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THE INFLUENCE OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS ON NATIONAL EUROPEAN CRIMINAL PROCEEDINGS

ROBERT LINKE*

INTRODUCTION

THE PURPOSE OF this paper is to show the importance of the European Convention on Human Rights1 (hereinafter referred to as the Convention) in influencing national jurisprudence and national legislation. Thus, it seemed advisable to make a survey of some of the relevant and steadily increasing decisions of the European Commission and of the judgments of the European Court of Human Rights (both created under the Convention). The main concern of this work is to examine the fair trial safeguards in criminal proceedings as contained in article 6 para. 1 and 3, and partly in article 5 of the Convention. The piece will also consider possible implications on extradition and international legal assistance in criminal matters. As only procedural rights will be examined, questions of substantive penal law arising out of the Convention, such as the right to compensation for those arrested or detained, the presumption of innocence, or the retroactivity of criminal law, and the prohibition of the extensive application of criminal law by analogy will not be discussed.

The rights under articles 5 and 6 of the Convention, pertaining to criminal proceedings, are among those which are most frequently invoked before the Strasbourg organs. The "habeas corpus" function of the Convention tends to predominate. This is confirmed by the applications declared admissible by the European Commission (as of December 31, 1967 there were 49) and especially by the nature of the cases brought before the European Court of Human

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Rights. Of the eight cases decided so far by the court, all, except the case concerned with Belgium's linguistic problem, have had to do with some phase of criminal law and procedure: detention on the remand in Ireland; forms of punishment and proceedings in cassation in Belgium; the requirements of a fair trial in Denmark; the reasonable length of criminal proceedings and some aspects of the "equality of arms" in Austria; and the reasonable length of detention on remand in Germany and Austria. The Convention anticipates a "common standard" of fair administration of justice in the member states of the Council of Europe, for in the last paragraph of the preamble the Convention is described as an expression of the common European heritage. This demonstrates the conviction of the draftsmen of the text of the Convention that the different systems of criminal proceedings in force in the member states of the Council of Europe are compatible with the Convention. Nevertheless, an examination of the texts of the various codes of criminal procedure reveal remarkable divergencies, even of provisions which are or at least should be influenced by the framework of the Convention. This scheme, as some sort of European basic law, opens new possibilities for comparative law studies in the fields directly affected by the Convention, and furthermore, could be the beginning of new efforts on the part of states in harmonizing or even unifying their laws. The prospects seem especially favorable as far as procedural criminal law is concerned. In this respect, the Convention could even be regarded as a forerunner to an international bill of procedural rights.

The Convention has contributed a great deal to the humanization of criminal proceedings, and to the protection of the individual against the exercise of arbitrary power by police authorities and penal systems in general. The rights of the defense under article 6 of the Convention, and the principle that any serious doubt left in the mind of the judge by a gap in the evidence must inevitably result in an acquittal, will help to avoid the conviction of one who is innocent. On the other hand, we must prevent the trial safeguards from finally becoming what was sometimes said to be true of codes of

2. Convention, supra note 1, preamble.
3. Convention, supra note 1, at art. 6. Not only in England but also on the Continent it is a basic idea to prefer the acquittal of ten guilty men rather than risk the conviction of one who is innocent.
criminal procedure in general, namely the "Magna Carta of criminals." Inbau has warned of the dangers of an isolated consideration of human rights without regard to the requirements of public safety and order. He mentioned, as an example, several cases where the "exclusionary rule," developed by the Supreme Court of the United States, has led to strange consequences. The problem for those who have to deal with criminal law in practice will therefore consist of finding a compromise between an effective prevention and suppression of crime on the one hand and the protection of the human rights of the individual on the other.

THE CHARACTER OF THE COURT

Article 6 para. 1 of the Convention requires the court ("tribunal") to be independent and impartial. In addition, the court must have been established by law. The latter provision is directed mainly at ad hoc or special tribunals. The doubts as to the guarantees of a fair trial before these courts led some of the contracting parties to the European Convention on Extradition to make reservations whereby extradition will only be granted, if at all, under certain conditions when the person claimed is to be brought before a special court or when the extradition should lead to the execution of a sentence imposed by such a court. The text of article 6 para. 1 of the Convention does not, however, go as far as these reservations and does not affect special courts which are legally constituted.

In two cases the European Commission has dealt with certain aspects of competence. In one decision the European Commission stated that competence under the law of the state concerned is sufficient. Therefore, there is no need to examine whether the presiding judge


5. A similar situation occurred in Washington, D.C.: The wife of a man living there had disappeared under mysterious circumstances. Because there was a certain suspicion against him, the police arrested the man and interrogated him. After several hours he confessed to the murder and led the police to the corpse. The confession could not be used as evidence because the police had failed to bring the man before a judge immediately. The accused was acquitted.


