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**European Union,
European Convention on Human Rights
and Human Rights Protection in Europe***

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The Council of Europe is today an organisation of 47 States and encloses the whole of the continent of Europe with the sole exception of Kosovo, Belarus and the EU. It has survived the challenges of the past half century, has expanded into central and eastern Europe and has flourished when it might just as easily have been marginalized and eaten up by the European Communities. Its best known and most successful treaty is the European Convention on Human Rights, its best known and most successful organ is the European Court of Human Rights. The Court tries to cope with an inexorably rising number of cases (some 53'000 in 2007). A few years ago, it delivered some 700 to 800 judgments a year. In 2005 the figure rose to 1'105, in 2007 to 1'503. At the end of 2007, some 104'000 cases were pending, 10'000 of which constituted backlog (that is to say, they had been pending for more than three years). In the meantime, the Court changed its method of calculation. It no longer counts applications which are provisional only; as a result, the Court would now say, that some 79'000 cases were pending, instead of some 104'000; the number of backlog cases remains the same.

Before attempting to identify what problems and challenges lie ahead, we should begin to understand how developments in the past fifty or so years have altered the European Convention on Human Rights' core objectives. Several things are clear about its origin. The organization was plainly a reaction to the atrocities of the Second World War. Mostly as a result of British reservations about anything more ambitious, the Council of Europe emerged from the negotiations of the late 1940s as a forum for intergovernmental

* This presentation owes a lot to the book of Steven Greer, *The European Convention on Human Rights Achievements, Problems and Prospects* (2006). And see Jonas Christoffersen, *Fair Balance. A Study of Proportionality, Subsidiarity and Primarity in the European Convention on Human Rights* (forthcoming); Luzius Wildhaber, *The European Court of Human Rights History, Achievements, Reform* (2006).

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cooperation rather than a vehicle for structural integration and supranationality. Along the same lines, the European Convention on Human Rights was a groundbreaking and innovative, but nevertheless a classical interstate instrument and was not intended to be supranational. It was undeniably the product of a “rights-affirming” rather than a “rights-sceptical” political morality. It defined the identity which the signatory States had of themselves and of Europe and was designed as a device to defend democracy against its totalitarian enemies. It was intended, therefore, to contrast sharply with Nazism, Fascism and the right-wing Spanish and Portuguese dictatorships and after the fall of the Iron Curtain with Soviet-style communism. The Convention articulated, in other words, an “abstract constitutional identity” prescribing limits, in terms of human rights, to the exercise of public power in European liberal democracies committed to the rule of law. The model was “abstract” in that it framed relevant principles or standards at a high level of generality, leaving plenty of scope for equally Convention-compliant, though different, institutional, procedural, and normative interpretations at the national level. Moreover, if I may express it in a somewhat simplifying way, with judicial and executive but no legislative institutions, neither the Council of Europe nor the Convention system could have “constitutions” in a more substantial sense. Undoubtedly, however, from the standpoint of what should be the content of any modern constitution, human rights protection must belong to it. So in a rather loose sense, we can consider the European Convention on Human Rights as part of a “Constitution of Europe”.

The Convention was inspired by the Universal Declaration of Human Rights of 1948. However, the fact that the Convention focuses almost entirely on civil and political rights rather than upon the wider rights catalogue provided by the Universal Declaration, indicates a stronger debt to the liberal rights tradition expressed, in particular, by the French Declaration of the Rights of Man and the Citizen, and many subsequent national bills of rights. The Convention has always been interpreted flexibly and evolutively. It is therefore too rigid to criticize it as a flawed, incomplete, or outmoded attempt to provide the citizens of Europe with a pan-continental judicial process which should offer remedies for alleged breaches of what is claimed to be the full panoply of fundamental rights, including social, economic, and other rights. Social rights are basically guaranteed by the European Social Charter and the non-judicial process set up in that Charter. The Convention, on the other hand, guarantees the right to life, the prohibitions of torture and of slavery, the right to liberty and security, the right to a fair trial, respect of private and family life, the freedoms of religion, of expression and of the press, of association and of assembly, effective national remedies, non-discrimination, the right to education and free and secret elections of the legislature.

As I have mentioned, the Convention was to provide an early warning device by which a drift towards authoritarianism, particularly in weak democracies, could be detected and dealt with through complaints by another member State or States to pan-European

judicial and political institutions. These two objectives, one symbolic and the other instrumental, were fundamentally connected with war. The Convention was intended to contribute to the prevention of war in western Europe, on what I believe to be a largely correct assumption that authoritarian regimes are more belligerent than democracies. It is quite difficult to assess the role the Convention and the Council of Europe may have played in preserving international peace and security in Europe since this contribution cannot be disentangled from that made by the European Communities and the European Union. However that may be, the wish to prevent wars explains that the founders of the Convention placed what proved to be an exaggerated confidence in interstate complaints and from a present-day perspective had surprisingly little confidence in individual applications.

