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A FURTHER STEP TOWARD PROTECTION OF MIGRATION FAMILY RIGHTS

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AMONG ITS POSITIVE RESULTS, the Universal Declaration of Human Rights of 1948, possesses one merit in particular, namely, that of having exercised great influence on the constitutions of many newly-independent countries and especially of having provoked the establishment of similar declarations for certain *regional* areas of the world.

I have in mind, in particular, two regional declarations on human rights: the Statute of the Inter-American Commission on Human Rights, approved by the Council of the Organization of American States (OAS) on May 25, 1960, and the European Convention on Human Rights, signed in Rome on November 4, 1950, and brought into force on September 3, 1953. There is also talk that the Organization of African Unity (OAU) has the intention of proceeding to draft a similar declaration for African States at an early date.

Among these regional declarations, the European Convention on Human Rights must undoubtedly be considered as the most advanced, as it is the only international instrument on human rights which has been endowed with an efficacious implementation procedure and control.

This new procedure has recently been successfully applied to a complaint referring to a refusal of immigration rights to a family member and, therefore, constitutes an important precedent for further development in this field. Because of the special interest this case presents on the protection of the family rights in immigration, we shall devote this article to it.

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U.N. Principles Transformed Into Legal Obligations

The first advantage of the European Convention on Human Rights is the transformation of the twelve principles proclaimed by the United Nations in 1948 into true legal obligations, between those countries who decided to take first measures to assure these human rights. They are civil and political rights, such as right to life, right to liberty and security, right to fair trial, right to marry and to family life, right to freedom of thought and religion, right to free information and right of association, etc.

To these rights a further three were added in the First Protocol to the Convention (right of peaceful enjoyment of possessions, right to education and right to hold free elections) and four rights in the Fourth Protocol concerning free movements which we shall examine later in this article.

Thus in total, the European Convention ensures at present the enforcement of nineteen fundamental human rights and freedoms in civil and political fields.

As regards economic and social rights, member countries of the Council of Europe decided to deal with them in a different manner, namely, to conclude a European Social Charter, whose implementation will be based on a system of periodic reports and their examination by two different committees of independent experts and on recommendations prepared by the Committee of Ministers. This European Social Charter was effectively signed in Torino on October 18, 1961.

It may be added that the European Convention on Human Rights at present joins together 16 states, *i.e.*, all members of the Council of Europe except France and Switzerland. It is hoped that these two countries, whose traditional freedoms are well known, will soon join the others. All of those who ratified the Convention undertook to secure the civil and political rights, mentioned above, not only for their own nationals or for the nationals of the other parties, but for all people within their jurisdiction.

The permissible limitations to these rights are carefully defined (*e.g.*, suspension during war time). Let us, for instance, examine the family rights, which are defined in Article 8 of the European Convention (and correspond to Article 12 of U.N. Universal Declaration):

> Everyone has the right to respect for his private and family life, his home and his correspondence.
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> There shall be no interference by a public authority with the exercise of this right, except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country. . . .

This article goes somewhat further than the Universal Declaration and its importance lies in the fact that the right to respect for family life in it includes in particular the right to preserve the unity of the family. This article was the subject of a complaint we shall examine further. It can be applied, for example, in the case of the right of a father or a son (or a husband or wife) to enter the country where the other member is living (if the contested measures, of course, do not

come within the limitations of national security, public safety, etc.).

Procedure Permitting an Individual to Complain

Let us examine the enforcement procedure for the rights enumerated in the European Convention.

Twenty years experience of the Universal Declaration has shown that an idealistic content is not enough and there is a need for an effective remedy without which a governmental obligation remains a dead letter. This was understood by the members of the Council of Europe, who reinforced the U.N. principles by introducing a system of international measures of implementation. In fact, the European Convention submits human rights to an international control and accepts the right of complaint granted to individual persons (article 25). At the same time it establishes two new international organs in order to ensure the observance of obligations undertaken: the Commission (article 19) and the European Court of Human Rights (article 46).[1]

The great innovation introduced by the European Convention of Human Rights is that it does not protect only states, but individuals. In fact, if a violation of a human right takes place, the really interested party is the individual, whose rights have been denied. In all probability this violation is often being carried out just by the authorities of his own country. Under the classic concept of international law, only the countries and their governments could be "subjects of law" and could be called to account. The idea was to give the individual himself a right of complaint to an international organ, which will call the offending party to withdraw the violation and restore a person's right. The European Convention thus permits an individual person to launch a petition, even against his own government.

This right of individual petition is something revolutionary and it is no wonder that many countries hesitated to accept it. However, it is to their credit that eleven European countries have agreed to this procedure. They are: Austria, Belgium, Denmark, Germany (Federal Republic), Iceland, Ireland, Luxembourg, the Netherlands, Norway, Sweden and the United Kingdom.

