

# WORLD LAW

## THE LAWLESS CASE\*

THE European Court of Human Rights, a newly established international tribunal, recently decided its first case. This case, known as the *Lawless* case, concerns an alleged violation by the Government of Ireland of the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>1</sup>

The European Court of Human Rights is an adjunct of the Council of Europe<sup>2</sup> and was established by the Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>3</sup> The purpose of this convention is the enforcement of the freedoms enumerated in the United Nations Universal Declaration of Human Rights.<sup>4</sup> In connection with the Court, the convention established the European Commission of Human Rights<sup>5</sup> which receives petitions alleging violations of the convention. Generally, only a state may petition the Commission, but an optional clause in the convention permits the Commission to recognize petitions by individuals if a state accepts this form of jurisdiction in advance.<sup>6</sup> If the Commission considers a petition admissible, it investigates the facts of the alleged violation and attempts

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\* *Lawless* case (*Lawless v. Ireland*), No. 1/61, Judgment of July 1, 1961, of the European Court of Human Rights. (The text of the opinion was issued in both French and English but only the French text is official.) The judgment on the merits and the two preliminary judgments are being printed in separate booklets by Messrs. A. W. Sijthoff of Leyden.

<sup>1</sup> The text of the convention may be found in I EUROPEAN YEARBOOK 317-341 (1955).

<sup>2</sup> The Statute of the Council of Europe may be found in I EUROPEAN YEARBOOK 275 (1955).

The member nations of the Council of Europe are Austria, Belgium, Cyprus, Denmark, Federal Republic of Germany, France, Greece, Iceland, Ireland, Italy, Luxembourg, The Netherlands, Norway, Sweden, Turkey, and the United Kingdom. All of these nations except France have ratified the Convention for the Protection of Human Rights and Fundamental Freedoms.

<sup>3</sup> CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS § IV. [Hereinafter cited as CONVENTION.]

<sup>4</sup> For a history of the negotiations concerning the convention, see Robertson, *The European Convention on Human Rights*, 1950 BRITISH YEARBOOK OF INTERNATIONAL LAW 145.

<sup>5</sup> CONVENTION § III. Information concerning the work of the Commission may be found in EUROPEAN COMMISSION OF HUMAN RIGHTS, DOCUMENTS AND DECISIONS (1959).

<sup>6</sup> The optional clause is contained in article 25. Thus far, this type of juris-

to effect a settlement. In the event that no settlement is reached, the Commission issues a report stating the facts that it has established and its opinion on whether the convention has been violated.<sup>7</sup> Thereafter, either the Commission or a state which is a party before the Commission may refer the alleged violation to the European Court of Human Rights for adjudication.<sup>8</sup>

As the foregoing indicates, the Convention for the Protection of Human Rights and Fundamental Freedoms contains notable provisions for which there is little or no precedent in international law. The establishment of an international court to apply an elaborate bill of rights directly affecting the rights of an individual against his own or a foreign state is of considerable innovational significance. Other innovations found in the convention are that an individual may in some cases directly petition the Commission and that one state may petition the Commission against another state on behalf of any person within the jurisdiction of such second state.<sup>9</sup>

The *Lawless* case arose out of the efforts of the Government of

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diction has been accepted by Austria, Belgium, Denmark, Federal Republic of Germany, Iceland, Luxembourg, The Netherlands, Norway, and Sweden. See *Council of Europe News*, N.S. No. 15 (July 1961).

<sup>7</sup> The Commission includes in its report its findings of the facts. The Commission may also include any proposals it sees fit. CONVENTION art. 31.

<sup>8</sup> Article 49 of the Convention for the Protection of Human Rights and Fundamental Freedoms provides:

"The following may bring a case before the Court . . . :

- (a) the Commission;
- (b) a High Contracting Party whose national is alleged to be a victim;
- (c) a High Contracting Party which referred the case to the Commission;
- (d) a High Contracting Party against which the complaint has been lodged."

Article 47 provides that the Court may deal with a case within the three month period specified in article 32. Article 32 provides in part:

"(1) If the question is not referred to the Court in accordance with Article 48 of this Convention within a period of three months from the date of the transmission of the Report to the Committee of Ministers, the Committee of Ministers shall decide by a majority of two-thirds . . . whether there has been a violation of the Convention."

The acceptance of compulsory jurisdiction of the Court is made optional by article 46. At the present time the following countries have accepted compulsory jurisdiction: Austria, Belgium, Denmark, Federal Republic of Germany, Iceland, Ireland, Luxembourg, and The Netherlands.