The ending of the Cold War in the 1990s has, it would seem, deprived the Convention of its war-related founding objectives and has subtly transformed those objectives which remain. Western European Governments have believed, and may well continue to believe, that States whose ideology was once the Soviet-communist one have been brought into the fold. That is indeed what many politicians have told me, that the Eastern European States, by joining the Council of Europe and ratifying the Convention, have more or less automatically become democracies. I find that quite naive and would suggest that you have to look beyond words and gestures to the lived reality of each State. As a result, the risk of "classical" interstate war has greatly diminished in Europe. By contrast, the risk of civil conflict, with the attendant risks of equally gross and systematic human rights abuses as in classical interstate wars has increased specifically in ex-Yugoslavia and the Caucasian region a prospect which could hardly have been foreseen in the late 1940s. Although the Convention has expanded geographically before, the enlargement of the 1990s was on a wholly different scale and brought a critical mass of up to now 22 States, some with chronically weak democratic traditions, into its judicial system. The statistics demonstrate evident shifts. In the past few years, some 60 to 70% of all applications have come from central and eastern Europe. 27% of all pending cases are from Russia. It is claimed that, as a result, the Convention has departed from its original function to become a mechanism for changing the political character of these states. But this puts it somewhat too strongly. The Convention was and remains mainly an instrument for gently and incrementally encouraging, rather than for instigating, change and civilizing the Member States. And in spite of the developments of the past fifty or so years, its original purposes of providing an abstract European constitutional identity, and of sounding the "alarm bell", remain. It is granted that the dominant risk is now often the intolerance by ethnic majorities or minorities, and the risk of civil conflict and further human rights violations this portends, than it is of "ideological" authoritarianism of the old fashioned left and right. And so another objective has emerged, which is promoting convergence in national public institutions, processes, and norms around Convention principles. The principal

mechanism for attaining all these goals can no longer be the inter-state complaint, as the founders of the Convention had imagined. This idea was based on the wrong assumption that antagonism between States can contribute towards their greater interdependence and unity. Instead, as the history of the past 60 years has proved amply, it must lie with the individual application or some other alternative. And indeed, the daily bread of the European Court are the individual applications.

In the whole history of the Convention and the Court, there have only been 21 interstate complaints. The last such application was the still pending complaint of Georgia about the arbitrary treatment of Georgians in Russia. However, there have been no interstate complaints concerning ex-Yugoslavia (for instance, Kosovo or Bosnia-Herzegovina) or Transnistria or the Caucasian region (for instance, Nagorno-Karabach, Abchasia, Southern Ossetia or Chechnya). So one must conclude that the principal mechanism and indeed the Court's normal working instrument are the individual applications.

Now I shall look at the developments of the last 60 years from the perspective of the European Communities.

For much of the past half century the European Convention on Human Rights on the one hand, and the European Economic Community/European Union on the other, had little maybe too little to do with each other. Only recently has it become apparent that the futures of each are likely to be increasingly intertwined. For the early European integrationists the Council of Europe was a missed opportunity and a bitter disappointment. Jean Monnet regarded it as "entirely valueless". Robert Schumann therefore decided that France should proceed with more substantial proposals for European integration without British participation. Schumann's plan laid the foundations for the six-member European Coal and Steel Community of 1951, the primary goal of which was to integrate the French and German coal and steel industries in order to prevent another Franco-German war. In 1957 the European Economic Community (EEC) emerged with the far more ambitious objective of establishing a common market among member states. The amalgamation of the EEC with the European Coal and Steel Community and the European Atomic Energy Community in 1965 created the European Communities. Retaining the distinctive economic identity of the European Communities as the "First Pillar", further re-organizations added a "Second Pillar" (a Common Foreign and Security Policy) and a "Third Pillar" (Justice and Home Affairs). This included such issues as asylum and immigration, drugs, judicial cooperation on civil and criminal justice, and police cooperation on terrorism and international crime. In 2002 twelve of the then fifteen members of the EU exchanged their national currencies for the Euro. By the mid-2000s ten new States had joined the EU (Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Estonia, Latvia, Lithuania, Malta and Cyprus), bringing the number of Member States to 25 and later with the arrival of Bulgaria and Romania to 27. The

number of 27 States is now over half that of the Council of Europe with its 47 Member States.

For much of their history, the political institutions of the EEC/EC/EU showed little overt interest in human rights. While the EEC/EC always regarded the ideals of democracy, human rights and the rule of law as important and desirable, human rights were not initially seen as integral to the project of European integration. In any case, it was assumed that they were adequately covered by the Council of Europe and the European Convention on Human Rights to which all members of the EEC/EC belonged, after France had ratified the Convention in 1974. The fact that the European Court of Justice (ECJ) in Luxembourg, the principal judicial organ of the EEC/EC, generally interpreted Community law as it applied to Member States (not as to the institutions of the Union itself) in accordance with the Convention and the jurisprudence of the Strasbourg institutions seemed adequate enough.

