THE EUROPEAN CONVENTION ON HUMAN RIGHTS:

A USEFUL COMPLEMENT TO THE GENEVA CONVENTIONS

by K. Vasak

Although by the very nature of its mission the Red Cross is concerned primarily with man's suffering, its efforts to provide the utmost possible protection for the " victim " dovetail with the vast present-day movement for the international defence of human rights. There is nothing fortuitous in this. As a result particularly of the 1949 Conventions, the humanitarian principles underlying the work of the Red Cross have been incorporated in a body of law and the distinction between this " humanitarian " law and international law in general is becoming less and less marked. If humanitarian law still deserves a place to itself, this is due less to its intrinsic character than to the methods used to ensure its observance.

This progressive acquisition by humanitarian principles of the *force of law* has gone hand in hand with a genuine *humanization* of international law, which tends less and less to be " international " in the sense of " inter-state ", but increasingly so in embracing the human being. Apart from the State, other beneficiaries of international law have emerged, among whom man and his sufferings tend to come more and more to the fore.

As a result of this twofold evolution, there is today a common ambit for humanitarian law and general international law. Under the circumstances it is not surprising that the Red Cross feels that the development of international protection for man is coming more and more within its purview, as such a development is capable of sustaining and widening the basis of its mission. Whilst the 1949 Geneva Conventions and—underlying them—the supra-legal principle of humanity, form that basis, other codes have arisen to carry them a stage further, such as the European Convention on Human Rights [1].

[1] For a full study of this Convention, see my publication: *La Convention européenne des droits de l'homme*, Paris 1964; Librairie générale de droit et de jurisprudence, 327 pages.

The European Convention on Human Rights was signed on November 4, 1950, and came into force on September 3, 1953. So far it has been ratified by all member States of the Council of Europe (Austria, Belgium, Cyprus, Denmark, Federal Republic of Germany, Greece, Iceland, Ireland, Italy, Luxemburg, Netherlands, Norway, Sweden, Turkey and the United Kingdom) with three exceptions (France, Malta and Switzerland). A Protocol was added on March 20, 1953, which became effective on May 18, 1954 [1].

Present in the minds of the authors of this Convention was the perspective of union of the European democracies and the Convention's first objective is to guarantee especially those rights of man which permit of the free operation of their institutions. It is therefore civic and political rights which are protected by the Convention, whilst it is left to the European Social Charter, signed in Turin on October 18, 1961, to guarantee economic and social rights.

The rights guaranteed by the Contracting Parties to the Convention collectively are as follows: the right to life, liberty, safety, the rule of law, respect for privacy and family life, inviolability of the home and correspondence, freedom of thought, conscience, religion, expression and opinion, freedom of assembly and association, including the right to form trade unions, the right to marry, to a hearing in a national tribunal, the right to own property, to education, the right of parents to choose the type of education they consider suitable for their children. States undertake to hold free elections at reasonable intervals; torture, degrading or inhuman punishment or treatment are forbidden; so are slavery, compulsory labour, legislation with retroactive effect and discrimination of any kind whatsoever.

It is not the Convention's assertion, on an international level, of a certain number of fundamental rights for the benefit of the individual which constitutes its originality. Its originality resides in the fact that its authors, holding the view that a law not enforceable is worth no more than the paper it is written on, set up a whole judicial array for the international guarantee of fundamental human rights and freedoms. This takes the form of a European Commission and a Court of Human Rights which, apart from the Committee of Ministers of the Council of Europe, are responsible

[1] Another Protocol — No. 4 — which was signed on September 16, 1963, has not yet become effective.

for ensuring that the Contracting Parties observe the rights protected by the Convention.

Let us first consider each of these bodies and then the connection between the European Convention on Human Rights and the Geneva Conventions.

