



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF LAWLESS v. IRELAND (No. 1)

(Application n° 332/57)

JUDGMENT

STRASBOURG

14 November 1960

In the "Lawless" case,

The European Court of Human Rights, sitting, in accordance with the provisions of Article 43 (art. 43) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as "the Convention") and of Rules 21 and 22 of the Rules of Court, as a Chamber composed of:

Mr. R. CASSIN, *President*

and

MM. G. MARIDAKIS

E. RODENBOURG

R. MCGONIGAL, *ex officio member*

G. BALLADORE PALLIERI

E. ARNALDS

K.F. ARIK, *Judges*

P. MODINOS, *Registrar*,

delivers the following judgment on the preliminary objections and questions of procedure raised in the Memorial of the Commission, the Counter-Memorial of the Irish Government and the submissions at the public hearing of the case:

PROCEDURE

On 13th April 1960 the Secretary of the European Commission of Human Rights (hereinafter called "the Commission") transmitted to the Registrar of the Court a request from the Commission, dated 12th April 1960, submitting to the Court the case brought before the Commission under Article 25 (art. 25) of the Convention by an Application dated 8th November 1957 and filed by Gerard Richard Lawless, a national of the Republic of Ireland, against the Government of the said Republic.

The request, which refers to the declaration made on 18th February 1953 by the Irish Government under Article 46 (art. 46) of the European Convention on Human Rights and to the powers vested in the Commission by Articles 44 and 48 (art. 44, art. 48) of that Convention, was transmitted to the Irish Government on 14th April 1960 in accordance with Rule 32 of the Rules of Court. In conformity with Rule 21, paragraph 2 of the Rules of Court, the Registrar furthermore invited the said Government to inform him, within thirty days, whether it wished to appear as a Party to the case. As prescribed in the concluding sub-paragraph of Rule 32, paragraph 1 of the Rules of Court, the Registrar also informed the Committee of Ministers, on 14th April 1960, of the filing of the request.

By a telegram of 12th May 1960, confirmed by a letter of the same date, the Irish Government informed the Registrar that it desired to appear as a Party in the proceedings relating to the "Lawless" case and that it had appointed as its Agent Mr. T. Woods, Irish Permanent Representative to the Council of Europe.

Following upon this communication, Lord McNair, President of the Court, proceeded on 18th May 1960, in London, in the presence of the Deputy Registrar to choose by lot the names of six judges to constitute the above-mentioned Chamber - Mr. Richard McGonigal, an elected Judge of Irish nationality, being the ex officio member required by Article 43 (art. 43) of the Convention. The composition of the Chamber was notified by the Registrar to the judges and to the Agent of the Irish Government on 23rd May 1960, and to the President of the Commission on 24th May.

After having, at Strasbourg on 1st June 1960, ascertained the views of the Agent of the Party and the delegates of the Commission upon the procedure to be followed, as required by Rule 35, paragraph 1, of the Rules of Court, the President of the Chamber, by an Order of the same date, appointed 30th June 1960 as the final date for the filing of the Commission's Memorial and 20th August 1960 as the final date for the filing of the Counter-Memorial by the Irish Government. At the request of the Party, this latter time-limit was extended to 30th August 1960, by an order of the President of the Chamber dated 16th August 1960. The Memorial and Counter-Memorial - both raising principally preliminary objections and questions of procedure - were filed on the appointed dates. In accordance with Rule 35, paragraph 3 of the Rules of Court, the Memorial of the Commission was transmitted to the judges and to the Agent of the Irish Government on 30th June 1960 and the Counter-Memorial was communicated to the judges and to the delegates of the Commission on 30th August 1960. So far as concerns the preliminary objections, the case has thus been ready for hearing since 30th August 1960.