7. Austria, Denmark, Netherlands, Sweden and Switzerland.
of the court was also competent to deal with the case in accordance with the internal court regulations assigning the particular cases to certain judges. Also, certain errors in constituting the jury called upon to hear the case could lead to the conclusion that the court was not established by law. But, as the European Commission stated, the composition of a jury is an administrative matter which does not concern the “establishment” of the court.⁸ Therefore, any such error is to be taken into account only insofar as the error caused such prejudice to the person sentenced as would amount to a denial of justice. In a case before the European Commission, three jurors had been admitted, by mistake, as principal jurors although they did not appear on the list of such jurors. The European Commission held that the mistake did in no way affect the outcome of the trial and rejected the application in accordance with article 27 para. 2 of the Convention.

The meaning of the requirement “impartial” was explained by the European Commission in the decision of Wemhoff v. the Federal Republic of Germany⁹ wherein it held that allegations of mere speculative inference are not enough. There must be at least some evidence indicating that the court failed to act impartially, and that it adopted a hostile or biased attitude against the accused at the trial, that the trial was otherwise conducted unfairly, or that the conviction was arrived at by any reasoning not based on the evidence before the court.¹⁰ It is clear that such an attitude of the court can amount also to a violation of the presumption of innocence and the requirement of a “fair trial” in general.

On the other hand, a court cannot be considered biased if the severity of the sentence imposed is based on the existence of previous convictions and not on an unjust or partial attitude on the part of the

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⁸ Coll. 11, p. 31.
⁹ “Application No. 2868168” [1967] Y.B. EUR. CONV. ON HUMAN RIGHTS.
¹⁰ In its report, the European Commission, pointing out the importance of the spirit in which the judge must carry out his task, used rather similar terms: The judge should not start with the conviction or assumption that the accused committed the act with which he is charged. The onus falls upon the prosecution, and any doubt is to the benefit of the accused. The judge must permit the accused to produce evidence in rebuttal. In his judgment, he can find him guilty only on the basis of direct or indirect evidence sufficiently strong in the eyes of the law to establish his guilt. See note 11 infra.
judge,\textsuperscript{11} or if the court can base its decision on "established and appropriate" jurisprudence.\textsuperscript{12}

The principles formulated in the \textit{Wemhoff} decision were apparently applied in a subsequent case, \textit{Boeckmans v. Belgium.}\textsuperscript{13}

In this case, the applicant was sentenced by a Brussels Court to two years imprisonment and to pay a fine for stealing valuables of a widow nearly 80 years of age. He maintained before the court that the things had been given to him by the woman because of "special relations" he claimed to have had with her. The president of the chamber of the Brussels Court of Appeal, when presenting his report, described this defense as "scandalous," "mendacious," "disgraceful" and "distasteful." He pointed out that, should the accused maintain this defense, the court would have to consider whether the sentence passed by the lower court was adequate.\textsuperscript{14}

The Commission did not reject the application since a possible violation of article 6 para. 1 of the \textit{Convention} could not be excluded. Subsequently, in the course of an "amicable settlement," the parties reached an agreement leaving the sentence unchanged, but a sum of money was paid to the applicant "as adequate reparation for his injury."\textsuperscript{15}

One could argue that the \textit{Convention} guarantees the accused the right to an impartial tribunal without any reservation up to the very close of the proceedings, and that the accused is entitled to challenge the judge at any stage of the proceedings. However, in one decision the Commission has accepted certain \textit{limitations} of the right to challenge \textit{propter affectum}:

Reference was made to Article 21 par. [sic] 2 of the Austrian Judicial Organization Act according to which the right of challenge does not apply when the party allegedly injured continues to take part in the hearing. The Commission accepted the intention of the Austrian legislator to prevent, by this limitation, the course of law being constantly interrupted by interlocutory judgments.\textsuperscript{16}

The challenge of the judge is not the only domestic remedy to be exhausted by the applicant according to article 26 of the \textit{Convention}. In addition, the accused must have tried to have the case transferred to another court.\textsuperscript{17}

\textsuperscript{12} Coll. 6, p. 41.
\textsuperscript{13} "Against Belgium" [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 370.
\textsuperscript{14} "Having Reached A Friendly Settlement" [1965] Y.B. EUR. CONV. ON HUMAN RIGHTS 410 (report of the sub-commission).
\textsuperscript{16} "Austria Against Italy" [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 740 (cases before the Committee of Ministers).
THE MINIMUM RIGHTS OF DEFENSE IN A FAIR TRIAL

The rights of the accused in the conduct of his defense in conformity with a fair administration of justice are listed in article 6 para. 3. The list consists of the "minimum" rights which should be available and as such is not exhaustive.

For example, there is the right to be informed of the nature and the cause of the accusation. This provision sets forth the right of a person to be informed of the reasons of arrest. It is clear that the information to which a person is entitled, concerning the charges made against him, must be more specific and more detailed in connection with his right to a fair trial under article 6 than in connection with his right to liberty and security of person under article 5. Article 6 para. 3(a) does not relate solely to arrested persons but applies to any person "charged with a criminal offense." This indicates that the indictment must transpire after the end of the preliminary investigation because only at this stage will the judicial authorities be able to state in detail the factual and legal reasons on which they intend to base their decision.

"Cause" refers to the grounds or facts upon which the accusation is based, and "nature" refers to the legal qualification of the facts. The information required under article 6 para. 3(a) must cover both, and must "enable the accused to prepare his defense." For example, the prosecution would have to inform the accused in time whether it intends to prosecute either for “having instigated or planned” offenses committed by another person, or for having done so by hypnotic influence exercised on the perpetrator. The accused obviously would have to conduct his defense differently depending on the charge.

