THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH CASES FROM THE EUROPEAN COURT OF HUMAN RIGHTS: LINGUISTIC AND DETENTION DISPUTES

W. Paul Gormley *

In this article, the author examines the potential development of substantive international law through the decisions of the European Court of Human Rights. He points out that while almost no cases were heard by the Court during the early part of this decade, several cases are now before the Court of such significance as to offer a rare opportunity for the development of the law in this area. Following a discussion of these cases, the author concludes that, because of the similarity in wording of the constitutions of various international organizations, the Court's decisions in these cases will form a valuable background of substantive international law capable of being applied by courts with an even wider jurisdiction such as the International Court of Justice. This, hopefully, will eventually result in the acceptance of universal principles in the area of human rights.

I. CONFLICT-RESOLVING ORGANS OF THE COUNCIL

At the Howard University School of Law Symposium on the International Law of Human Rights, [1] held in the spring of 1965, the distinguished professor and jurist Henri Rolin posed a serious and indeed embarrassing question as the title of his presentation: "Has the European Court of Human Rights a Future?" [2] In advancing a negative answer he conceded the inescapable fact that following the very significant judgments in the

* A.B., 1949, San Jose State College; M.A., 1951, University of Southern California; Ph.D., 1952, University of Denver; LL.B., 1957, LL.M., 1958, George Washington University. Member of the District of Columbia and United States Supreme Court Bars; Associate Professor of Law, University of Tulsa.

[1] *Symposium on the International Law of Human Rights*, 11 How L.J. 257 (1965).

[2] *Id.* at 442.

Lawless [3] and *DeBecker* [4] cases the Court fell into a period of inactivity. Although these two verdicts were great law-making epochs, [5] the case load of the European Court vanished as the European Commission of Human Rights and the Committee of Ministers disposed of over three thousand petitions filed by private individuals. Judge Rolin, one of the most distinguished members of the Court, went so far as to conclude that if one were to look "for the court decisions in '61 you find one, '62 also, '63 none, '64 none, '65 none either. There will be no decision this year [1965]. We have no case pending, nothing." [6] Accordingly, the premise was offered in his *Introduction* to the effect that he did not even deserve the title of judge, since he had not taken part in any judgments. [7]

The reason for the temporary decline of this great judicial organ can be found in the revival of absolute national sovereignty not only within member states of the Council but also on the part of governments comprising the European Economic Community. [8] In short, High Contracting Parties were unwilling to be placed in the position of an accused-defendant before an international tribunal. This nationalistic position became very apparent in 1962; all European states—especially France, a country not even ratifying the European Convention of Human Rights and Fundamental Freedoms [9] —resisted any further external pressure. [10] Following the defeat of Hitler, plus the full realization of Nazi atrocities, European states and their peoples banded together to create supranational systems of economic and human rights protection to prevent a future reoccurrence; however, twenty years after the war the desire for international machinery diminished, for each government sought maximum freedom of action toward its own nationals and aliens located within its territory. The immediate manifestation was

---

[3] "Lawless" Case, [1962] EUR. CONV. ON HUMAN RIGHTS Y.B. 438 (merits). O'Higgins, *"Lawless Case,"* [1962] CAMB. L.J. 234; Valentine, *The European Court of Human Rights, The Lawless Case*, 10 INT'L & COMP. L.Q. 899 (1961); Robertson, *The First Case before the European Court of Human Rights: Lawless v. The Government of Ireland*, 36 BRIT. Y.B. INT'L L. 343 (1960).

[4] "DeBecker" Case, [1962] EUR. CONV. ON HUMAN RIGHTS Y.B. 320.

[5] W. GORMLEY, THE PROCEDURAL STATUS OF THE INDIVIDUAL BEFORE INTERNATIONAL AND SUPRANATIONAL TRIBUNALS 110-15, 122-26 [hereinafter cited PROCEDURAL STATUS]; Gormley, *The Procedural Status of the Individual before Supranational Judicial Tribunals*, 41 U. DET. L.J. 282, 326-34 (1964).

[6] Rolin, note 1, at 442 *supra*.

[7] Now I have to give you an account of my personal activity as a judge . . . . And my public confession is that I hesitate as to whether I deserve the name or the title of judge. I have been so called here [at Howard University] many times, I find it quite nice. I love titles . . . . I never have been called so much Mr. Judge, Judge Rolin and so on. I'm afraid that will be the end of it.

Id. at 442. His prediction of continued inactivity proved immature. Rolin, though disqualified from the *Linguistic* case because of prior connection with the Belgian actions, is the presiding justice of the chamber hearing the detention cases. *See* note 75. As such he has a far heavier work load than the President of the ICJ.

[8] *Preface* to PROCEDURAL STATUS at vi.

[9] EUROP. T.S. No. 5, (1950); [1958] EUR. CONV. ON HUMAN RIGHTS Y.B. 4-36.

[10] Likewise, during this same period the EEC, the OECD, and the United Nations encountered considerable opposition from member states. Specifically, the entire European integrative movement was retarded. Similarly, ECOSOC was unable to proceed with its human rights efforts at the global level at the pace originally desired.

that the European Commission screened out roughly three hundred petitions each year. Only one percent of the complaints were deemed to be admissible [11] and worthy of any consideration on the merits. Pursuant to article 27(2) [12] of the Convention of Human Rights the majority of petitions were held to be "manifestly ill-founded." In short, the Commission of Human Rights functioned as a conflict-resolving tribunal rather than a preliminary screening body, as originally intended by the drafters of the European Convention. The result of their sweeping employment of the "manifestly ill-founded" concept to eliminate from further consideration over three thousand petitions was that the Court received no cases. Judge Rolin strongly criticized this practice by the Commission, and, though the writer has also previously questioned the conservative orientation of the Commission's procedural criteria, [13] little would be accomplished in reviving this discussion in view of the fact that the Commission has liberalized its position to a significant degree and begun to declare a number of important controversies worthy of consideration as to substance, as desired by the writer. [14]

Regardless of whether the emergence of the Commission into the primary conflict-resolving organ of the Council is criticized, as by Judge Rolin, [15] or noted approvingly, as by McNulty, [16] Secretary of the Commission, the important fact remains : no cases were transmitted to the Court for trial. This resulting lack of a "day in court" to petitioners is still attacked by the writer; yet, the factual result is that a major constitutional development has taken place within the Council, which has decreased the Court's case load. That is to say, the Commission holds a complete trial on the merits; elaborate briefs and written pleadings are presented to the Commission; oral hearings are held in either Strasbourg or Paris; full meetings of the Commission are convened; and a finding of fact results. In short, a final pronouncement is given which often includes dissenting opinions; moreover, the Commission attempts to reach a friendly settlement with disputing parties under article 28. The Commission "shall place itself at the disposal of the parties concerned

---

[11] PROCEDURAL STATUS 100-03. Golsong, *Implementation of International Protection of Human Rights*, 110 ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS [REC. C. ACAD. D. INT.] 109-24 (1963).

[12] "The Commission shall consider inadmissible any petition submitted under Article 25 which it considers incompatible with the provisions of the present Convention, manifestly ill-founded . . . ."

[13] *[T]here must be greater liberalization by the Commission of its own rules. This change is the major recommendation being offered by the writer.* The 2,000 rejected petitions prove that in the past the rules of the Commission have been too restrictive. Such criteria have tended to protect the Member States rather than private persons.

PROCEDURAL STATUS 124. *Accord*, Golsong, note 11, at 119-20 *supra*; Gormley, *An Analysis of the Future Procedural Status of the Individual Before International Tribunals*, 39 U. DET. L.J. 38, 79 (1961). *Contra*, McNulty & Eissen, *The European Commission of Human Rights: Procedure and Jurisprudence*, 1 J. INT'L COMM'N OF JURISTS 198, 212 (1958); McNulty, *The Practice of the European Commission of Human Rights*, 11 HOW. L.J. 430 (1965). *Cf.* Fawcett, *Some Aspects of the Practice of the Commission of Human Rights*, INT'L & COMP. L.Q. 70 (Supp. No. 5, 1965).

[14] PROCEDURAL STATUS 102-03.

[15] Rolin, note 1, at 444-45 *supra*.

[16] McNulty, note 13, *supra*.

with a view to securing a friendly settlement of the matter on the basis of respect for Human Rights as defined in this Convention."

A second factor also contributed to this inactivity; the Committee of Ministers became a political conflict-resolving forum for the one or two percent of petitions deemed admissible and worthy of further consideration. Indeed, such a quasi-judicial role for the Ministers was not contemplated in either the Statute of the Council of Europe, [17] or the Convention of Human Rights; [18] however, the failure of all High Contracting Parties to accept the compulsory jurisdiction of the Court [19] necessitated an alternative forum to which admissible cases could be sent in the event that the Commission was unable to resolve the dispute. [20] The inability of the administrative organ to render a final binding judgment (as opposed to a finding of fact and law), required a pragmatic solution, even though such was not fully desirable. Moreover, the need for an *in camera review* [21] rather than a full public hearing caused the Commission to send cases to the ministers instead of to the judicial tribunal, even though the state had accepted compulsory jurisdiction. [22]

Because of these two developments, the Court is at the mercy of the Commission of Human Rights, for the reason that there is absolutely no way the Court can become seized of a case except as one is referred to it from the Commission; however, as already indicated, a full scale trial of the facts has already been conducted by the Commission. And, as will be shown in connection with the current detention cases, [23] a sizeable body of positive law has been created at the expense of the Court.

While not concerning ourselves directly with internal constitutional developments of the eighteen-member Council of Europe, it is not feasible to conceive of the Court's future role apart from these other two organs. Consequently, Judge Rolin concluded in 1965 that so long as the Commission continued to apply article 27(2) ("The Commission shall consider inadmissible any petition manifestly ill-founded") so as to eliminate from further consideration almost all of the petitions sent to the Council, the Court does

---

[17] EUROP. T.S. No. 1 (1949).

[18] Convention For the Protection of Human Rights and Fundamental Freedoms, EUROP. T.S. No. 5 (1950). Sixteen states have ratified; France and Switzerland will not bind themselves to such international instruments in order to assure continued superiority of their domestic legislation.

[19] The compulsory jurisdiction of the Court requiring an additional adherence under article 46 has not been accepted by Cyprus, France, Greece, Italy, Malta, Switzerland and Turkey. The remainder of the eighteen members have accepted. Article 46 obtained the required eight ratifications in 1958.

[20] *E.g.*, Nielsen v. Denmark, [1959] EUR. CONV. ON HUMAN RIGHTS Y.B. 412. The case was referred to the Committee of Ministers rather than the Court under the provisions of article 32(1). See Valentine, *The Nielsen Case : The European Commission of Human Rights*, 11 INT'L & COMP. L.Q. 836 (1962). *Cf.* the utilization of this decision by the Commission, notes 142 & 143 *infra*.

[21] Article 33 states : "The Commission shall meet in camera."

[22] *E.g.*, Iversen v. Norway, [1963] EUR. CONV. ON HUMAN RIGHTS Y.B. 398. *See* the findings of the Commission, 3 INT'L LEGAL MATERIALS 417 (1964).

[23] *See* notes 141-45 *infra*. *Accord, generally*, McNulty, note 16 *supra*, and Golsong, note 11, at 106-24 *supra*. *See* especially, A. ROBERTSON, HUMAN RIGHTS IN EUROPE 43-74 (1963).

not have a "big future." [24] Fortunately, subsequent events have disproved Rolin's pessimistic statement to a significant degree. Although perfectly correct as to the dependence of the judicial tribunal on the administrative body, he did not foresee the Commission's liberalization. Of course, it can be argued that the certification of merely five cases—four of which involve a common subject, *i.e.*, excessive detention pending trial—does not represent the desired liberalization; however, because of the importance of the five pending cases, the writer chooses to advance a positive viewpoint, even though no enlargement in the Court's jurisdiction seems imminent. Not only has the Commission sent five cases to the Court for final determination on substantive points of European law as set forth in the Convention of Human Rights, [25] but use of the interstate complaint is possible, as seen from the current Scandinavian-Dutch actions against the military dictatorship ruling Greece. [26] Further, the pending *Belgian Linguistic Case* is one of the most important and explosive controversies ever heard in any international court. [27]

II. The Emerging Body of Case Law

The general aim of the following discussion is to examine the five

---

[24] Rolin, note 1, at 448 *supra*. Judge Rolin stated: "I also believe that even if the Court has nothing to do, its existence may have some utility because it remains ready to judge claims of a State party to the Convention against another State when they both have accepted its jurisdiction. Such cases may be very rare." *Id.* The important consideration is that the above statement was appropriate in terms of the situation existing in 1965. The present case load represents a basic change in the Court's position within the Council. Such constitutional change cannot take place as to the ICJ within the United Nations' sphere.

[25] Professor Clovis C. Morrisson has evolved the thesis: a unique European Law of Human Rights has been developed from those rights set forth in the Convention through actions by the Commission and Court. C. Morrisson, The Developing Law of Human Rights 17, 203 (1967); *see* Gormley, Book Review, L. Lib. J. (to be published Spring 1968). The writer has recently used this same approach concerning United Nations human rights conventions and the ECOSOC Covenants. *See* notes 159-60 *infra*.

