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THE DOMESTIC STATUS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

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I. INTRODUCTION

TODAY in the United States "tokenism" in the sphere of human rights is daily exposed as the negation of human rights. But in the domain of international law, the slightest achievement in this area, however small when compared to the tasks still undone, is hailed as a revolutionary step forward, and measures which would otherwise be dismissed as mere lip-service, are often uncritically accepted as progress. It is accordingly not surprising that the voluminous literature dealing with the European Convention on Human Rights and Fundamental Freedoms[1] does little to point out the practical weaknesses of the system established by it. That considerable success has been achieved in its administration, that its very existence is a great accomplishment, is undisputed. But apart from the fact that even the most complete implementation of its provisions would still only guarantee a bare minimum of human rights and fundamental freedoms, very few searching questions have been asked about the manner in which states adhering to the Convention are discharging the obligations incumbent upon them. Such questions have to be asked, not to disparage past achievements, but to prevent the lethargic acceptance of token implementation. While one cannot be unaware of the snail-like progress international law has been able to make in the sphere of human rights, it should also be remembered that, since the Convention is not global in application, it should in all fairness be evaluated in the light of what can today be reasonably expected of Western European states.

One aspect of the European Convention of Human Rights that has received very little systematic attention concerns the extent to which the Convention has been implemented within the states adhering to it. Ideally, a paper dealing with the domestic implementation of the Convention should examine all areas of national substantive and procedural law to determine whether and

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1. The European Convention on Human Rights [hereinafter cited as Convention] was signed in Rome on November 4, 1950, and entered into force on September 3, 1953, in accordance with the provisions of Article 66(2), after ten instruments of ratification had been deposited with the Secretary-General of the Council of Europe. The first Protocol to the Convention on Human Rights, which guarantees three additional rights (peaceful enjoyment of property, right to education, free elections), was signed in Paris on March 20, 1952. It became effective on May 18, 1954. The equally authentic English and French texts of the Convention and the Protocol may be found in European Commission of Human Rights, Documents and Decisions [hereinafter cited as 1 Yearbook] 4 (1955-57). See generally Stein & Hay, Cases and Materials on the Law and Institutions of the Atlantic Area 367-94 (1963).

how they are affected by the Convention. This task, because of its scope, calls for a joint multi-national scholarly project that has not yet been undertaken. That it should be undertaken is clear. Without it the real impact of the Convention cannot be properly evaluated. A more modest study and the one here attempted, seeks to ascertain, on a country by country basis, whether the Convention has gained the status of domestic law. Such an analysis should at least reveal the extent to which the High Contracting Parties honor the obligations they assumed by ratifying the Convention.[2]

II

The European Convention of Human Rights and Fundamental Freedoms was designed, as its preamble indicates, to bring about the collective enforcement by European states of certain of the human rights proclaimed by the General Assembly of the United Nations in the Universal Declaration of Human Rights. Section I of the Convention, consisting of 17 Articles, enumerates and delimits the rights and fundamental freedoms guaranteed in the Convention.[3] To ensure that the High Contracting Parties honor these obligations, the Convention provides for the establishment of a European Commission of Human Rights and a European Court of Human Rights.[4]

The Commission was created to review state and in some circumstances private petitions charging a violation of the Convention. That is, a state adhering to the Convention may refer to the Commission an alleged breach thereof by another High Contracting Party.[5] Aggrieved individuals have that right, however, only if the allegedly delinquent state has also, in addition to ratifying the Convention, expressly recognized the competence of the Commission to pass on private petitions.[6] The Commission's function consists of investigating the charges and, if possible, securing a friendly settlement "on the basis of respect for Human Rights as defined in this Convention."[7] If it fails to bring about such a settlement, it must submit a report to the Committee of Ministers of the Council of Europe,[8] containing the facts of the case, the Commission's opinion concerning the merits of the allegations together with any recommendations it desires to make.[9] Whenever such a case is not referred to

2. The following states have ratified the Convention: Austria, Belgium, Cyprus, Denmark, Greece, Germany, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Sweden, Turkey, United Kingdom.

3. For an analysis of these provisions, see Weil, The European Convention on Human Rights 43-80 (1963).

4. Convention, Art. 19. For a discussion dealing with these two institutions and their respective functions, see Weil, *op. cit. supra* note 3, at 81-165; Robertson, *The European Court of Human Rights*, 9 Am. J. Comp. L. 1 (1960); Golsong, Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention (1958).

5. Convention, Art. 24.

6. Convention, Art. 25(1).

7. Convention, Art. 28.

8. The Committee of Ministers consists of one government representative of each Member State of the Council of Europe. See generally, Robertson, The Council of Europe 24-40 (2d ed. 1961).

9. Convention, Art. 31.

the Human Rights Court, in the manner indicated below, within three months from the date of the Commission's transmission of its report to the Council of Ministers, it is the latter that must decide, whether there has been a violation of the Convention and what action should be taken.[10]

The European Court of Human Rights, whose jurisdiction extends to all cases concerning the interpretation and application of the Convention,[11] may only hear a case, if it has been submitted to it within the three-month period referred to above, if the Commission has failed to bring about a friendly settlement, and if the allegedly delinquent state has recognized the compulsory jurisdiction of the Court.[12] A state's ratification of the Convention does not constitute *ipso facto* a recognition of the compulsory jurisdiction of the Court; a separate declaration must be made to that effect.[13] A private party, however, has no standing to appeal to the Court. Only the Commission and the High Contracting Parties may do so.[14] The Court's judgment is final[15] and its decisions are binding upon the parties to the case.[16] While the Court lacks the power to reverse or set aside domestic judgments or to annul national legislation in conflict with the Convention, it may "afford just satisfaction to the injured party."[17]

III

Needless to say, the international machinery established by the Convention to ensure the enforcement of the rights proclaimed therein is far from perfect. To demonstrate its defects, one need only note that the victim of an illegal state action has no standing to initiate a suit in the Court. He cannot, furthermore, control the proceedings before the Commission, even if the deliquent state has recognized the Commission's competence to accept private appeals. Besides, a number of states which have ratified the Convention have as yet recognized neither the compulsory jurisdiction of the Court nor the right of private petition.[18] But even if all of them did so today, the expense, effort and

10. For the powers and function of the Committee of Ministers, see Convention, Art. 32. See also Cassese, *L'escercizio di funzioni guirisdizionali da parte del Comitato dei ministri del Consiglio d'Europa*, 45 Rivista di Diritto Internazionale 398 (1962).

11. Convention, Art. 45.

12. Convention, Arts. 45, 46, 47.

13. Convention, Art. 46.

14. Convention, Art. 48 provides that in addition to the Commission a case may be submitted to the Court by 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.

15. Convention, Art. 52.

16. Convention, Art. 53.

17. Convention, Art. 50. For an analysis of this provision, see Vis, *La réparation des violations de la Convention Européenne des Droits de l'Hommes*, 10 Annales de la Faculté de Droit et des Sciences Politiques et Economiques de Strasbourg [hereinafter cited as Annales] 279 (1961).

18. Of the 15 states that have ratified the Convention, only the following ten have recognized the right of private petition: Austria, Belgium, Denmark, Federal Republic of Germany, Iceland, Ireland, Luxembourg, Netherlands, Norway and Sweden. Eight of these have recognized the compulsory jurisdiction of the Human Rights Court, that is, Norway and Sweden have as yet not done so. Cyprus, Greece, Italy, Turkey and the United

delay involved in vindicating one's rights by submitting a complaint to an international institution like the Commission would be substantial, if only because all domestic remedies must first be exhausted.[19] Accordingly, if the High Contracting Parties had agreed only to be internationally accountable for a breach of the Convention, it might have been expected that its impact on the day-to-day administration of justice would be minimal. Needless to say, if relief cannot be had where and when it is needed, it loses much of its prophylactic value. Therefore, the real significance of the Convention derives from the fact that by adhering to it, the High Contracting Parties assumed two interrelated obligations. They undertook to implement the Convention within their respective jurisdictions by making it a part of their domestic law,[20] and they pledged that an aggrieved individual "shall have an effective remedy before a national authority" to enforce the rights guaranteed in the Convention.[21]

Since it is the purpose of this study to determine whether the High Contracting Parties have in fact discharged these obligations, it should be noted that the domestic implementation of the Convention is facilitated by the fact that most of its operative provisions[22] were designed to be self-executing in nature. That is to say, they were formulated so as to be capable of creating rights and duties directly enforceable in national courts without necessitating special implementing legislation.[23] As a result, in those countries whose constitutional law provides that the ratification of a self-executing treaty effects its automatic transformation into the internal legal order, the operative provisions of the Convention should *ipso facto* gain the status of directly enforceable domestic law.[24] And in those states, where a self-executing treaty, even if ratified,

Kingdom have recognized neither the competence of the Commission to receive private appeals nor the compulsory jurisdiction of the Court.

19. See Convention, Art. 26.

20. *Compare* Convention, Art. 64, *with* Arts. 1, 13. See also European Commission of Human Rights, Application No. 214/56, Decision of June 9, 1958, 2 Yearbook 214, 234 (1958-59); Golsong, *Die europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, 10 Jahrbuch des öffentlichen Rechts der Gegenwart 123, 128-29 (1961).

21. Convention, Art 13.

22. As used here, "operative provisions" of the Convention refers to the provisions enumerated in section I of the Convention.

23. That the Convention was drafted to achieve this result is apparent from the legislative history, or *travaux préparatoires*, of the Convention, see Golsong, Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention 9 (1958), the precise and mandatory formulation of most of its operative provisions, and from the fact that they demonstrate a clear intent to grant directly enforceable rights to individuals. For an extensive analysis of this question, see Süsterhenn, *L'application de la Convention sur le plan du Droit Interne*, 10 Annales 303, 304-07 (1961).

But see Comte, *The Application of the European Convention on Human Rights in Municipal Law*, 4 J. Int'l Comm'n Jurists 94 (1962), who argues that, while such provisions as Articles 3, 7, 11, 12 and 14 are capable of immediate application in any of the states adhering to the Convention, this is not necessarily true with regard to certain of the other provisions, because they may in some countries require far-reaching institutional changes beyond the province of the courts. *Id.* at 118. Although this may well be true, it cannot affect the contention that the Convention was intended to create rights enforceable in the domestic courts. Instead, it may well bolster the contention advanced in this paper that adherence to the Convention constitutes an undertaking that no such obstacles to the complete enforcement of the Convention exist within the jurisdiction of the High Contracting Parties.

24. See Weil, *op. cit. supra* note 3, at 44.

cannot be invoked in the courts until the requisite legislation has been enacted, no special legislation beyond such enactment should be necessary to achieve the full implementation of the Convention.[25] But since it is for the appropriate national authorities to decide whether and to what extent the provisions of a treaty create legal rights enforceable in their own courts, we must look to the law of the fourteen states[26] adhering to the Convention to ascertain its domestic status.[27]

AUSTRIA

To ascertain the domestic status of the Convention in Austria[28] two questions must be resolved. First, did the Convention, by virtue of the requisite parliamentary ratification, become a so-called constitutional law (*Verfassungsgesetz*), in which case it would take precedence over both prior and later ordinary laws?[29] Second, if it cannot be characterized as a constitutional law, what legal relationship exists between the Convention and ordinary Austrian laws?[30]

Although the contrary has generally been assumed,[31] the Austrian Constitutional Court recently ruled that the Convention does not have the status of a constitutional law.[32] This decision was based upon an interpretation of Articles 50 and 44 of the Austrian constitution. Article 50 of the Austrian Constitution[33] provides:

(1) All political treaties, and other treaties in so far as they

25. See Süsterhenn, *supra* note 23, at 307.

26. While 15 states have ratified the Convention, see *supra* note 2, no consideration will here be given to the domestic status of the Convention in Cyprus, since Cyprus did not ratify the Convention until October 6, 1962.

27. Despite basic similarities in the constitutional law of some of these states, great differences exist in the manner in which their courts have approached the Convention. Only the four Scandinavian countries can readily be treated as a group. Accordingly, except for these states, the domestic status of the Convention will here be examined on a country-by-country basis.

28. The relationship of the Convention to Austrian law has been the subject of considerable scholarly debate. See, *e.g.*, Ermacora, *Die Menchenrechtskonvention als Bestandteil der österreichischen Rechtsordnung*, 81 Juristische Blätter [hereinafter cited as J.B.] 396 (1959); Winkler, *Der Verfassungsrang von Staatsverträgen. Eine Untersuchung des geltenden österreichischen Verfassungsrechtes*, 10 Österreichische Zeitschrift für öffentliches Recht 514 (1959/60); Moser, *Die Europäische Menschenrechtskonvention und die Bestimmungen der StPO. über die Verwahrungs-und Untersuchungshaft*, 14 Österreichische Juristen-Zeitung 11 (1959); Janowsky, *Auswirkungen der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten auf das österreichische Recht*, 81 J.B. 145 (1959).

29. See Federal Constitution of Austria, Arts. 89 (2), 140; Adamovich & Spanner, Handbuch des Österreichischen Verfassungsrechts 398 (5th ed. 1957); Seidl-Hohenveldern, *Transformation or Adoption of International Law into Municipal Law*, 12 Int'l & Comp. L.Q. 88, 111-12 (1963).

30. On the relation between treaties and domestic laws in Austria, see Seidl-Hohenveldern, *Relation of International Law to Internal Law in Austria*, 49 Am. J. Int'l L. 451 (1955).

31. See, *e.g.*, Waldock, *The European Convention for the Protection of Human Rights and Fundamental Freedoms*, 34 Brit. Yb. Int'l L. 356, 358 (1959).