However, towards the end of the twentieth century the profile of human rights increased in the EC/EU. The ECJ's own wisdom and progressive spirit as well as a rebellion against supremacy, led by the German Constitutional Court, induced the ECJ, from the 1970s onwards, to articulate its own fundamental rights jurisprudence. Later on, the EU began to require respect for human rights as a condition of non-EU-States entering into formal trading and other relationships with it. This, incidentally, constituted a major leverage for the Council of Europe to push such countries as Bulgaria, Romania, Turkey and Croatia in the direction of executing the judgments of the European Court of Human Rights more effectively. And it is a leverage which is missing conspicuously in the relationship with Russia. It became increasingly difficult for the EU to justify not having a developed human rights policy for its own internal affairs. In the late 1990s the provision of a formal human rights document and more effective human rights monitoring arrangements were seen by the EU as offering a solution to the "legitimation crisis". This crisis was caused by the realization that the project of European integration seemed to somewhat have lost touch with the needs and aspirations of Europe's citizens.

The Treaty of Nice 2001, therefore, provided the EU with a formal statement of rights, the Charter of Fundamental Rights, which collects together, in a single document, rights which the EU already provides in various other sources. I shall proceed to discuss and describe the Charter, because the new EU Constitution is largely unchanged, as far as human rights are concerned.

The Charter differed from the European Convention on Human Rights in five ways.

- (1) While the former (the Charter) includes the rights contained in the latter (the Convention) it does not do so in the same terms. For example, Article 6 of the Charter expressed the right to liberty and security of the person in a single clause "everyone has the right to liberty and security of the person" while Article 5 of the Convention has no less than five clauses, one of which has six further sub-clauses,

twelve elements in total, for the same right. Article 52(3) of the Charter required the meaning and scope of rights found in both Charter and Convention to be interpreted in the same way as those found in the Convention. At first the formulation was that Charter and Convention should be interpreted “in a *similar* way”. It constitutes a major success for the European Court of Human Rights that this wording was changed, so that Charter and Convention should now be interpreted “the *same* way”. The European Court of Justice has said that its human rights jurisprudence is grounded in principles common to the EU member states, and since all member states have ratified the European Convention on Human Rights, this means, for practical purposes, that the reading of the Charter should be informed by, and harmonized with, the jurisprudence of the European Court of Human Rights. At this point in time, I am quite optimistic and believe that the two Courts (the ECJ and the ECtHR) will harmonize their case-law in a meaningful way.

- (2) The Convention is largely confined to civil and political rights, but the Charter included a wide range of social, economic, cultural, and citizenship rights.
- (3) The Convention provides different restriction clauses for each right, while the Charter provided a single general limitation clause.
- (4) The Convention binds Member States, in any and all of their activities, but Article 51(7) of the Charter indicated that it was addressed to the institutions of the EU and to its Member States only as far as the formulation and implementation of EU law were concerned.
- (5) The Charter did not provide a right of individual petition to the ECJ. Were the Charter to become legally binding and enforceable, the only recourse to Luxembourg open to litigants for a breach of a Charter right would be, therefore, through the preliminary reference procedure which enables domestic courts to consult the ECJ for rulings on points of Community law. And this is still so under the newly revised EU Constitution.

In the meantime there have been negative votes in the referendums on the EU constitution in France and the Netherlands in the summer of 2005. These negative votes provisionally ended the attempt to provide the EU with clearer constitutional foundations. They also deprived the Charter of Fundamental Rights of the formal legal character it would otherwise have had. It took the EU quite some time and soul-searching before it managed to come up with a slightly watered-down version of a new EU constitution. The governments decided that this new constitution would (except in Ireland) no longer be exposed to the vagaries and unpredictabilities of direct democracy, which will not necessarily help to overcome the democratic deficit of the EU. In December 2007, the EU-Charter of Fundamental Rights was “proclaimed” in Strasbourg by the EU Parliament. However, it will enter into force only upon ratification of the reform treaty by the Member States. Moreover, the United Kingdom and Poland obtained opting-out clauses. For them

the Charter will not automatically enter into force, but they can opt out, if they so choose, and since they bargained for these clauses, I would assume that they will indeed opt out. Apart from this opting-out clause, the Charter has remained the same as before, and what I have said about the Charter is therefore still relevant.

Let me close with a few words on the opting-out clause. The clause shows how interconnected the Charter and the Convention are these days. The United Kingdom wanted an opting-out clause because it was sceptical of social and economic rights which it considered as an interference with the sovereignty of the British Parliament. It also tried to guarantee what its government felt were necessary anti-terrorist measures and to shield them against such judgments as *Chahal v. United Kingdom and Saadi v. Italy* in which the European Court of Human Rights had found that certain anti-terrorist measures were incompatible with the Convention. Poland, on the other hand, feared a liberalization of the Polish hard line against abortion and against homosexual marriages.

Now the British and Polish governments can opt out of the Charter and the EU Constitution, but not out of the European Convention on Human Rights. They have not tried to opt out of the Convention when ratifying it and they have not tried since. It would seem, therefore, that Poland would not be bound if the ECJ decided that homosexual marriages are legal, but that it would be bound if the ECtHR so decided. Now please remember that the ECJ says it will apply in its case-law the ECHR as interpreted by the ECtHR as spelling out constitutional principles common to all Member States. So what does all this mean? The future will tell us. Perhaps the ECJ will indeed not apply case-law of the ECtHR which is contrary to the opting-out clause. But it is quite likely that the ECtHR will. And under international law it would be entitled to do so.