[26] At the commencement of the present study, the writer intended to devote a separate section to actions filed by Denmark, Norway and Sweden against Greece on September 20, 1967. Council of Europe Press Release C (67) 33, 20.9.1967; 6 Int'l Legal Materials 1065. (1967). The Netherlands joined the complaint on September 27. *See* Council of Europe Press Release C (67) 36, 27.9.1967; and *id.* C (67) 40, 5.10.1967. Belgium and Luxembourg "without formally associating themselves with it" support the action. Council of Europe Press Release C (67) 38, 29.9.1967. It is alleged that rights guaranteed by the Convention of Human Rights have been violated. Council of Europe Press Release C (67) 39, 3.10.1967. "On 24th January, 1968 the European Commission of Human Rights declared admissible the applications . . . ." *id.* C (68) 3, 25.1.1968. *See* the Greek Notice of Derogation of Obligations Under Article 15 of the European Convention on Human Rights, Council of Europe Doc. DH (67) 6, Appendix 4, *reprinted in* 6 Int'l Legal Materials 829 (1967), and the Consultative Assembly Resolution on the Greek Notice of Derogation, *reprinted in* 6 Int'l Legal Materials 827 (1967). See Council of Europe Press Release B (67) 37, 6.26.1967.

The recent unsuccessful attempt by the courageous young King to free his people from the military dictators has caused the Commission to suspend its hearings. Realistically, the revolt has given some support to the government's regime of martial law. Nonetheless, I believe, resulting publicity and massing of the "World Sense of Shame," note 156 *infra*, may produce the desired changes. *See* notes 156, 159-60 *infra*. A future investigation by the Commission will exert the "moral sanction of international law," even though the government's position may be technically correct. *See* Gormley, *The Status of the Awards of International Tribunals*, 10 How L.J. 33, at 37 n.25, 59-61 (1964).

[27] Note the comparison of the *Linguistic Cases* with the *South West Africa Cases*, notes 75-76, 95-97 *infra*.

cases [28] pending before the European Court of Human Rights with a view toward securing some insight into the Court's future role as a law-making tribunal. In this regard, special attention must be given to the *Belgian Linguistic Cases* [29] because of the head-on clash between state sovereignty as opposed to human rights and fundamental freedoms created by means of multi-lateral treaty.

The specific purpose of the study is to analyze the utilization—and subsequent development—of international law by a regional court, for the reason that the Strasbourg Court is developing a unique body of jurisprudence, [30] not only consistent with international law but which is also aiding the emerging International Law of Human Rights. [31] That is to say, the present body of international and regional jurisprudence represents a great deal more than merely five cases to be decided by another regional tribunal, in the nature of *ad hoc* arbitration.

III. Future Role of the European Court of Human Rights

Aside from limitations on the Court's effectiveness imposed by the Commission and Committee of Ministers, the Court is further restricted by its establishing treaty, the European Convention of Human Rights. [32] As such, the European Court can only deal with those human rights set forth in the Convention, the First [33] and Fourth Protocols; [34] it is not a court of general jurisdiction as is the International Court of Justice. [35] Regrettably, the European Court is *not* competent to resolve disputes between member states involving the remaining fifty-five multilateral treaties contained in the *European Treaty Series.* [36] In the event of controversy, member states must fall back on *ad hoc* arbitration or conciliation proceedings, [37] or refer

---

[28] As will be explained in connection with Jentzch v Germany, note 126 *infra*, a sixth detention case exists, in which the fact situation is rather unique, with the result that it will not receive extensive examination here, because the holding will not contribute to the Council's emerging jurisprudence.

[29] Note 75 *infra.*

[30] C. Morrisson, *supra* note 25; Procedural Status 186-89; and King & Gormley, *Toward International Human Rights*, 9 Wayne L. Rev. 294 (1963).

[31] Procedural Status 189-91. See the elaboration of this thesis in *United States Participation in 1968, International Year for Human Rights, Plus Ratification of the ECOSOC Covenants: The Abandonment of Our Isolationist Position*, How L.J. (to be published Spring 1968). *See also* the discussion of the ECOSOC Covenants in relation to the Council, note 114 *infra*. *See* Gormley, *The Use of Public Opinion and Reporting Devices to Achieve World Law: Adoption of ILO Practices by the U.N.*, Albany L. Rev. (to be published in the Spring 1968).

[32] Arts. 38-56. Articles 2-12 contain the positive law of human rights.

[33] Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T.S. No. 10 (1952).

[34] Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T.S. No. 46 (1963).

[35] U.N. Charter arts. 92-96. ICJ Stat. arts. 34-38 & arts. 65-68.

[36] *See, e.g.*, Gormley. *The Modification of Multilateral Conventions by Means of "Negotiated Reservations" and Other "Alternatives": A Comparative Study of the ILO and Council of Europe*, Inter-Am. L.R. (to be published 1968).

[37] European Convention for the Peaceful Settlement of Disputes, Europ. T.S. No. 23 (1957). Articles 4-18 encompass conciliation, whereas arts. 19-26 deal with arbitration.

the matter to the International Court of Justice [38] as required under the European Convention for the Peaceful Settlement of Disputes. [39] The Court is unable to take any steps to enlarge its jurisdiction. This fault lies with the treaty drafters; hence, only amendment of its Statute can correct the deficiency. Realistically, no major changes will be made in the immediate future.

Notwithstanding the very specialized function to be performed by the European Court, it is submitted here that the Strasbourg Court surpasses the International Court of Justice in importance, because of the despicable *South West Africa Case.* [40] Though the ICJ still retains the *Barcelona Traction Case,* [41] and the North Sea boundary cases are in the process of being filed, [42] the writer is of the opinion that the ICJ has lost the respect and confidence of the world community, [43] with the result that the World Court is dead as an effective tribunal until such time as its Statute is drastically modified. [44] In substantiating this comparison between the European and World Courts, we need only recall the dynamic orientation in the *Lawless* [45] and *DeBecker* [46] cases. The writer has equated these two decisions with *Marbury v. Madi-*

---

[38] *Id.* arts. 1-3.

[39] *Id.*; C. MORRISSON, note 25, at 157-60 *supra*; Gormley, note 31 *supra.*

[40] Ethiopia-Liberia v. South Africa (Second Phase), [1966] I.C.J. 6.

[41] Barcelona Traction Case (Belgium v. Spain) Second Phase. Spain will file its rejoinder May 31, 1968. Case Concerning the Barcelona Traction, Light and Power Co. (Belgium v. Spain) Preliminary Objections, [1964] I.C.J. 6, 59 AM. J. INT'L L. 131 (1965).

[42] North Sea Continental Shelf Cases (Denmark v. Federal Republic of Germany; and Federal Republic of Germany v. Netherlands), I.C.J.: Special Agreements for Submission to the Court of Continental Shelf Disputes Between Denmark and Germany and The Netherlands and Germany, 6 INT'L LEGAL MATERIALS 391 (1967). Germany has filed its memorials in each of the two cases. The counter-memorials of Denmark and The Netherlands will be filed February 20, 1968. Letter from American Society of International Law to Members, October 1967, at 3.

[43] Friedmann, *The Jurisprudential Implications of the South West Africa Case,* 6 COLUM. J. TRANSNAT'L L. 1 (1967).

> It is to be feared that the Judgment of the International Court in the South West Africa case has dealt a devastating blow to the hope that the International Court might be able to deal with explosive and delicate international issues . . . the Court for whatever reasons, failed to meet the challenge. This doubt that the Court will function as a judicial arbiter in some of the major international issues of our time is likely to be a far graver consequence of the Court's verdict than the political disappointment of some of the states, and of many groups and individuals, that the Court failed to condemn the apartheid policies of South Africa.

Id. at 16. Gormley, *Elimination of the Interstate Complaint: South-West Africa Cases and Resulting Procedural Deficiencies in the International Court of Justice,* 3 TEXAS INT'L L.F. 43, at 75-79 (1967). Similarly, other writers also continue to support retention of the ICJ, though at the same time advocating amendment of its Statute so as to remove procedural and jurisdictional defects which led to the "conservative" *South West Africa* judgment. *See* especially E. Gross, Chief Counsel for Ethiopia-Liberia, *in, The South-West Africa Case: What Happened,* 45 FOR. AFF. 36 (1966); also Falk, *The South West Africa Cases: An Appraisal,* 21 INT'L ORG. 1 (1967).

Reisman, however, directs his well-taken criticism toward the verdict itself, and he looks toward an additional trial on the merits. *Revision of the South West Africa Cases: An Analysis of the Grounds of Nullity in the Decision of July 18th, 1966 and the Methods of Revision,* 7 VA. J. INT'L L. 3 (1966).

[44] Gormley, note 43, at 75-79 *supra.*

[45] Note 3 *supra.*

[46] Note 4 *supra.*

son.[47] For instance, in *DeBecker* all parties—including the Commission of Human Rights—requested that the Court discontinue its proceedings on the ground that Belgium had repealed the offensive federal laws; however, the Court held that it was not bound by either the desire of the parties or the findings of the Commission.[48] Accordingly, it alone was competent to examine the new Belgian legislation.[49]

In view of the fact that the literature on *Lawless* is already extensive,[50] the case need not be re-examined here, despite the fact that the Court—in *Marbury*-like language—set forth its position as the final arbiter in the judicial system within the Council of Europe.[51] One key point relative to the five pending cases must be stressed, namely the rule of the Commission as a party before the Court in those instances wherein the cases of individuals are being presented. As indicated above, the Court is technically not even an organ of the Council, since neither it nor the Commission are mentioned in the Statute. Both entities, therefore, exist pursuant to the Convention of Human Rights. Under this treaty only the Commission and a High Contracting Party may bring a case before the Court;[52] there is no right of direct individual action. In the event that an individual petition is sent to the Secretary-General, pursuant to article 25, and declared admissible by the Commission of Human Rights under article 28 and referred to the Court under the authority contained in article 32 in connection with articles 45-48, the Commission must at the same time present the applicant's case at the hearing, for individuals have no standing before the judicial branch. This procedure—not precisely spelled out in article 48—was developed by the Commission in the *Lawless* case over strong objection from the Irish Government. In presenting the case of the petitioner[53] a public hearing was in fact accorded Lawless, with the result that data the Irish Government desired to have remain confidential were presented in open proceedings.[54]

The Commission, then, as in the later *DeBecker* case—and especially

---

[47] 5 U.S. (1 Cranch) 368 (1803).

[48] Reconsideration by the Commission of its Conclusions having regard to the Applicant's letter of 5th October 1961, "DeBecker" Case, [1962] Pleadings, Oral Arguments, Doc. (ser. B) 270-71.

[49] Conclusions of the Commission. *id.* at 216. *See also* "DeBecker" Case, [1962] EUR. CONV. ON HUMAN RIGHTS Y.B. 320, at 332-36 and my discussion *in* PROCEDURAL STATUS 113-14.

[50] *E.g.*, Christol, *Remedies for Individuals under World Law*, 56 NW. U.L. REV. 65 (1961). A. ROBERTSON, note 23, at 112-39 *supra*; and C. MORRISSON, note 25, at 161-73 *supra*.

[51] PROCEDURAL STATUS 113-14. *See* notes 47-49 *supra*.

[52] Article 48 provides in part:

The following may bring a case before the Court, . . .

(*a*) the Commission;

(b) a High Contracting Party whose national is alleged to be a victim;

(*c*) a High Contracting Party which referred the case to the Commission;

(*d*) a High Contracting Party against which the complaint has been lodged.

[53] The Case of Gerard Richard Lawless, Memorial submitted by the European Commission of Human Rights, "Lawless" Case, [1960-1961] Pleadings, Oral Arguments, Doc. (ser. B) 193.

[54] *See* especially, *id.* ¶¶ 55-58, at 207.

during the Merit Stage of the present *Belgian Linguistic* dispute [55]—is functioning in the role of the protector of European Human Rights Guarantees; it is not merely an agent of complainors. As stated in the pleadings of *Lawless*: "[T]he Commission conceives its duty to be to submit to the Court with complete objectivity and impartiality all matters of fact and law relevant for the Court's consideration of the case." [56] In rejecting the argument of the Irish Government that the applicant's contentions had no relevance, and secondly, that phases of the Government's position as presented to the Commission should remain secret, [57] the Commission established the precedent—controlling the current five cases—that it will "submit to the Court such information concerning the views of the applicant as appears to them to be useful at the present stage." [58] Furthermore, this stand was enunciated as follows:

> At the same time, the Court, while declaring that at that stage of the case there was no reason for the Court itself to authorize the Commission to transmit to the Court the Applicant's written observations on the Commission's Report, held that the Commission, as the defender of the public interest, is entitled of its own accord, even if it does not share them, to make known the Applicant's views to the Court. [59]

The Irish Government attempted to refute:

> [T]he view of the Government is that, notwithstanding the inclusion in the recitals in the judgment of the Court delivered on the 14th day of November 1960, of the phrase "the Commission, as the defender of the public interest, is entitled of its own accord, even if it does not share them, to make known the Applicant's views to the Court," the presentation to the Court at this stage of the case of the whole or part of the written observations of the Applicant on the Report of the Commission under the description "the views of the Applicant" is improper and the Government do [*sic*] not offer any observations on the so-called "views of the Applicant." [60]

This same problem of publicizing prior actions taken by the Commission, and especially the presentation of an individual's case *containing serious political overtones,* arose again in *DeBecker.* In short, the same conclusion was reached. [61]

---

[55] *Accord,* notes 84, 101-21 *infra.*

[56] "Lawless" Case, Pleadings, note 53, ¶ 55, at 207 *supra.*

[57] Statement of the European Commission of Human Rights with Respect to the Counter-Memorial (Merits), *id.* at 324 n.1.

[58] *Id.* ¶ 3, at 324.

[59] *Id.* ¶ 2. A complete analysis of the Commission's role as a party before the Court—pursuant to art. 48—is beyond the scope of this study; *see* the Oral Argument presented by Sir Humphrey Waldock, Verbatim Report of the Public Hearing Held by the Chamber of the Court, at Strasbourg 7th, 8th, 10th and 11th April 1961, *id.* at 357-67, in connection with the refutation of the Irish Government *id.* at 367-70. These are the best pronouncements available on the subject. The precedent is clearly established; only a modification of the Convention can produce a change.

