

The EEA Agreement and the European Convention for the Protection of Human Rights

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I. Statement of the Problem

Ratification of the EEA Agreement by EFTA member states will bind them to an instrument which will permeate the innermost recesses of their legal systems just as was the case with the European Convention on Human Rights of 1950. It will not only entail additional commitments but also possibilities of conflict. For EFTA states, what will be the relationship between these two instruments in matters of substance and procedure? In the event of conflict, which treaty will take precedence over the other? Who will decide such conflicts? Below, we begin by briefly viewing the significance of the protection of human rights in the EEA (chapter II.). We then go on to show the extent to which human rights safeguards today form part of the European legal order (chapter III.). Finally, this overview will allow us to provide answers to the above questions (chapter IV.).

II. The Significance of the Protection of Human Rights in the EEA

A. Are Human Rights at Risk in the EEA?

The topic of this article seems to imply that conflicts might arise between EEA law and the ECHR. At first sight this may come as a surprise, as the EEA Agreement, extending as it does the fundamental freedoms of the EEC Treaty to EFTA states, basically embodies a liberal concept. These fundamental freedoms serve not only to underpin the *basic principles* for the setting up of a homogeneous economic space in Europe;¹ they also constitute *individual rights*² enforceable against member states *as*

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¹ Article 1, para. 1 of the EEA Agreement. For the equivalent objective of the EC (creation of the internal market with a view to 'a harmonious development of economic life') cf. Article 6 of the

well as against EC and EEA organs, which means they occupy a position at least comparable to that of human rights. In addition, pursuant to its Article 4, the EEA Agreement establishes a general prohibition against discrimination on grounds of nationality, and Article 69 of the same instrument lays down the principle of equal pay for men and women.³

Despite the foregoing, the protection of fundamental rights in the EEA Agreement remains piecemeal. Areas central to the protection of such rights are neither mentioned nor implied. Furthermore, certain areas are discernible in which EEA law could affect fundamental rights and hence, in certain circumstances, interfere with the safeguards of the ECHR. The fulfilment of freedom of movement of persons is not without effects on transnational prosecution of crime. The regulation of transnational services encompasses areas such as the electronics mass media and thus encroaches on ground of great significance for freedom of expression and information; what is called in German legal doctrine the right of *informationelle Selbstbestimmung* (i.e., an individual's control over the storage and use of his or her personal data by third parties), and the problem of discrimination on grounds of sex may well arise in other fields than that of labour law.⁴ Important, too, is the question of the effect of Article 6 of the ECHR in civil and criminal proceedings in which EEA law is applied. ECJ rulings where the question of the scope of the ECHR is discussed, at least in passing – of which there are now many – are evidence of the existence of tensions between the ECHR and European integration law.

B. Defusing the Problem Through Recourse to the ECHR

Given this situation, it is to be expected that with respect to securing the protection of fundamental rights, EFTA states will witness a debate similar to the one that took place in the Federal Republic of Germany in connection with the first and second ruling of the Federal Constitutional Court known as the 'so long as' rulings (*Solange-Rechtsprechung*). It will be recalled that the Federal Constitutional Court reserved the right to review the constitutionality of community law so long as the protection of fundamental rights in the EEC had not been secured.⁵ In 1986, this line of argument was discarded on the grounds that the practice of the ECJ in the meantime had come to ensure sufficient protection of fundamental rights: so long as this situation lasted, the Court would no longer entertain complaints alleging that

EEC Treaty.

² For the EEC cf. *Defrenne v. Sabena (Defrenne II)*, Judgment of 8 April 1976, [1976] ECR 455-493. This case-law has the status of *acquis communautaire* according to Article 6 of the EEA Agreement and applies henceforth to EFTA states also.

³ These two provisions of the EEA Agreement correspond to Articles 7 and 119 of the EEC Treaty.

⁴ For details about these new issues cf. A. Clapham, *Human Rights and the European Community: A Critical Overview* (1991) 16 et seq.

⁵ *Solange I*, BVerfGE 37, at 271 et seq., Judgment of 29 May 1974.

