THE EUROPEAN COURT OF HUMAN RIGHTS.

I.

On the 4th November 1950, the fifteen states members of the Council of Europe signed at Rome a Convention for the Protection of Human Rights and Fundamental Freedoms.[1] The Convention will come into force when ten ratifications have been deposited. Only one ratification has been deposited to date.[2] It includes among methods of implementation recourse to a European Court of Human Rights, though of a limited and optional nature. The provisions of this Convention so far as they relate to the Court will be discussed below, in the light of the various proposals for the international judicial protection of human rights which have been debated and written about in the past five years. The main features of the system of enforcement in the Convention can be summarised as follows:—

Primary responsibility for the implementation of the fundamental rights guaranteed by the Convention in its first eighteen articles is vested in a European Commission of Human Rights, the members of which are to be elected for six years by the Committee of Ministers (Articles 20-22). Any state signatory of the Convention may refer to this Commission any alleged breach by another signatory of the provisions of the Convention (Article 24). The much more important right of individuals, groups of individuals, and non-governmental organisations to petition the Commission can only be exercised when the state against which the complaint is lodged has deposited a declaration recognising the competence of the Commission to receive such petitions. Moreover, the procedure for receiving individual petitions can only start when six such declarations shall have been deposited (Article 25). Safeguards are laid down to ensure the exhaustion of local remedies, and for the elimination of anonymous or "manifestly ill-founded" petitions (Articles 26 and 27). The primary function of the Commission is to effect a friendly settlement by conciliation. If it fails to achieve such a settlement, it transmits a report to the Committee of Ministers and to the states concerned, but this report may not yet be published. It is only after the Commission has failed in its efforts at conciliation that the function of the European Court of Human Rights can begin (Article 47). No individual can bring his case before the Court. Access to it is limited to the Commission and either to the state whose national is alleged

[1] For the text see *Command Paper* 8130 of 1951.
[2] July 1951 (Great Britain).

to be a victim or to the state which referred the case to the Commission, or to the state against which the complaint has been lodged. The jurisdiction of the Court can only arise where the state or states concerned have expressed their consent to submit to this jurisdiction (Article 48). This consent may be expressed either *ad hoc,* or in advance for "all matters concerning the interpretation and application" of the Convention, in a form reminiscent of the Declaration under the so-called Optional Clause of the Permanent Court of International Justice and of the similar Declaration provided for in the Statute of the International Court of Justice (Article 46). The Court can only begin to function when eight such declarations have been deposited with the Secretary-General of the Council of Europe. No such declaration has been made to date.[3] Nor is the setting up of the Court essential to the implementation of the provisions of the Convention, when once the Commission is functioning under Article 25. If, after the Commission has failed in its efforts at conciliation, the case is not referred to the Court within three months, the Committee of Ministers proceeds to decide by a two-thirds majority whether there has been a violation of the Convention. If it so decides, it prescribes the measures to be taken by the offending state and, if they are not carried out, publishes the Commission's report. The signatory states agree to regard the decision of the Committee of Ministers as binding upon them. Recourse to the Court is thus envisaged as optional, and strictly based on the consent of all states affected. The normal, and compulsory, procedure will be attempt at reconciliation by the Commission followed, if need be, by political action in the Committee of Ministers.

II.

Postponing for the moment analysis of these provisions of the Convention relating to the European Court of Human Rights, it will be observed that the Court's jurisdiction is subsidiary in that it is dependent on a previous failure by a Commission; that it is limited to states; and that it is based strictly on consent, whether given for the particular case, or in advance. Moreover, as the statement of the British Foreign Secretary of 13th November 1950 shows, it is possible for a state to sign the Convention, while reserving the

[3] July 1951. On 13th November 1950 the British Foreign Secretary stated that Britain had not undertaken to sign a declaration under article 46 of the Convention and added: "We have reserved our position, and we think it very important that we should do so." Hansard, *Parliamentary Debates* (Commons), Vol. 480, 1503-1504.