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17. Convention, supra note 1, at art. 6, para. 3(a).
The information must be in a language which the accused understands. This requirement has consequences also for international assistance in criminal matters, because a state requested to effect service of foreign writs—particularly indictments or summonses—upon an accused who does not understand the foreign language, may refuse to comply with the request if there is no translation attached to the writ.

Another right which an accused individual has under the Convention is adequate time and facilities for the preparation of the defense. There is a logical connection between this right and the right under article 6 para. 3(a). In the case of Koplinger v. Austria, the European Commission declared admissible an application in which the Applicant complained, inter alia, of a violation of this right, i.e., adequate time and facilities.

He alleged that he had not had time to prepare his defense properly, that the written communications he had addressed to his defense counsel had been transmitted belatedly by the prison authorities, that the length of his personal conversations with his counsel had been limited by these authorities, and that the counsel had not enjoyed the necessary facilities for following the course of the investigations. As there was a change in the person of the ex-officio counsel several times before and after the trial, the Commission considered also whether these changes could have prejudiced the facilities necessary for the preparation of the defense.

In its final report of October 1, 1968, the European Commission, having considered the merits of the case, found no violation of the Convention. It pointed out that only one counsel had assisted the accused at the decisive stage of the proceedings, namely at the trial, and that only one counsel had prepared the appeal and represented the accused in the hearing before the Austrian Supreme Court. The European Commission criticized the Austrian legal provisions applicable in the case according to which it was possible to designate an ex-officio counsel (Armenvertreter) separately for each stage of the

mission also took account of the fact that the applicant had been examined by a psychiatrist before the trial. This examination gave him a sufficient indication that the prosecution might argue that hypnosis had been used.

22. Convention, supra note 1, at art. 6, para. 3(b).
23. Supra note 15, at 323.
25. "Armenvertreter" (appointed counsel for paupers).
26. This counsel had stated as a witness that he had had the necessary time and facilities to prepare the defence.
proceedings. This legislation has been changed to the effect that only one and the same ex-officio counsel can conduct the defense until the end of the proceedings.

"Facilities" refers to access to documents, and it has been determined that access to the case file eight days before the trial is sufficient. Further, an accused who is assisted by a defending counsel, whether a defense attorney or simply a person acting on the accused's behalf, cannot complain that only his counsel had the possibility to consult the case file because the rights guaranteed by the Convention are both those of the accused and of the defense in general.

Also, communication between the accused and his counsel is necessary for the preparation of the defense. This right is, however, not violated by reason of the fact that the accused is not given an opportunity to talk to his lawyer about his case when there is nothing to prevent him from corresponding with his lawyer before the case is heard. In general, a short time for the preparation of the defense constitutes a violation of the Convention only when, as a result, the accused has suffered prejudice in the proceedings.

Likewise, in the interest of a proper defense, article 7 para. 3 of the European Convention on Mutual Assistance in Criminal Matters provides for a declaration by which a contracting state may request "that service of a summons on an accused person who is in its territory be transmitted to its authorities by a certain time before the date set for appearance."
By article 6 para. 3(c) of the *Convention* everyone charged with a criminal offense has the right "to defend himself in person or through legal assistance of his own choosing, or if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require." Free legal assistance is guaranteed only if three conditions are met: the accused must be "charged" with a criminal offense; the accused must not have sufficient means to pay for legal assistance of his own choosing; and the interests of justice must require that the accused be given the assistance. Except for cases covered by article 6, the *Convention* does not recognize the right to legal assistance as being one to which all persons are entitled and the refusal of which by the competent authorities would in itself amount to a breach of the *Convention*. Hence, in general the state has the right to exclude lawyers from appearing before courts, subject to the limitations imposed by article 6 para. 3(c).

The term "legal assistance" does not necessarily mean that the accused has a right to representation by a lawyer. The term includes also a probationary lawyer undergoing governmental training. Further, article 6 para. 3(c) offers no right to free legal assistance in order to bring proceedings against other persons, and no right for the accused to choose the lawyer who will assist him free of charge. Finally, there is no violation of the *Convention* if the lawyer designated to assist the accused refuses to do so.

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34. "Application No. 833160" [1960] Y.B. EUR. CONV. ON HUMAN RIGHTS 428 (Individual Applications). As to the procedural stage at which the accused can be, at the earliest, considered as "charged" see text infra.


37. Case, [1960] Y.B. EUR. CONV. ON HUMAN RIGHTS 114. The defense had been conducted by a Gerichtsreferendar. In the decision the Commission referred to the travaux préparatoires on art. 6 para. 3(c) which confirmed that the word avocat (French text) was not to be understood in the technical sense of the term but in the sense of "legal assistance."