Public hearings were held on 3rd and 4th October 1960, at which there appeared:

- for the Commission:

Mr. C.H.M. WALDOCK, President
of the Commission,

Principal Delegate,

Mr. C.TH. EUSTATHIADES, Vice-President,

and

Mr. S. PETREN, Member
of the Commission,

Assistant Delegates,

- for the Irish Government, Party to the case :

Mr. T. WOODS, Permanent Representative
to the Council of Europe,

Agent, assisted by

MM. A. O'KEEFFE, Attorney-General
of Ireland,

S. MORRISSEY, Barrister-at-Law, Legal Adviser,
Department of External Affairs,
P. REUTER, Professor
of the Faculty of Law of Paris,
A.J. HEDERMAN, Barrister-at-Law, *Counsel*,
and by
MM. D. O'DONOVAN, Chief State Solicitor,
P. BERRY, Assistant Secretary General,
Department of Justice.

At this hearing the Court heard the following statements, replies and submissions: for the Commission: from Mr. C.H.M. WALDOCK, principal delegate; for the Irish Government: Mr. A. O'KEEFFE, Attorney General.

On 3rd and 4th October 1960 the Court confined its debate to the preliminary objections and questions of procedure.

AS TO THE FACTS

The purpose of the Commission's Request - to which is appended the Report drawn up by the Commission in accordance with the provisions of Article 31 (art. 31) of the Convention - is to submit the case of G.R. Lawless to the Court so that it may decide whether or not the facts of the case disclose that the Respondent Government has failed in its obligations under the Convention.

As appears from the Commission's Request and from its Memorial, Mr. Lawless alleges in his Application that there has been a violation of the Convention in his case, by the authorities of the Republic of Ireland, inasmuch as he was detained without trial, between 13th July and 11th December 1957, in a military detention camp situated in the territory of the Republic of Ireland, in pursuance of an Order made by the Minister of Justice under section 4 of the Offences against the State (Amendment) Act, 1940. The special powers of arrest and of detention allowed to Ministers of State by this Act are said to have been brought into force on 8th July 1957, by a proclamation made and published by the Irish Government on 5th July 1957.

After being declared admissible on 30th August 1958, the Request was dealt with by the Commission according to the procedure laid down in Articles 28 and 29 (art. 28, art. 29) of the Convention. It proved impossible to secure a friendly settlement, and the Commission therefore drew up the Report called for by Article 31 (art. 31) of the Convention. This Report was adopted by the Commission on 19th December 1959, the majority holding that there had been no breach of the Convention on the part of the Irish

Government and that no action should be taken on the Applicant's suit for damages.

After transmitting this Report to the Committee of Ministers of the Council of Europe on 1st February 1960, in accordance with Article 31, paragraph 2 (art. 31-2), of the Convention, the Commission decided at its meeting of 1st April 1960, to avail itself of the possibility offered by Articles 44 and 46 (art. 44, art. 46) of the Convention, and refer the Lawless case to the Court for final decision.

In support of this step, the Commission recalled in its Memorial that an opinion stated by it under Article 31 (art. 31) of the Convention as to whether or not the facts found disclosed a breach of the Convention would not be conclusive. The Commission pointed out that under Article 32, paragraph 1 (art. 32-1), of the Convention, if a question were not referred to the Court, it rested with the Committee of Ministers to decide, by a majority of two-thirds, whether or not there had been a violation of the Convention.

In view of the fundamental importance of the legal problems raised in this case - and particularly of the questions arising in relation to Article 15 (art. 15) of the Convention - the Commission deemed it advisable to refer the case to the Court, though without qualifying in any way its own opinion on the subject as expressed in the Report.

At the meeting held on 1st June 1960, in accordance with Rule 35, paragraph 1, of the Rules of Court, and in its Memorial of 27th June 1960, the Commission stated that, in conformity with Rule 76 of its Rules of Procedure, it had, on 13th April 1960 - that is, after referring the case to the Court - transmitted the Report to the Applicant, inviting him to submit his observations to the Commission.

In submitting the Report to the Applicant the Commission pointed out that that document must be kept secret and that the Applicant was not entitled to publish it.

Rule 76 of the Rules of Procedure of the Commission runs as follows:

"When a case brought before the Commission in pursuance of Article 25 (art. 25) of the Convention is subsequently referred to the Court, the Secretary of the Commission shall immediately notify the Applicant. Unless the Commission shall otherwise decide, the Secretary shall also in due course communicate to him the Commission's Report, informing him that he may, within a time-limit fixed by the President, submit to the Commission his written observations on the said Report. The Commission shall decide what action, if any, shall be taken in respect of these observations."

