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The European Convention on Human Rights.

Robert M. Kornreich
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Dr. Wertham, in one of his perceptive assertions, states: "We are apt to use psychiatry like a drunk uses a lamp post: not for the light, but to lean against."[9] The reviewer feels he has done just that in *A Sign For Cain.* Psychiatry was used as a reason for collecting a myriad of every variety of violent acts, which were then strung together much more as if gathered by a news-clipping service than by a social scientist searching for patterns and meanings.

There is a table of contents and an index for which the examiner found little use. The bibliography, however, does supply a handy and extensive list of books and reviews concerning violence.

This book may have some value for the enormous collection of brief sketches of man's inhumanity to man. Anyone with even minimal experience in law or medicine or just the daily press would have little to learn from this presentation. It could have been a provocative in-depth study by a man with an enormous collection of personal studies, a vast experience with the courts, a tremendous and broad general knowledge, and a deep dedication to helping mankind.

Let us hope that Dr. Wertham will yet present us with this book that could have been.

Harold P. Graser, M.D.
Assistant Professor of Psychiatry, School of Medicine;
Lecturer, School of Law, State University of New York at Buffalo

THE EUROPEAN CONVENTION ON HUMAN RIGHTS. London: The British Institute of International and Comparative Law, 1965. Pp. viii, 106. 17s. 6d.

The book under review is a collection of six essays on the European Convention of Human Rights[1] which were delivered in 1964 at a London Conference sponsored by the British Institute of International and Comparative Law. The six authors are well-known for their outstanding contributions to the literature on the Convention and, with the exception of Professor Buergenthal, all hold official positions either with the Convention Institutions or the Council of Europe.[2] Each of the authors discusses a different aspect of the Convention's

9. P. 22.

1. Sir Humphrey Waldock, *Human Rights in Contemporary International Law and the Significance of the European Convention;* Dr. A. H. Robertson, *The Political Background and Historical Development of the European Convention on Human Rights;* Dr. H. Golsong, *The Control Machinery of the European Convention on Human Rights;* Mr. J. E. S. Fawcett, *Some Aspects of the Practice of the Commission of Human Rights: Its Sanctions and Practice;* Professor Thomas Buergenthal, *The Effect of the European Convention on Human Rights on the Internal Law of Member States.*

2. Sir Humphrey Waldock is a former Chairman of the European Commission of Human Rights and recently elected justice of the European Court of Human Rights; Dr.

development, from the history of the protection of human rights in international law to the creation of the Convention, and beyond, to its practice and domestic effects. Together, these essays present a brief but thorough introduction to the Convention suitable for both legal scholar and layman.

I

To put the contents of this book into perspective, it is necessary to briefly survey the historical progress of human rights in international law. The development of institutions to provide international protection for human rights is a phenomenon of the twentieth century. Under the customary law of nations, states were generally regarded as having absolute discretion in all their internal affairs. The right of aliens not to be treated below a minimum international standard was, of course, a well recognized exception to the general rule. In the event of a violation by a state of its international obligation toward aliens, the victim (after exhausting local remedies) could look to his own country to espouse his claim. The exercise of the right of diplomatic protection by a state developed as a means of preventing more serious interstate conflicts. Relief for the victim was an incidental result. Apart from this theory of state responsibility, states often claimed the right to intervene in another state's internal affairs for humanitarian reasons. However, the cases of true "humanitarian intervention" were rare, if indeed, they occurred at all.[3] In this century, protection of minority groups by the Minority Treaties placed under the guarantee of the League of Nations, and by the Mandate System of the League, were the first institutional attempts to extend the traditional scope of international protection of human rights. More recently, the United Nations has tried to internationalize the protection of human rights. The members of the United Nations have each undertaken to "promote respect for human rights and fundamental freedoms."[4] However, the most advanced institution for the protection of human rights is the European Convention of Human Rights which has been ratified by most of the countries of Western Europe.[5] The purpose of the Convention is to enforce some of the fundamental rights proclaimed in the United Nations Universal Declaration of Human Rights.[6] In this collective effort, the member states have given up their traditional sovereignty to an unprecedented degree.