32. Austria, Constitutional Court, Judgment of October 14, 1961, 84 J.B. 145 (1962), 4 Yearbook 604 (1961).

33. All translations of the Austrian Constitution are taken from 1 Peaslee, Constitutions of Nations 107 (2d ed. 1956).

> contain provisions modifying existing laws, require for their validity the approval of the *Nationalrat*.
>
> (2) The provisions of article 42, paragraphs (1) to (4), and, if a constitutional law be modified by a treaty, those of article 44, paragraph (1), are applicable, *mutatis mutandis*, to resolutions of the *Nationalrat* regarding the approval of treaties.

And Article 44(1) stipulates that:

> Constitutional laws or constitutional provisions contained in ordinary laws may be enacted by the *Nationalrat* only in the presence of at least one-half of its members and by a majority of two-thirds of the votes cast. They shall be specifically designated as such ("constitutional law", "constitutional provision").

In ratifying the Convention, parliament complied with the relevant provisions of Article 42 and Article 44 (1), on the assumption that the Convention, thus approved, would acquire constitutional status.[34] It failed, however, to designate the Convention as a "constitutional law" or "constitutional provision." This formal omission, the Constitutional Court ruled, deprived the Convention of constitutional status regardless of its contents and of any possible contrary parliamentary intention.[35]

This decision and its underlying reasoning has been severly criticized by a number of leading Austrian constitutional lawyers.[36] They argue that, when Article 50 (2) of the Austrian Constitution provides that Article 44 (1) is applicable by analogy, this stipulation refers to the voting requirement and not to the designation of a treaty as a "constitutional law." In support of this theory they advance a number of arguments. One contention is that parliament, in ratifying a treaty, discharges a function different from the one it performs in enacting laws, since it has no power to affect the contents of the treaty. If it were to designate a treaty or certain of its provisions as "constitutional laws" or "constitutional provisions," parliament would actually be modifying the treaty. This contention is buttressed by two related considerations: (1) that no treaty ratified by Austria contains such a designation, al-

34. In submitting the Convention for ratification to the National Council, the president of that body stated in taking the vote:

> Since the requested ratification of the Convention and the Protocol thereto constitutes a binding obligation by the federal constitutional lawgiver [Bundes-Verfassungsgesetzgeber] and accordingly must be regarded as state treaties modifying the Constitution [verfassungsändernde Staatsverträge] within the meaning of Article 50 of the Federal Constitution, I herewith note, in accordance with Article 55(c) of the rules of procedure, the presence of one half of the members.

Stenographische Protokolle über die Sitzung des Nationalrates, VII, GP., 1958, p. 2951, quoted in Winkler, *supra* note 28, at 522. (Author's translation from Winkler's text.)

35. Austria, Constitutional Court, Judgment of October 14, 1961, 84 J.B. 145, 146 (1962), 4 Yearbook 604, 613-16 (1961). This conclusion was reiterated by the Austrian Administrative Court, Judgment of December 15, 1961, 84 J.B. 644 (1962).

36. See, *e.g.*, Ermacora, *Die Menschenrechte und der Formalismus*, 84 J.B. 118 (1962); Pfeifer, *Die parlamentarische Genehmigung von Staatsverträgen in Österreich. Ihre innerstaatliche Wirksamkeit*, 12 Österreichische Zeitschrift für öffentliches Recht 1 (1962); Pfeifer, *Der Verfassungsrang von Staatsrverträgen*, 17 Österreichische Juristen-Zeitung 29 (1962). *But see* Winkler, *supra* note 28, whose arguments the Constitutional Court adopted.

though some of them or certain of their provisions had always been regarded as having constitutional status; and (2) that in ratifying the Human Rights Convention, parliament proceeded on the assumption that the Convention was a constitutional law and thought that it had complied with all provisions necessary to give it that status.[37] In addition, it is contended, that the determination whether or not a treaty does have the status of a constitutional law must be made by reference to its contents. That is, it has to be asked whether it deals with matters traditionally regulated by the constitution or by ordinary laws. Since the Convention deals with fundamental human rights and since in Austria such rights have been traditionally categorized as constitutional norms, the same should be true, so the argument runs, with regard to the relevant provisions of the Convention.[38]

It is noteworthy that in reaching its conclusion that the Convention did not acquire constitutional status in Austria, the Constitutional Court considered and rejected the arguments outlined above. As a result, it is necessary to determine what legal status, if any, the Convention does have in Austria. This question has been passed upon by the Constitutional Court in the decision already discussed[39] and in some other cases.[40] It was also considered by other Austrian courts.[41] What emerges from an examination of these decisions is the uniformly expressed view that, generally speaking, the Convention has become ordinary federal law.[42] But, as these cases indicate, this general conclusion does not resolve a more basic question: what protection does a person have in Austria, when rights guaranteed in the Convention are violated by the application of a prior Austrian law in conflict with a provision of the Convention? Clearly, since the Convention does not have the status of a constitutional norm, it can always be superseded by a later federal law. By the same token, one might assume that it would prevail over a prior law in conflict with its provisions.[43] But, since under Austrian constitutional law the rule *lex posterior derogat legit priori* applies only to self-executing treaties,[44] our second conclusion is valid only with regard to those provisions of the Con-

37. See note 34 *supra.*
38. See authorities cited in note 36 *supra.*
39. Austria, Constitutional Court, Judgment of October 14, 1961, *supra* note 35.
40. Austria, Constitutional Court, Judgment of June 27, 1960, [1960] Sammlung der Erkenntnisse des Verfassungsgerichtshofes [hereinafter cited as Slg. VerfG.] 330, 3 Yearbook 616 (1960); Austria, Constitutional Court, Judgment of October 13, 1960, [1960] Slg. VerfG. 460.
41. See, *e.g.*, Austria, Administrative Court, Judgment of December 15, 1961, 84 J.B. 644 (1962); Austria, Administrative Court, Judgment of December 11, 1958, Sammlung der Erkenntnisse des Verwaltungsgerichtshofes 990.
42. See Austria, Constitutional Court, Judgment of June 27, 1960, [1960] Slg. VerfG. 330, 3 Yearbook 616 (1960); Austria, Constitutional Court, Judgment of October 14, 1961, 84 J.B. 145 (1962), 4 Yearbook 604 (1961); Austria, Administrative Court, Judgment of December 15, 1961, 84 J.B. 644 (1962); see also Pfeifer, *Der Verfassungsrang von Staatsverträgen*, 17 Österreichische Juristen-Zeitung 29 (1962).
43. See Adamovich & Spanner, *op. cit. supra* note 29, at 317-18, 331-32. Pfeifer, *Die parlamentarische Genehmigung von Staatsverträgen in Österreich. Ihre innerstaatliche Wirksamkeit*, 12 Österreichische Zeitschrift für öffentliches Recht 1, 47 (1962).
44. See Seidl-Hohenveldern, *supra* note 29, at 111, 115 (1963).

vention which the Austrian courts determine to be self-executing in nature. The Constitutional Court considered this question recently in a case in which petitioner maintained that her arrest and detention under a penal provision of the revenue laws[45] violated Article 5(1)(c)[46] of the Convention. Although it acknowledged that the Convention was later in date and that the revenue law here in question might be incompatible with Article 5, the Court nevertheless rejected petitioner's claim, reasoning as follows:

> Paragraph 1(c) of Article 5 is, however, non-self-executing and the provision it contains requires to be read in the light of paragraph 3 of the same Article. That paragraph leaves open several questions: the official before whom an arrested person is to be brought . . .; what is to be regarded as a reasonable period within which to bring such person to trial; the conditions under which an arrested person may be allowed out on bail or other safeguard; and the nature of such safeguard or amount of such bail. These examples alone are enough to show that the self-execution of such provisions is impossible. It will not become possible to apply Article 5(3), and hence also Article 5(1)(c), unless and until further steps are taken to define explicitly the body before which an arrested person is to be brought and the period within which judgement is to

45. The provision in question is ¶ 85 of the *Bundesgesetz vom 26. Juni 1958, betreffend das Finanzstrafrecht und das Finanzstrafverfahrensrecht*, published in [1958] Bundesgesetzblatt für die Republik Österreich 1237, which permits the arrest and detention by the revenue authorities of persons suspected of having violated the revenue laws.

46. Convention, Art. 5 provides:

(1) Everyone has the right to liberty and security of person.

No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

(2) Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

(3) Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

(4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

(5) Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

> be pronounced, besides dealing in greater detail with the question of bail or other safeguard. Other measures may also be required for the application of the provisions in question. The provisions they contain need to be interpreted by the legislation. [*sic*] and cannot be self-executing.
>
> A provision that is not self-executing, and one that is, are not mutually exclusive and, for that reason, a non-self-executing provision cannot modify a self-executing one. Hence, paragraph 85 [of the revenue law] remains valid notwithstanding the provisions of Article 5(1)(c).[47]

The same tribunal, in an earlier decision, held equally categorically that Article 6[48] of the Convention is non-self-executing and therefore not directly enforceable in Austria.[49] These conclusions were echoed by the Austrian Administrative Court which, after finding that implementing legislation was necessary before Article 5 of the Convention could be enforced in Austria, specifically advised the appellant that his sole remedy was by way of a private petition to the European Commission of Human Rights.[50]

Thus, even without necessarily agreeing with some legal scholars, who have concluded that the Austrian courts would hold the remaining provisions of the Convention to be non-self-executing,[51] one thing is abundantly clear.

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47. Austria, Constitutional Court, Judgment of October 14, 1961, 84 J.B. 145 (1962), 4 Yearbook 604, 610-12 (1961). The validity of the Court's conclusion has been seriously questioned. See Pfeifer, *supra* note 43, at 51 n.176a; Ermacora, *supra* note 36.

48. Convention, Art. 6 provides:

> (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
>
> (2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
>
> (3) Everyone charged with a criminal offence has the following minimum rights:
>
> (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
>
> (b) to have adequate time and facilities for the preparation of his defense;
>
> (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
>
> (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

49. Austria, Constitutional Court, Judgment of June 27, 1960, [1960] Slg. VerfG. 330, 3 Yearbook 616 (1960). This judgment has been criticized by Vasak, *Was bedeutet die Aussage, ein Staatsvertrag sei "self-executing"?*, 83 J.B. 621 (1961).

50. Austria, Administrative Court, Judgment of December 15, 1961, 84 J.B. 644, 645 (1962) (note Janowsky).

51. See Ermacora, *supra* note 36; Vasak, *supra* note 49. See also Austria, Appeals Court (Oberlandesgericht/Linz), Judgment of January 22, 1960, 2 Zeitschrift für Rechtsvergleichung 170 (1961), where a Belgian defendant's contention that under the Convention he was entitled

That is, that in many, if not all, areas where the Convention might guarantee a person greater rights than are assured him under the Austrian constitution and laws, he will not be successful in invoking the protection of the Convention in Austrian courts until the requisite implementing legislation has been promulgated.[52] In this connection it is significant that in 1959 the Austrian government submitted to parliament a bill entitled "Federal Constitutional Law . . . for promulgating the provisions necessary to enable Austria to fulfill the undertakings arising from ratification of the European Convention for the Protection of Human Rights and Fundamental Freedoms and of the Protocol thereto."[53] While no action has as yet been taken on this bill and while it deals with only some provisions of the Convention, it is significant that, as the title of the proposed act indicates, it would, if passed, have the status of a *constitutional* law and therefore take precedence over ordinary legislation, both prior and subsequent.[53a]

BELGIUM

Under Belgian law a self-executing treaty approved by the legislature in conformity with Article 68 of the Constitution[54] has force of law. That is to say, it has the same effect as any other legislative enactment.[55] And like domestic legislation, its contents are not subject to judicial review.[56] Self-

to a French translation of the Austrian indictment was rejected. *But see* Ger. Fed. Rep., District Court (Amtsgericht/Bremerhaven), Judgment of October 18, 1962, 16 Neue Juristische Wochenschrift 827 (1963), ruling that American defendant was entitled under Article 6 of the Convention to the free services of an interpreter.

52. For a comparison of the rights guaranteed by the Convention with those protected under Austrian law, see the report of Prof. Pfeifer's lecture, *Die rechtliche Bedeutung der Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten für Österreich*, 80 J.B. 599 (1958).

53. Bill of September 23, 1959. An English translation of its text and accompanying explanatory message has been reproduced in 2 Yearbook 528 (1958-59). For a discussion of this bill see Golsong, *Die europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, 10 Jahrbuch des öffentlichen Rechts der Gegenwart 123, 132-33 (1961).

53a. Since the completion of this article, the following has come to the attention of the writer. As a result of a series of private appeals lodged with the European Commission of Human Rights against Austria, the Austrian legislature enacted an amendment to the Austrian Rules of Criminal Procedure. Pursuant to this amendment an accused has the right to be heard by the Court of Appeal and the Supreme Court, on a review of his "plea of nullity" (Nichtigkeitsbeschwerde). [1962] Bundesgesetzblatt für die Republik Österreich, No. 229. Prior to this amendment only the Public Prosecutor was given an oral hearing while the accused and his counsel were excluded therefrom, having the right merely to present written observations. A later law makes it possible for persons convicted before the 1962 amendment entered into force to apply for a re-hearing of their appeals within six months, provided their petitions have been ruled admissible by the European Commission of Human Rights. See [1963] Bundesgesetzblatt für die Republik Österreich, No. 66; Council of Europe News, November 1963, pp. 1-2 (New ser. No. 29).

54. Article 68(2) of the Belgium Constitution provides: "Treaties of commerce, and treaties which may burden the state, or bind Belgians individually, shall take effect only after having received the approval of the two houses." 1 Peaslee, Constitutions of Nations 153 (2d ed. 1956).

55. Janssen-Pevtschin, Velu & Vanwelkenhuyzen, *La convention de sauvegarde des Droits de l'homme et des libertés fondamentales et le fonctionnement des juridictions belges*, 15 Chronique de Politique Etrangère 199, 217 (1962); Masquelin, *Le contrôle et l'application des traités par les organes jurisdictionnels internes*, 15 Annales de Droit et de Sciences Politiques 3, 4 (1955).