I. ENQUIRY AND CONCILIATION BY THE EUROPEAN COMMISSION OF HUMAN RIGHTS

The European Commission of Human Rights, according to Article 19 of the Convention, is responsible, in conjunction with the Court, for ensuring the observance of the engagements undertaken by the High Contracting Parties. The number of members is equal to the number of contracting parties. Present membership is fifteen, as three of the States of the Council of Europe, i.e. France, Switzerland and Malta, have not yet ratified the Convention. The Commission is elected by the Committee of Ministers of the Council of Europe from the Consultative Assembly's nominees. Members are elected for a term of six years; they sit as individuals, so that they are quite independent of their " electors " and country of origin.

The Commission's headquarters is in the same town as that of the Council of Europe, i.e. Strasbourg. Its proceedings are in private, a fact which has often been criticized. It is justified, however, by its mission of conciliation under the Convention, which is more likely to be effective if performed with discretion. A secondary reason for the holding of proceedings in private is the aim of the authors of the Convention to avoid any undue publicity for spiteful or ill-intentioned demands.

A. The Commission's Competence

Any Contracting Party (under Article 24 of the Convention), person, non-governmental organization or group of individuals (Article 25) may have recourse to the Commission. In the case of Article 25, however, the Commission's competence to examine individual petitions must have been recognized beforehand by the State implicated. So far ten of the fifteen Contracting Parties have made the necessary declaration, viz. Austria, Belgium, Denmark, Federal Republic of Germany, Iceland, Ireland, Luxemburg, Netherlands, Norway, Sweden.

Complaints lodged by one Contracting Party against another appear at first sight to be analogous to diplomatic protection. This resemblance is deceptive, as a State may submit to the Commission an infringement of the Convention committeed against individuals who are not nationals of that State. A case in point was Greece's second complaint against the British Government concerning the application of the Convention in Cyprus, a British colony at the time. Another instance was Austria's complaint against Italy in respect of six young men, German-speaking but Italian nationals, in the Alto Adige.

Petitions by individuals have been much more numerous than those presented by States. From the 5th July 1955, when the Commission began to examine them, until the 31st of December 1964, 2388 individual petitions were lodged with the Commission, as against three brought by States.

The individual's right of petition is undoubtedly the cornerstone of the structure devised in Rome in 1950. It is also the most original feature of the whole procedure under the Convention; for the first time individuals may have direct recourse to an international judicial organ concerned with human rights. It is true that not all States acknowledge this right, and even where recognized, it may only be exercised during proceedings *in camera*. Nevertheless it is an effective weapon in the defence of human rights and the large number of cases already brought by individuals shows that Europeans, in particular, have made frequent use of it.

B. Procedure of the Commission

Simplicity is not a characteristic of the Commission's procedure, for petitions, whether by States or individuals, must go through slow and complicated channels. This is only to be expected of proceedings as revolutionary as those introduced into international law by the Convention.

Roughly speaking, there are three phases in the procedure:

— the Commission's investigation into the admissibility of the complaint;
— examination by a sub-commission of the admissible complaint;
— examination of the admissible complaint in plenary session of the Commission.

1. *Investigation of Admissibility*

Admissibility of a petition, whether by an individual or State, is determined by the Commission in plenary session, that is to say, it examines petitions to verify that they fulfil the conditions laid down in the Convention. There are seven such conditions. The first two are considered by the Commission to be common to both State and individual petitions: the State or individual must have exhausted all domestic means of obtaining redress of the alleged breach, and the petition must be lodged within six months of the date of the final decision taken at the national level.

The remaining five conditions are considered by the Commission to apply solely to individual petitions. They are: no petition shall be anonymous, identical to one already examined by the Commission, incompatible with the Convention, manifestly ill-founded or abusive.

There is a considerable fund of precedents in matters of admissibility already established by the Commission, no small part of whose function consists of this determination of admissibility. The vast majority of petitions are declared inadmissible for not complying with one or other of the conditions mentioned above. Up to December 31, 1964, only 36 individual and three State petitions had been declared admissible.

