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Constitutional Problems Involved in Adherence by the United States to a Convention for the Protection of Human Rights and Fundamental Freedoms

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CONSTITUTIONAL PROBLEMS INVOLVED IN ADHERENCE BY THE UNITED STATES TO A CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS*

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Current interest in the European Convention on Human Rights and Fundamental Freedoms and the work of the Commission and Court established thereunder suggests that it might not be entirely fanciful to consider the constitutional problems that might be involved in adherence by the United States to a similar Convention.[1] In order to give as much specific content as possible to this discussion, it will be assumed that a Convention substantially similar in substantive terms to the European Convention has been appropriately ratified by the American States, including the United States, sufficient in number to make the Convention operative according to its terms.[2] It should also be noted in passing that the substantive provisions thus assumed are basically the same, with a few notable exceptions, as the guaranties of our own Bill of Rights.[3] It will be further assumed that the Convention provides for the establishment of an international tribunal, which may be called the Convention Court, whose members are selected in a manner comparable to that described in article 39 of the European Convention—namely, nominated by the individual member nations and elected by an Assembly of the

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1 See, e.g., Robertson, Human Rights in Europe (1963); Weil, The European Convention on Human Rights (1963); Buergenthal, "The Domestic Status of the European Convention on Human Rights," 13 Buffalo L. Rev. 354 (1964); Greenberg & Shalit, "New Horizons for Human Rights: The European Convention, Court, and Commission of Human Rights," 63 Colum. L. Rev. 1384 (1963).

2 The European Convention provides in article 66 that it shall be open to the signature of the Members of the Council of Europe and that it will come into force at the date of the deposit of ten instruments of ratification. The condition was satisfied on September 3, 1953.

3 The privilege against self-incrimination, the right to trial by jury, and the right to indictment by grand jury are of course not mentioned. On the other hand, "the right to . . . freedom of association with others, including the right to form and join trade unions" (art. 11) and "the right to marry and to found a family, according to the national laws governing the exercise of this right" (art. 12) are explicitly mentioned. By special protocol, effective May 18, 1954, the rights to peaceful enjoyment of one's possessions, to education, and to free elections held at reasonable intervals by secret ballot, were added to the Convention. There are, of course, many differences in language between the Convention and our own Bill of Rights, particularly in the detail in which rights themselves and their qualifications are spelled out.

membership, and that the United States has accepted the compulsory jurisdiction of that court in accordance with article 46. Finally, it will be assumed that individuals and organizations asserting that they have been denied any of the rights guaranteed by the Convention as well as any one of the Contracting Parties, may file petitions with the Convention Court and that appropriate procedures are then established for the consideration and disposition of such petitions. For the sake of simplicity no intermediate body such as the European Commission of Human Rights is assumed.[4] At least at first blush, it does not appear that its presence or absence would affect the constitutional questions one way or the other.

The method of implementing such an agreement in terms of domestic law requires special consideration, particularly for a federal system. The European Convention provides simply: "The High Contracting Parties undertake to abide by the decision of the Court in any case to which they are parties." (article 53) Insofar as enforcement is concerned, it provides that "The judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution." (article 54) For present purposes it will be assumed that this or a similar provision in an American Convention imports no particular powers of enforcement, other than the persuasive powers of the ministers or their counterparts. In short, enforcement would have to come through the voluntary compliance of the member states or the judicial processes of their courts. Conceivably the Convention might be implemented by a federal statute declaring that any decision of the Convention Court would be binding upon both the federal and state governments and should have the force of law in the courts of both. Even without such a legislative declaration, the treaty might, by virtue of article 53, be regarded as self-executing and effective as domestic law, in the sense of requiring all courts, both state and federal, to give full effect to a decision of the Convention Court. Under such a view, for example, any person found by the Convention Court to be held in custody by the federal government or by any state government in violation of the guaranties of the Convention would be entitled to a writ of habeas corpus as one unlawfully detained. Whether

[4] Under the European Convention petitions must be filed with the Commission, rather than the Court (arts. 24-25) and the "Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement." (art. 47). The case may then be brought before the Court by the Commission, a High Contracting Party whose national is alleged to be a victim, a High Contracting Party which referred the case to the Commission, or a High Contracting Party against which the complaint has been lodged. The omission of the Commission from the constitutional discussion is not intended in any way to minimize its practical and political importance. It is indeed the major operating arm of the European Convention and its functions might well be emulated in any comparable Convention. See particularly Schwelb, "Operation of the European Convention on Human Rights," 18 Int. Org. 558 (1964).

or not the "enforceable right to compensation" accorded by article 5(5) for the victim of unlawful detention could also be effective as a matter of domestic law without implementing legislation is quite another question.[5] Conceivably the ratification of the Convention might itself be regarded as consent to suit against the United States in its own courts, and even as enforced consent by states to suit in their courts,[6] subject to whatever constitutional doubts such an interpretation might entail.

