill of Rights,<sup>487</sup> and would demonstrate that the European Community should adapt progressively along with history in order to protect its people.<sup>488</sup> EC accession to the ECHR is entirely consistent with ideals expressed by EC law and EC institutions.<sup>489</sup> Because a system could be developed to allow for EC participation in the framework of the ECHR, accession would present no threat to the EC legal order.<sup>490</sup> Furthermore, EC accession to the ECHR would encourage continued growth of the European Community.<sup>491</sup>

#### A. Amendment of the EC Treaty

The ECJ's holding that present EC powers do not provide for accession to an international institution such as the ECHR<sup>492</sup> does not lead to the conclusion that accession is unnecessary,

485. *Opinion 2/94*, [1996] 2 C.M.L.R. at 279-80, at § V, ¶ 3 (submission of Portuguese Government).

486. See *Internationale Handelsgesellschaft*, [1974] 2 C.M.L.R. at 540 (discussing term democratic deficit).

487. VENABLES, *supra* note 166, at 29. "It might have been expected that in introducing the concept of European citizenship, the Treaty would have made a clearer commitment to the Community adhering to the Council of Europe Convention, perhaps as a first step toward a Community Bill of Rights as the European Parliament proposed." *Id.*

488. See *supra* note 437 and accompanying text (describing progressive concept of due process).

489. See *supra* notes 260-61 (discussing references of EC law to human rights); *supra* note 248 (discussing EC reliance on ECHR's principles).

490. See *supra* notes 414-18 and accompanying text (presenting suggestions for EC participation in ECHR and solutions for jurisdictional issues).

491. See CASTBERG, *supra* note 11, at 5 (suggesting that focusing on human rights protection in European Community will contribute toward greater unity between Member States).

492. See *Refugee*, *supra* note 219 (discussing requests to U.N. organs and agencies to

nor does it signify that accession is undesirable. The ECJ's holding simply means that the European Community must follow an alternative route, namely amending the EC Treaty, to allow for accession. The European Community should change with the times<sup>493</sup> and emphasize the protection of EU citizens by instituting an EC Treaty amendment to allow for Community accession to the ECHR.

The achievements of the European Community should serve as incentives to improve those areas in which it has shortcomings. Although the EC Treaty does not provide for enumerated Community human rights protection, the European Community should nonetheless recognize this imperfection<sup>494</sup> and amend the EC Treaty to allow for EC accession to the ECHR. Although the ECJ has established that accession is presently beyond the limits established by Articles 228<sup>495</sup> and 235<sup>496</sup> of the EC Treaty, and could only be achieved by an EC Treaty amendment, it is clear that the component parts of the European Community, the Member States, and EC institutions, intend to adhere to the principles enumerated in the ECHR. The European Community must, therefore, amend the EC Treaty to allow for such accession.

A Treaty amendment providing for EC integration into the institutional system of the ECHR would formally incorporate ECHR regulations into Community law. While the concerns of those nations that do not support accession<sup>497</sup> should be recog-

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intensify their contributions to system-wide efforts to promote and protect human rights in light of fiftieth anniversary of Universal Declaration of Human Rights).

493. *Id.*

494. BORCHARDT, *supra* note 9, at 26.

[T]he Treaties did not map out any coherent scheme for a future common social policy. This was because there were major differences within the Community from the outset over whether the establishment of the common market required the broad alignment of social security costs or whether in practice it would inevitable bring the Member States' social security arrangements into line with one another eventually creating a Community social identity. Experience soon showed that the economic mechanisms of the common market did not automatically lead to social progress and full employment . . . eventually this policy approach had to be overhauled . . . .

*Id.*

495. EC Treaty, *supra* note 8, art. 228, [1992] 1 C.M.L.R. at 715; *see supra* note 19 (quoting text of Article 228).

496. EC Treaty, *supra* note 8, art. 235, [1992] 1 C.M.L.R. at 716; *see supra* note 21 (quoting text of Article 235).

497. *See Opinion 2/94*, [1996] 2 C.M.L.R. at 284-86, at § VI, ¶ 2 (demonstrating that

nized, the positive results to be achieved and the intention of the European Community to be bound by the ideals of the ECHR overrides reservations regarding accession and demonstrates the importance of an amendment to rectify this democratic deficiency<sup>498</sup> in the EC Treaty.