56. De Visscher, *La Communauté Européenne du Charbon et de l'Acier et les Etats*

executing international agreements, which have become domestic law by virtue of parliamentary approval and publication in the official journal, supersede prior legislative enactments.[57] By the same token, later laws bar the application of prior inconsistent treaty provisions.[58] Belgian courts reach this conclusion by postulating that it is for the legislature to determine whether a law violates international obligations assumed by Belgium, and that the courts have no power to refuse the application of a later law, even though it may conflict with a treaty.[59]

While Belgian courts have not expressly passed upon the hierarchic status of the Convention, it is safe to assume that the operative provisions of the Convention have become directly applicable Belgian law.[60] As such, they would prevail over conflicting prior domestic legislation. This conclusion finds support in the manner in which Belgian tribunals have ruled upon pleas invoking the Convention.[61] That is to say, these courts have in the past assumed that the provisions contained in Section I of the Convention created directly enforceable rights under Belgian law.[62] Thus, a Belgian administrative tribunal, relying on Article 9 of the Convention, ruled that, for the purpose of determining eligibility for unemployment compensation, a practicing orthodox Jew had the right to have Saturdays considered a day of rest, even though the applicable statute made no such provision.[63] And in 1963 the Belgian Supreme

membres, in 2 Actes Officiels du Congrès International d'Etudes sur la C.E.C.A. 7, 50 (1957); Verbaet, *Du conflict entre le traité et la loi*, 9 Journal des Tribunaux d'Outre-Mer 113 (1958). The courts do have the power, however, to determine whether the treaty was approved and published in the manner stipulated by the constitution. Masquelin, *supra* note 55, at 10-11.

57. Masters, International Law in National Courts: A Study of the Enforcement of International Law in German, Swiss, French and Belgian Courts 208-09 (1932) and cases cited there.

58. Masquelin, *supra* note 55, at 16; Rolin, *La force obligatoire des traités dans la jurisprudence belge*, 68 Journal des Tribunaux 561 (1953); Slusny & Waelbroek, Note, 75 Journal des Tribunaux 724, 725-26 (1960).

59. Belgium, Schieble v. Procureur général, Court of Cassation, Judgment of November 26, 1925, [1926] Pasicrisie Belge I, 76, reprinted in [1925-26] Ann. Dig. 8; Belgium, Min. Publ. Bara et cons v. Debeur, Cour d'Appel de Bruxelles, Judgment of July 3, 1953, 68 Journal des Tribunaux 518 (1953). *But see* Belgium, Tribunal de Commerce (Brussels), Judgment of June 16, 1960, 75 Journal des Tribunaux 724 (1960) with highly critical note by Slusny & Waelbroek.

60. See Rolin, *Un texte de droit positif ignoré des juristes belges: La Convention européenne des Droits de l'Homme*, 73 Journal des Tribunaux 515 (1958).

61. See generally Janssen-Pevtschin, Valu & Valwelkenhuyzen, *supra* note 55, at 217-19 and cases discussed therein.

62. See, *e.g.*, Belgium, Min. Publ. v. Knapen, Court of Cassation, Judgment of March 25, 1963, 78 Journal des Tribunaux 333 (1963); Belgium, Min. Publ. v. Belaid, Court of Cassation, Judgment of July 20, 1962, [1962] Pasicrisie Belge 1238; Belgium, Min. Publ. v. Ratzloff, Court of Cassation, Judgment of September 21, 1959, 75 Journal des Tribunaux 573 (1960).

63. Belgium, Cymerman v. Office national de l'emploi, Commission réclamation O.N.E. (Brussels), Judgment of March 13, 1962, 77 Journal des Tribunaux 267, 268 (1962).

Article 9 of the Convention provides:

> (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> (2) Freedom to manifest one's religion or beliefs shall be subject only to such

Court held that Article 6(3)(b) of the Convention[64] had not been violated by a refusal to furnish a person held in preventive detention with the dossier of the investigating magistrate. In the court's view, this provision of the Convention referred to the rights of an accused at the trial and not during the investigatory stage.[65] That same court, in another case, rejected an appeal based on Article 6(3)(d), wherein petitioner charged that the lower court violated the Convention by refusing to permit him to call a certain witness in his defense. It ruled that Article 6(3)(d) did not deprive a judge of his largely discretionary power to determine whether the testimony of a witness has probative value.[66] Significantly, a comparison of this holding with the case law of the European Commission reveals substantial agreement. Thus, the Commission held not long ago that Article 6(3)(d), in stipulating that everyone charged with a criminal offence is entitled "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him," cannot be construed so as to permit "an accused person to obtain the attendance of any and every person and in particular of one who is not in a position by his evidence to assist in establishing the truth."[67] But even if these Belgian decisions were erroneous in their interpretation of Article 6, they nevertheless demonstrate that the Belgian Supreme Court, unlike its Austrian counterpart, acknowledged, that this provision of the Convention was and is capable of invalidating the enforcement of a prior Belgian law in conflict with it. Accordingly, it is not unreasonable to assume that Belgian courts would reach that same conclusion in passing upon most of the operative provisions of the Convention, because they are, on the whole, framed with greater precision than Article 6.

A study of the domestic implementation of the Convention in Belgium would be incomplete without a discussion of the consequences resulting from the submission of the *De Becker* case to the Human Rights Court.[68] Raymond De Becker, a Belgian journalist and writer, was condemned to death for collaborating with the Germans during the Second World War. While the death penalty was subsequently commuted, his sentence carried with it the forfeiture of various civil rights enumerated in Article 123(6) of the Belgian Penal Code. Subsection (e) of this law provided for the forfeiture of "the right to have a proprietary interest in or to take part in any capacity whatsoever in

limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

64. The text of Article 6 of the Convention is reproduced, *supra* note 48.

65. Belgium, Min. Publ. v. Knapen, *supra* note 62, at 334.

66. Belgium, Min. Publ. v. Belaid, *supra* note 62, at 1239.

67. Application No. 753/60, Decision of August 5, 1960, 3 Yearbook 310, 320 (1960). To the same effect, see Application No. 1134/61, Decision of December 19, 1961, 4 Yearbook 378 (1961).

68. "De Becker" Case, Judgment of March 27, 1962. This case was published by the Registry of the Court as a separate pamphlet entitled "Publications of the European Court of Human Rights, Series A: Judgments and Decisions 1962," and will be published in Volume 5 of the Yearbook.

the administration, editing, printing or distribution of a newspaper or any other publication." In 1956, after his release from prison on condition that he leave the country, De Becker appealed to the Commission charging that the continued deprivation of the rights described in Article 123(6) and especially subsection (e) violated Article 10 of the Convention,[69] since the effect of this Belgian law was to prevent him for all practical purposes from exercising his profession and expressing his opinions. The Commission accepted the appeal[70] and referred it to the Human Rights Court on April 29, 1960.

For more than a decade attempts had been made in Belgium to modify this post-war legislation and to normalize the status of persons affected by it. For obvious political reasons, however, only minor revisions could be enacted. But, while the *De Becker* case was pending before the Human Rights Court, the Belgian parliament hurriedly passed a far-reaching amendment providing for the mitigation of punishments meted out to Belgian collaborators. This law prompted De Becker to withdraw the complaint he had addressed to the Commission. Since the Commission agreeed with the Belgian government that under these circumstances it would serve no useful purpose to pursue the matter any further, the Human Rights Court consented to the discontinuance of the proceedings.[71]

GERMANY (FEDERAL REPUBLIC)

In Germany the Convention has been invoked before domestic tribunals to a much greater extent than in any other signatory state.[72] And its effect on German law in general[73] and on specific legal provisions,[74] has been extensively

69. Article 10 provides:

(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interest of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

70. Application No. 214/56, Decision of June 9, 1958, 2 Yearbook 214 (1958-59).

71. "De Becker" Case, *supra* note 68. The applicable Belgian laws referred to in the text are set out in the Court's judgment.

72. For a discussion of these cases see Morvay, *Rechtsprechung nationaler Gerichte zur Europäischen Konvention zum Schutze der Menschenrechte und Grundfreiheiten vom 4. November 1950 nebst Zusatzprotokoll vom 20. März 1952*, 21 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 89 and 316 (1961). A comprehensive list of these cases may be found in Golsong, *Die europäische Konvention zum Schutze der Menschenrechte und Grundfreiheiten*, 10 Jahrbuch des öffentlichen Rechts der Gegenwart 123, 131 n.41 (1961).

73. See, *e.g.*, Echterhölter, *Die Europäische Menschenrechtskonvention im Rahmen der verfassungsmässigen Ordnung*, 10 Juristenzeitung 689 (1955); Herzog, *Das Verhältnis der Europäischen Menschenrechtskonvention zu späteren deutschen Gesetzen*, 12 Die öffentliche Verwaltung 44 (1959).

74. See, *e.g.*, Henrichs, *Änderung der ZPO durch die Konvention von Rom?*, 9

debated.[75] But the status of the Convention as directly applicable federal law was never seriously disputed.[76] Most of the discussion revolved around the more difficult problem of ascertaining its normative rank within the German legal order.[77] That is to say, its transformation into federal law[78] did not resolve the question whether it could be equated to a constitutional law and, if not, whether it might nevertheless prevail over later ordinary federal laws incompatible with its provisions.

That the Convention acquired constitutional status was suggested by one eminent German jurist who maintained that the Convention defines and amplifies the concept of human rights articulated in the German Constitution in very general terms, and thus became an inherent part of it.[79] The courts, however, have shown no inclination to accept this argument and have either implicitly or expressly denied the Convention any constitutional status.[80] Whether the Convention nevertheless outranks at least ordinary laws regardless of the date of their promulgation is a somewhat more difficult question. This is due to the fact that Article 25 of the Basic Law (Constitution) of the Federal Republic provides: "The general rules of international law shall form part of federal law. They shall take precedence over the laws and create rights and duties directly for the inhabitants of the federal territory."[81] Thus, if the Convention could be said to merely codify general rules of international law, its provisions would outrank ordinary federal laws and all state legislation with the possible exception of the Federal Constitution itself.[82]

Monatsschrift für deutsches Recht 140 (1955); von Weber, *Die Durchsetzung der Grundrechte der europäischen Menschenrechtskonvention in der innerdeutschen Strafrechtspflege*, 9 Monatsschrift für deutsches Recht 386 (1955).

75. For an interesting debate concerning the admissibility of a so-called constitutional appeal (*Verfassungsbeschwerde*) pursuant to Article 90 of the Law on the Federal Constitutional Court of March 12, 1951, see Guradze, *Kann die Verfassungsbeschwerde auf eine Verletzung der Konvention zum Schutze der Menschenrechte gestützt werden?*, 13 Die öffentliche Verwaltung 286 (1960) (arguing in the affirmative); Herzog, *Nochmals: Verfassungsbeschwerde gegen Verletzung der Menschenrechtskonvention?*, 13 Die öffentliche Verwaltung 775 (1960) (arguing in the negative). The Federal Constitutional Court in its decision of January 14, 1960, 10 Entscheidungen des Bundesverfassungsgerichts 271, 274 (1960), 3 Yearbook 628, 632 (1960), held that such an appeal could not be based on the Convention.

76. See, *e.g.*, Ger. Fed. Rep., Appeals Court (Oberlandesgericht/Bremen), Judgment of February 17, 1960, 13 Neue Juristische Wochenschrift [hereinafter cited as N.J.W.] 1265 (1960), 3 Yearbook 634 (1960). *But see* Henrichs, *supra* note 74.

77. See generally Münch, *Zur Anwendung der Menschenrechtskonvention in der Bundesrepublik Deutschland*, 17 Juristenzeitung 153 (1961).

78. On the domestic implementation of treaties under German law, see Menzel, *Die Geltung internationaler Verträge im innerstaatlichen Recht*, in Deutsche Landesreferate zum VI. Internalionalen Kongress für Rechtsvergleichung 401 (1962).

79. Echterhölter, *supra* note 73, at 691-92.

80. See, *e.g.*, Ger. Fed. Rep., Higher Administrative Court (Münster), Judgment of November 25, 1955, 9 N.J.W. 1374 (1956), 2 Yearbook 572 (1958-59); Ger. Fed. Rep., Bavarian Constitutional Court, Judgment of July 3, 1961, 14 N.J.W. 1619 (1961).

81. Basic Law for the Federal Republic of Germany, English translation from 2 Peaslee, Constitutions of Nations 30 (2d ed. 1956). The German text reads as follows: "Die allgemeinen Regeln des Völkerrechts sind Bestandteil des Bundesrechtes. Sie gehen den Gesetzen vor und erzeugen Rechte und Pflichten unmittelbar für die Bewohner des Bundesgebietes."

82. See Ger. Fed. Rep., Federal Constitutional Court, Judgment of March 26, 1957,

While it might be argued that at least some provisions of the Convention qualify as "general rules of international law,"[83] this proposition has been rejected by most commentators.[84] Their position is supported by at least one German court,[85] which reached the following conclusion:

> The general rules of international law [within the meaning of Article 25 of the Basic Law] comprise only those rules which are universally valid for all members of the community of nations and whose reciprocal provisions are binding on them. . . . In the first place Switzerland, Austria, Spain, Portugal, Yugoslavia, Finland and countries beyond the "Iron Curtain," not to mention all non-European countries, have not acceded to the Convention. Even though the municipal law of some of these countries is compatible with the provisions of the Convention, as is partly the case in Switzerland, those countries have shown no wish to be bound in this matter by an international Convention or to submit to a supranational authority. Furthermore, . . .the Convention cannot be regarded as a codification of general rules of international law, since the basic rights set forth therein are not recognised in most parts of the world, as is proved by the failure of the attempts of the United Nations to conclude a similar Convention.[86]

Needless to say, the court's reasoning is not entirely persuasive. Its method of ascertaining the meaning of "general rules of international law" is questionable, since it seems to confuse the general acceptance of certain legal rules with the political decision whether to adhere to international agreements codifying such rules. Furthermore, some provisions of the Convention may well be recognized "in most parts of the world" so as to satisfy the court's own test of a general rule of international law.