There is still another question of interpretation, as distinguished from constitutional law, presented by the problem of whether the various guaranties of the Convention should be treated as binding upon state and federal courts in advance of any determination by the Convention Court or only after a determination by that court and in accordance with that determination. For example, would any one detained without being "brought promptly before a judge or other officer authorised by law to exercise judicial power" as required by article 5(3) be entitled to file a writ of habeas corpus in the federal courts asserting that he was held in custody in violation of federal law—to wit, the Convention for the Protection of Human Rights? At first blush this may seem to be simply the question whether the treaty is self-executing, but on closer examination it may appear that the treaty could be self-executing in two different ways, either before or after a decision by the Convention Court. This question was partially presented under the European Convention during the domestic proceedings involving the celebrated Mr. Lawless. He asserted in habeas corpus proceedings in the Irish courts, that the Act under which he was held was invalid because of conflict with the European Convention. The Irish court responded that even if the provisions of the act conflicted with the European Convention, the latter did not have the force of law in Ireland and could not affect the right of the Government to rely upon the act.[7] This view adopted by the Irish court is apparently the view of most members of the European community, although there is also a minority view to the contrary.[8]

In terms of American domestic law the problem might be stated most broadly as this: Would the provisions of the Convention, upon its ratifica-

[5] The exact language of article 5(5) is: "Every one who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

[6] The constitutional problems involved in such "enforced consent" are discussed infra.

[7] Matter of O'Laighleis, [1960] Ir. R. 93, 124-26 (1957). There was no suggestion that the result would have been any different if the European Convention Court had already rendered judgment finding a violation of the convention.

[8] See Buergenthal, supra note 1. In this connection it should be noted that article 13 explicitly provides that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

tion as a treaty, become automatically part of the federal law of the United States, applicable to all federal and state governmental action, and to such private action as might come within the terms of the Convention? As stated, this is only a question of interpretation of the Convention; but an affirmative answer to the question is also the simplest way to pose the constitutional problems. Presumably the constitutional problems would be no different if a sweeping legislative declaration were made by Congress to the effect that the provisions of the Convention should be controlling in the courts of the United States and of the several states.

MISSOURI V. HOLLAND AND ALL THAT

Entirely apart from the rights of the individuals concerned, the first question which might be considered is whether such an incorporation of the law of the Convention, either taken by itself or as interpreted by the Convention Court, into the criminal and civil law of the various states, would itself so revolutionize our basic distribution of state and federal power as to be an abuse of the treaty power. This may be restated as the familiar question of whether there are some implicit limits upon the doctrine of *Missouri v. Holland*,[9] so as to protect the basic character of our government, particularly our federal system, from being in effect subverted by the treaty power; or substantially the same question may be put in the somewhat different terms, formulated by Charles Evans Hughes, whether there are some subjects which naturally belong to the sphere of international relations, with which the treaty power is appropriately concerned, and others which have no legitimate connection with "matters of international concern," and consequently no place within the range of the treaty power.[10] This question has been debated so fully in other contexts, that it would obviously be a work of super-rogation to explore it in any detail here.[11] Suffice it to say here that I can see no basis for a constitutional, as distinguished from a political, line of demarcation. To put it baldly, if a treaty were duly ratified in which the United States undertook that no person would be confined by governmental authority of the United States, state or federal, more than twenty-four hours without being brought before a magistrate, I assume that such a treaty provision could constitutionally be made binding upon all state and federal courts. Of course, the European Convention contains no such specific provision. Nevertheless, there is the possibility that the general

9 252 U.S. 416 (1920).

10 Hughes, "Statement," 23 Proceedings, Am. Soc'y Int'l L. 194 (1929).

11 See especially Chafee, "Federal and State Powers under the UN Covenant on Human Rights," 1951 Wis. L. Rev. 389, 623; Hyman, "Constitutional Aspects of the Covenant," 14 Law & Contemp. Prob. 451 (1949).

provision with respect to detention might be so interpreted. This suggests a series of more difficult questions, such as whose interpretation is to be controlling and how that interpretation is to be enforced.

THE CONVENTION COURT AND STATE SOVEREIGNTY

If as suggested above, the Convention is to be accepted as domestic law, binding on federal and state courts alike, the decisions of the United States Supreme Court interpreting the Convention would of course be authoritative. They would be enforced with respect to state authorities in the same way as other decisions of the Supreme Court applying constitutional guaranties against state action, either by direct review of state court decisions in the Supreme Court, or through habeas corpus proceedings, or other appropriate proceedings, in the lower federal courts. This is not to minimize the difficulties that might be involved; but they would not be essentially different from the difficulties encountered in enforcing remedies against segregation or failure to apportion electoral representation in accordance with constitutional requirements. The Convention would simply be another Bill of Rights, applicable to the states as well as the federal government, and enforceable either by such means as Congress might provide, or as the courts might be able to devise from their general judicial powers.