Community law failed to comply with fundamental rights.⁶ However, in 1989 the Federal Constitutional Court watered this position down somewhat in holding that, 'should it prove impossible to implement the indefeasible protection of rights by invoking the ECJ, redress could then be sought before the Federal Constitutional Court'.⁷

In Switzerland, Müller has drawn attention to the lack of a catalogue of fundamental rights in the EEC⁸ and to the correspondingly precarious arrangements for the protection of fundamental rights in European integration law. Referring to the German discussion, he asserted that, having regard to this deficiency, Swiss doctrine and practice needed to reach a clear definition of 'that inalienable minimum standard in human rights consonant with the rule of law' which, from a Swiss and European view of the law, was not a matter for the national or the supra-national legislator.⁹ It should therefore be up to the Swiss Federal Court to deny the application of EEC or EEA laws which are unconstitutional under Swiss law.

It may be objected that such proposals can hardly be reconciled with the supremacy of Community law and the rules according to which international law of the EEA Agreement prevails over domestic law. However, automatic application of such priority rules would not alter the fact that far-reaching tensions could occur between secondary EEC or EEA law of lesser significance and guarantees of fundamental rights enshrined in domestic legislation and deservedly occupying a higher status. In such cases, contradictions arise between the *hierarchy of values* whereby fundamental rights as standards of central significance take precedence over legal standards whose content is less important and the *hierarchy of norms* whereby European integration law overrides all forms of domestic law. To my mind, the solution for such cases lies not so much in a potentially problematic reservation in favour of one's own Constitution as in an attempt to bring hierarchies of values and hierarchies of norms *back into unison at a supra-national level*. Available to this end are firstly the generally recognized constitutional guarantees in the form of general principles of community law (as is the practice of the ECJ) and, secondly, the safeguards provided by human rights instruments, in particular the ECHR. Thus, a satisfactory solution might be found in very many, if not all, cases. In other words, a practice of the 'so long as' type could be avoided, to a large extent, if in cases of conflict European law is applied *with a reservation in respect of human rights*. Such

⁶ *Solange II*, BVerfGE 73, at 339 et seq., Judgment of 22 October 1986 (also in *EuGRZ* (1987) 20 et seq.).

⁷ BVerfGE, 2 BvQ 3/89, officially unpublished Judgment of 12 May 1989 on the EC tobacco directive re-printed in *EuGRZ* (1989) 339 et seq., *EuR* (1989) 270 and in W. Hummer, B. Simma, C. Vedder, F. Emmert, *Europarecht in Fällen* (1991) 114-116 (especially para. 19). This decision caused much debate. Cf. Everling, 'Brauchen wir "Solange III"?', *EuR* (1990) 195 et seq.; Scholz, 'Wie lange bis "Solange III"?', *Neue Juristische Wochenschrift* (1990) 941 et seq.; Tomuschat, 'Aller guten Dinge sind III?', *EuR* (1990) 340 et seq.

⁸ Müller, 'Grundrechts- und Demokratiedefizite als Legitimitätsprobleme der EG – Überlegungen zu einem Beitritt der Schweiz', *Zeitschrift für schweizerisches Recht (ZSR)*, Vol. I (1990) 109.

⁹ *Op. cit.*, at 115.

application is all the more imperative since the ECHR already represents a part of the European legal order which is of great significance for European integration.

III. Human Rights as Part of the European Legal Order

A. Human Rights as Part of the ‘acquis communautaire’

Since the ratification of the ECHR by all EC states, the ECJ has increasingly come to rely upon the Convention and its Protocols in its practice pertaining to fundamental rights.¹⁰ Since 1974, the ECJ has stressed that ‘fundamental rights belong to the general principles of law’ which it is its task to uphold. Thus, it acknowledges that preservation of such fundamental rights is not merely a matter of referring to the catalogue of such rights embodied in national Constitutions, but that the ECHR can ‘provide indications to be taken into account in Community law’.¹¹ At the outset, the ECJ referred to the ECHR as a source of inspiration for the purpose of developing principles of its own solely in line with the underlying concepts of the ECHR. However in some recent cases, the Court applied ECHR safeguards to full effect.¹² It was along these lines that the ECJ recently held in concise terms that those fundamental rights which were up to the Court to preserve flowed in particular from the ECHR.¹³