question whether it will ever accept the jurisdiction of the Court at all. This modest role of an international judiciary in implementing the protection of Human Rights is thus a very long way from the more radical proposals which have been advocated, mainly by Australia, for the past five years. Australia first proposed setting up a European Court of Human Rights at the Paris Peace Conference in 1946 as a method for the implementation of human rights obligations imposed under the treaties with the former satellite states of Germany. Since in 1946 the discussion of the implementation of the human rights provisions of the United Nations Charter had not yet started, it was perhaps not unnatural that this proposal should have been shelved at the Peace Conference, and left for future discussion on a world scale. But the Peace Conference also rejected in principle the proposal for the establishment of such a court on the grounds that "as long as no fundamental understanding has been arrived at on the principles involved, it is impossible in the present state of international law to compel a state to accept the decisions of an international body in this matter."[4] It is somewhat difficult to follow the reasoning of this, or to accept the view that an international legal body is not a suitable body to decide whether or not obligations undertaken by the terms of a treaty have been complied with. The Permanent Court of International Justice, for example, found no difficulty in interpreting the provisions of the obligations undertaken by certain states after the First World War for the protection of minorities, nor did the states concerned suffer any injustice from having to accept the decisions of the Court.

Since 1946 the proposal for the setting up of an International Court of Human Rights has been discussed, without achieving any marked progress, on several occasions in the United Nations Commission on Human Rights—the last such occasion being the Seventh Session of the Commission, in May 1951.[5] In the present impasse which has been reached on the question of implementing the protection of human rights it is obvious that a proposal for the setting up of such an international court of human rights has little chance of

[4] See United States Government Printing Office, *Paris Peace Conference 1946, Selected Documents*, 1280-1281.

[5] This session decided to defer the consideration of the question of setting up an International Court of Human Rights: See *United Nations Document* E/CN 4/640 of 24th May 1951, 55. The Secretary-General of the United Nations prepared for the session a summary of the various occasions upon which the question of the Court of Human Rights has been debated in the Human Rights Commission. This useful document provides a short guide to the numerous United Nations Documents which deal with the subject—see *United Nations Document* E/CN 4/521 of 2nd March 1951.

general acceptance in any foreseeable future. The Australian proposal has won very few supporters. But the modest, restricted and optional form in which the idea of a Court of Human Rights has been finally put into practice by the states of the Council of Europe shows that the objection to a court as a method of implementing the protection of human rights is not confined to the states within the Soviet bloc.

The proposals advocated by Australia in the past four years before the United Nations have varied in their form, but have all gone far beyond the European scheme. The essential distinction lies in the fact that whereas in the European Convention the Court occupies a subsidiary function, the proposals put forward by Australia envisaged an International Court as the primary organ for the implementation of human rights. Only two main schemes can be considered here. The first was made at the First Session of the Commission on Human Rights in February 1947.[6] This proposed that the International Court of Human Rights "shall have jurisdiction to hear and determine all disputes concerning the rights of citizenship and enjoyment of human rights and fundamental freedoms provided for in the Declaration of Human Rights." Its jurisdiction was to be "both original and appellate and shall extend to questions of interpretation arising in such disputes as are brought before administrative tribunals or administrative authorities" (Clause 2). It goes on: "The appellate jurisdiction shall extend to appeals from all decisions of the Courts of the states bound by the obligations contained in the Declaration of Human Rights in which any question arises as to the rights of citizenship or the enjoyment of human rights or fundamental freedoms" (Clause 3). By Clause 4 "the Court shall be open to any person or group of persons. It shall also be open to any of the States acceptors of the Declaration." Since original as well as appellate jurisdiction was to be conferred on the Court, it would seem that cases were envisaged where individuals could resort to the Court without having first exhausted all local remedies. Further provisions included an obligation by signatory states to comply with the judgments of the Court (Clause 5) and to provide for enforcement in their municipal law of such judgments by the individuals affected (Clause 6). This proposal, which would have had the effect of creating an international law of human rights the enforcement of which would be taken outside the sphere of municipal law, won little support, and it was left for "exploration" to the group responsible for drafting the

[6] *U.N. Document* E/CN 4/15.

implementation provisions of the Covenant of Human Rights then under discussion.[7] It is notable, however, that the draft bills put forward by both Britain and the United States at this session of the Human Rights Commission contained the proposal giving to a state against which an allegation of violation of human rights had been made the right to request the General Assembly to obtain an advisory opinion of the International Court of Justice on the question in a form of which, in the words of Professor Lauterpacht, "the innovation consists not in the right to request the General Assembly to obtain an advisory opinion, but in the obligation accepted by the signatories of the Bill to support the request."[8] The effect would be that, in settlement of disputes on human rights by the Human Rights Commission of the United Nations, a continuity of legal authority and opinion would in some measure be ensured.