A. H. Robertson is Head of the Directorate of Human Rights of the Council of Europe; James Fawcett and A. B. McNulty are, respectively, a member and the Secretary of that Commission; Dr. H. Golsong is the Registrar of the European Court of Human Rights.

3. See Ganji, International Protection of Human Rights 17-44 (1962); Lauterpacht, International Law and Human Rights 32-33 (1950).

4. U.N. Charter arts. 55, 56.

5. Only the eighteen member states of the Council of Europe are eligible to adhere to the Convention. At present fifteen states have ratified the Convention. They are: Austria, Belgium, Cyprus, Denmark, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxemburg, the Netherlands, Norway, Sweden, Turkey, and the United Kingdom. Three members of the Council of Europe remain outside the Convention. They are: France, Switzerland and Malta.

6. The preamble of the Convention declares the purpose of the members to "take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration [of Human Rights]."

Under the Convention, the contracting states undertake to secure the guaranteed rights to "everyone within their jurisdiction"[7] regardless of nationality. To ensure the enforcement of the rights which it proclaims, the Convention established a Commission of Human Rights as well as a Court of Human Rights.[8] Petitions alleging violations of the Convention must first be accepted by the Commission whose function in this respect is quasi-judicial. While ratifying states have the right to bring complaints to the Commission by virtue of their membership in the Convention, individuals may do so only if the allegedly delinquent state has, in addition to ratification, separately recognized the jurisdiction of the Commission to entertain individual petitions.[9] If the Commission finds a petition admissible, it then performs its investigatory and conciliatory functions. It undertakes an investigation of the facts of the alleged breach of the Convention, and upon discovering the violation, tries to induce a friendly settlement.[10] If the parties do not settle their differences informally, the Commission must transmit a report containing findings of fact and an opinion on the merits to the Committee of Ministers of the Council of Europe.[11] If the case is not submitted to the Court within a period of three months after the Commission has transmitted the Report, the Committee of Ministers must make the final decision.[12] Only the Commission or an interested state can submit disputes to the Court,[13] and then, only if the defendant state has made a separate declaration recognizing the jurisdiction of the Court.[14] Unlike the Commission, the proceedings before the Court are public. The judgment of the Court is final and binding on the parties to the case.[15]

Despite the assertion in the preamble of the Convention that the contracting parties are "like-minded and have a common heritage of political tradition," it should be noted that, in fact, these countries represent different legal systems as well as attitudes toward individual liberty. The rights and freedoms defined in section I of the Convention must, therefore, be applied in a variety of contexts. Affording uniform protection for all individuals raises immensely difficult and complex comparative law problems for the Convention organs. These comparative foreign law questions will also intrigue the American lawyer who encounters

7. Convention, art. 1.

8. For a detailed description of the Convention institutions, see Buergenthal, *Comparative Study of Certain Due Process Requirements of the European Human Rights Convention*, 16 Buffalo L. Rev. 18-22 (1966).

9. This is the so-called optional right of private petition of article 25 of the Convention. The following eleven countries have recognized the competence of the Commission to deal with individual complaints: Austria, Belgium, Denmark, Federal Republic of Germany, Iceland, Ireland, Luxemburg, the Netherlands, Norway, Sweden and the United Kingdom.

10. Convention, art. 28.

11. Convention, art. 31.

12. Convention, art. 32.

13. Convention, art. 48.

14. Convention, art. 46. The following eleven states have accepted the compulsory jurisdiction of the Court: Austria, Belgium, Denmark, Federal Republic of Germany, Iceland, Ireland, Luxemburg, the Netherlands, Norway, Sweden and the United Kingdom. Note that these are the same states which recognize the competence of the Commission to deal with individual complaints. See *supra* note 9.

