

OPINION 2/94 OF THE COURT
28 March 1996

(Accession by the Community to the European Convention for the Protection
of Human Rights and Fundamental Freedoms)

The Court of Justice has received a request for an Opinion, lodged at the
Registry of the Court on 26 April 1994, from the Council of the European
Union pursuant to Article 228(6) of the EC Treaty, which provides:

‘The Council, the Commission or a Member State may obtain 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 N of the Treaty on
European Union.’

Summary

I - The request for an Opinion

1. The Council, represented by J.-C. Piris, Director-General of the Legal
Service, and J.-P. Jacqu , Director in the Legal Service, acting as Agents, 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 (hereinafter “the Convention”) be compatible with the Treaty establishing the European Community?’

2. According to the Council, no decision on the principle of opening negotiations can be taken until the Court has considered whether the envisaged accession is compatible with the Treaty.

In its oral observations, the Council, whilst recognizing that the text of the envisaged agreement does not yet exist, submits that the request is admissible. The Council has not committed a misuse of procedure but is confronted by fundamental issues concerning legal and institutional order. Furthermore, the convention to which the Community would accede is known and the legal issues to which accession gives rise are sufficiently clear for the Court to be able to give an Opinion.

3. The Council, setting out the aim and objectives of the agreement envisaged, states its position on the scope of accession, Community participation in control bodies and the modifications which would have to be made to the Convention and the Protocols.

4. 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.

5. With regard to Community participation in control bodies, in particular the future single Court of Human Rights, there are various possible solutions: no Community judge, appointment of a permanent judge with the same status as the other judges, or the appointment of a judge with special status, entitled to vote only in cases concerning Community law. That judge would not be a member of the Court of Justice at the same time. The procedure for appointing the judge would be governed by the Convention on the understanding that the appointment of candidates proposed by the Community would be an internal Community matter. Community participation in the Committee of Ministers would not be envisaged; the Committee would moreover no longer have any function in the future judicial framework.

6. It would be necessary to amend the Convention and the Protocols which are currently open to accession only by Member States of the Council of Europe. The Community does not propose to join the Council of Europe. It would similarly be necessary to modify the technical provisions providing for the Member States of the Council of Europe to intervene in the control machinery of the Convention. In the event of accession, the Community would be bound only within the limits of its powers. There would have to be machinery enabling the Community and the Member States to determine the division of competence before the Convention authorities.

7. In reviewing the conformity of accession with the Treaty, the Council considers the Community's competence to conclude the agreement envisaged and the compatibility of the system of courts under the Convention with Articles 164 and 219 of the Treaty.

8. The Council recognizes that the Treaty confers no specific powers on the Community in the field of human rights. Such rights are protected by way of general principles of Community law. The need for such protection, reaffirmed by the case-law, is now enshrined in Article F of the Treaty on European Union. The Council considers that the protection of human rights flows from a horizontal principle forming an integral part of the Community's objectives. In the absence of a specific article, Article 235 of the EC Treaty would serve as the basis of accession, provided that the conditions of that article's application are fulfilled.

9. The Council also raises the question whether accession of the Community to the Convention, in particular to the system of courts, calls in question the exclusive jurisdiction conferred on the Court of Justice by Articles 164 and 219 of the Treaty and the autonomy of the Community legal order.

10. The Council emphasizes that judgments of the European Court of Human Rights have no direct effect: that court cannot repeal or amend a provision of national law but can only impose on a contracting party an obligation to bring about a certain result. The Court of Justice would, however, have to apply judgments of the Court of Human Rights in its own decisions. The requirement that in order for individual petitions to be admissible domestic remedies must first have been exhausted would mean that the Community's internal courts, in particular the Court of Justice, would rule on the compatibility of a Community act with the Convention. In Opinion 1/91 [1991] ECR I-6079, the Court accepted the Community's submission to judicial machinery created by an international agreement provided that the court simply interpreted and applied the agreement and did not challenge the autonomy of the Community legal order. The Council raises the question whether that statement applies only where the judgments of that court concern solely the international agreement or also where those judgments may cover the compatibility of Community law with the agreement.

II - Procedure

1. In accordance with Article 107(1) of the Rules of Procedure of the Court of Justice, the request for the Opinion was served on the Commission and the Member States. Written observations were submitted by the Belgian Government, represented by J. Devadder, Director of Administration at the Ministry of Foreign Affairs, Foreign Trade and Development, acting as Agent; the Danish Government, represented by L. Mikaelson, Ambassador, and P. Biering, Head of Department, Legal Advisers at the Ministry of Foreign Affairs, acting as Agents; the German Government, represented by E. Röder, Ministerialrat at the Federal Ministry of Economic Affairs, and A. Dietrich, Regierungsdirektor at the Federal Ministry of Justice, acting as Agents; the Greek Government, represented by V. Rotis, Honorary President of the Council of State, S. Zissimopoulos, Legal Adviser to the Permanent Representation of the Greek Republic, and N. Dafniou, secretary to the Special Service for Community Legal Affairs of the Ministry of Foreign Affairs, acting as Agents; the Spanish Government, represented by A. Navarro González, Director-General for Community Legal and Institutional Coordination, and Rosario Silva de Lapuerta, Abogado del Estado, of the Department of Community Legal Affairs, acting as Agents; the French Government, represented by E. Belliard, Deputy Director at the Legal Affairs Directorate of the Ministry of Foreign Affairs, C. de Salins, Head of Section in that directorate, and C. Chavance, Foreign Affairs Secretary in the same directorate, acting as Agents; the Netherlands Government, represented by A. Bos, Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; the Portuguese Government, represented by L. Fernandes, Director of the Legal Service Directorate of the Directorate-General of Community Affairs of the Ministry of Foreign Affairs, and M.L. Duarte, Consultant in the same directorate, acting as Agents; the United Kingdom, represented by J. Collins, of the Treasury Solicitor's Department, acting as Agent, and S. Richards and D. Anderson, Barristers; and the Commission, represented by J. Amphoux, Principal Legal Adviser, J. Pipkorn, Legal Adviser, and R. Gosalbo-Bono, of the Legal Service, acting as Agents.