The *Convention* also provides the right to obtain the attendance and examination of witnesses on behalf of the defense and the right of cross-examination. This right is intended to ensure the application of the principle of "equality of arms," especially for the collection and the hearing of evidence. As regards the calling and interrogation of witnesses the accused should be placed on equal footing with the public prosecutor. This does not mean that the accused is allowed to call everyone, in particular, persons who are not in a position to assist by their statements in elucidating the truth. One must therefore consider whether the refused admittance of evidence could have influenced the outcome of the proceedings. The court can refuse to summon a witness who could not disprove the charges against the accused, a witness whose evidence would have a bearing only on facts subsequent to the offense, or a witness who was not present at the events which constitute the charge against the accused.

This portion of the *Convention* introduces into the European continental law the common law concept of "cross-examination," according to which, in principle, only evidence given in public in the presence of the accused and subject to immediate cross-examination is admissible. This privilege of the accused is one of the reasons why courts under common law systems in criminal matters rarely request the judges of another country to take evidence, especially by hearing a person as a witness. In continental criminal procedure such requests are, quite to the contrary, very common. Under this sys-

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41. *Convention*, supra note 1, at art. 6, para. 3(d).
44. *Supra* note 16.
46. "X Against Belgium", supra note 42.
48. Another reason is that not the court but the parties are responsible for the collection of evidence.
tem, witnesses are heard in the requested state by the judge, normally in the absence of the parties, i.e., the counsels for the prosecution and the defense, because the procedure regarding legal assistance follows generally the rules of the non-public preliminary investigation and not the rules governing the public trial. In order to allow the parties to the proceedings to assist at the hearing of the evidence abroad, article 4 of the European Convention on Mutual Assistance in Criminal Matters provides that:

On the request of the requesting Party the requested Party shall state the date and place of execution of the letters rogatory. Officials and interested persons may be present if the requested Party consents.40

In cases where there was no possibility for the counsel for the defense to assist at the hearing of the evidence abroad, the admissibility of this evidence might be doubtful insofar as the right to cross-examination had not been respected. It might also be noted that an accused is given the right to free assistance of an interpreter50 and in addition this right deals with a person “charged with criminal offense.”51

THE RESIDUAL MEANING OF “FAIR TRIAL”

THE CONCEPT IN GENERAL

Article 6 of the Convention, which deals with the concept of “proper administration of justice,”52 is the basis of all trial safeguards guaranteed by the Convention. In this context, the concept of a “fair trial” procès equitable in article 6 para. 1, has gained an independent and overriding meaning in the decisions of the European Commission. It was in a private law case that the Commission first held that:

the right to a fair hearing guaranteed by Article 6, par. 1 of the convention appears to contemplate that everyone who is a party to civil proceedings shall have a reasonable opportunity of presenting his case to the Court under conditions which do not place him under a substantial disadvantage vis-à-vis his opponent.53

50. Convention, supra note 1, at art. 6, para. 3(e).
51. As to the procedural stage at which the accused can, at the earliest, be considered as “charged,” see text infra.
52. This is the term used in the official “Manual” of the European Convention on Human Rights for the procedural rules contained in article 6.
Later, in the *Nielsen* case, the European Commission, pointing to the enumeration of certain specific "minimum rights" of article 6 para. 3, stressed the importance of the residual meaning of "fair trial." It was stated that the six rights specifically enumerated are not exhaustive, and that a trial may not conform to the general standards of a "fair trial," even though these minimum rights—guaranteed by para. 3 and also the right set forth in para. 2—have been respected.

There are, of course, some limitations to this extensive interpretation of this concept. The idea of a "fair trial" gives, for example, no right to have the criminal proceedings conducted in a certain manner. The right of the accused to a fair trial does not require a court to base its decision on the statements of one party made under oath, to hear a party "as a witness in his own case," or to refuse to hear a witness for the prosecution, who is guilty of having committed the same offense as the accused. It could, however, be necessary that a court state in detail the reasons for its decision in order that, on appeal from that decision, the defense might properly be safeguarded.

The question of a possible violation of the general requirements of a fair trial cannot be determined *in abstracto* but must be considered in the light of the special circumstances of each case on the basis of a consideration of the trial as a whole. Accordingly, an application concerning the right to be represented or assisted by practicing lawyers in proceedings before a labor court was declared inadmissible because in the proceedings as a whole there was no de-


58. Coll. 10 (1963) p. 5

59. Coll. 10 (1963) p. 12

nial of justice. In extradition proceedings before a German court, the European Commission, abstaining from answering whether article 6 para. 1 is applicable to extradition proceedings remarked that the applicant had, in these extradition proceedings, "full opportunity to present his case" and hence a fair trial. In several cases, the European Commission examined whether informing the jury of the accused's previous convictions before determining the issue of his guilt was in conformity with article 6 para. 1 and 2. The European Commission did not consider such procedure a violation of the Convention, referring to "the (similar) practice in different countries which are members of the Council of Europe." In fact, in a trial before an English court, one will never hear any mention of the accused's past life before the conviction. But under the continental system, the revelation of the accused's previous life history, even before the conviction, does not normally serve in the determination of the question of guilt, but only in the determination of sentence.

In certain cases, and in particular, in cases where laymen participate as jurors in the proceedings, the guarantees of article 6 para. 1 may be impaired by a virulent press campaign against the accused, which "so influences public opinion and thereby the jurors, that the hearing can no longer be considered to be a 'fair hearing' within the meaning of Article 6 of the Convention."