A somewhat modified proposal was made by Australia at the Fifth Session of the Commission on Human Rights.[9] This proposal envisaged implementation of human rights no longer as directly by an International Court, administering international law, to the exclusion of municipal courts, but as an important adjunct to the working of the Human Rights Commission in its dealing with complaints. The proposal goes far beyond the provisions of the European Convention. Although the Court is envisaged as existing parallel to the Human Rights Commission, there is nothing in its Draft Statute, which formed part of the proposals, to suggest that its jurisdiction should be limited to cases referred to it by the Commission, or to cases where the Commission had failed to achieve peaceful settlement. By Article 17 of the Draft Statute states, individuals, groups of individuals, and national or international associations may be parties in cases before the Court. By Article 18 "the Court shall be open to the states or nationals of states parties to the present Statute." Articles 20 and 29 regulate the relations between the Court and the Commission. Thus, the Court may refer a dispute before it to the Commission for investigation and report and may delegate to the Commission such powers as may be necessary to enable the Commission to reach an amicable settlement (Article 20). The Commission, in turn, is empowered to request the Court's advisory opinion (Article 29). It would thus appear to have been the intention that when once a matter had come before the Court, whether at the

[7] *U.N. Document* E/CN 4/SR/16, p. 16.
[8] Academie de Droit International, *Recueil des Cours*, 1947, Vol. 1, 83.
[9] *Report of the Fifth Session of the Commission on Human Rights, U.N. Document* E/1371, 36-42.

request of an individual or of a state, the Commission could only function at the request of and with the authority of the Court. But there was no specific provision to this effect. The proposals also suffered from another serious defect, since the provisions of Article 19 of the Draft Statute seemed to be in direct contradiction to the provisions of Articles 17 and 18 already quoted. Article 19 reads: "1. The jurisdiction of the Court shall comprise the following:

(i) All disputes arising out of the interpretation and application of the Covenant on Human Rights referred to it by any party to such Covenant;

(ii) All disputes arising out of the interpretation and application of articles concerning human rights in any treaty or convention referred to it by any party to such treaty or convention;

(iii) All matters concerning the observance of human rights by the parties to any such treaty or convention referred to it by the Commission on Human Rights."

This definition of the Court's jurisdiction seems to leave no room for the individual, to whom by Articles 17 and 18 the Court is expressly stated to be open. A notable feature of this proposed Court was that, in contrast to the model established by the Permanent Court of International Justice, no concession was to be made to the claims of nationality. Its six judges (Article 3), of whom a quorum could be formed by three (Article 14), could in no way represent the many legal systems which would come into conflict in the course of evolution of a world law of human rights. Nor was there any provision made in the Draft Statute for any *ad hoc* judges of the nationality of the contestant parties. While disregard for nationality in the search for complete judicial independence is a praiseworthy aim, it is nonetheless true that in a subject such as the protection of human rights, where so many different national legal concepts are involved, such disregard of the claims of nationality is open to question.

III.

The system of the implementation of human rights by parallel political and judicial bodies, a Commission and a Court, as represented by the later Australian proposals, is very close to the views of Professor Brunet.[10] While he envisages enforcement by a commission with power to hear and investigate individual petitions, he

10 Rene Brunet, *La garantie internationale des droits de l'homme d'apres la charte de San Francisco*, Geneva, 1947.

concludes that no effective protection is possible without according to the individuals, as the bearers of fundamental human rights, recourse to an international tribunal.[11] To him the two methods are distinct and parallel and do not exclude one another. To petition the Commission "c'est demander l'appui d'un organisme qui examinera le cas en droit et en equite, agira par persuasion, cherchera un arrangement avec le gouvernement de l'etat considere."[12] This method is therefore particularly appropriate in cases where violation of social and economic rights is alleged, and Professor Brunet departs somewhat from his view that the two methods, petition and judicial trial, are distinct and parallel by asserting that in cases involving such rights the petition should be the sole method available.[13] To obviate possible conflict between Commission and Court he considers it sufficient if the Commission has the right to request an advisory opinion of the Court on legal questions.[14] In one respect Professor Brunet's scheme differs from both the Australian schemes. In order to prevent a great flood of applications by individuals he considers it essential that right of access to the international court should be restricted to "cas de denis de justice commis par les tribunaux de l'etat defendeur."[15]