In sum, it may be asserted that the ECHR is applied in the EC in accordance with the case-law of the ECJ within the framework of the general principles of Community law. Even though the ECJ has not explicitly recognized the direct applicability of the ECHR it nevertheless considers itself empowered to verify the compatibility of

¹⁰ Cf. A. Bleckmann, *Die Bindung der Europäischen Gemeinschaft an die Europäische Menschenrechtskonvention* (1986); Pescatore, ‘La Cour de justice des Communautés européennes et la Convention européenne des droits de l’homme’, in G.J. Wiarda, *Protection des droits de l’homme*, (1986) 441 et seq.; Pernice, ‘Gemeinschaftsverfassung und Grundrechtsschutz – Grundlagen, Bestand und Perspektiven’, *Neue Juristische Wochenschrift* (1990) 2414; Schwarze, ‘Schutz der Grundrechte in der Europäischen Gemeinschaft’, *EuGRZ* (1986) 293 et seq.; Clapham *supra* note 4, at 29 et seq.

¹¹ Case 4/73, *Nold v. Commission*, Judgment of 14 May 1974, [1974] ECR 372; Case 44/79, *Hauer v. Land Rheinland-Pfalz*, Judgment of 13 December 1979, [1979] ECR 372; Case 265/87, *Schröder v. Hauptzollamt Gronau*, Judgment of 11 July 1989, [1989] ECR 223; Case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, Judgment of 13 July 1989, [1989] ECR 2609.

¹² Cf. e.g. Case 63/83, *Regina v. Kirk*, Judgment of 10 July 1984, [1984] ECR 2689, at 2718, para. 22: ‘The principle that penal provisions may not have retroactive effect is one which is common to all the 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 whose observance is ensured by the court of Justice’. Similarly Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Judgment of 15 May 1986, [1986] 1651, at 1682, para. 18.

¹³ ECJ, Judgment of 18 June 1991, Case C-260/89, *Monomeles Protodikeio, Thessaloniki*, also known as *Elliniki*, not yet reported; para. 42; quoted after *EuGRZ* (1991) 283; still clearer is the conclusion of the Advocate-General (para. 41, at 279): ‘The rules of the Convention are to be considered as part of the legal order of the Community’.

secondary Community law with the latter instrument.¹⁴ This practice has its basis in the consent of the other Community organs as set out in the Joint Declaration on Fundamental Rights of 1977,¹⁵ whereby the ‘European Parliament, the Council and the Commission [underline] the precedence of fundamental rights [and undertake to observe] these rights in the exercise of their powers and in pursuing the aims of the European Communities’.¹⁶

B. Human Rights as Part of the ‘acquis européen’

Human rights also provide a basis for the European legal order beyond the circle of EC member states. Thus, for the purposes of our discussion, it is important that the ECHR is not merely an international instrument to which all European states have acceded but should prove, when placed in the historical context, to be a major instrument of European integration which, in a broader sense, includes EFTA states.¹⁷

This is borne out by its history. The high hopes of the European Federalists, particularly as expressed at the Hague Congress of the ‘European Movement’ in 1948 for creating a European Union with a federal structure in the wake of the setting up of the Council of Europe, were dashed in the late 1940s.¹⁸ The Council of Europe turned out to be no more than an international organization with comparatively weak organs and few powers. However, the call by the Hague Congress for a European Charter of Human Rights, which was to use collective machinery for the protection of individual rights as a basis for starting a process leading to the political unification of

¹⁴ In the cases *Nold v. Commission*, *Hauer v. Land Rheinland-Pfalz*, *Schröder v. Hauptzollamt Gronau* and *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft* (*supra* note 11) it was found after (mostly cursory) scrutiny by the ECJ that there had been no breach of the ECHR. In the judgments *Johnston v. Chief Constable of the Royal Ulster Constabulary* (*supra* note 12) and *Monomeles Protodikeio, Thessaloniki* (*supra* note 13), the national judge is empowered or required to exercise such control.

¹⁵ OJ C 103/1 of 27 April 1977; cf. also *EuGRZ* (1977) 157 et seq.