B. *The European Community Should be Progressive in Promoting and Protecting Human Rights*

The progression toward European unity can follow the lead of the Supreme Court of the United States<sup>499</sup> which stated that due process is not confined within a permanent catalogue of what may be, at a given time, the limits of protected, fundamental rights.<sup>500</sup> Similarly, the conception of human rights by the European Community must also move forward over time, for it is the very nature of a free society to advance its standards of what is reasonable and right.<sup>501</sup> The Commission protects the common interest of all members of the Council of Europe with respect to and in the enforcement of ECHR provisions.<sup>502</sup> When the Commission appears before the ECJ, it is to perform that task rather than to defend the interests of an individual applicant.<sup>503</sup> The ECHR, therefore, is more a vehicle for ensuring the rights of a society than the rights of particular individuals.<sup>504</sup>

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opinions expressed by Member States of European Community demonstrate separation between those states willing to relinquish more sovereign powers to EU and those less willing, or not willing at all, to do so).

498. See *Internationale Handelsgesellschaft*, [1974] 2 C.M.L.R. at 255 (discussing term democratic deficit).

499. BORCHARDT, *supra* note 9, at 6. "Indeed it was an American initiative that led to the founding of the first postwar European organization in 1948. The US Secretary of State, George Marshall, called on the countries of Europe to pool their efforts for economic reconstruction and promised American aid in return (which eventually took shape as the Marshall Plan)." *Id.*

500. See *supra* note 437 and accompanying text.

501. BORCHARDT, *supra* note 9, at 6.

502. See FAWCETT, *supra* note 74, at 271 (noting that some scholars have considered ECHR to be organ of Council of Europe). The Committee of Ministers of the Council of Europe elect the members of the ECHR, and the expenses of the ECHR are borne by the Council of Europe and its secretariat. *Id.* ("It does seem in fact advisable to attach the Commission from an administrative point of view, to the council of Europe," demonstrating early connection of Convention to institutions of Europe) (citing Report of Committee of Experts).

503. FAWCETT, *supra* note 74, at 269.

504. *Id.*

This is consistent with the newly placed emphasis on EU citizenship and, indeed, would further promote this goal.

Because the extent of EC growth and the challenges it presents to traditional EC institutions and procedures were not envisioned by the founders of the European Community, the original treaties establishing the Communities omitted such protection of human rights.<sup>505</sup> As the movement toward unity focuses on Europe as a single entity rather than as individual states, the progression toward EC accession to the ECHR is natural and necessary.<sup>506</sup> EC law confers rights on its Member States which become parts of their legal heritage.<sup>507</sup> Accordingly, EC accession to the ECHR would make human rights an inseparable part of EC legal heritage.

### C. Accession to the ECHR is a More Immediate Solution Than Adopting an EC Bill of Rights

While such bonds could be achieved by drafting an EC Bill of Rights,<sup>508</sup> an argument for accession to the ECHR does not preclude this possibility. Rather, accession is a necessary step<sup>509</sup> to attaining a future EC Bill of Rights.<sup>510</sup> European States, while desiring the benefits of European unity, are reluctant to relinquish their national sovereignty.<sup>511</sup> A rush to draft a binding Bill of Rights likely would ignite opposition in response to any resignation of national sovereignty<sup>512</sup> because Member States would have to bargain in order to agree regarding an area traditionally governed by national regulations. This might spark age-old rival-

505. Rasmussen, *supra* note 74, at 150 ("A caveat is necessary: I do not profess that things, competences included, should be frozen in the shape they were given at the outset.").

506. *Opinion 2/94*, [1996] 2 C.M.L.R. at 278, § V, ¶ 2.

507. *See supra* note 131 and accompanying text.

508. Dominick, *supra* note 3, at 642; *see* David Edward, *Constitutional Rules of Community Law in EEC Competition Cases*, 13 *FORDHAM INT'L L.J.* 111 (1990) (comparing Community's lack of codified rights with U.S. Bill of Rights); Rasmussen, *supra* note 74, at 135-36 (comparing EC Treaty to constitutional text).

509. *See supra* note 487 and accompanying text (suggesting that accession to ECHR may be first step in direction of EC Bill of Rights).