Be that as it may, it is important to recall that German courts have uniformly held that the operative provisions of the Convention are directly applicable federal law.[87] As such, they supersede conflicting prior federal laws

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6 Entscheidungen des Bundesverfassungsgerichts 309, 363 (1956-57). See also Münch, *supra* note 77, at 154, who contends that the hierarchic status of general rules of international law within the meaning of Article 25 of the Basic Law is by no means settled in Germany, since it is not clear in what relation they stand to the Constitution itself.

83. This argument has been advanced by von Stackelberg in his case note, 13 N.J.W. 1265 (1960), with regard to Article 5 (3) of the Convention and by Münch, *supra* note 77, at 154, with regard to the rights of aliens.

84. See Morvay, *supra* note 72, at 98-99, where the literature and jurisprudence are reviewed. See also Echterhölter, *supra* note 73, at 690-91.

85. Ger. Fed. Rep., Higher Administrative Court (Münster), Judgment of November 25, 1955, 9 N.J.W. 1374 (1956), 2 Yearbook 572 (1958-59).

86. *Id.* at 1375, 2 Yearbook at 580.

87. See Ger. Fed. Rep., Federal Constitutional Court, Judgment of May 10, 1957, 6 Entscheidungen des Bundesverfassungsgerichts 389 (1956-57), 2 Yearbook 594 (1958-59); Ger. Fed. Rep., Federal Court of Justice, Judgment of June 27, 1957, 25 Entscheidungen des Bundesgerichtshofes (Zivilsachen) 60 (1958), 2 Yearbook 596 (1958-59); Ger. Fed. Rep., Federal Court of Justice, Judgment of April 21, 1959, 13 Entscheidungen des Bundesgerichtshofes (Strafsachen) 102 (1960); Ger. Fed. Rep., Higher Administrative Court (Münster), Judgment of November 25, 1955, 9 N.J.W. 1374 (1956), 2 Yearbook 572 (1958-59); Ger. Fed. Rep., Appeals Court (Oberlandesgericht/Bremen), Judgment of February 17, 1960, 13 N.J.W. 1265 (1960), 3 Yearbook 634 (1960).

and all state legislation regardless of the date of enactment.[88] Thus, one German court set aside an otherwise valid detention order on the ground that it violated Article 5 (3) of the Convention.[89] In another very interesting case, a decree expelling a Belgian national from Germany was quashed, because the court concluded that its execution would amount to a serious interference with petitioner's right to a family life as guaranteed in Article 8 of the Convention.[90] The Belgian had been convicted of a sex offense in 1951, but his residence permit was not withdrawn at that time (as it was in the power of the government to do), due to the fact that, as a farm laborer, his services were found to be indispensable to his German employer. In 1953 petitioner married a German woman with two German-born illegitimate children not fathered by him. Thereafter, in 1953, a child was born to the couple. In 1954, by which time he had obtained other employment, he was served with an expulsion order withdrawing his residence permit. In setting aside this order, the court pointed out that under the Basic Law and Article 8 of the Convention "the family is under the special protection of the State." Accordingly, "if the unity and integrity of the family are threatened, the interests of family protection must be taken into account and set against other public interests."[91] This, the court concluded, was not done here.

> Should the expulsion order be put into effect, the wife will therefore be obliged either to follow her husband and part from the illegitimate children born to her before her marriage, who are still very young, or to part from her husband in order to remain with her children. It is probable, of course, that a way of reuniting the family will eventually be found, but, in view of the circumstances, the separation is likely to continue for some time.
>
> The unity of the family will be compromised by this separation. It is true that he has no parental connection with the children born to his wife before the marriage, but the children must nevertheless be reckoned as belonging to his family, within the meaning of the above-mentioned provisions; they live in his home and, in view of their age, need the care of their mother.
>
> Since, for these reasons, the expulsion order represented a serious threat to the plaintiff's family, it was necessary to consider whether the special conditions laid down in Article 8[2] of the Convention as a justification for such a threat were fulfilled.[92]

The court then concluded that these conditions had not been fulfilled,[93] so that

88. Echterhölter, *supra* note 73; Münch, *supra* note 77, at 154; Wendt, *Zur Frage der innerstaatlichen Geltung und Wirkung der Europäischen Konvention zum Schutze der Menschenrechte*, 9 Monatsschrift für deutsches Recht 658 (1955).

89. Ger. Fed. Rep., Appeals Court (Oberlandesgericht/Saarbrücken), Judgment of November 9, 1960, 14 N.J.W. 377 (1961).

90. Ger. Fed. Rep., Federal Administrative Court, Judgment of October 25, 1956, 72 Deutsches Verwaltungsblatt 57 (1957), 2 Yearbook 584 (1958-59).

91. *Id.* at 57, 2 Yearbook at 590.

92. *Id.* at 58, 2 Yearbook at 590-92.

93. *Id.* at 58, 2 Yearbook at 592. Article 8(2) of the Convention provides:
There shall be no interference by the public authority with the exercise of this right

the expulsion order had to be set aside. This judgment was followed in a more recent German case which reached a similar result.[94]

Mention might also be made of a 1957 judgment of the Federal Constitutional Court, in which the defendant challenged the constitutionality of German penal provisions punishing homosexual activities. In the course of its decision, that tribunal stated:

> Irrespective of the Applicant's allegations it is necessary for the Court to examine ex officio the question of whether Articles 175 et seq. of the Penal Code are or are not consistent with the Convention, in view of the fact that after its ratification . . . the said Convention entered into force in the Federal Republic on 3rd September 1953 . . . and the Applicant R. was not sentenced until 14th October 1953, after the Convention had entered into force. If Articles 175 et seq. of the Penal Code had been abrogated by the provisions of the Human Rights Convention, the Applicant would have been sentenced under a penal law no longer in force and his plea of unconstitutionality would have to be entertained.[95]

The court found, however, that the challenged provisions of the German Penal Code had not been abrogated by the Convention, since the punishment of homosexual activity was a measure necessary for the protection of health and morals within the meaning of Article 8(2).[96] It is noteworthy that this conclusion finds support in the jurisprudence of the European Commission of Human Rights. The Commission recently rendered the following judgment:

> [T]he Commission has already decided on many occasions that the Convention allows a High Contracting Party to punish homosexuality since the right to respect for private life may, in a democratic society, be subject to interference as provided for by the law of that Party for the protection of health or morals (Article 8(2) of the Convention); whereas it is clear from the foregoing that Article 175 of the German Criminal Code is in no way in contradiction with the provisions of the Convention; whereas it thus appears that this part of the Application is manifestly ill-founded and must be declared inadmissible under Article 27(2) of the Convention; . . .[97]

[to private and family life] 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, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

A valuable discussion of this case may be found in Golsong, *The European Convention for the Protection of Human Rights and Fundamental Freedoms in a German Court*, 33 Brit. Yb. Int'l L. 317 (1958).

94. Ger. Fed. Rep., Higher Administrative Court (Münster), Judgment of August 2, 1960, 13 Verwaltungsrechtsprechung in Deutschland 199 (1961), 4 Yearbook 618 (1961). *But see* Ger. Fed. Rep., Federal Administrative Court, Judgment of December 15, 1955, 3 Entscheidungen des Bundesverwaltungsgerichts 58 (1957).

95. Ger. Fed. Rep., Federal Constitutional Court, Judgment of May 10, 1957, 6 Entscheidungen des Bundesverfassungsgerichts 389, 440 (1956-57), 2 Yearbook 594 (1958-59) (excerpted report).

96. *Id.* at 441, not excerpted in Yearbook.

97. Application No. 530/59, Decision of January 4, 1960, 3 Yearbook 184, 194 (1960).

It thus appears that, while the Convention is not in Germany a norm in the nature of a constitutional law, it does have the status of an ordinary federal law. As such, it can be effectively invoked in German courts[98] and guarantees to those subject to the jurisdiction of the Federal Republic additional civil rights. While subsequent federal legislation would supersede any inconsistent provisions of the Convention, it is most unlikely that such action will be taken in the foreseeable future.

GREECE

Under Greek law an international agreement becomes domestic law following the enactment of legislation approving and reproducing the treaty.[99] Theoretically, it is not the treaty that is internally enforceable, but the law incorporating it into the domestic legal order.[100] Thus transformed, a treaty gains the status of an ordinary law, with the result that it abrogates prior inconsistent legislation and may itself be superseded by a later law in conflict with it.[101] But even though an international convention has been promulgated in the manner indicated above, the courts might still conclude that all or some of its provisions are non-self-executing. In that case, and until the requisite implementing legislation has been enacted, such a treaty cannot abrogate or modify prior laws.[102]

In view of the fact that the Convention was approved by the requisite legislation,[103] it has gained the status of Greek law.[104] The available case law indicates, furthermore, that Greek courts have so far not questioned the self-executing nature of its operative provisions. That is to say, these courts have proceeded on the assumption that these provisions were directly applicable Greek law and did not require any additional implementing legislation. Thus, for example, the Greek Supreme Court, after noting that the Convention had become Greek law, ruled that a law licensing and regulating the construction

98. See Süsterhenn, *L'application de la Convention sur le plan du Droit Interne*, 10 Annales 303, 311-14 (1961).

99. Kyriacopoulos, *Le Droit International et la Constitution Hellénique de 1952*, in Gegenwartsprobleme des Internationalen Rechtes und der Rechtsphilosophie 201, 211 (1953); Papacostas, *L'autorité des Conventions internationales en Grèce*, 15 Revue Hellénique de Droit International 361, 363 (1962).

100. Valticos, *Monisme ou Dualisme? Les rapports des traités et de la loi en Grèce (spécialement à propos des conventions internationales du travail)*, 11 Revue Hellénique de Droit International 203, 208 (1958).

101. Patras, *L'autorité en Droit interne hellénique des Traités internationaux*, 15 Revue Hellénique de Droit International 348, 360 (1962), and cases discussed therein; Papacostas, *supra* note 99, at 362-63.

102. Valticos, *supra* note 100, at 224. The courts have the power, furthermore, to determine whether a treaty or some of its provisions conflict with the Greek constitution and to refuse enforcement if that should be the case. Patras, *supra* note 101, at 360; Valticos, *supra* note 100, at 223.

For a study comparing the Convention with the pertinent provisions of the Greek constitution and the argument that no conflict exists between these two instruments, see Kyriacopoulos, *Zur Einwirkung der Europäischen Menschenrechtskonvention auf die Verfassung Griechenlands*, in Grundprobleme des Internationalen Rechts 285, 304-06 (1957).

103. Greece, Law No. 2329, [1953] Official Journal, I, No. 68 (March 3, 1953).

104. Kyriacopoulos, *supra* note 102.

and maintenance of religious edifices did not infringe upon religious freedom guaranteed in Article 9(1) of the Convention. The court noted that the law in question, besides being non-discriminatory in nature, came within the scope of Article 9(2), which permits states to enact laws restricting the exercise of religious freedom to the extent that such laws are necessary in a democratic society in the interest of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.[105]

The Council of State, Greece's highest administrative tribunal, has also repeatedly asserted that the Convention has "force of law" in Greece.[106] But it should be noted, on the other hand, that this court, which has exclusive jurisdiction over questions involving possible abuse of administrative power and related areas (*e.g.*, arrest and detention for political crimes), has consistently misinterpreted the Convention. The reasoning of this court has been so blatantly erroneous that one may seriously question whether the Convention is being properly implemented in Greece. For instance, in a 1954 judgment the Council of State ruled that a petitioner could not invoke Article 5 of the Convention to challenge his continued detention under a 1948 emergency measure enacted to cope with the Communist insurrection. The court took the position that, since Article 15(1) of the Convention permits states "in time of war or other public emergency threatening the life of the nation" to take measures derogating from the obligations they have assumed under the Convention, petitioner could not complain even if his detention violated Article 5 and that it was accordingly unnecessary to determine this question.[107] The Council of State adopted this same reasoning in two 1961 decisions,[108] implying, furthermore, that the determination of whether a public emergency threatening the life of the nation exists is not subject to judicial review.

These conclusions must, for a number of reasons, be considered erroneous. The laws challenged in the three cases decided by the Council of State were being enforced in Greece at the time that country ratified the Convention. Pursuant to Article 64 of the Convention, Greece could have reserved the right to enforce these laws, since Article 64(1) provides:

> Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this Article.

Since Greece did not register any reservation with regard to the laws here in

105. Greece, Supreme Court (Arios Pagos), Case No. 386/1955, 9 Revue Hellénique de Droit International 206 (1956), 2 Yearbook 606 (1958-59).