[60] Observations of the Government of Ireland on the Statement (16th December 1960) of the European Commission of Human Rights, 31st January 1961, *id.* ¶ 1, at 338.

[61] "DeBecker" Case, [1962] Pleadings, Oral Arguments, Doc. (ser. B) 213.

> *Whereas* the Secretariat of the Commission, acting on the orders of the principal Delegate, invited Me. Delfosse who was appointed by the Applicant to provide the

In its final judgment of *Lawless*, the Court set forth the basic law governing this indirect procedural right of individuals, which in fact makes such non-governmental entities *subjects of the European legal system.*[62] Although no right of direct individual action exists before the European Court, a half-way mark has been reached; an individual's case can be presented to an international tribunal. While realizing that this intermediate stage represents a tremendous stride over the International Court of Justice before which body "Only states may be parties in cases before the Court," under the language of article 34, the sad fact remains that the individual, though a subject of the European legal system, does not have control over his own action. He is at the mercy of the Commission. Similarly, the Court itself is at the disposal of the Commission. There is absolutely no way for the Court to seize itself of a dispute through the exercise of original jurisdiction, and there is no legal fiction by which private persons can be made parties to proceedings. That is to say, there is no counterpart in the Convention of Human Rights to article 173 of the Establishing Treaty of the European Economic Community[63] permitting direct individual action; further, no referral from a national court is possible, since no counterpart exists to article 177.[64]

Repeatedly, the writer has advocated direct petition, but such an ideal solution lies in the future. For the present, the great progress already achieved in according administrative (Commission), judicial (Court), and even political (Committee of Ministers) hearings to the complaints of injured individuals must be noted approvingly. Notwithstanding weaknesses in the Court's competence, the conflict-resolving system of the Council is far ahead of any alternatives available to the United Nations or its ten specialized agencies. Likewise even the New Human Rights Covenants of the Economic

---

> Delegates with all information or details required (see Judgment of the Court in the Lawless case on 7th April 1961) to submit in writing the observations of a legal nature which he had to make in the name of DeBecker . . . .

Id. at 213-14. *Accord*, Reconsideration by the Commission of its Conclusions having regard to the Applicant's letter of 5th October 1961, *id.* ¶ (b), at 270-71.

> [62] "Lawless" Case, [1960] EUR. CONV. ON HUMAN RIGHTS Y.B. 492 (preliminary objections). [T]he Court is of the opinion that the Commission is enabled under the Convention to communicate to the Applicant, with the proviso that it must not be published, the whole or part of its Report or a summary thereof, whenever such communication seems appropriate; whereas, therefore, in the present case, the Commission, in communicating its Report to G. R. Lawless, the Applicant, did not exceed its powers.

Id. at 512. *See also id.* at 508-12. See discussion in PROCEDURAL STATUS 110-15.

> [63] 4 EUROP. Y.B. 413 (1958).
>
> [64] The Court of Justice shall be competent to give preliminary rulings concerning:
> (*a*) the interpretation of this Treaty; . . .
>
> Where any such question is raised before any court of law of one of the Member States, the said court may, if it considers that a decision on the question is essential to enable it to render judgment, request the Court of Justice to give a ruling thereon.
>
> Where any such question is raised in a case pending before a domestic court of a Member State, from whose decisions there is no possibility of appeal under domestic law, the said court is bound to refer the matter to the Court of Justice.

Gormley, *Individual Petition to the Commission of the European Economic Community*, 1 VALPARAISO L. REV. 255 (1967), and the sources cited therein.

and Social Council, [65] strongly supported by the writer, do not provide for any type of judicial proceeding. [66] The only relief afforded under the ECOSOC Covenants involves interstate complaints [67] to the ECOSOC Committee of Human Rights and direct individual petition to the same Committee under article 1 of the Optional Protocol. [68] Conversely, within the continental system a hearing on substantive issues can be obtained and a final judicial pronouncement rendered in favor of private persons against sovereign states, provided of course the facts in the dispute so warrant.

Regardless of dependence on the Commission to receive its cases in the first instance, once a controversy has been referred to the Court, said Court becomes completely dominant. Previously, *Lawless* and *DeBecker* were compared with *Marbury v. Madison*; [69] in particular, the superiority of the Court was clearly set forth in the Belgian case. In order not to prolong this discussion of the Council's highly developed legal structure, [70] we need only summarize the gravamen in *DeBecker*; the Court is the final arbitrator in all disputes, not the Commission. In other words, though great deference will be given to the Commission's findings of fact and law, the judicial organ alone is capable of interpreting the European Convention of Human Rights, pursuant to article 45. The Court relying on *Lawless*, [71] established its fundamental position:

> [N]o one should forget the origins of a case such as this one brought before the Court by the Commission which had been petitioned in pursuance of Article 25 of the Convention on foot of an allegation that the rights of an individual Applicant were violated as a result of the application to him of legislative provisions in force in his country; whereas the Court is not called upon, under Articles 19 and 25 of the Convention, to give a decision on an abstract problem relating to the compatibility of that Act with the provisions of the Convention, but on the specific case of the application of such an Act to the Applicant and to the extent to which the latter would, as a result, be prevented from exercising one of the rights guaranteed by the Convention; .... [72]

---

[65] International Covenant on Economic, Social, and Cultural Rights [hereinafter cited Economic Covenant]; International Covenant on Civil and Political Rights [hereinafter cited Political Covenant]; Optional Protocol to the International Covenant on Civil and Political Rights, *adopted and opened for signature* at New York, December 16, 1966. G.A. Res. Annex. A/RES/2200 (XXI), reprinted *in* 61 AM. J. INT'L L. 861 (1967).

[66] Gormley, note 31 *supra*. *See* notes 159-60 *infra*.

[67] Political Covenant arts. 41-42.

[68] A State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol.

[69] Note 47 *supra*.

[70] *See, e.g.*, C. MORRISON, note 25 *supra*. A. ROBERTSON, THE COUNCIL OF EUROPE (2d ed. 1961); and G. WEIL, THE EUROPEAN CONVENTION OF HUMAN RIGHTS (1962).

[71] *See* notes 57-59 *supra*.

[72] Note 4, at 334, 336 *supra*.

Thus, a double problem arises in terms of the five pending actions, particularly in connection with the four detention cases. The Commission has already developed a sizeable body of "case law"; however, it is not binding on the Court. Admittedly, any researcher is venturing into "dangerous speculation" when evaluating major areas in terms of seven to nine holdings;[73] nevertheless, as will be shown, this developing regional and international law of human rights is setting the precedent for the United Nations, including the ECOSOC Covenants.[74]

IV. *Belgian Linguistic Cases*

Without question the case *Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*,[75] usually referred to as the *"Belgian Linguistic Cases"* is the most important—and indeed the most politically charged—dispute ever presented to the European Court, because the very foundations of Belgian sovereignty are at stake. Likewise, it is not invalid to conclude that the continued existence of the Court and even the Statute of the Council of Europe is at stake. That is to say, a judicial default similar to the *South West Africa Case*[76] would preclude the submission of future controversies thereby ending the tribunal's effectiveness. As will be stressed in the discussion of the *Linguistic Cases*, the despicable judgment in the *South West Africa Case* haunts the present Strasbourg proceedings. Specifically, the writer was in the courtroom at The Hague on July 18, 1966 at which time the world's highest tribunal destroyed its honored position previously held under the League of Nations and United Nations.

Lest the common name of the case be misleading, the Council of Europe is not involved with the entire controversy between French and Flemish speaking populations in Belgium—touching all phases of life in that country. To illustrate, a few days prior to the commencement of this study the government fell; further, as this section is being written the King is unable to form a new government because of a severe split among major political parties, resulting from aspects of the larger language problem. Though the Council is only dealing with selected aspects of the Belgian educational system as it relates to carefully enumerated articles in the Convention of Human Rights and First Protocol, the very sensitive nature of the whole

---

[73] The exact number of cases is open to question. The *Linguistic Cases* constitute two separate judgments as does *Lawless*. A fifth detention case has been referred to the Court, note 126 *infra*, and there is some possibility the interstate complaint against Greece may reach the Court, note 26 *supra*.

[74] Note 65 *supra* and note 147 *infra*.

[75] [1967] Publications of the European Court of Human Rights (ser. A) Judgment of 9 February 1967 (preliminary objection), noted *in* 61 AM. J. INT'L L. 1075 (1967). [hereinafter cited Belgian Linguistic Cases]. In addition to those applications presented in this First Stage, at least three other petitions are currently being examined by the Commission.

[76] Note 40 *supra*. See the works of Gormley, Friedmann and Reisman, note 43 *supra*.

judicial proceeding cannot be overlooked; the Strasbourg group cannot escape the relationship of its actions to the continued existence of the Belgian State, as presently constituted. In effect, the designation of official languages typically represents one of the most important aspects of state sovereignty. Normally, the right of any minority group to use its own language, even in a bilingual country, is dependent on municipal legislation, for the reason that international law does not concern itself with strictly domestic problems. In this regard, article 2(7) of the United Nations Charter need only be cited as the correct statement of contemporary international law, as slightly modified by the ECOSOC Covenants. [77]

Likewise, the rights of minority groups, such as those of French Canadians, Spanish-speaking Americans [78] and French-speaking Americans in Louisiana, are strictly dependent on municipal law. The different standard within the eighteen-member Council stems from the Convention of Human Rights, which multilateral treaty has no counterpart in any other regional or international institution. By way of general interest, only one other case—again involving Belgium—touched on the linguistic problem as it relates to a higher regional law. In June of 1967 the Court of Justice of the European Economic Community was called upon to apply Regulation 3 [79] —one of the more important administrative rulings regulating rights of foreign nationals within the Six—to an Italian worker who complained that local officials failed to employ the Italian language in dealing with him, as required by the supranational legal system of the EEC. [80] The foreign worker contended—and correctly so—that nationals of member states have the *right* to utilize their own language in dealing with the authorities of another member state. In a general law-making decision, clearly not limited to the individual case, the EEC Court interpreted Regulation 3 in such a manner as to extend this right to all alien workers. This decision stems from the unique status of the EEC Treaty and the growing line of social security cases in the EEC, [81] defining substantive rights of individuals, as

[77] Article 2(7) provides: "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter . . . ." *Cf.* the discussion of these present cases to the ECOSOC Covenants in text accompanying and following note 152 *infra*, constituting the conclusions to the present study.

[78] Katzenbach v. Morgan, 384 U.S. 641 (1966), commented on by Bickel, *The Voting Rights Cases*, [1966] SUPREME COURT L. REV. 79, at 95-102. *See* Morgan v. Katzenbach, 247 F. Supp. 196 (D.D.C. 1965). Avins, *Literacy Tests and the Fourteenth Amendment: The Contemporary Understanding*, 30 ALBANY L. REV. 229 (1966).

[79] Entered into force January 1, 1958. *See* annotations *in* CCH COMM. MKT. REP. ¶1022.40, at 1018, ¶ 1201.01, at 1054. Regulation 3 implements arts. 49 & 51 EEC Treaty, note 63 *supra*.

[80] Case No. 6/67 (decided June 1967). No report of the case has been published to date.

[81] *E.g.*, Vaassen-Göbbels v. Beambtenfonds voor Mijnbedrijf, 12-4 Recueil de la Cour 377, 2 CCH COMM. MKT. REP. ¶ 8050, at 7749 (1966). J.E. Hagenbeek widow of W. Labots v. Raad van Arbeid, Arnhem, 12-4 Recueil de la Cour 617, 2 CCH COMM. MKT. REP. ¶8051, at 7766 (1966); and J.G. Van Der Veen v. Sociale Verzekeringsbank, Amsterdam, 10 Recueil de la Cour 1105, 2 CCH COMM. MKT. REP. ¶ 8032, at 7472 (1964). See the discussion of the first two *Social Security Cases* in PROCEDURAL STATUS 176-77 and van Panhuys, *Conflicts Between the Law of the European Communities and Other Rules of International Law*, 3 COMM. MKT. L. REV. 420 (1966).

guaranteed by the law of the community. A future legal precedent has been created under the superior community law; yet, it would be incorrect to assume that this decision is related to the *Belgian Linguistic* dispute or that the Luxembourg Tribunal has pronounced upon a general question of international law. The EEC Court—unlike the Court of Human Rights—in the great majority of judgments does not decide cases *in concreto* but rather pronounces *in abstracto.*[82] However, in upholding the right of this Italian to use his own language in communicating with Belgian governmental agencies, the substantive EEC European law of individuals was significantly extended at the expense of domestic practice. Again, another example is available to show that private individuals can be protected by a regional legal system to a greater degree than by national law. As concerns this type of supranational protection, a valid comparison can be made with the Council of Europe in general and the *Belgian Linguistic Cases* in particular. Precisely, those articles involved in the *Linguistic Cases*, likewise, set forth a higher standard of protection than does Belgian municipal law; substantive legal rights of individuals are guaranteed by international treaties.

As will be shown in connection with the *embryonic* attempts to assure a minimum of language protection in the ECOSOC Covenants, international and regional treaties normally do not provide necessary safeguards for the reason that such topics are not encompassed in general international law. Nonetheless, this illustration from the EEC shows that language protection can be accorded by means of treaty law. Though not strictly a legal precedent to be utilized by the Council in the *Linguistic Cases*, an example now exists in which Belgian language legislation and governmental practice have been forced to yield to superior treaty law. Negatively, it must be remembered, the Convention of Human Rights is a treaty between the eighteen High Contracting Parties; the Convention is not a supranational document in the nature of the EEC Treaty; hence, contrary results may be forthcoming. But to bring the *Belgian Linguistic Cases* into focus *as both a regional and international-law dispute* (or at the very least a regional case having international overtones), the importance of these legal actions must not be underrated. This two-stage proceeding represents more than a single case; it is the most significant controversy ever presented to the European Court and, as already stressed, the future of the Council is also at stake. While every international arbitral or judicial proceeding in which a sovereign state is compelled to defend its action is important, not all of them delve into areas as sensitive as language legislation. For instance, in *Lawless*, the applicant had already been released from protective custody and was only seeking damages, whereas in *DeBecker* the problem posed by ex-

[82] Under the provisions of art. 177(2)-(3), note 64 *supra*, which contains the procedural remedy for certification of questions from national courts involving interpretation of the EEC Treaty, note 63 *supra*.