510. Dominick, *supra* note 3, at 646.

511. *See* Zuleeg, *supra* note 7, at 623 ("The purpose of European integration is to prevent the evils of nationalism."). The success of total European integration depends on the willingness of Member States to renounce their traditional concepts of sovereignty. *Id.*

512. *EC BULL.* 2/79, *supra* note 401.

ries between Member States and impede the successful and timely attainment of a Bill of Rights.<sup>513</sup>

Arguments regarding what rights to protect and what penalties to impose for their violation, would be less likely to arise in the case of accession, as the ECHR is already established and such decisions have already been made.<sup>514</sup> Although the ECHR must undergo institutional changes to accommodate EC participation,<sup>515</sup> the transition into an institutional framework of explicit, invocable, and directly effective human rights and protections would be easier than drafting an EC Bill of Rights.<sup>516</sup> Human rights are not tangential issues to be addressed only when Member States and the European Community agree on constitutional structures. Such agreement is a goal for which the European Community should strive, because human rights forms the foundation of modern, international society.<sup>517</sup> Accession to the ECHR is the best solution, whether viewed as the ends itself, or as the means towards achieving EC agreement on constitutional issues with hopes of drafting an EC Bill of Rights.

*D. The Community has Already Embraced the ECHR's Principles, Therefore, Accession is Consistent with EC Ideals.*

Article F of the TEU<sup>518</sup> relies on the guaranteed protection

513. WESSMAN, *supra* note 187, at 8 ("It is doubtful whether the necessary agreement could be reached in the foreseeable future . . . . If it were not to do so then . . . acce[ssion] to the European convention would appear to be sufficient.") (citing P.J.G. KAPTEYN & P.V. VAN THERMAAT, *INTRODUCTION TO THE LAW OF THE EUROPEAN COMMUNITIES* 169 (2d ed. 1989)); see WESTLAKE, *supra* note 2, at 390 (noting fear of war as factor behind European integration).

514. See *Opinion 2/94* [1996] 2 C.M.L.R. at 269, at § I, ¶ 2 (recognizing that text of ECHR is known and legal issues to which accession gives rise are sufficiently clear). *But see supra* notes 461-66 and supporting text (noting that control organs of ECHR would have to be revised to accommodate Community accession).

515. *Id.*

516. See *id.* at 270 § I, ¶ 10 (emphasizing that ECHR and CHR have no direct effect on European Community at present).

517. See BORCHARDT, *supra* note 9, at 80 (stating that "unity is the only sure way to create and preserve peace, freedom and prosperity in Europe," and in achieving this unity European Community must focus on human rights and freedoms, which are inseparable from this worthy goal).

518. TEU, *supra* note 8, art. F, ¶ 2, O.J. C 224/1, at 6 (1992), [1992] 1 C.M.L.R. at 728. "The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law." *Id.*

of human rights that the ECHR establishes, which demonstrates that the European Community has already embraced the ECHR's principles. The ECHR's principles, therefore, are consistent with those suggested in EC law,<sup>519</sup> rather than in conflict with them, and do not challenge the autonomy of the EC legal order. Furthermore, many Member States and EC institutions have already accepted the ECHR's principles,<sup>520</sup> and EC law relies on them.<sup>521</sup> The ECJ itself has suggested that the need for human rights protection is demonstrated in ECJ and ECHR case law.<sup>522</sup> EC accession to the ECHR would satisfy this need for comprehensive human rights protection and is consistent with EC goals.

Non-supporters of accession suggest that EC implied reliance on the ECHR is sufficient to protect human rights. Present case law, however, gives no guidance as to what rights are protected and what remedies exist for human rights violations.<sup>523</sup> EC references to common constitutional principles and traditional practices are not helpful because the ECJ selectively distills common practices from some Member States. Even then, this only provides vague guidelines for human rights protection.<sup>524</sup> Additionally, this reliance on Member States' common traditions results in the adoption of the lowest common denominator for EC human rights protection. This protection of fundamental rights<sup>525</sup> does not change the status quo with regard to vague EC reliance on the ECHR<sup>526</sup> and is not an adequate assertion of the rights that require protection.<sup>527</sup>

The provisions of TEU Article F(2) do not add significantly to the already weak EC protection of human rights.<sup>528</sup> This is partly because the enforcement of such rights could depend on an individual applicant being an EC national.<sup>529</sup> In contrast, the

519. *See id.* (demonstrating consistency of ECHR with EC law).

520. *See supra* notes 392-406 and accompanying text (demonstrating EC support of ECHR enumerated fundamental rights).

521. *See supra* note 260-61 and accompanying text (noting references to human rights in EC law).

522. *Opinion 2/94*, [1996] 2 C.M.L.R. at 270, § I, ¶ 8; *Id.* at 281-84, § VI, ¶ 1.