2. After the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the European Union, the request for an Opinion was also served on those Member States. Written observations were submitted by the Austrian Government, represented by K. Berchtold, university lecturer, acting as Agent, and by the Finnish Government, represented by H. Rotkirch, Head of Service at the Ministry of Foreign Affairs, acting as Agent.

3. At its request, the European Parliament, represented by G. Garzón Clariana, jurisconsult, and E. Perillo, of the Legal Service, acting as Agents, was granted leave to submit observations.

4. At the hearing on 7 November 1995 the Court heard the oral observations of the Belgian Government, represented by J. Devadder; the Danish Government, represented by L. Mikaelson and P. Biering; the German Government, represented by A. Dietrich; the Greek Government, represented by A. Samoni-Rantou, Special Deputy Legal Adviser to the Special Service for Community Legal Affairs of the Ministry of Foreign Affairs, acting as Agent, and N. Dafniou; the Spanish Government, represented by R. Silva de Lapuerta; the French Government, represented by J.-F. Dobelle, Deputy Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agent, and C. Chavance; Ireland, represented by D. Gleeson SC, acting as Agent, and M. Buckley; the Italian Government, represented by Professor U. Leanza, Head of the Department for Contentious Diplomatic Affairs, Treaties and Legislative Matters at the Ministry of Foreign Affairs, acting as Agent; the Netherlands Government, represented by M. Fiestra, Deputy Legal Adviser at the Ministry of Foreign Affairs, acting as Agent; the Portuguese Government, represented by L. Fernandes and M.L. Duarte; the Finnish Government, represented by H. Rotkirch; the Swedish Government, represented by L. Nordling, Adviser in the Legal Directorate for European Affairs of the Ministry of Foreign Affairs; the United Kingdom, represented by J.E. Collins and by S. Richards and D. Anderson; the Council of the European Union, represented by J.-C. Piris, J.-P. Jacqu e and A.Lo Monaco, of its Legal Service, acting as Agent; the Commission, represented by J. Pipkorn and R. Gosalbo-Bono; and the European Parliament, represented by G. Garz on Clariana and E. Perillo.

III - History of respect for human rights by the Community

1. Neither the EC Treaty nor the ECSC or EAEC Treaties makes any specific reference to fundamental rights other than by resolving ‘to preserve and strengthen peace and liberty’ in the last recital in the preamble.

2. The 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.

3. Drawing on that case-law, the Single European Act refers in its preamble to respect for the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention and in the European Social Charter.

4. Article F(2) of the Treaty on European Union states that the 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’. The fifth indent of Article J.1(2) of that Treaty refers to respect for human rights and fundamental freedoms. Article K.2(1) of the Treaty contains an express reference to compliance with the Convention in cooperation in the fields of justice and home affairs.

5. Reference to respect for fundamental rights has also been made in political declarations by the Member States and Community institutions. These include the Joint Declaration by the European Parliament, the Council and the Commission on fundamental rights of 5 April 1977 (*Treaty Series* 1995, p. 877); the Joint Declaration by the European Parliament, the Council, the representatives of the Member States, meeting within the Council, and the Commission against racism and xenophobia of 11 June 1986 (*Treaty Series* 1995, p. 889); the Resolution of the Council and the representatives of the governments of the Member States, meeting within the Council, of 29 May 1990 on the fight against racism and xenophobia (OJ 1990 C 157, p. 1), the Resolution of the Council and of the Member States, meeting in the Council, on human rights, democracy and development of 28 November 1991 (*Bulletin of the European Communities*, No 11/1991, p. 130, point 2.3.1) and the Conclusions on the implementation of that resolution adopted by the Council and the Member States on 18 November 1992. Declarations by various European Councils may also be mentioned, such as the Declaration by the Heads of State or Government of the Member States of the EC on the European identity of 14 December 1973 (*Bulletin of the European Communities*, No 12/1973, point 2501), the Declaration by the European Council on democracy of 8 April 1978, the Declaration by the European Council on the international role of the Community of 2 and 3 December 1988 (*Bulletin of the European Communities*, No 12/1988, point 1.1.10), the Declaration by the European Council on human rights of 29 June 1991 (*Bulletin of the European Communities*, No 6/1991, Annex V) and the Statement by the European Union on human rights of 11 December 1993 on the occasion of the 45th anniversary of the Universal Declaration of Human Rights (*Bulletin of the European Communities*, No 12/1993, point 1.4.12).

6. In a report of 4 February 1976, sent to the European Parliament and the Council, entitled 'Protection of fundamental rights in the creation and development of Community law' (*Bulletin of the European Communities*, Supplement 5/76), the Commission ruled out the necessity of accession by the Community as such to the Convention.

7. Formal accession was first proposed by the Commission to the Council by the Memorandum on the accession of the European Communities to the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 April 1979 (*Bulletin of the European Communities*, Supplement 2/79).

8. That proposal was renewed by the Commission's Communication on Community accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms of 19 November 1990.

9. On 26 October 1993, the Commission published a working document entitled 'Accession of the Community to the European Convention on Human

Rights and the Community legal order', in which it considered in particular the questions as to the legal basis of accession and the monopoly of jurisdiction of the Court of Justice.

10. The European Parliament has on several occasions made statements in favour of accession, most recently by a resolution of 18 January 1994 on Community accession to the European Convention on Human Rights, adopted on the basis of a report of the Committee on Legal Affairs and Citizens' Rights (OJ 1994 C 44, p. 32).