So far we have been considering the Court of Human Rights from two aspects: Either as an exclusive or as a parallel organ of implementation. Professor Lauterpacht has in the past been the principal advocate of the view that the function exercised by an international court in the implementation of human rights should be residuary only. This view he justified at the Conference of the International Law Association in 1948 on the grounds "(a) that the object of most petitions can be better met by a procedure which is not purely judicial, and (b) that a court is not in a position to cope with a vast number of petitions."[16] Even more formidable arguments against an international court had been advanced by him in his *An International Bill of the Rights of Man,* in 1945.[17] The attempt to introduce a world law of the rights of man is premature. On the other hand an international court cannot be entrusted with administering municipal systems dealing with human rights, even with such safeguards as ensuring the presence upon the court of judges

11 *Op. cit.*, 313.
12 *Ibid.*, 317.
13 *Ibid.*, 318.
14 *Ibid.*, 320.
15 *Ibid.*, 325, 335-336.
16 International Law Association, *Report of the Forty-third Conference* (Brussels, 1948), 122.
17 At 173-177.

of the nationality of the states affected; nor even by setting up in each state signatory of the Bill a division of the International Court consisting in its majority of nationals of that state. Moreover, quite apart from such difficulties, and the technical difficulty of the probability of a flood of individual applications to the Court, the system of international judicial review is open to criticism in the light of experience of this system in the United States. It is very much less likely to be acceptable in the international sphere, where there exists so much wider a divergence of legal and social systems than there is between the states of the United States. In accordance with this view Professor Lauterpacht's proposals to the International Law Association in 1948 suggested that the primary responsibility for the investigation of petitions alleging violations of human rights protected by the International Bill should fall to a Human Rights Council, responsible to the General Assembly. But this Council should have the power at any stage to ask the International Court of Justice for an advisory opinion on any legal issue of interpretation which might arise. Moreover, a state affected by a decision of the Council should have the right of appeal to a special Chamber of Summary Procedure of the Court "on any question of fact on which the finding of the Council is based."[18] Thus, not only would individuals be excluded from the Court, but states would only be able to obtain a ruling of the Court on a question of law should the Council agree to seek an advisory opinion. The residuary view of the Court's jurisdiction can thus be summed up as: Final court of appeal on fact, advisory on law. Since 1948, Professor Lauterpacht has considerably modified his views in favour of a much more extended jurisdiction for an international court of human rights. His most recent proposals would also allow the state whose action is the subject of an investigation to move the Council (i.e., the Commission) to request an advisory opinion from the Court; and would grant a right of appeal to the court on law, as well as on fact, not only to the state affected by a decision of the Council, but with leave of the Council, to individuals as well. This view of the function of an international court of human rights can perhaps be described as "appellate" rather than "residuary".[19]

IV.

It is now time to consider in the light of these earlier debates and discussions what functions the Council of Europe, the first group

18 International Law Association Report, *loc. cit.*, 135-137.
19 See H. Lauterpacht, *International Law and Human Rights* (1950), 381-388.

of states to put implementation of human rights into practice, has given to its proposed Court of Human Rights. The states of Europe proceeded from the very first upon the basis that the Court should exercise its functions only after a Human Rights Commission had examined the petition. In February 1949, before the Council of Europe had come into existence, proposals for the implementation of a Covenant of Human Rights were made by the International Council of the European Movement. This envisaged a European Court with jurisdiction over all cases of alleged infringement of human rights, to which individuals should have access when once local remedies had been exhausted. Domicile of an individual in a signatory state was to be sufficient to give access, without nationality—a provision of the greatest importance for the large number of stateless persons now resident in Europe. However, all petitions were first to be investigated by a Commission, with a view either to effecting conciliation or, should that fail, to referring the case to the Court or authorising the parties to refer it to the Court.[20] Later in 1949 a longer Draft Convention and Draft Statute of the European Court were prepared by the juridical section of the European Movement, in which the leading part was played by Sir Maxwell Fyfe, M. Teitgen, and M. Fernand Dehousse. This scheme was submitted to the Committee of Ministers of the Council of Europe on the 12th July 1949 with the recommendation that the whole question should be placed upon the agenda of the First Session of the Consultative Assembly.[21] Once again signatory states and "any natural or corporate person in the territory of any such state" were given the right to petition a European Human Rights Commission, after the exhaustion of local remedies (Article 7). The Commission, which was itself to be appointed by the European Court of Human Rights (Article 8), investigates petitions and makes recommendations where it finds there has been an infringement of a right guaranteed by the Convention. It may request an advisory opinion from the Court (Article 10). The most important provision of this draft convention was the unrestricted right conferred both upon the Commission and upon signatory states, at any stage after the petition had reached the Commission, to "initiate proceedings before the Court for the purposes of determining any relevant questions of fact or point of law." But individuals were only given the right of access to the court "with the authorisation of the Commission, which shall be entitled to withhold such authorisation without stating any reason" (Article 12). The Court was to be