This is all so simple that a vital omission is immediately suggested. The omission is, of course, the international tribunal, which by hypothesis is vested with final authority in the interpretation of the Convention. How is that institution to be welded into the system just described? In general terms, there are two possibilities. Either the Convention Court could be vested with a kind of appellate jurisdiction, from the United States Supreme Court, with respect to questions arising under the Convention; or it could be vested with an original jurisdiction under the Convention, to be exercised perhaps with due regard for the principle of exhaustion of all domestic remedies, as in the case of the European Court. The first alternative is plainly subject to major constitutional difficulties, in the absence of constitutional amendment. So far as the federal government alone is concerned, article III provides that there shall be "one Supreme Court"; it does not admit of a situation where that Supreme Court is to be in effect a court of intermediate appeal. In addition, the highest courts of the states exercise a portion of state sovereignty subject only to the appellate jurisdiction of the Supreme Court implied in article III. Even that hurdle was not without its historical difficulties.[12]

[12] Cf. Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304 (1816); Warren, "Legislative and Judicial Attacks on the Supreme Court of the United States—A History of the Twenty-Fifth Section of the Judiciary Act," 47 Am. L. Rev. 1 (1913).

The treaty power, despite the great breadth assumed for the purposes of this analysis, does not carry with it the power to subject the state courts to another kind of appellate authority, not provided for in article III.

We turn then to the second alternative postulated as a means of welding the international tribunal into an effective system of domestic law, i.e., original proceedings before that court. It has already been assumed that either the individual aggrieved or any one of the contracting parties has a right to institute proceedings before the Convention Court. But the problems still to be faced are: Who is the defendant, and how is he to be required to submit to the jurisdiction of the court? If the complaint is against the federal government the problem is no different than that presented with respect to any international court of compulsory jurisdiction, assuming that the federal government is obligated by the treaty itself to submit to the jurisdiction of the tribunal. To that extent it has surrendered its sovereign immunity. The United States might, of course, refuse to respond before the court despite its obligation; in that event it would have violated its treaty obligation. But can the federal government, through the treaty power, also obligate a state to respond before the court if a similar complaint is made against it under the Convention? Or may the state assert its sovereign immunity, on the ground that this may not be waived by the federal government? Here the problem is most akin to the doctrine of inter-governmental immunities. The assertion is not simply that the federal government in accepting the treaty has gone beyond the normal scope of international affairs and so abused the treaty power, but rather that it has sought to infringe a particular aspect of state sovereignty—the immunity from suit without the state's consent.

The first question presented by this challenge is whether the state's immunity to suit is generally valid against an assertion of federal power to subject a state to suit without its consent. We know that the immunity may not be asserted against the United States or against a sister state in the Supreme Court of the United States.[13] But ordinarily neither a private citizen nor a foreign state can sue a state either in its own courts or in the federal courts without its consent.[14] May the federal government, nevertheless, acting under one of its delegated powers, subject a state, without its consent, to suit by a private citizen or by a foreign state in order to effectuate an obligation created under such power? Until the decision of the United States Supreme Court this past term in *Parden v. Terminal Ry.*,[15] this question was virtually without authoritative pre-

[13] United States v. Texas, 143 U.S. 621 (1892); Rhode Island v. Massachusetts, 37 U.S. (12 Pet.) 657 (1838).

[14] Monaco v. Mississippi, 292 U.S. 313 (1934); Hans v. Louisiana, 134 U.S. 1 (1890).

[15] 377 U.S. 184 (1964).

cedent. In *Parden* the Court held that a state owning and operating a railroad engaged in interstate commerce, could not successfully plead sovereign immunity in a federal court suit brought against the railroad by employees under the Federal Employers' Liability Act. In so holding, Mr. Justice Brennan, speaking for the Court, denied that the immunity doctrine embodied in the eleventh amendment,[16] was being over-ridden or ignored. "It remains the law," he said, "that a State may not be sued by an individual without its consent."[17] The reconciliation of the apparent inconsistency involved three propositions, which, according to Mr. Justice Brennan, established the consent to suit or waiver of the immunity.

> By adopting and ratifying the Commerce Clause, the States empowered Congress to create such a right of action against interstate railroads; by enacting the FELA in the exercise of this power, Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.[18]

It is interesting to speculate on how much of this reasoning would be applicable to an exercise of the treaty power subjecting a state to suit without its consent, on account of some infringement of the treaty committed in the enforcement of the state's criminal law. Conceivably it might be said that in the grant of the treaty power, the states have authorized the President and Senate to ratify a treaty committing the nation and the states to the preservation of certain human rights; by ratification of the treaty the President and the Senate have conditioned the continued enforcement of state criminal law upon compliance with the treaty obligation; by thereafter enforcing its criminal law the state has accepted the condition and thus consented to suit on the treaty obligation. The formal logic of the demonstration may be roughly the same, but the content is so fundamentally different that the analogy seems forced and unpersuasive. The decision to operate a railroad may represent a real choice on the part of the state, but the same can hardly be said of the continued enforcement of its criminal law. Consequently, if the decision in *Parden* is eventually to be extended to support the power of

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16 Mr. Justice Brennan also explicitly noted that "Although the Eleventh Amendment is not in terms applicable here, since petitioners are citizens of Alabama, this Court has recognized that an unconsenting State is immune from federal-court suits brought by its own citizens as well as by citizens of another state." Id. at 186. [Footnote omitted.]