15. Convention, arts. 52, 53.

analogous problems in American constitutional law. The American lawyer also should remember that the broad provisions of the Convention protect the American traveling in those countries which have ratified the Convention. In fact, a number of cases involving Americans already have been recorded in the Convention Yearbooks.[16]

II

The first two essays, by Waldock and Robertson, are most profitably read together. Professor Waldock describes the legal development of international attempts to protect human rights discussed above, and evaluates the contribution of the Convention. Dr. Robertson traces the political history of the Convention from its immediate origins in the post-war movements for European unity. Following World War II, the nations of Europe faced the threat of a Communist take-over. Having narrowly escaped from the Hitler tyranny, the threat of another dictatorship strongly reinforced their desire to collectively secure the protection of human rights and democracy. Such political considerations lay behind the Council of Europe's attempt to draft a convention on human rights in 1949. Dr. Robertson discusses the draft proposals and shows how, after the immediate political crisis subsided, the nations again became jealous of their national sovereignty. The Convention's innovations, drastic as they are, represent a number of significant compromises. After discussing the changes in the final revision of the Convention, Robertson briefly analyzes the operation of several of its more important provisions. He then concludes his history of the Convention with a short discussion of the impact of the Convention in other parts of the world.

Both Robertson and Waldock (and Golsong as well[17]) regard the right of private petition as the Convention's most important contribution to the development of international protection of human rights. As Waldock notes, the necessity of the provision for private petition is demonstrated by the fact that only three interstate complaints have thus far been received by the Commission. States normally are reluctant to provoke disputes with other friendly states in cases which do not involve their own national interest. Thus, the recognition of the right of private petition is an indispensable condition to any adequate system of enforcement.

In the Convention, the right of private petition was extended far beyond earlier attempts to give an individual the right to bring matters before an international body. Once a state has made a declaration pursuant to article 25 recognizing the right of private petition before the Commission, this right may be exercised by any "person, non-governmental organization or group of individuals" regardless of nationality or lack of it. This is such a remarkable step that one is tempted to overlook the shortcomings of the procedure. The absence

16. See 7 Yearbook of the European Convention on Human Rights 380 (1964).
17. P. 54.

of a critical attitude is notable in the evaluations made by Waldock, Robertson and Golsong. A more balanced view of the remedy ought to consider the failure of the Convention to give the individual standing in the Court. Since he lacks the standing before the Court that he has before the Commission, the individual cannot himself obtain a legal adjudication of his claim and, moreover, cannot participate directly in the proceedings even if his case is otherwise referred to the Court. Except in the rare circumstance where a state submits a complaint, the individual has no representative to advocate his cause before the Court.[18] If, in addition, one considers the highly contingent jurisdictional requirements of the Court, and the expense and delay[19] involved in proceedings before the Commission and the Court, it should be obvious that a truly effective remedy is yet to be devised.

III

The third essay, by Dr. H. Golsong, examines in detail the control machinery of the Convention—namely, the European Commission of Human Rights, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe. Among the subjects discussed are the organization of the Commission and the Court, the independence and qualifications of members of the Commission and Court, privileges and immunities of officials of the Convention, and the legal position of the Commission and Court vis-à-vis the Council of Europe. The bulk of the essay is devoted to a description of how the Convention organs dispose of alleged violations of the guaranteed rights. The discussion covers a host of related problems: who can bring proceedings and in what circumstances; the requirements of admissibility of the petition by the Commission, jurisdiction of the Court; the relationship between the Commission and the Committee of Ministers, and between the Commission and the Court; and the position of the individual before the Commission and before the Court. Dr. Golsong presents a great wealth of information and insight which this short review cannot do justice. However, there are two points which deserve comment because they are particularly controversial. The first concerns the practice of the Commission in interpreting the Convention when deciding the admissibility

18. In his statement to the Human Rights Court as the Commission's principal delegate in the famous "Lawless" Case (Preliminary objections and questions of procedure), European Court of Human Rights, Judgment of November 14, 1960, 3 Yearbook 492 (1960), Professor Waldock defined the role of the Commission before the Court:

> The fact that in every case the Commission has to conduct an objective and impartial investigation . . . makes it impossible for the Commission, when the case comes before the Court, to depart from its objectivity and impartiality, and impossible for it to identify itself either with the Government or with the individual . . . . [F]or the Commission to express its opinion on a case is one thing, and for it to take up the case of one side and to contend for the success of that case before the Court is quite another thing.