IV - Admissibility of the request for an Opinion

1. *Ireland* and the *United Kingdom* argue that the request for an Opinion is not admissible. The *Danish*, *Finnish* and *Swedish Governments* also raise the question whether the request is premature.

In its oral observations, Ireland points out that there is no specific proposal for an agreement on accession on which the Court could give its opinion. The technical problems are numerous and a variety of solutions is conceivable. No option has yet been taken for determination by the parties who have to negotiate.

According to the United Kingdom, no agreement is 'envisaged' within the meaning of Article 228(6) of the Treaty. The Court may be seised only after the draft agreement has been substantially negotiated. In Opinion 1/78 [1979] ECR 2871, the request was admittedly held to be admissible notwithstanding the fact that the negotiations were still to take place. However, at the time the request was made the agreement existed in draft; negotiations took place during the proceedings and the Court was informed of the most recent state of the texts before delivering its Opinion. In these proceedings, in contrast, there is no draft agreement and no negotiations are envisaged before the Opinion is delivered. The request for Opinion 1/78 was relevant since the legal basis of the agreement was at issue. In this case, there is consensus as to the only possible legal basis, namely Article 235 of the Treaty.

As well as the fundamental problems outlined by the Council, the United Kingdom refers to other difficulties. It raises the question of the scope of accession given the reservations made by the Member States, the power of the latter to derogate at any time from certain provisions of the Convention and the risk of a discrepancy between the obligations of the Member States and those of the Community, the problem of the Community's participation in the organs of the Convention, in particular in the future single court, the division of competence between the Community and the Member States, the difficulty of the Community's acceding to the Convention without first acceding to the Council of Europe, and the future of the ECSC and EAEC Treaties. Given the number and gravity of these problems, the United Kingdom submits that the Court could not at the present stage give an Opinion of value.

Article 235 of the Treaty, the only possible legal basis, requires a unanimous decision of the Council. The fact that there is no such unanimity emphasizes the hypothetical and unrealistic nature of the request for an Opinion. In the context of references for a preliminary ruling, the Court has always refused to rule on general or hypothetical questions.

The Danish Government notes that there is no negotiated draft agreement. Still less has any agreement been reached within the Council as to the opening of negotiations.

The Finnish Government points out that, according to Article 107(2) of the Rules of Procedure and the case-law of the Court, an Opinion may deal with the compatibility of the envisaged agreement with the Treaty and with the question of the powers of the Community.

In the present case, the admissibility of the request for an Opinion depends on whether the agreement envisaged can be extracted from the documents annexed to the request or referred to therein with sufficient precision to enable the Court to deliver an Opinion. If so, the fact that the request may be premature would not prevent the Court from ruling generally and as a matter of principle.

In its oral observations the Swedish Government also points out that there is as yet no draft text in existence or even a Council decision to open negotiations. Even if the Court were to admit this request for an Opinion, once the legal and technical questions had been tackled during the negotiations, a subsequent request might be unavoidable.

2. The *Commission*, the *Parliament*, and the *Belgian, French, German, Italian and Portuguese Governments* submit that the request for an Opinion is admissible since it concerns an agreement envisaged within the meaning of Article 228(6) of the Treaty.

The Commission refers to the change in the wording of Article 228. The former text of the second subparagraph of Article 228(1) of the EEC Treaty, under which the Opinion of the Court of Justice could be obtained beforehand as to whether the agreement envisaged was compatible, followed on from the first subparagraph referring to the conclusion of agreements between the Community and third countries or an international organization. The new text of Article 228(6) of the EC Treaty refers only to an agreement envisaged with no mention of an Opinion before the conclusion of the agreement in question. In Opinion 1/78, the Court gave a broad interpretation to the concept of agreement envisaged; that case may be regarded as reinforced in the light of the new wording. As in the request for Opinion 1/78, the question before the Court relates to powers and there is no risk that the matter will come before it again during any negotiations.

The Parliament emphasizes that the purpose of Article 228 is, as is clear from Opinion 1/75 [1975] ECR 1355, to forestall disputes relating to the compatibility with the Treaty of international agreements. This case concerns the compatibility of the legal system established by the Convention with the Community legal order. The specific legal question is whether the Court's being subject to a judicial body outside the Community legal system is compatible with the Court's monopoly of jurisdiction. The Court accepted, in Opinion 1/78, cited above, that it is in the interests of all the States concerned, including non-member countries, for a

question of powers to be settled as soon as negotiations are commenced.

The Belgian Government also refers to the precedent of Opinion 1/78 and the new wording of Article 228(6) of the Treaty. It stresses three points. The Member States have accepted that the compatibility of accession with Community law must be established before negotiations are opened. The Court has already acknowledged, in Opinion 1/78, cited above, and Opinion 1/92 [1992] ECR I-2821, that a request for an Opinion must be admitted provided that the subject-matter of the agreement envisaged is known and that the originator of the request has an interest in the outcome, even if the content of the agreement envisaged has not yet been defined in all detail. To require that the institution which makes the request for an Opinion entertains no doubt as to the compatibility of the agreement envisaged with Community law at the time the Court is seised would undermine the effectiveness of Article 228(6) of the Treaty.

In its oral observations the German Government submits that the request is admissible since, when it was made, discussions on accession had reached a stage where an Opinion appeared necessary and justified. The Convention which is to be acceded to as well as the adaptations which such accession requires are known. In accordance with what the Court held in Opinion 1/78, it is in the interests of all the Member States that the question of the power of the Community to accede to the Convention be settled before negotiations begin.

The French Government, in its oral observations, accepts that the Court does not have before it a draft agreement, that there are many uncertainties surrounding the negotiations and that for the moment there is no consensus within the Council on the expediency of accession. However, the Court should admit the request for an Opinion since the legal questions concerning the compatibility of accession with the Treaty are clear and their relevance cannot be disputed.