¹⁶ Although this Declaration has the character of a political declaration of intent and thus creates no directly applicable law, in its case-law the ECJ has made direct reference to it: cf. Judgment of 15 May 1986, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, (*supra* note 12) at 1682, para. 18. This prompted the Federal Constitutional Court of Germany to state that the Declaration was ‘relevant in law’ (*von rechtserheblicher Bedeutung*) (*Solange II*, BVerfGE 73, at 378). Also worth noting is the so-called ‘Declaration of Fundamental Rights and Freedoms’ of the European Parliament of 1989 which guarantees both classical fundamental rights and judicial safeguards and social rights such as the right to education (OJ C 120/51 of 16 May 1989 in *EuGRZ* (1989) 205 et seq.).

¹⁷ For a detailed view see Kälin, ‘Die Europäische Menschenrechtskonvention als Faktor der europäischen Integration’, in *‘Im Dienst an der Gemeinschaft’*, *Festschrift für Dietrich Schindler zum 65. Geburtstag* (1989) 529 et seq. with references.

¹⁸ Cf. Bindschedler, ‘Rechtsfragen der europäischen Einigung’, *ZSR* (1975-I) 3; Golsong, ‘Der Schutz der Grundrechte durch die Europäische Menschenrechtskonvention und ihre Mängel’, in H. Mosler, R. Bernhardt, M. Hilf, *Grundrechtsschutz in Europa* (1977) 8.

Western Europe,¹⁹ achieved its aim through the setting up of the system for the protection of rights afforded by the ECHR. This is clearly seen in the Preamble to the latter which describes the safeguarding of human rights as a means of ‘achieving greater unity’ between European states. The Convention was designed to prevent the revival of totalitarian movements and thus to build up a basic consensus required for the eventual achievement of the aim of integration.²⁰ Thus, as ‘the first part of a European constitution’, the ECHR was logically endowed with superior jurisdiction of the type to be found at the time only in federal states.²¹ The hopes set out in the Preamble have been fulfilled. Not only has the ECHR made a major contribution to the harmonization of domestic law of member states in areas such as civil and criminal procedure, it has also provided in Greece and Spain – and continues to provide in the former Socialist states in Eastern Europe – a criterion for bringing former authoritarian states closer to Europe. The European Court of Human Rights is correct in crediting the ECHR with having created an objective order, a ‘European public policy’ designed to secure the commitment of the contracting parties around a common European ideal in the governance of their internal affairs.²²

This function of human rights as a measuring rod has gained recognition outside the circle of Council of Europe member states in the framework of CSCE process. The Final Act of the CSCE Conference of 1990²³ in Copenhagen on the Human Dimension and the Charter of Paris for a New Europe of 21 November 1990²⁴ expressly stress a commitment to human rights as the basis for relations between states in Europe.

IV. Duty of EFTA States to Secure Observance of the ECHR in the EEA

A. Precedence According to International Law?

A question now arises concerning the relation between the ECHR and EEA Agreement as regards EFTA states and their supra-national organs established under the EEA. In the event of a conflict is there an obligation to secure observance of the ECHR as against EEA law? If so, what is the source of that obligation and what are its effects?

¹⁹ A.H. Robertson, *The Council of Europe* (1956) 146; K.W. Weidmann, *Der Europäische Gerichtshof für Menschenrechte auf dem Weg zu einem europäischen Verfassungsgerichtshof* (1985) 43 et seq.

²⁰ Golsong, *supra* note 18, at 8.

²¹ Partsch, ‘Vor- und Nachteile einer Regionalisierung des internationalen Menschenrechtsschutzes’, *EuGRZ* (1990) 239 et seq.

²² Cf. *Irish case*, Judgment of 18 January 1978, Series A, No. 25, 90 et seq.

²³ *EuGRZ* (1990) 239 et seq.

²⁴ *EuGRZ* (1990) 517 et seq.

