



Is adherence to the European Convention on Human Rights a condition of European Union membership?

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The Government said in 2013 that it would consider withdrawing from the European Convention on Human Rights and the jurisdiction of the Court of Human Rights.

Questions have been raised as to the legal and political consequences of withdrawal from the European Convention and specifically, whether a European Union Member State can withdraw from the Convention while remaining in the EU.

This Note looks at what the EU Treaties say about adherence to human rights provisions and considers different views on the compatibility of withdrawal from the European Convention with continued EU membership.

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1 What the EU Treaty says about human rights

Article 2 of the [Treaty on European Union](#) (TEU), as amended by the Lisbon Treaty, states:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Article 6(3) TEU states:

Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law.

Article 7 TEU provides a mechanism for determining “that there is a clear risk of a serious breach by a Member State” of the values set out in Article 2 TEU.

2 Human rights in accession states and existing Member States

2.1 Accession states

Article 49 TEU states: “Any European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union”.

One of three so-called ‘Copenhagen criteria’ for EU membership (agreed at the European Council held in Copenhagen in 1993) is the stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities.

The Commission’s [Opinion of July 1997](#) on Bulgaria’s EU membership application elaborated on these political conditions, and the Commission monitors candidate states annually during the pre-accession process. The Commission noted in its 1997 Opinion that human rights provisions formed “part of the *acquis*: any State wishing to join the European Union must first have ratified” the European Convention and its main additional protocols. The political criteria for accession states have also been linked to EU financial assistance programmes and

accession partnerships. The original criteria have been enhanced by the inclusion of specific human rights requirements considered pertinent to the post-Communist states, such as the fight against corruption. The Commission monitors accession states annually during the pre-accession process, publishing a comprehensive monitoring report before EU entry.

2.2 Existing Member States

One criticism¹ of the EU's human rights policy has been that the Commission demands high standards in human rights and minority protection from the EU accession states that are not required of the older Member States. Article 6 TEU certainly emphasises the legality of human rights guarantees in the EU and the Member States, but there has been no systematic EU monitoring of human rights. As all EU Member States are also party to the European Convention on Human Rights and various United Nations human rights instruments, the Council of Europe and the UN have been the main monitoring and adjudicating bodies. It was envisaged that the EU Human Rights Agency, which began work in March 2007, adherence to the EU Charter of Fundamental Rights and EU accession to the European Convention on Human Rights in accordance with Article 6(2) TEU would put human rights at the heart of EU policymaking, introducing external judicial review of its respect for human rights.

3 Withdrawing from the European Convention on Human Rights

Some believe that withdrawing from the European Convention on Human Rights would mean leaving the Council of Europe. However, the EU Treaties do not deal with any linkage between EU membership and ratification of the European Convention: whether, for example, adherence to the European Convention is a formal requirement of continued EU membership, or a benchmark for a human rights standard that Member States should achieve and sustain.

3.1 Commission view

Members of the European Parliament (MEPs) have asked the European Commission whether withdrawal from the European Convention on Human Rights would affect a State's EU membership. On 21 November 2006, [Geoffrey Van Orden \(PPE-DE\)](#) asked:

... if for any reason a Member State were to decide that it wished to withdraw from the ECHR and abide by a different framework, while remaining a member of the EU. While this may be controversial, I do not see anything in the Treaties that would forbid it and I wish to seek confirmation of this.

The [Commission replied](#) on 26 January 2007:

Respect for fundamental rights as guaranteed by the European Convention on Human Rights is an explicit obligation for the Union under Article 6(2) [now Article 6(3)] of the Treaty on European Union, and the Court of Justice has held that the Convention is of especial importance for determining the fundamental rights that must be respected by the Member States as general principles of law when they act within the scope of Union law. The rights secured by the Convention are among the rights guaranteed by the Charter of Fundamental Rights of the European Union. In the negotiations for the accession of new

¹ See for example Open Society Institute, "[Bulgaria's Struggle to Make Sense of EU Human Rights Criteria](#)", Iavor Rangelov, 2010

Union members, respect for the Convention and the case-law of the European Court of Human Rights is treated as part of the Union acquis.

Any Member State deciding to withdraw from the Convention and therefore no longer bound to comply with it or to respect its enforcement procedures could, in certain circumstances, raise concern as regards the effective protection of fundamental rights by its authorities. Such a situation, which the Commission hopes will remain purely hypothetical, would need to be examined under Articles 6 and 7 of the Treaty on European Union.

The Commission's reply confirms that European Convention standards are general principles of EU law; that is to say, they apply to EU law and Member State law applying EU law. As such, they come within the jurisdiction of the Court of Justice, not the European Court of Human Rights.

On 3 March 2011 the UKIP MEP, [Nigel Farage](#), asked the Commission: "Can a Member State be a member of the European Union and not be a party to the European Convention for the Protection of Human Rights and Fundamental Freedoms?" The Commission [replied on 7 April](#), referring to and largely replicating the 2007 reply. On 20 March 2014 Mr Barroso replied to a [similar question from Catherine Stihler \(S&D\)](#) on 13 February 2014 by reference to the 2007 response.