Nazi collaborators was largely becoming a moot issue as most punitive legislation was "running its normal course." True, *Lawless* and *DeBecker* were emotionally charged, but compliance with the European Convention was obtained without a direct verdict from the Court or pressure from the Committee of Ministers. In the present dispute the Belgian Government argues that the judgment to be rendered by the Court could "provoke extremely violent political feelings in Belgium, which in turn could exert a substantial influence on the structure of the Belgian State." It added that the Court would have to pronounce on the point "whether the Applicants [had] not attempted to submit to the jurisdiction of the European Court of Human Rights questions which [belonged] to the sphere reserved" to the Contracting States. In conclusion it stressed "that, in its report, the majority of the Commission . . . [had given] to Article 14 of the Convention a very precise interpretation which, however, according to certain dissenting opinions in this report, conflicted with that given in several previous decisions of the Commission." [83]

Challenge of the state's "reserved domain of sovereignty," arose from a series of individual applications to the European Commission as early as June, 1962 at which time twenty-three French-speaking inhabitants of Flemish areas in Alsemberg and Beersel complained that their children were unable to receive compulsory education in their native tongue, French. Additional applications containing identical grounds were filed by five inhabitants of Draainem on October 22, 1962. Similarly, additional petitions were lodged on November 1, 1962 by sixty-two inhabitants of Antwerp and environs, on September 23, 1963 by fifty-seven inhabitants of Louvain and environs; and finally on January 28, 1964 by eighty-five inhabitants of Vilvorde. [84] These regions are classified as Dutch-speaking by national legislation, though significantly large French populations also reside in these areas. Applicants, who are parents of Belgian nationality, demand "separate and equal" educational facilities for their minor children of whom there are in excess of eight hundred.

Common features of the six applications at issue can be summarized. The Belgian Government: 1) does not provide adequate French-language education in the above mentioned municipalities, and in most instances such training is unavailable; 2) withholds grants from schools not complying with national linguistic provisions; 3) refuses to recognize leaving certificates issued by schools not fully complying; and 4) does not allow applicants' children

---

[83] Belgian Linguistic Cases ¶ 6, at 8.

[84] The Commission's reports on application numbers 147/62, 1677/62, 1691/62, and 1769/63 are set forth *in* [1964] EUR. CONV. ON HUMAN RIGHTS Y.B. 140-62; App. No. 2002/63, *id.* at 252. See also "Belgian Linguistic" Case—Hearing on the Merits, Council of Europe Press Release C (67) 41, 13.10.1967. *See also id.* C (67) 4, 9.2.1967. Belgian Linguistic Case 7. *See also* Proceedings Before the Commission, Council of Europe Press Release C (66) 39, 9.11.1966, at 1-2.

to attend French classes, which could be made available. [85] The alternative, petitioners argue, is that their children must be enrolled in local Flemish schools, or these children must commute long distances to the Greater Brussels District, where instruction is offered in Dutch or French according to the child's mother tongue or usual language. Without prolonging the factual discussion, the Belgian Government defends its legislation dating back to 1932 and subsequently amended as recently as 1963. The legal controversy, deemed admissible by the Commission pursuant to article 25 and presently pending before the Court in the Merit Stage, involves a direct confrontation between Belgian legislation maintaining exclusive Dutch instruction in these localities, and articles 8 and 14 of the European Convention, in conjunction with article 2 of the First Protocol. [86]

The text most strongly supporting the applicants' case is article 14 : "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, or other status."

Parenthetically, the similarity of this language to that contained in article 2(2) of the two ECOSOC Covenants cannot be overlooked at this stage in the study. Regardless of the outcome in the Strasbourg action, the Council is setting an international-law precedent that will be used to interpret the ECOSOC Covenants, as shown below. [87] However, a careful reading of article 14 reveals that no specific substantive law is set forth; consequently one must look to other provisions. Accordingly, the Commission accepted a portion of article 8(1) ("everyone has the right to respect for his private and family life, his home and correspondence") [88] to fill the need. By utilizing a portion of paragraph 2, [89] article 8 furnishes the necessary substantive law upon which the trial can proceed. But we may ask, has article 8 been stretched by means of a legal fiction so as to include education?

---

[85] Council of Europe Press Release C (66) 39, 9.11.1966, at 3-4.

[86] The Commission's request contained a report as provided for in art. 31, and was lodged with the registry of the Court within a period of three months as required by art. 32(1) and 47, in connection with art. 44 and 48(a). In addition, Belgium has accepted the compulsory jurisdiction of the Court, as required by art. 46, on June 8, 1960. On July 22, 1965, the Belgian Government informed the registrar of the Court that it wished to appear in the case. Belgian Linguistic Case 7.

[87] *See* text accompanying and following note 152 *infra*. Note especially Economic Covenant arts. 2(2) and 13(3), note 65 *supra*.

[88] Emphasis added. Further, art. 8(2) states :

> There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, 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.

[89] "[T]here shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law . . . ." *Id.* The Commission declared inadmissible allegations based on arts. 9 and 10, dealing with freedom of religion, free expression, and the right publicly to manifest beliefs. Obviously, the Commission held correctly.

A very strict reading of article 8(1) might indicate that a personal right —but not a corresponding duty on the state—has been guaranteed. Though the writer strongly agrees with the Commission's finding in declaring this issue admissible, serious questions will be raised by the Belgian Government concerning the subject matter included within article 8. Only private rights and beliefs may be covered; therefore, the state will argue that its actions are entirely in keeping with the Convention and Protocol.

A much stronger text, from the standpoint of petitioners, is article 2 of the First Protocol: "No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions." However, a similar problem arises; no person is being denied the right to receive an education. Significantly, the Commission held that the first sentence in article 2 of the First Protocol must be read in conjunction with article 14 and Belgian legislation was deemed incompatible with this combined reading. The strength of the conclusion is obvious; in fact, if this *joinder* of article 2, first sentence, with article 14 is upheld by the Court the Belgian defense seems doomed. But the second sentence of article 2 becomes much more troublesome. What is the meaning of the phrase "the State shall respect the right of parents to insure such education. . . . ?" Specifically, does the word "insure" impose an obligation on the state to provide separate and equal educational facilities? Does the word "respect" mean a government must conform to the wishes of minority groups? Can the phrase, "religious and philosophical convictions" be construed to include the word "education," as used in the first sentence of article 2? Though the writer favors an affirmative answer, this question of applying the Convention and the European Law of Human Rights [90] can only be resolved by the Court, though the Commission has previously given positive findings.

The difficulty of anticipating the decision on the Merits is heightened by the fact that the justices did not finally resolve the very vital legal issue posed in the First Stage, namely the contention that the field of education falls within the domain of reserved municipal sovereignty; but they left the issue for the Second Stage. The writer feels that there is considerable validity in such a position, for the reason that a basic principle of treaty interpretation is that a treaty must be construed restrictively as to surrender of state sovereignty. More directly, individual rights must be clearly enunciated in favor of private interests, and any ambiguity will be resolved in favor of the state. [91] The

---

[90] European Law of Human Rights is used here in the sense stated by C. MORRISSON, note 25 *supra*. *See also* A. ROBERTSON, THE LAW OF INTERNATIONAL INSTITUTIONS IN EUROPE 52-67 (1961). Gormley, note 31 *supra*.

[91] *E.g.*, Steiner v. The Polish State, [1928] Ann. Dig. 291 (Case No. 188) (Upper Silesian Arb. Trib. 1928). *Accord*, generally, Chorzow Factory Case, [1928] P.C.I.J., ser. A, No. 17, 1 HUDSON, WORLD C. REP. 663 (1934).

answer which must be given in the final judgment will, necessarily, determine the issue concerning the scope of the European Convention. Had the Court upheld the Belgian submission it would have been impossible to proceed with an examination of the three articles cited above. Conversely, the Court very wisely avoided finally determining the status of "reserved domain" through the expedient of accepting the Commission's solution, "the Government requests that its preliminary objection be joined to the merits. It reserves the right to supplement and amend its submissions in the course of these proceedings." [92]

The Court's most concise statement of its holding on the Preliminary Objection reads as follows :

> Whereas in reaching this decision, which is of a procedural nature and which also disposes of the alternative submission of the Belgian Government that the objection should be joined to the merits, the Court in no way prejudges the merits of the dispute; whereas the Government remains free to take up again and to develop on the merits its arguments on the scope of the rights and freedoms laid down in the Convention and the Protocol. [93]

Henceforth, the Belgian Government can advance and develop its claim to sovereignty notwithstanding that the Court has decided to proceed with the case. The writer believes that the reason the Court refrained from giving a negative answer in the Preliminary Objections to "reserved domain" was for the purpose of avoiding a *South West Africa*-type decision wherein the International Court of Justice reversed its 1962 judgment on Preliminary Objections.[94]

One side-comment on the *Linguistic Cases* seems especially appropriate. Last June 14, 1967 the writer was privileged to be present at final ceremonies during which Judge René Cassin, President of the Plenary Court, was awarded the title "Outstanding Jurist of the World" by the Geneva Conference on World Peace Through Law.[95] In fulfilling this role, Judge Cassin has taken steps to prevent a repetition of *South West Africa*. Still, this temporary avoidance of the jurisdictional question does not render the Belgian defense moot. As pointed out by Professor Leo Gross in his 1967 Hague Academy lecture entitled, "The International Court of Justice and the United Nations," [96] nothing decided in the Preliminary Objections ever prejudices the

---

[92] Belgian Linguistic Case 14.

[93] *Id.* at 19.

[94] South West Africa Cases (Ethiopia-Liberia v. South Africa) Preliminary Objections, [1962] I.C.J. 319, 57 AM J. INT'L. 640 1963). *Accord* on the point of reversal: Rao, Editorial Comment, *South West Africa Cases: Inconsistent Judgments From the International Court of Justice*, 6 INDIAN J. INT'L L. 383 (1966). *See also* Friedmann, note 43 *supra*; Cheng, *The 1966 South-West Africa Judgment of the World Court*, 20 CURRENT LEGAL PROB. 181, 193-205 (1967).

[95] World Law Awards, 4 Bull. World Peace Through Law Center, No. 7, July-August 1967, at 3, col. 1.

[96] REC. C. ACAD. D. INT. (1967). *Contra*, Cheng, *Binding Effect of Preliminary Judgments*, note 94, at 200-03 *supra*.

later decision on the Merits. This well-established principle of international law stands for the proposition that at the First Stage of any regional or international proceeding the only questions are whether a dispute exists, worthy of trial on the substance, and whether the forum has jurisdiction to conduct a further examination. In terms of the norms enunciated by Professor Gross, the European Court did dispose of Belgian objections in such a manner as to avoid a later inconsistent verdict. In this regard, the Court clearly took the best course of action, because there are no issues of an antecedent character, in view of the fact that the jurisdiction of the Court to hear the case has been permanently settled and will, therefore, not be reopened. This difference between the *Linguistic* and the *South West Africa* cases will prevent the type of "unresolved problem" left by The Hague decision. The skilful handling of an extremely difficult issue indicates the capability with which the merits will be decided.

In examining the important sections of the First Stage—which will have a strong bearing not only on the hearings presently taking place at Strasbourg, but also upon the developing international-law precedent being established, that in turn will undoubtedly affect the four detention cases and interstate complaint against Greece—the "World's Outstanding Jurist,"[97] in yet another instance, has taken steps to avoid a *South West Africa*-type holding, *i.e.*, very severe time limits have been imposed on oral hearings. Granted that the case began with the filing of the first petition as far back as June 16, 1962, and that the Commission in carrying out its series of oral hearings and secret meetings in Paris and Strasbourg extending over a period of four years largely because of a desire to resolve the issues, but primarily its subsequent attempts to reach a friendly settlement under provisions of article 28(b), plus the minimum time required for the series of memorials and counter-memorials from the Belgian Government,[98] the inescapable fact remains: once these legal issues were certified to the Court, severe time limits were established. By an order of September 23, 1966, opening arguments on the First Stage were limited to the period of November 21-23, 1966. Parenthetically, having attended oral hearings at The Hague in connection with the *South West Africa Case* in 1965, which examination of three witnesses lasted nearly two weeks,[99] the writer is amazed, but also very impressed, that such a vital case can be handled so expeditiously. Again to draw a comparison with the *South West Africa Case*, the African dispute

---

[97] World Law Awards, note 95 *supra*.

[98] *See* remarks relative to the preliminary work of the Commission, Belgian Linguistic Case 7-8; *see* especially *id.* ¶ 10, at 9.