106. See, *e.g.*, Greece, Council of State, Case No. 724/1954, 7 Revue Hellénique de Droit International 278 (1954).

107. *Ibid.*

108. Greece, Council of State, Case No. 35/1961; Greece, Council of State, Case No. 182/1961. For a French translation of these cases and Case No. 1442/1955, *infra* note 114, I am most indebted to the Hellenic Institute of International and Foreign Law and its distinguished director, Professor Pan. J. Zepos.

question,[109] it would seem to have waived its right to enforce them. But even if one were to assume that the right of derogation is not lost with regard to laws in force at the time the Convention was ratified, because such laws merely provide for the exercise of extraordinary powers in a national emergency sanctioned under Article 15(1), the state exercising such powers would have to comply with the procedure established in Article 15(3). It stipulates that a state invoking the right of derogation "shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor." This Greece failed to do. That a timely notification to the Secretary-General of a state's intention to exercise its right of derogation is a condition which must be complied with would seem to be apparent from the wording of Article 15(3). Whatever doubt there may have existed with regard to this question was resolved by the Human Rights Court in the *Lawless* case.[110] The Court there agreed with the Human Rights Commission that a state may only rely on Article 15 if it notified the Secretary-General without delay of the measuers of derogation taken by it together with the reasons therefor.[111] Finally, the assertion by the Greek Council of State that a derogation exercised by a state is not subject to judicial review, finds no support whatsoever in the text of the Convention. Needless to say, if such an argument were accepted, it would enable governments to freely nullify the rights guaranteed in the Convention, reducing it to a lofty but in practice ineffective statement of principle. It is, therefore, significant that the Human Rights Court in the *Lawless* case left no doubt about the fact that it considered the exercise of the right of derogation to be subject to judicial review.[112] As a result, since the Convention has become Greek law, it is difficult to see how a Greek court can, in reliance on the right of derogation, apply a law in conflict with the Convention, if such law was enacted before the effective date of the Convention, without at least determining whether the right of derogation was duly exercised.[113]

It is thus apparent that, regardless of the fact that the Convention has become Greek law, it has so far not been effectively enforced in Greece. That the courts are not entirely to blame for this unsatisfactory state of affairs may be illustrated by considering a 1955 case.[114] Petitioner here challenged a 1945 emergency measure by alleging that his continued detention under it violated the Convention. The Council of State found, however, that parliament

109. The only reservation made by Greece relates to Article 2 of the Protocol, which deals with the right to education and was not involved in the cases here under discussion.

110. "Lawless" Case (Merits), Judgment of July 1, 1961, 4 Yearbook 438 (1961). (This case will be more fully discussed on pp. 374-76 *infra*.)

111. *Id.* at 484-86.

112. *Id.* at 472.

113. The situation would be different, of course, if the law alleged to be in conflict with the Convention were later in date. In such a case, a Greek court would have no choice, under Greek constitutional law, but to apply the most recent legislation.

114. Greece, Council of State, Case No. 144/1955. This case is discussed in Papacostas, *supra* note 99, at 365.

had extended the effective date of this law by legislation enacted *after* the Convention entered into force in Greece. Since under Greek law, as we have seen, a later law supersedes a prior inconsistent treaty provision, the tribunal had no choice but to give effect to the will of the legislature and to reject the appeal.

Now it might be that none of the challenged laws actually violate the Convention.[114a] What is most regrettable, however, is that those subject to Greek jurisdiction are for all practical purposes deprived of the right to have that question effectively determined by Greek courts. This is especially serious, because Greece recognizes neither the compulsory jurisdiction of the Human Rights Court nor the right of private parties to appeal to the European Commission of Human Rights.

IRELAND

The Constitution of Ireland provides that "no international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas."[115] And Article 15.2(1) of the Irish Constitution stipulates that "the sole and exclusive power of making laws for the State is hereby vested in the Oireachtas: no other legislative authority has power to make laws for the State." It thus appears that, unless the Oireachtas (Parliament) has enacted a law implementing a treaty ratified by Ireland, it merely binds that country internationally without, however, creating any rights or duties enforceable in Irish courts.[116]

While Ireland deposited its ratification of the Convention on February 25, 1953, and also recognized the right of private petition as well as the compulsory jurisdiction of the Human Rights Court, no implementing legislation has as yet been promulgated by the Oireachtas. The Convention has, nevertheless, been invoked in the Irish courts in a very interesting case arising out of a habeas corpus proceeding instituted by one Lawless.[117] Suspected of being a member of outlawed Irish Republican Army (I.R.A.), he was arrested for allegedly engaging in activities prejudicial to the security of the state and placed under preventive detention, all in accordance with the provisions of the *Offences Against the State (Amendment) Act, 1940*.[118] In challenging the

114a. In a March 1, 1964 news dispatch from Athens, the New York Times reported that the new Greek government under Premier Papandreou plans to seek the enactment of a law, which "would free about two-fifths of Greek Communist prisoners, abolish political deportation and remove regulations under which the police can veto any applicant for work on political grounds." N. Y. Times, March 2, 1964, p. 8, col. 4. In view of these developments, it is not unreasonable to assume that Greece might now recognize the right of private petition to the Commission and the jurisdiction of the Human Rights Court.

115. Constitution of Ireland, Art. 29.6. The Oireachtas consists of the President, the House of Representatives (Dáil Eireann) and the Senate (Seanad Eireann). See Constitution of Ireland, Art. 15.1.(2).

116. See Lang, *A Constitutional Aspect of Economic Integration: Ireland and the European Common Market*, 12 Int'l & Comp. L.Q. 552, 561 (1963).

117. In re ÓLaighléis (Lawless), [1963] Ir. R. 93 (1957), *aff'd*, [1960] Ir. R. 109 (1957).

118. Ireland, Offences Against the State (Amendment) Act, 1940 (No. 2 of 1940).

legality of his detention, Lawless relied, among other grounds, on Article 5 and 6 of the Convention. Aware of the fact that Ireland's ratification of the Convention did not effect its transformation into domestic law, counsel for Lawless[119] made a rather ingenious argument to overcome this legal obstacle. He submitted that the government, having ratified the Convention and having bound itself to perform its obligations thereunder, should be estopped from asserting the right to exercise powers in violation of the Convention. But the High Court[120] as well as the Supreme Court[121] rejected this proposition. After indicating that the Oireachtas had not determined that the Convention was to be part of the domestic law, the Supreme Court emphasized that, in accordance with the explicit stipulations of the Irish Constitution, "this Court cannot give effect to the Convention if it be contrary to the domestic law or purports to grant rights or impose obligations additional to those of domestic law."[122] Then, addressing itself specifically to counsel's argument, the Supreme Court ruled:

> The Court accordingly cannot accept the idea that the primacy of domestic legislation is displaced by the State becoming a party to the Convention for the Protection of Human Rights and Fundamental Freedoms. Nor can the Court accede to the view that in the domestic forum the Executive is in any way estopped from relying on the domestic law. It may be that such estoppel might operate as between the High Contracting Parties to the Convention, . . . but it cannot operate in a domestic Court administering domestic law.[123]

Counsel's attempt to obtain Lawless' release by urging the Supreme Court to construe the Act of 1940 in such a manner as not to violate general rules of international law—a status which he sought to attribute to Articles 5 and 6 of the Convention—also failed since, in the Supreme Court's view, domestic laws must prevail against inconsistent provisions of international law.[124] It is thus apparent that the Convention cannot be successfully invoked in Irish courts against conflicting prior or subsequent domestic legislation.

Parenthetically, it should be noted that Lawless submitted his case to the European Commission of Human Rights. The Commission ruled that his

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This law supplemented the Offences Against the State Act, 1939 (No. 13 of 1939). Both were designed to check the illegal activities of the I.R.A. See generally Kelly, Fundamental Rights in the Irish Law and Constitution 52-59 (1961). Section 4 (1) of the 1940 law empowers a Minister of State to issue a warrant for the arrest and detention of a person believed by him to be engaged in activities prejudicial "to the preservation of public peace and order or to the security of the State." Section 3 (2) conditions the exercise of this power upon a governmental proclamation declaring that it is necessary and expedient to invoke the powers conferred in the Act "to secure the preservation of public peace and order."

119. Lawless was represented by Sean MacBride, former Irish Minister for External Affairs, and present Secretary-General of the International Commission of Jurists.

120. In re ÓLaigléis (Lawless), [1960] Ir. R. 93, 102-04 (1957).

121. *Id.* at 124-26.

122. *Id.* at 125.

123. *Ibid.*

124. In re ÓLaigléis (Lawless), [1960] Ir. R. 93, 124 (1957).

petition was admissible[125] and referred it to the Human Rights Court on April 12, 1960, where it became the first case to be decided by that Court.[126] The Court found that Lawless' detention violated Articles 5(1)(c) and 5(3)[127] of the Convention, since it was not imposed for the purpose of bringing him, within a reasonable time, before a competent judicial authority to determine the legality of his detention or to pass upon the merits of the charges against him.[128] It ruled, however, that the Irish government had nevertheless not acted unlawfully, since Article 15 of the Convention permits a state in time of war or other pubilc emergency threatening the life of the nation to take measures derogating from its obligations under the Convention "to the extent strictly required by the exigencies of the situation, . . ." The Irish government had notified the Secretary-General of the Council of Europe in 1957 that it was compelled to invoke Article 15, in order to cope with the terrorist activities of the I.R.A. In the Court's view, Ireland properly exercised its right of derogation, considering the circumstances prevailing within its territory at that time. Accordingly, after finding that the measures taken against Lawless were within the scope of Ireland's derogation, the Court dismissed the appeal.[129]

ITALY

While the Convention was ratified by Italy in 1955, it is still too early to say what domestic status it thereby acquired. As a general rule, a treaty approved by parliament becomes Italian law.[130] As such it is capable of abrogating prior laws inconsistent with it,[131] but "a subsequent legislative act can modify or even invalidate a prior treaty."[132] Since the constitutionality of statutes is subject to judicial review by the Constitutional Court,[133] that same tribunal may also review the constitutionality of treaties.[134]

125. Application No. 332/57, Decision of August 30, 1958, 2 Yearbook 308 (1958-59).

126. See "Lawless" Case (Preliminary Objections and Questions of Procedure), Judgment of November 14, 1960, 3 Yearbook 492 (1960); "Lawless" Case (Merits), Judgment of July 1, 1961, 4 Yearbook 438 (1961).

127. For text of Article 5, see note 46 *supra.*

128. "Lawless" Case (Merits), *supra* note 126, at 464-66.

129. *Id.* at 486. For a discussion of this case, see O'Higgins, *The Lawless Case,* [1962] Camb. L.J. 234; Robertson, *Lawless v. The Government of Ireland (Second Phase),* 37 Brit. Yb. Int'l L. 537 (1962).

130. Italy, Combes de Lestrade v. Ministry of Finance, Court of Cassation, Judgment of October 31, 1955, [1956] Jurisprudentia Italiana, I, p. 128, [1955] Int'l L. Rep. 882; Mosler, *L'application du Droit international public par les tribunaux nationaux,* 91 Recueil des Cours 619, 638 (1957).

131. Sereni, The Italian Conception of International Law 322-23 (1943).

132. Bebr, Judicial Control of the European Communities 223 (1962).

133. Cassandro, *The Constitutional Court of Italy,* 8 Am. J. Comp. L. 1, 4 (1959); Sanduli, *Die Verfassungsgerichtsbarkeit in Italien,* in Heidelberg Colloquium on Constitutional Jurisdiction 292, 305 (Mosler ed. 1962); Telchini, *La Cour constitutionnelle en Italie,* 15 Revue Internationale de Droit Comparé 33, 38 (1963).

134. De Visscher, *La Communauté Européenne du Charbon et de l'Acier et les Etats membres,* in 2 Actes Officiels du Congrès International d'Etudes sur la C.E.C.A. 7, 50 (1957); Bebr, *op. cit. supra* note 132, at 223. While Article 10(1) of the Italian Constitution stipulates that "the Italian juridical system conforms to the generally recognized principles of international law," 2 Peaslee, Constitutions of Nations 482 (2d ed. 1956), this provision is understood not to include treaties. Fiore, *The Relation of the International to the Domestic Law*

While the Convention accordingly became Italian law, due to its promulgation by the Italian parliament,[135] it may well be significant that the legislators apparently could not agree upon the legal effect produced by this transformation.[136] Thus the standing committee on foreign and colonial affairs of the Chamber of Deputies assumed, as its report indicates, that the Convention did not create rights directly enforceable within the member states, but that it merely formulated general obligations binding the signatories on the international plane. In other words, that the Convention was not self-executing in nature.[137] On the other hand, the Senate's counterpart of this committee reached the opposite conclusion, when it asserted that Italian courts were bound to apply the Convention and that additional implementing legislation was not necessary to achieve this result.[138] The courts apparently have not as yet had an opportunity to pass on this question, although the Convention was invoked before the Italian Constitutional Court in a case involving legislation dealing with bi-lingualism in the Alto Adige (South Tyrol) province.[139] Without addressing itself to the legal status of the Convention in Italy, the Constitutional Court merely pointed out that the Convention could not affect the outcome of the case, since the challenged Italian law guaranteed German-speaking Italian citizens greater rights than were available under the Convention.[140] Thus, no meaningful conclusion can be drawn from this judgment, since the Constitutional Court did not have to decide the crucial question whether the Convention, had it required a more favorable treatment than was provided under the challenged Italian law, would have modified or abrogated the latter. Therefore, for the time being, no definite answer can be given to this question.[141]

It may well be significant, however, that Italy has as yet recognized neither the competence of the Commission to accept individual petitions, nor the compulsory jurisdiction of the Human Rights Court and that, in defending this position, the Italian Foreign Minister made the following statement in 1961:

> In view of the important repercussions that decisions of the [Human Rights] Court might have on the Italian legal system, our Government . . . have thought it best not to adhere to certain more specifically binding clauses of the Convention until these have been accepted by almost all the member States . . . .

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and the Italian Constitution, in 1 Aktuelle Probleme des Internationalen Rechtes 165, 171 and 175-76 (Schriftenreihe der Deutschen Gruppe der AAA, 1957).

135. Law of August 4, 1955, No. 848, [1955] Gazetta Ufficiale, No. 221, p. 3372.

136. For a summary of Italian legislative debates and committee reports dealing with the Convention, see Partsch, *Die europäische Menschenrechtskonvention vor den nationalen Parlamenten*, 17 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 93, 127-31 (1956-57).

137. *Id.* at 130.

138. *Id.* at 128. One commentator assumes on the basis of the Senate report that the Convention has become directly applicable Italian law. Süsterhenn, *L'application de la Convention sur le plan du Droit Interne*, 10 Annales 303, 310 (1961).