In its Memorial, the Commission declared its readiness "to submit to the Court the Applicant's comments upon the Report as a document relevant in the present proceedings". However, instead of communicating these comments on its own initiative, the Commission thought appropriate, at this preliminary stage of the procedure, to request the Court for leave to file the

memorandum containing the Applicant's comments as a document submitted by the Commission.

In the pleadings, the following submissions were made in regard to the procedure alone:

by the Commission, in its Memorial:

"May it please the Court:

(1) to give leave for the Commission to submit to the Court the Applicant's comments on the Commission's Report as one of the Commission's documents in the case; and

(2) in general, to give directions as to the right of the Commission to communicate to the Court the comments of the Applicant in regard to matters arising in the present proceedings".

by the Irish Government, in their Counter-Memorial:

"May it please the Court:

(1) to decline jurisdiction in the present case unless the Commission satisfies the Court that between 19th December 1959 and

1st February 1960, the question of reference of the case to the Court was not discussed in any way by the Commission;

(2) to refuse to entertain the case while the delay on the part of the Commission in transmitting its Report to the Committee of Ministers and to the Government has not been satisfactorily explained;

(3) to declare that any publication by the Commission of its Report other than that expressly authorised by the Convention, is a breach of the obligations imposed on the Commission by the Convention;

(4) to rule that the comments of the Applicant on the Report of the Commission and the further comments of the Applicant on matters arising in the present proceedings be not received by the Court:

(a) because no argument in favour of their admission has been submitted by the Commission, and

(b) because the admission of such comments would be an oblique method of amending the Convention, and

(c) because such comments have come into existence only through a breach by the Commission of its obligations of secrecy, and

(d) because in the circumstances of the present proceedings such comments are not material;

(5) to declare that a correct interpretation of the Convention does not permit of action of the nature contemplated by Rule 76 of the Rules of the Commission".

At the hearing of 3rd October 1960, the Commission made the following submissions:

A. As to the objection to the Court's jurisdiction:

May it please the Court to reject the preliminary objections to the Court's jurisdiction formulated in paragraph 4 of the Respondent Government's Counter-Memorial.

B. As to the objection concerning the publication of the Report:

May it please the Court to decide that the provisions of Rule 76 of the Commission's Rules of Procedure and the Commission's communication of its Report on the present case to the Applicant fall within the competence conferred upon the Commission by the Convention, and to reject the preliminary objection formulated in paragraph 5 of the Respondent Government's Counter-Memorial.

C. As to the objection in regard to the role of the Applicant in the proceedings before the Court:

"May it please the Court:

(a) to give leave to the Commission to transmit to the Court the written comments of the Applicant upon the Commission's Report;

(b) to give such directions as the Court may consider appropriate as to the right of the Commission to communicate to the Court the comments of the Applicant in regard to matters arising in the present proceedings;

(c) to reject the submissions formulated in paragraph 6 of the Respondent Government's Counter-Memorial."

At the hearing of 3rd October 1960, the Agent of the Irish Government, in view of the explanations furnished by the Delegate of the Commission during his oral pleading, withdrew the preliminary objections appearing as Nos. 1 and 2 in his Government's Counter-Memorial.

The following submissions, relating to the preliminary objections and questions of procedure raised during the present proceedings, were presented by the Agent of the Irish Government at the hearing of 4th October 1960:

"May it please the Court:

(1) to declare that any publication by the Commission of its Report, other than that expressly authorised by the Convention, is a breach of the obligations imposed on the Commission by the Convention;

(2) to rule that the comments of the Applicant on the Report of the Commission be not received by the Court;

(3) to rule that no further comments of the Applicant on matters arising in the present proceedings may be received by the Court;

(4) to declare that a correct interpretation of the Convention does not permit of action of the nature contemplated by Rule 76 of the Rules of the Commission."