[99] *E.g.*, I.C.J., C.R. 65/55 through C.R. 65/59, containing the testimony and cross examination of Dr. J. P. van S. Bruwer, Professor of Social and Cultural Anthropology at the University of Port Elizabeth, and Dr. R. F. Logan, Professor of Geography at U.C.L.A., who testified on behalf of South Africa. *See generally* Gross, *The South-West Africa Case: What happened*, 45 FOR. AFF. 36 (1966).

actually arose in 1945 simultaneously with the founding of the United Nations, at which time South Africa sought unsuccessfully to remove all international supervision; moreover, the first advisory opinion was handed down in 1950,[100] but the legal nature of *apartheid* has yet to be settled. On the other hand, oral hearings on the Second Stage (Merits) were held at Strasbourg on the 25th, 27th, 29th, and 30th of November, 1967, a mere four days, in sharp contrast to the four years required by the ICJ, prior to which time the World Court could not decide whether or not Ethiopia and Liberia had the necessary standing to be present at The Hague. Admittedly, on November 30, 1967, President Cassin only closed the hearings provisionally in order that they might be reopened if the justices should require further information or argument. The Court held its first deliberations on November 30 and December 1. Although not reopening the oral proceedings, it has asked "the Belgian Government and the European Commission of Human Rights to give it, in writing, additional figures on the 'Central Board' system and non-subsidized schools giving education in French in the Dutch language region." [101] Obviously the prospect of further written and oral pleadings seems feasible since no date has been set for the verdict. But a final judgment will be handed down in open session during 1968.[102]

The Preliminary Objections, under examination in the present study, saw the Court reject Belgium's objection of incompetence, and at the same instance clearly set forth its jurisdiction. Significantly, no antecedent issues exist; all the Court decided was that it *must* proceed with a full examination of the merits without prejudicing the possibility of a representation of the same arguments (aside from the Court's competence). As implied in the above discussion of the Commission's handling of original petitions, the heart of the Belgian case is that the Convention (articles 8 and 14) and the Protocol (article 2) do not impose any affirmative duty on the state to provide a particular type of education; " such complaints are entirely foreign to the Convention and Protocol." [103] It follows, "the individual freedoms place purely negative duties on governmental authorities (*pouvoirs publics*) (the negative, *status libertatis*)." [104] More specifically, the articles in question impose "obligations not to interfere and to refrain from action . . . ." [105] "[I]n particular, Article 2 of the Protocol (first and second sentences) and Article 8 . . . *create mere obligations not to do anything* . . . ."[106] In

---

[100] Advisory Opinion on the International Status of South-West Africa, [1950] I.C.J. 128, 44 AM. J. INT'L L. 757 (1950).

[101] *See, e.g.*, Council of Europe Press Release C (67) 46, 7.12.1967.

[102] The judgment will be delivered at a public session, pursuant to rules 14(3) and 51(2), Rules of Court, implementing arts. 51 & 52.

[103] Belgian Linguistic Case 15.

[104] *Id.*

[105] *Id.*

[106] *Id.* (Emphasis added). Further the Belgian Government stated :

Whereas the Belgian Government adds that rights in matters of education cannot

advancing the defense of negative obligations, defendant argues that the Convention only prohibits discrimination and governmental interference with family life; therefore, education is not included. Rather the type of educational systems provided

> *form part of the reserved domain of the Belgian legal order; that the linguistic and educational legislation is to a large extent an integral part of the State's political and social structure, which belongs pre-eminently to the reserved domain*; that the Convention, as a declaration of rights, is not concerned with the organisation of governmental authorities; that the Belgian Conseil d'Etat and Parliament understood it in this way when the question of ratification arose; that the example of other European countries, for instance Switzerland, shows that *language regulations are within the exclusive jurisdiction of States*; that, therefore, there is in this case an inherent limit to the exercise of the Court's jurisdiction, this limit being so evident that it depends neither on an explicit clause of the Convention nor on a reservation under Article 64.[107]

It need only be indicated that the Commission takes the view—and the writer believes properly so—that "the idea of reserved domain has in principle no place in the system of supervision set up by the Convention."[108] Under this holding a specific reservation would be required to create an exception to the European system. In taking the position that a reservation must be attached as required by article 64,[109] the Commission has raised the most significant and far reaching legal contention that cannot be avoided in the final judgment: the relationship (or incompatibility) between the European Law of Human Rights and general international law. Whereas the Commission takes the position that norms of international law "cannot in their entirety govern proceedings instituted before the European Court by virtue of specific clauses of the Convention . . . ,"[110] the Belgian Government seeks

---

be deduced from Article 8 of the Convention, the object of which is to protect family life, those rights being governed by Article 2 of the Protocol; and that the second sentence of the latter protects only the "religious and philosophical convictions" of parents, not their cultural or linguistic preferences or opinions.

Id.

[107] *Id.* at 16.

Switzerland has not—and will not—ratify the Convention in order to avoid the imposition of any "higher law"; therefore, the analogy drawn by Belgium is faulty on its face. Likewise, Switzerland will not accept the right of individual petition nor accept the Court's compulsory jurisdiction so as to insulate its system of parliamentary supremacy. The Swiss are very firm in the application of their municipal law, as can be seen from the recent expulsion of foreign workers and the refusal to grant immunity to additional international organizations. *See* Gormley, *The Right of Officials and Employees of the Common Market to Invoke Immunity Against Their Sending States*, 17 SYRACUSE L. REV. 446, at 448 n.14 (1966).

Accordingly, Belgium has chosen the weakest possible example in support of its allegations of domestic superiority.

[108] Belgian Linguistic Case 17.

[109] 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 when in force in its territory is not in conformity with the provision.* (Emphasis added). Reservations of a general character shall not be permitted under this Article.

[110] Belgian Linguistic Case 17.

to invoke international law.[111] The real issue to be resolved is fundamental: How much sovereignty has been surrendered by the High Contracting Parties, and what degree of competence and jurisdiction has been left to states? Obviously, the High Contracting Parties have surrendered far less sovereignty than the six-member states comprising the EEC, and just as obviously the sixteen states ratifying the Convention have given up a great deal more than members of the United Nations. The writer chooses to offer the following hypothesis, though the final answer can only be given by the Court (and may even be avoided in the *Linguistic dispute*): the Court, as an institution created by the Convention and not the Statute of the Council, has a minimal existence separate and apart from the states originally creating the entity. The writer submits that the Court of Human Rights, being a forum of very limited and specialized jurisdiction, is not bound by prior pronouncements of international tribunals.[112] Its duty is to interpret the Convention until such time as the Statute is drastically modified. Nevertheless, there is still considerable merit in the Belgian position, for the Court—and the entire Council of Europe—is applying and creating new international law. Unlike the EEC, the Council is not strictly a regional institution; hence, its activities and law-making functions are not restricted to simply European jurisprudence. Indeed, the writer has previously concluded that the Council is leading the way for the United Nations[113] and even setting a precedent for the new ECOSOC Covenants.[114]

But in terms of the *Linguistic Cases*, the most obvious ramification of the writer's belief is found in the application of international law as pronounced by the World Court. Though the Strasbourg Court has looked to international-law precedent in *Lawless*,[115] its most significant application involved a rejection of the Belgian Government's final submission: "a single objection asking it to reject forthwith the Commission's request as a whole without distinguishing between the various Applications on which the request is based or between the various complaints of Applicants . . . ."[116] Defendant relied on *Electricity Co. of Sofia & Bulgaria*[117] decided by the old Permanent Court

---

[111] *Cf.* note 91 *supra.*

[112] *See* note 62 *supra* and notes 141-45 *infra.*

[113] PROCEDURAL STATUS 1-6, 189-91; Gormley, note 31 *supra*; and Gormley, *The Procedural Status of the Individual Before Supranational Judicial Tribunals*, 41 U. DET. L.J. 405, at 440-46 (1964).

[114] See text accompanying notes 147-55 *infra.*

[115] "[T]he Court is not called upon to examine in detail the precedents invoked by the Commission with regard to the part to be played by the individual before an international judicial body . . . ." [1962] EUR. CONV. ON HUMAN RIGHTS Y.B. 438, at 514 (merits). *See also* note 117 *infra* and the sources cited therein.

[116] Belgian Linguistic Case 18.

[117] [1939] P.C.I.J., ser. A/B, No. 77, at 83. In support of this same line of reasoning, Belgium relied on other case-law precedent from the Permanent Court when it was urged that the European Court

> should rather, if need be, adopt the method followed by that Court in its judgment of 30th August 1924, when, before ruling on the merits of the case, it verified that

of International Justice in April, 1939. Interestingly, in the 1930's Bulgaria had raised this same objection of dividing the Preliminary Objections and the Merits into two separate stages, an argument rejected by the Permanent Court. In upholding an identical line of reasoning originally raised by Belgium in 1937, the Strasbourg Court rejected the argument of the present Belgian advocates on the ground that the merits and the jurisdictional objections could not properly be dealt with in the single preliminary holding even on a reserved-power theory. Precisely,

> the Court cannot fail to conclude that all those complaints raise questions concerning the interpretation and application of the Convention; whereas, in order to decide on these questions, it would have to examine whether the Applicants are entitled to the rights they claim to derive from Articles 8 and 14 of the Convention and Article 2 of the Protocol, and whether those provisions place on the Belgian State the obligations which the Applicants allege to have been violated; whereas that would amount, not only to encroaching on the merits, but to coming to a decision in regard to one of the fundamental factors of the case, that is to say in regard to questions of interpretation and application which are inseparable from the merits.[118]

The Court correctly reasoned that a difference of opinion exists as to the interpretation of said Convention. As such, these differing interpretations by the Belgian Government and the Commission cannot be resolved at the Preliminary Stage; thereupon, a further trial on the merits becomes mandatory. In addition, "the notion of the reserved domain, . . . equally concerns the merits and therefore cannot lead to any different result [than would be obtained in the First Stage]."[119] The reason underlying this holding is that alleged rights of parents to secure French-language instruction for their children arise from "international instruments whose main purpose is to lay down certain international standards to be observed by the Contracting States in their relations with persons under their jurisdiction (Article 1 of the

---

> the dispute fell to be decided by application of the treaty clauses invoked (Mavrommatis case, Series A. No. 2, p. 16); that the use of this method is justified by the principle of economy of proceedings, by the logical sequence in which the various questions arise and by the fact that the European Court, like the World Court, has only an attributed jurisdiction derived purely from the consent of States.

Belgian Linguistic Case 16.

Prior use of international-law precedent can be seen in Nielsen v. Denmark, [1959] EUR. CONV. ON HUMAN RIGHTS Y.B. 412, sent to the Committee of Ministers. The Commission and Committee had to determine the concept of "exhaustion of domestic remedies" as the notion is found in the European Convention in light of prior international-law cases. *See* Valentine, *The Nielsen Case: The European Commission of Human Rights*, 11 INT'L & COMP. L.Q. 836 (1962). The writer has previously concluded in regard to *Nielsen*:

> In reality, the Council is relying on the classical principles as expressed in both municipal and international law. Specifically, the rules laid down in prior public law cases, such as the *Salen Case (United States v. Egypt), Interhandel (Switzerland v. United States), Finnish Ships Arbitration, Ambatielos Arbitration, (Greece v. United Kingdom), and the Electricity Company of Sofia* have been held to be controlling.

PROCEDURAL STATUS 96-97.

[118] Belgian Linguistic Case 18.

[119] *Id.* at 19.

Convention) . . . ." [120] Normally, educational matters are of strictly national concern, but the Convention and Protocol clash with domestic law. Therefore, the Court concluded, the Belgian plea does not eliminate its competence. "[T]he Court cannot in the circumstances regard the plea based upon the notion of reserved domain as possessing the character of a preliminary objection of incompetence." [121] Accordingly, we can only speculate as to the final verdict, even though it seems certain the whole concept of "reserved domain" will be re-examined.

The preliminary holding sets forth—unmistakably—that the Court is applying and, likewise, developing international law; no attempt is being made to split up existing international law into a specialized body of European jurisprudence. This First Stage has accomplished a great deal more than merely the protection of the Court's jurisdiction; it has set the pattern of approach for the pending detention cases.

It is apparent that the European Court is more than a regional body, as is the Court of Justice or the European Economic Community. Rather, the Court of Human Rights constitutes part of the developing international structure protecting human rights, [122] instead of competing with counterpart global institutions, as will be shown in the concluding portion of this study, presenting comments on the new ECOSOC Covenants. [123]

IV. PENDING *Detention Cases*

Five cases involving an alleged common violation by local prosecuting authorities have been declared admissible by the Commission. A breach of article 61(1) is advanced against German and Austrian criminal procedures. The international norm requires: "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* . . . ." [124] This concept of "reasonable time" must be read in conjunction with article 5(1): "Everyone has the right to liberty and security of person." More directly, paragraph 1 is given a definite meaning by paragraph 3: "Everyone arrested or detained in accordance with the provisions of Paragraph 1(c) [125]

---

[120] *Id.*

[121] *Id.*

[122] Gormley, note 31 *supra*. This premise is based on previously adopted human rights conventions from the United Nations and ILO plus resolutions of the General Assembly, passed unanimously. A similar conclusion as to the legal nature of General Assembly resolutions was offered by Gormley, note 43, at 76-77 *supra*, citing Lachs (recently elected a justice of ICJ), *The International Law of Outer Space*, 113 REC. C. ACAD. D. INT. 95-103 (1964). The ECOSOC Covenants, however, represent the most advanced development in the emerging International Law of Human Rights, note 114-23 *infra*.

[123] *Id.* *See also* Conclusions (Part V) to the present study, *infra*.

[124] (Emphasis added).

[125] "[T]he lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committeed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so."

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." Actually, the Commission rejected article 5(1) as being manifestly ill-founded, but the writer is still of the opinion that the general norm "security of the person" provides the *foundation* for the more precise guarantees accorded arrested persons; therefore, the Court cannot ignore this particular general legal concept which expresses the continental *Volksgeist.*

The issue to be tried by the Court becomes in fact a value judgment as to whether long periods of delay before bringing accused to trial constitutes a violation of the standard set forth in the Convention. Secondly, the four main trials (plus the detention of an ex-Nazi) must also determine if the criminal procedure law of Germany and Austria, *i.e.*, the long period of time required by public authorities to conduct a full investigation of the facts, including the time required for prosecutors and local police to prepare a case throughout the period of defendant's detention, also violates article 6(1) as employed in connection with article 5, paragraphs 3 and 4. In addition to these texts cited above, paragraph 4 holds: "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." Though other submissions were rejected by the Commission, it appears the Court will decide these five cases on fairly precise grounds. The writer wonders at what point the Commission or the Court on its own motion will raise article 5(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." Though no recovery was granted, the point was raised in *Lawless.*

An extended discussion of the lengthy factual allegations set forth in each of the cases should not be necessary because the findings of the Commission have been made public. The following summary should suffice.