139. Italy, Pres. Regione Trentino-Alto Adige v. Pres. Cons. ministri, Constitutional Court, Judgment of March 11, 1961, 44 Rivista di Diritto Internazionale 670 (1961).

140. *Id.* at 676.

141. *But see* Süsterhenn, *supra* note 138, at 310.

> It should be added that for States such as Italy, where there is complete separation of powers, adherence to Article 46 [compulsory jurisdiction clause] might create very serious difficulties . . . .
>
> In order to comply with a decision of the [Human Rights] Court affording just satisfaction [Article 50], the Italian domestic system would have to be adjusted in certain particulars, and this raises the problem of whether and how it could in practice be adapted to a specific obligation of this kind.[142]

Implicit in this assertion may be the government's belief that the Convention is not directly applicable domestic law. For, if the Convention could be effectively invoked in Italian courts, it might be argued that the problems anticipated by the Foreign Minister would be less likely to arise. But since Italian courts are not bound to adopt the government's characterization of an international agreement,[143] it is possible that they might nevertheless determine that the operative provisions of the Convention became directly enforceable Italian law.

LUXEMBOURG

The Luxembourg government and legislature, in considering the ratification and approval of the Convention, apparently proceeded on the assumption that it would take precedence over conflicting prior and subsequent domestic enactments.[144] The legal basis for this assumption can be traced to relatively recent but entirely unequivocal decisions of the highest Luxembourg courts dealing with the domestic status of treaties.[145] These cases hold that international agreements duly approved by the legislature and published pursuant to law not only supersede prior inconsistent legislation, but take precedence also over subsequent laws in conflict with them.[146] Thus, the Luxembourg Supreme Court in 1950 set aside a conviction on the theory that the law which the defendant had violated was incompatible with the provision of a treaty and could therefore not be invoked against him, even though it was later in date than the treaty. The Supreme Court emphasized that "in case of a conflict between the provisions of an international treaty and the provisions of a later domestic law, the international law must prevail over the domestic law."[147] This doctrine was reiterated by the same tribunal in a later decision, in which it pointed out that as a general rule the effect of conflicting successive laws

142. Italian Senate, February 25, 1961, 4 Yearbook 596-98 (1961).

143. Bebr, *op. cit. supra* note 132, at 223; Sereni, *op. cit. supra* note 131, at 324.

144. See Partsch, *supra* note 136, at 111-12.

145. For the most recent discussion of this case law, see Pescatore, *L'autorité, en droit interne, des traités internationaux selon la jurisprudence luxembourgeoise*, 18 Pasicrisie Luxembourgeoise [hereinafter cited as Pas. Lux.] 87 (1962).

146. Luxembourg, Chambre des Métiers v. Pagani, Cour Supérieure de Justice (Cassation criminelle), Judgment of July 14, 1954, 16 Pas. Lux. 150 (1954-56); Luxembourg, Dieudonné v. Administration des Contributions, Conseil d'Etat (Comité du Contentieux), Judgment of July 28, 1951, 15 Pas. Lux. 263 (1950-53); Luxembourg, Min. Publ. v. Brasseur, Cour Supérieure de Justice (appel correctionnel), Judgment of July 21, 1951, 15 Pas. Lux. 233 (1950-53); Luxembourg, Huberty v. Min. Publ., Cour Supérieure de Justice (Cassation criminelle), Judgment of June 8, 1950, 15 Pas. Lux. 41 (1950-53).

147. Luxembourg, Huberty v. Min. Publ., *supra* note 146 at 42 (Author's translation).

depends upon the date of their promulgation. This, the Supreme Court explained, was not true, however, if the provisions of a treaty were incompatible with a domestic law, since the former enjoyed a higher normative rank. Accordingly, a prior treaty provision, having received legislative approval, had to prevail even over a later law.[148] It is interesting to note, as one Luxembourg commentator does, that the principle establishing the hierarchic supremacy of treaties is entirely judge-made law.[149] Pre-1950 jurisprudence, furthermore, tended to equate international agreements to statute law, resolving any conflicts between them by applying the later in time.[150]

Since the Convention was duly approved by the Luxembourg legislature and published in the manner stipulated by law,[151] it should theoretically take precedence over all prior and subsequent domestic laws provided, of course, the particular provision is found to be self-executing in nature.[152] A lower Luxembourg tribunal, however, recently concluded that the Convention could not be successfully invoked in the courts.[153] The defendant in this case was found guilty and fined for charging a higher rental price for films than sanctioned by Luxembourg law. He appealed this decision without, however, complying with a statutory provision, which stipulates that "an appeal shall be admissible only if it is accompanied by a receipt for payment in full of the fine imposed." The prosecution accordingly submitted that the appeal was inadmissible, while the defense contended that this law violated the Luxembourg Constitution and Article 6 of the Convention. The court sustained the prosecution's argument and, after examining the Convention as a whole, ruled that "the rights and principles described in the Convention may not, under the terms of the Convention, be appealed against or invoked directly before national courts but may only be the subject of international appeals as laid down and stipulated in the Convention."[154] While it is difficult to see how the challenged law could violate the Convention unless appellant might show that he had no money to pay the fine,[155] the reasons given by the court in rejecting the appeal may seriously be questioned. First, the court did not even refer to a prior case in which the highest tribunal of the country, by implication at least, reached

148. Luxembourg, Chambre des Métiers v. Pagani, *supra* note 146, at 152.

149. Pescatore, *La prééminence des traités sur la loi interne selon la jurisprudence luxembourgeoise*, 68 Journal des Tribunaux 645 (1953).

150. Pescatore, *L'autorité, en droit interne, des traites internationaux selon la jurisprudence luxembourgeoise*, 18 Pas. Lux. 87, 112-13 (1962).

151. Law of August 29, 1953, [1953] Mémorial du Grand-Duché de Luxembourg 1099. Article 1(2) of this law provides that it be "executed and observed by all those whom it may concern."

152. See Luxembourg, Brasserie Henri Funck et Cie v. Kieffer, Tribunal d'arrondissement de Luxembourg (Commerce), Judgment of December 8, 1960, 18 Pas. Lux. 553, 556-57 (1960-62), where Article 86 of the European Economic Community Treaty was ruled to be non-self-executing in nature and thus could not be pleaded to invalidate a contractual arrangement concluded by the parties.

153. Luxembourg, Court of Summary Jurisdiction, Judgment of October 24, 1960, 4 Yearbook 622 (1961).

154. *Id.* at 630.

155. For text of Article 6, see note 48 *supra*.

a contrary conclusion.[156] Here a conviction under a ministerial decree temporarily restricting the use of certain propulsion fuels was challenged on the ground, *inter alia*, that it violated Article 5(1) of the Convention. While the Supreme Court rejected this contention, it did so only after concluding that no rights guaranteed in the Convention had been infringed.[157] While not conclusive, this approach indicates that the Supreme Court apparently assumed that the Convention was Luxembourg law and could be directly invoked in the courts. Secondly, the lower court does not seem to say that Article 6 of the Convention is too vague to be self-executing. Instead, it concludes that the Convention by its terms creates rights enforceable only through an international appeal.

It is one thing to say that the domestic legal order does not afford a person a remedy for a breach of a right guaranteed in the Convention. If true, this is merely an admission that the state in question is not living up to its international obligations. As the European Commission of Human Rights pointed out some time ago,

> . . . in accordance with the general principles of international law, borne out by the spirit of the Convention as well as by the preliminary work, the Contracting Parties have undertaken . . . to ensure that their domestic legislation is compatible with the Convention and, if need be, to make any necessary adjustments to this end, since the Convention is binding on all authorities of the Contracting Parties, including the legislative authority . . . .[158]

It is quite another thing to assert that the Convention by its terms creates rights enforceable only through an international appeal. This is so patently erroneous that it is difficult to believe that the court, despite its express language, did not merely hold that Article 6 was non-self-executing. Otherwise it is difficult to account for the unambiguous text of Article 13 of the Convention, which provides:

> 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.

Accordingly, while higher Luxembourg tribunals might reach the conclusion that some of the provisions of the Convention are not self-executing under Luxembourg law, it is reasonable to assume that they will not agree with the lower court that the rights guaranteed in the Convention were designed to be enforced only by appeals to the European Commission of Human Rights and the Human Rights Court.

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156. Luxembourg, Min. Publ. v. Wehrer, Cour Supérieure de Justice (Appel correctionnel), Judgment of January 25, 1958, 17 Pas. Lux. 248 (1957-59).

157. *Id.* at 252.

158. Application No. 214/56, Decision of June 9, 1958, 2 Yearbook 214, 234 (1958-59).

THE NETHERLANDS

The Law of May 22, 1953, effected a series of far-reaching changes in the Dutch Constitution.[159] These were clarified by additional amendments enacted in 1956.[160] Article 66 of the Dutch Constitution, as thus amended, provides:

> Legislation in force within the Kingdom shall not apply if its application would be incompatible with provisions of [international] agreements which are binding upon citizens and which have been entered into either before or after the enactment of such legislation.[161]

And Article 60 states in part that "the judiciary are not empowered to pronounce upon the constitutionality of [international] Agreements." These provisions, to speak in general terms, assure the supremacy of treaties over all other forms of domestic legislation.[162]

An analysis of these provisions indicates that when Article 66 refers to agreements "which are binding upon citizens" that the legislature had in mind self-executing treaties.[163] Furthermore, reading Articles 66 and 60 together, it is apparent, first, that, as far as the courts are concerned, such international agreements take precedence over the Dutch Constitution itself[164] and all other forms of domestic legislation either prior or subsequent in time.[165] And second, that it is for the courts to determine whether a conflict exists between a treaty and domestic legislation, be it of a statutory or constitutional nature, and if it is found to exist, to apply the treaty.[166] Parenthetically, it might be noted that the opponents of these constitutional changes acknowledged the necessity

159. Law of May 22, 1953, No. 261, [1953] Staatsblad van het Koninkrijk der Nederlanden 451. An English translation of these amendments may be found in Inter-Parliamentary Union, Constitutional and Parliamentary Information 104 (3d ser. 1953).

160. Law of September 11, 1956, No. 472, [1956] Staatsblad van het Koninkrijk der Nederlanden 1211. For English text, see Inter-Parliamentary Union, Constitutional and Parliamentary Information 26 (3d ser. 1957).

161. I have preferred the English translation of this provision found in Erades & Gould, The Relation Between International Law and Municipal Law in the Netherlands and in the United States: A Comparative Study 201 (1961), to that prepared by the Inter-Parliamentary Union, *op. cit. supra* note 160, which reads:

> Legislative provisions in force within the Kingdom shall not be applied in cases in which such an application would be incompatible with clauses by which everyone is bound contained in Agreements which have been concluded either before or after the entry into force of such provisions.

162. See Van Panhuys, *The Netherlands Constitution and International Law*, 47 Am. J. Int'l L. 537, 553 (1953); Zimmermann, *Die Neuregelung der auswärtigen Gewalt in der Verfassung der Niederlande*, 15 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 164, 195 (1953/54). While these monographs deal with the 1953 amendments, they apply with equal force to the 1956 amendments, since the latter, to a large extent, merely clarified and rearranged the provisions in question.

163. Bauer, *Die niederländische Verfassungsänderung von 1956 betreffend die auswärtige Gewalt*, 18 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 137, 152 (1957/58); Erades & Gould, *op. cit. supra* note 161, at 325-26.

164. While the courts lack the power to rule that a treaty is unconstitutional, the legislature would seem to be bound not to enact unconstitutional treaties.

165. This is the accepted view in the Netherlands. Erades & Gould, *op. cit. supra* note 161, at 416; Van Panhuys, *supra* note 162, at 557; Beaufort, *Some Remarks about the European Convention for the Protection of Human Rights and Fundamental Freedoms*, in Varia Juris Gentium (Liber Amicorum presented to J. P. A. François) 42, 45 (1959).

166. See Zimmermann, *supra* note 162, at 201; Van Panhuys, *supra* note 162, at 553.

and advisability of providing for the hierarchic supremacy of treaties. They thought it unwise, however, to empower the judiciary to decide whether or not an international agreement conflicted with domestic laws preferring, instead, to leave this determination to parliament.[167] This attitude may be attributed to the fact that Dutch courts may not review the constitutionality of statutes.[168] Thus, the above constitutional amendments relating to treaties wrought fundamental changes in the previously existing balance of power between the legislature and the judiciary.

The foregoing indicates that the operative provisions of the Convention should prevail as against conflicting prior and later legislative enactments as well as the Netherlands Constitution itself. Accordingly, a recent case[169] deserves special attention. The defendant Van Loon, a Roman Catholic priest, had been ajudged guilty of conducting a Catholic service in a public place and taking part in a religious procession on a public thoroughfare in violation of Article 184 of the Dutch Constitution, which permits the celebration of religious services only in buildings and other enclosed places. On appeal, an intermediate appellate court set aside defendant's conviction on the ground that the constitutional provision here in question was incompatible with Article 9 of the Convention. Article 9(1) provides that everybody has the right to freedom of religion and that this right includes the public or private manifestations of one's religion or belief. Under Article 9(2) the freedom to manifest one's religion or beliefs may be limited by laws "necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." The court first found that the acts of which the defendant was charged had to be regarded as a public manifestation of the Catholic religion within the meaning of Article 9(1) of the Convention. Interpreting the phrase "to manifest . . . in public" as referring to religious services outside buildings and public places, the court emphasized that "had there been any intention to limit this freedom to the manifestation of religion in public within buildings and enclosed places, that restriction would undoubtedly have been covered by Article 9."[170] The court then ruled that defendant's conviction could not be sustained as a permissible limitation under Article 9(2) of the Convention. Only the exception for the "protection of public order" could be relevant, but it was not applicable. The court reached this conclusion by pointing out that it had not been proved that the constitutional provision relied upon by the prosecution was necessary

167. For an extensive analysis of these debates see Zimmermann, *supra* note 162, at 197-201.

168. See Constitution of the Kingdom of the Netherlands, Art. 131(2) (formerly 124(2)). (An English translation of the Constitution without the 1953 and 1956 amendments may be found in 2 Peaslee, Constitutions of Nations 754 (2d ed. 1956)); see also Erades & Gould, *op. cit. supra* note 161, at 414.