For discussions concerning the organization and purposes of the Court, see Robertson, *The European Court of Human Rights*, 9 AM. J. COMP. L. 1 (1960); 8 INT'L & COMP. L.Q. 396 (1959).

<sup>9</sup> See generally HURD, *THE COUNCIL OF EUROPE: DESIGN FOR A UNITED STATES OF EUROPE* (1958); ROBERTSON, *THE COUNCIL OF EUROPE* (1956); RÖLING, *INTERNA-*

Ireland to end acts of violence committed by members of the outlawed Irish Republican Army in their effort to end British sovereignty over Northern Ireland. Such acts of violence became especially frequent in the early summer of 1957. Consequently, on July 8, 1957, the Government of Ireland called into effect the special powers of detention without trial conferred upon Ministers of State by the Offences Against the State Act.<sup>10</sup> On July 20, 1957, the Government of Ireland sent a letter to the Secretary-General of the Council of Europe notifying the Council of this action.

On July 11, 1957, Mr. G. R. Lawless, an Irish national, was arrested under the authority of the Offences Against the State Act for being a member of the illegal Irish Republican Army.<sup>11</sup> Lawless was then detained without charge or trial until December 11, 1957. During this period, he petitioned the Irish High Court for a writ of habeas corpus,<sup>12</sup> but the petition was denied and the denial was affirmed by the Supreme Court of Ireland.<sup>13</sup> Having exhausted local remedies, Mr. Lawless petitioned the European Commission of Human Rights for release<sup>14</sup> and compensation on the ground that the Government of Ireland was denying rights guaranteed to him by the Convention for the Protection of Human Rights and Fundamental Freedoms. The Commission declared the petition admissible and conducted hearings and investigations, but failed to effect a settlement. A majority of the members of the Commission felt that Ireland had not violated the convention; however, the Commission decided that it would refer the case to the European

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TIONAL LAW IN AN EXPANDED WORLD 114-120 (1960); Modinos, *La Convention Européenne Des Droits De L'Homme*, I EUROPEAN YEARBOOK 141 (1955).

<sup>10</sup> Offences Against the State Act of 1939, as amended in 1940 (Ireland).

<sup>11</sup> Lawless had been arrested on two previous occasions. He was arrested in 1956 for illegal possession of firearms but was acquitted. He admitted at that time, however, that he was a member of the Irish Republican Army. Lawless was again arrested in May of 1957 and was charged with the possession of incriminating documents and membership in the Irish Republican Army. He was convicted on the charge of possessing incriminating documents but was acquitted of the charge of being a member of the Irish Republican Army. See *Lawless* case at 14, 15 (official French text at 14-16).

<sup>12</sup> The Irish High Court granted a conditional order of habeas corpus on September 18, 1957, requiring the commandant of the camp in which Lawless was detained to show cause why Lawless should not be released. On October 11, 1957, the High Court ruled that the commandant had shown cause justifying the detention. See *Lawless* case at 17 (official French text at 18).

<sup>13</sup> *Id.* at 17-19 (official French text at 19-20).

<sup>14</sup> Mr. Lawless was released from detention on December 11, 1957. Consequently, the question of release did not come before the European Court of Human Rights. *Id.* at 19 (official French text at 20).

Court of Human Rights because of the complex legal problems involved.<sup>15</sup>

In proceedings before the Court, only delegates from the Commission and representatives of a state which is a party to the case have standing before the Court. Consequently, in this first case, the problem arose of how the contentions of the applicant were to be presented to the Court. The rules of the Court provide that it will consider the report of the Commission,<sup>16</sup> but this report contains only the views which the applicant has expressed before the Commission. At the request of the Commission, the Court ruled that the Commission's delegates to the Court had the right to inform the Court of any views the applicant had expressed subsequent to the Commission's report. The Court also held that the Commission could invite the applicant to place at the disposal of the Commission's delegates some person to make known to them the applicant's views on any points raised during the course of the proceedings. Such person would, however, have no standing before the Court.<sup>17</sup>

After an examination of the merits of the case, the court unanimously held that the facts did not disclose a breach of the convention by the Government of Ireland.<sup>18</sup>

The first issue before the Court was a plea in bar by the Government of Ireland based upon the provision of article 17 of the convention that:

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any rights and freedoms set forth herein. . . .<sup>19</sup>

The Commission, however, urged that the purpose of article 17 is to prevent totalitarian groups from exploiting the convention.<sup>20</sup> The Commission felt that in order to guard the convention from such exploitation, it is not necessary to deprive individuals of their rights, even if the individuals are engaged in activities aimed at the destruction of

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<sup>15</sup> The case was referred to the European Court of Human Rights on April 13, 1960. See *id.* at 2 (official French text at 2).