THE "FAIR TRIAL" AND THE LAW OF EVIDENCE

The fundamental principle of free judicial evaluation of evidence must remain untouched. However, one could imagine that in very exceptional circumstances evidence might be inadmissible according to the concept of a "fair trial" or other articles of the Convention.

61. "X Against the Federal Republic of Germany" [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 462 (Individual Application). The question of the applicability of art. 6 para. 1 to extradition proceedings is still open. One could argue, that extradition is exclusively dealt with in art. 5, para. 1(f).


63. Here we find one of the unfortunately rare examples where the Commission considered the "common standard" in Continental Europe. This standard should be, for instance, kept in mind when evaluating the meaning of the "reasonable time" in art. 5 para. 3 and art. 6 para. 1 of the Convention.

64. Coll. 11, p. 31.
As to the use of the lie detector in a criminal investigation, the Austrian Supreme Court has ruled that the interrogation of the accused with the help of such means—even with the consent of the accused—constitutes inadmissible evidence under article 6 para. 1 of the Convention and the relevant provisions of the Austrian Code of Criminal Proceedings, because the registration of unconscious and involuntary modes of expression is likely to hinder the manifestation of the free will of the interrogated person. On the other hand, the use of a tape recording of a private talk of the accused with a co-defendant, which took place before the institution of the criminal proceedings, as evidence in the trial has been admitted for consideration on its merits. The case is still pending before the European Commission.

THE PRINCIPLE OF "EQUALITY OF ARMS"

Only one aspect of the larger notion of "fair trial" is contained in the principle of "equality of arms," according to which both parties must have equal opportunity for presenting their arguments to the court, at least in writing, and to comment on their opponent's arguments. The principle is, irrespective of the guarantees in article 6 para. 3, embodied in the concept of a "fair trial," as the European Commission has held in the following cases: Ofner; Pataki; Hopfinger; and Dunshirn v. Austria.

The Pataki and Dunshirn cases had been heard by the Austrian Court of Appeals in closed session. Neither the accused nor his lawyer were present, but the Chief Public Prosecutor addressed the court. Austria had, as a consequence of the European Commission's report, enacted a bill making available to applicants a new means of access to the court. During an examination of these cases, the text of the Austrian Code of Criminal Proceedings was amended by the

65. Published in the ÖSTERREICHISCHE JURISTENZEITUNG S. 445 (1967).
66. "Application No. 2645/65 Against Austria" decision of the Commission of October 3, 1969 (not published). The conversation had been recorded, unknown to the accused, by the injured person in the presence of policemen.
67. "Pataki Against Austria; Dunshirn Against Austria" [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 714 (cases before the Committee of Ministers).
federal law of July 18, 1962, in order to establish the principle of equality of representation in proceedings before the court of appeals. In Austria at the present time, these proceedings are no longer non-public and conducted on the basis of documents only, but bilateral, taking place in a public session. By resolution the Committee of Ministers, expressing its satisfaction with these legislative measures, decided that no further action was required in both cases. In a judgment delivered on January 17, 1970 in the Delcourt case, the European Court of Human Rights held that article 6 para. 1 “is indeed applicable to proceedings in cassation.” Delcourt's application related to the presence of a member of the Procureur Général's department attached to the Belgian Court of Cassation at the deliberations of the highest court of Belgium. The European Court examined the issue not only in the light of the “equality of arms” concept, as the European Commission did, but took into account article 6 para. 1 as a whole. It found that there had been no breach of the Convention. While noting that certain considerations “may allow doubts to arise about the satisfactory nature of the System in dispute,” it did not find “the realities of the situation to be in any way in conflict with this right” to a fair hearing. They pointed out that the Procureur Général's department at the Belgian Court of Cassation is not a party to the case and enjoys complete independence from the Minister of Justice, nor is it the adversary of the accused whose conviction or acquittal may lead to an appeal in cassation; as an “adjunct” or an “adviser” of the Court of Cassation it “discharges a function of a quasi-judicial nature” in assisting the court “to supervise the lawfulness of the decisions attacked and to ensure the uniformity of judicial precedent.”

69. "Delcourt Against Belgium" [1970] Y.B. EUR. CONV. ON HUMAN RIGHTS.
70. Id.
71. Id.
72. Id.
73. Id.
74. It has to be noted that in Afner Against “Application No. 524159;” Hopfinger Against Austria “Application No. 617159” [1963] Y.B. EUR. CONV. ON HUMAN RIGHTS 679 (cases brought before the Committee of Ministers of the Council of Europe) the Commission and, following it, the Committee of Ministers had examined the very similar role of the Austrian Procurator général in the proceedings of cassation. Here also, the Commission found no breach of the principle of “equality of arms;” it considered that the Attorney-General (General prokuratur), in his written arguments filed before the decision of the Supreme Court was passed (at a non-public session in which neither of the parties were
The court applied the principle of “equality of arms” for the first time in the *Neumeister* case. It held that the European Commission had “rightly stated [this principle] to be included in the notion of a fair trial,” but it refused at the same time its application to proceedings for the examination of requests for provisional release.\(^7\)

The decisions on the “equality of arms” clearly reveal the problems of a “transplantation” of certain legal concepts inherent to a system of law based on the common law of England to quite different law systems. It is clear that under common law the principle of equality of arms is indispensable because criminal proceedings are conducted mainly by the prosecution and defense without much influence by the judge. The parties are responsible for submitting to the court the necessary information and evidence, and for the direct, cross, and redirect examination of witnesses called by them in order to prepare the basis for the court’s decision. Under this system, any inequality between prosecution and defense can lead to a false decision of the court. Quite differently, under European legal systems influenced by the French legislation of the nineteenth century, not only the judge, but also the public prosecutor is an organ in the service of criminal justice and obliged to act with objectivity. For example, he is obliged, under certain conditions, to appeal in favor of the accused.