[1960-61] European Court of Human Rights, Series B: Pleadings, Oral Arguments and Documents, "Lawless" Case 234.

19. In the *"Lawless"* case, the final decision of the Court came five years after the petition was received by the Commission.

of individual applications. In one well-known case,[20] the Commission found an individual application inadmissible by a 6-4 vote (a minority of the full Commission) on the ground that the provisions of the 1916 Norwegian Act, requiring work in public dental service in northern Norway, did not constitute "compulsory labor" within the meaning of article 4 of the Convention. Dr. Golsong cites this case as an example of the perversion of the Commission's authority to reject petitions which are manifestly ill-founded.[21] "This way of interpreting the Convention and provisions cannot, of course, be considered as the normal procedure. It largely seems to overstep the limits of a prima facie examination of the merits."[22] Golsong nevertheless suggests that the Commission not be judged harshly since it is only acting out an excess of caution so as not to jeopardize the acceptance of the right of individual petition by other governments. Yet, under the present Convention, a negative decision by the Commission on admissibility, even if clearly wrong, is not subject to review by anyone. Query whether the Court should not have at least a discretionary power to review this question before the application finally is denied.

The second point deserving comment involves the controversy over the Commission practice of allowing most cases to be decided by the Committee of Ministers rather than by the Court. Under article 32 of the Convention, the Committee of Ministers of the Council of Europe must make the final decision in a case if, within three months after the Commission's report has been transmitted to the Committee, the matter has not been referred to the Court by the Commission or a state concerned in the case. However, the Convention is silent as to the test the Commission should employ in making the determination to submit a case to the Court. Dr. Golsong justly criticizes this tendency to bypass the Court as subversive of the rule of law. He makes the following argument against permitting decision by the Committee on alleged violations of the rights guaranteed in the Convention:

> [W]hen a governmental representative has to take part in a vote in pursuance of Article 32, paragraph 1, he will never lose sight of the political interests of his State. Thus, the power of decision . . . will in general be exercised in accordance with political interests. This, of course, is in no way satisfactory within a system of control the main purpose of which is the maintenance of the rule of law.[23]

The logic of this position suggests that the "maintenance of the rule of law" requires decision by the Court in nearly all cases. Without entering into an extended discussion of the merits or demerits of Golsong's position, it is sufficient to note that the Commission, under pressure from a variety of

20. Iverson v. Norway, App. No. 1468/62, 6 Yearbook of The European Convention on Human Rights 278 (1963).
21. See Convention, art. 27(2).
22. P. 56.
23. Pp. 66-67.

critics,[24] has recently submitted a number of important cases for decision by the Court.[25]

IV

The two essays by Fawcett and McNulty treat selected aspects of the practice of the Convention organs. Mr. Fawcett covers a number of controversial topics in rapid fashion. He briefly suggests that the Commission is neither usurping the role of the Court, nor too politically oriented; that the voting procedure whereby less than a majority of the Full Commission may decide the issue of admissibility may be justified because the Commission is not really a court; and that dissenting opinions have no place in the decisions of the Commission. The McNulty essay, in contrast, is limited to a discussion of the informal sanctions available to the Commission in enforcing the rights guaranteed by the Convention. Mr. McNulty presents instances where the threat of an adverse decision by the Commission has induced corrective action on the part of the allegedly delinquent state. Although the Commission's Report is neither published nor binding as a judgment, states will normally want to avoid the risk of a legal determination by the Committee or the Court. Mr. McNulty ably demonstrates from his personal experience as Secretary to the Commission how the practical enforcement of the Convention has often depended on the Commission's use of this informal coercion.