20 European Movement, *European Court of Human Rights*, 1949.
21 European Movement, *European Convention on Human Rights.*

given power to deal with infringements of the Convention whether they arose out of "executive, legislative or juridical acts"; it could prescribe measures of reparation and demand administrative or penal action by the state concerned, or repeal of an offending municipal law; and the Council of Europe was to take action in the event of a failure to comply with its judgment (Articles 13 and 14). A notable omission from the Draft Convention was any undertaking by the signatory states to comply with the judgments of the Court or the recommendations of the Commission.

When the First Session of the Consultative Assembly opened on 10th August 1949 the question of implementing the declared aims of the Council with regard to human rights was tabled on the agenda. It was debated on 8th and 9th September 1949 and was finally adopted as amended by 64 votes against 1, with 2 absentions.[22] The new draft convention prepared in Committee (the Committee Draft) had undergone several important changes as compared with the draft convention submitted to the Committee of Ministers in July 1949 (the European Movement Draft). The views reached by the Committee are summarised in the following extracts from paragraphs 18 and 19 of the Committee's Report: "After a long debate, the Committee rejected as completely insufficient a proposal granting the victim of a violation of the Convention a simple right of petition whether to the Committee of Ministers or to a Commission of Enquiry . . . After this the Commission decided that the guarantee should include a judicial ruling preceded by a preliminary investigation of the complaint, followed if necessary by an enquiry and then an attempt at conciliation, to be carried out by a Special Commission." However, the opposition in this Committee to the judicial method of enforcement found reflection in the proposals which it made when they are contrasted with the European Movement Draft which has just been discussed. In the first place, individuals were no longer empowered to initiate proceedings before the Court, even at the unfettered discretion of the Commission, as had been proposed in the European Movement Draft. In the Committee's Draft Convention, "if conciliation fails the Commission may decide to transmit the documents in the case to the Court to obtain a legal ruling" (Article 18); while by Article 19, upon such failure of conciliation, "any

22 For the debates see Council of Europe, Consultative Assembly, First Session (10th August-8th September 1949), *Reports* (Strasburg 1949), Part 1, 209-241; Part II, 575-665. For the Report of the Committee which includes the Draft Convention prepared by this Committee see Council of Europe, Consultative Assembly, *Ordinary Session 1949* (mimeographed records), Vol. II, Documents, No. 77.

member state signatory of the Convention may submit the matter to the Court for judicial decision. In that case the Commission will immediately pass the case over to the Court." Hence, even though an individual could not himself take his case to the Court, *any* state signatory could ensure that the matter came before the Court, whether or not either the Commission or the state affected had consented. By Article 28, the Commission, which was to be elected jointly by the Committee of Ministers and the Consultative Assembly, "will function under the general supervision of the Court". Clearly therefore this draft aimed at giving a function of real importance to the Court in the implementation of human rights. A new limitation was however introduced in the Committee Draft as compared with the earlier European Movement Draft; by a proviso to Article 24 the Court was empowered to impugn a judicial decision, as distinct from a legislative or executive act, only where it was given in disregard of those provisions of the United Nations Declaration relating to arbitrary arrest, detention or exile, and fair and public hearing of a criminal charge (Articles 9, 10, and 11 of the Universal Declaration on Human Rights). Like the European Movement Draft, the Committee Draft suffered from the defect that it contained no undertaking by the signatory states to carry out the judgments of the Court. Moreover, in contrast to the earlier draft, it did not confer upon the Court any power to prescribe measures of reparation where the Court found that there had been an infringement of any of the rights guaranteed by the Convention. The Committee Draft merely provides that the findings of the Court "shall be transmitted to the Council of Europe, if necessary for action" (Article 27).