The Italian Government, in its observations, refers to Article 107(2) of the Rules of Procedure from which it is clear that a request for an Opinion may concern the compatibility with the provisions of the Treaty of the envisaged agreement or the power of the Community to enter into that agreement. If, as in the present case, the request concerned the Community's powers, the existence of a draft agreement already sufficiently defined would not be required. Even if the request also concerns the compatibility of accession with the substantive rules of the Treaty, the Court could not decline to give an Opinion since the Convention to be acceded to exists and its general aspects are known.

The Portuguese Government, in its oral observations, also points out that the result of the negotiations to be carried out and the terms of the Convention to which the Community proposes acceding are known.

V - The legal basis of the envisaged accession

1. The *Austrian Government*, after referring to the case-law relating to the external

competence of the Community, submits that the exercise of all the Community's powers involves respect for fundamental rights. The guarantee of the rights protected by the Convention is based on the powers on the basis of which the Community institutions act in each field concerned. Such internal horizontal application of the rights guaranteed by the Convention is at the same time the basis of the Community's external competence to accede to the Convention.

2. The *Commission*, the *Parliament* and the *Belgian, Danish, Finnish, German, Greek, Italian and Swedish Governments*, together with the *Austrian Government* as a subsidiary argument, submit that, in the absence of specific provisions, Article 235 of the Treaty is the legal basis for accession. The conditions for the application of Article 235, namely the necessity for action by the Community, the attainment of one of the objectives of the Community and the link with the operation of the common market, are fulfilled.

The Commission refers to its working document of 26 October 1993, cited above, in which it described respect for human rights as a transverse objective forming an integral part of the Community's objectives.

It is clear from the judgment in Case 43/75 *Defrenne* [1976] ECR 455 that the objectives, within the meaning of Article 235 of the Treaty, may be made clear in the preamble of the Treaty. The preamble to the Single European Act makes reference to respect for human rights and to the Convention.

The Parliament also considers that the protection of human rights is encompassed within the Community's objectives. The embodiment in the Treaty of citizenship of the Union is a new legal factor supporting that argument. By virtue of the combined provisions of the third indent of Article B of the Treaty on European Union and Article 8 of the EC Treaty, it is for the Community to ensure that the fundamental rights of a citizen of the Union are protected to the same extent as his rights as a national citizen with regard to State acts. The Parliament emphasizes the need for the Community, including the Court of Justice, to be subject to the same international judicial control as Member States and their courts of final appeal. According to the Parliament, the choice of Article 235 of the Treaty should be supplemented by reference to the second subparagraph of Article 228(3) of the Treaty, requiring, for the conclusion of certain international agreements, the assent of the Parliament. The need for such assent may be explained by reference to the *ratio legis* of that provision, which is to ensure that the Parliament is not required by an international agreement, in its role as co-legislator and by virtue of the Community's international obligations, to amend an act adopted following the codecision procedure.

The Austrian, Belgian, Finnish, German, Greek, Italian and Swedish Governments emphasize that the protection of human rights is a general horizontal principle which applies to the Community in the exercise of all its activities and that such protection is essential for the proper functioning of the common market.

According to those governments, the Court has realized that protection by way of general

principles of Community law, drawing on common constitutional traditions and international instruments, in particular the Convention. The preamble to the Single European Act, the preamble to the Treaty on European Union and Article F(2), J.1 and K.2 of that Treaty enshrine respect for human rights and, in that context, the role of the Convention.

The Greek Government also refers to Article 130u(2) of the EC Treaty, which mentions the objective of respecting human rights in cooperation and development.

The Austrian Government submits that, to determine the objectives of the Community, reference should also be made to the preamble to the Treaty which refers to the preservation of peace and liberty; that objective encompasses the rights guaranteed by the Convention.

The Finnish Government considers that, at the present stage of the Community's development, the protection of human rights is a proper objective of the Community.

According to all those governments, accession to the Convention and external judicial control are necessary to protect individuals against disregard of the Convention by the Community institutions.

The Belgian Government stresses the need to avoid divergent interpretations in Community case-law and that of the organs of the Convention. It notes that the system of remedies in Community law, which excludes actions for annulment by an individual in respect of an act which is not of direct and individual concern to him, affords less protection than that of the Convention.

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.

The Austrian Government refers to the need for a uniform interpretation of the Convention, to the continuing increase in the integration envisaged by the Treaty on European Union, an area in which the protection of human rights is particularly important, and the law governing Community officials.

The Finnish Government submits that accession is necessary from the point of view of strengthening the social aspect of the Treaty. The new bases of competence laid down in the Single European Act and the embodiment in the Treaty of the principle of subsidiarity have however restricted the scope of Article 235 of the Treaty. Whether that provision applies would depend on the structure and content of the accession agreement.

3. The *French, Portuguese and Spanish Governments* and *Ireland* and the *United Kingdom* assert that neither the EC Treaty nor the Treaty on European Union contains any provision allocating specific powers to the Community in the field of human rights capable of

being the legal basis of the envisaged accession. Article F(2) of the Treaty on European Union simply gives constitutional status to the existing case-law in the field of the protection of human rights and moreover envisages such protection only by way of general principles of Community law.

The French and Portuguese Governments add that Article J.1(2) of the Treaty on European Union, concerned with the common foreign and security policy, and Article K.2(1), concerned with justice and home affairs, which are moreover not within the jurisdiction of the Court of Justice, are in the nature of a programme and do not confer specific powers on the Community. The French Government also rules out Article 130u of the EC Treaty.

The Spanish, French and Portuguese Governments and Ireland and the United Kingdom also argue against any application of Article 235 of the Treaty. Respect for human rights is not among the objectives of the Community as set out in Articles 2 and 3 of the Treaty. The United Kingdom adds that reference to Article F(2) of the Treaty on European Union cannot justify recourse to Article 235.