17 Id. at 192.

18 Ibid. Mr. Justice White, dissenting for himself and Justices Douglas, Harlan, and Stewart, expressly agreed that "it is within the power of Congress to condition a State's permit to engage in the interstate transportation business on a waiver of the State's sovereign immunity from suits arising out of such business." Id. at 198. He concluded, however, that Congress had not made such a condition explicit enough in the Federal Employers' Liability Act to justify the implication of waiver or consent by the state.

the federal government to subject a state to suit for violation of a treaty commitment through the ordinary enforcement of its criminal law, the rationalization is more likely to rest on the proposition that the Constitution itself provides the necessary consent to suit, or dispenses with the necessity of such consent, when the federal government through the exercise of one of its delegated powers subjects the state to an enforceable obligation. This bears some resemblance to the theory upon which a state is subjected to suit by the United States or by a sister state in the United States Supreme Court. In those instances, however, the consent is found at least in part in the explicit language of article III establishing the judicial power of the United States and the original jurisdiction of the Supreme Court in such controversies. Here we have no such explicit language, plus the additional hurdle presented by subjection of the state to the jurisdiction of an international tribunal whose existence is hardly encompassed within the language of article III. The difficulties may not be insurmountable, but if they are surmounted, it would seem to involve virtual acceptance of the still more revolutionary proposition, carefully avoided in *Parden*, that violation of any federal right, founded on the Constitution, federal statute, or treaty, is sufficient to subject the state to suit by the individual for whose benefit the right was created.[19]

There are at least two possible approaches which should be explored as alternatives to treating the state itself as a defendant before the Convention Court. One possibility is for the United States to assume the position of the defendant and to answer for the alleged transgression of the state. This would, presumably, be more in accord with customary practices and principles of international law with regard to a federal union such as the United States.[20] It would also be consistent with the original hypothesis in which it was assumed that the Convention was binding as federal law upon all the states. There was also assumed to be a right to assert a claim founded upon the Convention in the Supreme Court of the United States. It must be assumed further that the claim has been denied by the United States Supreme Court. Thus the United States has in effect made itself responsible for the denial of the claim and might properly regard itself as the proper party to defend the denial. This may suggest some further difficulties with regard to the actual conduct of the proceedings, if there are any factual questions to be ex-

[19] As Mr. Justice Brennan repeated in Parden: "Nor is the State divested of its immunity 'on the mere ground that the case is one arising under the constitution or laws of the United States.'" Id. at 186. See also Ex parte New York, 256 U.S. 490, 497-98 (1921); Duhne v. New Jersey, 251 U.S. 311 (1920); Smith v. Reeves, 178 U.S. 436, 447-49 (1900); Hans v. Louisiana, supra note 14, at 10.

[20] See 1 Hyde, International Law § 32, at 126-27 (1945).

plored, and with regard to enforcement, if the state is directed to take some remedial action. These problems are best deferred for later discussion, since they must be faced in any event, no matter who is the nominal defendant.

Another alternative to state responsibility is to apply the theory of *Ex parte Young*[21] and to look for a state officer to hold individually responsible for the action of the state. Theoretically this, too, is not without promise. If the Convention is binding as domestic federal law, the state officer, acting in contravention thereof, has violated his constitutional obligation to respect the supremacy of federal law. Therefore, according to the reasoning of *Ex parte Young*, he is stripped of his official armor, and stands nakedly exposed to suit as an individual. The only difficulty with this approach is that it opens up an entirely new range of problems with respect to subjection of individuals to suit in international tribunals on account of actions done within the territorial jurisdiction of the United States in alleged violation of the laws of the United States. These problems are the next objects of our attention.

Individuals Before the Convention Court

The basic assumption thus far has been that the Convention will protect individuals against invasion of certain protected rights by both state and federal government action. It would not derogate in any way from existing constitutional rights, except insofar as the expansion of one right might conceivably limit someone else's constitutional rights. Theoretically this is of course possible. For example, the right to freedom of expression might be interpreted so as to accord so broad a privilege of comment on pending trial proceedings as to threaten the constitutional right to a fair trial. Even assuming that such a conflict might arise, it would not present a difficulty peculiar to the Convention or the treaty power. The asserted constitutional right would, if sound, clearly be superior in domestic law to the asserted treaty right, even if the latter were supported by a decision of the Convention Court. Consequently, the courts of the United States would to that extent refuse to enforce the decision of the international tribunal.

But the Convention is not necessarily limited to governmental as distinguished from private action. Furthermore, protection against governmental action may to some extent require enforcement against private individuals.[22] This suggests the broader question whether residents of

[21] 209 U.S. 123 (1908).