The first action against the Federal Republic of Germany involves one Heinz Jentzch who has been detained since May, 1961. Presently held in a West Berlin prison, he was first indicted on December 1, 1965. Jentzch is charged with having murdered a large number of inmates throughout 1941-1942 in the concentration camp at Mauthausen. The trial on these charges did not commence before the Regional Court of Hagen until August 28, 1967. His long period of detention has been ruled worthy of further consideration by the Court,[126] and the case will stress article 5(3). Because of

[126] Council of Europe Press Release C (67) 51, 22.2.1967.

the unique character of this war-crimes detention, it differs radically from economic crimes; consequently, regardless of the imprisonment from 1961 to 1967, the petitioner will probably be unsuccessful. Accordingly, this action will not be stressed in the present study, for it does not represent a precedent-making decision as do the other detention cases and the *Linguistic* dispute. Nonetheless, it does represent a sixth pending action.

Three of the four remaining cases involve Austria, and they seem much stronger from the standpoint of petitioners. The four cases are *Matznetter v. Austria*, [127] *Wemhoff v. Germany*, [128] *Stögmüller v. Austria*,[129] and the most interesting and complicated case *Neumeister v. Austria*.[130] The writer is of the opinion that the decision in the latter trial will set the precedent for the other three disputes, thereby constituting the "leading case." All are concerned with the interpretation and application of article 5(3); therefore, they will be treated as a common question and heard by the same chamber, with the result that a uniform interpretation of substantive law will emerge, although factual distinctions may produce different holdings. While common issues of law are at stake, separate trials will be held as to each of the above petitioners.

Consequently, the *Matznetter* case has been referred to the chamber already considering the *Neumeister* and *Stögmüller* cases. [131] This chamber of seven judges—unlike the full plenary court hearing the *Linguistic* disputes—was originally constituted to resolve the *Neumeister* case.

The *Matznetter* complaint sent to the Court originates from an application filed with the Commission in 1964. The detention began in May, 1963 when Otto Matznetter was arrested on suspicion of fraud and complicity for breach of trust stemming from violation of Austrian currency laws. He was held until July 8, 1965, before being released pending trial. The Austrian Government suspected Matznetter might flee the country, but it finally relented because of accused's poor health. [132] In February, 1967, defendant was sentenced to seven years penal servitude. [133]

---

[127] Matznetter v. Austria, [1964] EUR. CONV. ON HUMAN RIGHTS Y.B. 330; Council of Europe Press Release C. (67) 30, 25.7.1967 and *id.* C. (66) 18, 6.4.1966.

[128] Wemhoff v. Federal Republic of Germany, [1964] EUR. CONV. ON HUMAN RIGHTS Y.B. 280. The first public hearing before the Court was held on January 9, 1968. Council of Europe Press Release B (68) 3, 8.1.1968. Council of Europe Press Release C (66) 41, 15.11.1966; *id.* C (67) 48, 7.12.1967.

[129] Stögmüller v. Austria, [1964] EUR. CONV. ON HUMAN RIGHTS Y.B. 168. Council of Europe Press Release C (67) 21, 9.6.1967.

[130] Neumeister v. Austria, [1964] EUR. CONV. ON HUMAN RIGHTS Y.B. 224. *See also* Council of Europe Press Release C (67) 47, 7.12.1967; *id.* C (66) 40, 15.11.1966; *id.* C (66) 37, 12.10.1966. To date the full report of the Commission has not been made public. Oral hearings before the Court originally scheduled for January 4 were cancelled because of the illness of Professor Verdross—the judge of Austrian nationality. Proceedings were scheduled to commence on February 12, 1968.

[131] Pursuant to art. 34, Convention, as implemented by rule 21(6) of the Court.

[132] Council of Europe Press Release C (66) 18, 6.4.1966.

[133] Council of Europe Press Release C (67) 30, 25.7.1967.

Stögmüller v. Austria was referred to the Court on May 30, 1967. Ernst Stögmüller was arrested in March, 1958 on suspicion of having taken part, with accomplices, in crimes of embezzlement, fraud, plus offenses of breach of trust and usury. Though released in April, 1958, the defendant was re-arrested in August, 1961 and held in detention until August, 1963, when released on bail. The investigation against petitioner was completed in July, 1966, but no formal charges have been made to date, with the result his civil rights are still curtailed under the conditions of release. [134]

The third dispute referred to the Court involves Heinz Wemhoff, a German national, against the Federal Republic of Germany. He was convicted in West Berlin for financial offenses involving large sums of money. Subsequently, he was sentenced to six and a half years penal servitude; however, the Regional Court of Berlin took into account the period of prior restraint. This case was brought to the European Court on October 7, 1966, [135] and oral hearings at Strasbourg were set for January 9, 1968. The hearings were expected to last two or three days. [136] Interestingly, representatives of the German Federal Government were authorized to present their arguments in the German language, rather than the official languages of English and French, which dispensation indicates the growing internationalism of the justices. In these instances, the European Court is progressing faster than the ICJ. [137]

The main case and by far the most troublesome and complicated is *Neumeister v. Austria*—unique for the reason that the Austrian Government has made application to the Court, specifically requesting it to take jurisdiction pursuant to article 48(b) and (d), thereby becoming a cross-plaintiff. Austria is not merely a defendant brought before the Court through action of the Commission. [138] On October 11, 1966, the Court obtained jurisdiction.

Neumeister was originally arrested in February, 1961, on suspicion of tax fraud as the result of export and customs violations, *e.g.*, fraudulently obtaining refunds of indirect taxes in connection with the export of manufactured goods during 1952-1956. Shortly after the war, Austria, as did many European countries, paid subsidies to manufacturers of export products; however, in the present case it is alleged that certain goods designated for South America were in fact brought back into the country after having been held in the Netherlands so that they could again be officially exported and the subsidy collected on subsequent occasions. He was released on bail

---

[134] Council of Europe Press Release C (67) 21, 9.6.1967. *See* note 129 *supra.*

[135] Council of Europe Press Release C (67) 41, 15.11.1966. *See* note 128 *supra.*

[136] Council of Europe Press Release C (67) 48, 7.12.1967. *See* note 128 *supra.*

[137] *Id.*

[138] Council of Europe Press Release C (66) 37, 12.10.1966, at 3. *See also Id.* C (67) 47, 7.12.1967, and *Id.* C (66) 40, 15.11.1966, at 3.

May 12, 1961, but was re-arrested July 12, 1962, and held until September 16, 1964, after posting security of one million schillings. As such, he was detained for a total period of twenty-six months and four days. Moreover, this case is further complicated by the fact that in the first instance bail was refused, but later a sum of two million schillings was demanded, an amount which could not be paid. Despite repeated appeals to the Austrian courts, release pending trial was not forthcoming. In July, 1963, Neumeister petitioned the Commission; the complaint was declared admissible in July, 1964, and was, therefore, submitted to the Court October 7, 1966. As already indicated, on October 11 of the same year the Republic of Austria, acting pursuant to article 48(b) and (d), brought the case to the Court.

To date, the defendant has not been tried by the Regional Court of Vienna.[139] Admittedly, the complicated financial dealings necessitated a great deal of detective work by the prosecutor's office, with the result that the Austrian Government contends that the period of time is not unreasonable in terms of the type of investigation undertaken and the large number of appeals and motions filed by Neumeister, each of which proved very time-consuming.

The defense raised by the German and Austrian Governments is that the periods of detention were not excessive in view of the facts in each case. Obviously, no violation of German or Austrian procedure resulted; yet the Commission is not satisfied that the international-law standard as set forth in article 6(1) ("within a reasonable time") has been respected. That is to say, the higher substantive law contained in the Convention must be examined by the Court. As discussed in connection with the *Linguistic Cases*, domestic law always controls rather than international law, but in the present instance a standard has been superimposed by a multilateral treaty. Thus, the common issue found in the four cases becomes: Was the period of detention reasonable?

In examining these cases in terms of their future law-making role one severe limitation must be kept in mind: each case is decided on its own merits. Therefore, as is true of civil-law courts, cases are decided *in concreto*, never *in abstracto*, with the result that a precise time period to be applied to all future arrests will not be given by the Court. By way of comparison, the United States Supreme Court in *Mallory v. United States*[140] deemed a seven-hour detention a violation of due process as guaranteed by the Federal Rules of Criminal Procedure. As shown in the

---

[139] Council of Europe Press Release C (66) 37, 12.10.1966, at 2.

[140] 354 U.S. 449 (1957). The arresting authorities violated FED. R. CRIM. P. 5(a), which requires that an accused person be taken before a committing magistrate "without unnecessary delay." See P. KAUPER, CONSTITUTIONAL LAW 772-73 (3d ed. 1966).

discussion of the *Linguistic Cases*, general rules are not established by decisions from the European Court. Since there is no concept of stare decisis, each judgment refers only to the unique fact situation—a result very frustrating to common-law attorneys because firm rules cannot result, only a developing line of jurisprudence. Unlike the *Linguistic* and indeed the *Lawless* and *DeBecker* cases, in this instance the Court will have the opportunity to draw upon a major body of "case law" previously developed by the Commission. While the pronouncements of the Commission rendered in connection with articles 26-32, limited to the question of admissibility, will not bind the Court, the writer believes that the Court will follow the same approach. For example, in a long line of decisions the Commission has enunciated the basic rule of *in concreto* verdicts.[141] As early as 1962 the Commission, in declaring an application filed against the Federal Republic of Germany inadmissible,[142] stated the basic norm consistently followed :

> Article 6, paragraph (I), provides that "in the determination... of any criminal charge against him everyone is entitled to a... hearing within a reasonable time..."; and whereas Article 5, paragraph (3), provides that "everyone arrested or detained in accordance with the provisions of paragraph (I)(c) of this Article... shall be entitled to trial within a reasonable time or to release pending trial"; whereas, in its decisions on the admissibility of Applications Nos. 892/60 (O.v. the Federal Republic of Germany—Collection of Decisions, Vol. 6, p. 17) and 920/60 (W.v. the Federal Republic of Germany—Collection of Decisions, Vol. 8, p. 46) the Commission pointed out that the question whether a period of detention pending trial is reasonable or not is not a question to be decided *in abstracto* but to be considered in the light of the particular circumstances of each case.[143]

---

[141] *E.g.*, X v. Federal Republic of Germany, [1959] EUR. CONV. ON HUMAN RIGHTS Y.B. 344 (eight months detention); X v. Federal Republic of Germany, [1959] *id.* 204 (five months detention); Nielsen v. Denmark, [1959] *id.* 412 (two years and five months); X v. Federal Republic of Germany, [1960] *id.* 184 (eighteen months); X v. Federal Republic of Germany, [1961] *id.* 240 (two and a half years); X v. Belgium, [1963] *id.* 168 (three weeks); and X v. Federal Republic of Germany, [1962] *id.* 248 (seventeen months). Similar findings have yet to be published.

[142] X v. Federal Republic of Germany, [1962] EUR. CONV. ON HUMAN RIGHTS Y.B. 248.

[143] *Id.* at 252. Further, the Commission relied on the famous *Nielsen v. Denmark*—eventually sent to the Committee of Ministers rather than the Court—to enunciate the basic rule that long periods of detention are appropriate in some circumstances. Of course, it could also be determined that the Committee and Commission committed error.

> [I]t is true that in its decision on the admissibiilty of Application No. 343/57 (Schouw Nielsen v. Denmark — Yearbook II, p. 412), a case in which the Applicant, accused of having planned and instigated bank robberies and homicide, was detained for two and a half years pending trial, the Commission held that :
>
> "in considering whether an Application is inadmissible under Article 27, paragraph (2), of the Convention, the Commission is concerned only to determine whether, on a summary view of the contentions of the Parties in regard to the facts and the law, the Application must be rejected as manifestly ill-founded; and whereas, having regard to the very long period which elapsed before the Applicant was brought to trial in the present case and to the general circumstances of the case, the Commission does not consider that the Applicant's complaint of an alleged violation of his right to trial within a reasonable time, under Article 5, paragraph (3) and Article 6, paragraph (1) can be said to be manifestly ill-founded within the meaning of Article 27, paragraph (2)."

Id. at 252-54.

No single criterion—or abstract definition—of a speedy trial or "a reasonable period" of detention can be offered at present; nevertheless, such lack of standard works in favor of the particular local law under examination, since articles 5 and 6 lack specific content. Austria in particular argues that there is no single rule of "due process" applicable to all member states. Instead, the municipal legislation of each state must control—an argument very close to the notion of "reserved domain" as raised in the *Linguistic Cases*. While the defense to be imposed by states seems overly simple, the criteria of examination applied by the Commission and now to be further developed by the Court are far more complex, for the reason that *the length of any detention, in itself, is not the sole criterion.* While the cumulative period of imprisonment is one primary factor in interpreting "reasonable time" as used in article 5, the additional criteria can be summarized briefly. First, and of primary importance from the standpoint of the Commission's prior practice, is the length of detention in relation to the crime alleged. The possible penalty to be imposed must always be considered. In *Neumeister*, the petitioner argues he would not receive a sentence in excess of two years, whereas Austria contends that a maximum of ten years could be handed down for this type of serious economic crime. Although the period of detention is considered at such time as sentence is passed, in civil law it is not held to constitute an additional penalty. Furthermore, the jurisprudential basis for such restraints is found in the desire to protect society at large rather than private citizens, and appropriate provisions are set forth in codes of criminal procedure to legally allow infringements of individual rights (a position completely repugnant to the writer).