<sup>16</sup> Rule of Court of the European Court of Human Rights 29.

<sup>17</sup> See *Lawless* case at 3-5 (official French text at 3-5). The Court delivered its judgment on these procedural matters on April 7, 1961.

<sup>18</sup> Judge Maridakis concurred in the operative parts of the Court's decision but wrote a separate opinion. The concurring opinion is found in the *Lawless* case at 46-50 (official French text at 49-53).

<sup>19</sup> CONVENTION art. 17.

<sup>20</sup> See generally the application of the German Communist Party to the Commission. European Commission of Human Rights, Application No. 250/57.

rights guaranteed by the convention. The Court rejected Ireland's plea in bar and held that the purpose of article 17 is to prevent an interpretation of the convention which would recognize a right to engage in activities aimed at the destruction of rights guaranteed by the convention.<sup>21</sup> Conversely, article 17 cannot be construed as depriving a person of rights guaranteed by the convention. Furthermore, the Court pointed out, Lawless did not rely on the convention to justify or accomplish his acts, but complained of having been denied rights guaranteed by the convention.<sup>22</sup>

The second issue before the Court involved the allegation by Lawless that his detention was a violation of the provisions of articles 5 and 6 of the convention.<sup>23</sup> Article 5 guarantees to everyone the right to liberty and security of person and provides that no one shall be deprived of his liberty except in certain special circumstances. The Government of Ireland urged that the detention fell within the provision of article 5, paragraph 1(b) that a person's liberty may be denied by a lawful arrest or detention "for non-compliance with the lawful order of a court or in order to secure the fulfillment of any obligation prescribed by law."<sup>24</sup> The Commission, on the other hand, maintained that the phrase, "obligation prescribed by law,"<sup>25</sup> refers to a specific obligation which the law imposes, and not to detention for the prevention of an offence. The Court considered at length the Commission's interpretation but held that this provision of article 5 was irrelevant because Lawless was not detained for a failure to comply with a court order.<sup>26</sup>

The Government of Ireland further relied upon the provision of article 5, paragraph 1(c), that a deprivation of liberty is justified in the event of

the lawful arrest and detention of a person effected for the purpose of bringing

<sup>21</sup> *Lawless* case at 25 (official French text at 26).

<sup>22</sup> *Ibid.*

In a separate opinion, Judge Maridakis concurred in the Court's decision that article 17 is not a bar to the complaint, but reasoned that Lawless was not engaged in any activity forbidden by article 17 which would warrant the rejection of his petition. *Lawless* case at 50 (official French text at 53).

<sup>23</sup> In 1957, a member of the Irish Parliament petitioned the Commission to declare that the Offences Against the State Act, under which Lawless was detained, is incompatible with the guarantees of the convention. The Commission declared the application inadmissible and ruled that the Commission is not competent to rule in the abstract on the conformity of domestic legislation with the convention. European Commission of Human Rights, Application No. 290/57.

<sup>24</sup> CONVENTION art. 5, para. 1(b).

<sup>25</sup> *Ibid.*

<sup>26</sup> *Lawless* case at 31 (official French text at 33).

him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so. . . .<sup>27</sup>

The Government of Ireland contended that this provision does not require that a person detained to prevent the commission of an offence be brought before a judicial authority. The Irish Government based its interpretation on the above English text and conceded that its interpretation of article 5, paragraph 1(c) is not supported by the French text since in that text the provision that the purpose of the detention must be to bring the accused before a legal authority clearly qualifies all provisions of paragraph 1(c).<sup>28</sup> The Irish Government contended, however, that the preparatory materials of the convention reveal that the English text is dominant to the French text with respect to this provision.<sup>29</sup> The Commission, on the other hand, maintained that the detention of Lawless was not sanctioned by this provision of article 5 because it authorizes the detention of a person whom it is considered necessary to restrain from committing an offence only for the purpose of bringing him before the competent legal authority. The Commission contended that its interpretation was supported by both the English and French texts and, moreover, that the preparatory materials did not show that the English text is dominant.<sup>30</sup> The Court agreed with the Commission that the detention of Lawless was not justified by article 5, paragraph 1(c), and held that the plain and clear meaning of that provision is that a person may be detained only for the purpose of bringing him before a competent legal authority whether he is detained on suspicion of having committed a crime or to prevent him from committing an offence. The Court refused to examine the arguments based on preparatory materials, because of the principle of treaty interpretation that it is not permissible to resort to preparatory work when the clauses to be construed are clear and unequivocal in their

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<sup>27</sup> *Id.* at art. 5, para. 1(c).