**THE PRESENCE OF THE ACCUSED AT THE TRIAL**

The conditions under which criminal proceedings may be conducted in the absence of the accused vary under the legislations of the member states of the Council of Europe.\(^7\) The conviction of an accused in his absence is, from many points of view, less reliable than a judgment delivered after both sides have been heard. There are

represented), simply expressed his concurrence with the report of the Judge Rapporteur without trying to influence the decision to the disadvantage of the accused. However, it was made clear that the equality of arms might have been violated should the Attorney-General have played a more active part in the proceedings. Also in the *Delcourt Case*, the Attorney-General, before the decision of the Court of Cassation was passed, had formulated “conclusions” in writing without the accused having the possibility to answer. Here, the Court of Human Rights rejected the complaint as manifestly ill-founded.

\(^7\)4. “*Neumeister Against Austria*” (1968) *Y.B. EUR. CONV. ON HUMAN RIGHTS* 813 (cases brought before the court).

\(^7\)5. The official publication *Aspects of the International Validity of Criminal Judgments of the Council of Europe* (Strasbourg, 1968), contains a survey of the legislations of the member states of the Council of Europe on this particular point.
disadvantages in regard to the finding of the facts and to the determination of the sentence without any personal contact between the judge and the accused. Under some legislations, a judgment may be passed *in absentia* without the accused being aware at all of the fact that criminal proceedings have been instituted against him. This may be the case where personal service of summons is not prescribed, and where the summons is deposited, for example, with the Registrar of the court. The situation is still worse if the accused has no means of appeal after his return against the judgment passed *in absentia*.

The right of the accused to be tried in his presence is, as such, *not* guaranteed either by article 6 or by any other provision of the *Convention*. The European Commission has, however, examined some cases where the applicant was not present before the court and had no opportunity to present his arguments to the court in writing. They have expressed the opinion that the presence of a party to a civil law case might be a necessary aspect of a fair hearing, either in the general sense of a “fair trial” (article 6 para. 1) or on the basis of the rights of the defense under article 6 para. 3(c) and 3(d). In certain classes of cases, or in certain sets of circumstances, a “fair hearing” is scarcely conceivable without the presence of the party concerned. This is certainly true in criminal matters. However, the question was not finally decided by the European Commission.

A violation of the *Convention* provisions can be disregarded if the accused’s ignorance of the date of the hearing was due to the fact that he had himself failed to keep the court informed of his exact address, or if the accused was represented by a lawyer of his own choice, or, under certain circumstances, had one appointed by the court. However, a lawyer appointed by the court will not be able to prepare the defense properly when he has no chance to contact...
the absent accused in order to obtain the necessary information. In such cases, the chances of incorrect findings of fact are very great and the trial should not be properly called "fair." Nevertheless, whether or not a trial conducted in the absence of the accused was fair or not must be considered on the basis of the conditions of the trial as a whole, and therefore it must be done on a case-by-case basis.

The question is of importance also for the law of extradition. A state could hesitate to grant extradition—or even feel it must deny it—for the serving of a sentence imposed by a judgment *in absentia*, if the sentenced person was not able to make use of the rights of defense mentioned in article 6 para. 3 of the *Convention*, and if there is no remedy available against the judgment. The circumstances, which make it difficult for the requested state to grant extradition, may arise under article 3 of the *Convention*. One could argue that this provision excludes extradition when the person to be extradited will be or—in the case of a conviction—has been deprived by the authorities of the requesting state of all or some of the rights guaranteed by article 6 of the *Convention*.

THE RIGHT TO A HEARING WITHIN A REASONABLE TIME

THE MEANING OF THE RIGHT

Contrary to the majority of the European Codes of Criminal Proceedings, there is a provision in the *Convention* by which criminal proceedings may not last beyond a reasonable time. On the other hand, according to the *Convention*, the court is obliged to safeguard the rights of defense and to decide the question of guilt only after all possibilities of finding the whole truth have been exhausted. Very often, therefore, there will be a conflict between these requirements of criminal proceedings. Any compromise between them may not be to the detriment of the rights of defense or the finding of the truth.

It was, therefore, not surprising when the European Court of

81. The Netherlands has made a reservation to this effect in respect to article 1 of the European Convention on Extradition. [1957] EUROP. T.S. No. 24.

82. No limitations of the duration of the proceedings as such, but of the detention on remand are, however, known in some European national legislations, e.g., in Italy, Sweden, Denmark and Norway.