Those governments deny that a legal vacuum or deficit in the protection of human rights requires the envisaged accession. The Court of Justice has substantially incorporated the Convention into the Community legal order and fully integrated it into the corpus of Community law. The French Government lists the fundamental rights enshrined by the Convention, protection of which has been upheld by the Court of Justice.

The Portuguese Government adds that the risk of divergent interpretations of the Convention by the Court of Justice and the European Court of Human Rights is theoretical and may be explained by the Community's specific objectives of economic and political integration. This government raises the possibility of the Court of Justice making a reference for a preliminary ruling to the European Court of Human Rights on the interpretation of the Convention.

According to the governments, Community law comprises a complete system of remedies for individuals. Accession is not necessary in the context of the operation of the common market.

4. The *Danish Government* sets out arguments for and against accession. It refers to the lacuna in the protection of human rights in the law governing Community officials while recognizing that that lacuna is not fundamental but procedural in nature. Respecting the Convention by a sort of self-limitation which the Court has developed differs from respecting it by virtue of an international obligation, even if the difference is theoretical. The advantage of accession would be essentially political, in that it would underline the importance attached to respect for human rights. Accession would also enable the Community to undertake its own defence if Community law were challenged before the organs provided for by the Convention. The Government notes that in general disputes concern a combination of Community and national rules, in which case the national rules are in principle disputed; in that situation, the institutions, in particular the Commission, could assist the national

government before the organs of the Convention.

Opposed to that political advantage are, says the Danish Government, practical and legal problems. Currently, accession is only possible for States; the position of the other Contracting Parties is not clear; accession by the Community would give rise to problems with regard to the derogations granted to the Member States and the reservations made by them; accession would probably not extend to the whole of the Convention; it would be necessary to establish machinery for determining the entity responsible for infringement of the Convention, given that *ex hypothesi* the disputed act would be national; the question would also arise as to representation of the Community in the Convention's control bodies, in particular in the future single Court. In the light of the gravity of those problems, the Danish Government proposes that an agreement be concluded between the Community and the Contracting Parties to the Convention enabling the Court of Justice to refer questions concerning human rights to the European Court of Human Rights for a preliminary ruling and authorizing the European Court of Human Rights to seek a preliminary ruling on Community law from the Court of Justice.

VI - Compatibility of accession with Articles 164 and 219 of the Treaty

1. The *Commission*, the *Parliament*, and the *Austrian, Belgian, Danish, German, Finnish, Greek, Italian and Swedish Governments* submit that the envisaged accession, in particular the submission of the Community to the legal system of the Convention, is not contrary to Articles 164 and 219 of the Treaty.

The Commission notes that, unlike in the case of the Agreement on the European Economic Area, the objectives of the Convention and the Treaty concur in the area of human rights. The Convention lays down classic international-law control machinery and the judgments of the European Court of Human Rights have no direct effect in the internal legal order. Admittedly, the Convention has the specific feature that individuals may petition. That however is simply one aspect of control, alongside the applications which may be made by the Contracting Parties; it would moreover be contradictory to accept that control machinery and to refuse individual petitions. The European Court of Human Rights would not rule on the question of the division of competence between the Community and the Member States, which is regulated solely by the Community legal order. Thus there should be no possibility of any action between the Community and the Member States.

Neither can it be asserted that the control machinery of the Convention, in that it extends to all Community powers, calls in question the autonomy of the Community legal order. The Convention imposes only minimum standards. The control machinery has no direct effect in the Community legal order. Since it has not been considered contrary to the constitutional principles of the Member States, that machinery could hardly be considered to be incompatible with the principles of Community law.

The Parliament refers to Opinion 1/91, cited above, in which the Court recognized that the

Community had power to submit to decisions of an international court. The submission of the Community to a court competent in human rights matters is consistent with the development of the Community order which is no longer directed at the economic operator but at the citizen of the Union. External control in the field of human rights does not affect the autonomy of the Community legal order any more than it prejudices that of the Member States. The Parliament refers to its resolution of 18 January 1994, cited above, in which it noted the importance of being able to bring a direct action before an international court in examining the compatibility of a Community act with human rights and stressed that the envisaged accession is not such as to call in question the Court's competence in questions of Community law.

The Belgian Government considers that the Court is required to decide whether the fundamental rights integrated in the Community legal order, where they are drawn from the Convention, become Community law or retain their specific character. Whether or not the envisaged accession affects the autonomy of Community law will depend on the answer.

The Government notes first that the rights and freedoms of the Convention have their own status among the general principles of Community law. The Convention simply establishes a minimum threshold of protection and does not affect the development of that protection from other sources recognized by the Court, namely the Community legal order properly so called and the common constitutional traditions. When it refers to the Convention, the Court takes into consideration the interpretation given by the organs of the Convention, thus underlining the specific place of rights guaranteed by the Convention in the Community legal order. To that extent, the autonomy of the Community legal order, within the meaning of Opinions 1/91 and 2/92, cited above, is from now on simply relative.

The Belgian Government next argues that the agreement envisaged preserves the autonomy of the Community legal order. In accordance with the possibility provided in Article 62 of the Convention, any action between the Community and its Member States would be excluded, which would respect Article 219 of the Treaty. In order to avoid any external influence on the division of competence between the Community and the Member States, the latter could, in the event of an individual petition, adopt a position on the issue of who was liable for the alleged infringement; the machinery to be established would be based on Annex IX to the United Nations Convention on the Law of the Sea of 10 December 1982.

The Belgian Government emphasizes, thirdly, that absolute autonomy of the Community legal order in the field of the rights and liberties guaranteed by the Convention is not desirable. The risk that the organs of the Convention will consider themselves competent to rule on the compatibility with the Convention, if not of Community acts, at least of national implementing acts, cannot be ruled out if the protection of human rights in the Community legal order is less than that of the Convention.