International law hardly provides an answer to these questions. In conflicts between the ECHR and the EEA Agreement, all EFTA states would be confronted with a clash of an older and – having regard to the wide scope of the ECHR safeguards – more general instrument with a more recent and – in many respects – more specialized instrument. International law treaties are fundamentally equal in status and conflicts between two treaties with overlapping content should therefore be resolved in accordance with the general principle embodied in Article 30, paragraph 3 of the Vienna Convention on the Law of Treaties,²⁵ in conformity with the maxims *lex posterior derogat legi priori* or *lex specialis derogat legi generali*.²⁶ However, these rules cannot be satisfactory in the event of conflicts between human rights treaties and treaties with a different content because they fail to take into account the hierarchy of values as between high-ranking human rights and other treaty provisions possibly occupying a less important position. Although, today, good grounds exist for postulating the principle that human rights instruments should as a rule take precedence over other treaty obligations, such a principle has so far not been recognized. True, under Article 53 of the Vienna Convention on the Law of Treaties, instruments contradicting human rights safeguards with the character of *jus cogens* are null and void, but this extends only to the most basic human rights. Broad areas of the ECHR safeguards do not fall into the category of *jus cogens*.

B. Duty to Observe the ECHR as a Consequence of the Recognition of the ‘acquis communautaire’ in the EEA Agreement

General international law thus does not provide a satisfactory means of resolving conflicts between the EEA Agreement and the ECHR. However, an answer to the question as to how EFTA states and EEA organs should react in the case of conflict between the EEA Agreement and the ECHR can be derived from the Agreement itself.

Article 6 of the EEA Agreement is particularly noteworthy: it provides that the *acquis communautaire* adopted by the EFTA states and their institutions shall comprise ‘the relevant rulings of the Court of Justice of the European Communities given prior to the date of signature of this Agreement’, insofar as they affect the interpretation and implementation of those provisions of the EEA Agreement which are ‘identical in substance to the corresponding rules of the Treaty establishing the European Economic Community and the Treaty establishing the European Coal and Steel Community and to acts adopted in application of these two Treaties’.

²⁵ Vienna Agreement on Law of Treaties of 23 May 1969, Systematic Collection of Swiss Federal Legislation, SR 0.111.

²⁶ Cf. Verdross, Simma, *Universelles Völkerrecht* (3rd ed., 1984) 412 et seq.; Karl, ‘Conflict between Treaties’, in R. Bernhardt et al. (eds.), *Encyclopedia of Public International Law*, Vol. 7 (1984) 469 with references to the practice of international courts; Zuleeg, ‘Vertragskonkurrenz im Völkerrecht Teil I: Verträge zwischen souveränen Staaten’, *German Yearbook of International Law*, Vol. 20 (1977) 246 et seq.

ECJ practice, which views fundamental and human rights as general principles of Community law, is of course not embodied in the text of the EEC Treaty itself and does not represent a legal act adopted under the Treaty: that is, it does not constitute secondary Community law. Such case-law is, however, inseparably bound up with the substantive provisions of Community law. It was developed while the Court was scrutinizing the validity of Community law and thus forms part of ECJ case-law for the implementation of the EC Treaty. Teleological grounds require that ECJ practice concerning the applicability of human rights also be deemed to form part of the *acquis communautaire* defined as binding by Article 6 of the EEA Agreement. Clearly, the principal aim set out in Article 1 of the EEA Agreement²⁷ of creating a *homogeneous* European Economic Area would be endangered if EFTA states were able to obtain advantages, say in the field of competition, by applying provisions of European integration law in a manner conflicting with the ECHR. The above interpretation is also corroborated by the Preamble to the EEA Agreement which opens with a commitment to a Europe based on 'peace, democracy and human rights' and thus, on the ECHR.²⁸

Any remaining doubts may be dispelled by a reference to the Joint Declaration signed in Oporto on 2 May 1992 on the continuing applicability of existing treaties.²⁹ Under Article 31, paragraph 2 of the Vienna Convention on the Law of Treaties of 1969,³⁰ this Declaration is to be taken into account in the interpretation of the EEA Agreement. Pursuant to the Declaration such rights as may be secured under existing treaties between one or more EC states, on the one hand, and one or more EFTA states, on the other, and as concern, for example, individuals, shall not be affected by the EEA Agreement until such time as comparable rights have been implemented on the basis of the latter Agreement.³¹

Undoubtedly, the ECHR fulfils all of these conditions. Therefore, according to the declaration, the EEA Agreement cannot limit the guarantees of the ECHR.