AS TO THE LAW

Whereas the Irish Government, in reply to the questions of procedure raised in the Commission's Memorial, complied with Rule 46 of the Rules of Procedure of the Court in raising their preliminary and procedural objections in the Counter-Memorial which constitutes the first written document in their case; and whereas at the hearing of 3rd October 1960 the Court took formal note of the Irish Government's withdrawal of their preliminary objections set out in paragraphs 1 and 2 of the final submissions of their Counter-Memorial; whereas furthermore, in their submissions at the hearing of 4th October the Irish Government did not press the objections raised in paragraph 7 of the Counter-Memorial, concerning the interrogative form of the Commission's findings on the substance of the case; whereas accordingly there is no need for the Court to consider these matters;

Whereas, in the light of the final submissions of the Commission and of the Irish Government at the hearings of 3rd and 4th October 1960, the Court is called upon to decide the following three points only:

(i) Is Rule 76 of the Rules of Procedure of the Commission in general contrary to the terms of the Convention?

(ii) Could the Commission, after bringing the case before the Court, communicate its Report to G.R. Lawless, the Applicant, in the manner described by the Commission's Delegate, without infringing the terms of the Convention?

(iii) Should the Court, either at the instance of the Commission acting on its own authority, or through the Commission after authorisation by the Court, receive the written observations of G.R. Lawless, the Applicant, on the Commission's Report or on points arising during the proceedings?

(i) As regards the alleged incompatibility "in genere" of Rule 76 of the Rules of Procedure of the Commission with the Convention

Whereas among the preliminary points raised by the Irish Government with regard to the proceedings before the Court, that set out in paragraph 4 of their conclusions calls for a general decision by the Court on the

compatibility of Rule 76 of the Commission with the terms of the Convention;

Whereas in Article 19 (art. 19), the Convention sets up both the Commission and the Court "to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention" and assigns to each of these bodies specific functions in the safeguarding of human rights; whereas those of the Commission differ according to the stage reached in the proceedings; whereas, in the initial stage - governed mainly by Section III of the Convention - the Commission's chief function is to carry out an independent inquiry, to seek a friendly settlement and, if need be, to bring the case before the Court: whereas, once this has been done, the Commission's main function is to assist the Court, and it is associated with the proceedings; whereas, however, even at this stage its action is determined not by a decision of the Court, but directly by the terms of the Convention;

Whereas it follows from the whole body of rules governing the powers of the Court, that it cannot interpret the Convention in an abstract manner, but only in relation to such specific cases as are referred to it; whereas, according to Article 45 (art. 45) of the Convention, the jurisdiction of the Court "shall extend to all cases concerning the interpretation and application of the Convention"; and whereas the exact meaning of this clause is defined in other articles of the Convention, namely: (a) Article 47 (art. 47), according to which "the Court may only deal with a case after the Commission has acknowledged the failure of efforts for a friendly settlement and within the period of three months provided for in Article 32 (art. 32)"; (b) Article 53 (art. 53), which states that only High Contracting Parties which are "parties to the case" are bound by the decision of the Court;

Whereas it follows from the foregoing that the Court is not competent to take decisions such as to delete a rule from the Commission's Rules of Procedure - a step which would affect all Parties to the Convention - since this would amount to having power to make rulings on matters of procedure or to render advisory opinions; that accordingly the Court has no power to consider a point raised in a general by the Commission and the Irish Government;

Whereas, notwithstanding, it is the duty of the Court, in the exercise of its functions, to ensure that the Convention is respected and, if need be, to point to any irregularities and to refuse to apply in such a case any provisions or regulations which are contrary to the Convention; whereas it follows that the Court must consider the specific point which follows;

(ii) As regards the communication of the Commission's Report to G.R. Lawless

Whereas it was established, in the course of the proceedings, that the Commission transmitted the Report drawn up in accordance with Article 31 (art. 31) of the Convention to G.R. Lawless, the Applicant, on 13th April 1960 that is to say one day after bringing the case before the Court;