523. *COMMUNITY METHODS*, *supra* note 17, at 16-17.

524. *Id.*

525. *See supra* note 252 (describing origin of general principles of EC law).

526. *VENABLES*, *supra* note 166, at 29-30.

527. *COMMUNITY METHODS*, *supra* note 17, at 16.

528. *VENABLES*, *supra* note 166, at 30; *see id.* at 29 (discussing Article F(2)).

529. *Id.*; *see supra* notes 392 (referencing European citizenship).

rights of the ECHR are universal, and are granted to anyone within the jurisdiction of a contracting party, regardless of his or her nationality.<sup>530</sup>

*E. Accession To The ECHR Will Not Jeopardize EC Power*

The ECJ has already held that the European Community may commit to an international institution, as long as such submission does not challenge the autonomy of the Community legal order.<sup>531</sup> In the case of EC accession to the ECHR, there is concern as to whether such a holding would apply in a situation where the compatibility of EC law and the international agreement is at issue.<sup>532</sup> This concern is unwarranted, however, because EC law encompasses the general principles of the ECHR, rather than conflicting with them.<sup>533</sup> The case law of the ECHR already influences that of the ECJ<sup>534</sup> which argues strongly in favor of accession being compatible with the EC Treaty.<sup>535</sup>

Member States that both support and reject EC accession to the ECHR have agreed that their constitutional principles, the principles of EC law, and the principles of the ECHR are compatible and, therefore, amendment allowing for accession does not question the supremacy of EC law.<sup>536</sup> Parliament already has recognized that the ability to bring a direct action before an international court in examining the compatibility of an EC act with human rights was of utmost importance and it did not question the ECJ's competence in EC law issues.<sup>537</sup>

*F. Because it is not a Signatory Party to the ECHR, the European Community May Violate Human Rights*

The potential of EC threats to human dignity could present a grave situation in the human rights arena.<sup>538</sup> Because of the

530. VENABLES, *supra* note 166, at 14.

531. See *Opinion 1/91*, [1991] E.C.R. at I-6079.

532. *Opinion 2/94*, [1996] 2 C.M.L.R. at 274, § II ¶ 10.

533. See *supra* notes 393-406 and accompanying text (discussing similarities between ECHR and EC law).

534. See *supra* note 518 and accompanying text (demonstrating ECHR's influence on EC law).

535. *Opinion 2/94*, [1996] 2 C.M.L.R. at 283, § VI, ¶ 1 (argument of Danish government).

536. *Id.*

537. *Id.*

538. COMMUNITY METHODS, *supra* note 17, at 9-10.

far reach of EC institutions, their actions have the potential to be equally as devastating as they are positive.<sup>539</sup> In the past, the European Community has been concerned with the protection of economic rights.<sup>540</sup> It should now turn to the social needs of its citizens and ensure their protection at the EC institutional level in addition to national levels.<sup>541</sup>

Because full integration encompasses many institutional changes, both at the EC and Member State level, deadline variations<sup>542</sup> for accession requirements may be necessary for aspiring Member States, particularly regarding economic growth.<sup>543</sup> Certain matters, however, must not be negotiable<sup>544</sup> in the promotion of human rights and fundamental freedoms because such protection is at the heart of a united, functional European Community.<sup>545</sup> Potential EC violations of human rights would undermine the stressed importance of human rights protections in the European Community.

Although the principle of equality is an essential element of EC law,<sup>546</sup> equality will not be achieved if some Member States belong to the ECHR and are held to a higher standard of human rights protections, while the European Community is merely held to a vague standard of human rights protection.<sup>547</sup> Everyone affected by the actions of EC institutions must be treated equally.<sup>548</sup> This, however, is not the case. The ECJ is bound to draw from Member States' common constitutional traditions,<sup>549</sup> and may not uphold measures that are incompatible with the EC Treaty<sup>550</sup> which presents an obstacle to legal uniformity in

539. *Id.*

540. *Id.*

541. *Id.*

542. See *supra* note 427 and accompanying text (discussing deadline variations, termed variable geometry).

543. O'Keeffe, *supra* note 8, at 39.

544. *Id.*

545. See *Refugee*, *supra* note 219 (stating "[h]uman rights and fundamental freedoms . . . [are] the only sure foundation for stability and long-term economic development.").