²⁷ Article 1 refers to the creation of a unified economic space. Cf. also the Preamble to the EEA Agreement according to which 'a unified interpretation and application of this Treaty and community legal provisions and identical treatment of individuals and participants in the market with a view to the four freedoms and conditions of competition' form part of the aim of the Agreement.

²⁸ This results implicitly from the next recital of the Preamble which refers to the 'common values' of the parties to the Agreement.

²⁹ Cf. the contribution by Haas, Zellweger, 'Allgemeine und Schlussbestimmungen (Art. 118-129 EWR-A)', in O. Jacot-Guillarmod (ed.), *EEA Agreement, Comments and Reflections* (1992) para. 310 et seq.

³⁰ Systematic Collection of Swiss Federal Legislation, SR 0.111.

³¹ Cf. Haas, Zellweger, *supra* note 29, para. 203.

C. Duty to Observe the ECHR as a Consequence of the Practice of the Strasbourg Organs

1. Practice of the European Commission of Human Rights

The subordination to the ECHR of EFTA states and their organs within the EEA flows not only from the adoption of the relevant case-law of the ECJ as part of the binding *acquis communautaire*, but also, on closer scrutiny, from the *acquis européen* represented by the practice of the organs of the ECHR.

The European Commission of Human Rights has often received individual applications alleging, in substance, breaches of the ECHR by EC organs. So far, the Commission has declared such applications inadmissible. The following categories of cases have emerged:

- The Commission's consistent practice has been to dismiss complaints alleging breaches of the Convention by the European Community on the ground that the Commission had no jurisdiction since the EC is not party to the ECHR. Thus, applications directed against the European Parliament and other EC organs were thrown out *ratione personae*³².
- In a case of an alleged breach of the ECHR by EC organs, an applicant filed a subsidiary complaint against all EC states. The Commission explicitly left open the question as to whether breaches by EC organs involved the liability of member states, but added that, should the question be answered in the affirmative, a remedy before the ECJ would form part of domestic remedies as defined in Article 26 of the ECHR.³³
- The case of the German firm *M & Co.* was based on a different premise. The applicant objected to rulings by German courts holding that a decision concerning a fine imposed by the EC Commission and upheld by the ECJ was valid.³⁴ Before the European Commission of Human Rights, the applicant argued that the German authorities were in breach of the ECHR because they were enforcing a decision of the ECJ that ran counter to the ECHR. The Commission held that it had jurisdiction on the ground that the German authorities had acted in the case not as quasi-Community authorities but rather as an organ of a contracting party to the ECHR. According to Article 1 of the ECHR, contracting parties are responsible

³² Applications No. 8030/77, *C.F.D.T. v. European Communities*, Decision of 10 July 1978, DR 13, at 231; No. 11574/85, *Associazione spirituale per l'unificazione del mondo cristiano v. Italy*, Decision of 5 October 1987; No. 13539/88, *Dufay v. European Communities*, Decision of 19 January 1989; No. 13258/87, *M. & Co. v. Federal Republic of Germany*, Decision of 9 February 1990, at 865 et seq.

³³ *Dufay v. European Communities*, *supra* note 32. The applicant had failed to observe the deadline for lodging a complaint with ECJ. The Commission declared her application inadmissible on the grounds of non-exhaustion of domestic remedies.

³⁴ The firm was fined by the EC Commission for transgressing rules of competition and failed in its case before the ECJ. The firm then took its case further in Germany with an appeal to the Constitutional Court in which it complained, unsuccessfully, of acts of enforcement by the German authorities.

for all violations by their organs, irrespective of whether such violations stem from domestic law or from obligations to fulfil a duty under international law. Contracting states are not forbidden to transfer their own jurisdiction to an international organization provided that it is certain that the latter ensures an equivalent protection of human rights. This holds true for ECJ practice regarding ECHR safeguards and the Basic Rights Declaration of 1977. Under these circumstances, the Commission held that it was not called upon to look into the question as to whether the enforcement by a member state of a valid judgement of the ECJ was in breach of the ECHR.³⁵ Thus, the European Commission of Human Rights adopted a position corresponding to that of the German Constitutional Court in the *Solange II* judgement.³⁶

Although this practice is not directly applicable to EFTA states and their organs, conclusions can be inferred from it for the purpose of answering our question as to whether EEA organs of EFTA states are required to verify the compatibility of EEA law with the ECHR and, in the event of conflict, to give precedence to the latter.