Even if the Court of Justice were to conclude that the criteria laid down in Opinions 1/91 and 1/92 relating to the autonomy of the Community legal order were applicable, the envisaged accession could proceed.

The Belgian Government notes the lack of any personal and functional link between the Court of Justice and the organs of the Convention. The European Court of Human Rights may simply require the relevant party to comply with its judgments without being able to annul or invalidate the national measure in dispute. With regard to the effect of the judgments of that Court, the Government distinguishes two cases. If the provision of the Convention is sufficiently precise and complete, it will be respected simply by recognizing that it is directly applicable. If the infringed provision is not directly applicable, it will be for the State to take the appropriate measures to remedy the infringement. In neither case would the autonomy of the Community legal order be called in question.

According to the Austrian, Danish, Finnish, German, Greek and Italian Governments, the Court accepted in Opinion 1/91, cited above, that the Community may submit to a court set up by an international agreement for the interpretation and application of that agreement provided that the autonomy of the Community legal order is not affected. The Court stressed in particular the need to respect the independence of the Community judicature and the monopoly of the Court of Justice in the interpretation of Community law.

The Danish Government emphasizes that in the Agreement on the European Economic Area the difficulty lay in the fact that that law was the same as Community law. In this case, the Community institutions, including the Court of Justice, would be taking into consideration the case-law of the organs of the Convention solely in respect of human rights. Without wishing definitively to settle the question, the Government stresses that the case-law of the Convention already influences that of the Court of Justice, which argues in favour of accession being compatible with the Treaty.

The German Government also asserts that the question of the division of competence between the Community and the Member States remains within the jurisdiction of the Court of Justice, since the European Court of Human Rights does not rule on the internal law of the Contracting Parties. The Court of Justice safeguards fundamental rights by reference both to the constitutional tradition of the Member States and to the Convention, and achieves greater protection than the Convention. It cannot therefore be argued that the autonomy of Community law is called in question because identical provisions are interpreted differently by virtue of their different objectives. The 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, cited above. The German Government also refers to the fact that there is no personal link between the two courts.

The Greek Government considers that any involvement of the European Court of Human Rights in the Community legal order would be limited to interpreting the rights guaranteed by the Convention. Respect for the autonomy of the Community legal order would not prohibit any external involvement, but would require the fundamental principles and the institutional balances of Community law to be protected. The participation of a judge from the Community who would not at the same time be a member of the Court of Justice should ensure that the European Court of Human Rights takes into consideration the specific

features of Community law.

The Italian Government, in its oral observations, points out that the accession agreement will have to respect the criteria laid down by the Court in Opinions 1/91 and 1/92 as regards respect for the Community legal order. The Italian Government particularly emphasizes in this regard that 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.

The Austrian Government emphasizes the difference from the Agreement on the European Economic Area. Accession would not create a normative package essentially comprising rules already part of the Community legal order and to be integrated into that order. The European Court of Human Rights would not have jurisdiction to rule on questions of Community law which would for this purpose be treated in the same way as the law of the States party to the Convention.

The Swedish Government considers that accession could be incompatible with Articles 164 and 219 of the Treaty only in the event of a risk of a failure to observe the binding character of judgments of the Court and therefore an undermining of the autonomy of the Community legal order. In order to avoid that risk, the Swedish Government suggests that it would be possible to exclude, by special agreement, disputes between Member States or between Member States and the Community from the settlement machinery of the Convention. It also puts forward the idea of references being made by the European Court of Human Rights to the Court of Justice on questions of Community law.

The Finnish Government does not rule out the possibility that the envisaged accession and the subordination of the Community institutions to the jurisdiction of the European Court of Human Rights may have effects on the interpretation by the Court of Justice of provisions of Community law to the extent that such provisions affect human rights. If the principles set out by the Court of Justice in Opinion 1/91 were applied, it would none the less be necessary to recognize that human rights, protected by way of general principles of Community law, were not within the economic and commercial framework of that law and accession would not prejudice its autonomy.

2. The *French, Portuguese and Spanish Governments* and *Ireland* and the *United Kingdom* argue that accession by the Community to the Convention is incompatible with the Treaty, in particular Articles 164 and 219. Referring to Opinions 1/91 and 1/92, the governments emphasize that the envisaged accession calls into question the autonomy of the Community legal order and the Court of Justice's monopoly of jurisdiction.

The Spanish Government cites Articles 24 and 25 of the Convention establishing inter-State and individual petitions, Article 45 conferring jurisdiction on the European Court of Human Rights over the interpretation and application of the Convention, Articles 32 and 46 conferring a binding character on the decisions of the organs of the Convention, Article 52 on the final nature of judgments of the European Court of Human Rights, Article 53 obliging the Contracting Parties to abide by judgments and Article 54 investing the Committee of

Ministers with a duty to supervise execution of judgments. Article 62 of the Convention, submitting all disputes between Contracting Parties concerning the interpretation or application of the Convention to the means of settlement laid down therein, is incompatible with Article 219 of the Treaty; it would be necessary to provide for a reservation or special agreement to exclude disputes between the Member States *inter se* or with the Community. In contrast to the criteria laid down in Opinions 1/91 and 1/92, the organs of control of the Convention would not simply interpret it but would examine the legality of Community law in the light of the Convention, which would have an impact on the case-law of the Court of Justice.

The French Government asserts that the Community legal order has available an autonomous and specific judicial organization. No right of action in respect of an issue of human rights has been or could currently be instituted beyond the respect for the law conferred as a general principle on the Court.

It also considers the problem of the prior exhaustion of domestic remedies. In the Community system, actions open to individuals are limited and the Court of Justice is in the majority of cases seised by way of reference for a preliminary ruling. The question must arise whether the organs of the Convention would be moved to require the Community to widen access to the preliminary-reference procedure or whether, conversely, they might not refuse to take account of that procedure in assessing the requirement that domestic remedies be exhausted. It would accordingly be easier to amend the second paragraph of Article 173 of the Treaty so as to enable individuals to challenge Community acts affecting their fundamental rights.