Whereas the Irish Government claimed that the Commission committed a breach of the Convention in communicating its Report to G.R. Lawless, arguing that Article 31 (art. 31) of the Convention expressly forbade Contracting States to publish the Commission's Report; that this applied also to the Committee of Ministers unless the State concerned did not take the measures required by the decision of the Committee of Ministers; that if the case were brought to the Court, the Report had to remain with the Court and be kept secret unless the Court expressly authorised its publication; that just as the Contracting Parties undertook, by virtue of the Convention, to keep the Report secret, so the Commission, which derived its competence solely from the Convention to which those States were voluntary Parties, was correspondingly not at liberty to publish the Report when it wished, or to communicate it to whomsoever it thought fit, otherwise the Contracting Parties would be in a position subordinate to that of the Commission with regard to the secrecy of the Report; that it was not by a fortuitous omission that the authors of the Convention did not include a clause expressly forbidding the Commission to publish the Report; that under the terms of the Convention, the individual had no part in the proceedings either before the Committee of Ministers or before the Court; and that once the Commission had adopted its Report, the individual dropped out of the proceedings altogether;

Whereas the Commission, in justification of its action in communicating the Report to the Applicant, maintained that the Contracting States, subject to the express provisions of the Convention, had conferred on it the necessary powers to fulfil effectively the functions entrusted to it by Article 19 (art. 19) of the Convention; whereas, moreover, the latter contained no provision forbidding the Commission to publish its Report or communicate it to whomsoever it wished when it considered that the fulfilment of its functions so required; whereas, furthermore, in the present case, the Commission had communicated the Report to G.R. Lawless after the case had been referred to the Court in order to be in a position to present the case impartially and, in so doing had borne in mind that it was the Applicant who had first brought the case before the Commission;

Whereas in the opinion of the Court the procedure, in a case brought before it under the terms of the Convention, differs from that applicable either before the Commission or before the Committee of Ministers;

Whereas the procedures referred to in Section III of the Convention are secret and the proceedings before the Commission which involve the

Applicant, are conducted in camera in accordance with Article 33 (art. 33); whereas moreover, when the Commission transmits its Report to the Committee of Ministers and to the States concerned, they are prevented, by Article 31 (2) (art. 31-2), from publishing it;

Whereas, as soon as the case has been referred to the Court, in accordance with Article 48 (art. 48) of the Convention, the proceedings assume a judicial character; whereas, furthermore, in any democratic society, within the meaning of the Preamble and the other clauses of the Convention, proceedings before the judiciary should be conducted in the presence of the parties and in public; whereas this fundamental principle, with regard to domestic civil and criminal law, is upheld in Article 6 (art. 6) of the Convention and whereas Section IV of the Convention, governing the organisation and competence of the Court, contains no such provision as Article 33 (art. 33) which stipulates that the Commission shall meet in camera; whereas Rule 18 of the Rules of Court in fact states that hearings shall be public "unless the Court shall in exceptional circumstances decide otherwise"; whereas likewise, Rule 51 states that the Court's judgments "shall be read at a public hearing" and whereas it follows, therefore, that proceedings before the Court are public;

Whereas it is true that the debates and the judgment alone are public and that other documents in the case can only be published, in accordance with Rule 52 of Rules of Court, if the Court expressly authorises such publication; whereas, however, this provision cannot alter the fact that the proceedings take place in the presence of the Parties ("le caractère contradictoire de la procédure"), nor does it prevent the communication of the documents in the case to the persons or bodies directly concerned, with the proviso, made either by the Commission or by one of the Parties, that they should not be published; whereas, therefore, there is a distinction between the publication of documents for which the authorisation of the Court is required and the communication of the said documents to the Applicant, which requires no such authorisation;

Whereas, in the present case, G.R. Lawless, the Applicant, although he is not entitled to bring the case before the Court, to appear before the Court or even to make submissions through a representative appointed by him, is nevertheless directly concerned in the proceedings before the Court; whereas it must be borne in mind that the Applicant instituted the proceedings before the Commission and that, if the Court found that his complaints were justified, he would be directly affected by any decision, in accordance with Article 50 (art. 50) of the Convention, on the substance of the case; whereas Article 38 of the Rules of Court authorises it to hear any person whose deposition seem to it useful in the fulfilment of its task, as is admitted, moreover, both by the Irish Government and by the Commission;