169. Netherlands, Public Prosecutor v. Van Loon, Court of Arnhem, Judgment of March 8, 1961, 4 Yearbook 630 (1961).

170. *Id.* at 638.

for the protection of public order or that it was enacted solely for its maintenance. Besides, since what is necessary for the protection of public order should be decided in the light of present-day conditions, the enactment of Article 184 of the Constitution, even if intended for the protection of public order, "*cannot* be a valid standard for judging what is necessary for the protection of public order *today* (more than 100 years later) . . . ."[171] The prosecution appealed this decision to the Dutch Supreme Court which reversed.[172] While the Supreme Court rejected the prosecution's argument that the right to manifest one's religious beliefs in public as guaranteed in Article 9(1) of the Convention was designed as a protection only against the need to worship in secret, it based its reversal of the lower court's judgment on the theory that the law against public religious services was a measure for the protection of public order within the meaning of Article 9(2) of the Convention. The challenged law, the Supreme Court reasoned, had been intended and was designed to prevent tension and agitation leading to disorder among Netherlands' mixed religious population and must therefore be considered "as a measure necessary for the protection of public order."[173] In its view, furthermore, the lower court had erred, because it had applied an improper standard in deciding that the law under which defendant was sentenced was not necessary for the protection of public order. A judge, the Supreme Court ruled, may reach such a conclusion "only in the event of its being considered quite unthinkable that a legislature faced with the need to adopt a regulation in this matter . . . could adopt or maintain such a regulation in all equity . . . ."[174] By applying this test, the court upheld the validity of the challenged law on the theory that, even by present-day standards, it was not unreasonable for a legislature to enact such a measure in order to forestall potential conflict between different religious groups.[175]

Even if one might disagree with the Supreme Court on its interpretation of Article 9(2) of the Convention, it is clear that it and the intermediate appellate tribunal both proceeded on the assumption that Article 9 was self-executing in nature.[176] That is, had the Convention been found violated, Van Loon's conviction would have been set aside. The Supreme Court reached a similar conclusion in a prior case[177] where, however, it rejected a Protestant clergyman's allegation that an Old People's Act, requiring him to contribute to a pension plan, violated rights guaranteed in Article 9 of the Convention. To

171. *Id.* at 640 (Italics in the original).
172. Netherlands, Public Prosecutor v. Van Loon, Court of Cassation, Judgment of January 19, 1962, 4 Yearbook 640 (1961).
173. *Id.* at 648.
174. *Ibid.*
175. Netherlands, Public Prosecutor v. Van Loon, Court of Cassation, Judgment of January 19, 1962, 4 Yearbook 640, 650 (1961).
176. This view was confirmed in Netherlands, A.J.K. v. Public Prosecutor, Court of Cassation, Judgment of May 5, 1959, reported in 8 Nederlands Tijdschrift voor Internationaal Recht 73, 74 (1961).
177. Netherlands, Case No. 436, Court of Cassation (Third Chamber), Judgment of April 13, 1960, 3 Yearbook 648 (1960).

sustain its finding, the Supreme Court correctly noted that this provision of the Convention "does not mean that anyone may be free to evade the enforcement of laws even when they have nothing to do with the manifestation of religion or beliefs . . . ."[178]

From the preceding it appears that in the Netherlands the Convention enjoys a constitutionally guaranteed supremacy over prior and subsequent laws as well as the Dutch Constitution itself. It is possible, of course, that Dutch courts might conclude that some provisions of the Convention are by their nature incapable of application by the courts without additional legislation.[179] Considering, however, that the Netherlands Supreme Court did not place Article 9 of the Convention in that category, and that Article 66 of the Netherlands Constitution defines as self-executing those treaty provisions, which are "binding upon citizens," it is unlikely that more than one or two operative provisions would not meet this test.

Scandinavian Countries

In Norway, Sweden, Denmark and Iceland, where the Convention was ratified at an early date, parliamentary approval or ratification does not effect the transformation of international agreements into domestic law.[180] To achieve such a transformation, separate implementing legislation has to be enacted.[181] This has not been done in any of these countries. But where the respective legislatures considered that the Convention might conflict with certain provisions of their domestic law, appropriate reservations were made.[182] In this connection, it is interesting to note that Norway, which had made a reservation with regard to Article 9 of the Convention, because Article 2 of the Norwegian Constitution provided that "Jesuits shall not be tolerated," subsequently deleted this provision from its Constitution and withdrew the reservation.[183]

To my knowledge, only an Icelandic court has expressly considered the

178. *Id.* at 670.

179. See, in this connection, Netherlands, X v. Inspector of Taxes, Court of Cassation, Judgment of February 24, 1960, reported in 8 Nederlands Tijdschrift voor Internationaal Recht 285 (1961), where the court stated:

> As the Court of Appeal said, Article 13 merely imposes upon the contracting States the obligation to organize their legislation in such a way that in the cases defined by that Article effective remedies will exist. The Court of Appeal rightly decided that Article 13, according to its nature, cannot directly be applied by the Courts and therefore, under Article 66 of the Constitution, does not belong to those provisions of international agreements that are binding upon everyone and by which municipal legislation shall be judged. *Id.* at 286.

180. See Sørensen, *Principes de Droit international public*, 101 Recueil des Cours 1, 118 (1960); Ross, Lehrbuch des Völkerrechts 69 (1951).

181. Sørensen, *supra*, at 118; Løchen & Torgersen, Norway's Views on Sovereignty 95-96 (1955).

182. Sweden made a reservation with regard to Article 2 of the Protocol, 1 Yearbook 44 (1955-57); Norway with regard to Article 9 of the Convention. *Id.* at 41-42. Denmark and Iceland made no reservations.

183. Letter of December 4, 1956, by Norwegian Foreign Minister Lange to the Secretary-General of the Council of Europe, 1 Yearbook 42 (1955-57).

domestic status of the Convention. It ruled that, since the Convention "has not been legalized in this country, neither as general nor as constitutional law," plaintiff could not rely upon it in challenging the legality of an Icelandic revenue law.[184] While the Convention was recently also invoked in the Norwegian Supreme Court,[185] that tribunal left unresolved the question concerning the domestic status of the Convention. The case arose out of the conviction of a dentist named Iversen for the violation of the *Provisional Act of June 21, 1956, relating to obligatory public service for dentists.* This law subjects dentists completing their professional training after 1955 to compensated governmental service as dentists for a period of one to two years in certain parts of the country designated by the Ministry of Social Affairs. After serving in such an assignment for a few months, Iversen left his post and advised the Ministry that he was unwilling to perform "forced labour." He was tried and sentenced to pay a substantial fine. This judgment was affirmed by the Norwegian Supreme Court, where the defendant argued, *inter alia,* that the Act of 1956 violated Article 4 of the Convention. Article 4(2) provides that "no one shall be required to perform forced or compulsory labour." Article 4(3)(d) qualifies the term "forced or compulsory labour" by stipulating that it shall not include, among others, "any work or service which forms part of normal civic obligations." Addressing himself directly to defendant's contention, Judge Hiorthoy, speaking for the majority on the Court, ruled:

> It seems hardly doubtful to me that the prohibition in the Convention against subjecting anyone to perform "forced or compulsory labour" cannot reasonably be given such a wide construction that it includes instructions to perform public service of the kind in question here. The present case concerns brief, well-paid work in one's own profession in immediate connection with completed professional training. Although such injunctions [*sic*] may in many cases be in conflict with the interests of the individual as he sees them in the moment, I find it manifest that they cannot with any justification be characterized as an encroachment on, still less a violation of any human right. Accordingly, as I cannot see that there is any contradiction between the Convention and the Norwegian Act in question, I need not enter into the question as to which of these shall prevail in the event of conflict.[186]

It may be assumed however that, if the Supreme Court had found that the

184. Iceland, Olafson v. Ministry of Finance, Municipal Court of Reykjavik, Judgment of June 28, 1960, 3 Yearbook 642, 646 (1960). This Icelandic revenue law was the subject of an appeal to the Commission which held that it did not violate Article 1 of the Protocol to the Convention. Application No. 511/59, Decision of December 20, 1960, 3 Yearbook 394 (1960).

185. Norway, Public Prosecutor v. Stein Andreas Iversen, Supreme Court, Judgment of December 16, 1961, [1961] Norsk Retstidende, II, 1350. (I am most indebted to the Legal Department of the Norwegian Foreign Ministry and its Deputy Director, Mr. Egil Amlie, for providing me with an English translation of this decision, from which all English quotations are taken. A report of this case, prepared by Prof. Hambro, may also be found in 90 Journal du Droit International (Clunet) 788 (1963).)

186. *Id.* at 1351.

Act of 1956 conflicted with the Convention, it would have had to give effect to the Norwegian law. This result would seem to follow not only because the law was later in date, but also because in Norway, as in Denmark, Sweden and Iceland, an international agreement requires implementing legislation to be capable of creating rights enforceable in the municipal tribunals. Thus, in commenting on this case, Professor Hambro points out:

> It is interesting that the Court in this case—as in many cases before—discuss the possibility of a conflict between municipal law and an international obligation in spite of the fact that the well nigh unanimous doctrine in Norway states that Norwegian Courts must apply Norwegian law even when this law is clearly in opposition to international law.[187]

TURKEY

To ascertain the status of the Convention in Turkey is a most frustrating endeavor. The rather extensive bibliographies dealing with the Convention compiled in the Yearbooks of the European Convention on Human Rights list only one entry pertaining to Turkey.[188] The French-language law journal published by the Law Faculty of the University of Istanbul[189] contains no case reports or articles dealing with the Convention. And this writer's communications to some Turkish professors of constitutional and international law have elicited no response whatsoever. As a result, the following report on the domestic implementation of the Convention by Turkey is at best incomplete.

Turkey ratified the Convention in 1954.[190] The Turkish Constitution then in force[191] contained no express reference relating to the domestic status of international agreements. It provided merely that "the Grand National Assembly alone exercises such functions as enacting, modifying, interpreting, and abrogating laws; concluding conventions and treaties and making peace with foreign states; . . ."[192] This provision was interpreted to mean that a treaty duly approved by the Grand National Assembly became domestic law.[193]

187. Hambro, *supra* note 185, at 790. One Norwegian author, however, has recently advanced the theory, to judge from the English summary of his article, that the European Convention of Human Rights cannot be equated, for the purpose of determining its domestic legal status, to an ordinary treaty. Since, in his view, the Convention guarantees human rights to all persons within the jurisdiction of the High Contracting Parties, they have a right to the enforcement of the Convention regardless of the constitutional laws of the individual states. Wold, *Den européiske menneskerettskonvensjon og Norge*, in Legal Essays: A Tribute to Frede Castberg 353, 373 (1963). Whether a domestic court has the power to enforce a right guaranteed in the Convention, if it conflicts with a municipal law, may well be doubted.

188. The monograph listed is a doctoral dissertation presented to the Faculty of Law of the University of Geneva by Ali Reza Gullu, entitled Les Droits de l'Homme et la Turquie (1958). Unfortunately it is of limited usefulness for purposes of our study.

189. It is published under the title of "Annales de la Faculté de Droit d'Istanbul."

190. Turkey, Law No. 6366 of March 10, 1954, reprinted in 1 Yearbook 43 (1955-1957).

191. See Turkey, Constitution of January 10, 1945, 3 Peaslee, Constitutions of Nations 404 (2d ed. 1956).

192. Constitution of January 10, 1945, Art. 26.

193. Gullu, Les Droits de l'Homme et la Turquie 69-71 (1958).

Since, as above noted, the Convention was approved in that manner by the Turkish parliament, it should have gained that status.[194]

Since there are no available judicial decisions dealing with the Convention,[195] one can only speculate on the extent to which the Convention was implemented in Turkey. It is common knowledge, however, that the Menderes regime blatantly disregarded even the most elementary notions of human rights by imprisoning political opponents, imposing press censorship, etc. Accordingly, it may safely be assumed that during this era in Turkish history the Convention was not an effective guarantee against deprivations of human rights. But since Turkey recognized neither the competence of the Commission to hear private appeals directed against Turkey nor the jurisdiction of the Human Rights Court, it is impossible to assess the extent of such deprivations.

This situation may have been remedied with the overthrow of the Menderes regime and the subsequent adoption of a new Turkish Constitution,[196] which contains significant new guarantees in the sphere of human rights and fundamental freedoms.[197] Furthermore, it is noteworthy that Article 65(5) of the 1961 Constitution expressly provides: "International treaties duly put into effect shall carry the force of law. No recourse to the Constitutional Court can be made as provided in articles 149 and 151 with regard to these treaties." By virtue of this provision an international agreement like the Convention, besides having the status of domestic legislation, may very well have gained a preferred position vis-a-vis ordinary laws. This would follow from the fact that, whereas ordinary laws may be challenged and annulled if they violate the Constitution,[198] international treaties like the Convention are not subject to direct constitutional review.[199]

In the light of these developments, it is premature to attempt to say how Turkish courts will apply the Convention. The overthrow of the Menderes regime and the apparent establishment of a constitutional democracy taken together with the fact that the human rights guaranteed in the new Consti-

194. As such, the Convention could prevail over prior laws in conflict with it and could itself probably be superseded by subsequent legislation. Gullu, *op. cit. supra* note 193, at 71. Gullu, however, also suggests that a duly promulgated treaty could not be nullified by an ordinary law later in time. *Ibid.* But this proposition may well be questioned, because he bases this conclusion on the assertion that a treaty derives its legal force from international law so that it cannot be abrogated by national legislation. Thus he apparently confuses the continued international validity of a treaty, even after it has been unilaterally abrogated by a later domestic law, with the internal effect of such a law.