546. Zuleeg, *supra* note 7, at 634-35.

547. See *supra* note 274 and accompanying text.

548. Zuleeg, *supra* note 7, at 634-35.

549. See *supra* note 248 and accompanying text (listing bases for EC law).

550. See *supra* notes 148-55 (explaining supremacy of EC law and conflicts of laws with Member States and European Community).

human rights and other laws.<sup>551</sup>

The potential inconsistency in the determinations of the ECJ and the CHR could result in Member States applying different interpretations of human rights law, leading to a loss of continuity among EC Member States' national laws. Because the European Community relies on Member States to implement its policies,<sup>552</sup> Member States' viewpoints affect EC standards.<sup>553</sup> The assumption that EC conduct will never violate citizens' rights, therefore, conflicts with the constitutional reality of the constituent EC parts.<sup>554</sup> Additionally, as compared to treaties and internal national law, EC law is favored by bonds of law that are stronger than in other international organizations.<sup>555</sup> The protection of fundamental rights, therefore, would be most effective at the EC level.

The Holocaust did not begin in the gas chambers. Rather, like the present situation in Estonia and Latvia, it began with race laws and the segregation of specific peoples.<sup>556</sup> It is this type of devastation that the European Community must prevent. Although the European Community impliedly relies on the ECHR,<sup>557</sup> Europe's jaded past demonstrates that it must signify a greater attachment to its values by amending the EC Treaty and becoming a Contracting Party of the ECHR itself.<sup>558</sup>

The fight against racism and intolerance is an inseparable part of Europe's history and continues to be a worthy and neces-

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551. BERMANN, ET AL., *supra* note 8, at 145.

552. See *supra* notes 91-94 and accompanying text.

553. BERMANN, ET AL., *supra* note 8, at 166.

554. Dominick, *supra* note 3, at 668.

555. See *supra* note 139 and accompanying text (stating supremacy of EC law).

556. Douglas Broome, *Why We Still Have Genocide: The Nazis Weren't the Last to Practice Mass Slaughter, Although They Should Have Been*, VANCOUVER SUN, Nov. 23 1996, at F11 [hereinafter *Genocide*].

The patterns repeat. In May 1992, Natasa Komljenovic graduated from high school in Prijedor, Bosnia, but the young artist was a Croat in a Serb-dominated town. That summer, the Croats were forced to wear identifying armbands and banned from public facilities and stores, a pattern set in Nazi Germany.

*Id.*

557. See *supra* note 248 and accompanying text (stating reliance of EC law on ECHR).

558. See *supra* notes 517-45 and accompanying text (suggesting necessity of accession due to firm basis of human rights in continued stability and growth).

sary struggle.<sup>559</sup> Even in the wake of the devastation of World War II,<sup>560</sup> Europe realized its own weakness<sup>561</sup> and demonstrated that irreconcilable enemies could work together to achieve the common goal of future European unity.<sup>562</sup> The European Community should continue to pursue this goal and should not fear a change of constitutional significance, for it is only by reassuring the protection and importance of human rights that the European Community can achieve complete peace and unity.<sup>563</sup>

While EC law incorporates some of the principles of the ECHR and requires EC institutions to apply those principles, there is no institutional framework to which the European Community itself is accountable. It is inconsistent that because the European Community is not a member of the ECHR, it has greater leeway in the infringement of human rights than individual Member States.<sup>564</sup> Human rights violations can and do occur in civilized, democratic societies. Neither EC Member States, states awaiting membership, nor the European Community itself, should be able to hide behind a veil of state sovereignty, the principle of solidarity,<sup>565</sup> or a shroud of secrecy to justify denying citizens comprehensive protection of their human rights.

#### G. *The European Community Can Participate Fully in the ECHR's Institutional Framework*

Amendment of the EC Treaty to permit the European Community to accede to the ECHR presents questions regarding the composition of the CHR and its jurisdiction with respect to EC

559. See *supra* note 55 (noting importance European Community places on eliminating discrimination).

560. O'Keeffe, *supra* note 8, at 2.

561. BORCHARDT, *supra* note 9, at 5.

562. O'Keeffe, *supra* note 8, at 2.

563. See CROSSROADS, *supra* note 319, at 1 (stating that denial of human rights is historically at heart of conflict).

564. *Opinion 2/94*, [1996] 2 C.M.L.R. at 278-79, § V, ¶ 2. The Belgian Government stresses the need to avoid divergent interpretations in EC case-law and that of the organs of the Convention. *Id.* It notes that the "system of remedies in Community law, which excludes actions for annulment by an individual in respect of an act that is not of direct and individual concern to him, affords less protection than that of the Convention" and the Member States that belong to the Convention. *Id.* This is a democratic deficit, referring to the lack of a catalogue of European constitutional law, similar to the Bill of Rights in the United States. *Id.*; see *Internationale Handelsgesellschaft*, [1974] 2 C.M.L.R. 540 (discussing term "democratic deficit"); Edward, *supra* note 508, at 119-20 n.45.