3.2 UK government and parliamentary views

On 2 March 2013 the Justice Secretary, Chris Grayling, said that a future Conservative government would scrap the [Human Rights Act 1998](#) (HRA), which incorporates the European Convention on Human Rights into domestic law.² On 9 March 2013 the Home Secretary, Theresa May, said the UK should "stop human rights legislation interfering with our ability to fight crime and control immigration" and consider withdrawing from the European Court of Human Rights "and the Convention it enforces".

The Chair of the European Scrutiny Committee, Bill Cash, told [PoliticsHome on 6 March 2013](#) that "the UK could leave the Convention and stay within its EU treaty obligations", and that "If the UK were to withdraw from the European Convention, this would not be in breach of the EU treaties, but we would be bound by the European Court of Justice if we breached European Convention law in applying EU law". He did not think the EU's accession to the European Convention meant the UK could not withdraw from the Convention.

Politically and diplomatically, withdrawal from the Convention could, as the Attorney General Dominic Grieve QC, said in October 2012, "result in the UK becoming a pariah state" in Europe.³ He thought such an action would place the UK "in a group of countries that would make very odd bedfellows", with Belarus the only other European state outside the Convention. The former Justice Secretary, Ken Clarke, and the Liberal Democrats are also against withdrawal from the Convention. The Deputy Prime Minister, Nick Clegg, told the [Liberal Democrat spring convention](#) that leaving the Convention would not "be on the Cabinet Table so long as I'm sitting round it".

² Repealing the HRA would not mean that the UK would no longer be subject to the requirements of the European Convention, although they could not be relied upon in domestic courts. The UK agreed in to the jurisdiction of the Court of Human Rights in [declarations covering 14/1/1966 - 31/10/1998](#) until the compulsory jurisdiction of the Court was introduced under [Protocol No.11](#) to the Convention (entered into force 1 November 1998). Even without the HRA, the UK would remain bound by the Convention and the jurisdiction of its Court - unless it withdrew from the Convention.

³ [Telegraph, 9 October 2012](#)

A bill of Rights Commission which [reported in December 2012](#) on whether a UK bill of rights should replace the HRA diverged widely and agreed only to do nothing until after the outcome of the Scottish referendum on independence in 2014. Lord Faulks QC and Jonathan Fisher QC did not think the UK would become a pariah state if it withdrew from the Convention, saying “it is axiomatic to record that the UK would continue to adhere to an ethical foreign policy and promote adherence to the safeguarding of fundamental freedoms and civil liberties at all times”. They regretted that the Commission’s terms of reference “were drawn in a way which precluded the Commission from considering these critically important matters”.⁴

The [Human Rights Act 1998 \(Repeal and Substitution\) Bill](#), a Private Member’s Bill sponsored by Charlie Elphicke, purported to replace the HRA with a UK Bill of Rights and Responsibilities. The Bill had its [second reading](#) on 1 March 2013 and was withdrawn.

3.3 Expert opinion

There would be *no* obligation to leave the EU

The political scientist, Dr Michael Pinto-Duschinsky, does not think there is a formal EU Treaty requirement that binds existing Member States to remain party to the European Convention. In [Bringing Rights Back Home](#),⁵ he said: “there is no clear legal provision in the Statute of the Council of Europe which would oblige the UK to cease being a member were it to withdraw from the ECHR”. Experts who gave [evidence to the House of Commons Home Affairs and Constitutional Affairs Committees](#) in October 2006, Rabinder Singh QC and Professor Jonathan Fisher QC, shared this opinion. Singh did not want to be definitive, but said he “had always understood, as a legal matter, that membership of the European Union today requires adherence to the European Convention on Human Rights [...] what we expect of potential new entrants, so I think it is a matter of legal obligation”.⁶

Professor Fisher said:

It seems to me, on a reading of that, that if we put in place a bill of rights and obligations which replaces the European Convention and remains true to incorporating in it those fundamental human rights that we are speaking of and that we have been talking about this morning, I cannot conceive of how it can be said that we are not respecting fundamental rights as guaranteed by the Convention.⁷

Dr Pinto-Duschinsky pointed out that as the EU itself intends to ratify the European Convention, “Were a country to denounce the convention treaty, it would still be bound by its membership of the EU to adhere to the terms of the convention in matters falling under EU jurisdiction. However, this in itself would not necessitate its individual adherence to the convention”. He also maintained that withdrawal from the Convention “would not in itself entail the abandonment” of values emphasised in Article 2 TEU. He underlined that under Article 6(3) TEU, fundamental rights as guaranteed by the European Convention “and as they result from the constitutional traditions common to the Member States” constitute the general principles of the EU’s law. He conceded that the meaning and implications of this were “far from clear”, and, moreover:

⁴ [A UK Bill of Rights? The Choice Before Us](#), Volume 1, December 2012

⁵ Policy Exchange, 2011.