V

In the final essay, Professor Buergenthal inquires into the effect of the European Convention on the internal law of member states. The first part of the essay examines the obligation of states adhering to the Convention to enact its provisions into domestic law. At first glance, this question may seem irrelevant since member states clearly are under a positive duty under article 13 to provide an effective domestic remedy for the violation of the rights set forth in the Convention. It is Buergenthal's belief that the requirements of article 13 cannot be satisfied in practice unless an individual can rely on specific provisions of the Convention in the domestic forum. This is true because the determination that a violation has occurred must always be postponed in countries where the Convention is not domestic law until the case comes before the Commission.[26] After reviewing the status of the Convention in the member states, Professor Buergenthal turns to the question of the domestic effect of judgments of the Court of Human Rights, dividing them into "direct" and "indirect" effects. The direct effects involve the problem of how, if at all, a judgment of the Human Rights

24. See Robertson, Human Rights in Europe 81 (1963) (suggesting that the Commission try to distinguish between cases that are essentially political, and cases that are essentially legal); Buergenthal, Book Review, 13 Am. J. Comp. L. 301, 305 (1964) (proposing that all individual applications should be referred to the Court once the jurisdictional requirements are present, while interstate disputes should be generally submitted to the Committee since the states are themselves free to resort to the Court).

25. See, *e.g.*, European Commission of Human Rights, Minutes of the 56th Plenary Session, Council of Europe, Doc. DH(65) No. 5, p. 3 (1965).

26. See Convention, art. 26.

Court may legally affect an adjudication which is res judicata as a matter of domestic law. Since the Human Rights Court was not intended to be a "court of fourth instance or a Cour de Cassation," it cannot reverse or annul the prior conflicting domestic decision. However, Professor Buergenthal finds a solution to the problem in article 50. Under this article, the Court may afford "just satisfaction" if the individual cannot obtain an adequate domestic remedy.[27] While states are not under an obligation to implement the Court's decision into their own law, they still must provide other relief as determined by the Court. Nevertheless, as Professor Buergenthal observes, there is nothing to prevent a state from giving direct domestic effect to the judgment of the Court. Buergenthal argues that the Convention recognizes just this possibility by providing in article 50 that the Court determine whether the domestic law provides adequate relief. A number of interesting procedures are suggested to give effect to the Court decisions. The reader will find a cogent presentation of the pros and cons of each suggested measure.

The "indirect" effects of the Court's judgments concern the problem of precedent—to what extent are domestic judges bound to follow the decisions of the Human Rights Court in subsequent domestic cases. Buergenthal explains how the weight of Court precedent is influenced by the presence or absence of various factors, such as the domestic status of the Convention, the recognition of the right of private petition and the jurisdiction of the Court, and the domestic attitude toward stare decisis. The problem of the indirect effect of Court decisions would largely disappear if domestic courts were allowed (or required) to ask the Court for preliminary rulings in cases which involve interpretation of the Convention. However, since this procedure is not likely to be adopted in the near future, the analysis in this essay remains an excellent predictive model of domestic court behavior.

VI

Taken as a whole, the different aspects of the Convention's work presented in these six essays provide a balanced perspective of the Convention. While some of the authors tend to be too laudatory, most of the problem areas are discussed or at least suggested. Today, the future of the European Convention appears bright. Only last year, for example, Great Britain recognized the right of private petition and the jurisdiction of the Court. The next few years should see many important new development as the work load of the Commission and especially the Court increases. This book will be read by those who are interested in following the progressive contributions of the Convention to the international quest for human dignity.

ROBERT M. KORNREICH
Senior Member
Buffalo Law Review

27. The Convention is ambiguous as to the power of the Court in the case where the internal law does not provide *any* reparation. For two possible interpretations of the application of article 50 in this situation, see Robertson, *op. cit. supra* note 24 at 104-105.