565. *U.N. Draft*, *supra* note 322.

and national affairs.<sup>566</sup> These concerns, however, are unsurmountable. At present, the ECHR is not equipped to incorporate the European Community into its organizational structure. Member States, however, have suggested ways in which the European Community could participate in the ECHR control bodies, particularly the CHR, that would require little restructuring on the part of both the European Community and the ECHR.<sup>567</sup>

Suggestions for EC participation in the CHR include the CHR appointment of no judge from the European Community,<sup>568</sup> the appointment of a judge of special status to vote only on EC matters,<sup>569</sup> and the appointment of a permanent EC judge with the same status as other judges.<sup>570</sup> This last suggestion appears to grant the European Community the most influence, yet it would still participate on an equal level with other contracting parties. In order to deal with the separation of institutions, the ECHR should appoint the judge to the CHR who could not be a member of the ECJ at the same time.<sup>571</sup> The selection of candidates for this judicial position would be an internal EC matter in which the ECHR could not interfere.<sup>572</sup> This participation would allow the European Community to be actively involved in the control of the CHR.

Additionally, the Council of Europe raised the question of whether EC accession to the ECHR, particularly to the CHR, places in question both the exclusive jurisdiction the ECJ enjoys<sup>573</sup> and the autonomy of the EC legal order.<sup>574</sup> The CHR, however, is unable to repeal or amend a provision of national, or analogously, EC law and may only impose on a contracting party an obligation to bring about a certain result.<sup>575</sup> The European Community would be subjected to the same requirements. It is this obligation that Member States opposing accession question.

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566. *Opinion 2/94*, [1996] 2 C.M.L.R. at 269-70, § I, ¶ 6. Accession to the ECHR itself would raise institutional questions. *Id.*

567. *See supra* notes 414-18 and accompanying text (presenting suggestions for Community participation in ECHR and solutions for jurisdictional issues).

568. *Opinion 2/94*, [1996] 2 C.M.L.R. at 282-84, § VI, ¶ 1.

569. *Id.*

570. *Id.*

571. *Id.*

572. *Id.*

573. *See supra* notes 253, 409 (citing text of EC Treaty Articles 164 and 219).

574. *Opinion 2/94*, [1996] 2 C.M.L.R. at 270-71, ¶¶ 9-10.

575. *Refugee, supra* note 219.

The mere requirement of a specified outcome, however, is a minimal requirement and does not promote any particular methods of achievement. Furthermore, the European Community is no longer solely based on a common market.<sup>576</sup> It has evolved into a living organism, and all parts must work together in order for it to survive. Human rights are at the heart of this organism with human rights, implications flowing throughout its other controlling organs.<sup>577</sup>

#### H. *Accession to the ECHR Would Foster European Growth*

The commitment to broaden and deepen the European Community involves not only growth in membership, but also is inseparable from an increase in competences.<sup>578</sup> This growth is occurring in a period of heightened sensitivity to human rights.<sup>579</sup> Because human rights violations can and do occur in civilized, democratic societies,<sup>580</sup> as the European Union continues to grow and diversify, accession becomes more necessary. The aim of the Council of Europe is the achievement of greater unity between its Member States. One of the methods by which that aim must be pursued is the maintenance and further realization of human rights and fundamental freedoms.<sup>581</sup> The rights enumerated in the ECHR are common social values,<sup>582</sup> acknowledging many rights and freedoms already established in EC law, although not in a formal, legal form. The changing nature of the European Community requires that such rights be incorporated formally into the EC legal order.

Opponents of accession disfavor EC Treaty amendment to allow EC accession to the ECHR based on the principle of sub-

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576. See *supra* note 491 and accompanying text (suggesting that Member States will be comforted by accession to ECHR and formalized human rights protection).

577. See *supra* note 545 and accompanying text (stating that human rights form foundation for stability in modern nations).