<sup>28</sup> The French text of article 5, paragraph 1(c) is as follows: "s'il a été arrêté et détenu en vue d'être conduit devant l'autorité judiciaire compétente, lorsqu'il y a des raisons plausibles de soupçonner qu'il y a des motifs raisonnables de croire à la nécessité de l'empêcher de commettre une infraction ou de s'enfuir après l'accomplissement de celle-ci. . . ."

<sup>29</sup> Both the English and the French texts of the convention are equally authentic. CONVENTION art. 66. For a resumé of the contentions of the Government of Ireland concerning the preparatory materials and the dominance of the English text as to this provision, see *Lawless* case at 28, 29 (official French text at 28-32).

<sup>30</sup> For a resumé of the contentions of the Commission concerning the preparatory materials, see *Lawless* case at 30 (official French text at 32, 33).

meaning.<sup>31</sup> The Court also agreed with the Commission that article 5, paragraph 1(c), on which the Government of Ireland relied, must be read in connection with the provision of article 5, paragraph 3, that:

Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power. . . .<sup>32</sup>

Thus the Court held that since the purpose of the detention of Lawless was not to bring him before a competent judicial authority, his detention was inconsistent with the guarantees of the convention.<sup>33</sup>

Lawless further maintained that his detention was a violation of the provision of article 6 that "in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."<sup>34</sup> The Government of Ireland argued that article 6 was inapplicable since there was no criminal charge against Lawless. In the absence of any expression by the Commission, the Court so held.<sup>35</sup>

The third major issue before the Court was the alleged violation of the guarantees found in article 7 of the convention, as follows:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.<sup>36</sup>

Lawless contended that his arrest and detention were in violation of this guarantee against ex post facto punishment because they were a result of acts he allegedly committed before the provisions of the Offences Against the State Act, under which he was detained, were called into effect by government decree. The Commission and the Irish Government contended, however, that the Offences Against the State Act was not being applied retroactively, since it permitted detention only if an Irish Minister was of the opinion that, after the act came into force, the person detained was engaged in activities

<sup>31</sup> *Lawless case* at 32 (official French text at 35). See generally 5 HACKWORTH, DIGEST OF INTERNATIONAL LAW § 497 (1943); 1 OPPENHEIM, INTERNATIONAL LAW § 554a (8th ed. Lauterpacht ed. 1955).

<sup>32</sup> CONVENTION art. 5, para. 3.

<sup>33</sup> *Lawless case* at 32 (official French text at 35).

<sup>34</sup> CONVENTION art. 6, para. 1.

<sup>35</sup> *Lawless case* at 31 (official French text at 33).

<sup>36</sup> CONVENTION art. 7, para. 1.

prejudicial to the security of the state.<sup>37</sup> The Commission also took the position that article 7 was not applicable because Lawless was not detained on a criminal charge. The Court held that Lawless had not been deprived of the protection of article 7 as his detention was a preventive measure and not the consequence of the commission of a criminal offence.<sup>38</sup>

Although the Court had found that the detention of Lawless was contrary to article 5, paragraph 1(c) of the convention, the fourth and final issue before the Court was whether the detention was nevertheless justifiable on the ground that Ireland had properly exercised its right under article 15 to take measures in derogation of its obligations under the convention.<sup>39</sup> The Court thus had to determine whether Ireland had complied with the conditions of article 15 which govern the use of the right of derogation. The first such condition which the Court considered was the requirement that a public emergency exist before the right of derogation may be invoked. The Court interpreted the phrase "public emergency threatening the life of the nation"<sup>40</sup> to refer to a crisis which threatens the organized life of the community and held that such a situation existed when the Government of Ireland exercised its right of derogation.<sup>41</sup>

The second condition of article 15 which the Court considered was whether the measures taken by Ireland were "strictly required by the exigencies of the situation."<sup>42</sup> A majority of the members of the Commission agreed with the Government of Ireland that its actions were necessary. It was contended on behalf of Lawless that the measures taken were disproportionate, and some members of the Commission agreed with this viewpoint since they felt that other measures would have been sufficient.<sup>43</sup> The Court held that the measures taken under the Offences Against the State Act were in keeping with the exigencies

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<sup>37</sup> The applicable provisions of the Offences Against the State Act are quoted in the opinion of the *Lawless* case at 7-11 (official French text at 7-11).

<sup>38</sup> *Lawless* case at 34 (official French text at 37).

<sup>39</sup> "In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention . . ." CONVENTION art. 15, para. 1.

<sup>40</sup> CONVENTION art. 15, para. 1.

<sup>41</sup> *Lawless* case at 35-37 (official French text at 38-40).

<sup>42</sup> CONVENTION art. 15, para. 1.