Whereas in communicating its Report to Lawless, the Commission did not fail to draw attention to its confidential character in expressly forbidding its publication;

Whereas it follows from the foregoing that the 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;

(iii) As regards the presentation to the Court by the Commission of the Applicant's observations on the Report and other points arising during the proceedings

Whereas the Commission asked the Court for authorisation to submit, as a document in the case, the Applicant's observations on the Report following its communication to him under the conditions referred to above; whereas the Commission requests a general ruling on its right to communicate to the Court the Applicant's observations on points arising in the course of the proceedings; whereas, while realising that the Applicant is not a party to the proceedings before the Court, the Commission has stated that it wishes to submit to the Court the Applicant's views on the main points of the proceedings with which he is concerned; whereas the Commission has invoked various precedents drawn from advisory opinion procedure at the Permanent Court of International Justice and, subsequently at the International Court of Justice, where observations by individuals submitted through the international organisations who applied for the advisory opinions have been taken into consideration, although the Statutes of both these bodies provide that States alone may be represented in Court; whereas the Commission also invokes the terms of the Convention as a whole and, in particular, the English version of Article 44 (art. 44), to show that the authors of the Convention did not intend to disassociate entirely the individual who had applied to the Commission from the proceedings before the Court, but simply to prevent him from bringing a case to Court himself;

Whereas the Irish Government maintained that if the Court agreed to receive the Applicant's observations from the Commission, this would constitute a breach of the Convention since, according to the French version of Article 44 (art. 44), the High Contracting Parties and the Commission alone were entitled to appear before the Court ("se présenter devant la Cour"); and that, moreover, if the Commission were authorised to submit the Applicant's observations as a Commission document, the impartiality and objectivity required of the Commission under the terms of the Convention would be impaired; and furthermore, that to allow the Applicant to submit his observations to the Court would be to give an individual the

opportunity of using the proceedings as a means of propaganda against his own Government;

Whereas the 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; whereas, though recognising their force, the Court must bear in mind the fact that none of the examples cited is that of an individual appealing against the action of his own Government, while in the present case, proceedings were instituted by Lawless against the State of which he is a national; whereas, accordingly, the solution to this question must be sought in the special nature of the procedure laid down in the Convention; whereas, according to Article 44 (art. 44) of the Convention, Contracting States and the Commission are alone empowered to bring a case before the Court or to appear in Court; whereas, nevertheless, the Court must bear in mind its duty to safeguard the interests of the individual, who may not be a party to any court proceedings, and whereas the whole of the proceedings in the Court, as laid down by the Convention and the Rules of Court, are upon issues which concern the Applicant; whereas, accordingly, it is in the interests of the proper administration of justice that the Court should have knowledge of and, if need be, take into consideration, the Applicants's point of view; whereas to this end the Court has at its disposal: in the first place, and in any event, the Commission's Report, which of necessity sets out the Applicant's allegations with regard to the facts and his legal arguments, even if it does not endorse them; secondly, the written and oral observations of the Delegates and counsel of the Commission which, 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 as a means of throwing light on the points at issue; and thirdly, the Court may also hear the Applicant in accordance with Rule 38 of the Rules of Court, and, as part of the enquiry, may invite the Commission, *ex officio*, or authorise the Commission at its request, to submit the Applicant's observations on the Report or on any specific point arising in the course of the debates;

Whereas, in the present case, formal note must be taken of the Commission's request for authorisation to submit the Applicant's observations on the Report, but whereas the Court having been unable as yet to examine the merits of the case, is not in a position to reach a decision on this request and reserves its right to do so when it deems fit;

For these reasons,

THE COURT,

Takes note of the withdrawal by the Irish Government of the preliminary objections set out in paragraphs 1 and 2 of their final submissions in their Counter-Memorial and of the objections raised in paragraph 7 of the same Counter-Memorial;

By 6 votes to 1,

Rejects the objections relating to procedure raised by the said Government in paragraphs 1, 3 and 4 of their final submissions;

Declares that at this stage there is no reason to authorise the Commission to transmit to it the Applicant's written observations on the Commission's Report;

Decides unanimously to proceed to the examination of the merits of the case.