2. Duty of EEA organs of EFTA states to comply with the ECHR

Regard should be had first of all to the international level. Article 108 of the EEA Agreement obliges EFTA states to create an independent surveillance authority and a court. Whereas the EFTA Surveillance Authority is regulated to a large extent in the EEA Agreement itself, the powers of the EFTA Court are to be determined 'in accordance with a separate agreement between the EFTA states'.³⁷ The EFTA Court Treaty contains procedures modelled after those of the ECJ and has thus designed a system for preliminary rulings: EFTA states and natural or legal persons concerned may also make use, *inter alia*, of an annulment procedure against decisions of the EFTA Surveillance Authority.³⁸ Under Protocols 6 and 7 to this Treaty, the EFTA Surveillance Authority and the EFTA Court are endowed with legal personality including the right to conclude treaties, to own property and to litigate. Legally speaking, they thus constitute *international organizations* in their own right in relation to the EFTA states. However, this does not mean that the EEA as such will become an international organization for, unlike the EC, it will remain a treaty

³⁵ Application No. 13258/87, *M. & Co. v. Federal Republic of Germany*, *supra* note 32. However, the rejection by the Commission of the case *rationae materiae* has been criticized by the President of the European Court of Human Rights, cf. Ryssdal, *AEL* Vol. II-2 (1991) 1 (forthcoming). Cf. detailed commentary by Giegerich, 'Luxembourg, Karlsruhe, Strassburg – Dreistufiger Grundrechtsschutz in Europa', *ZaöRV* (1990) 836-863.

³⁶ Cf. *supra* note 6.

³⁷ Article 108, para. 2 of the EEA Agreement. In accordance with this provision, the EFTA Court shall at least be competent for 'a) actions concerning the surveillance procedure regarding the EFTA states; b) appeals concerning decisions in the field of competition initiated by the EFTA Surveillance Authority [and] c) the settlement of disputes between two or more EFTA states'.

³⁸ For details cf. Articles 35 and following of the Agreement between the EFTA states on the Establishment of a Surveillance Authority and a Court of Justice.

established under international law. Only the organs created by the EFTA states for the implementation of that treaty will possess legal personality.

There can be no doubt that the EFTA Surveillance Authority and the EFTA Court will have to comply with the ECHR and apply the latter if a conflict arises. As already pointed out, in *M & Co.*, the Commission clearly stated that, under Article 1 of the ECHR, contracting parties are responsible for all breaches committed by their organs irrespective of whether such breaches arise out of domestic law or the duty to fulfil an obligation under international law. Should they transfer their powers to an international organization, these states *must ensure that the organs of the latter secure equivalent protection of human rights*.³⁹ This duty applies to EFTA states and the organs set up by them at least to the same extent as the requirement placed upon the EC and its member states by the practice of the European Commission of Human Rights.

The requirements of the European Commission of Human Rights are met if, when adopting the relevant ECJ practice, the EFTA Surveillance Authority and the EFTA Court apply ECHR safeguards, be it only in the form of general principles of law. The practice followed so far by the European Commission of Human Rights prompts the view that the ECHR organs will not require direct application of the ECHR but simply, as in the case of *M & Co.*,⁴⁰ that the EFTA Court gives *full effect to its provisions*.⁴¹

It should, of course, be stressed that the decision as to the status to be given to the ECHR in the EEA lies finally with the EFTA Court which thus enjoys a certain margin of appreciation in reaching its decision. In my view, however, cogent arguments exist in favour of *direct application* of the ECHR by the EFTA Surveillance Authority and the EFTA Court. Despite the legal personality vested in these latter two organs, there are *basic differences* between the EC and the EEA. The substantive law of the EEA is not the law of a supra-national organization but is made up of treaty rules that are agreed upon between states, all of which have also ratified the ECHR. *EFTA states cannot divest themselves of their treaty obligations under the ECHR* as a result of their ratifying the EEA Agreement. The fact that EEA law is interpreted and applied for EFTA states in the last resort by organs endowed with legal personality essentially on practical grounds and thus being autonomous in relation to those states in no way alters this conclusion. In the joint Declaration on the

³⁹ Application No. 13258/87, *supra* note 32, at 8 ‘... the transfer of powers to an international organization is not incompatible with the Convention provided that within that organization fundamental rights will receive an equivalent protection’.