The French Government also emphasizes the risk of proceedings involving Community law being submitted to Convention organs consisting of nationals of States which are members of the Council of Europe but not of the Community. It similarly notes the difficulties of participation by Community judges in the control bodies of the Convention. In those circumstances, accession could occur only after amendment of the Treaty, including the Protocol on the Statute of the Court of Justice of the EC.

Ireland, in its oral observations, points out that accession by the Community to the Convention puts in question the exclusive jurisdiction of the Court, under Articles 164 and 219 of the Treaty, to settle any dispute relating to application and interpretation of the Treaty.

The Portuguese Government also stresses that the control bodies of the Convention are competent to apply and interpret provisions with a horizontal effect; that competence would inevitably interfere with the application and interpretation of Community law. Admittedly, Article 62 of the Convention would enable the inter-State action provided for in Article 24 of the Convention to be excluded in order to respect Article 219 of the Treaty. The *ratio legis* of that article cannot however be limited to proceedings between Member States but means that no method of judicial resolution of disputes other than that applied by the Court of Justice may interfere with the interpretation and application of the Treaty. The European

Convention on Human Rights would be moved to interpret Community law and take decisions on the competence of the Community. It would be difficult to devise practicable machinery enabling the Community and the Member States to resolve questions of competence. To determine whether domestic remedies had been exhausted, the European Court of Human Rights could even rule on the jurisdiction of the Court of Justice; thus it would have to decide whether an individual could have brought an action for annulment against a Community act which directly and individually concerned him.

The Spanish Government and the United Kingdom also note the legal effects of decisions of the European Court of Human Rights and the future single court. They stress in particular that that Court is competent to grant just satisfaction to the injured party which may take the form of monetary compensation. In the event of accession, the Court of Justice would surrender, within the scope of application of the Convention, its ultimate authority as the interpreter of Community law. In contrast to the criteria laid down in Opinion 1/91, the European Court of Human Rights does not limit itself to the interpretation and application of an international agreement. It would be involved in the interpretation and application of Community law and would have to rule on the competence of the Community and the Member States.

3. The *Netherlands Government* simply notes the problems which must be considered before taking a decision on whether accession is appropriate, without taking a definite position. It refers in particular to the question whether relations between the Court of Justice and the organs of the Convention are compatible with Article 164 of the Treaty, the question of the respective obligations under the Community Treaties and the Convention of the Member States, parties to the Convention and members of the Community, and the problem of determining the responsibility of the Community and the Member States with regard to observance of the Convention.

Opinion of the Court

Admissibility of the request for an Opinion

1 Ireland and the United Kingdom, as well as the Danish and Swedish Governments, submit that the request for an Opinion is inadmissible or is, at any rate, premature. They argue that there is no agreement framed in sufficiently precise terms to enable the Court to examine the compatibility of accession with the Treaty. In the opinion of those Governments an agreement cannot be said to be envisaged at a stage where the Council has as yet not even adopted a decision in principle to open negotiations on the agreement.

2 Article 228(6) of the Treaty provides that the Council, the Commission or a Member State may obtain the opinion of the Court of Justice as to whether an agreement envisaged is compatible with the provisions of the Treaty.

3 As the Court has stated, most recently in paragraph 16 of Opinion 3/94 of 13 December 1995 (not yet published in the ECR), the purpose of that provision is to forestall complications which would result from legal disputes concerning the compatibility with the Treaty of international agreements binding upon the Community.

4 The Court also stated in that Opinion (at paragraph 17) that a possible decision of the Court to the effect that such an agreement is, by reason either of its content or of the procedure adopted for its conclusion, incompatible with the provisions of the Treaty could not fail to provoke, not only in a Community context but also in that of international relations, serious difficulties and might give rise to adverse consequences for all interested parties, including third countries.

5 In order to avoid such complications, the Treaty has established the special procedure of a prior reference to the Court of Justice for the purpose of ascertaining, before the conclusion of the agreement, whether the latter is compatible with the Treaty.

6 That procedure is a special procedure of collaboration between the Court of Justice on the one hand and the other Community institutions and the Member States on the other whereby, at a stage prior to conclusion of an agreement which is capable of giving rise to a dispute concerning the legality of a Community act which concludes, implements or applies it, the Court is called upon to ensure, in accordance with Article 164 of the Treaty, that in the interpretation and application of the Treaty the law is observed.

7 As regards the existence of a draft agreement, there can be no doubt that, in this particular case, no negotiations had been commenced nor had the precise terms of the agreement for accession of the Community to the Convention been determined when the request for an Opinion was lodged. Nor will they be so when the Opinion is delivered.

8 In order to assess the extent to which the lack of firm information regarding the terms of the agreement affects the admissibility of the request, the purposes of the request must be distinguished.

9 As is clear from the observations submitted by the Governments of the Member States and by the Community institutions, accession by the Community to the Convention presents two main problems: (i) the competence of the Community to conclude such an agreement and (ii) its compatibility with the provisions of the Treaty, in particular those relating to the jurisdiction of the Court.

10 As regards the question of competence, in paragraph 35 of Opinion 1/78 of 4 October 1979 ([1979] ECR 2871) the Court held that, where a question of competence has to be decided, it is in the interests of the Community institutions and of the States concerned, including non-member countries, to have that question clarified from the outset of negotiations and even before the main points of the agreement are negotiated.

11 The only condition which the Court referred to in that Opinion is that the purpose of

the envisaged agreement be known before negotiations are commenced.