Done in French and in English, the French text being authentic, at the Council of Europe, Strasbourg, this fourteenth day of November 1960.

R. CASSIN
President

P. MODINOS
Registrar

Judge G. Maridakis, availing himself of his right under the terms of Rule 50 (2) of the Rules of Court, annexes his dissenting opinion to the present judgment.

R. C.
P. M.

DISSENTING OPINION OF MR. G. MARIDAKIS

(Translation)

According to Article 28 (art. 28) of the Convention, the Commission shall, with a view to ascertaining the facts, undertake together with the representatives of the parties an examination of the petition and, if need be, an investigation.

Under Article 31 (art. 31), if a solution is not reached, the Commission shall draw up a report on the facts and state its opinion as to whether the facts found disclose a breach by the State concerned of its obligations ... The opinions of all the members of the Commission on this point may be stated in the Report.

According to paragraph 2 of the said Article 31 (art. 31-2), the Report shall be transmitted to the Committee of Ministers, it shall also be transmitted to the States concerned who shall not be at liberty to publish it. For the purposes of the Convention the word "trans-mitted" shall be understood to mean hand over an exact copy of the Report to the Committee of Ministers and the States concerned.

From these provisions it can be deduced:

- (1) that the duty of the Commission is to ascertain the facts;
- (2) that, to this end, it shall undertake with the representatives of the Parties an examination of the petition and if need be, an investigation;
- (3) that it shall draw up a report on the facts and state its opinion ...;
- (4) that it shall transmit the Report to the Committee of Ministers;
- (5) that it shall also transmit the Report to the States concerned, who shall not be at liberty to publish it.

It is apparent from the provisions read together that the jurisdiction of the Commission as the body responsible for ascertaining the facts and drawing up a Report ceases as soon as the Report has been transmitted to the Committee of Ministers.

From this date begins the period of three months during which, under Article 32 (art. 32) of the Convention, the Commission may refer the question to the Court.

The provision contained in Rule 76 of the Rules of Procedure of the Commission, that when a case is referred to the Court, the Secretary of the Commission shall also in due course (?) communicate to the Applicant the Commission's Report, is contrary to the Convention. If, after the Report has been transmitted to the Committee of Ministers, the Commission no longer has the powers conferred on it by Articles 28 and 31 (1) (art. 28, art. 31-1) a fortiori it has no further powers after the case has been referred to the Court in accordance with Article 48 (art. 48) of the Convention. From this moment the Court has sole jurisdiction in the case. If the Court considers that certain points of the Report need to be clarified and that the Applicant is

the only person capable of doing so, the Court may, as sole judge call the Applicant and hear him, in accordance with Rule 38 of the Rules of the Court.

Under Rule 76, referred to above, of the Rules of Procedure of the Commission, the Applicant may submit to the Commission his written observations on the said Report and the Commission shall decide what action, if any, shall be taken in respect of those observations.

Now, under Article 28 (art. 28) of the Convention, the Commission undertakes an examination of the petition and, if need be, an investigation.

Consequently, if the Commission acts in accordance with the procedure described above, since it may not amend its Report once it has been transmitted to the Committee of Ministers and since, furthermore, the case as a whole has been placed in the hands of the Court, what kind of action could the Commission take in respect of the Applicant's observations on the said Report? It is not entitled to present them simply as they come from the Applicant, since Article 19 (art. 19) of the Convention places the Commission above the Parties. If it were to adopt these observations and submit them as its own, the Applicant would be appearing before the Court under cover of the Commission. But Article 44 (art. 44) of the Convention states that "only the High Contracting Parties and the Commission shall have the right to bring a case before the Court."

The wording of this Article (art. 44) brings out its deeper significance. It means that the Court has not been set up to settle disputes between the Applicant and the State which he is accusing of having violated, in his regard, its obligations under the Convention. It means that the Court is a high supervisory authority set up to guarantee the European order established by the Convention (cf. Statute of the Council of Europe, Article 1 (b)).