[22] Cf. Brewer v. Hoxie School Dist., 238 F.2d 91 (8th Cir. 1956). Of course, the more traditional practice of international law is to hold the state, not the individual responsible for treaty violation, even though the violations are actually committed by individuals.

the United States could without their consent be subjected to the jurisdiction of the international tribunal. This question might be presented, as earlier suggested, at three different stages of the proceedings in the international tribunal: (1) at the institution of proceedings, assuming that an individual, either an official or a private person, rather than the state, is the defendant; (2) in the course of the proceedings, assuming that the government, state or federal, appears as the defending party; and (3) at the conclusion of the proceedings if the international tribunal directs its enforcement order to an individual, rather than to the state itself.

The question whether the treaty power includes the power to subject individuals to international tribunals for determination of their rights and obligations has been discussed exhaustively in other connections where the problems might be more dramatically presented, as for example, in the imposition of criminal sanctions by international tribunals on account of violation of international regulations established by treaty.[23] Even with respect to this situation it has been argued that the treaty power includes the power to establish international tribunals, quite apart from article III, to determine criminal or civil responsibility for actions committed within the jurisdiction of the United States.[24] The argument is that just as the power to legislate for the territories includes power to establish territorial courts and the war power includes power to establish military courts, so the treaty power includes power to establish international courts quite distinct from article III courts.[25] I have

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See 1 Hyde, supra note 20, § 11A, at 33-36. But see Jessup, A Modern Law of Nations 15-26, 135-38 (1946).

[23] See, e.g., Henkin, Arms Control and Inspection in American Law (1958); McDougal & Arens, "The Genocide Convention and the Constitution," 3 Vand. L. Rev. 683 (1950); Nathanson, "The Constitution and World Government," 57 Nw. U. L. Rev. 355 (1962); Parker, "An International Criminal Court: The Case for its Adoption," 38 A.B.A.J. 641 (1952).

[24] See especially Parker, supra note 23; McDougal & Arens, supra note 23.

[25] McDougal & Arens, supra note 23; see also international tribunals established for the punishment of international war crimes after World War II, such as the military tribunal established in Japan by General MacArthur, as agent for the Allied Powers whose authority was unsuccessfully challenged in Hirota v. MacArthur, 338 U.S. 197 (1948), and "measures undertaken by the United States in collaboration with other governments to suppress the slave trade" including the establishment of " 'Mixed Courts of Justice, formed of an equal number of individuals of the two nations,' using a procedure at variance from that of the federal or state courts, and authorized to pronounce judgment without appeal." McDougal & Arens, supra note 23, at 698, 700. The constitutional position of such international tribunals has not been authoritatively clarified, but it is hard for me to believe that their justification lies simply in the fact that they are created under the treaty power entirely apart from the peculiar character of the offenses and their occurrence outside the original jurisdiction of the United States and its own courts. Whether genocide occurring within the boundaries of the United States would be such a special case may be put aside from the present discussion. A more pertinent example would be provided if the treaty involved in Missouri v. Holland, 252 U.S. 416 (1920), had established international tribunals for punishing the shooting of migratory birds out of season within the territorial boundaries of the United States.

elaborated elsewhere the view that neither the territorial court nor the military court analogy is persuasive of the validity of the proposition that the treaty power includes the power to subject American nationals to the imposition of criminal sanctions by international tribunals on account of acts done within the territorial jurisdiction of the United States.[26] On reconsideration I still adhere to this view. To put the argument in a nutshell it seems to me to make nonsense out of the elaborate provisions for an independent judiciary embodied in article III to assume that Congress might in the exercise of any one of its delegated powers establish another system of courts, entirely free of the guaranties of article III. Another reason for rejecting the analogy is that the territorial and military courts have a special and very limited role in American constitutional history which does not threaten the basic structure of article III courts. To engraft the additional exception of international tribunals with authority to enforce within the United States against American nationals rights and obligations enacted by international convention is to open a whole new vista of judicial enforcement outside the confines of article III.

It may be suggested, however, that the problem presented here is a much narrower one—namely, the mechanism or procedural technique for invoking the jurisdiction of the international tribunal to hear claims which the government of the United States in cooperation with other governments has agreed to recognize and to submit to international arbitrament. There is no doubt, for example, that just as the United States may establish, outside the ambit of article III, a Court of Claims to adjudicate claims against itself, it may also join with other nations to establish under the treaty power a kind of International Court of Claims, in which claims against all the high contracting parties may be determined.[27] To the extent that the international court is concerned only with claims against the United States, this argument seems to me decisive. But to the extent that the claims are against a state or private individual, the analogy to the Court of Claims is entirely inapplicable. Neither does it seem to me significant that the assertion is not one of criminal responsibility against the individual, or even of a right to damages, but only of a right to prevent the use of official or private power in derogation of the Conven-

To attempt to carry the principle of Missouri v. Holland that far seems to me almost as much a disservice to the cause of the treaty power as was the discredited suggestion that the power was exempt from all constitutional limitations. See Reid v. Covert, 354 U.S. 1, 16-17 (1957).

[26] See Nathanson, supra note 23.