83. This part of art. 6 para. 1 is certainly influenced by the idea of a "speedy trial" within the sixth amendment of the United States Constitution.
Human Rights in the *Neumeister* case held that there had been no violation of article 6 para. 1 as regards the length of the proceedings. The reasons given by the court are very important from the point of view of the procedural laws of the continental European countries. The court approved the procedural system in force on the continent of Europe according to which judges are responsible for the investigation and the conduct of the trial, and obliged them to take every measure likely to throw light on the truth or falsity of the charges (*Grundsatz der amtswegigen Wahrheitserforschung*). The court stated further that a concern for speed should not relieve judges from the observation of this principle. "It is obvious," the court added, "that the delays in opening and reopening the hearing were in large part caused by the need to give the legal representatives of the parties, and also the judges sitting on the case, time to acquaint themselves with the case record."

The term "reasonable time" provided for in article 6 para. 1 (delay in bringing to trial), just like the same term in article 5 para. 3, must be determined in the light of the concrete facts of each case. The European Commission had applied in the *Neumeister* case *mutatis mutandis*, the seven criteria developed for the interpretation of the term "reasonable time" within the meaning of article 5 para. 3, and also in connection with the meaning of article 6 para. 1. As the court has not accepted the European Commission's "criteria" theory, this method of interpretation has not proved to be a suitable one. The reasonableness of the length of proceedings, therefore, may not be judged in the light of certain abstract criteria but only in connection with the nature of the proceedings, the complexity of the case, and any particular difficulties met by the investigating authorities. For example, it is not possible to hold the judicial authorities of the respondent government responsible for the difficulties they have encountered abroad in obtaining the execution of their letters rogatory.

84. *Supra* note 74.

85. *Supra* note 74 at 815. As to the fundamental differences between European continental law and common law which the Commission had not taken into consideration in its report of May 27, 1966. This decision of the court has helped to avoid this principle to be degraded to a mere formal and fictive function.

86. *See* text *infra*.

87. *Supra* note 74.
THE BEGINNING OF THE PERIOD

In the Neumeister case, there was some discussion between the European Commission and the Austrian government as to the procedural stage at which the period of reasonable time referred to in article 6 para. 1 begins and ends. This provision emphatically does not concern the period that elapses between the offense and the charges. In Neumeister, the European Commission concluded that the relevant stage was that "at which the situation of the person concerned has been substantially affected as a result of a suspicion against him." Accordingly, the European Commission chose as a "starting point" a day on which the applicant had been informally heard by the investigation judge, long before the formal opening of the preliminary investigation. It was obvious that the applicant was at that time not yet "charged with a criminal offense" under Austrian law in the sense referred to in article 6 para. 1 of the Convention. The court could therefore not follow the European Commission's opinion and choose as a starting point the first interrogation of the applicant after the opening of the "preliminary investigation," nearly one year later.

THE END OF THE PERIOD

The problem of the period's final point was considered by the European Commission, and by the court, but was not finally solved. In the Neumeister report the European Commission held that the time referred to in article 6 para. 1 "is not interrupted by the opening of the trial of the accused, but runs at least until the judgment has

89. Supra note 74.
90. The legal basis of this interrogation was article 38(3) of the Austrian Code of Criminal Proceedings.
91. "Voruntersuchung" AUSTRIAN CODE OF CRIMINAL PROCEEDINGS art. 91-112. Even this timing may give rise to objections. Here again we see the difficulties of transferring—mutatis mutandis—the ideas of a "speedy trial" to legal systems not based on the English common law: English criminal proceedings do not already begin with the investigation conducted by the prosecution. In this early stage the person concerned may not yet invoke the right to a hearing within reasonable time. Proceedings do not start until the "issue process" by the judge. This "commitment for trial" may be compared with the formal indictment ("Anklageerhebung") in continental law after closing of the investigation.
been rendered by the court of the first instance.” The European Commission did not find it necessary to decide, in the Neumeister case, whether or to what extent appeal proceedings were also covered by that period. The European Court of Human Rights was in its Neumeister judgment of June 27, 1968 more precise. It pointed out that article 6 para. 1 indicated as a final point the judgment determining the charge and stated that this might be a decision given by an appeal court “when such a court pronounces upon the merits of the charge.” Also in the Wemhoff judgment of June 27, 1968, the court referred to a conviction or an acquittal even though such decision was rendered by an appeal court.

Normally, the period will end with the judgment rendered by the court of first instance, because it is only this judgment that is based on the merits of the charge. It is the duty of the appeal court to decide whether the judgment of the court of first instance is correct and in conformity with the law. The answer to the question will finally depend on the nature and purposes of the appeal or the plea of nullity.

THE RIGHTS OF THE ACCUSED WHO IS DETAINED ON REMAND

An accused detained on remand has, apart from the rights of everyone charged with a criminal offense under article 6, additional rights in order to safeguard his rights to liberty and security. Article 5 para. 1(c) defines the reasons allowing arrest and detention, but does not mention the authorities entitled to issue a warrant of arrest.