195. The Yearbooks of the European Convention on Human Rights, which note national court decisions involving the Convention, contain no reference to Turkish cases.

196. Constitution of the Turkish Republic of July 9, 1961, reprinted in Inter-Parliamentary Union, Constitutional and Parliamentary Information 18 (3d ser. 1962).

197. See generally Giritli, *Some Aspects of the New Turkish Constitution*, 16 The Middle East Journal 1 (1962).

198. Arik, *La Cour constitutionnelle turque*, 14 Revue Internationale de Droit Comparé 401, 406 (1962); Balta, *Die Verfassungsgerichtsbarkeit in der Türkei*, in Heidelberg Colloquium on Constitutional Jurisdiction 550, 556-57 (Mosler ed. 1962).

199. Arik, *supra* note 198, at 407. Balta, *supra* note 198, at 562, however, points out that the wording of Article 65(5) of the Constitution does not exclude the possibility of an indirect constitutional review of treaties by lower courts.

tution appear to be patterned on the Convention, are extremely significant factors. They may well give added meaning to our rather general conclusion that the Convention has become Turkish law.

UNITED KINGDOM

Under the constitutional law of the United Kingdom, a treaty does not upon its ratification acquire the status of domestic law.[200] As Lord Atkin explained in *Attorney-General for Canada v. Attorney-General for Ontario*:[201]

> Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law.[202]

In other words, the provisions of a treaty have no force of law in United Kingdom courts in the absence of implementing legislation.[203] This is true even if the particular international agreement is intended to be self-executing in nature and uses language capable of such interpretation.[204] As a matter of fact, with the possible exception of treaties affecting belligerent rights and diplomatic immunities, there is no such thing in British constitutional law as a self-executing treaty.[205]

Although the United Kingdom was the first country to ratify the Convention,[206] no legislation implementing its provisions has as yet been enacted.[207] Accordingly, the Convention cannot be successfully invoked in British courts although, as Professor Waldock suggests, it might be utilized by the courts "in dealing with doubtful points in the domestic system."[208] No such cases have as yet been reported.

In this connection, it should be noted that the United Kingdom has as

200. McNair, The Law of Treaties 81-82 (1961).
201. [1937] A.C. 326 (P.C.) (Can.).
202. *Id.* at 347.
203. See The Parlement Belge, 4 P.D. 129, 154-55 (1879), reversed on other grounds, 5 P.D. 197 (1880); Sinclair, *The Principles of Treaty Interpretation and their Application by the English Courts*, 12 Int'l & Comp. L.Q. 508, 525 (1963); Wade & Phillips, Constitutional Law 259 (6th ed. 1960).
204. See Marsh, *Civil Liberties in Europe*, 75 L.Q. Rev. 530, 535 (1959).
205. McNair, *op. cit. supra* note 200, at 81, 89-93.
206. The United Kingdom ratified the Convention on February 22, 1951, and deposited the instrument of ratification on March 8, 1951.
207. Here it might be noted that in ratifying the Protocol to the Convention, the United Kingdom availed itself of the right under Article 64 to stipulate the following reservations:

> . . . in view of certain provisions of the Education Acts in force in the United Kingdom, the principle affirmed in the second sentence of Article 2 [of the Protocol] is accepted by the United Kingdom only so far it is compatible with the provision of efficient instruction and training, and the avoidance of unreasonable public expenditure.

1 Yearbook 45 (1955-57).
208. Waldock, *The European Convention of Human Rights and Fundamental Freedoms*, 34 Brit. Yb. Int'l L. 356, 358 (1959).

yet neither recognized the competence of the Commission to receive, pursuant to Article 25, private petitions, nor accepted the compulsory jurisdiction of the Human Rights Court under Article 46. While the British government has been severely criticized in the House of Commons for not taking these steps,[209] it has shown no intention to make these declarations. Illustrative of its policy is the following government statement made in response to a question from the floor of the House of Commons:

> The position which Her Majesty's Government have continuously taken up is that they do not recognise the right of individual petition, because they take the view that States are the proper subject of international law and if individuals are given rights under international treaties, effect should be given to those rights through the national law of the States concerned. The reason why we do not accept the idea of compulsory jurisdiction of a European court is because it would mean that British codes of common and statute law would be subject to review by an international court. For many years it has been the position of successive British Governments that we should not accept this status.[210]

Even if one were to accept the government's position that, "if individuals are given rights under international treaties, effect should be given to those rights through the national law of the States concerned," it should be pointed out that the United Kingdom has failed to do that very thing. Of course, the real reason for British reluctance to permit individual appeals to the European Commission and to accept the compulsory jurisdiction of the Court may be traced to another problem. The United Kingdom, after ratifying the Convention, extended its application to many British colonial territories.[211] While the Convention in Article 15 permits derogations from the obligations assumed by the member states to deal with certain public emergencies, the legality of such derogations might be challenged by individuals, if private appeals could be instituted against the United Kingdom.[212] This the British government

209. For excerpts from relevant House of Commons debates, see 2 Yearbook 546-60 (1958-59) and 3 Yearbook 598-612 (1960).

210. Reply by the Minister of State for Foreign Affairs (Mr. Ormsby-Gore) in the House of Commons on November 26, 1958, quoting from prior Government statement, 2 Yearbook 546 (1958-59). Parenthetically it might be noted that this statement was quoted in the Netherlands Parliament as indicative of British attitude towards European integration and to demonstrate how unrealistic it was to expect British membership in the European Common Market. Mr. Van Der Goes Van Naters, Second Chamber of the Netherlands States-General, 15th Sitting, November 17, 1959, reported in 3 Yearbook 548, 576-78 (1960).

211. See Letter to the Secretary-General of the Council of Europe by the Permanent United Kingdom Representative to the Council of Europe, dated October 23, 1953, with list of territories, reprinted in 1 Yearbook 46-47 (1955-57). This declaration was made pursuant to the provisions of Article 63 of the Convention. See note 216 *infra*.

212. Even now, of course, another member state could challenge the legality of such a derogation or, for that matter, any other British action, which it might deem violative of the obligations assumed by the United Kingdom under the Convention. See Convention, Art. 24. But states are, for political reasons, generally reluctant to take such steps. Greece did take such action against the United Kingdom at the time of the Cyprus dispute, but withdrew its complaint as a result of the settlement of the Cyprus Question. See 2 Yearbook 175-96 (1958-59).

wants to avoid, for it considers the exercise of the right of derogation to be a purely political decision, which should not be subject to judicial review.[213] Besides, the United Kingdom is also concerned with the political problems that private appeals from the colonies might create. This fear was articulated in the House of Commons by the Joint Under-Secretary of State for Foreign Affairs in the following manner:

> Among emerging communities political agitators thrive and one may well imagine the use which political agitators would make of the right of individual petition. For every one grievance which had some substance there would be a hundred put up for political purposes only.[214]

While some other signatory states run similar risks, albeit on a much smaller scale, one might well echo the remarks of Mr. Anthony Kershaw who, in advocating British recognition of the right of individual petition and the compulsory jurisdiction of the Human Rights Court, stated in the House of Commons:

> It may be that the price which we have to pay for this form of international co-operation is too high, but I think that we should realise that in every form of international co-operation, every form of treaty into which we enter, there is a price which must be paid.[215]

Leaving aside the special problems involved in the administration of justice in the colonial territories,[216] it may well be that the human rights guaranteed in the Convention are already adequately protected under the domestic laws of the United Kingdom. But if the Convention is to be fully implemented, an individual subject to the jurisdiction of the United Kingdom should be able to have this proposition tested by an impartial body like the Commission and, if necessary, by the Human Rights Court. Furthermore, even though the United Kingdom is legally free not to permit private appeals to these institutions, it should and must, if it is to discharge the obligations incumbent upon it under the Convention, allow its own courts to pass upon these questions. And since, in addition to Ireland, the United Kingdom is the only other common-law signatory of the Convention, British courts would have a valuable contribution to make in developing the law of the Convention. Accordingly, one cannot but share the sentiments of one eminent British jurist, who states:

> In so far as we in this country have a conception of civil liberty which is of value—although some Continental comparisons may show that it is by no means comprehensive—it may be thought regrettable

213. See Statement by the Joint Under-Secretary of State for Foreign Affairs in the House of Commons on June 25, 1959, reported in 9 Int'l & Comp. L.Q. 314-15 (1960).

214. House of Commons, Debate of May 23, 1960, Reply by the Joint Under-Secretary of State for Foreign Affairs (Mr. Robert Allan), to Anthony Kershaw, M. P., reprinted in 3 Yearbook 606, 612 (1960).

215. House of Commons Debate of May 23, 1960, 3 Yearbook 598, 604-06 (1960).

216. The United Kingdom's concern over the application of the Convention which it extended to many of its colonies under Article 63, is largely unjustified, because Article 63(3) stipulates that "the provisions of this Convention shall be applied in such territories with *due regard*, however, to *local requirements*." (Emphasis added.)

> that our courts do not have an opportunity to interpret a Convention to which as a State we have subscribed. It is not easy to convince a foreign lawyer that it would be catastrophic for Parliament to pass a law giving legal effect to a Convention which we have signed and ratified.[217]

CONCLUSION

Our study indicates that the Convention lacks the status of domestic law in six states which ratified it, namely in the United Kingdom, Ireland, Norway, Sweden, Denmark and Iceland. It may, of course, be that the rights guaranteed in the Conventon are nevertheless adequately safeguarded in these countries. But whether or not this be true, the fact remains that one cannot test this proposition in their courts by attempting to show that a certain law or governmental action violates the Convention. The same is also true in states such as Austria and possibly Luxembourg, where the Convention has been held not to be self-executing in nature. In all these countries, accordingly, an individual does not enjoy the full benefits of the Convention because, if he should in fact have a valid claim based on the Convention, the appropriate domestic courts are powerless to give him any relief. This result cannot be squared with the provisions of Article 13 of the Convention which stipulates in part that "everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority . . . ." It is difficult to see how an individual can have "an effective remedy before a national authority," to enforce the rights guaranteed in the Convention, if he cannot invoke a specific provision "set forth" therein.[218] Article 13 must, therefore, be interpreted to require each High Contracting Party to give the Convention the status of domestic law.[219] States which have as yet not done so, have not fully implemented the Convention.

In such countries as Germany, Belgium and the Netherlands, on the other hand, the Convention does have for all practical purposes the status of directly applicable domestic law. Here an individual can effectively invoke a given provision of the Convention in the national courts to enforce the rights guaranteed by it. These states, furthermore, recognize the right of private petition as well as the jurisdiction of the Human Rights Court. These institutions, of course, lack the power to reverse a determination of a domestic tribunal. But it is reasonable to assume that such national courts might in subsequent litigation involving the same legal questions reconsider their own determinations in the light of the opinions expressed by the Commission and especially the Human Rights Court.[220] This type of informal interaction between

217. Marsh, *supra* note 204, at 537.

218. See Golsong, Das Rechtsschutzsystem der Europäischen Menschenrechtskonvention 8 (1958).

219. If it were interpreted not to impose such an obligation, it would be meaningless, because it would add nothing that the Convention does not already provide for.

220. This, of course, is not possible in those countries, where the Convention lacks the status of domestic law or where it has been considered to be non-self-executing, even though

the international judiciary and national courts empowered to pass on the Convention can work both ways in contributing to the growh of the Convention. For example, it is readily conceivable that the Human Rights Court may be less reluctant to adopt the more liberal interpretation of the Convention in a given case, if it can point to relevant national decisions supporting such a view.

These considerations point up one especially serious obstacle to the effective enforcement of the Convention. That is, that a state ratifying the Convention does not thereby recognize or even undertake to recognize the right of an individual to appeal to the Commission. Its negative consequences are painfullly apparent if we recall that in Greece, for example, the Convention has theoretically gained the status of domestic law without, as a practical matter, offering any real protection because Greek courts have in the past completely misunderstood its legal implications. But since Greece, like the United Kingdom, Italy and Turkey, does not recognize the right of private petitions, little can be done to rectify the situation. It is, of course, true that another High Contracting Party might nevertheless submit the victim's claim to the Commission. Experience shows, however, that states will rarely do this so as not to jeopardize their relations with another friendly nation.[221] In all likelihood, one state will charge another with a breach of the Convention only to further its own political interests.[222] Thus, unless individuals have access to the Commission and through it to the Human Rights Court, a state is under no real compulsion to live up to the obligations it has assumed by ratifying the Convention.

In practice, therefore, one cannot really divorce the domestic implementation of the Convention from the right of individual petition to the Commission. The situation in Turkey under the Menderes regime demonstrates this proposition. A government willing to disregard basic human rights will not be deterred by the fact that it is violating its own laws, even if their source be a duly ratified treaty like the Convention. It is more likely to abstain from embarking upon such a course, however, if its actions are subject to review by an international tribunal such as the Commission and the Court. Accordingly, one cannot but conclude that, unless the Convention enjoys the status of the domestic law in each state adhering to it and unless these states also recognize the right of private petition to the Commission and the compulsory jurisdiction of the Human Rights Court, the Convention will in some countries remain a document devoid of any meaning.

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all of them, except for the United Kingdom, recognize the right of private petition. But even in these countries it might have the effect of prompting legislative action designed to conform domestic laws to the provisions of the Convention.

221. See Rolin, *Les Conclusions du Colloque*, 10 Annales 404, 411-12 (1961).

222. Thus, Greece accused the United Kingdom of such a violation in Cyprus before that island became independent. And Austria has taken up various claims of certain South Tyrolian irredentists alleging that their rights were violated by Italy.