⁶ [Q 63](#)

⁷ [Q 41](#). See also Jonathan Fisher QC, *Rescuing Human Rights*, 2012.

... if a member country of the EU adheres to standards as high as those set out in the ECHR (or incorporates the ECHR into its national legislation), there is nothing in Article 6.3 that requires that country to accept the jurisdiction of the Strasbourg court as the preferred method of enforcement of those standards.

Other Member States might, he said, decide under Article 7(1) TEU that UK withdrawal from the Convention constituted a “clear risk of a serious breach” of the core values of the EU, which could result in UK suspension from the EU. However, in his opinion, this was “barely conceivable”.

Rosalind English (Barrister, 1 Crown Office Row) thought that reports on the linkage between adherence to the European Convention and EU membership had been “much exaggerated”:

Nothing in the relevant treaties requires continued adherence to the ECHR as a condition of continued UK membership of the EU. To repeat a well-rehearsed aphorism of statute interpretation, if they had meant to say that, they would have said it. This is underlined by the explicit requirement that ECHR membership is now required for accession; by implication, therefore, it is not an obligation for existing member states.⁸

An *Open Europe* Briefing Note⁹ in February 2011 stated “there is no formal requirement in the EU treaties binding on existing member states such as the UK to remain signatories to the European Convention on Human Rights”. Open Europe also noted that “withdrawing from the European Convention would still leave a huge number of human rights locked in at the EU level”:

This is because first, the EU is set to join the ECHR in its own right and as a separate entity (although the UK has a veto over this) and secondly, the EU has its own catalogue of justiciable rights – the so-called Charter of Fundamental Rights, enshrined in the Lisbon Treaty. The Charter allows citizens to contest rights set down in EU law at the European Court of Justice (ECJ) and, in future, possibly also the ECHR (when the EU accedes to it).

Withdrawal would also leave human rights “locked in” at an international level, as Adam Wagner¹⁰ commented in the [New Statesman on 3 March 2013](#):

... the European Convention on Human Rights is only one of a number of international conventions and EU ... rules which stop the UK from doing things like sending people back their home countries where they would face a real risk of torture or doing things which disproportionately affect children
Withdrawing from Strasbourg would do little or nothing to untangle that web.

He continued:

What is important to understand is that domestic courts are not bound to follow the European Court of Human Rights now, but judges take the view that if there is a principle arising from a consistent line of cases in the Strasbourg court and there is no particular conflict with UK law, they will follow it.

⁸ [UK Human Rights blog, 9 February 2011](#)

⁹ Open Europe, “Prisoners’ right to vote: the blurred line between the European Convention on Human Rights and the European Union”, February 2011

¹⁰ Barrister at 1 Crown Office Row chambers and editor of [UK Human Rights Blog](#).

Our own common law has become bound up with and highly influenced by the case law of the European Court (following the case of Ullah, UK courts to do "no more" than Strasbourg "but certainly no less"). Judges don't generally consider the Strasbourg court to be as barmy as some politicians would have us believe, and there is absolutely no indication at all that withdrawal from Strasbourg would alter this situation a great deal if at all.

There *would* be an obligation to leave the EU

Professor Francesca Klug (LSE Human Rights Centre) told the Commons Committee in 2006 that the UK could *not* remain in the EU if it left the Convention, because "it is a requirement now of the European Union that you ratify the Convention. You do not have to incorporate it into your laws, as we have done with the Human Rights Act, but you do have to ratify the European Convention on Human Rights to be a member of the EU".¹¹

The then Lord Chancellor, Lord Falconer, tended towards this view, telling the Committee: "I think the reason why there is some doubt is because the way that the relevant treaties are drafted does not express it as a condition, but to all intents and purposes, I believe it is not possible to be a member of the European Union and to have left or denounced the European Convention on Human Rights".¹²

4 Further reading

House of Lords Library Note for the debate held on 19 May 2011: "[To call attention to the European Convention on Human Rights](#)", Matthew Purvis, 13 May 2011

European Journal of International Law, Volume 17, Issue 4, 2006, pp. 771-801. "[The European Union and Human Rights: An International Law Perspective](#)", Tawhida Ahmed and Israel de Jesús Butler

LSE blog, "[As long as the UK is bound by the ECHR, it is hard to envisage how a new UK Bill of Rights could 'solve' the perceived problems of the Human Rights Act](#)", Francesca Klug and Amy Ruth Williams, 8 October 2012

New Statesman blog "[What would happen if the UK withdrew from the European Court of Human Rights?](#)" Adam Wagner, 3 March 2013

The Law Society Gazette "[Seat at international table at risk over human rights](#)", Joshua Rozenberg, 6 December 2012

Constitutional Law Group blog, Scott Stephenson: "[The Constitutional Significance of Statutory Repeal: How Far Can Parliament Turn Back the Clock?](#)" 7 March 2013

[UK Human Rights blog](#), Daniel Isenberg, 11 March 2013

¹¹ [Q 17](#)

¹² [Q 96](#)