578. See *supra* notes 159-62 and accompanying text (discussing EC competences).

579. *COMMUNITY METHODS*, *supra* note 17, at 3.

580. See *supra* notes 319-70 and accompanying text (describing human rights concerns in Europe); *U.N. Draft*, *supra* note 322. "[D]emocracy provide[s] the best defense for the human rights of the individual, . . . [h]owever, human rights violations [can] and [do] take place in democratic systems." *Id.* There is, therefore, an "urgent need to strengthen the international monitoring mechanism over the rule of international humanitarian law and other generally recognized standards in the field of human rights." *Id.*

581. *Id.*

582. *Opinion 2/94* at § VI, ¶ 1.

sidiarity<sup>583</sup> which limits EC competences.<sup>584</sup> EC competences, however, already have expanded to cover the extensive and growing reach of EC influence.<sup>585</sup> It would be inconsistent with such dramatic growth for the European Community not to demonstrate its own commitment to the protection of its citizens' human rights.<sup>586</sup> Considering the newly-placed emphasis on EC citizenship,<sup>587</sup> a failure to recognize human rights could undermine general, public support of European integration and potentially lead to nationalistic attitudes of the past.<sup>588</sup> This would be detrimental to the desire of a European group identity, at the heart of which lies the protection of human rights.<sup>589</sup>

The broadening and deepening of EC geography requires further growth in its competences. As EC competences increase, so do its duties, among which the protection of human rights is primary. Amendment of the EC Treaty to allow for accession to the ECHR would reflect this emphasis on European Community-wide protection of human rights and fundamental freedoms.

It is a misconception that the introduction of the European Community into the institutional system of the ECHR would encroach upon Member State and EC competences.<sup>590</sup> The introduction of EU citizenship has created a direct link between European integration and the people it is meant to serve.<sup>591</sup> This exemplifies only one of the many increases in EC competences in which the Member States have also fully participated.<sup>592</sup>

Protecting human rights is included in the responsibilities for which growth in EC competences calls.<sup>593</sup> Such protection at the EC level, which the ECHR could provide, would ensure EU citizens individual liberties, much like the attention given to rights in the economic and geographical spheres of the Euro-

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583. See *supra* note 77 and accompanying text (explaining principle of subsidiarity).

584. See *supra* note 478 (listing new EC competences).

585. COMMUNITY METHODS, *supra* note 17, at 2-3.

586. *Id.*

587. See *supra* note 392 (citing EU citizenship).

588. COMMUNITY METHODS, *supra* note 17, at 2.

589. *Id.* at 4.

590. *Id.* at 2.

591. BORCHARDT, *supra* note 9, at 64.

592. COMMUNITY METHODS, *supra* note 17, at 2.

593. *Id.* at 2-3.

pean Community.<sup>594</sup> This constitutionalized control of human rights protection is necessary in a period of rapid EU growth in other areas.<sup>595</sup>

Amendment of the EC Treaty to allow the European Community to accede to the ECHR would overcome a legal challenge caused, in part, by EC growth. The treaties establishing the European Community do no more than sketch out the rudimentary features of EC social protection.<sup>596</sup> The purpose of the Protocol<sup>597</sup> annexed to the TEU and to the treaties establishing the European Union was to close the door that the ECJ's interpretation of the EC Treaty<sup>598</sup> and their failure to focus on this important social dimension left open.<sup>599</sup> To account for this weak link in the EC Treaty, the Commission drew up social action plans that were then proposed to the Council.<sup>600</sup> Eventually, the Council passed a number of important directives, such as those to improve health and safety at work.<sup>601</sup> Later provisions were passed providing minimum levels of protection in Member States for migrant workers and providing for the equal treatment for men and women at work.<sup>602</sup> The sheer complexity of such decisions at the EC level hamper the emergence of the necessary steps towards integration, and demonstrate the greater effectiveness of the ECHR.<sup>603</sup> Moreover, this progression in law demonstrates prior EC actions addressing legal challenges that have arisen.

The human rights deficiency in the treaties establishing and regulating the European Community has been noted in the past. The changing nature of the European Community and increasing awareness of this problem, however, is forcing the European Community to make a decision regarding the regulation and protection of human rights in the European Community for the present and for the future.<sup>604</sup> The need for increased EC com-

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594. *Id.* at 2.

595. *Id.* at 3.

596. *Id.*

597. Weiler & Haltern, *supra* note 137, at 448 n.22.

598. *See id.* (relying on *SPUK v. Grogan*, Case C-159/90, [1991] E.C.R. I-4685).