Action Before the European Commission of Human Rights

Any individual or state may refer to the Commission an alleged breach of the Convention by a country.

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[1] It may be added in parenthesis that the U.N. Assembly voted quite recently the "Optional Protocol to the Covenant on Civil and Political Rights" which follows the example of the Council of Europe and authorizes the Committee on Human Rights to receive and to consider the communications from individuals (art. 1). This causes some embarrassment to those involved in human rights as there will be *two* separate organs for enforcement and some procedural differences may arise. See the interesting article by Mr. Polys Modinos, the Deputy Secretary General of the Council of Europe in the "Revue de Droit International en Compare", vol. I, page 41 under the title: "The co-existence of the European Convention of Human Rights and the United Nations Covenant on Civil and Political Rights." The findings of the Experts' Committee which met in November 1967 and January 1968 have not yet been published.

The members of the European Commission, who are elected by the Committee of Ministers of the Council of Europe, decide, upon the receipt of the petition, whether the petition is admissible. The Convention contains strict rules in this respect. If an individual lodges the complaint, he must first of all "exhaust his domestic remedies," *i.e.*, before addressing himself to the European Commission, he must have his grievance judged by the national courts or other authorities. The European Commission may refuse as inadmissible a petition which is anonymous or which is substantially identical with a previous petition already rejected. It will also not accept a petition which is manifestly ill-founded or constitutes an open abuse of the right of petition. In this last respect, the legislator wishes to avoid the discriminatory abuses which after the first World War were very frequent under the so called "minority rights" of the League of Nations and which facilitated the partition of Czechoslovakia in 1938 on account of the invoked rights of Sudeten minorities.

If the European Commission decides that a case is admissible, it appoints a Sub-Commission which has the task of ascertaining the facts and obtaining the views of the respondent government. This often involves oral hearings of the parties and ends by reaching a friendly settlement of the matter. If the Sub-Commission succeeds, it draws up a report which contains a brief statement of the facts and the solution reached. If its attempt is unsuccessful, the Commission as a whole draws up a report which states whether there has been a violation of the European Convention committed. This report is then transmitted to the Committee of Ministers of the Council of Europe for final implementation with the respective government.

The European Court of Human Rights

Once the Commission has established the facts of the alleged violation and expressed its opinion, the issue may be also referred to the European Court of Human Rights, the second organ established by the European Convention.

The European Court is composed of eighteen members, each member state of the Council of Europe having a right to be represented in the Court. The judges are elected by the Consultative Assembly of the Council of Europe, upon the proposal of the member governments. Normal sittings of the Court take place in a chamber of 7 judges who hear the governments' views or those of the Commission. The judgment of the Court should pronounce a "just satisfaction to the injured party." The contracting parties of the European Convention have agreed in advance to abide by the judgments of the Court and the Committee of Ministers is made responsible for supervising their execution.

As to the introduction of a case to the Court, it may only be referred by the Commission or by the state concerned and not by an individual petitioner. This limits the "judicial character" of the whole procedure. In fact, the Commission of Ministers has so far been called upon to decide a much greater number of cases than the Court. During the four-

teen years' existence of the European Commission about 3300 individual petitions have been lodged with it, and only six cases have been referred to the Court. Among the cases before the European Commission about 50 of them had been declared admissible and about 20 have come forward for the decision of the Committee of Ministers.

This shows that the whole procedure is of a conciliatory and fact finding character rather than judicial. On the other hand, after the declaration of admissibility, the procedure is confidential throughout. This moderation and these reasonable restrictions mean that the whole procedure is securely establishing itself in the confidence of the Member Countries, which is a good sign for the future. Tangible results have also been obtained by many individuals and have often affected a larger circle of people than the petitioner himself.

This is especially the case of two petitioners who lodged an immigration case in 1966 which we shall examine below and which may have important repercussions for the future.

The Alam and Singh Cases against the United Kingdom

In December 1966, applications were introduced to the European Commission by Mohamed Alam, a Pakistani, and Harbhajan Singh, formerly an Indian and now a United Kingdom citizen by registration. Both are textile workers at present employed in Yorkshire, England. They stated that members of their families, a son and father respectively, were refused entry into the United Kingdom in July 1966 by the Immigration Authorities of London Airport acting under the 1962 Commonwealth Immigrants Act. They allege violations of the right to family life (article 8) and the right to receive a fair and public hearing by an independent and impartial tribunal in determination of their civil rights (article 6, paragraph 1).

The applications, which were joined, were communicated to the U.K. Government in February 1967 for observations on admissibility and the applicants have replied.