<sup>43</sup> Suggested alternative measures referred to by the Court included application of the ordinary criminal law, institution of special criminal courts, and sealing of the border between the Republic of Ireland and Northern Ireland. See *Lawless* case at 38, 39 (official French text at 41, 42).

of the situation,<sup>44</sup> and that in taking those measures Ireland did not violate the provision of article 18 that:

The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.<sup>45</sup>

The third condition of article 15 examined by the Court was the requirement that a state "availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefore."<sup>46</sup> The Government of Ireland urged that the letter it sent to the Secretary-General on July 20, 1957, informing him of its actions under the Offences Against the State Act, was sufficient notification. On behalf of Lawless, the sufficiency of the letter was challenged. It was contended that even if the letter was sufficient notification, the derogation was not effective within Ireland until July 23, 1957, because the letter was not made public there until that date. The Court, agreeing with the Irish Government that the letter gave sufficient information of the measures taken and the reasons for taking them,<sup>47</sup> held that there was no unreasonable delay in notifying the Secretary-General, and that the convention does not require a country to promulgate domestically its notice of derogation.

The Court, on its own motion, further noted the provision of article 15 to the effect that measures taken in derogation of the convention must not conflict with obligations under international law,<sup>48</sup> but it found no such conflict. Thus the Court held that in view of the proper exercise of the right of derogation conferred by article 15, the facts did not disclose a breach by the Irish Government of its obligations under the

<sup>44</sup> *Lawless* case at 38-40 (official French text at 41-44).

<sup>45</sup> CONVENTION art. 18.

<sup>46</sup> *Id.* at art. 15, para. 3.

<sup>47</sup> The Court quoted the following portion of the letter: ". . . Insofar as the bringing into operation of Part II of the [Offences Against the State] Act, which confers special powers of arrest and detention, may involve any derogation from the obligations imposed by the Convention for the Protection of Human Rights and Fundamental Freedoms, I [the Irish Minister for External Affairs] have the honour to request you to be good enough to regard this letter as informing you accordingly, in compliance with Article 15(3) of the Convention." *Lawless* case at 13 (official French text at 14).

<sup>48</sup> The Court justified acting on its own motion on the ground that it is required to do so by article 19, which provides that the Court and the Commission are established "to ensure the observance of the engagements undertaken by the High Contracting Parties. . . ." CONVENTION art. 19.

convention.<sup>49</sup>

The first decision of the European Court of Human Rights indicates a disposition of the Court to be guided by the principles of broad interpretation in dealing with the Convention for the Protection of Human Rights and Fundamental Freedoms. Its conclusions that article 17 does not deny the rights guaranteed by the convention to individuals engaged in activities inimical to the convention, that article 5, paragraph 1(c), requires that persons detained to prevent the commission of a crime must be taken before a judicial authority, and that the Court must find strict compliance with each condition affecting the right of derogation imposed by article 15 clearly demonstrate liberality of construction. Of further significance is the Court's holding that it is required to act on its own motion to make certain that each relevant provision of the convention has been observed. This latter holding is especially important, since neither an individual applicant nor his representative has standing before the Court. With the Court free to act on its own motion, however, there is assurance that, even if the Commission were to fail to present adequately an applicant's views, the Court can insure to the applicant full protection under the convention.

The greatest significance of the *Lawless* case, however, is that it demonstrates the operability of the Convention for the Protection of Human Rights and Fundamental Freedoms and especially the Court of Human Rights. Since the Court has now heard and determined its first case, the entire machinery established for the enforcement of the rights guaranteed by the convention is now functioning. By assuring these rights and creating machinery for their enforcement, fifteen European states have asserted that an individual has rights of which not even his own nation may deprive him and that the enforcement of human rights is the concern of the international community. As World Court Judge Philip C. Jessup has commented, "surely, no less wonderful than sputnik is the launching of the European Court of Human Rights. . . ."<sup>50</sup>

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<sup>49</sup> *Lawless* case at 45 (official French text at 48).

Judge Maridakis concurred in the decision of the Court that the Irish Government properly exercised the right of derogation. He differed from the Court, however, in that he argued that the Court having decided article 15 was properly exercised, it was unnecessary to consider possible violations of other provisions of the convention. He did not discuss the existence of a public emergency but dealt primarily with the idea that acts done in derogation were in keeping with the exigencies of the situation. *Lawless* case at 46-50 (official French text at 49-53).

<sup>50</sup> Jessup, *Trends and Developments in International Law in the Twentieth Century*, 1 INDIAN J. INT. L. 167, 173 (1960-61). The statement was prepared before the author became a member of the International Court of Justice.