⁴⁰ Cf. *supra* note 32.

⁴¹ This view is consistent with the practice of the European Court of Human Rights which has acknowledged regarding dualist states that, although Contracting Parties are required to ensure their citizens enjoy the safeguards of the ECHR, it is for the states to determine the means for obtaining this goal. Cf. the Judgment in *Sunday Times v. UK* of 26 April 1979, Series A No. 30, 38; cf. B. Schmid, *Rang und Geltung der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 3. November 1950 in den Vertragsstaaten*, (1984) 135; J.A. Frowein, W. Peukert, *Europäische Menschenrechtskonvention: EMRK Kommentar* (1985) 189 et seq.

continuing validity of existing treaties⁴² to which we have already referred, the EFTA states expressly recognized that treaties concerning individual rights, to which category the ECHR undoubtedly belongs, continue to apply in EEA law and override the latter if it provides less than equivalent protection. This principle would be endangered if the implementing organs set up by the EFTA states did not fully apply the ECHR. However, full compliance will be achieved only if the ECHR is applied directly in complete conformity with the practice of the Strasbourg organs. Compliance with the ECHR within the framework of general principles of law tends, as is borne out by ECJ practice, not only towards invocation of the Convention and affirmation of its validity, but also towards early rejection of alleged violations after cursory examination. Moreover, such compliance does not take into account the interpretation of the Convention provisions by the Commission and Court of Human Rights in their case-law.

Will it be possible to challenge EFTA Court rulings before the European Commission of Human Rights by means of individual applications alleging a breach of the ECHR? It is not to be excluded that the Commission will reject this approach and, as in cases concerning applications against the EEC, might argue that the EFTA Court is an international organization and hence a subject of international law that has not ratified the ECHR.⁴³ However, this argument seems overly formalistic. It disregards the fact that the EEA is not an international organization, but has the character of a treaty under international law. Such character is in no way diminished by the choice of the form of international organization for its surveillance and implementing organs. Whereas the ECJ, as the Court of Justice of a supra-national organization, has the task of implementing the law of that organization, the EFTA Court, despite its formal autonomy, remains the organ of the EFTA states for the implementation of treaty law agreed upon by those states. These qualitative differences between EC and EFTA states within the EEA would seem to point to the desirability of treating the EFTA Court in proceedings before the European Commission of Human Rights in the same manner as a national court of the EFTA states.⁴⁴

42 Cf. *supra* note 31.

43 Cf. the applications mentioned in footnote 32.

44 In my view, if it wants to exclude this result, the Commission should decline jurisdiction not by invoking the status of the EFTA Court as a subject of international law but rather on the basis of Article 27(i)(c) of the ECHR which provides that the Commission shall not deal with a petition which has already been submitted to another procedure of international investigation or settlement. Thus, as already mentioned, it would be possible to complain before the EFTA Court that a rule of EEA law or an act of public authority based on such a rule is in breach of ECHR safeguards.

V. Conclusion

The main conclusion to be drawn is that, in the EEA, ECJ case-law on the application of the guarantees of the ECHR as general principles of EC law has the status of part of the *acquis communautaire* and should be adopted by the EFTA Court. The latter could and should, moreover, go a step further and apply the ECHR directly.

All in all, the EEA will by no means weaken the ECHR. On the contrary, more than ever before, the ECHR will serve not only as a minimum standard for domestic legal systems but also as a catalogue of fundamental rights for an integrated Europe. This is to be welcomed, since, if it is to enjoy lasting popular support in Europe, any form of European integration will need to be buttressed by the safeguards and legitimacy stemming from human rights.