Second, the moral character of defendant, including his standing in the community, wealth, prior arrests and convictions, and so forth, are all important factors. More directly, a third test frequently applied by the Commission is the conduct of accused during his restraint. As such, is he "cooperative" with his tormentors? Specific points would encompass answers to questions such as : Did detainee facilitate or delay the investigation? Did he help authorities bring the case to trial? Did he delay the final investigation by pressing numerous appeals or applications for release pending trial, which would go beyond the normal exhaustion of domestic remedies? Did he offer to post bail or other security to assure his presence at the trial? Was there a reasonable possibility he would leave the country? Again, in civil law the individual is at the mercy of the authorities—a notion contrary to the common law.

A fourth factor, probably controlling the economic and financial cases, is the difficulty of conducting and completing the investigation, for example the need to obtain evidence from foreign countries, the number of witnesses to be interrogated, the complexity and number of records and documents, but most important the necessity to investigate co-defendants.

The final test of "reasonable detention" concerns the manner in which local police and prosecutors conduct themselves during the investigation. In short, has their examination been completed as judiciously as possible, in order to avoid unnecessary delays? Included within this very broad criterion would be the actions of local judges and magistrates, primarily the committing judge; henceforth, the local judicial system will have to be examined by the Court in much the same manner as did the Commission in the prior interstate complaint of *Austria v. Italy*.[144] The Commission took special notice of clemency measures taken by Italian authorities because of offenders' youth.

The above discussion has centered around general concepts; they are not points on a check list to be applied automatically. The total length of imprisonment in the five cases, then, must be evaluated in terms of the above; nevertheless, the writer feels additional norms will be developed by the European Court as it develops the standard of international law. For instance, all of the above criteria speak of cooperation with prosecuting authorities—a notion completely shocking to the writer. Admittedly, a common-law attorney looking at the Commission and Court through Anglo-Saxon eyes will necessarily come to the conclusion that the defendant is not being accorded "due process" by German and Austrian law. In particular, Austrian criminal procedure is especially repulsive to the writer, for the reason that the private individual is at the complete discretion of police officials and local judges. The individual has *no right* to release but only a *privilege* conditioned by the arbitrary whim of "civil servants." However, the Court must now decide the legality of such practices in terms of the human rights law set forth by the Convention, which in turn will influence emerging world law. To illustrate, article 6(2) of the Convention states unequivocally : "Everyone charged with a criminal offense shall be presumed innocent until proved guilty according to law." The writer submits that article 6(2) must control the above criteria in order that every defendant be given adequate protection against authoritarian criminal procedure. For example, in *Neumeister*, the accused has been ruined financially because of detention for a total period of twenty-six months and four days, plus the demands of extremely heavy bail. Moreover, there is no indication that article 5(5) will be applied to award compensation, though the writer hopes the Court will provide such relief on its own motion.

The broad issue to be resolved by the Court—assuming sweeping law-making decisions similar in nature to those in *Lawless* and *DeBecker* are given—is the principle of "civil rights" as the concept is enunciated in

---

[144] [1961] EUR. CONV. ON HUMAN RIGHTS Y.B. 116. *See also*, [1962] *id.* 54. *See* report of the Commission, [1963] *id.* at 742, and the decision of the Committee of Ministers, Res. (63) DH 3, *id.* at 769.

article 6(1). The German and Austrian Governments are undoubtedly correct when they argue that no single standard of interpretation relative to "civil rights" is to be found in Western Europe; on the other hand, the writer believes that such a positive conception has been created by treaty law, in turn reflecting a common European tradition or *Volkgeist* at the philosophical level. Under *pacta sunt servanda* the sacred obligation of treaty law has created a common legal norm. Perhaps the writer will be permitted to use the term "due process" as developed by the United States Supreme Court in order to elaborate upon the subject under examination. The supranational definition must control, not the diverse laws of those sixteen states ratifying the Convention or general civil-law criteria. In other words, international law must now replace prior central European practice in order to protect private persons against arbitrary imprisonment in those instances where prosecuting authorities are unwilling to submit the case to trial.

V. Conclusions: Decisions of European Court as Precedent for the ECOSOC Covenants

Certain common elements arise from the case law of the European Court of Human Rights. In each instance local law must be tested against the regional and international law set forth in the Convention. Indeed, the fundamental nature of this European law of human rights was unmistakably pronounced in the *Lawless* and *DeBecker* verdicts. Accordingly, the writer anticipates a similar approach in the five pending cases. Though no single standard of unreasonable detention is to be found in Western Europe, one will be supplied by the "higher law." Likewise, a similar conclusion will be reached in the *Linguistic Cases*, for the defense of "reserved domain" must also be determined in terms of international and not municipal law. [145] The writer submits that if the Court rules against Belgium, it must, necessarily, hold against Austria and Germany in the financial disputes. Of course, cases can always be distinguished, but realistically the common issue of state competence (and sovereignty) is very similar in that the consistency (or violation) of municipal legislation with the Convention must be determined. In fact, the writer is hard put to decide whether education or criminal procedure is the most fundamental right to be found within the reserved domain of a sovereign state. Hopefully, the Court—as the final arbiter—will provide a definite answer, since the writer is unable to detect a hierarchy of preferred human rights and fundamental freedoms within articles 5 and 6 as opposed to article 8 in conjunction with article 2 of the Protocol. Further, article 14 does not set forth any priority but, rather, prohibits discrimination in the enjoyment of other guarantees. Thus, a certain

[145] Nottebohm Case (Liechtenstein v. Guatemala), [1955] I.C.J. 4.

consistency in the Court's developing line of jurisprudence will undoubtedly result because of the action taken by President Cassin and the other justices to avoid a *South West Africa*-type verdict.

One problem must still be resolved by the Court, but this time without any prior help from the Commission, namely compensation to injured parties. Whereas article 5(5) can be used to provide adequate compensation to those illegally detained, article 13 requires that national administrative or judicial remedies be made available to persons whose rights have been violated. "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." In the event that such compensation is not forthcoming the Court and the Committee of Ministers have jurisdiction to award proper damages pursuant to article 32(2)-(4).[146]

One main theme has been stressed in this paper; specifically the international legal development—as opposed to a strictly regional orientation such as that professed by the EEC—on the part of the Council. Moreoever, the view has been advanced that the Council is not only applying but at the same time it is developing new international-law precedent. In effect, the European Court fits into the global order; consequently, a conscious effort is being made deliberately to avoid compartmentalizing an International Law of Human Rights into competing regional legal systems with radically different criteria. There is no desire on the part of the Strasbourg group to develop a unique legal order similar to the EEC; conversely, the hope is to advance existing international law. While a separate study would be required to show the impact of the Council on United Nations Conventions, it is possible to note briefly the guidance given by the Council to the Human Rights Covenants of the Economic

---

[146] (2) In the affirmative case the Committee of Ministers shall prescribe a period during which the Contracting Party concerned must take the measures required by the decision of the Committee of Ministers.

(3) If the High Contracting Party concerned has not taken satisfactory measures within the prescribed period, the Committee of Ministers shall decide by the majority provided for in paragraph (1) above what effect shall be given to its original decision and shall publish the Report.

(4) The High Contracting Parties undertake to regard as binding on them any decision which the Committee of Ministers may take in application of the preceding paragraphs.

Gormley, *The Status of the Awards of International Tribunals: Possible Avoidance Versus Legal Enforcement*, 10 How. L.J. 33, at 83-85 (1964). As concerns the counterpart employment of the Convention as part of the national law of member states *see* Golsong, *The European Convention on Human Rights Before Domestic Courts*, 38 Brit. Y.B. Int'l. 445 (1962), and the collected cases therein; Procedural Status 78-79; Golsong, *The European Convention for the Protection of Human Rights and Fundamental Freedoms in a German Court*, 34 Brit. Y.B. Int'l. L. 317 (1958). *See also*, Comte, *The Application of the European Convention on Human Rights in Municipal Law*, 4 J. Int'l Comm'n of Jurists 94 (1962); Liebscher, *Austria and the European Convention for the Protection of Human Rights and Fundamental Freedoms*, *id.* at 282 and the numerous sources cited therein.

and Social Council now open for signature.[147] Previously, the writer has taken the position that the ECOSOC Covenants represent the *greatest international human rights treaties ever devised by mankind*, whereas the European Convention is the greatest regional convention in world history.[148]

Despite the desire of the eighteen European states to avoid regionalism, one basic question must be asked in connection with any examination of the ECOSOC Covenants: What will be the position of the European Convention, and, indeed, the European case law of Human Rights,[149] if the interpretations handed down at Strasbourg differ drastically from those at New York and The Hague? Notwithstanding the desire of the Council to represent one phase of the world community, and rightly so, the inescapable fact remains, the Council—with its human rights conventions, plus over fifty-five European Conventions, and three conflict-resolving organs, as stressed in the opening portion of this study—is so far advanced beyond the United Nations, and specialized agencies such as the International Labour Organization, that it simply cannot become a mere subdivision of the global scheme. Henceforth, it is more accurate to conceive of the Council as a *regional counterpart to the United Nations*, which is actually leading the way—and establishing needed precedent—for the world organization. The writer has previously taken the position that greater success can be achieved at the regional level by a smaller number of states seeking more specialized objectives.[150] Homogeneous groups such as the Council and the EEC have been much more productive than heterogeneous institutions, *e.g.*, the Organization for Economic Cooperation and Development, the OAS, and the United Nations. The reason for such superiority can be found in the common political and legal traditions of member states.[151] Accordingly, a qualified answer must be given, for the reason that some differences do exist—and will continue to exist—between the legal systems of the Council and United Nations. Taking the broader view, however, they are fully compatible. Both institutions are seeking the ultimate goal: protection of human rights under the "rule of law."

Nevertheless, the most important factor in the above generalization is that the European Commission and Court are creating international-law precedents that will be used to interpret the ECOSOC Covenants. Indeed,

---

[147] See notes 114-23 *infra*.

[148] Gormley, note 31 *supra*.

[149] C. MORRISSON, note 25 *supra*, and Gormley, note 31 *supra*.

[150] King & Gormley, note 30 *supra*; PROCEDURAL STATUS 6-8, 186-89.

[151] Professor G. Ténékidès concludes that only a small group of homogeneous states, sharing common ideals, can work together effectively within any organizational structure. *Regimes Internes et Organisation Internationale*, 110 REC. C. ACAD. D. INT. 271 (1963). *See also* P. POTTER, CONTEMPORARY PROBLEMS OF INTERNATIONAL ORGANIZATIONS 291 (1965).

the writer has detected identical language between the Economic and Political Covenants of ECOSOC [152] and the European Convention. Although a full comparison of the Convention and the Covenants would be helpful, these conclusions will be limited to those articles at issue in the five pending cases, in order to prove that the five disputes discussed in the present study are of tremendous importance not only to European states but to all signatories later ratifying the International Covenants.

In connection, then, with articles 8 and 14 in conjunction with article 2 of the Protocol, article 2(2) of the International Covenant on Economic, Social and Cultural Rights may be noted. "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, *language, religion, political or other opinion, national or social origin*, property, birth or other status." Identical word-choice is found in article 26, Political Covenants : "All persons are equal before the law and are entitled without any discrimination to equal protection of the law . . ." without any discrimination based on "race, colour, sex, *language, religion, political or other opinion, national or social origin* . . . ."

In addition to prohibiting discrimination based on race and language, which text is almost identical to article 14 of the European Convention, article 13(1), Economic Covenant, spells out in great detail : "The States Parties to the present Covenant recognize the right of everyone to education." Aside from assuring the availability of education at all levels, the rights of parents are guaranteed in paragraph 3, though instruction in a particular language is not mentioned :

> The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians, to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

Though much more detailed than the Strasbourg text, the language of any instruction must depend on article 2(2); yet the exact meaning of this text can only be determined after direct application to concrete disputes. Still, it is valid to conclude that the verdict in the *Linguistic Cases* will constitute extremely valuable precedent for the reason that much of the European Convention presently under examination has been incorporated into the Covenants. [153]

---

[152] *Compare* EUR. CONV. OF HUMAN RIGHTS art. 15 *with* Political Covenant art. 4. Likewise, the text of these covenants can be traced to ILO conventions.

[153] Gormley, note 31 *supra*. *See also* the comments of Dr. A. Robertson, Work Paper for the Working Session on Human Rights, Geneva World Conference on World Peace Through Law, July 9, 1967, to be published in the PROCEEDINGS of the Conference (1968).

In one regard, the ECOSOC Covenants are superior as international documents; the right of self-determination is set forth in both treaties, a norm that could include language usage. Obviously, there was no need to apply similar type provisions to European states. But article 1(1) of both the Political and Economic Covenants hold: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, *social and cultural development.*" It seems highly likely that education in their mother tongue might be included within article 13, and constitute a right inherent in all peoples. However, even though an inherent right, could minorities within a political unit require the central government to accord recognition to preferred language usage? Obviously, a negative answer would result from application of traditional international law. But what degree of change has been affected?

An even sharper comparison can be made between articles 5 and 6 of the European Convention with article 9 of the International Covenant on Civil and Political Rights. The international standard provides, in a text identical to article 5(1) of the European Convention: "Everyone has the right to liberty and security of the person." Paragraph 2 demands that persons be informed of the charges against them at the time of arrest, and paragraph 3 contains identical language of "within a reasonable time." The full text of paragraph 3 reads like the issues in the detention cases:

> Anyone arrested or detained on a criminal charge 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. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.