12 There can be no doubt that, as far as this request for an Opinion is concerned, the purpose of the envisaged agreement is known. Irrespective of the mechanism by which the Community might accede to the Convention, the general purpose and subject-matter of the Convention and the institutional significance of such accession for the Community are perfectly well known.

13 The admissibility of the request for an Opinion cannot be challenged on the ground that the Council has not yet adopted a decision to open negotiations and that no agreement is therefore envisaged within the meaning of Article 228(6) of the Treaty.

14 While it is true that no such decision has yet been taken, accession by the Community to the Convention has been the subject of various Commission studies and proposals and was on the Council's agenda at the time when the request for an Opinion was lodged. The fact that the Council has set the Article 228(6) procedure in motion presupposes that it envisaged the possibility of negotiating and concluding such an agreement. The request for an Opinion thus appears to be prompted by the Council's legitimate concern to know the exact extent of its powers before taking any decision on the opening of negotiations.

15 Furthermore, in so far as the request for an Opinion concerns the question of Community competence, its import is sufficiently clear and a formal Council decision to open negotiations was not indispensable in order further to define its purpose.

16 Finally, if the Article 228(6) procedure is to be effective it must be possible for the question of competence to be referred to the Court not only as soon as negotiations are commenced (Opinion 1/78, paragraph 35) but also before negotiations have formally begun.

17 In those circumstances, the question of Community competence to proceed to accession having been raised as a preliminary issue within the Council, it is in the interests of the Community, the Member States and other States party to the Convention to have that question settled before negotiations begin.

18 It follows that the request for an Opinion is admissible in so far as it concerns the competence of the Community to conclude an agreement of the kind envisaged.

19 However, the same is not true as regards the question of the compatibility of the agreement with the Treaty.

20 In order fully to answer the question whether accession by the Community to the Convention would be compatible with the rules of the Treaty, in particular with Articles 164 and 219 relating to the jurisdiction of the Court, the Court must have sufficient information regarding the arrangements by which the Community envisages submitting to the present and future judicial control machinery established by the Convention.

21 As it is, the Court has been given no detailed information as to the solutions that are envisaged to give effect in practice to such submission of the Community to the jurisdiction of an international court.

22 It follows that the Court is not in a position to give its opinion on the compatibility of Community accession to the Convention with the rules of the Treaty.

Competence of the Community to accede to the Convention

23 It follows from Article 3b of the Treaty, which states that the Community is to act within the limits of the powers conferred upon it by the Treaty and of the objectives assigned to it therein, that it has only those powers which have been conferred upon it.

24 That principle of conferred powers must be respected in both the internal action and the international action of the Community.

25 The Community acts ordinarily on the basis of specific powers which, as the Court has held, are not necessarily the express consequence of specific provisions of the Treaty but may also be implied from them.

26 Thus, in the field of international relations, at issue in this request for an Opinion, it is settled case-law that the competence of the Community to enter into international commitments may not only flow from express provisions of the Treaty but also be implied from those provisions. The Court has held, in particular, that, whenever Community law has created for the institutions of the Community powers within its internal system for the purpose of attaining a specific objective, the Community is empowered to enter into the international commitments necessary for attainment of that objective even in the absence of an express provision to that effect (see Opinion 2/91 of 19 March 1993 [1993] ECR I-1061, paragraph 7).

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.

28 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.

29 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.

30 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.

31 It is in the light of those considerations that the question whether accession by the Community to the Convention may be based on Article 235 must be examined.

32 It should first be noted that the importance of respect for human rights has been emphasized in various declarations of the Member States and of the Community institutions (cited in point III.5 of the first part of this Opinion). Reference is also made to respect for human rights in the preamble to the Single European Act and in the preamble to, and in Article F(2), the fifth indent of Article J.1(2) and Article K.2(1) of, the Treaty on European Union. Article F provides that the Union is to respect fundamental rights, as guaranteed, in particular, by the Convention. Article 130u(2) of the EU Treaty provides that Community policy in the area of development cooperation is to contribute to the objective of respecting human rights and fundamental freedoms.

33 Furthermore, it is well settled that fundamental rights form an integral part of the general principles of law whose observance the Court ensures. For that purpose, the Court draws inspiration from the constitutional traditions common to the Member States and from the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or of which they are signatories. In that regard, the Court has stated that the Convention has special significance (see, in particular, the judgment in Case C-260/89 *ERT* [1991] ECR I-2925, paragraph 41).

34 Respect for human rights is therefore a condition of the lawfulness of Community acts. Accession to the Convention would, however, entail a substantial change in the present Community system for the protection of human rights in that it would entail the entry of the Community into a distinct international institutional system as well as integration of all the provisions of the Convention into the Community legal order.

35 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 Treaty amendment.

36 It must therefore be held that, as Community law now stands, the Community has no competence to accede to the Convention.

In conclusion,

THE COURT

composed of: G.C. Rodríguez Iglesias, President, C.N. Kakouris, D.A.O. Edward, J.-P. Puissechet and G. Hirsch, Presidents of Chambers, G.F. Mancini, F.A. Schockweiler (Rapporteur), J.C. Moitinho de Almeida, P.J.G. Kapteyn, C. Gulmann, J.L. Murray, P. Jann, H. Ragnemalm, L. Sevón and M. Wathelet, Judges,

after hearing the views of First Advocate General Tesauro and Advocates General Lenz, Jacobs, La Pergola, Cosmas, Léger, Elmer, Fennelly and Ruiz-Jarabo Colomer,

gives the following opinion:

As Community law now stands, the Community has no competence to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Rodríguez Iglesias

Kakouris

Edward

Puissochet

Hirsch

Mancini

Schockweiler

Moitinho de Almeida

Kapteyn

Gulmann

Murray

Jann

Ragnemalm

Sevón

Wathelet

Luxembourg, 28 March 1996.

R. Grass
Registrar

G.C. Rodríguez Iglesias
President