599. BORCHARDT, *supra* note 9, at 64.

600. *Id.*

601. *Id.*

602. *Id.*

603. *Id.* at 79.

604. *See Refugee*, *supra* note 219 (discussing requests to U.N. organs and agencies to

petencies in the human rights arena should not be left to future leaders. This could potentially lead to the destruction of progress already made toward a unified Europe. In an era of international implementation of humanitarian law,<sup>605</sup> it is imperative that the European Community not fall behind the times. The European Community, therefore, should amend the EC Treaty and constitutionally recognize the ECHR through accession and formal incorporation of its principles.<sup>606</sup>

I. *Present Inconsistencies in Human Rights Laws Could Thwart Continued European Growth*

The strength of the bond created by the EC Treaty will be weakened by differing human rights laws among Member States.<sup>607</sup> Such inconsistency would impede the functioning of the EC system, place the goals of integration in peril,<sup>608</sup> and cause legal cohesion in the European Community to disintegrate.<sup>609</sup> Accordingly, concrete and uniform interpretation of human rights laws throughout the European Community has become a necessary base, without which the European Community could not continue to exist.<sup>610</sup>

European Community accession to the ECHR is the best solution to stop human rights violations, and will assist in inviting new Member States into the European Community by removing the potential for ambiguous legal guidelines and differing and difficult application of EC laws. EC law is supreme over conflicting national laws.<sup>611</sup> This doctrine of supremacy determines the relationship between the laws of Member States and directly applicable EC law.<sup>612</sup> Amendment of the EC Treaty to allow for EC accession to the ECHR would provide a solution for conflicting

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intensify their contributions to system-wide efforts to promote and protect human rights, in light of fiftieth anniversary of Universal Declaration of Human Rights (A/C.3/51/L.35)).

605. *Tribunal on former Yugoslavia brings accountability to Individuals, Part 1*, Nov. 26, 1996, available in WESTLAW, 1996 WL 13552847.

606. See *supra* notes 481-603 and accompanying text.

607. Zuleeg, *supra* note 7, at 624.

608. *Id.*

609. *Id.* at 10 (stating that it is challenge to avoid such outcome).

610. See *supra* notes 517, 545 and accompanying text (stating that human rights is at base of Community's foundation).

611. LASOK & STONE, *supra* note 170, at 21 (citing *Van Gend en Loos*, [1963] E.C.R. at 1, [1963] C.M.L.R. at 105).

612. *Id.* at 23.

laws because the requirement that directly applicable EC law is supreme would fully integrate the ECHR into both the EC legal order and Member States' constitutional laws. As the European Community continues to grow, it also must continue to overcome obstacles.<sup>613</sup> The lack of self-contained, enumerated human rights laws, such as are provided by the ECHR, presents such a challenge. An open door<sup>614</sup> in the human rights arena presents an especially dangerous situation, considering Europe's history of ethnic and political intolerance.

### CONCLUSION

The areas covered by existing EC laws must continue to expand with the geography of the European Community. When confronted with a situation such as a deficiency in human rights protection, the European Community should make the appropriate amendments to the EC Treaty to foster a smoother transition from distinct and isolated states, to a unified Europe with no internal frontiers. The European Community must take a necessary step to address, prevent, and punish violations of human rights at the EC level, and ensure consistent application and enforcement of violations against present and future Member States and EC institutions. Amendment of the EC Treaty to allow the European Community to accede to the ECHR is this necessary step and would provide an institutional framework that would encourage unity, peace, freedom, and prosperity in Europe. Such an amendment would involve EC Member States sacrificing certain traditional and arguably outdated ideals of sovereignty for a more lofty, progressive goal of complete European unity. EC accession to the ECHR would allow for crucial development in EC law and would provide the cohesive human rights legislation that the European Community needs in order to continue to grow and thrive economically, socially, responsibly, and consistently. The ECJ has determined that accession cannot occur under existing EC law. The EC Treaty, therefore, must be amended to permit European Community accession to the ECHR.

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613. See *supra* note 74 (discussing Intergovernmental Conference and suggesting further reform to EC laws and competences are necessary); LASOK & STONE, *supra* note 170, at 64 (discussing challenges European Community must meet).

614. See *supra* note 425 (presenting hypothetical in which states apply differing forms of EC law and danger of open-textured treaties).