2. *Examination of the admissible petition by the Sub-Commission*

Admissible petitions are examined by a sub-commission comprising seven members of the Commission and having a twofold task. Like an examining magistrate, the sub-commission enquires into the facts of the case and it also endeavours to effect a friendly settlement based on respect for human rights as recognized by the Convention. If this is successful, the sub-commission draws up a brief report on the facts of the case and the settlement arrived at. Such a friendly settlement has just been arranged in a case concerning Belgium (Boeckmans' petition). Failing any such agreement, the petition goes before the plenary Commission.

3. *Examination of the admissible petition by the Commission*

When conciliation fails, the plenary session of the Commission draws up a report on the facts and states whether in its opinion there has been a breach of the Convention by the State implicated.

As can be seen, proceedings before the Commission do not result in a binding decision, but only in a report and opinion. Fairly long-established practice, however, shows that States attach no little importance to this opinion, for although it is not legally enforceable, its moral force is the greater for being the result of proceedings which are often lengthy and meticulous.

The Commission's work is completed with the publication of its report, but the case continues.

The report is in fact the starting point for proceedings leading this time to a compulsory ruling. Within three months after the date on which the Commission submits the report to the Committee of Ministers of the Council of Europe, one of two situations may arise:

(i) the case may be referred to the Court of Human Rights by the Commission or by the Contracting Party concerned; or

(ii) the case not being so referred, it is incumbent on the Committee of Ministers of the Council of Europe to take a decision.

There are thus two decision-making bodies set up under the Convention: one judicial, the European Court of Human Rights; the other political, the Committee of Ministers of the Council of Europe.

II. THE EUROPEAN COURT OF HUMAN RIGHTS AND THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE

The existence of two bodies for deciding disputes under the Convention arises from the non-compulsory character of the jurisdiction of the European Court of Human Rights, the Committee of Ministers sitting as a decision-making body only if the case does not come before the Court.

A. European Court of Human Rights

This Court consists of a number of judges equal to the number of Member States of the Council of Europe. Consequently, at the present time it comprises 18 judges. They are elected by a majority of the votes cast by the Consultative Assembly of the Council of Europe, from a list of persons nominated by the Member States; each State is entitled to present three candidates, two of whom must be nationals of the State. Judges are elected for nine years and may be re-elected. Although there is no provision in the

Convention affirming their independence, it is nevertheless a necessary consequence of the judiciary authority vested in the Court. In addition, the rules of Court contain several clauses which presuppose the judges' independence.

Like the Commission and the Council of Europe, the Court sits in Strasbourg.

1. *The Competence of the Court*

The Court is not *ipso jure* empowered to take cognizance of a case: its jurisdiction must first be recognized as binding by the Contracting Parties or accepted by them in a specific case. So far nine of the fifteen Contracting Parties have recognized the Court's jurisdiction as binding; these States are Austria, Belgium, Denmark, Federal Republic of Germany, Iceland, Ireland, Luxemburg, the Netherlands and Norway. Under Article 48 of the Convention, recourse may be had to the Court by the Commission or by a Contracting Party involved, i.e. the country of which the victim is a national, the country which referred the case to the Commission, or the country against which the complaint was lodged. Furthermore, Article 44 provides that only Contracting Parties and the Commission have the right to bring a case before the Court. We shall see later the significance of this essential provision of the Convention.

2. *Court Procedure*

The procedure of the European Court of Human Rights follows more or less the same rules as the International Court of Justice. However, the function of the Commission and the position of individual petitioners raise special problems. In principle, the Court exercises its judicial functions through a chamber of seven judges. The Rules of Court provide, however, for cases when the Chamber can and even must refer a question or even the whole case to the plenary Court.

The report issued by the Commission constitutes the point of departure and the very basis of the whole procedure. To this there are normally two phases: firstly the exchange of written communications between the Parties and possibly the Parties and the Commission and secondly the oral phase, when the case is examined at a hearing of the Parties which is in principle public, unless the Court decides otherwise.

The Commission assists the Court in a manner similar to a "Ministère Public", representing the European community's general interest in human rights as postulated by the Convention. In no case, however, is the Commission a party to the proceedings. It usually assists the Court through three delegates appointed by it, who ensure *inter alia* that the Commission's report is not misinterpreted.