92. Supra note 74.
93. Supra note 74.
95. The European Committee on Crime Problems has discussed the questions concerning detention on remand in connection with the Convention (Doc. DPC/CEPC (64) 14). The resolution adopted by the Committee of Ministers’ Delegates expressed the view that detention on remand should be regarded as an exceptional measure and should be ordered or continued only when it is “strictly necessary.” Reports of the Human Rights Commission of the United Nations concerning the Right to Personal Freedom (cf. of Jan. 9, 1961, E/CN. 4/1813, p. 65 et. seq., and of Jan. 5, 1962, E/CN. 4/826, p. 67 et. seq.) reflect the very divergent views that exist as regards particularly the length of detention permissible from the points of view of the protection of Human Rights.
96. As a rule, only judicial authorities will be competent. ANDRIOLI, LA CONVENZIONE EUROPEA DEI DIRITTI DELL' UOMO E IL PROCESSO GIUSTO (Temì romana,
The grounds on which detention on remand is based must continue during the whole period of detention. Otherwise, the accused must be released pending trial.

The arrested person shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him. This information is not necessarily as specific and detailed as the information under article 6 para. 3(a). The Convention does not require that the reasons for the arrest be either set out in the text of the decision authorizing the detention or be given in writing.

Under article 5 para. 3, "everyone arrested or detained in accordance with the provisions of paragraph 1(c)" of that article "shall be entitled," inter alia, "to trial within a reasonable time or to release pending trial;" it is also provided that "release may be conditioned by guarantees to appear for trial." According to the practice of the European Commission, the exact significance of the words "reasonable time," a term which is vague and lacking in precision, can be judged only in the light of the facts of the case, not in abstracto. In order to facilitate this evaluation, the European Commission had developed in its report of May 28, 1966, in the Neumeister case, seven criteria according to which each individual case should be examined. The opinion of the European Commission in a particular case

1964) refers to the "disinteresse esternato dalla Convenzione per l'identificazione di coloro, che sono legittimati ad apportare limitazioni alla libertà personale."

97. Convention, supra note 1, at art. 5, para. 2.
98. Supra note 18.
101. These criteria or "elements" which influenced the Commission also in the Wemhoff case (supra note 94), were: (1) The actual length of detention; (2) the length of detention on remand in relation to the nature of the offense, the penalty prescribed and to be expected in case of a conviction and any legal provisions making allowance for such period of detention in the execution of the penalty which may be imposed; (3) material, moral or other effects on the detained person; (4) the conduct of the accused; (5) difficulties in the investigation of the case (its complexity in respect of facts or number of witnesses or co-accused, need to obtain evidence abroad, etc.); (6) the manner in which the investigation was conducted (the system of investigation applicable and the conduct by the authorities of the investigation); (7) the conduct of the judicial authorities concerned in dealing with applications for release pending trial and in completing the trial.
would then be the result of an evaluation of these criteria in toto. The European Court of Human Rights did not follow this method applied by the European Commission and objected to by the respondent governments in the cases of Neumeister and Wemhoff. It is rather, the court stated, "on the basis of the reasons given in the decisions on the applications for release pending trial, and of the true facts (faits non controuvés) mentioned by the applicant in his appeals, that the court is called upon to decide whether or not there has been a violation of the Convention." The court repeated this view in the Stogmuller and Matznetter cases. In the Stogmuller case, the court clarified its position and reserved its right to consider and assess the reasonableness of the grounds which persuaded the judicial authorities to decide... on this serious departure from the rules of respect for individual liberty and of the presumption of innocence which is involved in every detention without a conviction.

Referring to a decision of the competent Austrian Court of Appeals which had denied, in the last instance, the applicant's release on the assumption that he would continue to commit offenses of the same nature, the European Court of Human Rights held, contrary thereto, after having evaluated the facts, "that the existence of a danger of repetition of the offenses could not be upheld under the circumstances of the case." The period of detention spent afterward, was therefore, not "reasonable" in the view of the court. Thus, the European Court of Human Rights found itself in exactly the situation which the constant practice of the European Commission had tried to avoid: an international jurisdiction reconsidering—both as to the facts and as to the law—a national judicial decision and interpreting municipal legislation in a field specifically reserved to the prerogative of judicial discretion, thus sitting as a court of last instance in all questions of maintenance of detention. It apparently is not the ob-

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102. Judgment of the Court June 27, 1968 in the Neumeister case (supra note 62). ("As to the law," para. 5); in the same sense judgment June 27, 1968 in the Wemhoff case (supra note 94).


105. "Against Austria" [1965] Y.B. EUR. CONV. ON HUMAN RIGHTS 190 (Individual Applications). "It rests primarily with domestic courts to interpret municipal legislation, even in fields in which the non-observance of such legislation constitutes a violation of the Convention. The Commission merely exercises a supervisory function in this regard and must exercise it prudently."
ject of article 5 para. 3, which does not deal with the reasons for detention, to create such an additional competence. The danger of this method consists in leading the supervising jurisdiction to deny the existence of an obviously continuing reason for the detention, e.g., the danger of flight, only because it has come to the conclusion that the length of detention is no longer reasonable. The risk of a direct confrontation between the decisions of the national and the international jurisdiction would certainly seem to be increased by such actions on the part of the international body.
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