V.

It is clear therefore that the implementation provisions of the Draft Convention prepared by the Committee on Legal and Administrative Questions were far from perfect.[23] In comparison with the draft prepared by the European Movement in July 1949, the status and powers of the Court had been reduced. This whittling down of the powers of the Court was due to the strong opposition among the delegates to the Consultative Assembly to any form of judicial machinery of implementation of human rights and to any form of review by an international court of the decisions of municipal

[23] See H. Lauterpacht, *International Law and Human Rights* (1950), 449-453, for further criticism of the proposals relating to the European Court of Human Rights.

courts.[24] By the time the Convention in final form came up for approval by the Consultative Assembly in 1950, the draft as approved by the Consultative Assembly in September 1949 had been examined by the Committee of Ministers at its meeting of 3rd-5th November 1949. The Ministers did not approve the draft but set up a Committee of Legal Experts to reconsider it. The report of this Committee was further submitted for discussion and amendment to a Committee of Senior Government Officials. The Committee on Legal and Administrative Matters of the Consultative Assembly also submitted new comments. The resulting draft convention which came before the Consultative Assembly in August 1950 was thus a compromise between conflicting points of view.[25] It was adopted unanimously and without abstentions on 25th August 1950.[26] In the Convention as approved and signed this opposition to the Court on principle was further reflected in the provisions which have already been outlined and to which it is now necessary to return.

The Convention for the Protection of Human Rights and Fundamental Freedoms shows a weakening of the authority of the Court compared with earlier drafts in two fundamental respects. In the first place, the provision in the Committee's Draft which would make it possible for any state to bring a case before the Court is gone. Apart from the Commission, the right to bring a case before the Court has been limited to three states; the state whose national is alleged to be a victim, the state against which the complaint has been lodged, and the state which referred the case to the Commission. It may be that this new limitation will not in the end prove of too great importance. The third state which brings a complaint before the Commission in the first instance is in practice most likely to be the

24 See especially the arguments, during debate in the Consultative Assembly of delegates, of Rolin and Ungoed Thomas, Council of Europe, Consultative Assembly, First Session (10th August-8th September 1949), *Reports*, Part II, 623-627 and 629-630. For the amendment proposing the deletion from the Draft Convention of any reference to an European Court tabled in the name of these delegates, see Document No. 84 (mimeographed records, *loc. cit.*). It cannot be said that the arguments advanced against a court on principle were very convincing. M. Rolin argued that to remove from the International Court of Justice a large group of causes would have a detrimental effect on the dignity of that Court (at 625). Mr. Ungoed Thomas (as he then was) feared that the European Court would prove as reactionary in the defence of human rights as had the Supreme Court of the United States in interpreting the "due process of law" provision of the Constitution (at 630).

25 See Consultative Assembly, Ordinary Session 1950 (7th-28th August, 18th-24th November), *Documents*, Part II, No. 6, 517-535.

26 For the debates in the Consultative Assembly see Council of Europe, Consultative Assembly, Second Session (7th-28th August 1950), *Reports*, Part II, 494-543; Part III, 884-919, and 926-948.

state which, when the Commission's efforts at conciliation have failed, will seek to take the cause which it has championed before the European Court. The use in this article (Article 48) of the word "national" is most regrettable ("a High Contracting Party whose national is alleged to be a victim") since it would seem to preclude any case being brought before the European Court where the alleged victim is a stateless person resident in one of the signatory states. No such limitation is implied in the wording of Article 25 which permits the petitioning of the Commission (subject always to the acceptance of its jurisdiction by the state concerned) by "any person . . . claiming to be the victim of a violation by one of the High Contracting Parties" of the rights protected by the Convention. The result would seem to be that a stateless person may petition, but may never in any circumstances have his case determined by the Court.

Even more important is the second respect in which the Convention has pared down the powers of the Court. In the case of both the earlier drafts, signature and ratification of the Convention would of itself have been sufficient both to create the Court and to confer upon it jurisdiction within the limitations laid down by the Convention. As has been seen, this is no longer the case in the Convention as signed. The jurisdiction of the Court must in every case be founded on an express act of consent by the states affected, whether given *ad hoc,* or in advance in a special declaration. Moreover, the Court will not be set up at all until eight, i.e., a majority, of the signatories have made such special declarations. And one important signatory, Britain, has stated that she has reserved the question of whether she will make such a declaration.