Individual petitioners cannot bring a case before the Court and therefore may not appear as a party to the proceedings. This does not imply, however, that they will be entirely precluded. The rules of Court contain several provisions enabling individuals to be heard, notably as witnesses. But in the main an individual must rely on the Commission which, as the representative of the general interest, may deem it expedient to make known his opinions to the Court. These problems concerning the position of the Commission and of the individual in the Court proceedings were at the centre of discussions in the Lawless case and the judgment of November 14, 1960, is of considerable importance in this respect.

Cases are usually settled by a judgment of the Court for which the grounds must be given. The Court states in its judgment whether there has been a breach of the Convention or not. Its ruling is final, allowing for no appeal. It is mandatory on the Contracting Parties, which draw the inferences implied by its execution, which is supervised by the Committee of Ministers of the Council of Europe.

So far two cases have been before the Court, those of Lawless and of de Becker. The first was settled by a judgment in which the Court found that there was no breach of the Convention by the Irish Government, accused of having detained without trial the applicant Lawless; the second, which claimed that Article 123 of the Belgian Penal Code was incompatible with the Convention, was struck from the Court rolls after amendment of this article by the Belgian Parliament.

B. Committee of Ministers of the Council of Europe

The Committee of Ministers, which is the executive organ of the Council of Europe, intervenes only if the case introduced before the Commission is not submitted to the Court. Its function as a decision-making body is therefore to some extent subsidiary, as it makes no pronouncement except in the absence of one by the Court. However, since not all States have accepted the jurisdiction of the Court as compulsory and as even those States which have

done so are not compelled to bring a case in which they are involved before the Court, the Committee of Ministers has actually had to decide more often than the Court whether a breach of the Convention has occurred.

The composition of the Committee of Ministers is the same whether it serves as a decision-making body under the Convention, or as an organ of the Council of Europe. Regulations governing its proceedings have not been specified as clearly as desirable and this problem was recently referred to the Committee of Experts on Human Rights.

When the Committee of Ministers decides there has been a violation of the Convention, it may, if the State concerned does not take satisfactory measures, decide on " what effect shall be given " to its original decision. Article 32 of the Convention does not specify the nature of this " effect ", thus leaving the Committee of Ministers wide powers to decide what measures it would be suitable to take against a State which took no steps to repair its violation of the Convention. The Convention itself mentions only one sanction, namely, publication of the Commission's report. It is, however, expected that a State will usually endeavour to draw from the decision of the Committee of Ministers or of the Court the right conclusions and will take the requisite measures for its implementation.

The Committee of Ministers has had on several occasions to give a ruling, such as in the Nielsen case implicating the Danish Government, the dispute between Austria and Italy, as well as a whole series of cases of concern to the Austrian penal procedure.

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No description of the machinery set up under the Convention for the Protection of Human Rights would be complete without mentioning one provision which could be of enormous importance for the protection of human rights in Europe. This provision is contained in Article 57 of the Convention, according to which " on receipt of a request from the Secretary General of the Council of Europe, any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of this Convention ".

This provision was inspired by the work of the United Nations; it is a useful constituent of the Convention in that it strengthens

the protection accorded to the rights stipulated in the Convention. It was implemented for the first time in October 1964 and time alone will tell the importance of its latent possibilities.

III. EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE GENEVA CONVENTIONS

Although there has been no complete study so far of the connection between the European Convention on Human Rights and the Geneva Conventions nor of the influence of the one on the other, it is nevertheless possible to descry some lines of future investigation.