Such being the conception contained in the Convention of the duties devolving upon the Court, it is natural that the Applicant should not be entitled to appear before it. If he had this right, it is clear that the proceedings might degenerate into a simple legal action between the Applicant and the State involved, whereas, in the spirit of the Convention, the Court was set up not to judge disputes but "to ensure the observance of the engagements undertaken in the present Convention" (Article 19) (art. 19).

This is the only way of interpreting Article 31 (2) (art. 31-2) and justifying the provision that the Commission's Report may be transmitted only to the States concerned. The Applicant is the person who claims to have been injured by the State concerned, but his allegation only provides an opportunity - it could not be otherwise - of considering whether or not that State respects its obligations under the Convention. This is the explanation, too, of Article 31 (2) (art. 31-2), whereby States are not at liberty to publish the Report transmitted to them, and also of the provision

in Article 32 (3) (art. 32-3) that the Committee of Ministers is not entitled to publish the Report.

But, if neither the States to whom the Report has been transmitted nor the Committee of Ministers are at liberty to publish the Report a fortiori the Commission has no right to do so. And, in substance, to communicate the Report to the Applicant in the manner described in Rule 76 of the Rules of Procedure of the Commission is to publish it.

The provision in the Convention prohibiting publication of the Report has been inserted for a good purpose. When a State is accused of a breach of its obligations assumed under the Convention, its prestige suffers prejudice. The authors of the Convention thought that steps should be taken to safeguard the prestige of such a State during the proceedings. They therefore prohibited publication of the Report which contains the opinions of the members (Article 31) (art. 31) and merely prepares the ground for the final judgment to be rendered, in accordance with the Convention, by the Court or, in some cases, by the Committee of Ministers.

Unity is an important principle in all legal proceedings and by virtue of this principle the weight to be given to the Applicant's observations on the Commission's Report must be determined by the Court alone.

The provision contained in Rule 76 of the Rules of Procedure of the Commission, whereby the Commission decides what action, if any, shall be taken in respect of the Applicant's observations, is contrary to the above principle, since it confers on the Commission a discretionary power incompatible with the powers of the Court which has sole jurisdiction at the present stage.

For the above reasons, therefore, Rule 76 of the Rules of Procedure of the Commission is contrary to the terms of the Convention.

However, although the Commission has no authority to communicate the Report to the Applicant, it does not follow that the latter may not take cognizance of it (in the course of contentious proceedings).

Since the Applicant has accused one of the Contracting Parties of a breach of the undertakings given in the Convention, it is a principle of equity (and of law in general) that he should not be denied any means of taking cognizance of the Report. The only way to acquaint him with the contents of the Report would be for the Registrar to invite him to read it in his presence. Should he wish to make any observations on it, the Court alone has power to decide in what form they are to be presented.

This view does not derive from an abstract interpretation of the Convention, nor does it amount to the Court declaring null and void Rule 76 of the Rules of Procedure of the Commission. Both the Commission and the Irish Government in their submissions, refer to Rule 76 of the Commission's Rules of Procedure, but in order to weigh up their respective arguments it must first be determined whether Rule 76 complies with the terms of the

Convention or not. It is clear that this cannot be decided without interpreting the text of the Convention.

True, the Court is not empowered to declare null and void Rule 76 of the Commission's Rules of Procedure, but there is no doubt that the Court has the right, and is in duty bound, to refuse to apply any of these rules which it regards as contrary to the terms of the Convention, in accordance with the principle of domestic law, whereby it is a judge's duty to refrain from applying any legal provision which contravenes the Constitution or any regulation which is contrary to law.

In interpreting the Convention with this end in view, it is clear that the Court is not rendering an advisory opinion which could have any force outside the context of the present case, but is simply interpreting the Convention to support the arguments on which its judgment of the case itself and its decisions in respect of the preliminary objections and other incidental points are based, in accordance with the definition of its jurisdiction in Article 45 (art. 45).