However, in two respects the Convention represents an advance upon the provisions of the Committee's draft. The obligation of signatories to "abide by the decision of the Court in any case to which they are parties" now forms part of the Convention (Article 53). Moreover, "the judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution" (Article 54). Thus, while it has been made harder for a case to reach the Court, it has at any rate been made more likely that the judgment delivered will be obeyed. The ultimate sanction of the Council of Europe is that of public opinion. The Committee of Ministers can ensure that the weight of that public opinion is brought fully to bear on any member of the Council of Europe which disregards a judgment of the European Court of Human Rights. The second improvement to be found in the Convention is represented by the important powers conferred upon the Court. It

will be recalled that the Committee Draft discussed in the First Consultative Assembly (as distinct from the earlier draft prepared by the European Movement) conferred no powers on the Court to prescribe reparation for the wrong which it might adjudge had been committed. The Convention has to some extent remedied this in Article 50, which says: "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the present Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party." The Court can thus, at any rate, by its judgment secure satisfaction to the victim, even if it cannot (as the European Movement Draft proposed it should) protect future victims by demanding repeal of an offending law, or suitable administrative action, by a state whose municipal system does not live up to the obligation laid down in the Convention. It may be observed that the draughtsmanship of Article 50 appears to contain a lacuna which it is difficult to believe could have been intentional.[27] On a strict interpretation of its wording the Court would seem to have power to afford just satisfaction to an injured individual where the internal law of the offending state only allows *partial* reparation to be made to that individual; but to have no powers whatever if the internal law of this state allows *no* reparation to the individual concerned. Yet it is obvious that in many instances where a violation of a right guaranteed by the Convention takes place this will be due to the absence of any guarantee of that right in the municipal legal system concerned. Where this occurs, no reparation of any kind will be possible under that municipal law. Does this mean that in such a case the Court is powerless to prescribe a remedy? It is much to be hoped that, if and when the Court is set up, it will before long, under its general powers of determining its own jurisdiction (by Article 49), resolve this question, so that the lacuna, if lacuna it be, can be filled by an amending Convention.

The constitution of the Court follows in the main the traditional pattern of the International Court of Justice. The number of judges is equal to the number of members of the Council of Europe and no two may be nationals of the same state (Article 38). They are elected by the Consultative Assembly for nine years from lists nominated by the Committee of Ministers (Articles 39 and 40). The

27 There is no reference to this point in such debates as have been published.

national principle is preserved to much the same extent as in the World Court. The judge who is a national of any state concerned sits *ex officio* upon the Chamber of seven judges of which the Court hearing each case will be composed; "or if there is none, a person of its choice who shall sit in the capacity of judge." The remaining judges are chosen by lot (Article 43). The judgment of the Court is final, and the Court draws up its own rules and determines its own procedure (Articles 52 and 55). The Court has been given no power to deliver advisory opinions, nor does it exercise any supervision whatever over the Commission, such as was originally proposed in the Committee's Draft. It is clearly intended that the Commission shall function quite independently of the Court, without any legal guidance or interpretation of the Convention. The wisdom of this system is open to doubt. But it is inevitable within a Convention under which it may happen that the Commission will function, possibly for years, before the Court is set up, and by the provisions of which the number of cases referred to the Court will not be large. It is significant that the judges are to be remunerated "for each day of duty" and not by the year (Article 42).

Thus the first Court of Human Rights to be agreed on in principle in any Convention is modest and restricted in its jurisdiction. If the first and second Australian proposals which have been discussed above can be described as envisaging respectively the jurisdiction of a Court of Human Rights as "exclusive" and "parallel", and Professor Lauterpacht's earlier and later proposals as envisaging such jurisdiction as respectively "residuary" and "appellate", the best description for the jurisdiction of the European Court of Human Rights would seem to be "optional and occasional." Nonetheless, the agreement to set up this Court marks an important advance in the development of international law. In spite of the fears and hesitations of the states which have taken the first steps towards its ultimate creation, it may yet prove an important influence and model for the protection of fundamental rights and liberties.

L. S. SCHAPIRO.*

* *LL.B.; of Gray's Inn, Barrister-at-Law; Special Lecturer in International Law, London School of Economics.*