1. What most strikes the observer comparing the Rome Convention with the Geneva Conventions is that the former, like the latter, has deliberately and completely rejected the principle of *reciprocity* of obligations, even though it is the very basis of international law. In fact, under Article 1, Contracting Parties recognize the rights, protected by the Convention, of *all persons* to whom their jurisdiction extends. The European Commission on Human Rights has specifically confirmed the objective character of the rights protected by the Convention in its decision on the case opposing Austria and Italy. The question which arose in this case was whether the conviction of six youths in a village of the Alto Adige for the murder of an Italian Customs Officer in August 1956 involved a breach of the right to proper judicial procedure protected by Article 6 of the Convention on the rule of law. The Italian argument which interpreted the Convention as a series of reciprocal agreements among the Contracting Parties, was as follows: On ratifying the Convention of October 26, 1955, Italy undertook obligations only towards States which were Contracting Parties at that time. However, as the events with which the petition was concerned occurred in 1956 and the trial took place in 1957 at the Bolzano assizes, and in March 1958 before the Trento Appeals Court, and again in January 1960 before the Supreme Court, and as Austria only became a Contracting Party on September 3, 1958, the consideration of the petition was not within the competence *ratione temporis* of the Commission; indeed only the judgment of the Supreme Court was given after September 3, 1958, but the Austrian Government had raised no protest against that judgment.

The Commission rejected the Italian argument. After having observed that no clause of the Convention limits a State's right to lodge a petition merely in respect of events occurring subsequent to ratification of the Convention by that State, the Commission stated:

In concluding the Convention it was not the intention of the Contracting States to concede reciprocal rights or obligations which would be of use in the pursuit of the objectives and ideals of the Council of Europe . . .

The Commission was of the opinion that " consequently the obligations in the Convention to which the Contracting Parties have subscribed are essentially of an objective nature, in view of the fact that their aim is to protect the fundamental rights of individuals against encroachment by Contracting Parties, rather than to create subjective and reciprocal rights among those States".

2. The Geneva Conventions are applicable essentially in war time; only Article 3, which is common to the four Conventions, lays down a certain number of obligations—in fact rights to which individuals are entitled—binding on Contracting Parties even in case of armed conflict not of an international character. On the other hand, the rights protected by the Rome Convention must be respected in all circumstances, unless the State takes measures derogating from its obligations " in time of war or other public emergency threatening the life of the nation ". Even then the State may not derogate from the right to life (except in respect of " deaths resulting from lawful acts of war "), or the prohibition of torture, inhuman and degrading punishment and treatment, slavery, forced labour and retroactive penal legislation. Comparison of the respective scope of the Geneva Conventions and of the Rome Convention shows that in time of war the former give victims broader protection than is granted by the latter, whereas the Rome Convention can extend the " minimum " provided for by Article 3 of the Geneva Conventions in the event of armed conflict not of an international character; this no doubt, in the main, covers the concept " public emergency threatening the life of the nation ".

3. From what has just been said, it is clear that it is essentially during these " armed conflicts not of an international character " that the Rome Convention is a useful adjunct to the Geneva Conventions. There is one serious problem in this respect: the obligations laid down by Article 3 of the Geneva Conventions are

binding not only on States but also on other Parties to the conflict who have not, or do not yet possess, the status of a State: but is the Rome Convention also binding on parties other than States? Personally I am convinced that this is so [1]: therefore, we can state, for example, that the prohibition on the taking of hostages " in the event of armed conflict not of an international character " is binding on parties to the conflict other than States when Article 3 of the Geneva Conventions is inapplicable. This prohibition springs from Article 3 of the Rome Convention which in all circumstance forbids " inhuman treatment ". Nothing shows better than this example relating to hostages the complementary rôle of the Rome Convention.

CONCLUSION

It remains true that the application of the Rome Convention is restricted, as it is binding only on 15 European States. It is therefore to be hoped that, in the absence of a universal Convention on Human Rights—or pending it—the world will be covered by a network of regional Conventions [2]. Efforts being made—for a long time in Latin America, more recently in Africa and lately in Asia—show that this hope is in the process of being translated into reality. The Red Cross—and all men, in consequence—can but rejoice at this prospect.

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[1] For detailed argument see my study, op. cit. pp. 77-79.

[2] Cf. my article " The European Convention on Human Rights beyond the frontiers of Europe ", in *The International and Comparative Law Quarterly*, October 1963, pp. 1206-1231.