[27] Another analogy may be found in the establisbment of the Court of Private Land Claims, in effectuation of the Treaty of Guadalupe-Hidalgo for the settlement of claims against the United States to lands "derived by the United States from the Republic of Mexico." See United States v. Coe, 155 U.S. 76, 77 (1894).

tion. It is clearly not the kind of claim which, in the absence of a treaty, could have been entrusted to executive agencies or legislative courts.[28] Nor is the defendant's responsibility a nominal one even if he is being sued as an official of the state. In the absence of the state as a responsible defendant, the officer will have full personal responsibility for carrying out the mandate of the court. Presumably he will be able to evade that responsibility only by resigning his official position. In some situations, where private action itself is found to be offensive to the covenant, even this escape would not be available.

This brings us back to the second possibility suggested above, namely, that the United States step into the breach and accept responsibility as the defendant, even though the complaint is really directed at the state and its officers or against individuals or groups. Here the first difficulty envisaged is the refusal of state officers or other individuals, to testify without being subjected to compulsory process. This presents the question whether the Convention itself, or Congress by statute implementing the Convention, could grant the international tribunal the powers of compulsory process. The most obvious analogies are the grants of such powers to administrative agencies. It is noteworthy, however, that federal administrative agencies have never been authorized to enforce their own subpoenas through the contempt power. They have uniformly been required to apply to the federal courts for such enforcement. Although it is perhaps debatable whether such application is a constitutional necessity, I am personally inclined to believe that it is.[29] In any event it would seem sensible to avoid the difficulty by providing in an implementing statute that either party to a proceeding in the international tribunal could, when necessary, apply to the federal courts for the enforcement of a subpoena, or that the Attorney General might do so on behalf of a party. Some such procedure is suggested by Rule 43 of the Rules of Court of the European Court of Human Rights.[30] Insofar as there may be special problems of delegation of any part of the treaty power to international tribunals the discretionary power to grant or refuse subpoenas, subject to review through the necessity for application to the federal courts for enforcement, does not rise to the dignity of a serious constitutional problem.

[28] It seems to me that neither National Mut. Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582 (1949), nor Glidden Co. v. Zdanok, 370 U.S. 530 (1962), despite the intellectual chaos reflected in the variety of opinions, casts any doubt on the validity of this analysis. Of course there are peripheral problems remaining regarding the use of "legislative" courts, but they should not obscure the basic significance of article III as a guarantee of an independent judiciary, a cornerstone of our "fundamental freedoms."

[29] Cf. ICC v. Brimson, 154 U.S. 447, 485 (1894); Albertsworth, "Administrative Contempt Powers: A Problem in Technique," 25 A.B.A.J. 954 (1939).

[30] Robertson, Human Rights in Europe 237 (1963).

The same cannot be said quite so easily when we get to the third phase of the proceedings—the enforcement of the final judgment of the Convention Court. Conceivably this might be left to the pressure of international public opinion and the negotiating skills of the ministers. Presumably, when the judgment is directed against the United States itself, the only enforcement contemplated would be the obligation of the United States. Where, however, the complaint is really against one of the states or its officers, or some private individual or organization, there may be grounds for legitimate concern and inquiry as to how the United States proposes to insist on compliance with the obligation. If only the payment of money damages is involved, the answer is presumably easy. The United States could not insist that the state pay, but the United States could itself undertake to pay the damages on behalf of the state. Suppose, however, that the complainant is still held in custody—in violation of his rights nnder the Convention, as determined by the Convention Court. It seems to me on the basis of the foregoing analysis, that the Court's judgment could not be enforced directly against either the offending state or its officers. It does not follow, however, that Congress could not by implementing legislation authorize the federal courts to enforce the judgment of the international tribunal. Here again the obvious analogy is the way in which the federal courts are authorized to enforce the cease and desist orders of administrative agencies such as the National Labor Relations Board and the Federal Trade Commission. There are, it is true, some differences. The federal courts also supervise those agencies by determining whether they have acted in accordance with law, whether their findings are supported by substantial evidence, and whether they have abused their discretion. There are, however, some unresolved questions as to how far such supervisory jurisdiction is essential to the constitutional validity of judicial enforcement of the administrative decisions.[31] In any event, to the extent that some private constitutional right might be invaded by the enforcement of the order of the international tribunal, the United States court would be free to refuse enforcement.

Conceivably it might be argued that the federal courts would be made simply the lackeys of the international tribunal and that this would be contrary to the essence of the judicial power of the United States. But the federal courts would be exercising a not wholly unfamiliar kind of jurisdiction. Just as the federal court exercises the authority to examine the

[31] For shorthand purposes, this might be referred to as the problem of Crowell v. Benson, 285 U.S. 22 (1932). Whatever doubts may exist with regard to the present vitality of Chief Justice Hughes' opinion, it should be remembered that Justice Brandeis' dissent also assumed a constitutional right to some measure of judicial review.

jurisdiction of an administrative agency, or even of a Congressional committee, to issue a subpoena, before enforcing it,[32] so too the federal court could be authorized to determine the jurisdiction of the Convention Court to render judgment in the particular case. The exact scope of such inquiry into jurisdiction might present some delicate questions. Presumably the federal courts, meaning ultimately the Supreme Court of the United States, need not re-examine every question relating to the merits, or every procedural nicety, determined by the international tribunal. But neither should the processes of the United States courts be at the service of an international tribunal which has clearly strayed beyond the bounds of the international convention establishing its authority. Perhaps the likelihood of such a finding would be remote. Yet its theoretical availability would, I believe, be essential to the constitutional validity of the use of the federal courts as enforcement arms of the court established by the Convention.