Paragraph 4 of article 9 is an exact copy of paragraph 4 of article 5, European Convention, discussed above; whereas article 5 in both treaties—in the same phraseology—provides for "enforceable compensation." Since the ECOSOC Political Covenant has copied the European Convention, the detention cases will affect future international norms, not merely European civil law. Parenthetically, article 14(3) requires that an arrested person, including an alien, "be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him." Thus, the requirement developed by the EEC Court in Luxembourg,[154] examined above, has been incorporated into the international instrument. Likewise, article 6(3)(a) of the European Convention contains an identical text.

---

[154] Note 80 *supra.*

These comparisons could be carried to a greater level of detail; in fact the writer has previously made such an analysis.[155] At present we need only await the European Court's pronouncement.

In one regard, the ECOSOC system is *embryonic* in comparison with the Strasbourg institution. The United Nations lacks implementing administrative and judicial organs. In other words, there is only the possibility of interstate complaints among signatories, pursuant to the Political Covenant (but not the Economic Covenant), articles 41 and 42. In short, the main enforcement devices, copied from prior ILO practice, consist of a series of reports to the ECOSOC Committee of Human Rights and the United Nations' General Assembly, as set forth in Part IV, articles 16 through 42, Economic Covenant. Pursuant to article 1 of the Optional Protocol to the International Covenant on Civil and Political Rights individuals may send petitions to the Committee; however, no action can be taken by injured persons under any of the three documents. Private persons can only complain; *they lack the necessary right of action available to Europeans.* Consequently, the world community badly needs the Council to set precedent by developing effective international machinery. The writer believes that the nearly 120-member United Nations is incapable of even attempting to negotiate the required global legal structure as can be seen from the ineffective International Court of Justice.

In one regard, the Council and ECOSOC (plus the ILO) seek similar goals, *i.e.*, the use of publicity and world public opinion in order to secure desired compliance with supranational norms and reformation of inconsistent municipal legislation. Indeed, the writer is a strong advocate of the employment of "the world sense of shame"[156] to borrow the words

---

[155] Gormley, note 31 *supra*, and A. Robertson, note 153 *supra*.

[156] Saba, *The Quasi-Legislative Activities of Specialized Agencies*, 111 REC. C. ACAD. D. INT. 604 (1964). *Accord*, L. KUTNER, WORLD HABEAS CORPUS 133-41 (1962).

The writer is a strong advocate of the use of world public opinion to enforce the moral sanction of international law, and he has advocated that reporting and publicity devices developed by ILO for the implementation of its 125 labour conventions be adopted by the United Nations at the global level; *see The Use of Public Opinion and Reporting Devices to Achieve World Law: Adoption of ILO Practices by the U.N.*, ALBANY L. REV. (to be published Spring 1968). *Accord*, Gormley, *The Emerging Protection of Human Rights by the International Labour Organization*, 30 ALBANY L. REV. 13 (1966), and the sources cited therein. *See also* Golsong, *Implementation of Human Rights by Special Measures of a Non-Judicial Nature, Implementation of International Protection of Human Rights*, 110 REC. C. ACAD. D. INT. 22-50 (1963); Dumas, *Sanctions of International Arbitration*, 5 AM. J. INT'L L. 934 (1911). This article presents the main theses contained in his book LES SANCTIONS DE L'ARBITRATION INTERNATIONAL (1905). *See* especially Schachter, *Enforcement of International Judicial and Arbitral Decisions*, 54 AM. J. INT'L L. 1 (1960), C. JENKS, THE PROTECTION OF TRADE UNION FREEDOM 142-53 (1957); A. MCNAIR, THE INTERNATIONAL LABOUR CONVENTIONS: THE EXPANSION OF INTERNATIONAL LAW (1962); C. ALEXANDROWICZ, WORLD ECONOMIC AGENCIES: LAW AND PRACTICE (1962); C. JENKS, METHODS OF SECURING COMPLIANCE WITH INTERNATIONAL DECISIONS AND AWARDS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 663-726 (1964); and M. MCDOUGAL & F. FELICIANO, COMMUNITY SANCTIONING PROCESS AND MINIMUM ORDER, LAW AND MINIMUM WORLD PUBLIC ORDER 261-383 (1961).

of Dr. H. Saba, Legal Advisor to UNESCO. The use of reporting and publicity devices—developed by the ILO and Council of Europe—will help achieve a World Law of Human Rights as a phase of the World Rule of Law. Prior experience of the Council shows the potential of such devices. [157] For example, publicity resulting from the five or six cases discussed in this study may result in voluntary changes in the laws of Belgium, Austria and Germany. The subsequent political implications of these judicial actions should not be overlooked. Even if the states are victorious in all five or six judgments, modification of domestic law seems highly possible, for humanitarian considerations and respect for minority groups will predominate in the minds of legislators, guided more by notions of justice and internal tranquility than by strict international treaty law.

Within this context, the present 1968 International Year for Human Rights, promulgated by resolution of the United Nations' General Assembly, celebrating the twentieth anniversary of the Universal Declaration of Human Rights, [158] is a massive campaign of world-wide publicity. [159] In brief, the prior success of the Council has created the legal precedent upon which future United Nations' programs are being based; [160] furthermore, the Council's contribution to international law [161] will increase sharply

---

[157] As the result of the *DeBecker* case, Belgium changed its internal law thereby rendering the original petition moot. An even stronger illustration of the use of publicity can be seen in Austria's modification of its criminal procedure as the result of petitions having been declared admissible by the Commission. Pataki v. Austria, [1960] EUR. CONV. ON HUMAN RIGHTS Y.B. 356. Dunshirn v. Austria, [1963] EUR. CONV. ON HUMAN RIGHTS Y.B. 714. *See* decision of the Committee of Ministers, Res. (63) DH 2, *id.* at 736. The Austrian Federal Law of 27 March 1963 is cited *Id.* at 738.

[158] Universal Declaration of Human Rights, 3 U.N. GAOR 71, U.N. Doc. A/810 (1948), 43 AM. J. INT'L L. Supp. 127 (1949).

[159] G.A. Res. 2217 (XXI) [on Report of the Third Committee (A/6619)]. Agenda Item No. 63 1967). *See* earlier Resolutions, G.A. Res. 1961 (XVIII) of December 12. 1963; and G. A. Res. 2081 (XX) of December 20, 1965 on the International Year for Human Rights. *See also* International Year for Human Rights: Note by the Secretary-General, 22 U.N. GAOR A/6687, Agenda Item No. 59 of the Provisional Agenda (1967); and International Year for Human Rights: Report of the Preparatory Committee for the International Conference on Human Rights, 22 U.N. GAOR A/6670 (1967).

Human Rights Year in the United States has been promulgated by President Johnson by means of an executive order. United States of America [Program], International Year for Human Rights, Report of the Secretary-General, Addendum, 22 U.N. GAOR A/6866/Add. 1, Agenda Item 58, at 9-10 (1967). *See* discussion in Gormley, *Renewed American Dedication To International Human Rights Protection: Part I, 1968, The United Nations "International Year for Human Rights,"* TULSA LAW. (to be published Spring 1968). *But cf.* Lillich, *Forcible Self-Help By States to Protect Human Rights*, 53 IOWA L. REV. 325 (1967), *citing* INT'L L. ASS'N, ADVANCE REPORT BY THE AMERICAN BRANCH OF THE RESOLUTIONS ADOPTED AT THE FIFTY-SECOND CONFERENCE 12 (1966). The emphasis in human rights protection must be shifted to implementation. *Id.* 325 n.6 and the sources cited therein.

[160] For cooperating efforts by the Council of Europe see REPORT OF THE COUNCIL OF EUROPE TO THE U.N. INTERNATIONAL CONFERENCE ON HUMAN RIGHTS, Council Eur. Doc. H. (67) 8 1968.

[161] As concerns the Council's role in the global observance, the Secretary-General maintains:

> The Council of Europe is proud to record that Europe has given effect to the Universal Declaration on a regional basis by the conclusion in 1950 of the European Convention on Human Rights and Fundamental Freedoms. This Convention, together with a Protocol concluded in 1952, transformed into legal obligations fifteen of the principles proclaimed by the United Nations, thereby ensuring the fundamental civil and political human rights and freedoms. A European Commission and a European Court

during the final third of this century as its juridical procedures and structures become more sophisticated.

—— O ——

ADDENDUM

Since completion of the above text, the Court has handed down final judgments in two of the detention cases, namely *Wemhoff v. Germany*; [162] and *Neumeister v. Austria.* [163] The writer was present in the courtroom in Strasbourg on June 27, 1968, at which time Judge Rolin gave the public reading of the two judgments. [164]

Briefly, in *Wemhoff* the Court rules that the Federal Republic of Germany was not in derogation of either articles 5 or 6. As such, the question of compensation was deemed moot. The single dissenting opinion of Judge Zekia—strongly favored by the writer—emphasized the common-law standard of illegal and excessive detention, in relation to trial within a reasonable time. [165] In his very able opinion, Judge Zekia stresses the prejudicial effects of a prolonged detention lasting three years and five months upon an accused's ability to prepare an effective defense.

In *Neumeister*, the Court held that pursuant to article 6 there had been no violation of the Convention of Human Rights, for the reason that the complicated nature of Neumeister's financial transactions necessitated several years of careful investigation by Austrian authorities. Thus, as concerns article 6 the two decisions are—tragically—complementary. Specifically, by a five to two vote the Court held there had been no breach of article 6(1) insofar as the right of an individual to be tried "within a reasonable time" by a tribunal which shall determine "any criminal charge against him" was concerned.

---

of Human Rights have been set up for the effective protection of those rights and freedoms . . . .

The twentieth anniversary of the Universal Declaration of Human Rights in 1968 coincides with the fifteenth anniversary of the entry into force of the European Convention.

It is therefore only natural that the Council of Europe should make its own contribution to International Human Rights Year. Our countries, devoted to our traditions of political freedom and liberty, cannot but wholeheartedly support the world wide action undertaken by the United Nations. *Human Rights know no national frontiers.*

Council of Europe Press Release C. (67) 52, 28.12.1967 (Emphasis added). *Accord*, Wise, *Steps Towards The Advancement of Human Rights*, 18 W. RES. L. REV. 1548, 1566-71 (1967).

[162] European Court of Human Rights, D. 25.225, 27 June 1968.

[163] *Id.* D. 25.247, 06. 3/30, June 27, 1968.

[164] *Cf.* notes 2, 6-7 *supra.*

[165] *Supra* note 162, at 38-44 (dissenting opinion).

By a unanimous vote, it was held that Austrian authorities had not contravened article 5(4) nor 6(1), as regards the procedure followed in the examination of Neumeister in his series of actions seeking provisional release pending trial.

In the first case in which a High Contracting Party has been condemned as derogating from its obligations arising from the Convention, the Court held—*unanimously*—that Austria is presently violating article 5(3) under which everyone placed in detention is "entitled to trial within a reasonable time or *to release pending trial.*" To date, Neumeister is still held in custody, and it appears the Austrian authorities will not be prepared to bring his case to trial in the near future. Parenthetically, the Court is not empowered to direct the Austrian Government to take any specific action, for such executive function is within the competence of the Committee of Ministers, pursuant to article 54 of the Convention, implementing articles 52 and 53.

Aside from the condemnation of Austria as concerns article 5(3), in which verdict the *ad hoc* judge from Austria concurred, the writer is extremely disappointed with both decisions, for the reason the European standard of criminal procedure as set forth in the Convention—and which as a treaty is superior to the municipal legislation of the eighteen Member States—has not been enunciated or clarified by case law. Thus, no European norm has been clearly pronounced. Admittedly, the Court of Human Rights renders judgments *in concreto* and not *in abstracto,* as previously stressed; nonetheless, the writer feels the court has a law-making function. But in these two decisions the "common European standard" existing within the eighteen Member States or their *Volksgeist* has not been clarified. Indeed, international law (or European law) has not been created. It can only be hoped, therefore, that the remaining cases, as discussed in this paper, will provide the degree of insight required by European and international law, as stressed above.

Moreover, in *Wemhoff* the Court lost sight of practical reality, largely because of the initial failure to first clarify the European standard of "entitled to trial within a reasonable time." Whereas the majority opinion relies on the fact the three years and five months spent in custody were deducted from the final six years and six months sentence, only the single dissenting justice comes to grips with the fundamental issue: *the rights guaranteed on accused pending trial,* as codified in the Convention of Human rights, indeed in turn affect the ability of an accused person to effectively prepare his defense. Further, Wemhoff suffered serious financial injury during his long period of detention. Specifically, the procedures of investigation in both Austria and Germany tend, in large measure, to force an accused to cooperate with prosecuting authorities, thereby defeating article 6(2) : "Everyone charged with a criminal offence shall be presumed

innocent until proved guilty according to law." [166]

Judge Zekia concluded

> [I]n a democratic society the right to liberty is one of the valuable attributes cherished by the people living therein. One has to strike a fair and just balance between the interest of the state and the right to liberty of the subject.
>
> If a man, presumably innocent, is kept in custody for years, this is bound to ruin him. It is true in the case of Wemhoff that the trial ended with a conviction, but it might have ended with an acquittal as well. By detaining a man too long before he is tried you throw him into despair and the will and desire of a despairing man to defend his innocence is materially impaired. [167]

Realistically, part of the difficulty arises from the fact that the Council of Europe incorporates three and possibly four distinct legal systems, *i.e.*, common law, civil law, Scandinavian law, to a degree even Islamic law, as remnants remain in the legal orders of Turkey and Cyprus.

Admittedly, one looking at the Commission of Human Rights and the Court from an Anglo-Saxon vantage point, necessarily tends to be disturbed by the "inequality of arms" between the individual and the sovereign state. On the positive side, the future position of private individuals has been improved by the *Neumeister* judgment.

---

[166] Wemhoff v. Germany, *id.* at 43 (dissenting opinion).
[167] *Id.* at 43-44.