The cases came before the Commission in May 1967 which decided to hold a hearing of the parties in July. One of the applicants was given legal aid by the Commission and the Government was represented by the Solicitor-General.

After the long hearing, the Commission declared *admissible* the application lodged by Mr. Alam, but *inadmissible* the application lodged by Mr. Singh.

The Commission found that Mohamed Alam's application raised questions of law and fact which were sufficiently complicated as to justify a further examination and that, in consequence, it could not be declared manifestly ill-founded under either article, nor incompatible with the Convention. It also found that the question whether Mohamed Alam had exhausted domestic remedies as regards article 8 was closely linked with the ascertaining of the facts under article 6, paragraph 1, and it decided to "join to the merits" this question.

On the other hand, the Commission found that, in the case of Harbhajan Singh, the character of family life within

the meaning of article 8 had not been established in the particular circumstances of the applicant's relationship with his father and that, consequently, this application was manifestly ill-founded both under article 8 and under article 6, paragraph 1.

It is interesting to see in the minutes of the hearings that Mohamed Alam claimed permission for his son to enter the United Kingdom in order to take up residence with him as a member of his family and that, therefore, his claim should be considered as one concerning a civil right. This right is guaranteed by Article 8 of the European Convention and not excluded in *alinea* 2. It is also granted by English law, *i.e.*, Section 2 of the Commonwealth Immigrants Act of 1962, and is in accordance with the policy of the U.K. Government. It is not a right of entry, but the family right to the unimpeded entry of another member of the family, *i.e.*, a right relating to the family right of permanent residence.

The Commission was also of the opinion that the applicant was denied a fair and public hearing before an independent and impartial tribunal, because the determination of his civil right raised questions of such complexity that it must depend upon an examination of the merits of the case.

The Commission also stated that the United Kingdom Government was responsible for a breach of Article 13 of the European Convention in that it failed to provide any effective remedy before a national authority for the alleged breach of the right to respect for family life under Article 8. According to the generally recognized rules of international law, it was incumbent upon the respondent Government, if it raises the objection of non-exhaustion, to prove the existence in its legal system of a remedy which has not been exhausted.

No one will deny the capital importance of the issue of the *Alam* case.

By withdrawing its refusal to admit immigrants, the Government recognized that the petitioner had a valid claim to immigrate. This constitutes a breach in the exclusive rights which were so far reserved to the country that it alone had to decide the admission. It is an indirect recognition of the immigration rights of a person, at least in certain cases such as family reunion.

If followed by other complaints, this case will have important consequences going far beyond Mr. Alam's personal case. It may namely lead to the full recognition of the migrant family's right to immigration.

The Fourth Protocol

Whereas this recent evolution took place in the immigration rights, it may be stressed that another step forward was made in 1968 by the Council of Europe in the field of emigration rights.

On May 2, 1968, came into force the Fourth Protocol to the European Convention which transforms the right of emigration, the right of internal migration (or choice of the residence) and the right of re-emigration, into legal obligations. Besides, it refers to the prohibition of exile of national citizens, as well as of expulsion of aliens.

For the moment, this Protocol concerns only five member states, namely

Denmark, Norway, Sweden, Iceland and Luxembourg. Moreover, only three of them (Denmark, Sweden and Iceland) have accepted the right of an individual complaint and of the compulsory jurisdiction of the European Court of Human Rights. According to Article 6 of the Protocol, applications alleging violations of the Protocol may only be brought if the party concerned has made a statement recognizing such a fact or accepting the jurisdiction with regard to this Protocol. The two remaining signatories of the Protocol have not so far done so.

As to the contents of the Protocol, the text which refers to emigration rights, corresponds to Article 12 of the U.N. Covenant on Civil and Political Rights, with only some small changes on restrictions and "particular areas" (to which these restrictions are localized).

Will the American Continent Follow?

Finally, it is also rejoicing to state that there are signs that the trends taking place in Europe, will probably be followed—at least to some extent—on the American continent.

In fact, the Inter-American Commission of Human Rights is at present in full development and its statutes—amended substantially in 1965—have given it also the right to examine, within the American states, communications or individual claims from a person or group of persons. This evolution in the Western Hemisphere took much less time than in Europe, as the Inter-American Commission was only created in 1959 and thus has been in existence for only 9 years.

However, the list of human rights appearing in the American Declaration of the Rights and Duties of Man, and whose violations may be subject to these communications or claim is limited to seven, among which are the right to life, freedom of religion, right to security and usual legal rights against arbitrary arrest.

There is, for the moment, no mention of the rights of migration.

All these trends, both in Europe and in the Western Hemisphere, prove that real progress has been made in recent years in the field of the furtherance of human rights. It is hoped that the future developments will lead to some well defined supra-national system, in which the rights of the migrant's family will be fully protected.