Delegation of Powers

Still lurking in the background is another constitutional problem involved in such a use of the federal courts as handmaidens of the Court of the Convention. In one sense the United States would have delegated to an international tribunal the authority to make law enforceable in the courts of the United States. The general issue of the delegation of legislative authority to international tribunals through the treaty power has been elaborately debated in the Senate in connection with various arbitration conventions and treaties. In general the Senate has shown considerable reluctance to permit more than the barest minimum of delegation in the exercise of the treaty power.[33] Nevertheless, there does not seem any reason to doubt that the constitutional issue of delegability is the same with respect to the treaty power as it is with respect to legislation under other powers. It may be suggested, however, that the problem we are concerned with here is essentially different because the delegation is to an international tribunal, consisting of judges in whose election the United States has a voice, but not necessarily the decisive voice. If this in itself were sufficient to invalidate any delegation to an international tribunal it would be a crippling blow to the conduct of our foreign relations. The treaty might of course provide for ratification by legislative action of any decision of the international tribunal, a device used in other instances, but this would have the unfortunate appearance of being either

[32] Watkins v. United States, 354 U.S. 178 (1957); cf. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946).

[33] See Henkin, supra note 23, at 108-09; Nathanson, supra note 23, at 366-69.

an evasion of our own constitutional requirements or a reservation in our international commitment. It would seem preferable to face squarely the problem whether a reasonable amount of delegation to an international tribunal of this character is constitutionally permissible. In this connection it might be argued that a distinction should be made between delegations which commit only the United States as a government—to the payment of claims, for example, or even the determination of boundaries—and those which bind American nationals as individuals.[34] The objection in the latter case might be particularly forceful if the individual were subjected to criminal responsibility by virtue of the action of the international tribunal. Even with respect to such a delegation, an analogy might be drawn to the adoption of state criminal law, future as well as present, for federal enclaves, sustained in *United States v. Sharpnack*.[35] Attention might also be directed to the opinion for the Court by Mr. Justice Frankfurter, in *West Virginia ex rel. Dyer v. Sims*,[36] making short shrift of West Virginia's concern that a delegation of authority to control river pollution to an interstate tribunal, in which West Virginia would have only a partial voice, was a violation of the state constitution. The Justice thought it sufficient to say that "The Compact involves a reasonable and carefully limited delegation of power to an interstate agency."[37] The analogy is not perfect but it may be helpful in sustaining so carefully limited a charter as that embodied in the European Convention. It is also of some significance in this connection that the Convention does not involve the imposition of criminal sanctions but the additional protection of individual rights with only such sanctions against individuals as may be necessary to prevent governmental or private invasion of the rights protected.

SUMMARY

To recapitulate the tentative conclusions here suggested, the following propositions will now be stated much more categorically than the prior discussion warrants:

(1) There is no substantial objection to incorporating the substantive law of the Convention into the domestic law of the United States,

[34] As an example of the latter type, attention might be particularly directed to the Convention for the Northwest Atlantic Fisheries, Feb. 8, 1949 [1950] 1 U.S. T. & O.I.A. 477, T.I.A.S. No. 2089. It is noteworthy, however, that the regulations proposed by the International Commission must be accepted by the Secretaries of State and of the Interior before becoming enforceable under the Northwest Atlantic Fisheries Act of 1950, 64 Stat. 1069, 16 U.S.C. § 985 (1958). For this and other examples, see Henkin, supra note 23, at 227-28.

[35] 355 U.S. 286 (1958).

[36] 341 U.S. 22 (1951).

[37] Id. at 31.

either by assuming that the Convention is a self-executing treaty or by assuming implementing legislation.

(2) If the decisions of the international tribunal established by the Convention are given no effect in domestic law other than the moral and international obligation of the United States to do what it can to implement them, there are no further constitutional questions presented.

(3) If the decisions of the international tribunal are to be given some effect as domestic law with respect to the particular controversy decided, some method must be devised for grafting such decisions into the domestic law of the United States.

(4) Direct enforcement of the decisions of the Convention Court against either a state or an officer of the state as an individual is open to serious constitutional question on the ground that neither the state nor the individual can be subjected as defendants to the compulsory jurisdiction of the Court.

(5) Neither could proceedings in the Convention Court be treated as an exercise of appellate jurisdiction from the United States Supreme Court.

(6) The United States could undertake to appear in the Convention Court to defend against any alleged transgression by the federal government, or by any state, or conceivably by any individual.

(7) To the extent that compulsory process was required against an American national in the conduct of such proceedings, Congress could authorize the federal courts to enforce the subpoenas of the Convention Court.

(8) To the extent that enforcement of the judgment of the Convention Court was required, other than the voluntary action of the federal government or the state government concerned, Congress could by implementing legislation authorize the federal courts to enforce the judgment of the Convention Court against officials of the federal government or of the state government concerned, and against private individuals.

(9) In exercising such enforcement powers, the federal courts would have to retain some discretion to refuse to enforce judgments of the Convention Court rendered in cases clearly outside the jurisdiction conferred by the Convention, or otherwise clearly contrary to the terms of the Convention.

(10) The establishment of such a method for enforcing the decrees of the Convention Court against American nationals would not be an unconstitutional delegation of either legislative, executive or judicial power to an international tribunal.

Re-examination of the various steps in this analysis suggests the question whether there is not a basic inconsistency between the position suggested in proposition (4), that decisions of the Court established by the Convention cannot be directly enforced against state governments or individuals, and propositions (8), (9) and (10), suggesting that such judgments can in effect be enforced through the processes of the federal courts. It might be argued in support of the charge of inconsistency that enforcement through the federal courts in effect makes the judgments of the Convention Court binding upon states and individuals just as effectively as if they were enforced directly against such states and individuals as defendants. Thus it might be said that the difference is entirely one of form rather than substance; that the federal courts become simply errand boys for the Convention Court; and that it would be more appropriate to subject states and individuals directly to the jurisdiction of that Court. My principal response to this criticism is to deny the inconsistency so long as the federal courts retain some discretion to refuse to enforce judgments of the international tribunal. I would also suggest that proposition (9) provides a flexible formula according to which the federal courts could exercise their own independent judgment, before enforcing judgments of the international tribunal. Here again an analogy might be drawn to the principles according to which federal courts allow some discretion to administrative agencies in the interpretation of statutes, while still retaining ultimate authority to reject the administrative interpretation.[38]

A second objection to the steps in the analysis might focus on the confusion which might result from the same claim under the Convention coming twice before the courts of the United States, once before and once after the decision of the Convention Court. Assuming that a United States court has first rejected the claim under the Convention as unfounded, can it later reverse its position on the authority of the Convention Court decision, or would its own decision be binding as res judicata? If the United States court does reverse itself on the basis of the international tribunal's decision, do we not have in effect an appeal from our courts to the Convention Court, in contravention of proposition (3)?

[38] See Davis, Administrative Law (1958); Nathanson, "Administrative Discretion in the Interpretation of Statutes," 3 Vand. L. Rev. 470 (1950).

Here again perhaps we can find a basis for reconciliation by analogy to a principle of domestic administrative law, the principle of primary jurisdiction. Where a fairly debatable question under the Convention is first presented in the federal courts, the matter might be referred to the international tribunal for resolution. This might be done through the device of asking for an advisory opinion from the Convention Court,[39] or simply by staying or dismissing the action in the federal court and remitting the parties to their remedies before the international tribunal.[40] Of course, one of these techniques should be followed only where the United States court is prepared to accept the ruling of the international tribunal as determinative. Reference to that tribunal should not be merely an idle, time-consuming ceremony.[41] With these qualifications, it seems to me that the tentative conclusions might still be harmonized, although I recognize that the total effect is to subordinate the Convention Court to our article III courts, at least insofar as enforcement in our courts is concerned. This it seems to me is the price we would have to pay for attaching effective sanctions to the judgment of an international tribunal, in the absence of constitutional amendment.

In any event, this trial analysis of the constitutional problems involved in adherence by the United States to a convention on Human Rights should not be construed as an argument against such adherence on constitutional or other grounds. Entirely apart from the obvious solution of constitutional amendment, it should also be apparent that the constitutional objections which are considered substantial in the foregoing discussion are peripheral to the main thrust of a Convention on Human Rights, particularly as illustrated by the European Convention, and may well never arise in the actual operation of an American counterpart. In the first place, the substantive provisions are so closely comparable to our own Bill of Rights that they probably state only the minimum guaranties already recognized by the law of our land. In the second place, a difference in the meaning of the Convention as interpreted by our own Supreme Court and its meaning as interpreted by the Convention Court may never develop and therefore the problems of ultimate enforcement envisaged by the preceding discussion may never be presented. Finally, even if such a divergence should arise, its solution might well be found in political accommodation, such as the payment of reparations by the federal government or through persuasion brought to bear upon the state government concerned to accept the ruling of the Convention Court, without reliance

[39] Cf. Clay v. Sun Ins. Office Ltd., 363 U.S. 207 (1960).
[40] Cf. United States v. Western Pac. R.R., 352 U.S. 59 (1956).
[41] Cf. Federal Maritime Bd. v. Isbrandtsen Co., 356 U.S. 481 (1958), especially the dissenting opinion of Mr. Justice Frankfurter.

upon a theoretically enforceable court order. Thus, while the problems of enforcing the judgments of an international tribunal such as the Convention Court may be rewarding subjects for exploratory analysis, their solution, like many other constitutional questions dimly envisaged by the Founding Fathers, are very likely best left to the illumination of actual experience.